

**2180/ 2016/MPL/BGM**

**Hon. Arkadiusz Czartoryski,  
Member of the Sejm  
President of the Administration and Internal Affairs Committee**

**Comments of the Helsinki Foundation for Human Rights to the deputy-sponsored Bill  
on the amendment to the Assemblies Act (parliamentary paper No. 1044)**

1. On 15 November 2016, the Sejm received a member-sponsored draft amendment to the Assemblies Act of 24 July 2015.<sup>1</sup> The draft was accompanied by a justification, which concisely describes the content of the proposed modifications but fails to indicate what important social problem is to be addressed by the proposed change of law. Given the above, it is difficult to assess whether the proposed measures (such as the introduced concept of "cyclical assemblies") are capable of solving such a social problem. However, apart from certain facilitations for selected categories of public assemblies, the Bill introduces a number of restrictions on such assemblies. The commented Bill, as a law that limits the constitutional freedom of assembly, should be submitted to extensive public consultation and, in particular, a public hearing<sup>2</sup> that would serve as a forum for expressing opinions of both citizens organising assemblies and units of local government responsible for keeping the public peace and the safety of assemblies.

2. The Helsinki Foundation for Human Rights would like to note that the discussed Bill is another proposal for an amendment to the Assemblies Act made in the aftermath of the protests held during the Independence Day (11 November 2011) in Warsaw. The amendments proposed by the previous Sejm<sup>3</sup> in response to demonstrations organised on the Independence Day were widely criticised by then-opposition (currently, the ruling party), non-governmental organisations<sup>4</sup> and international institutions<sup>5</sup>. However, the present sponsors of the Bill propose even more far-reaching restrictions on the freedom of assembly than those envisaged under the previous legislative proposals from 2011 or 2013.

3. The Bill adds Chapter 3a, entitled "Proceedings in cases of cyclical assemblies", to the Assemblies Act. In accordance with Article 26a, the Chapter will apply to the assemblies that:

- are organised by the same organiser at the same place or on the same route;
- are held at least four times a year according to a developed schedule;

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1 J.L.. item. 1485.

2 Such a hearing was organised, for instance, during the legislative works of the 7th Sejm on the presidential Bill on the amendment to the Assemblies Act (parliamentary paper no. 35).

3 Cf. the Bill on the amendment to the Assemblies Act presented by the President of the Republic of Poland (parliamentary paper No. 2023).

4 An open letter of NGOs may be accessed at [http://beta.hfhr.pl/wp-content/uploads/2012/06/list\\_otwarty\\_ust\\_4zn7\\_o\\_zgromadzeniach\\_12.06..pdf](http://beta.hfhr.pl/wp-content/uploads/2012/06/list_otwarty_ust_4zn7_o_zgromadzeniach_12.06..pdf).

5 Office for Democratic Institutions and Human Rights, Note on the Draft Law Amending the Law on Assemblies of Poland - <http://www.osce.org/odihr/90855?download=true>.

and/or

- at least once a year, on dates of a national and state holiday;

and

- were held over the last three years, even if not in the form of assemblies;

and

- were intended, in particular, to commemorate events that are momentous and important for the history of the Republic of Poland.

In a situation where a given public assembly satisfies these prerequisites, the organiser may apply to a province governor (*wojewoda*) for a permission to organise such assemblies on a recurring basis.

On the one hand, the proposed criteria distinguishing "cyclical assemblies" seem relatively detailed and selective. However, sponsors of the Bill did not explain the reasons for them selecting those exact criteria as a basis for distinguishing cyclical assemblies from other types of assemblies. For example, it was not explained why an assembly must be held four times a year (and not, for example, once a month) to be considered "cyclical". Moreover, there are no arguments that would support the notion that a cyclical assembly is an assembly held on an annual basis for the past three years (and not five or ten years).

On the other hand, the definition is too broad as it also includes demonstrations that do not have the status of assemblies. The definition also includes examples of (preferred) themes of such a cyclical assembly. Sponsors of the Bill failed to explain why historically themed assemblies should be given priority over events held in relation to current events (this priority results from further provisions of the Bill).

