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Alessandro DE NICOLA

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## *The Italian way toward e-voting<sup>1</sup>*

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ALESSANDRO DE NICOLA

*Doctorant à l'Université Roma Tre*

Much has been said in recent years about e-voting. To get started on the topic, it is necessary to briefly point out that in this paper e-voting is intended as the use of electronic devices to cast or count electoral votes. From this perspective, e-voting is not generally a way to modernize the electoral process, but it significantly affects the right to vote.

- 2 E-voting is part of the most ambitious process to develop e-democracy, which is “the support and enhancement of democracy, democratic institutions and democratic processes by means of ICT, and linked to the engagement and re-engagement of citizens in democracy”<sup>2</sup>.
- 3 Thanks to the international legal framework, it is possible to arrive at a narrow definition of e-voting. Some international documents – even if they are not legally binding – offer an accurate definition of e-voting. For instance, the 2004 Council of Europe Recommendation specified that e-voting refers to “an e-election or e-referendum that involves the use of electronic means in at least the casting of the vote”<sup>3</sup>. In this view, the casting of the vote is seen as the most critical moment of the entire electoral procedure<sup>4</sup>. In 2013 the Handbook for the observation of New Voting Technologies published by the OECD provided a wider definition of e-voting as the “use of information and communication technologies (ICT) applied to the casting and counting of votes”. Therefore, in this sense, e-voting includes also the counting phase through ballot scanners. The Council of Europe returned to the

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<sup>1</sup> This Paper has already been published in issue no. 2/2022 of the *Roma Tre Law Review*.

<sup>2</sup> Council of Europe, Recommendation CM/Rec (2009)1 of the Committee of Ministers to Member States on electronic democracy (e-democracy), § 5 and 7, 2009.

<sup>3</sup> Council of Europe, Recommendation Rec (2004)11 of the Committee of Ministers of Member States on legal, operational and technical standards for e-voting.

<sup>4</sup> M. ROSINI, *Il voto elettronico tra standards europei e principi costituzionali. Prime riflessioni sulle difficoltà di implementazione dell'e-voting nell'ordinamento costituzionale italiano*, in *Rivista AIC*, 1/2021, 8.

definition of e-voting with the 2017 Recommendation that clarified e-voting as “to cast and/or count the vote”.

## I. E-VOTING IN ITALY: PAST ATTEMPTS AND THE STATE OF ART

- <sup>4</sup> In Italy, the discussion about the electronic systems of voting seems to be again an element of interest both in politics and in law. The Italian debate on electronic voting (vote elettronico) began in the 80s. During these years, some Italian MPs presented bills concerning the electronic ballot and the introduction of automated electoral procedures<sup>4</sup>. As a result, constitutional scholars have also focused their interest on the topic<sup>5</sup>. During the last two years, the debate on e-voting has increased notably because of the Covid-19 pandemic which brought back the debate on alternative forms of voting. The pandemic has shown us how the limitations of the freedom of movement have directly affected citizens' rights, including their right to vote. In the last few years, there have been several attempts to implement e-voting, but they were conducted locally without a national strategy.
- <sup>5</sup> The interest in e-voting has soared meaningfully in the last fifteen years throughout the EU Member States and EU institutions. About European Union, we have to remember that recently a Council Decision of 13<sup>th</sup> July 2018 amended the Act concerning the election of the members of the European Parliament by introducing a new article 4a which states: “Member States may provide for the possibilities of advance voting, postal voting, and electronic and internet voting, in elections to the European Parliament. Where they do so, they shall adopt measures sufficient to ensure in particular the reliability of the result, the secrecy of the vote, and the protection of personal data in accordance with applicable Union law”<sup>6</sup>. Thus, the EU explicitly encourages, under certain condition, the use of alternative forms of voting, including electronic voting. As specified in the preamble, one of the reason for issuing this Decision is to encourage a stronger ensure a stronger turnout and to encourage participation in the European elections. On this point, it should be noted that Decision no. 2018/994 leaves the regulation of the way in which the vote is expressed to the legislation of the Member States<sup>7</sup>.

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<sup>4</sup> See. E. BETTINELLI, *La lunga marcia del voto elettronico in Italia*, in *Quaderni dell'osservatorio elettorale*, n. 46, 2002.

<sup>5</sup> For some of the first doctrinal works on the topic see: A. AGOSTA, F. LANCHESTER, F. SPREAFICO (eds.), *Elezioni e automazione. Tutela della regolarità del voto e prospettive di innovazione tecnologica*, Franco Angeli, Milan, 1989.

<sup>6</sup> Article 1, par. 4 Council Decision (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976.

<sup>7</sup> ROSINI, *Il voto elettronico tra standards europei e principi costituzionali. Prime riflessioni sulle difficoltà di implementazione dell'e-voting nell'ordinamento costituzionale italiano*, in *Rivista AIC*, 1/2021, 4.

