

# The culture of referendum in Albania:

## Technical and theoritical reflections on the abrogative referendum

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### Abstract

The aim of this paper is to analyse the Albanian constitutional and legal framework on referenda, in general, focusing special attention to the abrogative referenda of a law or part thereof. Given the absence of any concrete case of an abrogative referenda held in Albania, which does not creates very much room for discussion in that regard, the paper, through a comparative approach on the referenda culture in other european states, aims at offering to the reader a more complete view on the mechanisms and guarantees enjoyed by voters and the effective way of their use, in order to give life to the direct democracy, but without replacing the representative one. In addition, part of the analyses will be the powers of the Constitutional Court for the *ex ante* constitutional review of the issue subject to a referendum, the review of constitutionality of the referndum and of its results. In this context, the paper will focus on the constitutional case-law as a tool for increasing the referenda culture and shaping the constitional order, as well as a source of standards and values. Another objective of the paper is to open a discussion on the need for the reception of referenda-related standards elaborated in those European countries, where the culture of holding a referenda and the case-law on the regard is enriched and may serve as a qualitative basis for further reference.

**Keywords:** democracy; referendum; abrogative; judicial review; case-law

### Introduction: General reflections on the culture of referendum in Albania

The fundamental law of the Republic of Albania, i.e. its Constitution stipulates that Albania is a parliamentary republic, where the sovregnty belong to the people, who exercise it through their representatives or directly.<sup>1</sup> This *dictum* means that the prevailing form of democracy is the representative one, while the direct form is applied, through *ad hoc* popular initiave, i.e. as many times as 50 thousand citizens, who enjoy the right to vote, request the abrogation of a law, or when they request the President of the Republic to hold a referendum about issues of special importance.<sup>2</sup>

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<sup>1</sup> See articles 1/1 and 2, point 2 and 3 of the Constitution of the Republic of Albania

<sup>2</sup> See article 150/1 of the Constitution

The referendum in a representative democracy matters, as it a constitutional remedy associated with the notion of popular sovereignty, which is exercised either by its representatives or directly by the people. The principle of the exercise of sovereignty by the people means a democratic concept according to the criteria of a representative democracy, which also contains elements that enable the direct exercise of constitutional democracy. The instruments of direct democracy are not a competitive power to representative bodies, but represents instruments that allow the elimination of the lack of action by their members, or the balancing thereof. Those do not enable law-making, which is charged exclusively to the legislators. In this way, the referendum is presented as a tool for integration and promotion of the legislative process in parliament, in those cases where the principle of matching between the parliamentary majority will with that of the majority of people in a specific case, can not be applied. Therefore, the referendum is a tool that enables the transmission of voter opinion toward political bodies.<sup>3</sup>

The first popular initiative for holding an abrogative referendum dates back in 2003 when 53 000 voters required the abrogation of articles 4 and 6 of the law no.8889, dated 25.04.2002, "On some some additions and amendments to the law no.7703, dated 11.05.1993, "On Social Insurance in the Republic of Albania""<sup>4</sup>, while the second initiative dates in 2013, when, over 50 000 voters asked for the abrogation of articles 22, paragraph 3 article 49 of law no.10463, dated 22.09.2011 "On the integrated waste management"<sup>5</sup>. Unfortunately, none of the popular initiatives took place, as in the first case, the Constitutional Court declared the question subject to the abrogative referendum as not in compliance with the Constitution, while, in the second case, even though the Constitutional Court pave the way toward holding an abrogative referendum, the new government that came into power after the 2013 parliamentary

<sup>3</sup> See decisions no.31, dated 19.11.2003 and no.8, dated 08.03.2013 of the Constitutional Court of Albania.

<sup>4</sup> Inter alia, articles 4 and 6 of the law of 2002 has increased the age for old-age pension for men from 60 to 65 years and for women from 55 to 60, therefore amending article 31 of the law of 1993, which provided for the terms of the pension benefit, as well as article 34 of the same law, which defines the conditions of partial retirement pension.

<sup>5</sup> Article 22, paragraph 3 "Integrated network of waste treatment plants," provides that: "The Council of Ministers prohibits or restricts the import of waste destined for incineration, when classified as a recovery operation and is estimated that: a) such an action is necessary to protect the network of waste treatment plants, b) allow imports of such treatment or disposal of waste land in ways that do not comply with the integrated waste management relevant plans." Article 49 "Import of non-hazardous waste" which states that: "1. In the Republic of Albania shall be imported only non-hazardous waste and inert waste, other than those specified in paragraph 3 of Article 48 of this Law. 2. Importing waste according to item 1 of this law is possible only with the authorization of the Council of Ministers. 3. The application for import authorization shall be submitted to the ministry. 4. Authorization to import non-hazardous waste shall be issued only in full compliance with the law and other applicable acts. 5. Council of Ministers, when considering the application for the import of non-hazardous waste, shall take into account the reasons for the importation of these residues. The applicant authorization to import non-hazardous waste must prove that they are using all waste by type and code, as required. 6. The authorization for the import of non-hazardous waste is valid for a period up to one year and is subject to the general conditions set forth in regulations adopted pursuant to this law, as well as to any specific requirement relating to the case. 7. In authorizing the importation of waste are defined: a) the type of waste for which import issued b) standards relating to packaging and labeling of waste associated with documents during their transport c) requirements for monitoring and reporting the movements of waste. 8. Council of Ministers, on the proposal of the Minister approves the list of waste allowed to be imported and regulations to implement this section. "

