

FREEDOM OF ASSOCIATION IN POLAND

AN ANALYSIS OF THE LAWS AFFECTING CIVIC ORGANIZATIONS

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PREFACE

Poland's third sector has been the subject of many studies. It is a worthy subject—for social activists, legal experts and journalists alike. The pace and direction of the Polish non-governmental sector has been notably impressive, and it continues to gain momentum. But this is not to say that it is beyond criticism: There are organizations that depart from fundamental principles, and individuals that have used the non-governmental sector to amass private riches. The non-governmental sector is one of the paramount elements of an emerging civil society; one which takes on both political and legal characteristics. Objective publications of the strengths and weaknesses of Poland's third sector are generally few in number.

The dynamic development of the non-governmental sector in new democracies is a socio-political phenomenon that attracts the interest of potential sponsors, scientific institutions, international organizations and the media. Those who care about the future of NGOs are aware of the dangers: Human weakness combined with lack of experience and carefully orchestrated supervisory procedures, along with interference from public authorities eager to place the not-for-profit sector under their "strict protection." Added dangers come with serious shortcomings of legal regulations, which can usually be attributed to failures of past governments. Even those governments that have taken strides to create or amend third-sector legislation have left much to be desired in terms of quality. Poland has made such attempts to improve its NGO legislation, but there is slim hope that serious regulatory shortcomings will be rectified in the immediate future. Nearly all new democracies find themselves in a similar situation: NGO legislation has never been a top priority for public officials, and that it would become so any time soon also seems highly unlikely. The non-governmental sector will have to expend a considerable amount of effort to convince these governments that strong civic legislation is a fundamental component to create conditions for the proper development of a civil society.

This is what makes the Open Society Institute's initiative to prepare a series of country reports on NGO legislation so very interesting and necessary. Hopefully, the reports will draw attention to the cause of third-sector development, and provide a number of strong arguments on its behalf. It is one thing to describe the existing legislation of countries included in this series of reports; but it is even more effective to compare such legislation to international standards and recommendations. On the bases of these international guidelines, existing shortcomings can be identified, and concrete solutions can be proposed.

Upon being asked to write this report, my first question was whether it was intended that my analysis of Polish third-sector legislation would be merely a comparison of the legislation to international standards, or whether particular situations and circumstances within Poland could be taken into account. If the former, such a report would merely be a flat presentation of norms of positive law to be compared to proposed legislation, leaving no room for any broader reflection. The latter approach would take into account certain elements unique to Poland, and any proposals would be more tailored to suit my country's particular needs. I decided on this latter approach, despite running the risk of inherent subjectivity. My primary reason for doing so is that I am reluctant to set aside five years of personal experience related to the third sector, both in Poland and throughout Eastern Europe. I contributed to the implementation of the European Union's largest program of support to the pro-democratic

infrastructure of NGOs, the DEMOCRACY Program. I have also served for many years as an NGO head, and I am a member of several other organizations.

Along with my own appraisals of the consistency of Polish legislation with suggested solutions, I have included in this report the facts and opinions provided by others to serve as ancillary illustrations.

Materials were gathered in a variety of ways. First and foremost, I gathered all major available publications on the non-governmental sector (see Appendix). I also commissioned a young jurist who specializes in not-for-profit law to interview a number of individuals. Those interviewed include a judge, one state and one local official, and various activists. I also spoke with many NGO activists, taking into account both their legal knowledge and disposition toward valid provisions.

My basic point of reference was OSI's "Guidelines for Laws Affecting Civic Organizations." The following documents also proved helpful: *Freedom of Association: The Question of NGO Registration*, OSCE/ODIHR Warsaw 1999; *OSCE Commitments on Freedom of Association and Peaceful Assembly*, Council of Europe; *The Legal Status of Non-Governmental Organizations and Their Role in a Pluralistic Democracy: A Guideline to Promote the Development and Strengthening of NGOs in Europe*; and, OSCE/ODIHR Provisions Referring to the Freedom of Association of Non-Governmental Organizations.

I have chosen to arrange this report in a structure that differs from any of the above documents. It consists of the following Chapters:

1. Introduction
2. Poland in the Family of European Nations
3. A Concise History of NGO Legislation in Poland
4. Definition of the Social, Legal and Political Context of NGOs
5. Forming Non-Governmental Organizations
6. NGO Management and Activity

I extend heartfelt thanks to all those who helped me to prepare this report. No one who contributed their time and effort should bear any blame for weaknesses that may appear.

CHAPTER 1: INTRODUCTION

I will begin by citing articles from two different Polish constitutions. The first is from the Constitution of the Polish People's Republic of 1952, and the second is from 1997's Constitution of the Republic of Poland.

Article 84 of the 1952 Constitution reads as follows: "1). With the aim to develop political, social, economic and cultural activity of the urban and rural working masses, the Polish People's Republic guarantees to its citizens the right of association. 2). Political organizations, trade unions, associations of working peasants, cooperative associations, youth-, women's-, sports- and defense organizations, cultural, technological and scientific associations, as well as other social organizations of the working people, may organize citizens toward active participation in political, social, economic and cultural life. 3). It is prohibited to establish and participate in associations whose aims or activities threaten the political and social system or the legal order of Polish People's Republic."

Article 12 of 1997's Constitution of the Republic of Poland of 1997 says: "The Republic of Poland shall ensure freedom for the creation and functioning of trade unions, socio-occupational organizations of farmers, societies, citizens, movements, other voluntary associations and foundations." Article 13 imposes limitations on the right of association: "Political parties and other organizations whose programs are based upon totalitarian methods, modes and activities of Nazism, fascism or Communism, as well as those whose programs or activities sanction racial or national hatred or the application of violence for the purpose of obtaining power or to influence state policy, or provide for the secrecy of their own structure or membership, shall be forbidden."

Read but perfunctorily, the above constitutional provisions might lead one to believe that both documents established constitutional grounds for the functioning of NGOs. Yet a detailed analysis of the former reveals itself to be a mere *declaration* of the right to associate. Constitutional provisions that guarantee the exercise of this right do not accompany this declaration. What is more, the wording of Article 84.3 made freedom of association illusory, as the general formulation of limitations contained in that provision enabled authorities to eliminate organizations that made the state uneasy. Any state registration agency was authorized to ban this or that organization if it could show that the organization posed a threat to the existing legal order. The Constitution granted the state a monopoly position to render support to non-governmental organizations, or to limit or ban them outright. [To illustrate the scope of state institutions' discretionary powers, one might quote the most spectacular example of the "Solidarity" trade union, whose emergence was the result of the authorities' political agreement with workers on strike. Legal registration was but a mere formality.] (*My comment: This was to say that "Solidarity" was agreed upon at the political level but after that it was just a formality to register this new social movement. In fact people got permission from the Communist Party for establishing this movement. No one would object to register organization whose emergence has been decided upon by Party and Government – ZL*)

The new Polish Constitution lays down the foundations of civil society by stating that "The freedom to express opinions, to acquire and disseminate information shall be ensured to everyone" (article 54.1) and by ensuring "freedom of the press and other means of social communication" (Article 14). It places freedom of association among other fundamental constitutional freedoms of the Polish State (Art. 12). This is referred to once more in a

separate chapter of the Constitution dealing with political rights and liberties. It is significant that these freedoms are guaranteed to *everyone*, not just citizens, as was the stipulation of 1952's basic law. Additionally, the 1997 Constitution establishes the principle that non-governmental organizations must be registered by a court of law. Competency, therefore, has been handed over to an independent agency of judicial authority. **[2.2.C of the Guidelines.]**

The existence and creation of non-governmental organizations is provided for by stipulations in *Western* European constitutions under either the rubric of "freedom of association" or the "right to associate." The two bear a remarkable resemblance, but there are key differences. In civil liberty construction, lawmakers are not empowered to determine individual conduct, but may merely determine specific limitations that may be imposed on the exercise of certain freedoms. All such limitations must necessarily be constitutional. Within such a framework, an individual may enjoy freedom of—say—movement, and the state should refrain from interfering with that freedom.

There is, however, a different construction when one applies the principle of the "right to associate." Here, lawmakers are authorized to draft an exhaustive list of freedoms, and the possibilities for action within those freedoms. In principle, the only permitted activities are those which have been specified within the law. Thus, either construction has significant and far-reaching legal consequences. Of the two, "freedom of association" seems to provide broader dimensions of freedom than the "right to associate." And it is from these two constructions that one sees important differences between Poland's 1952 and 1997 constitutions.

Adoption of either two conceptions affects the interpretation of statutory provisions explicating constitutional regulations. If "freedom of association"—the more advantageous of the two variants—is chosen, statutory provisions are no longer a closed catalogue of permitted activities, and broader possibilities for individual activity should be achieved through the interpretation of detailed provisions.

There can be little doubt that Poland's 1997 Constitution does offer such possibilities, and it bears mentioning again some of the advantages that I referred to earlier. The document lays the cornerstone for building freedom of association in Poland. Freedom of association has become a paramount principle of the state, and *everyone* is entitled to this freedom. Any limitations of this freedom are contained within a canon of legislation drafted under democratic "rule of law" principles. Unlike the Stalinist Constitution, the 1997 one enumerates cases when the existence of a party, trade union or non-governmental organization is prohibited. The Constitution prohibits the formation of political parties and other organizations that revert to methods and practices of Nazism, fascism, Communism, and also of those whose programs assume or permit racial and national hatred. The Constitution also prohibits the formation of organizations that assume or permit the use of violence in order to gain power or influence upon state policies, or assume secrecy of structure and membership. The Constitution no longer makes references to threats to the political or social system: Monarchist parties may freely question the systemic value of democracy, and may oppose the democratic constitutional order as long as they propose lawful ways of doing so. The Constitution no longer contains imprecise notions of legal order, bearing concrete terms instead: the Constitution and statute. Finally the Constitution provides the individual with a range of legal instruments for the protection of rights and liberties. First and foremost, it provides recourse to the law—a novelty—and establishes a new instrument for expressing personal grievances.

Despite everything mentioned above, it must be noted that the Polish legal system fails to fully implement the constitutional principle of freedom of association. Numerous lacunae can be found in our provisional regulations: some fundamental definitions are lacking; some solutions negate the principle of impartiality of the registering bodies; and freedom of association is unjustly limited through some faulty solutions. *It should be noted also that new Polish new Constitution fails to express directly that informal organizations are free to operate. In my opinion the list of non-governmental bodies from Article 12 of the Constitution ("trade unions, socio-occupational organizations of farmers, societies, citizens, movements, other voluntary associations and foundations.") does not include organizations of this kind.* All of these imperfections will be discussed later in this report.

CHAPTER 2: THE RELATIONSHIP OF POLAND'S NGO LAWS TO OTHER LAWS

Section 2.1: Poland in the Family of European Nations

The overthrow of Communism in Poland was tantamount to the country's reunion with the European family. According to an opinion that is nearly unanimous in Poland, and can also be heard very often throughout Western Europe, Poland never actually left that family. It preserved its cultural and national identity, despite political isolation and economic difficulties resulting from an illogical economic system. In other words, the degree of Sovietization of Polish society was much lower when compared to other former eastern bloc nations. This, however, is not enough for Poland to be recognized as a full member of the family of European countries. Full unity must include a successful adjustment of domestic civilized standards—economic and legal standards included—to those that exist throughout a considerable remainder of the continent. This kind of unity can be hastened through participation in international organizations and structures such as the Council of Europe, OSCE, NATO and the OECD. All of them—if to a differing extent—work toward creating and propagating precisely those standards. This is the natural result of many decades of European democratic experience. Poland is active in all these forums. The Polish model of parliamentary democracy has been patterned after the best European models. The measure of our commitment to the process of integration into the European community is the high esteem given to the European Convention of Human Rights by Polish law. Under the 1997 Constitution, the Convention is an integral part of Poland's legal system. The Polish system of guarantees and protection of human rights is patterned after Convention recommendations and solutions. The presently emerging system of national defense fully complies with NATO-developed standards.

