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Amendments to the Law on Assemblies Against the Background of the Constitutional Freedom of Assembly in Poland

... the right of peaceful assembly and petition (...) is a constitutional substitute for the revolution².

Abraham Lincoln

1. Introduction

Article 57 of the Polish Constitution³ outlines one of the fundamental human and civil freedoms: freedom of assembly, stating that “[e]veryone shall be guaranteed the freedom to organize and participate in peaceful assembly. The limitation of this freedom may be determined by law”.

This freedom is sometimes called the core of democratic systems and societies. It stems from the role that freedom of assembly plays in modern states, but also from its colliding with other foundations of democracy and political pluralism and freedoms such as freedom of speech or association. Recently, however, both domestic and foreign literature has been able to find views that freedom of speech and association have nowadays absorbed the freedom of assembly, that it has been pushed into the background, or that it is even completely subordinated to freedom of speech⁴.

However, such degrading treatment of freedom of assembly ignore its expressive potential. It should not be forgotten that freedom of assembly is a great value of democratic societies, and in most cases its violation goes hand in hand with violations of other constitutional rights and freedoms. Its implementation is nothing more than a direct

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² *Letter from Abraham Lincoln to Alexander H. Stephens, 19 January 1860*, in: G.A. Tracy (ed.) *Uncollected Letters of Abraham Lincoln*, Boston–New York 1917, <https://www.questia.com/library/1553459/uncollected-letters-of-abraham-lincoln>, accessed on: 19 October 2020.

³ The Constitution of the Republic of Poland of 2 April 1997 (Polish title: *Konstytucja Rzeczypospolitej Polskiej z 2.04.1997 r.*, Dz. U. Nr 78, poz. 483 ze zm.), hereinafter: “the Constitution”.

⁴ L. Oja, *Right to Freedom of Assembly in Europe: How are the Domestic Regulations able to address the Developments and Potential Problems of the Right to Freedom of Assembly in the light of the International Standard of the Right?*, <https://tinyurl.com/y3xbeuxe>, accessed on: 10 June 2020, p. 10.

reflection of the attitude of those in power to the exercise of human and civil rights and freedoms in the given state.

It is precisely the statements that marginalize the contemporary importance of freedom of assembly and the amendments to the Law on Assemblies⁵ that have become a direct stimulus for me to write this article and to recall in it its essence and meaning.

2. The concept of freedom of assembly

In the Constitution of the Republic of Poland, freedom of assembly has been placed among the political freedom and rights *sensu largo*⁶, i.e. in the category of freedom rights⁷. Such rights are determined by the norms of positive law and they define the spheres of behaviour of an individual, free from interference of the state and other individuals (other entities). In this sense, the freedom right, although it would be more precise to include the sphere free from interference by the state and other individuals, is determined by the content of the applicable legal norm. This norm determines, in parallel, the scope of actions necessary for an individual to take in order to exercise a constitutionally guaranteed freedom⁸. This freedom is associated with rights that do not derive directly from enactments. The law only defines the limits which, if respected, give us the opportunity to exercise it legally. As Jacek Sobczak aptly remarks, freedom has so many meanings and interpretations that it is impossible to define it unambiguously⁹. Nevertheless, Adam Łopatka states that it is an opportunity to make decisions and act according as one chooses¹⁰. In a similar tone, Wojciech Lis and Zbigniew Husak explain that:

The freedom of the individual is realized by the possibility, independence and freedom to make such decisions as one chooses. Freedom is a natural and inalienable value to which every human being is entitled in a simple, natural way. Legal instruments do not create freedom, they are not a source of freedom, but merely confirm its existence¹¹.

Then it needs to be clarified what the assembly is. This term is not explained by the Constitution. The Constitution only indicates its basic attribute – a peaceful character.

⁵ Act – Law on Assemblies of 24 July 2015 (Polish title: Ustawa z 24.07.2015 r. – Prawo o zgromadzeniach (tekst jedn.: Dz. U. z 2015 r. poz. 1485 ze zm.), hereinafter: “the Act”).

⁶ J. Juchniewicz, M. Kazimierzczuk, *Wolności i prawa polityczne* [Eng. *Political Freedoms and Rights*], in: M. Chmaj (ed.), *Wolności i prawa człowieka w Konstytucji Rzeczypospolitej Polskiej* [Eng. *Human Freedoms and Rights in the Constitution of the Republic of Poland*], Warszawa 2016, p. 127.

⁷ Judgment of the Polish Constitutional Tribunal of 18 September 2014 (K 44/12), OTK-A 2014/92, item 8; W. Sokolewicz, *Komentarz do art. 57 Konstytucji RP* [Eng. *Commentary on Article 57 of the Polish Constitution*], in: L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Eng. *Constitution of the Republic of Poland. A Commentary*], Warszawa 2005, Vol. IV, pp. 10–11. A more in-depth analysis of the freedom of assembly in the European Convention on Human Rights, see: A. Wróbel, *Komentarz do art. 11* [Eng. *Commentary on Article 11*], in: L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do art. 1–18* [Eng. *Convention on the Protection of Human Rights and Fundamental Freedoms. Vol I. Commentary on Articles 1–18*], Warszawa 2010.

⁸ P. Czarnek, M. Dobrowolski et al., *Prawo konstytucyjne* [Eng. *Constitutional Law*], in: S. Serafin, B. Szmulik (eds.), *Lexykon obywatela* [Eng. *A Citizen's Lexicon*], Warszawa 2008, p. 216.

