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CONSTITUTIONAL FREEDOM OF ASSEMBLY AND ITS LIMITATIONS

Abstract

In this publication, the author analyzes the article 57 of the Polish Constitution, which concerns the freedom of assembly and the provisions limiting this freedom. Considerations on the presented topic allow for the conclusion that the freedom of assembly plays an extremely important role in the functioning of a democratic state of law and allows the society to participate in the public debate on many important issues. The analysis shows that this freedom is not, however, absolute and the existing restrictions are necessary for the state and its individual institutions to function efficiently and for the possibility of using other rights and freedoms guaranteed in Poland.

Keywords: Constitution of the Republic of Poland, assembly, spontaneous assembly, limitations, democracy

Introduction

Freedom of assembly, which was introduced in the article 57 of the Constitution of the Republic of Poland of 2 April 1997¹ plays an extremely important role in the functioning of a democratic state ruled by law, as it enables participation in a public debate on a specific issue of importance to society. According to the provision, everyone is guaranteed the freedom to organize and participate in peaceful assemblies. This freedom may be restricted by the state. Therefore, the Constitution does not refer in detail to the type and scope of restrictions on this freedom and in this respect refers to the Law on Assemblies - the Act of 24 July 2015² - which regulates this type of social activity and to other provisions concerning this freedom. The Constitution of the Republic of Po-

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¹ Journal Of Laws of 1997, No. 78, item 483 as amended.

² Uniform text, Journal Of Laws of 2019, item 631 as amended.

land refers to assemblies, specifying the possibility of organizing them and calls it freedom, not law. On the other hand, the legislator indicates the right to assembly in the title of the act relating to this form of social activity. Therefore, the issue of both terms used in this case requires consideration. According to M. Chmaj, freedom means a certain sphere of activities that are not prohibited by the legislator. Man can act according to his will. Activities, the limit of which is the violation of the freedom of other entities should be protected, and the authority may not interfere with them. Thus, freedom has a much wider dimension than law. When defining freedoms, the legislator does not have to introduce detailed regulations regarding the freedoms granted. It only defines a framework that cannot be exceeded. Human rights, on the other hand, are inalienable and inseparable from the human being, cannot be waived and cannot be taken away by anyone. The granting of rights means that all elements related to the exercise of these rights must be carefully regulated, and citizens relying on these rights must not go beyond the scope of the opportunities granted to them³. Considering the presented distinction, it should be stated that the freedom of assembly is primary, and therefore the state does not create it. Its task is only to ensure that this freedom is realized. However, it should be noted that this freedom is not absolute and is subject to limitations resulting from legal provisions. According to the author, it is worth doing an analysis of the type and scope of these restrictions and considering the question whether the existing restrictions allow the full exercise of constitutionally guaranteed freedom. The author's hypothesis is that despite many limitations, it is possible to exercise the freedom of assembly, and the limitations themselves ensure security and public order in the state. The article adopts the method of analyzing legal provisions relating to freedom of assembly and subject literature relating to the indicated issue.

The definition of an assembly

In the article 57 of the Polish Constitution, an assembly was not defined, only the freedom to organize and participate in it was indicated. The definition was introduced in the article 3 (1) of the Law on Assemblies, according to which an assembly is a grouping of people in an open space accessible to unnamed persons in a specific place for the purpose of holding a joint session or for jointly expressing a position on public

³ M. Chmaj, *Pojęcie i geneza wolności i praw człowieka* [in:] *Konstytucyjne wolności i prawa w Polsce. Zasady ogólne*, tom I, ed. M. Chmaj, Zakamycze 2002, p. 85.

matters. The legislator resigned from the definition of the minimum number of participants in an assembly (15 people) as an element determining its legality, which was in force in the previous legislation⁴. However, as pointed out by A. Wróbel, to talk about an assembly, more than one participant is required⁵. According to S. Pieprzny, the concept of an assembly consists of two basic elements: gathering at least a few people in one place and the psychological relationship between them⁶, which assumes a common goal, the willingness to exchange views or opinions. A common position may be expressed by participants in words or otherwise, and the mere fact of being physically present with other people in certain places may be a form of expressing certain beliefs by an individual⁷. The gathering will not be a chance meeting of a few people or a gathering of passersby, because it is not purposeful.

