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## **REPORT BY THE RAPPOREUR ON RULE OF LAW DEVELOPMENTS IN THE EUROPEAN UNION**

Completed on 13 March 2019

### **1. Introduction**

On 18 October 2018, the Standing Committee on European Affairs decided, following a proposal by the VVD and CDA parliamentary groups, to set up a rapporteurship on developments in relation to the rule of law in the European Union. The focus was to be directed at developments in Hungary and Poland. The theme of developments in relation to the rule of law in the European Union was also included in the committee's knowledge strengthening annual planning for 2019.

The purpose of the rapporteurship was to acquire information about this theme by organising a number of committee activities. The rapporteurship ends with the delivery of this report on the findings, which can subsequently be discussed by the members during the committee general debate on the rule of law in the European Union with the Minister of Foreign Affairs, scheduled for 14 March 2019.

On 14 November 2018, the committee appointed its members Maeijer (PVV) and Van der Graaf (CU) as co-rapporteurs. When preparing the committee activities on the theme of the rule of law, the co-rapporteurs sought to achieve a balance, to allow the various opinions regarding the subject to be given an airing. On 19 December 2018, the committee agreed to the details of the proposed activities - namely, a round-table discussion with experts from the academic world, the judiciary and civil society from the Netherlands and elsewhere; a discussion with representatives from the Council of Europe; discussions with the Polish and Hungarian ambassadors in The Hague; and working visits to Poland and Hungary. The committee also decided to hold a discussion with the First Vice-President of the European Commission, Mr Timmermans.

While preparing for the activities, it appeared that the proposed public discussions with the two ambassadors were not going to be possible. The committee also decided against its proposed working visit to Hungary, after it became clear that the committee delegation would not be received by the Hungarian parliament or representatives of the Hungarian government. Committee member Maeijer decided to cease her activities as a co-rapporteur on 31 January 2019. The committee asked me to continue my work as a rapporteur alone, after it became clear that no other co-rapporteur was available for the remaining weeks of the rapporteurship.

As a rapporteur, I hereby issue my report of the work carried out and of the committee's activities. I have based a number of findings and recommendations upon it.

## 2. Findings

The functioning of constitutional institutions in the member states of the European Union is one of the major issues currently facing the EU. Reforms in various member states are raising fundamental questions about the significance of the values and safeguards that go with the rule of law. These questions have not just been prompted by concern about the protection of these values in parts of the EU; they are also related to the fundamental principles of European cooperation, which itself is based largely on mutual trust. Without that trust, it is almost impossible to imagine the European legal order and cooperation between the member states in such areas as the single market or police and justice being maintained.

Against this background, the Standing Committee on European Affairs decided to set up a rapporteurship on the theme, for the purpose of strengthening the relevant knowledge by organising a number of activities. The rapporteurship had clearly defined parameters. The aim was to collect information in order to gain a clearer picture of the reforms in the two countries to enable the committee to form ideas. The focus was on the reforms in Poland and Hungary. In addition, the work was carried out in a relatively short period of time. This report contains an account of the activities that were undertaken and, based on those activities, an impression of the information collected. In the light of the limited focus and time available, no detailed analysis of the facts or circumstances has been made. However, the account does give a picture of the various perspectives that were offered.

All told, that picture is worrying. It should be stated at the outset that reforms of political or legal institutions in the member states are in themselves legitimate, and indeed may be necessary for legal and other systems to work well and effectively. It should also be remembered that every country functions in its own constitutional, historical, and cultural context. However, it is also clear that various reforms in Poland and Hungary, particularly how they are being implemented in tandem and playing out in practice, raise fundamental questions about the protection of values relating to the rule of law. As well as questions about the independence of the judiciary and the protection of fundamental rights, there are concerns about other institutions of importance in any democratic state founded on the rule of law, such as the functioning of civil society, the ombudsman, and a pluralistic, independent press. This is not just about reforms to structures and regulations, but also the political and social climate in which there is hostility and an atmosphere of suspicion. The signs that have emerged in this regard are a cause for concern. Public debate has become polarised to a significant degree, with facts and motives being disputed. An underlying point of discussion is how democracy - and the right of the majority to effectuate reforms through democratic means - should relate to the principles of the rule of law.

The Article 7 procedure regarding Poland appears to be in an impasse. With regard to Hungary, no concrete steps have yet been taken in the Council. The procedure does not appear to be designed to deal with a situation in which a danger exists in more than one country of a serious breach of the values of the rule of law. The application of the procedure has also led to a discussion about alleged political selectivity regarding certain member states. As well as the Article 7 procedures, there are various infringement proceedings that have been launched by the European Commission because of breaches of EU law. A number of these are pending at the Court of Justice of the European Union or have already resulting in rulings, such as the recent interim provision regarding the lowering of the retirement age of Polish Supreme Court judges. The member states concerned have stated that they will abide by these rulings. The significance of this for the functioning of European law is considerable.

