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Law making citizens' initiatives and the constitutional law in Albania (legislation, jurisprudence, practice)[1]

ABSTRACT

The constitutionalization of the referendum and law making citizens' initiatives makes them important institutions and also important tools for exercising direct democracy. The question that arises today is the effective usage of these tools, in the framework of enhancing the direct participation of the citizens in governance. Particularly, in countries like Albania, which represents one of the newest democracies established after the fall of the Communist regime in Europe, the exercising of these instruments encounters different challenges, coming up especially due to lack of traditions and practices in exercising direct democracy, legislation vacuum and the insufficiency of organizational experiences of the civil society. Nevertheless, some experiences in particular have been achieved in the last 15 years, after the current Constitution of the Republic of Albania was enacted. Out of the direct democracy instruments that are sanctioned in the Constitution of the Republic of Albania, this paper will focus only upon the law making citizens' initiative and on the abrogative referendum initiative, as well. Legislation, jurisprudence of the Constitutional Court and some other issues identified through the experiences established in Albania will be treated in this paper. These experiences are analyzed in a comparative point of view with the experiences of other countries, particularly Italy.

Keywords: law making citizens' initiatives, abrogative referendum, direct democracy, direct participation in governance

[1] This work is published based on the same paper presented at the IXth World Congress of IACL (2014).

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Obywatelska inicjatywa ustawodawcza i prawo konstytucyjne w Albanii (ustawodawstwo, orzecznictwo, praktyka)

STRESZCZENIE

Konstytucjonalizacja referendum oraz prawo obywatelskiej inicjatywy ustawodawczej stanowią ważne narzędzia demokracji bezpośredniej. Rodzi się pytanie, czy w celu zwiększenia bezpośredniego udziału obywateli w rządzeniu narzędzia te są skutecznie wykorzystywane. Szczególnie w krajach takich jak Albania, która jest jedną z najmłodszych demokracji utworzonych po upadku reżimu komunistycznego w Europie, wykorzystywanie tych instrumentów napotyka różne wyzwania wynikające przede wszystkim z braku tradycji i praktyki demokracji bezpośredniej, braków w ustawodawstwie oraz niewystarczającego doświadczenia organizacyjnego społeczeństwa obywatelskiego. Niektóre z tych wyzwań, którym sprostano w ciągu ostatnich 15 lat od uchwalenia obecnej Konstytucji Republiki Albanii, są przedmiotem badań przedstawionych w artykule. Z instrumentów demokracji bezpośredniej przewidzianych w Konstytucji Republiki Albanii, artykuł koncentruje się na obywatelskiej inicjatywie ustawodawczej oraz referendum abrogacyjnym. Ustawodawstwo, orzecznictwo Trybunału Konstytucyjnego i niektóre inne problemy wynikające z albańskiego doświadczenia poddawane są analizie porównawczej w odniesieniu do doświadczeń innych krajów, w tym zwłaszcza Włoch.

Słowa kluczowe: obywatelska inicjatywa ustawodawcza, referendum abrogacyjne, demokracja bezpośrednia, udział bezpośredni w rządzeniu

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1 INTRODUCTION

Referring to the Constitution of Albania, the term „direct democracy" is more suitable than the term „democracy of referendum"[2]. This is a reflection after reading Andreas Auer's opinion that: „The direct democracy is characterized from the fact that the people are a state organ that besides the classic electoral competences, exercises as well as specific attributes in the constitutional, conventional, legislative, or administrative field"[3]. By this definition, it is clear that direct democracy attributes to the people, as an „organ", not only competences to elect periodically their own representatives, in the central and local authorities, but also the right to exercise other „competences". So, in Albania, people have the right to a referendum and can vote in it (article 150.1 of the Constitution); can exercise the law making initiative of the citizens (article 81.1 of the Constitution); have the right to address complaints to the public organs (article 48 of the Constitution). For the election of the Head of the State, unlike the majority of the democratic states newly created after the fall of the Communist regime, the Albanian voters do not vote directly, because the Head of the State is elected by the Parliament (People's Assembly).

Among the mechanisms created by the Constitution, the law making citizens' initiative to approve a law and the right to a referendum to abrogate a law, are two of the most important instruments that make the materialisation of direct democracy possible. The Constitution of Albania creates these two opportunities, as two important directions for the participation of the people in governance, thus: in one side, it is the law making citizens' initiative, which can act on a preliminary basis, to encourage and to initiate necessary solutions from the Parliament and on the other side, it is the legislative abrogative referendum, through which the people intervene directly to contest and to cancel the will of the Parliament, when an abrogative

[2] In the current Constitution of Albania it is sanctioned that: „The people exercise sovereignty through their representatives or directly" (article 2.2). In the Constitution there is a slight difference as compared to the Constitutional Law No. 7491, dated on 29.04.1991, „Law on the Major Constitutional Provisions", which confirmed the Referendum as an instrument to exercise the direct democracy, by stating that: „The people exercise sovereignty through their representative organs and the referendum as well" (article 3).

[3] See: A. Auer, La justice Constitutionnelle et la democratie referendaire, Rapport de synthese, *Justice Constitutionnelle et democratie referendaire*, Conseil de l'Europe, 1996, p. 168.

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referendum is formalized through a law. As a matter of fact, so far, these initiatives are mostly considered as an intervention in the legislative power, or as „complementary" to that. The Constitutional doctrine has continually emphasized this point of view. There are authors who see such initiatives in relation to the power of the representative organs, as an instrument to eliminate the inactivity of their members, or in order to balance them[4]. But, taking into consideration the recent tendencies of the Constitutional debate on the new separation of the powers, this point of view wouldn't be considered a completed one. Perhaps, it is time for deeper analyses. Such analyses can draw the conclusion that the effective usage of these instruments is not related only to the legislative power, but it influences directly in the separation and in the balance of the three powers. Such conclusion is achieved by studying the doctrine of „new separation of powers, as a current characteristic of the democratic systems of governance"[5], the opinion „on rising of new powers"[6], the doctrine on „powers" and „counter-powers" and the role of other institutions that intervene in the classic separation of powers[7]. Law making citizens' initiatives and all the institutions of direct democracy foreseen by the Constitution, which are exercised effectively, undoubtedly influence the separation and the balance of powers. So, it is necessary to focus the debate on their role and on the new dimension of the separation of powers.

