

The administrative limitation of assemblies in Ukraine and Poland in the light of the international law regulations – some remarks on the Ukrainian road to democracy

Introduction

Ukraine is one of the largest and youngest democratic states. It can also potentially benefit from the geopolitical stability on the continent the most. What is interesting in the context of current Ukrainian transformations is the experience of Poland, a state which, too, has recently regained independence and which, like Ukraine – albeit to a much lesser extent now – has to struggle with the remnants of Communist legal solutions. For decades, these solutions determined not only the structure and operational principles of public authorities but, first and foremost, the depth and scope of the administrative restrictions of political rights and freedoms.

Indubitably, one of the most important freedoms is freedom of assembly, upon which every civil society is based¹. Moreover, freedom of assembly is an essential structural component of the right to participate

¹ As Iwanowski rightly stressed, various forms of human and civil activities directed at solving issues considered as important for a given community are essential for the civil society, which is based on free initiative (S. Iwanowski, *Prawne formy organizowania się społeczeństwa*, "Samorząd Terytorialny" 2010, no. 1–2, p. 22); the significance of civil society is also highlighted by Pułło, among others, who considers the protection of such a society as a constitutional principle and "the best guarantee of maintaining a democratic system" (A. Pułło, *Zasada ochrony społeczeństwa obywatelskiego w systemie zasad konstytucyjnych*, "Gdańskie Studia Prawnicze" 2012, no. 2, p. 288). Also see: judgment of the European Court of Human Rights of 5 March 2009 in Banaco and France (complaint

in the conduct of public affairs, derived directly from human dignity – the fundamental value in the human rights system². It could thus be assumed that the scope of protection of this freedom is a yardstick for the degree of democracy in any given country³. In particular, such a yardstick gains special importance in the context of states undergoing democratic transformations, for it enables the assessment of the attained transformation stage according to the administrative restriction of human rights in that country.

The aim of this study is to analyse and evaluate the Ukrainian and Polish regulations of freedom of assembly. The chief research issue will be the answer to the question: how big are the administrative limitations of freedom in both countries? Do not the regulations applicable in both countries affect the essence of freedom? Do they sufficiently incorporate the international law? In order to achieve this aim and answer the questions above, the study has been divided into three parts. The first part will outline how the international legal regulation of the freedom of assembly has been implemented in Poland and Ukraine; the second will analyse the issue of constitutional guarantees of the freedom of assemblies in Ukraine and the limitations of this freedom permitted under Ukrainian law; the third and final part will contain the discussion on the form of administrative regulation of assemblies in Poland⁴. This division into parts dealing with Ukrainian and Polish law solutions separately has been made not only because of the subject matter and

31684 05): theses, the actual state of affairs and obiter dicta in: M.A. Nowicki, *Europejski Trybunał Praw Człowieka. Wybór orzeczeń 2009*, Warszawa 2010, p. 319.

² Besides freedom of assembly, the list of such freedoms compiled by Olejniczak-Szałowska includes freedom of association, right of access to public service, freedom to express opinions and to acquire and disseminate information, right to public information, electoral rights, right to participate in national and local referenda, right to launch a popular legislative initiative, and finally right to submit petitions, applications, and complaints, also in public interest (E. Olejniczak-Szałowska, *Prawo do uczestnictwa w kierowaniu sprawami publicznymi we wspólnotach samorządowych w świetle dyrektywy Rady 94/80/WE, "Samorząd Terytorialny" 2006*, no. 1–2, p. 5).

³ Jaskiernia includes even freedom of demonstrations, along with freedom of oral and written expression, privacy of correspondence, and freedom to create associations, organizations, and political parties in his "most general approach" to the principle of political pluralism (J. Jaskiernia, *Zasada pluralizmu politycznego w projektach nowej konstytucji RP, "Państwo i Prawo" 1991*, no. 10, p. 20).

⁴ The way the content of the study is divided (the clear separation of the parts concerning Ukrainian and Polish law) is not only because of its content but also the necessity to precisely attribute the authorship of its individual sections.

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1. Freedom of assembly under the international law instruments binding Poland and Ukraine

The issue of the right to organise assemblies including “both private meetings and meetings in public thoroughfares as well as static meetings and public processions”, which “can be exercised by individuals and those organising the assembly”⁵ is of such a tremendous importance within the system of human rights that it is addressed in various conventions, both universal and regional. In terms of the interpretation of freedom, the significance of these acts is fundamental, since in the domain of individual rights the international law has gained precedence over constitutional orders⁶. It has to be remembered, however, that the treaties concerning human rights contain no provisions making them directly applicable to the territory of the states – parties to the convention. Therefore, the possible direct application of the norms of the treaties and their incorporation into national law depends on the form of constitutional regulations⁷. The particular status of international regulations pertaining to human rights is taken into account in many constitutions; for instance, in Russia and Romania international standards are meant to be a uniform interpretation criterion of the rights guaranteed by the constitution; in the Czech Republic and Slovakia, the precedence of conventions on human rights over statutes are openly

⁵ The Judgment of the European Court of Human Rights of 20 February 2003 in the case of *Djavit An v. Turkey* (Application no. 20652/92); the theses, factual status, and discussion of the ruling in: M.A. Nowicki, *Nowy Europejski Trybunał Praw Człowieka. Wybór orzeczeń 1999–2004*, Kraków 2005, p. 1156.

⁶ C. Mik, *Międzynarodowe uwarunkowania konstytucyjnej regulacji praw człowieka (problemy podstawowe)*, “Państwo i Prawo” 1990, no. 12, p. 38. It is worth adding that the interaction between the international and domestic orders is bilateral and mutual: the effect of the international order can be observed in the activities of local institutions just as the influence of national orders is manifested in the practice of international bodies. More in: B. Kołaczkowski, *Kształtowanie się regulacji prawnych zgromadzeń w Polsce oraz w wybranych krajach o anglosaskiej tradycji prawnej*, Warszawa 2014, p. 7.

⁷ Cf. L. Wiśniewski, *Stosowanie międzynarodowych konwencji o prawach człowieka (na tle orzecznictwa organów sądowych i działalności Rzecznika Praw Obywatelskich)*, “Państwo i Prawo” 1992, no. 12, p. 52.

stated and directly applied⁸. Whereas in Ukraine international treaties recognised by the Supreme Council (Ukr. *Verkhovna Rada*) are an integral part of the national legal order⁹. Conversely, Art. 91(1) of the Polish Constitution (Pol. *Konstytucja RP*) of 2 April 1997¹⁰ provides that: “[a]fter promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.” Moreover, “an international agreement ratified upon prior consent granted by statute [has] precedence over the statute” if the provisions of the latter cannot be reconciled with such an agreement (Art. 91(2) of the Polish Constitution).

Acts of international law binding both Poland and Ukraine include:

- A. the Universal Declaration of Human Rights;
- B. the International Covenant on Civil and Political Rights;
- C. the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- D. the Convention on the Rights of the Child;
- E. the Framework Convention for the Protection of National Minorities; and
- F. the Convention on the Rights of Persons with Disabilities.

Ad A) The Universal Declaration of Human rights

The first act of international law in which the right to organise assemblies was directly specified is the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948 by 48 votes in favour, none against and eight abstaining. The Ukraine and Poland were among the latter¹¹. According to Art. 20(1) of the Declaration, “[e]veryone has the right to freedom of peaceful assembly and association.” The lack of precision of the regulation found

⁸ W. Sokolewicz, *Nowa rola konstytucji w postsocjalistycznych państwach Europy*, “Państwo i Prawo” 2000, no. 10, p. 30.

⁹ Cf. Art. 9 of the Constitution of Ukraine adopted on 28 June 1996: „International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine”; the text of the Constitution is available at: <http://www.legislationline.org/documents/section/constitutions/country/52> (accessed: 18 I 2016).

¹⁰ Dz.U. (J.L.) No. 78, item 483 as amended.

¹¹ The text of the Declaration is available online: <http://www.un.org/en/universal-declaration-human-rights/> (accessed: 3 III 2016).

in the Declaration is understandable due to its nature: it is a resolution, not an international agreement imposing specific obligations on states. Despite having the form of a resolution, the Declaration is of great importance, particularly concerning the political realities of the period directly after World War II and the will, common among the democratic states of the time, to define a new legal order – in the areas of both international law and domestic laws¹². This order is founded on as broad as possible establishment of the system of fundamental human rights. It is worth noting that from the text of the Declaration, the cornerstone of the international system of protection of human rights, the necessity to formulate limitations of these laws is obvious. In line with the wording of Art. 29(2), restrictions on rights are acceptable for the purpose of recognition and respect of the rights and freedoms of others and fulfilling the requirements of morality, public order, and the general welfare in a democratic society.

