

# RESILIO

## Country Report

### Luxembourg



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### 1. Introduction

Luxembourg can be characterized as one of the *bons élèves* – model pupils – regarding the rule of law, both within the EU and globally. In 2022, Luxembourg was ranked 8<sup>th</sup> out of 140 countries under the World Justice Project Rule of Law Index (and 8<sup>th</sup> out of 139 in 2021).<sup>1</sup>

Luxembourg also received an overall positive assessment by the European Commission in the 2023 Rule of Law Report,<sup>2</sup> according to which the country's 'justice system has maintained its very high level of perceived judicial independence among the general public and continues to operate efficiently.' Recent reforms at the constitutional level include establishing a Council for the judiciary and strengthening the independence of the Prosecutor's office, while reforms at the legislative level including making legal aid more accessible. Regarding anti-corruption measures, the Commission acknowledged that additional financial and human resources have been allocated for the prosecution of economic and financial crime, some efforts have been made to increase transparency and develop codes of conducts for Members of Parliament and government officials, and legislation has been adopted to strengthen whistle-blower protection. In terms of media resilience, the Commission noted that the 'general legal framework establishing the regulator for audio-visual media services and its functioning remains stable,' and that protection of journalists remains robust, although no-fast track option to access official documents exists. Luxembourg has also adopted constitutional reforms, including

the introduction of a legislative initiative for citizens, and 'the civic space in Luxembourg remains open.' The Commission's positive assessment is similar to its previous reports.<sup>3</sup>

Concerning areas where improvement is needed, the Luxembourgish National Human Rights Institution, the *Commission consultative des droits de l'homme* (CCDH) insists that its recommendations are rarely taken into account during the legislative process and not given any feedback,<sup>4</sup> that the lack of court statistics makes data monitoring and evaluation 'very difficult, if not impossible,'<sup>5</sup> and that there is a 'lack of consultation and transparency' in the public authorities' interaction with civil society and the CCDH.

Since 1 July 2023, the rule of law is an even more central part of Luxembourg's constitutional identity: Article 2 of the newly revised Constitution provides that the Grand Duchy of Luxembourg 'is based on the principles of the rule of law and respect for human rights'.<sup>6</sup>

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

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

Looking at the functioning of the judiciary, according to the three available European Commission Rule of Law Reports, Luxembourg's justice system has a 'very high level of perceived judicial independence' and operates 'effi-

ciently'. Article 104 of the newly revised Constitution now explicitly guarantees the independence of the judiciary. This is a positive development since it was explicitly addressed in the previous version of the Constitution.

Regarding the accessibility and affordability of the justice system, in 2020, lawyers' fees under the legal assistance scheme (hourly rates for lawyers paid by the state) were increased after a freeze of several years.<sup>7</sup> In 2023, Parliament approved a new law designed to make legal aid more accessible.<sup>8</sup> It expands the scope of application to persons who do not hold Luxembourgish nationality but reside in Luxembourg, and allows for partial legal aid, proportionate to resources. It therefore eases the requirements for acquiring legal aid, which until then was limited to people whose income was below the social inclusion income.

The courts continued to perform efficiently despite some clearance rate issues, potentially due to the COVID-19 pandemic. Despite the effects of the COVID-19 pandemic and the increase in estimated time needed to resolve a case, efficiency continues to be consistently high, although the length of proceedings is significantly longer at second and third instances. The number of pending cases remains low, with the exception of criminal cases which have accumulated during the pandemic. It is probable that the larger backlog of criminal cases is only temporary. Finally, for the first time, data are available on the length of court proceedings and the number of pending cases in administrative courts. The estimated time needed to resolve administrative cases at first instance is high in comparison to other EU Member States; in the absence of earlier data, it is not possible to establish trends.

