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Sabina Grabowska[1]

Right to Petition – Theoretical Analysis[2]

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Abstract

The subject of the article is a petition, or rather the right to submit it, understanding the concept of petition, as well as the nature of the petition and its relationship with the concepts of a complaint and a proposal in the context of Art. 63 of the Constitution of the Republic of Poland of 1997. The notion of the right to petition in both narrow and broad terms has been analyzed. The position of the doctrine on this issue was presented.

Streszczenie

Prawo do składania petycji – analiza teoretyczna

Tematem artykułu jest petycja, a właściwie prawo do jej złożenie, rozumienie pojęcia petycja, a także charakter petycji i jej relacja z pojęciami skargi i wniosku w kontekście art. 63 Konstytucji RP z 1997 r. Poddano analizie pojęcie prawa petycji zarówno w wąskim, jak i szerokim rozumieniu. Przedstawiono stanowisko doktryny w tej kwestii.

[1] ORCID ID: 0000-0003-0530-708X, Assoc. Prof., Department of Political and Media Systems, Institute of Political Science, College of Social Sciences, University of Rzeszow. E-mail: s.grabowska@ur.edu.pl.

[2] The article is a modified and updated version of the text published in the monograph: *Teoretyczne i praktyczne aspekty realizacji prawa petycji*, eds. R. Balicki, M. Jabłoński, Wrocław 2015.

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Pursuant to the provisions of the Art. 63 of the Constitution of the Republic of Poland of 1997, everyone has the right to submit petitions, complaints and motions in the public interest, for oneself or another person, with their consent, to public authorities or to social organizations and institutions in connection with their tasks commissioned in the field of public administration. This location of the petition together with the applications and complaints leads to a divergent position in the doctrine regarding the understanding of the right to petition. Basically, we can talk about three positions.

I.

Numerous scientists dealing with issues in the field of constitutional law, as well as the applicants of the draft act on petitions[3], claim that a petition is an institution different from complaints and motions due to a different subject, purpose or group of addressees. K. Działocha proves that "The right to petition is a separate (independent) law, different from complaints and motions, despite the common legal regulation in Art. 63. This results from defining the subjective right with a different, own name, putting it in the foreground of a constitutional provision. (…) There is no definition of the content of the petition, as well as the complaint and the motion, but what is important – the latter two institutions have found their more precise definition (defining their subject matter before the Constitution enters into force, because in the act – Code of Administrative Procedure in Art. 227 and 241), while the concept of the right to petition did not come to that (…). This state of affairs – the definition of the content (subject of) of complaints and requests in the absence of a substantially appropriate definition (subject of) of the right of petition – creates an additional reason for treating the petition as a separate legal institution"[4].

[3] Senate bill on petitions, Senate print No. 2135.

[4] K. Działocha, *Prawo petycji w obowiązującym ustawodawstwie i proponowane kierunki zmian*, "Opinie i Ekspertyzy. Prawo petycji w ustawodawstwie polskim" 2008, No. 85, p. 2.

The same view, in principle, was presented by the applicants of the draft act on petitions "despite the common legal regulation in Art. 63, the right to petition is a separate law, different from complaints and motions. It results from defining this subjective right with a different name, putting forward a petition in the order the provision of the Constitution of the Republic of Poland to the fore, as well as historical relations with such a law in the March Constitution of 1921 and comparative relations with petitions in the law of other democratic states"[5]. H. Zięba-Załucka also agrees with the opinion presented by the project applicants, claiming that the petition is a separate form of communication between the public and the authorities[6]. P. Winczorek specifies that "the purpose of the petition is to persuade the authorities to take a specific position on a matter or to take a decision expected by the interested party. The application, on the other hand, is a proposal to solve a problem in the manner indicated by the applicant, to make a decision, the content of which the applicant suggests, etc."[7].

Also B. Banaszak differentiates these three laws: "These differences are manifested even in the traditionally wider circle of petitioners than in complaints and motions. I mean here the Sejm and the Senate as the addressee of the petition. by both houses of parliament. The enactment of the law on petitions will emphasize not only their systemic importance, but will also highlight these differences, which will not allow them to be treated as a specific type of application or complaint"[8].

A different position is presented mainly by representatives of administrative law science, who believe that the petition should be treated analogously as a complaint or a motion, depending on its subject matter. On the other hand, the use of the names petition, complaint, motion was "a certain ornament, devoid of its own normative content"[9]. This view is also converged

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[5] Justification for the draft act on petitions, Senate Print No. 1036, p. 2.

[6] H. Zięba-Załucka, *Prawo petycji w Rzeczypospolitej Polskiej*, "Przegląd Prawa Konstytucyjnego" 2010, No. 4, p. 18.

[7] P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warsaw 2000, p. 86.

