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Freedom of Public Assembly in Poland

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Słowa kluczowe: wolność, zgromadzenia, prawa obywatelskie, cykliczność, spontaniczność

Abstract

The right to assembly is a manifestation of the social possibility of influencing state organs by loud and often expressive articulation of the position of a given social group on issues important to it. It should be clearly emphasized that the right to peaceful assembly is a manifestation of freedom and is one of the core guarantees of pluralism, freedom of speech and the nation's right to decide about self, which one considers a sovereign. Detailed rules and procedures for organizing, conducting and dissolving assemblies have been regulated in the Act of July 24, 2015 of the Act of Assembly Law[2]. The basic concept – the concept of assembly – has been defined in the Art. 3 of Act of the Assembly Law. According to the adopted systematics, two types of assembly were distinguished: ordinary and spontaneous. The first of these means "a grouping of persons in an open space accessible to unspecified persons in a specific place organized in order to carry our joint deliberations or for joint expression of public opinion". The organization of the meeting can be practically unlimited. The only requirement is having full legal capacity, which excludes persons partially deprived of legal capacity, regardless of the scope of such limitation and the relationship with the subject of the organized meeting. The

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[2] Act of July 24, 2015 of the Assembly Law (Dz.U.No. 1485), hereinafter: Act of Assembly Law.

process of organizing assemblies is not complicated, although one should be particularly careful about the deadlines and keep in mind the "privileged status" of some other forms of assemblies. The amendment to the Act of 2016 introduced new legal solutions, although definition issues were omitted, which in this case are of fundamental importance for the correct application of the Act and guaranteeing observance of constitutional norms by public administration bodies.

Streszczenie

Wolność zgromadzeń publicznych w Polsce

Prawo do zgromadzeń jest przejawem społecznej możliwości wpływu na organy państwa poprzez głośne, a często ekspresyjne wyartykułowanie stanowiska danej grupy społecznej na ważne dla niej tematy. Należy wyraźnie podkreślić, że prawo do pokojowych zgromadzeń stanowi przejaw wolności i jest jedną z trzonowych gwarancji pluralizmu, wolności słowa, prawa decydowania o samym sobie przez suwerena, jakim jest naród[3]. Szczegółowe zasady i tryb organizowania, odbywania oraz rozwiązywania zgromadzeń uregulowany został w ustawie z 24 lipca 2015 r. Prawo o zgromadzeniach[4]. Podstawowe pojęcie – zgromadzenia – zdefiniowane zostało w art. 3 uPoZ. Zgodnie z przyjętą systematyką rozróżnione zostały dwa rodzaje zgromadzeń: zwykłe i spontaniczne. Pierwsze z nich oznacza „zgrupowanie osób na otwartej przestrzeni dostępnej dla nieokreślonych imiennie osób w określonym miejscu w celu odbycia wspólnych obrad lub w celu wspólnego wyrażenia stanowiska w sprawach publicznych". Organizacja zgromadzenia jest niemal podmiotowo nieograniczona. Jedynym wymogiem jest posiadanie pełnej zdolności do czynności prawych, co wyklucza osoby częściowo pozbawione zdolności do czynności prawnych, bez względu na zakres takiego ograniczenia i związek z przedmiotem organizowanego zgromadzenia. Proces związany z organizacją zgromadzeń nie jest skomplikowany, jakkolwiek należy szczególnie uważnie pilnować terminów oraz mieć na względzie „uprzywilejowanie" niektórych innych form zgromadzeń. Nowelizacja ustawy z 2016 r. wprowadziła nowe rozwiązania prawne, jakkolwiek pominięte zostały kwestie definicyjne, które w tym przypadku mają zasadnicze znaczenie dla prawidłowości stosowania ustawy i gwarancji przestrzegania przez organy administracji publicznej norm konstytucyjnych.

