

# Restoring the Rule of Law Through Criminal Responsibility

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This article belongs to the debate » [Restoring Constitutionalism](#)

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## I. Of sledgehammers and scalpels

It seems that the Polish government's strategy – playing for time – is paying off. While the overhaul of the Polish judiciary has been repeatedly challenged before the Luxembourg and the Strasbourg courts, the PiS-led government does not seem ready to change course. In a strange legal ping pong between Brussels and Warsaw, the Polish government persistently shifts its position between responsiveness and resistance. In particular, judges are still appointed in application of procedures that have been found to violate [EU law](#) and the [ECHR](#). Eventually, the Polish government seeks to complete the overhaul of the Polish judiciary by creating a situation that cannot be undone. What is more, it has started to instrumentalise this new judiciary as a tool for repressing resisting judges and other government critics. The cases of Igor Tuleya and Wojciech Sadurski stand out as gloomy examples.

Yet, there is hope. Let's image the following scenario. Fast forward to the next Polish elections of November 2023. Imagine now that the Polish people is tired of a government that seems ready to sacrifice the country's European integration. Imagine further that PiS suffers a heavy electoral defeat and is replaced by the opposition. Finally, imagine, that this new government is ready to lead Poland back to the path of the European rule of law. After its victory, however, it will face a crucial dilemma. How should it deal with the messed-up judicial system? How should it restore the rule of law?

This question is asked by [Andrew Arato and András Sajó](#). Constitutional restorations are especially challenging in countries, where the legal system has entrenched a certain situation. The new Hungarian fundamental law is an illustrative example in this respect. In such a context, one may legitimately ask whether a democratic community is bound to follow these constitutional rules? [Gábor Halmai and Andrew Arato](#) propose to take up the sledgehammer and simply adopt a new constitution – even if this happens in violation of the rules currently in force.

What options would a new Polish government face when seeking to restore an independent judiciary that deserves the "[trust which the courts in a democratic society must inspire in individuals](#)"? On the one hand, said government could apply the sledge-hammer method and reverse all appointments that were conducted in violation of the European rule of law. In 2023, however, the consequences of such a complete reversal could be severe. Too many judges have already been appointed under the unlawful

procedures. Reversing these appointments could create a legal chaos. Importantly, it is unclear what should happen with decisions rendered by unlawfully appointed judges. Should they be open to appeal? Further, many judges – though appointed in an unlawful manner – may still be devoted to their mission as independent judges. While some might openly resist, others may reluctantly play along with the current government. Yet others again might stand truly behind the government’s agenda and gladly lend themselves to become an instrument of government repression. Hence, a one-size-fits-all solution seems hardly appropriate.

We suggest a much more constrained approach that resembles a scalpel rather than a sledgehammer. To restore an independent judiciary and – in a broader perspective – the rule of law, it would suffice to remove the central perpetrators from the judiciary. To achieve this aim, we plead for the criminal responsibility of those judges who severely and intentionally disrespect EU values. Establishing their criminal responsibility in fair proceedings would then justify – in fact: require – their removal from office. Accordingly, a criminal responsibility of judges who disrespect EU values can lead to a much more constrained and targeted restoration of the rule of law. Before diving into the specifics of such criminal responsibility (Section IV), we will briefly explain why violations of EU values are a useful point of reference to determine which judges should be removed from the judicial system (Section II). This, in turn, requires us to establish the judicial applicability of Article 2 TEU values and the duties of domestic authorities that flow from these values (Section III).

## II. Why EU values

To start with, one may legitimately ask why we built our proposal on EU values? Indeed, the overhaul of the Polish judiciary has taken place in blatant violation of the Polish constitution itself. Similarly, judges at the Supreme Court’s Disciplinary Chamber who allow themselves to become a tool of government repression violate national fundamental rights enshrined in the Polish constitution. So why do we suggest EU values as a point of reference?

The answer lies in the fact that the Polish Constitutional Tribunal, the institution tasked with interpreting and enforcing compliance with the Polish constitution, has been captured by the PiS-led government. Importantly, the ECtHR ascertained in *Xero Flor* that, due to its unlawful composition, the Tribunal cannot be regarded as a court “established by law” under Article 6 ECHR. Besides such institutional deficiencies, the Tribunal’s [decisional practice](#) further indicates its descent to a loyal servant rubberstamping the government’s agenda. This leads to a situation, in which there is no independent and trustworthy institution with a mandate to authoritatively interpret the Polish constitution. Against this backdrop, the Polish constitution can hardly serve as yardstick for the criminal responsibility of perpetrators, such as those sitting at the Disciplinary Chamber. In addition, these perpetrators are shielded by the captured Constitutional Tribunal against any contestation both on the domestic (see e.g. Cases [U 2/20](#) and [Kpt. 1/20](#)) as well as on the European level (see e.g. Cases [P 7/20](#), [K 3/21](#) and [K 6/21](#)).

