

THE COMPETENCE TO SET THE DATE OF ELECTIONS AND THE PRACTICE OF MERGING ELECTIONS IN THE ROMANIAN CONSTITUTIONAL COURT'S CASE LAW

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- I. *"By organizing at the same time the elections for the Chamber of Deputies and the Senate and those for the local public administration authorities, citizens will have to perform a much more complex task – expressing their choice on 6 ballot papers –, [...] The complexity of voting operations may have the effect of excluding from voting voters who, independently of their will, will not be able to vote during the time allocated for voting, until the polls close."*

(Decision No 51 of January 25, 2012)

1. Facts of the Case

In 2012, for reasons related to the adjustment of budgetary expenditure, the Government in power took responsibility for a draft law which essentially established that elections for local public administration authorities would take place on the date of the elections for the Chamber of Deputies and the Senate, with the local elected representatives in office to serve until the date of validation of the new elected representatives.

The Constitutional Court was thus seized by 146 MPs (88 MPs belonging to the Parliamentary Group of the Social Democratic Party and 58 MPs belonging to the Parliamentary Group of the National Liberal Party), pursuant to Article 146(a) of the Constitution, on the alleged unconstitutionality of the Law on the organization and conduct of elections for local public administration authorities and elections for the Chamber of Deputies and the Senate in 2012, and on the amendment and completion of Title I of Law No. 35 /2008 for the election of the Chamber of Deputies and the Senate and for amending and supplementing Law no.67/2004 for the election of local public administration authorities, the Law no.215/2001 on local public administration and Law no.393/2004 on the Statute of local elected representatives.

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2. Relevant Provisions. Ruling of the Constitutional Court

Referring to the plea of extrinsic unconstitutionality, the Court considers them to be unfounded. The Government engaged its responsibility to pass the Law by which the elections for local public administration authorities and those for the Chamber of Deputies and the Senate were to be held on the same date. Even if the executive has a wide margin of discretion over the appropriateness and content of the draft law, it cannot engage its responsibility in a discretionary manner, at any time and under any circumstances, since "it would amount to turning this authority into a public legislative authority, competing with Parliament".

In the light of this aspect, the Court reiterates the criteria laid down in case-law, compliance with which is required by Article 114 of the Constitution, and considers that they are met, from a formal point of view, in the case of the law that is the subject of the referral: "Thus, since the purpose of the adoption of this law is the organization on the same date of the elections for local public administration authorities and the elections for the Chamber of Deputies and Senate in 2012, elections to be held less than a year after the date on which the law was submitted to Parliament, it follows both *the urgency of the measures covered by the legislative act in question* and *the need for its adoption as soon as possible*. The same considerations also justify *the immediate application of the law*, as it is clearly necessary to take the technical and procedural measures necessary for the conduct of the electoral process under the terms of this law. Lastly, the criterion relating to *the importance of the field regulated* is also satisfied, since the contested law lays down far-reaching legislative measures in the field of elections, on the proper conduct of which the very legitimacy of those elected and the proper functioning of democracy depend."

However, the Court draws attention to the importance of the electoral field in a democratic society. A democratic and stable electoral system enables "the general will of citizens to express effectively the real will of the citizens to elect their representative bodies through free, regular and fair elections". That is why, in the spirit of the principle of loyal cooperation between state authorities, the Court "recommends that electoral regulations should be debated in Parliament and not adopted by way of an exceptional procedure, whereby Parliament is bypassed but obliged to vote tacitly on a legislative content that is almost exclusively at the discretion of the Government".

As regards the intrinsic unconstitutionality, the Court examines the following aspects:

A. Organization of parliamentary and local elections on the same date in 2012

The authors of the complaint argue the unconstitutionality of the law in question, since it radically changes the electoral legislation a few months before the elections,

in violation of European standards in this area, and since by regulating the organization of parliamentary and local elections on the same date, it creates confusion among the electorate, who are put in the situation of voting with a high number of ballot papers. The Court, taking note of the above, considers that "that legislation is likely to cause difficulties in the exercise of the right to vote which may ultimately have the effect of restricting the exercise of that right". By organizing the two elections at the same time, "citizens will have to carry out a much more complex task – expressing their vote on 6 ballot papers – which will exponentially increase the time needed to vote for each citizen, taking into account the distribution of ballot papers, the voting time in the voting booths, and the placing of ballot papers in the 3 ballot boxes".

