

# ELECTIONS IN ROMANIA DURING COVID-19. AN ANALYSIS THROUGH THE PERSPECTIVE OF THE EXTRALEGAL SOURCES OF LAW

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**ABSTRACT:** *Present times have forced entire mankind to go through what is probably the biggest transformation of society in the last decades. The changes brought about by the COVID19-outbreak include every and all aspects of life: social, economic, professional, human and legal. These changes appear at local, regional, national but especially global level, in all fields of concern for a human community, at both collective and individual level.*

*The concept of material source of law references to all of the causal influences that explain the existence of a particular legal provision, at a certain time and place. Explaining law and understanding not only its letter but also its spirit necessarily entails the identification and explanation of what conditions the particular differences in its conceptual unity.*

*We try to highlight, in our paper, how exactly has the current COVID19-outbreak influenced law, by analyzing the latest changes in the Romanian electoral laws and the way in which the Romanian state has managed to put into balance two fundamental rights: right to protection of health and right to vote.*

**KEY WORDS:** *local elections, right to vote, right to protection of health, COVID19, material source of law.*

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## 1. INTRODUCTION

Present times have forced entire mankind to go through what is probably the biggest transformation of society in the last decades. The changes brought about by the COVID19-outbreak include every and all aspects of life: social, economic, professional, human and legal. It is without doubt that the present pandemic the entire world is going through has put to challenge every individual, but in the same time every state and government in the world.

Since the spread of COVID-19 in Romania (february 2020), both the legislative and the government have passed legislation intended to address various problems anticipated

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to be caused by the virus, one of these concerning elections planned to take place in 2020 in Romania (local elections and parliamentary elections).

Romania is for sure not the only state that had elections planned to take place during 2020. All states finding themselves in this situation had to find the best ways to ensure that the exercise of the fundamental right to vote can be exercised in such conditions that another fundamental right – right to the protection of health, is guaranteed by the state.

Furthermore, the risks presented by the COVID19 outbreak forces countries that have or are to held elections this year and for sure next year also, to prove their ability to set the right priorities and to find the best legislative solutions for unprecedented challenges in recent history. The variety and number of elections, the dimensions of the electoral cycle and the need for solutions have raised significant questions world-wide about the future of democracy itself (Landman & Di Gennaro, 2020).

## **2. MATERIAL SOURCES OF LAW**

The phrase material source of law references to all causal/historical influences that explain the existence of a certain particular legal provision, at a certain time and place. Material or real sources of law have not been overlooked as research subject by the scholarly literature, neither Romanian nor foreign. Therefore, every book that deals with topics pertaining to general theory of law contains a chapter dedicated to analysing the “Sources of law”, detailing the types of sources that can be included in this category. (Mihai & Dogaru, 2007) Moreover, books that deal with certain branches of law also tackle this issue, limited, however, most of the times, to only defining the notion and its lengths. If problems and controversies do not exist concerning the existence of material sources of law, certainly we cannot find the same degree of understanding regarding the determination of the component of this “given” of the law, as well as the influence each of these components exerts upon law.

It is our belief that the still ongoing COVID19-outbreak could be the most meaningful material source of law in the last decades, having repercussions on various legislation, such as: fundamental rights and freedoms, labour law, social security law, commercial law etc. The COVID-19 pandemic is for sure a health and economic emergency, but it is also a crisis for democracy, human rights and governance.

## **3. GENERAL CHANGES IN ELECTORAL LAWS IN ROMANIA DURING THE COVID19-OUTBREAK**

Faced with a threat of the scale of COVID19, countries around the world and without exception within the EU, have adopted radical and previously unimaginable policies to counter the spread of the coronavirus. Strict confinement orders have been issued. The freedom of movement has been put under conditions. (Coman, 2020) Personal and civil liberties — such as freedom of assembly — have been severely restricted. (Valea, 2021) While Europe and the world were on lockdown, elections have been modified, postponed, and canceled in light of the health risk posed by the pandemic. (Belin & Maio, 2020) (Sloat, 2020).

For Romania, as for many other countries in the world, one of the most pressing matters in 2020 was protecting the safety and integrity of the election process while also

safeguarding the right to health. Two types of elections were scheduled to take place in Romania in 2020 – elections for local administration authorities (initially planned for June 2020 but finally held on 27 September 2020) and parliamentary elections (scheduled to be held and held on 6 December, 2020).

In Romania, the general legislative framework concerning local elections is set through the provisions of Law no. 115/2015 for the election of local public administration authorities, for the amendment of Law no. 215/2001 of local public authorities and for the amendment and completion of law no. 393/2004 on the Statute of local elected officials. This legislative act sets all the details concerning the organization of local elections, in great detail. However, given the situation generated by the COVID19 outbreak, this legislative act and the general organization of elections suffered certain adjustments.

