Warsaw, 20 March 2023

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**The European Court of Human Rights**
**Mr. Marko Bošnjak**
**President of the First Section**
Council of Europe
67075 Strasbourg-Cedex
France

**Ref. *Szczerba v. Poland***
**Application no. 15626/17**

Pursuant to the letter of Ms Renata Degener, the Section Registrar of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 27 February 2023 granting us leave to make written submission to the Court by 20 March 2023, the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland, would like to respectfully present its written comments on the case of Michał Szczerba v. Poland (application no. 15626/17).

On behalf of the Helsinki Foundation for Human Rights,

*Dr Piotr Kładoczny*
Vice President of the Board
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Warsaw, 20 March 2023

**WRITTEN COMMENTS**

**BY**

**THE HELSINKI FOUNDATION FOR HUMAN RIGHTS**

***Szczerba v. Poland***

**Application no. 15626/17**


**EXECUTIVE SUMMARY:**

- Parliamentary speech of the opposition MPs enjoys an elevated level of protection under Article 10 ECHR. Therefore, the law should be particularly clear and procedural safeguards duly provided.
- The vagueness of Article 175 of the Rules of the Sejm – giving basis for exclusion of MP from the session – should be counterbalanced by adequate procedural safeguards.
- When assessing legality, the Foundation invites the Court to take into account doubts in respect of compatibility of Article 175 of the Rules of the Sejm with the Constitution.
- In light of the practice of exclusion and subsequent appeals, there are doubts as to whether the Presidium of Sejm is an independent body, which is capable to deal with submitted appeals in effective manner, giving reasonable prospect of success.
- Neither law, nor practice give basis to claim that proportionality of the interference was duly considered by the Presidium of the Sejm.


## I. INTRODUCTION

1. Under Article 36 of the European Convention on Human Rights ('ECHR', 'the Convention'), pursuant to the leave granted on 27 February 2023 by the President of the Section of the European Court of Human Rights ('ECtHR', 'the Court'), the Helsinki Foundation of Human Rights ('HFHR', 'The Foundation') presents its written comments on the case of *Szczerba v. Poland* (application no. 15626/17), concerning the exclusion of opposition MP from the session of the lower chamber of the Polish parliament for alleged disruption of its work.

## II. APPLICABLE DOMESTIC PROVISIONS AND THEIR PRACTICAL APPLICATION

2. Before we proceed to the analysis of applicable legal standards in more general manner, it seems instrumental to outline the practice of exclusion from the sittings of the Sejm. It can be instructive for the Court to see how the provisions on exclusion (and further appeal against it) are framed and how do they work in practice.

3. According to Article 175(2) of the Rules of the Sejm, if a deputy during his speech departs from the subject of debate, can be reprimanded by the Speaker. Following the second reprimand, the Speaker may discontinue the speech of the MP concerned. Under Article 175(3), a deputy, after having been reprimanded, might be called to order by the Speaker, if a deputy makes it impossible to carry out the debate. Article 175(4) stipulates that in the event of non-compliance to warning submitted by virtue of Article 175(3), the Speaker might repeat a call to order and state that a deputy makes it impossible to carry out the debate. Following the application of Article 175(4), providing that a deputy still makes it impossible to carry out the debate, the Speaker is empowered – under Article 175(5) – to exclude MP from the session.

4. Under Article 175(6) the MP can submit an appeal to the Presidium of the Sejm – organ of the Sejm Presidium in an organ of the Sejm composed of the Speaker and Vice-Speakers of the Sejm.[1] The Presidium shall issue its decision on the matter urgently, after receiving an opinion of the Rules, Deputies' Affairs and Immunities Committee of the Sejm. Until the case is decided by the Presidium, the MP cannot participate in the session of the Sejm.

5. Article 25(1) of the Rules of the Sejm provides that the remuneration of the MP excluded from the session is reduced as if he was absent during the session. Moreover, Article 25(2) allows the Presidium to reduce the remuneration up to ½, as well as to forfeit the parliamentary allowance, for a period lasting up to 6 months.

