



Institutional resilience as an enabler for the rule of law

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1. Introduction

Numerous democracies around the world are witnessing continuous illiberal attacks on their very foundations, resulting in what has been dubbed democratic backsliding by scholars of democracy. At their core, these attacks by illiberal politicians and populists are directed against the backbone of liberal democracies: the rule of law.

Illiberal strategies can aim to dismantle democratic institutions and bend democratic norms in all their dimensions. This RESILIO snapshot will take a closer look at institutional resilience, i.e., how public administrations can be safeguarded against populist takeovers. The RESILIO model identifies two aspects of institutional resilience, which will be analysed in the remainder of this text: 1) the functioning of public administrations and 2) the quality of governance (public service ethos). Institutions play a key role in the rule-based functioning of pluralist democracies to which both aspects are equally crucial. Robust administrations are more difficult to subdue by undemocratic governments and are less easily

exploited to enact illiberal policies. In conjunction with the judiciary and the constitutional order, the RESILIO model describes public administration as a systemic resilience factor that lies at the core of the rule of law and entails the rules and norms implemented to safeguard the proper functioning of the legal and political order.

2. Administrations and the rule of law

State bureaucracy plays a vital role in ensuring the rule of law. While the judiciary and constitutional boundaries hold elected populists in check and prevent them from enacting anti-democratic policies, it is the executive's administration and its civil servants that can either serve as a tool of populist office holders or remain robust and withstand the pressure to enact illiberal policies that are intended to shrink pluralist spaces or tilt the democratic playing field in the incumbent government's favour. Unlike in autocracies where administrations are primarily a tool of upholding the rulers' power, public administrations in pluralistic democracies are primarily seen as a neutral, uncontested sector intended to deliver public services and enact policies adopted by legislatures, while

political contestation and pluralist deliberation remains a prerogative of the political sphere.¹ According to this conceptualisation of pluralist democracy, the “ideal” civil servant is primarily loyal to the constitutional and legal order that constitutes the rules and borders of said political sphere and only secondly to the elected government. However, even in lively democracies, this will always remain an area of tension. Nevertheless, the relative independence of public servants is particularly relevant for the resilience of the rule of law, since democratic backsliding often occurs in the form of executive aggrandisement, with the effective control of the bureaucracy playing a key role.

In modern democracies, public administrations have become more than mere executors of the legislature’s and government’s policy initiatives. In ever more complex, functionally separated and pluralistic societies, public administrations are increasingly more pluralistic themselves. According to recent public management research, modern governance systems are characterised by public consultations, participative government, public-private partnerships as well as policy co-creation with civil society organisations and lobby associations.² In many countries, these developments have shifted attention away from legislatures to ministries and public agencies as an increasingly important arena of policy creation. Such permeable administrations fulfil important informational gatekeeper functions, while policies are increasingly drafted and implemented in a technocratic and depoliticised fashion. This has not only attracted criticism from scholars of democracy, but also fuelled support for populist movements that claim that changes in government among established parties do not lead to substantial changes in policies.³

Against this background, modern pluralistic administrations collide with populists’ ideology in several ways: 1) Since populists believe in the superiority of a unified, single will of the people, which they claim to

represent, populist governments will not be able to accept a bureaucracy (or any other state institution) being loyal to someone or something other than them. 2) Pluralistic administrations that aim to take into account the diversity of modern societies are in an unresolvable conflict with the ontology of a populist worldview, which is illiberal and anti-pluralistic in essence. 3) Populists seek to politicise the depoliticised spheres of government. For many populists, technocratic decision-making represents a form of “undemocratic” and “corrupted” politics. While there are instances of populists aiming to depoliticise politicised administrations and create a merit-based, business-like bureaucracy, most national variations of today’s populism take aim at technocratic governance systems, like the European Union. Therefore, it comes as no surprise that in numerous cases, illiberal governments attempt to and often succeed in capturing the bureaucracy in their efforts to aggrandise executive power in their hands.

2.1 Administrations under pressure: populist takeovers

Among the literature on the rule of law crises’ impact on democracies, this dimension has been one of the least studied so far. Therefore, to discuss how public administrations can be made more resilient vis-à-vis illiberal takeovers and contribute to the rule of law, it is useful to first review some strategies recurrently used by populists to overcome institutional constraints thought to prevent incumbents exerting full control over the public service.