elections, listed the contested law on waste management among the “to be abolished laws”.

As stated above, since the approval of the Albanian Constitution in 1998, through a mixed procedure, i.e. approval by the Assembly and through a popular vote, no other referendum has been held. The Albanian reality has been largely characterised by voters’ apathy in taking popular initiatives, which has impacted negatively in establishing and promoting a referendum culture. The last year developments brought little improvement, due to the increasing of people awareness on their right to participate in decision-making process, in order to have their voice heard in policy-drafting and important issues approval. Direct democracy can help to re-engage voters with politics and democracy, and in this context, the very first signs of increase of Albanian voters’ awareness on negative effects of apathy and disenchantment with traditional forms of democracy, shows that there is a light at the end of the long tunnel toward the consolidated democracy.

General referendums, are optional in nature, since the assessment of the need for holding (or not) a referendum depends not only in formal requirements as the collection of a large number of signatures (generally over 50 000), but also in sharing of a common interest on the issue subject to the referendum. Still, despite these potential obstacles, holding of a referendum in a representative democracy is a must; therefore, the stakeholders shall take the necessary measures to contribute to the increase of the referendum culture in Albania.

### **Albanian constitutional and legal framework on referendum**

The Constitution of Albania provides for types of referenda and the respective subjects entitled with this right. *Constitutional referendum*, aims at approving by a popular vote the constitutional amendments, upon the request of one fifth of deputies; *general referendum*, upon the popular initiative, either for the abrogation of a law or for an issue of special importance, or upon the initiative of the Assembly (Parliament), when required by one fifth of deputies or the Council of Ministers to put an issue or a draft law of a special importance to a popular vote; *local referendum* on local government issues, upon the request of 10 percent of registered voters of the commune or municipality. In addition to these provisions, the constitutional and legal framework provides for bans in holding a referendum which are related either the nature of the question/issue or to the time to conduct a referendum.<sup>6</sup> On the other hand, principles and modalities for holding the referendum and its validity are prescribed by law, namely “Electoral Code”. The set of rules on referendums conduct dates back in 2003, when it was first provided by the Electoral Code, which has been subject to several amendments in the framework of a continuous and contentious

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<sup>6</sup> See Part XI and XVII of the Constitution, articles 150-152 and 177

electoral reforms, nevertheless, provisions on referendum has been always excluded from being part of this process.<sup>7</sup>

The Electoral Code specifies the conditions and criterias related to holding a referendum, listing as such: *first*, the request to begin the procedures for *the abrogation of a law or a part thereof* shall be presented by a group of not less than 12 initiators, who shall be voters registered in the National Register of Voters; *second*, it shall be submitted to the Central Election Commission (CEC); *third*, the request for the abrogation of a law or a part of it is acceptable when the remaining part of the law is self-sufficient; *fourth*, it shall contain two mandatory elements: a) the title, number and date of approval of law that is required to be abrogated, and if required to be repealed only a part of the law, its relevant provisions; b) the reasons why the law or specific provisions to be abrogated.<sup>8</sup>

The same provision provides further that the request to begin procedures for the referendum on a matter of special importance should clearly outline the issue raised, its importance and position of the initiators in connection with the issue. The question should be formulated clearly, fully and unequivocally and in a way that voters be able to answer "YES" or "NO"<sup>9</sup>. *Prima facie*, by comparing the legal formulation of points 4 and 5 it is not clear if the requirement "that *the request be formulated clearly, fully and unequivocally*" shall be considered as a "*fifth criteria*" to be applied for all types of referendums' request. Therefore, in the light of the above findings there is a need for the harmonisation of the terminology, therefore of the content of the Electoral Code provisions.

