

# THE CONTROL OF CONSTITUTIONALITY OF THE INITIATIVES FOR REVISION OF THE ROMANIAN CONSTITUTION<sup>1</sup>

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*"The constitution of a people must be in relation to the type of life and the intimate structure of that nation."*<sup>2</sup>

**ABSTRACT:** *When the concept of "supremacy of the Constitution" appeared, it also brought into discussion its protection. Thus, slowly but surely, different means of protecting the Constitution and its supremacy took shape, including the control of constitutionality. The purpose of the constitutionality control – the protection of the constitution – is fully achieved only when the cases the restriction of the fundamental law circumscribe to the control. The modern Romanian constitutional system established also the control of constitutionality of the initiatives for revision of the constitution forwarded to the Constitution's "guardian" – the Constitutional Court of Romania. This paper features a review of key aspects regarding the exercise of constitutional control initiatives to revise the Constitution such as: the competent authority and the foundation of that power, the notification procedure, the procedure of exercising the control for that mater, the solutions of the Constitutional Court and a summary of the practice of the Constitutional Court of Romania in this field.*

**KEYWORDS:** *Romanian Constitution, the constitutional control, initiatives for revising the Constitution*

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<sup>2</sup> See George Alexianu, *Studii de drept public*, The institute of graphic arts „Vreame”, Bucharest, 1930, p. 43.

## 1. THE LEGAL HEADQUARTERS. COMPETENT AUTHORITY

The high degree of stability, specific to a written constitution contributes to the affirmation of the principles of the rule of law. To ensure the stability of the Constitution, the authorities appealed to “*the constitutional rigidity*” which implies a special set of tools and processes of change (revision) of the Constitution.

Issues that are considered *methods of achieving constitutional rigidity*:

1. The establishment of certain special conditions necessary for exercising the initiative of revising the Constitution and the draft or the revision proposal of the Constitution are *officially* subject to the constitutional control of the Constitutional Court, according to Article 146 letter a of the Constitution;

2. Establishing *the competent body to adopt the law of revision and its debate procedure*<sup>3</sup>;

3. *Incumbency for subjecting law for revision to the referendum*; 4. The call for *certain constitutional provisions declared unrevisable*<sup>4</sup>.

Constitutional rigidity should not become a purpose in itself but should represent a guarantee of the constitutional stability<sup>5</sup>.

The initiatives of revising the fundamental law of the state are also subject to the constitutional control in the modern Romanian constitutional system.

The practicing of constitutional control on the initiatives to revise the Constitution is regulated by Article 146 letter a, the last part from the Romanian Constitution and by the Law no. 47/1992 regarding the organization and functioning of the Constitutional Court republished<sup>6</sup>.

The Constitutional Court of Romania is the only competent authority to rule on the constitutionality of the initiatives for revising the Constitution. It is a control exercised

<sup>3</sup> In our constitutional system, the competent body to pass a law of revision (constitutional law) is still the Parliament but the procedure of adopting a law of this kind presents some special aspects concerning the ordinary legislative procedure.

<sup>4</sup> According to Article 151 paragraph 1 of the revised Romanian Constitution, the following provisions cannot be the subject of a revision: the national, independent, unitary and indivisible feature of the state (provided by Article 1 paragraph 1 from the revised Constitution); the Republican form of government (provided by Article 1 paragraph 2 from the revised Constitution); the territorial integrity (provided by Article 3 paragraph 1 from the revised Constitution); independence of the judiciary (provided by Article 124 paragraph 3 from the revised Constitution); political pluralism (provided by Article 13 paragraph 3, Article 8 paragraph 1 from the revised Romanian Constitution); official language (provided by Article 13 from the revised Constitution). Also, the Romanian Constitution controls other necessary conditions necessary for constitutional revision: the revision cannot suppress fundamental rights and freedoms of citizens or their guarantees (Article 152 paragraph 2 from the revised Constitution); the Constitution cannot be revised during a state of siege, the state of emergency or in wartime (Article 152 paragraph 3 of the revised Constitution) and in the case of extending the Parliamentary mandate in accordance with Article 63 of the Constitution.

<sup>5</sup> See Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu “*Constituția României revizuită – comentarii și explicații*”, All Beck Publishing House, Bucharest, 2004, p. 337.

