Crises and their impact on rule of law resilience

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1. Introduction

At first glance, climate change, the COVID-19 pandemic, and the Russian war of aggression against Ukraine seem like phenomena unrelated to the rule of law crisis. However, as "crises" they share many important features and are, to a certain degree, also interconnected. Some experts today argue that what we are experiencing is a "polycrisis" in which multiple crises interact with each other or have causal linkages.[1] Others use the term "permacrisis" to describe a state of affairs in which one challenge is "seamlessly followed by the next."[2]

The RESILIO project understands crises as external factors affecting the resilience of the rule of law. While RESILIO's model also identifies other factors that enable rule of law resilience, crises can compromise each of the existing factors and thereby decrease their ability to protect the rule of law.[3]

In order to understand these effects, this snapshot will first define what is meant by "crisis." It will then show the general impact a crisis can have on the rule of law and analyse how crises can be instrumentalised by political actors.

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[1] Scott Janzwood and Thomas Homer-Dixon (2022). What is a global polycrisis? And how is it different from a systemic risk?, Discussion Paper 2022-4, Cascade Institute, pp. 1-11, here p. 2, URL: https://cascadeinstitute.org/technical-paper/what-is-a-global-polycrisis/ (last checked: 24 November, 2022).

[2] Fabian Zuleeg et al. (2021). Europe in the age of permacrisis, European Policy Centre commentary, URL: https://www.epc.eu/en/Publications/Europe-in-the-age-of-permacrisis~3c8a0c (last checked: 24 November, 2022).

[3] For an overview of the RESILIO model on the resilience of the rule of law, see Institut für Europäische Politik (2022): RESILIO model in a nutshell, URL: https://iep-berlin.de/en/projects/future-of-european-integration/resilio/nut-model/ (last checked: 10 February, 2023).

2. Conceptualising crises and their relation to the rule of law

Crises are phases that pose a threat to the structure, functionality or existence of a social system – and therefore also to the rule of law.[4] Crises can be triggered by episodic events – such as a sudden fall in prices or the break-up of a governing coalition – but often originate in a society's inability or unwillingness to adapt to long-term upheavals and changing circumstances.[5] These two factors often go hand in hand. For example, the German energy crisis resulted from sanctions against Russia in the aftermath of the invasion of Ukraine but is also closely interrelated with Germany's unwillingness to become independent of Russian gas prior to the invasion.[6]

But objective prerequisites for a crisis, such as a disruptive event or the lack of adaption to changing circumstances, are not sufficient for the existence of a crisis. Both also need to be publicly perceived as a crisis.[7]

The public perception of what constitutes a crisis may, however, vary significantly – particularly in democracies that aim to shape decision-making collectively and deliberatively while, at the same time, include a plurality of opinions. What for one party poses a threat to the basic principles of the democratic procedure may be downplayed or ignored by another party. Crises do not exist in a vacuum but are part of a social process in which events and changes in the structure of society are mediated and narrated. The objective and subjective dimensions of a crisis are so closely intertwined that it hardly makes sense to distinguish between them.[8] The existence of a crisis depends on both the objective existence of a problem and the public perception of that problem. Both can be determined by indicators such as opinion polls about fears or perceived threats.

Based on these conceptualisations, RESILIO uses the following definition: Crises are phases during which objectively existing problems, which result from episodic events and insufficient adaption to changing circumstances, are publicly perceived and mediated as negatively disrupting the status quo in a decisive manner. Empirical examples include economic shocks, environmental disasters, military confrontations, or health emergencies such as pandemics.

3. The interrelationship of crises and the rule of law

Once a crisis exists, it has three main features that illustrate its potentially negative impact on the rule of law. First, a crisis poses a threat to the basic structure of a system or its fundamental norms and is characterised by uncertainty of outcomes. Second, a crisis prompts an urgency to act, and third, it can have depoliticising effects.[9] In addition to these impacts, which usually result from the nature of crises themselves, crisis situations also allow for intentional instrumentalisation. This kind of malign instrumentalisation of crises can be one of the most dangerous consequences for the rule of law.

