

COVID 19

CRIMINAL

JUSTICE

CAMPAIGN

POLAND

Impact of the Coronavirus Pandemic on the Criminal Justice System

3. Freedom of Assembly During the Pandemic

The law	The law currently in force	<p>Freedom of assembly is guaranteed in Article 57 of the Constitution of the Republic of Poland and may only be restricted under a law provided that such a restriction is adequate, necessary and proportionate. The most far-reaching restrictions, which interfere with the essence of freedom of assembly, can only be introduced when certain extraordinary measures are introduced.</p> <p>The main legal act governing the exercise of freedom of assembly is the Act of 24 July 2015 – Assemblies Law¹ (“Assemblies Act”), which provides for three types of assemblies: (1) an ordinary assembly, which must be notified no later than 6 days before its planned date (2 days under the simplified procedure for an assembly which does not disrupt road traffic), (2) a cyclical assembly, which must be approved by the province governor (<i>wojewoda</i>) and (3) a spontaneous assembly held in connection with a sudden event related to the public sphere, does not need to be approved or notified.</p> <p>An assembly may be dissolved if its course poses a threat to human life or health or property of a considerable value, and also if it violates provisions of the Assemblies Act or those of criminal law. It is also possible to dissolve a spontaneous assembly due to a serious threat to safety or public order, road traffic on public roads or when a spontaneous assembly poses a threat of disturbances in the course of an ordinary or cyclical assembly.</p>
	Changes introduced in connection with COVID	<p>Under the Constitution of the Republic of Poland, restrictions on the freedom of assembly may be introduced by a law, in compliance with the principle of proportionality and without infringing the essence of the restricted freedom. Further restrictions are only allowed under the state of emergency or martial law, none of which has been introduced.</p> <p>Notwithstanding the above, the anti-COVID-19 restrictions were initially introduced primarily in regulations issued by the Minister of Health and later in regulations of the Council of Ministers, based on Articles 46–46b of the Act of 5 December 2008 on the prevention and control of infections and infectious diseases in humans². This served as the basis for the introduction of the state of epidemic</p>

¹ Journal of Laws of 2015, item 1485, as amended.

² Journal of Laws 2008 No. 234, item 1570, as amended (“Infections Control Act”).

	<p>emergency³ and later the state of epidemic⁴, which do not constitute extraordinary measures but were nevertheless designated by the Government as sufficient for adopting significant restrictions related to the coronavirus pandemic.</p> <p>Such a legislative arrangement is unconstitutional and cannot serve as a basis for enforcing compliance with the restrictions it contains. A court has ruled that in the absence of an extraordinary measure “extraordinary circumstances justifying special legal arrangements cannot be invoked to impose restrictions on human rights and freedoms and cannot justify far-reaching restrictions on civil liberties introduced by regulations”.⁵</p> <p>The first restrictions on the freedom of assembly, namely a ban on the organisation of assemblies of more than 50 persons, were a consequence of the state of pandemic emergency introduced by the regulation of the Minister of Health of 13 March 2020. The total ban on assemblies was imposed by the regulation of the Council of Ministers of 10 April 2020 which introduced the state of pandemic⁶.</p> <p>That assemblies ban was repealed by the regulation of 29 May 2020, which allowed the organisation of ordinary and cyclical assemblies with a maximum number of participants of up to 150 people. At the same time, assembly participants were obliged to keep 2 meters distance from each other and to cover their nose and mouth. The notification had to be communicated to the health inspector, who gave an opinion on the epidemic risk associated with the assembly⁷. Later, this model was maintained, only the upper limit of assembly participants was lowered to 5 persons (as in the currently applicable regulation of 21 December 2020)⁸.</p>
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³ The Regulation of the Minister of Health of 13 March 2020 on the declaration of the state of pandemic emergency in the Republic of Poland (Journal of Laws of 2020, item 433, as amended).

⁴ The Regulation of the Minister of Health of 20 March 2020 on the declaration of the state of pandemic in the Republic of Poland (Journal of Laws of 2020, item 491, as amended).

⁵ Judgment of the Provincial Administrative Court in Opole of 27 October 2020, case no. II SA/Op 219/20.

⁶ § 14 (1) (1) of the Regulation of the Council of Ministers of 10 April 2020 establishing certain restrictions, directives and prohibitions in connection with the occurrence of the state of pandemic (Journal of Laws of 2020, item 658). As a side note, § 15 of the “earlier” Regulation of the Council of Ministers of 31 March 2020 establishing certain restrictions, directives and prohibitions in connection with the occurrence of the state of pandemic (Journal of Laws of 2020, item 566) provided for the same ban but established a later date of its entry into force (12 April 2020 – on that date this Regulation was no longer in force) whereas the “later” regulation of 10 April 2020 made the ban effective on the day of the regulation’s publication, i.e. 10 April 2020.