Ad B) The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights¹³, adopted on 16 December 1966 (Poland ratified the Covenant on 18 March 1977 while the Ukraine did it already on 12 November 1973¹⁴) affects the legal orders of the states which ratified it more than the Declaration does because, contrary to the latter, it is an international agreement. The Covenant, one of the Covenants on Human Rights, is thus the basis on which the internal regulations in individual countries are shaped. In non-legal contexts, it is sometimes even called the “universal synthesis of humanism” or the “exemplary catalogue of human rights which confirms the existing possibility of agreement between the supporters of various political ideas on the most important matters of humankind”¹⁵.

Freedom of assembly is stipulated in Art. 21 of the Covenant, according to which “[t]he right of peaceful assembly shall be recognised.” Similarly to the Universal Declaration of Human Rights discussed above, the Covenant also contains provisions permitting limitations

¹² Ibidem.

¹³ J.L. 1977 No. 38, item 167 (att.).

¹⁴ Data available online at: https://treaties.un.org/Pages/ViewDetails.aspx?s-r=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (accessed: 20 I 2016).

¹⁵ Cf., e.g.: A. Bisztyga, *Przedmowa*, in: *Europejska Konwencja Praw Człowieka, Międzynarodowy Pakt Praw Obywatelskich i Politycznych*, Katowice 1992, p. 7; L. Wiśniewski, *Gwarancje podstawowych praw i wolności obywateli PRL*, Wrocław 1981, p. 17–18.

of freedom of assembly. It is obvious from the wording of the remainder of the aforementioned Art. 21 that the limitations of freedom of assembly are acceptable provided that two requirements are fulfilled: they must be introduced by law as well as be necessary for the reasons of national security or public safety, protection of public order, protection of public health or morality and, finally, the protection of the rights and freedoms of others. Whereas the specific condition for the limitation of freedoms guaranteed by the covenant, including freedom of assembly, is an exceptional “public emergency which threatens the life of the nation” – pursuant to Art. 4(1), “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

Provisions indirectly applicable to the freedom of assembly can also be found in Art. 18(1) of the Covenant. While this article concerns the freedom of thought, conscience, and religion, it also stipulates the freedom to manifest one’s religion or belief “either individually or in community with others and in public or private”; moreover, this freedom “may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others” (Art. 18(3) of the Covenant).

It is worth noting that the Covenant on Civil and Political Rights stresses the principle of equality similarly to the Universal Declaration of Human Rights discussed above: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Art. 2(1) of the Covenant).

Ad C) The European Convention for the Protection of Human Rights and Fundamental Freedoms

Freedom of assembly is also regulated by the acts of international law at the regional level. One such a regional act of international law which has been ratified by Poland as well as the Ukraine (on 19 January 1993

and 11 September 1997, respectively¹⁶) is the European Convention for the Protection of Human Rights and Fundamental Freedoms established on 4 November 1950¹⁷. This convention is the best known instrument for protection of individual rights in the framework of the Council of Europe and also the historically first international treaty to implement the idea of overall protection of human rights¹⁸.

Concerning assemblies, the Convention, in a similar way to the Universal Declaration of Human Rights, regulates this right in combination with the freedom of association, including the right to create and join trade unions in a common regulation. Pursuant to Art. 11(1) of the Convention, “[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.” Conditions justifying the limitation of these rights are defined in Art. 11(2). This catalogue of circumstances was formulated very broadly, similarly to the universal acts of international law. The permissible limitations are those which are necessary in a democratic society in the interests of national or public safety, protection of order and prevention of crime, protection of health and morality, or protection of rights and freedoms of others. The Convention also provides for the possibility to restrict the exercise of freedom of assembly by members of armed forces, police, and the administration of the state.

While stressing the significance of the Convention for the protection of the right to organise assemblies, to associate, and other fundamental rights, one should note that it establishes the European Court of Human Rights as the institution aimed at protecting the rights provided by the Convention in practice¹⁹. Indubitably, the prospect of international accountability before the Court for non-compliance with the obligation contributes to improving the efficiency of the activities of the state in areas of both legislation and execution of existing law²⁰. The significance of the case-law of the Court is enormous, since it defines “what the standards ensuing from Art. 11 demand from the member states of

¹⁶ Data available online at: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=QUCpRayD (accessed: 20 I 2016).

¹⁷ J.L. 1993 No. 61, item 284 as amended.

¹⁸ A. Wiśniewski, *O historii Europejskiej Konwencji Praw Człowieka*, “Gdańskie Studia Prawnicze” 2009, no. 1, p. 397.

¹⁹ Section II of the Convention.

²⁰ P. Bachmat, *Uwagi na temat horyzontalnego oddziaływania Europejskiej Konwencji Praw Człowieka*, “Państwo i Prawo” 2001, no. 10, p. 91.

the Convention”²¹. In other words, the rulings of the Court: “set out the standards to follow in European democracies”²². I.C. Kamiński provided an accurate analysis of the judgments delivered by the Court regarding the freedom of assemblies, in which he indicated among other things that both, in the case of a legal, peaceful demonstration as well as in the event of an illegal gathering, an immediate use of force by the police constitutes not only a violation under Art. 11 of the Convention, but it may also lead to a breach of Art. 3, in the part forbidding inhuman or degrading treatment (if the demonstrators suffered injuries of sufficient magnitude). The Court also stressed a number of times that small demonstrations do not give rise to serious risks to public order even if they are illegal or organised by banned organisations²³. Further, as can be derived from various judicial decisions, the essence of freedom and organising manifestations is contained in the possibility given to each citizen of expressing an opinion or an objection, as well as in: “challenging each decision of any authority”²⁴. In many decisions this relationship between the freedom to express an opinion and the freedom of assembly is particularly emphasised. For example, in the judgment of 11 January 2007 in *Kuznecov v. Russia*²⁵ the Court stressed that: “The right to freedom of assembly is intimately connected with the right to freedom of expression: by facilitating effective forms of public protest, the former right provides a practical means by which the latter right

²¹ I.C. Kamiński, *Wolność zgromadzeń i stowarzyszania się (art. 11) w orzecznictwie ETPCz za lata 2008–2009*, “Europejski Przegląd Sądowy” 2010, no. 9, p. 31, 36–37. The author made an accurate analysis of the judgments of the Court regarding the freedom of assembly, which indicates, among other things, that not only in the case of a legal, peaceful demonstration but also an illegal gathering, an immediate use of force by the police not only constitutes a violation of Art. 11 of the Convention but may also lead to the breach of Art. 3 in the part forbidding inhuman or degrading treatment (if the demonstrators suffered serious enough injuries). The court has also stressed many times that numerically small demonstrations do not give rise to serious risks for the public order even when they are illegal and organised by banned organisations (more in: B. Kołaczkowski, op. cit., p. 13–14).

²² B. Baczyńska, *Granice wolności zgromadzeń i stowarzyszania na podstawie orzecznictwa strasburskiego – wybrane zagadnienia*, in: *Prawne aspekty wolności. Zbiór studiów*, ed. by E. Cała-Wacinkiewicz and D. Wacinkiewicz, Toruń 2008, p. 212.

²³ More in: B. Kołaczkowski, op. cit., p. 13–14.

²⁴ Judgment of the ECHR of 3 February 2009 in *Women on Waves et al v. Portugal* (complaint No. 31276/05), thesis, the actual state of affairs and discussion in: M.A. Nowicki, *Europejski Trybunał. Wybór orzeczeń 2009*, p. 263.

²⁵ Complaint No. 10877/04 see in: M. Elliott, R. Thomas, *Public Law*, Oxford 2011, p. 816.

can be exercised.” These relationships were even better analysed in judgments of 29 June 2006 – *Ollinger v. Austria*²⁶ and of 13 February 2003 – *Refah Partisi v. Turkey*²⁷. In the former case it was held that: “the protection of the freedom of making and expressing opinions is one of the objectives of the freedom of assembly” while in the latter, which even more overtly emphasised the relationship between the freedom to express opinions and the freedom of assembly, the Court held that: “the protection of opinion and freedom to express it [...] is one of the objectives of the freedom of assembly and association.”

It is worth noting that judicial decisions are not uniform and vary considerably, which means that actual influence of the standards referred to above have a limited effect on the application of domestic regulations, which is particularly true in Ukraine where the rules governing assemblies come from the times when it was one of the Soviet republics, and its application is frequently far from standards observed in democratic states (more on that in Part 2 of this article). Two judgments may be quoted here: one of 10 October 1979 in *Rassemblement Jurassien Unite Jurassienne v. Switzerland*²⁸ and one of 15 March 1984 in *A. Association and H v. Austria*²⁹. In *Rassemblement Jurassien Unite Jurassienne v. Switzerland* the judgment concerned the freedom of a state to decide upon possible limitations of the freedom of assembly. The dispute involved a temporary prohibition of any political assembly issued by Bern canton authority in respect of one town in Switzerland. Despite the ban, a demonstration was organised and it eventually turned into clashes between the police and the demonstrators. The organisers of the demonstration accused the authorities of violation of the freedom of assembly and freedom to express opinions guaranteed, *inter alia*, under Articles 10 and 11 of the European Convention of Human Rights. The matter was referred to the European Court of Human Rights which upheld the arguments presented by the Swiss government. Of particular interest is the Court’s reflexion that: “the public interest in the freedom of assembly had to, temporarily, come second having regard to another,

²⁶ Complaint No. 769900/01, thesis, the actual state of affairs and discussion in: M.A. Nowicki, *Europejski Trybunał. Wybór orzeczeń 2009*, p. 263.

