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Judicial resilience as a systemic factor for rule of law resilience

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1. Introduction

Whilst the ongoing debates on the state of democracy in Europe have revolved predominantly around factors that have a deteriorating effect on the rule of law, the question of what boosts its resilience against hazardous events and incremental threats has received less attention. In particular, the concept of judicial resilience and its role in this process has remained largely understudied, especially in the context of national judiciaries.[1]

This snapshot proposes and adopts a **twofold definition** of judicial resilience. It encompasses the capacity of the judiciary to protect **the rule of law as the overarching principle of constitutional democracy in substantive terms**, and to maintain its resilience through the **formal functioning and independence of the judicial branch itself**. The first section of this snapshot analysis provides some preliminary considerations about the importance of the judiciary for the rule of law. The following sections delve into the concept of judicial resilience through the lens of the aforementioned twofold definition.

2. The judiciary and the rule of law

As the bearer of judicial power, the judiciary plays a crucial role for the rule of law as it has the competence to hold all branches of government accountable for their (non-)compliance with the law. In democratic systems with separa-

[1] See: Salvatore Caserta and Pola Cebulak (2021). Resilience Techniques of International Courts in Times of Resistance to International Law, in: International & Comparative Law Quarterly 70 (3), pp. 737-768. URL: https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/resilience-techniques-of-international-courts-in-times-of-resistance-to-international-law/6439ECF8105916DE772942B765175028 (last checked: 22.11.2022); Andreas Føllesdal (2017). Independent yet Accountable: Stress Test Lessons for the European Court of Human Rights, in: Maastricht Journal of European and Comparative Law, in: Maastricht Journal of European and Comparative Law 24(4), 484–510.

For some informative remarks on the concept of constitutional resilience, which also belongs to the core layer of RESILIO's model, see Christoph Grabenwarter (2018). Constitutional Resilience, 6.12.18, Verfassungsblog. URL: https://verfassungsblog.de/constitutional-resilience/ (last checked: 22.11.2022).

tion of powers, courts have the authority to determine through their interpretive mandates what the constraints of the law are, and, when applying it, to decide whether these constraints have been violated. Appellate and apex courts have the final say on whether lower courts have interpreted and applied the law correctly in their judgments. Courts may also decide on the lawfulness of executive (e.g. administrative) acts and, depending on the country's constitutional arrangements, certain courts may adjudicate on the constitutional validity of state acts.

In accordance with the fundamental place of the judiciary in a democracy, RESILIO qualifies judicial resilience as one of the systemic factors that have a first-degree effect on the resilience of the rule of law. As such, it is situated at the core of RESILIO's three-layered model alongside constitutional and institutional resilience. The judiciary plays a central role within this very core, which is recognised in RESILIO's definition of the rule of law as a 'thick concept', according to which 'all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.'[2] The judicial branch is acknowledged directly by reference to the controlling function held by (independent and impartial) courts, but also implicitly with a view to the requirement that all public power shall be exercised within the constraints of the law. While the general courts are ordinarily concerned with the adjudication of civil and criminal disputes that usually revolve around private parties rather than public bodies, the judiciary can also play a key role in determining whether the state itself has acted in accordance with the ground rules of governance. In a democratic context, these include the rule of law, separation of powers, and the respect for fundamental rights.[3] This question typically falls into the domain of constitutional law and, as such, is reserved to the jurisdiction of courts that have the power to decide on the constitutionality of acts of the state, usually through judicial review. This competence is related to the judicial system's capacity to protect the rule of law in substantive terms and is thus part of the first dimension of the aforementioned definition of judicial resilience, which will be considered next.

2.1 Substantive judicial resilience through judicial review

The central questions here include: which courts can review the exercise of public power; which acts fall under the scope of their review (e.g. only legislation or also executive and judicial acts); and what are the effects of a judgement declaring that a state organ has acted unconstitutionally. These issues are regulated differently in different constitutional systems, depending on factors such as institutional design (e.g. the hierarchy of the judiciary), legal tradition (e.g. whether the country follows a common or civil law system), as well as the understanding (vested in legal culture) of both legislators and judges concerning the proper role of courts in a democracy.

Notwithstanding these specificities, one can distinguish two main models of judicial review from a comparative perspective. The model of dispersed (or diffused) review allows the ordinary courts to (incidentally) review the constitutionality of acts of the state, usually legislation, in standard litigation proceedings. This means that any citizen could trigger this process before any court, subject to the relevant standing limitations.[4] This design is traditionally associated with the 1803 *Marbury v. Madison* case before the US Supreme Court and is therefore often referred to as the US-inspired, or American model.[5] In contrast, judicial review under the centralised (or concentrated)

[2] RESILIO's definition is informed by the working definitions of a series of European bodies – the European Parliament, the European Commission, the European Court of Justice, and the Council of Europe.