Parliamentary elections are primarily governed by Law no. 208/2015 on the election of the Senate and the Chamber of Deputies, as well as on the organisation and functioning of the Permanent Electoral Authority. This legislative act too went through different adjustments, made by the Romanian Parliament in September 2020 in a hasty manner and without public debate, contrary to international commitments and good practices. Law no. 202/2020 for the amendment and completion of certain normative acts in electoral matters brought changes to the Electoral Law, the Law on the Financing of Political Parties, and the Law on Postal Voting and passed the Romanian Parliament on the 14<sup>th</sup> of september 2020 after being registered for debate on the 8<sup>th</sup> of september 2020.

It is important to note, first of all, that adjustments to election legislation have been adopted quite late after COVID19 started to spread in our country. The first cases of COVID19 were reported in Romania in february 2020 and then in march 16, 2020, through presidential Decree no. 195/2020, the emergency state was established in Romania. Only aproximately 3 months later, moment at which local elections should have been already undergoing, the Romanian government started showing concern with this issue and this is the moment when the first legislative amendments were adopted. Looking back at the declarations of the President of the state from the spring of 2020, there is a significant change of perspective. If in the declarations given in the spring of 2020 the President emphasized the preeminance of the health issue over the need to organize elections, stating that if elections cannot be organized in safe conditions it is best to postpone them (in spring, during the emergency state, the number of new cases in Romania did not exceed 500), in the autumn of 2020 (when new cases of COVID19 were around 10.000 almost daily) the President seemed to have shifted deeply in priorities stating that Romania is dealing now with 2 huge problems – a health one and a political one. And, of course, the political one can only be changed through elections, mainly parliamentary elections.

The elections were managed by two administrative structures: the Permanent Electoral Authority and a three-level structure of electoral bureaus, established for each election, headed by the Central Electoral Bureau (BEC). Although the decisions of the Central Bureau were published on their website, its meetings were not open to the public thus reducing transparency of its decisional process. The electoral administration managed the technical aspects of the elections effectively. However, as we will outline in the following paragraphs, some of these decisions were adopted late, including those

related to adaptation to the context of the COVID-19 pandemic, and thus the efficiency of the measures were severely reduced.

#### 4. NEW ELECTORAL TIME LIMITS DURING THE PANDEMIC

The first aspect that has to be noted is that significant amendments have been brought to the time limits provided for by Law no. 115/2015. According to art. 10 of Law no. 115/2015, the date of local elections shall be determined by decision of the Government at least 75 days before the vote. This mechanism was however changed by Law no. 84 from June 17, 2020 on the extension of the mandates of local public administration authorities and on the amendment of Article 151, paragr. (3) from the EGO no. 57/2019 on the Administrative Code. Law no. 84/2020 stated in its introductory part that in the context of the current epidemiology, elections for local public administration authorities may not be organised within the time limit laid down by the legislation in force because pre-election and electoral operations cannot be carried out without major risks to public health and without violating the measures ordered by the medical authorities, outlining the need to bare in mind that elections must take place in a safe climate, such as to enable the effective exercise of rights without restriction of political rights and with the assurance of the safety of all those involved. We can therefore conclude that, at least on a declarative level, state bodies were more concerned with the right to protection of health than with the right to vote. We shall see at the end of our study whether or not this conclusion can still be held up.

Law no. 84/2020, provided by way of derogation from the provisions of Article 10 of Law no. 115/2015 that the date of the elections for local public administration authorities in 2020 shall be determined by organic law at least 60 days before the vote. The organic law that established the date local elections were to take place was Law no. 135/2020 on establishing the date of elections for local public administration authorities in 2020, as well as measures for their proper organisation and conduct and the date established was the 27<sup>th</sup> of september 2020. This legislative act brought yet other diminished periods of time for different stages of the election procedure compared to those provided by Law no. 115/2015. However, neither the law nor its explanatory statement make any references to the existing COVID19 pandemic, its stage in Romania at the moment the law was adopted.