[3] P. Czarny, B. Naleziński, *Wolność zgromadzeń*, Warsaw 1998, p. 14; P. Mijal, *Realizacja i ochrona konstytucyjnej wolności zgromadzeń w aspekcie praktycznym,* [in:] *Prawne aspekty wolności. Zbiór studiów,* eds. E. Cała-Wacinkiewicz, D. Wicinkiewicz, Toruń 2008, p. 219.

[4] Act of July 24, 2015, the Law on Assemblies (Dz.U. No. 1485), hereinafter: uPoZ.

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I.

In most European and world countries there are legal regulations which – in a more or less liberal way – create the subjective right of citizens to assembly. The adopted solutions are different depending on the level of democratization of the state, historical conditions or the awareness of the inhabitants of a given region. The right to assembly is a manifestation of the social possibility of influencing state authorities by loud and often expressive articulation of the position of a given social group on the issues which are important to it[5]. It should be clearly emphasized that the right to peaceful assembly is a manifestation of freedom and is one of the core guarantees of pluralism, freedom of speech and the right to decide about oneself by a nation, which one considers a sovereign[6]. These issues became even more important after the introduction of the amendment to the Act in the Polish legal system in 2016, where new institutions were defined, such as cyclical assemblies, or the rules for the possibility of organizing parallel assemblies were modified. As a result, the existing legal system raises a number of doubts from the point of view of constitutional norms, including Art. 31 section 3, Art. 54 and Art. 57 of the Polish Constitution. In addition, it is worth emphasizing that the current system raises reservations also from the point of view of Art. 11 par. 2 of the European Convention on Human Rights[7].

It should be emphasized that in Poland the right to assembly was guaranteed directly in Art. 57 of the Polish Constitution[8]. This provision states that "Everyone shall be guaranteed the freedom to organize and partici-

[5] M. Wiącek, *Wolność zgromadzeń i zrzeszania się*, [in:] *Prawa człowieka,* eds. W. Brzozowski, A. Krzywoń, M. Wiącek, Warsaw 2018, pp. 244–248.

[6] L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu,* Warsaw 2019, pp. 116–123.

[7] Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on November 4, 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Dz.U. 1993, No. 61, item 284 as am.).

[8] The Act of April 2, 1997, the Constitution of the Republic of Poland (Dz.U.No. 78, item 483 as am.).

pate in peaceful gatherings. The restriction of this freedom may be specified by statute". This means, therefore, that the Constitution provides the unlimited right to assembly, with the provison that the assembly is to be peaceful[9]. In other words, it is forbidden to organize and participate in assemblies which inted to cause social unrest, riots or situations that are not allowed from the point of view of, for example, the Penal Code[10]. The currently adopted solution fits in with the principle that the rights and freedoms of citizens constitute the limitation of another citizens' rights and freedoms. This border allows to moderate social harmony and creates the possibility of substantive discussion between the sovereign and MPs, senators or government administration. Any form of limiting or preventing the exercise of the right to peaceful assembly raises concerns, as it often leads to a change in the political regime or to a significant social division. In fact, we had too many historical examples from the 1980s to pass the importance of this issue without concern.

On the other hand, it is worth emphasizing that the right to assembly also results from the content of the Art. 20 par. 1 of the Universal Declaration of Human Rights[11]. This standard indicates that "Everyone has the right to the freedom of peaceful assembly and association". Moreover, this right is also guaranteed in the Art. 21 of the International Covenant on Civil and Political Rights[12]. The signatories emphasized that "The right to peaceful assembly is recognized. Restrictions other than those established in accordance with the Act and necessary in a democratic society in the interest of national or public security, public order or for the protection of public health or morality or the rights and freedoms of others may not be imposed

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[9] M. Jabłoński, S. Jarosz-Żukowska, *Prawa człowieka i systemy ich ochrony. Zarys wykładu*, Wrocław 2004, p. 120, A. Wróbel, *Wolność zgromadzania się,* [in:] *Konstytucyjne wolności i prawa w Polsce, t. 3, Wolności i prawa polityczne*, ed. W. Skrzydło, Cracov 2002, p. 11.

