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HINDSIGHT BIAS AND THE PRACTICE OF ARRESTS IN POLAND

EFEKT PEWNOŚCI WSTECZNEJ W PRAKTYCE STOSOWANIA ZATRZYMANIA W POLSCE

This comparative study deals with the various forms of arrest in the Polish criminal law system. The authors used the dogmatic-legal and comparative methods, and applied the empirical method in several case studies. The background of the considerations is the proposal of a typology of procedural arrests, based on the Code of Criminal Procedure and non-procedural arrests, based on special laws. The main subject of consideration is the risk of instrumentalization of arrest, which can be considered at several levels: structural, concerning the abuse of the grounds for arrest, and peri-arrest activities (such as informing and questioning the detained person). Within these are three risks of instrumentalization: abuse of the law *sensu stricto, sensu largo*, and violation of law. Hindsight bias helps to understand the risk of the instrumental application of the law. If the law poses a severe risk of instrumentalization, it must be changed. The authors conclude that the Polish legislator ignores these risks until the law is misapplied. Instead, a proper diagnosis of risks should lead to legislative amendments. The authors propose that mandatory recordings of actions should be introduced. To further strengthen the right to defence, the authors propose changes to the sequence of actions (peri-arrest activities), especially regarding the hearing of the arrested person. Moreover, there is doubt about the standards for applying non-procedural arrests, where the general rules of the Code of Criminal Procedure should apply. Still, the diverse status of the bodies authorized to carry out such actions is a factor that increases the risk of instrumentalization.

Keywords: arrest; detention; instrumentalization; right to defence; abuse of law

Niniejsze opracowanie ma charakter porównawczy i dotyczy różnych postaci zatrzymań w polskim systemie prawa karnego. Przygotowując artykuł, autorzy wykorzystali metodę dogmatyczno-prawną i metodę porównawczą, a także metodę empiryczną zastosowaną w kilku studiach przypadków. Tłem rozważań jest propozycja typologii zatrzymań procesowych, tych wyróżnianych na gruncie przepisów Kodeksu postępowania karnego (k.p.k.) oraz tzw. zatrzymań nieprocesowych, stosowanych na podstawie ustaw szczególnych. Główny przedmiot rozważań stanowi ryzyko instrumentalizacji zatrzymania, które można rozpatrywać na kilku poziomach: strukturalnym, dotyczącym nadużyć w odniesieniu do podstaw zatrzymania, oraz w odniesieniu do dzia-

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łań okołozatrzymaniowych (takich jak pouczenie i przesłuchanie osoby zatrzymanej). W ramach tych obszarów wyróżniono trzy rodzaje ryzyka instrumentalizacji: nadużycie prawa *sensu stricto*, naruszenie prawa *sensu largo* i naruszenie prawa. Zjawiskiem, które pomaga zrozumieć ryzyko instrumentalnego stosowania prawa jest tzw. efekt pewności wstecznej (*hindsight bias*). Jeśli zatem jesteśmy świadomi, że prawo jest uregulowane w taki sposób, iż stwarza poważne ryzyko instrumentalizacji, to oznacza konieczność jego zmiany. Wnioskiem płynącym z analizy zaprezentowanej w niniejszym szkicu jest, iż ustawodawca polski ignoruje te zagrożenia dopóty, dopóki ryzyko rażąco niewłaściwego stosowania prawa się nie ziści. Właściwa diagnoza ryzyk instrumentalizacji powinna natomiast prowadzić do zmian legislacyjnych. Autorzy proponują zwiększenie transparentności czynności zatrzymania m.in. przez wprowadzenie obligatoryjnych nagrań całej czynności. Celem wzmocnienia prawa do obrony postuluje się zmiany sekwencji czynności okołozatrzymaniowych, zwłaszcza w kontekście wzmocnienia prawa do obrony w związku z dokonaniem czynności wysłuchania osoby zatrzymanej. Wątpliwości dotyczą standardów stosowania zatrzymań pozaprocesowych, w przypadku których powinny być stosowane reguły ogólne przewidziane w k.p.k., jednak zróżnicowany status organów uprawnionych do dokonania takich czynności jest czynnikiem zwiększającym ryzyko instrumentalizacji.

Słowa kluczowe: zatrzymanie; zatrzymanie pozaprocesowe; instrumentalizacja prawa; prawo do obrony; nadużycie prawa

I. INTRODUCTION

The issue of arrest in the Polish criminal law system is complex and multifaceted. Firstly, it concerns so-called procedural arrests (hereinafter: PAs), regulated by the Polish Code of Criminal Procedure[1] (CCP), as well as non-criminal proceedings arrests ('NCPAs' or 'non-procedural arrests') applied based on special laws. Secondly, it is associated with the risk of instrumentalizing this mosaic of short-term deprivations of liberty. We have to duly note that in Poland there is no equivalent institution to police stops as understood in Anglo-Saxon legal culture.[2] However, this does not mean that citizens are not subject to short-term deprivations of liberty that carry a high risk of the abuse of law. To discuss these institutions, we have to refer to either procedural or non-procedural arrests. Although one could argue that a stop might occur in the context of procedural arrest (we call them peri-arrest activities/*czynności okołozatrzymaniowe*) or preventive and temporary arrest (when referring to NCPAs), such a limitation is not justified under the provisions of Polish law.

Among procedural arrests, we distinguish those carried out based on the provisions of the CCP or the Code of Proceedings in Minor Offences[3] (CPMO) – whereby these actions must ensure the proper course of criminal proceedings (Tylman, 2005; Waltoś, 2005). Procedural arrests are short deprivations of a suspect's liberty (24, 48 or 72 hours), being part of the criminal proceedings associated with a crime, or a fiscal offence, or part of proceedings in minor

[1] Act of 6 June 1997 – Code of Criminal Procedure, Journal of Laws of the Republic of Poland [JL] 2022, item 1375, 1855, 2582, 2600.

[2] For more information on stops, see, e.g. https://polstops.eu/

[3] Act of 24 August 2001 – Code of Proceedings in Minor Offences, JL 2022, item 1124.

offences cases. This results from the Polish criminal trial model, which is referred to as inquisitorial, with the dominant feature being its two-stage nature (on perceptual models of the criminal process see Damaška, 1973; Eser, 2008; Feeley, 1973; Goldstein, 1974; Luna, 1999; Packer, 1964). The pre-trial (preparatory) stage has a full-scale character, as procedural steps, including evidentiary actions, are taken, with their results forming the basis for court proceedings (the pre-trial file as an annex to the indictment is forwarded to the court; Janusz-Pohl, 2022, pp. 31–47). However, NCPAs refer to legal constructions in which there is a short-term deprivation of a person's liberty due to a particular situation in which they find themselves. A non-criminal proceedings arrest takes an isolated form, in the sense that it does not constitute a part of or lead to proceedings for any criminal act. Due to the limited scope of this paper, besides detailed elaboration on procedural arrests, we will inquire only selected forms of the NCPA. However, we would like to highlight that the remarks on the peri-arrest activities made in the procedural section are in fact universal, constituting the basis of conduct in both procedural and non-procedural arrest activities.

