

# IS CRIMINAL-LAW PROTECTION OF THE PREPARATION AND HOLDING ELECTIONS NECESSARY?

## Abstract

The paper contains a scientific (doctrinal) interpretation of criminal-law provisions, which are to protect the preparation and holding the elections, referendum and plebiscite on the recall of a President of the Slovak Republic. It examines the participation of those criminal offences in total criminal rate in the Slovak Republic in the context of the position of criminal law in the system of law of the Slovak Republic and tries to find the answer to the questions about inevitability or necessity of those provisions.

**KEY WORDS:** ultima ratio, elections, obstruction, preparation of elections, holding of elections, electoral fraud.

## 1 INTRODUCTION

The criminal law within the system of the Slovak law is perceived as a legal discipline of the last instance, an ultima ratio, i.e. the standards of criminal law are to be created and applied for resolving of socially undesirable phenomena only when the legal remedies of other sectoral legislation for the protection of the rights and legitimate interests of natural persons and legal entities as well as the interests of the state protected by law no longer suffice.

This position of criminal law is derived from the ultima ratio principle, which is especially reflected in the following:

- a) As a principle restricting a lawmaker, who will first resolve an anti-social behaviour by creation of respective legal standards within the legal disciplines that have specific and less stringent means and procedures,
- b) As a rule of interpretation of legal standards at resolving of a specific case by the law enforcement authority and courts in connection with an act qualification,
- c) As a rule of so called punishment economy, i.e. to solve a criminal liability for a

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committed act by less stringent statutory means (for example, by a settlement, a conditional suspension of the criminal prosecution, a sentence imposition excluding a prison sentence, and so on).

For the purpose of our examination, we have chosen the ultima ratio principle as the principle that restricts the lawmaker in relation to two criminal offences, the task of which is to protect the correct preparation and regular holding of the elections to the National Council of the Slovak Republic and to the European Parliament, the presidential elections, a plebiscite on a recall of the President of the Slovak Republic and the elections to the bodies of territorial self-administration.

## 2 CRIMINAL-LAW PROTECTION OF THE PREPARATION AND HOLDING OF ELECTIONS IN THE SLOVAK REPUBLIC

A citizen participation in governance and the correct elections to the bodies are considered as the significant indicators of a democratic society. The fairness of elections (municipal, parliamentary and presidential ones) is to be secured by the acts that regulate the preparation and holding of the elections and it is considered as the ideal condition if there is only one such act. Currently, we have two election acts: Act No. 180/2014 Coll. on Conditions of the Exercise of Voting Rights and on amendments to certain laws and Act No. 181/2014 Coll. on Electoral Campaigns and on amendments to Act No. 82/2005 Coll. on Political Parties and Political Movements as amended.

Penal Code (Act No. 300/2005 Coll. as amended, hereinafter referred to as Penal Code) protects the execution of the right to vote and the regular preparation of elections by two provisions: Section 351 which includes the criminal offence of obstruction of the preparation and holding of elections and Section 336a, where the criminal offence of electoral fraud is specified. The given criminal offences consists of blanket-wise formulated merits, since their application depends to a considerable extent on the accuracy of formulation used in Penal Code, as well as from the explicit formulation of the provisions in acts, which Penal Code refers to.

The criminal offence of obstruction of the preparation and holding of elections and referendum (Section 351 of Penal Code) protects “the constitutional right to vote or to vote in a referendum”. The constitutional right to vote is based on Article 2 Subsection 1 and Article 30 Subsection 3 of the Constitution of the Slovak Republic - „The right to vote shall be exercised through universal, equal and direct suffrage by secret ballot. The terms of exercise shall be laid down by a law.” According to Article 94 of the Constitution of the Slovak Republic, “Every citizen of the Slovak Republic, qualified to elect the Members of Parliament of the National Council of the Slovak Republic, shall have the right to vote in a referendum”

Obstruction of the preparation and holding of elections and referendum

consists of two basic merits of the criminal offences stated in Section 351 Subsections 1 and 2 of Penal Code and is included into Division V of Chapter Eight of Separate Part of Penal Code under the title “Other Forms of Interfering with the Activities of the Public Authorities”. In addition, it also has the qualified merit (Subsection 3), but in all the cases it is an offence.

