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Participation of Civil Society in New Modes of Governance.
The Case of the New EU Member States

Part 2: Questions of Accountability

Edited by
Heiko Pleines

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NewGov

NEW MODES OF GOVERNANCE PROJECT

Authors:
Michał Federowicz, Institute of Philosophy and Sociology, Polish Academy of Sciences, Warsaw, Poland (NEWGOV project partner No. 35)
Martin Kay, Centre for Privatisation & Public Private Partnership, University of Limerick, Republic of Ireland (NEWGOV project partner No. 40)
David Lane, University of Cambridge, UK (NEWGOV project partner No. 37)
Aleksandra Lis, student of sociology, University of Nicolaus Copernicus in Toruń, Poland; trainee, Research Centre for East European Studies, Bremen, Germany (NEWGOV project partner No. 38)
Zdenka Mansfeldová, Institute of Sociology, Academy of Science of the Czech Republic, Prague, Czech Republic (NEWGOV project partner No. 34)
Jakub Płażynski, student of law, University of Gdansk, Poland; trainee, Research Centre for East European Studies, Bremen, Germany (NEWGOV project partner No. 38)
Heiko Pleines, Research Centre for East European Studies, Bremen, Germany (NEWGOV project partner No. 38)
Michał Sitek, Institute of Philosophy and Sociology, Polish Academy of Sciences, Warsaw, Poland (NEWGOV project partner No. 35)
Marcin Michał Wiszowaty, Faculty of Law and Administration, University of Gdansk, Poland (by invitation)

Language editor: Hilary Abuhove
Technical editor: Matthias Neumann
Cover based on a work of art by Nicholas Bodde

Contents

Heiko Pleines

Introduction

This working paper is part of a series presenting the results of a research team examining the impact of the 2004 EU enlargement on governance structures involving the participation of civil society organisations. The research team is part of the NEWGOV Integrated Project, led by the European University Institute.[1]

> *The aim of this Integrated Project is to examine the transformation of governance in and beyond Europe by mapping, evaluating and analysing the emergence, execution, and evolution of what we refer to as 'New Modes of Governance'. By new modes of governance we mean the range of innovation and transformation that has been and continues to occur in the instruments, methods, modes and systems of governance in contemporary polities and economies, and especially within the European Union (EU) and its member states (both current and prospective).[2]*

In this context the research team examines the participation of civil society organisations from the new EU member states with socialist pasts in (old and new forms of) governance, whereby civil society is broadly defined to include all collective non-state actors participating together with state (including EU) actors in different modes of governance. Thus the focus is not only on NGOs in the narrow sense but on trade unions and business associations as well. An analysis of these organisations and their involvement in different modes of political governance was given in our first working paper.[3]

In this second working paper we focus on questions of accountability at the national level, distinguishing between its different forms and directions. Three forms are of relevance here:

- Political accountability concerns responsibility for the contents of political decisions and refers to participants in the political decision-making process.
- Administrative accountability concerns responsibility for bureaucratic implementation and refers to participants in the implementation process of political decisions. Administrative accountability is focused on the quality of implementation.
- Legal accountability pertains to the forms of participation in policy making and implementation. It concerns the legality of the means employed to influence decisions and refers to all participants in political decision-making and implementation.

Accountability, as covered by the research team, goes in two directions:

- *Civil society organisations holding state (including EU) actors accountable.* In this instance political and administrative accountability are most relevant, i.e. civil society organisations scrutinize the contents of policy measures and the quality of their implementation (much more than the rules of decision-making).

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[1] NEWGOV – New Modes of Governance, Project no. CIT1-CT-2004-506392, Integrated Project, Priority 7 – Citizens and Governance in the Knowledge-based Society, Funded by the European Union under the Sixth Framework Programme. The research team is part of project 24, which is directed by Daniela Obradovic, Amsterdam Center for International Law. The research team is headed by Heiko Pleines, Research Centre for East European Studies (Forschungsstelle Osteuropa, Bremen, Germany). Further NEWGOV partners in the research team are Michal Federowicz (Institute of Philosophy and Sociology, Polish Academy of Sciences, Warsaw), David Lane (University of Cambridge, UK) and Zdenka Mansfeldová (Institute of Sociology, Academy of Science of the Czech Republic, Prague).

[2] For more information on the analytical framework of the integrated project see www.eu-newgov.org

[3] Heiko Pleines (ed.): Participation of Civil Society in New Modes of Governance. The Case of the New EU Member States. Part 1: The State of Civil Society, Working Papers of the Research Centre for East European Studies (Arbeitspapiere und Materialien der Forschungsstelle Osteuropa) No. 67 (May 2005).

- *State (including EU) actors holding civil society organisations accountable.* In contrast, the focus here is not on the contents of policy recommendations but on the ways used to promote them; in other words, the emphasis is on legal accountability.

Accountability concerns the local, regional, national and the EU levels. As the same actors are present at all (or most) of the levels (especially on the side of civil society), questions of accountability can be addressed in a multilevel perspective.

As a first step, the research team concentrates its analyses of the new EU member states on the national level for two main reasons. First, civil society organisations started to participate in EU governance only in 2004, when their countries joined the EU. Therefore, their actual experience with participation is still limited. Second, questions of legal accountability of civil society organisations are primarily regulated at the national level. As a result, the involvement of civil society organisations at the EU level can only be examined after their nature and capacity and the legal regulation of their activities have been analysed at the national level. Providing this analysis is the aim of this working paper.

The working paper starts with a contribution by David Lane summarizing the state of civil society organisations in the post-socialist EU member states and their potential for an active role in new modes of governance. He offers a quantitative and qualitative assessment and discusses the implications for questions of accountability.

The following two articles by Zdenka Mansfeldová and Michał Federowicz and Michał Sitek go on to elaborate on civil society organisations holding state actors accountable. Mansfeldová examines the societal context for political and administrative accountability in the Czech Republic, while Federowicz and Sitek examine the political accountability of the Polish government.

The next two contributions focus on state actors holding civil society organisations accountable. As argued above, the focus here is on legal accountability. Marcin Wiszowaty offers an overview of national legal regulations of lobbyism and related involvement in political governance in the new EU member states. As only two of these states have passed a law on lobbyism so far (the others are still in the process of drafting relevant legislation), his focus is on its legal regulation in Lithuania and Poland. Jakub Płażynski then analyses the realization of legal accountability in practice, comparing different cases of legally questionable actions by Polish civil society organisations.

The final article by Martin Kay develops a highly refined theoretical perspective of legitimacy and accountability. Drawing on the Irish example, he shows the theoretical implications of the issues discussed in the preceding contributions and offers guiding questions for future research.

Whereas the contributions in this working paper have focused on the role of civil society organisations in political governance at the national level, their involvement at the EU level will be the topic of our third working paper, to be published in autumn 2006.

David Lane

Civil Society Formation and Accountability in the New Post-Socialist EU Member States

Abstract

The paper considers the peculiarities of civil society formation in the new member states. The structures of 'real civil societies' in the new member states are compared with those of the older members. It is contended that demands for accountability of civil society associations needs to be considered in the context of the 'deficit' of civil society organisations in the new states and the need for greater sustainability of civil society organisations. Accountability is discussed in terms of civil society inputs and outputs to the political process. Numerous types of regulation and kinds of stakeholders are defined as means of achieving accountability of different types of civil society associations.

Introduction

Civil society, understood in its most general form, is that social space between individuals and primary groups (the family) and the political authority (the state); autonomous associations and institutions as well as more amorphous networks of people fill this space.

One may distinguish between two approaches to civil society: a normative one – which defines theoretically how civil society ought to be constituted as part of a democratic society; and an empirical one – which describes the constitution in 'actually existing societies'. In the normative approach, civil society is constituted from an autonomous sphere, in which institutions interact with, but are independent from the state. In many existing societies, however, state (or supra-state) bodies finance, regulate and participate in this space and shape the character of civil society. Civil society institutions as forms of governance can be analysed as non-state bodies influencing and having an impact on the legitimate forms of government – as inputs to the political process; they may also be seen as groups, which may take on public duties – as political outputs. Forms of accountability will vary between these two types of activity. In the evolving European Union, civil society institutions are considered to be agents which may perform governmental functions as well as playing a part in the policy making process. The European Union's definition is:

> *Civil society includes the following groups: trade unions and employers' organizations (social partners); organizations representing social and economic players which are not social partners in the strict sense of the term… non-governmental organizations which bring people together in common cause, such as environmental organizations, human rights organizations, charities, professional associations, grass roots organizations; organizations that involve citizens in local and municipal life with a particular contribution from churches and religious communities.*[1]

Civil society associations in the new East European members of the European Union have had a different trajectory from those of the old members. All of the latter have had relatively robust (though differently constituted) forms of civil society associations before joining the Union. In the former, most public associations were highly dependent on, and controlled by, the state. A major task of early 'transformation policy' was 'to dismantle the central government control

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[1] Commission of European Communities (2001) *European Governance*: White paper, COM(2001) 428, Brussels, 25.7.2001, p. 14.

inherited from the communist system.'[2] In a normative sense, social movements extolling the virtues of civil society sought to replace ubiquitous state control, not by participation in the state, but through the 'self-administration' of groups clearly demarcated from the state: '… civil society represents a sphere other than and even distinct from the state'[3]. Whereas in the West European societies, civil society associations were outcomes of developments of the formation of capitalist society (which provided autonomous forms of power derived from private property in its different forms), in the post state socialist societies, civil society organisations were encouraged and took the form advocated 'from the top'. Unlike the normative concept, advocated by writers quoted above such as Arato, civil society took a different form: one increasingly shaped by state and foreign institutions. Foreign institutions – extolling the virtues of democratic societies – became crucial as sponsors of civil society in the formation of the new civil societies. The prevailing Western ideology during the formative period of transformation was that of neo-liberalism which had important effects on the type of civil society which was legitimated. The market was distinguished as a coordinating principle and the state disparaged. Non-government organisations (NGOs) in this context became not just institutions between the state and primary groups, but substitutes for the supposed incapacity of government. This policy has been criticised as promoting a new type of hegemony. Civil society formed in this way, it is contended, is '… a kind of political *laissez-faire*, the political equivalent of neo-liberalism. Civil society is seen as a way of minimising the role of the state in society, both [as] a mechanism for restraining state power and as a substitute for many of the functions of the state[4]'. From this viewpoint, it is a social and political counterpart of the economic process of transition to capitalism; it provides not only a safety net but also Western financial support to establish the 'rule of law and respect for human rights without taking account of the primary responsibility of the state in these areas[5]'. Another form of sponsored civil society development is the fostering of partnerships between NGOs, the private and public sector[6]. NGOs then have an 'enabling' role – promoting small business and democratic procedures.

However, it is important to note that these new institutions – linked to a capitalist and market type of society – were created on the foundations of the cultural and political traditions of specific countries. There were not only state socialist institutions but also cultural forms, which predated the communist regimes. Forms of answerability and accountability then may require different types of institutions and processes than in the old European Union societies. Policy might need to consider how to strengthen civil society as an 'autonomous social sphere', acting in a real intermediary role between state and the individual[7], in addition to defining means to increase answerability.

Real Existing Civil Societies

Detailed comparative data on the constitution of civil society in central and eastern European member states of the European Union have been collected by the European Society Survey, the European Values Survey and the World Values Survey[8], and the U.S. Agency for International

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[2] EU Subcommittee Civil Society Organisations, 'The Role and Contribution of Civil Society Organisations in the Building of Europe', Economic and Social Committee, Brussels 22 September 1999. CES 851/99 D/GW. Paragraph 4.2.

[3] J.A. Cohen and A. Arato, *Civil Society and Political Theory*. Cambridge MA:MIT press, 1992. p.74.

[4] H. Anheier, M. Glasius and M. Kaldor, 'Introducing Global Civil Society' in H. Anheier, M. Glasius and M. Kaldor, *Global Civil Society 2001*, Oxford: Oxford University Press, 2001: p. 11.

[5] Anheier et al, ibid.

[6] In schemes, for example, as the Prince of Wales's Business Leaders Forum.

[7] EU Subcommittee Civil Society Organisations, paragraph 3.7.

[8] See: http://www.worldvaluessurvey.org/

Development (USAID)[9]. While somewhat ethnocentric concerning the nature of civil society, these sources in combination present a picture of its strengths and weaknesses in the emerging post-communist societies.

The 1995–97 World Values Survey points to a much lower level of participation in thirteen post communist countries than in eight 'older democracies' (USA, Australia, Sweden, Finland, Japan, Norway, Switzerland, Japan and Federal Republic of Germany). Rates of organisational membership for the former were 2.39 memberships per person compared to only 0.91 memberships in the post-communist countries – Macedonia and the German Democratic Republic were the highest with scores of 1.5 and Hungary had 1.0. All countries of the former Soviet Union were below 1.[10]

A later European Values Survey conducted in 1999/2000 can be used as a basis for comparison between the new and older members of the European Union. Table 1 (on the following page) illustrates the percentage of the respondents in different countries who participated in various types of civil society associations in 1999/2000. To simplify the comparisons with the new member states only three old members of the EU and in addition four non EU members have been selected to illustrate differences. As there were considerable differences between the countries in each group, an average is expressed in terms of the median rather than the arithmetic mean.

In terms of the types of civil society associations, the survey shows important differences between the older democracies and post communist countries and it might be noted that there is a considerable range between different post-communist societies. Hence, something other than the 'legacy' of state socialism needs to be invoked to explain the transformation outcomes. Rather surprisingly perhaps, the new members had some constituencies in which they had higher participation rates than the old members. Trade union participation both in membership and in voluntary activity is considerably higher than the median for the three West European countries shown; and for the post-communist non-members it is nearly three times as high. Membership of religious associations is also higher (this is probably due to people seeking to distance themselves from association with the discredited ideology of communism) but voluntary work in them is lower - the median for the new members being at the level of Spain. Former communist countries outside the EU still have membership and participation much below the old and new EU members. Sports and recreational associations had on average a lower participation than in the older EU countries: though there are very great differences – with Czech Republic having 23 per cent compared to Romania's 2.1 per cent. Voluntary work in health associations was also at a lower level (except for the Czech Republic and Slovakia). The data for these aspects of civil society associations show a lower level of participation for the new member states, but not excessively so. It is when one considers political associations that a greater gulf is observed. In all the new EU states, membership of political parties is less than one percent; with extremely low participation in Estonia, Lithuania, Slovakia (0.2 per cent and less of the respondents). Comparatively, in the three old EU states, membership is higher than two per cent and in the non-EU post communist societies membership is about the same, even slightly higher. A conclusion we might draw from this analysis is that participation is much lower but comparable to the older democracies in its output form, rather than as inputs to the political system. This is a serious deficiency, as 'input' participation in civil society is important in strengthening the process of a democratic system.

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[9] Data taken from usaid2003, See USAID website at www.usaid.gov/locations/europe_eurasia/dem_gov/ngo index.htm

[10] Data have been conveniently collected by M.M. Howard, *The Weakness of Civil Society in Post-Communist Europe*, Cambridge University Press, 2003: chapter 4.

Table 1. Membership and Active Participation

	Trade Unions		Political Parties		Religious Church		Voluntary Health Orgs		Sports Recreation	
	A	**B**	**A**	**B**	**A**	**B**	**A**	**B**	**A**	**B**
Great Britain	8.2	2.2	2.5	1.4	4.9	6.3	3.0	10	3	3.9
Germany	7.2	0.4	2.8	0.9	13.5	5.6	2.5	1.3	28	6.7
Spain	3.5	1.0	2.0	1.3	5.8	3.7	2.7	1.4	8.5	3.5
Median	*7.2*	*1*	*2.5*	*1.3*	*5.8*	*5.6*	*2.7*	*1.4*	*8.5*	*3.9*
New EU members										
Estonia	4.7	0.5	0.1	0.2	7.3	2.8	0.7	0.7	8.8	3.4
Latvia	11.3	2.3	0.6	0.3	5.3	3.8	0.9	0.5	6.6	6.2
Lithuania	1.9	1.3	0.2	0.1	5.4	4.2	2.0	0.5	3.3	2.3
Poland	10.3	2.3	0.4	0.1	5.7	3.7	1.5	0.6	3.1	2.2
Czech Republic	10.5	2.9	0.7	0.4	6.6	2.8	5.9	3.1	22.8	10.5
Slovakia	15.9	5.7	0.2	0.2	16.7	13.1	4.4	3.7	17.6	13.4
Hungary	7.0	1.3	0.3	0.2	12.1	5.4	2.0	1.2	3.8	2.6
Romania	9.2	5.8	0.6	0.4	4.4	3.6	1.0	0.6	2.1	1.2
Slovenia	16.9	3.3	0.8	0.4	6.7	4.5	2.9	2.1	16.9	8.4
Median	*10.3*	*2.3*	*0.4*	*0.2*	*6.6*	*3.8*	*2*	*0.7*	*6.6*	*3.4*
Post-Communist: Non-EU Members										
Croatia	11.8	4.2	0.5	0.4	12.2	5.8	3.3	2.3	14.1	7
Belarus	39.0	5.3	0.5	0.7	2.1	4.1	0.7	1.7	1.8	1.2
Ukraine	20.6	3.8	0.7	0.2	4.3	2.2	1.7	0.6	1.9	0.7
Russia	23.6	3.6	0.1	0.0	2.3	0.5	0.7	0.3	4	1.3
Median	*22.1*	*4*	*0.5*	*0.3*	*3.3*	*3.15*	*1.2*	*1.15*	*2.95*	*1.25*
All above former state socialist societies										
Median	*11.3*	*3.3*	*0.5*	*0.2*	*5.7*	*3.8*	*1.7*	*0.7*	*4*	*2.6*

A: Which, if any, do you belong to?
B: Which, if any, are you currently doing unpaid voluntary work for?
Data show percent of respondents responding positively
Source: Derived from *The European Values Study: A Third Wave*. Source book of the 1999/2000 European Values Study Surveys. Loek Halman. Tilburg University. Nd. Accessed on Internet website. Calculations added.

The autonomy of associations is to a considerable extent dependent on the extent of their assets and financial means. The European Social Survey asked people about their financial contributions to various types of voluntary organizations. This survey has the advantage that it enables comparisons to be made with Western European countries with different types of civil society organizations and support structures. Table 2 shows the percentage of respondents who contributed financially to the associations and may be used as an index. Here only six countries have been selected to illustrate differences. It shows that in all aspects of financial support, the new member states have a significantly lower level of contributions than in Britain and Germany; there is still a difference from Spain, though this is less marked.

Table 2. Personal Financial Contributions to Voluntary Associations

Financial donation	Czech Republic	Poland	Hungary	Germany	UK	Spain
Sports/outdoor activity clubs	0.8	1.4	1	6	6.5	2.7
Cultural/hobby activity associations	0.9	1.5	0.7	5.7	6	2.7
Trade unions	0.4	2	0.3	0.7	3.2	2
Business/profession/farmer organisation	0.3	0.5	0.4	0.7	2.5	0.8
Consumer/automobile organisation	0.3	0.04	0.3	0.4	1.3	1
Humanitarian associations	7.9	3	1.2	15	12	5.6
Environmental/peace/animal associations	2.5	1.3	0.4	9	12.7	1.7
Religious/church associations	2.3	4	2.6	9	14.3	3
Political party	0.3	1	0.1	1	1.5	0.5
Science/education/teacher associations	0.7	1.5	0.2	2.5	4	2
Social clubs etc.	0.2	0.5	0.4	2.2	4.2	1.5
Other voluntary associations	1.2	1	0.7	1.8	5.6	1.7
Average	*1.48*	*1.48*	*0.69*	*4.5*	*6.15*	*2.1*

Source: based on the European Social Survey (responses of a sample of the population of the relevant countries in 2002/2003). The figures refer to the percentage of respondents who donated money to the given organisation within the last 12 month, divided by the number of respondents in the given country, multiplied by 100. Thus the figures represent an index of the role of financial donors (private citizens) in the six countries.[11]

Subscriptions to voluntary associations are derived from a much lower percentage of the population than in the three existing EU states. Four times as many citizens subscribe to voluntary associations in the UK than in the Czech Republic and Poland; even in Spain subscriptions are 1.5 times higher. There are significant differences between the former state socialist societies. Subscriptions to humanitarian associations in Czech Republic, and those to political parties and religious associations in Poland, are made by many more people than in the other former state socialist societies and are at levels similar to the three old EU member states. Contributions to trade unions in Poland are made by more people than in Germany or Spain. The number of subscribers to humanitarian and environmental/peace associations is greater in the Czech Republic than in Spain. One important conclusion to note here is the divergence between different new member states – related no doubt to the cultural and historical heritage of these societies.

Differences may also be linked to the stage of economic development of various societies. Table 3 (on the following page) shows the extent of participation in unpaid voluntary work, and Third World development or human rights activity, and GDP per head (at purchasing power parity) in all European countries. Examination of the table shows the unmistakable downward gradient of GDP as one moves from the old members of the EU to the new members and those currently not in the EU.

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[11] My thanks to Aleksandra Lis for help with this table.

Table 3. Participation in Voluntary Unpaid Work and in Human Rights Associations, and GDP per capita.

Country	Unpaid Voluntary Work	Human Rights activity	GDP (PPP) Per capita 2002
Denmark	4.1	1.2	29.4
Austria	3.4	0.8	28.24
Ireland	2.4	1.8	28.04
Netherlands	24.6	3.9	27.47
Belgium	9.8	5	27.35
Germany	0.6	0.2	26.22
France	1.4	0.7	26.12
Great Britain*	2.6	4.3	25.83
Finland	5.9	3.2	25.44
Italy	2.9	1.9	25.32
Sweden	15	4.4	25.08
Spain	2.4	1.3	20.46
Greece	1.8	3.2	18.24
Slovenia	0.8	0.4	17.96
Portugal	0.8	0.6	17.35
Czech	0.7	0.4	14.5
Hungary	0.3	0.2	12.81
Slovakia	0.2	0.2	12.19
Estonia	0.1	0.2	11.12
Poland	0.4	0.1	10.13
Lithuania	0.2	0.1	9.88
Croatia	0.5	0.4	9.76
Latvia	0.6	0.3	8.94
Russia	0.1	0	7.82
Bulgaria	0.4	0.2	6.84
Romania	0.6	0.4	6.29
Belarus	0.5	0.7	5.33
Ukraine	0.7	0.2	4.56
Median	*0.75*	*0.5*	*17.655*
Correlation with levels of GDP Pearson R =	*0.519*	*0.634*	
Medians for Old EU members	*2.9*	*1.9*	*26.12*
Medians for New EU members	*0. 4*	*0.2*	*10.625*

Key: *GDP for United Kingdom. GDP measured in 000s US $
Voluntary work, participation in Third World and human rights organizations, percent of respondents answering positively.
Source: own calculations based on European Social Survey and World Development Report 2004.

With the exception of Slovenia, all the post socialist countries are below the median GDP, and the same may be said about participation in voluntary work; with the exception of Belarus, all the post socialist countries are again below the median for participation in Third World and Human Rights associations. The medians of the two sets of countries (old and new EU members) bring out that the GDP is 2.44 times greater in the old EU countries; in terms of civil society participation it is 9.5 times greater and for participation in voluntary unpaid work, it is 7.25 times greater. This is evidence of a 'civil society deficit'. Not surprisingly then we see very high correlations between GDP and participation in civil society associations (0.52 and 0.63).

Typically, societies with active civil societies are prosperous and citizens have considerable spare time and disposable income. Overall, however, the new EU members from Central and Eastern Europe had a participation gap far in excess of the differences in GDP.

Organisational Development

The other side to levels of participation is the structure of civil society associations. The US Agency for International Development (USAID) uses a seven-point scale (1 – high development, 7 – poor) to measure the 'sustainability' of various non-profit organisations. USAID and similar international groups possess a different ideological view of civil society to that of the civil society reformers who legitimated opposition to state socialism. They refer to NGOs (non governmental organisations), which (as noted above) promote certain types of values as well as support for new associations. The vitality of NGOs, nevertheless, is an important indicator of the effects of transformation policies. Moreover, one should address the extent to which such organisations could be made accountable to their members, clients and beneficiaries, as well as to society as a whole.

USAID has measured the 'sustainability' of NGOs in the post communist countries. A score of between 1 and 3 indicates consolidation of the society into a western type democracy; 3 to 5 mid-transition stage and early transition 5 to 7. These scores are aggregated from seven components of civil society associations: legal environment, organisational capacity, financial viability, advocacy, service provision, infrastructure and public image. The top scores giving a 'consolidated civil society' show what Western policy makers consider to be a vibrant civil society.

In a 'consolidated' (as defined here and below by USAID[12]) civil society, the *legislative and regulatory framework* makes special provisions for the needs of NGOs or non-profit organisations, such as tax exemptions and the ability to compete freely for government contracts; the NGOs have sufficient expertise, and a legal framework exists. When *organisational capacity* is consolidated, 'transparently governed and capably managed non-governmental organisations exist across a variety of sectors'; they have boards of directors and clearly defined responsibilities; they have permanent and well-trained staff and a base of volunteers and strong local constituencies. Developed *financial viability* involves a network of organisations having sound management, independent audits, multiple sources of viable funding from local sources (government and corporate) and earned income. *Advocacy* is the term used to describe the ability of the non-governmental sector to 'respond to changing needs, issues and interests of the community and country.' In a consolidated system, NGOs have an institutional base to pursue issues of common interest and they promote legislation. They participate actively in politics by lobbying political parties and they lobby executive bodies. They have a mobilisation capacity both for citizens and for themselves. *Service provision* involves the delivery of products and services in the sphere of 'economic development, environmental protection and democratic government'. Here NGOs contract with government as well as private foundations. *Developed infrastructure* describes organisations and centres that provide training, information, legal support, and units to

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[12] US Agency for International Development 2003, NGO Sustainability, Statistical Appendix. http://www. usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/2003/index.htm

organise and coordinate fundraising as well as accounting and communication. Finally a consolidated civil society possesses a positive *public image* of non-government organisations. This involves trust in NGOs and voluntary participation in public work. Such an image is furthered by 'increased accountability, transparency and self-regulation within the non-profit sector'.

These criteria are useful indicators of how different is the conception of civil society from that of the more normative accounts attributed to theorists of civil society and civic associations which arose during the fall of state socialism. USAID also takes a much narrower definition of 'non-government organisations': the emphasis in their reports is not on self-sustaining groups but on the development of organisations which may take on activities in place of, or in addition to, presently state sponsored ones, also the organisation is strongly steeped in values of marketisation and destatisation. How one defines 'civil society' is dependent on one's ideological predispositions. However, the definition of the structure and framework of NGOs provides important information about the current development and sustainability of such associations.

Table 4: NGO Sustainability Scores: Former State Socialist Countries 1997 – 2003

	1997	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**
Czech Rep.	na	na	na	2.4	2.3	2.5	2.4
Estonia	na	na	na	2.4	2.1	2.2	2.2
Hungary	2.3	1.6	2.1	2.3	2.6	2.6	2.7
Latvia	3.6	4.2		2.8	2.9	2.8	2.7
Lithuania	4.0	3.0	2.9	3.1	2.9	2.7	2.5
Poland	1.8	2.0	2.1	2.1	2.1	2.2	2.1
Slovakia	2.8	2.8	2.2	1.9	1.9	2.1	2.2
Slovenia	na	na	na	na	na	na	3.4
Romania	3.6	3.8	4.0	4.1	4.0	3.7	3.8
Russia	3.4	3.4	4.1	4.3	4.2	4.0	4.4
Ukraine	4.0	4.2	4.1	4.4	4.3	4.0	3.9

Source: US Agency for International Development 2003, NGO Sustainability, Statistical Appendix.
http://www.usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/2003/index.htm

Table 4 is a summary of the scores achieved by eight new EU members between 1997 and 2003 (for comparison, Romania, Ukraine and Russia are added). The new member states are all in the 'consolidation' phase, with Poland and Estonia having the most sustainable non-government sector – at least in terms of the USAID measurements. The non-EU members, Romania, Russia and Ukraine by 2003 were still at the mid-transition stage. The societies with the strongest NGO sectors were Poland (2.1), Estonia (2.2), Slovakia (2.2); the weakest was Slovenia (3.4). A considerable gap had arisen between the new EU members and Russia (4.4) and Ukraine (3.9). The scores for the components of sustainability are shown in Table 5. Five out of eight new members had relatively poor financial viability with scores of more than three. Hungary (1.3), Lithuania (1.6) and Estonia (1.8) on the basis of this reckoning had more effective legal frameworks in place.

Table 5. Dimension Scores of Civil Society 2003

	Legal Environment	Organizational Capacity	Financial Viability	Public Image	Advocacy	Service Provision	Infrastructure	Final Scores
New EU members								
Czech Republic	3.0	2.9	1.9	2.1	2.0	2.2	3.0	2.4
Estonia	1.8	2.6	2.6	2.2	2.0	2.5	2.0	2.2
Hungary	1.3	2.9	3.3	3.2	3.3	2.3	2.4	2.7
Latvia	2.6	2.9	3.3	2.8	2.0	2.5	2.8	2.7
Lithuania	1.6	2.6	3.0	3.3	1.6	3.4	2.2	2.5
Poland	2.0	2.2	2.8	2.2	1.9	2.0	1.9	2.1
Slovakia	2.5	2.0	3.2	1.8	1.6	2.2	1.9	2.2
Slovenia	3.7	3.5	3.3	3.6	3.0	3.0	3.8	3.4
Average new EU members	*2.3*	*2.8*	*2.9*	*2.5*	*2.1*	*2.6*	*2.6*	*2.5*
Romania	4.0	3.8	4.3	4.0	3.8	3.1	3.6	3.8
Russia	4.3	4.3	4.9	4.6	4.5	4.1	4.0	4.4

Source: US Agency for International Development 2003, NGO Sustainability, Statistical Appendix.
http://www.usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/2003/index.htm

These quantitative measures, however useful in demarcating differences between different countries, have some drawbacks. In order to justify their own activity and secure further support there may be a tendency for NGOs and their sponsors to paint a rosier picture than is the case. Indeed, as we shall note below, individual country studies conducted by USAID NGOs often show the lack of capacity of civil society organizations in these countries. Governments, too, in seeking to fulfil conditionality requirements of the European Union and other aid giving bodies, have an interest in showing progress towards civil society creation. The rankings, however, bring out the significance of differences between the new states.

NGO Sustainability: Poland, Hungary, Czech Republic and Ukraine

These measures leave unstated the more qualitative aspects of civil society associations, such as their role in the provision of services and their accountability. Several of these topics are considered in detail by the following contributions in this publication. Here I review Poland, Hungary, Czech Republic and Ukraine. (The last is taken as an example of a country on the periphery of the EU and a possible future member).

Poland has a comparatively large NGO sector in the post-communist societies: there are 41,000 registered organizations, of which 36,000 are associations and the remainder foundations.[13] The most numerous type of NGOs is that of the trade union branches, of which there were over

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[13] US Agency for International Development 2003, NGO Sustainability, p. 145. http://www.usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/2003/index.htm

17,000 in 2003, followed by over 15,000 units of the Roman Catholic Church.[14] The activities of NGOs include the provision of basic services – education, health care, social assistance, promotion of culture and environmental protection and the promotion of human rights.[15] Many civil society organizations were founded and financed by foreigners, especially American public and private donors.[16] While difficult to quantify, it is widely recognized that 'The main problem of NGO infrastructure improvement is [the] dependency [of organizations] on sponsors, most of which are foreign donors'.[17] The Polish-American Freedom Foundation has taken over some of the funding left after the departure of American actors (which led to a fall in Poland's sustainability score in 1999 and in 2002). Other forms of income, particularly government support is gaining ground: 'many local NGOs are vitally dependent on local government decisions to grant subsidies or provide public work space'[18]. Financial viability has become weaker since 1998: the viability score has moved from 2.0 in that year to 2.8 in 2003. Government support for NGOs is limited; organizations with the status of Boards of Public Benefit Activity can receive contributions from donors, which are tax free for up to 1 per cent of their income. This in turn involves a government audit. Polish NGOs lack internal ethical codes and many do not publish annual reports. The decline of foreign funding and the parsimony of Polish public funds turn the NGO sector to seek support from the EU, particularly from its structural funds. The Law on Public Benefit Organizations and Volunteer Work requires annual reports though it may not apply to those who get funding from outside bodies.