6. For the purpose of drafting this *amicus curiae* brief, the Foundation submitted a motion to the Chancellery of the Sejm to disclose public information concerning the practice of exclusion of MPs from sessions of the Sejm. The documents we received are appended to this opinion. Important information stemming from these documents are also described in subsequent paragraphs.

7. We were informed that during VI and VII Sejm's term of office (2007—2015) there had been no decision of the Presidium of Sejm on exclusion of MPs.[2] However, the situation has changed in the following terms of office of the Sejm. From the beginning of VIII Sejm's term of office (12 October 2015) to 9 December 2022 (the date when the Foundation received a response from the Chancellery of the Sejm) there were 17 exclusions of MPs from session of the Sejm.[3] In 14 cases exclusion concerned MPs of the "Confederation" club, out which 11 concerned one deputy – Mr. G. Braun. Deputies of the Confederation

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[1] At the moment, there are 6 members of the Presidium: Speaker and 2 Vice-Speakers from the Law and Justice and 3 Vice-Speakers from the opposition.

[2] Nevertheless, it seems that the Speaker excluded Mr. Armand Ryfiński (opposition MP) on 11 September 2015. Previous decisions were taken in 2002, 2004 and 2005, and are described in P. Malec-Lewandowski, *Wykluczenie posła z posiedzenia Sejmu (art. 175 ust. 5 Regulaminu Sejmu) w świetle prac Komisji Regulaminowej i Spraw Poselskich*, Studia Prawa Publicznego 16(4)/2016, p. 143-169. It appears that previous decisions on exclusion concerned persistent obstruction or clearly disruptive behaviour.

[3] Only one of these exclusions was carried out during VIII Sejm's term of office, whereas the remaining 16 – during IX Sejm's term of office.

were excluded mostly for violation of the obligation to wear mask during COVID-19 pandemic. However, in one case Mr. Braun was excluded for stating during the sitting of the Sejm that Mr. A. Niedzielski, the minister of health, and said that the minister 'will hang'.[4] In 3 cases the exclusion concerned MPs – Mr. M. Szczerba, Mr. S. Nitras and Mrs. K. Jachira – from the Civic Platform, the most numerous opposition party in the Parliament since 2015. The case of Mr. Szczerba is the subject of proceedings in the present case. The exclusion of Mr. Nitras and Mrs. Jachira took place on 27 October 2020, during the session of the Sejm following the judgment of the Constitutional Tribunal of 22 October 2020 concerning the legality of abortion. The atmosphere in the Sejm was tense, and opposition MPs protested against controversial decision of the Constitutional Tribunal. Although the vice-speaker issued warnings, in respect of Mrs. Jachira, the period between first warning and exclusion was approximately 25 seconds. As it can be seen on the recording, it appears that the vice-speaker issued orders on exclusion without paying heed to individual assessment of the dynamic situation at hand. Some remarks of the vice-speaker – not reflected in the minutes, but hearable – can be considered inappropriate and raising doubts as to the impartiality of him in his official capacity.[5]

8. In 9 of the abovementioned cases the excluded MPs appealed to the Presidium of the Sejm. However, none of them was successful: in all cases the Presidium upheld the decision of the Speaker.

9. We were also provided with collection of resolutions of the Presidium of the Sejm concerning exclusion from the session of the Sejm. In our opinion the common denominators of all these resolutions are: brevity, lack of balancing exercise, summary reference to facts of the case etc. The Foundation draws attention of the Court to the fact that in cases of MPs Szczerba, Nitras and Jachira (Civic Platform) all members of Presidium from the opposition voted against upholding the decision of the Speaker, and those from the ruling party – for. In all other cases decisions were reached unanimously.