<sup>6</sup> Republished in the Official Gazette of Romania no. 643 of 16 July 2004, p. 337.

only in advance and only publicly appointed<sup>7</sup> and consists in the “verification of their consistency with the Article 148 of the Basic Law (Article 152 after the revision), with the international treaties and the rules of the procedure of law making”<sup>8</sup>

The exercise of the constitutional control on the initiatives to revise the Constitution according to Article 146 letter a the last part, of the Constitution is made in two stages.

Thus, according to Article 19 of Law no. 47/1992 republished, prior the notification of the Parliament to initiate the legislative procedure of revising the Constitution, the bill or the legislative proposal<sup>9</sup>, accompanied by the advice of the Legislative Council, shall be submitted to the Constitutional Court which is bound within 10 days to comply with the rules related to the constitutional revision. Subsequently, according to Article 23 paragraph 1 of Law no. 47/1992 republished, the Constitutional Court shall decide *ex officio* on adopting the law of revision of the Constitution within 5 days. Therefore it is a double-control<sup>10</sup>.

The fact that the law for revision is subject to a foregoing control only (even double) (always exercised before the entry into force of the law for revision - by its approval in the referendum) is justified on the basis of national sovereignty, which belongs to the people.

Thus, the ratification of the Constitution or its amendments by referendum is a means of exercising this sovereignty. Once people expressed such willingness, no one could interfere, as the Court determined through a decision: “*In general, when people, the owner of the national sovereignty is called to decide by referendum on the law of revision of the Constitution, and the moment the Parliament passed that certain law with the procedure and limits set by the Constituent, no public authority can decide upon it anymore. This explains the fact that the contentious constitutional court, within an a priori control, decides ex officio only upon the initiatives of revising the Constitution.*”<sup>11</sup>

<sup>7</sup> It was stated that an *a posteriori* control or perception through a plea of unconstitutionality to the law of revision would be necessary and useful; for details see Ion Deleanu, *Revizuirea Constituției*, article in the Review „*Dreptul*”, no. 12/2003, p. 6 (footnote no. 6).

<sup>8</sup> See Mihai Constantinescu, Ioan Vida, *Revizuirea Constituției*, article in the Review „*Dreptul*” no. 12/2003, p. 6 (footnote no. 6).

<sup>9</sup> The foundation of the distinction between bills and legislative proposals is set by the categories of initiators. The president of Romania, proposed by the Government will inform the Parliament through the bills, and the lawmakers and citizens’ initiatives will take the form of legislative proposals. But the distinction has no legal significance - see Tudor Drăganu, *Drept constituțional și instituții politice – tratat elementar*, vol. II, p. 109.

<sup>10</sup> In the specialty literature we find that „...under the current constitutional regulations (the revised Constitution – A/N), *ex post facto*, after the adoption of the law of revision, but before the referendum, it is not possible ...” - Ion Deleanu, *Instituții și proceduri constituționale - în dreptul comparat și în dreptul român*, Servo-Sat Publishing House, Arad, 2003, p. 706 (footnote no. 1). We believe that such a control cannot be considered *a posteriori*, but must be considered an *a priori* one (exercised before the entry into force of the law, even after its adoption by Parliament), as well as in the case of ordinary and organic laws adopted by the Romanian Parliament and subject to the previous control according to Article 146 letter a the first part of the revised Constitution.

<sup>11</sup> See the Decision of the Constitutional Court no. 356 of 23 September 2003, published in the Official Gazette of Romania no. 686 of 30 September 2003. By this Decision, the Constitutional Court rejected an intimation regarding the law of revision of the Constitution, outcome that must be considered correct related to the legal constitutional provisions in force at that time (23 September 2003). But later, the law no. 47/1992 was amended and republished by adding the Article 23 that decides a control within 5 days regarding the Law of revision.

The fact that it is a control exercised only *ex officio* excludes any possibility that the constitutional court to be notified by anyone else (other public authorities, individuals or legal entities). We believe that this procedure is based on the quality of the Constitutional Court as guarantor of the *supremacy* of Constitution. Considering these qualities, we must take into consideration the fact that the initiative of Constitutional Court is obligatory (obligation provided by Article 19 of Law no. 47/1992 republished).

