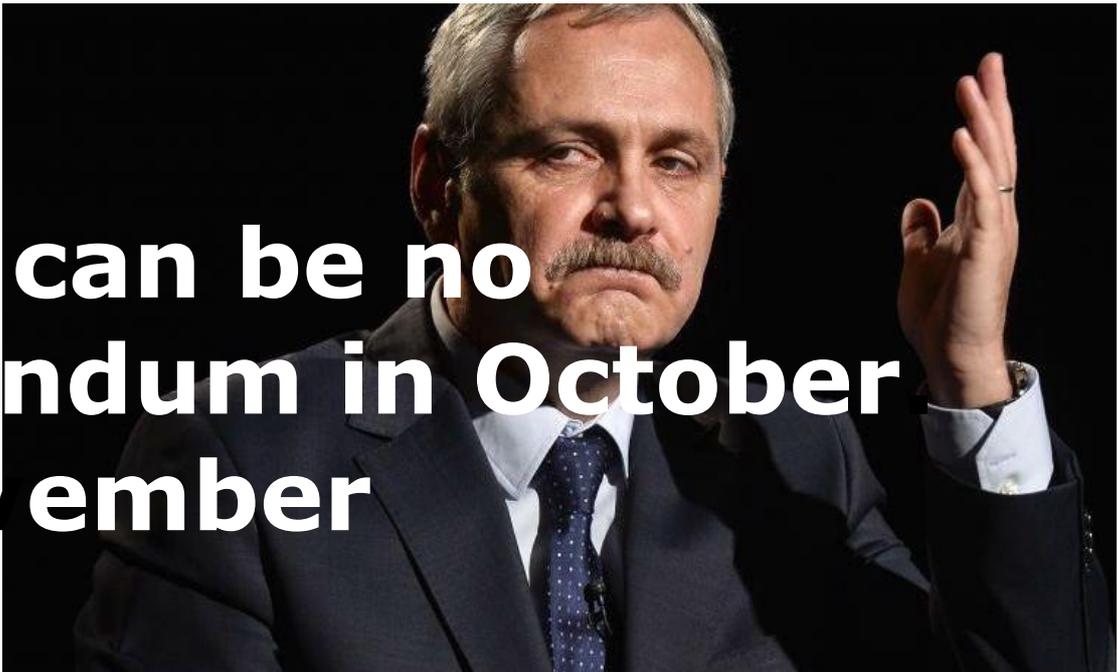


The ruling PSD-ALDE coalition plans to organize a referendum on October 7th to amend the Constitution. Technically, this is impossible: Law 3/2000 is a disaster and there is no human resource nor the capacity to organize the consultation on such a short notice

There can be no referendum in October or November

A photograph of a man with a mustache, wearing a dark suit, white shirt, and patterned tie. He is gesturing with his right hand raised, palm facing forward, as if speaking or presenting. The background is dark.

The PSD-ALDE government uses the controversial referendum to amend the Constitution¹ as a permanent populist instrument for electoral campaigning that constantly stirs the spirits. The party leaders have successfully leveraged the subject and threatened on several occasions that they would hold the referendum. Law 3/2000²,

which regulates the organization of the referendum, has been a matter of dispute in Parliament and in the public opinion.

The biggest issue of these initiatives is that they have not taken into consideration a few key aspects: Law 3 was promulgated in 2000, it has not been updated at all (except for the articles that served well the parties in

¹ The article states that „The family is based on the freely consented marriage between a man and a woman, on their equality and on the right and duty of the parents to raise, educate and instruct the children”,

https://senat.ro/Legis/lista.aspx?nr_cls=L569&an_cls=2016

²

<http://legislatie.just.ro/Public/DetaliuDocument/21139>

power) and its provisions still refer to laws adopted in 1991, when there was altogether another legislative philosophy in terms of elections.

Most of the references are connected to **laws from 2000s or 1990s**, which have either been repealed or repeatedly amended and republished.

Law 159/2018³ amended Article 6, which regulates the procedure to initiate the referendum on Constitutional Revision, but the rest of the provisions are totally unharmonized. Also, Law 341/2013 reduced the referendum validation thresholds, a political decision strongly criticized by EFOR as it undermines the role of the referendum as a democratic instrument⁴.

If a large proportion of the laws on elections and political parties were amended in 2015-2016, the referendum legislation lagged behind and was not updated. Currently, the laws on elections for the European Parliament and the President are also in Parliament. But Law 3/2000 does not refer to essential aspects that have been successfully implemented in recent years by the Permanent Electoral Authority (PEA) such as the **Computerized Monitoring System for Presence and Prevention of Illegal Voting (SIMPV)**. Political parties should have amended all the laws in a

coherent manner so as not to be in such a situation.

Besides legislative issues, there are **serious organizational problems**. If the referendum takes place on October 7th, as social democrat leaders recently announced, there is not enough time for identifying and preparing polling station presidents and vice-presidents (or doing this in a hastily manner) and for procuring the software for centralizing votes, which would raise serious suspicions about the proper organization of the referendum; for example, we should bear in mind that AEP has already begun consultations to purchase software for the 2019 presidential elections that will take place at the end of the year.

