

The principle of secret ballot: an analysis of the European Legislation and Treaties

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Abstract

The right of vote is directly related to the concept of democracy, since its used as the most important tool in verifying the democratic nature of the systems. This article explores the definition of the principle of the secret ballot that is vital to the legality of the elections and consequently the level of democracy of states. The field of investigation will expand through an analysis that will be held upon the concept of the secret ballot principle throughout the European legislation. The analyse will evolve in the studying of this principle and election rights in the interpretation of supranational charters and that of EU Treaty.

The article will conclude that the principle of secrecy of the vote was an unfailing element for the development of modern pluralistic democracies, because the secret vote made it possible to concretize the affirmation of universal suffrage. Consequently, the principle of secrecy of the vote has entered the epidermis of today's democracies, so much so that it deserves solemn mentions in almost all modern Constitutions and in supranational charters.

Keywords: secret ballot, election rights, free and fair election

1- Introduction

The right of vote is directly related to the concept of democracy, since its used as the most important tool in verifying the democratic nature of the system subject of study. The electoral processes developed and modified over the centuries are the result of the evolution of modern democracies from which it is possible to draw the democratic standards of the legal systems, useful

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both for elaborating the various models of democracy and for verifying the stage of evolution of contemporary democracy (Katz, 2011, pp. 70-95).

In this regard, scholars argued that the democratic standards of the constitutional systems resulted in a "democratic vote", that is, in the existence of the possibility of being informed and in the aspect of a pluralistic competition to inform. Always assuring the possibility of expressing the votes without constraint and with the certainty that it was counted and evaluated correctly. This resulted in the various formal procedures governing electoral processes, from the phase of registration in the electoral lists of those entitled to the stages of expression of the right to vote, till the inspection and announcement of the results (Rouquié, 1987, pp. 19-35).

It seems so evident that the reflection on the protection of the secrecy of the vote necessarily touches the tumours of the constitutional law and democracy of a constitutionally understood rule of law. In fact, talking about the secrecy of the vote necessarily means talking about the freedom of the right to vote, given that the constitutional principle is consolidated, widely shared in doctrine and jurisprudence, according to which the vote is free only if expressed in secret (Steik Rokkan, Angus Campbell, Per Torsvik, Henry Valen, 2009, pp. 145-226).

With the gradual extension of suffrage, and the guarantee for voters who would vote in secret and safe from external pressure without suffering any retaliation, the democratic participation of citizens in public life has also gradually increased.

The secrecy of the vote has thus become a fundamental principle for modern democracies, to the point of being an unfailing parameter for qualifying a "democratic" state. However, now days new questions have arisen. On the one hand, in the past, democratic states have consolidated the principle of secrecy of the vote as a bulwark of freedom and democracy of their systems, so much so that it is foreseen in almost all the Constitutions with some sporadic exceptions, while today they renounce full protection of the secret vote to ensure greater participation spaces for citizens. Already since the beginning of the twentieth century, consolidated democratic States have tried to improve the practical conditions for exercising their citizens' voting rights by providing for facilitated expedients of the same. Just by considering the possibility of voting by correspondence, early voting, voting for the disabled and voting for the illiterate, it can be clearly seen that the legislators were motivated by the desire to ensure the maximum participation of those entitled to the electoral rounds also by making concessions, in some exceptional cases, in terms of protecting the secrecy of the vote (Gratteri, 2015, pp. 25-56).

In this period, we are experiencing a new democratic season where the need to facilitate democratic participation in the public life of the community, such as to bring sector operators to talk about a new model of democracy or "participatory democracy" alongside the classic models of "direct democracy" and "representative democracy". This new democratic era undoubtedly brings with its necessary innovations that allow the citizens to become an "active citizen" of bottom-up democracy in the public reality. However, it requires checking whether this democratic participation through the aid of new participatory tools such as the financing of private individuals from the election campaigns and new technological tools such as cyberdemocracy, electronic voting entails a further deterioration in the protection of the secrecy of the vote (Political Affairs Committee, Parliamentary Assembly, Council of Europe, 2007, pp. 5-10).

Having laid the foundations of the reasoning, the question that arises in front of us is whether the secret vote could be part of a wider question that is where we are in terms of democracy (International IDEA, 2017, pp. 34-60). This is the starting point of this research, which aims to analyse the evolution of contemporary democracy through the focus of protecting the secrecy of the vote, in order to verify whether this is still a milestone for modern democracies and what is the impact of new participatory tools and new technologies on the evolution of democracy.