The key point of analysis in this study is the risk of instrumentalization in cases of short-term detention. The authors note that such a risk can be considered on several levels. Firstly, on the structural level, with the risk deriving from significant fragmentation of regulations concerning procedural and non-procedural arrests. Secondly, it can be examined with regard to the lack of substantive limits on the type of criminal proceedings, as procedural arrest may be used in cases regarding crimes and minor offences. Despite constitutional doubts, the legislator has not introduced any limitations related to the punishment for committing a given prohibited act, which is particularly problematic in the case of a merely suspected offence. In fact, an arrest may be more severe than punishment for a given offence. The biggest problem associated with NCPAs is the considerable discretionary power of the enforcement authorities, which might result in their arbitrary application. The third level is that of abuse of law in the context of the grounds for arrest, which is a sensitive issue regarding both PAs and NCPAs. The grounds for procedural arrest should be mandatory or facultative. However, the grounds for arrest might be subjected to arbitrary application. The fourth level concerns the instrumentalization of conducting the so-called peri-arrest activities, in terms of their sequences and the regularity of individual actions. We define peri-arrest activities as all the operations that the authorities must perform before their actions fall into the safeguarded scope of either type of procedural or non-procedural arrest (for full order of these activities see Section II.2). One of the critical actions in the frame of arrest (but belonging to the peri-arrest activities category) concerns the explanations given by the person under arrest (referred to here as hearing). This aspect of the analysis is connected with a particular problem in the Polish legal system related to establishing the right to defence when an arrest is an activity initiating criminal proceedings. The instrumentalization of actions associated with arrest may also relate to the issue of adequate instructions and possibly the use of unethical practices

by law enforcement authorities, such as deception (which is not expressly prohibited under Polish law).

In this article, we will address the identification of examples for the described areas of instrumentalization. Due to the comparative nature of this study, which entails the need to describe the institutions specific to the system in question, the considerations are divided into four main parts. Firstly, we discuss several issues related to procedural arrests. This section (II) contains three main points and elaborates on the normative basis constituting the point of analysis, as well as issues related to the prescribed conduct during the arrest and several case studies concerning severe violations of the arrestee's rights arising from the Polish Ombudsman's report. Secondly, we discuss the issue of peri-arrest activities and judicial control criteria that are used to assess arrests (Section III). The next part of the paper (Section IV) refers to non-procedural arrests, highlighting selected types and general issues. This section is divided into three parts, which contain detailed analysis of preventive and penitentiary arrests performed on the basis of the Police Act, administrative arrests, and a short description of the remaining NCPA types. In the last part (Section V), we present conclusions from the analysis presented and postulates *de lege ferenda*. As indicated in the initial remarks, this study is not limited to a multifaceted descriptive analysis of arrests in Polish law. The institution of the instrumentalization of law in the context of the arrests remains the central axis of our considerations. At the same time, it should be observed that the very notion of instrumentalization may be questionable due to the heterogeneous way in which it is used by researchers. The limited scope of this study does not allow us to present all the nuances related to the dynamics of this concept (see e.g. Belavusau, 2010, pp. 147–170; Dudek, 2013, pp. 189–237; Gillaerts, 2019, pp. 27–43; Gromski, 2018, pp. 95–105; Przylepa-Lewak, 2021, pp. 219–235; Wagner & Matulewska, 2020, p. 127). We therefore adopt the understanding of instrumentalization mainly developed in continental legal systems.

In general two major strands of instrumentalization may be distinguished. The instrumental conception of law consists of treating the law as a tool or a means to achieve goals external to the essence of the law (Wronkowska, 2017, pp. 109–112). This understanding creates the notion of instrumentalization in the broad sense and implies that law always has an instrumental character, as it serves to achieve or realize goals that can be understood as policy values. The instrumental conception of law is a rationalization of the instrumental exercise of the law ('use of the law') by the legislator, the bodies applying the law, or the addressees of the law, which occurs in various guises. The approach presented by Gromski (2018, pp. 95–105) falls into the narrow understanding of instrumentalization, according to which the law serves as a tool rather than a mechanism of realizing policy goals (Cyuńczyk, 2019, p. 46). Gribnau (2013, p. 93) sees it similarly, understanding instrumentalization (instrumentalism) as a technique or a way to implement policy goals. As Dudek (2013, p. 199) indicates, the acts of instrumentalization might be positive, indifferent or negative, with the latter meaning that the goals of an act are mutually exclusive with the goals of the law itself.

Regardless of the many specific approaches to instrumentalization (e.g. Atiyah & Summers, 1987, p. 404; Gillaerts, 2019, pp. 27–43; Summers, 1982, p. 98), for the purpose of this article, we adopt the narrow sense of instrumentalization, which describes it as a tool for realizing policy goals. However, as mentioned before, it may take a positive, indifferent or negative character. Due to the limited scope of this paper, we aim to highlight the risks associated with acts of negative instrumentalization of procedural and non-procedural arrests. For this purpose, we propose a three-fold understanding of the instrumentalization phenomenon, corresponding to the specific regime of criminal law. In our considerations, instrumentalization is a concept that encompasses both the abuse of law and the violation of law. Consequently, this concept is broader than the formula of the abuse of law, even in the widest sense. At the same time, the discussion on the legislative gaps giving rise to negative instrumentalization should impact both dogmatic discussion on the shape and scope of domestic criminal law regulations (in the broad sense) and conceptions of instrumentalization.

In this study, instrumentalization is understood as situations in which: (a) a given actor makes use of the powers granted to them, but the purpose of their action does not correspond to the aim designed by the legislator (abuse of law *sensu stricto*); (b) a given actor goes beyond the powers granted to them by the legislator with their action/inaction, but does not directly violate an existing legal norm, acts *ultra vires* (abuse of law *sensu largo*); and c) the entity concerned exceeds the existing legal norms with its action/inaction and violates a specific legal norm – in the extreme case committing a criminal act (violation of the law). This directly corresponds to the notion of instrumentalization in the narrow sense, as it perceives an actor's action as a means of realizing (implementing) criminal policy goals. The arrest is a sensitive activity, as it directly interferes with an individual's right to liberty, in other words, one of their fundamental rights. For this reason, the study adopts a pro-guarantee approach towards the detained person. Consequently, the instrumentalization of the law will only be considered mono-directionally, that is, in an interaction between the detaining authority (alternatively, the authority supervising the arrest) and the person subject to arrest.

II. PROCEDURAL ARRESTS: ISSUES CONCERNING THE CCP, THE CPMO AND THE FISCAL CRIMINAL CODE

1. Procedural arrests: Normative basis

Procedural arrests are related primarily to the three types of arrests under the CCP and a detention for minor offences. We will begin our considerations with the institutions standardized in the Criminal Procedure Code, as they constitute a specific universal model. As far as procedural arrests are concerned, we will focus on the institutions of Articles 244 CCP and 247 CCP,

which concern police arrest in criminal proceedings and prosecutorial arrest. As mentioned before, their analysis is not only relevant to procedural arrests, but the standards arising from these regulations are also applicable to non-procedural arrests as well. However, a whole set of regulations pertains to PAs, which will be the foundation for further analysis. Therefore, for the sake of clarity of these considerations, it is justified to cite them in full.

