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The Greek referendum of July 5, 2015: on legitimacy and state credibility

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Abstract: The Greek bailout referendum of July 5, 2015 has been in the spotlight for quite a long time, particularly because of its significance for the state's fate regarding its stay in the European Union (EU). The referendum has attracted extensive theoretical discussion regarding its political implications. This was pretty anticipated, due to the state's bankruptcy, and the long-standing austerity measures imposed on Greece's citizens. The economic and political scenery in Greece was marked by this unprecedented, by European standards, crisis. From this perspective, there has been a long debate over the credentials of rational decision-making by the Greek people, as well as the following governmental moves in negotiating with the state's lenders. On the contrary, little attention has been paid on the legal aspects of this referendum: 1) issues of constitutionality; 2) legitimacy; 3) the state's international credibility have been sidestepped. These are the major axes of this research.

Keywords: constitutionality; Greek bailout referendum; judicial review; legitimacy; state credibility; decision-making; participatory democracy; direct democracy; European Union; economic crisis.

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1 Introduction

1.1 *The referendum under the lens of the Greek constitution*

The Hellenic Republic, according to Art. 25 of its constitution is a state abiding by the social rule of law. Although this preliminary remark is axiomatic or self-evident, it serves as a means of intra-constitutional control. In other words, it is the Greek constitution's benchmark, posing an informal constitutionality test regarding the interpretation of the rest constitutional provisions (Eleftheriadis, 2005). In turn, this means that invoking a constitutional provision is not by definition within the realms of the Greek constitution. Hence, a constitutionality test cannot be neglected.

1.2 *Referenda according to Art. 44 Para. 2 of the Greek constitution*

As far as referenda are considered, the Greek constitution provides for two types, both in Art. 44 Para. 2. According to it:

“The President of the Republic shall by decree proclaim a referendum on crucial national matters following a resolution voted by an absolute majority of the total number of Members of Parliament, taken upon proposal of the Cabinet.”

“A referendum on bills passed by Parliament regulating important social matters, with the exception of fiscal ones shall be proclaimed by decree by the President of the Republic, if this is decided by three-fifths of the total number of its members, and as the Standing Orders and the law for the application of the present paragraph provide. No more than two proposals to hold referendum on a Bill can be introduced in the same parliamentary term.”

“Should a bill be voted, the time-limit stated in Article 42 Paragraph 1 begins the day the referendum is held (Hellenic Parliament, <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>).”

The first type (Art. 44 Para. 2a') concerns referenda related to a crucial national matter. The parliament takes a decision for such a referendum with plain majority (150+1 mps) after a proposal by the cabinet. The second type (Art. 44 Para. 2b') relates to draft laws that have already been adopted by the parliament on an issue of particular social concern. In this case, although the parliament has voted on the draft, excessive social disapproval that may occur between the legislation's vote and its enactment, might lead to a referendum. In other words, the law is not implemented until the referendum is taken.

The second type covers the rare case, when a decision by the parliament encounters strong social opposition. In modern Greek history this type of referendum was about to be applied only once, when the parliament voted on legislation that would exclude citizens' religion as constituent part of their identity cards. Although this political decision was in alignment with European standards, religious leaders expressed their severe opposition and called the public to protest. In the end, the referendum was not taken since the then government provided assurances to leader of the prevailing religion (see Art. 3 Greek constitution) that identity exclusion would not diminish their role in the public sphere (Hirschon, 2009).

