

The rule of law under permanent pressure and the compensatory role of external accountability: A comparative study of independent police complaints bodies

Hartmut Aden  · Genevieve Lennon  · Christian Mouhanna  · Kent Roach  · Anja Johansen  · Chikao Uranaka 

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Abstract Even in well-developed rule of law systems such as Canada, Germany, France, Japan or the UK, where public administration is bound to the law and citizens have the option to challenge public action or decisions before the courts, misconduct such as the excessive use of powers occurs in the public sector. This is particularly the case in the areas of core state powers, such as policing, where such misconduct constitutes a permanent challenge for the rule of law. Therefore, many countries have established independent accountability bodies such as ombudsman institutions, the French *Défenseur des Droits*, the *Independent Office for Police Conduct* for England and Wales, various *Beauftragte* in Germany or police complaints bodies in Canada.

The paper analyses the relationship between the rule of law and the work of these oversight bodies. From a comparative perspective, it asks to what degree conceptual differences between the *rule of law*, the *État de Droit* and the *Rechtsstaat* influence

Our colleague and co-author Christian Mouhanna died on 8 December 2024. We are very grateful for the many ideas and insights that he contributed to our comparative research and dedicate this article to his memory.

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✉ Prof. Dr. Hartmut Aden

Forschungsinstitut für Öffentliche und Private Sicherheit/Berlin Institute for Safety and Security Research (FÖPS Berlin), Hochschule für Wirtschaft und Recht Berlin/Berlin School of Economics and Law, Berlin, Germany

E-Mail: Hartmut.Aden@hwr-berlin.de

Dr. Genevieve Lennon

Swinburne University, Melbourne, Australia

E-Mail: glennon@swin.edu.au

the role of external accountability bodies, specifically in the case of policing. Building upon empirical data stemming from a research project that has been jointly carried out by several of the authors, it demonstrates that the ‘grey check’ (Brodeur) that politics tend to attribute to police agencies with legal bases that open a broad margin of police discretion may lead, from the perspective of the rule of law, to problematic deficits that external accountability bodies may partly compensate.

Keywords Accountability · Police complaints · Chèque en gris · Law enforcement · Rule of law

Externe Beschwerdemechanismen als Kompensation für Rechtsstaatsdefizite: Ein Vergleich unabhängiger Polizeibeschwerdestellen

Zusammenfassung Auch in entwickelten Rechtsstaaten wie Deutschland, Frankreich, Japan, Kanada oder dem Vereinigten Königreich, in denen die öffentliche Verwaltung an Gesetze gebunden ist und Bürger*innen das Recht haben, Verwaltungsentscheidungen gerichtlich überprüfen zu lassen, gibt es im öffentlichen Bereich immer wieder Fälle unangemessenen Handelns der Verwaltung bis hin zu Machtmissbrauch und exzessiver Gewaltausübung. Dies gilt besonders für die Polizei als Kern des staatlichen Gewaltmonopols. Daher haben viele Länder zusätzlich unabhängige Ombuds- oder Beschwerdestellen eingerichtet, z. B. den *Défenseur des Droits* in Frankreich, das *Independent Office for Police Conduct* für England und Wales, verschiedene Varianten von *Beauftragten* in Deutschland oder Beschwerdestellen in Kanada.

Dieser Beitrag analysiert das Verhältnis zwischen dem Rechtsstaat und der Arbeit dieser Stellen. In vergleichender Perspektive geht er der Frage nach, inwieweit konzeptionelle Unterschiede zwischen *rule of law*, *État de Droit* und *Rechtsstaat* die Arbeit der externen Beschwerde- und Ombudsstellen beeinflussen. Aufbauend auf empirischen Daten aus einem international vergleichenden Forschungsprojekt, zeigt der Beitrag, dass die Politik den Polizeibehörden auch in Rechtsstaaten große rechtliche Handlungs- und Ermessensspielräume einräumt, die auch als ‚grauer Scheck‘

Dr. Christian Mouhanna
Centre d'Études Sociologiques sur la Délinquance et les Institutions Pénales (CESDIP/CNRS),
Versailles-Saint-Quentin-en-Yvelines, France

Prof. Kent Roach
University of Toronto, Toronto, Canada
E-Mail: kent.roach@utoronto.ca

Dr. Anja Johansen
University of Dundee, Dundee, UK
E-Mail: a.m.johansen@dundee.ac.uk

Prof. Dr. Chikao Uranaka
Kyoto Sangyo University, Kyoto, Japan
E-Mail: uranaka@cc.kyoto-su.ac.jp

(Brodeur) bezeichnet werden. Dieser ‚graue Schecke‘ verstärkt Kontroll- und Rechtsstaatsdefizite, die externe Beschwerde- und Ombudsstellen unter Umständen teilweise kompensieren können.

Schlüsselwörter Polizei · Polizeiliches Fehlverhalten · Beschwerde- und Ombudsstellen · Definitionsmacht der Polizei · Rechtsstaat

1 Introduction: policing as a permanent challenge for the rule of law

Policing is a specific challenge for the rule of law. Police agencies have the mission to both enforce the law and maintain security effectively. These two missions are not necessarily synergetic, but often conflicting. In political systems based on the rule of law, the law not only defines the rules that citizens have to obey, but also those to be followed by state agencies, including the police. In particular, fundamental rights define ‘red lines’ that police agencies are supposed to not transgress when they act in the interest of public security. However, even in well-developed rule of law systems where public administration is bound to the law and citizens have the option to challenge public action or decisions before the courts, misconduct such as the excessive use of powers occurs in the public sector. This is particularly the case in the areas of core state powers such as policing and intelligence services. Many countries have therefore established accountability bodies that provide independent, external oversight. We refer to these bodies as *Independent Police Complaint Bodies* (IPCBs).