The control made by the Court is a systematic control (a single case<sup>12</sup>), *a priori* and *abstract*.

## 2. THE PROCEDURE OF NOTIFYING THE CONSTITUTIONAL COURT

Before informing the Parliament for the initiation of the legislative procedure of revising the Constitution, the bill or the legislative proposal, along with the advice of the Legislative Council, shall be submitted to the Constitutional Court which is bound, within 10 days, to decide upon the compliance with the constitutional stipulations regarding the revision (Article 19 of Law no. 47/1992 republished).

The bill or the proposed revision of the Constitution shall be filed only in the form required by law, elaborated and drafted according to the rules of legislative technique required<sup>13</sup>, and accompanied by the advice of the Legislative Council. In connection with this advice, it is clear that it must be demanded and obtained mandatory (since it must accompany the bill or the proposal of revision), but the question is whether this is an advisory opinion or assent?

Since the Constitution or the Law no. 47/1992 republished does not mention anything, they find their applicability in the provisions of Law no. 24/2000 republished, according to which the advice of the Legislative Council is an *advisory opinion* (Article 9 paragraph 3). Nor could we speak about another solution, since the Constitutional Court acts as the only authority of competent constitutional jurisdiction.

An eventual assent of the Legislative Council – respectively an obligatory assent for the authority that asked for it – especially if it is also negative, could end prematurely the procedures of the constitutional control before the constitutional jurisdiction has the opportunity to exercise its prerogatives.

## 3. PROCEDURE OF EXERCISING THE CONTROL REGARDING THE INITIATIVES FOR REVISING THE CONSTITUTION

Upon receiving the bill or the legislative proposal, the President of the Constitutional Court shall appoint a judge-rapporteur and shall set the hearing.

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<sup>12</sup> See Ioan Muraru, Mihai Constantinescu, *Curtea Constituțională a României*, Albatros Publishing House, Bucharest, 1997, p. 150; Ioan Muraru, Nasty Marian Vlădoiu, Andrei Muraru, Silviu-Gabriel Barbu, *Contencios constituțional*, Hamangiu Publishing House, Bucharest, 2009, p. 223.

<sup>13</sup> Through the Law no. 24 of 27 March 2000 regarding the legislative technique norms for the drafting of the normative acts, published in the Official Gazette of Romania no. 139 of 31 March 2000, republished in the Official Gazette of Romania no. 777 of 25 August 2004.

The document which actually launches the legal conclusion is in fact the conclusion by which the Plenary Court decides its notification *ex officio* (according to Article 16 paragraph 3 from the Rules of Court), the starting moment of the period of 10 days when the Constitutional Court must decide<sup>14</sup>.

The activities prior to the hearing, those preceding the debates and those related to the debate, deliberation and solution, take place, in principle, after the same rules established by the Regulations of the Chamber, as in the exercise of the previous constitutional control of laws before promulgation<sup>15</sup>. There are though two differences.

1. The first is related to the deadline for submission of the report of the judge-rapporteur, which must be much shorter, taking into account the fact that the Court itself is bound to rule within 10 days of submission of the bill or legislative proposal. We find here the application of Article 49 from the Regulation of the Constitutional Court, according to which, if urgency requires, the President of the Constitutional Court may decide, after consultation with the judge-rapporteur, the shortening of the terms. Regarding the period of 10 days in which the Constitutional Court is bound to rule on the initiatives for revising the Constitution, the specialty literature states that it wouldn't be the best one, as it is not a period of decay, "*being a term of constitutional procedure*" and anyway, even if exceeded, one couldn't continue with the legislative procedure for adoption the revision law, because the Parliament is bound to await the decision of the Court, while the Article 22 of the Law no. 47/1992 republished determines that the bill or the legislative proposal is presented to Parliament *only together with the decision of the Constitutional Court*<sup>16</sup>. The period of 10 days was considered by other authors as a period of constitutional procedure and not a civil procedure<sup>17</sup>.

