



REPUBLIC OF ALBANIA
CONSTITUTIONAL COURT
PRESIDENT

Prot. 291 Nr.

Tirana, on 09.072021

Subject: Kind request for an Amicus Curiae Opinion

Mr. Gianni Buquicchio
President of the Venice Commission

Honourable Mr. President,

First of all, please allow me to express our highest esteem and gratitude for your willingness to cooperate with the Constitutional Court of the Republic of Albania, as well as for the valuable contribution of the Venice Commission to the activity of this Court on issues of particular importance.

At present, the Constitutional Court of Albania is examining the application lodged by the Association of Municipalities of Albania concerning: *"1. On the unconstitutionality of the electability/election process held on June 30, 2019 for the election of local government bodies, mayors and municipal councillors, and subsequently finding as unconstitutional the election of members of these bodies. 2. Assessment of constitutionality of the activity of Democratic Conviction party (Partia Bindja Demokratike) with respect to its registration with the court and the elections of June 30, 2019."*

For the purpose of examining this application, due to its importance and nature, the Constitutional Court of Albania considered to kindly request to the Venice Commission, as an advisory body, an *amicus curiae* opinion, putting forwards the questions which, according to the Court, would clarify the main aspects of this judgement.

I. Circumstances of the case

On 5 November 2018 by decree no.10928 “On the fixing of the date of elections for local government bodies” (*decree no.10928/2018*), the President of the Republic set 30 June 2019 as the date of elections for local government bodies. On 6 November 2018 the decree was published in the Official Gazette no.156.

On 10 June 2019 by decree no.11199 “On the repeal of the presidential decree no. 10928 of 05.11.2018 “On the fixing of the date of elections for local government bodies”” (*decree no.11199/2019*), the President of Republic repealed June 30, 2019 as the date of elections for local government bodies. On 11 June 2019 the decree was published in the Official Gazette no. 84.

On 13 June 2019, the Assembly of Albania approved the Resolution “On the act of the President of the Republic repealing decree no.10928 of 05 November 2018 “On the fixing of the date of elections for local government bodies”. It found that the decree did not comply with the Constitution and the law, therefore declared it to be null and void.

On 13 June 2019, by decision no.836, the CEC dismissed the request of a political party to withdraw from the election process of 30 June 2019, reasoning that the presidential decree no.11199/2019 was null and void, therefore, the electoral process for local government elections of 30 June 2019 should follow through.

On 24 June 2019, by decision no.12, the Electoral College of the Court of Appeals of Tirana (*Electoral College*) rejected the appeal against CEC’s decision.

The President of the Republic had no standing and was not heard during the proceedings before the CEC and the Electoral College (*see paragraph 88 of the Opinion of Venice Commission CDL-AL (2019)019*).

On 27 June 2019, by decree no.11211 “On the fixing of the date of the elections for local government bodies” (*decree no.11211/2019*), the President of the Republic fixed 13 October 2019 as the date for local elections.

Decree no. 11199/2019 and decree no.11211/2019 (which was not even published in the Official Gazette) were not challenged either before any court of any instance, or the Central Election Commission (CEC) or the Constitutional Court (*see paragraph 88 of the Opinion of Venice Commission CDL-AL(2019)019*).

The elections for the local government bodies took place on 30 June 2019.

The OSCE/ODIHR, released its Final Report, according to which “*The 30 June local elections were held with little regard for the interests of the electorate. The opposition decided not to participate, and the government determined to hold the elections without it. In the climate of a political standoff and polarisation, voters did not have a meaningful choice between political options. In 31 of the 61 municipalities mayoral candidates run unopposed. There were credible allegations of citizens being pressured by both sides. Political confrontation led to legal uncertainty, and many decisions of the election administration were taken with the political objective of ensuring the conduct of elections. Voting was conducted in a generally peaceful and orderly manner and counting was assessed positively overall, although several procedures were not always followed correctly.*” The recommendations of the Election Observation Mission Final Report underlined, *inter alia*, that, with a view to strengthen pluralistic democracy, reaffirm the right of citizens to take part in government and demonstrate shared responsibility toward the integrity of the electoral process, political parties and other electoral stakeholders should engage in an open and inclusive dialogue and facilitate electoral reform addressing the recommendations contained in this and prior ODIHR reports.

