

ELECTORAL CRIMES - CONCEPT AND EVOLUTION UNTIL 1990

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Abstract

Throughout this paper, the author tries to configure the concept of electoral crime, by presenting the legal, philosophical and historical opinions emerged centuries ago and also by drawing a line between political criminality and ordinary criminality. Furthermore, the study aims also to synthetically highlight the important moments of the legislative evolution in the specified area of interest, starting from the early nineteenth century, during the monarchical regime and ending with the totalitarian government of Romania until the Revolution in 1990. Taking into consideration the new incrimination of electoral frauds in the New Criminal Code adopted in 2009, examining the historical - teleological conditions of the former regulations of these crimes appears as a necessary intercession, in order to ponder upon the new Criminal policy of the legislator.

Keywords: elections, democracy, political crime, legislative change, fundamental human rights

I. The concept of electoral offense

In the universal doctrine was attempted, over the time, the emphasizing of a demarcation between the ordinary and political crime, where such offenses were also classified.

In the year 410 BC, Demofantes's Decree was engraved on a bronze column located near the entrance of the Senate, reminding all citizens that:

“If somebody threatens the democratic government of Athens, he will be considered an enemy of the Athenians, he may be killed without a trial, and his fortune will be confiscated. The one who will kill or support his murder will be presumed innocent and blameless. All Athenians shall make the following oath: I will kill, with my own hands, if I can, the one who will destroy the democracy in Athens ..., the one who will proclaim himself a despot or help someone to become a despot. If someone else will kill him, he will be presumed innocent and pure before the gods, like the one who killed at war an enemy of Athens”¹.

Finally, it should also be cited another political punishment, specific to the Ancient Greece: it is about ostracism.

This political measure was intended to remove all those who seemed to be dangerous for the established political order and it is applied when there was insufficient evidence for an actual indictment.

That measure was taken by the Assembly of the people, which could be seized by any citizen, and consists in removing the offender from the fortress for 10 years, without impairing his honor or goods; that measure was also revocable at any time within 10 years, also by the decision of the Assembly of the people².

The renowned Professor R. Garraud stated that what characterizes the political offense, in the objective opinion, is the nature of the right affected by it. Therefore, “the infringement to the two categories of rights is subject, in most of the modern Codes, to two categories of crimes: the crimes against the external security of the State (Landesverrath), the crimes against the internal security of

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¹ Cf. Thoisseu, Criminal Law of the Athenian Republic, page 196, a quote by V. Pantea in *Infrațiunea politică și dreptul penal contemporan [Political offense and contemporary Criminal Law]*, Lumina Lex Publishing House, Bucharest 1998, page 13.

² C. Lombroso, *Political offense and revolutions*, 2nd volume, pages 221-222.

the State (Hochverrath). Any aggression against the political order, provided that they are incriminated by the criminal law, has a political nature.”³

Therefore, the purely political offense is the one which has not a predominant, but an exclusive and unique object, to destroy, alter or disturb the political order in one or more of the particulars thereof.⁴ The political order is the ensemble of the powers holding the general interests of the country. It includes: on the outside, independently of the nation, the integrity of its territory and the relationships of the State with other States; on the inside, the type of government, the organization of public powers, their mutual relationships and finally the political rights of citizens. However, shall be acknowledged, without objection, the purely political offenses: to have relationships with the enemy; to bring weapons against their country; to conspire in order to change the type of government; to join illicit political societies; press offenses (except for the attacks against individuals); offenses to the rules concerning the political elections, public meetings; all these offenses do not violate the law and the political interest.

As a conclusion, Garraud appreciated that the political offenses are less directed against the bases of social life than against the established order: therefore, they have not the same nature as the common law offenses – “The reasons which impel us to act in political offense are, most of the times, disinterested, sometimes even commendable; the goal we want to achieve has not such a personal and selfish nature which inspire the ordinary perpetrator: the political offense has not the same immorality as the common law offense. A rational legislation will suppress these two kinds of offenses by different punishments.”⁵

Thus, although, over the time, there were also opinions which placed such offenses in a range of deviant behaviors considered less dangerous to society, the consecration of importance of the fundamental political rights worldwide, especially from the second half of the twentieth century, led to an increased attention to such criminal acts.

Professor V. Dongoroz appreciated that “there is no intrinsic, overall difference between these two categories of offenses (common law offenses and political offenses – n.n.) – since, whenever, an ordinary offense may become a political offense, due only to the entirely intrinsic circumstances”⁶.

