States of Emergency and Human Rights Protection

The Theory and Practice of the Visegrad Countries

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Chapter 10

Restrictions on freedom of assembly

The case of Poland

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Origin of, substance of, and permissible restrictions on freedom of assembly

In the Polish legal system, freedom of assembly is based on Article 57 of the Polish Constitution, Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 12 of the Charter of Fundamental Rights. Article 57 of the Constitution guarantees freedom to everyone to peacefully assemble and participate in such assemblies. The wording of Article 57 of the Constitution and its interpretation have been influenced by two main factors: negative experiences of violations of freedom of assembly in a communist state and the case law of the European Court of Human Rights (ECtHR). One of these experiences was the introduction of martial law on 13 December 1981, when freedom of assembly was abolished. The ECtHR case law defining the standard of protection for freedom of assembly has been the basis for the regulation of this freedom in the current Constitution, in statutes that further define freedom of assembly and in the case law of courts and the Constitutional Tribunal. During the more than 30 years since Poland's political transition, there has been a visible evolution in the approach to freedom of assembly and its fundamental guarantees. The Act of 5 July 1990, the Law on Assemblies, primarily emphasised the free nature of assemblies and limited the state supervision of assemblies. This direction of guaranteeing freedom of assembly was also confirmed by the Constitutional Tribunal.[1] The emphasis on the free nature of assemblies, protecting them from excessive state interference, was also evident during the drafting of the Constitution. With the Constitution already in force, another aspect of freedom of assembly, related to the so-called positive obligations of the state, became apparent. The Legislator had a duty to create institutions that would effectively enable the exercise of freedom of assembly while counteracting its abuse. The trend towards institutionalisation can be seen in the Act of 24 July

1 Resolution of the Constitutional Tribunal (CT) of 16 March 1994 W 8/93 <https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=5634&sprawa=5986> accessed 28 November 2022.

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2015 – Law on Assemblies. While institutionalisation strengthens the protection of assemblies, it has caused problems in delimiting permissible restrictions on freedom of assembly and has required the resolution of interpretative doubts concerning its scope.[2] The next stage of evolution is marked by regression in the protection of freedom of assembly. This involved the introduction of so-called periodical assemblies. These assemblies are privileged over other assemblies, and the ability to treat certain assemblies as periodical reinforces the discretionary power of the state.[3]

Freedom of assembly, as expressed in Article 57 of the Constitution, is the first item on the list of political freedoms and rights. It is enjoyed by every individual, irrespective of whether or not they are Polish citizens. A legal person can also be the subject of freedom of assembly. The object of this freedom is the free grouping of persons for a specific purpose. Both the purpose and the course of the assembly should be peaceful. Groupings of people who are not peaceful are not assemblies within the meaning of Article 57 of the Constitution. The term 'assembly' does not include assemblies organised by public authorities or assemblies that are not of a public nature, such as private meetings.

An assembly should be distinguished from a confluence. The latter does not have a purpose set by the participants. An assembly happens occasionally, but it is not a random grouping of people. An assembly should also be distinguished from an association because of the latter's permanent character. Assemblies, although held for a specific purpose, do not exhibit such permanence. An assembly can be anonymous, and it has no organisational ties. Freedom of assembly creates two fundamental rights: the right to organise and participate in assemblies without being disturbed by public authorities or third parties and the right to protection by public authorities when such disturbances are likely to occur or are occurring. These rights are guaranteed by the statutory procedure for convening assemblies, freedom to determine the purpose of the assembly and its course, the exhaustively defined means of supervision over assemblies, and the statutory rules of liability for damage arising from holding an assembly.

Freedom of assembly is a prerequisite for democracy and for the exercise of other freedoms and rights. The purpose of this freedom is to ensure the autonomy and self-realisation of an individual and to protect the processes of public communication necessary for a democratic society to function; at

2 Lech J. Żukowski, 'Zmiany w prawie do zgromadzeń a milcząca zgoda na ich organizację – problemy wybrane' [Amendments to the Law on Assemblies in the Context of Tacit Consent for Organising Them: Selected Problems]' (2021) 1 *Państwo i Prawo* 91.

3 Monika Haczkowska, 'Skutki wyroku Trybunału Konstytucyjnego Kp 1/17 dla konstytucyjnej wolności zgromadzeń' [Effects of Constitutional Tribunal Judgment Kp 1/17 for the Constitutional Freedom of Assembly]' in Ryszard Balicki and Mariusz Jabłoński (eds), *Wolność zgromadzeń* [Freedom of Assembly] (Wydawnictwo eBooki.com.pl 2018) 69–91.

its core lies public interest.[4] An assembly is a special form of the expression of views, provision of information, and exertion of influence on the attitudes of others. This is an extremely important means of communication in both the public and private spheres, and a form of participation in public debate. Freedom of assembly is therefore important for the exercise of power in a democratic society. This latter aspect of freedom of assembly has been extensively characterised in the case law of the Constitutional Tribunal based on the case law of the ECtHR.[5]

A peaceful assembly must be characterised by respect for the physical integrity of individuals and private or public property. Therefore, the concept of a 'peaceful' assembly excludes the use of violence and coercion by participants of the assembly, both against other participants and against third parties or public officials. The purposes are relevant to assessing the peaceful nature of an assembly.[6]