At the same time, there is a broad-based realisation among many of the parties concerned of the importance of dialogue. This dialogue is taking place at European Union and Council of Europe level, as well as between national governments, umbrella organisations of judges and other social actors that are able to contribute to the dialogue on account of their position, experience, and

expertise. However, national parliaments can play a valuable role here too.<sup>1</sup> Because of their function as representatives, and because of the diversity of political opinions they have, they are ideally placed to enter into discussions with parliamentarians from other member states on democracy and the rule of law. This will enable them to learn from each other's experiences, to share actual feelings that exist in society, and to exchange thoughts on an equal basis. Parliaments can also look for cooperation partners to agree on shared viewpoints and convey their views to others.

### 3. Recommendations

The rapporteurship and the committee activities have yielded useful knowledge and insights. It is clear that the issues are complex and that the developments in Poland and Hungary, will continue, each in their own political and social context.

The findings have therefore led to the following recommendations:

#### *Recommendations to the Committee on European Affairs*

- The recommendation to the committee is that the rapporteurship be continued in order to gain more in-depth knowledge about the theme and to remain up to date. A working visit by the committee, such as the one to Poland, would be very worthwhile against that background and would offer an opportunity for direct dialogue. It is therefore recommended that the committee still make a working visit to Hungary in order to gain a clearer picture of the reforms taking place there and to exchange views on the matter.
- It is also recommended that the focus of the rapporteurship be broadened. After all, it is clear that the issues relating to Poland and Hungary are also affecting other member states to a lesser or greater degree. In addition, the rapporteurship could look more closely at the proposals that are expected in the short term on improving the existing framework for the rule of law in the European Union.<sup>2</sup>
- Greater cooperation with other national parliaments should be sought in order for the necessary dialogue between representatives of the people to take place and, wherever possible, joint action to be taken.
- Member states have united in the Council of Europe in order to uphold human rights and to promote democracy and the rule of law. It is recommended that the committee actively follows developments relating to the rule of law in Europe through the reports and opinions of the Venice Commission and GRECO (Group of States against Corruption).

#### *Recommendations to the government*

- First, it is recommended to the government that it continues to expand its support for non-governmental organisations in the member states in question that are involved with matters relating to the rule of law. In that connection, it is also important that sufficient financial and other resources be made available to embassies for an active role to be played in this area.
- Second, the government should certainly consider actively intervening or taking a position whenever infringement proceedings or other judicial steps are taken in relation to rule of law values in the member states, including in the European Court of Justice in Luxembourg.
- Third, efforts should continue at developing a fully-fledged peer review mechanism in the European Union, in which the member states can discuss and address constitutional developments on a regular basis with each other. A sound follow-up procedure should also be organised. Any such discussions could also take place on an informal bilateral basis. It should

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<sup>1</sup> An inventory using the European network of parliamentary documentation centres shows that attention has recently been focused in various national parliaments on the developments relating to the rule of law in Poland, Hungary, and elsewhere. Various motions, calling for a wide range of measures, have also been approved. In the French Assemblée nationale, for example, a resolution was adopted on 27 November 2018 about the rule of law in Poland, Hungary, and Romania, calling on national parliaments to act in concert.

<sup>2</sup> The European Commission is expected to put forward proposals in June 2019 for strengthening the existing Rule of Law Framework, which dates from 2014. The initiative by the European Commission work programme for 2019 has been declared a priority by the House of Representatives.

be avoided that dialogue does not progress beyond non-committal theme-based discussions, of the kind that often take place at Council level.

- Fourth, it is important that in the discussion about the new EU budget, attention continues to be emphatically directed at the relationship between receiving EU funds and rule of law values. The House of Representatives has already stated its view that the government should commit itself to not providing EU grants to member states that do not defend democracy in word and deed or tackle corruption.<sup>3</sup>
- Fifth, the safeguarding of the rule of law must emphatically remain on the European agenda for the coming years. This subject should feature prominently at the European summit in Sibiu on 9 May 2019, in the run-up to the adoption of the strategic agenda of the European Union for the next few years.
- Sixth, a rule of law programme, as part of Dutch human rights policy, that is aimed at countries in the Council of Europe where the rule of law is in the danger zone, can help in the exchange of knowledge between judges and lawyers, public authorities like the ombudsman, representatives of non-governmental organisations, and the media.

*Recommendations to the European Commission*

- The new European Commission, which is expected to take office this autumn, should continue to prioritise the developments relating to the rule of law in the member states, not least because of its role as guardian of the Treaties.

The rapporteur,  
Van der Graaf

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<sup>3</sup> In accordance with the Asscher-Buitenweg motion, Parliamentary document 21501-20, no. 1335.