⁷ § 15 of the Regulation of the Council of Ministers of 29 May 2020 establishing certain restrictions, directives and prohibitions in connection with the occurrence of the state of pandemic (Journal of Laws of 2020, item 964).

⁸ § 28 of the Regulation of the Council of Ministers of 21 December 2020 establishing certain restrictions, directives and prohibitions in connection with the occurrence of the state of pandemic (Journal of Laws of 2020, item 2316).

		The legislator decided against adopting pandemic-specific rules for the dissolution of assemblies and the use of direct coercive measures in such situations.
Practical application of legal rules	Statistics to determine the relevance of the issue	<p>The restrictions have not prevented the holding of assemblies (primarily, spontaneous assemblies), which have evoked a strong response from the police. A prime example of the heavy-handed police response was the Business Owners' Strike (a protest against restrictions on business activities and insufficient state aid for businesses affected by the pandemic) which took place during the period of the total ban on assemblies⁹, the night protest of 7/8 August 2020 which erupted immediately after the arrest of Margot, an LGBTI rights activist¹⁰, and the protests following the judgment of the Constitutional Tribunal, which abolished the possibility of legal abortion due to severe and irreversible fetal impairment or an incurable life-threatening illness, which started on 22 October 2020¹¹. These assemblies were often attended by a large number of participants and markedly exceeded the limit indicated in the regulation – one of the largest protests of the Women's Strike in Warsaw was attended by 100,000 people¹², accompanied by many smaller protests across approximately 600 Polish cities, towns and villages¹³.</p> <p>During the protests, the police performed mass ID checks and made many arrests among the protesters. According to a communication published by the Szpila Collective, a group coordinating legal aid to arrested persons (primarily those detained because of their participation in public assemblies), during the 100 days of protests following the Constitutional Tribunal's judgment, 150 arrests were made leading to 81 persons having been kept in police custody overnight (often outside the city where the assembly has taken place)¹⁴. During the protest after Margot's arrest, 48 people were</p>

⁹ HFHR's letter on the Business Owners' Strike: <https://www.hfhr.pl/wp-content/uploads/2020/05/KGP.pdf> (accessed on: 10.02.2021).

¹⁰ HFHR's letter on the protests after Margot's arrest: https://www.hfhr.pl/wp-content/uploads/2020/08/3601_001.pdf (accessed on: 10.02.2021).

¹¹ HFHR's letter on the first day of the protests: <https://www.hfhr.pl/wp-content/uploads/2020/10/Protesty-po-wyroku-TK-interwencja-KGP.pdf> (accessed on: 10.02.2021).

¹² See e.g. *Na Warszawę! 100 tysięcy osób protestowało w stolicy [ZDJĘCIA]*, <https://oko.press/na-warszawe-100-tysiecy-osob-protestowalo-w-stolicy-zdjecia/> (accessed on: 12.02.2021).

¹³ See e.g. M. Chołodowski, *Strajk Kobiet. Czas wykorzystać tę siłę*, <https://bialystok.wyborcza.pl/bialystok/7.35241,26620308,strajk-kobiet-czas-wykorzystac-te-sile.html> (accessed on: 12.02.2021).

¹⁴ See Szpila, *Raport (anty)represyjny – 100 dni protestu*, <https://www.facebook.com/kolektywshpila/posts/136721888271686> (accessed on: 10.02.2021).

		<p>detained during a single night.¹⁵ At the same time, the police checked IDs of hundreds of protesters. Frequently, the people taken into a “kettle” were only allowed to pass the police cordon after their personal information has been recorded. On 28 November 2020, the police checked IDs of 900 persons participating in a single protest¹⁶, on 18 November 2020, 500 ID checks were made¹⁷.</p> <p>Often, protesters faced the risk of being prosecuted for their participation in the protests, both under criminal law (for criminal or petty offences) and administrative law (they could be fined by a sanitary inspector). During the Business Owners' Strike in May 2020, the police issued 220 criminal citations and 150 tickets.¹⁸ On 28 November 2020, during one of the Women's Strike protest, the police registered 450 violations of the state of epidemic rules (punishable by administrative penalties imposed by sanitary inspectors) and 370 criminal citations.¹⁹</p> <p>The Helsinki Foundation for Human Rights made a request for information to the National Chief Commissioner of the Police, asking about the number of police actions during the assemblies. As presented in a letter from the Director of the HR, Training and Legal Services Office in the Police Headquarters, from 22 October 2020 to 3 January 2021, 3 085 tickets and 9 280 criminal citations were issued and 22 929 ID checks were made²⁰.</p>
	<p>Media accounts</p>	<p>The media have repeatedly reported on police brutality against persons arrested in connection with their participation in protests, which possibly could amount to inhuman or degrading treatment or punishment. In this respect, particular relevance should be given to</p>

¹⁵ See e.g. K. Sulowski, Protesty w obronie Margot. Policja zatrzymała 48 osób, *Gazeta Wyborcza*, <https://warszawa.wyborcza.pl/warszawa/7,54420,26192611,protesty-w-obronie-margot-policja-zatrzymala-48-osob.html> (accessed on: 11.02.2021).

