

Are We There Yet? Romania's Semi-Peripheral Rule of Law

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Abstract: Post-communist Romania has achieved several key milestones, most notably becoming a stable democracy and a European Union member. It ranks above the global average on democracy and the rule of law, with stable, if mediocre scores. This chapter contends that Romania's rule of law can be analyzed as a type of semi-peripheral rule of law, with sufficiently established formal norms and institutions, but uneven development of deliberative rule of law practices and culture. The chapter introduces the concept of semi-peripheral rule of law in order to ground the analysis of Romania's evolution, followed by a brief examination of positive post-communist developments. Ultimately, the rule of law in Romania remains embedded in a transitional and modernization logic, with formal rule of law reforms thwarted by the persistence of corruption and the politicization of law, and only partially matched by commitment to rule of law values and practices.

More than three decades after the collapse of the communist regime, Romania has achieved key milestones, most notably becoming a stable democracy and a European Union (EU) member. It is no longer subject to any special surveillance measures (EU's Cooperation and Verification Mechanism, CVM, was lifted in 2022), and ranks above the global average on democracy and the rule of law, with stable, if mediocre scores. Despite the erosion of democratic gains worldwide and the return to 1986 levels of democracy, Romania stands out for its steady, albeit gradual and occasionally regressive progress as an electoral democracy (V-Dem 2023). In 2022, the World Justice Project's Rule of Law Index grouped it with the EU and North America,

and ranked it 27 out of 31, and 38 overall (out of 140 countries) (World Justice Project 2022).

While Romania has not taken an illiberal turn like Hungary or Poland, it has also not become a fully consolidated, substantive democracy with entrenched separation of powers and various checks and balances, individual rights, the rule of law (which makes possible individual rights), and independent legislature and judiciary (Carothers 2006). This chapter contends that Romania's rule of law can be analyzed as a type of semi-peripheral rule of law, with sufficiently established norms and institutions but uneven development of deliberative rule of law practices and culture (Blokker 2021). Its struggle has been more political and human than technical or financial, as the rule of law has not easily taken root in a system rife with corruption and cynicism (Carothers 2006, 4).

In 1989, Romania had a notoriously dictatorial government that resisted political, social, and economic reforms, stifled fundamental rights and liberties, lacked rule of law mechanisms, and had a subservient justice system. A decade later, the country was still struggling "at the bottom of the European heap" (Judt 2001). Like its post-communist neighbors, Romania's transition targeted democratization, neoliberal market reforms and the rule of law, assumed a single, linear trajectory, and mostly ignored or treated as an obstacle its communist past (Blokker 2005). Romania's first EU application in 1995 was rejected, and the country remains one of just four EU members excluded from the Schengen Agreement, which enables free movement across state borders.

The chapter first introduces the concept of semi-peripheral rule of law in order to ground the analysis of Romania's evolution, and then offers a brief examination of positive (formal) post-communist developments. Formal rule of law reforms have been thwarted, I argue, by the persistence of corruption and the politicization of law, and have been only partially matched by

commitment to rule of law values and practices.

Semi-peripheral rule of law

Definitions of the rule of law run the gamut from thin, formal, or procedural understandings—the rule of law as an instrument of government, sometimes more rule by law than of law—to thick or substantive understandings that include rights and democracy (Tamanaha 2004; Raz 1979; Fuller 1969; Carothers 2006; Bedner 2010; Moller and Skaaning 2012). At a minimum, the rule of law encompasses basic attributes of laws—publicity, generality, clarity, certainty, stability, transparency, accountability, predictability. As the rule of law “thickens,” other attributes come to the fore, such as equality before the law, fairness, competent and efficient institutions, primarily the judiciary, judicial impartiality and independence, protection of individual rights, and potentially democracy itself (again, whether thin-electoral or more substantive) (Buyse, Fortin, McGonigle Leyh and Fraser 2021; Waldron 2020). The World Justice Project, which measures the rule of law globally, defines it as a “durable system of laws, institutions, norms and community commitment that delivers accountability, just law, open government, and accessible and impartial justice” (World Justice Project, n.d.). The rule of law is meant to serve as a check on state power, and increasingly on private power as well (Kleinfeld 2006; Bedner 2010, 50-1). These goals distinguish it from thin understandings of the rule of law as rule by law, even while the rule of law becomes more diluted as it expands into a global neoliberal export.

Romania’s rule of law chronology since 1989 can be roughly divided into four distinct periods: the early 1990s, characterized by continuing internal turmoil, authoritarian hiccups (including inter-ethnic violence and riots in spring and summer 1990), as well as international

and U.S.-led involvement; the EU accession period, ranging roughly between 1995 and 2007, when the country was heavily monitored and pressured to fulfill various criteria related to rule of law; the early post-accession period, with formal, but weak, EU monitoring, focus on justice system reforms and anti-corruption mechanisms, as well as the corresponding rise of EU institutions, norms, and culture (Șerban 2015); and the current consolidation period, so far characterized by steady progress, deepening rule of law, even if unequally, and the country's revamped international role gained after Russia's invasion of Ukraine in 2022.

