

Warsaw, 18 August 2006

2257/2006/KH

**The Honorable
Mariusz Błaszczak
Chief of the
Chancellery of the
Prime Minister**
Al. Ujazdowskie 1/3
00-583 Warsaw

Dear Mr. Minister,

On behalf of the Helsinki Foundation for Human Rights, I would like to express my concern in connection with the information regarding work on the draft amendments to the Law on Foundations (draft of 19 July 2006 available on the website <http://kprm.gov.pl/bip/060726projekt.pdf>). In our opinion, the draft solutions are intended to significantly increase government supervision over foundation, regardless of their nature. The proposed amendments are aimed at the very essence of activity in the nongovernmental sector and create a temptation to subordinate the activity of certain foundations to the public authorities. This constitutes interference in their independence, as well as expresses a lack of confidence in the activity of the internal organs of foundations, the members of which after all bear full responsibility for their activity. It must be emphasized that this project poses a particular threat to all nongovernmental sector institutions in Poland, operating as foundations. These mainly include institutions that monitor public authorities, centers for independent thinking, research and studies on subjects that are often sensitive from the point of view of the interests of the ruling political option. In the opinion of the Helsinki Foundation for Human Rights, the draft constitutes another initiative that is intended to increase State control over civil society institutions.

Below I wish to present reservations to the most significant, in our opinion, new regulation proposals to be included in the Law on Foundations. In this letter we are not referring to issues of technical or organizational importance, as well as to those issues, in the extent of which the Helsinki Foundation for Human Rights lacks experience or sufficient knowledge (e.g. conducting economic activity by foundations or foundations under the control of the State Treasury).

Obligation to inform the minister about changes in the National Court Register (KRS)

In accordance with the proposed new provisions of Article 12 par. 4 of the Law on Foundations, the foundation is obliged to inform the proper minister about changes subject to registration in the National Court Register. This requirement constitutes excessive interference in the activity of foundations, as it imposes an additional burdensome administrative requirement. The essence of court registers is

their publicness. Their objective is to serve the society as well as the public administration. If the public administration wishes to inspect the changes made in the KRS, it should establish principles of cooperation with this register in such a manner, so that it receives the appropriate information. Shifting this obligation onto the foundation expresses the public administration's reluctance to introduce its own internal procedures. This in turn results in an unfounded additional burden for foundations in their relationship with the administration. Imposing further bureaucratic obligations on citizens and organizational units established by citizens may in turn violate the right to "good administration".

Obligation to inform the minister about resolutions made by the foundations' organs

In accordance with the proposed new provisions of Article 12 par. 3 of the Law on Foundations, the foundation is obliged to submit to the proper minister the resolutions made by the foundation's organs within 30 days of their issue. The above regulation will result in increasing the obligations of each foundation towards the public administration. The solution applied so far, which consists in submitting annual reports, as well as informing the National Court Register, seems sufficient to control foundations. The increased obligation to provide information seems to be directly linked with the possibility for the proper minister to use the new authority provided for in the draft amendments to the Law on Foundations (see below).

Request of the proper minister to waive a resolution made by the foundation's organs

In accordance with the proposed provisions of Article 13 of the Law on Foundations, *"the proper minister may request the court to waive a resolution of the management board of the foundation if it contradicts its objective or the provisions of the foundation's charter or legal regulations. At the same time, the proper minister may request the court to order the suspension of the implementation of that resolution until the matter is resolved"*.

In the opinion of the Helsinki Foundation for Human Rights, the above regulation is completely inappropriate to the purposes it is supposed to serve. This may give rise to a series of abuses, as well as lead to substantial interference in the current activity of the Foundation. Based on this regulation, every suspicion regarding the violation of the law, charter or foundation objectives, regardless of the violation's rank, would cause the minister to respond by filing a motion to the court and would probably lead to the suspension (until the matter is resolved) of that resolution's implementation. It is worth mentioning that according to the previous provisions of this regulation this applied only to a "glaring violation", which was in itself a serious restriction for the proper minister to perform an intervention, since it required him to prove the "glaring" nature of the violation. At the same time, it is difficult to imagine the manner in which the proper minister could control all management board resolutions made by the foundation's organs. An honest performance of this task would require a significant increase in the level of employment within the government administration. It doesn't seem probable that the Polish government planned additional resources for this. For this reason, there may be cause for suspicion that this regulation will be applied selectively. The proper minister will use this right only in situations that may turn out to be inconvenient for him. It must be emphasized that the mere fact that the proper minister institutes court proceedings may significantly

obstruct the activities of foundations (even if the court does not consent to the motion), because foundations will have to spend time on defending themselves against accusations and not on their statutory activity. In the context of the above remarks, it is necessary to recognize that removing the premise of “glaring” violation may lead to a situation where the procedure provided for in Article 12 of the new act is used to support actions aimed against foundations. The lack of such premise means that the regulation may be used against certain foundations.

Motion to the court to suspend the activity of a foundation and appoint an administrator

In accordance with the proposed new provisions of Article 14 of the Law on Foundations, *“if the activity of a foundation’s management board violates legal regulations or the provisions of its charter, or if it is inconsistent with its objective, the proper minister designates a suitable time limit for eliminating these shortcomings in the actions of the management board, or demands the replacement of that board within a specified time limit (par. 1). If the time limit referred to in Paragraph 1 expires without effect, or if the foundation’s management board persists in acting in a manner inconsistent with the law or the foundation’s charter or objective, the proper minister requests the court to suspend the foundation’s management board and appoint a compulsory government administrator (par.2).”*

The amendments to this regulation are similar in nature to the proposed provisions of Art. 13 of the Law on Foundations – elimination of the clause of “substantially” violating the law, the provisions of the charter or foundation activity objectives, which until now made it possible to file a motion to the court. Moreover, this regulation replaces all expressions that provide the Minister with power to take decisions (“*may designate*”, “*may demand*”, “*may request*”) with categorical statements leaving no room to maneuver (“*designates*”, “*demands*”, “*requests*”). Another novelty is the opportunity for the proper minister to appoint a compulsory government administrator for the foundation.

In the opinion of the Helsinki Foundation for Human Rights, based on the currently binding Law on Foundations the State already possesses sufficient and effective tools to supervise the activity of foundations. The regulations currently in force are correctly designed – they establish a proper balance between the administrative authority and the judicial authority in a democratic legal state. They enable an effective response in the event that a foundation’s authorities significantly violate the law or charter, or fail to realize the purposes, for which they were established. It must be emphasized that foundations are independent entities and possess legal personality, therefore granting the State (proper minister) the right to introduce changes in the management boards of foundations would constitute a significant restriction of their autonomy. Imposing categorical obligations for the proper minister to request the removal of transgressions or even the replacement of the board in the case of each and every violation of the law, is not only pointless, but also exemplifies a lack of faith in the public administration’s proper judgment. It must once again be stated that the actual implementation of the act would require substantial spending on government administration, which would monitor each action performed by the foundation from the point of view of conformity with the law, provisions of the charter and foundation activity objectives. Otherwise, notwithstanding their groundlessness, these regulations would be applied selectively.

In summary, I believe that the abovementioned most significant amendments to the Law on Foundations constitute an attempt against the autonomy and independence of foundations. They are a bad example of interference in the civil society that is only now being formed and has just begun to mature. Instead of creating conditions for the development of various forms of civil organization – in accordance with political announcements, the Polish government is taking exactly the opposite steps.

With kindest regard,

On behalf of the Board of the Helsinki
Foundation for Human Rights,

Marek Antoni Nowicki
President of the Board