There has been progress with the digitalisation of administrative courts, but the digitalisation of justice overall is still far from being realized. There are human resources shortages in prosecution services dealing with economic and financial crime. Court judgments are still not systematically published in Luxembourg - part of the issue mentioned in the Commission's 2022 rule of law report, noting that 'the scope of available online tools and digital solutions remains limited'<sup>9</sup> which makes systematic studies (including on enforcement) difficult. More generally, in their annual reports, court presidents repeatedly insist on the lack of human and material resources.<sup>10</sup>

A new Council of the Judiciary has been created and the law now specifies its duties regarding the appointment,

promotion, retirement, and secondment of magistrates.<sup>11</sup> On the appointment procedure, the Council for the Judiciary is the sole institution responsible and guided by criteria set in law. At the end of the procedure, the Council presents the selected candidates to the Grand Duke, who appoints them without having a power of veto. The decision for appointment is subject to judicial review regarding its legality.

Judges are not appointed in a cooperative appointment process (i.e. involving different bodies), but this is the case for appointing Council for the Judiciary members. The new Council has nine members: six magistrates elected by their peers - of whom the President of the Supreme Court, the President of the Administrative Court of Appeal, and the State Prosecutor General are ex officio candidates - one lawyer elected by their peers, and two persons elected by the Parliament based on their education or experience. This new structure is designed to comply with the Council of Europe's recommendations.<sup>12</sup>

Every year, Luxembourg faces the peculiar situation that barely enough candidates apply compared to the number of new positions in the judiciary. A recent government report on the difficulties in recruiting sufficiently qualified magistrates emphasised that the judicial career should be made more attractive.<sup>13</sup>

The level of perceived judicial independence in Luxembourg continues to be very high, both among the general public and companies. Overall, 77% of the general population and 76% of companies perceived the level of independence of courts and judges to be 'fairly or very good' in 2022. According to the 2022 EU Justice Scoreboard, no significant changes can be identified in the perceived level of independence since 2016.<sup>14</sup> Judges are independent in exercising their functions, while the Prosecutor's Office is independent in exercising individual investigations and prosecutions, without prejudice to the Government's right to give direction on criminal policies.

Judges enjoy independence from the Government and freedom from political pressures. In one recent headline case, a lawyer was prosecuted for having complained to the minister of Economy about a magistrate's behaviour in a high-profile case with high financial stakes for the Luxembourgish state. The proceedings against the lawyer concluded that his contact with the minister had not translated into any kind of governmental pressure, nor affected the magistrate's career in any way.<sup>15</sup>

Judicial courts (*juridictions judiciaires*) do not generally publish their judgments and it is therefore difficult to analyse the degree of impartiality of decisions. However in the administrative courts (*juridictions administratives*), we can identify differences in the level of engagement with the mechanism of preliminary CJEU ruling, depending on the subject matter. Over the past decade, several references for preliminary rulings have been sent to the CJEU concerning exchange of information in tax matters and the social benefits of frontier workers and their families in the past decade. In the area of asylum however, which represents between 40% and 50% of these courts' caseload,<sup>16</sup> only one reference for preliminary ruling to the CJEU (concerning the rights of the child) has been submitted in the past decade.<sup>17</sup> The Luxembourg administrative courts have also expressed their reluctance to further engage in immigration law which, according to the magistrates, is perceived as less prestigious, as opposed to other more high profile political or economic cases (competition law, real estate, and urban planning).<sup>18</sup>

As for ethical standard for judges, new legislative amendments have established rules common to all magistrates, including a new disciplinary regime. New detailed rules apply to all magistrates (judges and prosecutors) with regard to recruitment, training, appointment (including promotions), secondment, ethics, discipline, and retirement. There is now a Council for the Judiciary (*conseil de la magistrature*) which will be in charge of preparing a new compulsory deontology code, whose application will be monitored by the Council.<sup>19</sup> For the moment, there is a document compiling 'deontology principles' that is described as being 'merely a self-regulatory tool' on which third parties cannot rely.<sup>20</sup>

Regarding corruption or other serious misconduct, a recent case made the headlines, highlighting a peculiarity of the Luxembourgish judicial microcosm.<sup>21</sup> A judge was suspected of conflict of interest and corruption in connection with his friendship with a lawyer; he was ultimately not condemned, but the judgment was eagerly awaited by the judicial community, and commented on by journalists who pointed out the difficulty of applying strict non-collusion rules in a small country where all magistrates have been 'avocats' (registered at the Bar Association) before becoming judges,<sup>22</sup> meaning that close friendships between judges and lawyers are unavoidable.