The definition of an assembly indicated in the act also refers to its place, indicating that gathered people must be located in an open space that is accessible to unnamed people in a specific place. Thus, this phrase contains three components: open space, space available for unnamed persons and a specific place⁸. Open space, constituting a place of assembly, should be accessible to unnamed persons. This excludes recognition as an assembly of a group of people whose participation is based on invitations, entrance cards or tickets issued to specific persons specified by indicating the name and surname⁹. As P. Suski points out, "It is now accepted that the concept of open space is narrower than the term "in the open air" and does not cover parts of the earth's surface that are fenced and not covered. Therefore, a fenced area (e.g., a park, stadium, tent) should be considered a closed space, but a room covered with a roof, based only on poles, without any walls separating it from the surrounding space, will not be such a space"¹⁰.

⁴ Vide: article 1 (2) of the Act of July 5, 1990, Law on Assemblies (Journal of Laws of 1990, No. 09, item 01). Pursuant to the judgment of the Constitutional Tribunal of September 18, 2014 (Journal of Laws of 2014, item 1327), on October 3, 2014, the above-mentioned provision expired in the part containing the phrase "at least 15" and was considered inconsistent with the article 57 in connection with the article 31 (3) of the Polish Constitution.

⁵ A. Wróbel, *Wolność zgromadzania się* [in:] *Konstytucyjne wolności i prawa w Polsce, t. III, Wolności i prawa polityczne*, eds. M. Chmaj [et al.], Kraków 2002, p. 18.

⁶ S. Pieprzny, *Bezpieczeństwo zgromadzeń publicznych. Aspekty administracyjno-prawne*, Rzeszów 2013, p. 58.

⁷ A. Wróbel, *op.cit.*, p. 18.

⁸ A. Rzetecka-Gil, *Prawo o zgromadzeniach. Komentarz*, Warszawa 2019.

⁹ P. Suski, *Zgromadzenia i imprezy masowe*, Warszawa 2014, p. 75.

¹⁰ *Ibidem*, p. 74.

The concept and the essence of the assembly also show that its participants must physically be in a specific place, because only then is it possible to hold a joint session or jointly express a position¹¹. The essence of the assembly also shows that its participants must physically be in a specific place, because only then is it possible to hold a joint session or jointly express a position. However, it should be considered whether defining an assembly through the prism of indicating the place is adequate to modern technical possibilities and events that prevent the exercise of this freedom and are not dependent on a human, e.g., quarantine, which is associated with the obligation to stay in isolation for a specified period of time. The concept of specificity of a place cannot be treated too strictly and should take into account the functional factor. It is even believed that the requirement to be in the same fragment of space is not a *sine qua non* condition for an assembly. Considering the multitude of forms of expression, there may be a situation where members of the same assembly will be present individually in different parts of the same space. However, the condition for recognizing such behavior as an assembly will be, first, the ability to identify individuals with other participants in the assembly and, consequently, to meet the first condition, i.e., the ability to present views expressed in this way¹². Therefore, it must be stated that the obligation to stay in a specific place and time physically should not constitute a kind of restriction of the freedom of assembly.

When considering the issue of an assembly, one cannot forget about the introduction by the legislator of a legal definition of a spontaneous assembly. Pursuant to the article 3 (2) of the Law on Assemblies, this term should be understood as an assembly that takes place in connection with a sudden and unforeseeable event related to the public sphere, the holding of which on a different date would be pointless or insignificant from the point of view of the public debate. It follows from this definition that in order for an assembly to be classified as spontaneous, two conditions must be met: there must be a sudden and unpredictable event related to the public sphere and holding the assembly at a different date would be ineffective from the point of view of the public debate¹³. This assembly, unlike an organized assembly, does not require prior notifica-

¹¹ A. Rzetecka-Gil, *op.cit.*

¹² Vide: A. Jakubowski, S. Gajewski, *Prawo o zgromadzeniach. Komentarz*, Warszawa 2017, p. 34 and next; W. Sokolewicz, K. Wojtyczek [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II*, eds. L. Garlicki, M. Zubik, Warszawa 2016; J. Sułkowski [in:] *Konstytucja RP, t. I, Komentarz do art. 1–86*, eds. M. Safjan, L. Bosek, Warszawa 2016, p. 1357 and next.

