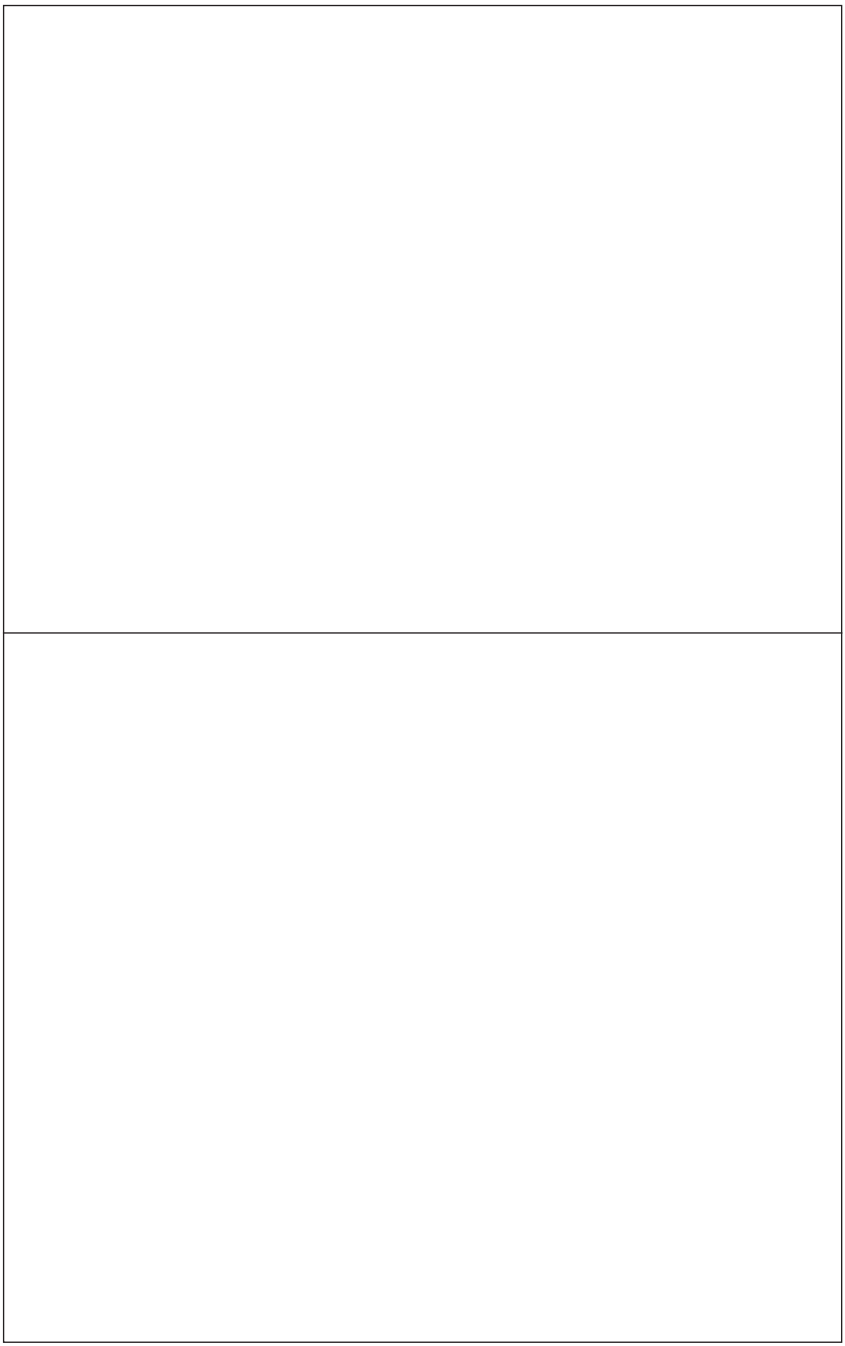
Katja Meier | Astrid Lorenz | Mattias Wendel (Hrsg.)

Rule of Law and the Judiciary

Nomos



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Foreword

Katja Meier

Without exaggeration, the rule of law is an indispensable component of democracy and a civilized community. However, it is anything but easy to put its essence into a formula and to make tangible what lies behind this rather abstract concept. For this reason, we like to help ourselves with linguistic images. We often refer to the rule of law as the "basis", "cornerstone", "pillar" or "foundation" of our coexistence. Where the related terms pass our lips naturally and routinely, there is a danger that we no longer even examine them for their true content, that we use them carelessly and entirely by reflex. Nevertheless, I believe that in Europe – German is by no means the only language in which such linguistic images are common – we consciously choose the related terms, for there is nothing decorative about the rule of law. It is neither a mere ornamental accessory nor an addition to the otherwise ready-to-occupy building of our polity.

Instead, it is true that only on the foundation of the rule of law can a political edifice be built that is characterized by stability and can withstand all storms. However, we must ensure that the foundation remains strong and is regularly renewed. In order to contribute to this, the Saxon State Ministry of Justice and for Democracy, Europe and Equality, together with the University of Leipzig, has launched the Leipzig Conference on the Rule of Law, which is to become an annual event. With this conference, we not only acknowledge the immense importance of the rule of law in the more than 65-year history of the European Union, but we also want it to be understood as the key to the future of the European community. It stands for the certainty that state power is not exercised arbitrarily but is bound by law and justice. It stands for confidence in the protection of our rights by independent courts. It guarantees that we can live freely, equally and in dignity. In other words, the rule of law affects our self-image as Europeans.

Within the European Union, we must constantly work to preserve the rule of law, and recent developments in some Member States have shown that this, unfortunately, does not always succeed. At the same time, we in Germany should not argue from a high horse in this debate. German history, in particular, repeatedly proves that the rule of law never comes

about on its own but has to be worked for and defended against threats through constant efforts. In Germany, where a contemporary tradition of the rule of law had to develop anew after the Second World War, we know all too well about the myriad challenges linked to it.

Aware of these historical connections, we in Saxony feel a great need to use our diverse cross-border contacts, especially those with our neighbouring countries, Poland and the Czech Republic, to preserve the common European value standard. Due to its history of transformation to the rule of law and its geographical location in the heart of Europe, the Free State of Saxony is in a unique position to have a unifying effect in the current debate on the rule of law in Europe. We have been working closely with Poland and the Czech Republic for a long time in the area of justice, for example in exchange projects and judicial partnerships as well as in cross-border criminal prosecution. Thanks to these contacts, we can also react together to European crises and current political developments – this kind of European cohesion has been called for not only since the aggressive Russian war against Ukraine. There is no lack of evidence that within the European Union our commitment to the rule of law is needed daily. In particular, judicial independence must be preserved, corruption must be fought, freedom and media pluralism must be protected, and civil society activities must be defended against state restrictions. Where dangers arise, they must be named, as was done again in the EU's third annual report on the rule of law (2022). Moreover, existing means must be consistently exhausted and, if necessary, the toolbox expanded to combat these dangers.

However, where the lines of conflict threaten to harden, it is also worth trusting in the power of dialogue. We may sometimes use the magic word "dialogue" in the debate on the rule of law in a similar inflationary manner as the linguistic images of foundations and pillars already mentioned. On the other hand, honest dialogue that deserves the name is rare. Nevertheless, this is what is needed now to defuse existing conflicts and find a common European denominator again on the rule of law. The Leipzig Rule of Law Conference aims to facilitate such a dialogue process. A mutual understanding of the rule of law cultures of Western and East Central Europe can help point out threats to the rule of law, explore their causes, and develop joint solutions. Another decisive factor from the beginning was the desire to bring European issues to Saxony and to help shape Europe from here, involving as many interlocutors as possible from politics, the judiciary, academia and civil society.

Leipzig was the perfect place for such a dialogue on the rule of law in many ways. It is impossible to imagine Leipzig's history without the struggle for the rule of law – think of the Peaceful Revolution of 1989, when people, inspired by the Polish civil rights movement, took to the streets to demand freedom, democracy, human dignity and respect for the law. Today, Leipzig is home to the Federal Administrative Court, the 5th Criminal Division of the Federal Supreme Court and the Forum Recht, among others, not to mention a university with an excellent reputation in the field of research into the rule of law. In a university city like Leipzig, which is as lively as it is worth living in, it is also possible to reach a young audience interested in European policy issues – conference content such as the student "Moot Court" were explicitly aimed at this group of addressees.

Today, Leipzig stands for the rule of law: for independent courts and institutions committed to protecting the human dignity of every individual. It is not something to be taken for granted, but an achievement we should value and preserve. When we talk about challenges to the European rule of law here in Leipzig, we are also talking about ourselves and the importance of the rule of law for our coexistence. I am delighted that the Leipzig Rule of Law Conference was so well received at its premiere, and I am confident that it can continue to make an essential contribution in the future so that the conversation thread does not break.

We must never put the rule of law itself up for discussion or otherwise put it at risk. Nevertheless, we may and must passionately debate the rule of law. The rule of law only exists if we actively engage with it and make it the yardstick of our political thinking and action. Let us be clear in a candid discussion about what the rule of law means today in Europe and what traditions it is shaped by within the individual Member States – then we will not only have the chance to defuse existing conflicts but also take a step towards a genuine European community.

Foreword

Didier Reynders

The rule of law is fundamental to a stable, resilient, fair and democratic political, economic and social environment across the European Union. It is essential to a well-functioning Single Market and to the Union as a whole. It is also a reflection of Europeans' aspirations and values, enshrined in Article 2 of the Treaty. The Russian invasion of Ukraine is a reminder of the need to uphold our basic EU values. Protecting our citizens and their rights needs a determined and consistent defence of the rule of law across the EU.

Respect for the rule of law is a prerequisite for protecting all other values, and it is crucial for the effective application of EU law and for mutual trust between Member States and their judicial authorities. We also need Member States to uphold the rule of law because it is essential for our internal market to function. When they know courts of law will uphold their rights, creditors are more ready to lend, businesses will be more active and innovative companies are more likely to invest. In fact, respect for the rule of law in Member States is a condition for the very functioning of the European Union itself.

It is important to recall that, while Member States have different legal systems and traditions, the core meaning of the rule of law is the same across the EU. The key principles of the rule of law are common to all Member States – legality, legal certainty, prohibition of the arbitrary exercise of executive power, effective judicial protection by independent and impartial courts respecting fundamental rights in full, the separation of powers, permanent subjection of all public authorities to established laws and procedures, and equality before the law – are enshrined in national constitutions and translated in legislation.

The case-law of the Court of Justice of the European Union (CJEU) on the rule of law and judicial independence provides a clear set of legal requirements which Member States have to follow in their rule of law-related reforms. Respect for the rule of law entails compliance with EU law and the principle of primacy of EU law, which is the foundation of the EU.

In recent years, we have witnessed concerns regarding respect for the rule of law emerging in some Member States. This shows that the rule of

law cannot be taken for granted. Therefore, the Commission has gradually developed and used a variety of instruments to address challenges to the rule of law over the last few years, the so-called Rule of Law Toolbox.

A new instrument has been added to this toolbox in 2020 with the annual Rule of Law Report. It is conceived as a yearly process, during which we aim to prevent problems from emerging or deepening. It also allows Member States to learn from each other, through an exchange of best practices. This improves our knowledge of what is happening in the Member States, which is also crucial for making the best possible use of the other tools in our rule of law toolbox.

The Commission remains fully committed to making use of all the tools at its disposal, as necessary to promote and uphold the rule of law. For example, in critical situations where judicial independence or the independence of regulatory authorities in a Member State is affected, the Commission can, as the guardian of the Treaties, launch infringement proceedings against a Member State. We can also protect the EU budget against breeches of the rule of law. We now have a conditionality mechanism in force since 1 January 2021. And both OLAF and now the European Public Prosecutor's Office are there to protect the budget against fraud.

We also see a number of national recovery plans investing in improving the rule of law. Many Member States are doing this with investment in the digitalisation of justice for example which we saw during the pandemic was extremely important.

But it is also true that we still need to do more to build broad awareness across Europe and help our fellow citizens understand why the rule of law matters in our daily lives. Germany, for example, has successfully carried out a public awareness campaign as part of 'the pact on the rule of law'.

In a time where the rule of law is under pressure, it is of the highest importance to strengthen the rule of law culture among the general public and to promote a better knowledge of the requirements of EU law and European standards. Civil society, media, Member States' education systems and of course academia can all play an important role to ensure a place for the rule of law in public debate and educational curricula.

Initiatives like the first tri-national conference on the rule of law organised by Saxony together with Leipzig University are therefore very important: they make a concrete contribution to building this narrative and a genuine culture of the rule of law in Europe. They provide a forum for direct exchange between academia, the judiciary and politicians on the key

challenges we are facing today. And what is particularly welcome is that the conference also involved students.

Young people can – and should – play an important role when it comes to building the rule of law culture. The tri-national moot court that was organised as part of the conference is an excellent example of this. It has brought law students from three countries together and allows them to both engage in a serious academic exchange on an important EU law topic and at the same to build personal relationships across borders.

Looking ahead it is true that at the moment, we are facing some serious challenges. But I do believe that change is coming. When I look back over recent years, it is clear that there has been a change in approach to EU-level discussions on the rule of law.

Today the rule of law, including country-specific discussions, has a permanent place on the agenda of the General Affairs Council. This was unthinkable only a few years ago. For a good part, this is the result of the introduction of the EU rule of law Mechanism with the annual Rule of Law Report at its centre.

The 2022 Rule of Law Report, adopted on 13 July 2022, further builds on this process and takes the next step in the Commission's investment in the rule of law: for the first time, the report includes concrete recommendations to all Member States. In line with the preventive nature of the report, the objective of these recommendations is to support Member States in their efforts to take forward ongoing or planned reforms, to encourage positive developments, and to help them identify where improvements or follow-up to recent changes or reforms may be needed, also with a view to address systemic challenges in certain cases.

But defending the rule of law is not just a task for the European Commission and the EU institutions in general. It is a task for the Member States and for all people living in Europe. And of course, the regions of Europe are part of this too. Through conferences such as the one organised by Saxony and Leipzig University in January 2022 and in the day-to-day cooperation across borders, you are making important contributions to building the culture of the rule of law bit by bit. These are vital contributions to the rule of law culture in Europe and I encourage you to further build on this experience in the coming years.

Rule of law challenges as integration booster, learning from resilient actors and ambiguities of rule of law by design

Multiplying perspectives on the rule of law

Astrid Lorenz, Mattias Wendel

1 Introduction

The rule of law is one of the fundamental values of the EU, enshrined in Article 2 of the Treaty on European Union. The treaty "confirms or rather assumes, for legitimating purposes, that the Union and national constitutional regimes are based on a broadly identical set of foundational principles and values."[1] In recent years, however, respect for it has become one of the most pressing issues on the European agenda. The conflicts between the EU and the governments of some of its Member States have shown how difficult it can become to take adequate measures to protect the rule of law in general and the independence of the judiciary in particular. Controversies include how exactly the rule of law principles are to be spelled out, who has the right to enforce their implementation, to what extent EU law may set standards for the organization of national justice, and whether the EU evaluates all its Member States fairly and equally.[2]

1 Laurent Pech, "'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law" (2010) 6 European Constitutional Law Review 359, 362.

2 There is a broad range of academic and other publications on the topic. For an overview, see Ramona Coman, *The Politics of the Rule of Law in the EU Polity: Actors, Tools and Challenges* (Palgrave Macmillan 2022); Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016); Ramona Coman, 'Protecting the rule of law and the state of democracy at the supranational level: Political dilemmas and institutional struggles in strengthening EU's input, output and throughput legitimacy' in Luca Tomini and Giulia Sandri (eds) *Challenges of democracy in the 21st century: Concepts, methods, causality and the quality of democracy* (Routledge 2018); Antonia Baraggia and Matteo Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' (2022) 23 German Law Journal 131; Lisa H. Anders and Sonja Priebus, 'Does It Help to Call a Spade a Spade? Examining the Legal Bases and Effects of Rule of Law Related Infringement Procedures Against Hungary' in Astrid Lorenz and Lisa H. Anders (eds), *Illiberal Trens and Anti-EU Politics in East Central Europe* (Palgrave Macmillan 2021).

The approach used in this volume to analyse the conflicts is based on the assumption that the crisis goes beyond mere legal problems,[3] which requires multiplying the perspective on the subject – be it in national and disciplinary terms or by bringing scholars and views from practice together. In order to deal with the numerous difficulties, uncertainties and gaps in knowledge on the subject and to strengthen research and international exchanges of ideas, we organized an international Rule of Law Conference, which took place in Leipzig on 27 and 28 January 2022. It was attended by academics, judges and politicians from the Czech Republic, Poland and Germany. The contributions collected in this volume present some of the fruits of this conference, which was hosted by the Saxon State Ministry of Justice and for Democracy, European Affairs and Gender Equality in cooperation with Leipzig University.[4]

In this introduction to the volume, we first explain in more detail the volume's particular approach of multiplying perspectives on the rule of law. Afterwards, we present its structure and highlight some main findings of the chapters. In the third section, we discuss how exactly research can benefit from the presented perspectives by systematizing three main insights. They include the counterintuitive effect of more integration through rule of law challenges, the benefit of learning from resilient actors, and ambiguities of ensuring the rule of law by institutional design and legal means. Finally, we summarize our findings and give some recommendations for future research.

3 Paul Blokker and Oscar Mazzoleni demand in a similar vein an "interdisciplinary, comparative, and historically sensitive approach to the relation between populism and law" (Paul Blokker and Oscar Mazzoleni, 'Judicial Populism: the Rule of the People against the Rule of Law' (2020) 13 Partecipazione e conflitto 1411. See also Dimitry Kochenov and Petra Bárd, 'The Last Soldier Standing? Courts Versus Politicians and the Rule of Law Crisis in the New Member States of the EU' in Ernst Hirsch Ballin, Gerhard van der Schyff and Maarten Stremler (eds), *European Yearbook of Constitutional Law 2019* (T.M.C. Asser Press 2020).

4 Astrid Lorenz wishes to acknowledge the German Ministry of Education and Research for funding the project "Rule of Law in East Central Europe" (2021–2024, project number 01UC2103) from whose insights her work on this volume benefited directly.

2 Aims and rationale of the volume

As a Union based on the rule of law, the EU depends on its basic values being shared and upheld by its Member States.[5] In recent years, however, the conflicts between the EU and some of its Member States have taken on a serious dimension that we might not have thought possible. They concern the very foundations of the European Union. It is about whether or not the values of the rule of law and democracy are upheld and what measures actors are willing to take to defend them. It is about whether the European Union will still be a Union of law tomorrow, that is a Union in which the strength of the law and not the law of the strongest prevails. It is about whether public power will still continue to be established, exercised and limited by formal procedures and substantive guarantees, such as fundamental rights and proportionality.

Obviously, it is difficult to take adequate, i.e. effective measures for protecting the rule of law and particularly judicial independence not just in the EU Member States, but also at EU level.[6] It became clear that although the rule of law is one of the EU's fundamental values, it is a concept with many faces, and that there is no "natural consensus" on what the rule of law principle exactly means,[7] who has the right to enforce it, to what extent the EU can formulate standards for the organization of national justice at the Member State level, and if the EU evaluations are fair and equal. However, the arguments and aspects mentioned in the rule of law crisis embrace very diverse aspects, including free and equal elections, media diversity, academic freedom and the fight against corruption. It is thus not a crisis limited solely to the rule of law but embedded in the larger, global context of an increasing challenge to liberal democracies. It is about the

5 Daniel Hegedüs, 'What Role for EU Institutions in Confronting Europe's Democracy and Rule of Law Crisis?' (2019) 4 GMF Policy Paper 2.

6 There is much criticism of the EU measures with regard to its effectiveness. See, for example, R. Daniel Kelemen, (2022) 'The European Union's failure to address the autocracy crisis: MacGyver, Rube Goldberg, and Europe's unused tools' (2022) 45 Journal of European Integration 223; Carlos Closa, 'Institutional logics and the EU's limited sanctioning capacity under Article 7 TEU' (2021) 42 International Political Science Review 501.

7 Laurent Pech argues that a consensual core meaning of the rule of law has crystallized in the EU but relies only on the Venice Commission/Council of Europe and EU actors (Commission, EP, CJEU) and key papers, not practices. Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14 Hague Journal on the Rule of Law, 107, 122ff.

extent to which the existing European model can be upheld in the global competition of values.

The rule of law crisis takes different forms, plays out on different levels and the lines of conflict vary at and across the different venues. They include horizontal and vertical struggles which are also interlinked by cross-level strategies of actors. Horizontal conflicts are fought between domestic governments, opposition and judicial actors at the Member State level, between Member State governments as well as between organs of the EU. Vertical conflicts are fought between governments and civil society inside Member States, between the EU and individual Member State governments as well as between other international courts and Member States.

The crisis can be traced back to the attempt by some governments to transform a horizontal relationship with the judiciary within the framework of the separation of powers into a vertical relationship by curtailing the powers of judges in order to control them. Since these problems could not be solved at the national level, the conflict spilled over to the EU level, where the reactions and horizontal relations between the EU organs varied. In 2021, the European Parliament accused the Commission of inaction and launched an action against it before the Court of Justice.[8] In certain areas, there is also lacking consensus between the Council on the one hand and the Commission and the European Parliament on the other, as can be seen in the so-called Article 7 procedure. In the case of cooperation between the Member States, another horizontal relationship, the question of the limits of mutual trust became a crucial point which was also an issue handled by courts upon individual proceedings. At what point, for example, must judicial cooperation in criminal matters be suspended and may persons no longer be transferred to a particular Member State because it fails to ensure judicial independence?[9]

Vertical conflicts are represented by the fact that civil society actors tried to support judicial independence, to defend judges against political majorities and to mobilize EU and other European actors for the fight for judicial independence. The European Commission has increasingly taken legal action against deficiencies regarding judicial independence in some Member States in recent years, which were more and more addressed as

8 The action was finally withdrawn in June 2022.
9 CJEU, case C-216/18 PPU *LM [Shortcomings of the Polish Judicial System]* (2018).

rule of law problems.[10] The Court of Justice of the European Union has issued landmark rulings, at first sporadically, but more recently in greater numbers.[11] The question of judicial independence and essential standards of fundamental rights were at the centre of this very jurisprudence. At the international level, the European Court of Human Rights has intervened several times. Here, too, the issue was judicial independence, and the right to a fair trial in particular.[12]

What became clear to a wider public during the rule of law crisis is that even in sub-regions of the EU, the rule of law developments and discourse in neighbouring countries can differ substantially. For example, although German Saxony is linked to the Czech Republic and Poland by common borders, by close political and civil society relations and by a history of social and constitutional change, these entanglements did not automatically create commonalities in the legal framework, in the world of thought regarding the rule of law and in the way problems are perceived. Likewise, the legal framework, the ways of thinking about the rule of law and the way problems are perceived differ between the Czech Republic and Poland. Also the features and development of the culture of rule of law vary from country to country. Nevertheless, all three parties form part of the European Union with its overarching legal framework and commit themselves to the idea of EU integration. Against this background, the aim of the Rule of Law Conference and of this volume was and is to create and deepen a mutual understanding of the challenges and threats to the rule of

10 See, in particular, CJEU, case C-619/18 *Commission v Poland [Independence of the Supreme Court]* (2019); case C-192/18 *Commission v Poland [Independence of ordinary Courts]* (2019); CJEU, case C-791/19 *Commission v Poland [Disciplinary Regime for Judges]* (2021); pending CJEU, case C-204/21 *Commission v Poland [Independence and private Life of Judges]*.

11 Groundbreaking CJEU, case C-64/16 *Associação Sindical dos Juízes Portugueses* (2018). On the legal situation in Poland see the rulings mentioned in *supra* note 4 as well as CJEU, case C-585/18 *A.K. [Independence of the Disciplinary Chamber of the Polish Supreme Court]* (2019); case C-824/18 *A.B. et al. [Appointment of Judges to the Polish Supreme Court]* (2021); case C-487/19 *W.Ż. [Chamber of Extraordinary Control and Public Affairs]* (2021). On the conditionality mechanism see CJEU, case C-156/21 *Hungary v Parliament and Council [Conditionality Mechanism]* (2022), paras 232 and 124–127 and CJEU, case C-157/21 *Poland v Parliament and Council [Conditionality Mechanism]* (2022). For case law on the legal situation in Romania see CJEU, case C-83/19 et al. *Asociația Forumul Judecătorilor din România* (2021), paras 207, 223, 241; CJEU, case C-430/21 *RS [Effects of Decisions of a Constitutional Court]* (2022), paras 38, 43 et seq., 57, 87.

12 ECtHR, case No 4907/18 *Xero Flor* (2021).

law with a particular focus on the national judiciary and to discuss possible solutions. What instruments are available to the EU and the Council of Europe to ensure compliance with the rule of law, and how much discretion is available for national specificities? Are judicial councils an appropriate means of protecting the courts from undue outside influence if we see that the Czech Republic and Germany ensure judicial independence without this model? How should disciplinary rules for judges in Poland be treated from the perspective of EU law? Are judges of state constitutional courts in Germany politically independent? These are just some of the topics discussed in this volume.

Under the term of multiplying perspectives, one idea of the conference and this volume is to bring perspectives from different *academic disciplines* together, with legal scholars and political scientists taking part. The aim was to step out of handling the rule of law crisis as a purely legal challenge and to leave the rather small, sometimes fragmented academic communities in which research issues are explored and discussed through very specific lenses. While the contribution of legal scholars may be obvious for a subject related to law, what social scientists can contribute to the rule of law discussion is that, ultimately, the rule of law crisis is also about actors and their different perceptions and experiences of the rule of law.[13]

Perhaps under the surface, in the countries with rule of law deficiencies, still unresolved domestic conflicts rooted in the post-1989 transition to democracy and a market economy and later EU accession play a role. These conflicts have a moral quality and could only partly be tackled by instruments available under the rule of law. Such conflicts relate to different dimensions of the post-1989 transformation, e.g. if the mode of transition was de-powerment of old political elites, as in the Czech Republic, or a compromise between old and new elites with a "thick line" under the past, like in Poland, or de-powerment of old elites combined with a transplant of institutional models and judicial personnel, like in Eastern Germany. Other dimensions were how countries came to terms with tackling moral questions of personal responsibility under communism under the new condition of the rule of law, or with tackling property and social rights in the course of the transition to a market economy.

13 See, for example, Jiří Přibáň, 'Sociology of the rule of law: power, legality and legitimacy' in Jiří Přibáň (ed), *Research Handbook on the Sociology of Law* (Edward Elgar 2020); Philip Selznick, 'Legal Cultures and the Rule of Law' in Martin Krygier and Adam Czarnota (eds), *The Rule of Law After Communism: Problems and Prospects in East-Central Europe* (Routledge 1999).

While to some observers, the post-1989 transformation seems to be a long time ago and unrelated, it can still cast a shadow on today's life because of its structural effects and profound disappointments. It can also be instrumentalized in political struggles by interested parties. Transformation meant that the enormous changes in all areas of life – politics, economy, society – had to be implemented in the form of new legal principles and rules, that a new system of judiciary and legal education had to be established.[14] While the law was being completely rebuilt, elements of the old law (and the methods of handling it) continued to apply until new law was adopted, which took its time. This caused problems, which was not the only reason why judges played a new, very important role in deciding conflict issues.[15] Some of these judges had made their careers in the old system and decided now on key issues such as lustration and restitution or the system of checks and balances between government, parliament and judiciary which affected themselves.[16] Very quickly, the democratization of law was followed by a Europeanization of law in the sense of an adaptation to "Western standards".[17] The background to this was the declared will of the domestic political majorities, like in the Czech Republic and Poland, to join the EU and to adopt its body of law.[18] It was "anticipated that, immediately after accession, the constitutional courts of new Member States will adopt an activist stance towards the relationship between EU law and the respective national constitutions, and to the questions of the direct effect and supremacy of EU law."[19]

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14 Raj Kollmorgen, 'Post-socialist Transformations in the Twentieth and Twenty-first Centuries' in Wolfgang Merkel, Raj Kollmorgen and Hans-Jürgen Wagener (eds), *Handbook of Political, Social and Economic Transformation* (Oxford University Press 2019).

15 On the role of constitutional courts see, for example, Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago University Press 2000); Radoslav Prochazka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Central European University Press 2002); Wojciech Sadurski (ed), *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International 2002).

16 For the Czech case, see the chapter of Jan Němec in this volume.

17 Ivan Krastev and Stephen Holmes, 'Explaining Eastern Europe: Imitation and Its Discontents' (2018) 29 Journal of Democracy 117.

18 Wojciech Sadurski, 'Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe' (2004) 10 European Law Journal 371.

19 Ibid, p. 393.

The East Germans, including people in Saxony, also have this dual transformation experience of democratization and Europeanization. And yet the processes differed with the early 1990 accession to the already well-established system of rules and policies of the Federal Republic of Germany. While the new Länder, like Saxony, gained much more freedom from the national level as compared to the GDR, the federal legal framework was fixed and not only the constitutional system as such, but complete federal statutes were "imported" from West German Länder.[20] Moreover, the system of legal education and administration of justice was imported to a large extent, as were judges. This saved time and reduced uncertainty and problems of possibly incriminated judges. Nevertheless, the processes were not without criticism. The morally and politically coloured criticism mainly referred to the transplant of models and personnel, but also to the protection of rights of high-ranking GDR officials. Well-known is the complaint by former dissident Bärbel Bohley: "We wanted justice and got the rule of law."[21]

Another idea linked to the approach to multiply perspectives on the rule of law crisis has been to bring views from different *countries* together, representing both the academic world and perspectives from outside academia. This is necessary because within the framework of a nation state, the domestic legal framework can quickly be taken to be "universal" or "normal" although the legal spaces and traditions differ. Sometimes national perspectives are conflicting or emphasize different aspects of an issue. At the same time, people from different legal spaces may have developed common beliefs and views of problems irrespective of their different cultural legacies. In this case, differences may be just nuances of relatively similar general norms and values. The present volume is based on the assumption that it is important to make differences and commonalities more visible in order to better conceptualize the rule of law, make it measurable, and protect it.

In sum, the approach of this volume to multiply perspectives on the rule of law is that understanding differences and similarities of legal orders and

20 Raj Kollmorgen, 'Umbruch ohne Revolution? Beitritt statt Transformation? Zur Deutung des ostdeutschen Wandels seit 1989 im mittelosteuropäischen Kontext' (2009) 20 Berliner Debatte Initial 90. An exception from this overall pattern was the particular domain of constitutional politics in the new Länder. See Astrid Lorenz, 'Parties and Rules. Constitution-making in the East German Länder after 1990' (2016) 7 Journal on European History of Law 28.

21 Ingo von Münch, 'Rechtsstaat versus Gerechtigkeit?' (1994) 33 Der Staat 165.

provisions, differences and similarities of perceptions of the rule of law as well as context factors (experiences, interpretations of more distant historical experiences or legal and political socialization) are relevant to solving the present rule of law crisis in the EU and some of its Member States. They need to be known and dealt with sensitively in order to shape policy and law effectively. Put more simply, the motto was: don't speak about other European countries; instead, speak with other Europeans. Many academics, but also judges, are already practising this idea in their everyday life. We want to promote even closer ties between legal practitioners and scholars of these countries and to enhance collaboration in joint projects.

3 Structure of the book and chapter findings

Against this background, the contributions in this volume analyse relevant issues and questions from different perspectives and disciplines. The *first part* of the book deals with the *foundations and challenges* of the concept of the rule of law, with a specific regard to the judiciary. The *second part* addresses key issues of *judicial independence* from a scholarly perspective. The *third part* reflects on the *experiences from legal and political practice* with regard to judicial independence.

In a joint chapter, *Astrid Lorenz* and *Lisa Anders*, both political scientists, contribute to the first part by providing an overview of established rule of law indices that are used in comparative politics. They analyse how renowned approaches developed independently from the current EU rule of law crisis define and measure the rule of law and how they can inform the highly political and even emotional disputes in the EU.[22] They show that while there are differences, the indices share some core assumptions, e.g. that the independence of the judiciary is a relevant element of the rule of law. This makes it possible to assess whether countries meet the broadly accepted rule of law standards. However, there are also clear differences of the indices with regard to the elements of the rule of law which make it necessary to be transparent about the definitions used, an approach already followed by the Venice Commission of the European Council and the European Commission. The chapter also reveals that compared to the

22 For a similar attempt see András Jakab and Lando Kirchmair, 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 German Law Journal 936.

scholarly indices, the EU has developed a very encompassing approach to define the rule of law. Moreover, it analyses – based on interviews – how judges and politicians in Poland and the Czech Republic perceive the rule of law. The authors make two policy recommendations. The first one is to argue straightforwardly that – for good reasons – the EU has encompassing rule of law standards instead of insisting that the EU's concept is the only possible understanding of the rule of law. The second one is to study whether governments' rule of law reforms and ideas in backsliding states are supported by other politicians and judges.[23] This helps in choosing the right instruments to resolve conflicts.

In a second contribution to part one, *Ivo Šlosarčík*, a legal scholar and Professor of European Integration Studies at Charles University Prague, maps out the future of the rule of law in the EU *beyond* Polish and Hungarian controversies. Taking the process of transformation in the Czech Republic as a starting point, he sketches out the legal standards for the independence of national courts under EU law as well as the instruments of the EU to counter the crisis. Afterwards, the author argues that in the context of dealing with the particular situations in Poland and Hungary, a new regulatory framework is emerging in the EU formed by loosely interconnected procedural tools with as yet no mutual hierarchy or temporal coherence. At present, it focuses predominantly on limiting the autonomy of Member States to establish rules for the functioning of their domestic courts, but in the author's view, "the boundaries of EU influence are still unclear and potentially expanding, e.g. into agenda of underfinancing of the judiciary, independence of the public prosecutor's office or (absence of) governmental activity when the national judiciary refuses to respect the EU law." He also raises open questions regarding the future development of the new EU regulatory framework, the concrete subject of judicial review and its legitimation. Inter alia, he suspects that there is a need to take the new rule of law approach as a basis for assessing all EU Member States, not just apparently problematic cases, because otherwise it might become "difficult to persuade political elites of new EU states that strengthening oversight

23 For the relevance of societal commitment to the rule of law see Paul Blokker, 'The democracy and rule of law crises in the European Union' (*Reconnect Project*, 22 April 2021) 34ff <https://reconnect-europe.eu/wp-content/uploads/2021/07/D14.1_web.pdf> accessed 1 March 2023, or Christian Boulanger, 'Europeanization Through Judicial Activism? The Hungarian Constitutional Court's Legitimacy and the "Return to Europe"' in Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds), *Spreading Democracy and the Rule of Law?* (Springer 2006) 264f.

of the EU over their national judiciary is not just another manifestation of their treatment as de facto second-class members with diminished levels of trust, especially in a situation when some of the new EU states are expected to become net contributors to the EU budget." In sum it becomes clear that the EU is an evolving legal space which can react to challenges to its legal provisions by fine-tuning and expanding regulation but needs legitimation vis-à-vis its Member States.

The *second part* of the book addressing key issues of *judicial independence* from a scholarly perspective unites authors from legal and political sciences. This part starts from the national level and proceeds with a look at the European and international level.

Jan Němec analyses the state of the independence of courts and judges in the Czech Republic. The author, a political scientist graduated from Charles University and the University of Economics, Prague, where he also received a PhD, departs from the fact that in many new East Central European democracies, institutions of judicial autonomy have been established to guarantee the rule of law. The Czech Republic is an exception to this, as the administration of the judiciary is still subordinated to the government's authority. Nevertheless, according to his analysis, a balance – still fragile – between the judicial and the political power has been achieved, allowing judges to exercise their functions independently. To show this, he sketches out the appointment of judges and judicial officers, describes the main actors who act formally or informally as representatives of the judiciary and draws attention to the issue of public confidence in the judiciary, which is often linked to the independent exercise of justice. Finally, he describes how interviewed representatives of the Czech judiciary and politics perceive the main areas of their relationships and the delicate balance between politics and judiciary. On both sides, there is an apparent belief in the independence of the judiciary, though with fragile institutional foundations. Many judges and some politicians claim that formalizing judicial self-government would mitigate the risk of undermining the institutional independence of the judiciary. Based on his analysis, the author asks if it would be suitable to use the relatively high trust of the Czech people in the judiciary to introduce a judicial council which would ensure judicial independence from politics to a better degree.

Werner Reutter, a political scientist and expert of federalism and the sub-state level in federations, deals with the appointment of judges, which is a topic of regular discussions in many countries. Accusations of politization are widespread and can impact on the trust in the judiciary's impartiality.

However, *Reutter* focuses on Germany and the selection of judges of the sixteen State Constitutional Courts. His chapter demonstrates that the principles of democracy and the separation of powers which are enshrined in the German Basic Law and the state constitutions guide the election of justices and the composition of the state constitutional courts. He gives detailed evidence for this, referring to the recruitment of candidates, the vote on nominees in state parliaments and the composition of benches of the courts. Based on the analysis of selection criteria, the author argues that there is no "partisan takeover" of courts in the German Länder. While the constitutional principles mentioned seem to be influential to ensure judicial independence from partisan majorities, *Reutter* finds that another institutional provision – the majorities required for an appointment as justice – is less relevant for reaching this end. Given these insights, it seems important to further explore the impact of institutional and non-institutional factors (including normative beliefs, a particular legal culture and others) for guaranteeing judicial independence. Understanding the causalities better would help to design effective measures in the European Union and its Member States.

Subsequently, *Mattias Wendel*, a legal scholar and Professor of Public and EU Law at Leipzig University, takes the perspective of EU law with a focus on its effects on domestic judicial independence. Using the judicial reforms in Poland as an example he analyses the (new) European standards and procedures that make it possible to enforce the independence of national courts under EU law. The core of his analysis is the recent and groundbreaking case law of the European Court of Justice on Article 19 of the Treaty on European Union, which has arguably changed the Union's constitutional architecture deeply and permanently. Like *Ivo Šlosarčík*, the author concludes that the CJEU case law on the independence of national courts has given European constitutional law a fundamental boost. As he puts it, "faced with the choice of either observing the systematic dismantling of the national judiciary rather passively (…) or taking seriously the possibilities of the European mandate of the national courts enshrined in Article 19 (1) subpara. (2) TEU and enforcing at least minimum standards of judicial independence through Union law, the CJEU has opted for the latter." Nevertheless, *Wendel* argues that the court should "resist the temptation to expand this new legal grip on the national institutional structure beyond the enforcement of minimum standards", focusing "on what it is intended for: the preservation of the foundations of the European community of law in situations of systemic risks."

Last but not least *Anne Sanders*, legal scholar and Professor of Judicial Studies at Bielefeld University, looks at the rule of law crisis through the lens of public international law and more specifically the approach used by the Council of Europe. She addresses the challenges, but also the limitations of the Council of Europe in countering the rule of law crisis, distinguishing between the individual, case-law-based approach by the European Court of Human Rights on the one hand and a more systemic approach pursued by bodies such as the Venice Commission and the Consultative Council of European Judges on the other. She shows that the ECtHR can only decide on individual and human rights in the concrete cases filed by individuals but "tends to adopt a systemic view, making general remarks on issues such as judicial independence, the rule of law and the institutional foundations of an independent judiciary." The Venice Commission and the CCJE take a more holistic approach and give abstract recommendations regarding the rule of law in its Member States. However, as she reveals for the example of the promotion of judicial councils, the work sometimes seems to be a kind of "toothless tiger" because there is no obligation to follow the opinions and recommendations. She recommends a discussion of the Council of Europe's judgments and recommendations by the Member States, an adoption "with care and caution" and avoiding overgeneralizations of promoted institutional models.

The *third part* of the volume, as mentioned, reflects on the experiences from legal and political practice with regard to judicial independence.

Adam Bodnar, former Ombudsman for Human Rights of the Republic of Poland, sheds light on the role of Polish civil society in supporting EU activities. Starting with a brief overview of the crisis of the judiciary in Poland and the measures taken by the EU in response, he examines the nature and extent of measures taken by civil society to counter the rule of law crisis. He also describes how the crisis has changed civil society itself and outlines lessons that can be learned in other Member States. He argues that the EU should learn from the Polish case that rule of law and judicial independence should not be taken for granted, even in established democracies. It can be undermined through legislative changes, cuts in budget, administrative measures or individual pressure from the executive branch, traditional media, social media or corporations, especially if judges take unpopular or controversial decisions. Bodnar sees a responsibility of the state to build a society that is able to protect the rule of law and to support civil society organizations, think tanks and universities that are necessary to uphold the independent operation of the judiciary and

educational programmes which raise awareness of judicial decision-making and the role of the judiciary in society among young and average people. In his eyes, such activities worked effectively in Poland to increase resilience against attempts to curtail judicial independence. Thus, the country is not just a negative example of how the rule of law can be damaged, but also a positive example from which to learn good practices. *Bodnar* recommends the EU and its Member States – even those where the state of the rule of law seems to be good – to promote respective programmes focused on the involvement of non-governmental organizations into the protection of the constitutional democracy.

Subsequently, *Klaus Rennert*, former President of the Federal Administrative Court of Germany and Professor of Public Law, deals with the appointment of judges between politics, independence and professionalism and strives to highlight tensions that judicial appointment encounters. In his eyes, appointments and the promotion of judges are always power issues, especially when it comes to high-ranking positions. According to him, they are "therefore political decisions" that "cannot be 'depoliticised'", e.g. by removing them from the political process. He believes that entrusting decisions on the appointment of judges to the judiciary would lead to the effect that judges would politicize and organize themselves "along party lines systematically". Instead, the appointment and promotion of judges must be subject to democratic legitimation by parliament based on the broadest possible consensus because "the law is not a mere instrument of rule by the respective parliamentary majority, but the basis for the coexistence of society as a whole." He also argues that it is essential to ensure the independence of judges before and after their appointment by establishing regulations providing for judges' objective and personal independence from "party friends" and others, guaranteeing also independence with regard to judges' personal beliefs and habitus. He adds that complex legal systems cause a need to ensure a high professional excellence of judges, which can be promoted by the participation of judiciary representatives in judicial personnel decisions. Finally, he highlights that any legal rules for the appointment or promotion of judges – no matter how reasonable they may be – "can only achieve its goals of independence and professional excellence to the extent that the decisive persons or bodies feel personally committed to these goals." Therefore, he finds this extra-legal factor especially relevant.

The volume ends with the shortened transcript of a panel discussion on how to overcome the rule of law challenges in Europe. The composition of participants represents perfectly the approach of multiplying perspectives

on the rule of law. Among them were *Bettina Limperg*, President of the German Federal Court of Justice, *Wojciech Piątek*, Professor of Public Law at the University of Poznań (representing Marek Zirk-Sadowski, President of the Polish Supreme Administrative Court and Professor of Law), *Ivo Šlosarčík*, Professor of European Integration Studies at Charles University Prague (representing Jiří Zemánek, Judge at the Czech Constitutional Court, and Jean Monnet *Professor* Professor of EU Law at Charles University in Prague) and *Joachim Herrmann*, Dr. iur. and Member of Cabinet of Justice Commissioner *Didier Reynders* (representing Didier Reynders, European Commissioner for Justice).

In this discussion, *Limperg* underlined that the European Union is a "tremendous gift" and "promise of freedom" after the "unimaginably criminal actions of the Germans in the Second World War with the invasion of Poland, Europe and, in fact, half of the world." At the same time, the growing complexity of regulation and other interconnections can become challenging and actors must learn to cooperate in this Union on a contractual basis. She also highlighted that constitutional principles like the separation of powers and judicial independence are "not static" but "must be constantly reconciled", continue to evolve and "be redefined". Getting into conversation about this is an important way for her to cope with these conditions.

Piątek added that in addition to the dialogue, the independence of the judiciary "must be constantly strengthened because it can be challenged in all countries of the European Union. There is no level of independence from which one can say it is perfect, and we do not need to do anything more." To him, it is necessary that scholars, judges, politicians and others bring the judiciary closer to citizens so that they understand its workings and have confidence in its judgments but also to ensure "the independence and the appointment of professionally qualified judges who can support the system with their experience and gain independence in the course of their service."

Herrmann argued that the issue of the rule of law is a crucial one to the European Commission because it is enshrined as a fundamental value of the EU in Article 2 of the Treaty on European Union and because it has a particular function, "namely to support the other values" mentioned in Article 2 – democracy, freedom and human rights – "in their materialization". It must serve the point that "everyone in the European Union is treated equally in the eyes of the law, without politics coming into play, that equality before the law is guaranteed, and that the checks and balances in

our democratic systems work." He also mentioned the relevance of the ECJ and the Member States' courts for the efficient application of Union law for which it is essential that all judges can work on the same, independent basis.

Šlosarčík then added that in his eyes, one of the biggest challenges for the rule of law in the EU is to maintain mutual trust between the courts of different Member States, which however does not mean "something like blind trust" but a "critical mutual trust, a functional mutual trust, between the different judicial systems of the Member States." Hinting at the Czech example, he also shed light on the fact that courts behave quite differently also within countries when it comes to concrete legal issues, like interpreting rights and duties during the Covid pandemic, and that governments sometimes do not feel committed to respecting court decisions.

Not all ideas of the panellists can be summarized here, but it became clear that although all participants supported the relevance of the rule of law, their main focuses differed. Taken together, international dialogue and openness to continuous changes (*Limperg*), dialogue with the society and ensuring judicial independence (*Piątek*), permanent supervision and review of processes at Member State level by the EU Commission and courts (*Herrmann*) and "critical mutual trust" (*Šlosarčík*) provide a whole list of possible to-dos for ensuring the rule of law, adding up to the findings and recommendations in the chapters before.