Bauer and Becker propose a framework,⁴ according to which populists choose between four different goals vis-à-vis public administrations, depending on the robustness/fragility of the administration they aim to take over and their own attitude to state bureaucracies. Populists with a positive attitude towards the state will attempt to capture a fragile administration (like Prime Minister Viktor Orbán in Hungary), or to dismantle it if they hold negative views on state capacities (like former President Alberto Fujimori in Peru). If populists face a robust administrative order,

¹ See: E. Fraenkel (1964). *Deutschland und die westlichen Demokratien*, Kohlhammer; M. Weber (1925). *Wirtschaft und Gesellschaft*, Mohr Siebeck.

² G. Hajnal (2021). Illiberal challenges to mainstream public management research: Hungary as an exemplary case, in *Public Management Review* 23(3), pp. 317-325.

³ M. W. Bauer & S. Becker (2020). *Democratic Backsliding, Populism, and Public Administration*, in: *Perspectives on Public Management and Governance* 3(1), pp. 19-31; Ch. Bickerton & C. Invernizzi Accetti (2017). *Populism and technocracy: opposites or complements?*, in: *Critical Review of International Social and Political Philosophy* 20(2), pp. 186-206.

⁴ M. W. Bauer & S. Becker, op. cit.

they will either try to reform it (like former Justice Minister Christoph Blocher in Switzerland) or sabotage it (like former President Donald Trump in the United States). While Becker and Bauer provide detailed insights into different instances of populist takeovers, they fall short of outlining what constitutes a robust administration. This will be attempted in the final section of this RESILIO snapshot.

Other authors have described the Hungarian case of capturing the state by a personalised, anti-democratic government in a Weberian sense as the ideal type of illiberal public administration.⁵ According to Hajnal, illiberal public administrations are characterised by centralising resources and steering capacities towards the higher level of agencies and ministries, while shrinking the relative independence of lower-level administrative units. This also includes concentrating competences into the hands of the central government at the expense of regional and local administrations. At the same time, high-level (and incrementally lower-level) jobs are politically appointed and are distributed among partisan loyalists rather than following meritocratic principles and expertise, which results in a highly politicised administration. In such a top-down system, even rather trivial decisions are exclusively taken by the leadership and horizontal coordination between mid to lower-level units is abolished or reduced. Peters and Pierre also add patronage to the characteristics of populist administrations.⁶ Appointments to many positions are not only based on political proximity rather than merit-based criteria but are also often personalised and follow informal and even clientelist patterns based on mutual favours and personal dependencies – a hotbed for kleptocracy.

Accordingly, all the above-mentioned studies unanimously agree that the politicisation, centralisation, and patronage as well as the simultaneous downgrading of expertise and merit that accompany illiberal takeovers

result in substandard or even chaotic policy outcomes.⁷ While the administration has become “instrumental to the will of its political masters,”⁸ the input of internal knowledge (of lower-echelon civil servants) and external knowledge (of civil society organisations, stakeholders or the scientific community) in the decision-making process is minimised. Illiberal administrations become more “activistic” and lose their ability to craft comprehensive, legally sound policies with a minimum of unintended, adverse effects. In turn, erroneous policies occur that could prompt the politicised leadership to centralise competences and capacities even more, further nurturing what Hajnal describes as a “vicious cycle” of illiberal administration.⁹

In those instances where populist incumbents lack the opportunity to fully capture the public service, the principles of politicisation, patronage, and centralisation can also be observed. The Trump presidency, for example, used the traditional prerogative of incoming US presidents to appoint thousands of people to high-ranking positions in the public service to install loyalists and business partners with little expertise in their respective tasks in key positions of the US administration. Sometimes Trump left positions vacant to obstruct the work of administrators or even appointed known adversaries of public agencies as their respective heads, e.g. climate change denier Scott Pruitt as head of the Environmental Protection Agency.¹⁰ Or the less salient example of Austria, where the so-called “turquoise” government of former Chancellor Sebastian Kurz inflated the roles of politically appointed people at the top of federal ministries and impeded horizontal coordination among ministries, while misappropriating public financial resources for partisan activities and using political appointees to stall the work of anti-corruption prosecutors.¹¹

Overall, as part of their attempts at eroding the rule of law, populist and illiberal governments target public

⁵ G. Hajnal, op. cit.

