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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT LAW OF THE REPUBLIC OF ALBANIA "ON REFERENDA"

General Considerations on Referendum by Mr Stefano Nespor

1.A Foreword.

The Albanian draft law on referenda introduces – in fulfilment of the dispositions of the Constitution concerning this institution– several types of referenda into the legal system: there is one constitutional referendum regarding the *"draft law on the revision of the Constitution" (art.4), there are two different "general referendums"* concerning ordinary legislation and *"issues of special importance"* (art.6), there is a *"local referendum"* concerning *"an important issue of local self-government"* (art.8).

In the following part of this report will be examined the specific provisions of the draft law.

Here some general aspects are treated: the aim is to draw the attention of the drafters of the law to potential flaws of the draft, and permit to reconsider it taking into account the following remarks.

2. Referenda and parliamentary system.

It must be noted, as a starting point, that – apart from the well known "exceptional" legal system of Switzerland – there is no other country in Europe where exists today such a wide possibility of direct exercise of people's sovereignty, considering the types of referenda introduced in the system as well as the lack of substantial limits and checks regarding the contents of the questions submitted to the people .

The reason of the "controlled use" of referendums in Western democracies has been generally attributed to the theoretical and practical difficulties to combine this institution with a parliamentary system and a representative democracy (it must be remembered that the Founding Fathers of the American Constitution considered with great suspicion and dangerous for the minorities all the institutions of direct democracy) .

Two of the major experts of the referendum, D.Butler and A.Ranney, pointed out in 1978 several reasons for avoiding a superimposition of direct democracy over representative democracy[1]. In the same time, and with specific consideration of the Italian situation, they remarked that in each political system there are times when it is necessary to take a decision, and the probability of reaching this goal via parliamentary means is very low. In these exceptional conditions, the referendum can become an useful instrument .

However, in Italy, starting with the referenda of 1978, the Constitutional Court made an extensive use of his power to judge the admissibility of the referenda (beyond the limits to this power defined in the Constitution), restricting the questions to be submitted to the people after 1978. Moreover, many bills have been drafted in order to restrict the abrogative referendum, .

It must me added that the doubts expressed by Butler and Ranney were deemed so consistent that the Founders of the Spanish Constitution of 1978, starting from a draft proposing several types of referenda (similar to the Albanian draft under comment), at the end cancelled all the tyoes but one, and consistently restricted the surviving type[2].

Another point has been usually stressed by the experts on referendum: the experience teaches that this institution defies forecasts and limits: as soon as it is introduced in a single state, the referendum finds its way to flourish and to be used in a number of possible ways, according to the social, political and cultural organisation of the country, following patterns of evolution which are impossible to imagine in advance.

In particular, the drafters of the bill should take care of the fact that while the referendum has received many theoretical justification, all of them have received altered or unforeseen applications in the practice.

The referendum has been justified:

a) As a tool available to the minorities to balance and check through a direct appeal to the people the power of the majority[3] (*"Fonction de contre-pouvoir").*

b) As a balance against partitocracy[4].

c) As a shortcut to reach a definite decision on a specific issue, where general elections are based on a proportional system (and consequently there are in the Parliament many different views about every specific issue, that cannot be grouped in order to form a majority).

d) As an exceptional tool, when do not work ordinary ways to produce legislation on specific subjects (*"fonction de arbitrage"* or "*transfer of law-making"*).

A said, all this possible uses of the referendum can be radically reverted in the practice.

a) The referendum has been very often used (in Italy, in the States of the U.S. where the referendum is admitted) not the minorities to defend their position, but by the majority to defeat the minorities or to pursue goals difficult to realise through the ordinary parlamentiary life.

b) The referendum has been often used not as a tool against partitocracy, but as a tool of parties for the competition amongst parties.

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[1] D.BUTLER – A.RANNEY, *Referendums: A Comparative Study of Practice and Theory*, American Enterprise Institute for Public Policy research, Washington 1978.

[2] Cfr. Cortes generales: Constitution espanola, Trabajos parlametarios, vol.II, Servicio de estudios y publicaciones Madrid 1980 (Comision constitucional del Congreso).

