

Romanian Liberal Democracy in the Times of the Pandemic¹

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Abstract

The stress to which the liberal democracy was subjected to in 2020 was unique. Never before in the history of contemporary democracy have states taken, in times of peace, such restrictive measures regarding the individual rights. Moreover, the protests against these measures have never been so poor. Of course, the restrictive measures may be considered necessary, and the level of social compliance may be considered normal as the Covid-19 pandemic has caused a real danger at global level. This study evaluates the dangers posed by various restrictions of the individual rights for the liberal democracy in Romania.

Keywords: Liberal Democracy, Rights, Lockdown, Covid-19

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POLITICAL STUDIES FORUM

The year 2020 exposed, more than ever, the vulnerability of democracy. And this general sentence is valid for each of the human activities. In politics, the great fear is that the pandemic favors the authoritarian tendencies and questions the ability of the democratic systems to cope with the new problems. At a close look, things are even worse, as, at the time being, the assault on democracy come not only from some politicians eager to get more power, but they are due to some weak democrats, due to some people with a parochial political culture (in terms of Almond and Verba) or due to some democratically deficient state structures. The de-democratization process is slow, many times it is almost invisible and it is composed of numerous elements which, separately, they mean nothing:

„(T)he assault on democracy begins slowly. For many citizens, it may, at first, be imperceptible. After all, elections continue to be held. Opposition politicians still sit in congress. Independent newspapers still circulate. The erosion of democracy takes place piecemeal, often in baby steps. Each individual step seems minor—none appears to truly threaten democracy. Indeed, government moves to subvert democracy frequently enjoy a veneer of legality: They are approved by parliament or ruled constitutional by the supreme court.” (Levitsky and Ziblatt, 2018, 76)

The last few years point, in very clear terms, to the rise of illiberalism and of autocratic populism. Therefore, in the moment when the states of the world had to take measures against the spread of the Covid-19 pandemic, it was the perfect occasion for many politicians to exercise their anti-democratic skills. Under these circumstances, the slippage of democracy is not measured any more in coups d'état or undesirable people picked up from the street (although these things still happen). If we talk about a decline of democracies at a global level, we do not do this because we see the army on streets establishing an autocratic regime, we do not do this because we cross quickly the street not to hear the cries of pain of those people from the cellars of different oppression services of totalitarian states or because we might become victims of this oppression. Just as the democracy today is totally different from that of 30 or 50 years ago, so the attacks on it have evolved and have taken different forms. We talk today about „promissory coups”, „executive

POLITICAL STUDIES FORUM

aggrandizement”, „strategic harassment and manipulation.” (Bermeo, 2016, 6) The current democratic slippage is a conscious and assumed renunciation of reaching an ideal, in this case, the democratic ideal.

Of course, this process of giving up to democracy has different steps and different speeds. But no matter how deep and strong this degradation is, it exists and it leaves big marks on the destiny of the liberal democracy of the 21st century.

This study wants to analyze the way in which the problems specific to unique times in the human history, in times of crisis (especially, a health crisis in 2020) influence in detail the behavior of the state institutions, and thus, they influence the increase or decrease of the level of liberal democracy. The main step concerns, of course, the Romanian democracy, and the premise I start with is that, factual, the Romanian political practice is fragmented in thousands of almost imperceptible non or anti-democratic pieces, but, together, they are very harmful. This process is all the more obvious in the unique context of the year of 2020, when the limitations of rights and the anxiety caused by the sanitary disaster are present in everyday life.