This paper analyses the relationship between the rule of law and the work of IPCBs in Canada, Germany, France, Japan and the United Kingdom (UK). From a comparative perspective, it examines the degree to which conceptual differences between UK and Canadian variations of the *rule of law*, the French *État de Droit* and the German *Rechtsstaat* influence the role of external accountability bodies, specifically interrogating the case of policing. In their study comparing 27 IPCBs in Europe and Canada, Roché and Varaine (2024) conclude that the variation of the rule of law prevailing in a specific country does not directly influence the resources and powers attributed to IPCBs. Ensuring the implementation of rule of law principles in relation to law enforcement is particularly problematic due to the police enjoying considerable scope for discretion which derives from three overlapping sources. First, the de facto autonomy attributed to street-level professionals (Goldstein 1963; Lipsky 2010). Second, the ‘grey check’ (Brodeur 1984) that legislative and executive authorities tend to attribute to police agencies through legal bases that open a broad margin of discretion. Third, the operational independence accorded to police chiefs and to police officers acting at street level by the legislature, executive and the courts, reflected in the often narrow nature of judicial review, also contributes to extend the autonomous margin of manoeuvre for policing. For these reasons the traditional structures of the rule of law—the courts, legislature and executive—fail to adhere to the core rule of law objectives of sufficiently controlling police discretion and ensuring accountability.

In some cases, the IPCBs are bodies specialised in police complaints, for example, the *Independent Office for Police Conduct* (IOPC) for England and Wales or various provincial or federal police complaints bodies in Canada. In other cases, the investigation of police complaints is part of broader ombudsman institutions, such as the French *Défenseur des Droits* (DDD) and some of the *Beauftragte* established in Germany. While in other countries, such as Japan, the complaints mechanisms are attached to civilian oversight within the broader structures of the public administration.

Thus, in the area of policing, the rule of law is not just periodically, but permanently under pressure. This is even more the case if the rule of law and its German and French parallel concepts *Rechtsstaat* and *État de Droit* include more than just formal legality, but also ‘thicker’, substantial requirements and in particular the protection of fundamental rights (cf. Møller and Skaaning 2014, pp. 13–37), even in areas characterised by broad discretion attributed to the police. Building in part upon empirical data stemming from a comparative research project, this paper demonstrates the challenges that police discretion poses for the rule of law and explores the ways in which IPCBs may compensate, albeit partially.

2 Theoretical framework: the rule of law, accountability settings and limitations to the rule of law in policing

The paper is based on theoretical assumptions with respect to the rule of law, the *Rechtsstaat* and the *État de Droit* for the comparison of their historical nuances and differences, as well as more recent converging trends. For this purpose, the paper builds upon comparative literature on the rule of law and related concepts (among others: Møller and Skaaning 2014; Loughlin 2010, 2024; Aden 1998, 2001). It combines this comparative perspective with two different bodies of literature. First, theoretical perspectives on accountability perceive the establishment of accountability forums such as IPCBs as additional settings that not only contribute to the legality of what public authorities do, but also to their effectiveness and acceptability in a much broader perspective (cf. Bovens 2007; Bovens et al. 2014). Second, based on empirical observations of how the police apply the law in practice, scholars developed theoretical approaches that this paper builds upon. This body of theoretical literature starts from the assumption that policymakers depend upon the loyalty of their police forces to effectively handle political challenges e.g.: during a crisis. This need for loyalty leads policymakers to issue a ‘grey check’ and broad discretion (*Definitionsmacht*) to their police (Brodeur 1984; Feest and Blankenburg 1972; Fährmann et al. 2022). The ‘grey check’ de facto reduces the legal obligations that police agencies must follow when they restrict citizens’ fundamental rights, contributing to a ‘thinner’ understanding of the rule of law. Therefore, it also conflicts with requirements for a high level of accountability.

3 Empirical framework: diversity of police complaints bodies

Alongside the theoretical framework already outlined, some elements of this article draw on research conducted as part of an interdisciplinary comparative project on independent police complaints bodies, comprising teams from Canada, France, Germany, Japan and the UK. In addition to extensive doctrinal analysis, primary sources such as reports and statutes were analysed and over 150 expert interviews were conducted with practitioners from IPCBs and other stakeholders such as policy-makers, representatives from the criminal justice systems and civil society. The broader analysis of this empirical data is being published in an edited volume (Johansen et al. 2026). In this article the empirical work carried out in the comparative project primarily informs the analysis of the IPCBs' perception of their relationship to the rule of law (see below, Sect. 6).

There are single IPCBs for France (DDD), Japan (公安委員会, *Public Safety Commission*), Northern Ireland (*Police Ombudsman for Northern Ireland*, PONI), Scotland (*Police Investigations & Review Commissioner*, PIRC), England and Wales (*Independent Office for Police Conduct*, IOPC) and, due to the more decentralised police systems, multiple IPCBs in Canada (*Civilian Review and Complaints Commission*, *Commissaire à la déontologie policière* and other designations) and Germany (*Polizeibeauftragte* in different variations). Some Canadian and British jurisdictions had already begun to experiment with IPCBs in the 1970s, whereas in Germany, France and Japan the first IPCBs only emerged around the turn of the millennium. With the exception of the PONI, all the current IPCBs in these five countries were established or substantially reformed after 2010. This is in line with the international trend towards IPCBs (Varaine and Roché 2023; Roché and Varaine 2024). The project compared the IPCBs across a number of interlinking categories. Particularly relevant are the IPCB's independence, powers, objectives, and resources. Powers refer to the legal and regulatory powers of the IPCB, including how a complaint may be instigated, notably whether the IPCB itself may instigate a case; their investigatory powers (such as to compel witnesses or evidence); and their power to conduct strategic reviews, which examine broader conduct issues beyond a single complaint. Independence is a complex category, incorporating the institutional status of the IPCB, such as its legal base and its relationship with the legislature and executive. It also includes broader issues such as the rules on staff, notably whether former police may serve in an IPCB and to what capacity (Johansen et al. 2026). Elements of all these categories impact the IPCBs' potential to enhance the rule of law by providing accountability over police exercise of power (Sects. 5 and 6 below).

4 Rule of law, *État de Droit* and *Rechtsstaat*: varying roots and converging trends

Historically, the British *rule of law*, the French *État de Droit* and the German *Rechtsstaat* developed under highly dissimilar political conditions. Consequently, significant variations exist in balancing the powers between the executive, the leg-

islative and the judiciary, as well as in the development of ‘thicker’ requirements to protect citizens’ fundamental rights. In recent decades, there has been a trend towards convergence influenced by the European Convention of Human Rights (ECHR), case law by the European Court of Human Rights (ECtHR) and the European Union’s Charter of Fundamental Rights (EU-CFR).

4.1 Divergent roots

The French concept of *État de Droit* emerged in late 18th century as a revolutionary rejection of what they saw as the arbitrary rule of the *ancien régime*. The French Revolution of 1789 established that sovereignty was vested in the nation with no authority superior to the laws passed by the National Assembly or accepted by the people through referendum. Conversely, because the judiciary was perceived as instrumental in enforcing arbitrary rule during the *ancien régime*, all post-revolutionary regimes sought to limit the scope for judiciary discretion.

