**Tweede Kamer - The Netherlands House of Representatives**

**Roundtable discussion on the rule of law in Poland and Hungary**

**14 February 2019**

**HUNGARY**

The April 2018 parliamentary elections in Hungary further consolidated the position of Prime Minister Viktor Orbán and provided his Fidesz party with a two-thirds super-majority in the Parliament. This has enabled Fidesz to swiftly pass legislation and institute constitutional changes without significant opposition or genuine parliamentary scrutiny. Following the elections, the Hungarian authorities have adopted legislation and measures that further eroded civic space and

fundamental European values, including criminalising legitimate and lawful human rights work, restricting rights and freedoms, and undermining the independence of judiciary

Although the authorities have gradually challenged the rule of law and human rights since 2010, the past two years have seen significant deterioration. The adoption of restrictive and sometimes punitive laws and measures, as well as open attacks on civil society and attempts to delegitimise its work, have had a deleterious effect on many individuals and organisations who are increasingly becoming reluctant, even afraid, to speak out or to have a dissenting voice.

In April 2018, a pro-government weekly magazine published the names of over 200 people it claimed were part of what Prime Minister Viktor Orbán called the “Soros’ mercenary army” paid to bring down the government. The list included members of Amnesty International, Transparency International, prominent civil society activists, as well as members of the Central European University[[1]](#footnote-2). In June 2018, a ruling party spokesperson announced that Amnesty International Hungary “facilitated illegal immigration” and “wanted to flood Europe and Hungary with migrants”. He encouraged government supporters to openly fight against Amnesty International and other organizations who, as he alleged, “threaten Hungary’s security” by “supporting migration”[[2]](#footnote-3). In response to the targeted government-led smear campaign, Open Society Foundations left Budapest in August 2018 and relocated to Berlin, as the leadership deemed Hungary no longer safe for their staff. In December 2018, the Central European University, which had made Budapest its home since 1993, announced it was moving its degree program to Vienna. In this current climate, the position of civil society organisations, including that of Amnesty International, is becoming increasingly precarious.

In addition to the actions that specifically targeted civil society, the authorities in Hungary have enacted a series of laws that might further constrain the freedom of expression and assembly and blur the lines between the executive and judicial authority.

[**LexNGO2017**](https://www.amnesty.org/en/latest/news/2017/06/hungary-ngo-law-a-vicious-and-calculated-assault-on-civil-society/) legislation (the original “foreign funding” legislation adopted in 2017[[3]](#footnote-4)) remains in place and continues to pose a potential threat to civil society organisations. The Law on the transparency of organizations funded from abroad forces NGOs receiving more than 24,000 EUR direct or indirect funding from abroad to re-register as “civic organization funded from abroad” and to put this pejorative label on every publication and on their website. The new legislation added further stringent reporting requirements for those receiving foreign funds, including an obligation to report donations of at least 1,500 EURO per tax year, and to provide the donor’s details. Failure to comply may bring heavy fines and ultimately the suspension of the right to operate in the country. Authorities justified the legislation as necessary to fight money laundering and international terrorism, however comprehensive legislation on money laundering is already in place. This legislation appears to purposefully target the NGOs promoting the rule of law and the rights of refugees, migrants and other marginalized groups, and the provision of social and legal services insufficiently offered by the state.

[**LexNGO2018**](https://www.amnesty.org/en/documents/eur27/8633/2018/en/) legislation (known as the “Stop Soros” package) was adopted on 20 June 2018. The new provisions criminalized a range of lawful activities related to migration, under penalty of up to one year in prison. The law created a criminal offence of “facilitating illegal immigration” and it applies to both individuals and organizations that engage in “organizational activities” that assist people who are seeking asylum, those who have entered Hungary irregularly and are attempting to secure a residence permit[[4]](#footnote-5). Activities include border monitoring, preparation or distribution of information materials, and building or operating a network in support of facilitating “illegal immigration”. The vague terminology contained in this law could see criminal penalties imposed for a broad range of legitimate activities, including campaigning, providing legal support to migrants and refugees or conducting research into human rights violations. The criminalization of such activities is a direct assault on the work of civil society actors who support or campaign on behalf of refugees, asylum-seekers and migrants.[[5]](#footnote-6)

**Special Tax Law** - On 20 July, the Hungarian Parliament enacted new punitive legislation imposing a special tax of 25% on any funds received by civil society organisations who are conducting activities deemed to be “supporting migration.” Such activities include “carrying out and participating in media campaigns”, “building and operating a network”, “educational activities” and “propaganda activity that portrays migration in a positive light”. The broad scope of the definition renders NGOs[[6]](#footnote-7) vulnerable to politically-motivated tax investigations and potentially significant fines and sanctions – including an additional penalty of 50% of the tax for late/non payment – which may jeopardise their ability to operate in the country and ultimately curtail their right to freedom of expression.

