Shooting Democracy in the Foot?

The Romanian Constitutional Court's Annulment of Presidential Elections

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On December 6th, the Romanian Constitutional Court (CCR) annulled the Presidential Elections while Romanian expats were queuing at the polls, mandating a complete re-do of the entire electoral process. The decision culminates the two-week long mayhem generated by Călin Georgescu's victory in the first (preliminary) round of the Presidential Elections on November 24th, which was to be followed by a final countdown last weekend, against the pro-EU, USR candidate, Elena Lasconi.

The CCR's decision followed the disclosure of intelligence documents on December 4th. These showed Russian interferences in the electoral process and campaign, via propaganda and disinformation in Romania's online sphere as well as several irregularities and violations of electoral law applicable to Georgescu's campaign (facilitated by TikTok's failure to comply with Romania's requests for removal of his content). At present, these allegations have resulted in the opening of investigations into the candidate's campaign and engagement by the EU Commission, which has issued a retention order against TikTok.

The gravity of the violations evidenced by the documents released, coupled with the *many* concerning declarations by this candidate, made the CCR's intervention vital. However, the modalities of and belatedness of the CCR's and the Romanian authorities' response with respect to this unfolding mess do nothing but exacerbate the root causes of Georgescu's win, bolstering his claim that democracy is being denied to the people of Romania.

The Constitutional Court's Decision

The first aspect to be noted is that the Court seized itself of the matter, "after taking note of the intelligence documents disclosed by the Romanian President" (paragraph 5). This intervention was justified on a joint reading of Articles 1(5), 142(1) and 146(f) of the Romanian Constitution (RC). Pursuant to Article 142(1), the Constitutional Court is to ensure the supremacy of the Romanian Constitution, compliance therewith being mandatory pursuant to Article 1(5) RC. Article 146(f) instead attributes the CCR the power to oversee compliance with the procedure for the election of the President of Romania as well as to verify election results (as per Law 370/2004).

The CCR's reliance on these provisions conveys a *core message*: elections ought to be free, fair and transparent in a constitutional democracy governed by the rule of law, values which Romania adheres to pursuant to Article 1(3) of the Constitution (paragraph 7) and is thus obliged to protect. The free and fair character of elections is also mandatory, pursuant to Article 2(1) RC, to ensure that the Romanian people may exercise their sovereignty and elect their representatives. Romanian public authorities have thus a *positive* duty to prevent interferences in the electoral process as well as a duty of neutrality – in the sense that they must improve voters' *resilience* by raising awareness as to how digital technologies may be used in elections (paragraph 10).

On this basis, the CCR observed that the documents disclosed on December 4th revealed three fundamental issues: (i) an interference with Article 81 RC, insofar as the free and fair character of the presidential election had been prejudiced; (ii) an interference with Art. 37 RC insofar as the manipulation of social media platforms decreased the other candidates' chances, affecting the equality requirement of the right to be elected; (iii) a broader violation of Romanian Law 370/2004 since Georgescu's videos did not display mandatory electoral content markers and did

not comply with financial disclosure requirements. These claims are addressed in order.

On the Free and Fair Character of Presidential Elections (Art. 81 RC)

The freedom to vote for a presidential candidate as enshrined in Article 81 RC entails two crucial aspects which had both been prejudiced: (i) voters' freedom to form their opinion (paragraph 12); (ii) protection from undue influence on voting behavior through unlawful and disproportionate acts (paragraph 13). The freedom to form an opinion had been interfered with in the context of Georgescu's campaign insofar as he did not mark his TikTok content as electoral material as demanded by Law 370/2004. This resulted in his "aggressive promotion" and "abusive use of social media platform's algorithm" which gave him "preferential treatment and distorted the voters' expression of their will" (paragraph 14). The fact that Georgescu had declared zero campaign expenses to the Permanent Electoral Authority (AEP) further underlined the risk of potential support by foreign actors. This, in turn, entailed an interference with the protection from undue influence on voting behavior; a conclusion the Court reached citing recital 4 of EU Regulation 2024/900 on Political Advertising.

Interferences with the Other Candidates' Right to Be Elected (Article 37 RC)

According to the CCR, the right to be elected includes the protection of the equal opportunities of candidates. This aspect had also been prejudiced because Georgescu's "significant media exposure" resulted in a "directly proportional reduction in the online media exposure of the other candidates" (paragraph 15). Such a situation (i.e. Georgescu's reliance on non-transparent practices) gives the competent authorities – according to the CCR – the "duty to verify, establish and, where appropriate, sanction such conduct" (paragraph 15).

Financial Transparency

Finally, the CCR stressed that the regularity of electoral processes requires transparency regarding the financing of electoral campaigns. This was not guaranteed in this situation: TikTok confirmed donations of over 1 million euros to Georgescu's campaign and payments of 381k Dollars to TikTok accounts involved in the promotion of the candidate by the TikTok user account "bogpr", belonging to Bogdan Peșchir, a Romanian citizen (Annex to DSNI/1742 of 04.12.2024, p. 5-6). Similarly, the reports evidence the participation of a South African firm, "FA Agency", which offered 1k euros payments for the dissemination of Georgescu's content to influencers. It is worth noting – as the Annex cited above reports does – that Bogdan Peșchir had previously been employed by a number of crypto companies (Globaya Fintech SRL and BITXATM TECHNOLOGY SRL) owned by an individual holding dual Romanian/South-African nationality, Gabriel Prodănescu. Against this background, the CCR found a violation of the principle of transparent financing of campaigns (paragraph 18), stressing that "social media platforms should be obliged to disclose data on political advertising and election sponsors on an ongoing basis" (paragraph 17).

