

Gender and Democratic Resilience against Autocratisation: The Case of Romania's 'Gender Identity' Bill

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Abstract:

This paper argues that, given the centrality of gender for recent processes of autocratisation, it has become imperative to understand and theorise the conditions underpinning democratic resilience against opposition to gender equality. I conceptualise democratic resilience as the outcome of critical actors' efforts to represent marginalised groups in the face of threats to existing gender equality rights. The case study is Romania's 2020 'gender identity' bill, which would have prohibited discussion of 'gender' within the educational system, but was eventually ruled unconstitutional. I identify two key causal mechanisms through which civil society organisations were able to shape this outcome: *framing*, which emphasised the bill's non-compliance with democratic norms and constitutional principles, and *learning*, which prompted a reflection by the two key institutional actors, the President and the Constitutional Court, as to the importance of core democratic principles for politics and society in post-communist Romania.

Keywords:

substantive representation, democratic resilience, democratic backsliding, autocratisation, LGBTQ+ rights, women's rights.

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On 16 December 2020, Romania's Constitutional Court ruled that legislation banning discussion of 'gender identity' within the educational system was unconstitutional. The bill, which had been passed six months earlier by parliament, prohibited 'activities that aim[ed] to spread the theory or belief of gender identity, understood as the theory or belief that gender as a concept differs from biological sex' (Camera Deputatilor 2019).ⁱ The bill had been referred to the Court by President Klaus Iohannis, following pressure from women's groups, LGBTQ+ groups, universities and students' associations, who argued that the bill ran counter to constitutional principles such as university autonomy and freedom of thought, while also breaching Romania's obligations under international law.

Romania's 'gender identity' bill represents a significant episode in the political struggles for gender equality in post-communist Europe, for two main reasons. First, it marks a rare victory for advocates of equality for women and LGBTQ+ groups in the region. Secondly, it raises an important theoretical question: how can we best understand and conceptualise democratic resilience against rising opposition to gender equality? As feminist scholars have persuasively argued, gender is a central component of recent trends towards autocratisation across the world: recent research has focused on the emergence of anti-gender campaigns (Kuhar and Paternotte 2017, Verloo and Paternotte 2018, Corrêa 2021), on opposition to gender equality (Verloo 2018), and on democratic backsliding from a gender perspective (Krizsán and Roggeband 2019, 2021). However, the question of how and when actors succeed in reversing negative gender outcomes such as Romania's 'gender identity' bill has been significantly under-explored by existing scholarship.

This paper argues that, given the centrality of gender for recent processes of autocratisation, it has become imperative to understand and theorise the conditions underpinning democratic resilience against opposition to gender equality. Within this context, I conceptualise democratic resilience as resulting from critical actors' efforts to represent marginalised groups in the face of threats to existing gender equality rights. Here, I draw on existing literature on substantive representation, which argues that understanding how and when critical actors play a crucial role in 'acting for' marginalised groups is essential for our understanding of political representation and democracy (Celis 2008, Celis *et al.* 2008, Celis 2009). In theoretical terms, this paper shows that democratic resilience in the policy area of gender equality occurs when critical actors such

as women's groups, LGBTQ+ groups and others are successful in influencing key institutional players in the political system with the power to reverse negative gender outcomes - in this case, the Presidency and the Constitutional Court. Within this context, the Romanian case study provides an excellent starting point for a discussion of how domestic actors and institutions can successfully counteract the current wave of autocratisation on gender equality.

This paper unpacks the factors driving democratic resilience in the case of Romania's 2020 'gender identity' bill by adopting a process-oriented, actor-centric approach. Thus, I conceptualise democratic resilience as *a process* starting with the attempt by proponents of the 'gender identity' bill to roll back the existing legal framework on equality for women and LGBTQ+ groups, and eventually culminating in the Court's ruling that the bill is unconstitutional. This process was characterised by two distinct, causally-related outcomes: first, the President's decision to refer the bill to the Constitutional Court; secondly, the Court's ruling, which was notable not only in declaring the bill unconstitutional, but also in proclaiming that 'sex' and 'gender' represent distinct concepts within the Romanian legal framework. Civil society *actors* including women's organisations, LGBTQ+ organisations, universities and student organisations played a central role in shaping both the President's decision and the Court's ruling. I identify two key causal mechanisms through which civil society organisations were able to shape these outcomes: *framing*, which emphasised the bill's non-compliance with democratic norms and constitutional principles, and *learning*, which prompted a reflection both by the Presidency and the Court as to the role of core principles such as freedom of thought, university autonomy, and existing concepts of 'sex' and 'gender' during Romania's post-communist history.

The paper is organised into four main sections. First, I discuss the paper's contribution to extant literature and outline the methods used in the analysis. Secondly, I outline the political context in Romania at the time of the bill's adoption, and provide an overview of the legislative process that led to the draft bill being passed by parliament. Thirdly, I focus on the impact of civil society on the President's decision to refer the bill to the Constitutional Court. Fourthly, I focus on the impact of civil society on the Court's reasoning in its ruling. The conclusions summarise the findings and reflect on the implications of the Romanian case for the study of democratic resilience.