For the above reasons, the proposed definition is, on the one hand, based on extensively specific prerequisites. On the other hand, however, the definition is too broad, as it leaves a province governor a significant degree of discretion in deciding whether or not permit an assembly.

4. The concerns over the definition are relevant because a province governor's decision permitting the organisation of a cyclical assembly is a ground for restricting the possibility of holding other simultaneous or spontaneous assemblies at the same time and at the same place. The Bill amends Article 14 of the Assemblies Act, which regulates situations where a municipal authority is obliged to issue a decision prohibiting an assembly. The current wording of this provision is that such a decision should be issued at the latest 96 hours before a planned date of an assembly, in a situation where:

1) its [the assembly's] purpose violates the freedom of peaceful assembly, the holding of the assembly would violate Article 4 or the rules governing the organisation of assemblies or where the assembly's purpose or holding would violate provisions of criminal law;

2) the holding of the assembly may pose a threat to the life or health of persons or to the property of a considerable value, and in particular where such a threat has not been removed in the cases referred to in Articles 12 or 13.

Notably, the Bill adds para. 3 to Article 14, pursuant to which a municipal authority must also issue the prohibition if "an assembly is to be held at the place where and in the time when other cyclical assemblies take place". Furthermore, the proposed Article 26b provides that a municipal authority must issue such a decision within 24 hours of the receipt of notice

from a province governor. The province governor must issue a decision not later than 5 days before the first planned cyclical assembly.

This means that the possibility of holding an assembly that has been notified to a municipal authority will be restricted due to the fact of the holding of a cyclical assembly, whose status is determined by the province governor at the request of the cyclical assembly's organisers. Additionally, Article 2 of the proposed amendment reads that a province governor is authorised to issue a replacement order prohibiting an assembly if such a prohibition has not been issued by a municipal authority.

The Constitutional Tribunal ruled that “an assessment of the admissibility of the restriction of a particular freedom always involves a determination of an **actual need for an interference with this sphere**. The legislator may only use such legal measures that are effective means for attaining ends and, at the same time, are the least burdensome to individuals.” In this case, however, the legislator has failed to show what public interest requires to be protected so extensively that its protection necessitates a prohibition of other assemblies with the spatial and temporal proximity to a cyclical assembly.

Also, the European Court of Human Rights has been repeatedly expressing in its case law a need of the restrictive interpretation of any limitations on the right to assemble freely and peacefully, which is enshrined in Article 11 (1) of the Convention. This approach leads to the assumption that, whenever practicable, authorities should take measures to ensure the possibility of holding all assemblies rather than use the notification obligation applying to simultaneous assemblies as an excuse for the imposition of unreasonable restrictions<sup>6</sup>.

According to the Guidelines on Freedom of Peaceful Assembly issued by the OSCE and the Venice Commission, Counter-demonstrations are a particular form of simultaneous assembly in which the participants wish to express their disagreement with the views expressed at another assembly. In such situations, the unity of time and place of two assemblies is an important element of the message that is to be delivered during both demonstrations.

5. The position of municipal authorities and province governor and the duty to ensure safety

The primal tenet of both the 1990 Assemblies Act and the 2015 Assemblies Act was the assumption that administrative proceedings in cases involving assemblies are conducted by a municipal authority. The above assumption resulted from the conclusion that municipal authorities, acting in cooperation with the local Police, are in a better position to assess factors such as safety issues relating to the organisation of a given assembly. Thanks to this arrangement, the authority is aware of the assemblies that take place in a given area (which is a consequence of submitted notifications) and also knows whether there are any grounds for a decision prohibiting the holding of these assemblies.

By naming the province governor a decision-making authority, the proposed amendment sets aside the assembly notification regime that has been operating in Poland for more than 25 years. It is possible that a province governor fails to notice security threats resulting from the holding of a given cyclical assembly, yet the obligation to ensure safety

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6 *Öllinger v. Austria*, ECtHR Judgment of 29 June 2009, Application no. 76900/01.

would be still imposed on a municipal authority (and the local Police). Even though a municipality considers an assembly a security risk, it must abide by the decision of the province governor. This means that the Bill gives the province governor certain powers but none responsibility whatsoever for the actual course of either a cyclical assembly or the assembly prohibited under Article 14 (3) of the Assemblies Act.