Europe and the United States can offer yet other model solutions for the creation, functioning and legal protection of non-governmental organizations. All of the aforementioned institutions and organizations take up in different ways the issue of NGO participation in a democracy, and of the state's duties with regard to NGOs. Their joint efforts lead to the development of a catalogue of third-sector rules and principles. Mechanisms for the standardization of human rights protection that are observed in most European countries should be extended to offer a similar level of protection to non-governmental organizations. In the process of systemic transformation that is presently occurring in many Eastern European countries, it is indispensable to reflect whether, and to what extent, a given legal system meets emerging standards of creation, functioning and legal protection of non-

governmental organizations. There is an urgent need for Polish law to be put to that test as well.

With some limitations Poland is a party to all significant human rights instruments, both universal and European ones. From the UN documents one can quote International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights (both ratified by Poland in March 1977). First Protocol to International Covenant on Civil and Political Rights came into force in April 1992. Poland has not ratified the Second Protocol to this Covenant yet. International Convention on the Elimination of All Forms of Racial Discrimination (ratified in January 1968) with reservation regarding jurisdiction of the International Court of Justice. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (ratified in October 1989). Convention on the Rights of the Child (ratified in September 1991) with reservations regarding Article 7 and Article 38.

Among European human rights instruments to which Poland is a party three most important need to be mentioned: [European] Convention for the Protection of Human Rights and Fundamental Freedoms ratified by Poland in January 1993, European Convention for the Protection of Torture, ratified in October 1994, European Social Charter entered into force in 1997.

New Polish Constitution incorporates acts of international law into Polish legal system. Provision of Article 87 states clearly that “The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements and regulations”; in Article 91.1 the Constitution states that “ After promulgation [...] in the Journal of Laws of the Republic of Poland [...], a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute”.

Constitution defines also relation between international law and domestic law. It is said that an international agreement ratified upon prior consent granted by state shall have precedence over statutes if such an agreement cannot be reconcile with the provisions of the statutes (Article 91.2). Finally, Constitution gives priority to international law by stating in Article 91.3 that “If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws”.

Section 2.2: The History of NGO Legislation in Poland

Poland, in principle, does not have a law on non-governmental organizations. There has never been a compact system of legal norms or single legal act to comprehensively regulate public-sector organizations. A 1919 decree on foundations and the approval of donations and legacies, as well as a 1932 ordinance of the President of the Republic of Poland (the “Law on Associations”), were in effect between the two World Wars. The former act was valid in principle only in the previous Russian sector of partitioned Poland. However, many foundations in other regions of the country also operated under that decree. The ordinance issued in the thirties applied to the whole of Poland’s territory. Despite their imperfections, which is particularly true of the decree on foundations, the two acts made it possible for welfare, relief and education associations and foundations to emerge within a Poland experiencing revival.

After World War II, there was a radical regression of social infrastructure. A rapid national consolidation of banking and industry began as early as 1945-1946, accompanied by the

compulsory seizure of property and liquidation of the private sector. This was a crippling blow to foundations and welfare societies. Both the real property and capital of social organizations were seized by the state against no compensation. That wasn't all: In 1952, a decree was issued to liquidate all Polish foundations. As a result of that barbarous regulation, the "foundation" disappeared from the map of Polish social life for 32 years—only to return in April of 1984, together with the Foundations Act. Amended in 1991 after the fall of Communism, the Act now provides the legal basis of existence for this particular form of NGO in Poland.

The history of the "Law on Associations" is less turbulent. The "Law on Associations" of 1932 remained in force throughout the post-war period until 1989. Its originally restrictive nature was made even more so by several amendments introduced under communist rule. Each amendment was an attempt to intensify state control over associations and to limit their activity. A new Associations Act (bearing the same name as its predecessor) was adopted in 1989. Although far from perfect, it considerably mitigated state control over organizations, and was quite an important step forward in the area of association activities. Since its adoption, the Act has been amended three times (1990, 1996, and 1998). It now serves as the legal basis for Polish association creation and activities.

Section 2.3: The Definition of the Social, Legal and Political Context of NGOs

There is no proper definition of a "non-governmental organization in Polish law. The very term itself has not found a secure place in the language or consciousness of Poles. It is used primarily by politicians with NGO connections, a few journalists, and third-sector activists. It is an unfamiliar term to the general public. The more commonly used term, "social organization," was the term used in the 1952 Constitution and in many acts that came afterward, some of which are still in force today. The definition of rights—procedural rights included—generally refers to subjects that are not engaged in economic (for profit) activity. Paramount among those rights enjoyed by legal persons is the capacity to be a party in civil case and carry out legal transactions.

The undoubtedly technical/legal term "social organization" took on well in journalism and common parlance. At the same time, it came to refer to other national organizations: QUANGOs, a few political parties, quasi-political youth organizations, trade unions, and local citizens' associations. "Social organization" carried—and still does—some obviously negative connotations. Since state-controlled social organizations were only allowed to exist under conditions that would not pose a threat to authority, membership in such organizations was viewed by many as collaboration with the political regime. Attitudes toward such organizations became increasingly hostile, as numerous people had membership imposed on them by the state—in trade unions and student organizations, etc. A person eager to flaunt an apolitical attitude or non-involvement in the system would stress their not being a member of any organization. By contrast, nearly every official personal questionnaire contained questions about such membership. Membership in one or several state-endorsed organizations was a valuable trump card if a person entertained hopes of receiving a job, promotion or a passport. Many others would join such organizations for purely conformist reasons. Of course, there were a number of people who joined organizations to become involved in social activity, quite aside from purely political considerations.

The only specific legal definition applicable to NGOs is contained in 1989's "Law on Associations." According to the law, an association is a "voluntary, self-managed and permanent union with non-profit aims", which "[...] defines its own aims, programs and

structure" and "[...] bases its activity on unpaid work of its members." The law, however, is non-applicable for foundations, because of their fundamentally different structure.

The voluntary nature of associations means that anyone may form or join an association. Polish law is quite explicit on this point, providing that no person may be forced to participate. At the same time, it prohibits any limitations of the right to join associations. Such regulations result from the principle that no person should suffer negative consequences for organization membership or non-membership. To this extent, the "Law on Associations" is consistent with the spirit and text of the OSCE Copenhagen Document of 1990. **(3.2.K)**

The essential difference between an association and a commercial company—or co-operative—is that an association pursues non-profit aims. Economic activity of associations is permitted, but the "Law on Associations" explicitly states that income from such activity may only be used toward the organization's statutory aims, and may not be divided among its members (Art. 34). The problem of whether or not this limitation applies to employees of non-governmental organizations as well was somewhat controversial, as they were not mentioned in the law. However, an explicit judiciary decision has established that employees may not *directly benefit from* an association's profit-making activities. To this extent, both Polish law and judicial decisions are consistent with European standards. **(4.3)**

An association, according to Polish law, is in fact a union of individuals. This, among other things, is the fundamental difference between an association and a partnership—or foundation. The latter, having separate capital, is treated as an economic entity, and not as an NGO. This creates paradoxical situations. As mentioned earlier, there are a number of legal acts in Poland that are still in effect, and which apply to "social organizations." Certain specific rights, such as the capacity to be party to legal proceedings, belong to organizations that have that very status. A wide spectrum of organizations falls into this broad category. Not only does an association fall into this category, but also a trade union or socio-occupational organization of farmers. Under these provisions, a foundation or partnership established for other than commercial (e.g., educational) purposes is not a social organization. This legal inconsistency develops precisely for the reason that Polish law lacks an explicit definition of a non-governmental organization that would be consistent with, say, OSCE and Council of Europe documents. Such a definition would be of unquestionable value in terms of putting this terminological chaos in order.

In the attempt to arrive at something of a universal definition of a non-governmental organization *grounded in numerous international documents (OSCE Guidelines)*, two elements seem particularly important to stress. The first point is that it matters little which specific legal form is adopted by an organization (association, foundation, partnership, etc.); what is truly important, however, is the organization's independence from authorities. The other key element is that an NGO should be distinguished by its not-for-profit nature; being involved in the solving of social problems, or addressing a specific sphere of the social life (human rights promotion, environment protection, welfare assistance, education, etc.). Generally included among NGOs are associations and foundations, partnerships, independent committees and social movements. Political parties, trade unions, including farmers' trade unions, are definitely excluded.

The 1984 Foundations Act contains no precise definition of a foundation, but defines its various features in different provisions: A foundation has separate capital; its aim must be

socially or economically useful, and consistent with the basic interests of the state; it has legal personality acquired through the procedure of registration; and it may enjoy other specific privileges. In the absence of an explicit definition, it must be assumed that a foundation is that which meets the above requirements, and has been registered in court of law in accordance with a specified procedure.

To remove the obvious shortcomings of the Foundations Act, the Supreme Court made the attempt in one of its rulings to formulate a foundation definition. The Court expressed the opinion that a foundation is "a formally personified capital, the assignment of which is determined by the founder's will expressed in the statute." Two elements crucial in the Supreme Court's approach: the foundation's capital and its aim. While the issue of the capital gives no cause for argument, the problem of the foundation's aim needs to be discussed. Polish law deserves some fundamental criticism here. Article 1 of the Foundations Act provides that a foundation can be established toward socially or economically useful aims, but only those that are consistent with the state's fundamental interests. Thus the law grants registration courts the right to appraise the aims of a newly established foundation. To use a specific example, a foundation aiming to resurrect the traditions of a specific noble family might not obtain entry in the registry for the very reason that its aim does not meet the above requirements. **(3.2.C/F)**

With the entering into force of the new Constitution of the Republic of Poland, the issue of aims for which a foundation is established must be seen in a somewhat different light. Under Article 12 of the Constitution, foundations and associations—along with trade unions and social movements—have been recognized as the basic legal forms of exercise of the freedom of association. In Article 13, the Constitution specifies the limitations of that freedom, and does not differentiate in so doing between the aforementioned organizations according to their aims, as does Article 1 of the Foundations Act. The constitutionality of Article 1 of the Foundations Act is therefore brought into question. As I see it, that provision is in fact unconstitutional, and brings discredit to the Polish legal system. A trial in which an inquiring jurist challenges the constitutionality of that legal regulation is a future possibility.

Polish legal provisions that regulate the functioning of NGOs contain one more lacuna with regard to the definition of such organizations. International documents and other subject literature assume the existence of two basic types of NGOs. Those that work for member benefit are mutual benefit organizations, or MBOs; those that work for public benefit are called public benefit organizations, or PBOs. This somewhat difficult distinction is absent from Polish law. **(6.1.B)**

It is worth mentioning here that the former "Law on Associations"—the 1932 Ordinance of the President of the Republic of Poland (subsequently amended by Communist authorities)—introduced something known as the "higher utility organization," which in a sense corresponds with today's concept of a PBO. "In a sense," I say, because in practice, higher utility organizations performed specific state-commissioned functions and enjoyed government support and financial assistance. They were completely state dependent, monopolized specific service markets, and—while spending public funds—operated largely without supervision.

The absence of a legal distinction between PBOs and MBOs **(3.2J)** is resented both by state-commissioned organizations and the non-governmental sector at large. For several years now,

a group of leaders among those concerned have been hard at work on a draft bill that would regulate this concern. Though the fate of this bill is not the subject of this report, it will be an interesting process to follow, as it drives at the heart of the problem facing Poland's non-governmental sector. I find it noteworthy to mention that the conception of the bill has changed radically since its initial elaboration. It was the original intent to draft a bill that would regulate the principles and procedures of public benefit activity, and to establish the state's role in this regard. While needing an important supplement to existing legal acts regulating the activity of associations and foundations, it soon became apparent that this somewhat myopic approach failed to include a whole range of critically important issues. The scope of the draft bill was therefore expanded to include issues regarding the mutual relationship between the state and the third sector. This is reflected in the bill's title: "On Cooperation between Public Administration and Non-Governmental Organizations." Guided by a shared interest, the draft law forges cooperation between the two sectors, based on four principles: partnership; *subsidiarity* (NGOs supporting public administration); effectiveness (friendly state cooperation with the third sector being a requisite for public administration effectiveness); and openness (public access to information). Without wishing to go into too much detail about the draft principles, I will focus instead on issues that are relevant to the concept of a broader approach.

