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Recourse to the People in Semi-presidential Systems: Lessons from Romanian Referendum Practice during Periods of Divided Government (No.4/2020)

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**Recourse to the People in Semi-presidential Systems:  
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**1. Introduction**

This article investigates the interlinkages between constitutional referendums – their design, operation, and expected outcomes – and semi-presidential systems of government.<sup>1</sup> It starts from the assumption that there will be novel insights to be drawn from looking at the interplay between key features of the political system specific to the semi-presidential model and referendum practice in such a system. I pursue this investigation interested in the distinctive role that this participatory mechanism has come to play in semi-presidential systems, especially during periods of divided government. I am also interested in whether and how semi-presidentialism can exacerbate problems with constitutional referendum practice, particularly the danger of elite control of the referendum process.

The article proceeds to narrow down its investigation by asking whether referendums in semi-presidential systems can perform a deadlock-breaking function or else whether the oft-repeated problems of politicisation and abuse of referendums are exacerbated in such systems. As will be seen, much literature on referendums views them as useful tools in overcoming political and constitutional stalemate. Insofar as they are a blunt instrument that invoke direct popular will as the final decision-making authority, referendums can under certain circumstances serve to break impasse in political and constitutional processes. However, this hypothesis on referendum function has so far been little tested in the specific context of gridlock in semi-presidential systems, wherein periods of divided government can lead to serious institutional conflict and competing authority claims. With both the legislature and the president directly elected, appeals to their representative mandate cannot straightforwardly resolve conflict. This is where the referendum might come in, as an immediate, direct and often single issue appeal to the people to break the deadlock.

More broadly, my hope is that this foray into studying constitutional referendums in semi-presidential systems can deepen our understanding of referendum practice and its pathologies. Arend Lijphart's charge that referendums are inherently elite-driven and pro-hegemonic<sup>2</sup> would appear to be exacerbated wherever the constitution empowers the executive with the power to initiate them, as several semi-presidential ones do. The long-standing risks of executive abuse and, more broadly, elite control<sup>3</sup> in the use of referendums are likely to be impacted by the specific dynamics of semi-

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<sup>1</sup> I adopt a broad understanding of constitutional referendums here, meant to encompass referendums on the creation, revision, or amendment of constitutions; referendums on relations between different constitutional actors, such as presidential impeachment; and consultative referendums initiated by a constitutional actor. This definition expands on the one embraced by the Venice Commission in its *Guidelines for Constitutional Referendums at National Level Adopted by the Venice Commission at its 47<sup>th</sup> Plenary Meeting* (Venice, 6-7 July 2001) and on the one adopted by Stephen Tierney in his influential *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press 2012), p. 11.

<sup>2</sup> Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven: Yale University Press 1984), p. 203.

<sup>3</sup> On elite control and referendum practice, see Tierney 2012, pp. 98-128. Tierney defines 'elite control' syndrome as the following charge levied against constitutional referendums:

presidentialism, not least the dual nature of the executive and the specific types of constitutional and political conflicts likely to arise within this system.

The article proceeds in three steps. I first examine the general argument in favour of the referendum as deadlock-breaking mechanism, with recent examples of where this argument has been invoked to break political and constitutional impasse. I then explore two uses of the constitutional referendum in semi-presidential systems: the presidential recall referendum and the president-initiated referendum. Both types are present in several semi-presidential constitutions and have been used during periods of divided government, either as mechanisms to ensure political accountability (such as attempting to recall a directly elected president for unconstitutional acts) or else as instruments to shore up legitimacy for certain policies and to weaken political opponents (such as when initiated by a president mid-mandate). Finally, I map Romania's experience with both types of referendums. Romania's rich experience with such referendums makes it an apt testing ground for these hypotheses, as well as highlighting potential dangers specific to a democratising context. Insofar as much of the literature on referendums in semi-presidential systems has focused on only a handful of case studies, Romania can offer original insights.

The impetus behind this investigation is therefore referendum-centric, driven by an interest in the capacity of referendums to act as democratic correctives in, or conversely, to further destabilise, semi-presidential systems of government. I will argue that the referendum can play a positive function in semi-presidential systems, so long as the rules surrounding referendum process are clear and carefully integrated within the broader constitutional architecture. In the specific context of Romanian constitutionalism, referendums were envisioned as performing the role of democratic check – and sometimes democratic brake – within wider processes of constitutional revision, presidential recall, and presidential consultation. However, their constitutionalisation and legislative regulation has been inconsistent and at times unpredictable, making referendums prone to elite abuse precisely when their democratic corrective function was most needed: during period of divided government.

Before proceeding, a note on definitions. There has been much debate – and confusion – in the literature concerning the definition of semi-presidentialism, resulting in varying lists of countries that could accurately be described as such.<sup>4</sup> For the purposes of this article, I take Robert Elgie's definition on board, wherein he defines a semi-presidential system as that "where a popularly-elected fixed-term president exists alongside a prime minister and cabinet who are responsible to parliament."<sup>5</sup> This definition, very close to those previously proposed by Maurice Duverger and Juan Linz, has the advantage of focusing on the constitutional underpinnings of this regime type, rather than on subjective assessments of executive power (as 'considerable', as Duverger had held) or of the real-world operation of the system (whether it operates, in practice, closer to a parliamentary or presidential regime). The list of countries that will fit this definition will therefore include 'usual suspects' such as Austria, Finland, France, and Portugal, but also 'newer' democracies such as Bulgaria,

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The essence of this criticism is that 'elites' (which...is itself an elusive term), have an array of exclusive powers at their disposal, such as deciding to initiate the referendum in the first place, setting the question, and determining the process rules by which the referendum will be conducted and the issue decided. This allows them to deploy the referendum only when they are certain of victory.<sup>3</sup>

Tierney also reminds us that 'elites' may encompass both executive and legislative elites, as well as private actors with vested interests in the referendum outcome

<sup>4</sup> For an overview of these debates, see Robert Elgie, *Semi-Presidentialism in Europe* (Oxford: Oxford University Press 1999), pp. 1-25.

<sup>5</sup> *Ibid.*, p. 15.

Poland, Romania, and Ukraine.<sup>6</sup> Most relevant for our purposes here will be identifying the constitutional competences of different institutional actors vis-à-vis constitutional referendums, such as the power to initiate such a referendum and the role played within the referendum process.

## 2. Constitutional Referendums as Deadlock-breaking Mechanisms

There are several ways in which we can think of constitutional referendums as potentially performing the function of breaking deadlock. At a general level, we can understand deadlock as stalemate, or a certain degree of fossilisation of constitutional processes. The referendum vote can therefore perform the function of injecting renewed democratic energy into old debates and move things along. At a more specific level, and the one more relevant for the purposes of this article, we can think of deadlock on issues that are so politically sensitive or polarising that political elites cannot (or are unwilling to) find a solution on their own. These can be issues of high moral salience, such as abortion or same-sex marriage, or they can be highly politically charged, such as electoral reform or unpopular policy decisions. Whether because they are internally divided or else because they do not wish to assume the political responsibility for potentially electorally costly decisions, political elites may in such instances resort to a popular referendum to break the impasse. In what follows, I detail and provide examples of both these arguments.

Writing on Australia's long history of near-paralysis when it comes to constitutional change, Ron Levy has shown that "constitutional deadlock is rooted in broader trends concerning public trust in authority."<sup>7</sup> In this instance, deadlock refers to the near-impossibility of adopting constitutional amendments via referendums. Australia's negative track record when it comes to carrying constitutional referendums is telling, only eight such referendums having been successful out of 44 held so far. Looking at the growing empirical evidence on deliberative exercises such as citizens' assemblies, Levy has suggested that such instruments can improve public trust in democratic processes and increase the chances of popular endorsement of constitutional renewal.<sup>8</sup> For Levy, the legitimacy of constitutional change requires that democratic majoritarian decision-making, such as via referendums, be complemented with deliberative democratic values as enshrined in micro-deliberative mechanisms.<sup>9</sup> This view is shared by other deliberative constitutionalists, who see the twin goals of deliberative and participatory legitimacy as achievable only through the interlinking of micro- and macro-level exercises in citizen decision-making.<sup>10</sup> This more general view then sees referendums as part of broader participatory and deliberative democratic package of mechanisms that can inject much needed dynamism in constitutional processes.

More pertinent for this article's purposes, however, are arguments that referendums – by putting an issue directly to the people and returning a clear answer – can help overcome political and institutional

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<sup>6</sup> See Elgie 1999; Robert Elgie and Sophie Moestrup (eds.), *Semi-Presidentialism in Central and Eastern Europe* (Manchester: Manchester University Press 2008); and Robert Elgie and Sophia Moestrup (eds.), *Semi-presidentialism Outside Europe: A Comparative Study* (London: Routledge 2007).

<sup>7</sup> Ron Levy, *Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change*, (2010) 34:3 *Melbourne University Law Review*, p. 807.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, p. 838.

<sup>10</sup> Silvia Suteu and Stephen Tierney, *Squaring the Circle? Bringing Deliberation and Participation Together in Processes of Constitution-making*, in Ron Levy et al. (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press 2018), pp. 282-294; Jane Suiter and Theresa Reidy, *Does Deliberation Help Deliver Informed Electorates: Evidence from Irish Referendum Votes*, (2019) *Representation*.

blockages. It has been argued that even the mere threat of a direct popular vote may force deadlocked political players to reach a compromise.<sup>11</sup> For example, political parties may be divided on certain policy issues and unwilling to budge in order to reach compromise. Sweden's 1957 referendum on supplementary pensions was such a scenario, in which the political parties were not internally divided on their positions but diverged among each other, including the two coalition parties in government. The multiple choice advisory referendum was designed to put the main options endorsed by the different parties to the people to decide, and at the same time to buy the coalition government some time to work towards finding compromise.<sup>12</sup> Similarly, in the aftermath of the Brexit referendum, many latched onto the possibility of a second popular vote as the only means to break the political deadlock between parliamentary forces.<sup>13</sup> The issue was ultimately put to rest once a clear majority was returned at the 2019 UK general election. However, for a time, the prospect of going to the people a second time – less so to take Brexit off the table and more so to clarify the meaning of the first vote – seemed to many a democratic way to bypass an undecided parliament.

