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Important Amendments in Polish Regulation of Freedom of Assembly

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Summary

After the period of transformation in Poland, it was obvious that there is a huge need to secure freedom of assembly to polish nation. The Assembly Act of 1990 was established in result of efforts to reestablish the freedom of assembly, completely lost by Poles after Second World War. This act was constituted an important symbol of regained freedom, and was sufficient to exercise the freedom of assembly in the initial period of rebuilding democracy in our country. After some time, it began to require more and more changes. It ceased to comply with the growing demands of a developing social society. The amendments of Assembly Act was among others the consequence of the sentence of European Court of Human Rights in Strasburg and Polish Constitutional Tribunal. On 14th of October 2015 the new Assemblies Act was set into force. In this article the Author analyses several significant changes in respect to the rules of organization and course of the assembly introduced in new law and tries to answer the question if that changes should be evaluated positively. The paper contains also an analyze of the newest amendments of law on public assembly, which has been adopted on 13th December 2016 by Polish Sejm. MP's have proposed among other to implement new kind of assembly called

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“cyclical”. Polish President Andrzej Duda filled the motion to Constitutional Tribunal in order to examine its compliance with Constitution.

Streszczenie

Najważniejsze zmiany w polskiej regulacji dotyczącej wolności zgromadzeń

Regulacja prawna odnosząca się do konstytucyjnej wolności zgromadzeń w ostatnich latach była przedmiotem krytyki nie tylko wśród społeczeństwa ale również przedstawiciele doktryny. Wielokrotnie nowelizowana ustawa nie wypełniała standardów stawianych państwu demokratycznemu przede wszystkim w zakresie dopuszczalnych ograniczeń oraz procedury notyfikacyjnej. Orzecznictwo polskiego Trybunału Konstytucyjnego jak również Europejskiego Trybunału Praw Człowieka skłoniło polskiego ustawodawcę do pracy nad nową regulacją prawną. W 2015 roku prace te zostały zwieńczone uchwaleniem nowej ustawy prawo o zgromadzeniach. Analiza i ocena zawartych w niej rozwiązań prawnych jest przedmiotem niniejszego opracowania. Autorka przedstawiła również założenia zmiany ustawy uchwalone przez parlament 13 grudnia 2016 r.

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Following the process of transformation in Polish political system, there was a generally expressed conviction that freedom of assembly should be one of the most important aspects of democratisation of social life in Poland². This freedom by itself, safeguards other rights, not to mention free expression in the democratic society, or right to free elections. European Court of Human Rights (ECHR) many times declared that freedom of assembly constitutes an important kind of expression and pillar for freedom of speech³. Assemblies may serve to many purposes, including the expression of diverse, unpopular or minority opinions. Legal guarantees of that freedom of are crucial for creating a tolerant and pluralistic society in which groups with different beliefs,

² P. Suski, *Zgromadzenia i imprezy masowe*, Warszawa 2007, s. 66 – 74; A. Wróbel, *Wolność zgromadzania się*, [In:] *Konstytucyjne wolności i prawa w Polsce*, t. III, *Wolności i prawa polityczne*, ed. W. Skrzydło, Kraków 2002, p. 10; P. Czarny, B. Naleziński, *Wolność zgromadzeń*, Warszawa 1998, pp. 17–19.

³ ECHR, *Patyi and others v. Hungary*, 7.10.2008, No. 5529/05, par. 37.

practices or policies can coexist peacefully together⁴. As a fundamental right, freedom of assembly should insofar as possible, be enjoyed without states regulative interference. Under Polish Constitution there is only a general regulation. According to article 57 of above mentioned fundamental act the freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone. Limitations upon such freedoms may be imposed by statute. The Polish Constitutional Tribunal (TK) on numerous occasions emphasised great meaning of freedom of assembly for the establishment of modern state of law standard. Implementation of freedom of assembly ensure the effectiveness of social communication and it is fundamental for the dialogue between a society and the public authority. It is of particular importance not only for a single person but also for the whole nation⁵. In spite of the development of modern technologies enabling direct communication, specified but not limited to Internet, freedom of assembly still remains one of the most important ways of individuals participation in the public and political life. Its basic advantage is the power to gather many people in one place and one time⁶.