3.1 Impact of crises

Crises fundamentally threaten the basic structure of a system and its fundamental norms. They reveal systemic deficiencies and lead to fear and public uncertainty which, if managed unsuccessfully, can spur protest. For example, the Chinese government's initially efficient handling of the COVID-19 pandemic in 2020 led some people to wonder whether authoritarian states were better at dealing with the pandemic than liberal democracies.[10]

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[4] Joris Steg (2020). Was heißt eigentlich Krise?, in: Soziologie 4/2020, pp. 423-435, here p. 432.

[5] Frank Bösch et al. (2020). Für eine reflexive Krisenforschung – zur Einführung, in: Frank Bösch/Nicole Deitelhoff/Stefan Kroll (Ed.) (2020). Handbuch Krisenforschung, Springer VS, p. 12.

[6] Henrik Böhme (2022): Germany needs a new business model, DW commentary, 4.7.2022; Constanze Stelzenmüller (2022): Testimony: Putin's war and European energy security: A German perspective on decoupling from Russian fossil fuels, Brookings Institution, 7 June, 2022. URL: https://www.brookings.edu/testimonies/putins-war-and-european-energy-security-a-german-perspective-on-decoupling-from-russian-fossil-fuels/.

[7] 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.

[8] Bösch et al. Für eine reflexive Krisenforschung, p. 8.

[9] Arjen Boin et al. (2005). The Politics of Crisis Management: Public Leadership Under Pressure, Cambridge University Press, p. 2.

[10] Rachel Kleinfeld (2020). Do Authoritarian or Democratic Countries Handle Pandemics Better?, Carnegie commentary, 31 March, 2020, URL: https://carnegieendowment.org/2020/03/31/do-authoritarian-or-democratic-countries-handle-pandemics-better-pub-81404 (last checked: 24 November, 2022).

During crises, the need for action often does not allow for a careful consideration of any possible effects and repercussions.[11] They create an urgency to act that puts pressure on the executive. Crises are therefore "*die Stunde der Exekutive*" (the hour of the executive). Government officials are the first national point of reference for dealing with crises by means of crisis management. The executive can react by bundling power in its own hands and cutting short decision-making processes in order to react more quickly and efficiently. It has the power, for example, to pass new emergency laws, raise money, or mobilise the army in order to minimise the impact of a crisis.[12] This is no easy task in liberal democracies: Elected leaders and public officials are constrained by a delicate political, legal, and moral order in which deeply embedded values can prevent the use of the most effective tools to deal with the crisis. During the pandemic, governments in liberal democracies were faced with the challenge of needing to weigh citizens' fundamental rights to freely associate against their wellbeing and health. They had to act quickly and decisively, but thereby sometimes disregarded checks and balances by side-lining or circumventing parliaments. For example, the French public health state of emergency during the COVID-19 pandemic gave the executive "carte blanche" to massively restrict rights and liberties with almost no checks and balances.[13] And the Slovak government made frequent use of the shortened legislative process during the COVID-19 pandemic, which was criticised by the Rule of Law Index of the World Justice Project.[14] In a functioning democracy, however, these measures can only be time-limited and are subject to independent judicial review and legislative scrutiny.

Crises also have the potential to depoliticise public decision-making. Framing a crisis as an existential threat that must be averted at all costs can create situations in which alternative opinions or solutions to crisis management are deemed illegitimate, irrational, or immoral.[15] An excessive technocratisation that outsources decision-making to experts because "there is no alternative" (TINA) may be psychologically understandable, given the severity of a crisis. While scientifically-sound expertise is indispensable in a complex modern society, excessive devolution of decision-making is problematic from the point of view of democratic theory. Any policy will always create winners and losers and is therefore never merely a rational-technical instrument but belongs in the realm of the political.[16] Transparency, accountability, and responsibility are therefore fundamental features of democratic decision-making. Voters require knowledge about the factual reasons on which the decision-making is based. They need to know what alternatives could be pursued, and which decision-makers are responsible for any particular policy in order to decide whether to reward or punish them in the next election. Frustration about TINA crisis management can quickly increase the approval rates of extremist challenger parties that pose serious threats to the rule of law, as shown during the eurozone debt crisis and the COVID-19 pandemic. Therefore, if not addressed adequately by decision-makers, badly managed crises can unintentionally impact the rule of law.