⁹ J. Sobczak, *Prawo prasowe. Podręcznik akademicki* [Eng. *Press Law. A University Textbook*], Warszawa 2000, p. 27.

¹⁰ A. Łopatka, *Prawo do swobodnego wyrażania opinii* [Eng. *The Right to Freedom of Opinion and Expression*], Warszawa 1993, s. 5.

¹¹ W. Lis, Z. Husak, *Konstytucyjne podstawy wolności wypowiedzi* [Eng. *Constitutional Foundations of Freedom of Speech*], in: W. Lis, Z. Husak (eds.), *Prawne aspekty wolności wypowiedzi* [Eng. *Legal Aspects of Freedom of Speech*], Toruń 2011, p. 104. In the same tone, see: P. Czarny, B. Naleziński, *Wolność zrzeszania się* [Eng. *Freedom of Association*], in: B. Banaszak, A. Preisner (eds.), *Prawa i wolności obywatelskie w Konstytucji RP* [Eng. *Civil Rights and Freedoms in the Polish Constitution*], Warszawa 2002, pp. 574–575.

It leaves the question of definition to the statute, whereby the notion of assembly is defined as “a grouping of persons in an open space accessible to persons of undefined names in a specific place for the purpose of holding joint meetings or expressing their views on public matters together” (Article 3(1) of the Act). At the same time, the legislator, among assemblies, which, I will refer to in this article as ordinary assemblies, for the sake of clarity, distinguishes two specific forms of assemblies, namely spontaneous and cyclical assemblies, which will be discussed in more detail below.

In the Polish language, this term has many meanings. In everyday language, assembly is defined as “a collective speech, aimed at expressing a public protest against something or public support for something. It is a public display of affection or attitude towards something or someone by an individual or a group”¹².

This term is similarly explained in legal literature by Piotr Czarny and Bogumił Naleziński, who state that an assembly means “a gathering of a large group of people” or “a body representing a particular community – such as the members of a particular association”. These authors link this notion to other notions, such as manifestation treated as “public mass speeches to express sympathy, solidarity or protest”¹³.

Krzysztof Kliszczyński in turn identifies this term with such terms as a meeting, a parade, or a demonstration¹⁴. Other authors, understandably, connect it with a picket, rally, march or protest¹⁵ because under the term “gathering”, the dictionary of synonyms mentions: demonstration, manifestation, march, parade, picket, demonstration, parade, march, protest, and many other terms¹⁶.

The basic components of an assembly as indicated by P. Czarny and B. Naleziński, are, firstly, the assembly – at least several people in one place, which makes it a public assembly, and secondly, the internal psychological relationship between the people at the assembly, expressed in the desire to exchange views. This distinguishes an assembly from onlookers (for instance passers-by observing a road accident), or an accidental grouping (of persons waiting at a bus stop)¹⁷. It is important, however, that this relationship does not create a lasting bond between the participants of the assembly, which distinguishes the freedom of assembly from, for example, the freedom of association, or even private meetings, where establishing the identity of each participant is something natural or even obvious, or at least something fully possible. Another distinguishing feature of assemblies, therefore, is that participation in it is not by name, each participant can enjoy anonymity, while participation in a private meeting is personal and the names are known. This issue was fully addressed by the Constitutional Tribunal in its judgment of 10 November 2004, which states that

a public assembly, although occasional, is not an accidental grouping of people, but an intentional assembly convened by its organizers, it has its specific purpose, which is for its participants to express an opinion or idea or to defend specific interests. Thus, unlike in the situation

¹² Data quoted after Wikipedia, <https://pl.wikipedia.org/wiki/Demonstracja>, accessed on: 1 April 2020.

¹³ P. Czarny, B. Naleziński, *Wolność...*, pp. 13–14.

¹⁴ K. Kliszczyński, *Wolność zrzeszania się i wolność zgromadzeń* [Eng. *Freedom of Association and Freedom of Assembly*], in: L. Koba, W. Waclawczyk (eds.), *Prawa człowieka Wybrane zagadnienia i problemy* [Eng. *Human Rights. Selected Issues and Problems*], Warszawa 2009, p. 261.

¹⁵ Office for Democratic Institutions and Human Rights (ODIHR), *Handbook on Monitoring Freedom of Peaceful Assembly*, <http://www.osce.org/odihr/82979?download=true>, accessed on: 1 April 2020.

¹⁶ Data quoted after an online dictionary of synonyms, <https://synonim.net/synonim/zgromadzenie>, accessed on: 1 April 2020.

¹⁷ P. Czarny, B. Naleziński, *Wolność...*, p. 14. In the same tone, J. Juchniewicz, M. Kazmierczuk, *Wolności...*, p. 128; P. Mijał, *Realizacja i ochrona konstytucyjnej wolności zgromadzeń w aspekcie praktycznym* [Eng. *Implementation and Protection of the Constitutional Freedom of Assembly in the Practical Aspect*], in: E. Cała-Wacinkiewicz, D. Wacinkiewicz (eds.), *Prawne aspekty wolności. Zbiór studiów* [Eng. *Legal Aspects of Freedom. A Collection of Essays*], Toruń 2008, p. 219.

of a random group of people, or people gathered e.g. during a theatrical performance or a film screening, it assumes the necessary minimum organization of the gathering and the existence of an organizer, a presentation of the purpose and place of the gathering. It also entails the need to report this intention to the relevant public authorities. [...] Such assumptions eliminate the anonymous nature of participation in the assembly of its organizers¹⁸.

