

The Constitutional arbitration over the admissibility of the abrogating referendum - Comparative overview

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Abstract

Referendum is an institution of the direct democracy. Through it, citizens express their opinions regarding a specific law directly and without the intervention of the parliament. This is a great opportunity for the citizens to be part of the creation of the laws that influence their lives directly. Article 2 of the Constitution of the Republic of Albania states that the sovereignty belongs to the people only and they can exercise this sovereignty in two different ways, through representatives¹ and in a direct manner² whereas the constitution of the Italian Republic states that the sovereignty belongs to the people but they exercise it based on the limits that the constitution imposes them.³ This means that people exercise their legislative right through the chosen representatives and not directly.⁴

The Constitution has implied certain rules regarding the sovereignty that is exercised by the people. It is true that according to Article 2, point 1, of the Constitution, “*The sovereignty belongs to the people in the Republic of Albania*”. But this does not mean that people can have unlimited access in their sovereignty. Every article must be interpreted based on the context of the Constitution and not as something out of it.⁵ In this sense main purpose of this manuscript is the analysis of referendum in the Albanian constitution from a European perspective.

Keywords: Constitution, Albania, referendum, comparative overview.

Introduction

The instruments of the direct democracy are not considered as a competitive power of the representative bodies, such as the parliaments, but instead they are considered as instruments that avert the lack of action of the parliaments or they balance the lack of the action. They do not ensure the lawmaking process, which is a function directly charged to the legislator. In this way, the referendum is used as a tool to achieve the integration and stimulation of the *lawmaking process* in the parliament, in cases when there is no compliance between the parliamentary majority and the people regarding a specific case. So, this is an instrument that transmits the ideas of the voters to the

¹ The main institution of Albania parliamentary republic is the parliament, whose main function is to evaluate and adopt new laws in governing the country.

² The first referendum in Albania was held in 1994. In this case, people were invited to vote for the 1994 draft constitution, which was not accepted and voted.

³ See the second paragraph of the 1st article of the constitution of the Republic of Italy, which was enforced on 1. 1. 1948.

⁴ See the decision no: 31, of 19. 11. 2003 of the Constitutional Court of the Republic of Albania.

⁵ See the decision no: 25 of 24. 07. 2009 of the Constitutional Court of the Republic of Albania.

political class.

The Constitution of the Republic of Albania, in the XI and XVII parts (articles no: 150-152, 177), states the different types of referendums, entities legitimated to seek their development and constitutional prohibitions related to them. Regarding the principles and the procedures about the development of the referendum and its effectiveness, the Constitution explicitly provides that they are provided by law⁶. In fulfillment of this constitutional provision, principles and procedures on referendums are initially provided by the Law no: 9087, of the date 19.06.2003 "Electoral Code of the Republic of Albania", and that has been changed by the law no: 10019, of the date 29.12.2008. Article 185 states that "*provisions regarding the referendums (the 9th part of the law no: 9087/2003), and other parts of the provisions that are related with it, remains in force until the adoption of the new law about the general and local referendums. The administration of the process of the referendums and their final results are held in complete compliance with this Code*".

The procedure of the abrogating referendum in the Republic of Italy

Within September 30 of each year, starting from January 1, the issue of the abrogating referendum with the necessary documentation and signature collection can be deposited in the Cassation Court's office. On the coming days, the central office takes into consideration all requests that have been presented and by 31st October it find all the irregularities and invites all the region's initiators and delegates to fix these irregularities by 20th November. The central office may merge or divide the different requests based on their characteristics.

The procedure held in the central office is closed by a definitive ordinance which declares the legitimacy of the presented requests by 15th December (Cerri, 2012, 461-472). The procedure of the abrogating referendum that is held in the Constitutional Court begins after its president is notified by the *central office of the referendum*.⁷ This office has been created by the Cassation Court⁸ and it analyzes the legitimacy of the request of the abrogating referendum⁹ excluding the aspects regarding the constitutional acceptability which is conducted by the Constitutional Court. It is worth mentioning that the procedure that is held in the central office is totally different compared with the procedure that is held in the Constitutional Court. The Court takes into consideration only the existence of the central office's decision and it does not provide an evaluation about it.¹⁰ The Constitutional Court provides its

⁶ The article no: 150/3 of the Constitution of the Republic of Albania adopted by the law no: 8417, of 21. 10. 1998.

⁷ This office is composed by three chairmen who are the older ones of the cassation court and by the three old counselors that come from the sections of the cassation court, and the head chairman is the oldest of them all.

⁸ See Article 12 of the law no: 352 of 1970, Norme sui referendum previsti dalla Costituzione e sulla iniziativa legislativa del popolo.

⁹ For example, in cases when the law that is subject to the request for the abrogating referendum is in effect, the accuracy of the signatures, the validity of the local decisions, the arrival of the asked quorum, etc.