On the new disciplinary regime for magistrates, the future Council will play a major role, as it will have the prerogatives

to initiate a disciplinary investigation and to launch the proceedings before the disciplinary courts. The press reported some issues following the first elections of the national Council's members. Some senior judges who did not receive the votes and mandate they expected seemingly refused to accept the position of '*membre suppléant*' i.e. deputy member while more junior judges were appointed as main members.<sup>23</sup>

Other systemic resilience factors also play an important part. Regarding constitutional resilience, the impact of the recent constitutional re-design is to be monitored, with the new Constitution coming into force on 1 July 2023.<sup>24</sup> Fundamental rights are now listed in the Constitution, and the separation of powers is laid out in a much clearer way. Regarding institutional resilience, Luxembourg is praised for persevering in its efforts against corruption.<sup>25</sup>

Examples of good practices for strengthening and protecting the rule of law include the Constitutional reform establishing a Council for the Judiciary and strengthening the independence of the Prosecutor's Office is an example of Luxembourg taking into account comments by EU and European bodies and integrating them in its reform. These legislative amendments seek to further align the composition of the Council for the Judiciary with European standards.

## **2.2. Analysis of one most important subsidiary factor: civic resilience**

The civic space in Luxembourg remains open and a draft law intended to simplify the procedures for the creation and governance of NGOs is being discussed in Parliament. The draft law for non-profit organisations was initially tabled in 2009, but no action had been taken by Parliament since then. The new amendments simplify the procedures recognizing NGOs as public benefit organisations by increasing their transparency, reducing the required initial capital for creating a foundation, rendering the procedure more flexible, and making the governance of the organisations more efficient by adapting the framework to technological developments.<sup>26</sup>

70% of Luxembourgers are satisfied with the current functioning of their democracy (compared to 56% in 2015, but only 44% are satisfied with the democratic functioning of the EU). There is a slightly stronger trust in representative institutions such as the government (5.6/10 average) and the parliament (5.8), judicial powers (6.2), and the police

(6.3), compared to other institutions such as trade unions (5.3), religious organisations (4.3),<sup>27</sup> and political parties (5.1).<sup>28</sup>

68% of voters are interested in politics.<sup>29</sup> Voting is in principle compulsory although sanctions are not enforced.<sup>30</sup> Of all registered voters, 85% voted in the June 2023 municipal election. 71% of Luxembourgers have already signed at least one petition.<sup>31</sup> Regarding the participation of foreigners in municipal elections (an important question, since half of the resident population does not hold Luxembourgish nationality), their registration rate on electoral lists was of 19.8 % for the June 2023 municipal elections.

Other forms of participation in democratic life, and in legislative processes in particular, still need improvement. Despite the CCDH's numerous recommendations, the opinions of relevant stakeholders are only very rarely taken into account before the adoption of a first draft of legislation. Once the draft is adopted, many bodies can and actually give their feedback, but it is unclear if and how the relevant authorities (government and the Parliament) are following up on the many opinions they receive.<sup>32</sup>

There are 8,377 non-profit organisations (*associations sans but lucratif*) registered in Luxembourg.<sup>33</sup> These NPOs are active in a variety of areas such as culture (22%), social action (8%), education (8%), religion (4%), professional organizations and trade unions (4%), and defence (3%).