¹³ A. Rzetecka-Gil, *op.cit.*

tion or preparation, therefore its essence, as an instrument for the implementation of constitutionally granted rights and freedoms, is the possibility of immediate reaction to the most important events and changes taking place in the public space. Its dynamic nature allows for the creation of an additional mechanism of effective social control, which prevents the escalation of tensions, conflicts or widening the scope of violation of the law. Spontaneity is sometimes the only guarantee of effective criticism, protest or active drawing public attention to a given problem. Therefore, it should be recognized that the reservation of an immediate nature of the reaction should be considered in the context of the development and stimulation of public debate and the possibility of rapid obsolescence of information¹⁴. It is necessary, however, to emphasize that despite the lack of the obligation to notify the relevant commune authority (commune head, mayor, city president) about a spontaneous assembly (which is required from the organizer in the case of assemblies organized under the article 7 (1) of the Law on Assemblies, participants spontaneous assemblies are also required to manifest peacefully because only peaceful assemblies benefit from constitutional protection. This does not mean that the assembly must be organized to propagate the ideas of peace. This feature should be related to the course of the assembly.

The jurisprudence assumes that "a peace assembly is one which respects the physical integrity of persons and private and public property. The concept of "peaceful assembly" thus excludes the use of violence and coercion by the participants of the assembly, both against other participants in the assembly and against third parties and public officials"¹⁵. Therefore, as a rule, armed persons, i.e., those who, in accordance with Art. 4 (2) of the Law on Assemblies shall carry weapons, explosives, pyrotechnics or other dangerous materials or tools. Neither the Law on Assemblies nor the Constitution of the Republic of Poland prohibits people with covered faces from participating in a meeting, as clothing that prevents identification does not have to mean an intention to infringe legally protected goods but may result from fear for one's own life or health due to the views presented at the time of the assembly¹⁶.

The assembly will not lose its peaceful character in the event of acts of violence against the participants of the assembly by outsiders. In such

¹⁴ Vide: A. Bodnar, M. Ziółkowski, *Zgromadzenia spontaniczne*, „Państwo i Prawo”, 2008, No. 5, pp. 38–50.

¹⁵ The judgment of the Constitutional Tribunal of June 28, 2000, file reference number K 34/99, Lex No. 41213.

¹⁶ Vide: W. Sokolewicz, K. Wojtyczek, *op.cit.*.

a situation, it is the state authorities that are obliged to provide protection to those demonstrators who, by expressing their views, implement the constitutional freedom of assembly. This protection consists in police assistance in the number and equipment adapted to the expected threats, as well as judicial protection in the form of criminal liability of perpetrators for interfering with unlawful means in a peaceful assembly.

It should be emphasized that the legislator provided the organizer of the assembly with measures to counteract the violation of the peaceful nature of the assembly. Pursuant to the article 19 of the Law on Assemblies, the organizer and its chairman are obliged to ensure the course of the meeting in accordance with the provisions of law and to conduct the meeting in such a way as to prevent damage caused by the participants of the meeting. For this purpose, the organizer of the meeting and the chairman of the meeting shall take the measures provided for in the act. During the assembly, the chairman is obliged to stay in contact with the representative of the commune authority or the Police officers in the event of their arrival at the assembly site. He is entitled to demand that a person who violates the provisions of the Act by his behavior or prevents or tries to frustrate the meeting to leave the assembly. In the event of not complying with this request, he asks for help from the Police or the municipal (city) guard. If the participants of the meeting do not follow its instructions or if the course of the meeting violates the provisions of this Act or penal regulations, the meeting is dissolved, and the participants are obliged to immediately leave the place where the meeting was held.