2. The second difference is related to the necessary majority for adopting the Court decision in this case. According to the Article 22 of Law no. 47/1992 republished, the Constitutional Court rules on the bill or legislative proposal by a vote of two thirds of the judges (being taken into account the total number of members, respectively the plenum of the Court<sup>18</sup>). It is noted that a qualified majority, greater than that necessary for taking decisions regarding the other duties of constitutional control and, as noted in doctrine, it is equal to the required majority to adopt the law of revision by parliamentary chambers, "fully justified by the supreme importance of the initiative, challenging and bringing into discussion its fundamental structure of the country"<sup>19</sup> and obviously, the role of the Constitutional Court in this regard.

In the context of control, the Constitutional Court is qualified to review *the procedural requirements* imposed by the Constitution, regarding the exercise of the initiative to revise the Constitution (the subjects having the right to initiative regarding the

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<sup>14</sup> See Ioan Muraru, Mihai Constantinescu, *Curtea Constituțională a României*, p. 152.

<sup>15</sup> For details, see Daniela Valea, *Sistemul de control al constituționalității din România*, Universul Juridic Publishing House, Bucharest, 2010, p. 202-205.

<sup>16</sup> See Ion Deleanu, *Instituții și proceduri constituționale – în dreptul comparat și în dreptul român*, p. 709.

<sup>17</sup> See Ioan Muraru in Ioan Muraru, Elena Simina Tănăsescu (coordinators), *Constituția României. Comentariu pe articole*, p. 1395.

<sup>18</sup> See Ioan Vida, *Curtea Constituțională a României*, The Official Gazette of Romania, Bucharest, 2011, p. 70.

<sup>19</sup> See Ion Deleanu, *Instituții și proceduri constituționale – în dreptul comparat și în dreptul român*, p. 709.

revision of the Constitution; the compatibility between the proposal of the President of Romania and the Government, in the case of the President's initiative; the numeric criteria for respecting the distinction between the group members of Deputies and Senators, in the case of parliamentary initiative; numeric criteria or distribution of the initiator by county, in the case of the popular initiative – extrinsic constitutionality) but also *temporal requirements* (the Constitution cannot be revised during a state of siege, the state of emergency or in time of war neither in the case of the extended Parliamentary mandate – also extrinsic constitutionality) or the *compliance of the proposed amendments* to the provisions and principles of the Constitution (intrinsic constitutionality).

Thus, according to Article 150 of the revised Romanian Constitution, the ones who have the right of initiative to revise the Constitution are only: the President on Government's proposal; at least  $\frac{1}{4}$  of the number of deputies or senators, at least 500,000 citizens entitled to vote, which must come at least  $\frac{1}{2}$  from the counties of the state and in Bucharest, at least 20,000 signatures.

In our constitutional system, the competent body to pass a law of revision is the Parliament (which will act as the derived Constituent Assembly<sup>20</sup>), but the procedure of adopting such a law displays some special aspects compared to the ordinary legislative procedure, even if these aspects do not make the object of the constitutional control of the Court. Thus, the law of revision shall be adopted in the Chamber of Deputies and in the Senate by a majority of at least two thirds of the members of each Chamber (qualified majority). In case there are differences between the texts adopted by the two Chambers, the law will be sent to mediation committee set up for this purpose (it is a joint committee comprised of the two Chambers). If mediation procedure fails, the law for revision subjects to debate and vote in the joint assembly of both Parliamentary Chambers, where, in order to be adopted, it needs the vote of at least three quarters of the total number of MPs<sup>21</sup>.

Instead, another aspect to be considered by the Constitutional Court refers to the provisions of Article 151 paragraph 1 of the revised Romanian Constitution, under which, the following provisions cannot be subject to revision: the national, independent, unitary and indivisible feature of the state (provided by article 1 paragraph 1 of the revised Constitution) the Republican form of government (provided by Article 1 paragraph 2 of the revised Constitution); territorial integrity (provided by Article 3 paragraph 1 of the revised Constitution); independence of justice (provided by Article 124 of the revised Constitution) political pluralism (provided by Article 1 paragraph 3, Article 8 paragraph 1 of the revised Constitution), the official language (provided by Article 13 of the revised Constitution).

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<sup>20</sup> See Ioan Vida, *Curtea Constituțională a României*, Monitorul Oficial Publishing House, Bucharest, 2011, p. 69.

