

University of Warmia and Mazury in Olsztyn

MIROŚLAW KARPIUK
ORCID: 0000-0001-7012-8999
miroslaw.karpiuk@uwm.edu.pl

Restricting the Enjoyment of the Freedom of Assembly for Reasons of Safety and Public Order

Ograniczenie korzystania z wolności zgromadzeń ze względu na bezpieczeństwo
i porządek publiczny

INTRODUCTION

Human freedoms are protected by law, and restrictions on the enjoyment of these freedoms may be imposed in special circumstances where, exceptionally, other interests will take precedence over these freedoms. Other interests cannot be automatically prioritised over human freedoms; in each case, it is necessary to analyse the circumstances that will necessitate the introduction of appropriate restrictions in this sphere. The principle is that individual freedoms must be legally protected. The use of these freedoms may only be restricted in the name of an interest that is critical in given circumstances beyond any doubt.

Every individual lives in a society, and the laws it makes take into account not only personal interests but also the general good, which gives rise to the necessity to restrict the freedoms and rights of the individual to prevent their real or only potential conflict with the interests of society as a whole. The interdependence between particular rights and freedoms enjoyed by the individual also implies the need to restrict them. Any normative regulation of human and civil rights and freedoms must make it possible to define their limits¹.

¹ B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009, p. 176.

In an era of increasing threats and the difficulty of eliminating their sources, the restriction of human rights and freedoms for the sake of state safety and public order seems obvious. It is not always possible to guarantee safety and public order without interfering with other constitutional interests, so, in exceptional cases, individual rights and freedoms will not be fully protected. The presence of a specific threat opens up the possibility for interference in the sphere of human rights and freedoms, in which case it is necessary to comply with the constitutional rules allowing for the restriction².

The purpose of this article is to identify the situations that determine the possibility of imposing restrictions on the enjoyment of the freedom of assembly in cases that threaten safety and public order and to analyse the provisions of the law governing such situations. The doctrinal legal-research method was used in this article. The research problems raised in the study are reflected by the following questions: 1) What are the conditions for restricting human freedom? 2) In what cases will safety and public order be protected against the freedom of assembly when these values collide? 3) When will interference in the sphere of the freedom of assembly be unjustified?

RESTRICTING THE ENJOYMENT OF CONSTITUTIONAL FREEDOMS

Rights and especially freedoms cannot be limitless. Therefore, there arises a need to set limits for them³. The introduction of restrictions on the exercise of human freedoms cannot be done arbitrarily. It must meet the constitutional (as well as statutory) conditions that allow interference in this sphere. The constitutional legislator expressly provides that restrictions on exercising constitutional rights and freedoms may be imposed only by statute, only when necessary in a democratic state for the protection of its safety and public order, for the protection of the environment, public health and morals, or for the protection of the freedoms and rights of others, and in doing so, the restrictions may not infringe on the essence of the freedoms⁴. In Article 31 (3) of the Polish Constitution, the constitutional legislator establishes general conditions under which individual freedoms could be limited without indicating any specific cases. The legislator, in regulating the enjoyment of certain freedoms, will have to take into account the principles

² M. Karpiuk, K. Prokop, P. Sobczyk, *Ograniczenie korzystania z wolności i praw człowieka i obywatela ze względu na bezpieczeństwo państwa i porządek publiczny*, Siedlce 2017, p. 37.

³ P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku*, Warszawa 2008, p. 83.

⁴ Article 31 (3) of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended). See also K. Walczuk, [in:] *Obronność, bezpieczeństwo i porządek publiczny. Komentarz do wybranych przepisów Konstytucji Rzeczypospolitej Polskiej*, eds. M. Karpiuk, P. Sobczyk, Olsztyn 2018, pp. 81–112.

introduced by the constitutional legislator and thus cannot, at its discretion, in the exercise of its legislative freedom, regulate these matters differently from the Polish Constitution.

