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Constitutionality of Restrictions on Freedom of Assembly during the COVID-19 Pandemic in Poland

Abstract: Since the beginning of the pandemic, the Polish government has repeatedly imposed restrictions or a total ban on the freedom of assembly. A total of five different restrictions to this right were announced during this period, from a total ban on organizing and participating in assemblies to allowing assemblies in limited groups (150, 50, 5 and 2 persons). The restrictions were introduced each time by an ordinance, a legal act of a lower rank than the law. The government, wrongly, justified the authority to introduce such restrictions with the provisions of the act on preventing and combating infections and infectious diseases among people. In this paper, the author demonstrates that the ban on the organization of and participation in assemblies was introduced without a proper legal basis – by means of an ordinance instead of a statute – and contrary to the provisions of Article 57 and Article 31(3) of the Polish Constitution. The author also points out that as a result of the defective regulation, citizens have the right to refuse to accept criminal fines imposed by the police, pursuant to Article 54 of the Petty Offence Code, during assemblies. In the author's opinion, no circumstances, not even extraordinary ones, can justify the failure of authorities to observe the provisions of the Polish Constitution. Such a failure leads to a violation of the principle of individual trust in the state, legal certainty and security, and consequently the clause of a democratic legal state.

Keywords: ban on assembly, freedom of assembly, ordinance, pandemic, violation of the Constitution

Introduction

The freedom of assembly results from the natural human need to satisfy the social instinct to collectively express opinions – to support or oppose the decisions of

authorities.¹ Despite the distant history of the formation of this freedom, the first act which established it was the Pennsylvania Constitution of 1776.² On the European continent it was first guaranteed in the French Constitution of 3 September 1791, the first title of which regulated the freedom of citizens to assemble peacefully and without arms, respecting the laws of order³. Representatives of doctrine indicate that this regulation includes all the essential elements of the freedom of assembly⁴.

Today in a pluralistic and democratic state, the freedom of assembly plays a very important social function. Above all, the participants of an assembly have the opportunity to express their opinions or to propose new solutions.⁵ Thanks to this public discussion, the freedom of assembly performs a communicative function. After all, state policy is influenced through the presentation of opinions, assessments, demands or expressions of dissatisfaction.⁶

Freedom of assembly is guaranteed *expressis verbis* in Article 57 of the Polish Constitution⁷, whereas detailed regulations can be found in the Law on Assemblies.⁸ It is also guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁹ In the opinion of the Constitutional Tribunal. Freedom of assembly is a condition and necessary component of democracy, as well as a prerequisite for the exercise of other freedoms and human rights related to the sphere of public life (...). Assemblies are an essential part of democratic public opinion, providing an opportunity to influence the political process, enabling criticism and protest¹⁰ However, this does not mean that the freedom of assembly is absolute. It may be subject to restrictions, but only in accordance with the relevant provisions of the

- 1 A. Ławniczak, *Wolność zgromadzeń*, (in:) M. Jabłoński (ed.) *Realizacja i ochrona konstytucyjnych wolności praw jednostki w polskim porządku prawnym*, Wrocław 2014, p. 298.
- 2 B.P. Poore (ed.), *The Federal and States Constitutions, Colonial Charters, and Other Organic Laws of the United States*, Washington 1877, vol. 2, pp. 1544–1555; W. P. Adams, *The First American Constitutions*, Chapel Hill 1980, pp. 179–180 and 262–266.
- 3 French Constitution of 1791, <https://www.sbc.org.pl/dlibra/publication/323839/edition/305978/content> (accessed 25.08.2021).
- 4 M. Gołda-Sokolewicz, *Zgromadzenia publiczne w polskim systemie prawnym i ich znaczenie dla kultury i sztuki*, *Środkowoeuropejskie Studia Polityczne* 2014, no. 2, p. 151.
- 5 W. Sokolewicz, K. Wojtyczek, *komentarz do art. 57* (in:) L. Garlicki, M. Zubik (eds.) *Konstytucja Rzeczypospolitej Polskiej, Komentarz*. Tom II, Warsaw 2016.
- 6 See in more detail the arguments contained in the judgment of the Constitutional Tribunal of 10 July 2008 in case ref. P 15/08.
- 7 Constitution of the Republic of Poland of 2 April 1997 passed by the National Assembly on 2 April 1997, approved by the Nation in a constitutional referendum on 25 May 1997, signed by the President of the Republic of Poland on 16 July 1997, *Journal of Laws of 1997*, no. 78, item 483.
- 8 Act of 24 July 2015 – Law on Assemblies, *Journal of Laws of 2019*, item 631.
- 9 Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, *Journal of Laws of 1993* no. 61, item 284.
- 10 Judgment of the Constitutional Tribunal of 18 January 2006, ref. K 21/05, see also the judgment of the Constitutional Tribunal of 28 June 2000, ref. no. K 34/99.

