



## Civic resilience as a subsidiary factor of rule of law resilience

Regitze H. Rohlfing

PhD Fellow, University of Copenhagen

January 2023

### 1. Introduction

The rule of law is a vital part of the democratic architecture of Europe. Nonetheless, the European Commission's Rule of Law Reports clearly show that the recent state of the rule of law across the Union is quite fragile in many countries, including older democracies.<sup>1</sup> This demonstrates that the rule of law is not a static institutional element but dependent on a continuous commitment to this ideal. One way the rule of law can be upheld is through a strong civil society. Civil society can increase accountability, expose breaches to democratic principles, and facilitate links between citizens and their political system. This is, though, only possible when civil society is allowed the necessary space to operate.<sup>2</sup>

This snapshot analysis therefore looks at **civic resilience**: ensuring **trust** in the democratic system and its public insti-

tutions and maintaining high levels of **civic engagement**. High levels of trust sustain a commitment to the rule of law amongst both citizens and authorities. An empowered and robust civil society has the ability to act as a collective watchdog and hold power-holders accountable by raising awareness, undertaking advocacy, mobilising protests, documenting violations, and facilitating a space for civic participation and active citizenry. Together, these can contribute to the resilience of the rule of law. By contrast, a deprived civil society and lack of trust will fall short in this regard.

### 2. Civic resilience and the rule of law

The rule of law is a durable system of laws, institutions, norms, and community commitment. It is a well-established general principle of EU law and a treaty-based re-

<sup>1</sup> European Commission (2022). 2022 Rule of Law Report - The rule of law situation in the European Union (EUR-Lex - 52022DC0500), URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1658828718680&uri=CELEX%3A52022DC0500> (last checked: 4.12.2022).

<sup>2</sup> M. Jensen (2011). Civil society in liberal democracy, Routledge studies in contemporary philosophy 26, Routledge New York. doi: 10.4324/9780203817223.

quirement for all member states of the Union.<sup>3</sup> The rule of law guarantees people's basic liberties, keeps the authorities in check, and ensures meaningful access to the political system. According to the European Commission: "Respect for the rule of law is essential for the very functioning of the EU."<sup>4</sup> Nonetheless, respect for and commitment to the rule of law are in serious retreat, including restrictions on the independence of the judiciary, violations of basic constitutional rules and standards, and attacks on civil society and the civic space.<sup>5</sup> This is often referred to as rule of law backsliding or democratic backsliding.<sup>6</sup> The EU itself has suggested various solutions to this backsliding, in particular greater monitoring and sanctioning possibilities. Prompted by civil society, the EU is also directing efforts towards supporting the work of non-governmental organisations and social movements to protect the rule of law, although it has also been criticised for not doing enough in this regard.<sup>7</sup> This begs the question: what is the impact of civic engagement and trust on the resilience of the rule of law?

Civil society is crucial in "materializing and protecting" the rule of law, especially in people's daily lives and engage-

ment with their political systems.<sup>8</sup> Civil society can be defined as all forms of intentional actions undertaken collectively in a network of organisations and movements independent from the state and the market, although the boundaries between these spheres are becoming increasingly blurred.<sup>9</sup> Organisations typically have a more formal structure, while movements are more loosely organised.<sup>10</sup> Intentional actions encompass the mobilisation through both political and legal means by which civil society performs different democratic functions ranging from ensuring compliance and implementation, oversight and accountability, opinion forming and agenda-setting, to advocacy.<sup>11</sup> For a long time, civil society was not seen as a central factor for the rule of law. It was only in the late 1990s that civil society was acknowledged for its contribution to the different elements of the rule of law.<sup>12</sup> Until that point, civil society had largely been overlooked in the rule of law equation due to the overwhelming attention paid by positivists and realists to states and other formal actors. By contrast, a growing interest in recent years has redirected the focus towards civil society. This has been termed "rule of law from below", which stresses how legal and democratic norms are realised by and are part of

<sup>3</sup> World Justice Project (no date). What is the Rule of Law?, URL: <https://worldjusticeproject.org/about-us/overview/what-rule-law> (last checked: 4.12.2022); J. Möller, S. E. Skaaning (2014) The rule of law: definitions, measures, patterns and causes, Palgrave Macmillan; L. Pech (2022) The Rule of Law as a Well-Established and Well-Defined Principle of EU Law, in: Hague Journal on the Rule of Law 14(2), pp. 107–138. doi: 10.1007/S40803-022-00176-8.

