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## **Freedom of Assembly in the COVID-19 Pandemic and the Limits of its Restraints in the Context of the Experiences of the Republic of Poland and the United States of America**

**Abstract:** The aim of the study is to illustrate the problem of freedom of assembly during the COVID-19 pandemic against the background of the experiences of the Republic of Poland and the United States of America. This freedom is provided for in the constitutions of both states, which implies that public authorities are obliged to implement it also in COVID-19 conditions. Hence, the question arises as to whether, and if so to what extent, public authorities in Poland and the United States (countries belonging to the United Nations and obliged to consider the standards of human rights protection resulting from international law) applied solutions realising freedom of assembly in the conditions of COVID-19. The authors try to determine the extent of the impact of legal measures applied by public authorities in both countries on the realisation of freedom of assembly and the public reaction produced by these measures. The choice of such a context for assessment was justified by differences in the legal culture of

the countries being compared, the structure of the state, and the approach of both the public authorities and the society to freedom of assembly.

**Keywords:** constitution, COVID-19 pandemic, freedom of assembly, human rights, human rights restrictions, proportionality

## Introduction

Freedom of assembly is a political right under which an individual can express their views, exercise social control, and, in more general terms, participate in political, social, and economic life. In broad terms, this freedom includes the right to peaceful protest and the people's right to assemble virtually anywhere and for any reason. The social distancing order, which has often found a normative formulation in legal acts, has also affected freedom of assembly. In order to counteract the COVID-19 pandemic, individual countries have taken different actions using different statutory instruments<sup>1</sup>. The consequence of this was usually the restriction of certain freedoms and rights of individuals and even a suspension of these rights in extreme cases<sup>2</sup>. The authorities of individual countries had to balance the reasons related to the protection of certain goods and determine how to implement socially important goals such as ensuring the safety of citizens in various dimensions, including the security of life and health<sup>3</sup>. It was important that the state, in the face of a threat, implemented the protection of the most important constitutional values – life and health, and at the same time maintained as long as possible the possibility of undisturbed functioning of its supreme organs. The situation has sparked a general social debate going beyond the border of one country on how far-reaching human rights restrictions can be connected to the pandemic and what instruments can be used in this respect by the state and international organisations<sup>4</sup>. It has been recognised that, on the one hand,

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1 Public authorities, among others, undertook actions in the framework of states of emergency, created special regulations on an ongoing basis, adjusted to the level of threat, or based their actions on the applicable legal bases and possibly adapted procedures.

2 See: K. Dobrzeniecki, *Prawo wobec sytuacji nadzwyczajnej. Między legalizmem a koniecznością*, Toruń 2018.

3 See more: K. Dobrzeniecki and B. Przywora (eds.), *Ograniczenie praw i wolności w okresie pandemii COVID-19 na tle porównawczym. Pierwsze doświadczenia*, Warsaw 2021. Praca jest wynikiem badań zespołu w skład którego wchodzi: Ł. Czarnecki, P. Czarny, G. Krawiec, D. Héjj, A. Krzynówek-Arndt, K. Kakareko, J. Sobczak, M. Osuchowska, G. Pastuszko, I. Szpotakowski, A. Syryt, M. Kalinowska, M. Serowaniec, K. Jachimowicz, M. Żaba, P. Szwedo, L. Helińska, J. Woźniak, A. Rataj, A. Wróbel, M. Moulin-Stożek; see also: K. Dobrzeniecki and B. Przywora, *Legal basis for introducing restrictions on human rights and freedoms during the first wave of the COVID-19 pandemic*, 'Review of European and Comparative Law' 2021, no. 46 (3), pp. 43–65.

4 See e.g. J. Jaskiernia and K. Spryszak (eds.), *System ochrony praw człowieka w Europie w czasie wyzwań pandemicznych*, Toruń 2022; see also: S. Trociuk, *Prawa i wolności w stanie epidemii*, Warsaw 2021; F. Morawski, *Zakaz przemieszczania się w związku z pandemią COVID-19 w świetle konstytucyjnego prawa do poruszania się*, 'Przegląd Prawa Publicznego' 2020, no. 9; J. Paśnik,

assembling (in both a formalised and informal way) can help to spread COVID-19 and therefore maintain the threat. On the other hand, the introduction of social distancing orders infringes on the right of the individual to decide about his life and to participate in political, social, and cultural life through participation in various types of gatherings<sup>5</sup>.

These circumstances have become the reason for seeking answers on how to balance the objective to reduce or prevent the threat to life and health associated with the pandemic, with the implementation of the obligation to protect freedom and human rights fundamental to man's functioning in society. The pandemic did not suspend the application of international and national standards and guarantees for the protection of human rights. Nor did it suspend the validity of national constitutions. The statutory instruments taken in response to the pandemic, including possible emergency measures restricting human rights and freedoms, such as bans on public assembly and stay-at-home orders, must comply with international human rights norms and standards, including those relating to the rights to freedom of peaceful assembly and association.

The research conducted by the authors concerning the response of states to the COVID-19 pandemic confirmed its impact on the implementation of freedoms and human rights in the normative and practical dimensions. One such right is freedom of assembly.