It should be noted, however, that if there are several people taking part in the meeting, their measurable number is irrelevant to the concept of a meeting. In other words, the number of participants does not affect its definition¹⁹, or at most it affects the adjective defining it (numerous, small, etc.)²⁰. It also leads to the conclusion that this freedom is collective because its essence is to act together with other individuals or at least to be with them²¹. Thanks to this, the assembly allows for exchanging views, transmitting information, and influencing the attitudes of other people, but it also becomes an important tool of interpersonal communication and constitutes a form of participation in the public debate²².

It is also worth noting that the Constitution grants protection only to peaceful assemblies²³. This form of regulation was influenced by patterns taken from international acts, because in most of them protection is given only to those assemblies which are peaceful in nature²⁴. In Poland the adjective “peaceful” – denying any form of violation of physical integrity of persons, property, violence or coercion used against either the participants of the assembly or public officials²⁵ – appeared only at a later stage of work and became a permanent part of the Constitution of 1997²⁶. This solution was directly followed by the legislator, restricting participation in the assembly to those possessing weapons, explosives, pyrotechnic articles or other dangerous materials or tools (Article 4(2) of the Act)²⁷.

It is important, however, that in practice not every incident deprives the assembly of its peaceful character. Such a thesis is visible both in the case law of the European Court of Human Rights (hereinafter: “ECtHR”) and the Constitutional Tribunal. The ECtHR has repeatedly stressed in its judgements that the peaceful character of an assembly is determined on the basis of its overall assessment²⁸.

However, this assessment is not altered by individual disturbances of the peace or destruction of property. The same opinion has also expressed Constitutional Tribunal, pointing out that an assembly does not lose its peaceful character if there are single incidents or disturbances during the assembly. On the other hand, it ceases to be peaceful when the disturbances become so serious that violence against persons or

¹⁸ Judgment of the Constitutional Tribunal of 10 November 2004 (Kp 1/04).

¹⁹ Amnesty International, *Taking to the streets: Freedom of peaceful assembly in Cambodia*, London 2015, <https://www.amnesty.org/download/Documents/ASA2315062015ENGLISH.pdf>, accessed on: 1 April 2020, p. 12.

²⁰ A. Jakubowski, *Komentarz do art. 1* [Eng. *Commentary on Article 1*], in: S. Gajewski, A. Jakubowski (eds.), *Prawo o zgromadzeniach. Komentarz*, Warszawa 2017, p. 11.

²¹ S. Woolman, *Freedom of Assembly*, in: S. Woolman, M. Bishop (eds.) *Constitutional Law of South Africa*, 2008, https://www.researchgate.net/publication/313514218_Freedom_of_Assembly, accessed on: 10 June 2020.

²² J. Juchniewicz, M. Kazimierzczuk, *Wolności...*, pp. 130–131.

²³ S. Pieprzny, *Bezpieczeństwo zgromadzeń publicznych. Aspekty administracyjnoprawne* [Eng. *Safety of Public Assemblies. Administrative Law Aspects*], Rzeszów 2013, p. 43.

²⁴ W. Sokolewicz, *Komentarz...*, pp. 19–20.

²⁵ S. Pieprzny, *Bezpieczeństwo...*, p. 43.

²⁶ J. Sułkowski, *Komentarz do art. 57* [Eng. *Commentary on Article 57*], in: M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom I. Komentarz. art. 1–86* [Eng. *Constitution of the Republic of Poland. Vol I. Commentary. Articles 1–86*], Warszawa 2016, p. 1359.

²⁷ More widely on this subject in: judgment of the Constitutional Tribunal of 18 September 2014 (K 44/12).

²⁸ Judgment of the ECtHR of 26 April 1991, *Ezelin v. France* (11800/85).

damage to property occurs. However, assemblies in which someone incites to acts that are punishable in speech or writing, or provokes or humiliates others, lose their peaceful character only when there is actual violence or real damage²⁹.

Freedom of assembly as one of the features of a democratic state system which public administration bodies are obliged to respect. On the other hand, it obliges the legislator to shape the legal order so as to guarantee its implementation³⁰. While shaping this legal order and respecting the freedom of assembly, the legislator should not only protect the freedom of assembly but also support it as long as the assembly has a peaceful nature³¹. The Constitutional Tribunal, in one of its rulings, pointed out that this duty of public authorities to protect assemblies exists regardless of its controversial nature. The condition for such protection, however, is that the limits of the ban on expressing certain views are not exceeded³².

3. The personal scope of freedom of assembly

Freedom of assembly has two aspects. In the active aspect, it consists of the opportunity to participate in the assembly. The passive aspect, in turn, means the possibility of organizing assemblies. The first freedom means making a free decision to participate in the assembly, refusing to participate in it, but also leaving it at any time. The second freedom concerns the freedom to choose the time and place of the assembly, the form of expression of one's views, as well as the freedom to decide on the conduct of the assembly and its proceedings³³.