It may also be that a given issue is not just politically divisive, but perceived as the type of moral question on which political party members may themselves be split. In such instances, democratic representatives may be torn between their electoral mandate and their individual conscience. Alternatively, they may not wish to take on the electoral cost of voting on moral issues without a higher degree of direct popular legitimation. Ireland's votes on liberalising access to abortion (2018) and on recognising same-sex marriage (2015) are now viewed as positive examples of how going to the people – first in citizens' assemblies and then in national referendums – can break political stalemate and bring about change.<sup>14</sup> In these instances, the stalemate constituted years of debate on amending the constitution (especially regarding access to abortion) over the initiation of which neither of the major political parties wanted to assume ownership and risk political capital.

There are three caveats in order here. The first is that the referendum as a deadlock-breaking tool is not necessarily exclusive of other functions it might play. Thus, it may be that a popular vote is sought not just to break deadlock on a particular issue, but also to secure the popular legitimacy of any solution adopted. For example, the referendums on the EU constitution could alternatively be seen as seeking to legitimate an instrument on which there largely was political consensus (in some countries),

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<sup>11</sup> David Altman, *Citizenship and Contemporary Direct Democracy* (Cambridge: Cambridge University Press 2018), p. 147.

<sup>12</sup> Olof Ruin, *Sweden: The Referendum as an Instrument for Defusing Political Issues* in Pier Vincenzo and Michael Gallagher (eds.), *The Referendum Experience in Europe* (London: MacMillan Press 1996), p. 176 and Maija Setälä, *Referendums in Western Europe: A Wave of Direct Democracy?*, 22:4 *Scandinavian Political Studies* (1999), p. 332.

<sup>13</sup> For discussions of the arguments in favour of a second referendum on Brexit, see Leah Trueblood, *The Merits and Meaning of a 'Second' Referendum*, *UK Constitutional Law Blog* (5 February 2018), <https://ukconstitutionallaw.org/2018/02/05/leah-trueblood-the-merits-and-meaning-of-a-second-referendum/>; Kyle Murray, *Putting Parliament in Its Place: The Pro-Brexit, Democratic Case for a Second Brexit Referendum*, *UK Constitutional Law Blog* (26 July 2019), <https://ukconstitutionallaw.org/2019/07/26/kyle-murray-putting-parliament-in-its-place-the-pro-brexit-democratic-case-for-a-second-brexit-referendum/>; and Richard Bellamy, *Was the Brexit Referendum Legitimate, and Would a Second One Be So?*, 18 (2019) *European Political Science*, pp. 126-133.

<sup>14</sup> On the long-standing debates prior to the two referendums, and the politically charged referendum campaigns, see Brian Tobin, *Marriage Equality in Ireland: The Politico-Legal Context*, 30:2 *International Journal of Law, Policy and the Family* (2016) 115-130; Johan A. Elkink, David M. Farrell, Theresa Reidy, and Jane Suiter, *Understanding the 2015 Marriage Referendum in Ireland: Context, Campaign, and Conservative Ireland*, 32:3 *Irish Political Studies* (2017), pp. 361-381; Fiona de Londras and Máiréad Enright, *Repealing the 8th: Reforming Irish Abortion Law* (Bristol: Policy Press 2018); and Luke Field, *The Abortion Referendum of 2018 and a Timeline of Abortion Politics in Ireland to Date*, 33:4 *Irish Political Studies* (2018), pp. 608-628.

or else to endorse a clear direction under conditions of deep political polarisation on the issue (in others).<sup>15</sup> It may also be that referendums are resorted to for both policy purposes and institutional-oriented goals, such as political actors both seeking to overcome stalemate and, at the same time, to score electoral points by winning the popular vote and weakening their opponents.<sup>16</sup> Italy's frequent use of referendums (71), for instance, has revolved around policy and ethical issues *and* issues of institutional reform, with scholars remarking that this instrument has been more often resorted to by political parties as a weapon of party competition rather than as a means of empowering citizens.<sup>17</sup>

A second caveat is that referendums might play the role of breaking deadlock regardless of whether they are advisory or compulsory. Past referendum experience shows just how difficult it may be to escape, politically, the force of even a consultative referendum's result. We need look no further than the 2016 Brexit referendum: regardless of the advisory nature of referendums under the UK constitution, the vote was soon interpreted as carrying the force of obligation.<sup>18</sup> This was in part due to the vote being referred to as a decision (as opposed to mere consultation) of the British people during the referendum campaign, but in part also to fears of triggering a constitutional crisis were the political class to go against the clearly expressed popular vote.<sup>19</sup> The UK Supreme Court itself, in its first *Miller* decision, even while recognising the referendum's advisory nature under UK law, still acknowledged that the vote was "of great political significance".<sup>20</sup> The House of Lords Select Committee on the Constitution had already in 2010 admitted that "it would be difficult for Parliament to ignore a decisive expression of public opinion," even in a system grounded on parliamentary sovereignty such as the UK's.<sup>21</sup> The Venice Commission has also considered the possibility that advisory referendums may even be preferable on "question[s] of principle or generally-worded proposal[s]."<sup>22</sup> It has been noted that the advisory-compulsory distinction, while important from a purely legal point of view, may not carry the day politically when it comes to interpreting the results of a referendum, in particular on issues of great constitutional salience.<sup>23</sup> In practice, the distinction

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<sup>15</sup> Carlos Closa, *Why Convene Referendums? Explaining Choices in EU Constitutional Politics*, (2007) 14:8 *Journal of European Public Policy*, pp. 1311-1332. Bogdan Iancu has argued that some of these referendums were used by national governments to oppose the European integration process and to question European policies by directly appealing to the people at the national level. See Bogdan Iancu, *Can the "People" Decide (in Europe)? Uses, Abuses and Fear of Referendums*, (2018) 1 *Romanian Journal of Comparative Law*, pp. 169-170.

<sup>16</sup> Sergiu Gherghina, *How Political Parties Use Referendums: An Analytical Framework*, (2019a) 33:3 *East European Politics and Societies and Cultures*, p. 683.

<sup>17</sup> Saskia Hollander, *The Politics of Referendum Use in European Democracies* (London: Palgrave Macmillan 2019), pp. 105-106.

<sup>18</sup> Suteu 2018, p. 752.

<sup>19</sup> Jacob Eisler, *Dissonant Referendum Design and Turmoil in Representation*, [2019] *Public Law*, pp. 625-626.

<sup>20</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para. 124.

<sup>21</sup> House of Lords Select Committee on the Constitution (2010), *Referendums in the United Kingdom*, 12th Report of Session 2009-10, HL Paper 99, para. 197.

<sup>22</sup> In full, the Venice Commission considered the deadlock-inducing potential of legally binding referendums on such questions, insofar as they require legislative implementation that parliaments may resist:

Where a legally binding referendum concerns a question of principle or a generally-worded proposal, it is up to Parliament to implement the people's decision. Parliament may be obstructive, particularly where its direct interests are affected (reducing the number of members of Parliament or the allowances paid to them, for example). It is preferable, therefore, for referendums on questions of principle or generally-worded proposals to be consultative. If they are legally binding, the subsequent procedure should be laid down in specific constitutional or legislative rules. It should be possible to appeal before the courts in the event that Parliament fails to act

*Guidelines for Constitutional Referendums at National Level*, para. 54.

<sup>23</sup> Hollander 2019, p. 50.

must therefore be relativized, as the force of a referendum result – and the likelihood of its enforcement – will still depend on perceptions of legitimacy of the vote.<sup>24</sup>

A final caveat here is the recognition that referendums themselves may be the cause of deadlock. In some instances, their advisory nature may leave room for interpretations of the result that create confusion and deepen political conflict.<sup>25</sup> The three and a half years of political and constitutional crisis following the Brexit vote are a case in point, where the oft-repeated adage that ‘Brexit means Brexit’ struggled to find concrete meaning. In other instances, it may be the unexpected outcome of a referendum, upending the expectations of its initiators, that causes deadlock. The 2016 constitutional referendum in Italy, on which Prime Minister Matteo Renzi staked his premiership, had been meant to endorse his package of constitutional reforms (among which controversial changes to the nature and competences of the Senate).<sup>26</sup> The referendum failed, however, at least in part as a rejection by the Italian public of the top-down, party-driven, majoritarian use of the referendum instrument.<sup>27</sup> The 2016 vote has been characterised as leading to deadlock in the realm of constitutional change, insofar as it has tainted constitutional reform initiatives and risks triggering immediate opposition to any attempts at restarting the process.<sup>28</sup> In short, expecting referendums to break deadlock does not guarantee that they will return the intended results, or indeed that they will not backfire and exacerbate the deadlock themselves. This article is thus concerned with instances in which referendums might have been *expected* to play this role, exploring the constitutional law and politics surrounding their use.

To conclude, the idea behind expecting referendums to perform deadlock-breaking functions is less about appealing directly to the people as bearers of (original) constituent power in order to legitimate a constitutional change, though citizens’ invoked authority *is* part of the equation. Instead, the concerns here are much more mundane: a political/constitutional crisis may have arisen, or else a stalemate between political actors, which they themselves are incapable of overcoming. The referendum is clearly appealing during cohabitation periods and periods of divided minority government in semi-presidential systems that have enshrined this mechanism constitutionally. The hope might be that, where the fine balance of power required by semi-presidentialism breaks down, a last resort mechanism such as a referendum could settle the conflict. In the section that follows, I test this expectation against two forms of referendum institutionalisation in semi-presidential systems.

