OFFICE OF THE COMMISSIONER FOR HUMAN RIGHTS

Deputy Commissioner for Human Rights
Stanisław Trociuk

Warsaw, 19.04.2021

VII.613.137.2020.PF/MAW

Judge Ksenija Turković
President, First Section
European Court of Human Rights
F-67075 Strasbourg Cedex

Written comments of the Commissioner for Human Rights of the Republic of Poland in the case of *Ewa Siedlecka v. Poland* (Application no. 13375/18)

1. Pursuant to Rule 44(3)(a), (5) and (6) Rules of the European Court of Human Rights (**ECtHR**) and on the basis of the decision of the President of the Grand Chamber (ECHR-LE14.8bP3), the Commissioner for Human Rights (**CHR**) wishes to submit written observations related to the present case.

I. General submissions

2. The case pending before the Court concerns the right to peaceful assembly, freedom of expression and right to liberty. The Commissioner for Human Rights would like to make the following **main submissions**.

3. First, the introduction of the category of recurrent assemblies in the Polish law has led to an illegitimate differentiation of the freedom of assembly among individuals and groups of people, which may be a problem under Article 11 and 14 of the ECHR. The circumstances of the amendment of the law, as well as the material conditions and the administrative procedure applied to recurrent assemblies indicate that the national authorities aimed to give priority to assemblies organised by themselves or by groups which they support. Thus, the public authorities instrumentally abused the concept of individual freedom to pursue the objectives of the authorities themselves.

4. Second, the police practice of short-term detention (*de facto* arrest) of persons in order to check their identity, as well as temporary (e.g. two-hour long) blocking of demonstrating people by the police cordon for the same declared purpose of checking ID, amount to the depravation of liberty. It should be thus verified whether such police actions were a legitimate (proportionate) interference with the right to liberty under article 5 of the Convention. Based on the examination of a wider practice of the Police response to demonstrations, the CHR has serious doubts as to whether the identification of individuals is the primary reason for their temporary detention. The practice

takes the form of an intentional discouragement of individuals from taking part in demonstrations, in particular when the messages conveyed are not to the liking of the national authorities.

5. Third, the protests, such as the one in which the applicant participated along with other people, are a form of public expression of opinions on important societal issues. Public authorities may not, without a legitimate reason and proper legal basis, restrict the right to organise or participate in them. Therefore, the police action must be regarded as an interference with the right to freedom of expression under Article 10 ECHR.

II. Restrictions on the freedom of assembly in Poland; the issue of recurrent assemblies

1. Legislative changes in 2017–2018

6. The present case pending before the Court relates to an assembly whose participants objected to the Act of 13 December 2016 amending the Law on Assemblies.[1] Under the Act, recurrent assemblies, such as monthly Smolensk commemorations, gained priority over other assemblies. Any other assembly has to take place at least 100 meters away from the recurrent assembly, which effectively rendered impossible the exercise of the right to counter-demonstration.

7. The draft amendment to the Law on assemblies was submitted by a group of MPs (Law and Justice party). According to the justification of the draft, it concerned the addition of a new legal institution to the Law – the so-called recurrent assembly, i.e. an assembly organized by the same organizer in the same place or along the same route. The draft was adopted almost unchanged. It amended Article 12 of the Law on Assemblies, under which if notices of intention to organize two or more assemblies at least partially in the same place and time have been lodged, regardless of the situation, the recurrent assembly will always be given priority.

8. During the legislative process, the CHR presented an opinion[2] in which it was emphasized that the adoption of the Act in would mean the introduction of a hierarchy of assemblies in the following form: 1) recurrent assemblies, 2) 'ordinary' assemblies, organized pursuant to the provisions of Chapter 2 of the Law on Assemblies, 3) spontaneous assemblies. Moreover, giving priority to recurrent assemblies means that the possibility of organizing other public assemblies in this place is blocked for the period of their duration. In this case, the local authority is forced, under the Act, to prohibit the organization of another assembly. Even if at the time of the voivode's consent to organize recurrent assemblies, other assemblies had already been notified, the commune authority is obliged to prohibit them. In the absence of such a decision, the voivode is to issue a substitute order. These decisions are subject to appeal to the court.

