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Brief Considerations On The Fundamental Right To Vote In Romania

Keywords: rights and fundamental freedoms, human rights, right to vote

Summary. The rights and fundamental freedoms of humans and citizens are a constitutional reality, with deep implications in the existence of every person, in his relations with the state. It also represents an existential reality of every person, of the society as an ensemble and a dimension of democracy. A category of the rights and fundamental freedoms is represented by the exclusively political rights. These fundamental rights refer only to Romanian citizens and have as object the participation of citizens in the management of the state and in governance. The Romanian Constitution refers to two of them (the right to vote and the right to be elected), which represent human rights, essence of constitutionality and proclaimed by the first documents with constitutional value, but also to a third right, newly inserted by the revision of 2003: the right to choose and be elected in the European Parliament. These are the means by which the people, as owner of the sovereignty, participates in the exercise of power in the state.

Przyczynek do rozważań na temat czynnego prawa wyborczego w Rumunii

Słowa kluczowe: prawa i podstawowe wolności, prawa człowieka, prawo do głosowania

Streszczenie. Prawa i podstawowe wolności człowieka i obywatela są rzeczywistością konstytucyjną, mającą głębokie implikacje w egzystencji każdego człowieka, w jego relacjach z państwem. Reprezentuje również egzystencjalną rzeczywistość każdego człowieka, społeczeństwa jako zespołu i wymiar demokracji. Kategorię praw i podstawowych wolności reprezentują wyłącznie prawa polityczne. Te prawa podstawowe odnoszą się wyłącznie do obywateli rumuńskich i mają na celu udział obywateli w zarządzaniu państwem i sprawowaniu rządów. Konstytucja rumuńska odwołuje się do dwóch z nich (prawo do głosowania i prawo do bycia wybranym), które reprezentują prawa człowieka, istotę konstytucyjności i są ogłoszone przez pierwsze dokumenty o wartości konstytucyjnej, ale także do trzeciego prawa, nowo wprowadzonego przez zmianę konstytucji z 2003 r.: prawo do wyboru i bycia wybranym w Parlamencie Europejskim. W ten sposób naród, jako suweren, uczestniczy w sprawowaniu władzy w państwie.

Introduction

The Romanian Constitution employs in article 36 the term the right to vote, but other constitutions employ the term the right to choose. However, there are certain differences between the two concepts. Thus, the term choose is used when members of public bodies are elected, and the term vote is used when citizens decide for or against a rule or decision. One can, therefore, conclude the terms voting and referendum are synonymous.

The right to vote is an exclusively political right because it is used in order to allow the participation in governance of the people through the elected representatives, and second of all, this right belongs exclusively, in accordance with the Constitution, to Romanian citizens fulfilling the legal requirements. The right to vote is a complex electoral right, because it is both stated by the constitutional provisions, as well as by certain special laws, thus comprising in its content both constitutional elements, as well as the elements established by normative acts with legal force inferior to the Constitution¹.

According to academic literature in the field “the right to vote is the acknowledged rights, in accordance with legal provisions of the citizens of a state to express freely, directly or indirectly their electoral option for a particular political party or for a candidate proposed by a political group or an independent candidate”².

The Romanian Constitution states the right to vote, as any right recognized to Romanian citizens, in tight corroboration with the international treaties and covenants to which Romania is part, thus complying with the supremacy of the international provisions and the principle stated by Art 20 of the fundamental law. In this meaning, it is stated that “the constitutional provisions concerning the citizens’ rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence”.

The fundamental law adds to the recognition of this right and provisions regarding its exercise in concrete terms, thus taking into account the categorization of the right to vote as an exclusively political fundamental right.

To exercise the right to vote, the Romanian Constitution establishes in article 36 certain requirements which must be met by citizens who wish to exercise this right.

¹ M. Andreescu, A. Puran, *Drept constituțional. Teoria generală și instituții constituționale. Jurisprudență constituțională*, 3rd Edition, C.H. Beck Publ.-house, Bucharest 2018, p. 293.

² C. Gilia, *Sistemeși proceduri electorale*, C.H. Beck Publ.-house, Bucharest, 2007, p.29.

Therefore, according to the provisions of Art36 of the Romanian Constitution³, the right to vote is limited to citizens who have turned eighteen up to or on the election day and have a Romanian citizenship, irrespective of the place where they reside, with the exception of the mentally deficient or alienated persons, laid under interdiction, as well as the persons disenfranchised by a final decision of the court.