Romania's rule of law trajectory is normatively, historically, and socio-politically contingent, part of a much longer narrative of multiple modernizations faced by the country. It is a type of semi-peripheral rule of law (Santos 1985/1990; Guibentif 2014), characterized by center-periphery dynamics, the disconnect between the legal, normative, and institutional levels of state activity versus practices and implementation (the gap between law-in-the-books and law-in-action), and selectivity. Semi-peripherality refers to both unequal center-periphery power relationships and to how these relationships are themselves shaped by the country's history and context, "a hybrid of socialist legacies, neoliberal capitalism and informal and patrimonial practices" (Muller 2020, 739). Semi-peripherality encompasses bottom-up processes, as well, and it has recursive effects, with the center reacting and adjusting in response.

Equally important, semi-peripheral rule of law is characterized by selectivity, as not all aspects of the rule of law assemblage are valued or adopted. In Romania's case, rule of law reforms originated both endogenously and exogenously after 1989, and they were not necessarily or consistently top-down. Initially, the focus was primarily on formal norms and institutions, resulting in a thin or formal rule of law. This approach was driven by a neoliberal, law and development agenda that viewed law as a technocratic tool and prioritized property rights and

good governance over human rights (Garth 2003; Şerban 2018). External reformers and donors promoted the rule of law as an apolitical, “universal good” and followed an institutional approach that concentrated on judiciaries, reinforcing selectivity, and not always serving domestic agendas (Carothers 2010, 21; Bedner 2010, 53). Top-down approaches were also superficial and divorced from realities on the ground, as Iancu (2020) vividly remarked about the Copenhagen criteria—“an application of fresh paint, in a hurry, over half-corroded fences”. They have also not been consistently applied or promoted, as shown by the CVM mechanism in Romania and debates about rule of law conditionalities in Poland or Hungary (Blokker 2021, 7).

Internally, the post-communist transition was oriented towards both the past and the future, aiming to restore ideals of the pre-communist period, elide communism, and build a future within the European family (Elster 1991; Sajó 1994). These were not automatically compatible goals. Nationalism especially, a strong component of both pre-communism and communism, seamlessly transitioned to post-communism, as did an instrumental and legal positivist concept of law. This, in turn, induced a timid approach to legal and constitutional reforms, relatively little experimentation, and favored the continued predominance of formalism and legalism, which downplayed discussions of how fundamental norms and concepts, from the constitution to the rule of law, ought to be “vehicles of continuing dialogue over foundational values and rights, and the overall nature of the political community” (Blokker 2014, 4).

Semi-peripherality as epistemic space signals that countries like Romania are subjects of layered imperialism, eternally transitioning to an “elusive modernity,” itself contested, stuck in permanent liminality (Muller 2020, 736; Blokker 2005). As “the other” of Western Europe, Romania and its post-communist neighbors have been objects of the civilizational mission of both the United States and Europe (Muller 2020), evidenced by mechanisms such as the CVM or

various conditionalities imposed by international financial institutions (IFIs). Measurement efforts like rule of law indicators reinforce peripherality and the synergy between the rule of law and rule of law-adjacent phenomena, primarily corruption (Versteeg and Ginsburg 2017), and inherently create gaps—if there is a universal model of the rule of law, created and exported from the center (the United States and Western Europe), it is almost inevitable that post-communist countries like Romania will struggle to reach that model (Șerban 2015). Exogenous forces can undermine national sovereignty, moving countries like Romania towards models of “divided sovereignty,” which impact the degree to which externally driven reforms are well received (Pribean 2010). Yet this system of supra-national checks and balances can also strengthen the rule of law internally, both in terms of outcomes, as was the case after justice laws reforms were implemented in Romania in 2017-2019, and as process, as a type of rule of law practice.

The effects of the semi-peripheral condition on the rule of law are then not surprising. Martin Krygier noted long ago that post-communist countries were institutionally optimistic, but culturally pessimist toward the rule of law, looking at both human rights and the rule of law as unattainable, Western inventions (1996, 26). The rule of law has therefore not yet been fully “owned” domestically, and despite significant progress in terms of the adoption of various institutions, norms, and processes, it is still narrowly understood, and has not yet been internalized throughout society.

Formal rule of law

By 1989, Romania’s legal system and judiciary, while broadly authoritarian, remained rooted in the civil law tradition. The collapse of the communist regime brought a retrenchment into the

mainstream of the civil law tradition and Romania's pre-communist structures and practices. There was alignment between Romania's post-communist aspirations and external actors, but actual constitutional and policy-making was constrained by the latter, including the United States, the EU, IFIs, foreign investors, and private funders. These forces eventually converged on EU accession requirements.

