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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

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Amicus Curiae opinion for the Albanian Constitutional Court

The Albanian Constitutional Court requests an Amicus Curiae opinion on the following two questions:

1. Can a request to abrogate constitutional law or amendments to the Constitution, through a referendum initiated by the people, be based on Article 150 of the Constitution?
2. Is the principle stipulated in Article 2 of the Constitution providing that Sovereignty in the Republic of Albania belongs to the people in harmony with the provisions of Article 77 and 150 and 152 of the Constitution?

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.

1. Article 150 of the Albanian Constitution stipulates:

- “1. The people, through 50,000 citizens who enjoy the right to vote, have the right to a referendum for the abrogation of a law, as well as to request the President of the Republic to hold a referendum about issues of special importance.
2. The Assembly, upon the proposal of not less than one-fifth of the deputies or on the proposal of the Council of Ministers, can decide that an issue or a draft law of special importance be presented for referendum.
3. Principles and procedures for holding a referendum, as well as its validity, are provided by law.”

The question arises whether the wording “the abrogation of the law” applies only to the legislative acts issued in compliance with “chapter IV – Legislative Process” of Part III of the Constitution, or whether it applies also to the Constitution and the amendments to the Constitution.

More specifically, this question also pertains to the relationship between Article 150 of the Constitution and Article 177 of the Constitution on “Amending the Constitution.” This article stipulates:

- “1 An initiative for amending the Constitution may be taken by not less than one fifth of the members of the Assembly.
2. No amendment to the Constitution may take place when extraordinary measures are in effect.
3. A proposed amendment is approved by not less than two-thirds of all members of the Assembly.
4. The Assembly may decide, by two-thirds of all its members, that the proposed constitutional amendments be 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 Assembly.
5. An approved constitutional amendment is submitted to referendum when one-fifth of the members of the Assembly request it.
6. The President of the Republic cannot return for re-consideration a constitutional amendment approved by the Assembly.
7. An amendment approved by referendum is promulgated by the President of the Republic and becomes effective on the date provided for in it.
8. An amendment to the Constitution cannot be made unless a year has passed since the rejection by the Assembly of a proposed amendment on the same issue or three years have passed from its rejection by referendum.”

The question arises whether the direct participation of the people in the constitution-making process is limited to the possibilities offered by the specific provisions of Article 177 of the Constitution, or whether this direct participation can also be organised under the general provision of Article 150 of the Constitution.

2. Article 150 provides for the right for 50,000 citizens who enjoy the right to vote, to call for a referendum “for the abrogation of a law.” The notion of “law” is not specified in this article. It appears from the other articles of the Constitution that it refers to the law in general, or to a “legislative act”. As Article 4. 2. of the Constitution stipulates that the Constitution is the “highest law in the Republic of Albania”, Article 150 of the Constitution could, at first sight, be broadly constructed as also covering the referendum “for the abrogation of a constitutional provision or an amendment to the Constitution.”

Moreover, this broad construction seems to be confirmed by the fact that the Albanian Constitution has been adopted as a law, more specifically Law n° 8417, “Constitution of the Republic of Albania”, which was adopted by the *Kuvendi* on 21 October 1998, approved in a popular referendum on 22 November 1998 and promulgated on 28 November 1998. In addition, an amendment to the constitution is also promulgated as a law. In the present case, the law which the applicants would like to submit to a referendum is Law n° 9904 of 21 April 2008 On some amendments in Law n° 8417 of 21 October 1998, “Constitution of the Republic of Albania” as amended.

So Article 150 of the Constitution as such does not seem to exclude the possibility of submitting the abrogation of a law amending the Constitution to a popular referendum on the request of 50,000 citizens entitled to vote.

3. Constitutional provisions cannot, however, be interpreted in isolation, without having regard to the other provisions of that Constitution of which they are a part. So the question whether Article 150 also applies to constitutional amendments cannot be examined without taking into account Article 177 of the Constitution on the amending of the Constitution. According to this article, direct participation of the people in the constitutional process can be organised either on the request of two-thirds of the members of the Assembly (Art. 177.4) or on the request of one fifth of the members of the Assembly. (Art. 177.5) The referendum organized on the basis of Article 177.4 relates to a proposition for a constitutional amendment; the referendum organized on the basis of Article 177.5 relates to a constitutional amendment which has already been approved by two-thirds of the members of the Assembly.

4. As Article 177 of the Albanian Constitution is the specific ruling on the amendment of the Constitution, it must be considered to deal exhaustively with the possibilities of organising a constitutional referendum on an amendment to the Constitution. Article 177 does not provide for a right to call for a referendum for the abrogation of an amendment to the Constitution, neither for one fifth of the members of the Assembly, nor for 50,000 citizens who are entitled to vote. The Constitution seems to imply that the direct involvement of the people in the constitution-making process is only possible in cooperation with the representatives of the people in the Parliamentary Assembly. Hence the right for either two-thirds of the members of the Assembly to decide that a proposed constitutional referendum should be submitted to a referendum (Art. 177 point 4), or for one-fifth of its members to put an amendment which has already been approved by two-thirds of the members of the Assembly to a referendum.