[10] A. Ławniczak, *Zasady poszanowania wolności i jej ograniczenia,* [in:] *Wolności i prawa jednostki w Konstytucji RP. Tom I. Idee i zasady przewodnie konstytucyjnej regulacji wolności i praw jednostki w RP,* ed. M. Jabłoński, Warsaw 2010, pp. 367–409.

[11] Universal Declaration of Human Rights. UN General Assembly resolution 217 A (III) adopted and proclaimed on December 10, 1948, https://www.rpo.gov.pl/pliki/12108381350.pdf. (27.08.2019).

[12] The International Covenant on Civil and Political Rights opened for signature in New York on December 16, 1966 (Dz.U. 1977, No. 38, item 167).

on the exercise of this right". It is worth pointing out that the scope of this standard includes the right to organize and conduct, as well as the possibility of peaceful participation in the meeting taking place both in venues having either public or private status. As aptly emphasized in the literature, the scope of protection in this case "includes not only freedom from unauthorized interference by public authorities, but also other types of violations. Effective and real respect for freedom of assembly cannot be limited to the existence of an obligation on the part of public authorities to refrain from interfering in the organization or conduct of a peaceful assembly, as there are also positive obligations of the state to guarantee the safe exercise of the freedom in question"[13].

Guaranteed in the area of international standards and constitutionally, the citizens' right to assembly imposes on the authorities the obligation to enable organization of uninterrupted assemblies and on the other side to ensure its security[14]. According toW. Skrzydło, "[...] the organizers are therefore obliged to complete the necessary formalities and ensure the peaceful conduct of the assembly in accordance with the law and the adopted programme. On the other hand, public authorities have an obligation to ensure a peaceful and uninterrupted course of the meeting, as well as to protect its participants against the actions of opponents of the purposes for which the meeting was convened"[15]. The Voivodeship Administrative Court in Poznań likewise pointed out in a judgment of November 20, 2009. The justification reads that "The right to obtain protection by relevant security forces which are at the disposal of public authorities is granted to persons exercising the freedom of assembly, and practically – in the most real terms – to the organizers of the assembly. This is their subjective right "inscribed" in the constitutionally guaranteed freedom of assembly"[16].

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[13] M. Kołakowska-Skorupa, J. Wojsyk, *Wolność zgromadzeń w Polsce w latach 2016–2018. Raport Rzecznika Praw Obywatelskich*, Warsaw 2018, p. 15.

[14] Judgment of the Provincial Administrative Court in Poznań of December 14, 2015, reference number IV SA/Po 983/05, LEX No. 174377.

[15] W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* Warsaw 2013, p. 69.

[16] Judgment of the Provincial Administrative Court in Poznań of November 20, 2009, file reference number IV SA/Po 888/09, LEX No. 589422.

II.

Detailed rules and procedure for organizing, holding and dissolving assemblies have been regulated in the Act of 24 July 2015 of Assembly Law[17]. The basic concept – of assembly – is defined in the Article 3 of the Act of Assembly Law. According to the adopted systematics, two types of assembly were distinguished: ordinary and spontaneous. The first of these means "a grouping of persons in an open space accessible to unspecified persons in a specific place for joint deliberations or for joint expression of public opinion". As a result, it constitutes a fully professionally organized event, with the date, place, or security issues planned by the organizers. Assemblies of this type are, in principle, associated with specific celebrations, not only local but also national and international holidays.

