

THE RIGHT TO VOTE AND BREACH OF VOTING SECRECY

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Abstract

The article is meant to be a brief overview of the legal provisions concerning the right to vote, encompassing both the national provisions and the international standards.

The scientific approach also includes the fixation of the standards in the field of the right to vote, as defined in the European Court of Human Rights case-law.

Due attention will be granted to the provisions on the breach of voting secrecy, provided for in the current Criminal Code, which entered into force on the 1st of February 2014, as this piece of legislation regulates in a unified way the offence, applicable for any type of elections performed in Romania.

The paper will focus, also, on the legislation of some European states, in order to assess the compatibility of the offence of breach of voting secrecy with similar offences in the legislation of other countries.

To close with, the study will give some conclusions regarding the importance of the criminal punishment of the offence of breach of voting secrecy, as well as the conformity of this particular offence with the international standards.

Keywords: *elections, right to vote, breach of voting secrecy, Criminal Code, (First) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.*

1. Introduction

The principles underlying Europe's electoral heritage set down in The Code of Good Practice in Electoral Matters (universal, equal, free, secret and direct suffrage) require the necessity of a scientific approach to assess the national framework in the field of the right to vote by comparison with these fundamental European principles.

The development of the European standards for the protection of the right to vote in the case-law of the European Court of Human Rights requires the distinct approach of the evolution of the contents of the right to free elections, provided for in Article 3 from The (First) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

We think that the analysis of the offence of breach of voting secrecy is especially important, taking into consideration the fact that electoral offences were grouped in a distinct title in the current Criminal Code, which entered into force on the 1st of February 2014, in order to ensure a higher stability of these texts, but also in order to eliminate the parallel incriminations which existed in the previous legal framework.

Such an endeavour is even more necessary taking into consideration that ensuring the voting secrecy is an important leverage for securing the possibility of the citizens to freely and unrestrictedly express their will concerning the exercise of the right to vote.

The brief overview of the legislation of some European countries in the field of the offence of the breach of voting secrecy is indicative of the fact that

the national legislation is consistent with the European standards, having regard to the fact that the incrimination of such a behaviour is a truly European standard of protection of the freedom of the exercise of the right to vote.

The importance of the study also resides in the fact that this topic has been timidly approached in specialized literature despite the fact that the importance of ensuring a coherent and complete framework in the field of electoral law, including the matters of electoral offences, is likely to ensure a stability and trust of the society in the legality and fairness of the electoral process. From this perspective an in-depth examination by the specialized literature can bring an added value to the legal framework and can recommend some directions of action for the evolution of the electoral system as a whole.

2. Content

2.1. Introductory remarks concerning the right to vote

The regulation of elective rights and their exercise as such are instruments which allow the people to participate in leading a country by electing its representatives.

As specialized literature¹ has put it, the fundamental rules concerning the exercise of the elective rights are non-discrimination, access to vote and the right to vote, equal and universal ballot, *secret ballot* and the guarantee that the results of the ballot will reflect the free will of the citizens.

At international level, provisions and standards regarding the organisation of the electoral process and

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¹ G. S. Goodwin-Gill, *Elections libres et régulières*. Nouvelle édition, Union Interparlamentaire, Geneva, 2006, p. 171.

the right to vote can be found in: Article 21 from *The Universal Declaration of Human Rights*², Article 25 from *The International Covenant on Civil and Political Rights*³, Article 3 from *The (First) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*⁴ and in *The Code of Good Practice in Electoral Matters*⁵, a landmark document in the field of electoral law, representing the core of a code of good practice in electoral matters, which enumerates the five principles underlying Europe's electoral heritage: universal, equal, free, secret and direct suffrage; of course, elections must be held at regular intervals.

Unfortunately, not all the European States follow those basic principles when organizing elections. For example, The European Network of Election Monitoring Organizations (ENEMO) international observation mission to the early Parliamentary elections in the Republic of Moldova in 2009 refused to monitor the elections as the conditions that were set by the authorities of the country made it impossible to perform a comprehensive monitoring effort. In addition to overt interference from the authorities, the observers from ENEMO were threatened by unknown persons of a criminal appearance. Thus, ENEMO concluded that entities at the highest levels of Moldovan authority (the Ministry of Interior, the Central Election Commission, the immigration police) exceeded their authority and violated national legislation, as well as international norms and standards for democratic elections. Also, the authorities of the Republic of Moldova purposefully

created conditions to discredit the electoral process and undermine public confidence in the voting results.⁶

At national level, according to the provisions of Article 2 from the Constitution of Romania⁷ the national sovereignty shall reside within the Romanian people, that shall exercise it by means of their representative bodies, resulting from free, periodical and fair elections, as well as by referendum. No group or person may exercise sovereignty in one's own name.

In other words, the electorate is the only original power on which the state power and authority is justified and grounded⁸, whereas the elections are the democratic traditional way in which the people, holder of the national sovereignty, designates its representative authorities. In this way of exercising power, the state authorities are designated by elections, gaining directly from the people offices of utmost importance.⁹

The general principles contained in Articles 1 and 2 of the Romanian Constitution provided for the prevalence of the rule of law and democracy, but also the fact that the people is the only one entitled to exercise national sovereignty by its representative bodies emerged through free, regular and fair elections, as well as through referendum.

As a natural consequence of the general principles enshrined, Chapter II – Fundamental rights and freedoms within Title II, provide in Articles 36 and 38 the right to vote and the right to vote for the European Parliament, taken over and developed by a series of special organic acts.¹⁰

² The Universal Declaration of Human Rights (UDHR) was proclaimed by the United Nations General Assembly in Paris on 10 December 1948, available at: <http://www.un.org/en/documents/udhr/index.shtml#atop>, accessed on 15.01.2015.

"Article 21. (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

³ International Covenant on Civil and Political Rights, was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 23 March 1976, available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, accessed on 15.01.2015.

"Article 25 – "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic 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 electors;

(c) To have access, on general terms of equality, to public service in his country."

⁴ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20.III.1952, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf, accessed on 15.01.2015.

"Article 3. Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

⁵ Code of Good Practice in Electoral Matters. Guidelines on Elections, adopted by the Venice Commission at its 51st Plenary Session (Venice, 5-6 July 2002), para. 4, p. 9, available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282002%29023-e>, accessed on 15.01.2015.

⁶ The Statement of the European Network of Election Monitoring Organizations on the cancellation of its observation mission to the July 29, 2009 early parliamentary elections in the Republic of Moldova, available at: <http://www.enemo.eu/press/Moldova%202009%20-%20Final%20report%20-%20ENG.pdf>, accessed on 15.01.2015.

⁷ The Constitution of Romania of 1991 was amended and completed by the Law No. 429/2003 on the revision of the Constitution of Romania, republished in the Official Gazette of Romania No. 758 of 29 October 2003.

