

CONSTITUTIONAL FREEDOM OF ASSEMBLY AS A COMPONENT OF DELIBERATIVE DEMOCRACY

KONSTYTUCYJNA WOLNOŚĆ ZGROMADZEŃ JAKO CZĘŚĆ SKŁADOWA DEMOKRACJI DELIBERATYWNEJ

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Abstract

The article aims to analyse the legal regulations on the right to freedom of assembly and to show that freedom of assembly is a component of deliberative democracy. An analysis of the current legislation regulating this issue, from European standards to the national level, shows that it is a right of a political nature. Freedom of assembly is a civil liberty that allows citizens to influence the decisions of the authorities. It is also a component of a democratic state ruled by law and enables participation in social and political life.

Keywords: assemblies, democracy, participation, deliberation, freedom

Abstrakt

Artykuł ma na celu analizę uregulowań prawnych dotyczących prawa do wolności zgromadzeń, a także wykazanie, że wolność zgromadzeń stanowi część składową demokracji deliberatywnej. Przeprowadzona analiza obowiązujących przepisów prawa regulujących przedmiotowe zagadnienie, od standardów europejskich po szczebel krajowy, wskazuje, że jest to prawo o charakterze politycznym. Wolność zgromadzeń jest wolnością obywatelską, zapewniającą obywatelom wpływ na decyzje władzy publicznej. Stanowi także składnik demokratycznego państwa prawnego oraz umożliwia partycypację w życiu społecznym i politycznym.

Słowa kluczowe: zgromadzenia, demokracja, partycypacja, deliberacja, wolność

Introduction

Deliberative democracy implies greater citizen participation in public life through the organisation of institutionalised debates, complementing the process of forming informal views. This gives members of the public an opportunity to consciously form an opinion on the issues under discussion and justify their views, and in turn the state authority receives much broader information on the voters' expectations [Łapaj-Kucharska 2016, 109-36]. The idea of deliberative democracy boils down to the belief that decisions on public issues do not have to be backed by a vote of multi-million eligible citizens, but it is enough for a decision to be made through a process of argumentation free of violence and coercion with the participation of a selected not-so-large group of citizens [Krzewińska 2017, 48]. It is also worth noting the view of K. Goworek who states that the term in question cannot be applied to every type of discussion, since it is a more developed form leading to consensus on the issue at hand, and includes reinterpretation, changing needs, attitudes and views. It should be noted that these changes occur as a result of persuasion, not manipulation, blackmail or coercion. Deliberation can be interrupted and resumed, but at some point, it must end with a conclusion. It is argumentative in nature and should be characterised by inclusiveness, i.e., allowing for all kinds of views, even the most extreme and debatable ones, as well as assuming freedom from coercion, both externally and internally. Participation in the process is voluntary, and participants are limited only by the procedures established at the beginning of the interaction. Internal freedom means that participants are equal to each other and have the same opportunities to express their opinions and are subject to the same procedure [Goworek 2015, 164-65].

Accordingly, the main objective behind deliberative democracy is to optimise the decision-making process. There are four complementary objectives to the main one, i.e. seeking to legitimise decisions if the conflict is caused by limited resources, seeking to consider public issues from the perspective of the common good, in a situation of limited generosity on the part of citizens, and seeking to achieve mutual respect between conflicting parties, giving respect to each other, as a result of learning the arguments for the opposite solution, where preferred moral values are

inconsistent, as well as seeking to rectify erroneous decisions that result from an incomplete understanding [Węgrzecki 2009, 32].

As such, the basic idea of deliberative democracy is communication, dialogue and discussion relating to the most important public issues [Jasiński 2017, 49]. The dialogue is intended to address the most universal principles of public life. This means that the most fundamental issues that directly affect the lives of citizens should be discussed, including, for example, general principles of justice, ethical or economic issues. Advocates of deliberative democracy assume that during the dialogue, which directly affects the citizen, the latter will use sound knowledge and arguments, flowing not from the desire to satisfy private interests, but to actually create a just society [Kaczmarek 2022, 153]. The purpose of this article is to analyse the legal regulations concerning the right to freedom of assembly, as well as to show that freedom of assembly is a component of deliberative democracy.

