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**A review upon the 'Amicus curiae brief of the Venice Commission on the admissibility of a referendum to abrogate the constitutional amendments of the Republic of Albania Constitution'**

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*The amendments upon the Constitution of Albania of April 2008 were hugely criticized by a fraction of the political elites, nevertheless in the same time the public opinion was of the idea that the amendments themselves do make drastic changes to the current Albanian Constitution, thus the people only can decide on such issue. In addition, the demand from a group of people for a referendum where the people would be directly asked whether they accept the amendments of the constitution was initiated. At that juncture, the Constitutional Court of Albania was asked to say whether a referendum on the amendments made to the Constitution is constitutionally legal. The Constitutional Court of Albania referred this question to the Venice Commission, by asking the latter to give a professional opinion on the admissibility of a referendum to abrogate the constitutional amendments of April 2008. The opinion of Venice Commission was negative in front of the admissibility of the referendum as a way for judging the constitutional amendments undertaken upon the constitution. In this paper, I argue that the opinion of the Venice Commission, delivered for this case, lacked general democratic principles and showed technical negligence.*

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A review upon the: ‘*Amicus curiae* brief for the Constitutional Court of Albania on the admissibility of a referendum to abrogate constitutional amendments’. European Commission for Democracy Through Law (Venice Commission): Opinion No. 517/2009. Adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009).

The amendment of a given constitution might send either positive or negative signals in terms of democracy. From that perspective, the amendment of the Albanian Constitution, undertaken in April 2008, has mobilized huge critiques. The critiques have either come as a consequence of the political power centralization that the amendments themselves have enforced, or as a consequence of the public opinion’s disagreement with the two main political parties’ engrossment for changing the constitution.

Basically, the procedure of constitution amendment is commonly a well-thought process, initially from the authors of a given constitution, but also from the political elites which have favored the adoption of that respective constitution. Therefore, very minor provisions can in fact make huge power-sharing changes when it comes to the power exercising from a constitutional point of view. It so happened with the Albanian Constitution, which in fact had a provision, which even that was thought to have been highly democratic, it came to be poor, given that the participation

of the people in the giving of the direct say for a constitutional change was dismissed.

The amendment of the Albanian Constitution took place in April 2008, and a huge critique followed the amendment process itself. After the parliamentary amendment took place, a portion of the political parties, but also the public opinion, was of the idea that the constitutional amendments should be brought to a referendum, in order for the people to be able to give a decision to the amendments themselves. The Constitutional Court of Albania along with the Central Electoral Commission dismissed the inquiry for a referendum on the admissibility of the amendments; however the Constitutional Court demanded the opinion of the European Commission for Democracy Through Law (Venice Commission) on whether a referendum would be constitutionally right, as inquired by a group of people? The Venice Commission delivered an opinion about the questions set forth by the Constitutional Court of Albania, while refusing the idea that the referendum for the admissibility of the amendment is constitutional. With a view through that, this policy-based paper is addressed at reviewing the opinion of the Venice Commission, and of course, making a grounded critique upon the latter, given the need for the advancement of scholarship upon the constitutional democracy.

The Venice Commission considered three articles of the Albanian Constitution, as a way for interpreting the question on the admissibility of a referendum to abrogate

the constitutional amendments of the Republic of Albania Constitution, as below:

#### **Article 2**

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

#### **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."*

At the outset, the Venice Commission, in the above shown case, was asked to give a grounded opinion on whether a constitutional amendment could be brought to a referendum, if based in article 150 of the Albanian Constitution. Moreover, in a second question, the Venice Commission was asked whether the article 2 of the Albanian Constitution, does stand in harmony with the article 177 & 150 of the latter. The Venice Commission brought two basic conclusions about these questions. First, the Venice Commission considered that article 150 of the Albanian Constitution does not provide a basis for allowing a

referendum, called by 50000 people, on the admissibility of the constitutional amendment adopted by the Parliament. Second, the Venice Commission was of the opinion that article two of the Albanian Constitution does stand in harmony with the article 177 & 150 of the latter. I do develop my analysis based in these two

