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The Role of New Legal Regulations in Creating Civil Society in Poland after 1989

Key words: civil society, constitutional complaint, civil rights and freedoms, associations, foundations.

Introduction

Democratic legal state and civil society can be equaled. Civil society is able to function only on the basis of a favourable legal system, within which constitution, and within it, specialized institutions protecting civil rights and freedoms act. In Poland, after regaining in 1989 the actual independence, there was the need for the gradual and consequent introduction of reforms enabling to build the frames of a civil society from the basis. Firstly, the experience of democratic, developed states served as legal examples, next the acts of international law, including the law of the European Union. Therefore, several stages of constructing the civil society can be distinguished throughout the period of over 26 years, during which the state had been undergoing the reforms. The first period had lasted by the time the Constitution of the Republic of Poland was enacted in 1997. The next one covers the time between 1997 and 2001, when on the basis of the Constitution the institution of civil complaint was introduced and the development of above the level of commune (*ponadgminny*) forms of local self-government had place. The following years are marked with the regulation and the development of non-government organizations, complementary to the institutionalized possibilities of citizens' activity. The introduced reforms made it possible to establish legal and institutional system indispensable for the functioning of the civil society, which does not mean that the further changes in the present legal system are not necessary.

The above presented pondering aims at referring to the most significant legal reforms constructing both legal and institutional system of the civil society, including an attempt to assess their importance. The research method applied was formal and legal analysis of legal regulations, as well as the assessment of the views by eminent scholars presented in literature. The presented ponderings result also from the own research conducted within the area of local self-government, as well as the outcome of independent work of students.

The concept of civil society

The democratic system in a state is based on the foundation of the level of development of a civil society[1]. In

[1] J. Bardach, *Społeczeństwo obywatelskie i jego reprezentacje*, Warszawa 1995, p. 22.

theory the term "civil society" is ambiguous. According to the concept of R. Dahrendorf, political, civil and social rights of citizens, as the guarantees of a nation against the excessive interference of the government, as well as the fluctuating influence of the market, are identified with the term[2]. In the theory by F. Konieczny the minimum of a state and the maximum of civil freedom determines proper relations between a state and civil society, which ought not to be violated by any of them[3]. The contemporary concept of civil society is based on the system of rights of free citizens in fulfilling their individual as well as group objectives in production and market exchange, which are founded on the private property and the market. The term refers to the entirety of social and economic relations as well as analogous institutions, which came into existence without the participation of a state.

Civil society is the indication of the self-organization of citizens in their pursuit to resolve problems impossible to be solved on the central or local self-government levels. Existential problems of citizens, which are for some reasons neglected by government or self-government authorities, might be solved in an effective way provided they are perceived from another perspective[4]. The awareness of its members concerning the needs of a community and aiming at their fulfillment is therefore the basic feature of a civil society. It is the members of a particular community that express the interest in matters concerning a particular society and possess the sense of responsibility for its wellbeing. The concept of a civil society derives from the classical idea of a civil community[5]. Collective self-consciousness of cognitive and normative participation plays the fundamental role in comprehension of institutions constructing a civil society. The sources of the above mentioned self-consciousness stem from the structure and relations of associations between central legislative organs, executive bodies and courts, and organizations representing and fulfilling the needs and interests of citizens[6]. What is significant in a civil society are the rules of transition between the state of consciousness to the state of its active realization, namely from the experienced consciousness to the one realized in a particular society[7]. It happens, for instance, in case of the participation of citizens in creating a civil budget in numerous cities.

In a properly organized democratic state a just constitution makes the foundation, guaranteeing the freedom of equal citizenship, conscience and thought, actual political freedom, equal opportunities, especially in education and culture, the freedom of choosing a profession and starting business activity. A good democratic state ought to be based on creating the demanded social and economic conditions. Four divisions are to serve this purpose. The first of them, the allocation one, should have its basis not only in the property but also in taxes and subsidies. The second one should serve the stabilization, making the complete employment as well as the freedom in choosing a profession possible. In the third division of transfers, the rules of social minimum should be determined. Whereas the last one should determine the distribution whose task is to model and correct the richness, and prevent the concentration of power[8].

The concept of the civil society is used mainly in reference to this sphere of citizens' activity, whose main aim is to reach common prosperity. In such a society there are citizens who are willing to and have the right for self-fulfillment. They are autonomous and seek consent with the others in their actions concerning local communities, as well as their economic, cultural, household, and associative activities. The term "society" stands for the organization of a community of humans and its actions. The term "civil community" was introduced to the Polish language in 1949 to one of translations of Marx by the communist propaganda apparatus. It had reached popularity in 1989, when communists used it in order to suppress the demands for rightful and pluralistic political society, as well as the legitimization of the neo-liberal transformation[9]. Despite the common views on the term, "civil society" was not familiar to

[2] R. Dahrendorf, *Co zagraża społeczeństwu obywatelskiemu* [in:] *Europa i społeczeństwo obywatelskie*, red. K. Michalski, Warszawa – Kraków 1994, p. 236.

[3] F. Koneczny, *Chrześcijaństwo według ustrojów życia społecznego*, Krzeszowice 2003, p. 8.

[4] T. Białas, *Od społeczeństwa obywatelskiego do budowy trzeciego sektora w gospodarce* [in:] *Zarządzanie w sektorze publicznym i obywatelskim. Wybrane problemy*, ed. G. Pawelska-Skrzypek, Kraków 2006, p. 161.

[5] P.S. Załęski, *Neoliberalizm i społeczeństwo obywatelskie*, Toruń 2012, p. 72.

