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Holding or Postponing Elections During a COVID-19 Outbreak: Constitutional, Legal and Political Challenges in France

Case study

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Holding or Postponing Elections During a COVID-19 Outbreak: Constitutional, Legal and Political Challenges in France

According to the *International Institute for Democracy and Electoral Assistance* (International IDEA), as of 11 June 2020 at least 66 countries and territories across the globe had decided to postpone national or subnational elections due to COVID-19, whereas at least 33 had decided to hold elections as originally planned. The French case, however, is very unusual. Municipal elections, which in France involve two-round elections, were not entirely held, and not entirely postponed either. This unique situation raised issues connected with election management in the COVID-19 context concerning (a) the choice to hold or postpone the elections; and (b) the means available to adapt voting procedures during a pandemic crisis.

This case study will first present the institutional and political context of municipal elections in France. It will then discuss the series of decisions, first to hold the local elections; then to postpone the second round; and finally to organize the second round for 28 June 2020. Each of these situations will be analysed in terms of the relevant political, legal (international standards as well as French law), public health and electoral management considerations. The French case demonstrates the difficulty of navigating legal constraints and political imperatives during times of uncertainty. It also shows that international standards such as the search for political consensus, the stability of electoral law, and the early adaptation of voting procedures are important in resolving difficulties with organizing elections in these troubled COVID-19 times.

Institutional and political context

Municipal elections were planned in France for March 2020. French citizens elect their municipal council every six years, following different rules depending on the local municipality's number of inhabitants. If there are under 1,000 the voting system is a plural open-list system. If there are above 1,000 inhabitants, then it is a proportional system but with an added bonus of half the seats going to the winning list, with a closed-list. In both cases, a second round of voting is held if there is no absolute majority in the first round. The first round in 2020 was originally planned for 15 March and the second for the week after, on 22 March. It should be noted that there are 35,000 municipalities in France, among the highest numbers for a European country. The vast majority of these are villages or small towns: 24,889 have fewer than 1,000 inhabitants, and 33,873 have fewer than 9,000 inhabitants (AMF n.d.). This is a crucial point if one is to understand what happened in

France. About 30,000 municipal councils were fully elected on 15 March (thanks to an absolute majority in the first round), while in nearly 5,000 others, the second round had still to be organized.

The initial decision to hold elections

The rapid unfolding of the COVID-19 epidemic was not anticipated in France, especially its effects on the electoral process. Clusters of COVID-19 had appeared by the end of February in two small municipalities in Savoie, in the French Alps (Les Contamines-Monjoie and la Balme-de-Sillingy), but still appeared to be under control. However, during the first two weeks of March the epidemic grew very quickly. At the time of the election (15 March) there were 5,423 cases of coronavirus and 127 deaths reported. On 12 March President Emmanuel Macron addressed the French people and asked them to restrict their movements, especially elderly and vulnerable people (Cuthbertson 2020). President Macron asked a recently convened ‘COVID-19 Scientific Council’ if it was possible to hold elections and its answer was yes, even for the most vulnerable people (under specific conditions and with adaptations to voting procedures). The political decision to hold the local elections was therefore based primarily on scientific advice (Ministère Des Solidarités et de la Santé 2020).

Legal and political constraints

Nevertheless, there was intense controversy over whether to hold or postpone the municipal elections. According to media sources, Emmanuel Macron was doubtful and would have preferred to postpone (d’Allonnes 2020). However, there were several political and legal challenges. Even if it was not impossible to postpone, politicians refrained from using the constitutional provision (Article 16 of the Constitution) giving full powers to the President of the Republic. Neither did the executive use the ‘state of emergency’ statute, which has been used in the past for counter-terrorism, because it does not allow for the cancellation or the postponement of the elections. There is in fact no legal provision in France authorizing the Government to decide by itself to postpone an election, hence the impasse.

From this point of view, France faced a gap in its legal provisions as compared to those of certain other countries. According to the Venice Commission’s opinions and reports on states of emergency (Venice Commission 2020), several national constitutions provide—under exceptional circumstances—for the postponement of elections either directly or indirectly, for example by extending the term of parliament (as in Canada, Croatia, Germany, Greece, Hungary, Italy, Lithuania, Poland, Slovenia and Spain). In some states, parliament has the power to change the date of the elections in a state of emergency (e.g. Czech Republic, Slovenia). In others (Albania, Georgia), a constitutional provision provides that there can be no elections during a state of emergency or period of martial law (Venice Commission 2004; 2019). As the Venice Commission compilation indicates: ‘Only a few Venice Commission member states provide in their Constitution or legislation for the possibility to postpone elections in the case of state of emergency, and a few others in case of natural disaster or other extraordinary events’ (Venice Commission 2020: 31).

