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**FREEDOM OF ASSEMBLY IN THE LIGHT
OF THE CONSTITUTION AND OTHER NORMATIVE ACTS
OF THE REPUBLIC OF POLAND AND THE KINGDOM OF
SPAIN – HISTORICAL AND COMPARATIVE PERSPECTIVE:
AN OUTLINE**

Introduction

Freedom of assembly is one of the fundamental freedoms of the individual in a democratic state ruled by law¹. The right to assemble peacefully, according to the division introduced in the late 1970s by the French jurist Karel Vašák, belongs to the first-generation human rights. The first generation of human rights includes personal and political freedoms, i.e. rights of fundamental importance, closely related to individual freedom and ensuring participation in public life². The freedom to assemble, to manifest one's views in public, to express support for certain ideas or, on the contrary, dissatisfaction and opposition to given social phenomena or decisions taken by authorities, is one of the pillars on which democratic society is based. The right of social groups to openly manifest their convictions is of particular importance in the case of the opposition as well as new political movements, since in this way they can express their views and be noticed by the general public³. An assembly which shows discontent with the actions of the authorities or indicating social unrest acts as an early warning mechanism. Therefore, it can also be of paramount importance from the perspective of those in power⁴.

¹ The concepts of freedom and right, although not the same, are closely related, and in doctrine and legislation this division is not applied consistently. W. Brzozowski, *Zagadnienia wstępne* [in:] *Prawa człowieka*, eds. W. Brzozowski, A. Krzywoń, M. Wiącek, Warszawa 2021, pp. 29–31.

² *Ibidem*, pp. 33–34.

³ J. Juchniewicz, M. Kazimierczuk, *Wolności i prawa polityczne* [in:] *Wolności i prawa człowieka w Konstytucji Rzeczypospolitej Polskiej*, ed. M. Chmaj, Warszawa 2016, p. 128.

⁴ M. Wiącek, *Wolność zgromadzeń i zrzeszania się* [in:] *Prawa człowieka*, eds. W. Brzozowski, A. Krzywoń, M. Wiącek, Warszawa 2021, p. 262.

In addition to the assembly's pivotal role in influencing public opinion and, consequently, influencing the authorities, it is an indispensable tool for the exercise of other freedoms. Freedom of assembly enables the exercise of freedom of association and is also linked to freedom of expression⁵. While freedom of expression guarantees the individual the possibility to express his or her judgements and thus influence public opinion, in practice, the 'audible' are the few who are recognised in society as an authority or by virtue of their functions. The right of assembly allows entire social groups to have a voice and allows for the construction of identities of these groups and a sense of agency.

At present personal and political freedoms are widely recognised and incorporated into the legal order by states with democratic regimes. As a consequence of the experience of the Second World War, Western constitutionalism turned to the natural law view of the concept of human rights, at the centre of which was the notion of the dignity to which every person is entitled⁶. This marked a departure from hard legal positivism, assuming that all legal norms originate from and are enacted by the state. Human rights are now perceived in constitutional law doctrine not as being granted by the state as a result of the will of those in power. The state guarantees by law the freedoms to which the individual is entitled and enables people to exercise these freedoms⁷.

Not only is the right to assemble peacefully regulated by national law, but also by international law and regional human rights systems, which, beginning in the late 1940s, saw the regulations on fundamental rights and freedoms⁸. The Universal Declaration of Human Rights of 10 December 1948, states in Art. 20 that "everyone has the right to freedom of peaceful assembly and association"⁹. Freedom of assembly is guaranteed by Art. 11(1) of the European Convention on Human Rights, while section 2 of the same article emphasises that the only restrictions to which the right of peaceful assembly may be subject are those which are "prescribed by law and are necessary in a democratic society in the interest 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"¹⁰. Adopted on 16 December 1966, the International Covenant on Civil and Political Rights, in Art. 21, "recognises the right to

⁵ P. Czarny, B. Naleziński, *Wolność zgromadzeń*, Warszawa 1998, pp. 19–20.

⁶ L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2015, p. 90.

⁷ J. Juchniewicz, M. Kazimierzczuk, *Wolności i prawa...*, p. 129.

⁸ L. Garlicki, *Polskie prawo...*, pp. 90–92.

⁹ Universal Declaration of Human Rights, UN General Assembly Resolution 217 A (III) adopted and proclaimed on 10 December, 1948 <https://www.bb.po.gov.pl/images/Prawa/PNZ/PDPCZ.pdf> (20.07.2022).

¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on November 4, 1950, subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (Dz.U. 1993, No. 61, item 284).

assemble peacefully” and, in the same way as the ECHR, stipulates that this right can only be restricted by law and only if justified by the protection of “national security or public safety, public order or the protection of public health or morals or the protection of the rights and freedoms of others”¹¹. Within the framework of European Union law, the guarantee for freedom of assembly and association is contained in Art. 12 of the Charter of Fundamental Rights of the European Union¹².

Freedom of assembly is not absolute and, as for instance the provisions guaranteeing the right to assemble in international and regional regulations cited above indicate, certain limitations to it are permissible. Furthermore, the exercise of the freedom of assembly may bring it into conflict with other civil rights and liberties, such as the right to property, freedom of movement or the protection of personal rights. Moreover, a situation may arise in which a number of people wish to exercise their right to assemble and manifest their beliefs at the same time and place¹³. One of the basic grounds for limiting the freedom of assembly is the need to ensure public safety and order. State interference in this regard should be aimed at protecting the goods and rights of persons who could be affected by an assembly¹⁴.

The sense of security is one of the most essential human needs and its provision is vital for the proper functioning of society. While the dissolution of a demonstration may not be the result of dissatisfaction of the authorities with the views expressed by its participants, in the event that it poses a threat to public safety, the dissolution of the assembly is justified¹⁵. The task of those in power is, on the one hand, to refrain from interfering in the sphere of freedom and, on the other hand, to create such conditions for the individual in which he or she can exercise his or her freedoms. The positive obligation of the state obliges its officials to take measures to protect persons exercising their freedoms also by preventing infringements by third parties¹⁶.

Modern European democratic states recognise and protect the freedom of assembly in their fundamental laws and they are guaranteed both constitutionally and by international treaties. Although, as mentioned above, the impetus for the development of human rights, the recognition that they are inalienable came from the experience of totalitarianism and the two world wars, the very idea of

¹¹ The International Covenant on Civil and Political Rights opened for signature in New York on December 19, 1966 (Dz.U. 1977, No. 38, item 167).

¹² Charter of Fundamental Rights of the European Union 2016/C 202/02 (Dz.U. UE C 7 June 2016).

¹³ P. Czarny, B. Naleziński, *Wolność zgromadzeń...*, pp. 22–23.

¹⁴ *Ibidem*, p. 24.

¹⁵ M. Jurgielewicz, *Bezpieczeństwo zgromadzeń w Polsce. Zarys problematyki*, Warszawa 2020, pp. 8–9, 11–12.

¹⁶ L. Garlicki, *Polskie prawo...*, p. 89; W. Brzozowski, *Zagadnienia wstępne...*, pp. 30–31.

individual rights and freedoms obviously has a much longer pedigree. It is part of the constitutional standard of Europe, shaped by a centuries-old historical process dating back to antiquity. The constitutional assumptions forming the basis for European constitutionalism date back to the 18th and 19th centuries¹⁷. The ideas of the Enlightenment and the experience of the French Revolution marked a turning point from the perspective of the perception of individual freedom. It was at that time the first regulations relating to freedom of assembly were introduced in European countries. In parallel, in the newly established United States of America, freedom of assembly was guaranteed by the First Amendment to the Constitution in 1791 (prior to that, similar provisions had been included in the declarations of rights of the first North American states in 1776). In the first half of the nineteenth century, freedom of assembly (if recognised) was severely restricted as a result of the reaction of the authorities fearing a return of revolutionary sentiment. The second half of the nineteenth century was the time when the right of assembly began to spread in Europe, while, as already mentioned, after the Second World War it became the binding norm, guaranteed by both national and international law¹⁸.

