



The resilience of public discourse as enabler of rule of law resilience

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1. Introduction

The rule of law is often broadly defined as a process by which laws are made according to democratic standards, observed by institutions and public authorities, and under the scrutiny of independent courts. However, the rule of law is inseparably linked to many other factors that should be taken into account when analysing its functions and operationalization.

To that end, RESILIO has examined the elements that promote the resilience of the rule of law, including systemic factors (such as constitutional and institutional resilience), subsidiary factors (such as media resilience), and contextual factors, including economic dimensions or the resilience of public discourse.

The current snapshot focuses on the latter: the role of public discourse and its indirect effect on the resilience of the rule of law. Therefore, the following analysis will focus on two main indicators: **civility and mutual toleration**, and **the need for a sound public debate**.

2. A resilient public discourse and the rule of law

Freedom of expression is recognised by democracies as one of the most essential rights upon which societies must be built. Citizens need to be able to participate in the public sphere by exchanging ideas and points of view without fear of suffering consequences, and with respect for those who hold different opinions.

All these exchanges need to be made in the public sphere, which has been defined and studied by many authors since the term was coined by Jürgen Habermas.¹ For the purpose of this analysis, the approach taken by Craig Calhoun is relevant, according to whom:

“the public sphere is public first and foremost because it is open to all, not only in the sense that all can see and hear but also that all can participate and have a voice. In any modern large-scale society, this means that the public sphere is a matter of communications and other connections among strangers as well as among those networked by old school ties, church

¹ Jürgen Habermas et al. (1974). The Public Sphere: An Encyclopedia Article, in: New German Critique 3, pp. 49–55. JSTOR, <https://doi.org/10.2307/487737>.

membership, or community. One may talk about politics or issues like climate change inside the family, but this becomes a public conversation only when it is open to, and informed by, others.”²

Therefore, the following sections will focus on the elements that are needed to communicate, participate, and connect with others in the public sphere.

2.1 Civility and mutual toleration

Following Calhoun’s approach, it can be argued that public discourse can only be free and inclusive when participation in the public sphere takes place with **civility and mutual toleration, hence contributing to the resilience of the rule of law. To that end, participants need to respect each other and be protected from physical, psychological, and legal attacks and threats when taking the floor.**

While participation in the public sphere needs to be open to all citizens, safeguards are particularly relevant for those acting as the representatives of others – such as politicians, public figures, or civil society organisations – and those who hold power to account, including journalists and media workers. In fact, the importance of protecting journalists from physical, psychological, and legal harm has been emphasized by several international institutions, such as the Council of Europe in its Recommendation on the Safety of Journalists,³ the UN Plan of Action on the Safety of Journalists,⁴ and the European Commission Recommendation on the matter.⁵

When linking public discourse to the rule of law, the main factor to be considered is the **physical safety** of those who

wish to participate in the public sphere, as freedom of expression cannot be enjoyed if the physical integrity of participants is not protected, by law and in practice. Recently, in regions traditionally considered safe havens for freedom of expression, such as the European Union, several journalists have been murdered [for exercising their rights /while carrying out their work], such as Daphne Caruana-Galizia in Malta, Ján Kuciak in Slovakia, Giorgios Karaivaz in Greece, or Peter R. de Vries in the Netherlands. For many of those, justice has not been fully delivered yet. Moreover, the Council of Europe’s Safety of Journalists Platform states that there are currently 26 ongoing cases of impunity for the murder of journalists in Europe.⁶ One further noteworthy case was the murder of British MP Jo Cox, who was killed in 2016 during the EU referendum campaign by an individual who shouted “this is for Britain” and “keep Britain independent.”⁷ Other politically-driven murders followed in 2019: in January, Paweł Adamowicz, the outspoken opposition mayor of Gdańsk, was stabbed to death at a charity concert in Poland;⁸ and in June, the pro-immigration German local politician Walter Lübcke was shot dead on the porch of his house by a far-right sympathiser.⁹ Physical safety when participating in the public sphere and therefore contributing to the resilience of the rule of law is also especially relevant for political representatives.

Moreover, public discourse must allow for participation in the public sphere that is free from insults, harassment, and psychological threats to avoid incivility in the public discourse, described by Coe, Kenski and Rains as “features of discussion that convey an unnecessarily disrespectful tone toward the discussion forum, its participants, or its topics.”¹⁰

² Craig Calhoun (2011). Civil society and the public sphere, in: Michael Edwards (ed.) (2011). The Oxford Handbook of Civil Society, Oxford University Press, pp. 311-323 (p.13).

³ Council of Europe Committee of Ministers (2016). Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, 13.4.2016, URL: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9 (last checked: 23.11.2022).