[3] See, for example, the European Commission for Democracy Through Law (Venice Commission) Rule of Law Checklist, adopted at its 106th Plenary Session (11-12 March 2016). URL: https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf (last checked 07.01.2023); as well as the broader definition adopted by the EU co-legislators: Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2020.433.01.0001.01.ENG (last checked 07.01.2023).

[4] For example, the 'case or controversy' doctrine imposes considerable restrictions on the procedure for judicial review in the US. This procedure is marked by rigorous standing requirements, which have significant effect on the actual judicial review practice of US courts: James Pfander (2018). Standing, Litigable Interests, and Article III's Case-or-Controversy Requirement, in: UCLA Law Review 170 (65).

[5] *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

model is exercised by a specialised constitutional tribunal created specifically for this purpose, and vested with the exclusive competence to decide on the constitutionality (i.e. validity) of state acts.[6] Ordinary courts, therefore, do not possess this power. Judicial review under the centralised model can usually be triggered by a limited number of public bodies that have standing before the constitutional tribunal, and directly by citizens themselves only in exceptional circumstances.[7] Regardless of the model, judicial review is conceptually and intrinsically linked to the principle of the rule of law as it guarantees and enforces the primacy of the fundamental legal normative framework of the state – the constitution – by invalidating state acts that have violated it. This practice gained widespread popularity only in the second half of the 20th century when the centralised model of judicial review became a preferred feature of the post-authoritarian and post-communist constitutional transformations that emerged in the global waves of democratisation after World War II and again after the collapse of the USSR.[8]

There are two main ways in which judicial review can be relevant for the protection and resilience of the rule of law. The first is through the enforcement of the fundamental rights of citizens *vis-à-vis* the state, while the other is through upholding separation of powers and the structures of democratic governance overall. Rights-based judicial review can invalidate and remedy executive and legislative acts that violate constitutional rights. It can thus restrain and discipline governments and parliaments that disregard or abuse the rights of those subjected to their jurisdiction, and prevent, or at least discourage repeated violations.[9] This can have an ameliorating effect on rule of law building and consolidation, particularly in post-authoritarian contexts where there is little or no history of state accountability and rights enforcement. Conversely, this function of judicial review is especially important in contexts of democratic backsliding and (re)emerging authoritarianism, where the fundamental rights of vulnerable and underprivileged social groups and minorities are the common targets of (aspiring) autocrats.[10]

Judicial review can also be used to test and remedy the acts of public bodies that may have overstepped their constitutional mandates and breached the separation of powers. This is particularly relevant in the contexts of executive aggrandisement.[11] In such cases, on the one hand, the body exercising judicial review, such as a constitutional court, may invalidate governmental acts that encroach upon or seek to erode the powers and competences of the other branches of government, that is, the legislature and judiciary. On the other hand, if the parliament itself is captured or dominated by political parties with an authoritarian agenda or inclination, judicial re-

[6] The inception of this model is associated with the Czech-born Austrian jurist Hans Kelsen, who created what was arguably the first constitutional court in Austria in 1920. Some jurisdictions, e.g. Germany, allow for the judicial, or constitutional, review of legislative, administrative and executive acts. Judicial review of legislation can usually be exercised only *a posteriori*, i.e. after the law has been passed, although certain jurisdictions, e.g. France and Romania, allow for *a priori* judicial review of legislative bills.

[7] This is usually subject to citizens being directly injured by the act in question and having exhausted all available local judicial remedies.

[8] Currently, 163 out of 193 constitutions in force across the globe include a provision allowing the judicial review of the constitutionality of legislation. In 1939, there were only 11 such jurisdictions – see the interactive comparative database of the Constitute Project: http://comparativeconstitutionsproject.org/ (last checked 07.01.2023). Virtually all post-communist states in Europe adopted this provision and created constitutional courts for this purpose. On the proliferation of judicial review, see: Tom Ginsburg (2009). The Global Spread of Constitutional Review, in Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (eds.), The Oxford Handbook of Law and Politics (OUP). For the three waves of democratisation, see Samuel Huntington (1991). The Third Wave: Democratization in the Late Twentieth Century, University of Oklahoma Press.

