

The certification and decertification process of elections, with special emphasis in the Republic of Kosovo

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Abstract

The right of all adult citizens to participate in the issues of their country's governance is one of the cornerstones of democracy. Election participation is defined by internal legal acts such as constitution, laws, electoral codes, and through international legal acts. This right has been limited throughout history, by completely banning certain categories of citizens to participate in elections or by placing voters' censorship such as the rich, poor, educated, etc. Apart from the active and passive right to participate in the elections, the constitution and the electoral laws have also determined the right of exclusion from the elections. In the contemporary world, with internal norms and international law, special criteria are set for the certification and decertification of voters in the elections. The purpose of this paper is to assess the colliding norms that exist in Kosovo's legislation regarding the participation of citizens in the elections, especially the colliding norms between the constitution and the electoral laws in the certification-de-certification provisions of the elections. With these shortcomings and ambiguities, international standards for democratic elections have been violated.

Keywords: Right to election, electoral process, certification of election, de-certification.

JEL Classification: K15 and K16

Introduction

The object of this paper is the organization of free elections in line with international standards for democratic elections, with particular emphasis on the Republic of Kosovo. In this context, we will investigate one of the segments of the organizations of elections, the right to elect and to get elected, namely the active and passive right of elections, focusing on the certification and decertification segment of the candidates in the elections. Throughout history, various rules have been applied for the organization of elections and special censuses for the active and passive right of elections. Last decades a number of international acts for free elections have been issued. The signatory states of these acts are obliged to draft domestic legislation. They have determined with the constitution and laws the active and passive right of elections, such as: The right to elect and to be elected as a constitutional right and the dilemmas when this right can be denied to a citizen in legal terms; Participation of candidates in elections and their certification and decertification; Conditions when a person may be restricted the passive electoral right according to the Constitution of the Republic of Kosovo; When can this right be taken with a court decision? Non-

certification and de-certification under the Law on General Elections in Kosovo; Incidental control. The consequences that such norms have produced (conflicting with the constitution and international standards) in October 2017 election process for mayors of the municipalities of the Republic of Kosovo; Decision of the Election Complaint and Appeal Panel (ECAP), as well as the decision of the Supreme Court of Kosovo.

I. Methodology

For the compilation of this paper we will use scientific methods such as: normative, empirical and comparative methods. Based on these methods we will achieve concrete results. Certification and decertification of candidates in elections are mainly governed by international legal acts. However, each country regulates this issue specifically with domestic legal acts. Through the normative approach, the legal status of election participants is regulated, passive right to elections, or the right of candidates to be elected. By making comparisons between the constitution and the election laws in some Southeast European states, we find common and distinct points regarding the active and passive right of elections. These standards are also defined by the Constitution of the Republic of Kosovo and its elections. To be successful during the election process, especially during the certification and decoding process, we will apply the empirical method. Through this method, we will assess how the problems of certification and declarations of candidates during the elections are presented and resolved in concrete terms. In Kosovo, we have a collision norm between the Constitution and the Law on General Elections, the provisions that sanction the certification and decertification of the candidates in the elections. It is therefore urgent that these legal provisions be aligned with the constitution, because they are severely damaging the authority of the candidates in the elections, violating international human rights law.

II. Elections and international legal acts for the election process

So voting means being active in public life and controlling representative bodies while exercising their mandate; abstaining from voting means agreeing with any option for government [1]. The ideal of democracy and the right of everyone to participate in his country's governance are clearly stated in the Universal Declaration of Human Rights of 1948[2]. The application of this right was also limited until recently in the Western European democracies [3]. Since 1990, there has been a significant increase in the adoption of election acts: at national, regional, and global levels, harmonizing with standards for democratic elections [4]. The Copenhagen Document represented the most detailed drafting of the international standards for democratic elections at that time and is the first case in which states have provided specific international commitments regarding the proper electoral process, particularly certification and decertification of election candidates. While the European Commission for Democracy through Law, or the Venice Commission, has sanctioned the five basic principles of European electoral legacy, which are: general, equal, free, secretive and direct voting within which principles, certification and decertification of elections is

foreseen [5]. International Law sets specific objectives regarding the holding of free and fair elections and formulates a variety of obligations related to them. Primarily, the obligation of courtesy leaves the states to decide by law and other legal acts on how best to achieve the objectives in their particular historical, political and cultural context. Through these principles and international acts, the codification of international law for fair and correct elections is gradually being drafted, as well as specific criteria for punishing those who violate electoral codes such as certification of elections. Only by supplementing electoral legislation and by respecting that legislation, the selection of representative bodies will be done in conformity with the will of the people.