## APPENDIX

### A. Background

The European Commission has been conducting a political dialogue with Poland in the context of the Rule of Law Framework since 2015. In December 2017, the Commission concluded, partly on the basis of various reports by the Venice Commission, that there is a clear danger in Poland to rule of law values, as meant in Article 2 of the EU Treaty. The Commission therefore proposed to the Council that it activate the drastic Article 7 procedure.<sup>4</sup> The complaints relate to the independence and legitimacy of the Constitutional Court, the non-publication and implementation of various rulings of the court dating from 2016, the reform of laws relating to the Supreme Court, the regular courts, the council for the judiciary, and changes to the training of judges that undermine the independence of the judiciary, the separation of powers, and legal certainty. Poland is being called upon to prepare reforms in cooperation with the judiciary and all relevant parties, including the Venice Commission, and to refrain from taking measures or making public statements that could further undermine the legitimacy of the judiciary - individually, collectively, or the legal system as a whole.

Before the Council (with a 4/5 majority) can decide that a danger to the rule of law exists, the member state in question must be given a hearing. After the Council has made a decision, the European Council of government leaders may decide, on the basis of unanimity, that there is a 'serious and persistent breach' of the rule of law, after which sanctions may be imposed (the suspension of certain rights, including the right to vote in the Council). The Article 7 procedure against Poland has now been operating for more than a year, and there have been three hearings in the General Affairs Council. The third hearing was held in December 2018.

The Polish government responded to the launch of the procedure in March 2018 with a detailed white paper.<sup>5</sup> According to the government, the reforms are needed because of the low level of public trust in the judiciary, the lengthy duration of procedures, the accountability of judges with a past from the communist era, and to improve the balance between the State powers. In its introduction, the government stated that the new Polish legislation was not significantly different to legislation concerning the judiciary in established democracies. The white paper was intended to explain the reforms and to demonstrate that they were fully in line with European standards. The government emphasised the importance of an informed and calm discussion: the strong words used by proponents and opponents alike were undermining the already low levels of trust among the Polish population in the judiciary.

Because the Article 7 procedure resulted in little progress, the European Commission launched infringement proceedings against Poland in July 2018. In October 2018, the European Court of Justice ruled in an interim injunction that the changes to the law lowering the retirement age of Supreme Court judges should be suspended.<sup>6</sup> Poland has stated that it would respect the ruling and alter the legislative reforms in questions. In addition, Polish judges asked the Court various prejudicial questions. The reforms to the Polish legal system have raised the question in various EU member states of whether the extradition of suspects on the basis of a European arrest warrant is still admissible.<sup>7</sup>

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<sup>4</sup> European Commission, Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, COM(2017) 835 final.

<sup>5</sup> Chancellery of the Prime Minister, White Paper on the Reform of the Polish Judiciary, 7 March 2018.

<sup>6</sup> Order of the Vice-President of the Court in case C-619/18 R (Commission/Poland) dated 19 October 2018.

<sup>7</sup> On 4 October 2018, the international section of the court of Amsterdam decided to suspend the transfer of a person sought by Poland until the Polish legal authorities had responded to a series of questions about the recent reforms to the legal system. In January 2019, the court again suspended a series of Polish transfer requests.

An Article 7 procedure against Hungary has also been ongoing since September 2018, initiated by the European Parliament.<sup>8</sup> In the report, drawn up by EP rapporteur Sargentini, the European Parliament states its concern about the functioning of the constitutional system, including the voting system, the independence of the judiciary and other institutions, the rights of judges, corruption, and conflicts of interest. Concerns were also expressed about the protection of various fundamental rights, including privacy rights, the freedom of expression, academic freedoms, the freedom of religion and the freedom of association, as well as the rights of minorities, migrants, asylum seekers, and refugees. This led the European Parliament to conclude that the facts and developments referred to in the report together form a systematic threat and that a clear danger exists of a serious breach of the values in Article 2 of the EU Treaty.

The Hungarian government responded to the EP report with a point-by-point reflection on the various aspects in it.<sup>9</sup> The government questioned the scope of the report and the factors that underpinned it; no Hungarian government sources were used, which resulted in a one-sided picture. Moreover, the report dealt with policy matters that are the province of the member states. According to the government, the results of the parliamentary elections in May 2018 produced a clear democratic mandate on the basis of which Hungary is able to make its own choices, even if they deviate from the majority view in other member states.

No hearings have yet been held in the General Affairs Council in the Article 7 procedure in the matter concerning Hungary.<sup>10</sup> In recent years, the European Commission has launched various infringement proceedings against Hungary at the European Court of Justice because of breaches of EU law relating to the rule of law. In 2017, for example, proceedings were started in connection with new education legislation, which affected the Central European University in particular. In July 2018, infringement proceedings were initiated because of the so-called 'Stop Soros' legislation, which makes organisations offering assistance to those applying for asylum or other forms of residence in Hungary criminally liable.

## **B. Report of the committee's activities**

The section that follows gives a picture of the activities carried out by the committee and the points of view that emerged in the process.

