

Warsaw, 23 March 2021

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**Ms Ksenija Turković**  
**The European Court of Human Rights**  
**President of the First Section**  
Council of Europe  
67075 Strasbourg-Cedex  
France

**Ref. Ewa Siedlecka against Poland**  
**Application No. 13375/18**

*Dear Ms. President,*

Pursuant to the letter of Ms Renata Degener, the Deputy Section Registrar of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 3 March 2021, granting leave to make written submission to the Court by 24 March 2021, the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland, would like to respectfully present its written comments on the case of Ewa Siedlecka against Poland (application no. 13375/18).

On behalf of the Helsinki Foundation for Human Rights,

*Respectfully,*

Helsinki Fundacja Praw Człowieka  
**SEKRETARZ ZARZĄDU**  
*Piotr Kładoczny*  
Piotr Kładoczny



Helsinki Fundacja Praw Człowieka  
**PREZES ZARZĄDU**  
*Danuta Przywara*  
Danuta Przywara

***Ewa Siedlecka against Poland***

**Application no. 13375/18**

**WRITTEN COMMENTS**

**BY**

**THE HELSINKI FOUNDATION FOR HUMAN RIGHTS**

**EXECUTIVE SUMMARY:**

- The case of *Ewa Siedlecka against Poland* concerns important issues related to the freedom of assembly and protection of personal liberty in Poland.
- The 2016 amendment to the Act on Assemblies allowed the organisers of some assemblies held periodically to apply for a permission for organisation of recurrent assembly. The main benefit of having such permission is obtaining a priority over other assemblies which cannot be organised at the same time and place as the recurrent one.
- The concept of recurrent assemblies has always raised controversies among legal scholars and civil society, who perceived it as an unjustified preferential treatment of certain type of assemblies and a disproportionate restriction of a right to organise counter-assemblies.
- Practical application of the provisions concerning recurrent assemblies led to various problems, especially in the context of prohibiting counter-assemblies against the recurrent assemblies for commemoration of victims of 2010 air crash.
- The freedom of assembly in Poland is threatened also by other factors. One of them results from the excessive use by the police of the short-term detention against participants of assemblies for the purpose of ID checks. Analysis of the case-law of Polish courts shows that such instances of detention are qualified as arrest.
- Recently the police relatively frequently use the practice of cordoning against the participants of assemblies. Although the police does not perceive this action as a form of arrest, it is likely that courts would present a different interpretation. However, so far there is no relevant case-law in this area.

**I. INTRODUCTION**

1. This third party intervention is submitted by the Helsinki Foundation for Human Rights ("HFHR"), pursuant to the leave granted by the President of the Section on 3 March 2021.

2. The present written comments are divided into two sections. In the first one we present the legal framework concerning the "recurrent assemblies", as well as practical problems with its application. The second section is dedicated to the analysis of the problem of arrest made for identification purposes by the Polish Police, especially against participants of assemblies.

**II. "RECURRENT ASSEMBLIES" IN THE POLISH LAW**

3. In 2015 the Parliament adopted a new "Act on Assemblies"<sup>1</sup>. The law was aimed at, among others, implementation of the standards stemming from the case-law of the ECtHR. In *Bączkowski and Others v. Poland*<sup>2</sup>, the Court ruled that Poland violated, among others, Articles 11 and 13 of the ECHR. The violation was caused by the fact that the Polish law did not guarantee that the appeal against the prohibition to hold an assembly would be reviewed before the planned date of the assembly. The new law eliminated this flaw by introducing an accelerated appellate procedure. Moreover, the new Act on Assemblies definition and explicitly protected spontaneous assemblies. The law also introduced a new category of assemblies, so-called simplified assemblies, which includes those assemblies which do not cause any traffic obstructions.

4. In December 2016 the Sejm adopted an amendment to the Act on Assemblies<sup>3</sup>. The law introduced a new type of assemblies – the so-called "recurrent assemblies". At the moment of

<sup>1</sup> Ustawa z dnia 24 lipca 2015 r. Prawo o zgromadzeniach, Journal of Laws of 2015, item 1485.

<sup>2</sup> ECtHR, *Bączkowski and Others v. Poland*, 3 May 2007, app. no. 1543/06.

<sup>3</sup> Ustawa z dnia 13 grudnia 2016 r. o zmianie ustawy – Prawo o zgromadzeniach, Journal of Laws 2017, item 579.

adoption of the new law it was widely believed that its actual purpose was to protect the assemblies for commemoration of victims of crash of the Polish government plane in Smolensk in 2010 organised each month by the persons connected to the ruling party.<sup>4</sup> Each of these assemblies raised political controversies and faced counter-demonstrations.

5. According to Article 26a of the Act on Assemblies, "If the assemblies are organised by the same organiser in the same place or at the same route at least 4 times a year according to a schedule, or at least once a year on days of national or state celebrations, and such events have taken place in the last 3 years, even if not in the form of assemblies, and were intended, in particular, to celebrate events important for the history of the Republic of Poland Polish, the organiser may apply to the voivode for consent to the recurrent organisation of these assemblies". The consent for organisation of recurrent assemblies is an exception to the general model adopted in Poland, in which the organiser must simply notify the competent organs about his/her plans to organise an assembly, who in turn may issue a prohibition. The voivode's decision authorises the organisers to organise a recurrent assemblies in the period no longer than 3 years from the day of the first assembly. However, in some circumstances the voivode may withdraw a permission.