## III. POLISH LEGAL FRAMEWORK IN THE LIGHT OF THE ECHR STANDARDS

*General principles governing assessment of cases concerning political speech in the parliament*

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[4] See: *Bulwersujące zachowanie Grzegorza Brauna w Sejmie. Groził śmiercią ministrowi zdrowia*, „PAP", 16 September 2021, <https://www.pap.pl/aktualnosci/news%2C947724%2Cbulwersujace-zachowanie-grzegorza-brauna-w-sejmie-grozil-smiercia>.

[5] See: the minutes of the sitting of the Sejm, 27 October 2020, <https://orka2.sejm.gov.pl/StenoInter9.nsf/0/59C073768EDDA951C1258625002892EF/%24File/20_a_ksiazka_bis.pdf>, in particular p. 6-7; The recording of this sitting: <https://www.sejm.gov.pl/sejm9.nsf/transmisja.xsp?documentId=680786EF92AF7683C12586070037E18B&symbol=STENOGRAM_TRANSMISJA>, in particular between 10:28:40 and 10:33:40).

10. As regards general principles of the Convention in respect of the freedom of speech (Article 10 ECHR), there are several principles formulated by the Court that must be emphasised: (1) there is little room for restrictions under Article 10 ECHR on political speech or on the debate of questions of public interest, (2) parliamentary speech enjoys an elevated level of protection,[6] (3) interferences with the freedom of expression of opposition members of parliament call for the closest scrutiny on the part of the Court, as it is important to protect parliamentary minority from abuse by the majority.[7]

11. It can be added that not only the substance or content of ideas and information disseminated are protected under Article 10 ECHR, but also the form thereof.[8] In the context of parliamentary practice the Court held that it is important to distinguish between the substance of parliamentary speech and the time, place and manner in which such speech is conveyed. The inference with the content of speech is admissible only in limited circumstances, e.g. when there are calls for violence. Nevertheless, parliaments are empowered to regulate the time, place and manner of speech in parliament.[9] It seems that the fair balance must be struck between the freedom of MP to choose the form of imparting information, and the right of the Parliament to maintain appropriate rules on MP's conduct in this respect.[10] It appears that the orderly functioning of the Parliament should be an indicator whether a particular form of imparting information can be accepted.

*Foreseeability of the legal basis*

12. In the opinion of HFHR, these elevated standards apply not only to the requirement of proportionality of interference, but also to the requirement of legality, in particular of foreseeability of legal basis.[11] Therefore, the legal basis for interference in the context of parliamentary debate should be of particular clarity and foreseeability.[12] The requirement of quality of law is met, when the legal provisions – however vague in some instances – are interpreted and applied by legal bodies (including courts) in a consistent manner in order for the individual to enable him/her to foresee the result of his/her conduct.[13] Therefore, the foreseeability of domestic legislation will – to large extent – depend on previous interpretation and application of law in other cases.

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[6] See *Stoll v. Switzerland* [GC], App no. 69698/01, 10 December 2007, § 106.
[7] See e.g. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], App no. 14305/17, 22 December 2020, § 242—245.
[8] See e.g. *Murat Vural v. Turkey*, App no. 9540/07, 21 October 2014, § 53.
[9] *Karácsony and Others v. Hungary* [GC], App nos. 42461/13 et al., 17 May 2016, § 140.
[10] See *mutatis mutandis Karácsony and Others v. Hungary* [GC], App nos. 42461/13 et al., 17 May 2016, § 141.
[11] See implicitly *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], App no. 201/17, 20 January 2020, § 93—101, 116.
[12] Although the Court held otherwise in *Karácsony and Others v. Hungary* [GC], App nos. 42461/13 et al., 17 May 2016, § 126.
[13] See *Savva Terentyev v. Russia*, App no. 10692/09, 28 August 2018, § 54-55 and *mutatis mutandis Gorzelik v. Poland* [GC] App no. 44158/98, 17 February 2004, § 64.

13. Under Article 175 of the Rules of the Sejm, the warning and subsequent exclusion are contingent upon 'rendering the conduct of the session impossible' by the MP concerned. While it is true that it is not impossible to regulate one's conduct under these provisions, it is also true that this expression is vague, and the scope of borderline cases is rather broad. Therefore, such a legal basis should be counterbalanced by appropriate legal safeguards against abuse, both in substantive and procedural law.