²⁷ Complaints 41340/98, 41342/98 and 41344/98; thesis, the actual state of affairs and discussion in: M.A. Nowicki, *Europejski Trybunał. Wybór orzeczeń 1999–2004*, p. 1144.

²⁸ ECHR 1979, the judgment can be accessed at: <http://echr.ketse.com/doc/8191.78=en-19791010/view> (accessed: 1 III 2016).

²⁹ App No. 9905/82, the judgment can be accessed at: <http://echr.ketse.com/doc/9905.82-en-19840315/view> (accessed: 1 III 2016).

equally justified public interest in a harmonious living in a community among citizens of a democratic society.” Other arguments by the ECHR also prove that the European Court of Human Rights opted for a wide interpretation of the circumstances justifying far-reaching limitations of the freedom of assembly and granted the state considerable freedom to assess the legality of the limitations of the right to the freedom of assembly. These theses are not easy to reconcile with reflexions contained in other judgments, for instance in *Ollinger v. Austria* quoted above, in which the Court decided that: “a state must refrain from intervening in the right of freedom of assembly, including demonstrations that may irritate or offend other persons.” The second of the two judgments mentioned above also emphasised the primacy of other interests and freedoms over the freedom of assembly and concerned permissibility of issuing a decision to ban carrying an assembly. Among arguments justifying this decision was a threat to national security resulting from the slogans or words used during the assembly. In its decision the Court stood alongside the government of Austria, and emphasised that a “negation of the conception of the Austrian nation [...] and the pressure on the German nature of Austria justified the concerns of Austrian government that the proposed meeting might be used as a platform to activate a policy against Austrian independence and separation from Germany.” As can be seen, the Court decided that in the event of introducing by the state of the limitation, it was especially important that this limitation is properly justified rather than the very scope of the limitation³⁰.

Ad D) The Convention on the Rights of the Child

The Convention on the Rights of the Child was adopted by the United Nations General Assembly on 20 November 1989. Poland ratified the convention on 7 June 1991³¹, while Ukraine did so on 28 August of the same year³². This Convention interprets human rights from the viewpoint of the interests and needs of a child. It follows from the provisions contained therein that the states only ensure the exercise of the rights, which are therefore applicable to children not as granted by the state but objectively, flowing from the essence of humanity³³. The Convention on

³⁰ More in: B. Kołaczkowski, *op. cit.*, p. 13.

³¹ J.L. 1991 No. 120, item 526 as amended.

³² Information available online: https://treaties.un.org/Pages/ViewDetails.aspx?s-rc=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed: 20 I 2016).

³³ J. Sandorski, *Autorski projekt konwencji o prawach rodziny*, in: *Rodzina w świetle prawa i polityki społecznej*, ed. by T. Smyczyński, Poznań 1990, p. 119.

the Rights of the Child directly guarantees fundamental political rights to children, recognising as a child “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier” (Art. 1 of the Convention). Freedom of assembly is guaranteed in Art. 15(1): “States Parties recognise the rights of the child to freedom of association and to freedom of peaceful assembly.” Naturally, the provisions of the Convention permit the limitation of these freedoms. Conditions for such limitations were formulated similarly to the permissible conditions for the limitations of freedom of association and freedom of assembly in the other acts of international law mentioned above.

Ad E & F) The Framework Convention for the Protection of National Minorities and the Convention on the Rights of Persons with Disabilities.

The Framework Convention for the Protection of National Minorities defines the minimum standard for the protection of these minorities, guaranteeing such rights as freedoms of assembly and association. The Convention was open for signature in Strasbourg on 1 February 1995 and came into force on 1 February 1998. It was ratified on 20 December 2000 in Poland, and even earlier in Ukraine, on 28 January 1998³⁴. Whereas the Convention on the Rights of Persons with Disabilities was established in New York on 13 December 2006. It was ratified by Poland on 25 August 2012 and on 4 February 2010 by Ukraine³⁵. It is characteristic of the Framework Convention for the Protection of National Minorities that it includes only program provisions which do not create personal rights for individuals (the implementation of these rights in domestic legal orders was left to the parties of the Convention). It is due to the Preamble which stressed that the principles set out by the Convention would be implemented through national legislation and appropriate governmental programs³⁶. According to Art. 7 of the Framework Convention, “[t]he Parties shall ensure respect for the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion”³⁷. While the Convention on the Rights of Persons with

³⁴ Data is available online at: http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_MapMinorities_bil.pdf (accessed: 20 I 2016).

³⁵ Data available online at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en (accessed: 20 I 2016).

³⁶ Cf. P. Suski, *Stowarzyszenia i fundacje*, Warszawa 2008, p. 100.

³⁷ Text of the convention: J.L. 2002 No. 22, item 209; <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c10cf> (accessed: 3 III 2016).

Disabilities does not contain any provisions directly pertaining to the freedom of assembly, its careful analysis indicates that some of them are significant in the context of the freedom in question. What comes to the fore is Art. 21 of the Convention, according to which: "States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice", as well as Art. 29: "States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others"³⁸. The right to peaceful assembly is inextricably linked with freedom of expressing one's opinions and, first and foremost, is a political right. Therefore it is an obligation of States Parties of the Convention to guarantee the possibility of exercising this right to persons with disabilities to the same extent as to other persons.

2. The Outline of the Regulation of Assemblies in Ukraine

Ukraine considers itself to be rule of law state based on democratic principles. As well as in other democratic countries the main legal act is Constitution. The Constitution of Ukraine has the highest legal power. Laws and regulations are adopted on the basis of the Constitution of Ukraine and should correspond to it. Norms of the Constitution of Ukraine are norms of direct action³⁹. According to the Constitution of Ukraine, adopted at the fifth session of the Supreme Council of Ukraine on 28 June 1996: "citizens have the right to assemble peacefully without arms and to hold meetings, rallies, processions and demonstrations, upon notifying in advance the bodies of executive power or bodies of local self-government." Restrictions on the exercise of this right may be established by a court in accordance with the law and only in the interests of national security and public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, or protecting the rights and freedoms of other persons (Art. 39).

³⁸ <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (accessed: 3 III 2016).

³⁹ Cf. Art. 8: "The norms of the Constitution of Ukraine are norms of direct effect. Appeals to the court in defence of the constitutional rights and freedoms of the individual and citizen directly on the grounds of the Constitution of Ukraine are guaranteed."

Regarding legal regulation, Ukraine does not have any modern legislative act that would cover the range of problems that may occur in connection with the right of assemblies, similar to that existing under Polish law on assemblies. It is also necessary to point out here that the legislative act of the Soviet Union: Decree of the Supreme Soviet of USSR "On the procedure for organising and holding meetings, rallies, marches and demonstrations in the USSR" of 7 July 1988 is still in use, regardless the existence of international standards providing otherwise⁴⁰.

What can be seen from the surveys carried out in 2013 in Ukrainian communes as many as 199 regarded a decree to constitute the basic legislative act in the sphere of the administrative regulation of assemblies, while 205 communes never used a decree and the remaining communes failed to provide an unequivocal answer⁴¹. Another serious problem, not encountered in countries with more stable democracies such as e.g. Poland, is that in Ukraine there occur certain unlawful regulations of local governments that limit the constitutional right to peaceful assemblies:⁴²

- only citizens of the age of 18 or above can participate in mass events (48 cities),
- banners and slogans are to be approved by the executive committee (12 cities),
- at least three persons should be organisers of peaceful gatherings (10 cities),
- there is a ban on the use of loudspeakers (9 cities)
- a special permission for a meeting is necessary (3 cities, although it is noteworthy that the Council of Dzershynsk required that a copy of the decision allowing a meeting is sent to the local National Security branch and to the Ministry of the Interior branches of Donetsk oblast and to the prosecutor's office. A similar request was also made in Sverdlovsk
- the restrictions are justified by alleged "lack of space." In Obukhiv a specific size (in square meters) of space to be used near official buildings, enterprises and institutions was determined.

Pursuant to the Decree of 1988 it is "advisable" to notify⁴³:

⁴⁰ The text of the act is available at the website: http://search.ligazakon.ua/l_doc2.nsf/link1/PC889306.html (accessed: 18 I 2016).

⁴¹ Data available on <http://world.maidan.org.ua/2014/freedom-of-peaceful-gatherings-2013> (accessed: 27 V 2016).

⁴² See also *ibidem*.

⁴³ Cf. point 1 of the Decree.

- The executive body of village, town council (except Kyiv) – if a peaceful assembly is to be expected within the territory of the village, city;
- Kyiv city state administration – if a peaceful assembly is to be held in Kyiv;
- Regional state administration – if a peaceful assembly is to be expected on the territory of the district (region).

