

Michał Balcerzak¹ Agnieszka Bień-Kacała²

Do Armed Forces Personnel Need a Trade Union? The Perspectives of European Standards and the Constitution of the Republic of Poland on Freedom of Association

Keywords: human rights, trade unions, Council of Europe, Constitution of the Republic of Poland, freedom of association, Armed forces personnel, Organization for Co-operation and Security in Europe

Słowa kluczowe: związki zawodowe, prawa człowieka, Rada Europy, Konstytucja RP, wolność zrzeszania się, Personel Sił Zbrojnych, Organizacja Współpracy i Bezpieczeństwa w Europie

Abstract

The article aims to discuss the European standards concerning the freedom of association of armed forces personnel. Relevant norms in this regard result from human rights treaty law but also from soft-law elaborated within the Council of Europe. The authors juxtapose the existing standards with the scope of the freedom of association provided in Polish Constitution of 1997 and relevant domestic law. They ask whether the armed forces personnel need to form and join trade unions to secure their rights or perhaps the existing forms of exercising the freedom of association are satisfactory? The authors conclude that the current legal solutions in Poland meet the European and constitutional standards, and allow the Polish Armed Forces to observe neutrality regarding politi-

¹ ORCID ID: 0000-0002-6421-1742, Assoc. Prof., Department of International Security, Faculty of Political and Security Sciences, Nicolaus Copernicus University in Toruń. E-mail: michal.balcerzak@umk.pl.

² ORCID ID: 0000-0002-9559-3130, Assoc. Prof., Department of Human Rights, Faculty of Law and Administration, Nicolaus Copernicus University, Toruń. E-mail: abien@umk.pl.

cal matters. Nevertheless, the prohibition to form and join trade unions in Polish armed forces is of statutory rather than constitutional origin.

Streszczenie

Czy siły zbrojne potrzebują związków zawodowych? Perspektywa standardów europejskich i konstytucyjnych w zakresie wolności zrzeszania się

W artykule omówiono standardy europejskie dotyczące wolności zrzeszania się przez personel sił zbrojnych. Normy w tym zakresie wynikają z prawa traktatowego dotyczącego praw człowieka, lecz także z aktów soft-law, opracowanych w ramach Rady Europy. Autorzy zestawiają istniejące standardy z zakresem ochrony wolności zrzeszania się na podstawie polskiej Konstytucji z 1997 r. i właściwych przepisów prawa krajowego. Autorzy stawiają pytanie, czy personel sił zbrojnych potrzebuje tworzyć związki zawodowe i przystępować do nich, aby zabezpieczyć swoje prawa, czy też istniejące formy wykonywania wolności zrzeszania się są wystarczające? Autorzy konkludują, że obecne rozwiązania prawne w Polsce co do zasady spełniają standardy europejskie i konstytucyjne oraz pozwalają Siłom Zbrojnym RP na przestrzeganie neutralności w sprawach politycznych. Skądinąd zakaz tworzenia i przystępowania do związków zawodowych w Siłach Zbrojnych RP nie został umocowany w Konstytucji RP, lecz na poziomie ustawowym.

✱

I.

The issues concerning human rights of armed forces personnel are not necessarily at the forefront of debates concerning international or constitutional human rights law. It is probably more common to focus on the rules which govern the 'human dimension' of conducting hostilities with the engagement of military personnel, i.e. the international humanitarian law which is applicable in international and non-international armed conflicts.

But notwithstanding of how much attention is paid to international and constitutional protection of human rights in the armed forces, one should stress that military personnel is by no means deprived of international and domestic 'umbrella' of human rights, even if the special character of military

duties may result in certain limitations. The European standards in this regard have been significantly strengthened in the first two decades of the 21st century. This essay highlights the applicable European standards, while focusing on one selected issue: the freedom of association by members of armed forces personnel and their right to form and join trade unions.

Let us also stress that we consider the problem solely from the perspective of soldiers as right-holders and not duty-bearers, though it is clear that military personnel may appear in both roles. That is however not covered by the theme and scope of the present article. Further, we focus on the rights of members of armed forces in active military service, while noting that the notion ‘armed forces personnel’ may also refer to non-military (civil) personnel in other contexts.

We discuss firstly the European human rights standards in relation to armed forces personnel, then we provide the relevant constitutional standard and jurisprudence of the Polish Constitutional Tribunal, followed by concluding remarks.

II.

