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Freedom of assembly in Polish law 1918–2018

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Abstract

The right to assembly is recognized as one of the key human rights. It is essential for the functioning of the community, it is also the foundation of the democratic state. The legal regulations of the law of assembly in Poland have a tradition dating back to the mid-nineteenth century, but this right was regulated by 1990. The authentic freedom in this respect can be discussed only in the period of the Third Polish Republic, although this freedom has never meant freedom and has always been subject to limitation. The standards, which have been improved for decades, have been broken by the 2015 act, while in 2017 the Polish legislator introduced a number of solutions that made the law inconsistent and problematic in application. This article is aimed at tracing the evolution of statutory regulations from 1918–2015 and evaluating new solutions, especially those introduced in 2017, against it.

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Streszczenie

Wolność zgromadzeń w prawie polskim w latach 1918–2018

Prawo do zgromadzeń jest uznawane za jedno z kluczowych praw człowieka. Ma ono istotne znaczenie dla funkcjonowania społeczności, jest też fundamentem państwa demokratycznego. Prawne regulacje prawa zgromadzeń w Polsce mają tradycję sięgającą połowy XIX w., przy czym prawo to było do 1990 r. reglamentowane. O autentycznej wolności w tym zakresie można mówić dopiero w okresie III Rzeczypospolitej, choć wolność ta nigdy nie oznaczała dowolności i zawsze podlegała limitacji. Doskonalone przez dziesięciolecia standardy w tym zakresie zostały przełamane ustawą z 2015 r., natomiast w 2017 r. polski ustawodawca wprowadził szereg rozwiązań, które uczyniły ustawę prawo o zgromadzeniach niespójną i problematyczną w stosowaniu. Niniejszy artykuł ma na celu prześledzenie ewolucji regulacji ustawowych z lat 1918–2015 i dokonanie na jej tle oceny nowych rozwiązań, zwłaszcza tych wprowadzonych w 2017 r.

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I.

Freedom of assembly is recognized as one of the basic civil liberties, and its essence is the possibility of free gathering to manifest views or express positions[2]. The right to organize peaceful gatherings is considered as one of the basic standards that is what characterizes a democratic state of law. The important thing is the awareness that participation in the assemblies and unrestrained manifestation of views during them is often the only option for the individual to speak on matters – in their opinion – that are relevant to the state. The possibility of legal manifestation of views and beliefs cannot be limited, regardless of whether the participants of the assembly want to express their support or disapproval of the prevailing social, political or economic order[3].

[2] Cf. J. Szymanek, *Wolność zgromadzeń (art. 57)*, [In:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz encyklopedyczny*, eds. W. Skrzydło, S. Grabowska, R. Grabowski, Warszawa 2009, pp. 667–668.

[3] Cf. S. Kwiecień, *Wolność zgromadzeń w świetle ustawodawstwa II RP*, "Roczniki Nauk Prawnych" 2013, vol. XXIII, No. 1, p. 69.

Basic guarantees in this scope are secured by Art. 57 of the Constitution of the Republic of Poland of April 2, 1997[4], but this issue is regulated in detail in Poland by law. The first Polish legal act regulating the law of assembly comes from 1922, although regulations of this type were previously issued by the partitioning powers.

The history of the legal regulation of freedom of assembly in Poland dates back to 1867, which allows us to speak about an evolution lasting 150 years[5]. This thesis is legitimate, because despite the lack of legal continuity between the law of the partitioning powers and Polish law, established after regaining independence in 1918, the Second Republic of Poland has practiced the application of existing law until the parliament[6] settles certain issues.

The purpose of this analysis is to review the statutory regulations of the freedom of assembly in view of establishing the existence of a tendency of provability or anti-independence. Taking into account the systemic function of the freedom of assembly and the practice of its anti-system or anti-government exploitation, it can be argued that the attitude of the authorities to the freedom of assembly allows to assess the quality of relations between the individual and the state. If we are dealing with authority genuinely attached to civil liberties, not afraid of a freely expressive society, the right to congresses is characterized by a low level of regulation restrictiveness. Legislation that hinders the free assembly of citizens is a signal that state authorities are afraid of publicizing views and manifesting beliefs by citizens.

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[4] Constitution of the Republic of Poland of 2 April 1997 (Dz.U. No. 78, item 483).

[5] See S. Kwiecień, op.cit., pp. 71–73. In the Austrian Partition annexed to Poland party until 1932, the Act of 1867 was in force introducing numerous concepts taken over in subsequent Polish legislation including public gatherings under the open sky, electoral assemblies. In the areas of the former Russian annexation, the regulations of 1906 were in force and in the areas of the former Prussian partition – the act of 1908. All these acts introduced the requirement to obtain permits for the assembly and allowed for its easy resolution.