Europe's constitutional standard, based on the recognition of human and civil rights, the protection of political and personal freedoms and respect for the law to which authority is subject and has to act on its basis and within its limits, became widespread in Europe in the second half of the 20th century. Nevertheless that process was gradual. Both Poland and Spain underwent a systemic transformation towards democracy, thus adopting the systemic solutions underlying the democratic rule of law. Neither the socialist system of the Polish People's Republic, nor the dictatorship in Francoist Spain, implemented freedom of assembly in a manner consistent with the democratic standard. Another issue is the instrumental use of assemblies by regimes deviating from this standard and a kind of 'mobilisation' to participate in public celebrations aimed at demonstrating support for the authorities. Such an event, however, is in fact a denial of freedom¹⁹.

This paper will outline the issue of freedom of assembly in Poland and Spain, in the light of the constitutions and other selected normative acts of these countries. The aim of this article is thus to make the subject of comparison on the one hand, of the provisions previously governing the right of assembly in both cases, adopting the method of legal historical comparativism. When analysing Spanish legislation in the context of the right to assembly, we consider the changes taking place within national legislation. In case of Poland it was not

¹⁷ M. Wąsowicz, *Prawo i obywatel. Rzecz o historyczno-prawnych korzeniach europejskiego standardu ustrojowego*, Warszawa 2015, pp. 12–16.

¹⁸ P. Czarny, B. Naleziński, *Wolność zgromadzeń...*, pp. 25–29.

¹⁹ A. Ławniczak, *Wolność zgromadzeń* [in:] *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński, Wrocław 2014, p. 297 <http://www.bibliotekacyfrowa.pl/publication/51986> (20.07.2022).

until the regaining independence on 11 November 1918 that the process of creating of a national legal system could even begin. The regulations governing the right of assembly of the three partitioning states were binding not only before the establishing of the Second Polish Republic but also for a certain period of time remained in force in the interwar period. Taking into the account the above-mentioned political and social background is vital while drawing a comparison between the laws on the right to assemble in Spain and in the Polish lands (and from 1918 on, Poland as a state). Notwithstanding differences, those laws reflect the general European trend towards introducing regulations on the freedom to assemble. In the 20 both countries experienced a shift towards non-democratic regimes. Once again, while making a comparison the differences between the two regimes need to be contemplated. These considerations provide a starting point for a legal contemporary perspective. The adopted research method, by situating the subject of comparison in time and place, and then analysing selected normative acts, aims to demonstrate the similarities and differences between the legal solutions adopted by the legislatures of both states in the scope of the subject under discussion²⁰. The focus of this paper is on the constitutional guarantees. As mentioned earlier, the state is obliged to respect these guarantees but at the same time has to take measures in order to provide public safety. Hence normative acts regulating these matters are also considered.

Freedom of assembly in Poland – a historical perspective

The Constitution of 3 May 1791, adopted on the eve of the Partitions, in Chapter II entitled *The Nobility, or the Equestrian Order*, although it does not refer directly, like the American constitution, to freedom of assembly, it confirms all freedoms, liberties granted so far to ‘the noble state’²¹. The Partitions brought an end to national legislation and when discussing the regulation of the right of assembly in relation to the Polish lands it is necessary to analyse the regulations of the partitioning powers. In the territories of the Austrian partition, the Fundamental Law (known as the December Constitution) was passed on 21 December 1867, which was to regulate the functioning of the dualistic Habsburg monarchy, the Austro-Hungarian Empire. Among the civil liberties granted, Art. 12 included the right to assemble and form associations²². This article referred to a specific law, enacted on 15 November 1867. It is worth noting that under this law, organisers were only obliged to notify the authorities

²⁰ R. Tokarczuk, *Komparatystyka prawnicza*, Warszawa 2008, pp. 52–54.

²¹ The Government Act of 3 May 1791, <http://libr.sejm.gov.pl/tek01/txt/kpol/1791.html> (20.07.2022).

²² P. Czarny, B. Naleziński, *Wolność zgromadzeń...*, p. 31.

of their planned assembly – a permit was not required (although there were exceptions). The authorities' decisions were subject to appeal. On the other hand, foreigners were deprived of the right to organise and conduct an assembly concerning public affairs. In the case of states of emergency, the provisions of the Act could be suspended²³. Similarly, in the Prussian partition, the right of assembly was constitutionally guaranteed, in Art. 29 and 30 of the Constitution of 31 January 1850, and regulated successively in the Royal Decree of 11 March 1850 and then in the Law on Associations of 19 April 1908. The regulations in the Prussian/German partition were characterised by the granting of broad powers to the police and discrimination against the non-German-speaking population. The use of another language during a demonstration could be grounds for dissolution²⁴. In the Russian partition it was not until 1905 that all assemblies were forbidden, treated as an offence and subject only to criminal law. An order of 4/17 March 1906, an addition to the Law on the Prevention and Suppression of Crimes, was the first to regulate the organisation and conduct of assemblies – characteristic of Russian regulations was the prohibition of public assembly within a certain distance from the place where the Tsar was staying or the State Council and the State Duma were sitting²⁵.

The Polish lands in the period of partitions were subject to laws designed to suppress all forms of independence aspirations rather than promote any political freedoms whatsoever. The December Constitution improved the situation of the ethnic minorities – the regulations on assemblies reflect the political trend in the Austro-Hungarian Empire towards acknowledging (to a certain extent) their rights. In the Prussian/German regulation it is explicitly stated that only the German language could be spoken during demonstration and it goes hand in hand with the restrictions imposed on the use of the Polish language. It is to be emphasised that in the Russian partition until the first decade of the 20th century a public demonstration was defined as a crime, which left no room for manoeuvre for people willing to express their views in public.

After gaining independence by the Polish people in 1918, freedom of assembly in Poland was granted under the Constitution of 17 March 1921 by the newly formed state. The March Constitution established a parliamentary democracy and guaranteed a wide range of civil rights. According to Art. 108 of the Constitution, "citizens have the right to coalesce, assemble and form associations and unions. The exercise of these rights shall be determined by law". Freedom of assembly was therefore granted, in the light of the cited provision, not to everyone, but only to citizens, not to every individual. Article 124 of the March Constitution provided for the possibility of temporary

²³ P. Suski, *Zgromadzenia i imprezy masowe*, Warszawa 2010, pp. 14–16.

²⁴ *Ibidem*, pp. 16–19.

²⁵ S. Pieprzny, *Bezpieczeństwo zgromadzeń publicznych. Aspekty administracyjnoprawne*, Rzeszów 2013, pp. 17–18.

suspension of citizens' rights, including the right of assembly, for the entire state or locally, for reasons of public security. This provision set out in detail under what circumstances the suspension of rights could occur, and referred to the Martial Law and the Emergency Law²⁶. The crisis of parliamentary democracy in the Second Polish Republic led to a shift towards the authoritarian rule and restriction of civil rights. Significantly, the Constitution of 23 April 1935 does not contain a provision guaranteeing freedom of assembly and repeals Art. 108 of the March Constitution. Article 5 of the new Constitution does include the right of association ("the state shall ensure that citizens may develop their personal values and have freedom of conscience, speech and association"), but without the right of assembly it is difficult to speak of its full realisation²⁷. The inter-war period did not see a comprehensive regulation of assemblies until the Act of 11 March 1932²⁸. With its entry into force, the provisions of the earlier regulations on assemblies enacted up to that time were repealed, as well as the legal acts of the partitioning powers until then still in force. The law of March 1932 introduced the division into public and non-public assemblies (Art. 1(1)) and indoor and open-air assemblies (Art. 2(1)). Open-air assemblies required the permission of the authorities (Art. 7(1)). According to Art. 5, an assembly could be convened and presided over by "any adult Polish citizen having the capacity to act in law"²⁹.

Post-war Poland, since the enactment of a new constitution on 22 July 1952 officially bearing the name of the Polish People's Republic, was a negation of the constitutional standard respecting human freedoms and rights. The new constitution was a façade, and even those freedoms it provided for enjoyed neither institutional nor judicial protection. It needs to be said, though, that as the system decayed, the authorities began to make minimal concessions, and a system of institutional guarantees of constitutionality and legality developed in the 1980s³⁰. Nonetheless, at the level of declarations, the Constitution of 22 July 1952 ensured "freedom of speech, printing, assemblies and rallies, marches and demonstrations for citizens" (Art. 71(1)), and even stipulated in Art. 71(2) that, "the realisation of this freedom is served by putting to the use of the working people and their organisations printing presses, paper resources, public edifices and halls, means of communication, radio and other necessary material means"³¹.

