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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT LAW OF THE REPUBLIC OF ALBANIA "ON REFERENDA"

Comments by Mr Eugenio Polizzi

The following comments are based on the available documents in English language:

- Constitution of the Republic of Albania, approved on 21 October 1998 (translation by Kathleen Imholz, Esq. and Krenar Lolotsi, Member of the Technical Staff of the Constitutional Commission, and ACCAPP) prepared on 26 October 1998;
- draft Law "on Referenda", received by Pierre Garrone, COE.

I. Types of Referenda provided by the Albanian Constitution

The Constitution provides for 3 basic groups of referenda, different from each other with reference to their object:

- Constitutional referendum
- General referendum
- Local referendum

II. The Constitutional referendum – General outline of the relevant provisions.

The Constitutional referendum is provided for by art. 177 par.4 and 5 of the Constitution.

It can be initiated only by the National Assembly members, and its object is a revision of the Constitution.

There are two different kinds of constitutional referenda, that I have denominated, for purpose of clarity, as propositive *referendum (case A) and* abrogative *referendum (case B).*

In case A: The Assembly may decide, with two-thirds of all its members, that the draft constitutional amendments be voted 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 *(art. 177 par.4).*

This case is a rather peculiar case, because the same majority that would have the power to approve, finally, a constitutional reform (according to par. 3 of the same art. 177), is given also the opportunity to opt for a referendum on the same draft constitutional amendments that could be legitimately approved right away.

The *political* scenario is therefore of an Assembly willing to share with the population the responsibility of a constitutional amendment, although the political parties represented in the Assembly do have the necessary majority to approve such a constitutional revision. Thus, the Assembly proposes a draft constitutional amendment to the people, accepting the possibility that it will be rejected.

The legal scenario is that of an ordinary initiative for the parliamentarian revision of the Constitution.
Any such initiative can develop along 3 different paths:

1. a failure of the initiative, for lack of the required number of assenting Assembly members (2/3);
2. the final approval of the revision with the vote of not less than two thirds of all the members of the Assembly;
3. the alternative decision, by the same majority as in case 2, to have the draft constitutional amendments be voted in a referendum.

In case B: *The approved constitutional amendment is put to a referendum when this is required by one-fifth of the members of the Assembly* (art. 177 par.5).

This case B represents, on the opposite, a traditional case of a qualified minority that requests a referendum be held in order to challenge the majority's decision, by submitting the same draft amendment of a constitutional revision *that has already been approved by the Assembly with the relevant legal majority*, to the popular will. It is meant to abrogate an approved constitutional amendment.

II.A. The draft law, art.4: constitutional propositive referendum (case A)

The draft law acknowledges, indeed, that there are two types of Constitutional referenda, but fails to set type A in its proper constitutional frame. The Constitutional referendum is indeed provided as one of the possibilities granted to revise the Constitution, but the ordinary process is a parliamentarian one.

Art. 4 par.1 of the draft law assumes that a constitutional referendum can be initiated by not less than one fifth of the members of the Assembly, but it is a wrong assumption.
According to art. 177 par. 1 of the Constitution,
Initiative for revision of the Constitution may be undertaken by not less than one-fifth of the members of the Assembly.
The initiative is not according to the text of the Constitution, related to a referendum, but only to a process of parliamentarian revision of the Constitution. The draft law will eventually be approved by two thirds of the members of the Assembly, and in such case, apart from the provision of par.5, will be promulgated without any referendum.

As we have seen before, *The Assembly may decide, with two-thirds of all its members, that the draft constitutional amendments be voted in a referendum* rather than approve it directly. As it has been written before, it is a political choice, and not a technical need.
It is clear that the qualified number of parliamentarians requested to call for a constitutional referendum is, therefore, two thirds of the Assembly and not one fifth, before the revision is approved.

Given the misleading assumption of art. 4 par.1, this same paragraph as well as the following two paragraphs appear inconsistent with the Constitution: the review by the Constitutional Court of the initiative of one fifth of members is groundless, since the initiative prompts a parliamentarian amendment process, and not a referendum; the provision that the Assembly may decide to hold a constitutional referendum with two thirds of its members only after the announcement of the Constitutional Court decision, is also to be canceled, as part of the same wrong assumption.

In conclusion, the whole article should be re-drafted in a way consistent with the Constitution, replacing the initiative of "one fifth" with "two thirds" of Assembly members.
The case of a possible negative decision of the Constitutional Court during the preliminary review of constitutionality of the Assembly initiative should be particularly tackled. What, if the Constitutional Court rules out a referendum on the proposed text law? Should it be considered finally approved (as in art. 5.5 of the draft law), or should it go back the Assembly, or should it be considered rejected? The first option is certainly wrong: in this case, in fact, the amendment has never been approved as such, while the required majority has been achieved only to present the text to the referendum. Both the other solutions appear legitimate, but it is advisable that the law takes a clear stand between them.

