GLOSS

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Commentary on the Polish Constitutional Tribunal's Judgment of 16th March 2017, Case No. Kp 1/17*

1. Introduction

The Judgment of the Polish Constitutional Tribunal (hereinafter referred to as: "CT") of 16th March 2017 issued in case Kp 1/17,[1] whereby the phenomenon of 'cyclical assemblies' was legalised, merits attention not only because of the importance of the challenged provisions, the controversial nature of the decision, and the fact that it was issued with the participation of persons not authorised to sit as judges of the CT, but also – or perhaps predominantly – because of the new vision of the relationship between the individual and the state that we find in the statement of reasons. It differs from the one we used to deduce from the current Polish Constitution of 1997.[2] This vision assumes that the individual is subordinate to the state and that

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1 OTK ZU-A 2017, item 28.

2 The Constitution of the Republic of Poland of 2nd April 1997, Dziennik Ustaw (Official Journal of Laws of the Republic of Poland, hereinafter referred to as: "Dz.U.") 1997, No. 78, item 483, as amended, hereinafter referred to as: "Constitution."

the individual's freedoms can be radically limited to protect the rights of the majority, precedence being given to such forms of enjoying this freedom as the state prefers.

The commented judgment was issued in the preventive review procedure, initiated by an application submitted by the President of the Republic of Poland before signing the Act of 13th December 2016 on Amendments to the Act – Law on Assemblies (the 'Amending Act'). In respect of this Act, the President formulated three objections, two of which have finally been examined by the CT on their merits, while proceedings concerning the third one were discontinued. After the judgment was issued, the President signed the aforementioned Act and ordered its promulgation in the Official Journal of Laws of the Republic of Poland (Dziennik Ustaw).[3] The Act came into force on 2nd April 2017.

2. The objection of privilege of cyclical assemblies

2.1. Subject-matter of the objection

The first objection formulated by the President in his application to the CT concerned the unconstitutional differentiation of the status of public gatherings, whereby a category of cyclical assemblies was distinguished and granted privilege. These are assemblies organised by the same entity in the same place or along the same route at least four times a year according to an existing schedule or at least once a year on state or national holidays, provided that such events have taken place in the preceding three years, even if they were not assemblies, and aimed in particular to commemorate momentous events of great importance for the history of the Republic of Poland.

In the light of the challenged provisions, consent for cyclical organisation of assemblies is issued by a voivode (province governor). The consent confers, for the three subsequent years, an exclusive right to organise gatherings in a given place or along a given route, at dates fixed in advance. Cyclical assemblies are privileged over other public gatherings in that the organisers of the former have precedence in choosing the place and time of the assembly, even over assemblies that have been notified

3 Dz.U. 2017, item 579.

earlier.[4] Moreover, the municipal authority has a duty to issue a decision prohibiting another assembly scheduled in the same place and time as the cyclical one, even when the former does not infringe the law, or pose a threat to human life or health, or a considerable threat to property.[5] If that were not enough, once the voivode has agreed for the cyclical assembly to take place, the municipal authority, within 24 hours of the receipt of this information, is obligated to prohibit the organisation of assemblies notified previously, which were due to be held in the same place and at the same time. If no such decision is issued, the province governor immediately issues a substitute order forbidding any assemblies other than the cyclical ones.[6]

In the President's opinion, all peaceful assemblies should be guaranteed freedom of assembly under Art. 57 of the Constitution to the same extent. Public authorities have a duty to provide conditions for the exercise of freedom of peaceful assembly regardless of the form in which individuals want to exercise it. The President furthermore emphasises that Art. 57 of the Constitution does not provide any grounds for differentiating the legal status of gatherings depending on the criteria of purpose or frequency.

2.2. The essence of the freedom of assembly as defined by the CT

What commands particular attention is the way in which the CT presents the essence of the freedom of assembly in the commented judgment. The CT did not refer to its existing rich case law relating to this freedom,[7] and in defining its essence it relied on rather vague opinions 'from literature,' without quoting even one specific source. Consequently,

4 *Cf.* Art. 12(1) of the Act of 24th July 2015 – Law on Assemblies, Dz.U. 2018, item. 408, as amended; hereinafter referred to as: "the Law on Assemblies."

5 *Cf.* Art. 14(3) of the Law on Assemblies.

6 *Cf.* Art. 26b of the Law on Assemblies.

7 *Cf.* Judgment of the CT of 18th September 2014, K 44/12, OTK ZU-A 2014, No. 8, item 92; Judgment of the CT of 10th July 2008, P 15/08, OTK ZU-A 2008, No. 6, item 105; Judgment of the CT of 18th January 2006, K 21/05, OTK ZU-A 2006, No. 1, item 4; Judgment of the CT of 10th November 2005, Kp 1/04, OTK ZU-A 2004, No. 10, item 105; Judgment of the CT of 28th June 2000, K 34/99, OTK ZU 2000, No. 5, item 142; resolution of the CT of 16th March 1994, W 8/93, OTK ZU 1994, No. 1, item 18.

the definition of assembly that the CT used as its starting point was expressed in very general – not to say banal – terms. The CT states:

> In the literature it is assumed that 'assembling' means many persons gathering together. In other words, what is meant is a gathering (grouping, meeting) in a single place of at least several people, among whom there is an in-group psychological association resulting in a mutual willingness to exchange views.

The CT stresses also that the repeatability and regularity of assemblies are their defining features. It states:

> If the sole common criterion for distinguishing a group of people who take part in an assembly is the intellectual relationship that participants of the assembly have among themselves, which integrates them, nothing will strengthen this bond better than the repeatability and regularity of assemblies.

Meanwhile Art. 57 of the Constitution gives no grounds for any privilege of regularly repeated assemblies over one-off assemblies, while Art. 3(1) of the Law on Assemblies is even an argument that the latter are the typical ones. In the light of this provision, an assembly is a gathering of persons in an open space accessible to persons who are not named, in a specific place, in order to hold common deliberations or jointly express a standpoint on public matters. The purpose of the assembly identified in the Act is rather one-off than repeatable, while the notion of space accessible to persons who are not named indicates that public assemblies are open.

But the most surprising statement in the commented judgment is the one which introduces the actual reflections about the essence of assemblies. The CT considers that while:

> […] it is the notification model in the organisation of assemblies that most fully implements the freedom of assembly, other methods of determining the legal framework in which this freedom is realised are also permissible. The legislator has discretion in choosing the system of regulating the freedom-related rights.