Interference in the sphere of freedoms must remain in rational and adequate proportion to the objectives indicated in Article 31 (3) of the Polish Constitution, for the achievement of which certain limitations are imposed⁵. This provision contains three criteria for assessing the admissibility of restrictions on constitutional freedoms: the principle of exclusivity of the law, the principle of proportionality and the obligation to preserve the essence of freedom. The first of these is formal, and the next is substantive⁶.

Proportionality should be understood as the sum of three elements: suitability, necessity and prohibition of undue interference⁷. The principle of suitability consists of performing an instrumental rationality test. It aims to determine whether, according to the current state of knowledge, the introduced regulation can lead to the effects it intends to achieve. The application of the principle of necessity requires demonstrating that specific regulations are necessary for the protection of the interests, as indicated in Article 31 (3) of the Polish Constitution, and that from among the measures that effectively protect these values, the least onerous means have been chosen. Consequently, the application of this principle requires the consideration of possible alternative measures and the determination of their effectiveness. In the case of the prohibition of undue interference, it must be verified whether the effects of a particular regulation are in adequate proportion to the burdens it imposes on the individual⁸. The principle of proportionality applies both to the law-making level (where it is examined whether a particular regulation represents, in the abstract, an unacceptable interference with human rights and freedoms) and to the level of law application (where it is examined whether there has been undue interference concerning the rights and freedoms of a particular person)⁹.

When limiting the sphere of a person's constitutional freedom, a statutory provision must do so in a manner that, first and foremost, does not infringe on its essence and also does not cause a disturbance in the relationship of the constitutional interest that is being limited to the objective that is to be

⁵ Judgment of the Supreme Administrative Court of 23 January 2020, II OSK 582/18, LEX no. 2798959.

⁶ Judgment of the Constitutional Tribunal of 23 November 2009, P 61/08, OTK-A 2009, no. 10, item 150.

⁷ Judgment of the Constitutional Tribunal of 11 April 2000, K 15/98, OTK 2000, no. 3, item 86.

⁸ Judgment of the Constitutional Tribunal of 23 November 2009, P 61/08, OTK-A 2009, no. 10, item 150.

⁹ P. Tuleja, *Komentarz do art. 31*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, LEX/el. 2023.

achieved¹⁰. The requirement contained in Article 31 (3) of the Polish Constitution concerning the imposition of limitations to constitutional freedoms and rights only by statute implies not only the exclusivity of the statute in this matter but also the requirement of sufficient determinacy of the regulations contained therein¹¹.

The constitutional legislator, by establishing the general principle according to which the limitations imposed may not affect the essence of freedoms and rights, simultaneously defines its guarantees and limits and the conditions for applying the necessary limitations thereof¹².

SAFETY AND PUBLIC ORDER AS A RATIONALE TO JUSTIFY RESTRICTIONS ON THE RIGHT TO ASSEMBLE

The international lawmaker recognises the right of the individual to a peaceful assembly (whether to participate or to organise it). No restrictions may be imposed on the exercise of this right other than those established by the legislator and simultaneously necessary in a democratic society to ensure the safety of the state, public order or for the protection of public health or morals or the rights and freedoms of others¹³. The right of children to peaceful assembly is similarly recognised. No restrictions may be imposed on the exercise of this freedom except those that are lawful and that are necessary in a democratic society to ensure the interests of national security and public order, as well as the protection of health or social morals or the protection of the rights and freedoms of others¹⁴.

The Convention for the Protection of Human Rights and Fundamental Freedoms proclaims the right of everyone to freedom of peaceful assembly. The exercise of this right may not be subject to restrictions other than those specified by the legislator and which are necessary in a democratic society in the interests of national security, the protection of order, the protection of health and morals or the

¹⁰ Judgment of the Provincial Administrative Court of 4 July 2018, II SAB/Op 58/18, LEX no. 2531192.

¹¹ L. Bosek, M. Szydło, *Komentarz do art. 31*, [in:] *Konstytucja RP*, vol. 1: *Komentarz do art. 1–86*, eds. M. Safjan, L. Bosek, Legalis 2016.

¹² W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX/el. 2013, commentary on Article 31.

