

## **Comments and comparisons with European electoral laws on the postal voting provisioned by Law number 288/2015.**

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### **Abstract**

*The purpose of our theoretical research is investigating the manner in which the modifications brought about to Law number 288/2015 concerning the use of the postal vote are able to secure the vote of the person. We are also concerned with the European legislation on this matter, debating similar provisions in the Italian and German electoral law. The right to vote exists in order to be performed, thus we analyzed the proposal in link with its purpose, that of encouraging people to vote. We participate in the voting process, determined to ferret out what the political life has to offer for our democracy, only to end up wondering about ourselves as citizens. The manner in which we construct electoral legislation should be link with the behavior of our citizens, as well as with the findings at the European level. We found that there is inherent insecurity in this type of voting and that Law no. 288/2015 lacks certain provisions that are used in the European legislation.*

**Keywords:** *Public Law, Electoral Law, Law number 288/2015, presidential elections.*

### **1. Introduction**

Paradoxically, the protean quality of the vote is that it seems to have something to say about ourselves. Taking part in the voting process determines the citizen to analyze not only the political offer, but also himself. You begin in the middle of the political life and stop unexpectedly with what may or may not bring your vote.

To describe this in a different way, in the current national context the active participation of the citizen in the political life of the country has become not only relevant, but also paramount. As an European democracy, Romania holds responsibility not only for the manner in which it constructs and maintains its own democracy, but just as much on the influence it brings into the European community.

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At the same time, there is undeniable drive in the European Union's institutions to get citizens to participate in the voting process. The European community exists in a permanent link that allows for positive, as well as negative influences to travel from one corner to another. Besides the responsibility of strengthening one's own democracy via citizen participation, the authorities need to allow modernization of the country in a synchronic manner. The postal ballot represents one manner of trying to integrate the will of the Romanian citizens in the political life of the country. Romania presents a high degree of citizens living in the European community. These citizens need to be involved in the political decisions of the country. This law represents a manner in which the Romanian legislator expects to attract the Romanian citizens abroad to vote in greater numbers. Through this proposal the legislator desires to use the postal ballot for the presidential elections. Postal voting system that relies on a postal ballot has been recognized as being vulnerable, but it came to use in order to respect the main principal of universal voting. We believe that the postal voting system is allowed via understanding that we can renounce at some of the security imposed upon the vote in order to follow the universal suffrage principle. There are some drawbacks to using the postal voting system. Some we shall bring into question in this article, while some have already been identified by international organism: "in-person registration requirement", "exceedingly tight deadlines", "host-country postal service disruptions", and an "ineffective voter information campaign" states the report [1].

## **2. Provisions that cover the process of registering**

In our critical probing, the law starts by presenting the manner in which the voter comes to be registered for exercising his right to vote via a postal ballot. The registration needs on-line access. At this point we notice a limitation in the possibility of a person to exercise his right to vote. Although the postal ballot is an alternative to the traditional ballot without being a vote through electronic means, it does require an on-line registration. We find it modern, but a bit strange as it limits the access of people to voting via postal ballot. We believe it necessary for the legislator to create a manner of registering for postal voting without using an on-line system. Besides the registration process that should take place both on-line and in person at a Romania authority, we believe there is also the need to regulate the desire of the voter to withdraw his option of exercising his voting right through postal vote. We were unable to discover the provision allowing the person to withdraw the desire of using postal voting. For example, the choice to vote in Italy may be subsequently withdrawn by written notification to be sent or delivered to the Consular office using the same procedures, and within the same timeframes, envisaged for the exercise of the option. We believe

that the written withdrawn should be accompanied by the possibility to renounce at using postal voting via an on-line application [2].

In comparison the German Electoral Law provisions for more contact between the voter, the person that assists the voter and the authority. Contact with authorities is seen as a further security measure. The German Electoral Law provisions for an oath given in front of the an oath to the Constituency Returning Officer that the ballot paper has been marked either personally or in accordance with the declared intent of the voter [2]. The voter or the person assisting him or her must indicate on the polling card that he or she gives an affirmation in lieu of an oath to the Constituency Returning Officer.