II.B. The draft law, art.5: the constitutional abrogative referendum (case B)

Case B, as we called it, is dealt with in art.5 of the draft law.
This time, the general constitutional frame is respected by the draft law..
The referendum provided by this norm is, in its substance, an abrogative referendum. It offers to the popular vote an already approved amendment. For this reason, in fact, art.5 par.4, stipulates that CC reviews preliminarily the constitutionality of the request by this group of Assembly members "*in compliance with paragraphs 2 and 3 of art. 151 ".*
This article stipulates:
(2) Issues related to the territorial integrity of the Republic of Albania, limitations of fundamental human rights and freedoms, budget, taxes, financial obligations of the state, declaration and abrogation of the state of emergency, declaration of war and peace, as well as amnesty, cannot be voted upon in a referendum.
(3) A referendum upon the same issue cannot be repeated before 3 years have passed since it was held

The issues that cannot be voted upon in a referendum according to art. 151 par.2 are, in general, issues that a widespread juridical tradition has suggested not to ever offer directly to the voters[1].
The Constitutional referendum provided by art. 177 par.5 of the Albanian Constitution is an abrogative type of referendum: as such, a constitutional control as the draft law provides for, is consistent with the system: in order to avoid that a constitutional reform, approved by a legal majority, might be overruled by a referendum on issues too easy to be decided in one sense only, like taxation.

Some doubts are raised by art.5 par.7, where it is stipulated that

The law on the revision of the Constitution does not enter into force when the majority of the voters have voted against, but not less than 1/3 of those who have the right to vote.

We have a case of a law that has been approved by a large majority of two thirds of the Assembly, but it would be enough 33.34% of voters against it, to prevent it from entering into force. It seems to the author of these notes a contradiction: a clear minority of the population can prevent a revision of the constitution that is approved by a large majority of the Assembly!
It is noteworthy that the apparent likelihood with art. 4 par.8 is a "false friend", because in the latter case the 1/3 of voters cast their vote in the same sense as the two thirds parliamentarians that have already approved the draft law; while in the former case provided by art. 5 par.7 a minority of the voters would be enabled to overrule a draft law that has been approved by the two thirds of the Assembly.
The provision endows the existing constitutional norm of a particular strength, making it specially difficult to amend it. It is a political choice, that the author can only point out to the law makers.

III. THE GENERAL REFERENDUM- Outline of the relevant provisions

The "General" referendum is different from the Constitutional referendum, mainly because it is not related to Constitutional amendments.
Art. 150 of the Constitution provides for two types of "general" referendum, with reference to its initiators:
A. the first one is initiated by 50.000 voters;

[1] The exclusions have been explained, in the Italian system, because of the abrogative character of the Italian referendum, but the constitutional choice of the Albanian system is beyond the scope of these notes.

B. the second, by a group of MPs or the Council of Ministers.

III.A. The general referenda initiated by the voters, so that we could call them **popular referenda**, according to art. 150 par. 1 of the Constitution can have two different objects:

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

Both such referenda are treated together under art. 6 of the draft law.

According to the draft law, a popular referendum can be initiated by a "group of not less than 12 initiators".
The law does not say anything about who can be an initiator. The Constitutional norm stipulates that 50.000 citizens who enjoy the right to vote have the right to a referendum, and it may be understood that initiators belong to that same category: it would be better to make it clear in the law.

12 initiators of a referendum pursuant to art. 150 par.1, register the request to hold such referendum with the CEC: the request shall contain the title, number and date of approval of the law, that is requested to be repealed, as well as the number of the Official Journal where it [the law] is published.
There is no provision for the abrogation of some parts of a law.
Although with clear limitations, it should still be granted the possibility to abrogate only some parts of a law, especially considering that some laws may well contain very different regulations, concerning different issues. To limit the abrogative referendum to the whole law, could become an undue compression of a constitutional right. This issue will be specifically treated in the following part.

A second outstanding issue is the role that the draft law gives to the CEC.
It has to verify the request for referendum, and within 45 days from the deposit of the request with the 50.000 signatures, *takes the decision for its acceptance or rejection.*
Upon what ground the CEC takes such decision is not clearly stipulated.
There is a specific procedure for the "formal irregularities", but also this category is rather vague and although it should probably deal with the regularity of the signatures collected, it would be strongly advisable to explain the limits and bounds of such control of formal irregularities.
The CEC may also *decide to join in one the same issues within a request, or join the requests on the same issue, which is immediately communicated to the representatives of the request/requests* (par.7). It is a matter of high relevance, because the joining of several issues or requests can affect deeply the possibility of success of a referendum.

There is no specific provision for a control of Constitutionality of the request of referendum by the Constitutional Court, as for art. 5 par.4. Such omission does not seem to have any rationale behind it, and is probably just due to the fact that the Constitution already provides such control by the Court in art. 152 par.1 as well in art. 131, lett.h. It would still be advisable to provide for it in the law, as well.

The referendum can be held "*on an issue of special importance*" pursuant to the Constitution.
The law does not engage in the explanation of what an *issue of special importance* can be in order to be legitimately object of a referendum. Apart from the direct exclusions provided by art.

