Judgment of 10th November 2004, Kp 1/04

PROHIBITION ON DEMONSTRATION PARTICIPANTS DISGUISING THEMSELVES. LIABILITY OF DEMONSTRATION ORGANISERS FOR DAMAGE

Type of proceedings: Preliminary review of an Act **Initiator:** President of the Republic of Poland	**Composition of Tribunal:** Plenary session	**Dissenting opinion:** 1

Legal provisions under review	**Basis of review**
Prohibition of organising assemblies in which participate persons whose appearance renders their identification impossible [Assemblies Act and Road Traffic Act Amendment Act 2004: Article 1 points 1 and 6, concerning Articles 3(2) and 12(1) point 4 of the Assemblies Act 1990]	Rule of law Legal reservation (exclusivity of statutes) in relation to limiting constitutional rights and freedoms Principle of proportionality Freedom of assembly [Constitution: Articles 2, 31(3), 57]
Joint and several liability for damage committed during the course of an assembly, or directly following its dissolution, of the assembly organiser and perpetrator of such damage [2004 Act (*ibidem*): Article 1 point 5, introducing a new provision – Article 10a(2) in the Assemblies Act 1990]	Rule of law Freedom of assembly [Constitution: Article 2 and Article 57]

The Constitution of the Republic of Poland guarantees "everyone" the freedom to organise and participate in peaceful assemblies (Article 57). The organising of such assemblies is regulated in the Assemblies Act 1990. An assembly, within the meaning of the 1990 Act, consists of at least 15 persons and is "convened for the purpose of joint debates or for the purpose of jointly expressing a position".

In consequence of an analysis of the course and results of street demonstrations, in which numerous incidents violating the peaceful nature of assemblies occurred, involving, in particular, attacks on public order officers and commission of material damage, the Council of Ministers draft of the Assemblies and Road Traffic Amendment Act proposed the introduction of a prohibition on demonstration participants disguising themselves (i.e. concealing their faces) and the establishment of joint and several civil liability of the assembly organiser and perpetrator of any damage. These proposals gained parliamentary approval and took the form of the Assemblies and Road Traffic Amendment Act 2004.

The President of the Republic challenged the aforementioned amendments before the Constitutional Tribunal, within preliminary review proceedings (Article 122(3) of the Constitution). The applicant alleged that they failed to conform to the constitutional guarantee of the freedom of assembly (Article 57), read in conjunction with the principle of proportionality (Article 31(3)), and to the principle of the rule of law (Article 2).

The President did not challenge any other provisions of the 2004 Act.

Judge Jerzy Stępień disagreed with the Constitutional Tribunal's judgment, upholding the allegation that the challenged provisions did not conform to the Constitution, and submitted a dissenting opinion.

RULING

1. Article 1 point 1 of the challenged Amendment Act 2004, amending Article 3(2) of the Assemblies Act 1990, does not conform to Articles 2 and Article 57, read in conjunction with Article 31(3), of the Constitution insofar as it prohibits the participation in assemblies of persons whose appearance renders their identification impossible.

2. Article 1 point 5 of the challenged Act, introducing Article 10a(2) in the Assemblies Act 1990 (joint and several liability of the assembly organiser and perpetrator of any damage committed), does not conform to Articles 2 and 57 of the Constitution.

3. Article 1 point 6 of the challenged Act, providing Article 12(1) point 4 of the Assemblies Act 1990 (one of the bases on which commune authorities are allowed to dissolve an assembly) with the following wording: "the appearance of the assembly participants rendering their identification impossible", does not conform to Article 2 and Article 57, read in conjunction with Article 31(3), of the Constitution.

4. The provisions indicated in points 1-3 are not inseparably connected with the whole Act.

PRINCIPAL REASONS FOR THE RULING

1. The principle of the specificity of legal provisions, particularly where they allow for the imposition of sanctions, is one of the elements of the principle of legal certainty and the citizens' trust in the State, as stemming from the rule of law clause (Article 2 of the Constitution).

