

Electoral Campaign Financing and Criminal Policy

Dr. Brunela Kullolli

“Aleksander Moisiu” University of Durres, Faculty of Political Sciences and Law

Abstract

In a democratic state, power is exercised by elected bodies through free and fair elections. The choice of the political class that will exercise political, economic, etc. power by the sovereign (the people) is one of the most important moments in the way how a state works. The sovereign and the expression of his will by voting for those to be elected to the governing or governing bodies. The first part will address and analyze the election campaign, the day of voting until the moment of the results, is the period when the sovereign exercises his power directly by voting which political class will lead the state. Political classes seeking to govern and govern governing bodies disclose their programs, their policies during the election campaign. Election campaigns in modern and capitalist society require funding as they are associated with costs, expenses. Election campaigns cannot be done without capital, without money. The second part will analyze the power of money in election campaigns is related to the expenses political parties or candidates make to their program, to disseminate their political and governing ideas, so money power is used to influence the sovereign to be informed on election day, who to vote for and who to choose in the governing bodies. The use of money in election campaigns forces a democratic state to set rules on how to finance, spend, etc., so setting rules such as how the power of money will affect election campaigns and their control by the responsible bodies. In a country with a fragile and transitional democracy such as the Albanian state, the control of money power during election campaigns is extremely difficult, however the manner of controlling election campaign financing is clearly defined in legislation. In this paper I will contribute by analyzing the impact of money on the Albanian state policy, first in terms of electoral financing, financing of political parties and individuals in electoral campaigns. In this paper I will address and analyze how money affects constitutional principles during election campaigns, how it affects the principles of free and fair elections. The third part will address and analyze how entities participating in electoral campaigns are financed. The use of illegal money during campaigns affects the violation of constitutional principles for free and fair elections. I will address and analyze the criminal policies in the field of illegal financing of electoral campaigns. The Criminal Code of the Republic of Albania in relation to free and fair elections. Illegal financing of election campaigns is a current phenomenon of the Albanian society, bringing about the incrimination of Albanian politics. Illegal financing of entities participating in electoral campaigns comes from organized crime or suspects in criminal activities, and this brings about the establishment of those persons who protect the latter's interests and not the interests of the constituents or democratic interests of a state. Intensify the fight against illicit financing of electoral campaigns by creating not only a complete legal framework for preventing illicit financing but also creating practical mechanisms for not only law enforcement but also the practical prevention of uncontrolled funding of electoral subjects. Setting criminal penalties for illegal financing of electoral campaigns and revising the Criminal Code in incriminating all illegal financing actions that violate free and fair elections may be the most important step in the fight against illegal financing of electoral campaigns. Illegal financing of electoral campaigns in Albania calls for free and fair elections and questions the basic principles of the representation of political entities in governing institutions and therefore the interference in law and penal policy is current and immediate.

Keywords: Money, electoral campaigns, unlawful financing, criminal policy, legal mechanisms.

Introduction

The word “democracy” derives from the Greek word demos-people and kratos-rule which means the rule of the people by themselves. The Albanian state is a parliamentary democracy.

The actual situation of Albanian politics has highlighted a very important problematic of the fundamental principle of democracy: that of the governing of the people by the people through the representatives elected by the people in the governing institutions through free and fair elections.

In an Albanian society where democracy and society are still in transition and where democratic principles are not yet consolidated, the representation of the people through its elected representatives in the governing institutions is put into question; because the right to vote is directly influenced by the money power used in the electoral campaigns.

Political power, which is linked to the collective decisions, legal acts and concrete behaviors in the function of a state, is called government or governance. Political power (governance) stems from the right of people to vote in the local or central elections. When the right to vote in the elections is influenced by the power of money and by illegal financing, the political power taken in this way, gets the nuances of an illegal power, which as a source no longer has the free and honest vote of the people, but it has as its source illegal money and protects the interests of a small group of people who enjoy the power of money.

Constitutional rights of the right to choose. The right to vote.

The Albanian state is based on a system of free and fair elections. Through the present system of free and fair elections, the sovereignty of the Albanian people is exercised and the democratic principle of governing by the people is applied by means of electing its representatives through local or central periodic elections.

This sovereignty is exercised by the Albanian people through the right to vote - enjoyed by every citizen entitled to vote who has reached the age of 18 with the special exceptions set forth in the Constitution for the present category. The right to vote is exercised through an electoral system that guarantees the secrecy, the freedom and equity of vote by providing citizens with their politically active being and thus forming the essence of the role that the citizens need to possess in a democratic system.