Contribution to existing literature and methods

This paper contributes to three distinct strands of scholarship: existing literature on the substantive representation of marginalised groups (Celis 2008, Celis *et al.* 2008, Celis 2009, Erzeel and Rashkova in this issue); extant literature on gender and autocratisation / democratic

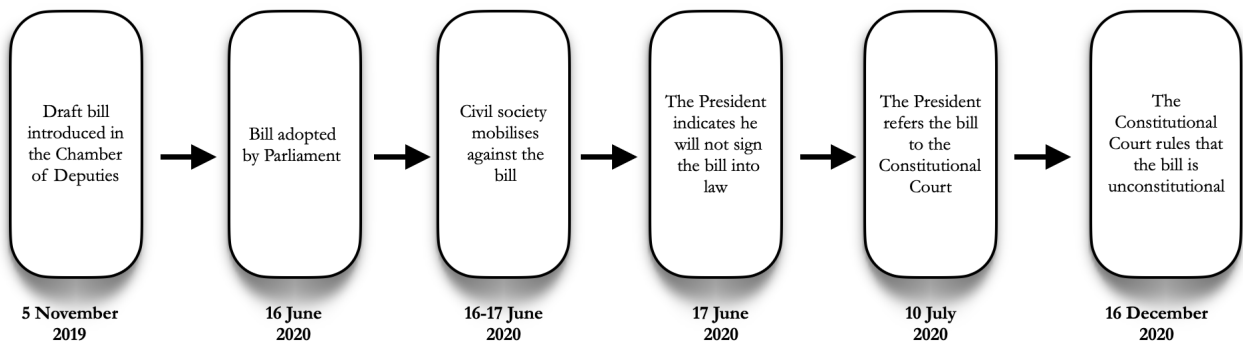
backsliding (Krizsán and Roggeband 2018, 2019, 2021, Corrêa 2021); and emerging literature on democratic resilience (Boese *et al.* 2021, Lührmann 2021).

The substantive representation of marginalised groups. As Celis (2008, 2009) persuasively argues, in order to understand the substantive representation of marginalised groups, we need to turn our attention to the question of where, why, and how the substantive representation of these groups occurs, and to focus on the role of critical actors such as women's and LGBTQ+ groups in these processes. Celis' influential work has set the research agenda for a growing literature on the ways in which critical actors seek to represent marginalised groups in politics in Europe and elsewhere. This paper contributes to scholarly understanding of the role of substantive representation in the process of democratic resilience - an area that has yet to be explored in any depth in the literature. Additionally, the paper's focus on substantive representation in post-communist Europe is itself noteworthy, because scholarship on the region has tended to focus primarily on women's descriptive representation (for exceptions to this situation, see Chiva 2018, Ilonszki and Vajda 2019).

Autocratisation/democratic backsliding. During the past two decades, scholars have become increasingly alert to the rise of hybrid regimes, described variously as 'illiberal democracies' (Zakaria 1997), 'electoral authoritarianism' (Schedler 2006) and 'competitive authoritarianism' (Levitsky and Way 2010), focusing on autocratisation (democratic backsliding) as an incremental process resulting in the decline and eventual demise of democratic institutions (Bermeo 2016). Within this context, feminist scholars have argued persuasively that these processes have an intrinsic gender dimension. For instance, Kuhar and Paternotte (2017) focus on the rise of anti-gender campaigns in Europe seeking to attack or even dismantle existing gender and sexual rights, while the contributors to Krizsán and Roggeband (2019) analyse policy backsliding on gender equality in Poland, Hungary, Romania and Croatia. Within this context, although, as Chirîtoiu (2019, 162) argues, elements of 'negligence, ignorance and malpractice' form an intrinsic part of democratic backsliding on gender equality in Romania, this paper also shows that the rise of anti-gender political entrepreneurs matters, especially when these conservative actors are in a position to push for rolling back existing rights, as was the case with the 'gender identity bill in 2020 or, in an earlier instance, with the 2018 referendum seeking to enshrine heterosexual marriage into the Constitution (see Norocel and Baluta 2021).

Democratic resilience. The concept of democratic resilience has begun to attract increasing scholarly attention recently. For instance, Lührmann argues that resilient institutions, together with a united and creative opposition, are 'the last line of democratic defence' (2021, 1019). However, to date, there are no analyses of democratic resilience in relation to autocratisation in the area of gender equality. This is surprising, not in the least because, as outlined above, there is already a

Figure 1. The sequence of events leading to the Constitutional Court's ruling



significant literature on democratic backsliding on gender equality. Overall, this paper supports Lührmann's argument that a united opposition (in the Romanian case, the broad coalition formed by civil society organisations opposing the bill) and state institutions (in the Romanian case, the Presidency and the Constitutional Court) are key to democratic resilience on gender equality.

