

OBSTRUCTION OF THE EXERCISE OF ELECTORAL RIGHTS

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Abstract

Throughout the present study, we analyze the crime of obstruction of the exercise of electoral rights, as it is presented in the New Criminal Code, in comparison with the current regulation within the specific election laws. Taking into consideration the fact that the election crimes have been inserted as a separate title (section) in the New Criminal Code, we need to highlight the vision of the legislator regarding these crimes. Furthermore, this study consists of a synthetic analysis of the constitutive elements of the mentioned crime, as reconfigured in the form provided by art.385 of the New Criminal Code. We consider that examining this crime is a necessity, because of the lack of Court decisions in this area of practice - probably due to the gaps in the legislation preceding the Criminal Code that is to be enforced in the near future.

Keywords: elections, constitutional rights, obstruction, civil and political rights, democratic competition

1. Introductory Considerations

Equality and freedom, as the fundamental principles of the life in any society, need a political and legal correspondent of an institutional type, namely the Fundamental Law, which lays down the principles imposed by the democratic game, allowing the affirmation and the achievement of sovereignty as an exercise conducted through representative bodies.

Elections are, traditionally, the democratic process by which the people, as the holder of national sovereignty, exercise their right to elect and to designate their representative bodies, entrusting them with powers of utmost importance. This operation mechanism of the Establishment is driven by the decisional component of the people, consisting of the constituency, whose free expression of the right to vote legitimates and enforces the power of the state and the state authorities as such.

Political pluralism is in the Romanian society the central pillar of democracy, representing a condition and a guarantee for constitutional democracy. Political parties established by law “contribute the maintaining and the free expression of the political will of citizens”.

Under these circumstances, the membership in one political party or another and the supporting of any party’s ideology through direct involvement in the political life are fundamental rights of the citizens enshrined in and safeguarded by the Fundamental Law.

As the electorate is the one deciding on the governing and the governed and on the political party alternation to power, its political will ought to be clear and free and restricted only by the rules of democracy and political pluralism, all manifested as a legal corollary designed in such a way as to prevent any sideslips with unpredictable consequences.

Over the time, the defense of the political and the civil rights of citizens has been a constant concern of democratic regimes. During the interwar period, namely in 1936, the Criminal Code was adopted, known as the Criminal Code Charles II, which, under Title II, suggestively headed “Crimes Against the Exercise of Political and Citizens’ Rights”, was listing a series of offenses against such rights. Although some of these offenses were also incriminated by the electoral laws of the time (The Romanian Election Law of 27 March 1926, Article 122), the lawmakers considered it as an imperious necessity to criminalize them under the Criminal Code as well, as a further warranty for the safeguarding of the political rights of the citizens. In fact, the purpose of this criminalization was

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to “protect the citizens in the exercise of these rights and freedoms and to punish those attempting to prevent the free exercise thereof.”

The coming to power of the communist dictatorship regime was a new stage, which, judging in terms of the legal safeguarding of such rights, represented a major setback. In spite of these rights being enshrined in the Fundamental Law of 1965, they could not actually be safeguarded due to the dictatorial politics of the ruling party.

After December 1989, the establishment of the political parties and the revival of political pluralism and the parliamentary system called for the need to put in place a legal framework designed to defend the citizens' political rights, which materialized by incorporation in the election laws of specific provisions to criminalize the acts of violating the rights under our consideration.

Nowadays, nearly two decades from the county's return to democracy, the lawmaker has considered it necessary, acting in line with the modern trend towards crime codification system upgrading, to incorporate in the new Criminal Code an additional title, Title IX, covering election crimes. As a matter of fact, we believe that by placing election crimes under Title IX, right before Title X “*National Security Offenses*”, Title XI – “*Crimes Against the Fighting Capacity of Armed Forces*”, and Title XII – “*Crimes of Genocide, Crimes Against Humanity and War Crimes*”, the lawmaker has not only wished to stress out the high importance of the social values being safeguarded, which are a mix of public and private interests, in a context where this revised structure of the new Criminal Code is a common trait found in most European codes, but also to reflect the shape and the dynamics of the regulation, in keeping with the established order of incriminating, firstly, the offenses against individual interests and, secondly, the offenses harming the collective interest.

Obviously, election crimes have a complex generic judicial object, which comprises, on the one hand, the social relations dealing with the building of and compliance with the general organizational framework required for the safe running of the election process and the supervision of the democratic process of election of the public bodies, a process which must be governed by the rules of fairness and correctness in order that it may legitimize the results of the electorate vote. On the other hand, all of the criminalization in the New Criminal Code aim at respecting the exercise of the fundamental political rights (right to elect and be elected), which are protecting the individual, as a social relation, seen in relation to his or her apertenance to the Romanian state.

