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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

ALBANIA

DRAFT OPINION

ON THE POWERS OF THE PRESIDENT TO SET THE DATES OF ELECTIONS IN A PARLIAMENTARY SYSTEM

on the basis of comments by:

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Table of Contents

I. Introduction

1. By letter of 22 July 2017, the Speaker of the Assembly of Albania, Mr Gramoz Ruci requested an opinion of the Venice Commission on the scope of the powers of the President to set the dates of elections (CDL-REF(2019)021).

2. The Commission invited Mr Kask, Ms McMorrow, Mr Pinelli, Mr Tuori and Mr Varga to act as rapporteurs for this opinion.

3. The Venice Commission asked the electoral management bodies (EMBs) which participate in the Commission's annual European Conferences of Electoral Management Bodies[1] to provide comparative information on the postponement of elections. The Commission is grateful to the EMBs for the replies received.

4. On 10-11 September 2019, a delegation of the Commission composed of Ms McMorrow and Mr Tuori, accompanied by Mr Markert and Mr Dürr, visited Tirana and had meetings, in chronological order, with, the President of Albania, the Speaker of the Assembly, the Prime Minister, the acting President of the Constitutional Court, the Minister of Interior, the majority and the minority at the Assembly as well as the Special Investigatory Commission of the Assembly, the Central Elections Commission, , extra-parliamentary opposition as well as with the diplomatic community and civil society. The Commission is grateful to the Albanian authorities for the excellent organisation of this visit.

5. During the visit in Tirana and during a meeting with the President of the Venice Commission in Strasbourg on 18 September, the President of Albania provided an explanatory report with a detailled annex, which are available at the web-site of the President.[2]

6. This opinion was drafted on the basis of comments by the rapporteurs and the results of the visit to Albania. It was adopted by the Venice Commission at its … Plenary Session (Venice, …).

II. Background / chronology

7. The request for an opinion by the Speaker of the Albanian Assembly explains that the Assembly seeks advice in the context of an on-going procedure of impeachment against the President of Albania because he cancelled / postponed local elections. Therefore, it seems useful to recall main elements of pertinent events to which reference is made in the further analysis in succinct form. The chronology below is necessarily incomplete and does not provide proof of any of the events mentioned.

5 November 2018	The President of Albania adopts Decree no. 10928 fixing the date for elections to local government bodies for 30 June 2019 (CDL-REF(2019)021). Preparations for the elections are undertaken (establishment of local electoral commissions with some 40,000 members; publication of voter's lists; registration of more than 40 political parties; start of the election campaign).
February 2019	With the exception of two MPs, most (58) MPs of the main opposition parties, Democratic Party (DP) and the Socialist Movement for Integration (SMI), relinquish their mandates and leave the Assembly. They allege that there has been collusion between organised crime and

[1] https://www.coe.int/en/web/electoral-management-bodies-conference.
[2] http://president.al/wp-content/uploads/2019/09/002-EXPLANATORY-REPORT.pdf; http://president.al/wp-content/uploads/2019/09/002-Annex-Anglisht.pdf

	the majority to falsify the 2017 parliamentary elections, that the allegedly illegally elected interim Prosecutor does not pursue criminal action in several cases involving the majority, that the Central Elections Commission is composed in an illegal manner and that their parliamentary rights to establish investigation commissions have been violated. The Central Elections Commission (CEC) fills vacated seats with persons from the lists of these parties under their proportional representational system but not all seats can be filled because some 120 persons on these lists do not take up the mandate. As a result, while it has a quorum, the Assembly currently has 122 instead of 140 members. The former MPs complain that their vacant seats were filled in an irregular procedure. The DP and the SMI do not register for the local elections
24 May 2015	In view of the crisis, the President of Albania offers postponing the elections "in accordance with the willingness expressed by the political parties".[3]
8 June 2019	The President makes a statement announcing that he will revoke his decree no. 10928 of 5 November 2018 and calling upon all domestic and international actors to contribute to re-establishing dialogue[4]
10 June 2019	The President adopts Decree no. 11199 (CDL-REF(2019)021) cancelling the Decree no. 10928 5 November 2018 that had fixed the date of the elections for 30 June 2019; this Decree no. 11199 is published in the official journal. In addition to the Decree, the President publishes the Reasons for it.[5]
13 June 2019	In decision no. 836 (CDL-REF(2019)021), the Central Electoral Commission (CEC) rejects the request of the National Unity Party (NUP) to withdraw from the local elections of 30 June. The NUP had based this request on the President's decree no. 11199 of 10 June. The CEC finds that by cancelling the elections the President had exceeded his competences, which provided only for the setting of the election date but not for cancelling the date of elections. According to the CEC, the decree is an absolutely invalid individual administrative act according to Article 110 of the Code of Administrative Procedure. The President points out that the CEC's decision of 13 June refers to the Parliamentary Resolution of the same day that was adopted several hours later and itself refers to the CEC decision.
13 June 2019	The Assembly adopts a Resolution (CDL-REF(2019)021) which supports the decision of the CEC and calls for the continuation of the preparation for the elections for 30 June, considering that the decree of 10 June is invalid.
17 June 2019	55 Members of Parliament file a request to discharge (impeach) the President according to Article 90(2) of the Constitution and Article 112 of the Rules of Procedure of Parliament.
24 June 2019	In reply to an appeal against the decision of the CEC by the NUP, the Electoral College of the Court of Appeal of Tirana adopts decision no. 12 (CDL-REF(2019)021). The Electoral College establishes its competence, referring to Decision no. 150 of 16 June 2017 of a College

[3] https://balkaneu.com/political-crisis-in-albania-president-willing-to-postpone-election-date/.
[4] http://president.al/en/deklarate-e-presidentit-te-republikes-sh-t-z-ilir-meta/
[5] http://president.al/en/presidenti-meta-dekreton-shfuqizimin-e-dekretit-nr-10928-date-05-11-2018-te-presidentit-te-republikes-per-caktimin-e-dates-se-zgjedhjeve-per-organet-e-qeverisjes-vendore-arsyet-e-s/.