Recognising the impact and assessing whether the actions taken were within the framework of legality, necessity, and proportionality is not only of informational and cognitive value. It also allows us to determine to what extent human rights protection

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Kilka refleksji o regulacji stanu epidemii jako sui generis pozakonstytucyjnego stanu nadzwyczajnego, 'Przegląd Prawa Publicznego' 2020, no. 11; B. Szmulik and J. Szymanek, O możliwości wprowadzenia stanu nadzwyczajnego w kontekście epidemii koronawirusa, 'Przegląd Legislacyjny' 2020, no. 2; T. Sroka, Ograniczenia praw i wolności konstytucyjnych oraz praw pacjenta w związku z wystąpieniem zagrożenia epidemicznego, 'Palestra' 2020, no. 6; M. Pecyna, Odpowiedzialność odszkodowawcza Skarbu Państwa za ograniczenia praw i wolności w czasie epidemii COVID-19, 'Państwo i Prawo' 2020, no. 12; P. Tuleja, Pandemia COVID-19 a konstytucyjne stany nadzwyczajne, 'Palestra' 2020, no. 9; M. Florczak-Wątor, Niekonstytucyjność ograniczeń praw i wolności jednostki wprowadzonych w związku z epidemią COVID-19 jako przesłanka odpowiedzialności odszkodowawczej państwa, 'Państwo i Prawo' 2020, no. 12; K. du Vall and M. Tomaszewicz, Zdrowie publiczne jako przesłanka ograniczenia działalności gospodarczej w świetle Konstytucji RP, (in:) J. Glumińska-Pawlic and B. Przywora (eds.), Swoboda działalności gospodarczej. Próba oceny polskich regulacji prawnych, Warsaw 2021, pp. 103–117; B. Przywora, Granice ingerencji w sferę wolności i praw człowieka w Konstytucji RP a ich realizacja w stanie pandemii COVID-19 – wybrane zagadnienia, (in:) J. Sobczak and A. Rogacka-Łukasik (eds.), Wybrane zagadnienia prawa medycznego wobec wyzwań pandemii wywołanej wirusem SARS-CoV-2, Poznań 2022, pp. 149–162.

5 See e.g. P. Stanisław, Ograniczenia wolności kultu religijnego w czasie pandemii COVID-19: między konstytucyjnością a efektywnością, 'Przegląd Sejmowy' 2021, no. 3, pp. 143–166.

standards are applicable in emergency situations and whether measures can be established to balance conflicting interests in this area.

For the above reasons, the article's subject is an attempt to assess the implementation of freedom of assembly during the pandemic in Poland and the United States. The deliberations were based primarily on normative acts, case law related to human rights performance in the COVID-19 pandemic, and literature presenting the public's response to the imposed orders and bans.

## **1. The Essence of the Freedom of Assembly as a Political Right and the Premises of its Limitation**

**1.1.** The article's objective is not to create another general study on freedom of assembly. However, in order to understand the context of executing this freedom during the COVID-19 pandemic, it is necessary to recall the general characteristics of this human right, including its importance as a political right. It is also worth pointing out the premise of permissible interference in the freedom of assembly.

The presented freedom is the foundation of a democratic state, where members of a pluralistic society can express their opinions and influence the policy of public authorities. For this reason, freedom of assembly is counted among political freedoms, and it is realised through peaceful gathering in a public space<sup>6</sup>.

Freedom of assembly is expressed in its direct impact on the individual's relationship with the community, enabling the personal formulation of views. At the same time, this freedom has a broader meaning. It serves the exercise of other rights and principles within a system: freedom of speech, freedom of religion, the sovereignty of the nation, the right to participate in public life. Freedom of assembly includes the ability to both organise and participate in it, and it is guaranteed at a national and international level.

Freedom of assembly is expressed in public international law, including: the Universal Declaration of Human Rights of 1948 (Art. 20), the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 11), and the 1966 International Personal and Political Rights Pact (Art. 21). Despite its weight and importance to society, freedom of assembly is not absolute. It is possible to restrict the exercise of this freedom considering appropriate forms of restriction (primarily parliamentary) and respecting the principle of proportionality. The above thesis is particularly confirmed in the European Court of Human Rights (ECHR) case law, which implies the need for a narrower interpretation of the restrictions on free, peaceful as-

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6 About freedom of assembly see e.g. R. Balicki and M. Jabłoński (eds.), *Wolność zgromadzeń*, Wrocław 2018; A. Ławniczak, *Wolność zgromadzeń*, (in:) M. Jabłoński (ed.), *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, Wrocław 2014, pp. 297–309; P. Czarny and B. Naleziński, *Wolność zgromadzeń*, Warsaw 1998.

sembly. The ECHR allowed restrictions if assemblies were to abandon their peaceful character and could thus endanger the security or public order<sup>7</sup>. It also stressed that state authorities should not introduce restrictions without prior assessment of the threat level<sup>8</sup>.