Both draft bills mentioned here contain regulations pertaining to non-governmental organizations whose privileged status results precisely from their performance of special tasks on behalf of the state or society, thereby gaining access to public funds. The essential difference between the two drafts is that the former merely sought to identify organizations (institutions) that conduct "public benefit activity" and are therefore due certain privileges; while the second and more recent draft would actually *create* a new type of organization—the "public benefit organization." Thereby, an organization would accept duties and receive privileges by acquiring a new status. No matter which of the two drafts will ultimately be accepted, one thing remains certain: Any provision that would confer special status to an organization on the basis of performing social tasks is *of urgent need in Poland these days and* would be fully in compliance with international recommendations. What must be stressed in the context of the two draft regulations is the specific evolution of approach to the regulatory function of law. The first draft bill was certainly an attempt to fill a gap in existing legislation. The second draft strives for a more complex regulation of the mutual relations between the state and the non-governmental sector. This progress on behalf of Polish third-sector leaders is to be commended.

Acknowledging the need for organizations with special status and privileges defined by law is an important first step. The development of clear procedures for granting such status and for supervision of the fulfillment of such duties is also needed. This leads us to the problem of the nature of the institution that will make these important decisions and distinctions. The decisions made by such an institution should, naturally, be impartial ones. This is an emotional subject among leaders and activists of the Polish third sector. The dispute is primarily focused on the composition and influence of this responsible state organ. **(Sec. 3.3)**

Due to its prestige and effectiveness, the Charity Commission of England and Wales has many advocates in Poland, and—in a somewhat modified formula—would be a welcome boon for the non-governmental sector. The legal status of the institution and the procedure of appointing its members remain controversial issues, however. The draft bill "On Cooperation between Public Administration and Non-Governmental Organizations" provides for the

creation of a new state agency, but does not explicitly articulate its status. In separate wordings of the draft—January and February 1999—the agency has two different names: the Joint Commission of the Government, Self Government and Non-Governmental Organizations; and, the Joint Commission of Public Administration Agencies and Public Benefit Non-Governmental Organizations. In both wordings, the Commission is an advisory body, its main tasks being "development of a joint standard of government policies with respect to non-governmental organizations," and "development of detailed standards of public benefit activity." The Commission would be composed of representatives of government, local government, and public benefit organizations. Its members would be appointed for 3 years, and would operate within the Office of the Prime Minister. In my opinion, neither wording of this draft legislation is sufficient. **(3.2.B)**

The procedure for appointment of Joint Commission members to represent the non-governmental sector remains a problem. How can the requirements of effectiveness and a democratic process be reconciled? It remains a lingering question within the third sector of whether this kind of representation can even be appointed democratically, and that everything is left to hang on principles of universal trust and good will. The absence of concrete decisions in this matter results from fears of an attempt at allowing certain groups to prevail over others—or, big groups over small ones.

The defects of Polish NGO legislation are indicative of the time during which they were written. (The two legal acts discussed here were adopted during the past era. Both were amended slightly by democratically elected authorities, yet they remain a relic of communist legislation, as the scope and shape of these amendments were the fruit of political compromises between opposing political forces.) Adoption of the Foundations Act in 1984, and of the Law on Associations in 1989, marked a process of gradual liberalization after the Solidarity period. As the first steps towards normalization, these two acts were then-landmark solutions. Today, they are outdated. While they introduced freedom of formation for associations and foundations, offered a judicial instead of administrative registration process, and also guaranteed a minimum of operational freedom; this is no longer enough. The need for a new law is long overdue.

Our present and far-from-perfect law is a manifestation of prior authority and contains inherent vestiges of hostility toward NGOs, and there is ample evidence to support this claim. Take as examples the Foundations Act and the "Law on Associations." While neither impose *explicit* barriers for the emergence of NGOs, nor grant unlimited powers of interference to the state, they do nonetheless significantly limit NGO freedoms in a variety of ways. Both contain provisions that indicate a strong mistrust on behalf of the authorities toward NGOs. The origins of this mistrust are somewhat different for associations and foundations.

The "association"—a manifestation of the freedom to build social infrastructure and strengthen interpersonal relations—was an alien concept to adherents of Marxist social engineering. State-dependent associations were conveniently manipulated; independent ones posed a lethal threat. Poland's present NGO legislation still bears traces of this desire to curb their far-reaching influence. The provision of "prior control" is an attempt to eliminate inconvenient, troublesome or hostile associations. The law grants to authorities the means by which they can exert political control over the formation and functioning of associations. *Some examples of this should will be cited later on.*

The situation for foundations is somewhat different. The authorities were as ill disposed toward them as towards associations, but for entirely different reasons. Under the law, a foundation was a unit of separate capital that grew outside of direct state control. This exceeded the acceptable limits of a centralized command economy. It was therefore only natural that foundations would be combated by economic and not political methods, as was the case with associations. From 1984 on, the law treated foundations as subjects of economic and not social relations. The fact that foundations fulfilled important social aims was irrelevant. Burdened with liabilities and seldom enjoying any privileges, they were not even included in registers as “social organizations.”

The situation for foundations has not changed radically since 1989. Some examples: A 1991 amendment of the Foundations Act offering tax breaks proved a legal fiction that made foundations dependent upon arbitrary interpretations of low-level fiscal authorities. Foundations were also included in the scope of application of the 1990 “Law on Taxation of Raised Wages,” which was aimed to curb inflation. Designed for a socialist economy, the law obviously discriminated against foundations. The 1993 extension to foundations of payment of the value added tax (VAT) was further proof that lawmakers still viewed foundations as for-profit organizations. In 1994 the Ministry of Finance once again attempted economic repression against foundations, this time taxing funds distributed as grants. In 1995 and 1996 the Ministry of Justice prepared a draft amendment of the Foundations Act that radically limited the possibilities of foundations' economic activity, and also introduced extended requirements for financial reporting. None of the drafts eventually became law.

Although the Polish third sector is larger and better developed than it has been, has more potential, and has scored a number of successes in preventing the adoption of further restrictive legislation, it has yet to achieve a respectable social status. Though there are numerous reasons for this, to go into great detail would be beyond the scope of this report. It does bear mentioning, however, as it affects both the shape of NGO law and the social context in which that law is to operate. With the state hard at work on other reforms, the non-governmental sector has been shoved into the background. Local governments are still learning new roles in governing and managing local funds, and are reluctant to rely upon unproven assistance. Polish businesses, although generous at times, remain generally mistrustful of organizations that have amassed capital through painstaking measures. Finally, in addition to trying to carry out program agendas, NGOs fight an intense battle on three fronts. First and foremost, they struggle for respected-partner status in spheres of social dialogue. Secondly, they are lobbying for and working toward the development of new NGO legislation. Thirdly, they are trying to forge a new and positive identity through the constant promotion of transparency of procedures, openness, and self-regulation.

CHAPTER 3: THE LEGAL EXISTENCE OF CIVIC ORGANIZATIONS IN POLAND

To begin this chapter, let me state once again that Poland does not have a single act regulating the legal status of non-governmental organizations. Nor is there a single procedure for registering NGOs—associations are registered differently than foundations. The fact that practically no other forms of NGOs exist in Poland, I will limit my present discussion to these two. **(3.1 & 3.2)**

The authors of international documents for the legal standards for forming non-governmental organizations—OSCE and Council of Europe alike—have reached a degree of consensus on

the nature of the spirit in which such legislation should be drafted. In other words, such laws should be friendly toward NGOs. It is inadequate that NGOs should merely be permitted to legally exist; the law should actually *stimulate* the emergence of a thriving civil sector. A rather strong case can be argued that Polish NGO legislation definitely fails to perform this latter function **(3.2.A-B)**. Admittedly, NGOs can be established in Poland with relative freedom; yet it cannot be said that the law creates the proper climate for their emergence. Although the pace at which NGOs have emerged in Poland is rapid (as many as about 50,000 have already been established), the system does very little to protect their existence. Although there is no perceptibly open hostility toward NGOs (either in the law or from state authorities), the Polish legal system does not guarantee to them the social rank that they deserve. I will demonstrate the truth of this statement further on in this discussion.

Associations in Poland are formed under provisions of the 1989 “Law on Associations” (with subsequent amendments). The forming of an association is a three-stage process **(3.1)**. Firstly, a founding body, with a minimum membership of 15, must be established. The founders must meet, adopt a statute, appoint the founding committee, and apply to the court for registration. The court, during the second stage, admits the motion, conducts the registration proceedings, notifies the competent state or local agency of the initiative of forming an association, issues its registration ruling, and enters the association in the register. Finally, the local (head of district) or state (head of province) agency, receives from the court the information about a specified group's initiative of forming an association, conducts its own proceedings to check whether there are grounds for objection, reaches its own decision concerning the association's formation and submits this opinion to the court, and participates in the judicial registration proceedings if this is deemed to be advisable. The cost and time to complete this process should be added to this necessarily brief description. Court registration of an association costs PLN 30—equivalent to USD 7.5, or 1/45 of an average monthly salary. The court is obliged by law to complete the registration procedure within 3 months.

Though subsequently amended, the forming of foundations is regulated by the 1984 Foundations Act. The registration procedure is comprised of two segments. The founder or founders first submit a statement of formation—or “authenticated act”—write the statute, and then apply to the court for registration. The second segment involves court registration of the foundation. During this procedure, the court verifies the foundation's aim and all the other requirements necessary for registration (e.g., starting capital), issues its decision on registration, and notifies the competent ministry of the foundation's aim—and, in some cases, the competent provincial head.

According to European legal standards concerning NGO legislation, the process of registration should be quick, simple and inexpensive. The Polish NGO registration process cannot be so simply explained.

The judicial stage comes free of charge, but the cost of drawing up the authenticated act amounts to 3% of the starting capita, plus other fees—i.e., postage and handling. If an average starting capital is PLN 3,000, the notary's fee would be about PLN 110 (USD 28). If, however, starting capital amounts to PLN 100,000, the notary's fee may reach PLN 3,200 (USD 820). **(3.2.A)**

In principle, the court is not bound by time limits concerning the registration of foundations. Under the Civil Procedure Code, however, it should act as promptly as possible. In practice,

the process takes between 3-5 months. If a foundation has large starting capital, or plans extended economic activity, this may be extended. **(3.2.A, 3.2.D)**

The “Law on Associations” provides a good example of the ideological perplexity that was present during Poland’s power shift. Parliament proved up to the task of making a decisive turn in the matter of registering associations by replacing an administrative procedure with a judicial one; but it lacked the courage to deprive the state of all control during this process. State administrative agencies have inherited the privilege of “prior control” over citizen initiatives submitted to court. **(3.2.F)** By law, the court is obliged to appeal to a local or state administrative agency for an opinion on the establishment of an association. The agency may refrain from formulating an opinion, submit its reservations, or join proceedings to defend an association’s arguments. The original intent of this law was to strike a compromise between novel court registration of associations and the public administration’s active role in the process of establishing NGOs. The truly revolutionary aspect of the law was that parties—association founders or a state office—could present their opinions in a court of law. Under the previous Associations Act, the registration of organizations was arbitrarily decided upon by the administrative agencies—including the secret police. Despite efforts to counter this, there is an administrative tendency to prohibit certain activities. While the number of outright refusals are few, the mere possibility for this situation to exist brings discredit upon Polish law. To cite just one example, the Provincial Office in Katowice recently barred a cultural association of Silesians from registration under the pretence that the organization’s program posed a threat to Polish State integrity.