The present right is not absolute but is limited and has become subject to limitations in the Constitution. Article 45 of the Constitution defines that the right to vote comprises a certain category of persons. The restriction made to the right to vote must be minimal and within the allowed constitutional limits. It is important that the restrictions are not such as to render ineffective the exercise of this right or to affect it in its essence. The right to vote is not a privilege that the state recognizes to its citizens, but it is an instrument to choose the way and the people who will govern them.¹

Funding of electoral campaigns vs. constitutional principles. The right to vote.

The right to vote is exercised during electoral elections. The vote determines the entity to be governed; therefore, the right to vote also determines the political power of a state.

The subjects of electoral campaigns are political parties or individuals who invest in demanding voters to represent the people in the governance institutions. Electoral campaigns in the Albanian state are characterized not only by the debate, the harsh language of communication among the candidates, conflicts that lead to physical conflicts, etc; but they are also characterized by the power of money used during the campaigns.

Illegal funding of electoral campaigns in Albania, of political entities or individuals is a current problem that has led to the non-representation in governmental institutions of the people's sovereignty. This has come as a result of the illegal financing of electoral campaigns, the loss of voter's power and the dominance of uncontrolled money power in electoral campaigns.

The right to vote and the principle of exercising the sovereignty of the people through its representatives or directly, is affected by the uncontrolled money power in the electoral campaigns. An example of the violation of the right to vote was the need to draft and adopt the law "On the Guaranteeing of the Integrity of Elected Persons, of the Appointed or of those who Exercise Public Functions"².

This law in principle prohibits the persons with a criminal past or the convicted persons being elected or appointed to public offices. Analyzing the law as a whole and the practical implementation of it, it is noticed that these persons not only had a

¹See Constitutional Court Decision 40/2007

² See Law N° 138/2015.

criminal past, but also possessed a wealth they used and invested during the electoral campaigns to get the popular vote to be representatives of the people in elected or appointed bodies.

A practical example of violating the constitutional principle of sovereignty of the people and of the right to vote is the case when a political party or an independent candidate uses the power of money in function of a goal in order to win the popular vote not by investing in an electoral program but by buying the vote. They do a luxury campaign and invest huge amounts in their advertising on television and on the written press. They spend illegal and undeclared money with the aim to do money laundering when they will have political power.

In the present case the sovereignty of the people is lost. The people's right to vote is fictitious and the state is governed by a political party or individual who comes to power from the power of money and not by the power of a free and fair vote. As a result of this political power - coming from an electoral campaign funded by illicit wealth resources - the interests of the sovereign are no longer protected and so is the rule of law; because the political power has a criminal source: that of illegal financing.

The Constitution of the Republic of Albania has made a restriction on political parties regarding their funding, property resources and their expenditures by forcing them to make them public.¹

The Constitution has limited the creation of political parties and political organizations whose programs and activities rely on totalitarian methods, that promote and support racial, religious, provincial or ethnic hatreds, that use violence to take power or influence state policy, as well as those of a hidden nature which are strictly prohibited by law.

2.1 Funding of the subjects participating in the elections

Political parties are the main subjects that participate in the elections through candidates established by their structures. The word party derives from the Latin word *pars-part*. They are unions of people who have a common program, shared ideas, proposals, participation in elections, who appoint candidates, etc.

A political party in the Albanian state is a party registered in accordance with Law No. 8580, dated 17.2.2000 "On Political Parties". The political party is the main subject in electoral campaigns. Through the power of the popular vote, political parties seek political power to lead the governing institutions, to provide financial resources for functioning as a union organization of individuals sharing ideas, programs and participating in electoral campaigns.

The electoral campaigns of the political parties require financial resources to cover the costs of the presentation of their program in national and private media, financial resources to cover the cost of the meetings with the electorate who has the right to vote, advertisements and other expenses that are covered by political parties or candidates during the elections.

The sources of election campaign funding for the electoral subjects are:

- I. State Funds;
- II. Funding from own source of political party as membership quota;
- III. Donations from non-public sources;
- IV. Loans².

I. The state budget finances the electoral campaigns of political parties based on the number of votes each party has received in those elections. This constitutes a separate voice in the State Budget in the year when the elections are held and the institution charged with the right allocation of this fund is the Central Election Commission.³

The direct support of the political parties by the State Budget by financing the parties directly from the annual state budget carries a positive discrimination towards the political parties that have a greater number of votes and greater representation in the parliament by funding and taking the largest part of the fund from the State Budget assigned to the electoral campaigns. This results in the fact that the other subjects that benefit less from the public funds of the electoral campaign

¹ See article 9 of the Constitution of the Republic of Albania

² See article 17 of the Law Nr.8580, date 17.2.2000 "On political parties".

