

SOME ASPECTS ON THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT REGARDING THE FUNDAMENTAL ELECTORAL RIGHTS

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ABSTRACT

The fundamental rights and freedoms of man and citizen are a constitutional reality, with deep implications in the existence of each person, in his relations with the state. It also represents an existential reality of each person, of society as a whole and a dimension of democracy. The regulation of electoral rights in the Romanian Constitution is the result of the existence of the democratic and social rule of law, which assumes that the people have the prerogative to participate in governance through their representatives who reflect their wishes.

KEYWORDS: *jurisprudence, rights, Constitutional Court, elections, right to vote*

INTRODUCTION

The basis of the people's participation in governance through its representatives is art. 2 of the Romanian Constitution which states that 'National sovereignty belongs to the Romanian people, who exercise it through their representative bodies, established through free, periodic and fair elections, as well as through referendums'. Also, para. 2 provides that "neither group nor person can exercise sovereignty in their own name". Thus, the people exercise their national sovereignty indirectly through representation and directly through referendum¹.

The supremacy of the Constitution would remain a mere theoretical matter if there were no adequate guarantees. The constitutional control of laws is the main form of constitutional justice and constitutes a basis of democracy guaranteeing the achievement of a democratic government, which respects the supremacy of the law and the Constitution.

Regulated in Title II of the Constitution entitled "Fundamental rights and freedoms", electoral rights are classified in the category of exclusively political rights. The fundamental regulation refers in art. 36, art. 37 and art. 38 to three electoral rights, respectively: the right to vote, the right to be elected and the right to be elected to the European Parliament. These provisions practically constitute the framework regulation in the matter, following that it will be supplemented with those provisions contained in special laws and which also refer to other rights that can be qualified by their nature in the category of electoral rights, such as for example: the right to contest, the right to check the registration on the electoral lists, etc. Therefore, as was natural, the Constitution only regulates the fundamental rights of citizens, the others being mentioned by other laws. Considering the narrow scope of the electoral rights nominated by the Romanian Constitution and considering the superior legal force of this normative act compared to the other special laws, which widens this scope, the three electoral rights (the right to vote, the right to be elected and the right to choose and to be elected in the European Parliament) can be considered to be main electoral rights. Thus, in the Romanian legislative system, a distinction is made between fundamental electoral rights, rights provided by the constitutional provisions, and other electoral rights provided for by special laws.

¹ Ramona DUMINICĂ, Andra Nicoleta PURAN, Again, about the consultative referendum. Pros and cons, Proceedings of the International Conference EUROPEAN UNION'S HYSTORY, CULTURE AND CITIZENSHIP 12th edition, May 2019, CH Beck Publishing House, pp. 429-439 and Consultative referendum debates on the referendum held in Romania in 2009, Ramona Duminiță, Andra Puran, in Aktualne problemy referendum, Uniwersytet Zielonogorski, Zielona Gora, Polonia, 2016, pp. 175-184

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1. BRIEF CONSIDERATIONS ABOUT ELECTORAL RIGHTS IN THE DOCTRINE

In specialized literature², electoral rights are classified in the category of exclusively political rights, these being considered as fundamental civil rights. From this perspective, electoral rights present two major specific features: they allow the participation of the people in governance through the elected representatives, who behave in this position as their “true trustees”, and secondly, because of the first feature, as we have stated, these rights belong exclusively to Romanian citizens. Although qualified as fundamental citizen rights, electoral rights differ from other socio-political rights and freedoms that do not have the same purpose, but which to some extent contribute to the exercise of electoral rights as well (for example: freedom of expression or the right of association).

The Romanian Constitution uses in art. 36 the title of the right to vote, but other constitutions use the title of the right to choose. However, there are differences between the two names. Thus, the term election is used when the members of a public authority are elected, and the term voting when the citizens pronounce themselves for or against a rule or decision. We can thus say that there is synonymy between voting and referendum.

It was expressed in the specialized literature that, “the right to vote is the right recognized, under the law, to the citizens of a state to freely express, directly or indirectly, their electoral option for a certain political party or a candidate proposed by a group politics or an independent candidate”³.

The right to be elected is regulated by art. 37 of the Romanian Constitution and implies the possibility of a person to be elected in the representative bodies of the state if he meets the legal requirements.

