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PERMISSIBILITY OF REFERENDUMS: LITHUANIAN CASE IN THE CONTEXT OF POLITICAL THEORIES

Key words: referendum, constitutional law, legal theory

Summary

Referendums are a direct manifestation of the sovereign power of the People. However, the rule of law raises certain procedural and material requirements for referendums. They are enforced by the courts, and their power not to permit a referendum provokes deep questions regarding the concept of democracy. In Aristotle's theory, certain foundations for this model can be found, along with potential criteria for maintaining a proportionate balance between authority of the courts and the will of the People.

Introduction

In Lithuanian law, courts have the power to decide, whether a referendum can be permitted. Among other factors, in the exercise of this power, compatibility with the Constitution is considered. This applies even when a referendum proposal contains a constitutional amendment. Such power of the judiciary can seem to compete with other constitutional provisions that provide supreme power to the People.

The jurisprudence of the Lithuanian courts lacks the logical resolution of this competition (which, by some could be seen as a contradiction). Although valuable insights can be found in the writings of other theorists as well, the limitations of a single article oblige to analyse the authors only one at a time. For this purpose, Aristotle's "Politics" was selected as the main source, on account of its richness in insights on the discussed issue and its prominence among other theories, therefore, other authors, whose theories concern the analysed issue, are discussed briefly.

Accordingly, the aim of this article is to explore whether and how the Lithuanian model of legal review on referendum permissibility is compatible with prominent political theories. This is achieved firstly by analysing the Lithuanian case and

formulating its comprehensive description and justification of internal coherence in the law. Secondly, the relevant political theory elements are presented by selecting the remarks that are relevant to the discussed issue and bear the potential to resolve possible competition of legal provisions in Lithuanian referendum law, as well as give criteria for applying the Lithuanian model, where the judiciary is granted discretion.

1. The Case No. R-22-629/2021

On 29 December 2021, the Supreme Administrative Court of Lithuania (hereinafter – the Court) announced a decision to uphold the Supreme Electoral Commission’s (hereinafter – SEC) position that the disputed referendum cannot be held. This case originated when a group of Lithuanian citizens addressed SEC with a request to register their initiative for a referendum. Under a regular procedure, SEC would register it and issue signature collection sheets to collect the necessary 300 thousand citizen signatures to initiate a mandatory referendum. However, SEC denied this request on the grounds that the proposal was incompatible with the Constitution of Lithuania.

The proposal included an amendment to the Constitution regarding parliamentary elections. The current system involves a mixed system, where 71 parliament members are elected in a majoritarian vote and 70 – in a proportional vote. The proposed amendment prescribed a fully majoritarian system, and additionally included a prohibition for candidates to receive foreign funding for their campaign; exceptional right of political parties and non-governmental organizations – the organizations registered in Lithuania to nominate a candidate for election; and other nuances. SEC stated that the proposed amendment was not compatible with other provisions of the Constitution. The SEC found contradictions with the material rules, according to which such an amendment in its nature would not be legitimate.

The Court agreed with the position that the suggested amendment is unconstitutional¹ but based this conclusion on different reasons which focused on the deficiencies of legal technique. These were based on constitutional requirements for the law to be clear and precise,² as well as the constitutional

¹ The Court was authorised to review legality of the SEC’s decisions by the general rules of procedure and afterwards this power was assigned by a special rule in the Article 11 of the Constitutional Act on Referendum of 23 June, 2022, No. XIV-1163, that states “decisions regarding registration of the group [...] can be appealed to the Supreme Administrative Court of Lithuania”.