By decisions of 11 July 2019, the CEC verified and published tabulation results of the election zones issued by each Commission of Election Administration Zone (CEAZ).

On 18 July 2019, the Association of the Municipalities of Albania lodged an application with the Constitutional Court on the above subject matter.

II. Claims submitted before the Constitutional Court

The Association of the Municipalities of Albania claimed that the electoral process of 30 June 2019 violated the principle of the rule of law, in the following aspects:

- The principle of sovereignty provided for under Article 2 of the Constitution of Albania, in connection with Articles 1, 3, 4 and 45 of the Constitution, requires that the representatives be elected through free, equal, general and periodical elections.

- Elections were conducted without the enactment of a presidential decree, thus CEC disregarded President’s authority to fix the date of the elections. In accordance with the principle of the supremacy of the Constitution and the direct application of its provisions, as well as the principle of hierarchy of norms, the competence assigned to the President by the

Constitution on the fixing of the election date, is directly exercised and no restrictions apply with the exception of cases provided by Article 65 of the Constitution.

- Enactment of a new presidential decree revoking a previous one represents a rational continuation of President's discretionary power to fix the date of elections. The President's decree is of normative nature because the Constitution authorizes its issuance. It expresses political orientation and it has *erga omnes* effects. Such decrees can only be examined with regard to their constitutionality and not their legality, so ordinary courts do not have jurisdiction over them.

- The President is the only authority empowered to change the election date and such act shall be obligatory for everyone. It can only be repealed by a Constitutional Court decision or a new presidential decree, or it can lose its power having its aim fully accomplished. By taking over attributes belonging exclusively to the Constitutional Court, CEC has also violated the principle of separation of powers.

Furthermore, the applicant alleged a violation of Article 45 of the Constitution as well as of Article 3 of Protocol no. 1 of the European Convention on Human Rights (*Convention*), in connection with Articles 1 and 10 of the Convention. In this regard, having only one candidate, the elections were of monistic nature, hence the political pluralism and the right to choice were not guaranteed. The vote casted could not influence the election of the mayor and municipal councillors for the simple fact that notwithstanding the number of the votes, in the absence of other candidates, the sole candidate would result a winner just by his vote. Since more than 50% of municipalities did not have a second candidate, the elections of 30 June 2019 clearly violated the secrecy of the vote under Article 45 of the Constitution and the Convention.

The applicant also claimed that the interference violated the principle of proportionality as provided for under Article 17 of the Constitution since a necessity for restriction of constitutional guarantees had not been established, namely that the restriction followed a legitimate aim, was necessary in a democratic society and proportionate to the legitimate aim pursued.

On the hearing of 23 June 2021, the Constitutional Court having heard the applicant's and interested parties' submissions, on the basis of Article 44/b of law no.8577, dated 10 February 2000 "On the organisation and functioning of the Constitutional Court of the Republic of Albania" decided to stay the examination of the case and request an *amicus*

curiae to the Venice Commission concerning the standards and principles that should be taken into consideration in the present case, as well as whether the authorities involved in the election process acted in compliance with the standards of the Venice Commission and the Convention. In deciding so, the Court took into account and paid attention to the particular nature of the case, which requires advice from institutions specialised on constitutional matters such as the Venice Commission as well as the latter's Opinion CDL-AL(2019)019, adopted at the 120th Plenary Session, held on 11-12 October 2019.

III. Grounds for an amicus curiae opinion

Firstly, the applicant addressed the Constitutional Court on the basis of article 131, point 1, letters "e" and "f" of the Constitution, claiming that the presidential decree constitutes an act of clear constitutional nature and represents an expression of the political orientation, regulating general relations covering the whole territory of the Republic of Albania. According to the applicant, due to its nature, the Constitutional Court can review this decree only.

The interested parties, the Assembly of Albania and the Council of Ministers, argued that Constitutional Court lacks jurisdiction under Article 131, point 1, letter "e", considering that the presidential decree is an act of individual nature, thus the case should be discontinued.

