

26 May 2023

RE: NGO letter to EU Ministers on continued rule of law backsliding in Poland and Hungary

Dear Minister,

As the next EU General Affairs Council prepares to hold a hearing on 30 May 2023 on the situation in Poland and Hungary under the Article 7.1 TEU procedure, the undersigned civil society organisations would like to draw your attention to recent developments regarding the rule of law and human rights in both countries, with a particular focus on Poland, whose situation has not been examined in a long time.

Since the Council last discussed the situation in 2022, both member states have adopted measures in response to EU scrutiny. However, the limited progress made in some areas fails to address many standing concerns with regard to the rule of law and other Article 2 TEU values and to prevent a breach of these values in Poland and Hungary.

Indeed, despite the various monitoring mechanisms activated since the Article 7.1 TEU procedures were launched in 2017 and 2018 respectively, the backsliding in both countries has not come to a halt. While past and ongoing legal actions and [budget conditionality procedures](#) testify to persistent EU law violations, the Polish and Hungarian governments' consistent refusal to comply with European courts' rulings and with the conditions set out by the Commission demonstrate a continued disregard for the norms and principles common to all the member states and on which the Union is founded. Member states' failure to take a firm position under Article 7.1 TEU has minimised the procedure's potential to impel a change of course for these member states, while allowing the rule of law and human rights situation in both countries to further deteriorate.

Our organisations urge the Council to hold the Polish and Hungarian governments to account by using the powers conferred to them under the Treaties, thus fulfilling the strong mandate to act given to the Council by the European Commission and Parliament. As civil society representatives, we call on your government to take a stance on the persistent risk to Article 2 TEU values by adopting recommendations on the issues raised in the European Commission's [reasoned opinion on Poland](#) and the European Parliament's [reasoned opinion on Hungary](#) and other issues that have emerged since in connection with Article 2 TEU. Absent concrete results, we encourage you to support a four-fifth vote under Article 7.1 TEU that would enable EU institutions to further examine and determine the existence of a serious and persistent breach of EU values under article 7.2 TEU.

With regard to Hungary, we would like to draw your attention to the [latest assessment](#) by Hungarian civil society organisations of recent reforms proposed by the Hungarian government in a bid to access EU money and to their [proposed recommendations](#) that the Council could adopt under Article 7.1 TEU. The analysis points to the fact that any change to the anti-corruption framework and to the judicial system takes place in an environment that is characterised by a dismantled system of checks and balances and a distorted media landscape, where the Government continues to have excessive regulatory powers and where legal certainty is lacking. In addition, there is a persistent practice of non-execution of both domestic and international court judgments and persons from various vulnerable groups face human rights violations without independent institutions being capable or willing to protect their rights. The article 7 procedure is uniquely placed to capture such systemic erosion of the democratic system in Hungary.

With regards to Poland, we would like to highlight some outstanding concerns regarding the current situation and refer to [draft recommendations](#) proposed by EU law professors in February 2023.

POLAND

Judicial independence remains under threat

The steps Poland has taken to comply with rule of law milestones set out by the European Commission in 2022 as a condition for releasing EU funds to Poland under the Recovery and Resilience Facility (RRF), are patently insufficient to address the Commission's stated concerns.

The [first newly adopted law](#) on the Supreme Court from 9 June 2022 essentially renames the controversial Disciplinary Chamber, entrusted with disciplinary proceedings against judges, instead of reestablishing an independent and transparent disciplinary system, as requested by the Commission. The composition of the new Chamber of Professional Responsibility, even through amended procedure, remains in the hands of Supreme Court judges nominated by the newly established and politically influenced National Council of the Judiciary, thus failing to guarantee this body's independence from political power and address the Commission's recommendations in this regard.