The law making initiative of the citizens is now sanctioned in the European regulation. After the changes made by the Lisbon Treaty in 2009, it is explicitly stated that: „Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider

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[4] See: V. Pajo, The culture of referendum in Albania: Technical and theoretical reflections on the abrogative referendum, *Academicus. International Scientific Journal*, No. 9/2014, p. 29.

[5] M. Troper, *Le nuove separazione dei poteri*, Napoli 2007; B. Ackerman, La nuova separazione dei poteri (Presidenzializmo e sistemi democratici), Roma 2003; taken from L. Omari, *Ndarja e pushteteve dhe pavarësia e institucioneve Kushtetuese*, Tirana 2011, p. 49.

[6] G. Vrabie, *La trinité des pouvoirs aujourd'hui. Un point de vue*, Le VIII eme Congres Mondial de l'AIDC, Mexico 2010, Website: http://www.juridicas.unam.mx/wccl/fr/g14.htm, visited for the last time on 18.04.2014.

[7] See: A. Anastasi, *Doctrinal developments for a revised principle of the separation of powers and constitutional case law*, in: „Separation and balancing of powers. Role of constitutional review", Tirana, on June 7–8, 2012.

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that a legal act of the Union is required for the purpose of implementing the Treaties"[8]. It is obvious that the direct initiative of the European citizens represents a new dimension of democracy itself, within the framework of the EU. Thus, the public debate on the European politic will increase, expanding the European public space. Since 2009, the Green Book (COM (2009)622)[9] has been enacted, which contains important rules for making these initiatives possible.

A new point of view upon these instruments is influenced from present day development to enhance the rights for participation of the citizens in the governance of the country. Development of the rights for participation is continuously encouraged, not only by the interest groups, but also by the legislative development. The rights for participation of the citizens in the governance are also encouraged by the continuous development of technology. Currently, the right of participation is considered closely related to the parliamentary right and it has requested the enhancement of legal envisagement in the regulation of the parliaments to guarantee these rights[10]. It is also foreseen in the framework of the specific laws that regulate the publicity of works during drafting and approval of the legal and sublegal acts by means of modern technology, aiming to ensure that the public has knowledge and access to express opinions and suggestions[11]. Under such conditions, the study of the Constitutional institutions of direct democracy is necessary, in order to relate them to the rights of participation in the governance of the country. Furthermore, in the juridical literature different opinions are expressed. Some of them consider the law making citizens' initiative as an instrument of the right of participation[12], while some others

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[8] Lisbon Treaty; 1 December 2009; art. 8B, Par. 4.

[9] C. Bova, *Il diritto d'Iniziativa dei cittadini europei ed i confermati limiti dell'iniziativa legislativa popolare in Italia*: http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/euroscopio/note_europa /0008_bova.pdf, last accessed on 02.09.2014.

[10] See: D. Piccione, *Gli istituti di partecipazione nei regolamenti parlamentari all'avvio della XVII legislatura:cronaca di una riforma annunciata, ma ancora da meditare*, in the website: http://www.associazionedeicostituzionalisti.it/sites/default/files/rivista/articoli/allegati/OSSERVATORIO_D.Piccione.pdf.

[11] The Albanian Government is discussing upon the preparation of the draft-law „On consultation and public notification" (2012).

[12] See: *L'iniziativa legislativa popolare in prospettiva comparata, Seminario di studi e ricerche parlamentari 'Silvano Tosi'*, Universita degli studi di Firenze, 2013, published in the website: http://www.centrostudi-parlamentari.it/index.php?option=com_docman&Itemid=0&task=doc_download&gid=346&lang=it, on 18.04.2014, p. 136–137.

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are different[13]. Meanwhile, there are authors who consider the direct legislative initiatives as institutes of the representative democracy[14]. A comprehensive study of such opinions will bring us to proper conclusions and lessons in relation to the relations between them.

Now that the referendum has become the main instrument of exercising direct democracy by people, it is evidenced that they cannot exercise such an instrument without the necessary organisms. This is the reason why the Constitutions after the World War II explicitly constitutionalized political parties, as forms of the political organization of the people, in order to exercise the sovereignty through their representatives. The Italian Constitution in particular (1948) and the Constitution of the French Fifth Republic (1958), are clear examples of this constitutionalism. But, the citizens also apply pressure upon the governance policies by being part of other organizations, which are protected by the Constitution as well, through the sanctioning of the right to be organized. It is true that the instruments of direct democracy foreseen in the Constitution and the laws that regulate the exercising of these initiatives are addressed to „voters", or to the „citizens having the right to vote", or to the „people" as an „organ"[15]. In practice, the experience has proved that different organizations and Trade Unions have encouraged civic initiatives and have acted as a very important factor to completely realize such initiatives. Nevertheless, such a role is not reflected in the laws, or in the initiation of the Constitution control related to them.

Observing the Albanian Constitutional practices over the last 15 years, after the assumption of the current Constitution of Albania, it is evident that the law making citizens' initiative was only exercised once, in 2006[16]. It is worth mentioning that during all the period of the democratic transition, since the fall of the Communist regime, this is the only initiative successfully crowned. Some previous attempts of the civil society organizations to exercise the law making citizens' initiative could not be fulfilled. While

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[13] See: D. Piccione, *Gli istituti di partecipazione nei regolamenti parlamentari all'avvio della XVII legislatura: cronaca di una riforma annunciata, ma ancora da meditare*, in the website: http://www.associazionedeicostituzionalisti.it/sites/default/files/rivista/articoli/allegati/OSSERVATORIO_D.Piccione.pdf, visited for the last time on 18.04.2014, p. 1–2.