[6] Such a situation also occurred in terms of the right of assemblies. See: S. Kwiecień, op.cit., pp. 69–70.

II.

The framework regulation of freedom of assembly in Poland was first made by the March Constitution of 1921[7]. Provisions of Art. 108 only informed about the right of citizens to assemble, treating the congregation as part of the right of association. This issue was more extensively regulated by the Act of August 5, 1922 regarding the freedom of pre-election assemblies, although it regulated only the assemblies organized by voters or candidates for deputies during the election campaign (Art. 1)[8]. It introduced a distinction that existed for a long time in Polish laws regulating the assembly, i.e. separated the rules for organizing meetings in closed premises with the yard or garden belonging to them and "constituting an organically closed whole" (Art. 5), from those taking place on roads and public squares (Art. 2). In the latter case, the organizer had to report to the local administrative authority or police station at least 24 hours before the start of the meeting, subject to the requirements set out in Art. 3 of the Act.

Comprehensive regulation of assemblies was carried out only in 1932, in the law on assemblies[9]. It introduced a number of categories of assembly, distinguishing: public assemblies (Art. 1, sec. 1, a), non-public meetings or meetings (Art. 1, sec. 1, b), assembly in premises (Art. 2, sec. 1, a), open-air meetings (Art. 2, sec. 1, b), public manifestations, parades (Art. 2, sec. 2). While the meetings at the premises were subject to notification (Art. 6, sec. 1), those organized "under the sky" required the permission of the authorities, and the application had to be submitted at least 3 days before the meeting (Art. 7, sec. 1 and 2).

The legislator provided for a number of reasons to prohibit the assembly, such as violation of the provisions of the Act on assemblies or criminal laws, threats to security or peace, and threat to public order. An interesting limitation was the ban on organizing gatherings within a radius of half a kilometer 'from the place of official residence of the President of the Republic, from the Sejm, Senate, National Assembly [...], barracks, explosives warehouses, fortress facilities, exercise areas and shooting ranges' (Art. 11 sec. 1).

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[7] Act of 17 March 1921 – The Constitution of Poland (Dz.U. No. 44, item 267).

[8] Act of 5 August 1922 on pre-election freedoms of assemblies (Dz.U. No. 66, item 594).

[9] Act of 11 March 1932 on assemblies (Dz.U. No. 48, item 450).

The analyzed legal act was the first to introduce extensive regulations in the area of organizer's responsibility for the course of the meeting, supervision over the assembly, as well as to resolve it (Chapter III: Assembly). Separate sections of the Act were devoted to the organization and holding of meetings, conventions, pre-election assemblies, as well as criminal provisions related to the exercise of the freedom of assembly. It is worth paying attention to Art. 27 of the Law on Assemblies, containing exemptions from its provisions, including: as-assembly for the implementation of statutory provisions, religious meetings and marches, social and family gatherings and meetings, entertainment meetings in premises, gatherings and academic meetings taking place in academic schools. The 1932 Act on Assembly was in force until 1962. The Constitution of April[10], did not deal with the issue of assemblies, although in Art. 5 guaranteed the freedom of con-science, words and associations.

III.

Changes that took place in Poland from 1944 often did not mean interference in the legislation of the inter-war period. This is also the case with the law on assemblies. The Act was subject to corrections under the 1949 Decree, but they were few in number.

Article 27 was supplemented with two categories of assemblies excluded from the provisions of the Act: 1) religious meetings taking place "inside churches or places intended to perform the worship of legally recognized religious associations, if held in a traditionally established manner [...] and for wedding and funeral marches"[11], 2) street processions connected with the ceremonies of Corpus Christi, subject to the obligation to agree on the detailed order of the procession with the competent authority of general ad-ministration[12]. The change of the authority supervising the implementation of regulations is symptomatic – if it was the Ministry of the Interior from 1932, sometimes in agreement with the Ministry of Military Affairs, from 1949 this task

[10] Constitution Act of April 23rd, 1935 (Dz.U. No. 30, item 227).

[11] Art. 1 lit. of the Act (Dz.U. 1949, No. 49, item 369).

[12] Ibidem, Art. 1, b.

was carried out by the Ministry of Public Administration and the Ministry of Public Security.