Methods. This paper employs a within-case research design focusing on the sequence of events leading up to the Court's ruling. Figure 1 outlines the sequence of events of interest here, starting in November 2019 with the draft bill's introduction to the Chamber of Deputies, and culminating with the Court's ruling in December 2020. Within this timeline, we can identify two distinct outcomes of interest: first, the President's decision to refer the bill to the Constitutional Court; secondly, the ruling of the Court itself. These two outcomes are causally related: had the President not referred the bill to the Court, the Court's ruling itself would not have occurred.

This paper uses process-tracing in order to unpack the causal dynamics resulting in the historical outcomes represented by the President's referral and the Court's ruling respectively. Here, I draw on extensive scholarship on process-tracing and causal mechanisms (Falleti and Lynch 2009, Collier 2011, Waldner 2012, Beach 2017), with the aim of specifying the impact of civil society mobilisation on the two outcomes of interest outlined above. Taking Falleti and Lynch's typology of causal mechanisms as a starting point, I identify two main such mechanisms at play in our case study: (1) *framing* (where 'elites shape behaviour via subjective orientations and beliefs about appropriate or desirable political actions') and *learning* (where 'actors act in accordance with lessons drawn from relevant, often past, political experience') (Falleti and Lynch 2009, 1150). While *framing* is apparent in civil society organisations' efforts to persuade the President and the Court that the 'gender identity' bill infringed democratic norms and fundamental constitutional

principles, *learning* is manifest in broader discussions tapping into the prevailing elite consensus around notions of democracy and progress in post-communist Romania.

In identifying and outlining the causal pathways present in the Romanian case study, I draw on: (1) primary documentation such as the bill's legislative record in the Chamber of Deputies (Camera Deputatilor 2019), the official transcript of the debates in the Senate (Senatul României 2020), the President's referral to the Constitutional Court (Președintele României 2020), and the ruling of the Court (Curtea Constitutională a României 2020); (2) media coverage of the bill in newspapers and news outlets such as *Libertatea*, *Adevarul*, *România Libera*, *Mediafax* and *Revista 22* among the established news outlets, and *Digi24* and *Vice News* among the more recently-established news outlets for the period June-December 2020; (3) press releases by civil society organisations and university during the period June-December 2020; (4) the *Amicus Curiae* briefs submitted to the Court by a wide range of civil society actors arguing both for and against the bill.

The political context and the legislative process

In order to make the political struggles around the 'gender identity bill' intelligible, we must place them not only against the background of politics in post-communist Central and Eastern Europe writ large, but also within the Romanian political context of 2020. Thus, Romania is distinctive within the Central and East European context in at least two ways. First, unlike other post-communist countries such as Hungary or Poland, liberal legislation on reproductive rights has remained in place throughout the post-communist period, largely due to a prevailing consensus around rejecting Romania's exceptionally repressive communist-era anti-abortion policy; thus, all post-1990 attempts to restrict reproductive rights have been unsuccessful (Brodeală 2017). Secondly, unlike in Poland, Hungary, Croatia or Bulgaria (Krizsán and Roggeband 2021), opposition to the Istanbul Convention on gender-based violence has not taken centre stage in political debate in recent years. However, the absence of backlash against reproductive rights and the Istanbul Convention does not mean that Romania has been impervious to the recent wave of anti-gender campaigns in Europe (Kuhar and Paternotte 2017, Paternotte and Verloo 2018). For instance, as it had happened earlier in Slovenia, Croatia and Slovakia, anti-gender groups in Romania were instrumental in pushing for a referendum on changing the constitutional definition of marriage to that of a union between a man and a woman, a move that would have effectively banned same-sex marriage (Margarit 2019, Norocel and Baluta 2021). The referendum did not pass due the fact that only 21 percent of eligible voters cast a ballot. Furthermore, Romanian

legislation is hardly LGBTQ+ friendly: although it decriminalised homosexuality in 2001, Romania has yet to pass legislation legalising same-sex marriage.

The party political context of 2020 was characterised by the prominence of populist radical right discourses emphasising ‘tradition’ and ‘conservative values’ in Romanian politics, with political actors seeking to position themselves on these issues against the background of imminent parliamentary elections, which were duly held in December 2020. The 2018 referendum on marriage had been instrumental in helping define political parties’ stances in this respect, with the overwhelming majority of parties on the left and the right of the political spectrum declaring themselves to be supporters of the ‘traditional family’. For example, the nominally left-wing communist-successor Party of Social Democracy (PSD), the liberal conservative National Liberal Party (PNL), the conservative People’s Movement Party (PMP) and the Alliance of Liberals and Democrats in Europe (ALDE) all supported the notion of enshrining heterosexual marriage into the Constitution in 2018. In contrast, progressive voices were under-represented in Parliament at the time of the bill’s adoption: the Save Romania Union (USR) held only 30 seats in the lower chamber (approximately 9 percent of the total). The December 2020 elections brought an additional unwelcome surprise in the form of the rise of an extreme-right, with the Alliance for Romanian Unity (AUR) obtaining close to one tenth of the seats in the two chambers. Overall, party support for ‘traditional values’ has largely reflected public opinion: for example, in 2019, only 38 percent of Romanians agreed that LGBT people should have the same rights as heterosexual people (the EU-28 average: 76 percent); only 47 percent agreed that school teaching materials should include information about LGB issues (EU-28 average: 71 percent); and only 43 percent agreed with the inclusion of information about transgender people (EU-28 average: 65 percent) (Eurobarometer 2019).