1997 Constitution. The restrictions must be adequate, necessary and proportionate. The most severe restrictions can only be imposed in certain states of emergency.

Detailed regulations governing the exercise of this freedom can be found in the Law on Assemblies.¹¹ The legislator has allowed for three types of assemblies:

- 1) ordinary, requiring notification no later than six days before the planned date of the assembly (two days in the simplified procedure – if the assembly will not cause traffic obstruction),
- 2) cyclic assemblies, requiring the consent of the provincial governor, and
- 3) spontaneous assemblies, not requiring consent or notification, held in relation to a sudden event associated with the public sphere.

Moreover, the legislator indicated that an assembly may be dissolved if its course poses a threat to human life or health or property of significant size, as well as if it violates the provisions of the Law on Assemblies or criminal law. It is also possible to dissolve an assembly due to a serious threat to public safety or order or to traffic disruption on public roads in the case of spontaneous assemblies, or due to disturbances in the course of ordinary and cyclical assemblies.

The aim of this study is to analyse the acts implementing in the Polish legal system the prohibition or restriction of the freedom of assembly during a special state which does not have the nature of a constitutional state of emergency. In order to achieve this aim, two basic hypotheses were set. The first comes down to the statement that the permissible limits of freedom of assembly are indicated directly in the Constitution of the Republic of Poland and the pandemic does not constitute justification for violating these limits. The second hypothesis assumes that the restrictions imposed in Poland in relation to the COVID-19 pandemic were unconstitutional. In order to verify the hypotheses, primarily the dogmatic method was used, which includes the exegesis of standards and the analysis of judicial decisions.

1. Permissible Limits for Restricting the Constitutional Freedom of Assembly

The Polish Constitution of 1997 in Article 57 guarantees the freedom to organize peaceful assemblies and participate in them. The principles of organization, conduct and dissolution of assemblies are regulated in detail by the Law on Assemblies.¹² It follows from the provision of the basic law that in addition to previously announced assemblies, citizens also have the right to spontaneous assembly in response to sudden events in the public sphere. As it follows from the provision wording, the sub-

11 Act of 24 July 2015 – Law on Assemblies, Journal of Laws of 2019, item 631.

12 Act of 24 July 2015 – Law on Assemblies, Journal of Laws of 2019, item 631.

jective scope of this freedom includes both Polish citizens as well as foreigners and stateless persons, and also legal persons¹³ and other organizational units.¹⁴ The sine qua non condition for including an assembly in the protection of the Constitution of the Republic of Poland is its peaceful character, which should be assessed as a whole, and not on the basis of individual incidents.¹⁵ An assembly where participants incite the use of violence, insult and slander other persons or destroy private or public property does not meet the peaceful character.¹⁶ It should be noted that it is the duty of the state to ensure the security of an assembly if there is a risk of its disruption.¹⁷ 'It is the duty of the public authorities not only to remove obstacles to the exercise of the sphere of freedom of assembly and to refrain from unjustified interference with this sphere, but also to take positive steps to make this right a reality.'¹⁸

