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Resilience observatory on the rule
of law in EU accession candidates

RESILIO-ACCESS Snapshot Series

**The Importance of Fundamental Rights
for the Resilience of the Rule of Law**

Andrei Lutenco



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1. Introduction

A global rule of law recession has materialised in recent years.¹ In countries around the world, including European ones, this decline has taken the new form of *autocratic legalism*, whereby politicians attain power by formally democratic means and ensure their dominance not by overt coercion but through the gradual erosion of rule of law safeguards.² They act by amending constitutions and overrunning legal norms. They pack courts or dismiss judges, weaken opposition and civil society organisations. They restrict independent media, intimidate dissenters, and manipulate electoral frameworks to entrench their rule. They consolidate control not through military force but through legal and institutional manipulation.³

Such threats are often presented as rule of law backsliding, a metaphor that also implies that it should be possible to resist this sliding or to slow it down, if only one could find the brakes.⁴ According to the RESILIO-ACCESS definition, resilience of the rule of law is its capacity “to experience hazardous events or incremental threats without losing its core function, structure and purpose.”⁵ A resilient rule of law would be able to anticipate, absorb, accommodate, or recover from threats.

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In this article, I explore the ways in which fundamental rights⁶ can be a resource for rule of law resilience. I start by examining the relationship between rule of law and fundamental rights and ways in which they intersect and interrelate. I then present two major ways in which fundamental rights can help rule of law to withstand threats – in the capacity of rights as legally enforceable obligations and as social practices, crystallised in societal norms and institutions.

2. Fundamental rights and rule of law

Within a *thin*,⁷ or formal, definition, rule of law merely means that power is circumscribed by law in a formal way without specifying any substantial outcome of this arrangement. This definition emphasises legal certainty and predictability, equal application of laws, and independence of courts. In this sense, the rule of law does not need to include substantive moral or political values – such as natural/human/fundamental rights.⁸ In other words, under this thin definition, fundamental rights are external to positive rule of law arrangements, influencing and being influenced by it but not being part of it. For our purposes, accepting such an externalised role may be useful in understanding how rights may function as external resources for rule of law, and a means to protect it, rather than indicators for its strength or weakness.

However, in Europe, a broader *thick*, or substantive, conception of rule of law is dominant. This thick meaning treats fundamental rights as an integral component of the

rule of law, along other values such as democracy. The European Commission for Democracy through Law of the Council of Europe (Venice Commission) thus includes fundamental rights among the six necessary formal and substantial components of the rule of law.⁹ Here fundamental rights are not external to the rule of law but *constitutive* of it – they define the moral and democratic quality of the legal order. Consequently, in this model fundamental rights shape rule of law resilience simply *by being part* of the rule of law.¹⁰ The better fundamental rights are protected, the stronger the rule of law.

A middle way conception can look at fundamental rights and rule of law as *co-equal but interdependent* and mutually reinforcing values that underpin democratic governance. It can be stated that this conception is reflected in Article 2 TEU, which lists “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights” alongside each other as foundational and interlinked values. In this approach, the rule of law provides the institutional guarantees (independent judiciary, legality, access to justice) that make rights effective. Meanwhile, fundamental rights not only give the rule of law its substantive legitimacy and limits; they also underpin it. In practice, this interdependence means that erosion of judicial independence, for example, can lead to systemic human rights violations, while crackdown on rights (freedom of speech, assembly, association, public participation) can be followed by rule of law breakdown and state capture. Finally, the two notions can also be perceived as separate but *overlapping and intersecting* at various points. Certain fundamental rights are intrinsically tied to the rule of law because they directly concern the functioning of law and justice and the equality of individuals before them.¹¹ This includes the right to a fair trial and to an effective remedy, the right to equality and non-discrimination, the presumption of innocence, access to information and freedom of expression, the right to vote and run for elections. Importantly, in everyday governance and civic life, the boundaries between the rule of law and rights blur. Fundamental rights and the rule of law coexist as living practices and societal norms that interact and sustain each other.

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Rights protect individuals from arbitrary power, while their exercise reinforces legality, accountability, and, by extension, democratic resilience. Even under conditions of rule of law backsliding, the public performance of rights keeps the normative expectation that government must be bound by law alive within society.

The different conceptions of the relationship between fundamental rights and the rule of law may illuminate distinct pathways for rights to contribute to rule of law resilience. Adopting the *thin* conception, we can look into ways by which rights can be instrumentalised to defend formal rule of law arrangements. In the *integrated* and *co-equal* conceptions, fundamental-rights defence is in itself contributing to rule of law resilience. Defence of rights in courts, and in the political arena, is also a defence of rule of law. The *overlapping* conception points to the fact that some rights are more connected to the rule of law setup than others, and can therefore be prioritised in the rule of law struggle. These rights can sustain legality itself from below, empowering citizens and institutions to defend the law’s integrity when formal guarantees weaken.