In support of these findings, the Court cites a rule laid down in the *Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report*, adopted by the European Commission for Democracy through Law at its 52nd Plenary Session (Venice, October 18-19, 2002), according to which "the voting procedure must remain *as simple as possible*, so as to leave voters free to express their will and thus ensure the effectiveness of the right to vote and to free elections". In addition, the European Court of Human Rights, in the *Mathieu-Mohin and Clerfayt v. Belgium* case of March 2, 1987, also stated that, although States have a wide margin of discretion in regulating the right to vote and the right to stand as a candidate, "the Court must ensure that such conditions are not such as to impair the very substance of those rights and thus deprive them of their effectiveness". The restriction on the exercise of those rights or the adoption of measures liable to affect fundamental principles of the rule of law cannot be justified in the present context by the situation of economic crisis which requires recourse to various measures to reduce budgetary expenditure.

The Court also holds that holding the two elections on the same date is likely to affect the exercise of the right to be elected, since "there are situations in which a candidate who has not won a local elected mandate (mayor or president of a county council) may express a wish to take part in the national elections for a parliamentary mandate (deputy or senator), which is perfectly possible, but only in the case of elections held on different dates". However, under this law, a person cannot run for the office of mayor/county council president and for a deputy or senator at the same time.

B. Extension of the term of office of local elected representatives

Under the contested law, the terms of office of local elected representatives in office are extended by approximately 6 months, which is contrary to the principle of periodicity of elections, according to which the term of office of a representative assembly must not exceed a certain period of time laid down by the Constitution or by law. The importance of this principle is such as to confer a strict and limitative character

on the exceptions which provide for cases where the mandates of local elected representatives may be extended beyond the terms laid down by law. The exceptions refer to "extreme situations of a very special nature, such as a state of mobilization, war, siege or emergency, natural calamity, or particularly serious disaster, situations which do not exist in the case in question".

As the term of office of the Chamber of Deputies and the Senate expires in November 2012, and parliamentary elections are held no later than 3 months after the expiry of the term of office, it follows that the organization, on the same date, of elections for local public administration authorities will lead to the extension of the term of office of local elected representatives. This reason for the extension of the terms of office does not fall within any of the situations expressly mentioned by the law justifying the extension of the terms of office of elected representatives.

The Court quotes from its own case law in order to emphasize that resizing the length of the current terms of office of local elected representatives violates the principle of non-retroactivity of the law, enshrined in art. 15 paragraph (2) of the Constitution: "the legislator is free to resize, by a new law, the duration of the terms of office of the leading positions in a different way from the law in force, but only for the future, not for the current terms of office, otherwise it would be to disregard the rule of non-retroactivity of the law, which is a constitutional norm" (Decision no. 375 of July 6, 2005, published in the Official Gazette of Romania, Part I, no. 591 of July 8, 2005). Referring to the situation of some mandates in leading positions in some institutions, the aforementioned considerations are applicable, *mutatis mutandis*, to the present case. The Court also notes that "where the law purports to alter the status acquired at the date of the beginning of the term of office by establishing a new case of termination of that office, the law becomes retroactive" (Decision No 61 of January 18, 2007, published in the Official Journal of Romania, Part I, No 116 of February 15, 2007).

Previous examples have been put forward in which several elections were organized at the same time using a common electoral infrastructure (parliamentary and presidential elections until 2004, or referendums and elections), but the Court rejected them, given the complexity of the voting operations involved in those cases, i.e. the fact that the organization of the elections and referendums mentioned did not alter the current mandates in question.

C. The constitutional relationship between Parliament and the Government and judicial review of acts concerning that relationship

Another criticism of the authors of the objection of unconstitutionality concerns paragraphs (2)-(4) of Article I of the Law, by reference to the first sentence of

paragraph (6) of Article 126 of the Constitution, which exempts from judicial review by administrative administrative litigation the administrative acts of public authorities that concern relations with the Parliament. According to paragraph (2) of Article I of the criticized law "Elections for the Chamber of Deputies and the Senate in 2012 shall be held in the single-member constituencies delimited by Government decision at least 4 months before the date of the elections, on the proposal of a special parliamentary commission composed of 2 representatives of each parliamentary group". Paragraph (4) states: "Interested persons may lodge an appeal against the Government decision referred to in paragraph (2) with the competent administrative court within 48 hours of its entry into force."