According to Article 131, point 1, of the Constitution, the Constitutional Court decides, *inter alia*, on: ... e) issues related to the **electability** and **incompatibility** in the exercise of the functions of the President of the Republic, members of the Parliament, officials of the institutions provided under the Constitution, as well as to **the verification of their election**.

The amendments of Article 131, point 1, letter "e" of the Constitution enacted by law no. 137/2015 "On some amendments and additions to law no. 8417 of 21 October 1998 "On the Constitution of the Republic of Albania", as amended, which were adopted within the framework of the decriminalization reform, aimed to ban an individual from appointment, nomination or exercise of a public function in one of the institutions provided for under the Constitution or other institutions established by law, in cases when circumstances violating a public official's integrity are established in accordance with the criteria and rules provided by a law enacted by a majority of three fifth of the members of

the Assembly. In this regard, Article 131, letter “e” was amended in order to include also issues regarding the electability and incompatibility in the exercise of the functions of the officials of the bodies provided for under the Constitution, as well as the verification of their election.

The report of the Albanian Assembly’s Special Parliamentary Commission accompanying these constitutional amendments states as follows: *“Having into consideration the fact that in the present case we are dealing with a restriction of a constitutional right, the added amendment recognizes the Constitutional Court’s competence to examine issues on the electability and incompatibility in the exercise of the functions of the President of the Republic, the members of the Parliament, the officials of the bodies provided for under the Constitution, as well as the verification of their election. If a person deems that he / she has been excluded from this right in violation of the Constitution or the law, he / she shall address the Constitutional Court and request that the right be restored.”*

Secondly, according to Article 1, point 3 of the Constitution, governance is based on a system of free, equal, general and periodic elections, whereas under Article 3 of the Constitution, pluralism is one of the basis of the state, which has the duty to respect and protect them.

Paragraph 75 of the Venice Commission Opinion CDL-AL (2019)019 notes that periodic elections are both a requirement of the principle of democracy and a fundamental right. Any restriction of the right to take part in periodic elections has to be provided for in the law, have a legitimate aim and be proportionate. The same criteria apply to local elections. Moreover, paragraph 98 of this Opinion notes that the electoral boycott by political parties, even if they represent an important share of the electorate, cannot prevent regular elections from taking place. Otherwise, these parties would obtain leverage to completely forestall any elections.

In addition, according to the findings of the Final Report of OSCE/ODIHR, regardless of the request submitted by the opposition parties to replace the CEC-nominated CEAZ members, such request was not accepted by CEC. In its interpretation of the diverging provisions of the Electoral Code, the CEC linked the parliamentary parties’ right to nominate commissioners to their registration as electoral subjects, and decided that those that did not register to participate in the elections had forfeited their right to nominate

commissioners at all levels of the election administration. This Final Report also notes that the CEC, although it is a permanent body appointed by parliament, and by law it is composed of seven members, during the local elections of 2019 it consisted of five members, because the main opposition party has not filled its quota of two members since October 2018.

Thirdly, given the moment the election date was cancelled, which corresponds to the period where, according to law, the bodies provided for under the Electoral Code need to prepare and administer the electoral process, as well as to conduct the election campaign, the bodies involved in the electoral process of 30 June 2019 have taken different approaches. This was due to the fact that during the period in question the Constitutional Court was not functional, and that no other complain was lodged with any judicial authority.

IV. Questions addressed to the Venice Commission

Having into consideration the above, The Constitutional Court would like to submit for consideration the following questions:

Question no. 1 *Shall article 131, point 1, letter “e” of the Constitution be interpreted as the Constitutional Court having jurisdiction to decide on the constitutionality of the election process?*

Question no. 2 *Given that the principles of periodicity of local elections and political pluralism are provided as fundamental constitutional principles, what would be the interrelation between them in a situation where there is a risk of violation of each of these principles? Which one could prevail over the other?*

Question no. 3 *In a situation of legal uncertainty climate, did the actions of public authorities and political parties violate the voters’ right to have meaningful choice? Should they have ensured voters’ highest interest?*

We remain at your disposal to provide any supporting document (acts or legislation) that you might consider useful and/or necessary on the matter.

We take advantage of this opportunity to reiterate the assurance of our highest respect and consideration for the continuous support of the Venice Commission.

Sincerely Yours,

Vitore TUSHA

President of the Constitutional Court

