Living Democracy in Romania: From Protest to Referendum ?

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Political developments after EGO 13

In the aftermath of the adoption of Emergency Government Ordinance No. 13/2017 (EGO 13) in the night of 31 January 2017 aiming at decriminalising abuse of office and other corruption-related offences, events went on rapidly in Romania.

The attempt to surreptitiously pass legislation changing the Criminal Codes, while trying to justify the "emergency" with decisions of the Constitutional Court, quickly became the object of popular discontent all over the country. It culminated on 4 and 5 February with over 500,000 participants demonstrating against the ordinance.

In the wake of the so called "Second Black Tuesday"[1], several independent authorities also took a stand against the governmental action. The Superior Council of Magistracy addressed the Constitutional Court with a request to solve a 'legal constitutional conflict' between the Government and the Parliament, stating that only the Parliament should have been allowed to pass legislation in the sensitive field of corruption as reflected in criminal offences. A similar request was made by the President of Romania, Klaus Iohannis. The Prosecutor General challenged the ordinance before the administrative courts, seeking its suspension. Finally, the Ombudsman, after having declared, on 1 February, that he will not challenge the ordinance before the Constitutional Court, decided a few days later to address the Court with an unconstitutionality referral.[2] Meanwhile, following the popular uprising and criticisms international pressure – European Commission, several embassies of important democratic states (Germany, France and the US etc.) – the Grindeanu Government decided to repeal the Emergency Government Ordinance through another Emergency Ordinance on 5 February. However a hypothetical rejection by Parliament of the repealing act could bring into discussion the re-entry into force of the abrogated one, if Parliament decides to approve the latter – even if it does so tacitly.

On 7 February, President Iohannis addressed Parliament on the recent events. Though acknowledging the legitimate right of the party that had gained the political majority in the last elections to govern the country, he remained critical of the ordinances. He asked the majority to govern according to its programme and to the rule of law, in the best interest of the country. He also referred positively to the popular demonstrations and the 'living democracy' and renewed his intention to initiate a referendum on the anti-corruption theme, as soon as possible.

On 8 February, a motion of censure, initiated by the opposition, was turned down by Parliament. The majority's MPs participated, but did not vote. Therefore, the Government has indirectly been given a new vote of confidence by the parliamentary majority.

The Constitutional Court remains formal

In the following days, the Constitutional Court gave its rulings on the above mentioned requests.[3] On 8 February, it decided that there was no legal-constitutional conflict between the authorities because "the Government (had) exercised a power given by the Constitu-

[1] The first "Black Tuesday" took place in December 2013, when the Chamber of Deputies tried to change the Criminal Code so as to change the meaning of the offence of 'conflict of interest'. The amendments were declared unconstitutional by the Constitutional Court. See, for details, Bianca Selejan-Gutan, *The Constitution of Romania. A Contextual Analysis,* Oxford, Hart Publishing, 2016, p. 86.

[2] The Ombudsman is the only authority that can challenge an ordinance directly before the Constitutional Court, other subjects can only challenge ordinances via the ordinary courts.

tion". There was no word about the lack of urgency or about the manner in which the ordinance had been passed.

One day later, the Court ruled on the Ombudsman's referral of unconstitutionality and said that the request had become inadmissible because its object – EGO 13 – had been abrogated right after its introduction. According to its organic law, the Court can only decide on laws and ordinances in force or producing effects at the time of the ruling. In this case, however, EGO 13 had never actually entered into force nor had it produced effects. Therefore the Court took a formalist view and avoided to take a stand on the merits. On the same day, 9 February, the minister of justice, who has been considered the author of EGO 13, resigned after stating once again that there was no legal or constitutional problem whatsoever with the ordinance and its adoption.

Although the ordinance was repealed, people continue to demonstrate for fear that the act could still enter into force, if adopted by Parliament, despite assurances by the leading party that this will not happen. Other reasons for the ongoing demonstrations are fear that the ruling party will adopt the repealed measures in another form and also distrust of the present government and its actions defying the rule of law. During the last week, counter demonstrations with a much smaller participation occurred in Bucharest, in front of the presidency headquarters and with an anti-presidential agenda.

