THE ACCEPTANCE OF ELECTORAL BRIBERY. BRIEF CONSIDERATIONS REGARDING THE OPPORTUNITY OF RECRIMINALIZATION

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Abstract
Starting from the multiple negative effects that electoral corruption has on the democratic electoral process and observing the existing legislative gap in Romanian law, in which only active electoral corruption is criminalized, the present article aims to identify arguments for the recriminalization of passive electoral corruption. This paper provides an overview of the historical evolution of the criminalization of the acceptance of electoral bribery in Romanian law and also includes a brief examination of the legislation of other European Union Member States in which the legislator has opted to criminalize this act. In conclusion, a proposal is made for the recriminalization of the acceptance of electoral bribery, which would result in strengthening the integrity of the electoral system.
Keywords: *elections, corruption of voters, acceptance of electoral bribery, offering of electoral bribery, offence, Criminal Code*

I. INTRODUCTION

The electoral process represents an essential component of the democratic system, the principal mechanism through which citizens express their political will. A properly conducted and unaltered electoral process guarantees the proper functioning of democracy, and its outcome reflects the true will of the electorate.

With a history as old as that of elections themselves, electoral corruption constitutes one of the most serious distortions of electoral competition. Whether active or passive, electoral corruption distorts the electoral will, ultimately vitiating the voting outcome and affecting the electoral process itself. This practice undermines public confidence, on the one hand, in the electoral process and in democratic mechanisms, and, on the other hand, in fundamental institutions, generating an effect of systemic delegitimization [1].

In this context, a firm response from the state to such practices is required, so as to ensure the proper conduct of elections, one component of this response being a coherent criminalization of acts directed against the proper functioning of the electoral process.

Domestic legislation provides, in Article 386 of the Criminal Code, the offence of corruption of voters, an offence that represents a specific form of the classic offence of bribery, provided in Article 290 of the Criminal Code, the difference being that the act of bribery is directed toward the voter, not toward a public official. However, with the adoption of the current Criminal Code, the legislator chose to decriminalize the act of accepting electoral bribery, probably for reasons related, as mentioned, to the degree of social danger posed by the act. We consider that this decision of the legislator was not a correct one, as it leaves unregulated a practice that may become widespread in the absence of legislative provisions.

II. THE EVOLUTION OF REGULATION IN ROMANIA

In contrast to the current situation, in the past, the offence of acceptance of electoral bribery was provided for in domestic legislation in various forms and in numerous normative acts.

Thus, the first provision of the offence appeared in the Electoral Law of 1864 [2], with the following legal content: “Anyone who is proven to have bought or *sold a vote* at any price shall be punished by the prohibition of the right to vote and to be elected, as well as by the prohibition of holding a public office for a period of at least 5 years and at most 14 years. The seller and the buyer of the vote shall also be punished by the payment of double the value of the goods received or promised.

A short time after its adoption, the Electoral Law of 1864 was repealed by the Electoral Law of 1866 [3], the new normative act regulating the field no longer providing any article concerning the act of corruption of voters, whether active or passive.

The offence of acceptance of electoral bribery reappears in Romanian legislation with the entry into force of the Electoral Law of 1884, promulgated by King Carol I through Decree no. 1788 of 8 June 1884 [4]. Thus, the offence was provided in Article 127, with the following legal content: “Anyone who is proven to have bought votes or abstentions

from voting, as well as those who have sold their vote, shall be punished with imprisonment from 3 months to 1 year and with a fine from 500 to 5,000 lei, and with unlimited interdiction." In addition to the penalty, the perpetrator could also lose the right to be elected and to vote for a period of up to 5 years.

Subsequently, the criminalization of the act was maintained in the Electoral Law of 9 May 1939 [5], the offence being provided in Article 55, with content identical to that of Article 127 of the Electoral Law of 1884, including the applicable penalties, the only difference in regulation being the absence of the sanction of disqualification from being elected, the new electoral law retaining only the disqualification from voting.

