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Resilience observatory on the rule
of law in EU accession candidates

RESILIO-ACCESS Snapshot Series

**Legal Culture as a Primary Resource for
Rule of Law Resilience**

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1. Introduction

This Snapshot examines the role of legal culture as a resource for rule of law resilience. The RESILIO-ACCESS model conceptualises legal culture itself as a primary, core resilience resource.¹ Institutionally, legal culture functions as an internalised set of values and practices within the legal system that determines whether legal professionals will uphold standards of procedural justice and professional integrity, even when they are faced with political threats. Socially, legal culture can positively affect the rule of law's resilience capacity through promoting and sustaining liberal democratic values, including law-abidingness, popular legitimisation of the legal order, public trust in the legal system, and civic engagement against autocratic encroachment.

A vibrant legal culture embedded in the spirit of rule of law has become the driving condition for the EU accession process. Thus, the Snapshot will also examine the correlation between legal culture, historical legacies and rule of law resilience in the Western Balkans. The first section defines the concept of legal culture. It is followed by an analysis of the principal ways legal culture can enhance rule of law resilience. The final section contextualises the challenges of legal culture as a resilience resource in the candidate countries and identifies modalities for how the accession process can contribute to building a more resilient legal culture.

2. Legal culture

Since its introduction in the 1970s,² the idea of legal culture has become one of the most potent discourses for explaining the nature, dynamics, and outcomes of legal systems across the world. In its essence, the concept emphasises the significance of the interaction between culture and law as a key factor that determines the state of legal systems and their propensity for change. In this sense, culture is either an enabler of or an obstacle to law.

Legal culture assumes that laws and legal systems are social constructs. That is, the characteristics and nature of laws, but also its organisational and functional features, are significantly determined by the social environment in which the legal frameworks and legal institutions are embedded. Hence, legal culture is manifested through the attitudes, beliefs, expectations and opinions that people hold about the law, as well as the legally oriented behaviours and established practices of the legal institutions. Existing literature distinguishes between a narrower, internal and a broader, external dimension of legal culture. Internal legal culture is understood as a specific culture that over time is developed among legal professionals. It encompasses the shared attitudes and legal values of the professional community (including lawyers, judges

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and other legal officials), but also the formal and informal practices through which legal professionals apply, interpret and further advance the law.

However, the outputs of the legal system only function if they are socially legitimised by the general population in a polity. This bottom-up perception of the legal system constitutes external legal culture, which emphasises how the general population thinks about and experiences the law and legal systems. In this sense, external legal culture encompasses popular trust in the legal system and the judiciary and citizens' assessment of the availability, accountability, fairness, or efficacy of the legal institutions.³ External legal culture also focuses on legal consciousness,⁴ which is more specifically related to the personal experiences and interpretations of the law by the ordinary citizens as legal outsiders, stressing how these perceptions can create behavioural dispositions towards law-abidingness or non-compliance with norms.

Assuming that the interaction between law and culture is a two-way street, legal culture is manifested in the processes of how cultural factors influence legal norms (for example, the role of traditional or religious values) as well as in how legal norms can influence society and societal change (for example, the regulatory outputs of EU law). Both processes comprise a legal culture that is seen as the architect of social order.⁵ Thus, legal culture can be an independent variable that explains the nature and problems of legal systems and how they operate, but it also represents an aggregate, shaped by the influence of a variety of cultural factors.⁶

Nonetheless, in all cases of application, legal culture is engrained in a very strong *cognitive* framework. In its essence, legal culture is a function of a culturally induced mindset that is shared by legal elites and by lay people alike – a *mentalité* understood as a way of thinking about the law that shapes the operation and positioning of the legal system in society and the state.⁷

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3. Legal culture as a resource for rule of law resilience

It is precisely this cognitive structure that establishes legal culture as a defensive cornerstone for the rule of law and a key resource for its resilience.

The rule of law presupposes that the legal system upholds liberal democratic values deriving from the Western legal tradition,⁸ including respect for individual and collective human rights and separation of powers.⁹ In this sense, how much the rule of law culture has been engrained in the mindset of the legal elites can become a measure of resilience of the legal system against authoritarian attacks or internal corruption. A well-established, long-lasting tradition of liberal and democratic values amongst the judiciary is assumed to serve as a buffer against authoritarian encroachment. Legal professionals are steeped in a culture of accountability, independence and integrity so that they can become judicial gatekeepers of the constitutional order either by voicing their concerns to the public and in the political sphere or by refusing to comply with unlawful and unconstitutional political diktats.

A vibrant internal legal culture based on ethical and professional standards and an agile system of procedural fairness is much harder to dismantle from the inside. Legal professionals who adhere to the rule of law ethos are much more likely to confront attempts to undermine their independence. This stems from a culture of progressive, pro-active legal profession that goes beyond legal formalism and is encouraged to interpret and uphold laws from a moralistic and humanist standpoint.

