

## 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<sup>1</sup>*

### *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.

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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.