	(chamber) of the Constitutional Court (admissibility decision), which had held that the fixing of the date of elections is an individual administrative act. The Electoral College confirms the CEC decision to refuse the withdrawal of the NUP from the elections. The College also confirms the CEC's assessment that Decree no. 11199 of 10 June 2019 is an absolutely invalid administrative act according to the Code of Administrative Procedure. In a separate opinion, Judge Hado points out that the Electoral College cannot decide on the validity of the President's decree, since no lawsuits against the decree have been filed before the College.
26 June 2019	The Commission for Legal Affairs of the Assembly adopts a report "on examination of the request of a group of members of Parliament for initiation of the procedure for dismissal of the President" (CDL-REF(2019)021). The Commission proposes to the plenary session to establish a special investigatory commission (on the basis of Law no. 8891 of 2 May 2002 "On the organization and functioning of investigatory commissions").
27 June 2019	The President adopts Decree no. 11211 fixing 13 October 2019 as the date of the local elections (CDL-REF(2019)021). Contrary to the decree of 10 June 2019, the Ministry of Justice does not publish this decree. There is no legal challenge against Decree no. 11211.
30 June 2019	The 30 June 2019 elections take place without the participation of the DP and the SMI parties. According to the CEC, 21,6% of the voters participated in the election.
8 July 2019	The plenary session of the Assembly establishes a Special Investigatory Commission, composed of 5 MPs from the majority and 4 MPs from the parliamentary opposition. This Commission is constituted on 11 July 2019.
1 August 2019	The President publicly defends his decrees and declares that the elections of 30 June were invalid[6]
5 September 2019	OSCE/ODIHR releases its Final Report[7] on the elections of 30 June. It repeats its Preliminary Findings and Conclusions, 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 ran 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." As to security, the report states that "Regular opposition protests against the Prime Minister began in February in Tirana and were often marred by violence and vandalism directed at state institutions. Closer to election day, the protesters in other parts of the country targeted the

[6] http://president.al/en/presidenti-meta-kthen-pergjigje-letres-se-kuvendit-te-shqiperise/
[7] https://www.osce.org/odihr/elections/albania/429230.

	election administration, often including acts of intimidation, violence and arson, and confrontations between municipal and state police." As to the publication of Decree 11211: "Unlike the 10 June decree, the presidential decree of 27 June remained unpublished in the Official Gazette, although the publication of acts issued by the President is required by law." As to the CEC: "Remaining within its legal competences, in several cases the CEC implemented the law inconsistently or in a manner that exhibited bias (…). Some CEC decisions, including those on candidate registration denials and complaints, were published with a significant delay, which undermined transparency." As to the competence to review Presidential Decrees: "The atmosphere of uncertainty and standoff among key institutions undermined public confidence in the legitimacy of the elections. The uncertainty was further compounded by the disagreement among the electoral stakeholders regarding the division of responsibility between the Constitutional Court, as the only body mandated to decide on the constitutionality of presidential decrees, and the Electoral College that is mandated to oversee the legality of the electoral process."
9 September 2019	The President of Albania is interrogated by the Special Investigatory Commission. He informs the Commission *inter alia* that before 10 June he had received intelligence reports that an announced march of the extra-parliamentary opposition would be abused to set fire to the Assembly and he had to act quickly to avert this danger.

8. During the visit of the Venice Commission's delegation to Tirana, several interlocutors pointed out that the origins of the crisis are linked to the fight against corruption in Albania. As an important first step[8] in this fight, Albania embarked on a procedure of judicial reform which includes the vetting of judges and prosecutors. The Venice Commission has already given two opinions on this subject.[9] All 140 MPs had voted for the constitutional amendments, but conflict erupted on the implementation of these amendments (adoption and amendment of some 30 laws and subsequent practice).

9. As a consequence of the vetting process, for a year and a half the Constitutional Court is no longer functional[10] due to the lack of a quorum. There is only one judge left. This is relevant for this opinion because the third stage of the impeachment procedure requires a decision by the Constitutional Court on the guilt or culpability of the President. The procedure for the filling of the vacancies at the Constitutional Court is under way.

III. Comparative overview concerning the fixing of the date of elections

10. The replies received from 22 Electoral Management Bodies show a varied picture of the issue of postponing elections. For some States, the Parliament has the power to change the date of elections in case of a state of emergency (Czech Republic, Slovenia) or by adopting a specific constitutional provision (Austria in 2016, in the case of defective postal ballots).

11. In some countries elections have been postponed or there is a specific legal basis for that:

[8] It seems that this is soon to be followed-up by a vetting of politicians.
[9] CDL-AD(2018)034 Albania - Opinion on draft constitutional amendments enabling the vetting of politicians; CDL-AD(2016)036 Albania - Amicus Curiae Brief for the Constitutional Court on the Law on the Transitional Re-evaluation of Judges and Prosecutors (The Vetting Law).
[10] This is true also for the High (supreme) Court, which is incomplete.

- In case of a flood, fire or other disasters. (Canada, Costa Rica in 2002 for some municipal elections, Iceland 1958,[11] Slovenia[12]);
- In case of insufficient number of candidates (Denmark,[13] Estonia in 2002, Russia by federal law);
- Where the date of elections coincides with an important day (Canada, by decree of the Governor);
- To ensure a broader participation of international election observers (Azerbaijan in 2001) – by Presidential decree;
- To ensure that the elections do not coincide with other elections (during the 2002 referendum in Azerbaijan) – by Presidential decree;
- For the unification of the local and federal elections (Mexico in 2018[14]).