9. Therefore, the act provided that the priority in the event of a collision of assemblies would be determined, among others, by the type of assembly – with priority given to recurrent assemblies. Thus, the provisions so constructed introduced a significant departure from the previous rule that in such a conflict, it is not the purpose or nature of the assembly that matters, but only the sequence of their registration by organizers. The CHR emphasized that the application of the priority to the above-mentioned categories of assemblies is a manifestation of unequal treatment of the organizers of such assemblies, which may question the constitutionality of the proposed solution.

10. The CHR pointed out as well that the introduced solutions do not meet the necessity criterion, and thus are inconsistent with Art. 31(3) of the Polish Constitution. The Constitutional Tribunal has repeatedly emphasized that the assessment of the proportionality of restricting this

[1] Official Journal of 2017, item 579.

[2] Commissioner for Human Rights opinion of 29.11.2016 on the amendment to the Law on Assemblies, https://www.rpo.gov.pl/pl/content/commissioner-human-rights%E2%80%99-opinion-amendment-law-assemblies (accessed: 18.04.2021).

particular freedom must be carried out taking into account the strict criteria of its necessity. This is dictated by the special importance of public assemblies, both in relation to the individual and in the context of the development of a democratic society (see the judgment of the Constitutional Tribunal of 18 September 2014, in the case K 44/12). The CHR pointed out that by giving priority to some assemblies, the legislator also prevented others from being held at the same place and time, thus limiting the right to peaceful counter-demonstration.

11. The CHR also indicated to the Polish authorities that the possibility of limiting the organization of several assemblies in the same place is questionable in the light of international standards, including ECHR. Moreover, the ODIHR and Venice Commission *Guidelines on the Right to Peaceful Assembly*[3] make it clear that the State has an obligation to protect and facilitate meetings held at the same time and place. The State should take appropriate measures to enable such assemblies to be held as far as possible so that both assemblies are within sight and hearing. Counter-demonstrations are a special form of simultaneous assemblies, the participants of which express opposition to the views manifested by the participants of the second assembly, and the unity of the place and time of two assemblies is a key element of the message to be manifested during both demonstrations.

12. The Supreme Court and the Union of Voivodeships of the Republic of Poland also presented critical opinions on the draft.[4] The Supreme Court noted i.e. that "the recurrent nature of an assembly is not a differentiating feature that would be so significant that it could serve as the basis for treating the organizers of recurrent events differently than others". In addition, consents to recurrent assemblies are issued by voivodes, a government administration body, while other assemblies are reported to the commune authorities (gmina). Thus, regulation leads to the violation of Art. 32(1) of the Polish Constitution (the principle of equality before the law)

13. The Act was then referred by the President of the Republic to the Constitutional Tribunal for constitutionality review. The Tribunal, in the judgment of 16 March 2017 (case Kp 1/17), while invoking arguments referring to the common good, protection of public safety and order, decided that the Act in question complies with the Constitution.

14. The CHR submits, however, that the ruling in case Kp 1/17 was issued by an organ formed in an unconstitutional manner and should therefore be disregarded by the ECtHR. The case was examined by the Tribunal's adjudicating panel whose composition included unauthorized persons, i.e. appointed to the positions previously lawfully taken (so-called "duplicate-judges", *sędziowie-dublerzy*), as the Constitutional Tribunal itself stated in the judgments of 3 December 2015 (case K 34/15) and of 8 March 2016 (case K 47/15). Hence, the ruling was issued by a body that does not meet the requirements of being "established by law". For this reason, the CHR decided not to join the case before the Tribunal.

15. An attempt to change the new, controversial legislation was taken in the upper chamber of the Parliament. On 23April 23 2018, the Senate's Legislative Committee initiated work on amending the Law on Assemblies in order to restore the previously applicable regulations. Likewise as before, the CHR presented an opinion in this legislative process.[5] Nevertheless, the legislation remained unchanged.

---

[3] *Guidelines on Freedom of Peaceful Assembly*, 2nd ed., 2010, https://www.osce.org/files/f/documents/4/0/73405.pdf (accessed 18.04.2021).

