THE INOBSERVANCE OF THE SPECIAL CONDITIONS AFFINED TO THE BALLOT BOX IN THE NEW PENAL CODE

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Abstract
The infraction of inobservance of the special conditions affined to the ballot box is statutory in the effective electoral laws as well as in the New Penal Code.

Next to vote malversation, electronic vote malversation, the invasion of voting secrecy, document forgery and electoral inventory forgery, it is part of the issues meant to protect the voting process.

Proper regulation is needed, especially considering that quite frequently election outcomes are close, while there is also to be considered the tremendous pressure from both political forces and public sphere alike. The trust as regards to the content of the ballot box must not be questionable.

The proper regulation of this infraction can serve as a buffer against the perpetration of linked infractions of a penal nature.

After a comparative analysis of the actual regulation and the future one, we believe that the adjusted and regular text of the New Penal Code is welcomed and it should be assumed by the legislator also in its present legal norms, in the context in which the 286/2009 law is deferred.

Keywords: electoral law, inobservance of the special conditions affined to the ballot box, electoral infraction, the New Penal Code.

Constructing a functional democratic system implies serious legislative and institutional endeavours. Towards achieving this goal, it is necessary but not sufficient to guarantee in the constitution the right to vote and to be elected, but

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3 Consecutive, in art. 36, 37 and 38 of the fundamental law the right to vote, the right to be elected, and the right to be elected in the European Parliament are present.

According to art. 36 „(1) Romanian citizens have the right to vote once they came of age 18, not excluding the day of the vote.

(2) The feeble, the disordered, those that are under interdiction, those that are condemned with their right to vote suppressed through final court decision do not have the right to vote.
also actuating an electoral process that can guarantee on one hand that every citizen has the practical ability to exercise this right, but as well the equity of the suffrage in its entirety because the result of the ballot has to reverberate the self-will of the electorate.

On these grounds the legislator of the New Penal Code inherently provided a chapter on electoral infractions.

Therein, through articles 385 to 391 it can be found: the infraction of arresting from exercising one’s electoral rights (art. 385), the perversion of the constituents (art. 386), ballot fraud (art. 387), frauding the electronic ballot (art. 388), encroaching on the privacy of the suffrage (art. 389), disregarding the statute of the ballot box (art. 390), the forgery of electoral documents or electoral inventory (art. 391).

At a closer look it can be observed that the legal texts are intended to protect both aspects that have been mentioned before, the factual exercise of the electoral rights, in consideration of which the infraction stipulated by the 385 article exists, as well as the social relations that are central to the electoral process.

To achieve this last mentioned desideratum the Penal Code protects the privacy of the vote, the electoral documents and inventory, which should mirror reality, as well as the equity of the turn out of the ballot which can be subjected to alteration through the perversion of the constituents or frauding the electronic ballot.

Within this ensemble the agency of the ballot box is essential.

The votes are collected in the ballot box through the conveyance of the polling station and these, and only these votes are subsequently counted after the poll is closed and the result of the count is registered in the recording of proceedings compiled by the members of the polling station and further processed so as to obtain the result for the ballot.

Art. 390 paragraph 1, from the New Penal Code, provides that opening the ballot box before the determined time for closing the poll is punishable with a term of between 1 to 3 years of incarceration and a ban on certain rights. Paragraph 2 provides that entrusting the special ballot box to any individual outside the members of the polling station, its transferring by any other individual outside the authorized team or in other conditions than those provided by the law it is

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Art. 37 asserts that “(1) The romanian citizens that fulfill the conditions provided by art. 16 paragraph. (3) benefit from the right of being elected, in case they are not banned from being members of a political party, under art. 40 paragraph. (3).

(2) The candidates must be of at least 23 years of age till election day, in order to be able to run in the elections for the Chamber of Deputies or for occupying public functions in the local public administration system; must be of at least 33 years of age in order to run in the elections for the Senate and at least of 35 years of age to be elected as President of Romania.