With the establishment of the communist regime in Romania, electoral legislation also became a tool for manipulating and controlling the population, electoral processes turning, in the absence of genuine multiparty competition, into mere formalities aimed at consolidating the regime and its leader [6]. Under these conditions, in the absence of fair electoral competition, the criminalization of the act of acceptance of electoral bribery in the electoral legislation [7] of the time no longer had any rationale.

Immediately after the 1989 Revolution, the adoption of a new legislative framework to regulate the electoral system became necessary.

Thus, the first normative act adopted was Decree-Law no. 92/1990 on the election of the Parliament and the President of Romania [8], which, in Article 89, provided: "The promise, offering, or giving of money or other benefits for the purpose of determining the voter to vote or not to vote for a certain list of candidates or independent candidate, as well as *the receipt thereof by voters for the same purpose*, or the exercise of the right to vote in violation of the provisions of Article 5, shall be punished by imprisonment from 6 months to 5 years."

After the stabilization of the new democratic structures, the legislator opted for the adoption of several normative acts, each regulating a specific type of election. Thus, Law no. 70/1991 on local elections [9], Law no. 68/1992 on the election of the Chamber of Deputies and the Senate [10], and Law no. 69/1992 on the election of the President of Romania [11] were adopted, all three normative acts criminalizing the receipt of money or other benefits by voters for the purpose of voting or not voting for a certain candidate or list of candidates, an act punishable by imprisonment from 6 months to 5 years.

Subsequently, maintaining the harmful practice for the unity of the national electoral system, namely, that of having a different normative act for each type of election [12], the legislator continued to adopt normative acts regulating each individual election, acts which provided for offences pertaining to the electoral regime.

Thus, with regard to parliamentary elections, Law no. 373/2004 on the election of the Chamber of Deputies and the Senate [13] was adopted, which in Article 102 provided: "The promise, offering, or giving of money, goods, or other benefits for the purpose of determining the voter to vote or not to vote for a certain list of candidates or a certain candidate, as well as *the receipt thereof by the voter for the same purpose*, constitute offences and shall be punished by imprisonment from 6 months to 5 years." The normative act was repealed and replaced by Law no. 35/2008 on the election of the Chamber of Deputies and the Senate [14], which provided for the offence of acceptance of electoral bribery in Article 55: "The promise, offering, or giving of money, goods, or other benefits for the purpose of determining the voter to vote or not to vote for a certain electoral competitor or a certain candidate, as well as *the receipt thereof by the voter for the same purpose*, constitute offences and shall be punished by imprisonment from 6 months to 5 years" [para. (1)]. According to paragraph (2), the attempt was punishable, and paragraph (3) provided that goods of symbolic value bearing the insignia of the respective party did not fall within the category of goods referred to in paragraph (1). By Emergency Ordinance no. 67/2012, paragraph (3) was amended and two new paragraphs were introduced, establishing which goods fall within the category of goods referred to in paragraph (1). Thus, according to paragraph (3), the category of goods referred to in paragraph (1) also includes foodstuffs, alcoholic or non-alcoholic beverages, tobacco products, or non-food goods. Paragraph (4) provides that the following do not fall within the category of goods referred to in paragraph (1): electoral propaganda materials and objects, such as posters, leaflets, postcards, calendars, notebooks, illustrated cards, pens, lighters, matches, badges, name tags, DVDs, pennants, flags, mugs, bags, T-shirts, caps, scarves, shawls, vests, beanies, gloves, raincoats, jackets, bearing the electoral insignia of political formations or candidates participating in the elections. Paragraph (5) further exempts from the provisions of paragraph (1) other electoral propaganda objects, bearing the electoral insignia of political formations or candidates participating in the

elections, whose value does not exceed 10 lei excluding VAT for each item, provided that such goods may not be foodstuffs, alcoholic or non-alcoholic beverages, or tobacco products.