1. The concept of assembly

The term “assembly” (Polish: “zgromadzenie”) refers to a meeting of many people, dedicated to the discussion of certain topics, a large group of people gathered in a specific place, or a large group of people representing the community and exercising power on their behalf.¹ The legal definition of an assembly is contained in Article 3 of the Assemblies Act, which states that an assembly is a grouping of people gathered in a specific place in an open area accessible to individually unidentified persons for the purpose of holding a joint deliberation or making a joint statement on a public matter. Article 3 (in paragraph 2) also defines a spontaneous assembly (Polish: “zgromadzenie spontaniczne”) as an assembly that takes place in connection with a sudden and unforeseeable event affecting the public sphere, the holding of which at a later date would be pointless or insignificant in terms of public debate.² In its case law, the Constitutional Court has established that the fundamental criterion for identifying a public assembly

¹ <https://sjp.pwn.pl/slowniki/zgromadzenie.html> [accessed: 22.11.2023].

² Act of 24 July 2015 on the Law of Assemblies, Journal of Laws of 2022, item 1389 as amended, Article 3 (1)-(2) [hereinafter: the Law of Assemblies].

is its purpose, which is also understood as the reason for the gathering of a certain group of people in a certain place and at a certain time. An assembly is a purposeful gathering because it is always about expressing an opinion, taking a stand, providing support or attempting to defend certain interests. It includes any form of public expression on a topic that is relevant to a particular community. The most common reason for holding an assembly is to draw attention to a particular issue and thereby present it to a wider audience and trigger a public debate. The other fundamental criterion is the peaceful nature of the assembly, which takes place with respect for the physical integrity of persons and private and public property. Peaceful assemblies exclude the use of violence and coercion by its participants, both in relation to other persons participating in the assembly and in relation to third parties or public officials. The assessment of the peaceful nature of an assembly should relate to the assumed purpose, the intentions of the organisers and the course of the event. An important characteristic of an assembly is also the existence of an intellectual relationship between the participants of such a grouping, who are united by a common position on a particular issue and the desire to express it publicly. As such, the public assembly is usually characterised by the fact that there is no *organisational* connection between the organiser and the participants of the assembly or between the participants themselves.³

2. Freedom of assembly in the light of the Constitution of the Republic of Poland and international law

According to Article 57 of the Constitution of the Republic of Poland, the freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone.⁴ Holocher categorises freedom of assembly as a civil liberty. It serves to ensure that citizens can exert influence on the authorities and has an individual and a collective dimension. Freedom of assembly is further related to the pluralism of values, and its content boils down to the freedom to participate in assemblies consisting of a free

³ Judgment of the Constitutional Court of 18 September 2014, K 44/12, Journal of Laws of 2014, item 1327.

⁴ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws, No. 78, item 483 as amended, Article 57 [hereinafter: the Constitution of the Republic of Poland].

decision whether or not to participate in the assembly [Holocher 2019, 87-88]. It should also be emphasised that this freedom can be divided into the freedom to organise assemblies and the freedom to participate in peaceful assemblies. The freedom to organise assemblies is expressed in the fact that the state authorities may not interfere with the organisation of the assembly at any stage. Nevertheless, it should be noted that public authorities may influence changes to the time and place of the assembly if this is necessary in order to balance the general interest and the interests of the assembly participants. Such changes must not be arbitrary. The freedom to participate in assemblies, on the other hand, is expressed in the ability to freely decide whether or not to participate in an assembly. This freedom also includes the prohibition of state authorities using repressive measures against peaceful participants. However, any assembly participants who break the law or commit acts of violence may be held criminally liable [Malinowski 2021, 139-40].

Freedom of assembly is also a matter of international law. The right to assemble freely brings together positive individual values. It is a civic institution and a component of a democratic state ruled by law that enables the exercise of other rights and participation in social and political life. In the inter-American system, the right of assembly is considered a political right. The American Declaration of the Rights and Duties of Man guarantees every person the right to assemble peaceably with others as a means of giving expression to views upon matters of common interest [Orzeszyńska, Skwarzyński, and Tabaszewski 2022, 349]. The right of peaceful assembly is recognised under Article 15 of the American Convention on Human Rights. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or the rights or freedom of others.⁵ The right to free association is also enshrined in Article 10 of the African Charter on Human and Peoples' Rights, which states that every individual has the right to free association provided that

⁵ American Convention on Human Rights adopted on 22 November 1969 (The San José Pact), <http://libr.sejm.gov.pl/tek01/txt/inne/1969a-c1.html> [accessed: 03.12.2023].

he abides by the law. Subject to the obligation of solidarity no one may be compelled to join an association.⁶

In the European system, the right to freedom of assembly is enshrined in Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. No restrictions may be placed on the exercise of these rights other than such as are prescribed by law in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. Article 11 does 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.⁷ Freedom of assembly is also guaranteed by Article 12(1) of the EU Charter of Fundamental Rights, which stipulates that everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests,⁸ and by Article 21 of the International Covenant on Civil and Political Rights, which provides that the right of peaceful assembly should be recognized and further states that no restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.⁹

⁶ African Charter on Human and Peoples' Rights, adopted at the Conference of the Organisation of African Unity in Nairobi on 26 June 1981, <http://libr.sejm.gov.pl/tek01/txt/inne/1981.html> [accessed: 03.12.2023].