The current definition of the *État de Droit* as the pre-eminence of law over executive power was only gradually established through the nineteenth-century. Due to the repeated political turmoil that led to nine regime changes between 1789 and 1870, law was often subjected to the political powers of the day, with limited access to challenge the executive over alleged violations of individual rights. Although citizens’ rights were enshrined already in the 1789 Declaration of the Rights of Man and Citizen, a ‘thicker’ concept of the *État de Droit*, with meaningful protection of citizens’ rights against the executive, only became a priority during the 20th century.

French constitutional scholars describe the first French Republics (1789–1799; 1848–1850; 1871–1940) as *États Légaux* (legal states) in which government and public administration were subject to ordinary laws as passed by the legislative (Carré de Malberg 1920; Redor 1992). In their interpretation, the *État de Droit* only emerged after 1958, when the Fifth Republic introduced access to constitutional review of any law or executive decision (Redor 1992; Chevallier 2023). In the seminal *Arrêt Canal, Robine and Godot* (19 October 1962), a decision by the President of the Republic for three people to be sentenced to death was overturned by France’s highest administrative court, the *Conseil d’Etat*, despite this presidential decision resting on a law passed by referendum (on 8 April 1962). This laid the foundations for challenging otherwise legal executive decisions, by questioning the constitutionality of specific laws. A few years later, the *État de Droit* was strengthened by the decision of the French Constitutional Court to determine not only whether specific laws conformed with the *letter* of the Constitution but also whether they violated the *spirit* of the principles recognised in the preamble to the Constitution and in the 1789 Declaration of the Rights of Man and Citizen (*Conseil Constitutionnel*, judgment of 16 July 1971). In 1974, further constitutional reforms allowed the parliamentary opposition to refer any new law to be reviewed by the Constitutional Court. The constitutional reform of 23 July 2008 introduced the *Question Prioritaire de Constitutionnalité*, which enabled any litigant to request a review of how, in their specific case, laws or executive decisions might infringe on constitutionally guaranteed rights and freedoms.

The German idea of the *Rechtsstaat*—similarly to the French concept of *État de Droit*—emerged as a reaction against arbitrary rule by late-absolutist rulers. The *Rechtsstaatsprinzip* emerged in the 1830s–1840s, influenced by French legal thinking (von Mohl 1832) and from the 1850s English notions of the rule of law (von Gneist 1853, 1882). Yet, the German conception of *Rechtsstaat* developed in unique ways because of the political-ideological struggles to which it was attached (cf. Stolleis 2001; Šarčević 1996). After the 1848 revolutions, the *Rechtsstaatsprinzip* became central to the liberals operating through legislative assemblies, who challenged conservative rulers continuing to control the executive. Although the executive was never subjected to parliamentary primacy, governments eventually committed to restrict the exercise of power and to respect the law, legal principles and court rulings (Stolleis 2001). With the seminal *Kreuzberg* judgment (*Kreuzberg-Urteil*, PrOVG Endurteil des II. Senats vom 14.06.1882), this also came to include police law, the last bastion of unrestricted executive powers. Despite these advances, the German *Rechtsstaat* long remained a particularly ‘thin’ variation in which the primacy of fundamental rights was barely recognised (cf. Heller 1971/1929).

With the violations of the *Third Reich* the need for judicial checks on the executive became an urgent concern. Citizens’ fundamental rights as a core element of the *Rechtsstaat* were considerably strengthened with the establishment, in the 1950s, of the West German Constitutional Court (*Bundesverfassungsgericht* (BVerfG)) and the access of individual citizens to launch a constitutional complaint (*Verfassungsbeschwerde*) before the BVerfG. However, this also triggered detailed legislation that justified far-reaching restrictions upon citizens’ fundamental rights, in particular with respect to police powers (see further: Massing 1981; Aden and Fährmann 2021; Fährmann et al. 2022).

In nineteenth-century Britain, the development of the *rule of law* was not tied up with wider political and constitutional struggles, as ‘parliamentary sovereignty’ over the executive was already established with the Glorious Revolution of 1688/89. Although judges within the English common law tradition have much broader scope to interpret and shape practice through their rulings, compared to their French and German counterparts, British courts may not annul legislation passed by Parliament. Building on eighteenth-century notions of ‘English liberties’, theorists like John Stuart Mill (1859) and A.V. Dicey (1915/1885) emphasised the guarantee of individual liberties against executive authority, arguing that *rule of law* strengthened the legitimacy of the legal-constitutional arrangement (Dicey 1915/1885; Edmundson 2004, p. 68; Loughlin 2024, p. 511 f.). Dicey (1915/1885) argued that the constitution was ‘pervaded by the rule of law’ as basic constitutional principles, such as the rights to liberty and assembly, were based on judicial precedent rather than a written constitution, yet this remained a ‘thin’ conception of the *rule of law* requiring certainty of law and equality before the law. Dicey held a deep suspicion of discretionary power, contrasting the English with the continental systems, such as the *droit administratif*, which he erroneously viewed as ‘based on the exercise by a person in authority of wide, arbitrary or discretionary powers of constraint’ (Dicey 1915/1885; c.f. Robson 1928; Jennings 1932). Conceptions of the rule of law ‘thickened’ through the twentieth century, with a partially substantive approach that goes beyond the mere formalism of clear, stable and generally applicable laws and incorporates aspects

of procedural fairness (Craig 1995; Jowell 2004; Allan 2001; Bingham 2010). Reflecting the unwritten constitution, limited fundamental rights, notably the rights to liberty (*Entick v Carrington* (1965) 19 St Tr 1030), equality, assembly and speech (*Simms v Secretary of State for the Home Department* [2000] 2 AC 115) are protected by the rule of law (Jowell 2004; Allan 2001; Craig 1995; Bingham 2010). The incorporation of the ECHR under the Human Rights Act 1998 led to some substantive changes (Sect. 4.2 below).