The successes of the early transition were represented by the adoption of a set of formal institutions, massive legal reform (the majority of statutes were eventually completely revamped, including all four main codes—civil code, code of civil procedure, criminal code, and code of criminal procedure), and baseline functioning processes. However, there were also hasty, overly detailed, and often conflicting changes, poor implementation of legal and institutional reforms, and constant tension between internally and externally driven processes (Mendelski 2018).

The post-1989 Romanian Constitution (adopted in 1991, amended in 2003) incorporates basic constitutional principles, such as separation of powers (explicitly since 2003), centralized judicial review (the Constitutional Court), and human rights, using foreign and domestic constitutional models to create a bicameral, semi-presidential system (Muraru and Tănăsescu 2016). A key concern was to prevent the possibility of the centralization of power (Perju 2015), yet questionable constitutional mechanisms that counter this goal and undermine the rule of law persist, such as the overuse of statutory orders and especially of emergency statutory orders.

Anchoring institutions were also set up quickly in the first decade of post-communism, from the Constitutional Court to the Ombudsman (Șerban 2018), and Romania's Supreme Court was fundamentally reorganized in 1993 and again in 2003. Both the 1991 Constitution and the new law on the judiciary proclaimed the independence of judges and the supremacy of law. The judiciary itself has been on an unmistakable upward trend, despite recent dips in their numbers.

The number of judges tripled (from 1,513 in 1990 to 4,600 in 2020), the number of prosecutors grew from 2,100 in 2004 to 2,466 in 2020, and, much more dramatically, the number of lawyers increased ten-fold, from a tightly state-controlled total of 2,600 lawyers in 1990 to 23,424 in 2020 (Șerban 2018, 181; CEPEJ 2022). Despite this growth, one should mention that a fifth of court users do not use a lawyer, and judges and prosecutors often help explain legal issues (World Bank 2013). Women account for 75 percent of the judges, the highest proportion in the EU at top levels. Prosecutors and lawyers are more evenly split by gender, although women still predominate within their ranks (CEPEJ 2022). Overall, judges and prosecutors are recruited, trained, and supervised in line with EU norms.

Romania ranks average on most indicators of justice system efficiency, including case resolution time and clearance rates (European Commission 2023b). It performs slightly under the EU median on alternative dispute resolution mechanisms and has a mixed record on various policies of access to justice, such as legal aid (European Commission 2023b; World Bank 2013, 14; Ministerul Justiției 2022). It has made significant progress during the 2010s in providing information to the general public, and in adding indicator tools that measure justice efficiency and performance (for example, case management system) (CEPEJ 2022). At the formal, institutional level, in other words, Romania is comfortably in the middle of the EU pack, although it has not fully addressed some chronic issues such as poor management and inadequate planning, which lead to both too much litigation and insufficient access to justice (World Bank 2013).

Corruption was a persistent issue throughout the EU accession process and it continues to underpin Romania's semi-peripherality in the EU. The rule of law itself has increasingly become associated with anti-corruption and judicial reform. Externally, the EU accession and funding

fueled this process, while internally, endemic corruption exasperated the population and increased pressures for reforms. This evolution was not necessarily predetermined. During the early 1990s Romania saw a lot of experimentation from a rule of law and human rights perspective, with groups like the Central and East European Law Initiative (CEELI) and the Soros Foundation working on issues as diverse as constitutional reform, women's rights, and legal advocacy. Yet once the accession process started and the EU singled out corruption and judicial reform as areas of insufficient progress, earlier broader efforts to promote the rule of law and human rights tapered down to these two topics at the exclusion of all others (Șerban 2015, 205-206).

Post-EU accession, both Romania and Bulgaria were monitored under the CVM with half-yearly reports, the only two countries in the EU subject to this level of scrutiny. For Romania, the CVM addressed four benchmarks in the areas of judicial reform and the fight against corruption, and explicitly grounded the monitoring on the rule of law as a founding principle of the EU. The CVM narrowed the rule of law discourse to these two areas despite the findings of the 2006 final accession report for Romania, which also identified other weaknesses, including discrimination against the Roma. Moreover, the CVM focused on a limited number of institutional and formal mechanisms. These included comprehensive national anti-corruption strategies, adopted by the government every three years, and the establishment of new agencies dedicated to the fight against corruption. Romania's National Integrity Agency (ANI), which started in 2008, focuses on wealth control, specifically income declaration and incompatibilities. Romania also created a special prosecutorial body, the National Anti-Corruption Directorate (DNA), responsible for investigating medium- and big-level corruption, and the General Anti-Corruption Directorate, which is responsible for fighting corruption within the Ministry of

Administration and Internal Affairs (Şerban 2015, 202-204).