2. Notion and Legal Content

According to the provisions of article 385 paragraph (1) of the new Criminal Code, *prevention by any means of the free exercise of the right to elect or to be elected shall be punished with imprisonment from 6 months to up to 3 years*. Also, pursuant to paragraph (2) of the same article, *attack by any means against the election place shall be punished with imprisonment from 2 to up to 7 years and the prohibition to exercise certain rights*.

Article 385 of the New Criminal Code has no counterpart in the previous Criminal Code, being, in fact, taken over from Article 52 and Article 58 of Law no. 35/2008 on the election of the Chamber of Deputies and of the Senate¹ and from Article 22 and Article 22⁶ of the Law no. 33/2007 on the organization and the running of elections to the European Parliament², as well as from Article 107 and Article 111 of Law no. 67/2004 on the election of local public administrations³ and Article

¹ Published in the Official Journal of Romania, Part I, no. 196, of March 13 2008, as further amended by the GEO no. 66/2008 and GEO no. 97/2008.

² Published in the Official Journal of Romania, Part I, no. 28, of January 16 2007, as further amended by the GEO no. 1/2007. GEO no. 8/2007. GEO no. 84/2007, GEO no. 11/2009 and GEO no. 55/2009.

³ Published in the Official Journal of Romania, Part I, no. 271, of March 29 2004, republished in the Official Journal of Romania, Part I, no. 333, of May 17 2007, as further amended by Law no. 131/2005, GEO no. 20/2008, Law no. 35/2008, GEO no. 32/2008 and Law no.129/2011.

263 of Law no. 370/2004 on the election of the President of Romania⁴. Compared to the previous regulations, the content of Article 385 of the New Criminal Code brings together and summarizes the provisions of the normative acts dealing with the organization and the running of the different types of electoral processes in Romania. Thus, the article is virtually reiterating identically the crimes criminalized under Article 26³ of Law no. 370/2004, whose scope of application, however, has been extended to include the types of elections referred to in the previous body of laws, by repealing all the relevant articles from the aforementioned special laws.

The offense of preventing the exercise of electoral rights is regulated in Article 385 of the Criminal Code, in both its standard and its aggravated forms. The standard type of such offense is referred to in Article 385 paragraph (1) of the Criminal Code and covers the prevention by any means of the free exercise of the right to elect or be elected. The aggravated form of this crime deals with the attack by any means against the place of election (polling station) [Article 385 (2) of the Criminal Code].

3. Analysis of Constituent Elements

3.1. Pre-existing Conditions

The special legal object consists mainly of the social relations related to the creation of and ongoing compliance with the general organizational framework for the fully safe running of the electoral process, as well as of the social relations dealing with the respect for the exercise of the fundamental political rights of the individual (the right to elect and to be elected).

This bundle of social relationships that are safeguarded by criminalization of the offense against these rights is primarily outlined by the provisions of the Fundamental Law of Romania, Title II, Chapter II – *Fundamental Rights and Freedoms* and in particular by Article 36 – *Right to Elect*⁵, Article 37 – *Right to Be Elected*⁶ and Article 38 – *Right to be elected to the European Parliament*⁷. The respect for the election rights of the Romanian citizens is in fact in full agreement with the international regulations and with the provisions of Article 3 of the First Additional Protocol to the European Convention on Human Rights, as well as with the provision of Article 25 of the International Covenant on Civil and Political Rights, consecrating the right to vote and to be elected at by organization of free elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors⁸.

⁴ Published in the Official Journal of Romania, Part I, no. 887, of September 29 2004, as further amended by GEO no. 77/2004 and GEO no 95/2009.

⁵ Pursuant to Article 36 of the Fundamental Law of Romania: “(1) Every citizen having turned eighteen up to or on the election day shall have the right to vote. (2) The mentally debilitated or mentally alienated persons placed under interdiction as well as the persons disenfranchised by a final decision of the court cannot vote.”

⁶ Pursuant to Article 37 of the Fundamental Law of Romania: “(1) Eligibility to be elected is granted to all citizens having the right to vote, who meet the requirements in Article 16 (3), unless they are forbidden to join a political party, in accordance with Article 40 (3). (2) Candidates are required to have turned, up to or on the election day, at least twenty-three years of age in order to be elected to the Chamber of Deputies or members of local public administration bodies, at least thirty-three years of age in order to be elected to the Senate, and at least thirty-five years of age in order to be elected to the office of President of Romania.