And art. 38 asserts that “With Romania being a member of the European Union, Romanian citizens have the right to elect and be elected in the European Parliament.

punishable with a term of 3 months to 2 years of incarceration or with a fine and
the ban on certain rights.

The infraction is known in its standard variety, as it is described in the first
paragraph of the law, as well as in its assimilated variety, regularized in the second
paragraph; and we choose to first analyze the standard variety, leaving for later the
analysis of the assimilated variety and only there where it is necessary.

The juridic subject matter of this infraction is made out of the social relations
pertaining to the scrupulous carrying out of the voting process. As we have
mentioned before, this is essential for the manifestation of the democratic system
as a working ensemble. The regulation of these issues is very important, especially
taking into consideration that the result of the poll is more often than not very close
and there is tremendous public pressure from both the political interests and
the electorate. Public trust in the content of the ballot box must be intact5.

The employment of the ballot box is a complex one. For example, under law
35/2008, each polling station is obliged to have in its administration sufficient
ballot boxes adequately marked for each voting category, as well as a special ballot
box (art. 41). 35/20086.

The ballot boxes, which are provided by the mayor of the township, town,
municipality and subdivisions of the municipality and the (prefect) chief
commissioner, must be placed in the same room with the office of the president of
the elective office of the polling station (art. 41 paragraph 2). The ballot boxes are
handed together with the materials needed for the voting process by the mayor to
the president of the elective office of the polling station on the strength of a
recording of proceedings, and from that moment on are kept under guard and key
under the authority of the president of the elective office (art. 41 paragraph 7). For
technical reasons the voting process can be suspended. During this period the
ballot boxes will be constantly guarded (art. 42 paragraph 18). The president of the
elective office can approve, upon written request received from untransportable
constituents due to illness or disability with medical or official documents proving
this state attached to the request, that a team made out of at least two members of
the elective office to travel with a special ballot box and the necessary documents –
the seal with the „VOTED” stamp and the ballot papers – to where the constituent
so as the process of voting be possible. Within the authority of a polling station
there is only one special ballot box. The special ballot box can be transported solely

6 Law nr. 35/2008 for the elections of the members of the Chamber of Deputies and The Senate and
for the modification and addition of Law nr. 67/2004 for the election of local public administration
authorities, of the Local Public Administration Law nr. 215/2001 and Law nr. 393/2004 regarding
the legal statute of local elected authorities, The Official Gazette of Romania nr. 196/13.03.2008, with
subsequent modifications and additions. We chose this text because out of all the text in exercise at this
point it is the most complete and clear. The procedure is provided for in a similar way in the rest of the
special laws, the differences are minor and do not change in any way our present analysis. For example,
one difference is in the hours between which the electoral process takes place.
by the members of that specific polling station. The special ballot box can be transported and used only within the authority of the polling station to which it was assigned (art. 42 paragraph 22). The regulation is meticulous and ranges across all the instant of the electoral process till the moment in which the voting is stopped and the ballot boxes are opened. Taking this aspect into account we can realize the importance of this infraction because its prevention is a real obstacle for a whole set of other acts of a penal nature. For example, opening the ballot box before the legally established hour could facilitate the insertion.

The same situation applies to the assimilated variety regulated in paragraph 2, where it is established that entrusting the ballot box to any other person besides the members of the elective office of that particular polling station or its transportation by unauthorized persons could result into illegal or misuse of the ballot box.

For example, it could be used by persons other than those with the right to vote, the veracity control addressed to the elective office of the polling station could be performed in inadequate conditions, and, it could also result in a larger number of ballot papers than the expected number.

The material object of the crime lies in the ballot box in which the ballot papers are placed. Actually, we are talking about a box out of cardboard or from another material.

Normal ballot boxes are placed within the polling station as it is mentioned above and are customized for each type of election. There is only one special ballot box for the territory assigned to a polling station. It is prohibited for more than just one special ballot box to be used within one’s polling station territory.