[14] *Ibidem*.

[15] A. Auer, *op. cit.*, p. 168.

[16] This initiative ended with the approval of the law No. 9669, dated 18.12.2006„On the measures against violence in family relations".

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in the framework of the abrogative legislative referendum only two initiatives were undertaken with the support of the Trade Unions and civil society organizations. None of these initiatives resulted in the organization of any referendum, due to different reasons which will be treated further in this paper. Besides the aforementioned facts, a doctrinal and media silence has almost continuously surrounded the Albanian environment, particularly related to the law making citizens' initiative. However, during the last year, it has activated the debate on the abrogative referendum in the political and juridical Albanian circles. It was an initiative for a referendum to abrogate some articles of the law No. 10463, dated 22.09.2011, „On the integrated management of the urban waste"[17].

If we refer to the compared studies, especially to the referendum experiences of Italy, we may notice a special development and attention for both of these institutes of direct democracy, especially after the seventies. These institutes are currently at the centre of an obvious political and juridical debate in Italy, but also in other countries having a known tradition and culture in relation to law making citizens' initiatives, such as Austria, Switzerland, Spain etc.[18]. Recent developments make comprehensive studies on the issue possible, by making use of the approach of comparison.

Nevertheless, the focus of this paper is limited. This paper aims to make the Albanian experiences in this field known, by analyzing the law making citizens' initiatives and the Constitutional rights during last 15 years period. By making use of the comparison with other countries experiences, particularly with the Italian Constitution due to the fact that the Albanian legislation and the jurisprudence of the Albanian Constitutional Court are mostly based upon it, this study aims to evidence the level of development of these institutes in the Albanian democracy and to help in drawing conclusions for the future.

[17] See: V. Pajo, *op. cit.*

[18] Seminario di studi e ricerche parlamentari 'Silvano Tosi', Universita degli studi di Firenze, 2013: http://www.centrostudiparlamentari.it/index.php?option=com_docman&Itemid=0&task=doc_download&gid=346&lang=it (18.04.2014).

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2

DIRECT LAW MAKING CITIZENS' INITIATIVE

By checking among the Albanian normative sources for the development of the direct law making citizens' initiative, it can be concluded that only two of them sanction this initiative. They are the Constitution and the Regulation of the Parliament. According to the Constitution, 20 thousand voters have the right to propose a law in the Parliament. This right is considered to be a law making initiative just like the right of the Council of Ministers and of every member of the parliament to propose laws (article 81 of the Constitution), without making differences between them. This fact brings us to the conclusion that, in principle, the law making citizens' initiative can propose all kinds of law besides the ones to change the Constitution (article 177 of the Constitution). The latter are undertaken only with the initiative of not less than one fifth of the members of the Parliament. Nevertheless, the Regulation of the Parliament, also foresees a difference when it envisages „the proposal of the amendments" (article 71 of the Regulation). Based on this article, every member of the parliament or the Council of Ministers has the right to propose reasoned amendments in a written form, which are presented during the review of the draft-law, the responsible Parliamentary Commission. If we consider the contents of the article, it can be noticed that it involves the amendments that are presented during the process of discussion and approval of the draft-law. That is why there are no obstacles to exercising the law making citizens' initiative in order to propose legal changes regarding the laws in power.

There are no specific provisions in the Regulation of the Parliament to norm the law making citizens' initiatives. But, by analyzing the provisions of the Constitution and the provisions of the Regulation of the Parliament in relation to all law making initiatives and in relation to the process of law making in general, we may encounter some conditions for the exercising of this initiative. Some of these issues were evidenced and were made understandable during the exercising of the initiative of 20400 voters for the approval of the law „On measures against violence in family relations". During the implementation of the procedures to present and to discuss that law, there were problems coming out of the legal vacuum, which were passed with the „good will" of the members of the parliament. Nevertheless such conditions can be easily put together in a list as follows: a. the minimum

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number of the proposers should be not less than 20000 voters (article 81 of the Constitution); b. The proposed laws should be drafted in the form of a normative act; should be followed by an explanatory material, which has to contain the objectives that are aimed through the approval of this law, the arguments explaining why such objectives cannot be achieved through the existing legal instruments, the compatibility of the draft-law with the Constitution, the approximation with the legislation in power and with the legislation of EU, as well as its social and economic effects (article 68.2 of the Regulation of the Parliament); c. If it is the case, proposing laws should be always followed with a financial report explaining the financial costs for the implementation of this proposed law in detail (article 82.1 of the Constitution); d. Failure to fulfil these requests legitimates the Head of the Parliament to send the proposed draft-laws back to the initiators, in a reasonable way (article 68.4 of the Regulation of the Parliament). e. The Regulation also foresees the possibility of the initiators to withdraw until the moment when the proposed draft-law is not yet voted in principle in the plenary session.

The experience of the law making citizens' initiative exercised in Albania, in 2006, showed us that all the process and the documents prepared were huge and requested a detailed organization, but on the other side such procedures are not regulated by law. All the preliminary work to draft the proposed law, to apply in practice the process of conversing with the citizens/voters and the process of gathering their signatures to be presented to the Parliament, was made possible by the activity of a coalition composed of 10 national NGO-s, supported by the international NGO-s as well[19]. During this process, a legal vacuum was evidenced in the Albanian legislation that can act as an obstacle and can hinder the exercising of the law making initiatives of the citizens as a right given by the Constitution. The existing legal vacuum can be seen not only through the empirical method of observation of actual practices, but also by making use of the comparative method, especially by making comparisons with the Italian legislation. Through such a comparison we are able to draft „recommendations" for the existing legal vacuum in the Albanian legislation in relation to this issue. There are no specific, defined legal provisions and procedures to exercise the direct law making citizens' initiatives. Thus, for the aforementioned

[19] See: *The Albanian Institutions for the protection of women against domestic violence*, Tirana 2006, p. 118–119.