¹⁶ See e.g. A. Karwowska, Strajk Kobiet i prof. Płatek radzą obywatelom. Co zrobić, gdy policja ogranicza nasze prawa, *Gazeta Wyborcza*, <https://wyborcza.pl/7,162657,26566398,strajk-kobiet-radzi-obywatelom-co-zrobic-gdy-policja-ogranicza.html> (accessed on: 11.02.2021).

¹⁷ See e.g. Z. Bukłaha, Rzecznik policji o przemocy podczas strajku kobiet: Użyliśmy siły i gazu i będzie ich używać, *Gazeta Wyborcza*, <https://warszawa.wyborcza.pl/warszawa/7,54420,26526549,rzecznik-policji-o-zatrzymaniach-i-tajnych-funkcjonariuszach.html> (accessed on: 11.02.2021).

¹⁸ *Strajk przedsiębiorców w Warszawie. Zatrzymano ponad 380 osób*, Polsat News, <https://www.polsatnews.pl/wiadomosc/2020-05-17/strajk-przedsiębiorców-w-warszawie-zatrzymano-ponad-380-osob/> (accessed on: 11.02.2021).

¹⁹ Z. Bukłaha, Policja: trzeba obejrzeć nagrania z kamerki, aby zobaczyć, jak było z tym gazem, *Gazeta Wyborcza*, <https://warszawa.wyborcza.pl/warszawa/7,54420,26558592,rzecznik-policji-podsumowuje-sobotni-protest-11-zatrzymanych.html> (accessed on: 11.02.2021).

²⁰ Letter from the Director of the HR, Training and Legal Services Office in the Police Headquarters, issued on 18 February 2020, no. Kwo-422/21/1758/20/JK.

the reports of the National Mechanism for the Prevention of Torture (operating within the Office of the Commissioner for Human Rights under the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, adopted by the United Nations General Assembly in New York on 18 December 2002) from *ad hoc* visits carried out immediately after the protests on 7 August 2020 (Margot's arrest) and between 23 October and 14 December 2020 (the initial phase of the Women's Strike protests).

In a report describing the situation of persons arrested during the protests on 7 August 2020, the NMPT drew attention to the recurring accounts of beatings by police officers, flagrant abuses of direct coercive measures, in particular physical force and handcuffs, the demeaning, homophobic or transphobic treatment of detainees, excessive use of body searches and the performance of body searches in a manner violating the dignity of arrested persons. The NMPT also noted the non-compliance with the key anti-torture guarantees: the police restricted arrestees' access to defence lawyers (and vice versa), prevented the exercise of the right to notify the third party about the arrest and refused access to medical examinations (also in cases of persons with visible injuries). In certain cases, arrests were made on a completely random basis: the police have arrested persons who happened to be in the general area of the protests but did not participate in the protests.²¹

Despite strong criticism of the police actions during the August protest, the NMPT report on the first two months of protests following the Constitutional Tribunal's abortion judgment shows hardly any improvement on the part of law enforcement authorities. As the reported visits revealed, the problems with access to a lawyer persisted, and the implementation of the right to a lawyer often depended on grassroots initiatives and lawyers' self-organisation. Access to medical examinations continued to be restricted and arrestees were not informed of the factual and legal grounds for their arrest. Again, there have been reports of police officers' violence against arrested persons: some of them were beaten with batons, forced to sit on the floor of a moving police car, punched in the face, restrained on the ground by officers kneeling on their

²¹ Report of the National Mechanism for the Prevention of Torture from *ad hoc* visits to detention and sobering up facilities located at police units subordinate to the Warsaw Police Department, <https://www.rpo.gov.pl/sites/default/files/Raport%20%20KMPT%20z%20wizytacji%20jednostek%20policyjnych%20po%20zatrzymaniu%20w%20Warszawie%207.08.2020%20-%207.09.2020.pdf> (accessed on: 10.02.2021).

		<p>backs, kicked in the stomach and crotch. The NMPT pointed to the police officers' demeaning attitude towards arrestees and the protests. The abuse of direct coercive measures – physical force, handcuffs, chemical incapacitating agents – remained a problem. In several cases, the police prevented the NMPT from exercising the Mechanism's mandate by refusing NMPT representatives an opportunity to talk to an arrestee).</p> <p>Attention was also drawn to the fact that, despite the objective possibility of taking arrested protesters to local police stations, the police transferred them outside the city limits thereby preventing their lawyers to reach their clients before the first police interview²².</p>
	<p>Court decisions</p>	<p>Considering the systemic problems of delays and backlogs in the courts, as well as the fact that the mass protests of 2020 have largely taken place in the last months of the year, the courts' jurisprudence on the freedom of assembly during the state of epidemic can hardly be considered substantial or comprehensive. Nevertheless, the courts have notably recognised the unconstitutional nature of restrictions on the freedom of assembly imposed to tackle COVID-19, as well as the accompanying police abuse.</p> <p>During the period of the total ban on assemblies, the Warsaw Court of Appeal held that "the above legal situation raises considerable doubts from the perspective of the constitutional right of citizens to assemblies under Article 57 of the Constitution, in particular in the context of constitutionally permissible restrictions on subjective rights and the principle of proportionality enshrined in Article 31 (3) of the Constitution".²³ The District Court for Warsaw's Śródmieście borough also noted that "the lack of introduction of the state of natural disaster, which corresponds to the current coronavirus situation, makes the prohibitions expressed in the content of the above-mentioned regulation unconstitutional and therefore devoid of a legal basis".²⁴</p>