In view of the above, it should be stated that the peaceful nature of the assembly also results in limitations which mainly concern the organizer (chairman) of the assembly and its participants. All these persons are obliged to behave appropriately according to the specifics of the assembly, because only peaceful assemblies enjoy the protection of freedom of assembly, which can be considered in two aspects: organizing and participating in assemblies.

As for the organizer, even though the Constitution of the Republic of Poland provides everyone with the freedom to organize and participate in peaceful assemblies, the Law on Assemblies introduces restrictions in this aspect. The organizer of the meeting, pursuant to the article 4 (1) of the Act, there cannot be a person without full legal capacity. Therefore, it is required that the organizer has full legal capacity, which means the possibility of acquiring rights and incurring obligations because of legal actions. It depends on age and mental health. Full legal capacity, pursu-

ant to the article 11 of the Act of 23 April 1964 - Civil Code¹⁷, has every adult, that is, one who is 18 years old or on the basis of the article 10 § 2 of the Civil Code by entering into marriage, she obtained such an age of majority. Therefore, the organizer cannot be a minor or incapacitated person. This restriction means that the organizer of the meeting may only be a person who will be able to bear the legal consequences of his actions and omissions related to the performed function. It is also justified considering the need to protect public safety and order, the principles of public morality or the freedoms and rights of other people¹⁸. It should be added that according to the article 18 of the Law on Assemblies, the chairman of the meeting is its organizer who is a natural person, unless another natural person expresses his consent in writing to assume the duties of the chairman of the meeting or a person acting on behalf of the organizer of the meeting who expresses his consent in writing to assume the duties of chairman of the meeting, if the organizer assembly is a corporate person or other organization.

However, the legislator did not introduce the requirement of Polish citizenship in the case of the organizer of the assembly. Therefore, everyone can be one, regardless of their nationality. A stateless person may also exercise active freedom of assembly. On the other hand, considering the possibility of participating in an assembly, i.e., the use of passive freedom of assembly, it is available to every person, regardless of age, mental state or citizenship. However, people who pose a risk due to their weapons, explosives, pyrotechnic products or other dangerous materials or tools may not participate in the assembly.

Restrictions relating to the freedom of assembly

The constitutional guarantee of the freedom of assembly is directly related to its limitations. Already in the article 31 (3) of the Constitution, it was indicated that restrictions on the exercise of constitutional rights and freedoms may be established only by statute and only if they are necessary in a democratic state for its safety or public order, or for the protection of the environment, public health and morals, or freedom and the rights of others. These restrictions may not violate the essence of freedoms and rights. The existence of limitations is also indicated in the second sentence of the article 57 of the Polish Constitution, where it was emphasized that this freedom may be limited by statute. Therefore, the

¹⁷ Uniform text, Journal Of Laws of 2022, item 1360 as amended.

¹⁸ P. Suski, *op.cit.*, pp. 167 – 168.

freedom of assembly is not absolute, and restrictions are necessary, because total freedom in the exercise of this freedom would cause chaos in the functioning of the state and would also pose a threat to public safety and order, even if it was a peaceful gathering of unarmed people.

A reflection of the restrictions introduced by the Law on Assemblies is the article 96, according to which the commune head, mayor or city president issues a decision to prohibit the assembly not later than 96 hours before the planned date of the assembly, if: its purpose violates the freedom of peaceful assembly, its holding violates the article 4 of the Act on the right to organize and participate in an assembly or the rules of organizing assemblies, or the purpose of an assembly or its holding, violate criminal provisions; its performance may threaten the life or health of people or property to a significant extent, including when the threat has not been removed; the assembly is to be held at a place and time where regular assemblies are held. The legislator also introduced in the article 28 Law on Assemblies - regulations concerning the dissolution of a spontaneous assembly. It may be dissolved by an oral decision subject to immediate execution and preceded by a two-fold warning of participants of a spontaneous assembly about the possibility of its dissolution, and then publicly announced to participants of the assembly by an officer in charge of the Police activities, if its course poses a threat to human life or health or to property to a significant extent; if its course causes a serious threat to security or public order; causes a significant threat to road safety or order on public roads; if its course violates the provisions of this Act or criminal provisions; disrupts the course of the previously organized and notified assembly.

