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Freedom of Assembly before the Courts: A Case Law Overview from the European Court of Human Rights and Polish Courts[1]

Thesis: In the practice of the post-transformation era in Poland, administrative and common courts have played a key role in safeguarding citizens' freedom of assembly. While decisions by municipal authorities have at times been inconsistent and insufficiently justified, the courts have often rectified these deficiencies, developing well-established lines of jurisprudence in favour of freedom.

Introduction

As reflected in jurisprudence, the positivisation of freedom of assembly that has taken place in constitutional acts and legislation poses an interesting research challenge. In the following review, we focus on constitutional and administrative dimensions, consciously leaving aside criminal problems associated with violations of the law of assembly (and other laws containing criminal provisions).[2]

[1] This article has been written based on research conducted as part of a research project entitled. 'Does the law on assemblies matter? Analysis of the evolution of freedom of assembly in Poland', carried out at the Nicolaus Copernicus University (*Uniwersytet Mikołaja Kopernika*) and led by Anna Tarnowska (grant of the National Science Centre – *Narodowe Centrum Nauki* – within the OPUS 25 programme, Contract No. 2023/49/B/HS5/02600).

[2] This is a separate phenomenon worth an in-depth analysis if only in the context of the misuse of administrative-punitive measures by police authorities to impede participation in a lawful

We have selected for our analysis key structural issues of freedom of assembly: 1) the issue of the definition of assembly; 2) the organiser of assemblies (the applicant); 3) the obligations of the applicant and the authority receiving the notification; and 4) the limitations on the right to organise an assembly in Polish legislation since 1990. For the sake of consistency and uniform methodology, we limit our analysis to the period of democratisation of the political system and consolidation of the constitutional foundations of the Third Republic of Poland.

We also felt that, alongside the interpretation of the law of assembly by Polish courts, the review should include the voice of the European Court of Human Rights (ECtHR), based on Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[3] but only in cases directly concerning Poland. We begin with Polish cases before the ECtHR. Next, we examine the jurisprudence of the Constitutional Tribunal. Finally, we analyse rulings of administrative courts (mainly from 1990 to 2015) and common courts (under the 2015 Act), both of which resolve key disputes under the law on assemblies.

Thus, the content of the review reflects a changing legal framework, beginning with the law of 5 July 1990,[4] the first act of the transition period that addressed the issue of freedom of assembly.[5] This law was created in a new political situation, in which citizens exercised the right in question while ignoring the requirements of the 1962 communist law.[6] The 1990 law is an overly concise act concerning public assemblies, excluding electoral ones, as well as those organised by state and local government bodies and churches. It provides for a simple procedure based on notifying the municipal authority of a planned assembly at least three days before the date of the assembly. The municipal authority has the power to prohibit the assembly in two cases: when the purpose of the assembly or its conduct is against the law, or the

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assembly. Cf. the Ombudsman's (*Rzecznik Praw Obywatelskich*) correspondence with the Capital Police Headquarters (*Komenda Stołeczna Policji*), for example, https://bip.brpo.gov.pl/pl/content/policja-interwencja-srodki-przymusu-bezposredniego-ksp-odpowiedz [accessed: 2024.09.20]; A. Ploszka, M. Sczaniecki, *Dajcie mi człowieka, a znajdzie się paragraf. O instrumentalnym stosowaniu kodeksu wykroczeń do tłumienia protestów* [Give Me a Man and a Paragraph will be Found. On the Instrumental Use of the Code of Offences to Suppress Protests], Warszawa 2024. Amnesty International as an organisation also takes action in practice, observing the course of proceedings concerning the right of assembly or issuing *an amicus curiae* opinion, for example, in the case of Joanna Wolska before the Regional Court (mid-level common court) in Bielsko-Biała (VII Ka 235/24).

[3] The Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, subsequently amended by Protocols Nos. 3, 5, and 8 and supplemented by Protocol No. 2 (Polish *Journal of Laws* 1993 No. 61, item 284).

[4] *Journal of Laws* No. 51, item 297.

[5] A brief overview of Polish legislation on freedom of assemblies after 1990 can be found in: R. Grabowski, *Ewolucja ustawowych regulacji zgromadzeń w Polsce* [The Evolution of Statutory Regulations on Assemblies in Poland] [in:] *Wolność zgromadzeń* [Freedom of Assembly], eds. R. Balicki, M. Jabłoński, Wrocław 2018, pp. 31–35; E. Kubas, *Constitutional freedom of assembly and its limitations*, "Polityka i Społeczeństwo" 2022, no. 4(20), pp. 160–170.

[6] Sejm Library, Sejm of the People's Republic of Poland/RP, 10th legislature (1989–1991), Ip. PRL/RP/10/30, Sejm session of 17–18 May 1990, columns (*łamy*) 179–191; statements by Jan Błachnio and Janina Kuś, https://bs.sejm.gov.pl/F?func=direct&doc_number=000023590 [accessed: 2024.09.20].

assembly could endanger the life or health of people and property of significant size. The organiser could initially appeal against this decision to a higher administrative authority, and later to the administrative court. A controversial issue was the strict definition of an assembly[7] as a gathering of at least fifteen people.

The new regulation on the law of assemblies, the Act of 24 July 2015,[8] is much more comprehensive. Its creators considered some objections formulated by academics and practitioners, such as the positivization of spontaneous assemblies (taking place 'in connection with a sudden and unpredictable event') in Article 3(2) of the Act. It also includes various examples of guidance from Constitutional Tribunal jurisprudence. While maintaining the notification system, the legislator clarifies the necessary elements of notification and addresses the issue of organising two or more assemblies simultaneously at the same time and location. Finally, the Act changes the system of monitoring municipal bodies' decisions concerning notifications. The prohibition of the assembly is lodged directly with the ordinary courts; their judgments need to be issued within twenty-four hours and are immediately enforceable.

The amendment of 13 December 2016 also introduces a new, previously unknown type of assembly – the cyclical assembly.[9] The legislator privileges the organisers of cyclical assemblies by giving them priority over other, ordinary assemblies and waiving the notification requirement in their case. It should be noted that this regulation was adopted *ad casum*, most likely for a specific political need, that is, to ensure preferential treatment of specific assemblies, the monthly gatherings commemorating the airplane crash in Smolensk.[10]

Another glaring example of episodic legislation was the Act of 28 April 2022, prohibiting spontaneous assemblies during the World Copernican Congress held

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[7] The Polish term *zgromadzenie* includes both formal assemblies and public gatherings, the regulation of which we analyse here. Outside the normal regulation of assemblies remain mass events, which are regulated separately.

[8] *Journal of Laws* 2015, item 1485.

[9] Act of 13 December 2016 amending the Law on Assemblies (*Journal of Laws* 2017, item 579). A cyclical assembly is organised 'by the same organiser in the same place or on the same route at least four times a year according to the schedule or also at least once a year on the days of national and state holidays and such events were held in the last three years, even if not in the form of an assembly, and aimed in particular at commemorating momentous and significant events in the history of the Republic'.

