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Warsaw, ¹⁴ April 2022

60...../2022/PSP

**The European Court of Human
Rights**

Mr. Marko Bošnjak

President of the First Section

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Ref. Marek Jarocki v. Poland

Application no. 39750/20

Pursuant to the letters of Ms Renata Degener, the Section Registrar of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 17 March 2022 granting leave to make written submission to the Court by 17 April 2022, the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland, would like to respectfully present its written comments on the case of Marek Jarocki v. Poland (application no. 39750/20).

On behalf of the Helsinki Foundation for Human Rights,

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WRITTEN COMMENTS
BY
THE HELSINKI FOUNDATION FOR HUMAN RIGHTS
Marek Jarocki v. Poland
Application no. 39750/20

EXECUTIVE SUMMARY

- The case of *Marek Jarocki v. Poland* concerns restriction of the freedom of assembly introduced by the Polish Government in times of COVID-19 pandemic.
- During the COVID-19 pandemic the Government imposed far reaching restrictions of fundamental freedoms and rights. However, the authorities did not decide to formally introduce one of the extraordinary states provided in the Constitution. Because of that, all restrictions of constitutional freedoms and rights had to comply with the requirements set in Article 31(3) of the Constitution.
- Article 31(3) of the Constitution provides two sets of requirements with regards to adoption of limitations of fundamental freedoms and rights. Formal criterion consists in requirement that all such limitations must have a legal basis in statute. Substantive criteria include the necessity to comply with the principle of proportionality and to respect the essence of given freedom or right.
- The restrictions of freedoms and rights adopted in times of COVID-19 pandemic did not satisfy these requirements. First, they were introduced in regulations adopted by the Council of Ministers and not in statute. Second, some of them violated the essence of restricted rights and freedoms.
- The exact scope of the restrictions of freedom of assembly evolved – in some periods the organisation of assemblies was completely prohibited, while in some the law imposed limits of maximum number of participants ranging from 5 to 150 persons. Moreover, at first the law prohibited only organisation of assemblies but subsequently the prohibition was extended also to participation in them.
- Many legal scholars perceived those restrictions as inconsistent with the Constitution. The inconsistency of regulations adopted by the Council of Ministers with the Constitution was recognised also in the case law of the Supreme Court, common courts and administrative courts.

I. INTRODUCTION

1. This third-party intervention is submitted by the Helsinki Foundation for Human Rights (“HFHR”), pursuant to the leave granted by the President of the Section on 17 March 2022.
2. The present written comments are divided into three sections (excluding introduction and conclusions). In the first part, we present the constitutional standard of the protection of the freedom of assembly, focusing in particular on the requirement that any restriction must have a legal basis in statute”. Second section is dedicated to description of restrictions of the freedom of assembly introduced in times of COVID-19 pandemic.

Finally, in the third section we discuss controversies about constitutionality of the abovementioned restrictions and selected case law of Polish courts on this matter.

II. CONSTITUTIONAL STANDARDS OF PROTECTION OF FREEDOM OF ASSEMBLY

3. According to Article 57 of the Constitution "The freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone. Limitations upon such freedoms may be imposed by statute". This provision must be interpreted in conjunction with Article 31(3) of the Constitution, according to which "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights".

4. All restrictions of fundamental rights and freedoms, including those concerning the freedom of assembly, must therefore satisfy two sets of criteria – formal and substantive. Substantive criteria are related to the principle of proportionality. Therefore, each restriction must serve one of legitimate aims enumerated in Article 31(3) of the Constitution, be necessary in democratic state (lack of less intrusive measures) and must satisfy the requirement of proportionality *sensu stricto* which involves balancing public interest with burden imposed on an individual. In addition, restriction must not interfere with the essence of freedom or right.

5. Besides the abovementioned substantive criteria, restrictions must also satisfy a formal criterion, namely – have a legal basis in statute (legislative act adopted by the Parliament). Interferences which do not have a legal basis at all or even do have but in a sub-statutory act will always violate the Constitution, regardless of their content. The requirement of statutory basis for any interference with fundamental freedoms and rights has been the subject of extensive case law of the Constitutional Tribunal. Many of its judgments concerned the extent to which restrictions of fundamental rights and freedoms could be specified in regulations.