Freedom of assembly, like most other rights and freedoms, is not absolute. When considering the issue of permissible limits of its restriction, it should be emphasized that Article 57 does not contain a catalogue of such premises. There is no content suggesting any limitations that may be imposed on the organizers of an event, if the violations cited above occur during the above-mentioned activities. It should be presumed that the aim of the legislator was to regulate the freedom of assembly in such a way that the authorities in the Republic of Poland would not constrain the actions of Polish citizens, stateless persons or foreigners aimed at raising awareness of a topic aiming at familiarizing the public with slogans which are considered by the organizers of a social event as important content that should become widely known.¹⁹ This means that the freedom of assembly is subject to limitations if the premises specified in Article 31(3) of the Constitution are met, according to which 'limitations on the exercise of constitutional freedoms and rights may be established only by statute and only when they are necessary in a democratic state for its security or public order, or for the environment, health and protection of public morals public morals protection, or for the freedoms and rights of others. Such limitations may not impair the essence of freedoms and rights.' This provision is the starting point for considering the legitimacy and legality of the restrictions on the freedom of assembly introduced during the COVID-19 pandemic. It should be emphasized that the provision

13 A. Wróbel, *Wolność zgromadzenia się* (in:) M. Chmaj, W. Orłowski, W. Skrzydło, Z. Witkowski, A. Wróbel, *Wolności i prawa polityczne*, Kraków 2002, p. 36.

14 J. Sułkowski, *Art. 57*, (in:) L. Bosek, M. Safjan, *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Legalis 2016.

15 See justification of the judgment of the Constitutional Tribunal in case ref. no. Kp 1/04.

16 M. Florczak-Wątor, *Wolność zgromadzeń* (in:) P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej, Komentarz* 2019.

17 W. Sokolewicz, K. Wojtyczek, *ibidem*.

18 Judgment of the Constitutional Tribunal of 28 June 2000, ref. no. K 34/99.

19 A. Ławniczak, *Wolność zgromadzeń*, p. 7; http://www.repozytorium.uni.wroc.pl/Content/52929/18_Artur_Lawniczak.pdf (accessed 25.07.2021).

is unique in its regulation, as when interpreting it, the principles of exception interpretation must be applied – first and foremost, the prohibition of an expansive interpretation of its provisions.²⁰ In addition, it follows from the constitutional principle of proportionality indicated here that the restriction of individual rights and freedoms must be equivalent to the purpose pursued by the regulation. The compatibility of a limitation with the Polish Constitution depends on the answers to three questions:

1. Does the introduced limitation serve a specific purpose? (usefulness)
2. Is it necessary for its achievement? (necessity)
3. Does it not constitute an excessive cost of achieving the stated goal – is the good sacrificed in proper proportion to the effect achieved? (proportionality).²¹

Therefore, the freedom of assembly regulated in Article 57 of the Constitution must be interpreted in conjunction with Article 31(3) of the Constitution, i.e. the principle of proportionality of limitations. This freedom may thus be restricted only in absolutely exceptional cases and only to the absolutely necessary extent. Only in one place does the Constitution explicitly mention a possible limitation of the mentioned freedom – in the chapter concerning states of emergency. However, as none of the states of emergency have to date been introduced during the COVID-19 pandemic, this is not the subject of the legal analysis.

2. Content and Legal basis of Restrictions Bans on Assembly during the COVID-19 Pandemic

Although the provisions of the Constitution of the Republic of Poland regarding permissible restrictions on human freedom are unambiguous, in the case of freedom of assembly during the COVID-19 pandemic, the restrictions were primarily introduced through regulations issued initially by the Minister of Health and then by the Council of Ministers. On the basis of Articles 46–46b of the act of 5 December 2008 on preventing and combating infections and infectious diseases among people,²² a state of epidemic emergency was declared,²³ and then a state of epidemic.²⁴ The

20 M. Wyrzykowski, *Granice praw i wolności – granice władzy*, (in:) *Obywatel – jego wolności i prawa*. Warsaw 1998, pp. 45–59.