151 par.2 of the Constitution, the open character of the term "issue of special importance" suggests that the law provides a more definite setting of what an "issue" can be. In the first place, it has to be a "question" to which voters can answer *yes* or *no.* Furthermore, the question must be clear, homogeneous, complete and univocal[2].
The lack of any such clarification is quite serious, and furthermore there is no device in the system to cope with the task to accept or reject such a referendum, and to review it according to such criteria.
The problem is even more serious, since art. 152 par. 2 of the Constitution stipulates that " *The importance of special issues, as provided in Paragraphs (1) and (2) of Article 141, is not subject to judgement in the Constitutional Court*."

The last norm has to be interpreted in the sense that the Court cannot decide if the issue put to referendum is important or not. But it cannot be interpreted in the sense that the Court cannot control the constitutionality of the referendum.

What remains not regulated is the definition of the special issues, and the body that will exercise any control over the request.

A possible answer is found in the phrasing of art. 150 par.1 of the Constitution, where there is an apparent different procedure between the request for an abrogational referendum and the one *about an issue of special importance.* In the first case, the people have the right to a referendum; in the second, they have the right *to request the President of the Republic to hold a referendum.* Is there a difference between the two cases? Does the President, in the latter case, have the ultimate decision over holding or not the referendum?

Art.6 par.3 of the draft law deals with this particular case, and it is provided that the President *may decide* to hold the referendum within the current year. Does it mean that the President may as well decide not to hold the referendum at all?

It is a constitutional issue whether to attribute to the President of the Republic, or to the Constitutional Court or the CEC the power to admit or reject the request of referendum about an issue of special importance, pursuant general principle on normative acts. In any case, the issue must be regulated, being of the utmost importance.

III.B. General Referendum : Assembly initiative of a referendum pursuant art. 150 par.2 of the Constitution.

The Assembly may decide that *an issue or a draft law of special importance be presented for referendum* (Constitution, art. 150.2).

The (draft) law at art. 7 stipulates *When the Assembly decides for a referendum according to Article 150, paragraph 2 of the Constitution, the norms and procedures provided in Article 4, paragraph[s] 4 and 6, Article 6 paragraphs 5, 7, 8, 10, 11, 13, and 15 apply by analogy.*

In the draft law that has been made available to the author of the present notes, art. 6 does not have the mentioned paragraphs over 7. Moreover, paragraphs 5 and 7 of art. 6 are hardly consistent with a referendum initiated by the Assembly.

[2] The point is treated by Stefano Nespor in his comments.

The constitutional frame is that of a proposal by one fifth of the MPs or the Council of Ministers, that has to be approved by the Assembly as for general terms, according to art. 78 of the Constitution by the majority of votes, in the presence of more than half of its members.
In the case of presenting a draft law for referendum by the Assembly, we are in a situation similar to art. 177 par. 4, with the only difference that the law is not a revision of the Constitution. The same comments apply to this case.

It is as we said a peculiar provision, because the same majority that would have the power to approve the law at the end, can decide to opt for a referendum on the same draft law that it could legitimately approve itself, although prompted by a group of MPs or the Council of Ministers.

The *political* scenario is therefore of an Assembly that wants to share with the population the responsibility of a draft law of special importance, although the political parties represented in the Assembly do have the necessary majority to approve such a law.

Or the case could be of an Assembly that cannot reach the necessary majority to approve a draft law, but it does reach such majority to present the draft to a referendum.
In any case, a draft law will be presented to the people, and the people will only be able to say Yes or No to the draft as it is.
The formulation of the draft law is responsibility of the Assembly.

The Assembly may also decide that an issue of special importance be presented for referendum.
In this case, all previous comments about the problems of such an institution, apply as well when the initiative is of the Assembly:

- definition of the admissibility of the request
- body entitled to admit/reject the request
- majority required

IV. Local referendum pursuant art. 108 of the Constitution

Self-government in the local units is exercised through their representative organs and local referenda (Constitution, art. 108.4*).*

Art. 8 of the draft law provides two types of local referenda:

- a popular one, requested by the voters of a local government entity, by *A number of citizens with the right to vote in an entity of the local government, not smaller than 5% of the number of citizens with the right to vote there*;
- and another one requested by *A number of municipality/commune councils, which represent not less than one third of the population of the region*.

In both cases, the object of the referendum will be "*an important issue of local self-government*" in the relevant entity of the local government.
It seems that at regional level, a local referendum could be requested either by 5% of the voters or by the councils that represent one third of the population.
Nothing is said about the definition of the important issue. There is a general reference, by par.4 *to the norms and procedures provided in Article 4, paragraph 4 and 6, and Article 6, paragraph[s] 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 13, and 15 apply by analogy.*
The references of the draft law text available are wrong: art. 4 par.4 cannot be applied as such; art. 6 has only 7 paragraphs; paragraphs *1, 2, 4, 5, 6, 7 should be adapted to the local referendum, better than simply referred to: a local referendum will never be abrogative of a law.*

Nothing is said about the body that will take a final decision about holding the requested referendum, and no role is given to the Regional Election Commission of the location where the referendum is going to be held.