- 6 Probably, the most important foreign experience is that of Estonia. In this Baltic Country, many aspects of citizens' lives can be conducted online. Even the right to vote can be exercised through an innovative internet voting system<sup>8</sup>.
- 7 Considering the Italian context, the most important initiative was carried out by the Lombardy Region during the 2017 referendum called to ask for greater legislative autonomy from the Government<sup>9</sup>.
- 8 The referendum was held using tablets set up in physical polling stations<sup>10</sup>. It was still on-site voting, since citizens had to go personally to cast their vote. But the innovative aspect concerned the introduction for the very first time of electronic devices to collect votes. However, many cases of failure were reported. For this reason, the time spent by electoral officers counting the electronic votes increased significantly.
- 9 All the circumstances of these last few years, together with the European experience, have brought out the critical issues of the current election law. The growing awareness of the topic has led the political discussion to focus on the opportunity to introduce electronic tools on a national scale. Additionally, the Covid-19 pandemic caused increased interest in e-voting or alternative forms of voting to the traditional ones.
- 10 In 2019, the Budget Law set up a one million euro fund at the Ministry of the Interior to implement electronic voting. This was an important step in the Italian e-democratization process<sup>11</sup>. It not only provided financial support but also encouraged a national level discussion on e-voting. The fund was aimed at financing experimentation directed towards a specific category of voters. Specifically, it was addressed to voters who are not living in their place of residence because of work, study or medical treatment<sup>12</sup>. The Italian legislator's approach to electronic voting is gradual and takes into account only limited cases.
- 11 In this context, it seems relevant to clarify why the Italian legislator has chosen to start precisely from the voters who are not in their place of residence on election day. Unlike many countries (for instance

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<sup>8</sup> M. SCHIRIPPA, *Il voto elettronico nell'esperienza europea tra pregi e criticità*, in *Federalismi.it*, n. 6, 2020, 239 ff. From the same author see SCHIRIPPA, *Le nuove frontiere del diritto di voto. Uno studio di diritto comparato*, Wolters Kluwer, Milan, 2022. For more information about the Estonian experience see L. G. SCIANNELLA, *Il Remote Internet Voting in prospettiva comparata. Il caso dell'Estonia*, in *Diritto pubblico comparato ed europeo*, no. 2, 2020, 451-476.

<sup>9</sup> It is necessary to specify that there have been some minor experiments since the 2000s but they affected only some polling stations in the municipality involved. For more information see: P. CARLOTTO, *Il voto elettronico nelle democrazie contemporanee*, Padua, Cleup, 2015; A. GRATTERI, *Finalità e problemi del voto elettronico: le prospettive della sua attuazione in Italia*, in *Forum Quad. Cost.*, 25<sup>th</sup> March 2015.

<sup>10</sup> The electronic voting during the regional referendum was regulated by Lombardy regional law no. 63/2015 (*Introduzione del voto elettronico per il referendum consultivo. Modifiche alla legge regionale 28 aprile 1983, n. 34. Nuove norme sul referendum abrogativo della Regione Lombardia – Abrogazione l.r. 31 luglio 1973, n. 26 e successive modificazioni*) and Regional regulation no. 3/2016 (*Regolamento per lo svolgimento del referendum consultivo mediante voto elettronico*).

<sup>11</sup> Article 1, par. 627, Law no. 160/2019 (Italian Budget Law for the year 2020).

<sup>12</sup> Article 1, par. 628, Law no. 160/2019 (Italian Budget Law for the year 2020).

France, Germany, United Kingdom), Italian election law does not allow absentee or early voting forms. A very limited exception is foreseen only for Italians residing abroad or temporarily abroad for work, study, or medical reasons who can vote by mail.