² E.g., in the 30 May 2003 ruling the Constitutional Court stated that “the requirement of legal certainty and clarity presupposes certain imperative requirements for legal regulation. It must be clear, coherent, legal norms must be formulated precisely, they cannot contain ambiguities”.

requirement that the question proposed for a referendum must be clear (in order to ensure that the voters are properly aware what they are voting for).³

It was stated in the Court's decision that the proposed constitutional amendment had deficiencies which, taken together, deemed the provisions unclear and ambiguous; some of the provisions raised impossible requirements. Furthermore, the fulfilment of some requirements was dependent on arbitrary circumstances. Regarding these findings, the Court found that the proposed amendment was incompatible with requirements arising from the principle of legal certainty and the SEC had the obligation to refuse the request to register the referendum initiative.⁴

2. Concerns regarding constitutionality of this procedure

In the presented case, Supreme Administrative Court of Lithuania exercised the power to review the constitutionality of a proposed constitutional amendment and had the final decision to “block” a citizens' referendum initiative. Freedom of referendum has been analysed in this regard⁵, but two concerns regarding its constitutionality and relation to political theory are yet to be resolved. Firstly, the Constitutional Court of Lithuania has the exclusive right to interpret the Constitution. Secondly, Lithuania is a democratic republic and the sovereign power belongs to the People – is it compatible with the Court's power to impose restrictions on referendum?

Regarding the **assignment of power to interpret the Constitution**, on one hand, Article 6 of the Constitution states that it is a directly applicable act. Moreover, the Constitutional Court has expressly stated that the SEC must evaluate whether a referendum initiative meets the legal requirements,

³ Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in Case No. 16/2014-29/2014. Available in Lithuanian: <https://lrkt.lt/lt/teismo-aktai/paieska/135/ta24/content> [viewed 30.11.2023.].

⁴ It was not disputed that the SEC had the obligation to refuse registering referendum initiative that proposes to consider questions which are incompatible with the Constitution. This duty was revealed in the 11 July 2014 ruling by the Constitutional Court.

⁵ See, for example, Jarasiunas E. La Cour constitutionnelle de la République de Lituanie et la protection des fondements constitutionnels de l'institut des élections démocratiques [The Constitutional Court of the Republic of Lithuania and the protection of the constitutional foundations of the Institute of Democratic Elections]. *Jurisprudencija*, 2007, 4(94), pp. 7–14; Kuris E. Constitutional Law in a Constitutional Democracy – View from the Constitutional Court of Lithuania. In Breitenmoser S., et al. *Human Rights, Democracy and the Rule of Law. Liber amicorum Luzius Wildhaber*. Zurich: Dike Verlag, 2007, pp. 1023–1042; Puraite-Andrikiene D. Teises aktu konstitucingumo patikros objektai Lietuvos Respublikos Konstitucinio Teismo jurisprudencijoje [Objects of constitutionality verification of legal acts in the jurisprudence of the Constitutional Court of the Republic of Lithuania]. *Teise*, 2020, No. 116, pp. 72–91; Sinkevicius V. Konstitucijos keitimo apribojimai [Restrictions on amending the Constitution]? *Jurisprudencija*, 2015, Vol. 22, No. 2, pp. 206–230; Zalimas D. Konstitucijos virsenybes uztikrinimas: kai kurie Konstitucinio Teismo implicitiniu įgaliojimu aspektai. *Jurisprudencija*, 2018, Vol. 25, No. 1, pp. 38–68.

among them – whether a proposed constitutional amendment does not violate the requirement to maintain consistency of the Constitution’s provisions; if a proposal does not meet the relevant legal requirements, the SEC must refuse to register a referendum initiative.⁶ However, on the other hand, in light of other constitutional provisions, the Constitutional Court has also stated that it is the only institution with the power to officially interpret the Constitution. Despite this, the former provisions create conditions where the only way for the Supreme Administrative Court to solve a dispute is by resorting to the interpretation of the Constitution.

Naturally, these provisions are intended to determine the supremacy of the interpretation provided by the Constitutional Court. However, such a system has a possible scenario that could result in complications – the scenario where the Administrative and Constitutional Court would have different views regarding the meaning of constitutional provisions and the Administrative Court’s views would impose harder restrictions on the right to referendum. This could become manifest out of a simple mistake or from a less accidental factor influenced by different prerequisites for judicial impartiality. According to Article 112 of the Constitution, judges of administrative courts are appointed and removed by the President of the Republic, whereas justices of the Constitutional Court – by the Parliament from the candidates submitted by the President of the Republic, the Parliament Speaker, and the President of the Supreme Court. A more complex procedure of judge appointment and removal has a higher potential for unconditional judicial impartiality.