1.2. In Poland, the issue of freedom of assembly during the COVID-19 pandemic has caused many doubts in both case law and literature. For the purposes of these considerations, it should be emphasised that the fundamental principles concerning the interference with freedoms and human rights arising from the Constitution of the Republic of Poland of 2 April 1997<sup>9</sup> [Art. 31 (3) of the Constitution of Poland] established restrictions only in the law, and demonstrating the necessity of restrictions in a democratic state to ensure its security or public order, or to protect the environment, public health and morals, or the freedoms and rights of others. Such limitations cannot violate the essence of freedoms and rights. This was expressed by the Constitutional Tribunal (CT), stressing that the determination requires specification whether:

- a) the restrictions fulfil the objectives pursued and whether they are justified in Art. 31 (3) of the Polish Constitution (the so-called utility criterion);
- b) the restriction was necessary to protect constitutional values, i.e. that no other, less restrictive measure could have been taken to accomplish the same effect (the so-called necessity criterion);
- c) the prejudice to constitutional freedoms and rights arising from this restriction is not disproportionate in relation to the benefits arising from the introduced regulation (the so-called *sensu stricto* proportionality criterion<sup>10</sup>).

Further, the Polish Constitution grants everyone the freedom to organise and participate in peaceful assemblies, allowing the restriction only in the law. The Polish Constitution, like the International Civil and Political Rights Pact and the Convention for the Protection of Human Rights and Fundamental Freedoms, provides protection only to peaceful assemblies, i.e. those held with respect for the physical integrity of persons and private and public property; a peaceful assembly shall exclude

7 See e.g. judgments of ECHR of 2 October 2001 *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, complaint no. 29221/95, 29225/95 and of 20 February 2003 *Djavit An v. Turcji*, complaint no. 20652/92.

8 See judgment of ECHR of 12 June 2014 *Primov v. Russia*, complaint no. skargi 17391/06.

9 Journal of Laws of 2021, item 2,095 with amendments, hereinafter: Constitution of Poland.

10 See judgment of CT of 8 January 2019, SK 6/16, OTK ZU A/2019, item 3; see also: K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999.

the use of violence and coercion by participants of the assembly against other participants in the assembly, third parties, and public officials<sup>11</sup>.

When restricting freedoms and rights, the provisions of Art. 92 of the Polish Constitution should be considered, according to which regulations are issued by constitutional bodies, on the basis of a detailed authorisation contained in the act and for its implementation. The basic constitutional requirement is the specificity of the authorisation contained in the act in the scope of a) subject, b) object, c) content<sup>12</sup>, and the prohibition of the functioning of a regulation that does not have a 'point of attachment' in the act<sup>13</sup>.

**1.3.** In the United States, freedom of assembly is regulated by the First Amendment to the Constitution<sup>14</sup>. Under this regulation, Congress will not establish laws introducing religion or prohibiting the free exercise of religious practices, laws restricting freedom of speech or the press or violating the right to assemble and petition the government for reparations peacefully. States also cannot enact such laws, pursuant to the incorporation doctrine under the 14th Amendment. Many jurisdictions also regulate assemblies through criminal law. At the same time, several codes criminalise riots and similar conduct<sup>15</sup>.

This freedom was affirmed by the U.S. Supreme Court, which stressed that the right to peaceful assembly is a right akin to freedom of speech and free press and is equally fundamental<sup>16</sup>. It explained that the right of assembly is one that, in principle,

11 See e.g. CT's judgments of 16 March 2017, Kp 1/17, OTK ZU A/2017, item 28; 18 September 2014, K 44/12, OTK ZU no. 8/A/2014, item 92; 10 July 2008, P 15/08, OTK ZU no. 6/A/2008, item 105; 10 November 2004, Kp 1/04, OTK ZU no. 10/A/2004, item 105; 28 June 2000, K 34/99, OTK ZU no. 5/2000, item 142.

12 See: CT's judgments of 9 November 1999, K. 28/98 OTK ZU no. 7/1999, item 156 and 26 April 1995, K 11/94, OTK w 1995 r., part. I. See also CT's judgments of 26 October 1999, K 12/99; 14 February 2006, P 22/05, OTK ZU no. 2/A/2006, item 16; 3 April 2012, K 12/11, OTK ZU no. 4/A/2012, item 37; 17 July 2014, K 59/13, OTK-A 2014, no. 7, item 73.

13 See: CT's judgments of 17 July 2014, K 59/13; 9 May 2006, P 4/05, OTK ZU no. 5/A/2006, item 55; 12 September 2006, K 55/05, OTK ZU no. 8/A/2006, item 104; 31 March 2009, K 28/08, OTK ZU no. 3/A/2009, item 28; 3 April 2012 r., K 12/11. See also: S. Wronkowska, Model rozporządzenia jako aktu wykonawczego do ustaw w świetle Konstytucji i praktyki, (in:) A. Szmyt (ed.), *Konstytucyjny system źródeł prawa w praktyce*, Warsaw 2005; B. Banaszak, *Komentarz do art. 92*, (in:) *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Wyd. 2, Warsaw 2012, P. Radziejewicz, *Komentarz do art. 92*, (in:) P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, wyd. II, LEX/el. 2021; M. Wiącek, *Komentarz do art. 92*, (in:) M. Safjan and L. Bosek (eds.), *Konstytucja RP. Tom II. Komentarz do art. 87–243*, Warsaw 2016.

14 See more: S.F. Rohde, *Freedom of assembly*, New York 2005.

15 T. El-Haj, *Defining peaceably. Policing the line between constitutionally protected protest and unlawful assembly*, *Missouri Law Review* 2015, vol. 80, p. 964.

