Judicial Activism affecting Rule of Law Standards and how the European Union can create better Conditions for the Operation of Civil Society

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Introduction

In several EU member states, governments have been responsible for various restrictions of the rule of law by controlling the judiciary. Additional changes to the media sector and the curtailment of freedom of information made it more difficult for the population to get sufficient knowledge on political decisions and to understand how their civil and political rights were curtailed. These measures have led to extensive executive aggrandisement (Bermeo 2016), meaning an expansion and concentration of power in the hands of the government. This has reduced the institutional and sometimes, as in the case of Hungary in 2011, also the constitutional opportunities for checks and balances. In addition, Polish and Hungarian parliaments passed laws that decreased the room of manoeuvring for civil society organisations and thus aimed to diminish the pluralistic nature of the political systems.

Despite these attempts to subdue any opposition, civil society, particularly in Poland, is still an active player that is fighting back against these measures. This sector in a broad understanding, including judicial associations, turned into a relevant playing field for actors that aim to protect and restore the rule of law but they have to operate under difficult conditions. Studying and understanding their activities and challenges more precisely allows to assess the level of resilience of a society confronted with democratic backsliding (Boese et al. 2021).

The struggles and achievements of civil society and related but separate actors, such as the judicial associations in Poland, will be the focus of this contribution. In addition, I will look into recent efforts on the European level to facilitate the work of civil society organisations by initiating the European Value Instrument. This instrument has been pushed forward by the European Parliament since several years and has now entered the legislative phase after the European Commission passed

a respective draft in autumn 2023 (European Commission 2023). In following up on both of these perspectives, this contribution takes into account the content of two panel discussions from the Leipzig Rule of Law Conference: the debates on a) the civil society revolt against rule of law challenges and b) on defining rule of law standards – understanding entanglements between EU law and domestic law.

The Polish judges' protest actions

That the Polish judges' associations began to engage in on- and off-bench mobilisation is quite extraordinary as judges are typically not considered to be part of civil society and do not view themselves as political activists. From their own understanding, their recent activities became rather a simple necessity, a legal response to governmental decisions that ignore and violate the rule of law since the Law and Justice party (Prawo i Sprawiedliwość, PiS) came to power again in 2015. The judges therefore do not consider their engagement to be a truly political act. Yet, to investigate what they are doing from a civil society perspective makes sense insofar as they are structurally confronted with very similar challenges as the true civil society organisations and, next to the legal means that they employ, they are also using similar measures in their interaction with society (Matthes 2022).

According to my conceptualisation of legal mobilisation based on theoretical and empirical literature coming from legal and social sciences, judges can theoretically take three different routes inside and outside the bench. The first type of activism derives from a theorisation of judicial behaviour in general, based on perspectives from literature on the decision-making inside the courtroom (Ferejohn 1999, Dyevre 2010). This considers judges to be rather reluctant to engage outside their usual legal arena but assigns either interest-based or value-driven motivations for legal mobilisation. Secondly, insights from previous research on cases where judges did become active in the public sphere (Bakiner 2016, Trochev/Ellett 2014), characterised as off-bench mobilisation, stress their eagerness to defend their own profession when attacked by executive or legislative powers. The third relevant field of action describes how interest groups act strategically in the multi-level system of the European Union (Beyers 2004, Bouwen/Mccown 2007). This system forms an opportunity structure for judicial protest against the decline of the rule of law in two ways: First, the EU's various protective instruments, such as the Article 7 or the infringement procedure, create access points for activists, but second approaching the European arena also implies the necessity to handle and overcome various hurdles in terms of time, expertise, personnel or financial restrictions. Becoming a successful activist is therefore not an easy task for any civil society organisation if it cannot already rely on a European network or partner organisations who know how to navigate in Brussels (Matthes 2021).

My study which investigated the time period from 2017 when the first mobilisation of the Polish legal actors started up to 2021, combined a document analysis of material from the Polish associations of judges Iustitia and Themis, the Polish Supreme Court, the Court of Justice of the European Union (CJEU) and the European Commission, with semi-structured interviews with several judges (Matthes 2022). It showed the following results: The Polish judges' association indeed prefer legal over political instruments but were able to adapt their strategies according to a changing political environment, shaped by the Polish government. In the beginning, they engaged in litigation through requests for preliminary rulings due to their belief in law as a normative field. In many cases, the CJEU confirmed the assessment of the Polish courts and provided recommendations on how to argue in line with the European treaties. Still, with time passing that the PiS-government was in office, the courts were further dismantled and it became harder to use this tool. Politically motivated changes of the mechanisms to appoint judges and to distribute cases made it much more difficult for national courts

to operate functionally and to address the CJEU. The Polish government even passed a law that denied the right to ask for a preliminary ruling which was met with huge protest but forced the judicial associations to develop other strategies (Matthes 2022).