Multiple instruments could be used to diminish the risk of this worst scenario, whereby administrative courts would impose higher restrictions on the right to referendum than necessary in the view of the Constitutional Court. Among them are (1) granting the Constitutional Court the power to review the legality of the referendum initiative; (2) developing a dual concept of constitutional interpretation.

The first path in the Lithuanian legal system might include complicated reforms and each form is hardly compatible with the concept of constitutional review established in the Constitution. Validating such power can take the form of a constitutional amendment or judicial case law but either way constitutes intricacies explained in more detail in earlier publications. However, the development of a dual concept of constitutional interpretation bears very few shortcomings and the potential for a substantial reward. A likely channel to create it is through judicial interpretation in cases having a relation with the ordinary courts’ power to apply and interpret the Constitution. This can include a concept of moderate constitutional interpretation which presupposes that ordinary courts do not have the power to creatively interpret the Constitution.

⁶ Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in Case No. 16/2014-29/2014. Available in Lithuanian: <https://lrkt.lt/lt/teismo-aktai/paieska/135/ta24/content> [viewed 30.11.2023.].

Such a concept can be directed towards a goal that ordinary courts would not restrict human rights (among them – the right to referendum) more than it is necessary but simultaneously would ensure effective implementation of constitutional provisions. This presupposes that ordinary courts abstain from interpretation of the Constitution which has not been previously revealed by the Constitutional Court, therefore, referendum initiatives would not be permitted when they are clearly contradicting the Constitution – either provisions of its text or the Constitution’s meaning laid out in the Constitutional Court’s case law. Other factors to take into account for ordinary courts inevitably are the risk of significant harm to human rights or other constitutional values (e.g., state independence, territorial integrity, rule of law, and others). Such a concept, perhaps, can already be found between the lines of judicial practice (ordinary courts, naturally, abstain from a creative interpretation of the Constitution) but it has not been clearly articulated yet. This path would require the SEC and the Supreme Administrative Court to permit the referendum that does not violate the Constitution according to the aforementioned criteria and the referendum’s constitutionality could be checked later in the Constitutional Court during the later stages of the process (e.g., when the Parliament announces a referendum, amendment of the law is adopted, etc.). This path seems to bear the potential to optimally balance the protection of constitutional values and the citizens’ freedom to realize their sovereign power through referendum.

A conflict with the **nature of democratic governance** is the other concern related to the SEC’s and administrative court’s power not to permit a referendum. Article 2 of the Constitution states that sovereignty belongs to the People, and Article 3 – that no one can restrict or limit the sovereignty of the People.

In its justification of the Parliament’s and the SEC’s obligation not to permit an anticonstitutional referendum, the Constitutional Court of Lithuania has stated that, according to the Constitution, People execute their highest sovereign power, *inter alia*, through democratically elected representatives; the requirement to follow the Constitution is not a restriction or a limit on the sovereign power, the Constitution’s purpose is to safeguard the fundamental values, and, accordingly, a referendum cannot be announced when it creates conditions to violate “constitutional principles, the Constitution itself, as the highest law”.⁷ However, this statement in itself does not fully resolve the conflict – it does logically refute a simple consideration that, if the People adopted the Constitution in a referendum, they should be able to amend *all* of its provisions and, moreover, why the “conflict” between the Constitution’s provisions and provisions of a proposed amendment cannot be regarded as having a relation of general and special rule (according to

⁷ Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in Case No. 16/2014-29/2014. Available in Lithuanian: <https://lrkt.lt/lt/teismo-aktai/paeska/135/ta24/content> [viewed 30.11.2023.].

the latter view, the special rule has the priority of application over the general rule). There is a very thin line between a conclusion that two rules are in conflict and a conclusion that they are not in conflict – one rule merely specifies another one by providing an exception (for example, how one rule establishes a human right to privacy and a number of other rules, which provide exceptions to this right, are not regarded as contradictory). Therefore, to some extent, the SEC and the courts have discretion in deciding, whether a constitutional amendment is in violation of other provisions of the Constitution.