In Romania, the right to vote, including the right to consultation by referendum belongs not just to Romanian citizens domiciling within the country, but also to Romanian citizens residing abroad. This fact results from Art 23 of the Law No 208/2015, which states that “polling stations for the voters domiciled or residing abroad shall be set up with the diplomatic missions and consular offices, consular sections, if they operate in different locations and with the cultural institutes abroad. Polling stations can also be set up in other locations than at the premises of the diplomatic missions or consular offices, with the assent of the authorities in the respective country”. In the same sense, Law no. 3/2000 on the law on the organization and conduct of the referendum but also Law no. 370/2004 regarding the election of the President of Romania are pronounced.

All persons fulfilling the legal conditions to vote represent the electoral body.

The presentation of the seat of the matter and of the content of the right to vote allows to emphasize its importance in the set of fundamental rights and freedoms recognized to the Romanian citizens. If the people hold the power, then the right to vote grants power to the citizen. The power to decide who and when will exercise state functions; the power to sanction the mistakes of its elected officials and to propel to government a certain political party whose doctrine should reflect its aspirations.

Closely related to the right to vote is the electoral system used for the distribution of mandates obtained by each political formation or candidate as a result of the vote exercised by citizens. The electoral system shall provide equal opportunities for citizens to influence the policy promoted by the government. If until 2008, Romania had an electoral system based on list voting, after this moment, the electoral laws changed, moving to uninominal voting, each of the two systems presenting both advantages and disadvantages. What is certain is that the electoral system must provide the citizen with the right to vote the possibility to participate in the government through its representatives or by referendum⁴.

³ Art. 36 of the Romanian Constitution: “(1) Every citizen having turned eighteen up to or on the election day shall have the right to vote. (2) The mentally deficient or alienated persons laid under interdiction, as well as the persons disenfranchised by a final decision of the court cannot vote”.

⁴ For developments on the referendum, see R. Dumitru (Duminică), *Rezultatele referendumului din 2009 – fundament al unei viitoare revizuirii a Constituției?* (*The results of the 2009 referendum – the basis for a future revision of the Constitution?*), [in:] „Revista de Științe Juridice” (Journal of Juridical

1. The features of the right to vote

As in the case of any fundamental right, the right to vote has certain characteristics. These are borne out of both Constitutional provisions as well as of those of the special laws in the field. Therefore, the features of voting in Romania are the following⁵:

A) The universality of the vote

The universal character of the vote does not automatically imply the acknowledgment of the right to vote of all Romanian citizens from birth, as this right, as already mentioned does not belong in the category of natural rights. In what regards this right, it is universal when it is granted to all citizens, beyond the legal imposition of certain minimal requirements, objective and justified, which may refer to age, citizenship, nationality or the exercise of civil and citizenship rights. In this respect, the Romanian Constitution excludes from exercising this right, stateless individuals, minors, people who are either incapable or do not have the moral ability to vote, being disenfranchised from exercising electoral rights as a result of a final sentence of the court.

It should be noted that persons arrested on remand are not excluded from the exercise of the right to vote, because they do not have a court conviction for committing an offence that could lead to the loss of electoral rights. Moreover, it is well known that, according to the constitutional provisions, these persons enjoy the presumption of innocence.

The universality, as a feature of the right to vote, has undergone a specific evolution, systematized in three stages, namely⁶:

- the masculine universal vote;
- women's access to electorate;
- decrease of the minimum age.

It is thus noticed that in certain epochs, the constitutional and electoral regulations provided unjustified incapacities on criteria that could be considered true violations of the principle of non-discrimination and universal suffrage, such as: exclusion of women from voting (in Romania this exclusion is eliminated in 1923) or of persons who did not have a certain wealth or a certain social status or did not have a certain degree of professional training (Constitution of 1938). These inca-

Sciences), no. 1/2011, „Referendumul și democrația” (Referendum and democracy), Universul Juridic Publ.-house, Bucharest, pp. 119-131.

⁵ See also A. Puran, A. Drăghici, *Drept electoral*, University of Pitești Press, Pitești 2016, pp. 24-27

⁶ .I. Muraru, E. S. Tănăsescu, *Drept constituțional și instituții politice*, 12th Edition, 2nd Volume, C.H. Beck Publ.-house, Bucharest 2006, p. 90.

pacities could not be justified by any argument, as they were rightly considered to be true limitations on the exercise of civil rights and freedoms.