With regard to the provisions contained in paragraphs (2) to (4) of Article I of the criticized law, the Court finds that "they regulate relations between Parliament and the Government which are incompatible with the rules of principle contained in *Chapter IV – Parliament's relations with the Government of Title III of the Constitution – Public Authorities*". Thus, in the procedure for delimiting the single-member districts, 'the prerogative of formulating proposals lies with the Parliament, while the prerogative of deciding on these proposals lies with the Government, taking the form of a decision', which distorts the essence of the relations established between the two authorities, which is 'parliamentary control of the Government's activity, and not governmental control of the Parliament's activity'. The Court also notes that, contrary to the provisions of Article 126(6), first sentence of paragraph (6) of the Constitution, paragraph (4) of the law makes an administrative act issued by the Government, which concerns its relations with Parliament, subject to judicial review by the administrative courts.

At the same time, the Court observes that "the way in which the composition of the special parliamentary committees is regulated by paragraph (2) of Article I of the Law ('two representatives of each parliamentary group') violates the provisions of Article 64 paragraphs (4) and (5) of the Constitution", according to which the Standing Bureaus and parliamentary committees are composed in compliance with the principle of political configuration, taking into account the fact that "parliamentary groups are not equal, but representative [...] in relation to the political configuration underlying the composition of the structures of the Houses of Parliament".

- II. *"the jurisprudence of the Constitutional Court has validated from the constitutionality perspective the legislative solutions allowing the simultaneous organization of an electoral poll and a referendum and invalidated the legislative solutions allowing the simultaneous organization of two types of electoral poll."*

(Decision No. 150 of March 12, 2020)

1. Facts of the Case

At the beginning of 2020, there were intense discussions in the Romanian society about the perspective of organizing snap elections for the Senate and the Chamber of Deputies, since, according to the statements of the parliamentary opposition, as well as of the President of Romania, the parliamentary majority existing following the 2016 elections no longer represented the will of the electorate. In preparation for this scenario, the Government adopted an Emergency Ordinance (OUG) adapting the normative framework for the hypothesis that early parliamentary elections were to be organized simultaneously with local elections, if no other date was available. In view of the existing practice in this matter, the People's Advocate institution raises directly before the Constitutional Court, according to Article 146 (d) of the Constitution, the objection of unconstitutionality of the provisions of the *Government Emergency Ordinance no. 26/2020 on the amendment and completion of some normative acts in the field of elections for the Senate and the Chamber of Deputies, as well as some measures for the proper organization and conduct of early parliamentary elections.*

2. Relevant statements of the complainant

One of the pleas of intrinsic unconstitutionality concerns Article IV, paragraph (1) of OUG no. 26/2020, considered to violate Article 1, paragraph (5) of the Constitution, "in two aspects (i) the requirements of precision, clarity and predictability, since the norm aims at organizing early parliamentary elections "exceptionally in 2020", thus the emergency ordinance regulates a concrete case, not having a normative character, and (ii) because it creates the possibility of organizing two types of elections simultaneously". Article IV paragraph (1) provides that "if early parliamentary elections cannot be organized on a date other than that of the 2020 general local elections in the country, voters shall vote in the same polling stations, in the same time frame, with the same VOTAT stamps, on separate ballot papers, with the voter turnout being recorded on electoral lists, with separate signatures for each type of

election". This provision creates "the possibility of organizing early parliamentary elections on the same date as the general local elections exceptionally in 2020". Given the fact that "legal acts at the level of law must have a normative character and regulate for the future all situations that may arise, without being limited to a specific situation, the provisions of Article IV paragraph (1) refer only to the situation of 2020, not regulating the possibility of applying the rule to other future situations after 2020". By making this exception for the elections of 2020, the author of the complaint claims, "the principle of legal certainty provided for in Article 1 paragraph (5) of the Constitution is seriously undermined", and its acceptance "would mean that the legislator – including the Government, abusing the power of legislative delegation – could at any time create exceptions according to the political interest of the moment with regard to the organization of several types of elections on the same date". The People's Advocate further invokes the Court's findings in Decision No. 51 of January 25, 2012, which we already presented in this paper.

