

## Part I: Foundations and Challenges



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

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## *1 Introduction*

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

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

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

## 2 Why rule of law conceptions and perceptions are important

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

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

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

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

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

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

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

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

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

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

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

7 Michael Coppedge et al., ‘The Methodology of “Varieties of Democracy” (V-Dem)’ (2019) 143 *Bulletin of Sociological Methodology/Bulletin de Méthodologie Sociologique* 107.

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

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

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- 8 European Parliament and Council Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I. <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020R2092>> accessed 1 March 2023.
  - 9 European Commission, 'European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report' (*European Commission*, 2022) <[https://commission.europa.eu/system/files/2022-07/rolm\\_methodology\\_2022.pdf](https://commission.europa.eu/system/files/2022-07/rolm_methodology_2022.pdf)> accessed 1 March 2023.
  - 10 European Commission, 'Special Eurobarometer 489: Rule of Law' (*Directorate-General for Communication*, 2019) <[https://data.europa.eu/data/datasets/s2235\\_91\\_3\\_489\\_eng?locale=en](https://data.europa.eu/data/datasets/s2235_91_3_489_eng?locale=en)> accessed 1 March 2023.
  - 11 E.g. Judit Varga, 'Facts You Always Wanted to Know about Rule of Law but Never Dared to Ask' (*Euronews*, 22 November 2019) <<https://www.euronews.com/2019/11/19/judit-varga-facts-you-always-wanted-to-know-about-rule-of-law-hungary-view>> accessed 1 March 2023.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

quality in EU Member States is also confirmed by previous studies showing that correlations between the different indices are low.<sup>19</sup>

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

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

#### *4 Rule of law perceptions: Concept and methodological approach*

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

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

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

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

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

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

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

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

23 See European Commission, ‘Special Eurobarometer 489: Rule of Law’ (*Directorate-General for Communication*, 2019) <[https://data.europa.eu/data/datasets/s2235\\_91\\_3\\_489\\_eng?locale=en](https://data.europa.eu/data/datasets/s2235_91_3_489_eng?locale=en)> accessed 1 March 2023.

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

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

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

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

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25 Senát PČR, ‘Slovník pojmu z parlamentní praxe’ (*Senát Parlamentu České republiky*, s.d.) <[https://www.senat.cz/informace/slovnik\\_pojmu.php](https://www.senat.cz/informace/slovnik_pojmu.php)> accessed 1 March 2023.

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

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

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

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

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

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

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

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

Question: Please mark what you personally think belongs to the rule of law.

Not important = 0; rather unimportant = 1; rather important = 2; essential = 3.

Control questions in italics.

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

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

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

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

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

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

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

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

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

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29 Petr Angyalossy, interview on 3 November 2021, citation translated.

30 Jan Klán, interview on 25 March 2022, citation translated.

31 Krzysztof Śmiszek, interview on 29 June 2022, citation translated.

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

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

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32 Josef Baxa, interview on 20 October 2021, citation translated.

33 František Kopřiva, interview on 10 November 2021, citation translated.

34 Anonymous (Poland), interview on 20 November 2021, citation translated.

there is a legislator who determines the framework for the operation of the judiciary, and judges should conform to such statutory actions.”<sup>35</sup>

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

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

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

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

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

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

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

## *6 Conclusion and outlook*

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

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

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

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

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

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

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39 See Limperg et al. in this volume.