The second step taken to comply with the milestones by amending the Law on the Supreme Court – which was referred to the Constitutional Tribunal by the President to validate its compliance with the Polish Constitution - also did not resolve the crucial deficiencies of the National Council of the Judiciary (NCJ) and the reestablishment of its independence. [Instead, the reform passed authority for disciplinary proceedings against judges onto the National Administrative Court](#). By entrusting the National Administrative Court with disciplinary cases against judges of common courts, military courts and the Supreme Court, the Act fails to respect the principle of separation of individual branches of the judiciary and exceeds the mandate of the National Administrative Court to control the activities of public administration, granted in the Polish Constitution. For these reasons the law cannot be considered a valid step towards compliance with the milestones set out by the Commission, whose main aim was to encourage the reestablishment of judicial independence within the disciplinary system in Poland.

Disciplinary proceedings against judges still ongoing

Regardless of the fact that judges who were suspended under the jurisdiction of the former Disciplinary Chamber can or have already returned to their duties, disciplinary prosecution of independent judges [has not subsided](#). On 21 February 2022 – immediately before the last Article 7.1 TEU hearing on Poland – disciplinary prosecutor Przemysław Radzik [communicated](#) that disciplinary proceedings had been initiated against judges Waldemar Żurek, Piotr Gąciarek, Paweł Juszczyszyn and Dorota Zabłudowska for taking part in a panel discussion on the rule of law and citizen's rights organised by the [Committee for the Defence of Democracy \(KOD\)](#), which is considered political engagement by the governing coalition. On 25 February 2022, Judge Anna Głowacka was also suspended by the President of the District Court in Kraków, Dagmara Pawełczyk-Woicka, a nominee of Minister Ziobro and a member of the politically controlled National Council of the Judiciary. The grounds of suspension were that she had implemented the judgments of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) [by challenging](#) a ruling issued by a judge nominated by the contested - due to its lack of independence - National Council of the Judiciary. Ms Pawełczyk-Woicka has subsequently been appointed and has served as president of the NCJ since 24 May 2022.

Constitutional Tribunal continues to undermines European legal order

The newly constituted and politically compromised Polish Constitutional Tribunal also continues to undermine European legal standards and the authority of European courts, including the ECtHR. In its ruling of 23 February 2022, the Tribunal stated that judges' legal standing cannot be questioned with regard to how they were nominated. It also stated that ECtHR judgments do not result in direct consequences for the national legal order if changes to the national laws are not implemented and are of a [“declaratory nature”](#). Furthermore, on 10 March 2022, the Constitutional Tribunal ruled that

Article 6 ECHR contravenes the Polish Constitution where it enables verification of the validity of the appointment of judges sitting in national panels and of the national laws regarding the judiciary, including those related to [judicial appointments by a politically influenced](#) National Council of the Judiciary. This ruling – which followed other [decisions](#) where the CT had questioned the compatibility of the ECtHR with the Polish Constitution - was openly contested by retired judges of the Tribunal, who declared it destructive of the [EU legal system overall](#). It also drew serious criticism by [international experts](#) and the [EU institutions](#), which denounced the threat the judgement posed to the principle of the primacy of EU law over national law, and warranted the launch by the EU Commission of an infringement procedure against Poland, currently pending before the [CJEU](#).

Recently proposed amendments would affect the composition of the Polish Constitutional Tribunal, reducing the number of judges to its General Assembly (from two-thirds of the entire number of judges to 10 judges) as well as the number of judges required to form a full panel (from 15 to 11). By doing so, the current government is attempting to enable the passing of the judgement on the newest law on the Supreme Court referred to the Tribunal by the President of the Republic. However, the CT ruling – on which rests the President’s decision to sign the bill into law – should not influence the EU institutions in their assessment, following the ECtHR [decisions](#) challenging the Tribunal’s independence and the Commission’s [decision](#) to refer Poland to the CJEU regarding the Tribunal’s inconsistency with EU standards on judicial independence. It also appears to be a strategy aimed at enabling current Constitutional Tribunal’s President Julia Przyłębska - a political appointee close to the ruling coalition - to stay in office. Indeed, some judges of the Constitutional Tribunal have been questioning the validity of Julia Przyłębska’s current position as CT President, due to the fact that the laws which would enable her to remain in office came into force after her appointment. By tabling the amendment, the government seems to pre-empt CT [judges’ criticism against this appointment](#). The bill is currently under examination by the Polish Parliament, which discussed it on 25 May.