[9] For a comparative study of rights-based judicial review in Central and Eastern Europe, see: Wojciech Sadurski (2014). Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe, Springer. For a critical take on rights-based judicial review from common law perspective, see: Jeremy Waldron (2006). The Core of the Case against Judicial Review, in: Yale Law Journal (115), pp. 1346 ff.

[10] For the case of Hungary, see: Gábor Halmai (2020). Rights Revolution and Counter-revolution: Democratic Backsliding and Human Rights in Hungary, in 14 Law and Ethics of Human Rights 97 (14), pp. 103 ff. The overturning of Roe v. Wade by the US Supreme Court, as well as the recent electoral developments in Italy and Sweden, insofar as they rested on anti-equality campaigns, demonstrate that more consolidated democracies are not immune to such processes.

[11] For an overview, see Tarunabh Khaitan (2019). Executive Aggrandizement in Established Democracies: A Crisis of Liberal Democratic Constitutionalism, in: International Journal of Constitutional Law 17 (1), pp. 342-356.

view may act as a lever against legislative measures that undermine the rule of law or other structures and instruments of constitutional government. If such political parties garner a constitutional majority, they may even try to achieve this through changing the constitution itself in order to favour those in power. This may be attempted, for example, by inflating their competences, prolonging their mandates, and hollowing out constitutional provisions that act as counterweights to unconstrained majority rule, such as fundamental rights, judicial independence, (to be considered in the next section), and even the very power of judicial review. In this regard, the latter can be a relevant avenue for challenging and potentially halting so-called unconstitutional constitutional amendments.[12] Curbing judicial review for political reasons and targeting the courts (and judges) that wield this power is a strong indicator of authoritarianism and democratic backsliding. The well-studied refurbishment and packing of the constitutional courts in Hungary and Poland exemplify this trend.[13] Conversely, the capacity of courts, both on paper and in practice, to exercise judicial review independently from the other branches of government, can have an ameliorating effect on judicial resilience and indicate the state of the rule of law.

Notwithstanding its added value for constitutional governance, it must be noted that, for reasons of democratic legitimacy, judicial review is usually designed as a last-resort mechanism that can only be used when all other (judicial) remedies have failed or been exhausted. Therefore, it has the potential to act as an emergency break rather than a first port of call when the rule of law is threatened. As such, it cannot replace existing mechanisms of democratic deliberation and decision making, nor should it be expected to fill the gaps or remedy the shortcomings of the other factors that affect the resilience of the rule of law according to RELISIO's model.

One further caveat is that judicial review is reactive rather than proactive, and extremely context sensitive. The question of *if* and *when* this power is exercised depends on the willingness, benevolence, and the political agenda of the bodies which can trigger it and can thus act as its gatekeepers. This holds particularly true in systems that do not allow citizens or parties outside the political domain, such as non-governmental organisations and civil society initiatives, to invoke judicial review directly in defence of their individual interest or *pro bono publico*. Moreover, the manner in which judicial review is applied depends on the capacity and, to a large extent, the independence and impartiality of the judges that exercise this power. Finally, the implementation of judgments and the practical effects of judicial review lie beyond the remit of the judiciary and rest with the executive and the legislative branches. The prospect of a packed (constitutional) court acting as an effective counterweight to aggrandised executives and captured parliaments, and the likelihood that the latter would comply with a ruling they have violated, are questions of political reality and culture rather than law.

2.2 Formal judicial resilience through an impartial and independent judiciary

Beyond the substantive domain of judicial review, there are other, formal criteria related to the administration, structure, and functioning of the judicial branch that influence the ability of the court system at various levels to maintain high integrity and operate effectively and independently. These include, among others: rules about the nomination, appointment and removal of judges from office; the duration and security of their tenure; and their remuneration and career progression. As such, these criteria belong to the second, formal dimension of judicial resilience, which revolves around the question of whether and how the judicial branch is insulated from political interference that can undermine its integrity, impartiality and independence and, by extension, the rule of law overall. It is important to stress that the judiciary cannot be fully insulated from the executive and the legislative branches, as the latter may play a role in determining its budget, the appointment of senior judges, and proposing and passing procedural laws. Moreover, the principle of separation of powers also requires the judiciary to be accountable to the other branches of democratic government. At the same time, there are certain features of judicial administration that can prevent or at least restrain the other branches from exercising undue, partisan influence on courts and judges. Depending on how these features are designed on paper and applied in practice, they

[12] See Yaniv Roznai (2017). Unconstitutional Constitutional Amendments, OUP.

