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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

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

by

Mr Oliver KASK (Member, Estonia)

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Questions put up before the Venice Commission are: (1) can a request to abrogate a constitutional law or 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, 150 and 152 of the Constitution?

To answer the first question, it has to be looked at Articles 150 and 177 of the Constitution of Albania. Interpretation of those articles can be constructed on different principles of interpretation of law, which in complex lead to the answer that referendum on the amendments of the Constitution cannot be initiated by people (peoples' initiative).

Interpretation of the Constitution has to be based on linguistic, systemic, teleological and historical arguments. Comparative legal arguments are appropriate as well.

I do not have documents which would be appropriate to assess the aim of the constitution makers. Information on the aims of Article 150 and 177 should be used by the Constitutional Court. If there are documents which make evident that the aim of the drafters of the constitution was to have a referendum called by peoples' initiative on the constitutional amendments as well, it would still be difficult to draw similar conclusions from other legal arguments.

Linguistic arguments could not be effective in answering the question. In Article 150, which regulates the referendum initiated by people, adopted laws are mentioned as object of the referendum initiated by people. Article 116(1) a) and c) of the Constitution of Albania make a difference between the Constitution and laws, but Article 4 states that the Constitution is the highest law in the Republic of Albania.

Systemic arguments support the standpoint that such referendum on constitutional amendments passed by the parliament is not allowed. Part 17 of the Constitution "Amending the Constitution" does not foresee a referendum initiated by people. Article 150 is located in part of the Constitution dealing with other legislative procedure. It is a common constitutional tradition to have the procedure for amending the constitution regulated in a special part of the constitution. Although it is also common to European constitutional heritage to apply the ordinary legislative procedure stipulated in constitution also to amendments of the constitution unless otherwise regulated, initiative to have a referendum is an important issue to have prescribed clearly in the provisions regulating the procedure for amending the constitution.

While using teleological arguments, it has to be noted that by Article 177(5), an approved constitutional amendment is submitted to referendum when one-fifth of the members of the Assembly request it. It is a guarantee for the opposition to veto the amendments and give the decision-making power to the people. As the requested minority is quite small, such referendum would take place quite often unless there is consensus on the amendment in the parliament of if it is clear that there is a big support of citizens for the amendments. The chance to call for a referendum by parliamentary opposition for ordinary laws is not provided, as according to Article 150(2) such decision needs the support of the parliamentary majority.

It leaves the possibility to have a referendum on constitutional amendments very open and peoples' initiative as stated in Article 150 would have effect only when the amendment was adopted in the Parliament with consensus or more than four-fifth majority. The aim of the constitution is not to have a referendum always for the amendment of the Constitution. Such procedure would be simpler and take less time (e.g. there would be no need to collect signatures).

Constitutional amendments need a two-thirds majority to be adopted in the Parliament. If the big majority in Parliament is for the amendments and there is no one-fifth of the members of Parliament calling for a referendum, there are not many arguments for allowing to call a referendum by 50 000 voters where the decision is made by simple majority of the voters. It could be suggested that the majority of voters would be in favour of the amendment. Although by Article 81 of the Constitution there are other laws which need a three-fifths majority of the Parliament and which can be put on referendum by 50 000 voters, the majority requested for the adoption of the amendments to the Constitution is bigger.

It could be suggested that the number of voters who have the right to call for a referendum should be bigger for a referendum on constitutional amendments than on ordinary laws. As Article 150 does not provide that, it can be concluded that the right to call a referendum for constitutional amendments is not foreseen.

It could also be argued by comparative constitutional law that a situation where peoples' initiative to call for a referendum is allowed for the ordinary laws but not for constitutional amendments is not absolutely unknown in European constitutional heritage. Such was also the case by 1931 Constitution of Spain (Article 66).

To answer the second question posed by Constitutional Court of Albania, it has to be noted that the question is on the coherence of the Constitution itself. It is a generally accepted principle of constitutional law that constitutions (as well as other legislative acts) have to be interpreted in a way which guarantees its coherence. Thus the principles laid down in the Constitution should only be applied as far as they are not in contradiction with other constitutional principles or rules. Sovereignty as a very general principle has to give room for other, more concrete norms of constitution, if there is doubt on their conformity.

The case would be different if Articles 150, 152 and 177 would be a result of constitutional amendments and the provisions for amendments of the general principles of the constitution would be different from provisions for amending other parts of the constitution, as is the case in some few Member States of the Council of Europe (e.g. Estonia). This is not the case here.

It has still to be noted that the principle of sovereignty of people laid down in Article 2 (1) and (2) is as a principle of constitution limited by constitution itself. Article 2(2) is not a basis for all kinds of decision-making by people, but a general statement which has to be clarified in more specific provisions in the constitution. People as *pouvoir constitué* is not allowed to amend constitution by other methods as the procedure stipulated in the constitution itself. Decision-making in referenda cannot take place leaving aside the regulation of constitution itself.