As far as the proclamation of a referendum of the second type is concerned, it requires a proposal by the cabinet and an increased majority of three fifths of the

parliament (180 mps). Finally, the second type expressly excludes fiscal issues of its scope of application. This is quite logical, since the constitutional legislator aimed at excluding the draft acts of the state's annual budget of this referendum's scope of application, to safeguard the smooth and uninterrupted operation of the state's administration (Spyropoulos et al., 2017). This exclusion is precisely an issue of concern, and has raised theoretical debates when the referendum of July 5, 2015 was announced. The question posed to constitutional lawyers is whether fiscal issues can be a question of the first type referenda relating to crucial national matters, given that there is an explicit mention only for the referenda of Art. 44 Para. 2b'. This question predated the 2015 referendum, giving rise to two different lines of argumentation on a theoretical basis. On one hand, the grammatical interpretation, which has the lead when a written constitution is at stake, suggests that the constitutional legislator did not aim at excluding fiscal issues from the first type referenda, since they qualify as 'crucial national matters'. Otherwise, they would be expressly mentioned in both sentences of Art. 44. According to this course of thinking, questions on fiscal issues may be posed by the first type referenda. This a *contrario* interpretation is consistent, yet over-simplistic, for at least three reasons.

First, both types are provided in a single article. If a systemic interpretation is applied on Art. 44 overall, this will lead to the definite conclusion that fiscal issues are excluded *ratione materiae* from both types of referenda. What is more, it is argued and widely accepted by constitutional theory, that the first type enjoys some kind of qualitative supremacy over the second; this is why the constitution requires an increased parliamentary majority for the second type of referenda. In other words, in order for a question to qualify as an important social matter, there needs to be agreement at least between two parties in the parliament. Secondly, following this line of argumentation, if fiscal issues are excluded from the second type, then *a fortiori* questions pertaining to them cannot be posed through a first type referendum. The second proposition relies exclusively on the qualitative supremacy of first type referenda over those on important social matters. Traditional constitutional interpretation relates directly first type referenda with issues of polity and state organisation, or issues relating to national defense and warfare. From this angle, any social question, no matter how important it might be for the state, does not reach the significance of a crucial national matter. Accordingly, it is widely accepted that important social matters are anything but questions pertaining to polity, or territorial sovereignty (Margaritis, 2014).

Finally and most importantly, special emphasis is given on the placement of Art. 44 within the body of the Greek constitution. The Greek constitution is a concrete legal document, as most written constitutions; therefore, the order of sections and provisions plays a cardinal role to its systemic interpretation. In this context, Art. 44 is placed under the section providing for the executive powers of the President of the Republic. At this point, a brief historical digression is necessary. The President of the Republic is under Art. 26 of the Greek constitution both the head of the legislative, as well as of the executive branch (Hellenic Parliament, <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20agglisko.pdf>). Although, his/her powers are of a purely symbolic character, there are still some provisions in the Greek constitution which echo the state's previous type of governance. Before 1975, when the present constitution was put in force, Greece was under a crowned parliamentary democracy. The King was in command of the army, and also head of the state's foreign affairs office. The remnants of this system of governance are few constitutional provisions which provide that the President of the Republic is in command of the army in

times of war, and also that he/she represents the state in its international affairs. Further, the President of the Republic gets a leading role in times of war, or when the public order is vehemently disturbed. Art. 44 relates to the powers vested on the President of the Republic in case of a national emergency (Kouroutakis, 2019). Therefore, referenda are not a typical form of decision-making according to the Greek constitution, but rather an exceptional scenario. As such, it is doubted whether fiscal issues can fit in this section at all.

The above arguments raise a particular concern of constitutionality regarding the referendum of July 5, 2015. The exact wording of the question to the public leaves no doubt that the referendum was on the acceptance or not of the fiscal terms set by the state's lenders after its bankruptcy. More specifically, the question was:

“Should the plan of agreement be accepted, which was submitted by the European Commission, the European Central Bank, and the International Monetary Fund in the Eurogroup of 25.06.2015 and comprises of two parts, which constitute their unified proposal? The first document is entitled “Reforms for the Completion of the Current Program and Beyond” and the second “Preliminary Debt Sustainability Analysis.”” (Hellenic Republic, 2015)

The referendum's content was undeniably fiscal, given it required the public to accept or not the terms of the unified proposal made by the state's lenders, the so-called ‘Troika’. This analysis regarding the referendum's constitutionality under Art. 44 Para. 2 is similar to an intractable puzzle. Although traditional constitutional interpretations (grammatical, systemic, or functional) pinpoint at the referendum's unconstitutionality, there are still considerable theoretical approaches which underline that the July 5 referendum is in full alignment with Art. 44 (Vlachopoulos, 2015).