The way in which Romania treated and is still treating to this day the evolution of the Covid-19 pandemic is worryingly similar to countries as South Africa, rather than countries from European Union:

South Africa's government did indeed draw on scientific advice when it decided to lock down economic and social life, but the state lacked the capacity either to respond to rising infection rates or to provide adequate economic relief for the poor. Individual departments failed to plan, and the government as a whole struggled at coordination. Meanwhile, the lockdown was enforced with a mix of coercion and incompetence. When the lockdown's economic impact compelled the government to ease it, officials shifted to an approach of often misguided microregulation, still without any overall plan or coordination. (Seekings, Natrass, 2020, 106-107)

If we replace South Africa with Romania, there is almost no risk to assess the situation incorrectly. Actually, in Romania, too, the crisis caused by the Covid-19 pandemic showed, more than ever, the malfunction in a society: it

POLITICAL STUDIES FORUM

increased the cleavages between its members and it underlined the weakness and incompetence of its political leaders. And, more than ever, it showed how important it is to see democracy not just as a simple speech about power, in the way that political science has been always analyzing, but to see it as a place where all ideas of the members of a society meet together, and thus, the quality of democracy depends on the quality of everyone's vision.

In other words, there is a good moment to see democracy, beyond its commonplaces, such as representative power, separation and balance of power and equal rights for everybody. All these depend on the way in which each of us participate, at any level, at their achievement. And the explanation is simple: for example, you cannot have representative power, if large segments of a society have not got a voice in the public space, or if it is being ignored. You cannot have separation and balance between state powers if impunity is the norm and the assumed objective, not only at the level of the political class, but at the level of the vast majority of people in public office, too. You cannot have equal rights for everybody when, in so many cases, the access to justice is difficult or obliterated. Even more, you cannot talk about equal rights in a society where the privilege with legal coverage is so common in the state structure.

What follows is the presentation of a descriptive thesis but with normative nuances: in the contemporary process of democratic erosion, there is a translation of non- or anti-democratic explicit act from the political power in numerous individual, local, regional acts which, so many times, they cannot be classified as explicit non- or anti-democratic, but which, counted together, weakens the hole democratic structure of state. The year 2020, with its unique circumstances in the human history, is the perfect "lab rat" of such an analyze, offering so many examples to this paper.

The most visible way, perhaps with no bad intention, but with explicit negative effects on both, long and short term, is the manner in which the political authority from Romania understood, during pandemic times, to treat the problem of rights during the emergency situation caused by the Covid-19 pandemic. Before taking any decision, Romania notified The European Council that it suspended the system of protection of human rights. This

decision was at least a strange one, as, at the level of the European Union, this practice was a flagrant exception. The derogation from the principles included in the European Convention of Human Rights can be invoked in case of emergency only when the existence itself of a nation is in danger and only if the normal restrictions allowed by the Convention for maintaining the security, the health or the public order are outdated or inapplicable.

The strangeness of this notification of derogation from the principles included in the European Convention of Human Rights is even bigger as, practically, neither at that time, march 2020, nor later, this derogation was of any use. Practically, by definition, in the moment of instauration of emergency state, certain rights are limited and, at that moment, no one disputed those normal limitations for the exceptional situation. Furthermore, the derogation from the respecting of principles included in the Convention was made without consultation, in secret, and was kept hidden until some information appeared in press. Even more, after that moment, the political institutions from Romania avoided to give any details referring to the manner that derogation would be used. In these conditions, a hypothesis that reasonably explains this request of derogation is that the political power was not interested in growing abusively its own prerogative, but the political authorities were not able to do two different things in the same time: to manage the problems caused by the pandemic and to respect the human rights. In other words, the derogation was an attempt of *ante factum* legal cover of any wrong step regarding possible abuse. The vague nature of notification, the lack of any clear reference to rights that were to be limited are arguments to support this hypothesis.