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on 4 November 1950, subsequently amended by Protocols Nos 3, 5 and 8 and supplemented by Protocol No. 2, *Journal of Laws of 1993*, No. 61, item 284.

⁸ Charter of Fundamental Rights of the European Union, adopted and signed on 7 December 2000, *OJ 2016 C 202*, p. 389.

⁹ International Covenant on Civil and Political Rights opened for signature in New York City on 19 December 1966, *Journal of Laws of 1977*, No. 38, item 167.

It is worth noting that the citizens' right of assembly, guaranteed in the area of international and constitutional standards, requires public administration authorities to allow uninterrupted assemblies and ensure their safety. Accordingly, the assembly organisers are required to comply with the necessary formalities and to ensure that it is conducted in a peaceful manner, in accordance with the law and the adopted agenda, and the public authorities are required to ensure that the assembly is conducted in a peaceful and uninterrupted manner, as well as to protect its participants from the actions of opponents for which the assembly was organised [Bidziński 2019, 205].

The purpose of freedom of assembly is not only to guarantee the autonomy and self-realisation of the individual, but also to protect the processes of social communication necessary for the functioning of a democratic society. The public interest forms a basis for this freedom. Freedom of assembly is a condition and a necessary component of democracy, as well as a prerequisite for the exercise of other freedoms and human rights related to the sphere of public life. In this context, assemblies are an essential element of the expression of democratic public opinion, creating the possibility of influencing the political process, enabling criticism and protest and thus forming part of the deliberative process of direct democracy. It is noteworthy that freedom of assembly as a form of public debate, as a means of articulating interests and views and as an instrument of minority protection increases the legitimacy and acceptance of decisions made by representative bodies and their subordinate administrative and executive bodies.¹⁰

Freedom of assembly is a necessary element of a well-functioning democracy and a precondition for the exercise of other freedoms and human rights that are inextricably linked to the sphere of public life, including freedom of speech, freedom of association and the right to petition. The strongest relationship is notably between freedom of assembly and freedom of speech, and this is related to the opinion-forming nature of assemblies, which are a form of expression aimed at attracting attention and expressing a position or protest on a socially important issue. There are also many

¹⁰ Judgment of the Constitutional Court of 10 July 2008, P 15/08, Journal of Laws of 2008, No. 131, item 838.

links between freedom of assembly and freedom of association, as both freedoms are connected by the desire to achieve certain social or political goals. However, freedom of assembly differs from freedom of association in that public assemblies only take place occasionally, whereas association presupposes the existence of relatively permanent relationships not only between the participants in the assembly, but also between the participants in the assembly and its organiser. The second characteristic that distinguishes freedom of assembly from freedom of association is the identification of members, which is relatively easy in the case of an association. In contrast, participation in a public assembly is anonymous, which is an important element of the content of the normative constitutional freedom of assembly [Drewniowska 2018, 55].

In addition to its public-law aspect, freedom of assembly is one of the basic and fundamental political human rights. The subject of this right is an individual and its content includes the possibility of personal fulfilment together with others, even if the understanding of personal fulfilment is opposed by other units of public life or by officials exercising public authority. This means that the authorities are obliged to guarantee the realisation of this freedom, regardless of the party and political beliefs they represent as the freedom of assembly is a constitutional value and not a value determined by a democratically legitimised political majority exercising power at a given time. Freedom of assembly is a positive freedom and concerns the right to organise an assembly, the right to participate in an assembly and the right to lead an assembly. The negative aspect of freedom of assembly, on the other hand, is the right not to participate in an assembly and the obligation to respect the principle that no one may be forced to participate in an assembly. This obligation applies to both public authorities and so-called third parties. Another element of the negative aspect of freedom of assembly is the obligation to create a situation in which the assembly is not disrupted by third parties and the attempt to disrupt the assembly is met with an appropriate response, that is not allowing the disruption of the assembly by third parties. The authorities not only have a duty to remove obstacles to the exercise of freedom of assembly

and to refrain from unjustified interference in this sphere, but also to take positive measures to realise this right.¹¹

