



## Political resilience as enabler of rule of law resilience

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### 1. Introduction

Politics and the rule of law are frequently contrasted as quasi-opposites: whereas politics is understood as a struggle for power, which ultimately enables its exercise, the rule of law is typically defined as a set of constraints on power by subordinating its use to well-defined rules. Yet, as Martin Krygier reminds us, the rule of law is also an enabler of power, by channelling it into all the right places where it can be held accountable and where its deployment serves the many rather than the few.<sup>1</sup> Conversely, what is less well understood is the way in which power competition, or better yet, politics, can be an enabler of the rule of law.

This RESILIO snapshot examines political resilience: the electoral system and process and the party system which, under certain conditions, can be powerful enablers of the rule of law. Free and fair elections, based on sound legal

frameworks that yield representative results and accountable governments can foster public confidence in democracy. Competitive party systems that offer citizens a genuine choice, complete with internal party democracy and institutional and cultural features that encourage centripetal rather than centrifugal competition, can help guard against apathy and disappointment with the democratic process.

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

RESILIO defines political resilience as the ability of the political system to secure free and fair elections, as well as to offer a pluralistic representation of interests in power structures. One way to think about political resilience as an enabler of rule of law resilience is to conceptualise *institutional hostility* to the *agents* of rule of law backsliding, or what political science refers to as anti-

<sup>1</sup> M. Krygier (2016) *Tempering Power*, in: M. Adams et al. (eds.), *Bridging idealism and realism in constitutionalism and Rule of Law*, Cambridge University Press.

political establishment (APE) parties.<sup>2</sup> While this is not unproblematic – after all, not all APEs pursue the demise of the rule of law – APEs generally advocate the supremacy of the people’s will. We can thus adopt resilience to them as a stand-in for rule of law resilience.<sup>3</sup>

What follows below is an overview of the lessons for political resilience that can be gleaned from the existing political science literature and democratic practice.

## 2.1 Electoral system and process

It is unsurprising that as consolidated democracies, EU member states hold periodic elections. But their quality is another matter: countries such as Hungary and Poland fail to meet important international standards for democratic elections that arise from international public law documents such as the UDHR and the ICCPR, but also regional instruments like the ECHR and political commitments of the OSCE Copenhagen Document. They also do not align with or contravene aspects of ‘soft’ tools such as the CoE/Venice Commission’s Code of Good Practice in Electoral Matters. Both, these standards and political science literature, can help guide our search for resilient election systems and processes.<sup>4</sup>

### 2.1.1 Electoral system

The extent to which the electoral system can make a polity more resilient to rule of law backsliding is necessarily contested.<sup>5</sup> One question that has received a lot of

attention in the study of populism is whether features of electoral systems can facilitate or conversely inhibit the rise of radical elements.

We have known since the 1950s that majoritarian systems impede the rise of small parties and thus tend towards two-party legislatures. We can deduce that majoritarianism is less likely to see anti-systemic challengers enter parliament. But as we have seen in Hungary, spoilers from within may be able to use the plurality component of a mixed system to ensure considerable majorities and ultimately also longevity in office.<sup>6</sup> Moreover, as we have also witnessed in the UK and US, plurality systems’ relative resistance to the emergence of new players may accommodate the radical drift inside mainstream parties.

Because they limit fragmentation and tend to produce clear single-party majorities, majoritarian systems are thought to lead to more effective governance.<sup>7</sup> Single party majorities are often preferred by voters, in part because they make governments more accountable, thus fuelling the virtuous circle of voter confidence in democracy. They also establish deeper bonds between electors and the elected, which can result in more responsive MPs. Importantly, majoritarian systems are thought to be less likely to exacerbate conflict, pushing contestants to appeal to the population at large instead. At the same time, pork barrel politics – spending that benefits narrow groups – is more prevalent in systems that focus on candidates rather than parties. Research also

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<sup>2</sup> This RESILIO snapshot uses a more comprehensive notion of an APE, first introduced by Andreas Schedler and refined by Abedi, as an actor that simultaneously: (1) ‘challenges the status quo in terms of major policy issues and political system issues’; (2) ‘perceives itself as a challenger to the parties that make up the political establishment’; and (3) ‘asserts that there exists a fundamental divide between the political establishment and the people.’ A. Abedi (2004) *Anti-Political Establishment Parties: A Comparative Analysis*, Routledge, p. 11.