The hypothesis above is confirmed, too, by the subsequent development of events. The Romanian political system found itself in the situation of treating the special problems of the pandemic with an outdated, lack of clarity legislation, often abusive by manifestly tendentious interpretation of it. Thus, Romania approached the crisis caused by the Covid-19 pandemic with a state of emergency legislation based on a simple Government Decision, 1/1999, which not only it was unconstitutional, but it did not fulfill the elementary conditions of legality. Simply, the stipulations of the article 28

POLITICAL STUDIES FORUM

paragraph (1) corroborated with the article 9 paragraph (1) from Government Emergency Ordinance 1/1999 do not indicate, in post factum vision of the Constitutional Court of Romania “clearly and unequivocal”, within the legal norm, acts, deeds and omissions which are offenses and do not permit easy identification of them, by referring to the normative acts with which the incriminating text is in connection. Thus, the stipulations of the article 28 from GEO 1/1999 do not meet the requirements of clarity, precision and predictability. In the end, the Constitutional Court of Romania held that “the imprecision of the text of law subject to constitutional review affects, accordingly, the constitutional guarantees which characterizes the rights to a fair trial established by the article 21 paragraph (3) from the Constitution, including its compound regarding the right to defense, fundamental right provided in article 24 of the Constitution.” (*Monitorul Oficial*, 2020)

Any reading of the legislation in force at the establishment of the state of emergency would have led to the same conclusions. Practically, there is no interpretation of the law that may say this Government Decision provides clear, transparent and effective rules in emergency management. As a consequence, the application of vague and potentially abusive provisions has not only led to flagrant abuses, but much worse, with the annulment of its effects, it led to undermining of any legal authority at times when it was correct, and, on the other hand, it led to collapse of a minimum relationship of trust and collaboration between the political authority and the citizens.

This relationship based on trust and collaboration completely disappeared when was to awareness that the Romanian Constitution had a very clear provision: (ARTICLE 53 (1) “The exercise of certain rights of freedoms may be restricted only by law and only if necessary, in order to: defense of national security, order, health or public morality, the rights and freedoms of citizens; conducting criminal investigation; prevention of the consequences of a natural calamity, of a disaster or of a particularly serious disaster”). This was not only flagrantly ignored, but it was also contradicted by a 14 years old legal provision that says exactly the opposite of this constitutional provision (*Mediafax*, 2020). In other words, the government’s activity has been for many months, beyond of any democratic limits by flagrant violation of very clear and explicit constitutional provisions.

POLITICAL STUDIES FORUM

As in the first case, it is too much to suspect that the lack of democratic rigor comes from an assumed antidemocratic intention. There have never been clear, open and deliberate illiberal manifestations as they have been in different countries in different moments of crisis management, as part of a bigger plan of undermining democracy, in a completely special occasion. What really happened in Romania's case was a mixture of neglect and incompetence, but the consequences for the democratic process are as harmful as a direct and assumed attack on democracy. Either intentionally or not, the attacks on democracy in Romania has left deep marks. And these marks can be seen in restriction of religious rights, in restriction of right to travel, in restriction of access to medical services etc. More than that, the unconstitutional and often illogical provisions did not lead to violations of rights, but they made possible that the authority of some state institutions grow unjustifiably much, with no possibility to legally oppose or challenge this authority. The idea of respect and collaboration between different state institutions and the citizen with rights, usually, an idea with no power in Romanian democracy, was transformed, in the spring of 2020, in idea of unpunished abuse from authorities to citizens who possess rights.

In other words, the measures taken during the state of emergency made the citizen too weak and some state institutions too powerful. In fact, any democratic act must have the reverse purpose: a stronger citizen and a state in his service. In Romania, since 2019 to present, governments came to power just to stop the authoritarian drifts of different PSD governments from the period 2017-2019. However, the slope of the degradation of the fragile Romanian democracy has been preserved, although attenuated, and the exercise of government in the period of the greatest health crisis at a global level in the last one hundred years revealed all of the authoritarian habits in the Romanian political practice.

In conclusion, democracy is, in many aspects, a form of government which we do not understand, and, because of this, we do not know how to take care of it. What is to be underlined is that democracy is about competence. In an ideal way, political competence should reward the competent ones. As, in

reality, this does not happen, the political elite keep their power by different mechanisms of abuse, and, in Romania, this is normal. The current political, health and economic crisis is a new unique challenge to democracy. The way it is answered now will determine the evolution of the political systems for decades to come, and this means that it depends on us, to a greater extent than ever, how democracy will evolve.

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