[3] C.MORTATI, *Istituzioni di diritto pubblico,* Padova 1976, p.838; S.FOIS, *Il referendum come contropotere e garanzia nel sistema costituzionale italiano,* in Referendum, ordine pubblico e Costituzione, Milano 1978, p.130

[4] C.MORTATI, *Significato del referendum,* in Rassegna Parlamentare 1960, p.63

c) The referendum is widely used also in non-proportional systems (*"fonction de vote de confiance"*), as it is now in Italy or in the United States.

d) In practice, the recent development of referendum in Italy shows that referendum can be used as a ordinary tool for political competition.

In conclusion, these considerations want to make clear that the wide possibility of referendums, and the substantial lack of barriers to start them, implies a choice for the future asset of the Albanian Parliamentary system that must be carefully thought of by the drafters of the law.

While the types of referendum are defined by the Constitution and cannot be altered with the ordinary law, special care should be reserved to the definition of the limits and the legal barriers concerning the questions and the issue.

3. The general limits of a referendum. <u>The Italian experience.</u>

Where referendum are admitted as a legal instrument, there are limits to the uses of this tool.

On this respect, focusing on the Italian experience in order to analyse the Albanian draft law concerning the referendum is important for two reasons.

First, because Italy is the European country – with the exception of Switzerland - where the referendum has been vastly used and deeply studied in its legal and political implications.

Second, because the Albanian draft law has been composed assuming as a model the Italian law (although the provisions of many different types of renferendums, instead of only the abrogtive one, modifies deeply the legal situation).

The Italian Constitution has simply pointed out several issues which cannot be subjected to referendum (more or less, like the art.151.2 of the Albanian Constitution).

This model has proved in the practice utterly insufficient, and has caused the Constitutional Court to work out a much more complex set of limits to the admission of the referendum.

The Italian Constitutional Court has been forced to develop a three-fold set of principles for the admission of the referendum.

Firstly, the referendum must concern an issue not *expressedly* excluded by the Constitution.

Secondly, the referendum must concern an issue non *implicitly* excluded by the Constitution: for example, the referendum may not request the abrogation of a law necessary for the ordinary working of the State and of the administrative system as a whole.

Thirdly, the question must be *clear, homogeneous, complete and univocal*. This was chronologically the first principle asserted by the Constitutional Court: since the referendum must work as a tool to express the people's will[5], the answer to every single referendum must be

[5] Constitutional Court, dec. 16\1978; this principle was exposed by J.D.BARNETT, 1915

either a YES or a NO, and the answer need to be the clear result of a global evaluation of the pros and the contras of a single issue.

In order to avoid future controversies, the drafters of the bill should carefully consider to make clear in the bill that the above mentioned limits – which are implicit in the function and the ratio of the referendum - should be respected.

4. The abrogative referendum in the Albanian draft law.

The Albanian draft law provides two different abrogative referendum. The first is a constitutional referendum, for repealing a law revisiting the Constitution (art.5). The second is a general referendum for abrogation of an ordinary law (art.5).

In both cases, the object of the referendum is a law (to be indicated by title, number and date of approval by the Assembly).

The Italian experience shows that a referendum for the abrogation of an existing legislation tends to become in the practice a referendum to introduce a new law in substitution of the repealed one. In other words, the abrogation becomes easily a creation of a new law, specially in the cases where the issues regulated by the legislation submitted to referendum need to have a regulation whatever.

This evolution has been permitted by the art.75 of the Italian Constitution, where is consented to abrogate not only a entire legislation, but also a part of it.

By simple operations of cutting out single parts of a bill, sometimes a few words, the referendum can transform a law in a completely different one (so-called *"subtractive and manipolative effect"*) , transferring to the people a much wider and creative power than the one, limited to abrogation. This manipolative effect was certainly not imagined by the Founders of the Italian Constitution (also because there were no previous examples in the history of the referendum): they for sure were thinking at a simple abrogation – totally or partially - of an existing legislation.

This evolution of an abrogative institution in a creative one seems intentionally not permitted by the draft of the Albania law, where the general referendum may concern exclusively a law in its entirety (if the words of art.6 are to be strictly interpreted).

But this provision, if avoids the above-mentioned distortion of the referendum, causes an opposite danger.

If – as usually happens - a law consists of many dispositions regarding a general issue, the referendum shall necessarily regard all the dispositions, although presumably only one or a few of them are really controversial.

For example, if a legislation regards the form and condition of the electoral procedure, the compulsory submission to the referendum of the whole law may not reflect the intentions and the will of the subjects asking for the referendum on one side, on the other side may create a very equivocal situation for the people asked to vote.