**Seventh Amendment to Constitution** - A separate bill proposing a “seventh amendment” to the Constitution - requiring state authorities to protect Hungary’s “Christian culture” - was adopted in June 2018. It bans the settlement of foreign populations; restricts people’s ability to peacefully protest; undermines the independence of the judiciary; and criminalizes homelessness. Taken together, these changes to Hungarian laws pose a serious threat to the right to seek asylum; the freedoms of association, assembly, expression, and movement; the right to housing and associated economic and social rights; and the right to be free from discrimination, in violation of international human rights law and regional law[[7]](#footnote-8). From 15 October, when the provisions on homelessness entered into force, at least ten people have been prosecuted for rough sleeping across Hungary.

**Law on Administrative Court** - In December 2018, the Hungarian Parliament adopted legislation to create a new administrative court system, which will be operational as of January 2020. The new courts, which will be overseen by the Ministry of Justice, will decide on matters of public administration, including those affecting human rights, taxation and economy[[8]](#footnote-9). The law provides Ministry of Justice with broad powers, including over budgeting, regulation, internal investigation, as well as appointment and promotion of judges, without the necessary checks and balances of safeguards, threatening to pave the way for political interference and further undermine judicial independence. The law was rushed through the Parliament in December with an extremely limited time for a meaningful public debate.

In response to the laws described above, several proceedings have been initiated at the EU level with regard to Hungary. Specifically:

* On 12 September 2018, two thirds of Members of the European Parliament (MEPs) endorsed and voted in favour of the report on Hungary drafted by MEP Judith Sargentini. The report listed numerous reasons for concern, related to the functioning of the country’s constitutional system, the independence of the judiciary, freedom of expression and freedom of association, as well as the right to equal treatment, the rights of persons belonging to minorities, including Roma and Jews, the fundamental rights of migrants, asylum seekers and refugees, and many more. It concluded that there was “a clear risk of a serious breach” by Hungary of the EU’s founding principles, as listed in Article 2 TEU, and triggered Article 7.1 TEU proceedings with regard to Hungary. The procedure is now on the agenda of the Council;
* In July 2018, the European Commission launched an infringement proceeding against Hungary in relation to the LexNGO2018 legislation. The EC mainly argued violations of the EU Directives related to asylum procedures, reception conditions, qualification and the right to seek asylum, and pointed out to inconsistencies with the EU’s provisions on freedom of movement;
* In December 2017, the infringement proceeding against Hungary in relation to LexNGO2017 (foreign funding legislation), initiated in July 2017, was referred to the Court of Justice of the European Union (CJEU) and remains pending;
* In December 2017, the infringement proceeding in relation to “LexCEU”, initiated in April 2017, was also referred to CJEU.
* In July 2018, the infringement proceeding launched against Hungary in 2015 concerning its asylum laws was referred to CJEU, the last step in infringement proceedings, and remains pending.

Furthermore, several international and regional bodies have criticised the recently adopted legislation, including [Council of Europe’s Commissioner for Human Rights](https://www.coe.int/en/web/commissioner/-/commissioner-concerned-about-proposed-additional-restrictions-to-the-work-of-ngos-in-hungary), [UNHCR](http://www.unhcr.org/news/press/2018/2/5a86dcff4/hungary-unhcr-dismayed-further-border-restrictions-draft-law-targeting.html), [OHCHR](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22665&LangID=E), Council of Europe Venice Commission[[9]](#footnote-10), [joint initiative by special rapporteurs and special procedures](http://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-HUN-1-2018.pdf).

**POLAND**

Amnesty International has documented the following patterns with respect to the erosion of the rule of law and shrinking space for civil society in Poland:

* Systematic undermining of the independence of the judiciary, including concentrating power over the judiciary in the hands of the Minister of Justice, thereby disrupting the balance of powers;
* Employing new mechanisms within disciplinary processes to intimidate and harass judges critical of the government’s “reform” of the judiciary;
* Sustained crackdown on peaceful protest manifested by the use of force against demonstrators, lack of accountability for breaches of protesters’ human rights, and criminalization of peaceful protest;
* Ongoing assault on freedom of assembly, including differential treatment of assemblies in an arbitrary manner.