Moreover, even if the voting would take place on different dates, but the electoral period corresponding to early parliamentary elections begins during the electoral period corresponding to other elections, it is considered that "the organization of the two categories of elections at a short interval of time from each other may lead to the violation of the right to be elected, [...] since a person cannot stand as a candidate for the office of mayor and for a deputy or senator at the same time, nor for the office of county council president and for a deputy or senator, if the electoral periods of the two types of elections overlap".

3. The Government's point of view on the referral

The Government's point of view submitted by Address no. 5/1115/2020 is interesting in the light of the two arguments put forward. First, with regard to the electoral rights regime, a distinction is made between *fundamental electoral rights* and *procedural electoral rights*. Quoting from the Court's case-law, the Government points out that the impairment of electoral rights by means of emergency ordinances "must be examined with certain nuances, in particular as regards those rights which are linked to the organization and conduct of the electoral process, taking into account certain practical realities". Moreover, "by means of emergency ordinances it is possible to intervene on procedural electoral rights provided for in infra-constitutional legislation, insofar as the existing right is not prejudiced, the substance of the right as such is not *affected*".

Secondly, with regard to the arguments taken by the complainant from Decision No 51 of January 25, 2012, according to which the simultaneous holding of local and parliamentary elections "is likely to cause difficulties in exercising the right to vote" in

view of the "complexity of voting operations". These arguments would not be applicable in the present situation, "since (i) the contested normative act provides for the possibility of extending the voting time by 3 hours precisely in order to avoid situations in which voters fail to vote within the allotted time, (ii) unlike in 2012, the computerized system for monitoring voter turnout and preventing illegal voting is currently in operation, which, among other things, ensures smooth access to voting, (iii) the registration of voters who wish to vote in both elections on the supplementary electoral lists is carried out by entering their personal data in a single document, (iv) unlike in 2012, significant steps have been taken to increase the skills and responsibilities of polling station staff, with a direct impact on the correct guidance of voters who come to vote, (v) voter information and training is effectively carried out through campaigns run by the Permanent Electoral Authority through the media and the Internet".

4. Relevant Provisions. Ruling of the Constitutional Court

With regard to the electoral field, the Court ruled that the Government has a *limited legislative competence* through emergency ordinances, since "the application of the express constitutional prohibition is conditional on the adoption of regulations that suppress, affect, prejudice, injure, damage, or entail negative consequences on constitutional rights, freedoms and duties" ("emergency ordinances cannot *affect*"). Thus, "if the regulations do not produce the aforementioned legal consequences, the Government shares the power to legislate with the Parliament", but the executive is "obliged to justify in the content of the legislative act the existence of an extraordinary situation, the regulation of which cannot be postponed, and the urgency of the regulation".

With regard to the intrinsic unconstitutionality of Article IV, paragraph (1) of OUG no. 26/2020, the provision in question is deemed to violate Article 1, paragraph (5) of the Constitution in the two aspects mentioned above. As regards the first aspect (*the infringement of the quality requirements of the law*), the Court holds that in so far as a given regulation is not designed to be applied to an indeterminate number of concrete cases, but, *de plano*, in a single case, unequivocally predetermined, it is individual in character, being adopted for reasons *intuitu personae*. However, in the scenario described by the Article IV, paragraph (1) of OUG no. 26/2020, the provisions in question, referring to "a hypothetical, possible situation", does not describe an individual case, but on the contrary, "without losing their normative character, [they] have rather an intertemporal nature, because the legislator identifies the possibility that [...] the calendar of early parliamentary elections overlaps with that of the general local elections of 2020, so that the date of the two types of elections coincide".

With regard to the second aspect (*the combination of two types of elections*), the Court cites its previous case-law which has enshrined different solutions in relation to the types of elections whose simultaneous organization was the subject of the case.