⁴ UNESCO (2012). UN Plan of Action on the Safety of Journalists and the issue of Impunity, URL (PDF): https://www.ohchr.org/sites/default/files/Documents/Issues/Journalists/UN_plan_on_Safety_Journalists_EN.pdf (last checked: 23.11.2022).

⁵ European Commission (2021). Recommendation on ensuring the protection, safety and empowerment of journalists, URL: <https://digital-strategy.ec.europa.eu/en/library/recommendation-protection-safety-and-empowerment-journalists> (last checked: 23.11.2022).

⁶ Council of Europe (2021). Safety of Journalists Platform, URL: <https://fom.coe.int/en/alerte?typeData=4&time=1667379509170> (last checked: 23.11.2022).

⁷ Ian Cobain (2016). Far-right terrorist Thomas Mair jailed for life for Jo Cox murder, in: The Guardian, 23.11.2016.

⁸ Piotr Buras (2019). The killing of Gdańsk’s mayor is the tragic result of hate speech, in: The Guardian, 17.1.2019.

⁹ Reuters (2019). Far-right AfD shares blame for politician’s killing, conservative leader says, Reuters, 19.6.2019.

¹⁰ K. Coe/K. Kenski/S.A. Rains, S.A. (2014). Online and Uncivil? Patterns and Determinants of Incivility in Newspaper Website Comments, in: Journal of Communication 64(4), pp. 658-679.

While disrespectful tone, verbal abuse and threats also take place offline, it is online where they thrive the most, safely hidden behind anonymity. This type of abuse affects all genders but is most commonly targeted at women participating in the public sphere. A Plan International survey of girls and young women from 31 countries found that more than half of them had been harassed and abused online. The study pointed out that there was a “heightened level of harassment when girls are actively engaged in speaking out online. Activists are attacked for what they are saying and for their outspokenness.”¹¹ Additionally, many of those who identified as LGBTIQ+ or as belonging to an ethnic minority reported experiencing harassment specifically because of it. The study concluded that online harassment is silencing young women’s freedom of expression online and stated that “it is clear from the survey results that the more frequently girls experience online harassment the more likely they are to decrease their use of that particular social media platform or to stop using it altogether.”¹²

According to a recent study published by UNESCO and the International Centre for Journalists, online harassment is also hindering women journalists’ participation in the public sphere. This study states that 73% of women journalists have suffered online violence, including death threats and sexual threats in many cases. This creates a chilling effect for public participation.

“When asked ‘How does the level of online violence you experience affect your journalism practice and your interaction with sources/audiences?’, 30% of the women journalists surveyed answered that they self-censored on social media. 20% described how they withdrew from all online interaction. Self-censorship was also a response noted by many interviewees.”¹³

Political participation is also affected by threats and ha-

arrassment. According to a study by the Inter-Parliamentary Union, 85.2% of female MPs who participated in the survey stated that they had suffered psychological violence during their term of office, while 46.9% had received death threats or threats of rape or beating, and 58.2% had been the target of online sexist attacks on social networks.¹⁴

Furthermore, mutual toleration also needs to be considered in the political sphere. Political debates and competition need to be based on respect for others, fair play, and legality of means.

“Mutual toleration refers to the idea that as long as our rivals play by constitutional rules, we accept that they have an equal right to exist, compete for power, and govern. We may disagree with, and even strongly dislike, our rivals, but we nevertheless accept them as legitimate. This means recognizing that our political rivals are decent, patriotic, law-abiding citizens.”¹⁵

Recent examples from around the world show that incivility against political adversaries can lead to polarisation, as seen with former US-President Donald Trump, Brexit, or the rhetoric of the United Right government in Poland and Fidesz in Hungary targeting local opposition as well as the EU. Their supporters have repeatedly labelled their opponents as traitors,¹⁶ terms that have been amplified online and sometimes by the press. As highlighted by Dmitry Chernobrov, the increasing use of traitor language has become a concern in western democracies:

“The normalization of traitor language through its use by all parties in and out of government suggests unresolved popular concerns and a shift of the political spectrum in some western democracies towards the ‘us’ versus ‘them’ perspectives, previously largely attributed to authoritarian or populist politics.”¹⁷

¹¹ Plan International (2020). Free to be online? Girls’ and young women’s experiences of online harassment, URL (PDF): <https://plan-international.org/uploads/2022/02/sofwtgr2020-commsreport-en-2.pdf> (last checked: 23.11.2022).

¹² Ibid.

¹³ UNESCO (2022). Top 26 preliminary findings. The Chilling: global trends in online violence against women journalists; URL (PDF) https://en.unesco.org/sites/default/files/the-chilling_top26.pdf (last checked: 23.11.2022).