Freedom of assembly was guaranteed by the Constitution of the Polish People's Republic[13]. According to Art. 71 The Polish People's Republic provides citizens with the freedom of speech, printing, assembly and rallies, parades and demonstrations. In practice – just as it was clearly articulated in Art. 72 of the Constitution with regard to associations – organization of assemblies and participation in assemblies whose purpose or activity was aimed at questioning the political and social system or legal order of the Polish People's Republic was prohibited. There was no possibility of legal gathering and manifestation, if it was not in accordance with the PZPR (the Polish United Workers' Party) and government policy, and the nodal points of the Polish People's Republic history are illegal manifestations that are transformed into mass social protests, under the influence of at-tempts by their authorities to solve them forcefully.

The Act of March 29, 1962 on Assemblies[14] was maintained in the same spirit as its predecessor from 1932, although the tighter regulation of the right to assembly was clearly visible. Provisions of Art. 1 point 2 defined congregations as "any grouping of people convened for joint deliberations or for the purpose of manifesting their position together in relation to a certain issue or phenomenon. Congresses, rallies, demonstrations, marches, lectures, processions and pilgrimages are assemblies. 'This was also manifested in the significant detail of the list of entities to organize gatherings with visible preferences for social entities (professional, self-governmental, cooperative and other socialized organizations and adult citizens) and in a very precisely constructed list of assemblies excluded form the provisions of the Act (Art. 4 sec. 1 items 1–9).

IV.

The breakthrough date in the history of Polish legal regulations in the field of freedom of assembly was on July 5, 1990. At that time, the Law on

[13] The Constitution of the People's Republic of Poland constituted by the Sejm, July 22nd 1952 (Dz.U. No. 33, item 232).

[14] Dz.U. No. 20, sec. 89.

Assemblies[15], was passed, which was broken with limitations in the scope of free gathering and expressing views in public space. This act is characterized by a libertarian philosophy typical of Polish legal acts adopted in the period immediately after the turn of 1989. The provisions of Art. 1 point 1 restore freedom of assembly to everyone, in Art. 1 point 2 is defined as a "grouping of at least 15 people, convened for joint deliberations or for the purpose of expressing common positions". These types of precise approach to the numerical boundary of the assembly left outside the provisions of the Act less numerous groups of demonstrators, thus favoring the freedom of manifesting views to an extent unknown in the history of assemblies in Poland.

The legislator has defined a number of restrictions aimed at the legal and safe organization of peaceful assemblies, which is in principle the purpose of adopting this kind of acts, but at the same time securing the freedom of assembly itself, prohibiting in Art. 2 non-statutory restriction of freedom of assembly, and statutory restrictions, allowing only for reasons of state security, public order, health protection, public morality, as well as the rights and freedoms of others. As in the case of earlier acts, the assemblies organized by the state organs, churches and religious associations as well as electoral assemblies were excluded from the provisions of the Act.

It is characteristic that the division into open-air gatherings has been maintained for which prior notification of the commune body is required, not to mention such an obligation in other cases. A relatively large part of the Act, covering the provisions of Art. 7 to 14, concerns notifying the intention to hold a meeting, the duties and rights of the organizer, responsibilities and rights of notified bodies, proceedings in the event of a ban on the organization of the assembly, as well as order and misdemeanors.

Freedom of assembly in Poland was guaranteed in the Constitution of 1997, which was al-ready signaled at the outset of this analysis. In accordance with the provisions of Art. 58 "Everyone is guaranteed the freedom to organize and participate in peaceful assemblies. Restrictions on this freedom may be specified by statue."

[15] Dz.U. No. 51, sec. 297.

While the 1990 Act was a breakthrough due to the fact that it was written in the spirit of a broad guarantee of freedom of assembly, the Law on Assemblies of September 29, 2015[16] broke with a classic view of the assembly from the mid-nineteenth century. Early acts demarcated congregations, dividing them into requiring filing or dismissal, and for those that due to their specific character (electoral or not related to politics) are excluded from these disciplines. The only exception to this rule were small demonstrations (up to 15 people) which, under the 1990 Act, were exempt from the notification requirement regardless of their character.

It was not until 2015 that the Polish legislator "captured" the idea of a free assembly convened for the purpose of manifesting views, introducing the category of a spontaneous as-assembly. It takes place "in connection with the sudden and impossible to predict event related to the public sphere, which would be futile or irrelevant from the point of view of the public debate"[17]. Thus, it became part of the needs of 21st century individuals and society, which, due to access to new media and the communication tools they offer, live in a different (faster) rhythm than previous generations.