6. The primary benefit of having a status of a recurrent assembly is the protection against potential counter-assemblies. According to the Article 12 of the Act on Assemblies, when the organs were notified about organisation of two assemblies at the same time and in the same place (or when the distance between them would be less than 100 meters) and it would be impossible for them to take place without threatening life or health of people or property of a significant value, priority is granted to this assembly which was notified earlier. However, these general rules do not apply to the recurrent assemblies. According to Article 14 of the Act on Assemblies, the fact that the planned "ordinary" assembly would take place in the same place and at the same time as the recurrent assembly is one of the grounds for issuing the prohibition of organising of the former. What is more, decision granting permission for organisation of recurrent assemblies affects also those "ordinary" assemblies which were notified earlier – the latter also must be prohibited. When the commune authority fails to prohibit organisation of the ordinary assembly, prohibition may be issued by a voivode in the form of substituting order.

7. It is therefore no surprise that the idea of "recurrent assemblies" was criticised already at the stage of the legislative process. According to the opinion submitted by the Commissioner for Human Rights<sup>5</sup> the law introduced an unjustified preferential treatment of recurrent assemblies by providing an exception to the general rules on solving the collision between assemblies. According to the Commissioner, the new law disproportionately restricted a freedom to organise counter-demonstrations and because of that it could lead to violations of Article 11 of ECHR. The Commissioner criticised also the provisions according to which permission to organise recurrent assembly affects assemblies notified before. Moreover, he argued that the notions used in the definition of the recurrent assembly were unclear and could be applied arbitrarily.

9. The opinion submitted by the Supreme Court<sup>6</sup> was equally critical. According to the Supreme Court preferential treatment of recurrent assemblies was unjustified and inconsistent with the principle of equality. The opinion criticised also granting the competence to issue decisions

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<sup>4</sup> See e.g. M. Zimmerman, *Ewa Kulik-Bielińska: obóz władzy taktycznie się wycofał, bo przestraszył się oporu*, „Onet.pl”, 10 December 2016, <https://wiadomosci.onet.pl/tylko-w-onecie/ewa-kulik-bielinska-nt-ustawy-prawo-o-zgromadzeniach/zmn7fmb> (last access: 16 March 2021); *Skandaliczny projekt posłów PiS. Nikt im się potem nie sprzeciwi*, „Fakt.pl”, 17 November 2016, <https://www.fakt.pl/wydarzenia/polityka/miesiecznica-nie-przeszkadzac-pis-chce-kontrowersyjnych-zmian/b83v4cg> (last access: 16 March 2021); T. Dereszyński, *Dr Mariusz Bidziński: Ta nowela jest zbędna. Nie limitujmy prawa do zgromadzeń*, 8 December 2016, <https://polskatimes.pl/dr-mariusz-bidzinski-ta-nowela-jest-zbedna-nie-limitujmy-prawa-do-zgromadzen/ar/11556217> (last access: 16 March 2021).

<sup>5</sup> Commissioner for Human Rights, opinion no. VII.613.12.2016.AG, <https://www.rpo.gov.pl/sprawy-generalne/pdf//2016/12/VII.613.12.2016/909471.pdf> (last access: 16 March 2020).

<sup>6</sup> Supreme Court, opinion of 30 November 2016, no. BSA I-021-499/16, [https://www.rpo.gov.pl/sites/default/files/021-499\\_16%20Uwagi%20SN%20do%20projektu%20ustawy%20o%20zm.%20ustawy%20-%20Prawo%20o%20zgromadzeniach.pdf](https://www.rpo.gov.pl/sites/default/files/021-499_16%20Uwagi%20SN%20do%20projektu%20ustawy%20o%20zm.%20ustawy%20-%20Prawo%20o%20zgromadzeniach.pdf) (last access: 16 March 2021).

concerning recurrent assemblies to voivode instead of organs of local government. Moreover, it underlined that it was hard to escape an impression that the provisions concerning recurrent assemblies were designed for two concrete events. The Supreme Court also held that the criteria for granting permission to organise recurrent assembly were unclear.

10. The critical legislative opinions were submitted also by non-state bodies, such as the Warsaw Bar Association<sup>7</sup> and the HFHR<sup>8</sup>. This negative assessment of the new law was shared by almost 200 other Polish NGOs which jointly appealed to the President of Poland to veto the law.<sup>9</sup> However, the President did not decide to veto the law but instead submitted a motion to the Constitutional Tribunal for the review of its constitutionality before signing it.

11. In the judgment of 16 March 2017 (ref. no. Kp 1/17) the Constitutional Tribunal ruled that the Act amending the Act on Assemblies was consistent with the Constitution. According to the Constitutional Tribunal, granting recurrent assemblies a priority over “ordinary” assemblies was justified by the fact that they promote values important from the perspective of the common good. Moreover, the Constitutional Tribunal noted that the date of recurrent assembly is usually connected to the concrete dates of some important historical events or facts and that the repetitive nature of the recurrent assemblies was beneficial from the perspective of the necessity to ensure public safety and order. The Tribunal also noted that even before adoption of the amendment at hand, the Polish law distinguished various categories of assemblies and that such differentiation serves justified reasons. The Constitutional Tribunal also held that the procedure and criteria for obtaining permission for organisation of recurrent assemblies were consistent with the Constitution. With regards to prohibition of organisation of assemblies at the same time and place as recurrent assembly, the Constitutional Tribunal held that counter-demonstrations could be organised in the distance of more than 100 meters, what is a proportionate limitation. All in all, the Constitutional Tribunal concluded that the challenged provisions not only did not violate the essence of the freedom of assemblies but even contributed to harmonisation of the exercise of this freedom with other freedoms and rights, safeguarding public security and realisation of the common good. It is worth to underlined that the Constitutional Tribunal’s ruling concerned only the consistency of the challenged act with the Constitution and not with the ECHR.

