Strasbourg, 5 March 2009 **CDL(2009)030***

Opinion No. 517 / 2009 Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT *AMICUS CURIAE* BRIEF FOR THE CONSTITUTIONAL COURT OF ALBANIA

ON THE ADMISSIBILITY OF A REFERENDUM TO ABROGATE CONSTITUTIONAL AMENDMENTS

on the basis of comments by

Mr Sergio BARTOLE (Member, Italy)
Mr Oliver KASK (Member, Estonia)
Mr Jan VELAERS (Member, Belgium)

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Introduction

1. The Constitutional Court of Albania, by a letter of its President dated 26 January 2009, asked the Venice Commission to provide an amicus curiae brief in a case concerning the admissibility of a referendum to abrogate constitutional amendments. In the case at issue the Central Election Commission refused to organise a referendum for the abrogation of the constitutional amendments adopted by the Assembly on 21 April 2008[1], although the number of signatures required for the holding of a referendum to abrogate a law had been collected. The Central Election Commission is of the opinion that the respective constitutional provisions refer to the abrogation of ordinary laws only and do not permit a popular initiative to abrogate constitutional provisions.

2. The Constitutional Court submitted the following two questions to the Commission:
- *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?*
- *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?*

3. The present amicus curiae brief was adopted by the Venice Commission at its … Plenary Session (Venice, ../.. …), on the basis of comments by Messrs Bartole (Italy), Kask (Estonia) and Velaers (Belgium).

The first question: 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?

4. The most directly relevant Articles of the Albanian Constitution for answering the first question are Article 150 on the abrogatory referendum and Article 177 on amending the Constitution. These Articles are worded as follows:

> ***Article 150***
> *"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."*
>
> ***Article 177***
> *"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*

[1] These amendments are the subject of an Opinion of the Venice Commission, CDL-AD(2008)033.

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."

5. The question therefore arises whether the wording "the abrogation of a law" in Article 150.(1) 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 amendments to the Constitution. In other terms, 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.

6. A literal interpretation of Article 150 is not sufficient to provide a clear answer to this question.[2] The Constitution of Albania uses the term "a law" in different ways. On the one hand, Article 116.(1) makes a clear distinction between the Constitution and "the laws". On the other hand, Article 4.(2) of the Constitution stipulates that the Constitution is the "highest law in the Republic of Albania". 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", adopted by the Assembly 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. Article 150 of the Constitution as such therefore does not seem to exclude the possibility of submitting the abrogation of a law amending the Constitution to a popular referendum at the request of 50,000 citizens entitled to vote.

7. Constitutional provisions cannot, however, be interpreted in isolation, without having regard to the other provisions of the Constitution of which they are a part. It is usual in European constitutions to have specific provisions for amending the constitution and the Albanian Constitution as well has a specific chapter -Part XVII- dealing with constitutional amendments. The question whether Article 150 also applies to constitutional amendments therefore cannot be examined without taking into account Article 177 of the Constitution on amending the Constitution. According to this Article, direct participation of the people in the constitutional process can be organised either at the request of two-thirds of the members of the Assembly (Art. 177.(4)) or at the request of one-fifth of the members of the Assembly (Art. 177.(5)). The referendum organised on the basis of Article 177.(4) relates to a proposition for a constitutional amendment; the referendum organised 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.

8. As Article 177 of the Albanian Constitution is the specific provision on amending the Constitution, it should be presumed 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

[2] The Constitutional Court of Albania is better placed than the Venice Commission to establish whether there are relevant elements in the *travaux préparatoires* of the Constitution.

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 co-operation with the representatives of the people in the 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.(4)), or for one-fifth of its members to put an amendment, which was already approved by two-thirds of the members of the Assembly, to a referendum.

9. The will to guarantee the stability of the Constitution provides a good explanation for the fact that the right for 50,000 citizens, who enjoy the right to vote, to call 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 for constitutional amendments. This stability 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 organised on the initiative of 50,000 citizens and which led to the result that a simple majority of the participants rejected the constitutional amendment. Since quite a small number of members of parliament, one-fifth, can request the holding of a referendum on a constitutional amendment, such referendums can already take place fairly easily. The Constitution, however, clearly does not aim at always having a referendum on amendments to the Constitution but only if there is a lack of a broad political consensus, which can be presumed to reflect the will of the majority of the voters.