The field of investigation will expand through an analysis that will be held upon the concept of the secret ballot principle throughout the European legislation. The analyse will evolve in the studying of this principle and election rights in the interpretation of supranational charters and that of EU Treaty.

2. The principle of secret ballot in European legal systems

The principle of secrecy of the vote, is undoubtedly a basic element for the democracies of the European States, which historically have recognized and guaranteed the secret vote as a fortification of freedom and equality of citizens. From the analysis of the European Constitutions we can identify three types of Constitutions that have different approaches in the secrecy of vote: the first group Constitutions that recognize expressly the principle the secrecy of the vote; the second group of Constitutions which guarantee protection of the secret vote only for parliamentary elections; and a last typology concerns the European States which do not provide in their respective

Constitutions for explicit protection of the secret ballot, but its protection is assured in the electoral legislation (OSCE/ODIHR, 2013, pp. 9-12)

It should be noted that perhaps the most indicative protection can be found in the Constitutions which provide for the protection of the secrecy of the vote, expressly and generally for all types of elections. The diversity of approaches to protecting the secrecy of voting can easily be attributed to the more liberal conceptions of public life in general and the right to vote. In this regard, the European dimension "the electoral function itself moves between a publicist dimension and a "private" dimension attributable to an available subjective right of the citizen-electors" is acknowledged. Whilst the last dimension "privatism" is typical of liberal countries, such as the United Kingdom the United States of America that are part of the same legal system that of the common law. (Gratteri, 2015, pp. 60-75).

The principle of secrecy of the vote finds its full place in the panorama of the principles that establish constitutionalism on a European scale, not only because it is recognized in all European legal systems, but also because it finds ample space for protection in supranational charters. Many documents of international law for the protection of fundamental rights include among the minimum standards of protection of the democratic principle for free elections also the secrecy of the vote, as an instrument for the proper functioning of the systems of representative democracy. From these documents the theory of the "authenticity of the vote" was developed. (Venice Commission, 1992, pp. 20-65).

The theory of the "authenticity of the vote" is based in article 21.3 of the Universal Declaration of Human Rights, which states that "*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*". Thus, further strengthening the bond between the holding of free elections and the protection of the secrecy of the vote (UN Human Rights Office of the High Commissioner, 2011, pp. 9-20). Great importance is given to art. 3 of the Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952 to the ECHR, where it is established that "the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which ensure the free expression of the people in the choice of the legislature" (Council of Europe, 1952, p. 3).

This provision therefore imposes on the contracting States minimum standards of protection of the right to vote, in which emphasis is given to secret voting as a perfect condition for effectively ensuring the free expression of the vote. This assumption was also clarified by the jurisprudence of the European Court of Human Rights, which concurred that the art. 3 of the protocol it derives from the idea of protecting an "institutional right" from the holding of free elections, until achieving the full affirmation of the notion of universal suffrage from which the subjective rights of participation radiate, which are appreciated as "concrete and effective" rights. The Court, while recognizing a certain margin of appreciation to the Contracting States in electoral matters, clarifies its role as guardian of compliance with the minimum standards of protection of the right to vote: It must 'ensure that the national electoral laws must not hinder the free expression of people's opinion on the choice of the legislative body' (European Court of Human Rights, 2019, pp. 9-12). However the legal nature of the right to vote, as protected by art. 3 of the protocol no.1, presents a different profile because unlike the other rights protected by the Convention, art. 3 is entitled "right to free elections". Implying that it is not an individual right of the individual, but an obligation of the Member States. The terminology used does not refer to individual persons, which enjoy a certain guarantee, but to the "*opinion of the people and its ...freedom of speech*". Thus, this conclusion is confirmed by the placement of this right, not within the Convention, but in an additional protocol (Zand, 2017, pp. 195-227).

However, the Commission has imposed its own interpretation on art. 3 of the protocol no.1, recognizing in the notion of free elections the concept of universal suffrage, thus attributing itself the role of compliance verifier and imposing the necessary obligation on the Member States (Zand, 2017, pp. 195-227).

Furthermore, the Commission expressly recognized the typical nature and protection of subjective rights specified in article 3, based on the assumption that article 5 of the protocol no.1 associates the articles 1, 2, and 3 to those of Title I, which, being "the basis of the whole Convention", are qualified as subjective rights (Dovydas Vitkauskas, Grigoriy Dikov, 2012, pp. 29-70).