[10] The website of the Mazovian Voivodeship Office records for its region (including the largest city in Poland, the capital Warsaw) fifteen such assemblies since the amendment came into force. Smolensk monthly commemorations are repeated on the list; other such assemblies commemorate, among others, the Warsaw Ghetto Uprising, the Warsaw Uprising, the restoration of independence (11 November), and commemoration of Epiphany on 6 January (https://bip.mazowieckie.pl/artykuly/441/informacja-o-miejscach-i-terminach-zgromadzen-organisowanych-cyklicznie [accessed: 2024.09.20]). These gatherings, organised by the Law and Justice party, commemorate the crash of a Polish government plane near Smolensk in 2010. The then President of the Republic of Poland, Lech Kaczyński, the plane's crew and all passengers forming part of the accompanying delegation of top officials and parliamentarians died. Later, during the Law and Justice government (which lasted until December 2023), the monthly commemorations became state ceremonies, and the regulations on cyclical assemblies no longer applied to them.

in February 2023 in Toruń.[11] The regulation raised numerous constitutional doubts, which the Ombudsman signalled.[12]

1. ECtHR jurisprudence in Polish cases

Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to conduct public assemblies. The ECtHR has summarised its standards concerning this freedom in a separate guide, updated as of 31 August 2024.[13] The guide refers to the few key cases adjudicated against Poland, among others, *Bączkowski and Others v. Poland* (issued on 3 May 2007),[14] *Grzęda v. Poland* (15 March 2022),[15] and *Stowarzyszenie Wietnamczyków w Polsce 'Solidarność i Przyjaźń'* (Association of the Vietnamese in Poland 'Solidarity and Friendship') *v. Poland*.[16] The ECtHR also communicated several cases concerning the freedom of assembly, related to the ban on assembly during emergencies (including the Polish-Belarusian border crisis[17] and COVID-19 measures),[18] as well as holding counter-demonstrations against cyclical assemblies.[19]

We will focus only on the case *Bączkowski and Others v. Poland*, because it considers the issues of admissibility and merits of the freedom of assembly encapsulated in Article 11 of the Convention.

The case was lodged under Article 34 of the Convention by Mr. Tomasz Bączkowski, Mr. Robert Biedroń, Mr. Krzysztof Kliszczyński, Ms. Inga Kostrzewa, Mr. Tomasz Szypuła, and by the Foundation for Equality on 16 December 2005. The applicants complained that their right to peaceful assembly had been breached by how the domestic authorities had applied relevant domestic law to their case. They alleged that there was no effective procedure available to secure a final decision ahead of the planned assemblies.

The authorities banned the assemblies planned by the applicants. The appellate authorities quashed the first-instance decisions, criticizing them for being poorly justified and in breach of the applicable laws. The ECtHR emphasized that these decisions were given after the dates on which the applicants had planned to hold the demonstrations.[20]

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11 Act of 28 April 2022 on the Copernicus Academy (*Journal of Laws* 2022, item 1459).

12 https://bip.brpo.gov.pl/pl/content/rpo-kongres-kopernikanski-zakaz-zgromadzen-spontanicznych-mein-kprp-odpowiedz [accessed: 2024.09.20].

13 https://ks.echr.coe.int/documents/d/echr-ks/guide_art_11_eng [accessed: 2024.09.06].

14 Application no. 1543/06.

15 Application no. 43572/18.

16 Application no. 7389/09, judgment of 2 May 2017.

17 Applications nos. 8520/22 and 10335/22. (The right to the independent and impartial tribunal established by law has also been invoked in this case).

18 Application no. 39750/20.

19 Application no. 13375/18.

20 The Case of *Bączkowski and Others v. Poland* (Application no. 1543/06), p. 66.

The Court acknowledged that the assemblies were eventually held on the planned dates. However, the applicants took a risk in holding them, despite the official ban in force at the time. The assemblies were held without a presumption of legality, which constituted a vital aspect of the effective and unhindered exercise of freedom of assembly and expression. According to the Court, the refusals to give authorization could have had a 'chilling' effect on the applicants and other participants in the assemblies. It could also have discouraged other individuals from participating in the assemblies because they lacked official authorization. Therefore, the authorities did not provide any official protection against potentially hostile counter-demonstrators.[21]

According to the Court, when the assemblies were held, the applicants were negatively affected by the refusals to authorise them. The legal remedies available could not alleviate the applicants' situation, as the relevant decisions were given in the appeal proceedings after the date on which the assemblies were held. The Court referred in this respect to its jurisprudence on Article 13 of the Convention (effective remedy before a national authority). Thus, the Court stated that there was an interference with the applicants' rights guaranteed by Article 11 of the Convention.[22]

Furthermore, the Court noted that the timing of public meetings to express certain opinions may be crucial for the political and social weight of such meetings. Hence, the State authorities may, in certain circumstances, refuse permission to hold a demonstration if such a refusal is compatible with the requirements of Article 11 of the Convention. However, the authorities cannot change the date on which the organisers plan to hold an assembly. Suppose a public assembly is organised after a given social issue loses its relevance or importance in current social or political debate. In that case, the meeting's impact may be significantly diminished. Freedom of assembly, if prevented from being exercised at a propitious time, may be rendered meaningless.[23]

In the Court's view, it is vital for the effective enjoyment of freedom of assembly that the applicable laws provide for reasonable time limits within which the State authorities should act. In the adjudicated case, the applicable laws provided time limits for the applicants to submit their requests for permission. In contrast, the authorities were not obliged by any legally binding time frame to give their final decisions before the planned date of the demonstration. The Court was, therefore, not persuaded that the available remedies, being entirely post hoc, could provide adequate redress for the alleged violations of the Convention.[24]

Ultimately, the Court determined that the applicants had been denied an effective domestic remedy regarding their freedom of assembly. Consequently, the Court concluded that there was a violation of Article 13 in conjunction with Article 11 of the Convention.[25]

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21 *Ibid.*, p. 67.
22 *Ibid.*, p. 68.
23 *Ibid.*, p. 82.
24 *Ibid.*, p. 83.
25 *Ibid.*, p. 84.

2. Law of assembly – interpretations of key elements in the jurisprudence of the Polish Constitutional Court

2.1. Attempts at definition

The Constitutional Tribunal has on several occasions undertaken to reconstruct the concept of 'assembly'. In the judgment K 34/99,[26] the Tribunal points out that the concept of assembly 'consists of two essential elements: gathering at least several persons in one place and the psychological link among the assembled persons'. Further, it emphasises that, 'the term "assembly" as used in Article 57 of the Constitution includes in its scope gatherings for the purpose of joint deliberation or the joint expression of a position'. What often unites strangers and anonymous individuals into an assembly is the desire to exchange opinions or views. In its judgment K 44/12,[27] the Court indicates that there should be an 'intellectual relationship' among the participants in an assembly, consisting of a desire to express a particular position or to externalise an experience. According to another ruling (Kp 1/04),[28] an assembly is, in principle, a planned and intentional event. By holding an assembly and being together at a specific time and place, citizens want to express their opinions, positions, and experiences: 'an assembly is most often a meeting planned and called by specific individuals. The term assembly encompasses gatherings whose purpose is to deliberate together or express a position collectively, whether the participants convey their views verbally or otherwise. The mere fact of being physically present together with others in a particular place may constitute a form of expression of an individual's beliefs.' The subject of the freedom of assembly is every individual; however, this freedom is exercised collectively. The Tribunal adopts a broad understanding of the concept of assembly, which includes not only assemblies convened to express attitudes, opinions, and demands on political and public matters but also assemblies of a non-political nature (for example, religious or private). The judgment also emphasises the occasional nature of an assembly and the anonymity of its participants: participants in an assembly are not bound by a permanent formal bond, and participation in the assembly itself does not require the exact identity of the participants. These factors distinguish an assembly from an association, which is characterized by assumed permanence, a formal bond among identifiable (non-anonymous) members, and an organisational structure. It should be considered a duty of the state to allow this freedom to be exercised as freely as possible and to guarantee the security of both the participants in the assembly and third parties. 'Constitutional protection', says the Constitutional Tribunal, 'extends both to assemblies indoors and to assemblies in the open, including, *inter alia*, assemblies on public roads'. Only peaceful assemblies enjoy constitutional protection: 'The concept of peaceful assemblies should be referred to the

