

# RESILIO Country Report Germany



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## RESILIO Country Report – Germany

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November 2023

### 1. Introduction

Similar to its European neighbours, German rule of law resilience has been put to the test by the various crises of recent years. Notwithstanding the so-called migration crisis of 2015, COVID-19 or, more recently, the Russian full-scale war of aggression against Ukraine, Germany has maintained a relatively strong rule of law resilience, which can be explained in part by its legal-political structure.

Following reunification in 1990, the Federal Republic of Germany is governed by the *Basic Law*, the constitution originally adopted on May 23, 1949<sup>1</sup> and originally applicable only to West Germany. The country's multilevel and federal structure, its political and legal system, as well as its strong constitutional underpinning thus mirror Germany's history, and more specifically enshrines the rule of law as a direct response to Nazi dictatorship.

The rule of law is essentially based upon Article 1 of the Basic Law, stating that '[h]uman dignity shall be inviolable'<sup>2</sup> and that '[t]o respect and protect it shall be the duty of all state authority.'<sup>3</sup> Unlike the constitution of the Weimar Republic, the Basic Law thus conceptualises human rights in a positive manner by resting state authority as well as that of state institutions upon the protection of human rights. Beyond that, Article 79(3) Basic Law, delineating the requirements for how the constitution may be altered, provides lasting protection of fundamental human rights against any kind of legal action possibly infringing upon, suspending, or abolishing

human rights, even under duress such as a state of emergency.<sup>4</sup>

Structurally, the Basic Law establishes a parliamentary system of government, characterised by a diffusion of power through an elaborate federal structure comprising sixteen federal states (*Länder*).<sup>5</sup> As head of state, the federal president is vested with largely ceremonial duties and a reserve capacity to act only under constitutionally defined circumstances.<sup>6</sup> The two-chamber parliament consists of the *Bundestag* (the federal assembly) and the *Bundesrat* (federal council). For the *Bundestag*, nationwide elections using a mixed-proportional system are held every four years; in case of the *Bundesrat*, membership is made up of federal states' representatives.<sup>7</sup> The federal government is led by the chancellor, who is elected by secret ballot by a majority of members in the *Bundestag* and selects all other federal cabinet ministers.<sup>8</sup>

As the third branch of government alongside the legislative and executive, the Basic Law establishes an independent judiciary with a pivotal role for the Federal Constitutional Court (FCC), whose members are jointly elected by both *Bundestag* and *Bundesrat* for a non-renewable 12-year tenure.<sup>9</sup> Widely regarded as a constitutional guardian, the Federal Constitutional Court authoritatively rules on the constitutionality of (federal) laws and state action, thus taking on a core responsibility for maintaining rule of law standards and resilience. While

the German legal system remains rooted in Roman law, basic due process rights enshrined in the Basic Law are rather similar to U.S. constitutional law.

Notwithstanding considerable external shocks and challenges in recent years, the overall stability of the legal-political system and its inherent ramifications for rule of law resilience are reflected in Germany's overall performance in relevant international indices. In its Freedom in the World 2023 ranking, Freedom House designates Germany as 'free' with an overall score of 94/100 (with political liberties scoring at 39/40 and civil liberties at 55/60);<sup>10</sup> its Global Freedom Score 2023 likewise categorises Germany as 'free' with the identical score of 94/100.<sup>11</sup> The World Justice Project's Rule of Law Index 2023 places Germany at sixth position worldwide, with an overall score of 0.83/1.0.<sup>12</sup> These findings are also corroborated regarding rule of law resilience, as within the RESILIO model, amongst EU member states, Germany claims fourth position (overall score: 7.5).

In the following, Germany rule of law resilience will be further assessed within the dimensions of judicial, political, and economic resilience.