12. Four judges of the adjudicating bench (Leon Kieres, Piotr Pszczołkowski, Małgorzata Pyziak-Szafnicka, Sławomira Wronkowska) filed dissenting opinions. Judge Małgorzata Pyziak-Szafnicka held that in her opinion although a mere introduction of a new category of assemblies did not violate the Constitution, it is impermissible to grant to recurrent assemblies a priority over those assemblies which were notified earlier. Also judge Sławomira Wronkowska held that there were no justified reasons for preferential treatment of recurrent assemblies and that: “The protection of recurrent assemblies provided for in this act deprives the freedom of assembly of all those who wish to exercise it in the same place and time as the participants of the recurrent assembly”. Some of them pointed out that the Constitutional Tribunal proceeded in a wrong personal composition, that is – with participation of persons who were unlawfully elected in 2015.

13. The Constitutional Tribunal’s ruling was criticised also by the legal scholars. For example, Professor Monika Florczak-Wątor<sup>10</sup> argued that the judgment is based on an unacceptable premise that the public authorities may control individuals “through the legal privileging of such ways of using the individual’s freedoms that serve to achieve the goals set by the public authority. In the light of this concept, the only way to resolve the conflict of constitutional rights and

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<sup>7</sup> Warsaw Bar Association, opinion of 7 December 2016, [http://obserwatoriumdemokracji.pl/wp-content/uploads/2016/11/stanowisko-ORA\\_zgromadzenia.pdf](http://obserwatoriumdemokracji.pl/wp-content/uploads/2016/11/stanowisko-ORA_zgromadzenia.pdf) (last access: 16 March 2021).

<sup>8</sup> Helsinki Foundation for Human Rights, comments to the draft law, 29 November 2016, <https://www.hfhr.pl/wp-content/uploads/2016/11/Opinia-HFPC-prawo-o-zgromadzeniach.pdf> (last access: 16 March 2021).

<sup>9</sup> *Appeal to the President concerning amendments to the Act on Assemblies*, 13 December 2016, <https://amnesty.org.pl/wp-content/uploads/2016/12/Apel-do-Prezydenta-13grudnia2016.pdf> (last access: 16 March 2021).

<sup>10</sup> M. Florczak-Wątor, *Glosa do wyroku TK z dnia 16 marca 2017 r., sygn. akt Kp 1/17*, LEX/el. 2017, nr 324075.

freedoms is to deprive those rights and freedoms from those who do not pursue the common good in the sense assigned to it by public authorities". Moreover, she argued that due to participation of unlawfully elected persons, procedure before the Constitutional Tribunal was invalid, however there is no legal procedure which would allow to review and quash the judgment. Nevertheless, the courts should take into account that the said ruling was issued with procedural flaws.

14. The Act amending the Act on Assemblies was promulgated soon after the announcement Constitutional Tribunal's judgment, that is on 18 March 2017. Almost immediately after its entry into force (2 April 2017) practical problems with application of the new provisions appeared.

15. First problem concerned possibility of appealing against the voivode's substituting order. This question had been discussed in the judgment of the Constitutional Tribunal which held that the law did not explicitly exclude the access to court. According to the Tribunal two interpretations were possible: first, that such an order of the voivode could be challenged to the administrative court and second, that it could be challenged to the common court the same as other decisions prohibiting organisation of assemblies. In practice, the second interpretation was adopted.

16. Second problem concerned collisions between recurrent and "simplified" assemblies. The latter cannot be prohibited *ex ante* and because of that, organs of local government did not prohibit them even if they were to take place at the same time and location as the recurrent assembly. However, voivode of Mazovia adopted a different interpretation and issued substituting orders prohibiting organisation of "simplified" assemblies. This concerned mostly "simplified" counter-demonstrations against the recurrent assemblies commemorating victims of the 2010 air-crash. The Circuit Court in Warsaw and the Court of Appeals in Warsaw, in a series of judgments, rejected the voivode's interpretation and quashed his orders<sup>11</sup>.

17. The third problem concerned the practice of the Voivode of Mazovia who, in many cases, issued substituting orders prohibiting organisation of "simplified" assemblies shortly before the scheduled date of their commencement. Such orders could not be effectively challenged with the effect of obtaining a court's ruling before the date of the assembly. The HFHR analysed<sup>12</sup> data concerning 32 orders issued by the Voivode of Mazovia between 8 May 2017 and 10 February 2018. In 21 cases, the Voivode's order was issued on the date of the planned commencement of the assembly. In 11 cases, the Voivode's order was issued before the date of the assembly, of which nine times on the day preceding the planned date of the assembly. However, in four cases its publication took place in the afternoon or evening hours, while the assembly started in the morning, which also made it impossible to appeal and obtain a court decision. Only two times the substituting orders were published earlier than one day before the start of the assembly. In some instances such practice may result from fact that the "simplified" assemblies could be notified even up to 2 days before their scheduled date. Nevertheless, this is yet another argument proving that the law does not allow to prohibit them *ex ante*.

