MONIKA WÓJCIK

Ph. D. Monika Wójcik, *Department of Roman Law*
John Paul II Catholic University of Lublin

FOUNDATIONS IN THE POLISH LEGISLATION IN COMPARISON WITH OTHER EUROPEAN STATES*

The beginnings of the idea of foundation can be traced back to Roman law. The first legislation on the foundation, perceived as an independent legal entity, was made under the rule of Emperor Justinian (6th century). The foundations of the time were related with a charitable activity and resembled charitable institutions involved in various initiatives, for example: *nosocomium* – hospital; *orphanotrophium* – orphanage; *ptochium* – poor house; *gerontocomium* – old men's asylum. Those ancient foundations were not expressly referred to as juridical persons, since the jurists of the time had neither *technicus terminus,* nor the theory of juridical persons at their disposal. The lack of theory, however, did not prevent foundations from being treated as legal entities.

In the following centuries, the idea of foundation gradually evolved. In the mediaeval era, first family as well as art and culture foundations emerged. In Poland foundations appeared around the 12th century. During the Enlightenment, the state authority was clearly disinclined toward foundations, hence a visible decline in their activity. According to the Enlightenment writers, the very idea of foundation contradicted modern thinking. The 19th century was marked by the debate on the nature of juridical person, including the largely arguable – from the viewpoint of the legal theory – category of foundation. The debaters sought justification for the treatment of non-human entities as legal persons. The most noteworthy theories on the issue are: fictional theory (Savigny, Puchta), the theory of non-subjective rights (Windscheid), the theory of intentional asset (Brinz), the theory of collective real person (Gierke) [1].

The legal doctrine isolated foundations as separate legal entities *(universitas bonorum)* and juxtaposed it with the corporate entity *(universitas personarum)* no earlier than in the 19th century. This was done in the work by A. Heise, *Grundriss eines Systems des allgemeinen Zivilrechts,* Heidelberg 1816. From the perspective of legal theory, the substratum of the foundation-like juridical persons is assets. This type of legal entity, as opposed to the corporate type, is not based on the personal component; it has no members, only «users.»

In the postwar period, foundations in Poland were dissolved under the Decree of 1952 on the abolition of foundations (Journal of Laws No. 25, item 172), with the exception of foundations based abroad. This was determined by the contemporary political situation. The possibility of establishing foundations in Poland was restored in 1984 (the Act of 6 April 1984 on Foundations (consolidated text: Journal of Laws of 1991, No. 46 item 203, as amended)). The literature on the subject highlights that the mentioned act failed to regulate the numerous foundation-related issues, and thus entitled the founders to resolve that in the foundation statute.

The foundation activity has recently been in the focal point of legislators in many European countries, including Poland. A gradual strengthening of international cooperation stimulates action, including legislative, aimed to standardize the legal framework in which foundations are deemed to operate. The European Foundation Centre has made an effort to establish the institution of European Foundation. It is then most advisable to pinpoint those elements of the institution of foundation that might be accepted by all European states. It should also be stressed that Europe has been witnessing a peculiar «foundation boom» in recent years. In some countries (Germany, France, Finland), 28 % to 40 % of all foundations were created only over the last decade.

The Foundations Act of 1984 introduced a licence-based system for the development of foundations. It was amended in 1991, when the ultimate powers as for the evaluation of a foundation's activity were delegated to courts. The freedom to create a foundation was secured in the Polish Constitution: «Article 12: The Republic of Poland shall ensure freedom for the creation and functioning of trade unions, socio-occupational organizations of farmers, societies, citizens' movements, other voluntary associations and foundations.» Yet, the enacted law on foundations did not cause new foundations to mushroom. In the first year of the act, only three were registered. Until mid-February 1989, there were 113 foundations. By the end of 1996, this number surged to 5,025. The figure for June 2006 is 8,840 registered foundations.

The aim of the national legislation is to secure the foundations the legal basis for their operation, and provide the rules for their establishment, state supervision and winding up.

The concept and purpose of a foundation

The Polish Law on Foundations covers only private-law foundations. Public-law foundations are not established by the founder's declaration of intent under private law, but through a statute or other public-law measures.