The process is a complex one, as it incorporates not only the initiators' role, but also that of the CEC, which in this procedural phase, shall be admitted that it is a formal one, meaning that it is limited in the assessment of the completion of formal requirements<sup>10</sup>. The CEC verifies the signatures and accuracy of the voter's identification documents, in accordance with the regulations issued by it and decides to accept or reject the request within 90 days from the date of its submission, grounding its decision on the

<sup>7</sup> Law no.10019, dated 29.12.2008 "The Electoral Code of the rRepublic of Albania", as amended does not contain at all provisions on referendum, but only a transitory provision, article 185 stating that: "... provisions for referendums (Part IX of law no.9087/2003) and any part of its related provisions shall remain in force until the adoption of the new law on general and local referendums. The administration of the referendum process and the disclosure of their outcome shall be made in accordance with this Code".

<sup>8</sup> See article 126, points 3, 4 of 2003 EC

<sup>9</sup> Article 126, point 5 of 2003 EC

<sup>10</sup> Article 127 provides that "Within 20 days from the submission of the request for a general referendum, the CEC provides the initiator group, against payment, with forms for the collection of signatures of 50 thousand voters registered in the National Register of Voters at the time of application submission. At the top of the form shall be placed the title of the law, or the provisions required to be repealed or the issue that shall be put to the referenda vote. Signatures in support of the request for a general referendum shall be deposited to the CEC in the period from January 1st to November 30th of each year".

regularity of the submitted documentation.<sup>11</sup> The above legal provisions provide for a procedure which has largely been defined as the *legitimizing stage*<sup>12</sup>. The CEC is the body required by the law to verify the regularity of requests for general referendum, while it has the duty to convey these applications to the President of the Republic and to the Constitutional Court, except for the cases expressly provided for in Article 119 of the Electoral Code.<sup>13</sup> CEC also informs the Assembly Speaker and the Prime Minister received requests.

In fact, the Constitution does not mention the CEC in none of the articles regulating the referendum, while referring to the constitutional case-law, there is a lack of consistency regarding the subject legitimated as “the applicant”. In 2003 the Constitutional Court legitimated 53 000 voters without interpreting the grounds for their legitimation, while in 2013 case, the CEC was legitimated based on the following arguments: *“The CEC is legitimated razione materiae, as it represents the entity which is recognized by the Electoral Code the competence for putting into motion of an ex ante review of the constitutionality of the request for a general abrogative referendum. In addition, the applicant claims are prima facie the competence of the Constitutional Court, as they are included in the constitutional articles no.131/ ÷ and 152/1, stipulating that the Constitutional Court decides on the “constitutionality of referendums” and “ex ante review of the constitutionality of issues put to referendum”. In terms of razione temporis legitimation, the request is filed within the period prescribed by the Electoral Code.”*<sup>14</sup>

In the light of the constitutional interpretation of subjects’ legitimation, as well as considering the case circumstances, in my opinion the correct argumentation would be that of 2013 decision. The initiators’ group is an entity mentioned only by the law (Electoral Code) and does not represent any particular association or group, but simply a group of individuals sharing the same interest in holding an abrogative referendum, entitled with the right to vote (either active or passive). Even though such a process

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<sup>11</sup> The decision shall be notified immediately to the initiators. In the case of a rejecting decision the CEC should clearly determine the causes of rejection. Within 5 days of notification of the decision, the initiators may declare to the CEC its readiness to correct irregularities. In this case, the CEC shall set a deadline up to 30 days for the resubmission of the request. The CEC shall decide within 10 days whether to accept the request and shall notify immediately the initiators.

<sup>12</sup> See “Commentario ala Costituzione Italiana”, 2006, pg.1476

<sup>13</sup> Article 119 “Restrictions on the exercise of the right for a referendum” “1.No general or constitutional referendum can be held on the date of election of Assembly or of the local government organs. 2. A constitutional referendum or a general one shall not be held during the period of six months before the end of the mandate of the Assembly until three months after the first meeting of the new Assembly. 3. A local referendum shall not be held during the period of three months before the expiry of the mandate of the local government organ up to three months after the first meeting of the local councils. 4. When early elections to the Assembly are announced, the procedure for holding a referendum is suspended until after the expiration of three months from the first meeting of the new Assembly. 5. When the local government unit announced early elections, procedures for holding a local referendum on the unit is suspended until after the expiration of three months from the beginning of the mandate of the local government body. 6. In accordance with paragraph 3 of Article 152 of the Constitution, the request for the referendum, which have not passed through all the procedures of this chapter, by March 15 of each year, regardless of when made, shall be postponed until next year.

<sup>14</sup> See judgment no.8, dated 08.03.2013 of the Constitutional Court of Albania ([www.gjk.gov.al](http://www.gjk.gov.al))

would not exist if the group of initiator would not submit such a request to the CEC, considering the nature of the process, CEC has been institutionalised as the organ, which, after the formal examination of the request for a referendum, comes up to the conclusion that the request meets all requirements and decides, in accordance with Articles 128 and 129 of the Electoral Code. This competence of the CEC is in function of its legitimation for initiating the constitutional process of *ex ante* verification of the constitutionality of the request for referendum.