21 L. Garlicki, *Orzecznictwo Trybunału Konstytucyjnego w 2000 r.*, 'Przegląd Sejmowy' 2001, no. 9, p. 97.

22 Ordinance of the Minister of Health of 13 March 2020 on the declaration of an epidemic emergency on the territory of the Republic of Poland (*Journal of Laws* 2020, item 433).

23 *Journal of Laws* of 2008 no. 234, item 1,570 as amended.

24 Ordinance of the Minister of Health of 20 March 2020 on the declaration of an epidemic state on the territory of the Republic of Poland (*Journal of Laws* 2020, item 491).

government considered this state, which does not have the nature of a constitutional state of emergency, as a premise authorizing the introduction of further limitations on human rights and freedoms, including the freedom of assembly. This freedom was prohibited or restricted on the basis of subsequent acts, which were enacted as ordinances.

Pursuant to the ordinance of the Minister of Health of 13 March 2020 on the declaration of an epidemic emergency on the territory of the Republic of Poland,²⁵ the organization of assemblies within the meaning of Article 3 of the Act of 24 July 2015 – Law on Assemblies²⁶ – was prohibited from 14 March 2020 until further notice. However, the ban did not apply when the number of participants in the assembly was no more than 50 persons, including the organizer and persons acting on his behalf.²⁷ The above ban was maintained in the ordinance of 20 March 2020²⁸ until the amendment introduced by the ordinance amending the ordinance on declaring a state of epidemic in the area of the Republic of Poland²⁹ and consisting of a total ban on holding assemblies within the meaning of Article 3 of the Law on Assemblies. This total ban was maintained in subsequent ordinances on the establishment of certain restrictions, orders and prohibitions in relation to the occurrence of an epidemic.³⁰ The change took place on 30 May 2020, when it was prohibited to organize assemblies within the meaning of Article 3 of the Law on Assemblies, with the exception of assemblies organized on the basis of notice referred to in Article 7(1), Article 22(1) of the Law on Assemblies or the decision referred to in Article 26b(1) of the Law on Assemblies, with the maximum number of participants not exceeding 150 persons.³¹ In October 2020, after the amendments,³² this maximum number of participants was drastically reduced and could not exceed five persons. This rule was maintained in subsequent ordinances banning assemblies.³³

The year 2021 did not bring the abolition of restrictions in this regard. The ordinance of the Council of Ministers of 19 March 2021 on establishing certain restrictions, orders and prohibitions in relation to the outbreak of an epidemic until 3 May

25 § 9(1) of the Ordinance of 13 March 2020 on the declaration on the territory of the Republic of Poland of a state of epidemic emergency, *Journal of Laws of 2020*, item 433.

26 Act of 24 July 2015 – Law on Assemblies, *Journal of Laws of 2019*, item 631.

27 § 9(2) of the Ordinance of 13 March 2020, item 433.

28 Ordinance of the Minister of Health of 20 March 2020 on revoking the state of epidemic emergency in the territory of the Republic of Poland, *Journal of Laws of 2020*, item 490.

29 § 1(6) of the Ordinance of 24 March 2020.

30 § 14(1)(1) of the Ordinances of 31 March 2020, 10 April 2020, 19 April 2020, 2 May 2020; § 13(1)(1) of the Ordinance of 16 May 2020.

31 § 15(1) of the Ordinance of 29 May 2020; § 16(1) of the Ordinance of 19 June 2020; § 25(1) of the Ordinance of 7 August 2020; § 28(1)(1) of the Ordinance of 9 October 2020.

32 § 1(17) of the Ordinance of 23 October 2020.

33 § 26(1)(1) of the Ordinances of 26 November 2020 and 1 December 2020; § 28(1)(1) of the Ordinance of 21 December 2020.

