Muzzling Associations of Judges

The Duty of Judges to Declare Membership in an Association Under Poland's so-called "Muzzle Law"

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Only a few days before the oral hearing at the CJEU about the preliminary measures against Poland, the Disciplinary law, often called "muzzle law" is on the mind of everyone who is worried about the rule of law in Europe. Art 88 a of the law has so far received little attention. It prescribes that judges must disclose their membership in associations, their functions performed in non-profit foundations and membership in parties before they became judges. The provision applies to memberships in all kinds of associations, including associations of judges. In this form, the provision violates the European Convention of Human Rights (ECHR) as well as the Charter of Fundamental Rights of the European Union (Charter).

Article 11 ECHR and Article 12 of the Charter protect the freedom of association. This freedom is closely connected to the freedom of expression, protected under Article 10 ECHR and Article 11 of the Charter and ensures free communication in a democratic society. It is clear that prohibiting membership in an association is an infringement of this right also when it comes to judges (see e.g., ECtHR judgment of 17.2.2004, 39748/98, *Maestri v. Italy*). But what about a duty to disclose membership to the government as in the Polish case? Such a law should also be seen as an infringement because it can have a chilling effect on joining associations, especially when there is reason to assume that such membership is frowned upon by the government.

The law is especially problematic when it comes to the membership of judges in an association of judges, as already pointed out by the Consultative Council of European Judges (CCJE). This follows from the importance of associations of judges as recognized in international documents. The Committee of Ministers of the Council of Europe has recognized the role of judges' associations in ensuring judicial independence and the rule of law, as well as in protecting the interests of judges (recommendation CM/Rec(2010)12, para 33). Consequently, judges may freely join such organizations which may operate at a national or international level. The CCJE Magna Carta of Judges (2010) in its para. 12 emphasizes the role of judges' associations in a democracy based on the rule of law and that *judges have the right to be members of national or international associations of judges, entrusted with the defence of the mission of the judiciary in the society.*

The right of judges to form and join associations of judges or other organizations to represent their interests was also endorsed by the General Assembly of the United Nations as one of the fundamental principles on the independence of judges (paras 8 and 9). In accordance with the Universal Declaration of Human Rights, members of the judiciary are, like other citizens, entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. Joining associations of judges in order to participate in debates concerning the independence of the judiciary and its organization must also be seen in the light of the decision of *Baka v. Hungary,* where the ECtHR has recognized a right of judges to engage in debates concerning national issues of judicial independence (ECtHR judgment of 23.6.2016, 20261/12, paras 165-176). Given the importance of judicial independence as a fundamental European value as recognized by the CJEU, associations of judges, especially international ones, which engage in such issues, have a crucial

role to play today. Especially in a country where there is no independent Council of the Judiciary to effectively protect judicial independence against the other powers, associations of judges are even more important as spokespersons for the judiciary and advocates for judicial independence. It is therefore no surprise that after the constitutional court, council of the judiciary and supreme court, critically-minded individual judges and the associations of judges and NGOs in which they organize, become a target. This likely underlying goal and the close connection of freedom of speech and freedom of association are highlighted by the fact that in a previous draft of the law, judges should be required to disclose all social media activity.

Of course, a drafter of the law would probably object that such a restriction was necessary in a democratic society and therefore justified. According to Article 11 (2) ECHR, restrictions are permitted in the interest of "national security", "public safety", "the prevention of order and crime", "protection of health or morals", "or the protection of the rights and freedoms of others". However, not one of these interests can be protected better by demanding that judges declare their memberships in lawful associations. The drafter of the law might, however, point to the fact that according to Article 11 (2) ECHR, lawful restrictions "on the exercise of these rights by members of the armed forces, of the police or of the administration of the State" are not prohibited. Judges, the argument would likely run, are involved in the "administration of the state". While judges are not engaged in the administration of the state as members of the executive, it is of course right, that they must behave in a way that preserves the trust in their independence and impartiality. Society in general and the parties in particular must be able to trust the impartiality of judges. This is ensured by the parties' right to challenge potentially biased judges. Therefore, in many countries for example, it is accepted that judges may not join political parties. In Poland this is even guaranteed in the constitution.

With this aim in mind, it may also be justified in specific cases to inquire about previous political activities. It is highly doubtful, however, that this aim could justify public disclosure of a judge's membership in lawful associations of all kind. Under the Polish law, even a failure to disclose membership in something as harmless as a cooking club may cause disciplinary proceedings.

In any case, it cannot justify the disclosure of membership in associations of judges. The right to form such associations is accepted in Poland. Article 178 of the constitution forbids judges to join trade unions, but this does not mean associations of judges. Membership in associations of judges is only for judges and thus cannot reveal a conflict of interest that parties need to be aware of to be able to challenge a judge successfully in order to preserve their right to a fair trial. Therefore, not only the CCJE, but also the First Study Commission of the International Association of Judges opposed any requirement for a judge to reveal membership in a judicial association (p. 8). Rather, such information can be misused to put pressure on critically-minded judges to leave associations of judges and thereby curtail their right to form and join such associations.

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