## **2. Analysis of the country case along the RESILIO model**

### **2.1 Most important systemic factor: judicial resilience**

Historically, Germany's judicial system belongs in the civil law tradition and is predominantly based on a comprehensive compendium of statutes. In both criminal as well as administrative law, the German legal system applies an inquisitorial approach, in which judges take a rather active role when investigating the facts of a given case. Overall, the organisation and standing of courts is traditionally strong, with almost all federal as well as state actions being subjected to rather extensive judicial review. The judicial system as such is established and governed directly in Article 92 of the Basic Law, which emphasises that 'the judicial power shall be vested in judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the *Länder* [federal states].'<sup>13</sup>

While the Basic Law establishes the judiciary, the law that is effectively applied within the courts stems from different, in part quite extensive, codifications with the court system adjudicating on public law (administrative

law in the form of civil-government litigation as well as litigation between single governmental bodies or organs), criminal law, and private law. While the German judiciary is not subordinated to the legislature, the Basic Law directly invests supreme judicial authority in the Federal Constitutional Court as well as in other federal and state courts on different hierarchical levels. Governed by primary legislation regulating their principal organisation, the courts are characterised by being specialist, regional, and hierarchically integrated at the federal level. Accordingly, there exist five basic types of courts (ordinary courts adjudicating in criminal and most civil law cases, administrative law courts, tax law courts, labour law courts, and social courts), including constitutional law courts on both the federal and state level, which focus on judicial review and constitutional interpretation. The main difference between the Federal Constitutional Court and the Federal Court of Justice (*Bundesgerichtshof*) is that the former may only be called in cases involving a constitutional question, for example the alleged violation of fundamental rights in a criminal case, while the latter may be appealed to as an appellate court. Correspondingly, only the Federal Constitutional Court may declare an Act of Parliament unconstitutional and thus invalid.

Besides, each of the federal states maintains its own constitutional court, all of which are administratively independent and financially autonomous from other (state) governmental structures. The Federal Constitutional Court is established as the country's supreme constitutional judicial organ directly under the Basic Law. The FCC's core function is to engage in judicial review, allowing it to declare any federal or state legislation ultimately unconstitutional and thus ineffective and inapplicable. Beyond that, the FCC directs selected additional powers, thereby contributing to the widespread public perception that the institution enjoys the most respect of all public institutions in the country and also – among expert circles – as probably the most interventionist and powerful domestic judicial body worldwide. However, unlike other highest courts, the FCC is not construed as an integral part of the judicial or appellate process – with the sole exception of cases concerning questions of constitutional or public international law – and therefore does not function as a regular court of appeal from either lower or the highest federal courts. Rather, the FCC's jurisdiction focusses on constitutional issues as well as the compliance of governmental bodies with applicable constitutional

provisions. In particular, constitutional amendments as well as legislative changes passed by the legislature are thus subject to its judicial review, particularly in relation to compatibility with the Basic Law's most foundational principles (the 'eternity clause' of Article 79(3) Basic Law), comprising human dignity, unalienable human rights, democracy republicanism, social responsibility, federalism as well as the separation of powers. The FCC's standing practice of intensive constitutional control at a comparatively high frequency on the one hand, as well as the abiding continuity in applying judicial restraint and political revisions on the other have thus contributed to the Court's prominent as a uniquely strong defender of the constitution in the post-World War II era, thus underlining its pivotal role in modern German democracy.

Another key category for judicial resilience according to the RESILIO approach is judicial independence. As such, judicial independence is not conceived of as a privilege granted by the state, but rather a clear obligation towards the state. In Germany, judicial independence is thus grounded in the Basic Law, clearly stated in Article 97(1) Basic Law that 'judges shall be independent and subject only to the law.'<sup>14</sup> This provision, however, comprises two different types of independence: firstly, it pertains to objective independence, thus safeguarding judges' neutrality, meaning that they may not be influenced by either colleagues or superiors (or other parties) in their decisions. Secondly, this provision stipulates the personal independence of judges who, as lifetime appointees, may only be relocated or dismissed in accordance with strictly defined preconditions. These two combined facets of judicial independence are envisaged to protect judges from any arbitrary or undue influence or interference.

Notwithstanding the above, it is the selection system by which judges are called into office that has repeatedly been questioned from a rule of law perspective. In principle, the appointment of civil servants – including judges – on all levels of government including the FCC is based upon merit. However, these appointments are regularly characterised by strong political considerations and thus by political interferences. At the state level, the Councils of the Judiciary (*Richterwahlausschüsse*, in which state parliamentarians regularly hold the majority of seats) decide on the appointment and promotion of judges up to the level of higher regional courts (*Oberlandesgerichts*). For judges serving at federal courts, including the FCC, elections are jointly conducted by *Bundestag* and *Bundesrat*, with candidates

nominated by different political factions. It has thus repeatedly been argued that these selection mechanisms allow political representatives to have considerable influence in how the (federal) judiciary is composed. Because political influence – if not interference – is inherent in the system, said mechanisms might need to be revised.