[26] Judgment of 28 June 2000 (K 34/99), OTK – 142/5/2000 (*Journal of Laws* 2000 No. 53, item 649).
[27] Judgment of 18 September 2014 (K 44/12), OTK – 92/8/A/2014 (*Journal of Laws* 2014, item 1327).
[28] Judgment of 10 November 2004 (Kp 1/04), OTK – 105/10/A/2004 (*Monitor Polski* No. 48, item 826).

conduct of the assembly […] with respect for the physical integrity of individuals and private as well as public property'. As a result, peacefulness 'excludes the use of violence or coercion by participants, whether directed at fellow demonstrators, third parties, or public officials'. The Tribunal also emphasizes that the purpose and intentions of the organisers are relevant to the peaceful nature of an assembly, although caution must be exercised before deeming an assembly non-peaceful: 'An assembly does not yet lose its peaceful character if there are isolated incidents or disturbances. It ceases to be peaceful when the disturbances become serious; there is violence against individuals or property'. Any prohibition of assemblies should be treated as an exception and must be subject to a legally defined mechanism of appeal or review. In conclusion, the Tribunal points out that the essential elements of the freedom of public assembly consist of: 1) the assembly's peaceful nature; 2) the anonymity of participants; and 3) the absence of organisational ties among individual participants, as well as between the organiser and participants.

The Tribunal strongly emphasises the importance of assembly in the legal order: in its view, assembly is 'an extremely important means of interpersonal communication, both in the public and private spheres, and a form of participation in public debate and, consequently, also in the exercise of power in a democratic society. The purpose of freedom of assembly is not only to ensure the autonomy and self-realisation of the individual but also to protect the social communication processes necessary for the functioning of a democratic society. It is therefore underpinned not only by the interests of the individual but also by the interests of society as a whole. Freedom of assembly is a necessary element of democracy and conditions the exercise of other freedoms and human rights relating to the sphere of public life' (K 34/99, see K 21/05, P 15/08, K 44/12, Kp 1/17). The Tribunal emphasizes the stabilizing and corrective role of assemblies within the political and social order. They enable the public to express discontent, criticism, or rejection of the existing legal or social framework, thereby serving as an early warning mechanism that alerts both state authorities and society to potential or already existing sources of tension.

2.2. Organisers of and participants in an assembly in the jurisprudence of the Constitutional Tribunal

According to Article 57 of the Constitution, the freedom to organise assemblies includes, among other things, the freedom to choose the time, place, and form of the assembly, as well as to plan its course. Freedom of assembly also includes the right not to participate in an assembly. Public authorities are, therefore, not only obliged to refrain from interfering with the organisation and conduct of assemblies, but also to take positive measures to enable the effective exercise of this right (K 34/99).

A participant in an assembly may remain anonymous, whereas an organiser may not, because of the obligation to meet statutory formal requirements (Kp 1/04). The notion of an assembly presupposes the existence of an organiser as well as a clearly defined purpose and location.

The concept of a 'participant' includes both those who support the purpose of the assembly and those who express other views provided they act peacefully and do not disrupt the course of the event. In practice, however, distinguishing participants from casual onlookers or passers-by may prove difficult (Kp 1/04).

Separately, the Tribunal declares Article 1(2) of the Act of 5 July 1990, Law on Assemblies, which requires a gathering to consist of 'at least fifteen persons', to be incompatible with the Constitution (K 44/12). In its reasoning, the Tribunal formulates a general principle: the Constitution does not allow the limitation or weakening of rights of assembly at the statutory level based on arbitrary criteria such as the number of participants. As stated in the official reasoning, 'both constitutional and statutory provisions guarantee the freedom of assembly to everyone'.[29]

2.3. Legalization and notification of an assembly in the assessment of the Constitutional Tribunal

The Tribunal explains that two forms of regulation of the relationship between the organiser of the assembly and the public authority can be distinguished: the notification model and the permit model. In 1990, the legislator adopted the notification model, considering the introduction of the permit unconstitutional because it grants 'excessive discretionary power to public administration bodies' (K 21/05).

Notification primarily fulfils an informative function and consists of the transmission of information about the date, place, duration, and number of the assembly (K 44/12). The purpose of the notification is to register the gathering formally and 'to enable the public administration authorities to take appropriate measures, on the one hand, to prevent gatherings whose objectives are contrary to the law, and, on the other, to ensure the protection of those organising and participating in lawful assemblies, when there are no grounds for prohibition" (P 15/08). Notification, therefore, fulfils not only an informative but also a guaranteeing function, allowing the public authorities to ensure the peaceful nature of the assembly by taking proper security measures. The complete absence of a notification requirement would impair the ability of public authorities to fulfil their duties of safeguarding and ensuring the peaceful conduct of assemblies. Notification also enables the resolution of conflicts between assemblies scheduled at the same location and time (K 44/12). As the Tribunal states in its judgment K 44/12, 'it is not sufficient in this context to state that there is indeed an identity of time, place, or routes of passage of two or more assemblies that cannot be separated. It is necessary to demonstrate an actual and real threat arising from plans to hold assemblies of similar size at the same place and time'.

The adoption of the notification model does not mean that the non-notified assemblies are not allowed in the light of the Constitution (K 44/12). As the Tribunal explains, 'the failure to notify an assembly to the municipal authority constitutes in

[29] M. Bartoszewicz, *Liczba uczestników zgromadzenia i jej znaczenie prawne w obecnym i dawnym prawie zgromadzeń* [The Number of Participants in an Assembly and Its Legal Significance in Current and Historical Assembly Law] [in:] *Wolność zgromadzeń*…, pp. 100–103.

itself only a breach of the rules of order (procedural requirements). However, the failure to notify cannot cause such far-reaching interference by the public authorities that the mere "holding" of such a non-notified (incorrectly notified) assembly justifies treating it as a prohibited assembly'. An unregistered assembly cannot be equated with an illegal assembly.

The Tribunal, in its ruling P 15/08, recognises the existence of the category of spontaneous assemblies 'as groupings of people unprepared in advance that, without a previous plan, develop into an assembly' or 'assemblies not prepared in advance, triggered by a sudden, unexpected impulse or event and for this reason not subjected to formal procedures at all or subjected to them too late'.[30] This judgment served as a crucial catalyst for the inclusion of spontaneous assemblies in the Act as a distinct legal form of public gathering.

In 2017, the Tribunal was called upon to address the issue of the constitutional validity of the introduction of the previously mentioned category of cyclical assemblies (Kp 1/17). The Tribunal argues that 'The introduction of another, third category of assembly […] is a manifestation of the realisation of the freedom of assembly. This is because it is a way of addressing the changing social situation through a formula that orders new states of affairs. It is a matter of classifying the emerging successive types of manifestations of the realisation of the freedom of assembly, which can be organised and systematised and, due to their specificity, require a separate standardisation, making it possible to ensure a more effective realisation of the freedom of assembly and to fulfil the related obligations of the state'. According to the Constitutional Tribunal, the specific nature of cyclical assemblies justifies granting them priority over notified assemblies, that is, a status with 'the characteristics of a privilege', grounded in the particular values they represent. It should be noted that the Tribunal discontinues the proceedings in the remaining parts of the case. Four judges issued dissenting opinions on this controversial judgment, criticizing especially the lack of judicial review against a ban on 'ordinary' assembly imposed by local authorities, which they deemed unconstitutional.[31] The judgment is also heavily criticized by legal literature (for example, Monika Haczkowska and Kinga Dreniowska).[32]

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[30] This type of assembly was recognised earlier by European courts and academic literature, for example, A. Bodnar, M. Ziółkowski, *Zgromadzenia spontaniczne* [Spontaneous Assemblies], "Państwo i Prawo" 2008, issue 5, pp. 38–50.