6. Regulations are sub-statutory legal acts which may be issued by organs enumerated in the Constitution "on the basis of specific authorization contained in, and for the purpose of implementation of, statutes" (Article 92 section 1 of the Constitution). Such authorization must "specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act". Regulations, as delegated sources of law, are not self-standing acts – they may serve only implementation of statutes. Therefore, the Parliament cannot grant an executive body too much discretion in regulating matters via regulations. This discretion must be particularly limited with regards to matters related to fundamental rights and freedoms.

7. According to the Constitutional Tribunal, "Since limitations on constitutional rights and freedoms may be established <<only>> by statute, this implies that the statutory regulation must be complete and must independently determine all the basic elements of the limitation of a given right and freedom, so that already on the basis of a reading of the provisions of the statute it is possible to determine the complete outline (contour) of this limitation"¹. Legal scholars argue that the extent to which given restriction may be specified in regulation depends on the importance of given right or freedom: "the requirement of exclusive statutory regulation must be applied more strictly in the case of the most important individual freedoms and rights, whereas in the case of the right to

¹ Constitutional Tribunal, judgment of 10 November 2004, No. Kp 1/04.

property, freedom of economic activity or social rights, the scope of matters which may be regulated by way of a regulation may be wider”.²

8. The Constitutional Tribunal struck down many statutes and regulations which violated the principle of exclusive statutory regulation of restrictions of freedoms and rights. This concerned, among others, regulations specifying symbols of disability on the certificate of disability³ or forms and conditions of use of measures of coercion⁴. In the context of the freedom of assembly the Constitutional Tribunal reviewed the constitutionality of the provision which authorised the Minister of the Interior and Administration to determine, by way of a regulation, the manner of ensuring public safety and order during events taking place on roads, the conditions for their holding and the procedure to be followed in these matters. Acting on the basis of this provision the Minister issued a regulation which imposed various obligations on organisers of events, including an obligation to apply for permission to hold such event. The Constitutional Tribunal ruled that the statutory delegation provided in the challenged provision did not conform to constitutional standards because it did not formulate any specific guidelines concerning its content. The Constitutional Tribunal took into account that the statute did not regulate any matters related to organisation of events on roads, delegating this matter entirely to the regulation. Such action was inconsistent with the Constitution.⁵

9. What is important, regulation which is inconsistent with the Constitution may not only be struck down by the Constitutional Tribunal but may also be disapplied by courts in the context of individual cases pending before them. It is worth to underline that even though the power of courts to review constitutionality of statutes is not universally accepted, their power to disapply unconstitutional regulations is generally uncontested. That is because according to Article 178(1) of the Constitution judges “shall be independent and subject only to the Constitution and statutes”. They are, therefore, not bound by provisions of regulations which are inconsistent with the Constitution or statutes.⁶

10. Rules concerning imposition of restrictions of fundamental rights and freedoms are modified in case of introduction of extraordinary state. There are three extraordinary states specified in the Constitution: martial law, state of emergency and state of natural disaster. Article 228(3) of the Constitution provides that “the degree to which the freedoms and rights of persons and citizens may be subject to limitation for the duration of a period requiring any extraordinary states shall be established by statute”. Such statute may provide introduction of restrictions which go further than it would be permissible under ordinary circumstances. In particular, it is permissible to violate essence of right this is justified in the light of the general clause provided in Article 228(5) of the Constitution: “Actions undertaken as a result of the introduction of any extraordinary measure shall be proportionate to the degree of threat and shall be intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the State”. However, some particularly important rights and freedoms cannot be restricted on that basis what means that their limitations must comply with Article 31(3) of the Constitution even in times of extraordinary state. Catalogues of such stronger protected rights and freedoms vary depending on type of extraordinary state.

² L. Garlicki, K. Wojtyczek, *Komentarz do art. 31 Konstytucji RP* [in:] L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. II, Wydawnictwo Sejmowe 2016, p. 82.

³ Constitutional Tribunal, judgment of 19 June 2018, No. SK 19/17.

⁴ Constitutional Tribunal, judgment of 17 May 2012, No. K 10/11.

⁵ Constitutional Tribunal, 28 June 2000, No. K 34/99.

⁶ See e.g. B. Naleziński, *Komentarz do art. 178 Konstytucji RP* [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX/el. 2021.