4 General findings of the contributions

What can we learn about the rule of law and the independence of the judiciary in particular from the multi-perspective chapters in this volume? While there is undoubtedly more than we can mention here, we want to highlight three main insights. Some of them seem to a certain extent counter-intuitive, given the narrative of an EU close to the abyss present in some political discussions and media coverage.

The first insight is that what comes as rule of law challenges for the EU and seems to have a divisive effect inside and across European societies can ultimately become an integration booster. Several authors and conference participants revealed in their contributions that attacks on the rule of law have triggered a whole range of responses – from a more detailed and systematic conception of the rule of law by the Commission and the Council of Europe (*Lorenz* and *Anders*; *Sanders*), to legal mobilization, i.e.

the activation of courts at the national and European levels (*Wendel*). The Court of Justice of the European Union's landmark rulings had the effect of profoundly transforming the constitutional landscape of the EU regarding standards of judicial independence and fundamental rights (*Wendel*). Court decisions resulted in the emergence of a new EU regulatory framework regarding judicial independence (*Šlosarčík*) and more detailed ECtHR case law (*Sanders*).

This effect goes beyond those countries in which rule of law challenges are deplored. It has repercussions for potentially all EU Member States. This is because the European Union follows the ideal of equal treatment (*Herrmann*) and because, in the long run, different treatment of the countries – assessing the quality of the rule of law for some but not for others – would be the subject of political contestation (*Šlosarčík*). Ironically, therefore, the state of the rule of law in conceptual and legal terms is much more advanced than it would have been without attacks on judicial independence and other elements of the rule of law in some Member States. And what is more, it would probably have been less comprehensive than the approach now used by the EU Commission, Parliament and CJEU, which also includes independent media, for example.

A second insight is that it would be flawed to only focus on countries with rule of law deficiencies as negative examples. Instead, one can learn from resilient NGOs, judges and other actors in these countries where the rule of law is at stake (*Bodnar*). In accordance with our approach that it is necessary to capture the development of the rule of law not merely in legal terms but with a focus on actors and their interaction it can be noted that the mentioned reactions would not have been possible without actors defending and supporting the rule of law. New forms of cooperation, networks and strategic coalitions of actors have emerged or been strengthened, which has resulted in a further development of EU policies and law.

Connected to this, it would be flawed to speak of problems between the EU and certain Member States – although this might be right in legal terms. Instead, it is necessary to speak more precisely of conflicts between the EU (or particular EU actors) and certain Member States' governments. This would avoid using and perpetuating national stereotypes with whole "problematic countries" vs. the rest of Europe and acknowledge the action of those who engage with great personal commitment for supporting the rule of law even against their governments. And it would improve the chance for a broader dialogue with citizens (*Limperg*) and especially younger people

who do not actively support rule of law deficiencies of their governments and have many open questions (*Piątek*).

This insight of new domestic and cross-level coalitions of actors and a variety of perceptions inside EU Member States implies that although it makes sense to a certain degree to analyse and compare the state of the rule of law in different Member States of the European Union it is also necessary to have in mind that countries and national legal spaces in the European Union are sometimes mere "containers" or formal units of analysis in a more complex and evolving setting of communities of thought and interest groups.

A third insight is that the effectiveness of establishing and ensuring the rule of law and an independent judiciary by institutional design and legal means is ambiguous. While some chapters and contributors underline the high relevance of legal and judicial answers to rule of law deficiencies (e.g. *Herrmann*, *Wendel*) or see it as an instrument to improve the preconditions for judicial independence (*Němec*), others find that all personnel decisions are necessarily political decisions irrespectively of the formal rules (*Rennert*), that institutional provisions cannot determine the outcome alone (*Piątek, Rennert*) and it is not so much the institutional factors that explain that the appointment of judges is not politicized (*Reutter*). For the Czech Republic it was stated that the judiciary can fulfil its functions independently from politics, although there is no judicial council for sectoral self-administration.

What is needed to make the institutional arrangements for the rule of law work when they are not self-enforcing or of vital importance to the outcome? Especially *Bodnar* highlights that an active civil society can help to ensure that institutional provisions regarding the rule of law are maintained and respected. *Limperg* also argues that society is relevant. *Rennert* finds that personal integrity and commitment of judges is as important as institutional guarantees of judicial independence. Similarly, *Lorenz* and *Anders* point out that the perceptions of those who make the law work on the ground are very relevant. *Piątek* emphasizes the effect of international exchanges promoting the diffusion of ideas. All mentioned contributors thus hint at aspects of culture and normative beliefs.

Šlosarčík and *Sanders* argue for a critical and conscious reflection about which judicial decisions and recommendations for institutional models really make sense for the respective case and how they can be implemented adequately. In the same direction goes the recommendation by *Lorenz* and *Anders* to argue straightforwardly that the EU has encompassing rule of

law standards. A more legalistic argumentation that the EU approach to capture the rule of law is the only "real" or possible one is in their view less convincing than basing the approach on normative ideals about how the EU's values can be realized in a suitable and advanced manner.

In sum, these insights corroborate our assumption that the rule of law problems can only be understood if they are conceived in their whole complexity. If we assume that the problems extend far beyond law and legal issues, we can nevertheless acknowledge that legal instruments and responses are relevant and necessary to tackle these problems in a community of law. However, put realistically, the rule of law crisis probably cannot be resolved by applying legal and coercive instruments alone. Ultimately, it is also about actors, their different perceptions and experiences, and public legitimation of the rule of law. Thus multi-perspectivity is relevant for understanding the rule of law better and deriving adequate policy measures.

5 Conclusion

Our introduction to the present volume started from the well-known fact that the rule of law forms one of the fundamental values of the EU, but currently under attack and subject of manifold conflicts between the EU and some of its Member States. While many analyses of the crisis take a legal view, we expanded the focus and multiplied the perspectives, bringing together views from different disciplines, countries and from outside academia with an empirical focus on Germany, Poland and the Czech Republic within the EU. We made the suitability of this approach plausible in Section 2. The findings presented in Section 3 show that reading the chapters provides readers with a lot of valuable expertise about the rule of law and judicial independence in the countries under study.

Section 4 clustered in more general terms what we can learn from the contributions. First, the rule of law challenges had not only divisive effects inside and across European societies, but ultimately worked as an integration booster. Second, one can learn from resilient NGOs, judges and other actors in countries where the rule of law is at stake. New actors, networks and strategic coalitions have emerged or been strengthened, which has resulted in a further development of EU policies and law. Third, the effectiveness of establishing and ensuring the rule of law, and an independent judiciary in particular, by institutional design and legal means is ambigu-

ous. Aspects of culture and normative beliefs seem to be relevant to ensure that formal rule of law provisions are respected and maintained in practice.

The contributions in this volume show that analysing the state of the rule of law in the European Union benefits from an interdisciplinary approach. Despite some difficulties in finding a common language in terms of methodology or terminology, both legal studies and political science have much to learn from each other, and need each other in order to understand the important rule of law challenges in the EU in their whole complexity and to hopefully contribute to resolving them. In fact, the two disciplines complement each other: legal science provides intriguing insights into the complex foundations and interrelationships of law, whereas political science has a profound interest in questions of legitimacy and the impact of specific contexts like national cultures or particular societal or political conflict lines on the law. The same benefit is provided by including views from outside academia and from different countries and regions.

In this sense, we recommend further interdisciplinary research on aspects related to the rule of law, including perceptions, narratives and strategic action. It seems promising to link the findings on the rule of law challenges as integration booster to those studies on EU integration which observed an integration pattern of "failing forward", i.e. impulses to more integration based on failed attempts and problems. It is also necessary to analyse empirically how the judicial sectors and civil society are interlinked and how rule of law activist organizations emerge, develop their strategies and interact with each other. It is, for example, puzzling that in Poland, different players are active in this field, while in Hungary, the resistance seems to be structured differently. Finally, analyses on the effectiveness of the rule of law by design are urgently needed. These should also take a longitudinal or intertemporal perspective and include comparisons across countries. Current studies on the judicial council model reveal how productive such analyses can be.

Part I:
Foundations and Challenges

Conceptions and perceptions of the rule of law and how studying them can help to resolve the EU rule of law crisis

Astrid Lorenz, Lisa H. Anders

1 Introduction

In the current conflicts around the rule of law in the European Union, politicians (especially Member State governments, members of the European Parliament and of the European Commission) and legal experts are the main actors.[1] Given the pressing need to resolve the conflicts surrounding one of the Union's key values, it seems useful to consider how other actors and experts from different academic disciplines can contribute to the debate. As we suggest in this chapter, the EU discourse can be informed by well-established conceptions and approaches to measuring the rule of law developed by independent scholars and experts. It can further gain from studying how non-governmental actors in EU Member States perceive the rule of law, as this helps to decide on strategies to address rule of law problems.

In order to enrich the debate in the outlined way, this article first explains why the study of rule of law conceptions and perceptions is relevant for resolving the EU rule of law crisis. The second part provides an overview of conceptions and approaches to measuring the quality of the rule of law, highlighting their common core and their differences. In the third and fourth sections, we present a method for analysing rule of law perceptions and preliminary findings of a research project on the rule of law perceptions of judges and politicians in East Central Europe based on interviews. In the concluding section, we summarize our findings and discuss open questions for future research.

1 This contribution is based on the research project "Rule of Law in East Central Europe" which is funded by the German Federal Ministry of Education and Research in the years 2021 to 2024 (project number 01UC2103).

2 Why rule of law conceptions and perceptions are important

The rule of law has a long history which some scholars trace back to Plato and Aristotle, while others date its beginning to the bourgeois revolutions of the 19th century.[2] The various approaches developed in political theory often reflect their respective social and political contexts, including specific problems and intellectual debates. They also borrow ideas from other contexts so that they have converged to a certain degree, for instance in Europe, though differences between rule of law institutions and in their quality clearly remain. Such differences can cause problems, especially when, as for example Blokker observed,[3] the hitherto dominant paradigm in the Western part of European legal-constitutional paradigm is increasingly challenged by "a number of competing constitutional narratives", including political constitutionalism, communitarian constitutionalism and democratic constitutionalism.

From a political science perspective, the EU is one empirical case in the universe of theoretically possible cases of political systems. As in other systems, political actors make law based on their normative ideas and interests. In this perspective, EU treaties, regulations, directives, decisions, recommendations and opinions are made by political actors under certain majority constellations. When political actors change their preferences due to a changing context or learning effects, or when new players with different preferences enter the political arena (e.g. later generations, people from accessing entities), conflicts can arise over whether existing rules still fulfil their functions or need to be adapted. Thus, from a political science perspective, changes of existing law, even in sensitive areas, are not unusual but the essence of democratic politics which implies that changing majorities will ultimately result in changing laws. Even strong contestation of existing laws does not necessarily destabilize a political system, as exemplified by the processes around the 1968 student movement in Western European countries. The crucial question is whether such changes are considered legitimate, whether they are organized by legal means according to established policy-making procedures, and whether they meet certain normative standards such as democratic rule or the rule of law.

2 Brian Z. Tamanaha, *On the rule of law. History, politics, theory* (Cambridge University Press 2004).

3 Paul Blokker, 'Varieties of populist constitutionalism: The transnational dimension' (2019) 20 German Law Journal 336.

These normative standards, however, are often controversial themselves, as the discourse about concepts and their measurement in comparative research shows. For a long time, studies had a "Western bias" and a "large-nation bias". As Munck has criticized, "The standard approach to comparison was to cast cases beyond Western Europe (…) as contrast or negative cases and to analyze them in terms of their divergence from the path blazed by the classic cases of England and France".[4] Influenced by such criticism, comparativists have become more cautious about proclaiming certain institutional models as general norms, although biases continued to exist.[5]

An increasingly shared assumption is that different institutional configurations are embedded in particular contexts and tend to reflect the broader tradition, experiences and culture of thinking about state, politics or democracy. From this point of view, it becomes important to systematize different meanings of overarching concepts like democracy or the rule of law and to understand (not necessarily to accept) how citizens and key actors perceive the concept and why this is the case.[6] In line with such considerations, approaches to data collection have changed. The newly developed Varieties of Democracy Index, for example, "instead of trying to settle a debate on democracy's nature" promises to focus "on the construction of a wide-ranging database consisting of a series of measures of varying ideas of what democracy is or ought to be".[7]

Based on these considerations we can derive two policy recommendations regarding the rule of law crisis in the EU, which also guide the empirical sections that follow.

First, we need to contextualize the EU's approach to the rule of law. As officially defined by the European Parliament and the Council, the EU's approach to the rule of law includes "the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process;

4 Gerardo L. Munck, 'The Regime Question. Theory Building in Democracy Studies' (2001) 54 World Politics 120.

5 Gero Erdmann, 'Party Research: western European Bias and the 'African labyrinth'' in Matthias Basedau, Gero Erdmann and Andreas Mehler (eds), *Votes, Money and Violence. Political Parties and Elections in Sub-Saharan Africa* (Nordiska Afrikainstitutet 2007).

6 E.g. Jean-Paul Gagnon et al., 'The Marginalized Democracies of the World' (2021) 8 Democratic Theory 1.

7 Michael Coppedge et al., 'The Methodology of "Varieties of Democracy" (V-Dem)' (2019) 143 Bulletin of Sociological Methodology/Bulletin de Méthodologie Sociologique 107.

legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law".[8] The European Rule of Law Mechanism – a tool of the European Commission to monitor rule of law developments in all EU Member States – additionally includes media pluralism and media freedom as well as an enabling framework for civil society.[9]

Comparing and contextualizing this understanding of the rule of law reveals its encompassing nature. Besides, it acknowledges that institutional settings and ideas that are not fully in line with the EU approach can nevertheless represent a certain type of the rule of law if they fulfil some minimum criteria. With regard to the current conflicts on the rule of law, this suggests that actors should focus on the concrete rule changes colliding with EU law and the EU's definition of key norms instead of engaging in a general dispute over principles which sometimes seems to overshadow the concrete problems. In addition, the EU could explicitly communicate that its rule of law standards are encompassing and demanding instead of insisting that they are the only possible understanding of the rule of law. At present, when criticizing the state of the rule of law in Member States such as Hungary and Poland, EU institutions insist that the rule of law is a "well-established principle, well-defined in its core meaning".[10] Yet governments of these states regularly seek to debunk this argument by referring to the diverging approaches in academic literature.[11] In this sense, general disputes

8 European Parliament and Council 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 [2020] OJ L 4331. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020R2092> accessed 1 March 2023.

9 European Commission, 'European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report' (*European Commission*, 2022) <https://commission.europa.eu/system/files/2022-07/rolm_methodology_2022.pdf> accessed 1 March 2023.

10 European Commission, 'Special Eurobarometer 489: Rule of Law' (*Directorate-General for Communication*, 2019) <https://data.europa.eu/data/datasets/s2235_91_3_489_eng?locale=en> accessed 1 March 2023.

11 E.g. Judit Varga, 'Facts You Always Wanted to Know about Rule of Law but Never Dared to Ask' (*Euronews*, 22 November 2019) <https://www.euronews.com/2019/11/19/judit-varga-facts-you-always-wanted-to-know-about-rule-of-law-hungary-view> accessed 1 March 2023.

over principles can promote a "rally around the flag" effect. Governments in the criticized countries can present the EU's accusations as unfounded and thus illegitimate; citizens feel disrespected or even threatened, remain loyal to their government out of principle and become more sceptical of the EU's measures to tackle rule of law problems.[12]

The second policy recommendation is to study whether the respective institutional reforms and ideas supported by national governments in so-called backsliding states are backed by other politicians and judges who are very important players in the realization of the rule of law on the ground. This helps to choose the right instruments to resolve the conflicts. If many ordinary politicians and judges do not share a government's illiberal rule of law understanding, open criticism of that government's position and instruments to enforce the rule of law might be promising to mobilize support for the EU positions. In such cases, criticism from EU institutions and pressure for reform can be supported by like-minded domestic actors pushing for change, and a change in government will likely result in a different course concerning the rule of law. If, however, the majority of politicians and judges share the government's illiberal rule of law understanding, it will be difficult to resolve the rule of law-related conflicts by coercion and in the short run. In this case, top-down measures to impose and enforce certain rule of law standards seem less promising because the changes they induce would likely remain formal and superficial at best. A widespread practice of informality, for instance, cannot be changed by enforcing formal rule of law instruments alone. Instead, it seems more promising to (also) address the particular understandings of the rule of law in a horizontal, transparent and broad debate, enabling a joint reflection on the common ground and allowing for the evolution of shared problem perceptions.

3 The common core of and differences between rule of law conceptions

To substantiate the first policy recommendation, we can analyse similarities and differences of well-established rule of law conceptions. As long as different institutions have existed, scholars have tried to compare them. Such comparisons usually do not start from a specific set of legal norms

12 See also Bernd Schlipphak et al., 'When are governmental blaming strategies effective? How blame, source and trust effects shape citizens' acceptance of EU sanctions against democratic backsliding' (2022) online first Journal of European Public Policy.

and examine whether they exist or are respected elsewhere. Instead, they frame the concept they seek to compare in more abstract terms in order to avoid the trivial conclusion that all cases are individual and different. While such conceptions are nevertheless often based on a set of normative assumptions[13], they generally allow for deviations or functional equivalents as country specifics.

These efforts have resulted in different conceptions of the rule of law that are applied in comparative empirical research. Several indices, i.e. quantifying approaches, intend to measure the rule of law in all or many countries of the world. Most of them measure the rule of law by aggregating indicators with continuous scales, implicitly assuming that they are equally important and that we can identify a perfect state of the rule of law when all indicators are present.

The most widespread rule of law indices were developed in the framework of the Freedom House Index, the Worldwide Governance Indicators, the World Justice Project, the Varieties of Democracy Index, the Democracy Barometer and the Bertelsmann Transformation Index. While the overall aim of most of these indices is to measure the quality of *democracy*, they all have their own rule of law sub-indices differing in their degree of sophistication. The World Justice Project, by contrast, focuses exclusively on measuring the rule of law. The Freedom House Index, the Worldwide Governance Indicators and the World Justice Project were developed mainly in the U.S. American context while the Varieties of Democracy Index is developed by an international project based at the department of political science of Gothenburg University in Sweden. The Bertelsmann Transformation Index and the Democracy Barometer were developed by international teams in Germany.

A comparison of these well-established indices reveals that they share some ideas of what the rule of law is, but that there are also remarkable differences. To begin with, these rule of law indices use different terms to determine what the rule of law means. According to Freedom House, for instance, it means to have access to an established and equitable judicial system. V-Dem understands the rule of law as "the extent to which laws are transparently, independently, predictably, impartially, and equally enforced,

13 This is even true for approaches which claim to be purely empirical ones. The German political scientist Klaus von Beyme once joked that empirical analysts are people working with assumptions established by theorists whose names they have forgotten.

and actions of government officials comply with law".[14] According to the Democracy Barometer, the rule of law "designates the independence, the primacy, and the absolute warrant of and by the law" and this "requires the same prevalence of rights as well as formal and procedural justice for all individuals".[15] It therefore comprises measures for equality before the law and the quality of the legal system.[16] The Bertelsmann Transformation Index, in contrast, intends to capture by its rule of law index how state powers check and balance one another as well as the independence of the judiciary and protection of the abuse of public authority and civil rights, which partly overlaps with democracy concepts.

Despite these differences, a closer look at the indicators reveals some overlapping assumptions regarding the core components of the rule of law. All indices share the idea that legality and law enforcement as well as an independent judiciary are the key elements of the rule of law.

The most important differences between the indices concern the inclusion or exclusion of the absence of corruption and of the absence of crime and violence. Also, highly importantly, some rule of law concepts include human or civil rights while others do not, and some include the separation of powers in general as well as democratic features of the law-making procedure, while others exclude such aspects. Some indicators of the rule of law indicators, therefore, overlap at least partly with the concept of democracy, while others do not.

Freedom House, for example, measures the rule of law by checking for the existence of an independent judiciary, by rule of law standards in civil and criminal matters and law enforcement authorities under civilian control, by protection from terror, unlawful imprisonment, exile, torture, by freedom from war, as well as by equal treatment through laws, policies and practices.[17] V-Dem measures the rule of law by checking for the presence of

14 Stefanie Kaiser, 'The Rule of Law in Eastern Europe – Hungary and Poland in Comparison' (*Varieties of Democracy (V-Dem)*, 9 February 2021) <https://v-dem.net/weekly_graph/the-rule-of-law-in-eastern-europe-hungary-and> accessed 1 March 2023.

15 Marc Bühlmann et al., 'The Democracy Barometer: A New Instrument to Measure the Quality of Democracy and its Potential for Comparative Research' (2012) 11 European Political Science 519, 524.

16 Sarah Engler et al., *Democracy Barometer. Codebook. Version 7* (Zentrum der Demokratie 2020) 16f.

17 Freedom House, 'Freedom in the World 2022 Methodology' (*Freedom House* 2022) <https://freedomhouse.org/reports/freedom-world/freedom-world-research-methodology> accessed 1 March 2023.

independent courts, free access to judiciary for women and men, and the absence of corruption and clientelism, but in contrast to Freedom House the index does not include individual rights and freedom from violence. And the Democracy Barometer measures the rule of law by legal equality and the quality of the judicial system, using different indicators for them.

Some of these differences can be explained by considering the other components of the indices which, as mentioned, aim at measuring democracy. The Democracy Barometer index, for example, does not conceptualize individual rights or the separation of powers as elements of the rule of law but as separate dimensions of its overall concept of democracy. Also in other indices, these elements are included but either constructed as separate dimensions of their own rights or subsumed under different dimensions of the overarching concept of democracy.[18]

As Table 1 demonstrates for the year 2016, different conceptions and indicators of the rule of law (as well as the different approaches to aggregate them) result in different evaluations of the same countries. It provides information on how the indices evaluated the quality of the rule of law in all of the then 28 EU Member States in that year. The higher the values, the higher the quality of the rule of law.

For a better understanding, we can divide the theoretically attainable index values by three, creating three categories representing low, medium and high rule of law quality. Table 2 groups EU Member States into these three categories of low, medium and high performers. States falling into the category of low performers are marked in dark grey, those falling into the category of medium performers light grey.

18 Wolfgang Merkel, 'Measuring the Quality of Rule of Law Virtues, Perils, Results' in André Nollkaemper, Michael Zürn and Randall P. Peerenboom (eds), *Rule of law dynamics. In an era of international and transnational governance* (Cambridge University Press 2012) 46.

Table 1: Quality of the rule of law in EU Member States in 2016

Country	Freedom House (FH)	Varieties of Democracy (V-Dem)	Worldwide Governance Indicators (WGI)	World Justice Project (WJP)	Democracy Barometer (DB)	Bertelsmann Transformation Index (BTI)
Austria	15	0.973	1.82	0.83	79.5	
Belgium	14	0.983	1.39	0.79	68.2	
Bulgaria	10	0.713	-0.06	0.54	21.8	7.8
Croatia	11	0.727	0.41	0.61	38.1	8.0
Cyprus	15	0.908	0.72		47.5	
Czechia	14	0.895	1.04	0.75	56.5	
Denmark	15	0.993	1.91	0.89	90.4	
Estonia	14	0.984	1.23	0.79	65.0	9.8
Finland	16	0.983	2.02	0.87	86.1	
France	13	0.962	1.41	0.72	50.5	
Germany	14	0.988	1.62	0.83	66.4	
Greece	10	0.832	0.11	0.60	43.8	
Hungary	10	0.756	0.42	0.57	51.9	6.5
Ireland	14	0.981	1.52		69.3	
Italy	12	0.906	0.33	0.64	32.7	
Latvia	12	0.939	0.96		35.0	8.3
Lithuania	13	0.956	1.03		46.0	9.0
Luxembourg	16	0.964	1.76		82.8	
Malta	15	0.847	1.00		50.0	
Netherlands	15	0.987	1.89	0.86	76.1	
Poland	13	0.897	0.64	0.71	50.8	9.3
Portugal	15	0.963	1.10	0.71	55.5	
Romania	12	0.856	0.36	0.66	33.9	8.3
Slovakia	12	0.829	0.65		11.7	8.3
Slovenia	14	0.951	1.08	0.67	51.2	9.3
Spain	15	0.979	0.98	0.7	49.1	
Sweden	16	0.991	2.02	0.86	89.9	
UK	15	0.97	1.69	0.81	62.4	

Sources: own compilation based on Bertelsmann Stiftung's Transformation Index, Democracy Barometer, Freedom House, Worldwide Governance Indicators, World Justice Project, V-Dem.

Table 2: Quality of the rule of law in EU Member States in 2016 (categorization based on theoretically possible variance)

Country	FH	V-Dem	WGI	WJP	DB	BTI	No. of different categorizations
Austria	High	High	High	High	High		1
Belgium	High	High	High	High	High		1
Bulgaria	Medium	High	Medium	Medium	Low	High	3
Croatia	High	High	Medium	Medium	Medium	High	2
Cyprus	High	High	Medium		Medium		2
Czechia	High	High	High	High	Medium		2
Denmark	High	High	High	High	High		1
Estonia	High	High	High	High	Medium	High	2
Finland	High	High	High	High	High		1
France	High	High	High	High	Medium		2
Germany	High	High	High	High	Medium		2
Greece	Medium	High	Medium	Medium	Medium		2
Hungary	Medium	High	Medium	Medium	Medium	Medium	2
Ireland	High	High	High		High		1
Italy	High	High	Medium	Medium	Low		3
Latvia	High	High	High		Medium	High	2
Lithuania	High	High	High		Medium	High	2
Luxembourg	High	High	High		High		1
Malta	High	High	High		Medium		2
Netherlands	High	High	High	High	High		1
Poland	High	High	Medium	High	Medium	High	2
Portugal	High	High	High	Medium	Medium		2
Romania	High	High	Medium	Medium	Medium	High	2
Slovakia	High	High	Medium		Low	High	2
Slovenia	High	High	High	Medium	Medium	High	2
Spain	High	High	High	High	Medium		2
Sweden	High	High	High	High	High		1
UK	High	High	High	High	Medium		2

Source: Own calculations based on the scores in Table 1.

As Table 2 shows, all EU Member States were high performers according to V-Dem, while three countries belonged to the medium performers according to Freedom House scores. According to the Democracy Barometer, nearly all EU members showed only a medium rule of law quality. The categorizations based on the Worldwide Governance Indicators and the World Justice Project fall between the more "relaxed" and the more demanding indices.

In sum, only in roughly one quarter (28.6 per cent) of the cases did the EU Member States fall into the same category according to all indices (value 1 in the right column). Especially the three countries (Bulgaria, Italy, Slovakia) that belonged to the group of low performers according to the Democracy Barometer were rated very differently by the other indices; the scores assigned by some of the indices even placed them in the category of high performers.

The same holds true in a more fine-grained analysis. For this analysis, we look at the spectrum of the actual scores achieved by Member States in each index (not the spectrum of all theoretically achievable values like above) and divide the range between the highest and the lowest score assigned by each index by three. By doing so, we again create three categories indicating low, medium and high rule of law performance and group the states accordingly (Table 3). The main difference compared to Table 2 is that the calculation of the categories is not based on the theoretically possible variance of the indices, but on the variance actually observed. This makes it easier to assess the relative performance of EU Member States.

For 2016, eight EU Member States belonged to the group of low performers in at least one of the indices. However, only for Bulgaria (5), Hungary (5) and Italy (4) was this assessment shared by most of the indices. For Croatia (4), Romania (4) and Greece (3), only some indices assigned them scores falling into the category of the lowest values for EU countries. The same mixed evaluations can be observed for the medium performers. In 2016, the relative position within the EU concerning the quality of the rule of law was rather similar only for the Czech Republic and Poland. For Latvia, Lithuania, Portugal, Slovakia, Slovenia and Spain, the indices came to different evaluations of the quality of the rule of law. In general, for the relative evaluation, the most "relaxed" index was again V-Dem. Here most EU Member States fell into the category of high performers in 2016, while the other indices were evidently more demanding.

Table 3: Quality of the rule of law in EU Member States in 2016 (categorization based on empirical variance)

Country	FH	V-Dem	WGI	WJP	DB	BTI	No. of different categorizations
Austria	High	High	High	High	High		1
Belgium	High	High	High	Medium	High		2
Bulgaria	Low	Low	Low	Low	Low	Medium	2
Croatia	Low	Low	Low	Low	Medium	Medium	2
Cyprus	High	High	Medium		Medium		2
Czechia	Medium	Medium	Medium	Medium	Medium		1
Denmark	High	High	High	High	High		1
Estonia	Medium	High	Medium	Medium	High	High	2
Finland	High	High	High	High	High		1
France	Medium	High	High	Medium	Medium		2
Germany	Medium	High	High	High	High		2
Greece	Low	Medium	Low	Low	Medium		2
Hungary	Low	Low	Low	Low	Medium	Low	2
Ireland	Medium	High	High		High		2
Italy	Low	High	Low	Low	Low		2
Latvia	Low	High	Medium		Low	Medium	3
Lithuania	Medium	High	Medium		Medium	High	2
Luxembourg	High	High	High		High		1
Malta	High	Medium	Medium		Medium		2
Netherlands	High	High	High	High	High		1
Poland	Medium	Medium	Medium	Medium	Medium	High	2
Portugal	High	High	Medium	Medium	Medium		2
Romania	Low	Medium	Low	Low	Low	Medium	2
Slovakia	Low	Medium	Medium		Low	Medium	2
Slovenia	Medium	High	High	Medium	Medium	High	2
Spain	High	High	Medium	Medium	Medium		2
Sweden	High	High	High	High	High		1
UK	High	High	High	High	Medium		2

Source: Own calculations based on the scores in Table 1.

Rankings and groupings can of course sometimes exaggerate small differences. However, the impression of differing evaluations of the rule of law

quality in EU Member States is also confirmed by previous studies showing that correlations between the different indices are low.[19]

To sum up, the well-established rule of law indices share some core assumptions regarding the meaning of the rule of law; for example, they agree that the independence of the judiciary is a relevant element. Based on their comparison, we can assess whether countries meet the standards linked to this common core or not. In this sense, the fact that the relative quality of the rule of law in Hungary and Romania in 2016 can be categorized as low based on five out of six indices suggests that rule of law problems in these two countries affect the core of the rule of law.

At the same time, there are remarkable differences between the indices as to the components of the rule of law, the indicators and the rules to aggregate them. These differences reflect that even in social sciences, the rule of law is an "essentially contested concept".[20] Hence, it is necessary to be transparent about the definitions and elements – an approach which is also followed by the Venice Commission of the European Council and the European Commission. However, the EU approach to measuring the rule of law goes far beyond the established rule of law indices analysed above. It additionally includes a democratic and pluralistic law-making process and – according to the Commission's monitoring scheme – also independent media and civil society and thus factors treated in the indices as components of neighbouring concepts, like rights or the separation of powers. In general, the EU has developed a very encompassing approach to define the rule of law when compared to the established rule of law indices, and it would be good if this would be clearly communicated.

4 Rule of law perceptions: Concept and methodological approach

With regard to the second policy recommendation, we conduct a research project to analyse and map the rule of law perceptions of parliamentarians and judges. Rule of law perceptions have not been studied systematically, but we know from comparative works on the neighbouring concept of de-

19 Svend-Erik Skaaning, 'Measuring the Rule of Law' (2010) 3 Political Research Quarterly 449.

20 Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (2002) 21 Law and Philosophy 137.

mocracy that people can associate very different terms with such concepts.[21] The lack of systematic empirical data covering the rule of law perceptions of politicians and judges is problematic because these actors can be considered a crucial pillar of implementing and upholding the rule of law in their everyday activities. We therefore investigate in more detail how they address the rule of law. In doing so, we complement studies on rule of law-related conflicts in the EU which often focus on government ideologies and their decisions concerning the rule of law[22] or measure by means of surveys if EU citizens support the rule of law and elements of it[23].

Our study focuses on Poland, the Czech Republic, Slovakia, Hungary and Romania. These five cases share a number of features, e.g. an authoritarian past or particular experiences during the transition to democracy and their accession to the EU. We are interested whether and to what extent these similarities resulted in similar perceptions to the rule of law. Are there regional specifics, or country specifics? The argument that these countries have their own legal cultures and traditions is frequently used in the current rule of law debate,[24] so it is worth studying in more detail.

We define rule of law perceptions as the individual understanding of the concept of the rule of law, of its elements and its boundaries and of its relationship to neighbouring concepts like democracy. Comparatively analysing perceptions is methodologically demanding. First, one has to deal with terminological differences. In the Czech language, for example, there is no strict equivalent to the rule of law. Instead, the notion "state under the rule of law" (*právní stát*) is used, a term emphasizing the state, similar to

21 Norma Osterberg-Kaufmann, Toralf Stark and Christoph Mohamad-Klotzbach, 'Challenges in conceptualizing and measuring meanings and understandings of democracy' (2020) 14 Zeitschrift für Vergleichende Politikwissenschaft 299.

22 E.g. Aron Buzogány and Mihai Varga, 'The ideational foundations of the illiberal backlash in Central and Eastern Europe: the case of Hungary' (2018) 25 Review of International Political Economy 811; Vratislav Havlík and Vít Hloušek, 'Differential Illiberalism: Classifying Illiberal Trends in Central European Party Politics' in Astrid Lorenz and Lisa H. Anders (eds), *Illiberal Trends and Anti-EU Politics in East Central Europe* (Palgrave Macmillan 2021).

23 See European Commission, 'Special Eurobarometer 489: Rule of Law' (*Directorate-General for Communication*, 2019) <https://data.europa.eu/data/datasets/s2235_91_3_489_eng?locale=en> accessed 1 March 2023.

24 E.g. Zoltán Szalai and Balázs Orbán (eds), *Der ungarische Staat. Ein interdisziplinärer Überblick* (Springer VS 2021); Gábor G. Fodor, *Az Orbán-szabály – Tíz fejezet az Orbán-korszak első tíz évéről* (KKETTK Alapítvány 2021); Tomasz Grzegorz Grosse, 'Europejski uniwersalizm w dobie kryzysów' (2022) 50 Roczniki nauk społecznych 137.

the German *Rechtsstaat*. The emphasis on the state is mirrored, for example, by the definition of *právní stát* in the official parliamentary glossary.[25] In the Polish language, one speaks either of the rule of law (*praworządność*) or of the state under the rule of law (*państwo prawa* or *państwo prawne*). It is still unknown if such terminological differences mirror or perpetuate different associations.

Second, questionnaires as the usual instrument for surveying individual political opinions are less suitable because they are mainly deductive tools. When developing them, researchers usually start from a certain definition of the concept they want to analyse (in our case the rule of law), theorize about its elements and ask in their own terminology by means of closed-ended questions if and to what extent people support these elements. In doing so, they do not provide room to explore unexpected context-specific elements. Thus, there is a need for additional methods that provide "people opportunities to articulate the connections that they themselves make between the meanings, the complexities that they themselves grapple with".[26] Qualitative interviews provide these opportunities. While they are time-consuming and (compared to standardized surveys) can only be conducted with a smaller number of respondents, they provide people with opportunities to explain their individual understandings of the rule of law in their complexity.

Based on these methodological considerations we interviewed politicians and judges from different branches of the judiciary in Poland, the Czech Republic, Slovakia, Hungary and Romania. Interviews were conducted face-to-face in 2021 and 2022 in the national languages to capture the terminology and the individual perspectives of these different actors as accurately as possible.[27] We interviewed ten politicians from different (including ruling and opposition) parties in each country as well as ten (in Poland eleven) judges from different courts. Thus, our sample provides for a relatively broad range of actors in the political sphere and the judiciary and can provide insights on which elements of the rule of law might be common sense or controversial.

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25 Senát PČR, 'Slovník pojmů z parlamentní praxe' (*Senát Parlamentu České republiky*, s.d.) <https://www.senat.cz/informace/slovnik_pojmu.php> accessed 1 March 2023.

26 Frederic C. Schaffer, 'Thin Descriptions: The Limits of Survey Research on the Meaning of Democracy' (2014) 46 Polity 303, 329.

27 The interviews analysed in this chapter were conducted by Madeleine Hartmann (Poland) and Jan Němec (Czech Republic), researchers in our project (see footnote 1).

To keep the interviews comparable while simultaneously leaving room for context-related associations and individual relevance structures, they were semi-structured, i.e. we prepared some questions in advance but allowed the interviewees to elaborate on those issues they regarded particularly important. We started by asking respondents openly what the rule of law means to them, what they think of first when asked about the rule of law and what they consider to be the most important elements of the rule of law. Later, we specifically asked them about their thoughts on elements of the rule of law that can be found in established rule of law indices and surveys and in the EU's approach. For that part of the interview, we used a questionnaire with 25 statements on elements of the rule of law, allowing the respondents to classify their importance. To test for the effects of social desirability, we included control statements on issues that are commonly not considered an element of the rule of law (for instance: citizens participate in public affairs through referendums). Overall, our research design allows us to provide new insights on rule of law perceptions of politicians and judges in East Central Europe.

5 *Rule of law perceptions of judges and politicians in Poland and the Czech Republic*

In line with the overall theme of this volume, the following analysis focuses on Poland and the Czech Republic. With their answers to the closed questions in the questionnaire filled in at a late stage of the face-to-face interviews, the respondents indicated that they consider nearly all of the mentioned issues as rather important or essential elements of the rule of law (see Table 5). This suggests a strong consensus among the interviewed politicians and judges in Poland and the Czech Republic regarding the importance of several elements of the rule of law.

The vast majority of the interviewed judges and politicians in both countries agree, for example, that it is essential for the rule of law that rules apply equally to every person, that laws are clear, stable and predictable, that fundamental rights as enshrined in the country's constitution are respected, and that people have free access to justice. Similarly, the politicians and judges in the Czech Republic, the Polish judges and – to a lesser extent – the Polish politicians regard the independence of judges, checks and balances and that public authorities and politicians respect and apply court rulings as essential.

Table 5: Average responses to questions on elements of the rule of law

	Poland		Czech Republic	
	Politicians (N =10)	Judges (N=11)	Politicians (N=10)	Judges (N=10)
The same laws and rules apply equally to every person.	2.9	3.0	3.0	3.0
The economy is not centrally commanded.	1.9	2.1	1.6	1.4
The laws are clear, stable and predictable.	2.9	2.8	2.8	3.0
Media and journalists can criticize the government.	2.5	2.9	2.4	2.9
Legislation will not be retroactively amended.	2.5	2.6	2.6	2.7
Parts of society shall not be discriminated.	2.5	3.0	2.9	2.9
No corruption and embezzlement (theft) in the public sector.	2.5	2.6	2.1	2.8
Judges may be dismissed only in exceptional cases.	2.6	3.0	2.3	2.9
Prohibition of arbitrariness of the executive powers	1.9	2.8	2.7	2.9
Torture is prohibited under all circumstances.	2.4	3.0	2.8	3.0
Protection of private property	2.1	2.5	2.6	2.8
Court proceedings are not excessively long or costly.	2.4	2.3	2.3	2.6
Respect for fundamental rights as enshrined in my country's constitution	2.8	3.0	3.0	3.0
Civil society organizations can operate freely and criticize the government.	2.4	2.9	2.6	2.5
Judges decide independently of political, religious and economic influences.	2.6	3.0	2.9	3.0
Transparent, democratic law-making process	2.6	2.8	2.8	2.8
The executive can decide quickly.	1.9	1.8	2.0	1.7
Effective fight against crime	2.3	2.2	2.6	2.7
Respect for fundamental rights as enshrined in the EU Charter of Fundamental Rights	1.8	2.6	2.7	3.0
Free access to justice	2.8	2.8	2.9	3.0
Checks and balances	2.4	2.8	3.0	2.9
LGBT+ persons must not be discriminated.	2.0	2.9	2.2	2.6
Public authorities and politicians respect and apply court rulings.	2.6	3.0	2.8	2.9
Citizens participate in public affairs through referendums.	1.8	1.8	1.8	1.5
Independent law enforcement	2.4	2.4	2.8	2.8

Question: Please mark what you personally think belongs to the rule of law.
Not important = 0; rather unimportant = 1; rather important = 2; essential = 3.
Control questions in italics.

There is also a great deal of agreement that a transparent, democratic law-making process is an essential component of the rule of law. Apparently, the interviewed political and judicial actors in both countries agree on the importance of an element which is included in the encompassing EU rule of law definition but not necessarily a part of all the rule of law indices compared in Section 4.

Apart from these commonalities, answers to some questions are more diverse and reveal some differences between the countries. The interviewed Polish politicians, for instance, on average rated the importance of the prohibition of arbitrary executive power, the protection of private property and the respect for fundamental rights as enshrined in the EU Charter of Fundamental Rights comparatively low while the interviewed Czech politicians, on average, considered the absence of corruption and embezzlement in the public sector as less important.

Two caveats, however, are in order when interpreting these findings. First, due to the low number of interviews, already one or two outliers can strongly influence the mean values displayed in the table below. Second, while the scores for the answers to the control statements (in italics) are lower, they are still high enough to suggest that social desirability might have played a role when answering the questions.

These results are somewhat at odds with the oral statements made in the first part of the interviews, or at least must be interpreted in light of these initial answers. In that first part, when asked openly what comes to their minds when thinking of the rule of law, most of the interviewed judges and politicians mentioned aspects that can be subsumed under the term of legality, the Czech politicians somewhat less so. The interviewees mentioned legal certainty, that laws are clear and comprehensible and do not apply retroactively, that public authority is exercised on the basis of laws, that the state and individuals are obliged to the law, and that the law needs to be applied.

In this sense, Piotr Schab, since 2022 President of the Court of Appeal in Warsaw, argued "Of course, when it comes to the rule of law, the features of a state under the rule of law are legal certainty, i.e. a situation in which anyone who takes a certain action, sanctioned by laws, sanctioned by inferior legal acts, can be sure that his behaviour will be judged on the basis of those legal acts that existed at the time of taking that behaviour."[28] Petr

28 Piotr Schab, interview on 21 September 2021, citation translated.

Angyalossy, President of the Czech Supreme Court, reported that "the rule of law, to me, means that we are governed by the law and we behave by the law, we make decisions by the law, everyone is governed by the law."[29] And Jan Klán (Communist Party of Bohemia and Moravia) said "The rule of law, in my opinion, creates the laws, of course, the rules that the society has to follow, but again, it has to enforce them in some way."[30] As these quotations show, the respondents from the judicial and the political realm do associate with the rule of law those aspects that are included in many comparative rule of law indices.

The interviews furthermore reveal that politicians and judges also considered the securing of freedom to be another important element of the rule of law, although they mentioned this less often than the various components of legality. Compared by country, the differences between the answers are small, both in terms of the frequency with which the securing of freedom was mentioned and of the reasons given. Respondents in both countries referred to the value of individual freedom, human rights and fundamental rights. Krzysztof Śmiszek from the centre-left Nowa Lewica (until June 2021 an MP for the then dissolved party Wiosna Roberta Biedronia), for instance, laid out "So, for me, the rule of law, or the state under the rule of law, takes place when we have (…) a consensus around the protection of human rights and civil liberties. We cannot talk of a state under the rule of law in which the rights of, for example, minorities or civil rights are infringed or violated when they are unpleasant for some ruling option."[31] Mentioning basic and human rights, many of the interviewed politicians and judges thus referred to elements of the rule of law which are not necessarily included in all rule of law indices.

A main difference between the answers, when compared by country, can be found in terms of equality before the law. Equality before the law and non-discrimination were discussed more often by the interviewees in the Czech Republic. Both the politicians and judges mentioned this aspect of the rule of law more frequently than their colleagues in Poland. As Josef Baxa (from 2003 to 2018 the President of the Supreme Administrative Court of the Czech Republic) put it when asked what he thought were the most important features of the rule of law: "I would certainly place equality of citizens before the law and proceedings before the courts and

29 Petr Angyalossy, interview on 3 November 2021, citation translated.
30 Jan Klán, interview on 25 March 2022, citation translated.
31 Krzysztof Śmiszek, interview on 29 June 2022, citation translated.

other public authorities in one of the first places"[32] and František Kopřiva (Czech Pirates) specified that equality before the law should apply for "foreign investors, for instance, but of course also for the domestic citizens of that state."[33] Similarly, a Polish judge argued "Of course, I will not give any legal definitions, but the essence, in my opinion, is the rule of law, the truth that everyone is, vis-à-vis the legal system, according to their hierarchy, treated equally, without any differences, and I think so from the perspective of these experiences of my life."[34] The differences concerning the importance attached to equality are striking also in the sense that in the standardized survey, respondents in Poland and the Czech Republic equally indicated that equality before the law is essential. If corroborated in further studies, they could mirror different law cultures or majority constellations in the countries. Again, this suggests that data gathered by surveys with closed-ended questions need to be complemented by other data sources to double-check their validity and to avoid misinterpretations.