According to Subsection 1, an offender of a criminal offence may be a natural person above 14 years of age, responsible at the time of committing an act, who through violence, threats of violence or deception restricts another person in exercising their constitutional right to vote or to vote in a referendum or forces another person to exercise their constitutional right in such a manner. According to Section 122 Subsection 7 of Penal Code, a criminal offence is committed by force “if for its commission the offender used physical violence against the physical integrity of another person or when it is committed on a person whom the offender rendered in a state of vulnerability or when the offender used violence against an item of another person“. „Violence is to be understood as the use of a physical force to overcome or restrict the applied or expected resistance“ (Novotný a kol., 1998, p. 269). A threat of violence means a threat of immediate violence, as well as a threat of violence, which will be carried out later (after a certain lapse of time). It can also relates to another person than a voter (e.g. a voter’s son) and a person towards whom the threat is directed may not even be present. “A criminal offence is committed by deception if it was committed with the exploitation of an error that offender caused or through the use of a trick” (Section 122 Subsection 6 of Penal Code). Offender raises an error when he/she intentionally provides false information to a person or intentionally conceals some information, while such information is important for a decision making, e.g. the offender provides the notice to a voter that a person in the list of candidates died a short moment ago. „The use of a trick means that offender admittedly did not mislead a person, but in addition to mentioning of all relevant and non-distorted information... the offender also followed the intention which the person had been awared of, his/her decision how to proceed in the given situation, would have been, at least, partially different.” (Burda/Čentěš/Kolesár/Záhora, 2010, p.726).

There are two another objective aspects of a criminal offence in Section 351 Subsection 2 of Penal Code:

- a) a person, who intentionally incorrectly counts votes or violates the secrecy of voting, or
- b) a person, who hinders the exercising of constitutional right in another gross manner.

If such conduct occurs in connection with the exercise of constitutional rights to vote or to vote in a referendum and the conduct is committed by a subject that fulfils all the requirements, it will be classified as a criminal offence of obstruction of the preparation and holding of the elections and referendum. In

the alternative under Paragraph a), a subject of a criminal offence can only be a person, who participates in counting of votes or his/her activity is of such nature that it may violate the secrecy of voting.

The counting of votes is carried out by district electoral commissions pursuant to the Act on Conditions of the Exercise of Voting Rights (Act No. 180/2014 Coll.), the counting of votes is regulated separately for all types of voting and only at the elections for the National Council of the Slovak Republic the votes are “counted”. As for other types of elections, the number of votes is “found out”, but all the provisions regulating the handling the cast votes are named “votes counting”. Therefore, only the members of district commissions could intentionally count the votes incorrectly and only those members could be offenders according to the alternative stated in Paragraph a) of Section 351 of Penal Code. Penal Code requires a “conscious” conduct so as to qualify the incorrect counting of votes as a criminal activity. The given merit is designed in such way that, applying the provision of Section 17 of Penal Code, for the criminal liability of an act stated in Subsection 2, an intentional fault is required, i.e. the offender was aware that their conduct may cause a violation or endangering of any interest protected by Penal Code and he/she sought such result or were consentient with it. It results from abovementioned that the Act assumes a knowledge component in every intentional fault. The criminal offences, where such formulation is stated are rare (e.g. this is the case of bigamy criminal offence pursuant to Section 204 Subsection 2 of Penal Code). If lawmaker explicitly specified the knowledge component, it is possible that they only sought to emphasize the knowledge of the fact that the votes are not counted correctly or that only direct intention is assumed here and a preparation is not sufficient; there is a prevailing opinion in the specialized literature that “it follows from the term being aware that the intention must be direct”. (Šámál, Púry, Rizman, 1995, p. 710). The alternative to the incorrect counting of the votes in the given provision is a violation of the secrecy of voting. Pursuant to Act No. 180/2014 Coll., the secrecy of voting is one of the principles of the voting right and a voter is obliged to enter a separate room for ballot papers completion after taking the ballot paper. If the voter does not enter the room, the district electoral commission does not allow to vote to such voter (Section 24) of the Act mentioned above. Any manner of the violation of the secrecy of voting by other person is the criminal offence.

Under Paragraph b), there is another alternative to the objective aspect, a person who “hinders the exercising of constitutional rights in another gross manner” what potentially would mean “a destruction or damaging of a polling station, a destruction of completed ballot papers, an intervention into empty ballot papers or electoral records, and so on.” (Ivor a kol., 2006, p. 390).