It is important to add that if a peaceful assembly is planned on route which runs through the territory of several regions or Kyiv, the organiser of a peaceful assembly is advised to give written notice to each regional state administration as well as to the and Kyiv city state administration.

It is also worth noting that there is no legislative act in Ukraine that defines the exact date when a notice of an assembly should be given. An important tip for the organisers of assemblies is decision No. 1–30/2001N 4-rp/2001 of The Constitutional Court of Ukraine⁴⁴. The Court said that the authorities should be informed in time sufficient for them to understand the legacy of such assemblies and in some case to solve to problematic issues in court; this judgment mentioned that “before an assembly” can mean any sensible term before the event, sometimes the authorities can be notified of an assembly several hours before it. However, pursuant to the Decree of the Supreme Soviet of the USSR “On the procedure of organising and holding meetings, rallies, marches and demonstrations in the USSR”, it is necessary to notify the authorities 10 days before the assembly (point 2 of the Decree).

In the same Decree, also certain prohibitions for the members of the assemblies are mentioned. According to the Decree members are prohibited to carry weapons, or other objects especially prepared or adapted that could be used against life and health, or cause material injury to the government, public organisations and citizens (point 4 of the Decree). In the Decree it is not outlined who can organise an assembly, it is only necessary to refer to international legislation applicable and binding in Ukraine. And so, pursuant to Art. 11 of the European Convention on Human Rights, “Everyone has the right of freedom of

⁴⁴ Decision of the Constitutional Court of Ukraine in the case of the constitutional petition of the Ministry of Internal Affairs of Ukraine concerning official interpretation of provision of Article 39 of the Constitution of Ukraine about advance notification of executive power or local authorities on holding meetings, rallies, marches and demonstrations (case of advance notification of peaceful assembly) Kyiv, April 19, 2001 Case N 1–30 / 2001 N 4-rp / 2001 (<http://zakon5.rada.gov.ua/laws/show/v004p710-01>, accessed: 20 I 2016).

peaceful assembly and freedom of association with others, including the right to form unions and join them to protect their interests.”

Ukrainian law also provides that, like in other democratic countries, the organiser (organisers) of meetings, rallies, marches, demonstrations or other peaceful assemblies have the right to appeal to the administrative court at the place of these measures with a claim for removal of restrictions on the right to peaceful assembly by executive bodies, local authorities, notified of such events (according to para. 1 of Article 183 of the Code of Administrative Legal Proceedings of Ukraine)⁴⁵.

Problems of assembly control and responsibilities of the organiser (chairman of the meeting) are the only subject of rudimentary regulation. One can merely indicate the records already quoted in the Supreme Soviet decree of 1988: “meetings, rallies, marches, demonstrations should be terminated at the request of the authorities, if not given application, the decision to ban take place, as well as violation of the order of their conduct, risks to life and health, disturbing public order” (point 7 of the Decree) and also “Persons who violate the established order of an organisation and holding meetings, rallies, marches and demonstrations, should be responsible under the legislation of the USSR and Union republics. Material damage caused during the assembly, rallies, marches and demonstrations by the participants of state cooperative and other public organisations or citizens shall be reimbursed in accordance with the law” (point 8 of the Decree). In the context of supervision of the assemblies it is worth noting that this decree also defines the universal premise of the decision on the prohibition of the meeting – “the Executive Committee of the Council of Deputies can ban the meetings, rallies, marches or demonstrations if their purpose does not correspond with the Constitution of the USSR, the Constitution and the Union of autonomous republics or threatens public order and security of citizens” (point 6 of the Decree).

It is also worth noting that the legal norms regarding assemblies are not applied for public entertainment, activities for vacations, sports events, wedding processions, folk festivals etc. There are also religious gatherings conducted by religious organisations as public worship, religious rites, funerals, ceremonies and processions – none of them is regulated by law.

⁴⁵ The Code of administrative legal proceedings of Ukraine (<http://yurist-online.com/en/kodeks/022.php>, accessed: 20 I 2016).

As has been mentioned above, Ukraine's Constitution provides for limitations of freedom of assembly that may be introduced by a judicial decision. Ukrainian courts often see an assembly as a threat to national security and public order in the event of⁴⁶:

1. lack of information about the person in charge, the number of participants, the time of the assembly or if the gathering is planned in the "wrong" place;
2. simultaneous events;
3. failure of the authorities to ensure public order or the security of traffic and pedestrians;
4. a danger to the health or morals;
5. possible obstacles or inconveniences on the rights of persons not involved in peaceful assembly;
6. potential damage to the image and reputation of state power.

For example, a visit to the Ukrainian website of court decisions and typing the keyword 'зібрання' which means 'assemblies' will provide a list of numerous court decisions forbidding:

– Case 9681/10/1570 No. 2a – Decision on restrictions on the right to peaceful assembly of 12 October, 2010 Odessa because of unsuitable place of assembly⁴⁷;

– Case 2a/1570/3571/2011 – Decision on restrictions on the right to peaceful assembly of 18 May, 2011 Odessa of unsuitable place of assembly⁴⁸ etc.

It is also noteworthy that the rationale for the decisions delivered by Ukrainian courts (and those delivered by courts of higher instance in particular) show at times a certain weakness of the Ukrainian regulation and a lack of compliance with the Constitution or the European standards. And so, in the judgment of the Babushkinsky District Court of Dnipropetrovsk of 30 March 2007 in the case of S. v. the Executive Committee of the Dnipropetrovsk City Council concerning the adoption

⁴⁶ Cf., e.g., Decision of Mykolayiv County Administrative Court of 30 XI 2010, case No. 2a-8357/10/1470 (<http://reyestr.court.gov.ua/Review/12574576>, accessed: 20 I 2016).

⁴⁷ Case 9681/10/1570 No. 2a – Decision on restrictions on the right to peaceful assembly on October 12, 2010 Odessa (<http://reyestr.court.gov.ua/Review/47067473>, accessed: 27 V 2016).

⁴⁸ Case 2a/1570/3571/2011 – Decision on restrictions on the right to peaceful assembly on May 18, 2011 Odessa (<http://reyestr.court.gov.ua/Review/51857004>, accessed: 27 V 2016).

of regulations on holding mass events in the city of Dnipropetrovsk, the court held, that the procedures for exercising the right to freedom of assembly and the procedures and grounds for restricting the right were not regulated by Ukrainian legislation and therefore the Council had no grounds to adopt the impugned regulation, which would interfere with the rights of citizens⁴⁹. In another case the Kyiv Administrative Court, in a judgment of 29 November 2011, restricted the right of several organisations and private persons to hold a demonstration on account, in particular, of their failure to notify the Kyiv City State Administration of their intention ten days in advance. The court referred to the abovementioned 1988 Decree. The participants appealed against that judgment. On 16 May 2012 the Kyiv Administrative Court of Appeal quashed the judgment of the first-instance court. In its decision the Court of Appeal noted that the 1988 Decree conflicted with the Constitution as it required the organisers to seek permission to hold a demonstration and authorised the executive authorities to ban such an event, whereas Article 39 of the Constitution provided that the authorities should be notified that a demonstration was being planned, and empowered only the judicial authorities to place restrictions on the organisation thereof. The court also noted that the judgment of the first-instance court was incompatible not only with Article 39 of the Constitution but also with Art. 11 of the European Convention⁵⁰. In other case the Kyiv Administrative Court of Appeal, in a decision of 11 October 2012, quashed the judgment of the Kyiv Administrative Court, which had restricted the freedom of peaceful assembly in respect of a number of political and non-governmental organisations upon an application by the Kyiv City State Administration. In its decision the Administrative Court of Appeal also noted that the 1988 Decree conflicted with the Constitution as it provided for a procedure for seeking permission to hold a demonstration and that the Decree concerned the holding of such events in a non-existent country (Soviet Union), regulated relations between the citizens of that country and the executive committees of the Soviets of People's Deputies, and considered demonstrations on the basis of their compatibility with the Constitution of the Union and the autonomous republics, that is, non-existent constitutions of

⁴⁹ Data available in Part G of chapter "Relevant domestic law and practice" 2013. *Yerentsov v. Ukraine* (<http://hudoc.echr.coe.int/eng?i=001-118393>, accessed: 27 V 2016).

⁵⁰ *Ibidem*.

non-existent subjects. The court also noted that under the Ukrainian Constitution human rights and freedoms, and the relevant safeguards, could be defined only by the laws of Ukraine⁵¹.