Another difference between the interviews when compared by country concerns the independence and the functioning of the judiciary. Judges and in particular politicians in Poland raised the issue relatively more often than judges and politicians in the Czech Republic. For the Polish case, judges approached the relationship between politics and the judiciary from a more abstract vantage point, focusing primarily on the hierarchy of norms, the primacy of the constitution and the fact that laws must be in accordance with a country's constitution. In contrast, the view of politicians was more practical and heterogeneous. It was predominantly members of opposition parties who emphasized the need for independent courts, stressed the importance of proper training of lawyers and criticized lengthy court proceedings. Likewise, particularly the members of the opposition parties (and also the judges) elaborated on the relationship between politics and the judiciary. Politicians belonging to opposition parties in Poland mentioned the recent judicial reforms and their effects. Politicians belonging to the governing party Prawo i Sprawiedliwość (PiS, Law and Justice), by contrast, underlined the primacy of politics. Iwona Arent, since 2006 member of the Sejm for PiS, for example, argued that "if judges try to force or try to impose legislation, it is not the rule of law, on the contrary,

32 Josef Baxa, interview on 20 October 2021, citation translated.
33 František Kopřiva, interview on 10 November 2021, citation translated.
34 Anonymous (Poland), interview on 20 November 2021, citation translated.

there is a legislator who determines the framework for the operation of the judiciary, and judges should conform to such statutory actions."[35]

In the Czech case, the independence and the functioning of the judiciary were less salient and handled either very briefly or in more abstract terms. Only two out of the ten Czech politicians mentioned the independence of the judiciary as an important element of the rule of law, but they did not further elaborate on it.[36] An interviewed judge, by contrast, argued that the first and unquestionable component of the rule of law "is the hierarchy of the legal order, i.e. a state in which the constitution is not just a proclamation, but the constitution, as a legal norm of the highest legal force, is at the same time a directly applicable and immediately effective legal norm of the highest legal force. In other words, in the application of any sub-constitutional norm, the constitutional requirement must be respected."[37]

These findings reveal three aspects. First, national differences (potentially mirroring different legal cultures or, as mentioned above, different majority constellations) which seem to be absent when analysing answers to the questionnaires become apparent when asking open questions. Qualitative interviews are therefore a very important tool to capture rule of law perceptions. Second, the government position towards the independence of the judiciary is not necessarily shared by other politicians and judges in both countries. Third, explanations that are suitable for one country may lack substance for another. The interviews with Polish politicians and judges suggest that the current and highly salient conflicts over the independence of the judiciary influence the actors' reflections and perceptions of the elements of the rule of law. This was obviously not true for the Czech case, where politicians did not particularly emphasize the absence of corruption and embezzlement (theft) in the public sector as rule of law elements even though examples of using economic advantages from political or administrative positions were politically salient in the country and also considered as problematic by the EU.[38]

35 Iwona Arent, interview on 26 May 2022, citation translated.

36 František Kopřiva, interview on 10 November 2021, and Marek Benda, interview on 22 February 2022, citations translated.

37 Anonymous (Czech Republic), interview on 20 October 2021, citation translated.

38 The problems reported were not strictly issues of corruption and theft but related to clientelism and abuse of EU subsidies. European Commission, 'Rule of Law Report. Country Chapter on the rule of law situation in Czechia' (European Commission, 20 July 2021), SWD(2021) 705 final.

With regard to our second policy recommendation, the interviews mirror a clear and widespread perception of the rule of law as an expression of the principle of legality. Individual freedom and rights were also associated with the concept, but less strongly. Judicial independence, by contrast, played a less prominent role when respondents laid out their rule of law associations, particularly in the Czech Republic. The interviews conducted in Poland reveal that the Polish government's position concerning the independence of the judiciary was not necessarily widely shared among politicians and judges. Overall, this suggests that open criticism of the government's policies and measures to enforce the rule of law will receive more support if linked to legality and its components as well as individual freedoms and receive less support if it refers to other issues. Moreover, they suggest that more attention should be paid to providing information about the relevance of such other issues, like judicial independence, as an element of the rule of law which is more salient and also controversial in Poland but less strongly associated with the rule of law in the Czech Republic. This will take time.

6 Conclusion and outlook

The rule of law as one of the founding principles of the EU has become increasingly salient and the discourse has become more and more controversial. Against this background, this contribution has set out to demonstrate how research on rule of law conceptions and perceptions can contribute to solving the problems concerning the rule of law. Drawing on political science approaches to rule changes and concept formation, we made two policy recommendations. The first one is to argue straightforward that – for good reasons – the EU has encompassing rule of law standards instead of insisting that the EU's concept is the only possible understanding of the rule of law. The second policy recommendation is to study whether the government's rule of law reforms and ideas in backsliding states are backed by other politicians and judges who are very important players when it comes to the realization of the rule of law on the ground. This helps to choose the right instruments to resolve conflicts.

To substantiate the first policy recommendation, the chapter has discussed and compared the various conceptions and indices to measure the rule of law provided in academic literature. As we have shown, they all centre around a common core including legality, law enforcement and the

independence of the judiciary. Identifying this core allows clear violations of the principle of the rule of law to be detected and also arguments that portray the rule of law as entirely arbitrary to be refuted. At the same time, the diversity of indices and indicators reminds us that the rule of law is and will probably always remain an essentially contested concept. The EU's rule of law definition, exceeding the common core of the rule of law indices and conflating the rule of law with democratic principles, thus needs to be endorsed as an encompassing conception and communicated and justified to a broader public to stir persuasion through continuous debate.

To support the second policy recommendation, we presented findings of a study on rule of law perceptions of politicians and judges in Poland and the Czech Republic. They clearly show that not just the indices but also most of the interviewed politicians and judges associate the rule of law with the principle of legality. Besides, they show that these actors associate the rule of law with the protection of individual freedom, human rights and fundamental rights. Consequently, debates about the rule of law should refer to these elements. The independence of the judiciary, for example, should be presented as an instrument for securing legality as well as the freedoms of the individual to allow for the evolution of shared problem perceptions. Section 5 furthermore revealed for Poland that the government's perspective on the independence of the judiciary is not widely shared among politicians belonging to parties of the opposition and judges. This suggests that open criticism and top-down measures to enforce core elements of the rule of law, particularly the independence of the judiciary, while not considered as suitable and legitimate by governing actors, are likely to be valued and potentially supported by others. The findings furthermore show that we do not yet know how exactly rule of law perceptions change. In the case of Poland, they appear to be influenced by salient political debates, while this does not seem to be the case in Czechia. Further research is needed to analyse these patterns and to collect empirical data from more judges, politicians and other actors.

All in all, exploring rule of law perceptions of politicians and judges can contribute to choosing the right arguments in the ongoing conflicts and to making people feel seen and valued as partners with a particular set of experiences and values. In addition to a clear communication of the EU's comprehensive rule of law approach and measures to enforce core principles of the rule of law, a broad debate seems necessary to make individual approaches to the rule of law transparent and highlight the relevance

of its core elements.[39] Of course, such a dialogue-based approach, which should build on established social science research on the functioning of rule of law institutions and societies, has its limits. It risks resulting in value relativism or being instrumentalized by norm breachers as de facto support of their positions. It does not provide immediate solutions for rule of law violations and can result in a domino effect when suggesting to other governments that norm-breaching behaviour is not immediately sanctioned. Moreover, delaying the resolution of conflicts over the rule of law means breaching the principle of legal certainty throughout the EU as a precondition (among others) for the principle of mutual trust. Last but not least, it might be frustrating to see EU actors continuing a dialogue with actors who systematically disregard or destroy the rule of law. Politically straightforward measures, however, are not always the most effective.

39 See Limperg et al. in this volume.

The future of rule of law in the European Union beyond Polish and Hungarian controversies

A Czech view

Ivo Šlosarčík

1 Introduction

This chapter traces back judicial reforms in the Czech Republic in the course of its transition to democracy and its accession to the EU as well as the emergence of a new rule of law framework for the functioning of the domestic courts in EU Member States. In doing so, it discusses the relationship between the EU and its Member States beyond recent Polish and Hungarian controversies.

The chapter is structured as follows. The first section provides an overview of judicial reform and transformation processes before EU accession. It highlights the complexity of the continuity and discontinuity of the judiciary within democratic transformation, the efficiency of the courts as a neglected element of economic transformation as well as limits of the accession conditionality of the European Union. The second section sketches out EU requirements for Member States' courts, including the efficient application of EU law, communication with the Court of Justice of the EU (CJEU) and the courts of other EU countries as well as structural requirements for the courts of the EU countries. The third section informs about the creation of EU instruments. Attention is paid to infringement procedures before the CJEU, the Article 7 TEU mechanism, termination of the mutual recognition of judicial decisions, and the rule of law conditionality of financial transfers. Finally, it is discussed if the rules established constitute an emerging new EU regulatory domain or whether their impact will be limited to Poland and Hungary.

2 Judicial reform and transformation process before EU accession

2.1 Continuity and discontinuity of the judiciary within democratic transformation

The transformation of the Czech judiciary in the 1990s combined elements of continuity and discontinuity. The general structure of Czechoslovak (and later Czech) courts continued to exist[1] and the majority of judges remained in their posts.[2] A key institutional innovation was the establishment of a constitutional court, inspired by the German model of constitutional justice and defined as a "body for the protection of constitutionality", which has developed into a strong legal and political actor.[3] In the following decades, there was a clear tension between the constitutional court and senior ordinary courts, where the constitutional court pursued less formalistic positions in the interpretation of Czech laws than the general judiciary.[4] However, in contrast to Poland or Hungary, no significant Czech political party incorporated criticism of the continuity of the judiciary into their core political programmes.

The judicial regulations were changed only gradually. The new Constitution of the Czech Republic and the Charter of Fundamental Rights explicitly stated that the courts were bound only by laws,[5] banned special courts, prohibited the relocation of a judge without his/her consent, and expanded the catalogue of individual rights protected by the judiciary. In contrast, a comprehensive recodification of civil and criminal judicial procedure has not been completed even decades after the change of political regime.

At first, European integration had only a marginal influence on the internationalization and Europeanization of the Czech judiciary. Much more important was membership in the Council of Europe and accession to

1 Minor institutional changes were caused by the split of Czechoslovakia at the beginning of the decade.

2 David Kosař and Ladislav Vyhnánek, *The Constitution of Czechia: A Contextual Analysis* (Bloomsbury Publishing 2021) 147.

3 David Kosař and Ladislav Vyhnánek, *The Constitution of Czechia: A Contextual Analysis* (Bloomsbury Publishing 2021) 152.

4 Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Central European University Press 2002) 238–244.

5 In contrast to the practice of the Communist regime, which required the courts to respect both laws and administrative by-laws and ministerial regulations. To complete the picture, it shall be mentioned that Czech judges were also bound by international treaties on human rights and (since the "European" constitutional amendment in 2021) also by the majority of other international agreements ratified by the Czech Republic.

the European Convention on Human Rights and Fundamental Freedoms, which opened for Czech citizens the possibility to challenge the behaviour of Czech courts before the European Court of Human Rights in Strasbourg. Symptomatically, the first case lost by the Czech Republic there concerned a violation of the right to due process caused by judicial behaviour.

2.2 The efficiency of the courts as a neglected element of economic transformation

The economic transformation in the Czech Republic was accompanied by a relative lack of interest in creating a sufficiently robust legal framework, when the whole process was even described by its critics as "running away from lawyers". In the judicial sector, this approach was mainly demonstrated by underfunding of the courts combined with a lack of judicial administrative staff. Later, when the constitutional court proved to be an actor capable of interfering in the political life of the state, there were also attempts by politicians to gain greater control over career processes in the judiciary. However, these efforts have been stopped by the constitutional court, and the political elite subsequently limited themselves to more detailed political profiling of candidates for constitutional judges, combined with occasional criticism of the excessively strong influence of the courts on policy-making.[6]

2.3 Judicial reform as part of the accession conditionality of the European Union

Respecting the rule of law is part of the political dimension of the Copenhagen criteria governing the EU accession conditionality. An independent and efficient judiciary is a component of the rule of law, as the Copenhagen criteria do not require simple formal adherence to the rule of law by states aspiring to join the EU but the existence of "stability of institutions ensuring democracy, the rule of law, human rights and respect for the protection of minorities" in those countries. As it transpired, the Copenhagen criteria reference to the rule of law was not just a symbolic demand. In the case of

6 Comp. Ivo Šlosarčík, 'Czech Republic 2006–2008: On President, Judges and the Lisbon Treaty' (2010) 16 European Public Law 1.

Slovakia, for instance, non-compliance with judgments of its constitutional court was one of the reasons for excluding Slovakia from the first group of candidate states with which negotiations on accession to the EU were initiated.[7]

However, the application of the rule of law conditionality has also been criticized, mainly because of the unclear, or even conflicting, signals sent by the EU countries and institutions to the candidate states. De Ridder and Kochenov in their analysis of the political conditionality mention that, for example, the inclusion of institutions for the training of judges (judicial academy) under auspices of the ministry of justice has been criticized by the European Commission in some candidate countries as a step threatening the independence of the judiciary, while elsewhere it was appreciated as a process enhancing the coherence and effectiveness of the training of judges and judicial staff.[8]

With the accession of the Czech Republic to the European Union, the accession conditionality associated with the existence of the rule of law ceased to exist and has been replaced by a new catalogue of requirements concerning EU law, complemented by a new range of procedural tools operating within the EU area.

3 EU requirements for Member States' courts

3.1 Efficient application of EU law

The first and seemingly intuitive requirement of European integration is the ability of national courts to interpret and apply EU law. Hence, the EU expects judges to apply Europeanized legal norms in compliance with the EU's principles of direct effect, supremacy and loyal cooperation. The requirement of the proper application of EU law is not limited to extending the catalogue of applicable legal sources to include EU founding treaties and legal acts, but also requires judges to be familiar with the case law of the Court of Justice of the EU and, last but not least, to take account of

7 In more detail Vladimír Leška, *Slovensko 1993–2004: Léta obav i nadějí* (Slovakia 1993–2004: Years of fear and hope) (Institute of International Relations Prague 2006) 60f.

8 Eline De Ridder and Dimitry Kochenov, 'Democratic Conditionality in Eastern Enlargement: Ambitious Window Dressing' (2011) 16 European Foreign Affairs Review 589.

the multilingual nature of EU law, where the different language versions of EU legislation are (at least in theory) equal.[9] The judge must also be able to identify situations in which he or she is required to apply EU law and, if necessary, decide to disregard domestic legislation colliding with the EU rules. And even when interpreting ordinary national laws, the national court judge should interpret the domestic legal acts in the light of EU rules and consider the general EU dimension of the case being heard.

In the Czech legal environment, this scenario has materialized especially after the adoption of the "European amendment" of the Czech Constitution[10], which provides for direct effect of most international treaties, stipulates the respect of the Czech state for its international obligations, and explicitly permits the transfer of powers from the Czech state to an international institution or organization. Although new constitutional clauses have not answered all questions that the Czech courts dealt with during the interpretation and application of EU law, they have provided a solid basis for doctrinal debates on the position of EU law in the Czech legal system. Jurisprudence produced by Czech courts since EU accession have accepted, for example, the principle of direct effect of EU law, supremacy of EU law over Czech legislation and even a constitutional obligation of Euro-conformist interpretation of Czech constitutional and legislative rules. At the same time, however, the constitutional court used its review of the Lisbon Treaty in 2008 and 2009 to formulate, albeit indirectly and rather vaguely, constitutional limits to the impact of European integration in the Czech Republic.

3.2 Communication with the CJEU and the courts of other EU countries

Communication with the CJEU through preliminary questions formulated by Czech courts has attracted a large part of the EU-related attention of judges and the academic community in the Czech Republic. The legislative anchoring of the preliminary reference mechanism was smooth[11] and Czech

9 Michal Bobek, 'On the Application of European Law in (Not Only) the Courts of the New Member States? Don't Do as I Say?' (2008) 10 Cambridge Yearbook of European Legal Studies 1, 2–4.

10 Constitutional Act no. 395/2001 Coll. (adopted October 18, 2001, effective June 1, 2002).

11 Law No 99/1963 of 4 December 1963 Code of Civil Procedure, Act No. 120/2002 Coll. of 21 March 2002 Code of Administrative Procedure, Law No. 141/1961 Coll. of

ordinary courts began to turn to the Court of Justice of the EU on a regular basis, albeit less frequently than their counterparts in some other medium-size EU states.[12] However, not a single question has yet been asked by the constitutional court. In addition to the prevailing "more technical" questions, the communication between the CJEU and Czech courts has also contributed to the clarification of structural elements of the application of EU law in new Member States, especially in the first years of EU membership; specifically the problem of the (non-)application of the EU legislation not properly published in the Czech language in the Official Journal of the EU (C-161/06 Skoma-Lux).

According to its critics, the preliminary rulings mechanism has the potential to challenge the judicial hierarchy within a Member State, when the lower courts, using a question referred to the CJEU, can assert their legal opinion even against the superior domestic courts. The Czech Republic did not escape this destabilizing scenario during a series of disputes referred to as the Slovak pension saga concerning the pensions of Czech and Slovak citizens living in the Czech Republic, but calculated and paid according to Slovak rules, due to the regime established by Czech–Slovak treaties adopted in connection with the division of Czechoslovakia.[13] Opinions of the constitutional judges and their colleagues in the Supreme Administrative Court differed both regarding the constitutional and the EU dimensions of the problem. In one of the cases, the Supreme Administrative Court referred a preliminary question to the CJEU (C-399/09 Landtová), but the answer from Luxembourg was de facto ignored by the constitutional court in a later similar (albeit formally different) dispute, and the whole affair was declared as an exclusively domestic matter outside the ambits of

November 29 1961 on judicial criminal proceedings (Code of Criminal Procedure). There have also been suggestions that preliminary reference can be based directly on the relevant clauses of the TEU and the TFEU, i.e. without specific amendments of Czech procedural codes. Comp. Zdenek Kühn and Michal Bobek, 'What About That "Incoming Tide?" The Application of EU Law in the Czech Republic' in Lazowski (ed), *The Application of EU Law in the New Member States: Brave New World* (T.M.C. Asser Press 2010) 344.

12 In 2015–2019, Czech courts referred 34 preliminary questions, which is fewer than the Hungarian (100), Belgian (154), Irish (48), Latvian (40), Lithuanian (39), Portuguese (79), Swedish (38) or Austrian (146) courts. Court of Justice of the European Union. Annual Report 2019. Judicial Activity. Luxembourg 2020, p.163.

13 Filip Křepelka, 'The imperfect dismantlement of the Czechoslovak pension system as an impulse for rebellion against European Union law' (2012) 2 European Journal of Social Law 278, 286ff.

EU law. Many academic commentaries labelled this decision as a Czech constitutional revolt against EU law,[14] even though its fundament was a dispute between two Czech senior courts.[15] This Slovak pension inter-judicial dispute eventually de-escalated after the Supreme Administrative Court withdrew its later preliminary question formulated as an even more direct confrontation with the constitutional court (C-253/12 JS v Czech Social Security Administration).[16]

3.3 Structural requirements for the courts of EU countries

Traditionally, EU law did not interfere with the structures of judicial authorities in individual Member States. In recent years, however, the CJEU and other EU institutions have started to actively seek to define the EU structural requirements for the judiciary in EU countries. This effort seems to be motivated by a combination of several components of European integration, including the ongoing constitutionalization of the European Union,[17] the expansion of mutual recognition of judicial decisions requiring mutual trust between the courts of individual Member States, as well as the increasing sensitivity to the importance of judicial control of the use of funds distributed through the Union budget or other EU financial instruments.

The trend of greater interest in the judiciaries of EU countries is reflected by the emerging heterogeneous catalogue of procedural tools (discussed in the following section of this chapter) which share, from the perspective of their critics, two horizontal challenges. The first is the vagueness of the

14 Michal Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure' (2014) 10 European Constitutional Law Review 54.

15 Robert Zbíral, 'Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12 – A Legal revolution or negligible episode? Court of Justice decision proclaimed ultra vires' (2012) 49 Common Market Law Review 1475.

16 The Supreme Administrative Court asked whether "European Union law prevents the national court, which is the highest court in the State in the field of administrative law and against whose decision there is no right of appeal, from being, in accordance with national law, bound by the legal assessment of the Constitutional Court of the Czech Republic where that assessment seems not to be in accordance with Union law as interpreted by the Court of Justice of the European Union?".

17 Comp. Thomas Christiansen and Christine Reh, *Constitutionalizing the European Union* (Palgrave 2009) 229–260.

frame of reference for the debate on EU standards for national justice. Several clauses of the EU's founding treaties (Article 19 TEU in particular) and the EU Charter of Fundamental Rights give only a limited idea how a judicial system of an EU state should look. Therefore, the EU actors must significantly rely on case law, the expertise of actors outside the European Union (e.g. the Venice Commission of the Council of Europe) or the views of the academic community.[18] The result is a regulatory mosaic that provides a relatively easy target for criticism.

A second weakness of the Union's efforts to influence the structural elements of the Member States' judiciaries is the lack of clarity of the boundaries of EU rules, or at least of the EU's influence. Clearly, the activities of the CJEU and other EU actors are not limited to situations with a clear cross-border element or to situations where national courts apply EU law but extend to the whole judiciary. Thus, in the case of Hungary and Poland, EU actions were directed against the general retirement rules for judges or their disciplinary responsibility.[19] In other cases, Union instruments require a closer link between structural judicial misconduct and Union activity, as with the rule of law conditionality, where the mechanism can be triggered only when breaches of principle of the rule of law affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.[20]

4 EU instruments

4.1 Actions for breaches of EU law before the CJEU

The activities and structure of the courts of Member States are not immune from infringement actions initiated by the European Commission and decided by the Court of Justice of the EU. However, the Commission must identify here a binding segment of EU law which it claims to be

18 For instance, recent Horizon 2020 RECONNECT Reconciling Europe with its Citizens through Democracy and Rule of Law project.

19 The Polish case is described in detail for example in Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).

20 Regulation 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, Article 4 par 1.

infringed. Sometimes, this requirement has led to paradoxical situations, such as when the Commission sued Hungary for reducing the compulsory retirement age of judges, motivated by a desire of the Hungarian government to vacate a number of judicial posts and refill them with government-friendly judges, only for a breach of general EU legislation against age discrimination in employment (C-286/12 EC v Hungary).[21] It was not until several years later that the European Commission and the CJEU began to identify strengthening governmental control over the national judiciary as an explicit violation of Article 19 TEU, requiring Member States to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."[22]

Infringement judgments in disputes between the European Commission and Poland on the conformity of the new Polish regime for disciplining judges (C-791/19 Commission v Poland, C204/21 Commission v Poland), combined with the Court's answers to preliminary questions on a similar subject asked by Polish and Hungarian judges (C-487/19 Waldemar Zurek, C-564/19 IS), have formulated the most detailed picture yet of judicial independence standards in EU law.[23] At the same time, however, these cases also demonstrated shortcomings of the infringement procedure, when the CJEU judgments can be relatively painlessly ignored by national authorities and a change in the domestic rules frequently materialized only after the threat of financial sanctions for not respecting the original CJEU judgment.[24]

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21 Gábor Halmai, 'The Early Retirement Age of Hungarian Judges' in Nicola and Davies (eds) *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017); Uladzislau Belavusau, 'On age discrimination and beating dead dogs: Commission v. Hungary, Case C-286/12' (2013) 50 Common Market Law Review 1145.

22 However, this argument did not appear for the first time in the context of Central Europe, but as part of an effort by Portuguese judges to reverse the consequences of the austerity measures taken by the Portuguese government during the eurozone crisis (CJEU, case C-64/16 *Association Syndical dos Juízes Portugueses* (2018)).

23 Rafał Mamko and Przemysław Tacik, 'Sententia non existens: A new remedy under EU law?: Waldemar Zurek' (2022) 59 Common Market Law Review 1169; Kim Lane Scheppele, 'The law requires translation: The Hungarian preliminary reference on preliminary references: IS' (2022) 59 Common Market Law Review 1107; Michał Krajewski and Michał Ziólkowski, 'EU Judicial Independence Decentralized: A.K.' (2020) 57 Common Market Law Review 1107.

24 In more detail Laurent Pech, 'Protecting Polish judges from Poland's Disciplinary „Star Chamber": Commission v. Poland (Interim proceeding)' (2021) 58 Common Market Law Review 137.

4.2 Article 7 TEU procedure

Already in the 1990s, a new control-sanction mechanism capable of responding to the collapse or significant implosion of democratic institutions in EU countries was inserted into fundamental EU treaties (Article F.1. TEU, later renamed Article 7 TEU). The new mechanism should be activated if any EU Member State seriously and persistently violates EU values, including the rule of law. The state in question may be subject to sanctions going beyond the standard sanctions catalogue for breaches of EU law, including the suspension of the voting rights in the Council, the interruption of transfers from the EU budget or even restrictions of its citizens' or companies' access to the internal market. However, Article 7 TEU does not go so far as to allow the expulsion of a state from the European Union. The relative limitlessness of sanctions under Article 7 TEU is compensated by its procedural rules, with an emphasis on de facto unanimity voting and institutional dominance of the European Council and the Council of the EU. In the light of the Austrian political crisis in 2000, Article 7 TEU was supplemented by a warning segment allowing the Council to declare that there is a clear risk of a serious breach of EU values in an EU state. In 2014, the European Commission extended (by means of a communication, i.e. without amending the founding treaties) the mechanism of Article 7 TEU by a preliminary procedure consisting mainly of consultations (described rather optimistically as "dialogue" in the Commission's documents) between the Commission and the Member State in which the Commission identified a systemic threat to the "political, institutional and/or legal order of a Member State as such, its constitutional structure, the separation of the powers, independence and impartiality of the judiciary or its system of judicial review". Communication between the Commission and the EU state may be followed by a recommendation to remedy the situation and, in the event of non-compliance with the recommendation, the Commission shall "assess the possibility of activating the Article 7 TEU mechanism in its complexity".[25]

Poland and Hungary became the first EU states to test the Article 7 TEU mechanism in practice. Firstly, the European Commission published, after unsuccessful communication within its EU rule of law framework, a reasoned opinion declaring that there was a serious risk of a breach of EU

25 Communication from the Commission to the European Parliament and the Council. New EU Rule of Law Framework, Brussels, 2014.

values in Poland. Several months later, the European Parliament adopted a similar motion in relation to Hungary. However, the whole procedure has not moved forwards due to passivity of the Council, and the political attention has been gradually moving towards rule of law conditionality of the allocation of EU finances (discussed below).

4.3 Termination of mutual recognition of judicial decisions

The conformity of the national judicial system with EU law has been challenged by individual national courts, which have repeatedly asked the CJEU whether the courts can cooperate with their counterparts from the "problematic" states and, in particular, whether they shall recognize judicial decisions originating from there. In 2018, the Irish court asked whether it should cooperate in the surrender of a Polish citizen for whom a European Arrest Warrant had been issued by Polish courts on suspicion of drug offences (C-216/18 PPU Minister for Justice and Equality versus LM). The Irish court was not confident it should recognize the euro-warrant in a situation where the independence of the Polish judiciary was being called into question and Article 7 TEU proceedings had even been initiated against Poland. The CJEU replied to the Irish judges that neither the Article 7 TEU procedure nor the European Commission's infringement procedures against Poland were automatically grounds for blocking cooperation. However, the Irish court should autonomously assess whether, in a concrete case, the person being surrendered would be guaranteed a fair trial in Poland, and Polish courts are obliged to provide their Irish counterpart with sufficient information to enable it to make a qualified decision in this matter.

To contextualize the problem of mutual trust in the EU, it shall be mentioned that challenges to mutual recognition between courts of EU countries have not been limited to situations where the independence of the judiciary has been called into question. Similar doubts have been raised concerning a European Arrest Warrant issued by courts from countries with a low standard of prisons and detention centres (C-404/15 Aranyosi and Căldăraru) or from a country withdrawing from the European Union (C327/18 RO).

4.4 Conditionality of financial transfers in the EU

The EU's latest initiative to strengthen the rule of law has been to link financial transfers from the EU budget to the quality of the functioning of the courts that control the distribution of the EU funds. When negotiations on the EU's multiannual financial framework (i.e. the framework for the standard EU budget) for 2021–2027 and the negotiations on the extraordinary financial instrument responding to the Covid crisis (Next Generation EU) coincided in 2020, the existing catalogue of conditions for transfers from the EU budget expanded to include respect for the rule of law in the receiving countries (i.e. rule of law conditionality). Within trialogue negotiations between the EU institutions, the European Parliament advocated a broader scope of the respective regulation, which it considered more of a tool for upholding the rule of law, while the Council emphasized the specific role of the new conditionality in protecting the Union budget, and therefore preferred a narrower definition of the activities covered by the regulation and their more direct link to the distribution of the EU funds.[26]

Finally, the respective regulation[27] contains its own definition of the rule of law,[28] indicators of breaches of the rule of law, including the generally formulated threat to the independence of the judiciary,[29] and detailed procedures for taking "appropriate measures" (typically to interrupt financial transfers to governmental entities in the receiving state) to protect the EU

26 The adoption of the Regulation is dealt with in more detail by Editorial Comments, 'Compromising (on) the general conditionality mechanism and the rule of law' (2021) 58 Common Market Law Review 267.

27 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.

28 Article 2 of the regulation states that "the rule of law refers to the Union … [it] includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law."

29 According to Article 3 of the regulation, the indications of breaches of the principles of the rule of law include: "Endangering the independence of the judiciary, failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest, or limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments…".

budget, where the European Commission shall play a central role while the Council of the EU will also retain its influence. In contrast, the European Parliament is vested with only limited formal powers, which does not prevent this EU institution from intervening in the procedure by means of political declarations and pressure.[30] The scope of this new rule of law conditionality is limited by a requirement that "appropriate measures" may be triggered only if "the breach of the rule of law in a Member State sufficiently directly affects or seriously jeopardises the sound financial management of the Union budget or harms or seriously jeopardises the protection of the Union's financial interests".[31]

The draft regulation was opposed in the Council mainly by Hungary and Poland, which, although they alone could not block the adoption of the regulation in the Council (decided by a qualified majority), threatened to veto the Multiannual Financial Framework (adopted by consensus of Member States). A political solution to this deadlock was found by the European Council, which in its conclusions of December 2020 asked the European Commission to develop a detailed methodology for the evaluation of new conditionality as well as to promise not to use the regulation to assess general deficiencies in the rule of law in EU countries.[32] In addition, the European Council requested the European Commission to de facto postpone the activation of the entire mechanism until the review of its legality by the CJEU.[33] The Court did so in 2022 when it dismissed the actions brought by Hungary and Poland challenging the legality of the

30 In particular, European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

31 Article 4 par. 1 of the Regulation.

32 The European Council conclusions state, inter alia, that "the application of the conditionality mechanism under the Regulation will be objective, fair, impartial and fact-based, ensuring due process, non-discrimination and equal treatment of Member States" and "the triggering factors set out in the Regulation are to be read and applied as a closed list of homogenous elements and not be open to factors or events of a different nature. The Regulation does not relate to generalised deficiencies." European Council conclusions 10–11 December 2020.

33 The wording used was: "Should an action for annulment be introduced with regard to the Regulation, the guidelines will be finalised after the judgment of the Court of Justice so as to incorporate any relevant elements stemming from such judgment … Until such guidelines are finalised, the Commission will not propose measures under the Regulation." European Council conclusions 10–11 December 2020, I. para. 2.point. c.

regulation (C-156/21 Hungary v EP and Council and C-157/21 Poland v EP and Council).

5 *Emerging new EU regulatory domain or only a Polish/Hungarian controversy?*

A new regulatory framework is emerging in the European Union limiting the autonomy of Member States to establish rules for the functioning of their domestic courts. At present, it focuses predominantly on the ability of courts to decide independently of political pressure from the executive, but the boundaries of EU influence are still unclear and potentially expanding, e.g. into agenda of underfinancing of the judiciary, independence of the public prosecutor's office or (absence of) governmental activity when the national judiciary refuses to respect EU law.

The new EU regulatory framework is formed by a loosely interconnected group of procedural tools with no mutual hierarchy or temporal coherence. Individual procedural tools also differ regarding space they provide for different EU and domestic institutions to pursue their views and preferences. The attention given to Poland and Hungary in recent years may overshadow the overall picture of this EU regulatory transformation and generate uncertainty of its future direction.

The first open question is whether the new EU rules will effectively expand beyond the Polish/Hungarian "two-country case study" and, in particular, whether the new EU regulatory domain will be limited to states which joined the EU in 2004 or later. Otherwise, it may be difficult to persuade the political elites of new EU states that strengthening EU oversight of their national judiciary is not just another manifestation of their treatment as de facto second-class members with diminished levels of trust, especially in a situation when some of the new EU states are expected to become net contributors to the EU budget.

A second factor influencing the future of the new EU regulatory framework will be its (in)capacity to capture not only formal rules but also to reflect the informal practice of interaction between the executive power and the courts.[34] The importance of attention given the soft constraints of the judiciary has already been reflected by the CJEU, which stressed how

34 For instance, the President of the Czech Republic, Miloš Zeman, revoked his already announced decision to award high state honour (Order of Tomas Garrigue Masaryk)

important for the rule of law an "appearance of judicial independence" of national courts is from the perspective of a well-informed outside observer.[35] The development of the EU regulatory framework in this direction will, however, require more robust comprehension of the legal systems and politics of new EU states in Brussels than exists at present.

Concluding, the competition between the EU procedural tools supervising the quality and independence of courts in Member States is not the only, or even the most pressing, challenge to the emerging EU regulatory regime. The legitimacy of this EU domain will require further clarification of its material scope (including the issues of subsidiarity and/or de minimis principle) as well as assurance of the non-discriminatory character of the territorial application of new EU instruments.

to the chairman of the constitutional court, Pavel Rychetský, as a reaction to the court's judgment annulling electoral legislation in 2021.

35 Michał Krajewski and Michał Ziolkowski, 'EU Judicial Independence Decentralized: A.K.' (2020) 57 Common Market Law Review 1107, 1124.

Part II:
Scholarly Perspectives on Judicial Independence

Judicial independence in the Czech Republic – Walking on a tightrope

Jan Němec

1 Introduction

The independence of the judiciary in the EU Member States of East Central Europe has recently come to the fore, most notably in the context of the controversies in Poland and Hungary. The considerable media, scholarly and political attention received by the disputes between the governments there and parts of the judiciary and the EU institutions has largely overshadowed developments in other countries of the region. The proverbial darkness under the candlestick may play into the hands of attempts to limit the independence of the judiciary also in other still young democracies such as the Czech Republic, mainly as there exists no independent body of judicial self-government in the country.

Recent events show that Czech politicians sought to influence the judicial branch. The alleged attempt by high-ranking aides of President of the Republic Miloš Zeman to trade the power to appoint judicial officials for favours in certain court proceedings was on the agenda of the parliamentary subcommittee on justice,[1] and it eventually became one of the arguments of the Senate, the second chamber of the parliament, for initiating the ultimately unsuccessful procedure of removing Zeman from office.[2] However, since the Ministry of Justice, an institution of the executive branch, is the supreme body of the state administration of the judiciary, influence can also be exerted more discreetly and subtly, well beyond such highly medialized events.

1 See Brian Kenety, 'MPs hear testimony over alleged attempts by Zeman, president's chancellor to sway judges' (*Radio Prague International*, 24 January 2019) <https://english.radio.cz/mps-hear-testimony-over-alleged-attempts-zeman-presidents-chancellor-sway-judges-8140379> accessed 1 March 2023.

2 Reuters, 'Czech opposition lawmakers fail in bid to remove president' (*Reuters*, 26 September 2019) <https://www.reuters.com/article/us-czech-president-idUSKBN1WB2NC> accessed 1 March 2023.

Against this background, this chapter seeks to enrich the mosaic of judicial independence in Central Europe by shedding light – in its first section – on the institutional guarantees and practice of judicial independence in the Czech Republic. It focuses mainly on the relationship between the legislative and executive powers on the one hand and the judiciary on the other. The relations within the bench, most notably between its hierarchical levels, are omitted because of limited space. Afterwards, it is determined whether the judiciary enjoys public confidence. In the third section, the chapter informs about the views of politicians and judges on the state of judicial independence in Czechia. This section is based on original research within the project "Rule of Law in East Central Europe" at Leipzig University.[3] In sum, the chapter will show that judicial independence in the Czech Republic, although institutionalized on paper, cannot be taken for granted. It is like walking on a tightrope, a delicate balance depending on the attitudes and behaviour of different actors, including the general public.

2 *Institutional guarantees and practice of judicial independence in the Czech Republic*

The structure of the Czech judicial system and the basic requirements for exercising judicial functions are enshrined in Part Four of the Constitution of the Czech Republic.[4] Judicial independence as a fundamental characteristic of the judiciary is regulated in Article 81: "The judicial power shall be exercised in the name of the Republic by independent courts." Article 82 then guarantees the individual independence of each judge, stating in paragraph 1 that "Judges shall be independent in the exercise of their functions. Their impartiality shall not be compromised by anyone." Thus, the Constitution guarantees the dual independence of the judiciary, namely of the courts as judicial bodies (external independence) on the one hand and individual judges on the other (internal independence, impartiality). These two dimensions of judicial independence are interrelated and interdependent; it is difficult to imagine the long-term existence of one in the absence of the other.

3 Project funded by the German Federal Ministry of Education and Science (2021–2024; Grant number 01UC2103), Project Team Leader Prof. Astrid Lorenz, Leipzig University.

4 Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic.

Notwithstanding the constitutional provision, indirectly – through the administration of the courts as state bodies – the judiciary is linked to the executive branch, namely the Ministry of Justice. This model has its roots in the system used in the Habsburg monarchy, of which the Czech lands were a part. This model persisted through dramatic changes in the legal system and the political regime, and the executive can influence the functioning of the judiciary, e.g. in terms of budget and judicial appointments. However, the government is not the only actor with the power under the Constitution or special laws to intervene in administering justice and judicial appointments. The President of the Republic and, to some extent, the second parliamentary chamber also play a significant role concerning judicial independence.

2.1 Government, the minister of justice, and their counterparts

As mentioned above, the executive, namely the minister of justice, interferes with the independence of the Czech judiciary under powers and duties defined by a specific law. The government nominates all judges formally appointed by the president, subject to the countersignature of the prime minister or the minister in charge. The same applies to the majority of judicial officials. Except for constitutional judges and the President and Vice President of the Supreme Court, judicial officials are appointed by the head of state upon the government's proposal, sometimes with the concurrent countersignature of the prime minister or the minister of justice. In the case of district courts, the presidents and vice presidents are appointed directly by the minister of justice. Table 1 offers a summary of the appointing powers concerning court officials.

In everyday practice, the linkage of the judiciary to the executive goes beyond judicial appointments. In the absence of a statutory supreme representative of the judicial power, such as the Judicial Council, several informal platforms have been created to fulfil this role de facto. The first platform is the Collegium of Presidents of Regional Courts, established in 2001 to discuss issues affecting regional courts while playing an active role in the judiciary and the Ministry of Justice relationship.

Another collective body that, by definition, defends the interests of judges is the professional association, the Judges' Union. It was founded in 1990 and is still the only professional association of judges in the Czech Repub-

lic. Since membership is optional for judges, it brings together slightly over 30 % of judges.[5] Despite this, it receives appropriate attention, especially from the media, on the functioning of the judiciary.

Table 1: Overview of powers to appoint judicial officers under the Constitution and special laws

Court	**Position**	**Proposes**	**Countersignature/ approval required?**	**Appoints**
Constitutional Court	Justices	President of the Republic	Senate majority vote	President of the Republic
	President	-	-	
	Vice presidents			
Supreme Court	President	-	-	
	Vice president			
Supreme Administrative Court	President	-	Prime minister or designated minister	
	Vice president			
High courts	President	Minister of justice		
	Vice presidents	President of the high court concerned	-	Minister of justice
Regional courts	President	Minister of justice	Prime minister or designated minister	President of the Republic
	Vice presidents	President of the regional court concerned	-	Minister of justice
District courts	President	President of the regional court in charge		
	Vice presidents	President of the district court concerned		

Source: Own elaboration based on the Constitution of the Czech Republic (Constitutional Act No. 1/1993 Coll.), the Act on Courts and Judges (Act No. 6/2002 Coll.), and the Administrative Procedure Code (Act No. 150/2002 Coll.).

An informal grouping, however, which does not have such a long history and is highly dependent on the personal relationships of its members is the trio of presidents of the highest judicial instances, i.e. the Constitutional Court, the Supreme Court and the Supreme Administrative Court. Such a constellation emerged in 2015 with the then Presidents Pavel Rychetský,

5 Interview with Libor Vávra, President of the Judges' Union, 27 October 2021.

Pavel Šámal and Josef Baxa, respectively, who, in 2017, together with the then Supreme State Prosecutor and the Public Defender of Rights (Ombudsman), published a joint statement on government interference in the judicial independence in Poland.[6] Beyond all doubts, this message was also directed to the domestic audience – politicians and the general public. However, with the personnel changes in these positions (only Rychetský holds the office today), this platform has faded into the background.

As mentioned, the minister of justice, the highest authority of the courts' state administration, is a crucial figure within the government. However, his or her role is to mediate between the political sphere and the bench. Considering that judicial officials are appointed for seven or ten years, while the position of the Czech Minister of Justice is one of the less stable ones,[7] it is mainly the presidents of regional courts who, both as a result of their relatively long mandates and primarily due to the influence of information superiority, decide on the functioning of justice in the area of the jurisdiction of a given court.[8]

2.2 President of the Republic

According to the Constitution, the Czech Republic is a parliamentary system where the centre of executive power lies in the government, accountable to the Chamber of Deputies. However, it is significant for the functioning of the separation of powers that the president has always been largely autonomous from the government or the ruling parliamentary majority in the three decades of the Czech Republic's existence. Although two of the three Czech presidents were former prime ministers and leaders of principal political parties, they acted independently from their former party fellows.

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6 See the joint statement "We cannot remain silent" published on 21 July 2017 on the website of the Constitutional Court <https://www.usoud.cz/aktualne/spolecne-prohlaseni-k-situaci-v-polsku> accessed 1 March 2023.

7 Between 2010 and 2022, there were six governments, in which a minister of justice was appointed nine times. Although several politicians held this position repeatedly in different governments, still there were seven different ministers. See Ministry of Justice of the Czech Republic, Gallery of Ministers of Justice from 1989 to the present <https://justice.cz/web/msp/historie?clanek=galerie-ministru-spravedlnosti> accessed 1 March 2023.

8 David Kosař, 'Politics of Judicial Independence and Judicial Accountability in Czechia. Bargaining in the Shadow of the Law Between Court Presidents and the Ministry of Justice' (2017) 13 European Constitutional Law Review 96.

The introduction of the popular election of the president in 2012 (before, the head of state was elected by the parliament) moved the Czech political system closer to the model of semi-presidentialism or at least opened space for the reinterpretation of relations between constitutional powers. Even the two presidents elected by the parliament were influential political players; nevertheless, the first president elected by the people in 2013 made it clear that he intended to exercise his mandate differently. In an interview with a leading Czech daily, he stated that "the notion of constitutional conventions is totally idiotic, because if they really were constitutional, then they would be somehow enshrined in the Constitution. They are only conventions. The president, despite being directly elected, cannot change the Constitution; however, he certainly has an inviolate right to change conventions that are not enshrined in the Constitution."[9]

The self-perceived autonomy of the head of state is crucial since the Constitution confers some elemental powers on the president in judicial appointments. Starting from the bottom of the judicial structure, the president appoints all judges at the beginning of their professional careers. The formal appointments on the government's proposal need the countersignature of either the prime minister or the minister in charge. Although the head of state usually appoints nominated candidates automatically, there has been a situation in the past where the president refused a group of nominees, citing their young age, and ignored a subsequent adverse court decision.

Moreover, the President of the Republic appoints heads of eight regional courts, two high courts and the President and Vice President of the Supreme Administrative Court. These appointments are subject to the countersignature of the prime minister or a minister authorized by him. At his or her discretion, the head of state shall appoint the President and the Vice President of the Supreme Court from among its judges.

Last but not least, the President of the Republic appoints all judges to the Constitutional Court under the prior approval of the Senate. Here, the American model was incorporated into the Czech Constitution, where the head of state selects possible candidates at his or her discretion and then has to win the support of the second chamber of parliament. From among

9 The English translation taken from Jan Wintr, Marek Antoš and Jan Kysela, 'Direct election of the president and its constitutional and political consequences' (2016) 8 Acta Politologica 145, 149.

the members of the Constitutional Court, the head of state also appoints its president and vice presidents, this time freely, at his or her discretion.

The fact that the judges of the newly created Constitutional Court of the Czech Republic were almost all appointed in 1993 for a constitutionally defined ten-year term of office has led to the situation that most of the seats are replaced at approximately the same time. Considering that all Czech presidents were re-elected for a consecutive five-year term, each could appoint all the Constitutional Court judges and shape its internal composition entirely.

Every president pursued a different strategy for selecting candidates for constitutional judges. Václav Havel (1993–2003) strived for a relatively homogeneous Constitutional Court that would contribute to implementing democratic values and human rights policies in the political and legal framework of the transforming society. At the same time, in his search for suitable candidates, he turned to expert institutions for their recommendations and opinions. Václav Klaus (2003–2013) purposefully sought a more diverse composition of the Constitutional Court in terms of professional experience and ideological background. As a long-time politician (before being elected President of the Republic, Klaus was Prime Minister and Speaker of the Chamber of Deputies, among others), he considered the Constitutional Court to be a political institution, which is why he appointed several people with careers in top politics to its ranks.[10] At the same time, he cooperated much less with the professional public in selecting suitable candidates, which, according to critics of this approach, has contributed to the low quality of the nominees and, thus, to the higher rejection rate by the Senate. Miloš Zeman (2013–2023), in the early years of his term, relied on the recommendation of the President of the Constitutional Court, Pavel Rychetský (appointed in 2003 by Václav Klaus), who had previously

10 This was primarily Pavel Rychetský, a former interior minister, deputy prime minister and senator elected as a member of the Social Democratic Party, the party in opposition to Klaus. Alongside him, Miloslav Výborný, a long-time member of the Christian Democratic Party and former defence minister in Klaus's government, and Dagmar Lastovecká, former mayor of Brno and senator for Klaus's Civic Democratic Party, were also appointed Constitutional Court judges. It should be noted that none of them has been questioned as to their readiness to serve as a constitutional judge. On the other hand, it is worth mentioning that all three of them were involved in the drafting of legislation as members of parliament (Rychetský and Výborný, moreover, from ministerial positions), whose conformity with the Constitution they were subsequently supposed to test.

been the deputy prime minister of Zeman's cabinet and a high-profile party politician. It was only in 2016 that Zeman decided to select candidates based on the recommendations of his office staff, again non-transparently, "behind closed doors".[11]

All three Czech presidents had to deal with rejection from part of the parliamentary chamber. In the case of Václav Klaus, the stand-off culminated in a situation where the number of members of the Constitutional Court fell below the legal minimum required for plenary decision-making. This situation lasted for several months and harmed the Constitutional Court's ability to rule, for example, on the incompatibility of legislation with the Constitution. Based on this experience, it is evident that the president sets the pace for filling vacant seats and, in extreme cases, can block the Constitutional Court from making some of its decisions.