This is what I. I. Haus firmly argue: “By political offenses we must understand the offenses and crimes hitting only the political order”⁷.

A closer definition also suggests the great jurist Franz von Liszt who considers political offenses the ones affecting the existence and security of their own state or of a foreign state, as well as those directed against the head of the government and against the political rights of citizens.

Or, more synthetic and highly accurate: “the political offenses are the crimes and offenses hitting only the political order, either external or internal”⁸.

Therefore,, I. Tanoviceanu has considered the electoral offenses “also a type of political offenses,” an assertion also repeated by T. Pop in 1923.

But I. Tanoviceanu, soon after he made this statement, says that they (the electoral offenses) could be considered as a third category of offenses, besides the political and common law offenses, which obviously leads to a lack of clarity of the concept.

The French legal doctrine considers the political nature of the electoral offenses beyond any doubt, arguing his point of view with the jurisprudence⁹; they say it is about crimes and offenses against the Constitution and, in particular, electoral frauds.

³ R. Garraud, *Traite theorique et pratique du droit penal francais*, 1898, p.197-207.

⁴ A. De Stieglitz, *Etude sur l'extradition* (Paris, 1883). D. Lowenseld Zeitschrift fur die gesamte Strafrechtswissenschaft, 1885, p.55.

⁵ R. Garraud, quoted works, p. 211.

⁶ Vintilă Dongoroz, *Drept penal* (Criminal Law), Bucharest, 1939, page 314.

⁷ I.I.Haus, *Principes genereaux du droit penal – belge*, Paris, 1889, vol. I, page 252.

⁸ G. Vidal, *Principes fondamentaux de la penalite*, Paris, 1890, pag. 76.

⁹ R. Merle, A. Vitu, *Traite de droit criminel*, Ed. Cujas, Paris, 1997, pag.239.

The electoral offenses may be defined as “that category of acts provided by the criminal law having as object the social relations involving the normal conduct of political life.”¹⁰ Another definition of the electoral offenses was given by the Professor T. Pop, as follows “the electoral offenses are those offenses affecting the cleanliness and legality of elections for the legislative bodies”¹¹.

Thus, starting from the legal object of this category of offenses, it is found that they concern an essential attribute defining the notion of politics.

It stands to reason that these offenses affect precisely those essential elements by which is manifested the political composition of the society; the occurrence of violence, frauds, forgeries in the electoral process - so crimes -, denoting the actual existence of the sides which define, at least in terms of subjective criteria, the qualification as a political crime.

Given the foregoing, it is noted that the criminalization of the electoral offenses “protects the essential attributes of the free exercise of the political rights of citizens: the right to vote and to be elected, secrecy of the vote, correctness of vote, health and physical integrity of the electorate, defense against the electoral frauds”¹².

At least seven methods of election fraud populate the Romanian political imagination. From the fraudulent voting system (taking over of the sealed ballots by electors at the entrance to the polling station and handover, in exchange, of the unsealed ballots on exit), to the baton (the simplest version of the previous consisting of failure to submit some sealed ballots by some of the first electors and handing them to the representative of the party who distributes them to other electors then entering the logic of the fraudulent voting system), from the blue shirt (another version of the first method when the voter who declare that he is unable to focus on the vote requires the assistance of a particular member of the polling station - for example the one dressed in a “blue shirt”) takes as much terrestrial the replacement (the substitution of the voted ballots and replacing them with other „properly” sealed ballots); the insecurity and handling of ballots play an important role in the mythology of the Romanian elections. On the other hand, the infiltration (the submission of some persons to a polling station, other than the one to which they belong, where, with the complicity of the representative of the party, they would vote on behalf of a systematically absent voter), hikers (a formula inspired by the existence of the special lists allowing the voting of the electors belonging to another station or from another place) or non-transportable (use of mobile ballot box to force the vote of older people who otherwise would not have participated in the poll) indicates another direction, that of multiple voting or administratively conditioned vote.¹³

Obviously, the punishment of the electoral offenses aimed to protect some values related to the state sovereignty, including, on the one hand, the social relations concerning the creation and compliance with the general organizational framework for conducting the electoral process, in complete safety and watching the democratic process for the election of the public authorities which must take place in complete fairness in order to confer legitimacy to the results of the vote of the electoral body.

II. Evolution of the regulation of the electoral offenses in Romania until 1990

The regulation of the electoral offenses was due to the electoral frauds existing right from the beginning of the organizations of popular consultations and of the first appointments of some governors for leading the Romanian countries in the nineteenth century.

