

## An unconstitutional postponement

The usual transfer of votes from one candidate to another after the first round was overtaken by an unprecedented decision to postpone the second round to an unspecified date.

The decision to postpone the only second round of the municipal elections is unconstitutional. The exceptional gravity of the current circumstances cannot justify it.

Every election forms a whole, whether it is held in one or two rounds. To temporarily separating the first round from the second round for several weeks or even months, is equivalent to holding two elections when there should be only one. This then distorts the sincerity of the vote, which is a constitutional principle, thereby violating the Constitution.

It's easy to be convinced of that.

**It is no longer two rounds of the same election, but two one-round elections.**

First of all, let us ask ourselves why in France, and more generally in Europe, the two rounds of an election are held on such a close date. The reason is simple: although there are two rounds, they constitute one and the same election.

It is for this reason, moreover, that the judge, when forced to annul the results of the second round of an election, pronounces the annulment of the entire vote, "**although no offence is articulated against the operations of the first round**".<sup>1</sup>

For the same reason, on the only occasion when the Constitutional Council has had to address the decision to postpone the second round of a legislative election, it has accepted the legality of such a postponement because it was scheduled **for a date "as close as possible" to the normal date**.<sup>2</sup> In 1973, the island of Réunion in 1973 suffered from a cyclone that passed and the prefect issued a traffic ban, preventing it from holding the second round, as it could not say "Stay at home. But go vote", a common sense that apparently is no longer shared by everyone today. The second round was finally held a week after the original date. The problem was different, but the judge's central argument could only remain.

Voting is an eminently subjective process, which starts from the intimate and free conviction of the voter, which he or she makes official in the polling booth, thanks to the set of factual elements available to him or her. The greater the space and time between the two rounds, the greater the factors and issues that determine the vote in the first and second rounds. However, these factors and issues must converge to be considered as one and the same election.

In the current case, the postponement of the second round to a date much after the first – probably 21 June 2020 – will mean that many of the factors that will determine the conviction of the voters in the second round did not exist in the first. Then they could have made a completely different choice.

So, it is no longer two rounds of the same election but, in fact, two elections in one round.

---

<sup>1</sup> Legifrance, Council of State, 7th and 2nd subsections, 11/08/2009, available at <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000021646756&fastReqId=1821766264&fastPos=1>

<sup>2</sup> Constitutional Council, Ruling no. 73-603/741 AN from 27 June 1973, available at [https://www.conseil-constitutionnel.fr/decision/1973/73603\\_741an.htm](https://www.conseil-constitutionnel.fr/decision/1973/73603_741an.htm)

In addition, the longer the time between the two rounds, the longer the campaign period in the second round, and competing candidates can potentially make a greater effort to convince voters. This is the game of any campaign, but in the logic of the same election, with two rounds close together, the first-round campaign has a knock-on effect on the second-round campaign. This is no longer the case if the two rounds are disconnected.

This is all the more true if the deadline for the submission of the lists for the second round is not maintained tonight, at 6 p.m., but is postponed to the Tuesday before 21 June, as announced last night by the Minister of the Interior and as the bill in preparation seems to confirm. The lists wishing to merge will not have 48 hours but three months to negotiate the merger. Once again, the factors that will be considered will not be those of the first round, of your campaign and of your results, but all those that arise by June.

There are as many possible illustrations as there are second rounds, but let's mention a few. Whether the government tackles the current crisis well or badly, whether we realize a feat or a mistake by the former Minister of Health, whether we discover an ecological cause that justifies the spread of the coronavirus, the results in Le Havre, Paris, Lyon and Lille may be totally altered.

To justify such a move, the theory of exceptional circumstances is invoked, which allows decisions that would normally be illegal to be justified on an exceptional basis. However, this is a theory that is applied primarily with regard to regulatory power, while the postponement of election deadlines depends on the law.

The reason is obvious: it is impossible for the Constitution not to be enforced. It is our common foundation and the last resort for the preservation of rights and freedoms: it must therefore protect us especially in times of crisis.

Democracy and, above all, election periods require serenity. It is therefore not possible to maintain the second round of the municipal elections in the current period and it is even the first round that should have been postponed. There was still time to do so on Saturday evening.

Today, the only decision to be taken, in accordance with constitutional principles, is, on the one hand, the validation of the first round with regard to the candidates elected on Sunday afternoon: a strong abstention is not, in itself, a cause of invalidation of the vote and, if the election has taken place, the results must be recorded as final. Overturning them would be tantamount to calling into question a democratic decision, whereas, on the contrary, it is a question of preserving democracy. Moreover, because it was impossible to organize the second round, the entire municipal vote should be reorganized in all municipalities where the election was not won in the first round.

While it is true that the electoral code provides for the complete renewal of municipal councils. But it also provides that the second round, when it takes place, is organized on the Sunday following the first... And, if this second provision has hardly been questioned, the first one, on the other hand, is very often questioned when "partial elections" of municipal councils have to be organized, by the annulment of the judge or by the dissolution of the municipal council in the Council of Ministers.

Finally, at this stage, the bill would not contain any specific mention of the date of the second round. If the outbreak has not been contained by then, it may not be possible to hold it in June.

It is therefore envisaged that a review will be carried out in May to determine whether it should be postponed further.

The question of whether the results of the first round would be maintained would then be resolved and the entire election reorganized. But then another problem will arise: the postponement of the Senate elections, which are normally scheduled for next September and can only take place a renewed electorate (it is referred to the elected mayors who appoint the Senators) compared to the previous elections in 2014.<sup>3</sup> Such a postponement can only result from an organic law, voted with the agreement of the Senate and submitted... to the Constitutional Council.

That is why the constitutional awareness of parliamentarians, which is their main concern, can only lead them to denounce and oppose this unconstitutional postponement. Otherwise, in addition to a serious unconstitutionality, it would set a dangerous precedent in our law that would allow the disconnection of a first and second round of the same election. And we must never prejudge the future.

---

<sup>3</sup> \_\_\_\_\_, Ruling no. 2005-529 DC from 15 December 2005, available at <https://www.conseil-constitutionnel.fr/decision/2005/2005529DC.htm>