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<sup>24</sup> Laurence Morel, *Types of Referendums, Provisions and Practice at the National Level Worldwide* in Laurence Morel and Matt Qvortrup (eds.), *The Routledge Handbook to Referendums and Direct Democracy* (London: Routledge 2017), p. 32. An example of a compulsory referendum with both a clear vote and high turnout whose decision was nevertheless overturned by a simple parliamentary majority is France’s 2005 vote on the Lisbon Treaty. Morel has referred to this as an example of a ‘politically obligatory’ referendum. See Laurence Morel, *The Rise of ‘Politically Obligatory’ Referendums: The 2005 French Referendum in Comparative Perspective*, (2007) 30:5 *West European Politics*, pp. 1041-1067.

<sup>25</sup> Hollander 2019, p. 50.

<sup>26</sup> For an overview of the process, and the lead up to it, see Paul Blokker, *The Grande Riforma of the Italian Constitution: Majoritarian versus Participatory Democracy?*, (2017) 9:2 *Contemporary Italian Politics*, pp. 124-141.

<sup>27</sup> *Ibid.*, p. 136.

<sup>28</sup> Giuseppe Franco Ferrari, *A Deadlock Difficult to Break*, (2017) 3:1 *Italian Law Journal*, pp. 113-118.

### 3. Constitutional Deadlock in Semi-presidential Systems and the Role of Referendums

Semi-presidential systems will behave differently – closer to parliamentary or to presidential systems – depending on a variety of factors, including electoral results, the type of electoral system, the personalities of key political players, traditions of political conflict and cooperation etc.<sup>29</sup> Following Cindy Skach's classification,<sup>30</sup> we can distinguish between three sub-types of semi-presidential systems: (1) consolidated majority government, wherein the PM enjoys a majority in the legislature and the president comes from the same party; (2) divided majority government (also known as cohabitation), wherein the PM enjoys majority support in the legislature but the president comes from a party opposing this majority; and (3) divided minority government, wherein neither the PM nor the president enjoys the support of the legislative majority. Skach views the first of these as most durable and stable, whereas the second and third versions are most likely to result in instability and political and constitutional conflict.

For the purposes of this article, a key question is what role referendums play in scenarios of divided government. Can they play their expected deadlock-breaking role under these conditions? Conversely, are referendums more prone to political capture under such circumstances? And what can we learn from comparative constitutional practice about the extent to which referendums can be designed to help, rather than hinder, conflict resolution during periods of crisis in semi-presidential systems? To the extent that the referendum itself is invoked as a direct expression of popular sovereignty, it carries with it an immediate authority claim that is difficult to resist. The referendum's appeal in instances of divided government in semi-presidential systems is therefore significant, insofar as it promises renewed popular legitimacy endorsing one or the other side of the conflict. At the same time, the risk of executive control is likely to play out differently in such systems, given the presence of two constitutional actors with executive powers and given the complex executive-legislative dynamics during periods of divided government.<sup>31</sup>

There are two main categories of referendum use I will explore, both central to understanding the role referendums have played during constitutional conflicts in semi-presidential systems.

#### 3.1 Presidential recall referendums

A first category I will explore entails referendums to ratify presidential recall. The recall procedure may be initiated by parliament, the scenario I will explore here, alone or in conjunction with other constitutional actors (a top-down process) or directly by the people, through the collection of signatures (a bottom-up process).<sup>32</sup>

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<sup>29</sup> Stephen Gardbaum, *Political Parties, Voting Systems, and the Separation of Powers*, (2017) 65:2 *American Journal of Comparative Law*, pp. 229-264.

<sup>30</sup> Cindy Skach, *The "Newest" Separation of Powers: Semipresidentialism*, (2007) 5:1 *International Journal of Constitutional Law*, pp. 93-121. See also Cindy Skach, *Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the French Fifth Republic* (Princeton: Princeton University Press 2005), pp. 12-29.

<sup>31</sup> In what follows, I will mainly be interested in periods of cohabitation, i.e. divided government wherein the government enjoys a legislative majority. These periods heighten the risk of intra-executive conflict with competing popular mandate claims, insofar as both the president and the Prime Minister will be able to claim to represent popular majorities.

<sup>32</sup> For a more in depth exploration of recall referendums, see Yanina Welp, *Recall Referendums around the World*, in Laurence Morel and Matt Qvortrup (eds.), *The Routledge Handbook to Referendums and Direct Democracy* (London: Routledge 2017), pp. 451-463. More generally on the underpinnings and increased use of recall mechanisms, see Yanina Welp and Laurence Whitehead (eds.), *The Politics of Recall Elections* (Cham: Palgrave Macmillan 2020).



Of special interest here is the use of recall mechanisms in semi-presidential systems, specifically the recall of the president, through a direct or indirect popular procedure. Interestingly, the French constitution had provided no such mechanism for removing the president until the constitutional reform of 2007. Despite the French president being able to dissolve the parliament (Article 12), there had been no mechanism initially for removing the president before the end of her/his mandate, save for high treason (original Article 68). The situation had proved in need of clarification and updating in line with the evolution of the French presidency, specifically after 1962 when the direct election of the president was constitutionalised.<sup>33</sup> Behind the 2007 reform was a desire to introduce a mechanism ensuring the political accountability of the French president that could reign in her/his powers, notably during periods of consolidated majority government when the president dominated the executive.<sup>34</sup> The amended Article 68 now allows for presidential removal only on grounds of “a breach of his duties patently incompatible with his continuing in office,” as determined by parliament sitting as a high court. The grounds for removal have been rendered entirely political, although the high threshold required (a two thirds majority vote in parliament) has made the procedure very difficult to achieve in practice. Indeed, despite a failed attempt in 2016, the Article 68 process has not been successfully initiated so far.<sup>35</sup> This is also due to the alignment of presidential and parliamentary elections and of the duration of their mandates, steps that have significantly reduced the possibility of divided government in France.<sup>36</sup> The new process envisaged in Article 68 was criticised already at the time of its adoption for failing to give the people a direct vote, via referendum, on the question of presidential removal. It was argued then that this would have been necessary to allow those empowered to elect the president to also be the ones ultimately deciding on her/his removal, ensuring a symmetry of competences and also avoiding unnecessary elections.<sup>37</sup>

Other semi-presidential constitutions do contain presidential recall mechanisms, though not all incorporate popular referendums as part of presidential removal. As we will see in greater detail below, Romania’s constitution stipulates such a procedure: Article 95 allows for presidential removal on political grounds in a procedure initiated by parliament, with the consultation of the Constitutional Court, requiring a simple majority vote of the two chambers and ratification by citizens via referendum. Austria’s constitution allows for presidential impeachment by a two-thirds majority vote (Article 60(6)), with the important addition that a popular rejection of the initiative to remove the president will result in the dissolution of parliament (Article 29). In other words, the Austrian constitution makes presidential removal a riskier proposition, insofar as MPs might automatically cut short their own mandates if their attempt to remove the president fails. Other semi-presidential constitutions contain presidential recall procedures involving referendums (Article 11 of the Icelandic constitution, Article 106 of the Slovak one), though some do not require recourse to the people to ratify the president’s removal (Article 103 of the Bulgarian constitution, Article 145 of the Polish one). More still allow for presidential impeachment for criminal acts without popular involvement (Article 130 of the Portuguese constitution, Article 96 of the Romanian and Article 111 of the Ukrainian ones).

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<sup>33</sup> See discussion in Marie de Cazals, *La Ve République face à l'instauration d'une destitution politique inédite du Président de la République: Retour sur la révision du titre IX de la Constitution du 4 octobre 1958*, (2007) 71:3 *Revue française de droit constitutionnel*, pp. 451-470.

<sup>34</sup> *Ibid.*, pp. 456-458.

<sup>35</sup> Clara Egger and Raul Magni-Berton, *The Recall in France: A Long Standing and Unresolved Debate* in Welp and Whitehead 2020, p. 57.

<sup>36</sup> *Ibid.*, pp. 57-58.

<sup>37</sup> de Cazals 2007, pp. 466-468. It should also be noted that the French president retains the power to dissolve parliament, including during or immediately after the presidential removal process. As such, the threat of dissolution further discourages the French parliament from utilising the Article 68 procedure.

The recall referendum shows that the potential danger of executive control is actually more complex: in semi-presidential systems, during periods of intra-executive conflict, the recall referendum may become the constitutional lever used by one head of the executive (the PM, through her/his parliamentary majority) against the other. In other words, the risk of referendum elite control is not just about executive-legislative relations and whether parliament must approve the initiation of a referendum.<sup>38</sup> Instead, the referendum may also pit the two heads of the executive against each other, searching for a renewed popular mandate to remove the previously directly elected president. A difference with president-initiated referendums is thus that recall referendums have an in-built deadlock-breaking function. Insofar as they are part of the constitutional process *designed* to solve conflict between different constitutional actors by way of removing the president from office, the referendum's function is more straightforward.