## **independence of the judiciary**

Since 2016, the government of Poland has systematically chipped away at judicial independence. The assault on the independent judiciary in Poland puts the right to fair trial and human rights at risk. Threats levelled at judges via social media, by post, and through email, and negative media campaigns targeting the members of the judiciary in Poland contribute to a hostile climate in which individual judges might be at risk. There is a notable absence of a clear commitment of the state to adequately protect those who experience such security threats.[[10]](#footnote-11)

### **The Supreme Court**

In response to the 2018 legislation that lowered the retirement age of Supreme Court judges and gave the President of Poland the discretion to decide if judges can remain on the bench after the age of 65, the European Commission (EC) referred the law to the Court of Justice of the European Union (CJEU) on 2 October 2018.

The EC argued that Poland had infringed EU law and requested immediate action in the form of an order for interim measures, which the CJEU issued on 17 December 2018. The order required the Polish authorities to immediately suspend the application of the provisions of the law that lowered the retirement age for Supreme Court judges to 65.[[11]](#footnote-12) The EC also lodged a formal complaint with the CJEU arguing that the Law on the Supreme Court is in breach of EU law and requested a decision on the merits. On 15 November, the CJEU granted the EC’s request for the case to be heard in an expedited procedure.[[12]](#footnote-13) The CJEU scheduled the first hearing in the case for 12 February 2019.[[13]](#footnote-14)

### **National Council of the Judiciary**

The National Council of the Judiciary (NCJ), the constitutional body tasked with safeguarding the independence of courts and judges, lost its independence pursuant to a 2017 legislative “reform”. Judges from courts in various parts of Poland have opined that the appointment procedure for the NCJ introduced by the new legislation is in breach of the Constitution.[[14]](#footnote-15) The amendment of the Law on NCJ increased the number of NCJ members appointed by parliament from the original 6 to 15 (out of the total 25 members), thereby making the body increasingly dependent on legislative authority in breach of the principle of separation of powers.

The CJEU will soon adjudicate the question of whether the reformed NCJ is a body capable of safeguarding the independence of judiciary in Poland, in compliance with EU law. Poland’s Supreme Court submitted this question to the CJEU on 30 August 2018[[15]](#footnote-16) and the first hearing is scheduled for 19 March 2019.[[16]](#footnote-17)

### **disciplinary proceedings**

The Polish government’s apparent targeting of certain judges and prosecutors for disciplinary action for their opposition to key reforms is of particular concern. Amnesty International continues to receive information about new and ongoing cases of disciplinary proceedings against judges and prosecutors who have spoken out against the “reform” of the judiciary or who have simply reiterated the importance of judicial independence. In addition, there are documented cases when disciplinary proceedings have been triggered upon some judges’ referral of judicial questions to the CJEU.[[17]](#footnote-18)

Power over the disciplinary proceedings is concentrated in the hands of the Minister of Justice. The Disciplinary Prosecutor for Common Courts, a position established within the “reform” of the judiciary, is appointed directly by the Minister of Justice for a four-year term.[[18]](#footnote-19) The Disciplinary Prosecutor then chooses deputy Disciplinary Prosecutors for the district and appeal courts.[[19]](#footnote-20) The Minister of Justice also selects the judges for the disciplinary panels in disciplinary courts.[[20]](#footnote-21)

## **freedom of assembly**

Amnesty International continues to observe with concern the situation of individuals who have participated in peaceful protests. Thousands of people took to the streets in the summer and winter of 2017 in cities all over Poland, demanding respect for the Constitution, an independent judiciary, and the protection of human rights. Such demonstrations have been met with a set of policing measures that often infringe the right to freedom of peaceful assembly and expression.[[21]](#footnote-22)

In April 2017, an amendment on the Law on Assemblies entered into force.[[22]](#footnote-23) The law provided that “cyclical demonstrations” organized by the same entity at the same location several times a year had priority over requests for other assemblies at that location and at those times. [[23]](#footnote-24) One such “cyclical demonstration” is the annual Independence Day March held in November.