<sup>21</sup> In order to be approved unappealable, the law of revision should be subject to a national referendum held for that purpose, within 30 days of its adoption by the Parliament. The law of revision is not subject to promulgation. Law revision shall be published in the Official Gazette of Romania within 5 days of its adoption by Parliament and after its approval by national referendum, shall be republished but only after the publication of Constitutional Court's decision in the Official Gazette, decision that confirms the results of the referendum.

Also, the Constitutional Court must verify whether the provisions of the Article 152 paragraph 2 and 3 of the revised Constitution are respected, according to which: the revision may not suppress fundamental rights and freedoms of the citizens or their guarantees (Article 152 paragraph 2 of the revised Constitution); the Constitution cannot be revised during a state of siege, a state of emergency or in time of war (Article 152 paragraph 3 of the revised Constitution) and in the case of extending the Parliamentary mandate in accordance with the Article 63 of the Constitution.

The court's decision is not only communicated to those who initiated the bill or legislative proposal or, where appropriate, to their representative, but like any other decision, shall be published in the Official Gazette of Romania.

After adopting the law of the revision by Parliament, the law is subject again, ex officio, to the Constitutional Court for constitutional review within 5 days of adoption. The provisions of the Article 20 (the appointment of a judge-rapporteur by the president and setting of the hearing terms) and Article 21 (the Constitutional Court pronounces on the bill or legislative proposal by a vote of two thirds of the judges; the Court's decision is communicated to those who initiated the bill or legislative proposal or, where appropriate, to their representatives) of the Law no. 47/1992 republished apply accordingly.

#### **4. THE SOLUTIONS OF THE CONSTITUTIONAL COURT. EFFECTS OF THE CONSTITUTIONAL COURT**

In the review conducted by the Constitutional Court, the first issue to be verified will be the extrinsic constitutionality (resulting from the compliance with the provisions of Article 150 of the revised Constitution - condition *ratione personae*, but also in Article 152 paragraph 3 and Article 63 paragraph 4 from the revised Constitution – condition *ratione temporis*) and only subsequently, given that it is respected, the issues of intrinsic constitutionality shall be verified (arising from the provisions of Article 152 paragraph 1 and 2 of the revised Constitution - condition *ratione materiae*, considered “hard core”<sup>22</sup> of the Constitution).

If these conditions are not met, the Constitutional Court by decision shall declare the initiative of revision unconstitutional.

Subsequently, the Constitutional Court pronounces also on the law of revision adopted by the Parliament according to Article 23 paragraph 1 of Law no. 47/1992 republished. If the constitutional provisions regarding the procedure were not respected, the Court's decision would be sent to the Chamber of Deputies and Senate for the reexamination of the law of revision, to implement its agreement with the Constitutional Court decision (Article 23 paragraph 2 Law no. 47/1992 republished).

The effects produced by a decision of the Constitutional Court in this matter resulted in a series of discussions in doctrine, first taking into account the extrinsic and intrinsic aspects of unconstitutionality revealed and, secondly, by the fact that the decision issued by the Court contains a series of “recommendations” or proposals, suggestions,

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<sup>22</sup> See Mihai Constantinescu, Marius Amzulescu, *Drept contencios constituțional*, „România de mâine” – the Foundation's Publishing House, Bucharest, 2007, p. 118.

opinions. In general, it is argued that, when non-compliance of provisions that provide extrinsic constitutionality, the Court's decision asserts the Parliament in the sense that, this cannot take into debate such a project or proposal<sup>23</sup>.

As in the case where the Court pronounces on the intrinsic constitutionality, "determining" that certain provisions of the bill or proposed revision are unconstitutional. Instead, when the Court only makes a number of comments and assessments in the form of recommendations or suggestions, they are not binding for the Parliament<sup>24</sup> so that the real value of such a decision is the "opinion"<sup>25</sup>.

## 5. SUMMARY OF THE CONSTITUTIONAL COURT PRACTICE IN THIS MATTER

From the practice, it results that the Constitutional Court was approached six times regarding its duty provided by Article 146 letter a the last part of the Constitution (the former Article 144 letter a the last part), being pronounced four decisions by which the Court declared unconstitutional the initiatives (finding a situation of intrinsic unconstitutionality and another two extrinsic unconstitutionality), two partial admission decisions of the initiatives for revision of the Constitution (with some observations and recommendations)<sup>26</sup>.