3.2 Instrumentalisation of crises

In addition to these "natural" effects of crises, crises can also intentionally be exploited, manipulated, or instrumentalised by governments, oppositional forces, or external agents.

Crises disrupt societal routines and expectations, and generate framing contests. They open spaces for talking and thinking about political issues in radically new ways, proposing policy innovations, and gaining popularity or attacking opponents.[17] In a framing contest, different sides of a debate try to ensure that their framing or narrative becomes the publicly dominant one when it comes to explaining the nature of the crisis. These

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[11] Bösch et al. Für eine reflexive Krisenforschung, p. 6.

[12] Boin et al. The Politics of Crisis Management, p. 8.

[13] Marie-Laure Basilien-Gainche (2021): French Response to COVID-19 Crisis: Rolling into the Deep, 18 March, 2021, URL: https://verfassungsblog.de/french-response-to-covid-19-crisis-rolling-into-the-deep/ (last checked: 3 March, 2023).

[14] Lucia Mokrá (2022). Slowakei, in: Werner Weidenfeld and Wolfgang Wessels (eds.) (2022). Jahrbuch der Europäischen Integration 2022, Nomos.

[15] Bösch et al. Für eine reflexive Krisenforschung, p. 6.

[16] Chantal Mouffe (2005). On the Political, Routledge.

[17] Boin et al. The Politics of Crisis Management, p. 82.

framings explain the roots and causes of the crisis, suggest the best possible solutions for dealing with it, and identify who to blame for its outbreak. For example, at the beginning of the pandemic in 2020, former US President Donald Trump framed COVID-19 as the "China virus."[18]

There are three strategies that political actors can use in a framing contest.[19] First, they can deny responsibility by arguing that the respective events are nothing more than unfortunate incidents for which nobody is to blame. Business as usual should therefore continue. Second, political actors can frame the crisis as a threat to the collective good embodied in the status quo. In order to defend this status quo, blame should be diffused. And third, a crisis can be narrated as an opportunity to correct systemic errors and remove status quo policies and actors.

By trying to make sense of a crisis, political actors can try to implement changes or policies that would have been unthinkable under normal circumstances. Crises therefore create "room for manipulation."[20] Political actors can actively use crises to "strengthen their positions and authority, to attract or deflect public attention, to get rid of old policies or sow the seeds for new ones."[21] Whichever crisis narrative emerges from the framing contest as dominant decides if, how, and which possibly radical changes can be implemented in policy fields that were otherwise stable and resistant to change.[22]

This is especially dangerous for the rule of law if governments instrumentalise and exploit a crisis. When resorting to the introduction of emergency laws or states of emergency, governments can easily undermine established democratic procedures and practices, and implement policies unrelated to the crisis. In Italy, for example, decrees to fight the pandemic issued in the name of the president of the Council of Ministers severely restricted personal liberties. According to the country's constitution, those are only limitable by law.[23] Crises are not only sometimes used by some governments to circumvent parliaments or committees, but also to censor alternative views. Provisions from emergency laws can find their way into constitutions and thereby permanently change the status quo ante. It is no accident that authoritarian leaders frequently use crises to legitimise their otherwise unacceptable actions.[24] This is best illustrated by the government of Hungarian Prime Minister Viktor Orbán, which used several crises to consolidate its own power. It justified the adoption of a new constitution with reference to the financial crisis in 2008, cracked down on civil society organisations during the crisis of the European Union's asylum system, and used the COVID-19 pandemic to give Orbán "unlimited emergency powers" by amending the constitution towards "full-out authoritarianism."[25]

Opposition forces can also have incentives to instrumentalise crises to their own advantage, with potential repercussions for the rule of law. By artificially perpetuating or amplifying a crisis without offering any sensible solutions, they can attempt to weaken the incumbent government, which might actually be in the process of effectively dealing with the crisis. Recently, authoritarian-populist parties have often deliberately used fake news or disinformation to create a prolonged sense of crisis that undermines social cohesion and trust in political institutions, public officials, and decision-makers. Thus, populist actors in particular perform crises

[18] Robin Kurilla (2021). "Kung Flu" – The Dynamics of Fear, Popular Culture, and Authenticity in the Anatomy of Populist Communication, in: Frontiers in communication, 6, pp. 1-19, here p. 3.