<sup>4</sup> European Commission (no date). Upholding the rule of law, URL: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law_en) (last checked: 4.12.2022).

<sup>5</sup> See, for instance, T. Ginsburg (2018). Democratic Backsliding and the Rule of Law, in: Ohio Northern University Law Review 44(3), pp. 351; A. Buyse (2019). Why Attacks on Civic Space Matter in Strasbourg: The European Convention on Human Rights, Civil Society and Civic Space, in: Deusto Journal of Human Rights (4), pp. 13–37. doi: 10.18543/DJHR-4-2019PP13-37; R.D. Kelemen, L. Pech (2019). The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland, in: Cambridge Yearbook of European Legal Studies 21, pp. 59–74. doi: 10.1017/CEL.2019.11; L. Pech, P. Wachowiec, D. Mazur (2021). Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action, in: Hague Journal on the Rule of Law 13(1). doi: 10.1007/s40803-021-00151-9; and L. Tomini, S. Gürkan (2021). Contesting the EU, Contesting Democracy and Rule of Law in Europe. Conceptual Suggestions for Future Research, in: A. Lorenz, L. H. Anders (eds). Illiberal Trends and Anti-EU Politics in East Central Europe, Palgrave Macmillan, pp. 285–300. doi: 10.1007/978-3-030-54674-8\_12.

<sup>6</sup> N. Bermeo (2016). On Democratic Backsliding, in: Journal of democracy 27(1), pp. 5–19. doi: 10.1353/jod.2016.0012; L. Pech, K. L. Scheppele (2017). Illiberalism within: Rule of law backsliding in the EU, in: Cambridge Yearbook of European Legal Studies 19, pp. 3–47. doi: 10.1017/CEL.2017.9

<sup>7</sup> European Civic Forum and Civic Space Watch (2021) Civic space in the European rule of law framework; and European Civic Forum and Civic Space Watch (2022) Towards vibrant European civic and democratic space.

<sup>8</sup> A.E. Christopoulou (2022). Civil Society and Rule of Law Backsliding in the EU, in: European Public Law 28(2), pp. 245–278.

<sup>9</sup> E. Wnuk-Lipinski (2007). 'Civil Society and Democratization', in: The Oxford Handbook of Political Behavior. Oxford University Press, Political Science Series. doi: 10.1093/oxfordhb/9780199270125.003.003; Buyse, Why Attacks on Civic Space Matter; M. D. Kennedy, (2020). 'Afterword. Mobilizing Justice Across Hegemonies in Place: Critical Postcommunist Vernaculars, in: Postcommunism from Within. New York University Press, pp. 385–408. doi: 10.18574/9780814724255-016

<sup>10</sup> L. Way (2014). 'The Maidan and Beyond: Civil Society and Democratization', in: Journal of Democracy, 25(3), pp. 35–43. doi: 10.1353/jod.2014.0042

<sup>11</sup> D. Della Porta (2013). Social Movements, Power, and Democracy, in: The Future of Social Movement Research, University of Minnesota Press, p. 347. doi: 10.5749/j.ctt46npj4.24; J. Markoff (2015). Waves of democracy: Social movements and political change, in: Waves of Democracy: Social Movements and Political Change, second edn., pp. 1–223. doi: 10.4324/9781315631202; C. Albiston (2018). Democracy, civil society, and public interest law, in: Wisconsin Law Review 187, pp. 187–214.

<sup>12</sup> M. R. Anderson (2003). Access to justice and legal process: making legal institutions responsive to poor people in LDCs, IDS Working Paper issue 178.

everyday struggles.<sup>13</sup> Newer work thus aims at showing how civil society can play ‘an essential role in the struggle for the rule of law.’<sup>14</sup>

From this, we can understand civic resilience as resting on the notion that civil society “is meant to build solid foundations based on citizens’ participation in democratic processes, and to hold government and institutions accountable to both the voters’ fickle choices and the more stable rule of law anchored in constitutionalism.”<sup>15</sup> To put it differently, civil society ensures – and is a sign of – a society with pluralism, tolerance, and respect for minorities and dissenting views, which are paramount for any democratic system based on the rule of law,<sup>16</sup> both in terms of the values organisations and movements represent and the tasks they undertake. More crucially, organisations and movements can have a democratising effect on citizens through civic and political education and awareness raising. In addition to seeking legal changes through litigation cases and ensuring international pressure, civil society can build a strong demand for the rule of law from below. Hence, civic resilience in the form of trust and civic participation can make important contributions to advancing, fostering, and protecting a strong rule of law culture.<sup>17</sup> The following sections will explore how trust and civic participation contribute more concretely to a resilient rule of law.