¹⁰ See Decision No. 63 of 1990 of the Constitutional court of the Republic of Italy, Decision N0. 174 of 2011 and Decision No. 35 of 1985.

evaluation on the acceptability of the abrogating referendum after the central office's evaluation (Cerri, 2012, 462-464).

The head of the Court determines the date and the day of the Court's meeting to decide, not later than 20th January of the coming year, about the central office's decision.¹¹ The Constitutional Court comes to a conclusion, by a decision that has to be published by 10 February, which requests are admitted and which are not accepted because they contravene the second paragraph of Article no: 75 of the Constitution of the Republic of Italy. The decision shall be communicated within 5 days of its publication in the Chambers of the Court, the President of the Republic,¹² the Presidents of Chambers of Parliament, the Prime Minister, the Central Referendum Office, regional delegates and referendum presidents (Bin, Pitruzzella, 2012, 447). Within the same deadline, the decision is published in the Official newspaper. During the admissibility control, the categories of general procedural law, such as the concept of the party, the procedural interest and the judgment etc, remain outside. The court's decision does not concern a subjective situation but concerns only the prohibition or continuation of the procedure that is wholly objective. The words of the enacting clause of the court are either accepting or refusing the referendum request, declaring the unfounded and based claim of referendum promoters.

As we mentioned above, given that this is more like a control procedure rather than a mere judgement, the development of the referendum procedure does not include the participation of the parties but only that of the titular entities in order for them to request an abrogating referendum (the delegates or the presenters that have been chosen by voters) and even the government can submit documents regarding the acceptability of the request in the Court 3 days before the meeting of the judges that have been appointed to make a decision.¹³ Because of this, the delegates, initiators and the government get notified about the meeting's date.¹⁴ Even though this is not stated anywhere in the Constitution, the entities can present their documents orally in the Counseling Chamber.¹⁵ The Court has specified that even though the law does not say anything about the initiators to present their documents orally, this does not necessarily mean that they can't do so if that helps the Court in making a decision.¹⁶ Going to the 31st decision of the year 2000, the constitutional jurisprudence supports the idea that the necessities of the objectivity of the procedure of the abrogating referendum do not exclude the possibility that other documents might come from other entities but the delegates and initiators.

¹¹ According to the Article 32 of law no. 352 from 1970, the decision taken from the central office is held by 20th December of the previous year.

¹² Thanks to the Government's permission, president has full power in deciding the date of the referendum on a Sunday between the 15 April to 15 June.

¹³ The 3rd paragraph of Article 33 of the law no. 352 from 1970, Norme sui referendum previsti dalla Costituzione e sulla iniziativa legislativa del popolo.

¹⁴ The 2nd paragraph of Article 33 of the law no. 352 from 1970, Norme sui referendum previsti dalla Costituzione e sulla iniziativa legislativa del popolo..

¹⁵ Decision no. 16/1978 of the Constitutional Court of the Republic of Italy.

¹⁶ Decision no. 31/2000 of the Constitutional Court of the Republic of Italy.

The procedure of the abrogating referendum according to the Albanian legislation

From a simple analysis of the Albanian legislation about the institution of the abrogating referendum, we can say that this referendum procedure is composed by two stages. There are included three important constitutional institutions in this procedure, such as the Central Election Commission, the President of the Republic and the Constitutional Court. The first phase is held in front of the Central Election Commission and the second phase is held before the Constitutional Court ruling on the constitutionality of issues under the referendum. The Constitution, in the article no: 150 provides for the right of the people, through 50 thousand eligible voters, to request a referendum on the repeal of a law. *The request for the commencement of referendum proceedings is submitted to the Central Election Commission by a group of not less than 12 initiators who are voters registered in the National Registry of Voters.*¹⁷

The request for the commencement of a referendum procedure for the repeal of a law or part of it shall contain: a) the title, number and date of adoption of the law that is required to be repealed, and if it is required to abolish only one part of the law, the relevant provisions; b) the reasons why the law or special provisions should be abrogated. So, as you can see, this request can also be done to abolish only parts of the law, provided that the remainder of the law is self-imposed. The Central Election Commission (CEC) has a 20-day deadline from filing a request to equip a group of initiators with a handout that serves to collect 50,000 signatures of voters registered in the National Register of voters at the time the request is submitted.