[4] See attachments under the link http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1044

[5] See CHR opinion to the Senate of 30.05.2018, ref no VII.613.10.2018; https://www.rpo.gov.pl/sites/default/files/Opinia%20RPO%20ws.%20projektu%20nowelizacji%20Prawa%20o%20zgromadzeniach.pdf

2. The practice of application of the new legislation

16. The CHR has conducted in the last 5 years a number of proceedings related to the practical operation of the new provisions. There were many situations when the police took action against counter-demonstrators. These activities consisted, in particular, in ID checks, locking participants in a cordon, removing them from the area of a recurrent assembly, and then imposing fines or submitting motions for punishment to courts in connection with violation of public order by counter-demonstrators.

17. The Commissioner concluded that as a result of the amended provisions of the Act, the rights of participants in public assemblies were frequently violated. The CHR conducted cases regarding recurrent assemblies organized in Warsaw in order to pay tribute to the victims of the Smolensk catastrophe, on the basis of the voivode's decision of 27 April 27 2017. The holding of these assemblies made it impossible to hold a counter-demonstration at the same time and place; the commune authority issued a decision prohibiting ordinary assemblies, while the voivode issued substitute orders also for assemblies reported under the simplified procedure.

18. In addition, holding a counter-demonstration at a distance of at least 100 meters from the recurrent assembly often resulted in interventions by the police, who checked the ID of the participants of the counter-demonstration and charged them with disrupting a lawful assembly. There were also situations in which, due to work on securing the place for the planned recurrent assembly, participants of lawful assemblies were removed, thus preventing them from holding the assembly.

19. On 10 September 2017 in Warsaw, the police decided that the assembly, which was a counter-demonstration to the monthly Smolensk demonstration, was disrupting the recurrent assembly. Both assemblies were submitted under different procedures (regular and recurrent). Participants of the counter-demonstration expressed their views by shouting, they also used a megaphone. The police stopped the counter-demonstration stating that it is disturbing recurrent assembly. The police identified a number of people and submitted 13 motions for punishment to the court. The court acquitted the activists, pointing out that they had exercised their constitutional freedom of assembly.[6]

20. Similar judgments were issued in cases of many other counter-demonstrations, i.e.: the judgment of 7 March 2018 (case XI W 1957/17) acquitting two of the accused of the fact that on 10 April 2017, they disturbed public order in Warsaw at Twardowski Square by shouting loudly during the commemoration of the victims of the Smolensk catastrophe and using sound devices, which aroused the interest of the participants of the ceremony, which disrupted its course; the decision of 20 March 2018 (case XI W 5003/17) to discontinue the proceedings against those charged with acts under Art. 52(2) point 1 of the Code of Petty Offenses as regards the finding that the actions of the accused do not contain the indications of a misdemeanour; discontinuation of the proceeding in the case Xl W 722/18 (sitting on the route of the recurrent assembly on 10 July 2017).[7]

21. Recently, on 9 February 2021, the Supreme Court in the Criminal Chamber examined the CHR's cassation appeal brought in connection with the punishment of three people who on 10 August 2017, by shouting and jumping over the barrier, were to disturb the recurrent assembly

[6] See M. Jałoszewski, *Sąd: obywatele mają prawo do kontrmanifestacji. Nawet jeśli to kontrmiesięcznice. I nawet jeśli są cięci jak OSA* (oko.press, 07.03.2018r.), access: https://oko.press/sad-obywatele-maja-prawo-kontrmanifestacji-nawet-jesli-kontrmiesiecznice-nawet-jesli-sa-cieci-osa/

[7] Detailed analyse of cases in which the CHR participated can be found in the report: "Freedom of Assembly in Poland 2016-2018", access: 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

(monthly Smolensk demonstration). The Supreme Court found the appeal to be "obviously justified", since the case was based only on the so-called "summary judgement" (*wyrok nakazowy*), i.e. without a trial and without hearing the accused. The Supreme Court quashed the judgment under appeal and discontinued the proceedings against the accused.