The legislative proposal on ‘gender identity’ was submitted to the legislature in November 2019 by Senator Vasile-Cristian Lungu, who had been elected for the first time in 2016 on national conservative PMP’s list but had been sitting in the unaffiliated senators’ parliamentary group since 2018. The bill sought to amend the 2011 Act on National Education by adding ‘proselytising on grounds of sex’ and ‘proselytising on grounds of gender’ respectively to the list of prohibited activities in schools. The list already included activities that breached ‘norms of morality’, activities that would put pupils or staff in danger, political activities and ‘proselytising on grounds of religion’ (Camera Deputatilor 2019). In the rationale accompanying the draft bill, Lungu argued that the bill was necessary in order to combat the ‘real threat’ of ‘gender ideology’ to Romania’s educational system (Camera Deputatilor 2019).

In addition to its content, a notable feature of the draft bill was that senator Lungu was its sole proponent initially (he was later joined by deputy Emil-Marius Pașcan, who played a secondary role throughout). Lungu’s motivation for proposing the bill is unclear, although both electoral

considerations and ideological commitment to ‘traditional values’ are likely to have played a role. On the one hand, Lungu may have calculated that the bill would enhance his public profile and therefore help his re-election prospects in the December 2020 elections. In the event, he did run in the elections for the Senate (once again, for the People’s Movement Party, PMP), but the party fell below the 5 percent threshold for winning seats. On the other hand, Lungu’s support of ‘traditional values’ was a constant feature of his legislative record. For instance, he made a number of formal statements (*declaratii politice*) on the importance of the ‘traditional family’ and supported the 2018 family referendum. Interestingly, in a series of interviews about the bill in June 2020, Lungu did not mention the elections or, for that matter, his own political party when discussing his reasons for introducing the bill. Instead, he framed the bill as a personal crusade designed to prevent the harmful consequences of introducing LGBTQ+ policies (see Popescu 2020). This suggests that the primary motivation for the draft bill was ideological rather than electoral.

The Chamber of Deputies began its consideration of the bill as soon as it was submitted on 4 November 2019. During the committee stage, the opinion of the Committee on Education, Science, Youth and Sport was particularly important, as it was formally responsible for recommending whether the bill should proceed to the next stage of the legislative process. In its written report, the Committee rejected the bill on both procedural grounds (because of its failure to meet the quality threshold for draft legislation) and on substantive grounds (because it appeared to contradict not only existing legislation on education, but also non-discrimination law) (Comisia Camerei Deputatilor pentru învățământ, știința, tineret și sport 2020a). However, the legislative process in the lower chamber concluded abruptly, due to the constitutional provision that bills under scrutiny for more than 45 days are considered adopted and can proceed on to the other chamber. Work on the bill in the Senate therefore began in February and, by early April 2020, the Committee on Education, Science, Youth and Sport had issued its report, which was, once again, negative. However, the bill was eventually adopted because the Senate decided to send it back to the Committee on Education and Youth for an additional report. This time, the Committee’s report, issued on 5 June 2020, was in favour of the bill, on condition that it be amended. In the event, there were two amendments: the first changed the ban on ‘proselytising’ with a ban on ‘activities aiming to spread the theory or belief of gender identity, understood as the theory or belief that gender as a concept differs from biological sex’; the second stipulated that activities contravening Article 3 of the Education Act (such as fairness, efficiency, decentralisation, public accountability, equal opportunity) were also to be banned (Comisia Senatului pentru învățământ, știința, tineret și sport 2020).

The only opportunity that the senators had to debate the bill took place on 16 June 2020. Opening the debate, Ecaterina Andronescu, a veteran social democratic (PSD) MP, argued that the bill would protect children and benefit the educational system (Senatul României 2020).

Opponents of the bill did not pull any punches. In a furious intervention, Senator Vlad Alexandrescu, representing the progressive USR, argued that the bill ‘was based on a presumption of biological determinism, infringed on key constitutional principles of freedom of expression and university autonomy, and breached Romania’s international commitments (Senatul României 2020). In defence of the bill, Lungu argued that spreading (‘proselytising’) the notion of gender ideology represented a ‘real danger for the education system’ (Senatul României 2020). The bill was eventually adopted with 81 votes in favour, 22 against and 27 abstentions. Lungu’s former party, PMP, and Andronescu’s PSD voted in favour of the bill, while USR voted against it.

Civil society mobilisation and the President’s referral to the Constitutional Court

In the immediate aftermath of the bill’s adoption, the strategy of civil society organisations coalesced around the goal of persuading President Iohannis to send the bill to the Constitutional Court. While these organisations were successful in their efforts, it should also be noted that the President’s referral was selective in its approach to the issues at stake, highlighting non-gendered arguments put forward largely by universities and students’ associations (such as that the bill infringed fundamental freedoms, as well as the constitutional guarantee of university autonomy) and largely ignoring the arguments formulated by women’s groups and LGBTQ+ organisations, which tended to emphasise issues related to the role of gender in social and political life.