Thus, in Decision No 147 of 21 February 2007, analyzing the introduction of a new paragraph (3) in Article 5 of *Law No 3/2000 on the organization and holding of referendums*, according to which "the referendum may not take place simultaneously with the holding of presidential, parliamentary, local or European Parliament elections or less than 6 months before the date of the elections in question", the Court ruled that the text of the law under criticism is unconstitutional, in violation of the constitutional provisions of Article 90 and those of Article 95(3), and that, consequently, the referendum may be held at any time during the year if the prior legal requirements have been met, since "according to the Constitution, there is no other condition prohibiting the organization and holding of the referendum simultaneously with the presidential, parliamentary, local or European Parliament elections or within a certain period of time before or after the mentioned elections. The conditions laid down by the legislator for the holding of the referendum add to the provisions of the Constitution, which renders them unconstitutional".

In Decision no.51 of January 25, 2012, the Court reiterates (i) the difficulties resulting from the concurrent organization of parliamentary and local elections, which may have the effect of restricting the exercise of the right to vote, respectively (ii) the complexity of voting operations, which may lead to "the exclusion from voting of citizens that, independently of their will, will not be able to vote during the period of time affected until the closing of the ballot box".

- III. *"Parliament has full power to set the date of elections by an ordinary or organic law, as the case may be, depending on the political decision to hold elections within the term of office of the Chambers or within the period of 3 months following the expiration of the term of office."*

(Decision No. 678 of September 29, 2020)

1. Facts of the Case

Given the pandemic context, the mandates of local elected representatives were extended by organic law. Similar to the way in which the date of the local elections was set, the Parliament opted for a normative solution according to which the date of the next elections for the Senate and the Chamber of Deputies would be set by the Parliament by organic law. According to the legislation in force, the date of the

elections is set by the Government, which adopts a Decision in this sense. Thus, the President of Romania has referred to the Constitutional Court, on the basis of Article 146(a) of the Constitution, the provisions of the *Law on some measures for the organization of the elections for the Senate and the Chamber of Deputies*, following the end of the mandate of the Parliament elected in 2016. The subject of the constitutionality review was the law as a whole and, specifically, Article 1(1) of the law.

2. Relevant statements of the complainant

Article 1, paragraph (1) of the law reads as follows: "(1) By way of derogation from the provisions of Article 6, paragraph (2) of *Law No. 208/2015 on the election of the Senate and the Chamber of Deputies, as well as for the organization and functioning of the Permanent Electoral Authority, as amended and supplemented*, the date of the elections for the Senate and the Chamber of Deputies to be organized following the expiry of the term of office of the Parliament, which is in office on the date of entry into force of this law, shall be set by organic law, at least 60 days before the date of the elections". According to the authors of the complaint, this establishes an obligation of result for the Parliament to adopt an organic law within a certain timeframe, and also predetermines the solution to be imposed on senators and deputies, whose real will no longer seems to have any meaning.

It is also submitted that the contested provision alters, only a few months before the elections, the competence to set the date of the elections, contrary to the constitutional rules, by establishing a prerogative for Parliament to set the date of parliamentary elections at its discretion. If, for a variety of reasons, Parliament does not adopt the law in due time, this may lead directly to a violation of the constitutional rules which clearly establish the duration of Parliament's term of office and the maximum period within which parliamentary elections must be held.

According to the legislation in force, it is the Government that sets the date of the elections, and the date of the elections is made public at least 90 days before the day of the vote, by publishing the Government Decision on the date of the elections in the Official Gazette of Romania, Part I. The setting of the election date is linked to the duration of Parliament's term of office, and the Government is the authority which ensures compliance with the constitutional rules by implementing the legal provisions, which are essentially a transposition of the constitutional provisions.

The law criticized may lead to a situation where the Parliament can set the date of elections arbitrarily, without any limitation and without any sanction if, by setting the date, it indirectly extends the current term of office. If the Government implements the primary rules on parliamentary elections in a manner other than that prescribed, its conduct may be sanctioned through parliamentary control, including the adoption

of a motion of no confidence. Also, in the case of failure to set the date of the elections as it would be the competence of the Parliament or of the Government, it is concluded that the Government can be obliged, through the administrative contentious procedure, to issue the Government Decision setting the date of the elections, while the Parliament cannot be obliged in any way.