18. Recently the controversies surrounding the recurrent assemblies have slightly decreased. This may be related to the fact that since 10 April 2018 the recurrent assemblies commemorating the victims of the 2010 air crash are no longer organised. According to the website of the Voivode of Mazovia, at the moment there are only 7 registered recurrent assemblies on the territory of the Mazovia voivodeship (and it seems that in case of one of them period of validity of permission has expired)<sup>13</sup>. In other parts of Poland situation looks similar, e.g. 6 registered recurrent assemblies in Lesser Poland voivodeship (in case of 2 the permissions are probably no longer valid)<sup>14</sup>, 8 in

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<sup>11</sup> See e.g. decision of the Circuit Court in Warsaw of 10 May 2017, ref. no. XXIV Ns 37/17; decision of the Circuit Court in Warsaw of 31 May 2017, ref. no. XXIV Ns 43/17; decision of the Court of Appeals in Warsaw of 2 June 2017, ref. no. I ACz 889/17.

<sup>12</sup> See: HFHR, *amicus curiae* to the Supreme Court in the case ref. no. III SZP 1/18, <https://www.hfhr.pl/wp-content/uploads/2018/03/SN-amicus-zgromadzenia-HFPC.pdf> (last access: 16 March 2021).

<sup>13</sup> <https://bip.mazowieckie.pl/artykuly/441/informacja-o-miejscach-i-terminach-zgromadzen-organizowanych-cyklicznie> (last access: 16 March 2021).

<sup>14</sup> See: website of the Lesser Poland Voivode Office, <https://bip.malopolska.pl/muw.a.1345469.informacja-o-miejscach-i-terminach-zgromadzen-organizowanych-cyklicznie-na-obszarze-województwa-malo.html> (last access: 16 March 2021).

Łódzkie voivodeship (it seems that there only 3 have active permissions)<sup>15</sup>, 4 in Pomorskie voivodeship<sup>16</sup>. In some parts of Poland there are no active permissions for the organisation of recurrent assemblies<sup>17</sup>. Moreover, according to publicly available data, since 10 March 2018 the Voivode of Mazovia has not issued a substituting order prohibiting “ordinary” assembly<sup>18</sup>.

19. This does not mean that recurrent assemblies no longer cause any practical problems. For instance, the media informed about the proceedings which took place in 2019 in Toruń.<sup>19</sup> On 3 April 2019 group of women’s rights activists from the “Women’s Strike in Toruń” notified the organisation of ordinary assembly on 3 May 2019 in the proximity of the seat of “Radio Maryja” – controversial, conservative Catholic radio. The organisers wanted to protest against the actions of Radio Maryja and generally against the role of the Catholic Church in the Polish political and social life. The mayor did not issue a decision on prohibition within deadlines specified in law. However, on 26 April 2019 group of students of The College of Social and Media Culture, founded by the priest Tadeusz Rydzyk – director of “Radio Maryja”, applied to the voivode for permission on organisation of recurrent assembly which would take place at the same time and place as the abovementioned ordinary assembly. The very next day the voivode granted permission and subsequently the mayor of Toruń issued a decision on prohibition of the said ordinary assembly due to its collision with the recurrent assembly. The organisers challenged the decision and on 30 April 2019 the Circuit Court in Toruń quashed the prohibition. The court held that the voivode did not comprehensively analyse the facts of the case, in particular – he did not whether the students who applied for permission organised similar assemblies in the past. According to the media, the Circuit Court’s ruling had not been challenged to the Court of Appeals and so it became final.<sup>20</sup> This example may suggest that the concept of recurrent assemblies may still be used instrumentally, to promote certain types of assemblies and prevent organisation of other types.

20. Besides the problems related to recurrent assemblies, there are also other threats to freedom of assembly in Poland. For instance, in the comprehensive report on the freedom of assembly in Poland, the Commissioner for Human Rights informed about situations in which the officers of the Police or State Protection Service prevented peaceful demonstrators from exercising their freedom of assembly.<sup>21</sup> Moreover, numerous proceedings were initiated against protesters accused of committing a petty offence in the context of assemblies. Many of such proceedings were described in the report published by the Helsinki Foundation for Human Rights<sup>22</sup> which

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<sup>15</sup> See: website of the Voivode of the Łódzkie Voivodeship Office, <https://bip.lodzkie.eu/page/4695.zgromadzenia-cykliczne.html> (last access: 16 March 2021).

<sup>16</sup> See: website of the Voivode of Pomorskie Voivodeship Office, <https://uwgdansk.bip.gov.pl/zglaszanie-zgromadzen/informacja-o-miejscu-i-terminach-zgromadzen-organizowanych-cyklicznie-na-terenie-wojewodztwa-pomorskiego.html> (last access: 16 March 2021).

<sup>17</sup> See e.g. Lubuskie voivodeship: [https://bip.lubuskie.uw.gov.pl/zgromadzenia/miejsca\\_i\\_terminy\\_zgromadzen\\_cyklicznych](https://bip.lubuskie.uw.gov.pl/zgromadzenia/miejsca_i_terminy_zgromadzen_cyklicznych) (last access: 16 March 2021); Greater Poland voivodeship: <http://www.poznan.uw.gov.pl/zgromadzenia-cykliczne/informacja-o-zgromadzeniach-cyklicznych> (last access: 16 March 2021).

<sup>18</sup> <https://bip.mazowieckie.pl/artykuly/443/1/25/informacja-o-zarzadzeniach-zastepczych-w-sprawach-zakazu-zgromadzen> (last access: 16 March 2021).