¹⁴ Inter-Parliamentary Union (2018). Sexism, harassment and violence against women in parliaments in Europe, URL: <https://www.ipu.org/resources/publications/issue-briefs/2018-10/sexism-harassment-and-violence-against-women-in-parliaments-in-europe> (last checked: 23.11.2022).

¹⁵ S. Levitsky and D. Ziblatt (2018). How Democracies Die, Crown Publishing, p. 59.

¹⁶ C. Stokel-Walker (2019). “Traitors,” “betrayals” and “surrenders”: how Boris Johnson’s inflammatory language is challenging our democracy, Prospect Magazine, 1.10.2019, URL: <https://www.prospectmagazine.co.uk/politics/boris-johnson-surrender-bill-parliament-language-brexit-division> (last checked: 23.11.2022).

¹⁷ D. Chernobrov (2019). Who is the modern ‘traitor’? “Fifth column” accusations in US and UK politics and media. Politics, 39(3), pp. 347–362. <https://doi.org/10.1177/0263395718776215>.

Public participation also needs to be protected from legal threats. Here it is important to mention Strategic Lawsuits Against Public Participation (SLAPPS), abusive lawsuits used to deter participation and critical speech through lengthy and costly legal procedures. Its use has recently increased, affecting journalists, activists, and citizens in many countries. For example, the Spanish energy company Iberdrola has filed a €17.6 million lawsuit against the independent newspaper El Confidencial for its coverage of the investigations into the alleged relations between the company and a convicted former police agent.¹⁸ A good legal framework to protect those who participate in the public sphere from such lawsuits is necessary to contribute to the resilience of public discourse, and in turn, the rule of law. However, some recent improvements can be highlighted, such as the EU Commission's recent 2022 proposal on an EU anti-SLAPP directive.¹⁹ It is also important to emphasize the need for legislation that protects whistle-blowers and those who report malpractice and corruption, such as the 2019 EU Directive to protect whistle-blowers.²⁰

2.2 Sound public debate

It has already been established that for the public discourse to contribute to the resilience of the rule of law it needs to be based on civility and mutual toleration. The following section analyses the elements needed for sound public debate, including the right to access information held by public authorities, countering disinformation, and the role of free media.

Transparency and access to information held by public authorities is one of the most relevant issues to consider when analysing public discourse and how it can contribute to the resilience of the rule of law. Incumbents can only be held democratically accountable for their actions if citizens are aware of these actions. But how can citizens know what their elected governments and public authorities are

doing and how they are spending taxpayers' money? Most democratic countries have passed Freedom of Information Acts or Access to Information Laws, pieces of legislation that allow citizens to request information held by public authorities. The European Commission has already linked this right to the rule of law in its annual rule of law reports, stating that "the right of access to information held by public authorities is fundamental for journalists to do their work, as well as for civil society and citizens at large."²¹

Two elements should be considered when analysing the link between access to information, a sound public debate, and the contribution to the public discourse: first, the strength of the legal framework, and second, the effectiveness of the right in practice, in other words when citizens submit requests. Access to information is not harmonised within the European Union, and both frameworks and real practices vary between EU member states.

The right to access information is essential to fight misinformation and disinformation, and for sound debates based on facts, data, and policy outcomes. However, as Seth Kreimer has argued, Freedom of Information Acts should be understood as functioning within an array of factors and actors, such as "the permanent infrastructure of federal civil servants with integrity, internal watchdogs, reasonably open opportunities to publish and share information, and a set of civil society actors capable of pursuing prolonged campaigns for disclosure."²²

A public debate that is based on facts and figures will contribute to a sound public discourse, and in turn, to strengthening the rule of law. However, the sources of information and the ways in which they are feeding information into the public sphere also play a crucial role. Misinformation – false information not intentionally shared to cause harm –, and disinformation – false information

¹⁸ Mapping Media Freedom (2022). Energy company files 17.6 million SLAPP lawsuit against independent newspaper, 22.4.2022. URL: <https://www.mapmf.org/alert/24588> (last checked: 23.11.2022).

¹⁹ EUR-Lex (2022). Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation"), URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0177> (last checked: 23.11.2022).

²⁰ Official Journal of the European Union (2019). Directive of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, URL (PDF): <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937> (last checked: 23.11.2022).

²¹ European Commission (2022). 2022 Rule of Law Report, URL (PDF): https://eur-lex.europa.eu/resource.html?uri=cellar:2e95c008-037b-11ed-ace-01aa75ed71a1.0001.02/DOC_1&format=PDF (last checked: 23.11.2022).

²² S. Kreimer S (2008). The Freedom of Information Act and the Ecology of Transparency. Faculty Scholarship, Paper 192.

shared with the intention of causing harm – have critically affected the quality of public debates and fuelled polarisation.