Thus, by Decision no. 85 of 3 September 1996 regarding the constitutionality of the initiative of revising the provisions of Article 41 paragraph 7 of the Romanian Constitution, the Constitutional Court ascertained the intrinsic unconstitutionality of the initiative (belonging to a number of 39 senators), as it would result in the suppression of certain guarantees of the property rights, breaching of the limits of revision provided by the Article 148 paragraph 2 of the Constitution<sup>27</sup>.

The initiative for revision proposed the replacement of the presumption on Legality of acquisition (Article 41 paragraph 7 of the Constitution from 1991 provided that "Legally acquired assets shall not be confiscated. Legality of acquirement shall be presumed") with the following text: "the legal acquirement of a wealth that cannot be proved shall be confiscated".

The Court grounded its decision, arguing that "*the presumption of lawful acquisition of wealth is one of the constitutional guarantees of the property rights, in accordance with the provisions of the Article 41 paragraph 1 from Constitution of 1991, according to which ownership is guaranteed. This assumption is based on the general principle that any act or legal fact is legitimate until proven otherwise, requiring, in what*

<sup>23</sup> See Ion Deleanu, *Instituții și proceduri constituționale – în dreptul comparat și în dreptul român*, p. 709-710; Ioan Muraru, Mihai Constantinescu, *Curtea Constituțională a României*, p. 15; Mihai Constantinescu, Marius Amzulescu, *Drept contencios constituțional*, p. 119.

<sup>24</sup> See Ion Deleanu, *Instituții și proceduri constituționale – în dreptul comparat și în dreptul român*, p. 709-710; Ioan Muraru, Mihai Constantinescu, *Curtea Constituțională a României*, p. 15; Mihai Constantinescu, Marius Amzulescu, *Drept contencios constituțional*, p. 119.

<sup>25</sup> See Tudor Drăganu, *Drept constituțional și instituții politice – tratat elementar*, volume I, Lumina Lex Publishing House, Bucharest, 2000, p. 312. Ioan Muraru, Mihai Constantinescu, *op.cit.*, p. 15.

<sup>26</sup> [http://www.ccr.ro/statistics/pdf/ro/sin11\\_2011.pdf](http://www.ccr.ro/statistics/pdf/ro/sin11_2011.pdf) (11.12.2011).

<sup>27</sup> Published in the Official Gazette of Romania no. 211 of 6 September 1996.

*concerns the wealth of a person that the illicit acquisition to be proven. ... The proposal of revision aims for the reversal of the burden of proof regarding the legal feature of the property, providing that the fortune whose legal acquirement cannot be proved shall be confiscated. Consequently, it follows that the wealth of a person is presumed to be acquired illegally, until the proof of the contrary is made by its titular.... According to Article 148 paragraph 2 of the Constitution no revision can be made if it results in the suppression of guarantee regarding a constitutional right."*

By Decision no. 82 of 27 April 2000 regarding the constitutionality of the initiative for revision of the provisions of Article 41 paragraph 2 the first part of the Constitution initiated by 689.237 citizens, the Constitutional Court declared it unconstitutional on the grounds that it cannot hold the fulfillment of conditions of formal nature.

The legislative initiative revising the Article 41 paragraph 2, first part, of the Constitution of 1991, according to which: "Private property shall be equally protected by the law, irrespective of its owner", the text proposed by the initiators of the revision will be as follows: "Private property shall be equally guaranteed by law irrespective of its owner". According to the Court's reasoning, the documentation attached to the complaint, it follows that the gathering of signatures to support the initiative of revising the Constitution was made before the entry into force of Law nr.189/1999 (regarding the exercise of legislative initiative by citizens). Therefore, these operations could not be subject to verification by reference to the conditions set by the law, whereas in this way the provisions of Article 15 paragraph 2 from the Constitution of 1991 would be violated, according to which: "The law shall only act for the future, except for the more favorable criminal or administrative law". Under these circumstances, the Constitutional Court ruled that it could not verify the fulfilling of the conditions of form as they are required (the authenticity of signatures on the list if signatories had the quality of citizens entitled to vote and whether they were residing in counties where they have signed lists) and therefore cannot hold the "(non) performance of"<sup>28</sup> formal conditions provided by Article 146 of the Constitution, concerning the necessary minimum number of supporters and their dispersion in the counties and in the municipality of Bucharest.