<sup>19</sup> Description of the case on the basis of: B. Mikołajewska, *Sąd uchylił zakaz „Chryi pod Radiem Maryja”. Był bezzasadny i łamał wolność zgromadzeń*, „OKO.press”, 30 April 2019, <https://oko.press/sad-uchylil-zakaz-zorganizowania-chryi-pod-radiem-maryja-byl-bezzasadny-i-lamal-wolnosc-zgromadzen/> (last access: 16 March 2021).

<sup>20</sup> Toruń: „Chryja pod Radiem Maryja” przeciwników rozgłośni i jej dyrektora, PAP, 3 May 2019, <https://www.pap.pl/aktualnosci/news%2C446232%2Ctorun-chryja-pod-radiem-maryja-przeciwnikow-rozglosni-i-jej-dyrektora.html> (last access: 16 March 2021).

<sup>21</sup> M. Wróblewski (ed.), *Wolność zgromadzeń w Polsce w latach 2016-2018. Raport Rzecznika Praw Obywatelskich*, Office of the Commissioner for Human Rights, Warszawa 2017, p. 205-208, <https://www.rpo.gov.pl/sites/default/files/Wolno%C5%9B%C4%87%20zgromadze%C5%84%20w%20Polsce%20w%20latach%202016-2018.%20Raport%20RPO.pdf> (last access: 16 March 2021).

<sup>22</sup> J. Jezińska, A. Mieszkała, *Wolność zgromadzeń w praktyce polskich sądów. Raport HFPC z monitoringu postępowań*, Helsinki Foundation for Human Rights, Warszawa 2019, <https://www.hfhr.pl/wp->

monitored various cases concerning protesters. Among the charges brought against participants of assemblies were: unlawful obstruction of a police officer to perform official duties, violation of bodily integrity of police officers, insults against police officers, blocking other protests (often – recurrent assemblies), allegedly illegal placement of slogans in the public area. It is difficult to assess in what percentage of cases the charges were completely unjustified, however according to the data provided in the report of the HFHR, 69 from among 82 observed first instance proceedings concerning protesters accused of committing petty offence ended with acquittal (43) or discontinuation (26). HFHR observed only 30 appellate proceedings but in the majority of them discontinuation or acquittal were upheld by the court of the second instance. Other NGOs reported the problems with excessive use of force by the police officers against peaceful protesters.<sup>23</sup>

21. Recently, the most important threat for the protection of freedom of assembly in Poland results from serious restrictions imposed by the Government in times of pandemic. The Polish Government decided to not to introduce a state of natural disaster (Article 232 of the Constitution) or any other extraordinary states provided in the Chapter XI of the Polish Constitution. Instead, it introduced a far reaching limitations of human rights in regulations, that is sub-statutory acts. On 31 March 2020 the Government adopted a regulation on the establishment of certain restrictions, orders and prohibitions in connection with an epidemic. Its § 14 provided that from 1 April until 15 April 2020 organisation of assemblies was completely prohibited. Subsequently, the Government modified the scope of prohibition of organisation of assemblies depending on the pandemic situation in Poland: in some periods there was a complete prohibition, in other – prohibition with the exception concerning assemblies with no more than 150 participants. The regulation which is currently in force specifies that the maximum number of participants could not exceed 5. Leaving aside question of proportionality of such far reaching restrictions of the freedom of assembly, it must be underlined that according to the Polish Constitution, limitations of constitutional freedoms and rights can be introduced only in statute and not in regulations. Therefore, the abovementioned restrictions of freedom of assembly were introduced with violation of the Constitution. However, despite the said restrictions, in practice some demonstrations took place. This concerns in particular protests after the Constitutional Tribunal's judgment in the case concerning criterion for the legality of abortion related to fetal defects.

### III. LIMITS OF DETENTION – DOMESTIC PRACTICE

#### *Legal grounds for arrest in Poland*

22. According to Article 244 § 1 of the Code of Criminal Procedure of 6 June 1997<sup>24</sup> (hereinafter: "CCP"): "The police are authorised to arrest a suspected person if there is reasonable grounds to suppose that he or she has committed an offence, and it is feared that such a person may go into hiding or destroy the evidence of his or her offence or if his or her identity cannot be established, or there are reasons to carry out accelerated proceedings against this person." Also, pursuant to Article 244 § 2 CCP, an arrested person should be informed about the reasons for the arrest, a record of arrest should be prepared and a copy of the record should be delivered to the arrested person (art. 244 § 3 CCP) and a prosecutor should be informed about the arrest (art. 244 § 4 CCP).

23. It should further be emphasized that Article 45 § 1 of the Code of Procedure for Petty Offences of 24 August 2001<sup>25</sup> (hereinafter: "CPPO") provides as follows: "The police are authorised to arrest a person apprehended in the act of committing a petty offence or immediately afterwards if (1) there are grounds for carrying out accelerated proceedings against this person; 2) the person's identity cannot be established." Where an arrest is made based on the above grounds, the arrested

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[content/uploads/2019/11/Wolno%C5%9B%C4%87-zgromadze%C5%84-w-praktyce-polskich-s%C4%85d%C3%B3w-FIN2-web.pdf](https://www.amnesty.org/download/Documents/EUR3733702020ENGLISH.PDF) (last access: 16 March 2021).