Article 244 CCP regulates grounds for police arrest. According to this provision: A person may be arrested by the Police if there are justified grounds to suspect that this person committed an offence: (1) and it is feared that they might escape, go into hiding, conceal traces of the offence, or their identity cannot be established, or the conditions are fulfilled to order accelerated procedure; (1a) used violence against a member of his household and it is feared that such an offence may be repeated, especially if the suspected person is threatening to do so or; (1b) arrests a person if the offence referred to in (1a) was committed with the use of a weapon or other dangerous objects. The arrestee is immediately informed of the reasons for the arrest and their rights to make statements, to refuse to make statements, to obtain a copy of an arrest protocol, to have access to medical first aid, and to be heard (2). The protocol shall contain personal data of the arrestee and the arresting officer, date, hour, place and reasons for the arrest, detailing the offence of which the arrestee is suspected (3). Immediately after the arrest of the person suspected of the offence, the public prosecutor must be notified, and the necessary information must be collected. In the event of the existence of the circumstances referred to in Article 258(1–3), the motion to the court for detention on remand must be entered into the report (4).

Subsequent editorial units regulate procedural matters and safeguards. Article 245 CCP states: The arrested person, upon their demand, shall be allowed to contact and talk directly with a legal representative. In exceptional cases justified by particular circumstances, the person who made the arrest may reserve the right to be present when such a conversation occurs.

Article 246 CCP provides detailed regulations on the right to complain: An arrestee may submit an interlocutory appeal, in which they may demand that the grounds, legality and propriety of the arrest be examined, which is immediately referred to the court. If the arrest is found groundless or unlawful, the court orders the immediate release of the arrestee.

The essential components of arrest are also highlighted by Article 248 CCP: The arrestee is released immediately if the reasons for their arrest cease to exist and also if, within 48 hours from the arrest, the arrestee was not surrendered to the court or upon the order of the court or the public prosecutor. The arrestee is released if, within 24 hours of being surrendered to the court's jurisdiction, the motion to order detention on remand was not granted. It is not permissible to re-arrest a person upon the same facts and evidence.

It must be added that a unique form of procedural arrest, to which the procedural standards described above apply, is arrest under the decision of the prosecutor. Importantly, such a decision is issued already in the course of previously initiated pre-trial proceedings. Under Article 247 CCP: The public

prosecutor may order that a suspect or person suspected of the offence be arrested and brought compulsorily if there are justified reasons to fear that: they will fail to answer a summons to participate in the respective procedures or tests, or they will obstruct the proceedings in another unlawful way, or if there is a need for the immediate application of a preventive measure. As it was signalled, the arrest in criminal proceedings has its parallel institution of arrest in minor offences cases. The difference is, however, that in minor offences proceedings, police arrest is the only admissible form of depriving a suspected person of liberty (in these proceedings, the use of temporary custody is not permissible). Furthermore, the catalogue of grounds for applying this measure is more narrowly defined and, as a rule, the duration of arrest is shorter. Under Article 45(1) CPMO, the police have the right to arrest a person caught in the act of committing an offence or immediately afterwards if 1) there are grounds for the application of accelerated proceedings against them, 2) their identity cannot be determined. The arrest period starts when the person is arrested and may not exceed 24 or 48 hours in cases where expedited proceedings are necessary. The safeguarding aspects related to the performance of the peri-arrest activities and the grievance review are similar to those provided in criminal proceedings. Let us mention that, apart from the controversial application of the institution of arrest in cases of minor offences per se due to its disproportionality in respect of violations of the law and penalties related thereto, other issues related to peri-arrest activities and judicial control correspond to those regarding police arrest under the CCP.

Regarding the use of arrest in proceedings for fiscal offences, under Article 113(1) of the Fiscal Criminal Code (FCC),[4] in proceedings for fiscal offences and fiscal misdemeanours, the CCP regulations shall be applied accordingly unless the provisions of the FCC provide otherwise. However, under Article 150(4) FCC, in addition to the police, the arrest may also be exercised by the Border Guard, the Customs and Fiscal Service, the Internal Security Agency, the Central Anti-Corruption Bureau or the Military Police.

2. Procedural arrest: Main remarks and scheme of conduct

Having elaborated on the normative basis, we may conclude that the primary institution for police arrest is the formula of arrest governed by Article 244 CCP, which we will primarily refer to in further remarks regarding the scope of potential instrumentalization. Given this context, it is noteworthy that the thesis of the risk of instrumentalization of arrest has two-fold grounds. Firstly, it is related to the functional coupling of arrest with the institution of pre-trial detention. Secondly, it concerns the issue of interference with constitutionally protected civil rights and the liberties of a person. Therefore, the arrest must be strictly in accordance with the principle of proportionality and minimize restrictions on liberty. The other problem, ensuing from the above, concerns the risk of the non-guaranteeability of a hearing as

[4] Act of 10 September 1999 – Fiscal Criminal Code, JL 2022, item 859, 1301.

a component of the procedural act of arrest. It is closely linked with the procedural status and rights of an arrested person. Furthermore, police arrest may frequently take a form of an activity applied in the foreground of specific criminal proceedings in a case. In this context, it may be treated *de facto* as the initiation of preparatory proceedings (which, in the model of Polish criminal investigation, is the first full-scale stage of a criminal trial). The highlighted issues are crucial, and they are related to both law enforcement and judicial practice. The functional conjunction between arrest and pre-trial detention is associated with the regulation of Article 244(4) CCP, which provides that if the grounds referred to in Article 258(1–3) CCP exist, the prosecutor should request pre-trial detention to the court. One should note that the grounds for pre-trial detention and arrest due to the risk of abscondment or concealment of the accused (suspect) are closely interrelated. The practice of pre-trial detention in Poland itself is controversial (ECtHR: *Kauczor v. Poland*[5]; *Kowrygo v. Poland*[6]; *Choumakov v. Poland* [No. 2][7]; *Ruprecht v. Poland*[8]; *Dochnal v. Poland*[9]; *Nowicka v. Poland*[10]; Klepczyński et al., 2019). Noteworthy is the fact that although the grounds for the application of this preventive measure are clearly defined, it continues to be abused, and the effectiveness of motions for its application reaches over 90% (Skorupka, 2021; Wawrzyńczak, 2021).