Insofar as the organic law setting the date of the elections for the Senate and the Chamber of Deputies is not adopted and does not enter into force until the expiry of the term of the current Parliament, thereafter the Parliament cannot adopt such a law either under the ordinary legislative procedure or under the review procedure under Article 77(2) or Article 147(2) of the Constitution. However, "the criticized law allows (by the phrase "before the election date") the adoption of an organic law setting the election date after the date until which the Parliament in office may still adopt, amend or supplement organic laws, namely after December 20, 2020".

3. Relevant Provisions. Ruling of the Constitutional Court

a) Pleas of unconstitutionality referred to Article 1(5) of the Constitution

Quoting from the *Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report* adopted by the European Commission for Democracy through Law at its 52nd plenary session (Venice, 18-19 October 2002), the Court notes that it is not the change of voting systems *per se* that is to be avoided, but their frequent change or the change less than a year before the elections are held. Thus, on the one hand, *the frequency of legislative amendments* is likely to make the regulatory framework unpredictable and confuse voters as to the applicable voting system. On the other hand, *the timing of the legislative changes* is relevant: "The closer the timing is to the date of the elections, the stronger the presumption that the changes are intended to create a benefit/advantage for the political party that adopted them, dictated by its imminent political interests, and may result in manipulation of the electorate. For the purpose of these forms of manipulation, it is recommended that the essential elements of the electoral law should be regulated at the level of a constitutional or organic law, which should enjoy greater stability.

These *essential elements*, expressly identified (the electoral system itself, the composition of the electoral commissions, the constituencies and the rules for the constitution of districts), give substance to the electoral rights of citizens. With regard to the case at hand, the Court finds that the change in the authority competent to set the election date does not affect the legal certainty of the citizen and does not constitute an essential aspect of the electoral law. "Such a choice of the legislature concerns an aspect related to the distribution of competences between public authorities, so that neither the voter is disoriented by such a change of competence,

nor is his/her political choice in the electoral process or the outcome of the election influenced or misappropriated".

The only requirement with regard to the authority competent to set the date of the elections is that it must not end up in a situation where two public authorities simultaneously have and exercise the power to set the date of parliamentary elections, because such a situation would cause confusion among citizens and create an institutional deadlock. In the case at hand, "if the entry into force of the criticized law did not take place sufficiently in advance of the time at which the Government is required by the framework law to issue the decision setting the date of the elections, this decision already issued [Government Decision No. 744/2020 on setting the date of the 2020 Senate and Chamber of Deputies elections, published in the Official Gazette of Romania, Part I, No. 816 of September 4, 2020] shall automatically cease to have effect from the time of the entry into force of the law temporarily withdrawing its power to set the date of the elections".

b) Pleas of unconstitutionality in relation to Article 61 and Article 63(1), (2) and (4) in conjunction with Articles 36, 37 and 147(4) of the Constitution

In the present decision, with reference to Art. 63 of the Constitution, the Court highlights the moments when parliamentary elections can be organized. Thus, we can talk about "*early elections* [which] shall be organized no later than 3 months after the dissolution of Parliament, in which case the term of office shall be extended until the new Parliament is legally convened. As for the *elections* to be held *within a term of office*, "[they] shall be held during the 4-year term of the Parliament, in which case, if necessary, the term of office shall be extended until the new Parliament is legally convened". Finally, "*elections beyond the term of office* take place in two distinct hypotheses, namely when (i) the election day is fixed within 3 months of the expiry of the 4-year term of office of the Chambers and (ii) the election day is fixed within 3 months of the end of the extension of the term of office of the Chambers, in case of mobilization, war, siege or emergency (Article 63 (1) and (2)), in both hypotheses the term of office being extended until the new Parliament is legally convened". The first hypothesis of elections beyond the term of office is likely to provide "an additional guarantee that [the Parliament] effectively and fully exercises its four-year term of office, preventing, as far as possible, the electoral campaign from interfering with legislative activity".

Following the adoption of *Law 373/2004*, it was established as a rule that *the election date is set within the Parliament's term of office, and the Government was also empowered to do so*. Thus, the exception remained the setting of the election date outside the term of office, within a maximum of 3 months after the expiry of the term. From this rule established by *Law No. 373/2004* and taken over by successive laws (*Law No. 35/2008* and *Law No. 208/2015*), the Parliament can derogate only by

organic law, "the Government not having the power to derogate, by decision, from the legal mandate entrusted by Parliament to set the date of elections according to the practice initially established by Law No. 373/2004 and maintained by successive laws concerning the election of the Chamber of Deputies and the Senate".