Taking into consideration the social norms that are hence protected it can be argued that this infraction has no material object and the existence of the ballot box represents only a premise type situation for committing the infraction. Because this is purely a theoretical aspect we shall not debate upon it any further.

The active subject of the infraction is not named. The ballot box can be opened by voters, observers that are within the polling station or even by candidates. Likewise, the infraction can be committed by any of the members of the elective office of the polling station, by the personnel assigned with the security of the polling station or by individuals, who, although do not have the right to vote, enter the premises of the polling station or come into contact with the special ballot box.

The passive subject of this infraction is represented by the state, represented by the institutions that handle the organization the electoral process and in its capacity of guarantor for the validity of the electoral process. Secondly, it can be said that the candidate running for election has also its interest of being elected put into jeopardy, as long as the infraction consists also in the defrauding of the electoral process and as a result the turn out of the electoral process is influenced. Anyway, the candidate shall be considered a passive subject of the infraction of defrauding the electoral process and not of the infraction of infringing upon the statute of the ballot box.
As far as the constituent content of the infraction, the material element of the act in its standard type is materialized into an action, the action of opening the ballot box.

The time span in which the infraction can be committed starts just before the electoral process (for example, in accordance with Law number 35/2008, between 06:00 o’clock and 07:00 o’clock in the day established for the vote) with the moment in which the ballot boxes are sealed, in the day of the vote, by the president of the electoral office of the voting station, together with its members, till the moment in which the electoral process is stopped and the ballot boxes are opened. This last moment can be represented by the time appointed by Law (Law Number 35/2008 established 21:00 o’clock as the designated time), or at a later time in cases in which the electoral process has been extended.

As a result, any act upon the ballot box before the moment in which it is sealed can be constitute an infraction because the ballot box is checked and any problem detected by the electoral office can be fixed. The author shall be accountable for the infraction of property damage if in the act of tempering with the ballot box it is damaged.

Subsequent to the moment in which the seal is broken and the ballot papers are extracted it can not be said that another infraction consisting in ballot box opening can not occur.

Taking into consideration the type of the action needed for this infraction according to the law, this infraction does not have a continuous aspect. The infraction takes place the moment the ballot box is opened. In case the ballot box is reopened after being resealed, another infraction takes place.

Nevertheless, in our opinion, this infraction can be committed in a continuous aspect as long as the author opens the ballot box repeatedly and having in mind the same infractional drive.

Law number 390 from the New Penal Code contends on the opening of the ballot box before the appointed time. If a person, taking advantage of the same opportunity, opens more than just one ballot box, be it normal or special, this person shall commit only one infraction and this person shall not be within a concurrence of criminal offences. This type of situation can occur for example during the electoral process for the Parliament because each polling station is equipped with a ballot box for the Senate and another ballot box for the Chamber of Deputies.

However, in the situation in which the author of the infraction enter within a polling station and opens ballot boxes, only to continue by entering another polling station where he commits the same act, we consider it to be a concurrence of criminal offences, not a simple infraction.

Firstly, the law can not hold into account all the ballot boxes from all the polling stations, and secondly, the lack of a time and space term can not delineate a criminal determination which could be specific to just only one infraction, not even one specific to a recurrent offence.
The inobservance of the special conditions ...

The moment a criminal activity leads to damaging the ballot box which can not be expected merely as a result of opening it, the infraction shall concur with property damage in its standard type.

Perpetrating an action upon the establishment of the polling station can result or not, depending on the situation, in committing an act provided for by article 390 from the New Penal Code. Hence, if by perpetrating an action upon the establishment of the polling station, the individual does not intend to open the ballot boxes, and this happens accidentally, the author shall not be accountable for this action.

In the foreseeable situation in which the author commits the crime so as to open the ballot boxes, the acts shall be in an etiological relationship concurrence, while if the author acknowledges that through his actions the ballot boxes will be opened, we shall consider that we analyze a concurrence of criminal offences.