The criminal offence of obstruction of the preparation and holding of the elections and referendum contains also particularly aggravating circumstances:

the criminal penalty increases to one up to five years, if offender commits the basic merits by more serious method of conduct (the following options included in Section 138 of Penal Code are considered: the commission of a criminal offence with a weapon, through the exploitation of distress, inexperience, dependency or subordination, by an organized group or on several persons). A particularly aggravating circumstance is the fact, if the given criminal offence is committed by a public official (the persons specified in Section 128 of Penal Code), if the criminal offence was committed in connection with their powers and liability (e.g. by a municipality mayor at appointing and recalling the reporter of a district commission, by a chairman of state commission for elections, etc.), by a special motive (according to Section 140 of Penal Code, special motive means the commission of a criminal offence also of national, ethnic or racial hatred, hatred based on skin colour, hatred based on sexual orientation, with the intention to publicly incite violence or hatred against a group of persons or an individual because of their belonging to one race, nation, nationality, skin colour, ethnicity, origin or religion, if it is an excuse for threats for the above reasons) or publicly, i.e. in the presence of more than two persons or by mass communication media specified within Section 122 Subsection 2 of Penal Code.

The electoral fraud criminal offence (Section 336a of Penal Code) is also an offence in all the subsections, and it is included in the Chapter Eight of the Separate Part of Penal Code, likewise the obstruction of the preparation and holding of the elections and referendum, but into Division III “Fraud”. It is relatively new criminal offence, which was incorporated into Penal Code in 2011 (Act No. 262/2011 Coll.). The given criminal offence has two basic merits: an active fraud, whoever, “directly or through an intermediary, provides, offers or promises a bribe”, an indirect fraud, “through an intermediary, provides, offers or promises a bribe to a person” (Subsection 1) and a passive fraud, whoever, “directly or through an intermediary accepts, requests or accepts the promise of a bribe for themselves or another person” (Subsection 2). In all cases, the bribe is to affect an authorized person so as:

- a) to vote in a certain manner,
- b) not to vote in a certain manner,
- c) not to vote at all, or
- d) not to take part in elections, referendum or plebiscite regarding the removal of the President of the Slovak Republic.

Unlike the criminal offence of obstruction of the preparation and holding the elections, the Act explicitly specifies the elections, referendum and plebiscite regarding the removal of the President of the Slovak Republic herein. Considering such different reference to other legal rules, the grammatical interpretation indicates that the provision of Section 351 of Penal Code does not relate to a plebiscite regarding the removal of the President. It is difficult to find a reason,

why the provision of Section 351 would not relate to the plebiscite regarding the removal of the President of the Slovak Republic. Therefore, we believe that it is just a legislative and technical error, which occurred at the amendment creation, which resulted in a difference of both given criminal offences. There is also a difference in the wording of protection of the exercising the right to participate in a referendum. While the provision of Section 351 of Penal Code protects “voting in a referendum” the provision of Section 336a protects “taking part in a referendum”. Also in this case we believe that it is only a legislative and technical error, what, however, evokes the considerations, while comparing both of criminal offences, that lawmaker had different intentions.

Particularly aggravating circumstances at electoral fraud include:

- a) If offender commits a criminal offence by a more serious manner of conduct (pursuant to Section 138 of Penal Code). We believe that it will be, in particular, the exploitation of distress, inexperience, dependency or subordination, through violation of an important obligation arising from and offender’s employment, position or function or imposed upon them by law, by an organized group or on several persons;
- b) As public official (pursuant to Section 128 of Penal Code);
- c) On a protected person (pursuant to Section 139 of Penal Code, it will be, in particular, close persons, dependent persons, elderly persons, ill persons, public officials or persons who perform their duties imposed by law; while in case of protected persons the examination, whether the criminal offence is committed in connection with the state, condition or age of the protected is always carried out;
- d) Public commission of a criminal offence (pursuant to Section 122 Subsection 2 of Penal Code); it probably means a case when an act is committed in the presence of more than two persons. Such provision or acceptance of a bribe is, however, unusual.

The penalty for acceptance of a bribe is a prison sentence of up to one year, the penalty for provision of a bribe is a prison sentence of up to two years and if offender commits the act with particularly aggravating circumstance, the penalty is one to five years.

In connection with the criminal offence of electoral fraud, it is necessary to deal with the term “a bribe” more widely. Pursuant to Section 131 Subsection 3 of Penal Code, “for the purposes of this Act, a bribe shall mean an item or other fulfilment of a material or non-material nature, for which there is no legal entitlement“. „From the point of view of fulfilment of this characteristic, a bribe amount is not important and the Act does not specify any value limit. However, it is not possible to tolerate any bribes, even the ones of a negligible value, in the sphere of exercise of public authority“ (Samaš, Štifel, Toman, 2006, p. 676). Based on Article 2 Subsection 1 of the Constitution of the Slovak Republic which



states that “The state power derives from the citizens, who shall exercise it through their elected representatives or directly” and of Article 30, which states “Citizens shall have the right to participate in the administration of public affairs directly or through freely elected representatives”, then the provision or acceptance of bribes in connection with elections of representatives (through which a citizen exercises state power as a component part of public authority) or by taking part in a referendum as a direct exercise of that authority is the case, when it is not possible to tolerate any bribe.