An analysis of decisions of the European Court on Human Rights that concern Ukraine, provides examples of cases where the issue of the terms or dates of notifying the authorities is raised. The absence of information on the terms of notifying the authorities about the planned assemblies or demonstrations was also raised in the case 'Shmushkovich v. Ukraine' of 14 of November 2013. The court stated that applying the penalties to the applicant not for the breach of the rules of holding the picket but for the breach of the procedure of organisation based on the Decree of the Supreme Soviet of USSR "On the procedure for organising and holding meetings, rallies, marches and demonstrations in the USSR" of 28 July 1988 is the violation of the right to assemble freely in Ukraine⁵². Another important judgment directly involving administrative regulation of assemblies in Ukraine is the decision of the European Court of Human Rights of 11 April 2013 in *Vyerentsov v. Ukraine*. In this judgment the ECHR emphasized among other things that a structural problem dating back to the Soviet times and related specifically to the lack of respective regulations on freedom of gatherings was still persisted in Ukraine. The Court proposed that Ukraine immediately reforms its legislation and administrative practice to set up the requirements to organise and conduct peaceful manifestations and the grounds for their restrictions. Even though the Court acknowledged that it could take some time for a country to establish its legislative framework during a transitional period like the one Ukraine was currently going through, it could not agree that a delay of more than 20 years was justifiable – especially when such a fundamental right as freedom of peaceful demonstration was at stake⁵³. One of the most recent cases

⁵¹ *Ibidem*.

⁵² M.V. Buromenskiy, *The Right on Freedom of Association and Peaceful Assembly*, in: *European Convention on the Human Rights: basic statements, practice of usage, Ukrainian context*, ed. by O.L. Zhukovska, Kyiv 2002, p. 621–626.

⁵³ See also: <http://world.maidan.org.ua/2014/freedom-of-peaceful-gatherings-2013> (accessed: 27 V 2016); the European Court of Human Rights held, unanimously, that there had been: a violation of Art. 11 (freedom of assembly and association) of the European Convention on Human Rights, a violation of Art. 7 (no punishment without law) of the European Convention and a violation of Art. 6 §§ 1 and 3 (right to a fair trial). The case concerned a human rights activist who complained in particular that he had been

directly involved with the freedom of assemblies in Ukraine is *Sirenko v. Ukraine* (application no. 9078/14⁵⁴) still pending. The European Court of Human Rights communicated to the Ukrainian Government the application and requested it to submit its observations. The case concerns a complaint by a participant in the ongoing protests in Kyiv (Ukraine) that he was beaten by the police and unlawfully detained. The applicant, Igor Sirenko, is a Ukrainian national. According to his submissions, he had taken part in the ongoing protests in central Kyiv since 29 November 2013. He states that he was beaten up by special police units during a violent dispersal of protesters and then unlawfully detained on 30 November 2013. He complains in this respect of a violation of Art. 3 (prohibition of inhuman or degrading treatment), Art. 5 (right to liberty and security), Art. 11 (freedom of assembly and association) and Art. 13 (right to an effective remedy) of the European Convention on Human Rights. Mr. Sirenko also complains that the measures employed by the authorities to deal with the demonstrations have been in violation of his – and other protesters’ – rights under Art. 3, Art. 5, Art. 8 (right to respect for private life), Art. 11 and Art. 13 (right to an effective remedy) of the Convention, and under Art. 1 of Protocol No. 1 to the Convention (protection of property)⁵⁵.

A consequence of the complicated history of the newest Ukraine are also so called The Ukrainian anti-protest laws restricting freedom of speech and freedom of assembly cancelled by the Parliament on 28 January 2014. These laws were passed by the Parliament of Ukraine on 16 January 2014⁵⁶, (referred to as Black Thursday) and signed into

sentenced to three days of administrative detention for holding a demonstration without permission, even though such permission was not required by domestic law. Relying on Art. 11 (freedom of assembly and association), Mr Vyerentsov complained that the interference with his right to freedom of peaceful assembly was neither prescribed by law nor necessary in a democratic society. Under Art. 7 (no punishment without law), he also claimed that he had been found guilty of breaching the procedure for holding demonstrations even though such a procedure was not clearly defined by law. Finally, he alleged a violation of Art. 6 §§ 1 and 3 (right to a fair trial), claiming that the court decision in his case had been ill-founded and that he had had no possibility to prepare his defence, to examine witnesses or to obtain the assistance of a lawyer.

⁵⁴ Data available at: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4657322-5642968&filename=003-4657322-5642968.pdf> (accessed: 15 VI 2016).

⁵⁵ *Ibidem*.

⁵⁶ Information is available at the official web portal of Verkhovna Rada of Ukraine (<http://www.rada.gov.ua>, accessed: 20 I 2016).

law by President Viktor Yanukovich, which caused massive anti-government protests called Maidan⁵⁷. Apparently, these laws were called “dictatorship laws” by everybody who supported Euromaidan and who had any kind of knowledge of law⁵⁸. Western nations also criticized the laws for their undemocratic nature and their ability to significantly curb the rights to protest, free speech and the activity of non-governmental organisations⁵⁹. They were also called “draconian”, as they effectively established the dictatorship and were widely denounced internationally⁶⁰.

The laws adopted on 16 January 2014 included or concerned⁶¹:

- restriction on driving cars in a queue of more than 5 cars;
- more severe consequences of traffic offences. The fine to be paid by the owner of the car, not the driver;

⁵⁷ Cf., e.g.: “In Ukraine, protesters appear to be preparing for battle”, *The Washington Post* 20 I 2014 (https://www.washingtonpost.com/world/in-ukraine-protesters-appear-to-be-preparing-for-battle/2014/01/20/904cdc72-81bd-11e3-9dd4-e7278db80d86_story.html, accessed: 20 I 2016); “Громадські організації закликають до Всеукраїнської мобілізації”. *Transparency International Ukraine* (<http://ti-ukraine.org/news/4272.html>, accessed: 20 I 2016).

⁵⁸ Cf., e.g.: “МЗС відповів ОБСЄ: «закони про диктатуру» відповідають усім демократичним стандартам”. *Українська правда* (<http://www.pravda.com.ua/news/2014/01/18/7009888/>, accessed: 20 I 2016); “Кравчук: закони про «диктатуру» треба вдосконалити” (www.Тиждень.ua, accessed: 20 I 2016); “Масові позови і народний фронт – відповідь правозахисників на «закони про диктатуру»” (<http://www.radiosvoboda.org/content/article/25233727.html>, accessed: 20 I 2016).

⁵⁹ Cf., e.g.: *Australians condemn new dictatorship laws in Ukraine*, “Maidaner Efim” (<http://world.maidan.org.ua/2014/australians-condemn-new-dictatorship-laws-in-ukraine>, accessed: 20 I 2016); M. Danilova, *Ukrainian protesters defy new draconian laws*, “Toronto Star” (http://www.thestar.com/news/world/2014/01/19/ukraine-protesters_vent_frustration_with_opposition_leaders.html, accessed: 20 I 2016).

⁶⁰ Cf., e.g., T.D. Snyder, *Ukraine: The New Dictatorship*, “The New York Review of Books” (<http://www.nybooks.com/daily/2014/01/18/ukraine-new-dictatorship/?insrc=wbll>, accessed: 20 I 2016).

⁶¹ Based on: Amendments to the Law of Ukraine “On the Judicial System and Status of Judges” and procedural law on additional measures to protect the safety of citizens [Verkhovna Rada (VVR), 2014, No. 22, p. 801] (<http://zakon4.rada.gov.ua/laws/show/721-vii>, accessed: 20 I 2016); Amendments to some legislative acts of Ukraine concerning liability for administrative violations in the field of road safety recorded automatically [Verkhovna Rada (VVR), 2014, No. 22, p. 803] (<http://zakon3.rada.gov.ua/laws/show/723-18>, accessed: 20 I 2016); Amendments to the Regulations of the Verkhovna Rada Ukraine [Verkhovna Rada (VVR), 2014, No. 22, p. 804] (<http://zakon3.rada.gov.ua/laws/show/724-18>, accessed: 20 I 2016); amendments to the Criminal Procedure Code of Ukraine on criminal proceedings in absentia [Verkhovna Rada (VVR), 2014, No. 22, p. 805] (<http://zakon3.rada.gov.ua/laws/show/725-18>, accessed: 20 I 2016).

- media restriction. Mass media must be approved government;
- breaking the rules of assemblies organisation that has become more expensive than it was;
- organisation of assemblies which now requires obtaining an acceptance of the militia;
- prohibition to wear a helmet or a mask during an assembly;
- setting up tents that is now punishable by a fine of UAH 5000 or 15 days of imprisonment;
- helping protesters is now punishable with a fine of UAH 10200;
- contempt of court (showing disrespect) is punishable by a fine of UAH 5100 or 15 days of imprisonment;
- showing disrespect to the requirements of the Security Service of Ukraine is punishable;
- publishing articles about extremist activity and calumny including on the Internet is punishable;
- parliamentary immunity has been cancelled;
- criminal proceedings in absentia have been introduced;
- blocking the access to a dwelling by a group of people is punishable with a 6-year imprisonment.

The laws were adopted with a number of procedural violations. While the Interior Minister Vitaliy Zakharchenko said in public that: “each offence will be met by our side harshly”⁶².

The extent of the lack of understanding of the essence of the freedom of assembly in Ukraine is best proved by the fact that in 3 main cities there were no meetings held in 2012 at all. In an urban settlement Rozivka (Zaporizhzhya oblast) with 3537 residents, no gatherings have been held since 2002, according to the city council data. The city council, meanwhile, designated the local airfield as the only place for public gatherings⁶³. What is even more shocking is that according to the Ukrainian Helsinki Human Rights Union in 2012 the Ukrainian authorities sought to restrict peaceful gatherings in 358 cases and in 90% of the cases they succeeded⁶⁴.