The immediate result of the act is translated in the sense of danger created by the author related to the over-all trust of the persons involved in the correctness in the electoral process and the results of the suffrage.

As a danger related crime, the causal link is a result of the materiality of the act.

As the subjective side is concerned, the condition of the guilt lies in the intention.

Most of the time the intention is a direct one, the author of the act proceeding to open the ballot box to influence the results of the electoral process in one way or another. Just as well, the act can be committed without an indirect intention.

A person that unwillingly opens a ballot box shall not be accountable for this infraction. For example, consider the situation in which a voter, once he has stamped his ballot paper, while trying to insert it in the ballot box, pushes it on the floor by mistake and the seal is broken.

In this case the ballot box shall be resealed and the electoral process can continue.

The ballot box can not be opened under any circumstance. As we mentioned before in the article, taking this into account, in the situation in which a person has made an error on the ballot paper, the person can received another ballot paper only if the ballot paper with the error has not been already inserted in the ballot box.

Likewise, the law indicates that if a valid ballot paper comes to be placed in another ballot box, it will be taken into consideration, but that ballot box could not be opened in order to retrieve it.

In practice we noticed the wide range of events that can take place during the electoral process. It has been recorded situations in which voters have dropped different objects into the ballot box, such as keys, personal documents and so on. Furthermore, it has been recorded the situation in which with the ballot paper, the voter also introduced the voting seal leading to a disturbance in the electoral process.
We believe that in this case a rigid interpretation of the law would not be in accordance with the volition of the legislator. As we have discussed, the condition of the guilt behind the act lies in the intention. Without intention the infraction does not exist. This is especially true in the case in which the electoral process is adjourned, the ballot box is opened by the president of the electoral office of the polling station in the presence of its members and once the objects are extracted the ballot box is resealed.

The motive and the aim do not influence the act. Nevertheless, most of the times these elements can be found in practice and can constitute a way of singularizing the given punishment.

According to article 392 of the New Penal Code the infraction of disregarding the statute of the ballot is also punishable during a referendum.

Likewise, according to article 393 from the New Penal Code the attempt of committing this infraction is punishable.

Concerning the punishment, the infraction in its standard type is punishable with an imprisonment term of 1 to 3 years or a fine or restricting access to certain rights.

In the judicial system implemented through The New Penal Code the problems associated with enforcing complementary punishments is no longer an issue. We would like to underline that taking into account the nature of the infraction, the court should take into consideration the possibility of restricting the access to the electoral process, besides restricting access to the possibility of being elected or exercising a position that infers the use of the state authority.

In its assimilated type the punishment is less restrictive, consisting in a term of incarceration of 3 months to 2 years, or a fine.

The text from the second in-line of article 390 from the New Penal Code asserts that entrusting the special ballot box to any other person beside the members of the electoral office of the polling station or even its transportation by any other person or in any other conditions that those asserted by the law is punishable by law.

A first observation would be in connection with the active subject, in case of entrusting the special ballot box, where, although the text makes no reference, the subject is in actual fact detailed. Taking into consideration that only the president of the electoral office of the polling station and the members of the electoral office have authority upon the special ballot box, only they can entrust the special ballot box to another person.

Next, discussing the way in which the transport takes place, we mention that the special laws assert this procedure. Consequently, any person that transports the special ballot box, outside the persons entrusted by the electoral office of the polling station would commit this infraction.

This infraction can be committed even by the persons that are legally entrusted with this task if they do not respect the procedures asserted by the law. For example, they can be held accountable for moving the special ballot box outside the territory of the polling station to which it was assigned.
The inobservance of the special conditions …

The material object is represented by the special ballot box \(^7\). As we have asserted earlier in the article, a polling station can have only one special ballot box and it can not be used in the territory of another polling station. We also mention the fact that the special ballot box is carried by two members of the electoral office to the persons that have requested it, under constant guard. Entrusting means giving something or someone in the care and guard of a person that you trust\(^8\). Taking this into account, we believe that this infraction does not take place in the situation in which the members of the electoral office entrust the special ballot box to a voter for a moment while they solve a series of administrative issues linked with the electoral process.