2021 prohibited the organization of or participation in assemblies, with the exception of assemblies organized on the basis of notice referred to in Article 7(1), Article 22(1) or the decision referred to in Article 26b(1) of that act, provided that the maximum number of participants did not exceed five and the distance between assemblies could not be less than 100 meters. Thus, the ban not only on organizing assemblies but also on participating in assemblies was maintained. In addition, the organization of or participation in 'events, meetings and gatherings of any kind' was prohibited. From 6 May 2021³⁴ to 5 June 2021, it continued to be prohibited to organize or participate in assemblies within the meaning of Article 3 of the Law on Assemblies, with the exception of assemblies organized on the basis of notice referred to in Article 7(1), Article 22(1) or the decision referred to in Article 26b(1) of that act, whereby the maximum number of participants could not exceed five and the distance between assemblies could not be less than 100 m. At the same time, from 15 May 2021 to 5 June 2021, assemblies organized as part of church or other religious associations' activities could take place, provided that the assembly took place in a church or other building of religious worship, with a distance between people of not less than 1.5 m, no more participants than one person per 15 sq m of space (excluding persons performing religious worship or persons conducting funerals, or persons employed by a funeral establishment or funeral home in the case of a funeral) and that participants comply with the order to cover the mouth and nose referred to in § 25(1), with the exception of persons engaged in religious worship. In case such assemblies were held outdoors, participants were to remain at a distance of not less than 1.5 m from each other. On 11 June 2021, pursuant to the regulation of the Council of Ministers³⁵ amending the regulation on the establishment of certain restrictions, orders and prohibitions in relation to an outbreak of epidemic, § 26 indicated that from 26 June 2021 until 31 August 2021 the organization of or participation in gatherings within the meaning of Article 3 of the Law on Assemblies was possible subject to the condition that the maximum number of participants should not exceed 150 and the distance between the assemblies should not be less than 100 m. Furthermore, these restrictions did not apply to the National Fan Zone event held on 19 June 2021 in Warsaw at the PGE National stadium, where half the seats were made available to the public. Until 31 August 2021 the participants of assemblies referred to in Sections 1a and 1b were required to keep a distance of at least 1.5 m between each other and to cover their mouth and nose, unless the assembly was held in the open air. The cited regulation also established that from 13 June 2021 to 25 June 2021, assemblies organized as part of church or other religious associations' activities could take place under the same conditions as previously. From 26 June 2021 to 31 August 2021, the limit for assem-

34 Regulation of the Council of Ministers of 6 May 2021 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, item 861.

35 Ordinance of the Council of Ministers of 11 June 2021 item 1,054.

blies held as part of church or other religious associations' activities was increased to 75% occupancy of a church or other religious building (excluding persons performing religious worship or persons conducting funerals, or persons employed by a funeral establishment or funeral home in the case of a funeral), and with the order to cover the mouth and nose.

3. Practice – Protests Despite Assembly Bans

As life has shown, the imposed ban on assemblies had little effect did not have any effect. Citizens participated in spontaneous assemblies. Examples include: demonstrations of entrepreneurs³⁶, farmers³⁷, an attempt to organize an annual Independence March, numerous protests organized by women or representatives of LGBT+ communities, or protests that have been taking place since 22 October 2020 after the Constitutional Tribunal ruled that the premise allowing abortion on the grounds of severe and irreversible fetal disability or incurable life-threatening disease was unconstitutional.³⁸

In the first of these cases, the applicant notified the Mayor of Warsaw of its intention to hold a public assembly on 16 May 2020. The mayor replied that the assembly could not be registered due to the ban on assemblies. The applicant appealed to the Regional Court in Warsaw. He pointed out that the Law on Assemblies does not provide for the possibility of refusing to register an assembly. In dismissing the appeal,³⁹ the court referred to the aforementioned regulation.⁴⁰ In the court's opinion, the mayor was therefore entitled not to register the assembly and not to apply the Law on Assemblies on the grounds that the provisions of the ordinance exclude the application of the Law on Assemblies. The prejudging factor for the court was the epidemic state. Hence, it held that the office was not obliged to apply, under the present special circumstances, the standard procedure in proceedings concerning assemblies regulated by the Act. Furthermore, the court held that there was a prerequisite for

36 Dissatisfied with the aid offered by the government in relation to the pandemic, demonstrations began in Warsaw already on 7 May 2020. One of the initiators of the protests was Paweł Tanajno, who was also a presidential candidate. Police intervened during the protests.