The scope of human rights-related problems of armed forces personnel has been relatively broad. This includes *inter alia* issues related to military justice and military discipline, status of women in the armed forces, some reported instances of abuses, brutality, institutional bullying and sexual harassment, difficulties in joining professional associations or trade unions, restrictions on electoral rights, etc. Of course, the above indicated problems did not characterize each and every military in Europe. Nevertheless, they brought the attention of the Parliamentary Assembly of the Council of Europe (CoE), which in 2006 recommended that the Committee of Ministers (CoM) prepare and adopt a recommendation for member states designed to guarantee respect for human rights by and within the armed forces³.

The impulse from the Parliamentary Assembly has proven successful and following a more in-depth elaboration of the topic, the Steering Committee

³ Recommendation 1732 (2006) of the Parliamentary Assembly of the Council of Europe, adopted on April 11, 2006.

for Human Rights (CDDH) set up a working group entrusted to draft a recommendation on human rights of members of armed forces. The final document was adopted by the CoM in February 2010⁴ and can be considered as a modern catalogue of human rights of military personnel. Even though the recommendations of the CoM are soft-law instruments and do not have binding force, one should stress that a considerable part of the 2010 Recommendation is based on treaty obligations of the CoE member states. This is reflected in the language of the instrument, with ‘shall’ reflecting an already existing obligation, and ‘should’ introducing elements of added normative value.

In any event, the 2010 Recommendation is heavily based on the provisions of the European Convention on Human Rights⁵ (ECHR, Convention), the relevant case-law of the European Court of Human Rights, as well as other applicable standards, such as those resulting from the European Social Charter⁶. The scope of the present essay does not allow for a detailed discussion of all these standards but one general observation should be made: the 2010 Recommendation is not just a set of norms drafted without proper acknowledgment of special characteristics of military life. The drafters were aware of the fact that operational effectiveness and military discipline are two sides of the same coin, however, neither of these factors should be considered as justifying departures from human rights standards.

III.

We shall focus on one particular standard: the freedom of association of armed forces personnel⁷. One should start by noting that this freedom is traditionally associated with the freedom of assembly and constitutes part and parcel

⁴ Recommendation CM/Rec (2010)4 on the human rights of members of the armed forces, adopted by the CoM on February 24, 2010.

⁵ Convention on the Protection of Human Rights and the Fundamental Freedoms, adopted on November 4, 1950, European Treaty Series No. 005.

⁶ Adopted on October 18, 1961, European Treaty Series No. 035, and the revised version of the Charter, adopted on May 3, 1996, European Treaty Series No. 163.

⁷ The freedom of association of armed forces personnel was highlighted in the resolution of the European Parliament *on the right of members of the armed forces to form associations*, adopted on April 12, 1984 (Official Journal of the European Communities, C 127, p. 86). It

of the catalogue of human rights guaranteed in hard-law instruments, such as the ECHR. Its Art. 11 (1) provides that everyone has the right to freedom of peaceful assembly and of freedom of association with others, including the right to form and to join trade unions for the protection of his interests. However, there is an explicit caveat in Art. 11 sec. 2 of the ECHR, which in relevant part stipulates: 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 administration of the State.

The 2010 Recommendation refers to the discussed standard and also recalls that any restrictions placed on the exercise of the freedom of association must comply with Art. 11 sec. 2 of the ECHR, i.e. the so-called limitation clause⁸. The latter provides for specific tests that are to be applied in order to determine whether the restrictions of a particular right or freedom can be considered in accordance with the Convention. Like many other rights and freedoms guaranteed under the ECHR, the freedom of assembly and association is not absolute. However, an interference into the scope of this freedom can only be justified, if it was prescribed by law ('test of legality'), necessary in a democratic society ('test of necessity') and undertaken in the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others.

Insofar as the freedom of assembly and association is concerned, the 2010 Recommendation does not however limit itself to paraphrasing Art. 11 of the ECHR, but goes a step further by stating that members of the armed forces 'should' have the right to join independent organisations which represent their interests. They should also have the right to organise and to bargain collectively⁹. These standards expand but in no way contradict the general freedom of association as enshrined in Art. 11 of the ECHR. Given the mixed practice of the European states as to scope of freedom of association in the armed forces, the 2010 Recommendations encourages the states to lift 'unnecessary and disproportionate' restrictions on the right to assembly and associations.

refers to the resolution adopted by the Parliamentary Assembly of the Council of Europe on May 8, 1979 ('Declaration on the Police').

⁸ Para. 53 of the 2010 Recommendation.

⁹ Para. 54 of the 2010 Recommendation.

Importantly, the 2010 Recommendation provides that a mere participation in the activities of lawfully established military associations or trade unions should not constitute a reason to any disciplinary action or discriminatory measure against members of the armed forces. Any such consequences of exercising the freedom of association by military personnel would obviously have a chilling effect and run counter the very essence of this human rights guarantee.