In 2004, the Law on the Election of the President of Romania, Law no. 370/2004 [15], was also adopted, which, with regard to liability, in an atypical manner, referred to the normative act regulating parliamentary elections: “The contravention sanctions and penalties provided by law for violations of the legal provisions concerning the election of the Chamber of Deputies and the Senate shall also apply with regard to violations of the corresponding legal provisions concerning the election of the President of Romania” (Article 27). In 2009, the normative act underwent substantial amendments through Emergency Ordinance no. 95/2009, abandoning the reference to the provisions of Law no. 67/2004 and introducing a new chapter regulating contraventional and criminal liability. However, this chapter did not include any provision concerning criminal liability for the acceptance of electoral bribery, so that from that moment onward the passive corruption of voters on the occasion of presidential elections was no longer criminalized.

Law no. 67/2004 on the election of local public administration authorities [16] criminalized, in Article 105 (Article 109 after the republication of the normative act in 2007), the offence of acceptance of electoral bribery: “The promise, offering, or giving of money, goods, or other benefits during the electoral campaign, as well as for the purpose of determining the voter to vote or not to vote for a certain list of candidates or a certain candidate for the office of mayor, councillor, or president of the county council, as well as *the receipt thereof by voters*, constitute offences and shall be punished by imprisonment from 6 months to 5 years.” The attempt was punishable. It is noteworthy that the text did not criminalize the acceptance of the promise or the offer, but only the actual receipt of the money, goods, or benefits. Moreover, for the offence to exist, the act of receipt had to occur during the electoral campaign.

With regard to elections to the European Parliament, Law no. 33/2007 on the organization and conduct of elections to the European Parliament [17], in its initial form, did not criminalize the offence of acceptance of electoral bribery (in fact, the normative act did not provide for any criminal offences at the time of its adoption). Subsequently, considering the imperative of ensuring a fair and transparent electoral process [18],

Emergency Ordinance no. 11/2009 introduced Article 22^3, which criminalized the acceptance of electoral bribery, with the following legal content: “The promise, offering, or giving of money, goods, or other benefits for the purpose of determining the voter to vote or not to vote for a certain list of candidates or an independent candidate, as well as *the receipt thereof by the voter for the same purpose*, constitute offences and shall be punished by imprisonment from 6 months to 5 years.” The attempt was punishable, and goods of symbolic value bearing the insignia of a party did not fall within the category of goods whose receipt was prohibited. It is noteworthy that the text required, as a condition, that the receipt of money, goods, or benefits be made for the purpose of voting or not voting for a list of candidates or for a particular candidate. With the republication of the normative act on 31 August 2012, the act was provided in Article 58, retaining the same legal content.

Finally, in Law no. 3/2000 on the organization and conduct of the referendum [19], one notes the absence of an offence sanctioning the acceptance of electoral bribery.

As can be observed, the regulation of the offence in the legislation prior to the current Criminal Code lacked consistency, the act of acceptance of electoral bribery committed on the occasion of local, parliamentary, or European Parliament elections being punishable, while the same act committed on the occasion of presidential elections or during a referendum was not criminalized. At the same time, significant differences may be noted between the legal provisions incriminating the act. Thus, in the case of local elections, the act had to be committed during the electoral campaign, whereas in the case of elections to the European Parliament and in the case of elections to the Parliament of Romania, no such condition existed. There are also substantial differences regarding the manner in which the goods that may constitute the object of electoral bribery and those excepted from this category were determined, ranging from the absence of such provisions in some normative acts to an excessive level of detail in others.

With the entry into force of the new Criminal Code, the legislator opted to incorporate all electoral offences into the Code, thereby eliminating the previously existing parallel system, with all its shortcomings. However, in a surprising manner, within Title IX of the Special Part of the Criminal Code, dedicated to electoral offences, the offence of acceptance of electoral bribery is no longer included, the legislator choosing to

decriminalize this act. Thus, at present, Article 386 paragraph (1) of the Criminal Code provides for the offence of corruption of voters with the following legal content: “The offering or giving of money, goods, or other benefits for the purpose of determining the voter to vote or not to vote for a certain list of candidates or a certain candidate shall be punished by imprisonment from 6 months to 3 years and the prohibition of certain rights.” According to paragraph (2), “goods of symbolic value, bearing the insignia of a political formation, do not fall within the category of goods provided for in paragraph (1).” Pursuant to Article 392 of the Criminal Code, the provisions of Article 386 apply accordingly to acts committed on the occasion of a referendum. As can be observed, the legal text of Article 386 of the Criminal Code covers only the hypothesis of active electoral corruption, not that of passive electoral corruption.