III. The practice of short-time detention of demonstrators in light of the requirements of Article 5 ECHR

22. As submitted above, the courts while examining appeals of counter-demonstration participants in cases concerning disturbing public order or disturbing the assembly, usually acquit the accused.[8] Accordingly, the CHR addressed recommendations to the Minister of the Interior Affairs, the Police Commander in Chief and the Association of Polish Cities, pointing to the court rulings.[9] Nonetheless, it appears this already established case law has not changed the hitherto police practice in relation to the counter-demonstrations.

23. In line with the Polish legislation and jurisdictional standards established in the Polish case law, there is no basis for a 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. This was confirmed, i.e. in the judgement of the District Court in Warsaw of 31 August 2018 (case XVIII Ko 28/18). In this case counter-demonstrators were forcibly removed by the police and transported the police station, where they spent from 2 to 3 hours. The police officer who gave the testimony questioned the fact that persons who had been taken to the police station were detained, since the purpose of transportation was only for identification. The court found these statements unfounded because despite the fact that, as a result of the transfer to the police unit, IDs were checked, people were deprived of liberty as a result of the official actions taken. The court referred to the Convention, noting that "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."

24. The police have the right to detain a person found guilty of committing an offense or immediately thereafter, if their identity cannot be established (Article 45 of the Petty Offense Code). The inability to establish the identity of a suspect may come into play when he or she does not have any proof of identity with him or her, such as an identity card or passport, or when he or she has one, but there are justified doubts as to its credibility. Then the detention may be justified in order to verify identity in the Police unit competent for the place of residence the person provides. However, if it is possible to establish an identity on the spot without being detained, the police are required to check the documents on the spot.

25. Moreover, in every situation of detention, the police are obliged to draft a report, while the detained has a right to be informed about the reason of detention, as well has a right to contact a lawyer. In similar cases, in which demonstrators were taken to police stations to establish their identity (for example after demonstration on 11 November 2017 such measure were used with regard to 43 persons), despite the lack of reports, complaints were filed against detention. In most cases (see i.e. judgment of the Appeal Court in Warsaw of 11 February 2019, case II AKa 433/18),[10] courts found that the persona was arrested and examined their complaints. Courts stated that the detentions were unfounded and incorrect. The irregularity consisted in the failure to draft

[8] See the judgment of the District Court for Warsaw of March 7, 2018, ref no XI W 1957/17

[9] See CHR communication: https://www.rpo.gov.pl/pl/content/jak-zagwarantowac-wolnosc-zgromadze%C5%84-rpo-pisze-do-mswia-i-prezydent%C3%B3w-miast

[10] See the CHR communication about one counter-demonstrator https://www.rpo.gov.pl/pl/content/zadoscuczynienie-za-bezprawne-zatrzymanie-11-listopada-2017

arrest reports, and the detained did not receive appropriate instructions and information about the reasons of their detention.

26. Recently, due to limitations related to the pandemic, demonstrators have been arrested more frequently. On 8 May 2020 during the police action against the "town of entrepreneurs", the police detained 62 people. In the vicinity of the metro station "Centrum" another 62 people were arrested. On 16 May 2020, 386 people were detained in the area of Castle Square in Warsaw. The detained persons, due to their large number, were transported to various units. On 23 May 2020, at Defilad Square in Warsaw, the policemen again used direct coercion measures. They identified 347 people and detained 5 of them. On 24 October 2020 in Warsaw, 278 people were detained by the police after public protests against the judgement of the Constitutional Tribunal on the abortion law (case K 1/20). A total of 948 people were identified, and notes were made for 711 for the health and safety department, which may impose very heavy fines (up to 30'000 Polish Zloty) for failure to comply with the restrictions during the pandemic. The direct aim of such detentions is to stop the demonstrations, since the police recognise them as unlawful.

27. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 ECHR, the starting point must be his/her concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.

28. With regard to the duration of the detention, the Polish doctrine refers directly to the jurisprudence of the ECtHR. In a situation where a specific person was brought to the Police station under threat of the use of force and could not leave the premises of the station without the consent of the Police, it should be considered that there was an element of coercion, which, despite a short period of detention, constituted an element of deprivation of liberty, and therefore in such circumstances, amounted to an arrest.