[31] Because of the refusal of the President of Poland to swear in the three Tribunal judges still elected by the outgoing parliamentary majority in 2015, the then new coalition in power elected the judges themselves, commonly referred to as 'doubles'. This was one of the key symptoms of the rule of law crisis in Poland.

[32] M. Haczkowska, *Skutki wyroku Trybunału Konstytucyjnego Kp 1/17 dla konstytucyjnej wolności zgromadzeń* [The Effects of the Constitutional Tribunal's Judgment Kp 1/17 on the Constitutional Freedom of Assembly] [in:] *Wolność zgromadzeń*…, pp. 69–91; K. Drewniowska, *Wolność zgromadzeń w Polsce po nowelizacji ustawy z dnia 24 lipca 2015 – Prawo zgromadzeń* [Freedom of Assembly in Poland After the Amendment of the Act of 24 July 2015 – Law on Assemblies] [in:] *Wolność zgromadzeń*…, pp. 57–66.

3. The right of assembly in the jurisprudence of administrative and common courts

As indicated, judicial review of decisions issued by regional state administration authorities, acting as supervisory bodies over self-governing municipal decisions, was initially conducted only by the Supreme Administrative Court, and later also by local administrative courts. In some cases, the state administration upheld the municipal body's point of view, and the potential organisers then turned to the administrative court. There were also cases in which the local state authorities supported assembly organisers, and the municipal body challenged the decision. Administrative courts did not issue many rulings on the decision concerning freedom of assembly. Between 2004, when the local administrative courts gained competencies on the analysed matter, and November 2011, we were able to identify just over 40 rulings (including only three by the Supreme Administrative Court).[33]

Administrative courts laid the groundwork for assembly law, particularly in interpreting when assemblies can be banned. Since 2015, common courts have also helped strengthen the protection of this democratic freedom. Przemysław Szustakiewicz and Malwina Jaworska, in their analysis of the relevant case law, observed that administrative courts consistently challenged any attempts by public authorities to impose de facto restrictions on the freedom of assembly. On the one hand, the courts interpreted the statutory grounds for banning or dispersing assemblies narrowly; on the other, they demanded that officials provide a thorough and reliable assessment of the facts of each case, ensuring that any restriction on the freedom of assembly was genuinely supported by evidence.[34] However, another scenario is worth considering. Given how often courts repeat the same reasoning, now familiar to local municipal officials, it seems that they have used it to issue administrative bans on assemblies they politically oppose, expecting courts to overturn the decision. In doing so, they shifted responsibility for allowing such gatherings onto the courts.

3.1. The form of an assembly

Courts examining decisions banning assemblies have rarely had to undertake more serious considerations of the definition of an assembly. We have already mentioned that the Constitutional Tribunal's jurisprudence has contributed to a better understanding of the nature of assemblies. Nevertheless, it is possible to cite the judgement of the local

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[33] Based on reports on the activities of administrative courts 2004–2011; data collected by P. Szustakiewicz, *Przesłanki i procedura zakazu zgromadzeń w świetle orzecznictwa sądów administracyjnych* [The Grounds and Procedure for Banning Assemblies in the Light of the Jurisprudence of Administrative Courts], "Ius Novum" 2012, no. 1, p. 160.

[34] *Ibid.*; M. Jaworska, *Sądy administracyjne jako organy wymiaru sprawiedliwości w sprawach z zakresu wolności zgromadzeń, orzecznictwa w świetle orzecznictwa sądów administracyjnych* [Administrative Courts as Judicial Authorities in Matters Concerning the Freedom of Assembly: Jurisprudence in the Light of Administrative Court Case Law], "Przegląd Prawa i Administracji" 2020, no. 123, pp. 205–223.

Administrative Court in Poznań (IV SA/Po 888/09),[35] which had to cope with a rather peculiar limiting understanding of assembly by a municipal authority. The decision states that the term 'passage' should be interpreted literally. The authority considered that a planned bicycle ride did not meet the prerequisites set out by the legislator for an assembly. It takes the form of another social activity, such as a rally. The authority emphasized that the protection of constitutional freedoms of assembly, as guaranteed by Article 57 of the Constitution, cannot be enjoyed by all public meetings, including rallies.

This view was challenged by the local authority and the administrative court of first instance, who argued that the distinction between the concepts of 'passage' and 'ride' was unfounded. They noted that upholding such a distinction could, among other things, lead to the exclusion of people using wheelchairs from participating in assemblies. The ruling establishes a consistent practice permitting assemblies involving motor vehicles, such as cars or tractors. Incidentally, it is worth noting that the 1932[36] Polish law explicitly allowed 'demonstration passages on carts and cars'.

Separately, common courts examining assembly law cases since 2015 have reached similar conclusions. In one case, a mayor attempted to block an assembly organised by roller skaters, intended to 'popularise skating as a means of transport in the city and to promote the City of Warsaw as a place friendly to physically active people'. Municipal authorities argued that the application required a 'route of passage' and that 'the relevant regulation does not allow for assemblies conducted in forms other than on foot'. This interpretation would imply that participants on roller skates would be treated as road users and, therefore, be subject to the provisions of the Road Traffic Act. The court found that the municipal authority had, in effect, imposed an unjustified ban on the assembly. It further holds that if the assembly's purpose is lawful, then 'the planned form of expression […] is irrelevant'. The court concludes that 'it cannot therefore be assumed that the planned assembly does not fall within the cited definition of an assembly'.

3.2. Notification of an assembly

In the context of assembly notifications, one can recall the decision of the local Administrative Court in Gliwice issued in June 2022, in which the court rejects the complaint of the organiser of an assembly.[37] The complainant stated that on 23 October 2020, they submitted a notification for a public assembly scheduled for 24 October 2020 at 7 p.m. The administrative authority stated that the notification had been submitted too late and demanded that the date of the assembly be changed.

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35 Judgment of the Administrative Court in Poznań of 20 November 2009 (IV SA/Po 888/09).

36 Act of 11 March 1932 on assemblies (*Journal of Laws* No. 48, item 450).

37 Judgement of the Administrative Court in Gliwice of 29 June 2022 (III SAB/Gl 39/21). The parties to the proceedings still filed a cassation complaint with the Supreme Administrative Court. Still, it was rejected on the grounds that a professional attorney should have drawn it up (see also the decision of the Supreme Administrative Court of 22 March 2023, III OZ 135/23).

However, this decision was not issued in the proper legal form of an administrative decision as required by Article 107 of the Code of Administrative Procedure, which became the basis for an attempt to challenge it by means of a complaint for inaction. The court agreed with the claimant's argument but held that, prior to initiating court proceedings, the claimant should have formally requested the authority to issue a proper administrative decision.

3.3. Grounds for prohibition: 'threat to the life and health of citizens'

A frequently raised ground for the prohibition of the organisation of an assembly by municipal authorities under Polish law on assemblies is the circumstance of 'a threat to the life or health of citizens'. Judgments referring to this premise are, therefore, numerous.

For instance, the decision of the administrative court in Bydgoszcz (II SA/Bd 242/15)[38] points out that it is the duty of public administration bodies not only to offer conjectures as to possible threats but also to identify and indicate these threats against the background of the case's specific circumstances. This requires an investigation that assesses the powers and interests of the entities involved, examines how these interests interact, and determines how any resulting conflicts justify the decision taken.