On a more informal basis, the Basic Law calls for (future) judges to possess certain character qualities in addition to their respective legal qualifications, including the obligation to apply the law even in cases where due application may conflict with their personal convictions or interpretation of the law. However, given that judges are themselves part of the judicial system, the system also provides for mechanisms to monitor and evaluate their activities. Despite their broadly conceived independence, judges are also subject to internal administrative supervision to assess their work and any complaints. Accordingly, judges may also be prosecuted for perversion of justice in case they incorrectly and unduly interpret and apply the law. Ultimately, judges may be reassigned or even removed from the bench, either as a result of disciplinary proceedings or impeachment. With the exception of ongoing proceedings, judges may recuse themselves, for example due to partiality or apparent bias, provided they see no way to arrive at a fair judgement. Similarly, plaintiffs as well as defendants may file for a judge's recusal, provided said conditions are met. Notwithstanding these internal control mechanisms, the German judiciary remains a partly closed system, the exception being regular reviews of German domestic judicial decisions by the European Court of Justice or the European Court of Human Rights.

## **2.2. Most important subsidiary factor: political resilience**

Germany's (federal) electoral law establishes a system of personalised proportional representation, in which each voter is given two votes: the first for an individual constituency candidate, the second for a party-list in a particular federal state determining the share of representation in the *Bundestag*. The effective composition of the *Bundestag* is thus determined directly by the people every four years. The Basic Law stipulates that its members are elected in 'general, direct, free, equal, and secret elections.'<sup>15</sup> Accordingly, 'general' refers to eligible German citizens aged over 18 who are able to vote. Elections are further conceived as 'direct,' given that

citizens elect their representatives directly and without any form of mediation or delegation to an electoral college. 'Free' further denotes that voters may not experience any kind of pressure or intimidation, whereas 'equal' refers to the principle that each vote carries the same electoral weight with respect to the composition of the *Bundestag*. Finally, 'secret' implies that each voter must be able to vote without others knowing which party or candidate the voter has chosen to support.

Accordingly, one half of members of the *Bundestag* are elected directly from 299 constituencies, while the other half is elected on the basis of party lists in each federal state, thus determining the relative strength of parties represented in the *Bundestag*. Through this mechanism, at least 598 members of parliament are sent to the *Bundestag* whose size, under certain circumstances, may increase during the process of allocating seats. Parliamentary seats are thus proportionally distributed among the parties that gained more than five percent of the second vote or at least three constituency seats, in which case the five percent threshold is suspended.

In compliance with an FCC decision of 2013, Germany's electoral system combines the first-past-the-post election of constituency candidates with proportional representation on the basis of votes for parties' state lists. Following this decision, the method by which votes are effectively converted into parliamentary seats was also reformed, comprising two different stages including two different means of calculation. Moreover, the electoral system was further amended by the current coalition government, which faced severe backlash from parliamentary opposition including a constitutional complaint lodged at the FCC. At the time of writing, the Sainte-Laguë/Schepers allocation method is applied to convert electoral votes into parliamentary seats, using a two-stage process with each step including two calculations: firstly, the number of seats to be allocated to each federal state is calculated, based on the proportion of population in each state. Subsequently, seats in each federal state are allocated to its respective party lists, based on the proportion of second votes received by each party. The minimum number of seats for each party at the federal level is then determined by calculating – for each state party list – the number of constituency seats won on the basis of first votes, as well as the number of seats to which a party is entitled on the basis of second votes. The higher of these two figures then determines the respective party's minimum number of seats in that respective

federal state. Adding together the minimum number of seats to which a party is entitled in all federal states thus produces a total number representing this party's guaranteed minimum number of seats in the *Bundestag*.

In addition, it may be necessary to increase the size of the *Bundestag* under certain circumstances in order to ensure that each party receives its guaranteed minimum number of seats once these have been allocated according to the Sainte-Laguë/Schepers method. Subsequently, it must then be ensured that seats are distributed to parties according to its nation-wide share of second votes. Hence, additional balance seats are created to ensure that the distribution of seats reflects parties' overall share of the second vote and that no party receives fewer than its guaranteed minimum number of seats. Balance seats are thus a direct means as to ensure that each party requires roughly the same number of second votes per parliamentary seat. Once the number of seats each party is entitled to receive across the country has been determined, these are allocated to parties' respective federal states' lists. Each federal state list must thus be allocated at least as many seats as the number of constituencies that a party has won in the respective federal state. The results of *Bundestag* elections thus determine the options available for forming a (coalition) government on the federal level.