⁷ After Romania's accession to the European Union, Romanian citizens shall have the right to elect and be elected to the European Parliament.

⁸ For a detailed analysis of the terms “elections” “electoral process” “right to elect” and “right to be elected” see I. Muraru, E.-S. Tănăsescu, A. Muraru, K. Benke, M.-C. Eremia, Gh. Iancu, C.-L. Popescu, Șt. Deaconu – *Elections and Constituency* – Ed. All Beck, Bucharest, 2005, pp 1-15; I. Deleanu – *Institutions and Constitutional Procedures – Romanian Law and Comparative Law* – Ed. C.H. Beck, Bucharest, 2006, pp 66-68, pp 135-183, pp 489-490 and pp 572-583.

Note should be made here that the legal status of the organization and conduct of elections in Romania is determined by the provisions of the election laws, namely by Law no. 35/2008 on the election of the Chamber of Deputies and of the Senate, Law no. 33/2007 on the organization and conduct of elections to the European Parliament, Law no. 67/2004 on the election of local public administrations, and Law no. 370/2004 on the election of the President of Romania.

The material object. A crime is usually devoid of material object to the extent to which the social values safeguarded by the standard type of the offense criminalized are abstract values and are not expressed by a material entity⁹. In its aggravated form however, we believe that the material object consists of the place of election (the building as such where the polling station is located, the various items inside the polling station etc.). However, where the crime also affects the bodily integrity of individuals inside the polling station, this does not become the material object of this crime but of another distinct crime, i.e. the crime against the bodily integrity or the health of the individual, in relation to which the offense referred to in paragraph (1) or paragraph (2) of Article 385 of the Criminal Code will be deemed as a concurrent crime.

The active subject. The active subject of the crimes covered by Article 385 of the Criminal Code can be any individual who meets the general conditions of the active subject of the crime. However, there are frequent cases when the active subject holds a certain official position: president or the members of the electoral bureau of a polling station; security officer in charge with public order and peace within the polling area; a member or a supporter of a particular party, faction or political alliance.

Criminal participation may occur in all its forms, in either of the forms of crime subject to criminalization.

The passive subject. The main passive subject is the state by its central and local administrations or its specialized bodies (The Permanent Electoral Authority) in charge with the organization and the running of the various types of elections in Romania.

Secondly, the passive subject is, on the one hand, the citizen who meets the requirements of the law allowing his or her to exercise his or her right to vote, and, on the other hand, the person / political party / political or electoral alliance that runs for the election.

According to the provisions of the Fundamental Law specified above and to those laid down by the election laws, to be a part of the constituency a person is required to meet the following legal requirements: to be a Romanian citizen, to have turned 18 years old before or on the day of election, not to be mentally impaired or alienated and not to be placed under a ban or disenfranchised by a final decision of the court.

On the other hand, the passive subject and the individual who is lawfully entitled to be elected may also be any citizen enjoying the right to elect, who resides in Romania, unless he or she is forbidden to join political parties under Article 40 (3) of the Fundamental Law of Romania. Also, depending on the public function or office the citizen intends to candidate for, he or she must also meet further conditions set out by the Fundamental Law and by the election laws, as appropriate. For example, under paragraph (2) of Article 37 of the Fundamental Law “*candidates must have turned, up to or on the election day, at least twenty-three in order to be elected to the Chamber of Deputies or the bodies of local public administration, at least thirty-three in order to be elected to the Senate, and at least thirty-five in order to be elected to the office of President of Romania.*”

3.2. The Objective Dimension

The material element of the crime referred to under paragraph (1) of Article 385 of the Criminal Code is the prevention by any means of the free exercise of the right to elect or be elected. According to the definition given by the legislator, the action of the active subject may be exercised

⁹ I. Pascu – Criminal Law, General Part – Ed. Hamangiu, Bucharest 2007, p. 157.

by both an action and an inaction and can take two forms: in the first sentence the offender prevents the elector from exercising his or her electoral choice, and the second sentence refers to the act of preventing a citizen or a political party or a political/an electoral alliance, that meets all the conditions established by law to run for elections, from obtaining the vote / votes of the constituency.

It is worth highlighting here that, although these forms of exercising the material element appear as alternative, the exercise of either form would normally involve the exercise of the other form as well, given the fact that prevention of the elector from manifesting an option may indirectly imply the prevention of any of the competitors to take advantage of that vote, and vice versa.