- 12 In 2000, a constitutional amendment modified Article 48 of the Italian Constitution by introducing a new third paragraph. According to the new provision, the law must lay down the requirements and modalities for citizens residing abroad to exercise their right to vote and it must guarantee the effectiveness of this right. Moving from the new constitutional framework, the Italian legislator changed the election law by introducing postal voting for citizens resident abroad.
- 13 To understand the legal basis of the Italian postal voting system, it is necessary to keep in mind that Italian Constitution provisions state that “The vote is personal and equal, free and secret. The exercise thereof is a civic duty” (Article 48, § 2). We can affirm that the need to guarantee “the effectiveness” of the right to vote for those who are abroad can be interpreted as a reason to justify postal voting.
- 14 More recently, a new amendment to Italian election law<sup>13</sup> has extended the right to vote by mail also to citizens who are temporarily abroad for work, study, or medical reasons even if they are not properly Italians residing abroad because they are not registered on the special registry created for them called AIRE (Anagrafe degli Italiani residenti all'estero).
- 15 The Italian Constitutional Court has not yet had the chance to rule against postal voting. However, on two occasions the Court issued warnings to the legislator concerning the need to correct the distortions of the postal voting system for Italians abroad<sup>14</sup>.
- 16 However, the 20-year-experience in postal voting for citizens resident abroad and the most recent experience for citizens temporarily abroad (since 2015) have shown serious weaknesses in the management of votes expressed by mail from foreign countries<sup>15</sup>.
- 17 The lack in the election law of any forms of absentee or early voting creates additional problems. Voters are forced to go back to the municipality where they are resident to correctly cast their vote. In this view, e-voting could be a great opportunity to fill this loophole in Italian election law.
- 18 As we have seen so far, the debate on the topic has finally begun to have an impact. Although initially disregarded, the proposals on e-voting have significantly developed during the last couple of years and have translated into a series of concrete actions.
- 19 In line with these, the Decree-law no. 77/2021 amended the provision contained in the budget law for the year 2020 to extend the e-voting experimentation to regional and administrative elections<sup>16</sup>.

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<sup>13</sup> Article 2, par. 37, Law no. 52/2015 that introduced a new article 4-bis in the Law no. 459/2001.

<sup>14</sup> Italian Constitutional Court ruling no. 63/2018 and no.195/2003.

<sup>15</sup> For an accurate analysis of critical issues concerning voting for Italians living abroad see: V. DESANTIS, *Il voto degli italiani all'estero: nuove criticità e vecchi problem nella prospettiva del superamento del voto per corrispondenza*, in *Federalismi.it*, no. 32, 2022.

<sup>16</sup> Article 38-bis, par. 10, Decree-law no. 77/2021.

- 20 Besides this, according to the original provision, the Ministry of the Interior, in agreement with the Ministry of Technological Innovation and Digitalization (then Ministry for Digital Transition), had the task of adopting a decree to define how to use the “Fund for electronic voting”.
- 21 The Ministry was to adopt the decree within thirty days from the entry into force of the 2020 Budget Law. However, the deadline was not respected. For this reason, the term was extended to 31 June 2021. Finally, guidelines for testing e-voting were approved by a ministerial decree issued on 9 July 2021. Of course, the decision to involve regional and administrative elections in this project made it necessary to update the guidelines. A few months later, the ministerial decree of 21 October 2021 established the terms and conditions for the experimentation in the forthcoming regional and administrative elections, in full compliance with the provisions of Decree-law no. 77/2021. However, “in consideration of the international political situation and the risks connected with cyber security” the start of the experimentation has been postponed to 2023, the year when it was presumed that there would be political elections (Art. 6, para. 3 of Decree-Law no. 41/2022). As is well-known, given the premature termination of the parliamentary term, the elections were held on 25<sup>th</sup> September 2022, so there was no time to organize the experimentation. Therefore, unless there are further derogations, it is expected to begin for the next administrative elections.
- 22 The drafting of the guidelines directly involved some institutional bodies. It seems interesting to point out that these guidelines were written up by a Commission set up by the Ministry of the Interior’s Central Directorate for Electoral Services composed of the representatives of the Ministry of Foreign Affairs and International Cooperation, the Ministry of Justice, and the former Ministry for Technological Innovation and Digitization.
- 23 With the e-voting regulation, the legislator aims to stop the numerous fraudulent episodes that occurred in the votes of expatriates. Additionally, e-voting seems to be a valuable solution for voters who live in places where they are not officially resident. In the current legislative context, citizens have to go back to the city of residence to validly cast their vote, which means that people have to deal with considerable organizational and economic difficulties. These obstacles often represent real impediments to exercising the fundamental right to vote. Furthermore, current election law may also hurt turnout as recently underlined by the White paper on abstentionism<sup>17</sup> published in April 2022 by the Italian Ministry for relations with Parliament. The report distinguishes between two kinds of abstentionism affecting the turnout. The first is voluntary abstentionism, which is the case if citizens spontaneously choose not to vote because they are disaffected with politics. The second is involuntary abstention, which occurs when citizens cannot cast their vote because of obstacles or objective practical reasons, even if they want to participate. Among these obstacles, there is undoubtedly the presence of no alternative form to the in-person vote on election day.

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<sup>17</sup> White paper “Per la partecipazione dei cittadini. Come ridurre l’astensionismo e agevolare il voto, Dipartimento per i rapporti con il Parlamento”, April 2022, available at the following link: [https://www.riformeistituzionali.gov.it/media/1427/ebook-libro-bianco\\_02\\_05\\_22.pdf](https://www.riformeistituzionali.gov.it/media/1427/ebook-libro-bianco_02_05_22.pdf).

