



Media resilience as a subsidiary factor for rule of law resilience

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1. Introduction

The media has the principal ability to defend the rule of law through independent fact-finding and reporting, thereby imposing a check on the power exercised by public institutions. Its functioning is therefore a crucial determinant for the resilience of the rule of law. For the media itself to be resilient, it depends both on the internal functioning of the media system as well as on the external capacity of institutions, such as courts or the Ombudsman, to uphold its independence.

The media's role as public watchdog extends not only to the activities of government but to all branches of power. The watchdog function manifests itself most visibly in detecting abuses of power and reporting them to the public. First, such reporting is essential for democratic decision-making because it informs citizens about the actions of

public officials, thereby enabling the public to hold incumbents accountable through protest, approval, or votes. Second, it has an educational function by increasing citizens' awareness of the functioning of public institutions, thereby shaping their attitudes towards the rule of law. Third, it has a preventive component: an effectively functioning media increases the risk of abuses of power coming to light and deters from committing such abuses in the first place. Finally, the media plays a crucial role in challenging the status quo, in presenting alternatives, and in allowing for them to be debated in a public forum, i.e. the deliberative function.

At the same time, voices that question the legitimacy of the rule of law can and do emerge in public debate.¹ These voices typically attack the mainstream media, using terms such as *Lügenpresse* (lying press) and *fake news*.

¹ M. Conrad (2023 [2022]). From Denouncing to Defunding: The Post-Truth Populist Challenge to Public-Service Media, in: M. Conrad et al. (eds). Europe in the Age of Post-Truth Politics, Palgrave Macmillan, DOI: https://doi.org/10.1007/978-3-031-13694-8_5; J. L. Egelhofer, S. Lecheler (2019). Fake news as a two-dimensional phenomenon: a framework and research agenda, in: Annals of the International Communication Association 43:2, pp. 97-116, DOI: <https://doi.org/10.1080/23808985.2019.1602782>; A. Schulz et al. (2020). We Are the People and You Are Fake News: A Social Identity Approach to Populist Citizens' False Consensus and Hostile Media Perceptions, in: Communication Research 47(2), pp. 201-226. DOI: <https://doi.org/10.1177/0093650218794854>.

In addition to populism but not independently of it, the rise of social media and global platforms poses a serious challenge to traditional media and the public sphere.² Such new platforms degrade professional media content to the status of competitor with non-professional, user-generated content; they constantly disrupt the chances of media content reaching the audience by means of arbitrary, uncontrolled tuning of algorithms.

But the impact of social media on professional media and the public is not only negative. These platforms are more difficult to control by states and offer an alternate route to reach audiences, especially in countries with democratic deficits.³ Overall, the media can be an effective factor in ensuring the stability of the rule of law, but political populism in the short-term and the rise of social media in the long-term significantly narrow the media's scope for action.

2. Media resilience and the rule of law

The stronger the autonomy of journalists and editorial staff (i.e. their independence from political and economic influence) and the more diverse the supply of professional media content for information and public debate, the more likely and wider the media contribution to a resilient rule of law. Independence is a guarantor of power and control free from external influence, while diversity is a guarantor of democratic transfer of power that can preserve the rule of law.

2.1 Media independence

A prerequisite for the media to fulfil its watchdog role is the independence of media organisations, newsrooms,

and journalists.⁴ Independence is the autonomous decision-making space that guarantees that media output serves the public interest and not particular political or economic interests. Journalistic independence as a constitutional principle and a press ethical requirement sees the journalist as the agent of the public, entitled to high social esteem and a constitutional position, and specific additional rights precisely because s/he is mandated by the community to check power and present alternatives to decision-making.⁵

Three closely interrelated factors relevant to resilience are discussed below: the professionalisation of journalism; pressures on media institutions; and violations of media freedom. Professionalism in journalism is the basis of professional autonomy and thus a prerequisite for journalism free from influence. Journalists and editors are the ultimate recipients of external, political, and/or economic pressures on media institutions. The aim of such pressure is to shape public discourse in a particular political and/or economic interest by overriding autonomous journalistic and editorial decisions. All such interference, regardless of its means, is an illegitimate restriction of media freedom.

In principle, the better the state of journalism education and the enforcement of professional standards, the lesser the risk of external influence; and the more regulatory guarantees against legal, political, and financial interference, the lesser the risk of external influence.