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case, the group of initiators was obliged to set up a form to gather the signatures themselves, because there was no official form, defined through a legal act. There are not foreseen procedures to define the way of gathering the citizens' signatures, or to foresee any electronic means for gathering the signatures. It has not defined any form, or procedure for the verification of the signatures. A provision for the publication of the initiative and for proclaiming this initiative as an official one does not exist. Until the moment that the signatures are handed over at the Parliament and the proposed draft-law is recorded at the Parliament, the whole process remains a totally independent one and it goes up to the boundaries of informality, by putting the successful results of such initiatives at a serious risk. It has not created any preliminary relation between the proclaimed initiative and the legislative organs. There are no deadlines for the presentation of the proposed draft-law after the publication of the initiative. There are no procedures for the presentation of the initiators in the Parliament during the discussions on the proposed draft-law either at the Parliamentary Commission, or at the plenary session.

Such problems are already solved by the Italian legislation, which regulates through procedures, legal and sublegal acts, in order to guarantee a real exercising of such initiatives, not only at a central level, but at a local one as well. The modules of gathering the signatures of the citizens/voters are defined. It is guaranteed for the citizen to sign, after knowing the text of the law, in order to avoid cases of signing without accepting responsibility. It is guaranteed that the publication of the initiative through the Court of Cassation. The initiative is published in the official journal and the entities authorized to check the authenticity of the signatures are defined and the way how the signatures are gathered etc.[20].

First Conclusions. Based on a comparative consideration of the Albanian and the Italian legislations on this issue, we can conclude that both countries are at different stages of the development and implementation of such initiatives. Italy is trying to improve and make the procedures better, aiming to make the initiative effective, applicable and to guarantee its progress. In order to do this, the participation of the representatives of the initiative in the commissions and in all other parliamentary procedures are requested

[20] See: Legge 25 maggio 1970, n. 352, „Norme sui referendum previsti dalla Costituzione e sulla iniziativa legislativa del popolo".

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to be formalized by law. The access of the initiators in the Constitutional Court in cases of conflicts during the procedures for discussing and approval have to be formalised[21]. In Albania, there is a need to regulate all the legislation, starting with the basic formal criteria for gathering the signatures and going up to the procedures of approval of such initiatives by the Parliament. The existing differences have become factors that influence the development of law making citizens' initiatives and have affected the juridical and constitutional debate in relation to such initiatives as well. Under such conditions, the institutional influence from other countries is a solution that will accelerate the improvement of the Albanian legislation, by giving the chance to the latter to profit from the traditions of other countries that have already developed these institutes.

The direct law making citizens' initiative is important and it is based on a relevant legislation. It can be totally applied into practice, despite the level of development of the society. However, there doubts in relation to its benefit and utility, because it is usually considered easier to follow the procedures for the exercising of the Parliament or Government law making initiatives. Furthermore, the direct will of the citizens in the aforementioned case has been totally in harmony with the will of the Government and of the Parliament. The organizations of the civil society in Albania have even drafted other important draft-laws, which are proposed to the Parliament through the Government law making initiative[22]. Nevertheless, the citizens' initiative showed us that it helps a lot to have increased citizens' awareness of the importance and contents of the law that is being proposed. The direct law making initiative helps to enhance civic debate in the media, as well as the juridical debate among the professionals of the institutions. A good example is the debate organized before and after the approval of the law against domestic violence, which was proposed directly by the voters.

[21] See: *L'iniziativa legislativa*..., *op. cit.*, p. VI.

[22] Among them can be mentioned: the Law „On the gender equality in the society" (2008), the Law „On the protection from discrimination", (2010), the Law „On the legal support" (2009).

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3

REFERENDUMS

3.1 People's initiative for referendum

The Constitution of the Republic of Albania foresees that the people's initiative for referendums can be exercised in two cases (article 150 of the Constitution): In the first case: The people, through 50,000 citizens entitled to vote, have the right to a referendum for the abrogation of a law, (Abrogative legislative Referendum). In the second case: The people, through 50,000 citizens entitled to vote, have the right to request the President of the Republic to call a referendum on issues of special importance (Referendum on issues of special importance)[23]. In order to give comprehensive information, it is considered as appropriate to mention briefly other forms of referendums foreseen by the Constitution of the Republic of Albania. Besides

a. the abrogative legislative referendum and,
b. the referendum on issues of special importance with the request of the people.

The Albanian Constitution has foreseen some opportunities to request and to hold a Referendum, with the decision of the Parliament. In concrete terms[24], the Parliament decides whether an issue or a draft law of special importance can be submitted to referendum (article 150.2). In such a case, unlike the initiative of the people which is decided by the President of the Republic, it is Parliament that makes the decision, after the proposal of 1/5 of the members of the Parliament, or with the proposal of the Council of Ministers. The Parliament may decide, by two-thirds of all its members, that

[23] Constitution of Republic of Albania, besides the abrogative legislative referendum and the referendum on issues of special importance, which are initiated by the people initiatives for referendum, has also foreseen the Constitutional Referendum, for the approval of a draft-amendment presented at the Parliament, or for the approval of a Constitutional amendment, when this is requested by 1/5 of the members of the Parliament.

[24] Can be mentioned here as follows: a – referendum for an issue of a special importance; b – referendum for a draft-law of a special importance; c – Constitutional referendum for the approval of draft-amendments of the Constitution; d – Constitutional referendum for the approval of the amendments of the Constitution; e – Referendum for the approval of a Convention.