The formulation of a thesis of this kind leads to the conclusion that the CT is not aware of the distinction between rights and freedoms and the importance of this distinction for the legislator. Yet the legislator can only set the boundaries of freedoms, rather than permit their exercise, which is the case with rights. Thus we cannot assume that the legislator can apply a system of permits (consents) in the regulation of constitutional freedoms in the same way as the system of notifications is applied. In the Judgment of 18th January 2006,[8] the CT clearly stated that:

> […] it is unacceptable – from the constitutional point of view – for any regulation to remove notification as the basic construction, provided for by the 'original' statute, that is, the Law on Assemblies.

On that occasion, the CT stressed that:

> The constitution does not permit enacting such regulations that, in a specific matter, undermine the constitutional model of a given freedom or right. Such undermining can consist in replacing the requirement of prior notification of municipal authorities with the requirement of obtaining a permit to hold an assembly. The need to obtain a permit would have to 'repeal' the conception of notifying the municipal authorities and, as a stronger means of influence of public authorities on assembly organisers, it annuls the basic construction provided for in the Law on Assemblies.

Considering the above findings, included by the CT in judgment K 21/05, one should observe that consent for the organisation of a cyclical assembly means in fact annulling the effect of a prior notification of another assembly to be held in the same place and at the same time. So this is a typical 'regulation removing notification as the basic construction,' held unacceptable by the CT. However, in the commented judgment the CT did not even refer to the view it had earlier expressed in judgment SK 21/05, so it is hard to find whether the change of view was the Tribunal's conscious decision.

Early on, it should be mentioned that the CT, in the commented judgment, does not devote any attention to the problem of an evaluative

8 SK 21/05, OTK ZU-A 2006, No. 8, item 103.

nature of the criteria of granting consent for a cyclical assembly to be held. The voivode is actually completely free in evaluating whether the assemblies held earlier were 'aimed in particular to commemorate momentous events of great importance for the history of the Republic of Poland.' The expression 'in particular' means that the past assemblies could have also had other aims, not mentioned by the legislator. Also the criterion of 'commemorating' and that of certain events being 'momentous' and 'of great importance' for Poland's history are evaluative in nature. All the above criteria are capable of being interpreted and applied by the province governor in a discretionary manner, which obviously infringes the principle of legalism formulated in Art. 7 of the Constitution, which requires public authorities to function on the basis of the law and within its limits.

2.3. The problem of rationality of special regulation concerning cyclical assemblies

In its reconstruction of the *ratio legis* of the statute which introduced cyclical assemblies into the Polish legal system, the CT provided three arguments in favour of the need to cover them with special statutory regulation.

Firstly, the CT found that the statutory regulation of cyclical assemblies was:

> […] an attempt to accommodate the changing social situation by means of a formula systematising new facts. This concerns classifying the newly appearing ways in which realisation of the freedom of assembly is manifested, which can be systematised and which, due to their particularities, require separate norms.

Of course, the legislator can also extend the scope of regulation to the newly appearing social phenomena if they remain outside such regulation. However, cyclical assemblies had not previously been outside the scope of regulation of the Law on Assemblies. Quite the contrary, they were subject to the same statutory regime as any other public assembly. The amendments did not, therefore, aim to cover them with the existing legal regulation, but to exclude them from its scope of application and subject them to a new legal regime, created especially for them. Similarly, one cannot accept the CT's view that there are 'newly appearing

ways in which realisation of the freedom of assembly is manifested.' When the Amending Act entered into force, there was only one kind of assembly that met the requirements pertaining to cyclical assemblies: the monthly assemblies held to commemorate the victims of the Smolensk plane crash (the so-called Smolensk monthlies). Other assemblies, even if organised repeatedly, too, did not fulfil the statutory criteria of cyclical assemblies in terms of the frequency or the aim for which they were held, and thus they remained outside the scope of regulation of the Amending Act.

Secondly, in the CT's view, 'the need to ensure order and safety' is an important reason for covering cyclical assemblies with a special statutory regulation. This argument should be dismissed as completely incomprehensible. Accepting it would require proving that the participants of cyclical assemblies are exposed to particular danger, which is not present in the case of other public assemblies. Meanwhile, at the stage of applying for the province governor's consent for holding assembles cyclically, the organiser is not required to demonstrate any particular threats. Moreover, in order to forbid an assembly due to take place in the same place and at the same time as the cyclical one, there is no need to show that it is highly likely that the former might pose a threat to the latter. Even if both assemblies were peaceful ones, it would not be legally possible to organise them at the same time if either of them were not a cyclical assembly. This way the legislator, assuming that citizens would exercise their freedom of assembly in a confrontational manner, decided to simply ban competing assemblies at the given time and in the given place. From a range of the possible ways to address the problem, the legislator has chosen the one that is the most onerous for citizens, moreover one that is applied automatically, regardless of the actual threat for the participants of both assemblies. At the same time the CT held in the judgment in question that cyclical assemblies 'are safer from the state's point of view and give better guarantees of public order, as well as the state's stability, so they are more conducive to the common good.' Yet it is not the state's role to name which assemblies are better from the state's perspective, while no common good justifies such a drastic restriction of the freedom of assembly as the absolute ban on organising any assemblies at a given time and place. As the CT stressed in judgment in case K 21/05:

> […] public authorities have a duty to guarantee implementation of […] the freedom of [of assembly], regardless of the party affiliation and political views, because the freedom of assembly is a constitutional freedom and not a value defined by a democratically legitimated political majority that holds power at a given point in time.

Moreover, in the same judgment the CT stated that:

> […] [the] constitutional safeguards of the freedom of assembly imply that public authorities are prohibited from taking this freedom away […] when the message that is communicated is inconsistent with the set of values professed by those holding public power. The public authorities have no right to ascribe the assembly organisers any aims or intentions and – on this basis – to formulate evaluations that lead them to forbid the assembly. The moral convictions of those holding public power are not synonymous with 'public morality' as the grounds for restraining freedom of assembly.

The commented judgment completely contradicts the views expressed in judgment K 21/05, to which the CT did not make any reference at all.