[6] E. Shils, *Co to jest społeczeństwo obywatelskie* [in:] *Europa i społeczeństwo obywatelskie. Rozmowy w Castel Gandolfo,* ed. K. Michalski, Warszawa – Kraków 1994, p. 12.

[7] E. Smolarkiewicz, *Społeczeństwo obywatelskie – lokalizm a kapitał kulturowy* [in:] *Praca i kapitał społeczny w procesie budowy społeczeństwa obywatelskiego*, ed. J. Stępień, Poznań 2006, p. 181.

[8] T. Kowalik, *Własność, właściciel a sprawiedliwość społeczna* [in:] *Europa właścicieli*, ed. Z. Galor, Poznań 2005, pp. 22–23.

[9] P.S. Załęski, *op.cit.*, pp. 122–141.

the anti-communist opposition. During the times of the first "Solidarity" it was neither known nor applied, establishing instead the concept of "self-governing Republic"[10]. Civil society can rightfully exist exclusively in a democratic state, which sets normative frames concerning legal regulations, organization of institutions and civil organizations. In a society perceived in such a way the role of a state is limited barely to providing citizens with both external and internal security.

To be acknowledged as a civil society one ought to meet the following conditions:

a) the nation is the sovereign of power performing it through either its representatives or directly,
b) authorities act within the law and on its basis,
c) the system of the legal sources takes into account the interests of citizens,
d) there is a legal system of the protection of rights and freedoms of citizens,
e) there are institutions guaranteeing observance of law (e.g. the Constitutional Tribunal, ombudsman),
f) citizens are provided with the possibility of participation in social life, there are certain legal guarantees of establishing organizations representing the interests of citizens.

An imminent feature of a civil society in so called "good state" is the state of matters, in which within the state organization there work and appear freely, spontaneously and widely organizations and social movements directed at achieving aims chosen by their participants. The organizations of civil society ought to assist the state in fulfilling all the needs of its citizens. Such an assistance may relieve the public power apparatus from performing a part of its assignments and as a result simplify the structures of administration, as well as decrease the costs of it's functioning. The rise of a state's efficiency is a consequence deriving from the shaping of civil society through strengthening of the bond between citizens and the state[11]. In Poland, after the historic breakthrough of 1989, the system transformation resulted also in social changes for which the society had in way been unprepared and was not able to handle it. The increase of corruption and scandals, in which people of politics were involved, was the negative consequence of transformation. Due to this, the society expressed helplessness and reluctance, which was well reflected in the low participation in parliamentary, presidential, as well as self-government elections, implying political passivity of citizens[12].

The beginnings of shaping civil society between 1989 and 1996

In 1989, after the long period of military and party dictatorship lasting since the marshal law was introduced on 13th December 1981, there was a breakthrough in Poland. It was influenced by the "Solidarity" movement as a countrywide civil effort. As a result, there came a spontaneous process of organizing self-reliant and independent from the communist state social and labour organizations being in opposition to the official communist institutions. The demand to establish the independent Constitutional Tribunal or a suitable Chamber of the Supreme Court was one of the demands included in the resolution of the 1st State Convention of Delegates of "Solidarity" from 7th October 1981[13]. The Constitutional Tribunal was established in the bill from 26th March 1982 on the amendment of the Constitution of the Polish People's Republic[14]. Since merely seven sentences were introduced to the Constitution in art. 33a, it was necessary to elaborate a separate bill, which would regulate this significant matter of civilian society. Fifteen projects of this legal act had been elaborated in the complex legal process[15]. In consequence, the bill on the Constitutional Tribunal was passed by Sejm on 29th April 1985[16], and the formal activity of the Tribunal was initiated on 1st January 1986. The status and competence of the Tribunal were, however, greatly limited. Its decisions on whether the bills were unconstitutional were not ultimate and could be rejected by resolution of Sejm (with 2/3 majority). Moreover, in practice these decisions were not frequently voted over, which meant a particular state of suspension. At the same time resolutions concerning the commonly applicable interpretation of bill were undertaken solely by the State Council. Despite the above mentioned limitations of competence the Constitutional Tribunal

[10] *Ibidem*, pp. 111–121.

[11] P. Winczorek, *Dobre państwo – spojrzenie prawnika* [w:] *Dobre państwo*, ed. W. Kieżun, J. Kubin, Warszawa 2004, p. 34.

[12] M. Pikulińska, *Kondycja społeczeństwa obywatelskiego we współczesnej Polsce* [w:] *Refleksje o prawie, państwie i społeczeństwie*, ed. A. Turska, Warszawa 2005, http://akademia.e-prawnik.pl/porady/artykuly-3/kondycja-spoleczenstwa-obywatelskiego-we-wspolczesnej-polsce.html, [15.12.2015].

[13] R. Alberski, *Trybunał Konstytucyjny w polskich systemach politycznych*, Wrocław 2010, pp. 104–105.

[14] Dz. U. 1982 r. nr 11 poz. 83.

[15] R. Alberski, *op. cit.*, p. 112.

[16] Dz. U. 1985 nr 22 poz. 98.

had developed certain independence as well as created independent and valuable jurisprudence, determining in it among the others the rule of a democratic state of law, the rule of equality towards the law, as well as non-application of legal rules backwards in time. After the transformation of the political system in 1989 the position of the Constitutional Tribunal strengthened since it acquired the right (after the State Council had been abolished) to determine commonly applicable interpretation of bills. Despite this, Sejm could still reject the decisions on whether bills were unconstitutional with the 2/3 majority. Before the new fundamental bill was passed in 1997, the Tribunal had to adjust the former constitutional regulations to the new system, political and social reality. After the Constitution of 1997 had been introduced Sejm, basing on the transitory regulations, still had the right (till 17th October 1999) to reject, with the majority of 2/3 votes, in presence of at least half of statutory number of MPs, decisions of the Constitutional Tribunal on whether the bills were unconstitutional, yet only the ones passed before the Constitution came into force. Neither did it concern the decisions made in response to legal enquiries directed to the Tribunal by courts of law (they were ultimate)[17].