Professionalisation of journalism

Journalism education is a key arena for shaping perceptions of the journalistic role. In principle, training helps anchor attitudes such as commitment to the public

² P. Iosifidis (2011). The Public Sphere, Social Networks and Public Service Media, in: Information, Communication & Society 14:5, pp. 619-637, DOI: <https://doi.org/10.1080/1369118X.2010.514356>; L. M. Kruse et al. (2018). Social Media as a Public Sphere? Politics on Social Media, in: The Sociological Quarterly 59:1, pp. 62 -84, DOI: <https://doi.org/10.1080/00380253.2017.1383143>; Th. Poell, J. van Dijck (2016). Constructing Public Space: Global Perspectives on Social Media and Popular Contestation — Introduction, in: International Journal of Communication 10, pp. 226–234.

³ V. Carty (2015). Social Movements and New Technology, Routledge New York, DOI: <https://doi.org/10.4324/9780429493119>; C. Leong et al. (2019). Social media empowerment in social movements: power activation and power accrual in digital activism, European in: Journal of Information Systems 28:2, pp. 173-204, DOI: <https://doi.org/10.1080/0960085X.2018.1512944>.

⁴ E. Psychogiopoulou (2014). Media Freedom and Independence in Contemporary Democratic Societies, in: E. Psychogiopoulou (ed.) Media Policies Revisited, Palgrave Macmillan, DOI: https://doi.org/10.1057/9781137337849_3; J. Trappel, T. Tomaz (2021). Democratic performance of news media: Dimensions and indicators for comparative studies, in: The Media for Democracy Monitor 2021: How leading news media survive digital transformation, vol. 1, pp. 11-58, DOI: <https://doi.org/10.48335/9789188855404-1>

⁵ R. A. Jones (2013). Rethinking Reporter's Privilege, in: Michigan Law Review 111(7), pp. 1221–1282, DOI: <http://www.jstor.org/stable/23812857>.

interest, ethical journalism as a standard, the need for factuality, and the recognition of external influence.⁶ Journalism training, whether in university or other forms, does not of course guarantee journalistic autonomy per se, but it does reduce susceptibility to external influence.

Clear definitions and the consistent enforcement of professional, ethical rules is crucial to journalistic independence and a resilient media. In some countries, professional and ethical rules are developed and enforced by self-regulatory organisations that bring together editorial offices and media companies. In other countries, professional and ethical decision-making is exclusively or more heavily embedded within the editorial staff. However, neither self-regulatory organisations nor in-house codes of ethics alone can guarantee autonomous, professional journalism. The tools available to enforce ethical standards also need to be examined. The greater the proportion of editorial offices and journalists subject to some form of professional ethics regulation, the less vulnerable the media system is as a whole to external pressures. Polarised media systems are characterised by a strict adherence to ethical principles by one part of the editorial staff, while the other part is instrumentalised by the politics. The more divergent the norms followed by different actors in the media system, the more likely it is that media publicity will contribute to social polarisation.

The requirement of independence includes clarifying the relationships within the media company. The regulation of the relationship between the owner and the editorial staff is an important guarantee of editorial and journalistic autonomy and of resilience against external pressures exerted through the owner. Furthermore, the concentration of revenue sources can also pose a risk to the media outlets' independence: the more exposed a media outlet is to a single advertiser or financier, the

greater the ability of the advertiser or financier to exert influence over content and editorial issues, and the higher the risk to media independence. All media outlets are considered at risk where a particular revenue source exceeds one third (or possibly a quarter - this requires judgement) of the total revenue. Particularly risky is the situation in which a significant proportion of advertising comes from the state or state-owned companies; the Hungarian media system is an example of this.

A much-discussed element of media independence is the independence of the media regulator. The independence of the regulatory body implies that the existence of independent regulators is a fundamental precondition of media freedom. Ultimately, when competent public bodies decide on the allocation of scarce media market resources and how they enforce media content restrictions and obligations, then what is at stake is whether they operate as independent media regulatory bodies. If they promote a free and pluralistic media market and media supply, they need to tread the path of independence. Independence is partly a legal problem, but at the same time it also relates to culture, politics, and even personnel selection.⁷ Formal and legal safeguards are subject to more or less objective legal review. Similarly, substantial conditions of independence depend on uncertain factors in the political and social environments. While the relevant academic literature devotes considerable attention to the issue of formal guarantees and their assessment,⁸ the question of actual independence is not discussed sufficiently in research and policy-making. Yet, independence is not an end but a means of regulation. It is a tool for the development of a regulatory authority that guarantees a free and diverse media, the uniform application of European regulations, and ensuring a high degree of professionalism and cost-effectiveness.⁹

⁶ T. Bettels-Schwabbauer et al. (2017). NEWSREEL - New Skills for the Next Generation of Journalists, Research Report, University of Pécs, URL: https://newsreel.pte.hu/sites/newsreel.pte.hu/files/REPORT/new_skills_for_the_next_generation_of_journalists_-_research_report.pdf (last checked: 12.12.2022).