⁸ I. Muraru, *Alegerile și corpul electoral [The elections and the electoral body]*, in I. Muraru, E. S. Tănăsescu, A. Muraru, K. Benke, M.-C. Eremia, Gh. Iancu, C.-L. Popescu, Șt. Deaconu, *Alegerile și corpul electoral [The elections and the electoral body]*, All Beck Publishing House, Bucharest, 2005, p. 3.

⁹ I. Muraru, *Alegerile și corpul electoral [The elections and the electoral body]*, in I. Muraru, E. S. Tănăsescu, *op. cit.*, p. 1.

¹⁰ Law No. 3/2000 on the organization and performance of the referendum; Law No. 67/2004 on the election of the authorities of the local public administration; Law No. 370/2004 on the election of Romania's President; Law No. 33/2007 on the organization and performance of

2.2. The right to vote

In a state based on the principles of the rule of law and democracy the people has to have the last word and this becomes reality by the exercise of elective rights by its citizens. The exclusively political nature¹¹ of the right to vote and the right to be elected has several legal consequences: on the one side, they are used only for the participation to the government, that is for the exercise of power directly by the people and, on the other side, they usually only belong to the citizens, not to other categories of persons as well.¹²

According with the provisions of Article 36 of the Fundamental Law, every citizen having turned eighteen up to or on the election day shall have the *right to vote*. The mentally deficient or alienated persons, laid under interdiction, as well as the persons disenfranchised by a final decision of the court cannot vote.

In order for a person to be allowed to cast a vote it has to meet the following *conditions* cumulatively:

a) To be a Romanian citizen. According with the applicable legal provisions, the Romanian citizenship is the connection and affiliation of a natural person to the Romanian state and it can be acquired by birth, adoption or it can be granted on request. The Romanian citizenship can be lost: by withdrawal of the citizenship, approval of renouncing the citizenship or other cases provided for by law¹³.

Concerning the existence of a citizenship related condition in the context of *local elections* it was stated that, although the national law which makes the right to vote and to stand for election (*in local elections*) subject to the requirements of citizenship and residence is not in violation of any imperative rule of

international or European law concerning universal suffrage, however, a tendency is emerging to grant local political rights to long-standing foreign residents, in accordance with the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level. Furthermore, the Venice Commission recommends, in its Code of Good Practice in Electoral Matters, that the right to vote in local elections be granted also to noncitizens, after a certain period of residence.¹⁴

b) To be at least 18 years of age on the date of the elections, that is to have reached the *political maturity*;

c) To not be mentally deficient or alienated persons, laid under interdiction. According with the provisions of Article 164 of Law No. 287/2009 concerning the Civil Code, the person who lacks the necessary power of judgment in order to take care of its own interests, following its mental alienation or disturbance, shall be placed under interdiction. Also underaged persons who have diminished power of judgment can be placed under interdiction.

d) To not have lost its right to vote by having been sentenced to loss of elective rights based on a final court decision. The moral capacity, also called *electoral dignity*, is meant to show the elector's minimum attachment to the state; lacking it will cause the impossibility to vote and is ascertained by sentencing the citizen for perpetration of certain offences.¹⁵

As regards its *characteristics*, the vote has to be *universal, equal, secret and freely expressed*¹⁶, its exercise being optional so that each citizen who has the right to vote has the freedom to go or to not go to the polls in order to express an electoral option.¹⁷

the elections to the European Parliament; Law No. 35/2008 on the election of the Chamber of Deputies and of the Senate and for amendment and supplementing of Law No. 67/2004 on the election of the authorities of the local public administration, of the Law No. 215/2001 on the local public administration and of the Law No. 393/2004 on the Status of locally elected representatives.

¹¹ Concerning the right to vote and the right to be elected the *French literature* considered that these rights are civil rights, alongside all rights whose interdiction can be ordered by the court based on the provisions of Article 34 of the French Criminal Code (which provides for the sanction of civil degradation by the interdiction of the exercise of some rights and aptitudes attached to the quality of a citizen). See F. Luchaire, in F. Luchaire, G. Conac, *La constitution de la République française*, Economica, 2^e edition, 1987, p. 757.

¹² Șt. Deaconu, E. S. Tănăsescu, in I. Muraru, E. S. Tănăsescu – coordonatori, *Constituția României. Comentariu pe articole [Romania's Constitution. Article comments]*, C.H. Beck Publishing House, Bucharest, 2008, p. 331-332.

¹³ Articles 1, 4 and 24 of the Law on the Romanian citizenship No. 21/1991, republished in the Official Gazette of Romania No. 576 from 13 August 2010, with subsequent amendments and supplements.

¹⁴ Venice Commission, Opinion on the law for the election of local public administration authorities in Romania (*comments by U. Mifsud Bonnici, P. van Dijk*), Opinion No. 300/2004, Strasbourg, 4 janvier 2005, p. 3, available at: <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282004%29040-e>, accessed on 15.01.2015.

¹⁵ E. M. Nica, *Drept electoral [Electoral law]*, Sitech Publishing House, Craiova, 2010, p. 86.

¹⁶ See Șt. Deaconu, E. S. Tănăsescu, respectively I. Vida, in I. Muraru, E. S. Tănăsescu – coordonatori, *Constituția României. Comentariu pe articole [Romania's Constitution. Article comments]*, C.H. Beck Publishing House, Bucharest, 2008, p. 338-340 and p. 604-608.

¹⁷ However, there are also states in which the exercise of the right to vote is mandatory. The majority of countries in Western Europe which still use compulsory voting in some form have done so for between 50 and 100 years: *Belgium* [Fines for not voting are up to 50 euros for a first offence and 125 euros for a second offence], *Luxembourg* [According to electoral legislation sanctions include fines and imprisonment but none have ever been enforced], *Liechtenstein* [Non-voters may be fined if they do not give an approved reason for not voting.], *Switzerland* [more specifically, the Swiss canton of Schaffhausen - a small fine is payable by non-voters to the police who come to re-collect each citizen's voter legitimation card. Sanctions are enforced against everyone who has not voted, unless they are exempt], *Cyprus* [The punitive sanctions are fines of up to £200 and/or a prison sentence of up to six months for failing to vote or register. There have been very few prosecutions and none since the 2001 general election.] and Greece [There are no specified sanctions enforcing the compulsory system – the relevant passage was omitted from the 2001 revision of the constitution.]. See The Electoral Commission UK, *Compulsory voting around the world. Research report*, June 2006, p. 7-8, 13, available at: http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/002016157/ECCCompVotingfinal_22225-16484_E_N_S_W_.pdf, accessed on 15.01.2015.

