

CONSIDERATIONS ON THE CONDUCT OF ELECTIONS IN THE COVID-19 PANDEMIC

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ABSTRACT: *In this paper, we aim to present the amendments to the electoral legislation caused by the COVID-19 pandemic by reference to the experience of other countries and Romania. Following the analysis, I shall indicate whether the postponement of the election or its organization under restrictive conditions complies with the criteria of the rule of law.*

KEYWORDS: *Electoral legislation; constitution; comparative law; voting.*

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1. PRELIMINARY CONSIDERATIONS ON THE RECOMMENDATIONS OF EUROPEAN ORGANISATIONS ON THE ASSURANCE OF THE RIGHT TO VOTE IN THE COVID-19 PANDEMIC

The COVID-19 pandemic called into question human rights and freedoms and underlined the importance of the state's role of guaranteeing and protecting citizens' fundamental rights. Democratic principles enjoy a reputation in times of peace, in everyday natural existence, but they become formal when troubled times occur in society.

Since the COVID-19 outbreak, considered to be an international public health emergency, on 3 January 2020, became a pandemic shortly – on 11 March 2020 – some states were put in difficulty in terms of taking action in accordance with constitutional terms. The difficulties were revealed in a context in which constitutional and legal measures limiting the spread of the virus were taken at universal level. Measures have been taken to prohibit public and religious assemblies, conditioning international travel, interpersonal contacts, distancing and social isolation, limitation of fundamental rights and freedoms. The challenges at that time were aimed at ensuring the continuity of state, economic, social and cultural life. In other words, the COVID-19 pandemic had turned

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into a virus that annihilated democracy faster than in the past natural disasters, wars, revolutions, etc. In this context, the concept of state resilience was questioned at EU level. Furthermore, the Member States of the European Union had to reduce vulnerabilities and the intensity of the impact of the crisis. In this respect, the concept of resilience includes ensuring the functioning of democratic mechanisms and confidence in the institutions (*Joint Communication to the European Parliament and the Council - A Strategic Approach to Resilience in the EU's external action, 2017*).

Consequently, among them is also the organisation and conduct of elections in states that were constitutionally obliged to comply with certain electoral terms.

In the doctrine, it has been noted that, in holding elections during the period when freedom of movement and freedom of assembly are restricted, States must take concrete measures to encourage free and public debate before the elections, so that votes are exercised in full knowledge of cause (*Biljana Braithwaite & Catharina Harby & Goran Miletić, 2021*).

The case law of the European Court of Human Rights, it has been held that a possible introduction of new voting methods should be carefully planned and introduced in accordance with national law sufficiently long before the elections, so that citizens are not denied the right to vote due to practical problems arising from the implementation of a new system (*Decision Riza and others v. Bulgaria, no. 48555/10 and no. 48377/10, 2015*). In this respect, it has been pointed out that assurance of the right to vote must not be discriminatory, as the exercise of the right should be effective. Similarly, the European Court of Human Rights has held that situations involving organisational obstacles or additional costs cannot be accepted as a justification for limiting voting rights (*Decision Riza and others v. Bulgaria, no. 48555/10 and no. 48377/10, 2015*). In the pandemic context, the methods for organising elections must prevent any difficulties that people vulnerable to COVID-19 may encounter by proposing the variant of the electronic vote (*Biljana Braithwaite & Catharina Harby & Goran Miletić, 2021*).

Lastly, I consider that those case-law considerations are consistent with the general meaning of the guidelines adopted by the European Commission for Democracy through Law (Code of good practices in electoral matters, 2002), in the sense that the amendment of voting systems does not have to be frequent precisely in order to ensure legal certainty in electoral matters. This removes the unpredictability of the regulatory framework and voters' confusion about the applicable voting system. Moreover, these changes should not take place close to the date when the elections are held, as the psychological effect is not the one expected by the legislator, but rather create the feeling that the political party that adopted them will have an advantage on the electorate.

One tougher on these issues is the Constitution itself, which provides for a number of guarantees according to which amendments to the electoral law can only be made through constitutional and organic laws.