Thirdly, the CT asserts in the commented judgment that deeper interference in the exercise of the freedom of assembly in the form of cyclical assemblies is justified 'by the need to […] provide guarantees to other persons or entities.' In this context, it is unclear who those 'other persons or entities' are. The use of the word 'other' seems to suggest rather that these are not the participants of the cyclical assembly. But once those other persons – not the participants of the cyclical assembly – are prohibited from organising another assembly at the same time and place, it can hardly be considered a method of guaranteeing to those persons the ability to exercise the freedom of assembly. So it seems that even though the CT formulated the above view, it had failed to consider the question of the rights and freedoms of other persons who might wish to organise another gathering at the place reserved for the cyclical assembly. The CT limited itself to stating that cyclical assemblies:

> […] do not eliminate, for assembly organisers, the possibility of exercising the freedom of assembly in other forms (*i.e.* by means of notified or spontaneous assemblies) if they are […] forced to refrain

> from exercising their right to freedom of assembly at a given place and time.

Many more similarly controversial tips for citizens who would like to enjoy freedom of assembly can be found in the commented judgment. And so the CT states that once cyclical assemblies are granted precedence, there are 'no obstacles to holding another assembly at a distance greater than 100 m' and also that:

> […] the legislator, by granting to organisers of cyclical assemblies precedence in choosing the place and time, does not, by any means, preclude organising another assembly, unless the latter is held at same place and time.

Thus the CT completely ignores the fact that the right to choose the place and time of holding an assembly is one of the basic rights of a person exercising the freedom of assembly. If a person is forced to organise an assembly at a different place and time than they wished, this is a violation of said person's freedom, which the CT confirmed as early as in the interpretative resolution of 16th March 1994 (W 8/93), where it stated:

> A voivode – when issuing […] a decision forbidding an assembly at a given place, time and along a specified route […] – cannot specify another place, time of assembly and another route for the march.

The commented judgment does not even mention the above interpretative resolution.

2.4. The problem of privilege of cyclical assemblies

In the commented judgment, the CT asserts that cyclical assemblies need to be privileged over other public assemblies, because they:

> […] enable emphasising certain publicly important values and make them the subject of public debate. It is precisely because of the defined subject-matter that they should have the guarantee that they will be able to be held at a specific place and time.

This statement gives rise to considerable doubts in view of Art. 57 of the Constitution, which guarantees the same protection to all peaceful assemblies, regardless of their aim and subject matter. Additionally, the CT's general thesis about it being permissible to differentiate between public gatherings is justified in a rather unconvincing way.

First, the CT argues that 'Art. 57 of the Constitution does not indicate any criteria for differentiating assemblies,' thus the legislator is free to apply any criteria. We can find this argument strange if we realise that the only criteria for any differentiation that the Constitution might mention – though none are mentioned – are negative. It is hard to imagine the constitution legislator formulating any positive criteria on whose basis the regular legislator could differentiate the right of citizens to exercise the freedom of assembly.

Secondly, the CT stresses that 'Art. 31(3) of the Constitution […] confirms that such a differentiation can be introduced.' Meanwhile this provision does not even concern the problem of differentiating the rights and freedoms of the individual. This issue is regulated by Art. 32 and Art. 33 of the Constitution, which generally prohibit such differentiation and to which the CT made no references in this part of its argumentation. The quoted Art. 31(3) of the Constitution defines the conditions for restraining the constitutional rights and freedoms and does not contain – contrary to what the CT asserts – a general permission for differentiating those rights and freedoms. It is just the opposite: differentiating the rights and freedoms is a form of restraining them, permissible as an exception and subject to the conditions defined in this provision.

Thirdly, in order to justify the permissibility of differentiating public gatherings, the CT makes references to statements it has never formulated, which statements are identified as ones apparently already existing in CT case law. In this respect the CT stated that it upheld 'also its existing standpoint that the legislator can apply various legal solutions that will match the kind of the public assembly, the number of its participants, its reach, and other circumstances.' This is a statement without any grounds whatsoever in CT case law, just like the next one, according to which 'within the category of public assemblies, the legislator has already introduced certain differentiations that have not been challenged

before the Constitutional Tribunal.' The only differentiations introduced by the legislator with reference to public assemblies were those concerning spontaneous assemblies and this was a consequence of a CT judgment confirming that spontaneous assemblies – if peaceful – are lawful assemblies and enjoy the protection guaranteed by Art. 57 of the Constitution.[9] The provisions on spontaneous assemblies have never been challenged before the CT, hence it is impossible to draw any conclusions from the fact this body has never questioned them.

Fourthly and finally, the CT asserts that:

> An argument in favour of giving priority to cyclical assemblies is the aim of holding them, which influences the formation of specific attitudes. In particular, they are worth supporting if the individualising criterion is values of special importance from the point of view of the state as the common good.

The CT repeats this view later in the commented judgment. More precisely it stated that the regulation at issue enables the 'formation of specific civic attitudes.' The Constitution does not allow the state to accord any preferential treatment to certain assemblies because of the aims pursued by their organisers. The freedom of assembly comprises also the freedom to choose any goal for these assemblies. The state cannot give privilege to assemblies whose aim is convenient or advantageous for those holding political power. By its nature, the freedom of assembly does not serve to express support for the state, but rather public disapproval. For this reason assemblies organised by public authorities remain outside the scope of regulation of the Law on Assemblies.[10] The freedom of assembly is a political freedom, enjoyed particularly by those dissatisfied with the state's policies. In this context, it is a cause for concern that the CT endorses the following view:

9 This concerns Judgment of the CT of 10th July 2008, P 15/08, OTK ZU-A 2008, No. 6, item 105. *Cf.* approving commentaries on the Judgment by A. Niżnik-Mucha, "Przegląd Sejmowy" 2009, No. 2, p. 175–183, and by R. Rybski, "Przegląd Sejmowy" 2012, No. 3, p. 227–232.

10 *Cf.* Art. 2(1) of the Law on Assemblies. The same exclusion appeared in the previous version of the statute. *Cf.* Art. 4(1) of the Act of 5th July 1990 – Law on Assemblies, Dz.U. 2013, item. 397, as amended.

> When the […] participants' goals further at the same time the goals of the state as the community of citizens (common good), the state should give them priority and grant privilege to the form of assembly by which these goals are pursued.