Article 57 of Polish Constitution resembles article 11 of the European Convention on Human Rights. As guaranteed by Article 11 of the Convention, everyone 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 (§ 1). No. restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the adminis-

⁴ OSCE Office for Democratic Institutions and Human Rights, *Guidelines on Freedom of Peaceful Assembly*, Warsaw/Strasbourg 2010, p. 15.

⁵ Judgment of TK, 18.09.2014, sygn. K 44/12 (Dz.U. 2014, poz. 1327), called also "TK, K 44/12"; Judgment of TK, 28.06.2000, sygn. K 34/99 (Dz.U. 2000, Nr 53, poz. 649), called also: "TK, K 34/99"; Judgment TK, 10.11.2004, sygn. KP 1/04 (M.P. 2004, Nr 48, poz. 826).

⁶ J. Juchniewicz, M. Kazimierzczuk, *Wolności i prawa polityczne w Konstytucji RP z 1997 r.*, [In:] *Wolności i prawa człowieka w Konstytucji Rzeczypospolitej Polskiej*, ed. M. Chmaj, Warszawa 2009, p. 119; W. Studziński, *Wolność zgromadzeń i stowarzyszania się*, [In:] *Prawa i wolności I i II generacji*, eds. A. Florczak, B. Bolechow, Toruń 2006, p. 179.

tration of the State (§ 2). European Court of Human Rights expressed conviction that Article 11 of the Convention requires only such interferences with the exercise of the freedom of assembly which are “necessary in a democratic society”. It also should not be forgotten that the exceptions set out in Article 11 have to be construed strictly⁷.

Freedom of assembly like other rights and freedoms set forth in the Polish Constitution can be limited only by law. The general principles of that limits are specified in article 31. The Polish authorities are not allowed to decide freely about the matters and the scope of restrictions. According to article 31.3. any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights. It should be noted that legislator is obliged to respect some universally recognized general standards of these limitations. There is also a duty to respect standards of proportionality. That means that there is an obligation to choose only such measures which are necessary to achieve the aim of these limitation and to use only such measures which are onerous to the least possible extent for the individuals. The other requirement is that freedom of peaceful assembly should be enjoyed equally by everyone. That means, for example, that the relevant authorities must not discriminate against any individual or group on any ground. The limitations of freedom of assembly according to Article 57 of Polish Constitution have to respect all constitutional requirements imposed also in the provisions of the Article 31.3., as it has been already mentioned above⁸.

As it was said, after the period of transformation, it was obvious that there is a huge need to secure freedom of assembly to polish nation. After the declaration of martial law in 1981 the law⁹ and the practice of the authorities provided many restrictions for assemblies¹⁰. The Assembly Act of 1990 was established in result of efforts to reestablish the freedom of assembly, completely

⁷ *ECHR, United Communist Party of Turkey and Others v. Turkey*, 30.01.1998, No. 133/1996/752/951, par. 45–46.

⁸ Wyrok TK, K 34/99.

⁹ Decree of martial law, 13.12.1981 (Dz.U. 1981, Nr 29, poz. 154), art. 13.