The demanding legal conditions necessary for the existence of the right to be elected are a guarantee for a good exercise of public functions in the interest of the community and the general interest. The imposition of these conditions was necessary to propel into these positions only responsible persons “with an increased degree of civic and political maturity”⁴.

Romania’s adhesion to the European Union brought with it, including the modification of the legislative framework in electoral matters, a fact determined by Romania’s participation, as a member of the Union, in the establishment of European bodies, such as the European Parliament.

After the revision of the Constitution in 2003, along with the right to vote and the right to be elected, the right to vote and be elected to the European Parliament was introduced.

Thus, art. 38 of the revised Constitution provides that “under the conditions of Romania’s adhesion to the European Union, Romanian citizens have the right to elect and be elected to the European Parliament”.

The Romanian Constitution agrees with the international treaties regarding the provisions stating the electoral rights, offering in addition a series of guarantees necessary for their specific exercise.

In Romanian legal doctrine, it is considered that the right to vote and the right to be elected form the category of exclusively political rights, i.e., those rights that, by their content, can be exercised by citizens only for participation in governance.

The jurisprudence of our Constitutional Court is edifying to outline the doctrinal aspects regarding the guarantee of fundamental rights and freedoms⁵, especially in situations where their exercise is subject to conditions, limits or restrictions.

² Ioan Muraru, Elena-Simina Tănăsescu, *Constitutional law and political institutions*, C.H. Beck Publishing House, 12th Edition, 2nd Volume, Bucharest, 2006, p.83

³ C. Gilia, *Sisteme și proceduri electorale*, C.H. Beck Publishing House, Bucharest, 2007, p. 29

⁴ Ioan Muraru, Elena-Simina Tănăsescu, *Constituția României. Comentarii pe articole*, C.H. Beck Publishing House, Bucharest, 2008, p. 344

⁵ For applications, analysis of the general practice of the national and European courts, namely of the doctrine, see also: Aida-Diana Dumitrescu, “Studiu asupra aspectelor teoretice și practice determinate de modificările succesive ale cadrului normativ în materia despăgubirii persoanelor care au suferit condamnări cu caracter politic sau măsuri

At the same time, the jurisprudence also provides clarifications regarding the scope and content of some fundamental rights and freedoms, as well as their defining elements.

In this article we analyse the edifying aspects of the Constitutional Court's jurisprudence, which we consider to be essential for the application of the rules and principles of the Constitution regarding the guarantee of fundamental rights and freedoms. The analyses of the Constitutional Court are highlighted, in relation to the legislator's compliance with the requirements imposed by art. 53 of the Constitution, regarding the legitimacy of restricting the exercise of some fundamental rights. Jurisprudence states that the principle of proportionality evoked explicitly or implicitly by our Constitutional Court, represents a general criterion for establishing the legitimacy of interferences in the exercise of fundamental rights and freedoms or of a fair balance between subjective rights or diverging legitimate interests⁶.

Most of the time, the Constitutional Court refers to the criterion of proportionality in a generic way, invoking the provisions of art. 53 of the Constitution. There are relatively few decisions of our Constitutional Court that include elements of proportionality analysis. It is true that the interpretation and understanding of the principle of proportionality, considered to be one of the guarantees of fundamental rights and freedoms in situations where it is possible to limit or restrict their exercise, presents serious difficulties, given the diversity of concrete situations, the margin of appreciation recognized by the legislator, the nature of the protected right and last but not least the interpretive reasoning of the Constitutional Court, which must be maintained at a high level of abstraction, establishing the constitutionality of a rule by reference to the provisions stated by the Constitution.

The provisions of art. 36 and of art. 37 of the Constitution implies the principle of proportionality to guarantee the exercise of the right to vote and the right to be elected, as they may be subject to conditions or limitations. Also, the exercise of these rights can be restricted, which implies compliance with the condition of proportionality provided by art. 53 para. 2 from the Constitution.

The Constitutional Court, evoking the international legal instruments in the matter, admitted the possibility of conditions and limitations of electoral rights, if they are reasonable, which means respecting the principle of proportionality.