12. Often there are no specific provisions on postponing elections. Constitutional Act No. 110/1998 Coll., on the Security of the Czech Republic, is rather an exception when it provides the possibility of postponing the elections in the following terms: *"If during a period of a state of emergency, a condition of threat to the State, or a state of war, the conditions in the Czech Republic do not permit the holding of elections by the deadline prescribed for regular electoral terms, the deadline may be extended by statute, however for no longer than six months."*

13. Similarly, according to Article 196 of the Public Official Election Act of the Republic of Korea, the President may postpone an election (for President or National Assembly) and the head of the competent regional election commission (for a local election) may postpone an election *"in the case of a natural disaster, terrestrial upheaval or any other [un]avoidable circumstances."*

14. Typically, postponement of the elections is subject to clear conditions: the situations of emergency requiring such a measure are provided for in detail (war, threats to national integrity, natural disasters and so on) by the Constitution or by statute, and the measure of postponing the election can only be undertaken by the President in circumstances that demonstrate the existence of one of these situations.

15. Norway is currently in the process of revising its 2002 election act *inter alia* to introduce an emergency clause in the event of natural disasters, terrorist attacks, or other extraordinary events interrupting the election (pandemics, or a major break-down in communications for example due to a cyber-attack or due to a break-down in the energy supply) and which require the election to be postponed or extended. It seems that few countries yet have such emergency clauses in their election laws, but in view of the risk of cyber-attacks or massive disinformation campaigns in elections, it may be prudent to have one.[15]

16. According to the Venice Commission's Report on Choosing the Date of an Election (CDL-AD(2007)037), there is no common practice to have the exact date of elections stipulated in the law (or even constitution, as e.g. in Estonia for parliamentary elections) and the competent authorities have in many countries at least, some discretion to decide on that issue.

17. As pointed out in paragraph 12 of the Report, a wide discretion allows the competent body to decide to have the elections earlier than the general wording of the law would provide. As such, it is not against the democratic standards nor the voters' fundamental rights if the elections take place just a short time after the respective three, four- or five-years term of mandate has ended.

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[11] Postponement of local elections for one month for one municipality due to stormy weather.
[12] Parliament could postpone elections during a state of emergency.
[13] Legal basis for local elections only: if the number of nominated candidates is less than the number of mandates in the electoral district – authority: City/Rural Municipality Election Committee.
[14] One the basis of a transitional constitutional provision.
[15] https://verfassungsblog.de/norways-heureka-moment/?fbclid=IwAR0mNssWOizMT_KYbCLStLv-1efAzfpc3tPSdKHGTwPGGnZMOtEnkbqylII.

18. In the European constitutional law tradition, it is possible to postpone elections in limited circumstances. This has previously happened for municipal elections and wherever there is a legal basis for it, for instance in Estonia, Bosnia and Herzegovina,[16] Azerbaijan, Poland, Russia, Ukraine,[17] Switzerland and Canada.[18] Such a decision has to be taken by a competent body. This competent body has to be identified in the law or the postponement process should be directly provided for in the law. The competent body to postpone the elections is not necessarily the institution competent to set the date of elections. As far as the Venice Commission is aware, with the exception of a state of emergency, there appear to be no countries where the elections can be cancelled without providing a new date for the elections.

19. To sum up, elections that take place slightly after the term has ended would not be problematic if this is based on a consensus of main stakeholders and if an appropriate legal base for the postponement either already exists or is created ad hoc.

20. In its Report on Choosing the date of an Elections (CDL-AD(2007)037), the Venice Commission observed that "In many states the Constitution or the electoral law does not precisely determine the date of the ordinary elections, but they contain a fairly strict temporal framework in which the decision on the date of the elections will have to be taken. This framework holds three elements:
(a) it determines the authority that will have to decide on the date of the elections;
(b) it determines the period during which the decision has to be taken;
(c) it determines the period within which the elections will have to be held." (paragraph 8).

21. The Report states that *"The power to choose the date of the elections is, in these states, not a discretionary power, as the Constitution or the electoral law gives compulsory indications as to the period in which the elections will have to be held. These terms vary from country to country".*[19] The Report includes Albania among those States, in the light of Article 65 of the Constitution.

IV. Previous practice of postponing elections[20] in Albania

22. On 17 January 1990, the last communist leader, the Chairman of the Presidium of the People's Assembly, Ramiz Alia, postponed the general elections from 10 February 1991 to 31 March 1991 in order to allow the new opposition to participate in the elections. This was done upon request by the opposition and with the agreement of all political parties. At the time, the communist legal framework applied.

23. The 2017 general elections were originally scheduled for 18 June but when the opposition announced a boycott and after a 3 months crisis, an agreement was reached between the parties to postpone the elections to 25 June 2017. That date remained within the timeline of the electoral period. On 21 May 2017, President Nishani adopted a decree for this postponement on the basis of this consensus.

24. As concerns local elections, on 14 January 2007, President Moisu postponed local elections scheduled for 20 January to 18 February 2007 because of an opposition threat to boycott the elections due to concerns over fraudulent voting rolls. The new date was the last possible date

[16] On the basis of facts indicating that the elections are not possible to be conducted in accordance with the provisions of the law – authority: the Central Elections Commission.
[17] In 2018, due to the state of martial law – authority: the Central Elections Commission.
[18] By reason of a flood, fire or other disaster – authority the Governor in Council.
[19] Paragraph 10.
[20] On 8 April 2013, President Nishani had fixed 22 December for the holding of a referendum on the law "On integrated waste management" (http://president.al/presidenti-nishani-dekreton-caktimin-e-dates-per-referendum-te-pergjithshem/). However, without being cancelled, this referendum did not take place because the legislation had been annulled due to a change of government.

within the timeline of the electoral period. The Assembly introduced a transitional provision into the electoral code, which provided the legal basis for the presidential decree.