As regards the emergence of foundations, Article 1 of the Foundations Act stipulates that a foundation may only be established if its existence is deemed (by the state) to be of paramount social importance. This is a not-so-thinly-veiled attempt to grant the state an inordinate amount of power. The opportunity to exercise this power occurs because the court is obligated to render a decision based upon an administrative decision on foundation aims, which the court must submit beforehand. This provision should be immediately stricken from the Foundations Act, as it severely stunts not-for-profit sector growth, and is inconsistent with provisions of the OSCE Copenhagen Document. *(I would suggest coming back to original translation and change this paragraph since the issue of preventive control has disappeared. In fact by controlling the importance of the aims the state controls the foundations – ZL)*

The OSCE “Guidelines” suggests that NGO registration should take no longer than 60 days. A legal obligation to involve an administrative agency for the registration of an association considerably lengthens this process. Under Polish law, the court has been given a period of 3 months to complete this process, which seems excessively long.

By comparison, foundations fare even worse, as there are no strict time limitations imposed upon the court to complete the process.

Polish NGO legislation does not provide for the active role of the Prosecutor during any stage of forming an organization. Although the Prosecutor’s main task is to review the observance of law by citizens and public institutions, the office has been granted no special powers regarding the creation of NGOs or their activities. Within limits of general competence, the Prosecutor may institute criminal *ex officio* proceedings if an offence has been committed. To this extent, Polish solutions correspond with OSCE recommendations.

The registration of a non-governmental organization in Poland is no doubt a rather complex and lengthy process. With regard to associations, the requirement of 15 founding members is

excessive, and there is no justification for this to be found in provisions of the “Law on Associations.” It becomes quite clear that the former authorities were interested in effectively blocking the development of independent social structures at a practical level. While the minimum membership requirement may have been established to prevent the establishment of mock organizations, it remains a mystery as to why the law continues to contain this provision. The OSCE document "Freedom of Association: the Question of NGO Registration" contains the recommendation that the minimum number of founders should not exceed 10 *while OSI's Guidelines recommend that the number of founding members should not be “burdensome”*. Though not an incredible discrepancy, efforts should be made to sufficiently reduce this number, *even below ten, which seems to be high too*. **(3.2.E)**

The “Law on Associations” also imposes on founding members a number of obligations that must be met before the motion for registration can be submitted. They must first call and hold founders meeting, pass a resolution that establishes the organization, and then adopt its statute. Additionally, founding members must submit a signed motion of registration, along with personal information, to the court. Due to the burden of those requirements, legal provisions are often evaded in practice. It is not uncommon for founders’ meeting to be attended only by the association’s group of initiators. This group resolves the formation of the organization and adopts the statute. The remaining members only then sign the appropriate documents before being submitted to the court. **(3.1)**

Costs are a separate issue. While the court fee of PLN 30 for registration of an association is not excessive, there is good reason to argue that if the state were to assume these related costs, it would be a demonstration of commitment to the development of the not-for-profit sector. By assuming the nominal court costs, the state would lose little in terms of revenue, and gain much in public confidence.

Matters are much more complicated for foundations. According to the Foundations Act, the establishment and entry into the court register of an “authenticated act” should be free of charge. This was formerly possible when notary offices were an integral component of the administration of justice. Yet times have changed. In the early 1990s, notary offices became privatized, rendering this provision moot. Under the new provisions, notaries were granted the right to charge fees for all actions performed, and they eagerly exercise this right. Notaries now charge a rate of 3% of the value of the foundation's capital, plus handling fees. If starting capital is small, fees are not likely to exceed PLN 200 (USD 50). Because the state has relinquished control over this important aspect of NGO creation, a quite paradoxical situation has arisen in which foundations are established against payment of a notary’s fee and are registered by the court free of charge. In any respect, the future of foundation in Poland lies in the hands of private commercially oriented notary’s offices. **(3.1.A, 3.2.A)**

There is another ramification of change that particularly affects the creation of foundations in Poland. Things have grown so complex to the extent that legal assistance often proves indispensable. This is particularly so if the new foundation plans to pursue economic activity, when it then becomes necessary to apply for various tax exemptions. Things become even more complicated if a particular economic activity requires special permission or a license. The average citizen is unable to write a foundation statute of such a foundation that will bring it into compliance with provisions of the Foundations Act, Tax Code, the “Law on Economic Activity,” etc. At the same time, legal services in Poland have become prohibitively

expensive. There is an emerging trend to solicit unpaid assistance from law students in the preparation of documents required to register a foundation. (3.2.A)

The fact that the “Law on Associations” and the Foundations Act are relics of the past is particularly apparent with regard to the role of the state in the process of creating and supervising the operations of non-governmental organizations. "Preventive" or "prior" control, however, is not the only manifestation of the state's active role. These institutions preserved the dubious privilege of supervising NGOs, though with the succession of amendments and new regulations in other areas (e.g., the administrative reforms launched on January 1, 1999), the scope of this supervision is becoming ever narrower. With regard to associations, state supervision consists of a review of legality of NGO operation, its conformity with the law, and compliance of interpretation and spirit of the association statute. With regard to foundations, the state acquired broader supervisory powers, and is much less eager to resign its competencies. [Even when establishing a foundation, the founders must indicate the foundation's planned activity to the competent ministry, and this intention must be entered into the register upon entry. The intention that is legally binding, however, is that which is specifically identified by public administrative agencies. By law, the court is bound to indicate the agency and any provisional conditions upon entry. The indicated competent ministry is then obliged to undertake supervision over the foundation's activity.][**This isn't clear to me.**] (EXPLANATIONS: According to Polish law foundations act under supervision of the state. Ministers execute this supervision in most of the cases. When establishing a foundation, the founder can indicate which minister, according to him, is proper/competent taking into account field of interest and planned activities of this particular foundation. This statement is not binding to the court. Court can decide otherwise but it has to determine which minister is competent. Court is also obliged to inform this proper/competent minister that the foundation had been established and had been entered into the register. By law, the entry into the register means that indicated minister is obliged to undertake the supervision over the foundation and its activity. If the foundation acts only in one voivodeship (province) court informs also local voivode.) One instrument at the competent ministry's disposal is the duty imposed on foundations to submit annual activity reports. This report was introduced by a 1994 order of the Justice Ministry. Rather surprisingly, this order requires much more detailed data, and is generally less favorable for foundations than its 1991 predecessor. (3.6)

The issue of foundation supervision in Poland is a highly emotional one. The broad powers granted to public authorities under the 1984 Foundations Act are no longer justifiable. With the 1991 amendment to the Foundations Act, the administration's role in the process of registration and supervising foundation activity was limited. Beginning in 1991, these supervisory powers were handed over to the registration court, though the administration preserved the right to initiate court proceedings. By motion of the competent ministry, the court can quash a foundation board member resolution if it finds fault with the statute or other legal provisions. It may also suspend the board and appoint an independent *receiver*. In other words, joint action between the administration and the court is required to interfere with the internal matters of a foundation. This is a favorable development, as it eliminates arbitrary interference stemming solely from the executive branch of government. Yet the fundamental question remains. Is administrative supervision over foundations at all necessary? Such supervision seems fully justified if a foundation receives or administers public funds. In such instances, an administrative agency performs a supervisory function in the interest of and on

benefit of society—i.e., the taxpayers. In other situations, excessive supervision over NGOs is bound to arouse suspicion.

The Foundations Act introduces a solution whereby administrative and judicial supervision is internally regulated, irrespective of the foundation's sources of financing and scope of activity. Let us return to the previous example of a foundation desiring to promote the history of a particular noble family. Let us also assume that it is possible to establish such a foundation (it must be borne in mind that foundations may only be established for socially and economically useful aims *such as health care, economic development, science, education, culture and arts, social assistance, ecology and preservation of historical monuments*), and that it is financed from funds obtained from a private sponsor. What is the justification for state supervision of this foundation? Early '90s lawmakers seem to have lacked sufficient determination and imagination to radically change the model of administrative supervision over foundations.

According to international law the freedom of association applies insofar as that NGO aims and activities do not jeopardize the fundamental interests of the state and society. The right to establish and/or join an NGO applies equally to everyone. No discrimination is permitted, which applies to natural and to legal persons alike, to foreigners and citizens, and to adults as well as the young.

It is the right of natural and legal persons to establish organizations. **(3.2.H)** Polish law here is essentially inconsistent with international standards. The “Law on Associations” provides that only natural persons may form an association, and that legal persons may only join as supporting members. This regulation, in fact, imposes a ban on forming associations comprised of legal persons only. A further implication is that it is impossible to form an association of associations in Poland—a popular means of strengthening the NGO sector in many countries. There are a few examples of legislation that enable certain groups to group together under a similar structure. The Copyright Act of 1994 permits the foundation of organizations of natural and legal person concerned with the protection of that right. The “Game Law” of 1995 provides for associations of natural and legal persons actively involved in the protection and development of the game population; and the “Communal Self-Government Law” of 1990 secures a similar right for communes to form associations.

Article 22 of the “Law on Associations” provides instead for the setting up of a union of associations. Under this provision, associations—at least three of them—may establish a union of associations that can be joined by other legal persons. **Furthermore, the provisions of Article 22.2 apply exclusively to a union of associations.** [This is probably wrong redaction of the original translation, which basically reads as follows: *Furthermore, under Article 22.2 all the provisions of the “Law on Associations” apply respectively to the union of associations – ZL*] Thus a union of associations to which the “Law on Associations” applies is permitted, while an association of associations or of other legal persons is not. Why lawmakers deprived legal persons of the right to establish and join associations is unclear. While the answer may seem obvious with respect to the previous regime (as associations of legal persons could have gathered serious organizational momentum and material wealth), the preservation of this provision *today* has no rational justification. This provision should be stricken from the “Law on Associations” as soon as possible. Leaders of the Polish third sector who, in 1998, drafted a memorandum concerning the complex regulation of legal and operational conditions for NGOs and their volunteers share this opinion. According to their

vision, the possibility of an association of legal persons is a requisite condition for the full exercise of freedom of association in Poland.

The fact that Polish law bans the formation of associations of legal persons seems particularly disadvantageous in light of the growing role of umbrella organizations. **(12.2)** These are non-governmental organizations that group together to solve shared problems. The “Guidelines for Laws Affecting Civic Organizations” states that the law should create the possibility of establishing such organizations. It seems that the most advantageous and obvious solution would be to set up such organizations as precisely associations of natural persons and non-governmental organizations. Yet under Polish law, an umbrella organization may only be created as a union of associations.

Again, foundations fare even worse as they have practically no possibility of associating. Use of the term “practically” is intentional: in principle, foundations are not permitted to form associations or unions of foundations, but there remains a specific possibility to do so. Namely, foundations may co-establish or join unions of associations. Article 22 of the “Law on Associations” states that “other legal persons may be founders and members of a union as well.” Since foundations are not excluded, this means that they are permitted to join a union. A characteristic—but paradoxical—example is that of one of the best-known umbrella organizations in Poland: the Polish Foundations Forum. Though established as a union of associations in 1992 “upon request” of an initiative group, its primary purpose is the development of Polish foundations. (It remains regulated under provisions of the aforementioned Art. 22.) At present, the organization links 215 foundations from around the country, and another of its main goals is to press for better NGO legislation. Formally, an organization of foundations is a union of associations: this is the first paradox. The other paradox is that in order to commence legal activity for a radical improvement of NGO legislation, the Forum had to evade valid provisions and form a fictitious union of associations. As is evident from this example, creating the possibility for associations and foundations to associate is something that needs to be urgently addressed in the Polish legal system.

Highly controversial in many countries is the problem of non-governmental organizations established by foreigners. European standards are explicit on this point: foreigners should enjoy the same rights as citizens. The sole reservation is that domestic law may require the majority of members of an organization board to permanently reside within the territory of a given country. Polish law is basically consistent with these recommendations, but there are specific differences between associations and foundations.