How can we explain the success of civil society in lobbying the President? Speed was crucial: the initial reaction of civil society organisations to the bill was swift and determined, not in the least because the issue was time-sensitive: according to Article 77(1) of the Constitution, the President has to sign bills into law within 20 days of formally receiving them. Within two days of the bill’s adoption, organisations representing women and LGBTQ+ groups, universities, and students’ associations sought to put pressure on President Iohannis to not sign the bill into law. For example, Accept, the largest LGBTQ+ association in Romania, coordinated a letter by more than 80 civil society organisations requesting that the President refrain from signing the bill so as ‘to prevent severe backsliding’ with respect to fundamental human rights and university autonomy (Asociatia Accept 2020). Some of Romania’s most important higher education institutions, such as the University of Bucharest, the Babes-Bolyai University of Cluj and the West University of Timisoara, also expressed their opposition to the bill (Pora 2020). Finally, the National Students’ Council and the National Alliance of Student Organisation in Romania argued that ‘schools and universities should be debate- and participation-friendly spaces for all pupils and students, irrespective of their sexual orientation or their gender identity’ (Pora 2020). Thus, civil society organisations formed a broad coalition of LGBTQ+ groups, women’s organisations, universities and students’ associations. In doing so, these organisations drew on what Ayoub (2016) describes as ‘the politics of visibility’: by 2020, organisations such as Accept were able to influence public

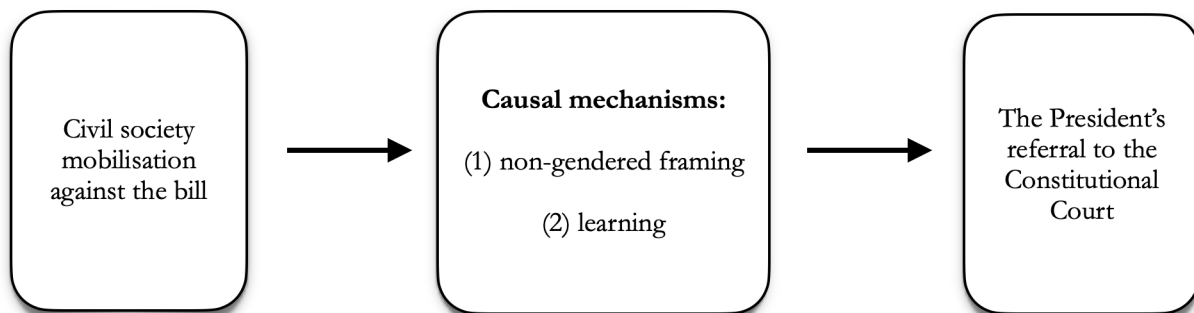
debate because they already had not only the organisational capacity, but also public recognition as legitimate representatives of marginalised groups in society.

The effort to shape the content of the President's referral played out largely in the media, where coverage of the bill was overwhelmingly negative. In this respect, the tone was set early on in a Facebook post by Vlad Alexandrescu, the senator who has so strenuously opposed the bill during the debates in the Senate. Alexandrescu's scathing post, published on the day that the bill had been adopted, was cited widely in the print media (for instance, by dailies such as *Libertatea*, *Adevarul*, and *Evenimentul Zilei*). Higher education institutions' and civil society organisations' opposition to the bill was also widely reported on. In contrast, media coverage of Senator Lungu and of the other MPs who had voted for the bill largely ridiculed and/or sought to portray them as ignorant. For example, the title of a piece on Lungu published in one of the major news dailies, *Libertatea*, reads 'The senator's defence of the 'gender identity' bill: "there are 114 invented genders"' (Otopeanu 2020). Furthermore, interviews with members of the relevant committees responsible for the bill in parliament revealed that MPs lacked a basic understanding of the content and consequences of banning 'gender identity' from schools (Munteanu 2020).

To what extent were civil society organisations and higher education institutions able to shape the President's case to the Court? Figure 2 summarises the two main causal mechanisms at play in this respect: *framing* (which refers to how civil society organisations and higher education institutions argued that the bill was contrary to fundamental democratic norms) and *learning* (the extent to which the legacy of authoritarian rule made the issues raised by the bill highly salient for the President and therefore worth referring to the Court). The two mechanisms are distinct in that, while framing speaks directly to the impact of civil society mobilisation on the President's position on the bill, political learning reflects a broader consensus in the political arena as to the pitfalls of authoritarian rule.