²² Report of the National Mechanism for the Prevention of Torture from ad hoc visits to police stations and detention and sobering up facilities located in units subordinate to the Warsaw Police Department and the Provincial Police Department of Radom,

<https://www.rpo.gov.pl/sites/default/files/Raport%20KMPT%20z%20wizytacje%20pomieszcze%C5%84%20policyjnych%20po%20demonstracji%20zwi%C4%85zanych%20z%20wyrokiem%20TK%20-%2011.01.2021.pdf> (accessed on: 10.02.2021).

²³ Decision of the Court of Appeal in Warsaw of 15 May 2020, case no. VI ACz 339/20.

²⁴ Judgment of the District Court for Warszawa-Śródmieście in Warsaw of 16 October 2020, case no. V W 2757/20.

The courts have also recognised that even if it was possible to restrict the freedom of assembly in a regulation, the regulations in force since March had banned the *organisation* of assemblies, rather than *participation* in assemblies²⁵.

Smaller protests and happenings have also been organised in the duration of the state of epidemic restrictions. Participants in these events complied with epidemic rules, including social distancing rules, but still frequently dealt with negative responses from the police. As noted by the District Court for Warsaw's Śródmieście borough, "the defendants have maintained all necessary and legally required safety measures aimed at protecting their own health and that of other persons and, in the court's opinion, a conclusion that their behaviour could violate public peace or order and should result in their punishment would be entirely without merit"²⁶.

One should also remember that there are two procedural tracks for the cases brought against participants in public assemblies: the criminal and administrative proceedings. In administrative proceedings, pursuant to art. 48a of the Infections Control Act, a state district sanitary inspector may impose an immediately enforceable administrative penalty (fine) of up to PLN 30,000. In cases concerning violations of state of pandemic rules, the choice of the procedural track is made by the police officer responding to an incident – they may issue ticket (or, if the ticket is not accepted, a criminal citation to be dealt with by a court) under Article 54 or art. 116 § 1a of the Petty Offences Code²⁷ or notify the state district sanitary inspector (SANEPID, the sanitary and epidemiological inspectorate) about the violation.

One of these proceedings concerned several persons protesting against the plans to hold the general election through postal voting. In the period of the total ban on assemblies, several protesters carried a large banner. Although the protesters kept the required

²⁵ Judgment of the District Court for Warszawa-Śródmieście in Warsaw, case no. V W 1083/20, cited in: Obywatele RP, *Orzeczenia sądów powszechnych z lat 2017-2020. Czy uczestniczenie w zgromadzeniu podczas epidemii jest wykroczeniem? Kiedy i kogo można legitymować? Co ze zgromadzeniami spontanicznymi? Czy kontrademonstracja jest zakłócaniem zgromadzenia?*, <https://obywatelerp.org/pliki-do-pobrania/> (accessed on: 10.02.2021).

²⁶ *Ibid.*

²⁷ Article 116 § 1a was added by Article 1(2) of the Act of 28 October 2020 amending certain acts in connection with the addressing of COVID-19 emergencies. Previously, in similar situations the police applied (and still apply in some cases) Article 54 of the Petty Offences Code (which refers to violations of rules of conduct in public places). However, the courts have consistently refused to interpret the notion of "rules of conduct" in a way that would allow extending that notion on the state of pandemic restrictions, discontinuing proceedings brought on that basis; in this regard see, for example, the judgment of the District Court in Rzeszów, case no. II W 539/20 (quoted in: Obywatele RP, *Orzecznictwo...*).

distance between each other and wore masks, the incident was reported to the sanitary and epidemiological inspectorate, which imposed on each protester the fine of PLN 10,000. The Commissioner for Human Rights, who intervened in the appeal proceedings, argued that the case had been decided *ex parte* and that the protesters had not even been informed of the proceedings. The Commissioner also noted that the penalty imposed was disproportionate and grossly excessive. Ultimately, the fine was lifted²⁸.