On the other hand, external legal culture is of equal importance for rule of law resilience. Legal culture is directly connected to the degree to which a community accepts and complies with its laws. It is nourished by the values communities attach to the legal system and how much the law is respected by the common citizen.¹⁰

In this sense, the laypeople within a society are the ones to legitimise the legal system through trust and law abidingness. Legal systems based on liberal understanding of the law enjoy high levels of public trust in the judiciary and strong popular support for judicial independence. Societies with a strong tradition of civic activism and respect

for constitutionalism shield the rule of law through public expectations and demands for adherence to law by government actors and political elites.

Legal culture should not be construed as a cure-all for judicial resilience, however, but rather as a significant contributing factor. Recent events across the globe demonstrate that judiciaries, even in established democracies, are not immune to external political encroachment.

To capture both the internal and external legal culture of a political system, RESILIO-ACCESS has constructed an innovative variable to measure rule of law history based on historical scores registered in the World Justice Project's Rule of Law Index. It serves to capture legal culture as an image of the *quality* of legal behaviour and practices in a polity, both on behalf of its legal elites and its citizens.

This empirical measure of legal culture is bolstered by two other important resources included in the RESILIO-ACCESS model. A vigilant civil society and media serve as legal watchdogs, able and willing to confront breaches of the rule of law. Such a setting already exponentially raises the political costs to those with illiberal and authoritarian intentions. However, if society is faced with democratic backsliding and political pressures on the judiciary, a robust external legal culture should set in motion a widespread manifestation of popular resistance and civic mobilisation which can delay or reverse the autocratic threats. Civil society mobilisation may range from more formal means of fighting the autocratic decrees in the courts to full-scale public protests. Good examples of the latter are the 2017 protests in Poland against the government's intention to subjugate the supreme court, or the massive protests in Israel in 2023 against the government's attempt to limit judicial independence.

4. Challenges of legal culture in the Western Balkans

Since 2000, legal culture in the Western Balkans has been confronted with an external push for transformation and modernisation. After 2005, the EU's strategy on enlargement has placed rule of law at the heart of the accession process by conditioning the progress in other policy areas on a successful track record of rule of law reforms. EU conditionality has attached particular importance to establishing a culture of judicial independence through

the formation of powerful judicial institutions: i.e. judicial councils and academies for judicial training.¹¹ Rule of law reforms and harmonisation with EU legislation are considered modernising agents that bring good laws and legal standards into the impoverished Western Balkans societies. However, almost two decades after the introduction of this robust and stringent EU rule of law conditionality framework, compliance results are a far cry from the desired outcomes. The judiciary is still constantly exposed to political pressures, marred by internal corruption and is amongst the least trusted institutions across all Western Balkan societies. The novel, externally stimulated institutional reform has not become an effective resilience resource, because the reform did not engender an adequate transformation of domestic legal culture.

This logic of legal transplants¹² has been criticised based on the culturally conditioned contexts in which law operates.¹³ In other words, the success of legal reforms depends to some extent on legal culture, especially in cases of transposition of legal frameworks borrowed from systems with different legal cultures.¹⁴ Thus, the formal and rigid nature of EU conditionality is conflicted with already established formal and informal rules and practices which are embedded in traditional culture and ideological values that often invoke resistance towards EU induced conditions. Most scholars agree that one of the key factors in the ambivalent rule of law performance of the Western Balkan candidate countries has been the slow pace of adaptation of local legal culture, a transition heavily constrained by historical legacies.

Legacies and traditions can play a dual role for the quality of legal culture and its potential for resilience. Legal systems with long-standing rule of law traditions are more likely to develop a high level of resilience from autocratic attacks. On the contrary, legacies of authoritarian rule could become an important disabling factor for the success of rule of law reforms and diminished resilience capacities. Except for Turkey, all of the current candidates

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have at least 50-year-long legacies of communist/socialist legal traditions, with the dominance of communist parties as the key feature of the local legal cultures.¹⁵ The judiciary and the wider legal profession were stripped of autonomy and were instrumentalised to serve the interests of the party elites. Over time, this created a submissive judicial culture based on practices of evading responsibility for passing judgements, and deeply ingrained in excessive judicial formalism and positivism, focused on textual interpretations instead of argumentations based on the spirit of the law.¹⁶

The democratic transition after 1990 did not bring a decisive cultural transformation. The communist legacy continued to shape legal culture through path-dependent practices and institutional memory, as the judicial elite in the newly established democracies remained largely the same as before. These legacies created structural and behavioural patterns that are still shaping some aspects of internal legal culture to this very day.