On the other hand, spontaneous assemblies are by their very nature a sudden phenomenon resulting from specific social, political or economic events. Such meetings cannot be planned and their postponement or organization at another time would contradict their purpose and make no sense. This type of assembly shows the power of democracy and shows whether this right is observed and implemented by the state. In this respect, the judgment of the European Court of Human Rights of 10 July 2012 is significant. In its content it was emphasized that "[...] when an immediate response in the form of a spontaneous demonstration can be justified, interruption of such a demonstration only due to the lack of prior – required – notification of the intention of organizing it, assuming that no behavior on the part of participants of the demonstration was recorded that would be unlawful, may be considered tantamount to a disproportionate restriction on the freedom of peaceful assembly. Furthermore, it should be recalled that serious reasons must be given to justify restrictions on political statements or statements on serious matters of public interest, since the extensive restrictions imposed on individual cases undeniably affect the respect of freedom of expression in the State concerned

[17] Act of July 24, 2015 on the law on assemblies (DzU.No. 1485), hereinafter: Act of Assembly Law.

in general"[18]. A similar position was expressed in the judgment of March 6, 2007, where it was emphasized that "in a democratic society the right to free peaceful assembly is a fundamental right, and its essence is the ability of citizens to publicly express their opinions and opposition in various forms, including questioning government policies and decisions"[19]. Moreover, which is important from the point of view of spontaneous assemblies, "not every presence of people in a certain number in one place must be considered an assembly [...] the mere presence of a group of people [...] can be an expression of support for a particular idea"[20].

Finally, it should be noted that, together with the amendment of December 13, 2016, a new chapter 3a was introduced into the Act. This chapter regulates issues related to the so-called cyclical assemblies, which are one of the most controversial legal solutions from the point of view of the entire Polish and European legal system. The introduction of cyclical assemblies results in the unauthorized – and clearly contradictory to the Constitution of the Republic of Poland – division between assemblies and society, which makes this regulation clearly contrary to the norms set out in art. 57 of the Polish Constitution[21]. The provisions of the constitution imply that everyone has the equal right to organize and participate in assemblies, irrespective of their origin, views, affiliation and other individual features. As a side note, it can be emphasized that, contrary to any logic and legal system, the Constitutional Tribunal, following the application for examination of the compliance of these solutions with the Polish Constitution, stated that the added legal norms are in accordance with the guidelines expressed in the Constitution[22].

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[18] Judgment of the European Court of Human Rights of 10 July 2012, case number 34202/06, Berladir and others v. Russia, http://www.echr.coe.int. See Judgment of the European Court of Human Rights of 17 May 2011, case number 28495/06, Akgöl and Göl v. Turkey, LEX No. 787429.

[19] Judgment of the European Court of Human Rights of 6 March 2007 in the case of Çiloğlu and Others v. Turkey, complaint 73333/01, § 51.

[20] Judgment of the European Court of Human Rights of 25 January 2005 in the case of Karademirci and Others v. Turkey, joined complaints 37096/97 and 37101/91, § 26.

[21] W. Skrzydło, op.cit., p. 68.

[22] Judgment of the Constitutional Tribunal of 16 March 2017, file reference number KP 1/17, OTK-A 2017/28.

III.

The organization of meetings can be practically unlimited. The only requirement is having full legal capacity, which excludes persons partially deprived of legal capacity, regardless of the scope of such restriction and the relationship with the subject of the organized meeting. Additionally, entities which own – in accordance with the Art. 4 par. 2 of the Act of Assembly Law – weapons, explosives, pyrotechnic articles or other dangerous materials or tools. One should agree with the position of the Court of Appeal in Bialystok, which emphasized that "in the event of a conflict of constitutionally guaranteed freedom of assembly with other rights, such as the right to security, to public order – freedom takes an equal position [...] the obligation of public administration bodies is not only formulating assumptions as to the possible risks arising from the planned assembly, but indicating and thoroughly identifying the negative aspects of the assembly in light of the specific circumstances of the case. This requires demonstrating that in the context of the circumstances of the specific case, the threat to human life or health, or property of considerable size is real"[23]. In turn, the Constitutional Tribunal in its judgment of January 18, 2006 indicated that "any gathering in the open air may cause difficulties for its use by other participants of collective life. It is obvious that these impediments should be as limited as possible in time and its range. The organizer of the meeting is obliged to consider the freedoms and rights of other participants of collective life"[24]. As a result, the very onerous nature of such an assembly cannot constitute a basis for restricting the constitutional freedom of assembly[25].