Referring to the provisions of art. 25 of the International Covenant on Civil and Political Rights, the Constitutional Court held that: "the provisions of the first paragraph contain an additional clarification – the respective rights are exercised without unreasonable restrictions, which implies the possibility of the existence of conditions in the exercise of these rights. Under these conditions, the prohibition of any discrimination no longer appears as unlimited, lending itself, in the case of its regulation by law, to the natural investigation of the condition of reasonableness"⁷.

Also, in its jurisprudence, the Constitutional Court ruled that "every citizen has the right to be elected in the governing bodies of his country, and this right may be subject to certain reasonable restrictions"⁸.

It was mentioned that "the addition of supplementary conditions to the specific requirements of the right to vote, so that a person can occupy elective public positions and dignities, is motivated by their importance, by the role of representative bodies in the exercise of the sovereign power of the people and by the idea of a responsible and efficient representation, which imposes an increased degree of political and civic maturity"⁹.

administrative asimilate acestora", *Dreptul* no. 5/2011, www.ujr.dreptul.ro, pp.31-58; Aida-Diana Dumitrescu, "Reflecții asupra evoluției contextului național și european în materia ajutoarelor de stat, compensarilor și plafonării prețurilor", *Curierul judiciar* no. 8/2021, pp. 457-460

⁶ Marius Andreescu, Andra Puran, *Drept constituțional. Teoria generală și instituții constituționale. Jurisprudență constituțională*, 4th Edition, C.H. Beck Publishing House, Bucharest, 2020, p. 357

⁷ Decision no. 226/2001, published in the Official Gazette of Romania, no. 605/26 September 2001

⁸ Decision no. 70/5 March 2002, published in the Official Gazette of Romania, Part 1, no. 234/8 April 2002

⁹ Decision no. 736/6 December 2016, published in the Official Gazette of Romania, Part 1, no. 184/15 March 2017

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The Court specified that the constitutional norm enshrined in art. 37 para. 1, with express reference to art. 16 para. 3 of the Constitution, which stipulates among the conditions for holding public, civil or military positions and dignities, the fulfilment of the conditions established by law, gives the legislator the right to establish the content and limits of the citizen's right to be elected, taking into account the purpose of this right, as well as the general interest that must be protected. Prohibiting the exercise of the right to be elected in the case of persons who have been forbidden, by a final court decision, to exercise this right is an appropriate, necessary, and proportional measure with the legitimate aim pursued, i.e., the removal of the possibility of occupying elective public positions or dignities by convicted persons, by final court decision, upon the loss of electoral rights¹⁰.

Legal doctrine and the jurisprudence of the Constitutional Court analysed the constitutionality of the provisions of art. 64 para. 1 let. a), referred to art. 71 of the former Criminal Code, which allow the restriction of the exercise of the right to vote, as an accessory or complementary punishment¹¹.

Analysing the condition of proportionality, it was established that the provisions of art. 64 and of art. 71 C. pen. do not contravene the provisions of art. 36 of the revised Constitution. Are fulfilled the provisions of art. 53 regarding the restriction of the exercise of certain rights, including the principle of proportionality¹².

The temporary suspension of the exercise of the right to vote for a person deprived of liberty or to whom such a complementary or accessory punishment was applied, is not contrary to the constitutional provisions, including the fact that such a restriction does not affect the substance of the right itself. Moreover, these measures are not contrary to the general constitutional principles regarding the exercise of national sovereignty by its holder. In this sense, the constitutional court emphasized that "restrictions regarding a limited category of persons, namely those convicted, who are serving custodial sentences, do not affect the free expression of the people's opinion regarding the election of the legislative body¹³."

Confusion should not be made between the right to vote enshrined in art. 36 of the Constitution, as a fundamental right, and the methods of election – direct vote or indirect vote – of some local public authorities, under the law. The Court emphasizes, however, the importance of the direct feature of the vote, such a method being the essence of modern democratic representativeness, in which citizens directly and personally express their option for a certain candidate proposed in the elections. In the case of indirect voting, a smaller number of voters participate in the actual election of representatives, depending on the method of election provided by law¹⁴.

Also, the Constitutional Court specified that in the postal voting procedure, the voter is the one who directly expresses his electoral option, because between his vote thus expressed and the end of the operation, respectively the election of the members of the Chamber of Deputies or the Senate no there is no interposition by any person or any electoral body. Regarding the fact that the voter does not have an appropriate civic conduct or other aspects contrary to the law that can be encountered in the electoral process, do not concern the normative text, but its external elements¹⁵.