¹⁰ P. Czarny, B. Naleziński, *op.cit.*, p. 41.

lost by Poles after Second World War. This act was constituted an important symbol of regained freedom, and was sufficient to exercise the freedom of assembly in the initial period of rebuilding democracy in our country. After some time, it began to require more and more changes. It ceased to comply with the growing demands of a developing social society. The amendments of Assembly Act was among others the consequence of the sentence of European Court of Human Rights in Strasburg (ECHR) of 2007 in the case of Tomasz Bączkowski and others v. Poland¹¹. ECHR considered that Warsaw authority violated in 2005 the European Convention on Human Rights by the refusal to grant permission for a march and meetings to protest against homophobia called in Poland “Equality Parade”. The President of Warsaw prohibited that assembly for the reasons of public safety. He prohibited also another sixteen assemblies, which were supposed to be organized in the same time as “Equality Parade”. This case gave the ECHR an opportunity to rule among others on the time-limits for issuing decisions concerning the exercise of freedom of assembly. The main issue in described case was the cancellation of an unlawful refusal to authorise demonstrations, delivered after the date on which the demonstrations had been scheduled. The applicants complained of the absence of a remedy which would have enabled them to obtain a final decision before the date on which their events were scheduled. The ECHR considered that it was important for the effective enjoyment of freedom of assembly that the applicable laws provided for reasonable time-limits within which the State authorities should act when giving relevant decisions. The applicable laws clearly set out the time-limits within which the applicants were to submit their requests for authorisation. In contrast, the authorities were not obliged by any legally binding time frame to give their final decisions before the planned date of the demonstration. The Court was therefore not persuaded that the remedies available to the applicants in the present case, all of them being of a *post-hoc* character, could provide adequate redress in respect of the alleged violations of the Convention. It therefore concluded that there had been a violation of Article 13 of Convention¹².

In aftermath of this case the Polish Assembly Act was changed but still was the subject of court’s control. The Polish Constitutional Tribunal found the

¹¹ ECHR, *Bączkowski and others v. Poland*, 3.05.2007, No. 1543/06.

¹² *Ibidem*.

changes as insufficient and unconstitutional¹³. The Tribunal has referred to the organization of so called parallel assemblies. That are at least two assemblies organized at the same time and even partly in the same place. The Assembly Act introduced the general prohibition of such assemblies. The Tribunal ruled that such a prohibition was inadmissible and the procedure of prohibition was unclear and unfair. The prohibition of a public assembly solely on the basis that it is due to take place at the same time and location as another public assembly will likely be a disproportionate response where both can be reasonably accommodated. The principle of non-discrimination requires further, that assemblies in comparable circumstances do not face differential levels of restriction. The prohibition should be used only in exceptional cases.

On 14th of October 2015 the new Assemblies Act was set into force. This act replaced previously applicable Assembly Act of 1990. The new law introduced several significant changes in respect to the rules of organization and course of the assembly. Primarily there is a significant difference between a current and former definition of assembly. In the previous act only the meeting of at least 15 people could be defined as an assembly. Now, under the Act of 2015, there is not such a requirement. According to Article 3.1. the assembly is defined as a gathering of people in open space, which is accessible to many unspecified individuals in one certain place convened in order to hold a public debate or to express jointly their position. So far, the assembly of less than 15 people was not a subject of legal regulation. The Polish Constitutional Tribunal found this regulation as unconstitutional. It was said, that law does not need to specify the minimum number of participants in the demonstration to exercise standards of democratic state ruled by law. That is why the new law does not contain these numbers in the definition of public assembly. Nowadays, there is also a definition of spontaneous assembly which can be organized in case of a sudden, unexpected and impossible to predict event connected with public life when its organization in another time would be pointless or insignificant from the point of view of the public debate. That kind of assembly is a new institution in Polish law¹⁴. Such an assembly would only occur in circumstances where the legally established deadline cannot be met. The

¹³ TK, K 44/12.

¹⁴ A. Bodnar, M. Ziółkowski, *Zgromadzenia spontaniczne*, "Państwo i Prawo" 2008, Issue 5, p. 31.

authorities should always protect and facilitate any spontaneous assembly so long as it is peaceful in nature. The provisions of the Act of 2015 do not apply to assemblies organized by public authorities or that are held within the activities of the Catholic Church, other Churches, and religious unions. There are also some limitations for people who want to organize or take part in the assembly. According to article 4 the right to arrange an assembly is granted solely to natural persons with full capacity to legal acts. In the previous act that right was wider and included also legal persons, other organizations, as well as groups of persons. Since 2012 the participation in assembly has been prohibited for people who carry weapons, explosive materials, pyrotechnic materials, hazardous fire materials or other dangerous tools with them. This provision did not change after 2015.