¹³ Article 21 of the International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966 (Journal of Laws 1977, no. 38, item 167).

¹⁴ Article 15 of the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989 (Journal of Laws 1991, no. 120, item 526).

protection of the rights and freedoms of others¹⁵. The right to freedom of peaceful assembly also derives from the EU Charter of Fundamental Rights¹⁶.

The constitutional legislator, in Article 57 of the Polish Constitution, guarantees everyone the freedom to hold peaceful assemblies and participate in them, while at the same time stipulating that limitations upon such freedoms may be imposed by statute. The exercise of the freedom of assembly depends on the free decision and activity of those concerned themselves. In this case, the lawmaker delimits the sphere free from interference by the public authority, whose fundamental duty is to prohibit unjustified interference in the sphere of activity of individuals as defined in the Polish Constitution¹⁷.

The legislator defines an assembly as a grouping of persons in an open space, which is accessible to unnamed persons in a specific location to hold joint deliberations or to express a position on public issues. It also distinguishes spontaneous assemblies, defining them as assemblies that occur in connection with a sudden and unforeseeable event in the public sphere, the holding of which at another time would be pointless or of little relevance to public debate¹⁸. The concept of assembly consists of the criterion of form (grouping), place (in a specific location), accessibility (to unnamed persons) and purpose (holding joint deliberations or jointly expressing a position on public issues)¹⁹.

If the conduct of a spontaneous assembly causes a serious threat to safety or public order, then the officer in charge of the Police may, pursuant to Article 28 (1) (2) of the Law on Assemblies, dissolve it. Such premises are not provided for by the Law on Assemblies in the case of a decision prohibiting an assembly.

Safety should be considered as one of the most essential spheres of the existence of a definite entity, which concerns all its elements and is related to ensuring its existence and development²⁰. Safety is an area of great importance,

¹⁵ Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws 1993, no. 61, item 284, as amended).

¹⁶ Article 12 of the Charter of Fundamental Rights of the European Union (OJ EU C 326/391, 26.10.2012).

¹⁷ W. Sokolewicz, K. Wojtyczek, *Komentarz do art. 57*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, eds. L. Garlicki, M. Zubik, vol. 2, LEX/el. 2016.

¹⁸ Article 3 of the Act of 24 July 2015 – Law on Assemblies (consolidated text, Journal of Laws 2022, item 1389).

¹⁹ S. Gajewski, A. Jakubowski, *Prawo o zgromadzeniach. Komentarz*, Legalis 2017, commentary on Article 3.

²⁰ B. Zdrodowski, *Istota bezpieczeństwa państwa*, “Annales Universitatis Paedagogicae Cracoviensis. Studia de Securitate” 2019, vol. 9(3), pp. 52–53.

both for the state as a public institution and for society or its members. It should, therefore, be seen in terms of the common good²¹.

The rationale behind the protection of public order (although its content is, by far, undefined) contains the postulate of such shaping of the actual situation within the state, which facilitates the normal co-existence of individuals within the state organisation. When restricting a particular right or freedom, the legislator should be guided by concern for the proper, harmonious co-existence of the members of society. This refers to the protection of the interests of individual persons, as well as specific social goods, including public property²².

The freedom of assembly may also be restricted in the case of the imposition of a state of emergency and martial law. However, no such restriction has been provided by lawmakers for a state of natural disaster.

During a state of emergency, the right to organise and hold all types of assemblies may, among others, be suspended, which, however, does not apply to assemblies organised by churches and other religious associations and religious organisations operating within temples, church buildings, in other premises serving for organising and holding public worship, as well as assemblies organised by state authorities or local government bodies²³. Under Article 15 ASE, where a state of emergency has been declared, all natural persons residing there, even temporarily, are subject to restrictions on human and civil rights and freedoms. The restrictions also apply respectively to legal persons and organisational units without legal personality having their registered office or conducting activities in the area covered by the state of emergency. Such restrictions should correspond to the nature and intensity of the threats constituting the grounds for the imposition of a state of emergency, as well as ensure the effective restoration of the normal operation of the state.