So, if the courts, not the voters in the referendum make the final decision on the question of what is unconstitutional – is not a restriction of the sovereignty?

A doctrinal model to resolve this conflict concerns the concept of sovereignty and the question of what can be regarded as an exercise of sovereignty.

It would not be easy to find legal or theoretical sources which define the sovereignty of the People as a majority's power to anything, anytime (in laymen's terms – a mob rule). Among other traits, sovereignty is described as a rule of the majority that has to follow the law. Representative democracy creates even more nuances. It is rather established in Western jurisprudence that the People in a referendum do not have the power to adopt such decisions as committing genocide. However, this cannot be considered a restriction or limit of sovereignty – the concept of sovereignty does not include the power to commit crimes against humanity. Also, from the *procedural* point of view, a referendum must be organized according to law, thus a referendum without any regard to procedural requirements or where voters are at gunpoint would not be valid. This naturally leads to the conclusion that sovereignty encompasses the right to make decisions in a referendum with the condition that the law is followed (both procedural and material rules) – similarly, individual rights (e.g. the right to a trial) do not guarantee the freedom to exercise certain rights in any desired way, but rather the freedom to exercise them according to law. Just as there is no right to receive legal remedy by shouting at the court's door, there is no sovereign power for a crowd to verbally hold a chaotic referendum.

Sovereignty is exercised through directly or indirectly elected officials and there is no compelling reason to disagree that a judge is one of those officials. Accordingly, the fact that the People exercise their will through the courts can be compatible with the concept of sovereignty, if we define it as a power to make decisions according to a legally established procedure and legally established grounds.

Additionally, even when courts would not permit a referendum on the grounds of its unconstitutionality, people still are able to hold such a referendum if they elect politicians who support it and eventually alter the composition of courts (when the judges' terms of service end) with new judges who also support the referendum in question. Therefore, this sort of "obstacle" in reality does not permanently restrict the right of the People to hold a referendum, but instead obliges them to take time to consider it.

3. Theoretical basis

The writings of Aristotle contain an extensive political and legal theory that does not omit the issue discussed above. In Aristotle's writings, theoretical grounds can be found that substantiate the described element of the Lithuanian legal system and with it – provide criteria to seek balance (the middle ground praised by Aristotle) in similar cases occurring in the future.

One way to categorize these insights is to form two groups: one that would be related to the rule of law, and another – counterbalancing the majoritarian governance.

In Aristotle's "Politics", which includes analysis of democracies by the historians of the 4th century,⁸ there is a remark directly related to the rule of law: "the rule of the law is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law [...] He who bids the law rule, may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast"⁹. Aristotle similarly stated that "all matters of this kind are better regulated by law than by the will of man, which is a very unsafe rule"¹⁰. The last quote was mentioned in the context of a discussion on how the position of public servants ought to be terminated. It seems to be provided by the way, in passing the discussion on other matters, but this statement fits with Aristotle's views on different matters. In the analysis of various forms of democracies, we can find a type where every citizen can be admitted to the government but the supreme power belongs not to the law, but to the majority of citizens. This sort of state is described as brought about by the demagogues and without a proper rule of law "the people become a monarch, and is many in one [...] the people, who is now a monarch, and no longer under the control of law, seeks to exercise monarchical sway, and grows into a despot [...] this sort of democracy being relatively to other democracies what tyranny is to other forms of monarchy [...] they alike exercise a despotic rule over the better citizens [...] The law ought to be supreme over all, and the magistracies and the government should judge of particulars"¹¹.

Regarding the power of the majority in state governance in a wider perspective, it is worth to remember that a defining trait of good governance in Aristotle's theory is that the rulers pursue the common good. Opposing corrupted ruling of the few or the many is the one where rulers (even if the state is a democracy ruled by the majority) only pursue their own interests and neglect the interests of the rest¹². The relevance of this insight concerns a possible threat of majoritarian

⁸ Chambers M. Aristotle's 'Forms of Democracy'. Transactions and Proceedings of the American Philological Association, 1961, Vol. 92, p. 36.

⁹ Aristotle. Politics. Translation by Jowett M. A. Oxford: Clarendon Press, 1885, p. 1287a.