The proposal of a referendum

On 13 February, the parliament discussed in a plenary session the request of President Iohannis to organise a referendum on anti-corruption issues. The referendum will be organised on the basis of Article 90 of the Romanian Constitution, which gives the President the authority to call for a consultative referendum 'on issues of national interest'.

In this context, some brief clarifications on the referendum in Romania should be made. The constitution provides for two types of referendum: a consultative one, which can be initiated by the President and a binding one, which must be initiated either in two cases: for the approval of a draft law amending the Constitution or to decide on the dismissal of the President after suspension from office by the Parliament. All types of referendum are validated by the Constitutional Court only if voter turn-out surpasses 30 percent of the electorate and at least 25 percent of the votes are valid. Thus, the referendum initiated by the President does actually not have compulsory legal effects on Parliament, i.e. the Parliament is not bound to adopt laws on the result of the referendum.

Consultative referendums have been initiated twice under the current constitution: one regarding the change of the electoral system and the adoption of the uninominal voting system in 2007 and one regarding the change of the parliamentary structure to unicameral and limiting the number of MPs in 2009. Both were initiated by former President Basescu and – especially the latter one – used as a political tool against Parliament that had suspended him from office, under the slogan "They will get what they are afraid of".

This last referendum took place on the same day as the presidential elections and was validated by the majority of voters. However, to put the result into practice would mean, if accepted by Parliament, the amendment of the Constitution. This made questionable the very constitutionality of the referendum itself, as the Romanian system does not foresee for constitutional referendums the people to substitute the legislator.

In its judgements,the Constitutional Court had some interventions regarding the scope of the referendum law and of the President's prerogative to call for it. For example, the Court stated that the President is free to choose the 'issue of national interest' and that the law on the referendum cannot limit this discretionary power.[4] Moreover, by a decision of the Constitutional Court of 2011, the referendum on the unicameralism should be considered compulsory for Parliament, in

[3] The Decisions are still unpublished, therefore the motivation is not yet known to the public. As soon as the decisions are published, I will make more elaborate comments on the Court's reasonings.

[4] Decision no. 567/2006, not published in English

the sense that the Court approved the part of the draft law amending the Constitution which proposed this change at the initiative of the President, 'in order to apply the result of the referendum'. In the same decision, however, the Court made a suggestion regarding the change of the very constitutional text on the referendum, 'so as to expressly except from the referendum called by the President the issues of national interest which, once approved by the people's will, would entail the amendment of the Constitution.'

A progressive change in an environment of corruption?

In this context, the present issue of the referendum on anti-corruption called by President Iohannis raises a few delicate questions. I will not discuss, at this stage, the purely political matter and its impact on the President and the political parties, but I will try to put it into a constitutional perspective. The initiation of this referendum looks like a legitimisation, from a constitutional viewpoint, of the popular uprising against corruption. What happened in Romania since 20 January is almost unprecedented since 1989, as people did not have financial or social requests, but claimed respect for the rule of law – a founding constitutional principle of the still young Romanian democracy.[5] Of course, one may question the necessity of this referendum in the current Romanian context. A country plagued by endemic corruption, with high-level officials from all main parties convicted or accused of corruption, with a low voting turn-out, with serious poverty and other social issues. A country where most governments chose to legislate by emergency ordinances, with the tacit approval of Parliament. A country which, although EU member state for 10 years, is under the supervision of the European Commission through the Cooperation and Verification Mechanism, precisely because of its corruption issues. It is difficult to say what a 'negative' outcome would mean. But it is also premature to claim that the Romanian people are not yet prepared to answer such a question, to which, at least apparently, all political parties agree on the positive side. Therefore, it will all depend on the actual question that will be object of the referendum. This question has not been made public yet, but right now it seems that all hopes for the actual respect of the rule of law in Romania depend on it.

A smart question and a positive answer from the people – expressed in a valid referendum – would mean a strong leverage on the Parliament and the Government to respect the people's will, to comply with the constitution and to 'take it out of their pockets', as Thomas Paine once said.

[5] Article 1 (3) of the Romanian Constitution reads that "Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizen's rights and freedoms, the free development of human personality, justice and political pluralism are supreme values, in the spirit of the traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed"

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