<sup>3</sup> As Cas Mudde and Cristobal Rovira Kaltwasser remind us, because APEs advocate the unconstrained supremacy of the will of the people and reject ‘the notions of pluralism and, therefore, minority rights as well as the “institutional guarantees” that should protect them,’ these forces are at odds with the liberal component of democracy. However, *anti* is not always anti-rule of law. This brief follows Sartori’s conceptualization of the term ‘system’ and its negation ‘anti-system’ as ‘neutral’ and ‘relative,’ meaning that ‘anti-system’ is not a synonym for ‘anti-democratic,’ ‘outside the system,’ or ‘revolutionary.’ See G. Sartori (1976) *Parties and Party Systems: A Framework for Analysis*, Cambridge University Press, and G. Sartori (1982). *Teoria dei Partiti e Caso Italiano*, Milan; and C. Mudde, C. Rovira Kaltwasser (2017) *Populism: A Very Short Introduction*, Oxford University Press.

<sup>4</sup> While the EU provides international election assistance and engages in observation in third countries, the monitoring of member states’ elections is left to the OSCE. All OSCE participating states are subject to ‘peer-review’ monitoring by the organisation’s Office for Democratic Institutions and Human Rights (ODIHR).

<sup>5</sup> According to Sartori, electoral systems affect party systems, not parties *per se*. G. Sartori (2007). *The Party Effects of Electoral Systems*, in P. Mair, R. Hazan (eds.), *Parties, Elections and Cleavages*, Frank Cass, pp. 13-28.

<sup>6</sup> This may be paradoxical in light of recent findings that show that radical elements tend to consistently obtain approximately twice the number of seats in PR as in majoritarian systems.

<sup>7</sup> As we have seen in case of the UK during the past decade, the stability argument does not always hold.

shows that single-mandate district elections are easier to manipulate and are thus more prone to fraud.

Proportional representation (PR, or two-ballot plurality) elections generally result in multi-party parliaments, often with a considerably wider ideological dispersion. As such, PR is not only more likely to facilitate the rise of radical parties, but in systems where extremist forces are present, they can be expected to have a higher number of seats than in majoritarian systems. PR systems are potentially also more likely to foster corrupt political rent-seeking because they give more power to parties and weaken the link between performing well in office and re-election.

Conversely, PR systems can be better at producing desirable public goods and stronger, more institutionalised parties. They foster greater policy congruence between legislators and the electorate – even if they may reduce legislative effort compared to majoritarian systems – and tend to encourage higher turnout, hence promoting greater buy-in into the political system.<sup>8</sup> PR systems are better at reflecting the pluralism of our societies, with women and minorities more likely to be elected through PR ballots. Because they are more likely to bring non-elite individuals into the legislature, they are also thought to enhance social representation. However, this presumes some form of intraparty democracy, where non-elite individuals can rise to the rank of candidates.<sup>9</sup> These features are expected to facilitate representation, thus lowering dissatisfaction and anti-system sentiments; yet whether they offset the aforementioned risks is an open question.

Apart from the electoral system, election law is a crucial prerequisite for sound elections. Beside guarantees of

access to freedoms, authoritative bodies such as the CoE/Venice Commission identify stability as a key component of frameworks conducive to democratic processes. Aspects (such as harmonisation) that improve the quality of the law are important, but amendments should be introduced well in advance of the vote so as to avoid perceptions of political expediency.<sup>10</sup>

Reforms should respect the principles of democratic parliamentarism, with consultation and agreement involving a wide range of stakeholders within and without the legislature. The law should regulate all key steps of the process, limiting the room for interpretation. Any gaps should be filled with secondary legislation or regulations, including measures taken by the election administration.