The law fails to provide the definition of foundation. However, judging by the provisions of the statute, several constitutive characteristics of the institution of foundation can be named. These are:

1) it is an entity upon which the law confers legal personality;
2) foundation has assets that must be intended for legitimate objectives, as indicated by the founder;
3) foundations need to pursue socially or economically useful aims;

* Стаття друкується мовою оригіналу

4) the purpose of foundation must be permanent in nature[2].

Consequently, after H. Cioch, a foundation can be defined as the organizational unit equipped with the status of legal personality, established on the initiative of natural or juridical persons in order to sustainably and through the proceeds of any assets transferred to it pursue the public interest aims as indicated in the articles of association[3].

In the years after the adoption of the Law on Foundations, the majority of newly established foundations were involved primarily in social aid, then art and culture followed by science and education[4].

The legislations of other European states also lack a uniform definition of foundation. Many national systems omit to define this institution expressis verbis (e.g. Germany, Finland). Still, some laws attempt to supply a legal definition. For example, Article 2 (1) of the Slovak Foundations Act of 1996 where foundation is defined as a collection of items, funds, securities and other «valuables» assessed in money (hereinafter referred to as «the foundation assets») and intended by the founder for the realisation of essentially benevolent objectives. In the Latvian law, a foundation is made up of assets isolated by the founder with a view to pursuing an objective defined by the founder that must be of non-profit nature (Article 2(2) of the Associations and Foundations Act, 2003). In Croatia, a foundation is the assets intended, together with any income they bring, for the implementation of a generally useful or charitable purpose on a permanent basis (Article 2 of the Funds and Foundations Act, 1995). The Dutch legislation provides that foundation is a juridical person established by an act in law; the person with no members and seeking to realize the assigned goals by means of assets allocated to it (Article 285 of the Civil Code, 1976).

Based on these national definitions and taking account of the legislation of other European states, the European Foundation Centre (EFC) has arrived at the following definition: foundations are independent, non-profit bodies, with a stable source of income originating with (though not exclusively) the initial capital, and having their own governing bodies *(Working with Foundations in Europe: Why and How?*, www.efc.be). Any collected funds they expend on public benefit purposes, both by supporting associations, institutions, individuals, etc. as well as pursuing their own programmes. Such a definition of foundation excludes those established for private purposes, e.g. family foundations, which are permissible in some countries.

The purpose of a foundation is to be provided by the founder. The purpose is indicated in the deed of foundation and cannot be changed, yet can be subject to modification[5]. The binding of a foundation with its purpose is permanent (irreversible), i.e. the founder is not entitled to alter the purpose of his foundation. His decision is restricted by Article 1 of the Polish Law on Foundations, which reads what objectives can be realized through the foundation activities: «Article 1. A foundation may be established for the implementation of purposes aligned with the fundamental interest of the Republic of Poland that are socially and economically beneficial, in particular: health protection, development of economy and science, education and upbringing, art and culture, care and social assistance, environmental protection and historical monuments protection.» The doctrine proposes that Article 1 be amended so as to outlaw the operation of foundations focused entirely and exclusively on «economically beneficial purposes.» The existence of such foundations distorts the very essence of foundation whose main purpose should not be operating for profit, but for «public benefit» goals[6]. The purposes of foundations under the Polish law are set out in Article 1 of the Law on Foundations. These purposes do not comprise a *numerus clausus,* but only list the most predominant objectives pursued in practice:

1) health protection,
2) development of economy and science,
3) education and upbringing,
4) art and culture,
5) social care and assistance,
6) environmental protection,
7) historic monument protection.

Furthermore, the purpose must be public, that is, must benefit the public and not only the founder or his associates.

In most European countries, foundations are regarded as serving the «public benefit» purposes. In the Czech Republic, foundations can be created exclusively for the furtherance of publicly useful aims. Article 1(1) of the Czech Bequest and Foundations Act of 1997 offers a catalogue of such aims: the development of spiritual values, protection of human rights and other universal values, environmental protection, protection of cultural and heritage monuments, advancement of science, education, physical education and sport.

In Croatia, a foundation is defined as the assets intended, together with any income they bring, for the implementation of a generally useful or charitable purpose on a permanent basis (Article 2 of the Funds and Foundations Act, 1995). The «generally useful» purpose is one that concerns the cultural, educational, scientific, spiritual, moral, and sports development, health protection, environmental protection or development of other social activity; «charitable» purpose is about providing assistance to the needy (Article 2).