29. The CHR submits that, given the circumstances, the period of two hours, is sufficient to constitute a deprivation of liberty for the purposes of article 5 ECHR. Especially, since it was not clear why it took the police 2 hours to identify a person who produced the ID. According to the well-established case law of the ECtHR, where the facts indicate a deprivation of liberty within the meaning of Article 5, the relatively short duration of the detention does not affect this conclusion. Referring directly to the jurisprudence of Polish courts, the judgment of the Court of Appeal in Warsaw of 8 July 2019 in the case II AKa 499/18 should be indicated. The court noted that the "hour of detention" should be understood as the moment of the actual arrest, not the moment of bringing to the Police Station, and it is necessary to indicate not only the full hour, but also the minute of the detention. Thus, the detention is understood more broadly than detention in the police station and it starts with the beginning of police actions (stopping the person).

30. It should be examined whether the situations when the demonstrators are held in a police cordon (the so-called kettle) amounts to detention/arrest place. Notwithstanding that, it should also be considered, whether the detention in the police cordon amounts to an interference with the exercise of the freedom of peaceful assembly. In *Austin and Others v. the United Kingdom* (apps. no 39692/09, 40713/09 and 41008/09) the Court concluded, that Article 5 "must be interpreted in a manner that takes into account the specific context in which the techniques are deployed, as well as the responsibilities of the police to fulfil their duties of maintaining order and protecting the public." In this case the applicant was held in the so-called "kettle" (cordon), similarly to the applicant in the present case. The Court considered that the coercive nature of the containment within the cordon, its duration, and its effect in terms of physical discomfort and inability to leave, pointed towards a deprivation of liberty. Polish jurisprudence as well regulated the issue of deprivation of liberty in untypical places. An example may be the judgment of the Court of Appeal in Katowice of 27 August 2014, case II AKa 230/14, in which the court stated that detaining

a person in a place that is usually not treated as a typical place of isolation, e.g. in a hospital during hospitalization for health reasons under the supervision of police officers, restricting freedom, contacts with other people, including from outside, or the possibility of moving around, entitles the court to recognize such a state as a detention having a procedural nature, authorizing such a person to file a claim for compensation and redress for the harm suffered.

31. Applying the abovementioned standards to the issues at stake in the present case result in the conclusion that removal and stopping in the police cordon meets the threshold of depravation of liberty. Considering relevant objective factors it is clear, that those contained in the police cordon are not free to leave the restricted area. The degree of supervision and control by the police over the movement was high (e.g. they were prohibited to buy drinking water). The time-span of isolation (e.g. 2 hours), in the context of ongoing demonstration, was significant. In addition, when demonstrators were taken to the police station, they were made difficult or impossible to contact their families or lawyers. Moreover, coercive measures (removal, cordon) were used in order to stop demonstrators in the restricted area.

IV. Interference with the freedom of assembly (Article 11 ECHR)

32. In recent years, the United Nations Rapporteurs included demonstrations, strikes, sit-ins, and peaceful occupations in their reports as part of the exercise of the rights to peaceful assembly and association. National and international courts have held that the right to peaceful and unarmed assembly should not be interpreted narrowly, since it constitutes a fundamental element of democracy.[11]

33. In the context of the present case before the Court, the assembly was clearly intended as a counter-demonstration to protest against the new regulation which provided for the possibility of recurrent assemblies. The coincidence in time and venue with the monthly Smolensk commemoration, which was recognised as the recurrent assembly, was an essential part of the message the protesters wanted to convey. The new regulation which gave the priority to the recurrent assemblies and allowed a counter-demonstration to be organized only in a distance of at least 100 meters, effectively preventing the possibility of counter-demonstrations.

34. It *de facto* amounts to the prohibition of a genuine counter-demonstration aimed at expressing the opinion directly to the participants of the recurrent demonstration. The CHR submits it this thus inconsistent with Article 11 ECHR as well as Article 57 in conjunction with Article 31(3) Polish Constitution, since it interferes with the essence of the right. Moreover, the Court in the case of *Öllinger v. Austria* noted that "the unconditional prohibition of a counter-demonstration is a very far-reaching measure which would require particular justification" (para 44, app. no 76900/01).