37 The protests took various forms; farmers organized for example road blockades with tractors (21 October) and a car protest in Warsaw (28 October). The demonstrations, organized by Agrounia, concerned opposition to the so-called Animal Friday, i.e. the Law and Justice Party's bill which would prohibit, among others, raising animals for fur and ritual slaughter for export. Ultimately, the Sejm did not pass the bill.

38 The Constitutional Tribunal announced the ruling on 22 October 2020. The decision triggered massive protests across the country. See <https://wiadomosci.onet.pl/kraj/wyrok-tk-ws-aborcji-kolejne-protesty-w-calej-polsce-zdjecia/9dlb8yw> (accessed 10.02.2022).

39 Decision of the District Court in Warsaw of 14 May 2020, XXV Ns 45/20.

40 Ordinance of the Council of Ministers of 2 May 2020 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state.

prohibiting an assembly due to a threat to human life or health as set forth in Article 14(2) of the Law on Assemblies. He referred to the obligation under Article 68 of the Polish Constitution to combat epidemic diseases. The applicant filed a complaint with the Court of Appeal in Warsaw. The proceedings were joined by the Ombudsman,⁴¹ who requested that the contested decision be annulled in its entirety and alleged that it violated

- Article 7(3) of the Act of 24 July 2015 of the Law on Assemblies – by the failure to immediately make available information about the place and date of the organized assembly on the subject page in the Public Information Bulletin;
- Article 14 of the Law on Assemblies – by the failure to issue a decision to ban an assembly in a situation where the authority considered that the premises for banning a registered assembly existed;
- Article 57 in relation to Article 31(3) of the Constitution.

The Court of Appeal, while considering the appeal on 15 May 2020, pointed out that failure to register an assembly does not mean its prohibition. Such behaviour of the city hall can be considered in terms of inaction – as it should have either banned the assembly or entered it in the register. Only the prohibition of assembly may be reviewed by the court. Given the absence of such a decision, the court dismissed the applicant's appeal. At the same time, the court agreed with both the appellant and the Ombudsman that the ban on assembly imposed by the ordinance of the Council of Ministers raises serious constitutional questions, especially in the context of permissible restrictions of subjective rights and the principle of proportionality (Article 31(3) of the Constitution).

On 6 June 2020, the first manifestation of the anti-vaccinationists and the so-called corona sceptics, i.e. people who do not believe in the existence of the COVID-19 virus, was held in Warsaw. It was registered and included within the limit allowed by the regulation (150 people). Another large demonstration of this group, held on 24 October, exceeded the regulation limit and ended with the detention of about 120 people.

In August 2020, protests in defence of LGBT+ rights took place in many cities in Poland. During the protests, the police invoked the ordinance of 7 August, which establishes a ban on spontaneous assembly, and on the basis of it called on people to disperse if the protest was not previously registered.

Numerous demonstrations took place in over 500 Polish cities as part of the All-Poland Women's Strike, the participants of which demanded liberalization of

41 <https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-do-wsa-calkowity-zakaz-zgromadzen-niekonstytucyjny> (accessed 25.08.2021).

the abortion law.⁴² Police questioned and arrested participants in the protests, citing the provisions of the ordinances (initially those of 9 October, then the stricter ones of 26 November). The annual Independence March was also banned under the so-called Covid ordinance.