When Canada was created as a federation in 1867, it adopted a constitutional system similar in principle to the United Kingdom. Thus, Canada was established on the common law principle subject to parliamentary supremacy with the *rule of law* less present in political and legal debates (Mockle 1994). However, the *rule of law* as protection of civil liberties and citizens' rights is situated in a highly complex constitutional structure. Canada, as a federation with a written constitution, divides powers both between federal and state government and separates the powers of the executive from the legislatures and courts. The federal government has jurisdiction over criminal law and procedures, while the provinces have jurisdiction over the administration of justice including policing. This matter is complicated by the role of the *Royal Canadian Mounted Police* (RCMP) in providing local policing in eight of ten provinces including all three northern territories and is subject to a federal *Civilian Review and Complaints Commission*. The access for citizens to challenge acts committed by the police is sometimes hampered by the difficulties of identifying the authority accountable.

In Japan, the legal system was first modernised according to the principles of the French Napoleonic model, but with the Meiji government becoming increasingly interested in the Prussian system during the 1880s. In 1889, when the first constitution was established for the Empire of Japan, the French Charter of 1814 was initially considered as a model. Eventually it was the Prussian constitution of 1848 which became the preferred model because it granted the Emperor additional power and Japan was trying to modernise by strengthening the power of the emperor. With Japanese government officials and scholars being sent to Austria and Germany to study their legal systems, the German concept of *Rechtsstaat* (法治国家) was 'imported' to Japan through the influence of Austrian and Prussian jurists (Urabe 1990, p. 63). In the field of administrative law, the 'limits of police power' were discussed, based on the 1882 *Kreuzberg-Urteil*, which, as discussed above, limited police authority and introduced the principle of police acting proportionally. However, unlike Germany, where the courts were key actors in limiting the acts of the executive, in Japan, there was no judicial control over the police and no accountability for the police as public officials in their role as 'officials of the emperor'. Police officers were accountable only to the Emperor and accountability to the citizens did not exist (Imamura 2020). After World War 2, a democratic constitution was enacted at the initiative of the USA. The Japanese Constitution (1947) enshrines the rule of law (法の支配) (Ohama 2016; Shimada 2017). It guarantees fundamental rights to the citizens (Articles 10 to 40) and attributes to public officials the obligation to respect and protect the constitution (Article 99), guarantees there be no penalty without law and due process (Article 31), judicial independence (Article 76), and gives courts the power to review unconstitutional legislation (Article 81).

In conclusion, policing in all five countries is based, to a certain extent, on political and legal concepts that can be conceived as variations of the *rule of law*. Despite traces of mutual influence, historical differences that go back to fundamentally divergent political and legal systems prevailed until the mid-20th century. The aspect of the *rule of law* relating to protection of individual liberties and citizens' fundamental rights developed separately, and in France, Germany, and Japan only from the period after World War 2. Still, whenever conflict arose between police powers and respect for individual liberties, the primacy of the interests of the state—as defined by the police—has been stronger in these three countries compared to the UK and Canada. However, this discrepancy has also narrowed since World War 2.

4.2 Converging trends

In Europe, the historical differences between the *rule of law*, *l'État de Droit* and the *Rechtsstaat* have been softened in practice by converging trends. The ECHR, the ECtHR's case law and the EU-CFR all bind restrictions to fundamental rights to a specific legal base and the principle of proportionality. Thus, the high level of judicialisation established in post-World War 2 Germany increasingly became the standard in the other Council of Europe countries, but with remaining variations with respect to the intensity of judicialisation. The rule of law perspective influenced by the ECtHR and by the 'thicker' variation of the German *Rechtsstaat* established after World War 2 in order to better protect fundamental rights contributes to enhanced transparency and has led to more police actions being challenged before the various judicial and administrative bodies. Of particular importance is the requirement under the ECHR that a power exercised against an individual be based on law ('prescribed by law' or 'in accordance with the law'). This speaks to the legal certainty that is central to the rule of law, the *Rechtsstaat* and the *État de Droit*.

The *État de droit* gradually established in France has been further strengthened by the recognition of the ECtHR's case law and the supremacy of EU law over national law. The ECtHR held in a 1990 landmark judgment against France that 'French law, written and unwritten, does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities' (*Kruslin v. France* (1990), app. no. 11801/85, par. 36). French law enforcement agencies had carried out telephone tapping without a specific legal base, and French law had to be amended (see Aden 1998, p. 301). However, this trend is still being contested by a section of the political class, from both the left and the right of the political spectrum, which defends popular sovereignty. This has been combined with the emergence of an increasingly widespread criticism of human rights on the far right. Nicolas Sarkozy, then Minister of the Interior, used this argument in 2002 to oppose criticism from the *Ligue des Droits de l'Homme* and other associations contesting his draft law on internal security (cf. Ceaux et al. 2002). Comparison between France and Germany still reveals differences with respect to the density of legal rules that govern policing which remains much higher in Germany, due the Constitutional Courts' requirements for the justification of encroachments upon the citizens' fundamental rights (see Schmitz 1989 and Aden 1998 for a comparison of French and German police law in the 1980s and the 1990s).

The incorporation of the ECHR into domestic UK law in 2000 with the Human Rights Act (HRA) 1998 led to significant changes in the rule of law in relation to judicial review (Craig 1995; Jowell 2004; Bingham 2010). Public bodies must now act in accordance with the ECHR unless required otherwise by primary legislation (HRA 1998, s.3). The courts must ‘take into account’ ECtHR jurisprudence and issue a declaration of incompatibility if a public body acts in breach of the ECHR (HRA 1998, s.4). Parliament has discretion whether to act to correct the breach or not, thus retaining parliamentary sovereignty. The courts must adopt a Convention-compliant interpretation ‘so far as possible’, with the courts adopting a broad, and at times ‘bold and creative’ approach (Kavanagh 2015, p. 1017). The standard of review has also changed. Previously, courts could interfere with a public body’s decision only if the body had acted so unreasonably that no reasonable person acting reasonably could have made the same decision (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* (1948) 1 KB 223). The standard, where ECHR rights are engaged, is now proportionality, which has increased the intensity of review, requiring consideration of whether an appropriate balance was struck and of the ‘relative weight accorded to interests and considerations’ (*R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26). Overall, these changes have led to stronger judicial review and a ‘thicker’, more substantive approach to the rule of law. There has always been some opposition to the incorporation of the ECHR into UK law, drawing on the tradition stemming from Dicey, which is becoming increasingly mainstream among the Conservative party since Brexit. While not official party policy, there has been increased opposition to the ECHR and other international human rights commitments, particularly in light of debates around immigration and refugees (cf. Elgot 2023). Given the comparatively recent—and ongoing—evolution to a post-EU legislative landscape (e.g. Retained EU Law Act 2023), it is unclear what, if any, rule of law elements of EU law will remain post-Brexit. Although, some divergence seems inevitable, particularly given the exclusion of the EU-CFR (European Union (Withdrawal) Act 2018, s.5(4); see further Birkinshaw 2023).