25. As the candidates for local elections for the early elections in the municipality of Kavaja had resigned the day before the elections, on 25 May 2017 President Nishani postponed these local elections from 7 May 2017 to 25 June 2017 (coinciding with the general election, see above). The basis for this was a request from the leaders of the majority and the DP. The date of the new elections exceeded the 45-day deadline of the Electoral Code but it did not extend the mandate of the major because this was a case of early elections due to the dismissal of the mayor by the Constitutional Court on the basis of the decriminalisation law.

V. Analysis

A. Constitutional and legal basis

1. Presidential powers in general

26. Article 91 of the Constitution of Albania provides the following list of powers:
"a) address messages to the Assembly;
b) exercise the right of pardon according to the law;
c) grant Albanian citizenship and permits it to be given up according to the law;
ç) gives decorations and titles of honour according to the law;
d) accord the highest military ranks according to the law;
dh) appoint and release plenipotentiary representatives of the Republic of Albania to other states and international organizations on the proposal of the Prime Minister;
e) accept letters of credentials and the withdrawal of diplomatic representatives of other states and international organizations accredited to the Republic of Albania;
ë) sign international agreements according to the law;
f) appoint the director of the State Intelligence Service upon proposal of the Prime Minister;
g) nominate the Chairman of the Academy of Sciences and the rectors of universities pursuant to law;
gj) set the date of the elections for the Assembly, local government bodies and the conduct of referendums;
h) request opinions and information in writing from the directors of State institutions for issues that have to do with their duties".

27. Among such powers, those under letter c), ç), d), dh), e), ë), f), and g) are of a formal kind. The scope of the power to set elections under item gj) needs to be assessed as part of the analysis of this opinion.

28. According to Article 94 of the Constitution, *"the President of the Republic cannot exercise other powers besides those recognized expressly in the Constitution and granted by laws issued in compliance with it".*

2. President's powers for fixing the dates for elections

29. Different provisions apply for the fixing of the dates for parliamentary and local elections:

30. As for the Assembly, Article 65(2) of the Albanian Constitution provides that *"Elections for the new Assembly are held in the nearest electoral period that precedes the date of the ending of the mandate of the Assembly. Electoral periods and the rules for holding the elections for the Assembly are determined by the law on elections".*

31. Furthermore, according to Article 67,
"1. The President of the Republic convenes the newly elected Assembly not earlier than the date of the termination of the mandate of the preceding Assembly, but no later than 10 days after such mandate has expired. If the preceding Assembly has been dissolved before the ending of its mandate, the President of the Republic convenes the new Assembly not later than 10 days since the announcement of the election results.
2. If the President of the Republic does not exercise such a competence, the Assembly convenes itself on the tenth day of the period of time provided in point 1 of this Article".

32. More detailed provisions on the setting of the date of elections are included in the Electoral Code. According to Article 10(1), the election date for local government bodies is set by a decree of the President of the Republic, complying with Article 9(1-2) of the Code. The latter provisions address the setting of date for the elections for the Assembly, but the reference in Article 10(1) extends their application to the elections for local government. Furthermore, the electoral period for the elections for both the Assembly and local government units is laid down in Article 8 of the Code. The electoral periods last from 15 March until 30 June and from 15 September until 30 November.

33. According to Article 9(1) of the Electoral Code, the date of the elections is set by a decree of the President of the Republic according to the rules provided for in Article 65 of the Constitution. Indirectly, Article 9(1) of the Electoral Code also extends the application of Article 65 of the Constitution to the setting of the date for local elections. This article provides, *inter alia,* that "the mandate of the Assembly starts with its first meeting after the elections and ends on the same date, of the same month of the fourth year from the date of the first meeting" and that "elections for the new Assembly are held in the nearest electoral period that precedes the date of the ending of the mandate of the Assembly".

34. Article 9(1) of the Electoral Code further sets out that elections for the Assembly are to be conducted on one of the last two Sundays within the electoral period, not later than 30 days before the expiry of the mandate of the Assembly (or respectively the local governments units). In case the mandate ends earlier than 30 days from the beginning of the electoral period, elections must be conducted in the preceding electoral period. This means that seeks to avoid even minor extensions of the respective mandates.

35. Article 9(2) of the Electoral Code provides that the date of the elections must be decreed by the President at least nine months before the expiry of the mandate of the Assembly (local government units).

36. Article 109 of the Constitution establishes the periodicity of local elections when it states that *"The representative authorities of the basic local governance shall be the councils, which are elected every four years, through general, direct and secret voting."* Taken together with Article 67 of the Constitution and Article 9(1) of the Electoral Code, this means that the mandate of local authorities shall not exceed four years.

37. The provisions which regulate the setting of the date of elections are thus rather complicated. However, their general purpose is clear: to provide ample time for both authorities and political forces for preparations for the elections and to prevent an undue prolongation of the mandates of the elected bodies. This purpose could be thwarted if the President could, through new decrees, cancel the elections and set a new date for them, perhaps even without respecting the time limits set out in the Electoral Code.

38. The requirement to set the date of the elections well in advance also serves the purpose of legal security. A power of the President to cancel elections would be detrimental to this purpose, too.

B. Nature and scope of the powers of the President

39. The question arises whether under the Constitution the President is empowered not only to fix the dates for elections but also to change these dates or even cancel them.

40.As a starting point it is necessary to examine why the Constitution attributes the power to fix the date of elections to the President of Albania and not to another body. This is due to the neutral position that the Albanian Constitution attributes to the President of the Republic both as "the Head of the State" and as the organ that "represents the unity of the people" (Article 86).