Some European countries once had compulsory voting before abolishing it. Austria had compulsory voting in all regions from 1949–1982 and the Netherlands used it from 1917–1967. [See *Voter turnout in Western Europe*, International Institute for Democracy and Electoral

a) *the freely expressed character of the vote* indicates the fact that the participation to the suffrage is not mandatory though it represents one of the highest and civil responsibilities in terms of manifestation of the citizenship connection between an individual and a state.¹⁸ In other words, the law does not force the voter to vote and does not sanction its electoral passivity.¹⁹

In any case the participation to the elections only assumes the presence in the polling station and does not also mean the provision of an obligation concerning what the vote should contain. Even in case of the mandatory vote citizens continue to have the possibility to cast a vote in blank or a null vote, according with their own consciousness.²⁰

b) As regards the *universal character of the vote* – the right to participate in an election as a voter (the “active” electoral right) and the right to stand as a candidate for election (the “passive” electoral right) – it has been asserted that this characteristic is a core element of modern democracy. It is of utmost importance that these fundamental rights are neither formally nor practically restricted without sufficient justification.²¹

Exclusion of some citizens from among the citizens who can exercise their right to vote is not decided based on discretionary or discriminating conditions, but rather having regard to practical issues which have to do with the voters’ maturity of thinking, as well as with possible psychological or moral incapacities.²²

c) *Equality of vote* is the expression of the principle of equality of rights of the citizens, provided for at a general level in Articles 4 and 16 of the Constitution. The equality of vote is reflected both in the number of votes a citizen is entitled to and in the weight of each vote in the designation of the nation’s representatives. Legally, each citizen has the right to one single vote and this vote has the same weight as all

other votes in designation of the same state authority, no matter the person who exercised the right to vote.²³

d) The *voting secrecy* guarantees the possibility of the citizens to manifest freely and unrestrained the will concerning the designation of one person or the other in elective public functions and offices.²⁴

The voting secrecy is that guarantee of the free expression of the vote based on which the voter’s opinion is expressed as individual option – personal, anonymous, in an autonomous, independent manner, not subject to any constraint and pressure. The secrecy thus assumes that the voter cannot be forced or put under pressure in order to reveal its option, neither at the moment of exercising its right to vote, nor subsequently.²⁵

For the protection of the voting secrecy the national lawmaker introduced the offence of breach of voting secrecy performed by any means and sanctioned according with the provisions of Article 389 of the Criminal Code.

At the level of the European Union, the elections are provided for in the Act of 20 September 1976²⁶, which lays down principles common to all Member States (e.g. members of the European Parliament shall be elected on the basis of proportional representation, using the list system or the single transferable vote; elections must be held on a date falling within the same period starting on a Thursday morning and ending on the following Sunday).

The regulation of the *right to vote for the European Parliament* is effected by the Council Directive 93/109/EC of 6 December 1993²⁷ laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.

Assistance, Publications Office International IDEA, Stockholm, 2004, p. 28-29, available at: http://www.idea.int/publications/voter_turnout_europe/upload/Full_Reprot.pdf, accessed on 15.01.2015]

¹⁸ E. S. Tănăsescu, *Legile electorale. Comentarii și explicații [Electoral Laws, Comments and explanations]*, All Beck Publishing House, Bucharest, 2004, p. 3.

¹⁹ C. Ionescu, *Legile electorale pe înțelesul tuturor [Electoral laws made easy]*, All Beck Publishing House, Bucharest, 2004, p. 38.

²⁰ E. S. Tănăsescu, *op. cit.*, p. 71.

²¹ F. Grotz, *Recurrent challenges and problematic issues of electoral law*, în *Venice Commission, European electoral heritage – 10 years of the Code of Good Practice in Electoral Matters*, Conference, Tirana, Albania, 2-3 July 2013, Science and technique of democracy, No. 50, Council of Europe Publishing, Strasbourg, 2012, p. 8.

²² E. S. Tănăsescu, *op. cit.*, p. 70.

²³ Șt. Deaconu, E. S. Tănăsescu, în I. Muraru, E. S. Tănăsescu – coordinatori, *op. cit.*, p. 338.

Since “one person one vote” is a hallmark of a democratic system, why would we encounter any variation here? The reason is simple: giving people more than one vote does not violate democratic principles provided everyone still has the same number of votes. Having just one vote is very much the norm, but in most cases within the family term “mixed” systems everyone has two votes. For example, when voters in Germany or New Zealand go to the polling station on the election day they are confronted with a ballot paper that invites them to cast one vote for a candidate to represent their local single-member constituency, and another vote for a party in contest for seats awarded at the national level. See M. Gallagher, P. Mitchell (editors), *The Politics of Electoral Systems*, Oxford University Press, Oxford, 2006, p. 7.

²⁴ Șt. Deaconu, E. S. Tănăsescu, în I. Muraru, E. S. Tănăsescu – coordinatori, *op. cit.*, p. 339.

²⁵ E. M. Nica, *op. cit.*, p. 91.

²⁶ Act of 20 September 1976, annexed to Decision 76/787/ECSC, EEC, Euratom, concerning the election of the representatives of the European Parliament by direct universal suffrage, amended by the Council Decision of 25 June 2002 and 23 September 2002.

²⁷ Amended by the Council Directive 2013/1/EU of 20 December 2012 as regards certain detailed arrangements for the exercise of the right to stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.

At national level, the Law No. 429/2003 on the revision of the Constitution of Romania²⁸ introduced in the Constitution Article 38 which provides for the right to be elected to the European Parliament: after Romania's accession to the European Union (1 January 2007), Romanian citizens have *the right to elect and be elected to the European Parliament*.

2.3. European Court of Human Rights case-law regarding Article 3 from the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms

According to Article 3 (right to free elections) from the (First) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, *the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature*.

Analysing the content of Article 3 (right to free elections) from the (First) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms a difference of wording from the other substantive clauses in the Convention and in the First Protocol can be observed. Article 3 does not state that "everyone has the right" or "no one can refuse the right to free elections", but rather it states that the "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot".²⁹

The European Court of Human Rights [ECtHR], in the case of *Mathieu-Mohin and Clerfayt v. Belgium*³⁰, ruled that the "right to vote" and the "right to stand for election to the legislature" are not absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations. In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3. They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether

the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, such conditions must not thwart "the free expression of the opinion of the people in the choice of the legislature".

The real test which is employed by the Court in recent cases³¹ dealing with the alleged violations of Article 3 of Protocol No. 1 is, first, whether, there is legitimate aim for disenfranchisement or another restriction of the electoral rights in question, and, second, whether this restrictions would be proportionate in the case at hand.³²

Regarding the applicability of Article 3, both the Commission and, later, the Court, in its case law, defined the notion of "legislature" („*corps législatif*") used in the text.