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the proposed constitutional amendments are voted on in a referendum. The proposed constitutional amendment becomes effective after ratification by referendum, which takes place not later than 60 days after its approval by the Parliament (article 177/4). While an approved constitutional amendment is submitted to referendum, in case one-fifth of the members of the Assembly request it (Article 177/5). In the framework of the referendums for Conventions, the Republic of Albania delegates state powers to international organizations for specific issues on the basis of international agreements The Parliament may decide whether the ratification of an international agreement be done through a referendum (article 123)[25].

The Albanian Constitution does not foresee the initiative of the people to initiate a Constitutional referendum, for changing the Constitution. This, not only isn't foreseen explicitly by the Constitution, but it is also confirmed by the jurisprudence of the Constitutional Court of Albania[26]. The latter has taken into consideration the request of a group of initiators to hold a referendum and has interpreted article 150 of the Constitution. In its reasoning, the Court states that, „Taking into consideration the case whether article 150 can be applied for the laws to review, the Constitution cannot be judged without taking into consideration article 177 of the Constitution as well... This article does not foresee the right to hold a referendum for the abrogation of a change of the Constitution from 50 thousand citizens entitled to vote. This means that the direct involvement of the people in the Constitutional making process is made possible only by their representatives in the Parliament... Furthermore, the Constitutional Court, states that the Constitution, explicitly does not aim at always holding a referendum for the changes in the Constitution, but limits it only in those cases when the wide political consensus is missing. In this sense, article 177 foresees sufficient guarantees for the minorities (1/5th of the members) without having the need to turn to the envisagement of the article 150 of the Constitution"[27].

During the years of the transitory democracy, in Albania, several referendums by the people were held only for the approval of the Constitution

[25] The Organ that ratifies the international agreements is the Parliament. There is an exception only for the international agreements that foresee the delegation of the state competences for certain issues. Nevertheless, this issue remains to the Parliament to be evaluated.

[26] Decision of the Constitutional Court of RA, No. 25, dated on 24.09.2009.

[27] *Ibidem*.

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and for the selection of the form of governance[28]. But after the entrance into power of the current Constitution of Albania (1998) which was approved by the Parliament and with a Referendum, there have not been any other cases of holding referendums, despite some initiatives from the citizens voiced through their organizations. In some cases, they have requested a general referendum, and in only one case the request has been for a regional level referendum. This limits our analyses only in some aspects and issues of holding referendums with the initiative of the people, which as a matter of fact is the main goal of this paper.

3.2. Constitutional boundaries of the referendums

The Constitution of Albania is engaged to explicitly regulate only some boundaries related to requesting and developing referendums, while in relation to the details of the procedures, it is referred to the law. On concrete terms, law No. 9087, dated 19.06.2003 „The Electoral Code of the Republic of Albania", has foreseen a specific chapter for referendums. As mentioned above, the Constitution has defined the subjects related to referendum initiatives. It has defined some rules and limitations for the development of referendums as well. Constitutional prohibitions are defined for the categories of issues that are excluded from the referendum. The Constitution

[28] In Albania, the referendum as a constitutional instrument for the exercising of the direct democracy, is developed after the fall of the Communist regime. In the Constitutional law No. 7491, dated 29.04.1991, „Law on the Major Constitutional Provisions", the referendum is acknowledged as one of the forms of exercising the power of the people: „The people exercise sovereignty through their representative organs and the referendum as well" – article 3. In 1994, it was approved through an accelerated procedure the law „On Referendums" (law No. 7866, dated 06.10.1994), which opened the way for the first referendum in the Albanian state, organized on 6 November 1994, to vote for the draft-Constitution drafted in the same year. This referendum didn't approve the draft presented for direct approval of the referendum, thus the „Law on the Major Constitutional Provisions" still remained in power. Based on this law, in 1997, the Parliament decided to call a general referendum, in the same day with the general parliamentary elections. Through this referendum, the Albanian voters could express themselves regarding the form of the regime, so either for the form of Republic, or for the form of Monarchy. Most of the voters voted for the Republic. Meanwhile there were complaints for irregularities during the process of counting the votes. In 1998, it the referendum for the approval of the current Constitution of Albania was called, which was approved by the Parliament on October 21 of that year. The call for this referendum was followed by a very tense political situation and by severe debates. The largest Party of the opposition of that time didn't participate in the drafting of the draft-constitution and boycotted the voting process for this referendum, which was held on November 22, 1998. Nevertheless, the draft-Constitution approved from the Parliament, was approved by the referendum as well. It was proclaimed by the President of the Republic on November 28, 1998 and enacted at the same day, in memorial of the Independence Day of Albania. See: L. Omari, A. Anastasi, *E drejta Kushtetuese*, Tirana 2010, p. 289–295.

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has enlisted unambiguously all the issues that cannot be submitted to a referendum. So, „Issues related to the territorial integrity of the Republic of Albania, the limitation of fundamental human rights and freedoms, the budget, taxes and financial obligations of the state, the imposition or lifting of a state of emergency, a declaration of war or peace, and amnesty cannot be submitted to a referendum (article 151.2).

Another category of boundaries set by the Constitution for the development of referendums is the time limit. As rarely seen in any other European Constitution, the Constitution of Albania, has defined all the actions of the involved bodies for the development of a Referendum, by setting quite clearly the time limits and moreover with preclusive effects. So, for example, the Constitutional Court, that examines the constitutionality of all the issues submitted to a referendum, must conclude all of the process, within 60 days. This deadline has preclusive effects, which means that any decision taken by this Court after this deadline does not have any effect on the case at all. This is made clear in the Constitution envisagement, which states that The President of the Republic sets the date of the referendum within 45 days after the announcement of a positive decision by the Constitutional Court, or after the expiration of the period within which the Constitutional Court should have rendered its decision (Article 152/3). These rigorous time-limits foreseen by the Constitution are related to historical reasons in Albania. In the practice of Albania, Constitutional institutions often do not give a verdict within the time-limits foreseen for the fulfilment of their constitutional duties. Nevertheless, this constitutional boundary is set deliberately to prevent experiences like those created before the drafting of the current Constitution. In concrete terms, such cases like the one created by the Constitutional Court with the decision given in 1995, can be mentioned with regard to the verification of the constitutionality of the referendum held for the approval of the Draft-Constitution, on 6th of November 1994. This decision was announced by the Constitutional Court nearly 4 months after the Referendum had been organized. The referendum turned down the draft-Constitution"[29].