35. It is contested, whether the police have the power to dissolve an assembly by stopping demonstrators in a cordon. The recent practice of the police which arbitrarily declares that protest distorts public safety and/or order demonstrates that these methods are used indeed to dissolve demonstrations, thus nullifying the exercise of the right to a peaceful assembly.

36. Public assemblies may be dissolved only on the terms specified in the Law on Assemblies. Pursuant to Art. 25, the decision to dissolve the notified assembly may only be taken by a commune authority and only in a situation where its course poses a threat to life or health of people or to property to a significant extent, causes a significant threat to the safety or order of traffic on public roads or violates the provisions of the Law on Assemblies, or penal provisions. In addition, pursuant to Art. 28(1) of the Law on Assemblies, a spontaneous assembly may be dissolved by an officer in charge of the Police activities, if its course is a threat to the life or health of people or

[11] UN, Report of the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association, Maina Kiai, A-HRC-20-27, para. 12.

property to a significant extent; its course causes a serious threat to security or public order; causes a significant threat to road safety or order on public roads; its course violates the provisions of this Act or criminal provisions; disrupts the course of a recurrent assembly (organized pursuant to the provisions of chapter 2, 3 or 3a of the Law).

37. In regard to competing rights of different groups of demonstrators the judgement of the District Court for Warszawa-Śródmieście in Warsaw of 4 October 2018, case XI W 2059/17, should be taken into account. The defendants, in that case, were charged that on 29 April 2017, tried to obstruct unlawful registered public assembly by blocking the route of the march (sitting in the street). They tried to block the march of an extreme organization, pointing that it is inciting hatred. The court examined whether the protest (taking the road on which the march of the other assembly is to pass) was contrary to the freedom of assembly and whether the behaviour of the participants of the assembly allowed the event to be classified as an assembly deserving protection by the state authorities. The court noted that:

> "the behaviour of the accused cannot be assessed as negative in the light of socially, universally accepted values. The protest of the counter-demonstrators against the march of the participants of the assembly (...) was peaceful. Its participants who decided to occupy the road (sitting on it) behaved passively while police officers were lifting them, pushing them away and later during the identification. The evidence collected in the case does not allow the accused to be assigned even attempts to engage in aggressive behaviour towards the participants of the gathering."

38. Thus, in the circumstances of the case, the court recognised that there was a situation where the defendants' behaviour formally violated to a small extent the object of protection (public order, right to assembly of the second group). However, the benefits for society as a whole of the peaceful demonstration of the accused against the hateful slogans definitely compensated for such minor traffic disruptions.

39. In the present case removal and coercive measures were used (stopping in police cordon) due to participation in the counter-demonstration. The character of this demonstration was peaceful, e.g. sitting on the street. The police took actions in order to secure the other demonstration, monthly Smolensk commemoration, which was notified and recognised by local authorities as the recurrent assembly. Therefore, it shall be considered whether such regulation and actions in issue were proportionate to the aim pursued (protecting other demonstration, protecting public order). Counter-demonstrators sat in the middle of the street, forming a cordon. The policemen took them out individually, earlier informing that their actions violated public order, but they were not informed about dissolution of their spontaneous assembly, according to the Law on Assemblies procedure. It seems that it was possible to use less restrictive measures and postpone the counter-demonstration in such a way as to enable organisation of both demonstrations. However, the counter-demonstrators were moved to a completely different street, which effectively thwarted their protest. Thus, authorities in this regard gave little weight to the one group's interest in holding the intended counter-demonstration and expressing political protest against the regulation of recurrent assemblies, while giving too much weight to the interest of monthly Smolensk commemoration in being protected against some rather limited disturbances.

40. Having regard to these factors, and notwithstanding the margin of appreciation afforded to the State in this area, the Court shall consider whether the Polish authorities strike a fair balance between the competing interests of both protesting groups. Moreover, it should be analysed whether the law itself provides for a fair balance between different kinds of organisations.

41. It should be emphasized that the creation of an actual possibility of counter-demonstration in Polish law would increase the security of both demonstrations. In a situation where the applicant could inform the authorities in advance about the counter-demonstration, the authorities – instead of prohibiting them – could indicate an appropriately close, designated place to organize it in order to

protect rights of both groups. Nonetheless, in case of spontaneous demonstrations both should be protected without giving priority to any of them.