In *Mathieu-Mohin and Clerfayt Case*³³ the Court took the position that the word "legislature" does not necessarily mean the national parliament only. According to the Court its meaning has to be interpreted in the light of the constitutional structure of the State in question. On that basis the Court held that, further to the 1980 constitutional reform, the Flemish Council in Belgium was vested with competences and powers wide enough to make it, alongside the French Community Council and the Wallon Regional Council, a constituent part of the Belgian "legislature" in addition to the House of Representatives and the Senate.³⁴

Since *Mathieu-Mohin and Clerfayt v. Belgium*, the Strasbourg Court has consistently held that Article 3 of protocol No. 1 not only imposes obligations on the Convention States, but also grants rights to individuals, namely, the right to vote and the right to stand for elections.³⁵

ECtHR, in the case of *Ahmed v. The United Kingdom*³⁶, did not rule on the application of the provisions of Article 3 of Protocol No. 1 in the

²⁸ The Law No. 429/2003 on the revision of the Constitution of Romania was approved by the national referendum of 18-19 October 2003, and came into force on the date of the publication in the Official Gazette of Romania: No. 758 of 29 October 2003.

²⁹ C. Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole. Vol. I Drepturi și libertăți [The European Convention on Human Rights. Article Comments. Volume I - Rights and Liberties]*, Ed. All Beck Publishing House, Bucharest, 2005, p. 1079.

³⁰ The European Court of Human Rights [ECtHR], case of *Mathieu-Mohin and Clerfayt v. Belgium*, Application No. 9267/81, Judgment from 2 March 1987, para. 52. All the ECtHR judgements mentioned in this study are available on the website of the ECtHR <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/> and were accessed in February 4, 2014.

³¹ ECtHR, case of *Py v. France*, Application No. 66289/01, Judgment from 11 January 2005; ECtHR, case of *Gitonis others v. Greece*, Application No. 18747/91; 19376/92; 19379/92, Judgment from 1 July 1997.

³² S. Golubok, *Right to free elections: case-law of the European Court of Human Rights*, University of Essex, Law Department, 2007, p. 35.

³³ ECtHR, case of *Mathieu-Mohin and Clerfayt v. Belgium*, Application No. 9267/81, Judgment from 2 March 1987, para. 53.

³⁴ P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak, *Theory and practice on the European Convention on Human Rights*, 4th edition, Intersentia, Antwerpen-Oxford, 2006, p. 930; ECtHR, case of *Mathieu-Mohin and Clerfayt v. Belgium*, Application 9267/81, Judgment from 2 March 1987, para. 53.

³⁵ L. López Guerra, *The spill-over effect of Article 3 of Protocol No. 1: from parliamentary to local elections*, in L. Berg, M. Enrich Mas, P. Kempes (editors), *Cohérence et impact de la jurisprudence de la Cour européenne des droits de l'homme, Liber amicorum Vincent Berger*, Wolf Legal Publishers (WLP), Oisterwijk, p. 269-270.

³⁶ ECtHR, case of *Ahmed and others v. The United Kingdom*, Application No. 65/1997/849/1056, Judgment from 2 September 1998. In the words of the Court, without taking a stand on whether local authority elections or elections to the European Parliament are covered by Article 3 of Protocol No. 1, as was also disputed by the Government, the Court concludes that there has been no breach of that provision in this case (para. 76).

elections organized for local councils, although it was said³⁷ that this was regrettable as those local authorities which exercise significant governmental powers (including the enacting of bylaws) ought, as a matter of principle, to have their elections subject to the requirements of this Article. Such a development of the jurisprudence would be in conformity with the above judgement in *Mathieu-Mohin* case³⁸.

The right to free elections enshrined in Article 3 is not an absolute right, so that the Court allowed to the states the possibility to regulate some limitations of the right to vote or to be elected, their margin of appreciation being very generous. Obviously, any restrictions imposed should not affect the very substance of the right, they have to have a legitimate scope and to be proportional with this scope.

In this sense, the deprivation of certain persons of the right to vote in their own country is not *per se* contrary to the *Convention*, on condition that it is not performed arbitrarily or as a form of discrimination.

In the case of *Aziz v. Cyprus*³⁹, the applicant complained that he was deprived of the right to vote because of his Turkish-Cypriot ethnicity. Cypriot law as it stood allowed Turkish-Cypriots and Greek-Cypriots only to vote for candidates from their own ethnic communities in the parliamentary elections. However, since the Turkish occupation of Northern Cyprus, the vast majority of the Turkish community had left the territory and their participation in parliament was suspended. Consequently, there was no longer any list of candidates for whom the complainant could vote. While the government argued that the inability to vote was due to the fact that there were no candidates available for whom the complainant could vote, the ECtHR was of the view that the close link between the election rules and membership of the Turkish-Cypriot community, together with the government's failure to adjust the electoral rules in light of the situation, meant this amounted to direct discrimination on the basis of ethnicity.⁴⁰

In the case of *Hirst v. The United Kingdom* (No. 2)⁴¹, the Court observed that the applicant, sentenced to life imprisonment for manslaughter, was

disenfranchised during his period of detention by section 3 of the 1983 Act which applied to persons convicted and serving a custodial sentence.

While the Court reiterated that the margin of appreciation is wide, it is not all-embracing. Further, although the situation was somewhat improved by the 2000 Act which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.⁴²

The Court concluded that there has been a breach of Article 3 of Protocol No. 1 in the case of *Frodl v. Austria*⁴³. Under the *Hirst test*, besides ruling out automatic and blanket restrictions it is an essential element that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and democratic institutions.

The essential purpose of these criteria (provided by the *Hirst* case) is to establish disenfranchisement as an exception even in the case of convicted prisoners, ensuring that such a measure is accompanied by specific reasoning given in an individual decision explaining why in the circumstances of the specific case disenfranchisement was necessary, taking the above elements into account. The principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned; no such link existed under the provisions of law which led to the applicant's disenfranchisement.

³⁷ A. Mowbray, *Cases and materials on the European Convention on Human Rights*, Oxford University Press, Oxford, 2007, p. 982.

³⁸ ECtHR, case of *Matthews v. The United Kingdom*, Application No. 24833/94, Judgment from 18 February 1999.

³⁹ ECtHR, case of *Aziz v. Cyprus*, Application No. 69949/01, Judgment from 22 June 2004.

⁴⁰ European Union Agency for Fundamental Rights, European Court of Human Rights - Council of Europe, *Handbook on European non-discrimination law*, Publications Office of the European Union, Luxembourg, 2011, p. 27, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf, accessed in February 4, 2014.

⁴¹ ECtHR, Grand Chamber, case of *Hirst v. The United Kingdom* (No. 2), Application No. 74025/01, Judgment from 6 October 2005, para. 12, 13, 72, 82-85.