Some of the proceedings which have been brought against participants in public assemblies are based on grounds other than suspected violations of state of epidemic rules. According to the Szpila Collective, the most frequently presented charges include, in addition to those based on Articles 54 and 116 § 1a of the Petty Offences Code, violations of Article 65 (refusal to produce an ID) and Article 65a (failure to comply with police instructions), as well as violations of provisions of the Criminal Code such as Article 222 (violation of an officer's personal inviolability), Article 224 (interfering with a public officer's duties), Article 226 (insulting an officer), Article 261 (insulting a monument), art. 288 (destruction of someone else's property).²⁹

Although the majority of the criminal and petty offences cases of participants in public assemblies are still be pending, the courts have already dealt with some, discontinuing the proceedings or issuing a penal order (*wyrok nakazowy*). Among the decided cases was one of a photojournalist accused of violating an officer's personal inviolability. Although a penal order may only be issued in cases where the circumstances of the violation and the violator's guilt is evident, the court decided to fine the photojournalist even as she did not admit guilt³⁰. The case has aroused widespread

²⁸ Commissioner for Human Rights, *Sanepid uchylił kary 10 tys. zł dla protestujących pod Sejmem przeciw wyborom „kopertowym”*. Uznał odwołanie obywateli i RPO, <https://www.rpo.gov.pl/pl/content/sanepid-uchylil-kary-10-tys-zl-C5%82-dla-protestujacych-pod-sejmem-odwolanie-RPO-skuteczne> (accessed on: 11.02.2021).

²⁹ *Raport (anty)represyjny...*

³⁰ The penal order may still be appealed – according to media reports, the public prosecutor has lodged an objection which means that the journalist's case will go to full trial. For more information, see TVN Warszawa, *Sąd wydał wyrok w sprawie fotoreporterki zatrzymanej na proteście przed ministerstwem*, <https://tvn24.pl/tvnwarszawa/najnowsze/warszawa-agata-grzybowska-fotoreporterka-skazana-wyrokiem-nakazowym-za-naruszenie-nietykalnosci-policjanta-5006850> (accessed on: 11.02.2021).

		<p>controversy and the outcome was strongly opposed in Poland and abroad³¹.</p> <p>Preventive measures have been taken against some of the accused protesters. A leader of the Women's Strike, charged with criminal trespass and violating an officer's personal inviolability, offences allegedly committed during a protest in the vicinity of the Constitutional Tribunal, was obliged to weekly report at a designated police station. She also received a temporary restraining order, prohibiting her from being present within a 100-metre radius from the premises of the Constitutional Tribunal, which, given the fact that she leads the protests against the Tribunal's judgment, may significantly affect her ability to exercise her freedom of assembly³².</p>
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³¹ See e.g. Reporters Without Borders, *Poland: Drop charges against reporter who covered women's rights protests*, RSF says, <https://rsf.org/en/news/poland-drop-charges-against-reporter-who-covered-womens-rights-protest-rsf-says> (accessed on: 11.02.2021).

³² Klementyna Suchanow publicised the content of the decision on the preventive measures via Twitter: <https://twitter.com/ksuchanow/status/1355256527700029447> (accessed on: 11.02.2021).

HFHR actions in the discussed area	General actions	<ol style="list-style-type: none"> 1) Following the events of the night of 7/8 August 2020, the HFHR has called on the Minister of the Interior and Administration to introduce a rule requiring officers of riot police units, typically present at the scene of public assemblies, to wear identification markings. The absence of such markings prevents the identification of officers responsible for abuses of police powers and the taking of legal action against such officers.³³ 2) Responding to the abuses of police powers during the protests, the HFHR prepared a guidebook on the rights and obligations of persons dealing with the police. The guidebook includes 10 factsheets discussing, among other things, direct coercive measures³⁴, freedom of assembly during the state of epidemic³⁵ or the rules governing the use of pepper spray³⁶. 3) At the beginning of 2021, the Foundation prepared an opinion statement on changes to the petty offence procedure. The changes, proposed by the Government, seek to abolish the option to refuse the acceptance of a ticket which is to be replaced by the possibility of appealing against the ticket. If the proposal becomes law, the defendant will have seven days to lodge a notice of appeal invoking all known evidence subject to the proviso that no additional evidence may be invoked at a later stage of the proceedings. In the opinion of the HFHR, such an arrangement would violate the defendant's right to a defence, which is based on the principle that it is the prosecutor who needs to indicate the arguments pointing to the defendant's guilt. The discussed amendment reverses this rule and deprives the defendant of the possibility to respond to the prosecuting party's arguments.³⁷ This proposal was presented after more than two months of the protests following the Constitutional Tribunal's abortion judgment, during which the protesters refused to accept tickets <i>en masse</i>, bearing in mind that the courts often discontinue proceedings in similar cases or acquit those accused of similar violations³⁸.
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³³ HFHR, *Policjanci bez znaków identyfikacji – czas na zmianę*, <https://www.hfhr.pl/policjanci-bez-znakow-identyfikacji-czas-na-zmiane/> (accessed on: 11.02.2021).