We could make an instructive comparison between Europe and South Korea to further illustrate this point. According to article 196 of the Public Official Election Act of the Republic of Korea, the President may postpone an election for President or National Assembly, and the head of the competent regional election commission may postpone a local election in the case of a natural disaster, earthquake, or any other unavoidable circumstances (Korea 2014). Korea decided not to use this provision and held their election on 15 April, with nearly 66 per cent of the country’s 44 million voters participating, the highest turnout since 1992 (Spinelli 2020). This could be a useful example for the Venice Commission,

which suggests postponing elections during times of crisis, because of the precedents of Turkey in 2017 and 2018 (Venice Commission, 2020:8; Venice Commission 2018).

In France, there was no legal provision for postponement except for one judicial precedent from the Constitutional Court in 1973 concerning an isolated legislative election (in the Island of La Réunion), which allowed postponement of an election because of a cyclone (Conseil Constitutionnel 1973). Postponing the municipal elections was therefore not possible without passing a new law, but there was no political consensus to enable this. President Macron asked Gerard Larcher, the President of the Senate, for his opinion on March 12, but Larcher refused to support a law to postpone the elections (Cornudet 2020). The question then was whether or not the Government could postpone the elections unilaterally, but this would have been extremely difficult both legally and politically. Such a decision would have been illegal, based on the 'exceptional circumstances' theory (an exceptional case law solution is one which would allow a government to break the law if no other solution to the problem faced was available; on that route, the Government would have been placed under the decision of administrative judges). Politically, various stakeholders, including opposition political parties, would have accused the Government of a coup d'état.

The first round of the municipal elections was eventually held. Nevertheless, a psychological 'shock' intervened on Saturday 14 March, because of the sudden decision of the Government to close the country's restaurants and bars, but still to hold the elections on 15 March. The situation therefore illustrates the importance of the legal and political constraints in France.

Safety measures implemented

In the first round several measures were adopted to reassure voters of a safe voting environment. Voters were asked to keep a safe distance of at least one metre from each other, with signs and marks placed throughout the voting premises to assist them in strictly maintaining this distance. Voters also had to sanitize their hands. Unlike the situation in the Republic of Korea, voters did not have to wear facemasks when they were queuing to vote, and their temperatures were not checked before entering the polling station. Special voting arrangements adopted in other countries were not implemented in France on 15 March because they were not provided for in the legal framework, such as postal voting (as was available in e.g. Geneva and Bavaria) and early voting (as in South Korea).

This approach was effective in small municipalities with only a few polling stations, but was controversial in the larger towns and cities. According to some reports, the campaign as well as election day may have facilitated the transmission of the virus (Franceinfo n.d.; *Le Figaro* 2020). Nevertheless, a pre-publication study on MedRxiv on 19 May suggests that while the 15 March election day may have facilitated the transmission in some isolated cases, it did not accelerate the propagation in general (Zeitoun et al. 2020).

Turnout and its consequences

The safety measures were unfortunately not sufficient to reassure voters. Turnout dramatically declined, especially amongst groups more likely to be affected by the disease. Turnout of older people, who tend to participate the most consistently, was around 60 per cent, 15 points lower than in 2014 (IPSOS 2020). Along with presidential elections, municipal elections are ones that usually enjoy higher turnout in France. From 1995 to 2014, the turnout was maintained at between 62 and 70 per cent, but in the first round in 2020 it stood at only 44.5 per cent - 18 points lower than six years previously (James and Asplund 2020).

After the first round, about 30,000 municipal councils were fully elected on 15 March, because of an absolute majority being gained in the first round. In 4,922 other cities, including the biggest ones (Paris, Lyon, Marseille, Lille, Toulouse, Bordeaux, and so on), the

second round still had to be organized. Voter abstention may have had political effects because of differential turnout, such as older people voting less than in normal times. According to political analysts, green political parties gained an advantage in large cities (Mestre 2020), while the advantages of incumbency may have been enhanced elsewhere. In 20,600 municipalities, mayors were re-elected (Le Courrier Des Maires 2020).