But in whatever aspect, the freedom of assembly is open to all. Many factors have influenced this regulation. These include the origins of freedom of assembly, its pre-national nature, and the great importance it plays in a democratic rule-of-law state. This importance is evidenced by the fact that freedom of assembly is placed at the forefront of all freedoms and political rights in the Constitution. There is one more thing pointed out by Artur Ławniczak in one of his statements, namely the creation of a "global civil society" in Poland³⁴. Therefore, enjoyment of freedom of assembly is not related to citizenship and is also available to foreigners and stateless persons³⁵.

The peaceful nature of assemblies as defined in the Constitution, however, excludes the participation in the assembly of persons possessing weapons, explosives, pyrotechnic products or other dangerous materials or tools (Article 4(1) of the Act)³⁶. The Act also requires that the official organizers cannot be persons who do not have full legal capacity³⁷.

²⁹ Judgment of the Constitutional Tribunal of 10 November 2004 (Kp 1/04); judgment of the ECtHR of 20 October 2005, *Ouranio Toxo and Others v. Greece* (74989/01).

³⁰ Judgment of Poznań Appeal Court of 14 December 2005 (IV SA/Po 983/05), OSA 2006/11, item 5.

³¹ Office for Democratic Institutions and Human Rights (ODIHR), *Handbook*..., p. 21; A. Jakubowski, *Komentarz*..., p. 8.

³² Judgment of the Supreme Administrative Court of 25 May 2006 (I OSK 329/06), ONSAiWSA 2007/2, item 45. Office for Democratic Institutions and Human Rights (ODIHR), *Handbook*..., p. 21; A. Jakubowski, *Komentarz*..., p. 8.

³³ J. Juchniewicz, M. Kazimierzczuk, *Wolności*..., p. 131.

³⁴ A. Ławniczak, *Wolność zgromadzeń* [Eng. *Freedom of Assembly*], http://repozytorium.uni.wroc.pl/Content/52929/18_Artur_Lawniczak.pdf, pp. 300–301, accessed on: 1 April 2020.

³⁵ P. Czarnek, M. Dobrowolski et al., *Prawo*..., p. 216; P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* [Eng. *Commentary on the Constitution of the Republic of Poland of 2 April 1997*], Warszawa 2008, p. 138.

³⁶ More on this subject, A. Jakubowski, *Komentarz*..., pp. 49–54.

³⁷ A. Ławniczak, *Wolności*..., p. 301.

4. The substantive scope of freedom of assembly

The above findings allow us to state that freedom of assembly consists in the freedom to organize and participate in public gatherings of persons (Polish citizens, foreigners and stateless persons), often held outdoors³⁸. The key question is what the purpose of freedom of assembly is, or what it protects. The best, because the simplest, answer is provided by legal scholarship in the *Citizen's Lexicon* stating that the essence of freedom of assembly is a legal grouping of persons convened to deliberate or to express a position³⁹. The development of the above can be found in the case law of the Constitutional Tribunal, which states that

[an] assembly is a special way of expressing views, providing information and influencing the attitudes of others. It is an extremely important means of interpersonal communication, both in the public and private spheres, and a form of participation in the public debate and, consequently, in the exercise of power in a democratic society. The aim of freedom of assembly is not only to ensure the autonomy and self-fulfillment of the individual, but also to protect the processes of social communication necessary for the functioning of a democratic society. It is based on the public interest. Freedom of assembly is a condition and a necessary component of a democracy, as well as a premise of the exercise of other freedoms and human rights related to the sphere of public life⁴⁰.

Assemblies are an essential element of democratic public opinion, providing an opportunity to influence the political process, express criticism and protest. They form an integral part of the processes of direct democracy⁴¹.

5. Constitutional restrictions of freedom of assembly

Regardless of its role in a democratic state governed by the rule of law, freedom of assembly is not absolute⁴². This freedom has been rationed. The intention was, on the one hand, to protect other constitutionally protected values⁴³, because in practice the exercise of freedom of assembly may undermine other and higher constitutional rights and freedoms⁴⁴. On the other hand, this rationing was dictated by the fear of excessive exercise of freedom of assembly, which could result in a threat to other individuals and the common good. For this reasons, the Constitution first of all restricts this freedom by means of Article 31(2), which states that “Everyone is obliged to respect the freedoms and rights of others. No one may be forced to do what is not prescribed by law”. This statement is followed by the restrictive clause contained in Article 31(3), which provides that restrictions on the exercise of constitutional freedoms and rights may be imposed only by statute and only if they are necessary in a democratic state for its

³⁸ P. Winczorek, *Komentarz...*, p. 138.

³⁹ P. Czarnek, M. Dobrowolski et al., *Prawo...*, p. 216.

⁴⁰ Judgment of the Constitutional Tribunal of 28 June 2000 (K 34/99).

⁴¹ R. Spitzmiller, *Reliance on Freedom of Assembly: Comparative Perspectives*, “Peace Processes OnLine Review” 2016/1, Vol. 2, p. 4.

⁴² More on restrictions on freedom of assembly in UE states: Office for Democratic Institutions and Human Rights (ODIHR), *Handbook...*, pp. 7–8; E. Turkozu, H. Öndül, *European Union*, in: H. Sola Martín, M. Hamilton (eds.), *Regional Study The Right to Freedom of Assembly in the Euro-Mediterranean Region. 2. 0. 1. 3. Part I. Legislation Review*, Copenhagen 2013, pp. 152–154.

⁴³ A. Ławniczak, *Wolność...*, p. 304.

⁴⁴ B. Banaszak, *Prawo...*, p. 380.

security or public order, or for the protection of the environment, public health and morals, or the freedoms and rights of others. These restrictions must not affect the essence of freedoms and rights⁴⁵.