²⁶ Act of 17 March 1921 – Constitution of the Republic of Poland (Dz.U. 1921, No. 44, item 26).

²⁷ The Constitutional Act of 23 April 1935 (Dz.U. 1935, No. 30, item 227).

²⁸ R. Grabowski, *Ewolucja ustawowych regulacji wolności zgromadzeń w Polsce* [in:] *Wolność zgromadzeń*, eds. R. Balicki, M. Jabłoński, Wrocław 2018, p. 29, <http://www.bibliotekacyfrowa.pl/publication/100569> (20.07.2022).

²⁹ Act of 11 March 1932 on assemblies (Dz.U. 1932, No. 48, item 450).

³⁰ L. Garlicki, *Polskie prawo...*, pp. 25–26.

³¹ Constitution of the Polish People's Republic adopted by the Legislative Sejm on 22 July 1952 (Dz.U. 1952, No. 33, item 232).

The communist authorities did not repeal the 1932 Law on Assemblies, which argues against the pre-war law in the context of the realisation of freedom of assembly. Its restrictive provisions introduced in authoritarian, Sanacja-ruled Poland, proved to be of use, from the point of view of the communist authorities, in the first decades of the new regime³².

Under the new Act on Assemblies of 29 March 1962 freedom of assembly was further restricted³³. It adopted a very broad definition of an assembly, which was, according to Art. 1(2) “any grouping of persons convened for the purpose of joint deliberations or for the purpose of manifesting together their position in relation to a certain issue or phenomenon. Conventions, rallies, demonstrations, marches, lectures, readings, processions and pilgrimages are assemblies” – assemblies organised by the authorities, political organisations and trade unions were not subject to the Act (Art. 3). According to Art. 10(1), the authorities could refuse to authorise or prohibit an assembly not only on grounds of security or public order, but also if it was ‘contrary to the public interest’. Although the Act provided for exemptions from the provisions of the Act in Art. 4 (such as family meetings, social gatherings and funeral ceremonies), these were also subject to Art. 17(2), under which the Citizen’s Militia could enter the place where they were held and dissolve them after checking the circumstances³⁴. It is therefore difficult to speak of any form of freedom of assembly in the communist era – assembly became a tool in the hands of the authorities, and individuals who broke from this collective vision of society faced severe sanctions. In the 1980s, the declaration of martial law (following the introduction of the Decree on Martial Law of 12 December 1981), and the decade-long economic and social crisis contributed to the tightening of the already extremely restrictive regulations³⁵.

With the collapse of the Polish People’s Republic, freedom of assembly, an issue of great importance for society on the road to transition to a democratic system, was already the subject of two drafts in 1989, one from the government and one from the public³⁶. The Act of 5 July 1990, in Art. 1, granted everyone the right of assembly – both the pre-war law of 1932 and the one passed by the communist government 30 years later, granted this right only to citizens (the communist law additionally listed professional, self-governing, cooperative and other social organisations among the entitled entities in Art. 2³⁷). The first democratic law on assemblies in the Republic of Poland precisely indicated, in contrast to the previous laws, the minimum number of persons forming an assembly.

³² S. Kwiecień, *Wolność zgromadzeń w świetle ustawodawstwa II RP*, „Roczniki Nauk Prawnych” 2013, Vol. XXIII, No. 1, p. 76; P. Czarny, B. Naleziński, *Wolność zgromadzeń...*, p. 38.

³³ R. Grabowski, *Ewolucja ustawowych...*, p. 31.

³⁴ Act of 29 March 1962 on assemblies (Dz.U. 1962, No. 20, item 89).

³⁵ P. Suski, *Zgromadzenia i imprezy...*, pp. 36–37.

³⁶ *Ibidem*, pp. 37–38.

³⁷ Act of 29 March 1962 on assemblies (Dz.U. 1962, No. 20, item 89).

In the light of Art. 1(2), “an assembly is a grouping of at least 15 persons, convened for the purpose of joint deliberations or for the purpose of jointly expressing a position”³⁸. This provision, by the Constitutional Court Judgment of 18 September 2014, was found to be incompatible with Art. 57 in conjunction with Art. 31(3) of the Constitution of the Republic of Poland. In its justification, the Constitutional Tribunal agreed with the position of the Ombudsman contained in the motion of 4 March 2013 that the determination of the minimum number of participants is arbitrary and results in smaller assemblies not being subject to the protection provided for in the law, which is a limitation of the freedom of assembly³⁹. However, the very fact that the minimum number of persons forming an assembly was specified in the Act, given the intention of the legislator, was pro-freedom in nature, regardless of the subsequent controversy. Its purpose was to protect smaller groups from interference by the authorities. On the other hand, the minimum number itself referred to other regulations of the time, e.g. concerning associations⁴⁰. The Act of 1962, as mentioned above, allowed interference by the authorities practically without restriction, even if a few people gathered for a family or social meeting.

Article 2 of the Act of 5 July 1990 stipulates that freedom of assembly may only be restricted by law for the protection of state security, public order, the protection of health, public morals and the rights and freedoms of others. Under the Law of 7 May 1999 on the Protection of the Sites of Former Nazi Camps, a provision on the protection of Holocaust Memorials was added to the provision⁴¹. The right to organise assemblies in the 1990 Act was granted in persons with full legal capacity, as well as legal persons, other organisations and groups of persons (Art. 3(1)). The proceeding of assemblies is a delegated task of commune bodies (*organy gminy*) (Art. 5(2)) and the appeal body is the voivode (Art. 5(1))⁴². The Law on Assemblies of 5 July 1990 was amended several times. It is worth emphasising that it was a law of fundamental importance in the state at the beginning of the democratic transition and this is also how its creators perceived it⁴³.

³⁸ Act of 5 July 1990 Law on Assemblies (Dz.U. 1990, No. 51, item 297).

³⁹ Judgment of the Constitutional Tribunal of 18 September 2014, file reference number K 44/12 (Dz.U., item 1327). This judgment is extremely important in the context of the changes made to the Act. Among other things, the obligation expressed in Art. 7(1) to inform the municipal authority not later than 3 working days before the date of the assembly was deemed unconstitutional as well.

⁴⁰ M. Bartoszewicz, *Liczba uczestników zgromadzenia i jej znaczenie prawne w obecnym i dawnym prawie o zgromadzeniach* [in:] *Wolność zgromadzeń*, eds. R. Balicki, M. Jabłoński, Wrocław 2018, pp. 98–100, <http://www.bibliotekacyfrowa.pl/publication/100569> (20.07.2022).

⁴¹ Law of 7 May 1999 on the protection of the sites of former Nazi extermination camps (Dz.U. 1999, No. 41, item 412).

⁴² Act of 5 July 1990 – Law on Assemblies (Dz.U. 1990, No. 51, item 297).

⁴³ P. Suski, *Zgromadzenia i imprezy...*, p. 39.

Freedom of assembly in Spain – a historical perspective

In Spain, the right to assembly was first granted by the democratic, liberal Constitution (Democratic Constitution of the Spanish Nation – Constitución Democrática de la Nación Española) ratified on 1 June 1869. However, the provisions of the Constitution relating to freedom of assembly imposed restrictions to the exercise of this freedom⁴⁴. According to Art. 17, no Spaniard may be deprived of the right to assemble peacefully. The above-mentioned provision listed a catalogue of rights to which the Spanish people were entitled. In addition to the right of assembly, the right to freedom of speech and writing, the right of association as long as it did not contravene public morals, and the right of petition were guaranteed. However, according to Art. 18, open-air assemblies and political demonstrations may only take place during the day, and all public assemblies are subject to general police regulations⁴⁵. The subsequent Basic Law of 1876, whose enactment followed the proclamation and fall of the First Spanish Republic (1873–1874), was entitled the Constitution of the Spanish Monarchy (Constitución de la Monarquía Española), Art. 13 of the Constitution, contained in Title I, ‘The Spanish People and their Rights’, granted all Spaniards the right of peaceful assembly. In addition, Art. 14 stated that laws would set out rules to secure respect for the rights contained in Title I of the Constitution, without prejudice to the rights of the Nation or to the essential attributes of public authority, and would define the civil and criminal liability of authorities, judges and officials who violate the rights in this Title. According to Art. 17, freedom of assembly (as well as other rights specified in the provision), could not be suspended in the whole or part of the country, except temporarily and by law, in extraordinary circumstances when the security of the State so requires. Neither civil nor military authorities could provide for penalties other than those prescribed by law⁴⁶. This provision gave the government wide discretion to suspend constitutional rights and in the following years proposals for specific regulations on this matter were submitted⁴⁷.