In comparison to the previous Assembly Act, the procedure of notification has been simplified. The organizer is entitled to notify the intention of organization an assembly in many forms for example in written or verbal form, by fax or via electronic communication (for example via e-mail). The organizer is obliged to notify the municipality authority no later than 6 but no earlier than 30 days before the scheduled date of the assembly. Under Polish law the municipality council is able to specify locations where if an assembly does take place it does not require notification. The situation is different if the organizer is sure that planned assembly does not create the traffic hindrances. Then he is able to choose the special, more simplified procedure described in the provisions of Assembly Act. The established procedure requires only the notification of planned assembly to a competent crisis management center no later than 2 days before the planned date of the assembly. In this procedure there is no possibility to issue a prohibition order against the assembly. However, the representative of the municipality authority has the power to solve all kind of assemblies during its course if it endangers the life or health of people or property of considerable value, pose a risk to security or order of traffic on public roads or violates the provisions of Assembly Act or criminal law. The representative of the municipality authority is able to use this power only if the leader of the assembly after being warned about the need to resolve the assembly, does not act so.

Despite dynamic development of forms of contact between people and public authorities and forms of criticism like television, press or Internet, the

need to ensure freedom of assembly is still current. It should be treated as an effective instrument of exercising political pressure and influencing the decisions of government¹⁵. The Polish Constitutional Tribunal stated that the free assembly fulfill a very important role of early – warning mechanism. It shows the representative bodies and the public potential and existing sources of tension and allows early reaction and even changes in directions of state policy. The similar position expressed the European Court of Human Rights. In the opinion of this Court the meaning of an assembly would be significantly lower if it is organized when the social issue has already lost its meaning in the current political debate. Freedom of peaceful assembly loses its meaning if people cannot use it in the right time. As a result of long theoretical discussion, polish legislator introduced into the polish law a new institution. In case of a sudden, unexpected and impossible to predict event connected with public live there is a possibility to organize a spontaneous assembly. This kind of assembly does not have to be previously notified. This exception in the Act of 2015 is justified by the fact that this kind of assembly would lose the sense or would be negligible from the point of view of the public debate if it will not be organized immediately. As an example it could be necessary because of the controversial political statement, unexpected foreign guest's visit or passing a new law, etc. Therefore, this new regulation regarding to the spontaneous assembly met with such an enthusiastic reception in Poland even if it met some restrictions. First of all such assembly cannot collide with other assembly organized in accordance with the standard procedures. It also could be resolved by Police among others in case of colliding with previously notified assembly.

It also should be noted, that the new Polish Assembly Act introduces a significant change in the appeal procedure in case of an issue a prohibition order against assembly. According to a current act competent local authority is able to pass a prohibition order against assembly no later than 96 hours before its scheduled date. This prohibition order is acceptable in cases when the purpose or fact of holding of that assembly is breaking the provisions of the Act or violates criminal law. The municipality council shall prohibit a public assembly also if its course may pose a threat to the life or health of individuals or to property of considerable value. The organizer may appeal against

¹⁵ Ibidem, p. 40.

this prohibition order to the district court within 24 hours of the receipt of the decision. There is also a possibility to appeal against the decision of the district court, taken within the next 24 hours, to the Court of Appeal. The regulation in the new Assembly Act strictly defined, short deadlines for appeal and courts' consideration to guarantee the resolution of proceedings before the date of the planned assembly. This significant change in the law solves many important and practical problems. According to the previous Assembly Act the Voivode was the authority competent *ratione loci* to examine appeals against prohibition orders against the assembly. After his negative decision there was a possibility to appeal to the administrative court. The whole appeal proceedings were very difficult and long.