### **Discussion with Mr Timmermans, First Vice-President of the European Commission**

On 9 February 2019, the committee spoke with Mr Frans Timmermans, First Vice-President of the European Commission, about the theme of the rule of law in the European Union. Mr Timmermans views the European legal system that has been built up over the years as a building consisting of three pillars - democracy, human rights, and the rule of law. All three are essential and may not be used to play each other off. A number of member states of the European Union are seeing some regression on this point, with parties claiming that winning elections gives them the right to take full control of such matters as democracy, the judiciary, and freedom of the press. Also of importance to the European Union is that developments in this area can affect the internal market,

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<sup>8</sup> European Parliament, Report on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, 4 July 2018 (2017/2131(INL)). The European Parliament approved the report on 12 September 2018.

<sup>9</sup> Information sheet of the Hungarian Government on the issues raised by the report on 'a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded', 10 September 2018, available at: <http://abouthungary.hu/media/DocumentsModell-file/1536582679-information-sheetsargentini-report.pdf>.

<sup>10</sup> According to the report by the General Affairs Council of 19 February 2019, the Netherlands, in accordance with the motion by Buitenweg and others (Parliamentary document 35 078, no. 12), together with eight other member states, supported putting a hearing with Hungary on the agenda in order to enter into dialogue with the Hungarian government regarding the areas of concern raised by the European Parliament. Although there is currently no majority in the Council, the Netherlands will continue to push its views among like-minded member states. Parliamentary document 21 501-02, no. 1967.

in which national courts have an important role in uniformly interpreting European law and where mutual trust in each other's legal system is essential.

It was against this background that the European Commission launched an Article 7 procedure against Poland in December 2017. Three hearings have so far been held in the General Affairs Council. A vote will eventually have to be taken regarding sanctions against Poland, but that, according to Mr Timmermans, is not the real value of the procedure. That is found primarily in the dialogue that takes place. There has traditionally been a tendency in the Council not to be too robust in calling other member states to account when it comes to such themes as the rule of law and democracy; however, this is starting to change, because of the idea that not only candidate member states should be questioned on these themes, but that current member states should be able to raise them with each other. The Netherlands is playing a constructive role in this dialogue.

An Article 7 procedure against Hungary was launched in September 2018, initiated by the European Parliament. The Commission supports this initiative. With regard to the reforms in Hungary, the European Commission has always opted for the infringement proceedings before the Court of Justice of the EU. Experience shows that rulings by the Court are carried out. If the political dialogue does not work, this can, believes Mr Timmermans, be regarded as a useful alternative in the event of any breach of European law. Infringement proceedings have also been started against Poland. Some procedures are still at the information gathering stage, while others are due to be assessed by the Court. In Hungary, proceedings about the new asylum legislation, the education legislation, and the position of non-governmental organisations, are currently underway. With regard to Poland, reference is made to the recent interim ruling by the Court concerning the lowering of the retirement age of Supreme Court judges. The Polish government has said it will reverse this reform.

In addition, according to Mr Timmermans, it is greatly important to actively involve civil society in the member states in question. Ultimately, nothing can be achieved if it goes against the wishes of the people. There are signs of hope. In Poland and Hungary, and in Romania too, Mr Timmermans is seeing increasing support among the population for the action being taken by Europe, even after the start of the Article 7 procedures. Local non-governmental organisations deserve active support, not just from the European Union but also from the other member states.

### **Discussions with representatives from the Council of Europe**

On 13 February 2019 the committee spoke with Mr Kuijer, deputy member of the Venice Commission on behalf of the Netherlands, and with Mr Esposito, executive secretary of the Group of States against Corruption (GRECO). Both bodies are part of the Council of Europe and in recent years have reported extensively on the developments relating to the rule of law in the member states of the Council of Europe, including Poland and Hungary.<sup>11</sup>

Mr Martin Kuijer (Venice Commission) identified a tendency in various member states of the Council of Europe of a winner-takes-all mentality. Criticism is being excluded, while the independence of such institutions as the courts, the press, and civil society is under threat. The attacks on the existing checks and balances are fairly direct in some cases - examples include officials being threatened with dismissal, detention, or confiscation. Many other measures are in themselves technical in nature, but in practice have the same far-reaching effects. Moreover, legislative measures concerning the reform of the judiciary, for example, such as the system of disciplinary measures or the retirement age, are often accompanied with a hostile attitude towards these bodies and others, such as the press. Vacancies that arise are filled with loyal officials. Measures are also taken that are intended to impede the independent monitoring of government bodies, in relation to fighting corruption, for example. It is also noteworthy that bad practices, as well as good ones, are being adopted in Europe. The reception given by member states to reports by the Venice Commission generally varies; in cases where recommendations were requested by a

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<sup>11</sup> See the appendix for a concise summary of the most important reports.

member state itself, there is often a certain willingness to accept the recommendations, but where the initiative comes from one of the bodies of the Council of Europe, things are often different. Nonetheless, investigations are generally met with cooperation - after all, countries know that the reports are going to be read by other member states. With regard to Poland, the Venice Commission is working on a report about the funding of non-governmental organisations, which is due to appear in March 2019. The Venice Commission is also critical of the measures taken in Hungary after the European Parliament voted to invoke the Article 7 procedure.