## 2.1 Trust

Trust is important for the functioning of any society and covers, among other things, the belief in the ability and reliability of the democratic system and institutions as well as trust in each other, which is necessary for civic cooperation.<sup>18</sup> Trust therefore constitutes a form of social capital that affects confidence in those in power and society at large.<sup>19</sup> As it determines social interactions, levels of trust can have an indirect effect on the resilience of the rule of law.<sup>20</sup>

Trust is the foundation for engagement between people and their participation in the political system.<sup>21</sup> There exists a circular relationship between trust and the performance of the political system<sup>22</sup>: the more people trust in their ability to influence decisions that matter to them, the more they will actively engage with the system, for example by exercising their democratic right to vote. Greater engagement means higher (electoral) accountability and hence, higher performing incumbents and institutions.<sup>23</sup> It also generates “a better appreciation of the larger community among the public.”<sup>24</sup> The possibility to participate in itself is, however, not enough as people must also experience the system is responsive and inclusive. Inclusiveness improves the democratic

<sup>13</sup> A. Buyse (2021). The Rule of Law from Below – A Concept Under Development, in: *Utrecht Law Review* 17(2), pp. 1–7. doi: 10.36633/ULR.771.

<sup>14</sup> Ł. Bojarski (2021). Civil Society Organizations for and with the Courts and Judges. Struggle for the Rule of Law and Judicial Independence: The Case of Poland 1976-2020, in: *German Law Journal* 22, pp. 1344–1384 (pp. 1346). doi: 10.1017/glj.2021.72.

<sup>15</sup> M. Pardavi, B. Knoll-Tudor (2022). Europe Needs a Civil Society Strategy, *Verfassungsblog*, URL: <https://verfassungsblog.de/europe-needs-a-civil-society-strategy/> (last checked: 4.12.2022).

<sup>16</sup> M. Kíai (2013). UN General Assembly, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

<sup>17</sup> European Union Agency for Fundamental Rights (2022). Europe’s civil society: Still under pressure - Update 2022. Luxembourg. doi: 10.2811/351140.

<sup>18</sup> J. Perry (2021). Trust in public institutions: Trends and implications for economic security. United Nations. URL: <https://www.un.org/development/desa/dspd/2021/07/trust-public-institutions/> (last checked 14.12.2022)

<sup>19</sup> R. D. Putnam (1995). Bowling Alone: America’s Declining Social Capital, in: *Journal of Democracy* 6(1), pp. 65–78. doi: 10.1353/JOD.1995.0002; K.M. Sønderskov, P.T. Dinesen (2016). Trusting the State, Trusting Each Other? The Effect of Institutional Trust on Social Trust’, in: *Political Behavior* 38(1), pp. 179–202. doi: 10.1007/S11109-015-9322-8/TABLES/6.

<sup>20</sup> D. Acemoglu, J.A. Robinson (2013). Economics versus Politics: Pitfalls of Policy Advice, in: *Journal of Economic Perspectives* 27(2), pp. 173–92. doi: 10.1257/JEP.27.2.173.

<sup>21</sup> M. Baurmann, L. Mengyue (2017). Rule of law and codes of trust. Interdependencies between legal and social institutions: A case study of China, in: von Alemann et al. (eds), *The State of Law: Comparative Perspectives on the Rule of Law in Germany and Vietnam*, Düsseldorf University Press, pp. 275–307. doi: 10.1515/9783110720358-017.

<sup>22</sup> D. Acem S. Knack, P. Keefer (1997). Does Social Capital Have an Economic Payoff? A Cross-Country Investigation, in: *The Quarterly Journal of Economics* 112(4), pp. 1251–1288. doi: 10.1162/003355300555475; R. La Porta et al. (1998). Law and finance, in: *Journal of Political Economy* 106(6), pp. 1113–1155. doi: 10.1086/250042.