<sup>23</sup> See: Amnesty International, Public Statement – *Poland: The extraordinary wave of protests across the country should be protected not attacked*, 20 November 2020, <https://www.amnesty.org/download/Documents/EUR3733702020ENGLISH.PDF> (last access: 16 March 2021).

<sup>24</sup> For the Code's consolidated text, see the Journal of Laws of 2020, item 30, as amended.

<sup>25</sup> For the Code's consolidated text, see the Journal of Laws of 2020, item 729, as amended.

person should be informed about the reasons for the arrest and their rights and moreover a record of arrest must be prepared and handed to the arrested person (Article 46 §§ 1-2 CPPO).

24. Considering the above provisions, the following observations made in the literature on the criminal procedure should be noted: "The legal institution of arrest involves short-term detention of a person for the purpose of attaining procedural or non-procedural aims. The former is related to ensuring the participation of the arrested person in specific procedural steps while the latter has a preventive, administrative or penitentiary nature. Considering the wording of Article 244, arrest is designed to ensure that the alleged perpetrator of the offence is able to take part in the proceedings, prevent them from fleeing, going into hiding or covering traces of the (attempted) offence.... The arrest is a coercive measure but not a preventive measure, although the objectives of both measures overlap to a certain extent."<sup>26</sup> Another scholarly writing emphasises that "[a]rrest is defined as a form of coercion involving the short-term detention of a particular person .... Notably, the purpose of arrest is to deprive the arrested person of the right to move freely, communicate with others and prohibit them from accepting or handing over any objects without the permission of a competent authority. Further, arrest is designed to make sure that the arrested person follows the authority's instructions, as well as, usually, to place the arrested person at a place of detention.... The arrested person may not freely dispose of their person or act according to their wishes."<sup>27</sup>

#### *Cases of arrests made for identification purposes*

25. In Poland, in recent years, many public assemblies have been organised in connection with the public debate on topics that generate strong emotions and social tensions, such as the "reform" of the judiciary or the right to abortion. Recently, we have seen an increasing number of situations in which protesters' personal liberty or freedom of movement is restricted or denied. Also, the police and the courts have adopted different interpretations of when an arrest begins.

26. Protesting citizens are increasingly often subjected to identity checks. Some of them refuse to give their particulars unless police officers give them a reason for a request to produce an ID. As a consequence, participants in public assemblies are detained by the police.

27. For example, a protest against the President's veto of two laws concerning the judiciary was held outside the ruling party's headquarters on 24 July 2017. The protesters reportedly failed to respond to police calls to turn down the sound systems and voluntarily leave the scene. At the same time, they refused to provide their particulars indicating that the actions of the police were unlawful. As a result, police officers resorted to physical force to bring three individuals to a police vehicle, where their IDs were checked and names run through the wanted persons database. The individuals also received citations with fines. Although they did not receive the record of arrest, all three detained persons decided to file an appeal against their arrest. In their appeal, one of the persons brought to the police vehicle stated that they had been deprived of their liberty by being brought to the vehicle, where they had been held for a period of 2-3 hours and, despite numerous requests, no record of their arrest had been drawn up. The person further claimed that they had been subjected to a body search, which had been documented in the relevant record. According to the police, the appellant had not been procedurally detained by police officers but rather brought to a police vehicle for the duration of completing "administrative steps", including an ID check.<sup>28</sup> In a decision of 26 September 2017 (ref. no. III Kp 906/17), the District Court for the capital city of Warsaw admitted the arrested person's appeal in part and found that the arrest was justified and legal but improperly carried out. The statement of reasons for the decision shows that the arrest has been confirmed by the collected evidence. At the same time, the District Court emphasised that: "... the demonstration in question met the criteria of a spontaneous assembly

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<sup>26</sup> Skwarczyński, *Komentarz do art. 244*, [in:] D. Drajewicz (Ed.), *Kodeks postępowania karnego. Tom I. Komentarz. Art. 1-424*, Legalis, Warszawa 2020.

<sup>27</sup> *Komentarz do art. 244*, [in:] R. A. Stefański, S. Zabłocki, (Eds.), *Kodeks postępowania karnego. Komentarz do art. 167-296*, LEX, Warszawa 2019.

<sup>28</sup> The above account of facts is based on the decision of the District Court for the capital city of Warsaw of 26 September 2017, ref. no. III Kp 906/17.



set out in Article 3 (2) of the Act on Assemblies, and the behaviour of its participants was no more disruptive than that of participants in other assemblies....” In addition, the Court held: “[T]he manner in which the police officers made the arrest in the present case, including the duration, methods and conditions of the arrest, the failure to draw up a record of arrest and give the arrested person the appropriate notice of rights for perpetrators of petty offences, means that the arrest must be deemed to have been carried out in an improper manner. Given the circumstances of the case and the behaviour of the assembly participants, the means used by the officers should be considered disproportionate and possibly giving rise to concerns that the actual purpose of the intervention was not only to establish the particulars [of the arrested persons] and investigate whether or not a petty offence has been committed.”