Moreover, considerable risks of abuse are concealed in that aspect of the arrest which involves the active involvement of the arrested person. We refer to the hearing of an arrested person (an action consisting of given explanations by the arrested), the essence of which is to ensure full freedom of expression for the detainee concerning the grounds and circumstances of the arrest, manifested by the absence of any pressure on such a person (Paprzycki, 2000). Under regulations in Poland, the arrested person formally does not have the status of a suspect, who is granted various procedural safeguards. Following the Polish CCP, a suspect is a person against whom a decision on pressing charges has been issued or who has been charged following interrogation as a suspect (through entering the charge into the protocol). However, the arrest of a person, as has been indicated, may in some cases be the first action in a case (Article 308 CCP), and thus the so-called factual initiation of preparatory proceedings. Then, we will deal with an arrested person concerning whom the authorities have a justified suspicion that they have committed an offence, although against whom official charges have not been pressed. In Polish law, it means that such a person is not a party to the pre-trial proceedings (Janusz-Pohl & Mazur, 2010, pp. 81–91).

From the perspective of an arrested person, this distinction between a suspect and a suspected person is crucial. As mentioned, the moment a person is charged, they become a suspect and, therefore, a formal party to these pro-

[5] ECtHR, *Kauczor v. Poland* (App. no. 45219/06), 3 February 2009.
[6] ECtHR, *Kowrygo v. Poland* (App. no. 6200/07), 26 February 2013.
[7] ECtHR, *Choumakov v. Poland* (No. 2) (App. no. 55777/08), 1 February 2011.
[8] ECtHR, *Ruprecht v. Poland* (App. no. 39912/06), 21 February 2012.
[9] ECtHR, *Dochnal v. Poland* (App. no. 31622/07), 18 September 2012.
[10] ECtHR, *Nowicka v. Poland* (App. no. 30218/96), 3 December 2002.

ceedings (*arg. ex* Article 299 CCP). This refers primarily to a number of procedural guarantees granted to the accused, resulting from the wording of Article 71 § 3 CCP, which confers all the rights of the accused also on the suspect. Polish scholarly literature has long emphasized the troublesome nature of the suspect status, including that of the arrestee (who formally is not acknowledged as a party to the proceedings). Within this debate, the prevailing opinions advocate for the inclusion of arrestees within constitutional right to defence as well as under the European Convention on Human Rights (ECHR)[11] (Wąsek-Wiaderek & Steinborn, 2015, p. 447). Even in moderate positions, it is acknowledged that an arrestee – in a formal sense being only a suspected person (one who has not yet been charged) – enjoys only a specific surrogate of the right to defence. One must remember that the construction of a suspected person is not regulated under either the ECHR or Directive 2013/48/EU. Hence, whether it is compatible with these legal acts could be questionable. However, such a distinction, stemming from the fact that Polish legislators opted to operate under the formal rather than material definition of a suspected person, is significant. It primarily accounts for situations in which granting status to an accused would impede the pre-trial proceedings due to the requirement to discontinue the proceedings. Such a regulation may not be controversial under Article 244 of the CCP, but it certainly is when discussing the duty under Article 74 § 3 CCP (submitting to medical examination). In the light of the current legislation in force, it seems that the construction of a suspected person shall remain within the Polish CCP. However, it is necessary to note that these persons should be enabled to execute their right to a defence, most notably to an attorney. We have to bear in mind that criminal procedure must account for various, often contradictory values – the effectiveness of preparatory proceedings may not compromise the effective realization of suspect/accused procedural safeguards and vice versa.

Nevertheless, one must note that, unless dealing with an action under Article 247 CCP (prosecutorial arrest), to the extent that it concerns a procedural party (suspect), an arrested person against whom the charges have not been pressed, does not enjoy the right (*de jure* but also *de facto*) to appoint a defence counsel. The entity representing the arrested person under Polish law is a legal counsel, who is slightly less protected when it comes to secrecy than a regular legal representative of the accused. The appointment of a legal representative may be, in fact, considerably impeded if the arrestee has no professional representative cooperating with them, as arrest, being a real act of short-term deprivation of a person's liberty, is also time-limited. Hence, an arrested person can only contact an attorney known to them and for whom they have contact details (in Polish law an on-call institution for attorneys in arrest cases is not established). Among the solutions to guarantee the pos-

[11] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14 and 15, ETS 5, 4 November 1950, https://www.echr.coe.int/documents/d/echr/convention_ENG

sibility of exercising this right would be to prepare on-call lists analogous to defence lists for pre-trial detention hearings.

At this point, Polish statutory regulation seems incompatible with the minimum procedural standards established by Directive 2013/48/EU.[12] Although the Polish legislator declares that the CCP implements the standards of this Directive, one cannot agree with this. Moreover, the lack of regulation on how detaining authorities proceed with arrested persons remains problematic. Usually, the arrest will be made by the police in the framework of police arrest under Article 244 CCP, or by executing the prosecutor's order under Article 247 CCP. The Code of Criminal Procedure fails to specify the nature and the order of the arrest operations. Article 244(2) CCP merely provides the content of the instruction on the arrestee's rights. Therefore, the scheme of conducting non-procedural criminal arrests carried out by officers under the Police Act[13] must be referred to. It is specified in the Ordinance of the Council of Ministers of 4 February 2020 on proceedings in the exercise of certain powers of police officers[14] (hereinafter: the Ordinance), which, *per analogiam*, police officers also use when performing arrests under the CCP. We describe these operations as peri-arrest activities, given that the grounds and instructions of such conduct are external to the Code of Criminal Procedure.

Somewhat anticipating the issue of police arrest, we shall only point out that instructing arrestees on their rights (including the right to use an attorney) occurs after they have been transported to the police station; thus, after the arrestee has suffered an actual short-term deprivation of liberty. Crucially, § 9(1) of the Ordinance, establishing the timetable of peri-arrest activities, in (1) orders the instruction of the arrestee on their rights but (2) requires the hearing of the arrested person on the facts of their arrest. Subsequently, (3) and (4) determine that an arrest protocol must be drawn up and a copy served on the arrested person, whilst only (5) orders to take action towards realizing the arrestee's rights if they requested it. Thus, we see that the pattern of conduct with the arrested person is dubious regarding the guarantees of the hearing. The issue is that the person should first be heard (which does not exclude obtaining procedural information for future proceedings), and only afterwards should they be allowed to contact a counsel. *De lege ferenda*, the legislator should consider reversing that sequence of peri-arrest actions to enable the full exercise of defence rights. In other words, the interests of the arrested person should be safeguarded first by allowing the arrestee to contact a representative, and only then, after actually being allowed to contact a representative, should they be heard.

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[12] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294/1.

[13] Police Act of 6 April 1990, JL 2021, item 1882, 2333, 2447, 2448, and 2022, item 655, 1115, 1488, 1855, 2600.

[14] Ordinance of the Council of Ministers of 4 February 2020 on proceedings in the exercise of certain powers of police officers, JL 2020, item 192.