These arguments are twofold. First, this referendum cannot be detached from the overall crisis Greece undergone during 2015. The state's bankruptcy prompted political instability and polarisation (Pervou, 2016). Since there is consensus on the state's sociopolitical turbulence during the referendum's declaration, one cannot dissociate this governmental choice from the surrounding atmosphere. From this point of view, the referendum touched upon a crucial national issue, cardinal to the state's sustainable recovery from the financial crisis. As a result, this is by definition an issue of concern for the population, as it was inextricably linked to the state's financial sovereignty (Kampmark, 2016). The second argument on this side, does not focus on the question posed by the referendum, rather it emphasises on the fact that referenda do not form a typical fact of decision-making according to the Greek rule of law, and they are systemically related to a state of emergency. Therefore, if Greece's fiscal crisis qualifies as an emergency, then a referendum is a possible constitutional option.

This legal approach described the country's situation at the time as a ‘financial state of emergency’ (Scheurman, 2000), supporting that Greece's financial hardship and distress was a peril to the state's political stability and social cohesion. Indeed, the state's situation translated to inability in forming a stable government, which in turn resulted in recurring elections. Although these conditions, tallied with social turmoil, led Greece on the verge of eruption, there are still far from the standard meaning of a state of emergency. For this reason, the view that Greece was under a state of emergency due to the financial crisis did not gain sufficient ground among theorists and was soon abandoned. Thus, both propositions follow a peculiar line of argumentation, as they deviate from the letter of the constitution and attempt a more dynamic, or creative interpretation of it (Bobbitt, 1980). Although their legal foundation is ambivalent, it is

undeniable that they consider ‘the relationship between law and society as a symbiotic’ one, the major driving force for the former’s interpretation (Tassopoulos, 1999).

1.3 Referenda and the role of the President of the Republic

The second aspect of constitutionality regarding Greece’s bailout referendum relates to the institutional role of the President of the Republic when a referendum is delivered to him/her by the President of the Parliament (Spyropoulos, 2017). More specifically, the Greek constitution provides that after the parliament decides on a referendum, the President of the Parliament delivers the decision to the President of the Republic, who is responsible to issue it in the state gazette. The President of the Republic is bound by the decision and has absolutely no discretion to challenge the Parliament. However, he/she is also obliged to review the typical legality of this decision (as opposed to its substantial). That is, he/she is obliged by the constitution to check if the requirements of Art. 44 Para. 2 are met.

In this regard, except from parliamentary majorities, the President of the Republic is able to exclude questions on fiscal issues, and refuse to publish the referendum decision in the gazette. Of course, this is highly improbable to ever happen, given the institutional weakness the President of the Republic bears in Greece (Tassopoulos, 2007). This institutional weakness does not stem from the body of the constitution as such; rather it stems from a long-standing approach towards the role the President of the Republic. This attitude on the institution’s role is owed primarily to historical reasons. More specifically, the institution of the President of the Republic substituted for that of the King. The latter had an active role in the country’s political life since he assumed and exercised legislative and executive power. The former king, Constantine II, was considered largely responsible for not averting the dictatorship of 1967: not only he did not mobilise the state against the junta, but he swore in the dictators, recognising them as the state’s official government. This momentum paved the way for regime change and political structure of Greece as soon as democracy was restored (Sulzberger, 1970). Although the restoration of democracy was accompanied by a constitutional revision stipulating that the President of the Republic shall be elected through an increased parliamentary majority requiring cross-party consensus, there was a subtle agreement of the Greek political world so that the President of the Republic would not have a decisive role that could allow a new democratic aberration (Papadaki, 2018).