2.3 The Senate

Although the Czech Republic is a relatively homogenous unitary state, the Constitution of 1992 re-established the second parliamentary chamber. The Senate was part of the constitutional architecture of the first Czechoslovak Republic (until 1938), but at that time, it only copied and reproduced existing power relations due to its excessive institutional similarity to the first parliamentary chamber. The Czech Constitution builds on the tradition of bicameralism. However, it emphasizes the dispersion of power; thus, the second chamber serves as a possible counterbalance to the first chamber and, to some extent, to the executive power. Indirectly, through its interaction with the Chamber of Deputies, it has check powers towards the government backed by the majority in the first chamber. Towards the President of the Republic that is also part of the executive power according to the Constitution the Senate has direct scrutiny powers in selected nomination and appointment processes.

The guiding concept of the arrangement of the Czech Parliament is indeed asymmetrical bicameralism, i.e. the first chamber has the upper

11 Zdeněk Kühn and Jan Kysela, 'Nomination of Constitutional Justices in Post-Communist countries: Trial, Error, Conflict in the Czech Republic' (2006) 2 European Constitutional Law Review 183; Zdeněk Kühn, 'The Czech Constitutional Court in times of populism. From judicial activism to judicial self-restraint' in Fruzsina Gárdos-Orosz and Zoltán Szente (eds), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (Routledge 2021).

hand in the legislative process (most importantly, it can override any vetoes or amendments by the Senate, and the Senate is also excluded from the consideration of the national budget). However, in some critical areas for the functioning of the constitutional system, the Senate is relatively strong. These include amendments to the Constitution, where the Senate has to approve such proposals by a qualified majority, and specific laws (e.g. the Electoral Law), where explicit consent of the Senate is needed, and the Chamber of Deputies cannot override it.

Since the elections to the Senate are held every two years, with a third of seats being renewed each time, the second parliamentary chamber is the most frequently reshuffled of all constitutional institutions. On the other hand, the individual senators have the most extended term of all elected offices: six years, compared to four years for the members of the first chamber and five years for the president. Thus, they are disconnected from these electoral cycles. In addition, senators are relatively free from party pressure as a consequence of the fact that the majority voting system is used for the Senate election. This voting system emphasizes the personalization of the vote instead of the party affiliation, a more important feature of the proportional representation voting system used for election to the Chamber of Deputies. Last but not least, the government arises from the Chamber of Deputies, to which it is also formally accountable but, at the same time, enforces the voting discipline of the parliamentary party groups supporting the government. Such attempts are less frequent and often unsuccessful towards senators.

The president, who has some powers over the government and can thus indirectly influence the governing majority in the Chamber of Deputies, has no leverage on the Senate. Thus, vis-à-vis the president, the Senate acts as an equal actor when considering nominations for constitutional judges. In addition, to the Senate, the president has little to offer as a reward for senators' potential willingness to accommodate his personal preferences. That is also why, after the Senate was established in 1996, Presidents Václav Klaus and Miloš Zeman suffered several rejections of their nominees (Klaus nine, Zeman five out of twenty-one nominations each)[12].

12 Jana Ondřejková, 'Výběr soudců Ústavního soudu ČR' (2016) 11 Právník 945. Figures updated according to data available in the database of the Senate of the Czech Republic as of 31 December 2022.

3 Public trust in the judiciary as a protective shield?

The correlation between the general public trust in the judiciary and judicial independence has often been researched and eventually confirmed.[13] The leading argument is that judicial independence and its public perception contribute to trust-building. Therefore, since public confidence in the bench is a desired outcome, judicial independence should serve as a means to achieve that outcome. However, the relationship between these two aspects is of mutual influence. Attacks on the independence of the judiciary are indeed easier to launch if the judiciary does not enjoy significant public confidence, for instance due to general negative experiences with the functioning of the courts (e.g. slowness of their decision-making) or as a result of medialized corruption cases of individual judges.

Similarly, suppose more organizations act as spokespersons for the judiciary vis-à-vis the political sphere and the general public, and these organizations may compete with each other. In that case, it may reinforce the public perception of disorder in an institution that should be exemplarily flawless by the logic of its role. Although public perception may not reflect the reality of the functioning of the judiciary, if a critical part of the general public is in favour of reforming the bench, it opens a window of opportunity for systematically limiting its independence.

In the case of the Czech Republic, the judiciary had to fight for public trust for a long time. The initial low level of public confidence in the judiciary stemmed mainly from the requirements of the process of transforming the judiciary from a non-democratic system to a democratic state governed by the rule of law. After the collapse of the authoritarian regime, a crucial issue was the renewal of the judicial staff in a way that showed as few links to the previous regime as possible. The undemocratic regime endured more than 40 years, so filling the judiciary with judges with no professional history and no links with the previous regime was practically impossible.

The lustration laws, adopted in 1991 and repeatedly extended after that, prevented the continuation in office of judges who directly collaborated with the repressive apparatus of the authoritarian regime. Nevertheless, in the context of the high degree of institutional continuity and the rejection of a broad application of the principle of collective guilt, it was not

13 See, for instance, Frans van Dijk, *Perceptions of the Independence of Judges in Europe. Congruence of Society and Judiciary* (Palgrave Macmillan 2021).

feasible to remove from office all judges who had been members of the authoritarian Communist Party. Although it has been reported that approximately 70 % of judges left the judiciary during the years of transition,[14] a significant number of them did so for economic reasons, as the remuneration of judges was extremely low compared to, for instance, private law practice. The subsequent understaffing and a dramatic increase in court cases associated with the change in social, economic and legal conditions linked to the system transformation in the 1990s and the resulting delays in decision-making affected the public perception of the judiciary. Some also questioned the independence of judges' decision-making given their possible linkage to former authoritarian structures.[15]

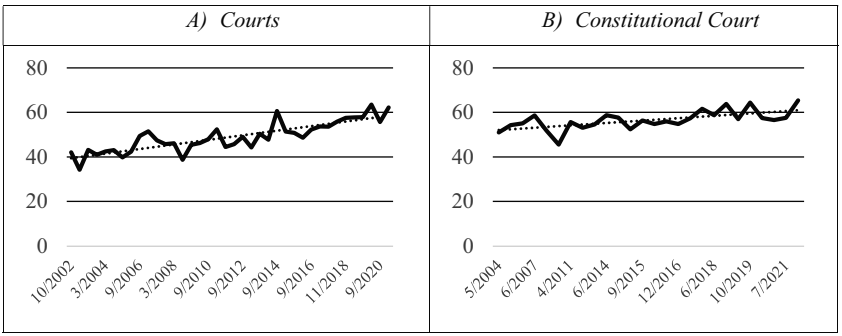
Despite the adverse starting conditions mentioned above, the Czech judiciary's independence thirty years after its transformation is perceived as good by most of the general public.[16] Public confidence in the judiciary has gradually increased over the past 20 years. As shown in Figure 1, from around 40 % in 2002, it steadily rose to 60 % in 2021. Trust in the Constitutional Court followed a similar trend. Unlike ordinary courts, the Constitutional Court has established itself relatively quickly as one of the most trusted central constitutional institutions. Although occasional fluctuations can be observed, mainly due to controversial decisions (such as the annulment of the early elections in 2009 due to the unconstitutionality of the parliamentary procedure used for calling them), an upward trajectory and generally more than 50 % public confidence can be observed.

14 Daniela Piana, 'The Power Knocks at the Courts' Back Door. Two Waves of Postcommunist Judicial Reforms' (2009) 42 Comparative Political Studies 816, 822.

15 In relation to this, since 2011 the Ministry of Justice has made public information about membership of judges and state prosecutors in the Communist Party before 1990. It was forced to change its initially reluctant approach due to the decision of the Constitutional Court from 2010 that gave the right of access to this information a higher level of public interest than the protection of privacy. See Nález Ústavního soudu ze dne 15. listopadu 2010, sp. zn. I. ÚS 517/10.

16 See European Commission, *Perceived independence of the national justice systems in the EU among the general public: report* (Publications Office of the European Union 2022) <https://data.europa.eu/doi/10.2838/685657> accessed 1 March 2023.

Figure 1: Development of the Czech public's trust in the courts between 2002 and 2021, % of respondents

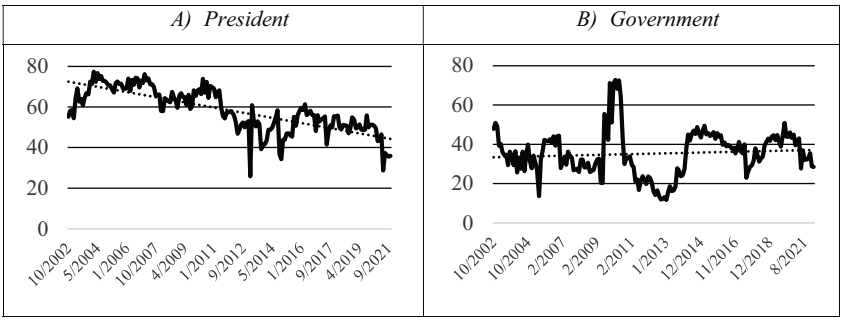


Source: Centre for Public Opinion Research, Academy of Sciences of the Czech Republic. https://cvvmapp.soc.cas.cz

Note: Trustworthiness ratings for the courts have been tracked since October 2002 and for the Constitutional Court since May 2004. Graphical representation of the sum of "definitely trust" and "rather trust" responses to the question "Please tell me, do you trust the courts/Constitutional Court: definitely trust, rather trust, rather distrust, definitely distrust?"

These data and, in particular, the trends contrast with the evolution of trust in the institutions of the executive branch, i.e. the president and the government – see Figure 2. In particular, confidence in the president had declined significantly in recent years, which may have been contributed to by the introduction of direct election of the head of state, when the presidency became the subject of polarized electoral competition. In addition, trust in the president also reflects the current assessment of the incumbent's performance. In any case, confidence in the president has fluctuated from relatively high levels of over 60 % since 2013 to between 60 % and 30 %. Similarly, low levels of trust are usually experienced by governments, which rarely, and usually only in the short term, manage to convince more than 50 % of the public. Most often, however, it has oscillated between 20 % and 40 %.

Figure 2: Development of the Czech public's trust in the institutions of the executive branch between 2002 and 2021, % of respondents



Source: Centre for Public Opinion Research, Academy of Sciences of the Czech Republic. https://cvvmapp.soc.cas.cz

Note: In order to make the data comparable with Figure 1, the ratings of the trustworthiness of the president and the government since October 2002 are shown. Graphical representation of the sum of the responses "strongly trust" and "rather trust" to the question "Please tell me, do you trust the president/government of the Czech Republic: strongly trust, rather trust, rather distrust, strongly distrust?"

Given this considerably high level of trust in the courts, encroachments on the independence of the judiciary would face resistance from the society that would be supportive of judges and their protection from outside pressures. Recently, the most prominent expression of public awareness regarding the rule of law in the Czech Republic was the series of protests against Prime Minister Andrej Babiš and Justice Minister Marie Benešová, one of which was the largest demonstration since 1989.[17] Ultimately, the fact that criminal proceedings were brought against the acting prime minister has contributed to an increase in public interest in the functioning of the rule of law institutions while significantly lowering the threshold of sensitivity to any, even suspected, political interference in its structures.

Nevertheless, relying solely on the strength of public trust and support would be naive. Generally speaking, if "attacking" the independence of the judiciary in a pluralist democratic system, political actors can adopt differ-

17 See, for instance, Siegfried Mortkowith, 'Czechs march in biggest anti-government protest since communism' (*Politico.eu*, 23 June 2019) <https://www.politico.eu/article/czech-republic-czechs-prague-stage-biggest-protest-since-communism-against-prime-minister-andrej-babis/> accessed 1 March 2023.

ent strategies that will naturally consider their objectives and especially the political costs of such a move. For instance, when the ruling power seeks to limit or outright remove obstacles to pushing its agenda through legislation, it will focus primarily on the Constitutional Court, which often stands outside the general structure of the judicial system. Thus, it would probably leave the judicial system intact; however, such a move would not escape public attention. In contrast, the political parties systematically involved in corruption will seek to neutralize the criminal justice apparatus. Moreover, in countries with decentralized politics and court system structures, the latter may only be the case locally, again without affecting the institutional independence of the judiciary on a systemic level. Thus, undermining judicial independence can be subtle and limited in scale, not always raising public awareness.

As outlined in the following section, many Czech politicians are not opposed in principle to interference in the judiciary if – in their perspective – it would improve the quality of its performance. On the other hand, some judges mentioned the many pressures and temptations they are exposed to, particularly concerning the appointment processes within the judiciary. A relatively high and stable level of public confidence in the judiciary is probably the most appropriate environment to establish mechanisms and institutions for strengthening its independence from the President of the Republic or the Ministry of Justice as bodies of executive power.

4 Judicial independence in views of Czech judges and politicians

To understand the practice of judicial independence better, one needs to know how judges and politicians perceive the rule of law as a concept and their mutual relationship. This is explored in the mentioned "Rule of Law in East Central Europe" research project at Leipzig University. As part of this project, the author conducted semi-structured interviews with ten representatives of the Czech judiciary and ten politicians from different political parties. In the case of the party representatives, the main objective was to obtain the most diverse picture of perceptions of the rule of law possible while deliberately approaching, on the one hand, politicians with an educational and professional background in law and, on the other hand, members of parliament with different qualifications and specializations.

Similarly, long-serving members of parliament and politicians with relatively short parliamentary experience were purposively selected.[18]

The representatives of the judicial power were selected to reflect both functional differences, i.e. to include judges of the highest judicial instances (two judges of the Constitutional Court, the President of the Supreme Court, and the former president of the Supreme Administrative Court), as well as judges from different regions (four regional courts – Prague, Ústí nad Labem, Ostrava and České Budějovice, two high courts – Prague and Olomouc). In the case of the regional courts, the interviewees were mainly their former or sitting presidents, i.e. court officials who combine two roles in their person: an independent judge who is involved in decision-making activities and a manager who is responsible for the state administration of the courts within his or her jurisdiction. An interview was also held with the President of the Judges' Union, the only professional association of judges in the Czech Republic.

During the semi-structured interview, open questions were also raised about the independence of the judiciary, the evaluation of the transformation of the bench after 1990, and, if applicable, the problems the Czech judiciary is currently facing. Besides this, respondents were asked to fill in a one-page questionnaire with a prepared list of twenty-five possible attributes of the rule of law. Among others, the independence of judges in their decision-making and the possibility of dismissing them were included. The interviewees were also asked to assess how important a respective attribute is for the rule of law.

There was a cross-cutting and clear consensus on the necessity of having a separation of powers and independent judges. The statement "Judges decide independently of political, religious and economic influences" was considered as reflecting the typical feature of the rule of law by all interviewees and assessed as "essential" by all judges and nine of ten politicians (one MP considered this to be "rather important"). Similarly, the separation of powers as a state power arrangement was considered essential for the rule of law by all politicians and nine judges (one judge considered this "rather important").

18 The respondents include two members of the Chamber of Deputies elected for ANO2011, one for ODS, TOP09, KDU-ČSL, SPD, STAN, and at the time of the interview soon after the 2021 elections, former MPs elected for the ČSSD, KSČM and the Pirate Party.

However, when it comes to the possibility of dismissing a judge from office (expressed by the statement "Judges may be dismissed only in exceptional cases"), half of the politicians assessed this feature as "rather important" or "rather unimportant". In contrast, 80 per cent of judges considered this an "essential" element of the rule of law. The interviewed MPs usually mentioned corruption or misconduct of judges as a possible reason for their removal from office. Still, the fact that politicians give lower importance to the inviolability of the judicial office indicates their understanding of interventions in the judicial system if there is an acceptable reason for such a move.

Nevertheless, all respondents expressed the opinion that the justice system in the Czech Republic is so systemically and institutionally set up that it can face possible pressures on its independence. According to the President of the Supreme Court, this independence is accepted by other actors.[19] According to the former speaker of the Chamber of Deputies and the current chairman of its Constitutional Law Committee, "there is no political entity in the Czech Republic that could claim to have any influence on the judiciary".[20] The former president of the Municipal Court in Prague and sitting President of the Judges' Union noted that "compared to some neighbouring countries, we are perhaps lucky (...) that no one here has dared to go after the judiciary systemically. And the longer it goes on, the harder it will be to get started."[21]

Although the independence of the judiciary seems to be generally recognized as a desirable element and a de facto state of affairs, some respondents criticized judges as individual decision makers. They pointed out that the judicial system cannot be completely immune to the possible entry of individuals who "fail" for various reasons, even though in material terms (the level of remuneration) or concerning the prestige[22] and security of the

19 Interview with Peter Angyalossy, President of the Supreme Court, 3 November 2021.

20 Interview with Radek Vondráček, Chairman of the Constitutional and Legal Committee of the Chamber of Deputies of the Parliament of the Czech Republic, 23 February 2022, citation translated.

21 Interview with Libor Vávra, President of the Judges' Union, 27 October 2021, citation translated.

22 According to a public opinion poll, the profession of judge has long been among the ten most prestigious professions, see CVVM, 'Tisková zpráva Prestiž povolání – červen 2019' (*Centrum pro výzkum veřejného mínění*, 27 April 2019) <https://cvvm.soc.cas.cz/media/com_form2content/documents/c2/a4986/f9/eu190724.pdf> accessed 1 March 2023.

job,[23] there is no "need" for judges to get involved in corruption. Therefore, the critical interviewees linked the potential corrupt behaviour of individual judges to their immaturity.

Some judges pointed out that the appointment powers of the President of the Republic or the government may create incentives for seeking proximity to political actors who can ensure individual career advancement. In the words of a former president of the Supreme Administrative Court, "the normal ordinary judge, when well organized, is very immune to this. The problem arises when that judge looks where he would climb up some of those ladders and who would help him. (...) And these are the cracks in that independence."[24]

In countries with supreme bodies of judicial autonomy (so-called judicial councils), the issue of career advancement and the selection of judicial officials is the responsibility of such institutions. In the Czech Republic, such a body has not been established, despite many judicial officials calling for its creation – for instance, the President of the Supreme Court: "Historically, from the times of the Austro-Hungarian Empire, we have adopted the model of the management of the judiciary by the Ministry of Justice. Maybe it is more comfortable for the judiciary to some extent to have someone taking care of it. (...) The Supreme Council of the Judiciary will even better ensure the independence of the judiciary from the executive, from the Ministry of Justice, absolute independence."[25] The President of the Regional Court in Ústí nad Labem specifically mentioned the issue of influence on judges' careers: "I would never have thought that I would say this publicly, but it is so... that I see a real handicap in the fact that there is no self-governing body of justice here. In that sense, the judiciary setting in relation to the executive, where the Ministry of Justice determines the material conditions for the administration of justice, is problematic. (...) Moreover, the second problematic element is, of course, who influences the selection of judicial officials."[26]

23 Judges are appointed for life, and by law their judicial mandate expires at the end of the year in which they reach the age of 70, five years above the standard retirement age.

24 Interview with Josef Baxa, former president of the Supreme Administrative Court, 20 October 2021, citation translated.

25 Interview with Peter Angyalossy, President of the Supreme Court, 3 November 2021, citation translated.

26 Interview with Lenka Ceplová, President of the Regional Court in Ústí nad Labem, 4 November 2021, citation translated.

On the other hand, the President of the Regional Court in České Budějovice believed that the function of a body like the Judicial Council is already being fulfilled by representatives of the highest judicial instances who act as spokespersons for the judiciary. She also described the College of Presidents of Regional Courts as an essential platform: "Perhaps we do not need to start by establishing the Supreme Judicial Council, but we need to formalize the structures that we have and are functioning and somehow make them representative. I think it is already informally taking shape, but it is very fragile. It always depends on how much the executive wants to respect those unofficial representatives of the judiciary, to listen to them, if there is not some of that solid organizational structure."[27]

The former minister of justice also expressed her support for the creation of a body representing the judiciary, albeit to facilitate communication between the ministry and the bench and, in particular, to overcome the substantial decentralization of state administration of the courts, which, in her opinion, negatively affects the functioning of the judiciary as a whole: "So, as a minister, you have to talk to every president of a regional court in the Czech Republic, at most you invite them to a joint meeting because they are the real decision makers in their 'gubernia', because one 'gubernia' is different in Karlovy Vary, another is in Zlín, which should not be. It is just against the rule of law."[28]

The former president of the Supreme Administrative Court sees the problem of the unfinished reform of the judiciary on the part of politicians: "I blame it on the state of politics here, the instability in politics (...) There is no continuity; there is no institutional memory (...) Politicians are aware of their limited time – in the best case, it is the election cycle, four years, but experience shows that it does not have to be four years – so they are not interested in long-term things. (...) We do not have these ministers of justice here whom we knew many years ago that they are potential ministers of justice, that they are preparing for it, that they have their programmes, their visions, and when they get the political influence, they will start to

27 Interview with Martina Flanderová, President of the Regional Court in České Budějovice, 21 October 2021, citation translated.

28 Interview with Helena Válková, Member of the Parliament of the Czech Republic and former minister of justice, 25 October 2021, citation translated.

implement them. It is always starting from scratch, and unfortunately, it affects the state of the justice system."[29]

The fact that a supreme body of judicial autonomy has not yet been established is interpreted by judicial actors as the reluctance of political parties. For example, the Vice President of the High Court in Prague commented: "The ruling party, or the one that has the majority in parliament or the government, always says, you do not need it that much, the supreme council of the judiciary, and very often it happens that the political party that is in opposition calls for it. (...) When the parties change and the opposition party starts to rule, it no longer wants to hand over part of its powers to the judiciary."[30] The chair of the regional court in Ústí nad Labem also perceived the absence of a political will and commented on the possible reasons: "I think it is fear. I think it is the fear of politicians that we will get away from them."[31]

Nevertheless, the fact that it is ultimately the structure of the judiciary that has the main influence, for example, on personnel policy, was confirmed by the President of the Judges' Union: "The presidents of regional courts play a key role in selecting judges. I did that for seven years and introduced a system of selection procedures that was not even regulated by law. (...) None of the five or so ministers who have been replaced has ever said a word. All they had to do was to say, look, here is how it is, here was one step, the second step, these people saw it, these people checked it. And by the way, the president never spoke up either. (...) The justice system actually proposes these people de facto, although formally the minister of justice."[32]

5 Concluding remarks

The institutional independence of the judiciary in the Czech Republic is a delicate balance that has been established despite the legal framework that grants strong powers to the executive. This balance is determined primarily

29 Interview with Josef Baxa, former president of the Supreme Administrative Court, 20 October 2021, citation translated.

30 Interview with Jan Sváček, Vice President of the High Court in Prague, 18 October 2021, citation translated.

31 Interview with Lenka Ceplová, President of the Regional Court in Ústí nad Labem, 4 November 2021, citation translated.

32 Interview with Libor Vávra, President of the Judges' Union, 27 October 2021, citation translated.

by the current strength or weaknesses of the executive. The fact that the minister of justice is one of the less stable government positions contributes to the informational superiority of the judiciary, particularly in appointing judges and some judicial officials.

It is mainly the presidents of regional courts who have a decisive influence on the running of the judiciary. Although this might be assessed as a positive outcome of searching for mechanisms that protect judicial independence and provides it with a certain degree of de facto administrative autonomy, the concentration of powers in the hands of a few judicial officials poses several risks, starting with the potential for individual abuse of power and reaching a systemic hijacking of the judiciary by a coordinated action.

Based on the information from the interviews with selected judicial officials, the solid material background and social prestige of the profession, as well as the relatively high and growing public trust, play an essential role in the resistance of the judiciary to potential political pressures. Undoubtedly, it affects the individual independence of judges in their decision-making. However, the institutional independence of the judicial branch is still highly fragile, even though judicial independence has become a prominent topic of political and public debate in the context of the criminal prosecution of the former prime minister during his term. It has significantly increased the general public awareness of the problems of the functioning of the institutions of the rule of law or possible political interference in their activities.

When the relationship between political power and the judiciary is depicted as fundamentally correct by many interviewed interlocutors, it can be the right moment to establish a supreme judicial independence body or institutionalize judicial self-administration in another way. It would potentially enhance the transparency of the selection of judges and judicial officials and decrease the risk of political influence on such processes. In this way, the judiciary would ultimately achieve its institutional independence and the Czech walking on a tightrope would probably end.

German state constitutional courts: the justices[1]

Werner Reutter

1 Introduction

Why should we be interested in how justices of German state constitutional courts are selected and elected? For three reasons: first, perceptions can be deceiving. Many believe that in Germany there is just the Federal Constitutional Court (FCC) that says what "the constitution is"[2] and that state constitutional courts[3] are negligible. The latter are understood as obscure institutions that most people have never heard of and that rarely make the news.[4] This view takes public perception at its face value. Thus, if something gets little or no media attention then it is of no relevance. Such a view might fit nicely in the world of the Kardashians. However, a scientific analysis should never confuse face value and media attention with the real world. So, even if rarely reported on a nationwide scale, state constitutional courts have a mandate and obligation to "say what state constitutions are" and to act as a check on state legislatures and state governments. It is for this reason that former presidents of the FCC and former justices of state

1 This paper first appeared in the summer issue 2021 of *German Politics and Society* (Vol. 39, issue 2). I am very grateful to the editors of the journal and notably to Eric Langenbacher for granting me the permission to republish my article and to have a slightly updated version included in the conference volume. This work was supported by the Deutsche Forschungsgemeinschaft under Grant RE 1376/4–1 and RE 1376/4–2. Please also note, that I use the terms state or states instead of *Land* or *Länder.*

2 This phrase goes back to *Marbury vs. Madison* 5. U.S. (1 Cr.) 137, 177 (1803) which stated that it is "emphatically the province and duty of the judicial department to say what the law is."

3 For clarity I use the term state constitutional court instead of *Land* constitutional court (or in German *Landesverfassungsgericht*). However, it should be kept in mind that German *Länder* enjoy state privilege but are not sovereign. They are not to be understood as a sort of nation-state in embryo.

4 Interestingly enough, some 30 years ago George Alan Tarr and M. C. Porter believed that American State Supreme Courts acted in "relative obscurity" as well; George Alan Tarr and Mary Cornelia Aldis Porter, *State Supreme Courts in State and Nation* (Yale University Press 1988), 1.

constitutional courts stress the contributions that German subnational constitutional courts make to the rule of law, to democracy, and to federalism.[5]

Second, state constitutional courts hand down more than 700 decisions per year (some 45 per court).[6] Some of these rulings have even made headlines,[7] but even more important are the routine decisions that rarely receive nationwide media attention and that pertain to the power of parliaments, the separation of powers in the states,[8] to direct democracy,[9] to electoral

5 Hans-Jürgen Papier, 'Die Bedeutung der Landesverfassungsgerichtsbarkeit im Verhältnis zur Bundesverfassungsgerichtsbarkeit' in Helge Sodan (ed), *Zehn Jahre Berliner Verfassungsgerichtsbarkeit: Ansprachen anläßlich des Festaktes am 24. Mai 2002* (Carl Heymans 2002), 19; Matthias Dombert, 'Landesverfassungen und Landesverfassungsgerichte in ihrer Bedeutung für den Föderalismus' in Ines Härtel (ed), *Handbuch Föderalismus: Band II: Probleme, Reformen, Perspektiven des deutschen Föderalismus* (Springer 2012), 19; Andreas Voßkuhle, 'Die Landesverfassungsgerichtsbarkeit im föderalen und europäischen Verfassungsgerichtsverbund', in Peter Häberle (ed), 59 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2011), 215; Sascha Kneip, 'Verfassungsgerichte und Demokratie in Bund und Ländern' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 25; Marcus Höreth, 'Der Beitrag der Landesverfassungsgerichte zur Unitarisierung des Bundesstaates', in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 49.

6 Werner Reutter, 'Landesverfassungsgerichte in der Bundesrepublik Deutschland: Eine Bestandsaufnahme' in Werner Reutter (ed), *Landesverfassungsgerichte: Entwicklung – Aufbau – Funktionen* (Springer 2017), 1; Werner Reutter, 'Landesverfassungsgerichtsbarkeit, Verfassungsgerichtsverbund, und Verfassungsdemokratie in der Bundesrepublik Deutschland' in Oliver Lepsius et al. (eds), 70 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2022), 855.

7 See, for example, Michael Sachs, 'Verfassungsrechtliche Anmerkungen zum Strafverfahren gegen Erich Honecker' (1993) 40 Zeitschrift für Politik 121; Verfassungsgerichtshof des Landes Berlin, Beschl. vom 12. Januar 1993 – VerfGH 55/62; Bayerischer Verfassungsgerichtshof, Urteil vom 20. März 2019 – Az Vf. 3-VII-18; Sächsischer Verfassungsgerichtshof, Urteil vom 16. August 2019 – Vf. 76-IV-19 (HS), Vf. 81-IV-19 (HS).

8 Franziska Carstensen, 'Parlamentsrechtliche Entscheidungen von Landesverfassungsgerichten in Organstreitverfahren' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 237; Pascal Cancik, 'Entwicklungen des Parlamentsrechts – Die Bedeutung des verfassungsgerichtlichen Organstreitverfahrens' (2005) 58 Die Öffentliche Verwaltung 577; Martina Flick, *Organstreitverfahren vor den Landesverfassungsgerichten: Eine politikwissenschaftliche Untersuchung* (Peter Lang 2011); Martina Flick, 'Der Einfluss der Landesverfassungsgerichte auf das Parlamentsrecht der deutschen Bundesländer' (2011) 42 Zeitschrift für Parlamentsfragen 587.

9 Arne Pautsch, 'Landesverfassungsgerichte und direkte Demokratie' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 263.

systems,[10] to constitutional rights of local communities,[11] or to the constitutionality of administrative measures to fight the Covid-19 pandemic.[12] Of course, this includes rulings of subnational constitutional courts pertaining to fundamental rights such as freedom of religion, speech, or the right to peaceful assembly.[13] True, only a few of these decisions receive media attention and if so mostly in local or regional journals. Nevertheless, these decisions effectively impact on politics, policy, and public life in Germany at the subnational level. Furthermore, as Charlie Jeffery and others have argued,[14] at least since unification there has been a growing tendency towards regionalization and territorialization of politics in Germany. Such a trend would increase and reinforce the contribution of state constitutional courts to the functioning of federalism, constitutional democracy, and the rule of law.

Third, as we know from other European countries and the USA, the appointment of justices to high courts is a crucial issue for the legitimacy of the rule of law in general and these institutions in particular. Not surprisingly, studies on how justices are appointed to national high courts are legion. Although there exists a host of studies on the composition of American state supreme courts,[15] our knowledge about justices serving

10 Jürgen Plöhn, 'Landesverfassungsgerichte und Landtagswahlen: Wahlrecht 'ad libitum' oder unter 'strict scrutiny'' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 289.

11 Marcus Obrecht, 'Landesverfassungsgerichte, kommunale Selbstverwaltung und Gebietsreform' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 323.

12 As of 18 August 2020 at least 70 cases that pertain to measures for dealing with the Covid-19 pandemic have been filed at state constitutional courts; <https://dejure.org/corona-pandemie#Verfassungsgerichtsbarkeit> accessed 18 August 2020.

13 Christian Henkes and Sascha Kneip, *Das Kopftuch im Streit zwischen Parlamenten und Gerichten: Ein Drama in drei Akten*, Discussion Paper SP IV 2009–201 (Wissenschaftszentrum Berlin für Sozialforschung).

14 Charlie Jeffery, Niccole M. Pamphilis, Carolyn Rowe and Ed Turner, 'Regional policy variation in Germany: the diversity of living conditions in a 'unitary federal state'' (2014) 21 Journal of European Public Policy 1350; Werner Reutter, *Die deutschen Länder: Eine Einführung* (Springer 2020).

15 See, for example, George Alan Tarr, *Without fear or favor: Judicial independence and judicial accountability in the states* (Stanford University Press 2012); Matthias Kumm, 'On the Representativeness of Constitutional Courts: How to Strengthen the Legitimacy of Rights Adjudicating Courts without Undermining their Independence' in Christine Landfried (ed.), *Judicial Power: How Constitutional Courts Affect Politi-*

on German state constitutional courts is still comparatively scant.[16] These courts and the justices who serve on them have long been ignored by political scientists. Some legal scholars have described and evaluated the formal appointment process as laid down in the legislation on state constitutional courts. In addition, several recent empirical case studies have been published in Germany. This growing interest has arisen partly because the appointment of justices to state supreme courts has become a controversial issue charged with partisan interests and conflicts. In the meantime German states have seen several courts with justices nominated by the right-wing populist or extremist party known as the AfD (*Alternative für Deutschland*).[17] The nomination and election of a nominee to the constitutional court in Saxony-Anhalt has also garnered nationwide attention and critical comments.[18]

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cal Transformations (Cambridge University Press 2019), 281–291; Anne Sanders and Luc von Danwitz, 'Selecting Judges in Poland and Germany: Challenges to the Rule of law in Europe and Propositions for a new Approach to Judicial Legitimacy' (2018) 19 German Law Journal 769.

16 See Werner Reutter (ed), *Landesverfassungsgerichte: Entwicklung – Aufbau – Funktionen* (Springer 2017); Werner Reutter, *Landesverfassungsgerichtsbarkeit* (Kohlhammer 2022), 87–105.

17 Studies by legal scholars focus on the formal side of the appointment processes without providing data on elections in parliaments or on the composition of benches; e.g. Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), 61 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449; Beate Harms-Ziegler, 'Verfassungsrichterwahl in Bund und Ländern' in Peter Macke (ed), *Verfassung und Verfassungsgerichtsbarkeit auf Landesebene: Beiträge zur Verfassungsstaatlichkeit in den Bundesländern* (Nomos 1998), 191; Franz Knöpfle, 'Richterbestellung und Richterbank' in Christian Starck and Klaus Stern (eds), *Landesverfassungsgerichtsbarkeit: Teilband I: Geschichte, Organisation, Rechtsvergleichung* (Nomos 1983), 231. This article very much profits from: Werner Reutter, 'Verfassungsrichterinnen und Verfassungsrichter: zur personalen Dimension der Verfassungsgerichtsbarkeit in den Bundesländern' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 203. There is also a number of case studies on single courts to which I will refer in due course.

18 Werner Reutter, 'Verfassungsrichterinnen und Verfassungsrichter: zur personalen Dimension der Verfassungsgerichtsbarkeit in den Bundesländern' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 203); Werner Reutter, 'Der "Fall Borchardt" und die Wahl von Landesverfassungsrichter*innen' (2020) 56 Recht und Politik 407.

The answer to my original question is hence threefold. State constitutional courts enjoy broad jurisdiction and are the ultimate umpire with regard to subnational constitutional questions. They hand down decisions that affect the public life of the states. And lastly, we so far know precious little about how justices of state supreme courts are selected and elected. The goal of my study is to partly remedy this deficit by shedding some light on the justices of state constitutional courts.

However, this paper is about reaching an understanding rather than merely testing hypotheses based on a theory of judicial recruitment in the German states. For an analysis of how justices to German subnational courts are elected and to assess the demographic makeup of courts, I still need a theoretical framework in order to structure my analysis and evaluate the election process and composition of these courts. State constitutional courts have an ambivalent status. Like other institutions that exercise public power, state constitutional courts need democratic legitimacy. Thus, they depend on politics. At the same time, in their function as courts they are part of the German judicial system and supposed to act as checks on the other branches of government. In this regard they are expected to be politically independent and neutral institutions.

Any system of appointment of justices to constitutional courts has to take this ambivalent status into account. This system needs to serve two constitutional ideas: democracy and the separation of powers. Arguably, there are many ways to balance these contradictory criteria.[19] The "European Commission for Democracy through Law", better known as the Venice Commission, distinguishes three pathways for appointing justices: the direct appointment system (without a voting procedure), the elective system (where the parliament elects justices), and hybrid systems (which combines the other two).[20] While the first is supposed to give precedence to an independent judiciary, the second should favor democratic legitimacy.[21] We find similar considerations with regard to the appointment of justices

19 Matthias Kumm, 'On the Representativeness of Constitutional Courts: How to Strengthen the Legitimacy of Rights Adjudicating Courts without Undermining their Independence' in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019), 281, 286.

20 Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010). CDL–AD(2010)004-e. <https://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx> accessed 17 January 2020, 4–5.

21 Venice Commission, ibid., 9.

to American state supreme courts. Appointing justices to state supreme courts also has to follow the requirements of democratic accountability and judicial independence.[22] In contrast to the American states that use various methods when appointing justices to state supreme courts,[23] the German states overwhelmingly apply the "elective system". Just two out of 164 sitting justices have not been elected by a state parliament but rather appointed by a minister of the judiciary. My analysis builds on the theoretical cornerstones previously laid out,[24] and reflects on the fact that the selection, appointment, and composition of justices of state constitutional courts must comply with the principles just explained. I explore these dimensions in four steps. First, I describe the recruitment of constitutional justices; second, I examine how justices of state constitutional courts are elected; third, I analyze how the terms of justices end; and finally, I explore the demographic makeup of the courts.

According to Barbara Geddes,[25] good research in social sciences depends – among other things – on the cases you pick, and the evidence you collect. I picked all available cases and included all sixteen German state constitutional courts in my survey. The survey is based on data found in parliamentary records, in the *Handbuch der Justiz* (Handbook of the Judiciary), on homepages of the state constitutional courts, in entries in Wikipedia and other secondary sources.[26] The sources provide reliable data on the votes on justices in state parliaments. Yet it is far more difficult to find information on how candidates are selected and recruited. Similarly, the makeup of the judiciary in state constitutional courts is restricted to those aspects that are reported in official records (gender, main profession,

22 George Alan Tarr, *Judicial Process and Judicial Policy-Making* (5th edn., Wadsworth 2010), 52–61.

23 George Alan Tarr, ibid.; George Alan Tarr, *Without fear or favor: Judicial independence and judicial accountability in the states* (Stanford University Press 2012).

24 Stefan Haack, 'Organisation und Arbeitsweise der Landesverfassungsgerichte in Deutschland' (2010) 24 Nordrhein-Westfälische Verwaltungsblätter 216; Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), 61 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449.

25 Barbara Geddes, *Paradigms and Sand Castles: Theory Building and Research Design in Comparative Politics* (The University of Michigan Press 2003).

26 Deutscher Richterbund (ed), *Handbuch der Justiz*, (C F Müller 1953 et seq.); Werner Reutter, 'Verfassungsrichterinnen und Verfassungsrichter: zur personalen Dimension der Verfassungsgerichtsbarkeit in den Bundesländern' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 203.

age). I included all justices elected to the sixteen German state constitutional courts over the time periods shown in table 1.

Table 1: Justices of state constitutional courts: nominations and elected justices

State (court established in)	Period covered by the survey (years)	Number of nominated candidates[a]	Elected justices (including deputies)
Baden-Wurttemberg (1955)	1955–2018 (63)	213	203
Bavaria (1947)	1947–2018 (71)	677	616
Berlin (1992)	1992–2018 (26)	40	37
Brandenburg (1993)	1993–2018 (25)	49	36
Bremen (1949)	1999–2019 (20)	127	125
Hamburg (1953)	1997–2018 (21)	75	75
Hesse (1948)	1948–2019 (71)	450	446
Mecklenburg-Western Pomerania (1995)	1995–2017 (22)	41	41
Lower Saxony (1957)	1957–2019 (62)	195	194
North-Rhine Westphalia (1952)	1952–2018 (66)	187	187
Rhineland-Palatinate (1947)	1947–2019 (72)	332	330
Saarland (1959)	1959–2015 (56)	49	49
Saxony (1993)	1993–2017 (24)	85	83
Saxony-Anhalt (1993)	1993–2017 (24)	58	58
Schleswig-Holstein (2008)	2008–2018 (10)	30	30
Thuringia (1995)	1995–2018 (23)	116	101
Σ	– (639)	2,724	2,611

a) All nominees proposed for election or ex officio appointment as justice (or as a deputy to a justice); multiple nominations included; for Saarland only elected justices.

Source: my survey based on parliamentary records; Peter Rütters, 'Saarland: Von der Verfassungskommission zum Verfassungsgerichtshof' in Werner Reutter (ed), *Landesverfassungsgerichte: Entwicklung – Aufbau – Funktionen*, (Springer 2017), 297, 304.

2 Recruitment of justices to state constitutional courts: selection trumps election

From a formal point of view, the election of justices of state constitutional courts is straightforward. Members of parliament vote on candidates with the majority laid down in the constitution or the statutory laws on state constitutional courts. However, it would be misleading to assume that the

vote in a parliament represents the crucial step in this election process. On the contrary, it seems that finding and recruiting the right candidates are far more important. We can thus conclude that selection trumps election. This can be shown by analyzing the process of recruiting and proposing candidates which comprises three dimensions: (a) eligibility requirements, (b) the selection of candidates, and (c) the right to propose candidates to parliaments.

Table 2: Justices in German state constitutional courts: number and eligibility requirements

	Number of justices (Deputies)	Minimum age	Maximum age[a]	Eligibility for
BW	9 (9)	–	–	–
BAV	38 (38)	40	–/65	state parliament
BER	9 (–)	35	–	Bundestag
BB	9 (–)	35	68/68	Bundestag
BRE	7 (7)	35	–/65	Bundestag
HAM	9 (9)	40	–/65	state parliament
HES	11 (11)	35	–/65	state parliament
MW	7 (7)	35	68/68	state parliament
LS	9 (9)	35	–	state parliament
NRW	7 (7)	35	–/65	state parliament
RP	9 (9)	35	70/65	state parliament
SLD	8 (8)	–	–	state parliament
SAY	9 (9)	35	70/65	Bundestag
SAT	7 (7)	40	–	state parliament
SH	7 (7)	40	–	Bundestag
TH	9 (9)	35	70/65	state parliament

Abbreviations: BW = Baden-Wurttemberg, BAV = Bavaria, BER = Berlin, BB = Brandenburg, BRE = Bremen, HAM = Hamburg, HES = Hesse, LS = Lower Saxony, MW – Mecklenburg-Western Pomerania, NRW = North Rhine-Westphalia, RP = Rhineland-Palatinate, SLD = Saarland, SAY = Saxony, SAT = Saxony-Anhalt, SH = Schleswig-Holstein, TH = Thuringia.
a) Maximum age for members for non-professional judges (like university professors or lawyers) / maximum age for professional judges.

Source: my compilation based on state constitutions and laws on state constitutional courts; Ulrike Schmidt, *Altersgrenzen für Verfassungsrichter und die Dauer ihrer jeweiligen Wahlperioden im Bund und in den Ländern. (Wahlperiode Brandenburg, 4/2). Potsdam: Landtag Brandenburg, Parlamentarischer Beratungsdienst 2008.* <https://nbn

-resolving.org/urn:nbn:de:0168-ssoar-52409-1> accessed 15 January 2020, , 2f.; Werner Reutter, 'Verfassungsrichterinnen und Verfassungsrichter: zur personalen Dimension der Verfassungsgerichtsbarkeit in den Bundesländern' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 203, 206.

(a) Eligibility requirements: Any possible nominee is checked beforehand as to whether he or she meets the eligibility requirements laid down in the state constitution or in the relevant act on the state constitutional court.[27] In addition to rules relating to the composition of a court (see below) three criteria can be distinguished in this respect (table 2). First – except for Baden-Wurttemberg[28] – constitutional justices must be eligible to enter a German parliament: that is, either for the Bundestag or for the state parliament (of course, they must not be member of a parliament). This means that nobody can become justice at a state constitutional court if he or she does not have German citizenship, has been sentenced to at least one year's imprisonment, or who has been legally declared as incapable of acting. Eligibility for the federal diet, the Bundestag, increases the number of possible candidates, while eligibility for a state parliament ensures that a justice has intimate knowledge of the laws of that state. Second, the Venice Commission found that "usually" constitutional justices were not allowed "to hold another office concurrently" in order to protect them "from influences potentially arising from their participation in activities in addition to those of the court".[29] Similarly, in the German states we find the usual incompatibility rules stipulating that a constitutional justice may not hold other public offices (in the administration, in parliament, or in government).[30] It must

27 Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), 61 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 467–469; Werner Reutter, 'Landesverfassungsgerichte in der Bundesrepublik Deutschland: Eine Bestandsaufnahme' in Werner Reutter (ed), *Landesverfassungsgerichte: Entwicklung – Aufbau – Funktionen*(Springer 2017), 1, 9–13.