A fundamental guarantee of freedom of assembly is provided by the notification system. Notification of the intention to hold an assembly is sufficient for it to take place. Authorities may prohibit a meeting only if it does not meet the requirements set out in the statute. If the purpose and planned course of the assembly are within the limits of the law, it cannot be assessed by the authority receiving the notification. Exceptionally, a system of permits to hold assemblies may be introduced.[7] Restrictions on the convening of assemblies or their course must be proportionate to the protection of the rights of others, security or public order, and the protection of the environment, health, and public morals.[8] Public authorities have a duty to provide protection to groups organising and participating in rallies. Such protection must be real. It may not be excluded due to controversy over the purpose and course of the assembly (but not transgressing the legally established prohibitions on proclaiming certain views, e.g., inciting racial hatred or promoting fascist ideology) amongst the general public.[9]

Under Article 31(3) of the Constitution, freedom of assembly restrictions may be prescribed by law when they are necessary in a democratic state for its security or public order, or for the protection of the environment, health, or public morals, or for the freedoms and rights of other persons. Restrictions on freedom of assembly may be entity-oriented. It is permissible, for example, to restrict the right of persons without full legal capacity to convene assemblies.[10] As such, constitutionally permissible restrictions on freedom of assembly do not include the possibility for public authorities to use repressive

4 Judgment of the CT of 28 June 2000, K 34/99.
5 Judgment of the CT of 18 January 2006, K 21/05.
6 Judgment of the CT of 10 July 2008, P 15/08.
7 Judgment of the CT of 10 November 2004, Kp 1/04.
8 Judgment of the CT of 18 January 2006, K 21/05.
9 Judgment of the CT of 18 January 2006, K 21/05.
10 Judgment of the CT of 18 September 2014, K 44/12.

measures against persons behaving peacefully after the assembly has taken place. Grounds for restricting freedom of assembly do not include any asymmetry between the purposes and results of the exercise of this freedom and the meanings, functions, purposes, or intentions ascribed to organisers and participants by the media or those commenting on public life. Public authorities must not take away this freedom because of differences of opinion or when the views proclaimed are incompatible with the system of values represented by those holding public power.[11]

Some of the rights comprised in freedom of assembly are also part of other constitutional rights. This substantive convergence occurs particularly with freedom of expression, the right to privacy, and freedom of movement. This convergence of rights is important for resolving conflicts arising from different constitutional principles. In particular, this is taken into account when considering the permissibility of restrictions on freedom of assembly based on limitation clauses contained in Article 31(3) of the Constitution. A proportionate restriction on freedom of assembly should not lead to an excessive restriction on other constitutional freedoms and rights.

As for the manner in which assemblies are convened and their possible course, regulated by the Act of 24 July 2015 – Law on Assemblies, a distinction is made between ordinary assemblies that require notification or – exceptionally – a permit, spontaneous assemblies that do not require any notification or permit, and periodical assemblies.[12] Controversies arose after the introduction of the last grouping into the statute concerning the discretionary nature of the province governor's decision and the fact that they are privileged over other assemblies in terms of the protection granted to them.[13]

Constitutional basis for extraordinary measures

The constitutional regulation of extraordinary measures was significantly influenced by Poland's historical experiences connected with the state of martial law declared in 1981.[14] The Constitution is intended to provide safeguards against the state's unjustified use of extraordinary measures resulting in significant restrictions on human rights. There is a separate chapter on extraordinary measures. This chapter sets out the types of extraordinary measures, the rationale and modalities for their introduction, the basic principles for the

11 Judgment of the CT of 18 September 2014, K 44/12.

12 Paweł Kuczma, 'Rodzaje zgromadzeń' [Types of Assemblies] in Ryszard Balicki and Mariusz Jabłoński (eds), *Wolność zgromadzeń* [Freedom of Assembly] (Wydawnictwo eBooki.com.pl 2018) 46ff.

13 Haczkowska (n 3) 79.

14 This was confirmed by the CT in its Judgment of 16 March 2011, K 35/08, which recognised the declaration of martial law as illegal and pointed to the human rights violations committed <https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=2&document=6583&case=4934> accessed 28 November 2022.

functioning of the state during states of emergency, and the permissible conditions for introducing restrictions on human rights. Pursuant to Article 228 of the Constitution, in situations of particular danger, if ordinary constitutional measures are insufficient, then, respectively, martial law, a state of emergency, or a state of natural disaster may be declared. A state of emergency can only be declared with a regulation on the basis of statutory law. Martial law can be declared by the President at the request of the Council of Ministers in the event of an external threat to the state, acts of armed aggression against its territory, or when an obligation of common defence against aggression arises by virtue of international agreement (Article 229). A state of emergency may be declared by the President at the request of the Council of Ministers for a period of up to 90 days on part or all of the state's territory in the event of a threat to the constitutional order of the state, the security of citizens, or public order (Article 230). Within 48 hours, a regulation introducing martial law, or a state of emergency, must be presented to the Sejm [Lower Chamber], which may repeal it. The Council of Ministers may declare a state of natural disaster on part or all of the state's territory for a limited period of no longer than 30 days. A state of natural disaster is declared to prevent the consequences of natural disasters or technical failures. This state may be extended with the consent of the Sejm (Article 234). According to Article 228(5), the actions of public authorities must be proportionate to the degree of threat and must be intended to lead to the swiftest possible restoration of the normal functioning of the state. When extraordinary measures have been declared, no amendments can be made to the Constitution, electoral laws, or laws on extraordinary measures. When extraordinary measures are in place, and for 90 days thereafter, elections to the Sejm, Senate, local government authorities, and the election of the President must not be held. The terms of office of these authorities are extended accordingly (Article 228(6) and (7)). If, during martial law, the Sejm cannot convene for a session, the President, at the request of the Council of Ministers, issues regulations with the force of statutes. They are subject to approval by the parliament at its next session. The Constitution introduces specific principles for restricting human rights and freedoms when extraordinary measures are in place. When martial law or a state of emergency is declared, freedom of assembly may be subject to further restrictions that are not permitted in ordinary situations. The introduction of a state of natural disaster does not justify the introduction of specific restrictions not provided for in Article 31(3) of the Constitution.[15]

According to the Constitutional Tribunal, the Constitution contains a closed list of extraordinary measures; thus, it prohibits the introduction by statute of other extraordinary measures.[16] Extraordinary restrictions on freedom

15 Krzysztof Prokop, 'Stany nadzwyczajne w Konstytucji Rzeczypospolitej Polskiej' [Extraordinary Measures in the Constitution of the Republic of Poland] (*Temida* 2 2005) 18ff.