III. RESTRICTIONS OF FREEDOM OF ASSEMBLY INTRODUCED IN TIMES OF COVID-19 PANDEMIC

11. Even though according to the law “the mass occurrence of infectious diseases in humans” may be a ground for introduction of the state of natural disaster⁷, public authorities decided to not to introduce any extraordinary state in connection to COVID-19 pandemic. Instead, on 13 March 2020 the Minister of Health announced a “state of epidemic threat”⁸ and, seven days later, “a state of epidemic”⁹. However, both these mechanisms have their legal bases only in statute, and not in the Constitution and thus they could not have modified the general rules for protection of constitutional freedoms and rights. Therefore, all restrictions introduced in times of COVID-19 epidemic should have conformed to the standards defined in Article 31(3) of the Constitution.

12. State of pandemic threat and state of pandemic were introduced by the Minister of Health on the basis of Article 46 of the Act on the prevention and the combatting of human infections and illness¹⁰ (hereinafter: “the Act”). According to this provision, regulation introducing a state of epidemic threat or state of epidemic may also impose certain restrictions of fundamental rights – enumerative list of permissible restrictions is provided in Article 46(4) of the Act. It includes, i.a., “temporary restriction on a particular move of movement” and “prohibition to hold spectacles and other assemblies of people”.

13. Regulation of 13 March 2020 on the introduction of state of epidemic threat prohibited organisation of all assemblies, within the meaning of the Act on assemblies, with more than 50 participants. This restriction was maintained in the Regulation of 20 March 2020 which introduced the state of epidemic.

14. On 2 March 2020 the Parliament adopted a law¹¹ which added Article 46a and 46b to the Act. According to these provisions the Government may issue a regulation in which it would specify areas on which state of epidemic threat or state of epidemic occurred and restrictions which are introduced due to this situation. With regards to these restrictions, the law referred to the “restrictions, obligations and orders” specified in the abovementioned Article 46(4) of the Act, but also added some other measures concerning quarantine and evacuation.

15. On 31 March 2020 the Government issued regulation establishing certain restrictions, obligations and prohibitions in connection with the occurrence of the state of epidemic (Journal of Laws 2020 item 566). According to this regulation, between 1 and 11 April 2020 it was completely prohibited to organise assemblies within the meaning of the Act on assemblies as well as all other gatherings. There were however several exceptions to these prohibitions. First, churches and other religious groups were not prohibited to organise assemblies/gatherings. Second, the prohibition did not apply to meetings of persons with their close persons (as defined in the Penal code) or close persons of their informal partners. Third, the law provided also exception related to meetings connected to exercise of professional, business or agricultural activities. The law provided that most of these restrictions would be lifted on 12 April 2020 – after this date, only assemblies,

⁷ See: Article 3 section 1 point 2 of the Act of 18 April 2002 on the state of natural disaster (Journal of Laws of 2017, item 1897).

⁸ Regulation of the Minister of Health of 13 March 2020 on the introduction of the state of epidemic threat on the territory of Poland (Journal of Laws of 2020, item 433).

⁹ Regulation of the Minister of Health of 13 March 2020 on the introduction of the state of epidemic on the territory of Poland (Journal of Laws of 2020, item 491).

¹⁰ Act of 5 December 2008 on the prevention and the combatting of human infections and illness (Journal of Laws of 2021, item 2069 with further amendments).

¹¹ Act of 2 March 2020 on the specific arrangements to prevent, counter and combat COVID-19, other communicable diseases and emergencies caused by them (Journal of Laws 2021, item 2095).

within the meaning of the Act on assemblies, of more than 50 persons would remain prohibited. However, on 10 April 2020 the Government issued a new regulation which prolonged the complete prohibition of organisation of assemblies and gatherings (with three exceptions mentioned above) “until further notice”.¹²

16. The prohibition of organisation of assemblies and gatherings, in the form specified above, remained in force until 16 May 2020 when the Government introduced three new exceptions.¹³ The first of them concerned gatherings of two persons, the second – meetings connected to activities of NGOs and the third – meetings connected to organisation of exams. Nevertheless, the organisation of public assemblies, within the meaning of Act on assemblies, remained to be completely prohibited, regardless of the number of participants.