⁴² In the case of *Greens and M.T. v. the United Kingdom*, the Court held that there had been a violation of Article 3 of Protocol No. 1 to the Convention. It found that the violation was due to the United Kingdom's failure to implement the Court's Grand Chamber judgment in the case of *Hirst* (No. 2) v. *the United Kingdom*. Given in particular the significant number of repetitive applications it had received shortly before the May 2010 general election and in the six following months, the Court further decided to apply its pilot judgment procedure to the case. Under Article 46 (binding force and execution of judgments) of the Convention, the United Kingdom was required to introduce legislative proposals to amend the legislation concerned. See, ECtHR, *Factsheet - Prisoners' right to vote*, February 2015, available at: http://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf, accessed in February 4, 2015.

Because the United Kingdom failure to bring its legislation up-to-date, The Coust, subsequently, found violation of the right to vote in ten follow-up prisoner voting cases, but awarded no compensation or legal costs. In the Chamber judgment from the 12 August 2014, in the case of *Firth and Others v. the United Kingdom*, Application No. 47784/09 and nine others, ECtHR held that there had been a violation of Article 3 of Protocol No. 1.

⁴³ ECtHR, case of *Frodl v. Austria*, Application No. 20201/04, Judgment from 8 April 2010, para. 34-36.

In *Calmanovici v. Romania*⁴⁴ case and, subsequently, in *Cucu v. Romania*⁴⁵, the Strasbourg Court concluded that there has been a violation of Article 3 of Protocol No. 1 to the Convention, as the national legislation, at that stage, provided for the automatic withdrawal of his voting rights as a secondary penalty to a prison sentence and of the lack of competence of the courts to proceed with a proportionality test on that measure⁴⁶. In ruling in favour of the applicants, the Court recalled that the rights guaranteed by Article 3 of Protocol No. 1 to the Convention are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law; a general, automatic and indiscriminate restriction on the right to vote applied to all convicted prisoners serving sentences is incompatible with that Article.

Of course, the present Criminal Code of Romania laid down new rules regarding the automatic withdrawal of the voting rights as a secondary penalty to a prison sentence, observing the findings of the Strasbourg Court.

Consequently, the provisions of Article 66 from the Criminal Code, dealing with the complementary penalties⁴⁷, introduced a difference between the right to be elected to the ranks of public authorities or any other public office [provided by para. 1 lett. a)] and the right to vote [provided by para. 1 lett.d)], which was not regulated in the former Criminal Code (from 1968).

Also, according to Article 67 para. 1 and 2 from the Criminal Code, the complementary penalty of a ban on the exercise of certain rights can be enforced if the main penalty is imprisonment or a fine and the Court finds that, considering the nature and seriousness of the offense, the circumstances of the case and the person of the offender, such penalty is necessary. Enforcing the complementary penalty of a ban on the exercise of certain rights is mandatory when the law stipulates such penalty for an offense.

The contents of Article 3 from the First Protocol which guarantees the right to free elections, as well as the large margin of appreciation allowed by the Court to the member state for the regulation of the electoral

system generated the existence of some cases in which it was considered that the provisions of Article 3 were not violated. Hence, in *Scoppola (No. 3) v. Italy*⁴⁸, the Court held that in Italy there is no disenfranchisement in connection with minor offences or those which, although more serious in principle, do not attract sentences of three years' imprisonment or more, regard being had to the circumstances in which they were committed and to the offender's personal situation.

Concluding, the Court found that, in the circumstances of the case (the applicant was convicted of murder, attempted murder, ill-treatment of his family and unauthorised possession of a firearm), the restrictions imposed on the applicant's right to vote did not "thwart the free expression of the people in the choice of the legislature", and maintained "the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage" [see *Hirst (No. 2)*]. The margin of appreciation afforded to the respondent Government in this sphere has therefore not been overstepped. Accordingly, there has been no violation of Article 3 of Protocol No. 1.

2.4. Breach of voting secrecy

a.) *Sedes materiae*. If voting were not secret, any person who has the right to vote could be reluctant in expressing its electoral will for fear of possible consequences which its choice could generate, if known by the others. This is also why the breach of voting secrecy is sanctioned by the criminal law.⁴⁹

The offence of breach of voting secrecy, provided for currently in Article 389 of the Criminal Code brought together, basically, all offences which related to voting secrecy, previously regulated in special laws in electoral matters⁵⁰.

"Art. 389. Violation of voting secrecy

(1) The violation, by any means, of the voting secrecy shall be punished by a fine.

(2) If the act was perpetrated by a member of the electoral bureau of the polling section, it shall be punishable by no less than 6 months and no more than 3 years of imprisonment and a ban on the exercise of certain rights."

⁴⁴ ECtHR, case of *Calmanovici v. Romania*, Application No. 42250/02, Judgment from 1 July 2008, para. 146-154.

⁴⁵ ECtHR, case of *Cucu v. Romania*, Application No. 22362/06, Judgment from 13 November 2012, para. 105-112.

⁴⁶ Although acknowledging the decision of 5 November 2007 of the High Court of Cassation and Justice, following an appeal in the interests of the law, the Strasbourg Court observed that this decision became mandatory for courts only in July 2008, after the applicant's conviction and sentencing.

⁴⁷ According to Article 65 para. 1 and 2 from the Criminal Code, an ancillary penalty consists of a ban on exercising the rights stipulated at Article 66 para. 1 lett. a), b) and d) - o), whose exercise was banned by a court of law as a complementary penalty. In the case of life imprisonment the ancillary penalty consists of the court banning the exercise of the rights stipulated in Article 66 para. 1 lett. a) - o) or a number of those.

⁴⁸ ECtHR, case of *Scoppola (No. 3) v. Italy*, Application No. 126/05, Judgment from 22 May 2012, para. 107-110.

⁴⁹ S. Bogdan (coordinator), D. Al. Șerban, G. Zlati, *Noul Cod penal. Partea specială. Analize, explicații, comentarii. Perspectiva clujeană [The New Criminal Code. Special Part. Analyses, explanations, comments. The Cluj Perspective]*, Universul Juridic Publishing House, Bucharest, 2014, p. 777.

⁵⁰ What we mean is: Article 108 of Law No. 67/2004 on the election of the authorities of the local public administration; Article 60 of Law No. 370/2004, republished, on the election of Romania's President; Article 57 of Law No. 33/2007 on the organization and performance of the elections to the European Parliament; Article 54 of Law No. 35/2008 on the election of the Chamber of Deputies and of the Senate and on amending and supplementing Law No. 67/2004 on the election of the authorities of the local public administration, Law No. 215/2001 on the local public administration and Law No. 393/2004 on the Status of locally elected representatives; Article 53 of Law No. 3/2000 on the organization and performance of the referendum.

b.) Preexisting conditions. *Legal object of the crime.* The special legal object resides in the social relations concerning the proper performance of the elections; these relations involve the person's right to vote under conditions of secrecy, according with the applicable legal provisions, which is incompatible with the breach of voting secrecy.

