Countering the Judicial Silencing of Critics: Novel Ways to Enforce European Values

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06.03.2019 doi: 10.17176/20190324-203914-0

The Polish government is stepping up its repression. Or so it seems. After packing the Constitutional Tribunal, dismissing more than 150 (out of 700) presidents and vice-presidents of ordinary courts, raising the overall number of Supreme Court judges, and creating new tools for cowing judges,[1] the Polish government now seems ready to instrumentalize this transformed judiciary. The freedom of political speech is a main target.

Possible evidence can be found in the proceedings against *Wojciech Sadurski*: For his vocal criticism of the current Polish government,[2] *Sadurski*, a renowned law professor at the Universities of Sydney and Warsaw, faces a range of legal proceedings. A member of the new Supreme Court's disciplinary chamber has submitted a motion to initiate disciplinary proceedings against *Sadurski* at the Warsaw University because he called judges of the Supreme Court's disciplinary chamber "losers". The Law and Justice Party (PiS) has filed a civil lawsuit because *Sadurski* called it an "organized criminal group". In addition, TVP (the Polish public television, which is controlled by the ruling majority) has pressed for defamation charges against *Sadurski* relating to his public views. Similarly, TVP filed a lawsuit against Polish Ombudsman *Adam Bodnar* as a private individual following a statement about hate speech made after the assassination of the mayor of Gdansk. *Bodnar* indicated that one motivation for the assassination could have been TVP's biased reports suggesting, inter alia, a connection of the mayor to Nazis and Communists and his involvement in corruption.[3] Finally, rumor has it that proceedings against the former president of the Polish constitutional tribunal, *Andrzej Rzepliński*, are also in the making.

In the current context, such proceedings are not an internal Polish but a European affair, as they regard the basic order of the European Union. They squarely fall into the situation addressed by the proposal of the European Commission for a decision under Article 7 (1) TEU to determine "a clear risk of a serious breach" of EU values. A safe starting point for any legal analysis is that the Polish proceedings have to respect the freedom of expression to the extent it is enshrined in Article 2 TEU. The focus of this blog post is not to discuss whether *Sadurski*'s or *Bodnar*'s pronouncements are protected by Article 2 TEU; for that we do not have enough evidence. Rather, it discusses what Polish judges can and have to do under EU law, and what possible sanctions they might face if they disrespect their duties.

Freedom of Speech as an EU Value

Though we cannot fully qualify the aforementioned cases, it seems likely that judicial proceedings against such critics for expressing opinions—including offensive ones—on Polish public issues violate free speech under EU law.[4] Of course, the EU Fundamental Rights Charter protects the freedom of expression (Article 11 CFR) only within the scope of Union law (Article 51 CFR). However, the essence of this freedom is also protected by the values of "human rights" and "democ-

[1] On the measures, see COM(2017)835 final, "European Commission, Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland: Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law".

[2] For his views, see W. Sadurski, How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding. Sydney Law School Research Paper No. 18/01; ibid., Constitutional Crisis in Poland, in: A. Graber, S. Levinson and M. Tushnet (eds.), Constitutional Democracy in Crisis (OUP 2018); ibid., Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler, Hague Journal on the Rule of Law (2018).

racy" enshrined in Art. 2 TEU. As explained by the ECtHR[5] and more recently by the CJEU in *Tele2 Sverige*, the freedom of expression is of "particular importance … in any democratic society." According to the Court, it "constitutes one of the essential foundations of a pluralist, democratic society, and is one of the values on which, under Article 2 TEU, the Union is founded." This applies particularly to political speech. If a Member State disrespects this "essential foundation", it crosses a red line of membership.[6]

Since the limits of Article 51 CFR do not apply to EU values, relying on the "essence" of a fundamental right under Article 2 TEU makes a great difference. To the extent that the freedom of expression falls under Article 2 TEU, Polish citizens' political speech is protected under Union law against *any* measure of their home country that seriously infringes this value.[7]

Applicability and Primacy of European Values

What does that mean for national officials involved in judicial proceedings against critics? Poland has not yet enacted specific laws targeting critical voices. Judicial proceedings are likely to rely on general laws, be it torts in private law (like slander), defamation in criminal law (Article 212 of the Polish Criminal Code), or general clauses of disciplinary law. Given the openness of such general provisions, a judge can interpret and apply such a general provision in such a way as to sanction critical pronouncements. Here, EU law steps in: its applicability and primacy in domestic proceedings bars such interpretation. This flows from the general EU principle that any domestic judge has to interpret and apply domestic law in conformity with EU law,[8] which today includes its directly applicable values. Of course, such applicability of the European values has been in doubt. In two grand chamber decisions, the CJEU has, however, determined that the European values are to be applied by domestic courts, in particular when they protect the essence of a fundamental right.[9] Hence, all national law, including domestic criminal, disciplinary, and private law, must be interpreted in light of the European values, thereby protecting political free speech.