### **3.2 President-initiated referendums**

The second scenario involves referendums initiated by the president. The paradigmatic example is often taken to be that of France, where the president is empowered to initiate referendums, on a recommendation from the government or upon a motion from the two houses of parliament, on specific issues listed in Article 11 of the constitution. Commentators look especially to de Gaulle's enthusiastic use of referendums during his presidency, though there were additional instances thereafter in which the French people were called upon by their presidents to vote on specific issues.<sup>39</sup> It is noteworthy that France became what we now call a semi-presidential regime by way of such a referendum vote, when in 1962 president de Gaulle invoked his Article 11 powers to hold a referendum on direct presidential elections. The move was contested as constitutionally dubious, given that constitutional changes in France are meant to be channelled through the procedure stipulated by Article 89.<sup>40</sup> De Gaulle saw the referendum as not just a means to give voice to the people's constitutionally retained national sovereignty (Article 3), but also as a direct means of self-legitimation as against other constitutional actors, tying his political fate to the outcome of the votes.<sup>41</sup> In fact, it was a lost referendum in 1969 that ultimately led to his resignation. The president-initiated referendum in France, therefore, has been explained as a mechanism whereby the president seeks "some kind of endorsement at mid-mandate to reinforce his own position", especially relevant given the long French presidential mandate (seven years initially, reduced to five in 2000).<sup>42</sup>

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<sup>38</sup> Cf. Tierney 2012, p. 117.

<sup>39</sup> A full account of the referendum experience in France is beyond the scope of this article. For overviews with discussion of similar issues to those tackled here, see Laurence Morel, *France: Towards a Less Controversial Use of the Referendum?* in Michael Gallagher and Pier Vincenzo Uleri (eds.), *The Referendum Experience in Europe* (London: Palgrave Macmillan 1996), pp. 66-85; Skach 2005, pp. 71-92; Tierney 2012, pp. 130-137; Hollander 2019, pp. 113-144.

<sup>40</sup> De Gaulle instead argued that a referendum vote was the most democratic way to ascertain the people's decision and that, either way, the vote fit within the competences afforded him by Article 11. See discussion in Wanda Mastor and Lilian Icher, *Constitutional Amendment in France* in Xenophon Contiades (ed.), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (London: Routledge 2012), pp. 115-142.

<sup>41</sup> See Sophie Boyron, *France* in Dawn Oliver and Carlo Fusaro (eds.), *How Constitutions Change: A Comparative Study* (London: Hart 2011), p. 124. The Conseil Constitutionnel endorsed de Gaulle's argument that the vote represented an expression of national sovereignty and refused, on this basis, to review the constitutionality of the bill submitted to referendum. See Conseil Constitutionnel, decision no. 62-20 DC of 6 November 1962. The situation has changed following the 2008 constitutional reform, with the French constitution now requiring the constitutional review of Article 11 bills submitted to referendum (see Article 61).

<sup>42</sup> Morel 2007, pp. 1052-1053.

Nevertheless, from a comparative point of view, the relevance of the French example to understanding president-initiated referendums in semi-presidential systems is narrower than might initially appear. This is not just because of their constitutionally dubious use in the early days of the French Fifth Republic. Instead, it has more to do with the specificities of the French semi-presidential system as well as the nature of the French president's power to initiate referendums. On the former, it has been observed that, despite periods of divided government becoming more common in recent years, the French system has nevertheless operated on the basis of unified executives more often than not.<sup>43</sup> Moreover, there is general satisfaction with the operation of the system in practice and few if any calls for a reorientation of the balance of powers.<sup>44</sup> Despite occasional turbulent periods, the French system could be said to operate on the basis of clear constitutional competences divided between the dual executive. When it comes to cohabitation periods and constitutional conflict, therefore, it has been remarked that "'cohabitation' takes place against an established background of constitutional and political powers."<sup>45</sup> This has not been the case with the semi-presidential constitutions of countries in Central and Eastern Europe, and certainly not in Romania.

The literature on semi-presidentialism has long listed referendum initiative amidst the possible presidential powers characteristic of this model,<sup>46</sup> but has typically not discerned between mandatory and advisory referendums, nor between the types of issues on which presidents can call referendums. Indeed, referendums initiated by the French president are binding. However, when looking at newer semi-presidential systems, notably many adopted in Central and Eastern Europe, we tend to find different presidential competences in this area. In some instances, we find constitutional provisions empowering presidents to hold consultative referendums on matters of significance. Thus, the Romanian Constitution empowers the president, after consulting the Parliament, to "ask the people to express their will on matters of national interest by means of referendum." (Article 90) The Polish Constitution empowers the president, with the consent of the Sejm, to order a nationwide referendum "in respect of matters of particular importance to the State." (Article 125) The Croatian Constitution also allows the president to call a referendum "on a proposal for the amendment of the Constitution or any other issue which he considers to be important for the independence, unity and existence of the Republic of Croatia", but at the proposal of the Government and with the counter-signature of the Prime Minister (Article 87).

Another difference is that the French constitution requires the president to work together with other constitutional actors when submitting a bill for a referendum – be it the government or the two houses of parliament. Similarly, the Portuguese constitution empowers the president to call mandatory referendums, but following proposals from the parliament or government (Article 115(1)). Morel places these two countries in a group requiring joint initiative for executive-initiated referendums, whereas he classifies Poland and Romania as countries with "personal use" executive-initiated referendums.<sup>47</sup> He views such personal use referendums as a feature of unconsolidated

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<sup>43</sup> Robert Elgie, 'Cohabitation': *Divided Government French-Style*, in Robert Elgie (ed.), *Divided Government in Comparative Perspective* (Oxford: Oxford University Press 2001), pp. 106-126.

<sup>44</sup> Gianfranco Pasquino, *The Advantages and Disadvantages of Semi-presidentialism: A Western European Perspective* in Robert Elgie and Sophia Moestrup (eds.), *Semi-Presidentialism outside Europe: A Comparative Study* (Abingdon: Routledge 2007), p. 18.

<sup>45</sup> Elgie 2001, p. 110.

<sup>46</sup> See Maurice Duverger, *A New Political System Model: Semi-Presidential Government*, (1980) 8 *European Journal of Political Research*, pp. 165-187; Jon Elster, *Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea*, (1993) 71:1-2 *Public Administration*, pp. 169-217; and Matthew S. Shugart and John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (Cambridge: Cambridge University Press 1992), pp. 148-158.

<sup>47</sup> Morel 2017, p. 38.

democracies.<sup>48</sup> Other post-communist semi-presidential systems restrict the referendum initiative to the parliament (Bulgaria, Lithuania).

From the point of view of our current investigation, Romania's president-initiated advisory referendum would seem to be if not unique, then a rare design feature of semi-presidential systems. The question raised by such a mechanism is how it has been used during moments of crisis, especially during cohabitation. As will be seen, Romanian presidents using this tool were seeking legitimation for specific policy objectives, trying to force the hand of prime ministers and legislative majorities who did not share them. Strategic timing choices further enmeshed these referendums into the electoral game. There was also an element of self-legitimation to these initiatives, wherein these presidents combined the democratic legitimacy of their position with an additional direct vote on a specific set of policies to overcome parliamentary and governmental opposition. The Romanian examples will also partially confirm the premise, shared by much referendum literature nowadays, that the distinction between advisory and mandatory referendums is not as clear cut as it might appear. While in neither case did the president-initiated referendums in Romania lead to clear policy or constitutional changes, it might be argued that they nevertheless played a role in pushing the president's agenda in this direction, acting as a *de facto* veto to certain government initiatives, and overall strengthening the president's hand (politically if not legally) vis-à-vis other constitutional actors.

#### 4. Romania's Referendum Experience as a Testing Ground

Reflecting on Romania's fraught experience with constitutional crisis, Vlad Perju had asked "how constitutional democracies that are still at a relatively early stage of political maturity can handle the pressures of ideological splits within the executive power" and whether semi-presidentialism was a help or hindrance.<sup>49</sup> The focus on the Romanian experience with referendums as deadlock-breaking mechanism amidst political and constitutional crisis may appear narrow. However, the country's rich experience with referendums during periods of divided government make it fertile ground for testing the hypothesis that referendums can indeed play this role. Readers interested in the historical background and peculiarities of Romania's semi-presidential system or in attempts at constitutional reform to bring clarity to the country's constitutional ambiguities surrounding this system will find worthy contributions on these topics in this very journal.<sup>50</sup>

The following section seeks to map out Romania's experience with both types of referendums in order to assess whether and how they can perform a deadlock-breaking function, or else whether the referendum remains open to charges of elite control. Before proceeding, however, it is important to nuance the discussion on elite control. As Tierney has argued, "the issue of control has perhaps been oversimplified in much of the literature, which tends to focus upon the initiation of the referendum process in fairly narrow terms, seeking to identify a key actor who organizes the referendum."<sup>51</sup> He explains that, while this gatekeeper problem is indeed important, the question of whether it results in

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<sup>48</sup> *Ibid.*, p. 36.

<sup>49</sup> Vlad Perju, *The Romanian Double Executive and the 2012 Constitutional Crisis*, (2015) 13:1 *International Journal of Constitutional Law*, p. 246.

<sup>50</sup> See Manuel Guțan, *Romanian Semi-Presidentialism in Historical Context*, (2012) 3:2 *Romanian Journal of Comparative Law*, pp. 275-303; Bogdan Dima, *The European Models of Semi-Presidentialism: The Peculiarity of Romania's Post-Communist System of Government*, (2014) 5:1 *Romanian Journal of Comparative Law*, pp. 60-82; and Simina Tănăsescu, *Conflicting Revisions to Romanian Constitution Give Rise to Questions about Semi-Presidentialism*, (2014) 5:1 *Romanian Journal of Comparative Law*, pp. 35-59.

<sup>51</sup> Tierney 2012, p. 99.

elite control of the referendum is both more complex and wider, intertwining questions of constitutional competence and political capacity.<sup>52</sup> For Tierney, this complexity requires that we look not just at who initiates the referendum, but also at agenda-setting and process-planning question; it also requires that we consider how power is dispersed among constitutional actors by both constitutional rules and political factors.<sup>53</sup> In short, it will not be enough to simply analyse the constitutional rules surrounding Romania's referendum experience, nor the political outcome of its referendums. Instead, it will be necessary to consider the entire referendum process – from the subject-matter of the referendum and the power of initiative to constitutionality control of the initiative and ratification of the result – in order to assess the question of elite control.