The data that the person has to transmit is personal and sensitive: name, surname, personal numerical code, address of the domicile or of the residence, e-mail address and the option for delivering the envelope with the vote. This procedure applied for the voter that has the domicile or the residence outside Romania. Besides entering personal data, the voter shall annex a scanned copy of his Identity Card and of the documents that prove his right of stay issued by the proper authorities. A mandatory condition, required by the law is for the identity card to be valid (Art. 4 in-line 5, Law number 288/2015, with modifications in place starting with the 28 of July 2019). Similar personal data is required by the Italian Electoral System where a written notice must be provided on unstamped paper and - in order to be valid - must contain the name, last name, date, place of birth, place of residence and signature of the voter [3].

The voter needs to consider the fact that there is a dead-line for registering. The deadline starts with the first of April of the year in which elections take place and ends just before 15 days from the start of the electoral campaign[3]. The Italian legislator considered that a different deadline would be preferred. The Italian legislation provides that the written notice of this choice must arrive at the Consular Office no later than ten days after the date the elections are called, in other words no later than Monday, January 8, 2018 [3]. The voter does not need to be already registered in the evidence of the Electoral Registry provisioned in art. 42 in-line 2 of Law number 288/2015.

The Permanent Electoral Authority has a mandatory obligation, that of verifying within five days from the moment in which the person provided the data the veracity of the before mentioned data. The on-line registration is valuable only for that ballot. The five day deadline for the authority to verify data is important for the person just as much. Only once the five day dead-line expires can the person verify his registration in the Electoral Registry. The voter is not registered as long as the data, as a result of the verification, is either incomplete or incorrect. The procedure for registering for postal ballot is different from the procedure established by law for voting in a polling station, as it implies an extra effort from the person. This option is an exception from the normal

procedure and it involves extra effort and initiative. By analyzing the provisions for exercising one's right to vote we notice differences between those norms and the provisions that regulate the postal ballot in several points such as: the manner in which the electoral lists are comprised, the manner in which the electoral registry is built and at the level of the voting procedure [4].

The permanent electoral lists for postal voting are created by the Permanent Electoral Authority in 48 hours from the expiration of the five day dead-line. These lists shall be sent to the National Company of Postal Services in 24 hours from the moment the Permanent Electoral Authority creates the permanent electoral lists for those that shall exercise the postal ballot. Another important dead-line is the one in which the Permanent Electoral Authority has the obligation to transmit the permanent electoral lists with those that chose the postal ballot. In 3 day time from the creation date of the area electoral office, the Permanent Electoral Authority has the obligation to send the permanent electoral lists of those registered for postal voting.

### **3. The manner in which one exercises the right to vote via postal voting. The documents needed for exercising the right to vote**

The procedure of delivering the documents to the voter is covered in Chapter IV, Section 1, art. 10 to art. 12, Law number 288/2015, with modifications in place starting with the 28 of July 2019. The procedure of delivering the necessary documents to the voter holds security measures that protect against outside tampering upon the envelope with the vote and hold attention to properly securing the vote inside, as well as to delivering it to the right address. By doing this, the legislator tries to ensure that the envelope reaches in time the electoral office. Despite these security measures, the legislator fails to properly secure the essence of the vote: the fact that it should be a free, direct and secret. This responsibility falls upon the voter. The switch of responsibility is only natural as a result of the entire procedure. As the procedure becomes more flexible, the less responsibility is placed on the state authorities that have less control over the entire procedure. Although the voter gains comfort and time for exercising the right to vote, there is also an added responsibility in the fact that the voter needs to constantly monitor the documents, the process and the procedure, having the responsibility of alerting the authorities. Little can be done in terms of ensuring the same degree of credibility in the vote delivered via mail, as it is passed from hand to hand. The security measures are meant to prevent outside tampering, but little can be done against human error and delivery error. It is difficult to ensure that 100% of the envelopes shall reach their destination in time, as there is no such full-proof guarantee for any delivery. It lacks the framework design to protect the secrecy of the vote, such as the presence of the

polling station that can prevent outside pressures upon the elector at the moment of exercising the vote [5].