41. These qualifications do not mean that the President's authority is above politics. They rather mean that the President has to remain outside partisan politics, with a view to ensure *inter alia* a fair competition among parties and the regular functioning of the form of government and of the other State's activities.

42. In parliamentary regimes, the highest status among public authorities is given to the President, not because he or she is the most powerful authority, but because the objectives which he has to pursue are conceived as standing beyond those of partisan politics. On the other hand, it is to pursue these objectives that constitutions entrust the President with specifically determined powers, merely formal or also substantial. From this it follows that, in the exercise of such powers, the President not only has to behave impartially, but must also be seen to behave in this manner.

43. Nonetheless, given these elements, it appears that the power of the President of Albania to set the dates of elections has to comply with strict constitutional requirements and the power to set the dates of elections gives the president only limited discretion, notably to choose dates within the framework of the electoral periods, not exceeding the electoral mandates. It is necessary to examine whether there is a justification for the President to cancel / postpone elections without an explicit legal basis.

C. General powers as justification

44. It could be argued that if a person is entitled (competent) to decide on an issue, s/he can also annul his or her own decision *(actus contrarius*[21]*)*. This is related to the idea that a person who has a power can also do less than fully exerting that power (*qui potest majus, potest et minus*). Applied to the issue of setting the date of elections, this would mean that the President who is explicitly empowered by the Constitution to set the dates of elections could also annul that decision or fix new dates of elections.

45. In reply to this argument, first a textual analysis of the Constitution is required. The powers under items c), dh) and e) of Article 92 of the Constitution explicitly provide for the powers to adopt the "negative act", i.e. give up citizenship, release plenipotentiary representatives, withdrawal of diplomatic representatives. This is not the case for the powers under gj) to set the date of elections. Taken together with the limitation in Article 94,[22] it seems therefore difficult to construct a right of the President to adopt the negative act also as concerns the setting of the date of elections.

46. In addition, the principle of *actus contrarius* is not fully applicable in issues concerning human rights, because any restrictions of human rights have to comply with the principle of proportionality. Annulling or postponing elections directly affects the right to vote, which is a

[21] This is a principle from Roman law, which often is not reflected in administrative law, where the power of an authority to annul its decision is strictly limited. In EU law, for instance, this is connected to the principle of legitimate expectations.

[22] "the President of the Republic cannot exercise other powers besides those recognized expressly in the Constitution and granted by laws issued in compliance with it"

human right. Such a restriction has to be proportionate. The right to vote is linked to an official election. Between two elections, this right exists, but cannot be exercised (*dormit:* it is sleeping). The postponement of an election restricts the right to vote, it suspends it but it does not remove it.

47. Specifically, as concerns elections, important decisions such as fixing their date require a sufficient foresight. The principle of the stability of electoral law discussed by the Venice Commission in the Code of Good Practice on Electoral Matters, in interpretative declaration (CDL-AD(2005)043) is applicable to important decisions related to elections by analogy.

48. The knowledge of the dates of elections allows stakeholders to plan their time-line for campaigning, recruiting of personnel for campaign activities and is linked to civil contracts with media and other companies responsible for producing campaign material. Postponing an election is not comparable to a situation where elections are advanced due to the death of the incumbent or for other reasons. Postponing elections past the electoral mandate results in a loss of legitimacy of the elected institutions.

49. This means that once the dates of an election have been fixed, political actors must be able to trust this decision and a change of such a decision needs wide consensus (and an appropriate legal basis). In the case of Decree 11199, there was no such consensus, which could lead to the establishment of an *ad hoc* competence to postpone the elections.

50. In conclusion, a right of the President to postpone or even cancel elections is questionable and cannot be established without a specific legal basis. It is necessary to examine whether such a power can be derived in situations of emergency.

D. Emergency powers

51. The legitimate aim of maintaining the constitutional order can justify the postponement of elections in exceptional situations, such as state of war or natural catastrophes. When a severe crisis affects a country, elections might indeed exacerbate political conflicts and it may be necessary to seek a solution to the crisis. In very exceptional conditions it can be the duty of the authorities to postpone elections with a view to reduce tensions and to give voters the possibility of expressing their will in a safe and well-ordered context.

52. In his Reasons for the 10 June decree, the President indeed referred to such serious security threats and during his interview with the Investigative Commission he explained that had received credible intelligence information that a planned march of the Democratic Party on 8 June could be abused to burn the Assembly. According to the President, this is why he announced the postponement on 8 June, Decree 11199 was then enacted on 10 June.

53. The Minister of Interior on the other hand informed the delegation of the Venice Commission that he had access to the same intelligence information as the President. According to the Minister, the security risk was manageable and that there had been no danger that the Assembly would be burned.

54. The Venice Commission cannot examine or determine this question of fact but it can explore the question of emergency situations in legal terms given that without referring to this type of specific danger, the Reasoning of Decree no. 11199 does refer to the "risk of a civil conflict" as well as a danger to the "stability to public order, which could also be a threat to the national security". Admitting for the sake of argument that there might have been such a danger, the question is therefore who is entitled to take such a decision according to the national constitution.

55. According to Article 86(1) of the Constitution the President *"represents the unity of the people".* Extraordinary situations often require special measures, and a President, whose

primary mission is representation of the unity of the people, he or she has the constitutional mandate to contribute to the normal operation of the State. This mandate certainly includes appeals for dialogue to the State actors and political parties and the President repeatedly called upon the political actors to engage in dialogue. From this starting point, it needs to be examined whether the President has specific powers relating to a state of emergency, which would provide a constitutional and legal basis for postponing elections in such a case.

56. The President's Reasons do not refer to Article 170 of the Constitution, nonetheless it is important to examine whether this provision could have served as a basis for the decree of 10 June.