It should be noted that the cases discussed below do not exhaust Romania's experience with referendums, or indeed with mechanisms of participatory democracy.<sup>54</sup> Under the Romanian Constitution, a referendum is also mandatory in order to approve constitutional amendments (Article 151(3)). Such a constitutional referendum was indeed used to approve the 2003 revision of the constitution, so far the only successful instance of the constitution being amended. A mandatory referendum was also held in 2018, as part of the attempt to pass a citizens' initiative to amend the constitutional recognition of family as solely between a man and a woman; this referendum failed to meet the required voter turnout.<sup>55</sup>

#### **4.1 Presidential recall referendums in Romania**

The Romanian Constitution allows for the president's impeachment in Article 95, which mandates the two chambers of parliament, in a joint sitting and after having consulted the Constitutional Court, to suspend the president from office for committing "grave acts infringing upon constitutional provisions." Only a majority of votes is required. Should this happen, a referendum is to be organised within 30 days in order to remove the president from office. The framers adopted this as a political form of presidential accountability, to be complemented by a legal (criminal) one incorporated in Article 96, which establishes an impeachment procedure for high treason.<sup>56</sup> The Constitution does not, however, define what would constitute "grave acts infringing upon constitutional provisions." As part of the process of suspending the president, therefore, the referendum comes at the end of a parliamentary process also involving the advisory opinion of the Constitutional Court. The referendum is a mandatory step in this process, and one that might be viewed as complementing the representativeness of the parliament with the direct expression of the popular will in order to confirm the suspension from office of the directly elected president. In theory, this complex process should

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> For more expansive accounts of participatory constitutional change and constitutional deliberations in Romania, see Paul Blokker, *The Romanian Constitution and Civic Engagement*, (2017) 11:3 *Vienna Journal on International Constitutional Law*, pp. 437-455; Sergiu Gherghina and Sergiu Mişcoiu, *Crowd-Sourced Legislation and Politics The Legitimacy of Constitutional Deliberation in Romania*, (2016) 63:1 *Problems of Post-communism*, pp. 27-36; and Bianca Selejan-Guţan, *The People and the Constitution: Who Is Above? Direct Democracy Tools and Limits of Constitutional Amendment in Romania*, (2019) 10:1 *Romanian Journal of Comparative Law*, pp. 134-145.

<sup>55</sup> For an overview of this process and the constitutional issues raised, see Simina Tănăsescu, *Partie I: La Roumanie: Chronique d'un référendum échoué*, *IACL-AIDC Blog* (17 October 2018), <https://blog-iacl-aidc.org/blog/2018/10/17/partie-i-la-roumanie-chronique-dun-referendum-chou> and Simina Tănăsescu, *Partie II: La Roumanie: Chronique d'un référendum échoué*, *IACL-AIDC Blog* (18 October 2018), <https://blog-iacl-aidc.org/blog/2018/10/18/partie-ii-la-roumanie-chronique-dun-referendum-chou>.

<sup>56</sup> Tănăsescu 2014, p. 43.

work to infuse popular legitimacy into a sensitive process designed to overcome deadlock, especially likely to arise during periods of cohabitation. Romania's experience with this referendum type, however, complicates this reading.

There have been two instances in which recall referendums have been used in Romania. The first came in 2007, during a period of divided government having arisen in the aftermath of the break-up of the previous governing coalition.<sup>57</sup> Parliament suspended the president, accusing him of having breached his constitutional role as mediator between state powers,<sup>58</sup> of grave abuses and breaches of the Constitution, and of defying and denigrating state institutions. The Constitutional Court, in its advisory opinion on the matter, found that it had to first clarify the meaning of grave acts in order to evaluate the charges against the president.<sup>59</sup> It proceeded by noting that not just any constitutional breach would qualify, but only 'grave' ones, which would be determined on the basis of the impugned value, the (real or potential) consequences of the breach, the means used, and the person of the perpetrator and her/his intention. The Court proceeded to indicate that such 'grave acts' might entail: decisions or failure to issue mandatory decisions; decisions that would prevent the functioning of public authorities, would suppress or limit citizens' rights and freedoms, would upset the constitutional order or would change the constitutional order; or other acts of the same nature or with similar effects. Ultimately, the Constitutional Court found the charges of abuse of power and unconstitutional acts against president Băsescu not to meet the threshold imposed by its reading of Article 95(1). Nevertheless, the parliament proceeded with the removal proceedings and a referendum was held on 19 May 2007.

Noteworthy for our purposes is not so much the result of the referendum – which returned a 74.48% majority in favour of keeping the president in office – but the turnout of the vote. The Romanian Constitution does not stipulate any turnout requirement for referendums. The law on referendums at the time of the vote suspending the president had required a majority of votes from all citizens on the electoral registry in order for the vote to be valid.<sup>60</sup> The parliament passed a last minute amendment to this law, seeking to revise the turnout provision so only a simple majority of votes cast would be required to validate the referendum.<sup>61</sup> The Constitutional Court found this specific change unconstitutional, but left open the possibility that in the future, lawmakers might indeed change the law to require only a relative majority for the president's suspension.<sup>62</sup> It also ended up validating the result of the 2007 referendum vote, despite the fact that it had amassed only a 44.45% turnout.<sup>63</sup>

An even more consequential constitutional crisis came in 2012, again during a period of cohabitation. With political alliances in the parliament again shifting, president Băsescu found himself locked in a bitter battle with PM Ponta, the latter ultimately leading a new removal attempt. Again, the

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<sup>57</sup> As Bianca Selejan-Guțan has aptly noted, cohabitation in Romania has often arisen as a consequence of political migration and the breakdown of governing coalitions. Bianca Selejan-Guțan, *The Constitution of Romania: A Contextual Analysis* (London: Hart 2016), p. 116.

<sup>58</sup> The Romanian Constitution envisions a mediator role for the president, alongside her/his roles as state representative, guarantor of national independence, and constitutional guardian. Article 84(1) prevents the president from retaining party membership during her/his term in office so as to guard this impartiality. See more in Guțan 2012, pp. 278-279.

<sup>59</sup> Romanian Constitutional Court, Advisory Opinion no. 1/2007 (5 April 2007) (author's translation). Perju has argued that this amounted to the Court reading Article 95 as a legal sanction rather than an instrument of electoral politics. See Perju 2015, p. 259.

<sup>60</sup> Article 10, Law no. 3/2000 on organising and holding the referendum.

<sup>61</sup> Law no. 129/2007 amending Article 10, Law no. 3/2000 on organising and holding the referendum.

<sup>62</sup> Romanian Constitutional Court, Decision no. 147/2007.

<sup>63</sup> See also discussion in Perju 2015, p. 268.

parliamentary majority voted to suspend the president in July 2012, and again the turnout requirements in the referendum law were at the heart of the political battle.<sup>64</sup> Prior to the cohabitation period, the government had sought to reinstate the threshold requirement of a majority of votes from all citizens in the electoral registry.<sup>65</sup> Once Ponta became PM, the new parliamentary majority again sought to change the referendum law to only require a simple majority of votes cast (a single majority) in order for the referendum result to be validated.<sup>66</sup> Once more, the Constitutional Court was to be the arbiter.<sup>67</sup> In a departure from its previous case law, notably the 2007 decision discussed above, the Court upheld the new turnout requirement. It noted that, given the constitution's silence on the matter, lawmakers could choose to adopt an absolute majority turnout requirement, so long as it applied consistently to all referendum votes. Moreover, it interpreted the double majority requirement as quintessential in order for the referendum vote to represent "the real and effective will of the citizens", which it linked to the popular sovereignty principle enshrined in Article 2(1) of the Romanian Constitution.

In practice, this allowed the suspended president Băsescu to aim for a low turnout in the referendum as a means to avoid removal. The strategy worked, given that despite an 88.70% majority in favour of removing him from office, the referendum was invalidated on account of the turnout threshold not being met (only 46.24% of registered voters cast a ballot). Ultimately, the president and PM still had to find a way to coexist and did so on the basis of a memorandum of cohabitation.

Vlad Perju has explained the government's decision to respect the result of the referendum as grounded in political calculation and European pressure, arguing that: "neither the constitutional structure of Romanian semi-presidentialism, nor the tools of European constitutionalism, ultimately solved the constitutional crisis. If anything, the features of the semi-presidential regime were a foil against which the events unfolded, and were used to gradually escalate the crisis."<sup>68</sup> To him, arguments rooted in democratic representation and the will of the people were merely instances of 'Eurospeak' used strategically by political actors: "what better anchors for grounding political action in a Union still struggling with structural deficits of democratic legitimacy?"<sup>69</sup> Finally, Perju asks, insofar as the referendum mechanism in Article 95 was designed as a deadlock breaking mechanism, it is worth asking why semi-presidential systems even need such a mechanism to break institutional deadlock.<sup>70</sup> To him, political actors should not have an *easy* way out of institutional conflict during periods of cohabitation but should instead be forced to cooperate with one another in the public interest. Too easy a way out of such conflict would lead to abuse.

This is an appealing reading of the Romanian presidential recall mechanism, insofar as it challenges assumptions that cohabitation should be read as a failure of semi-presidentialism and unavoidably a

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<sup>64</sup> The Constitutional Court's advisory opinion, though containing language chastising the president, was nevertheless against his impeachment. See Romanian Constitutional Court Advisory Opinion no. 1/2012.

<sup>65</sup> Law no. 62/2012 approving Emergency decree no. 103/2009.