The Basic Law grants constitutional status to political parties participating in the formation of the peoples' political will according to Article 21 Basic Law.<sup>16</sup> Political parties may thus freely be established, while their internal organisation must be oriented towards fundamental democratic principles. Political parties thus play a foundational role in democracy and popular sovereignty in Germany. Accordingly, the Federal Constitutional Court has consistently described political parties as 'integrative components of the constitutional structure and constitutionally organised political life.'<sup>17</sup> In addition, the German Political Parties Act (*Parteiengesetz*)<sup>18</sup> provides a correspondent statutory definition of political parties, conceptualised as associations of citizens which, on a continuing basis or for a prolonged period of time, aim at influencing the development of informed political opinion, on the federal and/or state level.<sup>19</sup> The activities of political parties are thus further directed at participating in the representation of the people in parliamentary assemblies (i.e. the *Bundestag* or a state parliament). This overall objective is thus evinced by their overall standing, further determined by the size and

strength of their organisation, their membership structure, as well as their presence and visibility in the public sphere.<sup>20</sup> This definition therefore excludes certain types of associations from attaining party status, including political associations in which a majority of members or members on respective (executive) committees are foreigners, political associations whose registered seat and/or executive office is located outside the territorial scope of application of the Political Parties Act, municipal parties, or other kinds of (municipal) associations of voters.

Due to the constitutional status of political parties, the threshold for such an association to lose this legally privileged status is rather high. Hence, the status as a political party is lost when the association has not participated with its own nominated candidates in either a federal or state election for six years, or when it has not submitted a statement of accounts to the president of the *Bundestag* for six years. In addition, the Basic Law foresees that under certain conditions, a party may be banned by the FCC when it actively strives to abolish the free democratic basis order as established by the Basic Law.

In essence, political parties are tasked with participating in and organising the formation of citizens' political will, and thus have considerable influence in shaping political opinions. In mass democracies such as Germany, political participation is effectively enabled by and through the work of political parties, given that citizens can hardly influence political decision-making processes on their own. Accordingly, political parties in Germany have both a vehicle and mediating function between societal interests on one hand, and the state as a complex and organising structure on the other. As an intermediary, political parties therefore structure the process of forming and translating the peoples' will into tangible political action, as guaranteed by the Basic Law which accounts for this specific function of political parties by comprehensively defining their tasks and status. Competing for the electorate's votes in parliamentary elections, political parties thus gear their activities towards participating in elections as successfully as possible. In the conflict between the attempt to raise their profile and mobilise as much support as possible, their overall achievements in terms of integration of political will is twofold: they reconcile converging interests and opinions at the same time as participating in public debate and providing agendas to be voted upon.

### **2.3. Most important contextual factor: economic resilience**

Principally, Germany is a highly developed social market economy, the largest economy in Europe<sup>21</sup> and the fourth largest by nominal GDP in the world.<sup>22</sup> Due to a volatile currency exchange rate, the country's GDP measured in US dollars may fluctuate considerably. As a founding member of the Eurozone, Germany accounted for roughly 30% of the Euro area's economic strength in recent years.<sup>23</sup> In 2016, Germany recorded the world's highest trade surplus, totalling €252.9 billion, which made it the biggest capital exporter globally.<sup>24</sup> Since then, it has remained one of the world's largest exporters. In Germany, the service sector contributes around 69% of total GDP, with industry accounting for roughly 30%, and agriculture for about 1%.<sup>25</sup> Overall, exports accounted for 47% of national input in 2021, with the top export products being vehicles, chemical goods, electronic products, electrical equipment, pharmaceuticals, transport equipment, basic metals, food products, as well as rubber and plastic.<sup>26</sup> The German economy thus constitutes the largest manufacturing economy in Europe, making it less volatile to external shocks or financial turndowns.