B) The equality of the vote

The Constitution introduces a second characteristic of the right to vote, namely the equality of the vote, establishing in art. 4 and art. 16, in accordance with international regulations, the principle of full equality among citizens without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin. The equality of the vote reveals two important dimensions: on one hand the fact that a citizen cannot possess more than one vote for the election of the same public body and on the other hand the fact that polling stations are divided proportionally among the number of inhabitants. For the electoral circumscriptions to be proportional with the number of population and to reflect the demographic evolution of a society, a deep analysis in this meaning it is necessary and the performance of a correct census. Equality of the vote implies the elimination of certain procedures meant to alter this feature, such as: electoral geography⁷, multiple voting⁸, first election, electoral colleges, plural voting. The equality of vote thus implies that it is forbidden for a citizen to vote more than once for the designation of the same state authority and it is also forbidden to put more than one ballot paper for each public authority in the ballot box. Moreover, these actions are considered to be crimes and are punished as such.

C) The direct character of the vot.

Romanian citizens express in a direct and personal manner and not through intermediaries or representatives their option regarding the proposed candidates or the bill put forth in the referendum. As the vote reflects and individual's opinion and thinking, receiving, therefore a personal character, it cannot be exercised through a representative.

There is also indirect voting, which means that more voters appoint more representatives who, in turn, will elect a public authority. For instance, the G.E.O No 57/2019 regarding the Administrative Code⁹ states in Art 129 Para 3 as one of the attributions of the local council, the election, by secret voting with

⁷ Electoral geography is the process of establishing unequal constituencies as the number of inhabitants for the election of the same state body. It is a procedure used to disadvantage cities where there are opponents of the ruling party or parties. In this meaning, I. Muraru, E. S. Tănăsescu, *op. cit.*, p. 91.

⁸ It was also used in our country, when according to the Constitution of 1923, a university professor is given up to 4-5 votes.

⁹ Published in the "Official Gazette of Romania" No 555/5 July 2019, with subsequent modifications and amendments.

absolute majority, of the deputy-mayor(s) among the local counselors, at the proposal of the mayor or of the local counselors. The vote cannot be exercised by proxy even in the case of the election of the President of Romania, even if in this case the expression of the vote is not conditioned by a certain electoral constituency. In this case, citizens can go to the polls directly by voting on special electoral lists, if they are not at home. The same will apply to persons in hospital or detention who are serving a sentence that does not result in an electoral incapacity.

D) **The secret feature of the vote** expresses the possibility of the citizens to freely manifest their will, without this manifestation to be known to others. Also, it represents an important guarantee of the fairness for the election of representatives, but also a fundamental aspect of a democratic and social rule of law.

In order to ensure the secrecy of voting, the electoral law states a series of guarantees, such as: the absence of distinctive marks, reason for which the ballot paper shall be marked with only the absolutely necessary symbols; equipping polling stations with booths that allow the confidentiality of the vote cast and where only one person can enter. Thus, Law No 208/2015 states that “the presence of any person other than the voter inside the polling booth is forbidden”¹⁰. Opposed to the secret vote is the public vote which has the disadvantage that the voters may very easily be influenced to vote with a certain candidate aiming to occupy a certain place.

E) **The freely expressed vote** refers to the ability of the citizen to take part or not in elections, and in the first situation to ensure his consent is not vitiated, so that he is forced to vote differently from how he wanted to. In Romania, voting is not compulsory, therefore any type of coercion exercised over the citizen to force him to exercise his right to participate in voting is a vitiation of his consent.

Law No 208/2015 states as guarantee of the prevention of constraints which may be exercised against a voter’s consent the fact that “besides the members of the electoral bureau of the polling station, the candidates, the delegates and accredited observers, no other person may dwell in the public places in the voting room or inside the voting premises for a period of time longer than the time needed to vote”. Also, the same law states that “the voter who, for well-founded reasons, ascertained by the president of the electoral bureau of the polling station, cannot vote on his/her own shall be entitled to call an attendant of his/her choosing, to help him/her in the polling booth”. It is a guarantee justified by the fact that the

¹⁰ Art 85 Para 7 of the Law No 208/2015 on the election of the Senate and the Chamber of Deputies, as well as on the organization and functioning of the Permanent Electoral Authority, published in the “Official Gazette of Romania”, No 553/2015.

members of the polling station are representatives of a political party, thus being able to influence the voter's option. There are also states in Europe where voting is mandatory, which is determined by the introduction of this citizen action in the category of legal obligations. Although a compulsory vote increases the responsibility of citizens, it would not comply with the principles of a democratic state. In most European states, the exercise of the right to vote is considered a civic duty, the law not regulating sanctions for non-compliance.