The act of entrusting something to someone must be understood as the act of keeping the special ballot box by a person for some time while also ensuring the security of its content and its integrity. The act of entrusting the special ballot box can be also of a continuous nature, the moment in which it is entrusted to several persons by the same individual.

The act of transporting the ballot box is as a result of its nature a continuous act which stops the moment in which the special ballot box is brought back to the individuals which have the authority of transporting it or when the term offered by the law is fulfilled. As a result the infraction of transporting the special ballot box without respecting the conditions provided by the law can have a continuous aspect. This can happen if once the transportation of the special ballot box is restarted the provisions of the law are again ignored. As a result, the member of the electoral office of a polling station that entrusts the special ballot box to individuals that are not authorized, while also opening the special ballot box will be held responsible for both infractions. The variant in question may be committed in the state of aggravating circumstances of existing multiple offences with the opening of the ballot boxes.

This is especially true taking into consideration that in practice the fact that the special ballot box is entrusted or transported without observing the rule of the law with the precise objective of opening it and changing the results of the vote.

Before the New Penal Code took effect the infraction was present in all the laws that presently bring under regulation the electoral process.

Hence, article 59 Law no. 35/2008 asserts that the opening of the ballot boxes before the established time for the closing of the voting process represents an infraction. The attempt is also punishable. A similar view is presented by article 57 Law no. 3/2000\(^9\). The only difference lies in the fact that on one hand the legislator uses the singular, ballot box, and in the other case the legislator uses the plural,

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\(^7\) The previous opinions regarding the lack of a material object are also valid in this case.
\(^8\) http://dexonline.ro/definitie/incredintare.
\(^9\) Law no. 3/2000 appertains to the organization and progress of the referendum, The Official Gazette of Romania no. 84/24.02.2000, with subsequent modifications and additions.
ballot boxes. The legislator did not take into account that a referendum can be organized in order to settle multiple problems.

The same praxis was present in article 62 from Law no. 33/2007\textsuperscript{10}.

The punishment present in the first regulation, as well as in Law 33/2007 was of 6 months to 3 years, while in the judicial system of Law no. 3/2009 it was of 1 year to 5 years.

The 67/2004\textsuperscript{11} Law asserts, at article 112, that opening the ballot boxes before the established time as well as the employment of the special ballot box without following the strict legal regulations represented an infraction and it is punishable with a term of imprisonment of 6 months to 3 years.

Article 113, paragraph 1, asserts that entrusting the special ballot box to any other individual besides the members of the electoral office of the polling station constitutes an infraction that is punishable with a term of imprisonment of 1 year to 5 years, while paragraph 2 asserts that the same punishment can be applied to the person that transports the special ballot box without being a member of the electoral office of that polling station.

In both situations, the attempt at the crime is punishable.

Finally, Law no. 370/2004\textsuperscript{12}, harboring the general capricious legislative climate, asserted through article 61 paragraph 1 that the opening of the ballot boxes before the established time for closing the voting process is punishable with a term of imprisonment of 1 year to 3 years or a fine and or restricting access to certain rights, while paragraph 2 asserts that entrusting the special ballot box to any other individual besides the members of the electoral office of the polling station or even its transportation by any other individuals or in any other conditions that those provided by law is punishable with a term of imprisonment of 3 months to 2 years or a fine and or restricting access to certain rights. The attempt is also punishable.

Our first observation is that the text of the standard type of the infraction provided for by the New Penal Code was found in all the regulatory documents, with only small differences in wording.

This is the starting point for a legislative chaos. The assimilated type was to be found only in two out of the four laws, and in these two laws it was provided for in a different way, in its form, but not in its merits.