In 2003, in the Czech Republic were 58,000 registered NGOs. In 2004, NGOs were regulated by legislation covering different associations; there was a law on volunteerism, and one on Civic law was being drafted. NGOs are not required to draft annual reports or to make public their finances. Tax legislation is in place which enables gifts and endowments from foundations to be tax exempt, other donors also have some exemptions. Foreign donors were significant in the early days of transition but their support has declined by 2003 when some 85 per cent of income was domestically sourced.[19] A third of total income originates from public budgets, Czech foundations provided 10 per cent, corporate financing 11 per cent, individual contributions 7 per cent and income generation 20 per cent. There is some public distrust of NGOs and public authorities seek to limit the sector's participation.[20] Political lobbying is poorly developed. As in other new member countries, 'The biggest problem service organisations face is their lack of financial sustainability, exacerbated by the low purchasing power of other NGOs and the decreasing number of donors…' [21] In the Czech Republic, the non-profit sector has a relatively low profile, organisations are poorly financed, lack transparency; have poorly qualified staff and haphazard provision of services.

In Hungary, the sustainability of NGOs has fallen consistently since 1998. In 2003, the non-profit sector was particularly hit by falls in budgets. Overall, the sector lacks financial viability. Staff is low paid and poorly trained. The government is the most active supporter of the sector and foundations established by political parties may receive finance. In 2003 the National Civil Fund Program provided support to the sector. Government matches private contributions to NGOs, and taxpayers may donate one per cent of designated tax liability. By far the preponderance of finance comes from the government making the sector dependent on it. In 2001, 83 per

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[14] Klon/Jawor Association, 'Situation of non-governmental sector in Poland in 2004' http://english.ngo.pl/labeo/appcms/x/48315

[15] NGO Sustainability Index 1999, p.79.

[16] USAID NGO Sustainability Index 2003, ibid. p.145.

[17] ibid. p.152.

[18] ibid. p.147.

[19] ibid. p.66.

[20] ibid. p.67.

[21] ibid. p.68.

cent of NGOs with a budget under $700 were short of resources. Mid-sized organisations are dependent on state grants and 84 per cent of the income of human rights organisations is derived from international private donors which led to their collapse when international support was withdrawn.[22] As in other post-communist societies, the decline in foreign help has been replaced by greater state financing, though this is insufficient. In future EU matching funds are seen as a possible source of support. State maintenance and the bailing out of failing or bankrupt civil society organisations seem to be a developing condition of the NGO sector in Hungary.

Ukraine is not a member of the EU though it is a potential candidate country and is cited here for comparison. According to USAID, it is not at the consolidated stage but in 2003 was still at a transition stage with an overall score of 3.9: this gives a rating suggesting that practices and policies only minimally sustain NGOs: 'progress may be hampered by a stagnant economy, a passive government, a disinterested media or a community of good-willed but inexperienced activists'.[23] The NGO sector is highly dependent on foreign sponsors, with little (though growing) support from government and business. Dependence on external donors 'negatively affects the NGO sector's ability to provide goods and services that truly reflect the needs and priorities of their communities'.[24] Such sponsors influence the priorities and activity of associations. The financial basis of most NGOs is unstable; the financial viability index is 4.8. NGOs, as in all continental European societies, are registered with the authorities: in 2003, 30,000 units were registered of which 4,000 were active.[25] Laws regulate the sector and grants, donations and loans are tax-free. A law on Social Services allows government procurement of NGOs to provide services. The legal sphere, however, contains ambiguous and contradictory laws often restricting the activity of NGOs. The sector is not very effective as a lobbying group on government though the government decree 'On Citizens' Engagement in the Decision-Making Process' envisages advisory boards with NGO participation. Most of NGO activity is addressed to the provision of social services – humanitarian assistance, youth initiatives and environmental concerns. The intervention of NGOs in the Presidential elections of 2004/05 highlights the contentious role of foreign sponsored organizations in the electoral process, often to secure the election of their own favoured candidates. The American National Endowment for Democracy had available over fifteen million dollars for the Ukraine alone, in 2004 it spend over two million dollars.'[26]

The Sustainability of Civil Society Associations

On the basis of this overview, the sustainability of NGOs is confounded by considerable problems. Membership of voluntary organizations is lower than in the old member states, though there are some exceptions, particularly in the trade unions. Since the collapse of the state socialist system, a legal framework is being set up, though by 2004 it was incomplete and ambiguity remained. Many organizations have been formed on the basis of sponsors' purses; they lack transparency, self-regulation, and independent forms of finance. Since the departure of foreign funding they look to public financial support including that of the EU. The withdrawal of 'long-term supporters such as USAID and British DFID… caus[ed] a substantial reduction in the an-

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[22] ibid. p.90,91.

[23] Ibid. p.5 (criteria for level 4).

[24] Ibid. p.206.

[25] Ibid. p.201.

[26] The following is one example, $50,000 was given to the Institute for Euro-Atlantic Cooperation 'to build support for greater integration of Ukraine into Western political and economic structures. The Institute will organize four roundtable meetings on "Ukraine in the Euro-Atlantic Space: Experience and Perspectives" and two training sessions for NGO leaders on management and public relations techniques and the workings of Western institutions such as NATO and the EU. *National Endowment for Democracy Report* made available to current author.

nual amount of support available to the … NGO sector.'[27] NGOs are lacking in resources, the professional qualifications of employees are low and the infrastructure of support is weak. Active membership of civil society organisations is low and puts in question their effectiveness as interest groups articulating public interests. The sector is lacking in organizational capacity and regularized forms of accountability and transparency. In the public image, NGOs are compromised due to their lack of competence and lack of transparency. It might be questioned whether they are bodies which can effectively take over responsibilities currently assigned to local and central government.

Since the disintegration of state socialism, USAID reports have shown considerable progress with respect to the legal framework, citizen participation, organisational capacity, financial support and general public awareness of the civil society groups in the new member states. Social surveys, which have been conducted in European societies, show a lower level in the new EU member states than in the older ones in terms of level of membership, participation and public finance of civil society organizations. As inputs to the political process, the infrastructure of interest groups and political parties needs further development. With respect to civil society associations as political outputs, those in the post-communist countries lack transparency, adequate monitoring and responsibility. Financially, organizations are not viable; there is a dependence on sponsors and reliance on foreign backers, which has left the sector financially vulnerable. The relatively low level of economic productivity in the post-communist societies, and the small amount of personal disposable income precludes the development of financially self-sustaining organizations. NGO activities are often 'donor driven' and lack a local constituency and membership base.[28] While answerable to their sponsors, there is an absence of accountability to users of services. The sector is unable to respond to potential service users' needs. There is a general tendency for these groups to be separate from society; consequently, they are often viewed by the public with suspicion. One might question whether the conditions in the post-communist societies are appropriate for the development of a non-profit sector in ways intended by USAID policy. Attempts to provide alternative social services may weaken even further state provision which itself suffers under stringent budgetary cuts. The influence of foreign donors has even more distorted the provision of services.

From a policy point of view, the further development of civil society groups in the new member states within the context of the European Union should first take account of the unique culture and history of these societies. Civil society organizations in the old states of the European Union have different forms, profiles and priorities: Germany, the United Kingdom and Spain have different kinds of civil societies. However, trade unions in the new EU member states have a very high level of participation and might be considered a base for the exercise of accountability reforms – especially in countering economic corruption. Policy priorities assumed by organizations such as DFID, USAID, the National Endowment For Democracy, the Open Society Foundation, Freedom House do not always coincide with those of people living in the areas concerned. There is therefore a need for greater answerability of the growing number of NGOs and civil society organisations, many of which are founded and funded by foreign bodies.

Accountability

The development of 'new forms of social and economic governance in the EU', involving the participation of civic society groups from the new member states, is unlikely to be effective until the preconditions of building effective civil society associations have been fulfilled. The EU Subcommittee on Civil Society Organisations, has opined that the 'difficulties besetting both western and eastern European countries are not purely economic, social and financial.

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[27] Report on Slovakia, ibid p. 177

[28] Ibid p.177

They are mostly related to internal changes in the way civil society is organised…'[29]. But for the post-communist countries, the economic and financial aspects are crucial conditions for the development of civil society in the first place.

Answerability and accountability are clearly important issues. But in addressing the question of how the EU can enhance them, one must not be lose sight of the fact that the normative concept of civil society associations is that they should be autonomous self-sustaining bodies and this entails independence from the state and corporate economy. Had the early Western trade union movement been 'responsible and answerable' for their actions to the state and employers, there would never have been free independent trade unions. Indeed, it may well be that the focus in defining new forms of governance and answerability, should not be on making civil society associations 'answerable', but on encouraging such groups to secure accountability of government and corporate capital. Civil society associations in Western societies promote such accountability through direct action (boycotts, strikes), indirectly through media activity and lobbying and also through cooperation with the state and corporations – cooptation onto government bodies and worker codetermination on workers councils and governing bodies.

Civil society associations need their own forms of governance: an unambiguous legal framework, particularly with respect to taxation law, defined internal procedures, transparent forms of responsibility are desirable. It is when civil society associations become entangled with public bodies, are dependent on them for assets, income and general finance that accountability becomes more important and requires a regulatory role by the state – and particularly by the EU, should such associations receive financial support. In this context, conditionality of donors might include the provision of annual reports, the audit of accounts and the election of office holders. Answerability may take different forms depending on the type of association. The relevance of different types of stakeholders – sponsors, employees, and clients – has to be addressed in establishing lines of accountability.

For purposes of accountability, civil society organizations may be classified into different types depending on their major form of finance (state, corporate economy, participants/beneficiaries) and type of regulation (direct, indirect and self-regulation). A provisional categorization is suggested in Figure 1. The source of finance defines the type of regulation which different associations require. If churches or political parties, for example, receive state finance then they are regulated by four different types of control: general laws (giving rights/ or constraints on association and speech), specific laws (defining the uses to which state provision can be put), taxation law (when appropriate, defining the type of activity which associations may benefit) and self-regulation (statutes binding the association's members and rules of association). Where the corporate economy sources associations, state laws also apply in different ways to regulate the financial provisions, through tax laws for example. Where participants and beneficiaries are self-financing, associations are usually only constrained by general laws and self-regulation (unless they afford themselves of taxation benefits). The table shows various combinations of regulation, depending on choices made by civil society organisations or choices made for them. Only legal regulation is shown here, as a consequence of state finance, in addition, associations may be required to accept co-opted representatives on their executive committees to ensure their compliance with the terms of financial support.

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[29] 'The Role and Contribution of Civil Society Organisations in the Building of Europe', Economic and Social Committee 22 September 1999. CES 851/99 D/GW. Paragraph 4.3.

Figure 1. Types of Regulation of Civil Society Associations by Source of Finance

	Type of Regulation				
	General Laws (Indirect)	Specific Laws (Direct)	Taxation (Indirect)	Self-Regulation	
Associations					*Source of Finance*
Churches, Political Parties, Health care provision	X	X	X	X	State
Political Parties, Humanitarian aid, Educational institutions	X	X	X	X	Corporate Economy
Churches, Parties, Youth organizations, Sports Clubs, Environmental associations	X			X	Participants/ Beneficiaries

Civil society associations indulge in many different types of activity which may need regulation. As indicated in Figure 2, the type of activities pursued range from political lobbying through the provision of public services to strikes, boycotts and demonstrations. It is contended that relevant stakeholders may be the appropriate form of accountability. As indicated in Figure 2, these range from sponsors, through members to the government. While the emphasis in much civil society literature is on the independence of group organization, the concern here is with the responsibility and answerability of groups and networks to the wider public and society.

Figure 2. Responsibility of Civil Society Organizations by Types of Activity

	Type of Activity						
	Lobbying	Media	Public Service Provision	Member Service Provision	Strikes	Boycotts	Demonstrations
Stake Holders							
Sponsors	X	X	X	X			X
Consumers			X		X	X	
Members	X	X	X	X	X	X	X
Clients	X	X	X	X		X	
Governments	X	X	X	X	X	X	X

The chart brings out the importance of government as a stakeholder in all these activities. This does not mean that government runs and controls civil society organisations but that the government has a responsibility for the provision at least of a legal environment in which activities

may take place. In providing services to members (religious services) the state also has a responsibility to consider the impact on other interests; hence there is a pluralism of answerability even of church associations – to members, clients, sponsors and the state. The problem here is to maintain the autonomy of civil society organisations and concurrently provide some safeguards to stakeholders that their interests are promoted, and not infringed.

Conclusions

This chapter has shown that compared to the old members of the European Union, there is a qualitative 'deficit' in the sphere of civil society associations in the new member states. Regulation and a legislative framework can only be effective if civil society is constituted from self-sustaining associations with a viable organisational capacity. Civil society organisations as effective political inputs are concentrated in countries with high levels of economic development, and robust autonomous civil society organizations will only develop in the new states in pace with a substantial rise in economic development. Without an adequate structure of employment and personal income, the financial sustainability of civil society organizations is imperilled and their capacity to act as political inputs to the political process severely weakened. Civil society organizations are generally too weak to take over the provision of services on a substantial scale. Hence there is a danger that ad hoc development of NGOs as providers of collective services will lead to piecemeal development. For a considerable time to come, provision of services should be predicated on local and central government institutions. These in turn should be made subject to greater democratic control and answerability and in this respect civil society associations have an important role to play. Such associations may lobby governments and may promote accountability through strikes and demonstrations (or the threat of them). The postcommunist societies have particularly weak civil society organisations as political inputs; most of all they need to be strengthened as a component of democratic government. Concurrently with the development of accountability mechanisms, policy needs to consider means to promote the development of associations which might articulate and defend group interests. The postcommunist societies have some civil society assets, particularly in the trade union movement. In countries with a weak and often illegitimate business class, the unions might well be developed as a support for government stability. While civil society organizations require autonomy, their accountability is dependent on different kinds of stakeholders and the types of activities they promote. In addition to analyzing the answerability of civil society organization in terms of legal norms, attention should make such associations responsible to different types of stakeholders not only to those who support and constitute civil society organisations, but also to the constituencies (sponsors, consumers, clients, members, and society at large) that benefit. The accountability of civil society organisations has to strike a balance between maintaining their autonomy and ensuring that the interests of stakeholders are furthered, not infringed.

Zdenka Mansfeldová

Political and Administrative Accountability in the Czech Republic

1. Introduction

Accountability is a problem in every democracy, particularly in countries in the process of building a democratic system and market economy. Accountability is linked with the delegation of power, the existence of classical democratic checks and balances, potential abuses of power, and the existence of sanctions. A legislative foundation can create the necessary framework for accountability, but political practice may be different as "the rules of the game" are created gradually. Often, the weaknesses of specific legislation are revealed only after such legislation has been put into practice. Accountability is related to the institutionalisation of democratic structures, the establishment of democratic values, the acquisition of experience, the profession-alisation of the elite and, last but not least, external political and economic influences. Account-ability differs from transparency in that it only enables negative feedback after a decision or action, while transparency also enables negative feedback before or during a decision or action.

We can distinguish between different directions and different forms of accountability. With respect to direction, we can accept the basic differentiation introduced by O'Donnell [O'Donnell 1998] between vertical and horizontal accountability, according to which vertical accountability "describes the relationships between unequal [actor]s", including relationships between superiors and inferiors and between voters and their representatives. Horizontal ac-countability includes relationships between equals, i.e., between democratic institutions them-selves [Schedler 1999 and others]. Horizontal accountability depends on there being a system of "checks and balances", and includes the executive, legislative and judiciary powers on the one hand, and on the other the institutions that supervise, control, intervene and impose sanctions in the event of illegal misconduct [O'Donnell 1998].

O'Donnell emphasises the importance of horizontal accountability in new democracies because "reasonably free and fair elections provide a means of vertical accountability in these countries, along with freedoms of speech, the press, and association, which permit citizens to voice social demands to public officials…Elections, however, occur only periodically, and their effective-ness at securing vertical accountability is unclear" [1998: 112–113]. There are two distinct (though sometimes coinciding) ways in which horizontal accountability can be violated. The first is encroachment; the second is corruption (when a public official obtains illegal advantages, whether for personal use or for the benefit of associates) [O'Donnell 1998:121]. We often en-counter both these phenomena in new democracies, and the Czech Republic is no exception to this. According to the *Transparency International Corruption Perception Index* (CPI) ranking 146 countries, in 2004 the Czech Republic ranked 51st. When we compare the position of the Czech Republic with other CEE countries, we can see that the CR is one of the more corrupt. The least corrupt countries among CEE countries are Slovenia and Estonia. For comparison, Germany has a CPI of 8.2 (ranking 15th), and the US 7.5 (ranking 17th).

With respect to forms, three forms of accountability are relevant here. *Political accountability* concerns responsibility for political decisions and refers to actors in the political decision-making process, whereas *administrative accountability* concerns responsibility for bureaucratic implementation and refers to actors in the implementation process of political decisions. Both political accountability and administrative accountability are focused on the content of policy measures and quality of implementation. *Legal accountability*, on the contrary, relates to the forms of participation in policy making and implementation, and concerns responsibility for the legality of the means employed to influence decisions, and refers to all actors in political deci-sion-making and implementation. For the purposes of this paper, political and administrative

forms of accountability are the most relevant; civil society organisations oversee the contents of policy measures and the quality of implementation.

Accountability is relevant at all levels of governance – the local, regional, national and the European Union (EU)/supranational levels. Each level of governance usually includes its own combination of horizontal and vertical dimensions. Some authors argue for a "vertical" or "external" mechanism of accountability and for a more conventional "internal" or "horizontal" mechanism of accountability. In addition, accountability is influenced by a number of international and supranational organisations which bring their own standards and know-how to civil society organisations and often provide financial support for these organisations as well. When discussing recommendations as to what can be done to strengthen horizontal as well as vertical accountability, O'Donnell says: "Encourage domestic actors – especially the media and the various social organizations working on behalf of vertical accountability – to remain active and persistent. Transnational organizations and networks can be helpful too" [O'Donnell 1998:122–123].

Freedom of speech and freedom of the press in the Czech Republic were formally instituted when the country was founded. There exists a wide spectrum of independent electronic and printed media in the CR, and we have witnessed a loosening of the influence of political parties on the media, although the independence of some media, especially public television, is still subject to debate. With digitalisation in the planning, we can expect further development in the sphere of electronic media and its pluralisation. Investigative journalism is still underdeveloped.

As P. Schmitter cautions, accountability can be oblique [Schmitter, 1999: 62]. Oblique accountability envisages non-state or semi-state institutions manoeuvring against those with power in order to heighten awareness of, and provoke reaction against, alleged breaches of obligations.

Social accountability does not take place in a vacuum. It requires a set of regulatory, institutional and political conditions. The existence of an enabling environment for civic engagement and social accountability involves three basic dimensions: 1. a regulatory framework, 2. a political and institutional setting, and 3. a civic culture of a given society which affects the way civil society organisations and public institutions engage in policy dialogue, advance systems of social and public accountability, and co-operate in providing public services. [Reuben 2002:16]. Reuben summarises the conditions that facilitate and influence civic engagement and social accountability in the following table.

Table l. Conditions for social accountability and civic engagement

Factors	Regulatory Environment	Political/ Institutional Setting	Civic Culture
Association	Freedom of Association	Recognition	Social capital
Resources	Tax systems, fundraising and procurement regulations	Government grants, private funds, contracting, other transferences	Social philanthropy (the culture of giving)
Voice	Freedom of expression. Media and information and communication technologies related laws	Political use of public media	Communication practices (use of media by different social groups)
Information	Freedom of information. Right to access public information. Public disclosure regulations	Information disclosure policies and practices. Ability to disseminate public information	Information network, the use of the word of mouth
Negotiation	Legally established dialogue spaces (referendums, lobby regulations, public forum, etc.)	Political will. Customary policy dialogues and social accountability mechanisms. Parliaments', and local and national governments' capacities to engage	Tolerance. Listening practices

Source: Reuben 2002:17.

2. Regulatory Environment

The aim of this part is to describe Czech legislation that impacts the existence and functioning of civil society actors and allows a broad spectrum of actions and mechanisms that can be used to hold public officials and servants accountable, and in general create the conditions for civil engagement and participation.

General legislative framework

Associations of citizens and activities of non-government non-profit organisations (NGOs) in the Czech Republic are governed by the following laws, which address the process of registration, organisational structure, financial procedures, management and termination of an organisation:

- Civic associations are governed by Act No. 83/1990 Coll., on the Association of Citizens, as currently in force
- Generally beneficial organisations are governed by Act No. 248/1995 Coll., on Generally Beneficial Organisations in the version of the Amendment to Act No. 208/2002 Coll.
- Foundations and foundation funds are governed by Act No. 227/1997 Coll., on Foundations and Foundation Funds in the version of the Amendment to Act No. 210/2002 Coll.
- Churches, religious societies, and religious legal entities are governed by Act No. 3/2002 Coll., on the Freedom of Religious Faith and the Position of Churches and Religious Societies.

Other areas in which NGOs are active include:

- Voluntary services – Act No. 198/2002 Coll., on Voluntary Service
- Public collections – Act No. 117/2001 Coll., on Public Collections.

There are also many other general laws in Czech legislation that apply to NGOs. Among the most important are the following:

- tax laws (e.g. Act No. 586/1992 Coll., on Income Taxes, as currently in force)
- accounting laws (Act No. 563/1991 Coll., on Accounting, as amended).

Work is underway on a new amendment to the Civil Code which will significantly affect the activities of NGOs.

As stated above, legal provisions related to the right to associate are contained in Act No. 83/1990 Coll., on the Association of Citizens, as well as Act No. 116/1985 Coll., on the Conditions of Activities of Organisations with an International Element in the Czechoslovak Socialist Republic, which, while still valid, is at variance with the Declaration of Basic Rights and Freedoms and is obsolete. Act No. 83/1990 Coll., addressing the activities of civic associations, has been criticised as too general. Some organisations, which according to the nature of their activities are generally beneficial societies, prefer to register as civic associations as a result of the non-binding legislation. Such a legislative environment does not contribute to the transparency of non-profit organisations (especially in view of the fact that civic associations constitute almost 90 per cent of the total number of Czech NGOs). Attempts to change the inappropriate legislative situation have been hampered by a lack of political will.

Kolář and Syllová [Kolář, Syllová 2005] characterise developments regarding the legal provisions for the functioning of the third sector in the following basic terms: the private non-profit sector underwent stormy legislative developments after 1989. The legal space was opened immediately after the change of the political system, but based on old legal forms inappropriate for this purpose. Some non-profit organisations started to appear in the legal form of associations, i.e., based on the association law as civic associations. Legally, this form was very vague, and this is still largely true today. Most traditional leisure activities – sports, voluntary firefighting,

gamekeeping, gardening, working with children and youths – are organised based on this legal form. Lobby groups and mutual assistance and services groups (patients' associations, small-sized farmers, renters, consumers etc.) are organised on the same legal basis.

Very early on, the private non-profit sector started supplementing public services in some areas. At that time the state and public sector were retreating from their centralised services, and underwent a process of decentralisation. Basic reforms of the former budgetary and contribution organisations occurred. While budgetary organisations were reassigned to the category of state items,[1] contribution organisations (or the form of contribution organisations) were preserved. When self-administrative regions were established, some contribution organisations (and also some state items) were transferred to the districts[2], which concerned especially schools and hospitals.

A special regulation pertaining to the private non-profit sector was adopted as late as 1995, when the law on generally beneficial societies was passed. Originally, the law was intended to be an umbrella law for all non-profit legal entities; the poor quality of the preparatory work, however, resulted in the law addressing only generally beneficial societies. These legal entities are registered in the register of generally beneficial societies and their sphere of activity is restricted to "generally beneficial services under conditions set in advance and equal for all users". Therefore, these cannot be mutually beneficial organisations; any profit that beneficial organisations generate must be used to provide these services. The law has been harmonised with tax regulations.

The creation of 'purpose-driven associations of property' – foundations and foundation funds – was more complicated. An amendment to the Civil Code in 1992 introduced a new (or old-new) legal entity, the foundation, and foundation funds were placed on par with foundations. However, this was merely a framework, and it failed to address the management of foundations in a clear and complete manner. Therefore, in 1997 a new bill was passed which addressed foundations and foundation funds in a strict and relatively complex manner[3]. Because of the strictness of the legislation, the amendment resulted in the disbandment of many foundations: of the original 5,000 foundations, by 1998 as few as 1,000 remained. Foundations must be registered, must define in advance the ratio of the costs for the management of the foundation, must not do business under their own name (with many exceptions, however) etc. The obligation to prepare and keep annual reports is also addressed in the law, which is meant to facilitate internal and public control of foundations.[4] The new law on foundations has become one of the most successful pillars of the non-profit sector and basically complies with European standards. It has not yet been significantly amended [Kolář, Syllová 2005].

In addition to general legal forms, some legal entities have been created with a specific sphere of activity, and these have acquired special status, with advantages similar to those of generally beneficial legal entities. Churches and religious legal entities are another portion of the non-profit sector. Development in this sphere has been turbulent, and it is not yet over. A new legal regulation under preparation should establish a balance between the obligations of legal entities to perform generally beneficial services and protecting the autonomy of the church.

The current version of the law on association has brought a number of problems. One such problem is that the law does not expressly define any purposes for which an association may be founded. How an association is terminated is also not adequately addressed. Termination of an association is not linked solely to deletion from the register kept by the Department of Home

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[1] Act No. 219/2000 Coll., on the Property of the CR and its Conduct in Legal Relationships.

[2] Act No. 408/2001 Coll., on the Transfer of Some Items.

[3] Act No. 227/1997 Coll., on Foundations and Foundations Funds.

[4] Many foundations, however, do not comply with the obligation to keep annual reports. Compare Ekonomické výsledky nadačních subjektů v roce 2002, CVNS Brno 2004.

Affairs; an association may also terminate itself if it voluntarily disbands, or it merges with a-
nother association, or it may be terminated as a result of a final legal decision by the Department
on disbanding it. For this reason, the register includes associations that are no longer active.
This may distort the information provided by the Czech Statistical Office on the number of civic
associations in the CR. The estimate is that 15–20% of registered organisations are not active.
Today, there is no register of societies serving as a public list which societies would be obliga-
ted to notify with respect to information about their statutory bodies and identification number.
Although there is a Register of Civic Associations at the Department of Home Affairs of the
Czech Republic, it is not public and therefore it is not possible to obtain information about statu-
tory bodies, the length of its mandate, secretaries etc. This may have an impact on the transpa-
rency of civic associations from the perspective of third parties and the public.

One of the conditions for accountability, especially in relation to decision-making authorities, is
access to information – the possibility to ask and the right to demand answers, and the availabil-
ity and reliability of public documents and data. In this respect, the passage of bill No. 106/1999
Coll., dated 11 May 1999, on Free Access to Information, represents a landmark, as it addresses
the conditions pertaining to the right to free access to information and sets the basic conditions
under which information is provided. It defines obligated entities, which pursuant to this law are
obligated to provide information related to their competencies. The administrative system of the
state is stable; we have seen a marked improvement in information provision to citizens by the
public administration and the use of information and communication technologies for this pur-
pose, especially at the level of the central state administration. Pursuant to this law, each legally
obligated entity must always, by 1 March of each year, publish its annual report on its activities
for the previous calendar year. For example, the cabinet of the CR received 263 requests for
information in 2000, the first year the law was in force, and the number continues to grow. In
2001 there were 503 requests, in 2002 there were 394, in 2003 there were 328 and in 2004 there
were 349 requests. The percentage of directly settled requests is also rising, from the initial
80.6% in 2000 to the current 90%.[5]

3. Civil Society Organisations and NGOs in the Czech Republic

The issue of how civic participation and the non-profit sector in post-communist countries have
developed has been attracting increased attention from scientists as well as politicians. The main
question is primarily the extent to which civic society has already managed to become a pillar of
democracy. Social movements and NGOs can contribute to political accountability through their
influence on political culture. They can also influence horizontal accountability [Fox 2000].

The non-profit sector that emerged in the CR after the events of 1989 did not arise from a void;
there were already several officially recognised organisations that may be considered embryonic
forms of non-profit organisations – environmental organisations, tourist and sports clubs etc. In
addition to these there were, of course, several illegal and semi-legal organisations that served
as the foundation for a number of non-profit organisations after 1989. The Czech non-profit
sector, which has quite a rich history, saw resurgence after November 1989.

The non-profit sector plays a number of roles in democratic societies. A strong non-profit sector
may be a partner, critic or supporter of the government. Taking a little bit of licence, we can say
that societies are governed well in two cases: 1. when it is a mass of passive individuals who
cannot or do not want to associate, or 2. when it consists of citizens who are used to co-
operating and trusting each other and are actively interested in public affairs. The view that civic
society can support the government has taken hold in developed democratic countries over the
last ten or fifteen years. The United Nations is increasingly paying more attention to umbrella
organisations of civic society and believes that their support is helpful during the implementa-

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[5] Source: www.vlada.cz and author's calculations.

tion of political measures. The World Bank finances the civic sector in various ways. The European Commission is engaged in dialogue with the civic sector in which it strives to define resources for the sector as well as the conditions for supporting its development [Frištenská, Vyšín 2003: 8].

In modern democracies, non-profit organisations play an irreplaceable role, or, more precisely, roles. The first role is the participative role. Through their association in non-profit organisations, citizens strive to express their common interests and demands; they associate with the goal of solving their common problems. In this manner, citizens actively contribute to decision-making in a municipality, region or state, and thereby assume a certain share of the responsibility for decisions made by bodies of public power. This type of co-operation between the non-profit sector and the state administration or self-administration is mutually beneficial because non-profit organisations are often better informed about the realities involved and can therefore help decision-making bodies in defining issues that need to be solved. They can also identify functional problems and signal the need for changes in governmental organisations and in public services [Malena et al. 2004: 14]. Additionally, there are many experts in non-profit organisations whose knowledge and comments at public hearings improve proposed solutions. Citizens' involvement in non-profit organisations also contributes to their development as "homo politicus". People learn to formulate their opinions, learn to discuss and speak in public and improve their organisational skills; they form and shape their social and cultural capital [Rakušanová 2005]. As Henderson alerted us, this function is very important in Eastern Europe. In Slovakia, NGOs, 'civic associations' supported by the European Union, and Transparency International contributed in large part to the fall of Mečiar's cabinet [Henderson, in: Pridham/Ágh 2001: 220].

At the beginning of the 1990s a large number of non-profit organisations were created in the Czech Republic, often developing under the influence of stimuli coming from Western Europe and the United States. The Anglo-American concept of active citizenship and civil society was the ideological backdrop for this. The creation of NGOs was made possible by the involvement of supranational foundations (Open Society Fund, Foundation for Civil Society, Ford Foundation, National Democratic Institute) and inter-governmental programmes supporting civil society, including those of the British, Dutch and Canadian governments. The outcome of these interactions was the gradual introduction of types of activities and programmes that resulted in a breakthrough and a new understanding of practice and innovation in areas where the state traditionally dominated or that up to then had not been addressed at all.

Starting in the second half of the 1990s, the profile of NGOs started to change under the process of EU enlargement and the preparations of the Czech Republic for accession to the European Union. It brought new challenges for NGOs, such as the need to prepare themselves for changes in funding possibilities (the structural funds) and the opportunity to actively thematise some topics of European policies in the areas of regional and human resources development. The current situation attests to the fact that the process of preparation and implementation of large projects funded by the EU will become another milestone in the development of NGOs in the Czech Republic. The difference between large non-profit organisations and small NGOs (the majority), which will not be eligible for these EU funds, will also increase [Vajdová 2004].

It is very difficult to define non-profit sector organisations. The most recognised definition is probably that of L. Salamon. According to Salamon, an organisation needs to meet the following criteria in order to be recognised as a non-profit sector organisation: 1. *institutionalisation*; 2. *separation from the state and public administration*; 3. *use of potential profit for development of its own activities*; 4. *self administration* – management of its own activities independently and according to its own internal rules; 5. *voluntary basis* (the functioning of the organisation contains an element of voluntarism (voluntary work and/or contributions); and 6. *public benefit* [Salamon 1990].

The last attribute, however, does not apply to all types of non-profit organisations. From this perspective we can therefore distinguish two types of non-profit organisations. The first are mutually beneficial organisations (especially associations and societies which are established for the purpose of fulfilling the interests and needs of its members). Members of such organisations are brought together on the basis of various hobbies, social standing, age, ethnicity, religious persuasion etc.

The second type of non-profit organisations is the generally beneficial organisation. Their goal is to provide generally beneficial services to third parties, and they are open to all interested parties from the general public. These organisations are undoubtedly much more beneficial for society as a whole. Therefore, in many countries they are given an advantage over the mutually beneficial organisations, e.g., through various forms of tax exemptions. In the Czech Republic the law does not differentiate between mutually and generally beneficial organisations. Table 2 below documents how NGOs can be grouped according to the nature of their activities and the percentage of NGOs in each grouping.

Table 2: Numbers of non-profit organisations according to the main area of activity (%)

Recreation, sports and physical training	17
Social services	15
Culture and arts	14
Education and research	13
Ecology (environment)	9
Health	8
Community development and housing management	5
Civil rights and consultative education, human rights protection	4
Religious, churches	3
International activities	3
Trade unions, professional societies and entrepreneurial associations	3
Volunteer (charity)	2
Other	5

Source: Frištenská, Vyšín 2004.