57. According to Article 170(1) of the Albanian Constitution: *"Extraordinary measures can be taken due to a state of war, state of emergency, or natural disaster and last for as long as these states continue."*

58. In turn, Article 170(2) requires that *"the principles of the activity of public bodies, as well as the extent of limitations on human rights and freedoms during the period of the existence of situations that require extraordinary measures, are defined by law".* This means that even in emergency situations extraordinary measures have to be based on the law.

59. According to Article 170(6) of the Albanian Constitution, *"During the implementation period of extraordinary measures, there may not be held elections for local government bodies, there may not be a referendum, and a new President of the Republic may not be elected. The elections for the local government bodies can be held only in those places where the extraordinary measures are not implemented."* This means that indeed elections should not be held during a state of emergency.

60. If thus Article 170 may be applicable in substance, the procedure set out in 173 clearly does not provide a competence for the President as *"in the case of a threat to the constitutional order and public security, the Assembly, at the request of the Council of Ministers, may impose a state of emergency in a part or in the whole territory of the State, which lasts for as long as this threat continues, but no longer than 60 days."* However, neither the Council of Ministers (Government, nor the Assembly took action). Does the President have the power to act instead of these bodies if they remain inactive, even though an emergency situation arises?

61. The principle of the rule of law requires that emergency measures are provided for in abstract terms by the law[23], because only this guarantees that, whenever institutional and/or political tensions arise in a country, the task of evaluating whether these tensions correspond to a situation of emergency is anchored to a legal standard. Otherwise, that task would be left in the hands of rulers who might define as 'emergency' whichever tension they believe dangerous for the functioning of the country's and adopt whichever measure they might think fit for dealing with an emergency as defined by themselves. Respect for the rule of law bars such a possibility, which might pave the way for unchecked enlargement of power by rulers.

62. As a consequence, the emergency powers of Article 170 cannot serve as the legal basis for the postponing of elections by the President. The President can only refer to a crisis situation that is below the level of warranting action under Article 170 of the Constitution. However, the Constitution explicitly links the non-holding of elections to the state of emergency. A "lower level" of crisis can therefore not justify the cancelling or postponing of elections by a public body not empowered to do so.

[23] CDL-AD(2016)007, Rule of Law Checklist, II.A.6.

E. Absence of competition - non-meaningful elections

63. There are not many countries where boycotting has happened to such a large extent as in Albania.[24] There is only very little guidance from common democratic practice in cases where the presumption in the democratic society that there are enough candidates and enough competition in the elections is not fulfilled. A situation where the electoral code has been declared unconstitutional and further legislation is required but not yet there, has been a ground to postpone elections in some countries. Such a situation affects all stakeholders in the same way and is foreseeable for the stakeholders and voters on equal level.

64. Often, the political parties prefer to take part in dubious elections where fraudulent acts are suspected, alleged or even substantiated rather than not participate. The scientific studies on the consequences of boycotting are dissenting but suggest mainly that it usually does not lead to wide reforms at least in short run.[25] Boycotting does not in itself lead to a constitutional crisis or instability of public order, but that may happen after the elections if the elected political parties do not make enough effort to reform the constitutional system and communicate with the abstained political parties or the electorate. Postponing the elections is thus not the only solution to deal with the situation. Further constitutional reforms could be discussed among the stakeholders even if the lack of legitimacy of the election results becomes clear after the elections (due to a low participation level).

65. The right to vote includes the right to a choice between candidates. The absence of the two main opposition parties, the DP and the SMI, indeed might affect the right to vote. However, It was not the Albanian State preventing these parties from competing in the elections, but the parties themselves decided to boycott the elections. Whether this could have justified a postponement of the elections according to Art. 170 of the Constitution, seems questionable since the constitutional requirements for the taking of emergency measures are clearly and narrowly defined. In any case, the required procedure was not followed (see above)

66. Another question is whether an election boycott as such can lead to a restriction of the right to vote that is attributable to the State, given that typically it is not the State which prevents a political party from participating in the election but this is a choice of the political party.

67. A justification advanced by the President in his Reasons for postponing the election is a violation of the right to vote according to Article 3 of the First Protocol to the European Convention on Human Rights by conducting elections in which there is no real political choice. In this respect, the President refers to the case Riza and Others v. Bulgaria of the European Court of Human Rights of 13 October 2015.[26] That case concerned the decision of the Bulgarian Constitutional Court to annul the election results in 23 polling stations set up outside the country (in Turkey) during the 2009 Bulgarian general elections. The Court came to the conclusion that the right to vote in and to stand for general elections under Article 3 of Protocol No. 1 to the Convention had been violated by Bulgaria.

68. However, the prevailing circumstances underlying that case were quite different from that in Albania. In Bulgaria, the elections did take place, there was no issue of a postponement of elections. More importantly, the voting rights of the applicants were definitively violated and their

[24] See https://en.wikipedia.org/wiki/Election_boycott. Cases of boycotting of referendums are not comparable, as the non-voting has usually a decisive importance for the validity of the referendum.
[25] See e.g. Staffan Lindberg at https://www.brookings.edu/wp-content/uploads/2016/06/02_election_boycotts_frankel.pdf and Roger Valhammer at http://bora.uib.no/bitstream/handle/1956/4924/84868895.pdf?sequence=1&isAllowed=y (see especially pages 95-96) with references to other studies claiming that boycotting has had little effect on constitutional reforms.
[26] Applications 48555/10 48377/10

votes were lost. In the present case, all voters could still cast their vote but it was less meaningful due to the absence of real competition.

69. While during a state of war, natural disasters etc. the elections cannot be held due to objective circumstances not related to the lack of democratic competition, the issue of public distrust in elections and of boycotting of elections by a large part of political spectrum is a subjective, not an objective obstacle for holding elections.

