

Scholars and rule of law backsliding

Dear friends,

Let me get straight to the point: I feel like an imposter. Talking about defending the rule of law in Poland in the presence of Judges Hetnarowicz-Sikora, Zurek and Tuleya is like having to explain how to play football or tennis with Johan Cruyff and Robert Lewandowski or Serena Williams and Iga Swiatek in the audience. So let me first acknowledge it is a humbling privilege to share a podium with them, and to thank the wonderful organisation for making this happen.

My talk is not about direct action and the front line – **their** domain. I am a scholar, a teacher, a professor as well as an equality judge. My topic is how scholars and legal practitioners not themselves directly involved – and some colleagues actually are (I will come back to that) – could and should relate to rule of law defense. My position is that an academic or legal professional defense of the rule of law is not and cannot be a spectator sport.

If you, like me, have built up expertise on the rule of law and EU law over many years, and if you, like me, have a platform as a professor and a member of a human rights body, it is not neutral to stay quiet. It may be tempting but it is not neutral, if all you do is just observe and go quietly about your own business, don't pick up the phone when journalists call and write articles and chapters that will be published 1 or 2 years from now. Recently a colleague of the 3 judges here told me: out of 100% of judges in Poland, 10% are radicals siding with the governing party, 10% follow their moral compass like me and other IUSTITIA and THEMIS judges, and then there is a very large group in the middle that stays silent and swings with the pendulum. A silent majority.

My feeling is too many scholars and legal professionals are silent too – particularly because we are witnessing a veritable implosion of rule of law standards in the EU. There is even an ongoing discussion about whether a scholar speaking up and acting based on his or her expertise, and fighting for the notion that a judgment is not just any other opinion but an essential basis from which any political action and discussion can at all take place, is in fact a scholar, or actually an activist– a scholactivist. I will address that criticism after I describe in somewhat more detail what brought me here. And then I will ask for your help.

Dear friends,

There is an elephant in the room. I am the only non-Pole on the podium. I often get the question: why do you, a Dutch guy who does not speak any Polish and is not in any way related to that country, be it by blood or love, go there so often? Why the obsession? It is personal in a number of ways.

Just before Judge Tuleya was suspended by a body that is not a court according to both the Polish constitution and ECHR and Union law standards, because it contains individuals that are not independent and impartial and can therefore not be a court in the legal sense nor issue judgments in the same sense, I co-authored a letter to support him. I explained that my own grandfather, who had had to go into hiding in the Netherlands because he did not want to return to forced labour in a German weapons factory, may have survived because of the grandfathers of Polish people present here. Polish forces helped liberate my country. I think it is important to have this long view. We, the Dutch, owe are freedom to Poland. Therefore, my issue is not with Polish people. It is with the Polish government.

But there is a deeper, more important question. It is a key question driving me as a scholar and a legal professional. It could not be more personal, and yet I think many of you will recognise it. That question is simply: **what would I do?** I think none of us can really answer that, until we are in a situation where our values clash with a governmental agenda. Or, like in my own case, until you witness someone getting into such a situation.

I was never an activist. In Holland, I have never participated in a protest. For the longest time I worked quietly as a scholar, civil servant and diplomat. I wrote my academic articles and countless political speeches about the importance of the rule of law for Dutch ministers to read out. Then I met a Polish scholar who had been my professor at the EUI. His name is Wojciech Sadurski. In the spring of 2019, a few critical tweets about the leader of Law and Justice, Jaroslaw Kascynski, and the public TV, TVN, led him to be sued by both. His cases were meant to intimidate – so called SLAPP cases.

Sadurski was my own teacher. A NL guy learned about Europe's legal DNA from a PL scholar. I felt compelled to ask him how I could support him. This initially led to me co-authoring an open letter to defend his freedom of speech. We kept in touch, and I followed his cases. I found myself flying to Warsaw in November 2019, now 3 years ago, to witness his trial.

This experience completely changed my perspective. Theory became reality. I saw how, at the last minute, Sadurski's hearing was relocated to a much smaller courtroom to ensure that many of his supporters could no longer enter, and so that we were absolutely packed in there. I saw police inside the courtroom. I saw prosecutors who were not independent. I saw a familiar professor behind a lectern, looking at his back, not his face - not to teach his students – like I once was – but to face a judge. I saw a judge who was in a difficult spot, because following the law could bring her into trouble personally. This was in Europe. 1.5 hour flight from Amsterdam. I wrote about it. And in these few hours I had learned that I needed to get to know the people who defend and resist: the journalists, the attorneys, the scholars and the judges. I wanted to get to know them to get closer to an answer to my question: **what would I do?**

This led me to Luxembourg at least five times, to listen to cases about Polish judicial independence at the European Court of Justice. I met Polish judges. It is also where I saw a Polish judge, seconded to work at the Ministry of Justice, argue against her own colleagues to justify why the judicial system in Poland should be cleansed of real judges and replaced by non-judges. In open court I saw her harass judge Zurek, and tell untruths about him. I saw attorneys from the wonderful NGO Wolne Sady, Free Courts, defend these judges. I learned what it takes to defend European values. I wrote about it and gave radio and TV interviews, to share my worries, to talk about those who have a clear answer to my question.