<sup>66</sup> Law no. 131/2012 amending Article 10, Law no. 3/2000 on organising and holding the referendum. While the Romanian Constitutional Court was called on to consider the constitutionality of this law, the government passed an emergency decree seeking to effect the same material changes to Law no. 3/2000. See Emergency decree no. 41/2012. For commentary, see Perju 2015, p. 259.

<sup>67</sup> Romanian Constitutional Court Decision no. 731/2012.

<sup>68</sup> Perju 2015, p. 273.

<sup>69</sup> *Ibid.*, p. 275. Iancu has also argued that this positioning worked insofar as it resulted in European institutions endorsing the unprincipled president and the partisan Constitutional Court as "implicit champions of the 'rule of law'". Iancu 2018, p. 271.

<sup>70</sup> Perju 2015, p. 263.

source of instability.<sup>71</sup> Perju's interpretation would insist on accepting periods of divided government as reflecting a mixed popular mandate demanding responsible actions from political actors, *i.e.* compromise between the president and the PM. This reading is also appealing when contrasting the Romanian constitutional architecture with that of other semi-presidential systems having adopted a presidential impeachment mechanism. Oft-quoted in Romanian debates is the Austrian alternative, wherein a failed attempt to impeach the president via a referendum automatically results in parliamentary dissolution and early elections.<sup>72</sup> As has been argued, however, we must be cautious about transplanting this solution to a very different context: unlike the formally great, but ceremonial in practice Austrian president, the Romanian presidency is formally weaker but its powers can increase significantly outside periods of divided government.<sup>73</sup> It is not a coincidence that this mechanism has never been tested in Austria.

I would instead suggest an alternative reading of the role of the recall referendum in Romania's semi-presidential constitution, one that takes more seriously the referendum's democratic credentials. This is also a reading that views the delicate balance between the two executive players as a design feature, not as a flaw or accident of the country's semi-presidential constitution.<sup>74</sup> Leaving aside for a moment the potential for politicising the referendum process and the likely impact of the personalisation of the presidency on the referendum outcome, we are left with a recourse to the people as final arbiter of a serious constitutional crisis: the removal of the president from office ahead of the expiration of her/his mandate. An alternative reconstruction of both the 2007 and the 2012 impeachment attempts in Romania would view them as the result of post-electoral political realignments in parliament resulting in cohabitation. In other words, it is at least doubtful whether voters had purposefully chosen the split the democratic mandate. It is at least plausible to view both periods of cohabitation above as the result of political realignment in parliament (via the breakup of governing coalitions and political migration) that the voters had not explicitly endorsed. Such political fluctuations are not uncommon in multiparty systems, and may indeed be rather frequent in newer democracies and ones where traditions of political compromise and cooperation might be lacking.<sup>75</sup> In such scenarios, the referendum requirement becomes the final step in a process initiated by a new parliamentary majority to remove a directly elected president. In such scenarios – of post-electoral cohabitation – direct appeal to the people complements the democratic representation function played by MPs and removes the previous direct mandate of the president.

Returning to the question of whether Romania's experience is a case of the politicisation of referendum use, I believe we must be more precise in what we mean by this charge. Specifically, whether we object to how political actors have used the recall referendum or else to how this

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<sup>71</sup> For a similar take on divided minority government in semi-presidential systems, arguing that such periods are positively associated with higher levels of democracy, see Young Hun Kim, *A Troubled Marriage? Divided Minority Government, Cohabitation, Presidential Powers, President-Parliamentarism and Semi-Presidentialism* 50:4 (2015) *Government and Opposition*, pp. 652-681.

<sup>72</sup> Perju discusses the Austrian solution approvingly, see Perju 2015, p. 264. See also Tănăsescu 2014, p. 51.

<sup>73</sup> For a critical view of the promise of an 'Austrian model' applied to Romania, see Manuel Guțan, *Raporturile dintre Presedinte, Guvern si Parlament in perspectiva revizuirii Constitutiei Romaniei*, (2013) *Revista de Drept Public*, pp. 105-106.

<sup>74</sup> In other words, this view takes seriously the framers' desire to avoid the presidentialisation of the constitution even while admitting that the balance struck in the Romanian Constitution may not be the most workable.

<sup>75</sup> On coalition formation in Romania, see Veronica Anghel, "Why Can't We Be Friends?" *The Coalition Potential of Presidents in Semi-presidential Republics—Insights from Romania*, 32:1 (2018) *East European Politics and Societies and Cultures*, pp. 101-118.



mechanism has been constitutionalised in the country's fundamental law.<sup>76</sup> The former is a question of political practice, whereas the latter will have implications for constitutional design. I would argue that whether to endorse or reject the removal of a directly elected president is precisely the type of single issue, black and white vote said to be fit for referendum decision-making.<sup>77</sup> I would also contend that the Article 95 removal process is itself political, and purposefully so. Insofar as it is designed as a mechanism of presidential political accountability, it could never escape politicisation. As was seen above, the Romanian Constitutional Court attempted to give Article 95 a more formal reading, thereby to transform the process in a legal sanction against presidential unconstitutional actions. However, the Court's attempts to define the unconstitutional 'grave acts' that would come under the scope of Article 95 have not brought much more clarity in this area. This is compounded by the constitutional requirement of going to referendum within 30 days of the president's suspension by parliament: a move undoubtedly designed to resolve the crisis quickly but one that, in terms of deliberative good practice, is double-edged.<sup>78</sup> It has the appearance of predictability, while actually allowing the parliamentary majority – as the constitutional actor with the power to initiate the recall process – to determine the timing of the referendum and therefore exercise a certain control over the whole process. It is also doubtful whether the referendum campaign will allow for an informed debate surrounding the charges against the president, a fact compounded by the constitutional ambiguity surrounding the "grave acts" s/he is accused of committing.

Overall, it would appear that the Article 95 process that is open to politicisation as a whole, and not just the referendum as a final step in the impeachment procedure. So long as Article 95 remains on the books, however, the referendum element of the process may be viewed as ensuring the president's political accountability remains ultimately to the citizens who first elected him.

#### **4.2 President-initiated referendums in Romania**

The Romanian Constitution empowers the president to initiate referendums "on matters of national interest by means of referendum" (Article 90). The constitutional text remains silent on what those matters might be. While a previous iteration of the referendum law had sought to stipulate what those matters should be, that provision was struck down by the Constitutional Court.<sup>79</sup> The referendum law details the procedure to be followed: the president informs parliament of her/his intention to initiate a referendum, after which the parliament can express its (advisory) point of view via a decision adopted in a joint session of the two chambers, with a single majority vote, within 20 days of the presidential request; the referendum is then initiated by the president via presidential decree.<sup>80</sup> This

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<sup>76</sup> Gherghina himself, despite decrying the instrumentalisation of referendum use in Romania, distinguishes between objections of practice and normative objections to referendums more generally. See Sergiu Gherghina, *Hijacked Direct Democracy: The Instrumental Use of Referendums in Romania*, (2019b) 33:3 *East European Politics and Societies and Cultures*, pp. 778-797.

<sup>77</sup> Tierney 2012, p. 232.

<sup>78</sup> *Ibid.*, pp. 111-112.

<sup>79</sup> See Romanian Constitutional Court Decision no. 567/2006 (see also, previously, Decision no. 70/1999). Article 12(1) of Law no. 3/2000 on organising and holding the referendum had sought to define the "matters of national interest" that the president could submit to a national referendum. The Court found this article unconstitutional, however, as it constrained the president's unlimited competence on this matter under Article 90 of the constitution.

<sup>80</sup> The 20 day deadline for parliament to vote on the president's initiative was controversially introduced via emergency ordinance in 2009, in the run-up to such a president-initiated referendum. See Emergency Ordinance no. 103/2009.

referendum type is consultative.<sup>81</sup> As we will see, the binding/advisory referendum distinction has also been debated in Romanian constitutional jurisprudence.

The first use of this president-initiated referendum came in 2007, when president Băsescu called a referendum on electoral change. The issue had been on the political agenda for some time, but political parties could not agree on a switch from the proportional representation system with party lists to a uninominal system. It has also been said that parties did not fully understand the changes proposed and how they might impact their electoral success.<sup>82</sup> The referendum was not validated as it failed to reach the necessary turnout, with only 26% of the electorate taking place. At the time, a minority government was in power, led by PM Tăriceanu, who had opposed the referendum as 'useless' (given that the government had the power to assume responsibility for the bill).<sup>83</sup> The president's insistence on holding the referendum, and on holding it on the same day as European elections, was seen by many political players as motivated by his desire to openly campaign for his former party and play a greater electoral role.<sup>84</sup>

The second use of this type of referendum in Romania came two years later. The political situation had again shifted, with the referendum taking place under a caretaker government that had been voted out via a no confidence vote a month prior. Again called by president Băsescu, the 2009 referendum took place on the same day as presidential elections and asked the people to vote on two separate issues: whether to render the country's parliament unicameral and whether to reduce the number of MPs to 300. Despite serious contestation from democratic forces arguing that the president was using the referendum for electoral gain, the referendum turnout reached 50.56% and was validated. Over 77% of voters endorsed the president's proposed changes. A 2011 bill was introduced, designed to give effect to the changes approved at the referendum but also going beyond these.<sup>85</sup> Among other changes, the bill sought to increase the president's powers in ministerial appointments, referendum initiative, and appointments of heads of secret services, and has been described as "a draft of presidential origin for a presidential political system."<sup>86</sup> While the 2009 referendum itself did not occur under usual conditions of divided government, the 2011 bill meant to give effect to the referendum result was rejected by a two-thirds majority in parliament in 2013. By this time, Romania was living through a period of cohabitation, between PM Ponta and president Băsescu (2012-2014).