In the same note, setting the date of the parliamentary elections turned into a controversial issue. What public authority has the power to decide this date: the Parliament or the Government? Law no. 208/2015 on the election of the Senate and the Chamber of Deputies, as well as on the organisation and functioning of the Permanent Electoral Authority provided in its article 6 that the date of parliamentary elections is set through Governmental Decision, 90 days prior to election date. In the summer of 2020, the Romanian Parliament approved a legislative act according to which the date of the parliamentary elections is to be set through an organic law adopted by the legislative power. The President challenged the constitutionality of this law before the Constitutional Court of Romania and while this examination was pending, the Government set the date for the elections on the 6<sup>th</sup> of December 2020. On October 14, the Constitutional Court ruled that nothing precludes the date of the parliamentary elections to be set by the Romanian Parliament. In its decision no. 678 from september

29, 2020, the Constitutional Court made a reference to the Report on the timetable and inventory of the political criteria for evaluating the elections adopted by the Council for Democratic Elections at its 34th Meeting (Venice, 14 October 2010). This Report notes that “any reform of the electoral legislation to be applied to elections must take place early enough to be truly applicable”. However, in certain situations, “exceptions to the one-year rule may be accepted, for example, if it is necessary to remedy unforeseen problems legislatively”. Or, concluded the Constitutional Court, the provisions of the criticized law, structured in 3 articles, do not have the nature of a reforming legislative intervention, but contain legal remedies brought in relation to the social realities and the legislative policy of the Romanian state: at present, the setting of the date of the parliamentary elections has a wide margin of appreciation, in relation to the existing references, together with the need to prevent and combat the effects of the COVID-19 pandemic.

We can conclude so far thus that the mere process of setting the date for the elections has turned into a legal and political adventure, given that the existing constitutional frame does not provide for clear solutions for cases such as the one created by the COVID-19 pandemic.

Further adjustments were brought to the local Electoral legislation by Law no. 84/2020 which provided that the time limits laid down in Law no. 115/2015, with the exception of the duration of the election campaign, the deadline for the submission of applications and the 24-hour deadline, shall be reduced by half. All these measures were meant to diminish the overall period of time all election operations took up and thus, theoretically, reduce the health risks involved.

Law no. 84/2020 provided for yet other significant changes, all meant to reduce the possible risks of infection with the COVID19, such as the minimum required number of supporters a candidacy must have, providing that this minimum number is also cut to half of that provided by Law no. 115/2015. Further more, in case of candidacies to the public office of mayor and local councilor from the same constituency, respectively candidacies for county council president and county councilor from the same constituency, political parties, political alliances, electoral alliances, national minority citizen organisations and independent candidates were given the possibility to present a single list of supporters, according to article 4 of the law. The same changes were brought to the legislation regarding parliamentary elections, Law no. 202/2020 reducing the number of supporters, coupled with the possibility of collecting their signatures through electronic means, as well as the submission of applications by electronic means.

## **5. THE USE OF TECHNOLOGY IN ELECTION PROCEDURES**

Article 5 of Law no. 84/2020 provided that both the candidacy documents and the supporters lists could be signed and submitted electronically. We were not able to find any data concerning the use of this possibility to sign and submit electronically the candidacy or the list of supporters. The Permanent Electoral Authority adopted through its Decision no. 2/2020 a Methodology for the submission of candidacies and lists of supporters in the local elections in 2020, bringing some much needed clarifications. According to this Methodology, in case of candidacies, all documents should have a qualified electronic signature, an advanced electronic signature transmitted using

substantial or high level authentication mechanisms or the qualified electronic seal of the political formation; for supporters lists, the Methodology provided that supporters' data and signatures may be collected in electronic form, including any electronic platform enabling the processing of personal data in compliance with Regulation 2016/679 and electronically drawn-up supporters lists can be signed by supporters with the use of an electronic signature.

The electronic signature is regulated through the provisions of Law no. 455/2001 on the electronic signature (republished). In April 2020 a new regulation was adopted, by EGO no. 38/2020 on the use of electronic documents at the level of public authorities and institutions. Electronic signature is of three kinds: simple, advanced and qualified. The difference between an advanced electronic signature and a qualified electronic signature is given by the possession of a qualified signature creation device (usually in the form of a token device) and the possession of a qualified certificate. The only way to obtain the qualified electronic signature and, by implication, the qualified certificate and the qualified device, is by using the services of a specialised service provider. The duration of the procedure may differ from one service provider to another, as well as the applicable fee. The procedure itself, even though the legislative possibility has long-time existed, is relatively new to the Romanian citizen and therefore we can rather safely state, even lacking any official statistics to this regard, that this possibility of electronically signing and submitting candidacies has been used merely exceptionally in the local and parliamentary elections that have taken place in Romania in 2020. However, we strongly believe that this option should be kept in future election legislation, given the importance and ubiquity of the technological resource in present (Kajcsa, 2018).

The changes brought to parliamentary elections legislation in 2020 have extended the application period for mail-in voting by 30 days, for non-country voting to two days, allowed queuing people to vote until midnight, allowed voters to download the ballot to facilitate the mail-in voting process and all these changes can be considered for future use, even lacking a pandemic context.