In addition to the subjective restrictions already indicated in the Law on Assemblies, regarding the place of the assembly or its purpose and nature, the existence of specific provisions should be emphasized, which also limit the freedom of assembly.

Pursuant to the article 341 of the Act of March 11, 2022 on the defense of the Fatherland¹⁹, during the performance of professional military service, a professional soldier is not allowed to, inter alia, participate in political assemblies, however, this reservation does not apply to assemblies related to the elections of state and local authorities. Professional soldiers participating in such assemblies may not wear uniforms and military badges. Similarly in the case of the article 328 (3) of the Act, soldiers who are not professional soldiers, while participating in political assemblies, may not wear uniforms and military badges. Unfortunately, the act does not define a political assembly, but it can be stated that these

¹⁹ Journal Of Laws of 2022, item 655 as amended.

will be assemblies concerning the issues of the state system, activities of the government, party, relations between states²⁰. However, as emphasized by P. Suski, the participation of soldiers in political assemblies cannot be the reason for dissolving an assembly under the provisions of the Law on Assemblies, as the provisions of this Act are not violated. Soldiers may alternatively be subject to the disciplinary sanctions provided for in special regulations²¹.

Also in the article 233 of the Constitution of the Republic of Poland, it was stated that restriction of the freedom of assembly was possible during martial law and during the state of emergency. On the basis of 16 sec. 1 point 1 of the Act of June 21, 2002, on the state of emergency²² during a state of emergency, the rights to organize and conduct gatherings of any kind may be suspended. A similar solution results from the provisions of the article 22 (1) point 1 of the Act of 29 August 2002 on martial law and on the competences of the Supreme Commander of the Armed Forces and the principles of his subordination to the constitutional organs of the Republic of Poland²³. It should be emphasized, however, that in the case of both above-mentioned acts, the prohibition does not apply to assemblies organized by churches and other religious associations and religious organizations operating within temples, church buildings, in other rooms used for the organization and public celebration of worship, as well as assemblies organized by state bodies. or local government bodies. In the event of organizing an assembly during one of the above-mentioned states of emergency, the organizer is liable to arrest or a fine, and the case is examined pursuant to the provisions of the Act of August 24, 2001, on petty offenses in accelerated proceedings²⁴. On the other hand, pursuant to the article 46 of the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans²⁵ it was indicated that in the event of an epidemic threat or an epidemic, a ban may be introduced, by way of a regulation, to organize shows and other gatherings of people in the voivodeship or part of it by a voivode, if an epidemic threat or an epidemic occurs in more than one voivodeship - by the competent minister for health.

The restriction of assembly was also introduced on the basis of the Act of 5 January 2011, the Electoral Code²⁶ where in the article 107 § 1,

²⁰ *Polityczny*, Słownik języka polskiego, <https://sjp.pwn.pl> (1.07.2022).

²¹ P. Suski, *op.cit.*, p. 181.

²² Uniform text, Journal Of Laws of 2017, item 928 as amended.

²³ Uniform text Journal Of Laws of 2017, item 1932.

²⁴ Uniform text Journal Of Laws of 2022, item 1124.

²⁵ Uniform text Journal Of Laws of 2021, item 2069 as amended.

²⁶ Uniform text Journal Of Laws of 2022, item 1277 as amended.

it was indicated that on the voting day and 24 hours before that day, conducting election campaigns, including convening assemblies, organizing marches and demonstrations, making speeches and disseminating election materials, is prohibited. The rationale for this restriction is to give voters time to take an electoral decision calmly. A person who breaches this restriction is subject, pursuant to Art. 498 of the Electoral Code, to the penalty of a fine, and the proceedings in this case are also conducted on the basis of the provisions of the Code on proceedings in misdemeanor cases.