2. Conditioning the admissibility of limitations on constitutional freedoms and rights upon their establishment "only by statute" (Article 31(3) of the Constitution) is more than merely a reminder of the general principle of exclusivity of statutes (legal reservation) in relation to regulating the legal situation of individuals, constituting a classical element of the democratic State governed by the rule of law principle. It also formulates a requirement of the appropriate specificity of a statutory regulation. Since limitations on constitutional freedoms and rights may "only" be instituted by statute, this signifies an order of completeness of statutory regulation, which must independently specify all basic elements of the limitation on a particular right or freedom in order to allow the complete outline of this limitation to be identifiable solely by reading the provisions of the statute. The legislator should not, by virtue of the ambiguous formulation of a provision, leave the organs applying the law an excessive discretion which leads to them determining the *ratione materiae* and *ratione personae* of the limitations on constitutional rights and freedoms in practice.

3. The freedom of assembly is one of the crucial elements of the contemporary standard of a democratic State. Although the freedom of assembly is, like the freedom of association, an expression of the ideal of freedom of expression, both freedoms are contemporarily separate legal categories, which is also confirmed by the text of the Constitution (Articles 57 and 58). A public assembly is occasional, whereas the

bonds between members of an association are relatively stable. In contradistinction to the enjoyment of freedom of association, as well as to participation in private assemblies or gatherings, the identity of the participants of public assemblies is not specified. The right of a participant in a public assembly to remain anonymous is an essential element of the normative contents of the constitutional freedom of assembly.

4. The peaceful nature of assemblies is a fundamental element of the democratic standard of freedom of assembly. Observance of the peaceful nature of assemblies is, correspondingly, a precondition for enjoyment of this freedom. The constitutional protection of the freedom of assembly concerns exclusively peaceful assemblies. Violation of the peaceful conduct of an assembly, or the existence of a serious and direct threat to its peaceful nature which could lead to an infringement of basic constitutional values indicated in Article 31(3) of the Constitution, may result in limitations on the enjoyment of the freedom to participate in an assembly. Restrictions could then be, in particular, placed upon the anonymous nature of participation in a public assembly.

5. The organisers of an assembly are not, however, endowed with the right to remain anonymous. The organiser may not be anonymous and their responsibility for the organisation and conduct of the assembly is determined by the due exercise of the activities required by statute.

6. Article 3(2) of the Assemblies Act 1990 restricts the constitutional freedom of assembly by prohibiting persons possessing “weapon, explosives or other dangerous tools” from participating in assemblies. This prohibition, preventive in nature, does not raise concerns. Permitting the participation of such persons in a public assembly would constitute a serious threat to the peaceful character of the assembly and, consequently, to the values indicated in Article 31(3) of the Constitution.

7. A constitutional evaluation of the amendment indicated in point 1 of the ruling yields different results. A prohibition of participation in assemblies by persons “whose appearance renders their identification impossible” would restrict the freedom to participate in an assembly in a way which is not necessary to guarantee the peaceful nature thereof. This restriction would cover not only persons voluntarily disguised whose type of outfit could suggest aggressive behaviour and a possible threat to the constitutional values enshrined in Article 31(3). The prohibition would also concern persons who may not be identified either for ordinary reasons or for voluntary disguise which, nevertheless, represents a way of expressing a particular position in relation to a given problem, situation or fact, as opposed to a sign of aggressive behaviour and possible threat to the peaceful character of the assembly. With respect to such persons, the prohibition on participation in assemblies would constitute an obvious, excessive interference in the constitutional freedom to participate in public assemblies. Furthermore, the limitation of the freedom of assembly consisting in restricting the possibility to participate in assemblies in an anonymous manner is unnecessary, given that the Police Act 1990 provides the police with adequate possibilities to intervene in the course of an assembly where there exists a threat to its peaceful nature, including the possibility to determine the identity of persons participating in the assembly (Article 15(1) point 1 of this Act).