And later the CT adds that:

> […] introducing a precedence for cyclical assemblies […] is an implementation of the state's obligation to protect assemblies […] thanks to establishing a rule to resolve the physical collision of assemblies. This is confirmed in the […] case law of this Tribunal and the European Court of Human Rights.

So again the CT uses an argument from authority without naming judgments of either court to justify its assertion. Yet, more importantly, in this case the assertion made by the CT is also unfounded. Both the CT[11] and the European Court of Human Rights (hereinafter referred to as: "ECtHR"),[12] in their respective case law, accepted that the very fact of a gathering being a counter-rally did not justify banning it. Even the Law on Assemblies permits holding two or more assemblies in the same place and at the same time. The statute only prohibits them when it is impossible to hold them in such a way as to avoid threats to human life or health, or significant threats to property. Meanwhile, with regard to cyclical assemblies the legislator adopts the opposite rule, namely that it is never possible to hold them together with other assemblies, because the latter will always pose a threat to human life or health, or a significant threat to property. Thus the legislator presupposes ill will

11 *Cf.* in particular Judgment of the CT of 18th January 2006, K 21/05, OTK ZU-A 2006, No. 1, item 4.

12 *Cf.* in particular: Judgment of the ECtHR of 10th October 1979, App. No. 8191/78, *Rassemblement Jurassien* v. *Switzerland*; Judgment of the ECtHR of 6th March 1987, App. No. 13079/87, *G.* v. *Germany*; Judgment of the ECtHR of 21st June 1998, App. No. 10126/82, *Plattform "Ärzte für das Leben"* v. *Austria*; Judgment the of the ECtHR of 30th January 1998, App. No. 133/1996/752/951, *United Communist Party of Turkey and Others* v. *Turkey*; Judgment of the ECtHR of 24th November 2005, App. No. 46336/99, *Ivanov and Others* v. *Bulgaria*; Judgment of the ECtHR of 20th October 2005, App. No. 59489/00, *United Macedonia Organisation Ilinden-Pirin and Others* v. *Bulgaria*; and Judgment of the ECtHR of 20th September 2005, App. No. 45454/99, *Yesilgoz* v. *Turkey*.

on the part of participants of assemblies other than the cyclical ones, which it is not allowed to do in the light of the Constitution.

The CT asserts that '[t]he idea of cyclical assemblies devoted to certain topics of public or historical importance facilitates the formation of certain civic attitudes and has an educational function.' It also stresses that cyclical assemblies 'can contribute to the creation of social conditions for development, which is an argument in support of their special legal position.' This is a recurring theme in the statement of reasons of the commented judgment. Meanwhile a democratic state has no right to educate its citizens by naming the preferred aims or forms of exercise of their freedoms. The only obligation of public authorities, as the CT stated in its Judgment of 28th June 2000 (K 34/99), is to remove obstacles to the enjoyment of the sphere of freedom of assembly and to abstain from unjustified interference with this sphere, as well as to take positive steps aimed at implementing this right.

2.5. Cyclical assemblies v. spontaneous assemblies

When justifying the constitutionality of cyclical assemblies, the CT makes several references to spontaneous assemblies. In this context it quotes a fragment of the statement of reasons of its Judgment of 18th September 2014 (K 44/12), concerning the last category of assemblies, which reads as follows: 'There are […] no grounds for differentiating assemblies on the basis of Art. 57 of the Constitution in terms of the extent of their protection, applying the criterion of how a given gathering of persons was organised,' and adds that '[t]he thesis advanced by the Tribunal holds true also for the cyclical assemblies introduced by the Amending Act.' Meanwhile the thesis about the inadmissibility of differentiating the extents of public assemblies' protection, formulated in the judgment in case K 44/12, leads to precisely the opposite conclusion. Indeed, the main objection raised by the Polish President was that the legislator, when introducing the category of cyclical assemblies, unconstitutionally differentiated the protection accorded to public assemblies, which is prohibited in the light of the quote from the judgment in case K 44/12.

Similarly, one cannot share another view presented by the CT in the commented judgment, namely that notified assemblies take precedence over

spontaneous ones, because the latter must not disturb the former. Although Art. 27 of the Law on Assemblies does indeed provide that the participants of a spontaneous assembly cannot disturb the course of a notified one, but this does not mean that the participants of a notified assembly are permitted to disturb the course of a spontaneous one. The prohibition of disturbing the course of another assembly applies equally to all assemblies and does not permit establishing any hierarchy of assemblies on this basis. Similarly, it is not true – as the CT asserts – that 'the procedure of organising cyclical assemblies is stricter than the procedure of organising notified assemblies.' In case of the former it is enough to obtain a single consent guaranteeing reservation of the place and time of the assembly for three years, while in the latter case the requirement of notification has to be fulfilled before every single assembly. Even the application for consent to organise a cyclical assembly need not contain such detailed information as the notification submitted in case of organising a notified assembly. In the application, the organiser only provides the justification of the aim why cyclical assemblies are organised, identifying their number and dates. Meanwhile the notifier of a notified assembly is obligated to provide detailed information referred to in Art. 10(1) of the Law on Assemblies. By the same token, another thesis put forward by the CT is disproved:

> Once the […] procedure of organising cyclical assemblies is stricter than the procedure of organising notified assemblies, granting to the former (cyclical) assemblies precedence displaying the features of privilege in fact compensates for the degree of legislative interference in the exercise of the freedom to hold such assemblies.

The CT expresses yet another unacceptable view, namely that in case of cyclical assemblies there exists a 'right to organise the assembly at the specified time and place, which right has been acquired under an administrative instrument' and that:

> […] this right should be given stronger protection, because it has double safeguards: in the Constitution and in the statute. This fact also justifies the precedence of a cyclical assembly over any other kind of assembly if they were to be held at the same place and time.

This argumentation method leads to the conclusion that it is legitimate for the legislator to identify the preferred form in which citizens should exercise their constitutional freedoms and then privilege this form over other available forms. This would amount to negating the freedoms guaranteed by the Constitution, for whose exercise the state merely defines the legal framework, without interfering in how the citizens enjoy their freedoms within the defined legal framework.