16 See more: The First Amendment Encyclopedia, *DeJonge v. Oregon case* (1937) <https://mts.u.edu/first-amendment/article/55/de-jonge-v-oregon> (accessed 25.01.2022); and case *Cox v. New Hampshire*, 312 U.S. 569 (1941).

cannot be denied. To do otherwise would be a violation of the fundamental principles that underlie all civic and political institutions<sup>17</sup>.

It should be underlined that classical constitutional theory thereby underwent a reinvention by the executive for the sake of speedy policy action and to the detriment of institutional control while favouring authoritarian forms of governance<sup>18</sup>. Permit ordinances are used to manage how citizens use public space for assemblies; restrictions on the right of assembly are allowed, usually in the form of permits, which organisers apply for to protest in public areas<sup>19</sup>.

Under U.S. law, any interference with freedom of assembly will be permissible if there is an impending incitement to lawlessness. The assembly to which a restriction would apply will not be peaceful, and restrictions cannot serve the political goals of the rulers<sup>20</sup>.

**1.4.** The above remarks on protecting freedom of assembly confirm its status as a fundamental political right. It should be protected, as it allows individuals to participate collectively in public life and express their views, also related to matters concerning the state and society. Therefore, this right will also be important in a pandemic situation, when public authorities take extraordinary measures to interfere with human rights and affect their daily lives.

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In the next cases this thesis was confirmed. E.g., Supreme Court in *Grayned v. City of Rockford case* (408 U.S. 104, 116, 1972) said that 'peaceful demonstrations in public places are protected by the First Amendment'.

See also: P. Gutierrez, *Wolność zgromadzeń w ujęciu porównawczym na tle orzeczenia Sądu Najwyższego Stanów Zjednoczonych Ameryki: United States v. Grace z 1983 r.*, (in:) M. Jabłoński (ed.), *Identyfikacja granic wolności i praw jednostki. Prawnoporównawcza analiza tożsamego przypadku pod kątem praktyki stosowania prawa amerykańskiego i polskiego*, Wrocław 2016, pp. 401–418. See also review of the main cases of the Supreme Court of the United States on freedom of assembly: J. Seigenthaler, *The First Amendment Encyclopedia* (in:) <https://www.mtsu.edu/first-amendment/encyclopedia/case/11/freedom-of-assembly> (accessed 27.01.2022).

17 See: *De Jonge v. State of Oregon* (1937). T. Abu El-Haj, 'The neglected right of assembly,' *University of California Law Review* 2009, vol. 56, p. 547.

18 J. Eichler and S. Sonkar, 'Challenging absolute executive powers in times of corona: re-examining constitutional courts and the collective right to public contestation as instruments of institutional control,' *Review of economics & political science* 2021, vol. 6, no. 1, pp. 3–23.

19 J.D. Proctor, 'So when did public order start trumping fundamental constitutional rights? Rethinking the modern interpretation of the right to assemble and the role police should play in protecting that right,' *Drexel Law Review* 2016, vol. 8, p. 84; T. El-Haj, 'Defining peaceably.' *op. cit.*, p. 964.

20 D.J. Hudson Jr., 'Freedom of Assembly Overview,' 29.10.2002 (in:) Freedom Forum Institute: <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-assembly/freedom-of-assembly-overview/> (accessed 25.01.2022). See also: J. Inazu and B. Neuborne, 'Right to Assemble and Petition. Common Interpretation,' (in:) Interactive Constitution: <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/267> (accessed 26.01.2022).

## **2. Realisation of Freedom of Assembly during the COVID-19 Pandemic**

While freedom of assembly is not absolute and the exercise of this freedom may be limited given the requirements of legality, adequacy, necessity, and proportionality, even in exceptional circumstances – and in this case during a pandemic – public authorities have a duty to respect human rights and ensure their implementation.

On 14 April 2020 in Geneva, the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association, Clément Nyaletsossi Voule, urged states not to abuse public health emergency institutions or declare a state of emergency during the COVID-19 pandemic merely to impose mass restrictions on the freedom of peaceful assembly and association. He also published guidelines to be followed by public authorities to avoid human rights violations. The UN Special Rapporteur underlined that civil society organisations play a key role in supporting the state in shaping inclusive policies, disseminating information, and providing social support to communities in need. The expert stated that where new legal regulations are adopted, the imposed restrictions on rights must comply with the principles of legality, necessity, and proportionality. He also stressed that it is unacceptable to introduce general restrictions on human rights. He recommended exemptions from certain restrictions for civil society entities, particularly those monitoring human rights, trade unions, social services providing humanitarian aid alongside journalists dealing with crisis management.

Because of the above, the question arises whether, and if so to what extent, public authorities in Poland and the United States (i.e. countries belonging to the United Nations and obliged to consider the standards of human rights protection resulting from international law) applied solutions making freedom of assembly a reality amid the COVID-19 pandemic.

### **2.1. Realisation of Freedom of Assembly during the COVID-19 Pandemic in the Republic of Poland**

In Poland, due to the COVID-19 pandemic, the provisions of the act of 5 December 2008 on preventing and combating infections and infectious diseases in humans have been applied<sup>21</sup>. Additionally, detailed regulations have been introduced concerning preventing, counteracting, and fighting the disease caused by the SARS-Cov-2 virus<sup>22</sup>. The most controversial issues included the problem of freedom of

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21 Journal of Laws of 2021, item 2069.