[8] B. Banaszak, *Opinia na temat projektu ustawy o petycjach*, [in:] *Opinie prawne na temat projektu ustawy o petycjach*, "Opinie i Ekspertyzy OE-115", Warsaw 2009, p. 5.

[9] A. Jaroszyński, *Opinia w sprawie projektu ustawy o petycjach*, [in:] *Opinie prawne …*, p. 10.

by J. Borkowski[10] and J. Lang[11], or M. Wierzbowski, who claim that the functional identity and homogeneity of petitions, applications and complaints reflects "the right to petition, which has been recognized for centuries, i.e. the right of citizens to address requests and complaints to authorities"[12].

Also R. Piotrowski treats the petition, depending on the content, either as a complaint or as a request "From this point of view, the petition – depending on its content – may be considered a complaint (pursuant to Art. 227 of the Code, the subject of a complaint may be, in particular, negligence or improper performance tasks, violation of the rule of law or the interests of the complainants, as well as lengthy or bureaucratic handling of cases) or a request (pursuant to Art. 241 of the Code, the subject of a request may in particular be matters of improving the organization, strengthening the rule of law, improving work and preventing abuse, protection of property, better satisfaction of needs)"[13]. Then he states that "One can get the impression that the legislator has not thoughtfully combined institutions of different importance. The respectable institution of petitions – that is, collective statements of citizens in important public matters – was juxtaposed with the conclusions and complaints known from pre-constitutional system practice, from rules y devoid of political importance, although significant due to the lack of more effective means of asserting rights by citizens. In this way, the constitution-maker, in a sense, trivialized the institution of the petition, depriving it of its identity related to the possibilities it could create as a means of dialogue with the authorities"[14].

Some specialists in the field of study of constitutional law – incl. W. Sokolewicz, L. Wiśniewski, W. Orłowski – are inclined toward a different understanding of the petition law than the indicated ones. L. Wiśniewski argued that the right to petition consists of individual complaints and petitions as

[10] J. Borkowski, [in:] *Kodeks postępowania administracyjnego. Komentarz*, eds. B. Adamiak, J. Borkowski, Warsaw 2009, p. 668.

[11] J. Lang, *Wybrane problemy prawnej regulacji wykonywania prawa do składania skarg i wniosków,* "Acta Universitatis Wratislaviensis, Prawo" 1990, vol. CLXVIII, p. 167.

[12] *Postępowanie administracyjne,* ed. M. Wierzbowski, Warsaw 2005, p. 244.

[13] R. Piotrowski, *Konstytucyjne uwarunkowania prawa petycji oraz pożądanych kierunków zmian legislacyjnych w tym zakresie,* "Opinie i Ekspertyzy. *Prawo petycji w ustawodawstwie polskim*" 2008, No. 85, p. 27.

[14] R. Piotrowski, op.cit., p. 26.

well as collective petitions, i.e. "petitions are a group application, and individual actions are taken by means of an application (pursuant to Art. 241 of the Code of Administrative Procedure – S.G.)"[15].

W. Sokolewicz believed that a "petition differs from complaints and applications in that it is always collective authorship – it is submitted on behalf of a group of entities, and includes, inter alia, a demand for a specific action by the authorities (…), therefore, the petition may correspond to legal and substantive characteristics of both the application and, more rarely, the complaint"[16]. According to J. Lipski "very often submissions to the authorities combine elements of a petition, applications and complaints (…) The subject of a petition (application) may be any legal action, i.e. general and individual legal acts, as well as facts or lack of action by competent authorities or employees (inaction, omission)"[17].

W. Orłowski notes that a petition should be considered a petition made by a group of persons in the public or individual interest, while an application is an individual right and is submitted by one entity. Thus, according to W. Orłowski, the right to submit an application is an individual right of an individual, and collective applications are petitions and there is no difference as to their subject matter[18]. He also states: "Personally, however, I believe that due to the political traditions of other countries, petitions should be treated rather as an institution closer to the conclusions"[19].

Such an understanding of the concept of petition may justify the thesis that it takes precedence over the notions of a complaint and a motion. E. Wójcicka states that after 1989 most constitutions of post-socialist countries replaced complaints and conclusions with a broader concept, ie. the right of petition. The analysis of the constitutional regulations of contemporary states

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[15] L. Wiśniewski, [in:] *Biuletyn z XVI Posiedzenia KKZN w dniu 21–22 marca 1995* r., Warsaw 1995, p. 66.

[16] W. Sokolewicz, *Komentarz do art. 63,* [in:] *Konstytucja Rzeczypospolitej Polskiej, Komentarz*, vol. IV, ed. L. Garlicki, Warsaw 2005, p. 4.

[17] J. Lipski, *Prawo do petycji, skarg i wniosków w polskim systemie prawnym*, "Zeszyty Prawnicze Biura Studiów i Ekspertyz kancelarii Sejmu" 2004, No. 4, p. 119.