Another surprising statement of the CT is that 'the organisers of an assembly that was prevented from taking place because of a cyclical assembly held in the given place and at the given time can also resort to the formula of a spontaneous assembly.' This statement practically encourages circumventing the law by means of holding spontaneous assemblies in the same place and at the same time as cyclical ones. The former cannot be prohibited in advance, because they are not notified. Moreover, it is obvious that not every assembly that has not been notified is spontaneous. In order to be one it has to meet the conditions specified in Art. 3(2) of the Law on Assemblies, namely it has to take place in connection with the occurrence of an unexpected and previously unforeseeable event connected with the public sphere, and holding it at a different time would be irrational or of little importance from the point of view of the public debate.

2.6. The prohibition of organising assemblies other than cyclical ones

In the CT's view, the prohibition of organising an assembly in the same place and at the same time as one of the cyclical assemblies is justified by 'the state's obligation to ensure safety of those exercising the freedom of assembly.' This statement is not confirmed by the contents of Art. 14 of the Law on Assemblies, which lists three independent cases when the municipal authority can issue a decision prohibiting the assembly. The first one is a situation when the aim of the assembly infringes the freedom of peaceful assembly, when it is organised by persons without full legal capacity or persons holding firearms, explosives, pyrotechnic articles or other dangerous materials or devices, as well as when the principles of organising assemblies or the aim of the assembly or holding the same are criminal offences. The second situation justifying a decision to forbid an assembly

is when holding it can pose a threat to human life or health or a considerable threat to property, including if such a threat cannot be removed in ways regulated by statutory law. And, lastly, the third situation is the one added by the Amending Act: the issue of a decision prohibiting an assembly if it is due to be held in the same place and at the same time as an assembly organised on a cyclical basis. Concerns about safety are clearly the factor behind the decisions issued in the first two cases, but in the third situation they play no role at all. In this case the only factor taken into account is the sameness of the place and time of the prohibited assembly and the one organised on a cyclical basis. Therefore, as far as this criterion is concerned, the authority does not evaluate the questions of safety and it is impossible not to issue a decision prohibiting the assembly even if both assemblies were mutually friendly and peaceful in character.

Resolving conflicts of rights and freedoms of individuals requires balancing the underlying values and considering to what extent one right or freedom can be limited in order to protect the other, without encroaching upon the essence of the former. A general ban on any assemblies at the time and in the place designated for a certain cyclical assembly means granting absolute protection to participants of the latter assembly, while violating the freedom of assembly of all other persons. Meanwhile, in the statement of reasons for the commented judgment the CT holds that:

> The challenged regulation does not violate the essence of the freedom of assembly, but harmonises the mutual exercise of the freedom of assembly with other human freedoms and rights, while striving to ensure public order and realise common good.

Once the state completely deprives the citizens of the possibility to exercise freedom of assembly in the place and at the time when other citizens organise cyclical assemblies, any mention of the mutual harmonisation of freedom of assembly is beyond comprehension.

3. The objection of lack of possibility to challenge the substitute order

The second objection expressed by the President in the application submitted to the CT concerned the unconstitutionality of Art. 1(4)

of the Amending Act to the extent to which, by inserting Art. 26b(4) in the Law on Assemblies, it precluded the possibility of the assembly organiser challenging the voivode's substitute order that forbids the assembly. Pursuant to the challenged provision, if a municipal authority, within 24 hours of becoming aware that the voivode issued a consent for holding a cyclical assembly, fails to prohibit other assemblies that were scheduled to be held in the same place and time as the aforementioned cyclical assembly, the voivode is obligated to immediately issue a substitute order prohibiting those other assemblies. As the applicant submits, a substitute order is a means of supervision over the activities of local authorities, thus it can only be challenged – pursuant to Art. 98(3) of the Act on Municipal Self-Government[13] – by a municipality or an association of municipalities. The applicant believes that it is not only the right to a fair trial that is infringed if the organiser of the assembly covered by the prohibition has no means to challenge the order, but it also contradicts the principle of equality, because organisers of assemblies covered by such prohibitions issued by municipal authorities can appeal against them to a court, while the addressees of a voivode's substitute order cannot do so.

In the commented judgment the CT held that 'the legislator did not expressly state that there is no legal remedy or appeal against this decision,' while and Art. 98(3) AMSG, from which the applicant infers the closure of the judicial path of the assembly organisers wishing to challenge the voivode's substitute order, was not challenged in this case. The last statement of the CT appears completely incomprehensible. It is obvious that the President, in the preventive review procedure, could not have challenged a provision in force, namely Art. 98(3) AMSG. Moreover, the President did not question the constitutionality of this provision. Instead, he stated that the provision prevented the assembly organiser from appealing against the substitute order of a voivode, hence such a possibility should be provided for in Art. 26b(4), inserted into the Law on Assemblies.

Continuing this argumentation, the CT states that once the applicant's objection:

13 The Act of 8th March 1990 on the Municipal Self-Government, Dz.U. 2017, item 1875, consolidated text, as amended; hereinafter referred to as: "AMSG."

> […] concerns in general the lack of possibility to challenge the voivode's substitute order before the relevant court, this objection should refer to the provision which excludes the judicial path, rather than the provision indicating the substitute order as a form of operation of a public administration authority.

In this regard, the CT fails to indicate which provision specifically the applicant should have challenged; we should add that in the system of law there is no provision that prevents the assembly organiser from challenging the substitute order. Similarly, there is no provision that would enable citizens to appeal against the order to a court and it is precisely the reason why the President concluded that such orders could not be appealed against. However, the CT discontinued proceedings in respect of this important objection, stating that the applicant should have challenged a provision that in fact does not currently exist in the legal system.

Moreover, in several subsequent paragraphs the CT – in its own words – 'as a side note to the examined objection,' tried to demonstrate that the assembly organiser was able to appeal against the voivode's substitute order and, to justify this assertion, provided three mutually exclusive legal bases. Firstly, it asserted that:

> […] the right to appeal against the voivode's substitute order to an administrative court, enjoyed by the entities that have a legal interest in doing so, resulted from the general jurisdiction of administrative courts to examine appeals against administrative decisions.

Secondly, it asserted that 'if a voivode's substitute order achieves the same goals as those achieved by a municipal authority's decision prohibiting an assembly and has the same effects, then the voivode's order should be treated as an instrument of a particular nature.' This instrument will be 'covered by the relevant verification procedure specified in Art. 16 of the Law on Assemblies.' Thirdly, the CT reached the conclusion that:

> […] regardless of which understanding of the challenged legal mechanism becomes more widespread, it is not excluded from evaluation by courts. […] [I]n view of the silence of the statute, the presumption of judicial path can be inferred from Art. 45(1) of the Constitution.

