

Position Paper on the President of the Republic act aiming to repeal the presidential decree defining the Election Date

1. Relevant facts on the 2019 administrative elections in Albania

On 5 November 2018, the President of the Republic, after having consulted the relevant political actors, together with the chairman of the Parliament, by a Presidential Decree, assigned June 30, 2019 as the date for the 2019 administrative elections to be conducted (hereinafter referred to as the “Presidential Decree”).

The President issued such decree on the basis of articles 92, letter (gj) and 93 of the Constitution together with articles 8, 9 and 10 of the Electoral Code.

The above mentioned articles, in the relevant part, provide as follows:

Article 92 of the Constitution

“The President exercises these powers: ... (gj) set the date of the elections for the Parliament, local government bodies and the referendums;”

Article 93 of the Constitution

“The President of the Republic, in the exercise of his powers, issues decrees”.

Article 8 of the Electoral Code

“General elections for the Assembly or for local government units are conducted simultaneously, in the entire territory of the country, within the period lasting from 15 March until 30 June or from 15 September until 30 November. The cases provided for in points 3, 4, 5 and 6 of article 9 of this Code are exempt from this rule”.

Article 9 of the Electoral Code

“1. The date of the elections for the Assembly is set by a decree of the President of the Republic according to the rules provided for in article 65 of the Constitution. Elections for the Assembly are to be conducted on one of the last two Sundays within the electoral period determined in article 8 of this Code, and in any case no later than 30 days before the expiry date of the Assembly’s mandate. In case the mandate of the Assembly ends earlier than 30 days from the beginning of the electoral period, elections are to be conducted in the preceding electoral period. For purposes of this Code, the mandate of the Assembly expires on the same date of the same month of the fourth year after the date of its first meeting.

2. The President of the Republic decrees the date of the elections for the Assembly no later than 9 months before the expiry of the Assembly’s mandate. Upon the decision of the Assembly, the closing of the legislative session or the legislature’s dissolution are to take place no sooner than 45 days before the date set for the elections and no later than 30 days prior to this date”(....)

Article 10 of the electoral Code

*“1. The election date for local government bodies is set by a decree of the President of the Republic. For setting the election date for the local government bodies, the President complies with the rules provided for in **points 1 and 2 of article 9 of this Code.***

2. For the purposes of this Code, the mandate of local government bodies shall end on the same date of the same month of the fourth year after the date the CEC declares its decision on the election results nationwide for local government bodies.” (...)

The Decree was published in the Official Gazette.

Since that date the Central Election Committee (CEC) and other state bodies undertook all the legal steps as provided by the Electoral Code and relevant legislation to ensure that effective and democratic administrative elections be held in Albania on June 30, 2019.

Accordingly, the political subjects registered their candidates, the electoral commissioners were appointed, the election commissions of all levels were set up all over Albania, etc. **The electoral campaign started officially on May 31, 2019.**

On June 8, 2019 the President declared publicly his intention to annul the Presidential Decree, justifying this action for the sake of the stability of the country due to the on-going protests of the opposition after the withdrawal of the parliamentary mandates. He also declared that on Monday, June 10, 2019 he will declare the relevant arguments on the bases of such decision. No act was issued on that date by the President of the Republic.

2. Legal analyse on the merits of the situation arisen from the president' repealing the Presidential Decree on the 2019 administrative elections

Assuming that the President of the Republic will issue a decree annulling the Presidential Decree mentioned above, we consider that such act is to be considered arbitrary and in total breach of the Albanian Constitution on the following grounds:

✓ The President is exceeding its powers as provided by the Constitution

The amendment of administrative election date is not a prerogative of the President expressly provided by the Constitution. According to article 94 of the Constitution "*President of the Republic cannot exercise other powers besides those recognized expressly in the Constitution and granted by laws issued in compliance with it*".

As stated in article 92, letter gj) of the Constitution the president prerogative **is to define the election date**. He exercises this task based on rules and criteria set in the Electoral Code, (articles 8, 9 and 10). Indeed, the Article 9/2 and Article 10 of the Electoral Code do not give the President the power to express the date of elections beyond the 9 month deadline preceding the termination of the mandate of the elected bodies (Parliament and local bodies).