⁶² Zakharchenko pledges harsh response to lawbreakers, “Kyiv Post” (<http://www.kyivpost.com/content/ukraine/zakharchenko-pledges-harsh-response-to-lawbreakers-335207.html>, accessed: 20 I 2016).

⁶³ Ibidem.

⁶⁴ Data available in part G of chapter G “Relevant domestic law and practice” of the ratio decidendi of the judgment of the European Court of Human Rights of 11 April 2013 *Vyerentsov v. Ukraine* (<http://hudoc.echr.coe.int/eng?i=001-118393>, accessed: 27 V 2016).

3. Outline of the Polish regulations on freedom of assemblies

The most important legislative act in Poland which contains guarantees of freedom of assemblies is, like in Ukraine, the Constitution. Human rights and freedoms enjoy a high rank in the Polish Constitution, which is attested by placing said regulations before other issues. The Constitution of 1997 contains a basic catalogue of these rights and freedoms and guarantees their “insuspending to the extent stipulated by international documents”⁶⁵. According to Art. 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.” Thus, the freedom of gathering together should be considered as a freedom which can only be limited by a statute and which is available not only to Polish citizens but to foreigners as well. Moreover, the constitution recognises the freedom of assembly as inherent and inalienable. Therefore, the regulation on the freedom of assembly is, in a sense, declaratory⁶⁶.

The constitutional approach to freedom of assemblies results in the narrowing of legal regulation, which is essentially reduced to limitations of freedom in the form of various bans, orders, and sanctions.⁶⁷ In Polish legal system, these bans, orders, and sanctions are primarily included in the Act on Assemblies of 24 July 2015 (Pol. *Ustawa Prawo o zgromadzeniach*)⁶⁸, which on 14 October 2015 replaced the Law of Assemblies of 5 July 1990⁶⁹, which was in force for 25 years⁷⁰. These

⁶⁵ M. Kruk, *Przyczynek do rozważań o inspiracjach Konstytucji RP z 1997 r.*, “Państwo i Prawo” 2002, no. 12, p. 9.

⁶⁶ Cf. A. Wróbel, *Wolność zgromadzania się*, in: *Wolności i prawa polityczne*, ed. by W. Skrzydło, Kraków 2002, p. 11. More broadly on the interpretation of Art. 57 of the Constitution in, e.g.: W. Sokolewicz, *Wolności i prawa polityczne*, in: *Konstytucja RP. Komentarz (cz. IV)*, ed. by L. Garlicki, Warszawa 2005, p. 1–33; W. Skrzydło, *Komentarz do art. 57 Konstytucji Rzeczypospolitej Polskiej*, in: idem, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Kraków 2002, p. 68.

⁶⁷ B. Naleziński, *Wolność zgromadzeń*, in: *Prawo konstytucyjne RP*, ed. by P. Sarnecki, Warszawa 2008, p. 133.

⁶⁸ J.L. item 1485.

⁶⁹ Consolidated text: J.L. 2013, item 397 as amended.

⁷⁰ It should be stressed that the issue of assemblies is not regulated in Poland by the Law of Assemblies Act alone. There is a range of special regulations, which indubitably inform the scope of the constitutional freedom of assemblies. These regulations concern the assemblies taking place in special locations, such as public roads, universities, or monuments of the Holocaust, assemblies occurring in special times, e.g., assemblies during emergencies or electoral rallies, or even the participation of soldiers in assemblies.

normative acts of fairly limited volume specify, among other things, the legal definition of assembly, a number of prohibitions associated with participation in an assembly, formulate the scope of responsibilities of an organiser, and the procedure to cover the cases of assemblies. It is worth reminding that the Act of 1990 replaced, in turn, the Act of 29 March 1962 on Assemblies (Pol. *Ustawa o zgromadzeniach*)⁷¹. The change in legal regulation carried out in 1990 was enormous, even revolutionary, as the 1962 Act on Assemblies was strongly anchored in the Socialist realities of the mid-20th century. It should be remarked here that the most recent changes to the legal regulation of assemblies in Poland were catalysed by the Judgment of the Constitutional Tribunal of 18 September 2014⁷², in which the Tribunal declared many fundamental solutions of the previous regulation, including the definition of assembly, as unconstitutional.

Currently, therefore, an assembly in Poland is “a gathering of people in open space available to people not specified by name in a specific location, convened in order to confer over an issue or with an aim to express jointly their position.” Whereas the previous legal regulation considered as an assembly “a gathering of at least 15 people, convened in order to confer over an issue or with an aim to express jointly their position” (Art. 1(2) of the Act of 5 July 1990). The main difference between the definitions quoted above is the departure from setting the minimum number of people forming an assembly. It is a justified solution: some of the authors of literature felt for many years that the definition of assembly was too narrow and the number of participants arbitrary⁷³. There is no doubt that the new definition of assembly takes into account the standards formulated in decisions of the ECHR to a much greater degree than the previous one. What is more, in its judgment of 18 September 2014 the Constitutional Tribunal found the earlier definition unconstitutional; in the *ratio* the Tribunal referred to judgments delivered in *Stankov* and the *United Macedonian Organisation v. Bulgaria* (2 October 2001), in *Christian Democratic Peoples Party v. Moldova* of 14 February

⁷¹ J.L. No. 20, item 89 as amended.

⁷² J.L. item 1327.

⁷³ Cf., e.g., P. Czarny, B. Naleziński, *Wolność zgromadzeń*, Warszawa 1998, p. 69. Wiśniewski also notes that the number 15 was adopted arbitrarily and is not justified by the Polish tradition, as the previous acts did not quote any numbers (L. Wiśniewski, *Wolność zgromadzeń w świetle prawa o zgromadzeniach*, “Państwo i Prawo” 1991, no. 4, p. 41). More in: B. Kołaczkowski, op. cit., p. 86.

2006 and in *Primov v. Russia* of 12 June 2014⁷⁴. In the author's opinion, however, the most dubious part of the Polish definition has been and regrettably still is, the identification of the aim of the assembly. It seems impossible to indicate beyond dispute any range of permissible aims which make gatherings into assemblies under the Act⁷⁵. It is worth reminding here that Ukrainian law does not contain any definition of assembly at all, and thus does not specify its aim either. Concerning the aim of an assembly, one should also remember that not only are administrative organs in Poland not authorised to analyse the slogans, ideas, and content which the assembly is to serve and which do not violate the rules of law in force but they do not have the competence to evaluate the aims of an assembly specified in its notification as apparent and deny permission on this basis, since such an evaluation "directly violates the essence of the freedom and political right, guaranteed by the Constitution, to organise and participate in peaceful assemblies"⁷⁶.

Polish administrative law, contrary to the Ukrainian one, provides a relatively complex classification of assemblies. Considering the form of the resolution of an administrative organ regarding the possibility of organising an assembly, one can distinguish:

1. assemblies which require only a notice and a silent acceptance of the public authority competent to accept it;
2. spontaneous assemblies which do not require a notice;
3. assemblies which require a prior permission (e.g., assemblies in the areas of Monuments of the Holocaust);
4. assemblies in the case of which it is necessary to agree the time and place of holding the assembly with the operator of the road (religious assemblies taking place on public roads).

Since recently, assemblies which require only a notice can in turn be divided into assemblies tied to potential obstructions in the traffic flow and those which do not cause obstructions in the traffic flow, particularly changes in its organisation.

⁷⁴ The reasons for the judgment are available at the website of the Helsinki Foundation of Human Rights (www.hfhrpol.waw, accessed: 24 V 2016).

⁷⁵ For instance, it is not clear whether the discussion of private matters can be an aim of an assembly. Polish literary sources say that even though an assembly is public, private matters fall in the range of aims of assembly; cf., e.g., H.E. Zadrożniak, *Zgromadzenia publiczne jako forma udziału obywateli w życiu społecznym*, "Samorząd Terytorialny" 2009, no. 5, p. 64. More in: B. Kołaczkowski, op. cit., p. 87–88.

⁷⁶ Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 5 October 2010 (VII SA/Wa 1856/10, LEX no. 760065).

It should be emphasised that neither a notice of a planned assembly, nor the requirement to procure a permission to hold an assembly is contrary to the judicial decisions of the European Court of Human Rights. In the judgment of 7 November 2009 in *Skiba v. Poland*⁷⁷ the ECHR stated that the: “obligation to notify beforehand of a planned manifestation is not contrary to the provisions of Art. 11 of the European Convention of Human Rights as long as it does not constitute a hidden obstacle to the right to assembly”; In the Court’s opinion, a state may also impose an obligation of procurement a prior permission to hold an assembly and to regulate free movement of persons during an assembly. It was also emphasised in the *ratio* that the reason for making such restrictions is not arbitrary regulation of the use of the right but provision of the authorities with reasonable time to take appropriate measures that on the one hand will cater for the right of certain persons to enjoy the freedom of a peaceful assembly, but, on the other hand safeguard the rights and interests of others, especially with regards free movement, as well will ensure public order and prevention of crime⁷⁸.