Implementing minimum standards under the cited Directive raises a particular issue regarding non-procedural arrests. According to Recital 20, interrogation does not include preliminary questioning by the Police or other law enforcement authorities to establish a person's identity, determine the possession of weapons or any similar safety matters, or whether an investigation should be initiated, for example, during traffic control or routine random stops when the identity of a suspect or accused person is yet to be established. Under § 8(1) of the Ordinance, the procedure followed by officers in arresting persons revolves around identifying them and performing a preventive search for weapons or other dangerous objects, the possession of which is forbidden, or which may be used as evidence in proceedings, followed by bringing the arrestee to the police station. Subsequently, during the factual act of arrest combined with a search of the person, one cannot speak of these acts being protected by this Directive. Thereby, the degree of protection of the arrested person is considerably limited, which may be controversial upon preliminary enquiries made by the arresting authorities regarding information which is part of the arrestee's hearing stage. Performing arrest and peri-arrest activities entails a significant risk of instrumentalization in all three variants indicated in the introduction (as abuse of law *sensu stricto*, abuse of law *sensu largo* and violation of the law).

3. Abuse of power by the police: Ombudsman case studies

The Polish Ombudsman indicated the issue of torture and inhuman treatment during procedural actions performed by police officers against arrested persons. The Ombudsman highlighted that between 2008 and 2015, 33 police officers were convicted in Poland for the crime under Article 246 CC (forced confessions by a public officer), committed against perpetrators of crimes (suspects and arrestees) and against perpetrators of minor offences, by attempting to coerce them into accepting fines, whereby both adults and minors were victims (Ombudsman, 2017, pp. 5–6).

Principally, the Ombudsman (2017, pp. 15–16) suggested strengthening safeguard mechanisms during arrests. The proposals included performing a medical examination during the initial period of arrest, the right to contact a counsellor immediately after arrest and the possibility to notify a third party of the arrest since, despite the theoretical entitlement, this right is not always exercised in practice. The Ombudsman has also widely described the pathologies of the practice of the arrest authorities and noted the crucial importance of a defence counsel's participation throughout the arrest (pp. 16–25). Moreover, it is common in the practice of arresting authorities to impede the implementation of the arrestee's right to contact an attorney (pp. 30–31).

To illustrate this issue, let us cite selected facts of cases analysed by the Ombudsman. As an example, the arresting officers used physical violence against two persons arrested for committing a minor offence (defecating in a public place – indecent behaviour under Article 140 of the Minor Offences

Code (Judgment of the District Court in Bolesławiec, ref. no. II K 1490/10). Another minor, after being detained at school, was tortured during a hearing in such a way that he was repeatedly punched in the face and the kidney area, kicked in the crotch area, and had his hand twisted by pressing his face to the floor, was hit on the soles of his bare feet with batons and officers ordered him to do sit-ups while commenting that they would 'make him an athlete'. At the same time, the court later deemed the arrest unjustified and illegal (Judgment of the District Court for Warsaw-Żoliborz, ref. no. III K 71/10). Violations of law also happened during the arrest of a young girl, during which the officer threatened her with planting drugs in her purse, which would result in her criminal liability and imprisonment, ordered her to kneel for a certain time during the questioning, struck the desktop with a police baton threatening to beat her, used vulgar words against her, hit the victim three times with a police baton after putting leather gloves on her hands, grabbed her by the throat, kicked the chair where she was sitting to knock her over (Judgment of the District Court in Kalisz, ref. no. II K 411/09).

Amendments proposed by the Ombudsman were negatively assessed by the Minister of Justice (2021), particularly regarding the elimination of the possibility for an officer to supervise an arrestee's contact with his lawyer in exceptional cases, and regarding the possibility of an arrestee having the right to contact a lawyer in any case (pp. 3–4). The Minister of Justice, in his response to the Ombudsman's submissions, indicated that the proposed amendments would result in such a structure of arrest that officers would *de facto* not be allowed to have contact with the arrestee without the presence of a lawyer, which would require the provision of *ex officio* legal assistance to each individual – thus significantly extending the time of arrest and causing serious organizational challenges (p. 4). Analysis of police arrest statistics confirms the accuracy of the objections made. We can indicate here that, on average for 2021, there were approximately 580 arrests in the act of committing an offence per day and approximately 300 arrests of persons who had 'wanted' a warrant issued against them, totaling about 880 arrests per day, and thus would result in an obligation to provide *ex officio* 880 attorneys for arrested persons alone. Realistically, the statistics for all arrests would be higher, as the figures mentioned refer only to partially reported actions of police officers. Nonetheless, the failure to take any action to ensure a greater level of guarantees within the proceedings regarding arrestees is questionable and should be met with concern, given that the Minister of Justice (2021, p. 8) merely indicated that cases of violation of the rights of arrestees result from officers acting in a manner contrary to the applicable legislation.

We believe that an effective way to combat the potential instrumentalization of the law by arresting authorities is to increase the level of digitalization by recording this activity. The recording should begin before the arrest, namely when the officer initiating the detention identifies themselves and provides the legal grounds (under § 8(1) of the Ordinance), and should last for the entire duration of the arrest. We believe that recording arrests would,

firstly, strengthen the level of guarantees in the case of violations – thus enabling victims to claim their rights effectively. Note that recording all actions could prevent officers from violating the law due to the concern that it may be recorded. This solution would be much less obstructive in terms of the efficiency and duration of proceedings, especially if we take into account that it is already obligatory to record certain activities (such as the interrogation of minors by the Police and other pre-trial authorities, mainly if the lawyer is not present at this stage and the child is deprived of their liberty; Minister of Justice, 2021, p. 5) and therefore at least some police stations should be equipped with recording tools. Further possible safeguard amendments could be to introduce the on-call lists mentioned above, which would allow the selection of an attorney, therefore enabling effective legal assistance to those arrestees who wish to exercise this right (of an optional nature). This would also strengthen judicial control over the act of hearing – ensuring that the officers do not pursue the procedural functions of interrogation aimed at gathering valuable information for the proceedings against that person, therefore contravening the purpose of a hearing.

Nevertheless, the absence of fundamental guarantees for the right to appoint a representative results in the poor standard of protection of the arrested person during the hearing. This is problematic insofar as, by its very nature, this element of the arrest activity can only serve to allow the arrestee to express their opinion regarding the grounds for the arrest. This activity cannot develop into preliminary questioning or other forms of taking information from an evidentiary source about the facts of the case. The mere fact of giving a statement, however, may be procedurally significant since, as is emphasized in the doctrine, the statement may convince the arresting authority that the reason warranting the arrest is no longer valid (Article 248(1) CCP; Cora, 2015). However, it should be borne in mind that the only possibility to speak out should not clash with the entitlement under Article 74(1) CCP, namely the lack of obligation to prove innocence and provide evidence to one's disadvantage (Sobolewski, 1982). A hearing in the context of arrest cannot be identified with interrogation, as it is directly related to the impossibility of recognizing the arrested person being heard as a suspected person who is being interrogated as a suspect under Article 308(2) CCP, and therefore with the moment when criminal prosecution is directed against the person (Paprzycki, 2013). Nevertheless, an arrestee's right to be heard is their entitlement, not an obligation. They may declare that they do not wish to make any statements in the context of the hearing without specifying a reason, and the procedural authority may not challenge such a decision.