I have since been active in other ways too as a scholar and a colleague legal professional. I helped students organise events to inform themselves about what is going on in Poland, the OurRuleofLaw festival. It will soon have its third edition in Brussels. This taught me many young people seek answers to the same question: **what can I do?** As a member of the TGL Professors I wrote to the dean of the law school where Judge Tuleya was teaching, to tell him he should not be fired. This led to the dean being fired and to Judge Tuleya remaining Professor Tuleya. **Pressure can help.** In the TGL Profs capacity I also offered my expertise, alongside other professors, to support 4 European umbrella organisations of judges to challenge before the Court of Justice in Luxembourg a Council decision to issue to Poland so-called EU Covid funds. This decision included so-called milestones to re-establish judicial independence, that in the European judges' view violated basic judgments of the ECJ. It was judges, not politicians, who spoke up and stood up. I believe scholars have a practical duty to support them.

Almost precisely a year ago I flew to Warsaw to participate in the protest against a government decision to instruct the Polish CT that it now fully controls to issue a statement about how EU law has no supremacy in Poland. This was a frontal attack on the Union as a community of law. I wanted to be there. Thousands of people were waving European flags. They greeted me in Polish, knowing I was not. But we both knew we were there supporting the same idea. I never before felt so European. Polish judges, journalists, attorneys and citizens have given me a much better understanding of what my EU is about.

All of this still begs the question: given that I am focused on a defending the rule of law in both theoretical and practical ways, are my actions problematic from a scholarly viewpoint? This has recently been argued by some renowned scholars, and would particularly apply to those working on constitutional law. There is – they argue – a need to be cautious to stay out of politics, so as not to be seen as co-opted by one political colour or another. If not, the very reputation of science and scholarship may become at stake.

I think this critique misses the point in a quite fundamental way. Law is the language of power and power is the currency of any politics. So law, by nature, engages power and touches upon politics, both by facilitating and limiting it. A hands-off approach is no less normative or more neutral than engagement. After all, it will serve, or be taken, to silently support, endorse or facilitate the status quo. I personally feel lawyers have a professional vocation to explain what the law is and to defend it, both internally and in public. They need to explicate what lawyers amongst each other can keep implicit: the very relevance of the law to power and politics.

I don't see myself as an activist. But if an activist is what you want to call someone who defends the necessity of ECJ and ECHR rulings to be executed, who underlines the necessity of complying with binding legal standards, and who tries to describe the real situation on the ground in this light both to academic and general audiences, I am fine with that. Being a scholar comes with professional responsibility too, and I consider this to be part of my duty. But I look forward to the day that I can get back behind my desk and write a note about how strongly I disagree with the judgments of Judges Hetnarowicz-Sikora, Zurek and Tuleya, rather than having to defend their very position.

I am coming to a conclusion.

Later, in the film, you will notice the judges I have the privilege of sharing the podium with this afternoon sincerely feel they are doing nothing special. Their self-understanding is one of “just” keeping their oath to uphold the law. As an engaged scholar and practitioner, seeking an answer to “what would I do?”, this is absolutely fascinating to me. Because they are both right and wrong.

They are right in a formal sense. If you take an oath, like I did myself when I became an equality judge, it is implicit you will stand for your duty however the situation changes. You swear to be impartial and independent. If anything interferes with that, you are to act. Hiding is not an option. Not in your own interest, but for the good of the system and ideas that granted you this obligation. The special status of judges is in the interest of the larger society.

But judges under pressure – and I hesitate to contradict them in their presence – are wrong too when they say there are just doing their job. Because what you will witness is tremendously courageous on a personal level. They are going out on a limb. It affects their whole life, and that of those close to them, both emotionally but also financially. Many actions by autocratic governments, like the Polish government, are meant precisely to keep the majority silent by cracking down on those who step up and resist. They serve as examples to scare the rest. This is called chilling effect. And it works well. It works well, because of the silent majority remaining silent and remaining in the majority.

So once you have seen the film, help me support these judges. Help me unchill the chilling the effect. Help me unsilence the silent majority. Not just by giving them a standing ovation. But also by supporting free media in Poland that keeps on putting a spotlight on the pressure on the rule of law there. By financially supporting NGOs working there. By going out and protest. By going out and vote. By joining me write about it if you are a scholar. By informing yourself, and offering your expertise to the media. By making judges and other frontliners feel they are not alone. **By answering the question of “what would I do?” by saying that, at least, you are not part of the silent majority.**

It is good you came to listen and watch today. But I hope you will join me and act tomorrow. Dziękuję bardzo / thank you // Dankuwel