In addition, freedom of assembly is restricted by the provisions of Chapter IX of the Constitution of the Republic of Poland, which concern emergency situations, regulating the possibility of restricting rights and freedoms in connection with the occurrence of specific threats (Article 233 of the Constitution). Interestingly, in a state of disaster, freedom of assembly enjoys full constitutional protection. Based on the above, it must be concluded that if, at a given time, there is no martial law or emergency, individuals can exercise their freedom of assembly to the full extent⁴⁶.

Nevertheless, the Constitution provides one more very specific possibility of limiting this freedom, based on Article 5, which states that “the Republic of Poland shall ensure the freedom and human rights and security of citizens”, because it places security above the exercise of freedoms and rights⁴⁷.

6. Amendments to the Act on Assemblies and other restrictions of freedom of assembly

On 13 December 2016, a law was passed to amend the Law on Assemblies⁴⁸. This amending statute introduced a new form of assemblies: cyclical assemblies. These assemblies were granted a privileged status compared to ordinary and spontaneous assemblies.

At this point, it should be remembered that ordinary assemblies are groupings of people in an open space accessible to undefined persons in a specific place in order to hold joint deliberations or in order to express a common position on public matters (Article 3(1) of the Act)⁴⁹.

Article 3(2) of the Act defines a spontaneous assembly as an assembly that takes place due to the occurrence of a sudden and unpredictable event related to the public sphere, the holding of which at another time would be pointless or of little importance from the point of view of the public debate.

In turn, according to the aforementioned amending statute, a cyclical assembly is an assembly which is organized by the same organizer in the same place or along the same route at least four times a year following a fixed schedule or at least once a year on state and public holidays, and such events have taken place within the last three years, even if they did not have the form of an assembly, and were aimed in particular at celebrating events important in the history of the Republic of Poland (Article 26a(1) of the Act).

⁴⁵ More insight into restrictions on freedom of assembly in the European Convention on Human Rights, A. Wróbel, *Komentarz...*

⁴⁶ B. Banaszak, *Prawo...*, p. 380; J. Juchniewicz, M. Kazimierczuk, *Wolności...*, pp. 130–131.

⁴⁷ On Article 5 of the Polish Constitution in more detail, see: P. Sarnecki, *Artykuł 5* [Eng. *Article 5*], in: L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom I* [Eng. *Constitution of the Republic of Poland. Commentary. Vol. I*], Warszawa 2016, pp. 230–236.

⁴⁸ Act Amending the Act – Law on Assemblies of 13 December 2016 (Polish title: Ustawa z 13.12.2016 r. o zmianie ustawy – Prawo o zgromadzeniach, Dz. U. z 2017 r. poz. 579).

⁴⁹ However, the possibility of holding meetings also on the Internet is increasingly often emphasized, *The Rights to Freedom of Peaceful Assembly and Association and the Internet: Submission to the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association by Association for Progressive Communication (APC)*, Association for Progressive Communication (APC) https://www.apc.org/sites/default/files/APC_Submission_FoA_Online_0.pdf, accessed on: 10 June 2020.

The preference given by the legislator to cyclical assemblies has measurable consequences. In practice, this means that the other two types of meetings are subordinated to cyclical assemblies.

With regard to ordinary assemblies, the law restricts a municipality's options either to accepting the notification of an assembly or to issuing a decision prohibiting holding it. When accepting the notification, the municipality may not change the place and time of the assembly specified in the notification by the organizer⁵⁰.

The municipality may issue a decision prohibiting the organization of an assembly if: 1) its purpose would be inconsistent with freedom of peaceful assembly, its holding would violate Article 4 of the Act or the rules of organizing assemblies or the purpose for which the assembly is to be held would infringe criminal law; 2) holding it may pose a threat to the life or health of persons or property of considerable value or such a threat has not been removed; 3) the meeting is to take place at the place and time when a cyclical assembly referred to in Articles 26a and 14 of the Act is held.

In addition, the municipality may also issue a decision refusing consent for the assembly to be held at the chosen place and time on the basis of a prior notification of another assembly organized at a distance of less than 100 metres from the assembly in point if it is impossible to hold them in such a way that their course does not pose a threat to the life or health of people or to property of considerable value (Article 12 of the Act).

When issuing a decision prohibiting the organization of an assembly, based on the above grounds, the municipality has to follow a number of guidelines⁵¹. Apart from refusing consent for the assembly to be held, the municipality can dissolve an assembly already taking place. Such a decision can result from the occurrence of grounds for prohibiting the assembly or it can be based on criminal regulations (Article 20(1) of the Act).

In the case of a spontaneous assembly, its organization and course depend on there being none of the other two types of assemblies. This follows from Article 27 in conjunction with Article 28(1), which states that an assembly may be dissolved when 1) it poses a threat to the life or health of persons or property of considerable value; 2) its course constitutes a serious threat to security or public order; 3) it poses a serious threat to road safety or public order; it shall be solved in accordance with point (a); 4) if its course violates the provisions of the Act or criminal law; it is additionally subject to termination if it interferes with the course of ordinary and cyclical assemblies.