Preventing the free exercise of the right to elect or be elected can take the form of an action, such as, for example, the unreasonable prohibition of access of the elector to the polling station, the unlawful rejection of the candidature file of an eligible candidate etc., or the form of an inaction, such as, for example, refusal to give an elector the ballot ticket to be filled in.

Prevention action may be exercised, according to the legislator, “by any means”, an expression which may involve both an act of physical obstruction, and one of a mental nature, such as solicitation or exertion of moral pressures on the passive subject. On the other hand, the action related to the material element may be performed either directly by the active subject or through other people (an order given to the security officer in charge with surveillance of the election place to forbid access onto the premises of certain persons or the blocking of the entry). However, where the action of the offender involves the use of any means that are typically associated with other crimes, such as unlawful deprivation of liberty, threat, blackmail, physical abuse, forgery etc., then the crime referred to in Article 385 (1) is concurrent with that particular offense (multiple offenses), where appropriate.

In its aggravated form, the material element of such crime involves the attacking by any means of the polling station. This manner of committing a crime is always and exclusively by way of action, as defined by the expression *verbum regens*, which describes an aggression against the election station. We believe that the wording “election station” refers to the building where the polling station is located and any items as may be found on the premises, in which case the action corresponding to the material element is not directly against the persons inside or in the immediate vicinity of the election station.

However, where the assault affects (also) one/several individuals, then we will be dealing with a case of multiple crimes consisting of the offense referred to in Article 385 (2) of the Criminal Code and a crime against the life, the bodily integrity or the health of an individual, respectively, as the case may be.

The main and immediate consequence of this offense is the generation of a hazardous situation, which endangers the exercise of the fundamental political rights of the citizens, while secondarily endangering the proper organization and conduct of the election process.

The causal link results from the materiality of the act (*ex re*), i.e. preventing the exercise of political rights by any means, which would suffice in itself to endanger the safeguarded values.

3.3. The Subjective Dimension

The form of guilt is usually the direct purport; however, indirect intent may also be considered a form of guilt depending on whether the active subject has sought to actually prevent the exercise of political rights or has only agreed with such a possibility.

The motive and the purpose, though not specifically determined, may also be relevant in determining the form of guilt with which the crime was committed, all the more that crimes of this type are in most cases caused by dissatisfaction with some of the candidates in the elections or are purporting at favoring some candidates in the detriment of others.

4. Forms and Means

This crime is susceptible of all the forms of the offense purported. Thus, while **the acts preparatory to the commission of the crime**, though possible, are not criminalized, the **attempt** is criminalized under Article 393 of the Criminal Code. For example, the attempt to commit an electoral crime occurs in the following case: after the voting and the return of the vote stamp, the elector is asked by a member of the election bureau to leave the section without signing the electoral list, thereby purporting to invalidate the elector's vote, although the elector refuses to follow the order and proceeds to the signing of the electoral list.

Consummation of the crime takes place upon the successful prevention of the exercise of the right to elect or be elected or in the case of an attack against the polling station.

5. Penalties

Preventing the exercise of electoral rights, in the standard form, is punished with imprisonment from 6 months to up to 3 years.

In its aggravated version referred to in paragraph (2), i.e. in the case of attack (assault) by any means against the polling station, is punished with imprisonment from 2 to 7 years and the prohibition of exercising certain rights.

Under Article 33 of the Criminal Code, attempt is applied the punishment prescribed by law for crime consumed but reduced to half.

Conclusions

As the legislator states in the Recitals to the new Criminal Code, it was considered preferable to regroup electoral crimes under a separate title of the Criminal Code, in order to give this text of law a greater stability, while also eliminating the overlaps currently existing in the regulation. Indeed, under the various incriminations contained by the election laws in force, although the offenses criminalized by the various laws are to a large extent similar, some correlation gaps and discrepancies have nevertheless pervaded into the regulation, which are totally unreasonable. Therefore we believe that in this case, too, alike in the case of other provisions of the New Criminal Code, the law has returned to the interwar legislator's mindset, with the systematization and the restructuring of these crimes involving also a more just individualization and enforcement of the legal texts in this matter.

Consequently, in the context of this new regulation, we believe that the process of establishment, investigation and punishment of the crimes contemplated herein may take place in conditions that are more favorable than in the past. Moreover, the absence, for various reasons, of previous judicial practice should not obstruct the application in the future of this text of law, taking into account the multitude of electoral processes taking place in Romania after the country's accession the European Union in 2007.

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