Controversial National Council of the Judiciary remains unchanged

The currently functioning National Council of the Judiciary [has been criticised](#) for its lack of independence from political power and has been excluded from the European Network of National Councils of the Judiciary on this account. Yet, [in May 2022](#) the Polish Parliament voted on the appointment of a new group of 15 NCJ members, disregarding all appeals to reconstruct the body and restore its independent, democratic model of functioning⁷.

Prosecutor’s office unwillingness to cooperate with EPPO

The Law regarding the EU Prosecutor’s Office, [passed in December 2022](#), which was meant to enable cooperation between Poland and the European Public Prosecutor’s Office (EPPO), instead makes it obligatory for all communications issued to the EPPO to first go through the National Prosecutor’s Office. It further states that in case the activities of the EPPO were deemed contrary to the laws of the Republic of Poland or a violation of its sovereignty, the court or prosecutor is to deny carrying them out. This puts proceedings launched and carried out by the EPPO at risk of lack of access to needed information and evidence. As Poland is not a member of the EPPO, and the prosecution service in Poland has been under scrutiny for its lack of independence from political power, this amendment to the Law on the Prosecutor’s Office is not a welcome development, but rather an obstacle to efficient cooperation on criminal matters within the EU.

Foreign agents laws threaten to undermine civil society work

Following the attack on Ukraine by Russia, [new laws were proposed in Poland](#), with the purported aim to counter foreign threats in the country. However, these laws carry a substantial risk of abuse for political purposes against opposition leaders and civil society actors. One of the proposals aims at introducing a new form of espionage, referred to as ‘involuntary espionage’. Under the bill, any activity of persons, which consists of disclosing information (or “a message”, as it is framed in the draft law) which may cause harm to the Republic of Poland, to a person or other entity who is

believed to be taking part in activities of foreign intelligence based on the surrounding circumstances, shall be punishable by imprisonment from 3 months to 5 years. Although the amendment purportedly aims to target those engaged in cooperation with foreign powers like Russia, the provision is overly broad and vaguely worded so as to encompass activities which are not aimed at providing intelligence to foreign actors. In the absence of a clear legal definition of “foreign intelligence” in Polish law, any person or entity which originates from or cooperates with third countries may fall under the definition. Under the new law and unless its scope is clearly defined and narrowed, NGO activity relating to cooperation with foreign embassies or international organisations may provide the basis for criminal investigations and prosecutions.

Secondly, the proposal to establish a “[Commission on Russian influence in the Polish public sphere](#)” is supposedly aimed at “clarifying the activities of persons who were public officials or members, in the years 2007-2022, of senior management that were influenced by Russian activity aimed at causing damage to the interests of the Republic of Poland”. However, due to the fact that the new Commission will be allowed to withdraw security clearance or impose a ban on receiving security clearance for a period of up to 10 years from the date of the decision and/or prohibit the performance of functions related to the distribution of public funds for periods up to 10 years as a consequence of the proceedings, this may result in a widespread limitation to the opposition and civil society’s work and significantly undermine the ability of opposition candidates to campaign in the run up to the upcoming elections in the fall of 2023.

Rights of women, children and LGBTI+ persons before a non-independent judiciary

The rapid degradation of the rule of law has had [a devastating impact on the rights of women and LGBTI+ people](#) in Poland. Of particular concern are the effects that the October 2020 ruling by the politically compromised Constitutional Tribunal that virtually banned access to legal abortion had on women and girls in Poland. Although the ruling does not ban abortion under all circumstances - the threat to the mother’s life remaining one of the grounds on which abortion is still legal – the chilling effect it created on health professionals and society at large represents an obstacle to the exercise of the right in practice and has had deadly consequences in some cases. At least [five women](#) are reported to have died after doctors refused to terminate their pregnancies, despite life-threatening complications.