As practice showed, these assemblies were, as a rule, spontaneous and often quite numerous. Their number exceeded the limit indicated in subsequent ordinances.⁴³ The protests resulted in a response from the police, who extensively questioned and detained people participating in the assemblies.⁴⁴ The media frequently reported on improper behaviour of the police in relation to the detained participants of the assemblies. The National Mechanism for the Prevention of Torture has repeatedly drawn attention to this in its reports.⁴⁵

4. Constitutionality of the Implemented Restrictions/Prohibitions

Article 57 of the Constitution, which stipulates the freedom of assembly, in the second sentence states that its limitation may be specified by statute, thus reiterating the general principle expressed in Article 31(3) of the Constitution. Therefore, it is inadmissible to establish any limitation without a statutory basis. However, the Constitutional Tribunal has indicated that the constitutional 'principle of the exclusive nature of statutes in the sphere of human rights does not exclude the transfer of certain matters related to the realization of constitutional freedoms and rights to be regulated by way of ordinances.'⁴⁶ It should be stressed that '(...) it is inadmissible (...) to adopt blanket regulations in the law, leaving the executive authorities or local government bodies the freedom to regulate the final shape of these limitations, and in particular to determine the scope of these limitations,'⁴⁷ which is contained in Article 46(4)(4) of the act of 5 December 2008 on preventing and combating infections and infectious diseases among people.

42 On 22 October 2020, the Constitutional Court announced its verdict declaring the premise of abortion 'due to severe and irreversible fetal impairment or incurable life-threatening disease' to be unconstitutional. The decision triggered massive protests across the country.

43 See for example On Warsaw! One hundred thousand people protested in the capital, <https://oko.press/na-warszawie-100-tysiecy-osob-protestowalow-stolicy-zdjecia> (accessed 10.02.2022).

44 On 28 November 2020, 900 people were questioned at one of the protests. See for example A. Karwowska, Strajk kobiet i prof. Płatek radzą obywatelom. Co zrobić, gdy policja ogranicza nasze prawa, *Gazeta Wyborcza*, <https://wyborcza.pl/7,162657,26566398,strajk-kobiet-radzi-obywatelom-co-zrobic-gdy-policja-ogranicza.html> (accessed 09.02.2022).

45 See <https://bip.brpo.gov.pl/pl/content/oswiadczenie-kmpt-po-uniewinnieniu-katarzyny-augustynek> and <https://bip.brpo.gov.pl/pl/content/Policja-zatrzymania-demonstracje-strajk-kobiet-raport-KMPT> (accessed 10.02.2022).

46 Judgment of the Constitutional Tribunal of 8 July 2003, ref. no. P 10/02

47 Judgment of the Constitutional Tribunal of 12 January 2000, ref. no. P 11/98

During the period when the ban on assembly was in force, several judgments were issued in which the courts recognized the unconstitutionality of the above restrictions on freedom of assembly. In the ruling of the District Court for Warsaw-Śródmieście, it reads as follows: ‘The failure to implement a state of natural disaster, which corresponds to the current situation related to the coronavirus, means that the bans expressed in the content of the (...) ordinance should be deemed unconstitutional, and therefore without legal basis.⁴⁸ However, it should be emphasized that even the introduction of a state of natural disaster would not authorize such actions by the authorities, because the Constitution does not indicate the freedom of assembly among those that may be restricted after the introduction of martial law or a state of emergency.⁴⁹ Also the Court of Appeal in Warsaw indicated that ‘the above legal state raises significant doubts from the point of view of the constitutional right of citizens to assemble, arising from Article 57 of the Constitution of the Republic of Poland, particularly in the context of constitutionally permissible limitations of subjective rights and the principle of proportionality contained in Article 31(3) of the Constitution of the Republic of Poland⁵⁰ The jurisprudence also states that even if it was possible to limit the freedom of assembly through ordinance, the ordinances in force since March 2020 did not prohibit participation in assemblies, but only their organization.⁵¹ As practice has shown, participants of small assemblies, where it was possible to maintain a sanitary regime in the form of prescribed distances between participants, were also exposed to problems.

In the decision of the District Court in Rzeszów, II W 539/20, it was stated that the ban on organization of assemblies under the ordinance of the Council of Ministers violated the principle of proportionality set out in Article 31(3) of the Constitution. The ordinance unconditionally banned all assembly without taking into account the degree of threat of the SARS-CoV-2 virus and the impact on such a possibility of other restrictions, bans and orders established at the same time. Therefore, the prohibition on exercising one of the fundamental rights set forth in the Constitution was established without considering whether other simultaneously applied measures are not sufficient to achieve the intended purpose in terms of public health protection.