## II. THE FORTHCOMING EXPERIMENTATION ON ELECTRONIC VOTING

- 24 As already mentioned in the previous section, the guidelines on e-voting experimentation were approved on 9 July 2021<sup>18</sup>, with a ministerial decree issued by the Ministry of the Interior and the Ministry for Digital transition. The decree establishes the principle of gradual implementation as the core of the electronic voting experiments. In the application of this general criteria, the primary goals are, on the one hand, to verify the correct functioning of electronic voting and, on the other, to balance costs and benefits. To do so, the decree provides a two-stage approach. The first phase concerns a voting simulation. The idea is to reproduce all the stages of an electoral event and to involve a significant sample of voters in the area chosen for the simulation (municipal or consular area). The main purpose of this procedure is to test the practical and operational solutions since the outcomes will not have any legal value. To make the simulation work properly, the decree states that voters must be aware of the meaning of the simulation phase and they need to be acquainted with the lack of legal value of the related results. A targeted communication campaign is anticipated, to be launched through various channels to make the voters aware of the simulation and its effects. After the simulation, real experimentation can be held. This phase takes place during a real electoral event, so it produces binding results. According to the Ministerial decree, at this stage, electronic voting should represent a concrete alternative to traditional voting methods. Therefore, voters must be able to opt in advance, in a fixed time frame before the election day, whether to exercise the vote on-site or electronically. If no choice is made, the procedure establishes that citizens are asked to vote in person in the municipality where they are registered or by mail in case of Italians living abroad.
- 25 To participate in the experiment, voters are requested to apply at their municipality's electoral office. Once the form is received, the office carries out an initial verification to ensure that the applicant has the right to vote. Only in the case of a positive outcome, does the office certify this status by generating a "qualified attribute" uniquely related to the applicant. Then, a digital identity is created for each applicant, and this is associated with its profile. Digital identity is an essential requirement and an enabling factor for voting electronically. Whereas, for the authentication, the voters are identified by the Italian public Identity System (so-called SPID, Sistema pubblico di identità digitale).
- 26 Both in the simulation phase and during the following experimentation, the Ministerial decree envisages that electronic voting can take place in two different forms. The first one consists of a web application to which citizens access to express their votes. This is certainly a way to enhance the absentee voting method, since people can express their choice from wherever they are located, simply by accessing the online platform. The second one is "on-site" voting characterized by the use of special electronic devices situated in the polling station. In this case, the voters' physical presence is still requested, but electronic tools ensure a simplified and paperless electoral procedure.
- 27 The Ministerial decree points out the criteria for regulating the entire electronic voting process. First of all, the system needs to ensure neutrality, it must not, even indirectly, influence the voter's intention. Moreover, the system must protect the secrecy of the ballot. This means that the system has

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<sup>18</sup> Ministry of the Interior decree 9<sup>th</sup> July 2021.

to be built in a way that votes are not referable to voters under any circumstances. To achieve this, the Ministerial decree sets some basic requirements. The electronic system must separate the voter's information from those relating to the cast vote. A voter cannot cast more than one vote in the same electoral event. Very conveniently it is also possible to express a blank ballot. Nevertheless, the voter is not allowed to cast a null vote.

- 28 In the framework drawn up by the Ministry of the Interior, the voter should be able to verify if the choice he/she has made corresponds to his/her will. Therefore, the device used for voting should allow voters to check their vote on the screen before they submit it definitively. Once the vote is electronically cast, it is permanently acquired by the system and virtually "sealed". All the votes are collected in an electronic ballot box without any alteration and they are mixed up virtually. In addition, all turnout data are encrypted. Only at this point, just before the counting of electronic votes, is the virtual seal removed. After the closure of all voting operations, including those carried out with traditional methods, the counting of the votes can start. The results of electronic voting are immediately communicated to the bodies entitled to proclaim the results who read up the minutes and add up votes expressed both electronically and in the traditional way.
- 29 The Ministerial decree focuses on the need to guarantee the secrecy and personal vote principle, in line with the ministerial guidelines that recognize the rule of a secret ballot as an essential value for all phases of electronic voting.
- 30 The last section of the Ministerial decree is specifically addressed to the "system of guarantees". It primarily consists of the chance to demonstrate that each vote has been correctly included in the electronic ballot box and that the procedure ensures the protection of all personal data involved. In addition, the Ministerial decree establishes that the source code of the electronic voting system is published on the institutional website of the Ministry of the Interior, to ensure transparency and to allow independent and extensive verification of the system itself. Plus, the decree opportunely prohibits the issue of voting proofs that somehow reveal the content of the vote itself. The aim is to avoid the illegal use of such a document by third parties (for instance vote-trading).