16 Judgment of the CT of 21 March 2001, K 50/07.

of assembly are only permissible after a declaration of martial law or a state of emergency. The Legislator may allow restrictions on freedom of assembly that do not meet the proportionality test, as long as this is justified by the need to combat specific threats. However, such extraordinary restrictions on this freedom are not permitted during a state of natural disaster, nor are they permitted in ordinary statutes that are intended to prevent specific threats that do not, however, justify declaring martial law or a state of emergency.

The solution adopted in Poland assumes that in a rule-of-law state, the introduction of extraordinary restrictions on human rights is permissible only exceptionally, subject to conditions specified in the Constitution. This should prevent arbitrary interference with human rights under the guise of combating specific threats. However, the question arises as to whether extensive constitutional regulation is too rigid. Does this not make it difficult for the state to adequately respond to future threats whose nature and scale cannot be predicted?

Freedom of assembly restrictions in the practice of extraordinary measures

In the 23 years since the Constitution came into force, no extraordinary measures have been declared. They have only been of interest to legal scholars.[17] The need for one of the constitutional extraordinary measures was only considered in recent years in connection with two events: the outbreak of the COVID-19 pandemic and the humanitarian crisis on the Poland–Belarus border, which began in August 2021. In the first case, public authorities were accused of failing to declare extraordinary measures, despite the existence of the constitutional grounds to do so. In the second instance, objections were raised that public authorities had declared a state of emergency, even though no such grounds existed. In both cases, the issue of constitutionally unjustified restrictions on freedom of assembly arose. What is relevant to the interference with freedom of assembly is the rule-of-law crisis, which has been ongoing since November 2015. This has called into question the ability of the courts and the Constitutional Tribunal to protect freedom of assembly.[18]

Freedom of assembly during the COVID-19 pandemic

The early course of the COVID-19 pandemic justified declaring a state of emergency or natural disaster in Poland. We were dealing with a specific threat,

17 Krzysztof Eckhardt, *Stan nadzwyczajny jako instytucja polskiego prawa konstytucyjnego* [State of Emergency as an Institution of Polish Constitutional Law] (Wyższa Szkoła Prawa i Administracji Przemyśl-Rzeszów 2012) 367.

18 Monika Florczak-Wątor, 'Commentary on Judgment of the Constitutional Tribunal of 16 March 2017, Kp 1/17' <https://konstytucyjny.pl/glosa-do-wyroku-tk-z-dnia-16-marca-2017-r-sygn-akt-kp-117-monika-florczak-wator/> accessed 28 November 2022.

and the public authorities were unable to prevent it by ordinary constitutional means. In particular, this threat was associated with the rapid spread of the SARS-CoV-2 virus, the severity of the infection, lack of medical equipment to effectively prevent the virus, and the concern about the healthcare system potentially collapsing under the strain. Initially, the most effective measures to counter the pandemic were isolation measures, including freedom of assembly restrictions. However, the government and the President ruled out declaring any extraordinary measures. The decision was politically motivated. Indeed, in March 2020, the campaign for the presidential election was underway and a state of emergency or natural disaster would have prevented the election from taking place. The new threats were tackled on the basis of Article 46 of the Act of 5 December 2008 on the Prevention and Control of Infections and Infectious Diseases in Humans. According to this provision, if an epidemic threat or an epidemic occurs in more than one province, a state of epidemic threat or epidemic can be declared and revoked by means of a regulation from the minister in charge of health in consultation with the minister in charge of public administration at the request of the Chief Sanitary Inspector. Article 46(4)(4) of the Act provides that such a regulation may establish a prohibition on holding performances and other public assemblies. The prohibition should consider the way in which infections and communicable diseases spread and the epidemic situation in the area in which a state of epidemic threat or a state of epidemic is declared. On the basis of these statutory provisions, on 13 March 2020, the Minister of Health issued a regulation declaring a state of epidemic threat in the territory of the Republic of Poland. Pursuant to Section 9(1) of the regulation, peaceful assemblies were banned from 14 March 2020 until further notice due to the SARS-CoV-2 epidemic in Poland, except when the number of assembly participants was no more than 50. Ten days later, on 24 March 2020, following the introduction of the state of epidemic, a regulation by the Minister of Health amending the aforementioned regulation, in its Section 11a(1), introduced a total ban on organising and holding assemblies. This provision was soon repealed, but the total ban on assemblies was maintained by Section 14(1)(1) of the Regulation of the Council of Ministers of 31 March 2020 on the establishment of certain restrictions, orders and prohibitions in connection with the state of epidemic, and then by subsequent Regulations of the Council of Ministers of 10 April 2020 on the establishment of certain restrictions, orders and prohibitions in connection with the state of epidemic, of 19 April 2020 on the establishment of certain restrictions, orders, and prohibitions in connection with the state of epidemic, of 2 May 2020 on the establishment of certain restrictions, orders, and prohibitions in connection with the state of epidemic, and then by Section 13(1)(1) of the Regulation of the Council of Ministers of 16 May 2020 on the establishment of certain restrictions, orders, and prohibitions in connection with the state of epidemic. The complete ban on public assemblies was only lifted at the end of May by Section 15 of the Regulation of the Council of Ministers of 29 May 2020 on the establishment of certain restrictions, orders, and prohibitions in

connection with the state of epidemic. Organising public assemblies on the basis of the notice referred to in Article 7(1), Article 22(1), or the decision referred to in Article 26b(1) of the Law on Assemblies was made possible again. However, the total ban on spontaneous assemblies referred to in Article 3(2) of the Law on Assemblies was maintained.[19]