Additionally, problems linked to the hearing of a detained person relate to the catalogue of circumstances that the hearing is meant to cover (Skorupka, 2007). Statutory provisions do not limit the scope of an arrested person's statement. However, it seems reasonable to recognize that the statements made must be relevant to the ongoing activity. Consequently, we can agree with the view that these statements may relate to the grounds for arrest, refer to misconduct violating one's dignity and physical integrity, and regard one's

innocence (Hofmański et al., 2011). Hence, the essence of statements given by the arrested person will be intended to challenge the justness, legality and regularity of the arrest (Cora, 2015).

III. PERI-ARREST ACTIVITIES AND JUDICIAL CONTROL OVER PROCEDURAL ARRESTS IN POLAND

The guarantee dimension of procedural arrest in Polish law is most clearly secured by the judicial control over arrest and other peri-arrest activities. This is because every arrested person is entitled to lodge an appeal, which will result in the criminal court reviewing the complaint. Within the framework of judicial review, three criteria are verified: the legitimacy, legality and correctness of the action taken. These elements of the Polish criminal procedure are closely related to its conventional nature. The doctrine has established that criminal procedural actions are conventional actions that are significant in law (Janusz-Pohl, 2017; Wawrzyńczak, 2022). For the sake of clarity of the argument, let us point out that conventional acts are always performed by an entity authorized by the provisions of the criminal procedural law. A conventional action is performed through the realization of a material substrate: such human behaviour to which certain rules of sense (in this case, the criminal procedural provisions) assign a particular meaning. Procedural actions are subject to conventionalization (based on rules determining their validity), and formalization (grounded on rules determining their effectiveness, correctness and legitimacy). In the case of the act of arrest, the Polish legislator, in the wording of Article 246(1) CCP, in addition to regularity and legitimacy, also mentions the criterion of the legality of arrest. The three criteria of judicial control indicated also correspond with the three formulas of the instrumentalization of law distinguished earlier: the criterion of reasonableness and regularity is connected with abuse of law *sensu stricto*, the criterion of regularity and legality is also connected with abuse of law *sensu largo*, and in some cases, the criterion of legality may also be connected with violation of the law.

In compliance with the presumption of the axiological rationality of the legislator, we can assume that these criteria have different denotations since the legislator distinguishes the criteria of legitimacy, legality and correctness in the wording of Article 246(1) CCP. The legality and legitimacy of arrest are linked with the right of the arresting authority, the matter of admissibility of the arrest of a given person and the grounds for this action. The correctness of arrest, however, pertains to fulfilling the various arrest-related actions required by law. Among these, we distinguish, among other things, giving warnings to the arrestee, drafting an arrest protocol (Czepita, 2006, p. 22), following the rules indicated in Article 244(3) CCP and providing the arrested person with a copy thereof (Cora, 2015, pp. 250–253). When considering the correctness of the arrest, the method of performing this action is also assessed, including the application of adequate and proportionate measures, that is,

without unnecessary use of coercive measures, ill-treatment or damaging the arrested person's property (Grzegorczyk, 2014, p. 877). Some define legitimacy as the necessity and proportionality of the arrest, treat legality as compliance of the activity with the law, and consider the criterion of correctness in terms of the manner of deprivation of liberty and the circumstances of the arrest (Skorupka, 2015, p. 575).

Peri-arrest activities constitute an additional formalization of arrest as a factual act and are recognized in the doctrine and jurisprudence as those examined when assessing an arrest's correctness. However, the legislator has determined that the examination of the correctness of this activity during a grievance procedure does not undermine the act itself, in the sense that the finding of its incorrectness does not create the procedural consequence of ordering the immediate release of the arrested person. In this case, the court only notifies the public prosecutor and the superior authority to the one that made the arrest under Article 246(3) and (4) CCP. This interpretation indicates that also in the case of procedural arrest, the correctness has been referred by the legislator to the whole sequence of peri-arrest activities. This is important insofar as any arrestee may claim compensation for unquestionably unjust arrest under the provisions of Chapter 58 of the Polish CCP. The judicature has stated that only legality and correctness are subject to review in the examination of a compensation motion (Appellate Court in Kraków, ref. no. II Aka 146/09),[15] which notably justifies considerations on this matter.

We shall also briefly characterize the other elements of the judicial review of the factual action of arrest: legitimacy and legality. The control of legality verifies the conformity of an arrest with the applicable law, while legitimacy refers to the evaluation of the facts and of the proportionality, which justifies the advisability and necessity of applying this coercive measure (Hofmański et al., 2011, pp. 1354–1355). The arrest is lawful when the authorized body made it (or the authorized body issued a relevant procedural decision, e.g. Article 247 CCP) when the person could have been detained (lack of negative premises, e.g. immunity), and when it occurs without violation of any of the premises under Article 248 CCP. The legitimacy of arrest, however, is characterized by the criminal trial doctrine as the occurrence of sufficient factual grounds to arrest a person and to determine the appropriateness of applying this coercive measure under the circumstances of the case (Grajewski & Steinborn, 2003, p. 14; Hofmański, 1998, p. 309; Hofmański et al., 2011, p. 1354). Appropriateness is understood as ensuring the proper course of the proceedings and issuing a good decision on the matter. In his monograph, Cora (2015, p. 327) rightly notes that the authorities have a considerable margin of discretion in deciding whether to arrest a person, which in turn should lead to a declaration that an arrest was illegitimate whenever there are any doubts as to the grounds for performing this action.

Although the prisms of judicial review are broad, permitting verification of instrumentalization within the three indicated areas, the specificity of the

[15] Judgment of the Appellate Court in Kraków of 10 September 2009, II AKa 146/09.

arrest action renders judicial review incapable of preventing instrumentalization. This hypothesis is confirmed by the variants of the court's rulings in the complaint procedure. As we indicated above, the criteria of judicial review differ depending on whether the arrest was a factual action (Article 244 CCP) or whether it was preceded by an appropriate procedural decision to arrest a person (Article 247 CCP). Another criterion distinguishing the types of possible rulings is the arrestee's status when the complaint is heard, in other words, whether they are still deprived of their liberty. This element is essential insofar as the court may decide to release the arrested person – regardless of whether the arrest was made under Article 244 CCP or Article 247 CCP. The court may uphold the order in question if the arrest was made under Article 247 CCP (prosecutorial arrest) and the person remains in custody. If the complaint is deemed well-founded (thus, if the arrest is deemed illegitimate, illegal or incorrect), the court must annul the contested procedural decision and, by a decree, immediately release the arrestee under Article 246(3) CCP. In contrast, ruling on the complaint against the factual action of arrest (Article 244 CCP) may, for obvious reasons, result in a ruling on the legitimacy or illegitimacy of the arrest (Ludwiczek, 1998, p. 45) and eventually ordering the immediate release of the arrested person. Simultaneously, in each case, once a court finds that the arrest is illegitimate, illegal or incorrect, it shall notify the public prosecutor and the authority superior to the one that made the arrest. Detected cases of instrumentalization do not cause complex procedural consequences. If irregularities of arrest are found, disciplinary sanctions may be imposed on the persons who have committed them.