In Germany, where the Constitutional Court in many cases strengthened citizens’ fundamental rights, the option to bring a case before the ECtHR (and more restrictively before the Court of Justice of the EU (CJEU), previously the European Court of Justice) expanded citizens’ options for bringing breaches of fundamental rights to a court, but challenged the *BVerfG* as the sole, binding body for the interpretation of fundamental rights. This has led to some intensively debated conflicts between the three courts and a legal discussion on how to deal with colliding interpretations of fundamental rights (Sauer 2012).

For France and Germany as European Union member states, the CJEU has also contributed to a converging trend of the interpretation of the rule of law. EU citizens can only bring cases before the CJEU concerning an act directly addressed to them by an EU institution or body (Article 263 Treaty on the Functioning of the EU, TFEU). Therefore, preliminary reference proceedings (Article 267 TFEU) are more relevant in the perspective of the rule of law. Only the member states’ courts can initiate this procedure, in which they can address questions related to EU law to the CJEU that are relevant in a pending case. Thus, citizens or civil society organisations have the option to bring a case before a court in a member state that then addresses

to the CJEU questions related to the conformity of a member states' action with EU law. Based on preliminary references, the CJEU has issued numerous highly relevant judgments related to the rule of law and to proportionality, for example, with respect to data retention for law enforcement or the application of the European Arrest Warrant (see Aden 2021 for an overview).

By contrast, in Canada and Japan as non-European countries that are neither bound to the ECHR nor to EU law, judgments by the ECtHR and the CJEU do not have a direct impact. Therefore, the converging trend does not fully include these two non-European countries. Nevertheless, the relevance of fundamental rights and therefore of a 'thicker' rule of law concept has grown in these countries as well. In Canada, only in 1982, a constitutional bill of rights was added to the constitution as well as a domestic amending formula which meant that the former British colony gained complete control of its constitution (Russell 2004). The Canadian courts had, before 1982, failed to interpret a 1960 statutory Canadian Bill of Rights generously, but they soon interpreted the 1982 Canadian Charter of Rights and Freedoms in a broad fashion that rivalled the activism of the Warren Court in the United States in imposing due process rights on police and prosecutors (Roach 1999). Unlike the United States, however, Canada retains a parliamentary system of government where the Canadian prime minister has more power than any president of the US.

Frequently, legislation replied to judicial decisions applying the constitutional bill of rights. These responses include the creation of new warrant powers that allow the police to obtain a judicial warrant to seize DNA and even take body impressions from suspects (Roach 2016). Both Canadian federal and provincial legislatures also have the power under the 1982 amendments to enact laws notwithstanding the legal rights (as well as equality rights and fundamental freedom) for renewable five year periods. The province of Québec, which did not agree to the 1982 constitutional amendments, has frequently used this power to protect the French language and secularism. But the federal parliament with its jurisdiction over criminal law and procedure, has not yet used this power but has contemplated doing so, especially with respect to some unpopular judicial decisions protecting the due process rights of those accused and charged with sexual offences (Roach 2016).

Fundamental rights have also grown in importance in Japanese court decisions related to policing. For example, in 1999, the Japanese Supreme Court ruled that warrant-based interception of communications is constitutional but requires a special law respecting several conditions.¹ Such a special law was enacted in 1999 to address this issue, defining 13 types of crimes for which the police can intercept communications.²

¹ 高所 平成9年(あ)第636 https://www.courts.go.jp/app/hanrei_jp/detail2?id=50400.

² Act on Communications Interception for Criminal Investigation, <https://www.japaneselawtranslation.go.jp/ja/laws/view/3857>.

5 Shortcomings of a pure *rule of law* perspective in the case of policing—the ‘grey check’

A ‘thin’ *rule of law*, *Rechtsstaat* and *État de Droit* perspective over-emphasizes the legitimising force of a law that allows restrictions upon the citizens’ fundamental rights. Courts cannot fully compensate the effects of the ‘grey check’ that policy-makers attribute to the police with vague legal bases, leaving them broad discretion.

Two factors contribute to limiting the impact of the rule of law in relation to policing. First, front-line police officers largely escape accountability because controls by accountability mechanisms are far removed from their actual work, especially at the street-level (Brodin 2008; Pearson and Rowe 2020). Second, they are used to transcribing reality into formal legal language. This discretion has long been recognised as structuring the profession (Goldstein 1963; Bittner 1967; Mastrofski 2004). Due to factors such as the often nebulous nature of legal provisions that authorise police action, the magnitude of the crime, the limited resources available to law enforcement and other criminal justice agencies, public perceptions of and support for the police, constitutional restrictions on government power and the fact that much of the work of the police consists of handling non-criminal matters, police officers can and must exercise considerable discretion in serving the public.

Policymakers and police leadership contribute to this broad police discretion by *de facto* delegating certain decisions to street-level police officers. The former are responsible for the citizens’ security and depend upon the front-line police officers’ loyalty for the effective execution of this task. They also prefer to leave the responsibility for certain acts to the police officer on the beat, if they feel that police action could go outside the strict legal framework in order to be effective, and do not wish to take responsibility for this in a political system governed by the rule of law. This ambivalence gives rise to the notion of a ‘grey check’ (Brodeur 1984, 2003; Aden et al. 2022) that the state gives its police officers to carry out their duties while respecting the formal legal framework that affords them broad discretion. Present in all countries, this phenomenon is well identified by researchers in France and Germany (Monjardet 1996; Jobard 2001; Feest and Blankenburg 1972; Aden et al. 2022; Fährmann et al. 2022). The highly politicised nature of security issues and the extreme centralisation of police forces in France make the interdependence between politics and the police particularly strong (Mouhanna 2011). The French political system also has a long tradition of attributing emergency powers to the President (*théorie des pouvoirs propres*) and to the police in situations of crises (Schmitz 1989, pp. 182–189). In Germany, Johannes Feest and Erhard Blankenburg (1972) characterised the power attributed to the police with broad legal discretion as *Definitionsmacht der Polizei*: even if, formally, the legal bases applied by the police comply with the minimum requirements of the *Rechtsstaat*, broad discretion is left to police officers applying these legal bases. Recent empirical studies have confirmed this result for police stops (Aden et al. 2022; Fährmann et al. 2022).