⁷ Hans Bredow Institut (2011), INDIREG: Indicators for Independence and Efficient Functioning of Audiovisual Media Services Regulatory Bodies for the Purpose of Enforcing the Rules in the AVMS Directive, Brussels: European Commission, https://www.indireg.eu/assets/files/final_report.pdf.

⁸ A. Herold (2013). From independence of audiovisual media regulators to Europeanization of audiovisual media regulation: Reaching for the apples of the Hesperides?, in: K. Donders et al. (eds). Private Television in Western Europe, Palgrave Macmillan Basingstoke, pp. 260–72; A. Mutu (2018). The regulatory independence of audiovisual media regulators: A cross-national comparative analysis, in: European Journal of Communication 33:6, pp. 619–38.

⁹ C. Lorens et al. (2014). European Union media policy and independent regulatory authorities: A new tool to protect European media pluralism?, in: Journal of Information Policy 4, pp. 396–420. 274,5 mm

It is worth distinguishing between formal and substantive guarantees. Formal guarantees are reflected in the rules governing the organisation and financing of the regulatory body, such as the nomination, election, status, and financial flexibility of its members. These guarantees are based on the assumption that the organisational and funding framework thus established can indirectly provide the scope of autonomous decision-making that ultimately leads to impartial and professionally informed decisions. The substantive guarantees of independence are those directly reflected in the regulatory body's decision-making activities. On the one hand, these can take the form of requirements concerning principles, such as respect for media pluralism in all the decisions of the competent authorities. On the other hand, these guarantees can also take the form of control mechanisms that provide both the regulatory body itself as well as its institutionalised external evaluators with continuous feedback on the quality of the authority's operations and decision-making. Such feedback could include a full and substantive judicial review of all decisions taken by the regulatory authority. Judicial review has the potential to continuously shape the regulatory body's practice through individual judgements. It could also take the form of a monitoring system to track the regulator, which continuously evaluates the regulator's decisions and other activities, and makes the results publicly available. No such regulation currently exists either at national or EU level.

Pressures and violations of media freedom

Political pressure on editorial offices and journalists can be achieved with a fairly wide range of instruments. Pressure can be positive, rewarding, or negative, repressive. Positive pressure can result in an unhealthy loyalty and dependency between the media outlet, company, or political actor in question, which makes it impossible for the media outlet to perform its democratic functions credibly. Negative pressure through intimidation prevents the media outlet from performing its democratic functions. Pressure can both be formal, when exerted through legal, official means, and informal, when exerted through non-legal means.

Whether or not a media outlet can resist such pressure depends on many factors, which include the quality of the

functioning of rule of law institutions, the ability of opposition parties to limit and challenge power, and the strength of solidarity among journalists.

Self-censorship can be reinforced by measures that have the aim or effect of silencing or distorting certain positions, for fear of repercussions, or for some advantage incompatible with professional rules or even the law. The consequences may include: being excluded from public resources (broadcasting frequencies, public advertising, public loans and subsidies, data of public interest); verbal attacks on editorial staff and journalists; termination of employment; harassing but lawful actions against the business by public authorities, such as the tax authorities; the imposition of a disproportionate penalty which seriously impedes the medium's operation; or even legislative intervention that weakens the undertaking's economic position.

The legal environment is inherently not a tool for exerting pressure, but a means of setting reasonable and constitutional limits to public communication, and of balancing freedom of the press with other constitutional values. Yet, the greater the likelihood of arbitrary application or even creation of legislation, the more journalists may also experience the regulatory environment as a tool for political pressure. This can be avoided if the regulatory environment is transparently prepared and professionally justified; the rules governing the behaviour of editors and journalists are clear, consistent and transparent in their application; the sanctions envisaged do not threaten the existence of the media, except for the most serious infringements clearly defined by law; and regulatory decisions are well-reasoned and subject to review by the courts.