Therefore, addressing the European Commission became the second relevant field of action. Since this institution is the gatekeeper to the CJEU and has most rule of law protection measures at its disposal, the European Commission is the key player to access. The judges turned to networking as a strategy in order to make the European Commission aware about the severity and intensity of the problem and lobbied for opening infringement procedures against the Polish government. A particular adversarial legal culture that has evolved in East-Central Europe helped the judges to gain access to the Commission because they found allies in civil society such as the Helsinki Foundation for Human Rights. In addition, their ideational motives and a growing conviction that they should act as guardians of the Polish constitution drove their mobilisation outside the bench. Although it was surely not the judges alone that convinced the European Commission to start the then four infringement procedures against the Polish government, they became important actors on the European level. So far, Poland lost all these infringement procedures and as it ignored some rulings, in some cases even received high fines to be paid until legal changes occurred.

In the course of engaging with the legal measures, the judges also became socially relevant judicial activists. They understood that in order to regain a state of rule of law in Poland, the society needed to be more informed about the meaning of this concept and should understand that this is not only an abstract term but a procedural practice that effects every individual citizen. Hence, the judges engaged in various kinds of off-bench mobilisation. They organised mock court procedures in schools and at rock festivals, set up legal cafes in smaller cities where the population was also less exposed to an already alert civil society and aimed to increase the public visibility of the problem with dismantling courts of their powers through public demonstrations such as the "March of 1000 Robes" (Matthes 2022).

This very specific mix of mobilisation inside and outside the bench in the form of litigation efforts at the CJEU, the lobbying of the European Commission to open infringement proceedings, collaboration with the European Parliament that fought for pushing the Art. 7 procedure, and their protest outside the bench, taking into account both national and European structural possibilities, made the judges' associations a very prominent and visible actor in the fight for protection of the rule of law. Thus, they managed to combine different instruments in the face of the conditions described above.

The effects of the judges' protest action on the notion of the rule of law

The various actions of the Polish judges showed several effects. First, it has to be underlined how important networks for mobilisation are, both inside and outside the judiciary. Without partners such as the European association of judges Magistrats Européens pour la Démocratie et les Libertés (MEDEL) or other European roof organisations of human rights' groups, that were able to open doors in Brussels or to make appointments with Commissioners Frans Timmermans, Didier Reynders or Věra Jourová, the pressure on the European Commission would not have been so strong. Also, the efforts to engage in a broad variety of activities that address the public directly were very effective. Inside Poland, the attempts of judges to promote the idea of the rule of law in the society helped to counter the government's "contestation of constitutionalism" (Blokker 2020, 336) and increased democratic

resilience. Although this effect cannot be quantified somehow, a greater awareness of what the law means, became visible in the Polish society. This was achieved also by collaboration with the initiative “wolny sady” (Free Courts). This group of four lawyers considers themselves as a kind of legal guerrilla and started to shoot short films on the relevance of the rule of law which they uploaded to the internet. They very quickly became pretty famous and well-known in Poland and across Europe. They also defend judges who were accused by the government of overstepping their competences and provide evidence at the hearing of the CJEU in Luxembourg.

Due to this ongoing mobilisation and contestation, also the European institutions themselves had to deal more intensively with the notion of rule of law and made their own understanding of what Art. 2 means more pronounced. While rule of law had been a blurrier concept some years ago, this has changed in the meantime. By more frequent occasions to justify the opening of an infringement procedure and after various non-successful consultations with the Polish government which made the Commission send the cases on to the CJEU which in turn prepared more and more judgments on the issue, all EU institutions developed more exact and precise definitions. Today, Art. 2 TEU is clearly connected to Art. 19 on the independence of judges and Art. 49 of the European Charta of Fundamental Rights. In addition, there is a comprehensive body of legal assessments and judgments on what the rule of law means inside the EU that resembles quite closely O’Donnell’s (2004) definition of a thick concept, connecting rule of law and democratic procedures. The European Commission also created additional instruments in the meantime, such as the Rule of Law Report that it now publishes on every member state in every year. Finally, the dissatisfaction with the political tool, the Article 7 procedure, that did not move forward due to its unanimity clause and the likely veto by the Hungarian prime minister Viktor Orbán, made the European Commission to come up with a new instrument: the rule of law conditionality that allows to cut money from the European budget and funds in case of rule of law violations and a likely misuse of these financial means. The Polish and the Hungarian governments tried to evade this clause coming into action and therefore sued the European Commission. However, they lost also these cases.