III. The right to elect and to be elected as constitutional right and dilemmas when this right can be denied to a citizen a legal perspective

In principle there is an active and passive election right: active electoral right (right to vote) and passive electoral right (right to be elected). The right to elect and to be elected may be subject to a number of conditions, where the most common are those related to age and citizenship. Active and passive electoral rights can be limited by domestic and international legal acts. Limitation of this right can be made for two reasons: legal incapacity or sentenced for a serious criminal offense [6]. In principle, each state with constitutions and other legal acts determines who has the right to participate actively and passively in elections and to whom this right is denied. In Kosovo, any citizen who has reached eighteen years of age, even on Election Day, has the right to elect and to be elected, except when this right is limited by a court decision [7]. With the constitution of Albania, the right to elect and to be elected is governed as follows: "Any citizen who has reached the age of eighteen, even on Election Day, has the right to elect and to be elected". They are exempt from the right of elect, the citizen who by a final court decision is declared to be mentally incapacitated [8]. The Republic of Macedonia has regulated the right to participate in the elections with the Article 22, which states: "Every citizen who has reached the age of 18 acquires the electoral right [9]. Electoral right is inseparable, inclusive and directly carried out in free elections by secret ballot. Persons who have been granted the ability to act do not have electoral right [10]. From these comparisons it turns out that none of these constitutions foresees the possibility of limiting electoral law by a judicial decision, which is completely logical and reasonable, because each constitution and that of Kosovo prescribe a constitutional norm, which says that fundamental freedoms and rights can be restricted by law.

IV. Certification and de-certification of candidates for participating in their elections

a. Conditions when a person may be restricted the passive electoral right under the Constitution of the Republic of Kosovo

The expression in Article 45 of the Constitution of Kosovo that the right to elect and to be elected can only be taken by a court decision has created barriers and does not

allow full de-criminalization in Kosovo politics for the fact that in such circumstances, if we respect the constitution, one may be denied the right to elect (passive electoral right) only if such a right is limited by a court decision. Consequently, according to the constitution, no one can acquire the right to passive elections if such a right is not limited by a judicial decision [11].

b. *When can this right be taken by a judicial decision*

According to Article 63 of the Criminal Code of Kosovo (CPC), the court shall deprive a perpetrator of the right to be elected for one (1) to four (4) years, if such person, with the intent of becoming elected, commits a criminal offence against voting rights or any other criminal offence for which a punishment of at least two (2) years imprisonment is provided [12].

c. *Non-certification and de-certification according to the Law on General Election in Kosovo*

Law on General Elections in Kosovo provides: a candidate cannot be certified, will not be certified, and respectively will be de-certified also if this right has been taken through a judicial decision (Article 29, *para.1. Letter p*) and found guilty of a criminal offence by a final court decision in the past three (3) years (LGEK, 2008). If we make the comparison between the Constitution and the LGEK, it turns out that despite the constitution, the law has extended the range of circumstances to prevent a candidate from participating in the elections even when there is no judicial decision and that this right has been limited to, as foreseen by Article 45 of the Constitution of Kosovo [13].

In such colliding situations, between the constitution and the law, law enforcement institutions have two paths available:

a. The constitutional one (which unfortunately, as it is built, sacrificing the ethical-moral criterion), to enable the race to any person to whom such a right was not limited by a court decision.

b. And the legal one that fulfills the ethical and moral criterion, the de-criminalization of the Kosovar political scene, but it is against the constitution, for the non certification or the de-certification of all those who have been found guilty of punishable verdicts. It would be unreasonable for a person who has been convicted to effective prison sentences, for example for robbery or other forms of abuse of official duty and the right to be elected by court decision is not restricted to participate in the elections [14].

d. *Sentence with fine can not produce legal consequences for the perpetrator*

Article 29. paragraph 1. Letter q. of the Law on General Elections is in contradiction with international standards for democratic elections, but also with the Criminal Code of Kosovo, with Article 100 which stipulates that: "Legal consequences of the punishment cannot be created where a fine, suspended sentence or judicial admonition is imposed on the perpetrator or when the perpetrator is exempt from punishment." From this, it clearly turns out that despite the fact that article 29, para. 1. Letter of the aforementioned law has used the generous phrase "is found guilty by a final judgment", no exception, no one can be taken the right to elect, whether punished with a fine or with any of the punishments under Article 100, paragraph 2. of the Criminal Code of Kosovo. Drafters of laws, when drafting them, should have

had the Constitution as a referral point, and in this case, before constructing this norm had to consult the constitution, chapter of human rights and freedoms, then the Criminal Code of Kosovo, which regulates the issue of additional penalties.