In practice, these provisions have measurable effects, because if an ordinary assembly is held at the place and time of a cyclical meeting, then even if its organizers have previously submitted a notification of the assembly, i.e. did so before the organizers of the cyclical assembly, it is the ordinary assembly that will be prohibited. The same applies to spontaneous assemblies; they must also give way to cyclical assemblies. In such a case, if they conflict with cyclical assemblies, they can be dissolved by means of an oral decision, immediately enforceable, of the officer in charge of police operations, preceded by two warnings to the participants of the spontaneous assembly about the possibility of it being dissolved, and then announced publicly to the participants of that meeting (Article 28(1) and (2) of the Act).

⁵⁰ Resolution of the Constitutional Tribunal of 16 March 1994 (W 8/93), OTK 1994/1, item 18.

⁵¹ More widely on this subject in: judgment of the Provincial Administrative Court in Poznań of 14 December 2005 (IV SA/Po 983/05); judgment of the Supreme Court of 5 January 2001 (III RN 38/00), OSNP 2001/18, item 546; judgment of the ECtHR of 12 July 2005, *Güneri and Others v. Turkey* (42853/98); Office for Democratic Institutions and Human Rights (ODIHR), *Handbook...*, p. 22; judgment of the Supreme Administrative Court of 25 May 2006 (I OSK 1907/10).

Another problem arises from total discretion in assessing the grounds for granting consent for the organization of a cyclical assembly, which the voivode (province governor) has and which they may abuse⁵². And it needs to be reminded that in the light of the amended regulations, consent for a cyclical assembly is issued not by a municipality as a local authority, but by government administration, that is, the voivode. Such consent is issued in advance for the entire anticipated period of cyclical assemblies. It is withdrawn either at the request of the organizer or if at least two assemblies in the cycle do not take place as scheduled.

Additionally, the legislator does not provide for any security in the event that the cyclical assemblies cease to have the characteristics of peaceful ones⁵³. Moreover, by the amendment under discussion, which guarantees cyclical assemblies a special statutory position, there may be a situation where other entities may be permanently deprived of the possibility to exercise their freedom of assembly at a specific place and time, including in particular counterdemonstrations⁵⁴.

But we must remember that counterdemonstrations have been protected by the European Court of Human Rights on many occasions. The Court has emphasized that the right to counterdemonstrations is an integral part of freedom of assembly. However, it is the duty of the State to protect freedom of assembly of both demonstrators and to seek the least restrictive measures that would allow both demonstrations to take place⁵⁵. This thesis is evident in ECtHR rulings, for example in *Öllinger v. Austria*⁵⁶ and *Éva Molnár v. Hungary*⁵⁷, which emphasize that the essence of democracy includes also the possibility to hold spontaneous assemblies, previously unprepared. Such assemblies should be accepted by the authorities even without a prior legal notification.

Therefore, the preference given to cyclical assemblies at the expense of ordinary and spontaneous assemblies does not take into account the fact that freedom of assembly brings tangible benefits to democratic societies. Spontaneous assemblies are a brilliant tool by which society can express its opinion on any subject and even overthrow governments. Moreover, such assemblies provoke public debate and even scientific discourse, which makes them a very effective social instrument for introducing or preventing change. They are also an instrument for uniting society around similar views and for activating society in general. Of course, this does not mean that assemblies (whether spontaneous or cyclical) never cause any issues, but such inconveniences must not under any circumstances overshadow the essence of freedom of assembly⁵⁸.

However, in relation to doubts about the potential for abuse of the introduced amendments in practice, my personal concern is that the argument of organizing cyclical

⁵² Dissenting opinion of Sławomira Wronkowska-Jaśkiewicz with the judgment of the Constitutional Tribunal of 16 March 2017 (Kp 1/17), OTK-A 2017/28.

⁵³ Dissenting opinions of Leon Kieres and Piotr Pszczołkowski with the judgment of the Constitutional Tribunal of 16 March 2017 (Kp 1/17).

⁵⁴ Dissenting opinion of Małgorzata Pyziak-Szafnicka with the judgment of the Constitutional Tribunal of 16 March 2017 (Kp 1/17).

⁵⁵ *Polska: Wolność zgromadzeń zagrożona* [Eng. *Poland: Freedom of Assembly Under Threat*], Amnesty International, 16 March 2017, opinion about the Law on Assemblies, <https://amnesty.org.pl/wolnosc-zgromadzen-zagrozona/>, accessed on: 19 October 2020.

⁵⁶ Judgment of the ECtHR of 29 June 2006, *Öllinger v. Austria* (76900/01). See also: Office for Democratic Institutions and Human Rights (ODIHR), *Handbook...*, p. 21.

⁵⁷ Judgment of the ECtHR of 7 October 2008, *Éva Molnár v. Hungary* (10346/05).

⁵⁸ *Wolność zgromadzeń: na czym polega i dlaczego jest tak ważna?* [Eng. *Freedom of Assembly: What Does Consist in and Why It Matters So Much?*], <https://www.liberties.eu/pl/news/wolnosc-zgromadzen-na-czym-polega-i-dlaczego-jest-tak-wazna/13174>, accessed on: 1 April 2020.

assemblies may be simply abused, used for the purposes of political struggle, rather than to protect citizens, participants in assemblies or property.

7. Freedom of assembly and public interest

The above findings lead to the conclusion that freedom of assembly enables members of the society to pursue their interests. This freedom enables them to influence those in power and even lead to the overthrow of governments, which makes it a very effective tool in the fight for public interest.