22 They were particularly: a) Act of 2 March 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and emergencies caused by them, Journal of Laws of 2021 r. item 2,069 as amended (Act on COVID-19 of 2 March 2020); b) Regulation of the Minister of Health of 20 March 2020 on the declaration of an epidemic in the territory of the Republic of Poland, Journal of Laws, item 491 (regulation on the declaration of



movement, which was also expressed in the jurisprudence of the Supreme Court. For example, in the justification of a judgment dated 16 March 2021, the Supreme Court emphasised that legal acts of a lower rank than a statute may not affect citizens' constitutional freedom of movement. Hence, the Supreme Court recognised the Regulation of the Council of Ministers of 31 March 2020, as well as the Regulation of the Council of Ministers of 10 April 2020 (containing a similar solution) 'to the extent that it basically excluded the freedom of movement of citizens throughout the entire country' as violating Art. 52 (1) 1, in conjunction with Art. 31 (1) and (3) of the Constitution of Poland.

Similarly in the justification to the judgment of 29 June 2021<sup>23</sup>, the Supreme Court emphasised the lack of maintaining the statutory form for restrictions concerning freedoms and rights guaranteed by the Constitution of the Republic of Poland. Also, the jurisprudence of administrative courts provides examples demonstrating the violation of requirements for limiting human rights and freedoms of constitutional provisions by the legislation issued during the COVID-19 pandemic<sup>24</sup>. Legal problems indicated in the rulings mentioned above could be related to the freedom of assembly.

Arguments contained in the justification of the judgment of the Supreme Administrative Court of 27 April 2021<sup>25</sup> should also be noted. The court pointed out that 'the restrictions of rights and freedoms in connection to the state of an epidemic are based on the statutory regulation, which constitutes an implementation of the constitutional order resulting from Art. 68 (4) of the Polish Constitution'<sup>26</sup>. Therefore, according to the Supreme Administrative Court, 'this type of restrictions should be regarded as ordinary constitutional measures that do not require the use of legal solutions specific to states of emergency, more precisely a state of natural disaster'. In the Supreme Administrative Court's opinion, 'a restriction may take the form of a ban on holding assemblies, which may lead to questions concerning the relation of this ban to Art. 57 of the Constitution of Poland when it comes to public assemblies'. The

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an epidemic); c) regulation of the Council of Ministers of 31 March 2020 on the establishment of certain restrictions, orders and bans in connection with the occurrence of an epidemic, *Journal of Laws*, item 566 as amended (CM Regulation of 31 March 2020); d) Regulation of the Council of Ministers of 19 April 2020 on the establishment of certain restrictions, orders and bans in connection with an epidemic, *Journal of Laws*, item 679 as amended (CM Regulation of 19 April 2020 r.). See also law on pandemic in Poland on GOV.PL <https://www.gov.pl/web/koronawirus/podstawa-prawna> (accessed 29.01.2022).

23 Judgment of the Polish Supreme Court of 29 June 2021, II KK 255/21, LEX no. 3207608.

24 e.g., judgments of the Supreme Administrative Court (NSA) of 8 September 2021, case no. II GSK 602/21, LEX no. 3230490; Provincial Administrative Court in Szczecin of 11 December 2020, case no. II SA/Sz 765/20; Provincial Administrative Court in Gorzów Wielkopolski of 7 October 2021, *Legalis* no. 2357975.

25 Case no. II GSK 673/21; LEX no. 3185186.

26 Case no. II GSK 673/21.

Supreme Administrative Court pointed to the linguistic interpretation of the term 'restriction'. We have to use this meaning when restricting civil rights and freedoms.

In the context of the discussed issues, it is worth paying attention to the so-called strike of entrepreneurs of 16 May 2020<sup>27</sup>. The city authorities refused to accept the notification of a public assembly due to the ban under the Regulation of the Council of Ministers of 2 May 2020. The organisers appealed against this decision. The District Court in Warsaw dismissed the appeal with a decision dated 14 May 2020, XXV Ns 45/20. It found that there was a reason for prohibiting the assembly due to the threat to life or health under Art. 14 point 2 of the Act of 24 July 2015 – Law on Assemblies<sup>28</sup> and referred to the obligation of public authorities to combat epidemic diseases specified in Art. 68 (4) of the Constitution of the Republic of Poland.

The Commissioner for Human Rights joined the proceedings, requesting that the decision of the President of the Capital City of Warsaw be revoked. The Commissioner for Human Rights justified his intervention, among other things, with the fact that the prohibition of assemblies in the ordinance issued by the Council of Ministers violates the principle of proportionality and the essence of the freedom of assembly expressed in the Constitution of the Republic of Poland. The Court of Appeal in Warsaw agreed with the Commissioner. It stated that banning assemblies by ordinance without proper statutory authorisation raises constitutional doubts about the freedom of assembly and the principle of proportionality<sup>29</sup>.