V. The consequences that have produced such norms (conflicting with the constitution and international standards) in the October 2017 election process for mayors of the municipalities of the Republic of Kosovo

The Candidate from the Political Entity “Initiative for Kosovo”, IK, has submitted its candidacy for mayor of IK to the Central Election Commission (CEC) for the local elections in the eighth month held on 22 October 2017. The CEC, initially certified it for this contest, meanwhile the CEC, with its decision no. 16223/2017 dated 12.09.2017, has done the de certification of this candidate from the Local Election Process, held on October 22, 2017, referring to Article 29, for the fact that this candidate was found guilty of a criminal offense and was sentenced by a fine (decision CEC no. 16223, dated 12.09.2017).

a. Decision of the Election Complaints and Appeals Panel, (ECAP)

The Election Complaints and Appeals Panel, with the decision A.nr.18 / 2017, dated 15.09.2017, rejected as ungrounded the complaint of NN, from the political entity ‘Nisma për Kosovë’, the candidate for Mayor of Prizren, filed against the CEC Decision. The candidate NN from the Political Entity ‘Initiative for Kosovo’ filed a complaint with the Supreme Court, which disputes the legality of the decision mentioned [15].

b. Decision of the Supreme Court

The Supreme Court, by Judgment AA.no.16/2017 dated 19.09.2017, approved the appeal, annulled the two decisions: that of the CEC and the ECAP, with reasoning that the applicant, respectively the complainant by a court decision was not taken the right to elect and to be elected as foreseen by Article 45 of the Constitution of Kosovo, as the highest legal act, despite that the Law on General Elections foresees such a possibility, and in this case the Supreme Court rightly did not use the incidental control [16]. Although, this Supreme Court decision was only about the complainant, that is, it was the individual decision, we consider that the CEC was mistakenly treated as a precedent for other certified candidates who did not appeal the decision for their certification to the Supreme Court and all the candidates were returned to the electoral list, no matter for what offense they were punished through a court decision.

c. Incidental control

According to the Article 113, para. 8 of the Constitution of the Republic of Kosovo, the courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court’s decision on that case depends on the compatibility of the law at issue. In the concrete case, if any of the candidates raised the issue of non-certification or de-certification to the Supreme Court, the Supreme Court should not use the “Incident Control” institute, but must directly enforce the constitution, as there is no dilemma for the discrepancy of the law with the Constitution, while

incidental control applies when there are doubts about the compliance of any law with the Constitution (it is still not clear whether the law is in compliance with the constitution), whereas in the concrete case the situation is clear and easily understood by anyone.

Conclusions and Recommendations

How to get out of this absurd situation created by Article 45 of the Constitution of the Republic of Kosovo

When the country's law is in contradiction with the Constitution and human rights and freedoms, the law enforcers (also the court) has no alternative but to apply the Constitution, regardless of the implications of such a decision on the image of the state, based on the fact that we are dealing with the highest legal act of a state. This act has its primacy in relation to domestic legislation although we are aware that this constitutional wording is not in favor of de-criminalizing Kosovo's politics. The alternative for the enforcement of the law enforcement is in favor of de-criminalizing Kosovo's politics, but it is not constitutional.

After finding the collision between the Kosovo Constitution and the Law on General Elections in Kosovo, we make the following recommendations:

- Article 45 of the Constitution of Kosovo should be changed urgently, and the phrase "only if this right is limited by a court decision" to be deleted.
- The question of the possibility of eventual limitation of this right should be regulated by law, but always based on international instruments.
- Also, the Law on General Elections has to be supplemented because it contains absurd provisions, especially when someone has been found guilty of a criminal offense committed by negligence (e.g., against public safety, only with material damage) and is sentenced to fine, conditional sentence, or even when released from punishment, is denied the right to participate in election.
- This can damage the candidates who possess all human, ethical, moral, professional qualities, those who enjoy unquestionable authority in the community.
- Through these constitutional and legal changes in Kosovo, would then the international principles for free elections be respected in accordance with the Copenhagen Document and the Venice Commission.

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