The title of the law and the provisions that need to be abrogated are placed at the very top of the demo paper.¹⁸ After the initiators' signatures are collected or sent to the CEC which then validates the signatures and the accuracy of the identifying documents and decides to accept or not the referendum request by 90 days after its submission. It is worth mentioning that CEC bases its decision for accepting or not the request based on the accuracy of the submitted documentation (Anastasi & Omari, 2008, 295; Sadushi, 2004, 63-66). The CEC in this case decides administratively, therefore it does not essentially examine the request for a referendum because it is a competence of the Constitutional Court. The decision is immediately notified to the initiators. The notification given by the part of CEC is very important if the request is not accepted,¹⁹ because it gives the initiators the opportunity to resubmit the request within a certain deadline. If the initiators within 5 days from the notification of the decision of non-acceptance express interest in correcting the irregularities noted, CEC will set a deadline of 30 days for the restatement of the request. In this case, the CEC decides within 10 days whether or not to accept the resubmitted application and immediately notifies the initiators.

If CEC reaches a positive evaluation regarding the accuracy of the request, then it

¹⁷The second paragraph of Article 126, of law no. 9087 from 19.6.2003, the electoral code of the Republic of Albania.

¹⁸The first paragraph of Article 127, of law no. 9087 from 19. 6. 2003, The electoral Code of the Republic of Albania

¹⁹If CEC does not accept the request, the decision for the inadmissibility of the request must clearly define the causes of this inadmissibility.

immediately sends this information to the head of the Constitutional Court except in the cases that are listed in the article no: 119 of this Code.²⁰ CEC should notify the Speaker of the Assembly and the Prime Minister of the received request. The Constitutional Court decides on the constitutionality of the request for a general referendum and whether they are formulated in accordance with points 3 and 5 of Article no: 126 of the Code and according to Article no: 150 paragraphs 1 and 2, Article no: 151, paragraphs 2 and 3 of the Constitution within 60 days starting with the day in which the requests are submitted to CEC.²¹ Concerning the term within which the Constitutional Court has to consider the constitutionality of the abrogating referendum is considered as necessary to be provided for in the Constitution due to the precedent established by this Court with the decision no. 3, held in 23.02.1995, on the constitutionality of organizing the referendum on of the 6th November 1994. This appeal brought the referendum request after the referendum had been made, legislation did not set a deadline within which the Court should decide (Sadushi, 2012, 184). The date of the referendum is appointed by the President of the Republic within 45 days after the positive evaluation has provided by the Constitutional Court or after the deadline to which the Constitutional Court should have expressed its decision. The referendums are held in just one day during the whole year.²² According to the Constitution, there can't be held any referendum about the same case unless it has been three years from its date of the submission.

The causes of the inadmissibility of the abrogating referendum in the Italian judicial system

Firstly, the Constitution of the year 1948 has not accepted the control over the admissibility of the abrogating referendum. That was created with the constitutional law no: 1/1953 (the integrating norms of the constitution in relation to the Constitutional Court) and that it gave the Constitutional Court the right to evaluate if the requests for the abrogating referendum presented as described in Article 75 of the Constitution

²⁰Article 119 of the Electoral Code foresees that: 1. None of the constitutional or general referendums can be held on the date of the elections on the parliament or on the date of the local elections. 2. A constitutional or general referendum cannot take place during the six months prior to the end of the mandate of the Assembly, up to three months after the first meeting of the new Assembly. 3. A local referendum cannot be held during a period of three months before the end of the mandate of local government bodies, up to three months after the first meeting of local councils. 4. When announcing early elections to the Assembly, the referendum procedure is suspended until three months have passed since the first meeting of the new Assembly. 5. When local elections are announced in a local government unit, the procedure for conducting a local referendum on that unit is suspended until three months have elapsed from the beginning of the mandate of the local government body. 6. In addition to Article 152, paragraph 3 of the Constitution, regarding the referendum requests, which have not gone through all the procedures of this chapter, by 15 March of each year, regardless of when they are presented, are postponed until the following year.

²¹The second paragraph of Article 129 of law no. 9087 from 19. 6. 2003, the Electoral Code of the Republic of Albania.

²²Article 152/3 of the Constitution of the Republic of Albania that has been adopted with law no. 8417 from 21.10. 1998.

are admissible as described in the second paragraph of the same article.²³ Article 75 does not contain a lot of cases for which we can ask an abrogating referendum. The referendum is not applied about the fiscal laws, budget laws, amnesty and parole laws and the laws that authorize the ratification of the international treaties.

Firstly, not only the Court has expressed its acceptance about this provision on its decisions,²⁴ but it has also expressed its disapproval through the decision no: 16 of the year 1978, in which it states that the causes of inadmissibility can be taken from the article no: 75 of the constitution and from the nature of the referendum when acting as a constitutional institution (Zagrebel'sky, Marceno, 2012, 491). Taking this decision into account, the Constitutional Court has progressively expanded its evaluation on certain directions. Some other causes of inadmissibility of the request for abrogating referendum that are elaborated by the Court are as follows:

- The constitution, constitutional laws and enforced laws shall not be subject to referendum.²⁵ The court has also said that the laws implementing the Concordat shall not be subject to abrogation.²⁶ The laws that have an obligatory constitutional content cannot be subject to abrogating referendum, which means that the normative core can not be changed without the evaluation of the constitutional principles or of the laws that regulate the functioning of the main bodies'.²⁷
- The constraints imposed by Article 75/2 of the Constitution should be interpreted in an expanded manner. Referendums cannot be subject to not only the laws on the approval of the balance sheet but also other laws pertaining to financial maneuvering, starting with the financial law.
- The requests must be homogeneous in order for them to be accepted. One case came when a single request wanted to abolish 97 articles, including several criminal offenses. The court has said that these types of requests limit the voter's freedom to vote and that these requests should be as homogeneous, coherent and complete (Bin, Pitruzella, 2012, 447-448).