¹⁰ Ibid., p. 1272a.

¹¹ Ibid., p. 1292a.

¹² Ibid., p. 1279a.

decision-making – the possible infringement of the rights of minorities. The rule of law implemented through the judicial branch of government might help to avoid this threat. Together with the aforementioned quotes, Aristotle's insights on the rule of law and a key trait of good governance presuppose that the limits on the majority's arbitrary rule are a way to protect the stability of a state and the rights of "the governed". Additionally, this is supported by another observation: the chief cause for a revolutionary feeling is a desire for equality. Inferiors revolt in order that they may be equal, and equals that they may be superior¹³.

Although there is plentiful research dedicated to Aristotle's writings, naturally (according to the author's best knowledge), it lacks a direct focus on the issue analysed in the current article. Scholarly literature contains observations that Aristotle prefers a *demos*, which only participates in assemblies to a limited extent,¹⁴ hence, it is no surprise that some might find Aristotle's view "not democratic enough",¹⁵ and some entitle it as an attempt to "render democracy acceptable by moderating it"¹⁶. Other commentaries of Aristotle's model state that "The whole contains all, not as a totality of undistinguished bodies, but as a collection of defined multitudes [...] Justice requires a democracy, perhaps not as democratic partisans would have it, but a democracy in which all factions have their fair say".¹⁷ However, as noted by A. Scalia, Aristotle's directive on supremacy of law encompasses a nucleus of personal discretion¹⁸ (of judges). It is hard to disregard the last point, since it hits the Achilles' heel of the idea of democracy governed by law by making it seem like a model wherein aristocratic governance (embodied by the judiciary) constantly rivals the democratic governance. Surely, we can assume that there is nothing wrong with that, nevertheless, few constitutions (if any) contain a statement that their respective state is a mix of aristocracy and democracy. Accordingly, a resolution requires either to end the contemplation before this point or go further.

Regarding this issue as considered by other authors, firstly, the proponents of natural law concept ought to be mentioned, because they usually contain the well-known principle *lex iniusta non est lex*, which was upheld by Cicero, St. Augustine, G. Radbruch, J. Finnis, and many others. A famous modern supporter of this view was Lon Fuller, whose theory of inner morality of law can also be seen as compatible with the discussed restrictions on referendum, as long

¹³ Aristotle. *Politics*. Translation by Jowett M. A. Oxford: Clarendon Press, 1885, p. 1302a.

¹⁴ Lintott A. *Aristotle and Democracy*. *The Classical Quarterly*, Vol. 42, No. 1, 1992, p. 125.

¹⁵ Anagnostopoulos G. *Aristotle's Defense of the Multitude Being in Authority in Politics III.11. The Poetry in Philosophy: Essays in Honor of Christos C. Evangelou, Mitsis P. and Reid H. L.* (eds). Parnassos Press – Fonte Aretusa, 2021, p. 194.

¹⁶ Papageorgiou C. I. *Four Or Five Types Of Democracy In Aristotle? History of Political Thought*, 1990, Vol. 11, No. 1, p. 6.

¹⁷ Winthrop D. *Aristotle on Participatory Democracy*. *Polity*, 1978, Vol. 11, No. 2, p. 160.

¹⁸ Scalia A. *The Rule of Law as a Law of Rules*. *The University of Chicago Law Review*, 1989, Vol. 56, No. 4, p. 1176.

as those restrictions can be derived from Fuller's principles.¹⁹ In connection with the supremacy of law, J. Locke has written that the legislative authority is not, nor can possibly be absolutely arbitrary over the lives and fortunes of the people and the legislative, or supreme authority, cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized judges.²⁰

In the "Federalist No. 10" of the Federalist Papers, J. Madison acknowledged the dangers of majoritarian rule and endorsed the solution that is entitled as a republican state – the one where "the scheme of representation takes place". It is characterized, *inter alia*, by the delegation of the government which can make it likely that "the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose".²¹