### III. THE RECENT EXPERIMENTATION FOR THE ELECTION OF THE "COM.IT.ES"

- 31 In all the initiatives discussed so far the Ministry of the Interior has played a key role. But it is not the only player to have taken action. The Ministry for Foreign Affairs and International Cooperation (MAECI) has recently completed the first trial of electronic voting for the elections of the Committees for the Italians abroad (Comitati per gli italiani all'estero - Com.It.Es<sup>19</sup>).

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<sup>19</sup> The Committees were established by Law no. 286/2003. Their normative framework was completed by D.P.R. no. 395/2003. Anyway, already Law no. 205/1985 had established the so-called Committees for Italian emigration (Comitati dell'Immigrazione italiana). Nowadays, the Committees are bodies that represent Italian residents abroad in the relationship with Italian embassies and consulates (Article 1, par. 2, Law no. 286/2003).



- 32 The use of electronic voting for the renewal of Com.It.Es has already been discussed in the past, even though it has brought few results. In 2012, the Mario Monti government approved a decree-law according to which the Ministry of Foreign Affairs, in agreement with other Ministries, were to adopt a ministerial regulation concerning the implementation of electronic voting for the election of Com.It.Es<sup>20</sup>. The ministerial regulation was to ensure the principle of secrecy of the ballot and lay down the criteria for voting data encryption. However, the ministerial regulation on the e-voting for the Com.It.Es. was not adopted because the deadline fixed by the decree-law expired. For this reason, the following 2015 Com.It.Es. elections were conducted using the already known postal vote.
- 33 More recently, another experiment was carried out on 3 December 2021 and involved, on a voluntary basis, voters residing in 11 consular districts<sup>21</sup>. As has already occurred in other similar cases, the experiment did not produce any legal effects. In fact, for this kind of election, only the vote by mail remained binding.
- 34 The voter who wanted to participate in the trial and vote digitally had to connect to the MAECI *IOvoto* portal. Even in this case, the above-mentioned SPID system was used for the authentication.
- 35 The Ministry of Foreign Affairs decree<sup>22</sup> also includes provisions relating to the trial procedure. It seems particularly significant to underline that the decree was approved by the Italian Authority for Data Protection, which only raised concerns regarding the hosting provider. As specified by Article 2 (Principles), the whole set of rules introduced by the decree is inspired by Article 48 of the Italian Constitution and in particular by the principles of the personal vote, equality, freedom and secrecy of the vote. The decree clarifies that the main objective of the experiment is to collect technical elements regarding the feasibility of electronic voting for the election of Com.It.Es. In line with the Interior Ministry decree examined above, the Ministry of Foreign Affairs decree states that it is essential to inform voters about the meaning and the functioning of the experiment. For this reason, it requests an informative campaign beforehand.
- 36 Regarding the procedural aspects, the decree provides that e-voting is hosted by a Cloud service provider previously approved by the Italian Government. The vote is to be expressed via the Internet since there are no physical polls where voters can go to cast their vote. The entire Internet voting process takes place on the Ministry of Foreign Affairs web portal called *IoVoto*. To gain access, voters should use a personal device and authenticate themselves twice through the SPID System. Following this, voters are requested to give their consent to the personal data treatment. At this point, each voter is notified with a personal code. Once all preliminary procedures have been fulfilled, the voter can choose the list and the candidates. The choice has to be confirmed to become definitive. The vote is immediately transmitted to the database and encrypted. In this phase, all the voters' data are separated

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<sup>20</sup> L. TRUCCO, *Le nuove tecnologie salveranno il voto all'estero degli italiani?* in *Forum Quad. Cost.*, 6 January 2013.

<sup>21</sup> Berlin, Munich (for the Munich and Nuremberg committees), Marseille, London (for the London and Manchester committees), The Hague, Houston, Sao Paulo, Tel Aviv and Johannesburg.

<sup>22</sup> Ministry for Foreign Affairs and International Cooperation decree 22 November 2021.

from the data relating to votes. At the end of the procedure, the voter receives a confirmation attesting he/she has voted validly. But, again, no reference to the choice expressed is permitted.