When it comes to election management bodies (EMBs), there are two models: one drawn from the judiciary (or the ministries of interior or justice) and another appointed from parliamentary groups. Although the political cross-check system is preferred where mutual trust is low, ultimately, both types of EMBs can be misused if ill will prevails. Sudden changes to the rules or the institution itself can augur challenges to a sound process. For instance, although the appointment procedure remained unchanged in Hungary, Fidesz packed the Hungarian election commission with loyalists, thanks to its overwhelming majority.

In Poland, the system was amended in 2019, replacing the trusted body drawn from the judiciary with political appointees. Although the new commission has not shown obvious tell-tale signs of bias, there are concerns whether it can dependably serve as a neutral arbiter tomorrow.

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<sup>8</sup> Data from local elections in Spain has shown that the ballot format may matter as well, with open list elections drawing a greater turnout than closed lists. The CoE recommended that parliaments of its member countries study the effects of electoral systems and take the necessary steps to stimulate citizens' participation in the political process, in terms of turnout and the proportion of women and minorities among others. Some research shows that the percentage of support for APEs is negatively correlated with the level of electoral turnout, traditionally used as an indicator of the healthy functioning of democracy. See P. Zagórski et al. (2021) *Preaching in the Desert or Leading to the Promised Land? The Effects of Anti-Political-Establishment Parties and Party System Fragmentation on Electoral Turnout*, manuscript prepared for a special issue of West European Politics.

<sup>9</sup> Finally, we should also examine, first the existence and second the quality of internal party democracy as a factor that can serve to enable political resilience in the face of a rule of law challenge. This has long been recognised in the academic literature, but this understanding is not well institutionalised on the practice side. Although some member states codify the requirement that certain political party functions be democratised, internal party democracy is not yet a strong international norm and remains confined to 'soft tools' such as the joint Council of Europe and the ODIHR Guidelines on Political Party Regulation. We should expect the relationship between the level of parties' democratic constitution and espousal of anti-systemic programmes to be negative. Indeed, where the rule of law is most profoundly challenged, i.e. Hungary and Poland, the 'culprit' political parties are tightly controlled by their leaders, who determine the composition of party lists or who stands for office.

<sup>10</sup> According to the CoE/Venice Commission, in order to foster electoral stability, rules should not change during the election year.

## 2.1.2 Electoral process

In the liberal democracy triad of democracy, rule of law, and human rights, we tend to think of elections as political contests and associate them with the former. But they are rule of law exercises *par excellence*. Without legality, legal certainty, equal treatment, and the impartial adjudication of grievances, there can be no democratic elections. Nor can there be a free process without access to fundamental freedoms for both candidates and voters, thus facilitating informed choice. We examine some of the key safeguards in detail below.

The election cycle can be divided into three parts. The pre-election period is the wider context within which elections take place, and starts immediately after the conclusion of the previous ballot. Elections held in an environment where the rule of law is violated or access to fundamental freedoms is restricted cannot meet a genuineness test.<sup>11</sup>

The second part of the cycle is the election period proper. Regardless whether the system is active or passive, voter registers that are inclusive, current, and complete allow for broad citizen participation. The delimitation of constituencies should be concluded by a body of experts rather than politicians, and reviewed at regular intervals to ensure adherence to the principle of voter equality. Similarly, although minimal barriers to entry are permissible, candidate registration should be as inclusive as possible.

Several principles make for free and fair campaigns. Stakeholders must be able to access fundamental freedoms without undue constraints, especially the right to expression and assembly. Campaigns must respect a level playing field: misuse of state resources or abuse of office must be sanctioned. Further, campaigns must not

feature undue enticements, whether diffuse forms of clientelism or more direct forms of vote-buying. Pressure, intimidation, and threats, or conversely, fear of actual or potential retribution, have no place in democratic campaigns. Pluralistic media play an important role in informing the public about elections. Public and private outlets must be neutral in terms of coverage amount and tone.<sup>12</sup>

International standards generally only demand that political and campaign financing be transparent. But political science tells us that income and expenditure limits, as well as some restrictions on sources and purposes, can safeguard the process.<sup>13</sup> Third-party or political-issue campaigning – the favoured loopholes in many jurisdictions today – should be regulated. Reporting requirements must be in place to allow for verification of compliance and to inform voters. Finally, oversight bodies must be neutral and effective.