The threat of prosecution is real for those who help women seek abortion in cases where this is no longer legal following the 2020 ruling. On 14 March 2023, Justyna Wydrzyńska, a women’s rights defender, was convicted by the District Court in Warsaw following a criminal proceeding and sentenced to 30 hours per month for eight months of community service for aiding an abortion by delivering abortion-inducing pills to a woman in an abusive relationship. Regardless of whether or not she could have been acquitted – since [under Polish law](#) only a felony that is socially harmful to a considerable degree can be tried as such – the judgement deserves attention for two main reasons. First, because Justyna’s case is the first one in Europe where an activist has been criminally prosecuted and convicted on charges of aiding a woman to exercise her fundamental right to abortion, which creates a dangerous precedent, especially against the background of generalised rollback on women’s rights and a shrinking civic space. Secondly, because the judgement was passed by a judge nominated by the newly-constructed National Council of the Judiciary, whose lack of independence from political power has been [extensively criticised domestically](#) and [internationally](#). The fact that the verdict was issued by a judge appointed through a procedure and by a body that has been established and operates in breach of the principle of judicial independence and whose lawfulness is therefore questionable, raises the question of its own validity from a legal standpoint. Additionally, the fact that the judge who sentenced Justyna Wydrzynska was [promoted](#) to a higher court on the very same day by a decision of the Ministry of Justice seems to support the assumption that the judgement might have been subject to undue political influence.

Since PiS came into power in Poland, LGBTI+ and [women's rights activists](#) have faced [pressure and interference from the authorities](#) over their peaceful activism, including arrests and criminal prosecutions, some under blasphemy laws. [LGBTI+](#) and [women's rights activists](#) also reported the use by local authorities of what is known as Strategic Lawsuits Against Public Participation (SLAPP) to interfere with and silence their work. In addition to undermining the independent functioning of civil society, a clear rule of law violation, these measures have contributed to a hostile climate for LGBTI+ people and women's rights defenders and activism in Poland.

On 4 May 2023, the ruling party announced a draft amendment to the Education Law Act called "Protect Children, Support Parents," which would restrict access to schools for non-governmental organisations providing sexuality education. Such groups are often the only reliable source of this information due to a restrictive and discriminatory national curriculum. This is the government's latest attempt to eliminate comprehensive sexuality education in Polish public schools. If the proposed draft becomes law, it would have a chilling effect on non-government organisations and the few teachers who provide comprehensive sexuality education and make it excessively difficult for Polish schools to address topics of sexual orientation, gender identity and reproductive rights. This legislative initiative comes in a context where authorities in one-third of the country have adopted [anti-LGBTI+ resolutions](#), fifty-one of which remain in place as of this writing.

The developments highlighted above show that, despite some progress, the situation remains dire and that further steps are needed to restore the respect for EU founding values in Poland and in Hungary. Past and ongoing actions at the EU level show though that serious scrutiny, followed by close monitoring over recommendations and their implementation, and persistent political and diplomatic measures have the potential to bring about slow but steady change. This should embolden the EU institutions to continue holding the Hungarian and Polish government accountable for violations of EU law and founding values by using all the instruments at their disposal.

We urge your leadership to:

- **take the Article 7.1 TEU procedures forward, by moving on to adopting clear, concrete and time-bound recommendations** in relation to all the issues raised in connection with Article 2 TEU **and holding a four-fifth vote** that would allow the EU institutions to further examine serious and persistent breaches of EU values in Hungary and in Poland;
- **demand the Polish and Hungarian government's genuine commitment to implementing reforms needed to fully comply with the milestones** set out by the Commission with regard to Article 2 TEU values and to
- **refrain from supporting any decisions to release EU funds until concerns are effectively and genuinely addressed** and to support any future proposal to suspend or withdraw EU funding to Poland in the event that existing rule of law concerns were found to represent a threat to the EU financial interests.

Our organisations reiterate the importance that unity and the need to support frontline member states in countering the aggression by the Russian Federation do not result in a lenient approach to Article 2 violations within Europe's borders. We consider that the current geopolitical situation warrants a heightened vigilance and stronger resolve to enforce EU values and call on member states to act accordingly.

We stand ready to provide any further information you may require.

Your sincerely,

Amnesty International

FIDH (International Federation for Human Rights)

Human Rights Watch

International Commissions of Jurists

Open Society Foundations

RECLAIM

Transparency International EU