If the Parliament considers that there is uncertainty as to the organization of elections within this timeframe due to the pandemic context, it has the constitutional obligation to temporarily withdraw the legal competence granted to the Government, thus assuming the political decision to organize elections after the expiry of the term of office, depending on the evolution of the epidemiological situation in the country. This political decision "cannot be taken by an administrative act, but by a law, understood as a political-legal act of Parliament". The Government, as an executive authority, "does not have the popular legitimacy to set the date of parliamentary elections after the expiration of the term of office of the Chambers and, therefore, does not have the functional competence to take such a decision".

Thus, the Court concludes that the Parliament has full competence to set the date of the elections by an ordinary or organic law, as the case may be, depending on the political decision to organize elections within the term of office of the Chambers (elections within the term of office, i.e. before the expiry of the term of office of the Parliament – by ordinary law) or within the three-month period following the expiry of the term of office (elections after the expiration of the term of office of the Parliament – by organic law). In the absence of a law setting the date of parliamentary elections, elections can only be held within the 4-year term of office of the Chambers, whereas, in case of having such a law adopted, parliamentary elections can be held within or after the term of office, the political decision in this respect being the exclusive prerogative of the Parliament.

4. Comments

A characteristic feature of modern democracies is the legitimization of public representatives through elections, where citizens exercise their right to vote, choosing those who will represent them in the circles of power at the top of the state. A nuance needs to be pointed out: the legitimacy conferred by elections does not affect the substantive outcome, but only the process itself. Each candidate normally has a political program which they commit themselves to carry out while holding the office for which they have chosen to run. By means of elections, this program can be validated (or not) by the citizens. However, the election result is considered legitimate even if the winner subsequently disappoints the electorate during their term of office².

² See Behnke J., *Wozu Wahlen?* in Kursbuch, vol. 174, 49/2013, Nomos Verlag, Hamburg, 2021, p. 10, doi.org/10.5771/0023-5652-2013-174.

Elections confer powers of authority on those elected for holding positions of public dignity, but at the same time give voters the possibility to sanction the exercise of the mandate by the person elected (a particular candidate, political party or political group) in the previous election by re-granting or not granting the vote anymore. Elections are considered to fulfill three major functions in any democratic system: *empowerment*, *representation* and *sanctioning*. In accordance with the first of these functions, the will of the electoral body must be implemented immediately and requires periodic renewal, and its legitimizing effect is temporary, since it subsists only until a previously stipulated moment – until the next elections are held. With regard to the function of representation, it should be emphasized that elections presuppose the establishment and subsequent preservation of a sufficiently close legitimating link between the actions of the representatives and the will of the represented. If the will of the electorate is suspended for a certain period of time, such as between the date of the elections and the date of the investiture of the newly elected representatives, then the legitimizing power of elections is also significantly diminished. Finally, the sanctioning function is the most affected in the hypothesis of the simultaneous organization of several electoral polls³.

If we focus our theoretical considerations on this year's situation in Romania, where, on the same day, June 9th, both the European parliamentary and local elections were held, we can see how the sanctioning function normally performed by elections is affected. First of all, the merging of elections makes it very likely that public dignitaries or representative bodies in office will end up coexisting for a period of time (from a few weeks to a few months) with the newly elected. This is also the situation in our country following the June elections, with local elected representatives continuing in office until the end of their term of office, while the newly elected officials will be sworn in only afterwards, in October. This transitional period of time is beyond any possibility of sanction by citizens. By eliminating the possibility of sanction from the electorate, political actors are freed from any form of pressure that would normally lead them to act in full congruence with the will of the electorate. Moreover, in the event of elections being held before the expiration of the term of office, the electorate will not be able to make a decision based on an overall assessment of all the actions taken by the incumbent during his or her term of office.