The bill from 15th July 1987 on ombudsman[18] was the next stage in creating the system of civilian society. The ombudsman stood at the guard of the freedoms and rights of a man and citizen. This fact was confirmed by the Constitution in its art. 208 in 1997, as well as other normative acts. In 1989 the talks of the round table had place, which led to the first partly democratic elections and reestablishment of the two-chamber parliament representing the society. System and political transformations required the enacting of a new constitution. It was passed on 2nd April 1997. The new constitution introduced the three division of powers, political pluralism, the rule of a democratic state of law and the sovereignty of the nation. Having had negative experience from the period of People's Republic of Poland, when the process of destroying and suppressing any attempts of social activity, devaluation of social associations as incredible and inefficient, the Poles bore the conviction that citizens are but the objects of the state. It imprinted a long-lasting trace on shaping the social awareness of the nation[19].

In order to guarantee the development of competition and protect the interests of consumers, Antimonopoly Office was established on 24th February 1990 in the bill on acting against the monopolist practices[20]. It was to be the central organ of the state administration in cases of preventing monopolist practices. This bill, succeeding the previous one, i.e. the bill from 28th January 1987 on the prevention of monopolist practices in the national economy[21], initiated the construction of the system of consumers protection in Poland, based mainly on the state structures. The regulation was of fundamental meaning for the protection of citizens, as consumers in the emerging market economy. The introduction of this legal and institutional protection was necessary since even conscious and active consumers could not usually avoid the asymmetry in relation with an enterpriser, frequently taking advantage of their ignorance. The protection of consumer was also supposed to regulate the procedure in the issues of general safety of goods on the Polish market. Citizens, as a weaker party in market transactions, were often deprived of the possibility of negotiating agreements, and not knowing the quality and the content of purchased commodities, did not possess sufficient knowledge on whether an entrepreneur was a reliable partner or not. Therefore, it was indispensable that citizens acquired a support of the system providing them protection in both individual cases, as well as protecting their group interests. The system of protection of competition and consumers, as a significant element of civil society, had been evolving in the following years, and is currently, according to the bill on the protection of competition and consumers from 16th February 2007[22], an important component of the Polish Republic as a democratic state of law. Each citizen whose interest as a consumer has been violated can, as a rule, lodge a complaint to a specialized organ of administration, the Head of the Antimonopoly Office. A complaint from an interested party might be a cause to began the proceedings on the violation of group interests of consumers. Moreover, on the basis of art. 100 par. 1 of the bill on the protection of competition and consumers, each citizen may forward a written notice to the Head concerning a suspicion of applying practices violating group interests of consumers. The Antimonopoly Office performs the government policy of consumers protection. Its basic task is to rep-

[17] P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku*, Warszawa 2008.

[18] Dz. U. 1987 nr 21 poz. 123.

[19] M. Pikulińska, *op.cit.*

[20] Dz. U. 1990 nr 14 poz. 88.

[21] Dz. U. 1987 nr 3 poz. 18.

[22] Dz. U. 2007 nr 50 poz. 331.

resent public interest, which means initiating administration procedures on the violation of group interests of consumers. As their consequence the Head makes decisions forbidding applying practices violating the rights of weaker participants of the market and imposes fines.

The institution of the constitutional complaints an element of civilian society

The Constitution of the Republic of Poland from 1997 in its art. 5 introduced the guarantees of freedoms and rights of a man and citizens, as well as the safety of citizens as one of the main tasks of the state. Chapter II of the Constitution, which comprises 57 articles, has been devoted to freedoms, rights and duties of a man and citizen. Apart from general rules grouped in eight articles, there have been included 39 articles in the Constitution that formulate the catalogue of rights and freedoms. Rights and freedoms have been divided into three groups: personal freedoms and rights, political freedoms and rights, economic, social and cultural freedoms and rights. Additionally, it was also included what means of the protection of rights and freedoms citizens are entitled to. The guarantees of the protection of rights and freedoms of a man in Poland are provided by state institutions that have been established for this reason, for instance: common courts of law, the Supreme Administrative Court of Poland, Constitutional Tribunal, ombudsman, and non-government organizations. The institution of the constitutional complaint, introduced by the Constitution, has become a significant element in civil society.

The constitutional complaint was firstly introduced in Bavaria in 1814, as a consequence of a complaint of an individual whose constitutional rights had been violated. Next, it appeared in 1867 in Austria as complaint to the Court of Reich. In Poland it was included in the legal system for the first time by the Constitution of the Republic of Poland from 2nd April 1997. A complaint for individual acts, e.g. court decisions, is used not only in Germany, but also in Spain and Czech Republic[23]. According to art. 79 par.1 of the Constitution every person whose constitutional freedoms or rights have been violated has the right to lodge a complaint to the Constitutional Tribunal referring to the compliance with the Constitution of the bill or other normative right on basis of which a court or an organ of public administration adjudicated ultimately on his freedoms or rights, or his duties determined in the fundamental bill. The constitutional complaint in the Polish law is supposed to have both subjective and objective function within the scope of protection of the constitutional rights of an individual. The first function is about protecting these rights by providing an individual with possibilities to put into motion the procedure of controlling the compliance with the Constitution of the acts of the public authority. The objective function, on the other hand, means abolishing acts that have been regarded as unconstitutional from the system of law. Each Polish citizen is entitled to lodge a complaint. The entitled individual must be an addressee of a particular law, which means that both a natural person as well as a legal one can be the entitled subject. Foreigners or a stateless person have got a limited right in using this legal means. They cannot lodge a complaint concerning the violation of their right for asylum and granting them the refugee status by Poland (art. 79 par. 2 in reference to art. 56 of the Constitution). The constitutional complaint is a means that can be taken advantage of by an individual after adjudicating the ultimate decision by a court or an administration organ, and may only be lodged in case of exhausting the course of instances, i.e. when all the means of appeal have already been used. A complaint can only be lodged during three months since a complainant was delivered a final and legally valid court decision, ultimate decision or other ultimate judgment.