The obligation to verify the actual nature of the threat cited by the authorities banning an assembly is also stressed in a decision issued by the administrative court in Gdańsk (III SA/Gd 524/14).[39] The organisers intended to hold a protest in front of the residence of the sitting Prime Minister. The local authorities banned the assembly, arguing that the town where it was to take place had the status of a health resort. In their decision, they emphasise that local residents have a right to peace, particularly on public holidays. They also cite safety concerns for children spending time at a nearby playground. They invoke Article 47 of the Constitution of the Republic of Poland, which states that everyone has the right to the legal protection of their private life, family life, honour, and good reputation, and to decide on their personal life.

The administrative court in Gdańsk found that evidence presented in the case did not substantiate the authorities' claims. They should be precisely based on concrete circumstances and not only on assumptions or presumptions. In such a case, the authority must establish and demonstrate that, in the circumstances of the specific case, the threat to human life or health or property of a significant size is real. The court notes that the case file did not even contain a situational sketch of the place indicated by the organiser as the place where the assembly was to be held, nor any information on whether the playground was fenced and, if so, how high the fence was. The court assesses that the circumstances of fundamental importance for evaluating the application had not been established.

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38 Judgment of the Administrative Court in Bydgoszcz of 7 October 2015 (II SA/Bd 242/15).

39 Judgment of the Administrative Court in Gdańsk of 8 July 2014 (III SA/Gd 524/14).

Let us draw attention to the Supreme Administrative Court judgment of 10 January 2014.[40] The municipal authorities assessed that the assembly, because of the time and place of its organisation (resulting in heavy traffic at the designated point), posed the threat of a disturbance to public order and danger to vehicular and pedestrian traffic. As a consequence, it could endanger the life or health of people or property of significant size, especially as the declared number of participants (twenty-five to thirty persons) could increase in an uncontrolled manner. However, the complainant pointed out that authorities did not fully substantiate the existence of those circumstances in the relevant case. He argued that the location of the declared assembly was a square closed to vehicular traffic, which had previously been used to host various cultural events, without causing a real threat to the safety of participants and others. The complainant believed that the reason for the ban was also 'extra-legal considerations, that is, pressure from persons and organisations not accepting the values promoted by the organiser of the assembly'. The court found the complaint justified and overruled the authorities' decisions. In its justification, it cites the jurisprudence of the Constitutional Tribunal and also the judgment of the ECtHR of 24 July 2012 in the case of *Faber v. Hungary*. This ruling highlights the state's positive obligations to ensure adequate conditions for exercising this freedom. It is the responsibility of the competent authorities to assess the security threat and the risk of interference and then apply the appropriate measures dictated by evaluating such risk. Such measures should, in principle, be the least restrictive ones and allow demonstrations to proceed. The court disagrees with the position of the authorities, according to which the fulfilment of the premise of a threat to life and health, conditioning the prohibition of an assembly, is determined by the anticipated obstructions to pedestrian and vehicular traffic alone. As the court brilliantly pointed out, 'in principle, every gathering will be associated with such impediments'.

Another case was adjudicated by the common court (mid-level) in Olsztyn in February 2024.[41] It upheld the decision of the municipal authorities prohibiting the organisation of an assembly in the form of a blockade by tractors of a roundabout and a municipal road for seven days. The roundabout was to be blocked entirely, and the organiser planned to let only emergency vehicles through. A joint-stock company, one of whose buildings was located on the aforementioned road, argued that the complete blocking of the road exit would result in, among other things, the presence of out-of-date goods at the company-owned centre and, because of a prolonged lack of supply, the closure of 213 grocery shops supplied from this centre. The company claimed that, for these reasons, the losses would reach the amount of 125 million PLN and could be even higher due to fixed costs, such as staff and maintenance of the distribution centre and shops. The municipal authorities organised a meeting to persuade the organisers to allow cars and services to pass. However, a final agreement was not achieved; so the local authorities announced the decision to ban the assembly. The decision was

[40] Judgment of the Supreme Administrative Court of 10 January 2014 (I OSK 2538/13).
[41] Judgement of the Regional Court in Olsztyn of 19 February 2024 (I Ns 46/24), LEX no. 3695269.

challenged in court, which found that the authorities had taken all necessary steps to clarify the facts of the case accurately, had exhaustively considered the necessary evidence, and had attempted to resolve the conflict in a consensual manner. In the court's view, 'the losses of the order of 125 million PLN represent a significant amount of property', and 'the circumstance that the indicated loss could occur was sufficiently demonstrated in the decision'.

3.4. Pluralism of views and the problem of counter-demonstration

At the outset, let us refer to the judgment of the Supreme Administrative Court of 2006 (I OSK 329/06).[42] In this case, the premise already analysed above was used to prohibit an assembly. However, it refers to possible damage caused not by the participants in the notified assembly but by the participants in a counter-demonstration. The municipal authorities, by a decision of 15 November 2005, after considering the notification from the Organising Committee, banned the assembly, justifying the ban on the grounds that holding the assembly and marching on the indicated route could endanger property of significant size. The authorities referred to the course of the assembly-march on 20 November 2004 on the occasion of the International Day of Tolerance,[43] during which opponents of the assembly threw stones and eggs, resulting in the destruction of property and the wounding of a police officer. According to the authority, such behaviour and damage to shop windows, advertisements, and benches was possible during the assembly planned for 19 November 2005. A possible closure of pedestrian traffic along the route of the march would have violated citizens' constitutional right to freedom of movement. It would not have prevented opponents' intrusion on the march's route. Thus, the premise for the prohibition did not concern the notified assembly itself but rather the anticipated behaviour of counter-demonstrators. The Supreme Administrative Court emphatically emphasised in the operative part of its judgment that 'it is not the task of public administration bodies and administrative courts to analyse slogans, ideas, or content that do not violate the provisions of the law in force and which the assembly is intended to serve, from the point of view of the moral convictions of persons acting on behalf of an administrative body or judges sitting on the bench of a court, or the convictions of any part of the population'. This would nullify the constitutional freedom of assembly (Article 57 of the Polish Constitution) and violate the law on assemblies.

In a case considered by the administrative court in Gdańsk in May 2011,[44] the municipal authority banned a public assembly in December 2010 because the content

[42] Judgment of the Supreme Administrative Court of 25 May 2006 (I OSK 329/06), ONSAiWSA – 45/2/2007.

[43] In the publication of the judgment in question, it only mentions 'International Day […]', thus omitting the specific context of the ban. The International Day of Tolerance was established by UN General Assembly Resolution 51/95 of 12 December 1995 at the initiative of UNESCO, and is celebrated on 16 November.

[44] Judgment of the Administrative Court in Gdańsk of 12 May 2011 (III SA/Gd 68/11); cf. also B. Kołaczkowski, *Polityczne uwarunkowania rozstrzygnięć administracji lokalnych w sprawach*

of the notification submitted by the organisers, in their view, bore the characteristics of a criminal offense. The authority found that the form and nature of the received notification violated public morals and the rights and freedoms of others: the organiser had repeatedly used offensive words and slandered the Prime Minister of the Republic of Poland, the Minister of the Interior Affairs and Administration, the Prosecutor General, the City President and other persons connected with the Prosecutor's Office and the Police, in violation of the Penal Code.

The court finds that the city authority had made its own incorrect assessment of the purpose and conduct of the planned assembly by assuming that the use of insulting language in the notification, directed at individuals holding state or local government positions, violated public morals, the freedom of others, and specific articles of the Penal Code. The Court notes that the right to organise peaceful assemblies includes, within its scope, the possibility of expressing dissatisfaction with the views or behaviour of state or local authorities. Disapproval of certain actions of those in power is often the subject of public assemblies during which participants express their views on a given matter. In this context, the Court finds that the municipal authorities failed to provide convincing substantiation of the relationship between the content of the notice and the potential violation of the cited criminal provisions.