8. The absence of a definition of the crucial notion – "a person whose appearance renders their identification impossible" – in the provision mentioned in point 1 of the ruling makes the decision as to the final shape of restrictions, and in particular specification of the scope thereof, dependent upon the discretion of public authority organs. Decisions dependent upon the decision-maker's discretion would then be taken on the basis of the ambiguously worded provision of the amended Assemblies Act. The application of this provision will not only fail to eliminate legislative imperfections but will, rather, aggravate them.

9. The permissible restrictions on the freedom of assembly may also be connected with introducing explicit grounds for civil liability of the assembly organiser for damage committed therein. That does not, however, permit the legislator to establish any possible sort of liability without taking into account the need to achieve a rational compromise between the public interest, on the one hand, connected with the peaceful and safe conduct of an assembly, and, on the other hand, the freedom of assembly itself. The measures introduced by the legislator may not exceed the limits of proportionality, as provided for in Article 31(3) of the Constitution.

10. In the course of preliminary review proceedings, the Constitutional Tribunal may not make any reference to judicial practice and may only employ hypotheses concerning the directions in which the reviewed regulation has been interpreted. Nevertheless, where the preliminary review relates to the requirement for sufficient specificity of legal provisions (as stemming from Article 2 of the Constitution), probable interpretational divergences must be taken into account. This is especially so when the provision in question has crucial significance for realisation of one of the standards of the democratic State governed by the rule of law (in this case: the freedom of assembly).

11. From the aforementioned perspective, the form of liability enshrined in the new Article 10a(2) of the Assemblies Act 1990, referred to in point 2 of the ruling, deserves a negative evaluation. This provision states that "the assembly organiser and perpetrator of damage shall be held jointly and severally liable for any damage committed by a participant in the course of an assembly or directly following its dissolution". This provision is ambiguous for several reasons. Firstly, Article 10a(1) requires the assembly organiser and its president to "organise the assembly so as to prevent the possibility of causing damage, during the course thereof or directly following its dissolution, as a result of the fault of an assembly participant". The relation between these two provisions is unclear. If the legislator aimed to narrow the scope of the joint and several liability of the organiser and the perpetrator, in respect of damage caused by the latter, it would have been sufficient for Article 10a(2) to refer to Article 10a(1). Secondly, it may prove difficult to determine whether or not a person is an "assembly participant" in specific situations of mass public assemblies. Thirdly, an assessment of whether or not damage was caused "directly following the dissolution of the assembly" may also be complicated, especially since the challenged provision fails to specify whether this only concerns damage caused at the location of the assembly. The ambiguity of the challenged provision results in a lack of specificity and legal certainty, whilst providing for excessive discretion of organs applying the law.

12. Strict liability (i.e. non fault-based) for damage caused, which is a form of aggravated liability *ex delicto*, should always be justified by an explicit legislative purpose indicating the expediency of departing from the general rule, connected either with the ex-

istence of the aforementioned dependence relationship or with, for example, obtaining certain economic effects from a given activity. This is confirmed in the rules governing liability established, in particular, by Article 435 of the Civil Code (liability of persons running an enterprise set in motion by natural forces) or Article 449^1 *et seq.* of the Civil Code (liability for dangerous products placed on the market) which clearly link the risk of using new technology with an aggravated form of liability of the person benefiting thereby. As regards the reviewed solution, mentioned in point 2 of the ruling, it is difficult to define the motive which would justify the imposition of an aggravated form of liability. Prevention may not constitute such a motive, since even the utmost diligence of the assembly organisers would not preclude their liability. An alternative conclusion suggests itself – that the aim of imposing an aggravated form of liability is rather to produce discouraging effects for potential assembly organisers.

13. For the reasons indicated in points 10-12 of the principal reasons for the ruling, the amendment provides for excessive liability of assembly organisers for damage caused therein. In practice, this results in entirely shifting the potential risk of liability onto such persons, together with imposing duties upon them which are impossible to fulfil, which violates the balance mentioned in point 9 of the principal reasons for the ruling. Therefore, the reviewed type of organiser's liability infringes the freedom of assembly, as stemming from Article 57 of the Constitution.