The assembly notification proceedings shall be conducted by competent municipality. In some cases, when the assembly is going to be organized on the territory of at least two municipalities, all authorities are competent to conduct the procedure. The new regulation refers also to assemblies organized by two or more organizers at the same time, in places or walking routes which are identical or partially colliding. They can take place, if their performance does not endanger life or health of persons or property to a large extent. If there is no certainty that it will be succeed the primacy would have that assembly which notification was provided earlier. In this case the municipal authority immediately calls to the organizers of these later notified assembly by phone or by means of electronic communication, to order them to change the place or time of assembly. The municipal authority may also conduct an administrative hearing to agree on changes in location or time of assembly. If during the administrative hearing, the organizers of assemblies are not able to agree on an appropriate place or time, the authority would ask them to choose the place or time of assembly in accordance with the order of notification of their assemblies. It should be stressed that the authority in case of restrictions imposed on the time, place or manner of an assembly is obliged to offer some reasonable alternatives.

There is no doubt that new solutions provided by the Assembly Act of 2015 should be evaluated positively. They are intended to create more effective conditions for exercising one of the fundamental human freedoms – freedom of assembly. It was also very important to create the balance between freedom of peacefully assembles and the need to maintain law and public order. The

notification process seems to be inoffensive and not excessively bureaucratic. The period of notice is not too long but still secures adequate time for the relevant municipality authorities to make the necessary plans and preparations to satisfy their positive obligations. The possibility of appeal to an independent court in case of prohibition of assembly should be also positively assessed. The primary responsibility of the state is to put in place adequate mechanisms and procedures to ensure that the freedom is enjoyed and not subject to undue bureaucratic regulation. It was achieved in new Assembly Act. Even Polish ombudsman is enthusiastic about this adopted law¹⁶. Often, however, it is not the letter of law that is of an essence but its implementation.

Just after this publication was given to print, on 15th of November 2016 there was new draft statutory regulation submitted by members of Parliament to the Sejm, on amendment of law on public assembly. MP's proposed among other to implement new kind of assembly called "cyclical". New draft has been adopted by the Sejm on 13th December 2016 on 32nd meeting of the Sejm. That facts caused necessity to supplement this article. Amended regulation was supposed to enter into force 14 days after official publication, however Polish President Andrzej Duda filed the motion to Constitutional Tribunal in order to examine its compliance with Constitution. It should be emphasized, that all opinions presented herein were based on available legal sources, and might become irrelevant, since legislation process including Tribunals assessment is still ongoing.

Historical experience in Poland bring safety of assembly participants to a high level. During past regime of Marxists Polish nation paid many times a high price in a blood of men and women, determined to manifest their beliefs by means of public gathering. It should be also buried in a mind that casualties among demonstrators were not only caused by armed forces but also by civil entities incited by the state authorities. Regarding security as a priority, must lead to necessary restrictions of a discussed freedom. Pursuit to secure peace during assemblies, has its legal grounds in the Constitution, which allows in art. 31 to restrict rights and freedoms when it is necessary in a democratic state to ensure public safety and order or freedom of other people. Criteria of public safety and order has become a legal basis of assembly prohibition in a vast majority of administration decisions, issued in respect of that

¹⁶ See: <https://www.rpo.gov.pl/pl/content/nowe-prawo-o-zgromadzeniach> (9.11.2016).

matter. In most of them basic reason was necessity to avoid collision of public gatherings, and potential clashes in a result of that. For that reason, the issue of priority of gatherings was vividly discussed in constitutional law doctrine in Poland.