In turn, the Administrative Court in Wrocław assesses in a judgement issued in November 2013 that the decisions of the municipal and local administrative authorities, banning the organisation of a public assembly aimed, as indicated by the organiser, at 'popularising a healthy lifestyle by informing about the advantages of the egg diet and encouraging the use of scooters […] as an alternative to bicycle transport'.[45] The justification for the ban was based on a letter from the Chief of Police, in which he warned that the assembly was most likely organised as a camouflage counter-manifestation for a previously reported 'Equality March'. According to the police, the assembly would not serve the purposes indicated in the law on assemblies (to hold joint deliberations or to express common positions) because its only aim was to obstruct another assembly. Law enforcement warned the authorities that the assembly posed a real threat of disruption of the 'Equity March' by individuals sympathising with far-right circles and identifying themselves as fascists.

The Court remained critical of the findings of the city authorities and the Police Chief. Despite agreeing with the indications of the police that the complainant had already held assemblies with 'a nationalistic and homophobic tinge', the Court states that this fact could not be the only reason to ban future assemblies. The alleged 'tinge' could not, by itself, justify prohibiting future assemblies. The court also refers to the police authority's proposal to request that the assembly organiser change its time and place. The city authorities had indeed requested a change in the time of the assembly but did not request a change in the location.

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zgromadzeń [Political Determinants of Local Administration's Decisions on Assemblies], "Acta Politica Polonica" 2016, vol. 37, no. 3, pp. 39–49.

[45] Judgment of the Administrative Court in Wrocław of 19 November 2013 (IV SA/Wr 762/13).

The court emphasises that only a threat to the life or health of people or property of significant size should result in a ban on an assembly at a specific place and time and for a specific purpose. In the court's view, this had not been sufficiently demonstrated in the case under review. The authorities argued that there was a risk of disrupting a gathering taking place near the applicant's assembly. The anticipated consequences of such disruption were described as 'verbal taunts, provocations, and even attempts to physically assault the participants', allegedly coming from 'individuals sympathizing with or identifying themselves with fascist circles and holding extreme right-wing views.' However, it was not established that these individuals were actually participants in the complainant's assembly.

In turn, already under the 2015 Act, the Lublin common court of the highest instance also expresses its position on the same issue.[46] The thesis of the judgment states that 'it is impermissible to make the possibility of exercising the freedom of assembly dependent on the reaction of the opponents of the assembly'. The correct interpretation of Article 14 of the Law on Assemblies should consider 'that the assessment of whether holding an assembly may endanger the life or health of people, or property of significant size, must refer to the organisers and participants of that assembly'. This judgment concerns a situation where two notifications had been submitted concerning assemblies taking place 140 metres apart. The city authorities, as well as the court of first instance, considered that the organiser, by submitting a notification to hold a public assembly, was unable to adequately ensure the safety of participants. The Ombudsman did not share this position. In his opinion, the assumption that the fact of organising two gatherings of social groups of different socio-political persuasions on the same day, at approximately the same time and in close proximity to each other, constituted sufficient grounds to ban the assembly on the grounds of a threat to property of significant size, and life or health of the participants was only potential and based on speculation. As such, it did not constitute grounds for restricting the freedom of assembly. The Court uses elements of the Ombudsman's reasoning to justify its decision.

3.5. The organiser of an assembly in the jurisprudence of administrative and common courts

The applicant was directly referred to in the judgment issued by the Administrative Court in Poznań in February 2006.[47] In this case, the municipal authorities prohibited the assembly because they assessed that the organiser – M. R., had been 'convicted by a non-final judgment of the District Court […] for the incident related to the demonstration in front of the Consulate […]. In addition, M. R. was convicted by a non-final verdict […] for participating in an illegal demonstration organised during the stay of Russian President Vladimir Putin'. As a result, a change of venue was proposed,

[46] Order of the Appeal Court in Lublin of 12 October 2018 (I ACz 1145/18), LEX no. 2559817.

[47] Judgment of the Administrative Court in Poznań of 23 February 2006 (IV SA/Po 440/04), LEX no. 835420.

but M. R. refused to accept it, stating that the purpose of the assembly was to protest against the genocide in Chechnya and that the place was the most appropriate point.

Under current Polish law, there is no basis for evaluating the organiser's personal background if the assembly itself meets the requirements of Article 3(1) of the Law on Assemblies. In particular, the authorities cannot assess the issue of organisers' criminal records or their personal histories in terms of determining whether the organiser 'provides guarantees for the peaceful conduct of the gathering'. The organiser's refusal to move the assembly to a different location than the one indicated in the notification cannot affect the merits of the case. The court states that neither the purpose nor the holding of the assembly conflicted with the law, so 'The circumstances cited by the administrative authorities at both instances did not provide sufficient justification to conclude that the conditions set out in Article 8 of the Law on Assemblies were met'.

3.6. Correlations with other laws: administrative bypassing of freedom of assembly?

In light of the preceding discussion, it is worth considering how judicial rulings assess the issue of whether specific provisions of substantive administrative law may influence the interpretation and application of the Law on Assemblies. The first case of this kind involves the use by local government authorities of a provision prohibiting 'arbitrary occupation of the road lane without the permission of the road manager', according to the Public Roads Act.[48] On the basis of this provision, municipal and administrative authorities have imposed fines on participants in assemblies that block traffic lanes, in cases where the notification of the assembly did not explicitly indicate an intention to occupy the roadway. Courts put an end to this practice by overturning the decision of the President of Warsaw,[49] who imposed a fine of PLN 2,193.60 on the organiser of an assembly for occupying the road lane without the road manager's permit by erecting tents with an area of 54.84 m^2 in the road lane.

The administrative courts of both instances emphasized that the organisation of a public assembly is a right guaranteed under Articles 54 and 57 of the Constitution of the Republic of Poland, as well as under the Law on Assemblies. The court also cited the ECtHR judgment of 7 July 2009 (10659/03), which holds that even a failure to give notification of an assembly does not automatically entitle state authorities to interfere with the right to organise or participate in peaceful gatherings.

Referring to Article 11(1) and (2) of the European Convention on Human Rights and Fundamental Freedoms, alongside Article 31(3) of the Polish Constitution, the courts affirm that this freedom may be subject to certain limitations. Still, such restrictions must have a clear statutory basis, serve a legitimate purpose in a democratic society, and be interpreted narrowly.

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48 Act of 21 March 1985 on public roads (*Journal of Laws* 1985 No. 14, item 60, as amended).

49 Judgment of the Supreme Administrative Court of 8 September 2022 (II GSK 218/20).

In the case at hand, the court identifies a potential conflict between the constitutional right to assembly and the objectives of public order and prevention of unlawful behaviour on public roads. However, it rules that a pro-constitutional interpretation should prevail, with the protection of fundamental civil liberties taking precedence. The courts underline that permissible limitations on the freedom of assembly are, as a rule, exhaustively set out in the Law on Assemblies. Restrictions stemming from other legal acts may be permitted only exceptionally, and only when their provisions directly relate to the organisation or conduct of assemblies. Since the provision concerning fines for occupying a traffic lane without authorization does not meet this condition, it cannot serve as a legitimate ground for restricting constitutional rights.