- 37 The counting procedure can take place only when all the consulates selected for trial conclude the collection of votes. In this phase, a Commission composed of 5 members and chaired by a diplomat is called to perform the following operations. The Commission has to check that for each Com.It.Es there have been at least 20 e-voters. If this condition is fulfilled, votes can be counted. On the contrary, if there are fewer than 20 e-voters, the counting operation is suspended. In addition, it is up to the Commission to draw up a report of the counting of the votes.
- 38 In the light of the report of the 3 December 2021 experiment, the decree entrusts to the Ministry of Foreign Affairs the task of drawing up a report (within 9 months from the conclusion of the e-voting operations) with all the data related to the electronic consultation.
- 39 As regards the turnout, we can briefly say that there were 7756 voters registered to participate in the e-voting experiment for Com.It.Es. Among them, only 1236 were registered on the SPID System, the prerequisite for taking part in the digital vote. The voters were 672 overall<sup>23</sup>.
- 40 Even if it was only a one-off experiment, this experience represents the first step toward a new voting system for the election of Com.It.Es. Moreover, from a long-term perspective, it would permit the correction of some serious malfunctioning that has occurred the voting for Italians residing abroad. The conclusion of the technical analysis in the final report states that use of remote e-voting is feasible for the election of Com.It.Es., while further research would be needed for the use of this system for elections and referenda.
- 41 In the following section, we will analyze which features an e-voting system has to respect to be fully compliant with the Italian constitutional framework. Internet voting<sup>24</sup> raises several complex issues that would require an in-depth analysis of the relevant constitutional principles and legislation. As can be easily understood, the vote expressed through a personal device in the form of *home voting* could not sufficiently guarantee all the conditions set down by the Italian Constitution, in particular, the secrecy and personal vote principle. Finally, the decree aims to establish a connection between the two different experiments. The idea is to share the experience gained by the Ministry of Foreign Affairs with the Ministry of the Interior where the fund for electronic voting was established in 2020. All data collected during the Com.It.Es. experiment must be sent to the Ministry of the Interior.

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<sup>23</sup> All the data are contained in the Final report published by MAECI and available at the following link: [https://www.esteri.it/wp-content/uploads/2022/07/MAECI\\_Portale\\_Voto\\_Elettronico\\_Relazione\\_Finale.pdf](https://www.esteri.it/wp-content/uploads/2022/07/MAECI_Portale_Voto_Elettronico_Relazione_Finale.pdf)

<sup>24</sup> For further definition of Internet voting see: K. GOOS, B. BECKERT, R. LINDNER, *Electronic, Internet-based voting*, in R. LINDNER, G. AICHHOLZER, L. HENNEN (eds.) *Electronic Democracy in Europe. Prospects and Challenges of E-Publics, E-Participation and E-Voting*, Springer, 2016, 135 ff.

#### IV. SOME CONSTITUTIONAL ISSUES RELATED TO E-VOTING

- 42 E-voting is most certainly an important challenge for Constitutional law. The use of electronic devices for voting purposes raises serious constitutional issues. Before analyzing the impact of e-voting on the Italian Constitutional framework, we must remember that recently the topic of e-voting has surfaced again regarding Italians residing abroad and Italians not living in their place of residence. Therefore, the Italian legislator is about to introduce some e-voting experimentation for these categories. E-voting may offer major benefits. First, it is seen as an instrument to make the exercise of voting easier for expatriates and citizens located in a city where they do not reside. In addition, e-voting could overcome the problems identified in postal voting.
- 43 As mentioned above, Article 48 paragraph 2 of the Italian Constitution states that the vote must be free and secret, personal and equal and that the exercise thereof is a civic duty. According to Italian constitutional legal doctrine, “personal and equal” and “free and secret” are two pairs of guarantees<sup>25</sup> that represent the minimum voting standards as regards democracy<sup>26</sup>.
- 44 Based on these principles, scholars have started raising questions about the compliance of e-voting with the constitutional framework.
- 45 One of the major problems concerns system security. Many informatics experts have expressed doubts about the current safety level of the most modern voting infrastructure. Two of the most important informatics associations in Italy have spoken out against e-voting as imagined by the Ministry of the Interior decree<sup>27</sup>. In this context, even Blockchain would not be helpful
- 46 But security is not the only concern. Even if an e-voting infrastructure is absolutely safe, it is necessary to investigate if and to what extent electronic voting could guarantee the personal vote principle and the secrecy of the vote. The personal principle requires that the choice has to be cast directly by the voters. In some other countries, the principle of the personal vote is not constitutionalized. As a result, for instance, proxy voting can be easily introduced into the election system. Unlike in France and the United Kingdom, in Italy proxy voting is forbidden by election law, and it is ontologically incompatible with the personal principle stated by the Italian Constitution. Only very limited exceptions are envisaged. This is the case of voters who are unable to express their vote because of their physical or medical condition (e.g., blind people). Under this specific circumstance, voters can be helped by their relatives who are supposed to only give aid to the sick voter but who do not replace or represent him/her. This provision represents a defence against fraudulent episodes that could occur with proxy voting.

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<sup>25</sup> E. BATTINELLI, *Voto (diritto di)*, in *Dig. Disc. Pubbl.*, 1990, § 8.

<sup>26</sup> F. LANCHESTER, *Voto (diritto di)*, in *Enc. Dir.*, 1993, § 17.

<sup>27</sup> In relation to the Ministerial decree, the “Gruppo di Ingegneria Informatica” (GII) and the “Gruppo di Informatica” (GRIN), two groups of Italian Informatics experts, recently approved a motion on e-voting expressing high risks for the safety of the electoral procedures.