Also in Serbia, foundations must pursue a publicly useful objective; for example, the act provides two of them: promoting creativity and humanitarian goals (Article 2 of the Bequests, Funds and Foundations Act, 1989). Similar requirements are to be found in French and Spanish legislations, where the non-profit purpose is mandatory (Article 18 of the Foundations Act, 1987 and Article 1 of the Foundations Act, 1994, respectively).

Few states opted for no requirement of «higher benefit» purposes in the operations of their foundations. For example, Germany, Austria, Sweden, Denmark, the Netherlands and Finland (*Comparative highlights of foundation laws,* European Foundation Centre, 2007, p. 6 (www.efc.be)). In the Austrian legislation, the Private Foundations

Act of 1993 stipulates that foundations do not need to be run for charitable purposes. Less than 10% of Austrian foundations are charitable. Most are established to endorse a family business, or prevent the division of a company. In Germany, foundations can be created under civil law. This is governed by the provisions of Articles 1980–1988 of the BGB. Foundations can be formed for different legally permissible purposes, which do not need to address public benefit. However, only those pursuing publicly useful objectives can benefit from tax concessions.

The legislations in Sweden, Denmark and the Netherlands lay down a requirement that the purpose must be lawful, but not necessarily «publicly beneficial.» However, in Finland the purpose needs only to be «beneficial» (Article 5(3) of the Law on Foundations, 1930).

The European Union is working on a common regulation providing for the possibility of creating the so-called European Foundation. The proposed regulation on European Foundation envisages the following requirements: a foundation must possess assets of at least EUR 50 thousand; it should operate in the territory of at least two member states, a foundation has no members, it has legal personality (Article 1 *Proposal for Regulation on a European Statute for Foundations;* www.efc.be). Article 1(1) of the proposed regulation makes a reservation that foundations should be designed to serve «public benefit» purposes. Article 2(1)(b) offers a sample, albeit extensive, catalogue of such purposes. Foundation activities have been arranged in various fields: arts, culture and historical preservation; assistance to, or protection of, people with disabilities; assistance to refugees and immigrants; civil or human rights; consumer protection; international and domestic development; ecology or the protection of the environment; education and training; elimination of discrimination based on race, ethnicity, religion, disability, or any other legally proscribed form of discrimination; prevention and relief of poverty; health or physical well-being and medical care; humanitarian or disaster relief; European and international understanding; protection of, and support for, children and youth; protection or care of animals; science; social cohesion, including the promotion of respect for minorities; social and economic development; social welfare; sports.

Establishment. Legal personality

Under the Polish law, a foundation can created by both a natural (whatever their nationality) and juridical persons, including foreign. The natural person should have full legal capacity. The registered seat of the foundation should be in the territory of the Republic of Poland (Article 2).

In the modern Polish law, the founder can refer to an *inter vivos* or *mortis causa* act in law (Article 3). In the former case, the declaration of intent to establish a foundation requires an *ad solemnitatem* form of a notarial deed. A foundation can also be created in the will (Article 927(3) of the Civil Code). Foundations attain legal capacity and legal capacity to effect acts in law upon the entrance into the National Court Register, i.e. upon acquiring legal personality.

The deed of foundation is a declaration of intent to establish a foundation, which indicates the purposes and assets for their implementation[7]. In accordance with Article 3(2) of the Polish Law on Foundations, the *essentialia negotii* of the deed of foundation includes two provisions: to identify the purpose of a foundation and assets allocated to this purpose. The transfer of assets is a constitutive component of the foundation establishment; the law does not specify the minimum or maximum value of the assets. In the preliminary period of the Polish Law on Foundations, it frequently occurred that the assets allocated to the establishment of a foundation proved insufficient for pursuing the activity named in the deed of foundation.

The legal basis for the operation of foundations is the provisions of the Law on Foundations and the foundation statute. The statute is defined in the doctrine as «a set of regulations that define the objectives and measures for their implementation by a juridical person, as well as its organizational structure and manner of representation[8].» The statute is a separate document from the deed of foundation; it is mandatory. Unlike in corporate persons, the foundation statute is not drawn up by the foundation itself, but it comes from outside the structure of the foundation. The composition of the statute rests with the founder, however, the law authorizes him to transfer this obligation to another person, natural or juridical (Article 5–6). In the event the statute is not framed, the foundation may not operate legally. The Law on Foundations does not resolve this condition and the doctrine proposes various solutions: the establishment of a foundation can be assumed ineffective, or the obligation of drawing up the statute can be transferred to the competent minister who supervises this foundation[9].