17. The situation had changed on 30 May 2020 when the new regulation entered into force.¹⁴ According to it, the prohibition of organisation of assemblies was not applicable to assemblies organised on the basis of prior notification or decision for permission to hold recurrent assembly, provided that the number of participants did not exceed 150 persons. This meant that two types of assemblies were still prohibited: those whose number of participants would exceed 150 participants and the spontaneous assemblies which due to their specific nature take place without prior notification. Participants of assemblies were obliged to cover their mouths and noses and keep an appropriate distance from other participants. The regulation provided that also other gatherings should not exceed 150 participants (with exception to weddings and First Holy Communion celebrations). Additional provision regulated organisation of assemblies by churches and religious groups inside and outside of religious buildings. All these restrictions (with some minor changes) were maintained in subsequent regulation issued on 19 June 2020¹⁵.

18. The provision prohibiting organisation of assemblies without prior notification and of more than 150 participants was repeated in the regulation issued on 7 August 2020.¹⁶ However, a new element added in this regulation was the introduction of “red” and “yellow” zones on areas with particularly high levels of COVID infections. According to the regulation, some restrictions of freedoms and rights depended on the zone to which given area was qualified. This concerned, for example, rules for organisation of religious assemblies or other types of gatherings of people, but not organisation of public assemblies within the meaning of the Act on assemblies which could be held on the same rules on the whole territory of Poland.

19. The freedom of assembly was further restricted in Autumn 2020. The new regulation, issued on 9 October 2020, originally repeated prohibition of organisation of assemblies without prior notification and of more than 150 participants.¹⁷ However, it also added a requirement that the distance between various assemblies should be at least 100 meters. Just 8 days later the regulation was amended – from then on the maximum number of

¹² Regulation of the Council of Ministers of 10 April 2020 establishing certain restrictions, obligations and prohibitions in connection with the occurrence of the state of epidemic (Journal of Laws 2020, item 658).

¹³ Regulation of the Council of Ministers of 16 May 2020 establishing certain restrictions, obligations and prohibitions in connection with the occurrence of the state of epidemic (Journal of Laws 2020, item 878).

¹⁴ Regulation of the Council of Ministers of 29 May 2020 establishing certain restrictions, obligations and prohibitions in connection with the occurrence of the state of epidemic (Journal of Laws 2020, item 964).

¹⁵ Regulation of the Council of Ministers of 19 June 2020 establishing certain restrictions, obligations and prohibitions in connection with the occurrence of the state of epidemic (Journal of Laws 2020, item 1066).

¹⁶ Regulation of the Council of Ministers of 7 August 2020 establishing certain restrictions, obligations and prohibitions in connection with the occurrence of the state of epidemic (Journal of Laws 2020, item 1356).

¹⁷ Regulation of the Council of Ministers of 9 October 2020 establishing certain restrictions, obligations and prohibitions in connection with the occurrence of the state of epidemic (Journal of Laws 2020, item 1758).

participants of assembly was 10 persons in yellow zone and 25 in red zone. On 24 October 2020 these limits were reduced to just five participants.¹⁸ The prohibition of organisation of assemblies of more than five participants and those without prior notification was repeated in the subsequent regulations and remained in force until May 2021. It is worth to note, however, that until 27 March 2021 the regulations prohibited explicitly only organisation of assemblies. The regulation which entered into force on 27 March 2021 prohibited also participation in assemblies.¹⁹

20. The new regulation which entered into force on 11 May 2021 provided that until 28 May 2021 the maximum number of participants of assemblies was 25, while between 29 May and 5 June – 50.²⁰ On 4 June 2021 the Government issued yet another regulation which provided that until 25 June 2021 the maximum number of participants would be 150.²¹ The subsequent regulation, which entered into force on 12 June 2021,²² prolonged this limit until 31 August 2021 and lifted the prohibition of organisation of and participation in assemblies organised without prior notification. Regulations adopted in the following months prolonged duration of these restrictions until 1 December 2021, when the maximum limit of participants of assemblies was reduced to 100. This limitation remained in force until 28 February 2022.

21. The new regulation, issued on 25 February 2022,²³ did not provide any limitations of freedom of assembly. Likewise, the regulation of 25 March 2022,²⁴ which is in force at the moment, do not provide such restrictions.

22. Persons who violated the prohibition of organisation and participation in public assemblies could face two types of sanctions. First, according to Article 54 of the Petty Offences Code,²⁵ person who violate the provisions regulating the conduct in public places, issued on the basis of authorisation provided in statute, shall be punished with fine up to 500 PLN or reprimand. In October 2020 the Parliament adopted a law²⁶ which introduced a new type of petty offence – violation of prohibitions, orders and obligations defined in the provisions concerning prevention and combating infections and infectious diseases among humans or provisions concerning the National Sanitary Inspection or non-compliance with decisions issued on the bases of these provisions by the sanitary

¹⁸ Regulation of the Council of Ministers of 23 October 2020 amending the regulation establishing certain restrictions, obligations and prohibitions in connection with the occurrence of the state of epidemic (Journal of Laws 2020, item 1871).