I will now proceed to examine how fundamental rights can serve rule of law resilience in practice, by distinguishing their potential in two major aspects: as enforceable obligations and as practice.

3. Fundamental rights as enforceable obligations

The first way in which fundamental rights can contribute to rule of law resilience is in their capacity as enforceable legal obligations, protected by treaties, constitutions, and courts. If we accept that (in a *thick* definition) rule of law and fundamental rights are two sides of the same coin, backsliding on the rule of law will usually interfere, in one way or another, with fundamental rights of individuals and groups of citizens. This takes the form of impediments to access to justice, freedom of information, expression, assembly, association, etc. Such hurdles would warrant them to seek legal remedies. The reverse can also be true: legal redress provided by courts in individual cases may indeed reinforce rule of law. This is what Kim Lane Scheppele calls “transforming rights into structures”, whereby judges and courts can (and often do) contribute to democratic resilience, by converting individual rights – to a fair trial, electoral rights – into systemic rule of law requirements.¹²

To maximise the efficiency of wielding rights in this way, *strategic litigation* can play an amplifying role. Going to court based on a resilience strategy can achieve broader systemic changes, beyond the immediate interests of the parties involved, including strengthening the rule of law, expanding human rights protections, or holding governments accountable. To this end, civil society and advocates will often select cases with broader impact on the rule of law, target courts with more potential to influence policy, or administrative practices and use advocacy and public engagement, including media campaigns, civil society mobilisation, or international monitoring to increase impact. In this sense, strategic litigation is also a highly effective form of public participation in shaping rule of law policy.¹³

More direct instances, where individual rights can be used to address systemic rule of law issues, are those cases where the rights of key players are concerned – judges who are dismissed or sanctioned, political candidates barred from running for office or taking office, CSOs directly affected by “foreign agent laws”. Individuals directly targeted by autocratic measures are more vulnerable but also better positioned to enact change through resistance in courts. This means that resilience through litigating rights also requires for key rule of law players to be empowered and willing to act.

The obvious proviso to all of the above is that, for rights litigation to achieve its goal, there needs to be a sufficiently independent and strong judiciary in place. A justice targeted for capture may be a poor ally. It is therefore important that one detects early signs of rule of law backsliding and acts rapidly. One should also be able to make a case that individual rights may be affected by apparently neutral policy changes (e.g. that court packing violates free trial, media defunding affects freedom of speech, “foreign agent laws” drastically limit freedom of association).

If it is too late, and national courts have already been politicised or compromised, regional human rights mechanisms can still step in. In recent years, there has been an emerging trend in which transnational courts – European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) among them – use individual litigation to decide on wider rule of law issues. One such example is the case law on Poland following the political capture of the judiciary by the Law and Justice (PiS) gov-

ernment after 2015, whereby the two courts addressed not merely the individual cases but also composition of the Constitutional Tribunal, functioning of disciplinary boards, and the very way the National Judicial Council was formed.¹⁴

The problem is that by the time courts like the ECtHR or CJEU issue rulings, the damage is often already done – judiciaries captured and elections manipulated. Because adjudication is slow and deliberative, it rarely prevents autocrats from consolidating power in real time. Kim Lane Scheppele argues, however, that these judicial decisions acquire renewed importance after autocracy recedes and the rule of law bounces back. Once democratic forces return, the standards and principles articulated by transnational courts – on judicial independence, electoral fairness, and equality – can serve as blueprints for democratic reconstitution.¹⁵

In light of the above, to strengthen litigation of rights as a rule of law resource, four factors need to be considered. First, efforts should be made to preserve a degree of judicial independence and access to justice. *Courts and individual judges* need to retain (and fight for, including in court) enough autonomy to issue impartial judgments, while individuals and organisations should be able to bring claims without obstruction. This means that litigation should happen at the earliest signs of rule of law backsliding, before the system is captured or succumbs to political influence, including by appealing to transnational mechanisms.

Second, *civil society organisations (CSOs)* should build their legal capacities and be supported in engaging in strategic litigation on rule of law issues. By framing cases that expose structural rule of law deficiencies – such as discrimination, media capture, or restrictions on protest – CSOs turn courts into arenas for civic accountability.

Third, *transnational litigation* amplifies the protective function of rights. Linking domestic cases to supranational mechanisms allows litigants to mobilise external oversight when domestic remedies are weak. This has proven crucial not only within the EU but also in candidate and neighbourhood countries. In Moldova, for example, the work of human rights NGOs to assist victims of state abuse – the 2018 abduction and transfer to Turkey of seven teachers, Turkish nationals – led to an ECtHR ruling¹⁶ that

exposed not only the abuses of the security apparatus but also the failure of the rule of law setup as a whole. This, among other cases, delegitimised the then oligarchic government and its captured justice system and contributed to democratic change in 2019. This case also shows that even where implementation of ECtHR judgments is poor, they still play a political role. In Poland legal challenges brought by judges and NGOs led to key rulings by the ECtHR and CJEU,¹⁷ which reaffirmed judicial independence and forced partial rollback of disciplinary measures against judges.