As Figure 2 shows, civil society organisations were successful in their effort to shape the President's position on the bill. However, this success was highly conditional on a non-gendered framing of the bill's content. Here, it is useful to distinguish between two different types of argument put forward by civil society in opposing the bill. On the one hand, actors such as higher education institutions tended to rely on non-gendered arguments, emphasising the fact that the bill infringed the constitutional guarantee on university autonomy, and the fact that the bill breached fundamental rights such as freedom of expression and thought. For example, the University of Bucharest, the Babes-Bolyai University of Cluj and the West University of Timisoara all emphasised that the bill represented a form of state interference with university autonomy (Pora 2020). One partial exception is the National School of Political and Administrative Studies (*Școala Națională de Studii Politice și Administrative*, SNSPA), whose statement referred specifically to gender studies as a discipline and focused primarily on the

Figure 2. The causal pathway leading to the President's referral to the Constitutional Court



consequences that banning gender studies as a discipline would have for university autonomy (Școala Națională de Studii Politice și Administrative, 2020). On the other hand, the primary concern of civil society actors such as Accept was with gendered issues and LGBTQ+ and women's rights. For example, Accept's open letter to President Iohannis did mention the 'profound constitutional flaws' (*vicii profunde de constitutionalitate*) of the bill, but focused mostly the impact of the bill on transgender people and women respectively. Furthermore, Accept argued, the bill was also in breach of legal commitments that Romania had made to international organisations such as the EU and the Council of Europe (Asociația Accept 2020, 2).

The President submitted his referral (*sesizare de neconstitutionalitate*) to the Court on 10 July 2020, less than a month after its adoption by Parliament. Its most notable feature was that it framed the case for the bill being unconstitutional almost exclusively in non-gendered terms. Thus, the President argued that the bill was in breach of the Constitution in a wide range of areas: freedom of conscience (Art. 29); equality of rights (Article 16(1)); university autonomy (Art. 32(6)); freedom of expression (Art. 30(1)) and the prohibition of censorship (Art. 30(2)); the principle of the separation of powers (Art 1(4)) and the supremacy of Parliament (Art. 61(1)) (the latter because deciding what gets taught in schools should properly be a decision of the executive rather than the legislature); the rule of law (Art. 1(3) and 1(5)) (because of the fact that the bill was poorly drafted); and, last but not least, the constitutional provision on the primacy of international law over domestic law (Art. 20(2)) (Președintele României 2020). However, gender was not altogether absent: the referral did mention gender briefly towards the end of the submission: first, in arguing that the bill was in contradiction with the government's Strategy on Promoting Equality of Opportunity and Equality of Treatment, which mandated gender mainstreaming in school textbooks (Președintele României 2020, 16); secondly, because the bill was contrary to Romania's obligations, under the Istanbul Convention of the Council of Europe,

to include equality between men and women and non-stereotypical gender roles in the educational curriculum (Președintele României 2020, 17).

If framing was the first causal mechanism at play in the President's decision, learning represents the second causal mechanism at play here. In order to understand how this came about, it is important to note that the President had several options: first, to ask the legislature to reconsider the bill; secondly, to sign it as it stood; thirdly, to refer it to the Court. The first option was risky, because a President can return a bill to Parliament only once; thus, the bill could well make its way back to the Iohannis's desk unchanged, in which case he would have had to sign it. Given the strength of opposition to the bill and the persuasive case against its constitutionality, the second option was not available to Iohannis. Here, it is significant that numerous actors on the political scene argued forcefully that the bill was essentially an exercise in authoritarianism. Higher education institutions such as the National School of Political Science and Public Administration described the bill as 'scientifically unacceptable and anti-democratic'; politicians and civil society actors pointed to the 'slippery slope' of authoritarianism in Hungary and Poland, where similar laws have been adopted; others argued that the bill was part of a broader religious assault on secular institutions and practices (see Pora 2020, Sandu et al 2020). These arguments resonated with Iohannis because of the particular social and political context of post-communist Romania, where core institutional players such as the Presidency have had to learn how to play by democratic rules over the period since 1989. Historically, the President's commitment to democratic values has been all the more important in Romania by contrast to other post-communist countries, because of the negative experience of a highly-personalised communist regime with a President at its centre during the Ceaușescu period. While not all of Romania's post-communist Presidents have been particularly sensitive to the importance of commitment to democracy, Iohannis, who was first elected in 2014 on a centre-right platform and is Romania's first ethnic minority head of state, has generally sought to play the institutional role allocated to the Presidency in the Constitution rather than creating a personalised regime. Furthermore, referring the bill to the Court had a range of reputational benefits for the President, such as domestic and international praise for his defence of the Constitution and gender equality.

Civil society mobilisation and the Constitutional Court's ruling

The Constitutional Court's ruling was issued on 16 December 2020, with seven of the nine justices joining the majority and two dissenting opinions.ⁱⁱ Brodeală and Epure's (2022) legal analysis highlights that the significance of the ruling lies not only in its upholding of the President's case as to unconstitutionality, but also in the Court's finding that 'sex' and 'gender' are distinct concepts in the Romanian legal system. However, Brodeală and Epure (2022) argue, the Court missed the opportunity to draw more systematically on the UN's Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in its reasoning - a