[18] W. Orłowski, *Prawo składania petycji, wniosków i skarg*, [in:] *Wolności i prawa polityczne*, ed. W. Skrzydło, Zakamycze 2002, p. 159.

[19] W. Orłowski, *Konstytucyjne uwarunkowania prawa petycji,* "Opinie i Ekspertyzy. *Prawo petycji w ustawodawstwie polskim*" 2008, No. 85, p. 11.

also supports the deduction of complaints and conclusions from one source – petitions[20]. The author's analysis of more than eighty constitutions of modern countries providing for the right to petition leads to the conclusion that most of them use the concept of petition to include all submissions to public authorities, regardless of their name, or name different statements by name, considering them as different forms of petition[21].

The right to petition has never been of an imperative nature, i.e. it has not imposed an order on the addressee to comply with the demands contained in the petition. As E. Wójcicka points out, due to the obligation of the public authority to accept and consider the petition, but not to implement its demands, and thus lack of binding force, the right to petition should be considered as one of the forms of semi-direct democracy[22]. M. Jabłoński also proves that the direct exercise of power cannot be called procedures which do not oblige representative bodies to take specific actions according with the voting will[23]. On the other hand, P. Uziębło states "This intermediate form, creating a kind of demarcation belt between the two classic forms of democracy, is usually called semi-direct (semi-direct) democracy. It may include all instruments that assume the participation of a collective subject of sovereignty or a specific group of people, included in the decision-making process, although the final decision in such a case rests with public authorities, usually bodies of representative character"[24].

II.

The right to petition is a form of individual participation in public life, but most of all it is a right of a political nature, which is proved by its placement by the constitutional maker in the subsection of the Constitution entitled "Political

[20] E. Wójcicka, *Ocena regulacji konstytucyjnej prawa petycji – postulaty de lege ferenda*, [in:] *Konieczne i pożądane zmiany Konstytucji RP z 2 kwietnia 1997 r.*, eds. B. Banaszak, M. Jabłoński, Wrocław 2010, p. 241.

[21] E. Wójcicka, *Petycja w prawie konstytucyjnym państw współczesnych*, "Ius Novum" 2008, No. 2, pp. 28–29.

[22] E. Wójcicka, *Prawo petycji w Rzeczypospolitej Polskiej*, Warsaw 2015, p. 147.

[23] M. Jabłoński, *Referendum ogólnokrajowe w polskim prawie konstytucyjnym*, "Acta Universitatis Wratislaviensis, Prawo" 2001, vol. CCXXIV, p. 17.

[24] P. Uziębło, *Demokracja partycypacyjna. Wprowadzenie*, Gdańsk 2009, p. 18.

rights and freedoms". At the stage of work in the Constitutional Committee of the National Assembly, expert P. Sarnecki argued that the right to petition is a manifestation of citizens' participation in the exercise of sovereignty[25].

K. Działocha proves that "its character as a political right also results from the fact that petitions are submitted to public authorities in the public interest, and when they are submitted to social organizations and institutions, they should be related to the tasks entrusted to them in the field of public administration"[26]. In the opinion of W. Orłowski, "the intention of the legislator is to emphasize that such a setting of the universal right of petition should be exercised in the public interest. This is what determines that they should be treated as a political right"[27]. The thesis that a petition should concern public matters, as indicated in Art. 63 of the Constitution, that petitions may be brought in the public interest and are addressed to public authorities and entities performing tasks in the field of public administration, was also confirmed by the Constitutional Tribunal, stating that the right to petition does not include the possibility of initiating court proceedings[28].

It seems reasonable to say that the petitions, complaints and requests presented together in Art. 63 of the Constitution constitute three different ways of implementing the constitutional right of petition[29]. However, the legislator did not indicate the individual characteristics of each of these instances in any of the legal acts. The lack of clear boundaries between petitions, complaints and applications is indicated, among others, by W. Sokolewicz[30], B. Banaszak[31], P. Winczorek[32].

From the inclusion of petitions, complaints and motions in the same provision of the Constitution, it can be concluded that they serve the same constitutional right. The provisions of Art. 63 of the Constitution uniformly define

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[25] *Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego 1995*, No. XVIII, p. 22.

[26] K. Działocha, op.cit., p. 2.

[27] W. Orłowski, *Konstytucyjne uwarunkowania prawa…*, p. 10.

[28] Judgment of the Constitutional Tribunal dated November 16, 2004, file ref. No. P 19/03, OTK-A ZU 2004, No. 10, item 106.

[29] M. Florczak-Wątor, *O potrzebie ustawowego uregulowania trybu rozpatrywania petycji*, "Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu" 2013, No. 2, p. 29.

[30] W. Sokolewicz, op.cit., p. 4.

[31] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2009, p. 323.