In modern democracies, non-profit organisations play an irreplaceable role, or to be more exact, roles: (1.) *participative* – through association in non-profit organisations citizens strive to express their common interests and demands; they associate with the goal of addressing their common problems;[6] (2.) *servicing* – non-profit organisations provide services especially for groups of people who cannot satisfy their needs elsewhere;[7] (3.) *formation of plurality of opinions* – various marginalised groups of society can voice their interests and needs through association in non-profit organisations.

When analysing the third sector, some of the following aspects of its functioning are generally examined: the legal environment (legislative and regulatory framework), organisation resources

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[6] In this manner people actively contribute to co-decision-making in their municipality, region or the state and thus assume a certain portion of responsibility for decisions adopted by bodies of public power.

[7] Thus, non-profit organisations fill a gap by offering services generally provided by the state or the municipality. Services offered by the non-profit sector are usually very efficient because non-profit organisations are not forced to monitor profit generated from their activities. These services often are also more targeted because they stem from the actual needs of clients.

(functioning of an NGO, existence of educational and consultation mechanisms), financial viability (diverse funding sources, transparency of grant competition environment), defence (the non-profit sector monitors, demonstrates and defends its interests, is able to mobilise people and adapt to changes), provision of services (the non-profit sector considers and satisfies the needs and interests of people and social groups), infrastructure (existence of organisations providing training and support to the NGO), the image of NGOs among the public (knowledge and trust in the non-profit sector among the public, growing rate of voluntary work). The United States Agency for International Development (USAID) combines all these aspects in a non-profit sector viability index which it publishes annually [Stuart 2003].

4. The Formalisation and Structuring of Consultation and the Principle of Partnership[8]

Structural funds of the European Union are one of the funding possibilities for non-profit organisations in the Czech Republic. Though the principle of partnership is one of the basic building blocks of structural funds, the European Commission has not yet explicitly defined it, leaving it to the individual country to interpret this principle. Partnership means co-operation between the European Commission and institutions or organisations at the national, regional and local levels in all phases of the implementation of structural funds – from the preparation of programme documents to the use of resources and implementation of the projects. Explicatory documents of the European Commission[9] currently describe partnership as a dialogue with regional and local offices, economic and social partners, other relevant organisations (including those that attend to environmental protection and equal opportunities for men and women) and with citizens. However, nowhere is it defined how such co-operation between all the social and economic partners should occur.

From 1999–2002 the Czech Republic was preparing to submit the documentation needed in order for new member states to apply for structural funds. This preparatory phase can also be seen as a process in which the public should be included. Departments responsible for the creation of programme documents established a link on their websites to information sources and working versions of documents. In later phases of the programming process, when time was limited and the situation became more opaque, updated information was not available on the Internet. No schedule was set up for future or current activities and therefore most partners had only vague ideas about the process, deadlines for the completion of other documents and other steps. Despite these obstacles, Czech NGOs managed to become involved in the phase of preparing structural funds (1999–2002), primarily thanks to their own initiative and active interest in co-operation. Public hearings were organised by the Ministries responsible for operational plans in co-operation with the Ministry of Environmental Protection. These hearings were held only two weeks before the deadline for submitting the English version of the documents to the European Commission and therefore no significant changes in the structure or focus of individual measures could have been expected. During these two weeks, each of the six operating programmes was debated. The public hearings can be seen as one of the biggest success stories in the process; the meetings made the departments recognise the need to organise formal meetings to present the documents to the public and that such presentations were a necessary part of the

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[8] This portion of the text is based on a sociological study prepared based on a contract from CpKP: *Neziskovky a regionální rozvoj*, for CpKP Gabal Analysis & Consulting, 2003, and a study resulting from an international cooperation of CpKP and other Central and Eastern European countries: *Report on the Structural Fund Programming Process in Central Europe*, prepared by SF team Central Europe, 2003 (CpKP ČR, EEC Poland, CEPA Slovakia, NSC Hungary) and a report prepared by Frištenská and Vyšín [2004].

[9] European Commission: Plans and programming documents for the Structural funds 2000–2006: Vademecum, Luxembourg, 2000; European Commission: Structural Actions 2000–2006 – Commentary and Regulations, Luxembourg, 2000.

programming process. On the other hand, there was not a great deal of interest in these meetings. One reason for this may have been low awareness of the process in general, or the non-standard nature of the programming process. Because there is no data available, not even from the Council of the Government for NGOs (there are no statistics on the number, quality and relevance of comments), it is nearly impossible to measure the actual impact of partnership (public consultation) on the content of the programme documents. We can say that the drafters of the programmes and responsible ministerial officers respected the important comments. However, a list of the comments raised by the public during the programming period has never been published, to say nothing of any explicit publication of what or how comments were taken into account [Fryštenská, Vyšín 2004: 37]. The absence of this information precludes subsequent control.

In order to achieve social accountability, it is particularly important that non-profit organisations be included in the programme implementation phase – during the selection and follow-up monitoring of projects. As for the choice of projects, the situation will differ in the individual operating programme (only the Department of Environmental Protection has explicitly expressed that they intend to include NGOs in the Monitoring Committee, i.e., the body responsible for project selection).

Communication between non-profit organisations and the state is underdeveloped in the Czech Republic. On the part of the state, there is often no appropriate partner – for example, departments could include non-profit organisations in their agenda in fulfilling the vertical level of the principle of *partnership*, but only on the condition that there is a sectoral umbrella organisation [Gabal Consulting 2003]. The principle of *partnership* is one of the main principles of EU policy, including, on the **vertical axis,** close co-operation between the European Commission and corresponding bodies at national, regional and municipal levels, identified by each member state for all phases of implementing a measure, from preparation to realisation; and, on the **horizontal axis,** partnership at the level of a member country or a region where the term refers to the need of state administration, self-administration and public initiatives to co-operate. O'Donnell emphasises the need to create networks: "Effective horizontal accountability is not the product of isolated agencies, but of a network of agencies" [O'Donnell 1998:119].

Where civil society organisations that could get involved in programme implementation and monitoring are missing, or where the network is underdeveloped, is where "watch-dog"organisations play an important role. Watchdog organisations are usually established as a result of impetus from abroad, and they are able to function because of external funding. In the field of environmental protection, there are two very influential watchdog organisations in the Czech Republic that are part of the CEE Bankwatch Network[10]**,** an international non-governmental organisation that currently has member organisations in 10 countries in the CEE and CIS regions. The basic goal of the network is to monitor the activities of International Financial Institutions (IFIs) in the region, and to propose constructive alternatives to their policies and projects in the region. In the Czech Republic, the members of the CEE Bankwatch Network are the Centre for Transport and Energy (CDE) and Hnuti DUHA (DUHA Movement)[11].

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[10] The **CEE Bankwatch Network** was formally set up in 1995 and has become one of the strongest networks of environmental NGOs in Central and Eastern Europe. Members of the CEE Bankwatch Network are NGOs from Bulgaria, the Czech Republic, Estonia, Georgia, Hungary, Lithuania, Latvia, Poland, the Slovak Republic and Ukraine. The Network focuses mainly on energy, transport and the EU enlargement, while working to promote public participation and access to information about activities of IFIs in the CEE region. Members of the CEE Bankwatch Network attend the annual meetings of the IFIs and are engaged in an ongoing critical dialogue with their staff and Executive Directors at national, regional and international levels. The mission of this Network is to prevent environmental or social damage from being inflicted by international development funds, and to promote alternative solutions and public participation.

[11] Hnutí DUHA (DUHA Movement, http://www.hnutiduha.cz) is a member of the largest international environmental federation – Friends of the Earth. It uses the services of its office in Brussels. The movement monitors Czech legisla-

In addition to environmental protection, watchdog organisations in the Czech Republic are also active in areas such as advancing human and minority rights, fighting corruption, supervising compliance with laws, creating equal opportunities on the labour market, and promoting new methods of criminal justice and police work. These types of organisations are particularly well established in the US, Canada and Western Europe. The following are some of the watchdog organisations in the Czech Republic: EPS – Ekologický právní servis (EPS – Environmental Legal Service, environmental standards), Transparency International (fighting corruption), Bílý kruh bezpečí (White Circle of Safety, assistance to victims of violence), Gender Studies, o.p.s. and Otevřená společnost o.p.s. (Open Society) (both concerned with equal opportunities on the labour market), Člověk v tísni (People in Need, rights of minorities), Otevřená společnost o.p.s (Open Society, pilot project of community police), Sdružení pro probaci a mediaci (Association for Probation and Mediation, alternative punishment).

Monitoring committees – the chief bodies for implementing operation programmes which pass programme amendments and formulate criteria for project selection – should contain, according to an interpretation of the Act on the Support for Regional Development, at least two representatives of the non-profit sector (one each from the social and environmental domains). NGO representatives were nominated to the monitoring committees by the Council of the Government for NGOs after an open tender according to given criteria. The committees, in principle, respect the nomination of NGO representatives by the Council of the Government. In regional monitoring committees (regional development committees) there are at least two NGO representatives (again, one each for environmental and social issues), and in some regions there are as many as four NGO representatives.

However, these rules do not always function in real-world situations, and thus citizens, if they wish to influence and supervise the fulfilment of decisions that concern them, must resort to other methods. They can set up a civil association that is entitled to participate in zoning proceedings (e.g., for road construction) in a municipality. They have the right to obtain information that the local authorities may wish to keep secret or filter out. They can actively participate in negotiations and become involved in public consultation in decision-making. An example of such a civic association at the municipal level (of which there are many) is the Obyvatelé Ovčárecká association (Ovčárecká Inhabitants), whose members have protested against the worsening of the environment in their neighbourhood after the construction of the TPCA car factory (Toyota-Peugeot-Citroën Automobil), and which is attempting to identify those who failed to fulfil their obligations. Legal services are being provided by EPS – Ekologický právní servis (Environmental Legal Services), the above-mentioned watchdog organisation.

Social accountability can also be understood as a particular form of civic engagement. M. Kay, in the chapter *A New Approach to Legitimacy and Accountability. Limitations and Possibilities in the Context of the Enlarged EU* in this volume, claims that "citizens have rarely reacted to the issue of who now exercises executive power in the modern Irish State". Judging from the ISSP[12] Citizenship 2004 data, something similar can be said to be happening in the Czech Republic. One important finding concerns trust, and the fact that there is a clear linear relationship between trust in fellow EU citizens and participation in European Parliament (EP) elections. The more a respondent is inclined toward trusting fellow EU citizens, the more likely he/she is to have taken part in the 2002 EP elections. The difference between respondents inclined to trust the least and those inclined to trust the most is 500% (among those who trust the least, the like-

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tion related to emission trading, drafts comments on national documents and presents appeals to ministers. It also studies the financial aspects of environmental problems. It lobbies for European funds to be invested in the environmental development of Czech regions and strives to introduce rules to prevent funding going to projects that harm the land or contribute to air pollution.

[12] ISSP – The International Social Survey Programme is a continuing annual programme of cross-national collaboration on surveys covering topics important for social science research.

lihood of participation in EP elections is 0.3215; the likelihood among those who trust the most is 1.5439, with a growth coefficient of 1.299). Membership in both political and civic organisations influences participation in elections. Internal and external efficacy both play an important role when trying to understand people's perceptions of democracy and its functioning. The level of information and subjective ability to understand politics play a crucial role [see Rakušanová 2005].

The concept of social accountability is closely linked to participation. In many cases, citizens, communities and civil society organisations do not merely participate in social accountability activities but initiate and control them. While many participatory approaches focus exclusively on the individual community (or micro-level), social accountability mechanisms expand opportunities for participation at the macro-level [Malena et al. 2004:7].

At the end of this portion of the text, we must mention the importance of foreign funds for the development of the non-profit sector and civil society organisations in the 1990s, and of the relationships between foreign donor organisations and national recipients. On the vertical axis, the relationship between foreign donors and national recipients has consolidated; successful models for co-operation have been developed and mutually beneficial relationships have been established. National recipients carried out their projects; often, long-term co-operation has been established and modern organisational culture has been transferred. Foreign funds for Czech non-profit organisations have become quite diversified and we can see significant shifts. Because the Czech Republic is considered to be a consolidated democracy, after the accession of the country to the EU many foreign donors announced a move eastward, especially to the post-Soviet republics and South-Eastern Europe. For the interim period before the Czech Republic and other countries in the region are able to successfully partake of the new sources (e.g., structural funds and other EU programmes),[13] the *Trust for Civil Society in Central and Eastern Europe* was founded by a group of prominent US foundations, in June 2000. The members of this alliance are: Atlantic Philanthropies, the Charles Stewart Mott Foundation, the Ford Foundation, the German Marshall Fund of the United States, the Open Society Institute and the Rockefeller Brother Fund. The alliance has undertaken to spend USD 75 million on the development of civic society in the region between 2000 and 2010 [Rakušanová 2005].

Conclusion

In the Czech Republic, conditions have been created for social accountability and civil engagement. There is state support for civic engagement in the legislative framework as well as in funding. The political representation has also pledged to apply the principles of partnership and co-operation with non-profit organisations when applying for EU funds and formulating policies at national and regional levels. To some extent it has been possible to strengthen the voice and capacity of citizens. Insofar as organised civil society groups are able to control and make decision-making authorities accountable, such actions benefit not only the target groups whose interests are represented by a specific civil society organisation, but also other potential beneficiaries. One example is the actions of environmentally-oriented civil society groups.

As the research data shows, the non-profit sector is viewed positively by people. According to the general public, non-profit organisations contribute to solving social problems, both in general (over 54%), and concretely in their surroundings (more than 33% of respondents). Over 46% of respondents consider non-profit organisations in the Czech Republic to be well-organised and efficient in their sphere of activity (21.7% of respondents did not agree with this

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[13] EU pre-accession funds are Phare, Sapard and Ispa. Structural funds for which the Czech Republic qualifies after its accession are: the European Regional Development Fund (ERDF), the European Social Fund (ESF), the European Agricultural Guidance and Guarantee Fund (EAGGF) and the Financial Instrument for Fisheries Guidance (FIFG). The Cohesion Fund (CF) is somewhat different.

statement and almost 32% said they did not know). Approximately 27% of respondents, how-ever, said that non-profit organisations serve to fulfil the goals of individuals; these were mostly respondents with lower education (elementary education, vocational training or secondary with-out diploma) and men over 45 years of age. Regional differences have also been discovered [Rakušanová 2005]. This is related to the fact that societal organisations can encourage state accountability without necessarily being accountable to their base. An example of this is the watchdog organisation, which derives its legitimacy from a universal ideal of democracy, justice and environmental sustainability.

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Michał Federowicz and Michał Sitek

Accountability to the Forum:
The Case of Civil Society Interacting with Political Institutions

Introduction: Political Accountability – Definition, Problem, Case

The concept of accountability is most often defined in terms of delegation and the chain of principal-agent relations. Parliamentary democracy can be seen as a chain of delegation running from voters to elected representatives, from the representatives to the government and then from the government to civil servants – appointed officials responsible for the implementation of political decisions (Przeworski, 1996; Strom, 2000). The corresponding chain of accountability runs the opposite direction and mirrors the chain of delegation. Accordingly, the basic accountability relationship is between the parliament, which embodies popular sovereignty, and the executive branch of government. More broadly, political accountability is about voters, the ultimate principals, holding participants of the political decision-making process accountable. As Manin, Przeworski and Stokes wrote in their influential contribution (1999:40),

> Governments are 'accountable' if voters can discern whether governments are acting in their interest and sanction them appropriately, so that those incumbents who act in the best interests of citizens win re-election and those who do not lose them.

Along these lines, much of the literature on accountability has focused either on macro-institutional arrangements, such as the structure of executive-legislative relations and party systems, or on individual voting behaviour. It is clear, however, that just as it does not suffice to define democracy in a minimal sense, it likewise does not suffice to evaluate political accountability solely in terms of the design of political institutions and electoral results. This is one of many reasons to extend the scope of the concept of accountability. That is also why accountability is quite often used as a normative standard, a synonym for similarly vague notions such as responsibility, good governance or transparency, which attempt to grasp the more qualitative aspects of democratic performance. The growing complexity of the political process, characterized by experimentation with new modes of governance and increasing multi-dimensionality, is another important reason for the popularity of the concept of accountability. Nowadays, the lines of delegation and accountability extend well beyond the standard set of institutions of parliamentary democracy. The notion of accountability has been stretched to accommodate these developments and is used to describe how various actors, both public and private, are accountable to various types of principals.

The conceptual over-stretching which characterizes the use of 'accountability' in academic literature requires some clarification of terminology. A good point of reference, taken in this paper, is Bovens' proposal (2005), which defines accountability as

> a relationship between an actor and a forum, in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgement, and the actor can be sanctioned.

This conceptualization emphasizes three essential elements or stages of the relations between an actor and a forum: the obligation of an actor to explain its conduct, a forum to interrogate the actor about its conduct and, thirdly, a mechanism to pass judgment or impose sanctions. The main merit of Bovens' definition is its potential to introduce a fairly broad range of actors and forums, while preserving the basic logic of the accountability relationship. Depending on the forum, for example, several types of political accountability may be evident, including electoral accountability, exercised by voters at the ballot box; parliamentary accountability, based on

parliamentary oversight and confidence in the government; legal accountability, exercised by the courts; or social accountability, pertaining to broader state-society relations.

The importance of the latter is the main theme of this analysis. While we agree that the core mechanism of political accountability operates on election day, we argue that civil society, in the traditional sociological sense of the word, is of critical importance for political accountability. At a minimum, the mezzo-level institutional structures, situated between the micro-level of the family and the macro-level of the state, help voters to make well-informed decisions and strengthen other mechanisms of democratic control. One of most important examples is the controlling role of parliamentary opposition. When there is a deficit of a well-informed citizenry, the parliamentary opposition tends to make informal deals with the ruling party rather than openly compete for voters, thus forgoing its potential as a counterbalancing force. This seems to be a typical threat to young or weakly embedded democracies, where the cleavage between political elites and society is much deeper than between various political parties; thus, formal democratic institutions remain behind a façade of political and social life (Staniszkis, 2000). On the contrary, a structured pressure exerted by citizens makes the mechanisms of democratic control more vigorous. The formal and informal institutions of civic communication signal problems and empower citizens to sanction or reward political performance. In many cases it can be argued that such intermediate structures use accountability mechanisms of their own, helping to advance the political accountability of decision-makers in a more direct way. They may also, however, strengthen the controlling role of the existing formal political institutions. In this way, democratic institutions become both more socially embedded and more effective in exercising their fundamental role of democratic control. This paper considers an empirical case of one such development on the Polish political scene that took on the name "Rywin Gate", and which revealed the game-playing surrounding the government's media bill in 2002–2003. These events ultimately led to a change of government, followed by a significant shift on the political scene.

Political accountability and institutional change

The process of systemic transformation and democratic consolidation in post-communist countries is an important area in which to apply and test different conceptualizations of accountability. The process of democratization that has occurred in the region calls into question the traditional criteria of successful democratic consolidation, which are based solely on formal requirements. It is not enough to change the government via parliamentary elections, even twice, to establish proof of a sound democratic mechanism. Even in central European countries, where the democratic and market institutions are embedded to a greater extent than elsewhere in the region, important questions have been raised concerning the quality of democratic conduct. Fair and competitive elections have been held in these countries for years. Nevertheless, malaise is rampant and may be expressed as the "low-level equilibrium" of political and economic life (Greskovits, 1998). The deficiencies of a weak democracy perpetuate distorted markets and vice versa, leading to corruption and social distrust. To cite an example, Poland's consecutive elections resulted in radical shifts in parties and governments, the reshuffling of party membership and the changing of party labels. Such events may suggest that voters do sanction governments and that political accountability exists. However, the problem of accountability persists. It is evidenced by factors as rudimentary as electoral absenteeism or distrust of political institutions. Turnout in the recent parliamentary elections of September 2005 was a mere 40.5%, compared to 46.3% in 2001 and 48% in 1997. At the same time, recent Eurobarometer surveys show that Poles have the lowest confidence in political parties, the national parliament and government among all 25 EU member states (Eurobarometer, 2005).

The merits and weaknesses of the institutional design have been at the core of the debate on the quality of Polish democracy. There have been calls to move away from the "Third Republic" and to form a new institutional framework under the rubric of the "Fourth Republic"[1]. The events that precipitated the crisis of the Third Republic were the so-called "Rywin Gate" and the broad public debate that followed the parliamentary investigation into it. The Rywin affair exposed a number of weaknesses in the democratic process. It confirmed and illustrated deficiencies in Polish democracy, which have figured prominently in recent Polish sociological literature.

More importantly, from an analytical point of view, the dynamics and results of the affair came to a large degree from society's interest and engagement.

The social and political background of the events is well documented in Polish political sociology. The segmented nature of Polish democracy has been emphasized (Staniszkis 2000, Zybertowicz 2002, Rychard, 2002 among others)[2], whereby it is argued that democratic façade should be distinguished from the undemocratic substance of the political process. To describe this phenomenon, Andrzej Rychard (2002) uses the metaphor of a double scene. The parliament, political parties and the government are the main actors who populate the foreground. They are divided primarily along symbolic and historical lines, which dominate public discourse in a ritualized way (cf. Grabowska, 2004). However, a second, hidden scene exists as well. It is more fluid and is populated by various interest groups. In short, one type of politics is played in public and another behind the scenes. This interpretation of the Polish transformation, albeit quite popular in Polish sociological circles, was nevertheless very difficult to confirm empirically[3].

The theory of a double political scene, if true, causes important problems in terms of political accountability. The importance of hidden agendas and interests weakens the position of citizens and calls into question the controlling role of voters in a formally "consolidated" democracy. The lines of the delegations are blurred, as the chains of formal delegations differ from the actual power structure. It is difficult for voters to trace how public policies and specific decisions were made or discern their rationale and underlying interests. Voters cannot make informed judgments, as they have little access to valuable information on policy-making on a hidden, non-public scene. These issues require a more systematic and careful look into various mechanisms of accountability. Their effectiveness needs to be evaluated in a broader attempt to analyze the nature and dynamics of the institutional order. As argued elsewhere (Federowicz, 2005), a meaningful analysis of the institutional transformation needs to be comprised of the broader macro perspective covering all important segments of the institutional order, as well as the micro-foundations of institutional settings (including individual motivations, experiences and expectations). The dynamics of the links between the micro and macro levels must also be taken into consideration. What is therefore needed is a look into mezzo-structures and specific policy-making processes, which would help to open up the black box of the "double-scene". The story of the Rywin affair described below is a valuable case to study.

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[1] The term "Third Republic" connotes the political shakeup after 1989 and indicates the continuity of statehood from the inter-war Second Republic. The term was actually coined by one of the opposition parties: Prawo i Sprawiedliwość (Law and Justice), which eventually won 2005 parliamentary elections under this slogan.

[2] A separate strand emphasizes the peculiarities of imitating liberal blueprints and the role of quasi-liberal discourse in the transformation period (Szacki, 1994; Krasnodębski, 2003)

[3] One of the first attempts to grasp these phenomena empirically is found in the work of Kaja Gadowska (2002). Her study of the Polish coal mining sector and the clientelist networks that surrounded it shows the stability of these networks and the little relevance of political divides and political changes in Poland.

"Rywin Gate" The Case of the First Parliamentary Investigative Commission in a Post-Communist Country

The affair

On 22 July 2002 the well-known film producer Lew Rywin approached Adam Michnik, a former dissident and the editor-in-chief of a major Polish daily, *Gazeta Wyborcza,* with a peculiar offer. During the meeting, secretly taped by Michnik, Mr. Rywin offered his help to tailor a media bill under discussion by the government in exchange for a $17.5 million bribe. The new bill would restrict potential concentration of the Polish media and strengthen the role of the state regulatory and licensing agency. If it were approved by the parliament in that form, *Gazeta's* publisher, Agora, would not be allowed to purchase a television station. At that time, the newspaper market had been almost fully privatized and was therefore practically beyond government control; radio, however, remained strongly subjected to the licensing policy, and television was still dominated by the state.

The disagreement between the private media and the government on the new media bill was well known to the wider public, as it was reported on in the newspapers over the first half of 2002, but it did not arouse extraordinary public interest, even when the European Parliament officially expressed its concern about the Polish government's policy towards the media.

In Rywin's proposition of July 2002, the government was to withdraw the elements disfavouring the further market expansion of Agora from the media bill. Mr. Rywin claimed that he "was sent" to Agora by a "group holding power", which, as he vaguely hinted, included Prime Minister Leszek Miller. As part of the deal proposed to Gazeta, Rywin would be nominated head of the television station bought by Agora, and in exchange *Gazeta Wyborcza* would stop criticizing the prime minister. In subsequent public perception, "the group holding power" became synonymous with political regimes and informal power relations.

The story was made public five months later, in late December 2002, when *Gazeta Wyborcza* published the transcript of the Rywin and Michnik conversation. Warsaw prosecutors launched a criminal investigation into the scandal. The idea to set up the first US-style parliamentary investigative commission arose based on a special 1999 law. A few days later, the major opposition parties Civic Platform (PO), Law and Justice (PiS) and the League of Polish Families (LPR) moved to establish such a commission. The matter was extraordinary, they argued: key political figures seemed to be involved and it could reasonably be doubted whether the prosecutors would do a good job. Of critical importance was, however, the position of the governing party, the Left Democratic Alliance (SLD). It would suffer heavily if its main politicians were identified as standing behind Rywin's proposal. Initially, the SLD attempted to belittle the scandal. However, when its former leader and acting president Aleksandr Kwaśniewski backed the initiative to examine the matter, the SLD supported him. The Sejm's motion was passed on 10 January 2003 with an overwhelming majority of 394 deputies voting in favour, 1 against and 4 abstentions.

The parliamentary commission

Although this was the first time an investigative commission based on the new law was established, there were a number of similar precedents of special parliamentary commissions spanning the previous twelve years (Bil et al. 2005). The new case did not seem to be much different; the ruling coalition, dominated by the SLD, seemed to be able to control the major line of proceedings. Typically, the political parties did not send their first seat leaders to the commission. The larger public, although intrigued by a new scandal, was rather doubtful towards the commission's capacity to reveal the real story.

After lengthy negotiations, the composition of the commission was decided upon. The SLD could actually expect to control the commission's work and apply the brakes if necessary. As the commission's configuration mirrored the party composition of the Sejm, the ruling coalition SLD-UP-PSL had 6 out of 10 seats, including 4 seats for the SLD, 1 for the PSL, and 1 for the UP. The opposition was represented with individuals from four political parties. The commission started work in January 2003.

At the beginning the important decision was taken to make the commission proceedings public, which undermined the possibility of blatant manipulations. This move turned out to be a decisive factor in the commission's conduct and its eventual results, as public support for commissioners was seen as crucial.

Scores of witnesses, including Prime Minister Miller, Adam Michnik, Agora's President Wanda Rapaczyńska and Aleksandra Jakubowska, deputy minister in charge of the draft of the media bill, testified in front of television cameras. This was the first time that the political class was exposed to such public scrutiny. The proceedings aroused great interest that surprisingly did not tend to vanish. In the first half of 2003 some 50–57% of the adult population declared general interest in the affair and an additional 10% closely followed the hearings conducted by the commission (Pankowski 2003a). Despite the generally negative evaluation of the commission proceedings, the public found it beneficial for Polish democracy. In November 2003, 35% of respondents supported this view and in January 2005 it was shared by 48% of the public. During that time, the percentage of those who saw the commission as bad for democracy decreased from 41 to 32% (Pankowski, 2005).

Poles questioned, however, the ability of the commission to uncover the truth. Only 22% believed so when the commission started its work and thereafter this figure was never surpassed. In 2003, the contrary view was shared by as much as 60–69% of respondents (Pankowski, 2003b). In an open, unstructured questionnaire they indicated that people holding power were involved (41%), matters were too complex (31%) and witnesses were reluctant to speak the truth (14%).

Nevertheless, the huge public interest in the hearings conducted by the commission contributed to a significant decrease in popularity of Miller's government, and at the same time elevated two of the most active representatives of the opposition parties. The arrogant attitude of people potentially included in "the group holding power" amplified public criticism and confirmed the former public image of the ruling party. The commission revealed numerous shortcomings of the formal proceedings in the government's activities which provoked questions on the quality of the existing formal mechanisms of political accountability.

Politically, the informal accountability of politicians to the larger public forum became more important than it was in the past. It triggered a series of political shifts that took place during and after the public investigation. It heightened tensions within the ruling coalition, eventually leading to its disruption. It also activated the work of prosecutors in many other affairs not related to the publicly investigated case. It provoked some important personnel changes among the highest ranked prosecutors. A series of scandals in the ruling party also stoked internal tensions and resulted in its eventual split. The initial proportions in the investigative commission were turned upside down, as well as those in the parliament, and the SLD was no longer able to fully control the Sejm's decisions related to the investigation.

The media bill

The most important element and immediate context of "Rywin's offer" was of course the new radio and television broadcasting bill under discussion by the government and highly criticized by private media. As mentioned, Polish newspapers had been independent of the government for a long time. The new media bill intended to introduce a curb on capital concentration in the media, which would limit the ability of a major national broadcaster or newspaper to purchase a radio or television station. The bill seemed to be aimed at stemming Agora's further develop-

ment, along with its most influential organ, *Gazeta Wyborcza*. If *Gazeta* gave some support to Miller's party (SLD) before the 2001 election, it expressed increasing disapproval of Miller's government after the vote. However, the ongoing conflict over the bill could also be read in broader terms as the struggle for control over the mass media (see: Bil 2005:25–29, Koryś and Tymiński, 2005). Numerous concerns had been voiced over the politicization of public television, somewhat influenced by the SLD and clearly dominating the electronic media. Also, the dubious and unclear rules of licensing in the radio market were under strong but not very open criticism by private radio stations. While some of the larger stations started to openly express their criticism, the smaller ones, mostly local, were subjected to hidden informal pressure from officials of the state regulating agency.

The controversial media bill was actually drafted by this agency, namely the National Radio and TV Broadcasting Council (KRRiTV). It proposed the strengthening of its authority, which raised fears of even further politicization of TV and radio. The anti-concentration bill, in fact, could be interpreted as a law restricting the sphere of the independent media. KRRiTV – the politicized regulatory and licensing body overseeing broadcasting – was long seen as a channel of political influence over public television. Among the key actors of the Rywin scandal were, in fact, the president of the public television company, Robert Kwiatkowski, and Włodzimierz Czarzasty from KRRiTV, both perceived as members of the SLD establishment. Mr. Czarzasty, one of the key figures in KRRiTV, was also linked to the private publishing house Muza, and intended to purchase a much bigger publishing house still in state hands. Based on these assets, as some witnesses testified before the investigative commission, a part of the SLD establishment planned to create a new nationwide daily, which would be able to compete with the two most influential newspapers in Poland, *Gazeta Wyborcza* and *Rzeczpospolita*. When *Gazeta* published the transcript of Rywin's peculiar offer in late December 2002, the privatization of the large state-owned publishing house (to Muza's benefit) was close to being decided. The scandal and further work of the commission brought these plans to a halt.

The second largest quality daily in Poland, *Rzeczpospolita,* also suffered extraordinary tensions in its relations with state officials. The newspaper is jointly owned by the Norwegian concern Orcla and a Polish state-owned enterprise. This ownership structure guaranteed the newspaper's autonomy. In early 2002, after a claim filed by the state-owned enterprise, the fiscal authorities opened an investigation into the Norwegian representatives, and restricted their travel outside Poland. The nature of the restrictions was found inappropriate to the matter in question, but more importantly, the claim itself was questionable. It eventually led to an official statement issued by a commission of the European Parliament supporting the autonomy of the Polish newspaper, but it did not overrule the measures prescribed by Polish prosecutors. Another instance of the difficult relations between the private media and Polish state officials was the case of the nationwide radio station RMF FM, the largest station in Poland in terms of listenership. RMF FM was among the stations that had increasing difficulties with the prolongation of its license by KRRiTV in 2001–2002. The clandestine war between the private media and the government probably had the most impact on the direct and indirect outcomes of the closely-watched parliamentary investigation.

The outcome

However, the direct result of the parliamentary investigation was subjected to intense political bargaining. After the year-long effort of the investigative commission and more than 500 hours of questioning, the commission was divided on whether "the group holding power" ever existed. SLD representatives on the commission still managed to outvote the opposition and adopted the mild version of the final report. By contrast, the opposition succeeded in winning back the parliamentary floor when the Sejm adopted the most radical of the minority reports generated by members of the commission. It implicated not only the prime minister but also the president and named the presumed members of "the group holding power" mentioned by Rywin in his initial

conversation with Michnik. The parallel criminal investigation and the court trial did not go so far. Rywin was found guilty and sentenced to two years in prison, but judges stated that he acted alone, which undermined any search for "the group holding power" that might have backed his peculiar offer. However, the appellate court redefined Mr. Rywin's role in the affair as that of an intermediary. Also, a separate investigation started to dig into the murky legislative process of the media bill, in which Jakubowska and officials from KRRiTV were accused of breaking the law.