⁴⁴ R. Hinojosa, *La protección jurisdiccional del derecho de reunión en el Ordenamiento español*, „Revista Española de Derecho Constitucional” 1990, No. 28, p. 178, file:///C:/Users/e7450/Downloads/Dialnet-LaProteccionJurisdiccionalDelDerechoDeReunionEnEIO-79406-5.pdf (20.07.2022)

⁴⁵ Democratic Constitution of the Spanish Nation of 6 June 1869, https://www.congreso.es/constitucion/ficheros/historicas/cons_1869.pdf (20.07.2022).

⁴⁶ Constitution of the Spanish Monarchy of 1876, https://www.congreso.es/constitucion/ficheros/historicas/cons_1876.pdf (20.07.2022).

⁴⁷ R. Flaquer Montequi, *El derecho de asociación, reunión y manifestación*, „Ayer” 1999, No. 34, pp. 167–168, https://revistaayer.com/sites/default/files/articulos/34-6-ayer34_DerechosyConstitucion_Flaquer.pdf (20.07.2022).

The Law on Assemblies, was enacted in Spain on 15 June 1880⁴⁸. According to Art. 1 of the law, the right to peaceful assembly granted to Spaniards in Art. 13 of the Constitution was available to everyone without restriction, the only condition for convening a public assembly was to give 24 hours' notice to the local authorities or, in the case of provincial capitals, to the civil governor. Article 2 adopts the definition of a public assembly – it is, in the light of the said provision, more than 20 persons gathered in a building that is not their place of residence. Under the 1880 Assembly Act, public assemblies, civic processions and processions which are organised in squares, streets, promenades and other places of transit require the prior written permission of the authorities (Art. 3). Article 4 provided for the possibility for the authorities to be present at the assembly, but without the right to lead or take part in the debate. The regulations provided for grounds for suspension of assemblies: non-compliance with the Law on Assemblies, inconsistency of the place with the notification of the planned assembly and objectives of which the authorities were not informed, obstruction of public traffic in any form, and grounds relating to the provisions of the penal code (Art. 5). The following were excluded from the provisions of the Act: Catholic processions and meetings of Catholics and followers of other tolerated cults in temples and cemeteries, associations and establishments operating on the basis of statutes approved by the state, and assemblies in theatres and at other performances (Art. 7)⁴⁹. The Law on Assemblies of 15 June 1880 provided therefore detailed regulations on the right to assemble – it defined the term ‘public assembly’ and specifically stated which public gatherings required prior permission. In addition, it listed grounds on which the authorities could suspend public assemblies. Neither modification to the submitted plan of an assembly nor any actions which might lead to disturbance in public space were permitted.

In the inter-war period, Spain was plagued by social unrest and a struggle between opposing political parties. The Second Republic, proclaimed in 1931 after the fall of Primo de Rivera's dictatorship, was brought to an end by the civil war (1936–1939) between the Republicans and the supporters of General Francisco Franco. The Republican government enacted a new Constitution on 9 December 1931. The Republican Constitution, introduced solutions characteristic of modern constitutionalism, which distinguished it from previous Spanish Fundamental Laws. Citizens' rights were broadly protected and citizens were made equal before the law⁵⁰. In light of Art. 38, the right to assemble peacefully without

⁴⁸ R. Hinojosa, *La protección...*, pp. 178–179.

⁴⁹ Law regulating the exercise of the Constitutional Right of Assembly (15 June 1880), <http://www.ub.edu/ciudadania/hipertexto/evolucion/textos/reunion/1880.htm> (20.07.2022).

⁵⁰ M.Z. Dankowski, *Kryzys konstytucyjny w Hiszpanii początku XXI w. Szkice prawnoustrojowe: geneza – rozwój – perspektywy*, Toruń 2021, p. 42.

arms was recognised, and the enactment of a new law regulating the right to assemble in the open air and the right to demonstrate was provided for⁵¹. However, a new law on assemblies was never introduced and the Law of 15 June 1880 remained in force⁵². Under Art. 42 of the Republican Constitution, the suspension of constitutional guarantees (including the right to peaceful assembly), could not exceed 30 days, and could only occur when the security of the State required it ('in cases of notorious and imminent gravity'). Suspension of constitutional guarantees required a decree by the Government, which was then decided by the Cortes, and if the latter was dissolved, the Government was obliged to report to the Permanent Deputation of the Cortes established in Art. 62 of the Constitution⁵³.

The victory of the *caudillo* meant the introduction of a dictatorship and the curtailment of civil liberties in Spain. The Francoist regime introduced seven laws called the Fundamental Laws of the Kingdom (las Leyes Fundamentales del Reino) in place of the Constitution. These did not include the principle of the sovereignty of the people, and the power of General Francisco Franco was not regulated by law⁵⁴. The regulations on human rights, were provided for by law, but their implementation was not possible in a state that did not recognise the rule of law and which was not based on the idea that human rights could limit the state's power⁵⁵. The right to assembly did exist in the Spanish legal order of the period, but, given its restrictive limitations, in practice it existed only in a formal sense without actual implementation⁵⁶. According to one of the Fundamental Laws, the Law of the Spaniards (Fuero de los Españoles) of 17 July 1945, Spaniards could assemble and associate freely, for lawful purposes and in accordance with the laws (Art. 16). However, according to Art. 33, the exercise of the Rights recognised in the Fuero de los Españoles (including therefore the right to assemble), could not be detrimental to the spiritual, national and social unity of Spain⁵⁷. Assemblies required prior authorisation by the Ministry of the Interior (Ministerio de Gobernación), and the lack of authorisation made them

⁵¹ The Spanish Constitution of 1931 of 9 December, https://www.congreso.es/constitucion/ficheros/historicas/cons_1931.pdf (20.07.2022).

⁵² T. Vidal Martín, *El derecho de reunion y manifestación*, „Parlamento y Constitución. Anuario” 1997, No. 1, p. 269, file:///C:/Users/e7450/Downloads/Dialnet-ElDerechoDeReunionYManifestacion-197125-3.pdf (20.07.2022).

⁵³ The Spanish Constitution of 1931 of 9 December, https://www.congreso.es/constitucion/ficheros/historicas/cons_1931.pdf (20.07.2022).

⁵⁴ M.Z. Dankowski, *Kryzys konstytucyjny...*, pp. 45–47.

⁵⁵ J.D. Ruiz Resa, *Los derechos humanos en el franquismo*, „Precedente. Revista Jurídica” 2014, No. 4, pp. 241, 258.

⁵⁶ T. Vidal Martín, *El derecho...*, pp. 269–270.

⁵⁷ Fuero de los Españoles of 17 July 1945, <https://www.boe.es/datos/pdfs/BOE/1945/199/A00358-00360.pdf> (20.07.2022).

illegal and subject to sanctions under the Public Order Act of 30 July 1959⁵⁸. Article 2 of this law lists assemblies and demonstrations deemed illegal as acts contrary to public order and Art. 14 details the powers of the services responsible for maintaining order in the event of an illegal (not authorised) assembly or demonstration. According to the latter provision a single warning is sufficient in order to dissolve a demonstration if deemed tumultuous and if they persist in resistance the services are authorised to open fire provided they once warn the demonstrators⁵⁹. In the era of democratic transition, a certain liberalisation in the context of the right of assembly was brought by Law 17/1976 of 29 May⁶⁰.