⁶ B. G. Peters & J. Pierre (2019). Populism and Public Administration: Confronting the Administrative State, in: *Administration & Society* 51(10), pp. 1528.

⁷ G. Hajnal, op. cit.; M. W. Bauer & S. Becker, op. cit.; B. G. Peters & J. Pierre, op. cit.; B. A. Rockman (2019). Bureaucracy Between Populism and Technocracy, in: *Administration & Society* 51(10), pp. 1546–1575.

⁸ G. Hajnal, op. cit., pp. 320.

⁹ Ibidem.

¹⁰ T. McCarthy (2017). Trump's cabinet picks: here are all of the appointments so far, in: *The Guardian*, 3 January, 2017.

¹¹ Salzburger Nachrichten (2023). Initiative stellt sich Parteipolitik in Verwaltung entgegen, in: *Salzburger Nachrichten*, 28 February, 2023.

administrations with the intention of capturing or dismantling them where possible. Commonly, they use centralisation, politicisation, and patronage to achieve this goal. However, the exact strategies of illiberal incumbents can vary substantially, depending on their ideological attitudes as well as the country-specific societal and institutional context they are acting in. Since these observations are based only on comparatively few cases, new instances of populist takeovers could possibly take other forms.

It is also important to note that these tools have not been exclusively used by populists and anti-democrats to attack the rule of law but are recurrently employed by democratic governments worldwide, too. Sometimes they aim to increase political steering capacities in specific policy areas, sometimes they try to strike a more efficient balance between centralised and decentralised decision-making. However, the substantial difference lies in the scope and comprehensiveness of such measures, which are a lot more far reaching in the case of illiberal governments.¹²

2.2 Increasing institutional resilience: functioning of public administration & public service ethos

If centralisation, politicisation, and patronage are the main means of illiberal strategies to capture, dismantle, sabotage or reform public administrations, institutional resilience can be achieved by constraining the ability of incumbent governments to pursue these strategies as well as by building what Bauer and Becker call “robust administrations.” The RESILIO model identifies two interlinked dimensions of institutional resilience: the overall functioning of public administrations and the quality of public governance, which can only be discussed in conjunction.

A number of factors may constrain the room for manoeuvre of incoming illiberal governments. First, if the public service recruitment process was not transparent and was based on personal connections or political loyalty in the past, it will be easy for illiberal governments to co-opt this system and fill the ranks with their own

personnel. Conversely, a public service that is selected transparently and based on merit and qualifications is less exposed to political pressure. However, the importance of public service professionalism extends beyond the initial hiring process. The career progression of bureaucrats should be based on merit and seniority rather than on the political or personal considerations of the political leadership. The negative relationship between meritocracy and patronage has been shown by various studies.¹³

To impede patronage and reduce the potential for corruption, it is also common to rotate employees across units and positions, because it prevents long-term work relationships from developing into clientelist networks. This practice is especially relevant for the so-called high-risk sectors, such as public procurement or defence, where officials have a lot of discretionary power over comparatively high volumes of public resources. Besides being an effective anti-corruption measure for all types of governments, it also helps to avoid patronage that can be co-opted by incoming illiberal governments.

Another factor that can increase the independence and impartiality of public servants concerns the stability of their employment. In many countries, public servants are protected by laws or regulations that make it difficult for them to be dismissed without justification. This is thought to reduce the risk of retribution for resisting political pressure and carrying out their duties impartially. Furthermore, public servants are usually employed on permanent contracts, reducing the turnover of personnel in the public sector and further impeding governments from replacing technocrats with loyalists over time.

Apart from employment rules and labour regulations, administrations and governments can also introduce or expand public service standards that contribute to institutional resilience. For example, in most countries public agencies issue professional codes of conduct that regulate the behaviour of public servants in order to ensure impartiality and independence, avoid conflict of interests, and prevent corruption or partisan activism. These codes of conduct are intended to go well beyond criminal law and often have a rather preventive character.

¹² Rockmann, op. cit.

¹³ N. Charron, C. Dahlström, M. Fazekas, V. Lapuente (2017), Careers, Connections, and Corruption Risks: Investigating the Impact of Bureaucratic Meritocracy on Public Procurement Processes, in: *The Journal of Politics* 79(1), pp. 89-104.