#### 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 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."

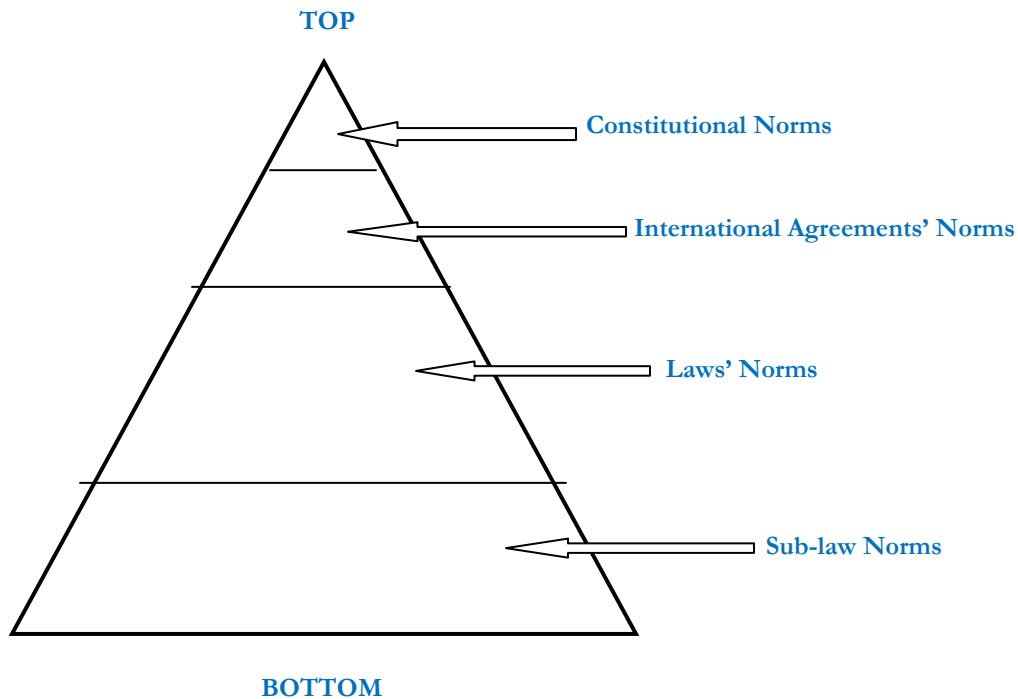
conclusions of the Venice Commission, by arguing that both of the Venice Commission's conclusions fail to suggest a grounded constitutional democracy that would allow the logic of direct involvement

of people when deciding upon the Constitution.

In the first instance, *the Venice Commission was 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.'*

In the second instance, *The Venice Commission saw 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 concretize it by indicating to which extent sovereignty is exercised directly by the people, indirectly by their representatives or in a mixed form.'*

Finally, the Venice Commission provided that, *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.'*



The hierarchy in the system of norms in Albania, as of my model of explanation

[Figure A]

Preliminarily, the opinion of Venice Commission upon this case, considered that, the term 'law' used in article 150 is not sufficient to allow the application of the referendum procedure from article 150 in a constitutional amendment adopted by the Parliament. It was so, argues the Venice Commission, given that the term law seen from the whole constitution, does not imply acts higher than a statute of the parliament. From that perspective, in the Venice Commission's opinion, the application of article 150 can only be implied upon a law (parliamentary act) and not upon a constitutional amendment. Following that, while giving the final opinion, the Venice Commission argued that, constitutions, and Albania constitution also, transfer powers to

state institutions, thus allowing them to act on behalf of the people. With a view through that, the Venice Commission claimed that, the right on constitutional amendment, and on a referendum upon the latter, has been transferred by the people, through the constitution, to the Parliament of the Republic. It was indirectly argued therefore, that people have no right to directly demand a referendum for a constitutional amendment, as of article 150 of the Albanian constitution. In that logic, Venice Commission argued and concluded that, once a power has been given by the people themselves through the constitution to a state institution, it cannot anymore be claimed by the people themselves. However, according to their opinion, the application

of article 150 upon a law adopted by the Parliament, does say that the power to abrogate laws, from a referendum context, has been granted to the people, as of the constitution.