In this instance, the assembly had been properly notified in accordance with legal requirements. If the authority believed the event posed a threat to constitutionally protected values under Article 14 of the Law on Assemblies or Article 31(3) of the Constitution, it had the option to prohibit it. Since no such decision was made, the legality of the assembly stood, precluding interference based on unrelated administrative regulations. The authority retained the ability to intervene during the event, but only if the legal conditions for dissolving an assembly were met and proper procedures were followed.

The view expressed in the ruling reflects well-established jurisprudence: occupying a traffic lane for the purpose of a peaceful, lawfully notified public assembly does not require prior authorization from the road authority. Imposing such a requirement or penalizing participants for setting up assembly-related structures would unduly restrict the constitutional freedom to assemble and would distort the essence of this civil right.[50] Punishing individuals for participating in a legal gathering based on administrative regulations that do not explicitly limit this right is categorically unacceptable. Consequently, provisions of the Public Roads Act cannot serve as a basis for imposing sanctions on participants in lawful assemblies. In light of this settled case law, municipal and administrative authorities should by now be fully aware of these legal boundaries.

3.7. Assemblies during the COVID-19 pandemic: total prohibition by regulation of the Council of Ministers vs. jurisprudence

The proposed review would be seriously deficient if we did not at least address the assembly problem during the COVID-19 pandemic. The Polish authorities initially opted for the most restrictive solution, that is, a total ban on assemblies.[51] Several

[50] This was already the case in the Supreme Administrative Court judgment of 20 April 2021 (II GSK 1063/18). The Court also takes a position on this issue in subsequent judgments of 8 September 2022 (II GSK 872/18 and II GSK 751/19); see also the case of 8 September 2022 (II GSK 257/20).

[51] Not all European countries opted for this solution; for example, Germany and Israel allowed assemblies where precautions – distances between participants and sanitary security measures – were observed. See also the resolution of the *Bayerischer Verfassungsgerichtshof* of 9 June 2020 (20 CE 20.755), openJur 2020, item 3902.

other personal and civil rights were also restricted. However, the authorities did so by employing government regulation[52] rather than a statute (law), which remains contrary to the provisions of the Polish Constitution regarding the possibility of restricting key civil rights. Later versions of the regulation eased the ban on assemblies somewhat: limits were placed on the number of participants in assemblies, and they were required to keep a distance of at least 1.5 m between each other and to cover their mouths and noses.[53]

It is important to highlight the dynamics of the courts' approach to appeals concerning assemblies during the pandemic. For example, the court in Warsaw in its judgment of August 2020,[54] does not question the legal basis for the ban expressed in the regulation. The case analysed refers to a challenge against the decision of the municipal authorities that prohibited the organisation of an assembly because of a very serious threat to the life and health of all persons participating in it. However, in their appeal, the organiser stresses that the threat must be of a real and actual nature and not based on hypothetical assumptions, conjectures, or unverified media reports (as is clearly articulated in earlier case law). According to the organiser, there was no real threat in this case, as the number of infections at that moment in Poland testified to the low probability of contagion during the gathering and the absence of a real threat. He also indicated that the authority should, in the first instance, call upon the assembly organiser to change the conditions of the notification of the assembly, for example, by setting a limit on the number of persons during the assembly. The notification stated an expected number of up to 1,000 people, but this was only a maximum limit, and it

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[52] The provisions of § 14(1)(2) of the Regulation of the Council of Ministers of 10 April 2020 on the establishment of certain restrictions, orders, and prohibitions in connection with the outbreak of an epidemic (*Journal of Laws*, item 658). These formally introduced a very broad ban on assemblies, both within the meaning of Article 3 of the Act of 24 July 2015 – Law on Assemblies (*Journal of Laws* 2019, item 631), as well as other assemblies, organised as part of the activities of churches and other religious associations, and events, meetings, and gatherings of any kind, except for meetings of a person with the persons whom he/she was closest to within the meaning of Article 115 § 11 of the Act of 6 June 1997 – Penal Code, or with persons closest to the person with whom he or she is cohabiting (§ 14(1) of the Ordinance of 10 April 2020). The dilemmas related to regulating the freedom of assembly through executive acts issued by the Council of Ministers have been the subject of extensive criticism in legal literature, see especially: M. Florczak-Wątor, *Granice ingerencji państwa w wolność zgromadzeń w czasie epidemii* [The Limits of State Interference in the Freedom of Assembly during an Epidemic] [in:] *Wokół kryzysu praworządności, demokracji i praw człowieka* [On the Crisis of the Rule of Law, Democracy and Human Rights], eds. A. Bodnar, A. Ploszka, Warszawa 2020, pp. 644–663; N. Daśko, *Zakaz zgromadzeń w Polsce w okresie stanu epidemii a odpowiedzialność karna* [Prohibition of Assembly in Poland during an Epidemic and Criminal Liability], "Przegląd Prawa Konstytucyjnego" 2021, no. 5(63), pp. 163–173; A. Kustra-Rogatka, *Freedom of Assembly and the Right to Protest in Times of COVID-19 – The Case of Poland* [in:] *Pandemic Poland. Impact of COVID-19 on Polish Law*, eds. M. Löhnig, M. Serowaniec, Z. Witkowski, Vienna 2021, pp. 82–93; M. Wróblewski, *Wolność zgromadzeń w czasie epidemii* [Freedom of Assembly during an Epidemic], LEX/el. 2020.

[53] *Inter alia*, the Regulation of 7 August 2020 on the establishment of certain restrictions, orders, and prohibitions in connection with the occurrence of an epidemic state (*Journal of Laws*, item 697, as amended), Articles 25 and 26.

[54] Judgement of the Regional Court in Warsaw of 27 August 2020 (II Ns 26/20).

was most likely that only a few dozen people would participate. The complainant also assessed that the authority's actions against the fundamental freedom guaranteed by Article 57 of the Polish Constitution, which can only be restricted by law enacted by the parliament, not by the executive Regulation of the Council of Ministers of 7 August 2020. In the complainant's view, such a restriction, taking into account the nature and essence of a public assembly, is unconstitutional and, moreover, incompatible with the realities of organising public assemblies. Thus, the reasons indicated by the municipal authority in the contested decision were abstract, without foundation in the current factual circumstances of the case, and were based on presumptions and doubts.

However, the court assessed that the appeal was unfounded, arguing that the President of the City correctly interpreted the provisions of the Government Regulation, particularly considering the role of the Regional Sanitary Inspector. According to the ruling 'The gathering in the open space, in the area delimited by the designated streets, of the number of persons anticipated by the organiser does not give grounds to assume that both the organiser […] and the public authorities obliged to ensure order will be able to ensure respecting the rules of gathering […] in the manner specified in § 25(2) of the Government Regulation'. The court ruled that the repeal of the ban would cause a threat to the life and health of a large number of people, 'which is not only apparent from the referenced opinion of the Sanitary Inspector, but is part of a matter of public knowledge'. According to the court, the constitutional freedom of assembly is not absolute, as is clear from the content of Article 57 of the Polish Constitution. 'In this case, the freedom of assembly must give way to the protection of the health and life of citizens, with human life being the most important constitutional value'.

However, the Supreme Court has taken a different view in several subsequent decisions. In July 2021, it upheld the Ombudsman's cassation appeal[55] in connection with a conviction for, *inter alia*, attending a gathering of more than five people and failing to comply with an order to cover one's mouth and nose. In the judgment, the Supreme Court refers more broadly to constructing statutory (legislative) delegation. In the court's view, the provision of the government regulation prohibiting the organisation of assemblies oversteps the boundaries of statutory delegation. The granted authorisation concerns only restrictions, obligations, and orders; therefore, it does not permit the introduction of bans. The court stresses that using executive regulation instead of a statute (law) enacted by a parliament is contrary to Articles 57 and 31 of the Constitution of the Republic of Poland.