Both the ANI and the DNA have been very active. As of June 2023, more than 11 million income statements were publicly available on the ANI's website. It has carried out nearly 20,000 verifications, issued findings or referrals, and developed an effective electronic system to prevent conflicts of interests in public procurement. The DNA has been the highest profile anti-corruption agency in the country, having investigated over 15,000 individuals since its inception, and working on 6,000 cases per year on average, many against public officials and leading politicians. Hundreds of mayors, two prime-ministers, other government ministers and members of Parliament, as well as over 100 judges and prosecutors are among those charged, and billions of Euros were recovered (according to the DNA annual reports). However, the DNA was also criticized, especially once cooperation agreements with the Romanian Security Service came to light, for misusing its power during investigations (Mendelski 2021; Venice Commission 2018).

The CVM failed to bring together human rights, integrity and anti-corruption efforts, and justice reforms in a coherent package buttressed by the rule of law, forestalling more meaningful rule of law reform (Mendelski 2016; Şerban 2015). Yet during its almost sixteen-year existence, the CVM fulfilled multiple purposes. It was a political technology of control symbolizing the country's inability to reach modernity, reinforcing semi-peripherality, and draining the rule of law discourse of alternative meanings (Şerban 2015, 204-205). It was also a relationship that shaped rule of law practices, even when there was insufficient pressure on Romania, or Romanian governments used it "to please Brussels" or to achieve their own agendas (Alegre, Ivanova, and Denis-Smith 2009, 82; Iancu 2020). The end of the CVM roughly coincided with the establishment of regular monitoring for all countries through the European Rule of Law Mechanism. The 2022 recommendations for Romania pick up where the CVM left off, noting

that continuing challenges are a fragmented legal framework on integrity, the lack of uniform provisions on revolving doors for public servants or lobbying rules for members of Parliament, and limited transparency on political party financing.

Despite clear progress, the public perception regarding corruption has not changed much over the past decade, and Romania continues to score at the bottom of the EU, according to Transparency International. Other findings are only slightly more optimistic: in 2023 Romania is in the middle of the EU, with 79 percent of Romanians believing that corruption is widespread, barely down from 2019 (by 4 percent) and 2013 (by 14 percent), and higher than the overall surprising 70 percent for the EU overall (European Commission 2020a, 2023a). Courts did reasonably well in the survey, better than the police, public administration, and the political system, with 20 percent of respondents thinking that bribery and abuses of power for personal gain are common in the judiciary. This is an improvement over 2013, when public perception tied the functioning of the judiciary with the fight against corruption, after years during which top magistrates were investigated by anti-corruption agencies (Șerban 2015, 210).

The rule of law and politics

Romania's struggles exemplify its semi-peripheral condition, the gap between formal norms and institutions and their implementation, with two main concerns: the politicization of justice, and the unintended consequences of overemphasizing some parts of the rule of law at the expense of others. Political conflict has regularly spilled over into the legal arena to impact constitutional revision attempts, regulatory processes, judicial reform, and judicial independence (as suggested by public attacks against magistrates, including from members of parliament).

Various attempts to revise the constitution have blurred the lines between regular and

constitutional politics, signaling that the constitution itself is part of the political playground and its ordinariness. Some addressed overarching problems, such as corruption (proposals to limit parliamentary immunity, to reverse the presumption of legitimacy of private property, and to eliminate anti-corruption institutions), or structures (bicameralism versus unicameralism, presidential powers, or the role of the Constitutional Court). Others addressed immediate issues, such as the 2008-2009 economic crisis (proposing limits on public debt). Most were struck down by the Constitutional Court.

The 2012 attempt to impeach President Traian Băsescu, which led to a constitutional and political crisis, significantly weakened the rule of law. The Romanian parliamentary majority manipulated the rules to achieve its purpose, such as by replacing the Ombudsperson (the only authority who could challenge *ex ante* Parliament acts), relying on executive ordinances to bypass the Constitutional Court, and introducing last-minute amendments of the Referendum Act to lower the quorum (Perju 2015; Sajó 2021, 316-318). The Constitutional Court issued contradictory rulings, responding initially to internal and then to EU pressures. The main reason the system held, and a good illustration of Romania's semi-peripheral rule of law, was external—the involvement of the EU determined the Constitutional Court to change course and declare the referendum invalid, the Prime Minister to observe the Court's decision, and all to pay some attention to the Venice Commission's opinion detailing rule of law violations (Perju 2015). The 2013 failed process of constitutional amendment was itself a direct outgrowth of the 2012 political crisis (Kanterian 2013).

The consultative referendums organized in 2009 and 2019 also had a political edge. They addressed both structural issues (switching to a unicameral Parliament, limiting the number of legislators to 300, and restricting the use of emergency ordinances) and corruption (bans on

amnesty or pardons for corruption-related offenses, bans on emergency ordinances regulating criminal punishments and the organization of the judiciary, extending standing before the Constitutional Court). Yet the lack of concrete effects of these referenda, despite Constitutional Court rulings affirming that the will of the people should be respected regardless of format (Decision 682/2012), illustrate the politicization of law, the weakness of the rule of law culture among political actors, the fundamental lack of compliance with the law, the lack of agreement over basic values, and ultimately deepened constitutional skepticism in society (Blokker 2013).