In the months that followed, various restrictions on freedom of assembly – both related to subjects enjoying it and its scope – were maintained, and epidemic threats were cited as justifications. The Regulation of the Council of Ministers of 29 May 2020 on the establishment of certain restrictions, orders, and prohibitions in connection with the state of epidemic introduced the requirement for participants of assemblies to maintain a distance of at least 2 metres between one another and to cover their mouths and noses. Provincial sanitary inspectors were authorised to issue opinions on the risks to assembly participants and other persons in connection with the epidemic situation in the relevant municipality, and the organisers of the assemblies were obliged to inform the participants of said opinions. In the case of periodical assemblies, the province governor and, in the case of other permitted assemblies, the municipal authority, were obliged to inform the provincial sanitary inspector of any organised assemblies. The opinions were advisory in nature, but they could be the rationale for a decision to refuse to hold a public assembly when the assembly was found to pose a threat to human life and health.[20]

The total ban on assemblies introduced by the implementing instruments did not extend to meetings and gatherings related to the performance of professional activities or official tasks. The ban did not apply to assemblies with more than 150 participants, wedding receptions, or first communion receptions, either. The Minister of Health, when declaring the state of epidemic, also imposed restrictions on religious worship in public places, including buildings and other places of worship. No more than 50 people were allowed to take part in worship-related activities. From 24 March 2020, the maximum number of attendees was reduced to five persons, in addition to the ministers or persons employed by the funeral home in the case of a funeral. Pursuant to Section 15(8) of the Regulation of the Council of Ministers of 29 May 2020 on the establishment of certain restrictions, orders, and prohibitions in connection with the state of epidemic, assemblies organised in the context of the activities of churches and other religious associations could take place outdoors or indoors, provided that the participants maintained a 2-metre social distance or covered their mouths and noses, with the exception of ministers.

19 For more on the restrictions on freedom of assembly during the COVID-19 pandemic cf. Mirosław Wróblewski, *Wolność zgromadzeń w czasie pandemii. Komentarz praktyczny* [Freedom of Assembly During the Pandemic: Practical Commentary] (LEX/el. 2020) 1ff.

20 Wróblewski (n 19) 2.

Restrictions on the maximum number of people attending religious ceremonies were lifted completely.[21]

Violations of the above prohibitions carried two kinds of sanctions. Penal tickets were issued under the Code of Misdemeanours. Most of them were for PLN 500. The COVID-related legislation introduced a second type of liability involving administrative fines of up to PLN 30,000. These fines were imposed by the sanitary inspection authority.

The main doubts concerned the fact that restrictions on freedom of assembly had been introduced in breach of constitutional requirements. First of all, these restrictions were not introduced by a statute passed by parliament, but by regulations issued by the Executive. The statute providing for a state of epidemic contains blanket authorisation for issuing such regulations. This authorisation is incompatible with Article 92(1) of the Constitution, according to which the authorisation to issue a regulation must be specific and must set out the guidelines for its content. This requirement is strict when it comes to restrictions on human rights and freedoms. Only matters of lesser importance and detailed ones may be regulated by a regulation. Fundamental issues must be regulated by statute. The introduction of further restrictions on freedom of assembly gave rise to doubts as to their proportionality. Sanctions for violations of COVID-related bans were also questioned.[22] First, they were introduced in violation of the prohibition against double jeopardy. It was permissible to punish someone with both a penal ticket and an administrative fine. Second, administrative fines were administered that disregarded the perpetrators of the acts and their financial capacity. They were imposed under a regime that was more appropriate for legal persons.[23]

In Poland, a special situation arose in connection with the fight against the COVID-19 epidemic and related restrictions on freedom of assembly. The situation had all the features of an extraordinary constitutional measure, which, however, was not formally declared. There were legitimate reasons for introducing strict restrictions on freedom of assembly, but the way they were introduced led to numerous violations of the Constitution. First, the failure to declare a state of emergency meant that any restriction on freedom of assembly should have met the requirements set out in Article 31(3) of the

21 ibid 5.

22 Monika Florczak-Wątor, 'Granice ingerencji państwa w wolność zgromadzeń w czasach epidemii' [Limits of State Interference in Freedom of Assembly in Times of Epidemic] in Adam Bodnar and Adam Ploszka (eds), *Wokół kryzysu praworządności, demokracji i praw człowieka. Księga jubileuszowa Profesora Mirosława Wyrzykowskiego* [Around the Crisis of the Rule of Law, Democracy and Human Rights: Jubilee Book for Professor Mirosław Wyrzykowski] (Wolters Kluwer Polska 2020) 661.

23 Mikołaj Małecki, 'Legalne zgromadzenie to nie zagrożenie: analiza w kontekście art. 165 Kodeksu karnego' [Lawful Assembly Is Not a Threat: An Analysis in the Context of Article 165 of the Penal Code]' (2020) <https://www.dogmatykarnisty.pl/2020/10/legalne-zgromadzenie-to-nie-zagrozenie/≥ accessed 28 November 2022.