The same logic applies to a law *explicitly* permitting charges against a politically inconvenient person. An example can be found in the Hungarian laws directed against "enemies" like the Open Society Foundation or the Central European University in Hungary.[10] If a domestic judge faces such laws, he or she has to refrain from applying it to the extent it stands in conflict with a European value. The same holds true for any official called to execute such a judicial decision or detention measure violating this freedom.[11]

The Duty to Refer as a Shield for National Judges

Union law, by giving such directions to national judges, puts those judges in a hard place, in particular in countries where the government's respect for judicial independence is low. Yet, a national judge does not stand alone but finds support in the European union of courts. To this end, we hold that a national judge concerned with procedures brought against critics is not only empowered but *required* under Union law to make a preliminary reference to the CJEU. This duty rests on a seminal legal development: the protection of the European values has become as important as the uniform application of Union law.

Generally, only courts of last instance are under a duty to make a reference when the application of EU law in the case at hand is surrounded by uncertainties (see Article 267(3) TFEU). According to the CJEU's *Foto-Frost* decision, however, this obligation extends to lower courts in case they doubt the validity of a provision of EU law.[12] Before not applying this provision,

[3] For a full account, see the Ombudsman's official website; for reactions from the Council of Europe, see PACE, Rapporteur calls on Polish Public Television to withdraw its suit against Ombudsman.

[4] In *Bodnar*'s case, he probably acted in his official capacity as Ombudsman, thus raising issues of his powers rather than his fundamental rights.

[5] See ECtHR, Judgement of 8 July 1986, Lingens v. Austria, App. No. 9815/82, para. 42; Judgement of 26 November 1996, Wingrove v. the United Kingdom, App. No. 17419/90, para. 58; [GC] Judgement of 22 April 2013, Animal Defenders International v. the United Kingdom, App. No. 48876/08, paras. 102-103.

[6] A. v. Bogdandy/P. Bogdanowicz/I. Canor/M. Taborowski/M. Schmidt, Guest Editorial: A potential constitutional moment for the European rule of law – The importance of red lines, CML Rev 55 (2018), 983; see the debate "A Rescue Package for Fundamental Rights" on Verfassungsblog.

they have to refer the question of validity to the CJEU. The underlying rationale of this extension is to preserve the effective and uniform application of EU law (*effet utile*), which has been the Court's guiding star in the past six decades.

Now, with Opinion 2/13, *ASJP, Achmea, L.M.,* and *Wightman,* the CJEU has complemented this functional rationale with an axiological one, implementing what the framers state in Article 2 TEU. Today, "values" figure as prominently as "uniform application" in its constitutional jurisprudence. Recognizing the EU as a veritable "Union of values", the Court forcefully protects its very foundations against the unprecedented challenges of the illiberal turn in some Member States. In light of this new axiological rationale, we suggest extending the logic of *Foto-Frost*: a national judge has not just the right but an outright *duty* to refer a case whenever the common value basis is in danger. Thus, a Polish judge faced with a case concerning the silencing of critics, must refer the matter to the CJEU and request an interpretation of Article 2 TEU in light of the rights at stake.

This duty should help judges in difficult situations. They might be intimidated by political pressure or the threat of disciplinary measures; remember the newly established disciplinary chamber at the Supreme Court.[13] As courts in Lodz and Warsaw have proven, national judges can and do seek support from the CJEU.[14] These Polish judges are confronted with issues sensitive to the Polish government. They fear being subjected to disciplinary measures should they decide against the government, and see their judicial independence at stake. Therefore, they have asked the CJEU, based on its findings in *ASJP*, whether the newly introduced disciplinary measures for ordinary courts are in conformity with Article 19(1)(2) TEU, Article 47(1) CFR, and Article 2 TEU.

These references present a further opportunity for the Court to show that it takes European values seriously. We argue, therefore, that the CJEU should declare these cases admissible and decide in support of those judges. With the help of precautionary measures, it might even shield those judges from governmental pressure. As the interim measures in *Commission v. Poland* have shown, the Polish government remains responsive to this basic layer of the European rule of law.[15]

The Last Resort: Criminal Liability

But what happens if the respective judge does not respect European law and silences critics with his or her decisions? Indeed, quite a few judges owe their position to the recent overhaul of the Polish judiciary and are considered close to the government's agenda. We argue that if they do not respect the primacy of Union law and do not refer the case to the CJEU, they could face criminal liability. Why?

Again, the primacy of EU law entails that a law may not be applied or interpreted in a way that violates European values. If a judge hands down a decision that violates the EU's foundational values, she exceeds her judicial powers. Knowingly exceeding public powers, however, is sanctioned under most legal orders. The relevant provisions of the Polish Criminal Code describe well the various forms that may take. For example, Art. 231(1) punishes the general excess of authority: "A public official who, by exceeding his or her authority, or not performing his or her duty, acts to the detriment of a public or individual interest, is liable to imprisonment for up to three years".[16]

Certainly, the criminal liability of judges is a most delicate instrument. In order not to infringe upon judicial independence, a careful balance has to be struck. Therefore, the criminal liability of Polish judges can only be triggered as a last resort; it is confined to "exceptional cases".[17] Therefore, judicial immunity must be lifted in a special procedure.[18] Second, high standards apply. Just recall the CJEU's *Köbler* jurisprudence, which limits the action for damages for the disrespect of Union law to a "manifest breach of the

[7] For the full argument, see A. v. Bogdandy/M. Kottmann/C. Antpöhler/J. Dickschen/S. Hentrei/M. Smrkolj, Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States, CML Rev 49 (2012), 489.

