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Is the Greek referendum unconstitutional?

Afroditi Marketou*

It would be shocking if the Greek government announced an unconstitutional referendum. They, who had so much emphasized the need for constitutional legality in their critique towards previous governments and in their electoral campaign, they would now so violently and profoundly violate the Greek Constitution in its most fundamental feature: the way the Greek people expresses its sovereign will.¹

The arguments of unconstitutionality

After the announcement of the referendum on Saturday 27 June by the Greek Prime Minister Alexis Tsipras, virtually all Greek constitutionalists and other public personalities rushed to express their opinion on the constitutionality of such a move. Expert opinions, expressed inside and outside Parliament, by people possessing the expertise or not, attracted high publicity in public debates and arguments on the unconstitutionality of the referendum have been touted by the media.

Article 44 paragraph 2 of the Constitution declares:

“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 the 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, following a proposal of two-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 a 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.”²

The constitutional procedure chosen by Government requires proclamation of the referendum in a presidential decree, following a resolution voted by the absolute majority of MPs. The argumentation for the unconstitutionality of the referendum was comprehensively presented by Venizelos, a well-known Greek constitutional law scholar, and the representative of PASOK (Socialists) in the parliamentary debate preceding the voting of this resolution. Introducing his party's objection of unconstitutionality -supported by ND (Right)- Venizelos used harsh language: in his words, the proposition for referendum was an “institutional deviation”, entailing “multiple and manifest unconstitutionality”, it

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Article 1 of the Greek Constitution, a non-amendable provision according to article 110, declares that popular sovereignty is the fundament of the Greek parliamentary democracy.

² Source of translation <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20agglisko.pdf>

circumvented constitutional provisions and ultimately constituted “an attempt to impose a putsch”.³

In Venizelos’ view, referenda for a “crucial national matter” according to article 44 can only concern the foreign affairs of the country or its security and defense policy. In any case, they cannot concern fiscal issues. This is prohibited by the second paragraph of article 44 and by article 80 paragraph 2, declaring that the minting and issuing of currency shall be regulated by law. To the vision of the referendum as a direct democratic expression of the people, Venizelos responded that popular sovereignty should be expressed according to the standards of European legal civilization which are not fulfilled in the present case. According to him, the tight deadlines imposed by the Government were violating constitutional procedural rules and left no time for public dialogue in order for the people to acquire a comprehensive knowledge of the issue at stake, and no time whatsoever for the organization of the procedure. Venizelos also invoked article 28 of the Constitution and its interpretative clause, drafted by himself fifteen years ago, which constitutionally embeds the European orientation of the country. In his view, the referendum, putting at stake the Greek membership to the Eurozone and the EU, violates article 28. An eventual negative decision would be equivalent to drawing away from Europe. It would thus overturn an historical *acquis* for Greece, through a decision taken only by a simple majority of the Greek people and not by the qualified majorities required for constitutional amendments.

The final argument on the unconstitutionality of the referendum concerns the vagueness of its question. The referendum question is formulated as follows:

“Should the draft agreement submitted by the European Commission, the European Central Bank and the International Monetary Fund to the Eurogroup of 25.06.2015 and consisting of two parts, constituting their unitary proposition, be accepted?”

The first document is titled “Reforms for the Completion of the Current Programme and Beyond” (followed by the Greek translation) and the second “Preliminary Debt Sustainability Analysis” (followed by the Greek translation).⁴

The possible answers are “NOT APPROVED/NO” or “APPROVED/YES”.

Venizelos maintained that the question was actually unknown to the Greek people and Parliament, since the documents to which it was referring were inexistent, or at least unofficial and invalid. The true question that the Government was hiding behind this referendum was whether the Greek people wants the country to remain in the Eurozone or not, whether it wants euro or drachma. If the question was really about a draft agreement, it was the Government’s proposition that should be submitted to the people’s scrutiny.

Other constitutionalists and lawyers expressed similar opinions,⁴ while others emphatically denied the unconstitutionality of the referendum.⁵ Some MPs and the media actually called

³ See the video of Venizelos’ speech in Parliament, <https://www.youtube.com/watch?v=pQV9sE1BNAE>.