Review for the Constitutionality of the issues submitted to a referendum, is a preliminary preview and it is spread over all the initiatives for legislative and for constitutional referendums, as well as over all other issues of a special

[29] See: The decision of the Constitutional Court of Albania No. 3/1995 and S. Sadushi, *Drejtësia Kushtetuese në zhvillim*, Tirana 2012, p. 184.

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importance. Nevertheless, regarding the issues of a special importance, the object of the Constitutional review is related only to the compatibility of this issue with the Constitution and not the importance of the issue, which is evaluated by the petitioner (article 152 of the Constitution). Preliminary review ex ante of the constitutionality of the issues submitted to a referendum is obligatory and cannot be treated as a facultative issue in the hands of the organizers' structures. This attitude is held even by the Albanian Constitutional doctrine which has considered the Constitutional Court in such cases as a body of an ex officio[30] nature.

Going further in the above analysis, it is concluded that the Albanian legislation has foreseen three moments for controlling and verifying the acts of the people. Referring to the division that professor Auer has set for the three stages of the verification procedure of the acts, which are grouped in verifications before gathering of the signatures, before the vote of the people and after the vote of the people[31], we can say that there is a control of the formal and material conditions, where the main role is played by the Constitutional Judge. The Central Election Commission also has a special importance in this process, as an independent body of the public administration. So, in the case there is an initiative of 50 thousand citizens entitled to vote for the development of a referendum to abrogate a law (abrogative legislative referendum), the request is submitted to the formal conditions, which means that the number of signatures, the ways the signatures are gathered and the respecting of time-limits for gathering the signatures are verified. This is realized by the Central Election Commission (CEC). From the material conditions' point of view, in relation to the constitutionality of the issue submitted to a referendum, the verification is exercised by the Constitutional Judge. The issue that is set forth here is related to the moment in which the judge should intervene. From this point of view, it is necessary to make a difference related to the intervention of the constitutional judge towards the referendum: a. Preliminary review of the constitutionality of the issue submitted for referendum and, b. review of the constitutionality of the Referendum and verification of its results (article 131.ë). The latter is exercised „a posteriori", after the referendum, if the Constitutional Court is put in motion from the legitimated subjects. So, compared to the preliminary review

[30] See: S. Sadushi, *op. cit.*, p. 187.

[31] See: A. Auer, *op. cit.*, p. 176.

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of the constitutionality of the issue submitted for referendum, the review of the constitutionality and verification of its results are not obligatory verifications[32].

3.3. Issues of the Constitutional practice and case law in exercising the referendum initiatives of the people in Albania

3.3.1. Administrative verifications

There are different cases from the practice of the Central Election Commission (CEC) in relation to the interpretation of the formal requests for the submitted materials[33]. Mainly, all the activity is focused on the verification of the signatures of the voters. Such an activity has faced difficulties as well, especially due to the legal vacuum. So, for instance, in order to gather the signatures for the referendum, the Electoral Code does not set any preliminary guarantee through the institutional assistance, as is foreseen by the Italian Legislation[34]. In Albania, gathering signatures according to the form prepared by CEC itself, is a private task of the initiators, without any official supervision or authorization. Of course in such massive processes, the lack of assistance from the official institutions for gathering the signatures, as it is foreseen in the legislations of other countries, sets the whole process in danger due to formal reasons, as it has happened more than once in Albania. The independence of the initiators in this phase creates the conditions for quick proceedings, but on the other hand, this can also bring unexpected events in the phase of the verification of the signatures, after the lists with the signatures are deposited at CEC from the group of initiators. This happened with a request for a local referendum in 2005.

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[32] See: S. Sadushi, *op. cit.*

[33] CEC, within 20 days from the submission of the request for general referendum, provides the group of initiators, after the payment, with the forms for gathering 50 thousand signatures from citizens entitled to vote, who during the submission time, have been registered in the National Register of Voters. On top of this form the title of the law, the provisions requested to be abrogated or the issue submitted to referendum are set. Furthermore, CEC verifies the signatures and the accuracy of the identity documents of the voters, in compliance with the sublegal acts issued on the case. CEC decides to accept or not the requests within 90 days from the date of the presentation of the request. The decision is based only upon the accuracy of the submitted documentation, so upon the formal fulfillment of the criteria of submitting the request. The decision for turning down the request should define clearly the reasons of not accepting such a request.

[34] Legge 25 maggio 1970, n. 352, „Norme sui referendum previsti dalla Costituzione e sulla iniziativa legislativa del popolo".