In Poland, the problem of the ban on assemblies during the COVID-19 pandemic has been the subject of many discussions, including its expression in a report of the Commissioner for Human Rights<sup>30</sup>. The Commissioner emphasised the necessity of restrictions during the state of a pandemic but pointed out that a total ban on assemblies violates the essence of the citizens' constitutional right to an assembly and the principle of proportionality<sup>31</sup>. In his opinion, 'the legislator could reduce the risk of an epidemic by using less severe measures (even by indicating how to demonstrate during the times of an epidemic)'<sup>32</sup>. The report also shows the disturbing practice of the Warsaw City Hall of refusing to register notifications concerning organising

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27 Legalis no. 2357975.

28 Journal of Laws of 2019, item 631.

29 See: decision of postanowienie Sądu Apelacyjnego w Warszawie of 15 May 2020. Description of a case on: the Public Information Bulletin of the Commissioner for Human Rights: <https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-do-wsa-calkowity-zakaz-zgromadzen-niekonstytucyjny> (accessed 22.01.2022).

30 Information on the activities of the Commissioner for Human Rights in the year 2020, pp. 199–204: [https://bip.brpo.gov.pl/sites/default/files/Informacja\\_RPO\\_za\\_2020.pdf](https://bip.brpo.gov.pl/sites/default/files/Informacja_RPO_za_2020.pdf), accessed 24.01.2022 r.).

31 Information on the activities of the Commissioner for Human Rights in the year 2020, p. 200; see also critical stance towards regulations introducing a ban on assemblies: S. Trociuk, *Prawa i wolności w stanie epidemii...*, *op. cit.*, pp. 65–69.

32 Information on the activities of the Commissioner for Human Rights in the year 2020, p. 200.

public assemblies and not issuing administrative decisions prohibiting assemblies, in accordance with Art. 14 Laws on Assemblies. The Commissioner pointed out that these assemblies took place despite the information provided to the notifying parties, which led to radicalising public moods and citizens losing trust in the authorities.

The Commissioner addressed the President of the Capital City of Warsaw to change this practice<sup>33</sup>. The Commissioner also intervened *ex officio* in the case of actions undertaken by the police against participants of the spontaneous assembly on the night of 22–23 October 2020, which constituted a social reaction to the ruling of the Constitutional Tribunal regarding the non-compliance of certain provisions on the admissibility of abortion with the Constitution of Poland<sup>34</sup>. The Commissioner's doubts were raised due to the proportionality of direct coercion measures by the police against demonstrators and the significant number of detained people. In the Commissioner's opinion, due to the pandemic and the need to care for health, the necessary sanitary guidelines should be followed (including masks and the recommended distances between participants). In his opinion, the situation of a spontaneous assembly does not exclude the necessity to apply the following principles:

- a) participants of all demonstrations should behave in a manner that respects the rights and freedoms of other people and public order, avoid hate speech, as well as limit behaviours and gestures that may provoke violence,
- b) actions by public authorities that impede conducting an assembly are unacceptable,
- c) officers (of the police and other services) should not take actions that make it difficult or even impossible for peaceful demonstrators/counter-demonstrators to exercise the freedom of public assembly,
- d) measures of direct coercion applied by the police to participants of public assemblies should be proportionate and adequate<sup>35</sup>.

The above shows that society took advantage of the freedom of assembly despite the existing bans. Various types of protests took place during the pandemic, and public authorities reacted when the participants' behaviour could endanger life or health and public safety and order.

The formal bans introduced by ordinances connected to the COVID-19 pandemic have not prevented the public from expressing views collectively.

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33 *Ibidem*.

34 CT's judgment of 22 October 2020, K 1/20, OTK A/2021, item 1.

35 Information on the activities of the Commissioner for Human Rights in the year 2020, pp. 201–202.

## 2.2. Realisation of Freedom of Assembly during the COVID-19 Pandemic in the United States

The observation of the situation related to the COVID-19 pandemic in the United States in the context of exercising constitutional freedoms and rights has highlighted that this period exerted significant pressure on the freedoms resulting from the First Amendment, and therefore the freedom of assembly. This pressure was related to the legal instruments used by public authorities at the federal and state levels<sup>36</sup>. John Whitehead from the Rutherford Institute wrote: ‘Never before in the history of this nation has the government (federal or state) attempted to impose such burdensome restrictions on the rights of religious units as seen in response to the COVID-19 pandemic.’<sup>37</sup>

Regarding this claim, it should be noted that most of the court cases involving religious assemblies in the context of pandemic restrictions have dealt with restrictions under the First Amendment’s religion clauses. Therefore, it was not a reference directly to freedom of assembly per se. Undoubtedly, however, the restrictions in question indirectly affected the ability to assemble and the exercise of the right to assemble. More important than the political right to manifest one’s views, however, was the realisation of religious freedom, especially in religious practice. This perspective clearly shows the weaker position of freedom of assembly in the United States compared to religious freedom. During the summer 2020 protests, the protesters had their right of peaceful assembly restricted<sup>38</sup>.