¹⁹ Regulation of the Council of Ministers of 25 March 2021 amending the regulation establishing certain restrictions, obligations and prohibitions in connection with the occurrence of the state of epidemic (Journal of Laws 2021, item 546).

²⁰ Regulation of the Council of Ministers of 10 May 2021 amending the regulation establishing certain restrictions, obligations and prohibitions in connection with the occurrence of the state of epidemic (Journal of Laws 2021, item 879).

²¹ Regulation of the Council of Ministers of 4 June 2020 amending the regulation establishing certain restrictions, obligations and prohibitions in connection with the occurrence of the state of epidemic (Journal of Laws 2021, item 1013).

²² Regulation of the Council of Ministers of 11 June 2021 amending the regulation establishing certain restrictions, obligations and prohibitions in connection with the occurrence of the state of epidemic (Journal of Laws 2021, item 1054).

²³ Regulation of the Council of Ministers of 25 February 2022 establishing certain restrictions, obligations and prohibitions in connection with the occurrence of the state of epidemic (Journal of Laws 2022, item 473).

²⁴ Regulation of the Council of Ministers of 25 March 2022 establishing certain restrictions, obligations and prohibitions in connection with the occurrence of the state of epidemic (Journal of Laws 2022, item 679).

²⁵ Act of 20 May 1971 – Petty Offences Code (Journal of Laws of 2021, item 2008 with further amendments).

²⁶ Act of 28 October 2020 amending certain acts in relation to countering emergencies related to COVID-19 (Journal of Laws of 2020, item 2112).

inspection authorities. Such unlawful act is punishable with fine up to 5,000 PLN or reprimand. Finally, on 31 March 2020 the Parliament adopted a law²⁷ which introduced possibility to impose administrative fines on persons who violate restrictions, prohibitions or orders introduced in regulations adopted on the basis of the abovementioned Article 46 or 46a of the Act. The minimum and maximum amount of such fine is respectively 10,000 PLN and 30,000 PLN. The competence to impose administrative fine belonged to the sanitary inspector.

23. The abovementioned restrictions have not prevented the holding of assemblies (primarily, spontaneous assemblies), which have evoked a strong response from the police.²⁸ This concerns for example the night protest of 7/8 August 2020 which erupted immediately after the arrest of an LGBTI rights activist, and the protests following the judgment of the Constitutional Tribunal concerning the access to abortion which started on 22 October 2020. These assemblies were often attended by a large number of participants and markedly exceeded the limit indicated in the regulation – one of the largest protests of the Women's Strike in Warsaw was attended by 100,000 people,²⁹ accompanied by many smaller protests across approximately 600 Polish cities, towns and villages³⁰. During the protests, the police performed mass ID checks and made many arrests among the protesters. Frequently, the Police used the practice of “kettling” and allowed participants to pass the police cordon after their personal information has been recorded³¹. Often, protesters faced the risk of being prosecuted for their participation in the protests. In this context it is worth to note that according to the media reports, some of the organisers of the “Nationwide Women’s Strike” were charged with committing a crime of “bringing danger to the life and health of many persons” (Article 165 § 1 of the Penal Code).³² The media also informed that the National Public Prosecutor instructed prosecutors to prosecute organisers of “illegal assemblies” under this very provision³³, what prompted the reaction of the Commissioner for Human Rights, according to whom persons should not be prosecuted for exercising their fundamental freedoms and rights³⁴. The criminal liability for violation of Article 265 § 1 of the Penal Code is much more severe than liability under the Petty Offences Code or provisions on administrative sanctions mentioned above. The said crime is prosecuted in the criminal proceedings and is punishable by imprisonment for a term of between 6 months and 8 years. Moreover, the

²⁷ Act of 31 March 2020 amending certain laws in the area of the health system related to the prevention, counteraction and combatting of COVID-19 (Journal of Laws 2020, item 567).

²⁸ See: Helsinki Foundation for Human Rights, *Impact of the coronavirus pandemic on the criminal justice system. Freedom of assembly – update*, <https://www.hfhr.pl/wp-content/uploads/2021/11/Wolnos%CC%81c%CC%81-zgromadzen%CC%81-brief.pdf> (last access: 12 April 2022).