The “Law on Associations” stipulates that foreigners residing in the Republic of Poland may establish associations according to the same principles as Polish citizens. This is generally consistent with international standards. Rather problematic, however, is the vague notion of “residence in the territory of Poland.” Linguistic confusion might lead one to infer that those persons concerned are those residing at a specific address, and capable of demonstrating this fact. However, based on interviews with judges and Warsaw court employees, having a specific Polish address is not sufficient in the judicial practice. Foreigners who wish to establish a non-governmental organization are required to have a permanent resident's card. This interpretation of the provision raises fresh questions. Lack of sufficient data makes it difficult to say whether courts in other Polish localities also interpret permanent residence as tantamount to possession of a permanent resident's card. This issue requires explicit resolution, and would involve adding precision to the wording of Art. 4.1 of the “Law on Associations.” If lawmakers would prefer that only holders of permanent resident cards should enjoy the same rights as Polish *nationals*, and to be able to establish NGOs according to the same principles, this should be clearly stated. The same applies to the more lenient interpretation. It should be stressed, however, that this matter is the only key difference in Polish law concerning Polish and foreign subjects.

Considering what has just been said, there are no special difficulties related to the setting up of non-governmental organizations by foreigners. Neither the provisions nor the practice pose any particular obstacles here. Instances of administrative reservations or outright refusal to register a foreign organization are rare in Poland. In any case, such news is quickly brought to the attention of local or national human rights organizations by the media.

A different situation exists for foreigners who do not reside in Poland. Provisions on associations permit such persons to join only “existing” associations—if provided for in the association’s statute. This is also consistent with international recommendations. Here, Polish judicial practice has decidedly left it up to organizations to decide for themselves upon who may or may not join as members. If the statute allows for the admission of foreigners, the courts have bowed to the organization's will. By the same token, there have been instances when organizations have included foreigners without explicitly providing for this in their statutes. This practice is to be lauded.

The Foundations Act regulates the issue of foreigners in *very simple and radical/in principal* [a rather formal and dogmatic – **this expression does not reflect the sense of the original text – ZL**] manner. Article 2 stipulates that a foundation may be established by natural persons, irrespective of citizenship and place of residence. Legal persons may also establish foundations, whether the seat of the foundation is in the territory of Poland or abroad. Yet after a closer analysis of the contents of the Act, the legislator's blind adherence to principles seems rather doubtful. Yet, despite the explicitness of Art. 2, a 1991 amendment to the Foundations Act introduced the concept of a “foreign foundation mission.” Under Article 19 of the Act, a foreign foundation seated abroad may establish a “mission” in the Republic of Poland. By its very definition, a mission cannot be entered into the registry of foundations—not being a foundation in the strictest use of the word. Furthermore, a system of licensing for mission activities was also introduced. Those wishing to establish a mission in Poland must obtain a permit issued by the competent ministry in charge of regulating foundation aims; and any mission that plans to pursue economic aims must meet a number of provisional requirements that are demanded of factories and other commercial enterprises. This is yet another indication that foundations—and, in this case, missions—do not receive the kind of treatment that should be given to those organizations that pursue socially beneficial aims.

What is the *ratio legis* justification for this particular provision? Why is there a special procedure for the registration of missions? Article 2 of the Foundations Act clearly states that a legal person seated abroad—including a foreign foundation—may establish a foundation in Poland. Perhaps it was seen as a simple registration mechanism by which some measure of administrative control over foreign foundations could be gained. The solution appears advantageous for foreign foundations: they can apply to the competent ministry and thereby avoid the complex procedure of authenticated court registration. One particular barrier that is sidestepped is the court appraisal of foundation aims and compliance with provisions of the Foundations Act (*cf.* Article 1). Also avoided are the difficulties that come when a foundation wishes to pursue economic activities. Bearing this in mind, mission founders may consider the ministry license procedure to be much simpler and quicker. There is, however, a price to be paid—direct supervision by the state administrative agency over the mission's operations. Under “appropriate” grounds, the ministry may withhold or, if necessary, revoke an operational license. Of course, the parent foundation and its mission have at their disposal all remedies provided for under law to challenge such a decision. The fact remains, however, that it is much easier to withdraw a license than to initiate liquidation proceedings against a

registered foundation, which involves close cooperation between the supervisory agency and the court—to say nothing of time spent in court to reach a final verdict.

Young people are among those that are most involved in developing a healthy third sector, and Poland is no exception. **(3.2.H)** European documents devote but little attention to this issue. The most often-formulated proposition is that youth should be entitled to join NGOs. Typical of Polish NGO law, youth regulations for associations and foundations are different.

Since a statement of intent to establish a foundation must be made in the form of an authenticated act—and because foundations involve property—it is taken for granted that those persons who have not reached 18 years of age may not establish such an organization. Minors, however, are not prohibited from indirect? [ZL] participation in a foundation established by adults. **[But are they prohibited from becoming members?]**

[Yes, they are since according to Polish law foundation is not a membership organization. Also in original translation last sentence of this paragraph reads as follows: There is however no obstacles to the fulfilling their ideas and plans within a foundation established by adults. It may need correction but I think it gives clear idea - ZL.]

Associations may only be established persons of full legal age that have full capacity to conduct legal transactions; yet persons under 18 may join an existing association if they meet specific criteria. With regard to persons aged 16-18, the “Law on Associations” merely requires that the board of directors be comprised of an adult majority—or, to use the legal language—persons with full capacity to conduct legal transactions. Thus the law poses no obstacles for minors who wish to become association members, but it does strive to guarantee minimum of certainty and management stability—especially if teenagers prevail among its members. It should be noted that the law extends full membership rights to minors—including those of eligibility and franchise—unless otherwise stipulated in the statute.

The law is applied somewhat differently for those under the age of 16. They may only join an existing association with the consent of a statutory representative. In this case, however, rights are radically limited as they are not allowed to take part in voting, and do not enjoy the rights eligibility and franchise. [The only exception to this is if an association membership is comprised of minors only; but such organizations are always placed under the guardianship or supervision of adult members of the organization]. **[Use of “members” and “membership” is contradictory.]**

[I agree, but this sentence has been changed. In the original translation there was no word “membership”. I think “unit” should replace the word “membership” - ZL.]

As recommended in the “Guidelines for Laws Affecting Civic Organizations,” Polish law establishes voluntary organization membership. **(3.2.K)** No person may be forced to join an organization. By contrast, no person should suffer negative consequences of any membership. However trivial this might sound, many Polish citizens were forced to join trade unions or made to become members of the Society for Polish-Soviet Friendship. Even in the early 1980s, it was standard practice in many Polish universities to encourage students to join the Communist Students’ Organization.

* * *

A modern democratic state cannot properly function without a well-organized civil society; and civil society cannot exist without a well-organized non-governmental sector. For Poland

to realize the truth of this paradigm, two conditions must be met: 1) People must be willing to commit themselves to not-for-profit goals; 2) The state must create legal conditions under which not-for-profit goals can be effectively and efficiently realized.

What I have written about up to now are the legal instances by which non-governmental organizations acquire legal status and are fully capable of participation in legal transactions. What I have not yet referred to is the spontaneous activity of citizens in its simplest form—clubs, societies, circles, etc. Presently in Poland, organizations must complete a procedure specified by law to be able to participate in legal transactions—which, here, happens to be a rather lengthy and complex process. Our NGO laws should also extend the possibility of legal emergence and activity to organizations that do not claim full participation in legal transactions, and are satisfied to hold an informal status. **(2.2)**

The emergence of a non-governmental organization proceeds in two dimensions: The human dimension is reflected by the will of a membership, while the institutional dimension is made manifest by legal procedures that are applied by state institutions. Is it possible for NGOs to emerge and function without active state involvement? This is and indeed should be possible. Let us assume for a moment that a group of individuals wishes to form an organization. They notify authorities of their intent, receive no formal objection, and commence with operations. In the meantime, they recruit members, collect membership dues, and begin interacting with the public. Yet it is likely that the organization will achieve either a level of responsibility (handling public funds), or be granted specific privileges (tax benefits), which will in some way necessitate that they become legally accountable. Let us now assume that it is at this point that the organization decides to formally register itself according to law. It is precisely at this point where law determines the level of state interference. In some legal systems, it is sufficient to serve notice to a competent authority of emergence, membership construct, and primary aims. Other systems are much more complex and expensive. In conformity with international recommendations that formal registration should be made as simple as possible, Art. 6 of Poland's "Law on Associations" allows for the existence of "ordinary" associations.

Three people can establish the ordinary association. All that is required for such association to emerge is to notify a competent agency. Activity is deemed authorized if there is no received notice of objection within 30 days after the state agency had been notified. Naturally, this organization does not enjoy the same rights of registered associations. This concerns the legal personality, acceptance of donations and legacies, pursuit of economic activity and the formation of local structures. First of all ordinary association does not acquire legal personality. It is not allowed to pursue economic activities and can not accept donations and receive grants. This association can not establish its local units and is not allowed to participate in the unions of the associations. Thus its legal position is very weak. The legal bulwark for ordinary organizations was created during a rash of collective citizen actions. The point, in fact, was to establish legal grounds for the ever-more-frequent collective actions of various popular structures rising in opposition to Communist rule. The problem of registering associations was a crucial one during 1989 negotiations for a new association law. Government representatives could hardly imagine the existence of a non-registered organization. When other arguments failed, they would contend that registration was necessary with regard to the principle visibility of legal transactions: "If non-governmental organizations are to have property and pursue economic activity, they must necessarily have legal personality, and all information about them must be contained in the appropriate register." As a result, the division into registered and ordinary associations was preserved, and the rights of the latter radically limited. The lowest rank held by ordinary associations was confirmed in practice. With ordinary organizations having neither legal personality nor the means to legally generate revenue, this can hardly fulfill Polish third-sector expectations.

* * *

Though the "Law on Associations" and the Foundations Act are basic components of Polish NGO legislation, other legal acts deserve attention. The few mentioned earlier (the "Copyright Law," "Game Law" and "Communal Self-Government Law") pertain to associations of legal persons. The formation of these associations was impossible under the

“Law on Associations,” but permitted under an appropriate law that defines a particular scope of activity, and is regulated by provisions that are related to NGO law.

In instances of Catholic and students' organizations, internal registration (by the bishop or respective rector) affords the organization legal personality and makes it equal to other subjects in the conduct of legal transactions.

An independent court in Poland registers associations and foundations. According to NGO recommendations, Polish law is in accordance with this, and the courts have consistently displayed the requisite amount of impartiality. Difficulties in the registration procedure itself can hardly be blamed on a lack of staff professionalism. Delays most often result from the structural collapse of Poland's court system. *There is more and more cases pending against Poland before the European Court of Human Rights in Strasbourg for this very reason. (violations of the Art. 6 of the European Convention of Human Rights) (3.2.C, 3.3.A). Just to give some examples: case Humen v Poland (Application No 26614/95) concerns the length of court proceedings, case Trzaska v Poland (Application No 25874/94) concerns detention and the length of the criminal proceedings, case Wójcik v Poland (Application 26757/ 95) concerns the length of detention and length of criminal proceedings. Very recently, July 2000 European Court of Human Rights has decided that Poland violated right of Mr. Trzaska for fair trial (Article 6 of the European Convention). Very recently (July 2000), European Court of Human Rights found Poland guilty of infringement of Mr. Trzaska's right to fair trail by stating that court procedure lasted to long. According to Article 50 of the European Convention Court afforded just satisfaction to Mr. Trzaska, without any financial reparation.*

According to international standards, both the “Law on Associations” and the Foundations Act allow organizations to amend their statutes without having to re-register. (3.4) Changes of basic internal structure, composition of authorities, or legal address are generally of little legal consequence. However, changes thus entered into the register take on important differences with regard to foundations. Any foundation entry is essentially law-making in nature; thus any change may significantly affect the foundation's legal personality. Changing foundation aims during registration has sparked a certain degree of controversy. The Supreme Court has formed an opinion that this change is only possible if envisaged in the foundation statute. Absence of such a provision may result in the court's refusal to introduce such changes during the registration process.