Three remnants from the past continue to affect rule of law reforms in candidate countries.¹⁷ First, judges' self-perception as professional bureaucrats tasked to solely apply law manifests in low self-awareness of the concept of separation of powers and its role in maintaining judicial independence. Second, a hierarchical mentality fosters submissiveness in the judicial ranks and severely limits dissent and difference of opinion from junior judges. Third, despite newly acquired constitutional powers, the constitutional courts' impact is limited by legal formalism and textualism.

Paradoxically, the EU's strategy to empower judicial and prosecutorial councils, in some cases, has unintentionally assisted the perseverance of this mentality. One of the problematic outcomes of the institutional transformation of the judiciary has been the creation of very powerful judicial elites who were given control over the processes of recruitment, appointment and career advancement of judges and prosecutors, thus opening the door to judicial oligarchies keen on nepotism, corruption and political clientelism.

Another challenge for legal culture in the Western Balkans is related to some indicators of its external dimension and patterns of legal consciousness. Although external legal culture in the region remains largely unexplored, some preliminary research indicates that, in all Western Bal-

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kan countries, more than a third of the population is not prone to unconditioned law-abidingness. A noteworthy proportion of the population is inclined to circumvent or break the law in given situations. Moreover, the attitudes towards the law in the Western Balkans are situated in a context of a backlash between internal and external demands for legal modernisation and a traditional culture resistant to legal change. This has been particularly pronounced amongst the Eurosceptic population, which is more likely to break or circumvent the law than other demographics.¹⁸

These challenges prove that even extensive institutional reforms cannot fully uphold rule of law resilience – unless they are accompanied by a substantive transformation of local legal culture. Two pathways can support this transformation. First, sustained reforms of legal education and training of legal professionals aimed at changing judicial mentality should be prioritised.¹⁹ Moreover, elementary and secondary education should foster a more widespread understanding of legal rights and develop a proactive, democratic legal consciousness as a precursor for a more resilient external legal culture. In this sense, extensive support of watchdog civil society and media organisations as complementary resilience anchors further reduces the vulnerability of the legal system to autocratic threats.

The second pathway for EU rule of law conditionality to steer transformations towards a more resilient legal culture is through fostering professional socialisation and facilitating peer support. Judicial networks have been recognised by judges and prosecutors in former candidates for EU membership as significant vectors for expanding their horizons and legitimisation of their work.²⁰ Hence, more extensive support for training of the judiciary from the candidate countries within pan-European judicial training associations like the European Judicial Training Network would enhance the processes of incremental socialisation towards a more Westernised legal culture.

5. Conclusion

Legal culture is an important resource for a resilient rule of law that extends beyond formal procedures; it exists at the cognitive level amongst lawyers and citizens. Recent examples of democratic backsliding and corresponding attempts to dismantle judicial independence in some EU member states are a compelling indicator that EU integration does not guarantee long-term stability of the rule of law. However, although legal cultures are based on path-dependent traditions and legacies that significantly contribute to their durability, they are by no means fixed. Legal cultures are always in a state of flux. EU conditionality might not be a panacea for the rule of law, but it can be a very important contributing factor for cognitive change amongst legal professionals and the wider population to internalise rule of law values.

“Legal cultures are always in a state of flux.”

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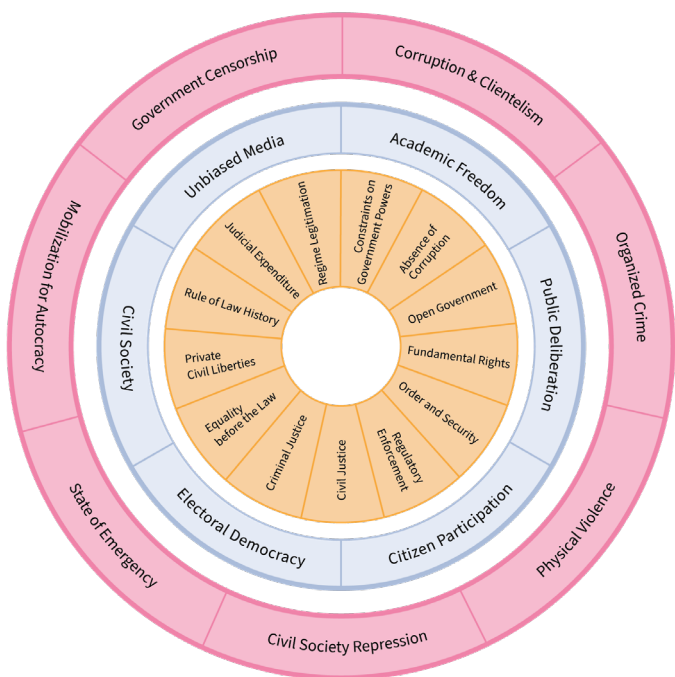
About the project

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.

RESILIENCE RESOURCES AND STRESSORS



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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