The combined effect of these violations and interferences required, according to the CCR, the annulment of the entire electoral process (paragraph 20), which will be run anew.

A Legally Erudite Decision

The decision largely reiterates EU, ECHR and Venice Commission principles and rules for the protection of electoral processes – all binding on and/or undersigned by the Romanian State – none of which prohibit the annulment of elections. To the contrary, the Code of Good Practice in Electoral Matters recommends annulment when transparency is prejudiced – especially via the non-disclosure of campaign financing, as was the case here. Similarly, the ECHR has underlined on multiple occasions that an annulment may be justified if it pursues a legitimate aim, is proportionate and does not affect the substance and effectiveness of electoral rights (*Riza v Bulgaria*, paragraph 153). In particular, the ECHR has underlined violations of Art. 3(1) Protocol I (right to free elections) when authorities could not demonstrate the existence of alterations of the outcome of elections and of the wishes of the electorate such as to warrant annulment (*Kerimova v. Azerbaijan*). It is worth noting

that the ECHR and the Venice Commission both indicate the choice of offering fresh elections by law as mitigating the gravity of an annulment. This is a possibility which Romanian Law attributes to the CCR via Art. 52(1) of Law 370/2004. Thus, the CCR's decision is only problematic for its potential effects vis à vis the wishes of the electorate, specifically if it substantially alters those. But this conclusion is also unlikely, given both the civil unrest generated by the disclosure of intelligence documents among Romanian voters and that Georgescu's operation evaded transparency, which is a quintessential aspect of guaranteeing voters' ability to make an informed choice (*Krasnov and Skuratov v. Russia*). The allegations of Russian interference, non-disclosure of foreign financing sources and Georgescu's failure to mark his TikTok content as political (as required by Law 370/2004) furthermore highlight a series of problems from the perspective of EU law as well, making the CCR's intervention necessary.

A Paradoxical Decision

Nonetheless, the Court's decision is also highly paradoxical because it annulled the Presidential elections due to systemic violations of the right to free elections but failed to do the same in relation to the Parliamentary elections of December 1st. Yet these had also been marked by similar irregularities that were revealed by the same intelligence documents that the CCR based the December 6th Decision upon. In particular, the documents highlight that the aggressive TikTok campaign that took place in the two weeks predating the elections had also favored the newcomer party "Partidul Oamenilor Tineri (POT)", which has supported Georgescu and is now part of Romania's Parliament, having gained roughly 6% of votes in the recent Parliamentary elections. How could voters' freedom to form their opinions be prejudiced systemically in the presidential elections, but not in the parliamentary ones, which took place in the same period? It is unthinkable to claim that the interferences identified may not have affected voting behavior in both cases. Yet despite political calls to this end, the annulment was not granted. This indicates a double standard which risks heightening the perception that the CCR is subordinate to the PSD – the ruling party in Romania, which incidentally won most votes in Parliament on December 1st. Respect for democratic principles and the rule of law would have required coherence now more than ever, and not only when the ruling party is losing the (presidential) elections.

A Belated and Slim Decision

The CCR's perceived impartiality is also prejudiced by the timing and modality of its intervention: the decision to annul *the whole process* was issued on day 1 of the 2nd round of presidential elections, when Romanians abroad had already begun casting their votes. However, Article 52(2) of Law 370/2004 only empowers the Court to intervene to annul pursuant to a referral by candidates made within 3 days after voting has concluded. In other words, the Court chose to intervene before it was legally empowered to do so, acting on the basis of notifications by civil society, but not the candidates (as the law would have required). And while there is a precedent suggesting that the CCR can do so, its failure to justify its intervention given the wording of Art. 52(2) of Law 370/2004 prejudices the procedural validity of the decision.

The CCR could have arguably relied on an older ruling that rejected the view that (now) article 146(i) of the Constitution (on the CCR's power to oversee and confirm the result of referenda, textually identical to Article 146(f), relied upon on December 6th) precludes *ex officio* action by the CCR when evidence of electoral fraud arises. In that case, the CCR had derived its conclusion from the powers to "monitor" and "confirm" (referendum) results attributed by that provision, which would have been limited by a requirement of referral placed via the law. Given the textual similarities between the constitutional provisions, the court could have made a similar argument here, but did not.

Some have nonetheless argued that the Court's timing and modalities are connected, and on this basis potentially justifiable: on December 5th (the day before elections) the CCR issued a press release reminding the public that it could receive requests for

review from the candidates admitted to Round II, a move that has been interpreted as a *de facto* recommendation by the Court to Lasconi, which however yielded no results. Against this background, the CCR's decision reveals itself as an attempt to prevent a possible win by Georgescu, the annulment of which would have surely generated broader opposition. Yet, in doing so, the CCR has likely also fed into the anti-establishment narratives championed by the very politicians it reprimanded. This is precisely what it did when it requested a recount of votes after Round 1, not allowing independent observers to oversee the process, which is mandated by law (Davydov and Others v. Russia); or, less recently, when it prohibited the ultra-nationalist SOS Romania MP Diana Șoșoacă from running for President due to her statements and views.

Conclusion

The CCR's decision is a last resort attempt to prevent a further decline in the rule of law in Romania. Yet, its modalities, timing and face value are such as to shoot Romanian democracy in the foot. The gravity of the interference in Romania's elections surely implied a need to intervene quickly, and to do something to protect democracy. The Court's intervention however may more easily be seen as counter-productive in the long run. Once again, Romanian democracy stands on a shaky ground.

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