Considering the “age” the legal provisions regulating the conduct of a referendum, it is normal to put into question their compliance with the current social, economic, political reality, public awareness on the importance of the right to vote, the debate on the referenda culture, etc. Although the above set of legal rules and procedures has been in the focus of the OSCE/ODIHR and Venice Commission expertise<sup>15</sup>, which has found not only inconsistent provisions<sup>16</sup>, but also lack of compliance with the Constitutions in terms of procedures<sup>17</sup> and powers granted to the constitutional organs<sup>18</sup>, no legislative initiative has been undertaken so far in order to bring the legal framework in line with constitutional and international standards on referenda. Currently, upon the initiative of the political parties, the electoral legal framework is undergoing another reform; let’s hope the above concerns will be properly addressed.

## European heritage on referendum

The nature of the referendum varies depending on whether it is mandatory or optional, as well as on the body who is granted the right to call a referendum. In this regard, shall be distinguished three types of referendums: (a) *mandatory*; (b) *at the request of an authority*; and (c) *at the request of a part of the electorate*. The last

<sup>15</sup> <http://www.venice.coe.int/webforms/documents/CDL-EL%282004%29002rev-e.aspx>, see “Joint Recommendations on the Electoral Law and the Electoral Administration in Albania” of the European Commission for Democracy Through Law (Venice Commission, CoE) and the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE on the basis of comments by Mr Jessie Pilgrim (OSCE/ODIHR, expert, USA) Mr Adriaan Stoop (OSCE/ODIHR, expert, the Netherlands)

<sup>16</sup> It is recommended that the relevant deadlines and inconsistent references related to referenda elections be corrected as Article 119, clause (6) sets 15 March of each year as the deadline for the completion of all legal procedures for a request for a referendum election. However, Article 127, clause (2) establishes the period between 1 January and 30 November as the time period for submitting the 50,000 supporting signatures required for a referendum election. Articles 128 and 129 provide for procedures related to the request which might require up to 195 days, thereby greatly exceeding the 15 March deadline established in Article 119, clause (6).

<sup>17</sup> Article 126 (3) of the Electoral Code recognizes the right to abrogate *parts* of a law through a general referendum. This appears to conflict with Article 150 of the Constitution as the latter grants the right to abrogate a law- not the right to rewrite portions through selective referendum abrogation. Also it is recommended that Article 126 be amended in order to comply with Article 150, clause (1) of the Constitution

<sup>18</sup> Clause (3) of Article 129 grants the President of Albania the power to decide that a referendum requested should not be held and, after making such a decision, advises the CEC in writing of his reasons, which the CEC transmits to the initiators. This is tantamount to granting the President power to overrule the Constitutional Court’s decision under clause (2) The EC empowers the President to quash the constitutional rights of the 50,000 citizens who initiated the referendum. It is recommended that Article 129 be amended in order to comply with Articles 150 and 152 of the Constitution. It should also be noted that clause (2) of Article 129 stipulates that the Constitutional Court decides whether a request for a referendum is formulated in accordance with clauses (3) and (5) of Article 126. However, it appears that the Constitutional Court should also decide whether a request for a referendum contains the data specified in clause (4) of Article 126, therefore it is recommended that this be clarified too.

one is divided into two subcategories: (c/1) ordinary optional referendum, generally focused on a text adopted by a state body; and (c/2) popular initiative, in the strict sense, which allows a part of the electorate to propose a text not approved yet by any authority. In the case of popular initiative the role of the authorities, in particular, of the Parliament, is limited.<sup>19</sup>

The text submitted to referendum vote may appear in different forms: (i) drafted in concrete terms (a *specifically-worded draft*) of a constitutional amendment, a legislative acts, including the repeal of an existing norm; (ii) question in principle (e.g. "Are you in favor of changing the constitution to forecast a presidential system of government?"); or, (iii) a concrete proposal, not in the form of a concrete norm, but as a "proposal drafted in general terms (*generally-worded proposal*)" (for example: "Are you in favor of changing the constitution in order to reduce the number of seats in Parliament by 300 to 200?").<sup>20</sup>

Venice Commission expertise states that:

*"Regardless of the form in which the request for a referendum is presented, in terms of **formal validity** it shall meet the following principles: (i) Unity of form: the application can not be formulated as a combination of two different forms (e.g.g formulation in concrete terms, formulation in general terms, or a proposal in principle). (ii) Unity of content: except where the request relates to the review of the entire law, in all other cases there should be a common link between different parts of the request/question put on vote, in order to garantting the right to vote (there should be no expectation that voters accept or reject, in whole, provisions having no relation among them). This principle is an expression of the freedom of vote. (iii) Unity of hierarchical level: laws of different hierarchical levels shall not be put in referenda vote simultaneously (e.g. the Constituion and other legislation approved on the bases and for the implementation of the Constitution). (iv) Clear questions and no guidelines: freedom to vote means that "the question presented to the electorate must be clear (not unknown, nor with several meanings), it should not lead to misunderstandings, nor to suggest a different answer: voters should be informed of the consequences of the referendum, should answer "yes" or "no", or even a blank vote. These principles, which are expressly sanctioned by some national legislation, must be considered universal".<sup>21</sup>*

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<sup>19</sup> See for more Pierre Garrone, Venice Commission (Council of Europe), Referenda in Europe, pgs.4-5, where the author brings as examples of countries where mechanisms of ordinary optional referendum and popular initiative are developed significantly Switzerland, Italy, Malta, Denmark, Russia, Albania, Poland, Portugal, Hungary, Macedonia, etc. For example, in Switzerland, "referendum" against laws relevant to international agreements and federal orders can be requested by 50,000 citizens, while "popular initiative" requires for 100,000 citizens who may request the revision the Constitution, while the "general popular initiative" could lead to a change of law. In Lithuania, the demand for ordinary optional referendum or popular initiative must be submitted by 500,000 signatories, while in Former Yugoslav Republic of Macedonia by 150,000 signatories, or in Lithuania by one tenth of the electorate.

<sup>20</sup> Ibid, pg.6

<sup>21</sup> Ibid, pg 7

Regarding the *material validity* of the text put in referenda vote shall be in compliance with the highest law (the principle of norms hierarchy) and not contrary to the international law or statutory principle of the Council of Europe, namely democracy, human rights and the rule of law<sup>22</sup>.

### **Constitutional review of a request for an abrogative referendum: Comparative approach**

The constitutionality review procedure, which is defined as the *admissibility stage*, has been debatable both from the doctrinal view and the case-law regarding the nature of review exercised, i.e. if it shall be of administrative or jurisdictional nature. However, taking into account the organ charged with this competence, i.e. Constitutional Court, the content of this function makes the jurisdictional element prevail. If considering the procedural element, the competence given to the Constitutional Court, belongs to the phase of review as a prerequisite for the validity of the proceedings. However, it is clear that the contribution of constitutional case-law in this regard, can not be evaluated strictly in procedural terms. Moreover, the case-law shall be credited for the visible and significant identification of the abrogative referendum institutional profile and its position among the sources of law.<sup>23</sup>

The importance of judicial review of the referendum in some countries reflects the general situation of this type of control. Thus, countries that have little or no judicial control as Switzerland, Denmark, Ireland, New Zealand, UK, Sweden, Finland, Greece or Luxembourg (as countries frequenting less the referendum) limit this type of formal control only on regularity of the process and the form of application. Since 1999, Switzerland has foreseen a material limitation of the constitutional popular initiative, since under Article 139 (2) of the Federal Constitution the popular initiative may be declared invalid by the Federal Assembly (political body), through *a priori* control, if the matter does not respect requirements of uniformity of shape and subject/issue, but even in the case when it violates binding norms of international law.

Judicial review of the referendum request traditionally has been related to the process conducted for holding a referendum, i.e. compliance with rules relating to the start of the referendum campaign, voting, etc and less on the formal and material aspect of the issue. *Formal validity* of the issue put in referendum vote shall be assessed in the light of clarity and uniformity of the question/issue (e.g. USA, Switzerland or Italy), which is considered as the minimum requirement of referenda. The *material validity* of the issue is, first of all, related to the assessment of areas which are subject to referendum. Application of one form of assessment or of other depends on the nature of the referendum (either legislative or constitutional), but also by the hierarchical ranking of the legislation on referendum<sup>24</sup>.

<sup>22</sup> Venice Commission, Code of Good Practices in Referendums, CDL-AD(2007)008rev, 21 January 2009

<sup>23</sup> See "Commentario alla Costituzione Italiana", 2006, pg.1476

<sup>24</sup> Michel Rosenfeld & Andras Sajó, The Oxford Book of Comparative Constitutional Law, 2012, pgs.522-523



Regarding the authorities entitled with the exercise of judicial control, sometimes, they are political bodies, e.g. the Federal Assembly in Switzerland, administrative courts controlling the regularity of the process, or the courts, generally, constitutional courts charged with reviewing the issue (e.g. Italy). This kind of control can be automatic or mandatory (e.g. in France after 2008 reform<sup>25</sup>). With regard to the moment of control (before or after), *a priori* control is deemed reasonable and is, currently, the rule to control the regularity of referendums (U.S. or Italy), in terms of material control on the issue (especially, compliance with the legislation of a higher hierarchy) the rules are not very clear as this type of control exercised *a posteriori* goes contrary to the principle of popular sovereignty.<sup>26</sup>