28 For Baden-Wurttemberg see: Werner Reutter, 'Richterinnen und Richter am Staatsbzw. Verfassungsgerichtshof Baden-Württemberg' (2019) 40 Verwaltungsblätter für Baden-Württemberg 485.

29 Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010). CDL-AD(2010)004-e. <https://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx> accessed 17 January 2020, 15.

30 Rosemarie Will, *Stellungnahme zur öffentlichen Anhörung der Kommission zur Reform der nordrhein-westfälischen Verfassung (Verfassungskommission) des Landtags*

be remembered, however, that state constitutional justices merely hold an honorary office. They are not formally employed by the state constitutional court and receive at best a modest expense allowance for their work. They make their living in their main profession (as a judge at another court, as a professor of law at a university, as a private lawyer in a law firm, or in another non-judicial job). In consequence, conflict of interests between the main profession and the public office as a justice at the constitutional court are possible, but seem to happen only rarely and are governed by specific rules of impartiality.[31] Third, in eleven states we find a minimum age of 35 years, and in four states 40 years. The minimum age is to ensure that justices have acquired sufficient life and professional experience when taking up a mandate at a constitutional court. As far as the maximum age is concerned we find three options: six states have no age limit at all, five for professional judges and another five for all groups.[32]

In addition to these formal requirements, we find informal criteria that might affect the selection of possible candidates like "experience in public life" (Saxony-Anhalt), "special knowledge in public law" (Bavaria), or commitment to democratic values (Bremen). If and in which way these informal criteria are referred to when recruiting a candidate is impossible to tell due to a lack of information.

Nordrhein-Westfalen am 11. Mai 2015 (unter Mitarbeit von R. Plöse), Stellungnahme 16/2739, <https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMST16-2739.pdf> accessed 15 May 2019, 25–35. In some Länder the rules on incompatibility include European institutions or the Federal Constitutional Court as well.

31 Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), 61 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 471.

32 Ulrike Schmidt, *Altersgrenzen für Verfassungsrichter und die Dauer ihrer jeweiligen Wahlperioden im Bund und in den Ländern. (Wahlperiode Brandenburg, 4/2). Potsdam: Landtag Brandenburg, Parlamentarischer Beratungsdienst 2008.* <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-52409-1> accessed 15 January 2020, 7.

Table 3: Branches of government with the right to propose candidates

	Executive[a]	Legislature[b]	Judiciary[c]
Baden-Wurttemberg	–	X	(X)
Bavaria	X	X	X
Berlin	–	X	–
Brandenburg	–	X	–
Bremen	–	X	–
Hamburg	X	X	–
Hesse	X	X	X
Mecklenburg-Western Pomerania	–	X	–
Lower Saxony	X	X	–
North Rhine-Westphalia	–	X	–
Rhineland-Palatinate	–	X	X
Saarland	–	X	–
Saxony	X	X	–
Saxony-Anhalt	X	X	–
Schleswig-Holstein	–	X	–
Thuringia	–	X	–

a) State governments.
b) Parliamentary parties, parliamentary committees, single MPs, council of elders, presidium of state parliament.
c) In Bavaria the chief justice of the Constitutional Court; in Hesse the chief justice of the highest regional court; in Rhineland-Palatinate the chief justice of the highest administrative court can propose candidates to the state parliaments; in Baden-Wurttemberg the state parliament can ask the state district court to draft a list with qualified candidates.

Source: my compilation based on state constitutions and laws on state constitutional courts; Werner Reutter, 'Verfassungsrichterinnen und Verfassungsrichter: zur personalen Dimension der Verfassungsgerichtsbarkeit in den Bundesländern' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 203, 211.

(b) Selecting candidates: The institutions that enjoy the privilege of proposing candidates must seek and find individuals who combine judicial expertise, individual integrity, and varying ideological views.[33] Without pre-

33 Julia Platter, *Die Wahl der Mitglieder des Verfassungsgerichts im Lichte des Artikels 112 Absatz 4 Satz 2 der Verfassung des Landes Brandenburg (Wahlperiode Brandenburg, 4/20). Parlamentarischer Beratungsdienst.* (Potsdam 2008). <https://nbn-resolving.

judice to this challenging profile, the state parliaments have found almost all nominees fit to serve as state constitutional justices and have elected around 95 % of the candidates proposed to the sixteen parliaments. This confirms the assumption that selection trumps election (table 1). Thus, finding and picking a suitable candidate seems the hardest part of the appointment process. However, except for the eligibility requirements just discussed we find no rules around how to select and recruit candidates. The recruitment of state constitutional justices is neither regulated nor transparent,[34] but is instead governed by informal rules and takes place in the shadow of the upcoming vote in parliament. Hence, it is hardly a surprise that we find no studies that explore this pre-parliamentary phase of the appointment process of justices of state constitutional courts.[35]

(c) Right to propose candidates: According to the findings of the Venice Commission, the "most obvious difference among elective systems is the variety of authorities which have the task of proposing candidates for election".[36] This is also true for the German states as far as the election of justices to constitutional courts is concerned. We find one common denominator, though: in all states the legislature (or parts thereof) enjoys the privilege of

org/urn:nbn:de:0168-ssoar-52477-8> accessed 15 January 2019, 11; cf. also Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), 61 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 485f.

34 Rosemarie Will, *Stellungnahme zur öffentlichen Anhörung der Kommission zur Reform der nordrhein-westfälischen Verfassung (Verfassungskommission) des Landtags Nordrhein-Westfalen am 11. Mai 2015 (unter Mitarbeit von R. Plöse), Stellungnahme 16/2739,* <https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMST16-2739.pdf> accessed 15 May 2019, 25–35; Christine Landfried, 'Die Wahl der Bundesverfassungsrichter und ihre Folgen für die Legitimität der Verfassungsgerichtsbarkeit' in Robert Chr. van Ooyen and Martin H. W. Möllers (eds), *Handbuch Bundesverfassungsgericht im politischen System* (2nd edn., Springer 2015), 369.

35 On the recruitment of judges to the Federal Constitutional Court see Christine Landfried, 'Die Wahl der Bundesverfassungsrichter und ihre Folgen für die Legitimität der Verfassungsgerichtsbarkeit' in Robert Chr. van Ooyen and Martin H. W. Möllers (eds), *Handbuch Bundesverfassungsgericht im politischen System* (2nd edn., Springer 2015), 369; Glenn M. Schramm, 'The Recruitment of Judges for the West German Federal Courts' (1973) 21 The American Journal of Comparative Law 691, 696–702.

36 Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010). CDL-AD(2010)004-e. <https://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx> accessed 17 January 2020, 5.

proposing at least some candidates. In five states the parliament has to share this privilege with the government and in two others with the judiciary (table 3). Due to a lack of information, it is impossible to tell whether the "most obvious difference" is one that really matters.

3 Parliamentary elections of justices to state constitutional courts: consensus cemocracy trumps majoritarian cemocracy

According to the Venice Commission and compared to the appointment system, the election of constitutional justices "tends towards greater legitimacy".[37] Not every scholar doing research in this field will endorse this message, notably because "elective systems" bring parties into the appointment process.[38] In this perspective, elections of justices by a parliament will increase the influence of political parties. In addition, Sascha Kneip has pointed out that a neutral and independent constitutional court can only be assumed if political minorities (in other words, the opposition in parliament) have a say in the elections. More tangibly, justices of constitutional courts have to be elected with a "supermajority" of at least two thirds of the members of parliament. Such a majority would grant the minority an institutionalized influence, increase the legitimacy of justices, and ensure judicial independence.[39] Not all elective systems by which state parliaments appoint constitutional justices live up to these standards.

37 Venice Commission, ibid.

38 Christine Landfried, 'Die Wahl der Bundesverfassungsrichter und ihre Folgen für die Legitimität der Verfassungsgerichtsbarkeit' in Robert Chr. van Ooyen and Martin H. W. Möllers (eds), *Handbuch Bundesverfassungsgericht im politischen System* (2nd edn., Springer 2015), 369; Rosemarie Will, *Stellungnahme zur öffentlichen Anhörung der Kommission zur Reform der nordrhein-westfälischen Verfassung (Verfassungskommission) des Landtags Nordrhein-Westfalen am 11. Mai 2015 (unter Mitarbeit von R. Plöse), Stellungnahme 16/2739,* <https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMST16-2739.pdf> accessed 15 May 2019, 25–35; Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), 61 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 460f.; Karl August Bettermann, 'Opposition und Verfassungsrichterwahl' in Herbert Bernstein, Ulrich Drobnig and Hein Kötz (eds), *Festschrift für Konrad Zweigert zum 70. Geburtstag* (J C B Mohr (Paul Siebeck) 1981), 723.

39 Sascha Kneip, 'Verfassungsgerichtsbarkeit im Vergleich' in Oscar W. Gabriel and Sabine Kropp (eds), *Die EU-Staaten im Vergleich: Strukturen, Prozesse, Politikinhalte* (3rd edn., Springer 2008), 631, 639f.

Table 4: Elections of Justices to state constitutional courts: average majorities (including deputies)[a]

	Number of elected justices[b]	Majority I (cast votes)[c]	Majority II (MPs)[d]	Governmental majority[e]	Required Majority[f]
BW	203	94.2	68.5	63.9	Most votes of all cast votes
BAV	616	92.1	75.8	62.3	Majority of cast votes
BER	37	85.7	79.2	64.1	Two thirds of cast votes
BB	36	N/A	79.8	61.6	Two thirds of all MPs
BRE	125	98.9	88.3	68.6	Absolute majority (> 50 %)
HAM	75	85.2	77.8	55.8	Majority of cast votes
HES	446	n/a	n/a	53.5	Two thirds MPs / simple[e]
MW	41	85.3	79.3	65.6	Two thirds cast
LS	195	93.1	74.7	56.7	Two thirds cast / absolute
NRW	187	93.7	79.6	53.7	Two thirds of all MPs
RP	330	98.1	98.0	57.6	Two thirds cast
SLD	49	n/a	n/a	n/a	Two thirds of all MPs
SAY	83	82.9	75.0	59.1	Two thirds of all MPs
SAT	58	89.7	79.2	55.9	Two thirds of all MPs
SH	30	91.6	85.9	65.4	Two thirds cast / absolute
TH	101	N/A	79.9	58.5	Two thirds of all MPs

a) Varying periods; in a number of cases the votes have not been registered; there are no data for Saarland; in Hesse a special committee elects some of the justices.
b) Number of elected justices.
c) Average share of votes cast in favor of elected justices/deputies.
d) Average share of MPs who cast their vote in favor of elected justices/deputies.
e) Average governmental majority. f) In Hesse a special committee of the state parliament elects five professional justices with a two-thirds majority; all MPs elect each term six justices; in both LS and SH two thirds of the votes cast and at least a majority of all MPs are required.

Source: own surveys and calculations; parliamentary record; www.election.de.

As in many EU member states, only six German state parliaments elect state constitutional justices with at least two thirds of their members (table 4). Other states require a smaller proportion of votes. In five state parliaments two out of three cast votes are required, while in three states more than 50 % of the members of parliament is necessary. The parliaments of Baden-Wurttemberg, Bavaria, and Bremen elect justices with relative or simple majorities. In Hesse a distinction is made between the members of

the professional judiciary, who are elected by the election committee with a two-thirds majority, and the other justices, for whom a simple majority in parliament is sufficient.[40] These rules seem to confirm Sascha Kneip's assumption that an elective system does not necessarily "tend towards greater legitimacy". On the contrary, from a legal point of view at least, in six states a ruling majority of 51 % of all members of parliament can elect justices at the state's discretion. In other words, a government could "create" a constitutional court that mirrors its political preferences.

However, in the German states consensus democracy mostly triumphs over majoritarian democracy with regard also to elections of justices to constitutional courts. Three findings support this assumption. First, the legally prescribed majority does not tell the whole story about the influence of parties in opposition. In fact, minority parties have had a say in the election of justices of state constitutional courts even if only a simple or relative majority was required. For example, in Bavaria and Baden-Württemberg justices are customarily nominated and elected according to the principles of proportional representation. Thus, parties with only a few seats in parliament are also entitled to nominate candidates according to their share in the state parliament. This informal rule even allowed the AfD in Baden-Württemberg, Bavaria and Mecklenburg-Western Pomerania to have their candidates elected to the constitutional courts of these states even though this right-wing party failed to muster a "blocking minority" in these parliaments.[41] In addition, in Brandenburg, Bremen, or Berlin[42] parliamentary parties or "political forces" have been constitutionally granted the right to nominate candidates. Secondly, a "supermajority" normally entails

40 Sigrid Koch-Baumgarten, 'Der Staatsgerichtshof in Hessen zwischen unitarischem Bundesstaat, Mehrebenensystem und Landespolitik' in Werner Reutter (ed), *Landesverfassungsgerichte: Entwicklung – Aufbau – Funktionen (*Springer 2017), 175, 183–185.

41 Michael Hein, 'Ausgrenzen oder integrieren? Verfassungsrichterwahlen mit oder gegen die AfD' (*Verfassungsblog*, 9 July 2018) <https://verfassungsblog.de/ausgrenzen-oder-integrieren-verfassungsrichterwahlen-mit-oder-gegen-die-afd/> accessed 15 February 2019; Werner Reutter, 'Richterinnen und Richter am Landesverfassungsgericht Mecklenburg-Vorpommern', (2019) 29 Landes- und Kommunalverwaltung 14, 16; Werner Reutter, 'Richterinnen und Richter am Staats- bzw. Verfassungsgerichtshof Baden-Württemberg' (2019) 40 Verwaltungsblätter für Baden-Württemberg 485, 485.

42 Werner Reutter, 'Richterinnen und Richter am Berliner Verfassungsgerichtshof' (2018) 28 Landes- und Kommunalverwaltung 489, 489–492; Werner Reutter, 'Richterinnen und Richter am Landesverfassungsgericht Brandenburg' (2018) 28 Landes- und Kommunalverwaltung 444, 445–448.

informal bargaining and horse trading among parties.[43] In other words, it leads to effects that such a requirement is supposed to make impossible because it undermines the democratic legitimacy of the appointment process. Finally, it should be noted that the support that constitutional justices receive in parliamentary votes is normally far higher than the formally required majority. On average, nearly 90 % of all votes cast and almost 80 % of all members of parliament supported the justices who were eventually appointed to the constitutional court (table 4). This is not only well above any required supermajority but also exceeds by far the majorities on which state governments could rely. These findings confirm Gärditz's assumption that a "one-sided partisan leaning"[44] of state constitutional courts by a governmental majority did not take place and show that parties in opposition have a say in these processes even if a simple or relative majority is sufficient. To use Arend Lijphart's terms we can conclude that, in these elections, consensus democracy trumps majoritarian democracy.[45]

4 Term length, re-election, end of office, and dismissal: independence trumps everything

In liberal democracies the rule of law needs independent judges. Justices have to act freely[46] "from improper pressures", because it is "emphatically the province and duty of the judicial department to say what the law is".[47] This was the reason why Alexander Hamilton saw no harm in granting justices of the U.S. Supreme Court a tenure for life. Such a life tenure would ensure the independence of justices serving on the highest court in the United States and thus make the "least dangerous branch of government" an effective check on the executive and legislature. Nevertheless, life tenure

43 Julia Platter, *Die Wahl der Mitglieder des Verfassungsgerichts im Lichte des Artikels 112 Absatz 4 Satz 2 der Verfassung des Landes Brandenburg (Wahlperiode Brandenburg, 4/20). Parlamentarischer Beratungsdienst.* (Potsdam 2008). <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-52477-8> accessed 15 January 2019, 15.

44 Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), 61 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 465.

45 Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press 1999).

46 George Alan Tarr, *Judicial Process and Judicial Policy-Making* (5th edn., Wadsworth 2010), 51.

47 Case Marbury vs. Madison, 5. U.S. (1 Cr.) 137, 177 (1803).

comes with a qualification because according to Art. 3 Sect. 1 of the U.S. Constitution the justices of the U.S. Supreme Court "shall hold their Offices during good Behavior." The lawmakers in the German states did not follow Hamilton's advice. They wanted to balance the aforementioned principles of judicial independence and democratic accountability in a different manner. According to their views, the rule of law requires continuity, judicial experience, and stability, while the democratic principle entails frequent renewal and a "regular refreshing" of the judiciary.[48] Within this spectrum, legal norms and political practice in the German states show considerable differences with regard to the terms in office, the possibility of re-election, and to the ways in which justices of constitutional courts can be impeached and removed from office.

No state constitutional justice is elected for life. In the German states there is always a way other than death to end a tenure at a constitutional court. The parliaments of Bremen, Bavaria, and Hesse give precedence to democratic imperatives and elect all or at least a large number of justices of the constitutional court at the beginning of each legislative term. In the other states, the term of office of constitutional court justices ranges from between six and twelve years. Re-election is ruled out in Berlin, in Mecklenburg-Western Pomerania, and in Brandenburg. In six states a justice can be re-elected once. In the other states justices can be re-elected unlimited times. The option to be re-elected as a justice to a constitutional court is mostly viewed critically. In this perspective, the possibility of re-election would encourage opportunism and increase the influence of ruling parties.[49] However, there is no evidence supporting such an assumption. According to Gärditz[50] the re-election of constitutional justices has yet not triggered any conflicts at all. If a re-election is possible, many justices use this privilege. In some cases justices served for almost 30 years at a court.

From a legal point of view, the tenure of a constitutional justice ends (except by death) when the maximum age has been reached, the conditions of

48 Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), 61 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 464.

49 Sven Leunig, *Die Regierungssysteme der deutschen Länder im Vergleich* (Barbara Budrich 2006), 206; Martina Flick, *Organstreitverfahren vor den Landesverfassungsgerichten: Eine politik-wissenschaftliche Untersuchung* (Perter Lang 2011), 50.

50 Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), 61 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 465.

eligibility for election are no longer fulfilled, the term of office has expired, a justice has requested his or her dismissal or a professional judge retires from his or her main job. All these options raise no problem. The only crucial issue in this context is when a justice is removed from office. According to the Venice Commission a "dismissal should involve a binding vote by the court itself".[51] In the German states we find various regimes ruling on this issue. In Bavaria and Bremen, constitutional justices cannot be removed from office, at all. In Baden-Wurttemberg, the federal constitutional court has to make the final decision on the removal of a state constitutional justice. In the other states the state constitutional court is always effectively involved either by posing the request or making the final decision on the dismissal. Reasons for such an impeachment include: violation of official duties, permanent incapacity for service, a sentence of six months or more in prison, cooperation with the Ministry of State Security or the National Security Office of the former GDR, or a violation of the constitution. To the author's knowledge no trial for impeachment has ever occurred. In addition, the legal provisions already indicate that a dismissal cannot be used as a political instrument. In almost all states, the constitutional court itself decides whether a justice is to be removed from office. And in most cases, an application from another institution is a prerequisite to start a trial for impeachment. Overall these findings show that judicial independence is guaranteed for the justices of state constitutional courts. Even though the states employ different rules in this respect, judicial independence trumps democratic principles as soon as a justice has entered office.

5 Demographic makeup of state constitutional courts

Statistically speaking, justices in German state constitutional courts are male, judge at a specialized court, and are in their late fifties. But what does that mean? In fact, it is debatable whether a constitutional court has to be representative and somehow mirror "basic salient social traits" in its de-

51 Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010). CDL-AD(2010)004-e. <https://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx> accessed 17 January 2020, 21.

mographic makeup.[52] The Venice Commission, too, found that the "representation of minority groups on the bench" seemed not to be a "common goal" in the 40 countries included in the study of the commission. Only women, who do not form a minority group in the first place, have been mentioned in this context. Things are different with regard to the American state supreme courts. Their demographic makeup should somehow reflect the "demographic makeup of the populace"[53] and include specific minorities.[54] In Germany we find only a few voices supporting such a call. Christine Landfried and Rosemarie Will voiced concern about the lack of representativeness and the demographic makeup of constitutional courts. They requested that the composition of constitutional courts in general and state constitutional courts in particular should also take into account the social and professional background of justices.[55] Yet legal stipulations fail to address such considerations. Instead, we find three dimensions that underlie the composition of state constitutional courts: age, gender, and profession (table 5).

52 Matthias Kumm, 'On the Representativeness of Constitutional Courts: How to Strengthen the Legitimacy of Rights Adjudicating Courts without Undermining their Independence' in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019), 281, 286.

53 George Alan Tarr, *Judicial Process and Judicial Policy-Making* (5th edn., Wadsworth 2010).

54 Gregory L. Acquaviva and John D Castiglione, 'Judicial Diversity on State Supreme Courts' (2010) 39 Seton Hall Review 1203.

55 Christine Landfried, 'Die Wahl der Bundesverfassungsrichter und ihre Folgen für die Legitimität der Verfassungsgerichtsbarkeit' in Robert Chr. van Ooyen and Martin H. W. Möllers (eds), *Handbuch Bundesverfassungsgericht im politischen System* (2nd edn., Springer 2015), 369, 372; Rosemarie Will, *Stellungnahme zur öffentlichen Anhörung der Kommission zur Reform der nordrhein-westfälischen Verfassung (Verfassungskommission) des Landtags Nordrhein-Westfalen am 11. Mai 2015 (unter Mitarbeit von R. Plöse), Stellungnahme 16/2739,* <https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMST16-2739.pdf> accessed 15 May 2019, 5.

Table 5: Composition of the judiciary of state constitutional courts by gender, main occupation and age (in percentage; without deputies)

			Main professions					
	# of justices[a]	Female justices	Judge at a court	Professor of law	Lawyer	Non-judicial occupation[b]	No data[c]	Average age on entering office
	Total	%	%	%	%	%	Total	
BW	92	17.4	34.8	14.1	13.0	38.0	0	54.9
BY	616	11.2	56.3	1.5	23.9	15.4	18	53.9
BB	30	33.3	43.3	23.3	13.3	16.7	1	49.3
BE	37	40.5	45.9	13.5	40.5	0.0	0	51.2
HB	18	33.3	44.4	38.9	16.7	0.0	0	55.7
HH	29	24.1	65.5	0.0	27.6	10.3	1	57.8
HE	66	15.2	51.5	7.6	21.2	9.1	7	54.0
MV	18	16.7	66.7	16.7	11.1	5.6	0	50.1
NI	52	17.3	59.6	19.2	11.5	7.7	1	56.5
NW	54	13.0	64.8	18.5	14.8	1.9	0	54.7
RP	73	11.0	50.7	8.2	15.1	24.7	1	55.4
SL	49	10.4	55.1	16.3	26.5	2.0	0	50.5
SN	40	12.5	60.0	27.5	2.5	10.0	0	53.1
ST	29	37.9	44.8	13.8	0.0	34.5	2	54.0
SH	14	28.6	78.6	14.3	7.1	0.0	0	54.9
TH	50	22.0	38.0	22.0	32.0	8.0	0	52.5
All	1267	15.5	53.5	8.8	20.5	14.8	31	53.0

a) Without deputies; justices who have been elected several times are only counted once in the statistics.
b) A justice belongs to the group of non-judicial justices (*Laienrichter*) if he or she has been assigned to this group by the electoral body.
c) The number of justices who could not be assigned to any occupational group.
d) Average age when taking up office for the first time.

Sources: my compilation; my survey; parliamentary records; Deutscher Richterbund (ed), *Handbuch der Justiz*, (C F Müller 1953 et seq.); Werner Reutter, 'Verfassungsrichterinnen und Verfassungsrichter: zur personalen Dimension der Verfassungsgerichtsbarkeit in den Bundesländern' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 203, 222.

Age: The average age of constitutional justices is around 53 years when they take office for the first time. This is well above the statutory minimum age set at 35 or 40 years in the German states for justices at constitutional courts. Only in Brandenburg are justices on average younger than 50 years old on entering office.[56] On average, justices leave after about nine years.

Gender: Female justices are a minority in constitutional courts. There are just two state constitutional courts with a gender quota. The laws on constitutional courts in Berlin and Brandenburg stipulate that each court has to have at least three male and three female justices (out of nine). In two other states (Lower Saxony and Saxony-Anhalt) such a quota is not obligatory but merely recommended. With regard to the composition of state constitutional courts the quota has been successfully applied in Berlin and Brandenburg. In both courts the share of female justices, at 15 %, is well above the average share of women in all constitutional courts. So far, female justices have only rarely been in a majority in a state constitutional court.[57] In terms of representativeness this can only be marked down as a failure.

Main professions (judges, professors of law, lawyers, and non-judicial professions): According to Ernst-Wolfgang Böckenförde, judicial expertise should count as the only criterion when appointing justices to the federal constitutional court.[58] The legislators in the states viewed this assumption (at least partly) differently. Even though all state constitutional courts are required to have members whose main profession is as a justice at a court, they show a diverse makeup with regard to appointees' main professions.

- *Professional judges:* From a legal point of view there are just two states in which professional justices have to have a majority in the constitutio-

56 Astrid Lorenz, 'Das Verfassungsgericht des Landes Brandenburg als politisiertes Organ? Möglichkeiten und Grenzen politischer Einflussnahme' in Werner Reutter (ed), *Landesverfassungsgerichte: Entwicklung – Aufbau – Funktionen* (Springer 2017), 105, 116.

57 Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), 61 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 487.

58 Ernst-Wolfgang Böckenförde, *Staat, Nation, Europa: Studien zur Verfassungslehre, Verfassungstheorie und Rechtsphilosophie* (Suhrkamp 1999), 177; for the following see also Werner Reutter, 'Verfassungsrichterinnen und Verfassungsrichter: zur personalen Dimension der Verfassungsgerichtsbarkeit in den Bundesländern' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 203, 221–224.

nal court: Mecklenburg-Western Pomerania and Saxony. In the first of these two states, four out of seven and, in the second, five out of nine justices of the constitutional court have to be justices at another court. Yet in reality, and with the exception of Baden-Wurttemberg, in all state constitutional courts professional judges make up the largest group. In Bavaria, Mecklenburg-Western Pomerania, Saxony, and Schleswig-Holstein their share is well above 50 %. Comparatively poorly represented are professional judges in Baden-Wurttemberg and Thuringia. In the Bavarian constitutional court only professional judges decide important proceedings.[59] Due to their main profession judges of special courts are assumed to prefer a legalistic, positivist, and case-oriented approach which might not always comply with the functional needs of constitutional adjudication.[60]

- *Professors of law:* University professors of law should take a different stance on legal issues than the other groups represented in constitutional courts. They are presumed to refer to basic values and to show more expertise in general constitutional issues than do judges or lawyers.[61] But this group remains across all courts a minority. On average, they represent just 7 % of all constitutional justices (table 5). They are particularly poorly represented in Hamburg and Bavaria, where just nine university professors were elected to the constitutional court between 1947 and 2018. Disregarding this outlier, the share of university professors in constitutional courts would reach around 18 %.
- *Lawyers:* According to Gärditz,[62] lawyers interpret law from the perspective of specific cases. They have never made up a majority in any state constitutional court. In Saxony-Anhalt they have not been represented at all and in four other states only for a short period. However, in Berlin, Bavaria, and Thuringia lawyers constitute the second largest group after professional judges.
- *Non-judicial occupation:* With the exception of Schleswig-Holstein, Bavaria and North-Rhine Westphalia (since 2017) all state constitutional courts can (and some must) have a number of judges without a law

59 Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), 61 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 477.

60 Klaus F. Gärditz, ibid., 449, 477.

61 Klaus F. Gärditz, ibid., 449, 479.

62 Klaus F. Gärditz, ibid., 449, 484.

degree. From a legal point of view, this type of judge has even managed to muster a majority in five state constitutional courts. Yet, on average, only about 17 % of justices at constitutional courts have not graduated from a German law school. The courts of Berlin, Bavaria, and Schleswig-Holstein are made up only of justices who can also serve as a judge at another court. It is difficult to describe the role these justices play in constitutional courts. While Will and Harms-Ziegler,[63] former constitutional justices in Brandenburg, found cooperation with these justices "positive" and enriching, Gärditz[64] believes the influence of these justices is insignificant.

According to Gärditz,[65] the demographic makeup of state constitutional courts shows "deficits". He finds that state constitutional courts are dominated by professional judges, only have a few female justices and even fewer young justices, not to mention the rarity of lawyers as a species and the fact that constitutional justices without a law degree play hardly any role in courts. Yet the data presented in this article paint a more nuanced picture. The different groups show varying shares in the state constitutional courts. Thus, even though it is difficult to tell how far the varying demographic makeups have affected decision-making in these courts we can still conclude that the heterogeneous picture created by the makeups of state constitutional courts might elicit a more pluralist understanding of German constitutional adjudication.

6 State constitutional adjudication and justices: tentative conclusions

The findings presented in this article lead to three basic conclusions.

First, with regard to the election of justices to and the composition of state constitutional courts we receive a colorful picture. The selection of candidates, the required majorities, the composition of the benches, and the

63 Rosemarie Will, *Stellungnahme zur öffentlichen Anhörung der Kommission zur Reform der nordrhein-westfälischen Verfassung (Verfassungskommission) des Landtags Nordrhein-Westfalen am 11. Mai 2015 (unter Mitarbeit von R. Plöse), Stellungnahme 16/2739,* <https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMST16-2739.pdf> accessed 15 May 2019, 6.

64 Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), 61 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 473.

65 Klaus F. Gärditz, ibid., 449, 492f.

way someone's position as a justice might end can hardly be boiled down to one model or to a consistent ideal type like an "elective system". Each state has established its own rules and patterns. In this regard, the state constitutional courts mirror a basic idea of federalism: pluralism. At the same time, this also means that state constitutional courts are not only basic pillars of subnational political systems but that they also inject federal ideas into the judicial system.

Second, the appointment of justices to German state constitutional courts reflects the dual status of these courts. This statement holds true along all the dimensions examined in this article. We always find that democratic accountability has somehow to reflect judicial independence. Yet the balance between these two principles is struck in varying ways and to different degrees depending on the dimension. One important lesson of this analysis is that we should hence not jump to conclusions when we qualify such a system.

Third, what all appointment processes have in common is their dependence on a vote by a state parliament. Even though in some states the executive and the ruling party have gained an influence that can give rise to criticism, there is no evidence for a one-sided party politicization of state constitutional courts. On the contrary, even in those states where a simple majority is sufficient the election of justices has rather complied with the logic of consensual democracy. It remains to be seen whether these formal and informal rules will still work in times of right-wing populism and linked with a party that openly challenges the principles of parliamentary democracy in Germany.

Enforcing the independence of national courts by means of EU law

Standards, procedures and actors as exemplified by the crisis of the Polish judiciary

Mattias Wendel

1 Introduction

Among the numerous crises that the European Union has gone through in recent years, the dismantling of the rule of law in several Member States is particularly severe. The rule of law crisis touches deeply on the constitutional foundations of the Union. What is at stake is nothing less than the preservation of the fundamental values enshrined in Article 2 TEU and in particular the principle of the rule of law. It is also (if not primarily) the third branch of government, the judiciary, that is caught in the crosshairs of populist or illiberal plans to restructure society. The Polish "judicial reforms" that have been gradually introduced since 2015 are a particularly impressive – and depressing – example in this regard. The origins, substance and result of these reforms have been described in detail many times[1] and do not need to be repeated here.

This article takes the perspective of Union law instead. Taking the Polish judicial crisis as an example, it reconstructs the extent to which EU law allows the domestic dismantling of the rule of law to be legally addressed and, in particular, how the independence of national courts can be enforced by means of EU law. In doing so, the article focuses on one of the most dynamic fields of European constitutional law. In recent years, the European Court of Justice (CJEU) has established a new and almost revolutionary line of case law in this area, which has further developed the constitutional

1 Mirosław Wyrzykowski, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland' (2019) 11 Hague Journal on the Rule of Law 417; Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); Marcin Wiącek, 'Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle' in Armin von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States* (Springer 2021); Laurent Pech, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 Hague Journal on the Rule of Law 1.

architecture of the European Union on a crucial point. This case law has recalibrated or "sharpened" certain standards of Union law, which are now applied with regard to the independence of national courts. This process has subsequently had a visible impact on the instruments used to counter national rule of law crises and on the role of European institutions in combating the rule of law crisis.

In a first step, the article deals with the relevant standards of EU law. The judicial innovations in this area directly oblige the Member States under EU law to ensure judicial independence of national courts and contribute to a more effective enforcement of the values of Article 2 TEU on the part of the EU – a move which was by no means accepted without contradiction (see Section 2). The article then turns to the procedures and instruments which are used by the EU to counter the lack of judicial independence at the national level. Unlike a few years ago, infringement proceedings and preliminary rulings before the CJEU now play a central role in the EU's toolbox with regard to national judicial reforms. This also entails consequences at the institutional level (see Section 3). The article concludes that the Union's crisis response is characterized by a fundamental EU constitutional evolution that will permanently change the Union's constitutional architecture (see Section 4).

The article is also aimed at a non-legal audience and attempts to reduce the issues, some of which are highly complex from a legal point of view, to their essential core and to present them as comprehensibly as possible.

2 Standards

2.1 Starting point: The limited scope of application of EU law

Starting from its beginnings as the law of an economic community, EU law has meanwhile developed into a highly differentiated law of a supranational political order. It not only claims primacy over national law,[2] including national constitutional law,[3] but also extends into a multitude of politically

2 CJEU, case 6/64 *Costa v ENEL* (1964).

3 CJEU, case 11/70 *Internationale Handelsgesellschaft* (1970), paras 2 et seq. and, more recently, CJEU, case C- 430/21 *RS* (2022), paras 51, 53. However, this claim to primacy did not go unchallenged, cf. for Poland already a decade before the beginning of the judicial crisis, Polish Constitutional Court (*Trybunał Konstytucyjny*), K 18/04 *Accession Treaty* (2005).

significant and at the same time controversial policy areas, such as migration law or environmental law. However, EU law also increasingly touches on areas that are sensitive to fundamental rights, such as the question under what circumstances accused persons in criminal proceedings may be transferred to other (Member) States.[4] Accordingly, the protection of fundamental rights under EU law, originally based purely on case law,[5] has undergone significant developments. Today, it is predominantly based on the Charter of Fundamental Rights of the European Union (CFR or Charter), which is very different from, for example, the fundamental rights section of the German Basic Law.[6]

As differentiated, practically relevant and life-shaping as modern EU law may be, it is far from covering all legally regulated areas of life in European societies. EU law is not a legal order with a comprehensive claim to regulate everything, but only extends to the matters expressly laid out in the Treaties.[7] The field of EU fundamental rights illustrates this vividly. According to Article 51(1) of the Charter, EU Member States are only bound to the extent that they implement Union law. What exactly is meant by "implementation" has been the subject of in-depth discussions in scholarship[8] and legal practice,[9] discussions which were fed not least by concerns about an excessively homogenizing effect of EU fundamental rights.[10] The CJEU has nevertheless opted for a comparatively broad approach, which, however,

4 See e.g. CJEU, case C-128/18 *Dorobantu* (2019), paras 50 et seq.

5 Groundbreaking CJEU, case 29/69 *Stauder* (1969).

6 Of course, this still says little about the actual scope of protection in practice. But here, too, the case law of the CJEU has set milestones, cf. for example CJEU, case C-293/12 et al. *Digital Rights Ireland et al.* (2014) regarding the annulment of the Data Retention Directive.

7 In terms of competences, this is expressed in the so-called principle of conferral according to Article 5(2) TEU.

8 See, *pars pro toto,* and with further references each, Frauke Brosius-Gersdorf, *Bindung der Mitgliedstaaten an die Gemeinschaftsgrundrechte* (Duncker & Humblot 2005); Daniel Sarmiento, 'Who's afraid of the Charter?' (2013) 50 Common Market Law Review 1267; Jan H. Reestman and Leonard Besselink, 'After Åkerberg Fransson and Melloni' (2013) 9 European Constitutional Law Review 169; Daniel Thym, 'Die Reichweite der EU-Grundrechte-Charta' (2013) 33 Neue Zeitschrift für Verwaltungsrecht 889; Thorsten Kingreen, 'Ne bis in idem: Zum Gerichtswettbewerb um die Deutungshoheit über die Grundrechte' (2013) 48 Europarecht 446.

9 Critical of the CJEU's approach German FCC (*Bundesverfassungsgericht*), 1 BvR 1215/07 *Antiterrorism File* (2013), para 91.

10 See former judge at the German Federal Constitutional Court Peter M. Huber, 'Auslegung und Anwendung der Charta der Grundrechte' (2011) 33 Neue Juristische Wochenschrift 2385.

still presupposes that the case at hand falls within the scope of application of Union law.[11] The Charter, as CJEU President Koen Lenaerts once put it, follows Union law like a "shadow".[12] In other words, EU fundamental rights are only applied to measures of EU Member States if these measures are sufficiently linked to substantive Union law, e.g. if they apply the General Data Protection Regulation or serve the purpose of implementing a directive in the field of, say, asylum.

With regard to the rule of law crisis, the difficult question arose to what extent the reorganization of national courts and their increasing subordination to populist governments actually fell within the scope of Union law and could be subject to judicial review, especially on the basis of EU fundamental rights. Certain aspects of human resources policy, such as the early retirement of judges and prosecutors, are subject to European guarantees prohibiting the discrimination on grounds of age,[13] just as the different treatment of male and female judges with regard to retirement age is covered by the prohibition of discrimination on grounds of sex.[14] Other aspects of national legislation may be covered by fundamental freedoms[15] or even WTO law, as was the case with the Hungarian Higher Education Act.[16] There are also specific legal supervisory regimes, such as the CVM for Romania.[17] Beyond these specific areas, however, EU law did not seem to have any grip on the national organization of the judiciary and its relations with the national executive and legislature. In particular, the fundamental right to an independent court, enshrined in Art. 47(2) GRC, was in principle not applicable to national judicial reforms. This is because, for the most part, there was no sufficient connection between the Polish reform

11 CJEU, case C-617/10 *Åkerberg Fransson* (2013) referring back to the case law already established before the Charter entered into force.

12 Koen Lenaerts and José A. Gutiérrez-Fons, 'The Place of the Charter in the EU Edifice' in Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014), 1560, 1568.

13 See CJEU, case C-286/12 *Commission v Hungary* (2012) and CJEU, case C-585/18 *A.K. [Independence of the Disciplinary Chamber of the Polish Supreme Court]* (2019).

14 Namely, Article 157 TFEU as well as Directive 2006/54/EC, see CJEU, case C-192/18 *Commission v Poland [Independence of the Ordinary Courts]* (2019).

15 In particular, the freedom of establishment and the freedom to provide services pursuant to Articles 49 and 56 TFEU.

16 CJEU, case C-66/18 *Commission v Hungary [Higher Education Act]* (2020).

17 The Cooperation and Verification Procedure (CVM) was introduced by decision 2006/928 on the occasion of Romania's accession to the EU. Cf. from case law CJEU, case C-357/19 et al. *Euro Box Promotion and others* (2021).

legislation and substantive EU law, with the result that the conditions for the applicability of the Charter were not met.

2.2 Portuguese judges as saviours of the Polish judiciary

In simplified terms, this made EU law look like a toothless tiger. Although it proclaimed that the Union is founded on the value of the rule of law (Article 2 TEU) and guarantees the right to an independent tribunal (Article 47(2) CFR), it could not effectively counter the continued breakdown of the judiciary at the national level. Against the background of these *prima facie* limited possibilities to address the core of the rule of law crisis by means of EU law, the groundbreaking impact of the CJEU's new line of jurisprudence becomes apparent. This jurisprudence has its origins in a landmark ruling from 2018 in the case *Associação Sindical dos Juízes Portugueses (ASJP)*, also widely known as the *Portuguese Judges* case.[18] The case itself was hardly spectacular. The Portuguese judges' association ASJP took action against EU-driven austerity measures in Portugal's public service. The competent Portuguese court referred the matter to the CJEU for a preliminary ruling. The referring court sought to ascertain, in essence, whether the principle of judicial independence as guaranteed by EU law was to be interpreted as meaning that it precluded general salary cuts such as those at issue.[19] The CJEU answered in the negative, in particular because the Portuguese measures were temporary and general, i.e. not specifically aimed at the judiciary.[20]

The outstanding significance of the *Portuguese Judges* case stems neither from the political context nor from the legal outcome of the ruling. Rather, it results from the standards set out in the judgment's reasoning, standards which were, with all likelihood, already fleshed out by the CJEU with specific regard to the Polish judicial reforms.[21] In other words, the standards set out by the CJEU in *Portuguese Judges* reach far beyond the specific case, as their establishment has set – in anticipation, so to speak – a legal precedent

18 CJEU, case C-64/16 *Associação Sindical dos Juízes Portugueses* (2018).
19 Ibid, para 27.
20 Ibid, paras 48–51.
21 See Matteo Bonelli and Monica Claes, 'Judicial Serendipity – How Portuguese Judges Came to the Rescue of the Polish Judiciary' (2018) 14 European Constitutional Law Review 622.

for later cases related to the crisis of the rule of law and in particular the judicial reforms in Poland.[22] At the centre of the *Portuguese Judges* ruling is Article 19(1) subpara. (2) TEU, a norm that had previously not been considered to have any significant impact on the national *organization* of the judiciary. It reads as follows:

> Member States shall provide the necessary remedies to ensure effective judicial protection in the areas covered by Union law.

In line with established case law, the CJEU states in *Portuguese Judges* that Article 19(1) subpara. (2) TEU confers a European mandate on national courts to the extent that they fulfil the function of European judiciary in cooperation with the CJEU.[23] The EU is not based on a system of dual, but cooperative federalism,[24] that relies largely on national institutions to enforce EU law. In this respect, national institutions simultaneously fulfil a European function in the sense of a *dédoublement fonctionnel*.[25] This is true for national administrative authorities when executing EU law and for national courts when exercising judicial review on the basis of EU law. The groundbreaking novelty of *Portuguese Judges*, however, is that the CJEU for the first time derives from Article 19(1) subpara. (2) TEU a legal obligation of the Member States to comply with certain minimum standards also with regard to the organization of their national judiciary, provided that the respective judicial bodies are "courts" within the meaning of EU law and may, by their type and jurisdiction, be competent to interpret and apply Union law.[26]

22 For more details on the precedent-setting of the CJEU, see Mattias Wendel, 'Auf dem Weg zum Präjudizienrecht?' (2020) 68 Jahrbuch des öffentlichen Rechts der Gegenwart 113, 132 et seq.

23 CJEU, case C-64/16 *Associação Sindical dos Juízes Portugueses* (2018), paras 32 et seq.

24 Robert Schütze, *From Dual to Cooperative Federalism* (Oxford University Press 2009).

25 For international law, Georges A. J. Scelle, 'Le phénomène juridique du dédoublement fonctionnel', in Walter Schätzel and Hans-Jürgen Schlochauer (eds), *Festschrift für Hans Wehberg* (Vittorio Klosterman 1956), 324 with further references.

26 CJEU, case C-64/16 *Associação Sindical dos Juízes Portugueses* (2018), paras 37–45.

2.3 The independence of national courts as a condition for the success of the European community of law

The functioning of the national judiciary is a prerequisite for the functioning of the European community of law. It is this fundamental premise on which the CJEU's case law, which started with *Portuguese Judges* and was subsequently further differentiated on the occasion of the Polish judicial reforms, is based. A functioning national judiciary, however, requires judicial *independence*. According to the CJEU, effective legal protection in the areas covered by Union law, as required by Article 19(1) subpara. (2) TEU, presupposes the independence of the national courts.[27] The CJEU also bases this reasoning on the telos of Article 47(2) CFR, which grants a fundamental right to an independent court and thus underlines the outstanding importance of judicial independence for effective legal protection.[28]

The distinctive feature of the standard based on Article 19(1) subpara. (2) TEU lies precisely in the fact that it does not depend on the (narrower) conditions under which the Charter applies to the Member States.[29] In order to apply Article 19(1) subpara. (2) TEU, it is not necessary to establish that a Member State is, in the case at hand, "implementing" EU law within the meaning of Article 51(1) of the Charter. Rather, it is sufficient that the national court in question, due to its type and jurisdiction, *may* (potentially) find itself in the situation of interpreting and applying Union law.[30] Subsequent case law has further clarified this aspect and put it as follows:

> In that regard, every Member State must, under the second subpara. of Article 19(1) TEU, in particular ensure that the bodies which, as "courts or tribunals" within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule *[FR susceptibles de statuer, DE möglicherweise … entscheiden]*, in

27 Ibid, paras 41–45.
28 Ibid, para 41.
29 Ibid, para 29.
30 At least implicitly ibid, paras 39 et seq. More clearly CJEU, case C-619/18 *Commission v Poland [Independence of the Supreme Court]* (2019), paras 52, 55 et seq. and, again more clearly, CJEU, case C-192/18 *Commission v Poland [Independence of the Ordinary Courts]* (2019), para 103.