The name of a foundation can be comparatively free, including names in a foreign language. The foundation name may be the name of the founder or another person indicated by him. Foundations may also use their own logo.

The body representing and administering the foundation activities is the board (Article 10). It is the only mandatory body within a foundation. However, the statute may provide for the establishment of other bodies, bearing different names, e.g. the council of founders, audit committee). A foundation is dissolved if, first, has accomplished the purpose for which it was established, or, second, its financial resources and assets have been exhausted.

Similar ways of the foundation establishment are provided for in the legislations of other European states.

In the Czech Republic, a foundation can be created through an *inter vivos* or *mortis causa* act in law (Article 3(1) of the Bequest and Foundations Act). It is established upon entry into the register maintained by the court (Article 5(1) of the Bequest and Foundations Act). In Slovakia, the establishment follows an *inter vivos* (§ 7 para. 2) or *mortis causa* act (§ 7 para.3 of the Foundations Act, 1997). A foundation is created upon entry into the foundation register. The Ministry of Internal Affairs issues the decision of registration and maintains the register (§ 11 para. 1) In Croatia, the establishment of a foundation (through an *inter vivos* or *mortis causa* act – Article 4 of the Funds and Foundations Act of 1995) requires a permit from the Ministry of Administration. The register is maintained by the same ministry (Article 36). Foundation acquires legal personality upon registration (Article 3(6)).

In Serbia, foundations require a permit to operate. The permit is issued by an administrative authority competent in cultural affairs (Article 24 of the Bequests, Funds and Foundations Act, 1989). A foundation acquires legal personality upon registration (Article 8). In Finland, foundation is also created through an *inter vivos* or *mortis causa* act in law (Article 1 of the Foundations Act, 1930). The founder needs a permit. The relevant request must be submitted to the Ministry of Patents and Registration (Article 5(1)). A licence-based system also operates in Spain and Portugal.

In many European countries, an official permit (also called other names) is required to create foundation (France, Belgium, Finland, Portugal, Spain). In other countries, the system of registration has been put in place (the Czech Republic, Hungary, Bulgaria, Poland). Sweden is the exception; it has a normative system, i.e. the entry into the register is only expected in two cases; in general, the state involvement is not required (Chapter 10, Article 1 of the Foundations Act, 1994).

As a rule, contemporary foundations should operate as juridical persons. In the Polish legislation, foundation acquires legal personality upon registration in the National Court Register (Article 7(2) of the Law on Foundations). The proposed regulation on European Foundation also provides that foundations will always carry legal personality.

Supervision

The doctrine distinguishes between the positive and negative control over foundations. Negative control consists in auditing the foundation for illegal activity. Positive control aims to verify whether the foundation meets its objectives set out in the deed of foundation.

The Polish Law on Foundations does not use the term «supervision»; yet, it is assumed that in the case of foundations, the same type of supervision is exercised as for associations. Still, the competence of the supervisory body is more restrained.

In accordance with Article 12 of the Polish Law on Foundations, foundations are subject to supervision. The demand for such supervision is justified by the need to protect the state and social interest, which are no doubt affected by the activity of all foundations. The founder is not empowered to exclude his foundation from the state supervision. The control is exercised by the court, the minister competent in the field of foundation's operation, and the district governor having jurisdiction over the foundation's seat. Foundation is obliged to submit annual reports on activity to the relevant minister (Article 12(2)). The supervision provided for in the statute is thought to be rather limited; apparently, it should be tighter in order to increase transparency of the foundation's activity[10].

The laws of most European countries propose similar supervisory policies.

In Finland, foundations are controlled by the Ministry of Patents and Registration (Article 13 of the Foundations Act, 1930). In addition, when the founder or a person who could benefit from foundation recognises that the foundation authorities act against the law or statute, they can notify the ministry (Article 15). In Sweden, foundations are controlled by the administrative bodies having jurisdiction over the foundation's seat (Chapter 9, Article 1 of the Foundations Act, 1994). Foundations in Slovakia are required to submit an annual report to the Minister of Internal Affairs (Article 33(3) of the Foundations Act, 1996) and are under his control (Article 36).