[13] See Kriszta Kovács and Kim Lane Scheppele (2018). The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union, in: Communist and Post-Communist Studies 51 (3), pp. 189-200.

can either strengthen or undermine judicial resilience and the rule of law, particularly in contexts of democratic backsliding.

There are different approaches to the design of judicial appointment and administration depending on the relationship between the judiciary and the other branches of government, especially the executive.[14] One can distinguish between an 'executive model', where the executive branch is heavily involved in judicial administration, and a 'self-management' or 'autonomous model', under which the latter is predominantly within the responsibility of the judiciary itself.[15]

From the perspective of judicial resilience, the main question is whether the specificities of a given model can guarantee and protect the operation, independence, and impartiality of the judiciary as central requirements for the rule of law. There is no universal formula for answering this question as the interplay between the black-letter legal rules on judicial administration and the political, cultural and institutional contexts in which they operate may yield different results or change over time. A prominent example are the various Councils of the Judiciary in post-communist central and south-eastern European states, which have become the preferred model of judicial self-administration in the region. These bodies, which usually consist of judges and prosecutors and which could be appointed by both the parliament and representatives of the judiciary, have had different effects on the judicial independence in different countries. The Superior Council of the Magistracy in Romania, for example, has been mostly hailed as a success story in this regard, while the Supreme Judicial Council of Bulgaria has often been criticised both nationally and internationally for its undue political dependence on the executive.[16] Once celebrated for its contribution to the successful post-communist transition in Poland, this country's National Council of the Judiciary has become a political battlefield and, after its refurbishment in 2017-2018 by the ruling Law and Justice (PiS) party, an accomplice in the ongoing executive capture of the Polish judiciary.[17]

Regardless of these contextual specificities, the following criteria can either foster or undermine judicial resilience. First, judges should be appointed in a transparent procedure that is based on merit and not on political affiliation or perceived or expected favourable inclination to those in power. There are internationally set and recognised standards and criteria for judicial office and appointment, such as Article 14 of the International Covenant on Civil and Political Rights, the Minimum Standards of the International Bar Association (1982), Articles 10-13 and 18 of the UN Basic Principles on the Independence of the Judiciary (1985), and the Latimer House Guidance on Parliamentary Supremacy and Judicial Independence (1998).

[14] There are prominent differences between common and civil law countries with regard to how the judicial profession is conceptualised and organised. Civil law countries usually have professional judges recruited through competitive examination. Judges in common law countries are usually sampled from private practice based on achievement and rely on peer recognition. As in most European systems where judges are usually appointed and not elected, parliaments play a limited role in the administration and especially the appointment of the judiciary. Of course, they may and do play an indirect role through appointing or confirming (parts of) the bodies that are in charge of judicial administration, e.g. Judicial Councils. Some notable exceptions apply to constitutional courts due to their particular status within the architecture of the state. For example, the Bulgarian Constitutional Court is formally not part of the judiciary but a self-standing institution outside of the three branches of government. The Bulgarian parliament appoints one third of its twelve judges.

[15] See Piotr Mikulak (ed.) (2017). Current Challenges in Court Administration, Eleven Publishing. There are alternative and hybrid models (e.g. in the UK), which operate based on bilateral framework agreements between the executive and the judiciary. They will not be considered due to spatial constraints and RESILIO's focus on Europe, where the executive and autonomous models are prevalent.

[16] For an evaluation of the role of the Supreme Council of the Magistracy in Romania, see the European Commission Report on Progress in Romania under the Cooperation and Verification Mechanism from 22.11.2022, p.3. URL: https://commission.europa.eu/document/download/25b16826-f0a8-4267-a664-da7c90c1f791_en?filename=com_2022_664_1_en.pdf (last checked 07.01.2023), and Bianca Selejan-Guțan (2019). Romania: Perils of a "Perfect Euro-Model" of Judicial Council, in: German Law Journal 19(7), pp. 1707-1740. On Bulgaria, see the Country Chapter on the rule of law situation in Bulgaria in the 2022 Rule of Law Report of the European Commission, pp. 6-7. URL: https://commission.europa.eu/document/download/6f13a57d-1780-4b2e-bc6d-54da44cfdf54_en?filename=10_1_193975_coun_chap_bulgaria_en.pdf (last checked 07.01.2023).

[17] Marcin Matczak (2019). Burning the Last Bridge to Europe, 12.12.2019. URL: https://verfassungsblog.de/burning-the-last-bridge-to-europe/ (last checked 07.01.2023).