Especially, the Italian doctrinal elaboration of the referendums' institute, its legal and constitutional framework and, in particular, the Constitutional Court case-law is one of the best practices and a valuable reference point on that regard. The Italian Constitution, in article 75, provides that: "*General referendum may be held to repeal, in whole or in part, a law or a measure having the force of law, when so requested by five hundred thousand voters or five Regional Councils. No referendum may be held on a law regulating taxes, the budget, amnesty or pardon, or a law ratifying an international treaty. Any citizen entitled to vote for the Chamber of deputies has the right to vote in a referendum. The referendum shall be considered to have been carried if the majority of those eligible has voted and a majority of valid votes has been achieved. The law defines the approach of the referendum.*" In addition to the constitutional framework, the constitutional law no.1/1953 (article 2) determined the Constitutional Court as the body charged with the competence to examine the admissibility of a request for a referendum, while law no.352/1970 has defined the procedures for holding a referendum.

In the light of the Italian Constitutional Court, the jurisdiction to rule on the admissibility of a request for abrogative referendum has specific and autonomous features compared to other powers reserved to it (*see decisions nr.251/1975; nr.16/1978*). The constitutionality of the law subject to the referendum is not subject to constitutional

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<sup>25</sup> France is the example of those countries, that although having a few past traditions in holding referenda, nowadays are moving towards a consolidated judicial review in this area. After the constitutional reform of 2008, the Constitution, in article 61 provides that "*institutional acts before their promulgation, Private Bills, according to Article 11, before put in referendum, regulations of both Houses of Parliament and acts of Parliament shall, before entry into force, referred to the Constitutional Council, which decides on their compliance with the Constitution.*" Article 11 and Institutional Act recognize the President's authority, that upon the recommendation by the Government or the joint motion of two Parliament's Houses, published in Official Journal, to put to a referendum any government bill concerning the organization of public authorities or economic reforms, or social or environmental policies of the country, or public services, or providing authorization for the ratification of a treaty, which although in accordance with Constitution, may affect the functioning of institutions. If the referendum is held at the request of the Government, the latter must submit a statement before each Chamber that is followed by a debate. The referendum on specific issues referred expressly by the norm may be required by one fifth of the deputies supported by one tenth of the voters. This initiative should take the form of a bill (private) and shall not be applied for abrogation of a rule that it has entered into force a year ago. Terms of submission and those under which the Constitutional Council assesses the respect of the above provisions are provided by the Institutional Act

<sup>26</sup> Supra note, at 25, pgs.522-523

review. In addition, neither laws relating to taxes, budget, amnesty or pardon nor laws on ratification of the international treaty can be subject to referendum. The right to vote in a referendum belongs to every citizen with the right to vote for Houses of deputies. The referendum shall be deemed completed upon voted by a majority of voters and a majority vote is achieved (*see decisions nr.15/2008; nos.45-48/ 2005; nr.13/2012*). In the constitutional order does exist such values, which should be protected by excluding them as being subject to the referendum, values which are beyond the cases envisaged by the Constitution. In this context: *First*, are unacceptable those requests formulated in such a way that every question will be presented to voters (electoral body) contains a heterogeneous set of questions that lack common denominator of rational connection, to that extend that those does not follow the logic of Article 75 of the Constitution. This rule applies also for those requests, which are clearly and arbitrarily separated by the constitutional goals of the referendum, as a tool for genuine expression of popular sovereignty. *Secondly*, are unacceptable those requests which are not related to the state legislative acts having the force of ordinary law, but tending to nullify - fully or partially - the Constitution, the laws of constitutional revision, "other constitutional laws" and acts other with "passive special power" that can not be repealed by ordinary legislation. These laws can not be repealed neither by ordinary legislative acts due to their "constitutional cover", nor though a referendum.<sup>27</sup> *Third*, are unacceptable those referendums requests having as a subject norms belonging to ordinary legislation, but having constitutional importance, which content can not be changed or become ineffective, without causing conflict with the respective constitutional norms (or other constitutional laws) (see decision nr. 35/1997).<sup>28</sup> Following this precedent, the electoral laws are considered as "necessary constitutional laws", therefore, requests for the complete abrogation of electoral laws contravenes the principle of constant activity of constitutional bodies, therefore is unacceptable. Still, the electoral laws may be subject to an abrogative referendum only for a few provisions (partial deletion), upon the condition that after the abrogation, these constitutional bodies can function (see decisions no.13/1999 and no.33/2000)<sup>29</sup>. *Fourth*, besides the inadmissibility grounds expressly described by the Constitution (article 75), implied criteria are also applicable. Therefore, are excluded from referendum those norms which effects are closely related to the scope of the laws stipulated in Article 75, and in this context, their exclusion should

<sup>27</sup> In this category are included also Patti Lateranensi provided in Article 7 of the Constitution which are agreements between the Italian state with Vatican.