Subjects of the crime. The active subject is not enlarged upon in the standard variant of the crime, provided for in para. 1, as it can be any person who meets the general conditions for criminal liability.

In case of the aggravated variant, provided for in para. 2, the active subject is qualified – a member of the electoral bureau of the polling section.

Looking at the wording, we can say that any other persons, even the members of the higher electoral bureaus, are excluded from the perpetration, as offenders, of the aggravated variant of the crime. Furthermore, for the perpetration of the crime, the offender has to act based on the functions it has within the electoral bureau. The aggravated variant shall not be applied if, for example, a member of a polling station renounces his functions, goes to another polling station and violates here the secrecy of a voter's option.⁵¹

The criminal participation is possible under all its forms (co-responsibility, incitement or complicity).

The main passive subject is the state, guarantor of the respect of voting secrecy and, overall, of the fairness of the electoral process.

The crime also has an additional passive subject, namely the natural person who has the right to vote, whose voting secrecy was violated.

Condition precedent. The perpetration of the crime requires the existence of a condition precedent – the performance of some election in Romania, no matter if local, presidential, Euro-parliamentary or parliamentary elections.

c.) The objective side. *The material element.* The material element of the objective side is the act of breach, by any means, of the voting secrecy by the members of the electoral bureau of the polling station, in case of the aggravated variant, or by other persons, in case of the standard variant of the crime.

The breach of the voting secrecy involves finding out about the electoral option of a person, of the way in which the person expressed its electoral option.⁵²

The breach of the voting secrecy in the sense attached to it by the incriminating norm has the meaning to disregard, to not obey the secrecy of the vote expressed by a person.⁵³ Hence, the elements of the crime provided for in Article 389 of the Criminal Code shall be met, for example if a person opens the ballot of another voter or enters the voting booth in order to find out how the respective person votes. The breach of the voting secrecy exists no matter how many persons found out, illegally, about a voter's electoral option.

It does not matter how a person votes, for which candidate or political party, if the vote was a blank vote or if the person annulled its ballot, it is enough that the secrecy of that electoral option was violated.

For the existence of the crime the means by which the voting secrecy was violated are not relevant (taping, photography⁵⁴, opening of the stamped ballot before introducing it in the ballot-box etc.). Obviously, if the means employed are by themselves a distinct offence, the rules of the concurrence of offences shall be applied.

One question which was asked in the specialized literature is if the legal text sanctions only revealing the vote to a person or also having the information about the content of the vote. Having regard to the fact that what is protected finally is the voting freedom, based on its secret character, we think that it can also be affected by the mere revealing of the choice. The information obtained can be used directly by the person who has it, for the purpose, for example, of altering the electoral process or for later revenge.⁵⁵

It shall not be considered that voting secrecy was violated where the voter makes its electoral option known or where he/she allows or makes it easy for a third party to enter the voting booth and allows the third party to see how he/she exercises his/her right to vote.

The procedure concerning the exercise of the right to vote pertains to public law and is performed, formally, under the coordination of the electoral bureau of the polling station and first of its president, which shall guarantee, from a material point of view,

⁵¹ T. Manea in G. Bodoroncea, V. Cioclei, I. Kuglay, L. V. Lefterache, T. Manea, I. Nedelcu, F.-M. Vasile, *Codul penal. Comentariu pe articole [The Criminal Code. Article Comments]*, C.H. Beck Publishing House, Bucharest, 2014, p. 818. See also, in the same context, M. C. Sinescu in V. Dobrinioiu, I. Pascu, M. Hotca, I. Chiș, M. Gorunescu, C. Păun, M. Dobrinioiu, N. Neagu, M. C. Sinescu, *Codul penal comentat. Vol. II. Partea specială [The Criminal Code commented. Vol. II. Special Part]*, 1st edition, Universul Juridic Publishing House, Bucharest, 2012, p. 1016.

⁵² The specialized literature stated that the wording "breach of voting secrecy" is extremely large and inaccurate in terms of the requirement of predictability of an incrimination text. See S. Bogdan (coordinator), *op. cit.*, p. 777.

⁵³ P. Dungan in P. Dungan, T. Medeanu, V. Pașca, *Drept penal. Partea specială. Prezentare comparativă a noului Cod penal și a Codului penal din 1968 [Criminal Law. Special Part. Comparative presentation of the new Criminal code and of the Criminal code of 1968]*, Vol. II, Universul Juridic Publishing House, Bucharest, 2013, p. 407.

⁵⁴ By the Decision of the Central Electoral Bureau No. 41/2008, available at <http://www.beclocaie2008.ro/documm/hot41.pdf>, accessed on 11.02.2015, in order to ensure the secret and freely expressed character of the vote according with Article 1 para. 2 of Law No. 67/2004 on the election of the authorities of the local public administration, in order to avoid any possible attempts at controlling the voting, it forbid the access into the voting booths with any recording or video taping devices. In this way they tried to limit the possibilities for electoral fraud, following offering of money or goods to persons who prove they voted for a certain candidate.

⁵⁵ T. Manea in G. Bodoroncea et al., p. 819.

the voter's full freedom to freely express its intimate belief. This procedure is one of the most important guarantees for the voting equality and secrecy, being at the same time a safeguard of its free character.⁵⁶

As regards the *voting procedure*, it is provided for in relation with each type of elections in part: in Articles 82 and 86 of the Law No. 67/2004 on the election of the authorities of the local public administration; Article 44 of Law No. 370/2004 on the election of Romania's President; Article 46 para. 7-9 of Law No. 33/2007 on the organization and performance of the elections to the European Parliament; Article 42 of Law No. 35/2008 on the election of the Chamber of Deputies and of the Senate and on amending and supplementing Law No. 67/2004 on the election of the authorities of the local public administration, Law No. 215/2001 on the local public administration and Law No. 393/2004 on the Status of locally elected representatives.

We can say that the above mentioned legal provisions *are likely to ensure the respect of voting secrecy*, whereas the members of the electoral bureau of the polling station have the obligation to obey these legal provisions, including the obligation to not breach the voting secrecy.

The voters cast their votes separately, in closed booths, putting the stamp with the text "Voted" in the square which contains the list of the candidates or the name of the candidate they vote for. After having voted, the voters fold the ballots, so that the white page bearing the control stamp stays outside and then introduce them into the ballot-box, taking care not to open them.

The presence of any other person in the voting booth, except the person who is voting, is forbidden. In exceptional cases, where the voter, based on justified reasons ascertained by the president of the electoral bureau of the polling station, cannot vote alone has the right to invite a companion of his choice to enter the voting booth to help.