How to relate this stringent definition of a bribe for the purposes of Penal Code to provision of various “gifts” within pre-election campaign? How to perceive a promise of an appointment to certain office given by a candidate in elections provided that whole broad family or company will vote for the given candidate? How to define a political nomination and the nominations for state administration bodies at lower levels or for managing bodies of companies with a state participation so as the promise of a nomination could not be confused for a bribe? Because, if electoral fraud is a criminal offence, then the bribe must be defined within the limits of Penal code and the bribe is any item (even of a negligible value) and any advantage, regardless of the term we use for its designation. The criminal offence is completed if a bribe is “promised” or a “promise to provide a bribe is accepted” (i.e. the promise is not refused). Pursuant to Act No. 181/2014 Coll. on Electoral Campaign, an electoral campaign means any activity of a political party, political movement, coalition of political parties and political movements, candidates of third parties pursuant to Section 8, for which a consideration is usually paid and is directed to a promotion of their activity, goals and agenda for the purposes of obtaining an office, which is elected pursuant to Act No. 180/2014 Coll. The control of electoral campaign is performed by ministry of interior and district authority, which controls especially financing of the electoral campaign. Provision of Section 20 of Act No. 181/2014 Coll. defines as an offence the conduct of a person who promises a financial reward or a gift to a voter for a ballot paper which the voter did not put into a ballot box and also the conduct of a voter who takes a financial reward or a gift for a ballot paper which they did not put into a ballot box. In connection with the fact that election fraud criminal offence is included between other criminal offences referred to in Chapter Eight, Division III of Separate Part entitled Fraud, it is much more strictly punishable act than the obstruction of the preparation and holding the elections and referendum, even though it does not result from the penalty, namely by the substantive and procedural reasons: an organised group, organizing the election fraud, would be a criminal one and establishment, plotting or membership in such a group is a separate criminal offence, or, for example, effective remorse relates to an offender who accepted a bribe. The criminal offence of failure to report a criminal offence according to Section 340 of Penal Code is an act, which is committed by everyone

who fails to report a commitment, inter alia, of the criminal offence of electoral fraud. Failure to prevent a criminal offence is the criminal offence according to the following wording of Section 341 of Penal Code: Whoever, in a credible manner, learns that another person commits, inter alia, a criminal offence of electoral fraud. For the purpose of uncovering a criminal offence or identifying the offender of a criminal offence of electoral fraud, it is possible to apply the procedures otherwise allowed only for crimes because the criminal offence of electoral fraud is included in the Fraud part; so as to identify such criminal activity, it is possible to use an agent (who may not be a police officer), they fall within the jurisdiction of the Specialized Criminal Court; it is possible to use some special procedures at identifying of a criminal offence, such as seizure of consignments, opening of consignments, replacement of the contents of consignments, preparation of audio-visual recordings, interception and recording of telecommunication operations and so on. It means that criminal offence is considered exceptionally as a crime, even though it does not fulfil the general conditions of a crime. In addition, the inclusion into the part along with other criminal offences of fraud indicates also a higher degree of the moral condemnation, what could be derived from the given provisions and procedures.. We believe that the criminal offence of electoral fraud would be integrated into a criminal offence of obstruction of the preparation and holding the elections pursuant to Section 351 as one of its forms or merits.

### **3 PROTECTION OF ELECTIONS BY CRIMINAL-LAW STANDARDS IN SELECTED COUNTRIES OF THE EUROPEAN UNION**

We examined the scope of protection of elections by criminal law provisions in selected countries of the European Union.

**In the Czech Republic,** Criminal Code (Act No. 40/2009 Coll. as amended) regulates the preparation and holding elections in provision of Section 351, which consists of one basic merit, combined merit, alternative merit and there is a penalty of six months to three years for an act commitment. The criminal offence of obstruction of the preparation and holding the elections or referendum is committed by a person, who obstructs another by threat of violence or deceit in exercising the relevant right or forces another in such a way to exercise the election right or voting right in referendum, counterfeits information in evidence on the number of members of a political party or on a petition for election purposes or in another document, knowingly incorrectly counts votes or breaches the secrecy of voting or grossly obstructs preparations or course of elections to a legislative body or representative body of local self-administration community or preparation or course of referendum until enunciation of their results. This part of the merit is the same as our Subsections 1 and 2 (including the penalty). However, in contrast



with our legal regulation, Section 351 also includes a conduct of a person who offers or promises to another or for another in connection to exercise of election rights in referendum a financial, material or another similar profit in order to make him/her vote contrary to independent expression of own free will (what we qualify as active fraud with all consequences). The acceptance of a profit by a person, who exercises his/her election right or voting right in referendum is not penalised in this provision nor in provisions on a fraud.