One should note that notwithstanding the participation in associations and trade unions, the 2010 Recommendation also highlights the general right of members of armed forces to join political parties ‘unless there are legitimate grounds for certain restrictions’¹⁰. The soft-law instrument adds that such political activities may be prohibited on legitimate grounds, in particular when a member of the armed forces is on active duty.

In essence, the European standard of the right to freedom of assembly and association in case of armed forces personnel has been shaped with due regard to Art. 11 of the ECHR, including the latter’s explicit reference to ‘lawful restrictions’ on the exercise of these rights by members of armed forces. However, we should underline that the restrictions allowed for in Art. 11 sec. 2 of the ECHR cannot be interpreted as depriving armed forces personnel of the right to join ‘independent organizations’. As a matter of fact, in many European countries there exist military associations or unions, with different degree of autonomy and competences¹¹. The European Court of Human Rights stressed in its case-law that the restrictions provided in Art. 11 sec. 2 should be construed narrowly and they cannot affect the crucial elements of the freedom of association¹². This includes the right to form and join trade unions also in case of armed forces personnel. In other words: European standards do not limit *per se* the right of members of armed forces to form and join trade unions, even though many European states (including Poland) explicitly prohibit soldiers to do so.

¹⁰ Para. 56 of the 2010 Recommendation.

¹¹ *Human Rights of Armed Forces Personnel: Compendium of Standards, Good Practices and Recommendations*, OSCE Office for Democratic Institutions and Human Rights (ODIHR), Warsaw 2021, p. 107. There is also an ‘umbrella’ organization, i.e. the European Organisation of Military Associations and Trade Unions – EUROMIL (www.euromil.org).

¹² *Matelly v. France*, judgment of the ECtHR of October 2, 2014, application No. 10609/10, paras. 57–58.

IV.

Taking into account constitutional standards, it has to be noted that the Polish Constitution of 1997¹³ does not limit *expressis verbis* any rights of armed forces personnel. In fact, no professional status of any kind affects constitutionally guaranteed rights and freedoms¹⁴. The freedom of association may serve as a prominent example. According to the Art. 58 of the Polish Constitution, the freedom of association shall be guaranteed to everyone. Therefore, freedom of association is guaranteed not only to citizens, but also to foreigners¹⁵. However, this freedom may be limited on the grounds of constitutional rules¹⁶. The Constitution provides for the general limitation clause stating that “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”¹⁷.

In a separate provision, the Polish Constitution ensures the freedom of association in trade unions, socio-occupational organizations of farmers, and in employers’ organizations (Art. 59). Although this freedom relates to the economic and social status of workers, the Constitution includes it into the catalogue of political rights¹⁸. The symbolism of the freedom of trade unions is a Polish particularity and derives from the experience of the second half of the twentieth century when the workers’ strikes and the ‘Solidarity’ trade union were of political nature. It should be added that the Constitutional Tribunal (hereinafter: CT, Tribunal)¹⁹ has stressed sev-

¹³ Constitution of the Republic of Poland of April 2, 1997 (Dz.U.No. 78, item. 483 as amended).

¹⁴ A. Bień-Kacała, *Konstytucyjne prawa i wolności żołnierzy zawodowych*, “Prawo i Administracja” 2006, t. 5, p. 35–53.

¹⁵ The CT judgments of: 15.7.2009 (K 64/07), January 12, 2012 (K 10/09).

¹⁶ Ł. Pisarczyk, *Artykuł 58*, [in:] *Konstytucja RP*, t. I, *Komentarz do art. 1–86*, ed. M. Safjan, L. Bosek, Warsaw 2016, p. 1379.

¹⁷ Art. 31 sec. 3 of the Polish Constitution.

¹⁸ A. Sobczyk, J. Zagrobelny, *Artykuł 59*, [in:] *Konstytucja RP*, t. I, *Komentarz do art. 1–86*, ed. M. Safjan, L. Bosek, Warsaw 2016, p. 1387 et seq.

¹⁹ The CT judgment of 17.11.1998 (K 42/97).

eral times that in the Polish reality trade unions played the role of ‘quasi-political parties’²⁰.

The perception of trade unions as quasi-political parties results in the extraction of the freedom of trade unions from general freedom of association. The Constitutional Tribunal recognises the freedom of association under Art. 58 and the freedom of association defined in Art. 59 as two separate components of a larger whole, which is a ‘universal human freedom in the field of various types of voluntary associations, expressing the need for self-realization and protection of interests’²¹. However, such distinction allowed the Parliament to differentiate the legal situation of associations and trade unions. There exist also different rules of limiting these freedoms. The freedom of association can be limited according to the general rule. On the other hand, the freedom of trade unions may only be subject to such statutory limitations as are permissible in accordance with international agreements to which the Republic of Poland is a party. As mentioned in part II, Art. 11 of the ECHR, allows for ‘lawful restrictions’ on the exercise of this right by members of armed forces.