Despite the fact that Law No. 67/2004 on the election of the authorities of local public administration very strictly provides for the rule of separate vote, in closed booths (the exception provided for in Article 86 being of strict interpretation), the breach of voting secrecy being sanctioned by the criminal law, on occasion of the monitoring of the local elections from 2008, a new way by which electoral fraud is attempted at was observed, namely the voter pretends to be incapable to focus on the vote and requires the assistance of another person, who is within the polling station and has a new electoral occupation, that is „*professional companion*”. In the

county of Vrancea, the mayor of a town, who was sitting for a new mandate for a mayor, accompanied into the voting booth several persons who pretended to not be able to vote alone and in the county of Tulcea, some voters came to a polling station, pretended to be blind, without presenting a medical report to this effect, and entered the voting booth in the company of the candidates.⁵⁷

With a view to the protection of the voting secrecy, but also in order to prevent voters' corruption we think that the introduction of an *interdiction concerning taking photographs or video-taping the ballots within the voting booth* is necessary, this being a method by which the voters are checked if and for whom they voted justified by amounts of money, goods or other advantages offered or given to them.

The immediate consequence is the creation of a danger for the social relations protected by the incrimination norm, created by the breach of the voting secrecy.

Causation results from the very materiality of the act, *ex re*.

d.) The subjective side. The offence is committed with direct or indirect intent, which implies that the offender knows that his act of breaching the voting will affect the social relations which protect the secret character of the vote within the elections.

The purpose or the reason based on which the offender acts are not relevant, but can be taken into consideration when establishing the sanctions.

e.) Forms of the offence. The acts of preparation, though possible, are not sanctioned. However, the attempt is sanctioned according with the provisions of Article 393 of the Criminal Code.

The offence is consummed in the moment when the breach of the voting secrecy is produced by any means.

f.) The sanctioning regime. Process related aspects. The breach of the voting secrecy in its standard variant provided for in para. 1 shall be sanctioned by fine and in case of the aggravated variant provided for in para. 2 shall be sanctioned by imprisonment from 6 months to 3 years and interdiction of the exercise of some rights.

In accordance with the provisions of Article 33 of the Criminal Code, the attempt shall be sanctioned with the punishment provided for by law for the offence consumed, its limits being reduced to the half.

The criminal proceedings are initiated *ex officio*⁵⁸.

⁵⁶ E. S. Tănăsescu, *op. cit.*, p. 210.

⁵⁷ Asociația Pro Democrația, *Reguli și nereguli în alegerile locale 2008. Raport cu privire la monitorizarea campaniei electorale și observarea procesului de votare de la alegerile pentru autoritățile publice locale din iunie 2008*, București, Octombrie 2008, p. 66.

The situation was similar also in case of the presidential elections of 2009 or parliamentary elections from 2008. See, Asociația Pro Democrația, *Prezidențiale 2009. Raport de observare a alegerilor pentru Președintele României din 2010*, București, mai 2010, p. 50, 59; Asociația Pro Democrația, *Parlamentare 2008. Raport de observare a alegerilor parlamentare din 30 noiembrie 2008*, București, 2008, p. 27-28.

⁵⁸ According with 3 para. 2 of Law No. 135/2010 on the Code of criminal procedure, *judicial functions are exercised ex officio, except in cases provided for by law*.

2.5. Short considerations on the legislation of some member states of European Union

a.) The crime provided for in Article 389 from the Romanian Criminal Code is consistent with the Code of Good Practice in Electoral Matters⁵⁹, which stipulates that the violation of secret suffrage should be sanctioned.

Secrecy of the ballot is one aspect of voter freedom, its purpose being to shield voters from pressures they might face if others learned how they had voted. Secrecy must apply to the entire procedure – and particularly the casting and counting of votes. Voters are entitled to it, but must also respect it themselves, and non-compliance must be punished by disqualifying any ballot paper whose content has been disclosed. Violation of the secrecy of the ballot must be punished, just like violations of other aspects of voter freedom. In this sense, the signing and stamping of ballot papers should not take place at the point when the paper is presented to the voter, because the signatory or the person affixing the stamp might mark the paper so that the voter could be identified when it came to counting the votes, which would violate the secrecy of the ballot. The voter should collect his/her ballot paper and no one else should touch it from that point on.⁶⁰

In order to secure the voter's secrecy, the voter should generally be alone in the voting booth. Only in special cases, for example, blind voters, are exceptions to be allowed. The conditions for giving assistance to voters should, if necessary, be formalised in the electoral law or electoral commission instructions. In any case, it is unacceptable that "interpreters" accompany voters to the voting booth and indicate the name of the candidate for whom the voter wants to vote. This is what happened, for example, with illiterate Roma voters during the rigged mayoral election held in the town of Mukachevo (Ukraine) in 2004.⁶¹

Obviously, family and group voting is by no means acceptable. It tends to deprive women, and sometimes young people, of their individual voting rights and as such amounts to a form of electoral fraud. The Congress Recommendation 111 (2002)⁶² emphasised the paramount importance of women's

right to an individual, free, and secret vote and underlined that the problem of family voting is unacceptable from the standpoint of women's fundamental rights.⁶³

b.) Regulation of electoral crimes is not a specificity of the Romanian legal system, the existence of such crimes being found in other European countries.

The examination of electoral regulations in comparative law reveals that the crime of breach of confidentiality of the vote provided for in the national law is also found, with a similar content, in the legislation of other European countries:

✓ Criminal Code of Estonia⁶⁴

Article 166 (Violation of confidentiality of voting) - Violation of the procedure for voting by secret ballot at an election or referendum is punishable by a fine of up to 100 fine units or by detention.

Article 153 (Violation of Free Determination) - Whoever at an election or ballot compels a voter to answer for his vote, or asks him how he has voted, or why he has not voted shall be punished by a fine or sentenced to imprisonment for not more than one year.

✓ Criminal Code of Slovenia⁶⁵

Article 156 (Obstruction of Secrecy of Ballot) - Whoever violates the secrecy of the election or ballot shall be punished by a fine or sentenced to imprisonment for not more than six months.

If the offence under the preceding paragraph is committed by an official through the abuse of his function relating to the election or ballot, such an official shall be sentenced to imprisonment for not more than two years.

✓ French Electoral Code⁶⁶

Article L113 - Apart from the cases specially provided for by the provisions of laws and decrees, anyone who, either in the frame work of an administrative or municipal commission, either in a polling station or in offices in town halls, prefectures and sub-prefectures, before, during or after ballot, will, by voluntary disregard for the law or orders of the prefect, or by any other fraud, violates or attempts to violate the secrecy of the vote, violates or attempts to harm the honesty of the vote⁶⁷, prevents or attempts to prevent voting operations or changes or attempts to

⁵⁹ *Code of Good Practice in Electoral Matters. Guidelines on Elections*, adopted by the Venice Commission at its 51st Plenary Session (Venice, 5-6 July 2002), para. 4, p. 9, available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282002%29023-e>, accessed on 15.01.2015.