14. A certain symmetry exists between the prohibition of a public assembly and the dissolution thereof. The prohibition on holding an assembly and the dissolution thereof are both utmost restrictive means of limiting the freedom of public assembly. The dissolution of an assembly is the ultimate means for depriving enjoyment of the constitutional freedom of assembly. The possibility to dissolve a public assembly may be solely envisaged by a precisely formulated statutory provision, in the event that the peaceful nature of an assembly is seriously and directly endangered and, in consequence, threatens one of the constitutional values indicated in Article 31(3) of the Constitution.

15. Article 1 point 6 of the Amendment Act 2004, insofar as challenged by the President of the Republic of Poland (cf. point 3 of the ruling), creates the possibility for a representative of the commune authorities to dissolve an assembly, which constitutes the farthest-reaching interference into the conduct of an assembly, where "the appearance of the assembly participants renders their identification impossible". Such a decision would be taken on the basis of an imprecise and ambiguous provision, containing phrases which fail to fulfil the requirements of sufficient specificity (cf. principal reasons referring to point 1 of the ruling). The decision-maker would be endowed with excessive discretion as regards the assessment of prerequisites for permitting dissolution of the assembly.

16. The limitation of the freedom of assembly contained in the provision indicated in point 3 of the ruling is also unnecessary. The present statutory regulation of limitations on enjoying the constitutional freedom of assembly, as contained in particular in the Assemblies Act 1990 and the Police Act 1990, provides for sufficient means to eliminate incidents which threaten the peaceful nature of an assembly. The operative Article 12(1) of the first of the aforementioned statutes permits commune authorities to dissolve an assembly where the assembly either "threatens life, health or property of considerable value" or violates the provisions of this Act or criminal legislation, provided that the president of the assembly, having been warned of the need to dissolve

the assembly, refuses to do so. This dissolution of an assembly takes place on the basis of a finding that the situation is one where the assembly has lost its peaceful nature. In such a case, the freedom of assembly is not legally protected since the conduct of the assembly points towards the need to protect significant values, such as health, life or property of considerable value. Furthermore, on the basis of provisions of the Police Act 1990, it is possible to identify assembly participants once specified incidents occur or where other facts could constitute a threat to the peaceful nature of the assembly.

MAIN ARGUMENTS OF THE DISSENTING OPINION

- In its hitherto jurisprudence, the Constitutional Tribunal has rightly assumed that the presumption of constitutionality is more stringent within preliminary review proceedings than as regards statutes which have already entered into force, since – within such proceedings – no reference may be made to judicial practice and, in particular, to the interpretation of the reviewed provisions in the course of their application. The fact that a Tribunal judicial decision within such proceedings, confirming the conformity of the reviewed provisions with the Constitution, does not prevent re-consideration of the constitutionality of the same provision with respect to the same basis of review (neither of the "*res iudicata*" and "*ne bis in idem*" principles applies in this case) also argues in favour of less stringency when reviewing a statute's constitutionality within preliminary review proceedings.

- The government draft representing the source of the reviewed amendment was generally accepted by both chambers of Parliament. Accordingly, both the government and the Parliament consistently acknowledged, following discussions and in compliance with applicable procedures, that the subject-matters encompassed by the challenged provisions are significant to such an extent that they require a special, new, regulation appropriate to the modern world and requirements of public life. The Tribunal's ruling that the provisions introducing a prohibition on the participation in assemblies of persons whose appearance renders their identification impossible and holding the assembly organiser jointly and severally liable for damage caused by an assembly participant, do not conform to the Constitution, may lead to an erroneous conclusion that the hitherto statutory provisions are sufficient or that their modification is not indispensable.