The politicization of justice is evident in both structural issues that give undue control to political forces, and political influences in judicial decision-making. The constitutional amendment process highlights both, and emphasizes the activist role of the Constitutional Court in cases related to the separation of powers (it has been less activist in rights protection). Some of the Court's most divisive decisions concerned "political question" issues, which other courts avoid as much as possible. The Romanian Court has narrower powers and standing rules compared to other post-communist constitutional courts—for example, it does not have the power of a posteriori abstract review, or the power to hear constitutional complaints (Șerban 2018, 184-6). Half of its powers pertain to separation of powers issues, such as the power to decide constitutional conflicts among state bodies (Article 146e), an arrangement that places the Court in the middle of political battles. The political and politicized nature of the Court is reflected in various statistics: more than half of its decisions on abstract preventive review, four out of eleven initiatives to revise the constitution, and 44 percent of parliamentary regulations were declared partially or totally unconstitutional over the years (Curtea Constituțională 2023).

The representative rule of law challenge of the 2010s entwined the fights against corruption and for judicial independence. In January 2017, Emergency Ordinance 13 decriminalized certain

corruption offenses, such as abuse of office, and introduced a pardon law. This was widely perceived as a shameless attempt on the part of the government to shield specific public officials from charges and criminal responsibility and was immediately followed by the largest protests in the country since 1989. The protests challenged the ordinance, which was subsequently rescinded. The Constitutional Court issued findings of unconstitutionality, as well, at a fairly rapid pace. Other proposed amendments to the Criminal Code and the Code of Criminal Procedure also attempted to undercut the fight against high-level corruption (by decriminalizing conflicts of interests and by narrowing the definition of corruption), thus contradicting European Court of Human Rights (ECtHR) case law and raising legal and policy concerns (Asociația Forumul Judecătorilor 2020).

Simultaneously, the government worked to revise statutes on the organization of the judiciary, the status of judges and prosecutors, and the organization of the Superior Council of the Magistracy. As Moraru and Bercea (2022) note, the Romanian government followed to some extent the Polish and Hungarian play book: political capture of the highest judicial positions, use of disciplinary sanctions to silence judicial criticism, launch of media campaigns to delegitimize the judiciary, and introduction of quick and opaque justice reforms. Unlike its illiberal neighbors, the Romanian government targeted the fight against corruption (to protect its own members and clients), and faced significant push back from the EU, in large part because of the existence of the CVM.

Both the process and the substance of the revisions were problematic. The process was criticized for its speed (facilitated by using the emergency procedure for an extensive revision of key organic laws), and for the lack of transparency, consultation, and predictability of the legislative process, with little to no opportunity for consultation and public debate giving due

account to the voice of the judiciary (CVM Reports 2017, 2018; Venice Commission 2018). Substantively, the controversy centered on the status of the prosecutors, the appointment of senior prosecutors (transparency, merit and role of the President and the Minister of Justice), the personal (material) responsibility of magistrates for their decisions, the establishment of a special prosecution section for investigating offenses committed by magistrates (SIIJ), the introduction of a new early retirement scheme, restrictions on freedom of expression for magistrates (bans on defamatory speech against the other state powers), extended grounds for revoking members of the Superior Council of the Magistracy, and the relationship between the judiciary and the intelligence services (CVM Reports 2017, 2018; Moraru and Bercea 2022).

Both separately and together, the proposed revisions amounted to systemic pressure on the magistrates, attacks on judicial independence, and attempts to undermine public trust in the judiciary. The revisions strengthened the role of the Minister of Justice and weakened prosecutorial capacity to fight high-level corruption, not coincidentally during a period of intensive investigations against members of the ruling party and attempts to remove the chief anti-corruption prosecutor (Venice Commission 2018; *Kövesi v. Romania* 3594/19). The involvement of the Romanian Intelligence Service (SRI) in high-level corruption cases and the existence of cooperation protocols between SRI and various judicial bodies (including the DNA and the High Court) raised multiple alarm bells in a country still plagued by the legacy of communism and the Securitate (Iancu 2020; Mendelski 2021).

The Superior Council of the Magistracy rejected initial drafts, and most magistrates rallied behind it, signing memoranda, engaging in silent protests, and appealing to domestic and international institutions, including the Venice Commission, whose preliminary opinion the government mostly ignored (Asociația Forumul Judecătorilor 2020). There were multiple rounds

of petitions to the Constitutional Court, on various aspects of the proposed revisions. The constant back-and-forth, rapid changes, lack of clarity, communication, and coordination among state bodies inherently undermine the rule of law. Various associations of magistrates challenged a number of these provisions before the Court of Justice of the EU (CJEU) and won; these challenges concerned the SIIJ, the personal liability of judges, and the organization of the disciplinary body for magistrates (*Asociația 'Forumul Judecătorilor din România' and Others* 2021). Ultimately, however, the government proceeded as it had intended all along, and was quick to implement measures restricting judicial independence, often through emergency ordinances (CVM Report 2018; Moraru and Bercea 2022).