³ See article 87 of the Electoral Code.

funding are limited to electoral campaigns in terms of funding and they tend to use illegal financing and non-transparent funding. It turns out that these funding come from criminal activities.

On the Financing of the Electoral Campaigns and the on the Public Fundraising, The Constitutional Court in its decision 28/2012 stated that: ... Public funding of parties and campaigns can be accomplished both in the form of "strict" equality and of "proportional" equality. According to "strict" equality, political parties are treated without considering their current strength in the Assembly or the voters, and according to "proportional" equality, party treatment is done in proportion to the number of votes (see decision no. 32, date 21.06. 2010 of the Constitutional Court).

Article 87 of the Electoral Code treats the parties in a proportional way.

Does this proportional treatment affect the illegal funding of electoral campaigns? I think so. An entity that has not received public funds for the electoral campaign will find other sources of funding; one of them is unlawful financing. The source of the present funding is criminal activity, undeclared money and thus this money is introduced into civil circulation.

II. The political parties may have as source of funding, non-public funds - which is the amount each local natural or legal person can give to the electoral subject.

The control of the present funding involves limiting the non-public contribution to the amount of 1 million Albanian Lekë. For the legal entities, the funding is also limited by the fact that the law stipulates that these persons should not have benefited from public funds, public contracts etc. Electoral subjects such as political parties have the obligation to register the non-public funds. The non-public funds, as a party's way of financing, are controlled through the registration in a special register of the amount given by the natural or legal person through the statement of the natural and legal person – indicating that the present has no obstacle to contribute to the political party taking part in the elections -, through the control of the bank accounts - in cases when an amount greater than 100,000 lek is being deposited¹.

The principle of transparency should lead each political party taking part in the elections. The Central Election Commission is the body responsible for monitoring and overseeing party financing. The Central Election Commission exercises the financial control through the financial auditing of political parties. The present commission also controls the financial documentation and the accounting records of the political parties. It is important to a political party in any case, keeping the documentation of the nonpublic contributions, of the contributors' statements, the bank checks, the campaign bills, or any other document accompanying the financial statement of a political party.

III. The political party as part of the funding can also use membership fees. By membership membership fee, we understand the contribution of every member of the party. The present quota is used as a source of funding during the electoral campaigns. The Statute of the Socialist Party of the Republic of Albania obliges its members to be provided with an annual membership card and to pay an annual membership fee². The Statute of the Democratic Party of Albania as well has as a condition of membership, the payment of an annual membership fee³.

IV. The loans taken by the political parties for the electoral campaigns are the easiest way to control or audit as far as private financing of political parties during electoral campaigns is concerned - as they are taken through the banking system.

2.2. Electoral campaign financing mechanisms

The financial control mechanisms of the electoral campaigns in the Albanian electoral system are:

- I. State control;
- II. International Control (OSCE-ODIHR);
- III. Statutory control of political parties.

I. State control

¹ See article 90 of the Electoral Code

² See article 18 and 84 of the Statute of the Socialist Party of the Republic of Albania

³ See article 22 of the Statute of the Democratic Party of the Republic of Albania

The Central Election Commission is the body responsible for monitoring and overseeing the financing of political parties and electoral campaigns. The Central Election Commission complies with the Electoral Code and the Law "On Political Parties", develops and approves rules on the reporting on the funds and their monitoring. It oversees and audits the financing of political parties, controls the financial documents of political parties or related entities, etc. Funding of political parties during the campaigns is controlled through the Central Election Commission by appointing an accounting expert (which is on the list of licensed private experts to conduct financial audits of political parties participating during the elections).

The financial audit of the political parties is not always fair. A licensed private accountant as a result of the interventions, may not give a precise conclusion to the financial balance used by the political party. Usually the intervention is made by the party representatives or by other persons associated with the party that is being audited. In this way, the political party may be deprived of the way of funding, some of the expenses that come from illegal sources may be hidden (they may not be reported or evaluated by the private auditing expert).

What is noticed in the political party's audit reports during the electoral campaigns, is that the accounting expert is based only on the financial statements sent by the political parties themselves. So, we cannot understand the actual costs of the political parties' electoral campaigns. Thus, the financial audit made by the Central Election Commission is based only on the financial statements sent by the political parties themselves to the present commission.