6. The sponsors also seek to add another paragraph (2) to Article 2, which provides that assemblies organised in accordance with the procedure and rules established in the Assemblies Act may not be held at the same time and in the same place as the assemblies referred to in Article 2 (1) of the Assemblies Act<sup>7</sup>. Therefore, the proposed amendment leads to the situation where “state” or religious assemblies will not encounter a counter-demonstration (a simultaneous assembly), even if the latter was a “silent” protest. Considering the fact that the freedom of assembly is above all a “civic” and not a “state” freedom, the proposed amendment raises substantial constitutional concerns. Furthermore, sponsors of the Bill fail to give any examples of negative practices of the application of the Assemblies Act (such as any actual cases of state- or church-organised assemblies having been disrupted by other public gatherings) that would justify an absolute prohibition of such counter-demonstrations.

If the purpose of the proposed amendment is to prevent the situation in which one assembly interferes with the conduct of another, a reference should be made to the wording of Article 52 § 2 (1) of the Petty Offences Code. Pursuant to this provision, anyone who disrupts or attempts to disrupt the organisation or conduct of a non-prohibited assembly is subject to the penalty of restriction of liberty or a fine. This measure seems to be sufficient – it allows for the organisation of several assemblies taking place at the same time with the *mutatis mutandis* application of the legal rule established in Articles 12 and 13 of the Assemblies Act, which governs such a situation.

In light of Article 57 of the Constitution, actions taken by public authorities should aim at ensuring that both assemblies may be held at the same time, provided that the obligation to ensure the safety of the public and maintain public order is properly discharged. Given the above, it is difficult to find a constitutional value that would justify such a different regulation of different types of assemblies and provide more favourable treatment of state or religious assemblies.

Freedom of assembly is a civic liberty, not a state prerogative. The above conclusion has been affirmed by the Constitutional Tribunal, which ruled that the freedom of assembly is “a political freedom that relates, in its general dimension, to individuals’ participation in public life and the establishment and attaining of jointly defined objectives, the obtaining of information about the manner in which public authorities act and the taking part in the appointment of these authorities”. Moreover, held the Constitutional Tribunal, freedom of assembly “is ... a fundamental element that determines an individual’s status in relation to the state”, which makes this freedom “a significant aspect of the constitutional model of the system of government”.

7. The Constitutional Tribunal pointed out in the judgment from 18 September 2014 that “the existence of an organised and formalised structure is not ... – as opposed to the

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7 This provision indicates that the Act does not apply to the following types of assemblies: (1) assemblies organised by public authorities, and (2) assemblies held as part of the activities of churches and other religious associations. This means, among other things, that such assemblies do not require notification.

freedom of association, expressed in Article 58 of the Constitution – a structural element that may be named a precondition of the exercise of freedom of assembly”. This means that the characteristics of an organiser of an assembly are irrelevant for both the assessment of whether the assembly has a peaceful nature or the decision whether the assembly should be given priority over other public gatherings.

However, the Bill gives the priority, first and foremost, to the assemblies referred to in Article 2 (1) of the Assemblies Act and, then, to cyclical assemblies. Notwithstanding the above, both the Constitutional Tribunal and the European Court of Human Rights consider spontaneous assemblies and counter-demonstrations “fully-fledged” assemblies. The key factor in an assessment of the legality of an assembly is the peaceful nature of an assembly, and not its substantial frequency or the organiser’s characteristics (a state body or a religious association)<sup>8</sup>.

The crucial element in the assessment of “the peaceful nature” of an assembly is whether an assembly takes place “with respect to the physical integrity of persons and private and public property”. Importantly, “it may not be determined that an assembly is no longer peaceful merely because there is *some* infringement to its peaceful course or where a single participant in an assembly misbehaves. On the contrary, it is accepted that only an escalation of behaviours that breach the peace, cause property damage or result in violence directed towards participants may be the evidence of an assembly losing its peaceful nature”.