10. Article 177 also provides sufficient guarantees for the opposition without having recourse to the provisions of Article 150. While under Article 177.(5) one-fifth of the members of the Assembly may *request* the holding of a referendum on an adopted constitutional amendment, by virtue of Article 150.(2) one-fifth of the members of the Assembly may *only ask the Assembly to call* a referendum to abrogate an adopted law. The majority of the Assembly is, however, unlikely to call a referendum on a text approved by it. With respect to ordinary laws the opposition therefore has to use the more difficult and time-consuming procedure of collecting signatures if it wishes to have a referendum.

11. 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 referendums (part nine, chapter II, section 2, art. 132) and that it mentions only two types of constitutional referendums, 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.

12. In the present case the procedure followed may have been problematic. It may be argued that under the provisions of the Electoral Code, the Central Election Commission, which has a clear mandate only for examining a referendum initiative for its formal regularity, should have submitted the issue to the Constitutional Court instead of refusing on its own to hold the referendum. This does, however, not change the reply to the question put to the Venice Commission.

13. As regards the first question, the Venice Commission is of the opinion that, if one considers the Albanian Constitution as a whole, it appears clear that a referendum on constitutional amendments may be held only if the requirements of Article 177 on constitutional amendments are met and not on the basis of Article 150.

The second question: 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?

14. The relevant provisions of Article 2 of the Constitution are worded as follows:

> ***Article 2***
> *"1. Sovereignty in the Republic of Albania belongs to the people.*
> *2. The people exercise sovereignty through their representatives or directly.*
> *3. …."*

15. In the background to the question there seems to be a theory of popular sovereignty according to which the people do not face limitations and are not bound by constitutional obligations and ties in the exercise of their sovereignty. Therefore the people, who are supposed to be the constituent power, would be free in choosing the way of amending the Constitution, specifically if the calling of a referendum on popular initiative is at stake.

16. 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 accepted. The sovereignty of the people established in the framework of a constitutional legal system cannot be mistaken for the constituent power and it is perfectly compatible with popular sovereignty to require that its exercise has to follow specific procedures. When one examines the text of the Albanian Constitution, it becomes clear that it also considers popular sovereignty as having to be exercised in the framework of specific rules.

17. It is true that according to Article 2.(1) of the Constitution "*sovereignty in the Republic of Albania belongs to the people"*. But this statement does not imply a full and unconditional attribution of power. As any provision in a legal text, an article in a constitution has to be interpreted in the context of the constitution as a whole and not in isolation. The following paragraph of the same Article 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 involved a change in the text from "the people exercise sovereignty directly or through their representatives" to the present version of Article 2.2. This change implies a clear preference in favour of representative democracy, while the previous text suggested a certain preference for direct democracy. But even the previous text did not show an exclusive preference for direct democracy or a wide understanding of popular sovereignty. Both the current and the previous text require legislation for the implementation of the principle of popular sovereignty, legislation which has to be adopted in conformity with the constitutional provisions dealing with the distribution of power between the State's bodies and the electorate.

18. This understanding of Article 2.2 prevents the possibility of a negative answer to the question of the compatibility between Article 2 and Articles 150 – 152 and 177 of the Constitution. Moreover, the answer could be negative only if the Albanian Constitution established a hierarchy among the constitutional provisions and enabled the Constitutional Court to decide on the compatibility of constitutional provisions with constitutional principles supposed to have priority. But there is no trace of such a hierarchy in the Albanian Constitution. And in any case it is evident that Article 2 authorises the Constitution itself and the ordinary implementing legislation to limit the scope both of the general referendum and of the constitutional referendum. The sovereignty of the people is a very general principle which becomes operational through the more specific provisions of the Constitution and cannot be used to set aside these provisions.

19. The Venice Commission sees therefore no reason to doubt that Articles 150 to 152 and 177 of the Constitution are fully compatible with the principle of popular sovereignty as set forth in its Article 2. These Articles do not contradict the principle but concretise it by indicating to which extent sovereignty is exercised directly by the people, indirectly by their representatives or in a mixed form.

Conclusions

20. In conclusion, the Venice Commission is of the opinion that the Albanian Constitution permits the calling of a referendum on constitutional amendments only to the extent foreseen in Article 177 on constitutional amendments, a provision which provides sufficient scope for the involvement of the people and sufficient guarantees for the minority in the Assembly. Article 150 on popular initiatives is not applicable to constitutional amendments. The constitutional provisions on the referendum and on constitutional amendments in no way can be considered as a violation of the principle of the sovereignty of the people but constitute well-balanced rules on the manner in which this sovereignty is to be exercised.