2. Brief considerations on the postal vote

One of the alternatives which could be promoted in order to combat the electoral absenteeism is the electronic vote (e-voting), namely the remote vote. Another alternative is the postal vote. The two ways differ by the action by which they are exercised. The first one refers to the use of electronic technology, while the second one implies the use of postal services.

Regarding the postal vote, it has been relatively recently stated in Romania by Law No 288/2015 on the postal vote, as well as the modification and amendment of the Law No 208/2015 on the election of the Senate and the Chamber of Deputies, as well as on the organization and functioning of the Permanent Electoral Authority and used for the first time during the parliamentary elections in December 2016. Art 1 of the Law No 288/2015 states the "exercise of the right to vote by post during the elections for Senate and Chamber of Deputies and for the President of Romania". So, this method of voting can be used only for this type of elections and only by Romanian citizens with the right to vote, having their domicile or residence abroad, according to the law [according to the definition given to the notion of "voter" by Art 2 Let a)].

The voter domiciling or residing abroad, wishing to perform their right to postal vote during the general elections for Senate and the Chamber of Deputies, shall register in the Electoral Register opting for postal vote based on a written, dated and signed request, submitted in person or sent by post, including by e-mail, to the diplomatic mission or consular office in the state of domicile or residence, to which is attached a copy of the passport mentioning the state of domicile, in the case of Romanian citizens domiciled abroad, respectively a copy of the ID card and a copy of the document proving the right of residence, issued by the foreign authorities, in the case of Romanian citizens residing abroad.

The voter choosing this option to vote shall no longer be listed on the permanent lists issued for this suffrage.

The documents necessary to exercise the right to postal vote which shall be sent to the voter, in accordance with Art 10 of the Law No 288/2015 are:

- a) an outer envelope provided with security elements to ensure its sealing, in which the inner envelope and the voter certificate will be inserted;
- b) an inner envelope provided with security elements to ensure its sealing, in which the voting option or options will be introduced, as the case may be. The inner envelope will contain a sticker with the words “VOTED”, provided with security elements established by Government decision. The voter sticks the sticker on his option from the ballot paper to be provided by mail;
- c) the voter’s certificate;
- d) instructions on the exercise of the right to vote, indicating also the term in which the voter must submit in the mailbox or at the post office the documents necessary to validate the vote, so that they are delivered to the competent electoral bureau, within the term provided by law;
- e) the ballot paper.

The National Company “Romanian Post” S.A. (Poșta Română S.A.) ensure that these documents are sent to voters no later than 30 days before the election date.

The voter shall fill in the documents and mail them so that they will reach the electoral bureau for postal voting with maximum 3 days before the date of the elections. On the day of the elections, after 9 pm, the electoral bureau for voting by mail unseals the ballot boxes one by one and unseals the inner envelopes and validates the votes that meet the legal conditions.

According to the Permanent Electoral Authority, for the parliamentary elections held in December 2016 “over 9.000 Romanians from 2.209 localities worldwide registered in the Electoral Register. For instance, Australia, with requests for postal voting from 76 localities, the United States with 99 localities or Canada with 68 localities. Citizens from European countries, but also from South Africa, South Korea, Tunisia, Mali, New Zealand, Vietnam, Cuba or China have applied for registration in the Electoral Register”.

During the presidential elections in 2019, according to <https://prezenta.bec.ro/>, 17.503 citizens voted by post.

As a conclusion, although the right to vote is a fundamental right, Romanians exercise it in smaller and smaller numbers. For instance, during the presidential elections held after the 1989 Revolution, it is noted a continuous decrease of the number of voters. Thus, the presence was of 86,19% in 1990, in 1992 – 76,29% (1st tour), 73,23% (2nd tour), in 1996 – 76,1 % (1st tour), 75,90% (2nd tour), in 2000 – 65,31% (1st tour), 57,50% (2nd tour), in 2004 – 58,51% (1st tour), 55,21% (2nd tour), in 2009 – 54,37% (1st tour), 58,02% (2nd tour), in 2014 – 53,18% (1st tour), 64,11% (2nd tour) and in 2019 – 47,66% (1st tour), 49,87 % (2nd tour)¹¹.

¹¹ <https://prezenta.bec.ro/prezidentiale> [access: 10.08.2020].

Thus, the rulers should think of optimal legislative solutions to reduce absenteeism.

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