III. ASPECTS OF COMPARATIVE LAW

At the international level, the choice of national legislators has been divided: some have considered that the act of acceptance of electoral bribery must be criminally sanctioned, while others have chosen not to incriminate this act.

In the legal systems that criminalize the acceptance of electoral bribery, according to the criterion of the regulatory framework, two systems have been identified: one in which electoral offences are provided for in the criminal code, a feature that ensures the stability of the incriminating provision, protecting it from the frequent amendments of electoral legislation, and another in which electoral offences are included in the electoral code, so that they may be revised whenever the general framework of elections is modified.[20]

Thus, in Germany, the offence of acceptance of electoral bribery is provided in the Criminal Code [21], in Article 108b paragraph (2), with the following legal content: “*Anyone who demands, allows himself to be promised, or receives gifts or other benefits in exchange for not participating in an election or for voting in a particular manner shall be punished* with imprisonment of up to 5 years or with a fine.” Article 108c provides that, in addition to a custodial sentence of at least six months, the court may order the loss of the right to be elected in public elections and the right to vote in public matters.

In Austria, the Criminal Code [22] criminalizes the act of acceptance of electoral bribery in Article 265 paragraph (2): "The same penalty (imprisonment of up to one year or a fine of up to 720 daily units - n.n.) *shall be imposed on a person entitled to vote who demands, receives, or accepts the promise of money in order to vote in a certain way or not to vote, or not to vote in a certain way*."

The Polish Criminal Code sanctions the offence of acceptance of electoral bribery in Article 250a paragraph (1): "*A person who, having the right to vote, receives a pecuniary benefit or a personal advantage, or demands such benefits in order to vote in a certain way, shall be subject to the penalty of deprivation of liberty from 3 months to 5 years*." According to paragraph (3), in cases of lesser gravity, the person who committed the offence shall be subject to a fine, restriction of liberty, or deprivation of liberty of up to 2 years, and according to paragraph (4), where the perpetrator informs the prosecuting authority of the offence and of the circumstances of its commission before the authority learns of it, the court may apply an extraordinary mitigation of the penalty or may even waive its imposition. [23]

In Denmark, according to Article 117 item 5 of the Criminal Code [24], *a person who receives, demands, or accepts the promise of material gains in order to vote in a certain way or to abstain from voting shall be punished with a fine or imprisonment of up to 2 years*.

The French Electoral Code [25] provides, in Article L106, the offence of acceptance of electoral bribery, alongside that of offering electoral bribery: "Any person who, by gifts or donations in money or in kind, by promises of donations, favours, public or private employment, or other special advantages, made for the purpose of influencing the vote of one or more voters, has obtained or has attempted to obtain their vote, either directly or through a third party, or any person who, by the same means, has induced or attempted to induce one or more voters to abstain from voting, shall be punished with 2 years' imprisonment and a fine of 15,000 euros. *Those who have accepted or solicited the same donations, gifts, or promises shall be punished with the same sanctions*."

In Belgium, the offence of acceptance of electoral bribery is provided for in the Electoral Code [26]. Thus, Article 181 incriminates both the giving and the acceptance of electoral bribery: "Anyone who gives, offers, or promises, directly or indirectly, even in the

form of a wager, money, goods, or any other advantage or guarantee in exchange for a vote, for abstention from voting, or for a voting proxy referred to in Article 147bis, or who offers the advantages described depending on the outcome of the elections, shall be punished with imprisonment from 8 days to one month and with a fine between 50 and 500 euros, or with only one of these penalties. *Anyone who accepts the offers or promises shall be subject to the same penalties*." At the same time, Article 182 provides that: "*Anyone who* makes or *accepts the offer or promise of public or private employment shall be subject to the same penalties provided in the preceding article*."