According to art. 79 par. 1 of the Constitution of the Republic of Poland everyone whose constitutional freedoms or rights have been violated is entitled to lodge the constitutional complaint. In cases that were initiated and not completed before 30th August 2015, the regulations of the bill on the Constitutional Tribunal from 1st August 1997[24] had been applied within the range determined in art. 134 of the bill. The current regulations on lodging constitutional complaints are determined in the bill from 25th June 2015 on the Constitutional Tribunal[25]. Thus, the constitutional complaint has become a legal means allowing a natural or legal person the verification of ultimate decisions of public organs, which violate constitutional rights and freedoms of an individual lodging a complaint.

[23] *Prawo konstytucyjne Rzeczypospolitej Polskiej*, ed P. Sarnecki, Warszawa 2002, p.125.

[24] Dz. U. 1997 nr 102, poz. 643.

[25] Dz. U. 2015 poz. 1064.

The Constitutional Tribunal is an organ that has been appointed to recognize constitutional complaints, and its decisions are legally binding for other organs of the state. A decision of the Tribunal may refer to a whole normative act or its particular regulations. The Tribunal ought to make a legal justification of its decision in writing, signed by the judges of the Tribunal who have voted over it, within one month since it was announced. A legal procedure in case of a constitutional complaint is concluded with passing of a decision by the Tribunal, in which it states whether a particular normative act is compliant with the Constitution or not. It is possible to initiate legal proceedings against the same act basing on different objection. It results from the fact that the Tribunal adjudicates only within the limits determined by a constitutional complaint. If the Tribunal decides that a normative act is unconstitutional it must be abolished. Decisions of the Constitutional Tribunal in case of a constitutional complaint produce erga omnes effects. An act of public authority containing general and abstract norms of law can be an object of a constitutional complaint. Whereas, it is impossible to lodge a complaint on not passing of an act. The Constitutional Tribunal also allows a complaint on an interpretation of a normative act set in judicial decisions, since an objection concerns the content of this normative act and not the way it is applied.

Gmina as the basic unit of a local self-government

As a result of the reform introduced by the bill from 8th March 1990 on local self-government[26] and the bill from 22nd March 1990 on the local organs of the state general administration of the Republic of Poland[27] a dualistic model of the system of public administration had been formed. Two divisions of local administration had been distinguished: state one (established on the rule of centralization and based on professional clerical apparatus) and self-government one (formed on the rule of decentralization). *Gmina*, being at the same time a unit of a local self-government, had become a unit of the principal territorial division of a basic level, whereas *województwo* – a unit of principal territorial division for the state administration assignments did not acquire self-government status. In the conscience of representatives of a newly established local self-government authorities one could notice openness for chances, proper comprehension of their significance, however the remains of the former authoritarian system as well as the longing of citizens for the state involvement in many matters were still present[28]. *Gmina*, as the structure closest to citizens, had become " a little homeland" for each inhabitant. The legal status of *gmina* allowed developing the awareness of civil connection, becoming the space for the development of social ambition and effective solution of economic, social and cultural problems of a given community[29].

In 1993 the Republic of Poland ratified the European Charter of Local Self-Government[30], whose regulations determined the notion of local self-government. According to art. 3 par. 1 of the Charter, local self-government means the right and ability of local communities, within the legal boundaries, to direct and manage the bulk of public matters taking responsibility for them and in the interests of their inhabitants. The ratification of the Charter strengthened the reforms aiming at the creation of civil society based on the foundations of local self-government. Due to its inhabitants, *gmina* being a self-government community, as a personal substrate creating a self-governed society, acquired social dimension[31]. In art. 35 of the bill on *gminny* self-government[32] the legislator created a possibility of further decentralization of competences of communal organs, determining the rules of joining, dividing and liquidating auxiliary units. In the light of this regulation an auxiliary unit is created in a resolution after consultations with inhabitants or on their initiative. *Gmina* is entitled to establish auxiliary units: *sołectwa, dzielnice, osiedla* and others (e.g. *sioła, przysiółki, okregi, obwody, kolonie, rejony, rewiry*) The legal status of this unit is determined in a statute given by a council of *gmina*, in which there ought to be provided: the name and area of an appointed auxiliary unit, its organs and the rules and mode of appointing them, organizational structure and tasks of

[26] Dz. U. 1998 nr 162 poz. 1126.

[27] Dz. U. 1998 nr 32 poz. 176 (the act was repealed on 1st January 1999 r.).

[28] B. Tuziak, *Pożądane kierunki i sfery działań rządu w opiniach przedstawicieli samorządów lokalnych Polski południowo-wschodniej* [w:] *Dobre Państwo*, ed W. Kieżun, J. Kubin, Warszawa 2004, p. 230.