The real change of course occurred mainly thanks to the jurisprudential interpretation of the European Court of Human Rights and the practical application of the soft law tools developed by the Venice Commission, such as the Code of Good Practice in Electoral Matters. In this context, there is an inclination in recognising the individual protection of the right to freely cast their vote,

because article 3 of the protocol no.1 also offers protection to "the right not to vote", which the individual can exercise within free elections (Venice Commission, 2013, pp. 41-58).

In particular, the European Court of Human Rights, has applied the method of teleological interpretation, that courts usually use relying on the purpose of legal, social and economic goals the legislator aim to achieve, of the Convention, observed that article 3 of the protocol no.1 has an interstate value because it aims to confer greater solemnity on the obligation assumed by the High Contracting Parties in guaranteeing free elections with adequate positive measures (Venice Commission, 2013, pp. 41-58).

Although the right to vote is not protected in Section I of the ECHR, it is considered the link between democracy and human rights, provided that certain principles are respected. The principles the Convention requires from the Contracting parties to respect are closely recognized by national Constitutions and supranational documents, such as: free elections, secret ballot, equality and universality of suffrage. In particular, the European Court of Human Rights recognizes article 3 of the protocol no.1 to be of a primary importance in the Convention system, because it guarantees the free formation of the opinions of the voters.

This purpose can only be pursued through the provision of the secret vote, given that "the free expression of the voter 's will also be safeguarded by the requirement of secret ballot as it reduces the danger of influence or pressure on the voter" (Grabenwarter, 2014, p. 403). In fact, the margin of appreciation recognized to the Member States finds a setback in the event that the States wish to change the principles of free voting, for example by providing for the imposition of the public vote (Spielmann, 2012, pp. 381-418). The prescriptive scope of the Convention has led part of the doctrine to affirm that it derives the "constitutionalized" protection of the secrecy of the vote common to all the Contracting States, including those whose Constitutions do not provide for it, such as Luxembourg and the United Kingdom.

3. The principle of secret ballot in the European Union legislation

As regards the EU legal system, acceptance of the principle of voting secrecy as a perfect element of representative democracies finds express recognition in the evolution of the legislation of the Union, and specifically in the Lisbon Treaty. Before this moment, the Treaties and the supranational charters of the European Community lacked the recognition of the principle of

secrecy of the vote, especially with reference to the election of the members of the European Parliament; in fact, the only explicit indications of the recognition of the secret vote for the election of the members of the European Parliament were contained in the 2002 Council Decision, amending the act of 1976 (Council of Europe, 1976, pp. 1-4), that provided for the authorization of Member States to establish a threshold up to 5 percent in the allocations of the seats of their representatives. The new Act thus sanctioned, in article 1, the requirement of secrecy and freedom to vote in the Union system (Raffaele Bifulco, Marta Cartabia, Alfonso Celotto, 2001, p. 270285). Furthermore, the attention placed on the gradual recognition of the protection of the secret ballot emerged both in its express provision in the Nice Charter of 7 December 2000, and in the Treaty that adopts the Constitution for Europe of 2004. In reality, the decisive momentum has been precisely with the signing of the Treaty of Rome of 29 October 2004, in which the principle of secrecy of the vote for the elections of the European Parliament had been formalized, through the transposition of the Nice Charter and the provision of a specific dedicated title “Institutions of the Union” (Horsley, 2018, pp. 21-59).

Today, we can surely affirm that the principle of secrecy of the vote is fully recognized within the EU legal system. In particular, the findings can be partially obtained through a systematic interpretation technique of all EU Treaties and Charters. In fact, given that the European order has the objective of creating a constitutionalism common to all the Member States, it is assumed that the principles governing European democracies, including the secrecy of the vote, already fully enter the European panorama (European Commission, 2007, pp. 155-160).