Constitution, in particular, the requirement for proportionality to the existing threats in terms of the rights of others, public health, and security. However, the proportionality test was not applied at all, and some of the bans, such as the ban on entering forests, had no rational justification. Second, the *de facto* suspension of freedom of assembly was not introduced by statute but by implementing regulations. The Constitution requires this to be done by a statute, while implementing regulations can only regulate specific issues relating to freedom of assembly. Meanwhile, during the pandemic, when it came to interfering with constitutional human rights, the decision-making centre shifted completely from parliament to government. Third, bans on organising and participating in assemblies introduced through implementing regulations, first by the Minister of Health and then by the government, carried specific sanctions. Violating the ban was considered a misdemeanour punishable by a penal ticket of several hundred zlotys. At the same time, however, sanitary authorities could impose an administrative fine of up to PLN 30,000 for such a misdemeanour. The prohibition against double jeopardy was violated. Before the pandemic, administrative penalties were more likely to be imposed on legal persons. The way they in which were imposed, and their amounts, were unsuitable for individuals.

The above legal environment created the conditions for massive restrictions on freedom of assembly in practice. The first year of the pandemic saw protests directed against the activities of public authorities in relation to the presidential election, in defence of LGBTQIA rights and against the Constitutional Tribunal ruling declaring a ban on abortion for embryo-pathological reasons to be constitutional. In the latter case, there were mass assemblies organised throughout the country. Restrictions on freedom of assembly were also applied in relation to bans on movement and business. Despite reservations about the constitutionality of regulations that suspended freedom of assembly, the police invoked them when intervening to disband assemblies, issuing penal tickets and informing the sanitary and epidemiological inspectorate of the possibility of imposing administrative fines on assembly participants. In a letter to the prosecution units, the National Public Prosecutor emphasised how organising protests during a pandemic displayed all the features of the offence defined in Article 165(1) of the Penal Code: causing a general danger to the life or health of many people. This offence is punishable by imprisonment of up to 12 years. The legal consequences for students and teachers intending to participate in protests against the abortion ban were announced by the Ministry of Education. Before and during the assemblies, the participants were detained by the police, coercive measures were applied disproportionately, and so-called kettling was used, while participants were indiscriminately asked to produce their ID cards.[24]

24 For a broader discussion of measures taken by the police and administrative authorities, cf. Piotr Kubaszewski and Katarzyna Wiśniewska (eds), *Prawa człowieka w dobie pandemii. 10*

Freedom of assembly and the humanitarian crisis on the Poland–Belarus border

The humanitarian crisis was caused by the actions of the Belarusian authorities. The country took in large numbers of people from Middle Eastern and African countries and escorted them to the Polish border to trigger mass migration to Poland and other EU countries. In response to this situation, in Poland, the Regulation of the Minister of the Interior and Administration of 20 August 2021 amended the Regulation of 13 March 2020 on the temporary suspension or restriction of border traffic at certain border crossing points, and subsequently, the Act of 14 October 2021 Amending the Act on Foreigners and Certain Other Acts was passed. These instruments were primarily intended to make it possible to restrict the movement of people at the border and to provide a basis for pushing people out of Poland who had crossed the border illegally. The use of so-called 'push-backs' has been criticised as unlawful. In particular, it concerned the expulsion into Belarus of persons whose lives or health were threatened. The controversy deepened after reports of fatalities in Polish forests near the border with Belarus. This issue would require a separate discussion.[25]

The response to the humanitarian crisis was to impose a ban on movement in the border zone and a ban on assemblies. The government justified these bans with the need to guarantee security, threatened by the large number of foreigners illegally crossing the border. A state of emergency was declared in the border municipalities by the Presidential Decree of 2 September 2022. Its consequence was a total ban on non-residents staying in municipalities where a state of emergency had been declared. The right to organise and hold assemblies within the meaning of the Act of 24 July 2015 – Law on Assemblies, was completely suspended. The state of emergency lasted until December 2021. Subsequently, the Act of 17 November 2021 Amending the Act on State Border Protection and Certain Other Acts was enacted and, on its basis, the Regulation of the Minister of the Interior and Administration of 30 November 2021, on the introduction of a temporary ban on staying in a specified area in the zone near the state border with the Republic of Belarus, was issued. These provisions allowed the Minister to prohibit anyone from staying in the border area. The amendment introduced into the Act and the Regulation of the Minister of the Interior and Administration issued

miesięcy, 10 praw, 10 ograniczeń, 10 rekomendacji na przyszłość. Raport Helsińskiej Fundacji Praw Człowieka [Human Rights During the Pandemic: Ten Months, Ten Rights, Ten Restrictions, Ten Recommendations for the Future. Report of the Helsinki Foundation for Human Rights] *Helsinki Foundation for Human Rights* (2021) 16ff. <Prawa-czlowieka-w-dobie-pandemii.pdf> accessed 21 November 2022.