2. IMPACT OF COVID-19 ON THE ORGANISATION OF ELECTIONS IN THE CZECH REPUBLIC, AUSTRIA, GERMANY, POLAND, FRANCE, CROATIA AND LATVIA. QUO VADIS, EUROPE?

As regards retrospectively, the Member States of the European Union in which elections were announced at the beginning of 2020 faced with constitutional and ethical

dilemma in deciding whether or not to organise elections. The scenarios that were under discussion concerned either the possibility of postponing the conduct of the elections or amending of electoral legislation in order to introduce special conditions for the exercise of the right to vote or to prohibit the exercise of the right to vote for non-vaccinated persons.

As we will see in the practice of some European states, the COVID-19 pandemic has brought Europe into abyss by creating inequalities of treatment with the aim of defending the general good, but in violation of universally recognised political rights. We refer in particular to President Macron's statement of January 4th 2022 that she condemned the French people who chose not to be vaccinated against COVID-19, appreciating "When my freedom threatens that of others, I become irresponsible. An irresponsible person is no longer a citizen." In the public sphere, it has been assumed that what the President of France suggested is that unvaccinated people can lose their citizenship rights, and, in particular, their right to vote. Likewise, the French Parliament rejected the amendment aimed at counteracting the statement of the French President, seeking to ensure that unvaccinated people have access to polling stations.

However, the French Constitutional Council held that participation in political meetings could not be made subject to proof of vaccination (*The Constitutional Council of France, Decision no. 2021-828 DC*).

Finally, anxiety should not create a precedent affecting fundamental rights and the alteration of the right to vote, after centuries of being considered unattainable, may be a particularly dangerous choice. It is considered that such an approach is one of extrinsic gestures, contrary to democratic principles and the jurisprudence of the European Court of Human Rights and universal guarantees, such as those provided for in Article 25 of the International Covenant on Civil and Political Rights of the United Nations, which prohibits any discrimination preventing citizens from participating in the conduct of public affairs, voting and being elected.

The scenario of postponement of elections was chosen by the Czech Republic (*Presidential Decree no. 23/2020*), Bulgaria and Austria. In those states, the date of the elections had been decided before the media coverage and spread of the COVID-19 virus. The decisions were taken in this respect at government level. In the case of the Czech Republic, Executive decision No 88/2020 Sb of 15 March 2020 was challenged before the Supreme Administrative Court, which held that Parliament should have adopted the act of deferring partial elections to the Senate (Decision No. 1/2020).

In Austria, the decision of the regional government on the postponement of local elections was taken a few days before the date of the elections. In the Styria region, the local electoral law was amended to allow announced local elections to be postponed. In accordance with the provisions of Article 96b, the electoral process may be interrupted for a period of up to six months only if a new date of the elections is fixed. The amendment of the Electoral Law created a framework in which the 2020 municipal elections could take place due to the disappearance of extraordinary circumstances (*Published in the Regional Official Gazette no. 36/2020*).

The Electoral Law was amended in order to create an optimal framework for the holding of local elections in 2020 after the end of extraordinary circumstances, such as the announcement of the date of the elections, the maintenance of the validity of the lists of candidates, the restoration of the list of voters, the reduction of the next term of office of

local councils and mayors from five years to four and a half by fixing the next regular local elections for March 2025 (*the Law on Municipalities, published in the Regional Official Gazette no. 37/2020*).

Another scenario, which concerns the amendment of electoral legislation, meets the electoral legislation in Germany. Thus, the German Federal Electoral Law was supplemented in order to reduce temporarily the number of signatures required in support of an application by one quarter in relation to the normal number. This amendment applied only to the September 2021 (*The Second Senate of the Federal Constitutional Court, Order 2 BvE 1/21, 2 BvE 3/21*) elections and was repealed with effect from 1 January 2022 (*published in Regional Official Monitor no. 21/2020 and in the regional Official Gazette no. 51/2020*). In April 2021, by Decision of 13 April 2021, the German Federal Constitutional Court rejected a request by a political party to amend the Electoral Law in order to adopt a permanent measure of this kind.