2.2 Diversity of media landscape

As the structure of the media market has changed and evolved over the past decades, so has the understanding of media market diversity. Pluralism and diversity emerged as a regulatory issue in the 1980s during the liberalisation of the analogue radio and television market.¹⁰ At that time, the concept of pluralism was developed by constitutional courts to counterbalance commercial interests that emerged with the opening of

¹⁰ B. Holznapel (1996). *Rundfunkrecht in Europa*. J.C.B. Mohr, Tübingen.

the market, when the monopoly of public service media could no longer be justified from a technological, market, or constitutional point of view. This allowed for the emergence of market players while simultaneously limiting the market presence and power of individual players to shape opinion.

While pluralism and diversity were originally intended to enforce a diversity of voices, information, and views in the public, today's multitude of (social) media platforms bring about a diversity and noise that carries the risk of marginalising traditional media content that is subject to fact-checking and quality control. The less professional media content is excluded from the information landscape, the lower the risk of disinformation and polarisation, and the more resilient the rule of law.

One specific guarantee of diversity is the promotion of specifically public service content. In European media systems, this is achieved by maintaining autonomous, publicly funded institutions with a public service remit and an organisational structure designed to prevent state interference. Public service content is also present in the media system outside of public service institutions. However, any form of public service media only contributes to democratic public discourse if the fulfilment of the public service remit and the use of public funds do not create opportunities for state influence on editorial decisions. While it is clear that public service media can play a decisive role in both the media's control and deliberative functions, it is also clear that direct public funding increases the risk of state interference.

Organisational and funding arrangements alone can at most reduce the risk of state interference. Such intervention itself can be justified or refuted mainly on the basis of a content analysis of the public service media. The balance of news programmes, the way in which different political sides and positions are presented, the openness of debates, the presence of NGOs, and the representation of local perspectives are all further significant and measurable factors that indicate how the control and deliberative functions of public service media are being performed.

The diversity of the media landscape can be assessed with reference to the concentration or dispersion of media

ownership, the concentration of journalistic resources, and the concentration of the audience's attention.

Dispersion of media ownership

The most obvious interpretation of media concentration is that of ownership concentration. The concentration of control over related infrastructures and services (e.g. print, cable, audio) among a few actors enables the exclusion or disadvantage of competitors in using that infrastructure or service, and threatens the resilience of the media towards abuses.

Concentration of ownership can and tends to be directly addressed by the legal regime. Part of regulation aims to ensure transparency of ownership, which is fully achieved by revealing the ultimate beneficial owners behind the media company that publishes and operates the media outlet. Some legislation may be satisfied with the disclosure of the primary owners.

The scope and focus of ownership concentration regulation varies from one country to another. A constant element of regulation is the limitation of *horizontal concentration*, the restriction of expansion within markets for the same media products or services. The risk of this expansion is that a single voice in a given media market becomes too strong. In turn, not all countries restrict so-called *diagonal media concentration*, the concentration between markets for different media products or services, the risk of the same information reaching the audience through different platforms, reinforcing each other's effects. Also uncommon is the restriction of *vertical concentration*, which aims to prevent the risks that arise from the simultaneous ownership of media outlets and the infrastructure and services necessary for the operation of the media. By shaping the conditions of access to the related infrastructure and services, a given operator may make it more difficult for its competitors to operate and reach audiences.

The most problematic element of the regulation of ownership concentration is when competition law scrutiny of media mergers is complemented by media law and constitutional considerations, namely the analysis of the impact of the merger on media pluralism. This regulatory approach is well suited to enforce the real objective of limiting media concentration: the protection

of pluralism of information. In practice, the predictability, transparency, and verifiability of the procedure may be significantly limited by the lack of elaboration and justification of the methodology of media rights assessment. Both American and German legislation have been tested by this problem, and Hungary serves as an example of the arbitrary and abusive application of such a balancing test.

Market diversity is clearly shaped by entry regulation, which also indirectly affects media concentration. This includes tendering for broadcasting frequencies and the administrative conditions for launching other media services (registration procedure). Genuine guarantees are needed to ensure that all operators have equal access to the capacity (frequencies) and administrative possibility to provide the service when entering the market. The transparency of market entry procedures is significantly reduced if the licence granted can be significantly modified by the media authority without objective technical justification. The non-discriminatory and transparent implementation of the market entry procedure is an indispensable condition for media market diversity.