A significant development came in 2012, when the Romanian Constitutional Court issued a decision on the new draft electoral law in which it also considered the effects of the 2009 referendum.<sup>87</sup> The Court noted the constitution's silence on the question of the effects of the president-initiated referendum. However, the Court did not outright dismiss this mechanism as without consequence. It read Article 90 in conjunction with Article 2, the latter of which explicitly recognises popular

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<sup>81</sup> For a discussion of this referendum type, but not including the most recent, 2019 referendum, see Selejan-Guțan 2016, pp. 47-49.

<sup>82</sup> *Ibid.*, p. 47.

<sup>83</sup> Tăriceanu: *Problema referendumului este una secundară*, *Adevarul*, 16 November 2007, [https://adevarul.ro/news/societate/tariceanu--problema-referendumului-secundara-1\\_50ac02c97c42d5a66383dcd0/index.html](https://adevarul.ro/news/societate/tariceanu--problema-referendumului-secundara-1_50ac02c97c42d5a66383dcd0/index.html).

<sup>84</sup> *Președintele cere din nou aprobarea legii votului uninominal*, *BBC Romanian*, 16 October 2007, [http://www.bbc.co.uk/romanian/news/story/2007/10/071016\\_uninominal\\_negociere\\_referendum.shtml](http://www.bbc.co.uk/romanian/news/story/2007/10/071016_uninominal_negociere_referendum.shtml).

<sup>85</sup> *PL-x nr. 492/2011, Proiect de Lege privind revizuirea Constituției României*, [http://www.cdep.ro/pls/proiecte/upl\\_pck2015.proiect?cam=2&idp=12163](http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=12163).

<sup>86</sup> Tănăsescu 2014, p. 50.

<sup>87</sup> Romanian Constitutional Court Decision no. 682/2012.

sovereignty as expressed through referendums.<sup>88</sup> The Court also invoked Canadian constitutional jurisprudence on referendums, as well as the Venice Commission's referendum guidelines and comparative practice.<sup>89</sup> It concluded that advisory referendums are to be distinguished from binding ones not so much in terms of whether popular will is to be respected – the Court found that the people's representatives could not ignore it, as an expression of popular sovereignty – but rather in terms of their effects. Thus, advisory referendums have indirect effect and depend on other constitutional organs, most often the legislature, to be implemented.<sup>90</sup> The Court found parliament to be under a duty to consider, analyse and identify ways to give effect to the people's will as expressed in the 2009 referendum, as anything else would reduce the referendum to “a purely formal exercise, a mere opinion poll” and would be unconstitutional.<sup>91</sup>

Scholars have called this a ‘presidential’ interpretation of the constitution, insofar as it sought to read constitutional silence as rendering president-initiated referendums binding.<sup>92</sup> Indeed, the effects of such a reading of advisory referendums go further than simply finding them politically binding, in the way the UK Supreme Court has referred to the Brexit referendum result. In terms of the balance of powers, the Constitutional Court decision in effect would have amounted to empowering the president to use her/his referendum initiative to force through legislative and even constitutional change.

The decision was also problematic from a democratic point of view, despite the Constitutional Court's efforts to couch it in terms of giving effect to popular will. Insisting that an advisory referendum result could bind future legislative and even constitutional change is tantamount to reading that vote as an expression of constituent power that supersedes subsequent democratic votes, notably elections.<sup>93</sup> In other words, the decision would have amounted to a reading Article 2 of the Romanian Constitution as prioritising referendums, as opposed to merely recognising them alongside elections, as vehicles for the expression of popular will. This in addition to the fact that the two questions put to the people in 2009 were rather general and would have required further details before being translated into concrete change.<sup>94</sup> Relying on Canada's Secession Reference was also misleading: the Canadian Supreme Court had recognised that a clear expression of self-determination by the people of Quebec could not remain without effect; however, it merely recognised Quebec's right to pursue secession and a duty on the federal government to engage in negotiations, not the binding nature of a successful secession referendum.<sup>95</sup> In the case of the 2009 referendum in Romania, its fate was ultimately

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<sup>88</sup> *Ibid.*, XII, 1.5. Article 2 of the Romanian Constitution states: “National sovereignty shall reside within the Romanian people, that shall exercise it by means of their representative bodies, resulting from free, periodical and fair elections, as well as by referendum.”

<sup>89</sup> *Ibid.*, XII, 1.6-1.9.

<sup>90</sup> *Ibid.*, 1.10.

<sup>91</sup> *Ibid.*, 1.11-1.12.

<sup>92</sup> Bianca Selejan-Guțan, *The Constitutional Court and Others in Romanian Constitutionalism – 25 Years After*, (2017) 11:4 *Vienna Journal on International Constitutional Law*, p. 570. Elsewhere, Selejan-Guțan refers to this decision as an instance of informal constitutional change in Romania. See Selejan-Guțan 2016, p. 245.

<sup>93</sup> Writing in the context of referendums on the EU integration, Andreas Auer has remarked that “referendum outcomes are not eternally binding.” Their outcomes can be challenged, albeit this is democratically sensitive given the heavy legitimacy of a direct popular decision. See Andreas Auer, *The People Have Spoken: Abide? A Critical View of the EU's Dramatic Referendum (In)experience*, (2016) 12 *European Constitutional Law Review*, p. 406.

<sup>94</sup> Rendering the Romanian parliament unicameral and reducing the number of MPs at the very least would have had knock-on effects on the separation of powers and would have needed further reflection. Interestingly, had the legislative majority been there to give effect to the changes, the ensuing constitutional revision would still have required popular ratification via referendum, in line with the requirements of Article 151.

<sup>95</sup> *Reference re Secession of Quebec* [1998] 2 SCR 217, para. 92 *et seq.*

decided through the ballot box. The bill meant to give effect to the referendum vote was put to rest by a new legislative majority following the 2012 parliamentary elections.

The third and final use of the president's referendum initiative power came in 2019, under conditions of cohabitation. President Iohannis had first announced his intention to organise a referendum on judicial reform measures in 2017, in the wake of large scale street protests against criminal code revisions via governmental emergency decree.<sup>96</sup> The two questions put to citizens were rather broad and reflect the president's intention behind the vote: to shore up legitimacy behind the fight against corruption and block attempts at weakening the rule of law by the government.<sup>97</sup> While he invited the leaders of all parliamentary parties for consultation prior to announcing the two questions, Iohannis decided on their content on his own, as allowed by the constitution. During the campaign, he distinctly linked the fight against corruption to the country's European orientation. Indeed, the referendum itself was organised on the same day as European elections. The referendum was validated on the basis of a 41.27% turnout, with over 85% of the votes answering 'Yes' to both questions, in what was widely perceived as a victory for the president.<sup>98</sup>

A final constitutional hurdle was passed when the Constitutional Court validated, with a slight delay, the referendum result.<sup>99</sup> Controversially, the Court used this opportunity to address contestations to the referendum questions, including matters of clarity, constitutionality (such as whether the president could initiate a referendum on matters resulting in constitutional change, whether the subject matter of the 2019 referendum contravened the constitutional eternity clause in Article 152, and whether the issues could be qualified as "of national interest"), whether the referendum contravened international standards by addressing more than a single issue, and whether the public had been adequately informed about the issues on which it was voting. The Court eventually confirmed the referendum result, even while it accepted some procedural failings. It especially faulted the lack of question clarity and adequate information provided to voters, in particular on such technical matters and in line with international standards of referendum good practice.<sup>100</sup> It did not find these failings to constitute reason enough for invalidation, however, as it considered the referendum purely consultative and with only political effect. The Court thus backtracked on previous jurisprudence (see Decision no. 682/2012 discussed above) and clarified that Article 90 referendum results did not impose a particular course of action on public authorities: any action or inaction of public authorities to implement its results would be evaluated on the basis of political, not legal, accountability.<sup>101</sup>

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<sup>96</sup> See Bianca Selejan-Guțan, *Living Democracy in Romania: From Protest to Referendum?*, *Verfassungsblog* (15 February 2017), <https://verfassungsblog.de/living-democracy-in-romania-from-protest-to-referendum/>.

<sup>97</sup> The two questions put to the Romanian people in 2019 were: "Do you agree with the prohibition of amnesty and pardon for corruption offences?" and "Do you agree with the prohibition of emergency Government ordinances in the field of criminal offences, criminal punishments and of the judicial organisation AND with the extension of the right to challenge Government ordinances directly before the Constitutional Court?"

<sup>98</sup> The turnout requirement had again been changed in 2013, so that validation required only 30% of registered voters, of which at least 25% needed to express valid votes. See Law no. 341/2013 amending and supplementing Law no. 3/2000 on organising and holding the referendum. The change was challenged, unsuccessfully, before the Constitutional Court. See Romanian Constitutional Court Decisions nos. 334/2013 and 471/2013. Given the absence of clear justification for its departure from its own previous case law, the Romanian Constitutional Court has been accused of "politically driven inconsistency" in this area. See Bianca Selejan-Guțan, *One Year After: How the Romanian Constitutional Court Changed Its Mind*, *I-CONNECT Blog* (14 July 2013), <http://www.iconnectblog.com/2013/07/oneyearafter/>.

<sup>99</sup> Romanian Constitutional Court Ruling no. 2/2019.

<sup>100</sup> *Ibid.*, paras. 60-61.

<sup>101</sup> *Ibid.*, para. 73.