At this moment, it seems the Government has no intention to amend the legislation through a Government Emergency Ordinance (GEO) (although a GEO is not a recommended practice), to solve the problems mentioned in this policy brief. The Parliament also does not seem to want to initiate a serious reform on how to organize a referendum.

In this context, **the urgency of a unitary Electoral Code becomes again evident**. EFOR has publicly repeatedly expressed that there is an urgency that elections be held in a coherent and professional manner⁵. An Electoral

³ <https://www.senat.ro/Legis/Lista.aspx?cod=20347>

⁴ Art 5:
(2) The referendum shall be valid if at least 30% of the persons on the permanent electoral rolls participate in it; (3) The result of the referendum is validated if the validly expressed votes represent

at least 25% of those on the permanent electoral rolls.
<http://legislatie.just.ro/Public/DetaliuDocument/153615>

⁵ <https://expertforum.ro/en/elections/>;
<https://politicafarabariere.wordpress.com/?s=cod+electoral>

Code would unify all technical organizational provisions regarding elections or referenda without the need for these parts of the law to be replicated in each of the disparate normative acts. But it is evident there is no political will to take this step, even if PEA has proposed a project on this issue (that was rejected); the parliamentary committee that amended the electoral laws separately was ironically called the Electoral Code Committee.

Therefore, not only policies on finances, EU funds, transport, health, education, pensions, energy etc. are in limbo; the ruling coalition cannot move forward on any of these topics because it has managed to cannibalize its own implementation capacity, through counter-selection, incompetence and instability. Even when there is a political interest in seeing a project finalized that would bring political capital, the government no longer has the administrative capacity to do so.

Interpretable regulations

EFOR explains the most problematic issues related to Law 3/2000, which will certainly generate difficulties for the institutions with attributions in organizing the referendum.

Law 3/2000 has previously proven to be too minimalistic, with numerous

references to other normative acts, which can be very confusing for the public institutions and the voters. In 2012, the number of decisions taken by the Central Electoral Bureau (BEC) detailing electoral procedures is significant and the number of references to other laws is equally high⁶. As Romanian practice is not based on legal precedents, it is possible for each Central Electoral Bureau to reinterpret these regulations at each referendum.

Actually, in 2012, the Central Electoral Bureau decided that Title I of Law 35/2008 would apply to the referendum⁷: practically, this means that all the provisions on organizing the Parliamentary elections apply to the referendum.

The Central Electoral Bureau (BEC) is a body that manages and monitors how elections are organized, but in no case should it be made responsible (burdened, in fact) to issue decisions to fill in the gaps of a loose and incoherent law.

An example of a case that may be very delicate is that of Article 25, which states that the BEC may cancel the vote in a polling station or a constituency in the case of electoral fraud⁸. What happens if the next BEC gives a different interpretation of what constitutes electoral fraud⁹?

⁶

<http://becreferendum2012.roaep.ro/hotarari.html>

⁷ Decision 34 -

<http://becreferendum2012.roaep.ro/DOCUMENTE%20BEC/Hotarari/Hot%20nr.34.pdf>

⁸Fraud was defined by Decision no. 26 regarding the interpretation of provisions of art. 25 para. 3 of Law no. 3/2000

<http://becreferendum2012.roaep.ro/DOCUMENTE%20BEC/Hotarari/Hot%20nr.26.pdf>.

⁹ EFOR has indicated in several of the election monitoring reports that there is a risk that electoral bureaus may interpret the law differently from year to year as there is no obligation to use the same interpretation and the composition is relatively different for each BEC

A law with many flagrant problems

The primary law governing the organizing of a referendum is Law 3/2000, which is supplemented by other normative acts. According to Law 208/2015 on the election of the Senate and the Chamber of Deputies, as well as for the organization and functioning of the Permanent Electoral Authority:

The provisions of the present law on the body of electoral experts, polling stations, electoral register and permanent electoral lists apply accordingly to the elections for the President of Romania, the elections for the local public administration authorities, the elections to the European Parliament, as well as the national and local referendum.

In other words, some provisions on the organization of elections are taken from Law 208 if there is no specific provision in Law 3. This leads to a kind of legislative mosaic, combining different articles with different philosophies, which often do not resonate.

For example, the Law on the referendum provides in art. 26 that:

(2²) The presidents of the electoral bureaus of the polling stations shall be appointed by the president of the county or Bucharest Tribunal, as the case may be, at least 7 days before the referendum day, by drawing lots.

(3) The lots shall be drawn from a list that will include, in the following order: judges and prosecutors, as well as other lawyers from the county or from Bucharest, who are not members of a political party.

(4) If the number of lawyers is insufficient, the lots shall be drawn from another list of persons of another specialty with a reputable reputation not belonging to any political party.

On the other hand, art. 15 of Law 208/2015 provides that:

The president of the polling station electoral bureau and its deputy shall be appointed by the Permanent Electoral Authority in a public session, announced 48 hours in advance, by computerized lottery [...]