5. The fact that the right for 50,000 citizens who enjoy the right to vote to call for a referendum “for the abrogation of a law”, which is explicitly provided for in Article 150 of the Constitution, is not confirmed in Article 177 of the Constitution specifically devoted to the amending of the Constitution, could be explained by the will to guarantee the stability of the Constitution. For the latter could be undermined if a constitutional provision which was approved by a two-thirds majority, and which was not submitted to a referendum by one-fifth of the members of the

Assembly, could be abrogated in a referendum which was organized on the initiative of 50,000 citizens and which led to the result that a simple majority of the participants rejected the constitutional amendment.

6. Besides, the interpretation that in addition to the possibilities of organising a referendum on a proposed constitutional amendment (Art. 177.4) or on an approved constitutional amendment (Art. 177.5), it would also be possible to organize a referendum on the abrogation of an approved constitutional referendum (Art. 150) would have a very strange effect. It would imply that the one-fifth of the members of the Assembly who, on the basis of Article 177.5 of the Constitution, take the initiative to organize a referendum on a constitutional amendment within 15 days of its approval (Art. 123. 2 of the Electoral Code of Albania) could, after the approval of the amendment by the people and the declaration by the president, take another initiative to submit the approved amendment to a referendum, this time on the basis of Article 150 of the Constitution, in order to have it abrogated. These rather absurd consequences also seem to corroborate the idea that Article 150 of the Constitution does not apply to the abrogation of a constitutional provision.

7. Finally the fact that the Electoral Code of the Republic of Albania makes a distinction between a constitutional referendum (part nine, chapter II, section 1, art. 121 – 125) a general referendum (part nine, chapter II, section 2, art. 126 -131) and local referenda (part nine, chapter II, section 2, art. 132) and that it mentions only two types of constitutional referenda, those provided for in Article 177. 4 and 5, seems to confirm that the legislature *in tempore non suspecto* opted for the interpretation that Article 150 of the Constitution does not include the possibility of holding a referendum for the abrogation of a constitutional provision.

2. Is the principle stipulated in Article 2 of the Constitution providing that Sovereignty in the Republic of Albania belongs to the people in harmony with the provisions of Article 177 and 150 and 152 of the Constitution?

Article 2 of the Constitution:

“1. Sovereignty in the Republic of Albania belongs to the people.

2. The people exercise sovereignty through their representatives or directly.

3. For the maintenance of peace and national interests, the Republic of Albania may take part in a system of collective security, on the basis of a law approved by a majority of all the members of the Assembly.”

Article 150 of the Constitution

1. The people, through 50,000 thousand citizens who enjoy the right to vote, have the right to a referendum for the abrogation of a law, as well as to request the President of the Republic to hold a referendum about issues of special importance.

2. The Assembly, upon the proposal of not less than one-fifth of the deputies or the Council of Ministers, can decide that an issue or a draft law of special importance be presented for referendum.

3. Principles and procedures for holding a referendum, as well as its validity, are provided by law.

Article 152 of the Constitution

1. The Constitutional Court reviews preliminarily the constitutionality of the issues put for a referendum according to Article 150, paragraphs 1 and 2, Article 151, paragraphs 2 and 3, as well as Article 177, paragraphs 4 and 5, within 60 days.

2. The importance of special issues, as provided in paragraphs 1 and 2 of Article 150, is not subject to judgement in the Constitutional Court.

3. The date of the referendum is set by the President of the Republic within 45 days after the promulgation of the positive decision of the Constitutional Court or after expiry of the term within which the Constitutional Court had to have expressed itself. Referenda can be held only on one day of the year.

Article 177 of the Constitution

1. Initiative for revision of the Constitution may be undertaken by not less than one-fifth of the members of the Assembly.

2. No revision of the Constitution may be undertaken during the time when the extraordinary measures are taken.

3. The draft law is approved by not less than two-thirds of all members of the Assembly.

4. The Assembly may decide, by two-thirds of all its members, that the draft constitutional amendments be voted on in a referendum. The draft law for the revision of the Constitution enters into force after ratification by referendum, which takes place not later than 60 days after its approval in the Assembly.

5. The approved constitutional amendment is put to a referendum when this is required by one-fifth of the members of the Assembly.

6. The President of the Republic does not have the right to return for review the law approved by the Assembly for revision of the Constitution.

7. The law approved by referendum is promulgated by the President of the Republic and enters into force on the date provided for in this law.

8. Revision of the Constitution for the same issue cannot be done before a year from the day of the rejection of the draft law by the Assembly and 3 years from the day of its rejection by the referendum.

It is a general rule of interpretation that, if possible, the different provisions of a law must be interpreted in a way that the coherence of the law is guaranteed.

In the present case there is no reason to see a contradiction in the articles of the Constitution which are mentioned above.

Although Article 2.1 states that sovereignty in the Republic of Albania belongs to the people, article 2.2. immediately adds that people exercise sovereignty through their representatives or directly.

Apparently, sovereignty of the people, in the Albanian Constitution, can be exercised in two ways, either by direct democracy, or by indirect democracy.

Rather than being in contradiction with Article 2, articles 150, 152 and 177 concretize the principle of sovereignty by indicating, in conformity with Article 2, whether it will be exercised indirectly by the representatives of the people, directly by the people itself or in mixed form.