28. Another example of this concerning police practice is the arrests made on 11 November 2017 during a counter-demonstration of the Association of Citizens of the Republic of Poland which took place in Wiśłocki Square in Warsaw directly along the route of the march of a recurrent assembly (the Independence March). Police officers decided that the persons present in the square were taking part in an assembly held in breach of the assembly laws and asked the protesters to leave the square. However, the counter-demonstrators did not react to police announcements, so a decision was made to remove them from the square to enable the conduct of the recurrent assembly. Police officers used physical force and restraining holds, and the protesters, who were passively resisting the intervention at the scene, were taken to a police station, where a total of 43 people were brought and remained in police custody until their personal details were established and ran through police databases. One of the arrested persons lodged an appeal against their arrest. The police explained that the procedural steps involving 43 persons were merely identity checks, and the bringing of the persons concerned to the premises of a Police unit cannot be considered an arrest. At the same time, the police pointed out that the ID checks were not carried out on the scene because police officers feared that the participants in the Independence March might want to directly confront the counter-demonstrators.<sup>29</sup> In a decision of 3 January 2018 (ref. no. II Kp 2976/18), the Warsaw-Śródmieście District Court admitted the appeal in part and found that the arrest was unjustified and improper, but lawful. In the Court's view, “the applicant was *de facto* detained because the steps taken by police officers exceeded the boundaries of the identity check procedure. The police would have acted properly if they had checked the appellant's ID in Wiśłocki Square.... It was possible to establish her particulars there, but the applicant was not requested to produce an ID. Instead, police officers immediately applied direct coercive measures against her and brought her to the headquarters of a police unit which effectively amounted to unlawful, short-term detention.” The Court also pointed out that the identity of the applicant had only been established at the headquarters, which meant that “... she had been deprived of the opportunity to freely dispose of her person and act according to her wishes for approximately two hours. Admittedly, she was not held in a typical place of isolation, however, she could not leave the police station, she was in the corridor under the supervision of police officers, so she could not fully exercise her freedom.” At the same time, the court noted that no record of her arrest had been made.

29. In this context, a ruling of the Circuit Court in Warsaw of 31 August 2018 (ref. no. XVIII Ko 28/18) should also be noted. In the decision, the Circuit Court held: “The fact that the persons concerned were held at a police station for 2-3 hours to be identified and have their IDs checked while being prohibited from leaving the premises of the police station, indicates that the degree of coercion of this measure was sufficient to fall within the scope of Article 5 of the Convention. In Polish law, there is no basis for the detention of a person due to the need to carry out police checks, such as establishing the person's identity or checking their identity documents.”<sup>30</sup>

#### *Arrests made with the use of police cordons*

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<sup>29</sup> The above account of facts is based on the decision of the Warsaw-Śródmieście District Court of 3 September 2018, ref. no. II Kp 2976/17.

<sup>30</sup> The ruling was upheld by the judgment of the Court of Appeal in Warsaw of 15 February 2019, ref no. II AKa 446/18.

30. In 2020, the Police, responding to many assemblies, including spontaneous assemblies, used the tactics of cordoning of protesters who have been subsequently requested to produce their IDs.

31. For example, on 10 June 2020, police officers responded to a spontaneous assembly held outside the headquarters of the Warsaw Police Headquarters in protest against the arrest of two activists. The protesters observed the nationwide requirement to cover their noses and mouths and to keep a proper distance from each other and from other persons. During the assembly, the protesters did not display any aggressive or violent behaviour, nor did they attack the police officers present at the scene. At the time, the police officers decided to check the protesters' IDs because, in their opinion, the latter violated Article 54 of the Code of Petty Offences of 20 May 1971<sup>31</sup> ("CPO"), read in connection with § 15 of the "pandemic regulation" issued by the Government<sup>32</sup>, which prohibited the organisation of certain types of assemblies (see above). Before proceeding with the checks, the police used loudspeakers to request the protesters to disperse. However, as protesters did not comply, the police officers surrounded them with a tight cordon, preventing them from leaving the perimeter. After the IDs were checked, the police continued to keep the cordon tight, preventing protesters from leaving the area. A protester decided to lodge an appeal against the arrest, indicating that the police applied de-facto detention without any legal basis.<sup>33</sup> By decision of 25 February 2021 (ref. no. II Kp 1827/20), the Warsaw-Śródmieście District Court admitted the appeal and found that the arrest was unlawful, unjustified and improperly carried out. According to the statement of reasons appended to the decision, the court ruled that the above facts allowed for the conclusion that the appellant was subjected to a coercive measure described in Article 45 § 1 CPPO (arrest). It is also apparent from the decision that the appellant's ID was checked for 20 minutes and she received a citation with a fine for violating the above-mentioned regulation, which she refused to accept. The District Court made the following observations: "In essence, the above-described incident constituted short-term detention ... which took the form of the controlled confinement of a group of persons including the appellant effected by means of physical force by many cooperating police officers. The appellant was neither allowed to leave the cordon voluntarily, i.e. move freely, communicate with persons outside the line of the responding officers, or receive [any objects from outside the line] or hand over objects outside the line." At the same time, the Court emphasised that: "The appellant could only decide what to do inside the area tactically surrounded by the police. Moreover, during her stay in the cordoned off area, she was at the full disposal of the police – the officers checked her ID and carried out steps to issue her a citation with a fine for a violation of art. 54 CPO, and when she refused to accept the citation, they completed the formalities related to the submission of a motion for a penalty for the violation in question." Accordingly, the Court pointed out that "... although the word 'arrest' does not appear in the case records in relation to the incident, the police have nevertheless de-facto applied the coercive measure known as 'arrest'". The District Court also noted that no record of the appellant's arrest had been drawn up, which means that the unlawful and unjustified detention was not documented in any way. Moreover, while being present in the cordoned-off area, the appellant was pulled by the hood of her sweatshirt, which made her breathless, and almost fell over. She was helped by another person who grabbed her hand. In the statement of reasons, the Court referred to the above situation by pointing out that the appellant's personal inviolability had been violated while it was inside the cordon and that such a situation should not have occurred at all during the arrest when her liberty was significantly restricted<sup>34</sup>.