The political consequences of the Rywin affair were mostly indirect. As mentioned, the scandal fuelled a number of other corruption investigations, and resulted in the fall of electoral support for the SLD and the government. To be sure, the affair was neither the first nor the largest political scandal in Poland. It was the first time, however, that a political scandal was so well publicized and that politicians had to justify their conduct in front of a broad societal forum. Eventually, it contributed to the demise of Miller's government, who resigned in May 2004. Much earlier, in March 2003, just two months after the investigative commission started to work, the coalition of SLD-UP with PSL broke down. Finally, in early 2004 one of the leading SLD figures, Speaker of the Parliament Marek Borowski and the head of the investigative commission, Tomasz Nałęcz, defected with some 30 deputies and set up a new political party, Polish Social Democracy (SdPL), distancing itself from the corrupted SLD.

Of equal importance were the effects of a less partisan character. The inquiry has shown how extensive informal ties between politicians, media moguls and public officials are. One of the losers in the Rywin affair was Adam Michnik, who failed to provide a convincing explanation as to why the publicizing of the affair was deferred until late 2002. According to Michnik the delay was due to the need to proceed with a journalistic investigation and the date of final negotiations on Poland's accession to the European Union, which was to be decided at the Copenhagen summit. Nevertheless, during the commission proceedings, Michnik's cosy relations with the post-communist elite, including the prime minister and the president, seriously undermined his credibility.

In larger terms, the result was an increase in perceived corruption. The Rywin affair reinforced the widespread view of the political elite as dishonest and untrustworthy. It conformed to the popular image shared by most Poles that politicians form a tight clique, united by mutual interests, and are deeply involved in various economic and financial scams (Marody et al 2004:160). The confidence in political institutions, the Sejm in particular, deteriorated to an unprecedented low level. By mid-2003, the majority of Poles was convinced that it was possible to buy a favourable decision in a local government office (71%), a favourable court ruling (56%), favourable wording of a parliamentary act (56%) or the favour of the press (56%) (OBOP, 2003). When asked to voice their greatest concern, more and more people singled out the answer "bad government, corruption and the pursuit of private interests". While in January 2002 and 2003 the problem was identified by 5 and 6 percent of respondents respectively, their share grew to 9 percent in 2004 and 28 percent in 2005. It became their prime concern in January 2005, supplanting problems named in preceding years, such as unemployment or worsening living conditions (CBOS, Pankowski 2005).

Conclusion: The role of civil society in enhancing political accountability

The Rywin affair initiated an important public debate, which has gone well beyond the scandal itself. The commission proceedings have clearly shown how close informal links between politicians and business are. The Rywin affair was, to quote one contributor to the debate, "the end of illusion" (Śpiewak, 2003). The above-mentioned academic debates entered into public discourse. What was perhaps most often noted was the oligarchic character of democracy in Poland. Ryszard Bugaj (2003) wrote "*formally we have a parliamentary democracy, but many*

people consider it to be only the screen behind which the influential and the privileged hide and pull strings". In his view the narrow political and business elite communicate behind closed doors and exterior to democratic procedures, with political divisions serving merely as a theatrical show for the public. The close and fraternal ties of Michnik and former communist apparatchiks provoked comments suggesting the existence of a "high society", in which the historical divides and the ethics of Solidarity were replaced by base interests (Krasnodębski 2003). A number of commentators saw the outbreak of the Rywin affair as the result of internal power struggles between the president and the prime minister or between the post-communist elite and *Gazeta Wyborcza*, in which the latter was seen as a part of the oligarchic network or, at best, as a key force of the legitimization of the post-communist order. Andrzej Zybertowicz (2003) went further, arguing that Poland is bound by a network of powerful interests, propagating through political institutions and controlling major economic resources. These networks, in which the former secret service plays a prominent role, seem to bind politicians and stifle the mass media. In such a world, Zybertowicz concludes, nobody, including the prime minister, the minister of justice, secret service institutions and the major media moguls, is interested in scrutinizing corruption scandals.

On the other hand, however, the parliament was able to pass a new law on investigative commissions in 1999, and then apply it to a very sensitive media bill case in early 2002. The decision to televise the hearing ran the risk of turning the proceedings into a political reality show and popularity contest, which partly materialized. Still, the opportunity for public scrutiny and public debate was worth the price. After the commission completed its work, two other investigative commissions were established: one investigating the state treasury's administration of the state-controlled PKN Orlen SA, the largest Polish oil group and the presumably politically-motivated arrest of its CEO Andrzej Modrzejewski, established in May 2004; and another investigating the privatization of the PZU insurance company, established in January 2005.

In that way the political institutions of the parliament offered the citizenry a large forum for the public scrutiny of politicians, enhancing the informal accountability of politicians to the voters, thus fortifying the weakest link in the chain of principal-agent relations in democratic accountability. This was also a means of activating and boosting the controlling role of the parliamentary opposition. At least partially, it deconstructed a "hidden scene" with "clientelist networks" behind a "façade democracy", so aptly described earlier in sociology and political science.

The role of the civic component in this evolution consisted of a direct link between the commission's conduct and the peoples' perception of justice and honesty. Democratic procedures were able to equip citizens with a more audible "voice", not only in the act of voting, but also in the evaluation of some critical cases of policy-making.

The case of the media bill examined by the commission was not the only one of public concern. Another example was a new bill regulating financial support for NGOs. The bill was postponed for a long time in the parliamentary agenda, which became somewhat symbolic for the difficult development of civil society. After a series of political shifts, in 2004 it was successfully promoted by both civic organizations and the deputy Prime Minister Jerzy Hausner (who eventually separated from the SLD in 2005) and adopted by the parliament. But prior to the Rywin affair, the NGOs' criticism that the government was ignoring their needs was not effective. Seemingly, in the case of media bill, neither the Polish media's nor the European Parliament's protests succeeded in altering government's position in 2002. Strong criticism has also been expressed against an amendment to the law on civil servants, introduced by Miller's government as one of the first measures after the election in 2001. The amendment drastically delimited the role of civil servants, creating a wider aperture for direct political pressure on public administrators. In all these cases, among many others, the public criticism expressed by civic organizations and supported by the newspapers was not effective. The ruling party successfully manipulated public opinion, deluding a large segment of the critical voices. Only when the greater public backed the attempts of the investigative commission, creating a forum virtually organized a-

round its work, did the criticism of the private media and civic organizations have an impact on the political scene.

We argue that the role of civil society in the Rywin affair was based on the transparency of the commission's work. Perhaps, for the first time since the historical election on June 4, 1989, citizens could feel their real contribution to the political process. Transparency put the work of the commissioners under the important watch of the public forum. The Rywin affair resonated in the public sphere, influencing politicians' conduct on both sides of the parliamentary arena. Furthermore, it clearly delineated the two sides and thus hampered informal, hidden game-playing. Public pressure was in the air when members of the commission issued consecutive working decisions and individual politicians testified in front of the forum. The Rywin affair resulted in the resignation of Miller's cabinet and the public debate that started after the scandal revealed that sound mechanisms of political and social control were possible and would enable the questioning and sanctioning of unacceptable conduct.

For social science, the upshot of "Rywin Gate" has important ramifications. The role of civil society in enhancing political accountability requires a shift of focus or completion of the research on civil society. Recent work has tended to emphasize the different functions of civil society, mostly focusing on how voluntary and non-profit organizations can provide input or output to the political process (Zimmer and Freise, 2005). In the first case, deliberation and communication are viewed by theorists as important inputs into the political process. For Habermas, civil society results from communicative action: open debate, deliberation and rational argument inside linked and competing public spheres. It forms the basis for popular sovereignty. However, he tends to limit the role of civil society to the input side of the political process. He describes its role as a "sounding board for problems that must be processed by the political system because they cannot be solved elsewhere" (Habermas, 1996:359). On the other hand, civil society organizations have traditionally been viewed as providers of social services. This locates them on the output side of the political system.

But the accountability-enhancing function of civil society is at the core of the original meaning of the term in the classic literature of political philosophy: Locke, Paine, Montesquieu, Ferguson and Smith, to name a few. They all examined ways to counteract despotism and absolutist states (Taylor 1990). Furthermore, the revival of the concept of civil society in late 20th century dissident writings in central Europe and the emergence of the Solidarity movement in Poland have brought state-society relations to the centre of the debate. Civil society was once viewed as an entity pitted against an uncontrollable power, or, as a "parallel-society", co-existing with "their" power structures.

What troubled students of the post-communist transformation was precisely this "anti-politics" legacy. According to Linz and Stepan, Poland has a relatively active and influential ethical-political civil society. This has led them to a rather pessimistic diagnosis:

> Unfortunately Poland's pioneering and heroic path to democratic transition via ethical civil society inevitably created discourses and practices that, until they can be transformed, will generate systemic problems for the creation of a democratic political society. Ethical society represents 'truth', but political society in a consolidated democracy normally represents 'interests'... (Linz and Stepan, 1996:272)

The evaluation of the different functions of civil society in a democracy calls for a clearer distinction between civil society organizations and the mechanisms through which they participate in the political process. This also requires shifting the focus from micro-foundations (the role of social capital, civic engagement and participatory behaviour) to a more intermediate level. A vital role in the Rywin affair was played by the autonomous mass media. But the most important role in the outcome of the case was played by the presence of a large forum of public opinion. The contribution of the forum was basically *ethical* in nature. The ethical intersection of civil society with political society as well as with the private media, consolidated democratic

political institutions, and made it possible to expose at least some of the hazy informal dealings formerly hidden behind a democratic façade. Referring to Linz and Stepan's terminology, but contrary to their conclusion, we argue that an ethical civil society is indispensable for the creation of a democratic political society; otherwise we risk impeding the "democratic consolidation" at the surface of formal and façade institutions. A political society, namely political parties, that is not effectively confronted by such a civil society will not reveal its actual agenda through democratic institutions.

In recent years, the development of investigative journalism in Poland has made significant progress. However, the media are not only the source of information on new corruption scandals. They very often exert pressure on politicians and the judicial system to work more efficiently in investigating these scandals. The mass media can therefore be seen as boosters of accountability. The Rywin affair has initiated important public debates, in which genuine public opinion can be expressed and influence can be exerted on politicians. There are several other examples of how civil society organizations can enhance political accountability. One clearly accountability-related example is a joint project of several Polish NGOs targeted on the reviews of fulfilment of electoral promises made by major political parties in the area of fighting corruption[4]. Starting in 2001, on the anniversary of Election Day, politicians are presented with an evaluation and are invited to testify on their progress. A similar project follows the promises made during the 2005 elections. The activities of this type of watch-dog institution can be seen as a very important way of increasing political accountability. But the results of these initiatives strongly depend on public perception, where the existence of a large forum may open more effective mechanisms of civic participation in the political process.

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Marcin Michał Wiszowaty

Legal Regulation of Lobbying in New Member States of the European Union

Introduction

In line with the Polish legislation lobbying can be defined as "*every action carried out by means of officially approved methods aimed at influencing public authorities or bodies during the process of law making*" (Law on Lobbyism, Article 2, paragraph 1). Such actions are regularly carried out by or on behalf of civil society organisations, especially in the form of business organisations. Accordingly legal regulation of lobbying defines the ways in which civil society organisations can try to influence policy making processes. With that laws on lobbyism are a major guideline for the legal accountability of civil society organisations. As will be shown in this analysis, the regulation of this kind of legal accountability still has major shortcomings in the new (as well as in the old) EU member states.

Since the late 1970s lobbying and its regulation in Europe has been receiving increased attention. It is difficult to pinpoint a clear reason for this surge in interest. Most probably, it has been a gradual process developing over a number of years, coinciding with European political scandals and the increased activity of special interest groups. The divisions appearing on the parliamentary political stage, thus far fairly stable and uniform (at least with respect to the corresponding terms of office), are infringing upon the traditional parliament-cabinet system based on majority governments. Observations of the lobbying activity now emerging in Europe invite a number of comments. Firstly, one can state that it is not exclusively American in character. Secondly, corporatism does not rule out the existence or need for lobbying. Thirdly, that the phenomenon of lobbying precedes legal regulation does not mean that lobbying itself does not exist. Finally, the appearance of lobbying on the European political scene has boosted European interest in American experiences and observations on the negative consequences of laissez-faire lobbying practices.

The big corruption scandals triggering demands for lobbying reform in the USA have also erupted in Europe in growing numbers, often involving high-profile national politicians. This actuality, coupled with growing awareness of the negative effects resulting from the links between politics and business, has engendered a closer look at the problems of lobbying in Europe (similar to those which once existed in the USA) resulting from the complete absence of state control.

The formation of the European Union has brought new impetus to the discussion on European lobbying and its regulation. EU structures have rapidly become a backdrop to a complicated game of local vs. national interests originating from all member states. There is no more doubt about the presence of lobbying in Europe, and its scale may well aspire to America's. So far, however, no laws expressly addressing the regulation of lobbying have been enacted in Europe, at least not to the extent of the Federal Lobbying Law in the USA or Canada. What is more, a certain reluctance has been observed on the part of EU politicians, the European Commission in particular, to formulate such detailed regulations.[1]

During the communist era, Central and Eastern Europe were neither a welcoming environment for the development of lobbying practices nor the creation of initial regulations directed at lobbying. Any contemporary research-oriented analysis of this phenomenon was marginal, bearing

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[1] W. Lehmann, L. Bosche, Lobbying in the European Union: Current rules and practices, European Parliament Working Paper, AFCO 104 EN, Luxembourg 2003, p. 37.

the hallmarks of an alien and even hostile political system. There have since been scientific surveys concerning the subject in some Eastern European countries, but such studies were very rare at that time.[2] At the same time, however, corporative concepts were very popular in that part of Europe, embodied in organs such as the Social and Economic Council at the Polish Parliament during the era of the People's Republic (1982–1989), or the Yugoslav *Skupsztina* (parliament), which since 1963 had been composed of several separate houses representing the various interests and branches of the "working world". That body's idea is now present in the form of the lower house of today's Slovenian parliament – the National Council – composed of 40 representatives standing for various interest groups.[3]

The EU enlargement on 1st May 2004, incorporating eight post-communist countries, resulted in an increase in lobbying activity in and around, but not limited to, Union bodies. As it happens, the East European countries are much more advanced in their proceedings on the legal regulation of lobbying activity. At present, among the 15 countries of the "old" European Union, only Italy and Ireland have proposed statutory regulation of lobbying. Neither country has thus far succeeded in turning those proposals into actual legislation. At the same time, however, two new Member States – Lithuania and Poland – can boast lobbying laws in force. In Hungary, a bill draft was unsuccessfully put up and the government is still working on another attempt. Among the European countries outside the Union, a law on lobbying is in force in Georgia, while in Bulgaria and Russia similar bill drafts have been entered and the preparations for enacting them are underway.

This paper offers an analysis of the laws on lobbyism in force in Poland and Lithuania – as examples of the European contribution to the legal regulation of this form of social participation in the political decision-making process. At present, the above-mentioned legislation constitutes the only lobbying acts in the European Union on the parliamentary level. The Lithuanian "*Law on Lobbying Activity*" dated 27 June 2000, became effective on 1 January 2001.[4] It has been amended once so far.[5] The Polish "*Law on Lobbying Activity in the Process of Law Making*" was enacted on 7 July 2005 and will become effective 7 March 2006.[6]

Although obviously very similar in nature, both laws exhibit interesting differences. They are relatively short (the Lithuanian act contains 15 articles while the Polish statute contains 22 articles). Their general system organises lengthier segments into chapters (Poland) and clauses (Lithuania) which are supposed to order the regulations by subject matter (an approach typical of Lobbying Laws around the world and in the USA in particular). Thus we are presented with definitions of lobbying (lobbying activity), lobbyists and their principals; an itemisation of lobbyists' duties and rights; characteristics of the lobbyists' register (list) and reports on lobbying activity, and, finally, a catalogue of penal provisions indicating sanctions for failure to observe the laws. The Lithuanian law is definitely more detailed, coherent, and consistent than its Polish counterpart. There is no doubt that its creators were strongly influenced by the American regulations; this is detectable in many instances.

The Polish law attempts to provide an original solution. It is the product of two significant developments. Firstly, it is a modification of a draft submitted to the last parliament in office

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[2] The monograph by S. Ehrlich "Władza i interesy. Studium struktury politycznej kapitalizmu" ("Power and business. A study of the political structure of capitalism"), Warsaw 1967, a book regarded in Poland as outstanding and extremely valuable, can be quoted as an example here. It must be mentioned that the next survey concerning similar matters was published 20 years later.

[3] Art. 96 of the Constitution of the Republic of Slovenia dated 23 December 1991.

[4] Law No. VIII-1749. Published in: "National News", 2000, No. 56-1644.

[5] Change dated 8 May 2001 (print No. IX-308).

[6] Published in: Dziennik Ustaw No. 169/2005 item 1414 (6 September 2005).

which was never enacted.[7] Secondly, the draft of the present law has undergone several amendments since its evaluation by the relevant commissions. Thus the Polish law is an update of the first version of the regulation rather than a mature law in its optimal form. Given the long evolution of American lobbying regulations, particularly on the state level, this solution seems to be correct and logical. A comprehensive assessment of its effectiveness (indicating possible suggestions for changes to the law in order to finalize it) will not be possible until after its practical application.

The Aim of the Regulation

Both laws clearly state their aims. The Lithuanian law indicates that it is for determining the definition of lobbying, its control and liability for violation of the statute (Article 1). The Polish law aims at implementing the principle of openness in lobbying activity in the law-making process. It specifies the principles of professional lobbying activity and its regulation, as well as the function of the lobbyists' register (Article 1).

Definition of Lobbying

Defining lobbying is said to be one of the most difficult tasks in the process of creating lobbying legislation. Most bill drafts were never resolved, due merely to controversy concerning the definitions. Australia's lobbying law was simply reversed as one neither corresponding (including its definition of lobbying) to reality nor meeting the standards of performance for which it was intended[8].

The European laws were passed more than 50 years after America's first, the Federal Law, which put forward a universal definition. This is evident in the wording of the definitions included in both laws, which bear a clear resemblance to the American version. In Lithuania, "lobbying activity" denotes "*remuneration for lobbyists' activities having influence on the changes, amendments of legal acts or the reverse of them, and also on the passing of new laws*" (Article 2, paragraph 1). In Poland: "lobbying activity" means "*every action carried out by means of officially approved methods aimed at influencing public authorities or bodies during the process of law making*" (Article 2, paragraph 1). In the second paragraph of Article 2, the Polish legislation provides a definition of "professional lobbying activity" as follows: "*profit-making lobbying activity for the benefit of third parties with the view of considering the interest of the said parties in the process of law making*".

There are some observations to be made pertaining to the above. Firstly, both laws define lobbying as an activity solely for the promotion of third party interests and financial gain. This position has been adopted by the majority of states which have passed lobbying legislation. Thus lobbying does not constitute an activity undertaken free of charge for its own sake, which would be described as exercising the right to petition (often guaranteed by constitutions). The Polish legislation slightly modifies this attitude by providing a broader definition of "lobbying activity" and a narrower one of "professional lobbying activity" (a subset of the former). This should neither be seen as an attempt by the legislature to create an alternative regulation of professional or other lobbying (as no other type of "non-professional" lobbying is mentioned elsewhere in the law), nor an intentional distinction between those two forms as elements of the single phenomenon of lobbying. The primary wording of the government draft bill on lobbying activity opted for a broad definition of lobbying not only on the federal but also on the local government

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[7] Draft dated 20th July 2000: "On the openness of decisive procedures, groups of interest and public availability of information", a Parliament print No. 2153, III-rd Term in Office of the Polish Parliament (1997–2001).

[8] J. Warhurst, Locating the target, Regulating lobbying in Australia, in: Parliamentary Affairs no 51, Oxford University Press 1998, pages: 538, 543–545

level, and pertaining not only to the parliament but to the executive bodies as well[9]. In the course of the debates over the draft, the Parliament Commission decided to confine the contents to what has become the present version[10]. It is at this point that one may encounter certain inaccuracies which may later give rise to the introduction of an amendment based upon observation of the "shrunk" version of the law in everyday practice. This is a courageous yet very reasonable idea.

To summarize, both laws describe lobbying as a purely professional activity carried out against remuneration and for a third party's sake. Both confine the lobbyists' area of operation to legislative bodies and their law-making function. As can be seen, European lobbying differs from its American counterpart, which, in addition to subjecting it to legal regulation, places lobbying under the jurisdiction of the legislative, executive and even judicial (which is rare) authorities,[11] both on the central (state or federal) and local (district or municipal) levels. As regards the legislative and executive branches, the American regulations cover lobbying activity affecting not only law-making (the enactment of legislation, presidential or gubernatorial vetoes, executive decrees) but appointments to office or official decisions on individual matters (concessions, tenders, permits, etc.) as well. The Lithuanian and Polish laws do not consider such activities lobbying, adhering instead to a narrow definition very close to the traditional meaning.[12]

The avoidance of using the English term "lobbying" is characteristic of both laws. Instead, terms like "lobbyist" or "lobbying activity" are employed. The tendency to replace the American "lobbying" (used almost exclusively by American regulations) with different terms is very common. Apart from "lobbying activity" examples of translation attempts include: "interest advocating", "interest representation", or "cabildeo" (South America).

The Polish law is basically confined to providing a short definition of lobbying activity. The Lithuanian law contains broader characteristics including substantive exclusions. The Lithuanian legislature distinguishes among three types of activities – lobbying activity, illegal lobbying activity, and activity not classified as lobbying. Lobbying does not appear to be regarded as an inherently legal activity, unlike in the majority of world laws wherein the notion itself contains an element of conformity to law. Among lobbying activities contrary to regulations, apart from the obvious violations, such as the running of a business without proper registration or by a person banned from lobbying, or deleted from the register, etc., there appear to be some very interesting exceptions. These include lobbying for electing a lobbyist to a public service position, lobbying run in the name of two principals with conflicting interests, and finally lobbying involving the making of open statements or suggesting a real capacity for exerting influence on the enactment of a particular law or on a politician's or public servant's actions (Article 5 items 7, 9, 10). The Lithuanian law does not regard activities conducted free of charge as lobbying (e.g., organisations acting on behalf of their members, owners of media or the distribution of statutory content, commentary or exposition by publishing houses). Similarly, actions performed under order of state or local government bodies (whether paid or free of charge) do not constitute lobbying. Neither is any activity by scientists (university teachers) involving commentary, opinion-giving or publication of legal acts. Apart from those mandated by state or local government, the actions mentioned above become lobbying if the individual or organisation involved receives extra remuneration for the lobbying activity. Thus if a journalist publishes

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[9] Parliament print No. 2188, IV-th Term in Office of the Polish Parliament (2001–2005)

[10] Cf: "Komisja Nadzwyczajna Sejmu RP do rozpatrzenia rządowego projektu ustawy o działalności lobbingowej (NDL)", ("Extraordinary Polish Parliament Commission for consideration of the government draft on lobbying activities"). Appointed 18/12/2003. Terminated 15/08/2005

[11] Cf. Lobbying Laws of the American states: Arkansas, Missouri and Oklahoma

[12] As it is commonly known – the term lobbying derives from the word "lobby" – parliament corridors, where the first lobbyists met deputies to discuss their own matters and exert pressure in the name of their clients. Thus, lobbying was born in parliament and is bound with it for good.

information concerning legislation and adds his or her professional opinion as an employee of a newspaper, he or she will not be called a lobbyist. However, if the same journalist receives additional remuneration for the same article from an entity authorised to commission lobbying, his or her action will have acquired the features of lobbying (Article 6).

Lobbyists

The Polish law does not provide a clear-cut definition of lobbying. It contains only a phrase specifying who is entitled to engage in professional lobbying activity. As this is only part of lobbying activity *sensu largo*, the law is silent on the issue of non-professional lobbyists (assuming that the Polish law distinguishes between the categories of lobbying and lobbyists). A professional lobbyist is an entrepreneur or a natural person who is involved in lobbying under a civil agreement (Article 2, paragraph 3).

The Lithuanian legislation devotes more attention to the key issue of defining a lobbyist. The second sentence of Article 2 contains a general definition of a lobbyist, who may be a natural person, enterprise, institution or organisation. The whole of Article 3 consists of exclusions and prohibitions which additionally help determine who is and who is not allowed to operate as a lobbyist. Only a fully mature person (18+) may act as a lobbyist. Public servants and politicians (except technical and service staff of public offices) may not be lobbyists if they belong to the group of people who are prohibited by law from acting as executives or managers in enterprises, institutions or organisations or are employed as experts, consultants or legal advisors at private companies. Former politicians and public servants may enter into lobbying not earlier than one year following the termination of their term in office or lapse of their official status.[13] A person duly convicted for premeditated crimes may not be a lobbyist (unless the penalty has been revoked). In addition to legal persons, budget institutions, including the Bank of Lithuania (*Lietuvos Bankas*) are not allowed to enter into lobbying. However, if a legal person (such as an enterprise) acts as a lobbyist, individuals who as natural persons are affected by the ban on lobbying may not engage in lobbying activities within such an enterprise, either (as its employees). Further prohibited are lobbyists who have engaged in lobbying despite the official ban or have failed to rectify the misconduct which gave rise to the cancellation of their activity. Such lobbyists are covered by a 5-year long prohibition from entering into lobbying (Article 9).

Principals

The Lithuanian law uses the term "Person Ordering the Lobbying Service" to define a principal. This may be a natural person or a group of persons, an enterprise, an institution or organisation that has concluded a paid agreement with a lobbyist governed by the civil code, or, in a broader sense, by the Lithuanian law (Article 2, paragraph 3). The law also includes entity exclusions, i.e. persons who are not allowed to commission lobbying. They are the following: politicians, public servants, institutions, state-owned enterprises or local government-run enterprises (Article 7).

The Polish law does not enumerate characteristics of the person ordering the lobbying services, using instead the term "third party" to describe the entity (Article 2, paragraphs 2 and 3).

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[13] This is the so-called "revolving doors" phenomenon, when politicians return to politics as lobbyists after losing elections or have to give up their office. In the USA, the percentage of former congressmen entering into lobbying is 30% (D. A. Leal, Home is where the heart is. Congressional Tenure, Retirement, and the Implications for Representation, American Politics Research, Vol. 30 No. 3, May 2002, p. 271)

Rights and Duties of Lobbyists

There are two elements of lobbying regulations which are considered critical for the effectiveness of the law. One is exclusive powers for lobbyists, which are supposed to stimulate them to act pursuant to the regulations and to distinguish them from unregistered lobbyists, who are not furnished with any rights. The other element is the sanctions and penalties which are not necessarily supposed to encourage compliance but rather serve as a deterrent to breaking the law.

At this juncture, the Lithuanian law reveals the first important difference from the American acts upon which it is doubtlessly based. The federal regulations and the State Law in the USA completely sidestep the issue of lobbyists' rights as it is understood that only registered lobbyists may engage in lobbying activities, which is a right in itself.[14] The Lithuanian legislation, meanwhile, grants a wide spectrum of powers for lobbyists to enjoy. Apart from various forms of participating in the legislative process, from the signing of a draft to the passage of a bill, lobbyists have the right to review expert opinion analyses, conclusions, and questions; to meet with the MPs and to attend sessions in the Parliament. In addition, the law proposes several specific powers. A lobbyist may, to mention but a few examples, propose a legislative initiative (Article 4, paragraph 1, item 7), organise meetings between deputies and their clients for the purpose of discussing the problems to be addressed by lobbying (item 8) or "shape public opinion in terms of drafts of the acts" (item 9). Lobbyists also enjoy the privilege of having copies of draft bills and informational materials delivered to them by the authorities, which makes their work much easier. Owing to this, the lobbyists are well informed about current legislative activity in the country, which positions them to either intervene or contribute to the shape of the final act or to prepare their later actions.

Seemingly the only obligation of lobbyists, as stated in the laws in question, is meeting the provisions of the law (Article 4, paragraph 2). This does, however, entail a few specific duties, such as registration, updating of personal details, and submitting activity reports.

The Polish law does not include a catalogue of lobbyists' powers. In Chapter 3, which comments on the principles of openness in lobbying activity, there is information concerning the authorisations which entitle the lobbyists to take part in the public hearings following the introduction of a new law in the Parliament (Articles 8 and 9). Lobbyists are also permitted to carry out their activities on the premises of the public office, thus making public institutions accessible. However, according to the law, the Houses of Parliament are supposed to provide details of this co-operation (which has not happened so far). In addition, both powers concern exclusively professional and registered lobbyists.

The Polish law puts forward an interesting solution by making the Council of Ministers responsible for informing the lobbyists about current developments concerning the legislative process. Once in six months, the Council of Ministers is supposed to prepare a programme of legislative tasks providing details of the reasons and assumptions for the prospective activity within the legislative area. The information is subject to publication in the electronically accessible Biuletyn Informacji Publicznej [Public Information Bulletin]. Every lobbyist has the right to express interest in a particular law. This can be done by means of a special application form on a specific date. Thereupon the lobbyists receive the right to participate in the public hearings procedure concerning the selected legislative draft. The application must contain the applicant's personal details (address, grounds for the activity), the identity of his or her possible principal, the subject matter, suggestions and any other issues the lobbyist may wish to include. This provision, unique among lobbying statutes, extends help to the lobbyists by obligating the public bodies to disclose information concerning not only the legislative process but the legislative timetables as well, so as to enable the lobbyists to prepare for the legislative process at the gov-

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[14] In some states in the USA lobbyists enjoy special tax breaks or are even exempt from taxation altogether.

ernment level in particular, which is usually the least accessible. A similar solution (although not yet reflected in regulations) was proposed in Columbia while lobbying regulations were under discussion.[15]

Among the duties Polish lobbyists must conform to (apart from observing the provisions of the law and registering their activities both with the Register of Entrepreneurs and the Register of Lobbyists), there is one additional requirement often present in American statutes as well. Lobbyists must present certificates of their entry in the register to the bodies before which they carry out their activities (At. 15).[16] In the USA, lobbyists must additionally wear visible identification badges showing their personal details, the name of the principal or principals and the term LOBBYIST in capital letters.[17] Neither the Polish nor the Lithuanian Laws require this measure.

Register of the Lobbyists

American concepts have inspired nearly all lobbying statutes in the world. Their foundations are composed of two components: "registration" and "disclosure" of lobbying activities. In keeping with that idea, compulsory registers of lobbyists have been and continue to be created everywhere.

The Lithuanian Register is kept by the parliamentary Supreme Commission for Occupational Ethics (*Vyriausioji tarnybinės etikos komisija*). All lobbyists are obliged to enter their names in the said Register under Article 2, § 2 of the law. Specific provisions concerning the Register and the manner of making entries in it have been set down in Clause 2 entitled: "the List of Lobbyists" in Articles 8 and 9. The Register is completely open, published in "Information Review", a supplement to the "Government News" Gazette (*Valstybines Zinios)* where one can find all data concerning current active lobbyists and also those who have been reinstated or suspended or whose operations have been cancelled. The Commission provides unlimited access to information on statutes and drafts covered by lobbying, reports by lobbyists and records of entities ordering lobbying services. There is no limit on the number of lobbyists. The Register will not, however, accept an entry of a natural or legal person not conforming to the requirements of the law (other discretionary reasons for denial are not accepted). The decision by the Commission may be appealed before the Administration Court of the Republic of Lithuania.

To be entered in the Register, a lobbyist must provide all required personal information, followed by duty,[18] within one month of application under the pain of entry annulment. The entry is also subject to cancellation as a result of failing to respond to the summon to fulfil the prescribed duties (annual report), death, annulment of the permit for the operations (a court sentence, election to a state function incompatible with the lobbying business, bankruptcy or dissolution of the legal person-lobbyist), or simply an application for the cancellation of an entry from the Register. A less severe method is suspension of the lobbyist for temporary failure to fulfil the prescribed duties or if a charge for an intentional crime is levelled.

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[15] During the discussion of the lobbying regulation, some other areas which had not been sufficiently regulated were tackled too. It was remarked that the government stage of legislative work should be regulated in detail. Contrary to the parliament stage, the citizens have no chance to learn about and express their opinions at this stage. In Columbia, government drafts are not subject to consultation nor are they published. Thus the regulation of lobbying has inspired a broader discussion on the political system (Primer debate del proyecto de ley 72 de 2003 Senado, 183 2003 Cámara *por medio del cual se regulan las actividades de cabildeo,* Bogotá, 15th April 2004.