It must be stressed that assemblies in Poland usually only require a notice, and the basic form of resolution by an administrative organ regarding the possibility of organising an assembly is silent acceptance. Its occurrence – in the case of assemblies – should be treated as a rule. In light of Art. 7(1) of the Act on Assemblies the organiser of an assembly shall notify the local authorities of an intent to organise an assembly in such a way that the notification should arrive at the authority, as a rule, no earlier than 30 days and no later than 6 days before the planned assembly date. Upon reception of the notification of intent to organise an assembly, the authorities make the information about the time and place of the assembly available on the appropriate Public Information Bulletin website (Art. 7(3)). The terms of notification and entities which should be notified are defined slightly differently in the case of assemblies which do not cause obstructions in the traffic flow: an organiser of such an assembly notifies the appropriate local (municipal) crisis management centre or, if such has not been established in the municipality, the voivodeship crisis management centre, no earlier than 30 days and no later than 2 days before the planned assembly date

⁷⁷ No. 10659/03, in: M.A. Nowicki, *Stawomir Skiba vs Poland ECHR judgment of 7 July 2009*, complaint No. 10659/03; these actual state of affairs and discussion), in: M.A. Nowicki, *Europejski Trybunał. Wybór orzeczeń 2009*, p. 327.

⁷⁸ More in: B. Kołaczkowski, *op. cit.*, p. 89.

(Art. 22 of the Act on Assemblies). Naturally, while providing a deadline for notifications of assemblies is conventional, “their subjection to an authorisation procedure does not normally encroach upon the essence of the right” by itself⁷⁹.

Until recently, the basic form of state interference in freedom of assembly in Poland was the issuing of a decision forbidding the assembly by the head of a municipality, or mayor of a city. Currently (since the new law of assemblies came into force), a local authority can issue such a decision only in the case of assemblies which may cause disturbances in the traffic flow. Under Art. 14, a local authority issues a decision prohibiting an assembly no later than 96 hours before the planned assembly date, provided that:

1. its aim violates freedom of peaceful assembly, holding it infringes Art. 4⁸⁰ or the rules of organising assemblies, or the aim of the assembly or holding it is in breach of the provisions of criminal law;
2. holding it may endanger life or health of people, or property in significant quantities, including when the danger has not been alleviated in the cases described in Art. 12 or Art. 13⁸¹.

An issue in the Polish regulations limiting holding assemblies, which the legislator has been unable to successfully resolve for years, is the problem of competing assemblies, including counter-protests. Before 2012, Polish law of assemblies, similarly to the Ukrainian regulations, did not contain appropriate regulations at all. While the entry into force of the 14 September 2012 act amending the Act on Assemblies⁸² resulted in the emergence of a regulation, it stirred a considerable controversy⁸³. The regulations currently in force are not entirely well thought-out

⁷⁹ Decision of the European Court of Human Rights of 10 October 1979 in the case of *Rassemblement Jurassien and Unité Jurassienne v. Switzerland* (Application no. 8191/78).

⁸⁰ Among other things, Art. 4 introduces a ban of participation in assemblies by people carrying arms, explosives, pyrotechnic articles, and other dangerous materials and tools.

⁸¹ The regulations in these articles concern the coincidence of assemblies.

⁸² J.L. 2012, item 1115.

⁸³ In 2012, a prohibition on holding assemblies organised by two or more organiser at the same time, at places or in routes of passage which are either the same or partially overlap unless it is possible to separate them or hold them in such a way that their course does not endanger life or health of people, or property in significant quantities (Art. 6(2b) added to the Act of 5 July 1990). The primary source of controversy was the imprecision of the regulations introduced into the Act: it did not follow absolutely unambiguously from the Act whether, in the case that the organiser of the assembly notified later did not fulfil the obligation, for example, to change the place of the assembly, the authorities would be allowed to forbid the other assembly as well.

either. There are doubts concerning – in the context of previous case-law – the possibility of the authority to propose a change of place or time of the assembly, among other things⁸⁴. The main objection, however, is the inconsistency of the legislator: for, if the possibility to issue a decision forbidding an assembly in the case of assemblies that would not cause disturbances in the traffic flow was abandoned, the possibility of preventing a counter-demonstration in such circumstances was also, somewhat “automatically”, excluded. Taking into account that the very mechanism of preventing assemblies organised by two or more organisers at the same time and place unless it is possible to separate them is such a way that their course does not endanger life or health of people, or property in significant quantities, manifestly contradicts the guidelines of the Office for Democratic Institutions and Human Rights of the Organisation of Security and Cooperation in Europe and the European Commission for Democracy through Law at the Council of Europe on freedom of peaceful assemblies of 2007⁸⁵ and is additionally contrary to the decisions issued by the European Court of Human Rights⁸⁶, the lack of appropriate regulation in Ukraine should be considered the right solution. The guidelines unequivocally adopt the idea of the obligation of states to facilitate holding concurrent assemblies, assuming that a total prohibition of holding an assembly only because another assembly takes place at the same place and time would infringe the principle of proportionality.

In order to ensure public safety and order, it is necessary to formulate certain prohibitions and introduce explicit obligations for the organiser of the assembly. In Poland, similarly to Ukraine, persons carrying arms, explosives, pyrotechnic articles, and other dangerous materials and tools are not allowed to participate in assemblies (Art. 4(2) of the Act on Assemblies). There is one more limitation which serves to ensure

⁸⁴ Cf., e.g., the resolution of the Constitutional Tribunal of 16 March 1994 (W 8/93, LEX no. 20603). According to the Tribunal, the right to assemble includes not only the power to decide to hold an assembly but also to freely choose its time and place.

⁸⁵ ODIHR – Venice Commission Guidelines on Freedom of Peaceful Assembly; the complete English 2nd edition of the document can be found online at: http://www.hrea.org/erc/Library/display_doc.php?url=http%3A%2F%2Fwww.osce.org%2Ffiles%2Fdocuments%2F4%2F0%2F73405.pdf&external=N (accessed: 20 XII 2015).

⁸⁶ In the judgment in *Öllinger v. Austria* cited above, the Court stated that: “if each potential tension/possibility of creating tension or a violent confrontation of the opposing groups during a demonstration were to justify a ban on its holding, the society would be deprived of the possibility of hearing differing opinions.”

public safety and order, concerning both the participants of an assembly and third parties (such as the owners of restaurants and other food services located at the place of assembly), which is absent in Ukraine and – by the way – should be considered as controversial. Namely, “at the times and places of mass assemblies” it is forbidden “to sell, serve, and consume alcoholic beverages” (Art. 14(1)(3) of the Act of 26 October 1982 on Upbringing in Sobriety and Counteracting Alcoholism (original Polish: *Ustawa o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi*)⁸⁷. Whereas the locations of mass assemblies are places “where alcohol consumption may have negative effects associated, among other things, with the difficulties in ensuring effective control of the number of participants, which can neither be roughly predicted nor controlled”⁸⁸, the harshness and imprecision of this provision gives rise to doubts and may increase the likelihood of making errors in determining the facts. The fundamental problem here seems to be the inability to unambiguously interpret the notions of “mass assembly”⁸⁹ and “location of the assembly”, not to mention the probably excessive restriction of the rights of third parties, such as garden restaurant owners.

The scope of obligations of the head of the assembly is defined much more specifically in Poland than in Ukraine (also, while the organiser of an assembly does not have to be its head in Poland, the Ukrainian regulation does not distinguish between these two terms). The head of an assembly directs it (Art. 18(1) of the Act on Assemblies). Both the organiser and the head are obligated to “ensure that the assembly proceeds in accordance with the law and to conduct it in such a way as to prevent damage caused by the participants of the assembly” (Art. 19(1) of the Act). The main measure to fulfil this obligation is the requirement of the head of the assembly to demand that a person whose behaviour infringes the provisions of the Act or obstructs or attempts to thwart the assembly should leave it. In the case that the demand was not obeyed, the head of the assembly asks the Police or municipal guard for help (Art. 19(5) of the Act). The final measure is the obligation, also imposed on the head, to dissolve the assembly “if the participants of the assembly

⁸⁷ Consolidated text: J.L. 2015, item 1286 as amended.

⁸⁸ G. Zalas, *Komentarz do art. 14 ustawy o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi*, LEX no. 72368.

⁸⁹ The notion of mass assembly is used in the Polish administrative law system – as the WSA in Poznań rightly observed in its judgment of 24 February 2010 (II SA/Po 670/09, LEX no. 542035) – exclusively by the Act on Upbringing in Sobriety and Counteracting Alcoholism.

do not comply with his instructions or when the course of the assembly violates the provisions of this Act or criminal law" (Art. 19(6) of the Act). It is worth noting here that the imposition on the organiser and head of the obligation to conduct an assembly in such a way as to "prevent damage caused by the fault of participants of the assembly" can be considered controversial, since it is not difficult to imagine situations in which damages caused by the fault of participants of an assembly, in particular regarding the difficulty to unambiguously distinguish a participant of an assembly from a third party (public assemblies are assumed to be open, after all)⁹⁰.