²⁹ 3 See e.g. *Na Warszawę! 100 tysięcy osób protestowało w stolicy [ZDJĘCIA]*, <https://oko.press/nawarszawe100-tysiecy-osob-protestowalo-w-stolicy-zdjecia/> (last access: 12 April 2022).

³⁰ See e.g. M. Chołodowski, *Strajk Kobiet. Czas wykorzystać tę siłę*, <https://bialystok.wyborcza.pl/bialystok/7,35241,26620308,strajk-kobiet-czas-wykorzystac-te-sile.html> (last access: 12 April 2022).

³¹ Helsinki Foundation for Human Rights, *Impact of the coronavirus...*, p. 3.

³² D. Sitnicka, *Lemparc i Suchanow: „Nie przestraszają nas”. Prokuratura stawia im coraz ostrzejsze zarzuty*, „OKO.press”, 13 February 2021, <https://oko.press/prokuratura-stawia-zarzuty-liderkom-i-pomocnikom-strajku-kobiet/> (last access: 14 April 2022).

³³ E. Ivanova, *Strajk kobiet na celowniku prokuratorów Ziobry. Mają ścigać organizatorów protestów*, „Wyborcza.pl”, 29 October 2020, <https://wyborcza.pl/7,75398,26456219,strajk-kobiet-na-celowniku-prokuratorow-ziobry-maja-szigac.html> (last access: 14 April 2022).

³⁴ Commissioner for Human Rights, Letter to the National Public Prosecutor, 30 October 2020, <https://bip.brpo.gov.pl/sites/default/files/RPO%20do%20PK%2C%2030.10.2010.pdf> (last access: 14 April 2022).

organisation of assembly was introduced not only with violation of the requirement of statutory legal basis, but was also inconsistent with the principle of proportionality. In this regard the Commissioner noted the inconsistency of the Government who excluded certain types of gatherings (for example, connected to professional or business activities) from the scope of prohibition. Moreover, such action violated the essence of freedom of assembly, what is prohibited without introducing the extraordinary state.⁴⁰

28. The unconstitutionality of regulations restricting the freedom of assembly was recognised also in the case law of courts. Particularly noteworthy is the judgment of the Supreme Court of 1 July 2021 (no. IV KK 238/21). The case concerned two persons who were fined on the basis of the abovementioned Article 54 of the Petty Offences Code for, among others, participating in the public assembly which exceeded the limit of five participants set in the Government's regulation. The fines were imposed in judgments of the District Court which were challenged to the Supreme Court by the Commissioner for Human Rights. The Supreme Court quashed the judgments and acquitted the defendants from the charges related to their participation in the assembly. The Supreme Court noted that the District Court provided a wrong legal basis for the punishment of the defendants (it referred to the amending regulation and not to the regulation which was amended) what was a sufficient reason for setting the rulings aside. In addition to this formal issue, the Supreme Court also made certain important comments concerning constitutionality of limitations of freedom of assembly imposed in times of pandemic. It held that while deciding on the responsibility for violation of Article 54 of the Petty Offences Code, courts must analyse whether the provisions regulating the conduct in public places, to which this provision refer, comply with the constitutional rules for making a sub-statutory legal acts. The Supreme Court noted that the Regulation of 9 October 2020 was issued on the basis of Article 46a and 46b of the Act. However, these provisions did not authorise the Government to introduce prohibition of organisation of public assemblies in the regulation. Pursuant to Article 46b point 1 of the Act, the regulation which specifies areas on which state of epidemic threat or state of epidemic occurred may impose "limitations, obligations and orders referred to in Article 46 section 4". Article 46 section 4 of the Act provides a basis for prohibiting spectacles and other assemblies of people, but prohibition does not constitute "limitation, obligation or order". Therefore, the Government could not prohibit participation in assemblies on the basis of that provision.