The causes of the inadmissibility of the abrogating referendum in the Albanian judicial system

The question that continuously arises is about the requests regarding the abrogation of a law or of a part of a law, if there is any constitutional limitation that is expressed or not in our judicial system? It is worth mentioning that the first paragraph of the article 152 of the Constitution of the Republic of Albania treats the determinant elements of the limitations regarding the constitutionality of the control of the case

²³Article 2 of the constitutional law no: 1/1953, the integrating norms of the constitution regarding the Constitutional Court.

²⁴Decision no. 10 of 1972 over the divorce and Decision no 251 of 1975 over the abortion, of the Constitutional Court of the Republic of Italy.

²⁵The Constitution has foreseen that in order to regulate a particular issue it is necessary to follow special law-making procedures more difficult than for ordinary laws, and these laws are called enforced laws. While in our legal system we call laws enforced by all those laws that require a qualified majority for their adoption, such as the laws that the Constitution provides in Article 81/2.

²⁶Look at decision no. 16 of 1978 of the Constitutional Court of the Republic of Italy.

²⁷For example, The electoral Code for both the chambers of the parliament.

that has been presented for referendum.²⁸ The evaluation of the constitutionality by the part of the Constitutional Court requires for the judges to evaluate if there are any limitations as described in the article no: 151, 2nd paragraph of the Constitution, so if the law (or its articles) that is required for an abrogating referendum, is part of the laws in which the Constitution does not allow, directly or not, the respective bodies to take such referendums.

The Court, by referring the article no: 151, point 2, finds that the list of the cases, that cannot be presented for general abrogating referendum, is limited between the borders of the whole territory of the republic of Albania. It has to do with the limitations of the basic rights and freedoms, with the budget, taxes and financial obligations of the State, the deployment and removal of the state of emergency, the declaration of war and peace and amnesty. During the preliminary evaluation of the constitutionality of the cases that have been pleaded for referendum, the Constitutional Court evaluates the formal and material validity of the pleaded case.²⁹ Constitutional provisions must be interpreted according to the fundamental principles that are stated in the Constitution because all the constitutional norms and principles should form a harmonic system. The concept of Constitutionality means that the Constitution cannot have inner contradictions. This means that the courts can identify implied limitations based on the constitutional jurisprudence. In other words, the existence of other constitutional requests that are related to those of the article no: 151 of the constitution, which are affected by the law or the articles that are subject to referendum. The electoral code cannot predict other cases but instead it has applied some restrictions when it comes to the procedures and the time in which the referendums cannot be pleaded.³⁰

Conclusions

From what we saw in this comparative overview regarding the procedures and the content about the evaluation of the admissibility of the abrogating referendum in both the judicial systems, we can say that the arbitration about the admissibility of the abrogating referendum in the Republic of Italy is much more complete than that in the Republic of Albania. The fact that their arbitration is more complete does not necessarily mean that it is clearer and more straightforward because the Constitutional Court of Italy, through its jurisprudence, has continuously changed the conditions regarding the admissibility of the referendum, especially the implied conditions. The consequences of this jurisprudence are contradictions and doubts as both theoretical and practical. Regarding the admissibility of the request for abrogating referendum in Albania, we think that this constitutional institution should be

²⁸The second paragraph of article 152 states that: The cases that are related with the whole territory of Albania, with the restrictions of fundamental human rights and freedoms, with the budget, taxes and the financial obligations of the State, with the deployment and removal of the state of emergency, the declaration of war and peace, and the amnesty cannot be put in any referendum.

²⁹The first paragraph of article 67/b of law no: 8577, from 10. 2. 2000 (it is changed with the law no: 99/2016), for the organization and the functioning of the Constitutional Court of the Republic of Albania.

³⁰The decision no. 8 of 08.03.2013 of the Constitutional Court of the Republic of Albania.

reformed by our legislator to make it easier for citizens to hold such a referendum to give voters a strong weapon against political classes that often underestimate the general public interest.

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- The decision no.31/2000 of the Constitutional Court of the Republic of Italy.
- The decision no.10/1972 of the Constitutional Court of the Republic of Italy.
- The decision no.25/1975 of the Constitutional Court of the Republic of Italy.