The Constitutional Tribunal has repeatedly explained what public interest is. It defined it on the basis of a specific case and, depending on the subject matter of the case, it defined the essence of public interest in different ways. In one of the judgments, it considered public interest to consist in rational and fair spending of public funds⁵⁹, in another, that it manifested itself in the establishment of levies and fees⁶⁰. In yet another judgment, the Tribunal pointed out that public interest was the prevention of involvement of public persons in situations that may call into question their personal impartiality or honesty, or undermine the authority of state bodies and the confidence of voters and the general public in their proper functioning. And in a representative democracy, this confidence is the grounds and a necessary condition for the functioning of the social system⁶¹.

Therefore, when Marian Zdyb states that public interest has no descriptive meaning which would be fully exhaustive, we should consider his statement to be accurate. It is subject to constant redefinition depending on the context⁶². Thus, it can be assumed that it is a vague concept⁶³, and that public interest is a kind of benefit or advantage resulting from the realization of certain matters concerning the interest of the state – treated as the whole people – serving everyone⁶⁴. Public interest determines the way in which the state and its citizens should operate in order to act in accordance with the idea of the common good⁶⁵.

The notion considered to be contrary to public interest is private interest⁶⁶. In legal scholarship there are several theories about the relationship between public interest and private interest. The first one assumes that public interest is above the interest of an individual, while allowing for the possibility of eliminating minority interests⁶⁷. The

⁵⁹ Judgment of the Constitutional Tribunal of 15 October 2001 (K 12/01), OTK 2001/7, item 213.

⁶⁰ Judgment of the Constitutional Tribunal of 30 January 2001 (K 17/00), OTK 2001/1, item 4.

⁶¹ Judgment of the Constitutional Tribunal of 8 October 2001 (K 11/01), OTK ZU 7/2001, item 210.

⁶² M. Zdyb, *Interes jednostki a interes publiczny. Konflikt interesów* [Eng. *Individual Interest Versus Public Interest. Conflict of Interests*], "Annales Universitatis Mariae Curie-Skłodowska, Problemy Prawa Publicznego" 1993/40, p. 37.

⁶³ J. Sobczak, *Prawo prasowe. Komentarz* [Eng. *Press Law. A Commentary*], Warszawa 2008, p. 612.

⁶⁴ W.J. Wolpiuk, *Samorząd zawodu zaufania publicznego a interes publiczny* [Eng. *Self-Government of a Profession of Public Trust in the Context of Public Interest*], in: S. Legat, M. Lipińska (eds.), *Zawody zaufania publicznego a interes publiczny – korporacyjna regulacja versus wolność wykonywania zawodu* [Eng. *Professions of Public Trust and Public Interest: Limitations Through Self-Government v. Freedom of Profession*], p. 134.

⁶⁵ The confrontation of the notion of "common good" with that of "public interest" enables us to note that under the provisions of the Constitution, "common good" functions in conjunction with the word "republic" (Republic of Poland), and public interest is also present in other selected provisions of the Constitution. On this subject, see: W.J. Wolpiuk, *Samorząd...*, p. 134.

⁶⁶ W.J. Wolpiuk, *Samorząd...*, p. 134.

⁶⁷ W. Sokolewicz, *Komentarz...*, pp. 15–16; S. Akinkunmi, *Ethics in the Public Sector: Who Determines the Public Interest? "Public Servants or Elected Officials"?*, <http://hdl.handle.net/10393/38322>, accessed on: 19 October 2020, p. 4; J. Friedmann, R. Nisbet, H.J. Gans, *The Public Interest and Community Participation. Toward a Reconstruction of Public Philosophy*, "Journal of the American Institute of Planners" 1973/1, pp. 2–12.

second one, called in the literature a theory of common interest, presupposes that the interest of the individual is taken into account and that public interest based on the summation of all individual interests, while taking minority interests into account. The last model, related to the theory of unity, assumes that the concept of public interest is based on competing claims, but based on certain common values recognized in society, which are the basis for decisions taken by public authorities⁶⁸.

However, public and private interests are not always in opposition to each other. Public interest is supposed to further the realization of private interests⁶⁹. This idea is present in the case law of the Constitutional Tribunal, which has stressed that public interest is linked to respect for freedoms of individuals⁷⁰. Such a stance corresponds to the currently dominant theory of arbitrariness, whereby public interest is not given priority over private interest. Both interests should be balanced on a case-by-case basis⁷¹.

The concept of public interest derives from the two main lines of liberal philosophy and historical thinking: utilitarianism and contractarianism. However, in order to better understand these lines of thinking one must also refer to Habermas' theory of communication, which introduced a new perspective in the concept of public interest⁷². What these philosophies have in common is the fact that they consider public interest to be a means of achieving a fairer society, although the way in which philosophers define this fairness is another question. Utilitarianism, defined in terms of the consequences for the persons concerned⁷³, proposes that the public interest should be an increase in public welfare achieved in various ways is not always fair. This is why contractarianism comes to help. The idea behind it is to compensate for inequalities through redistribution measures in favour of the less privileged. Social interest has no place in the libertarian-liberal thinking. Liberalists believed that the rights of the individual are based on nature, not on their own will, and Marxists were in favour of the idea of production, social integration, and protection of the ruling class⁷⁴.