Overall, the institutional gravity of the President of the Republic is lessened and there was no possibility of intervention during the process of the bailout referendum. Let alone, something similar had never happened in the Greek constitutional history. There was a single point of discussion regarding the role of the President of the Republic which attracted great interest: his previous occupation as a Professor of Administrative Law at the National and Kapodistrian University of Athens and the potential discomfort to proclaim a referendum whose constitutionality is dubious. Yet, his institutional role prevailed over his profession.

1.4 Referenda and issues of state sovereignty and European integration

The final question regarding the referendum’s constitutionality relates to the question potential discordance with Art. 28 Para. 3 of the Greek constitution. More specifically,

Art. 28 Para. 3, entitled ‘Rules of international law. international organisations’, provides that:

“Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.” (Hellenic Parliament, <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20agglisko.pdf>)

Art. 28 Para. 3 ends with an interpretative clause, according to which ‘Article 28 constitutes the foundation for the participation of the Country in the European integration process’. Evidently, Art. 28 clarifies how the concept state sovereignty is reconciled with the assignment of sovereign powers and competences to the EU, for the sake of integration (Contiades et al., 2019). The question raised was whether the content of the bailout referendum was in sheer contrast with the state’s obligations emanating from its membership in the EU, founded in Art. 28 Para. 3 of the Constitution. This argument lacks a solid legal establishment, since the normative and regulatory content of Art. 28 Para. 3 is specific; it is at least far-fetched to claim that Greece’s loan liabilities are the same as its European integration obligations.

Yet, there is a critical point regarding the referendum’s relation with Art. 28 Para. 3, given that a potential failure to reach agreement between Greece and the Troika would directly undermine the former’s participation in the EU. In other words, if the popular decision was well respected by the government during its subsequent negotiations with its lenders that would probably end up in Greece’s exit from the EU (Casanas Adam et al., 2018). This is the reason why the referendum was transformed into a ‘Yes’ or ‘No’ question to the EU by the campaigners of the two sides. In this context, it was thoroughly debated whether the parliament was vested by the Constitution with the power to question through a referendum the state’s stay in the EU (Mendez et al., 2014). This was more of a philosophical question, pointing at the referendum’s utmost importance, given that from a constitutional angle referenda are by definition meant to pose crucial questions. Thereat, not only there is no clash between the referendum and Art. 28 Para. 3 of the Constitution, but to the contrary it is typical that states’ participation in international organisations and the obligations they undertake to be referendum questions (Szczerbiak and Taggart, 2005).

1.5 The referendum’s constitutionality control

The referendum’s equivalent constitutionality was brought before the Greek Council of State (Simvoulío tis Epikrateias) on July 3, 2015. The Greek Council of State had to examine whether the Presidential Decree proclaiming the referendum (Hellenic Republic, 2015) alongside the prior proposal by the Cabinet met the Greek constitution’s requirements. The Greek Council of State issued decision 2787/2015 in plenary composition (Greek Council of State, Case 2787/2015). Its decision was awaited with a prospect of relief by all those who feared the referendum would signify the state’s exit from the EU. Nevertheless, the decision of the Greek Council of State was no surprise and did not change the course of history.

More specifically, the Court decided that the Presidential Decree proclaiming the bailout referendum is a governmental act, thus escaping its control (Greek Council of

State, Case 2787/2015), Para. 7). According to the national legal and judicial tradition, the term ‘governmental acts’ refers to a series of administrative acts of great political concern, related to the state’s higher political interests; it is their content which exempts them from judicial control, according to the principle of separation of powers (Art. 26 Greek Constitution). The Supreme Court has long abided by this line of argumentation when it comes, to issues on state immunities, international law, that is participation in international organisations and the implementation of their decisions (except for the EU), general elections, etc. (Pervou, 2013). The Court did not proceed to the referendum’s content, and found it had no jurisdiction to decide respectively.

This was an anticipated decision. The Council of State had the same reaction to the judicial review of referenda which were previously proclaimed. However, the Council of State’s decision reminded that even governmental acts, such as referenda, do not fully escape constitutional control. It mentions in the body of its decision that the results of the bailout referendum can be reviewed by the highest special court, according to Art. 100 Para. 1b’ of the Greek Constitution, which provides that:

- a special highest court shall be established, the jurisdiction of which shall comprise
- b Verification of the validity and returns of a referendum held in accordance with Article 44 Paragraph 2’ (Hellenic Parliament, <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>).