An association statute is amended on the day of its adoption by valid resolution to that effect by a competent agency, and not at the moment of court registration—as entries in the association register are not law-making in nature. In practice, however, changes of statute or managing board membership require some additional effort on behalf of the organization. The court requires that a formal motion be submitted, together with a copy of the deciding body's resolution and the minutes of that body's meeting. A fee equal to the amount of the registration cost must also be submitted—which is a result of the implementation of this practice.

In accordance with the Code of Civil Proceedings, a party to proceedings may challenge any decision of the registration court before the Court of Appeals. This includes rulings on registration and changes in the official register, and the legal standards involved here are the same as in any other appeal procedure. It can be safely said that Polish law fully meets the standards established for laws regulating NGO activity.

It is significant that a valid court decision becoming has different ramifications for associations and foundations. An association assumes legal personality from moment that the

court agrees *to register the organization*. A similarly valid decision has no particular legal effect for foundations Under Art. 7 of the Foundations Act, a foundation only acquires legal personality after its entry into the foundation register. This is yet another example of incoherent legislation.

In Poland today, there are separate registers for associations and of foundations. Each court that registers associations keeps its own associations register, while there is but one foundations register, which is kept by the District Court for the City of Warsaw. The contents of these registers are also different, as provisions require the inclusion of different data for the two groups of organizations. Despite these relatively minor differences, the contents of both registers are open to the public, as is an international standard cited in Rule 3.6 of the “Guidelines for Laws Affecting Civic Organizations.”

The January 1, 2001 introduction of the National Court Register will be of great benefit to the public. The present existence of separate registers makes public access to information much more difficult than it needs to be. It is with next year’s enforcement of the “Law on the National Court” that a single court register will be published, which will be open and accessible to all interested persons. The register will include all associations, foundations, commercial companies, cooperatives, etc. Under law, the Ministry of Justice is obligated to establish an Information Center that will compile data from individual registration courts for inclusion in the register, and to provide any information necessary for future applicants. (3.6)

Despite this encouraging development, one provision of the “Law on the National Court Register” is bound to receive some third-sector criticism. Article 4.4 imposes fees for information obtained from the Register Information Center, and for the preparation of copies and certificates. While small operational costs are justified, the introduction of fees for simple access to information seems an excessive commercialization of public institutions. It also violates a fundamental human right—the right to information. In many countries, all information in the hands of state institutions (e.g., statistical data) is provided to citizens free of charge. It is all the more disturbing that this provision of Polish law actually discriminates against NGOs: there is no such fee to acquire information about state institutions that do not pursue economic activity.

Polish law does not fully meet international standards regarding provisions that outline the procedure of NGO liquidation. (3.8) There is presently too little freedom in this regard that is given to the internal membership of organizations, and too much freedom is given to the state. Internal membership should have to the power to decide to terminate an organization’s actual and legal existence, and states that are openly hostile toward NGOs very often attempt to take away this power. The best example of such repression is taking place in Belarus. The Belarussian regime makes periodic announcements calling for the re-registration of certain organizations. Because many of these organizations fail to meet “new” requirements, this results in their natural disappearance. Because lawmakers sympathetic to international standards wish to avoid such a situation, it is generally agreed that organization bodies themselves should decide their own fate. State interference should only occur when an NGO commits a serious breach of the law or grossly violates procedure. It is the dual purpose of such legislation to protect NGOs from unnecessary state interference, and also to discourage acts of irresponsibility by NGO internal membership. A properly functioning organization should be recognized as a positive national commodity, and should not be subject to arbitrary whims of the state.

Polish law provides two legal grounds for liquidation of a foundation: 1) if foundation aims have been achieved or, 2) if funds to achieve foundation aims have been exhausted. Liquidation is not formally granted solely based on the expressed will of a founder or other foundation authority. The actual liquidation process is stipulated in the contents of the foundation statute. A court may conduct the liquidation process if such internal regulatory provisions are absent. It is unsatisfactory that the power to dissolve a foundation has not been granted solely to the foundation body.

The “Law on Associations” regulates the liquidation process of associations and the financial consequences with considerable precision. [**What are the financial consequences?**] *Costs of the liquidation are covered from the sources of the association (Article 39). All the remaining assets are to be allocated to a purpose determined in the statute of the organization or in the final resolution of the statutory body. In case there is no such a provision court decides on allocating the assets (Article 38).* An association may be either forcefully dissolved by a resolution of the competent body of authority (**internal supreme body of the organization! - ZL**), or during court proceedings. Grounds for a forced dissolution ordered by competent authorities have not been precisely specified. By contrast, dissolution in a court of law occurs under strictly defined circumstances: 1) if association membership falls below the statutory minimum (15), or 2) if conditions have not been met for membership appointment. The “Guidelines for Laws Affecting Civic Organizations” suggest that state intervention should only take place in the event of serious breach of the law or violation of ethical norms—not merely for technicalities or difficulties in appointing the association’s legal representation.

* * *

I would like to make one more general observation regarding the formation of no-governmental organizations. The number of organizations that become eligible to receive specific privileges through meeting the minimum of formal registration requirements is few. Naturally, organizations that wish to obtain such privileges should be formally registered. However, there are a number of organizations that are unable or unwilling to complete the process of registration—or have no intention to receive state benefits. Foundations aside, associations (so long as they pose no threat to the legal order of the state) should be free to enjoy an “implied” existence if the state does not issue a formal objection to such an association. The benefit to the public would be great, while loss of revenue to the state would be nominal.

CHAPTER 4: STRUCTURE & GOVERNANCE

Chapter 4 of the “Guidelines for Laws Affecting Civic Organizations” is devoted to provisions regulating the internal structure of organizations, and to the level of responsibility of organization membership and authority. While the “Law on Associations” and the Foundations Act contain relevant provisions, they lack the details that would effectively promote responsibility and confidence among NGO members and leaders.

Of the two, the Foundations Act contains much less detail in this regard. According to Art. 5.1 of the Act, a foundation statute should contain it’s the title and address, the location of foundation headquarters, the manner in which the main board is appointed, and the board’s power and duties. The statute may also contain other provisions regulating economic activity, merging with other entities, changes in aims or goals, or appointment procedures for other bodies.

The “Law on Associations” is more explicit. Article 10 goes into great detail about what must be included in the association's statute. As member organizations, the issues of acquiring and

losing membership are heavily emphasized. Also stressed is the procedure for appointing authorities, as well as the matters of fundraising, statute amendments, and terms and procedure of liquidation. Article 10 clearly states that failure to include any of the above may result in court refusal to register the association, or that the court will demand that the applicants correct any defects in the statute. While, by many accounts, Polish courts are quite conscientious in handling such cases, there are instances of them overstepping bounds of propriety. On one occasion, the court refused to register an association because the required documents had not been submitted in duplicate, as required by the court. This may seem trivial, but it indicates a degree of unwillingness on behalf of the court to treat applicants in an open and friendly manner. International documents unanimously encourage state institutions to take an active role in promoting friendliness and cooperation between the third sector and themselves.

Article 11 of the “Law on Associations” defines the model of association management with a fair degree of precision. Assuming here that the entire association membership is sovereign, the law grants supreme authority to the general assembly of its members. In the case of mass membership organizations, such power is placed in the hand of member delegates. The manner of appointing delegates is detailed in each individual statute. Each association must have its main board as the executive organ of the general assembly, which at the same time oversees ongoing operations. The law also requires that an audit board be appointed to internally regulate the association. Three particular strengths of this particular structure are: the management system is clear; it fully meets the requirements of internal democracy; and, it guarantees a balance of power between individual organs. **(4.1-3)**

The Foundations Act contains only two systemic provisions concerning the foundation statute and main board: Articles 5.1 and 10. Only the board of directors is mentioned as a foundation organ, which is the subject of Art. 10. The article stipulates only that the foundation's board of directors manages internal activity and acts as an external representative. The Foundations Act contains no details as to the manner of composition or protocols of conduct of the main board, leaving such issues to be regulated by the statute.

Since the Foundation Act does not refer to other organs, it is logical to assume that the board of directors would report to the founder (or founders). Because the founder is not a *de jure* foundation organ, subordination of the board of directors becomes somewhat dubious. It is Polish practice to create other organs beside board of directors, such as collective bodies with broader competencies that report on task-related activity to foundation management. Another problem concerning the composition of the board of directors has emerged in case-law documents and other related literature. Article 10 of the Foundations Act does not stipulate whether or not the board of directors should be a collective body. A foundation—like a partnership—might well be managed by a lone individual. The courts, and authors on the subject, assume that a foundation should be managed collectively. The required entry of the names of members in the register is interpreted by advocates of this opinion that it was the lawmakers’ intention to allow for the collective management of foundations. Opponents would argue that lawmakers failed to make this clear, and probably intended a lone individual to manage a foundation.

Both interpretations are acceptable, as it is recommended that organizations should be granted broad autonomy concerning their internal structure. The law itself cannot guarantee accountability, yet solidly prepared legal regulations demonstrate concern for upholding high

public organization standards. If organization management and staff regularly comply with legal provisions, it can only strengthen the argument for improved NGO legislation.

The Foundations Act—and particularly the “Law on Associations”—contain a number of provisions regulating secondary issues of a technical nature, but say nothing about management accountability, ethical standards, conflict of interest, or internal regulation. This aspect of Polish NGO law bucks the trend of attempting to promote organizational integrity and honesty. The lawmakers instead have limited their scope to the most basic of functions: to resolve property issues, and to preserve a smooth level of operation under the state’s “protection.” This is a highly cynical approach (??)—almost regarding the existence of NGOs as nothing more than a necessary evil. **(4.3)**

Article 14.1 of the Foundations Act reads as follows: "If a board of directors significantly violates provisions of the law, or of its statute, or pursues contradictory aims, the supervisory agency (competent ministry) may stipulate a time limit during which all violations or defects must be rectified, or to order a replacement board for a specified interim." Further legal provisions establish the procedure by which the supervising authority can take such action if the board of directors fails to respond accordingly.

How does this hold up in comparison to international recommendations? Ideally, a public organization pursuing a goal of benefit to society should enjoy rights and privileges, and not be subjected to state supervision and intense scrutiny. By the same token, organizations should be personally accountable and accept responsibility for their actions. The law's basic role should be to help mold an organization's internal structure that will enable it to cope with difficulties and obstacles. It should also allow for assistance in the preparation of reports and financial settlements. Essentially, the law should empower organizations to solve all problems internally. Under exceptionally difficult circumstances, the entire state machine should be an organization's disposal to find a solution. Instead, Polish law places the power to resolve organizational problems in the hands of the state. Organizations are treated as naughty children who cannot be trusted. (See Art. 14 quoted above.) In order to uphold its duties, the competent ministry must now closely monitor public organizations for conduct and statute violations. Organization bodies have been deprived of the means to solve problems on their own, and this is a key defect of current Polish legislation. **(4.4.A-B)**

Again, the law is applied differently to associations, but differences are subtler. Article 28 of the “Law on Associations” reads as follows: "If an association's activity is found to be in violation of the law or statute provisions on matters referred to in Article 10.1 and 2 (membership, representation of the association, amassing of funds and formation of local branches), the supervisory agency may [...] make a motion for their removal [...], warn the association's authorities, or apply to the court for imposition of measures referred to in Article 29 [“] (admonition, quashing of a resolution, liquidation of the association). The law is more precise in this case than the Foundations Act, as it law provides the supervisory agency with means for controlling associations. Under Article 25, that agency may demand copies of resolutions of the general assembly of members, along with necessary information. The truly important point is the fact that the state actually assumes responsibility for breaches of the law or of the association's statute. In other words, the competent ministry keeps a close eye on foundation's board of directors, while the entire organization of an association is under scrutiny. This difference is largely because of the difference in definitions between the two organizations; and also that they have different internal structure (i.e., an association has an assembly of members, a main board, and audit board, while a foundation has only a board of directors.