For these reasons, it seems that alternative standards are required to identify and remove perpetrators. These standards, we argue, can be found at the EU level. The Court of Justice has taken up the task to articulate and defend the values enshrined in Article 2 TEU. Since 2018, it has become the central forum to identify and remedy violations of EU values in the Member States. If Polish judges, prosecutors or other public authorities have doubts where to draw red lines, they should look at the jurisprudence of the Luxembourg court rather than at decisions rendered by the captured Constitutional Tribunal. As such, EU

values demarcate a line of grave illegality. For that reason, they provide yardsticks for assessing the conduct of national judges, such as those in the Supreme Court's Disciplinary Chamber.

### III. Why EU values create legal obligations

The very premise of this proposal is that national judges have a duty to respect the values enshrined in Article 2 TEU, which in turn presupposes their judicial applicability. Such an applicability is not self-evident. Based on the misleading value semantics, some even doubt their status as being law. In this spirit, the Polish Constitutional Tribunal stated that “[t]he values mentioned in Article 2 of the TEU are merely of axiological significance”. Such doubts are not convincing. The values of Article 2 TEU are laid down in the operative part of a *legal* text, the TEU. They are applied in *legally* determined procedures by public institutions (see Articles 7, 13(1) or 49(1) TEU) and their disregard leads to sanctions, which are of *legal* nature.

Admittedly, these values are vague and open. They fall short of the criteria for direct effect which require a Treaty provision to be clear, precise and unconditional. So far, the Court has avoided the contentious step of applying Article 2 TEU as a freestanding provision. Instead, it has started to combine Article 2 TEU with other Treaty provisions in its seminal *ASJP judgment*. The Court operationalises the values in Article 2 TEU through provisions that give “specific expression” to them (see in detail, [here](#), [here](#) and [here](#)). On the one hand, this fends off the possible critique of turning Article 2 TEU into the freestanding and unpredictable core of a centripetal, Member States-devouring constitution. On the other hand, the Court remains on solid methodological ground. Interpreting a provision of a given legal order in conformity with its fundamental principles constitutes nothing else than a systematic interpretation. In recent infringement proceedings against the Hungarian LGBTIQ laws, the Commission even relied – due to the “gravity of these violations” – on Article 2 TEU as a freestanding provision.

What does this mean for national authorities involved in judicial proceedings that violate the Union's values? Their duties flow from the doctrines of direct effect and primacy. Any Member State judge must interpret and apply domestic law in conformity with EU law. This includes the Union's common values enshrined in Article 2 TEU. Any Member State judge has a duty to heed these doctrines in any national proceeding when an infringement of Article 2 TEU is at stake (see also [here](#)). Hence, all national law, including domestic criminal and disciplinary law, must be interpreted in conformity with European values. If such an interpretation is not possible, these provisions must be set aside.

By giving such directions to national judges, Union law puts them in a difficult position, especially in countries where the government's respect for judicial independence is low. Judges handling sensitive cases might be intimidated by political pressure, the threat of disciplinary measures and a Constitutional Tribunal that rubberstamps the government's overhaul of the judiciary. Yet, a national judge does not stand alone but finds support in the European union of courts. Indeed, many Polish courts have turned to the Luxembourg court to protect their independence. In response, the CJEU repeatedly declared that the Disciplinary Chamber at the Supreme Court violates Article 19(1)(2) TEU and Article 2 TEU (see only *A.K. and Others* or *Commission v. Poland*). It also ordered the Disciplinary Chamber's suspension and an unprecedented daily penalty payment of 1.000.000 Euro.

### IV. Why disrespecting EU values leads to criminal responsibility

What happens if judges violate the values enshrined in Article 2 TEU, for instance in disciplinary proceedings? We argue that if they *seriously and intentionally* disrespect EU values, they could face criminal responsibility. Seriously and intentionally exceeding public powers, even as a judge, is sanctioned under most legal orders (see e.g. [Section 339 German StGB](#), [Art. 434-7-1 French Code Pénal](#), [Art. 323 Italian Codice Penale](#), [Art. 446 f. Spanish Código Penal](#) or [Sections 305 f. of the Hungarian Criminal Code](#)). In this spirit, Article 231(1) of the Polish Criminal Code 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”. This includes, under strict conditions, also the activity of judges.