**The Austrian Penal Code** regulates the protection of social interests relating to elections by a separate section entitled “Criminal Offences in the Sphere of Elections and Plebiscite” This section consists of seven independent criminal offences, by which the following is penalised: use of violence or threat of violence or other means which prevent another person from voting, a falsification of facts or making a vote invalid, a person, a deception, which results in the absence of another person in voting, spreading publicly a false notice which discourages an voter from voting, making false documents, calling into question their credibility, voting instead of another person without his/her awareness or against his/her will, falsification of the election results, a use of violence or threat of violence for disturbing the specific election and intentionally violence of the voting secrecy (including identification who and how votes). The penalties for those criminal offences (with one exception) include imprisonment for a term not exceeding six months or set up to six months or imposing a fine in the amount of 360 daily fines. However, the Austrian Penal Code applies penalties to bribery as one of criminal offences in the sphere of elections and plebiscite: Everyone who offers, provides, promises a reward to a voter in order not to vote at all, to vote or not to vote shall be punished by a prison sentence of up to one year or by a fine in the amount of 720 daily fines. The same punishment shall be applied for a person, who accepts such promise or bribe.

**The Hungarian Criminal Code** protects the elections and referendum by provision of Section 350, which states that any person who, in the course of elections, referendum, popular initiative or European citizens’ initiative: obtains nomination by violating the rules of nomination, by force of threat of force, deception or by offering financial benefits, obtains signatures for holding a referendum, votes without entitlement, obstructs any voter from participating in the election by any of mentioned manners, infringes upon the confidentiality of the election or referendum, falsifies the result of the elections, referendum, popular initiative or European citizens’ initiative, receives financial benefits in the nomination process of participants (candidates) of the elections, demands financial benefits for his vote and receives financial benefits therefor is guilty of a felony punishable by imprisonment not exceeding three years.

**The Polish Penal Code** defines criminal offenses against the elections and referendum in Articles 248-250a, which states that who in connection with elections or the referendum handles a list of voters without authorization or fraudulently,

destroys or damages the protocols or other documents, electoral or referendum, or votes instead of another person, shall be punished by imprisonment of up to three years.

A breach of secrecy of voting shall be punished by the imprisonment of up to two years. A person who uses a force or a threat of force or a deceit, which affects a person entitled to vote or forcing them to vote or refrain from voting or to be voted, inhibits the votes counting or making protocols or other electoral documents shall be punished by the imprisonment of three months to five years. The same punishment will be applied to a person who by force, threat of force or by abuse of dependency affects a manner of a voter to vote or not to vote, to a person who receives financial or personal advantage in relation to voting and to a person who provides financial means for this purpose. Pursuant to Article 250a (4) a court may apply extraordinary mitigation of punishment or even withdraw it, if the offender notifies the bribery before the respective authority is aware of it.

#### 4 CONCLUSION

The Penal Code and criminal law are to be the solution of anti-social phenomena where the other sectoral legislation is not sufficient for a protection of important interests of the society. Therefore, it seems to be more useful to clearly formulate the rules of the preparation and course of elections and voting in a referendum, to penalize a breach of rules as administrative offences or offences, to formulate an admissibility of a control made by the public as a threat of a penalty in the Penal Code. In support of this opinion, there is a knowledge that the criminal offence of obstruction of the preparation and course of the elections occurs rarely in the crime rate statistics (there were 22 cases of commenced criminal prosecution within 2007 – 2016), although the statistics indicate that it is rather an obsolete standard.

We consider the incorporation of the election fraud into Chapter Eight, Division III of a separate part of Penal Code. Also the legal regulation of selected countries of the European Union indicates that especially provision of a financial mean or gift in connection with the affection of the election by a certain manner can be one of the alternatives of a conduct in the criminal offence of obstruction of the preparation and course of elections. A problem, what to consider as a financial or other gift could be better manageable. The electoral fraud also occurs rarely in the crime rate statistics (there were 32 cases of commenced criminal prosecution within 2012 – 2016).

The ultima ratio principle is to be respected not only at the creation and approval of new codes, but also at each direct or indirect amendment. The provision of protection of the social interests by criminal law above the framework of inevitability raises a doubt, whether the state, through the excessive criminalisation of increasing number of undesirable conducts disclose that it is not able to prevent such conducts nor to handle them by the less stringent means.

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