- 47 The personal vote principle leads some constitutional scholars to also doubt the compatibility of the postal vote. As anticipated in the first sections, nowadays election law only allows Italians residing abroad and Italians temporarily abroad for work, study or medical treatment to access this voting method. The legal basis of this exception can be found under Article 48, paragraph 3 of the Italian constitution, which requires the legislator to guarantee the effectiveness of the vote for Italian expatriates. Therefore, the postal vote is admitted only for this limited category of voters just to protect its effectiveness. Unfortunately, Italian postal voting is badly organized. There is a lack of transparency, especially regarding the procedure of sending individual letters and voting sheets by mail. Moreover, there is a lack of controls over shipments. All these factors contribute to considerably increasing the risk of violation of the principles of secrecy and the personal vote principle.
- 48 Therefore, we must consider that remote electronic voting could pose similar problems. First of all, remote voting cannot guarantee that the person who sends the vote from home through a personal device is the eligible voter who is supposed to cast it. Online authentication cannot completely prevent this risk which implies a potential violation of the personal vote principle. Perhaps, in this field, it could be useful to implement biometric technologies to verify voters' identities<sup>28</sup>.
- 49 Another important aspect concerns the relationship between the principle of the secrecy of the ballot and the use of remote e-voting systems. Voting secrecy means that each vote must not be attributable to the citizen who expressed it. In other words, the vote must remain anonymous. This principle is closely connected with the principle of equality of the vote. Moreover, it is a fundamental principle of every democracy. Secrecy is also a prior requirement for protecting freedom, as repeatedly stated by the Italian constitutional court<sup>29</sup>. Only if the voters can rely on the secrecy of the ballot, can they express their will with full freedom, without any pressure or suggestions. Remote e-voting, as well as postal voting, raises a fundamental difficulty in respect of the principle of secrecy<sup>30</sup>. To illustrate the complexity of the problem the following example may be presented: the voters could be observed by someone while expressing their votes from home. Nonetheless, to ensure the respect of the secrecy principle, the e-voting system must not allow people to memorize or print the choice made.

## V. FINAL REMARKS

- 50 All the initiatives illustrated in previous paragraphs represent a remarkable step forward on the Italian way towards e-voting. However, despite the progress, there is still a long way to go. The first phase of the experimentation by the Ministry of the Interior should have started in 2022, during the last

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<sup>28</sup> ROSINI, *Il voto elettronico tra standards europei e principi costituzionali. Prime riflessioni sulle difficoltà di implementazione dell'e-voting nell'ordinamento costituzionale italiano*, cit., 24.

<sup>29</sup> Italian Constitutional Court ruling no. 98/1968.

<sup>30</sup> ROSINI, *Il voto elettronico tra standards europei e principi costituzionali. Prime riflessioni sulle difficoltà di implementazione dell'e-voting nell'ordinamento costituzionale italiano*, cit., 30.

administrative elections and referendum but it did not happen because the Government by decree-law postponed the deadline.

- 51 Looking at the Italian constitutional framework, it is necessary to distinguish between the different infrastructures that can support e-voting. On the one hand, e-voting can be held in protected public facilities. On the other, remote e-voting can be achieved through personal devices in the form of home voting. Looking again at the essential voting requirements established by Article 48 of the Italian Constitution, it is possible to affirm that the former kind of e-voting is more compatible with our fundamental law. Of course, to fully guarantee the secrecy and the personal vote principle even the infrastructure has to ensure security and impenetrability from the outside. It is not difficult to imagine the introduction of public e-voting stations in place of or in addition to the traditional ones. Only in this way can the personal vote and secrecy principles be adequately protected.
- 52 E-voting relates to wider issues of compatibility with the Italian constitution which go to the heart of the hesitancy of scholars to embrace this innovation. Somehow, remote e-voting could be compared with the postal voting, at least as regards the respect for the provisions under Article 48 of the Italian constitution. Remote e-voting collides inevitably with the personal vote and secrecy principles. When citizens privately express their vote from their own home, the State has no power to control whether those votes are expressed in full freedom. In this view, the voting booth offers more guarantees.
- 53 As previously pointed out, the Italian legislator is about to experiment with e-voting only for two kinds of voters: Italians residing abroad and voters living in a place that is not their official residence. Nowadays Italian expatriates can vote by mail. The same opportunity is not given to voters who live in Italy, but in a city where they are not residents. It is estimated that there are approximately 4,9 million Italian citizens (10,5% of all Italian voters) who have to go back to their residences to vote validly<sup>31</sup>. Currently, Italian election law provides a few electoral refunds (for the journey by train or affiliated air or sea companies). However, they fail the goal of securing concrete financial aid, since they are not sufficient to cover voters' travel expenses. As a result, due to both organizational and economic reasons, many voters decide not to go and vote and, in so doing, they sacrifice their fundamental right to vote. This is an anomaly that urgently needs a solution.
- 54 One option might be to extend postal voting to citizens who live far from where they reside, in a way similar to what already happens for Italians residing abroad (such as by introducing forms of early voting). An alternative might be to implement electronic voting by taking the necessary precautions. An on-site e-voting facility would be preferable and the IT supporting infrastructure should wholly guarantee compliance with all voting security standards.
- 55 In the light of the above, I believe we should look at e-voting as opportunities. Of course, there are still some issues of compatibility with the personal vote and secrecy principles to solve. Nevertheless, these tools might facilitate voting by allowing citizens to vote who would otherwise be unable to do so