When H. L. A. Hart attempted to define the boundaries of the law, he also drew attention to the question of sovereign power limits. The "Concept of Law" contains an insight that, although courts are not bound by popular opinion or morality in determining the validity of law, but "sometimes the supreme legislative power within the system is far from unlimited. A written constitution may restrict the competence of the legislature not merely by specifying the form and manner of legislation (which we may allow not to be limitations) but by excluding altogether certain matters from the scope of its legislative competence, thus imposing limitations of substance".²²

R. Dworkin has also contemplated the idea of sovereignty restrictions by the concept of human rights. Among other things, he focused on the idea of sovereignty restrictions by international law (enforced by the international community),²³ which also was extensively analysed by D. Held in the "Models of Democracy".²⁴ An extensive analysis of problems arising from majoritarian governance can be found in the writings by R. A. Dahl.²⁵

The common denominator and "the other" danger. The limited extent of this paper allows to show only a fraction of rich deliberation on this issue in the political theories, nevertheless, the insights of the aforementioned authors confirm that the concept of sovereign's limitations is not alien to the works of prominent theorists. However, just as Aristotle famously encouraged to seek for

¹⁹ Fuller L. L. *The Morality of Law*. New Haven: Yale University Press, 1964.

²⁰ Locke J. *Second Treatise of Government*. Available: https://www.johnlocke.net/2022/07/two-treatises-of-government-book-ii_84.html [viewed 19.01.2024.], pp. 135–136.

²¹ Madison J. *Federalist No. 10. The Same Subject Continued: The Union as a Safeguard Against Domestic Faction and Insurrection*. Library of Congress. Available: <https://guides.loc.gov/federalist-papers/full-text> [viewed 19.01.2024.].

²² Hart H. L. A. *The Concept of Law*. Oxford: Clarendon Press, 1961, pp. 67–68.

²³ Dworkin R. *Justice for Hedgehogs*. Cambridge: The Belknap Press, 2011, pp. 332–334.

²⁴ Held D. *Models of Democracy*. Cambridge: Polity Press, 2006.

²⁵ Dahl R. A. *Democracy and Its Critics*. New Haven: Yale University Press, 1989.

the “middle”, another side of the coin cannot be ignored. Although there have not been cases in history where courts usurped the ruling of the state, unlimited intervention with the will of the majority of the People would not end well due to many reasons. Regarding this side of the scale, Aristotle remarked that when the majority is assembled, it is able to make more rational decisions than each individual on their own, consequently, the majority must be permitted to make decisions on public affairs²⁶. The exact line where such permission collides with the requirements of law will always remain an open question to be decided *ad hoc*. Although the judiciary’s power not to permit a referendum can be justified, it should be exercised in a delicate manner. One of the criteria for resolving this conundrum in Aristotle’s writings is a question – would the referendum proposal disrupt the balance between the interests of the majority and minority? Also, if we turn to Hart’s so-called secondary norms, the suggested criterion could be a question of whether the referendum proposal threatens the rule of law system – the instruments which ensure that the government system balances the interests of the majority and minority.

Conclusions

1. The Lithuanian model of reviewing referendum permissibility enables the judiciary to recognize referendum initiatives as unconstitutional and, as a result, prohibit such referendums. At the first sight, this might seem in conflict with People’s sovereign power, however, this impression is countered with the view that the obligation to initiate referendums according to legal procedure and requirements is a part of democracy governed by the supremacy of law.
2. Foundations of the Lithuanian model in this regard can be found in political theory – plenty of prominent theorists found certain restrictions of the sovereignty to be an acceptable phenomenon. Among them, Aristotle discussed the issues of majoritarian governance, and one of measures to avoid them (and ensure proper governance of the state)²⁷ presented in his writings is the concept of the rule of law (in the sense that the rulers are subordinate to law), which essentially reflects the discussed model of mandatory legal review of referendum initiatives. The later political theories further support this model with rich insights, including the emphasis on the principle *lex iniusta non lex est* and contending that a republican democracy incorporates representative governance (in this context, it can be regarded as embodied by the judiciary).

²⁶ Aristotle 1885, pp. 1273a; 1281b–1282a.

²⁷ I.e., looking after the interests of all the classes of society.

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