14. It is important to emphasise that Article 175(5) of the Rules of the Sejm provides discretionary power to the Speaker of the Sejm, by use of words 'has a right to make a decision on exclusion'. The Court held that 'a law which confers a discretion is thus not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference'.[14] In the opinion of the Foundation the wording of Article 175 of the Rules of the Sejm provides no indications as to the manner of exercise of discretion conferred upon the Speaker. The substantive law in question does not include any criteria for determination whether the MP have indeed disrupted the session of the Sejm.

*Compatibility of the legal basis with the Constitution*

15. It also seems instructive to provide the Court with doubts, which arose to the legitimacy of insertion of the power of exclusion to the Rules of the Sejm, which is only internally binding act. According to Polish Ombudsman,[15] exclusion is incompatible with Articles 106 and 112 the Constitution of the Republic of Poland. Article 106 prescribes that 'conditions appropriate to the effective discharge of their duties by Deputies as well as for defence for defence of their rights resulting from the performance of their mandate shall be specified by statute'. Moreover, the general limitation clause, provided by Article 31(3) of the Constitution, requires that any limitation of constitutional rights and freedoms (including freedom of speech) shall be prescribed by statute. On the other hand, Article 112 stipulates that 'the internal organization and conduct of work of the Sejm and the procedure for appointment and operation of its organs as well as the manner of performance of obligations, both constitutional and statutory, by State organs in relation to the Sejm, shall be specified in the rules of procedure adopted by the Sejm'. Therefore, it seems that exclusion from the session of the Sejm falls within the scope of Article 106, but is not covered by Article 112. Although the Court has been reluctant to take into

[14] *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], App no. 201/17, 20 January 2020, § 94.

[15] See: Commissioner for Human Rights, letter to the chairman of the Rules, Deputies' Affairs and Immunities Committee of the Sejm, 22 August 2022, <https://bip.brpo.gov.pl/pl/content/wykluczanie-posla-z-obrad-rpo-powinien-istniec-skuteczny-srodek-odwolawczy>.

account alleged incompatibility of domestic provisions with national constitutions,[16] it is worth to note that persons excluded from the session of the Sejm have no judicial recourse to examine validity of such legislation, as there is no ordinary judicial review[17], as well as the individual measure to initiate proceedings before the Constitutional Tribunal.[18] Therefore the Foundation invites the Court to take this factor into account when assessing legality of the interference.

*Procedural issues*

16. The Foundation also finds it desirable to discuss procedural requirements stemming from Article 10 ECHR, in conjunction with Article 13 ECHR or alone.

17. First, it seems important to outline that the Court held that in the parliamentary context the MP 'who has been disciplinarily sanctioned cannot be considered entitled to a remedy to contest his sanction outside Parliament'.[19] On the other hand, the requirement of impartiality of the appellate body[20] cannot be invalidated solely because of the fact that the limitation of the freedom of speech takes place in the Parliament. One may ask a question whether the procedure before the Presidium of the Sejm meets requirements of sufficient independence and impartiality. It is important to stress that the Presidium of the Sejm of VII, VIII and IX term of office has consisted of Speaker, two vice-speakers (affiliated with the ruling party/coalition) and three vice-speakers affiliated with the opposition. As Article 13(4) prescribes that in the cases of the same number of votes for and against the resolution of the Presidium of the Sejm, the vote of the Speaker is decisive, it cannot be said that the procedure is free from being susceptible to purely political influence. In the opinion of the Foundation, the statistics on exclusions and examination of appeals (discussed above) clearly prove that members of the Presidium voted in line with their political affiliations.