IV. NON-CRIMINAL PROCEEDINGS ARREST

Non-criminal procedure arrest (NCPA) is unrelated to particular criminal proceedings and fulfills different functions than strictly procedural ones: it is performed on grounds laid within specific norms (Cora, 2008, p. 72; Grzegorczyk, 2005, p. 625; Woźniewski, 2005, p. 73). Undoubtedly, one common feature of PA and NCPA is that a person's liberty is deprived (even for a short period), and for procedural arrests, this may include freedom of movement restrictions (Cora, 2008, p. 76). It is emphasized that it is impossible for an arrest not to violate the arrestee's freedom (Kobus & Dziugieł, 2006, p. 212). Fundamentally, the issue that distinguishes procedural from non-procedural arrests lies in the characteristics of the arrested person. In non-procedural arrests, not only are the arrested persons not parties to the proceedings (suspects or accused) but also they are not even (formally) suspected persons (Cora, 2008, p. 77). The rationale for NCPAs is tied to the grounds set out in the provisions of the special laws that regulate the seven types of NCPA arrests that can be distinguished. The types include (1) preventive arrest; (2) penitentiary arrest; (3) administrative arrest; (4) arrest of a person to isolate them; (5) arrest of a foreigner for deportation purposes; (6) arrest of domestic violence perpetrators; and

(7) short-term arrest – although there is controversy about the actual nature of this type of action (Dana, 2012, pp. 17–19). Given the purpose of this paper, we will emphasize issues related to preventive, administrative and short-term (temporary) arrest. This is because preventive and temporary arrests are most similar to a police stop, which is distinct from arrest, but such stop is not present within the Polish legal system. We have also decided to discuss administrative arrest in detail because of the broad scope of potential instrumentalization resulting from the lack of precise substantive regulations and the discretionary power of non-judicial actors in applying direct coercive measures.

1. Preventive and penitentiary arrest: Activities carried out under the Police Act

We view preventive arrest as the first and most relevant type of non-procedural arrest. The authority performing such arrests is the police. The legal grounds for preventive arrests lie in Article 15(1)(3) of the Police Act, under which police officers may arrest persons who are an apparent direct threat to human life or health or property. The procedure may, in principle, be used to arrest any person whose behaviour creates a justified suspicion that a crime or minor offence either is about to be committed or has been committed and who poses a threat to public order and safety. It can also take place when it is necessary to prevent the perpetration of a crime or minor offence at railway stations, ports and in means of transport, or when concerning persons on whom items acquired through crime have been discovered (Dana, 2012, p. 22). Excluded from the group of people who may be arrested under this procedure are individuals with substantive and formal immunity. Such arrests follow guidelines under the Ordinance, which in § 8(1) precisely specifies the manner of performing non-procedural arrests, and in § 9(1) the procedure to be followed after an arrested person is brought to a police station. It should be borne in mind that officers are required to document their official actions. The scope of instructions, rights and information contained in the protocol in the case of an arrest under this procedure is analogous to the already discussed police arrest under Article 244 CCP.

Another type of NCPA is penitentiary arrest. People deprived of their liberty who, upon a decision issued by a competent authority, have left a penitentiary institution or detention centre and have not returned to it within the prescribed period, may be arrested under this procedure (Dana, 2012, p. 24). Furthermore, in Polish law, failure to return to prison is a crime (Article 242(2) CC). The purpose of arrest is solely to bring such a person to the relevant penitentiary unit (Dana, 2012, p. 25). The police can arrest following this procedure under Article 15(1)(2a) of the Police Act. Subsequently, the arrest procedure follows the guidelines under § 8 and § 9 of the Ordinance. Moreover, arrests can also be made by Prison Service officers under Article 18(1)(7) of the Prison Service Act.[16]

[16] Act of 9 April 2010 on the Prison Service, JL 2022, item 2470.

2. Administrative arrests and challenges with gaps within relevant legislation

Administrative arrests aim to eliminate a specific threat posed to oneself or public order by the individual, with the most frequent reference made to intoxicated persons who may create disorder in public spaces (Dana, 2012, p. 27). We will discuss only the two most relevant types of administrative arrests. Such arrests are usually based on Article 40(1) of the Act on Upbringing in Sobriety and Counteracting Alcoholism of 26 October 1982.[17] In the literature, the behaviour described therein is considered public intoxication (Skrzydło-Niżnik & Zalas, 2002, pp. 411–412). Pursuant to Article 40(3), an arrest under this procedure may be made by a police officer or a municipal police officer. Suppose an arrest of an intoxicated perpetrator of a crime or a minor offence occurs. In that case, the relevant type of procedural arrest will occur although Article 15(3) of the Police Act will co-constitute the grounds for making the arrest.

Within different forms of administrative arrests, we can distinguish one under the Mental Health Protection Act [MHPA] of 19 August 1994.[18] It is used when a mentally ill person refuses psychiatric treatment, and their behaviour to date indicates that non-admission to a psychiatric hospital will result in a significant deterioration of their mental health or they are incapable of satisfying their own living needs, with a reasonable expectation of improvement in their health due to treatment in a psychiatric hospital. An individual shall be ordered to a psychiatric hospital by the guardianship court, which shall do so at the request of an entitled entity. Under Article 40(2) MHPA, a person who has been admitted to a social welfare home and who refuses or obstructs the execution of this order may be arrested and forcibly brought there. In addition, Article 46(2a) provides grounds for arrest, stating that if a mentally ill person whom an expert shall examine refuses to appear at the indicated place or otherwise evades the examination, the court may order that the person be arrested and forcibly brought by the police to the designated place. An analogous procedure shall be followed when the conditions of Article 46(2c) MHPA are met concerning a mentally ill person in respect of whom an order for admission to a psychiatric hospital has been issued and who refuses to appear in the psychiatric hospital or otherwise obstructs the execution of this order. In such a case, the court may order the arrest and coercive transport of the ill person both *ex officio* and at the request of a psychiatrist authorized by the voivodship marshal. Notably, the doctor decides to use coercion with an ill person, specifies the type of coercive measure applied, and supervises its execution. Each case involving direct coercion and warning of its application must be recorded in the medical records.

The issue of the legislator's complete omission of regulations on the enforcement of arrests under MHPA is particularly problematic. In this case,

[17] Act of 26 October 1982 on Upbringing in Sobriety and Counteracting Alcoholism, JL 2021, item 1119, 2469, 2022, item 24, 218, 1700, 2185.

[18] Act of 19 August 1994 on Mental Health Protection, JL 2022, item 2123.

one can speak of a legislation gap (Kartasiński, 2020, p. 187). Its significance lies in the fact that the analysed provisions allow for the possibility to arrest and forcibly transport a psychiatric patient in order to execute a relevant court decision *de facto* refer to the stage of executive proceedings. As a consequence, there are no guidelines as to how to deal with an arrested ill person who is subject to the executed order. Nevertheless, since the provisions of the CCP apply accordingly to the arrest of an ill person under this procedure, the arrest should be made in the manner specified in § 8 and § 9 of the Ordinance, while additionally – under § 3(4) and (5) in connection with § 34(4) of the Ordinance no. 360 of the Police Commander-in-Chief on the methods and forms of carrying out escorts and escorts by police officers of 26 March 2009,[19] the arrest of an ill person shall be made in the presence of a doctor, a nurse or a medical emergency team of a specific medical entity indicated by the court.