Courts are bound to apply the law as it stands and have therefore only powers (and ambitions) to replace police discretion and the ‘grey check’ by stricter rules if the way in which discretion is being used disproportionately restricts the citizens’ fundamental rights. This is a limitation to fundamental rights litigation as a poten-

tially powerful tool against the arbitrary exercise of power by the police. Therefore, the outcome of litigation against police measures has been mixed. The ECtHR has used the requirement of an explicit legal base as a lynchpin to find that police actions unlawfully infringed ECHR rights in relation to, for example, surveillance powers (e.g. *Malone v UK* (1985) app. no. 8691/79; *Kruslin v. France* (1990), app. no. 11801/85), police retention of biometric data (e.g. *Marper & S v UK* (2008) app. nos 30562/04 and 30566/04), racial profiling in public transport (e.g. *Basu v. Germany* (2022), app. no. 215/19) and street policing measures (e.g. *Gillan v UK* (2010) app. no. 4158/05). It has also applied the proportionality test narrowly on occasion (e.g. *Steel v UK* (2005) app. no. 6841/01). While often portrayed as centred on the individual officer's exercise of power, the ECtHR generally focuses on the structural base of the power and means of oversight, often *ex-post*. In reality this does little to check and limit the individual officer's discretion. The reliance on an analysis of legality rather than rights allows the ECtHR to shy away from substantive engagement with the individual exercise of discretion. In German legal doctrine, this effect goes hand in hand with the limited court powers with respect to questioning a police measure based on discretion (*Ermessen*) that the law attributes to police officers (see Buchberger 2021, p. 1685f.).

In the UK and Canada another factor limiting the application of the rule of law to policing is the doctrine of *operational independence*, grounded in the need to ensure that the police are not subject to political direction and interests. In the English case of *R (Blackburn) v Commissioner of the Metropolis* ((1968) 2 QB 118), the Court of Appeal held that the Police Commissioner was responsible to the law and that neither the government nor a civilian oversight body could dictate police policy to the Commissioner: the police are 'answerable to the law and to the law alone' (ibid, pp. 135–136). Some ECtHR case law evidences substantial deference to the police and their operational discretion, whether explicitly (e.g. *Austin v UK* (2012) app. nos 39692/09, 40713/09 and 41008/09; *Brogan v UK* (1988) app.no. 11209/84) or implicitly, through the refusal to award damages despite finding a breach of rights (e.g. *McCann v UK* (1996) app.no. 189484/91). This doctrine of police independence is also accepted in Canada. It is defined in some provincial statutes that govern policing, but has been defined by the Supreme Court of Canada in a more limited manner to relate to the discretion of individual police officers to decide to investigate, arrest and lay charges. (*R. v. Campbell* [1999] 1 S.C.R. 565 [29]) This provides a form of checks and balances, though Canadian prosecutors have the ability to take over and stop prosecutions started by the police (Roach 2021). Another factor in Canada is that the courts have interpreted the 1982 constitutional bill of rights to restrain police powers but also to extend such powers especially in the areas of stop and searches. Evidence that is unconstitutionally obtained by the police is not automatically excluded from a subsequent criminal trial, but will be used if not the courts determined that its admission would bring the administration of justice into disrepute (Sharpe and Roach 2021, ch 14). This can create a 'grey check', even when the courts review police conduct in cases that are prosecuted.

In Japan, the debate on the rule of law and the theory of the 'limits of police power' left a significant impact on the interpretation of the Police Act. After World War 2, police practice was influenced by American criminal justice theory, namely

by the right to due process. However, both in academia and in practice, the ‘theory of the limits of police power’ remained highly influential until the 1990s (Tamura 2022). Until then, the Japanese police had avoided intervention in civil matters as much as possible what was supposed to prevent the police from an excessive use of power. This self-restriction can be explained against the backdrop of the situation under the previous regime (1874–1945), where the police had exerted control over the private sphere in areas such as family matters. In the 1980s, Japan experienced an increase in economic crime. Criminal organisations such as the Yakuza targeted private sector economic activities. Until then, the police had not intervened in economic activities (money lending, real estate transactions, etc.) because these were civil matters, but as the number of victims increased, pressure on the police to intervene increased as well. More generally, in the 1990s, changes in society and family values led to enhanced perception of crimes committed by intimate persons and family members, such as stalking, child abuse, and elder abuse, and society demanded the active intervention of the police. This contributed to a new understanding of the relationship between the rule of law and policing with additional powers attributed to the police.

All of these examples demonstrate that while the *rule of law*, *l’État de Droit* and the *Rechtsstaat* have contributed to establishing high(er) legal standards for the protection of fundamental rights, these legal principles alone are unable to effectively limit core state powers, including the use of legitimate force by the police. A ‘thin’ rule of law perspective therefore covers only a smaller part of the accountability for the exercise of police powers.

6 External accountability adding a broader rule of law perspective—the case of independent police complaints bodies

Before examining the ways in which the IPCBs serve to give effect to the rule of law, it is worth considering their own positioning in relation to this principle. In Germany, the law that established an IPCB at federal level in February 2024, does not mention the rule of law, but specifies the IPCB’s task to investigate cases in which fundamental rights have been violated (§ 1 (2) *Polizeibeauftragengesetz* of 28 February 2024). By contrast, the law establishing an IPCB at Bremen mentions the investigation of breaches of *Rechtsstaatlichkeit* as one of the IPCB’s tasks (§ 1 (1) no. 4 *Gesetz über eine unabhängige Polizeibeauftragte oder einen unabhängigen Polizeibeauftragten für die Freie Hansestadt Bremen* of 30 September 2022). In their statements and reports, the German *Polizeibeauftragte* refer to the legality of an individual police measure rather than to the *Rechtsstaatsprinzip* or to human rights as abstract concepts. In the IPCBs’ reports, the legality of a police measure often serves as starting point of a case report, that also includes recognising the legal doctrine with respect to police discretion (Aden and Bosch 2023).

