

REQUIREMENT TO OBTAIN PERMISSION FOR AN ASSEMBLY ON A PUBLIC ROAD

<p>Type of proceedings: Abstract review</p> <p>Initiator: Commissioner for Citizens' Rights</p>	<p>Composition of Tribunal: 5-judge panel</p>	<p>Dissenting opinions: 0</p>
<p>Legal provisions under review</p> <p>Conditioning the admissibility of an assembly hindering road traffic or requiring the use of a road in a particular manner upon ensuring safety and order, as well as obtaining permission, by the organiser [Road Traffic Act 1997: Article 65 (in the wording introduced in 2003)]</p>		<p>Basis of review</p> <p>Freedom of assembly [Constitution: Article 57]</p>

The Commissioner for Citizens' Rights challenged the provisions of the Road Traffic Act 1997 before the Constitutional Tribunal, insofar as they conditioned the organisation of an assembly which could create hindrances or changes in road traffic, upon obtaining permission (Article 65). The obtainment of such permission is conditional upon the organiser's fulfilment of the obligations specified in detail in Article 65a(2) and (3); that includes preparing a project on traffic organisation in consultation with the Police (Article 65a(3) point 9). The Commissioner's application was submitted during the time when local authorities, a few times, refused to grant permission to hold assemblies due to the failure to fulfil the requirements derived from the challenged regulation (this, for example, concerned the "Equality Parade" in Warsaw – *Marsz Równości*, i.e. the demonstration regarding the situation of homosexuals).

The crucial provision in the present case, i.e. Article 65 of the Road Traffic Act 1997, was worded in the following manner at the moment when the judgment was pronounced: "Athletic competitions, rallies, races, assemblies and other events hindering traffic or requiring the use of a road in a particular manner, are allowed to take place, subject to the condition that safety and order have been ensured during the event, and permission for the organisation thereof has been obtained".

Within the statutory meaning, an assembly consists of at least 15 persons convened for the purpose of joint debates or for the purpose of jointly expressing a position (Article 1(2) of the Assemblies Act 1990).

The Commissioner for Citizens' Rights alleged that the challenged limitations on the freedom of assembly fail to conform to Article 57 (freedom of assembly), read in conjunction with Article 31(3) (conditions permitting the imposition of limitations on constitutional rights and freedoms), of the

Constitution.

In his reasoning the Commissioner drew attention particularly to the fact that the requirement to obtain permission does not concern processions, pilgrimages and other events of a religious nature (Article 65h(1)). In the applicant's opinion, such a circumstance begs the question of whether it was necessary to impose the discussed requirement when the constitutional freedom of assembly was concerned.

In considering the application in the present case, first, the Constitutional Tribunal needed to take a position on the issue, whether it was authorised to pronounce judgment in a situation where the Tribunal had already ruled – within the judgment of 28th June 2000, [K 34/99](#) – that Article 65(1) of the Road Traffic Act 1997, in its then operative wording, similar to the wording of the current Article 65 (challenged in the present case), “[was not inconsistent](#) with” the constitutional provisions that have also been presently indicated by the applicant as the basis of review and, furthermore, with Article 59(3) of the Constitution, as well as several provisions of international treaties (*cf.* point 1 below).

THE TRIBUNAL'S RULING

Article 65 of the Road Traffic Act 1997, in its part encompassing the term “assemblies”, does not conform to Article 57 of the Constitution.

The Tribunal discontinued proceedings within the remaining scope, pursuant to Article 39(1) point 1 of the Constitutional Tribunal Act – given that it would be superfluous to pronounce judgment.