Hence, from December 2018, when the President has appointed the election date, the law does not give any authority to change, abolish or postpone the date of the elections. The way, in which Article 9/2 has been formulated, specifically the phrase "*no later than 9 months before the end of the mandate ...*" indicates that the President's powers are limited in time. It has been the will of the lawmaker to limit the competence of the President of the Republic within a period of time, not beyond it, because it is required to put in motion the bodies dealing with election administration as well as the electoral subjects to be prepared and subject to other deadlines as defined by law during the electoral period.

Pursuant to article 2, point 15 of the Electoral Code: "*Election period*" is the period of the year, defined in this Code, during which the next periodic elections for the Albanian Parliament and the local government bodies are held. Moreover, article 8 of the Electoral Code provides that:

"General elections for the Assembly or for local government units are held simultaneously throughout the country within a period ranging from 15 March to 30 June or from 15 September to 30 November. Exceptions to this rule are the cases provided for in points 3, 4, 5 and 6 of Article 9 of this Code."

Thus, after the appointment of the date by the President of the Republic, his competences are terminated and the exercise of power by the bodies responsible for the election administration and the electoral subjects begins.

By appointing the date of elections by the President of the Republic "*no later than 9 months before the end of his mandate ...*" he loses his authority.

Moreover, the President's decree of 30 June 2019 on the conduct of elections is considered an exhaustive act that has brought legal effects shortly after its issuance.

- ✓ **The President is seriously violating the Constitution deciding to extend the mandate of the elected bodies beyond their constitutional mandate.**

According to the Constitution (Article 109), "*The representative bodies of the local government are the councils, which are elected every four years with general, direct elections and secret ballots.*"

Pursuant to Article 10/2 of the Electoral Code: "*...the mandate of the local government bodies shall expire on the same date as the same month of the fourth year following the date of the decision of the Central Election Committee (CEC) on local election results for the local government bodies.*"

Based on official data, it results that the CEC decision is dated August 10, 2015. This is the date of termination of the mandate of local authorities. Referring to Article 8 of the Electoral Code, "*Elections for Local Government Units "are held simultaneously throughout the territory of the country within a period ranging from 15 March to 30 June or from 15 September to 30 November.*"

The President of the Republic, by cancelling the elections of June 30, 2019, will postpone the mandate of local authorities beyond August 10, 2019, because the elections cannot take place before September 15, 2019.

In addition, taking into consideration the time needed for the final results of the elections, the mandate of the existing local bodies would be postponed unlawfully for even more time.

- ✓ **Having regard to the above, the President in the event of issuance of a new decree will:**

- violate the constitution, extending the mandate of local authorities;
- seriously violate the symbol of the unity of the people, because it has acted unilaterally without consulting the political parties;
- seriously violate the right of citizens to choose and to be elected;
- intervene in the competences of the constitutional and legal bodies, because through issuing a new decree changing the electoral date and period, impeding the Electoral College (court) and CEC to exercise their constitutional and legal powers.

This decree would be an absolutely invalid act and as such null and void. The absolute invalidity may be ascertained by the body that issued the act, by a higher administrative body or by the court (Code of Administrative Procedures).

Any public or private entity that faces such an act is not subject to its rules and may not consider it during its activity. The absolutely invalid act can be completely ignored by the interested persons or by other administrative authorities. Absolutely invalid administrative act

cannot be corrected in the future as it is objectively considered to have not existed. Therefore, when an administrative body or court, when dealing with an issue, face an absolutely invalid administrative act, do not state a declaration of invalidity, but ignore it by finding the fact of invalidity.