> that capacity, on the application or interpretation of EU law, meet the requirements of effective judicial protection.[31]

Article 19(1) subpara. (2) TEU thus allows the organisation of the national judiciary to be addressed in a *systemic-structural* way as far as the national courts are functionally part of the European judiciary. As far as this is the case, they are a cornerstone of the European constitutional architecture and must *permanently* meet the requirements of Article 19(1) subpara. (2) TEU, *regardless* of whether or not EU law is implemented in the specific case at hand.[32] As the case law shows, this approach is a veritable *game changer,* as it allows judicial review of the independence of national courts on the basis of EU law beyond the comparatively limited scope of the Charter. In scholarship, Article 19(1) subpara. (2) TEU has therefore been compared to a self-standing – i.e. non-accessory – and quasi-federal judicial standard.[33]

2.4 Article 19(1) subpara. (2) TEU in its systematic context

2.4.1 Mutual linking with the fundamental right under Article 47(2) CFR

The requirements for the independence of national courts resulting from Article 19(1) subpara. (2) TEU have been further spelled out by the CJEU in subsequent case law.[34] In doing so, the Court of Justice has interpreted this provision with due regard to – i.e. in the light of – the fundamental right under Article 47(2) CFR.[35] Even if Art. 47(2) CFR is an individual

31 CJEU, case C-192/18 *Commission v Poland [Independence of the Ordinary Courts]* (2019), para 103 (emphasis added). See subsequently CJEU, case C-824/18 *A.B. and Others [Appointment of Judges to the Polish Supreme Court]* (2021), para 112; CJEU, case C-791/19 *Commission v Poland [Disciplinary Regime for Judges]* (2021), para 54 and in relation to the Romanian judiciary CJEU, case C-896/19 *Repubblika* (2021), para 37.

32 Koen Lenaerts, 'The Role of the Charter in the Member States', in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Bloomsbury 2020), 19, 25.

33 Laurent Pech and Sébastien Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case' (2018) 55 Common Market Law Review 1827, 1838.

34 The details are beyond the scope of this article. For an instructive overview of the case law, see Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice* (SIEPS 2021) 3.

35 Explicitly CJEU, case C-824/18 *A.B. and others [Appointment of judges to the Polish Supreme Court]* (2021), para 143, but on the merits already in CJEU, case C-64/16

right relating to the individual case, whereas Article 19(1) subpara. (2) TEU is basically construed as an institutional guarantee that structurally binds the national judiciary to (and within) its European mandate,[36] both norms are mutually interlinked as regards the substantive requirements of judicial independence. Accordingly, the CJEU reads the substantive content of Article 47(2) CFR, which in turn is partly derived from the ECHR,[37] into Article 19(1) subpara. 2 TEU.[38] As a consequence, the CJEU also qualifies the obligation resulting from Article 19(1) subpara. (2) TEU as a clear, precise and unconditional "obligation as to the result to be achieved", an obligation which also enjoys primacy over conflicting national law.[39]

However, the fact that the CJEU reads (parts of) the substantive content of Article 47(2) CFR into Article 19(1) subpara. (2) TEU does not mean that Article 47(2) CFR would directly apply. On the contrary, case law shows that there are numerous cases[40] in which Article 19(1) subpara. (2) TEU applies, whereas the fundamental right under Article 47(2) CFR "as such" does not.[41] It is precisely in these cases that the new standard unfolds its added value. This in no way precludes certain cases to be decided on the

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Associação Sindical dos Juízes Portugueses (2018), para 41; CJEU, case C-619/18 *Commission v Poland [Independence of the Supreme Court]* (2019), para 57.

36 Clearly highlighting this difference CJEU, case C-896/19 *Repubblika* (2021), para 52.

37 Because of Article 52(3) CFR, the interpretation of those Charter rights that correspond to ECHR rights is guided by the ECHR as interpreted by the ECtHR. Despite several considerable differences, Article 47(2) CFR corresponds structurally to Article 6 ECHR.

38 CJEU, case C-824/18 *A.B. and Others [Appointment of Judges to the Polish Supreme Court]* (2021), para 143; CJEU, case C-619/18 *Commission v Poland [Independence of the Supreme Court]* (2019), paras 71 et seq.

39 CJEU, case C-824/18 *A.B. and Others [Appointment of Judges to the Polish Supreme Court]* (2021), para 146. Confirmed in the case law on Romania, see CJEU, case C-83/19 et al. *Asociația Forumul Judecătorilor din România* (2021), para 250; CJEU, case C-357/19 et al. *Euro Box Promotion and others* (2021), para 253; CJEU, case C-430/21 *RS [Effects of Decisions of a Constitutional Court]*, para 58.

40 Most prominently, perhaps, CJEU, case C-619/18 *Commission v Poland [Independence of the Supreme Court]* (2019), paras 42–59 and CJEU, case C-791/19 *Commission v Poland [Disciplinary Regime for Judges]* (2021).

41 See expressly in the context of Romania CJEU, case C-896/19 *Repubblika* (2021), para 44; CJEU, case C-430/21 *RS [Effects of decisions of a constitutional court],* para 36. Even if Article 19(1) subpara. 2 TEU is sufficiently clear, precise and unconditional, it does not, for its part, trigger the application of the Charter under Article 51(1) CFR. For this conceptual problem see Luke D. Spieker, 'Werte, Vorrang, Identität: Der Dreiklang europäischer Justizkonflikte vor dem EuGH' (2022) 33 Europäische Zeitschrift für Wirtschaftsrecht 305, 308 et seq.

basis of EU fundamental rights. The CJEU relied on Article 47(2) CFR in a major preliminary ruling on the Polish judicial reforms. Several judges had challenged their early retirement and had incidentally questioned the independence of the newly established Disciplinary Chamber of the Polish Supreme Court in the main proceedings.[42] The CJEU answered the preliminary questions essentially on the basis of Article 47(2) CFR and saw no need to additionally interpret Article 19(1) subpara. (2) TEU in the case at hand.[43] What is decisive for legal practice, however, is that the new standard under Article 19(1) subpara. (2) TEU applies in cases where the individual guarantees ultimately do not.

2.4.2 Operationalization of the values from Art. 2 TEU

It is of utmost importance that the recent case law relates the standard under Article 19(1) subpara. (2) TEU directly to the safeguarding of the values enshrined in Article 2 TEU. Whether and how these values can be operationalized is the subject of ongoing academic discussion.[44] The recent CJEU case law has clarified that Article 19(1) subpara. (2) TEU gives concrete expression to the value of the rule of law under Article 2 TEU.[45] According to the explicit understanding of the CJEU, the values of Article 2 TEU are not mere policy guidelines, but constitute the normative core – the very identity – of Union law and are given concrete expression in principles or further provisions of the Treaties.[46] The CJEU also establishes a direct

42 CJEU, case C-585/18 *A.K. [Independence of the Disciplinary Chamber of the Polish Supreme Court]* (2019).

43 Ibid, para 169.

44 In-depth on the potentials and doctrinal modalities Armin von Bogdandy, *Strukturwandel des Öffentlichen Rechts* (Suhrkamp 2022), 154 et seq., and Luke D. Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 German Law Journal 1182, 1199 et seq., each with further references. Critically, by contrast, Frank Schorkopf, 'Wertekonstitutionalismus in der EU' (2020) 75 Juristen Zeitung 477, 482 et seq., and Martin Nettesheim, Die 'Werte der Union: Legitimitätsstiftung, Einheitsbildung, Föderalisierung' (2022) 57 Europarecht 525, 543 et seq.

45 CJEU, case C-64/16 *Associação Sindical dos Juízes Portugueses* (2018), para 32.

46 Groundbreaking CJEU, case C-156/21 *Hungary v Parliament and Council [Conditionality Mechanism]* (2022), paras 232 and 124–127 as well as CJEU, case C-157/21 *Poland v Parliament and Council [Conditionality Mechanism]* (2022), paras 264 and 142–145. While almost all other language versions use the term 'identity', the German version speaks of '*Gepräge*', which is terminologically unfortunate since the term 'identity' has become a (controversial!) key term of European constitutional law.

link between Article 2 TEU and the fundamental right under Article 47(2) CFR when it attributes the requirement of judicial independence to the inviolable essence of this fundamental right, pointing to the important role of the latter in upholding the values proclaimed in Article 2 TEU.[47] The significance of the essence of Art. 47 (2) CFR precisely for the (horizontal) relationship between the Member States will be discussed in the context of the preliminary ruling procedure.[48]

So far, the CJEU has not used Article 2 TEU as a justiciable stand-alone standard. Originally, Article 2 TEU played more of a role as the axiological background to the norms that necessarily give concrete expression to it and in particular to Article 19(1) subpara. (2) TEU. In the most recent case law on the rule of law crisis in Romania, however, Article 2 TEU sometimes already figures *alongside* Article 19 TEU,[49] even if this does not (yet) seem to entail any deviating legal consequences.[50] The problems of legitimacy resulting from a (potentially) free-hand judicial application of Article 2 TEU, which may in future be increasingly less linked to concretizing standards, should not be overlooked. One may therefore be curious about further developments, especially since the Commission has recently initiated infringement proceedings against Hungary, including a stand-alone claim that Article 2 TEU has been violated.[51] In this respect, the CJEU would be well advised to continue its previous approach of linking the operationalization of the values of Article 2 TEU to the applicability of concretizing norms.

2.4.3 Effects on the vertical distribution of competences?

In its new case law the CJEU does not claim that the EU has regulatory competence to shape the national organization of justice. The Court of Justice explicitly recognizes that the national organization of justice falls

47 CJEU, case C-216/18 PPU *LM [Shortcomings of the Polish Judicial System]* (2018), para 48.

48 See Section 3.2.2.

49 CJEU, case C-83/19 *Asociația Forumul Judecătorilor din România* (2021), paras 207, 223, 241; CJEU, case C-430/21 *RS [Effects of Decisions of a Constitutional Court]* (2022), paras 38, 43 et seq., 57, 87.

50 Especially since the CJEU in case C-430/21 *RS [Effects of decisions of a constitutional court]* (2022), paras 78, 93 refers to Article 19(1) subpara. (2) 'read in conjunction with' Article 2 TEU.

51 Pending CJEU, case C-769/22.

within the regulatory competence of the Member States, which, when exercising this competence, have to comply with the minimum standards under Article 19(1) subpara. 2 TEU.[52] However, in doing so, the CJEU applies a model of reasoning well-known from other areas of Union law. The Court of Justice restricts the exercise of Member States' competences within the scope of application of European prohibitions or obligations to comply with minimum standards. This can potentially endanger the federal balance between the EU and its Member States, as is being discussed in the area of fundamental freedoms (internal market law) and the general prohibition of discrimination on grounds of nationality.[53] This is why the CJEU must handle the new approach with care.

3 Procedures and actors

3.1 The Article 7 procedure and the EU framework for strengthening the rule of law

The recalibration of European legal standards, and in particular the case law on Article 19(1) subpara. (2) TEU as the European minimum standard ensuring the independence of national courts, has had a significant impact on the set of instruments available to the Union to combat national rule of law crises. This becomes particularly apparent in contrast to other instruments. An instrument that has turned out to be largely ineffective is the dialogue-based EU Rule of Law Framework launched by the Commission in 2014.[54]

The so-called Article 7 procedure, named after its legal basis in the TEU, has also proved ineffective. The procedure was specifically designed as a response to serious breaches of the values enshrined in Article 2 TEU by a Member State. However, due to its procedural arrangements and the limited judicial review under Article 269 TFEU, it is ultimately not a legal but a political procedure. It is for the Council to determine, by a majority of

52 CJEU, case C-192/18 *Commission v Poland [Independence of Ordinary Courts]* (2019), para 102; CJEU, case C-791/19 *Commission v Poland [Disciplinary Regimes for Judges]* (2021), para 56.

53 See Thorsten Kingreen, '§ 13 Verbot der Diskriminierung wegen der Staatsangehörigkeit' in Dirk Ehlers (ed), *Europäische Grundrechte und Grundfreiheiten* (4th edn., De Gruyter 2014), para 3.

54 By way of a communication, cf. COM(2014) 158 final.

four fifths of its members[55] after obtaining the consent of the European Parliament, that there is a clear risk of a serious breach of the values of Article 2 TEU (Article 7(1) TEU). Determining that a serious and persistent breach of the values of Article 2 TEU actually exists requires unanimity[56] within the European Council (Article 7(2) TEU). This unanimous determination is in turn a prerequisite for the Council to launch sanctions against the respective Member State, e.g. by suspending voting rights (Art. 7(3) TEU). However, if two Member States pledge support to each other, as is the case with Hungary and Poland, unanimity cannot be reached in the European Council, which is why the sanctions procedure cannot be initiated either. The Article 7 procedures initiated against Poland in 2017 by the Commission[57] and against Hungary in 2018 by the European Parliament[58] have so far not even cleared the first hurdle, i.e. the determination that there is a clear danger within the meaning of Article 7(1) TEU.

In any event, according to the CJEU, the Article 7 procedure does not have a pre-emptive effect. It does not generally block the use of other instruments to combat violations of the values under Article 2 TEU. Hence, the EU legislator was allowed to introduce the so-called *conditionality mechanism*[59] (to be discussed below), since, in the view of the CJEU, this mechanism was sufficiently different compared to the Article 7 procedure in terms of its objects, subject matter and measures.[60] Moreover, the CJEU has convincingly deemed a number of infringement proceedings and preliminary ruling proceedings in which the core issue was the rule of law under Article 2 TEU and its concretization by Article 19(1) subpara. 2 TEU admissible, without the existence of Article 7 TEU and Article 269 TFEU standing in the way. This already links to the proceedings before the CJEU as well as the conditionality mechanism.

55 Taking out the vote of the Member State concerned, cf. Article 354 TFEU.
56 Once again, not taking into account the vote of the Member State concerned, cf. Article 354 TFEU.
57 COM (2017) 835 final.
58 Resolution of 12 September 2018. Cf. CJEU, case C-650/18 *Hungary v Parliament* (2021).
59 Regulation 2020/2092.
60 CJEU, case C-156/21 *Hungary v Parliament and Council [Conditionality Mechanism]* (2022), para 167.

3.2 Proceedings before the CJEU

3.2.1 Infringement proceedings, including proceedings for interim measures

Infringement proceedings under Article 258 TFEU have become a particularly important instrument for countering the dismantling of judicial independence at the national level. The key leading cases on the Polish judicial reforms are based on this procedure, which is initiated by the Commission as guardian of the Treaties.[61] In all proceedings initiated by the Commission against Poland in this respect, the CJEU has found violations of EU law.

This applies first to the question of the independence of the Polish Supreme Court. This is true, first of all, with regard to the (lacking) independence of the Polish Supreme Court. The CJEU found Article 19(1) subpara. 2 TEU to be violated by the Polish rules that reduced the retirement age for (acting) judges of the Supreme Court while at the same time allowing some of them to exercise their office beyond this age, subject to the discretionary consent of the President of the Republic.[62] Furthermore, the CJEU found a violation of the Treaties by the Polish regulations for the ordinary courts, as these regulations provided for a different retirement age for male and female judges.[63] In addition to Article 19(1) subpara. 2 TEU, the prohibition of discrimination on the grounds of sex played a central role in this case.[64] The CJEU has also found the disciplinary regime for Polish judges to be in breach of Article 19(1) subpara. (2) TEU.[65] The decision covered a whole series of aspects of the judicial "reform", in particular that the Polish rules allowed the content of judicial decisions to be classified as a disciplinary offence, that the Disciplinary Chamber of the Supreme Court lacked independence, that the (local) jurisdiction of disciplinary courts was not sufficiently determined by law and that certain procedural guarantees were not properly protected in the disciplinary proceedings.[66] Furthermore,

61 Cf. Article 258 TFEU. In addition, it is also possible for Member States to initiate the procedure, Article 259 TFEU, but this is rarely used. As an example, see CJEU, case C-591/17 *Austria v Germany [Car Toll]* (2019).

62 CJEU, case C-619/18 *Commission v Poland [Independence of the Supreme Court]* (2019).

63 CJEU, case C-192/18 *Commission v Poland [independence of Ordinary Courts]* (2019).

64 Ibid, para 84 in relation to Article 157 TFEU and Article 5 lit. a) and Article 9(1) lit. f) of Directive 2006/54.

65 CJEU, case C-791/19 *Commission v Poland [Disciplinary Regime for Judges]* (2021).

66 Ibid, paras 50 et seq., 80 et seq., 134 et seq., 164 et seq., 187 et seq.

the Polish rules restricted the dialogue of national courts with the CJEU insofar as they opened up the possibility of disciplining judges for issuing preliminary references.[67]

Further infringement proceedings are currently pending, in particular against the so-called "Muzzle Law", which obliges judges, among other things, to provide information on existing memberships in political parties, clubs or associations, and against Polish rules which prevent, by means of disciplinary measures, Polish courts from questioning the compliance of other Polish courts with European standards of judicial independence and from making referrals to the European Court of Justice in this regard.[68] Finally, the Commission has also initiated infringement proceedings against Poland,[69] because the Polish Constitutional Tribunal, a politically controlled body, had declared parts of the obligations under EU law – including obligations under Article 19(1) subpara. (2) TEU as interpreted by the CJEU – not binding in Poland.[70] Thus, the conflict now also extends to the relationship of the Polish and European supreme jurisdictions.

A groundbreaking development lies in the quality and quantity with which the infringement proceedings were accompanied by interim measures. The judgment in the first infringement procedure was already preceded by a decision on interim measures under Article 279 TFEU.[71] The same is true for the infringement proceedings on the disciplinary regime.[72] In the still pending infringement proceedings against the "Muzzle Law", in addition to the issuance of extensive interim measures (for the provisional

67 Ibid, paras 222 et seq.

68 Pending CJEU, case C-204/21 *Commission v Poland [Independence and Private Life of Judges]*.

69 Procedure INFR (2021)2261.

70 Polish Constitutional Court (*Trybunał Konstytucyjny*), P 7/20 (2021) in relation to the interim measures and K 3/21 (2021) in relation to the obligations under Article 19(1) subpara. 2 in conjunction with Article 2 TEU as interpreted by the CJEU. Moreover, the Polish Constitutional Court also considered parts of the ECtHR case law not binding in Poland, insofar as this case law had denied the Constitutional Court the quality of a "tribunal established by law" in the sense of Article 6 ECHR (ECtHR, case No 4907/18 *Xero Flor* (2021)), cf. Polish Constitutional Court, K 6/21 (2021) and K 7/21 (2022).

71 Order of the CJEU of 17 Dec. 2018, case C-619/18 R *Commission v Poland [Independence of the Supreme Court]* (2018).

72 Order of the CJEU of 8 April 2020, case C-791/19 R *Commission v Poland [Disciplinary Regime for Judges]* (2020).

suspension of the regulations in question),[73] a penalty payment of one million euros per day was imposed for the non-implementation of these interim measures,[74] a novelty in terms of procedural law.

3.2.2 Preliminary reference procedure

The preliminary reference procedure has also played a significant role in the context of the Polish judicial reforms. Preliminary rulings were issued with regard to the (lacking) independence of the Disciplinary Chamber of the Polish Supreme Court,[75] the appointment of judges to the Polish Supreme Court[76] and the independence of the "Chamber of Extraordinary Control and Public Affairs" at the Supreme Court.[77] With regard to all these aspects, cases were brought by Polish judges before Polish courts, which then referred the matter to the CJEU for a preliminary ruling. The cases show that the crisis cannot only be brought before the courts in a "top down" mode by the Commission, but also in a "bottom up" mode, according to which individuals – in this case the judges concerned – defend themselves against the judicial reforms.[78] Infringement proceedings and preliminary ruling proceedings thus go hand in hand. However, the preliminary ruling procedure, in the course of which the CJEU interprets the relevant Union law, but leaves its application to the concrete case to the referring court, is ultimately dependent on there being a minimum degree of willingness to comply with the CJEU rulings at the national level. In the event of an open judicial conflict in which a national constitutional court ultimately declares CJEU rulings to be non-binding,[79] conflict resolution

73 Order of the Vice-President of the CJEU of 14 July 2021, case C-204/21 R *Commission v Poland [Independence and Private Life of Judges]* (2021).

74 Order of the Vice-President of the CJEU of 27 Oct. 2021, case C-204/21 R *Commission* v *Poland [Independence and Private Life of Judges]* (2021).

75 CJEU, case C-585/18 *A.K. [Independence of the Disciplinary Chamber of the Polish Supreme Court]* (2019).

76 CJEU, case C-824/18 *A.B. and Others [Appointment of Judges to the Polish Supreme Court]* (2021).

77 CJEU, case C-487/19 *W.Ż. [Chamber of Extraordinary Control and Public Affairs]* (2021).

78 Which does not automatically mean that the reference for a preliminary ruling is admissible, cf. for an inadmissibility ruling CJEU, case C-558/18 et al. *Miasto Łowicz et al.* (2020).

79 Cf. the case law of the Polish Constitutional Court, *supra* note 70. For in-depth and comparative studies of such cross-level judicial conflicts see Franz C. Mayer,

with the means of law, including infringement proceedings, reaches its limits.[80]

Furthermore, the preliminary reference procedure plays a crucial role in cases in which the horizontal relationship between the Member States is at stake. For example, in the much-discussed *LM* case, the question arose as to whether suspects in criminal proceedings may be transferred from an EU Member State to the Polish judiciary on the basis of a European Arrest Warrant if the Polish judiciary is (in part) no longer independent.[81] This is an extremely complex question in legal terms, as it ultimately concerns the limits of the principle of mutual trust between the Member States.[82] In *LM* the CJEU decided to generally maintain the system of judicial cooperation with Poland and to adhere to the high thresholds it had already set previously in its case law on judicial cooperation and asylum law. According to this approach, the transfer of a sought person to another Member State may – beyond the cases provided for in secondary law – only be refrained from if, *firstly,* there is a real risk that Article 47(2) CFR is violated in its absolutely protected essence "on account of systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts", and if, *secondly,* there are sufficient reasons to assume that the person will actually be exposed to this danger him- or herself after the transfer, i.e. that the systemic shortcomings have a concrete effect on the individual case.[83] The latter is often not the case in average and "apolitical" criminal law cases.[84]

Kompetenzüberschreitung und Letztentscheidung (CH Beck 2000); Monica Claes, *The National Courts' Mandate in the European Constitution* (Bloomsbury 2006); Heiko Sauer, *Jurisdiktionskonflikte in Mehrebenensystemen* (Springer Berlin 2008); Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht* (Mohr Siebeck 2011), 415 et seq.

80 See for the *political* resolution of the PSPP conflict between the German Federal Constitutional Court and the CJEU Mattias Wendel, 'Constructive Misunderstandings: How the PSPP Conflict Was Eventually Settled and How It Reflects Constitutional Pluralism' in Matej Avbelj (ed), *The Future of EU Constitutionalism* (Hart 2023).

81 CJEU, case C-216/18 PPU *LM [Shortcomings of the Polish Judicial System]* (2018).

82 In detail Mattias Wendel, 'Mutual Trust, Essence and Federalism' (2019) 15 European Constitutional Law Review 17.

83 CJEU, case C-216/18 PPU *LM [Shortcomings of the Polish Judicial System]* (2018), para 68.

84 Accordingly, in the original case, the person concerned ended up being transferred to Poland, see Irish High Court, [2018] IEHC 639 *Celmer No. 5* (2018), para 117, upheld by Irish Supreme Court, S:AP:IE:2018:000181 *Celmer* (2019), paras 87 et seq.

3.3 Conditionality mechanism (Regulation 2020/2092)

Finally, it is worth briefly mentioning the conditionality mechanism, based on regulation 2020/2092. This is a legislative instrument on the basis of which the EU can take measures if "breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way."[85] As an example of breaches of the rule of law, the Regulation also explicitly lists "effective judicial review by independent courts" of actions or omissions by the authorities with budgetary or financial relevance.[86] The connection between such violations and a "sound financial management" or the "protection of the financial interests of the Union" does not make the conditionality mechanism an all-purpose weapon against the threat of judicial independence at the national level. However, at least where such a link exists, there is now the possibility to impose financially sensitive measures on the Member States, such as the suspension of payments.[87]

While the practicability of the new instrument remains to be seen, it is, from the perspective of EU law, already significant that the CJEU has rejected the actions for annulment brought against the mechanism by Poland and Hungary. The two lengthy judgments contain not only detailed considerations about competences and the differences between the Article 7 procedure and other crisis intervention instruments. They also contain fundamental statements on the (legal) nature of the Union's values under Article 2 TEU.[88]

Unfortunately, the CJEU will no longer be able to rule on a chapter that is particularly interesting in terms of EU institutional law. In the context of a political deal that preceded the entry into force of the conditionality mechanism in December 2020, the European Council "agree(d)" on the modalities of application of the mechanism and stated in its conclusions, inter alia, that the Commission would not propose any measures under the mechanism until the CJEU had ruled on the actions for annulment brought

85 Article 4(1) Regulation 2020/2092.
86 Article 4(2) lit. d) Regulation 2020/2092.
87 In detail Article 5 VO 2020/2092.
88 CJEU, case C-156/21 *Hungary v Parliament and Council [Conditionality Mechanism]* (2022), paras 232 and 124–127 and CJEU, case C-157/21 *Poland v Parliament and Council [Conditionality Mechanism]* (2022), paras 264 and 142–145.

by Poland and Hungary (which were not even pending at that time).[89] The European Parliament then sued the Commission before the CJEU for failure to act. This case would have given the CJEU the opportunity to rule on the extent to which the Commission might actually be *obliged* under EU constitutional law to initiate action under the mechanism. However, after the Commission had taken up its activities in 2022 (initially against Hungary) following the two rulings, the European Parliament withdrew its action for failure to act in June 2022.

3.4 Institutional impact

From an institutional perspective, it should be noted that the European Commission has become a central player in combating the rule of law crisis. It has abandoned its earlier reticence and initiated a number of infringement proceedings against Poland, which were successful both as regards the interim measures (including even penalty payments) and in the main proceeding. The majority of these proceedings could, of course, only be won on the basis of the standards that had previously been "sharpened" by the CJEU, namely Article 19(1) subpara. (2) TEU. In this respect, the CJEU has also played a significant role in the dynamic development of recent times. The new jurisprudence on Article 19(1) subpara. (2) TEU is, of course, also criticized by some observers, as it harbours an enormous potential of federal power shift towards the Union. This is precisely why a cautious approach to this case law on the part of the CJEU is so important.[90]

89 Conclusions of 10/12/20, EUCO 22/20, I.2.c). This is astonishing because, according to Article 15 TEU, the European Council has no legislative powers whatsoever and therefore may not, in any case, lay down legally binding modalities for the application of an EU legislative act (within the meaning of Article 289(3) TFEU). Similarly, the European Council may not give the Commission specific instructions on the exercise of its supervisory function.

90 Cf. Martin Nettesheim, 'Die Werte der Union: Legitimitätsstiftung, Einheitsbildung, Föderalisierung' (2022) 57 Europarecht 525, 535.

4 Conclusion and outlook

All in all, the new case law of the CJEU on the independence of national courts has given European constitutional law a fundamental boost. The CJEU has elevated the independence of national courts to a condition for the success of the European community of law. Faced with the choice of either observing the systematic dismantling of the national judiciary rather passively with reference to the limited scope of application of EU law, or taking seriously the possibilities of the European mandate of the national courts enshrined in Article 19(1) subpara. (2) TEU and enforcing at least minimum standards of judicial independence through Union law, the CJEU has opted for the latter. It has thus laid the foundation for enforcing the value of the rule of law proclaimed in Article 2 TEU and concretized in Article 19(1) subpara. (2) TEU more effectively vis-à-vis the Member States. However, it is equally incumbent on the CJEU to resist the temptation to expand this new legal grip on the national institutional structure beyond the enforcement of minimum standards. The judicial enforcement of minimum standards of the rule of law or the principle of democracy,[91] which may one day also extend to the national legislatures or executives, must always remain focused with a sense of proportion on what it is intended for: the preservation of the foundations of the European community of law in situations of systemic risks.

91 Analogous considerations to the protection of the rule of law can also be made for the protection of the principle of democracy, although in an institutionally and principally differentiated manner.

Judgments and recommendations

The Council of Europe's work protecting the rule of law and judicial independence

Anne Sanders

1 Introduction

In a trinational conversation on the rule of law between Poland, the Czech Republic and Germany, the Council of Europe must play a role. All countries are members and have committed to the European Convention on Human Rights (ECHR) and the jurisdiction of the European Court of Human Rights (ECtHR). All three members have representatives in the different bodies of the Council of Europe. Therefore, the Council of Europe and the work of its institutions such as the case law of the ECtHR or the recommendations of the Venice Commission can function as a common point of reference in a conversation on the rule of law. Such a joint point of reference can be a topic of joint orientation towards the Council of Europe, of joint rejection, or a reference point of disagreement. Since its establishment, the Council of Europe has probably been in all three positions. This essay does not attempt to give an account of the relationship between the Council of Europe and the three members of the conversation. Rather, it wishes to highlight certain characteristics and challenges of the work of the Council of Europe as a joint reference point in this trinational conversation on the rule of law.

The paper addresses the challenges and limitations of the Council of Europe (1) before distinguishing between a human rights approach focusing on the individual through judgments of the ECtHR (2) and a systemic approach taken by other bodies of the Council of Europe like the Venice Commission and the Consultative Council of European Judges (CCJE) (3). These bodies work through recommendations delivered through Opinions which take a more systemic approach. The paper will conclude with a short discussion of judicial councils in Europe, which have been endorsed by the Council of Europe's different bodies. Judicial councils are discussed here as an example of the profound effects recommendations of the Council may have and highlight the need for a cautious adoption of such recommenda-

tions. The paper will argue that while a systemic approach is useful to support the rule of law in the member states, such work must strike a fine balance between respecting the context in which different rules function and the diversity of the member states on the one hand and the need to firmly insist on the respect of the rule of law on the other.

2 Challenges, limitations and cooperation

All international institutions need to find common ground within the diversity of national systems and have only limited means to enforce their orders. This is true for the European Union but much more so for the Council of Europe. The ECtHR may hand down judgments against member states but can only use fines to enforce them. The member states decide what consequences to draw from the judgments. During the time after the invasion of Crimea, the Russian Federation was denied voting rights within the Council of Europe. Apart from such measures, the Council of Europe may only issue recommendations and engage its members in dialogue. The Council of Europe also has no real means to force members to make financial contributions, as was noticeable when the Russian Federation – which was still a member then – withheld payments.

The Council of Europe never had the goal of creating legal harmonization for a joint market. Rather, the Council aims at protecting human rights, the rule of law and democracy in now 46 member states with different legal and political systems. Human rights issues are assessed against the ECHR. Its guarantees are still quite abstract, however. While the ECtHR interprets their meaning autonomously, it remains necessary that the ECtHR detects violations in relation to different legal systems, political cultures and societies. Comparative law is of special importance in this context. Principles like the rule of law and democracy are especially difficult to enforce compared to guarantees such as freedom of expression because they require that violations to these rather abstract principles are identified in concrete measures of member states. Moreover, the Council of Europe lacks something like the Article 7 Treaty on European Union (TEU) procedure. In relation to principles like democracy and the rule of law, recommendations and cooperation, which are the only means the Council of Europe may use, require fewer resources. An approach focusing on exchange and cooperation may also be more successful in the end. While the diversity of member states and the Council's lack of competence

might be seen as a disadvantage, the Council has the unique opportunity to take a bird's-eye perspective on distinct developments in vastly different political and legal systems.

The Council takes a two-pronged approach, working on the individual and systemic level. On the individual level, the ECtHR applying the ECHR can be identified as the most influential body of the Council of Europe. Just as the introduction of individual, constitutional complaints has considerably broadened the importance of the work of national constitutional courts,[1] the individual complaint of the ECtHR ensured the constant (one may say overpowering) influx of cases from all member states. This also guarantees the attention of the public, even though the attention is often rather nationalized as it is focused on different issues in different member states. The case law of the Court with its bird's-eye approach has led to considerable changes in, inter alia, German family law – even beyond influential decisions of the German constitutional court.[2]

With this decentralized approach and the right to issue judgments on the basis of the convention, the Court and consequently the Council developed much more impact than if it had been limited to the reports of a human rights commissioner.[3] Issuing judgments against a member state can be seen as meaningful, even if the state does not respond by making effective legal and systemic changes. However, this approach comes with its own challenges. Firstly, if member states do not change their actions in response to the judgments of the ECtHR, the whole process might be seen as futile. Secondly, the characteristic focus on the individual case makes it difficult to address systemic problems, as for example in the case of the European rule of law crisis.

1 Andreas Voßkuhle, in von Mangoldt, Klein and Starck (eds), *Grundgesetz* (7th edn., C H Beck 2018), Art. 93, para 13; Patrick Schäfer, in Karpenstein and Mayer (eds), *Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (3rd edn., C H Beck 2022), Art. 34, para 2; Holger Zuck and Reiner Eisele, *Das Recht der Verfassungsbeschwerde* (6th edn., C H Beck 2022), paras 100 et seq.; Introduction of the individual complaint before the consitutional court of North Rhine-Westphalia (NRW) in 2019; see NRW, LT–Drs. 17/2122, p. 20.

2 E.g. ECtHR, case 22028/04 *Zaunegger v. Germany* (2009), which was taken up by the German FCC, case 1 BVR 420/09 (2010).

3 The Council of Europe has of course a human rights commissioner doing important work: <https://www.coe.int/en/web/commissioner/home> accessed 26 August 2022.

3 Human rights approach and the rule of law

As already pointed out, the ECtHR is the most important player of what has been described above as the human rights approach on the individual level. In the German literature, Rebhan remarked that this orientation on the individual case would lead to a loss of doctrinal coherence generally.[4] Moreover, in the context of the rule of law, the individual approach has some limitations when it comes to systemic changes in the organization of courts in the member states. Even though the rule of law is meant to protect the individual, given its potentially broad scope and systemic character, it is more difficult to assess violations of the rule of law in the context of the traditional human rights focusing on the individual protected within the framework of the ECHR. Judicial independence, while of great importance for the rule of law, is not protected as an individual right. After all, judicial independence is not a privilege but meant to serve society governed by the rule of law.[5]

However, the Court has found a way to address such issues in its case law on Article 6 ECHR, thereby addressing systemic problems on the rule of law within the context of human rights issues on the individual level. Article 6 ECHR states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." In recent years, in the context of the European rule of law crisis, the Court has extended its case law on Article 6 ECHR to the institutional foundations of the rule of law.[6]

3.1 Violation of judicial independence from the perspective of parties

Cases concerning Article 6 ECHR may address aspects of central importance for the rule of law, especially the guarantee of an "independent tribunal established by law". Such complaints have been brought by parties to

4 Robert Rebhahn, 'Zivilrecht und Europäische Menschenrechtskonvention' (2010) 210 Archiv für die civilistische Praxis 489, 551.

5 Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, CM Rec 2010(12), para 11.

6 See Vilfan-Vospernik, Report on the ECHR case law on the Independence of the Judiciary, CDL–JU(2019)o19.

legal procedures.[7] Establishing a definition of an independent tribunal, the Court developed criteria such as irremovability, appointment of members, security of tenure and guarantees against outside pressures from the executive or legislator, for example in the case *Campbell and Fell v. UK*.[8] Not only direct instructions and pressures but also negative comments of politicians may violate the parties' right to a fair trial, as the Court decided in *Kinsky v. Czech Republic*.[9]

Moreover, the Court took the opportunity to put these guarantees into a wider context. In *Perez v. France*, for example, the Court stressed the importance of fair trial rights in a democratic society.[10] In *Sovtransvato Holding v. Ukraine,* the Court held that interventions from public authorities violated the "notion of an independent and fair tribunal" and revealed a "lack of respect for the judicial office".[11] In this decision, the Court also referred to the rule of law as a common heritage of the contracting states.[12]

In recent years, the Court has stressed the importance of the lawful appointment of judges.[13] In *Guðmundur Andri Ástráðsson v. Iceland*,[14] the Grand Chamber of the Court held that the rights of a criminal defendant protected under Article 6 ECHR could be violated if a judge who had been appointed in violation of national legal rules decided the case. Not all violations of the rules of judicial appointments have such far-reaching effects, however, but only those meant to protect judicial independence. In *Xero Flor v. Poland*,[15] the Court applied these principles to the Polish Constitutional Court to which a couple of judges with close connections to the ruling PiS party had been appointed to fill seats which had already been filled by the previous parliament. These events, by which the governing party gained considerable influence over the constitutional court, was noticed internationally and marked the beginning of increasing political influence over the Polish judicial system. The ECtHR held that a constitutional court

7 See ECtHR, case No 40575/10 *Mutu and Pechstein v. Switzerland* (2018); ECtHR, case No 80018/12 *Thiam v. France* (2018).
8 ECtHR, case No 7819/77, 7878/77 *Campbell and Fell v. UK* (1984), paras 77–82.
9 ECtHR, case No 42856/06 *Kinsky v. Czech Republic*, (2012), paras 91–99.
10 ECtHR, case No 47278/99 *Perez v. France* (2004), para 64; ECtHR, case No 42856/06 *Kinsky v. Czech Republic* (2012), para 82.
11 ECtHR, case No 48553/99 *Sovtransvato Holding v. Ukraine* (2002), para 80.
12 ECtHR, case No 48553/99 *Sovtransvato Holding v. Ukraine* (2002), para 72.
13 ECtHR, case No 55391/13 et al. *Ramos Nunes de Carvalho e Sá v. Portugal* (2018), para 144; EctHR, case No 18952/18 *Gloveli v. Georgia* (2022).
14 ECtHR, case No 26374/18 *Guðmundur Andri Ástráðsson v. Island* (2020).
15 ECtHR, case No 4907/18 Xe*ro Flor w Polsce v. Poland* (2021).

can be an independent tribunal in the sense of Article 6 ECHR and that parties' rights can be violated if judges are appointed in an unlawful way.[16]

Thus, the guarantees of Article 6 ECHR do not only protect the individual in court but have indirect systemic effects on the judiciary, as they might request member states to undertake changes in their judicial systems or politicians to respect the independence of procedures.

3.2 Individual rights of judges

Judges can be violated in their rights as well and can request access to an independent tribunal, even though judicial independence is – as pointed out already – not an individual right of judges. Still, the rights connected to a judicial post can be protected as civil rights under Article 6 ECHR if the preconditions of the *Eskelinen* test are met. This test requires that, firstly, the state in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the state's interest.[17] The Court has decided cases in relation to the applicability of Article 6 ECHR in the context of disputes concerning the appointment, career and dismissal of judges.[18] In *Gloveli v. Georgia*, the Court reprimanded the lack of judicial review for the decision not to appoint the applicant to a judicial post with respect to the general Council of European principle that judges' appointments must be based on merit.[19]

In *Baka v. Hungary,* the Court discussed the dismissal of Andras Baka as court president in the context of the Hungarian judicial reforms.[20] In *Ramos Nunes de Carvalho e Sá v. Portugal* the Court addressed judicial

16 ECtHR, case No 4907/18 *Xero Flor w Polsce v. Poland* (2021).
17 ECtHR, case No 63235/00 *Vilho Eskelinen and Others v. Finland* (2007), para 62.
18 ECtHR, case No 55391/13 et al. *Ramos Nunes de Carvalho e Sá v. Portugal*, 06.11. (2018), para 196; ECtHR, case No 20261/12 *Baka v. Hungary* (2016), paras 100–106; ECtHR, case No 49868/19 and 57511/19 *Dolińska-Ficek and Ozimek v. Poland* (2021), paras 220–228; ECtHR, case No 11423/19 *Gumenyuk and Others v. Ukraine* (2021), paras 44–59; ECtHR, case No 76521/12 *Eminağaoğlu v. Turkey* (2021), paras 59–63; ECtHR, case No 1571/07 *Bilgen v. Turkey* (2021, paras 47–52 and paras 65–68; ECtHR, case No 43572/18 *Grzęda v. Poland* (2022), paras 257–64; ECtHR, case No 18952/18 *Gloveli v. Georgia*,(2022), para 34.
19 ECtHR, case No 18952/18 *Gloveli v. Georgia* (2022), paras 49–51.
20 ECtHR, case No 20261/12 *Baka v. Hungary* (2016), para 79.

review against disciplinary procedures.[21] In *Grzęda v. Poland*, the Court discussed the Polish reform of the High Judicial Council, identifying the lack of judicial review against the dismissal from that council as a violation of Article 6 ECHR.[22] *Gumenyuk v. Ukraine*[23] concerned the dismissal of judges in the context of the reorganization of the judiciary after the Maidan Revolution. However, internal independence, in particular the relationship between judges and councils for the judiciary, were also of concern for the case law of the ECtHR.[24]

3.3 A systemic approach in the case law

While all these decisions concern individual cases, the Court took the opportunity again and again to stress the general importance of the judicial office for society and thereby the rule of law. Thus, the Court takes a much more systemic look than what might be expected from the national court of a member state.

For example, in *Gloveli v. Georgia,* the Court stated:

> Given the prominent place that the judiciary occupies among State organs in a democratic society and the importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see Ramos Nunes de Carvalho e Sá v. Portugal [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018, with further references therein), the Court must be particularly attentive to the protection of members of the judiciary against measures affecting their status or career that can threaten their judicial independence and autonomy.[25]

A considerable number of decisions concerned cases in the context of problematic judicial reforms such as in Hungary and Poland. In *Baka v.*

21 See ECtHR, case No 55391/13 et al. *Ramos Nunes de Carvalho e Sá v. Portugal* (2018), para 196.

22 ECtHR, case No 43572/18 *Grzęda v. Poland* (2022).

23 EctHR, case No 11423/19 *Gumenyuk and Others v. Ukraine* (2021).

24 See Vilfan-Vospernik, Report on the ECHR case law on the Independence of the Judiciary, CDL–JU(2019)019 p. 4; ECtHR, case No 21722/11 *Volkov v. Ukraine* (2013), para 130; ECtHR, case No 76639/11 *Denisov v. Ukraine* (2018), para 79; ECtHR, case No 55391/13 *Ramos Nunes de Carvalho e Sá v. Portugal* (2018).

25 ECtHR, case No 18952/18 Gloveli v. Georgia (2022), para 49; see also ECtHR, case No 11423/18 *Gumenyuk v. Ukraine* (2021), para 49.

Hungary, for example, the Court stressed the importance of judges speaking up against systemic threats to the rule of law.[26] In *Grzęda v. Poland*, the Court not only discussed access to justice for the loss of a seat on the Polish Judicial Council but took the opportunity to elaborate on the importance of such councils as an institutional basis for the independent appointment of judges based on merit for the rule of law. In *Grzęda v. Poland* the Court stated:

> 307. While there exists a widespread practice, endorsed by the Council of Europe, to put in place a judicial council as a body responsible for selection of judges, the Convention does not contain any explicit requirement to this effect. In the Court's view, whatever system is chosen by member States, they must abide by their obligation to secure judicial independence. Consequently, where a judicial council is established, the Court considers that the State's authorities should be under an obligation to ensure its independence from the executive and legislative powers in order to, inter alia, safeguard the integrity of the judicial appointment process. The CJEU underlined the importance of this obligation in respect of the NCJ (see §§ 138 and 142–144 of the judgment of 19 November 2019 in A.K. and Others, C-585/18, C-624/18 and C-625/18; and §§ 125–131 of the judgment of 2 March 2021, A.B. and Others, C-824/18; see respectively paragraphs 152 and 156 above), a conclusion fully endorsed by the Supreme Court and Supreme Administrative Court in their subsequent judgments relating to the NCJ (discussed further in paragraphs 316 and 319-321). The Court observes that States are free to adopt such a model as a means of ensuring judicial independence. What they cannot do is instrumentalise it so as to undermine that independence.
>
> 308. The Court has held that "independence" refers to the necessary personal and institutional independence that is required for impartial decision-making, and it is thus a prerequisite for impartiality. It characterises both (i) a state of mind, which denotes a judge's imperviousness to external pressure as a matter of moral integrity, and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during

26 ECtHR, case No 20261/12 *Baka v. Hungary* (2016), para 79 and paras 99–100.

> the exercise of his or her duties (see Guðmundur Andri Ástráðsson, cited above, § 234). The Court has also discerned a common thread running through the institutional requirements of Article 6 § 1, in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers (ibid., § 233).[27]

As will be discussed below, the bodies of the Council of Europe – taking a systemic approach to the rule of law – have advocated for judicial councils for some time. With the *Grzęda v. Poland* decision, the Court supported this approach, protecting its institutional basis on the level of a violation of individual rights. This shows that the Court takes a systemic perspective even within the individual approach. This systemic approach can be seen as an increasingly important feature of the work of the Court, noticeable in tools such as pilot judgment procedures[28] and non-binding Advisory Opinions (Protocol 16, 2018). Given the large influx of cases, this seems to offer the greater impact. However, this shift may blur the differences between the work of the Court and the other advisory bodies of the Council of Europe.

4 Systemic approaches within the Council of Europe

After a discussion of the ECtHR's case law on the rule of law which necessarily takes an individual, human rights perspective as a starting point, the paper will now turn to the systemic approach taken by other bodies within the Council of Europe. They draft reports, offer counselling to member states for the development of institutional foundations of the rule of law, and develop soft law standards. The highest ranking of them is the Council of Ministers, which has developed recommendations on the judiciary, e.g. CM Rec 94/12 and Rec 2010/12. These recommendations address internal and external independence, judicial conduct, councils for the judiciary, and appointment and disciplinary procedures.

The Commission for Democracy through Law (Venice Commission) and the Consultative Council of European Judges (CCJE) are two of the bodies concerned with protecting the rule of law and shall be discussed

27 ECtHR, case No 43572/18 *Grzęda v. Poland* (2022), paras 307–308.

28 <https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf> accessed 29 August 2022.

in more detail.[29] While their work necessarily takes a systemic view, these bodies face the challenge that in a diverse group of member states, one-size-fits-all solutions are rarely appropriate.