In the decision of the District Court for Łódź-Śródmieście in case no. IV W 455/20, it was emphasized that since the assembled people were standing at a distance from each other and were wearing face masks, there was no social harmfulness of the act. The defendants did not pose a threat and their actions, in this particular case, could not result in the spread of an epidemic, i.e. they did not in any way interfere with the purpose of the prohibition.

48 Judgment of the District Court for Warsaw-Śródmieście of 16 October 2020, ref. no. V W 2757/20.

49 Article 233 of the Constitution.

50 Order of the Court of Appeal in Warsaw of 15 May 2020, ref. no. VI ACz 339/20.

51 Judgment of the District Court for Warsaw-Śródmieście in Warsaw, ref. no. V W 1083/20.

A very important issue was pointed out by the District Court for Warsaw-Śródmieście, V W 2519/20. In its opinion, the prohibition set out in the ordinance concerns only the organization of assemblies. It does not ban participation in any assembly. Thus, the regulations are addressed to public authorities and not to citizens participating in assemblies.

Even if we accept the assumption that due to the ongoing epidemic state and the need to protect public health it was permissible to restrict many rights and freedoms, the introduction of a total ban on assembly on the basis of the ordinance of the Council of Ministers raises justified doubts. The assessment of regulations introduced by the ordinance leads to the conclusion that the essence of constitutional freedom of assembly (Article 57 of the Constitution) has been infringed, which in no way satisfies the proportionality test, and therefore is in contradiction with Article 31(3) of the Constitution. Pursuant to Article 31(3) of the Constitution, the government should at most introduce certain restrictions, e.g. concerning the distance between demonstrators or the obligation to cover their mouth and nose, and not prohibit assemblies in general.

Conclusion

The above analysis allows to verify the theses made in the introduction, that the permissible limits of freedom of assembly are indicated directly in the Constitution of the Republic of Poland, and the pandemic does not constitute justification for violating these limits and that the restrictions imposed in Poland in relation to the COVID-19 pandemic were unconstitutional. Since the beginning of the pandemic, the Polish government has repeatedly imposed restrictions or bans on the freedom of assembly. A total of five different restrictions to this right were announced during this period, from a total ban on organizing and participating in assemblies to allowing assemblies in limited groups (150, 50, 5 and 2 persons). The restrictions were introduced each time by an ordinance, a legal act of a lower rank than the law. The government, wrongly, justified the authority to impose such restrictions with the provisions of the law on preventing and combating infections and infectious diseases among people (Article 4(4)). According to experts from the Helsinki Foundation for Human Rights (HFHR), the organization of and participation in assemblies remain legal, despite the restrictions imposed by the authorities.⁵² A breakthrough, hopefully, will be the decision of the Supreme Court of 1 July 2021, in which it found that the ban on the organization of and participation in assemblies was introduced without due legal basis – by way of an ordinance – instead of an act of law, and contrary to the provi-

52 <https://www.hfhr.pl/wolnosc-zgromadzen/> (accessed 26.08.2021).

sions of Article 57 and Article 31(3) of the Constitution of the Republic of Poland.⁵³ It also emphasized that the provision prohibiting the organization of assemblies ‘has been issued in excess of the statutory delegation.’ In view of the above, it is necessary to agree with the opinion expressed by the HFHR experts that citizens have the right to refuse to accept criminal fines imposed by the police, pursuant to Article 54 of the Petty Offence Code, during assemblies. Everyone also has the right to defend themselves in court and to appeal against administrative fines imposed by the State Sanitary Inspectorate (e.g. on protesters who did not keep the required distance). It should be pointed out that no circumstances, not even extraordinary ones, can justify the failure of authorities to observe the provisions of the Constitution of the Republic of Poland. This leads to a violation of the principle of individual trust in the state, legal certainty and security, and consequently the clause of a democratic state of law.

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