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CEC decided to accept the request for referendum of the „Civic Alliance for the Protection of Vlora Bay" and verified the names of 12.3% of the persons who had signed, in the forms defined by CEC for gathering signatures to submit a referendum. From the verification process it resulted that 61 names or 3.5% of the verified persons, didn't exist in the list of voters of the respective communes and municipalities. For this reason, CEC decided to turn down the submitted request from the initiators of the „Civic Alliance for the Protection of Vlora Bay" to hold a local referendum on the issue of allowing or not the setting up of an Industrial and Energy Park in the seashore of Vlora[35]. Time-limits foreseen by law, after the request is turned down, become obstacles to resubmit the initiative. Furthermore, the issue set forth for referendum might become outdated. In the latter case, when an initiative from people to hold a referendum was deposited at CEC from the group of initiators belonging to the Alliance against the Waste Import (AAWI), to abrogate parts of the law No. 10463, dated. 22.09.2011, „On the integrated management of urban waste", it was on the verge of being turned down by CEC. In a press release of CEC, it was stated that in the forms where the citizens had signed, a lot of names and signatures written down by the same person were identified. Such forms were sent for verification to the forensic police. Based upon the act of the graphic expertise of the signatures it resulted that about 70% of the signatures in the forms that were sent to police were falsified[36]. Nevertheless, as a conclusion CEC accepted the request to take into consideration the issues by reasoning that about 20% more signatures than the minimum request of the law were sent. Based upon the reasoning of CEC, the question arises whether the forms for gathering the signatures can be considered as valid forms in cases when falsification is evidenced? Once again, in a situation where there is a lack of laws, this legal vacuum is overpassed with the „good will" of the institutions. The issues in laws and bylaws with regard to the organization of referendums should be fulfilled as quickly as possible.

The Central Election Commission has a very important role even for the classification of the referendum, in the moment of submitting the request. This is very important in this phase, because it is related to following the

[35] See: Decision of CEC, No. 609, dated 04.06.2005.

[36] See: Press release of CEC. Date 19.06.2012: http://www.cec.org.al/index.php?option=com_content&view= article&id=311%3Anjoftim-per-shtyp19062012&catid=51%3Adeklarata-2010&Itemid=158&lang=en (18.04.2014).

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further procedures. For example, in the decision of CEC, with regard to reviewing the request of 24 initiators, for starting of procedures to develop the general referendum for the abrogation of article 5, 7 and 8 of the law No. 9904, dated 21.04.2008, „On some changes in the law" No. 8417, dated 21.10.1998, „The Constitution of the Republic of Albania" changed, The Central Election Commission has evidenced that, the law object of the abrogation, has changed the Constitution of the Republic of Albania and respectively the articles 87, 104 105 of the Constitution. In this case, the request is classified as a request for a constitutional referendum and not a request for a general referendum, as it is presented by the initiators. Based upon the Electoral Code of the Republic of Albania, where the initial procedures are defined, The Central Election Commission is not the right body to accept the request for starting the procedures for the development of a Constitutional referendum. The procedure starts with the submission of the request to the Secretary General of the Parliament and it goes further with the preliminary review from the Constitutional Court. CEC is put to motion only after the appointment of the date of the referendum by the President of the Republic and after receiving notification by the Secretary General of the Parliament. Due to these reasons, CEC turned down the request[37]. Nevertheless, this case has brought about debate due to the reason that CEC has classified the referendum and at the same time has made an evaluation of the essence of the issue, meanwhile the Electoral Code gives CEC only the attributes of a body for formal verification and not for material verification[38]. Thus, CEC did not express only for the accuracy of the presented documents, but also for the constitutionality of the request presented by the group of initiators. This is a competence of the Constitutional Court and actually the case was taken for review by this Court[39].

3.3.2. Constitutional Review

The jurisprudence of the Constitutional Court is developed in the direction of the preliminary review of the issues submitted to Referendum. Such issues have been in a relatively low number. The researchers have discussed for apathy in relation to undertaking law making citizens' initiatives „The

[37] Decision of CEC, No. 47, dated 05.06.2008.

[38] See: L. Omari L., A. Anastasi, *op. cit.*, p. 295–301.

[39] See: Decision of the Constitutional Court of Albania, No. 2009, *op. cit.*

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Albanian reality has been largely characterized by voters' apathy in taking citizens' initiatives, which has had a negative impact in establishing and promoting a referendum culture"[40]. Nevertheless, in the few Albanian studies in this field there is not a deep and thorough analysis on the reasons of this apathy. Such analysis is necessary in order to encourage these initiatives in the future. On the other side, it should be taken in consideration that accepting the referendums is a limited tendency by the Constitutional Court, as it has happened in Italy, where the Constitutional Court „in the course of time has issued several limitations implied in the text of the Constitution by limiting the possibilities of developing referendums"[41]. „It seems that, the more the direct democracy is developed and used, the more the Constitutional Judge has reminded people of the boundaries of their normative power"[42].

The Albanian Constitutional Court is expressed in relation to the limiting elements, due to which the referendum cannot be developed, based upon the jurisprudence of the Italian Constitutional Court. For instance, in the case reviewed in 2003, this Court has reviewed the request of a group of initiators from 53 thousand voters with regard to the verification of the constitutionality of the request for the development of the referendum to abrogate two articles of the law 8889, dated 25.04.2002, on some additions and changes in the law "On social security law in the Republic of Albania'[43]. These articles foresee the increase of the age for full retirement for men and women, by changing the conditions to profit the full and the partial retirement for both (the age for men from 60 into 65 years old, while from women from 55 into 60 years old). The Constitutional Court of Albania judged this request as an anti-constitutional request based on the article 151/2 of the Constitution by reasoning that the „'On social security law' has close and direct links with the state budget and the abrogation of the provisions opposed in the request, will ruin the financial equilibrium of the general social security system and thus will directly affect the state budget"[44].

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[40] V. Pajo, *op. cit.*

[41] A. La Pergola, Justice constitutionnelle e democratie referendaire, *Justice Constitutionnelle et democratie referendaire*, Conseil de l'Europe, 1996, p. 9.

[42] A. Auer, *op. cit.*, p. 171.

[43] Decision of the Constitutional Court of Albania, No. 31, 2003.

[44] *Ibidem*.

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The Constitutional Court reviewed the request submitted by the Central Election Commission regarding the Preliminary review of the constitutionality of the request for the development of the general referendum on the abrogation of article 22, item 3 and article 49 of the law No. 10463, dated 22.09.2011 „On the integrated management of the urban waste". The request for referendum was presented by „more than 50 thousand voters", who were called in this judgment as the interested subject. The request was considered by the Court in compliance with the Constitution[45]. The Court opened the way to the development of this referendum, but this referendum didn't have the opportunity to be organized, because with the proposal of the Government that was elected and came to power in September of 2013, the law, object of the voting, was abrogated by the Parliament.