While it is important that codes of conduct are enforced to be effective, foreseen sanctions must be proportionate, issued in a transparent manner, and be based on rules laid down clearly in such codes. Otherwise, they can be exploited by populist governments as disciplinary instruments against dissenting public servants.

Other organisational features that could be useful to hold maladministration at bay are independent ombudspersons and protected whistleblowing channels for lower-echelon public servants. These institutions can help public servants file anonymous complaints and report otherwise obscured legal breaches while minimising potential repercussions for public servants or citizens. The case of Poland has showcased how important such institutions can be: Adam Bodnar, the Polish Ombudsman for Citizen Rights, repeatedly pointed out administrative misbehaviour and was able to maintain his independence when other institutions, like the judicial system or public administration, were already captured by the governing national-conservative coalition.¹⁴

Strengthening external accountability mechanisms can be an additional means to ensure the impartiality of public servants. In recent decades, government transparency has become a well-tested tool to help citizens and journalists to monitor the activities of public administrations and hold them accountable, if necessary. This can, for example, include the proactive publication of relevant information as well as freedom of information acts. Well-practiced transparency in government has the additional effect of consolidating a culture of openness and responsiveness among public services, which would be more difficult to compromise by illiberal governments than an administration that is accustomed to operating behind closed doors.

In sum, many of these measures also help to create an esprit de corps based on meritocracy and impartiality that apart from strengthening the functional independence of administrations vis-à-vis the political leadership provides

a strong public service ethos that is more difficult to undo by illiberal governments. Should all the above-mentioned safeguards fail, allowing illiberal governments to successfully centralise administrative decision-making and install loyalists in key positions, it is the robust esprit de corps that can serve as the last line of defence. Strong ethics can result in what O’Leary has termed “guerrilla government.”¹⁵ Dissenting individuals or networks in the public service can start to obstruct and disobey the administrative leadership in various ways. Be it by stalling internal processes, failing to implement decisions they consider “not right” or leaking information to independent media outlets. A strong ethos among public servants will increase the probability of guerrilla activities as O’Leary has repeatedly pointed out in her case studies.¹⁶ A good example of guerrilla government was displayed during the Trump presidency, which saw various leaks from the White House and in numerous instances public officials worked against Trump’s or his appointees’ agendas. Even though this does not seem to be a sufficient strategy to safeguard administrations against illiberal takeover in the long run, it will certainly make it more difficult to exert full control over the executive branch of governments.

Overall, all the measures discussed above imply a context in which the public service is already (moderately) professional, based on merit, and free of widespread corruption. However, in countries with weak institutions, short democratic traditions, and comparatively low incomes, this is rarely the case. In contrast, administrations in such societies operate in an environment where corruption is endemic and where consequently patronage and political tribalism is the norm rather than the exception.¹⁷ In these instances, institutional resilience is very low, and consequently administrations are extremely vulnerable to being captured by illiberal governments. In such contexts some of the measures discussed above can create more harm than good. For example, in an administration where corruption is (still) widespread, strengthening the independence of public

¹⁴ J. Cienski (2021). Poland’s top court hobbles human rights advocate, in: Politico, 15 April, 2021. URL: <https://www.politico.eu/article/poland-court-rule-law-democracy-kaczynski-pis-adam-bodnar-ombudsman/>.

¹⁵ Rosemary O’Leary (2019), *The Ethics of Dissent: Managing Guerrilla Government*, CQ Press.

¹⁶ R. O’Leary (2019), op. cit.; R. O’Leary (2017), *The Ethics of Dissent: Can President Trump Survive Guerrilla Government?*, in *Administrative Theory & Praxis* 39(2), pp. 63-79.

¹⁷ A. Mungiu-Pippidi (2015). *The Quest for Good Governance: How Societies Develop Control of Corruption*, Cambridge University Press.

servants or impeding the opportunities to dismiss them will solidify clientelist networks rather than help avoid them. Here, the appropriate order and timing of measures can vary substantially. Other reforms that are targeted against endemic corruption should receive priority in such contexts.

Finally, a strong judicial system also has a positive effect on institutional resilience. Courts can review and halt policies and administrative activities they deem to be in breach of the constitutional order and other legal key principles (for more details see the RESILIO snapshot on judicial resilience). Furthermore, specialised anti-corruption prosecutors and anti-corruption courts are important building blocks in reducing endemic corruption and creating the foundation for building institutional resilience.