Mr Gianluca Esposito (GRECO) reports that corruption in certain member states of the Council of Europe is actually increasing, rather than decreasing. Member states do respond to reports by GRECO, but real changes do not materialise in some countries. In that sense, there is a decline in the degree to which reports are being acted on. As far as Poland is concerned, it is clear there is a problem. In itself, there is no objection to adjusting the rules regarding the judiciary, such as the retirement age, but things are different if the effect of reforms is that large numbers of judges have to be replaced. It is also about the governance of the Supreme Court and the regular courts, and the appointment of judges. There has been little apparent movement of late. GRECO will be reporting again later this year. With regard to Hungary, it can be said that the country has always been a model for many central and eastern European countries. Now, there are two Councils for the Judiciary, which leads to a lack of clarity. Hungary has not given permission for the publication of the most recent report by GRECO about the country, something that until recently had been systematically refused only by Belarus. It is therefore not possible to discuss this report. Every other Council of Europe member state publishes the GRECO reports. GRECO will shortly be producing a report about the situation in Malta. There are problems in Romania too; reference is made to the transparency of the legislative process and to the appointment of the public prosecutor with responsibility for fighting corruption.

### **Round table discussion on the rule of law in the European Union**

The round table discussion on the rule of law in the European Union took place on 14 February 2019. It consisted of three panels, covering the themes of academics, the judiciary, and civil society. The programme, which was set by the committee, was put together on the basis of an inventory among the parliamentary groups. The co-rapporteurs sought to achieve a balanced list of participants, taking the focus on Hungary and Poland into account, to allow the various opinions regarding the subject to be given an airing.

The position papers submitted by the participants can be viewed on the House of Representatives website.<sup>12</sup> Following the round table discussion, additional information was received from a number of participants.<sup>13</sup>

#### *First panel: academics*

In the first panel, Dr Petra Bard (ELTE School of Law, Hungary, and visiting professor, Central European University) stated that elections in Hungary may be free, but that they are not fair. Institutions like the judiciary, the ombudsman, and the pluralist media landscape are under fire, as a result of which deliberative democracy is being weakened. Other institutions, like the European Union and the academic world are being treated with hostility. Similar developments are taking place in Poland, although they are of a different nature. That is because the governing party in Poland, PiS - unlike the Hungarian Fidesz party, for a period of several years - does not have the two-thirds majority in parliament that is needed to change the constitution. The developments in both countries have resulted in the European principle of mutual recognition coming under pressure.

Prof. Rick Lawson (professor of European Law, Leiden University) referred first of all to the recent Advisory Council on International Affairs report, 'The will of the people', which formed a useful framework for the discussion. He pointed out that much emphasis is being placed on obvious

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<sup>12</sup> Rondetafelgesprek Rechtsstatelijkheid, 14 February 2019.

<sup>13</sup> Dr Bard, Prof. Pech and Amnesty International.



aspects, such as the reforms of the judiciary in the countries concerned, but that there are also developments taking place that have remained under the radar. For example, reforms are being enacted at institutions like the Hungarian Academy of Sciences, the civil service, and the army, which have remained out of sight. Institutions that were regarded to a certain degree as independent, no longer are. This has consequences for international cooperation, with regard to national security, for example. It is striking that the reforms have so far led to very few rulings on the part of the European Court of Human Rights; it is not easy to translate values like academic freedom into enforceable rights and the Court is in any case structurally overburdened. Lawson recommends that the critical response should not be left only to international institutions like the EU and the Council of Europe, but should also come from national authorities and via diplomatic channels. Coalitions of sympathetic countries should be created, and contacts established and exchanged; local organisations deserve support too.

Prof. Laurent Pech (professor of European Law, Middlesex University, London) described the developments relating to the rule of law in Hungary and Poland as 'rule of law backsliding' that is being deliberately created and is systematic in nature. It starts by winning elections, after which the constitutional court is reformed. The ultimate goal is to undermine the existing system, as a result of which opposition is eliminated. This tendency is also appearing in other European Union member states, such as Romania and Bulgaria.

Dr Jonathan Price (Junior Research Fellow, Aquinas Institute, Oxford University) raised questions about the focus on Hungary and Poland in the political and academic discussion on the rule of law. He referred to the constitutional shortcomings in the European Union, such as in the measures concerning the euro crisis. Also the term 'rule of law' has different meanings in different languages. This is not sufficiently acknowledged in EU documents. This means that there is now too much being read into the term 'rule of law'. We will have to examine other systems in greater depth in order to understand it.

Dr Anikó Raisz (Associate Professor, University of Miskolc, Hungary) said that there is a great deal of misinformation about Hungary. She also questioned what the purpose of the meeting was. It is fine to gain a clearer picture, but not appropriate to lecture another country. There is no singular definition of terms like rule of law, democracy, judicial independence, and freedom of the press. There is always room for improvement, but basic matters are not topics for discussion. Reporting by the Dutch press about Hungary is not balanced - no space is given to the Hungarian perspective. Information comes from secondary sources, because people have no command of the Hungarian language. We should discuss our differences calmly and sensibly in the European Union. Double standards should be avoided. The reports by the Venice Commission are based on perceptions.