The effect, in other terms, is that the question may become not univocal and not clear, since the people may not understand clearly what is the real object of the referendum. And an unclear referendum is something that fails to meet the principal goal of the institution, which is to receive a clear-cut answer directly by the people on a single specific issue.

In conclusion: restriction of the referendum to a whole piece of legislation, and exclusion of a referendum concerning a part of the legislation (as tiny as a single word, as may happen in Italy), respects the nature of the institute (abrogation of a law), but may cause serious problems regarding the requisite of the clear and univocal question.

Therefore, the drafters should consider whether specify if the referendum is admissible also to repeal single parts of a legislation.

If the answer is no, the law should regulate the concrete possibility of a request for referendum concerning – intentionally or casually - a legislation where the dispositions are non homogeneous and clear or even do not concern the same issue, and consequently the "rationality" and the inner coherence of the referendum.

If the answer is yes, provisions should be introduced to control the subtractive and manipulative effects of the referendums concerning part of a legislation.

5. The referendums concerning the *"issue of special importance"*.

The Albanian draft law admits general and local referendums concerning issues of special importance (art.150.1).

The Constitution specifies that *"the importance of special issues"* is not subject to judgment in the Constitutional Court (art.152.2).

At first sight, there is a problem of interpretation created by the different formulation of the two dispositions of the Constitution. While the object of the referendum is an issue qualified by its *"special importance"* (art.150.1), meaning that the issue must be not only important, but *"specially important"*, the following art.152.2 sticks special not to importance, but to issue, and singles out the importance of the special issue: here the object of the referendum is not whatever issue, provided it is of special importance, but a special issue, that must be also important.

The difference is evident.

Viewing art.150.1 of the Constitution, any issue can be a matter of a referendum. Viewing art.152.2 of the Constitution, only special issues.

Moreover, an issue can be special, as opposite to a general one. An issue can also be special not as opposed to a general one, but in consideration of a specific political or economical situation of the country.

Not every issue, however special, can be qualified of special importance.

This consideration is important because the art.152.2 forbids the Constitutional Court to screen the importance of the issue; since no one else can, it is evident that the requisite of the importance is devoid of significance: any issue and also any special issue can be important for somebody, and the lack of control of the importance makes any issue, special or not, admissible for a referendum.

However, the art.152.2 of the Constitution does not seem to forbid the Constitutional Court to screen the speciality of the issue.

On this subject, nothing is said also in the draft law: the Constitutional Court may screen the specialty of the issue, and block a referendum if the issue is not deemed sufficiently special?

In order to put some limits to the popping up of referendum concerning any type of issue, the drafters should take into serious consideration to discipline the screening of the speciality of the issue.

6. The referendums concerning the *"issue of special importance"* and the law

The special issue or the issue of special importance can be regulated, directly or indirectly, or even implicitly, by existing legislation (a single law, or more than that).

In fact, it is probable that almost every issue receives in some way a regulation offered by an existing piece of legislation.

The preliminary question is if a referendum is admissible, when the (special) issue is regulated – all or in part - by law: in other words, can be "bypassed" the referendum concerning a law, using the other channel of the referendum on special issues?

This question may assume special relevance in case of electoral referendum: is it possible to extract a special electoral issue from an electoral piece of legislation, and produce by this way a change in the law?

The following question is: what happens of the existing legislation as a consequence of the results of the referendum? Can be indirectly abrogated by the results of a referendum on special issues? And, more important: which Authority is entitled to decide if there is this juxtaposition between the issue submitted to the referendum and the law?

Eventually, a third delicate problem must be solved: how can the people understand if the results of the referendum concerning an issue will produce effects on one or more existing pieces of legislation?

7. Effects of a new legislation on a referendum.

In the Italian experience, very often the initiative for a referendum, or the fixing of a date for a referendum to be held has caused the Parliament to introduce a new legislation, modifying the existing one, in order to avoid the referendum. In this cases, the experience has showed that it is always difficult to ascertain clearly if the new legislation is sufficient – whatever its content – to avoid the referendum concerning the old legislation, not more existing, or if it is necessary for the new legislation to modify the old one accordingly to the goal pursued by the initiative of referendum; in this second case, it is also necessary to establish which is the institution competent to decide whether the modification is sufficient to avoid the referendum or not.