The civil society sector in Luxembourg is vibrant and there are several public funding schemes, especially for social and cultural activities. CSOs active in human rights have more trouble securing funding.<sup>34</sup> In addition, the possibilities for collective litigation and/or litigation initiated by CSOs or NHRIs to support fundamental rights is limited: NHRIs and other rights defenders cannot take court action themselves,<sup>35</sup> and CSOs cannot act in court against violations of individual fundamental rights, except in specific cases if they have specific accreditation. Very few CSOs (ten organisations) have accreditation to act in court.<sup>36</sup> The Luxembourgish NHRI reports mixed practices regarding the access to and involvement of civil society actor in law and policy making. While good practices exist, the CCDH reports that in practice, the level of dialogue and participation mostly depends on the different ministries and platform. Although the NHRI and CSOs can in some instances provide their feedback, the follow-up is limited. A lack of consultation and transparency is a common issue that often confronts civil society actors and the NHRI.<sup>37</sup>

As regards other subsidiary resilience factors in Luxembourg, an interesting example of media resilience is the Prime Minister's (who is also minister for the media) acknowledgment of the issue regarding journalists' access to information, a first step in attempting to remedy this issue. In 2022, a new '*circulaire*' has slightly improved the situation. Nonetheless, this unbinding administrative document does not compensate for the lack of an effective legal framework guaranteeing access to information either in theory or in practice. Access to information is centralized by the government, which seemingly adopts a restrictive approach concerning journalists' access to information in some cases. According to the press association, journalists could not directly contact public officials but first had to go first through the Ministry's press contact – unless the public officials were explicitly allowed to talk to the press or the information was not of an internal or secret nature. There are restrictions and delays of several months only to find out if access is granted or not. The journalists' association as well as the CCDH have continued to recommend creating a legal framework for an effective right to access to information for journalists.<sup>38</sup> The government has just taken an extra step in that direction by announcing that it will prepare a new draft law to modify the 2018 law on transparency of public documents to include: a specific right of access to information for journalists, a stronger basis for access to administrations' documents, and additional procedural guarantees for exercising the right of access to information.<sup>39</sup>

### **2.3. Analysis of one most important contextual factor: economic resilience**

Luxembourg is generally considered a prosperous country with a high standard of living. The GDP growth rate for Luxembourg was 1.5% in 2022, 1.6% in 2023 and is expected to be 2.4% in 2024.<sup>40</sup> The European Commission considers the Luxembourgish labour market to be resilient, with the unemployment rate at 4.6% in 2022, which is expected to rise moderately to 4.8% in 2023 and 5% in 2024. Lack of housing is perceived as the major problem by the country's electorate.<sup>41</sup>

The perception of living conditions is relatively stable, although a third of the electorate considers that it has dropped (stable according to 47%, dropped according to 35%, improved according to 14%).<sup>42</sup> In addition, a majority of the electorate considers in 2023 for the first time that the economic situation has degraded (8% find it better, 34% the same, 35% slightly worse, 16% much worse).<sup>43</sup>

However, economic inequalities are increasing and the rate of persons at risk of poverty is rising.<sup>44</sup> The income of the wealthiest 20% of the population is 4.6 times higher than the income of the 20% poorest. Salaries are also growing slower for the low-paid workers.

The poverty rate has increased from 13.6% in 2006 to 18.1% in 2021. The high cost of living (especially housing) has adverse consequences on single parent families and families with several children. 42.4% of single parent families are currently at risk of poverty (the third highest in the EU, behind Malta and Spain). There is also a major discrepancy in poverty risk between 35% of tenants at risk of poverty, and only 11.6% of homeowners, with a 23.6% discrepancy that is the fourth worst in the EU. Social benefits represent half of the State's budget and without them, 42% of the population would live in poverty. A growing phenomenon is that of the working poor: one in seven workers faces the risk of poverty, the worst rate in the Eurozone.