The exchange of views that followed included discussions on the definition of the rule of law, the role of the European Court of Human Rights, the meaning of the Article 7 procedures and the current infringement proceedings, and the objectives of the reforms taking place in Poland and Hungary.

#### *Second panel: judiciary*

In the second panel<sup>14</sup>, Prof. Geert Corstens (former president of the Supreme Court) stated that the measures being taken in Poland and Hungary to gain control of the judiciary, such as the lowering of the retirement age, are effective methods that were also deployed by the Nazis. Corstens welcomed the recent intervention by the European Court of Justice and the announcement by the Polish government that it would abide by the ruling. Were it not to do so, then the European legal system would face collapse. At the same time, the developments in Poland are still worrying. For example, two new divisions of the Supreme Court have been created, with new judges. The appointment of these judges is indirectly in the hands of the governing party.

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<sup>14</sup> The third panel participant, Mr Miklós Szánthó, Director, Center for Fundamental Rights in Budapest, was unfortunately unable to attend.

They may be able to overrule the existing divisions. The system of mutual recognition in the European Union is therefore in danger. Courts must intervene if citizens are faced with measures by foreign authorities and their rights are not guaranteed. Corstens made reference to the fact that safeguards for the independence of the judiciary on paper are not very strong in the Netherlands either, but that there is a strong legal culture there. In other words, the culture is strong, but the structures are weak. In Poland there is a combination of a weak culture and weak structures, and that is dangerous. It is important to enter into dialogue: discover the underlying motives, feelings, and traditions, without appearing superior. We have to show that the rule of law in western Europe also took a long time to evolve to where it is today. Corstens called for support to be given to proponents of strengthening the rule of law, of supporting EU procedures, and of including the rule of law in the long-term financial framework.

Mr Kees Sterk (vice-chairman of the Council for the Judiciary and chairman of the European Network of Councils for the Judiciary (ENCJ)) stated that the developments in Poland and Hungary are being closely followed in the ENCJ. There are extensive contacts with members of the Polish council and other judges. In Poland, the reform of the Council for the Judiciary (KRS) is causing problems. The position of the Minister of Justice is also a cause for concern. ENCJ is open to reform of the judiciary, but adds that any such reforms should be in consultation with the judiciary itself. This was not the case in Poland. The KRS is now under the control of the governing party. This has resulted in the KRS being suspended from membership of the ENCJ. The ENCJ will shortly be travelling to Poland in order to discuss the disciplinary measures against judges. The developments in relation to the Supreme Court are also worrying. The KRS is attempting to gain control of regular courts by appointing government loyalists. It may be the case that the recent ruling by the European Court of Justice is being honoured, as confirmed by the Polish government, but this does not mean the problems are over. With regard to Hungary, there is currently a proposal for a new system of administrative justice, based on the French model. Although this is possible in itself, the Hungarian proposal represents a danger to the independence of the judiciary. For example, the appointment of the judges would be in the hands of the minister, even though they normally have to meet an examination requirement and are nominated by the judiciary itself. In most countries, the system of administrative law, which has often evolved separately from the regular judiciary, is becoming more and more integrated, while Hungary is now attempting to separate them. The question is why. Of concern, too, is the position of a second Hungarian Council for the Judiciary, the NJO. The chairman is nominated by the parliament, which has strong links to the prime minister. The question is the nature of the relationship between this new Council to the existing one. No clear answers about this have been forthcoming. The European Court of Justice will shortly be travelling to Hungary to talk about the independence of the judiciary. There are also concerns about judicial independence in other countries, such as Bulgaria, Romania, Malta, and Spain.

#### *Third panel: civil society*

In the third panel, Ms Claire Algar (Director of Global Operations, Amnesty International) referred to the recent report by Freedom House, which moved Hungary from the 'free' to the 'less free' category. As well as the undermining of democratic institutions, non-governmental organisations are also being interfered with. This happened to Amnesty International, for example, because it was said to help illegal immigrants. The Central European University and Open Society Foundation have since left Hungary. Legislation has been introduced that criminalises help to migrants, there are strict rules about the foreign funding of non-governmental organisations, and taxation measures have been proposed for NGOs that support migrants. The introduction of new administrative courts is problematic. As well as the reforms of the judiciary that are taking place in Poland, the hostile climate in which courts have to function is causing problems. Amnesty has published reports on this. The freedom of assembly and association is also coming under pressure. A case in point saw attacks on women's rights movement demonstrators leading initially not to prosecutions of the perpetrators, but of the victims. Amnesty International is calling on countries to actively protect human rights in these countries, and not to leave this to non-governmental organisations.