³⁴ HFHR, *Wiem, że... / Środki przymusu bezpośredniego*, <https://www.hfhr.pl/wiem-ze-elementarz-naszyc-praw-i-obowiazkow-w-kontaktcie-z-policja/> (accessed on: 11.02.2021).

³⁵ HFHR, *Wiem, że... / Wolność zgromadzeń a tzw. „rozporządzenia covidowe”*, <https://www.hfhr.pl/wiem-ze-wolnosc-zgromadzen-a-tzw-rozporzadzenia-covidowe/> (accessed on: 11.02.2021).

³⁶ HFHR, *Wiem, że... / Stosowanie gazu pieprzowego*, <https://www.hfhr.pl/wiem-ze-stosowanie-gazu-pieprzowego/> (accessed on: 11.02.2021).

³⁷ HFHR, *HFPC krytyczna wobec zmian w wykroczeniach i dostępie do akt zakończonych śledztw*, <https://www.hfhr.pl/hfpc-krytyczna-wobec-zmian-w-wykroczeniach-i-dostepie-do-akt-zakonczonech-sledztw/> (accessed on: 11.02.2021).

³⁸ See e.g. J. Jezierska, A. Mieszala, *Wolność zgromadzeń w praktyce polskich sądów. Raport HFPC z monitoringu postępowań* (accessed on: 11.02.2021).

**Actions
taken in
individual
cases**

- 1) On 22 May 2020, the HFHR sent a statement to the Chief Commissioner of the Warsaw Police and the National Chief Commissioner of the Police regarding the Business Owners' Strike. The organiser of the protest has notified the municipal authorities of the planned assembly in accordance with a procedure provided for in the Assemblies Act. Although the law does not provide for such a possibility, a municipal body refused to enter the assembly in the register of assemblies (a municipality may either issue a decision banning the assembly or enter the assembly in the register). The organiser appealed to a court, and the court ruled that the municipal body's letter refusing the registration cannot be considered a decision banning the assembly. Furthermore, the court put in question the constitutionality of the then-applicable total ban on assemblies imposed under a regulation. In a letter to the police, who arrested 380 persons participating in the assembly, issued 150 tickets and 220 criminal citations and used tear gas against the demonstrators, the HFHR observed that the ban on assemblies was unconstitutional and stressed the need to respect the principle of proportionality and respect for human dignity during police interventions³⁹.
- 2) In response to the events of the night of 7/8 August 2020 related to the arrest of Margot, the HFHR requested the Chief Commissioner of the Warsaw Police to provide information on the actions taken by the police. In its statement, the Foundation drew attention to the random nature of the arrests, which suggests that the arrests had been made without a legal basis, and noted the fact that the arrested persons had not been notified about the basis and reason for their arrest. The HFHR also expressed concerns about police brutality and the instances when lawyers had been deprived of access to arrested protesters kept in police custody. The Foundation referred to international standards, indicating possible violations of Article 3 and Article 6 (3) (c) of the European Convention on Human Rights, as well as of Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings and on the right to have third persons informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty⁴⁰. In addition to the letter sent to the Police, the HFHR also published a position statement calling on the Police to act in compliance with the law and requesting

	<p>state authorities to cease their activities leading to an escalation of violence⁴¹.</p> <p>3) From the first day of protests erupting in the wake of the so-called “judgement” of the Constitutional Tribunal banning abortion on embryopathological grounds, the Foundation monitored the police response to the assemblies.</p> <p>a. After the protests of the night of 22/23 October 2020, the HFHR wrote to the Chief Commissioner of the Warsaw Police and the National Chief Commissioner of the Police about the unconstitutionality of restrictions on the freedom of assembly. The Foundation also stressed that the state is obliged, under Article 11 of the ECHR, to demonstrate the greatest possible tolerance for peaceful public assemblies, and that police attempts to disband an assembly must be proportionate to the threat the assembly presents, whereas the use of measures such as tear gas must be assessed in terms of necessity, proportionality and rationality so to avoid the risk of violations of the prohibition of torture, inhuman or degrading treatment or punishment⁴².</p> <p>b. On 3 November 2020, the HFHR sent letters to the National Chief Commissioner of the Police and the Chief Commissioner of the Warsaw Police regarding the arrests of trade union activists travelling to Warsaw to take part in one of the Women’s Strike protests. In the letters, the HFHR argued that the arbitrary detention of the activists may have violated not only their right to personal liberty but also freedom of assembly⁴³.</p>
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³⁹ HFHR, *Epidemia nie uchyla prawa do wolności zgromadzeń. HFPC interweniuje ws. protestu przedsiębiorców*, <https://www.hfhr.pl/epidemia-nie-ogranicza-wolnosci-zgromadzen-hfpc-interweniuje-ws-protestu-przedsiębiorcow/> (accessed on: 11.02.2021).