The justification for the limitation is based on the Constitution²² and explained by the ‘mission’ of the Armed Forces in safeguarding the independence and territorial integrity of the State²³. Further, the Armed Forces have a constitutional obligation to observe neutrality regarding political matters. The neutrality principle has its roots in history and it reflects the introduction of the 1981 Martial Law in the collective memory. The 1981 Martial Law was planned and imposed by the members of the Armed Forces who held high positions in the socialist state. Having that historical legacy in mind, the Polish parliament decided to limit the freedom of association in relation to political matters²⁴ and the freedom to form and join the trade unions²⁵. The latter

²⁰ A. Bień-Kacała, *Dissolution of political parties by the Polish Constitutional Tribunal in light of the Venice Commission’s standards and decisions*, “*Studia Iuridica Auctoritate Universitatis Pécs Publicata*” 2017, vol. 154, p. 29–44.

²¹ The CT judgments of: March 13, 2000 (K 1/99), 12.7.2010 (P 4/10).

²² See Art. 26 of the Polish Constitution.

²³ P. Grzebyk, *Artykuł 26*, [in:] *Konstytucja RP*, t. I, *Komentarz do art. 1–86*, ed. M. Safjan, L. Bosek, Warsaw 2016, p. 684 et seq.

²⁴ Art. 106 of the Act of September 11, 2003 on the military service of professional soldiers (Dz.U. 2021, item 1131).

²⁵ *Ibidem*, Art. 108.

limitation was also the result of the above-mentioned role of the trade unions which may sometimes exhibit political aspirations.

In its judgement of March 7, 2000²⁶ the CT decided that the limitation of the freedom of armed forces personnel to form and join trade unions conforms with the Polish Constitution and Art. 11 of the ECHR. The Tribunal indicated that the limitation was compensated by other constitutional and sub-constitutional measures. The armed forces personnel may exercise their rights and freedoms before courts or submit their concerns to the Commissioner for Human Rights. The personnel may also take part in non-political assemblies and exercise its freedom of association in organizations that do not have political character. In addition, professional soldiers may form representative bodies and express their non-political demands this way²⁷.

V.

In conclusion, we would like to address the question raised in the title. It may be observed that the statutory prohibition of freedom to form and join trade unions in the case of armed forces personnel conforms with the Polish Constitution and the ECHR. On a more axiological level, it is justified by the special 'mission' of Armed Forces, its neutrality and historical legacy. However, we should bear in mind that contemporarily, the Armed Forces personnel are engaged even more in actions that go beyond safeguarding the independence and territorial integrity of the State, as well as ensuring the security and inviolability of its borders. The experience of fighting the COVID-19 pandemic shows that there are still matters that could be better addressed by the representative organisations of armed forces personnel.

²⁶ The CT judgment of March 7, 1998 (K 26/98).

²⁷ In the Polish army the status and functioning of such organizations is governed by the Regulation of the Minister of National Defense of June 28, 2004 on representative bodies of professional soldiers (Dz.U.No. 150, item 1585).

Literature

- Bień-Kacała A., *Dissolution of political parties by the Polish Constitutional Tribunal in light of the Venice Commission's standards and decisions*, "Studia Iuridica Auctoritate Universitatis Pécs Publicata" 2017, vol. 154.
- Bień-Kacała A., *Konstytucyjne prawa i wolności żołnierzy zawodowych*, "Prawo i Administracja" 2006, t. 5.
- Grzebyk P., *Artykuł 26*, [in:] *Konstytucja RP*, t. I, *Komentarz do art. 1–86*, ed. M. Safjan, L. Bosek, Warsaw 2016.
- Human Rights of Armed Forces Personnel: Compendium of Standards, Good Practices and Recommendations*, OSCE Office for Democratic Institutions and Human Rights (ODIHR), Warsaw 2021.
- Pisarczyk Ł., *Artykuł 58*, [in:] *Konstytucja RP*, t. I, *Komentarz do art. 1–86*, ed. M. Safjan, L. Bosek, Warsaw 2016.
- Sobczyk A., Zagrobelny J., *Artykuł 59*, [in:] *Konstytucja RP*, t. I, *Komentarz do art. 1–86*, ed. M. Safjan, L. Bosek, Warsaw 2016.