PRINCIPAL REASONS FOR THE RULING

1. Although Article 65(1) of the Road Traffic Act 1997 in its former wording, the subject of the Constitutional Tribunal's judgment in the case numbered K 34/99, constituted the equivalent of the currently operative Article 65 of the 1997 Act, challenged in the present case insofar as the requirement to obtain permission for organising an assembly is concerned, there exists no justification for referring to the *ne bis in idem* principle. The fact that presently, after the pronouncement of the previous judgment, the Tribunal reviewed Article 65 in an amended version (resulting from the Amendment Act 2003), is not the only argument against the discontinuation of proceedings. It is far more important that, in preserving the requirement to obtain permission for an assembly hindering traffic or requiring the use of a road in a particular manner, the aforementioned Amendment Act 2003 imposed many obligations upon the organiser of such an assembly (Article 65a(2) and (3) of the Road Traffic Act 1997), and the failure to meet these requirements results in the refusal to issue permission. The normative significance of the reviewed requirement (Article 65) underwent modification due to the content of Articles 65a-65h of the amended Road Traffic Act 1997. An additional factor justifying the current substantial consideration of the Commissioner for Citizens' Rights' challenge is the practical application of the Road Traffic Act 1997, which, contrary to the wording of the Constitution, transforms the essence of freedom of assembly into the right to assemble, regulated by decisions of an organ of public administration, acting on the basis of provisions whose formulation allows for excessive discretion in such decisions.

2. The goal of freedom of assembly, as guaranteed in Article 57 of the Constitution, is not only to ensure autonomy and self-realisation of a person but also to protect social communication processes, essential for the functioning of a democratic society. Freedom of assembly constitutes a precondition for democracy and a necessary component thereof, as well as a prerequisite for enjoying other human rights and freedoms connected with public life. Assemblies constitute the principal element of democratic public opinion, by creating the possibility to influence the political process through criticism and protest. By protecting minority groups, freedom of assembly increases legitimacy and acceptance for decisions taken by representative organs and the administrative-executive structure subordinate to them. The stabilising function of assemblies for the political and social order is also important, primarily for the representation mechanism. It consists of a public presentation of the sources, causes and essence of dissatisfaction, submitting them for analysis, as well as an expression of criticism, or negation, of the operative legal or social order. As an early warning mechanism, indicating to the representative organs and public opinion the potential and already existing sources of tension, as well as the limitations of the integration mechanisms and effects, assemblies allow for sufficiently early policy adjustments.
3. It is the obligation of public authorities to guarantee the enjoyment of freedom of assembly, regardless of the political views expressed by the holders of this authority. Freedom of assembly is a constitutional value and not a value defined by the democratically legitimised political majority in power at a certain moment in time.
4. The moral views of the holders of political power are not synonymous with “public morals” as a premise for limiting freedom of assembly within the meaning of Article 31(3) of the Constitution.
5. Public authority organs are entrusted with the obligation to ensure the protection of groups organising demonstrations and participating therein, regardless of the degree of controversy of the publicly-expressed views and opinions, provided that legal prohibitions have not been transgressed.
6. The risk of a counter-demonstration with the use of violence, or the potential of aggressive extremists joining the assembly, may not lead to the deprivation of the right to organise a peaceful assembly, even where there exists a genuine threat of infringing on the public order by events remaining beyond control of the organisers of the assembly, and public authorities fail to undertake effective actions aimed at guaranteeing the enjoyment of freedom with respect to the announced assembly.
7. The legal construction expressed within the Assemblies Act 1990 – i.e. prior notification of an organ of the commune as a sole precondition for holding a legal public assembly (Article 6) – corresponds with the model of implementation of the constitutional freedom of assembly in a democratic State governed by the rule of law. This model, as a regulation that optimally considers different values, as well as the need to weigh various arguments, constitutes the essence and the scope of the public authorities’ interference in the mechanism of the enjoyment of the right to assembly. The discussed model is of “primary” nature in the sense that all regulations successive to the provisions contained within the Assemblies Act 1990 must respect the legal construction expressed within this Act. The legislator is not equipped with the discretion to regulate the essence of a particular constitutional value, depending on circumstances that are not of fundamental significance from the constitutional point of view, e.g. (as in the present case) the rules for the use of public roads.