Poland chose to introduce the possibility to hold a hybrid vote, both by correspondence and in the voting section to the presidential election of 28 June 2020 (the Law on special rules for the organization of general elections for the President of the Republic of Poland and the Law of January 5, 2011 on the Electoral Code). An exception to the rule established the use of postal only for certain municipalities, at the request of the Minister for Health. In addition, the proxy voting system was extended to the Senate's initiative in the sense that 2 representatives authorized by the person were appointed and the possibility of requesting a proxy vote at home was recognised.

The scenario that altered the conditions for exercising the right to vote for non-vaccinated persons was chosen in Croatia. In that State, voters diagnosed with COVID-19 could not vote due to an isolation measure imposed on them and a ban on contact with members of the Electoral Board, cf. Article 21 of the Law on protection against infectious diseases. The exercise of the right was, however, authorized by a representative, who received a mandate from the person who was not allowed to enter the voting section, to fill in the voting sheet on its behalf (*Technical Instructions of the State Electoral Commission, Croatian Institute of Public Health – Voting on election day and ensuring epidemiological protection of all participants at polling station*). Similarly, if one of the voters did not have access to the voting section, the members of the Electoral Board could ensure that he could vote from their home.

Finally, a different scenario was chosen in Latvia. It is interesting to note that no elections were held in spring 2020 in that State. However, the issue of the exercise of the right to vote under pandemic conditions must be called into question, since the Law on additional temporary requirements for the work of members of the Saeima and members of the local board entered into force on 14 November 2021. The provisions of the Law ceased to apply on 1 April 2022.

According to that legislative measure, as from 15 November 2021, only a member of the Saeima who, in accordance with the procedures laid down in the present law, has submitted an interoperable COVID-19 certificate certifying either vaccination or recovery, as well as a member of the Saeima who has received an opinion from a clinical hospital or a board on the postponement of vaccination for a certain period and has submitted an interoperable certificate of negative test result, shall be entitled to take part in the work of Saeima. The situation was appealed to the Latvian Constitutional Court which, on 7 December 2023 (*Case no. 2022-20-01/Case No. 2022-20-01*), found that the regulations

are contrary to Article 101 (1) of the Constitution of Latvia, according to which ‘Every Latvian citizen shall have the right, under the conditions laid down by law, to participate in the work of the authorities of the State and of the local administration and to hold a position in the administration.’ In that regard, in the jurisprudence of the Latvian constitutional court the right of the deputy to exercise his mandate without interferences contrary to the general principles of law and to the rights of the Fundamental Law. That reasoning is part of the hard core of the guarantees of political rights which the European Court of Human Rights has held over time in its jurisprudence in order to reiterate the rights and guarantees enjoyed by a deputy when his or her representative mandate is confirmed to him. The Latvian Constitutional Court held that, from the statute of deputies, they have the right to participate in Parliament sessions „to speak, to vote, to submit proposals, to be a member of parliamentary committees (*Constitutional Court judgment in Case No 2019-08-01*), prerogatives considered essential to the protection and functioning of the representative mandate (*European Commission for Democracy through Law, Study of 15 November 2010 on the role of opposition to the parliament of a democratic state, CDL-AD (2010) 025*). In the jurisprudence of the Latvian Constitutional Court, it has been held that a Member’s right to participate in sessions and the right to vote cannot be rendered meaningless, but that they may be restricted in order to ensure the functioning of the Parliament (*Constitutional Court Judgment Case No 2019-08-01*).