However, the problem is that the legislation does not define temporal limits for the arrest of such persons. For this reason, Kartasiński's (2020, p. 192) recommendation to introduce temporal limits for the guardianship court's ability to order the arrest or forcible admission to a psychiatric hospital or a social welfare home seems justified. The duration of a patient's stay in a psychiatric hospital, in turn, depends on the premises under Article 29 of MHPA, which conditions the patient's admission to this institution. Noteworthy is the fact that the legislator has slightly enhanced the safeguarding nature of this procedure by introducing the institution of compulsory legal aid (*ex officio*) in Article 48 of the analysed Act. Consequently, an *ex officio* attorney is always granted to a person subject to proceedings for an arrest and forcible admission order under the MHPA. The issue of entitlement to a complaint against a court's order for arrest and forcible admission of a person is controversial (Kartasiński, 2020, pp. 220–222), and therefore, *de lege ferenda*, the legislator should unequivocally resolve this issue.

3. Other types of non-procedural arrests

The other types of arrests include the arrest of a perpetrator of domestic violence under Article 15a of the Police Act, which extends the grounds for the use of procedural arrest from Article 244(1a) and (1b) CCP. In addition, the types of NCPA include the arrest of a foreigner for deportation purposes under the Act on Foreigners[20] and the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland.[21] The Polish Constitution provides for three categories of states of emergency: martial law, a state of natural disaster, and a state of emergency. Only one special law that governs states of emergency allows for arresting a person. This is the Act of 21 June 2002 on the

[19] Ordinance no. 360 of the Police Commander-in-Chief on the methods and forms of carrying out escorts and escorts by police officers of 26 March 2009, JL 2023, item 2151.

[20] Act of 12 December 2013 on Foreigners, JL 2021, item 2354; 2022 item 91, 583, 830, 835, 1383, 1561, 2185.

[21] Act of 13 June 2003 on Granting Protection to Foreigners on the Territory of the Republic of Poland, JL 2022, item 1264, 1383.

State of Emergency,[22] which in Article 17 allows a person to be stopped and forcibly transported to a detention centre. It is worth emphasizing that the isolation of an individual under this procedure does not violate the immunities granted by separate laws.

We shall also discuss temporary arrests and actions related to them, which are similar to arrests. Temporary arrests are performed under Article 15(1)(1) of the Police Act, in order to identify a person, establish their identity, instruct them or impose a fine (Dana, 2012, p. 18). The very act of identifying is based on establishing or confirming the identity and other data of a person from the documents in their possession and is of an administrative and orderly nature (Dana, 2012, p. 45). Another activity similar to arrest is a personal inspection, which police officers may perform under Article 15(1)(5) of the Police Act. It may be conducted if there is a reasonable suspicion that a criminal offence has been committed or to find items specified by law. However, the doctrine has indicated that the actual deprivation of liberty by bringing a person to a police station for identification is not an arrest (Stefański, 1997, pp. 32–61). Although the person subject to identification must await the establishment of their identity – and hence have their liberty restricted – it is not an arrest within the meaning of Article 15(1)(3) of the Police Act (Pracki, 1996, pp. 107–111). Given the nature of this paper, we will forego the discussion about stadium arrests. Let us note that any of the above actions can be carried out by the police, thus following the scheme set out in § 8 and § 9 of the Ordinance.

V. CONCLUSIONS

This study confirms the thesis on the risk of instrumentalization at the structural level, given the absence of substantive limitations regarding the type of criminal proceedings when procedural arrest may be used and the grounds of arrest. Furthermore, it confirms the risk of instrumentalization concerning the performance of the so-called 'peri-arrest activities', particularly regarding defence rights. Within instrumentalization, three formulas were distinguished: abuse of law *sensu stricto*, abuse of law *sensu largo*, and violation of the law. Regarding the identified risks of instrumentalization, all abuse of power by authorities may occur. When considering procedural arrests, a particular risk of instrumentalization relates to the execution of peri-arrest activities and the deficiency of safeguards. As for non-procedural arrests, the procedural standard set by the Ordinance, and therefore a standard similar to procedural arrests, applies to most of them. What is problematic, however, are those procedural arrests that may be performed by authorities other than the police.

[22] Act of 21 June 2002 on the State of Emergency, JL 2017, item 1928.

The Polish Constitution[23] in Article 31 provides a rule for the exceptional and proportional use of coercive measures of an isolating nature. Under Article 7 of the Polish Constitution, public authorities must act according to and within the limits of the law. This leads to the conclusion that the arrest of citizens in a democratic state under the rule of law should be an exception (especially in the context of non-procedural arrests). Meanwhile, the legislator entrusts the public authorities with a broad *imperium*, granting them a sizeable discretionary leeway. Therefore, short-term deprivations of liberty should be closely monitored. There is, however, no detailed statistical information on the dynamics of their use. Such a state of affairs raises concerns. The absence of satisfactory guarantee standards and sufficient control over short-term arrests causes numerous malpractices by authorities that could easily be avoided.

In this paper, we examined the selected case laws that have confirmed the risk of instrumentalization regarding the use of short-term deprivation of liberty. We found that there are significant gaps when it comes to effective safeguards granted to the arrestees. One of the main spheres left for improvement is the degree of digitalization involved during arrests. As we indicated in the section on the Ombudsman's case studies, we believe that the recording of the activity should begin before the first action and last for the entire duration of the arrest. Further possible safeguard amendments could be to introduce on-call lists of attorneys. Such a solution would enable arrested persons to fully exercise their right to legal counsel. Another sphere in which we could see improvement is the order of the peri-arrest activities. We established that the current legislation seems to be suboptimal in terms of procedural safeguards for the arrestee. We propose reconsidering the sequence of peri-arrest actions and reversing them in such an order that the arrestee should first be allowed to contact a legal representative (if they wish to exercise their right), and only then proceed with the act of hearing. All of the proposed changes would also fulfill the minimal standards imposed by Directive 2013/48/EU, which at this moment, is only falsely claimed to be implemented into the Polish Code of Criminal Procedure. Finally, the last element to be emphasized is the need to adjust and respect the procedural guarantees available to arrestees on the grounds of non-procedural types of detention. Currently, this issue may seem questionable or, at best, ambiguous. From the point of view of procedural correctness and correspondence with constitutional requirements, it is necessary to extend identical protection to arrestees briefly deprived of liberty through detentions carried out outside the criminal procedure with such guarantees as those to which detainees are entitled under Article 244 CCP.

[23] Constitution of the Republic of Poland of 2 April 1997, JL 1997, No. 78, item 483, as amended).

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