Notwithstanding its economic strength and overall wealth, Germany has faced entrenched poverty and increasing income inequalities in recent years, including the fact that the 45 richest households in Germany own as much wealth as the bottom half of the population<sup>27</sup> with the wealthiest 5 percent owning more than 50 percent of the country's entire wealth in 2014.<sup>28</sup> While income inequality is addressed by both taxation and monetary transfers, gains from economic growth have tended to benefit higher income earners.<sup>29</sup>

Employment in Germany currently stands at a record high of 45.8 million, with the unemployment rate at a record low of 1.43 million. However, nearly half of all employed people work in atypical work forms, meaning they work part-time or on fixed-term contracts, as subcontractors or freelancers, or are marginally remunerated. Two-thirds of this group are women. Employment is not a guaranteed escape from poverty, as one third of people in Germany who live in poverty are in fact employed, with 40% of them working full-time. Regressive tax reforms over the last 20 years have tangibly reduced the redistributive impact of government policy, while basic social security benefits,

which are paid to around 7.6 million people, have proven to be barely sufficient to keep households above the poverty line. At present, 15.8% of the population live at or below the poverty line.

Recent legislation has therefore aimed at reducing the gender gap in both payment as well as political participation. However, most women still earn around 20% less than their male counterparts, while almost 50% of employed women – compared to only 12% of men – work part-time, especially due to a lack of available support schemes and care infrastructure. Thus, 90% of single parents are single mothers, on average earning 71.5% less than male single parents. Among other factors, this contributes to the fact that the pensions of retired women are 46% less than those of their male counterparts.

In the private sector, federal law requires that 30% of large companies' boards be filled with women, while in larger companies, women and men must be paid equally. However, payment structures need only be disclosed in organisations with over 200 employees, and for positions that can be compared to the average salary of at least six colleagues of the opposite sex holding a similar position; this is something of a theoretical construct, particularly with a view towards higher positions.

### **3. Impact of crises on the rule of law: financing and implementing societal transformation**

On November 15, 2023, the Federal Constitutional Court held that the 'Second Supplementary Budget Act 2021' (*Zweites Nachtragshaushaltsgesetz 2021*) was incompatible with Arts 109(3), 110(2), and 115(2) of the Basic Law and therefore void.<sup>30</sup>

A total of 197 members of the *Bundestag*'s CDU/CSU parliamentary group thus challenged the Second Supplementary Budget Act 2021, which had retroactively amended the both the Budget Act (*Haushaltsgesetz*) and thus the 2021 federal budget. The Act hence provided for the transfer of a general authorisation to borrow up to 60 billion Euros – which had previously been authorized in response to the COVID-19 pandemic, but were not required during the 2021 fiscal year – to the so-called Energy and Climate Fund, a legally dependent special-purpose fund of the Federation to be used, for example, for climate-related transformation, to be used in

subsequent fiscal years. This transfer of funds was executed retroactively in February 2022 for the then-concluded 2021 fiscal year. Since then, the Energy and Climate Fund has been renamed the Climate and Transformation Fund (*Klima- und Transformationsfonds – ETF*).

In the assessment of the Federal Constitutional Court, the Second Supplementary Budget Act 2021 did, however, not satisfy the principal constitutional requirements for emergency borrowing. The Senate's ruling was thus based on three core considerations, each of which were individually sufficient to declare the Act void: firstly, the legislator failed to sufficiently demonstrate the necessary factual connection between a required emergency and the crisis management measures taken in response thereof. Secondly, decoupling the declaration of a (fiscal) emergency pursuant to Art 115(2) Sixth Sentence of the Basic Law from the actual use of the borrowing authorisations was incompatible with the constitutional principle of a yearly-based budgeting (*Jährlichkeit*) and annuality (*Jährigkeit*). Hence, the de facto unlimited use of emergency borrowing authorisations in subsequent fiscal years without counting them towards the constitutionally warranted 'debt brake' rule (*Schuldenbremse*) for said years, thus instead counting them as debt for the 2021 fiscal year was therefore impermissible. Thirdly, the adoption of the Second Supplementary Budget Act 2021 after the 2021 fiscal year had already ended violated the principle of Art 110(2) First Sentence of the Basic Law, stipulating that the annual budget must be determined before the respective fiscal year commences (*Vorherigkeitsgebot*).

The Court's decision implied that the overall volume of the Climate and Transformation Fund had to be reduced by 60 billion Euros.<sup>30</sup> To the extent that the state had already entered into obligations that it could no longer service as a result of the respective reductions, the legislator was called upon to compensate through other means.