[19] Boin et al. The Politics of Crisis Management, p. 84.

[20] Boin et al. The Crisis Approach, p. 25.

[21] Boin et al. The Politics of Crisis Management, pp. 82-83.

[22] Ibid., p. 83.

[23] Arianna Vedaschi (2021). COVID-19 and Emergency Powers in Western European Democracies: Trends and Issues, 5 May, 2021, URL: https://verfassungsblog.de/covid-19-and-emergency-powers-in-western-european-democracies-trends-and-issues/ (last checked: 24 November, 2022).

[24] Bösch et al. Für eine reflexive Krisenforschung, p. 6.

[25] Kriszta Kovács (2021). Hungary and the Pandemic: A Pretext for Expanding Power, 11 March, 2021, URL: https://verfassungsblog.de/hungary-and-the-pandemic-a-pretext-for-expanding-power/ (last checked: 3 March, 2023).

to juxtapose "the people" against a dangerous other.[26] Such attacks on democratic institutions can lead to turmoil and riots, such as the storming of the Reichstag building in Berlin by far-right radicals in 2020.[27]

Additionally, attacks on the credibility of scientific expertise are used as a tactic to polarise public debate and dispute the legitimacy of decisions and the governments making them. During the pandemic, such parties framed governments' crisis management as excessive and undemocratic, and downplayed the seriousness of the disease or the usefulness of mask mandates. Similarly, they fueled fear of vaccinations by employing disinformation practices.

Furthermore, crises may also be instrumentalised by external actors, for example foreign governments, terrorist organisations, or political activists. In a similar way to domestic opposition forces, external actors can try to perpetuate – or even generate – crises through fake news or disinformation. For example, authorities in the EU are increasingly aware of Kremlin misinformation tactics via social media.[28] Such practices attempt to heighten the polarisation of public debate, which can result in a diminishing sense of community and mutual tolerance – key factors for a healthy environment that contributes to the protection of the rule of law.

4. Crises and resilience

As a reaction to the polycrisis that rattled the EU, the bloc has turned towards resilience as a new governance approach. This approach is embedded in a new "ontology of crisis" acknowledging the limits of predictability and controllability vis-à-vis crises.[29] According to this view, resilience is a crucial competence of a state to handle the intended and unintended consequences of crises. 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 as well as effectively defend itself against attempted assaults or crises. Sources of resilience lie not only in constitutional texts and institutions, but can also be facilitated by social, political, cultural, and economic circumstances.[30]

The RESILIO model identifies nine such resilience factors that are clustered along three dimensions: the systemic dimension, the subsidiary dimension, and the contextual dimension. Crises can challenge each of these factors or dimensions. The resilience factors of the contextual dimension (resilience of public discourse, economic resilience, social resilience) are most directly affected. Crises create emergency situations that almost always have economic implications and create social tensions as well as a more polarised public discourse. The resilience factors of the systemic dimension (institutional resilience, judicial resilience, constitutional resilience) and the subsidiary dimension (civic resilience, media resilience, political resilience) are equally affected by crises. However, here the degree depends more on whether the crisis is instrumentalised. If so, these two dimensions can be heavily challenged because crises often lead to an increase in executive power and can therefore be used to side-line or undermine institutions that hold the government accountable (parliaments, courts, the media, NGOs).

Crises and resilience are therefore two sides of the same coin. The less resilient a political system, the more vulnerable it is towards crises. The more crises affect a political system, the weaker its resilience becomes over time. However, the relation can also be mutually reinforcing. Crises disrupt the status quo, reveal weaknesses, and open paths for policy options that were previously not on the table. For that reason, some experts argue that there is something "deeply optimistic" about them: Their existence supposes that "the threat in

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[26] Benjamin Moffitt (2014). How to Perform Crisis: A Model for Understanding the Key Role of Crisis in Contemporary Populism, in: Government and Opposition, 2, pp. 189-217.