- The turbulent development of public life in recent years and the plurality of forms thereof, including the appearance of almost unlimited possibilities for social communication by means of electronic media, demand a different perspective of the constitutional right to organise peaceful assemblies and to participate therein from that specified by 19th century tradition or more recent experiences of totalitarianism. The abolishment of censorship, the appearance of free media, entirely independent from public authorities, the development of civil society – each of these causes the hitherto functions of peaceful assemblies to also adapt accordingly. The social costs of organising such assemblies also increase. The legislator must be aware of this new state and react appropriately, searching for the most suitable forms of counterbalancing different interests.

- In assessing the challenged provisions, the Tribunal has reviewed each separately and exposed it to an exclusively literal interpretation, drawing extremely disadvantageous conclusions from a constitutional perspective, which is supposed to justify the allegation as regards the absence of sufficient specificity. Nevertheless, such a technique would not even have been justified in the case of subsequent review, since priority is given to an interpretation of statutes which would ensure their conformity with the Constitution; *a fortiori*, the use of such an interpretational technique within preliminary review proceedings gives rise to doubts. An alternative procedure should have been applied: attempting to discover the answer to the question of what was the aim of the Amendment Act, within the context of the Act's wording and reasoning and, solely on this basis, assessing the constitutionality of the reviewed solution.

- Public order requires the imposition of real liability for damage caused. In the light of Article 31(3) of the Constitution, this may justify the imposition of statutory restrictions on the anonymous nature of public assemblies.

- The prohibition of participation in assemblies by persons „whose appearance renders their identification impossible" should not be considered solely from the perspective of protecting the peaceful nature of an assembly. The reviewed Amendment Act constituted an attempt at complex regulation of matters concerning liability for damage occurring during an assembly. The basis of the aforementioned regulation was the justified assumption that the hitherto existing legal institutions imposing liability for damage caused, contained

exclusively in the Civil Code 1964, were insufficient. Accordingly, the prohibition in question seems to be a rational solution which would facilitate, or even enable, detection of the perpetrator of such damage by the assembly organisers. The joint and several nature of liability of such a person and of the perpetrator must assume that, should the former be required to pay recompense for the damage, he has the real possibility to recover payment from the actual perpetrator.

- Even the assumption that the challenged wording of Article 10a(2) of the Assemblies Act 1990 implies the organiser's strict liability (i.e. not fault-based) for damage caused by an assembly participant need not lead to the disqualification of this provision in the light of constitutional standards. The strict liability cases have not been classified once and for all. The category of persons bearing such liability continues to increase. The *ratione materiae* of such liability is expanding likewise. This is due to the increasing complexity of social life and relations between its participants. Mechanisms governing assemblies are also becoming complicated, which must also lead to an increase in the scope of organisers' liability for damage caused as a result of such assemblies. Given the constitutional necessity to respect rights and freedoms of the, most often prevailing, section of society which does not participate in an assembly, this imposes new obligations upon organisers, which must be compatible with the obligations of participants. The legislator has not only a right but also an obligation to search for new solutions that will optimise the relations between assembly participants, assembly organisers and the remaining section of society which is passive as regards the assembly.

Provisions of the Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 31. […] 3. Any limitation upon the exercise of constitutional freedoms and rights may by 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. 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. 122. […] 3. The President of the Republic may, before signing a bill, refer it to the Constitutional Tribunal for an adjudication upon its conformity to the Constitution. The President of the Republic shall not refuse to sign a bill which has been judged by the Constitutional Tribunal as conforming to the Constitution.
4. The President of the Republic shall refuse to sign a bill which the Constitutional Tribunal has judged not to be in conformity to the Constitution. If, however, the non-conformity to the Constitution relates to particular provisions of the bill, and the Tribunal has not judged that they are inseparably connected with the whole bill, then, the President of the Republic, after seeking the opinion of the Marshal of the Sejm, shall sign the bill with the omission of those provisions considered as being in non-conformity to the Constitution or shall return the bill to the Sejm for the purpose of removing the non-conformity.