URL= < www.confecamaras.org.co/Documentos/2004/pl_183_3C_CABILDEO_PON_3R_DEBATE.doc >).

[16] In Arizona, a general order has been resolved under which a lobbyist himself must disclose his/her activity in the lobbying contacts (L. D.A., Sec. 14; A.R.S. § 41-1233.01).

[17] Connecticut, Georgia, Kansas, Massachusetts, New Hampshire, New Jersey, Nevada, North Dakota, Rhode Island, South Dakota. In some states, the lobbyists must wear photo IDs.

[18] The initial version of the Law required a stamp duty. This is the only change that has been introduced to the Lithuanian Law.

The Polish Register of Lobbyists is kept by the respective minister managing affairs of public administration. Thus it is run by executive bodies rather than legislative ones, as is the case in Lithuania. The Polish Register of Lobbyists is electronic and open. It is published in full in the electronic Public Information Bulletin. There is one exception, however. It is the private addresses of natural persons, which are not subject to disclosure (Article 10). The registration fee is PLN 100 (about EUR 25). The fee is compulsory for those who wish to carry out professional lobbying activities (Article 12). The Register includes all the lobbyists' personal details. There is no need to indicate (as there is in the USA) the identity of the person ordering the services or the lobbyist's prospective area of interest.

Lobbyist registration is on the docket in one more post-socialist EU member state: Hungary. As mentioned before, so far no lobbying legislation has been enacted there. A previous draft was dismissed and the current government draft, after long preparations, was finally presented to the parliament in October 2005.[19] Accordingly lobbying matters have so far been regulated within parliamentary regulations. They read as follows:

> *The Secretary-General of Parliament shall keep a register on the registered national interest groups and social organizations which request to be put on the register* (paragraph 1). *In the request for registration the following data shall be given on the interest group or social organization: name, seat, address; field of operation (purpose); administrative and representative organ; and persons authorized to represent it, and their addresses* (paragraph 2).

In this case, lobbyists are required to reveal their area of interest. However, disclosure of the principal, one of the keystones of lobbying openness, is not compulsory. Paragraph 3 reads as follows: *"The list of interest groups and social organizations put on the register shall be published each year in an official gazette by the Speaker of Parliament".*[20]

Disclosure – Reporting on Lobbying Operations

However, registration merely supplies data on those persons engaging in lobbyism. Such information, precious as it may be, gives society and the authorities only a vague idea of the lobbyists' range of operations and does not allow for any meaningful control of lobbyist activities. Hence the demand for obligating the lobbyists to submit detailed and regular reports as frequently as possible (every month, quarter or six months), a practice commonplace in the USA and many other countries opting for the legal control of lobbying.

The Polish legislation places the burden of disclosure on the public bodies, which seems a very original method. Once a year, by the end of February, heads of public service offices must submit a report on the activities performed for those offices by lobbyists over the period covered by the report. The report must provide details on the lobbyists, matters concerned, specification on whether or not their activities were aimed at backing or contradicting statutes and finally, what seems curious, the methods used by the lobbyists and the result that they gave (Article 18). Public authorities are obliged to make timely notes whenever they are contacted by a lobbyist (Article 16). Both types of reports (*ad hoc* and annual) are published in the electronic Bulletin of Public Information.

The Lithuanian law follows the American pattern. It is the lobbyist that must submit the report (Article 10) once a year by 15th February at the latest (the date may be extended a maximum of 30 days). Such a report must describe the lobbyist's finances in detail, including an expense report and a list of income evidenced by corresponding invoices and similar documents. Two

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[19] Magyar Köztársaság Kormánya, T/17795. számú törvényjavaslat a lobbitevékenységről, Budapest, October 2005.

[20] Resolution 46/1994 (Ix.30.) Ogy On The Standing Orders Of The Parliament Of The Republic Of Hungary. The Registration of National Interest Groups and Social Organizations. Standing Order No. 141 (1) i (2)

major elements of these reports are a list of the statutes (or drafts) targeted by the lobbyists and the identity of the entity commissioning the lobbying. The reports must also be accompanied by copies of agreements concluded in the previous year. Lobbyists about to terminate their operations must submit final reports covering the period since submission of the last report. The obligation to submit a report also applies to lobbyists who had no expenses or income, as well as to those who have suspended their activities.

Prohibitions

In addition to the regulations described above, there are two prohibitions in the Lithuanian law deriving from the American legislation. The first one concerns the so-called contingent fee, which is a commission paid in an amount commensurate with results (Article 11, paragraph 1). Such arrangements are generally believed to favour misuse and excessive pressure exerted by lobbyists who deem they "deserve" the remuneration. It must be noted that lobbying means "a process aimed at wielding influence" and not only "influence wielding". Thus the Lithuanian legislature is right in saying that the preparatory work for the direct contacts with the MPs also needs to be paid for, particularly because such work builds the foundations for a successful lobbying campaign. Furthermore, it provides the principal with data that might be useful in future. The other prohibition regards the financing of lobbyists by the state budget or local government bodies (Article 11, paragraph 2). Such lobbyists are a frequent occurrence in the USA on various levels of authority and in state-federal relations.

Control

Every year, the Superior Commission for Occupational Ethics in Lithuania submits a report on the supervision of lobbying activities to the parliament. Apart from investigating these activities, the Commission is authorised to analyse the reports submitted by the lobbyists (Article 12). Every action of the Commission is published in the "Information Review" (Article 13).

Under the Polish law, it is the public administration affairs minister who is responsible for the enforcement of the law and authorised to impose penalties.

Sanctions

The Lithuanian Lobbying Law is very laconic regarding the consequences for individuals who violate it. It states that such persons are subject to the penalty prescribed by law, and if they have been found to have done any harm, they are obliged to compensate the injured party (Article 14). The only information concerning penalties is in Article 9, paragraph 8, which cites a 5-year ban from lobbying. This is imposable by the Superior Commission for Occupational Ethics if the lobbyist has been lobbying despite his or her suspension (whether voluntary or obligatory), or if the Commission has determined that the lobbyist's activities are not conformant to the current law or that the lobbyist in question has not met the deadline for completing formal shortages.

In Article 5, the Polish law specifies the sanctions and the manner of implementation. The Polish legislature has opted for a penalty amounting to up to PLN 50.000 (about EUR 42.000) reserving the right to multiply the penalty. When determining the amount of the fine, the extent to which the lobbyist contributed to the decision of the authorities and the nature and type of the activities applied must be taken into account. The penalty is decided upon by the public administration affairs minister.

Neither the Polish nor the Lithuanian legislature has opted for punishment mandating imprisonment for violation of the Lobbying Law (however, it is theoretically possible in Lithuania due to the generality of the law). The Lithuanian law imposes a temporary ban from lobbying activity. The Polish one, on the other hand, provides only pecuniary penalties, which resembles the

American federal legislation. Interestingly, the penalty selected by the Lithuanian legislature, the temporary ban, which is also cited in American lobbying regulations, seems to contradict the American Federal Constitution on the redress of grievances (Ist amendment to the Constitution). In many authors' opinions, this ban denotes *de facto* a temporary denial of an entity's constitutional rights. The controversy has not been resolved to this day, and continues to divide legislators.

Conclusion

The Lobbying Laws of Lithuania and Poland appear to be a novelty on the European scene. The current global tendency allows for the expectation of more legislation regulating the issues of lobbying disclosure and control. As it is too early to analyse the practical effects of these two laws, we shall focus on a few comments in terms of "de lege lata" and "de lege ferenda".

The effort by the legislators of the two states to prepare and pass parliamentary-level legislation on the regulation of lobbying has been highly praised. Yet in so doing, a popular (yet increasingly criticised) concept of self-regulation by lobbyists has thereby been rejected. This concept would entail the creation of ethical codes and their enforcement within the lobbying community. This form of self-regulation has not been successful anywhere so far, which may be a result not only of misguided lobbying regulations but also of the failure to create incentive for this system among lobbyists whose activities are semi-official and not prone to disclosure.

It is important for lobbying legislation to be tailored to the political system of the country in which it is to be applied and not merely mimic regulations that have been tried and used elsewhere. For example, in countries where the role of the Council of Ministers is significant in the legislative process (i.e. where most legislative drafts are created by the government cabinets), lobbying activities in this area must be well looked into. A gradual expansion of the state's control over lobbying of executive authorities seems a must in both laws examined here. With time, local government-based lobbying will have to be included. Restricting the control of lobbying or limiting the definition of lobbying to external pressure exerted upon MPs is erroneous nowadays; so doing may even result in the failure of the regulations, as they will appear incomplete or fragmentary.

The American experience indicates that lobbying regulations, when isolated from other forms of fighting corruption, have a high chance of failure. Therefore, it is extremely important to make the lobbyists' and the principals' duties and restrictions compatible and coherent. In the USA lobbying regulations are coupled with legislation concerning political ethics and anti-corruption laws. Mandatory records of benefits, property declarations, and severe limits on donations and gifts for politicians, their parties or election campaigns; as well as regulations on conflicts of interest, particularly in their material version (which may preclude running a business) are all in force.

The American experience also underscores the insufficiency of the provisions enumerated in the Lithuanian and Polish laws to create definitive "lobbying regulations". The mere registration of lobbyists neither secured by proper sanctions nor specifying (as an incentive) the privileges for those who decide to register is insufficient, and the failure to demand regular and comprehensive activity reports from the lobbyists or the principals (or the lobbied) further contributes to the law's shortcomings.

The subject of lobbying will doubtlessly attract more attention on the part of legislators in the near future,[21] particularly when they realise the drawbacks of laissez-faire lobbying. The lack of regulations concerning external pressure on the most vulnerable element of any state, the legal

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[21] For example: the current discussion in the Czech Republic, which is shaken by corruption scandals among top politicians on a regular basis, may be a prelude to the creation of a lobbying law there.

decision-making process, creates a reckless if not dangerous environment. Therefore, the regulation of lobbying in Europe seems to be an urgent step in the right direction.

It is also worth remembering that lobbying can be a positive phenomenon. It allows for the exchange of information between the government and its electorate, whose needs, interests or aspirations may be unfamiliar to politicians. It is very often lobbyists who provide politicians with expert opinions or high-quality subject matter surveys, which would otherwise not reach them. Thus lobbyists are a precious source of information and raise the level of legislation and the political class.

Lobbying regulations are not aimed at eliminating the phenomenon but at counteracting cases of corruption (which has nothing to do with lobbying) and applying clear rules to the lobbying game. Lobbying is, after all, a tool of competition between groups of conflicting interests. Their open contest is an important element of a sane democratic system. Concealing this contest and applying forbidden means of pressure or simply force is a breach of the principles of a democratic state of law, and is therefore to be avoided at all costs. This is the role of lobbying regulations as a corner stone of legal accountability of civil society organisations.

Jakub Płażynski

Public Protests in Poland.
Legal Regulation and Legal Accountability

Introduction

This analysis concerns the issue of legal regulation and legal accountability in the case of public protest in Poland. These public protests are interpreted as a manifestation of civil society, assuming that public protests are born of discontent with political developments, which leads people to gather in groups with common interests to express their stance.

Moreover, this report describes and comments on the legal regulation of the right to protest. It presents a legal guideline of the citizens' rights and duties in connection with demonstrating their stance. In providing the exact legal regulations, the report tries to establish the legal boundaries of allowed conduct in influencing politics. What is more, the aim here is to outline the legal rules that hold representatives of organisations of civil society responsible for their actions. In other words, how far can these organisations go in their aspiration to achieve their goals without violating the law?

To that end, the report analyses four cases of protest actions by organisations of civil society. These four events concern the largest public protests in Poland in the period 1998–2003. The cases under discussion were chosen for their economic, social and political significance. They were also selected in order to show the diversity of actions taken by the protesters to influence politics. In addition the report presents the different reactions of state actors and changes in governmental policy along with developing protests.

The Legal Framework

The aim of this chapter is to describe and comment on Polish legislation concerning the legal regulation of public protests directed at policy making. Moreover, this chapter includes analyses of the specific laws that determine the legal range of rights entitled to Polish organisations of civil society.

Constitution

The supreme source of Polish law, laying the fundaments for the political, social, economic and legal system, is the constitution. It sets up the basic rules, which determine the legal order for both the state and its citizens. The constitution stands above other laws in the hierarchy of Polish law. Moreover, all other statutes are subjected to the constitution and must be in accord with its regulations.

The Polish constitution is divided into twelve chapters regulating different matters of the law. However, for public protests, the essential regulations are included in the second chapter, which is called "Freedoms, Rights and Obligations of the Persons and Citizens (Wolności, Prawa I Obowiązki Człowieka i Obywatela)". This chapter also includes the laws called "freedoms and political rights", which are expressed in articles 57–63. These articles form the basic rights of individual citizens participating in public life, granting the opportunity to express opinions and ideas.

In the first, article 57, citizens are assured of the right to organise and participate in peaceful assemblies:

> The freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone. Limitations upon such freedoms may be imposed by statute.

(Każdemu zapewnia się wolność organizowania pokojowych zgromadzeń i uczestniczenia w nich. Ograniczenie tej wolności może określać ustawa.)

The right to free assembly is thereby limited by the obligation to obey the law in terms of the constitution and the statutes. The constitution lays great emphasis on the peaceful character of assemblies. Participants may not behave in a way that would bring a violent or aggressive character to the assembly. Moreover, public authorities must guarantee the peaceful running of the assembly.

On 5 July 1990 the Polish Parliament passed a statute which strictly regulates the citizenry's right to associate in organised groups. The act is called the "right to associate" and will be further analysed later in this chapter.

The next article ensures the freedom of association. It also describes which associations are forbidden and which must be officially registered:

1. The freedom of association shall be guaranteed to everyone.

2. Associations whose purposes or activities are contrary to the Constitution or statutes shall be prohibited. The courts shall adjudicate whether to permit an association to register or to prohibit an association from such activities.

3. Statutes shall specify types of associations requiring court registration, a procedure for such registration and the forms of supervision of such associations.

(1. Każdemu zapewnia się wolność zrzeszania się.

2. Zakazane są zrzeszenia, których cel lub działalność są sprzeczne z Konstytucją lub ustawą. O odmowie rejestracji lub zakazie działania takiego zrzeszenia orzeka sąd.

3. Ustawa określa rodzaje zrzeszeń podlegających sądowej rejestracji, tryb tej rejestracji oraz formy nadzoru nad tymi zrzeszeniami.)

It is important to note that while the constitution guarantees the right of free association, at the same time it leaves the legislative the right to limit the associations in a way that would secure public safety. Every association must obey the law and may not pose a threat to public order. Moreover, the aims of the associations must be specified and accepted by the court; otherwise they will not be officially and lawfully recognised.

Article 59 describes the rights of employed citizens, granting them the right to organise. This article expands upon article 12, which assures the right to establish and work in organisations of voluntary character, such as trade unions or civil organisations.

1. The freedom of association in trades unions, socio-occupational organizations of farmers, and in employers' organizations shall be ensured.

(Zapewnia się wolność zrzeszania się w związkach zawodowych, organizacjach społeczno-zawodowych rolników oraz w organizacjach pracodawców.).

The first paragraph enumerates the types of organisations which are described as "organisations of working people". The constitution affirms that farmers' organisations enjoy the same rights as other labour organisations. Aside from farmers' organisations, no other workers' organisations are enumerated in the constitution. Agriculture has been determined as an independent branch, which has separate legal regulations from other economic branches.

2. Trade unions and employers and their organizations shall have the right to bargain, particularly for the purpose of resolving collective disputes, and to conclude collective labour agreements and other arrangements.

(Związki zawodowe oraz pracodawcy i ich organizacje mają prawo do rokowań, w szczególności w celu rozwiązywania sporów zbiorowych, oraz do zawierania układów zbiorowych pracy i innych porozumień.)

This paragraph provides the legal basis for resolving workers' and employers' disputes in the course of negotiations.

> *3. Trade unions shall have the right to organize workers' strikes or other forms of protest subject to limitations specified by statute. For protection of the public interest, statutes may limit or forbid the conduct of strikes by specified categories of employees or in specific fields.*
>
> *(Związkom zawodowym przysługuje prawo do organizowania strajków pracowniczych i innych form protestu w granicach określonych w ustawie. Ze względu na dobro publiczne ustawa może ograniczyć prowadzenie strajku lub zakazać go w odniesieniu do określonych kategorii pracowników lub w określonych dziedzinach.)*
>
> *4. The scope of freedom of association in trade unions and in employers' organizations may only be subject to such statutory limitations as are permissible in accordance with international agreements to which the Republic of Poland is a party.*
>
> *(Zakres wolności zrzeszania się w związkach zawodowych i organizacjach pracodawców oraz innych wolności związkowych może podlegać tylko takim ograniczeniom ustawowym, jakie są dopuszczalne przez wiążące Rzeczpospolitą Polską umowy międzynarodowe.)*

The right to strike permits workers associated in trade unions to cease work. The refusal to work should originate in the reasonable demand for executing or securing the trade-unionists' rights. The cessation of work should be voluntary and aimed at securing employees' rights. The right to strike is limited only by widely defined "public good". The strike cannot pose a threat to public order nor endanger any economic, social, or political sphere of life.

The regulation also grants the right to protest in forms other than strikes, which are not defined by the constitution. These other forms would include any activity aimed at securing workers' rights not entailing cessation of work, and, as a result, would not be defined as a strike.

Worker and trade union regulations end up in article 60, which introduces the principle of equal access to public service for all citizens enjoying full public rights. Articles 60–63 are devoted to citizens' political rights. These articles regulate among other things access to public information, participation in referenda, parliamentarian and presidential elections, and procedure of motions, complaints and petitions in the public interest. Although articles 60–63 do not have a direct impact on public protests, they are important for the affirmation of citizens' political rights.

Apart from the constitution, the sphere of social activity is regulated by separate statutes, which expand the constitutional ruling by making regulations more precise.

Statute on Solving Collective Disputes

An act of great importance is the "statute about solving collective disputes" (*ustawa o rozwiązywaniu sporów zbiorowych*) passed on 23 May 1991 (Dziennik Ustaw Rzeczypospolitej Polskiej 1991.55.236). The act consists of six chapters containing twenty nine articles. In the following paragraphs the regulation of strikes, as given in the statute, will be described, as strikes are a major form of public protest.

The first chapter of the statute includes general principles which apply to every case. It states that workers associated in trade unions are entitled to engage in collective disputes against an employer; however, the disputes may only be concerned with work conditions, wages, welfare benefits, rights and freedoms of trade unions or other employees' groups. Moreover, the second article states that the interests of employers and employees, as defined in the first article, may only be represented by employers' organisations and trade unions, respectively.

Article 4, paragraph 1 forbids initiating collective disputes aimed at personal gains if their resolution can be obtained by appealing to an institution which resolves employees' claims. This paragraph indicates that in the right to strike, protest is only entitled to associated groups of employees. A single worker can demand recognition of his or her personal rights only in court.

The second chapter, comprising articles 7 to 9, regulates negotiations between the parties involved in the collective dispute. Firstly, from a legal point of view, a collective dispute exists from the day the employees' demands are submitted to the employer by an organisation representing the employees' interests. An employer then has at least three days to meet the employees' demands. The entity submitting the motion can warn that in the case of unfulfilled demands there will be an announced strike. However, the date of the proposed strike cannot fall before the lapse of 14 days from the date of the announced dispute. The employer must then begin negotiations aimed at solving the collective dispute and at the same time inform the appropriate regional labour inspector of the arising dispute. The negotiations are ended with a written settlement, signed by both sides, or, in the case of no settlement being reached, with a protocol of the discrepancy indicating the stances of the two sides.

Chapter 3 of the statute, comprising articles 10 to 16, deals with mediation and arbitration. The purpose of these regulations is to prevent the excessive use of the right to go on strike by employees. The legislation regards striking as a last resort to resolve disputes, so all strikes must be preceded by negotiations. The prerequisite of mediation or arbitration is strictly regulated by the law and must be fully met prior to strikes by the employees' organisations.

The mediator is chosen together by both sides. The mediator can be chosen from the Labour and Social Politics Ministry's list established in accordance with the nationwide trade unions (art.11§1). If the sides do not agree on a mediator within five days, the Ministry of Labour and Social Politics appoints a mediator from its list (art.11§2). In the event that the dispute does not come to an end, the legislation gives trade unions the right to organise a single warning strike not lasting more than two hours (art.12). The mediation process is ended by both sides signing a settlement; however, in the case of a settlement not being reached, both sides instead sign a protocol detailing the discrepancy and which indicates their respective stances. Both actions are done in the presence of the mediator (art.14). Moreover, article 14 corresponds with article 9; both specify the documents necessary to end a dispute. In the event that a settlement is not reached resolving the collective dispute, the law allows for the initiation of a strike action (art.15). As stated earlier, the right to strike is granted only after fulfilling the strictly specified protocol of mediations.

However, the legislation anticipates one more way to solve collective disputes. Representatives of workers' interests can forfeit the right to go on strike (art.15), and cede the jurisdiction over the dispute to the jury of social arbitration (art.16).

Chapter 4, comprising articles 17 to 25, then regulates the actual strike. A strike means the collective refrain from working aimed at solving a dispute concerning interests entitled in article 1 (art.17§1). Striking is intended as a last resort and cannot be announced without previous exhaustion of possibilities to resolve the dispute according to the rules enumerated in articles 7–14. Strikes without prior negotiations and mediation can be organised only in cases where the employer takes illegal measures to prevent negotiations or mediation, or when an employer terminates a contract with the responsible trade unionists (art.17§2). The entity representing workers' interests should take into consideration the commensuration of demands with losses caused by striking when making the decision to strike (art.17§3). The next article (18) reiterates that participation in a strike is voluntary.

However, the statute in article 19 states that refraining from work in the form of a strike is not permissible at workplaces where a strike would pose a threat to life, health, or state safety. The institutions and organisations which are deprived of the right to strike are named in the article and comprise the Agency of Interior Security, the Agency of Intelligence, the police, military,

prison service, border guard, duty service, fire organisations, governmental and regional administration, courts and the public prosecutor's office.

According to article 20 §1, a strike can only be announced by labor organisations if a majority of the workers f the respective enterprise voted in favour (with voter turnout being above 50%). The announcement of the strike should be done at least five days before its start (art.20§3). Apart from strikes aimed at defending workers' interests, other forms of protest are allowed as long as they do not create a threat to health and are applied after the exhaustion of the protocol described in the second chapter (art.25§1)

It is important to note that among the articles concerning the situation of employed workers, farmers are given the right to protest in the way agreed to by their trade unions (art.25§2). The statute does not address the issue of the farmers' right to strike, because they are self-employed. They cannot go on strike, because they do not have an employer against whom they could protest. However, agriculture is treated as one of the branches of the economy, and on this basis farmers are given the legal means to air their grievances, reflecting the concerns of the entire branch.

In the last two chapters, the law includes regulations about responsibility for infringement of the statute (art.26, chapter V), transitory and final regulations (art.27–29, chapter VI).

Law on Assemblies

The next law regulating social activity is the statute called "law on assemblies" *(Prawo o zgromadzeniach)*, passed on 5 July 1990 (Dziennik Ustaw Rzeczypospolitej Polskiej 1990.51.297). The statute has great importance for the regulation of freedom and the right to associate. Moreover, the statute ensures the fundamental right to express ideas and opinions in the public forum. Citizens are given the right to gather in public, where they can exercise freedom of speech. The statute consists of three chapters, comprising 19 articles.

The general principles are set down in the first chapter, consisting of articles 1 to 4. In the first article, the statute states that everyone can exercise the freedom to assemble peacefully. Furthermore, the legislation defines an assembly as a group of at least 15 people called to share proceedings or to express a common stand (art.1§2). Moreover, the freedom to assemble can only be limited by the statutes essential for the preservation of state security, public order and health, political morality and rights of other citizens (art.2). The right to organise assemblies is extended to persons able to take legal actions, legal entities, and other organisations and groups (art.3§1). The participation of people bearing guns, explosives or other dangerous weapons in assemblies is forbidden (art.3§2). As we can see, the legislation does not impose strict conditions on organising and participating in public assemblies, except for safety regulations; lawmakers do not wish to unduly hamper this informal type of social activity. Thus the only limitations imposed are those necessary to ensure public safety for onlookers as well as assembly participants.

The second chapter, comprising articles 5 to 13, lays out the proceedings in the case of assembly *(Postępowanie w sprawach zgromadzeń)*.

Responsibility for the regulation of assemblies lies with the regional and local state organs (art.5§1). The Voivod, i.e. the head of the regional executive, is the appeal organ for decisions taken in the cases described in the first paragraph (art.5§2). The supervision of assemblies is handed over to the local administration and the Voivod. Assemblies organised in open spaces, accessible to an unlimited number of people, are called "public assemblies" and require previous notification of the local state organ adjacent to the place of assembly (art.6§1). Article 7 describes, in detail, the form and content of the notification:

Article 7§1 The organiser of a public assembly notifies the commune's organ in such a way that the notification would come not later than 3 days and not sooner than 30 days before the date of the assembly.

2. The notification should include the following data:

1) the name, surname, date of birth and address of the organiser as well as the name and address of the legal entity or other organisation, responsible for the organisation of the assembly;

2) the aim of the assembly as well as the language which will be used to communicate among participants;

3) the place, date, time, planned duration, expected number of participants, as well as the projected route of a demonstration march, if one is planned;

4) specification of planned means to assure a peaceful course of events as well as means requested by the organiser from the local state organ.

The notification procedure should not be regarded as a limitation of the freedom to assembly, but as its guarantee. It is a procedure of informing local authorities that a certain assembly is going to take place. The assembly will be approved as long as it does not constitute a concrete danger to other people or its participants. Article 8 regulates this matter; the local state organ forbids public assembly, if:

its aim or presence is in opposition to the statute or violates criminal laws;

the assembly could threaten lives, public health, or property to a significant extent.

Moreover, the next article (Article 9) describes the protocol upon failure to obtain permission to conduct an assembly:

1 The decision to forbid a public assembly should be delivered to the organiser within 3 days of the request, but not later than 24 hours before the planned beginning of the assembly.

2. An appeal may be initiated within 3 days of the delivery of the decision.

3. The issue of an appeal does not reverse the decision.

4. A response to the appeal must be delivered to the organiser within 3 days of receiving the appeal.

What is more, local authorities have been given one more prerogative in the supervision and assurance of safety concerning assemblies: They can delegate representatives to an assembly (art.11§1). The role of the delegated representative can be crucial to bringing under control a situation in which an assembly becomes a threat to public order or health; this procedure is regulated by article 12. An assembly can be dissolved by the representative of the local state authorities if its course presents a threat to public health or property to a significant extent; when it violates statutory or criminal laws; or if the chairman of the assembly, previously instructed to dissolve the assembly, refrains from doing so (art.12§1). An assembly's dissolution follows a verbal decision taken by the representative of the local state authorities, preceded by a warning of possible dissolution (to be repeated three times to its participants and announced to the chairman in the participants' presence). The decision to dissolve an assembly requires immediate notification. The decision, in writing, is to be delivered to the organiser within 24 hours of its inception (art.12§2). The organiser has the right to appeal the decision to dissolve the assembly within 3 days of notification (art.12§3).

As described above, the procedure of dissolving an assembly which is already in progress is hard to carry out and should be considered the final means of introducing public order. The assembly can be dissolved in the aftermath of serious violations of the law. Moreover, the representative of the local state authorities is required to warn the organiser about the consequences

of not following directives, so that he or she is fully aware of the risk being incurred. In the event that assembly participants refuse to cooperate, the representative of the local state authorities is obliged to dissolve the assembly. So far the right to dissolve public assemblies has only been sporadically used.

The third chapter of the statute includes changes in current regulations, transitory and final regulations. This chapter does not involve any regulations relevant to this project.

Summary

The regulation of public protest actions is regulated first of all by the constitution (articles 57–63), by the statute on solving collective disputes and by the law on assemblies. They provide the legal framework for political activities by organisations of Poland's civil society. This legal framework is in line with democratic standards and corresponds with the EU's major demands. In order to understand the regulation of public protests it is, however, vital to analyse how this framework is applied in practice.

For this purpose four cases of public protests will be discussed in detail in the next chapter: road blockades by farmers in 1999; grain spilling by farmers from 1998 to 1999; a violent demonstration by miners in 2003 and strikes by railway workers in 2003. These four events are among the largest public protests in Poland in the period 1998–2003. The cases under discussion were chosen for their economic, political and legal significance. They were also selected in order to show the diversity of actions taken by the protesters to influence politics.

Road Blockades by Farmers in 1999

The Russian financial crisis of 1998, which caused a sharp decline in demand for Polish food exports, and the increasing pressure to adopt EU regulation for domestic agriculture, led to discontent among the Polish farmers. The fact that the newly elected conservative government restrained from any reform measures then caused a general wave of protests. In 1998 and 1999 a considerable number of social groups engaged in protest actions, among them farmers. The farmers opted for rather radical protest methods including road blockades and the illegal spilling of imported grain.

Demands of the Protesters

The main aim of the farmers was to draw the attention of the public and of the government to the situation of the Polish countryside. Farmers wanted to force the government to bankroll agriculture. On the other hand, agricultural unrest was to some extent manipulated by the farmers' leaders, who tried to gain the political support of the countryside for their political movements.

The farmers' primary demand was the introduction of the "Pact for the Countryside". The pact would formalise governmental policy towards the countryside and would outline methods to improve the situation of agriculture. Furthermore, the farmers demanded an increase in prices for agricultural production and restrictions on food imports. Moreover, in fear of being penalized for setting up blockades, farmers demanded governmental recognition of blockades as a legal form of protest.

The Protest Action

The most influential farm leader in the late 1990s was Andrzej Lepper with his party "Samoobrona" (Self-defence). Other movements supporting protest actions by farmers were the "Krajowy Związek Kolek Rolniczych" (National Union of Agricultural Circles), led by Janusz Maksymiuk and Władysław Serafin, and the "Solidarność Rolników Indywidualnych" (Solidarity of Private Farmers), led by Roman Wierzbicki. Although, the different groups of farmes and the

rural population participated in the road blockades, the most active group were pork breeders, who were heavily affected by the low prize of pork.

The idea of road blockades was summarized by Andrzej Lepper:

> *Blockades will be prepared by setting harrows as spiky barriers and tyres smeared with inflammable liquids. If the police move in, water-carts with manure will be prepared to make the authorities feel the Polish countryside. (Gazeta Wyborcza 6.01.1999,p. 4)*

Apart from the above method, farmers also used bottles filled with petrol and cylinders with gas, for example in Nowy Dwór Gdański. (Rzeczpospolita 26.01.1999, p. 2)

The protest action started on 22 January 1999, when farmers blocked the frontier with Germany in Swiecko and set a few blockades on Polish roads. On 25 January at least 130 road blockades were set up. More than six thousands farmers were involved in the protests. (Gazeta Wyborcza 27.01.1999, p. 3) The largest number of blockades was observed in Wielkopolska, where the Polish "pork basin" is situated. As the Wielkopolski Voivod Maciej Musiał stated: *"Here the farmers lose the most."* (Gazeta Wyborcza 27.01.1999, p. 3).

Most of the blockades lasted until 8 February, when the government signed a settlement with the farmers, which included most of the farmers' demands. (Rzeczpospolita 09.02.1999, p. 2)

The settlement was co-signed by "Krajowy Związek Kolek Rolniczych" and "Solidarność Rolników Indywidualnych". Although Samoobrona took part in the preparation and negotiations of the settlement, its representative Ireneusz Martyniuk said that Samoobrona would take the agreement into consideration but would not sign it. Andrzej Lepper went much further, calling the settlement "mumbo-jumbo". (Rzeczpospolita 09.02.1999, p. 1) Accordingly, the road blockades organised by Lepper's supporters remained until the police dissolved them by force after the settlement had been signed.

The economic cost of the damage caused by the farmers' blockades is hard to estimate. Total costs comprise several points. Firstly, the losses incurred by the transport companies, whose trucks were stuck in the blockades: the estimated number of stranded trucks, as quoted by the International Transport Organisation in Poland, was 40,000, of which 22,000 were Polish (Gazeta Wyborcza 6.–7.02.1999, p. 1). Secondly, the state had to pay for police actions. Thirdly, the state had to repair the road damage caused by the farmers'blockades. Moreover, common citizens suffered from restrictions of travel, which are impossible to quantify in their economic relevance.

Public Reactions

The farmers' blockades were broadly discussed and became one of the major themes in Poland's public debates for two weeks. If we consider political reactions to the blockades, a line can be drawn between its supporters and opponents, which is by and large identical with the line between the government of conservative and liberal forces and the left-wing political opposition.