Regarding the freely expressed feature of the vote, the Court notes that "the regulation of voting by mail does not put the citizen in the situation of being obliged or conditioned by other possible participants in the electoral process in estimating his vote, nor does it oblige him to vote

¹⁰ Decision no. 715/20 November 2018, published in the Official Gazette of Romania, Part 1, no. 164/1 March 2019

¹¹ Art. 66 para. 1 let a) related to art. 65 of the current Criminal Code (Law no. 289/2009, published in the Official Gazette of Romania, no. 510/24 July 2009)

¹² Decision no. 184/2001, published in the Official Gazette of Romania, no. 509/28 August 2001

¹³ Decision no. 1439/2010, published in the Official Gazette of Romania, no. 12/6 January 2011

¹⁴ Decision no. 752/2010, published in the Official Gazette of Romania, no. 495/19 July 2010

¹⁵ Decision no. 799/2015, published in the Official Gazette of Romania, no. 862/19 November 2015

in a certain way, but provides him with all the conditions so that, according to his conscience and political option, he can exercise his right to vote¹⁶.

The provisions of art. 37 of the Constitution do not assume the right of the elected to exercise his office without any limitation, outside of any conditions of the law¹⁷.

In relation to the international documents on the matter and the existing jurisprudence, the Constitutional Court notes that the state can manifest its free option in electoral matters in relation to the establishment by law of an electoral system and electoral procedures, but on the condition of respecting fundamental human rights and, in general, the right to be elected and to choose. The conditions imposed on the exercise of these rights cannot be so extensive as to affect their very essence and to empty them of their content¹⁸.

The constitutional framework of the right to be elected is represented by the provisions of art. 37 of the Fundamental Law, and through intra-constitutional normative acts, the legislator, based on art. 37 of the Constitution details the conditions necessary for the specific exercise of this right. The Court established that the “deposit” provided for by the electoral law represents, along with other conditions regulated by law, a requirement for submitting the candidacy and not a wealth census, considering, on the one hand, the economic and social level at which Romania at present, and, on the other hand, its accessible amount, which the law establishes. Therefore, such a condition does not affect the substance of the right to be elected¹⁹.

The requirement imposed by the electoral law, regarding the submission of a list of adhesion signatures, does not affect the right to be elected, regulated by the Constitution. “The key feature of any mandate acquired as a result of the expression of the political will of the electorate through suffrage is its representativeness (...) this criterion for pre-selection of candidates is an objective and reasonably applicable one under conditions of equal treatment of each of the two categories of participants in elections: independent candidates, on the one hand, and those proposed on the list of a political party, on the other. The establishment of the legal condition regarding the submission of the list of signatures is a way by which the candidate for a public position or dignity proves his representative potential and shows, at the same time, the legislator’s concern to prevent the abusive exercise of the right to be elected, on the one hand, but also to ensure, on the other hand, effective access to the exercise of this right, for eligible persons who, indeed, benefit from the credibility and support of the electorate”²⁰.

The imposition of temporary conditions, specifically the condition that the Romanian citizen had his domicile in Romania at least 6 months before the date of the elections, is contrary to the principle of universality of rights, stated by art. 15 para. 1 of the Constitution, as well as the right to be elected²¹.

CONCLUSIONS

As a conclusion, the jurisprudence of the Constitutional Court is essential in the application of the constitutional norms and principles regarding the guarantee of the rights and fundamental freedoms in general.

Undoubtedly, the constitutional justice and its particular form, the control of constitutionality of laws, represent the main guarantee of the supremacy of Constitution, as expressly stipulated in the Fundamental Law of Romania

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¹⁶ *Ibidem*

¹⁷ Decision no. 38/2010, published in the Official Gazette of Romania, no. 149/8 March 2010

¹⁸ Decision no. 503/2010, published in the Official Gazette of Romania, no. 353/28 May 2010

¹⁹ *Ibidem*

²⁰ Decision no. 782/2009, published in the Official Gazette of Romania, no. 406/15 June 2009

²¹ Decision no. 80/2014, published in the Official Gazette of Romania, no. 246/7 April 2014

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