None of these three arguments is supported by the Constitution or the existing case law of the CT. The very fact that the CT does not provide a single specific legal basis to justify that a substitute order can be appealed against, but three different ones (with various courts being mentioned), already gives rise to considerable doubts. According to the first argument, the assembly organiser might challenge the substitute order before an administrative court, which the CT admitted. In line with the second argument, the assembly organiser could challenge the same order before a regional court (the court mentioned in Art. 16 of the Law on Assemblies). Finally, in keeping with the third argument provided by the CT, the district court would have jurisdiction to hear appeals of assembly organisers against substitute orders of voivodes, because if the legal basis for the appeal were to be found in Art. 45(1) of the Constitution, then jurisdiction of common courts should be presumed (Art. 177 of the Constitution) and among those courts, pursuant to Art. 16(1) of the Code of Civil Procedure,[14] district courts should be presumed to have jurisdiction. The assumption that the applicable laws allow a citizen to appeal against the same substitute order of a voivode to three different courts is dysfunctional in itself, therefore also unconstitutional. We can barely consider that the law enables the citizen to obtain a fair and public hearing of his case, without undue delay, before a competent court, as required by Art. 45(1) of the Constitution, if the case could be heard by three different courts at the same time and each of them would have jurisdiction in the CT's view.

It should also be observed that two of the methods that, according to the CT, are available to assembly organisers to appeal a voivode's substitute order, do not guarantee having the case heard before the planned date of the assembly.[15] If the order were to be challenged on the basis of the 'general jurisdiction of administrative courts to examine appeals against administrative decisions,' it would be highly unlikely for administrative courts of the first and second instances to hear the matter within

14 The Act of 17th November 1964 – Code of Civil Procedure, Dz.U. 2018, item 155, consolidated text, as amended; hereinafter referred to as: "CCP."

15 The need to guarantee the possibility of obtaining, before the planned time of the assembly, a final decision concerning the prohibition of an assembly is a consequence of the ECtHR Judgment of 3rd May 2017, App. No. 1543/06, *Bączkowski and Others* v. *Poland*. Article 16 of the Law on Assemblies does take into account the conclusions from this Judgment.

hours. Similarly, there are no such guarantees if the order is challenged on the basis of Art. 45(1) of the Constitution. Only challenging the substitute order on the basis of Art. 16 of the Law on Assemblies would guarantee exhaustion of the judicial path before the schedule time of the assembly. Article 26b(4) of the Law on Assemblies does not, however, refer to the aforementioned Art. 16 of the same Act, and without such a reference it is impossible to demonstrate that the amendment automatically extended the scope of regulation of the latter provision to include the new instrument, namely the voivode's substitute order.

The last argument used by the CT in this part of the statement of reasons is also peculiar. It goes as follows:

> […] without major problems the challenged regulation can be interpreted in such a way that the right of the relevant entities to appeal against such an order of a voivode was not excluded by the Amending Act.

Obviously, the voivode's order forbidding an assembly is a new instrument and as such could not have been appealable before the law that introduced it entered into force. And if it were so, the latter Act did not have to exclude the possibility of appealing against a substitute order. Quite the contrary, it should have provided for such a possibility. This omission was precisely the subject matter of the President's application in the part which the CT did not examine on the merits.

Why the CT discontinued proceedings to the extent relating to assembly organisers being deprived of the possibility to appeal against a substitute order of the voivode prohibiting the assembly is incomprehensible in that once – in the CT's view – appeal is possible, so the assembly organiser has the right to a fair trial, then the challenged provisions should be considered compatible to Art. 45(1) of the Constitution. Instead, the CT evaded deciding the case on the merits and only – in its own words – 'as a side note to the examined objection,' did it try to demonstrate that the right to a fair trial was available and did it thrice, each time indicating a different legal basis.

Regardless of the above argument, which speaks for the need to examine the objection of the lack of judicial path on the merits, there may be serious

doubts about whether the CT could have discontinued proceedings with regard to an objection raised by the President, relating to a specific provision of the bill awaiting the signature of the head of state. According to paragraphs 3 and 4 of Article 122 of the Constitution, the CT can pronounce the challenged provision in conformity or non-conformity to the Constitution, and in the latter case it can additionally adjudicate that the unconstitutional provision is inseparably connected with the whole bill. Neither of those paragraphs of Art. 122 of the Constitution provides for any other CT decisions or gives the President the right to decide himself on the objection of unconstitutionality to the extent to which no decision was issued by the CT. While it would be permissible to discontinue proceedings with regard to a specific benchmark for review, if the challenged provision is considered incompatible to another benchmark for review, discontinuing the proceedings with regard to the subject matter of review leaves open the President's doubts about the constitutionality of the law. And where the doubts were not removed by the CT, the President, as the authority ensuring observance of the basic law (Art. 126(2) of the Constitution) should not, without laying himself open to the accusation of violating said law, hence to constitutional liability before the Tribunal of State, have signed a bill that he considered unconstitutional.

4. Objection of defectively expressed intertemporal provisions

The last objection raised by the President concerned Art. 2 of the Amending Act, according to which assemblies whose organisation was notified before the day when the Act entered into force and which were to be held at the same place and time as some cyclical ones should be prohibited by the municipal authority's decision or, failing such a decision, by the voivode's substitute order. According to the applicant, the challenged Art. 2 of the Amending Act means that 'holding an assembly will be prohibited for reasons that did not exist on the day of the notification'; moreover, it threatens to violate 'important constitutional principles: that of citizens' trust in the state and the law; that of protection of acquired rights and – pivotally for the case in point – that of non-retroactivity of laws.' The President also submits that Art. 2 of the Act of 13th December

2016 on Amendments to the Act – Law on Assemblies is inconsistent with Art. 2 of the Constitution, because no arguments have been presented that would enable justifying retroactivity of this law. No constitutional value has been named that would require protection at the expense of introducing solutions with retroactive effect, no important state interest has been indicated as a valid reason for violating one of the fundamental principles of the rule of law, the *lex retro non agit* principle.