Let me now show my critique upon this. In the first instance, article 150, as of Venice Commission's opinion, is the only article to regulate the calling of referendum when initiated exclusively from the people. In addition to that, the Venice Commission argued that, article 150, if seen as an interdependent part of the whole Albanian Constitution, is to be applied upon the statutes or laws adopted by the parliament only<sup>1</sup>. I do agree with most of the argumentation built by the Venice Commission, however, I will argue that, the Venice Commission failed to adopt a logical interpretation model, when interpreting the Albanian Constitution. Admittedly, the argument of the Venice Commission, that once a power has been transferred to the Parliament, by the Constitution, it cannot be assumed anymore, given the limitations to a direct democracy, is grounded. I do agree up to here as well. However, if looking at figure A, we will be able to witness the system of norms in the form of a hierarchy, as the legal system<sup>2</sup> in a country is built. As such, we can see that figure A makes a clear distinction between volume and power of norms. We will deal with power of norms, once we see the system of figure A.

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<sup>1</sup> The term law or statute used here, is a reference for the act passed by the parliament, whose position in the hierarchy of acts, stands just after the constitution of the state.

<sup>2</sup> The term legal system used here is a reference to the system of legal norms that a polity has.

Consequently, the constitutional norms (or the constitution itself), is the peak of a legal system, given that it has the highest legal power. The constitution is followed by international agreements, which are subordinated to the constitution, and then, laws follow both the constitution and the international agreement. It is therefore argued that, laws are less powerful and totally subordinated to the constitution, as based in figure A. Subsequently, one would say that, once a given power has been transferred by the people, through the constitution, to the Parliament, it cannot be assumed anymore. In that line, the opinion of the Venice Commission was as well. Similarly, if the Venice Commission considered that the right of abrogating a law, through a referendum demanded by the people, has not been granted to the parliament, given the article 150, then, the right on amending the constitution freed from the possibility of the people to demand a referendum, is not transferred to the parliament as well. Why? Because, as figure A shows, the logical interpretation of article 150, says that, if the right to call a referendum on abrogating a law has not been transferred to the Parliament, the right on calling a referendum to abrogate the constitutional amendment passed by the Parliament has not been omitted by the people as well. The argument follows, how can then, the people retain the right to abrogate the law, when law-making is a function transferred to the Parliament exclusively by the Constitution, and loose the right to call a referendum for abrogating a constitutional amendment, when the Constitution has not been an act of the

Parliament. Admittedly, if the Constitution allows the devolution, undertaken by the people, to abrogate a law adopted by the Parliament, then the logical interpretation claims that, the right on calling a referendum for abrogating a constitutional amendment upon an act, that does not belong to the Parliament, but to the people, is in place, in the logical perspective of the whole Constitution and referred to article 150. As a result, if the right on calling a referendum, is recognized to the people, for an act with the power of law, then, the logic says that, the people hold the same right, upon every other act higher than law. In addition, by means of article 2, if the right on calling a referendum for abrogating laws is recognized, then, the impossibility of the people to call a referendum for abrogating a constitutional amendment, which stands upon the laws where the people have the right on referendum for abrogation, contradicts with the article 2 itself.

In the second stance, the Venice Commission has opinionated that there is a harmony between article 2 of the Albanian Constitution and article 177 & 150 of the Constitution, in addition to the refusal for allowing the application of article 150 to a referendum upon a constitutional amendment adopted by the Parliament. Therefore, in Venice Commission's view, the '*belonging of sovereignty to the people*' (art. 2) does not interfere to the impossibility of the people to demand a referendum for a constitutional amendment passed by the Parliament. As such, the opinion of Venice Commission saw that article 2 does not

contradict with articles 150 & 177, however the latter merely concretize article 2.

First of all, theoretically, I argue that, there should be coherence between article 2 and all other articles of the constitution. If seen from that perspective, article 2 sets the sovereignty in the hands of the people. The state sovereignty in a democracy, undoubtedly, is delivered in its most considerable form, by the Constitution. Therefore, if the Constitution is taken from the people's hands, there could be spoken for no popular sovereignty anymore. It is arguable therefore, that the Constitution as the highest legal act, where the state sovereignty is grounded, from a western concept of state, cannot be withered from the hands of the people, always according to article 2 of the Constitution. Therefore, the people sovereignty does in its most profound context, assert the possibility of the people to directly control the amendment of the constitution. Logically, if article 150 assigns a right to the people, as a way of concretization of article 2, as the Venice Commission also argued, then the impossibility of the people to call a referendum for a constitutional amendment cannot be seen to be compliant with the popular sovereignty of article 2. Moreover, if according to the Venice Commission, the rationality of article 150, does concretize the popular sovereignty upon laws, which have lower-than-constitution power, it would then never be rational if the interpretation would find it compliant the people's sovereignty with an article which halts the possibility of the people to call a referendum

for the amendment of the highest legal act of that polity.