The government's first reaction was to treat blockades as an infraction of the law. Prime Minister Jerzy Buzek stated: *"The State must counteract the protests, which hamper living".* (Gazeta Wyborcza 27.01.1999, p. 3) Moreover, at a press conference, the Vice-minister of Internal Affairs Krzysztof Budnik declared: *"The motions against participants in illegal actions will be sent to the Council of Citation or the public prosecutor."* (Gazeta Wyborcza 26.01.1999, p. 3)

The government held the view that the aim of the blockades was not to improve the situation of the countryside, but to accomplish Andrzej Lepper's political goals. The Minister of Agriculture, Jacek Janiszewski, claimed that *"Lepper was not interested in negotiations with the government, but only in an escalation of the conflict."* (Gazeta Wyborcza 26.01.1999, p. 3) Furthermore, Vice-minister Krzysztof Budnik said that *"The police should use force where the law*

is being broken". (Gazeta Wyborcza 26.01.1999, p. 4) However, the decision to use the police to disperse the protesters was left to the discretion of the regional state authorities, the voivodes.

The voivodes' approach to the blockades varied in each province. The decision to suppress the blockades was taken in Zachodniopomorskie (Pyrzyce), Wielkopolskie (Kostrzyn, Górzyn), Pomorskie (Nowy Dwór Gdański, Człuchów), Łódzkie (Bedlno), and Śląskie (Lubecko). The voivodes of Kujawsko-Pomorskie and Dolnośląskie decided not to use force as long as the blockades did not disturb public order uncontrollably or endanger lives. On the other hand, the Lubelski voivod tried to calm tensions by sending a letter to farmers in which he asked for peaceful and patient means for solving the problems. (Rzeczpospolita 28.01.1999, p. 3)

On the national level the opposition widely criticised the government for allowing police to suppress the blockades and supported the farmers' demands. Solidarity with the protesters was expressed by among others Jarosław Kalinowski, leader of the PSL (Polish Peoples' Party); KPEiR (National Party of Pensioners and Annuitants); Marian Jurczyk (President of Szczecin) and Jozef Wiaderny (OPZZ; Nationwide Treaty of Trade Unions). (Gazeta Wyborcza 26–27.01.1999, p. 3–4) However, Leszek Miller, the leader of the main opposition party, the SLD (Democratic Left Alliance), took a more balanced stance, on the one hand supporting the farmers' position, but on the other hand denouncing illegal road blockades (Gazeta Wyborcza 02.02.1999, p. 1)

This sentiment was also echoed by the Polish Church: Primate Jozef Glemp criticised the farmers, arguing that road blocking was "not a Christian method" (Gazeta Wyborcza 03.02.1999, p. 3). A similar opinion was voiced by Bishop Pieronek, who sympathised with farmers in the belief that agricultural reform was difficult for them, but did not support the desperate methods of road blocking (Rzeczpospolita 27.01.1999, p. 3)

However, a majority of the Polish public supported the farmers' protest actions. According to a poll by PBS 78% of the population felt that the farmers were justified in blockading roads and only a minority supported the use of force to undo the blockades. Sympathy for the protesting farmers was prevalent in all groups surveyed and was especially strong among farmers and workers of homesteads, where it was above 90%. (Rzeczpospolita 04.02.1999, p. 1).

The Legal Aspect

On 8 February 1999 the government signed a settlement with the farmers' representatives, as mentioned above. One critical point was the legal status of the blockades. The farmers demanded recognition of their means of protest as legal, implying immunity for both organisers and participants.

In response, the government issued a statement declaring that Polish legislation granted the right to protest and to choose a form of protest, adding that from and economic and social point of view, the protests were justifiable. Moreover, the government pronounced that Polish law and the judiciary did not stand for corporate liability. (Gazeta Wyborcza 09.02.1999, p. 3) This not unequivocal statement was commented upon by Minister of Labour Longin Komołowski: *"It is a justification of the protest, but not of the way in which it was held"* (Gazeta Wyborcza 09.02.1999, p. 3).

This record of the settlement meant that even though farmers broke the law they would not be taken to court for participation in the blockades. However, the police was instructed to send motions to the Council of Citations against all those who infringed the law in other ways. The motions were based on the data collected during the blockades.

However, many politicians cited PSL member Aleksander Bentkowski, who claimed that the right to blockade roads was lawfully given to farmers by the statute on solving collective disputes, which – as discussed above – in article 25 states that *"farmers have the right to organise a protest action in the way settled upon by their trade unions."* According to Bentkowski,

blocking roads may be permitted in certain situations, as long as the farmers' trade unions approve this kind of protest (Rzeczpospolita 29.03.1999, p. 8).

However, as Michał Skąpski, from the faculty of law of the Adam Mickiewicz University in Poznan, remarked: *"The lack of circumscriptions for allowed forms of protests makes it indispensable to refer to other statutes for appropriate interpretation of this particular law. Furthermore, according to the code of* citation *(art.90 and 91), road blockades are forbidden."* (Rzeczpospolita 14.04.1999, p. 8) It is obvious that approval by a trade union does not mean that every kind of protest action can be carried out. The organisers have to take into consideration the fact that the proposed protest action must be in compliance with the whole legal system, not only with one statute. Trade unions do not have the power to sanction actions, forbidden by Polish law.

Grain Spilling by Farmers 1998–99

A major group of farmers who were affected by bad conditions in the countryside were grain cultivators. These farmers faced difficulties in selling their crops and became largely discontented with grain prices, which were regulated by the state, and with the relatively small number of agencies buying the grain. According to cultivators, one cause of their economic problems was the flooding of the Polish market with imported grain. Accordingly Polish grain cultivators were strongly opposed to grain imports. During the protest wave of 1998–99 groups of farmers prevented grain transports from entering Poland by spilling the cargo from railway wagons onto the tracks.

Demands of the Protesters

The farmers' only demand, but for them a very important one, was a ban on grain imports. Farmers argued that the imported grain was of poor quality and was ruining upright, hard working Polish homesteaders. In addition to claiming product inferiority, the farmers accused import companies of smuggling grain. In their opinion, the importers did not pay duties on the foreign grain in full. As a matter of fact, according to transit papers the wagons were not fully filled, but when farmers spilled the grain from the wagons, they appeared to be full.

The Protest Action

The first instances of spilling grain occurred in May 1998. Such actions continued on a regular basis until September 1999. The organiser of these protests was in most cases Marian Zagórny, who became a leader of the National Protest Committee of Solidarność Rolników Indywidualnych (Solidarność RI).

One typical example of Marian Zagórny's actions took place on 13 August 1999 in Muszyna, on the southern border with Slovakia. At six o'clock in the morning, Marian Zagórny, along with a group of his supporters, arrived in Muszyna. They immediately ripped seals from the rail wagons and spilled grain onto the tracks. Railwaymen estimated that about 20 tons of wheat and a dozen tons of barley were spilled, worth almost 40 000 Złoty (at that time about 10 000 US-Dollars). The grain originated in Slovakia and Hungary. This was the fourth action taken to destroy imported grain at Muszyna railway station. (Rzeczpospolita 14–15.08.1999, p. 1)

Surprisingly, no-one from the railway authorities tried to prevent the grain spilling. Railway security did not intervene. Not until police arrived did protesters desist in their precedent-setting actions. According to the police, about thirty farmers participated in the protest. Even though police officer Ryszard Niekurzak claimed that the police had identified a dozen people, none of the farmers was detained. (Gazeta Wyborcza 13–14.08.1999, p. 1)

Public Reactions

The grain spilling protest was largely approved by the farmers' organisations and was officially organised by Solidarność RI. Furthermore, the leader of Krajowy Związek Kołek Rolniczych (National Union of Agricultural Circles), Władysław Serafin, announced that his party would join in the act of grain spilling. (Gazeta Wyborcza 14–15.08.1999, p. 1)

On the other hand, Minister of Agriculture Artur Balasz referring to the problem of imported grain, explained that grain transports in a duty-free contingent were approved in 1995 and would last until 2000 according to an agreement signed under the World Trade Organisation. (Gazeta Wyborcza 13–14.08.1999, p. 1)

As a matter of fact, the grain spilling of August 1999 was not widely commented upon and did not occur to be a point for public discussion, unlike the case of road blocking. The grain spilling was not in the public's limelight, because of its relatively small direct impact on society. The only group heavily afflicted by the protest were grain importers, who lost their cargo. The common citizens' interests were not interfered with and as a result the grain spilling did not arouse massive public attention.

The Legal Aspect

According to Polish law, all farmers' demonstrations in which grain was spilled were illegal. The participants of the protest would have to face full legal consequences. In the situation under consideration, the farmers' actions and the form they took were approved by the farmers' union, that is Solidarnosc RI, but they broke the laws of the citation and penal codes. On one hand, the actions constituted a citation, because they disrupted public order and endangered the citizenry. On the other hand, the actions violated the legal guarantee of property rights. In this case, the protest actions violated among other things the article 288 §1 and §2 of the penal code, which prohibits destroying, damaging or making unfit for use somebody's property.

Although many farmers participated in the protests, on most occasions only Marian Zagórny was put on trial for spilling grain. The authorities held Zagórny most responsible for spilling grain, as he was the organizer and as it was indeed Zagórny who ripped the wagons' seals out and caused the grain to fall onto the tracks. Zagórny was taken to court for each of his grain spilling protests.

For spilling grain in Muszyna on 13 August 1999, the district court in Muszyna sentenced Marian Zagórny to 10 months of limited freedom. The court ruled that Zagórny had to work gratuitously and remain under police watch 30 hours per month for the benefit of Polish State Railways (Polskie Koleje Państwowe). The sentence was pronounced in March 2000, and it was definitive.

Apart from the case presented above, Zagórny received further sentences. The court in Jastrzębie Zdrój sentenced him to 15 months in jail and an indemnity of 200 000 Złoty (at that time about 50 000 US-Dollars). However, of the 15 months, Zagórny spent only 79 days behind bars and was then granted a presidential pardon. Another sentence by the district court in Muszyna comprised a fine of 4 000 Złoty and 31 000 Złoty indemnity (at that time together about 8 000 US-Dollars). Again Zagórny was granted a Presidential pardon. The farmers' leader still had one more sentence from the court in Muszyna: 7 months in prison and 30 000 Złoty (at that time about 7 000 US-Dollars) indemnity. Furthermore, Zagórny, under accusation of destroying seven tons of grain, faced judgement from the court in Kłodzko. (I. Miecik and P. Pylatowski in the article "Ziarno Prawdy", Polityka, 01/2001 (2279))

Violent Miners' Demonstration in 2003

Since the end of the socialist planned economic the Polish coal mining industry faces a structural crisis, as most coal produced in Poland is not able to compete on the world market. For ages, mining was an essential branch of the Polish economy, and compared to that of other labour groups, the miners' situation was relatively good. Moreover, the mining industry had been mostly developed in the region of Silesia, where it became the leading industry, employing a huge percentage of Silesians. This occasioned miners to become a prominent part of society, well organised and with strong affection for the region, where the profession was passed from generation to generation. This made miners a solid group of workers, who would stand up to defend their mines. Whenever the government agreed on a new restructuring programme for the coal industry, envisaging mine closures on a massive scale, miners regularly organized strong protests. So far they have been able to prevent a radical restructuring of their industry. The most recent protests took place in 2003.

Demands of the Protesters

Miners were strongly opposed to the proposed plan of mining reform. Most importantly, they were wrathful toward the government's decision to shut down four coal pits: Polska-Wirek, Bolesław Śmiały, Centrum and Bytom II. They demanded maintenance employment for miners from liquidated coal mines as well as special social programs for those who would leave the industry.

The Protest Action

The first miners' demonstration was organised by "Związek Zawodowy Górników w Polsce" (Miner's Trade Union in Poland). It took place on 11 September in Warsaw. Seven thousand miners from thirteen different mining trade union centres participated in the protest. Although the demonstration was originally conceived as a peaceful procession, the miners nevertheless came to Warsaw equipped with various weapons, including spade handles and crow bars.

The miners gathered in the centre of Warsaw next to Torwar, a concert hall and sports stadium. At twelve o'clock, seven thousand miners moved to the headquarters of SLD (Democratic Left Alliance), the governing party. As the crowd reached the building it started shouting: *"Robbers, robbers!"* and pelted the party's main office with eggs, paint, stones, and firecrackers. (Gazeta Wyborcza 12.09.2003, p. 6) Then the protesters moved on to the head office of the Ministry of Economy, where the demonstration turned into a riot.

Although the ministry building was guarded by two rows of policemen and metal crash barriers, these precautions did not prevent the frustrated miners from charging the office. Furthermore, the crowd was determined to smash the police forces. They hit police officers with pavement bricks, wooden cudgels and finally threw Molotov cocktails at defending officers. At that point, city authorities decided to dissolve the demonstration. The police appealed to the demonstrators to disperse and announced that the demonstration had been declared illegal. (rz.12.09.2003)

However, the miners attacked the police with even more aggression. After thirty minutes, the police managed to defuse the situation and the miners divided themselves into two groups. The first group continued their march towards the Sejm (the Lower House of the Parliament), but the second group fanned out along the streets of Warsaw, causing minor disturbances.

Next, the protesters headed for government headquarters and the Russian Embassy, which they pelted with petards, stones and Molotov cocktails (Gazeta Wyborcza.12.09.2003, p. 6). The Russian Embassy had been chosen as a target because cheap, subsidized imports of Russian coal were seen as a threat to the Polish mining industry. Finally, at two o'clock the demonstration ended and the miners went back to Silesia.

The Ministry of Interior Affairs and Administration estimated the total damage resulting from the demonstration to amount to at least 200 000 Złoty (at that time 50 000 US-Dollars). Moreover, 62 policemen were injured (eleven of whom were subsequently hospitalised), and medical help was given to 22 demonstrators. 55 helmets and 60 police uniforms were damaged. Windows in the Ministry of Economy, the SLD's office and the Russian Embassy were broken and 5 police cars and 2 diplomatic vehicles were also damaged. Nine demonstrators were detained by the police. (Gazeta Wyborcza 13–14.09.2003, p. 3)

Public Reactions

The miners' demonstration was widely discussed in the public. The protests elicited a national debate about the poor state of the Polish mining industry and the hopelessness of the miners. On the other hand, public authorities and even the organisers of the demonstration themselves declared to be shocked by the outbreak of violence. For example the Minister of Interior Affairs Kszysztof Janik stated: *"I am shocked; an invisible line has been crossed. Every citizen has a right to demonstrate, but for the first time, the police became a target of aggression."* (Gazeta Wyborcza 13–14.09.2003, p. 3)

The police said that they had been assured by the organisers of a peaceful demonstration. (Rzeczpospolita 12.09.2003, p. 3) However, in response to the police's statement, Vice-chairman Wacław Czerwiński of "Związek Zawodowy Górników w Polsce", who was personally responsible for organising the demonstration, argued that he had warned the police about possible riots. Czerwiński said: *"I told the police that people are frustrated; they have been on strike for two weeks in coal pits. However, on Wednesday (10.09.2003), 13 unions' centrals of miners assured me that the protest would be quiet."* (Rzeczpospolita 12.09.2003) He admitted that he had lost control over the demonstrating miners. (Gazeta Wyborcza 13–14.09.2003, p. 3) Piotr Duda, the chairman of the Solidarity Union from the Śląsk-Dąbrowa region, said that the situation had spun out of the control, but he had tried to calm the people down. He also added that the Solidarity Union had only been a participant, not an organiser. (Rzeczpospolita 12.09.2003, p. 3) ZZGwP Chairman Andrzej Chwiluk argued that the violence had been provoked, but that he deeply deplored the ensuing events. (Gazeta Wyborcza 13–14.09.2003, p. 3)

The parliament discussed the problem of the Polish mining industry on 12 September, the day after the riots. The Deputy Prime Minister and Minister of Economy Jerzy Hausner, in his speech before the Sejm, presented the catastrophic condition of the industry, arguing that without reform it might be necessary to shut down all the coal pits, not only four. Hausner attacked the trade unions for not being interested in reforming Polish mining, due to their prosperous stake in its continued turmoil. (Gazeta Wyborcza 13–14.09.2003, p. 3)

The miners' trade unions strongly criticised the minister's speech. Daniel Podrzycki, the chairman of the trade union August '80, declared that Hausner was provoking the miners, and Marek Klementowski, the chairman of miners' Solidarity, regarded the speech as a declaration of war. (Gazeta Wyborcza 13–14.09.2003, p. 3)

Sejm member Ryszard Pojda from Unia Pracy (Labour Union), in an attempt to explain the miners' behaviour, stated: *"The government made a mistake of a psychological nature. It informed [the public] about shutting down, but did not say what would happen to personnel. That's why we have protests."* (Gazeta Wyborcza 13–14.09.2003, p. 3) However, Hausner quickly replied: *"We have always said that we would not close down coal pits without a provision for its personnel."* (Gazeta Wyborcza 13–14.09.2003, p. 3)

On the other hand, Minister of Interior Affairs Krzysztof Janik said: *"Those who attacked the policemen are bandits, the same as those who attack the police in other places."* Janik also assured that security measures would be increased and that the police would be prepared for future demonstrations. (Rzeczpospolita 13–14.09.2003, p. 4)

The police worked on the identification of the most aggressive demonstrators, who would be arraigned on charges of attacking police officers. As far as the problem of attacking policemen was concerned, trade union head Wacław Czerkawski stated: *"We will help the police to identify those who threw Molotov cocktails but we will defend those who fought with the police in self defence."* (Gazeta Wyborcza 13–14.09.2003, p. 3)

The Legal Aspect

The miners' demonstration had been legal until the accord for organising the protest was revoked by the mayor of Warsaw. As described in the first chapter, according to the law on assemblies everyone has the right to assemble peacefully. On the basis of the law, Związek Zawodowy Górników w Polsce was granted official permission to organise a public demonstration on 11 August 2003. On behalf of ZZGwP, Wacław Czerkawski gave assurances that the demonstration would proceed peacefully. When the demonstration disturbed public order the mayor of Warsaw used his right to dissolve the demonstration, declaring it illegal.

Accordingly the local police was obliged to dissolve the demonstration. The police conduct is regulated by the "statute about the police" passed on 6th April 1990 (Ustaw Rzeczypospolitej Polskiej 1990.30.179). In the event of a public manifestation, which violates the law, the statute grants the city mayor has the right to ask the appropriate police commanding officer to restore legal order or to take preventive measures (art.11§1). However, the request cannot dictate the specific function to be taken by the police, or the manner in which the police should operate (art.11§2). If the people participating in the public manifestation do not follow the demands by the police, the police can use the following measures of direct compulsion (16§1):

1) physical, technical and chemical measures used to incapacitate or escort people and to stop vehicles

2) police batons

3) water means of incapacitation (water canon)

4) dogs and horses

5) rubber bullets, shot from firearms.

The police can only use the measures of direct compulsion adequate to the needs of a given situation (16§2).

In reaction to the following riots a political debate about tougher rules emerged. Warsaw mayor Lech Kaczyński argued: *"At present we do not have any legal means to block a demonstration before it occurs."* The Minister of Interior Affairs declared that he would consider changes to the law which would make the organisers of the protests financially and criminally liable for the results of actions taken by demonstration participants. These changes were approved by parliament in an amendment to the law on assemblies, passed on 2 April 2004. However, the President did not sign the amendment, but sent it to the Constitutional Court to adjudicate whether the amendment was in accord with the constitution. The President argued that the amendment would restrict the fundamental right to free assembly. On 10 November 2004 the Constitutional Court assented to the Presidential opinion and ruled that some regulations of the amendment were in violation of the constitution. The parliament now has the possibility to pass a revised version of the amendment.

Railway Strikes in 2003

Polskie Koleje Państwowe (PKP – Polish National Railway) is the biggest employer in Poland and also one of the few state enterprises which has not yet been privatised. In 2003 it employed over 140 000 people, which is rather small compared to more than 400 000 workers in the early

1990s. However, it still needed serious restructuring if the PKP was to compete with foreign enterprises. Most of the governmental attempts to introduce a new restructuring plan were opposed by strong railway trade unions, which try to preserve employment and their own position. At the end of the year 2003 Poland witnessed a wave of discontent among railway workers.

Demands of the Protesters

During the first strike the unions demanded to prepare a new plan of reform for the PKP, which would include governmental subsidies in summary amounting to 1.7 billion Złoty (at that time about 400 million US-Dollars). Secondly, they demanded that the PKP Przewozy Regionalne (PKP Regional Transport) be kept intact and not divided into smaller companies. Moreover, unions did not want PKP Cargo or any other transport company to be privatized before privatization of the whole PKP enterprise.

In December the railway workers also demanded a guarantee that the regional transport would be subsidised by local governments and that abolished regional railway connections would be partially restored.

The Protest Action

PKP's employees are gathered in 28 different trade unions, which vary heavily in membership numbers. The biggest trade unions are "Railway NSZZ Solidarność" (Solidarity) and "Federacja Związków Zawodowych Pracowników PKP" (Federation of Workers' Trade Unions of the PKP). The strike was organised by a strike committee, which consisted of 13 trade unions. The leading role was played by railway Solidarity, whose trade-unionist mainly participated in the protest.

The strike committee announced that on the 11 November no trains would leave railway stations after 12:01 a.m. unless the government fulfilled the trade-unionists' demands, with one exception: Trains which began their journey before midnight would be allowed to continue. Stanisław Kogut, chairman of the railway Solidarity, declared that the strike would encompass the whole country. In his opinion this was guaranteed by the makeup of the committee, which included almost 90 percent of PKP's employees working on trains (Gazeta Wyborcza 12.11.2003, p. 1).

After hours of negotiations the trade unions managed to reach an agreement with the government, which on all important points accepted the demands of the trade union with only minor compromises. As a result the general strike was suspended until the government fulfilled its part of the agreement. (Rzeczpospolita 13.11.2003, p. 3)

However, trade unions feared that the government would not implement the agreement. The first attempt to put more pressure on the government was undertaken by 11 chairmen of central trade unions, who began a hunger strike on 8 December in one of the PKP's headquarters. Furthermore, in an act of solidarity, about one hundred railway workers began a concurrent hunger strike in 23 different spots (Rzeczpospolita 17.12.2003, p. 4). Moreover, in response to the abolition of 518 regional railway connections, on 16 December the trade unions organised short term blockades (up to two hours) of the 12 biggest Polish railway junctions. The most significant blockades were in Lublin, Bydgoszcz, Toruń, Tarnowskie Góry and Gdynia. *"We demand the enforcement of present agreements and we worry that they won't be fulfilled,"* declared Leszek Mietek from the National Strike-Protest Committee. (Rzeczpospolita 17.12.2003, p. 4)

In reaction to the renewed protests the government began negotiations with the strike committee on the following day. However, not all trade-unionists were satisfied with the form and the course of the negotiations, and they decided to go on strike again. On the evening of 19 December the protesters stopped traffic on the following railway stations: Katowice, Czechowice-Dziedzice, Jaworzno-Szczekowa, Pszczyna, Bielsko-Biała, Lublin, and Tczew. The blockades

caused huge delays of all trains, including up to 3–5 hours for express trains. (Rzeczpospolita 20–21.12.2003, p. 3)

The avalanche of new blockades was stopped at midnight by the news that the Sejm (the Lower House of the Parliament) had granted the PKP 550 million Złoty (at that time about 140 million US-Dollars) for regional transport. On 20 December, the strike committee suspended the protest and called off the railway blockades. Moreover, the 11 union chairmen ended their hunger strike after 13 days. Solidarity Chairman Stanisław Kogut declared that trade-unionists would be on alert until the Senate (the Upper House of Parliament) and the President accepted the Sejm's decision. (Rzeczpospolita 22.12.2003, p. 3) Although the NSZZ Solidarity did not sign any settlement, it approved the financial conditions offered by the government and no further strikes were undertaken.

Public Reactions

First of all, an important stance was taken by Federacja Związków Zawodowych Pracowników PKP, the PKP's second biggest trade union, in opposing the strike with the argument that it was a politically-motivated action by the conservative opposition. Moreover, the FZZP argued that the strike committee was not cohesive and would soon break up, causing the entire strike action to fail. Both the FZZP and the PKP's board declared that the strike would only occur in certain regions, and not throughout the whole country.

In response to the above accusations, Stanisław Kogut said that the strike committee had gathered the support of 89 percent of PKP's employees working directly on the operating railway posts. (Gazeta Wyborcza 12.11.2003, p. 4) Furthermore, Kogut argued that the FZZP did not want to go on strike because it sympathised with the governing SLD (Democratic Left Alliance).

Moreover, the strike caused a parliamentary debate about the PKP's future. The government's strategy was to head off the strike by starting negotiations with the trade unions. However, the government made some clear demands, including a plan for PKP's economic restructuring. These demands were executed by the Ministry of Infrastructure. Once in a while, the Vice-prime Minister and Minister of Infrastructure Marek Pol and Vice-Minister Maciej Lesny came out in favour of the governmental reform. *"The restructure is necessary for the PKP to be able to compete with foreign transport hauliers that would enter Poland during the next few years"* (Marek Pol). (rz. 17.12.2003, p. 4)

On the other hand, the political opposition criticised the government for preparing an inappropriate restructuring and privatisation plan for PKP. The initiative to support PKP, which included a parliamentary vote to increase subsidies to the company, was initiated and led by Prawo i Sprawiedliwość (Law and Justice).

The legal aspect

The Ministry of Infrastructure announced in advance that the planned strike of railway workers would be illegal. The Ministry explained that according to the law the trade unions' demands could only concern working matters, such as salaries or work conditions, and not the government's policies of subsidies and privatisation. (Gazeta Wyborcza 12.11.2003, p. 1). However, the trade-unionists answered that their postulates were aimed at saving jobs, whose numbers would plummet in the case of structural reforms at PKP (Gazeta Wyborcza 12.11.2003, p. 1).

If we strictly stick to the letter of the statute of solving collective disputes, the right to strike can only concern working conditions, wages or welfare benefits as well as the rights and liberty of united workers or other associations (art.1). According to this article, all actions, taken to acquire other demands than listed in the first article, would be illegal. However, in a liberal interpretation the statute enables employees to take strike actions, when they consider that their work conditions, wages or welfare benefits are threatened and can worsen. The liberal interpretation

allows the trade unions to oppose the restructuring plan, because includes massive dismissals. The question of the legality of the protests can only be definitely solved by a court.

As a matter of fact, the strike was suspended in November before it had really begun. As a result, the situation did not cause any legal perturbations. However, during the second wave of strikes in December, the matter of their legality came back to the debate. The government announced once again that the protest would be illegal and that the railway workers who had blockaded railways would be brought to account. However, the governmental declaration occurred to be an empty threat aimed at gaining advantage over the trade unions during the negotiations.

Conclusion

In order to analyse the legal framework for public protests in Poland, four recent protest actions have been presented and analysed in terms of their form, course and legality. Based on these case studies results will now be summarized concerning different types of protest organizers, the question of legality of protests, the role of the government and the success of protest actions.

Collective and individual organisers

First of all, it is important to distinguish between two types of protest organisers. Trade unions, which have a natural opportunity to organise strikes, use them as instruments to achieve their goals and to advance the interests of their members. Indeed, they are established to secure these interests. In theory, their aim is to strive for the good of all workers belonging to the trade union, rather than to pursue personal agendas. Two of the cases analysed here, the miners' demonstration and the railway strike, were organised by the respective trade unions. It can be argued whether the motives or the protests themselves were justified, but there is no doubt that protests were organised and carried out under legal authority. In addition there are individual leaders who rally groups of discontented workers in the name of achieving their goals.

The basic difference between the two types of protest organisers lies in the very subject at hand. A trade union leader represents the entire organisation and thus his or her actions are an extension of the organisation itself. On the other hand, an individual leader represents him- or herself as well as a group of protesters. This distinction has an important application in the matter of legal responsibility.

Polish law does not recognize collective responsibility, so certain acts must be attributed to certain individuals. As a result, in the case of trade unions, the responsibility for legal violations is diluted. A trade union cannot be put on trial for the collective acts of its members. If members of a trade union violate the law as a result of executing the trade union's directives, each member is brought to account separately. This was indeed the case in the miners' demonstration: the trade union was not made to answer for the acts of its individual members. By contrast, in the grain spilling incident (led by an individual, Marian Zagórny), it was easier to assign responsibility for the orchestration of the protest; an individual leader is not covered by the trade union's umbrella of protection. Zagórny was taken to court for spilling grain from railway wagons; he was held personally responsible for committing the crime. As a matter of fact, he was the one who broke the wagons' seals and allowed the grain to spill onto the railway tracks. Zagórny's personal actions provided the basis for his prosecution, because it was possible for the government to level individual charges.

Only trade unions hold the privilege of representing the workers' interests in conflicts with employers and they alone have the right to organise strikes. Individual leaders, on the other hand, only have the right to speak their minds in the form of public demonstrations (on condition that they gather a group of 15 people who want to be represented by them). The crucial fact is that trade unions are the only entities allowed to organise strikes. Workers cannot go on strike indi-

vidually; they have to be associated in a trade union. (The right to strike is further limited by the lengthy procedure of acquiring the legal authorisation to do so. This protocol shields employers from excessive use of the right to strike and persuades both trade unions and employers to seek peaceful solutions to disputes.)

The question of legality and legal responsibility

The next point to dissect is the issue of the protests' legality. Strictly speaking, all four protests in this study were technically illegal. According to Polish law, in the event that a strike or public assembly is deemed unlawful, the organisers of the protests must bear the legal consequences. The statute about solving collective disputes, in Article 26.2 of the constitution, states that: *"Whoever manages strikes or other protest actions, organised contrary to regulations of the statute, will be subjected to fines or a mandatory work program."* Article 52, point 3, in the code of citation further addresses the matter: *"Whoever manages an assembly after its dissolution by the chairman or local authority's representative is subjected either to arrest and detention for up to 14 days, a mandatory work program or fines."* Polish law does not assign criminal responsibility to mere participation in an illegal strike or assembly. However, if the nature of the protest is unlawful or if participants engage in unlawful activities, criminal charges can be levelled.

As a matter of fact, the government, at least in the early stages of the protests, adhered to constitutional law and declared the protests illegal. However, the government and state actors changed their stance towards the protests as they spread and developed. The subsequent discrepancies and changes in policy necessitate separate analysis of the governmental responses to each of the protests.

Firstly, the road blockade case: The initial governmental reaction was to declare the protest illegal, and to authorise the voivodes (regional authorities) to use force to unblock the roads. Although the protest was officially illegal, the government nonetheless signed a settlement with the farmers' trade unions, which ended the road blockades. The settlement included unclear statements concerning the legality of the protest.

Equally interesting is the fact that the government pardoned not only the most recent action, but all of the farmers' protests up until the day of signing the settlement. The operative word in understanding the statement is "pardoned". Referring to the situation, it implies that the protest action, in the form of road blockades, was illegal. However, farmers escaped culpability for organising the illegal gathering, because the protest was justified in the government's eyes by the farmers' economic and sociological plight. Thus, paradoxically, although the protest was technically illegal, it was nonetheless granted official recognition.

In the second incident under review, the grain spilling case, the action was undoubtedly illegal. The government did not take an official stand on the protest. The method of response was left to the local authorities. Apart from the illegality of the protest itself, the significant fact is that the protesters committed the punishable offence of destruction of property. The nature of the offence theoretically enlarges the range of people bearing criminal responsibility from protest organisers to persons directly involved in the action of spilling the grain. However, the authorities zeroed in on Marian Zagórny as the culprit.

A wave of farmer demonstrations in summer 2000, fresh memories of road blockades and subsequent cases of grain spilling paved the way for the preparation of an abolition project encompassing instituting or holding legal proceeding against farmers who participated in or organised agricultural protests after the year 1998. The project was presented by seven trade union leaders.

Władysław Serafin, the head of Krajowy Związek Kolek Rolniczych (The State Union of Agricultural Circles), argued that the protests were socially endorsed and on this basis he demanded that only the farmers' unions be tried and not their leaders. (Rzeczpospolita 11.08.2000, p. 3)

Approval for the absolution project was voiced by PSL (Polish Peoples' Party), whose member Franciszek Stefaniuk declared support for this measure and said that PSL was eager to come forward with the respective legislative initiative. (Rzeczpospolita 11.08.2000, p. 3) However, the project never materialized.

Contrary to the farmers' cases, the miners' demonstration was initially legal, but evolved into riots with the police and was finally outlawed. It is interesting to note that the announcement of the demonstration's illegality did not deter the demonstrators, but only provoked further escalation of the conflict. And although the demonstration was outlawed, the protesters were given plenty of leeway, thanks to the police's passivity. This gave the miners a feeling of impunity.

The matter of legal responsibility posed a significant problem in this particular case. The dilemma arose when it the time came to assign culpability for the situation. The demonstration was ruled illegal, but its organisers had previously been granted permission to carry it out, which enabled them to avoid the penalty for conducting an illegal demonstration. As a result, the police could only accuse individual miners, some of whom were in fact charged with assault on policemen.