<sup>28</sup> This principle was elaborated during the examination of a request for holding a referendum for the abrogation entirely of the abortion law, which in the assessment of the Italian CC "would nullify the minimum necessary protection of inviolable constitutional rights such as right to life, right to health, etc. This case was considered by the doctrine as the precedent, according to which the constitutionality of the Act is inadmissibility in terms of constitutional considerations.

<sup>29</sup> Upon these considerations, the Italian CC has considered unacceptable several requests for a referendum, aiming at abrogation of the entire law. Similar positions has been held regarding requests for holding electoral referendums in 1999 and in 2000.

be considered as implied.<sup>30</sup> In line with these principles, a referendum on abolishing the mandatory laws of the European Community can not be held. Reference is made to those normative acts for which the national legislator discretion is mandatory by EU law (*see decision nr.31/2000*). *Fifth*, In 2005 the Constitutional Court further elaborated the inadmissibility criteria in cases of a request for the entire abolition of the ordinary laws, which are constitutionally necessary, by preventing holding of a referendum for abrogation of those laws that provide for a range of interests protected by the Constitution and, as such, in any case require a legislative framework (e.g. law on artificial fertilization). Reasons for this additional exclusion include the need for their necessary existence in the legal order either because they are essential to the functioning of constitutional bodies, or because they are provided directly by the specific provisions of the Constitution. The absence of these laws would make the constitutional ruling, impossible (e.g. law on the functioning of the High Council of Justice, etc.) (*see decisions no.29/1987, no.47/199; no.45/2005*). *Sixth*, in order to guarantee the freedom of vote, the Court has emphasized that such requests, in order to be eligible, shall be complete, clear and univocal. The completeness of the request is a prerequisite for the referendum to be clear, meaning that that the voter should be able to understand the scope of abrogating, as well as its consequences and what is the purpose that the promoters of the referendum seek to achieve. An essential tool of direct democracy, such as abrogative referendum can not be transformed - without doubt - in a distorted instrument of representative democracy, through which, in essence, are proposed plebiscites or popular confidence motion against the general elections inseparable from political parties or organized groups that have supported referendum initiatives (*see decisions no.16/1978, nos.24, 25, 26, 28, 31/1981, no.27/1982, no.28/1987, no.32/1993*).

The constitutional judgment on the admissibility of the referendum aims to provide: a) the lack of prohibitions/bans (stipulated or implied the Constitution), in conjunction with provisions protected by the referendum question (laws authorizing the ratification of international treaties, tax laws, budgetary laws, amnesty and pardon laws, constitutional laws, laws having a constitutional content, or or constitutionally necessary); and b) the presence of the referendum question formulation criteria, i.e consistency, clarity and simplicity, unique character, completeness, consistency, adaptability to the purpose, respecting the essentially ablativ nature of the referendum. The assessment of suitability, adequacy and clarity of the question subject to an abrogative referendum is necessary to: a) individualize the goal to be achieved, b) adjusting the outcome of the referendum; c) to compare the results deriving from the first two points (*see decision no.26/1981, no.45/2005; no.16/2008*).

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<sup>30</sup> For example, are excluded by being subject to a referendum laws authorizing the ratification of international treaties, what shall be interpreted that are, also, excluded laws that provide for the execution of these treaties. Another example of exclusion from being subject to an abrogative referendum the issue on immigration of extracommunity citizens, considering this an obligation deriving from the Community law, in particular the Convention and the Schengen agreement, i.e. the Treaty of Amsterdam.

The request for a referendum is an act devoid of motives, since the objective of signatories does not derive from declaring their purpose, but only from the purpose included in the question of the referendum, i.e. the goal objectively attainable resulting from the relationship between the norms subject to abrogative referendum and those that will result after abrogation. In other words, the question is interpreted exclusively on the basis of its formulation and considering the impact of the referendum on the normative framework (see decision no.25/2011).<sup>31</sup>

### **The dilemma of the reception by Albanian Constitutional case-law of referendum request admissibility criteria elaborated by other Constitutional Courts**

The comparative law has been largely used in the Albanian constitutional case-law in general. Considering the age of the Constitutional Court in Albania, established in 1992, as well as the age of the Constitution, approved in 1998, it is understandable that the constitutional and legal vacuum needed models of reference in order to best shape the Albanian constitutional order, as well as to “furnish” it with best values and standards.