In light of the above, it appears that the legislation provides remedies to be exhausted in similar events. Such legal mechanism could remedy this situation and bring it to constitutional and legal ground by:

Declaring nullity of the presidential decree for amendment of election date by exhausting the following remedies:

i) **the President himself** (pursuant to Article 111 of the Code of Administrative Procedures: *"The public body has the obligation to ascertain the absolute invalidity of the administrative act if it becomes aware of the cases provided for in Article 108 of this Code."*)

ii) **the CEC**, primarily or upon request (*according to Article 110/2 of the Code of Administrative Procedures "The absolute invalidity of the act can be ascertained at any time, mainly or upon request of any interested party, by the public body that issued it, the superior body his or her authority that is competent to review the administrative legal remedies ..."*)

iii) **Electoral College** when considering the case, (*according to Article 110 of the Code of Administrative Procedures "... by the competent court ..."*).

iv) **The Parliament of Albania**, by considering the President' actions for amendment of election date as unconstitutional, may exercise the prerogative to initiate the dismissal procedure of the President as provided by article 90 of the Constitution which provides that:

"1. The President of the Republic is not held responsible for acts carried out in the exercise of his duty. 2. The President of the Republic may be discharged for serious violations of the Constitution and for the commission of a serious crime. In these cases, a proposal to discharge the President may be made by not less than one-fourth of the members of the Assembly and must be supported by not less than two-thirds of all its members. 3. The decision of the Assembly is sent to the Constitutional Court, which, when it proves the culpability of the President of the Republic, declares his discharge from duty". The Parliament proceedings for such issue are regulated by article 112 of the Rules of procedures of the Parliament.

3. Legal analyze on the procedural aspects – Jurisdiction issue

The President of the Republic (PR), referring to the constitutional provisions with regard to election, has only one competence, that of decreeing the election date, from which a series of decisions of the Central Election Commission (CEC) are interconnected, and specifically determines the electoral period, determines when the constitutional right of the citizens of the Republic of Albania to elect their representatives in the local government is realized (as in this case), etc..

This competence is exercised by the PR only once for each election, according to the constitutional provisions and the legislation in force for elections (Article 92/"g" and Article 94 of the Constitution, and Articles 8, 9, 10 of the Electoral Code). The act by which the PR exercises the competence is the presidential decree. Regarding the administrative elections of 2019, this competence has been exerted form the PR by decreeing 30 of June 2019 as the day of holding administrative elections in the Republic of Albania.

From a thorough analysis of the Electoral Code, it is noted that clear procedural rules are set

on the competencies of the responsible institutions during the elections administration phase, precisely in the specific period specified in the Electoral Code (election period).

The provisions on the CEC 's establishment, organization and functioning enshrined in the Electoral Code, give grounds to consider that CEC has all the prerogatives for it to be a quasi-judicial body, whose decisions are appealed to the court, such as the Electoral College.

Constitutional Court (CC) in its decision no. 150, dated 16.06.2017, in the case with object the *"Repeal as unconstitutional of the Decree No. 10351, dated 21.05.2017 of the President of the Republic" For an amendment to the Decree No. 9883, dated 05.12.2016 "On the determination of the date for Parliamentary elections "*, analyzing the *ratione materiae* legitimation of the case, highlights the lack of jurisdiction of this court on the grounds that:

(...) The Constitutional Court, based on Articles 131 and 134 of the Constitution, deals in the last instance for the claims filed against acts of the public authority that violate the fundamental rights and freedoms guaranteed by the Constitution, after exhaustion of all effective legal means for the protection of these rights, unless otherwise is provided in the Constitution. In the present case, it finds that the act against which the complaint was filed, the decree of the President of the Republic, which is an individual administrative act, since it only deals with the date of elections for the Albanian Parliament. For this reason, the College considers that this act does not fall within the jurisdiction of this Court but under the jurisdiction of the administrative courts and therefore, the claimant is not legitimated to address this Court with the object upon request. "

In the same decision, analyzing in substance the merits of the claim, the Constitutional Court concluded that *"the compliance of the President of the Republic decree with the provisions of the Electoral Code is not under the jurisdiction of this Court, but under the jurisdiction of the administrative courts or, as the case may be, of the Electoral College, and as such cannot be examined by this Court "*.

As above, based on the provisions of Articles 131 and 134 of the Constitution and the manner of its interpretation by the Constitutional Court in the above-mentioned decision, it is clear that the scrutiny of the PR decree which changes the date of the elections:

- 1. It is not subject for the review by the Constitutional Court.**
- 2. depending on the nature of the claim or the essence of the dispute, it could be under the jurisdiction either of the administrative courts or under the jurisdiction of the Electoral College;**

According to the jurisprudence of the Constitutional Court, the objection of the PR decree that changes the election date may fall under one of the two jurisdictions, that of the administrative court and that of the electoral college. Both jurisdictions are judicials.