Lack of implementation of judgments, common especially in accession countries such as Moldova, does not necessarily negate the value of transnational litigation, but rather reshapes the function of such rulings: they often operate less as instruments to order immediate compliance and more as sources of political, normative, and reputational pressure. International verdicts thus expose domestic systemic failures and ultimately delegitimise captured institutions. This in turn can empower domestic actors – judges, civil society, media – by providing authoritative external validation of rule of law breaches and framing the injured rights as international obligations rather than partisan claims. In accession contexts, such judgments also feed into EU conditionality and monitoring, increasing the long-term costs of non-compliance even when short-term implementation remains weak.

To conclude, litigation of rights can contribute to rule of law resilience in the face of threats by transforming rights into rule of law guarantees. No less importantly, it can also contribute to societal resilience by reaffirming citizens' trust in courts and by demonstrating that legality remains a viable means of redress. In this sense, litigation is not merely reactive but constitutive of the rule of law, transforming abstract rights into instances of legality and collective resilience.

4. Fundamental rights as everyday practice

Another way in which fundamental rights are important for rule of law resilience is in their practical exercise. When citizens, activists, journalists, legal professionals, and organised civil society actors invoke rights outside of courts and put them into action, they translate constitutional and treaty-based guarantees into operational safeguards capable of constraining public power and preventing rule

of law breakdown. Citizens practicing their rights function as “rule of law from below”.¹⁸

This is most apparent in the case of *freedom of assembly*. Protests play a visible role in expressing dissent and mobilising opposition to unlawful or arbitrary measures and often have substantial political outcomes, including by opposing, delaying, or mitigating rule of law backsliding. The 2017 “Chains of Light” demonstrations in Poland, which opposed reforms undermining judicial independence, led to significant public attention and political pressure. The result was the presidential veto of a law that would have undermined judicial independence.¹⁹ Although an amended version of the law still passed later on, the initial protests did demonstrate the capacity of public mobilisation to influence legislative processes. Romanian protests against corruption and legislative interference with the judiciary from 2017 to 2019 exemplified how collective exercise of assembly rights may impose political and reputational costs on governments pursuing illiberal reforms. In Moldova, protests against state capture, electoral law reform, and high-level corruption between 2015 and 2019 managed to mobilise the public, create new political forces, and overturn the oligarchic government in June 2019.²⁰ Freedom of expression and access to information are equally central to rule of law resilience. Independent media and watchdog organisations use these rights to monitor public institutions and to disseminate information necessary for informed public oversight. In doing so, they also reinforce “the rule of law from below” by asserting the effectiveness of these rights.

Similarly, the right to public participation – as detailed in the European Commission recommendation on participation²¹ – enables citizens to influence decision-making and create expectations that important decisions, including on the rule of law, are subject to debate and deliberation. Freedom of association, citizens joining together in organisations and political parties, allows collective action and creates organisational infrastructure for durable interventions, including on the rule of law.

Finally, the exercise of political rights – running for office, voting in or boycotting elections, participating in or organising referendums – underpins democratic processes and often is crucial for restoring, or at least defending the rule of law. In Moldova, in 2017–2018 a citizen-led initiative to organise a referendum to annul the pro-oligarchic elector-

al reform was blocked by authorities, but managed to gain popular support and expose a captured Central Electoral Commission.²²

To strengthen the impact of human rights practice on rule of law resilience, one should focus on lowering the barriers to mobilisation and strengthening the infrastructure of civil society. *Protecting and expanding the civic space* should be a central priority, with systematic monitoring of legislative developments on freedom of speech and assembly, advocacy work and, where necessary, litigation. Freedom of association should also be strengthened by lowering bureaucratic hurdles for NGOs' and political parties' registration and funding, as these provide the organisational infrastructure needed for long-term rule-of-law action, rather than just one-off protests. Furthermore, grassroots movements should be encouraged to develop and transition into formal political and civil society forces. By pushing for institutionalised *public participation mechanisms*, rule of law actors can move from a reactive role in preserving rule of law standards to one of active players in the democratic deliberative process at the earliest stages of potential backsliding. To safeguard such a role, all laws affecting the judiciary or electoral systems should be subject to mandatory consultations. By creating an expectation of debate, rule of law advocates will make it harder for governments to push through illiberal reforms in secret.

Watchdog organisations should be supported in their role through institutional protection in exercising access to information and by creating feedback loops: formal and informal mechanisms where civil society watchdogs can report rule of law breaches directly to independent bodies or international monitors.