Consequently, the European Court of Human Rights indicated that restrictions on the freedom of assembly may only apply to assemblies that have lost their peaceful nature and may thus pose a threat to public safety and order<sup>9</sup>. Conversely, restrictions on the freedom of assembly may not be based on assumptions or speculation<sup>10</sup>. Introduction of such restrictions may not involve state authorities acting without a prior assessment of a degree of threat, which results in the use of the most radical measures preventing the exercise of freedom of assembly<sup>11</sup>. In consequence, the standard developed by the European Court of Human Rights is based on the assumption that in all circumstances, state authorities should “show a certain degree of tolerance towards peaceful gatherings” irrespective of whether some assemblies may involve certain disturbances of public order<sup>12</sup>.

By amending Articles 2 and 14 of the Assemblies Act, sponsors of the Bill excluded the requirement of performing an individual assessment of a given case, introducing the general prohibition of simultaneously holding two assemblies at the same or similar location.

8. The Constitutional Tribunal has analysed issues related to statutory regulation of freedom of assembly on a number of occasions<sup>13</sup>. Based on its previous case law, the Tribunal held in the last judgment on the issue (in September 2014) that there is a minimum standard of the adequate protection of citizens’ freedom of assembly that should be ensured by public authorities. The Assemblies Act of July 2015 is a direct consequence of this judgment and, at

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8 This is even more superfluous since the current version of the Act already has a simplified procedure for organisation of assemblies (Article 21 et seq.).

9 *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, ECtHR Judgment of 2 October 2001, application nos. 29221/95, 29225/95.

10 *Vajnai v. Hungary*, ECtHR Judgment of 8 July 2008, application no. 33629/06.

11 *Primov and Others v. Russia*, ECtHR Judgment of 12 June 2014, application no. 17391/06.

12 *Kasparov v. Russia*, ECtHR Judgment of 3 October 2013, application no. 21613/07.

13 Judgment of 10 July 2008, case no. P 15/08; judgment of 10 November 2004, case no. Kp 1/04; judgment of 18 September 2014, case no. K 44/12.

the same time, an implementation of a Strasbourg standard concerning, among other things, the status of spontaneous assemblies.

The Tribunal's reading of Article 57 of the Constitution leads to the conclusion that the state may not regiment freedom of assembly. The state should rather ensure that a given freedom may be exercised and any interference from state authorities should always be an exception<sup>14</sup>. According to this definition, freedom of assembly encompasses the selection of not only an assembly's objective but also its time and place. "In consequence, this means that individuals may freely decide on the topic, location and time of their expressed statements", the Constitutional Tribunal held<sup>15</sup>.

## 9. Conclusions

The proposed amendment is an unreasonable restriction on the freedom of peaceful expression of ideas. The Bill limits and weakens the independent standing of spontaneous assemblies and counter-demonstrations, which receive protection under the currently applicable Assemblies Act and also the Constitution and the European Convention on Human Rights. The existing mechanisms and framework of obligations imposed on public authorities are sufficient to secure public order. Even if the proposed law prohibits certain types of assemblies, this does not mean that such assemblies will not take place. As the Constitutional Tribunal ruled, "freedom of assembly plays a stabilising role in respect of the existing social and political order and, above all, the mechanism of political representation. It is a form of citizens' active participation in the life of their state and as such is an expression of citizens' concern over the common good."

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14 In light of the Tribunal's standard, concerns may be raised in respect of the definition of assemblies laid down in Article 3 of the Assemblies Act, according to which "an assembly is a group of people at an open space that is accessible by individually unidentified persons present at a certain location for the purpose of holding common deliberations or expressing a joint statement on a public matter". On the other hand, the Tribunal adopted a broad understanding of the term "assembly" that includes common deliberations of both public and non-public (private) matters.

15 Judgment of 18 September 2014, case no. K 44/12.