Institutions which are completely absent from the Ukrainian regulation are the representative of authorities delegated to an assembly and the institution of spontaneous assemblies, highly important in any democratic state of law⁹¹. According to Art. 17(1) of the Polish Act on Assemblies, a local (municipal) authority can designate a representative to participate in an assembly, which designation is obligatory in the case where there is a risk of disturbance to public order during the assembly. The representative of local authorities can dissolve an assembly (which is the essence of his function) when its course endangers the life or health of people or large quantities of property, or when it violates the provisions of criminal law and the head of the assembly has been warned by the representative of communal authorities that it is necessary to dissolve the assembly but does not dissolve it (Art. 20(1) of the Act on Assemblies). Regarding spontaneous assemblies, it is worth stressing here that the appropriate legal regulation is a novelty in Poland: it only appeared in the Act of 2015. Thus, in line with the wording of Art. 3(2) of the new Act, a spontaneous assembly is "an assembly taking place in connection with a sudden event in the public sphere which could not be predicted earlier, and when holding it at another time would be inappropriate or of little significance from the perspective of the public debate." It is obvious that the supervision of assemblies which are not subject to the notification procedure has to be relatively strong. Namely, contrary to notified assemblies, a spontaneous assembly can be dissolved by the officer directing Police operations in a number of circumstances, e.g., when the assembly causes a significant threat to

⁹⁰ More in: B. Kołaczkowski, op. cit., p. 152–153.

⁹¹ "Sometimes spontaneity is the only guarantee of successful criticism, protest, or actively drawing the attention of the public opinion to a given issue" (A. Bodnar, M. Ziółkowski, *Zgromadzenia spontaniczne*, "Państwo i Prawo" 2008, no. 5, p. 41).

the safety or order of traffic on a public road or, as is the case of other assemblies, when the course of the assembly endangers the life or health of people, large quantities of property, or causes a significant threat to safety or public order (Art. 28(1) of the Act on Assemblies). Moreover, the legislator rightly gave a certain preference in exercising freedom of assemblies to participants of assemblies organised under general rules. Specifically, the participants of a spontaneous assembly cannot disturb the course of other assemblies; such disturbances is yet another premise for the dissolution of the spontaneous assembly by the officer directing Police operations (Art. 27 of the Act on Assemblies).

Conclusion

Adopting the scope and depth of administrative limitation of freedom of assemblies as a yardstick for evaluating the stage of development of democracy has proved to be successful in the area of comparative studies of Ukrainian and Polish law. The analysis of numerous normative acts, literature, and case-law in both countries allowed to draw many interesting conclusions. What comes to the fore here are the international law issues. It should be noted, therefore, that both countries adopted the most important conventions, both at European and global levels, which directly or indirectly guarantee freedom of assemblies. However, the compliance of the domestic law in Ukraine with these conventions gives rise to serious doubts. While freedom of assemblies in Ukraine is guaranteed by the constitution, like in Poland, the similarities end there. The lack of a modern act to collectively regulate the issues of public assemblies – as the Polish Act on Assemblies does – can hardly be seen as positive. Selective application of regulations adopted by the USSR that are unfit to the realities of a democratic state, combined with the constitutionally expressed right of the courts to impose limitations on freedom of assemblies are conditions conducive to entirely arbitrary decisions, which indubitably violates the essence of the freedom (it is worth mentioning here the national security, which is the general constitutional premise to restrict freedom of assemblies, and the lack of specific regulations regarding the supervision of assemblies). The absence of a legal definition of assembly and case-law contrary to normative regulations which – fortunately – usually takes international law standards into account (although most frequently it does not refer

directly to the judgments of the European Court of Human Rights), complete the image of the chaos. The case-law analysed in this study indicate that, for instance, the notification deadline of several hours, referred to in court judgments, at least partially solves the problem of the lack of regulation concerning spontaneous assemblies.

Poland, in turn, consistently fails to incorporate the provisions of the Convention on the Rights of the Child in its domestic law; this problem has a different dimension in Ukraine, where the domestic regulation shaping the administrative limitation of assemblies is vestigial and it can be assumed that the provisions of the Convention are applied directly in the absence of other regulations. Thus, paradoxically, as a result of the lack of provisions which might contradict the solutions adopted in acts of international law, Ukrainian law complies with international law regulations concerning the exercise of freedom of assemblies by persons with disabilities to a greater extent than Polish law.

It is beyond doubt that the administrative legal regulation of assemblies in Poland is significantly more mature, whereas the administrative limitation of such events is necessarily deeper in Ukraine. The Act on Assemblies in force in Poland includes a definition of assembly, defines types of assemblies, obligations of organisers, as well as the supervisory powers of the authorities. However, it is difficult to regard Polish domestic law as exemplary either. This law is being changed too frequently, regulations are not always consistent, and the processes of excessive tightening of specific solutions (e.g., concerning competing assemblies which is, further, contrary to the judgments of the European Court of Human Rights) are mixed with perhaps too far-reaching relaxation of provisions (e.g., the lack of possibility to issue a decision forbidding an assembly – unless it is associated with the use of a public road or takes place, for instance, in the area of a Monument of the Holocaust and thus is subject to a separate regulation).

Concluding, it is worth stressing that Poland and Ukraine are the two European countries which suffered from totalitarianism the most. The experiences of both countries are similar to some extent, provided that the democratic transformations in Ukraine have been (and still are) definitively more tumultuous than in Poland, and the whole process began many years later. It is thus natural that in the sphere of human rights and freedoms which are of fundamental importance for these transformations, the state of Ukraine faces significant challenges. It is also clear that Ukraine should take advantage of Polish experiences

and learn from the mistakes of Poland as well. What is beyond doubt, however, is that Ukraine – at least from the viewpoint of the guarantees of exercise of freedom of assemblies – is at the beginning of its road to democracy, in a place similar, tentatively, to the end of the 1980s in Poland. The immaturity of the Ukrainian regulation regarding freedom of assembly is so substantial that it practically hinders any direct comparative analysis in the scope of detailed solutions.

ADMINISTRACYJNE OGRANICZENIA WOLNOŚCI ZGROMADZEŃ NA UKRAINIE I W POLSCE W ŚWIELE UREGULOWAŃ PRAWA MIĘDZYNARODOWEGO – REFLEKSJE NA TEMAT UKRAIŃSKIEJ DROGI DO DEMOKRACJI

Streszczenie

Przedmiotem opracowania jest umiejscowiona w kontekście uregulowań prawno-międzynarodowych oraz orzecznictwa Europejskiego Trybunału Praw Człowieka analiza porównawcza kształtu administracyjnej reglamentacji zgromadzeń na Ukrainie i w Polsce. W jego pierwszej części dokonano analizy tych spośród wiążących Ukrainę i Polskę aktów prawa międzynarodowego, w których podejmowana jest problematyka zgromadzeń, m.in. Międzynarodowego Paktu Praw Obywatelskich i Politycznych, Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolnościach czy też Konwencji Ramowej o Ochronie Mniejszości Narodowych. Część druga dotyczy zagadnień konstytucyjnych gwarancji wolności zgromadzeń na Ukrainie oraz dopuszczalnych w prawie tego kraju ograniczeń tej wolności. Wreszcie trzecia część zawiera refleksje na temat kształtu administracyjnoprawnej regulacji zgromadzeń w Polsce, obejmujące przede wszystkim zagadnienia definicji zgromadzenia, klasyfikacji zgromadzeń i wreszcie obowiązków organizatora oraz uprawnień porządkowych władz, takich jak np. możliwość rozwiązania zgromadzenia. W pracy wykazano między innymi, że wprawdzie na Ukrainie, podobnie jak w Polsce, wolność zgromadzeń gwarantowana jest konstytucyjnie, ale na tym podobieństwa się kończą. Trudno ocenić pozytywnie brak nowoczesnej ustawy, która zbiorczo regulowałaby zagadnienia zgromadzeń publicznych tak jak polska ustawa Prawo o zgromadzeniach. Wybiórcze stosowanie zupełnie nieprzystających do realiów państwa demokratycznego przepisów uchwalonych jeszcze w ZSRR, w połączeniu z konstytucyjnie wyrażonym prawem sądów do wprowadzania ograniczeń wolności zgromadzeń, sprzyja skrajnej arbitralności podejmowanych rozstrzygnięć, co niewątpliwie narusza istotę wolności. Problemem polskiej administracyjnoprawnej regulacji zgromadzeń są z kolei częste i nie zawsze przemyślane zmiany odpowiednich przepisów. Nie ulega jednak wątpliwości, że Polską regulację prawną można uznać za znacznie dojrzalszą.

Słowa kluczowe: zgromadzenia w Polsce i na Ukrainie – porządek publiczny – administracyjna reglamentacja