Second, once in office, there should be guarantees in place that ensure that judges can fulfil their mandates in accordance with the law and the ground rules of democratic and constitutional government, rather than service the interests and goals of those wielding political or economic power. This should also be reflected in the rules concerning the disciplining and removal of judges, which should ensure that judges enjoy immunity and security of tenure. In other words, judges should be insulated from measures aimed at political interference and intimidation that could undermine their authority and integrity, potentially with a chilling effect on other judges.[18]

Third, judges should receive adequate and fair remuneration and enjoy job security that can help prevent corruption, clientelism and undue economic dependence and influence. This is particularly relevant in young and unconsolidated democracies, as well as in other systems where political power is (becoming) intertwined with oligarchic structures or organised crime and marked by high-level corruption and the practices of kleptocracy and cronyism.[19] In sum, judicial resilience is conditional upon the 'freedom of the individual judge from fear, coercion, reward or any other undue influence that might distort the judge's actions, as well as the capacity of a 'legal system [to] protect its judges from governmental, business, personal, or social pressures that could force a judge to deviate from her interpretation and application of the law.'[20] Accordingly, executives should not have the power to 'appoint and dismiss judges at will, to vary their salaries, to alter their opportunities for future promotion or to move them arbitrarily between courts'.[21]

In the context of democratic backsliding, these conditions are jeopardised in ways that usually employ both structural and personnel changes.[22] These tactics may include executive and legislative action that seeks to repeal and amend existing provisions, and introduce new laws that subjugate the judicial administration to political control. This usually takes place under the guise of carrying out necessary judicial reforms, which are presented as being compliant with and fostering the rule of law, but which effectively undermine judicial resilience.

A common strategy of the 'authoritarian playbook'[23] is to tamper with the bodies in charge of judicial administration, such as the aforementioned councils of the judiciary, as well as the apex and constitutional courts that wield the power of judicial review.[24] This can be achieved through increasing the number of seats on already existing bodies and courts and furnishing them with politically amenable office holders.[25] This ties in with the supplementary tactic of changing personnel in addition to, or in lieu of, changing the formal rules of judicial administra-

[18] Poland's 'muzzle law' from 2020 is an infamous example of legislation producing such negative effect. See Laurent Pech (2021). Protecting Polish Judges from Political Control: A brief analysis of the ECJ's infringement ruling in Case C-791/19 (disciplinary regime for judges) and order in Case C-204/21 R (muzzle law), 20.7.2021. URL: https://verfassungsblog.de/protecting-polish-judges-from-political-control/ (last checked 07.01.2023); Allyson Duncan, John Macy (2020). The Collapse of Judicial Independence in Poland: A Cautionary Tale, in: Judicature 104 (3). URL: https://judicature.duke.edu/wp-content/uploads/2020/12/DUNCANv2-compressed.pdf (last checked 07.01.2023).

[19] For a brief yet comprehensive overview of judicial appointments, tenure, removal and accountability, see International IDEA, Judicial Appointments Primer. URL: https://www.idea.int/sites/default/files/publications/judicial-appointments-primer.pdf (last checked 7.1.2023) and International IDEA, Judicial Tenure, Removal, Immunity and Accountability Primer. URL: https://www.idea.int/sites/default/files/publications/judicial-tenure-removal-immunity-and-accountability-primer.pdf (last checked 7.1.2023).

[20] T. E. Plank (1996). The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia, William & Mary Bill of Rights Journal 5/1 (Winter), p. 7, and International IDEA, Judicial Appointments Primer, p. 6.

[21] International IDEA, ibid.

[22] On the Council of Europe's take on threats to the independence of judges and the judiciary, see the Commissioner's Human Rights Comment from 3.9.2010, URL: https://www.coe.int/en/web/commissioner/-/the-independence-of-judges-and-the-judiciary-under-threat (last checked 7.1.2023).

[23] Protect Democracy (2019). The Authoritarian Playbook, URL: https://protectdemocracy.org/the-authoritarian-playbook/ (last checked: 22.11.2022).

[24] On the application of the authoritarian playbook in the Polish context, see the conclusion to Wojciech Sadurski (2019). Poland's Constitutional Breakdown (OUP).