Election day proceedings should be clearly spelled out in the law or regulations. Every step should be enumerated, starting with the opening of polling stations, through voting, counting, and the tabulation of results.<sup>14</sup> All stages of the process – not just limited to election day – should be open to observation by party representatives, civil society, and international monitors.<sup>15</sup> Deficits in election observation – both in the law and practice -- are surprisingly common in the EU, especially compared to neighbouring partners to the east (such as Ukraine and Georgia) and the south (such as Tunisia).<sup>16</sup>

Finally, there is the post-election environment. In case of complaints, all stakeholders should have access to effective remedy, which invariably depends on impartial EMBs and independent judiciaries. Violators should be subject to proportionate and dissuasive sanctions.

<sup>11</sup> As prescribed by a number of international instruments, including the UDHR or the ICCPR.

<sup>12</sup> Public broadcasters must be held to a particularly high standards of neutrality and editorial independence.

<sup>13</sup> Although findings vary in Western Europe, recent research has shown that the rise of APES is less prevalent in East Central European jurisdictions where parties are at least partly funded by the state. Nonetheless, it should be noted that most EU Member States have public financing, including the worst Rule of Law performers, Hungary and Poland.

<sup>14</sup> The use of technology at any stage of an election has declined because of decreasing in public confidence. Where it is employed, its use should be transparent and subject to verification, preferably through a 'paper trail.'

<sup>15</sup> The latter is a function of a commitment that OSCE participating states undertook in the 1990 OSCE Copenhagen Document.

<sup>16</sup> EU hopefuls such as Ukraine and Georgia have over the years developed state of the art domestic observation capacities. The OSCE's ODIHR observes elections with full-format missions across Eastern Europe and Eurasia. The EU and several US-based NGOs are active in observing the ballot in Northern (and other parts of) Africa.

Although international standards focus on successful candidates' instalment in office, political science tells us about the importance of proportionate allocation of seats. As we have seen in Hungary, the disproportionality that was further embellished by Fidesz's 2013 constitutional reform facilitated the emergence of a dominant party system.<sup>17</sup> Mechanisms that give rise to dominant systems nullify the threat of electoral punishment and correlate negatively with liberal democracy.

## 2.2 Party system

Party systems enjoy considerable scholarly attention, with an ever-increasing number of studies focusing on their relationship to the emergence of APEs. Most research has shown that the quality of liberal democracy deteriorates as APEs establish themselves in party systems.

Traditionally, scholars examined systems in terms of the number of parties and their polarisation. Although quantitative research across a large number of cases shows its limited correlation with the rise of APEs, increased fragmentation is thought to have played an important role in some instances.<sup>18</sup> There is more robust evidence that fragmentation correlates positively with polarisation, which has reached particularly high levels during the 2010s.<sup>19</sup> Polarisation is associated with inimical opposition, centrifugal competition, and the 'politics of outbidding,' causing high levels of systemic instability. These findings are important because they suggest that the negative effects of polarisation trump gains, such as corrective opportunities in malfunctioning democracies.<sup>20</sup>

Recent scholarly work has focused on the degree of institutionalisation of both parties and party systems, with

data showing that the latter is more important for the quality of democracy. Although institutionalisation is expected to consolidate democracies, it is viewed as a necessary but not sufficient condition when it comes to democracy's survival. The last two decades have seen a considerable degree of de-institutionalisation of European party systems. While there is some agreement on the detrimental role of populist polarisation, parties and party systems in East Central Europe tend to be less institutionalised. Interestingly, while the pair have become the *enfant terribles* of rule of law backsliding in the EU, Hungary sports the most and Poland the least institutionalised party system among the *Visegrád* Four countries.

Scholarship on the structure of competition has shown that 'closed' systems that display formalised and predictable patterns of interaction among parties are generally more immune to APE ascendance. Much of this work has focused on patterns of alteration in government, degrees of innovation, or persistence in the process of its formation, and the range of actors that gain access to it.<sup>21</sup> Although closed systems are thought to enable the rule of law more aptly, open systems can foster responsiveness to voter demands and inhibit cartelisation or the hollowing-out of parties.