Ms Marta Pardavi (Co-chair, Hungarian Helsinki committee) welcomed the interest of the Dutch parliament in the developments relating to the rule of law in Hungary. She regretted the cancellation of the working visit to Hungary and saw a parallel with the recent and unprecedented refusal by the Hungarian authorities to admit UN experts to the transition zones for migrants on the Hungarian border. The seriousness of the situation can be illustrated by a recent ruling by the European Court of Human Rights, which ordered Hungary to stop withholding sufficient food from adult migrants in the transition zones. The legislation that criminalises help to migrants is unacceptable. From next summer, if we, as an organisation, speak in public about these matters, it could lead to prosecution and extra taxes. Non-governmental organisations are essential for bringing injustices to court and for gathering evidence. They therefore deserve financial and political support. Member states should actively stand behind the current infringement proceedings by the European Commission against Hungary.

Dr Israel Butler (Head of Advocacy, Civil Liberties Union for Europe) discussed the application of the EU instruments in response to the developments relating to the rule of law in various member states. He said that the EU had not yet fully deployed all its instruments. The problem with the existing instruments is that they are not designed for a situation in which governments systematically undermine the rule of law. The EU therefore needs new instruments, which would eliminate the problem of political selectivity. A more permanent system of review of the rule of law should be created. The European Commission is currently working on this. In addition, the rule of law should become a precondition for receiving EU funds, as is currently being discussed in the context of the new long-term financial framework. Finally, investing in grassroots movements in countries where the rule of law is coming under pressure is important, in Mr Butler's view, given that governments are imposing restrictions on civil society there. Non-governmental organisations should not be viewed as sub-contractors, as set out in the current European Commission plan. Attempts are being made by the European Parliament to amend this; this deserves the support of the Council.

Dr László Marác (senior lecturer and researcher, University of Amsterdam) pointed out the importance of being able to speak the language of a country in order to gain a clear idea of the facts. He asserted that much information about Hungary is one-sided. The Dutch press copies it and repeats mostly soundbites. Certain terms, such as illiberal democracy, are taken out of context. The reforms of the Hungarian constitution have been enacted by democratic means. The report by the European Parliament about the situation in Hungary is a missed opportunity and does not meet academic standards. Many matters that it referred to are out of date. Mr Marác also pointed out that the Central European University in Budapest is still operating. Such a university would not be able to function under Dutch law. The reasons why Hungary is being treated in this way are primarily geopolitical. It is important that the facts are properly presented, which is why it is a good thing that the Dutch parliament is devoting its energies to this. At the same time, it should be remembered that the Hungarian legal system has always been based on other, western legal systems. The question now is, what next? The initiative by Mr Timmermans for a review system in Europe merits support, believes Mr Marác.

### **Working visit to Poland**

On 22 and 23 February 2019, a delegation of the committee paid a working visit to Warsaw, Poland. The delegation consisted of the members Veldman (VVD, chairman and delegation leader), Van Dam (CDA), Van Ojik (GL), Van der Graaf (CU), and Bisschop (SGP). The purpose of the visit was to gain a clearer picture of the reforms currently taking place in Poland, against the background of the committee's focus on the developments relating to the rule of law in the European Union. The programme, which was drawn up with the help of the Dutch embassy in Warsaw, and which provided official administrative assistance at the committee's request, sought to achieve a balance between various points of view, with discussions taking place both with proponents and opponents of the reforms.

Various reports and other documents were received from the discussion partners during the working visit. These have been appended to this report.<sup>15</sup>

#### *Meeting with members of the Sejm*

The working visit began on Friday 22 February 2019, with a meeting with members of the committee for EU affairs of the Sejm, the lower house of the Polish parliament. Members of the governing party, PiS, and of the opposition, attended the discussions. The delegation was welcomed by Ms Kloc, the chairman of the committee for EU affairs. Also invited to the meeting was Mr Piotrowicz, the chairman of the Justice and Human Rights committee of the Sejm, as this committee is dealing with the legislation relating to the judiciary. During the discussions with the delegation, the legal reforms which have been implemented since 2015 were explained, with a range of opinions and approaches being expressed. The background to the reforms, as was explained, is that after the upheavals of 1989, every state institution has been reformed except the judiciary. During the election campaign, the governing party promised to address the reforms that previous governments had not. The judiciary in Poland is extensive; its expenditure is the highest in Europe. At the same time, it was stated that there is much dissatisfaction among the population about the legal system, one reason being the lengthy proceedings.

Among the aspects raised was that of the independence of the judges. Judges in Poland are appointed by the Council for the Judiciary. Similar councils are found in half of all EU member states, it was stated; they are appointed in different ways and have different competencies. It was also emphasised that the composition of the council in Poland was entirely in line with the constitution. Candidates proposed by the parliament are elected by three-fifths of the members of the Sejm, which means that support from the opposition is needed. It was also pointed out that all reforms have been brought about by democratic means. On the other hand, it was countered that the Council for the Judiciary is now actually completely politicised. Most newly selected members by far were said to be allied in more ways than one with the Minister of Justice, both politically and personally. It was said that the constitution had been breached several times in recent years, and that the separation of powers had become invisible in many areas. Changes can be put to the Constitutional Court, but that body was said to no longer be independent. Reference was also made to the public campaign that had been launched against the judiciary, with billboards being posted about disciplinary infringements by judges that took place many years ago, with the intention of attacking the judiciary as a whole. Another angle that emerged was that although everyday rule of law matters were not in danger, the image of the judiciary was being undermined, which would affect confidence in the legal system.