While disinformation operations do not happen exclusively online, social media networks have been a breeding ground for campaigns aimed at introducing false information and interfering with political debates. Recent examples include false data about the safety of Covid-19 vaccines, as well as false information spread by foreign agents aimed at interfering in political processes and debates in other countries, such as Russian disinformation campaigns mimicking Western news websites to promote the Kremlin's agenda and fuel dissent within the EU and the UK, as exposed recently in a report by Meta.²³

Fighting disinformation is not an easy task and involves, amongst other things, several initiatives such as the scrutiny of ad placements and political advertising, empowering social media users, improving media literacy, and funding fact-checking initiatives. Some of these initiatives are collected in international recommendations, such as the Strengthened Code of Practice on Disinformation 2022.²⁴

On that note, **online content moderation** plays a significant role in shaping public discourse and deciding which information is available for citizens to discuss in the public sphere. In recent years, several attempts have been made to hold powerful social media companies to account, such as the EU's Digital Services Act, which recently entered into force,²⁵ and other self-regulation initiatives such as Meta's Oversight Board.²⁶

Finally, while one RESILIO snapshot is exclusively dedicated to the role of media, it should be pointed out that media outlets have a responsibility as enablers of public debate and therefore as contributors to the public discourse and the resilience of the rule of law.

Media pluralism is essential for a sound public debate in that it curbs the spread of mis- and disinformation and

contributes to an environment of mutual toleration by publicly representing a multitude of viewpoints.²⁷

3. Conclusions

This snapshot has analysed one of the contextual factors identified by RESILIO that contribute to rule of law resilience, and focused on public discourse resilience and its effect on the rule of law by examining two main indicators: **civility and mutual toleration** and **sound public debate**.

The snapshot has identified the main elements that contribute to **civility and mutual toleration** and promote free exchange of ideas and opinions without fear of suffering consequences for exercising the right to freedom of expression. The snapshot focused on **participation in the public sphere that is free from physical attacks, harassment, and legal threats** and has offered examples of frameworks that could be used to promote an enabling environment that encourages public participation. The snapshot has also highlighted the need to protect participants via anti-SLAPP legislation and whistle-blower protections.

The second aspect identified by RESILIO regarding the quality of public discourse is the need for a **sound public debate**. The following factors have been highlighted as key elements that can influence the resilience of the public discourse in this area and therefore have an effect on the protection of the rule of law: **the right to access information held by public authorities, a proper framework to fight misinformation and disinformation, a framework to ensure that online content moderation is carried out in accordance with rule of law and human rights standards, and media pluralism**.

²³ M. Scott (2022). "Grotesque" Russian disinfo campaign mimics Western news websites to sow dissent, Politico, 27.9.2022, URL: <https://www.politico.eu/article/russia-influence-ukraine-fake-news/> (last checked: 23.11.2022).

²⁴ European Commission (2022). 2022 Strengthened Code of Practice on Disinformation, URL: <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation> (last checked: 23.11.2022).

²⁵ European Commission. The Digital Services Act (DSA) package, URL: <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> (last checked: 23.11.2022).

²⁶ Oversight Board, URL: <https://www.oversightboard.com/> (last checked: 23.11.2022).

²⁷ EUJ Centre for Media Pluralism and Media Freedom (2022). Media Pluralism Monitor 2022 Results, URL: <https://cmpf.eui.eu/mpm2022-results/> (last checked: 23.11.2022).

About the author

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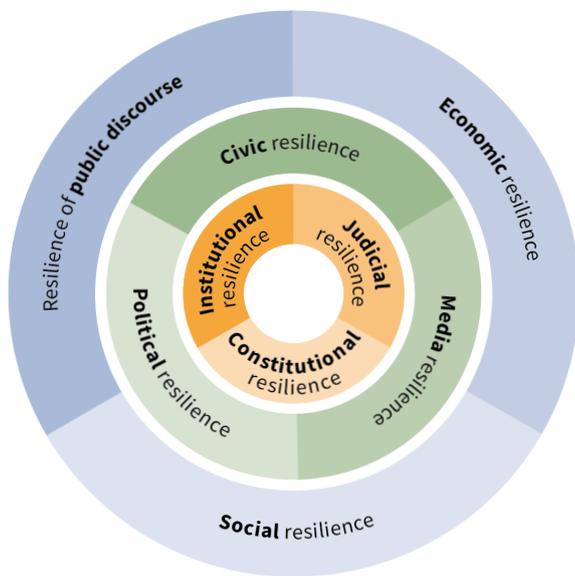
About the project

[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 **public discourse** as a contextual factor strengthening the rule of law.

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