The last two decades of significant social change, namely globalisation and secularisation, precipitated the decline of the traditional cleavages of class and religion. Both of these processes affect all European democracies, with some regional variation.

In their place, other cleavage structures emerged, including the 'post-communist' divide in East Central Europe, but also 'transnational,' 'demarcation,' or 'post-

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<sup>17</sup> Fidesz has been able to consistently obtain a constitutional majority of seats on results that hover around but are sometimes under 50 percent of the vote. Despite its use of a PR system, Poland too shows a relatively high but less drastic disproportionality that is in part a function of political fragmentation on the centre-left.

<sup>18</sup> In 2015, PiS won 38% of the vote but received a significant bonus in the number of seats because of the smaller number of parties that made it into parliament (all three centre-left formations failed to reach the 5% threshold). Some recent research indicates that fragmentation appears to have lesser impact on the quality of democracy than previously thought. See V. Valentim, E. Dinas (2020) Does Party-System Fragmentation Affect the Quality of Democracy?, in: *British Journal of Political Science*.

<sup>19</sup> Of some significance is the format, or the number of parties within a system that realistically compete for power, with systems of up to four 'leading' parties showing greatest resilience.

<sup>20</sup> As Cas Mudde and Cristobal Rovira Kaltwasser emphasize: 'depending on its electoral power and the contexts in which it arises, populism can work as *either* a threat or a corrective for democracy.' C. Mudde, C. Rovira Kaltwasser (2017) *Populism: A Very Short Introduction*, Oxford University Press, p. 79, italics in the original.

<sup>21</sup> See P. Mair (1998) *Party System Change: Approaches and Interpretations*, Oxford University Press; F. Casal Bértoa, Z. Enyedi (2021) *Party System Closure Party Alliances, Government Alternatives, and Democracy in Europe*, Oxford University Press.

materialist' cleavages across the EU.<sup>22</sup> Their rise is said to have decreased party identification among voters and undercut electoral stability. Given the increasing availability of voter data and the growth of political technologist industry, parties have become much better at pitching distinct messages to different segments of the electorate. Segmentation has allowed political parties to transcend and cross-cut traditional cleavages.<sup>23</sup> The effects of this can be seen in Hungary and Poland, where the electoral bases of Fidesz and PiS are generally confronted with expected culturalist messages, while the less partisan voters are swayed with the programmatic but also clientelist appeal of (direct) welfare benefits.<sup>24</sup> This potent mix has paid off with unprecedented levels of support at the ballot.

The sociological changes cited above, coupled with traditional political parties' growing convergence at the centre, have opened up space at the spectrum's fringes. Some authors contend that radical vote is a response to the 'hollowing-out' of political parties rather than a sign of disaffection with democracy.<sup>25</sup> Others show that parties' deep enmeshment with the state – their dependence on state funding, over-regulation, and networks of patronage – has allowed them to neglect the voters.<sup>26</sup> This 'cartelisation' has been met with a supply of new formations at the margins.

Political science identifies two types of strategies *vis-à-vis* the APEs: inclusion and exclusion. The former suggests co-optation or accommodation. The latter normally prescribes demonisation and discrimination through *cordon sanitaire* strategies, for instance an agreement not to enter into government with the challengers, as well as

the 'nuclear option' of a party ban. Results have been mixed. The 'boomerang' effect has meant that excluded formations benefit from a 'martyr' bonus, while inclusion can further radicalize the APEs. Unsurprisingly, what most scholars have advocated is regeneration, in other words, an ideational renewal of political parties, complete with greater policy innovation and concerted engagement with voters.

### 3. Conclusions

Two findings and one recommendation emerge from the above. First, rather than focus on individual parts of electoral institutions and processes, or party systems, we must extricate and view the composite picture to more fully understand liberal democracy's vulnerabilities towards APEs and rule of law backsliding.

Second, we should be vigilant and wary of some institutional reforms, especially sudden amendments, and in particular those that may appear to be driven by partisan rather than *volonté générale* considerations. This is especially important where APEs hold power and present a more systemic threat to the rule of law.