V. Interference with the freedom of expression (Article 10 ECHR)

42. Article 11 ECHR should also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedom of assembly and association enshrined in Article 11. In this connection, it must be borne in mind that there is little scope under Article 10(2) ECHR for restrictions on political speech or on the debate on questions of public interest (see *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, para. 30). It shall be then considered whether protest, such as sitting demonstration, amounts to a form of political expression. Referring to the present case, the assembly wished to express dissent with, in their view, unconstitutional Act of 13 December 2016 amending the Act on Assemblies. Discussion about new legal provisions should be recognised as a form of political expression with the high interest of the public.

43. Polish Constitutional Tribunal has repeatedly pointed to the link between the freedom of assembly and the freedom of expression. In the judgment of 18 January 2006 in the case K 21/05, the Tribunal emphasized:

> "the assembly is a special way of expressing views, providing information and influencing the attitudes of other people. It is an extremely important means of interpersonal communication, both in the public and private sphere, and a form of participation in public debate, and, consequently, also in exercising power in a democratic society. The aim of freedom of assembly is not only to ensure the autonomy and self-realization of the individual but also to protect the social communication processes necessary for the functioning of a democratic society. It is based on the public interest. Freedom of assembly is a condition and a necessary component of democracy, as well as a condition for the enjoyment of other freedoms and human rights related to the sphere of public life. Assemblies are an essential element of democratic public opinion, providing an opportunity to influence the political process, enabling criticism and protest, forming part of the process of direct democracy".

44. The specificity of the freedom of assembly allows it to be rendered servant in relation to other constitutionally protected principles, which in the doctrine is defined as performing the *operationalization* function. With the freedom of assembly, other freedoms and rights can be exercised, as well as systemic principles, such as, for example, freedom of religion, freedom of speech, the principle of national sovereignty or political pluralism (judgment of the Constitutional Tribunal of 28 June 2000, case K 34/99). Therefore, by restricting the right to peaceful assembly, freedom of expression could also be interfered with. The exercise of the right to assembly creates:

> "organizational and functional forms of the implementation of the constitutional freedom of speech and the freedom to transmit and receive a variety of content which, without the constitutional guarantees of the freedom of assembly, would not have such a chance of reaching the addressees. In this way, the mechanism of confrontation of various, controversial positions, views and ideas, which are often not understood by the majority of society, is guaranteed, which is fundamental to democracy" (judgment of the Constitutional Tribunal of 10 July 2008, P 15/08).

45. Freedom of expression means freedom of any behaviour (actions and omissions) that constitute a form of expression of one's own thoughts, both verbalized and using a meaning code other than the word. Views can be expressed in various ways, not only verbally, but also, e.g. by means of pictures (see the judgments of the Constitutional Tribunal of 20 July 2011, ref. no K 9/11, and of February 12, 2015, ref. no SK 70/13). Views can also be expressed through action and failure to act (omission) (see J. Sadomski [in:] Konstytucja RP, Komentarz, M. Safijan, L. Bosek (eds), Legalis 2016). Thus, even a silent protest could amount to a form of political expression.

46. Freedom of expression is exercised interdependently during a demonstration or protest. As noted by the Inter American Court: "the ability to protest publicly and peacefully is one of the most

accessible ways to exercise the right to freedom of expression, and can contribute to the protection of other rights."[12] Thus, removal from the place of the protest could lead to the factual prevention of exercise of freedom of expression

VI. Conclusions

47. The Commissioner for Human Rights considers that the amendment of the Law on Assemblies which led to the creation of a hierarchy of assemblies, with the priority of recurrent assemblies, does not meet standards for the protection of right to peaceful assemblies. The practice shows, moreover, that the Law effectively prohibited organization of counter-demonstration, which leads to the infringement of this right. The practice of short-term detention of demonstrators in order to provide identity checks has no basis in Polish law and should be recognised as unlawful interference with Article 5 and Article 11 ECHR. Sit-in protests, especially in the form of counter-demonstration, should be perceived as a legitimate form of political expression, which deserves appropriate protection.

[12] I/A Court H.R., Case of López Lone et al. v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015.