3. Conclusion

This snapshot has highlighted the importance of professional and impartial administrations for the functioning of modern democracies. It has demonstrated how illiberal governments can exert pressure on the rule of law by capturing and exploiting the public service through executive aggrandisement. While a lot more research in this field is still needed, some attempts at systemising populist takeovers and resilience factors have been discussed in this RESILIO snapshot. Depending on the robustness of public administrations, populists will attempt to capture, dismantle, obstruct or reform the public service according to their capacities and attitudes towards state institutions. The most recurring characteristics of populist takeovers of the administration include centralisation, politicisation, and patronage. In order to constrain populist takeovers and prevent the weaponisation of public administrations against the rule of law a multitude of measures and frameworks can serve to increase institutional resilience. Employment and career progression must be based on merit and professionalism. Internal and external accountability mechanisms, like

transparency, codes of conduct, public consultations, whistleblowing channels, ombudspersons, and the rotation of employees will also help to make the public service more robust.

¹⁴ Adam Bodnar, *Polish Road toward an Illiberal State: Methods and Resistance*, Indiana Law Journal, vol. 96 (2021), pp. 1059-1087.

¹⁵ See e.g. Joshua Leifer, *Whose Constitution, Whose Democracy?*, *New York Review of Books*, April 13 2013, <https://www.nybooks.com/online/2023/04/13/whose-constitution-whose-democracy-joshua-leifer/>.

¹⁶ The use of the “foreign agents” law by Russia was analyzed in the recent ECtHR judgment – *Ecodefence and others v. Russia*, Application No. 9988/13, judgment of 14 June 2022.

¹⁷ Ivan Nechepurenko, *Georgia drops a draft “foreign agents” law that set off mass protests over parallels to Russia*, *New York Times*, 10 March 2023, <https://www.nytimes.com/2023/03/10/world/europe/georgia-foreign-agents-protests.html>.

About the author

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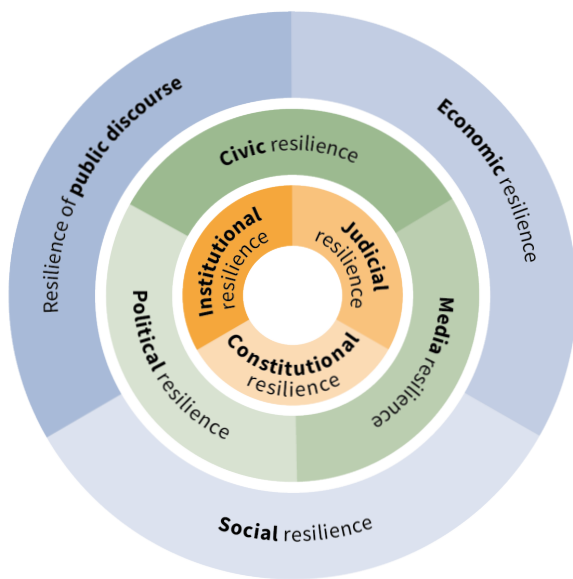
About the project

RESILIO aims to identify institutional and societal factors that make the rule of law more resilient, thus adding a constructive contribution to academic and policy debates. It draws on a “thick” definition of the rule of law, understood as closely connected to democracy and fundamental rights. The resilience of the rule of law means that the rule of law can experience hazardous events or incremental threats without losing its core function, structure and purpose.

About the paper

This paper is part of the **#RESILIOsnapshot** series, a collection of compact analyses that explain ties between resilience factors of the rule of law in the European Union, identified within the RESILIO model.

RESILIENCE FACTORS



RESILIO offers a multi-layered model of the rule of law resilience. Systemic dimension (orange) reflects upon the resilience of the legal setup; subsidiary dimension (green) looks at the phenomena and tendencies present in societies as possible facilitators; and contextual dimension (blue) analyses the broader habitat, determined by structural and systemic variables like economic growth, social cohesion, and general political climate. **RESILIO** also takes into account the horizontal effects of unpredicted and unprecedented crises that can affect all dimensions of rule of law resilience with different intensity. While each factor is necessary for a resilient rule of law, they are only sufficient in combination.

The considerations in this paper are compatible with the developed conceptual model of the resilience of the rule of law. They focus on **institutional resilience** as a contextual factor strengthening the rule of law.

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For more information, visit the project website: <https://iep-berlin.de/en/projects/future-of-european-integration/resilio/>