The restriction on the freedom of assembly must, therefore, be adequate to the nature and intensity of the threats that determine the imposition of the state of emergency. The threats which are the reasons for the imposition of the state of emergency, as follows from Article 2 ASE, must harm the constitutional system of the state, the safety of citizens or public order, which may be caused, among others, by actions of a terrorist nature or actions in cyberspace²⁴ and which cannot be removed by the use of ordinary constitutional measures.

²¹ M. Czuryk, *Bezpieczeństwo jako dobro wspólne*, "Zeszyty Naukowe KUL" 2018, no. 3, p. 15.

²² Judgment of the Constitutional Tribunal of 12 January 1999, P 2/98, OTK 1999, no. 1, item 2.

²³ Article 16 of the Act of 21 June 2002 on the state of emergency (consolidated text, Journal of Laws 2017, item 1928), hereinafter: ASE.

²⁴ For more information on cyber threats, see K. Kaczmarek, *Zapobieganie zagrożeniom cyfrowym na przykładzie Republiki Estońskiej i Republiki Finlandii*, "Cybersecurity and Law" 2019, vol. 1(1); A. Bencsik, M. Karpiuk, M. Kelemen, E. Włodyka, *Cybersecurity in the Visegrad Group*

As in the case of the state of emergency, in the case of martial law, the legislator has also decided that the right to organise and hold all types of assemblies may be suspended. However, this does not apply to assemblies organised by churches and other religious associations and religious organisations operating within temples, church buildings, and other premises serving for organising and holding public worship, as well as assemblies organised by state authorities or local government bodies²⁵.

CONCLUSIONS

Freedom of assembly is among those freedoms that are fundamental to the functioning of democracy. It is one of the pillars of a democratic state under the rule of law and crucial in a civil society. Freedom of assembly guarantees the individual effective participation in social and political life and it is necessary to present views and convictions in the public sphere, as well as to effectively influence political and social reality or to manifest membership in specific communities (religious, political or cultural communities). It plays an important role in the exercise of the rights of minority groups, including their full participation in social and political life with equal rights with other groups²⁶.

It is important to stress that a restriction on the freedom of assembly means any reaction by a public authority that causes inconvenience to the organisers,

Countries, Maribor 2023; U. Soler, *The World of New, Virtual Trends – Central Europe Societies Touched by COVID-19*, “European Journal of Transformation Studies” 2020, vol. 8(Suppl. 1); A. Bencsik, M. Karpiuk, *Cybersecurity in Hungary and Poland: Military Aspects*, “Cybersecurity and Law” 2023, vol. 9(1); eadem, *The Legal Status of the Cyberarmy in Hungary and Poland: An Overview*, “Cybersecurity and Law” 2023, vol. 10(2); A. Pieczywok, *The Use of Selected Social Concepts and Educational Programmes in Counteracting Cyberspace Threats*, “Cybersecurity and Law” 2019, vol. 2(2); M. Czuryk, *Restrictions on the Exercising of Human and Civil Rights and Freedoms Due to Cybersecurity Issues*, “Studia Iuridica Lublinensia” 2022, vol. 31(3); eadem, *Cybersecurity as a Premise to Introduce a State of Exception*, “Cybersecurity and Law” 2021, vol. 6(2); eadem, *Supporting the Development of Telecommunications Services and Networks through Local and Regional Government Bodies, and Cybersecurity*, “Cybersecurity and Law” 2019, vol. 2(2); eadem, *Special Rules of Remuneration for Individuals Performing Cybersecurity Tasks*, “Cybersecurity and Law” 2022, vol. 8(2); J. Kurek, *Operational Activities in the Field of Cybersecurity*, [in:] *Cybersecurity in Poland: Legal Aspects*, eds. K. Chałubińska-Jentkiewicz, F. Radoniewicz, T. Zieliński, Cham 2022; M. Karpiuk, *Crisis Management vs. Cyber Threats*, “Sicurezza, Terrorismo e Società” 2022, no. 2; K. Gawkowski, *Cyberbezpieczeństwo w inteligentnym mieście*, “Cybersecurity and Law” 2023, vol. 10(2); J. Kostrubiec, *The Position of the Computer Security Incidents Response Teams in the National Cybersecurity System*, “Cybersecurity and Law” 2022, vol. 8(2).