[29] W. Kieżun, *Struktury i kierunki zarządzania państwem* [w:] *Dobre państwo*, ed. W. Kieżun, J. Kubin, Warszawa 2004, p. 53.

[30] Dz. U. 1994 nr 124 poz. 607.

[31] *Prawo administracyjne*, ed J. Boć, Wrocław 2010, p. 195.

[32] Dz. U. 2001 nr 142 poz. 1591.

a unit, the range and form of control and supervision over the functioning of a unit. Since auxiliary units cannot have legal personality their statutes cannot include such a legal status[33]. It ought to be remarked that beside an obligatory auxiliary unit in rural area – *sołectwo* (art. 36 of the bill on local self-government), in urban areas there is merely a possibility of establishing such a unit, which has not been taken advantage of so far by many *gminy*, and as the research shows, they have no intention of doing it[34].

Out of the basic characteristic of *gmina* one may conclude the range of competences, which is mainly determined in art. 164 par. 3 of the Constitution, and expresses the presumption of fulfilling the tasks of local self-government on the account of *gmina*. This regulation is associated with a general presumption determined in art. 163 of public tasks on the account of local self-government. However, art. 164 par. 3 of the Constitution determines merely the duty for a legislator so that the establishing of new levels of self-government or changes within the range of their competences do not limit the competences and tasks of *gminy*, performing at the same time the protective function against any attempts of interference of other levels of local self-government or even the state. The basic character of *gmina* is not of absolute character though, due to the fact that a possible interference of a state ought not to be excessive in relation to the constitutional rules.

The influence of citizens on all important issues concerning lives of inhabitants was stipulated in another institution of significance for the functioning of civil society, namely referendum. In art. 11 par. 1 and art. 12 par. 1 of the bill on local self-government in the institution of a local referendum two obligatory issues were determined. One of them was the possibility of dismissing a council of *gmina* before the end of its term. The other one regulates the possibility of introducing by inhabitants their own levy, in the form of self-taxation for public purposes. Moreover, it was decided that in each case that was significant for *gmina* an optional referendum could be conducted (art. 12 par. 2). There, however, appeared doubts concerning the interpretation of the word "could" used by the legislator. It was interpreted as the right of a council to decide freely on whether a referendum would be held[35]. It was only the Supreme Administrative Court of Poland that determined in its decision that the word, "does not mean the freedom of a council in making a decision on the way of resolving a conflict"[36]. However, in order to make the institution of a referendum in *gmina* effective, there was the necessity of introducing another regulation, which had place in form of the bill from 11th October 1991[37]. This bill had introduced two types of referenda, namely the referendum on dismissing a council of *gmina* and the referendum on other matters, each with a different procedure. In the procedure on dismissing of a council (art. 8 par. 6), a motion was to be forwarded to an election commissary, who was to state whether it agrees with the requirements of art. 18 par. 1 of the bill. In case of a referendum on any other matter (art. 11 par. 1), a motion ought to be forwarded to a head of the management board of *gmina* (*wójt*, mayor, president). A resolution on a referendum, according to art. 13, ought to be adopted by a council of *gmina*. Formally, both referenda were equaled[38], and in case of a referendum on dismissing of a council the number of signatures required on a motion had been decreased from one fifth, required in the first regulations in the bill on the local self-government, to one tenth of the entitled, and the demanded minimal attendance was lowered from 50 to 30%. These changes resulted from not very positive experience[39] and aimed at increasing the role of citizens in managing issues of *gmina* by increasing the access to the institution of a local referendum as a significant instrument of direct democracy. In 1995 regulations on referendum were changed in the bill on local self-government introducing an alteration that a referendum could only be conducted at the request of inhabitants, not earlier than after 12 months since the election day[40]. This change was to prevent motions on dismissing of a council resulting from conflicts within the council.

[33] H. Izdebski, *Samorząd terytorialny. Podstawy ustroju i działalności,* Warszawa 2008, p. 92.

[34] A. Strzelecki, *Aktywność obywatelska jednostek pomocniczych samorządu terytorialnego w miastach Województwa kujawsko-pomorskiego*, „Zarządzanie Publiczne" 2013, vol. 3, Kraków 2014, p. 272.

[35] E Olejniczak-Szałowska, *Prawo społeczności lokalnych do rozstrzygania spraw w drodze referendum*, „Samorząd Terytorialny" 1993, vol. 7–8, p. 54.

[36] „Orzecznictwo Sądów Polskich" 1991, vol. 11–12, p. 496.

[37] Dz. U. 1991 nr 110 poz. 473.

[38] *Ibidem*, art. 44 par. 2.

[39] E. Sękowska, *Referendum gminne – uregulowania i praktyka* [w:] *Referendum w Polsce i Europie Wschodniej*, ed. M.T. Staszewski, D. Waniek, Warszawa 1996, pp. 140 et seqq.

[40] Dz. U. 1995 r. nr 124 poz. 601, art. 13 par. 3.