Additionally, the Supreme Administrative Court issued several key rulings regarding decisions to impose penalties on citizens for violating the aforementioned prohibitions or restrictions. Among these judgments, we should draw attention to the judgment of October 2021,[56] issued in connection with the decision of the Sanitary Inspector in Warsaw to impose a fine for violating the ban on organising assemblies.

[55] Judgment of the Supreme Court of 1 July 2021 (IV KK 238/21).

[56] Judgment of the Supreme Administrative Court of 28 October 2021 (II GSK 1417/21).

The court annulled the administrative decisions of both sanitary authorities. The court of first instance had already found that the administrative decisions had been issued without a legal basis, as the provisions of the aforementioned 'COVID' regulation of the Council of Ministers of 10 April 2020 could not constitute such a basis. According to the court, the prohibition formulated there violates the constitutional freedoms of an individual, namely personal freedom (Article 41(1) of the Polish Constitution), the freedom to move within the territory of the Republic of Poland (Article 52(1) of the Polish Constitution), and the freedom of assembly, guaranteed by Article 57 of the Polish Constitution and consisting in the freedom to organise peaceful assemblies and to participate in them; the prohibition, thus, encroached on areas reserved to statutory legislation. The court finds no statutory delegation to issue them in the provision of Article 46a in conjunction with Article 46b of the Act of 5 December 2008 on preventing and controlling infections and infectious diseases in humans.[57] The content guidelines of the Act do not address the possibility of restricting organising and participating in peaceful assemblies or restricting movement in the broad sense. Thus, the introduction of prohibitions leads to the conclusion that the provisions of the regulation are inconsistent with Article 57 of the Constitution of the Republic of Poland, as well as with Article 92(1) of the Constitution, because it exceeds the scope of the delegation granted by the Act to issue an executive regulation. In view of the court, the sole statutory delegation was not free of constitutional deficits.

The Supreme Administrative Court shared the view of the judicature of the Supreme Court, already mentioned above, that the state of epidemiological emergency introduced by the government and the subsequent state of epidemics are not states of emergency within the meaning of Article 228(1) of the Polish Constitution. Restrictions that lead to the infringement of fundamental rights and freedoms cannot be introduced on this basis.[58] Thus, like the court of first instance, the Supreme Administrative Court found that the disputed administrative decisions, which imposed sanitary penalties for organising an assembly, lack a legal basis. The essence of the legal dispute involved answering the question regarding the possibility and permissibility of interfering, in the manner, on the scale, and especially in the form imposed by the regulation, with constitutionally guaranteed general personal freedom, including personal freedom of movement within the territory of the Republic of Poland and with the freedom of assembly. The Court expressly emphasises the principle of absolute exclusivity of the statute (law, statutory matters) in criminal law, or more broadly in the provisions of a repressive (sanctioning and disciplining) nature, as well as in the field concerning freedom and human rights. According to the court, it is also necessary to bear in mind the consequences arising from the obvious fact that the state of epidemics is not a state of emergency within the meaning of the Polish Constitution. Simplifying, it is not possible to restrict the right to assembly by employing a government regulation.

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57 *Journal of Laws* 2019, item 1239 as amended.

58 In addition to the aforementioned ruling, see Supreme Court judgment of 16 March 2021 (II KK 64/21), OSNK – 18/4/2021, judgment of 11 June 2021 (II KK 202/21).

A state of epidemic, preceded by a state of epidemiological emergency, is not a state of emergency within the meaning of Article 228(1) of the Constitution of the Republic of Poland. Thus, it is inadmissible to introduce restrictions on constitutional freedoms through an executive regulation implementing statutes.

Concluding remarks

We have analysed the case law developed under two statutes governing assemblies: the 1990 Act and its 2015 successor, amended in 2016 to include cyclical assemblies. The judgments of various courts, including the ECtHR and the Constitutional Tribunal, have set a high standard for understanding the democratic essence of assemblies.

However, our review reveals that the practical implementation of the freedom of assembly is shaped by a different dynamic – one that unfolds between the organiser (as the notifying party) and the municipal authority (mayor or city president) responsible for processing the notification.

In this context, the courts play a key role, formerly administrative courts and now increasingly common courts, in correcting misinterpretations of assembly law found in decisions banning assemblies or alleging improper conduct. Courts regularly tasked with safeguarding the freedom of assembly appear to draw on ECtHR case law, often through the Constitutional Tribunal's rulings, which incorporate international legal standards.

We have identified well-established lines of jurisprudence that have effectively curtailed the misapplication of legal provisions such as in cases involving the occupation of roadways without road authority consent. A similar trend is evident in rulings clarifying how the statutory prerequisites for banning assemblies, danger to life, health, or significant property, should be interpreted. These judgments stress that authorities invoking such grounds must provide credible, fact-based justification.

As we have sought to demonstrate, the courts have sent a clear message to local authorities: persistent over-interpretation of these legal grounds may indicate their instrumental use for purposes unrelated to legitimate public safety concerns.

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Summary

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Freedom of Assembly before the Courts: A Case Law Overview from the European Court of Human Rights and Polish Courts

In this text, the authors present an overview of the jurisprudence of the European Court of Human Rights and Polish courts – including the Constitutional Tribunal as well as ordinary and administrative courts – concerning freedom of assembly. The review covers the legal framework under both the initial, highly liberal statute adopted during the democratic transition in 1990 and the more extensive regulation introduced in 2015, together with its 2016 amendment concerning cyclical assemblies. The authors conduct a selective review, focusing on the constitutional and administrative dimensions of the law on assembly. In particular, they examine issues such as the definition of an assembly, notification requirements, grounds for prohibition, and conflicts between assembly law and other areas of administrative law, including the Public Roads Act and regulations enacted during the COVID-19 pandemic. The analysis demonstrates the key role that courts have played in shaping the proper interpretation of this fundamental civil liberty.

Keywords: assemblies, constitutional freedom, prohibition of assembly/gatherings, rulings on the freedom of assembly.

Streszczenie

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Nowe spojrzenia na klasyczną wolność – prawo o zgromadzeniach w orzeczeniach Europejskiego Trybunału Praw Człowieka i sądów polskich

Przedłożony tekst stanowi przegląd orzecznictwa Europejskiego Trybunału Praw Człowieka oraz sądów polskich – Trybunału Konstytucyjnego, sądów administracyjnych i powszechnych – dotyczącego wolności zgromadzeń. Przegląd obejmuje ramy prawne zarówno pierwotnej, liberalnej ustawy przyjętej podczas transformacji demokratycznej w 1990 r., jak i bardziej rozbudowanych przepisów wprowadzonych w 2015 r., wraz z nowelizacją z 2016 r. dotyczącą zgromadzeń cyklicznych. Autorzy w szczególności koncentrują się na konstytucyjnych i administracyjnych aspektach prawa zgromadzeń. Analizują głównie takie kwestie, jak definicja zgromadzenia, wymogi dotyczące notyfikacji, przesłanki zakazu oraz kolizje między prawem zgromadzeń a innymi aktami prawa administracyjnego, w tym ustawą o drogach publicznych i przepisami wprowadzonymi podczas pandemii COVID-19. Analiza uwypukla kluczową rolę, jaką sądy odegrały w kształtowaniu właściwej interpretacji tej podstawowej wolności obywatelskiej.

Słowa kluczowe: zgromadzenia, wolność konstytucyjna, zakaz zgromadzeń/zgromadzeń publicznych, orzeczenia dotyczące wolności zgromadzeń.