The legal issue in the case of the railway strike provides an example of the government anticipating the situation by calling the proposed strike illegal. The government warned railway trade unions that there would be legal consequences for organising an unlawful strike.

Importantly, at that time the government was negotiating the situation of Polish State Railways with its trade unions. Both sides were threatening each other to achieve their demands. As it turned out, the government itself issued threatening directives to exert pressure on the trade unions and to prevent them from going on strike. The railway leaders who organised the strike were not charged with any crime.

The role of the government

The next point to consider is the assessment of the governmental policy towards the protests. Firstly, it must be noted that for the period of time under discussion, the government was formed by two different coalitions. When the first two cases took place, the governing coalition consisted of AWS (Solidarity Electoral Action) and Unia Wolności (Freedom Union). The next cases occurred during the coalition of SLD (Democratic Left Alliance) with the PSL (Polish Peoples' Party).

Although the governments were formed by different coalitions, both were characterized by a lack of decisive action regarding the protests. Moreover, excessive forbearance for the form and course of the protests revealed the fact that neither government knew how to contend with large scale protests. Evidently, they were unable to define an unambiguous policy that would end or master the situation. This failure underscored the government's weakness.

Looking back on the road blockade incident, the government should have been reproached for neglecting to take a decision about using the police to disperse the protesters; it was instead left to the discretion of the voivodes. Even though the farmers' blockades were undoubtedly illegal and posed a serious threat to public order, the government did not wish to assume the responsibility of exercising force to restore order. The decision to disperse the protesters should have been taken on the governmental level to ensure uniform proceedings in all voivodeships. With no overarching policy, the voivodes' approaches towards the blockades were diverse and turned out to be inefficient.

A similar event arose in the third case under discussion. The government did not act on the rapidly developing situation, which quickly spun out of control. The scale and course of the demonstration required decisive methods to be communicated by a government representative to the police, who should have then been able to master the situation.

Moreover, decisions regarding massive social protests exceed police authority and demand governmental action. The police alone are not authorised to deal with large scale unrest. A codified policy towards social protest should be an element of any national government. In reality, decisions taken on how to handle protests become political decisions, which in turn shape public opinion about the government. Ultimately, the government should never have allowed any kind of protest to paralyse the country or its cities. Its indecisiveness was exploited by the protesters and enabled chaos to ensue.

The second and fourth cases will not be subjected to analysis here, due to their specific character. In fact, the grain spilling case should not have required direct government involvement to bring the situation under control; reform of the grain market would have circumvented further protests.

As far as the fourth case is concerned, the government's policy is difficult to analyse, because it should be deliberated from the economic legitimacy of the proposed reform for PKP. The government's policy was based on negotiations with the board of PKP and its trade unions.

Evaluating the success of protest actions

Finally, it is important to describe the factors that ensure a protest's success. As the cases examined here illustrate, there are three essential factors for a successful action: massive participation, duration and disruption. As a matter of fact, all of these factors were present in the first, third and fourth cases. Undoubtedly, the first and fourth cases can be considered successful. In the first protest, farmers exhibited determination (the protest lasted for two weeks) and ruthlessness (no cars were permitted to pass through the blockades except ambulances) in blocking roads. Miners presented an aggressive monolith which did not refrain from breaking the law to achieve their demands. Their stance effectively put pressure on the government, which finally broke down and signed a settlement. In this case as well as in the farmers' demonstration, a key role was played by violence and the determination of the protestors, which aroused public attention.

Ultimately, this conduct forced the government to take the protesters seriously and agree to a compromise. The main aim of the miners was not to achieve particular demands, but to show the government that they still represented a powerful, united community. The railway strike was similarly successful, because the participating trade union members also remained cohesive throughout. Moreover, they had the government in a chokehold insofar as that stopping railway traffic would have caused massive societal unrest. As a result, the protest triggered serious discussion, which was followed by the Sejm's decision to grant financial aid to the Polish Railways.

In contrast, the grain spilling incident would have to be judged unsuccessful. Even though it dramatically broke the law, the case did not manage to arouse much attention due to its relatively small impact on the general public. The grain importers were the ones most greatly affected by the action. The organisers also failed to gather large numbers of farmers to support and participate in the protest, which also diminished its impact.

To the ordinary citizen, the protests appeared to be the final means of venting frustration and an opportunity to influence the government. Unfortunately, it is often true that civil societies' pleas are only recognised by the government after they ignite in protest. A good government, however, should be capable of engaging in constructive dialogue with civil society.

Martin Kay

A New Approach to Legitimacy and Accountability.
Limitations and Possibilities in the Context of the Enlarged EU

Introduction

This contribution consists of two parts. Together they explore a link between Legitimacy and Accountability, which is not yet recognised in the literature. This link enables a new form of Legitimacy to be described which is of relevance in situations of major reconstruction. Major reconstruction entails new forms of governance. This contribution explains how State actors and civil society groups may participate together in those forms of governance in ways that build mutual Accountability.

Both parts work from an Irish perspective. However, they offer a view of the State, of civil society and of Citizens, which, it is argued, is transferable to situations of major reconstruction and still with a tradition of centralised control. The contribution draws upon Irish experiences of the Public Private Partnership (PPP) infrastructure procurement model. PPPs authorise new forms of governance to take certain executive actions in the name of the State. These actions affect the lives of ordinary citizens but without attaching more than project delivery responsibility to the power so delegated. PPPs are increasingly used within, and recommended by, the European Union. However, little guidance is given on how the normative potential of citizen participation is to be realised as a counter-balance to project delivery and, therefore, on how Accountability between the various PPP partners is to be accomplished.

Part 1 sets out a theory of the State and citizenship, and reviews the limitations of Citizen participation and civil society. Next it suggests how the concept of Accountability may be extended to overcome those limitations.

Part 2 argues that extending the concept of Accountability enables a new approach to Legitimacy whenever new infrastructure projects are imposed upon Citizens and communities. It explores the ontological insecurity of those affected in this way and explains how their resistance may be replaced – and their own Accountability described.

Part 1: Limitations: the State, the Citizen and Accountability itself

Introduction

This Part sets out a theory of the State and of citizenship by which both Parts in this contribution should be assessed. It argues that this theory, which is shaped by the Irish experience, is transferable to Central and Eastern European States undergoing major reconstruction – not least because the Irish model is a widely acknowledged exemplar.

At the heart of the continuing Irish success story is an aggressive pursuit of new infrastructure using the Public Private Partnership (PPP) model of procurement. PPPs authorise new forms of governance to take certain executive actions in the name of the State. These actions affect the lives of Citizens but without attaching more than responsibility for project delivery to the power so delegated. The model is British in origin although France and the US have long pursued their own versions. It is increasingly seen as the optimum global solution to deficits of infrastructure and public service. The European Union (EU) officially endorses PPPs and expects States in receipt of Cohesion and Structural Funding to use them in their development strategies. PPPs are perceived, therefore, as being both legitimate and accountable. It is the observation of the author, however, after nearly a decade and a half of involvement in PPPs, that Citizens affected

by them may not always agree. It is from such Citizens that civil society groups emerge seeking to participate.

The views expressed on the way that PPP governance may or may not satisfy Accountability and Legitimacy expectations are the author's own. He supports PPP procurement but has conducted empirical research to establish that the current model is unlikely to be accountable to the Citizens affected by projects. Much of his reasoning relies on Foucault. It needs to be acknowledged, therefore, that Foucault's rhetoric and enthusiasm for power and knowledge has been criticised (see, for example, Fox, 1998: 417; Lukes, 2005: 91). Foucault's distinguishable view of norms and discourse remains sound and supportable however. In brief, power normalises. *All* norms or statements of values, whatever their origin, emerge from the dominating power of the discourse in which the actors are participating. These become so pervasive that their consequences become natural or the norm (Sheridan, 1980: 128; McNay, 1994: 111). Discourse itself does not create truth but a regime in which the *effects* of truth are felt (Fox, 1998: 415) through structures, hidden meanings, associations, rituals and so on.

The State

The State forms part of a wider structure of power relations. Both within and beyond the State, complex institutionalised interests pursue different trajectories. These interests have been generally seen as, together, constituting the place of national last resort. Increasingly, however, Citizens in dispute with the State are turning to the wider structure of power relations, specifically to the European Union (EU), as their last resort. This is because much of the wider structure of power relations is now formally constituted, and more intelligible and accessible. However, the relevance of this formal network of power relations to Citizens themselves is still not clearly grasped (Blondel, Sinnott and Svensson, 1998: 87). Some relationships within the network still operate on a customary basis. Some are scarcely visible if recognised at all. A pattern of national referendum rejections of EU initiatives between 2002, in Ireland, and 2005, in France and the Netherlands, suggests that Citizens do not believe that every wider power relation is a legitimate influence upon their lives. The security of their own existence, rather than the interests of the national State, remains their referent in cases of doubt or concern.

This view of the State differs from the generally accepted definition, established by Weber (1947: 156). Furthermore, Weber's definition differs from the integration achieved by the internationally constituted network of power relations in Europe (Kohler-Koch, 2003: 11).

The definition used here acknowledges the internationalisation of State organisation, the globalisation of institutions and the complex, differentiated nature of the evolving State. It interprets the State as less a durable, monolithic structure and more a relationship of the moment, but still without loss of authority in the eyes of Citizens. This draws some strength from the Irish experience of the State as a coalition of interests gathered pragmatically under the parliamentary majority of the day (Curtin and Varley, 1995: 386). The arrangement satisfies democratic criteria and suggests a generally liberal model of consensus (Coakley, 1996: 35; Held and McGrew, 2002: 88), without being classically Liberal in the tradition of the moral centre ground (Marquand, 1997: 72).

Three particular aspects of this conceptualisation of the State reveal that those active in the process of shaping and exercising authority are not exclusively publicly accountable figures. These are the institutionalised interests active in the power relations of the State, the internationalisation of State organisation, and the pragmatic coalition of interests within the Irish experience. Examples are, respectively, the rational choice imperatives of those determined to drive through low 'transaction cost' and 'off balance sheet' procurement of infrastructure (Millar, 2003: 134); EU policy directives that PPPs shall be used extensively in public infrastructure

and services[1]; and different groups with particular collective visions of the future which serve their own interests, for example, the Church, the Farmers and the Employers (Peillon, 1982). More recently, the latter group has included the partners in Social Partnership (Allen, 2000). Social Partnership is a corporatist sharing of power (O'Donnell and Thomas, 1998: 117; Powell and Geoghegan, 2004: 230) producing a sequence of national agreements associated with Ireland's remarkable economic recovery from a low point in the 1980s. The 'social partners' interact to achieve consensus within an arena provided by Government (O'Donnell and Thomas, 1998: 122).

The consequence of key actors not being publicly accountable figures is that those with influence over public authority are not exclusively subject to the conventions of public office. Such conventions might include public election, parliamentary responsibility and the functional obligations of civil service strategic management. More than one writer has characterised the way in which such 'non-public' interests and institutions interact as "knowing the rules of the game" (see, for example, Rhodes, 1997: 15, in the context of governance; and Millar, 2003: 132, in the context of institutionalism). The point is that the norms and values they promote or defend in pursuing 'the game' are not necessarily intrinsic to the State, aligned with it, open to public scrutiny and identified with by either the nation or its elected majorities. There is considerable ambiguity in the term 'State', therefore, and scope for uncertainty about which interests it represents at any point in time or place.

The Irish State is acknowledged to have been habitually centralised and secretive (Garvin, 1991: 42, and 1993: 256). It has also worked by stealth (Lee, 1989: 177) to secure that arrangement of different projects, or collective visions of the future, (Peillon, 1982; Peillon, 1992: 22) necessary to further the interests which dominate. But these interests are now part of the wider structure of Power relations pursuing global competitiveness priorities. In this way, the Irish State has been increasingly influenced by neo-liberal pressures. Neo-liberalism assumes freedom of choice within an expanding interconnected market place – that is, within a climate of values consistent with a successful market place (Marquand, 1997: 42; Geoghegan and Powell, 2004: 26, citing Hertz). Neo-liberalism privileges private capital and the market over other values or institutions.

It is consistent with Marxist theorising, therefore, that the State in Ireland has benefited the interests of capital and of elites (O'Cinnéide, 1998–9; Allen, 2000). But this tends to associate the Irish State with an economic determinism that has not characterised much of its first 80 years (Fahey, 1993: 107; Coakley, 1996: 34). It is the dominance of particular projects themselves then, rather than any historical relationship with capital, which has determined and continues to determine the course of events in Ireland.

To what extent is this portrayal of the State recognisable to actors in post-socialist Central and Eastern Europe and relevant to a discussion of Legitimacy and Accountability? This contribution argues, first, that the explanation set out above, of a centralised, secretive State which can still remember and revere its revolution, is not unimaginably different from political instincts that have struggled with the transition from authoritarian rule to mass, competitive democracy in the last fifteen years (Arato, 2000: 38). Furthermore, the 'collisions' of Accountability implicit in Europeanised governance (Benz, 2003: 88) may open the door to projects and rationalisations which suit the imperatives of the State, especially when Europe urges their acceptance. Arguably, too, the quest for economic equality (O'Connell, 2003) will also make whatever the Irish State does, as opposed to whatever it is, a logically consistent model.

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[1] See, for example, *Guidelines for Successful Public Private Partnerships* (EU. Directorate-General Regional Policy, 2003). and national Community Support Frameworks.

The Citizen

Within the Liberal model of the State, citizenship is a status attaching to all who are members of society (Marshall, 1950). This circular and essentially modern view rested upon three centuries of British constitutional advance in civil rights, political rights and then social rights. The rights were institutionally developed and differentiated (Turner, 2001: 190), from a starting point of "basic human equality and freedom" (White and Donoghue, 2003: 394).

Marshall's limitations lie, first, in the omission of cultural rights – for example, in the protection of a particular way of life. Second, Marshall fails to treat Citizen rights as a coherent, evolving package (White and Donoghue, 2003: 403). Any study of citizenship should start from this dynamic interdependence, not conclude with it. Similarly, Marshall can also be criticised for failing to differentiate citizenship itself in the context of different historical, social and cultural conditions. His was, furthermore, "a theory of entitlement […with…] little to say about duties and obligations" (Turner, 2001: 191).

Within the neo-liberal and market-oriented State, citizenship can approach a condition of passive consumerism (Powell and Geoghegan, 2004: 27, citing Hertz; Cousins, 1996). The sense of obligation, noted by Turner, can be defined therefore. It is to be dutiful recipients of social benefits, to be a reliable source of tax receipts, and to exercise choice in accordance with the rules of the market (Marquand, 1997: 63). But this is clearly a denial of the starting point from which citizenship can be measured – equality, freedom and potential – as well as a rejection of Marshall's entitlement of political, social and cultural rights. This means that the domination of the neo-liberal State by particular projects, as happens in Ireland and perhaps is being reproduced in some Central and Eastern European States, is wholly inconsistent with what Citizens are entitled to expect and entitled to do. How then are they to respond?

The challenge for Citizen interests seeking to defend equality, uphold their freedom and fulfil their potential is more than just the decision whether to reject the neo-liberal, market-oriented State or to engage with it. It must also be more than a question of trusting enough in the institutions already present to sense an additional obligation to comply with new rules and forms of governance (Follesdal, 2005: 5) deriving from the wider network of power relations. Their challenge is that trying to defend Citizen interests – for example, by objecting to the actions of dominant projects – has not only a cost but no obvious pattern or rubric of its own.

On the one hand, immersion in activities recommended or approved by the State is in the nature of denial of *political* citizenship (Powell and Geoghegan, 2004: 16), while simultaneously lending Legitimacy to the projects of the State (Meade and O'Donovan, 2002: 4). On the other, rejection necessarily entails adopting a radical political alternative, which may come at a heavy price (Powell and Guerin, 1997: 144, citing the example of reduced availability of funds for local development initiatives). The central difficulty remains, however, that habitually not to engage with the State is to degrade the means of successfully challenging new forms of governance emanating from it. This is a circular dilemma. *Political* citizenship, which is intrinsic to citizenship status, cannot function without a pre-existing civic culture. At the same time, the institutions of *social* citizenship, which are the means of resisting passive consumerism, become overbearing and rigid in the absence of active or *civic* participation (Marquand, 1997: 152). In effect, the degraded institutions of social citizenship work against the potential of political citizenship in the absence of a civic culture. Through conformity, moreover – for example in fashions, life-styles and employment patterns – Citizens are increasingly demonstrating that being *socially* true to themselves has less influence over their ability to act than do the expectations of the State and the trends of the market. In effect, it becomes easier to acquiesce in the State, the market and the new forms of governance which they normalise, than to challenge the actions of dominant interests. A degraded form of *social* citizenship then becomes more than an oppositional force to civic participation: it becomes a means by which dominating projects can continue to dominate.

The significance is, then, that both rejection of the State's authority and obedience to it appear to frustrate what it means to be a Citizen and what is necessary for citizenship, unless the civic culture already in place can expose the dilemma and accommodate the potential of Citizens to take action to dispute Legitimacy and demand Accountability. The troublesome, proposed EU Constitutional Treaty, finalised in 2004, says much the same in the values and objectives it will support and on the automatic entitlements of EU citizens. Significantly, the Treaty expects a degree of participation from 'civil society' groups representative of citizen opinion[2] if the Union is to function successfully.

Participation and the Civic Culture

In classical democracy, the classic virtue was participation – the inalienable right and duty of individual citizens to be part of the process and decisions of the ancient city-state. The advent of representation and *res publica* changed the nature of participation, as did the centuries of feudalism which followed. With the transformation of western society at the end of the 18th century, however, notions of liberty and equality began to shape ideas of what modern nation-statehood entailed. De Tocqueville explored and embraced the perspective of liberal individualism and presented the American model of democratic, associational activity as an ideal type (1971). In Europe, in their different ways, humanists, utilitarians, liberals, socialists and Marxists struggled *for* social improvement and *against* capitalist domination and political tyranny. Common to each, however, were the inescapable problems caused by people living together as industrialisation gathered pace and as small municipal localities grew relentlessly into overcrowded urban centres. Participation in one form or another steadily re-emerged, therefore, as a central theme of thought and society. It encouraged individuals to assist in the making of decisions and, therefore, to benefit from the experience of participation (Pateman,1970: 24, citing Rousseau). It sustained and improved the nature of popular involvement (Pateman, 1970: 29, citing Mills). And, through the self-fulfilling nature of man as an associational creature, it encouraged the universality of democratic principles (Pateman, 1970: 36, citing Cole). Central to decision-making, popular involvement and democratic principles are the Legitimacy of power and Accountability for its exercise (Almond and Verba, 1963: 230).

There were exceptions however. Participation through the act of voting for elected representatives did not qualify as a civic virtue (Pateman, 1970: 17, citing Schumpeter; Biagini, 1996: 37, citing Mills; O'Donnell, 1999: 30). This is because such participation, at its extreme, is aimed at domination not political consensus (Dahl, 1989: 156). Similarly, campaign activity and contacting officials (Dalton ,1988: 36, citing Verba *et al*) of a politically partisan sort is a continuing, distinguishable theme (see, for example, Pateman, 1970; Giddens, 1994; and Collins, 2002). More noteworthy is that Collins sees the area for non-partisan participation as *within* the state apparatus (2002: 93); that, for Giddens, it lay *between* the state and mobilised society (1994: 15); and that, for Pateman participation was a matter of will and *for the individual* senses (1970: 25).

On the one hand, therefore, modern civic culture may be seen as a state of mind and, at the other, a state of involvement. Involvement may have been a less available option in the Marshall-influenced era when Pateman was writing, whereas today it is the constant theme of, for example, the 'communitarian' practice of community development (Etzioni, 1993) and even of the politics of doubt in the face of global environmental threat (Beck, 1992). Participation similarly pervades the European project of integration and Citizen involvement in new forms of governance (the proposed EU Constitution). Participation, as the central activity of civic culture, appears to have come full circle therefore. However, collective participation today is substantially different from the individual, innate responsibility of more than two millennia ago.

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[2] See, for example, Articles I- 32(3), I-47(1) and I-50(1)

Participation today is frequently identified with associational activity, such as voluntary clubs, activities, neighbourhood groups, societies and churches – "the building blocks of society because they teach civic virtues such as trust and co-operation" (Powell and Guerin, 1997: 22, citing a wide literature). If *association* teaches something, it may be argued that *dissociation* loses something in the way that the denial of social citizenship and its adverse effect upon the civic culture have been argued. Putnam explains that these lost qualities can be recovered through social capital. Traditionally, social capital understands "goodwill, fellowship, mutual sympathy, and social intercourse among a group of individuals and families" (2002: 154, citing Hanifan); and, more recently, dense webs of community participation and cultures of association upon which healthy democracies are built.

Civic culture, therefore, may be seen as both a longing for a lost way of life and a deliberate effort to recreate it, overhaul it and facilitate its role in State and society today. Viewed like this, participation is a means to achieving a civic culture, not the end.

Some, however, are less sanguine and see in social capital, new ways of making society calculable and governable (see, for example, Walters, 2002:378; Graefe, 2001). Support for this more sceptical view is lent by those for whom the use of the word 'capital' is thought to lead to "facile theorising" about economic and human equivalence (Smith and Kulynych, 2002: 180). Similarly, those seeking radical alternatives can also be manipulated by deflecting their efforts harmlessly into participation as the end of civic culture (Meade and O'Donovan, 2002: 7; Powell and Geoghegan, 2004: 13).

Participation by itself, therefore, is at best a step on the way to achieving a civic culture of mutual trust and responsibility. But it is no guarantee that Citizens are mediating the dominating projects of the State.

Civil Society and Civic Culture

As modern society progressed from Gemeinschaft to Gesellschaft, so those entitled to citizenship created a sphere of influence separate from municipal leadership and capable of balancing its excesses. This was initially a bourgeois arrangement linked specifically to the historical development of municipally-based market economies (Habermas, 1989: 44). That which commenced as an essentially property-based phenomenon became steadily infiltrated by the progressive politicisation of the private sphere of family life (Habermas, 1989: 50). In this evolution of political awareness and communication, civil society emerged as citizenry critically engaged with the State in a shared concern for the management of common concerns. However separate the phenomenon, it was still very much identified *with* the State because of the interests of commerce and economy, which each defended and pursued (Habermas, 1989: 52).

This identification provided the seed-bed for Marxist conceptualisation of civil society as a distinct, property-centred sphere of Power and autonomy (Kumar, 1993: 378). However, the argument, that this essentially bourgeois, economic interpretation of civil society also included social and civic functions, was much influenced by de Tocqueville's ideal of political society co-existing with political economy – that is, *distinct from* the State 1971: 560).

The distinction is important. A civil society that formed part of the State would entail belief in, or acceptance of, the dominant projects in the State. A civil society which had maintained its 'free association', while remaining engaged with the State, would tend to indicate a dialogue. It follows that civil society is neither a fixed, definable presence, nor a sanctum for independent thought permanently underwritten by the State. Civil society may be better understood, therefore, by what it accomplishes (Keane, 1988: 14). Dahl explains that political Power rests upon "binding collective decisions" (1989: 107): a civil society, which 'rubber-stamped' the intentions of dominant projects, could scarcely be said to be struggling "against tyranny without destroying public order" in the way that de Tocqueville imagined (1971: 560); in contrast, one which challenged and successfully changed their agenda would.

It may be said, then, that civil society, if it means anything at all, will liberalise that which is illiberal and bring about a more democratic state of affairs, or it will provoke repression and a strengthening of that which is illiberal (Arato, 2000: 45). Civil society is, therefore, a collective agent for change – a 'melting pot' of tensions struggling non-violently both with the State and with its own contradictions (Keane, 1988: 6; Cohen and Arato, 1992: 480). If civil society is successful in this project, there develops a political society – the same civic culture remarked by Marquand, in which political citizenship may flourish and in which engagement with the State will reliably mediate the agenda of dominant projects. But if civil society is unsuccessful, there is a presumption that dominant projects have prevailed.

The attraction of an indomitable and reflexive free spirit within 'the people', acting collectively through non-governmental institutions, became particularly compelling during the progressive collapse of authoritarian regimes in late 20th century Europe. A successful civil society was widely seen as the means of replacing authoritarianism with democratic arrangements between the State and its liberated Citizens (Arato, 2000). This attraction may be traced to Gramsci's influential reappraisal of the Marxist view of civil society (1971). Written in the context of imprisonment under early 20th century Italian fascism, Gramsci's explanation of the way the State 'cements' its grip on power has re-energised contemporary understanding of the predicament of society under dominant State interests (Arato, 2000: 44). Gramsci distinguished political society from civil society. Political society described the State directly dominating its subjects through formal institutions of government power, while civil society was the site of social and cultural hegemony of those with power (1971: 12; Powell and Guerin, 1997: 13). This interpretation is provocative: social citizenship has been demonstrated as being degraded in the absence of a civic culture; if civil society is to be created, then it is already destined to be dominated.

Gramsci explains that, when forces within civil society do try to change things, there is "a crisis of the ruling class's hegemony" (1971: 210). Here, Gramsci is using 'hegemony' to describe both political consciousness and the maintenance of domination. He implies that the crisis affects political society as well as civil society: the ruling class makes the adjustments necessary to retain its grip on power using *all* elements at its disposal (1971: 211). Through techniques of both coercion and consensus, control of the political and the social order is maintained (Ransome, 1992: 32, citing Milliband, 1982). This is an ongoing process in which the ruling class and its resources constantly form and re-form around the core objective of maintaining the dominance of their own world view (Clegg, 2000: 80). In such a scenario, Accountability is 'a resource' to be manipulated in order to retain a grip on power.

Accountability

Accountability entails an obligation to present an account of, and to answer for, the execution of responsibilities entrusted (Gray, 1998). The account is made to those who entrusted responsibility in the first case. This gives rise to the notion of stewardship, or looking after that which has been entrusted. It implies the possibility of retaliation if stewardship has been deficient. Stewardship can be seen as an ongoing obligation, therefore, whereas accounting and answering are a periodic event or intervention. There is a presentational flavour to accounting and answering (for actions taken), whereas stewardship is about care (of a responsibility handed over).

Schedler explains that Accountability rests upon a dialogic connection between accountable and accounting actors. He tends, therefore, to link Accountability only to the 'etymological ambivalence' of accounting and answering (1999: 15). Schedler uses the expressions 'book-keeping' and 'story-telling', respectively, which this contribution also adopts.

Where writers do focus on stewardship, they tend not to talk in terms of Accountability but concentrate instead upon the outcomes of good husbandry. For example, corporate governance must protect the company's good name (Solomon and Solomon, 2004: 14). 'National trusts'

must care for the environmental and archaeological heritage. The World Health Organisation calls upon governments to treat the health of their populations as a crucial national resource (WHO, 2000: 119). And social, charitable and voluntary organisations, in receipt of public funds, are traditionally required to retain and reinvest net earnings (Boyle and Butler, 2003: 23). Each is an instance of stewardship – of caring for something which has been entrusted – but none is specifically identified with, or as, Accountability.

Notwithstanding some uncertainty with the concept, there is a compelling reason for treating book-keeping, story-telling and stewardship together as the inseparable elements of accountability. Book-keeping, story-telling and stewardship can be seen clearly in the way that a public Company makes its annual report to shareholders. The report explains what the Company has been doing (story-telling); it opens its audited accounts for public inspection (book-keeping); and it seeks to demonstrate that the Company as a whole is in good hands (stewarding). Such a code of accountability is statutorily based. The annual general meetings of organisations, which are not statutorily regulated, follow similar, universal procedures in which the Board or Committee charged with stewardship answers for its conduct *and* its care. This approach is, therefore, customary, too.

There is a tension between those answering for their conduct and their care, and those to whom answers are due. The tension originates in the dispositions of fear attaching to the obligation entrusted and to the condition of being answerable. The condition of being answerable is, therefore, in the nature of process. It follows that fear can be experienced on both sides of that equation. The *rationality* of the code of Accountability in force at the time is designed to resolve this tension. Rationalities can be, for example, legal, economic, political or social (Gray, 1998: 17) and, being normative, will specify – and, indeed, be structured by – the sanctions available. Rationalities do not of themselves remove fear: they merely elaborate the ethical and organisational measures needed to resolve 'the demands' placed upon those who are accountable (Boyle and Butler, 2003: 25). The *code* of Accountability can reduce fear, however, by creating predictability or producing specific outcomes or impacts. Between professionals, for example, codes may condition behaviour. Such codes are intrinsic to the connection which gives rise to Accountability. In this way, a process whose rationality is supported by a code and a sanction, as opposed to resting merely upon domination, can be described as 'a relationship of Accountability'. *Relationships* clarify the obscurities of 'being accountable'. They make knowledge accessible to those who are entitled to have access. They provide certainty in place of ambiguity and ambivalence. Rationalities, sanctions and codes constitute the mechanics, or 'fixed parts', of Accountability relationships, therefore, while book-keeping, story-telling and stewardship are its dynamics or 'moving parts'. By their interaction, relationships dispel fear. If fear persists, there is either a muddled Accountability relationship or none at all.

The authority within relationships tends to be vertical or horizontal (Gray, 1998; Schedler, 1999; O'Donnell, 1999). Vertical Accountability implies a hierarchical relationship between 'unequals' – for example, the relationship between Citizens and their rulers. Horizontal Accountability implies a relationship between 'equals' – for example, between professionals and their peers, or between partners in a PPP or in some other mechanism of governance (see, for example, Rhodes, 1997, and Stoker, 1998).

It has also been suggested that Accountability can be oblique (Schmitter, 1999: 62). Oblique Accountability envisages non-State or semi-State institutions manoeuvring against those with power in order to heighten awareness of, and provoke reaction against, alleged breaches of obligations. Schmitter's explanation of oblique Accountability can be developed. The act of eventually satisfying allegedly breached obligations will be an act of either horizontal or vertical Accountability. For example, victim-patients of medical malpractice can obliquely force erring doctors to face, horizontally, the ethical judgement of their peers. Empirical support for obliquely forcing vertical Accountability can also be seen in the campaigning in 2002–3 against the Catholic Church by representatives of victims of child abuse. Any penalties, which ensue from

horizontal or vertical admissions of liability, will always flow vertically from the code established earlier by the relationship which has since been offended. And because penalties flow vertically, those giving offence cannot avoid, through claims to be horizontally remote, the sanctions in the code which is offended. The fact of a relationship, therefore, imposes *both* narrow Accountability for actions taken (book-keeping and story-telling) *and* a broad duty of care (stewardship).

Discussion

This contribution has put forward a highly critical review of the potential of civic culture to accommodate the Citizen who expresses dissent or otherwise seeks answers. Participation is a way of describing what that Citizen is doing. In the eyes of the Citizen, the act of expressing dissent or otherwise seeking answers removes, or at least suspends, Legitimacy from the governance under challenge. Receiving answers restores it. For the Citizen, then, Accountability and Legitimacy are directly linked – and participation is the way to achieve both. The situation is different for the State seeking to implement a programme of governance. Legitimacy rests upon creating supportive perceptions not providing awkward answers. Participation, or any act which disrupts the required perception, is not helpful to the project of the State and needs to be defended against.

It is in this context that the model of PPP governance can be exposed as a discourse of power. A Foucauldian interpretation of discourse explains how those, seeking to discourage unhelpful participation, influence or manipulate what is said. They may even come to exercise a *moral* domination of Citizens expressing normative concern (Gutting, 2001: 265). This is an increasing characteristic of political criticism in Ireland of those objecting to certain PPPs. Any view of the State, which concedes that this can happen, must also acknowledge that civil society by itself is unlikely to achieve much more than to underline the importance of strengthening the required perceptions.

This pessimistic conclusion is based upon extended observation of the way the governance of PPP operates. In brief, PPPs are more accountable to the Banks which fund them than to the Governments which authorise them, or to the Citizens who depend upon them (see, for example, IPPR, 2001; Kay and Reeves, 2004) – and governments will not intervene to re-orient that allegiance. It is accurate to say that Citizens only enter the calculations of the PPP process as 'risks' or threats to the successful outcome of whatever PPP projects set out to accomplish. The thought that the general public might be capable of adding its own value to PPPs, given the right modalities, is never apparent. In much the same way, the official Irish PPP Communications Strategy even goes so far as to exclude Citizens from its list of 'key audiences' (Ireland. Department of Finance, 2003: 13).

The ability to maintain the required perceptions, in other words to legitimate the agenda of power, rests upon a narrow view of Accountability – that is, upon book-keeping and story-telling. It relies upon a vocabulary of 'feel good' language, for example 'stakes' and 'stakeholders' (see, for example, Ireland. Department of the Environment & Local Government, 1999), but without offering conceptual guidance on what stakeholding by Citizens might entail. In fact, the origins of stakeholding lie in a manipulative, conservative, defensive theory arising from business practices (Abzug and Webb, 1999). Stakeholders are threats, each requiring a defensive strategy appropriate to the damage they could potentially inflict upon profitability and commercial survival.