¹⁰ Gh. Diaconescu, *Infracțiunile în legile speciale și legi extrapenale* [Offenses in special laws and other courts laws], Sirius Publishing House, Bucharest 1994, p.36.

¹¹ T. Pop, *Drept procesual penal. Parte introductivă* [Criminal Procedural Law. Introductory part], 1st volume, Ed. Universul Juridic (Legal Universe Publishing House), Bucharest, 2011, page 257.

¹² V. Pantea, quoted works, page 64.

¹³ Pro Democracy Association – History of a disagreement: the uninominal vote, 2008, www.apd.ro, p.11.

Thus, in 1857, at the first elections in the Principalities for the ad hoc Divan also broke out the first scandal of fraud whose international impact marked the history of the Union. And, at that time, not the vigilance or organization of the unionists allowed the disclosure of counterfeiting of the elections in Moldova by the Caimacam Nicolae Vogoride, but the courage of his wife, Ecaterina (Cocuța) Conachi, the stepsister of Costache Negri and the daughter of the famous chancellor - the poet Costache Conachi. She discovered the secret correspondence between the governor and his relatives of Phanar proving the intervention of the Gate for the falsification of the elections. Handed over to her brother and published in *L'Etoile d'orient*, edited in Brussels, the documents could justify the unionists' pressure for canceling the elections. Meanwhile, in Moldova this evidence circulated as an Extract of the secret letters sent to the Caimacam of Moldova by great political figures and contributed to the relaunching of the electoral process. This was the context which launched Alexandru Ioan Cuza on the first stage of the political life, a chief magistrate of Galati at that time, otherwise a relative of Vogoride (who appointed him and facilitated his rapid ascent in the army), whose resignation resulted in maximizing the scandal. Faced with the refusal of the Ottoman Empire to cancel the elections, France, Russia, Prussia and Sardinia broke the diplomatic relations with the power from Istanbul.

The tensions between England, Austria, encouraging the Gate not to accept new elections, and the other states participating in the Congress of Paris reached the brink of a war which was prevented only by the meeting in Osborne between Napoleon III and Queen Victoria after which the elections falsified by Vogoride were canceled.

After becoming a Lord of the United Principalities in 1859, Cuza did not hesitate to use, in the confrontation with the Opposition, some authoritarian methods and to influence the results of the elections. Introducing the Senate as a “balancing body” in the Developing Statute was a coup constitutionally intended to limit the role of the Chamber of Deputies. By the institution which this year celebrates its 140 years of existence, consisting of senators by law and senators appointed by the Lord, Cuza ensures his absolute control over the political life, so that not only the conservative majority, but also the parliamentarism was affected.¹⁴

In the Electoral Law voted in July 1866 there is a provision which foresees that any abuse of the electors shall be punished by fine or imprisonment, and five electors had the right to file a lawsuit for punishing the offenses committed during the elections, if the public ministry had no initiative.

During the monarchial period, the only elections not suspected of fraud are those of 1928 won by Peasants on the background of the Liberals' crisis after the unexpected death of Ionel Brătianu in 1927. The constitutional system inaugurated in 1866, kept after the constitutional changes of 1923, assumed the appointment firstly of the Prime Minister and then the convening of the elections. Any government which held elections in Romania, except for the Tătărăscu government in 1937, never lost such elections. The used means varied according to the size of the electorate. Until the imposition of the universal suffrage, in 1919, the control of the polling stations was sufficient to designate the winning party. Constantin Bacalbașa in the “Bucharest of yesteryear”, a witness and a victim of the electoral practices of the late nineteenth century and the early twentieth century, describes the *a la romaine* use of the electoral agents, actually some bullies paid to prevent the renowned electors of the adverse party to exercise their electoral right. The party which thus obtained the control of as many polling stations won the elections, and the complicity of the authorities was more than transparent. Miming the elective process has contributed to the undermining of the democracy and has provided an alibi for the extremist movements thriving after the First World War.

According to the law of 1918, the elector should remove or cut with a pencil the lists or the names of the candidates who did not want to choose and to make visible only the selected list or the name of the favorite candidate. The number of candidates who are not removed from the ballot could not exceed the number of mandates of that constituency, but the elector was allowed to vote for

¹⁴ Pro Democracy Association – History of a disagreement: the uninominal vote, 2008, www.apd.ro, p.9.

fewer candidates. Nothing else could be added on the ballot, any sign being construed as an attempt at deception.