IV. CONCLUSIONS AND *THE LEGE FERENDA* PROPOSAL

As can be observed from the material presented in the second section of this paper, from a historical perspective, the offence of acceptance of electoral bribery has evolved and has continuously accompanied the democratic electoral processes in our country. The presence of the offence in domestic legislation reflected the legislator's concern for protecting the freedom of the vote and ensuring the correct outcome of the electoral process. The only extended period during which the act was not criminalized was the communist period; however, this absence was justified by the characteristics of the political system of the time, without political pluralism, without genuine elections or alternative options, with a purely formal vote, so that regulating an offence of electoral corruption, whether active or passive, was pointless. The situation is entirely different today, when there must be a guarantee that the electoral process takes place under democratic and fair conditions that provide legitimacy to the outcome of the vote. Under these circumstances, we allow ourselves to assert that the choice of the Romanian legislator to no longer criminalize the act of acceptance of electoral bribery, alongside that of offering electoral bribery, is an erroneous one.

In the doctrine [27], the view has been expressed that the decision to decriminalize the act of the person who receives electoral bribery is a correct one, given that the persons targeted by such bribery attempts are individuals in a precarious material situation, a circumstance that renders the degree of culpability of the act relatively low. Certainly, it is generally accepted that the recipient of electoral bribery is, in most cases, a materially disadvantaged citizen, with a precarious social situation and a lower level of

education and information[28], however, this aspect, considered in isolation, does not justify the decriminalization of the act of acceptance of electoral bribery, as long as the consequences of the offence fall upon the state, as the holder of social values, which ensures the proper conduct of the electoral process. [29]

The giving and acceptance of bribes are two facets of a complex act that necessarily requires the involvement of two persons, the bribe-giver and the bribe-taker.[30] The act of accepting or receiving the bribe offered by the bribe-giver serves to complete and perfect the latter's illicit conduct and consummates the picture of elections with a tainted outcome. Bribery cannot exist without a bribe-taker, whose contribution to producing the harmful result affecting the protected social relations is substantial. Under these circumstances, we consider that the recriminalization of the act of acceptance of electoral bribery is necessary, so that the bribe-taker may also be held liable alongside the bribe-giver. By criminalizing the act of acceptance of electoral bribery, a complex process of increasing the accountability of the citizen and of society as a whole will be achieved with respect to the extremely harmful phenomenon of electoral corruption.[31]

In our view, in cases of electoral bribery, the act of the bribe-taker is just as serious as that of the bribe-giver, and, in the event of a possible recriminalization, the penalty ranges provided for both acts - offering and accepting electoral bribery - should be similar, all the more so since, with the inclusion of the offence of corruption of voters in the Criminal Code, the penalty limits for offering electoral bribery were reduced. There is also the view [32], which we do not dispute, according to which the gravity should be focused on the person upon whom the creation of the corrupt state depends, without whose contribution the phenomenon would not exist. Thus, contrary to the situation of classic bribery, where this person is the public official who receives the bribe, in the case of electoral corruption the person upon whom the corrupting phenomenon fundamentally depends is the bribe-giver, who, moreover, has an interest in obtaining a certain result in the elections or the referendum. Accordingly, in the author's view, in cases of electoral corruption, the sanctioning regime applicable to the corrupted voter (the bribe-taker) should be considerably more lenient than that applicable to the bribe-giver. As stated above, we do not consider this view to be incorrect either, the determination of the sanctioning regime remaining within the discretion of the legislator.

In conclusion, sharing the view of other authors [33] that the decriminalization of the act of acceptance of electoral bribery was an unfortunate decision, we consider that its recriminalization is necessary, the legal provision to have the following content: "*The soliciting, accepting, or receiving of money, goods, or other benefits for the purpose of voting or not voting for a certain list of candidates or a certain candidate shall be punished by imprisonment from 6 months to 3 years and by the prohibition of the exercise of certain rights*."[34]

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