With regard to the present case, the Constitutional Court noted that the provisions subject to the review of constitutionality prohibited unvaccinated Members from accessing even remote to the Parliament sessions. In Latvian jurisprudence, it has been held that the limitation of fundamental rights must be provided for in a legislative process that respects the principle of good regulation (*Decision of the Constitutional Court in case 2022-08-01*)¹ or be imposed for an important interest, such as a legitimate objective (*Decision of the Constitutional Court of November 22, 2011 in case no. 2011-04-01*). Consequently, the Constitutional Court held that the objective of the regulatory act was to increase the coverage of COVID-19 vaccination, but that the exercise of each Member’s rights contributes to the effective functioning of democracy, from the perspective of the legitimacy of the legislature and the pluralism of opinions in parliamentary activity in accordance with the sovereign will (*Decision of the Constitutional Court in case no. 2019-08-01*). That view is part of the guidelines already laid down by the European Court of Human Rights, according to which Parliament is an essential asset of a democratic society, as a forum essential to political debate and which also includes the performance of the duties of a Member of the European Parliament (*Decision of the Grand Chamber of the European Court of Human Rights, Selahattin Demirtaş/Türkiye (no. 2), application no. 14305/17, 2020*).

3. ROLE OF THE ROMANIAN CONSTITUTIONAL COURT TO ENSURE LEGAL CERTAINTY IN ELECTORAL MATTERS IN THE COVID-19 PANDEMIC

¹ See Annex II, Decision of the Constitutional Court of September 29, 2022 in case 2022-08-01, point 13.

At the heart of global events and fears about the exercise of fundamental constitutional rights and freedoms, discussions were held in our country on the opportunity of organising parliamentary elections under the conditions of the COVID-19 pandemic.

Initially, the legislature introduced special conditions in the electoral legislation for the exercise of the right to vote, in order to organise parliamentary elections in good time on 6 December 2020. The measures were established at central level and the elections took place under increased health safety conditions in order to reduce the risk of infection with the coronavirus: mandatory mask, disinfection of entry and exit from the voting section, identity card presented by voters in the electronic identification system, minimizing contact with the members of the electoral commission. No exception has been made to the rule for persons with body temperature greater than 37.3 C or for persons with obvious respiratory symptoms. Conversely, such a finding gave them priority access in the voting section. In addition, in quarantine areas there were no travel restrictions to vote and isolated people were offered a mobile ballot box.

However, Romanian Constitutional Court has been called upon to rule on constitutionality referrals in key issues. On that occasion, the Constitutional Court recalled the democratic concepts also laid down by other European constitutional courts. I refer to the repetition of the provisions of the Code of Best Practice in electoral matters, the recommendations of which 'constitute contact details of a democratic ballot, in respect of which States – which are characterized as belonging to this type of regime – may demonstrate their free choice in electoral matters, while respecting fundamental human rights in general and the right to be elected and to vote in particular' (*Decision no. 678/2020 a*).

In this respect, a point of reference in an uncertain context should constitute the stability of legal norms in electoral matters, as an expression of the principle of legal certainty, enshrined in case-law for the interpretation of Article 1 (5) of the Constitution. This exhaustive coupon must convey that citizens must be protected against a danger which has come from the law, against uncertainty that the right has created or is likely to create, by requiring that the law should be accessible and predictable (*Decision no. 240/2020*).

The issue of the normative content of the parliamentary representative mandate was called into question during the debate on the determination of the public authority responsible for setting the date of parliamentary elections.

Specifically, the Romanian Constitutional Court stated that it did not fall within the scope of the reconfiguration electoral law within the competence of the public authorities to fix the date of the elections, following the cessation of the mandate of the Parliament (*Decision no. 678/2020 b*). That prerogative lies with the legislature, which must take into account the optimum valuation of electoral rights without creating an institutional blocking or hindering their exercise.

The Court noted that, in the event that the state of emergency is established, regardless of whether the law or the Government's decision is the one that establishes the date of the elections, the mandate of the chambers is automatically extended, and the Parliament or the government, as the case may be, is required to fix the date of the elections within 3 months of the end of the extension of the mandate of the chambers. There is no incompatibility between the introduction of the state of emergency, by decree of the President of Romania, and the fixing of the date of the elections by law or by decision of the Government (*Decision no. 678/2020 c*). On that occasion, it was pointed out that,

during the automatic extension of the mandate of the chambers, in the case of Article 63 (1) of the Constitution, the Parliament has the power to adopt organic laws, that is to say that it may respond appropriately to such an unforeseen situation (*Decision no. 678/2020 d*).