Associations most commonly turn to arbitration panels (*sometimes called: arbitration by one's fellow-colleagues - ZL*) or “courts of honor” to escape excessive state interference. The “Law on Associations” does not formally provide for such a body, nor does it strictly prohibit it. For this reason, many Polish associations have internal courts. Their primary duties are to resolve inter-member disputes, or disputes between members and association authorities. In most cases, these courts become involved in questions involving ethical conduct or the association statute. All things considered, Polish law trails far behind that of other countries when it comes to legislation that can build a higher level of moral standards for founders and members of non-governmental organizations.

NGOs often encounter incidents of leader or staff disloyalty. Polish law, again, falls short in regulating matters of conflict of interest. **(4.5.A)** Particularly well-endowed organizations regularly offer temptations for career advancement or personal gain that prove irresistible for certain individuals. International standards are very clear on this point: the law should empower NGOs authorities and staff to protect the best interests of the organization. This can be done through introducing fundamental principles prohibiting particular types of conduct, and for courts to rule on particular infringements. Added supplements to the law would bring conflict of interest matters to light much earlier, and it hoped that many issues could be internally resolved. There are very few organizations that presently contain such provisions in their statutes. In essence, if conflict of interest provisions were added to the “Law on Associations,” more and more associations would include the appropriate regulations in their statutes.

Because of the present legislative defects concerning conflict of interest provisions, the Polish non-governmental sector is hard at work to develop codes of ethical conduct for NGOs. There has been a long-time need for such codes, but in recent years it proved more urgent to address matters of development and integration—and the success of these past efforts is undeniable. Presently, there is a draft charter for principles of NGO operation, which has won some international acclaim. Poland has also been conducting a lengthy campaign for openness of NGO activity, especially regarding NGO staff policy and the administration of funds. NGOs are encouraged to publish annual minutes and financial reports, as improper management of funds and lack of transparency only add strength to the arguments of those who oppose non-governmental organizations.

The problem of direct or indirect private benefit applies to foundations in particular. **(Chapter 5)** It is commonly believed throughout Poland that foundations afford individuals a safe haven for the acquisition of tainted wealth. **(5.1)** This opinion is the result of past mismanagement of vast sums of money by foundations—many of them established by the Treasury or local governments. The Polish third sector faces a difficult challenge to reverse this negative image. The task is not made easier by lack of third-sector support—including from members of government—or a law that fails to satisfy the needs of the moment.

There is clear evidence that the government is ill disposed towards the non-governmental sector, and foundations in particular. The Justice and Finance Ministries are most actively hostile. They have spearheaded their attacks by: limiting the scope of foundation economic activity; taxing funds granted by foundations; treating foundations in all ways as commercial entities; limiting tax privileges; imposing the obligation to pay value added tax (VAT); using foundations as a springboard to establish new forms of “economic crimes”; and by limiting access to public funds. The latter two were brought into force by the 1994 Resolution of the

Council of Ministers on “Citizens’ Safety and Public Order,” and the now-notorious Art. 118 of the “Public Finances Act.” [What were the actual consequences of these pieces of legislation?]

[This paragraph has been changed in such a way that, in my opinion, is less clear than previously. For example, it is not true that: “using foundations as a springboard to establish new forms of “economic crimes”; and by limiting access to public funds. The latter two were brought into force by the 1994 Resolution of the Council of Ministers on “Citizens’ Safety and Public Order,”” The true is that the Council of Ministers in its Resolution on “Citizens’ Safety and Public Order,” using examples of NGOs refers to new economic crimes. This had no direct legal consequences. As to the Article 118 of the Public Finances Act it stated that self-government grant can only be offered to public bodies. Since NGOs are not public bodies this had strong negative affect on financial situation of the NGOs. This Article has been changed in April 1999 in such a way that now self-governments can give grants to all non-public bodies provided that there would be a open competition. More on that, see page 32 – ZL].

While the Foundations Act stipulates that a foundation may pursue economic activity, it fails to introduce clear regulations on the salary distribution. Furthermore, there is no clear ban on the division of profits among founders or staff. International documents demand such a prohibition. Of course, the principle that profit should not be divided does not mean that people should work for foundations without payment. Quite the contrary. They should be paid—and paid good money at that—as this is the only way to attract top specialists to the third sector. Highly qualified people are required to effectively administer public funds. (5.2)

Provisions of the “Law on Associations” are much more precise, if insufficient. Article 34, for example, stipulates that an association may pursue economic activity “according to principles defined by other provisions.” This is a rather untidy reference to the Economic Activity Act of December 23, 1988. Under that act, an association may undertake equal economic activity in all spheres—involving, in some instances, special licensing. There is also the added provision (Art. 2) that association profits may not be divided among members.

Provisions of the “Law on Associations” do not regulate the *record keeping* (registration) of association economic activity. (6.3) Nor is it referred to in the Economic Activity Act or Justice Ministry ordinance on the pattern and procedure for maintaining the register of associations. Failure to regulate this by law means that any such *record keeping* (registration) of economic activity is performed in an extralegal manner. Other legal obligations under the Tax Code and Accountancy Act are the only means of enforcing that associations prepare and maintain detailed financial records.

There is a total lack of symmetry in provisions regulating economic activity undertaken by associations and foundations. Undertaking—even considering—economic activity makes registration particularly difficult for foundations. For associations, on the other hand, it is virtually irrelevant, and also has little effect on their ability to operate. A foundation is obliged to include the form of economic activity in their statute, while an association may become involved in economic activity in accordance with general principles *described in Economic Activity Act (23 December 1988). Article 1 states that undertaking economic activities is free and allowed to everyone on equal rights according to the rules described by law. It means that associations can undertake any economic activity including these, which require a special permission or license. [Please define or cite to “general principles.”]* Lastly, foundation economic activity is registered in a like manner to that of commercial entities, while there are virtually no such grounds for registration for associations. (6.3)

The primary difference between non-governmental organizations and commercial entities is that NGOs undertake economic activities as a means to achieve goals for the public benefit. Economic activities *must not* be the primary aims of foundations and associations. In this context, the role of the law is to guarantee NGO participation in cultural and social life, and to solve fundamental social problems. Polish law, by failing to impose strict limitations on association activities, radically limits the operational possibilities for foundations. (6.1)

The very few limits of activity imposed on associations (e.g., guarding national borders or trading in arms) are domains that are wholly state controlled. Over the last decade, the non-governmental sector has been particularly eager to assume control over spheres of activity over which the state enjoyed a total monopoly. One such sphere is education. Aside from a small number of schools that were managed by the Catholic church, the state ran schools of all types—elementary and secondary schools in particular. Today, the “STO” Educational Association operates an entire network of schools.

Article 1 of the Foundations Act states that a foundation may only be “established toward socially or economically useful aims consistent with the fundamental interests of the Republic of Poland.” I will return to the example of a foundation that wishes to restore the Polish monarchy. To re-introduce monarchy in Poland would require a constitutional act—tantamount to the liquidation of the republic. This would obviously be against the current interests of the state, therefore the court would have sufficient grounds to refuse to register such a foundation—leaving the would-be foundation with no recourse other than to register as an association with a similar profile, where such activity would be legally permissible.

The draft law “On Cooperation between Public Administration and Non-Governmental Organizations” is an attempt to create legal uniformity for NGOs (foundations and associations alike) that perform functions commissioned by state or local authorities. The status of such an organization willing and able to perform such functions will change radically. It will receive special protection from public institutions, but also bear full responsibility for violations of fundamental rights and freedoms.

The draft also contains a number of provisions that cannot be found in any other legal acts pertaining to the Polish non-governmental sector. Among these are provisions to regulate institutions that supervise NGOs that have gained special status, as well as provisions to ensure that these NGOs are institutionally and socially responsible. NGOs must thereby submit detailed reports and provide all necessary material to inspecting institutions. Social obligations include the duty to publish annual minutes and financial reports. The assumptions of the draft's model of functioning of a privileged organization are consistent with recommendations of the International Center for Not-for-Profit Law. Each non-governmental organization that obtains significant sums of state or local funds would submit detailed reports to its supervisory institution. The same pertains to special taxes, customs and other privileges. Careful and detailed regulation of these issues are urgently needed, as any current grounds of supervision and inspection of non-governmental organizations that receive grants of public funds are contained in entirely different spheres of legal transactions, such as the Public Finances Act, the Accountancy Act and the Economic Activity Act. **(8.1)**

Non-governmental organizations that obtain significant amounts of state funding still constitute a minority. Fundraising (**Chapter 7**) is a problem faced by Polish NGOs, and those in many other countries. It is from methods of fundraising that NGOs and the third-sector in general have inherited the greatest amount of pejorative stereotypes. Under the previous regime, most associations (all but the Party favorites, that is) were particularly poor. The activity of “social organizations”—as they were called in those days—was identified with unpaid work, membership fees, and small subsidies. The turning point took place only after 1989, when a stream of funds for various types of civic activity flooded Poland. Yet much of this money was not used for intended purposes and found its way into other hands.

Not accidentally, this was a renaissance period for foundations. During the first five years of Foundations Act (1984), approximately 100 foundations were registered in Poland; 200 emerged in 1989, and as many as almost 700 in 1990. Yet the true boom was only to take place after the Foundations Act was amended in 1991. The annual growth in the number of foundations rose to 1,340. Foundations appeared to be a cure-all for every social ill, and they were established by central authorities, ministries, provinces, local governments and foreign subjects. Funds were flowing in, and foundation employment was tantamount to sinecures and never-ending profit. It was only later that inspections carried out by the Supreme Chamber of Audit revealed the truth about many foundations financed from the state budget and local funds. The foundation sector was rife with corruption, waste and favoritism.

The emerging Polish non-governmental sector inherited the bad habits of many organizations, as well as a poor reputation. It is for this very reason that the sector's leaders now devote so much attention to matters of organization transparency. The question remains of how the law can best encourage transparency and honesty within the third sector. Polish NGOs acquire funds under three different legal acts: the Foundations Act, the "Law on Associations" and the Public Collections Act of March 15, 1933. Again, significant differences can be found between regulations pertaining to associations and foundations, but there is more clarity where associations are concerned. Article 33 of the "Law on Associations" enumerates the following components of association property: membership fees, donations, inheritances, legacies, and incomes from activity, property and public contributions. Article 16 of the Foundations Act includes inheritances, legacies, donations, movable property, and property rights. Article 16 is silent on the right to accept public contributions. The Public Collections Act pertains to associations, organizations with legal personality, and committees as subjects authorized to organize such collections, but not foundations. On the other hand, the Foundations Act does not prohibit the organization of such collections. Perhaps of decisive importance, the Public Collections Act makes no mention of foundations, yet it identifies organizations with legal personality, which foundations most certainly have. In practice, this is sufficient grounds for foundations to obtain official licenses to organize public collections. Yet, the present state of affairs is far from satisfactory, and it is our duty to demand uniform provisions that regulate NGO fundraising methods.

The rapid development of non-governmental organizations in Poland in the early 1990s was only possible with considerable financial support from foreign institutions. **(Chapter 10)** Polish law imposes no obstacles to the obtaining of funds from abroad. Poland's present banking system, exchangeability of Polish currency, and a rather friendly tax system guarantees the certainty and safety of the country's financial transactions foreign institutions.

The last of a complex range of issues related to the financing of non-governmental organizations concerns tax and customs privileges. **(Chapter 9)** The amount of revenue that the state is willing to concede to NGOs is an important barometer of a government's commitment to third sector development.