Yet the CT did not find a violation of the principle of non-retroactivity, justifying it as follows: if 'events initiated under the regime of the previous provisions are continuous ones and are still continuing, the new provisions apply to them.' It is difficult to say what continuity would mean in case of assemblies notified to municipal authorities in whose respect the relevant authorities did not issue decisions prohibiting their organisation. A notification is a one-off act, just like a decision prohibiting the assembly, which can be issued no later than 96 hours before the start of the assembly. The lapse of this time limit results in a closed set of facts, which should not be evaluated in the light of provisions subsequently introduced into the legal system. Furthermore, in the context of this objection, the CT repeats yet another time its peculiar argument that:

> The new provisions do not prevent the exercise of the freedom of assembly by the persons who notified the municipal authority of the intention to organize the assembly. There are no obstacles to their holding the assembly at a different place or time. The Amending Act does not deprive them of the possibility of holding a spontaneous assembly.

However, as mentioned earlier, it is precisely the fact of having to organise the assembly at a different time and place than the organiser would wish that violates the essence of the freedom of assembly.

5. Doubts concerning the adjudicating panel

5.1. Selection of the adjudicating panel

Regardless of the aforementioned doubts relating to the merits of the commented judgment, one cannot fail to observe that it was issued by a panel with defectively appointed members. Apart from CT judges, the panel

that issued the judgment consisted of unauthorised persons, appointed to fill positions that had been filled by the Sejm in the previous term (Henryk Cioch, Lech Morawski and Mariusz Muszyński). This circumstance was confirmed by the CT in its Judgment of 3rd December 2015 (K 34/15),[16] in which the Tribunal stated that the provision being the basis for the election of judges by the Sejm of the previous term, *i.e.* Art. 137 of the Act on the CT of 2015, to the extent concerning justices of the Tribunal whose tenure ended on 6th November 2015, was consistent with Art. 194(1) of the Constitution. In the statement of reasons for this judgment, the CT stressed that the election by the Sejm of the previous term of three judges to replace the judges whose tenure ended on 6th November 2015 was 'valid and there are no obstacles for the procedure to be finalised with the persons elected judges of the Tribunal taking the oath before the President.' Thus the election, by the Sejm of the new term, of three more persons to fill the posts of judges whose tenure ended on 6th November 2015, was legally ineffective.[17] The Constitution does not allow the Sejm to elect more than 15 CT judges.[18] The fact that the defectively elected 'CT judges' took the oath before the Polish President the night before promulgation of Judgment of the CT in case K 34/15 did not result in convalidation of the defective election. The fact that the CT adjudicated with unauthorised persons sitting on the panel, one of whom

16 OTK ZU-A 2017, No. A, item 28.

17 It should be added that there are also doubts relating to the lawfulness of the election by the Sejm of the VIII term of two more persons to the posts of CT judges, namely Julia Przyłębska and Piotr Pszczółkowski. Although in its Judgment in case K 34/15 the CT did find the legal grounds for the election of two previous CT judges unconstitutional, opening the path to the election of new judges to those vacated posts, J. Przyłębska and P. Pszczółkowski were elected before the promulgation of this Judgment, when these posts were filled. As the CT assets in the Judgment in case K 34/15 it is only 'in connection with the entry into force of this Judgment that the Sejm has a duty to elect two judges of the Tribunal whose respective tenures end on 2nd December 2015 or will end on 8th December 2015.' But since the issue of filling those two posts would require a more in-depth analysis, beyond the framework of this commentary, it will no longer be discussed here.

18 It should be added that the Sejm of the new term defectively elected these persons to fill the previously filled posts in contravention of the injunctive order issued by the CT on 30th November 2015, in which the CT requested the Sejm to 'refrain from any measures intended to elect judges of the Constitutional Tribunal until the Constitutional Tribunal has issued a final Judgment in case K 34/15.'

as the rapporteur probably drafted the commented judgment, is important for the consequences of this judgment, to which we shall return later.

The fact that some members of the adjudicating panel were not authorised to sit as judges was not the only irregularity relating to the panel adjudicating in this case. The other irregularity was the failure to disqualify from the panel Judge Michał Warciński, who participated in parliamentary work on the bill as the person who approved, on behalf of the Sejm's Bureau of Research (BAS), two legal opinions about it.[19] The first one was the opinion about the bill's conformity to EU law,[20] the second one concerned how the bill **implemented** EU law.[21] The Tribunal provided two reasons for its failure to disqualify Judge M. Warciński from examining the case. The first one was that both opinions concerned 'matters that are not in any way related to the scope of review in case Kp 1/17,' the second that Judge M. Warciński was neither the author, nor the reviewer of the opinions, while his approval confirmed by his signature and name stamp was 'merely an element of the official procedure of delivering opinions to the Speaker of the Sejm.' Neither argument is true, because the opinions concerned the bill that introduced into the Law on Assemblies the provisions that were the subject of review, while the role of the BAS director is not just to forward the opinions to the Speaker. The BAS director is responsible for the contents of the opinions and his approval is necessary for giving them the status of BAS documents. Considering the bill and the earlier CT case law, there are no doubts that he should have been disqualified from hearing the case, which the CT failed to do in its decision of 15th March 2017. Additionally, the decision was issued with the participation of a person who was not a judge of the CT. One of the members of the adjudicating panel was Henryk Cioch, appointed to the post filled by the Sejm of the 7th term. For this reason, the decision not to disqualify Judge M. Warciński gives rise to the same doubts as the doubts relating to the judgment that ended the proceedings in this case, which were discussed above.

Yet another irregularity concerning the composition of the panel adjudicating in case Kp 1/17 was the unlawful disqualification of three CT judges:

19 *Cf.* the bill amending the Law on Assemblies, Sejm paper No. 1044, VIII term.

20 BAS opinion of 16th November 2016, ref. No. BAS – WAPEiM – 2442/16.

21 BAS opinion of 16th November 2016, ref. No. BAS – WAPEiM – 2443/16.

Piotr Tuleja, Stanisław Rymar and Marek Zubik. They were disqualified by CT decision of 8th March 2017 as a consequence of an application made by the Prosecutor General the day before. According to the Prosecutor General, the reason for their disqualification was the fact that in his application of 11th January 2017, concerning a completely different case, he questioned the constitutionality of the resolution whereby these judges were appointed. In the statement of reasons for the decision, the CT held that:

> […] the situation where one of the participants (the Prosecutor General) formally challenged a judge's legitimacy to adjudicate and where the actions of a participant in the proceedings may result in annulling a CT judge's mandate, may influence this judge's attitude towards this participant.