4.1 The Venice Commission

The Venice Commission was founded in 1990 to support the drafting of new constitutions in the so-called young democracies in Central and Eastern Europe. The Venice Commission was not dissolved after an initial time of institution-building in the "new democracies" but grew in importance and membership. Today, there are 61 member states going far beyond the borders of the Council of Europe, including Algeria, Costa Rica, South Korea, Mexico and the USA.[30]

The Venice Commission prepares legal Opinions on issues concerning the rule of law and democracy (democratic institutions and fundamental rights, constitutional justice and ordinary justice, elections, referendums and political parties) on the request of different institutions including the government, parliament or heads of state of the states concerned.[31] Thus, like a court, it addresses topics brought to its attention by parties, rather than being completely free in the choice of its subject of investigation. Such Opinions are drafted by working groups consisting of individual members who include judges or former judges of the highest rank, academics, lawyers and heads of human rights institutions.[32] They are based on information gathered in the respective countries, especially through interviews with people bringing different perspectives, including, for example, government officials but also representatives of NGOs. As members of the Venice Commission say, it is deemed important to assess any topic in the context of the individual country. Thereby, while taking a case-by-case approach, the Venice Commission may address systemic issues.

29 Others are for example Group of States against Corruption (GRECO). For an overview: <https://www.coe.int/en/web/portal/rule-of-law> accessed 26 August 2022.

30 List of the current member states of the Venice Commission: <https://www.venice.coe.int/WebForms/members/countries.aspx?lang=EN> accessed 26 August 2022.

31 See for information on the tasks and working methods: <https://www.venice.coe.int/WebForms/pages/?p=01_activities&lang=EN> accessed 26 August 2022.

32 List of the current individual members of the Venice Commission: <https://www.venice.coe.int/WebForms/members/default.aspx?lang=EN> accessed 26 August 2022.

After the process of collecting information on the specific country and topic, Draft Opinions are discussed and adopted in the plenary sessions. While these Opinions have no legally binding force, a yet unpublished seminar paper by Jan-Philip Fahrbach, a student of the German University of Münster, has shown that a majority of member states act on the recommendations of the Venice Commission at least to some degree. A particularly large number of states obey major recommendations if the state's institutions have requested it. The Venice Commission refers to its own Opinions in its work, but also to other international documents and decisions of the ECtHR. Apart from its legal Opinions, the Venice Commission sometimes works on topical issues, summarizing the principles developed in its Opinions. Such documents include studies on the rule of law,[33] the Rule of Law Checklist[34] and the Report on the Independence of the Judicial System Part I.[35]

4.2 Consultative Council of European Judges (CCJE)

The CCJE was established in 2001 as an advisory body consisting exclusively of judges from all of the now 46 member states of the Council of Europe. The CCJE prepares Opinions on topics of importance for judiciaries based on the rule of law. The now 25 Opinions[36] address topics such as judicial independence,[37] judicial councils,[38] corruption,[39] judges' associations,[40] separation of powers,[41] training of judges,[42] evaluation of

33 Venice Commission, Report on the Rule of Law, CDL–AD(2011)003rev, adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011).
34 Venice Commission, Rule of Law Checklist, CDL–AD(2016)007, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016).
35 Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL–AD(2010)004-e, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010).
36 All Opinions are available at <https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta> accessed 26 August 2022.
37 CCJE Opinion No. 1 (2001).
38 CCJE Opinion No. 10 (2007); No. 24 (2021).
39 CCJE Opinion No. 21 (2018).
40 CCJE Opinion No. 23 (2020).
41 CCJE Opinion No. 18 (2015).
42 CCJE Opinion No. 3 (2003).

judges,[43] court presidents,[44] judges and technology,[45] ethics,[46] the media[47] and the relationship between judges, prosecutors[48] and lawyers[49]. In 2010, the CCJE summarized the main principles of the Opinions drafted so far in a Magna Carta of Judges. In addition to the Opinions drafted to advise the Council of Ministers, the CCJE also prepares Opinions and reports on current issues. For example, the CCJE used to publish situation reports on challenges for judicial independence and the rule of law in the member states.

The CCJE decides on the next year's Opinion at the annual plenary meeting. On that occasion, a working group is formed, which is usually chaired by the president and vice president. Then, a questionnaire is developed and sent out to the member states in order to collect information and views on the selected topic. The questionnaire, responses and other preliminary works are published online.[50] The CCJE works with an expert from academia or the judiciary who undertakes the evaluation of the responses, makes a first draft of the Opinion, and then supports the drafting process up to the adoption in the plenary.[51] The Opinions take a general perspective, addressing issues in an abstract way which may take into account individual examples without always addressing them. The goal of the Opinions is not to blame individual member states for their practices, but to develop abstract principles that can be applied in different contexts on the basis of concrete experiences. For example, while Opinion No. 18 (2015) "on the position of the judiciary and its relation with the other powers of state in a modern democracy" is clearly a response to the emerging European rule of law crisis, it only briefly addresses the situation in individual member states.

Opinions of the CCJE,[52] like those of the Venice Commission and the European Network of Councils for the Judiciary (ENCJ), are not legally

43 CCJE Opinion No. 17 (2014).
44 CCJE Opinion No. 19 (2016).
45 CCJE Opinion No. 14 (2011).
46 CCJE Opinion No. 3 (2002).
47 CCJE Opinion No. 7 (2005).
48 CCJE Opinion No. 12 (2009).
49 CCJE Opinion No. 16 (2013).
50 Documents to the Preliminary Works are available at <https://www.coe.int/en/web/ccje/preliminary-works> accessed 26 August 2022.
51 The author has supported four CCJE Opinions as expert: No. 17, 18, 22 and 24.
52 See generally: CCJE, Opinion No. 10 (2007).

binding but are often used by the ECtHR[53] to interpret the guarantees of the Convention in relation to judges.[54] Especially in recent decisions like *Guðmundur Andri Ástráðsson v. Iceland* and *Grzęda v. Poland*, the ECtHR referred to the work of the CCJE at length. In this context, it is also interesting to note that two judges of the ECtHR, Raffaele Sabato from Italy and Julia Laffranque from Estonia, have previously been members of the CCJE.

The close cooperation of judges from different member states in networks like the CCJE but also in the European Network of Councils for the Judiciary (ENCJ), European Commission for the Efficiency of Justice (CEPEJ), and also international judges' organizations such as the International Association of Judges (IAJ), European Association of Judges (EAJ) and Magistrats Européens pour la Démocratie et le Libertés (MEDEL) may increase the cross-border understanding of judges for topics like judicial independence, administration of the judiciary and efficiency. Elaine Mak has suggested that an international judges' identity may be fostered this way.[55] Such an international identity of judges may even encourage cross-border engagement to protect judicial independence in Europe. It may be remembered that judges from different countries marched in Poland for the protection of judicial independence. It may be assumed that a body like the CCJE, consisting exclusively of judges, is able to gain more attention for topics concerning the judiciary than other bodies like the Council of Ministers and the Parliamentary Assembly, which are closer to the views of the executive and legislative.

However, the body has also been criticized. Fabian Wittreck has formulated concerns on the composition of the CCJE. He has argued that the judges would take a biased view on issues, aiming to expand the power

53 See e.g.: European Commission's Regular Report on Czech Republic's Progress towards Accession, SEC (2002) 1402 final (Oct. 9, 2002,), p. 22–24; Daniel Smilov, 'EU Enlargement and the Constitutional Principle of Judicial Independence' in Czarnota et al. (eds), *Spreading Democracy and the Rule of Law* (Springer 2006), 313, 323–325.

54 See only ECtHR, case No 20261/12 *Baka v. Hungary* (2016), para 79; ECtHR, case No 48783/07 *Gerovska Popčevska v. the Former Yugoslav Republic of Macedonia* (2016), paras 34, 35; ECtHR, case No 34796/09 *Albu and others v. Romania* (2012), para18; ECtHR, case No 48554/10 *Borovská and Forrai v. Slovakia* (2014), para 43; ECtHR, case No 4410/11 *Mráz and Others v. Slovakia* (2014), para 42;ECtHR, case No 26374/18 *Guðmundur Andri Ástráðsson v. Iceland* (2020), paras 124–127; ECtHR, case No 43572/18 *Grzęda v. Poland* (2022), paras 135–139.

55 Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the changing practices of western highest courts* (Bloomsbury 2013).

of the judiciary.[56] In my opinion, this criticism is not justified. I have worked on four CCJE Opinions and was always under the impression that discussions focused on how judges can contribute best to a society based on the rule of law not in their own interests but in the interests of the people. It is certainly true that judges have a unique perspective on the best approach to reaching that goal. Not everybody might agree with the views taken by the all-judges body. However, the CCJE was established especially in order to include the unique perspective of a body composed exclusively of judges in the policymaking of the Council of Europe. After all, the Council of Ministers is composed of members of the executive, while the Parliamentary Assembly provides the perspective of a parliament. The CCJE is completely transparent about its composition in its name and on its website. This does not mean, of course, that all positions of the CCJE – just as any other body of the Council of Europe – must provide the right approach for every member state. After all, it only makes recommendations without binding force.

An approach of the Council of Europe that is discussed critically is the endorsement of the establishment of judicial councils as an institution supporting the rule of law in the so-called new democracies. The next part of the paper will turn to the judicial council as an example of the effects of the advisory bodies of the Council of Europe.

4.3 Judicial councils

Both the Venice Commission[57] and the CCJE[58] recommend the adoption of judicial councils as an approach to the self-administration of the judiciary and in order to protect the rule of law and separation of powers.

56 Fabian Wittreck, 'Empfehlen sich Regelungen zur Sicherung der Unabhängigkeit der Justiz bei der Besetzung von Richterpositionen?' (2020) Gutachten G zum 73. Deutschen Juristentag, G8, G34.

57 Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL–AD(2010)004-e, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010), para 32; Venice Commission, Rule of Law Checklist, CDL–AD(2016)007, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), paras 81, 82; Venice Commission, Judicial Appointments – Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16–17 March 2007), CDL–AD(2007)028-e, para 25,26. Some doubts are expressed in para 26 if judges should be responsible for the administration

The origins of the concepts of judicial councils lie in southern Europe, especially in Italy, where the Italian Judicial Council (Consiglio Superiore de la Magistratura, CSM) still forms the basis of a model of a judicial council with extensive competence. In Italy, the constitution of 1948 introduced the Council in its basically current form after the fascist regime.[59] In Portugal and Spain, judicial councils were also introduced after the end of authoritarian systems.[60] After the end of the Cold War, most new constitutions in Central and Eastern Europe introduced judicial councils to institutionalize their judiciaries with the goal of making them independent after similarly profound changes to their constitutional systems.

According to the recommendations of the CCJE,[61] such a council shall support judicial independence and efficiency. It should be independent from the other powers of state, namely the legislative and the executive.[62] The majority of its members should be judges elected by their peers.[63] A selection by the executive or legislative should be avoided. Members should also not be politicians but may very well be non-judges like attorneys and also laypeople who have no legal education.[64] Older recommendations suggest that such councils should have considerable competence including the administration of the judiciary and career decisions like selection, promotion and disciplinary decisions.[65]

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of the judiciary, see at <https://www.venice.coe.int/webforms/documents/CDL-AD(2007)028.aspx> accessed 26 August 2022.

58 CCJE, Magna Carta of Judges (2010), para 13; CCJE Opinion No. 10 (2007), para 42.

59 Simone Benvenuti and Davide Paris, 'Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model' (2018) 19 German Law Journal 1641, 1642.

60 See for Portugal the information provided on the ENCJ website: <https://www.encj.eu/images/stories/pdf/factsheets/csm_portugal.pdf> and website of the Council itself: <https://www.csm.org.pt/> both accessed 26 August 2022. See for Spain: Aida Torres Pérez, 'Judicial Self-Government and Judicial Independence: the Political Capture of the General Council of the Judiciary of Spain' (2018) 19 German Law Journal 1769, 1770.

61 CCJE Opinion No. 10 (2007) para 8–10.

62 CCJE Opinion No. 10 (2007) para 8–14; CCJE Opinion No 24 (2021) para 5.

63 Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, CM Rec 2010/12, para 27; CCJE Opinion No. 10 (2007) para 17.

64 CCJE Opinion No. 24 (2021) para 29.

65 CCJE Opinion No. 10 (2007) para 13.

4.3.1 Prevalence in Europe

A recent survey among members of the CCJE shows how successful the recommendations of the Council of Europe have been. The survey was undertaken in preparation of CCJE Opinion No. 24 (2021). Information from 41 of the 46 member states was submitted.[66] Thirty-four out of 41 responses stated that their member state had a judicial council. Taking Malta, which has information published on the website of the ENCJ, into account, this makes 35 member states which have established a judicial council, a considerable majority: Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta (ENCJ information), Monaco, Montenegro, The Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Turkey, Ukraine. Only seven member states responded that they have no judicial council: Austria, Czech Republic, Germany, Luxembourg, Sweden, Switzerland (none at the federal level, 5 out of 26 cantons have one), United Kingdom.

Being aware of the diversity of systems, the CCJE did not prescribe a definition, but offered a yes/no question if a member state had a judicial council and asked for its name. These inquiries were followed by a number of questions about different competences in relation to the judiciary such as administration, personnel, ethics and PR. Among the most important competences of judicial councils following the judicial council model[67] endorsed by the Council of Europe and most famously established by the Italian CSM are competences in the administration of the judiciary[68] and competence for personnel. The latter includes the selection (27 of 41

66 The questionnaire and a compilation of answers can be found on the CCJE website: <https://www.coe.int/en/web/ccje/opinion-no.-24-on-the-evolution-of-the-councils-for-the-judiciary-and-their-role-for-independent-and-impartial-judicial-systems?> accessed 26 August 2022.

67 See Anne Sanders, Comparative Overview of Judicial Councils in Europe, DG I-DLC(2022)1, drafted for the International Roundtable "Shaping Judicial Councils to meet contemporary challenges", <https://www.venice.coe.int/files/overview_JC_Europe_en.pdf> accessed 26 August 2022.

68 Albania, Andorra, Bosnia and Herzegovina, Bulgaria, Denmark, Estonia, Finland, Georgia, Greece, Hungary, Italy, Latvia, Lithuania, the Netherlands, Norway, Portugal, San Marino, Slovakia, Slovenia, Spain, Turkey.

member states),[69] promotion (28)[70] and evaluation of judges (19)[71]. Most judicial councils also contribute to the selection of court presidents (21).[72] In 24 member states, judicial councils also have a role in disciplinary procedures.[73]

4.3.2 The Council of Europe and judicial councils

While there was never a legal duty to introduce such councils,[74] for states in Eastern and Central Europe it was tempting to adopt them in order to quickly show progress on the 1993 Copenhagen Criteria to qualify for

69 Information from responses to CCJE questionnaire sent out in preparation of CCJE Opinion No. 24 (2021) (CCJE information): Albania, Andorra, Armenia, Azerbaijan (judges selection committee formed by council), Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Finland (technical role), France (gives a binding opinion on proposal of MoJ; judges at supreme court and presidents of courts are selected by the council), Georgia, Hungary, Italy, Latvia, Lithuania, Malta (advice), Monaco, Montenegro, North Macedonia, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Turkey.

70 CCJE information: Albania, Andorra, Armenia, Azerbaijan, Belgium (not for deputy and specific mandates), Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Finland, France (promotion of judges except supreme court judges; court presidents suggested by MoJ to council), Georgia, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Monaco, Montenegro, North Macedonia, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Turkey, Ukraine.

71 CCJE information: Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Georgia, Ireland, Italy, Lithuania, Montenegro, North Macedonia, Portugal, Romania, San Marino (not yet, but is about to be introduced on the recommendation of GRECO), Slovakia, Spain, Turkey.

72 CCJE information: Andorra, Armenia, Azerbaijan (suggestion), Belgium (proposal), Bulgaria (except for Supreme Court and Supreme Administrative Court), Croatia (except president of Supreme Court), Cyprus, Estonia (suggestion, can block appointment), France, Georgia, Greece, Latvia, Lithuania, North Macedonia, Netherlands (proposal), Portugal, Romania, San Marino (no removal), Slovakia, Slovenia, Spain (removal only for disciplinary reasons).

73 CCJE information: Albania, Andorra, Armenia, Azerbaijan, Belgium (no, but Council may provide information to the disciplinary courts if a judge refuses to assist in the exercise of powers of the Council), Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, France, Georgia, Ireland, Italy, Malta, Monaco, Montenegro, North Macedonia, Poland (elects judges' disciplinary representative), Portugal, Romania, San Marino, Slovakia, Slovenia (independent body within), Spain, Switzerland (in cantons where they are in place), Turkey, Ukraine.

74 See Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, CM Rec 2010/12, para 35, see also p. 25 of the Explanatory Memorandum of Rec(2012)10.

the admission to the European Union demanding "achieving stability of institutions guaranteeing … the rule of law".[75]

The endorsement of judicial councils by the different institutions of the Council of Europe and the European Union had a detrimental effect, it is argued, because its adoption was taken as an "easy fix" to adhere to European rule of law standards while neglecting the necessary "small steps" for an efficient, transparent and accountable judiciary in a society based on the rule of law.[76]

Moreover, it is argued that the focus on judicial councils ignored the fact that elements of judicial self-administration protecting judicial independence may be found not only in systems with a judicial council but also in member states where a ministry of justice or a court service board have the final say on the administration of the judiciary.[77]

It is true that in different member states the administration of the judiciary as a basis for the rule of law can only be understood by a detailed analysis of the interplay of different institutions. The CCJE is aware of this fact. In the options offered in the CCJE survey to the member states of the CCJE for the different competences were not only the options "judicial council", "ministry of justice" and "parliament", but also "judicial administration board" (which was intended to cover the court service model of the Nordic countries), "court presidents", "bodies within courts", "association of judges" and "others" with a request for clarification. The approach was meant to show not only the competence of judicial councils but also how different institutions interact in different systems. This proved correct: in most member states, all mentioned authorities and bodies are involved in different ways in the administration of the judiciary.

75 Copenhagen European Council, Presidency Conclusions, 21.06.-22.06.1993, iii): "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union"; <https://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf> accessed 26 August 2022.

76 The Venice Commission and CCJE have recently stressed this: Venice Commission, Urgent Interim Opinion on the draft new constitution, 11.12.2020, Bulgaria, CDL-AD(2020)035, para 37; CCJE Opinion No 24 (2021) para 3.

77 See Katarína Šipulová et al., 'Judicial Self-Governance Index: Towards better understanding of the role of judges in governing the judiciary' (2022) 17 Regulation and Governance 22 with further references; and Aarli and Sanders, working paper presented at the EGPA 2022 in Lisbon.

There is some overlap between the competence investigated in the CCJE survey with the dimensions of competence of judicial self-administration identified by Šipulova et al. in their important work on judicial self-administration in the Czech Republic, Germany, Slovakia and Italy.[78] Both works show that judicial self-administration is not only undertaken by judicial councils but also by court presidents and bodies of judges within courts.

While the endorsement of judicial councils may lead to a critical self-assessment of judicial systems and improvements, it may also be understood as the "European must-have" for all systems. The Nordic countries Denmark, Norway and Finland responded affirmatively to having a judicial council. However, the Nordic countries are often described as following a court service model in which the judiciary is administrated by an independent administrative body.[79] Such bodies are usually not led by a majority of judges and do not have competence for personnel.[80] In Norway, for example, there is even some resistance to handing the administration of the judiciary over to a body with a majority of judges. Such a system, the recent Court Commission debating a reform argued, would lack democratic legitimacy. Nevertheless, Denmark, Norway and Finland (which have a majority of judges present on their judicial administration boards) responded that they had a judicial council. Denmark and Finland are also members of the ENCJ. This response may very well be seen as a sign of a broad understanding of judicial councils, embracing diversity of systems. According to this understanding, different institutions can be judicial councils if they protect judicial independence and the rule of law. However, this shows that while judicial councils are an important feature in the administration of many judiciaries in Europe, a more nuanced view of its composition, competence and interactions with other institutions is necessary to truly understand

78 Katarína Šipulová et al., 'Judicial Self-Governance Index: Towards better understanding of the role of judges in governing the judiciary' (2023) 17 Regulation and Governance 22, 24.

79 See for these different models the two reports drawn up in preparation of CCJE Opinion No. 10 (2007), both accessible at *Martine Valdés-Boulouque,* The Current Situation in the Council of Europe's Member States*,* CCJE (2007)3; See for a report on countries without a judicial council: Lord Justice Thomas, Preliminary Report Councils for the Judiciary, States without a High Council, CCJE (2007) 4; see also Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A critical study in judicial councils in Central and Eastern Europe' (2014) 15 German Law Journal 1257, 1265, who distinguish the Ministry of Justice model, the judicial council model, the courts service model, a hybrid model and the socialist model.

80 For a discussion of the Nordic systems see Aarli/Sanders (forthcoming).

their role in different member states and whether and how they actually help secure the rule of law.

The judiciary in countries with powerful judicial councils is not necessarily perceived as particularly independent, at least if the Nordic countries are not counted as having judicial councils. For example, the 2022 EU Justice Scoreboard shows that the judiciary in Finland, Denmark, Austria, Luxembourg, the Netherlands, Germany and Sweden are considered the most independent by the public. Poland and Croatia have the worst results. Countries with powerful judicial councils like Spain, Italy, Belgium and Slovakia have not achieved particularly good results.[81] According to the 2022 ENCJ survey, judicial councils also do not enjoy particularly high acceptance among judges for personnel decisions.[82] For example, roughly 37 % of participating Italian judges and roughly 65 % of participating Spanish judges assume that promotion is not achieved because of competence. However, not having a judicial council also does not seem to be a guarantee for acceptance: 35 % of German judges assume that promotions to the highest courts are not based on competence. The best results are shown by Denmark (1 %), the Netherlands (1 %), Norway (3 %) and England and Wales (3 %).

A nuanced view is necessary to explain such individual results. The analysis must take into account general trust in public institutions, transparency, economic situation and general stability. It must be assumed that many of the difficulties judicial councils struggle with are beyond their control. Nevertheless, the data shows that just adopting a judicial council is not enough to achieve a judiciary that is perceived as independent and trustworthy.[83] However, adopting another system, for example a Nordic-style court administration, would not be enough either. Rather, a bespoke strategy of small steps tailored to the individual member state is necessary. For example, the systems doing particularly well in relation to decisions on personnel follow different approaches. They employ independent commissions with various compositions and procedures and have persons from

81 The 2022 EU Justice Scoreboard, figure 50, p. 40: <https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2022.pdf> accessed 26 August 2022.

82 ENCJ Survey on judicial independence 2022, 34 ff; <https://www.encj.eu/node/620> accessed 26 August 2022.

83 Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A critical study in judicial councils in Central and Eastern Europe' (2014) 15 German Law Journal 1257; Cristina E. Parau, 'The Drive for Judicial Supremacy' in Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012) 619, 643.

different institutions including laypersons from civil society interact with each other.

4.3.3 A more nuanced approach

Thus, a context-oriented approach to the systemic work of the different Council of Europe bodies is necessary. The Council of Europe should continue to assess situations and legislation in context and emphasize that different approaches can lead to satisfactory results. Therefore, it should adopt a healthy scepticism in respect to lists of best practices and easy fixes. This is especially important if recommendations are adopted in individual member states. The Venice Commission follows this very useful but also resource-intensive approach.

However, it shall not be denied that without general rules, assessing and making suggestions for improvements from a European perspective are much harder. It makes it very difficult to reprimand one country for enacting legislation that others have in place, but which might function differently in its specific context. In the discussion on the judicial reforms in Poland, for example, Polish officials often argued that its new laws were comparable to the German rules on the administration of the judiciary. While this suggestion was not convincing because it overlooked the context of the German system,[84] it highlights the difficulties of comparing the functioning rather than the rules of two different systems. This again shows the importance and difficulties of assessing rules and practices in diverse political and legal contexts. A fine combination of justified criticism on the basis of general principles from a bird's-eye perspective – which is to be expected and desired from an international institution – must be combined with a respectful, context-oriented analysis. A great challenge indeed!

The Council of Europe's bodies seem to be increasingly aware of this. The Council of Ministers,[85] the CCJE and the Venice Commission have all stressed in recent Opinions that institutional changes are not enough but that long-term efforts are needed to achieve independent, trusted and ef-

84 See Anne Sanders and Luc von Danwitz, 'Selecting Judges in Poland and Germany: Challenges to the Rule of law in Europe and Propositions for a new Approach to Judicial Legitimacy' (2018) 19 German Law Journal 769, 800–804.

85 See Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, CM Rec 2010/12, para 35, see also p. 25 of the Explanatory Memorandum.

fective judiciaries supporting the rule of law.[86] Moreover, these institutions are issuing warnings against politicization and corporatism, learning from difficult experiences made in the European rule of law crisis. In its Opinion 24, the CCJE has also cautioned that an all-powerful judicial council is especially vulnerable to politization from within and outside the judiciary.[87] A system of checks and balances involving different institutions may be the best way forward to develop and protect the rule of law.

5 Concluding remarks

This paper has argued that the Council of Europe follows a multilevelled approach through its different institutions. The ECtHR necessarily focuses on the individual and human rights in the cases filed by individuals. The paper showed that the ECtHR, while ruling on an individual case, nevertheless protects guarantees of the rule of law. Moreover, the Court tends to adopt a systemic view, making general remarks on issues such as judicial independence, the rule of law and the institutional foundations of an independent judiciary.

Other bodies such as the Venice Commission and the CCJE take a more systemic approach, drafting Opinions containing abstract recommendations or looking at challenges to the rule of law in a member state, taking a holistic perspective. With their work, these European institutions create a European audience that points out dangers to the rule of law, as has happened during the rule of law crisis. However, the special case of the endorsement of judicial councils by the Council of Europe shows that there are no easy fixes just from lists of best practices and recommendations. However, it should be kept in mind that it is not the fault of the CCJE and Venice Commission that politicians at all ends wanted to see quick results institutionalizing independent judiciaries. While a systemic view is necessary, it must avoid overgeneralization to be effective. Long-term efforts after careful analysis are necessary.

In all this, the work of the different bodies of the Council of Europe is crucial and its judgments and recommendations must be discussed and adopted by the member states with care and caution.

86 CCJE Opinion No. 24 (2021) para 3; Venice Commission, Urgent Interim Opinion on the draft new constitution, Bulgaria, CDL–AD(2020)035 para 37.

87 CCJE Opinion No. 24 (2021) para 25.

Part III:
Perspectives from Practice

The role of Polish civil society in supporting EU activities as regards protection of judicial independence and other elements of the rule of law

Adam Bodnar

1 Introduction

There is no doubt that Poland has been experiencing a crisis of the rule of law since 2015. The crisis has included an attack on the independence of the Constitutional Court, the subordination of the prosecutor's office to political interests, the reduction of the independence of the judiciary and the reduced role of parliament. The concept of constitutional crisis is described in Prof. Wojciech Sadurski's excellent book *Poland's Constitutional Breakdown*[1], as well as in the works of many constitutionalists.[2]

In a speech in the Senate of the Republic of Poland summarizing the term of office as the Polish Ombudsman in August 2020, I described how Poland was suffering due to the anti-constitutional current of changes. Through this I wanted to convey that, in essence, not only was the Constitution broken, but its values were being questioned. This happened not through a single action, but through a whole series of events – legal and political acts – which led to a change in political reality. Poland is a different state than it was in 2015. 2020 was a clear manifestation of this. For the first time in democratic Poland, presidential elections, planned in advance to be held on 10 May 2020, were not organized. No one has been held accountable for this, despite negative opinions of the Supreme Audit Chamber of May 2021 and the judgment of the Regional Administrative Court in Warsaw of 15 September 2020, finding that the prime minister gravely violated the principle of legalism.[3]

The crisis of the rule of law leads to specific consequences. Firstly, there is a growing sense of unpredictability and instability in the legal system and

1 Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).

2 E.g. Armin von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States* (Springer 2021).

3 See e.g. *2021 Rule of Law Report. Country Chapter on the rule of law situation in Poland*, Commission Staff Working Document, Brussels, 20. July 2021, SWD(2021) 722 final,

thus in the definition of the individual–power relationship. Institutional changes concerning the National Council of the Judiciary and the Supreme Court, as well as disciplinary actions against judges, create a sense of threat to participants in the legal system and a sense of instability and chaos.

Second, a so-called dual state as defined by Ernest Fraenkel is gradually being constructed.[4] This is the prerogative state – making decisions and implementing them based solely on political will – and the normative state – leaving space for the legal regulation of social relations. The problem is that politics should never replace law. This conflict can be clearly seen in Jan Matuszyński's film[5] and Cezary Łazarewicz's reportage *Żeby nie było śladów* (*Leave No Traces*)[6] on the murder of Grzegorz Przemyk, when political decisions replace the law, when false scenography is created just to cover up the real responsibility.

Third, the crisis of the rule of law also creates a sense of political and legal irresponsibility for the decisions made and abuses, including violations of the law. This is particularly true of the political dependence of the prosecution service. How can the abuses carried out by the Minister of Justice, precisely enumerated by the Supreme Audit Office (e.g. in the context of the use of funds from the Justice Fund, administered by the Ministry of Justice), be accounted for when the Minister of Justice is also the Prosecutor General?

2 Judicial independence, the rule of law and the reaction of the European Union

Today we look at the crisis of the rule of law from a certain distance. Since 2015 the European Union has developed a set of mechanisms to counteract abuses. The Article 7 TEU procedure, the so-called nuclear option, proved

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0722&from=EN> accessed 1 March 2023.

4 Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (Oxford University Press 1941).

5 *Leave No Traces* movie by Jan P. Matuszyński, presented at the Venice International Film Festival, <https://www.labiennale.org/en/cinema/2021/lineup/venezia-78-competition/żeby-nie-było-śladów-leave-no-traces> accessed 1 March 2023.

6 See information on the book by Cezary Łazarewicz: <http://www.en.nurnberg.pl/2017/10/02/nike-2017-literary-prize-has-been-awarded-to-cezary-lazarewicz-for-his-reportage-zeby-nie-bylo-sladow-sprawa-grzegorza-przemyka/> accessed 1 March 2023.

to be inadequate to address the rule of law crisis. It requires a unanimous vote in the European Council (minus the state under review), but the Polish and Hungarian governments mutually supported each other, thus preventing a unanimous vote.[7] Nevertheless, the European Commission started to extensively use infringement actions under Article 258 TFEU, and could rely on jurisprudence of the CJEU issued as a response to numerous preliminary reference cases from Polish courts. Furthermore, the European Commission developed a practice of preparation of annual rule of law reports that provide a comprehensive overview of the situation in all EU Member States. Finally, in December 2020, the Conditionality Regulation[8] was adopted. This mechanism makes respect for European values a condition for the transfer of EU money. The suspension of payments from the EU Recovery Plan was a similar, indirect method of disciplining Member States.

There were two important milestones in the development of the EU rule of law machinery. First, on 15 July 2021, the CJEU issued a judgment on the disciplinary mechanism operating in the Polish judiciary.[9] As a result of this judgment, Polish authorities cannot depart and claim non-enforcement. Such an approach has a consequence in the imposition of financial penalties, but also in difficulties in getting EU Recovery money. Thus, the European Union has leverage to put pressure on the Polish government. Second, CJEU judgments of 16 February 2022[10] concerning the Conditionality Regulation confirm that the protection of European values, the EU budget and solidarity among Member States are key priorities for the EU development. Therefore, after long legal battles and political discussions, it is now just a question of time when and how the Polish government will implement the CJEU case law concerning judicial independence. The first positive steps have already been taken – four suspended judges (including Judge Igor Tuleya and Paweł Juszczyszyn) could come back to adjudication.

7 Kim Lane Scheppele, 'Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too' (*Verfassungsblog*, 24 October 2026) <https://verfassungsblog.de/can-poland-be-sanctioned-by-the-eu-not-unless-hungary-is-sanctioned-too/> accessed 1 March 2023.

8 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, OJ L 433I, 22.12.2020, pp. 1–10.

9 CJEU, case C-791/19 *Commission v. Poland* (2021).

10 CJEU, case C-156/21 *Hungary v European Parliament and Council of the European Union* (2022); CJEU, case C-157/21 *Poland v. European Parliament and Council of the European Union* (2022).

The Disciplinary Chamber of the Supreme Court has been liquidated and replaced with the Chamber of Professional Responsibility. Nevertheless, some further actions are required.

Right now, after many political decisions and judgments of the CJEU (but also the European Court of Human Rights), one could interpret this situation as a victory for the European Commission and the wisdom of the Court of Justice of the European Union, including its Chief Justice Koen Lenaerts. He constantly repeated that "*You can't be a member of the European Union if you don't have independent, impartial courts operating in accordance with fair trial rule, upholding Union law.*"[11] The CJEU delivered upon his promise and provided the legal framework for the evaluation of judicial independence in Member States.

However, I claim that this process of change would not have happened without strong pressure coming from the Polish civil society and judges. Without their strategic actions, protests and continuous resistance, the European Commission would not have had enough legitimacy to undertake consistent and strategic actions to protect the rule of law in Poland.

3 Civil society in defence of the rule of law

The crisis of the rule of law has been an experience of many Polish citizens since 2015. Many of them experienced changes in Poland and were fearful for their own future and that of their children and grandchildren. Citizens worried about the prospects for Poland's membership of the European Union. At the same time, Poland was experiencing economic progress, and Polish citizens, as a result of important social benefits, could participate in building a more egalitarian society. The rule of law threat was and still is not visible to many. Like in the painting by Bruegel, which probably inspired Polish poet Tadeusz Różewicz to write the following words: "*The ploughman ploughs the land, the shepherd watches over the flock.*" Nevertheless, the rule of law crisis marked a change in the functioning of civil society.

11 Hans von der Burchard, 'EU top court gears up for rule-of-law battle (of its life)' (*Politico*, 17 December 2020) <https://www.politico.eu/article/poland-hungary-rule-of-law-court-of-justice-of-the-european-union-gears-up-battle-of-its-life/> accessed 1 March 2023.

With the crisis of the rule of law, processes are taking place that did not happen before. Before 2015, we could observe a process of pillarization of civil society, according to the theory of Prof. Gregory Ekiert of Harvard University.[12] More and more organizations were corresponding their programmes, ideas and activities to the main, leading political forces. Secondly, organizations became more and more professional, used new forms of activity, and raised funds for their activities. To a large extent, the Polish non-governmental sector was slowly approaching the one found in the earlier EU Member States, although of course this was a process stretching over time and nevertheless growing out of different traditions.

The 2015 transition triggered a new energy in civil society. Firstly, mass organizations, the so-called street opposition, emerged to protest against undemocratic changes. These included the Committee for the Defence of Democracy (*Komitet Obrony Demokracji*), brought to life thanks to a proclamation by Krzysztof Łoziński on 18 November 2015. Later on, Citizens of the Republic of Poland (*Obywatele RP*), referring to the tradition of civil disobedience, was established. The Podkarpackie Rebelyants (*Podkarpaccy Rebelyanci*) and many other, sometimes smaller, local organizations should also be mentioned. Over time, they began to transform, experiencing various organizational and personal problems, but they became the exponents of a new form of activity. There were also individuals leading individual protests, such as Gabriela Lazarek from Cieszyn and Beata Katkowska from Gryfice. But also individuals who decided to sacrifice their lives in defence of values through self-immolation. I am thinking of the sacrifice of Piotr Szczęsny, who set fire to himself on 19 October 2017. In his manifesto, he wrote: *"I protest against the violation of democratic principles by those in power, in particular against the destruction (in practice) of the Constitutional Court and the destruction of the system of independent courts. […]"*

NGOs reached out to possibilities offered by new technologies. A good example is the internet-campaign-oriented organization Democracy Action (*Akcja Demokracja*). Movements for discriminated and disadvantaged groups, such as the All-Poland Women's Strike (*Ogólnopolski Strajk Kobiet*), Girls to Girls (*Dziewuchy Dziewuchom*) or LGBT+ organizations, have gained in importance. The organizations used de facto quite similar methods (protests, petitions, demonstrations, symbolism), but appealed to

12 Grzegorz Ekiert, 'The Dark Side of the Civil Society' (*Concilium Civitas*, 24 June 2019) <http://conciliumcivitas.pl/the-dark-side-of-civil-society/> accessed 1 March 2023.

different traditions. For example, the Committee to Protect Democracy referred to Václav Havel's idea of the strength of powerless, the Women's Strike to feminist ideals.

Organizations that began to counter the rule of law crisis through legal means also began to play an important role. One should note here the Helsinki Foundation for Human Rights, the Civic Development Forum (*Forum Obywatelskiego Rozwoju*), the Wiktor Osiatyński Archive or the Free Courts Initiative (*Inicjatywa "Wolne Sądy"*). The latter organization has built a new narrative about why independent courts are essential for a functioning democracy. They have also shown how to effectively use social media in campaigning for such abstract values as judicial independence. This activity has been appreciated by international human rights circles.[13]

The professional organizations of judges and prosecutors have become particularly important. The Iustitia Judges' Association and the Themis Association, as well as Lex Super Omnia, not only represent the interests of their professional groups, but have become important entities providing civic education, the fight for democratic standards and the rule of law.

Organizations began to cooperate with each other, referring to the need to emphasize the importance of the Constitution and Poland's membership of the European Union. At the same time, initiatives began to emerge that represented these interests on an umbrella basis. One is the Committee for the Defence of Justice (*Komitet Obrony Sprawiedliwości*), which aims to jointly defend aggrieved judges and prosecutors against the disciplinary apparatus, as well as to represent them before international courts and tribunals. Another one is the Tour de Constitution (*Tour de Konstytucja,* Congress of Civic Democratic Movements), which is dedicated to promoting constitutional patriotism, with the support of decentralized structures of street opposition and legal circles.[14]

Initiatives based on crowdfunding have also started to emerge. This was particularly important due to constraints on free media and restrictions on artistic freedom, including limited public support to artists. There have also been initiatives that try to create a ground for reflection on the future of

13 See e.g. 2022 Rule of Law Award by UIA International Association of Lawyers and LexisNexis, <https://www.uianet.org/en/news/egyptian-human-rights-lawyer-mohamed-el-baqer-and-polish-initiative-wolne-sady-selected> accessed 1 March 2023.

14 Lena van Holt, 'Last stop for democracy: on tour with Poland's rebel judges' (*Guardian*, 20 September 2021) <https://www.theguardian.com/world/2021/sep/20/last-stop-for-democracy-on-tour-with-polands-rebel-judges> accessed 1 March 2023.

Poland beyond traditional polarization and divisions in society. One should note here especially *Projekt Spięcie*, which engages representatives of the most important Polish think tanks and ideological circles in conversation.[15]

NGOs defending the rule of law have indirectly become an exponent of the idea that Poland's *raison d'état* should rely on Poland's stable membership of the European Union. They have managed to establish interesting cross-border ties with organizations from other countries. An example of absolute commitment to the idea of European integration was the March of a Thousand Gowns in January 2020, an unprecedented event in the history of the European Union, when judges from more than 20 Member States marched through the streets of Warsaw in defence of judicial independence.[16]

There is certainly the other side of the coin. The above organizations are examples of grassroots movements motivated by the energy and values of their members and supporters. However, the state has also started to shape the space for civil society activities in its own way.

4 Overcoming obstacles by civil society – fight for the rule of law when the space for operation is shrinking

The crisis of the rule of law also has the effect of reducing the space for civil society activity. This is a concept commonly mentioned in the literature.[17] Its essence boils down to restrictions on the exercise of freedom of speech, freedom of peaceful assembly, freedom of association and the right of access to public information. In short, the exercise of political rights which are the essence of democracy. It is an ongoing process, influenced by the political and legal environment.

15 Tina Rosenberg, 'The Magazines Publishing One Another's Work' (*New York Times*, 29 January 2019) <https://www.nytimes.com/2019/01/29/opinion/poland-journalism.html> accessed 1 March 2023.

16 See speech by Krystian Markiewicz, President of Association of Polish Judges "Iustitia" at the March of 1000 Gowns, <https://www.iustitia.pl/en/3596-krystian-markiewicz-president-of-the-assosiation-of-judges-iustitia-a-statement-from-the-march-of-1000-gowns-11-january-2020-warsaw> accessed 1 March 2023.

17 E.g. Adam Ploszka, 'Shrinking Space for Civil Society: A Case Study of Poland' (2000) 26 European Public Law 941; see also European Parliament resolution of 8 March 2022 on the shrinking space for civil society in Europe (2021/2103(INI)), <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0056_EN.html> accessed 1 March 2023.

The most important methods of curtailing freedom of association and restricting the operation of independent NGOs and activists include(d):

- financial support for organizations favourable to the authorities, including the creation of their own organizations by the authorities (so-called GONGOs);
- creating a situation of dependency for independent organizations (e.g. those providing charity work), thereby silencing their criticism;
- lack of funding for certain activities that serve the public interest, but are carried out by organizations critical of the authorities (e.g. those dealing with women's rights or the rights of refugees and migrants);
- harassment and repression of some NGO activists, mostly through the use of the prosecutor's office;
- the use of emergencies (pandemic and state of emergency) to limit the possibilities for action;
- SLAPP-type lawsuits (strategic lawsuits against public participation) against critics of the authorities;
- lack of access to state-controlled media for NGO leaders and independent thinkers, and thus limiting space for public discussion on important issues (which, after all, should serve all citizens);
- limiting the capacity of private media, through financial dependence on public authority or other forms of creating a "chilling effect";
- tacit acceptance of violent actions by police during demonstrations.

An important concept for defining our reality is "discriminatory legalism". This is a situation where the law is enforced ruthlessly against ideological and political opponents, and is disregarded (or not applied) in the case of violations committed by allies of power. In other words, the law becomes an instrument of repression. A teenager is summoned to family court for using a megaphone (and violating noise standards), while a fascist using hate speech for years can escape any repercussions.[18]

Krzysztof Podemski points out that Poland is undergoing a process of de-democratization according to Charles Tilly's theory[19] – a weakening of the

18 Adam Bodnar, '„Für meine Feinde das Gesetz": Das Rechtsverständnis der PiS-Regierung in Polen' (2021), 71 Osteuropa 99, 99–111.

19 Krzysztof Podemski, 'Proces de-demokratyzacji systemu politycznego a demokratyczne ruchy społeczne: Przypadek Polski 2015–2018' [Process of de-democratization of the political system and the democratic social movements: Case of Poland 2015–2018] in Jacek Kołtan and Grzegorz Piotrowski (eds), *Kontrrewolucja u bram* [Counter-revolution at the Gate] (Europejskie Centrum Solidarności 2000).

four dimensions of consultation, i.e. "*any public means through which citizens express their collective preferences about state personnel and policies*". These dimensions include the breadth, equality, protection and mutual commitment of consultation. On the other hand, there is a consolidation of the power of the state through an increase in its redistributive actions in the sphere of resources, forms of activity, and human relationships. This is an abrupt, sudden process, based essentially on an elite decision, not preceded by the mobilization of the masses. Redistribution not only concerns material resources, but is also a redistribution of dignity. This allows the whole process of de-democratization to take place.

5 Civil society changing its character as a result of the rule of law crisis

There is no doubt that civil society has changed its character. Civil society has learned new forms of action, such as the organization of mass demonstrations or expressing non-violent dissent. Rooting itself in the structures of the EU and the Council of Europe has created the opportunity to pursue strategic litigation, including achieving landmark judgments (such as the CJEU judgment of 15 July 2021 regarding the Disciplinary Chamber in the Supreme Court). For many, the post-2015 events have become a watershed in terms of life path choices. As Prof. Marcin Matczak[20] writes, this was not a planned choice. Specific activities, attitudes, appearances made them public figures overnight: "*Everyone is patting you on the back and congratulating you on your courage, and you're just starting to get scared, because it all seems to have gone too far.*"

For some people, the crisis of the rule of law has become a personal challenge, a huge professional risk, a moment when reality has said "check" to them. Probably many of them would like to practise their profession as a judge or prosecutor normally. However, in extraordinary times, times of trial, there is no space for ordinary behaviour. Such an approach would mean compromising, saying goodbye to ideals, to professional dignity, to everything that independent judges or prosecutors have learned. They believed it is their responsibility to fight for ideals, for the dream of a free and democratic Poland. They took a huge professional risk, not knowing whether the wind of history would not blow them away in a moment.

20 Marcin Matczak, *Jak wychować rapera? Bezradnik* [How to raise a rapper. A joyless guide] (Społeczny Instytut Wydawniczy Znak 2021), 23.

They paid a huge price for this. A number of judges have been suspended in their professional functions. A number of them were the subject of disciplinary proceedings or other forms of reprisals.[21] Prosecutors were forcibly posted, such as the first one – Mariusz Krasoń – forcibly sent from Kraków to Wrocław, without taking into account that he had to look after his sick parents. One should also mention human rights defenders who were suffering the consequences of their activities and civic courage (such as Marta Lempart).

Forty-five years ago the Workers' Defence Committee (*Komitet Obrony Robotników, KOR*) was founded. It was then that the intelligentsia created a programme of support for the workers. KOR opened the way for change, for the creation of "Solidarity". For the 45th anniversary, KOR members formulated a letter to judges, prosecutors, lawyers and solicitors. They wrote:

> "On the 45th anniversary of the founding of the KOR, we – its members and collaborators – address today's defenders of human and civil rights, defenders of the rule of law: judges, lawyers, solicitors and prosecutors – we admire you and thank you.
>
> To all of you who adjudicate in accordance with the law and your conscience, and in your proceedings are guided by the principles of dignity and integrity – as you have sworn to do. To all of you who stand by these principles tenaciously, despite political pressure and persecution.
>
> There are numerous groups in Poland who are resisting – fighting for women's rights, for workers' rights, for climate protection, for education, for the preservation of independent media. But your fight is to defend the very essence of democracy: it is to protect the right of citizens to dissent, it is to maintain a framework of security for citizens and to put limits on state oppression. This is fundamental for the future of Poland and for society, however divided it may be. That is why we are grateful to you. And we stand behind you with a wall."