The Constitutional Court had an ambiguous role, at best, during the 2017-2019 justice reforms crisis. It upheld some of the most controversial amendments and turned away from its prior EU-friendly case law, prompting European criticism and a conflict with the CJEU (Venice Commission 2018, 11-13; CVM Report 2018). If in the early 2010s the Court recognized the CVM and its benchmarks as legally binding and as a standard for constitutionality reviews (Decisions 1519/2011, 2/2012), in 2018, with its new composition, it decided that the CVM was nothing more than a simple recommendation (Decisions 33/2018 and 104/2018). The CJEU affirmed the binding nature of the CVM and the benchmarks (*Asociația 'Forumul Judecătorilor din România' and Others* 2021; Moraru and Bercea 2022). The Constitutional Court followed up with a defiant decision fundamentally questioning the primacy of EU law and falling back on an undefined concept of “national constitutional identity” (Decision 390/2021). The Court’s decision highlighted the center-periphery (universalism-nationalism) tension within a semi-peripheral rule of law system, as it pitted not just national law against EU law, but also ordinary courts in Romania and supra-national courts at the EU level, versus the Constitutional Court in

the middle.

The lack of implementation of court decisions, both internally and those of supranational bodies, particularly the non-enforcement of ECtHR decisions against the state, further undermine the rule of law (CVM Report 2018). In 2018, for example, the Constitutional Court called on the legislature to establish a legal framework for the legal recognition and protection of same-sex families (Decision 534/2018). The failure of the legislature to comply resulted in a loss before the ECtHR (*Buhuceanu and Others v Romania* 2023). The effective functioning of various bodies, such as the Superior Council of the Magistracy, has been a running theme, as the Council has historically been plagued by internal divisions, has been an inconsistent defender of judicial independence, and its opinions have sometimes been ignored (CVM Report 2018; Moraru and Bercea 2022).

Public trust in the judiciary crumbled after the 2017-2019 crisis, with the percentage of Romanians holding a positive view of judicial independence dropping from 51 percent in 2016 to a low of 37 percent in 2020, and then rebounding to 51 percent in 2022. However, even at its highest point, this level of trust remained below the EU average of 53 percent in 2022 (European Commission 2020b, 2023c).

Rule of law culture

Romania's evolution offers grounds for cautious optimism, while validating some of the early skepticism about building the rule of law in post-communism. The rule of law "skeleton" is in place, and there is broad agreement within the country that it has a minimum, core rule of law, particularly when contrasted with its totalitarian past (Șerban 2015). The overemphasis on corruption and judicial reform is not inherently problematic, but it leads to conceptual overlap

between the rule of law, anti-corruption, and judicial reform, biased towards institutional issues; narrowed focus compared to other dimensions of the rule of law, like rights and quality of governance, while prioritizing formalism over substance; and the disregard for efforts to construct a deliberative, democratic rule of law culture (Șerban 2015; Blokker 2021). These are gaps at the level of meaning-making, cracks in the rule of law culture.

A rule of law culture is fundamental to the effective protection of rights, legal stability, and general restraint of government. It encompasses values, meanings, practices, as well as rule of law consciousness (Mezey 2001; Rosen 2008). It exists when not just legal practitioners, but also political elites, public servants, and the public at large believe in rule of law values, such as non-arbitrariness, and instantiate them in their everyday lives, when rule of law values shape everyday expectations and behavior and we talk about a “living rule of law” (Taylor 2023, 10; Krygier 2019; Hertogh 2016).

Romania has not been “held back” by its inherent Easternness, backwardness, or communist cultural legacy (what Sztompka (1993) called ‘civilizational incompetence’), nor is it constantly running to “catch up” with the rest of Europe (the convergence argument). Historical and institutional patterns matter (arguably going back to the early 20th century modernization versus nationalism debates), as do the choices made since, but equally important are the cultural effects of the semi-peripheral condition, specifically the relatively narrow field of choices and the constrained nature of decision-making within that field (Lukes 2005). There is no doubt that Romania’s place is within the EU, yet in the immediate transitional period, the country did not really have the luxury of engaging in significant democratic debates and self-reflection about its post-communist identity and trajectory, in a context where perhaps the very model adopted—constitutional democratic—was itself in turmoil (Blokker 2014).