Historical perspective – conclusions

In the case of Spain the right to assemble peacefully has been constitutionally guaranteed since 1869 by national legislation. According to the first regulation on the freedom of assembly demonstrations were permitted only during the daytime. The enactment of the subsequent constitution brought about the right to assemble without the above mentioned limitation. At the same time in the light of the provisions of the Constitution of 1876 the authorities could suspend the right to assemble in extraordinary situations. Since it gave no legal definition of an extraordinary situation it was left to the discretion of the government. On the other hand, the constitution provided for the introduction of a specific law on assemblies under which the officials would be held accountable for violating the right to assemble (as well as other constitutionally guaranteed rights). The Law on Assemblies of 15 June 1880 both specified grounds for suspension of assemblies and defined the term ‘public assembly’. In the case of Polish lands in the 19th century only in the Austrian and Prussian/German partitions the right to assemble was guaranteed by law, though in the latter it was severely restricted, especially for non-German speaking people. The first half of the 20th century saw first Polish regulations on the right to assemble. It should be emphasised that in the interwar period the newly established Polish state had to face the situation in which three different legal systems were binding. The March Constitution guaranteed the right to assemble to all citizens, specifically stated under what circumstances it could be suspended, and contained a provision in the light of which the exercise of this right was to be regulated by law. Nevertheless, it was not until the 1932 that a comprehensive regulation of assemblies was introduced, following the enactment of the Constitution of

⁵⁸ T. Vidal Martín, *El derecho...*, p. 270.

⁵⁹ Law 45/1959 of 30 July 1959, on Public Order, <https://boe.vlex.es/vid/ley-orden-445684478> (20.07.2022).

⁶⁰ R. Hinojosa, *La protección...*, p. 179.

23 April 1935. The new constitution, however, did not guarantee the freedom of assembly. Neither did the Spanish legislation see new regulations on the right to assemble following its new Constitution of 9 December 1931, which, similarly to the Polish March competition, granted broad civil rights.

The post-war period in Poland was marked by the dismantling of the structures of independent, democratic state. The new legislation, heavily affected by the Soviet Union's legal system, at least in theory acknowledged the right to assemble. The extremely broad definition of an assembly served quite the opposite purpose and gave the authorities grounds for refusing any form of demonstration if recognized as 'contrary to the public interest', that is to say, expressing views any other than supporting the government. Not only public demonstrations but even social gatherings were subject to dissolving. The Spanish legal system in the 20th century also experiences a shift towards non-democratic legislation, though the hindrance to the recognition of freedom of assembly came from within. The regime of General Francisco Franco also in theory acknowledged the right to assembly, but on condition that it was not detrimental to 'spiritual, national and social unity' of the country. In both cases the authorities provided detailed regulations in order to penalise free public expression. At the same time vague terms used in the provisions on assemblies left room for a wide and biased interpretation. Given all the differences, in both communist Poland and Francoist Spain the legislation only formally guaranteed freedom of assembly. The severe restrictions on this freedom both in law and in practice meant that its implementation was impossible in practice. Individual freedom had to give way to the primacy of the state and its ideology.

Freedom of assembly in Poland in the light of current regulations

The Republic of Poland as a democratic state ruled by law guarantees and protects human and civil liberties and rights under the Constitution of 2 April 1997. The provisions contained therein relating to these rights and freedoms have been shaped under the influence of international law standards⁶¹. In the light of Art. 57 of the Constitution of the Republic of Poland, "everyone shall be guaranteed the freedom to organise peaceful assemblies and to participate in them. The limitation of this freedom may be determined by law". Freedom of assembly is included in Chapter II of the Constitution, entitled "Freedoms, rights and duties of a human being and a citizen", in the subsection "Political freedoms

⁶¹ M. Jabłoński, *Identyfikacja wolności i praw jednostki w pracach nad treścią Konstytucji RP z kwietnia 1997 roku* [in:] *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński, Wrocław 2014, pp. 17–19, <http://www.biblioteka.cyfrowa.pl/publication/51986> (20.07.2022).

and rights”⁶². The naming of the freedom of assembly as a freedom implies that the constitutional provision is in the nature of a guarantee, not the will of the state, and any restriction of this freedom can only be introduced by law. In case of doubt, the provisions limiting this freedom are to be interpreted in favour of freedom⁶³. The cited above provision three premises: everybody is guaranteed the freedom of assembly, the peaceful nature of an assembly protected by law and the fact that no other limitation than those determined by law are to be imposed.

Significantly, an assembly must be peaceful, in order to be protected constitutionally as well as under international law. However, the premise of peacefulness, while obliging the demonstrators to refrain from acts of violence, must not be over-interpreted by public authorities. The authorities may refuse to grant permission for organizing an assembly only if there is clear and convincing evidence that it is highly probable that violence will be used during the given event. Thus the decision cannot be based on the assumption that violence may be used by demonstrators. Similarly, the act of dissolving an assembly has to be justified and isolated incidents taking place during a peaceful conduct of a demonstration or manifestation are not a sufficient reason for taking such measures⁶⁴. Freedom of assembly under the Constitution of the Republic of Poland is granted to ‘everyone’. It is therefore granted to every person, not only to ‘citizens’, as was the case with the March Constitution. In this way it is recognised as one of the fundamental rights to which foreigners and stateless persons are also entitled, although pursuant to Art. 37(2) of the Constitution, exceptions to the principle concerning foreigners may be defined⁶⁵.

It should be emphasised that Art. 57 distinguishes between organising assemblies and participating in them. The organiser of such an event is a person who is responsible for the organisation and conduct of an assembly whereas in case of the participant might not even be actively involved in the demonstration. Article 57 of the Constitution of Polish Republic no does not contain any restrictions to which the organisers or participants of such peaceful assemblies are to be subjected. Nonetheless, in the light of the provision in question such limitations may be specified by law. Although there is a close relationship between freedom of expression and freedom of assembly, the former is not restricted in any way whereas the latter is not. As far as the freedom of assembly is concerned public safety needs to be considered hence the limitations⁶⁶. This does not mean that the role of authorities is to censor the ideas that the organisers

⁶² The Act of 2 April 1997 – the Constitution of the Republic of Poland (Dz.U. 1997, No. 78, item 483 as amended).

⁶³ P. Suski, *Zgromadzenia i imprezy...*, p. 97.

⁶⁴ M. Wiącek, *Wolność zgromadzeń...*, pp. 265–266.

⁶⁵ The Act of 2 April 1997 – the Constitution of the Republic of Poland (Dz.U. 1997, No. 78, item 483 as amended).

⁶⁶ A. Ławniczak, *Wolność zgromadzeń...*, pp. 302–304.

of an event wish to disseminate to the public. According to the judgement of the Supreme Administrative Court of 25 May 2006, the analysis of the slogans and ideas proclaimed during an assembly does not fall within the sphere of competence of the public administration or the court. The officials or judges must not be guided by their own moral views or opinions or the beliefs of any section of society. The controversial nature of the demonstrators' views may not affect the scope of the protection to which they are entitled, and one restriction of their freedom may be the utterance of judgements prohibited by law, such as calling for racial hatred or promoting fascism⁶⁷.

Freedom of assembly under Art. 57, as was already mentioned, may be restricted by law. This freedom may experience restrictions, on the grounds of Art. 233(1) of the Polish Constitution, during martial law and state of emergency, but this is not, according to Art. 233(3), permissible in the event of a state of natural disaster⁶⁸. The suspension of the right to assemble in the event of emergency is regulated in Art. 16(1)(1) of the State of Emergency Act of 21 June 2002⁶⁹. Furthermore, Chapter II of the Constitution, in Art. 31(3), defines the extent to which constitutional freedoms and rights may be limited. They may be, firstly, established only by law, secondly, they must be necessary in a democratic state for its security, public order, or for the protection of the environment, public health and morals, or the freedoms and rights of others. Thirdly, they must not affect the essence of the rights and freedoms⁷⁰. This type of limitation, expressed by the limitation clause contained in the above provision, is an important element of constitutional norms in a democratic state, in which various values come to the fore and are subject to protection, and it plays an important role in constitutional jurisprudence⁷¹.

The right of assembly is currently regulated by the Act on Assemblies of 24 July 2015. Unlike the 1990 Act, no minimum number of persons forming an assembly is specified. The right to organise an assembly is granted to persons with full legal capacity (Art. 4(1)), and as far as participation is concerned, the only restriction is the prohibition on the possession of weapons, explosives,

⁶⁷ Judgment of the Supreme Administrative Court of 25 May 2006, file reference number I OSK 329/06, ONSAiWSA 2007/2/45 LEX No. 236573; Judgment of the Constitutional Tribunal of 18 January 2006, K 21/05, OTK-A 2006, no. 1, item 4, LEX No. 182442.

⁶⁸ The Act of 2 April 1997 – the Constitution of the Republic of Poland (Dz.U. 1997, No. 78, item 483 as amended).

⁶⁹ Law of 21 June 2002 on the State of Emergency (Dz.U. 2002, No. 113, item 985).