#### *Discussions at the Ministry of Justice and in the Chancellery of the Prime Minister*

At the Ministry of Justice, the delegation had a meeting with Under Secretary of State Piebiak of Justice, and a number of his staff members. The delegation's interest in the reforms in Poland was welcomed, and there was also interest in the developments in the Netherlands and other EU member states. The reforms of the judiciary in Poland are the result of election promises that the ruling coalition had made, and which are not yet completed. The question is how the term rule of law should be defined, and whether common preconditions regarding the rule of law should be set for all member states. Discussions also focused on the need for the reforms, the low level of trust in the Polish legal system among the public, and the perception that the judiciary are an autonomously functioning group that does not sufficiently consider the interests of citizens. Another topic discussed was the reform of the Council for the Judiciary, with the Spanish model being looked at. The role of the government in the disciplinary system was also raised. Another topic covered was that of the political nature of the Article 7 procedure.

In the Chancellery of the Prime Minister, the delegation then had a meeting with director Jablonski and his staff. The first matter discussed was the Polish government White Paper that appeared in March 2018 in the wake of the reasoned proposal by the European Commission by which the Article

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<sup>15</sup> Can be viewed at [www.tweedekamer.nl](http://www.tweedekamer.nl).

7 procedure was started, and the follow-up steps that have been taken. Matters covered included the importance of upholding the rule of law and the protection of fundamental rights and the need to implement reforms at the same time, partly in view of Poland's communist past. This has been the case with other member states too. There was a focus on the political nature of the discussion and the role of perception compared to facts. The discussions also took in the reform of the disciplinary system and the Council for the Judiciary.

#### *Meeting with non-governmental organisations*

In the Dutch embassy, the delegation had meetings with various Polish non-governmental organisations and thinktanks about the rule of law. Various opinions were aired during the discussion. It was pointed out, for example, what the primary objectives of the reforms in Poland were: the importance of a greater parliamentary role in the appointment of judges, as expressed in the reform of the Council for the Judiciary. Reference was made here to the parallels with the German system. In addition, it was stated that many judges are not effective in practice, and that some had played a dubious role in the days of communism. Another reform is that legal cases are no longer allocated to judges by court presidents, but on the basis of an automated system. The point was made here that the great majority of Polish judges were appointed before 2015, before the current government took office.

On the other hand, the view was stated that the legal system was in need of reform, but that the measures taken are completely unacceptable because the authority of the judiciary is being undermined, with political monitoring taking place. The situation in Poland was described as being worse than a year ago, when the Article 7 procedure was launched. The lowering of the retirement age of Supreme Court judges may have been reversed following the ruling of the European Court of Justice, but the other complaints raised by the European Commission are still unresolved. Concerns were also expressed about the structure of the new division in the Supreme Court that is going to be responsible for disciplinary matters. The claim that 80 percent of the population supports the reforms was questioned, while it was also stated that trust in the legal system in Poland is higher than that in the government and parliament. There were also doubts about whether the reforms implemented by the government were addressing real problems, such as the duration of proceedings and access to legal aid. The Council for the Judiciary is politicised. There was also reference to the defamatory treatment of judges in the media, which also reaches into their private lives. The automated allocation of cases is done on the basis of an algorithm that has not been published.

The delegation had dinner at the Dutch ambassador's residence, hosted by the ambassador, Mr Van Dartel. Further discussions were held about the reforms with various Polish guests from the world of the judiciary. Among the topics covered were the relationship between the judiciary and politics, the position of the Polish judicial system in the European Union, and the consequences of the choices made for individual judges and public prosecutors.

#### *Brunch discussion about the media landscape*

Saturday morning, 23 February 2019, started with the delegation exchanging experiences with the Dutch ambassador. The visit was then concluded with a discussion over brunch with a range of guests about the Polish media landscape. The discussion considered among other things the reforms of the Polish public broadcasting organisation. For example, it is now the Finance Minister who appoints the management board. Also, the government invests directly in the organisation, because the current system of viewer levies is not working. Compared to other eastern European member states, Polish public broadcasters have a relatively large market share. Recent research suggests that the election coverage about the opposition is negative, to a high degree. On the other hand, it was pointed out that the market share of the public broadcasting organisation should not be overestimated, given the position of private media companies and popular news websites. This includes media that are critical of the government. Generally, the media landscape can be said to be strongly polarised, which raises the question of whether the established media channels are regarded as sources of independent reporting by the public.