On the bright side, Romania has not had a charismatic leader to steer it down a potentially illiberal path (Sajó 2021, 270). On the alarming side, populism and nationalism have been a continuous background noise, with the recent success of the extremist Alliance for the Union of Romanians (AUR) being deeply concerning (Soare and Tufiş 2019; Dragoman and Ungureanu 2017). This is reflected in Romania's overarching ethnic or constitutional nationalism that privileges the ethnos over the demos and hovers between nationalism and universalism (Lungu 2002; Şuteu 2017). Romania is a nation state, with minority rights conditionally guaranteed and key constitutional clauses pertaining to its nation state character exempt from revision (Articles 1, 4, 8, 6, 13, 152). Debates during the constitution-making process highlighted the symbolic role of the constitution in terms of nationalist meaning making and self-determination (Blokker 2013), and contributed to identity becoming an important element of the country's constitutional and legal culture. Nonetheless, attempts to revise the constitution by bolstering nationalism fell short. They included recognizing the historic role of the monarchy and of the Romanian Orthodox Church in the construction of the nation (Constitutional Court Decision 80/2014), and the 2015 same-sex marriage ban, which was supported by almost all main political parties, but ultimately failed because the referendum did not meet the required quorum.

When the Constitutional Court makes an argument based on "national constitutional identity" or when various populist politicians chafe against the CVM, the unease is at least partially about Romania's modernity and identity, center-periphery power relations, and the meaning of contemporary divided sovereignty (Blokker 2005; Priban 2010). Rule of law values are then enmeshed in this broader meaning-making exercise, where institutions, norms, and formal processes are necessary but not sufficient, and institutional blockages are a symptom not a cause of rule of law failures. At this point, Romania does not lack an institutional infrastructure, and

has already adopted a myriad action and strategic plans (over 20 national strategies). Where it falters is its commitment to implementation, in part because these tools are not the result of “a deep interrelatedness of democratic participation and the rule of law” (Blokker 2021, 7), but rather a signal of the lack of social embeddedness of the rule of law.

The 2017-2019 justice reforms illustrate the lack of broad-based consultation with the judiciary and society at large, the willingness to ignore the opinions of the judiciary and to selectively apply or disregard European-level standards and decisions, the high number and rapid pace of proposed revisions, and the poor quality and incoherence of the legislation (CVM Reports 2017, 2018; Asociația Forumul Judecătorilor 2020). The justice laws crisis was simultaneously a high and a low rule of law point in Romania’s recent history: a low point because the revised statutes had a negative impact on judicial independence, efficiency, and quality of justice, resulted in a massive drop in public trust towards the judiciary, brought down sustained attention from various European bodies, and regressed Romania’s progress towards ending the CVM.

It was also a high point because it was a constitutive moment in the creation of a rule of law culture. The country saw the largest demonstrations since 1989 and public mobilization from below, with the public and the magistracy articulating their values and actively fighting for the rule of law. On 2 October 2017, thousands of magistrates signed a petition asking for the bill to be withdrawn, and tens of thousands of people protested (Asociația Forumul Judecătorilor 2020). The pressures on the political system to ensure judicial independence came from above but also from below, from the civil society. Internal and external backlash and implementation problems had an effect. The government reversed course and again amended the three justice laws in 2022, this time vowing to respect European recommendations and correct some of the issues, including

by dismantling the SIIJ (Law 49/2022) (European Commission 2022).

Nevertheless, failures of communication and cooperation are broadly dispersed within the state apparatus, and between state agencies and the civil society, with the state often undermining or attacking civil society, as demonstrated by the accusations of corruption raised by the Minister of Justice in 2005 against Freedom House (Șerban 2015). These, in turn, take place in a context marked by an obvious lack of interpersonal trust and trust in political institutions (Blokker 2021, 17).

When rule of law values are socially embedded, we see “rule of law from below” (Buyse, Fortin, McGonigle Leyh and Fraser 2021), as was the case with the massive street protests against governmental efforts to water down the fight against high-level corruption cases that took place in January 2017. Rule of law from below can encompass a wide range of actions, from formal (such as by using institutions, or the legal mobilization of the magistrates who sued before the CJEU) to informal (such as by creating or organizing civil society groups to fight corruption, protect judicial independence, or monitor the government). Pressures from above (the EU) and from below (civil society and collective action) illustrate both semi-periphery dynamics, and the construction of rule of law from below (Tsampi 2021). The government itself can and should be a primary agent here, for example when it translated into Romanian and circulated to all courts the Council of Europe recommendations in the field of justice.