8. Principally, the Constitutional Tribunal does not review the law in relationships between acts of identical rank (in the present case, the Assemblies Act 1990 and the Road Traffic Act 1997). Nevertheless, in a situation where the interrelation between two statutory norms may pose a threat to the content of a constitutional freedom (*cf.* point 7 above), the Tribunal is authorised to review the relationship between these norms from the point of view of conformity with the Constitution.
9. The reviewed Article 65 of the Road Traffic Act 1997 places different types of events on the same level, even though they are not of the same constitutional nature. The legislator made an error by failing to account for the constitutional nature of freedom of assembly as a fundamental political freedom. Therefore, freedom of assembly may not be subject to the same regulation as the Road Traffic Act 1997 envisages for the organisation of athletic competitions, rallies, races and similar events, which are by nature politically neutral.
10. In Article 65h of the Road Traffic Act 1997 the legislator excluded the application of Articles 65-65g with respect to processions, pilgrimages and other events of a religious nature, as well as funeral processions taking place on roads in accordance with local customs. This signifies that the legislator rightly noticed the difference between such situations and, for example, sporting events. However, it is unjustified to treat assemblies, whose significant common feature with events of religious nature is their constitutional rank, differently. Within the analysed scope, there exist no grounds for differentiating between the statutory regulation of enjoyment of the constitutional freedom of conscience and religion (Article 53(1) and (2)) and the enjoyment of the constitutional freedom to organise peaceful assemblies (Article 57 of the Constitution). This assessment remains unchanged by the content of Article 25 of the Constitution: neither the particular status of churches and religious organisations, nor the principle of impartiality of public authorities in matters of personal religious convictions, nor the freedom of their expression in public life, remain directly related to the subject of the application considered in the present case.
11. It is not possible to agree with the argument that the challenged provision of the Road Traffic Act 1997 serves, primarily, the freedom of movement, as guaranteed in Article 52(1) of the Constitution. The aforementioned freedom does not refer to the use of roads but essentially signifies the possibility to change the place of stay.
12. Finding Article 65 of the Road Traffic Act 1997 unconstitutional in its part encompassing the term „assemblies” results in a situation where, following the loss of binding force of the aforementioned part of the discussed provision, the remaining provisions of the 1997 Act challenged by the applicant (Article 65a(2) and (3)) no longer concern assemblies. Consequently, adjudication regarding these provisions is superfluous, within the meaning of Article 39(1) point 1 of the Constitutional Tribunal Act, since they have been challenged precisely for the reason that they also concerned assemblies.

Provisions of the Constitution and the Constitutional Tribunal Act

Constitution

- Art. 25.** 1. Churches and other religious organizations shall have equal rights.
2. Public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life.
 3. The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.
 4. The relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute.
 5. The relations between the Republic of Poland and other churches and religious organizations shall be determined by stat-

utes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers.

Art. 31. [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 52. 1. Freedom of movement as well as the choice of place of residence and sojourn within the territory of the Republic of Poland shall be ensured to everyone.

Art. 53. 1. Freedom of faith and religion shall be ensured to everyone.

2. Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services.

Art. 57. The freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone. Limitations upon such freedoms may be imposed by statute.

Art. 59. [...] 3. Trade unions shall have the right to organize workers' strikes or other forms of protest subject to limitations specified by statute. For protection of the public interest, statutes may limit or forbid the conduct of strikes by specified categories of employees or in specific fields.

CT Act

Art. 39. 1. The Tribunal shall, at a sitting in camera, discontinue the proceedings:

- 1) if the pronouncement of a judicial decision is superfluous or inadmissible;
- 2) in consequence of the withdrawal of the application, question of law or complaint concerning constitutional infringements;
- 3) if the normative act has ceased to have effect to the extent challenged prior to the delivery of a judicial decision by the Tribunal.

Should you have any questions or comments, you may write to us:

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