The Albanian Constitutional Court, in assessing the limits of the constitutionality review of the request for an abrogative general referendum has been referred to the constitutional provisions. Article 152, paragraph 1 and 2 provides that the Constitutional Court is the body charged with the power to review, through a preliminary screening (*ex ante*), the constitutionality of the issues listed expressly in constitutional provisions.<sup>32</sup> The framers of the Constitution have excluded two categories of issues that cannot be voted upon in a referendum, therefore, from being subject to the *ex ante* constitutional review: *first*, issues or draft-laws of special importance, but without mentioning the criteria to be met by an issue/draft-law in order to be classified as such; *second*, issues related to the territorial integrity of the Republic of Albania, limitations of fundamental human rights and freedoms, budget, taxes, financial obligations of the state, declaration and abrogation of the state of emergency, declaration of war and peace, as well as amnesty; *third*, the importance of special issues. In addition to the requirements related to the nature of the issue, another restriction for holding a referendum is related to the time, i.e. a referendum upon the same issue cannot be repeated before 3 years have passed since it was held.

In the light of the 2003 constitutional case-law on abrogative referendum, constitutional analyses have been largely based on the case-law of Italian Constitutional Court and that of the Federal Constitutional Court of Germany, as well as in their constitutional

<sup>31</sup> The request for the admissibility of the referendum for the abrogation of article 15 of law “The choice of the management and procurement procedures”, Legislative Decree of April 3, 2006, no.152 (Environmental Regulations), as amended by article 2, paragraph 13 of Legislative Decree January 16, 2008, no.4, amended by section 12 of the Decree of the President of the Republic September 7, 2010, Article 168.

<sup>32</sup> See articles 150, paragraphs 1 and 2, articles 151, paragraphs 2 and 3, and article 177, paragraphs 4 and 5.

and legal requirements. While in 2013 decision the constitutional analyses were based only in assessing the existence of constitutional bans in direct reference to the Albanian Constitution; therefore, making no reference neither to further developments of the European case-law, nor to the legal requirements of self-sufficiency or clarity of the request.<sup>33</sup> A justification for this could be the results of the constitutional review, i.e. in 2003 the request for holding a referendum was found contrary to the Constitution; therefore, more arguments were needed for its rejection, while in 2013, the CC assessed the request as being in compliance with the Constitution, by accepting the request and paving the way to holding an abrogative referendum.

In the light of the above findings, reference to the doctrinal developments of other European countries as well as to the European constitutional case-law has served to solve difficult problems, to think more clearly, to revive the hidden potential energy, to enlarge perspectives, to enrich arguments, to pay attention to the specific issues that might, in other circumstances, would be ignored.<sup>34</sup> In this context, there shall be no more dilemma on incorporating "others' best standards" fearing that this could affect the context of constitutional decision making, due to the fact that comparative approach has always contributed to ensuring a common understanding of values and standards, as well as to the consolidation of Albanian constitutional case-law, without interfering with its own identity in the constitutional design.

## Conclusions

The analyses of the Albanian constitutional and legal framework on referenda, in general, and abrogative referenda of a law or part thereof, in particular shows that there is a need for further revision in order to ensure consistency in the constitutional order. The lack of the referendum culture in Albania is a determinative factor for increasing public awareness, but also a reason for adaption of the comparative approaches outcomes in order to ensure the mechanisms and guarantees necessary for an effective democracy, be it representative or a direct one. In this regard, the role of Constitutional Court and its case-law becomes of a crucial importance as a tool for increasing the referenda culture and shaping the constitutional order, as well as a

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<sup>33</sup> In 2003 the CC interpreted the first criteria as a prerequisite for the acceptance of abrogative referendum request has been defined as a prohibition provided for in the Electoral Code which is in harmony with the constitutional principle of representative democracy. In this regard, if, after the abrogation of the law by referendum, the remaining part of the law would not be self-sufficient, then there would be a legal vacuum, a situation that obliges the legislator, against his will, to fill this vacuum. This situation, if repeated often, would violate the fundamental principle of parliamentary democracy and the key principle of the rule of law, namely, the principle of legal certainty. While the criteria of "*the question/issue formulated in a clear, complete and unequivocally manner and in a way that voters be able to answer "YES" or "NO"*", takes significant value not only as a main source for the orientation (right or wrong) of 50 thousand voters on referendum day, but, especially, to the result of the referendum if the intention of the initiators, the understanding of the issue/question and the outcome of the referendum goes in the same direction (see decision no. 31/2003). See for more the dissenting opinion of judge V.Tusha in decision no.8/2013

<sup>34</sup> Gustavo Zagrebelsky, 1956-2006 *Cinquant'anni di Corte Costituzionale*, Corte in - politica, Vol. III, 2006, pgs.1790-1976

qualitative source of standards and values. Still, reference to the constitutional case-law of other European countries is a must; therefore no dilemma or fear of losing its own identity shall exist on that regard.

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