25 Dominik Zając, 'Stosowanie procedury push-back a odpowiedzialność karna' [Use of the Push-Back Procedure and Criminal Liability] *Karne24.com* (16 December 2021) <https://karne24.com/stosowanie-procedury-push-back-a-odpowiedzialnosc-karna/> accessed 28 November 2022.

on its basis *in fact* 'extended' the state of emergency under Article 230(1) of the Constitution. Freedom of movement guaranteed by Article 52(1) of the Constitution and, consequently, other constitutional rights were significantly restricted. The authorisation to introduce restrictions was granted in a regulation rather than in a statute, shifting the decision on far-reaching restrictions on human rights from parliament to a minister.[26] Such unconstitutionally introduced restrictions hindered, rather than facilitated, the attainment of the objectives declared by the Legislator. This also enabled arbitrary restrictions on freedom of assembly.[27]

Judicial protection of freedom of assembly in extraordinary measures

The aforementioned restrictions on freedom of assembly should be subject to judicial review. Unfortunately, due to the rule-of-law crisis in Poland, this protection is limited in scope. The problem of specific restrictions on freedom of assembly justified by the state of epidemic and state of emergency was not addressed by the Constitutional Tribunal. After its ruling of 16 March 2017 on periodical assemblies (Kp 1/17), which indicated the broad discretion of the Legislator in concretising and limiting freedom of assembly, none of the entities entitled to apply to the Tribunal applied for a review of legal instruments restricting freedom of assembly. The lack of confidence in the Tribunal stems from an institutional crisis.[28] Unlike many European constitutional courts, the Polish Constitutional Tribunal was not concerned with setting a standard for the protection of human rights during the pandemic.[29]

The protection of freedom of assembly by courts was limited. Only a judgment of the Constitutional Tribunal pronouncing that a normative instrument is incompatible with the Constitution or an international agreement leads to its repeal. Courts deciding on a particular case can, at most, refuse to apply a provision by referring to its incompatibility with an international agreement or the Constitution. Such a refusal is relevant to the determination in a particular case but does not bind other courts or public administration bodies. The

26 Piotr Tuleja, 'Czasowy zakaz przebywania w strefie nadgranicznej a kryzys humanitarny' [Temporary Ban on Staying in Border Zone and Humanitarian Crisis] *konstytucyjny.pl* (9 December 2021) <https://konstytucyjny.pl/piotr-tuleja-czasowy-zakazu-przebywania-w-strefie-nadgraniczne-a-kryzys-humanitarny/≥ accessed 28 November 2022.

27 Opinion of the Ombudsman for the Senate of 22 November 2021 on the Act Amending the Act on State Border Protection and Certain Other Acts (Senate Print No 569) <https://bip.brpo.gov.pl/sites/default/files/2021-11/Do_Senatu_granica_panstwowa_22.11.2021.pdf> accessed 28 November 2022

28 Małgorzata Pyziak-Szafnicka, 'Trybunał Konstytucyjny *à rebours*' [Constitutional Tribunal *à rebours*] (2020) 5 *Państwo i Prawo* 25.

29 Venice Commission, 'e-Bulletin on Constitutional Case-Law: Special Collection Related to COVID-19' *venice.coe.int* <https://venice.coe.int/files/Bulletin/COVID-19-e.htm> accessed 28 November 2022.

above-mentioned reasoning justifying the unconstitutionality of the introduced restrictions on freedom of assembly was reflected in various ways in court decisions. For example, in its Decision of 2 May 2020, Case No IV Ns 47/20, the Regional Court of Warsaw found the nationwide ban on assemblies to be lawful and found no violation of freedom of assembly of the persons who were banned from organising them. Although, in the Court's view, there may have been doubts as to whether Article 46a and Article 46b(1)–(6) and (8)–(12) of the Act of 5 December 2008 on the Prevention and Control of Infections and Infectious Diseases in Humans were the correct basis for issuing a regulation that banned assemblies, these doubts did not affect the validity of the ban. A different view was expressed by the Supreme Court in its Judgment of 1 July 2021, Case No IV KK 238/21. It considered the above-mentioned statutory authorisation to be defective, and the regulation issued on its basis, containing a general order to cover the mouth and nose, to be an instrument without a legal basis. Its defectiveness meant that there could be no criminal liability for a breach of the regulation. The state of epidemic, declared in a defective way, also meant that there could be no criminal liability for violations of the prohibition on organising and participating in assemblies expressed in the regulation. In the Supreme Court's view, courts applying the law should always examine whether the implementing regulations are issued on the basis of a statute and restrict constitutional rights in accordance with it. This view was also expressed by the Supreme Court in other judgments (SC Judgment of 16 March 2021, II KK 64/21 and SC Judgment of 11 June 2021, II KK 202/21). The above-mentioned views of the Supreme Court were referred to in a number of ordinary court judgments, which found violations of freedom of assembly in the form of prohibitions on assembly organisation, criminal charges for participation in assemblies, and the use of direct coercion against participants.[30]

Judicial protection of freedom of assembly in connection with the humanitarian crisis on the Poland–Belarus border faced similar problems. The provisions that introduced the prohibition of movement and the prohibition of holding assemblies were not reviewed by the Constitutional Tribunal either. The initially diverse case law was significantly influenced by the views of the Supreme Court. In its judgment of 18 January 2022, Case No I KK 171/21, it held that even during a state of emergency, restrictions on human rights must correspond to the degree of threat and should aim to restore the normal functioning of the state as soon as possible. The total prohibition on staying in the border zone, introduced by the Resolution of the Council of Ministers

30 Dominika Sitnicka, 'Udział w zgromadzeniach podczas epidemii nie jest nielegalny. Policja masowo przegrywa w sądach' [Participation in Assemblies During an Epidemic Is Not Illegal: Police Lose Case After Case in Courts] *Osiatyński Archive* (16 December 2020) <https://archiwumosiatynskiego.pl/wpis-w-debacie/udzial-w-zgromadzeniach-podczas-epidemii-nie-jest-nielegalny-policja-masowo-przegrywa-w-sadach/≥ accessed 28 November 2022.

of 2 September 2021 on restrictions on freedoms and rights in connection with the declaration of a state of emergency, was not justified by statutory law. Moreover, it was a disproportionate response to the existing threats related to foreigners illegally crossing the border. It was possible to impose only local bans on stays and restrictions on other rights. Consequently, the Supreme Court held that it was not an offence for journalists to stay in the border area, despite the prohibition formulated in the regulation of the Council of Ministers. Therefore, the Supreme Court reversed the judgment of the District Court and acquitted the defendants. The reasoning above is fully applicable to restrictions on other constitutional rights, including freedom of assembly, during a state of emergency.