[27] Dirk Peitz (2020). Sie brauchten nur dieses eine Foto, 31 August, 2023, URL: https://www.zeit.de/kultur/2020-08/sturm-reichstagsgebaeude-querdenken-demonstration-rechtsextremisten-berlin (last checked: 3 March, 2023).

[28] Mark Scott and Ilya Gridneff (2022). Putin's propaganda machine hammers EU while Brussels sleeps, 22 July, 2022, in: Politico. URL: https://www.politico.eu/article/russia-disinformation-africa-europe-sergey-lavrov/.

[29] Regine Paul and Christof Roos (2019). Towards a new ontology of crisis? Resilience in EU migration governance, in: European Security, 4, pp. 393-412.

[30] Institut für Europäische Politik. The RESILIO model in a nutshell.

question may still be averted if people, communities, institutions, leaders or systems rise to the challenge."[31]

In other words, crises also present opportunities and could even strengthen the conditions that make the rule of law resilient over the medium and long term, as defined by the RESILIO project. For example, if Germany manages to deal with its energy crisis successfully, this could increase trust in institutions and the rule of law (political resilience), foster economic prosperity (economic resilience), make people less susceptible to Kremlin propaganda (resilient discourse), and decrease polarisation (social resilience). Lastly, the European Union's "failing forward"[32] can serve as an example of how crises can threaten the resilience factors of the rule of law but also increase resilience in the long term – if managed successfully.

5. Conclusion

In sum, crises effect every single factor that makes the rule of law resilient. These effects are mostly negative, i.e., they weaken the respective resilience factor. In some instances, crises can also strengthen resilience.

Constitutional, judicial, and institutional resilience factors as well as civic, media, and political resilience factors are affected if crises are instrumentalised by governments to rule by decree, weaken checks and balances or restrict civil society organisations or the media to obstruct their function as watchdogs for good governance and legality. The social effects of crises can lead to increasing polarisation, fading trust in democracy and its institutions, and a more aggressive public debate. Lastly, the economic impact of crises can lead to less prosperity and trigger conflicts over redistribution and polarisation. In short: crises have the potential to weaken all the factors that make the rule of law resilient.

Thus, resilience and crisis are two sides of the same coin. To protect the rule of law against opportunistic power grabs and the possibly negative impacts of crises, its institutional, political, and socio-economic components must be enforced and strengthened.

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[31] Boin et al. The Crisis Approach, p. 24.

[32] Erik Jones et al. (2021). Failing forward? Crises and patterns of European integration, in: Journal of European Public Policy (10/2021), pp. 1519-1536.

![resilio — Resilience observatory on the rule of law in Europe](logo)

About the authors

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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
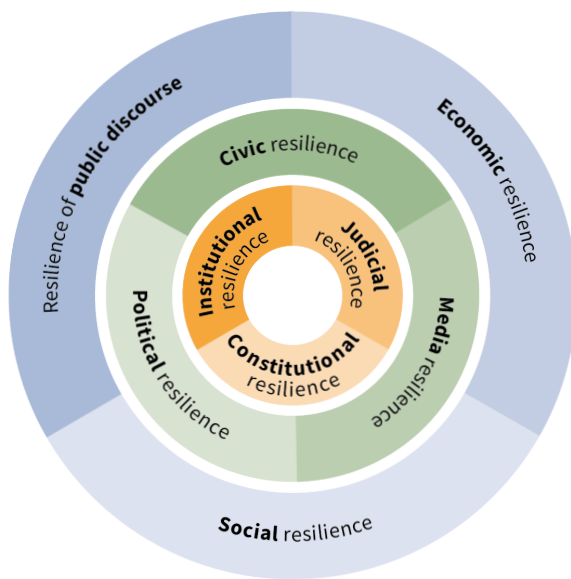
RESILIO offers a multi-layered model of the rule of law resilience. Systemic dimension (orange) reflects upon the resilience of the legal setup; subsidiary dimension (green) looks at the phenomena and tendencies present in societies as possible facilitators; and contextual dimension (blue) analyses the 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 **crises** as a horizontal factor affecting the resilience of the rule of law.