⁷⁰ The Act of 2 April 1997, the Constitution of the Republic of Poland (Dz.U. 1997, No. 78, item 483 as amended); Order of the District Court in Warsaw of 28 April 2019, I Ns 12/19, LEX no. 2669178.

⁷¹ W. Mojski, *Generalne klauzule odsyłające we współczesnym polskim prawie konstytucyjnym. Zarys problematyki*, „Annales UMCS” 2016, Sectio G, Vol. 63, No. 2, pp. 157–158, file:///C:/Users/e7450/Downloads/2578-13269-1-PB-1.pdf (20.07.2022).

pyrotechnics or other dangerous tools and materials (Art. 4(2)) On the basis of the current legislation, the following types of assemblies can be distinguished: ordinary assemblies, simplified assemblies (which do not cause obstructions to traffic), spontaneous assemblies and cyclical assemblies⁷². The cyclical assembly was introduced into the Polish legal order by an amendment to the Act of 13 December 2016⁷³. A spontaneous assembly is, according to Art. 3(2) of the aforementioned Act, “a grouping of persons in an open space accessible to unspecified persons by name in a specific place for the purpose of holding joint deliberations or for the purpose of jointly expressing a position on public matters”. As stated in Art. 3(2), it is such an assembly of which it is a reaction to a sudden and unexpected event, so that it would be pointless or insignificant from the point of view of public debate to hold it at another time⁷⁴. The introduction of a definition of a spontaneous assembly means that such an assembly can be organised legally, without the need to notify the relevant authority in advance, which enables broader participation in the public debate⁷⁵. A spontaneous assembly may not, however, in accordance with Art. 27, disrupt other assemblies, while Art. 28 lists the circumstances under which an officer in charge of police operations may dissolve such an assembly – 1) its course endangers life or health of persons, or substantial property; 2) its course poses a threat to public safety or public order; 3) it causes a serious threat to traffic safety or traffic order on public roads; 4) its course violates the provisions of the Act on Assemblies or penal provisions⁷⁶.

The cyclical assembly was introduced by the amendment of 13 December 2016, as a new type of assembly. An organiser may apply to a voivode for permission to organise an assembly in a cyclical manner after fulfilling the following conditions: 1) the assembly is organised by the same organiser in the same place or on the same route; 2) it is organised at least 4 times a year according to a prepared schedule or at least once a year on the days of national and state holidays; 3) such an event has taken place in the last 3 years even if not in the form of assemblies and aimed in particular at commemorating momentous and important events for the history of the Republic of Poland. In the light of Art. 26b(3) in conjunction with Art. 14(3), in the event that the voivode issues a decision on the consent to hold a cyclic assembly at the place and time where another assembly was to take place, the community authority has 24 hours from the receipt of information from the voivode on this fact to issue a decision banning the other assembly, not later than 96 hours before its planned date.

⁷² M. Jurgielewicz, *Bezpieczeństwo zgromadzeń...*, pp. 16–17.

⁷³ A. Kamiński, A. Osiński, *Prawo o zgromadzeniach. Teoria i praktyka*, Warszawa 2021, pp. 15–16.

⁷⁴ Act of 24 July 2015 of the Assembly Law (Dz.U. 2015, item 1485).

⁷⁵ A. Kamiński, A. Osiński, *Prawo o zgromadzeniach...*, p. 53.

⁷⁶ Act of 24 July 2015 of the Assembly Law (Dz.U. 2015, item 1485).

Should the municipal authority fail to do so, the provincial governor shall immediately issue a substitute order banning the assembly (Art. 26b(4))⁷⁷.

The provisions on cyclic assemblies raised doubts of the President of the Republic of Poland as to their compliance with Art. 32 and 57 of the Constitution of the Republic of Poland and were referred to the Constitutional Tribunal on the charge of violation of the principle of equality⁷⁸. In its judgment of 16 March 2017, the Constitutional Tribunal did not find any irregularities in the new regulations, stating that the new regulations are not unconstitutional and that they aim to strengthen the exercise of freedom of assembly⁷⁹. A number of issues of concern are raised in the doctrine though. It is emphasised that a procedural dualism has been introduced by involving the governmental administration body in the notification process of the assembly⁸⁰. Furthermore, the question is raised as to whether cyclical assemblies have been given priority over other types of assemblies⁸¹.

Acts of violation of law during assemblies are punishable under the Polish Penal Code and the Code of Petty offences. Article 52 of the Code of Petty Offences provides for penalties for violation of the assembly regulations. According to the aforementioned provision, a person who is in possession of weapons, explosives, pyrotechnic products or other dangerous materials or tools is liable to a punishment of arrest for up to 14 days, restriction of liberty or a fine. Whoever attempts to obstruct the course of a lawful assembly or presides over a prohibited assembly or without notice, presides over a dissolved assembly or refuses to leave the place where another person or organisation is the organiser or chairperson, shall be punished by a fine or imprisonment⁸².

⁷⁷ *Ibidem*.

⁷⁸ A. Gajda, *Kilka uwag o wolności zgromadzeń na tle najnowszych zmian ustawy – Prawo o zgromadzeniach*, „Gdańskie Studia Prawnicze” 2017, Vol. 38, pp. 191–192, <https://konstytucyjne.home.amu.edu.pl/wp-content/uploads/2018/12/A.-Gajda-Kilka-uwag-o-wolno%C5%9Bci-zgromadze%C5%84-na-tle-najnowszych-zmian-ustawy.pdf> (20.07.2022).

⁷⁹ Judgment of the Constitutional Tribunal of 16 March 2017, file reference number Kp 1/17, OTK-A 2017/28, LEX No. 2242310.

⁸⁰ K. Drewniowska, *Wolność zgromadzeń w Polsce po nowelizacji ustawy z dnia lipca 2015 r. – Prawo o zgromadzeniach* [in:] *Wolność zgromadzeń*, eds. R. Balicki, M. Jabłoński, Wrocław 2018, p. 58, <http://www.bibliotekacyfrowa.pl/publication/100569> (20.07.2022); A. Kamiński, A. Osiński, *Prawo o zgromadzeniach...*, p. 161.

⁸¹ K. Drewniowska, *Wolność zgromadzeń...*, pp. 59–60; M. Bidziński, *Freedom of Public Assembly in Poland*, „Przegląd Prawa Konstytucyjnego” 2019, No. 5(51), p. 210, <https://biblioteka.nauki.pl/articles/940634> (20.07.2022); M. Kołakowska-Skorupa, J. Wojsyk, *Wolność zgromadzeń w Polsce w latach 2016–2018. Raport Rzecznika Praw Obywatelskich*, Warszawa 2018, pp. 193–196.

⁸² Act of 20 May 1971 – Code of Petty Offences (Dz.U. 2021, item 281); Judgment of the District Court in Warsaw of 25 January 2022, file reference number X Ka 1078/21, LEX No. 3337233.

Interference with a lawfully held assembly by violence or unlawful threat is, according to Art. 260 of the Penal Code, punishable by a fine, restriction of liberty or imprisonment for up to two years. However, the mere fact of participating in an assembly during which acts of violence occurred is not, according to the jurisdiction, grounds for criminal liability⁸³.

Freedom of assembly in Spain in the light of current legislation

The Spanish Constitution of 27 December 1978 regulates in detail and precisely the issue of human and civil rights, providing an extensive system of guarantees and protection of rights and freedoms, and recognises the aspirations of historical regions and peoples. In its solutions, it refers to those contained in the German, Portuguese and Italian Fundamental Laws⁸⁴. Contained in Title I entitled On Fundamental Rights and Duties, Art. 10 states that the norms relating to fundamental rights and freedoms shall be interpreted in accordance with the Universal Declaration of Human Rights and international treaties and agreements ratified by Spain⁸⁵. In the Spanish legal order, a special role is played by ‘organic laws’, which have a specific material scope: they regulate, among other things, fundamental rights and public freedoms. According to Art. 81(2) of the Constitution, a special procedure is provided for their enactment, amendment or repeal⁸⁶.