Depending on the type of election that is taking place, a member of the elective office of the polling station in question, that entrusts the ballot box to a person that was not authorized for this task, can or can not be held accountable. Additional, in Law Number 67/2004 we find the sanctioning of the usage of the ballot box in any

\textsuperscript{10} Law no. 33/2007 appertains to the organization and progress of the elections for the European Parliament, republished, The Official Gazette of Romania nr. 627/31.08.2012.

\textsuperscript{11} Law no. 67/2004 appertains to the organization and progress of the local public administration authorities, republished, The Official Gazette of Romania nr. 333/17.05.2007, with subsequent modifications and additions.

\textsuperscript{12} Law nr. 370/2004 for the election of the President of Romania, republished, The Official Gazette of Romania. no. 650/12.09/2011.
other conditions besides those explicitly provided for by the law, unlike the other judicial texts that mentioned only the transportation of the ballot box in any other conditions besides those explicitly provided for by the law. Nevertheless, the conditions are described in article 87\textsuperscript{13} and its content does not lead to the conclusion that situations may arise in which its usage could mean anything else than its transportation in other conditions\textsuperscript{14}.

The most balanced regulation was found in Law number 370/2004, a regulation that has been absorbed into the New Penal Code.

Inconsistency results also from the fact that the limits for the punishment were different in an assorted number of laws. After analyzing this context we assert that the Law number 370/2004 was the only one that enforced the execution of complementary punishment. Consequently, the regulation brought about by the New Penal Code, adjusted and coherent, is more than welcomed.

References

\[1\] Law no. 286/2009, The Official Gazette of Romania. no. 510/24.07.2009;

\textsuperscript{13} Art. 87 - (1) For the voters that can not be transported as a result of illness or invalidity, the president of the electoral office of the polling station can approve upon their written request that a team of at least two members of the electoral office of that polling station to transport the special ballot box together with the materials needs in order for one to exercise the right to vote – the seal with the mark VOTED and the ballot papers – to where the voter has requested so as the voter can exercise his right to vote. The special ballot box can be transported only by the members of the electoral office of the polling station.

(2) In the cases provided for by paragraph (1) the vote can be cast only on the basis of an abridgement personally set by the president of the electoral office of the polling station in accordance with the copy of the permanent electoral list, the copy of the complementary electoral list or of the supplementary list that is at that particular polling station. The list is signed and stamped by the president, while the persons that are on this list must be erased from all other existing lists at that polling station.

(3) In accordance with the provisions from paragraph (1) and (2) can vote only the persons that reside within the territory assigned to that specific polling station and only if the secrecy of the vote is guaranteed.

\textsuperscript{14} The only other discussion would be around the cases in which the vote is cast by a different person than the person that should cast the vote in the special ballot box. In these cases, we see happening either the alteration of the content of the extras of the electoral list used by the members of the electoral office of the polling station and in this case we note that the infraction of deliberately enlisting on the electoral list a person without the right to vote using the special ballot box, an act provided for by art. 106 paragraph. 2, or, in another case, the forgery of the documents from the electoral office, act provided for by art. 110 paragraph, 1. There is also the possibility that a supplementary number of ballot papers is introduced in the ballot box without changing the electoral list. In this case we note that another specific infraction takes place, the infraction of inserting a supplementary number of ballot papers, provided for by art. 110 paragraph. 1.
[3] Law no. 35/2008 for the elections of the members of the Chamber of Deputies and The Senate;
[4] Law no. 67/2004 for the election of local public administration authorities;
[6] Law no. 393/2004 regarding the legal statute of local elected authorities, The Official Gazette of Romania no. 196/13.03.2008, with subsequent modifications and additions;
[7] Law no. 3/2000 appertains to the organization and progress of the referendum, The Official Gazette of Romania no. 84/24.02.2000, with subsequent modifications and additions;
[9] Law no. 67/2004 appertains to the organization and progress of the local public administration authorities, republished, The Official Gazette of Romania no. 333/17.05.2007, with subsequent modifications and additions;