Based upon the decisions of the Constitutional Court in these two cases, some characteristics of the constitutional jurisprudence can be evidenced. Firstly, the court has directed its control on the issues of constitutionality, especially in the verification of the prohibitions foreseen explicitly by the Constitution (151/2)[46]. The Court has considered these prohibitions as absolute ones. Nevertheless, in both decisions given on this issue, the Court has emphasized that not only the prohibitions foreseen by the Constitution, but also the compatibility of the issue with the fundamental principles of the Constitution should be taken in consideration and reviewed. Moreover, the court has highlighted that the entirety of the provisions of the Constitution should be seen as one and in this meaning „none of the provisions of the constitution can be taken out of the Constitutional context to be interpreted separately"[47]. Thus, the Constitutional Court has identified even „implied prohibitions", which can serve as convincing reasons to estimate that a direct relation with the constitutional prohibitions exists. For example during the judgment of the request on the law „On social security", referring to increasing the age of retirement, the Constitutional Court reasoned that this law, „has close and direct relations with the 'On State Budget Law' and the abrogation of the opposed provisions will ruin the financial equilibrium of the general social security system and thus will directly affect

[45] Decision of the Constitutional Court of the Republic of Albania, No. 8, in 2013.

[46] *Ibidem*.

[47] See: Decision of the Constitutional Court of the Republic of Albania, No. 25, dt. 24.07.2009.

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the state budget"[48]. Secondly, the Constitutional Court is focused even in the control of the self-sufficiency of the law, in the case when the abrogation of all whole law is not requested through the referendum, but the abrogation of some articles of the law instead. This control is referred to the Electoral Code (article 126).

Thus, the Court has referred only to the control for the fulfilment of the material conditions and not to the fulfilment of the formal ones, because the Court considers the formal conditions as valid due to the previous control exercised by the Central Election Commission. The judge who remained in minority when the decision was taken has expressed her opinion against the attitude kept by the Court[49]. Referring to the expertise of the Commission of Venice, the Judge who remained in minority has expressed that the Court should treat the verification of the formal validity of the request submitted for referendum as well. She explained this as the control on the harmony of the form with the contents of the request, on the unity of the hierarchy of norms etc.[50]. The doctrine on referendums has defended this opinion, by making clear that the control of the constitutional judge is exercised first of all on the formal conditions of the development of the referendum, while in relation to the control of the validity of the materials, the role of the constitutional judge is a central one[51].

Another characteristic of the Albanian constitutional jurisprudence is also the so-called „circulation of the jurisprudences"[52]. This is clearly noticed in the direct referrals of the Decisions of the Albanian Constitutional Court to the decisions given by Italian and German Constitutional Courts[53]. As a matter of fact, this has now become a tendency in the jurisprudence of the Albanian Constitutional Court for all the issues, while referring to the jurisprudence of the European Court of the Human Rights is considered to be an obligation.

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[48] Decision of the Constitutional Court of Albania, No. 31/2003.

[49] See: Opinion of the Judge Vitore Tusha in the Decision of the Constitutional Court of Albania, No. 8/2013. See in the Web the dissenting opinion of judge V. Tusha in Constitutional Court Decision No. 8/2013: http://www.gjk.gov.al/web/Vendime_perfundimtare_100_1.php, p.14–19.

[50] See: V. Pajo, *op. cit.*, p. 34.

[51] See: A. Auer, *op. cit.*, p. 171–172.

[52] It is referred to the term used by G. Zagrebelsky, 1956–2006 Ciunquant'anni di Corte Constituzionale, *Corte in-politica*, vol. 3/2006.

[53] Decision of the Constitutional Court No. 31/2013 is referred textually to the decision No. 2/1994 of the Italian Constitutional Court and to the decisions 11, 221, 22, 242, 26, 44, (61f) of the German Constitutional Court.

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CONCLUSION

The Albanian democracy is a new democracy and perhaps this is the reason why, since 1998, when the current Constitution of Albania was established, there is only one initiative of the people that was crowned successfully, but no referendum is developed so far. Nevertheless, it seems that it has shaped a constitutional justice sufficient enough to carry out analyses. The constitutional justice in Albania has only had three judged cases, but it has clearly shown the tendency to be transferred from justice in opposition with the initiative of the people, into justice that is complementary to the initiative for referendum. The constitutional justice has not just defined new boundaries on the issues submitted for referendum, but it has also defended the referendum. So, we can state that, Albania is in the way of developing the constitutional justice of referendums and is making the elements of the direct democracy more concrete and understandable. Nevertheless, in the political terrain, Albania needs to materialize the initiatives by developing the referendum in reality, aiming at making the tendencies of development of the constitutional instruments for exercising a direct democracy more visible. This study verifies that the method of comparing the experience of one country with the experiences of other countries is the most efficient method to evidence the development of justice and its needs. Under such conditions, a clear conclusion is drawn that in the current Albanian legislation there is a considerable vacuum on the law making, or on the abrogative initiatives of the people which should be fulfilled as soon as possible. This should be done at the same time with the legal improvement, in order to involve the rights of participation as well. Study of the experiences so far has clearly shown that the initiatives of the people cannot be realized without the encouragement and support of the organizations of the civil society, which are neglected almost completely from the legislation and the procedures foreseen explicitly from the legislation. The law shall envisage provisions to foresee the activity of NGO-s, aiming at least to legally recognize the contribution of the organizations that organize all the initiative. This will encourage more activity and responsibility of such organizations to undertake and organize such initiatives. These measures and regulations will not violate the autonomy and the independence of the initiators and of the citizens at all, but they will influence positively in the successful organization of such initiatives and in their efficiency.

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