Restrictions on the organization of assemblies were also introduced under the Act of May 7, 1999, on the Protection of the Sites of Former Nazi Death Camps²⁷. Under the article 7 of the Act introduces an obligation to obtain the consent of the voivode, issued by way of a decision, for an assembly to be held in the area of the Holocaust Monument or its protection zone. The application is submitted no later than 30 days before the date of the meeting and the application submitted after this date is not considered by way of a decision. This article also indicates situations in which the voivode refuses to grant consent if the purpose or holding of the assembly is inconsistent with the provisions of this Act or the Law on Assemblies or violates the provisions of criminal acts; if holding an assembly may pose a threat to people's life or health or to property of considerable value; if the purpose or holding of an assembly may violate the dignity or nature of the Holocaust Memorial; if the entity holding the legal title to the property located on the area of the Holocaust Monument or its protection zone did not agree to hold an assembly on this property.

Special arrangements for assemblies can also be found in the article 52 of the Act of July 20, 2018 Law on Higher Education and Science²⁸. Pursuant to this provision, members of the university community have the right to organize assemblies at the university after obtaining the consent of the rector. The organizers are obliged to notify the rector of the intention to organize the meeting at least 24 hours before the commencement of the event, but in cases justified by the urgency of the matter, the rector may accept the notification submitted in a shorter period of time. The Rector refuses to grant permission to organize an assembly or forbids such a form of social activity if its purpose or program violates the provisions of law. The regulations also authorize the rector to dissolve the assembly himself or his representative, after informing the organizers, if it is in violation of the law. Both in the case of the Act on

²⁷ Uniform text Journal Of Laws of 2015, item 2120 as amended.

²⁸ Uniform text Journal Of Laws of 2022, item 574 as amended.

the Protection of the Sites of Former Nazi Death Camps and the Law on Higher Education and Science, the obligation to notify about the planned meeting was waived in favor of the obligation to obtain consent, in the form of an administrative decision, to organize the meeting. These solutions are *lex specialis* in relation to the provisions of the Law on Assemblies and their introduction should be considered right due to the need to protect Holocaust Monuments or the autonomy of universities.

Conclusion

The primary goal of freedom of assembly is to ensure freedom of expression and belief, even those that shock, irritate, outrage, offend, oppose dominant religious, political, or social views, or are unacceptable to the authorities. Guaranteeing this freedom is a necessary condition for the realization of the idea of a civil society²⁹. Freedom cannot, however, be absolute, because its existence cannot constitute an obstacle to the functioning of the state and its individual institutions. The introduction of restrictions on the exercise of the freedom of assembly should be assessed positively. Their goal is, above all, to ensure public safety and order in Poland, as well as not to violate other rights and freedoms.

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²⁹ P. Ruczkowski, *Zgromadzenia* [in:] *Prawo administracyjne*, eds. M. Zdyb, J. Stelmasiak, Warszawa 2020, p. 657.

Konstytucyjna wolność zgromadzeń i jej ograniczenia**Streszczenie**

W niniejszej publikacji autorka poddaje analizie art. 57 Konstytucji RP dotyczący wolności zgromadzeń oraz przepisy stanowiące ograniczenia tej wolności. Rozważania dotyczące prezentowanego tematu pozwalają stwierdzić, że wolność zgromadzeń odgrywa niezwykle istotną rolę w funkcjonowaniu demokratycznego państwa prawa oraz pozwala społeczeństwu na udział w debacie publicznej dotyczącej wielu istotnych spraw. Z analizy wynika, że wolność ta nie ma jednak charakteru absolutnego, a występujące ograniczenia są niezbędne do tego, aby państwo i jego poszczególne instytucje mogły sprawnie funkcjonować, oraz po to, aby istniała możliwość korzystania z innych praw i wolności gwarantowanych w Polsce.

Słowa kluczowe: Konstytucja RP, zgromadzenie, zgromadzenie spontaniczne, ograniczenia, demokracja