Because of the low turnout some strands of public opinion challenged the legitimacy of the councils elected on 15 March. Opposition candidates initiated many disputes contesting the elections in the administrative courts. At the time of writing, the administrative courts had not judged these cases. We therefore do not yet know precisely how the judges will take abstention rates into account. However, even if in classical case law, abstentions are irrelevant except in very specific situations such as fraud or inequality between the different candidates regarding the event that caused the abstention. Importantly too, the emergency law of 23 March, which both postponed the second round and established Public Health State of Emergency, also created a provision to stabilize the first round. This law stated that: '[i]n all cases, the regular election of municipal councillors who have been elected in the first round on 15 March 2020 is still granted, according to the article 3 of the Constitution' (France 2020). This provision is currently facing judicial review in the Constitutional Court (under article 61-1 of the Constitution).

The decision to postpone the second round

Just after the first round, on Monday 16 March, the President of the Republic decided to confine the French population to their homes because of the increasing spread of the virus. French citizens would otherwise have been unlikely to want to stay at home during a week of warm weather. This decision enjoyed broad support from the public. With the agreement of all political parties and in light of the restrictions, the Government decided to postpone the second round of the municipal elections using the case law theory of exceptional circumstances. The French Parliament started to work on a 'law of emergency to face the COVID-19 epidemic', both to postpone the elections and create a state of emergency.

Political consensus

During 17–23 March 2020, the Parliament (National Assembly and Senate) discussed and adopted this law of emergency. The main course open to France at that time was to establish a political and parliamentary consensus on this law. As stated by international standards of electoral law, an electoral legal framework should be adopted through a public and inclusive process, which allows for a meaningful discussion and facilitates the consensus of the key stakeholders. The Commission of Venice affirms in its advice that:

successful electoral reform should be built on at least the following three elements: 1) clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations; 2) adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; and 3) political commitment to fully implement the electoral legislation in good faith
(Venice Commission 2018)

These international standards have been fully respected in France because of the working arrangement between the National Assembly and the Senate. The opposition did not revert to the Constitutional Court, although it would have been possible to do so. In other words, the French political class addressed the situation well. Of course, there were some controversies, but these were contained at a reasonable level despite the constitutional

uncertainty. The Government and the most other stakeholders respected this political consensus up until the decision to organize the second round in June.

Postponement of the second round

In just under 5,000 towns and villages the second round was postponed under the provisions of the emergency law, Article 19 (France 2020). This law stipulated postponement of the second round until June ‘at the latest’, because of the exceptional circumstances requiring society’s protection from the COVID-19 pandemic. The date of this election would have to be determined at the latest by 27 May, ‘if the health situation allow the organization of voting process’, following the advice of the Scientific Council. The law also provided that: ‘if the health situation does not allow the organization of the second round (...) the mandate of the municipal counsellors is prolonged for a period determined by the law. The voters are summoned by a decree for the two rounds, which are organized 30 days before the end of the mandates’ (France 2020).

This meant that the law provided the following two different possibilities: (a) if it were possible to organize the second round in June, it would be mandatory to do so; (b) if that were not possible, then the elections could be organized later – but the law did not specify when. The Government took its decision on the advice of the Scientific Council, which had analysed the health situation in the country, the implications of electoral campaigning, and the health challenges of the voting procedures themselves (Ministère De Solidarités et de la Santé 2020). The law also established other details, such as the date for submitting candidate lists, and political financing.

Constitutional uncertainty

Despite its consensual nature, there still exists some legal uncertainty concerning the constitutionality of this decision, because the Constitutional Court was not consulted about it beforehand. The *Conseil d’Etat* (Council of State), which is the highest administrative counsel of the Government (and the highest administrative court, but that is another problem) gave advice that this postponement was not unconstitutional, because of exceptional circumstances, but that it still had to be proportional. On this basis the *Conseil d’Etat* decided that while organizing the second round in June was possible and constitutional, organizing the second round later than June would imply reorganizing both rounds.