II. International Election Observation Mission (IEOM), (OSCE / ODIHR)

The International Election Observation Mission is the international election's guarantee and licensing. The OSCE Office For Democratic Institutions and Human Rights (OSCE / ODIHR), the OSCE Parliamentary Assembly, the Parliamentary Assembly of the Council of Europe and the European Parliament make a preliminary assessment to determine whether the elections are in line with the OSCE, the obligations of the Council of Europe, the other international obligations and standards for democratic elections, as well as with the national legislation¹.

After the elections, the International Election Observation Mission issues a statement on the preliminary findings and conclusions. In the June 2017 parliamentary elections, as far as the electoral campaign funding is concerned, the present body reported that: "The newly appointed financial experts have been authorized to monitor the campaign activities and to report to the Central Election Commission within four months from the announcement of election results. On June 16 and 23, these experts also provided interim reports for their monitoring of the electoral campaign activities, which are posted on the Central Election Commission's website. The Central Election Commission took steps to ensure the compliance with the new campaign regulations on the basis of the experts' reports. However, the lack of disclosure requirements during the campaign restricted the transparency of the campaign's own donations.

The OSCE / ODIHR Election Observation Mission in the Final Report on the financing of the Electoral Campaigns states that some OSCE / ODIHR Election Observer interlocutors expressed concern that persons with a criminal background, still played a significant role in the electoral campaigns.

What is this role of persons with criminal background in electoral campaigns? One of the roles is, among other things, the funding role of the electoral campaign with illicit financial resources coming from the world of the organized crime, from trafficking in narcotic substances, etc.

The OSCE / ODIHR Election Observation Mission recommends serious efforts to address the ongoing issue of voting, both through a civic awareness campaign and through prosecution, in order to strengthen confidence in the electoral process. Political parties can undertake a concrete and genuine commitment in order to combat vote buying practices. Also, a public refusal by politicians to receive financial support from individuals with a criminal record would help the building of public confidence in the integrity of the elections. Campaign financing rules should be harmonized and sub-legal acts should be drafted in order to provide a solid methodology and to access to complete campaign funding information for financial experts

¹ See International Election Observation Mission Republic of Albania - Parliamentary Elections, June 25, 2017, Statement of Preliminary Findings and Conclusions

and voters before and after the election day. Attention may be paid to the deadlines for the completion of post-election audits¹.

III. Statutory control of political parties.

Political parties operating in Albania and exercising political power in the country have sanctioned in their statutes the way of financing, the financial report and the financial control. The Socialist Party of Albania as the main party in Albania has sanctioned the way of its financial functioning. From Article 82 of the Statute to Article 91, the types of funding, financial reports, audits, the structures responsible for the financing and management are defined. The party's financial control mechanism is exercised by assigning an independent licensed audit under the legislation².

The Democratic Party of Albania in the Statute has sanctioned in articles 67, 68, 69 the party finances, the financial resources and the institution within the party that is responsible for monitoring its finances³.

2.3 Penalty Measures for Electoral Campaign Financing

The Electoral Code and the law "On Political Parties", depending on the breach of the campaign funding rules, has envisaged, in accordance with the law, the measures taken on the subjects and on the political parties. The measures envisaged by the Electoral Code and by the Law "On Political Parties" are administrative measures which, as punishment, provide for a fine towards the person responsible who has financed the political party, who does not cooperate with the Central Election Commission's audit, who refuses the campaign financing transparency, the violations that come from donors for not keeping the documentation of the party's non-public accounts and for violating the maximum spending limits made by the political party during the electoral campaign⁴. The fines provided by the Electoral Code and by the Law "On Political Parties" are administrative measures that in no case prevent the illegal financing. If the electoral campaign or a political party or entity are funded by illicit and undeclared finance or illegal money, there is no financial obstacle to paying the fines set out in the Electoral Code and in the law "On Political Parties"; the parties continue to participate in elections, to be funded illegally and to cooperate with organized crime; this is because these political parties have financial resources to cope with the fine imposed on them.

An important step as a punitive measure against the illegal financing of political parties in the electoral campaigns has been undertaken by the Socialist Party of Albania. Its Statute sanctions that the use of unlawful sources of funding for the activity of the political party is incompatible with the norms of the political party itself; in the case of the use of unlawful sources of funding, measures should be taken to exclude individuals from the party and to report them to justice bodies⁵.