Since the introduction of the universal suffrage in 1919, the method of fraud was adapted. The falsification of the results could no longer be achieved by the contribution of the “street agitators”, but in the regions under martial law, such as Bessarabia and the Quadrilater, the victory of the Government was assured.

The elections in 1922, organized and conducted by the Liberal government, by Ion I.C. Brătianu, were held, in the same manner for the Chamber, between 5 to 7 of March 1922, and for the Senate, during the 4 days - 1, 2, 9 and 10 of March 1922 (although the law provided only 2 days). The citizens who had certificates of elector were forced to vote in the section or subsection “to which belongs the village of residence”; those who did not exercise such right “without a legal basis” were sent to the competent justice of the peace and punished with a fine of up to RON 500.

A Peasant candidate exiled in a constituency of Quadrilater during the elections in 1926, Grigore Gafencu stated in “Political notes” the experience of his detention by the representatives of the Ministry of Interior, managed by Octavian Goga, in full campaign and his liberation once the results have been published.

The fragmentation of the political life and the emergence of the coalition governments justified the introduction of the electoral premium, another method of circumventing the vote and artificial insurance of absolute majority. Following the amendments to the Electoral Law of 1926, the party which achieved 40% of votes received, as a premium, 50% of mandates, and from the other half a number of mandates equivalent to the share of the obtained votes.

The vote based on qualification between 1866 and 1919 allowed a type of fraud, the proportional representation between 1919 and 1937, another, but the result was the same: the crisis of democracy. In 1937, Carol the Second believed that it was the time for a personal government, so that prevented the accomplishment of the 40% threshold by the Liberals who still occupied the first position with 36%. However, the government was set up by the National Christian Party, managed by Octavian Goga and A.I. Cuza, ranked the fourth with 9.15%. The coup of 10 February 1938 became justifiable, and the authoritarian government became possible. The plebiscite for the Constitution of 1938 was a simulacrum where underwent the open vote, only 5,483 Romanians having the courage to vote against, versus 4,300,000.

The last elections in the Kingdom of Romania of November 19, 1946 had been rigged by reversing the shares. The government of Groza, represented by the Bloc of Democratic Parties, claimed 70% of the votes, and the remaining 30% of the seats were divided to the other parties (the National Peasant Party - 13%, the Hungarian People's Union - 8%, the National Liberal Party - 4%). The repressive electoral campaign and the circumvention of the electorate's will reached its peak.

In the Criminal Code of Carol the Second was legislatively established the complex political offense, in the provisions of article 27, paragraph 1, being stipulated as follows: “when from the circumstances in which it was committed or due to the reason is found that an offense ... has a political nature, but it is sanctioned by law with common law punishments, the court shall replace the common law punishment with a political punishment”.

Therefore, the Criminal Code of Carol the Second implicitly stipulated the political offenses by providing some punishments exclusively intended to this category of offenses. In the article 22, paragraph 2 and article 23, paragraph 2, of the Criminal Code of Carol the Second, establishing the punishments for the political offenses, provided the following grid:

a) Punishments for crimes in the political field:

- Hard life detention;
- Hard detention from 5 to 25 years;
- Rigorous detention from 3 to 20 years;

b) Punishments for each offense in the political field:

- Easy detention from 1 month to 12 years;

- Fine from RON 2,000 to 20,000, except when the law provides another maximum.

There was no political punishment in the correctional field.

In the articles 36, 37 and 38, the Criminal Code of 1936 explained in detail how the punishments were executed in the political field, essentially the difference between the hard and rigorous detention and easy detention, consisting in the fact that those convicted to the first two categories were subjected to the isolation regime during the night and forced to perform a work while the person convicted to an easy detention, besides he/she was not subject to the isolation regime and had other rights, quite large: free communication with the family members, the permission to receive books, magazines and journals, the possibility to support themselves on their own.

Regarding in terms of punishments, the Criminal Code of Carol the Second established as political offenses, among others: the crime of overthrowing the constitutional order (article 207); the crime of rebellion (article 210); the crime of military usurpation (article 212) etc., those referring to offenses against the internal security of the state, offenses against the security of foreign states, peace and good international relations law: offense against the good international relations (article 225); plot (article 227) and others; to the offenses against the exercise of the political and civil rights: the crime of electoral fraud (article 235); the crime of rebellion against the legislative assembly (article 258); the crime of clash of authority (article 331) and others.