<sup>23</sup> C.S. King, K.M. Feltey, B.O. Susel (1998). The Question of Participation: Toward Authentic Public Participation in Public Administration, in: *Public Administration Review* 58(4), p. 326. doi: 10.2307/977561; R. Box (2014). *Citizen Governance: Leading American Communities into the 21st Century*, Citizen Governance: Leading American Communities into the 21st Century, SAGE Publications. doi: 10.4135/9781483328249.

<sup>24</sup> R.A. Irvin, J. Stansbury (2004). Citizen Participation in Decision Making: Is It Worth the Effort?, in: *Public Administration Review* 64(1), pp. 55–65 (p. 56). doi: 10.1111/J.1540-6210.2004.00346.X.

accountability of the system.<sup>25</sup> The political system flourishes when it is capable of demonstrating that it is trustworthy and possesses legitimate authority. In essence, if people experience that their institutions and those in power deliver tangible and just results, their trust in the system is strengthened,<sup>26</sup> and so is their resilience towards autocratic temptations. On the other hand, without trust, people are reluctant to contribute voluntarily to their society and engage with the political system.<sup>27</sup> This means that a high level of trust strengthens the resilience of the rule of law and, correspondingly, if there is a lack of trust, power-holders have a greater chance of exploiting the situation to erode the rule of law.

An increasing number of people take a passive approach to the well-being of their society and a general decline in the level of trust can be observed.<sup>28</sup> This is, for example, evident in the low voter turnout observed both in Europe but also globally.<sup>29</sup> How can the level of trust then be improved?

Firstly, building greater communication and recognisability between citizens and the authorities can make the system appear more responsive.<sup>30</sup> If citizens understand the functioning of the system, their trust into liberal democracy is expected to increase, strengthening the resilience of the rule of law.

Secondly, ensuring a well-functioning civil society as a space for citizen participation can improve accessibility

and inclusiveness across socio-economic groups. As Donatella Della Porta argues: “people that engage in associations are more likely [...] to pressure for better public performances.”<sup>31</sup> Both aspects are important for the resilience of the rule of law and should be a top priority for any member state.

## 2.2 Civic space

The civic space is the arena “in which people interact to hold the state accountable, shape public debate, participate in politics, and express their needs and opinions.”<sup>32</sup> The space is organised around civil-political liberties such as freedoms of association, peaceful assembly, and the right of expression.<sup>33</sup> Through civic participation, people can potentially wield tremendous power over authorities and their commitment to the rule of law. In the context of strengthening the resilience of the rule of law, it is important to understand the constraints under which civil society works, but also organisations’ and movements’ relentless efforts to maintain pressure from below.

In the last decade, civil society has in some European countries experienced increased oppression in the form of a shrinking of their civic space.<sup>34</sup> This has led not just to a smaller space available but also to a change in the values and the organisations and movements occupying

<sup>25</sup> G. J. Postema (2020). Trust, Distrust, and the Rule of Law, in: P.B. Miller and M. Harding (eds), *Fiduciaries and Trust: Ethics, Politics, Economics and Law*, Cambridge University Press, pp. 1043–1053. doi: 10.1111/1468-0297.00205.

<sup>26</sup> L. Wang, P. Gordon (2011). Trust and institutions: A multilevel analysis, in: *Journal of Socio-Economics* 40(5), pp. 583–593. doi: 10.1016/j.socsec.2011.04.015; F. van Dijk (2021). Perceptions of the Independence of Judges in Europe, Springer Nature. doi: 10.1007/978-3-030-63143-7.

<sup>27</sup> K.S. Cook, R. Hardin and M. Levi (2005). *Cooperation without trust?*, Russell Sage Foundation. C. Bjørnskov (2007). Determinants of generalized trust: A cross-country comparison, in: *Public Choice* 130(1), pp. 1–21. doi: 10.1007/S11127-006-9069-1.

<sup>28</sup> A. Wallace, J. Goodman-Delahunty (2021). Measuring Trust and Confidence in Courts, in: *International Journal for Court Administration* 12(3), pp. 1–17. doi: 10.36745/IJCA.418.

<sup>29</sup> F. Kostelka, A. Blais (2021). The Generational and Institutional Sources of the Global Decline in Voter Turnout, in: *World Politics* 73(4), pp. 629–667. doi: 10.1017/S0043887121000149.

<sup>30</sup> Bojarski, *Civil Society Organizations for and with the Courts and Judges*.