[23] Judgment of the Court of Appeal of 23 February 2017, file reference number I Acz 232/17, LEX 2240072; cf. judgment of the Supreme Administrative Court in Warsaw of 10 January 2014, file reference number I OSK 2538/13, LEX No. 1456989, judgment of the Provincial Administrative Court in Warsaw of 13 June 2012, reference number VII SA/Wa 1311/12, LEX No. 1356055 and judgment of the Supreme Administrative Court in Warsaw of 29 December 2011, reference number I OSK 2167/11, LEX No. 1149316.

[24] Judgment of the Constitutional Tribunal of 18 January 2006, reference number K 21/05, OTK-A 2006/1/4.

[25] B. Banaszak, *Prawo konstytucyjne*, Warsaw 2012, pp. 359–363.

IV.

The process of organizing assemblies is not complicated, although one should be particularly careful about the deadlines and keep in mind the "privileged nature" of some other forms of assemblies. At the beginning it is necessary to notify the commune authorities about the intention to organize the assembly, however it must be not earlier than thirty and not later than six days before the planned date of assembly[26]. The adopted solution aims to ensure that relevant information is provided to the relevant services. Depending on the type and place of organization of the assembly, information should be forwarded to the poviat police commander, the district police commander, the minister competent for foreign affairs, the Head of the Government Protection Bureau, or the Chief of the Marshal's Guard.

The notification may be made in various forms, including in writing, by fax, orally for the record, or by means of electronic communication. The receipt of the notification is recorded not only in the form of indication the day of its submission, but also the hour and minute of its submission. This is due to the fact that when organizing more than one assembly, the authorities must proceed in the order of receipt of the individual applications from the assembly organizers, and minutes may decide here. On the other hand, in the event of an oral notification being registered in the protocol, the order of accepting the application depends on the date, time and minute of the start of the preparation of protocol, and not its completion. As indicated by the analysis, the most dangerous form in terms of obtaining certainty as to the order of notification is notification via electronic means of communication. The decisive factor here is the date and time of entering information into the commune's ICT system. This means that electronic notification may not be treated as first, but as subsequent and will not be granted priority.

In practice, there is often a situation of parallel organization of competing assemblies. In this situation, the legislator has introduced rules regarding priority of place and time of organizing an assembly. In accordance with the Art. 12 of the Act of Assembly Law, if two or more assemblies are to be or-

[26] It should be noted that when organizing an assembly, which will take place in more than one commune, it is necessary to carry out the procedure for permission to organize an assembly in each of the communes.

ganized at least partly in the same place and time, and this may in turn lead to a threat to life or health or property, then the organizers who made the notification as the first one – have priority. Other applicants are invited to indicate a different, alternative place for the organization of the assembly[27]. In addition, from the point of view of security, the legislator prohibited the organization of two counter assemblies if they are about to take place at a distance of less than 100 m from each other.

It is worth emphasizing, however, that the distance norm should be interpreted together with the norms regarding the so-called cyclical assemblies (Article 26a of the Act of Assembly Law). The current wording of the Act introduces the absolute priority of cyclical assemblies, which from the point of view of their approval constitutes a solution that allows to block virtually any assembly that does not fit into a specific political or ideological line. Such a solution definitely violates the constitutionally guaranteed principle of equality of citizens before the law, unjustifiably privileging certain social groups. Moreover, legal differentiation of society results in a violation of the citizens' right to equal treatment. The European Court of Human Rights has made clear that the right to freedom of assembly under Art. 11 of the Convention is "a fundamental right of a democratic society and – like the right to freedom of expression – is one of the foundations of this society. States must not only protect the right to peaceful assembly, but also refrain from applying the unreasonable indirect restrictions of this right. In view of the fundamental importance of freedom of assembly and its close relationship with democracy, there must be recognized compelling and valid reasons for interfering with this right"[28].