The Supreme Court, when pronouncing the restrictions on freedom of assembly to be unconstitutional, referred to the argumentation developed after the entry into force of the Constitution in 1997 and that was well-established in both legal scholarship and the earlier case law of the Constitutional Tribunal. However, this argumentation was not recognised by the government, administration authorities, and law-enforcement agencies. They respected the total ban on the organisation and holding of assemblies in the border municipalities. Freedom of assembly was temporarily abolished. In the event of a breach of this prohibition, the police and the public prosecutor's office attempted to bring individuals to justice for misdemeanours or offences.

Freedom of assembly in extraordinary situations

The Polish Constitution, the legal instruments that flesh out its provisions, and the cases of the courts and the Constitutional Tribunal introduced protection for freedom of assembly at a level similar to that guaranteed in other European states. The substance of freedom of assembly and the permissible restrictions met the standards set by the ECtHR. Its implementation did not cause much doubt in legal scholarship. Disputes over violations of freedom of assembly were resolved by the courts and the Constitutional Tribunal. If anything remained outside the Tribunal's jurisdiction, such disputes were decided by the ECtHR.[31] Under the Constitution, there were no systemic problems with protecting freedom of assembly. During the post-1989 transition period, the belief that freedom of assembly was important for the exercise of other constitutional rights and for the functioning of democracy became consolidated. Over time, the statutory fleshing out of freedom of assembly began to emphasise its institutionalisation. An example of this process is spontaneous assemblies, which were initially not recognised at all. After the judgment of the Constitutional Tribunal of 10 July 2008, P 15/08, it was assumed that convening them was allowed directly on the basis of Article 57 of the

31 *Bączkowski and ors v Poland* App No 1543/06 (ECtHR, 3 May 2007).

Constitution, but now they are regulated in Article 27 of the Act of 15 July 2015 – Law on Assemblies.

Until 2020, however, the process described above was not tested in emergency situations. This happened during the pandemic and the humanitarian crisis at the border and gave rise to some doubts about the way in which extraordinary measures were regulated in the Constitution. The doubts concerned the capacity of public authorities to respond to extraordinary threats in a way that would not lead to human rights violations. Freedom of assembly has become a specific area where such doubts have accumulated.

The course of the COVID-19 pandemic brought to light the uncertainties surrounding the regulation of extraordinary measures. A comprehensive resolution of these doubts through the appropriate interpretation of the Constitution and statutes proved impossible due to the crisis surrounding the judicial power. The first doubt relates to the short period for which a state of emergency or natural disaster can be declared and the vague criteria regarding extensions. The unchallenged premise underlying Article 228 of the Constitution was the three characteristics of extraordinary measures: the existence of a serious threat to legally protected goods that cannot be countered by ordinary measures alone, the sudden occurrence of such a threat, and its short duration. Linked to this last feature are the constitutional periods of extraordinary measures, the measures used by public authorities and the consequences of ending extraordinary measures. They do not form a coherent whole in a situation in which exceptional threats last for a long time. Under Article 230(1) and (2) of the Constitution, a state of emergency can last up to 90 days and can only be extended by 60 days with the consent of the Sejm. A state of natural disaster can last up to 30 days and can then be extended with the approval of the Sejm. However, Article 232 does not define the grounds for its extension. Neither the Constitution nor the statutes regulating a state of emergency or natural disaster provide adequate solutions to deal with exceptional threats that last for a prolonged period of time. Nor do they explicitly indicate how restrictions on constitutional freedoms and rights should be differentiated. The basis for such differentiation remains the general principle in Article 228(5) of the Constitution: Actions taken by public authorities should be proportional to the degree of threat. With regard to a state of emergency, Article 233 of the Constitution exempts a closed list of constitutional freedoms and rights from specific restrictions. However, freedom of assembly is not one of them. In restricting freedom of assembly, public authorities are therefore not required to follow the principle of proportionality from Article 31(3) of the Constitution. Consequently, Article 16(1)(1) of the Act of 21 June 2002 on the State of Emergency makes it possible to suspend the right to organise assemblies of any type. In practice, freedom of assembly was restricted in a discretionary manner by administrative authorities on the basis of general and evaluative grounds justifying the prohibition of organising and participating in assemblies. In turn, Article 233(3) of the Constitution indicates that a statute restricting human rights and freedoms during a state

of natural disaster may restrict the rights indicated in this provision. Freedom of assembly is not one of them. A literal interpretation of the provision would lead to the conclusion that freedom of assembly cannot be restricted at all during a state of natural disaster. However, a systemic interpretation suggests that restrictions on freedom of assembly in a state of natural disaster are permissible under the general principles set out in Article 31(3) of the Constitution. It is likely that the lack of terminological consistency and the inconsistent way in which the constitutional requirements for restricting human rights during extraordinary measures are formulated have resulted in a complete failure to regulate freedom of assembly in the Act of 18 April 2022 on the State of Natural Disaster. Meanwhile, during the COVID-19 pandemic, restrictions on freedom of assembly were among the important measures preventing the spread of the virus.