Disqualification of these three judges was, however, unlawful, because the CT is not authorised to examine 'a judge's legitimacy to adjudicate,' hence the proceedings initiated by the Prosecutor General in this case should have been discontinued. The CT's delay in doing so cannot serve as a pretext for disqualification of CT judges in a different case. It is also worthy of note that at the time of disqualification of the three CT judges, the resolution in the matter of their appointment still enjoyed the presumption of constitutionality and, it being a specific and individual instrument, the CT did not have jurisdiction to review it. Yet just as importantly, the decision to disqualify these three judges was issued by an adjudicating panel on which sat two persons who were not CT judges, namely Henryk Cioch and Mariusz Muszyński. The decision issued in these proceedings arises exactly the same doubts as the final judgment and the aforementioned decision not to disqualify Judge M. Warciński from the case.

Another irregularity regarding the adjudicating panel was the fact that Deputy President of the CT, Stanisław Biernat, was unlawfully prevented from adjudicating in this case. The scope of this commentary does not allow expanding on this issue, so the reader is advised to consult the opinion of A. Sobczyk published in the press.[22] The unequivocal conclusion

22 *Cf.* A. Sobczyk, *Urlop sędziego Biernata, czyli o powszechnym łamaniu kodeksu*, "Rzeczpospolita" 9th May 2017.

from the opinion is that, regardless of the constitutional doubts, also under the Labour Code[23] it was not permissible to force Judge Biernat to take a leave of absence, preventing him from adjudicating in this case.

5.2. Consequences of the CT sitting as a deficiently composed panel

The above reflections lead to the conclusion that in case Kp 1/17 the adjudicating panel was defectively composed, because it included persons who were not CT judges and one judge who should have been disqualified, and furthermore four CT judges were prevented from adjudicating under the pretext of disqualification or because of a forced leave of absence. Therefore, the main question relating to case Kp 1/17 concerns the consequences of the CT sitting as an defectively composed panel.

The Act of 30th November 2016 on the Organisation of and Procedure before the Constitutional Tribunal[24] does not regulate situations of this kind, so it should be evaluated – pursuant to Art. 36 of said Act – according to the Code of Civil Procedure applied *mutatis mutandis*. Therefore, Art. 379(4) CCP should apply *mutatis mutandis*. It provides that if the composition of the adjudicating panel is inconsistent with the law, the proceedings are null and void. The logical conclusion is that the proceedings before the CT in case Kp 1/17 were null and void due to the unlawful composition of the adjudicating panel. But this does not mean that no judgment was issued in the null and void proceedings. This last issue is separately resolved by Art. 386(2) CCP, according to which if proceedings are found to be null and void, the court of second instance sets aside the judgment appealed against, cancels the proceedings to the extent affected by nullity, and refers the case to the court of first instance for re-examination. In the current state of law there is, however, no possibility to apply Art. 386(2) CCP *mutatis mutandis* in proceedings before the CT, because in this kind of proceedings there is no second instance. Following this train of thought, we reach the conclusion that although the proceedings before the CT in case Kp 1/17 were null and void, there is no procedure that would enable setting aside the judgment issued in this case. The invalidity of these proceedings, resulting in invalidity

23 The Act of 26th June 1964, Dz.U. 2018, item 155, consolidated text, as amended.

24 Dz.U. 2016, item 2072.

of the judgment issued by the CT, should however be taken into account by courts adjudicating in cases of citizens affected by the prohibition of organising assemblies in the place reserved for cyclical assemblies. Although the Amending Act became part of the applicable legal order, the courts, when applying its provisions, should at the same time directly apply the Constitution, as Art. 8(1) of the Constitution requires them to do. The provisions on cyclical assemblies, though pronounced constitutional by the CT, can still be questioned by courts. No affirmative judgment of the CT, especially when issued by a defectively composed panel, makes the presumption of constitutionality non-rebuttable.

6. Conclusion

Summing up the reflections concerning the commented judgment, we should express an unequivocally critical assessment, both in terms of how the CT resolved each of the three objections formulated in the President's application and in terms of the reasons for these decisions. The CT's new conception of the relationship between the individual and the state has absolutely no grounds in the Constitution in force. This conception assumes that the individual is 'steered' by the public authorities by means of granting, in the law, certain privileges for such exercise of the individual's freedoms that are conducive to achieving the goals set by the public authorities. In the light of this conception, the only way to resolve conflicts of constitutional rights and freedoms is depriving of these rights the individuals who do not realise the common good in the meaning ascribed to this term by public authorities.

Determination of the legal consequences of the commented judgment for the practice of applying the challenged provisions is the more difficult that the proceedings before the CT in which the judgment of issued were null and void due to the deficiently composed adjudicating panel. Yet the provisions in force do not anticipate any procedure that would enable setting aside a judgment issued by the CT in proceedings that were null and void. The aforementioned doubts about the constitutionality of provisions challenged in case Kp 1/17, which the CT failed to resolve, will be evaluated by the courts applying them.

Summary

In December 2016, the President of the Republic of Poland applied to the Constitutional Tribunal for the constitutional review of the Act of 13th December 2016 on Amendments to the Act – Law on Assemblies. The Amending Act introduced the concept of "cyclical assemblies," defined as assemblies organized on an annual basis within last three years or at least four times a year. When this Act entered into force, there was only one kind of assembly that met the requirements pertaining to cyclical assemblies: the monthly assemblies held to commemorate the victims of the Smolensk plane crash (the so-called Smolensk monthlies). In respect of the Amending Act, the President formulated three objections, two of which have finally been examined by the CT on their merits, while proceedings concerning the third one were discontinued. The CT has ruled that the Amending Act granting privileges to cyclical assemblies are in conformity with the Constitution. The author of the commentary expressed critical assessment, both in terms of how the CT resolved each of the three objections and in terms of the reasons for these decisions. Determination of the legal consequences of the commented judgment is difficult as the panel that issued the judgment consisted of unauthorised persons, appointed to fill positions of judges of the CT that had been filled by the Sejm in the previous term.

Keywords: freedom of assembly, cyclical assembly, Polish Constitutional Tribunal

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