V.

The amendment to the Act of 2016 introduced new legal solutions, although definitional issues were omitted, which in this case are essential for the correct

[27] It should be noted here that the content of this provision was amended by the Act of 13 December 2016 amending the Act – Law on Assemblies (Dz.U. 2017, No. 579).

[28] Judgment of the European Court of Human Rights of March 31, 2015, reference number 59109/08, Helsinki Committee of Armenia vs. Armenia, LEX No. 1661391.

application of the Act and guaranteeing observance of constitutional norms by public administration bodies. First of all, it should be pointed out that the cyclical nature of assemblies is determined by the descriptive norm referred to in art. 26a of the Act of Assembly Law. This right is granted to those assemblies that are organized by the same organizer "in the same place or on the same route at least 4 times a year according to a fixed schedule or at least once a year on public and national holidays, and such events took place over the past 3 years, though not in the form of assemblies, and were intended in particular to commemorate events of major importance and significance to the history of the Republic of Poland". This means that virtually any "organizer" can apply to the voivode for permission to organize assemblies on a regular basis. However, even a cursory analysis leads to the conclusion that the regulation adopted by the legislator is intentional. The adopted norm is directed at ensuring priority for assemblies having specific political and ideological character. Firstly, consent to organizing such assemblies is not issued by the commune authorities (as in the case of all other meetings) but by the voivode. Therefore, decisions are made by a body from the level of government administration (political body). In the process of determining the detailed rules of the course, place, date and time of the assembly, the local government unit was deprived of any decision-making power. Such a solution should be considered an interference with competences previously reserved only for local government – that is, interference with the nature of self-governance. Contrary to the ruling of the Tribunal, such a state should be considered inconsistent with the Constitution of the Republic of Poland. Secondly, doubts are raised by the content of the Art. 26a par. 1 of the Act of Assembly Law, conditions for qualifying a given event as a cyclical assembly. An extremely enigmatic catalog of events and circumstances that allow qualifying given events or happenings as privileged forms of assembly should not take place in the case of an act on statutory charter. As a result, entities organizing any form of meetings or happenings can apply for granting them the status of cyclical assembly. The arbitrariness of the competences of public administration bodies (in this case the voivode) may lead to recognition of each meeting of several or a dozen or so participants as a cyclical assembly having priority over other assemblies that are not entirely consistent with the government's policy. Such a solution undeniably violates the constitutional prin-

ciple of equality before the law and render the content of the Art. 57 of the Polish Constitution fictitious. Finally, it is worth to point out that cyclicality is also determined by whether the assembly was convened to celebrate important and significant events in the history of the Republic of Poland, and was organized at least once a year for three years. Such indefinite premises may cause that events known only to a narrow group of subjects of quasi-historical significance will take displace in the schedule the gatherings actually organized in order to manifest the views of their participants. It is difficult to make a political classification of certain events as being significant or not. The qualification of an assembly as significant results from social acceptance, the passage of time, and historical or strategic significance for the state. The introduction of such an imprecise provision to the content of the Act raises a great danger to the principle of equality and undeniably violates the Art. 32, as well as Art. 57 of the Polish Constitution.

It is important that the period of validity of consent for organization of regular meetings in accordance with the Art. 26d of the Act of Assembly Law is up to three years after organization of the first of the series of meetings. This means that in this specific time and place for a period of up to 36 months, no other assembly will be organized, in particular opposing the first in terms of ideological assumptions. This solution gives extremely strong power to government administration bodies to create political and social reality. Such an instrument is extremely dangerous from the point of view of a democratic and pluralist system. Its skilful use may in practice lead to the fact that the provision of the Art. 57 of the Constitution, which establishes the right to assembly, will become a fiction and could not find its practical application.

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