The practical effect of the law on “cyclical” assemblies has led to bans on numerous assemblies in 2017 and 2018. For example, between April 2017 and March 2018, the governor of Mazowian province banned 36 assemblies in Warsaw. The reason given was that the banned assemblies were announced in the same place or in the vicinity of “cyclical” assemblies. States must make reasonable efforts to accommodate all types of peaceful protest; outright bans on one type of protected assembly in favour of another is arbitrary and infringes freedom of assembly and expression.

Such a double standard is also reflected in the way that law enforcement agencies police protests. Amnesty International has documented several cases (see below) where the police have failed to act to halt harassment or violence from far-right or nationalist groups when it has been directed at protesters. This type of policing appears deliberate, raising concern that state law enforcement actors may favour pro-government and nationalist demonstrations over other types of assemblies.[[24]](#footnote-25)

## **Prosecution of 14 women protesters**

1. On 11 November 2017, 14 Polish women were attacked during the Independence Day March in Warsaw, in which around 60,000 people took part. The women entered the march holding a banner that read “Stop Fascism” and were verbally abused and physically attacked by nationalist marchers.[[25]](#footnote-26) The police did not assist the women.

The Polish authorities not only failed to protect the women during the march, they opened proceedings against them for “interference with a lawful assembly”. A court ordered the women to pay a fine in October 2018.

The women did attempt to seek a remedy for the violence they endured. The investigation into the women’s abuse at the march ended in September 2018 when the Prosecutor dropped it, claiming that the attackers had not intended to seriously harm the women but were merely “expressing their displeasure” that the women had joined the march.[[26]](#footnote-27) Whilst she acknowledged that the assault and the insults qualified as criminal offences, the Prosecutor concluded that there was no public interest in continuing the case and recommended that the women pursue private prosecution. Amnesty International has called on Poland’s Minister of Justice to ensure justice for the 14 women.[[27]](#footnote-28)

**KEY RECOMMENDATIONS TO DUTCH AUTHORITIES**

**Concerning attacks on civil society and independence of judiciary**

* Publicly support civil society organizations (such as Amnesty International, Helsinki Committee/Foundation for Human Rights, Association for Legal Intervention (SIP) Civil Liberties Union and others) and human rights defenders in Hungary and Poland and affirm the legitimate and crucial role of the work they carry out;
* Put pressure on the governments in Hungary and Poland to repeal restrictive legislation and policies that infringe the right to freedom of association and assembly and imposes undue restrictions on the work of human rights defenders and civil society organisations;
* Put pressure on the governments in Hungary and Poland to repeal, or substantially amend, legislation that undermines the independence of judiciary.

**Concerning proceedings related to Article 7, Treaty of the European Union (TEU)**

Coordinate with the Dutch Ministry of Foreign Affairs to use their presence in the EU General Affairs Council (GAC) to advance discussions around Article 7 proceedings on Hungary and Poland:

* Encourage the Dutch Government to coordinate with governments of other Member States to advance proceedings on Article 7 on Hungary by initiating hearings with Hungarian authorities to discuss concerns raised in the report adopted by the European Parliament in September 2018;
* Encourage the Dutch Government to coordinate with governments of other Member States to continue Article 7 proceedings on Poland, in order to debate and address concerns over continuing erosion of the rule of law; urge the Polish authorities to address and implement all the European Commission’s recommendations; and make urgent calls, for example, for an immediate end to the harassment of Polish judges.