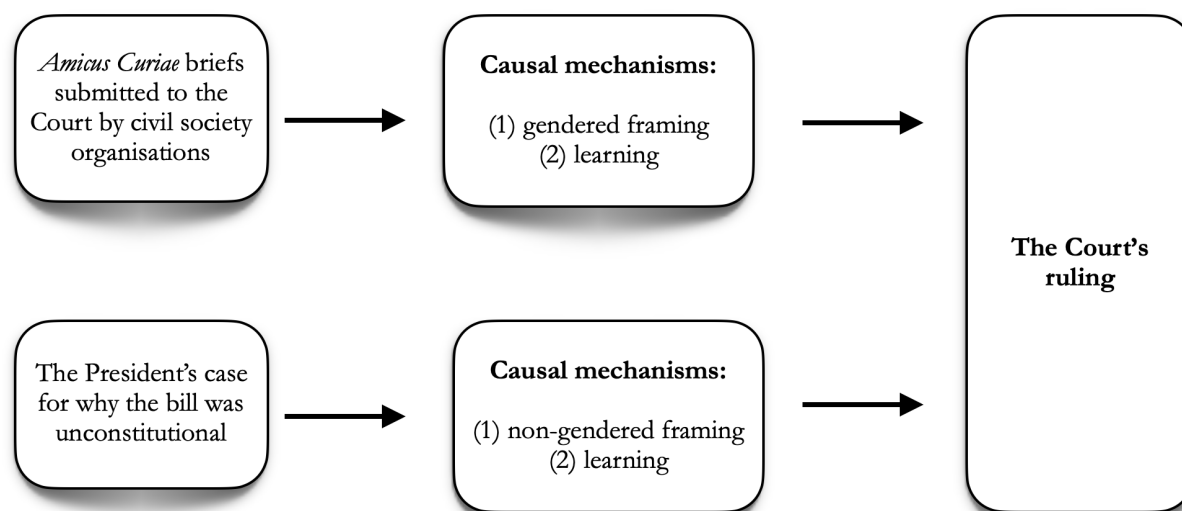
puzzling decision, given that Article 20(2) of the Romanian Constitution gives precedence to international law over domestic law when it comes to fundamental human rights (Brodeală and Epure 2022). The analysis presented in this section complements Brodeală and Epure's in focusing primarily on civil society mobilisation and the Court's ruling, rather than on the legal case per se.

The Constitutional Court deliberately brought gender back onto the agenda, even if that was not strictly necessary. Indeed, the Court could have simply responded to the President's case, tacitly adopting a non-gendered framing. Instead, the Court dedicated 5 pages of a total of 19 to an extensive discussion of the role of the gender-sex distinction in Romanian legislation. Most remarkably, the Court ruled that the concepts of 'sex' and 'gender' are indeed distinct within the Romanian legal framework: 'the concept of 'gender' has a wider scope than that of 'sex'/sexuality in a strict biological sense, since it incorporates complex elements of a psychosocial nature' (Curtea Constitutională 2020, 14; translation from Brodeală and Epure 2022, 10). The Court also argued that the constitutional framework 'does not contain any distinction that would describe belonging to the feminine (or masculine) sex on the basis of biological criteria or on any other criteria' (Curtea Constitutională, 2020). This amounts to saying that the bill's proponents' argument that gender is biologically determined had no legal basis in the fundamental law. The Court also reviewed Council of Europe and European Union legislation on gender equality, highlighting that the distinction between gender and sex was also present in a wide range of international legal instruments that Romania has ratified.

Why did the Court bring gender back into the discussion? I argue that, as was the case with the President's referral, civil society organisations were able to shape the Court's decision in this respect. Once again, the key causal mechanisms at play were (1) framing (through the Amicus Curiae briefs submitted to the Court) and (2) learning (as is apparent in the Court's reflection of the changing legal framework on gender equality in Romania since 1990). These causal pathways are summarised in Figure 3.

The Amicus Curiae briefs submitted to the Court by a variety of civil society organisations are notable for three main reasons. First, a total of twelve briefs were submitted, eight by civil society organisations opposing the law, and four by those supporting it (Curtea Constitutională a României 2020, 8-9). As Brodeală and Epure also note, this is a fairly high number; we should also note that the briefs opposing the bill outnumbered those supporting it by two to one. Secondly, virtually all of the briefs opposing the bill were from women's organisations, LGBTQ+ organisations, and scholars. This suggests that non-gendered arguments concerning university autonomy and freedom of thought were less influentially represented than had been the case in June. Instead, the bill's impact on gender equality emerged as the primary focus of opposition to the bill. Thirdly, by the autumn of 2020, the constellation of actors arguing forcefully against the

Figure 3. The causal pathways leading to the Court's ruling



law had expanded from primarily domestic actors to include transnational and international actors too, such as ILGA-Europe, the US-based Centre for Reproductive Rights, and a group of UN Special Rapporteurs and Independent Experts (Curtea Constitutională a României 2020, 8-9).