The development of above the commune level (*ponadgminny*) forms of civil society between 1997 and 2001

The Constitution of 1997 determined in art. 164 that *gmina* is a basic unit of local self-government, and other units of regional self-government or local and regional self-government were to be determined in a bill. According to par. 3 *gmina* ought to perform all the tasks of local self-government that are not reserved for other units of local self-government. The legislator by determining *gmina* as a basic unit of local self-government assumed that a particular constitutional position of *gmina* results from the fact that it had been the only level of local self-government existing during the works on the Constitution. The legal character and significance of *gmina* had been determined before, and the status of *gmina* was an already existing term for the authors of the fundamental bill. Moreover, it is *gmina* that plays a fundamental role within the rule of decentralization of public administration expressed in art. 15 par. 1 of the Constitution[41]. It should also be noted that *gminny* Self-government was the only one mentioned and named in the fundamental bill, which means that a commune is a constitutional institution. The legislator had also determined *gmina* as a basic unit of local self-government. Therefore, it was assumed that a particular constitutional position of *gmina* results from the fact that it had been the only level of local self-government existing during the works on the Constitution. Thus it might be concluded that the legal meaning and character of *gmina* had already been determined, and the notion itself was for the authors of the fundamental bill an already existing term. Secondly, *gmina* plays the fundamental role in fulfilling the rule of decentralization of public administration expressed in art. 15 par. 1 of the Constitution. According to the Constitution, neither *powiat* nor *województwo*, basing on art. 164 par. 1 in reference to art. 164 par. 2, are of fundamental character.

Taking into account their territorial range *powiaty* became "heirs" of the former administration area, which in the previous territorial division belonged to the system of organs of the state administration. Therefore, their creation was less costly than establishing *gminy*. *Powiat* had become a local self-government community covering a particular, limited with boundaries, area of a broader range than *gmina*, since it consisted of a number of basic units of local self-government. *Powiat* has not got constitutional basis because it was appointed by the bill[42], yet similarly to *gmina* it has not only legal but also social dimension. Due to the fact that *powiat* as a community of inhabitants is qualified on the validity of the bill, belonging to it does not depend on the will of its inhabitants. *Powiat* was determined as a subject of territorial character, which means that a set area is its second immanent feature. Two categories of *powiat* were determined in the bill on *powiatowy* self-government. *Powiat ziemski* is a basic unit, which covers the whole area of neighboring *gminy*. The other type of *Powiat* is a unit covering the whole area of a city, called *powiat grodzki*. The rule of homogeneity of the *powiat* area determines that while creating, abolishing, joining, dividing *powiaty* as well as setting their boundaries one ought to aim at creating a unit that is homogenous when it comes to the settlement and spatial layout, and to socio-economic ties, which provide the ability to perform public tasks. Competence legal norms in *powiat* were delegated to a *powiatowa* self-government community, created on legal grounds. Public tasks performed in *powiat* are of over the commune level character and concern particularly social and technical infrastructure, safety and public order, as well as spatial and ecological order. The bill also includes, for organs of *powiat*, the possibility of performing assignments of government administration, for which it is provided with suitable funds. *Powiat* performs its own assignments on the basis of the bill in its own name and responsibility.

Województwo, established on the basis of the bill[43], became the only level of local self-government, comprehended as the largest territorial unit of the state. Like *gmina* and *powiat*, *województwo* was equipped in elected organs and situated between local and central authorities. The Constitution required the introduction of local self-government, however it did not mention *województwo* as a unit of local self-government. In this respect, constitutional guarantees are limited, since they merely mention the need of establishing self-government on regional level, not determining its name though. *Województwo*, as a unit of local self-government, became a regional self-government community with the greatest

[41] A. Rakowska-Trela, *Komentarz do art. 164 Konstytucji RP*, http://www.annarakowska.pl/post/komentarz-do-art-164-konstytucji-rp-28/, [01.02.2106].

[42] Dz. U. 1998 nr 91 poz. 578 as amended by Dz. U. 2015 poz. 1445.

[43] Dz. U. 1998 nr 91 poz. 576 as amended by Dz. U. 2015 poz. 1392.

range between the units of basic territorial division of the state. Similarly to *gmina* or *powiat*, *województwo* has both legal and social dimension. Inhabitants of *województwo* create a community based on legal grounds, which means that being a member of this community does not depend on either a decision of *wojewódzkie* organs or the will of its inhabitants. Another, apart from the community of inhabitants, qualification element of *województwo* is its area. Due to the regional location of *województwo* in the structure of territorial division of the state, it has become appropriate in determining the development strategy of *województwo* as a distinguished region. In programs of *województwo*, within this strategy the following objectives are taken into consideration: shaping and maintaining spatial order, developing economic activity, as well as the level of competition and innovativeness of the economy of *województwo*. Other significant tasks are also nourishing Polish values and shaping national, citizen, and cultural identity of inhabitants, as well as caring for the value of cultural and natural environment.

Like in case of *gmina*, the institution of local referendum was supposed to become the direct form of performing authority by inhabitants of a particular *powiat* or *województwo* in matters significant for it. Inhabitants fulfilling the requirements determined in electoral law to councils of *gmina*, *powiat* ,and a regional assembly called *sejmik wojewódzki* , were entitled to participate in referenda. The requirements were as follows: Polish citizenship, being over 18, possessing full public rights. Referendum could concern resolving matters concerning a community as well as issues within the range of tasks and competences of organs of *powiat* or *województwo*, and additionally dismissing the council of *powiat* or regional assembly, *sejmik wojewódzki*. In practice, the institution of *powiat* or *województwo* referenda was not taken advantage of. Establishing two new levels of local self-government in 1998 made it necessary to change the regulations concerning local referendum. Although, there were bills including regulations on both *powiat* and *województwo* referenda already in 1998, in order to take advantage of this institution the statutory detailed regulations did not exist. It was only the bill from 15th September 2000 on local referendum[44] that provided inhabitants with the possibility of using this direct tool in shaping local democracy. According to the regulations of the electoral law to councils of *gmina*, *powiat* , and regional assembly *sejmik wojewódzki* , all inhabitants of *województwa* who were Polish citizens, over 18, and holding full public rights, were entitled to participate in a referendum. Referenda were to resolve in voting the same types of matters like in case of *gminne* units of local self-government. A referendum became a direct means of performing authority by inhabitants of *gmina*, *powiat* or *województwo* in issues of significance for it. Inhabitants of *gmina*, *powiat* and *województwo* fulfilling the requirements determined in the electoral law to councils of *gmina*, *powiat* , and *sejmik wojewódzki*, were entitled to participate in referenda. The following could be the subjects of referenda: solving issues concerning a community, matters within the range of tasks and competences of organs of *powiat*, dismissing of a council of *powiat*.

