

# 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

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## 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.”<sup>1</sup> 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.<sup>2</sup>

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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 Dmitry 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 Trends 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,<sup>3</sup> 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.<sup>4</sup>

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.

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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 Stremmer (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.<sup>5</sup> 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.<sup>6</sup> 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,<sup>7</sup> 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

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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.<sup>8</sup> 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?<sup>9</sup>

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

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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.<sup>10</sup> The Court of Justice of the European Union has issued landmark rulings, at first sporadically, but more recently in greater numbers.<sup>11</sup> 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.<sup>12</sup>

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

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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 Juizes 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.<sup>13</sup>

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.

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13 See, for example, Jiří Příbáň, ‘Sociology of the rule of law: power, legality and legitimacy’ in Jiří Příbáň (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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> Very quickly, the democratization of law was followed by a Europeanization of law in the sense of an adaptation to “Western standards”.<sup>17</sup> 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.<sup>18</sup> 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.”<sup>19</sup>

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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.<sup>20</sup> 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.”<sup>21</sup>

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

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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.<sup>22</sup> 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

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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.<sup>23</sup> 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

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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](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 Šlo-sarčík*, Professor of European Integration Studies at Charles University Prague (representing Jiří Zemánek, Judge at the Czech Constitutional Court, and Jean Monnet 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 (*Limpert*) 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.