3. The functions of freedom of assembly

According to Gajda, the constitutional freedom of assembly fulfils the following functions: 1) The operationalisation function, which consists in giving freedom of assembly a serving nature in relation to other constitutional principles; 2) The opinion-forming (participatory) function, which manifests itself in the possibility of shaping state policy-making through the public presentation of public opinion, offering the opportunity to influence the political process, and enabling criticism and protest, and thus forms a component of deliberative direct democracy; 3) The function of protecting the rights of minorities, which manifests itself in enabling minorities to express their opinions, demands and points of view, whereby the minority gains influence on decisions and the shaping of political will; 4) The stabilisation function, which includes the public presentation and analysis of the sources, causes and content of social discontent, the expression of criticism or denial of the existing legal or social order; 5) The control function, which offers the public the opportunity to evaluate a particular policy or decision of an authority. These evaluations can influence the design of the state policy, the acceptance or rejection of certain decisions, or other solutions [Gajda 2017, 182-84].

4. Conditions for the restriction of freedom of assembly

The constitutional guarantee of freedom of assembly includes limitations built into this guarantee. It should be noted that a society could not function normally if any of its members could, at any time and in any place, convene an assembly of an indefinite number of people for a voluntary purpose, even if it were a peaceful assembly of unarmed persons [Sokolewicz and Wojtyczek 2016]. In addition, this freedom may be restricted if the conditions set out in Article 31 (3) of the Constitution of the Republic of Poland are met, i.e. if the restriction is provided

¹¹ Judgment of the Constitutional Court of 18 January 2006, K 21/05, Journal of Laws of 2006, No. 17, item 141.

for by law and is proportionate, consistent with the principles of a democratic state and does not violate the essence of the restricted right. The aforementioned provision also contains a catalogue of values for which restrictions on freedom of assembly are permissible, namely: national security, public order, public health and morals, protection of the environment and the rights and freedoms of others [Bańczyk 2015, 16]. According to Zubik, when assessing any restriction in the light of the principle of proportionality, one must examine whether the regulation as introduced is necessary, i.e. whether there is an assessment of the actual necessity of the interference and whether it is useful for achieving the intended objectives; the legislator may only apply legal measures that are effective in achieving the objectives. It must also be analysed whether the effects of the restrictions as introduced have been appropriately weighed against the burdens imposed on the individual, i.e. whether the legislator has chosen the least burdensome and still effective solution [Zubik 2021, 97].

The legislator has also endowed a public administrative body with the power to revoke the freedom of assembly by means of an individual ban. A municipal authority may prohibit an assembly when: 1) the purpose of the assembly violates the freedom of peaceful assembly, if the holding of the assembly violates the Law of Assemblies or criminal law provisions; 2) the holding of an assembly may pose a danger to life or health or to property of a considerable size; 3) the assembly is to be held in a place and at a time where regularly organised assemblies take place. The ban should be issued in the form of an administrative decision, which should be classified as a constrained decision, although the authority has some discretion at the first stages of the decision-making process due to the interpretative leeway resulting from the use of vague, undefined concepts [Duniewska, Jaworska-Dębska, Olejniczak-Szałowska, et al., 2020, 839]. A decision to ban an assembly must be announced on a designated website of the Public Information Bulletin. The municipal authority notifies the organiser of the decision, informing them of the announcement of the ban, by electronic means. At the same time, the municipal authority submits the decision together with the files to the competent regional court [Ura 2021, 514].

According to A. Gajda, a prohibiting decision issued due to failure to meet the deadline for notification of an assembly is typically justified by reference to the nature of the notification. It is worth noting that

the notification is not only a formal registration of the assembly that performs a notification function, but, above all, it allows public administration authorities to take appropriate measures to ensure the safety of participants of the assembly and bystanders and to ensure public order [Gajda 2015, 35].

It is to be noted that the appeal against the decision to ban the assembly is not lodged with the local government appeals board (Polish: “samorządowe kolegium odwoławcze”), but directly with the regional court with territorial jurisdiction over the municipal authority, within 24 hours of the decision being announced in the public information bulletin. Filing an appeal does not suspend the implementation of the decision to ban the assembly [Zdyb and Stelmasiak 2020, 675]. The regional court is obliged to examine the appeal in non-litigious proceedings “without delay”, but at the latest within 24 hours of the appeal being lodged. The decision granting the appeal is immediately enforceable. A party can challenge this decision by filing an appeal on incidental issues (Polish: “zażalenie”) with the court of appeal, which must examine the appeal within 24 hours. There is no right of appeal in cassation (Polish: “skarga kasacyjna”) against the decision of the court of appeal; the decision is immediately enforceable [Miemiec 2019, 88].

