Strasbourg, 27 February 2009 **CDL(2009)027***

Opinion No. 517/2009 Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE ADMISSIBILITY OF A REFERENDUM TO ABROGATE CONSTITUTIONAL AMENDMENTS IN ALBANIA

by

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The Constitutional Court of Albania is dealing with a case concerning the refuse of the Central Election Commission of reviewing a request submitted by a group of citizens for initiating the procedure of conducting a general referendum for the abrogation of some articles of a Law on amendments of the Constitution.

The CEC argued that the request regarded a constitutional referendum but it was submitted in accordance with the rules concerning general referenda: it had to be rejected.

Before deciding the case the Constitutional Court considered necessary to submit to the Venice Commission a request of an Amicus curiae on two questions which don't touch directly the merit of the case but regard the basis of principle which can affect the decision of the case. The two questions are:

1) Can a request to abrogate a constitutional law on amendments to the constitution through a referendum initiated by the people be based on article 150 of the Constitution?

2) Whether the principle stipulated in article 2 of the Constitution providing that sovereignty in the Republic of Albania belongs to the people is in harmony with the provisions of articles 177 and 150 and 152 of the Constitution?

It may be useful to postpone the answers to both the questions by previously introducing some comments about the text of the constitutional provisions concerning the referenda.

The Albanian Constitution deals with referenda in its Part Eleven and Part Seventeen. In Part Eleven we find the general rules concerning the initiative and the calling of a referendum for the abrogation of a law: these rules were implemented by the Electoral Code (which is a new Code adopted in December 2008, but keeps in force the Part Nine "Referenda" of the old law in the matter until the approval of a new law on general and local referenda) which called this kind of referendum general referendum (art. 126). Different rules of the same Part Eleven of the law deal with constitutional referendum (articles 122–125). Therefore the legislation apparently sticks to the opinion that the Constitution implies a clear distinction between general referenda and the referenda provided for by the Seventeen Part of the Constitution which the Code calls constitutional referenda.

As a matter of fact art. 177 of the Constitution, that is the only article of the Part Seventeen of the Constitution, provides for popular consultations dealing with the amending of the Constitution by exclusively allowing referenda called on the basis of an initiative of two thirds of all the members of the Assembly (approval of proposed constitutional amendments which the Assembly decides to leave to the people) or of one-fifth of the members of the Assembly (after the parliamentary approval of constitutional amendments). The constitutional text does not apparently provide for a popular initiative of a constitutional referendum. The electoral legislation confirms this interpretation. Moreover, while the initiative of a general referendum has to be submitted to the Constitutional Court (art. 152 Const.) to check its compliance with the constitutional rules concerning the issues which can be submitted to a referendum (art. 151 Const.), a similar provision is missing in the Constitution as far as constitutional referenda are at stake. Obviously a constitutional referendum is not affected by the limits provided for by art. 151 Const., while the Electoral Code entrusts the Constitutional Court with the preliminary examination of the proposal of constitutional referenda initiated "according to point 4 or 5 of article 177 of the Constitution", apparently on the basis of art. 131 é) of the Constitution.

In the case of constitutional referenda the decision of the Constitutional Court is requested by the General Secretary of the Assembly (art. 123.2 of the Electoral Code), while the decision of the Court about the initiative of a general referendum is requested by the CEC if this body decides that the request is "in order" (art. 129 of the Electoral Code), that is the signatures and voters' identification documents are valid (art. 128.1 of the Code).

Perhaps the CEC, whose task is clearly restricted to the formalities of the referendum's procedure, should have submitted the question about the compliance with the Constitution of the initiative, which is at stake in the present case, to the Constitutional Court. It is a task of this body to verify whether the issues affected by the initiative of a general referendum fall or not in its competence. The exclusion of general referenda from the constitutional issues adds a new limit to the list provided for by art. 151 of the Constitution. It is a question concerning citizens' rights which has to be settled by a judge and CEC is not a judge.