A question has been raised in public debate conducted in the United States on whether the COVID-19 pandemic justifies a direct restraint of the fundamental rights under the Constitution’s First Amendment. It is worth recalling that in the *Jacobson v. Massachusetts* case (1905)<sup>39</sup>, the Supreme Court stressed that ‘There are manifold restraints to which every person is necessarily subject for the common good.’ Therefore, in the case of health measures, the Court upheld the state immunisation bill, which pastor P. Henning Jacobson contested. This decision, however, was made before the Supreme Court ensured enhanced protection of individual rights, including

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36 For more about the restrictions of human rights during the pandemic in the United States see: M. Kalinowska and A. Syryt, *Ograniczenia praw i wolności w okresie pandemii COVID-19 w Stanach Zjednoczonych Ameryki*, (in:) K. Dobrzeniecki and B. Przywora (eds.), *Ograniczenie praw i wolności w okresie pandemii COVID-19 na tle porównawczym. Pierwsze doświadczenia*, Warsaw 2021, pp. 403–428.

37 Cited after D.L. Hudson Jr., *COVID-19 Emergency Measures And The First Amendment*, (in:) *TheFire.ORG*: <https://www.thefire.org/first-amendment-library/special-collections/COVID-19-emergency-measures-and-the-first-amendment/> (accessed 24.01.2022).

38 See more: O. Moulds, *Fracking the bedrock of democracy. The United States policing of protests violates the right of peaceful assembly under the ICCPR*, *American University International Law Review* 2021, vol. 36, i. 4, pp. 926–927.

39 See: JUSTIA US Supreme Court: <https://supreme.justia.com/cases/federal/us/197/11/> (accessed 23.01.2022).

freedoms under the First Amendment<sup>40</sup>. The issue of interference with the rights under the First Amendment to the United States Constitution was approached in various ways in jurisprudence during the pandemic. The stances of the courts on the admissibility of restrictions on fundamental rights under the First Amendment to the Constitution were not uniform. Quite the contrary – their viewpoints can be assessed as widely divergent.

For example, the judge of the federal district court for the district of California, Judge J.G. Bernal, in the ruling of 23 April 2020 in the *Gish v. Newsom case*<sup>41</sup> vacated the request for a temporary restraining order. The case concerned the orders imposed by California's governor, G. Newsom, who had directed 'all California residents to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors'. Riverside County officials issued a disposition prohibiting public or private meetings in any indoor or outdoor space. Officials in San Bernardino County issued an order allowing for 'faith-based services' to be provided through streaming or other technology while people may not leave their homes. No gatherings during religious services in an in-person mode were allowed. Four people, including lead plaintiff Wendy Gish, filed a lawsuit against Newsom and officials in both counties, alleging 'gross abuse of their power'. Their complaint included allegations that the defendants had violated their First Amendment religious liberty, freedom of expression and assembly, as well as other constitutional rights<sup>42</sup>.

It should be emphasised that commonly, where public authorities directly violate fundamental rights, such as the freedoms resulting from the First Amendment, the court examines whether the regulation meets the constitutional standards of restraint proportionality. It requires the public authorities to limit or regulate them to support important public interests in the least restrictive way. Judge Bernal decided that traditional constitutional review does not apply in an emergency. Hence his rejection of the possibility of not respecting emergency law restricting the laws under the First Amendment. The ruling explains that extraordinary measures are in line with the Constitution as long as 1) they have a 'real or significant relationship with the crisis' and 2) 'do not constitute a simple, tangible violation of clearly protected rights'. According to Bernal, it is easy to prove that emergency measures meet this test, as physical remoteness is necessary to slow down the spread of the virus. He stressed that the freedoms were not suspended as they can be exercised in other forms, e.g. online. The judge affirmed that secondary legislations in the form of orders of public authorities

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40 See more about this case: J. Blackman, 'The Irrepressible Myth of *Jacobson v. Massachusetts* (17 August 2021)', *Buffalo Law Review* 2021, vol. 70, no. 113, available at SSRN: <https://ssrn.com/abstract=3906452> (accessed 25.03.2022).

41 See: CASETEXT: <https://casetext.com/case/gish-v-newsom-1> (accessed 26.01.2022).

42 *Ibidem*.

were admissible during a nationwide state of emergency. Bernal acknowledged that the extraordinary orders did not affect the very essence of religious practices or gatherings, and he described them as generally applicable to all kinds of meetings<sup>43</sup>.

Judge J.R. Walker from the federal district court for the District of Kentucky maintained a contrary position on the limitation on human rights during the pandemic in *On Fire Christian Center, Inc. v. Fischer*<sup>44</sup>. It was based on the following state of affairs: the mayor, L.G. Fischer, prohibited the organisation of services a few days before Easter. He banned large gatherings that could have led to the spread of the coronavirus. The On Fire Christian Center challenged this ban, invoking the Free Exercise Clause of the First Amendment and the Kentucky Religious Freedom Act. The Church pointed to the inconsistency between the prohibition of attending church services and the permission to gather in shops and access other businesses.

Judge Walker referred to the Supreme Court ruling in the *Jacobson* case, stressing that even in that ruling, the existence of constitutional rights, including those covered by the First Amendment, had not been denied. The judge, therefore, gave priority to fundamental rights, including freedom of assembly, over extraordinary orders issued in connection with the pandemic.