⁴ See for example Nicos Alivizatos, “Referendum or deviation? [in Greek]”, *Kathimerini*, 28 June 2015, <http://www.kathimerini.gr/821262/opinion/epikairothta/politikh/dhmoyhfisma-h-ektroph>; see also the relevant voting by the Athens Bar Association, <http://www.dsa.gr/>

⁵ See Ioanna Bratsiakou, “Referendum: Two constitutionalists give all the answers to NEWS247 [in Greek]”, *news247*, 27 June 2015, <http://news247.gr/eidiseis/politiki/dhmopshfisma-2-syntagmatologoi-dinoyn-oles-tis-apanthseis-sto-news247.3550545.html>

upon the President of the Republic –a public law scholar himself- and the Council of State to impede the realization of this referendum in the name of the Constitution.⁶

Is thus the referendum unconstitutional, or even an attempt for a putsch?

The Greek referendum is NOT unconstitutional

Referenda have been very rarely used in Greek politics. The last time that a referendum took place, in 1974, the Greek people rejected monarchy and expressed their will that the Hellenic Republic be an uncrowned democracy. Even more rarely have referenda been used sincerely, as a way for the Greek people to sovereignly express its will. Rather, they have been an opportunistic tool in the hands of authoritarian regimes, sure about the answer that they would get, but willing to legitimize their policy. Since 1974, parliamentary democracy in Greece has functioned without the need of recourse to the direct expression of the people's will. The announcement of a referendum -that was really going to take place- by Tsipras was thus *per se* a shock for the Greek political world.

However, this move took place in very particular circumstances from the point of view of constitutional politics. The last five years, Memoranda of Understanding (MoU) have been determining with considerable detail the content of governmental policy in virtually all of its domains. These *sui generis* emergency legal instruments, agreed between technocrat institutions and governments lacking the democratic legitimacy to do so, have been implemented through emergency acts and procedures and have considerably undermined the role of Parliament in policy decision making. Even the most clear and formal constitutional provisions have been occasionally violated or circumvented. The time line for democratic decision making within Parliament has been constantly tight, determined by the review missions of the troika. Political decision making has rather resembled a huge technocratic operation; it has ceased to be transparent, since decisions have been taken in closed meetings of technical nature and political information has been exchanged through e-mails and USB sticks, full of foreign and incomprehensible economic terms and acronyms. The way the MoU have been operating within the Greek constitutional order might be indeed characterized an institutional diversion. Yannis Drossos, a moderate constitutional law scholar has talked about "a turning point" in the functioning of the Greek polity,⁷ while many others have repeatedly denounced the *de facto* abolition of the Constitution.⁸

The Government's decision must thus be considered in this chaotic constitutional context. Though a rarely used instrument, the referendum is now mobilized by a democratically elected Government, after negotiations with its creditors reached a deadlock. Creditors rejected every proposition for alternative measures with equivalent fiscal effect to the ones

⁶ An action for the annulment of two administrative acts, part of the preliminary procedure for the conducting of the referendum has been brought before the Council of State, whose Plenary Session will meet extraordinarily on Friday 3 July 2015 to decide on the matter. However, it is difficult to see how these citizens will ground their personal and direct legal interest, which is a necessary condition in order to introduce proceedings before the Council of State. Further, the competence of the Court to rule on the matter is dubious, since relevant matters belong to the competence of the special election court.

⁷ Yannis Drossos, «Το 'Μνημόνιο' ως σημείο στροφής του πολιτεύματος [The 'Memorandum' as a turning point of the regime]», www.constitutionalism.gr, published in *The Book's Journal*, Vol. 6, April 2011, 42.

⁸ On this matter, cf. Afroditi Marketou and Michail Dekastros, Greece, <http://eurocrisislaw.eui.eu/>, especially the part "Changes to Constitutional Law".

that they propose and, appealing to their technocratic expertise, refused to concede to at least some core points of the Government's political programme. Signing the proposed agreement would again result in an MoU implemented by a Government which lacks the democratic legitimacy to do so, and would perpetuate constitutional deviation, if not lead to a political chaos.

On the other hand, a close and cool-headed look at the constitutional provisions on the referendum shows that there is nothing in the Constitution that prohibits it. Let us take the unconstitutionality arguments one by one.