Polish law seems not to depart any too much from the regulations adopted in other countries; it also meets the recommendations formulated by international institutions. It is the principle in Polish law that associations and foundations pay taxes and other public law fees identical to those paid by other subjects of the law, and may enjoy objective exemptions more often than the subjective ones. Tax privileges of associations and foundations have to be examined

in four dimensions: income tax, tax privileges for donors, value added tax and customs exemptions.

Associations and foundations are not entitled to exemption from income tax, i.e. exemption of subjective character. The Legal Entities Income Tax Act of the 15th of February 1992 grants exemption from that tax to, among others, Polish National Bank, Polish Tourist Organization, earmarked funds, pension funds and units of the territorial self-government (art. 6.1) while it is silent in case of non-governmental organizations. In other words, according to the legislator there are no reasons to assume that association or foundation should be entitled to exemption from the tax just because they enjoy the status of non-governmental organization.

The fact that associations and foundations are under the tax obligation does not mean that they pay that tax. Both, former and the latter enjoy exemptions of objective character. The key article in that matter, art.17 par.1 p.4 of the Legal Entities Income Tax Act, proclaims that free from the tax is the income of those legal entities, the statutory goal of which is everything that traditionally falls into the domain of NGOs, i.e. scientific activity, educational activity, supporting citizens and economic initiative, building roads, charity, etc. – but only in the part assigned to those goals. That in turn means that an association (foundation), which would deal with something that is not comprised by the legal catalogue would enjoy exemption from income tax only in some part of its activity.

In Poland there is quite a common conviction that associations and foundations which conduct economic activity are under the tax obligation. In such a case tax payment would be, in citizens' opinion, justified. However, it is the rule of the Polish law that the tax obligation imposed on the association or the foundation is not restricted to the economic activity sphere, it comprises also statutory activity. Income tax does not apply only to the income from economic activity, but also to the income from other sources, e.g. investment or proprietary interest.

In practice, associations and foundations are granted exemption from income tax almost automatically the moment the organization is registered in the appropriate to its seat revenue office. It is enough when in the registration application the association or foundation states that, in its statutory activity it will deal with the sphere or spheres of activities mentioned in art.17 par.1 p.4. Statement of the organization should be supported by the appropriate formulation in the statutes, which are submitted together with the registration application.

It is also worth noticing, that from time to time department of finances attempts to reduce the tax privileges of non-governmental organizations. In its practice, the revenue authorities assumed that the activity mentioned by the art.17 par.1 p.4 of the Income Tax Act means direct activity of that kind (e.g. scientific, educational, etc.) as well as indirect actions, such as e.g. promoting such activity, informing about it or supporting it in other way. In mid 90s revenue authorities together with the Ministry of Finance began to identify e.g. educational activity only with conducting specific educational activity, which considerably narrowed the sphere of the possible application of this regulation. Due to the harsh criticism coming from the non-governmental organizations circle, the department of finances ceased that practice.

Associations and foundations in Poland nowadays are more often aided with means coming from private donators, firms and natural persons. It should be noted, with satisfaction, that

representatives of the business being born in Poland willingly open their wallets to give bigger or smaller sum of money to a non-governmental organization. Donations, which we are talking about, as all other forms of gathering financial means, trigger the tax obligation on the side of the donator, excluding the situation in which the organization is engaged in achieving goals preferred by the legislator (listed above important social goals) and gained means spends on those particular goals.

Giving the donation to the non-governmental organization triggers certain (rather restricted) privileges on the side of the donator. Both, the Natural Persons Income Tax Act of the 26th of July 1991 and Legal Entities Tax Act of the 15th of February 1992 proclaim that it is possible to deduce from the taxation base the donations given to certain social goals. Comprising, of course, the needs of the non-governmental organizations. The amount of the deduction depends on the goal on which money is spent. If it is scientific, scientific-technical, educational, rehabilitation activity, supporting social initiative, etc. It is possible to deduce 15% of the taxation base; if it is charity-guardian or philanthropic activity as well as activity connected with the sphere of national defense, protection of the environment or building, it is possible to deduce 10% of the taxation base. The amounts of the deductions and goals to which the donation is given are identically formulated in both quoted acts.

Since, as it was mentioned before, the associations and foundations are liable to tax encumbrance as other subjects, they are also under the obligation of VAT tax payment. In certain situations (e.g. receiving grounds for activity within the framework of so called help programs financed by the European Union) the non-governmental organization can apply to the European Integration Office to issue the certificate, on the grounds of which the revenue authorities reimburse part of the paid VAT tax.

Similarly goes with the duties. As for the rule, associations and foundations are obliged to pay all the border and duty payments. If the possibility of gaining some exemption from such an obligation exists, it is objective in character. That means that an organization, if it receives the exemption from the duty, it is so not because it is a non-governmental organization, but because its activity, or the kind of goods it is importing, is such that it justifies such an exemption.

Considerable doubts concern the position of associations and foundations against the State Treasury or other sources of public finances. Contracting non-governmental organizations services by state or self-government authorities is one of the characteristic features of the third sector in such countries as the USA or some European countries. Polish legislator admits such possibility in art. 20 of the Budgetary Law (act of the 31st of January 1989 – Legal Journal of 1993 no 72, p. 344) allowing for giving donations from the State Treasury to the non-governmental entities in order to perform state duties, passed on those entities to be accomplished. Provisions issued on that grounds were not precise enough to enable creating clear system of financing associations and foundations, especially it concerns possibilities of donating NGOs from self-government funds. This regulation was binding till the 31st of December 1998. On the 1st of January 1999 the Public Finance Act of the 26th of November 1998 came into force (Law Jour. No 155, p. 1014). On the grounds of that act associations and foundations were included in the category of entities not comprised by the public finance sector, even though in one of its provisions the act, rather inconsistently, speaks about entities not comprised by the public finance sector and associations and foundations. Even though the Act does not constitute a precise and clear base to financing non-governmental organizations

from public funds, it formulates the rule of publicness (openness ?) of public finances, it formulates the rule, according to which the right to perform duties financed from public funds is granted to all subjects, it defines the notion of donation, and states that entities not comprised by the public finance sector receive such donations on the grounds of the agreements signed with the state budget disposers.

It is historical now, the battle that was fought by the non-governmental organizations for interpretation of the article 118 of that act. This article states that self-governments can give donations only "by name to certain public subjects". Regional Accounting Chambers responsible for self-government finance control assumed that category "specified by name public subjects" does not comprise associations and foundations. Third sector activists in Poland were unanimous that such interpretation of the contents of the art. 118 of that act means liquidation of many foundations and associations, which existed thanks to self-government donations. On the 10th of April 1999 Sejm modified the Public Finances Act. Quoted earlier art. 118 received the following form: " entities not comprised by the public finance sector can receive donations for public goals following the rules of competition and best offer choice, in the understanding of the Public Orders Act." Such formulation of the act means the end of non-governmental organizations discrimination in access to the financial means being to the disposition of self-governments.

Discussed separately should also be the issue of property of a dissolved non-governmental organization. International standards are most precise on this point: the law should prohibit division of the organization's property among its founders, executive, or members. This is in principle how this matter is regulated in Polish law. There are however some doubts that are worth mentioning here.

From provisions of the Foundations Act it follows that the disposer of a foundation's property is in fact that very foundation, or to be more precise - the author of its statute. Article 15.4 of the Act provides as follows: "If the foundation's statute fails to specify the assignment of funds [...] the court shall decide on such assignment with due consideration to the foundation's aims". Thus the founder, the author of its statute, decides upon the fates of a liquidated foundation's property in the first place, and the court only comes second. The question might therefore be asked about the limits of freedom of such founder (author of statute). Can it be stated in the statute that once the foundation's aims are achieved, the funds remaining after its liquidation should be returned to the founders? Although there is no explicit ban on such a provision, it seems logical to assume that if the court does not enjoy freedom of decision and must assign the remaining funds to a purpose consistent with the liquidated foundation's aims, also the founder should not enjoy such freedom. Answered in a similar spirit should also be a question about the possibility of so drafting the statute as to assign such funds to some other purposes, not necessarily related to the foundation's aims. All such doubts disappear as soon as the law follows the suggestion contained in Rule 5.4A of the Guidelines for Laws Affecting Civic Organizations and explicitly prohibits a transfer of any assets of a liquidated organization to its members and employees.

The property of a liquidated association is assigned to purposes specified in its statute or in a resolution of the general assembly of members dissolving that association. If relevant provisions are missing from the statute and no resolution has been adopted, the court assigns that property to a specified public purpose. So much for provisions of the Law on Associations. The following follows clearly from those provisions: first, the Law on

Associations bases on the principle that the person who decides about the association's liquidation should also be the one to decide about its property; second, that there are no statutory limitations as to assignment of the property of a liquidated association; and third, that the court deciding about such property is obliged to assign it to any public purpose.

CONCLUSIONS

The development of the non-governmental sector in Poland is truly impressive. In a period of ten years, it managed to pass from the stage of being slowly awakened from a deep lethargy to that of exuberant development accompanied by numerous pathologies, and finally to maturity full of thought and consideration.

The non-governmental sector still has few advocates in Poland. They have already been mentioned before: a small group of parliamentarians, some journalists, jurists related to academic communities. The sector also has few local sponsors. The state is still too busy restoring normalcy and reforming public life to offer any serious support to the third sector. The Polish capital, which is still in the making, needs some more time to become strengthened and then seriously involved in supporting non-governmental organizations. Local government, interested in contracting NGO services, is evolving into an important partner. On the other hand, the Polish non-governmental sector has many learned leaders and devoted members. It is no doubt becoming an important force. This is clearly manifested by the number of registered organizations, estimated at about 50,000. Yet it is not figures but the potential, men, and leading organizations that make the sector strong. The present analysis contains numerous examples of interesting initiatives launched by Polish NGOs. There are also areas where the Polish non-profit sector's achievements are a highly praised contribution to the building of civil society on the European scale. What has become a specific Polish specialty is the compilation of useful databases on non-governmental organizations.

The non-governmental sector in Poland finds itself in a difficult situation. It is burdened with the odium of bad experiences of the early nineties. It is easy to accuse all organizations of dishonesty or embezzlements. All one has to do is quote individual examples of abuses. The process is by no means as easy in the opposite direction: discussion of hundreds of good examples is unlikely to convince anybody. The Polish non-governmental sector has to be helped. It needs interest and support on part of politicians; honest coverage in the media, the electronic ones above all; and finally, understanding and acceptance on part of citizens.

Yet first and foremost, the Polish non-governmental sector needs a good law today: a law that would clearly define which organization is, and which one is not an NGO. A law that would define the legal methods of fund-raising and the proper manners of spending funds. A law that defines procedures that guarantee transparency in NGO operation and a social oversight of the spending of public funds. Finally, a law that would encourage self-regulation and the setting of the supreme ethical standards.

The present Polish law regulating the functioning of non-governmental organizations is incoherent, insufficiently precise, and affected by inner conflicts. On many points, it fails to meet international standards formulated with respect to this branch of the law by ICNL, OSCE, or the Council of Europe. In its present shape, Polish law is an obstacle to rather than an instrument of a responsible building of the third sector in the country.

The thesis that a good law is the Polish third sector's priority has been confirmed in a Standpoint of the Association for the FIP on the situation of the third sector in Poland, presented at the 2nd National Forum of Non-governmental Initiatives. Its authors are quite explicit: "The battle for a good law for NGOs, and particularly for organizations acting for the

public benefit, should not be seen as a battle for privileges. What we want is a system conducive to the regaining by society of their right to solve their matters without involving the state, but also effective in the area of protecting that society against a waste of public funds and emergence of new monopolies". Realization of this vision of civil society necessarily requires co-operation of all social sectors. Yet at the present stage, the state's active role in the process of modernization of the law is of crucial importance, as without prompt changes in this area we can hardly hope to achieve our intended aims.

-End-

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