32. As mentioned above, the police increasingly often use cordons to surround protesters. This method has been used very often during protests against the tightening of abortion laws following

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<sup>31</sup> For the Code's consolidated text, see the Journal of Laws of 2021, item 281.

<sup>32</sup> Journal of Laws of 2020, item 964, as amended.

<sup>33</sup> This account of facts is based on the decision of the Warsaw-Śródmieście District Court of 25 February 2021, ref. no. II Kp 1827/20.

<sup>34</sup> Similarly, the Warsaw-Śródmieście District Court indicated the use of cordons and detention in the decision of 25 February 2021, ref. no. II Kp 3214/19 and in the decision of 25 February 2021, ref. no. II Kp 3219/19.

the Constitutional Tribunal's ruling. The cordoning off tactics were used, for example, during the protests in Warsaw on 18 November 2020<sup>35</sup>, 28 January 2021<sup>36</sup> and 8 March 2021<sup>37</sup>. At the same time, during a press conference held on 29 January 2021, Chief Commissioner Sylwester Marczak, spokesman of the Head of the Warsaw Police, made the following comments referring to the protests that took place on 28 January 2021: "And, of course, it should be stressed that there was no such thing as persons detained in a 'kettle', as some people have said. The term itself, 'kettle', is, of course, a kind of catchphrase, used, I think, to make it sound more sinister, or dramatic, but in fact, it is nothing more than a police cordon used for the single purpose, these persons can leave the area at any time. Literally at any time. As soon as their IDs are checked. This was what the police officers kept telling the people involved for a long time, these people could have left the area earlier without any ID checks, but they did not listen to the announcements, did not follow the instructions of the police officers. So, after that time passed and that there was no reaction, only one decision could have been taken. Set up a cordon, secure the area, perform ID checks of individual persons."<sup>38</sup> It follows from the above that the Police still do not consider the cordoning off tactics as leading to arrests despite the fact that, as pointed out by the Spokesperson for the Head of the Warsaw Police, individuals concerned are only allowed to leave the cordoned-off area after their IDs are checked by police officers. At this stage, it is too early to say how the courts will approach the question of arrests made with the use of cordoning off tactics, for example during the protest that took place on 28 January 2021. However, considering the aforesaid decision of the Warsaw-Śródmieście District Court of 25 February 2021 (ref. no. II Kp 1827/20), it is likely that the courts may find that the cordoning off of protesters demonstrating against the tightening of abortion law also constitutes an arrest.

#### IV. CONCLUSIONS

33. To conclude, introduction of the category of "recurrent assemblies" may be perceived as a restriction of freedom of assembly and in particular – the right to organise counter-assemblies. Preferential treatment of this particular type of assemblies is difficult to justify. Moreover, practical application of the provisions concerning recurrent assemblies led to several problems, in particular in the context of collisions between this type of assemblies and assemblies organised in simplified procedure. Although recently the controversies around the recurrent assemblies have slightly decreased, the provisions adopted in 2016 still be used instrumentally, to promote certain types of assemblies and prevent organisation of other types.

34. In addition to the abovementioned problems related to the concept of recurrent assemblies, the freedom of assembly in Poland is restricted also by other factors. One of them is the excessive use of short-term detention and cordoning against the participants of peaceful assemblies by the police. Fortunately, as the court rulings presented in this opinion show, the courts tend to avoid a narrow interpretation of the notion of arrest, looking solely on the criteria set out in Article 244 CCP and Article 45 CPPO. It is clear from the above provisions that arrest is made whenever a means employed serves its purpose, and above all, whenever persons concerned are not free to dispose of their persons (are unable to leave a police station, get out of a police vehicle or leave the cordoned off area) and remain at the disposal of the police even after they produce identification documents.

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<sup>35</sup> *Strajk Kobiet: Protest przed TVP. Policja użyła gazu, ucierpiał operator Onetu [ZDJĘCIA]*, 18 November 2020, onet.pl, <https://wiadomosci.onet.pl/warszawa/strajk-kobiet-warszawa-policja-uzyla-gazu-wobec-demonstrantow/qwfhnbx> (last access: 16 March 2021).

<sup>36</sup> *Protest przed siedzibą trybunału. Policja wyprowadziła uczestników. Lempart do funkcjonariuszy: do zobaczenia*, 28 January 2021, tvn24.pl, <https://tvn24.pl/tvnwarszawa/najnowsze/warszawa-strajk-kobiet-protest-i-blokada-centrum-relacja-na-zywo-5002284> (last access: 16 March 2021)

<sup>37</sup> *Strajk Kobiet w Dzień Kobiet. Policja trzymała protestujących w kordonie do północy*, 8 March 2021 roku, wyborcza.pl, <https://warszawa.wyborcza.pl/warszawa/7.54420,26860899,dzien-kobiet-bez-kompromisow-strajk-kobiet-w-centrum-warszawy.html> (last access: 16 March 2021).

<sup>38</sup> *Konferencja Komendy Stołecznej Policji - 29 stycznia 2021* (Media conference of the Warsaw Police Department), 29 January 2021, youtube.pl, 6:45-7:42, <https://www.youtube.com/watch?v=mpp9eXssV3Y> (last access: 16 March 2021).