Today in philosophy, public interest is treated differently. There are theories that modern democratic systems based on pluralism eliminate public will from the concept of public interest. In practice, this means that the supporters of this theory believe that if democracy functions on the basis of the actions of the party that wins a majority in an election (enabling it to govern effectively, alone or through a coalition), the party acts in its own interest. This statement refers to the party's definition that it is a public organization seeking to gain and maintain power in the state. When we add to this claim the fact that in the United States a significant part of any party's income comes from corporate contributions, we will be partly justified in believing that pluralism in modern society exists but it is corporate pluralism⁷⁵. Therefore, if a party gains power, it is actu-

⁶⁸ A. Żurawik, „*Interes publiczny*”, „*interes społeczny*“ i „*interes społecznie uzasadniony*” [Eng. “*Public interest*”, “*Social Interest*” and “*Socially-Justified Interest*”], “*Ruch Prawniczy, Ekonomiczny i Socjologiczny*” 2013/2, pp. 57–70.

⁶⁹ J. Boć, *Prawo administracyjne* [Eng. *Administrative Law*], Wrocław 2004, p. 24.

⁷⁰ Judgment of the Constitutional Tribunal of 21 December 2005 (K 17/05), OTK-A 2005/11, item 140.

⁷¹ Judgment of the Constitutional Tribunal of 20 March 2006 (K 17/05), OTK-A 2006/30, item 3.

⁷² M.B.F. de Córdoba, *Public Interest In Political Philosophy. A Necessary Ethical and Regulatory Concept for Territorial Planning*, “*Boletín de la Asociación de Geógrafos Españoles*” 2010/53, p. 385.

⁷³ J.F. Méthot, *How to Define Public Interest?*, <https://tinyurl.com/y2x23fa8>, accessed on: 25 April 2020.

⁷⁴ O. Brinkman, *The Public Interest and the Welfare State: Contemporary Political Philosophy*, in: G. Vonk, A. Tollenaar (eds.), *Social Security as a Public Interest: A Multidisciplinary Inquiry into the Foundations of the Regulatory Welfare State*, Antwerp–Oxford–Portland 2010, pp. 91–118.

⁷⁵ M.B. Fernández de Córdoba, *Public Interest*..., p. 385.

ally the corporation that stood behind it that gains it, so the public interest fades into the background and corporate interest, the party's interest becomes the primary one.

In these conditions, one should ask oneself how this theory is implemented in the Polish conditions as regards freedom of assembly? When answering this question one should reach for the concept of public interest in Poland, which has a strong connection with the common good, the realization of which should be supervised by the Constitutional Tribunal. This means that one of the basic guidelines for the realization of public interest is to act for the common good⁷⁶. Therefore, recognition of the compatibility of provisions on freedom of assembly with the Constitution of the Republic of Poland should depend on realization of the public interest, which is to serve the common good. This does not mean, however, that each assembly is in the public interest, but the essence of the assembly, which is the possibility of expressing one's views, already is.

On the other hand, those in power are dependent on the realization of the public interest that is, in the light of today's philosophical views, this criterion is fundamental for determining the legitimacy of authorities and evaluating their actions⁷⁷. Democratic power (as the most appropriate means of identifying public interest) therefore remains justified, and what is more, it can even be considered necessary, but only to the extent that it serves the public interest. Governments should be guided by certain principles when furthering the public interest. First of all, the principle of subsidiarity manifested in transferring decisions concerning a given community to the lowest levels of administration, i.e. the municipality, because local representatives know the most about the needs and views of a given community. Secondly, the principle of respect for the autonomy of individuals, which means that the state should act with respect for the rights and freedoms of the individual and his or her will. Thirdly, the principle of transparency, which means that the society should be informed about the actions of those in power and have access to such information⁷⁸.

The last question is whether the new rules on assemblies allow for full exercise of freedom of assembly and at the same time ensure realizing public interest, which question I will answer in the conclusion.

8. Conclusions

In conclusion, it must be considered that the current regulation of the Law on Assemblies does not meet all the requirements of a democratic rule of law.

Discrimination against ordinary and spontaneous assemblies, through the relationship between freedom of assembly and the public interest, makes it impossible for the latter to be fully realized. In a pluralistic society, realization of the public interest depends on observance of regulations that specify it, in this case the regulations on freedom of assembly. These regulations should not be transcendental rules, but should have a normative dimension that reflects the consensus of all social groups without giving rise to constitutional doubts. Admittedly, in a given case the public interest may not be achievable by consensus. In such a case, as Montesquieu put it, the wise law-giver must understand the spirit of the people, and formulate laws that correspond to the public interest⁷⁹. In this context, this interest lies in not discriminating ordinary and spontaneous assemblies.

⁷⁶ W.J. Wolpiuk, *Samorząd...*, p. 135.

⁷⁷ S. Akinkunmi, *Ethics in the Public...*

⁷⁸ J.F. Méthot, *How to Define...*

⁷⁹ J.F. Méthot, *How to Define...*

**Amendments to the Law on Assemblies Against the Background
of the Constitutional Freedom of Assembly in Poland**

Abstract: Article 57 of the Polish Constitution outlines one of the fundamental political human and civil freedoms: freedom of assembly. Currently, in Poland, this freedom has been affected by amendments to the provisions regulating it, contained in the Law on Assemblies. The introduced changes, due to their nature, understandably give rise doubts of theoretical, legal, and practical nature. And it is against the background of the constitutional regulation of the meaning and role of freedom of assembly that the reflections in this paper are presented.

Keywords: human and civil rights and freedoms, freedom of assembly

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