Citizens do engage, and when courts respond, they contribute to fostering a rule of law culture. In 2022, for example, there were 1,720 petitions and letters addressed to the Constitutional Court on matters as diverse as complaining about public officials to criticizing Court decisions. As the Court engages with the letter writers and explains its operation and processes, it both gains legitimacy and embeds the rule of law societally. The failed 2013 attempt

to amend the constitution included public deliberations through the Constitutional Forum, a bridge between civil society and lawmakers, which organized over 40 debates and received more than 350 proposals (Muşat 2013). Civil society groups like Asociația Pro Democrația were deeply involved, as well. The Alliance for a Clean Romania combats failed governance and institutionalized corruption, as do individuals like the journalist Emilia Șercan or Judge Cristi Danileț. Surveys pick up on this semi-embeddedness of the rule of law: 47 percent of Romanians felt well informed about the rule of law in their country (a rate below the 54 percent EU average), and half of Romanians thought that core EU values (fundamental rights, democracy, and the rule of law) are protected in Romania (less than the 65 percent for the EU overall) (European Union 2021).

A final troubling rule of law gap lies in the marginalization of rights and the relationship between the individual and the state. The state administration is perceived as distant and depersonalized, their actions unpredictable, while public expectations have steadily increased and people want to be treated with dignity and respect. Fewer organizations work on broader rule of law, human rights, and advocacy issues. Human rights are not on the public agenda, and attention is paid only when there is a major decision formulated by the ECtHR, or a particularly egregious domestic decision, such as the recent High Court of Justice decision exonerating former Securitate officers for the torture and murder of dissident Gheorghe Ursu (Decision 238 from July 27, 2023). Issues like racial discrimination, prison reform, or LGBTQ rights remain marginalized, and the human rights discourse is seen as a soft discourse that is hiding other agendas (Șerban 2015, 206-207).

Romania has consistently been in the top five most active countries before the ECtHR and is only behind Turkey, Russia, Italy, and Ukraine in terms of the total number of judgments issued

by the Court. Top areas of litigation before the ECtHR are broadly indicative of domestic rule of law gaps: protection of property, right to a fair trial within a reasonable time, inhuman or degrading treatment, length of proceedings, right to liberty and security, private and family life (ECtHR 2023). The Court deployed its pilot judgment procedure (plus follow-up rulings), indicative of systemic issues at the national level, on conditions of detention (*Rezmives and Others v Romania* 2017), structural dysfunctions in the prison system, including overcrowding, and restitution of nationalized property (*Maria Atanasiu and Others v Romania* 2010).

Conclusion

In the fall of 2022, Austria vetoed Romania's admission to the Schengen Area, concerned about its weak border controls. In 2011, the Netherlands had vetoed Romania's accession, accusing it of lacking the rule of law. These rejections are both about the rule of law and about Romania's conditional acceptance to Europe. In 2023, Andrew Tate, the self-proclaimed "king of toxic masculinity," was arrested and indicted in Romania on charges of human trafficking, rape, and forming a criminal organization. Tate chose Romania in 2016 because it is a country "where corruption is accessible to everybody" (Higgins 2023). His arrest and indictment have been hailed as a sign of significant progress in the fight against corruption. More skeptical observers point out that had one of the victims not been American, Romanian authorities would not have intervened (Higgins 2023). Tate's arrest is perhaps less an illustration of Romania's progress, and more of its semi-peripheral rule of law—without external pressure, domestic norms, institutions, and processes are selectively activated, or not at all.

Thirty-five years after the fall of the communist regime in Romania, the rule of law is on the thin side, formalist, legalist, focused on norms and institutions. It is still embedded in a

transitional and modernization logic that aims primarily to constrain some aspects of state power and to ensure a market-friendly environment, subject to explicit or implicit external supervision, and insufficiently assumed. The law is either not applied, or selectively applied. Romania's struggle to create and sustain a rule of law culture has been channeled in the direction of anti-corruption, itself the result of converging pressures—from above (the EU), and from below (popular dissatisfaction and push back). As a case study of the semi-periphery, Romania illustrates the gap between the law-in-the-books and the law-in-action, relatively high non-compliance with the law, the role of international influences in the production of law, uneven pressures from below (weak domestic social forces), gaps within the state, and weak civic engagement with official law (Santos 1985/1990; Guibentif 2014, 544-545). Paradoxically, the existence of formal accountability mechanisms—the CVM—had unintended negative consequences, such as cynicism and a “thin” understanding of the rule of law, both consolidating and undermining the rule of law (Mendelski 2016, 348).

Post-communist rule of law has become just that—post-communist, hiding historical continuities, how the rule of law was occasionally a constitutive force in Romania's modernization processes of the past, and thus the potential to embed it better in the present. The rule of law remains both too narrow and a touchstone of modernization, as yet unfulfilled. The impact of the COVID pandemic, while significant in terms of loss of human resources, slowdowns in the justice system, and questionable government response, still pales by comparison to deeper structural problems and long-standing battles. Frequent legislative changes, the regular use of emergency ordinances, and the limited and non-transparent policy-making processes are perhaps the biggest obstacles to the rule of law, together with the limited attention paid to fundamental human rights. There is hope for the future, however, as shown by

the justice reforms battle between the rule of law and politics, where the former scored a small, but meaningful win towards building a rule of law culture.

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