# The Law Can't Always Fix It

## The Venice Commission's Opinion on the President's Power to Postpone Elections in Albania

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On 14 October, the Venice Commission released an opinion on the scope of the power of the President of Albania to set the dates of elections. In Albania, the President is facing impeachment procedures due to his postponement of the local elections and the Albanian Assembly's Speaker requested the Venice Commission to issue its opinion on the President's actions. While the Commission was clear in its legal conclusions, the reactions of the Albanian public to the report illustrate that a reasoned legal opinion was not suited to calm the ongoing political battles in Albania.

### What happened?

In February 2019, the MPs of the opposition relinquished their mandates and left the Assembly alleging, *inter alia*, a collusion between organised crime and the majority to falsify the 2017 parliamentary elections. Also, the opposition parties boycotted the local elections. In view of the crisis, the President announced that he will revoke local elections "in accordance with the willingness expressed by the political parties" and called upon all domestic and international actors to contribute to re-establishing dialogue. On 10 June, the President of the Republic adopted a decree cancelling the decree that had fixed the elections for 30 June and on 27 June he adopted a decree fixing 13 October as the date of the elections. On 13 June, the Central Electoral Commission (CEC) rejected the request of the National Unity Party to withdraw from the elections of 30 June, alleging that the President had exceeded his competences and that the presidential decree was invalid under the Code of Administrative Procedure. On 17 June, 55 MPs filed a request to discharge the President according to article 90 of the Constitution. On 30 June, the local elections took place without the participation of the opposition parties. According to the CEC, 21,6% of the voters participated in the election. Following these events, a procedure of impeachment was initiated against the President because he postponed the local elections by decree. On 22 July 2019, the Albanian Assembly's Speaker asked the Venice Commission for its opinion on the President's powers to postpone the elections and on 5 September, an OSCE/ODIHR Report affirmed that

> *"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."*

In addition, the Report observed that the uncertainty about the legitimacy of the elections "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". It should be added that the Constitutional Court is not functioning at the moment, due to difficulties in replacing 6 vacancies of its members.

Such account should lead to the conclusion that the highest institutions' legitimacy is contested to the point that the regular functioning of the electoral process is far from being ensured. It is against such

background that the scope of the President's power to set the date of the elections, which does not pose particular legal controversies in other contexts, emerged as a crucial issue in Albanian politics. The opinion of the Venice Commission acquired therefore an importance going far beyond the expectations usually surrounding this body's advice. Interestingly, in the first days of October previous versions of the opinion were leaked, and distorted, to the Albanian media.

## The opinion of the Venice Commission

After having afforded a comparative overview concerning the fixing of the date of elections in other countries, the Commission's opinion focuses on the nature of the President's legal acts according to the Albanian Constitution. The Commission concluded that the Constitution gives the President the power to fix the date of elections due to its "neutral position", which does not mean that the President's authority is above politics, but rather "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." (§ 36). In particular, "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." (§ 39). As for the power to postpone elections, the Commission relies *inter alia* on "the principle of the stability of electoral law", implying 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." (§ 43). Therefore, "even if the President may have pursued a legitimate aim, neither the Constitution nor the Electoral Code establish any general power for the President to cancel elections and to set a new date" (§ 69).

Once ascertained that the postponement of local elections violated the Constitution, the Commission goes on "to examine whether this violation was also so 'serious' in the sense of Article 90 of the Constitution to warrant impeachment proceedings" (§ 74). The Commission concludes that the before mentioned violation "is not of a nature serious enough to warrant an impeachment of the President" (§ 99). A series of arguments support this conclusion, among them the President's expectation that postponing the election would contribute to the pursuit of a compromise between the parties, the lack of direct challenge of the President's decrees before a court, and the constitutional status of local elections as compared to parliamentary elections (§ 98).

## A legal opinion, not a political solution

The Commission is therefore convinced that the issue of postponement of local elections has to be disentangled from that of whether the violation of the rules concerning such postponement amounts to a "serious violation" of the Constitution which would justify an impeachment procedure against the President. The opinion demonstrates that such distinction was prospected with the aim of giving legal advice on the matter, rather than with the intention of searching a political compromise among the competing parties of the Albanian battle.

On the other hand, the fact that none of those parties is likely to be entirely satisfied with the opinion confirms that legal advice is driven by criteria that do not correspond to political needs. This was, after all, the message in the bottle which was sent from Venice to Tirana. The dramatic political confrontation affecting the Albanian institutions is a serious problem, particularly in a moment in which Albania is calling for accession to the EU. Such problem rests however in the hands of the Albanians. We can only hope that "democracy through law", which is the very objective of the Venice Commission, will guide their path.

*The author participated in issuing the opinion as a member of the Venice Commission.*

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