To conclude, the practice of fundamental rights by the citizenry contributes to rule of law resilience even in the face of weak formal checks and balances by maintaining channels of contestation, oversight, and participation. The contested rights' effectiveness depends on the broader political and institutional environment – particularly the independence of the judiciary, the openness of the public sphere, and the responsiveness of public authorities. Yet, where these conditions exist to a minimal degree, the exercise of fundamental rights can generate pressure for institutional correction and preserve the normative expectations of legality within society.

More importantly, where exercise of fundamental rights is actively practised and internalised through civic traditions, societal norms and a vibrant civic space, the rule of law demonstrates greater resilience.²³ When citizens, media, and civic actors habitually exercise rights to contest abuses or demand transparency, they reinforce societal expectations of lawful governance and constrain arbitrary authority. This everyday practice of rights thus complements institutional safeguards: it sustains public vigilance even when courts or oversight bodies are weakened and becomes both a habit of citizenship and a mechanism of rule of law resilience.

5. Conclusion

Fundamental rights are essentially interlinked with and central to the resilience of the rule of law. Operating as enforceable obligations, societal norms, and lived practices of people and communities, they can provide multiple layers of defence against rule of law backsliding.

Legal adjudication, especially strategic litigation and resort to transnational justice, has the power to transform individual rights into systemic safeguards. Civic engagement and public mobilisation operationalise rights “from below”, creating pressure for accountability and institutional correction. Finally systemic practice of rights and their internalisation through societal norms and traditions fosters enduring expectations of lawful governance.

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The experiences of both EU and candidate countries illustrate that even under conditions of institutional weakness or partial capture, the active exercise of fundamental rights can constrain arbitrary power, expose abuses, and sustain democratic legitimacy. Ultimately, a resilient rule of law is not only a formal legal structure but a living system, continuously reinforced by the practice, advocacy, and societal recognition of fundamental rights. Where these rights are widely respected, internalised, and mobilised, both citizens and institutions are empowered to uphold legality, making arbitrary authority contestable and democratic governance more durable.

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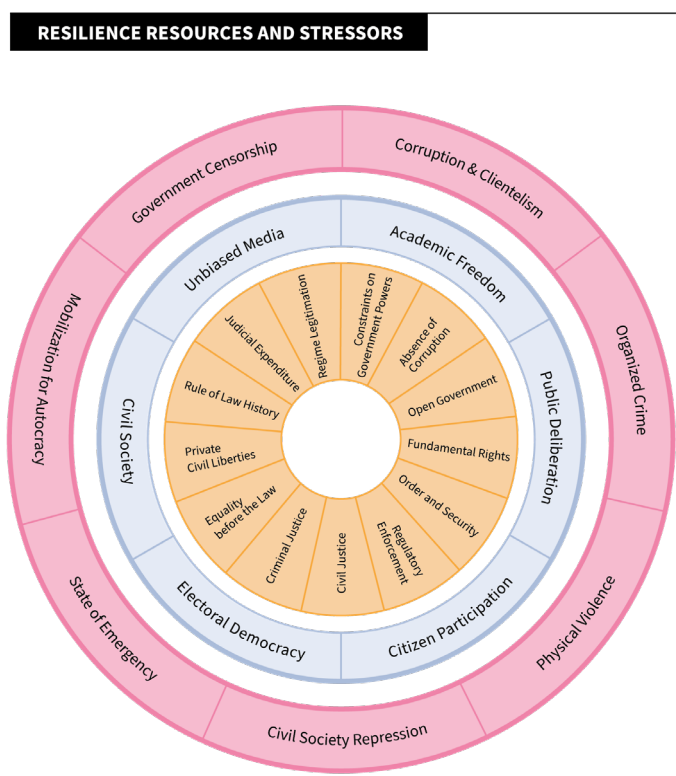
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About the project

RESILIO-ACCESS investigates the resilience of the rule of law in the current (potential) candidate states for EU accession. The project explores how to measure the resilience of the rule of law and assesses the potential of the EU’s enlargement policy toolbox to foster resilience in the region. Resilience here means the capacity of the rule of law to prevent, cope with or recover from hazardous events or incremental threats without losing its core function, structure and purpose.

About the paper

This paper is part of the **#RESILIO-ACCESS Snapshot Series**, a collection of compact analyses that explain ties between resilience resources of the rule of law identified by the RESILIO-ACCESS model.



The RESILIO-ACCESS model is based on three dimensions: The system of the rule of law itself provides primary resilience resources such as an effective judicial system, the protection of fundamental rights, and regulatory enforcement.

These resources are embedded into a social environment with subsidiary resilience resources such as civil society, academia, and the media.

However, these resources are constantly being challenged by threats such as autocracy, corruption, violence, or censorship. The characteristics of each dimension, their interactions and their conditions of resilience resources determine the overall resilience capacity of the rule of law.

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