⁴⁰ HFHR, *Interwencje Policji w czasie wydarzeń z 7 sierpnia. Wystąpienie HFPC do Komendanta Stołecznego Policji*, <https://www.hfhr.pl/interwencje-policji-w-czasie-wydarzen-z-7-sierpnia-wystapienie-hfpc-do-komendanta-stolecznego-policji/> (accessed on: 11.02.2021).

⁴¹ HFHR, *Stanowisko Helsińskiej Fundacji Praw Człowieka w sprawie zatrzymania w Warszawie w nocy z 7 na 8 sierpnia 2020 r. po zatrzymaniu aktywistki LGBT+ – Margot*, <https://www.hfhr.pl/stanowisko-helsinskiej-fundacji-praw-czlowieka-w-sprawie-zajsc-w-warszawie-w-nocy-z-7-na-8-sierpnia-2020-r-po-zatrzymaniu-aktivistki-lgbt-margot-2/> (accessed on: 11.02.2021).

⁴² HFHR, *Helsińska Fundacja Praw Człowieka interweniuje w sprawie wydarzeń w nocy z 22 na 23 października*, <https://www.hfhr.pl/helsinska-fundacja-praw-czlowieka-interweniuje-w-sprawie-wydarzen-w-nocy-z-22-na-23-pazdziernika/> (accessed on: 11.02.2021).

⁴³ HFHR, *Helsińska Fundacja Praw Człowieka interweniuje w sprawie zatrzymania działaczy jadących na Strajk Kobiet*, <https://www.hfhr.pl/helsinska-fundacja-praw-czlowieka-interweniuje-w-sprawie-zatrzymania-dzialaczek-i-dzialaczy-zawodowego-inicjatywa-pracownicza-jadacych-na-strajk-kobiet/> (accessed on: 11.02.2021).

- c. During the protest on the night of 18/19 November 2020, peaceful protesters were surrounded by an impenetrable police cordon. The police used pepper spray against non-violent protesters (including a Sejm deputy who intervened during the assembly). A plain-clothes officer appeared in the crowd, hitting protesters with a telescopic baton in the presence of other police officers. Again, the HFHR drew attention to possible violations of standards under the European Convention on Human Rights, also pointing to an increased risk of COVID-19 infections resulting from the use of irritating substances by the police during public assemblies⁴⁴.
- d. A prosecutor's office requested the pre-trial detention of a protester. The first instance court rejected the request, but the public prosecutor challenged the decision. The HFHR submitted an amicus curiae brief before the second instance court. In its opinion, the HFHR has underlined that the imposing of pre-trial detention in connection with a person's participation in a public assembly may lead to a violation of freedom of assembly. The second instance court rejected the prosecutor's appeal and refused to apply the most severe preventive measure⁴⁵.
- e. During the 28 November protest, the police used pepper spray against another parliamentarian, surrounded peaceful protesters and performed mass ID checks. The police entered the grounds of the Warsaw University of Technology, violating the university's autonomy. Once again, the Foundation drew attention to the requirements related to the use of direct coercive measures, the risks associated with the use of pepper gas, as well as to the standards under Articles 3 and 11 of the ECHR and the unconstitutionality of extremely restrictive limitations on the freedom of assembly⁴⁶.

⁴⁴ HFHR, *Interwencja HFPC w sprawie wydarzeń z 18 i 19 listopada 2020 r. w Warszawie*, <https://www.hfhr.pl/interwencja-hfpc-w-sprawie-wydarzen-na-pl-powstancow-i-przed-sadem-okregowym-w-warszawie> (accessed on: 11.02.2021).

⁴⁵ HFHR, *Wniosek o tymczasowe aresztowanie dla uczestniczki protestów – HFHR składa opinię przyjaciela sądu*, <https://www.hfhr.pl/wniosek-o-tymczasowe-aresztowanie-dla-uczestniczki-protestow-hfpc-sklada-opinie-przyjaciela-sadu/>

(accessed on: 11.02.2021).

⁴⁶ HFHR, *Użycie gazu wobec posłanki, otoczenie kordonem, masowe legitymowanie. Kolejna interwencja HFPC*, <https://www.hfhr.pl/uzycie-gazu-wobec-poslanki-otoczenie-kordonem-masowe-legitymowanie-kolejna-interwencja-hfpc/> (accessed on: 11.02.2021).