18. Yet another problem is caused by the fact that Speaker (or Vice-Speaker) who decided on the exclusion is entitled to participate and vote in the Presidium over the excluded

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[16] See e.g. *Sindicatul "Pastorul cel Bun" v. Hungary* [GC], App no. 2330/09, 9 July 2013, § 156—157; *N.K.M. v. Hungary*, App no. 66529/11, 14 May 2013, § 52—54; *Bayatyan v. Armenia* [GC], App no. 23459/03, 7 July 2011, § 115—116.

[17] See in this respect decision of the Supreme Administrative Court of 28 July 2022, No. III OSK 1343/22.

[18] Under Article 79 of the Constitution of the Republic Poland constitutional complaint can be submitted by an individual, if there was final decision of the court or public administration body. As the Presidium of the Sejm is neither of the two, it seems that constitutional complaint would be considered inadmissible. Moreover, the Foundation is of the opinion that since 2016 the Constitutional Tribunal cannot be considered a tribunal established by law (see *Xero Flor w Polsce sp. z o.o. v. Poland*, App no. 4907/18, 7 May 2021) and its adjudicatory role has been greatly impaired. Thus it cannot provide effective measures for the applicants to ECtHR in general.

[19] See *mutatis mutandis Karácsony and Others v. Hungary* [GC], App nos. 42461/13 et al., 17 May 2016, § 157.

[20] See *mutatis mutandis* e.g. *Riener v. Bulgaria*, App no. 46343/99, 23 May 2006, § 138; *Özpinar v. Turkey*, App no. 20999/04, 19 October 2010, § 85; *Mugemangango v. Belgium* [GC], App no. 310/15, 10 July 2020, § 70.

MP's appeal. Such person may be seen as insufficiently impartial because he/she has already expressed the view on the matter before, during the session of the Sejm.[21] It seems that such situation could be avoided because there certainly is a possibility of construction of proceedings with less doubts as to the impartiality, for example in the parliamentary commission.

19. Second, under Article 13 ECHR the measure of legal protection must be effective.[22] The requirements of effectiveness imposes on the domestic authority the obligation to assess the legality, existence of legitimate aim, necessity and proportionality.[23] It is clear that neither provisions of the Rules of the Sejm, nor established practice of the Presidium of the Sejm, give basis to claim that the Presidium duly examines all these factors.

20. Moreover, although the effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant, the remedy must be effective in law, as well as in practice.[24] The burden of proof as to the effectiveness is on the state party.[25] The assessment of effectiveness of a measure under Article 13 ECHR can, at least to some extent, depend on general legal and political context and personal circumstances of the applicant.[26] The Foundation claims that the fact that all appeals submitted under Article 175(6) of the Rules of the Sejm were dismissed can contribute to finding that it is not an effective measure in practice.

21. Third, the requirement of effectiveness covers also minimal guarantees of promptness.[27] It seems that in the context of the debate in the Parliament it is of particular importance, as a person excluded from the session under Article 175(5) of the Rules of the Sejm, cannot participate in it until the end thereof, which means that he/she cannot exercise his/her freedom of speech or perform his/her obligations (in particular, he/she cannot vote). Given of what is at stake, it seems that any decision on this point should be taken urgently. The Rules of the Sejm do not provide any regulations on the period within of which the decision should be taken[28].

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[21] See P. Malec-Lewandowski, *Wykluczenie posła z posiedzenia Sejmu (art. 175 ust. 5 Regulaminu Sejmu) w świetle prac Komisji Regulaminowej i Spraw Poselskich*, Studia Prawa Publicznego 16(4)/2016, p. 159.

[22] See e.g. *Maskhadova and Others v. Russia*, App no. 18071/05, 6 June 2013, § 242.

[23] See *Neshkov and Others v. Bulgaria*, App nos. 36925/10 et al., 27 January 2015, § 185 with references cited therein.

[24] See *Kudła v. Poland* [GC], App no. 30210/96, 26 October 2000, § 157.

[25] *Wcisło and Cabaj v. Poland*, App nos. 49725/11, 8 November 2018, § 158.

[26] *Ivko v. Russia*, App no. 30575/08, 15 December 2015, § 82.