The law stipulates the documents that the voter receives: the outer envelope, the inlying envelope, the voter certificate, the instructions and the ballot paper. At this point we note that the documents needed for postal voting in Romania are similar with those demanded by The Federal Electoral Law of Germany in Section 36, article 1 [2]. Besides these documents that are meant for the Romanian voter abroad, there is another element that is meant for the Romanian voter that votes from Romania. For this category of voter, the law provisions the inclusion in the package of a sticker that comes with the address of the electoral office for managing the postal ballot in the country. The voter has to choose this electoral office. The procedure is meant to protect the vote of the person by having security measures. It is important to notice that the protection is oriented towards tampering with the envelope, the process being able to protect only from outside interference. The outer envelope is meant to hold the inlying envelope and the voter certificate. The protection is represented by a self-seal. In case of the presidential elections the voter shall receive two distinctly marked outer envelopes, one for the first ballot and the other for the second ballot. It is important to note that the outer envelope is self-addressed, in order to prevent its loss as a result of lack of information or lack of attention from the part of the reader. The legislator has thought to norm for the implementation of available measures to prevent the loss of the envelope or to avoid misidentification of the voter. Thus, the outer envelope has the name, surname, the address of the voter, as well as a bare code that ensures the proper identification of the voter. Dangers such as the loss for lack of the proper address, lack of information regarding the voter and loss of the documents inside was envisaged by the legislator. Unfortunately, the legislator cannot protect the right to vote via correspondence from outside damage to the envelope, the material presents a high degree of sensitivity to outside dangers or from the reality that sometimes envelopes are lost during the delivery process (art. 10 in-line 1, Law number 288/2015, with modifications in place starting with the 28 of July 2019).

The inlying envelope shall also contain safety elements such as a seal. The purpose of the inlying envelope shall be to allow the voter to mark his vote by applying a "Voted" sticker. In the case of the presidential vote the voter shall receive two inlying envelopes and two "Voted" stickers, each distinctly marked for the first ballot and for the second ballot (art. 10 in-line 2, Law number 288/2015, with modifications in place starting with the 28 of July 2019).

The voter certificate represents in itself a safety measure, as it stands for the identity of the person and for the right to vote. The person that holds the voter certificate has the right to vote. There are a number of personal data on the voter certificate: name and surname of the voter, the personal code, the domicile or

abroad residence, and as the case may be the series and number of the ID card, as well as the dated and signed self-declaration of liability of the voter that the vote was freely, directly and secretly. The voter certificate can be used only once and has to be signed by the voter. At this point we notice that the responsibility for securing the vote, for the vote to be a free, direct and secret vote, falls upon the voter. We believe this not to be perfect vision upon the secrecy of the vote. Through this attitude the value protected seems to be viewed as more of a personal value, than a societal value. We believe that the secrecy of the vote represents a social value that should be guarded by the society, as it impacts the society first. This value should not be entrusted only to the individual and should not be viewed in any context as a value upon which one person can place more or less value than what the legislator considered to be necessary. Confidentiality is a privilege provisioned for in order to guarantee the freedom of expressing one's freedom to elect [6]. The postal ballot places a lot of the responsibility of the voter [7] [8], including in the case represented by Romanian legislation. The voter has to secure the vote and ensure the security of the vote. Although the vote via correspondence presents the advantage of being performed within the comfort of one's home, the person has to take part of the responsibility. This becomes evident from art. 11 in-line (4), Law number 288/2015, with modifications in place starting with the 28 of July 2019, that stipulates the obligation of the voter to communicate to the Permanent Electoral Authority the loss, the theft, the damage or the destruction of any of the documents sent to the voter. It is important to note that the voter has to announce the authorities this actions, as long as he is not at fault. The voter is obliged via article 3 in-line (5), Law number 288/2015, with modifications in place starting with the 28 of July 2019, to protect the secrecy of the vote. In case the voter does divulge the vote the voter shall be held responsible in full compliance with the penal law. In the eventuality that the voter shares the blame or holds the blame for the loss, theft, damage or destruction of any of the documents he shall be held responsible according to the law. Part of the responsibility is transmitted to the voter that is also mandated by the state to signal to the authorities the fact that the postal ballot failed to reach him with at least 20 days before voting day.