Audience reach

The diversity of information is ultimately measured by the degree to which the audience's attention is concentrated on a single medium or media outlet of a single media company. Especially in the digital media system, some media outlets and media companies have a significantly higher audience reach than others. The number of media outlets available alone does not provide sufficient information on the diversity of information that reaches audiences.

The concentration of attention also has regulatory consequences in some countries: the media with the largest audience reach may be subject to specific additional burdens, such as reporting obligations, broadcasting in the original language, or prohibitions on further market expansion.

The analysis of private media outreach activities is relevant for the new sources with the largest reach. The analysis of the information activities of the most popular commercial television channels, news portals, daily newspapers, and radio stations gives the most comprehensive picture of the public issues that voters encounter. It is possible to

examine which private media platforms provide public information and how impartial they are.

Dispersion of journalistic resources

The ultimate aim of regulating media concentration is not to ensure market diversity - this is primarily the task of competition law - but to guarantee the diversity of information that reaches the public. It is pointless to have many independent players in the media and news market if only a minority of newsrooms use their own sources. The fierce competition for news in the digital environment has increased the role of news agencies, and the copying of each other's material has become commonplace, while at the same time social media have become an increasingly important news source. In more and more newsrooms, journalistic output is being squeezed out of the newsroom, with fewer journalists and fewer resources available for on-the-spot reporting and in-house reporting.

3. Conclusions

The media can be an important yet sensitive defender of the rule of law as well as an indicator of the state of the rule of law. Through its monitoring and deliberative function, it can best contribute to rule of law resilience if it is an independent actor operating in a diverse media landscape.

Independent reporting is best ensured through a number of ways. The first is journalistic professionalism, characterised by high quality education, training, a sense of social responsibility and commitment to ethical standards. Second, there must be mechanisms to enforce those ethical standards. Third, internal and external pressures must be absent or kept to a minimum. This can be achieved by the editorial team giving journalists sufficient autonomy to make their professional decisions, thereby inhibiting internal pressures that threaten journalistic independence. External pressures can be avoided by ensuring that media companies are not financed by one dominant investor or advertiser, potentially putting into question companies' independence.

A diverse media landscape can be achieved by dispersing media ownership structures (horizontally, vertically, and diagonally), by dispersing journalistic resources, and by a division of audience attention over several media outlets and sources of information.

As such, a diverse media landscape can foster a pluralistic and inclusive public debate. Yet, with the rise of social media and a diversity of new platforms disseminating information, there is also an increasing risk of mis- and disinformation spreading and posing a threat to democratic discourse and the rule of law. Ultimately, a diversity of actors in the media landscape will ensure that no single actor can distort the media system as a whole, thereby allowing for a higher quality of reporting and public debate.

In the presence of both an independent and a diverse landscape, the media can fulfil its function of informing and educating citizens about the rule of law and government action, thereby laying the groundwork for the electorate to be able to hold the government accountable. As such, the media constitutes a crucial contributor to the resilience of the rule of law.

About the author

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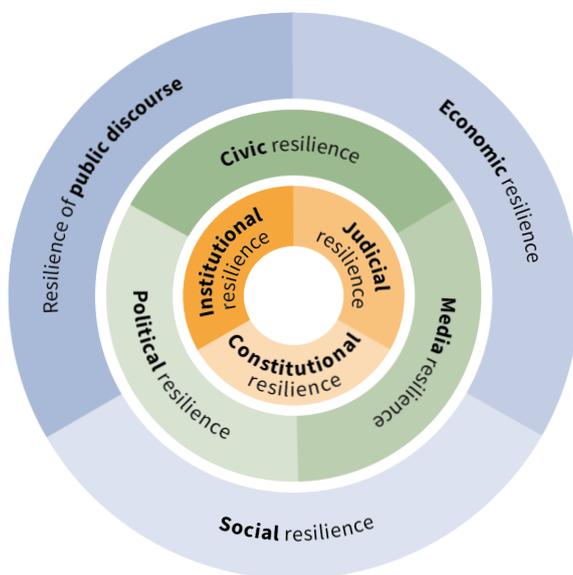
About the project

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 **media resilience** as a contextual factor strengthening the rule of law.

RESILIO is implemented by Institut für Europäische Politik in Berlin and funded by Stiftung Mercator.

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