The Constitutional Court Decision no. 148 of 16 April 2003<sup>29</sup> notified itself ex officio regarding the initiative of revising the Romanian Constitution of 1991, initiated by 233 deputies and 93 senators.

The Court, through its decision, considered the vast majority of the constitutional proposals (for example, a proposal prohibiting forced passage of goods in public ownership based on ethnic, religious, political considerations of the holders, considered a solid guarantee of the right to property; establishing competence of the two Chambers of Parliament in joint and separate meetings), some were considered unconstitutional (overturning the burden of proof regarding the legal feature of the property; the decisions of the Superior Council of Magistracy cannot be challenged in court, violating the free

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<sup>28</sup> It was seen as a mistake of typing the text, it had to appear as „to comply with” otherwise there would be a contradiction between the enacting terms and the Decision's reasons - see Ion Deleanu, *Instituții și proceduri constituționale – în dreptul comparat și în dreptul român*, p. 708.

<sup>29</sup> Published in the Official Gazette of Romania no. 317 of 12 May 2003.

access to justice) and concerning specific issues, the Court made specific proposals or comments (eg regarding the Country's Supreme Defence Council, related to the extradition of Romanian citizens; the Court's acquisition of other tasks by organic law; the term of maximum 45 days, set for Government and Parliament's agreement upon the unconstitutional provisions, should not be applied in the case of exercising the attribution set by the Article letter a; the right of the Ombudsman to directly address the Constitutional Court with a plea of unconstitutionality; the tie breaker between public and private education, on the one hand and the secular and religious, on the other hand; the specialization of the Ombudsman's deputies is under the jurisdiction of organic law and not a under constitutional provision; reinvestment of the former judges of the Constitutional Court that had not exercised the entire mandate of nine years; the replacement of the term "public institution" with "public authorities"), proposals and comments that the Parliament has appropriated only in part. Later, after the adoption of the Law of revising the Constitution no. 429/2003, the Constitutional Court has received two pleas of unconstitutionality which were resolved by Decision no. 356 of 23 September 2003<sup>30</sup> and Decision no. 285 of 15 October 2003<sup>31</sup>. In both the above-mentioned decisions, the Constitutional Court pronounced itself incompetent to rule on the two complaints invoking the provisions of the Constitution and the Law no. 47/1992 at the time, respectively before revision and before the amendment of Law no. 47/1992 in 2004.

By Decision no. 6 of 4 July, 2007 regarding the citizens' legislative initiative for the revision of the Constitution<sup>32</sup>, in what concerns the Article 48, the Court held that it does not satisfy the requirements of Article 150 of the Constitution, because it does not meet the cumulative condition of territorial dispersion in counties and in Bucharest (more than 20 counties have not sent at least 20,000 signatures).

In the most recent occasion, the Constitutional Court ruled upon the initiative to revise the Constitution of Romania in the Decision no. 799 of 17 June, 2011<sup>33</sup>. Is the first time, when the initiative to revise the Constitution initiated by the head of state, respectively the President of Romania on the proposal of the Government. The amendments taken into consideration by the initiator address three main objectives: "switching to a unicameral parliament; the need for adaptations and adjustments of the Constitution to the realities of the contemporary society, clarifying institutional and regulatory solutions to determine the cooperation of public authorities and eliminate gaps that might arise between them"<sup>34</sup>. Most of the proposals for amendments aim at the re-correlation of the Romanian constitutional system reported by a unicameral Parliament.

The Constitutional Court considered as much the aspects of extrinsic constitutionality (compliance with the provisions of the Article 150 paragraph 1 and Article 152 paragraph 3 corroborated with Article 63 paragraph 4 of the Constitution) as

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<sup>30</sup> Published in the Official Gazette of Romania no. 689 of 30 September 2003.

<sup>31</sup> Published in the Official Gazette of Romania no. 728 of 17 October 2003.

<sup>32</sup> Published in the Official Gazette of Romania no. 540 of 8 August 2007.