The good news is that voters are not looking to part ways with democracy. We know that smart election systems, solid electoral legal frameworks, sound processes that meet international standards, and party systems that encompass societal pluralism may not necessarily shield us from actors that challenge the rule of law. But they can become robust enablers of its resilience. None of these factors can ultimately shape the number or kinds of

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<sup>22</sup> The 'transnational' and 'demarcation' cleavages denote conflicting approaches to transnational integration in political, cultural and economic terms, as well as differing attitudes towards national sovereignty and identity in a globalising world. The 'post-materialist' cleave refers to value change in relatively wealthy societies where concerns about value such as environment displace more 'bread-and-butter' socio-economic considerations.

<sup>23</sup> Research shows that the higher the level of cross-cuttingness of cleavages, the lower the level of institutionalisation of the party system. See F. Casal Bértoa (2014) Party systems and cleavage structures revisited: A sociological explanation of party system institutionalization in East Central Europe, in *Party Politics*, Vol 20, 1, pp. 16-36.

<sup>24</sup> In Hungary, electoral clientelism is tied to the Workfare programme offering stable jobs, and in Poland to the 500+ child benefit scheme.

<sup>25</sup> See L. Cianetti, J. Dawson, S. Hanley (2018) Rethinking "democratic backsliding" in Central and Eastern Europe – looking beyond Hungary and Poland, in *East European Politics*, 34:3, pp. 243-256; G. Pop-Eleches (2010) 'Throwing out the Bums: Protest Voting and Unorthodox Parties After Communism' in *World Politics* 62 (2): 221-260; A seminal study by Greskovits found no systemic relationship between backsliding and hollowing-out in East Central Europe. See B. Greskovits (2015) The Hollowing and Backsliding of Democracy in East Central Europe, in *Global Policy*, 6, pp. 28-37.

<sup>26</sup> See F. Casal Bértoa, J. Rama (2020) Party decline or social transformation? Economic, institutional and sociological change and the rise of anti-political-establishment parties in Western Europe, in *European Political Science Review*, 12(4), pp. 503-523; I. van Biezen, P. Kopecký (2014) 'The cartel party and the state', *Party Politics* 20(2), 170-182; P. Mair (2013) *Ruling the Void: The Hollowing of Western Democracy*, Verso Books.

parties that form in our polities, but they can provide a strong basis for reinventing the formations that represent citizens at the seat of legislative or executive power. As we know from Hungary and Poland, where it is radicalized mainstream parties that have become agents of an anti-systemic challenge, ultimately, it is the parties themselves that are the best enablers of rule of law resilience. In the name of the rule of law, our resilience efforts should be directed at them as much as the institutional contexts within which they operate.

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<sup>27</sup> See L. Bustikova, P. Guasti (2017) 'The Illiberal Turn or Swerve in Central Europe?', in *Politics and Governance*, vol 5, No. 4, pp 166-176.

# resilio

Resilience observatory  
on the rule of law in Europe

## About the author

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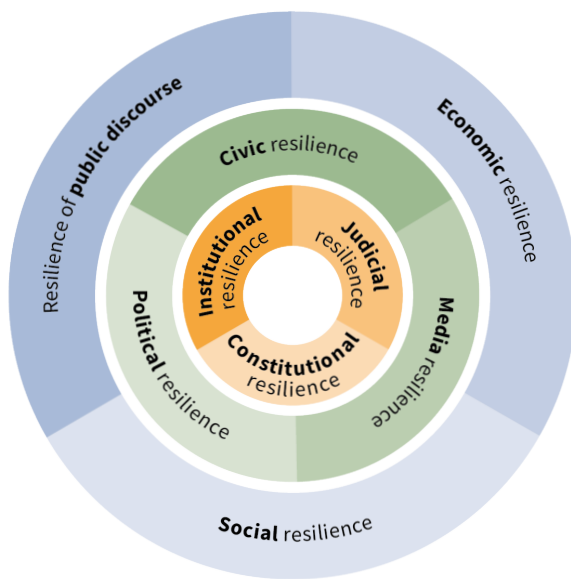
## About the project

**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 **political 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/>