The Council of State’s reference functions more like a reminder of the constitutional options regarding the judicial control of referenda. All in all, this slight window opened by decision 2787/2015 cannot compensate for the judicial control deficit, which left unanswered serious matters of constitutionality, and did not resolve legal doubts at the time.

In addition, this judicial tradition to leave out of control acts of a great political concern has proven historically to affect Greece’s international relations (International Court of Justice, Case *concerning Jurisdictional Immunities of the State*, 2012). Judicial refusal which allows the state’s executive to pursue its policy without interventions, formulates the country’s state practice. Therefore, it shapes the perspective and expectations of other international actors for the state at stake (UKSC, *Miller and Anor, R (on the application of) v Secretary of State for Exiting the European Union*, 2017). As far as the referendum proclamation is concerned, there are two points. First, there has been harsh criticism on its proclamation by several international organisations, bodies, or public figures worldwide. The fact that the Presidential Decree escaped judicial control fortified a sense of insecurity of law permeating the Greek legal order, and reaffirmed how this referendum troubled the rule of law. Second, it demonstrated a doctrinal bewilderment regarding the handling of referenda both theoretically and judicially.

2 The bailout referendum and issues of legitimacy

Even if one concedes that the referendum’s constitutionality is a legal query difficult to puzzle out, there are issues of legitimacy that cannot be ignored. To begin with, there can be no reconciliation of the Greek legislation regarding the typical prerequisites required to hold a referendum with the bailout referendum of 2015. Although Act 4023/2011, entitled ‘Enlargement of direct and participatory democracy by holding a referendum’,

does not provide for a particular minimum period between the announcement of a referendum and the electorate's voting, it sets the legal provisions regarding time allotment for the opposing sides and stipulates that there will be sufficient debate which will safeguard the democratic character of the process (European Commission for Democracy through Law (Venice Commission), 2020).

Evidently, the threshold set by national legislation was not met by the five-day time limit of the 2015 referendum. In general terms, the national legislation provides for a time period of at least a month for general elections to be held. By way of induction, when decision-making is direct (as in the referendum) the electorate should have at least the same amount of time to decide. This short and pressing limit did not meet international standards either, which provide for a fifteen time lapse at least.

The Greek government was well aware of this temporal hurdle when they proclaimed the referendum. For this reason, they had to change the legal framework overnight. Act 4023/2011 was amended in order to fit in the short five-day period. This rather suffocating deadline jeopardised the holding of the referendum as such, since the ballots and rest material were ready in the nick of time.

The second issue of legitimacy relates to the framing of the referendum's question (European Commission for Democracy through Law (Venice Commission), 2007; Rocher and Lecours, 2017). National legislation leaves the content of the question untouched, yet it requires the question to be framed in clarity and consistence, so that the electorate is able to form a rational and solid decision. Theory also supports this legal requirement, for otherwise referenda may become potentially highly manipulative (Kang, 2003).

In the present case, the question of the referendum is not as plain as possible, for it refers to documents negotiated between the Greek government and its creditors. There are problems regarding the available translation of the documents, and most significantly the electorate's ability to understand and delve into the specialised terms and technicalities included therein. As a result, campaigns both on the side of Yes and No attempted to simplify the question and turned the referendum into a Yes or No to the state's participation in the EU. From this point of view, there are considerable doubts on the respect of the voters' right to information (Ruane, 1998).

Lack of information combined with the extremely short period to make up one's mind has severely diminished the quality of the debate. Overall, these shortcomings may well be argued that they damaged the democratic process (Clark, 1998).