Regarding other contextual resilience factors: social resilience elements are in place but need to be reinforced, as pointed out by several bodies. The CCDH and other national and international actors recommend strengthening the powers and resources of the equality body (Centre for Equal Treatment).<sup>45</sup> There is a national action plan for promoting LGBTI rights but it has not yet been implemented.<sup>46</sup>

Throughout 2021, the national equality body (Centre for Equal Treatment - CET) has been communicating the results of its 2020 quantitative survey on victimisation and discrimination. 20% of respondents reported being discriminated against in the last three years (26% in 2015). Among these respondents, 46% indicated nationality as the reason for discrimination, 28% sexuality, 22% languages, 22% physical appearance, and 19% age.<sup>47</sup> Race discrimination is a particularly acute issue and has been under the spotlight in Luxembourg. The study 'Being Black in Europe' by the Fundamental Rights Agency (FRA) led the Luxembourgish Parliament to order a study on racism. LISER and CEFOS have documented race-based discrimination in key societal areas such as access to housing (50% of respondents), job search (44%), or teaching (26%).<sup>48</sup>

On gender discrimination, the lack of available data is a problem in itself.<sup>49</sup> But based on the available data, the Committee on the Elimination of Violence against Women

(CEDAW) is particularly preoccupied by the absence of judicial decisions on cases of discrimination against women, the limitation of the CET's missions (it cannot take court action to defend victims), the reluctance of lawyers to take discrimination cases, and the lack of awareness among women and girls of their rights.<sup>50</sup>

### **3. Impact of crises on the rule of law: the Covid-19 pandemic**

The Covid-19 pandemic raised questions about the initial compliance of the government with constitutional and legal rules in a crisis situation. Overall, poor democratic dialogue, lack of transparency over the scientific grounds justifying the measures, and lack of coherence in the design of responses at different stages of the crisis have been pointed out.<sup>51</sup> The Government first took the lead in March 2020 by using the 'state of crisis' mechanism under Article 32 of the Constitution. Dealing with the following waves especially the 2020-2021 winter, Parliament took over and measures were adopted via the standard democratic process. Two laws of 24 June 2020 dealing with natural persons<sup>52</sup> and with sports and cultural gatherings<sup>53</sup> put an end to the constitutional state of crisis and established a basic legal regime regarding the pandemic.

### **4. Conclusion**

Luxembourg is a key example of a combination of resilience factors and aspects, robustness of the judiciary, attachment to and trust in institutions, and economic prosperity with a solidarity system which remains stable. It is also an instance of recent constitutional 're-design' with the new version of the Constitution proclaiming the definitional importance of the rule of law, providing a list of fundamental rights, and organising the separation of powers much more clearly. The impact of those new constitutional provisions will require close monitoring in the coming years. In the meantime, where improvements are still needed – transparency and fight against discrimination – Luxembourg is demonstrating a willingness to comply with international and EU recommendations, and the outcomes of its efforts to adjust to corresponding standards should also be closely monitored.



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### About the author

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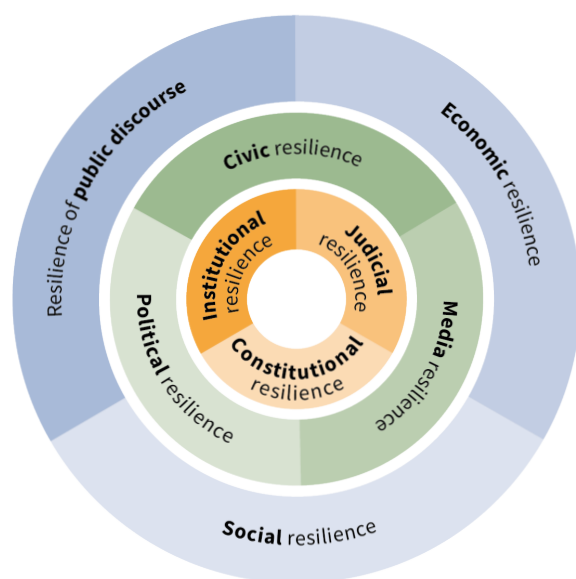
### About the project

**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.

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

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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/)