70. Boycotting is thus different from objective crisis situations, as there are at least some political parties and voters who have trusted the electoral processes and time-line. Postponement of elections in this situation might still have a legitimate aim, as the boycotting intends to lead to a more thorough constitutional reform (e.g. reform of election management bodies, electoral legislation, legislation related to corruption and misuse of administrative resources, powers of the parliament).

71. Boycotting elections by some parties is also different from a situation where political stakeholders use their powers or political opportunities specifically to prevent the legitimate operation of other institutions or – what is worse – to obstruct their constitutional functioning. If such an attempt were successful, it would indeed interrupt at least temporarily the legal or constitutional functioning of the State. Indeed, in the run-up to the local elections, there were attempts in Albania to prevent the elections that exceeded a simple boycott, such as violent attacks against polling stations etc. In parallel to attempts for a sincere political dialogue, such matters need to be addressed in the framework of the criminal justice system.

72. If the aim of the postponement of elections or cancellation of the previous decision on the election day was to lead to a discussion among the stakeholders and guarantee the choice for the electorate, there was at least the legitimate aim for the postponement. Avoidance of possible upcoming conflicts in society and safeguarding the democracy can be considered as a legitimate aim to postpone the elections.

73. In conclusion, even if the President may have pursued a legitimate aim neither the Constitution nor the Electoral Code establishes any general power for the President to cancel elections and to set a new date.

F. Periodicity of elections

74. The principle of democracy requires that the elections have to be held periodically – including on local (municipal) level. This stems for parliamentary elections from Article 25(c) of the International Covenant on Civil and Political Rights and Article 3 of the First Protocol to the European Convention on Human Rights and has been identified as one of the principles underlying Europe's electoral heritage in the Code of Good Practice in Electoral Matters.[27] Without periodic elections at the local level, local self-government would lack the required legitimacy.

75. Periodic elections are thus 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.

76. Consequently, the postponement of local elections exceeded the competence of the President. It will be for the Assembly and its investigation commission and finally the Constitutional Court to establish whether this was a violation of the Constitution and, if so,

[27] CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, see also p. 57 of the explanatory report.

whether it was also so "serious" in the sense of Article 90 of the Constitution to warrant impeachment proceedings.

VI. Impeachment

A. Procedure

77. According to Article 90 the Constitution of Albania and the Rules of Procedure of the Assembly, dismissal of the President (impeachment) follows several steps:

1. A group of at least ¼ [=35] Members of the Assembly requests the impeachment (Article 90(2)).
2. The Plenary Session of the Assembly requests a report from its Legal Affairs Committee.
3. The Plenary Session of the Assembly establishes a Special Investigation Commission.
4. The Special Investigation Commission reports to the Plenary Session on whether the President committed serious violations of the Constriction or a serious crime.
5. The plenary assembly decides by a two thirds majority whether to impeach the President (Article 90(2)).
6. If the plenary decides for impeachment, it refers the case to the Constitutional Court, which decides on the "guilt" of the President (Article 90(3)).
7. When the Constitutional Court establishes the guilt, the President is dismissed.

78. At the time of preparation of this opinion, the Special Investigation Commission has been established but it has not yet provided its report, expressing the wish to take into account the opinion of the Venice Commission. The allegation against the President is not the commission of a serious crime but "serious violations of the Constitution".

79. During the last phase of the impeachment procedure, the Constitutional Court decides as a plenary (Article 62 of the Law on The Constitutional Court). As a consequence, the Constitutional Court must be established and have quorum of at least six judges (Article 32 of the Law on the Constitutional Court). A majority of five judges is required to decide on impeachment (Article 74(4) of the Law on the Constitutional Court). This means that the impeachment of the President cannot happen until the Constitutional Court has at least six judges. Currently, the Court has only one Judge and it seems that the appointment of four judges is being prepared.

80. It is unfortunate that the Constitutional Court might be established with such an important case already pending.[28] While the composition of a constitutional court is always of keen interest for political actors, having in mind such a specific case when the judges are chosen is not an ideal background for ensuring their independence. However, this does not affect the legitimacy of the Court if the procedure of appointment is followed.

B. Seriousness

81. If indeed the cancelling and the later postponement of the local elections exceeded the powers of the President as set out above, the Assembly and its investigation commission should take into account a number of factors which raise the question whether the act was of a sufficiently serious nature:

82. (a) Before adopting the Decree of 10 June, the President repeatedly offered his assistance to the parties to postpone the elections in order for them to find a compromise. This shows that the President tried to attenuate the crisis, taking into account his role as the organ that represents

[28] Once it is established, the Constitutional Court may also have occasion to decide whether it upholds its 2017 decision that the setting of the dates of elections is an individual administrative act or whether it comes to the conclusion that this is a normative act, the control of which is its competence.

the unity of the people (Article 86 of the Constitution). The intention of the President was to prevent non-competitive elections without the participation of the opposition parties.

83. (b) Even if the President first cancelled the local elections without setting a new date, the Reasons given show that he had no intention to postpone the elections indefinitely, but only for a short period.

84. (c) In view of how previous crises of boycotting Parliament had been settled in Albania before, it was not unreasonable for the President to expect that a similar political solution could be found this time.

85. (d) In practice, the damage was somewhat reduced because the elections on 30 June did take place. While the President declared these elections invalid and without any legal consequence, he did not take further steps to prevent the organisation of these elections.