Thus, we note that the electoral offenses enjoyed a special regulation: “in the second title of the Criminal Code of 1936, the electoral offenses were treated as *offenses against the exercise of the political and civil rights* and they were provided in the articles 232, 235, particularly referring to acts of violence or threat, preventing the exercise of the political and civil rights, as well as the electoral fraud”¹⁵.

The law contains some inadvertencies, considering the same offense, when it is a political offense, when it is a common law offense. For example: the crime of hindering the political or civil rights is as such in the article 232, being punishable with an easy detention from 3 months to 1 year; while the qualified offense, provided in the article 234 is punishable by law with correctional imprisonment from 1 to 3 years.

The situation remained unchanged even after amending the Criminal Code in 1948 and its republishing in 1958, indicating that in the 60s, the Criminal Code has undergone a series of amendments which completely distorted the meaning and reason of criminalization of the political offenses, the punishments being applied with utmost severity, for minor or inexistent offenses.

Note that, with the advent of the Criminal Code in 1968, any difference between the common law offenses and political offenses disappeared, the Romanian law considering all the offenses as being common law offenses; consequently, automatically disappeared also the political punishments¹⁶.

One of the debated issues concerning the electoral offenses of that time was related to the procedure, which was different from the common law offenses, namely “the limitation period for the criminal liability was unreasonably short, more precisely one month after the proclamation of the election results, an issue criticized by the theorists of that time”¹⁷. The same Professor Vasile Pantea said that in the legislation “was also provided an original way, *suigeneris*, implementing the criminal action, being stipulated that it can be triggered, besides the victim and prosecutor, by minimum 20 electors. Such offenses enjoyed a privileged sanctioning regime, both by shortening the punishments, and by the fact that, in this field, the preventive arrest was forbidden; as regards the jurisdiction, the electoral offenses were submitted to the Courts of assizes”¹⁸.

¹⁵ V. Pantea, quoted works, page 65.

¹⁶ V. Pantea, quoted works, page 65

¹⁷ T. Pop, quoted works, page 257.

¹⁸ V. Pantea, quoted works, page 65.

The last legislative regulation in the field of electoral offenses may be found in the Law no. 67 of December 20, 1974, the electoral law of the Socialist Republic of Romania¹⁹ which included, in the article 104, two offenses, as follows:

”(1) Shall be punished with imprisonment from 6 months to 5 years and the interdiction of certain rights:

a) hindering by any means the free exercise of the right to vote or to be elected;

b) falsification by any means of the electoral works or the outcome of the vote.

(2) Attempt shall be punished.”

We note that the exposure of the regulations in the field of electoral offenses until the revolution of 1989 is required only for reasons of historical and teleological analysis, given that, during the period 1858-1938, the democracy in Romania was too early for implementing the compliance with the fundamental political rights, and after the reassessment of their importance worldwide, the insertion of certain criminal rules to protect such social values was strictly formal in the context of the Carlist and then of the totalitarian regime.

References

- New Criminal Code (Law no. 286/2009).
- Criminal Code in force.
- Criminal Code of Carol the Second.
- Constitution of 1866.
- Constitution of 1923.
- Constitution of 1938.
- Constitution of 1952.
- Constitution of 1965.
- Constitution of 1991.
- Basarab M. and others – Commented Criminal Code. 1st Volume. General part, Hamangiu Publishing House, Bucharest, 2007.
- Basarab M., V. Pașca, Gh. Mateuț, T. Medeanu, C. Butiuc, M. Bădilă, R. Bodea, P. Dungan, V. Mirișan, R. Mancaș, C. Miheș – Commented Criminal Code. 2nd Volume. Special part, Hamangiu Publishing House, Bucharest, 2008.
- Constantinescu T. – Effects of electoral law and the lessons arising from the choices made after the war – Bucharest, Independența Printing House, 1927.
- De Tocqueville A. – About democracy in America – 1st Volume – Humanitas Publishing House, Bucharest, 1995.
- Garraud R. – Traite theorique et pratique du droit penal francais – Paris, 1989.
- Gilia C. – Electoral systems and procedures – C.H. Beck Publishing House, Bucharest, 2007.
- Gorghiu A. – Offences against the electoral rights – Universul Juridic (Legal Universe) Publishing House, Bucharest, 2012; Pantea V. – Political offense and Contemporary Criminal Law – LuminaLex Publishing House, Bucharest, 1998.
- www.roaep.ro.
- www.aec.gov.au.
- www.apd.ro.

¹⁹ Published in the Official Gazette no. 161 of December 23, 1974.