⁶⁰ *Code of Good Practice in Electoral Matters. Explanatory Report*, adopted by the Venice Commission at its 52nd Plenary Session (Venice, 18-19 October 2002), para. 52, 55, 34, 35, p. 24, 21, available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282002%29023-e>, accessed on 15.01.2015.

⁶¹ Council of Europe, *Electoral Law*, Council of Europe Publishing, Strasbourg, 3 July 2013, para. 145, p. 132-133, available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-EL%282013%29006-e>, accessed on 15.01.2015.

⁶² Congress of local and regional authorities of Europe, *Recommendation 111 (2002) on women's individual voting rights: a democratic requirement*, adopted on 6 June 2002.

⁶³ Council of Europe, *Electoral Law*, *op. cit.*, para. 147, p. 133.

⁶⁴ The Penal Code of Estonia, available at: <http://legislationline.org>, accessed on 15.01.2015.

⁶⁵ The Criminal Code of Slovenia, available at: <http://www.policija.si/>, accessed on 15.01.2015.

⁶⁶ French Electoral Code, available at: <http://legifrance.gouv.fr>, accessed on 15.01.2015.

⁶⁷ Regarding the notion of "honesty" in electoral matters, see R. Ghevoantian, *La notion de sincérité du scrutin*, *Cahiers du Conseil constitutionnel No. 13 (Dossier: La sincérité du scrutin)*, Janvier 2003, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/cahiers-du-conseil/cahier-n-13/la-notion-de-sincerite-du-scrutin.52035.html>, accessed on 15.01.2015.

change the outcome of the elections, shall be liable to a fine of 15 000 euro and imprisonment of one year or one of these penalties.

Article L116–(1) Those who, by any fraudulent means, performed even outside the premises or commissions referred to in article L. 113, have violated or attempted to undermine the honesty of the vote, violated or attempted to violate the secrecy of the vote, prevented or attempted to prevent voting actions, or by the same maneuvers, changed or attempted to change the results of the vote, shall be punished with sentences provided for in those articles.

✓ German Criminal Code⁶⁸

Section 107c (Violation of secrecy of elections) - Whosoever contravenes a provision which serves to protect the secrecy of elections with the intention of obtaining for himself or another knowledge as to how a person voted, shall be liable to imprisonment not exceeding two years or a fine.

According to Section 108d (Jurisdiction), Sections 107 to 108c shall apply to elections to the parliaments, election of members of the European Parliament, other popular elections and ballots in the Federation, the member states, municipalities and municipal associations, as well as direct elections in the social security system. The signing of nomination papers or the signing of a popular referendum shall be equivalent to an election or ballot.

✓ Swiss Criminal Code⁶⁹

Article 283 (Breach of voting secrecy) - Any person who obtains knowledge by unlawful means of how individuals have voted is liable to a custodial sentence not exceeding three years or to a monetary penalty.

3. Conclusions

Almost two decades after having returned to democracy, the law maker considered it necessary to include in the New Criminal Code, based on the trend of modernization of the codification of the incrimination of criminal acts, Title IX which contains the electoral offences (Articles 385 – 393)⁷⁰, whereas the texts bring a better systematization of

incriminations in this matter considering their legal object.⁷¹

From this perspective we would like to mention the introduction of an offence to sanction *the breach of the voting secrecy*, which is likely to ensure a higher stability of the incrimination, on the one handside, and to eliminate the existing parallel incriminations which existed in the previous framework, on the other handside.

The possibility of any citizen to freely and unrestrictedly express their will when exercising their right to vote is exactly that guarantee of free expression based on which the voter elects freely and independently, without being subject to any constraint. From this perspective it is important to mention that the law maker has the obligation to create a coherent and stable legal framework in electoral matters which is likely to ensure, *inter alia*, the respect of the voting secrecy, as well.

We consider that the legal provisions as a whole create sufficient instruments, both in relation with the actual way of ensuring the voting secrecy, given that, as mentioned, all normative acts in electoral matters provide for the right of the voters to vote separately, in closed booths, whereas the presence of any person in the voting booth, except the person casting her vote, is forbidden, but also in relation with the regulation of a criminal sanction (Article 389 of the Criminal Code), incident when the members of the electoral bureau of the polling station or any other persons do not respect the legal provisions and violate the voting secrecy.

To close with, we would like to mention that the offence in Article 389 of the Criminal Code is in accordance with the provisions of the Code of Good Practice in Electoral Matters which states that the breach of voting secrecy has to be sanctioned, the same as cases of violation of other aspects of the freedom to vote. Voting secrecy is an aspect of the freedom of vote whose purpose is the protection of voters against any form of pressure they can be confronted with in case other persons find out about which candidates they voted for. The principle of secrecy has to be applied to the entire procedure and especially to the phase of voting and counting of votes. Voting secrecy is not only a right of the voter, but also an obligation to respect the right of the other.

References

1. Legislation

A. National Legislation

- Constitution of Romania
- Criminal Code of Germany
- Criminal Code (Law No. 286/2009) of Romania

⁶⁸ German Criminal Code, available at: <http://www.gesetze-im-internet.de>, accessed on 15.01.2015.

⁶⁹ Swiss Criminal Code, available at: <http://www.admin.ch/>, accessed on 15.01.2015.

⁷⁰ M. C. Sinescu in V. Dobrinoiu et al., *op. cit.*, p. 993.

The law maker actually came back to the traditional approach existent during the inter-war period, namely the Criminal Code of 1936, which contained in Book II – Crimes and offences in special, Title II – Offence against the exercise of political and civil rights.

⁷¹ Law No. 286/2009 on the Criminal Code – notes and explanations, p. 274, available at: <http://www.just.ro/LinkClick.aspx?fileticket=Wpo7d5611%2fQ%3d&tabid=2604>, accessed on 15.01.2015.

- Criminal Code of Slovenia
- Criminal Code of Switzerland
- Criminal Procedure Code (Law No. 135/2010) of Romania
- Electoral Code of France
- Law on the Romanian citizenship No. 21/1991, republished in the Official Gazette of Romania No. 576 from 13th of August 2010, with subsequent amendments and supplements.
- Law No. 3/2000 on the organization and performance of the referendum;
- Law No. 67/2004 on the election of the authorities of the local public administration;
- Law No. 370/2004 on the election of Romania's President;
- Law No. 33/2007 on the organization and performance of the elections to the European Parliament;
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