Article 228(7) of the Constitution prohibits holding elections during extraordinary measures. This solution is justified, among other things, by restrictions on the exercise of political rights. The terms of office of the authorities listed in this provision are extended accordingly. However, it is not clear whether this extension guarantees the continuity of the term of office of the central authorities of the state, such as the President.

First, these doubts were raised in relation to the COVID-19 pandemic, its particularities, and the long-standing state of high epidemic threat, as well as its impact on healthcare. However, the legal instruments of the extraordinary measures were not tested in practice, because no extraordinary measure was declared, even though the constitutional criteria had been met. The decision not to declare any extraordinary measures and to combat pandemic threats by implementing regulations from the Minister of Health and the government had a strong detrimental effect on freedom of assembly. Restrictions were introduced without the accompanying reflection on their proportionality to the existing threats. While this could be understood in the early period of the pandemic due to the rapidly changing epidemic situation, a lack of parliamentary debate in subsequent periods contributed to the introduction of arbitrary restrictions on freedom of assembly. Second, the fact that these restrictions were introduced by the government's implementing instruments rendered them unconstitutional. This limited the effectiveness of legal measures to combat the pandemic, including in situations where restrictions on freedom of assembly were justified for health reasons. The belief that restrictions on freedom of assembly were unconstitutional meant that they were organised despite prohibitions formulated in regulations, often also disregarding the procedures required by the Law on Assemblies. This was particularly evident following the Constitutional Tribunal's ruling declaring abortion for embryo-pathological reasons unconstitutional. The introduction of a state of natural disaster in the early period of the pandemic would have rationalised the discourse on the necessary restrictions on freedom of expression. Third, the dispute over the legality of assemblies held during the pandemic resulted in disproportionate police action involving, *inter alia*, kettling participants

and submitting motions for punishments for misdemeanours or offences to courts.[32]

In Poland, there was no wider discussion on the legitimacy of specific restrictions on freedom of assembly due to the particular nature of the threats caused by the COVID-19 pandemic.

On the other hand, it is difficult to use the experience of the introduction of a state of emergency in municipalities along the Poland–Belarus border as the basis for a rational discourse about restricting freedom of assembly. Leaving aside the issue of the legitimacy of declaring this state of emergency, the manner in which it introduced a ban on organising assemblies must be questioned. This ban was not a measure by which the state border could be protected; instead, it caused a violation of the essence of Article 57 of the Constitution.

In both cases discussed above, excessive restrictions on freedom of assembly resulted from the rule-of-law crisis in Poland. The lack of Constitutional Tribunal rulings on the above-mentioned normative instruments had two negative consequences. First, the unconstitutional instruments were not repealed. They served as the basis for many decisions that violated freedom of assembly. Second, interpretive disputes related to the application of the provisions of the Constitution and statutes on extraordinary measures remained unresolved. Thus, an appropriate standard of conduct for public authorities was not created. One example in this regard is the failure to define permissible restrictions on freedom of assembly on the basis of the requirement that they should be proportional to the degree of threat. It was the case law of the Supreme Court that verified the legality of the normative instruments and acts of applying the law that restricted freedom of assembly during the pandemic period and during the state of emergency at the border. In its rulings, the Supreme Court declared the regulations that excessively restricted freedom of assembly unconstitutional. On a case-by-case basis, the Supreme Court overturned decisions and rulings imposing sanctions on citizens for acting contrary to unconstitutional regulations. However, these rulings did not have a direct impact on the way in which the government and its law-enforcement agencies operated.

Conclusion

The above-mentioned problems are the source of three negative trends with respect to freedom of assembly. The subjects of this freedom see it as important for expressing their views and influencing public authorities. At the same time, there is a growing conviction that the freedom of assembly declared by the Constitution does not have adequate guarantees at the level of enactment and in the practice of their application. It is apparent that an increasing number of spontaneous assemblies are being organised in disregard of the statutory

32 Tomasz Sroka, 'Kettling as a Deprivation of Liberty Under Polish Law' (2021) 2 *Journal of Criminal Law and Penal Studies* 63.

requirements for the organisation of assemblies and their course. Provisions on freedom of assembly are not seen as a legal guarantee of this freedom, but as an oppressive instrument for its unjustified restriction.

In contrast, the executive authorities recognise that normative instruments issued by the government are crucial to the extent to which freedom of assembly is exercised. The government expects law-enforcement authorities to comply with its regulations. Behaviour involving violations of prohibitions formulated in the implementing instruments should be strictly sanctioned by criminal law, misdemeanour law, and administrative law. Law-enforcement authorities are expected to respond to attempts to organise assemblies.

Conflicts between public authorities and citizens that arise against this background can only be resolved by courts to a limited extent.

The emergencies of recent years and the war in Ukraine have not led to a debate on the optimisation of state measures and the permissible restrictions on citizens' rights. Instead, the government has proposed amendments to statutes to allow for the declaration of quasi-extraordinary measures, an example of which is the bill on the protection of the population. These solutions consist, among other things, of granting the executive authorities broad authorisation to interfere with freedom of assembly.[33]

33 Hubert Izdebski, 'Projekt ustawy o ochronie ludności oraz stanie klęski żywiołowej – nowa wersja, nowe treści?' [The Bill on the Protection of the Population and the State of Natural Disaster: New Version, New Content?]' *Batory Foundation* (26 September 2022) <https://www.batory.org.pl/publikacja/projekt-ustawy-o-ochronie-ludnosci-oraz-o-stanie-kleski-zywiolowej-nowa-wersja-nowe-tresci/> accessed 28 November 2022.