<sup>31</sup> D. Della Porta (2012). Critical Trust: Social Movements and Democracy in Times of Crisis, in: *Cambio. Rivista sulle Trasformazioni Sociali* 2(4), pp. 33–43 (p. 34). doi: 10.13128/CAMBIO-19432.

<sup>32</sup> L. Horner, A. Puddephatt (2011). *Democratic Space in Asia-Pacific: Challenges for Democratic Governance Assistance and Deepening Civic Engagement*, GSDRC, p. 5.

<sup>33</sup> A. Buyse (2018). Squeezing civic space: restrictions on civil society organizations and the linkages with human rights, in: *The Internal Journal of Human Rights* 22(8), pp. 966–988. doi: 10.1080/13642987.2018.1492916; C. Medina-Guce, A.M. Galindes (2018). Democratic Backsliding & Shrinking Civic Spaces: Problematizing the Strengthening of Philippine Democratic Institutions, iLEAD, URL: <http://ilead.ph/2018/02/26/democratic-backsliding-shrinking-civic-spaces-problematizing-the-strengthening-of-philippine-democratic-institutions/> (last checked: 17.8.2021).

<sup>34</sup> T. Carothers, S. Brechenmacher (2014). Closing Space - Democracy and Human Rights Support Under Fire; D.B. Rutzen (2015). Authoritarianism Goes Global (II): Civil Society Under Assault, in: *Journal of democracy* 26(4), pp. 28–39. doi: 10.1353/jod.2015.0071; J. Wolff, A.E. Poppe (2015). From Closing Space to Contested Spaces. Re-assessing Current Conflicts over International Civil Society Support, URL: <http://external-democracy-promotion.eu> (last checked: 18.8.2021); M. Glasius et al. (2020). Illiberal Norm Diffusion: How Do Governments Learn to Restrict Nongovernmental Organizations?, in: *International studies quarterly*, 64(2), pp. 453–468. doi: 10.1093/isq/sqaa019.

that space. What we are witnessing is a transformation of the civic topography, which allows organisations and movements loyal to the government to operate freely, while oppositional ones are increasingly paralysed. This is especially the case in Eastern Europe, where Stefánia Kapronczay goes so far as to claim that “a war is starting on dissent.”<sup>35</sup> These developments result from a deliberate strategy of governments to inhibit and restrict the right to freely organise and express views.<sup>36</sup> Often these actions are disguised in a language of promoting transparency and accountability in civil society.<sup>37</sup> The concrete methods used vary, including institutional, discursive, and practice-oriented means, all of which target civil society’s ability to operate, mobilise people, and facilitate activism.<sup>38</sup>

Against this background, the question remains if and how civic participation can be maintained, and furthermore, whether it can impact the resilience of the rule of law. As Antoine Buyse puts it: “The demise of a well-functioning civil society or even its deliberate destruction fatally weakens democracy.”<sup>39</sup> This also includes the ability to protect the rule of law. Although it has become more difficult for parts of civil society to operate, evidence from across Europe has nonetheless shown civil society’s continued engagement in rule of law issues.<sup>40</sup> An empowered civil society landscape can indirectly strengthen rule of law resilience. Moreover, concrete examples from countries such as Hungary, Poland, and

Slovakia have proven that even a civil society under constraints can play an important role.<sup>41</sup>

Firstly, sustaining an open civic space substantiates in itself the rule of law through the realisation of fundamental rights.<sup>42</sup> Building organisations and movements, organising activism, and facilitating a room for participation all contribute to this. Secondly, oversight and reporting activities on the compliance and implementation of laws, or lack hereof, can keep authorities accountable.<sup>43</sup> This represents civil society’s potential for constituting a non-institutional counterbalance by identifying and reporting “wrongful activities of public authorities and malfunctions of the political system.”<sup>44</sup> This includes providing information to the public and relevant international actors, as well as the method of naming and shaming. Hence, the more politically and socially active civil society is, the better equipped is the public to make informed voting-decisions and the more accountable for decision-makers. Thirdly, in case of breaches to the rule of law, civil society can impose pressure either through political mobilisation, such as demonstrations, or through legal means, such as seeking legal remedies at both the national and supranational level. High-profile cases of the Court of Justice of the European Union and the European Court of Human Rights have shown how civil society can play an important role in precedent-setting cases, either by direct litigation or by

<sup>35</sup> S. Kapronczay (2017). War on NGOs in Eastern Europe, *Sur* 14(26), p. 110.