²⁵ Article 22 of the Act of 29 August 2002 on martial law and on the competences of the Supreme Commander of the Armed Forces and the rules of his subordination to the constitutional authorities of the Republic of Poland (consolidated text, Journal of Laws 2022, item 2091).

²⁶ A. Gliszczyńska-Grabias, L. Wiśniewski, *Komentarz do art. 21*, [in:] *Międzynarodowy pakt praw obywatelskich (osobistych) i politycznych. Komentarz*, ed. R. Wieruszewski, LEX/el. 2012.

potential demonstrators or counterdemonstrators, actual protestors, or persons wishing to remain neutral and not participate in the assembly. This reaction may relate to restrictions relating to the content of the opinions proclaimed, the possession of posters, banners, emblems, the venue, the timing, the noise associated with the demonstration, and the sanctions that may be applied before, during and after the assembly. It is, therefore, of minor importance when the reaction takes place. What is important is that it is related to the planned, ongoing or past assembly. Due to the weight and role of the freedom of peaceful assembly in a democratic state under the rule of law, any restrictions imposed should be assessed with the utmost stringency and severity²⁷. This also applies to restrictions imposed for reasons of safety and public order. There can be no arbitrariness in imposing restrictions in this respect; it must always be weighed against whether it is indeed impossible to guarantee safety or duly secure public order through other, less stringent measures.

When restricting the enjoyment of human and civil liberties and rights, it is necessary to carefully analyse the arguments supporting the general good whose protection requires appropriate interference. The general good may require ensuring safety and public order at the expense of the freedom of assembly (if justified by the circumstances). Both categories (safety and public order), perceived through the prism of the general interest, may, therefore, constitute grounds for interference in the sphere of individual freedoms and rights when that interest cannot be protected otherwise.

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²⁷ Judgment of the Supreme Court of 20 October 2022, I NSNc 247/22, OSNKN 2022, no. 4, item 24.

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ABSTRACT

The public good (which will also include public safety and public order) will sometimes require protection at the expense of human and civil rights and freedoms. As long as the interference is justified by the circumstances and is legally permissible, it is possible to restrict the freedom of assembly. This may, however, be done in special circumstances where safety and public order cannot be guaranteed using other measures. Moreover, the disadvantages for the addressees of the restriction must not be excessive, and the restriction itself must not last longer than necessary. The right to organise and hold assemblies of any kind may be suspended during both martial law and a state of emergency. Both are states of exception, imposed due to the need to protect the state, including against threats to its safety.

Keywords: freedom of assembly; safety; public order; states of exception

ABSTRAKT

Dobro powszechne (w którym to pojęciu będzie się mieściło również bezpieczeństwo i porządek publiczny) będzie czasem wymagało ochrony kosztem wolności i praw człowieka i obywatela. O ile ingerencja będzie uzasadniona okolicznościami i prawnie dopuszczalna, można wprowadzić ograniczenie korzystania z wolności zgromadzeń. Może to jednak nastąpić w szczególnych okolicznościach, gdy za pośrednictwem innych środków nie da się zapewnić bezpieczeństwa i porządku publicznego. Co więcej, dolegliwości dla adresatów ograniczenia nie mogą być nadmierne, a samo ograniczenie nie może trwać dłużej, niż jest to konieczne. Prawo do organizowania i przeprowadzania wszelkiego rodzaju zgromadzeń może być zawieszane zarówno w czasie stanu wojennego, jak i stanu wyjątkowego. Oba stany nadzwyczajne są wprowadzane ze względu na konieczność ochrony państwa, w tym przed zagrożeniami godzącymi w jego bezpieczeństwo.

Słowa kluczowe: wolność zgromadzeń; bezpieczeństwo; porządek publiczny; stany nadzwyczajne