[25] The Hungarian Constitutional Court was packed through this strategy, among others. Gabór Halmai (2022). Coping Strategies of the Hungarian Constitutional Court since 2010, 27.9.2022, URL: https://verfassungsblog.de/coping-strategies-of-the-hungarian-constitutional-court-since-2010/ (last checked 7.1.2023).

tion, for instance by removing incumbent judges and other office holders through disciplinary means or by forcefully retiring them before filling the newly vacated seats with compliant individuals.[26] Another strategy is to create new bodies and courts, such as disciplinary chambers or extraordinary tribunals, which effectively serve the purpose of removing and replacing incumbent judges.[27]

3. Conclusions

The formal and substantive dimensions of judicial resilience are interrelated and co-dependent. Courts cannot be expected to protect the rule of law without having the power to review and invalidate exercises of public power that malevolently or negligently overstep the boundaries of constitutional democratic governance. If courts have no formal means to hold the executive accountable, even the most independent and pro-democratic judges cannot protect the rule of law. Through judicial review, the judiciary can also challenge and resist executive and legislative attacks on its independence. At the same time, courts cannot, or will not, exercise the power of judicial review effectively if their judgements are not impartial, independent, and sufficiently insulated from undue political influence. Even the courts with farthest reaching competences and review powers are irrelevant for the resilience of the rule of law if they are captured or cowed. On the contrary, such courts may not only fail to resist democratic backsliding, but even accelerate it.[28]

The Central and East European region is witnessing an intensifying trend of formally independent apex and constitutional courts that curb instruments of liberal democratic governance through illiberal and narrow interpretations of constitutions, thus manufacturing a clash between national constitutional identities and international instruments, especially in the area of fundamental rights.[29] The unprecedented contestation of previously accepted norms highlights the fact that in the face of illiberalism, the role of courts may be changing in subtle ways that exceed preconceived notions concerning their centrality as bulwarks of liberal democracy. This speaks to the fact that a resilient judiciary should not be seen exclusively as a safety net within RESILIO's multi-layered model, but rather as an important link in a chain of interconnected factors that determine the resilience of the rule of law which, as is often the case, can only be as strong as its weakest link.

[26] The strategy of removing incumbent judges through the lowering of their retirement ages was adopted in Poland in both 2017 and 2018, and found to be in violation of EU law by the CJEU, see: Case C-192/18 and Case C-619/18 in eucrim 2/2018. These measures triggered two infringement procedures against Poland by the European Commission – on 29.7.2017 (URL: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2205, last checked 7.1.2023) and 2.7.2028 (URL: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4341, last checked 7.1.2023), respectively.

[27] The adoption of a new, politically controlled disciplinary regime of judges in Poland triggered a third infringement procedure against this Member State by the European Commission on 3.4.2019 (URL: https://ec.europa.eu/commission/presscorner/detail/el/IP_19_1957, last checked 7.1.2023).

[28] On how this is achieved through 'abusive' judicial review, see Rosalind Dixon and David Landau (2019). Abusive Constitutional Borrowing (OUP).

[29] In 2018, the Bulgarian Constitutional Court declared that the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) was incompatible with Bulgaria's constitution and thus halted the ratification of this treaty (Decision Nr. 13/2018 of 27.7.2018). This ruling signalled the beginning of a growing trend of constitutional and political contestations of this human rights treaty among other CoE Member States: Els Leye, Hayley D'Souza and Nathalie Meurens (2021). The Added Value of and Resistance to the Istanbul Convention: A Comparative Study in 27 European Member States and Turkey, in Frontiers in Human Dynamics 3, URL: https://www.frontiersin.org/articles/10.3389/fhumd.2021.697331/full (last checked 7.1.2023).

About the author

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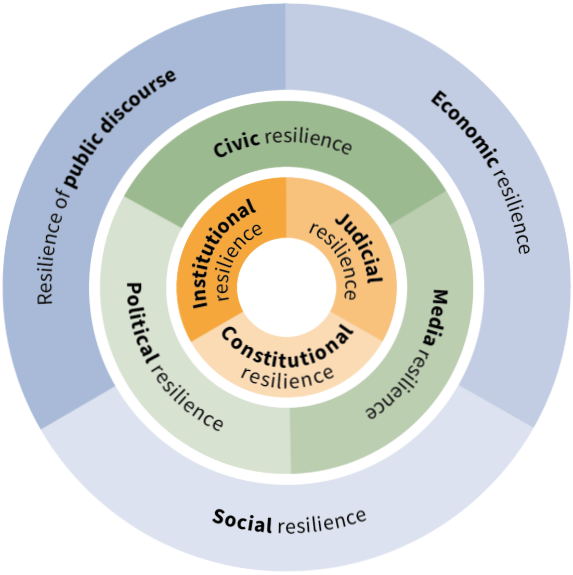
About the project

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

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STIFTUNG MERCATOR

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