In order to see how applicable this statutory provision is, we should take the example when the illicit financing of the electoral campaigns is done at the party leadership level. The question arises: How will this provision apply when unlawful financing comes as a result of the secretive approval of senior electoral campaign leaders?

2.4 Penalties sanctioned in the Criminal Code

The Criminal Code of the Republic of Albania in Chapter X has sanctioned the protection of legal relations in order to guarantee the democratic system and the free elections. In the present chapter of the Criminal Code, a number of offenses related to the violation of free and fair elections, to the guarantee of the free vote and of its exercise have been sanctioned. With regard to the illegal financing of election campaigns, the only connection but not directly is active corruption in the electoral campaigns. The connection is indirect because the illegal source of electoral campaigns goes for the purchase of the voter's votes by offering a sum of money to them versus the vote⁶.

¹See International Election Observation Mission Republic of Albania - Parliamentary Elections, June 25, 2017, Final Report

² See article 91 of the Statute and the Regulation of the Socialist Party of Albania

³ See article 67 and following of the Statute of the Democratic Party of Albania

⁴ See article 173 of the Electoral Code of the Republic of Albania

⁵ See article 86 of the Statute of the Socialist Party of the Republic of Albania

⁶ See article 328 of the Criminal Code of the Republic of Albania

In this case the responsibility lies on the physical persons. Only if the purchase of the vote is made in the name and on behalf of the party and is done by its governing bodies, then the responsibility belongs to the legal person (political party taking part in the electoral elections).

3.1 Criminal policies against the illicit financing of election campaigns

Political reality and electoral campaigns carried out in the recent years in Albania, have shown that the drafting of criminal policies is in order to combat the illegal financing of electoral campaigns. Organized crime has found political support as a result of the electoral campaign funding and has thus also found the way to clearing illegal money, the source of which is the criminal activity. The punitive mechanisms sanctioned in the Electoral Code and the law "On Political Parties", not only can not prevent the illegal financing of political parties, but they also influence the increase of the illegal fund of electoral campaign funding, as they use illegal funds for the payment of fine sanctions imposed by law enforcement agencies for non-compliance with the law for fair and transparent funding.

3.2 Discussion

Legislative bodies such as the Parliament or those of the executive power should harmonize the rules for the financing of electoral campaigns and should draft sub-legal acts in order to provide a solid methodology and the access to the complete information on the financing of electoral campaigns of political parties for the financial experts and voters - before and after election day. The present recommendation was provided by the OSCE / ODIHR Electoral Observation Mission in the Final Election Report of June 2017. It should also be closely monitored any non-public contribution made to a political party during the electoral campaign by analyzing the source of the individual who contributes to the political party in order to verify whether these sources are legal illegal.

The legislative body, such as the Parliament, should draft criminal penalties by directly sanctioning in the criminal code the actions of any individual or any legal entity that unlawfully finances the electoral campaign of a physical entity or of a political party. A criminal policy should be drafted by sanctioning in the criminal code the holding of criminal responsibility of any political entity that operates with illegal financing or that receives from other persons illegal financing and it is necessary to sanction in the criminal code the holding of criminal responsibility of any political entity for the links it may have with organized crime and the financial support it receives from organized crime.

The legislative body, such as the Parliament, should draft criminal policies where it should prepare a law on political party funding; a kind of "financial vetting" for each party – it should set up check-out procedures for the out-of-campaign period and sanction penalties in cases of violations of these rules.

The financial control of political parties during the electoral campaigns should not be left to independent private auditors "controlled" by the Central Election Commission, but should be given to a special and independent structure that will control the finances of the political parties. During the electoral campaigns, the present independent structure should have any control over the finance of a political party and the audit should be weekly, by calculating any expense and any funding that enters and goes out of the political party during the electoral campaign.

3.3 Conclusions

The drafting of criminal penalties as above will bring about the concrete fight of illegal financing of the electoral campaigns, the fight against the organized crime and its involvement in the electoral campaigns, and will guarantee the constitutional principles of free and fair elections. More harsh criminal policies will enable a concrete fight for illegal funding of electoral campaigns; it will legitimize the political power of a party that will govern legislative and executive institutions as it has the direct source of the right and power of the sovereign's vote.

The fight against the illicit financing of electoral campaigns should be comprehensive; not only of the legislative or executive power but of each subject; and especially the political parties that participate in the elections should be guided by the constitutional principles. They should give up any unlawful financing and any connection with criminal organizations; so, the exercise of political power would be safe, as it has as its source the power of the sovereign; it would bring about political stability and fair representation in the governing bodies.

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