There have not been any more radical solutions adopted in Romania, involving even further the use of technology in voting. There are on-line and mail solutions for training, registration, and voting itself, each of which has a number of problems that need to be dealt with, and that will be subject to the influence of political self-interest from political parties and candidates. Any on-line solution faces problems relating to information security, the threat of cyber attacks, and hacking more generally, as well as questions over the integrity of the results, as was seen during the Iowa caucuses before COVID-19. (Landman & Di Gennaro, 2020)

## **6. THE CONUNDRUM OF THE SPECIAL MOBILE BALLOT BOX AND ITS USE DURING THE PANDEMIC**

The use of the special mobile ballot box has always been a sensitive and debatable issue in electoral legislation. In the context of our analysis, the use of the special mobile ballot box during local elections was regulated through Decision no. 81/07.09.2020 on the uniform application of some legal provisions on the exercise of the right to vote in the elections for the local public administration authorities in 2020 (republished in 10.09.2020) of the Central Electoral Bureau. Although the Decision mentioned in its

introductory part all the legislative acts issued by different central authorities concerning the prevention of the spread of the coronavirus - responsible for the pandemic, the articles of the Decision do not make any sort of special references to those cases when a citizen requires the use of the mobile ballot box due to disease caused by the coronavirus or is a contact of an infected and is in quarantine. The Decision provided that those citizens that cannot move to the polling section due to sickness or invalidity can request the use of the mobile ballot box and need to file a special request to this end at the location of the polling station the day prior to the elections, between 18:00 and 20:00. Basically, the text of the Decision was a standard text, generally used in all elections prior to those from 2020. Specific provisions were adopted at a later date, through a Joint Order of the Minister of Health and the Minister of Internal Affairs no. 1594/140/16.09.2020 on the establishment of public health measures and actions necessary to be respected for the safe conduct of the electoral process. It is difficult to discern the logic behind a legislative act that makes many references in its introductory part to the pandemic caused by the coronavirus and yet does not contain any sort of substantial legal provision concerning this issue!

Law no. 208/2015 on the election of the Senate and the Chamber of Deputies provides for the use of a special mobile ballot box for voters who cannot go to the polling station and for hospitalized voters or those serving a prison sentence. Identical with local elections, despite previous recommendations from the *Office for Democratic Institutions and Human Rights* (ODIHR, 2021) for extending the schedule for applications for the special ballot box, the Central Electoral Bureau decided on October 27 that the requests for the mobile ballot box can only be made for a period of two hours, one day before the election day, effectively limiting the scope of this option. Voters infected with COVID-19 and those in self-isolation were also able to request the special ballot box. On November 27<sup>th</sup>, the Central Electoral Bureau issued Decision no. 40 clarifying what documents were needed to be able to vote at home in case of quarantine or self-isolation. The Central Electoral Bureau extended this opportunity for all voters to request the special ballot box by December 4, in person or electronically. The decision simplified the requirements and improved voters' access to this procedure, although the late approval restricted its impact.

## 7. CONCLUSIONS

The pursuit of the evolution and interactions of law and the social-political factor can attest the tendency of certain components of this factor (economy, politics, ideology, culture) to subordinate law and to transform it into a technique that could be used to any final end. Politics should set the purposes of government while the law should choose the means for reaching these purposes and in this scheme the place the law has is a subordinated one. If we are to admit the thesis according to which society is founded upon, develops and perfects within an order, this order implies a certain discipline and the role of politics is to conceive this discipline and order while the law has the task of exteriorizing it. The two phenomenon therefore seem inseparable. Politics is done within the law and the law finds in politics the means through which its legal provisions acquire efficiency.

The role of politics as a material source of law is thus obvious. However, 2020 and 2021 have been characterized by a yet unprecedented state – the pandemic caused by the coronavirus and its consequences on all aspects of life. Analyzing the issue of the elections in Romania and the way the political and administrative class have adapted to the new reality of having to find a middle ground that allows elections to be organized during the pandemic, we conclude that this new source of law topped all else. COVID-18 and the restrictions it imposed subordinated, not always in the most efficient mean, all legal and administrative decisions. We believe that the decisional procedures have been in most cases hesitant, late and not transparent. On the other hand, we believe that it would be a sign of political maturity if authorities would keep for future use some of the changes brought to the election legislation, even lacking a pandemic context.

The experience of holding elections during the current COVID-19 pandemic is valuable in guiding electoral authorities to develop practices that are adapted to future health crises. The changing climate increase the likelihood of epidemics and pandemics, which are in all probability going to become more frequent in future years. (Birch, 2020) Electoral administration must adapt not only to the immediate threat posed by COVID-19, but also to a world in which any election period could coincide with a major outbreak of an infectious disease for which treatments are limited. Certainly, the following period in Romania, until the next presidential and European Parliament elections, represents an opportunity for the promulgation of a unified electoral code.

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