The provisions of the Act of 2015 stand out against the background of earlier provisions by their breadth, but they are also much more precise from them. The legislator has regulated in detail the organization, holding and dissolution of assemblies (Chapter 2, Art. 7–20), simplified proceedings in matters of assemblies (Chapter 3, Art. 21–26), spontaneous assemblies (Chapter 4, Art. 27–28). This allowed to eliminate the drawbacks of previous regulations, especially concerning dead-lines to inform the commune body and appeal against their decisions, introduce and regulate new categories of assemblies: the already mentioned cyclic meeting, as well as the assembly organized in a simplified mode – unless the organizers intend to cause difficulties in traffic being undoubted drawback of the Act of 2015 is the withdrawal from determining the lower limit of the number of the assembly at the level of 15 people, as was the case in the Act of 1990.

[16] Dz.U. 2015, item 1485.

[17] Art. 3, sec. 2 of the act.

V.

Exactly fourteen months after entry into force, the Law on Assemblies of 2015 was amended. The Act amending the Act – Law on Assemblies of December 13, 2016[18] introduced a number of changes that raised doubts as to the compliance with the idea of freedom of peaceful assembly. Changing the wording of the provisions of Art. 12, in practice, prevented the organization of counter-manifestation, as it required the simultaneous organization of assemblies not less than 100 meters apart. It also introduced a new category of the congregation, ie. a cyclical assembly, whose organization requires joint fulfillment of specific premises (the organizer's person, demonstrating the earlier organization of manifestations in the same place, historical importance or goals significant for the state).

A separate issue is the procedure for obtaining consent for organizing a cyclic assembly, excluding commune bodies and introducing the voivode to this place (Art. 26 b sec. 1). The Act significantly impedes the withdrawal of consent for conducting cyclic meetings (Art. 26 c), whereas a one-off decision of the voivode allows for the organization of cyclic meetings for 3 years (Art. 26 d), even if the normal rules for the organization of peaceful assemblies are violated.

It is worth mentioning that since the beginning of organizing such meetings, ie. from 10 May 2017, there have been attempts to counter-manifestation, although the provisions of the amended Art. 27 prohibit disturbing cyclical assemblies even to participants of spontaneous assemblies, which necessitates physically separating demonstrators from themselves and engaging in securing assemblies of cyclical significant police forces. Establishing a kind of privileged assembly is therefore not good for the idea of peaceful gatherings, manifesting views and the right to express opinions in the framework of counter-manifestation. The Ombudsman particularly criticizes the applicable regulations, which due to the systemic location of the office and its constitutional functions, assesses the act in terms of system cohesion and the scope of guarantees for the implementation of basic civil rights.

In the opinion of the spokesperson "As a result of the application of the new regulations, the rights of participants of public gatherings repeatedly vio-

[18] Dz.U. 2017, item 579.

lated. An example can be cases con-ducted by the Ombudsman related to the cyclical gatherings organized in Warsaw every month to commemorate the victims of the Smolensk disaster, organized on the basis of the voivode's decision of 27 April 2017. At the same time and place it was not possible to make counter-demonstrations (the commune body issued a decision prohibiting the assembly submitted in the ordinary mode, and the voivode issued replacement orders in relation to the assemblies reported in a simplified mode). Also, counter-demonstration at a distance of over 100 m from the cyclical assembly often resulted in police interference (the counter-manifestation participants were legitimized and allegations of disruption of the legal assembly were made). There were also situations in which participants of legal assemblies were removed because of work on securing the place of the planned cyclic assembly"[19].

The same document draws attention to the lack of precise statutory legal grounds allowing for the banning of the assembly, which was reported in a simplified manner, due to the fact that the cyclical assembly is held at the same place and time.

Previous practice proves, however, that the voivode in this case issues replacement orders, which after the appeal are often repealed by the court. Characteristically, substitute orders are often issued on the day the organization of the meeting is planned, which excludes the possibility of effective dismissal. The manner of shaping the content of the act has aroused a number of controversies that have appeared at the stage of proceedings conducted by the courts. Doubts have aroused the scope of authority of the commune body, formally not having the right to appeal against the decision of the voivode, as well as the scope of the court's duties, as the proceedings may be discontinued due to the unnecessary issuance of the verdict, or may end with its release.