In light of this experience, can we see president-initiated referendums in Romania as playing a deadlock-breaking role? The one example of such a referendum organised during a period of cohabitation, the 2019 referendum, has still to produce legal effects as of the time of writing.<sup>102</sup> It was used strategically by president Iohannis to apply pressure on the government and thereby block further attempts at criminal justice reform, especially via emergency decrees. Scheduling the referendum alongside European elections might be read as strategic as much as symbolic: while it helped frame the referendum in European terms, it also framed the elections in terms of the fight against corruption and, implicitly, in terms inimical to the ruling party. Insofar as the May 2019 referendum results were perceived as a victory for the president, they could also be seen as a tactical move in preparation for the November 2019 presidential elections that followed (won with a comfortable majority by Iohannis).

The timing of all three president-initiated referendums was, in fact, problematic. It is not just that they were scheduled for the same day as elections – European elections in 2007 and 2019 and presidential ones in 2009. It is also that, absent any constraints to the contrary, the Romanian president can exercise almost full control over the Article 90 referendum schedule. In all three cases, the referendums were organised within one month of the passing of the respective presidential decrees, thereby leaving little room for an informed referendum campaign on complex matters of constitutional significance such as electoral system change, parliamentary reform, and justice reform. The parliamentary debate envisioned by Article 90 – insofar as parliament is called on to deliberate on the president’s intention to hold a referendum – also falls short of deliberative standards. The 20 day deadline for a parliamentary vote on the president’s referendum initiative means that parliament itself has very little time to fully consider the implications of the referendum. This means that a popular vote can be triggered by the president swiftly, preventing either the parliament or voters to engage in informed deliberation on the questions asked. The fact that Article 90 referendums are advisory only cannot suffice to justify designing a democratically deficient referendum process.

Moreover, the Article 90 referendum process does not institute any real controls on the president’s initiative via consensus-building mechanisms. The parliament’s approval has not proven a hurdle to the president, however, and in fact both the 2007 and the 2009 referendums went ahead despite a negative vote in parliament. Parliamentary approval, while desirable, is formally advisory. It might have been expected to act as a soft constraint, at least requiring some justification from the president for pushing ahead with a referendum despite parliamentary opposition, but this has not happened.

Romania’s case is not singular, however. Writing on executive-initiated referendums in France, Morel had noted that only once was a president-initiated referendum held during cohabitation: in 2000, when a vote was called on reducing the presidential mandate from seven to five years.<sup>103</sup> To Morel, however, the conditions of divided government were ultimately irrelevant: the president easily obtained the PM’s constitutionally required countersignature for the referendum to go ahead, given that opposing a popular vote would have been politically detrimental to the PM.<sup>104</sup> Thus, Morel did not see the constitutional requirement of cooperation – in the form of prime ministerial countersignature – as a real constraint on the president’s initiative power. His observation held true for Romania’s president-initiated referendum in 2019 as well. Despite that referendum clearly being targeted against acts undertaken by the ruling party, the Romanian parliament did vote in favour of

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<sup>102</sup> Two bills introduced to give effect to the referendum result were found partially unconstitutional by the Constitutional Court. See Romanian Constitutional Court Decisions no. 464/2019 and 465/2019.

<sup>103</sup> Morel 2007, p. 1052.

<sup>104</sup> *Ibid.*

the president's initiative in 2019.<sup>105</sup> Publicly opposing a referendum framed as an anti-corruption vote would have been politically costly for the government. Thus, whether we see the referendum as a presidential gamble meant to shore up his popular legitimacy ahead of impending presidential elections, or else as a genuine attempt to block further action by the ruling majority eroding the rule of law, it paid off. Unlike in France, however, the vote was less a mid-mandate legitimating tool for the president on an issue on which he staked his presidency (though it might have been, had it gone ahead when first entertained in 2017) and more an end-of-mandate surefire win to confirm his perceived anti-corruption and pro-European credentials.

In light of this experience with president-initiated referendums, it is difficult not to view these examples as instances where the referendum tool was 'instrumentalised',<sup>106</sup> or else playing a 'plebiscitary', power-reinforcing role played by similar referendums in France.<sup>107</sup> The constitutionalisation of the president's power to initiate such referendums does not encourage consensus-building or deliberation, neither parliamentary nor societal, and allows for this instrument to be deployed unilaterally by the president. Interventions by the Constitutional Court have not resulted in any curtailment of these powers, quite on the contrary, any material constraints on the subject-matter of such referendums have been removed. The president's powers to set the agenda and control the timing of these referendums makes this instrument especially prone to abuse. This is especially true in a constitutional framework wherein a chasm has emerged between the president's formal role – as impartial mediator and guarantor of the constitution – and the actual operation of the office in practice.

## 5. Conclusion

Romania's referendum experience offers rich ground for examining assumptions in the participatory democracy literature as to the operation of referendums in times of political and constitutional crisis. As we saw, several referendums were organised during periods of divided government, with the direct or indirect aim of shoring up legitimacy for one or another of the constitutional actors entangled in conflict. Insofar as the referendum's potential to act as deadlock-breaking mechanism is concerned, the Article 95 presidential recall referendum can be seen as designed to perform precisely this function. It reflects a certain symmetry, wherein the president's direct electoral mandate can only be revoked with the consent of the same people. This will not prevent it from being deployed strategically by legislative majorities, which have often shifted significantly post-elections. Moreover, the Romanian constitution's requirement of only a majority vote in parliament to suspend the president for unconstitutional acts, together with the 30 day deadline to organise the recall referendum, are

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<sup>105</sup> Not without controversy, however. Initially, the parliamentary committee report on the basis of which the vote was to be held stipulated restrictions on the president's Article 90 powers, including seeking to prevent him from initiating legislative or constitutional change via the referendum. See *Raport comun privind scrisoarea domnului Klaus-Werner Iohannis, Presedintele Romaniei, prin care solicita consultarea Parlamentului cu privire la organizarea unui referendum national referitor la probleme de interes national*, Bucharest, 16 April 2019. The controversial report recommendations were dropped after it emerged they had been included without consulting opposition committee members.

<sup>106</sup> Gherghina 2019b.

<sup>107</sup> Morel 2007, p. 1050. The Venice Commission has classified extraordinary referendums that concern the citizens' confidence in the authority initiating them as plebiscitary. See Venice Commission, *Referendums in Europe: An Analysis of the Legal Rules in European States*, Report adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005), paras. 27-38.

conducive neither to cross-party consensus-building nor to informed popular deliberation.<sup>108</sup> Article 90 referendums, in turn, are harder to view as playing a deadlock-breaking function. The president's extensive powers in initiating such referendums – including deciding on subject matter and timing – make this mechanism especially prone to strategic deployment and little constitutional oversight. Had the presidential role played out differently in Romania, more in line with framer expectations of the president as impartial mediator, perhaps Article 90 referendums might themselves have been less politicised.

Romania's case is instructive also beyond constitutional design. The frequent changes to the referendum law, including last minute amendment to the turnout rules in advance of an impending referendum, are deeply problematic.<sup>109</sup> Legal stability is not desirable for its own sake, but because having stable rules of the game governing the referendum process will maximise the chances of it engendering democratic legitimacy and losers' consent – *i.e.* the willingness of those having cast their vote with the losing side to nevertheless accept the referendum outcome because they perceive the rules having governed the process as fair.<sup>110</sup> Inevitably, these changes have resulted in the juridification of the referendum process. The Constitutional Court repeatedly stepped in as final arbiter of turnout rule changes that would very likely decide the fate of the referendum. As discussed above, the Court has not always been consistent in its decisions, and some of its interpretations of the constitutional function of referendums were themselves dubious.

Returning to semi-presidentialism, it should be noted that such systems are not solely prone to referendum use for political gain.<sup>111</sup> However, the distinctive political and constitutional conflicts that arise under semi-presidentialism, in particular during times of divided government, raise the threat of elite control of the referendum mechanism. Semi-presidential systems in Central and Eastern Europe must navigate an additional layer of complexity. Most post-communist states adopted their constitutions quite quickly and retained a certain ambiguity, in particular when it came to intra-executive relations.<sup>112</sup> Shugart and Carey had already remarked, based on a number of case studies, that the unclear division of constitutional competences in particular stood to preclude the advantages promised by this system and constituted a stumbling block to cooperation within the executive.<sup>113</sup> Such ambiguity exacerbates competing claims of constitutional authority, and thereby unavoidably influences the perceived legitimacy of the referendum process during times of crisis.

The case for constitutional revision in Romania has been strenuously debated for many years, and clarification as to its semi-presidential system has been among the priorities. If and when such revision happens, the role, design, and constraints on constitutional referendums should also be considered,

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<sup>108</sup> Alternative design choices might have required a higher parliamentary majority and/or a longer period allowing the electorate to consider the reasons behind the president's suspension. Slovakia's constitution, for example, requires a three-fifths vote and stipulates a 60 day period to organise the referendum (Article 106).

<sup>109</sup> The Venice Commission recommends entrenching fundamental referendum rules, including rules on validating its result: "fundamental aspects of referendum law should not be open to amendment less than one year before a referendum, or should be written in the Constitution or at a level superior to ordinary law." Venice Commission, *Code of Good Practice on Referendums* adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006), para. 2.b.

<sup>110</sup> Tierney 2012, pp. 54 and 207.

<sup>111</sup> Gideon Rahat, *Elite Motives for Initiating Referendums: Avoidance, Addition and Contradiction* in Maija Setälä and Theo Schiller (eds.), *Referendums and Representative Democracy: Responsiveness, Accountability and Deliberation* (Abingdon: Routledge 2009), p. 111.

<sup>112</sup> Jasper de Raadt, *Contestable Constitutions: Ambiguity, Conflict, and Change in East Central European Dual Executive Systems*, (2009) 42 *Communist and Post-Communist Studies*, p. 84.

<sup>113</sup> Shugart and Carey 1992, p. 56

as well as their place within the broader constitutional architecture. In the interim, Romania's referendum experience during periods of divided government offers important comparative lessons.