In contrast, Citizen determination to obtain answers rests upon a broad interpretation of Accountability. It asks "how, in this particular instance of governance, does your book-keeping and story-telling also steward what we, as Citizens affected by this new form of governance, believe is essential to our security?" The term 'security' is a cipher for anything precious or irreplaceable to those affected by new forms of governance. In terms of *ontological* security, for

example, it means "the confidence that most humans have in the continuity of their self-identity and in the constancy of the surrounding social and material environments of action" (Giddens, 1990: 92).

If governance, as a new way of doing the business of government, is promoting the agenda of dominant interests in the State, then Citizens affected by governance are defending their only authentic referent, the security of their existence. It is from such Citizens that groups will emerge and seek to participate as 'civil society groups'. To discourage them can only provoke resistance. To encourage them will be to build Accountability between all those participating in the new form of governance itself.

Conclusion

This Part, the first of two, argues that an unnecessarily narrow interpretation of Accountability has been allowed to dominate questions of governance. This is particularly so in the case of PPPs where the impact of governance upon social order can often be considerable. By shaping the obligation to give answers in terms of book-keeping and story-telling only, Accountability has become a instrument of perception – an instrument for those, called upon to provide answers, to use against those to whom answers are due.

However, Accountability can be interpreted broadly to include stewardship. Stewardship is normative whereas book-keeping and story-telling are empirical. Normative questions impel Citizens who find themselves in the path of PPP projects to seek Accountability. Their reasons for doing so can be intense – even to the point of reflecting immense ontological *in*security. Answers which satisfy them, therefore, can be seen as generating an authentic, rather than perceived, form of Legitimacy.

This first Part concludes with the thought that obtaining answers is likely to prove a more productive way for Citizens to participate in new forms of governance than acquiescing in required perceptions. The second Part addresses the motive which drives Citizens to demand answers. It explores what ontological insecurity might mean in the context of Legitimacy, and how to use it to promote accountable participation in new forms of governance.

Part 2: Possibilities:
The Local Voice and 'Legitimacy as Stewardship'

Introduction

A Foucauldian interpretation of power and discourse accompanies both Parts of this contribution but was particularly relevant to the first, where criticisms of Foucault are acknowledged. That part invites readers to accept that a PPP discourse is beginning to operate in which those who question projects are starting to be '*ab*normalised'. In this second Part, the British sociologist, Giddens, is the major influence. His theories have long been associated with a social democratic orientation, particularly with the 'third way' (Giddens, 1988) and more recently with 'progressive politics' (Giddens, 2003). Giddens' value is that his theories encourage new ways of thinking about stubbornly persistent problems and seek solutions based on shared responsibility rather than on dominating or defensive policies. Within Ireland, the extent to which Giddens can be brought into any analysis of social order is moot (see, for example, Tovey, 2001: 81; Tovey and Share, 2003: 107). But a sharing of responsibility is what the European project purports to embrace. Giddens is worth turning to, therefore – not least because he has attended, as an official adviser, much of the national governance whence the widely adopted PPP model originates.

Part 1 argued that an unnecessarily limited view of Accountability prevails. This gives scope to those with power to manipulate the perception that PPP projects must be accountable because

… well, because they are legitimate. Part 2 turns first to Weber to restate the circularity and tensions of legal rationality. Part 2 also argues that, far from being rather elderly theorising, Weber's ideas remain relevant today.

Weber, the Foundations of Legitimacy and the Argument against Him

Weber explains, in the context of modern administration, that to be legal was rational and to be rational was legal (1978a: 217). For Weber, the question of Legitimacy in such a situation turned on reciprocity by the objects of authority and legitimate domination (1978a: 214). Reciprocity, in one sense, meant obedience. But it also entailed validity – a belief held independently of any systems of domination.

Belief was intrinsic to the legal-rational order and would, therefore, be held at every level. In the rule-bound society this entailed, Weber saw the building of a "stable, strict, intensive and calculable administration" (1978a: 224), in which the role of knowledge was central. But knowledge would so completely dominate that structure that the values needed to sustain its hierarchy would supplant all others. Knowing those values would be key. Wealth and status would be matters of inconsequence. Even art would be replaced by technical competence. In this way, the capacity for holding an independently formed belief would always be 'levelled' into the reality of obedience "determined by highly robust motives of fear and hope – fear of … the power-holder, hope for reward …" (Weber, 1991: 79).

Hope, in such a context, would respond only to the preference and expectations of those with access to the next higher functioning of bureaucratic power (Weber 1991: 159). Fear would focus on the arbitrary demands that followed. But such demands could only reflect the technicalities of legal rationality – while fear would not remain focused in the "rule-bound", "calculable" way that legal rationality works. Fear is dynamic and preys upon the imagination (Koonings and Kruijt, 1999: 19). It is less sensitive to the bureaucracy of Power resources than it is to their threat or exercise (Dahl, 1989: 252; Flyvbjerg, 1998: 5). Fear generates an "infernal vicious circle" (Torres-Rivas, 1999: 286). Faced with threats and with incremental, unpredictable shifts in the use and abuse of Power, it turns law-abiding citizens into concentration camp guards and honest problem-solvers into deceivers, liars and revisionists (Arendt, 1973a: 16). Fear is consciousness unexposed (Giddens, 1991: 92): it exists between "the structures of the mind not immediately available to it" (Giddens, 1987: 88) and the predispositions and forms of knowledge not immediately accessible by discourse (Giddens, 1987: 63). Fear cannot be shown, as legal rationality demands, to obey universal laws or known, as power forbids, to be breaking them. In the context of torture, for example, fear produces unreliable answers under interrogation (see, for example, Sao Paolo, 1998: 146). Fear is, therefore, an intensely personal discourse which none but the fearful know – and its concomitant, hope, can only be equally indeterminate.

Obedience may indicate reciprocity, therefore, but its underpinning by fear and hope can never establish belief in the authority of the one with power. Thus, Legitimacy must always be an open question. Such a politically monopolised State would be much less stable than it appears (Turner, 1996: 359). Legal rationality is actually part of an ongoing struggle with any group or idea, therefore, which is not completely consistent or compliant with the circular nature of legal authority. Necessarily, that struggle is for the domination of knowledge.

Despite the repressive attempt at eradication in Weber's theorising of legal rationality, knowledge is not so easily reduced or 'essentialised': it can always be differentiated and value compromise concealed (see, for example, O'Malley, 1998: 14). That is how fear suppresses knowledge, which it is dangerous to hold. Arguably, Legitimacy may be settled, therefore, when belief is replaced by acceptance – that is, by a conscious decision not to struggle but to acquiesce in, and obey, a particular knowledge system and the power structures supporting it (Follesdal, 2005: 5).

But if the stability of legal-rational domination is so precarious, balanced as it is upon the fears, hopes, compromise or ignorance of those subject to it, and upon the infelicity of their situation, what are the dynamics of *dis*belief? Does something grow out of a fear that has become hopeless, and out of a hope that is now afraid? A refusal to compromise any further, which is triggered by rejection of demands become intolerable? This might appear to occur independently of any struggle for knowledge. However, Weber explains that legal rationality operates "in a spirit of formalistic impersonality… without hatred or passion, and hence without affection or enthusiasm" (1978b: 225). In such a repressed atmosphere, conformity and subjugation of the will resulting from morally insensible demands could prove a near-intolerable burden and lead to mounting turmoil of the conscience and a struggle for consciousness itself. Whatever stimulates disbelief, therefore, may be exogenous to the structure of legal-rational authority and, as a consequence, in the nature of alternative knowledge. But it will be wholly "concretised" by domination (Löwith, 1993: 63) of the mood, emotions and sense of personal viability of those who find themselves within it. Necessarily, whatever stimulates disbelief must also be contingent and triggered when domination cuts across some "ultimate value or life meaning" (Löwith, 1993: 66) preserved within the 'iron cage' of existence (Weber, 1930: 181). At this point, ontological insecurity will have replaced belief, acquiescence or the preparedness to submit: *dis*obedience will be in prospect.

Turner places the question of ontological insecurity within "Weber's sense of personal tragedy and the fatefulness of Western history…" (1996: x). Weber's pessimism, he explains, turned on the predicament of academic freedom against the bureaucratisation of the intellect, which characterised the young German State. This is a theme Turner returns to in the context of Marshall and citizenship rights (2001). Possibly, therefore, Turner is also reflecting his own unease with the Government's dominating tendencies, at the time, in his Australian State of domicile, Victoria[3] (see, for example, Mendes, 2002, who explains how and why civil disobedience resulted there). This contribution accepts that the dynamics of disbelief (as with Weber's view of belief) defy universal description and are purely contextual: they are accessed only through dissent, utterance or some other evidence of consciousness that, at *this* level of society, *that* demand is not accepted for its *unendurable* impact on human existence *here, now* and *stretching into such future* as the dominated can foresee (Löwith 1993: 66; Giddens, 1972: 19).

There are broader explanations than Weber's and also alternatives. Follesdal offers a taxonomy of Legitimacy extending beyond Legality and Compliance to Justifiability and Problem-solving (2005: 3). Beetham, whose work is drawn upon by Follesdal, is particularly concerned that Legitimacy should justify and solve problems (1991: 39) and thereby offer normative solutions (1991: 10). He moves beyond perceived deficiencies in the explanatory power of Weber's Legitimacy but he does so in way that minimises the contingent and transcends the contextual. There is some support for Beetham's purpose – from Habermas's critique of subject-centred reason (1989: 17), his theorising of universal communication (1989: 342) and his support for the mutually communicative (Tully, 1999: 99).

Beetham's criticism goes beyond Legitimacy as an opaque and open question, and says that Weber actually confuses the concept by emphasising its foundation in belief. This emphasis precludes rational or objective standards and admits only the outcome of cumulative influences (1991: 8). Beetham does explain how Weber can be defended, by correlating cumulative influences with being able to justify "in terms of local beliefs" (1991: 11). But he claims, too, that the centrality given to belief still limits the concept of Legitimacy because different types of belief will be prioritised. What matters more, says Beetham, are congruence or discrepancy (between the rules imposed by authority and the beliefs people hold). Hence, Beetham also stipulates the two further criteria for Legitimacy – legality (or conformity to legal rules) and

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[3] The Australian State of Victoria has since, and uniquely, introduced an objective 'public interest test' to be applied, as a normative check, against all PPPs.

evidence of consent (actions conferring Legitimacy). Together with justification in terms of local beliefs, these extend the concept and allow an obligation to obey to be described systematically and methodologically.

In theorising his continuum of multi-dimensional legitimacy, Beetham is seeking to illuminate what Weber deliberately left an enigma. But Weber had already warned that he could offer neither "a fool's paradise … [nor] … an easy road to it" (1978a: xxxiii). In seeking more from 20th century sociology, therefore, Beetham may risk losing sight of the individualistic ways in which people persist in reacting to situations within a globalised and power-laden world (Beck, 2002: 295). Beetham's allegiance is to science. He prioritises what can be objectivised over the relative and the doubtful. He is highly critical of Weber whose "… modest contribution to [systematic comparison between different forms of legitimacy] was *inadequate* for the purpose, and *quite useless* for the second, more critical task of analysis and explanation" (1991: 23, emphases added). Weber's opinion, however, when compared with Beetham's, seems to be rooted in a familiarity with the human condition which the author of the Contribution finds insistent and persuasive: "…men act as they do because of belief in authority, enforcement by staffs, a calculus of self-interest, and a good dose of habit" (Roth, 1978: xxxv).

Nevertheless, Beetham's disagreement with Weber is helpful. It allows Legitimacy to be confirmed as a demand upon the powerless. In certain accessible or especially transparent social circumstances, Legitimacy may indeed rest upon different factors against which discrepancy or convergence can be measured. However, the powerless may not be able to participate in such distinctions from a position of knowledge or enlightenment (Lynch, 1999: 51). Equally, process may not invite them to express ethnic or gendered perspectives (McKie, Gregory and Bowlby, 2002: 907). Indeed, the powerless may not even have created the space in which to break the "silence" about their domination in the first place (Lynch, 1999: 46). Analysis along Beetham's lines may also privilege expert knowledge (Fraser and Lepofsky, 2004) over the local. Legitimacy as a demand, however, may be borne, in the context of process, without having to think much about it – while also being a burden, in the context of event, which suddenly needs to be put down. This is because fear differentiates knowledge and allows compliance with domination – up to a point. Suddenly realising that that 'point' has been reached needs neither emancipated knowledge nor specialist intervention.

Weber is not to be jettisoned so lightly and Beetham's demand for universal precision may be more useful as a means of providing contextual focus. Both Weber and Beetham are talking about power relations, authority and a continuum of Legitimacy. But in emphasising the ontological question, Weber is implying that an ongoing process can still enjoy belief despite an event that is intolerable. The Legitimacy of process does not automatically collapse for being 'useless' or 'inadequate' just because an event has occurred. This is demonstrated by Reiner (2000: 6), using the example of habitually law-abiding citizens suddenly experiencing arrest by the police. Notwithstanding Beetham's attempt to supplant Weber, he does offer a potentially penetrating insight into the epistemological situation about which Weber's ontological sense, normally secure within a pre-existing process, is suddenly aroused.

To summarise, this Contribution views Legitimacy as a dichotomy. At one level, it works, as Weber says, on belief or, at least, on submission – belief in, or submission to, authority. At another level (as argued by Beetham), it works on consent, conformity to rules and justifiability – in this sense, legitimacy is much more a question of challenging authority which has suddenly gone too far. However, Beetham seeks to replace Weber rather than provide a parallel and supportive explanation. In so doing, he fails to recognise the co-existence of the two levels and the contingency of the shift between them in reaction to the demands made by those with authority. This contingency is masked by a generally untroubled sense of being able to continue, a sense of ontological security under the processes of power. But it is readily awakened by a particularly disturbing event and by the unwelcome demands and domination it entails. The legal rationality, which weakened Weber's explanation, works in the neutral time of bureaucratic rationality and

neither sees nor admits anything onerous or objectionable in such events. Demands are context-dependent, however, and differentiated belief identifies those which it knows will prove intolerable. The shift in belief is sensitive, therefore, to questions of time and place and existence – to such ultimate meanings or life values as domination has not completely removed. These sensitivities normally reside deep within the consciousness. Once aroused, however, they can be described by contextually focusing Beetham's approach, in order to give methodological access to what is particular and contingent.

The Link between Legitimacy and Accountability

The link between the Legitimacy and Accountability is initiated when a discrete event occurs in the context of an ongoing process. The upheaval caused by a local infrastructure procurement project is such an event. Infrastructure procurement programmes constitute a process.

Upheaval frequently provokes a reaction. Process more usually engenders compliance or acquiescence. Compliance or acquiescence is one way of looking at Legitimacy: it rests upon perception rather than reaction (Follesdal, 2005: 5). An absence of reaction strengthens the perception that such democratic controls as Accountability have been satisfied, without actually demonstrating that this is supportable. Compliance can be seen, therefore, as laziness or ignorance or simply submission in the way that Weber understood.

The question of Accountability does become a matter for investigation, however, when the project is procured by PPP. This is because the actors in PPPs are rarely subject to democratic scrutiny in the way that governments or local authorities are, and yet they are also endowed with a form of executive power. Citizens have rarely reacted to the issue of who now exercises executive power in the modern Irish State. In contrast, the proximity of powerful strangers, who are driven by performance and profit, does initiate a reaction when linked with their intention of making imminent major change to the local environment. The phenomenon has been experienced before (and is now the subject of the Mahon Tribunal of Inquiry into Certain Planning Matters & Payments, set up by the Irish parliament in 1997 as 'the Flood Tribunal'). But the Citizen reaction is new. This may be accounted for by decades of infrastructural stagnation, together with widespread acquiescence in the over-arching process of building a new Irish State. Now, however, there is an explosion of infrastructure projects justified by a policy of 'procurement at all costs' in the name of remaining competitive. Those driving forward this programme have failed to recognise that competitiveness by itself is insufficient to legitimate 'procurement at all costs', especially in locations which are much loved, sensitive or otherwise thought indispensable. And those who find themselves in the path of major projects have found that the habit of acquiescing in process has created no obvious way of obtaining answers for the event suddenly thrust upon them.

 The tension between those driving forward the PPP programme and the Citizens in the path of a particular project can be viewed in at least two ways. From one perspective, it can be seen as a symptom of modernity – an instance of progress delivering social change and necessitating a decline in the influence of tradition. From another, it can be seen as the reaction of those who are deeply unsettled by a change which threatens irreplaceable aspects of local life. The "over-arching 'story line' " of the State (Giddens, 1990: 2) continues as this tension surfaces. Those driving forward infrastructure projects argue that the 'story line' needs the change in order to thrive and continue. Those who are deeply unsettled claim that the 'story line' will falter if that which is irreplaceable and in need of protection is lost. There is then a contest of knowledge which reaction *at the level of the event* can only 'legitimately' pursue by contesting the power to determine knowledge. However, that legitimate contest can only be resolved *at the level of process* where either the overall policy will be altered or the resolve to contest different knowledge will be defeated and replaced by acceptance and submission. At no point, then, can this contest of knowledge be called 'Accountability'. Accountability means story-telling, book-

keeping and stewarding – a one-way answering for care and for actions taken, not a joint debate on opposing positions.

So, where does the interaction between Legitimacy and Accountability lie, and how does it work, whenever the Legitimacy of an event is disputed?

Structuration, Reflexivity and Generative Politics

The argument, that a link exists between Legitimacy and Accountability, is located in Giddens' theorising of reflexivity and generative politics. Giddens's concern (1990: 7) is to find a way of re-stating the tension of modernity, already described above from the perspective of those driving forward projects. His related theory of structuration (1984) explains how the competing perspective, of those who find themselves in the path of projects, identifies what is thought in need of stewardship.

Structuration is defined as the normative power of practical consciousness, grounded in the duality of structure and human agency and recursively implicated in the reflexive monitoring of interaction (Giddens, 1984). Giddens distinguishes practical consciousness, which he calls tacit knowledge about social life, from discursive consciousness. By structure, Giddens understands rules and resources, or sets of 'transformative' relations, reorganised as properties of social systems. Systems themselves are reproduced relations, organised as regular social practices. Thus, structure is recursively implicated in social systems comprising the situated activities of human agents across time and space. This means that the "structured properties of social systems can be stretched away in time and space beyond the control of any individual actors" (1984: 25). In this way, structuration describes the conditions governing the continuity and evolution of structures and also, therefore, the reproduction of social systems themselves.

The attraction of structuration theory lies in its consequent propositions. If the most important features of structure are rules and resources, then clearly structural practice expresses both domination and power. But rather than view these as a dualism, Giddens insists upon their duality, in that rules and resources drawn upon in the production and reproduction of social action are at the same time the means of system reproduction (1984: 18; see also Bourdieu, 1998: 72, and *habitus*). Moreover, the structural properties of social systems are both the medium and the outcome of the practices they recursively organise. Therefore, structure is not to be equated with constraint but is always both constraining and enabling.

By way of critique, however, Craib argues that structuration theory lacks ontological depth (1992: 178): Giddens focuses on social practices and pays less attention to the underlying social structures. Furthermore, his synthetic theory is not well-suited to a diverse, complex world. This Contribution believes that the linkage between Legitimacy and Accountability, grounded in Giddens' theorising of reflexivity and generative politics, answers such critique.

Giddens' purpose is to explain how to 'break' the ordered, confining nature of established social systems which impede progress. His pre-occupation is with time and space, and with the way that institutions become situated in each, while modernity is busy disentangling them. Giddens offers a recombinant sociology (1990: 17) in which new connections become possible. Indeed, these become irresistible with advancing knowledge and 'expert systems'. In one sense, this irresistibility can be compared with the technique of survival under Weber's legal rationality: 'knowledge' becomes geared to the reproduction of knowledge and systems – in other words, geared to its own bureaucratic organisation. But Giddens distinguishes this form of 'routinisation', which is without regard for tradition, from the reflexivity of social life itself which constitutively updates itself (1990: 38) :

By this, Giddens means that "modernity is not an embracing of the new for its own sake, but the presumption of *wholesale* reflexivity" (1990: 39, emphasis added). New knowledge is constantly fed back into social practices, on a large scale and without discrimination at either the

micro or macro level (Ritzer and Goodman, 2003: 509). There, it is reflexively applied to the rapidly changing, but still recursively implicating, circumstances of modern life. Every actor participates in this time-stretched cycle. None can avoid it. The significance is that a radical, centrist form of social interaction then becomes conceivable, built upon mutuality and new connections. Giddens calls these possibilities 'generative politics':

> *... a defence of the politics of the public domain, but [not situated] in the old opposition between state and market. It works through providing material conditions, and organizational frameworks, for the life-political decisions taken by individuals and groups in the wider social order. Such a politics depends on the building of active trust, whether in the institutions of government or in connected agencies.* A key argument … is that generative politics is the main means of effectively approaching problems of poverty and social exclusion… (1994: 15, emphasis added)

Locating the link between Legitimacy and Accountability in Giddens' theorising of reflexivity and generative politics is consistent, therefore, with the declared purpose of the Irish National Development Plan, in the context of which the PPP programme is being pursued. It is also consistent with Structural and Cohesion Funding and, presumably, with every other development programme in Europe.

The Operation of the Link between Legitimacy and Accountability

Central themes of Giddens' vision are trust and expertise: "Trust may be defined as confidence in the reliability of a person or system, regarding a given set of outcomes or events, …" (1990: 34). If Citizens trust the expertise affecting their existence, as a consequence of 'the presumption of wholesale reflexivity', then Citizens are *ontologically secure.* Ontological security, for Giddens, means "the confidence that most humans have in the continuity of their self-identity and in the constancy of the surrounding social and material environments of action" (1990: 92). This Contribution's review of Legitimacy has found, by way of endorsement, that Citizens are ontologically *in*secure when reliability and constancy are threatened, when the important features of local social life are ridden over rough-shod by the forces of modernisation without any concern or care.

In this way, Giddens offers two supports for the linking of Legitimacy and Accountability. First, he has explained how ontological security and a concern for stewarding the irreplaceable are outcomes of the stretching of time and space through structuration. And, second, he has confirmed that, at the onset of insecurity, the surge of concern is emotional rather than cognitive. In other words, Giddens agrees that the 'shift', *from* Weber's condition of Legitimacy as Compliance *to* a state of demanding answers using Beetham's objective reasoning, is indeed initiated by ruptures of "trust and security" (O'Brien, 1999: 20). It is triggered by fear. The subsequent demand for epistemological certainty need never have been made if the appropriate safeguard had been in place. Either, wholesale reflexivity had to have been pursued as a matter of habit, practice, conviction and commitment. Or, an Accountability relationship had to have been built into the PPP process, containing both the rationality for trust, the code for dispelling fear and the sanctions and resources to support each (Part 1). Giddens argues for the former as a matter of ideology. This Contribution argues that, practically and procedurally, the latter is the way to accomplish it.

O'Brien examines the link made by Giddens between structuration and ontology, on which this Contribution relies. He confirms its pivotal role in understanding Giddens's life work (1999: 21). Giddens's purpose is always to move beyond the dualism of structure and agency and, therefore, importantly, *not* to reassert unthinkingly the primacy of the old ways. His is a process of constant re-assessment, revision and re-incorporation – the *reflexive monitoring* of interaction *recursively implicated* in social life. In other words, updating without losing sight of either the context, what else is being updated within it, or what the act of updating does to the context. In this way, reflexivity offers "…a 'methodology of practical consciousness'…by which people

'keep in touch' with the phenomenal world" (O'Brien, 1999: 25, citing Giddens 1990). Reflex-ivity as conceived by Giddens, then, is a "deeply instructive sociological phenomenon" (O'Brien, 1999: 25). It explains what is precious today – not what was precious yesterday or what previous generations said was irreplaceable, but what they handed on and still seems im-portant to protect.

The Significance of 'Domain'

The link between structuration and ontology operates through what Giddens calls the 'locale', specifically the locale which is threatened by the infrastructure project. Giddens associates lo-cale more with the availability and use of space (1984: 118) than he does with temporal com-plexity. Hence, his ontology of 'time-space' is focused more on the constitution of social prac-tices than the underlying, enduring values (Craib, 1992: 120). By Craib's 'values', Giddens understands rules and resources, or sets of 'transformative' relations, reorganised as properties of social systems. Systems themselves are reproduced relations between actors and collectiv-ities, organised as regular social practices (1984: 25). For Giddens, then, values mean structures – and in their transformative potential, they become the 'knowledge' that Citizens need to feel ontologically secure about.

These transformative relations lie just as much at the root of the reaction to events like new infrastructure projects, as does the recursive implication of the social practices which stretch them through time. When Citizens want to feel re-assured about trust and expertise, therefore, it is an all-encompassing need. Values, structures, relations, gender, ethnicity, social practices are all as central to the locale as the built and natural environment, as the social networks, and as the culture and symbolism detected by the Irish perspective of Corcoran (2002: 49). It is against this diverse, phenomenal world that practical consciousness registers insecurity – and, therefore, this Contribution prefers the word 'domain', to distinguish that multiplicity of awareness from 'lo-cale' which sounds topographic and like an open landscape. A domain is something richer, more immediate, more intensely personal, immanent and reflective of the need for stewardship than a reading of Giddens infers. Even Foucault recognises in 'domain' the "*pure* description of the facts of discourse" (1998: 306, emphasis added) – that is, an irruption of authentic insecuri-ties, not something stretching to the emotional horizon.

The Role of 'Fear'

From being accepting of the Power of the State and acquiescent in its authority, Citizens are suddenly fearful for themselves and fearful for the domain about them. This is caused by the news that the local physical environment is about to be changed permanently through a major infrastructure project. Fear is the indicator of the onset of ontological insecurity – a sudden un-certainty about the impact of physical change upon life as the individual knows it. This may well be heightened by the incomplete information flows and imperfect public consultations, which have tended to characterise major infrastructure projects. At this point, therefore, fear is undifferentiated, although it will be gendered, and intensely personal. Whether it is also over-whelming and even impossible to deal with (Hydén, 1999: 455) may be influenced by the com-plexity or intensity of the personal perspective of the individual (Adam, 2000: 137). The scale and proximity of the disrupting event will also have an effect. Hydén even suggests that, in situations of fear for the self, inner activity can be considerable while outwardly the manner is passive (1999: 453). This is because the affected Citizens will be exploring the development, turning the news of it over and over against their practical consciousness of the phenomenal world of their respective domains. In whatever way fear is first manifested, therefore, does not clarify ontological insecurity, but merely indicates its advance.

Unless fear remains an isolated and successfully concealed phenomenon, it must be followed by discursive consciousness. The question then is no longer "what has been *instantiated* to cause my sudden fear?" It becomes "what is recognised, now that we are sharing our fears, as still

being so sufficiently important that our collective consciousness does not *distantiate* it sufficiently from our understanding of what this project is proposing to do?" Instanciation and distanciation can be understood as "the conditions under which time and space are organised so as to connect presence and absence" (Giddens, 1990: 14) – a normative differentiation and prioritising of fear.

Giddens grounds the outcome in mutual knowledge (1990: 38). In so doing, he may be accused of overlooking the relative ease or difficulty with which gender expresses different fears (Gilligan, 1982: 2), as well as gendered perspectives among the actors themselves (Skeggs, 2001: 432, citing Hartsock, 1983, 1997, 1998; Kemmis and McTaggart, 2000: 573). Gendered reasoning is highly controversial (Davis, 1992: 219) but not the central issue here. Mutual knowledge does not rest solely upon reciprocity between the actors. It requires more particularly reciprocity between the actors and each element of the structures with which they interact. Time is "so deeply implicated" in that reciprocity (Adam, 1990: 9) that the domain generated, it is argued, transcends different epistemologies or standpoints and can only be fully understood in terms of temporal gaze over a spatial landscape. It is against such a domain then that the question of ontological insecurity can be grasped completely (Malpas, 2001: 133) because only the collective 'gaze' allows the differentiation of fear. Differentiation leads to the capacity for action noted by Hydén (1999: 457) based upon a shared epistemology. And only action, in the context of an event, can mean that Legitimacy is contested and Accountability not proved.

The Significance of 'Stewardship' – the Normative Element of Accountability

As Citizens move away from undifferentiated fear, they begin to seek Legitimacy answers in the way that Beetham demands – by seeking to establish conformity with rules, by actions conferring consent and by justification in terms of local belief. They judge those answers in the same way that Accountability relationships work – by codes, sanctions and rationality (Part 1). Both Legitimacy and Accountability, while normally implicit in process, now become explicitly linked to the stability and security of the domain. Two of the respective sets of criteria for Legitimacy and Accountability (see the Table below) are directly connected with the domain, as local qualifications of universal principles. Furthermore, each set of criteria is driven by the need to restore ontological security there. This Contribution argues, therefore, that, at this crucial point, Legitimacy and Accountability are, in effect, the same standard.

Components of the area of overlap between Legitimacy and Accountability

Legitimacy	Accountability
Conformity to legal rules	Codes which condition the behaviour of the accountable, or produce specific outcomes or impacts
Process dependent	*Process dependent*
Actions conferring legitimacy	Sanctions – the resources or actions available to those seeking an account
Domain dependent	*Domain dependent*
Justification in terms of local beliefs	Rationalities – for example, legal, economic, political or social – specifying ethical or organisational measures which resolve the demands upon those who are accountable
Domain dependent	*Domain dependent*

Conclusions

There are five conclusions to be drawn. First, ontological security can be seen as a continuum. But rather than being described by total insecurity at one extreme and total security at the other, the continuum is better characterised by fear. This is because domains differ: people see them differently according to their personal temporal gaze over the spatial landscape and their reflexive relationship with it. Nevertheless, common aspects of each gaze coalesce and enable a collective domain to be articulated. In this case, at one extreme of the continuum will lie undifferentiated fear and practical consciousness and, at the other, differentiated fear and discursive consciousness. The former is marked by an incapacity for action in the face of overwhelming fear, the latter by capacity for action and only background fear (Hydén, 1999: 457). The action, for which capacity is generated discursively, is action to pursue Accountability – through seeking evidence that, in this particular domain, the book-keeping and story-telling of the PPP have not neglected also to steward it. And if Accountability is not satisfied, the capacity is there to adopt some other course of action – or simply to acquiesce and allow the domain quietly to subside.

The second conclusion is that Legitimacy is not a quantum and that obtaining Accountability answers – and, therefore, conceding Legitimacy – is a matter of discursive judgement. Just as a domain is temporally rich, so Accountability for whatever a PPP plans to do to it should not be in the flat, neutral time (Adam, 2000: 126) of legal-rational reasoning and its consequent, circular assertion: "This is pursuant to process. Therefore, it can only be, and remain, both legitimate and accountable". Instead, whatever Legitimacy is conceded at a particular stage in the procurement process will always be conditional *unless* an Accountability relationship is formally constituted. Such an Accountability relationship would cover the life of the project, be built upon the rationality of the domain and be capable of evolution as the domain itself evolves. Conditional Legitimacy may be geared expressly to future events or interventions therefore. Alternatively, as with any ongoing process, Legitimacy may be in the nature of being watchful or conditional – alert to further insecurity and ready once again to react.

The third conclusion is that, on every occasion conditional Legitimacy is withdrawn, it is because the domain is felt to be vulnerable once more – and that, on every occasion that action to obtain answers is recommended, it is because the concern to care for particular features of the domain is no longer satisfied by book-keeping and story-telling. It follows then that stewardship, an intrinsic component of Accountability, is located within the area of coincidence with Legitimacy. Stewardship is the lens through which *both* Accountability and Legitimacy can be settled when a PPP is announced in a particular location. And because the area of concentration is a *particular* location, stewardship can be seen as being co-terminous with the domain-dependent criteria of both Legitimacy and Accountability – for stewarding is what local Citizens would do themselves to preserve the domain if they had control of the imminent PPP.

The fourth conclusion is that Legitimacy can now be expanded beyond Follesdal's taxonomy of Legality, Compliance, Justifiability and Problem-solving (2005: 3). Legitimacy can also be categorised as Stewardship. This means necessarily that Legitimacy as Stewardship, being dependent upon reaction, lies within the gift of Citizens. It has already been argued that Legitimacy as Compliance, being dependent upon perception, lies within the power of those who need to legitimate. The proximity of other forms of Legitimacy to the need to legitimate – and, therefore, their vulnerability to manipulation – will be a matter for separate empirical research.

The fifth conclusion is simply that, if stewardship is a lens, then it must work in both directions. Legitimacy as Stewardship is also a description of how civil society groups may make themselves accountable in turn, in the context of domain.

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