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<sup>31</sup> White paper, cit., p. 17. Among the 4.9 million voters who live or study outside their province of residence, 1.9 million (4% of all voters) would take at least four hours round trip to return to their place of residence.

for all the reasons outlined above. In this sense, it is worth recalling that there are other constitutional provisions relevant to the right to vote besides Article 48. In fact, Article 3 should also be considered. Its second paragraph establishes: “It is the duty of the Republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country”. All the difficulties experienced by citizens living far from their residence.

- 56 With the terms “remove those obstacles” that impede “the effective participation of all workers in political (...) of the country” the difficulties connected with living far from the voter’s place of residence immediately comes to mind. Hence, Article 3, paragraph 2 could be balanced with Article 48, paragraph 2, in particular with the personal vote principle, in order to come to an acceptance of remote e-voting. In this sense, it is important to highlight another principle that is part of the equation, that of universal suffrage.
- 57 Finally, both the experiments conducted by the Ministry of the Interior and those conducted by the Ministry of Foreign Affairs seem to be positive enough to encourage a debate on e-voting in Italy. Last year’s Com.It.Es. simulation was held using a home voting system. However, it would be better if the Ministry of the Interior’s forthcoming experiment were held in controlled public polling stations in the form of on-site e-voting.

## RESUME :

*Le vote électronique est sans aucun doute un défi pour les démocraties contemporaines. Au cours des dernières années, l'Italie a adopté une approche hésitante du vote électronique en favorisant des expérimentations locales diverses et décousues sans aucune stratégie nationale. Récemment, le législateur italien a renouvelé son intérêt pour la question en créant un « Fonds pour le vote électronique » au sein du ministère du Budget de l'Intérieur. Le fond vise à encourager l'expérimentation du vote électronique adressé uniquement aux Italiens résidant à l'étranger et aux électeurs qui vivent dans une ville différente de celle où ils résident. En fait, en vertu de la loi électorale italienne, cette dernière catégorie d'électeurs doit rentrer chez elle pour voter valablement. Pour réglementer les expérimentations, le ministère de l'Intérieur adopte un décret basé sur les travaux d'une commission d'experts. Parallèlement, le ministère des Affaires étrangères a entrepris son expérience de vote électronique pour l'élection de l'organe consultatif des Comités des Italiens de l'étranger (Com.It.Es.). Partant des cas susmentionnés, le document vise à souligner brièvement certaines questions constitutionnelles nationales liées au vote électronique. Ensuite, il se concentrera sur l'utilisation du vote électronique comme moyen de combler les lacunes de la loi électorale italienne selon laquelle les électeurs qui vivent loin de leur lieu de résidence sont obligés de rentrer chez eux pour exercer valablement le droit fondamental de voter. Ce facteur était particulièrement évident lors de la pire phase de la pandémie de Covid-19 lorsque les voyages représentaient également un risque pour la santé des électeurs.*

## SUMMARY:

*Electronic voting is undoubtedly a challenge for contemporary democracies. Over the last few years, Italy has adopted a faltering approach to e-voting by fostering various and disjointed local experiments without any national strategy. Recently the Italian legislator has renewed its interest in the issue by setting up a “Fund for electronic voting” in the Ministry of the Interior Budget. The fund is aimed at encouraging e-voting experimentation addressed only to Italians residing abroad and voters who live in a different city from where they are resident. In fact, under Italian election law, the latter category of voters has to go back home to validly cast the vote. To regulate the experiments, the Ministry of the Interior adopted a decree based on the work of a commission of experts. In parallel, the Ministry of Foreign Affairs undertook its e-voting experiment for the election of the consultative body of the Committees of Italians abroad (Com.It.Es.). Starting from the above-mentioned cases, the paper aims to briefly point out some domestic constitutional issues connected to e-voting. Then, it will focus on using e-voting as a way to fill the loopholes in Italian election law according to which those voters who live far from the place of their residence are forced to go back home to validly exercise the fundamental right to vote. This factor was particularly evident during the worst phase of the Covid-19 pandemic when travel also represented a health risk for voters.*