- f. In response to statements announcing negative consequences for pupils and teachers participating in or supporting the protests, the HFHR sent statements to the education authorities that engaged in potentially unlawful conduct.⁴⁷
- g. The HFHR also intervened in the case of a protester participating in a spontaneous demonstration of support near a police station whose arm was broken by a police officer and who did not receive proper medical assistance⁴⁸.
- h. The HFHR also acted upon reports of police actions taken against a 14-year-old who had created a Facebook post on a protest. According to press reports, police officers came to the boy's home and informed him that disseminating such information was a public incitement to commit a criminal offence.
- i. In another letter sent to the National Chief Commissioner of the Police, the Foundation referred to the events of 20 and 28 January 2021. On 20 January, the police again used pepper spray against several persons, including photojournalists (although the circumstances showed that the officers were aware of the latter's professional role). Immediately after having been pepper-sprayed, a participant was brutally arrested, left lying handcuffed in the snow, and later dragged to a police car. On 28 January, the police repeatedly formed a cordon to surround the protesters. A person surrounded by the officers had a panic attack, yet the police attempted to prevent that person from receiving assistance. That night, the police arrested 14 people, but only one was brought to a police station in Warsaw, despite the protest taking place in the city centre. The other arrestees were transported to seven different towns outside Warsaw. Reports of abuse also appeared in arrestees' accounts: a woman was forcibly stripped by two female officers in the presence of two male officers, she was verbally abused and, although her tights were taken away during the humiliating strip search, she was placed in a cold holding cell at another police station and did not even get a blanket. The arrested woman was forced to remain handcuffed during an interview. Police officers addressed another arrestee in a vulgar manner, threatening them with beating. During the eight-hour detention, the arrestee was searched four times. In its letter, the HFHR reiterated the standards stemming from Articles 3, 5 and 11 of the ECHR⁴⁹.

Proposed changes (or objectives of our actions)	Related to the law	<ol style="list-style-type: none"> 1) The unconstitutional restrictions on the freedom of assembly contained in the so-called “Covid regulations” should be abolished. 2) Members of the riot police units should obligatorily wear identification markings. 3) The law allowing the non-acceptance of a ticket should be maintained.
	Related to practices of national authorities	<ol style="list-style-type: none"> 1) The pandemic should not be used as a pretext for restricting citizens' fundamental rights and freedoms. 2) Freedom to hold peaceful spontaneous assemblies should be respected (irrespective of whether the police think that a given assembly could take place upon prior notification). 3) The police should refrain from using measures that are likely to foster the spread of COVID-19 and adversely affect the course of the disease such as cordoning off large crowds of protesters in a small area or using chemical incapacitating agents. 4) The police should strictly comply with the principles relating to the use of direct coercive measures, namely those of proportionality, necessity, subsidiarity and harm reduction. 5) The police should only take such action against protesters as is strictly necessary in the circumstances.

⁴⁷ HFHR, *Prawa dzieci w praktyce – kuratoria odpowiadają na wystąpienia HFPC w sprawie uczniów wyrażających poparcie dla trwających protestów*, <https://www.hfhr.pl/prawa-dzieci-w-praktyce-kuratoria-odpowiadaja-na-wystapienia-hfpc-w-sprawie-uczniow-wyrazajacych-poparcie-dla-trwajacych-protestow/> (accessed on: 11.02.2021).

⁴⁸ HFHR, *Złamanie ręki osoby protestującej podczas policyjnej interwencji. Interwencja HFPC*, <https://www.hfhr.pl/zlamanie-reki-osoby-protestujacej-podczas-policyjnej-interwencji-interwencja-hfpc/> (accessed on: 11.02.2021).

⁴⁹ HFHR's letter from the to the National Chief Commissioner of the Police of 12 February 2021, <https://www.hfhr.pl/kolejne-przypadki-naduzyc-policji-wobec-protestujacych-hfpc-kieruje-interwencje-do-komendanta-glownego-policji/> (accessed on: 19.02.2021).

- 6) Participants in public assemblies may be arrested only if this is objectively and absolutely necessary.
- 7) If the arrest is necessary, arrested persons should be taken to the nearest police station with sufficient holding capacity.
- 8) The police should take measures to ensure that arrested persons may exercise their right of access to defence lawyers.
- 9) The police should refrain from taking any action that would result in a violation of demonstrators' freedom from torture, inhuman or degrading treatment or punishment, in its substantive or procedural aspects.
- 10) Participants in peaceful protests should not face legal sanctions.
- 11) The police should abandon the routine practice of cordoning off ("kettling") assemblies, mass ID checks of "kettled" crowds and the use of pepper spray on peaceful protesters.
- 12) The police should not assume that the participation of minors in a peaceful demonstration is a sign of their demoralisation and should refrain from taking legal action against such minors.
- 13) The courts should not use the penal order procedure to decide on the criminal liability of persons charged in connection with their participation in an assembly.
- 14) The police should allow members of the media to cover the protests.
- 15) The police should abandon the practice of using hand-held pepper spray throwers on parliamentarians presenting their identity cards.
- 16) Police officers should be made aware that a person's participation in a peaceful assembly (including a spontaneous assembly) is a manifestation of the exercise of constitutional rights and freedoms fundamental to a democratic society rather than a crime, which should be reflected in the police treatment of protesters.
- 17) Officers responsible for violations of the freedom from torture, inhuman or degrading treatment, the right to personal liberty and freedom of assembly should be held accountable instead of being rewarded for human rights violations.

**HR HELSINKI FOUNDATION
FOR HUMAN RIGHTS**