Non-government organizations in civil society

Legally established institutional forms of grouping citizen with common interests or aim play a significant role in creating civilian society. Unlike inter-governmental organizations they group not states but natural or legal persons, acting on the basis of legal state regulations of the organization`s seat, and are established not as a result of an international agreement, but a civil law contract. Beside the public sector consisting of authorities and public administration, and the market sector, including entrepreneurs, there is the third sector consisting of non-government organizations. Unlike the public organs, however similarly to entrepreneurs, non-government organizations are private and are established on the initiative of their creators. On the other hand, unlike entrepreneurs but like public authorities these organizations act in public, or in other words social, interest. They can be established by natural persons and all the subjects, which are not state organs or units subordinate to government or self-government administration, or the ones whose objective is to gain profit. The legal regulations concerning non-government organizations were introduced in the bill from 24th April 2003 on the public benefit and volunteer work[45]. The bill defines the term of non-government organization determining that a non-government organization can be a legal person or an organizational unit without legal personality, not being units of public finances sector, which are granted

[44] Dz. U. 2000 nr 88 poz. 985 as amended by Dz. U. 2005 r. nr 175 poz. 1457.

[45] Dz. U. 2003 nr 96 poz. 873.

legal capacity in a separate bill, including foundations and associations not working in order to gain profit. The universal character of this definition is of such a meaning that other legal acts as a rule refer to this definition of a non-government organization in the bill[46]. According to art. 9 of the bill from 27th August 2009 on public finances[47], also the subjects whose main aim is to conduct economic activity for gaining profits are not non-government organizations. Non-government organizations (e.g. associations and foundations) may conduct economic activity, however not aiming at profits; therefore they do not belong to the commercial sector of enterprises.

It is worth noting, however, that the bill on public benefit and volunteer work, allowed (art. 3 par. 3 point 4) conducting the activity of public benefit by: joint stock companies and limited liability companies provided they do not aim at gaining profit and assign all their income for their statutory objectives, and do not divide their income between their members, shareholders, and employees. The code of commercial companies[48] allows some of partnerships, although they are established in order to run an enterprise, i.e. they are of exclusively commercial character, to establish a capital company with any legally permitted aim. Also sports clubs, which are companies based on the regulations of the bill from 25th June 2010 on sport[49], if they work to gain profit, can be treated like non-government organizations due to the character of their activity. According to art. 3 par. 3 of the bill on public benefit and volunteer work, also natural persons and organizational units acting on the basis of regulations of the bills on the relation between the state towards the Catholic Church in the Republic of Poland, the relation between the state to other churches or religious unions, as well as on the bill on the guarantees of the freedom of conscience and faith, and associations of the local self-government units, are not non-government organizations. Catholic organizations as well as, analogously, other religious organizations are established provided there is the agreement of church authorities, and as the practice confirms, fulfill social and cultural, educative, and charity and care, objectives. The rules of the Law of associations are applied to these organizations[50]. For instance such organizations as Caritas Poland, Diakonie of the Evangelical Church of the Augsburg Confession, the Orthodox Centre of Mercy of Białostocko-Gdańska Diocese ELEOS, are church organizations. Church organizations, religious and also associations of the local self-government units are not recognized as non-government organizations, however when the legal aspect is taken into account, they were treated equally with non-government organizations, since they are also allowed to conduct public benefit activity. They can acquire the status of organizations of public benefit and get the support of voluntary workers, as well as apply for means from social assistance. Associations of the units of local self-government (*gminy, powiaty*, *województwa*) are the ones that are established with the aim of supporting the idea of local self-government and protecting their common interests.

Social cooperatives are not considered to be non-government organizations since they are created by members with a view to creating common enterprise, i.e. they aim at gaining profit. Nevertheless, according to art. 2 par. 3 basing on the art. 3 par. 3 point 3 of the bill on cooperatives they can conduct activity of public benefit, provided in accordance with art. 8 their statutory activity relating to social and professional reintegration is not economic and can be conducted as the activity of public benefit. Also a social cooperative may use the help of voluntary workers. On the basis of art. 11 par. 3 of the Bill on public benefit and volunteer work a social cooperative can participate in a competition of tenders for the fulfilling of public tasks along with non-government organizations, religious organizations, as well as units subordinate to public administration.

Associations are characteristic legal forms in typical and numerous non-government organizations[51], which may differ substantially, and yet their activity can be similar to each other`s. Associations provide the possibility of expression for a certain group, e.g.: friends, acquaintances, family members, common interests or objective. The expression of will of at least 15 people is a necessary condition to establish an association. According to art. 2 par. 3 of the bill an activity of an association is based on a voluntary work of its members. Anyone may establish an association and it does not require any property, anyone can also join an existing association, and leave it any time. It may be presumed, that associations, as voluntary organizations, are one of significant legal component of the system of civilian society. It ought to be remarked that the aims of an association must be non-profitable. An association may not

[46] Dz. U. 2003 nr 122 poz. 1143, art. 2 point 2.
[47] Dz. U. 2009 nr 157 poz. 1240.
[48] Dz. U. 2013 poz. 1030.
[49] Dz. U. 2010 nr 127 poz. 857.
[50] Dz. U. 1989 nr 20 poz. 104.
[51] *Ibidem*.

be established in order to provide profit for its members. The ones who decide to join an association do it not for money-making, but to achieve social well fare included in a statute. To establish an association it is not necessary to possess property but there are necessary at least 15 people. An association bases its activity on voluntary work of its members (art. 2 par. 3 of the Law on associations) If the number of members decreases below the required minimum (15 people) there are the grounds to abolish an association.