[32] P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej*, Warsaw 2000, p. 86.

the entity that may submit a petition, complaint and motion (i.e. each) and the entity that may be the addressee of each of these speeches (i.e. a public authority or organization and social institution performing tasks commissioned in the field of public administration), as well as the subject of petitions, complaints and motions, which are matters falling within the competence of state authorities and matters relating to tasks commissioned in the field of public administration performed by social organizations and institutions. However, each of these occurrences has its own name, that is, it must have features that are unique to it only, which the other forms do not.

One should agree with the opinion of E. Wójcicka, who states that: "the solutions proposed by some authors limiting the petition only to collective statements are an unnecessary restriction of the right to petition, which – based on the principle of universality – has given every individual present your case"[33]. As also noted by M. Florczak-Wątor: "the legitimacy of this thesis is also confirmed by the fact that during the constitutional work it was postulated that it should be clearly stated that the petition may be of a collective as well as individual nature. a petition may be brought by anyone in the public interest, own interest or that of another person, it may be considered a specific consideration of this postulate"[34].

Both imprecise constitutional regulations and the lack of clarification in the act of the concept of petition result in the lack of precise boundaries between the application, complaint and petition. The thesis of E. Wójcicka seems to be justified, as she claims that the right to petition is an institution that allows anyone, individually or jointly with others, to refer to public authorities in the public or personal interest. A petition is an institution with a great deal of content, which in practice may take the form of a petition, complaint, request, appeal, remark. These measures have a similar purpose and function and the notion of petition should be given priority[35].

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[33] E. Wójcicka, *Ocena regulacji konstytucyjnej prawa petycji…*, p. 238.

[34] M. Florczak-Wątor, op.cit., p. 32. Senator A. Grześkowiak, during the work on the new constitution at the KKZN meeting, suggested adopting the provision in the wording of Art. 42 of the Senate draft Constitution of the Republic of Poland – Citizens have the right to submit individual or collective petitions to any state and local government authorities. See Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego 1995, No. XV.

[35] E. Wójcicka, *Prawo petycji w Rzeczypospolitej…*, p. 28.

The legislator also uses a broad understanding of the term petition. In Art. 233 para. 1 of the Constitution states: "the act defining the scope of limitations of human and civil freedoms and rights during martial law and emergency may not limit the freedoms and rights specified in (…) Art. 63 (petitions)". Thus, the term "petition" has been used in this case as a broader term to include all statements contained in Art. 63, i.e. a complaint, motion and petition.

III.

The broad understanding of the right to petition referred to in Art. 63 and Art. 233 para. 1 of the Constitution, leads to the conclusion that the right to petition covers complaints and motions, but their essence does not end there. So, if the petition in this Art. 63 is mentioned on a par with the complaint and the application, this concept must also contain some additional (own) content. Therefore, a petition can also be understood as postulates, requests, appeals, demands or other statements that are not complaints and requests[36]. As noted by B. Banaszak, such terms: "serve to express a similar purpose (…). It is to provide state authorities with certain information with the intention of causing action (…). It is because of this common feature that the doctrine of public law adopted the general name of petition for all these measures"[37]. M. Florczak-Wątor states that "An example of a petition that is not a petition or complaint within the meaning of the Code of Administrative Procedure may be a citizen's request to the parliament with a request to start legislative work on a specific matter"[38].

When analyzing the meanings of the concept of petition, the first of which assumes that the concept of petition is equivalent to the concepts of a complaint and an application, the second, which states that the concept of petition is superior to these concepts, but also contains its own content, it should

[36] M. Florczak-Wątor, op.cit., p. 40.

[37] B. Banaszak, *Prawo obywateli do występowania ze skargami i wnioskami*, Warsaw 1997, p. 7.

[38] M. Florczak-Wątor, op.cit., p. 40.

be considered that these two understanding of the concept of petition does not have to contradict each other.

Petition, motion and complaint, i.e. the terms which make up the content of Art. 63 of the Constitution, in both senses are considered separate from the others. Both positions of the doctrine also agree that petitions, complaints and motions are a form of realization of the same constitutional right, that is the right of petition in the sense of the right to refer to the authorities with specific demands. Thus, the concept of petition can be understood strictly, as one of the three types of statements mentioned in Art. 63 of the Constitution and the concept of petition in the broad sense, that is, so called by the constitutional legislator, almost as defined in the provision of Art. 233 para. 1 of the Constitution. Also, in the doctrine, such an interpretation of the concept of petition finds its supporters, e.g. W. Sokolewicz states that: "The right to petition (…) in the light of Art. their object and purpose, directed to any entities exercising powers and/or tasks of public authority under the Act. Whether a right is a petition (application, complaint) is determined by its content, not an external form, in particular the name given to it by author"[39].

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[39] W. Sokolewicz, op.cit., p. 3–4.

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