What can and should the European Union do to improve conditions for civil society organisations?

Despite changes in the toolbox, experts frequently criticised that the EU institutions were still too inactive (Mycielski/Pech 2020). Civil society organisations are often doing a double job, they check what national governments do and also monitor if European institutions live up to their promises or not. Considering that civil society organisations are facing more and more difficult domestic contexts, this watchdog role increasingly becomes a challenge that can hardly be mastered. Next to attempts by the respective national governments to curtail their financial stability by forcing those that receive international support to indicate themselves as foreign agents, it is also the state-owned or state-affiliated media and journalists that start defamation campaigns, sometimes openly, sometimes more in disguise as in Poland with the platform Kasta Watch (Matthes 2022). Considering that many media are no longer free in their reporting, this provides an important channel for governments to discredit any protest action.

So, what civil society organisations, including interest associations, need is a protective legal European framework that secures their operation. This is what the report with recommendations to the Commission on a statute for European cross-border associations and non-profit organisations, developed by the European Parliament and its rapporteur Sergey Lagodinsky (European Parliament 2022), demands. More specifically, the proposal stresses the following actions points: To create the

legal form of a European Association as a basis for pan-European civil society engagement that should include the option for freedom of movement for civil society organizations under national law, the abolition of obstacles and restrictions, such as fees and cumbersome formalities, plus a level playing field, including the receipt of public and private funding and taxation (Lagodinsky 2023). This would establish a European legal codex for the operation of cross-border civil society organisations and would protect them from politically motivated prosecution in their countries of origin or operation.

In September 2023, the European Commission submitted the draft for a respective Directive to the European Council and the European Parliament. This draft introduces two legislative proposals, 1) a regulation (under Article 352 TFEU), which creates the legal form of European associations, 2) a directive harmonising common minimum standards for non-profit organisations (NPOs), under Article 114 TFEU (European Commission 2023). Given that this draft passes the European legislative procedure in the suggested form, this would contribute an important component of the European legal framework and protect civil society organisations. Public consultations on the draft were held during its preparation phase in summer 2022. Many of the responding organisations favoured a new legal form and common minimum standards. The main intention of the draft is to create an additional legal form of those non-profit associations at the national level that aim to engage in cross-border purposes and that this should be recognised by all member states.

While this initiative is surely a step forward and will protect the mere existence of civil society organisations, there are still some problems connected: Since the proposal is designed as a directive, member states have to implement it into their own national legislation. As it became visible in several other occasions, the governments of countries that question the freedom of association and other rights, will not be very eager to come up with legislation that is in line with the Commission's draft and potential new legal act. In addition, this draft does not include measures that would defend the organisations in their financial means of operation. It might again provide them with a tool to engage in legal complaints against their governments, but this takes time that is already needed for undertaking those activities addressing the actual problem but not the means of operation. Hence, the European Union institutions should additionally come up with a better or an easier to reach mechanism for supporting the networking among civil society organisations. Many associations already have European umbrella associations that provide such kind of assistance, but as research shows, there are still plenty of civil society organisations that do not have such support structures and therefore cannot speak out so easily on the European level. The European Commission should also increase the involvement of civil society organisations when it explores the conditions in the member states during the process of compiling information for the Rule of Law report. Here, there has been some critique, that the Commission was reaching out to only a very few of them and in few countries (Lagodinsky 2023).

All in all, civil society organisations from member states that curtail the rule of law do see the European institutions and especially the European Commission because it has the majority of protection tools in its own hands, as important partners in their fight to support, reinforce or defend the rule of law. The European Commission does take this responsibility serious as the recent draft for European cross-border associations shows, but there is still more that can be done to protect these organisations. This is especially related to the field of financial support and the transfer of know-how so that civil society organisations can run their own campaigns or engage in the collection of evidence, the publication of findings and reports or in strategic litigation. By doing this, the European institutions

should not create their own “gongos” (government-organised non-governmental organisations) but ensure that the opportunities to operate freely across the European Union are sufficiently secured.

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