In the light of Art. 21 (found in Title I, in the chapter “Rights and Freedoms”, in the section “On Fundamental Rights and Public Freedoms”), section 1, “the right to assemble peacefully and without arms is recognised. The exercise of this right does not require prior authorisation”. Prior notification must be given to the authority in cases of assemblies in places of public traffic and demonstrations. The authorities can only prohibit them if there is a well-founded fear of a disturbance of public order posing a threat to persons or property (Art. 21(2)). Thus the following premises are contained herein: firstly, the right to assemble peacefully is recognised, secondly the use of weapons is prohibited, and thirdly, no prior approval of the assembly is required⁸⁷. Significantly, two categories of assembly appear in section 2 – assemblies in places of public traffic and demonstrations, for which notification is required. The distinction between

⁸³ Act of 6 June 1997 – Criminal Code (Dz.U. 1997, No. 88, item 553); Judgment of the Regional Court in Wrocław of 1 April 2014, file reference number II K 940/11, LEX No. 1903402.

⁸⁴ T. Mołdawa, *System konstytucyjny Hiszpanii*, Warszawa 2012, pp. 29–32.

⁸⁵ The Spanish Constitution of 27 December 1978, <https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229> (20.07.2022).

⁸⁶ M. Supera-Markowska, *Zarys prawa hiszpańskiego i prawa polskiego. Esbozo del derecho español y del derecho polaco*, Warszawa 2013, p. 45.

⁸⁷ The Spanish Constitution of 27 December 1978, <https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229> (20.07.2022).

the two categories does not change the fact that there is one right – the right to assemble – whereas a demonstration is defined as an assembly in motion, in places of public transit, and therefore constitutes one of the types of assembly. This is the interpretation adopted by the Supreme Court in Spain in a judgment of 26 June 1991⁸⁸. Both assemblies in places of public transit and demonstrations have the character of public assemblies⁸⁹.

The Spanish Constitution grants the right of assembly to every person (the provision says “the right to assemble is recognised”), that is not only to its citizens but also to foreigners. According to Art. 13 of Title I, foreigners, within the limits set by treaties and law, enjoy the public freedoms guaranteed in Spain⁹⁰. In accordance with the Organic Law 4/2000 of 11 January on the rights and freedoms of foreigners in Spain and their social integration, currently in force, foreigners may exercise the right granted in Art. 21 of the Spanish Constitution, without having to obtain prior authorisation (Art. 7(1)). In the case of assemblies requiring prior notice, the organisers of demonstrations or assemblies in places of public traffic are subject to the Organic Law on Assemblies. It is only on the basis of its provisions that foreigners may be prohibited from assembling or the authorities may propose amendments to the planned assembly (Art. 7(2))⁹¹. The Spanish Constitution distinguishes in Art. 116(1) between a state of alert, a state of emergency and a state of siege, referring to the relevant law regulating the matter. Art. 55(1), in Chapter 5 “On the Suspension of Rights and Freedoms”, provides for a list of rights that may be suspended in the event of a state of emergency or state of siege. The right to assembly is listed as one of them⁹².

In the current state of the law, the right of assembly is regulated by the Organic Law 9/1983 of 15 July. Article 1(2) of the Act defines an assembly as a consensual and temporary gathering of more than 20 persons for a specific purpose, while Art. 1(3) states that illegal assemblies are defined as such by criminal law. In the light of Art. 3, no assembly requires prior approval (section 1) and the government administration is obliged to protect assemblies and demonstrations from those who attempt to obstruct the exercise of this right.

⁸⁸ T. Vidal Martín, *El derecho...*, p. 275.

⁸⁹ J.J. Solozábal Echavarría, *La configuración constitucional del derecho de reunión*, „Parlamento y Constitución. Anuario” 2001, No. 5, p. 120, file:///C:/Users/e7450/Downloads/Dialnet-LaConfiguracionConstitucionalDelDerechoDeReunion-1060348-2.pdf (20.07.2022)

⁹⁰ The Spanish Constitution of 27 December 1978, <https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229> (20.07.2022).

⁹¹ Organic Law 4/2000 of 11 January on the rights and freedoms of foreigners in Spain and their social integration, <https://www.boe.es/buscar/doc.php?id=BOE-A-2000-544> (20.07.2022); under the previous Organic Law 7/1985 of 1 July 1985 on the Rights and Freedoms of Foreigners in Spain, a permit for assembly was required, the Constitutional Court, in its Judgment 115/87 of 7 July, declared this provision unconstitutional (STC 115/1987).

⁹² The Spanish Constitution of 27 December 1978, <https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229> (20.07.2022).

Notification is required for assemblies in public places and demonstrations. Such events must be notified to the relevant authority at least 10 calendar days but no more than 30 calendar days in advance. However, when there are extraordinary, serious reasons, a procedure of notification at least 24 hours in advance is provided for (Art. 8). A governmental authority may prohibit an assembly or demonstration or propose changes to its organisation. Nevertheless, such a decision must be justified and communicated at the latest within 72 hours of the notification (Art. 10). Assemblies, according to Art. 4(1), may only be initiated and convened by persons exercising their full rights as citizens. With regard to the military, and persons using their military status at an assembly, Art. 4(4) refers to specific legislation. An assembly may, according to Art. 5 of the law, be suspended or dissolved in 4 cases: 1) they are contrary to the provisions of criminal law; 2) they disrupt public order by posing a danger to persons or property; 3) participants wear paramilitary uniforms; 4) they are organised by members of the Armed Forces or the Civil Guard, in violation of the relevant provisions governing the rights and duties of the Armed Forces and the Civil Guard respectively⁹³.

The law which is also relevant in the Spanish legal order with regard to the right of assembly is Organic Law 4/15 of 30 March, repealing Organic Law 1/1992 of 21 February. The new law, commonly referred to as *Ley Mordaza* (Gag Law), has caused public concern and protests in Spain⁹⁴. It has also raised the concern of the Council of Europe Commissioner for Human Rights, who sent a letter on the matter to the Spanish Parliament⁹⁵. The legislator explains the introduction of stricter regulations by the need for more effective security guarantees. The new regulations have been perceived as a response to social tensions and the economic crisis⁹⁶ and, in the case of Spain's overseas territory (the Ceuta and Mellila regulations), the immigration crisis seems relevant⁹⁷.

⁹³ Organic Law 9/1983 of 15 July 1983, regulating the right to assembly, <https://www.boe.es/buscar/act.php?lang=es&id=BOE-A-1983-19946&tn=1&p=20141205> (20.07.2022)

⁹⁴ *Multitudinaria marcha contra la reforma de la 'Ley Mordaza' entre gritos de 'Gobierno dimisión': 'Quieren poner a policias por debajo de delincuentes'*, „El Mundo” 2021, 27 November, <https://www.elmundo.es/espana/2021/11/27/61a2027921efa0870e8b457d.html> (20.07.2022); *Cuatro manifestaciones se unen en Valencia contra la 'ley mordaza'*, „El País” 2021, 5 June, <https://elpais.com/espana/comunidad-valenciana/2021-06-05/cuatro-manifestaciones-se-unen-en-valencia-contra-la-ley-mordaza.html> (20.07.2022); *Ni Ley Mordaza ni mordaza maquillada*, <https://www.es.amnesty.org/en-que-estamos/campanas/ley-mordaza-feb22/> (20.07.2022).

⁹⁵ <https://rm.coe.int/letter-to-mr-jose-luis-abalos-meco-president-of-the-interior-committee/1680a57abe> (20.07.2022).

⁹⁶ M.F. Massó Garrote, *El derecho de reunión y manifestación en el nuevo marco regulatorio de la ley de protección de seguridad ciudadana lo 4/2015 de 30 de marzo*, „Estudios de Deusto: revista de Derecho Público” 2016, Vol. 64, No. 2, pp. 1–2, file:///C:/Users/e7450/Downloads/Dialnet-ElDerechoDeReunionYManifestacionEnElNuevoMarcoRegu-5878495-2.pdf (20.07.2022).