1. “List of 200 ‘Soros mercenaries’ published in Hungary”, The New York Post, 12 April, 2018, <https://nypost.com/2018/04/12/list-of-200-soros-mercenaries-published-in-hungary/>. [↑](#footnote-ref-2)
2. Amnesty International, *Hungary: New laws that violate human rights, threaten civil society and undermine the rule of law should be shelved* (Index: EUR 27/8633/2018) [↑](#footnote-ref-3)
3. <https://www.amnesty.org/en/latest/news/2017/06/hungary-ngo-law-a-vicious-and-calculated-assault-on-civil-society/> [↑](#footnote-ref-4)
4. It is already a criminal offence in Hungary to assist a person to cross Hungary’s border unlawfully or to remain in Hungary unlawfully, or for a person to cross a border barrier. Hungarian Criminal Code, Sections 353 (smuggling illegal immigrants); 354 (facilitation of illegal residence); 352/A. [↑](#footnote-ref-5)
5. Amnesty International, *Hungary: New laws that violate human rights, threaten civil society and undermine the rule of law should be shelved*, (Index: EUR 27/8633/2018) available at <https://www.amnesty.org/en/documents/eur27/8633/2018/en/> [↑](#footnote-ref-6)
6. The same provisions and penalties apply to donors to civil society organizations. [↑](#footnote-ref-7)
7. Amnesty International, *Hungary: New laws that violate human rights, threaten civil society and undermine the rule of law should be shelved*, (Index: EUR 27/8633/2018) available at <https://www.amnesty.org/en/documents/eur27/8633/2018/en/> [↑](#footnote-ref-8)
8. The court will decide on matters including those affecting human rights, such as police violations, asylum, and protest, as well issues of economic relevance: disputes over taxation and customs, media, public procurement, construction and building permits, cases of land and forest ownership, land and real estate public records and market competition matters. [↑](#footnote-ref-9)
9. Joint opinion on the provisions of the so-called “Stop Soros” draft legislative package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration) adopted on June 2018 and available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)013-e#](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)013-e); Joint opinion on section 253 on the special immigration tax of Act XLI of 20 July 2018 amending certain tax laws and other related laws and on the immigration tax, adopted in December 2018 and available at <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)035-e>; [↑](#footnote-ref-10)
10. Amnesty International. *Poland: The Judges who Defend the Rule of Law*. February 2019. [↑](#footnote-ref-11)
11. <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-12/cp180204en.pdf> [↑](#footnote-ref-12)
12. Case C-619/18. Accessed: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=207961&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=10695272> [↑](#footnote-ref-13)
13. <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62018CN0619:EN:HTML> [↑](#footnote-ref-14)
14. See for example: Resolution no 1 of the representatives of the Appeal Court in Katowice from 14 January 2019: <https://www.iustitia.pl/83-komunikaty-i-oswiadczenia/2803-uchwaly-zgromadzenia-przedstawicieli-apelacji-katowickiej-z-14-stycznia-2019r-dotyczace-wstrzymania-sie-od-udzialu-w-procedurze-nominacyjnej-oraz-popierajace-postulaty-placowe-pracownikow-sadownictwa> [↑](#footnote-ref-15)
15. <http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=236-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach> [↑](#footnote-ref-16)
16. <http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=253-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach> [↑](#footnote-ref-17)
17. Amnesty International. *Poland: The Judges who* Art. 112.3 Law on Common Courts. http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20010981070/U/D20011070Lj.pdf *Defend the Rule of Law*. February 2019. Pp. 6-8 [↑](#footnote-ref-18)
18. <https://www.euronews.com/2017/11/17/view-independence-day-in-poland-was-no-beautiful-sight> [↑](#footnote-ref-19)
19. Art. 112.6-13 Law on Common Courts [↑](#footnote-ref-20)
20. Art. 110a.1 Law on Common Courts [↑](#footnote-ref-21)
21. Amnesty International. *The Power of 'the Street': Protecting the Right to Peaceful Protest in Poland*. 25 June 2018. <https://www.amnesty.org/en/documents/eur37/8525/2018/en/> [↑](#footnote-ref-22)
22. Helsinki Foundation for Human Rights. “Constitutional Tribunal: amendments to Assemblies Act constitutional despite all objections.” 16 March 2017. http://www.hfhr.pl/en/constitutional-tribunal-amendments-to-assemblies-act-constitutional-despite-all-objections/ [↑](#footnote-ref-23)
23. Amnesty International. *Poland: “Reform” of the judiciary in Poland poses risk to the right to fair trial*. March 2018. <https://www.amnesty.org/en/documents/eur37/8059/2018/en/> [↑](#footnote-ref-24)
24. Amnesty International. *The Power of 'the Street': Protecting the Right to Peaceful Protest in Poland*. 25 June 2018. <https://www.amnesty.org/en/documents/eur37/8525/2018/en/> [↑](#footnote-ref-25)
25. <https://www.euronews.com/2017/11/17/view-independence-day-in-poland-was-no-beautiful-sight> [↑](#footnote-ref-26)
26. 1. Amnesty International. “Beaten and prosecuted for standing up to hate”, 30 November 2018. <https://www.amnesty.org/en/latest/news/2018/11/beaten-and-prosecuted-for-standing-up-to-hate/>

    [↑](#footnote-ref-27)
27. <https://www.amnesty.org/en/get-involved/take-action/poland-protect-rights-activists/> [↑](#footnote-ref-28)