It should be underlined that based on the provisions of the Electoral Code, the precondition for addressing the Electoral College is after the exhaustion of the CEC remedy.

Under the terms when there is no specific provision in the legislation in force for applicable legislation, with regard to the jurisdiction of this dispute, the Constitutional Court's decision constitutes a source of the right.

When we are ahead of the competition of the same jurisdictions, it is the right of the party seeking to restore the rights violated by the relevant act to choose the jurisdiction that seems most appropriate.

In this choice, and in particular with regard to the context of this case, special importance is also given to the consequences that may create the repealed act. On this regard, is important

to empathize the fact that the decree of the PR that decided 30 of June as the date of the administrative elections in the Republic of Albania has already given its effects and has produced, and produces every day, consequences. Some of them are:

- *Different entities have acquired the status of electoral subjects;*
- *Approval of candidates and their presentation to voters;*
- *A series of decisions taken by CEC regarding the establishment of all the specific temporary bodies responsible for the administration of the elections;*
- *Start of electoral campaign by electoral subjects;*
- *Administrative and financial engagements taken by various public bodies for the purpose of correctly development and administration of the elections, etc.*

Having regard to the above, there are no doubts that at this stage of the elections administration process, the special jurisdiction dedicated to solving problems related to the conduct of elections is the competent jurisdiction for reviewing the PR act, in line with the analysis of the CC.

As a result of this analysis and starting from the nature of the dispute, the jurisdiction of the Electoral College, under these conditions, prevails over that of the administrative court. This reasoning is strengthened by the following analysis:

It is worth mentioning that the electoral administration starts its management activity precisely after the PR has determined the electoral period and it is precisely this administrative and judicial superstructure that takes over the realization of the constitutional right of the citizens of the Republic of Albania. Defining the date of election is the determination of the moment when the citizens of the Republic of Albania will exercise their constitutional right, in this case the election of their representatives to the local government. In order to fulfill this sovereign constitutional right, the Electoral Code has authorized the electoral administration, that from this moment should administer the electoral process as an instrument of fulfilling the constitutional right of the citizens of the Republic of Albania, by making available the necessary preliminary time for realization of this right with standards and on the date already announced.

Any administrative act, action or omission, from any natural or legal person, a mere or constitutional institution, issued during the electoral period and which interferes with or attempts to interfere with the normal administration and progress of the electoral process is subject to review and evaluation only by the electoral administration, in a hierarchical way according to the subject matter of each electoral administration body. It is the obligation of the electoral administration not only to guarantee the exercise of the right of choice by constitutional and legal standards by Albanian citizens, but also to protect the exercise of this right from any illegal interference committed or attempted by any natural or legal person, by not allowing the violation of this process.

The PR's act that repeals the election date is an absolutely invalid act, since it has been issued by the public body outside its powers, and is in flagrant violation with the Constitution and the law, (Article 108 and following, of the Code of Administrative Procedures); this act no longer aims to realize the constitutional right of Albanian citizens to elect their representatives, but because of its lawlessness it turns into an act aimed at intervening in an already announced and administered electoral according to the criteria, conditions and deadlines provided for in the Electoral Code. It is an act that tends to intervene directly in a process that is already within the competence of its governing body and as such should be

reviewed and evaluated by the electoral administration bodies, provided for in the Electoral Code.

Since the electoral administration bodies have entered the intensive process of electoral administration, precisely as a result of determining the electoral period by the PR, carrying out all actions pre-stipulated by the Constitution and the law so that the citizens exercise their constitutional right on 30 June, it is first and foremost their task to assess the legality or not of any act or action of any citizen, any legal person or any institution, that intervenes or attempts to intervene in the non-fulfillment of the right of voters to elect with standards and at the certain time.

For these reasons, CEC is the body that should first assess whether the presidential act (in this case) constitutes interference in the electoral administration process, the degree of interference, possible consequences that it can create and resolve them if consequences are identified.

Any action or omission of the electoral administration is subject to the control of the Electoral College, which has the attributes of the Court of Appeal, the decision of which is final.