Venizelos' interpretation of the term "crucial national matter" as concerning only foreign affairs and the country's security and defense has no constitutional basis and no other constitutionalist has adopted it. Besides, the 1974 referendum did not concern such matters either. As to the argument based on article 80 paragraph 2 of the Constitution, declaring that the minting and issuing of currency shall be regulated by law, the Government has repeatedly reassured the Greek people that the referendum will not determine Greek monetary policy.

Concerning the European orientation of the country and article 28 of the Constitution, the Government has constantly repeated that an eventual negative response to the measures proposed by the creditors would not entail exit from the Eurozone, even less the EU.⁹

The most commonly repeated argument for the unconstitutionality of the referendum is that the Constitution prohibits a plebiscite for fiscal issues. However, this prohibition exists *only for bills already passed by Parliament*, which is not the case with the creditors' propositions. Apart from the fact that these propositions have not been voted in Parliament, once "agreed" between the Greek Government and its creditors they would not constitute a bill, but only another MoU. The Council of State has ruled that MoU's do *not* have a legally binding nature: they are the political programme of the Greek Government, albeit in the form of staff level agreements with foreign officials.¹⁰ The substantial aspect of this argument is also flawed, since the distinction between "fiscal" and "non-fiscal" issues is difficult to make. It is generally admitted that the MoU, though basically containing austerity policies, which could be characterized as fiscal issues, in reality determines *every aspect of governmental policy*.

Finally, concerning the objections as to the tight deadlines and to the question of the referendum, the Constitution *does not contain any particular procedural requirements*. Indeed, scholars who reiterate these arguments do not invoke any constitutional provision. In reality, it seems that the referendum will be normally conducted and it actually contains a clear question to which people should answer yes or no (no or yes).

Why do then expert constitutionalists howl the unconstitutionality of Tsipras' proposition? While reading their comments, one should not forget that most Greek constitutionalists have a clear political affiliation; needless to say, then, that their expert opinion often coincides with the line of argument expressed by their party. On the other hand, arguments on constitutionality strongly influence public opinion. Ironically, this is due to the attachment of the Greek people to the Constitution, as well as to the impression of

⁹ I will not comment the absurdness of the comparison between the qualified majority in Parliament required by the Constitution and the simple majority of the Greek people.

¹⁰ Cf. decision no. 668/2012 by the Greek Council of State Plenum, 20 February 2012, <http://www.dsanet.gr/Epikairothta/Nomologia/668.htm>

objectivity and truth of expert constitutional interpretation. In Greece thus the Constitution has been typically used as an ideological tool.

In other words, the objections raised to the referendum are not constitutional but rather *political*. Is it important that the papers to which the referendum refers are not valid propositions? Yes, if you care about the concrete (fiscal) measures to which the Government will agree; no, if you think that the question is one of technocratic vs. democratic political decision making. Are the real consequences of the referendum known? No, but that is rarely the case. There is always much at stake in a referendum, especially when crucial national matters are under negotiation. Would posing the dilemma “euro or drachma” be better? Yes, if you consider certain that Greece’s Eurozone partners will eject the country from the Eurozone in case of a “no”. It is doubtful whether a European idealist would say so, however, since an eventual “drachma” answer would end all negotiations and would lead a whole European people to definitively reject the euro. Is one week not enough for organizing a referendum and for informing the people on the matters at stake? It is not, if you think that the public debate in Greece is unbiased and democratic, and that it can actually lead to profound information of the people on the current situation and on its eventual consequences. However, if you lived in Greece during the last days, and if you perceived the bank closure and capital controls as blackmail, you might consider that one week is very, very long.

We could go on like this, asking questions and giving two opposing views, corresponding to the polarized ideologies in Greek society. In any case, the Greek referendum is NOT unconstitutional. One might politically disagree with its consequences, the dilemma that it poses, its timeliness or the way that the eventual answers will be used by the Greek Government. But one cannot really talk about constitutional or institutional “diversion”. Those who call upon the President of the Republic or the Council of State to cancel this referendum in the name of the Constitution, vest their political complaints with an objective garb of expertise and call for highly political and clearly undemocratic interventions.