The *Amicus Curiae* briefs submitted by domestic and international civil society organisations were therefore instrumental in bringing the issue of gender equality to the attention of the Court. Indeed, the Court's inclusion of an extended discussion of the gender-sex distinction reflects, at least in part, civil society's arguments as to the centrality of gender for social and political life. This causal pathway is best exemplified through a counterfactual: had civil society and international organisations not argued forcefully in favour of gender as a social construct, would the Court have dedicated five pages to clarifying the legal status of the gender-sex distinction in Romania's legal framework? This is unlikely to have been the case, even if, as Brodeală and Epure (2022, 27-28) note, two of the nine justices - Justice Elena-Simina Tanasescu and Justice Daniel Marius Morar - were well-versed in gender equality law and therefore understood the importance of the issue at stake. Moreover, there is nothing in the Court's previous rulings on gender equality to indicate that it has been consistently progressive on this issue. In fact, the Court's track record in this respect can be best described as uneven: in 2018, it gave the go ahead to the 'traditional family' referendum against strong civil society opposition; the same year, following a ruling by

the Court of Justice of the European Union that Romania must recognise same-sex marriage (case C-673/16), the Court essentially limited the application of the ruling to marriages concluded within an EU member state (Selejan-Guțan and Tanasescu 2022, 204). Most importantly, some of the arguments made by civil society actors are clearly present in the Court's ruling. For example, the Court's emphasis on human dignity in its reasoning echoes the arguments in the Accept-ILGA Europe brief that the bill breached fundamental principles of dignity and equality. Interestingly, the dissenting opinion also echoes some of the arguments put forward by supporters of the bill, such as the Association Pro-Vita (Curtea Constitutională a României 2020).

While opponents of the bill were successful in their efforts to draw the Court's attention to the importance of gender equality, the text of the Court's reasoning demonstrates that learning as a second causal mechanism also played an important role in the Court's decision to re-gender the issue at stake. In the section dedicated to the gender-sex distinction, the Court engages in a lengthy reflection on the transformation of the Romanian legal system since 1990. 'The jurisprudence of the Court', the ruling notes, 'reflects the changes that have occurred over time with respect to the social roles of men and women, and a [process of] moving away [*distantare*] from gender stereotyping' (Curtea Constitutională a României 2020, 12). The Court gives the example of a 1995 ruling that different pension ages for men and women were justified due to women's responsibilities in the domestic sphere; however, by 2010, relevant legislation stipulated that men and women should retire at the same age, largely due to the requirement deriving from the EU's *acquis communautaire*. In this sense, the Court argues, we have witnessed a process of 'social development away from gender stereotypes, due to the acceptance of the changing social roles of women and men' (Curtea Constitutională a României 2020, 12). Thus, the Court appears to be arguing that a process of learning within the Romanian legal framework can and does occur over time. The Court's reasoning as to why the bill is unconstitutional clearly incorporates this process of learning over time: the ruling states that, since the bill not only 'bestows legal standing onto gender stereotypes' (*stereotipiile de gen apar ridicate la rang de lege*), but also penalises those who disagree with this approach, it is reflective of an antiquated concept of gender equality and therefore it is unconstitutional (Curtea Constitutională a României 2020, 15). As with the case of the President's referral to the Court discussed above, this causal mechanism is more diffuse than framing because it reflects the extent to which societal attitudes shape actors' decisions and actions. At a minimum, the Court clearly acknowledges just how much the legal framework on gender equality has shifted over time; in a more maximalist reading, the Court views progress as being a key feature of Romania's legal system. While very much optimistic, given just how much opposition there still is to LGBTQ+ rights in Romania, as well as the rather patchy implementation of the EU's *acquis* on non-discrimination, the Court reflection on social change

illustrates its determination to tell a story of progress in its ruling and indirectly frame the bill as representing a backwards step in time.

Conclusion

To what extent are democracies able to withstand the current wave of autocratisation in relation to gender equality? Romania's 'gender identity' bill presents an opportunity to identify the driving factors behind democratic resilience, understood here as successful resistance against conservative and/or autocratic attempts to remove fundamental rights and/or shape existing policy in a more authoritarian direction. Overall, as the case of Romania shows, civil society actors seeking to represent marginalised groups play a crucial role in bringing about outcomes that demonstrate the continued resilience of democracies to autocratisation. Within this context, it is important to note, scholarship on democratic resilience is only at its beginning. However, we do have case studies other than Romania that also merit scholarly scrutiny from the perspective of democratic resilience, such as recent rulings by Latvia's Constitutional Court on the constitutionality of the Istanbul Convention in 2021, and by Slovenia's Constitutional Court on same-sex marriage in 2022. Indeed, it is imperative that we conceptualise and substantiate empirically when and how civil society and other actors are able to counteract the current wave of autocratisation,, whether through fine-grained country case studies or from a broader comparative perspective.

This paper has also demonstrated the importance of a systematic approach to democratic resilience, in particular in terms of analysing the sequence of events leading to a historical outcome, and identifying the causal mechanisms shaping political actors' decisions in this respect. Further research on the causal pathways whereby organised civil society is able to influence and eventually counteract autocratisation in different contexts is thus imperative in order to investigate and theorise the factors underpinning democratic resilience. Finally,, it is also important to develop a broader comparative research agenda comparing democratic resilience in new and established democracies across the world.

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Notes

ⁱ Unless otherwise stated, all translations from Romanian are mine.

ⁱⁱ The ruling was due on 30 September 2020, but the Court deferred it to mid-December, most likely in order to avoid interfering with the campaign for the parliamentary elections held on 6 December.