The above dilemmas were decided by the Supreme Court, issuing on March 28, 2018 a resolution of seven judges, ref. III SZP 1/18. In the justification, the court pointed out that "Submission of a decision on control in the appeal procedure provided for in the Assemblies law, causes that the process related to the ban on assemblies becomes transparent, especially when all inter-

[19] Opinion of the Ombudsman of 6 June 2018 to the Project of amendment of the Law on Assembly submitted by PO senators: https://www.rpo.gov.pl/pl/content/rpo-popiera-projekt-usuniecia-zgromadzen-cyklicznych-z-polskiego-prawa (10.12.2018).

ested entities are allowed to participate in the proceedings. The adoption of such an optics does not undermine the essence of the relationship between weight and benefit. An entity in relation to which a ban was issued or a commune body (which did not issue a prohibition decision) has the right to participate in court proceedings, and the burden of such a solution is not excessive, since the launch of appeal proceedings does not stop the execution of the assembly's order (Art. 16 sec. 1 sentence 2 draft certificate). Moreover, the appeal is quickly recognized, which brings about a control function against the act of power"[20]. In addition, in the court's opinion "As soon as the date of the meeting expires, the issuance of the decision shall not become unnecessary or unacceptable. On the contrary. The organizer of the meeting (possibly another applicant – here the commune body) still has a legal interest in obtaining an answer to the question whether the prohibition of the assembly was lawful. [...] If the court, by adjudicating ex post, had only to discontinue the proceedings and therefore refuse to resolve the substance of the case, it would mean a further, unjustifiable deterioration of the effectiveness of the protection of individual rights and freedoms [...][21].

VI.

The above analysis allows to positively verify the thesis that the manner of shaping the statutory regulations of the law of assemblies makes it possible to assess the attitude of the authorities to the idea of freedom in general and freedom of expression in particular. It also al-lows you to formulate the following conclusions.

It should be remembered that while the task of constitutional regulations of freedom of assembly is to guarantee the freedom of citizens' assembly and their views, the task of the laws to regulate this freedom is to create coherent ordinances. They are aimed at: 1) establishing the rules of peaceful gathering, 2) indicating the circum-stances enabling the dissolution of the assem-

[20] Resolution of the composition of the seven judges of the Supreme Court, 28 March 2018, pp. 18–19, http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/III%20SZP%201–18.pdf (10.12.2018).

[21] Ibidem, pp. 36–37.

bly, 3) defining the procedures for holding, re-porting, securing and resolving assemblies.

The statutory provisions regulating the assembly are also meant to protect the participants of the assembly against those who manifest different views – participants of counter-manifestation. The essence of freedom of assembly is manifesting views, also in the form of counter-manifestation. There is a challenge ahead of the legislator, consisting in the creation of regulations that will not only allow peaceful gathering of supporters for specific reasons, but also for the gathering of different views. Limiting ourselves to prohibitions in this regard, irrespective of the argumentation cited, should be considered to be contrary to the spirit of freedom of assembly.

Regardless of the periodization used for the needs of the conducted research, it should be stated that the evolution of the right of assembly in Poland should be divided into two separate periods. The first covers the years 1918–2015, when successive laws on the law of assemblies – despite the fact that different political regimes were adopted – combined the perception of the congregation and its functions, and the changes had an ordinal character: meetings and election meetings were separated from assemblies, categories of privileged state assemblies were introduced co-church etc. The second period – characterized by a change in philosophy regarding the perception and regulation of assemblies in Poland – started the adoption of the 2015 Act. It is characterized by a new understanding of the idea of gathering, which is clearly visible on the legalization of spontaneous gatherings that are becoming more common in the era of new media.

A positive assessment of the 2015 regulations distorts the rejection of the precise border, allowing to determine when we are dealing with the assembly. While the Act of 1990 operated in this case with the number of 15 people, not recognizing the joint manifestation of a smaller group as a congregation, and thus clearly broadening the boundaries of freedom, the Act of 2015 abandoned this practice. The significance of the existence of such a precise border in the regulations can be appreciated only from the perspective of time, especially in view of the drastic exacerbation of the right to counter-manifestation at the turn of 2016/2017.

Breaking the classic formula in 2015 – the one known in Polish lands for almost 150 years – allowed for further deviations from its classic form. The

dislike for people who manifested different views led to the act amending the act in December 2016 and the introduction of a new category of cyclical assemblies. Considering the scope of the prerequisite for recognizing the assembly as cyclical, as well as the scope of protection of such assemblies against counter-demonstrators, they should be considered as a new type of privileged assembly. Thus, there was a return to the division of assemblies organized in Poland into well-perceived pro-government and anti-government organizations, which should be treated with suspicion and obstructed.

At this stage it is difficult to express whether the regression with which we deal is permanent or temporary. The level of political culture in Poland requires that far-reaching skepticism is pre-served when it comes to removing from this system such norms that defy human freedom. Usually, the provoke indignation of political groups only during their opposition. However, the growing resistance to new regulations and the gradual activation of Poles demonstrating their dissatisfaction with the changes in the law on assembly may determine the return to the original shape of the content of the 2015 Act.

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