This is made evident first of all by the provision of article 6, Title I, of the Treaty of the European Union which recognizes the adhesion of the EU to the European Charter of Fundamental Rights, to which the same legal value of the Treaties is expressly attributed (European Commission, 2007). This Charter expressly recognizes article 39, paragraph II, of Title V, that "Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot" (European Union LEX, 2007, p. 11) and, moreover, the same article 6 in paragraph II adheres to the European Convention for the Protection of Human Rights and Fundamental Freedoms being, the latter, sound bearer of the general principles common to all Member States (Sciarabba, 2019, pp. 33-65). Subsequently, in art. 2, Title I, of the EU Treaty, it is stated that “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities” (Sciarabba, 2019,

pp. 79-86). The reference to the principles common to the Member States finds its natural explanation in article 10 of the TEU where it is stated that "the functioning of the Union is based on representative democracy", since it emerges that the secret vote is a minimum standard of protection for representative democracies. Therefore, the Member States and the EU must guarantee the effectiveness of this principle in order to ensure the freedom of expression of the vote and, in consequence a democratic electoral outcome. The article 233 of the Treaty on the Functioning of the EU stating that "the European Parliament is preparing a draft to establish the necessary provisions to allow the election of its members by direct universal suffrage, according to a uniform procedure in all Member States or according to principles common to all Member States", must be read in conjunction with article 14/b of the TEU and article 20, second paragraph, where it reaffirms and specifies that the members of the European Parliament are elected by universal suffrage, direct, free and secret suffrage, for a five-year term (Hermann-Josef Blanke, Stelio Mangiameli, 2013, pp. 185-110).

However, this systematic interpretation is intended to support the obligatory principle of secrecy of the ballot all within the legal framework of the EU and its member States. However, despite the formulation of the principles being general and ascetic and not respecting the typical editorial strategy of the International Charter, which is affirmatively and formally engaged in participation in all democratic life as fundamental rights and freedoms, in which it is preoccupied with the "expression of minimum standards of protection", which the Member States must provide for, regardless the number effectively guaranteed", as the rest is status in the article 3 (Borchardt, 2017, pp. 89-125). This indicates that the minimum number of ballots required must be met in order to be consistent, but that the second one does not have the competence in the substance of the basic rules as to how to proceed with the ballot (Borchardt, 2017, pp. 89-125).

This would appear to emerge from the combination of the articles of the Treaty of the EU, which introduces a safeguard clause of competencies in in joining the ECHR, which "does not change the competences of the Union defined by the Treaties" and article 51 of the Charter, which stipulates that "the provisions of the Charter do not stand in the way of the competence of the Union defined in the Treaties" (Beck, 2014).

However, this approach is not agreed upon scholars, because the standards analysed demonstrate a certain care in specifying the minimal standards for holding the voting and the elections. Scholars agree with the thesis that is derived from the jurisprudence of the Court of Justice of the EU.

According to the latter, pursuant to art. 51 of the Charter, the EU, in addition to being competent in the protection of fundamental rights, is also competent in the matter of adaptation, updating and development of stable guarantees to protect fundamental rights. In fact, pursuant to art. 6 of the TEU, wide scope is given to the protection of the principles common to the constitutional traditions of the Member States, considering that the principle of secrecy of the vote is a fortification of the democratic constitutional traditions of Europe. (Beck, 2014, pp. 10-14)

Conclusion

From the analysis conducted in this article it can be concluded that the principle of secrecy of the vote was an unflinching element for the development of modern pluralistic democracies, because the secret vote made it possible to concretize the affirmation of universal suffrage, not downgrading it to a mere principle. Consequently, the principle of secrecy of the vote has entered the epidermis of today's democracies, so much so that it deserves solemn mentions in almost all modern Constitutions and in supranational charters, supported by institutions implementing the same provided for by ordinary law.

Today, however, a new trend, if not a real season, seems to be emerging in consolidated pluralistic democracies. The emergence of “participatory democracy”, which does not replace “representative democracy”, but integrates it into the management of the democratic process, and which has certainly been accepted as an evolutionary bound in modern democracies. The principles of democratic participation, publicity and transparency, which govern the democratic process, represent the arrival point of the development of democracies, but also the starting point, because this involves rethinking the principles that governed the democracies pluralistic of the last centuries, including the principle of secrecy of the vote.

As we have tried to demonstrate, it appears that the secrecy of the vote is now recessive for governments, which are more careful to implement participatory institutions. In this regard, it has been argued that democracy consists in the government of “visible power”, which belongs to the nature of democracy that nothing can remain confined in the space of mystery, not even the expression of one's vote. Democracy is nothing other than the government of “public power in public” and therefore its evolution should tend towards full publicity in all its fields of expression;

from this it would emerge that the open vote would be more edifying in a democracy than the secret vote.

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