<sup>36</sup> D. Rutzen, C. Shea (2006). The associational counter-revolution, in: *Alliance Magazine*, URL: <https://www.alliancemagazine.org/analysis/the-associational-counter-revolution/> (last checked: 7.12.2022).

<sup>37</sup> See similar arguments in D. Christensen, J.M. Weinstein (2013). Defunding dissent: Restrictions on aid to NGOs, in: *Journal of Democracy* 24(2). doi: 10.1353/jod.2013.0026; T. Carothers (2016). Closing Space for International Democracy and Human Rights Support, in: *Journal of human rights practice* 8(3), pp. 358–377. doi: 10.1093/jhuman/huw012.

<sup>38</sup> C. van der Borgh, C. Terwindt (2014). NGOs under Pressure in Partial Democracies. doi: 10.1057/9781137312846; R.H. Rohlfing (2022). Methods of shrinking civic space and its consequences - Actions undertaken as part of the democratic backsliding in Hungary and Poland, in: *Civil Society and the Fight Against Democratic Backsliding in Europe*, *Nyt Europa*.

<sup>39</sup> Buyse, *Why Attacks on Civic Space Matter*, p. 19.

<sup>40</sup> N. Giada (2020). How European Civil Society Is Pushing Back Against Democratic Erosion, *Carnegie Europe*, URL: <https://carnegieeurope.eu/2020/03/12/how-european-civil-society-is-pushing-back-against-democratic-erosion-pub-81254> (last checked: 2.5.2022); C.Y. Matthes (2021). Safeguarding Democracy and the Rule of Law by Civil Society Actors? The Case of Poland, in: *Illiberal Trends and Anti-EU Politics in East Central Europe*, pp. 263–281. doi: 10.1007/978-3-030-54674-8\_11.

<sup>41</sup> Z. Enyedi (2018). Democratic Backsliding and Academic Freedom in Hungary, in: *Perspectives on Politics* 16(4), pp. 1067–1074. doi: 10.1017/S1537592718002165; M. Avbelj, J.L. Čerňič (2020). The Current Crises of Human Rights Protection, the Rule of Law and Democracy in Slovenia, in: *The Impact of European Institutions on the Rule of Law and Democracy*. doi: 10.5040/9781509915071.CH-005; B. Grabowska-Moroz, O. Śniadach (2021). The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland, in: *Utrecht Law Review* 17(2), pp. 56–69. doi: 10.36633/ULR.673.

<sup>42</sup> P. Staszczyk (2019). *A legal analysis of NGOs and European civil society*, Kluwer Law International.

<sup>43</sup> J.A. Scholte (2011). *Building global democracy? Civil society and accountable global governance*, Cambridge University Press. doi: 10.1017/CBO9780511921476.

<sup>44</sup> Christopoulou, *Civil Society and Rule of Law Backsliding in the EU*, p. 255.

encouraging judges to ask preliminary questions.<sup>45</sup> Both courts are moreover important for activists who can no longer trust their national justice systems and are in need of an unbiased, fair trial before independent courts. Hence the more active civil society is in holding decision-makers accountable, the higher the pressure to abide by the rule of law. Fourthly, by engaging in the decision-making process, or pushing for engagement in it, civil society can help guarantee a transparent and participatory process. In representing diverse societal interests and providing expertise and information, civil society becomes important for the formulation of just laws and participatory opportunities, which lies at the centre of the rule of law.<sup>46</sup> Lastly, educational activities on the rule of law, directed at both institutional actors, such as judges and decision-makers, as well as broader society, help create awareness.<sup>47</sup> This, in turn, makes it difficult for those in power to contravene key elements of the rule of law without generating vocal criticism. Together, these reasons show the important role civic participation has for the rule of law resilience.