The instructions shall contain the date to which the voter needs to place the postal ballot in a mailbox or at the postal office. Only by respecting this deadline can the vote reach the electoral office in time to be considered. The voter holds responsibility of the vote exercised. There is no excuse for the voter that after exercising the right to vote via correspondence, votes in a polling station. In such a situation the voter shall be held accountable in full compliance with the penal law (Art. 3 in-line 2, Law number 288/2015, with modifications in place starting with the 28 of July 2019). The validity of the vote via correspondence is in nexus

with its free, secret, equal and direct character. A vote that does not comply with these legal demands shall be subject to the scrutiny of the law.

#### **4. The manner in which one exercises the right to vote via postal voting. The practical manner in which the voter exercises the right**

It is important to note that the outer envelope must contain all the documents demanded by the present day legislation and in full accordance with the instructions provided in the package meant for the voter. The voter shall insert the vote certificate and the ballot paper first into the inlying envelope, then into the outer envelope. The voter has to carefully insert his personal data onto the voter certificate, to date and to sign this document. The voter certificate shall attest the identity of the person and that the vote was exercised by the rightful person (Art. 14 in-line 2, Law number 288/2015, with modifications in place starting with the 28 of July 2019). The voter shall vote via placing the sticker on the ballot paper. The ballot paper shall be introduced into the inlying envelope. It is important to note that the vote shall be cast by the person. At this time Law number 288/2015, with modifications in place starting with the 28 of July 2019 does not mention the possibility of the voter to be helped by another person to vote. We mention this issue as it contrasts with the Electoral Law in Germany where the legislator specifically mentions in Section 36, article 2 that there is also "the person assisting him" [2]. The inlying envelope, together with the voter certificate shall be introduced in the outer envelope. It is important to note that both the inlying envelope and the outer envelope shall be sealed. The envelope needs to reach the headquarters of the electoral office for postal voting prior with 3 days to election day. We notice a difference between the vision of the Romanian legislator and the German legislator. In the Federal Electoral Law of Germany, in Section 36, article 1 letter b there is less time for the authorities to organize the postal ballots received. The German voter has till 06:00 pm in election day to have his postal ballot reach the Constituency Returning Officer. There is more time for the postal vote to reach its destination, which presents an advantage for the voter. Nevertheless, the fact that the vote continues well into the voting day can represent a vulnerability. We believe that the Romanian legislator chose well not to overlap the two voting systems, leaving plenty of time to organize the postal vote, to secure them and guarantee a better administration of these votes without combining the two systems. The voter has more than one choice on where the envelope can be delivered. The legislator has placed emphasized on the importance of the vote and has allowed the voter to transmit the envelope personally to the postal office or in any mail box, via any delivery operator or to any embassy, consulate or diplomatic mission. Although the postal ballot is declared to be free, as per article 3 in-line (8), Law number 288/2015, with

modifications in place starting with the 28 of July 2019, in the eventuality that the voter used a private delivery company the costs will have to be covered by the person (Art. 14 in-line 4, Law number 288/2015, with modifications in place starting with the 28 of July 2019).

## 5. Conclusion

Our insight about the postal ballot and how is mistakenly viewed as a viable secure modality of exercising one's right to vote should encourage the diversification of methods employed in order to secure the vote of the citizen. Participating in the voting process renders the citizen's memory in ways that engage him in a process of looking back critically and also looking forward.

*De lege ferenda* we consider it necessary for the introduction of the person that assists the voter. The German Federal Electoral Law provisions for the existence of a person that assists the voter because postal voting is seen as an exception meant for those that are unable to present themselves at the polling station. By mentioning this situation we would acknowledge the fact that this type of voting can be used for citizens living within or outside Romania, but with physical or health difficulties. Furthermore, it would allow the person of the assistant to be involved and recognized in the voting procedure, thus protecting him from the accusation that he may interfere in the voting process. Without this mention in the law there is a relative open way of accusing the well intentioned person of the assistance that he or she is part of an infraction against the right to vote of the person. Another reason would be that it moves some of the responsibility, rightfully, to the assistant and it attracts attention to the authorities that special care and scrutiny should be given to such cases.

We believe that the current legislation should also expressly provision for the person to withdraw the desire to vote via the postal voting system. We could not find any legal provision that allows the person to change this option. Considering that this an extraordinary option, meant to allow the person to participate in the democratic vote, focused upon Romanians that live abroad, the legislator should take into consideration the fact that meanwhile the person can return to Romania. A special procedure should exist in the law in order to facilitate the participation of the voter in the democratic electoral process.

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