Early elections shall be held no later than 3 months after the dissolution of Parliament, the mandate extending to the legal meeting of the new Parliament. The forward elections take place during the Parliament's term of office of 4 years, in which case the mandate is extended, where appropriate, until the legal meeting of the new Parliament. Elections after the deadline take place in two separate situations, namely where (i) the day of the elections is fixed within 3 months of the expiry of the 4-year term of office of the chambers and (ii) the day of the elections is fixed within 3 months of the end of the extension of the mandate of the chambers, in the event of mobilization, war or emergency.

The Court has held that Article 63 (1) of the Constitution lays down flexible rules to ensure that elections can be held where objective situations which are not of the nature of those leading to the automatic extension of the term of office prevent elections from being held within a time limit. Furthermore, the holding of elections during the three months following the date on which the Parliament's 4-year term ended is an additional guarantee that it effectively and fully exercises its 4-year mandate by preventing, as far as possible, the interference of the election campaign with legislative activity. It follows that the Parliament's 4 years' mandate may be extended to a maximum of 4 years 3 months and 20 days.

Moreover, the power of the government to fix the date of the elections can be retained only in respect of the situation of elections within the time limits and only if it is fixed within the current term of office. This is also the meaning of Article 6 (2) of Law nr.208/2015. The state of the forward elections ensures a natural succession of the mandate of the chambers, subject to the most faithful observance of its duration of 4 years, and is the rule governing the conduct of the procedure for the regular election of the chambers (*Decision no. 678/2020 e*).

On the other hand, if the Parliament considers that there is uncertainty as to the organization of elections within that period due to the situation in the country, it is under a constitutional obligation to temporarily withdraw the power conferred on the government, thus also taking the political decision to organize elections after the expiry of the mandate, in the light of developments in the epidemiological situation in the country (*Decision no. 678/2020 f*).

It follows that the political intention to organise elections beyond the deadline – after the expiry of Parliament's term of office – cannot be achieved by the Government, but only by the Parliament, since it has the representative authority exercising national sovereignty (*Decision no. 678/2020 g*). The representative mandate does not confer on the Member the right to represent natural or legal persons before public administrative authorities. The representative mandate is a guarantee of promotion and respect for the fundamental rights and freedoms of citizens in the context of parliamentary democracy (*Decision no. 80/2014*).

Another issue concerns the hierarchical level of determination of the legislative act by which the Parliament may exercise that prerogative. According to the Romanian Constitutional Court, the answer follows from reading Art.73 (3) (t) of the Constitution, according to which organic laws also apply in areas other than those referred to in Article

73 (3) (a) to (s), in so far as the Constitution provides. Thus, the date of elections after the expiry of the Parliament's term of office is determined by the organic law and, before the term of office of the Parliament expires, by the ordinary law (*Decision no. 678/2020 g*).

At European level, the requirement to hold elections even in the context of a pandemic is universally valid, taking the necessary measures for the exercise of the right to vote by anyone, even in the specific context of limiting the spread of the virus.

It is considered that the measures relating to the elections taken by the Member States during the 2020-2022 pandemic have been temporary in nature, but that they may be included in a similar event if the requirements of the winnings so require. Ensuring the exercise of the right to vote is essential for safeguarding the foundations of constitutional democracy and the rule of law. States have an obligation to ensure that constitutional standards and democratic desiderates are implemented in practice by ensuring the right to vote without discrimination. The limitation of any fundamental right must be reasonable, but when speaking of the limitation of the right to vote, regard must also be given to the constitutional effects that it could have in society if the limitation of the exercise, the right also disappears as such. Consequently, no situation should hinder the free expression of the people in parliamentary, European parliamentary, presidential or local elections, as such a situation calls into question the very functioning of the rule of law.

It is precisely for this reason that the measures taken in the pandemic to organise parliamentary elections in Romania can be taken and possibly improved in similar situations.

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