5. Permissibility of restrictions on freedom of assembly

Every human being functions in a public sphere together with or next to people who enjoy the same dignity and the same rights and freedoms arising from such dignity. By nature, therefore, certain conflicts may arise at the intersection of individual human rights and public interest or between the interests of specific individuals. Written law should harmonise conflicting values and interests by appropriately balancing the interests and setting the rules for resolving such conflicts in the most objective and realistic manner possible. Such presumptions should lie under any restrictions on the exercise of human rights and freedoms in a democratic state. Restrictions may neither have any freely chosen form nor be arbitrary and they should result in the possibly least severe consequences possible that are necessary to achieve a socially legitimate goal [Zubik 2021, 95]. Therefore, 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, i.e. to protect health or the rights and freedoms of other

people. The restrictions must not affect the essence of the rights and freedoms.¹² Therefore, a formal condition for imposing a restriction with respect to citizens' rights in compliance with the Constitution is to establish them by statute and not in any other manner. This means that it is legally impossible for the legislature to grant the executive power the competence to enact regulations aimed at restricting the rights and freedoms of citizens enshrined in the Basic Law.¹³

It should also be emphasised that Article 31(3) of the Constitution of the Republic of Poland provides for the principle of proportionality of formal nature, according to which it may be established to what extent certain constitutional rights may be restricted due to necessity to implement another right or substantive principle. The proportionality principle consists of three sub-principles which together form a so-called proportionality test. The first one is the principle of usefulness, under which any restriction of constitutional rights is lawful only if it is introduced by means of legal measures that lead to the achievement of a goal that justifies the restriction. The second one is the principle of the least restrictive measure, known also as the necessity principle, which states that if there are several different methods to restrict a specific constitutional right in view of a constitutionally justified goal, the least restrictive method should be chosen. Above all, it is necessary to avoid a scenario in which a legal measure reasonably restricting an individual's freedom or constitutional right simultaneously results in the restriction of other rights. The third element of the proportionality principle is proportionality per se. It requires the act of balancing two or more conflicting principles and indicating which of them prevails in specific factual and legal circumstances. If the conflict of principles is resolved in the process of establishing law or controlling it, it is of abstract nature and it takes a form of a legal norm [Tuleja 2023, 118-25].

One of the foundations of a democratic society is the freedom of peaceful assembly accompanied by a number of exceptions that should

¹² Judgment of the Supreme Administrative Court of Poland of 2 March 2023, II OSK 2090/20, Lex no. 3506454.

¹³ Judgment of the Supreme Administrative Court of Poland of 8 September 2021, II GSK 781/21, Lex no. 3241233.

be interpreted strictly, and any necessity to restrict this freedom must be convincingly established. It should be pointed out that interference is considered necessary in a democratic society for the purpose of achieving a legitimate goal if it is justified by a pressing social need, in particular when it remains proportional in the light of the legitimate goal pursued and if reasons provided by national authorities to justify the interference are relevant and sufficient.¹⁴ Therefore, since the ban on LGBT gatherings imposed by the national authorities did not respond to any pressing social need, it was not necessary in a democratic society. The Court additionally states that the applicants suffered unjustified discrimination on the grounds of sexual orientation, that said discrimination was incompatible with the standards of the Convention, and that they were denied an effective domestic remedy in respect of their complaints concerning a breach of their freedom of assembly.¹⁵

Another example of restricting the right to freedom of assembly comes from the Electoral Code as in its Article 107 an election silence period is established during which it is forbidden to promote candidates, political parties or electoral committees by means of: convening assemblies, organising marches and demonstrations, giving speeches, distributing leaflets, or otherwise canvassing for candidates or lists of candidates [Musiał-Karg 2013, 285-86].

Conclusion

This article is dedicated to the question of freedom of assembly as a component of deliberative democracy. An analysis of the current legislation regulating this issue, from European standards to the national level, shows that it is a right of a political nature. Freedom of assembly is a civil liberty that allows citizens to influence the decisions of the authorities. It is also a component of a democratic state ruled by law and enables participation in social and political life. Freedom of assembly is a component of deliberative democracy because it involves the expression of an opinion

¹⁴ Judgment of the European Court of Human Rights of 19 December 2017, 60087/10, Lex no. 2411255.

¹⁵ Judgment of the European Court of Human Rights of 27 November 2018, 14988/09, Lex no. 2594189.

and also enables a particular problem to be presented and helps to initiate a public debate. It also increases citizens' trust in public authorities.

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