Similarly, in France, the DDD does not refer solely to the *État de Droit* and little to human rights. In general, the DDD prefers to invoke concepts such as the professional ethics of police officers or the need to bring the police and the public closer together. While not denying its involvement in the defence of human rights, the DDD prefers not to encroach on the prerogatives of the courts, which are legally

the most competent in these matters. The positioning on ethics and strategies of reconciliation between police and the population allows the DDD to try to show the police that it is also concerned about their concrete working conditions and the concrete conditions of law enforcement. The idea is not to offend the police and to a certain extent, take police discretion into account.

The same is evident across the UK IPCBs, with the rule of law not featuring in any legislation or statutory guidance. It is mentioned only in the Police Ombudsman for Northern Ireland's Code of Ethics, in relation to upholding equal rights, so far as they equate with the rule of law (para 27, 2000). It is also absent from IPCBs' reports and publications. There are references to human rights, but these tend to be more detailed and concrete, for example, specific issues arising from the ECHR, rather than the broader concept. Looking more closely at France than Germany, their IPCB's primary focus is not on legality, but rather on issues of conduct, with ethics being particularly prevalent for the PONI.

The rule of law is also not mentioned in Canada in any of the laws establishing police complaints bodies. For example, the federal *Civilian Review and Complaints Commission* was established by the RCMP Act without reference to the rule of law but with the requirement that the commissioners not be current or former members of the force. Like most complaint bodies in Canada, it only has power to make non-binding recommendations (RCMP Act RSC 1985, c. R-10 Part VI). Other provincial laws provide for independent investigations of suspected police illegality (Scott 2014). These laws are designed to ensure that the rule of law is applied to police actions that result in death, serious injury and in some jurisdictions sexual assault. They also generally provide that the directors of such independent entities may not be current or former police officers (*Special Investigations Unit Act* S.O. 2019 c.1 Sch. 5 s.5 (2)).

In Japan, the *Public Safety Commission* (PSC) system was established in 1947 and complemented by a complaints system in 2000. The independence of the PSCs from the police is limited, as the secretariat of each prefectural PSC is located within the headquarters of the prefectural police department. The Japanese Federation of Bar Associations (2000) proposed that the complaints body against the police should become a completely third-party organisation, but this is not on the political agenda. The rule of law nowadays features more prominently in relation to police complaints. In 2000, legislators amended the Police Act to add a complaint-handling function to the prefectural PSCs, which are intended to exercise democratic control over the police. In this way, efforts were made to increase citizens' control over the police. In 2010, a comprehensive evaluation of the 10-year process was conducted, and the 47 prefectural PSCs and prefectural police forces implemented feedback from the 2000 police reforms, including a complaint filing system (National Public Safety Commission and National Police Agency 2010). The evaluation found that the Japanese police have established accountability settings where citizens can complain about the police and therefore the fact that the police are subject to the citizens' control in line with the rule of law.

In conclusion, the *rule of law* respectively the *État de Droit* and the *Rechtsstaat* play a rather marginal role in the IPCBs' statutes and policies. However, where laws attribute broad powers to the police, IPCBs may join in and compensate for

the often ‘thin’ *rule of law* concept that governs police discretion. In terms of controlling discretion and shining a light on the ‘grey check’, the IPCBs can navigate waters uncharted by the courts, legislature and executive. The (non-) compliance of police action with the law is the typical starting point of an investigation launched by the latter bodies. By contrast, the IPCBs adopt a broader analytical lens, which examines whether an officer’s conduct was appropriate. Indeed, as explored below, some IPCBs cannot investigate alleged criminal behaviour. This broader lens can encompass low-level cases, such as impoliteness, and extends to cases in which police agencies or individual officers use their broad discretion in a way that citizens perceive as unacceptable. In this context, we can distinguish between stated police policies and practices, which can be identified as complying or not complying with the law, and acts by individual officers that are often difficult to pinpoint exactly as strictly beyond their legal mandate—what Egon Bittner referred to as ‘legal illegality’ (Bittner 1970, pp. 28–29). This broader gaze permits the IPCBs to examine what Meares et al. (2015) term ‘perceived illegality’, which they found links strongly to concepts of procedural justice, whereby the public are more likely to obey and trust the police if they believe them to be acting fairly. It thus narrows the sphere of acceptable conduct covered by the law, expanded by the ‘grey cheque’ and concepts such as operational independence, enabling the application of the rule of law concepts of accountability and the prohibition on the arbitrary exercise of power. It also provides a means of holding power to account by way of individual redress. As accountability forums, IPCBs can publish judgements that are not limited to the legality of the police measure and therefore go beyond a ‘thin’ understanding of the rule of law.

This is reinforced by the ability of the Canadian, German, French and UK IPCBs to instigate their own investigations and to conduct strategic or thematic reviews. In Canada, the commissions can in extraordinary situations and if their resources allow investigate individual complaints and conduct systemic reviews of police practices such as strip searches or policing events that have drawn a large number of individual complaints (Scott 2014; Roach and Sossin 2017). While subject to some variation, UK IPCBs can initiate investigations if in the public interest. For example, in Northern Ireland, the PONI conducted an ‘own motion’ report into the use of spit hoods and bite guards, deployed at the start of the Covid-19 pandemic, reviewing body worn camera (BWC) footage. This was instigated despite there being no complaints registered. The report concluded that there was no criminality in what the police did but identified a number of conduct issues and provided 14 policy recommendations, relating to training, guidance and accountability via the use of BWC (PONI 2021). This shows how the IPCBs can, in contrast to the courts, act in a more pre-emptive manner, potentially limiting the abuse of power and ensuring greater accountability.

However, there remain significant limitations. Complaints are typically triggered by individuals directly impacted by the action complained about. The only exception among the project IPCBs, the *Commissaire à la déontologie policière*, recently changed the rules to exclude third-party complaints. Because most people do not complain, most police action continues to be shielded by the ‘grey cheque’ and claims of operational independence. Significant challenges remain in proving what occurred at street level policing, where determination of events often comes down

to conflicting accounts by the individual and the officers involved. Delays are endemic (Fairfield 2024; Angolini 2020), with PONI recently calling for fast track powers after a four-year delay in dismissing an officer (Young 2025). Even when complaints are made and substantiated, the impact of these beyond the individual officer is often limited. While all the IPCBs in our study foregrounded the need to draw lessons from the complaints as well as the need for police to action based on these learning points, they all nonetheless lack powers to enforce the police to act on their recommendations. For some IPCBs, the soft power they hold, for example, by requiring responses by the police to published recommendations can be effective. However, several IPCBs lack even this power or the resources to conduct thematic reviews. Thus, while the IPCBs can offer accountability at the micro level, their limited impact on the macro level means that much of the police discretion remains uncontrolled and unaccountable.