A series of procedures governed by Law 3/2000 leave room for interpretation: the procedure for requesting a mobile ballot box is vaguely described [Article 40], there are no limitations regarding the person who can accompany a voter in the voting booth [Article 39 (2)], voting rules abroad are virtually non-existent etc. The procedures for voting and closing the polling stations are incomplete. And these are just a few of the unclear aspects.

The procedures to draw up electoral lists (Article 17) include references to outdated provisions, conflicting with the ones regarding the Electoral Registry and those on personal data. For example, Article 18 would allow publicly displaying personal data:

Displaying electoral lists, if the law provides for such an operation, the delimitation, numbering and making public of the polling stations and of the polling stations are made according to the provisions of the Law no. 68/1992¹⁰ and of Law no. 70/1991¹¹,

<https://expertforum.ro/program/procese-electorale/>.

http://www.cdep.ro/pls/legis/legis_pck.htm?act_text?id=12169

¹⁰ Law no. 68/1992 for electing the Chamber of Deputies and Senate, abolished in 2004

¹¹ Law no. 70 of the 26th of November 1991 regarding local elections, abolished in 2004

republished, no later than 48 hours after the deadline provided in art. 17 par. (2).

According to Article 24, **the Permanent Electoral Authority (PEA) is not part of the Central Electoral Bureau**, even if it provides technical assistance¹². PEA is the main depository of electoral expertise and should therefore be the institution whose experience weighs significantly in the decision-making process in the BEC. The Authority also manages many of the instruments mentioned here, so it is almost impossible to organize a process of this kind without the full involvement of the institution.

There are no provisions on SIMPV, so there will be no monitoring of the vote and no real-time voting data available. In any case, there would not be enough time to organize such operations in one month.

It is not even possible to record the closing of the polling station and the counting of votes, a procedure that has substantially increased the transparency of one of the most vulnerable moments of the voting day during the last round of elections.

Considering that at the 2012 referendum there were polling stations which recorded a presence of 3-400% on supplementary lists, such a system would be more than necessary; the only tool available in 2012 was regular SMS reporting, which does not provide a real

http://www.cdep.ro/pls/legis/legis_pck.http_act?id=1342

¹² Generally, BEC is composed of judges, members of the Parliamentary political parties and representatives of the AEP. Read more on the role

dimension of the voting presence at the ballots.

In contrast to a proactive fraud prevention system, Law 3 refers to the primitive manual verification of voter lists, which can take months:

The Central Electoral Bureau will submit copies of the permanent electoral lists and the electoral tables used in the polling stations to the Permanent Electoral Authority, which will check them for multiple possible votes, within 60 days of the date of the referendum. If the Permanent Electoral Authority identifies persons who have exercised their vote several times, it will notify the criminal prosecution bodies in order to apply the provisions of art. 387 of the Criminal Code. [Article 43 (5)]

There are no clear provisions to observe elections. The law provides that, apart from the members of the electoral bureau of the polling station and the delegates accredited by the Central Election Bureau, no other person can stay in public places in the polling zone or in the polling station beyond the time required to vote [Art. 33 (3)]. Delegate means the representative of a political party. Moreover, the accreditation procedure has been changed and improved since the 2000s. Therefore, accreditation procedures will most likely have to be defined by the BEC's decision, which may generate abuses and may even block the right to observe the referendum.

EFOR, together with the **Politics without Barriers** Coalition, other non-

of AEP in the 2012 referendum in the following report - <http://www.roaep.ro/legislatie/wp-content/uploads/2015/06/RAPORT-privind-referendumul-national-din-29-iulie-2012-2.pdf>

governmental organizations and international observers, have repeatedly called for transparency in the work of electoral bureaus and increased rights for observers. Most likely, Law 3/2000 will have adverse effects on the activity of independent observers¹³.

Provisions regarding **campaigning** are virtually non-existent; there is only art. 30, with three paragraphs, which does not refer, for example, to the electoral materials that can be used, to the means of campaigning or to the presence of sides in the media:

(1) The referendum campaign shall start on the date of the referendum's public notice.

(2) During the referendum campaign, political parties and citizens have the right to express their opinions freely and without discrimination, through rallies, public meetings and mass media.

(3) The means used in the referendum campaign must not contravene the rule of law.

In the case of the referendum in 2012, BEC adopted a decision stating that the applicable provisions are those regarding the electoral campaign in Law 35/2008 (parliamentary elections)¹⁴. Such regulations should be clearly established by Law 3, especially as the referendum has specific rules.

Sanctions are far too weak and do not cover many of the possible violations of the law.

If we consider all these problematic aspects, it is clear that a referendum should not take place in such conditions of uncertainty.

The rules of the game should be clear, in accordance to international standards, especially if the organization of such a consultation is not urgent and is strongly criticized in the public space.

¹³ <https://expertforum.ro/transparenta-alegerilor-nu-este-optionala/>

¹⁴

<http://becreferendum2012.roaep.ro/DOCUMENTE%20BEC/Hotarari/Hot%20nr.8.pdf>

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Semilunei 7, ap. 1
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