One problem is the difference between the two types of municipalities: namely, the principle of equality as between those where the election was completed (due to an absolute majority being obtained), and those where the second round became subject to the postponement. Some commentators believe that this principle was not respected, while others think it is not a problem because of the difference of situation induced by the pandemic and the decision to confine the population after the first round (on 16 March). Another problem is the principle of ‘sincerity of election’: is it possible to postpone only the second round of an election, or is it impossible, and should France therefore restart the entire electoral process?

There is no precedent on this point, except the minor one of La Réunion in 1973 (as mentioned), so the solution in French law is not known. Nevertheless, in issues concerning the regulation of electoral laws the Constitutional Court has exercised self-restraint in the past case law; that is to say, the *Conseil Constitutionnel* does not wish to interfere too much in political issues. This tendency is likely to be reinforced by the fact that the postponement of the second round was decided following political consensus building. Finally, to cancel all the municipal elections in France seems to be an improbable solution. At the time of writing, it appears most likely that the constitutional court will not declare the law unconstitutional. However, for the time being the constitutional uncertainty remains.

The decision to schedule the second round in June

After restrictions on movement were relaxed on 11 May 2020, the question was whether the elections should be organized in June, September or October 2020, or even later, in January 2021. With the ongoing public health issue, a new problem emerged: the need to stabilize elected councils and mayors of municipalities in order to engage their expenditure and investment decisions, as well as those of related public organizations, to kickstart the French economy. With no sign of a second wave of COVID-19 infections, many opinion leaders commented that the elections should be scheduled for June, as provided for in the emergency law.

The Scientific Council gave its advice on 18 May but did not offer any determinate recommendation, considering that this was the responsibility of political institutions (it had been criticized for having advised in favour of holding the first round). The Scientific Council considered that it was impossible to say whether the epidemic had been brought under control in France, calling instead for a review of the situation 15 days before the date of the elections.

Nevertheless, the Scientific Council considered that from a public health point of view it would be preferable to organize only one (further) round and not two. In effect, this was indirectly to endorse a June schedule (recall that according to the emergency law, a later second round implies also a re-run of the first round). Besides, the Council advised that the voting process should be adapted with provisions such as wearing masks, washing hands, instituting a special voting form for older and vulnerable people, creating a special polling booth for people with symptoms, and protecting polling station staff.

However, in its view the main threat of infection was posed by electoral campaigning. The Council therefore advised prohibiting political meetings, while also recommending the wearing of facemasks and keeping physical distance during door-to-door canvassing. This intervention was consistent with the core concerns of international standards: for example, the Venice Commission has warned that: ‘there is clearly a danger that the democratic process will be encumbered when there are restrictions on the ‘normal’ rule of law processes. There is also a risk that fundamental electoral principles will be undermined during a state of emergency, in particular the principle of equality of opportunity’ (Venice Commission 2020: 28). Even so, it will be difficult for candidates to garner equal publicity, where incumbent mayors might have had favourable exposure through organizing aspects of the public health response.

Finally, the French Government, after consulting the associations of mayors and the political parties, decided to follow the first scenario envisaged in the emergency law and to schedule the elections for 28 June, while the virus had started to plateau. The Government then decided to start consultations between stakeholders on Coronavirus-related restrictions and regulations, to increase the number of proxy voters and to facilitate technological adaptation of electoral campaigning. The Government has not decided whether to change the voting rules, although discussions have taken place. Unfortunately, there was no provision for early voting, postal voting or electronic voting in French law prior to COVID-19, except for a few isolated exceptions. Some political figures—F. Bayrou, R. Dati, L. Hénart—have proposed the adoption of postal voting and electronic voting to increase turnout, but the Government rejected this idea because of the short time remaining until the elections. The Government was probably right to respect the principle of stability of electoral law. Even though the adoption of these provisions may have increased turnout, it would have been a worse outcome if newly adopted voting procedures were accused of fraud or that the new procedures ended with errors associated with rushed adoption. Poland provides an

example of where attempts to introduce postal voting at short notice were not successful (Kalandadze 2020).

Conclusion

In France, the COVID-19 pandemic collided frontally with the electoral process. It is clear that French electoral law was not prepared, and was not sufficient, to deal effectively with these exceptional circumstances. The case demonstrates the difficulties in postponing an election where there is inadequate legal provision for this—and the importance of broad political consensus. It also demonstrates how various international standards can be helpful in making countries prepared when the electoral process enters uncertain times.

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