86. (e) There is a qualitative difference between both the constitutional rules pertaining to, and, the status of parliamentary and local elections. Even recognising that local elections are essential to democracy overall, parliamentary and local elections are not of the same constitutional status. Parliaments – specifically the Assembly in Albania – is not only a *constitutional* but also the *constituent* body (see Article 117 of the Constitution). Parliaments have a decisive role in establishing and controlling other state institutions and its officials. Local authorities are also important having regard to their being elected bodies and their officials exercise public authority on behalf of the sovereignty of the people, but local authorities are *not constituent* but only *constitutional* bodies. It follows from this that postponement of local elections is not as significant or detrimental to the constitutional functioning of a state that an eventual postponement of parliamentary elections would be. In the Albanian case this difference is represented by the lack of a similar constitutional rule for local elections than Article 66 of the Constitution regarding the Assembly: even if local governments are elected for four years (Article 109 Section 1 of the Constitution), there is no explicit rule stating that the mandate of the local government can be extended solely in the case of war and only for so long as it continues.

87. The difference is clear, but all the constitutional clauses have to be interpreted in the context of other rules, not in isolation. Article 109(1) determines a four-year mandate for local authorities. If rules of the Electoral Code are also taken into account it seems that the Decree is not in line with the Electoral Code, consequently placing it also in conflict , with the Constitution. Thus, the Constitution attributes a higher value to the periodicity of parliamentary elections, which it regulates directly whereas it delegates the provisions on local elections to the ordinary legislator.

88. (f) Most importantly, Decree no. 11199 of 10 June 2019 (and even more so the Decree no. 12211 of 27 June 2019, fixing the new date – this decree was not even published) was not properly challenged before any court in main proceedings (neither before the Electoral College nor the Constitutional Court, as it may be). The President had no standing and was not heard in the proceedings before the CEC and the Electoral College. These bodies found his Decree invalid merely incidentally.

89. Taken together, these factors provide elements to the Assembly indicating that the cancelling and later postponement of the local elections may not meet the requisite criteria not being of sufficient seriousness in the circumstances to warrant impeachment.

C. Nature of impeachment proceedings

90. The impeachment process involves both legal and political aspects and phases. The work of the Special Investigation Commission is mainly of a legal nature. By contrast, when the plenary assembly decided whether to impeach the President, it may – and even should – take into account also the political repercussions of its decision. Finally, the Constitutional Court focuses merely on the legal aspect. The Venice Commission can only comment on the legal aspects, but it also wishes to emphasise the importance of the political aspect involved in the Assembly's decision-making. Even if the Assembly were to consider that serious violations of the Constitution had occurred, it may legitimately decide to refrain from continuing with impeachment proceedings

91. The various phases of the procedure at the Assembly have a very different nature. The Special Investigation Commission and the Constitutional Court focus on facts and legal issues.

92. As concerns the Plenary Session on the other hand, even if the word "may" in the English translation of Article 90(2), may have a narrower meaning than the Albanian text (this was suggested to the Venice Commission's delegation at the Assembly), it is clear that the decision by the plenary session – taken by a two thirds majority – is also a political one.

93. Thus, even if "serious violations of the Constitution" (the Constitution uses the plural) were established, the Plenary Session also takes into account the opportunity of impeaching the President and can refrain from doing so. The Venice Commission cannot advise on this issue but it will be for the Plenary Session of the Assembly to decide whether an impeachment would reduce or increase tensions and ultimately serve or frustrate the goal of mutual checks and balances in a situation where Parliament and all municipalities are dominated by one party. Would the pursuit of such an Impeachment option serve the unity of the people and in terms of international optics would it lend credibility to the Albanian State?

VII. Conclusion

94. In response to the request for an opinion by the Speaker of the Albanian Assembly, the Venice Commission comes to the conclusion, that in the absence of a statutory provision on the issue, that the President can only cancel elections for local government bodies in a situation which meets the criteria for taking emergency measures. Even then the President needs a specific – *ad hoc* – legal basis to postpone elections.

95. This conclusion is supported by the general interpretative rule according to which express regulation of emergency powers in the Constitution and laws restricts recourse to any complementary unwritten emergency powers to very exceptional situations; primarily to situations of factual or legal impossibility which are not explicitly provided for by written emergency law. Cancelling elections is possible only in situations which meet the requirement for declaring a state of emergency. However, the applicable constitutional rules for emergency situations were not followed in this case. Neither was there a political consensus, which would have allowed for the establishment for an *ad hoc* legal basis.

96. Cancelling elections also affects electoral rights recognised by international human rights instruments and the mere application of *actus contrarius* is prevented by the requirement of proportionality of any interference.

97. The absence of a legal basis and the availability of alternatives (postponing the elections according to emergency measures under Article 170 of the Constitution or the resumption of political dialogue after the elections) render the interference with the electoral rights non-proportionate.

98. 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.

99. The President thus exceeded his competences under the Constitution by first cancelling, then postponing the local elections. It will be for the Assembly and finally the Constitutional Court to establish whether this amounts to "serious violations", which would allow for an impeachment of the President.

100. As set out in this opinion, a number of factors show that this was not of such a character necessary to substantiate a serious violation. This concerns notably the President's calls for dialogue, the expectation postponing election would contribute to the pursuit of a compromise between the parties, the absence of a law precisely regulating the powers of the President, the lack of direct challenge of the President's Decrees before a court, the constitutional status of local elections as compared to parliamentary elections.

101. Taken together, all these elements lead to the conclusion, that although the President exceeded his constitutional competences by cancelling and postponing the local elections beyond the electoral mandate of the local authorities without a specific legal basis. However, the elements presented above could lead to the conclusion that these acts may not have been of a serious enough nature to warrant an impeachment of the President.

102. Finally, even if the seriousness of the violations were established, this need not necessarily lead to an impeachment of the President, taking into account the power of the Plenary Session of the Assembly to take into account constitutional goals, such as checks and balances.

103. The Venice Commission remains at the disposal of the Albanian authorities for further assistance in this matter.