Without doubt, judges may err. Not any judicial decision that violates the law is per se an excess of authority. Indeed, non-accountability is a core element of judicial independence. An independent judiciary is a manifestation of the separation of powers and an inherent component of effective judicial protection. It is obvious that the criminal responsibility of judges can apply only ultima ratio in very serious cases and under strict procedural safeguards. This is particularly true in Poland, where judicial immunity is explicitly enshrined in the Constitution (see Article 173, 180(1) and (2) and 181 of the [Polish Constitution](#)).

How does this reflect into Union law? First, EU law is an independent source of law in national procedures. The principles of primacy and direct effect require a domestic judge to apply EU law and to disapply or re-interpret conflicting national laws. Second, according to an established line of jurisprudence, “infringements of EU law must also – at the very least – be punishable under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance” (AG Kokott in Case C-105/14, [Taricco](#), para. 80). In short this means: Member States are required to penalise any person who infringes Union law in the same way as they penalise those who infringe national law.

Even if the thresholds for the criminal responsibility of judges is a matter of *national* criminal law, EU law can provide guidance for its operation. With regard to the Polish disciplinary regime for judges, the Court of Justice noted that such a disciplinary liability must be confined to entirely exceptional cases that concern “[serious and totally inexcusable forms of conduct \(...\) which would consist, for example, in violating deliberately and in bad faith, or as a result of particularly serious and gross negligence, the national and EU law](#)”. A similar threshold must apply to criminal responsibility. When is this threshold crossed? In our view, the threshold is crossed by breaching Article 2 TEU values. Even if these values are vague and open, they gain specific meaning in the CJEU’s interpretation. Thereby they become relevant for national procedures establishing the criminal responsibility of judges.

What does that mean for Polish judges who decide in disciplinary proceedings? By interpreting the respective legal basis for such proceedings in a way that seriously violates judicial independence protected under Article 2 TEU, a judge at the Disciplinary Chamber might reach the threshold of criminal responsibility. For sure, any conviction requires proving the intention of the judge concerned, i.e. to substantiate that he or she knew the relevant law and deliberately disregarded its effects. Determining this intention falls to the trial judge. But here again, actions by European institutions are important. If a Polish judge intentionally disrespects a CJEU decision that protects EU values *in the case at hand*, a red line and, in all likelihood, the threshold of criminal responsibility are crossed.

Three fundamental objections could be raised against this proposal. First, the criminal responsibility of

judges for infringements of Union law could be understood as Europeanizing the Member States' substantive criminal law. Yet, criminal justice firmly remains in national hands. The proposed criminal proceedings are part of a *national* process to restore the rule of law. These trials are conducted before *national* courts in accordance with *national* criminal law.

Second, the Polish Constitutional Tribunal prohibits national courts from following the CJEU's verdicts and rather confirms the constitutionality of the provisions at issue. Thus, one could argue that such diverging pronouncements create a situation of legal uncertainty that excludes criminal liability. Under normal circumstances, this would probably be the case. Yet, as the ECtHR has recently ascertained, the Tribunal's composition has taken place under manifest violation of Polish law. Accordingly, it cannot be considered a "[tribunal established by law](#)" and the decisions taken by the respective panels must be disregarded.

Third, many might feel a strong uneasiness with respect to the criminal responsibility of judges. And so it should be, considering the importance of judicial independence. However, it should be recalled that our proposal is conceived as a middle way between doing nothing and the sledgehammer method of removing all judges appointed under unlawful circumstances. In this sense, the approach advanced in this contribution is directed at few chief perpetrators who have become crucial tools of government repression. Again, the criminal responsibility only applies under extremely narrow conditions.

## V. Summing up

In sum, our proposal provides a path to clear the courts and restore the rule of law in a manner that complies with the rule of law. Admittedly, it seems rather unlikely that judges who seriously and intentionally violate Union values will face prosecution anytime soon. Nevertheless, it cannot be stressed enough: no government lasts forever. Biased public officials can be held accountable once the political landscape has changed. Such criminal proceedings do not constitute an unacceptable "victor's justice" if they are pursued in a manner that itself respects the Union's common values. Drawing on the CJEU's jurisprudence, these proceedings must be conducted before an independent institution and in full respect of the rights enshrined in Articles 47 and 48 of the Charter (see [Commission v. Poland](#), Case C-791/19, para. 19). If these standards are guaranteed, the criminal responsibility of judges might be an important tool to re-establish a judicial system in line with the European rule of law.

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