Only in the UK can IPCBs play a role in criminal investigations against police officers (always in the case of PONI and sometimes for PIRC and IOPC, depending on the nature of the alleged crime). Some IPCBs have to interrupt their own investigations while a criminal case against the officer concerned is pending, even if their task is to draw lessons beyond the single case. As criminal investigations against police officers mostly end without any conviction (for Germany: Derin and Singelstein 2022, pp. 227–236; Piening et al. 2024), this means that the IPCBs can only draw conclusions from the case a long time after the facts occurred, contributing to the delay noted above. There is a similar trend in Canada with most independent criminal investigations of police conduct not resulting in charges and the minority of cases where there are prosecutions for causing serious harms mostly resulting in acquittals, often on the basis that the police have acted in self-defence (Roach 2022). In terms of investigative powers, the Japanese and some of the German IPCBs have very limited powers, with the Rheinland-Pfalz IPCB's powers limited to requesting information from the police via the Minister of the Interior (§ 22 BürgBG RP). This clearly limits the scrutiny to which they can subject the police. Others have extensive powers, notably DDD, IOPC, PONI and some of the more recent German IPCBs who can enter police premises and seize evidence, with the DDD able to compel witnesses, including police officers and the Canadian IPCBs' powers generally in between the two. While these more extensive powers translated into broader accountability than the Japanese or some of the German IPCBs, our study found that in practice these legal tools were often not fully utilised, due to a lack of resources and a dependence on the police as gatekeepers for most of the information required for the investigation, again, impacting the ability of these IPCBs to provide accountability over police actions, blunting their potential to contribute to a 'thick' rule of law.

A lack of adequate resources was evident across all the IPCBs, with the exception of PONI. The average annual operating budget across Germany, France and all Canadian provincial IPCBs was €0.31 per inhabitant and €1.25 on average in Great Britain. PONI was substantially higher with €6.84 per inhabitant (Johansen et al. 2026), although it must be noted that they uniquely investigate every complaint made about the police and conduct all investigations into potential police criminality (passing their report to the public prosecutor). Also, uniquely, they conduct historical

inquiries into complaints against the police during ‘the Troubles’, which accounted for around a quarter of their budget in 2022/23 (PONI 2023). The problems are well illustrated by the DDD who have some of the most extensive legal powers and, uniquely, a constitutional status but only 11 staff to investigate police forces totalling some 250,000 people which in practice places significant limits on their role.

Aggravating these resourcing issues are the objectives of IPCBs, which are usually broadly stated and sometimes contradictory. All the IPCBs covered by the project aimed to increase public confidence in policing, sometimes specifically in police complaints and to provide feedback and promote learning. However, these objectives do not always coincide with complainant satisfaction and their broad aims suggest a macro view encompassing systemic problems. In fact, much of the IPCBs’ work operates on micro level, considering individual complaints. For example most German IPCBs operate entirely on this level with very limited resources to investigate broader structural issues. This still permits the IPCBs to gaze into the shadows cast by the ‘grey check’ but offers less visibility on issues concerning operational independence.

In Japan where police oversight outside the police does not exist until today, the Public Safety Commission system was introduced, allowing citizens to control the police. However, as with other government agencies, the police were not very proactive in terms of accountability. In 1999, the Administrative Information Disclosure Act was enacted, and a system of information disclosure to the police was established. Police scandals in the 2000s led to an increased emphasis on police accountability.

In conclusion, it can be said that IPCBs, to some extent, contribute to a ‘thick’ variation of the rule of law by ensuring a broader accountability over state power than would be otherwise possible. This occurs precisely because they go beyond a narrow analysis of lawfulness which is subject to all the limitations discussed above. Additionally, they also look at problems in the areas covered by the ‘grey check’ and operational independence that can usually not be successfully challenged before a court, as they are covered by legal discretion. However, this potential is often blunted, in particular, by limited investigation powers and a lack of resources.

7 Conclusion and outlook

In a context where police officers often oppose respect for rights and the effectiveness of their action, the rule of law remains under permanent pressure. The action of external police complaints bodies whose origin is mostly based on a ‘thick’ concept of the rule of law including the protection of the citizens’ fundamental rights against inappropriate police measures and the idea of balancing the executive power is sometimes considered disconnected from the field by police officers. Torn between a legalistic vision of respect for the law and the police agencies’ need to carry out effective action in the interest of security, the IPCBs have to make compromises.

Even if the IPCBs in the countries involved in this study do not often directly refer to the rule of law, they take the (il-)legality of a police measure as a starting point for their investigation. As they rather focus on the relationship between the police

and the citizens and on the citizens' individual rights, the historical and doctrinal differences between the *rule of law*, the *État de Droit* and the *Rechtsstaat* seem to be of low practical relevance for the IPCBs' work. However, IPCBs contribute to higher accountability standards in thematic areas that would not be covered by a 'thin' variation of the rule of law. They are able to look at issues covered by the 'grey check' and operational independence. As accountability forums, IPCBs have a broader scope than courts that are often limited to the narrow perspective of a legality check in areas where the police have broad discretion. However, this does not automatically mean that the IPCBs' investigations have a broader impact. Their impact also depends upon the political will to implement a 'thicker' variation of the rule of law focussing the protection of the citizens' fundamental rights, the implementation of measures meant to prevent repeated similar police misconduct and the improvement of policing in the general interest. In this perspective, our comparison shows that none of the IPCBs that we looked at in our study, ideally fulfils its mission—there is still broad room for improvements in the interest of getting closer to 'thick' rule of law concepts for policing.

On the one hand, the comparative study of police accountability and its relationship with the *rule of law*, the *Rechtsstaat* and the *État de Droit* shows remaining divergence. On the other hand, it reveals some converging trends, such as an increasing importance of the control of policing by the courts, the persistence of broad discretion left to police agencies and their officers at street-level and the establishment of additional accountability mechanisms such as the IPCBs that may look at the areas of policing that escape from judicial control. The comparative study of police accountability is therefore likely to remain of major importance, also against the backdrop of persisting conflicts about the powers that police agencies should have in democratic rule of law systems and of multiple forms of international cooperation between police agencies that lead to additional challenges for police accountability (Bowling and Sheptycki 2016; Aden 2021).

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