In recent amendment of art 12 of law on public assembly, there was a new criteria added to gatherings priority assessment. According to the new provision, when there are two or more notifications of assembly organization submitted to competent authority, and they are planned to take place even partially in the same place or time, in particular in a distance not further than 100 m from each other, and there is no possibility to avoid a threat to life or health or property in a significant amount, about priority of choice of place and time of assembly it should be decided taking under consideration the sequence of submissions. It is worth to emphasize, that according to above mentioned statutory provision related to the distance must be assessed in conjunction with impossibility to provide security to life or health or property in a significant amount. It seems to be obvious that organization of counter demonstrations cannot be totally excluded, since such a restriction would be contrary to the principle of necessity in a democratic state. Regarding freedom of assembly as belonging to the family of freedoms of expression this situation might be compared to a verbal exchange of thoughts, which is allowed to a very far extent. It is worth to notice also that organization of an assembly even when there is a threat of violence from opponent demonstrators is also allowed, under condition that distance of 100 meters between them will be kept. This should be sufficient for police forces to secure necessary minimum of public safety. In particular given distance should provide sufficient time to apply security measures like tear gas or provide water cannon's assistance.

As it was already mentioned, the novelty in polish law will be cyclic assemblies. This institution is highly criticized by the political opposition of current government. According to new art. 26 a1. assemblies might be regarded as cyclic if they are organized by the same organizer in the same place or in the same route, at least 4 times a year, according to given time schedule; or at least annually during state or national holiday, and such annual assemblies took place at least during last 3 years – not necessarily in a legal form of public assembly, and their purpose was to honor important events in polish history. To obtain a status of a cyclic assembly, the organizer must submit a mo-

tion to voivode, and receive his consent given in a form of an administration act. What might be regarded as controversial under principle of legal equity, this type of assemblies requires different procedure of organization. Firstly, to organize cyclic assembly, the organizer must submit the motion not later than 7 days before first of the planned cycle public gatherings. It is mandatory to provide a number, and a time schedule of the assemblies, as well as justify their purpose. Secondly assemblies might take place only after administrative consent of voivode, to organize them for maximum period of 3 years. Decision in that matter should be issued not later than 5 days before first of the planned cycle public gatherings. Voivode shall publish on the public information web bulletin, an information about place and time of cyclic assemblies, as well as informs executive of municipality on territory of which the public gathering shall take place. Thirdly, when voivode has issued a decision on consent to hold cyclic assembly, in time and place where other public gathering was supposed to take place, the municipalities executive shall issue a prohibitive decision in respect to this other one. Such an administrative act must be issued within 24 hours since receiving information from voivode. If municipality executive shall not perform its duties, voivode is entitled to issue a substitute order. Fourthly, voivode issues a decision on withdrawal of consent for cyclic assembly, when organizer issued such a motion, or a cyclic assembly did not take place at least two times according to previously provided schedule, unless it happened because of reasons independent from organizer. The new regulation gives clear priority to cyclic assemblies, which prevail over regular assemblies, and spontaneous assemblies. As to the last ones, its participants are not allowed to disrupt cyclic assemblies.

The objections of the governments opposition should be treated conservatively. Argument that cyclic assembly will be used only by governing party to organize Smoleńsk catastrophe anniversary is exaggerated. There are plenty of other assemblies which can also obtain such a status, not to mention Independence day, Labor Holiday, EU Accession Holiday or 3 May Constitution Anniversary. It must be considered in details whether current social situation in Poland and EU justifies treating honoring assemblies in a different way than the others. Since Poland as well as other EU states must struggle for their identity and stay against current clash of civilizations clearly visible thru terrorists activity in a Western Europe, there is some ratio in creating

such a difference. All anniversaries are great occasion to manifest unity of the nation and its cultural heritage, which must be currently defended.

Although in general such an idea might be worth to be supported, procedural regulations given in the amendment can be described as unnecessary even to achieve above described purpose. In particular solution of the assemblies collision with prejudice to rights to regular assembly demonstrators shall be assessed negatively. That fact was a main ground of Presidential motion to the Constitutional Tribunal, which from that point of view seems to be necessary and justified. Hopefully The Tribunals judgement shall waive all above mentioned doubts.

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