⁹⁷ F. González Botija, P. González Saquero, *La Ley Orgánica 4/2015, de 30 de marzo, sobre protección de la seguridad ciudadana*, „FORO. Revista de Ciencias Jurídicas y Sociales, Nueva

According to Art. 35(1) of Organic Law 4/15 of 30 March, it is a very serious breach of the law, for which the organisers and leaders of assemblies are liable, when assemblies or demonstrations that have not been declared or banned are organised on the premises or in the vicinity of facilities and infrastructure where essential services to the community are provided. Similarly, it is a very serious infringement of the law to hold public spectacles or recreational activities if they have been banned or suspended (Art. 35(3)). Interference with public safety during any assembly (including public events, sports and cultural spectacles) is a serious violation of the law when it does not constitute a criminal offence (Art. 36(1)). In the same way, the disruption of public security that occurs on the occasion of assemblies or demonstrations in front of the seats of the Congress of Deputies, the Senate and the legislative assemblies of the autonomous communities is a serious violation of the law when it does not constitute a criminal offence (Art. 36 (2)). According to Art. 37 (1), it is a minor offence to hold assemblies in places of public traffic or demonstrations in violation of the specified provisions of Organic Law 9/1983 of 15 July, for which the organisers and leaders of the meetings are liable. Article 39 provides for sanctions, depending on whether the violation is very serious, serious or minor, of between €100 and €600,000⁹⁸.

The Spanish Criminal Code, in Art. 513, considers unlawful and punishable assemblies organised for the purpose of committing a crime or with the use of weapons, explosives, blunt objects or other dangerous objects. According to Art. 514 are punishable by fine or imprisonment 1) the leaders or organisers of such assemblies; 2) participants carrying the objects listed in Art. 513; 3) persons who commit acts of violence against representatives of the authorities or public or private property during a demonstration; 4) persons who disrupt the course of a lawful demonstration; 5) persons who attempt to reconvene a previously suspended or prohibited demonstration, provided that they do so with the intention of subverting the constitutional order or seriously disturbing public order⁹⁹.

Current legislation – conclusions

The Constitution of Republic of Poland of 2 April 1997 and the Spanish Constitution of 27 December 1978 both guarantee freedom of assembly to every person. While the two normative acts respect international law standards, the Spanish Constitution specifically refers to the Universal Declaration of Human

Época” 2015, No. 18(1), pp. 295–298, <https://revistas.ucm.es/index.php/FORO/article/view/49724> (20.07.2022).

⁹⁸ Organic Law 4/2015 of 30 March 2015 on the Protection of Citizen Security, <https://www.boe.es/buscar/act.php?id=BOE-A-2015-3442> (20.07.2022).

⁹⁹ Organic Law 10/1995 of 23 November 1995 on the Penal Code, <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444> (20.07.2022).

Rights in Title I, in which fundamental rights and duties are recognised. In both cases an assembly must be peaceful in order to be protected by law. The Polish Constitution distinguishes between organising assemblies and participating in them. The provisions governing the freedom of assembly does not contain any specific limitations as far as this freedom is concerned, though it states that such limitations may be specified by law. According to the Polish Constitution freedom of assembly may be restricted during martial law and state of emergency. Other restrictions are only permissible when they are necessary in a democratic state for its security, public order, or for the protection of the environment, public health and morals, or the freedoms and rights of others and must be enacted by law. The provision on freedom of assembly in the Spanish Constitution contains an additional premise – the assembly must be peaceful and without arms. It is emphasised that no prior authorisation is required. Two types of public gatherings are specified which do require notification and these can be prohibited by the authorities if there are well-founded fears of disturbance of public order or they pose a threat to persons or property. Furthermore, the freedom of assembly may be suspended in the event of a state of emergency and a state of siege. As far as the provision in both Constitutions are concerned, the Spanish normative act explicitly states when assemblies can be prohibited whereas the Polish normative act refers to a more general limitation clause, containing a wider catalogue of possible limitations (not including a threat to property though) but at the same time specifying that they must be enacted by law and only when necessary in a democratic state.

Under Art. 57 of the Polish Constitution no limitations are specified such as prior notification (the provision only states that the freedom may be limited by law). Turning to the specific regulations on the right to assemble, the Polish Act on Assemblies of 24 June 2015 introduced a ‘spontaneous assembly’, which allows for an immediate reaction to events, which, if expressed later, might prove to be pointless. On the other hand the other new type of public gathering, a ‘cyclical assembly’ is an event which can be organised only after certain conditions are met. The Spanish law on assemblies, the Organic Law 9/1983 of 15 July provides for a special procedure of notification at least 24 hours in advance. When drawing a comparison between these two normative acts it can be also noted that in Spanish legislation an assembly is defined as a gathering of more than 20 persons while in Polish legislators did not specify such a number of persons. Moreover such a specification was deemed unconstitutional when the previous Law on Assemblies of 5 July 1990 was in force. The Spanish regulations stipulate that a gathering may be dissolved when its participants were paramilitary uniforms or are organised by members of the Armed Forces or the Civil Guard.

Notwithstanding the differences, the constitutional regulations of both countries guarantee freedom of assembly and limit it only in the way that is consistent with the international standard. Yet, certain provisions contained in the specific normative acts on assemblies or relating to them are perceived as controversial.

Conclusion

This article presents an overview of the historical development of Polish and Spanish legislation with regard to freedom of assembly, and outlines the current regulations on this right in both countries. While the starting point was diametrically different, with Spain relying on its own legal solutions from the beginning, in the Polish case the process of national legislation began after 1918. For a few decades of the 20th centuries, due to lack of respect for fundamental laws on the part of the authorities, both societies were severely limited in their ability to realise the right of assembly. With the re-establishment of a democratic order, Poland and Spain lived to see modern constitutions recognising and protecting human and civil rights, as well as legislation regulating this matter in detail. At present provisions contained in the constitutions of both countries respectively. Nonetheless, as it has been outlined, certain solutions may raise concerns as far as other normative acts regulating the right to assemble are concerned.

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Summary

The aim of this paper is to compare selected Polish and Spanish normative acts, with a particular focus on the Constitution of the Republic of Poland and the Spanish Constitution, in terms of implementation of one of the fundamental civil liberties, i.e. freedom of assembly. The right to peaceful assembly is guaranteed by a democratic state ruled by law. Nevertheless, the state is responsible for ensuring the security of participants in such gatherings, thus it may impose by statute necessary restrictions, insofar as security, public order or the rights and freedoms of others are threatened. Measures taken by the authorities cannot, though, lead to a violation of freedom of assembly as such. As a result of the democratic transitions and consequently the passing of the Constitutions, both Poland and Spain reinstated the rule of law and safeguarded civil rights and liberties. The paper attempts to discuss, on the one hand, the legal *status quo* regarding the protection of freedom of peaceful assembly as well as the imposed restrictions and on the other hand the historical context.

Keywords: freedom of assembly, Constitution of the Republic of Poland, Spanish Constitution, civil liberties, public order, comparative law perspective

WOLNOŚĆ ZGROMADZEŃ W ŚWIETLE KONSTYTUCJI I INNYCH AKTÓW NORMATYWNYCH RZECZYSPOLITEJ POLSKIEJ I KRÓLESTWA HISZPANII – PERSPEKTYWA HISTORYCZNA I PORÓWNAWCZA

Streszczenie

Celem niniejszego opracowania jest porównanie wybranych polskich i hiszpańskich aktów normatywnych, ze szczególnym uwzględnieniem Konstytucji Rzeczypospolitej i Konstytucji Hiszpanii, pod kątem realizacji jednej z podstawowych swobód obywatelskich, tj. wolności zgromadzeń. Prawo do pokojowego zgromadzenia się jest gwarantowane przez demokratyczne państwo prawa. Niemniej państwo jest również odpowiedzialne za zapewnienie bezpieczeństwa uczestników takich zgromadzeń, a więc dopuszczalne jest narzucanie niezbędnych, określonych ustawą ograniczeń, o ile zagrożone jest bezpieczeństwo, porządek publiczny lub prawa i wolności innych osób. Środki przedsięwzięte przez władze nie mogą jednak prowadzić do naruszenia wolności zgromadzeń jako takiej. Na skutek demokratycznej transformacji ustrojowej, a w konsekwencji uchwalenia konstytucji, zarówno Polska, jak i Hiszpania przywróciły rządy prawa i zagwarantowały ochronę praw i wolności obywatelskich. W opracowaniu podjęto próbę omówienia z jednej strony obecnego stanu prawnego odnośnie do ochrony prawa do pokojowych zgromadzeń, jak i narzuconych na nie ograniczeń, a z drugiej strony kontekstu historycznego.

Słowa kluczowe: wolność zgromadzeń, Konstytucja Rzeczypospolitej Polskiej, Konstytucja Hiszpanii, swobody obywatelskie, porządek publiczny, perspektywa prawnoporównawcza