### 3. Conclusions

The RESILIO model understands the rule of law to depend on more than its institutional design. Trust and civic participation should therefore be understood as vital aspects of a resilient rule of law. Although the civic space in Europe has changed significantly over the last decade, and levels of trust are on a downwards trend, civil society continues to play a significant role for the resistance of the rule of law vis-à-vis regression. As Natacha Kazatchkine (2021), head of Internal EU Policy at the Open Society European Policy Institute, has said: “Civil society

organisations and actors are on the front lines of this crisis.”<sup>48</sup>

For civic resilience to continue to play an important role however, we need a greater understanding of how national civil societies under duress can, and should, be better supported by the EU. Civil societies in member states with serious rule of law problems are standing up to their governments to protect the rule of law. They do so by documenting violations and holding those in power accountable, by seeking to enforce supranational obligations and the values underlying the rule of law through means of collective actions on the streets and in the courts. Studies from Poland have demonstrated how such actions have slowed down the pace of the Polish government’s attack on the rule of law.<sup>49</sup> When the civic space is under attack, these forms of collective actions require support from both EU institutions and like-minded organisations in other member states. Only this way can we maintain what the Venice Commission calls an “enabling environment.”<sup>50</sup>

To summarise: the rule of law flourishes when citizens feel a collective responsibility for the advancement and protection of the concept. As William Galston wrote many years ago, “the viability of liberal society depends on its ability to engender a virtuous citizenry.”<sup>51</sup> Therefore, if the rule of law is to be upheld, we must work to ensure high levels of civic participation and trust, both in countries currently without any rule of law issues and in countries where such issues are present.

<sup>45</sup> European Civic Forum and Civic Space Watch, 2021.

<sup>46</sup> J. Mendes (2011). *Participation in EU Rule-Making: A Rights-Based Approach*, Oxford University Press. doi: 10.1093/ACPROF/OSO/9780199599769.001.0001; A. Alemanno (2020). *Levelling the EU participatory playing field: A legal and policy analysis of the Commission’s public consultations in light of the principle of political equality*, in: *European Law Journal* 26(1–2), pp. 114–135. doi: 10.1111/EULJ.12371.

<sup>47</sup> Bojarski, *Civil Society Organizations for and with the Courts and Judges*.

<sup>48</sup> N. Kazatchkine (2021). *Civil society’s crucial role in defending European democracy*, in: *The Parliament Magazine*, 7 December, URL: <https://www.theparliamentmagazine.eu/news/article/civil-societys-crucial-role-in-defending-european-democracy> (last checked: 4.12.2022).

<sup>49</sup> Bojarski, *Civil Society Organizations for and with the Courts and Judges*; C.Y. Matthes (2022). *Judges as activists: how Polish judges mobilise to defend the rule of law*, in: *East European Politics* 38(3), pp. 468–487. doi: 10.1080/21599165.2022.2092843.

<sup>50</sup> Venice Commission (no date). *Rule of Law*, URL: [https://www.venice.coe.int/WebForms/pages/?p=02\\_Rule\\_of\\_law&lang=EN](https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN) (last checked: 4 December 2022).

<sup>51</sup> W. Galston (1995). *Liberal Virtues and the Formation of Civil Character*, in M.A. Glendon and D. Blankenhorn (eds), *Seedbeds of Virtue: Sources of Competence, Character, and Citizenship in American Society*, Madison Books, pp. 35–60 (p. 38).

## About the author

**Regitze H. Røhlving-Fredriksen** is a PhD Fellow at the Department of Political Science (Centre for European Politics) and iCourts at the Faculty of Law at the University of Copenhagen, where she specializes in theoretical conceptualisation and empirical cases of democratic backsliding. She is also a Vice-Chair and board member of the Danish NGO *Nyt Europa*, which works on issues of democracy, climate, and civil society across Europe.

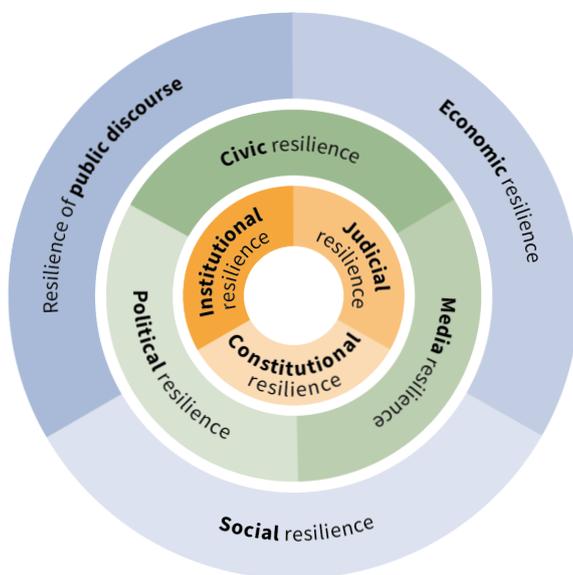
## About the project

[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 **civic 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.