In addition, the practice of holding several elections at the same time has been analyzed in the specialized literature also from the point of view of other aspects, and depending on the angle from which we look at them, they can be regarded as advantages or disadvantages. Thus, by combining the dates of several elections, officials elected to a particular political office will not have to think their entire activity in the logic of election campaigning. On the other hand, the run-up to the elections

³ VerfGH Nordrhein-Westfalen, 18.02.2009 – Decision of the Constitutional Tribunal no. 24/08, p. 9.

plays a beneficial role, as public officials really take the pulse of society and the additional pressure to deliver results to the electorate leads them either to start certain projects or to speed up the completion of others. It was also felt that holding several rounds of elections at the same time would be a positive initiative in terms of saving financial resources, but above all in terms of increasing voter turnout. Thus, where possible, an election that has consistently aroused the electorate's interest (e.g. federal, parliamentary elections) has been combined with one characterized by rather modest turnout (regional elections) or two elections with traditionally low turnouts (European and local elections) were held on the same day, but the resulting statistics have not always provided conclusive results justifying such a strategy. Inevitably, the question of voter exhaustion has also been raised, which can be interpreted from a double perspective: holding several elections consecutively, within a relatively short time span, would exhaust the electorate, just as holding several elections on the same day would require additional intellectual effort on the part of voters and would make the whole voting process more difficult. An interesting argument against the practice of merging elections is put forward by an American professor and refers to the need to find ways to activate party members. Nowadays, when we are witnessing a generalized de-ideologization of the parties, the only remaining opportunity that can contribute to increasing solidarity within the parties, including by activating passive members who do not hold any office, is electoral campaigns. In other words, more election campaigns help "to keep our membership happy"⁴.

The position of the Constitutional Court on the issue of combining elections has been largely constant, at least until this year. Thus, the Romanian Constitutional Court has ruled in favour of legislative solutions allowing the simultaneous organization of an election and a referendum, but has invalidated legislative solutions allowing the simultaneous organization of two types of elections. In 2012, the Romanian Government engaged its responsibility for a law which essentially aimed at holding parliamentary and local elections on the same day. The Court invalidated this law, motivating its decision with the arguments already presented. On the other hand, this year, the Government adopted *Emergency Ordinance No. 21/2024 on some measures for the organization and conduct of the elections for Romanian members of the European Parliament in 2024 and the elections for local public administration authorities in 2024*, whereby local elections were to be held before the expiry of the term of office, at the same time as the European Parliament elections, without, however, shortening the terms of office of local elected representatives in office. On this occasion, we witnessed a change in jurisprudence, as the Court rejected the objection of unconstitutionality raised by some members of the parliamentary

⁴ See Von Beyme K.; „Zusammenlegung von Wahlterminen: Entlastung der Wähler – Entlastung der Politiker?“ in Zeitschrift für Parlamentsfragen, Vol. 23, No. 2 (Juni 1992), pp. 340-348; <https://www.jstor.org/stable/24225183>.

opposition against the emergency ordinance as a whole and some specific provisions of its content, and consequently allowed the two elections to be held on the same day. By what the Court states, "the emergency ordinance does not violate the constitutional provisions regarding legal certainty, separation and balance of State powers, the role of Parliament as the sole legislative authority of the country, the conditions for adopting emergency ordinances and the decisions of the Constitutional Court". Moreover, in what concerns the pleas of extrinsic unconstitutionality, considering "the scope and the large number of elections organized in 2024", the Court considered that the reasoning provided by the Government in the preamble of the ordinance verifies "the existence of an extraordinary situation whose regulation could not be postponed", but also that the normative solution in question, even though it was adopted "less than a year before the date of the elections" and modifies *inter alia* the way in which the Central Electoral Bureau is composed, does not create legal uncertainty for the electoral competitors, but, on the contrary, given the holding of two categories of elections on the same date, it establishes a "common and homogeneous set of rules for the proper conduct of elections, in conditions of fairness for all competitors involved in the electoral process"⁵.

Even if, in principle, the process of setting the date of the elections and eventually the decision of organizing two elections on the same day, might seem to be a purely technical, administrative matter, the rich case law on this subject reveals the important political stakes behind it, often with strong repercussions in the field of constitutional contentious.

⁵ Press Release of the Constitutional Court of Romania from 14 May 2024; <https://www.ccr.ro/en/press-release-14-may-2024/>.