The examples provided represent various court reactions to public authority acts restricting freedom of assembly in the time of COVID-19 in the United States. They reflect the interpretation of the freedoms under the First Amendment in the face of the state of emergency. It should be noted that these are some of the first rulings related to COVID-19 and the First Amendment. Since then, many rulings associated with the restraint of the First Amendment freedoms have been issued during this pandemic. Various restrictions related to COVID-19 have reached the US Supreme Court. They were particularly concerned about exercising religious liberty, closely related to the freedom of assembly. It is because freedom of assembly allows one to pursue religious practices. Moreover, the subject of proceedings before the courts was not the issue of freedom of assembly but the freedom of assembly in connection with religious liberty. What was particularly emphasised was the discrimination against the possibility of exercising the freedom of assembly by members of religious communities as part of practising religion, compared to other individuals exercising the freedom of assembly for other purposes<sup>45</sup>.

A general afterthought on observing the events regarding the freedom of assembly in the United States comes down to acknowledging the need to weigh values. Un-

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43 *Ibidem*.

44 See: documents on this case on JUSTIA US Law <https://law.justia.com/cases/federal/district-courts/kentucky/kywdce/3:2020cv00264/116558/6/> (accessed 24.01.2022).

45 See e.g. case *Roman Catholic Diocese of Brooklyn v. Cuomo* (more on <https://www.law.cornell.edu/supremecourt/text/20A87>, accessed: 22.01.2022) and *South Bay Unified Pentecostal Church v. Newsom* (more on: <https://www.law.cornell.edu/supremecourt/text/19A1044>, accessed 22.01.2022).

doubtedly, the pandemic of COVID-19 is a threat to public life and health, but it should not justify extraordinary long-term interference with fundamental freedoms.

## Conclusions

States are obliged to perform their constitutional functions, particularly to be proactive (including the immediate introduction of legal regulations) in the face of the need to combat epidemic diseases. Hence, when assessing the legality of restrictions on freedom of assembly during the COVID-19 pandemic, the principle of proportionality should be regarded as particularly important.

Against this background, the United States gave priority to the need to respond to the threats posed by the pandemic. Still, at the same time, the perspective of actions of public authorities was strongly confronted with the rights resulting from the First Amendment to the US Constitution, considered fundamental by Americans. In particular, the introduced restrictions were emphasised as temporary measures which should not become an instrument used by the state to limit the ability of individuals to participate in public life through expressing their opinions during specific assemblies. The restrictions met with public opposition, which frequently led to consequences in court proceedings. At the same time, it should be underlined that in the conflict between the implementation of the state's objectives related to ensuring sanitary safety and the protection of freedom of assembly and the First Amendment, various fundamentally different lines of jurisprudence have developed. Freedom of assembly was often analysed with freedom of assembly of members of individual religious communities and religious organisations aimed at religious observance.

In Poland, while the regulations introduced during the COVID-19 pandemic were substantively justified, the primary object of the debate was the method of their introduction. It was argued that the statutory and sub-statutory solutions adopted during the pandemic did not meet constitutional standards (violation of the principle of the exclusivity of the act by 'transferring' statutory matters to lower-level acts which then served as a basis for interfering with the essence of constitutional freedoms and rights)<sup>46</sup>. It concerned especially the prohibition on organising assemblies, which – within the meaning of Art. 31 (3) of the Constitution of Poland – failed the 'test of proportionality'. Therefore, public bodies were accused of failing to act based on the law by introducing prohibitions within the law without introducing constitutional states of emergency<sup>47</sup>.

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46 P. Tuleja, *Ustrojowe znaczenie...*, *op. cit.*, p. 51.

47 M. Florczak-Wątor, *Niekonstytucyjność...*, *op. cit.*, p. 18 i p. 200; S. Trociuk, *Prawa i wolności w stanie epidemii...*, *op. cit.*, pp. 65–69; *Informacja o działalności Rzecznika Praw Obywatelskich...*, *op. cit.*, p. 200.

By contrast, in the United States, there were apparent conflicts between the public interest and individual interest, especially in the case of extraordinary orders imposed by state authorities. The conflicts were resolved in courts or through agreements with state authorities<sup>48</sup>.

The examples of Poland and the United States demonstrate that the protection of life and health as superior values justifies far-reaching restrictions directly or indirectly affecting freedom of assembly. However, the problem remains at the level of the limits of the admissibility of restrictions. This was reflected in the public debate but also in court proceedings.

The American and Polish experiences have highlighted different contexts of limiting the freedom of assembly. The main question regarding the legality of restrictions in Poland was the form of the introduced restrictions (statutory or executive act) and their rationality (purposefulness). In America in comparison, two trends of assessment developed, one of them giving priority to fundamental rights – despite the existing jurisprudence of the Supreme Court on the possibility of restricting the First Amendment rights in order to achieve important public goals – and the other allowing for an exception to the strong protection of fundamental rights in order to protect the life and health of the public.

In Poland, both the entities that justified the restrictions and those that questioned them focused on the constitutional principle of proportionality. In the United States, the benchmark was the high rank of First Amendment rights as essentially not subject to state interference and the extraordinary circumstances in which certain action had to be taken. Therefore, more emphasis was placed on the issues related to adequacy rather than proportionality as understood by Polish constitutional law.

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48 See: *On Fire Christian Center, Inc. v. Fischer*.



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