[8] See CJEU, Judgement of 13 November 1990, *Marleasing*, C-106/89, EU:C:1990:395, para. 8.

[9] CJEU, Judgement of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117; Judgement of 25 July 2018, Minister of Justice and Equality, C-216/18 PPU, EU:C:2018:586.

case-law of the Court in the matter".[19] Thirdly, any criminal prosecution of public officials in general and judges in particular will have to show that the official knew about the effects of Union law and intentionally set its application aside. Determining this knowledge falls to the trial judge. But here again, actions by European institutions will be important: If a Polish judge knowingly disrespects a CJEU decision that protects free speech in the case at hand, a red line and, in all likelihood, the threshold of criminal liability are crossed. To bring about such a CJEU decision is the responsibility of either the Polish court or the European Commission, which should initiate infringement proceedings in a timely manner.

Furthermore, Polish criminal law protects the independence of the legal system against those intimidating or pressuring judges. Art. 232(1) Polish Criminal Code criminalizes anyone "who, by using violence or an illegal threat, influences the official functions of a court of justice". Other officials, i.e., prosecutors, are protected by Article 224(2) Polish Criminal Code: "Anyone who uses violence or an illegal threat with the intention of forcing a public official, or a person assisting him or her, to undertake or abstain from legal official activity is liable to the same punishment."

Admittedly, it seems rather unlikely that judges or politicians who silence critics will face prosecution anytime soon. But no government lasts forever. Biased public officials will be held accountable once the political landscape has changed. Such criminal proceedings might also be an important tool to re-establish a judicial system in line with the rule of law. In any event, Polish judges and Europe as a whole must act determinedly in favor of free speech, which is essential for self-healing through domestic democratic processes. This process of self-healing must be the overarching aim, after all.

[10] G. Halmai, Legally sophisticated authoritarians: the Hungarian Lex CEU, Verfassungsblog (31 March 2017); R. Uitz, The Return of the Sovereign: A Look at the Rule of Law in Hungary – and in Europe, Verfassungsblog (5 April 2017); R. Uitz, Academic Freedom in an Illiberal Democracy: From Rule of Law through Rule by Law to Rule by Men in Hungary, Verfassungsblog (13 October 2017); M.R. Maftean, The CEU Leaves – Hungarian Students are Left in the Lurch, Verfassungsblog (5 December 2018); D. Kochenov/ P. Bárd, The Four Elements of the Autocrats' Playbook, Verfassungsblog (18 September 2018).

[11] Generally on the obligation of any public official to conform with EU law, see CJEU, Jugdement of 4 December 2018, *Garda Síochána*, C-378/17, EU:C:2018:979.

[12] CJEU, Judgement of 22 October 1987, Foto-Frost, C-314/85, EU:C:1987:452.

[13] Act on the (Polish) Supreme Court of 8 December 2017, *Journal of Laws* (2018), item no. 5.

[14] See the pending preliminary references *Miasto Łowicz v. Skarb Państwa – Wojewoda Łódzki* (C-558/18) and *Prokuratura Okręgowa w Płocku v. VX, WW, XV* (C-563/18), which have been submitted to the expedited procedure pursuant to Order of 1 October 2018 (ECLI:EU:C:2018:923); see further the similar reference in case *Prokuratura Rejonowa w Słubicach* (C-623/18).

[15] CJEU, Order of 19 October 2018, *Commission v. Poland*, C-619/18 R, EU:C:2018:852; for more detail, see Order of 17 December 2018, *Commission v. Poland*, C-619/18 R, EU:C:2018:1021; see further P. Bogdanowicz/M. Taborowski, Why the EU Commission and the Polish Supreme Court Should not Withdraw their Cases from Luxembourg, Verfassungsblog (3 December 2018).

[16] If a critic is sent to prison, the much more severe Article 189(1) Polish Criminal Code on illegal imprisonment might apply: "Anyone who deprives another person of their freedom is liable to imprisonment for between three months and five years". If force is applied, Article 191(1) Polish Criminal Code could come in: "Anyone who uses violence or an illegal threat to force another person to conduct him or herself in a specified manner, or to refrain from or tolerate a certain conduct is liable to imprisonment for up to three years."

[17] Polish Supreme Court, Judgement of 30 August 2013, SNO 19/13.

[18] See Art. 181 Polish Constitution; on this see A. Bodnar/L. Bojarski, Judicial Independence in Poland, in: A. Seibert-Fohr (ed.), Judicial Independence in Transition (Springer, 2012), 667, 716.

[19] CJEU, Judgement of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, para. 56.

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SUGGESTED CITATION

von Bogdandy, Armin; Spieker, Luke Dimitrios: Countering the Judicial Silencing of Critics: Novel Ways to Enforce European Values, Verfassungsblog, 06.03.2019, doi: 10.17176/20190324-203914-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20190324-203914-0.