The ruling will most likely have far-reaching ramifications for Germany's future rule of law development. It can affect further development and societal transformation in the wake of challenges deriving from climate change, migration, or geopolitical alterations. Especially, should the ruling's overall argument also apply to other funds outside the annual budget, for example the Economic Stabilization Fund *Wirtschaftsstabilisierungsfonds – WSF*, which has been used to mitigate the rise of energy

costs following Russia's aggression against Ukraine. It remains unclear for the moment how such far-reaching and costly transformative processes shall be sustainably financed in the future, thus potentially intensifying distribution struggles over available financial means, increasing societal polarization, and hence ultimately challenge (institutional) rule of law resilience. It is the more important with a view towards a series of elections coming up in various Eastern German states, currently predicting the far-right AfD with more than 30 per cent of the popular vote.<sup>31</sup>

including the fallout from Russia's 2022 full-scale invasion of Ukraine. While structural changes have been initiated, including diversification of the country's energy supply, economic inequalities have sharpened in recent years, thus posing considerable political polarisation.

#### 4. Conclusion

As already indicated by the above-mentioned indices, the rule of law in Germany has proven resilient in recent years, despite being challenged by a state of poly- and permacrisis. The judiciary has remained independent and duly enforces individual as well as collective rights as provided in statutory law as well as the constitution. Before the courts, legal matters are treated in accordance with international rule of law standards while respecting due process provisions. The constitution as well as statutory law guarantee equality before the law and prohibit discrimination based on origin, gender, religion or belief, disability, age, or sexual orientation. Notwithstanding that the nomination and selection procedures for judges can be characterised, at least in some cases, by strong political considerations and involvement, this has not tangibly jeopardised judicial independence, autonomy, and authority.

Political parties do not face structural restrictions in their registration or operations, although under the currently applicable electoral laws, a five per cent threshold clause remains in place. While the constitution allows for the banning of political parties in principle, procedural barriers remain high in that a political party must pose a threat to democracy for a ban to be legal and constitutional. While the rise of the far-right AfD party now represented in both the *Bundestag* as well as most state parliaments indicates growing public support for populist and even extremist political positions, the democratic party spectrum has – thus far – managed to oppose and rule out any form of formal collaboration or coalitions involving this party.

Given its economic performance, Germany has also proven its resilience amid a series of external shocks,



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### About the author

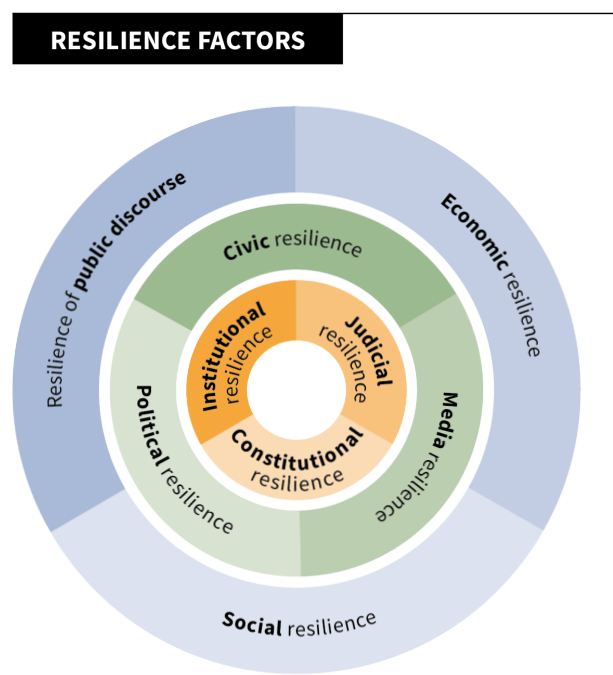
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### About the project

**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 **RESILIO Country Report series**. It is a collection of compact analyses that assess the source of rule of law resilience in each EU member state by examining the most prominent resilience factors, using the analytical framework of the RESILIO model.



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

## resilio

Resilience observatory  
on the rule of law in Europe

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

For more information, visit the project website: [www.iep-berlin.de/en/projects/future-of-european-integration/resilio/](http://www.iep-berlin.de/en/projects/future-of-european-integration/resilio/)