<sup>33</sup> Published in the Official Gazette of Romania no. 440 of 23 June 2011.

<sup>34</sup> See the Decision of the Constitutional Court no. 799 of 17 June 2011.

those relating to the intrinsic constitutionality (in relation to Article 153 paragraph 1 and 2 of the Constitution).

As in the past, the Constitutional Court considered certain provisions constitutional in the draft of the revision (a new area of regulation by organic law, namely that of the liability of judges and prosecutors; the procedure for adopting the laws related to the possible unicameral structure of the Parliament; consulting the President of Romania before the proposed dismissal or appointment of the Government members by the Prime Minister, express regulation of the extinctive effect of the negative decision of the Constitutional Court regarding the procedure for suspension of the President; quantitative limitation of the possibility of Government to engage liability towards the Parliament, constitutional consecration of the principle of budgetary balance), some were considered unconstitutional (for example, the proposal on the elimination of the presumption regarding legal feature of the wealth (because it has the effect of suppressing a guarantee of the property ownership, thus violating the limits laid down in Article 152 paragraph (2) of the revised Constitution); proposal for elimination the inviolability of the MP (have the effect of suppressing a fundamental right of the person who occupies a high public position, violating the limits set by the Article 152 paragraph (2) of the revised Constitution); restricting the duties of Interim President regarding the appointment of the candidate for the prime minister position and implicitly forming a Government; giving up the constitutional guarantee established in Article 109 paragraph (2) regarding the initiation of prosecution against Government members; a new exemption from the judicial control namely the administrative provisions relating to certain fiscal and budgetary policies of the Government (it has the effect of suppressing free access to justice, violating the limits of revision under Article 152 paragraph (2) of the Constitution); the increase in number of the members of civil society representatives and changing proportion of representation in the Superior Council of Magistracy (an effect would be the violation of judicial independence, contrary to the provisions of Article 152 paragraph (1) of the Constitution) and moreover a series of observations or recommendations were made and certain reservations were expressed about the appropriateness of proposals (eg making rules constitutional, rules already contained in an organic law - the procedure of initiating the referendum by the President on matters of national interest; limiting the object on which the Government may assume responsibility in a program; a statement of general policy or a single bill to regulate social relations that concerns one area; the obligation of the Government to transmit to the European Union the project of the state budget and that of the social security of the state, after informing the Parliament - it is considered redundant and excessive, the re-evaluation the Constitutional Court's jurisdiction provided in Article 146 letter e; the recommendation of being repealed Article 146 letter 1 of the Constitution according to which "*fulfills other functions provided by the organic law of the Court*", the Court proposes the introduction of new powers of the Constitutional Court respectively the one of pronouncing, *ex officio*, upon the constitutionality of decisions issued by the High Court of Cassation and Justice that resolves the appeals in the interest of law).

## 6. CONCLUSIONS

Beyond the controversy related to the legal nature of the constitutional judicial authority and independence from other state authorities, we believe that the inclusion in the jurisdiction of the Constitutional Court of the attribution to verify the compliance to the constitutional conditions, in its efforts of amending the fundamental law, contributes to the strengthening role as guarantor for the of supremacy the Constitution.

The fact that such a control, as the one regulated by the Article 146 letter a the second part, of the Constitution is exercised *ex officio* and features an *obligation* of the Constitutional Court, confers consistency in this matter and in the same time it features also a guarantee towards any attempt of inappropriate amendment of the Constitution.

An aspect that contributes to the solution of the Court that declared the constitutionality/unconstitutionality of certain provisions regarding the constitutional bill related to the “hard core” of the Constitution or on matters of extrinsic unconstitutionality has a generally obligatory feature.

On the other hand, it should be noted that although the Constitutional Court expresses - as it did whenever it had the opportunity - the point of view or makes a series of recommendations on the revising provisions of the bill, they are no longer binding.

Although the Constitutional Court’s role in the revision of the fundamental law is undisputed, there’s still only one stage left in the development of this procedure, followed by the debate and voting procedure of revision by the Romanian Parliament (in the position of a Derivative Constituent Assembly) and then national referendum stage (the decisive stage as the “last word” must belong to the people and its volition).