3 International reactions on the Greek referendum

The international community did not reserve a warm welcome to the bailout referendum. The reservations expressed by the Secretary General of the Council of Europe, Thorbjørn Jagland, are of paramount importance, pointing at the referendum's typical deficiencies. The Secretary General stated to the press that the referendum 'has been called on such a short notice [which is] in itself a major problem' and also commented on the fact that 'the questions that are put to the people [...] are not very clear' (EKathimerini, online). These statements underline the issues of legitimacy expressed above, and are in full alignment with the reports of the European Commission for Democracy through Law of the Council of Europe (the well-known Venice Commission).

In this context, it becomes clear that the referendum did not meet international standards, while it also mitigated the national legal requirements set thereupon. Concerns expressed on an international level underpin the general impression that the bailout referendum was inherently problematic. However, all actors pointing at the referendum's lack of legitimacy were not in a position to push for a turnover. Given the very short period during which the electorate had to make their decision, such kind of statements, albeit correct in all their elements, did not provide any help. In addition, a more robust expression of dissent could have been interpreted as an intervention in matters which fall essentially within the domestic jurisdiction of the state (Wheatley, 2020). This was the major reason why the Venice Commission did not move to an official statement, and used diplomatic venues to remind of the risks the referendum posed.

4 Conclusions: referenda and state credibility

The Greek bailout referendum of 2015 undoubtedly begot great concerns, both in terms of constitutionality and legitimacy. Yet, the referendum took place and the electorate's decision came to wipe out all doctrinal concerns. Thus, the public vote had a corrective role too, since it 'legalised' the proclamation's defects *ex post facto* (Auer, 2016). The example of the Greek referendum brings forward three areas of reflection. First, the defects of a referendum cannot be overcome in the majority of cases, for fear of an unauthorised judicial or international intervention. Second, the constitutionality and legitimacy of a referendum reflects the state's international credibility. The same applies to a government's interpretation of the popular decision and whether it was well respected or not. Third, if there are the institutional counterweights to avoid a referendum's political instrumentalisation.

On the first conclusive remark, the Greek example is enlightening; it demonstrated that judicial review, or international interventions cannot deter the holding of a referendum problematic in its terms. The power of direct democracy and the appeal of a referendum to the general population take over any national and international check and balance system (Eule, 1990). However, the very fact that referenda are means of direct democracy, symbolising inclusiveness may turn to a democratic damage. This paradox arises due to their implicit significance for a democratic state, which hinders all institutional counterweights. In this regard, once a referendum is proclaimed its formal and substantive validity is practically impossible to review (Spyropoulos and Fortsakis, 2018). Thereat, their validity relies on the credibility of the respective government.

A government's credibility is not definitive of a referendum's validity only; rather it marks the state's international credibility too. More specifically, the way the proclamation and holding of a referendum is treated is indicative of the state's rule of law (Garrone, 2021). It demonstrates the relationship between the electorate and the government, as well as the levels of transparency and corruption. The same applies to the treatment of a referendum's results (Cheneval and Ferrine, 2018). That is, although there are mandatory and consultative referendums, people's will shall be respected at least in general terms. This is another troublesome point in the Greek example, since the emphatic 'No' of the electorate was overturned in the subsequent negotiations of the government with its lenders (Vasilopoulou and Halkiopolou, 2015). Greece's cautionary tale was used as a counter-argument to the UK's Prime Minister who declared that 'Brexit means Brexit, we are all Brexiters now' (Cowburn, 2016). The UK's example is

the exact opposite of the Greek one, given that the government respected people's vote, even though it was a thorny path, requiring a series of institutional changes (Goucha Soares, 2019).

The final conclusion of this research is that states which perceive referenda as a last resort tool have not developed such a constitutional culture (Morel, 2018). This conclusion is self-evident; yet it asks for further elaboration, regarding the tools and means which will allow a state's electorate to be capable of actively and effectively participating in direct democratic institutions. The cases of Ireland and Switzerland are exemplar; these constitutional systems have achieved to reach a high level of participatory democracy. In such cases, referenda are complementary to legislative lawmaking (Steams, 2012). However, this constitutional tradition cannot be easily transmitted to states where referenda are considered an extreme case scenario.

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