Like associations also foundations[52] have a particular socially or economically significant aim, for which they transfer the property. A foundation, according to the Dictionary of the Polish Language is "offering something, construction of something for one`s own money for social use; founding something"[53]. On the basis of art. 3 par. 2 and 3 of the bill on foundations, a founder in declaration of intent on establishing a foundation (the founding act) determines the aim of a foundation as well as financial components devoted for its realization. Money, bonds, as well as movable and unmovable property may be assets. There are no legal boundaries of a minimal value of property for establishing a foundation, however it is the property that is the basis for its establishment and activity. A foundation cannot exist without property. It should be emphasized that a foundation is created by people working together to achieve a common good determined in the statute. However, establishing of a foundation and its aim is usually decided on by one man or several people who wish to achieve a particular socially significant aim and transfer their property on it. Founders may also transfer property for an economically significant aim. In art. 1 of the bill on foundations from 6th April 1984 it was determined that a foundation can be established for the realization of socially and economically useful aims, in accordance with the basic interests of the Republic of Poland, especially such as: health protection, development of economy and science, education, culture and art, care and social assistance, environment conservation and protection of monuments.

Conclusion

In the contemporary understanding of civil society the nation is the foundation as a sovereign of power performing it either through its representatives or in a direct way. It is guaranteed by the system of a state determined in the Constitution and based on the legislation. The nation as the sovereign by electing: the President of the Republic of Poland and its representatives to the two-chamber parliament, and to *gmina, powiat* and *województwo* organs of local self-government units, has the possibility of performing and controlling power with increasing efficiency. After 1989 in Poland, in the emerging reality of actual independence, the system of the democratic state of law had began to be reformed, which aimed at constructing a well-organized and functioning civilian society. Statutory reforms were being introduced, and eventually the Constitution was enacted, which made it possible to construct frames of the system allowing the nation to perform authority in both direct and indirect way within the boundaries and on the basis of legal regulations.

In the system of the sources of law that was being created as a result of the reforms, citizens` interests were taken into account, which led to establishing the legal system of the protection of civil rights and freedoms. Within the system of institutions guaranteeing law obedience the functioning of the Constitutional Tribunal and the ombudsman had been provided at the very beginning. The introduction of the constitutional complaint provided each citizen, whose constitutional rights or freedoms had been violated, the right to lodge a complaint to the Constitutional Tribunal. The ombudsman was appointed as the guardian of the freedoms and rights of a man and citizen, whereas for the protection of consumers and competition the possibility of lodging a complaint to a special administration organ, namely the Head of the Antimonopoly Office, had been introduced.

To enable citizens to participate in social life, beside the right to influence on choosing organs to *gminy, powiaty,* and *województwa*, also legal guarantees of establishing organizations expressing the interests of citizens, had been introduced. Apart from public sector, consisting of public authorities and administration as well as market sector, consisting of entrepreneurs, legal possibility had been created for the activity of non-government organizations, creating a kind of the third sector. The legal possibility of the functioning of non-government organizations had been introduced in the bill on public benefit and volunteer work. Also the term and functioning of non-government organizations had been set in the bill, determining that legal persons or organizational units without legal personality are con-

[52] Dz. U. 1984 nr 21 poz. 97.

[53] Słownik Języka Polskiego, Warsaw 1998.

sidered to be non-government organizations. Hence, a significant segment of civilian society had been regulated, i.e. the legal and institutional system of organizing various groups of citizens with a view to fulfilling their vital plans and interests.

As always there is a question whether such constructed system of civilian society is already complete, appropriate, and in which directions it ought to develop? Answering these questions is not an easy task, since from the perspective of the legal system it might seem that it is so, yet the real life and practice frequently verify such conviction. Two spheres of the functioning of the civilian society can be taken as an example, where practice generates the need for changes. These are the sphere of functioning of auxiliary units and the sphere of creating civilian budgets in the area of local self-government.

In the first sphere, the bill on community self-government makes it possible to appoint such units in cities, however in practice only in bigger cities *osiedla* and *dzielnice* have been established. In these units citizens have the possibility of almost direct participation in resolving their own issues. In many medium and small towns, though, such units have not been appointed since it was assumed that several councilors with a mayor or president would know best what was necessary for inhabitants. Therefore, should not there be a legal requirement to appoint such units, especially they already exist as customary (unofficial) institutions, and what is more concentrated on their area between several thousand and several dozen thousand inhabitants?

In the sphere of civil budgets, it is the citizens that choose the directions of investing and spending budget means from their taxes. The process of this civilian participation had come into existence without legal regulations, and the attempt of regulating it made by the president proved inefficient. There was, thus, grassroots civil movement being the evidence of the fact that if the organs of local self-government made it possible, citizens are willing to participate in managing investment matters in towns, *dzielnice, osiedla* inhabited by them. Hence, is there the need for legal regulation to make it not merely a possibility but a duty? It seems there is, since many units of local self-government, mainly medium and small ones, have not introduced the institution of participation budget so far, and in places where it has been introduced this institution causes increase in the involvement of a local community.

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