Likewise, if the Venice Commission concludes that the application of article 2 does not contradict with articles 177&150, given that the sovereignty of the people is exercised both by people's representatives and by the people directly, then, which article of the constitution sets the possibility for the people to directly exercise their sovereignty? There is no answer from the Venice Commission, of course. However, it is seen that article 177 sets a way for amending the Constitution through people's representatives, as would an interpretation of article 2 find. I agree with that also. However, no article or provision in the Constitution itself, enables the people's sovereignty to be exercised directly when it comes to the amendment of the Constitution, which in fact, as argued, is the most substantial and profound basis of sovereignty. Therefore, Venice Commission conclusion, as shown above, is illogical, given that there is either a contradiction between article 2 of the Constitution, and the conclusion found by the Venice Commission itself for articles 177&150, or there should be a way for allowing the people to directly demand a referendum for a constitutional amendment, in order for the article 2 to have existence. Of course that, article 150 should have been interpreted as a manner of application of the article 2, where the people would be directly capable to demand referendum for constitutional changes.

The third argument is a technical analysis of the articles in discussion. In fact, the Venice Commission concluded that, a basis for allowing a referendum can only be traced if following the provisions of article 177. In fact, article 177 implies that: '*An initiative for amending the Constitution may be taken by not less than one fifth of the members of the Assembly*'. Therefore, I argue that, technically, this article does not have an exclusive approach towards the amending of the constitution through a people's initiative for referendum, given that, the word '*may be taken*' in this article, shows that other possibilities for putting a constitutional amendment in a referendum can exist. It is therefore, in the logical capacity of the Albanian Constitutional Court to better protect the popular character of the Constitution, by making more innovative interpretations, rather than simple literal ones. If a logical interpretation model upon the amending process upon the Albanian Constitution would be applied, article 177 would not be taken the exclusive amendment article, given that, even literally, this article itself, shows that the procedure it puts through, is only a possible way that can be followed for amending the constitution, but not the only one. Therefore, article 177 shows no exclusivity towards constitutional amendment, as such, the Venice Commission's opinion should have not biased the people's initiative to engage in constitutional amending. Moreover, if looking at the preamble of the Constitution, and the adoption procedure followed for the latter, the Albanian Constitution is an act of the people – therefore, its interpretation, might not restrict even the literal meaning

that its articles set forth, having understood that a bias towards its popular ground should not be allowed, not as a matter of idea, but as a matter of the Constitution itself. Besides, article 150 is not literally argued to exclude the possibility for a referendum upon constitutional amendments, if a number of people request it. Similarly, Venice Commission failed to see article 177 as a complementary part of other provisions on referenda for deciding on constitutional amendments, since this article provides the basis only for a referendum if preferred to be called by the Parliament. As such, the referendum proclaimed in article 177, is a consultative referendum, given that only Parliament can decide on its initiative. However, article 2 of the Constitution, cannot stand sufficient, if a freed-from-Parliament procedure of referenda initiative is not existent.

As a conclusion, it is argued that, the Venice Commission, through its opinion for the Albanian Constitutional Court, has set a poor standard for the constitutional

democracy, biasing the position of the people towards the amendment of the Constitution, and disabling a logical rather than a literal interpretation of the latter. The poorness of this standard has neglected very high principles of the constitutional democracy, such as the directness of people's sovereignty, and has failed to make a logical system which a functional democratic constitution should build, rather than strict-textually looking at the words of the Constitution. Ultimately, a constitutional interpretation should acknowledge that the rationality, rather than fixed interpretations, is the route to be followed once making constitutional interpretations. Complementarily, the idea that '*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...*' is democratically irrational, given that there can be no limitation to the people's involvement, if there is an interest to do so, on following the procedures set forth by the Constitution itself.