The competence of the general referenda are therefore restricted and completely separated from the competence of the constitutional referenda. Guaranteeing the compliance with this division of functions is a task of the Constitutional Court, and the CEC cannot pretend to take its place. This is, perhaps, the fault of the decision of the CEC which is the object of the case presently pending before the Constitutional Court. It is true that both the Constitution and the Electoral Code don't explicitly entrust to the Constitutional Court the control of the popular initiative of a referendum with regard to the provisions of art. 177, but a similar explicit provision is also missing as far as the CEC is concerned. It is easier to argue in favour of an enlargement of the competence of the Court already provided for by art. 152 of the Constitution than supporting the present decision of the CEC to judge without any basis about the conformity to the Constitution of a popular initiative of a referendum.

Obviously the reasoning which is behind these conclusions can be accepted only if we share the opinion that the exercise of the popular sovereignty can be limited and regulated by the laws implementing the Constitution. If we thought that the people may exercise its sovereignty without any limitation, we could argue that the popular initiative is allowed to deal also with constitutional items on the basis of a large interpretation of art. 150 in connection with art. 2.1 of the Constitution. According to this construction of the legislation presently in force art. 150 of the Constitution would authorize the people to take the initiative of a referendum even for the abrogation of constitutional provisions: the s.c. constitutional referendum would not have the monopoly of the popular consultations regarding constitutional items but it would have a relevance restricted to the frame of the procedure for the amendment of the Constitution promoted by the Parliament.

But the idea that referenda for the amendment of the Constitution can be initiated both on the basis of art. 177 of the Constitution and in compliance with art. 150 of the Constitution cannot be accepted.

Behind the idea we cannot accept, it is a theory of the popular sovereignty according to which the people don't face limitations and are not bound by constitutional obligations and ties in the exercise of their sovereignty. Therefore the people which are supposed to be the constituent power, would be free in choosing the way for amending the Constitution, specially if the calling of a referendum initiated by a popular proposal is at stake. Sovereignty would imply fullness of power even with regard to the choice of the modalities and procedure of its exercise.

It is evident that in a constitutional State the idea of a power which does not face limitations and obligations based on the Constitution cannot be easily accepted. The sovereignty of the people established in the frame of a constitutional legal system cannot be mistaken for the constituent power. If we look at the Albanian Constitution, we can find a confirmation of these conclusions.

It is true that according to art. 2.1 of the Constitution “sovereignty in the Republic of Albania belongs to the people”. But this statement does not imply a full and unconditioned attribution of power. The following § 2 of the same art. 2 states that “the people exercise sovereignty through their representatives or directly”. This provision is the result of an amendment to the draft of the Constitution which implied the change of the text from “the people exercise sovereignty directly or through their representatives” to the present version of art. 2.2. The commentators say that this change implies a clear preference in favour of the representative democracy, while the old text suggested a preference for the direct democracy. Certainly the amendment has a meaning for the interpretation of the Constitution, but it is evident that even the old text did not show an exclusive preference for direct democracy and a large construction of the popular sovereignty. Both the new text and the old text, as far as they allow different way of exercise of the sovereignty, require legislation for the implementation of the principle of the popular sovereignty, a legislation which has to be adopted in conformity with the constitutional provisions dealing with the distribution of the power between the State’s bodies and the electorate.

The construction of art. 2.2 which is proposed in these pages bars the possibility of a positive answer to the question of an incompatibility between the mentioned art. 2 and the articles 150-152 and 177 of the Constitution. This is the main object of the second question submitted by the Albanian Constitutional Court to the Venice Commission. Are articles 150–152 and 177 compatible with the principles stated in art. 2? The answer could be negative if we thought that the Constitution entrusted the people with the fullness of the sovereignty. This answer could imply the unconstitutionality of art. 150–152 and 177, if the Albanian Constitution established an hierarchy of the provisions of the constitutional text according to substantial criteria and allowed the Constitutional Court to judge on the compatibility of the constitutional provisions with the constitutional principles supposed to have a priority in the hierarchy. But nothing in the Albanian Constitution – differently from other European constitutions – gives evidence of the existence of a hierarchy of the constitutional provisions and authorizes the Constitutional Court to use the constitutional principles as the yardstick to judge the constitutionality of the provisions of the Constitution.

And in any case it is evident that art. 2 explicitly authorises the Constitution itself and the ordinary implementing legislation to limit the competence both of the general referenda and of the constitutional referenda.