It was an important, symbolic letter, connecting generations of Polish activism and Polish history. At the same time, that standing up for values was not the experience of the whole of society, but only of certain judges and civil society leaders. Many Polish citizens accepted the new rules of the

21 See e.g. description of different forms of reprisals against Judge Waldemar Żurek in the Strasbourg case *Waldemar Żurek przeciwko Polsce*, ECtHR, case no. 39650/18 Żurek v. Poland (2022).

game, accepted some form of compromises in their daily life or even started to opportunistically participate in dismantling rule of law and democratic guarantees. Taking this into account one should even more appreciate the work of those who resisted.[22]

6 Lessons for the rule of law in other EU Member States

The lesson of resistance by Polish civil society and judicial associations should be an important guide for other EU Member States and their judiciaries. Rule of law and judicial independence should not be taken for granted. In the case of populist motivations, the judiciary could become the subject of attack even in established democracies. A good example is the reaction of Boris Johnson to the decisions of the UK Supreme Court on the prorogation of the work of parliament[23]. Even in a well-established democracy, a leading politician started to undermine the credentials and legitimacy of judges.

In contemporary democracies there are different ways via which guarantees of judicial independence might be the subject of pressure. They may include legislative changes, cuts in budget, using the administration of justice as a way of exerting pressure on judges or forms of individual pressure from the executive branch, media or corporations. Moreover, pressure may be wielded via social media, due to its omnipresence and direct way of engaging citizens. Judges and courts may usually speak only via judgments or other judicial pronouncements. Sometimes they have to issue controversial decisions, being against the expectations of larger groups of citizens. In such a situation, courts might be especially vulnerable to unjust criticism and having their legitimacy undermined. In this new communication environment, courts may not be fully equipped to resist such dynamics of pressure.

That is why there is a need for strong civil society that would be able to defend the judiciary when it is under threat. It should be the responsibility of the state to have this in mind and to support civil society organizations, think tanks and universities that are ready to provide such indirect support to the operation of judiciary. Moreover, educational programmes concern-

22 See on this Adam Bodnar, 'Polish Road toward an Illiberal State: Methods and Resistance' (2021) 96 Indiana Law Journal 1059.

23 R (on the application of Miller) v The Prime Minister, [2019] UKSC 41, <https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf> accessed 1 March 2023.

ing the role of the judiciary in a society are needed in order to raise awareness of judicial decision-making among school pupils, students and ordinary citizens.

In this regard, the Polish example of a fight for the rule of law could be interesting for other countries. Poland is not only a laboratory of different negative practices affecting the rule of law. Polish civil society has built good practices of resistance as well as new educational techniques concerning the judiciary. In particular, one should highlight the recognition of the importance of communication for the public's understanding of why independent courts are important for citizens – the use of virtual reality to illustrate the consequences of the loss of the rule of law (Dr Konrad Maj, SWPS University) or the 'Free Courts' activity of illustrating the consequences of the loss of the rule of law from the perspective of an ordinary citizen – with the use of short video messages and their distribution via social media.

One of the values of the European treaties is the protection of civil society. Specifically, Article 2 TEU (second sentence) provides that European values (including the rule of law) should be common to the Member States *"in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".*

This means that the rule of law should not be protected in isolation, but by building a civil society able to protect it. Taking into account the Polish example and good practices, the European Union should promote programmes supporting the involvement of non-governmental organizations in the protection of constitutional democracy. Such a task should also be on the shoulders of particular EU Member States. Even where good programmes of civic education and support for non-governmental organizations exist, those states should reflect on whether the response to actual or potential threats to the rule of law is sufficient.

Marian Turski on the 75th anniversary of the liberation of the Nazi concentration camp in Auschwitz stated that we should follow the 11th Commandment – We cannot be indifferent.[24] I understand this statement that we must recognize that the public sphere concerns each of us, and thus requires our personal, real commitment. We must show solidarity

24 *"Never be a bystander whenever a minority is discriminated against."* The speech by Marian Turski at the memorial ceremony on 27 January 2020 in Auschwitz, <https://auschwitz.info/en/commemoration/commemoration-2020-75th-anniversary-of-the-liberation/2020-01-27-marian-turski-the-eleventh-commandment.html> accessed 1 March 2023.

and support to all those who suffered. But we also have to build, on the basis of this experience, public programmes and policy ideas that would lead us to create a strong and resilient civil society, responsible for shaping modern citizenry. The Polish example shows how the rule of law might be vulnerable and that its protection requires great care in every EU Member State and in strategic EU policies.

Keynote speech

Judicial appointments: Between politics, independence and professionalism – An impulse for discussion

Klaus Rennert

Ladies and Gentlemen,

The title of my presentation, "Judicial appointments: Between politics, independence and professionalism", attempts to highlight the tensions that judicial appointments encounter. I do not want to showcase a particular national legal system or the European view. Instead, I would like to take a step back and formulate some general theses on what should be considered if one wants to legislate on this challenging topic. The following six theses are intended to inspire reflection and discussion.

1 Personnel issues are power issues

The first thesis is a mere factual one, but to me it is the most important one. Personnel issues are power issues; personnel decisions are therefore political decisions. They cannot be "depoliticized". In particular, they cannot be depoliticized by removing them from the political process. On the contrary, it is likely that any body to which the competence for personnel decisions is assigned will be overtly or covertly politicized. This also applies to the appointment and promotion of judges.

Therefore, I believe it is misplaced to try to depoliticize judicial personnel decisions by entrusting them to the judiciary itself. This will lead to a situation in which these judges, the representatives of the magistrates, the judiciary, which is to make the personnel decisions, will politicize itself and organize itself along party lines systematically. There will be judges' representative bodies that will be Christian Democratic, Social Democratic, green, right-wing, left-wing or otherwise coloured. Thus, personnel issues cannot be depoliticized.

Naturally, the higher the judicial office in question, the more interested politicians become. Politicians are not yet interested in the recruitment of

a very young judge. However, the interest of the partisan politics is considerable for presiding positions, especially for presidencies of the highest courts.

2 Personnel decisions must be subject to democratic legitimation

My second thesis is: political decisions, including personnel decisions, in a democracy must be democratically legitimized. In a parliamentary democracy, they must be referable back to parliament. This also applies to the appointment and promotion of judges. Furthermore, judges are supposed to represent the law. The law is not a mere instrument of rule by the respective parliamentary majority, but the basis for the coexistence of society as a whole. For this reason, personnel decisions regarding judges should also not be made in a unilateral-party manner; instead, they should be made based on the broadest possible consensus.

When I advocate that personnel decisions for judges should be referred back to a parliamentary decision, this does not mean that they must be referred back to the respective parliamentary majority. On the contrary, they should be based on rules according to which the parliament is involved in judicial personnel decisions to the greatest possible extent. Be it by raising the quorum for an election to two-thirds or three-fifths of the parliament, be it by limiting the elections to a certain proportion of judges and then allowing the next parliament to decide on the next set of judges so that the judiciary can be as plural as possible.

3 When assuming office, judges are dependent

My third thesis: at the moment of their appointment or promotion, judges are, of course, dependent. They depend on those who appoint or promote them, which is absolutely unavoidable. However, it is essential to ensure the independence of judges during the time before and after their appointment.

This requires, first and foremost, high-quality regulations on the status of judges, in particular on their objective and personal independence, including disciplinary law with exceptionally high substantive and procedural standards. It must not be possible to misuse disciplinary law to drive politically disfavoured judges out of office. However, the regulations on the status of judges only apply to the period after a judge has been appointed. They

also only secure the external independence, not the judge's personal beliefs and habitus.

For this reason, rules for strengthening the internal independence of a judge must be added, above all for strengthening the independence vis-à-vis so-called "party friends", both before the appointment as a judge and afterwards. A highly esteemed colleague of mine, a former judge at the Federal Constitutional Court, once told me: "At the moment of appointment as a Federal Constitutional Court judge, you are, of course, dependent on the political constellation that is to appoint you. But afterwards, one becomes independent in the judge's office, and the political parties are often surprised how independent the judge can then be concerning their requests." That is all well and good if that is the case. Nevertheless, I am convinced that one should not rely on this. One should think about what precautions can be taken to ensure that the judge is also internally independent and remains independent.

4 Complex legal systems require professionally excellent judges

Fourthly, we live in highly complex industrialized countries. And these highly complex industrialized countries need and produce highly complex legal systems. As a result, there is a need for highly competent judges. This makes the professional excellence of a judge an indispensable eligibility criterion for the office of judge. Because it is a substantive criterion, and thus one that is far away from politics, it simultaneously safeguards judicial independence.

There is another advantage to the criterion of professional excellence. At least in principle, regardless of an unavoidable vagueness, it is also justiciable, i.e. it can be reviewed by a supervisory court. It hence provides the basis for judicial review of personnel decisions. A personnel decision between several applicants can be reviewed by a court to determine whether it is based on the criterion of professional excellence.

A system of scrutiny by the judiciary guided by the professional suitability of candidates for judicial office and exclusively by this has proved to be the most effective way of safeguarding judicial independence. For this reason, I consider this to be the essential element of our arrangement of rules for judicial appointments in Germany. Unsuccessful competitors can appeal to an administrative court with a competitor's lawsuit and demand that the

administrative court review this personnel decision judicially, solely for the criterion of professional excellence.

5 The judges' representative bodies ensure professional excellence

Fifthly, the participation of judiciary representatives in judicial personnel decisions provides further emphasis to the criterion of professionalism. However, the participation of representatives of the judiciary should only be given the status of co-decision-making and a significant weight if the representatives of the judiciary are democratically legitimized, i.e. if parliament has elected them.

I have pointed out that judicial appointments, personnel decisions, are political decisions that require democratic legitimization by parliament. Nevertheless, suppose judiciary representatives are to be allowed to participate in this personnel decision with decisive weight. In that case, this presupposes that the judiciary does not elect these judges' representatives itself. The consequence of this would be that the judiciary would risk becoming politicized, which would devalue their professional opinion. Even if it is only in the sense of a perhaps well-founded, perhaps unfounded suspicion that the co-deciding voice of the judiciary is not professionally but party-politically motivated.

6 Proper selection of judges requires ethics of responsibility

My last, sixth thesis is as important to me as the first. Both theses frame the issue as a whole. The sixth thesis is: any system for the appointment or promotion of judges can only achieve its goals of independence and professional excellence to the extent that the decisive persons or bodies feel personally committed to these goals. A good set of legal rules can stabilize the respective system and counteract weaknesses and abuse. However, it will never be able to prevent all abuses. Even a good legal system of rules is not completely immune to abuse. It always depends on the fact that the decisive persons and bodies, in our case political decision makers, consider the independence of the judiciary to be an important asset and want to defend and promote it to the best of their ability.

These are the six theses on the basis of which, in my view, the rules on the appointment and promotion of judges must align. As you can see, this is

a very complex topic and I am therefore looking forward to any discussion on this. Thank you.

Panel discussion

How to overcome the challenges of the rule of law in the EU?

with Bettina Limperg, Joachim Herrmann, Wojciech Piątek and Ivo Šlosarčík, moderated by Mattias Wendel and Astrid Lorenz[1]

Challenges of the rule of law

Lorenz: Today, we will talk about the rule of law, instruments and options for action, and the rule of law culture.

Wendel: The rule of law crisis is existential and very multifaceted. It encompasses judicial independence, the fight against corruption, and media diversity, but possibly also different normative models, perceptions of the relationship between politics and law or the source of public power, and perhaps different ideas of identity and the community of law. In your view, what are the central challenges to the rule of law in Europe, and how should they be addressed?

Limperg: Before I come to the challenges of the rule of law in Europe, I would like to say something about the tremendous gift of Europe. Let us remember the unimaginably criminal actions of the Germans in the Second World War with the invasion of Poland, Europe and, in fact, half of the world. After this destructive experience, Europe could only be re-established in the 1950s thanks to an almost unjustified act of trust on the part of our partners – the Allies and our neighbours. That was unimaginable after what Germany had brought upon the world. We must never forget what it means to set out together, first in a smaller circle and later with many European neighbours. It is a promise, a promise of freedom, a promise of security, a promise of the rule of law, which we then made to each other. Starting from the economic union, we have built a community based on the rule of law. That is something we have to hold on to – a truly magnificent achievement of humanity, compassion and the idea of freedom and justice.

1 An abridged version prepared for the book is printed. The spoken word is authentic and available at https://www.europa.sachsen.de/1-trinationale-rechtsstaatskonferenz-des-freistaates-sachsen-6635.html.

Of course, this also includes the collapse of the Iron Curtain, eastward enlargement and German reunification. These are all moments of happiness in history that are closely linked to the idea of the rule of law and to the idea of the separation of powers, which is part of the rule of law and is a prerequisite for it.

At the same time, this also describes a complexity that can lead to a crisis and a challenge because the interconnections have become much stronger over the decades. The depth of regulation by the Union has also increased significantly. We must learn to cooperate in this increasingly intertwined and legally complex world. We are united in diversity but on a contractual basis. Currently, we see a new spirit of return to national values emerging. We must now learn how to find our way back to a new phase of unity in diversity in this very complex situation of increasing legal intertwining of Union law with national law and constitutional law, as well as with fundamental European values.

Separation of powers and independence are concepts that are not static, that must be constantly reconciled, that continue to evolve, and that we must redefine. One way is that we do not cease to talk, to communicate with each other, not about each other, or in an accusatory way. There are understandable, sometimes political, reasons for many developments. We have to talk about that. What can politics do? What can the law and the judiciary do? How are the powers assigned to each other? These questions bring us to the rule of law because the rule of law divides power. That is always conflicting because each branch of power wants the most power. Moreover, it is a particular conflict now that power has to be shared in Europe as well. In the awareness of the value of this great Union, however, we have to get back into the conversation, scientifically and practically, and look together for common pathways. Only through communication will we succeed in interpreting and applying in unity the treaty on which our community is based.

Lorenz: Mr Piątek, from your point of view, what are the hot issues? What do we need to focus on?

Piątek: One can mention two areas that are discussed very often. The first is judicial independence, and the second is dialogue.

The independence of the judiciary must be constantly strengthened because it is not given forever. It is easy to lose but much more challenging to regain, and this is true in all countries of the European Union. There is no

level of independence from which one can say it is perfect, and we do not need to do anything more.

In Europe, countries with a very rich tradition of judicial culture show great independence, which Eurobarometers and other instruments can measure. These countries are still trying to strengthen and consolidate their independence. In the Scandinavian countries, dedicated agencies (National Courts Administration) have been created to support the courts and to help transfer the judicial power out of the competence of the parliaments. The French parliament has just passed a new law to build more trust in the judiciary. At conferences, for example in Austria and Denmark, the question of how independence should be further strengthened is being discussed.

We should look at the problem from two points of view here – the external and the internal perspective. The external perspective only wants to bring the judiciary closer to citizens. So that people understand its workings and have confidence in how judgments are made and how justice is carried out. On the other hand, the internal perspective is the question of independence and the appointment of professionally qualified judges who can support the system with their experience and gain independence in the course of their service.

Dialogue is also essential, cultivating respectful interaction with people who have a different view from ours. That we talk to each other, perceive each other, listen to our arguments, and address these arguments professionally is the only way. Not an easy way in light of the political situation in many countries. Often the only aim is to find political acceptance among the citizens. Furthermore, there is much talking and little listening. We have to work towards finding common solutions.

Wendel: We have heard the word dialogue several times. Mr Herrmann, the European Commission is also involved in an institutional dialogue in many ways. In your view, what are the central challenges to the rule of law?

Herrmann: As you know, the issue of the rule of law is a crucial one to the European Commission. Ms Limperg has already put it in a nutshell, the European Union as a peace project, an integration project that should overcome division and bring the peoples of Europe together. I do not want to repeat this here; however, I would like to remind you of the fundamental, shared values of the Union, of Article 2 of the Treaty on European Union, which, in addition to the rule of law, includes democracy, freedom and

human rights, and where the rule of law has a particular function, namely to support the other values in their materialization.

From its very beginning, the European Union has been a community based on the rule of law, to use the words of Walter Hallstein or, later, the ECJ. Therefore, a crisis of the rule of law also affects the very existence of the European Union. It would be excessively narrow to present the challenges of the rule of law as a debate between the EU or Brussels on the one hand and one or another Member State on the other. The rule of law concerns us all.

The point is that everyone in the European Union is treated equally in the eyes of the law, without politics coming into play, that equality before the law is guaranteed, and that the checks and balances in our democratic systems work. That corruption is fought, that EU funds that are used are protected from misuse, and that there is media plurality in our Member States, where free access to information and democratic discourse is possible. And not to forget that civil society should have a framework in which it can function freely and act as a watchdog on political forces. That is why the crisis of the rule of law affects the European Union's identity.

For a community of law such as the EU, the efficient application of Union law is central, and this is entrusted not only to the ECJ but also to the courts of the 27 Member States. After all, an Italian or a Polish judge are all European judges. If such a judge is no longer independent, then the question arises as to how the EU law can still be applied efficiently in this common area. It also relates to the principle of joint trust in judicial cooperation but goes beyond that. For example, in town twinning, cultural or school exchanges – if now in one country a town declares itself LGBTIQ-free, what does the other side do? How do you deal with that? These are fundamental questions that we all have to find answers to, not just the institutions of the EU.

It also concerns the internal market, which ultimately can only generate our prosperity if it rests on a legal framework. The various economic actors must be assured that they can rely on the law.

Lorenz: Mr Šlosarčík, from your perspective as a scientist, what are the hot potatoes we have to deal with?

Šlosarčík: I want to focus on two challenges to the rule of law in Europe – trust and Covid-19.

My predecessor mentioned that the rule of law not only concerns the relationship between Brussels and the Member States, and I want to stress

how vital cooperation between the Member States and their courts is. One of the biggest challenges in the rule of law in the EU is, therefore, to maintain mutual trust between the courts of the different Member States.

Only through trust is it possible to enforce the mechanisms of mutual recognition. Everyone cites the European Arrest Warrant as an example. Nevertheless, the principle is much broader and has become one of the pillars in constructing the European area of justice and European integration. We cannot, of course, want something like blind trust. Today, we expect a critical mutual trust, a functional mutual trust, between the different judicial systems of the Member States. If there is no effort to maintain this trust, the foundation on which European integration stands crumbles.

The second challenge relates to specific incidents that have occurred in recent years. Namely, how do the judiciary and the rule of law deal with the issues raised by the coronavirus pandemic? Every country has looked for a way to restrict activity, and it is precisely with reference to the rule of law that this has been done. On the one hand, individual rights are to be preserved, but on the other hand, the rule of law is not only a package of rights but also a package of duties that every individual has to assume.

The courts have behaved quite differently in this mixed situation in the Czech Republic. The Supreme Administrative Court is very active and somewhat more passive is the Constitutional Court – not only for the reason that these courts would have a different approach but also because the government used different instruments. The basis of some activities is the Act on Security of the Czech Republic. This law made it possible to declare a state of emergency, with extraordinary legal powers for the government. The state of emergency was then prolonged by parliament. As a result, many of the government's measures fell outside the standard pandemic law. Complaints about many measures then ended up going not to the Constitutional Court but to the Supreme Administrative Court, which was thus empowered to give the government an explanation of how it envisaged upholding the rule of law in such an exceptional situation.

However, we cannot say that the Czech government has listened very well. It has repeatedly taken measures by government decree that it actually suspected would be overturned by the Supreme Court. After a few weeks, precisely this happened, and the government returned with the same decree. Then it took another few weeks before it was overturned again. So, for several months, the government pushed through with its Covid policy despite the clear opposition of the Supreme Administrative Court.

Every state deals differently with the massive challenge of the coronavirus pandemic, but the courts everywhere have the opportunity to show what importance they have for the functioning of the state. It clearly shows that the rule of law debates are not abstract debates that are just discussed at conferences; they do have an evident impact on the lives of individuals and large populations in every state.

Piątek: We, as academia, can also show the value of the rule of law. We have a lot to do with young people, and we can invest in their development and accompany them. They often ask many questions; I also see this from my Polish perspective. They are looking for answers. We should show a way, not give concrete answers, just as this academic exchange occurs here. I encourage my students: go to Germany, to Austria. It is a real investment in the future. When we talk about the crises that affect us, we should also continue to look at how things will be in twenty or thirty years. The more young people we address, the easier it will be to deal with this crisis.

Wendel: In a way, that is knocking at open doors in our case. Yesterday, as part of the conference, we held a trilateral court simulation on questions of the rule of law. Students from Poland, the Czech Republic and Germany came together to discuss European law.

Limperg: We also try to reach people beyond the judiciary and academia. For example, the Forum Recht Foundation, based in Karlsruhe and Leipzig and virtual space seeks precisely to deal with the issues of the rule of law, which often seems so complicated, twisted and complex, so that citizens can understand it. One should try out its rules, for example through role-playing, through moot courts. It would be an excellent initiative if one could play this across national borders and invite each other and ask, what is your solution to the problem? What is my solution? Then you are right in the middle of it, and I think there is a need for such examples in Europe as well.

Controversy over instruments and options for action

Wendel: I would like to return to the European Commission's role. On the one hand, you were sued by the European Parliament, which argued that you should have intervened more strongly and earlier in the rule of law crisis. On the other hand, crisis intervention is not without controversy. During a political deal in the Council, the EU issued a regulation that ties the disbursement of EU funds to comply with specific requirements. What

is the role of the Commission as guardian of the treaties here, and is the new conditionality mechanism a suitable instrument for combating a lack of judicial independence?

Herrmann: The question of legitimacy is an essential one. In the justice field, it is not the Commission's task to tell individual Member States exactly how they should organize their justice systems. That is clearly the competence of the Member States. At the same time, of course, there are requirements of primary law, as the ECJ has also made clear, for example on judicial independence. As guardian of the Treaties, the Commission must, of course, respect these Treaty requirements. That is one of the reasons why the European Commission has developed this toolbox to improve the rule of law situation in the EU with different approaches.

Let us take the dialogue, which has already been mentioned many times. A few years ago, it was not at all common in Brussels to discuss the rule of law in the Council of Ministers. Commissioner Reynders proposed in the Council in 2016 to introduce a peer review between the Member States, but there was no interest in it. Furthermore, his previous initiatives did not really elicit any response at all. Nevertheless, then, in the light of the challenges we have seen in the last few years, President von der Leyen, in her guidelines for the new Commission in July 2019, envisaged an annual rule of law report that would not concern individual Member States, but all 27 based on equal treatment and objectivity. This was one of the great projects of the Commission and the Justice Commissioner.

We have published the first two editions of the Rule of Law Report in the last two years, which is publicly available. We developed a solid basis for this and talked intensively with the government authorities, but also with the non-governmental organizations, media and judiciary representatives. On this basis, we produced the Commission's report on the rule of law in the EU and the individual Member States for the first time. With this basis, it was then possible to discuss the rule of law – in the Council, the European Parliament, national parliaments and NGOs.

In the General Affairs Council, the rule of law in five Member States has been discussed every six months since this report exists. What is the rule of law situation there? Once a year, there is a general discussion on the rule of law situation. The justice ministers have also started to discuss the justice-specific rule of law issues twice a year. It is also essential to take this out of Brussels and have a debate in the Member States as well. For example, Justice Commissioner Reynders discussed the second edition of

this report in Vienna, Rome, Luxembourg, Budapest, Warsaw, Paris and Brussels, among other places, with parliamentarians, NGOs and so on. This strand of dialogue is vital, and progress is being made.

At the same time, there are, of course, also reactive instruments, in addition to the conditionality mechanism, the infringement procedure. The Commission has launched several infringement proceedings against Poland, for example to protect the rule of law in the Union, including the principle of the independence of the judiciary. In 2019, for example, one case concerned the disciplinary regime for judges, which, in our view, violated the requirements of judicial independence in Poland. The ECJ ruled in favour of the Commission in a judgment of 15 July 2021. In the context of infringement proceedings, interim measures may also be issued. In another case, the Commission had brought infringement proceedings against the law reforming the judiciary in Poland before the ECJ. In that case, the ECJ had issued an interim measure. The Commission concluded that Poland had not implemented this interim measure. The ECJ, after being approached again by the Commission, even imposed a penalty payment. This is very unusual and the level, at a million euros a day, even more so.

This demonstrates that the primary law provides legitimacy and, at the same time, the task of using reactive instruments if necessary to ensure the rule of law. There are other instruments, and one could mention Article 7, which involves punishing severe violations of the rule of law, which could ultimately lead to a withdrawal of voting rights according to the treaty.

Concerning the conditionality mechanism, it should be briefly recalled that this is an instrument, a regulation, created under the German Presidency in December 2020. Many citizens and the European Parliament have asked themselves: if there are severe violations of the rule of law in a Member State and they create a risk for the Union's budget, why is it not possible to protect the Union's funds? This instrument was created by the European lawmakers, the Council and the Parliament on the proposal of the Commission. Poland and Hungary then decided to challenge this regulation before the ECJ. The regulation applies from 1 January 2021, and without formally initiating proceedings, the Commission sent requests for information to Hungary and Poland, which were also answered. This reactive instrument, therefore, does not only involve the Commission, but according to the regulation, the Council ultimately has the power to decide. All Member States are represented in the Council.

Lorenz: Ms. Limperg, how do you assess the role of the ECJ or the relationship between the ECJ and the national courts? After all, a cooperative relationship is necessary for the European legal system to function at all, but here, too, the question of legitimacy arises: where is the need for cooperation unduly excessive and where is it just right?

Limperg: First of all, this is a very unexciting situation. It is a regulated proceeding, especially the preliminary ruling procedure, which is basically a structured dialogue. It involves questions about the interpretation and application of Union law which are brought up, and the answers provided. That can lead to conflicts. Because Union law is interwoven into national law in different ways, partly it has to be implemented, and partly it has a direct effect. It is not always easy, and, as always, it depends on the following: are the right questions being asked, and how can we deal with the answers?

The ECJ emphasizes that the answers should apply equally to all Member States. However, it is not always easy for the ECJ to answer in the necessary abstractness. From my point of view, also from the point of view of our court, this has been a learning process. Of course, the first impulse is to preserve one's national law. Now we are learning and accepting that it is our task also to give effect to Union law.

In my view, the ECJ has also gone through specific phases. It, too, had to learn not to appear excessive, to leave national law in place or to leave the implementation of European law to the national user again. However, my impression is that this is a successful process overall, which on the one hand gives Union law an increasingly self-evident effect, but on the other hand also strengthens the national legal systems in their Union law character.

Lorenz: In political science, there is a concept of judicial self-restraint or moderation in favour of specific goals, that is, that you do not do everything that you would legally be allowed to do. Is that something you think about and talk about, even as a court? How much is suitable to use now, for whatever considerations, and should one sometimes restrain oneself?

Limperg: Yes, of course, we must hold back; we have actual power. We are the third power, and power and force must always be exercised with restraint. Firstly, only within the framework it is given to you, and secondly, always with a view to the other party, whoever that is – in civil proceedings, for example, the other side, which must be given space. We have the

good procedural principles of the right to be heard and the fairness of the proceedings, which always consider all interests simultaneously. Of course, courts must exercise restraint concerning our theme of the rule of law and the separation of powers. Neither should the courts take away the space for politics, nor should politics take away the space for the courts.

Mr Šlosarčík has also just mentioned the example of Covid. A review of measures by the judiciary was of course called for, but the judiciary must also accept certain justifiable fundamental decisions by politicians. Regarding weighing up proportionality, the courts can set a framework, but they have to feed this back to parliament. That is what the ECJ should also do: it can say that this is the European legal framework, and the rest is again national competence.

Wendel: Let us return to the scholarly perspective. In day-to-day practice, the dialogue between the ECJ and the national courts functions smoothly for the most part, but precisely in the area of the rule of law, which is often reconstructed with reference to identity, do we not run the risk of running into conflicts that may at some point become difficult to manage? Some national constitutional courts refer to this concept of constitutional identity and thus enter into disputes with the ECJ. It can also affect the relationship of administrative jurisdiction to the ECJ.

Šlosarčík: Debates about a possible conflict between the constitutional identity of the Czech Republic and European law began even before Czechia joined the EU. There were discussions about whether the country was prepared to reject the supremacy of European law. Particularly at the academic level, there were debates about, for example, the Union relevance of the Beneš Decrees and whether Union law influences them. The European Parliament also took a position on this. Questions arose as to how the Czech Republic, the government and the Constitutional Court, for example, would react to making the use of nuclear energy in the Czech Republic impossible if it came to the Europeanization of the hitherto only bilateral dispute between the Czech Republic and Austria over the nuclear power plant in Temelin.

Such considerations were more likely to be made by politicians than by judges. For example, when the ratification of the Lisbon Treaty was prepared, at the last moment, really on the last day, then President Václav Klaus said that he would not complete the ratification with his signature if the Czech Republic did not demand an opt-out from the Charter of Fundamental Rights, as Poland, the United Kingdom and also Ireland then

did. It increased the risk that the Czech Republic would be sidelined with this opt-out. In practice, there would have been a conflict, which carries an element of constitutional identity.

From the perspective of European law, there was a marginal dispute concerning social security, social insurance and the consequences in connection with the disintegration of Czechoslovakia on 1 January 1993. Here it had to be clarified which mode Slovak citizens in the Czech Republic and Czech citizens in Slovakia should follow. It was a particular matter which became the subject of a dispute between the Constitutional Court and the Supreme Administrative Court. The Supreme Administrative Court applied European law and turned to the European Court of Justice with a referral question. Later, the Constitutional Court stated that European law should not be applied to this specific case and that the interpretation of European law was irrelevant to this problem. It was primarily a bilateral dispute between the two highest courts in the Czech Republic, in which European law was only used as an instrument. This dispute then calmed down in the Czech Republic, and the argumentation regarding European law was no longer used.

So the debate about the Czech constitutional identity and the EU exists, but it has had a minimal practical impact so far. The Czech Republic requested the opt-out that I mentioned, and it was promised that it would be negotiated. However, the Czech government withdrew the opt-out demands when the new President Zeman took office and no longer represented this demand.

Wendel: The "Landtová saga" you refer to, in which the two highest courts in the Czech Republic fought out a conflict between themselves through the vehicle of European law, is an excellent occasion to ask how the relationship between precisely the administrative jurisdiction and the European Court of Justice presents itself. Following that, is there a European rule of law culture?

Piątek: It would be a mistake to set these two legal systems against each other or to say: we have our law on one side and foreign law on the other. Because European law is a component of the Member States' legal systems, Polish law is also part of it. Article 91 of the Polish Constitution mentions the primacy of European law, and the administrative courts have to implement this. I do not see any significant problems here, except that we naturally have specific problems in the context of this dialogue.

Administrative law has the characteristic that it is very much intertwined with EU law. Polish administrative courts emphasize that they are part of EU law. They often turn to the European Court of Justice with questions in preliminary ruling proceedings. In 2020, there were six such requests. Consequently, on all these six questions, the court decision was awaiting the ECJ's answer, and the administrative courts considered all indications and assessments by EU bodies.

One of the questions most recently referred to the ECJ concerned appointing judges to the Polish Supreme Court. It was related to whether one can invalidate the national supreme chamber or its decisions. Following the answer, the interpretation by the European Court of Justice was considered and implemented. The Supreme Administrative Court has a special department for EU law and a department for EU human rights. Every month we receive an extract of the most important decisions of the ECJ. Within the framework of internal accessibility, they are translated into Polish, and every judge has the right to inspect the files. There is a constant dialogue here.

To answer your second question: yes, we have a European legal culture, and it is based on the values of the EU, for example the rule of law. We can interpret details and individual issues differently here. Nevertheless, I think that in the end, we will reach a common consensus as Europeans and as citizens of Poland. I very much expect that we will reach this consensus on all issues concerning Poland. The acceptance of EU membership is still very high there – and I say this not only on my behalf but also on behalf of the citizens, who expect both sides to reach an agreement as quickly as possible.

Of course, there are cultural differences between countries. They originate, among other things, from historical concerns and economic circumstances. It is fascinating to compare how certain things are regulated and function in different countries. Often, a particular element is quickly grafted onto another country, indicating that if it works in country A, it will also work in country B. However, this has been challenged by the courts in Europe. The ECJ has indicated that in addition to the shared values, the Member States have peculiarities resulting from cultural differences between the countries. For example, between the Eastern and Western European countries or differences between Western Europe and Scandinavia. Nevertheless, these are very, very stimulating differences in scientific work, which should not obscure the commonalities.

Is there a European culture of the rule of law?

Lorenz: You are raising an interesting point. Although the Member State governments have emerged from elections, their policies do not match the population's attitudes on all points. You can have Eurosceptic governments but at the same time strong popular support for the European Union. Conversely, there may be no significant disagreement between the national government and the EU and, simultaneously, a rather Eurosceptic population, as in the Czech Republic. Therefore, I would like to ask Mr Šlosarčík again: would you also say that there is a European culture of the rule of law? Are you also so optimistic? What does it consist of?

Šlosarčík: If we look at the legal system as a system of norms, I will say yes. I would say that the motto of the European Union is "United in diversity". Diversity is lived and promoted, especially through multilingualism, also at the level of the European Union. If we look at law as a social system, I would be more cautious and sceptical about whether we have a uniform European legal culture. Because there are significant changes, there are differences in trust in institutions, including the courts. There are also differences in social behaviour, such as voluntary compliance with legal norms and society's tolerance for specific rules not being observed. Furthermore, there are also differences when it comes to showing solidarity or when it comes to rewarding success or punishing failure in European societies.

Looking at the sociology of law, the existence of a uniform European legal culture is more questionable than when it comes to constitutional law or criminal law. The Czech government, formed shortly before Christmas 2021, is quite interesting regarding European integration, and its behaviour seems quite heterogeneous. It is not easy to assess it because there are five parties in the government. Several of these parties are pretty sceptical about certain aspects of European integration. Some belong to the so-called European mainstream. However, other parties are very pro-European, even very federally oriented. It means that when it comes to evaluating the Czech Republic alone, it is again much more complicated because we have a coalition government with five parties, and if there is one thing where the parties differ, it is their perspective on European integration.

Lorenz: Mr Hermann, many want the European Commission to do more to protect the independence of the courts at a national level. Others, on the other hand, wonder whether the European Union's overly strict policy towards deficits in the rule of law at a national level does not promote

Euroscepticism in the countries. What is your concrete strategy as a Commission to get out of this somewhat deadlocked situation?

Herrmann: I would perhaps like to come back to what I said earlier, that at the beginning, there were relatively few instruments to deal with the issue of the rule of law, and I gave the example that in the Council of Ministers, the willingness to discuss the issue openly was not very pronounced. With the rising rule of law problems that began in 2010, 2012 and 2014, the Commission reacted, first in the form of reflection papers: how can we strengthen the rule of law in the EU? And then, ideas were formed from this, a coherent strategy – called Rule of Law Toolbox – which contains the reactive instruments. We have already mentioned the infringement procedure and discussed conditionality as a new instrument. As you know, the Commission has also launched the Article 7 procedure against Poland for violating the values of the EU. The European Parliament has done the same against Hungary, and since then, discussions of all 27 ministers on the situation in Hungary and Poland have taken place in the Council. On a reasonably regular basis. I think this is also a novelty that 27 ministers discuss together the situation in a specific state. That is a form of dialogue.

Of course, there is also criticism. Yes, the procedures do not lead to the result that, for example, it is voted on that voting rights are withdrawn. However, I think one has to appreciate that this dialogue of the ministers about the concrete problems of a Member State exists and that this exchange takes place. In addition, it was crucial to create the preventive instruments – the rule of law report and the dialogue that we seek through this rule of law report. The reports have a relatively large resonance, not only centred on certain Member States which are constantly under discussion. They have also influenced, for example, judicial reforms or legislation to ensure media pluralism. For example, there was a reform of the Judicial Council which was discussed and taken up; Luxembourg changed its constitution to create a Judicial Council. This rule of law report made the dialogue between the Commission and the authorities possible. In other words, it is a framework for a European dialogue.

The Commission's art and task are to find the right balance. Yes, there are cases where we cannot avoid ensuring compliance with Union law or its requirements – such as judicial independence or the primacy of Community law in the case of the Polish Constitutional Court – by initiating infringement proceedings. However, it is only one of the instruments, and

we must use these instruments correctly. I draw an overall positive balance when I see how the dialogue has developed.

Preserving the culture of the rule of law is also part of our toolbox; perhaps that is the most challenging task. I have little doubt that there is a European rule of law culture. Constitutional documents such as the European Treaties and the European Convention on Human Rights are evidence of this, but they must not become dead paper, and they must not only – as has already been said – keep judges or civil servants busy. They must also occupy the people. How do we create an awareness of this and discuss the rule of law? This is also a vital topic for us.

I want to pick out just two or three aspects. We are considering better involving civil society in this dialogue on the rule of law. For example, the Portuguese Presidency deliberately organized a Rule of Law Conference in Coimbra with civil society. We talked about the issue of education. For us, universities are key partners that convey values such as democracy and the rule of law through teaching. Through our programmes, we consciously work with universities and would like to intensify this further. Events like this one, which use the transnational relationship between countries or regions like Saxony with its neighbours as a platform to discuss the rule of law, are also important. I believe these are also points on which we must build. We must not only use the prominent instruments that are constantly in the press, but we must create a network on which the rule of law can really rest and come to practical life.

Wendel: Madam President, what is your assessment of the European culture of the rule of law?

Limperg: I am cautiously optimistic that we have a European legal culture. As far as Union law is concerned, it has become more apparent through the treaties and the ongoing adaptations. In addition, there is undoubtedly what Professor Piątek also mentioned – national peculiarities and historically developed understandings that can exist alongside Union law but may also conflict with it.

I am currently also the chairperson of the Network of the Presidents of the Supreme Judicial Courts of the European Union. We meet regularly, and it is always amazing how much we agree on specific, very practical issues that we discuss. The approaches are often different in intensity, pace and other matters. Nevertheless, in the end, we almost always agree on what we, as the judiciary in the European Member States, consider to

be essentially correct. I hope that we can reach an agreement within this framework.

We also have exchange programmes in this network for judges and prospective lawyers, who network and discuss things with each other. This also works amazingly well and nourishes my hope that in a learning process that is progressing, we will increasingly have the chance to develop a shared understanding of European and then perhaps increasingly also of national legal issues. Of course, scholars who emphasize the comparative law aspects also contribute to this. So: I do believe that there is a European culture of the rule of law, and above all, it can and will grow.

Lorenz: But why is there such a low awareness of these interrelationships among the general population? Many people do not seem to be very interested in these questions.

Limperg: I believe things are attractive when they are made tangible. For example, why must the degree of curvature of cucumbers or bananas be standardized? These are examples that can be used to start explaining. What is the regulatory framework, and what is the contractual basis? What happens in the national context? I do believe that people are very interested in the many advantages of this area of freedom, which also promises economic prosperity and security.

It is our task to explain the seemingly so complex topics and to work out their everyday meaning. Then I am convinced that people can become interested in Europe, maybe even enthusiastic about it.

Lorenz: Does the German Federal Court of Justice have an Instagram account?

Limperg: We do not have Instagram; we only tweet our press releases and direct interested people to our website that way. However, we have other formats with which we try to engage with citizens.

The future of the rule of law

Wendel: Is the current situation a significant threat to the integration process or rather an opportunity?

Piątek: I think we can come out of this crisis stronger. Provided we talk to each other and continue the dialogue. That is what I lack. As I said, we often present our opinions but do not listen to the other person. From a judicial and academic perspective, this crisis, and these disagreements,

open many people's eyes to the values that are important to us and that we should respect. Moreover, these values are often compromised for different reasons from different sides. Many people very often ask about these aspects. We also discuss the issues of European integration. Union law is more than ever and more than we thought before at the centre of the citizens' interests. So, I am full of hope that we can come out of all these difficult situations well, hopefully unharmed for all sides.

Šlosarčík: If it were now the year 2025, I would have an answer to whether we have overcome the crisis years 2020 to 2022, whether that was a crisis or a development opportunity for European integration. In the debates on the judiciary and the rule of law in the EU, the best result is when it is not only a dialogue but also a self-reflection. A self-reflection of all actors who participate in this dialogue. The result would then be a state of the rule of law and the judiciary capable of convincing the EU citizens of where the advantages lie. To persuade them to support all this in the elections, in which politicians they elect and which political directions they want to take.

Lorenz: Mr Hermann, where will we be in ten years? Will the crisis of the rule of law that we often talk about have been resolved? And what contribution could a federal state like Saxony make to this?

Herrmann: In European integration, crisis and progress are always close together because progress often comes from a crisis. That is why I am confident. I believe we cannot deny the crisis; I said at the beginning: if the European Union is a community of law, then a crisis of law is a problem and a threat to the European Union. However, at the same time, we also see – and this can also be seen in today's discussion – that the processes that move us forward are underway.

In the judiciary, as Ms Limperg has already said, there is an exchange between the judges of the various Member States and the judges with the ECJ via the networks. A whole new awareness is emerging, and there is also a reflection on this: what is the role of Europe? What is the role of the Member States?

We see something very similar in the governments, for example government programmes. There we have the coalition agreement of the new German government, in which the rule of law is very prominent. We see the same thing in the coalition agreement in the Netherlands. The French Presidency of the Council has emphasized the issue in its agenda and, together with the Netherlands, it has issued a joint declaration on

cooperation in which the rule of law also plays a unique role. And we see that tangible things are also happening at the national level. For example, in Germany, the Pact for the Rule of Law is a deliberate initiative to advance the rule of law. That is an excellent example that one can hope will inspire others.

What makes me optimistic is the capacity for self-reflection. For example, in the Netherlands, the scandal about the non-allocations of certain social funds has definitely triggered strong self-reflective processes in the state institutions. The more we see such processes, the more resilient we will be in the future. That is why I am optimistic that in ten years, we will perhaps also see our kind of integration in this area, a kind of greater awareness and resilience in the face of such crises.

Lorenz: Do you attribute an important role to countries and regions in the solution? Or who are your main partners as the European Commission?

Herrmann: I believe that the regions play an utterly essential role. We have very close links with the regions, for example through the funding programmes. Issues of fundamental rights and the rule of law also play a significant role. For example, there are efforts to consider in legislation whether fundamental rights are respected in the implementation of Union programmes. And here, too, one does not only seek dialogue with the government but also goes to the levels responsible for a given issue. Europe lives the idea of subsidiarity. That is why events like this are essential. The closer we are to the citizens, the better. Moreover, Saxony's relations in the border regions are essential to give impetus for development in the German states and beyond the border. Hopefully, we will be able to discuss progress in the coming years.

Wendel: Mr Piątek, where do you see us in ten years?

Piątek: Maybe I should talk more about the crisis here from the Polish perspective and how we are trying to get out of it, but I want to end by saying that we should not focus on the crisis. It is solvable, as I said. However, we have quite a lot of other challenges beyond the crisis in terms of the judiciary, for example opening the judiciary to the citizens, especially during the pandemic period when the courts actually became sealed units, when court cases had to be heard behind closed doors for health reasons. I would also see that as a challenge for the EU. Likewise, the discussion with the citizens, the shaping of the legal culture, and the question of new technologies that could be used in the judiciary.

Many such questions need to be dealt with in greater depth. We should therefore look further than solving the current crisis. We should move towards the judiciary being closer to the citizens, a little more efficient in its effect and a little more professional. These are the future tasks we must face, and I hope they will be realized. What we will have in three, four, five years, I do not know. We are in such a dynamic political situation in Europe and the whole world that it is also difficult to speculate. As an optimist, I would conclude that it will be better.

Lorenz: Ms Limperg, you have a lot of experience in various functions. Are you also that optimistic? We all get along well and can ignore the elephant in the room?

Limperg: Now, I have the feeling that this is open-heart surgery. The heart is beating, but it is obviously diseased. We are not yet at the apex of the crisis at the moment. Nevertheless, I also see that the national constitutional courts, in particular, are very willing to learn. Many have already started to develop new dogmatic figures or mechanisms in this crisis, for example by somehow implementing the fundamental rights of the Union in the national context. They are circling this elephant and embracing it quite fiercely. That will probably prevail in the end.

Anything else, to be honest, would be a disaster. If the rule of law in Europe had to declare bankruptcy, it would be a cultural, judicial and economic disaster. I am deeply convinced that we can overcome this crisis, and I am also deeply convinced that most people want this. That is why I believe the political forces that may not want it will not prevail in the end. Nevertheless, it is still a complicated process and a long road. There will be more crises, and there will be new constellations. But yes, I believe it will be resolved in ten years. That is just the way it has to be.

Concluding remarks

Wendel: What have we learned from the discussion? One can probably focus on the need for dialogue on very different levels – between the individual Member States, between different cultures, and between the European and national levels. It is a dialogue between different research directions and a dialogue between research and practice. Nevertheless, perhaps the most important thing is the dialogue between people. Even if the dialogue is sometimes difficult, if it is difficult to find a common language, it is always important to follow this path of talking and listening to each other.

We believe this is an excellent starting point for sustainable contacts that we have made today and here in the framework of this conference.

Lorenz: It is essential for all of us – whether we work in the field of justice or science or even in the Commission – to engage in transfer. That is what is meant by dialogue, but dialogue can also be conducted internally in one's bubble. I think it is vital that we all justify ourselves to others and tell ourselves what we are actually doing and why we are doing it. So thank you all for the inspiring insights into your work and thoughts on our topic today.

Wendel: Stay healthy and keep up the conversation.

Contributors

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