29. The inconsistency of regulations introducing far reaching restrictions of freedom of assembly with the Constitution was also the subject of case law of common courts. During the period of the total ban on assemblies, the Warsaw Court of Appeal held that "the above legal situation raises considerable doubts from the perspective of the constitutional right of citizens to assemblies under Article 57 of the Constitution, in particular in the context of constitutionally permissible restrictions on subjective rights and the principle of proportionality enshrined in Article 31 (3) of the Constitution".⁴¹ In the decision of 16 October 2020 the District Court for Warsaw-City Centre⁴² discontinued the petty offences proceedings against participant of public assembly. The court held that the regulations which introduced restrictions and prohibitions for organisation of and participation in public assemblies did not contain references to Article 54 of the Petty Offences Code and

⁴⁰ Commissioner for Human Rights, Letter to the Prime Minister dated 4 June 2020, https://bip.brpo.gov.pl/sites/default/files/do%20Prezesa%20RM%20ws%20naruszania%20praw%20i%20wolno%C5%9Bci%20w%20czasie%20pandemii%2C%204.06.2020_0.pdf (last access: 12 April 2022).

⁴¹ Court of Appeal in Warsaw, decision of 15 May 2020, No. VI ACz 339/20.

⁴² District Court for Warsaw-City Centre, decision of 16 October 2020, No. V W 2757/20.

did not explicitly provide that violation of their provisions constitute a petty offence. The Act provided that violation of restrictions and prohibitions introduced in regulations is punishable with administrative fines what suggest that the legislator preferred the administrative regime and not the petty offences responsibility. In addition, the District Court noted that the Constitution requires that any limitation of the freedom of assembly must have a legal basis in statute. Moreover, far reaching restrictions of this freedom could be introduced only in times of extraordinary state but the Government did not decide to use such measure. In these circumstances, the regulation of the Government was inconsistent with the Constitution, and thus – illegal. In the decision of 23 March 2021 the District Court in Olsztyn⁴³ noted another interesting problem. The Act provided only for possibility to introduce prohibition of organisation of “spectacles and other assemblies of people”. Therefore, it could not form a legal basis for prohibiting a mere participation in assemblies, including spontaneous assemblies.

30. Constitutionality of regulations restricting freedom of assembly was also the subject of case law of administrative courts. For example, in the judgment of 28 October 2021 the Supreme Administrative Court ruled that imposition of an administrative fine on person who violated the prohibition of organisation of assemblies was unlawful.⁴⁴ The Court underlined that even though the freedom of assembly does not have an absolute character, according to the Constitution it may be limited only by way of regulation. The necessity to respect the principle of exclusive statutory regulation in the case at hand was even more important taking into account that it concerned the sphere of repressive law. In the case considered by the Supreme Administrative Court this requirement was violated because the statutory regulation was very broad and vague and as a result the prohibited acts were almost entirely defined on the level of regulation. Therefore, the Supreme Administrative Court concluded that the decision was issued without proper legal basis and as such was invalid. Analogous interpretation can be found in numerous other rulings of the Supreme Administrative Court⁴⁵ and regional administrative courts⁴⁶.

V. CONCLUSIONS

31. During the COVID-19 pandemic the Government imposed far reaching restrictions of fundamental freedoms and rights. However, the authorities did not decide to formally one of the extraordinary states provided in the Constitution. Because of that, all restrictions of constitutional freedoms and rights had to comply with the requirements set in Article 31(3) of the Constitution, in particular – have a legal basis in statute.

32. Restrictions imposed by the Government concerned also the freedom of assembly. The exact scope of these restrictions evolved – in some periods the organisation of assemblies was completely prohibited, while in some the law imposed limits of maximum number of participants. Moreover, since 27 March 2021 the law prohibited also participation in the assemblies. All those restrictions were introduced in regulation what was inconsistent with the abovementioned constitutional requirement that all restrictions of constitutional freedoms and rights are imposed by way of statute. The unconstitutional character of these regulations was recognised in the case law of the Supreme Court, common courts and administrative courts.

⁴³ District Court in Olsztyn, decision of 23 March 2021, No. II W 202/21.

⁴⁴ Supreme Administrative Court, judgment of 28 October 2021, No. II GSK 1417/21.

⁴⁵ Supreme Administrative Court, judgment of 23 September 2021, No. II GSK 876/21.

⁴⁶ See e.g. Regional Administrative Court in Rzeszów, judgment of 1 February 2022, No. II SA/Rz 1466/21 (judgment is not yet final); Regional Administrative Court in Bydgoszcz, judgment of 25 January 2022, No. II SA/Bd 1004/21 (judgment is not yet final); Regional Administrative Court in Gorzów Wielkopolski, judgment of 18 November 2021, No. II SA/Go 678/21 (judgment is not yet final).