[27] See *Kadikis v. Latvia (no. 2)*, App no. 62393/00, 4 May 2006, § 62.

[28] Nevertheless, in the cases of exclusion of MPs Szczerba, Jachira, Nitras, as well as of 2 exclusions of Mr. Braun (21 June 2021, 16 September 2021), the exclusion, the submission of the appeal, and the decision of the Presidium of the Sejm toook place on the same day. Nevertheless, in 4 other cases of Mr. Braun (exclusions of 7 July, 29 September, 16 and 30 November 2021) the period between lodging an appeal and its examination was 14, 3, 6 and 7 days respectively. Even if it seems insignificant period of time, it can effectively impair the participation of MP in the session of the Sejm, as these sessions usually last several days.

*Proportionality of the interference*

22. The Foundation draws attention of the Court to the fact that exclusion from the debate under Article 175 of the Rules of the Sejm is a prerequisite for obligatory lowering of his remuneration under rules applicable for absent MPs (Article 25(1) of the Rules of the Sejm), as well as discretionary decision of the Presidium of the Sejm to lower by up to 50% remuneration of the excluded MP or have his parliamentary allowance forfeited, for a period up to 6 months (Article 25(2) of the Rules of the Sejm). Therefore, the interference with the freedom of speech does not only result in exclusion from the session of the Sejm (and impairment of possibility of dissemination of MP's views), but can also result in a form of pecuniary sanction, which can amount (as of 2023) to approximately 40,000 PLN. Without any doubt, this can impact the assessment of proportionality of interference carried out by the Court.

23. It seems that in cases where Article 175 of the Rules of the Sejm is invoked, in line with the wording of these provisions, the legitimate aim of limitation pursued under Article 10(2) ECHR, is prevention of disorder, and, potentially protection of rights of other MPs.[29] As regards the freedom of speech in the unique parliamentary context, it seems that such measures should be aimed at enabling the effective functioning of the Parliament.[30] Therefore, in the opinion of the Foundation, when there is no risk of disruption of the smooth and effective operation of the Parliament—in particular when a MP follows the rules of the session by speaking within allocated time, in allocated place, and without abusive behaviour—such measures should not be used.

24. Moreover, it is for domestic authorities to provide reasons to justify the interference, which will be relevant and sufficient, and explain that the measure was proportionate to the aim pursued, using criteria acceptable under Article 10 ECHR.[31] It is difficult to say that the Polish law complies with this requirement, as neither the Speaker, nor the Presidium of the Sejm (acting as appellate body) are obliged to give written reasons for the taken decision. While it is understandable in respect of the Speaker (as the situation is dynamic), it cannot be accepted as regards the Presidium of the Sejm. Although the practice (discussed above) reveals that written reasons are attached to resolutions of the Presidium of the Sejm, they refer only to formal grounds (voting results, opinion of the Sejm's commission, the fact that discussion took place within the Presidium), without any attempt to make balancing exercise in the light of the facts of cases.

[29] See *Karácsony and Others v. Hungary* [GC], App nos. 42461/13 et al., 17 May 2016, § 151.
[30] See *Karácsony and Others v. Hungary* [GC], App nos. 42461/13 et al., 17 May 2016, § 141—147.
[31] See e.g. *Tátar and Fáber v. Hungary*, App nos. 26005/08 et al., 12 July 2012, § 35.

## IV. CONCLUSION

To sum up, we invite the Court to consider in adjudication of case of *Szczerba v. Poland* the standards presented above, with particular emphasis on procedural issues. We hope that the attached documents will also enable the Court to assess the broader practice of exclusion from the session of the Sejm. It seems that the approach of the Court in respect of parliamentary debate can be clarified in the case at hand and we invite the Court to do so.

Attachments:

1. The table sent by the Chancellery of the Sejm, including decisions on exclusion against particular MPs and information on subsequent appeals
2. The collection of resolutions of the Presidium of the Sejm on appeals following exclusion from the sessions of the Sejm