The Croatian legislation allows the control of several entities: the Minister of Administration (Article 2 of the Funds and Foundations Act, 1995), but also the Minister of Finance (Article 30). In Switzerland and Germany, the control is exercised by the administrative bodies at various hierarchy levels. Also in Italy, administrative authorities maintain supervision; they may also have recourse to broad coercive measures (Article 25 of the Italian Civil Code). By contrast, in Belgium, supervision is limited; the auditing bodies are not entitled to use coercive measures. In the UK and the Netherlands, a separate institution has been established to control non-profit organizations.

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[1] L. Stecki, *Fundacja*, t. I, Toruc 1996, s. 27-42.

[2] H. Cioch, *Prawo fundacyjne*, Warszawa 2002, s. 25.

[3] H. Cioch, *Prawo fundacyjne*, Warszawa 2002, s. 26.

[4] M. Wawrzycski, *Fundacje w Polsce*, Warszawa 1997, s. 22.

[5] H. Cioch, *Przeksztaicenie fundacji*, «Studia Prawnicze» 1988, nr 4.

[6] H. Cioch, A. Kidyba, *Ustawa o fundacjach. Komentarz*, Warszawa 2007, s. 18-20.

[7] P. Suski, *Stowarzyszenia i fundacje*, Warszawa 2006, s. 371-373.

[8] P. Suski, *Stowarzyszenia i fundacje*, Warszawa 2006, s. 371-373.

[9] P. Suski, *Stowarzyszenia i fundacje*, Warszawa 2006, s. 394-395.

[10] *M. Swora, Nadzyr nad stowarzyszeniami, fundacjami oraz prowadzeniem dziaialnośći poïytku publicznego*, «Pacstwo i Prawo» 2003, nr 12, s. 68-77.

Резюме

Авторкою надається аналіз формування польського законодавства у порівнянні з іншими європейськими країнами. Розглядається роль Римського права на правотворчі процеси Польщі та інших європейських країн.

Ключеві слова: формування польського законодавства, порівняльний аналіз, римське право.

Резюме

Автором проводится анализ формирования польского законодательства в сравнительном аспекте к другим европейским державам. Рассматривается роль Римского права на правотворческие процессы Польши и других европейских держав.

Ключевые слова: формирование польского законодательства, сравнительный анализ, римское право.

Summary

The article elaborates on the legal aspects of the institution of foundations in Polish legislation and that of selected European countries (e.g. Germany, the Netherlands, Finland, Croatia, Slovakia). Also, the role of the European Foundation Centre was mentioned and its effort to establish the institution of European Foundation.

Key words: foundation of polish legislation, comparative analyses, Roman law.

Отримано 20.06.2011

БОГУСЛАВ БАНАШАК

Богуслав Банашак, *профессор Вроцлавского университета (Республика Польша)*

ИЗМЕНЕНИЕ КОНСТИТУЦИИ – В ПОИСКАХ ТАК НАЗЫВАЕМОГО КОНСТИТУЦИОННОГО МОМЕНТА*

Частота изменений конституции, как полных, так и частичных, в отдельных странах весьма неоднородна и зависит от многих факторов. Трудно в этом случае найти какие-то общие закономерности, управляющие этим процессом. Слишком большую роль играет здесь специфика практики общественного и государственного устройства отдельных государств. Можно, однако, попробовать указать на наиболее часто проявляющиеся факторы.

1. Пределы конституционного регулирования

Ограничение предметов, охваченных конституционными нормами, способствует устойчивости данной конституции. В этом убеждает хотя бы пример конституции Соединённых Штатов 1787 г., или конституции Исландии 1944 г.

Конституцию сложнее изменить, чем иные правовые акты. Поэтому предметом её регулирования не должны быть текущие, временные дела, а также вопросы, имеющие малую общественную значимость. Если они встречаются в конституции, это влечёт за собой необходимость её частого изменения.

Ограничение предметов, регулируемых конституцией, делает её, правда, менее подверженной изменениям, но не должно заходить слишком далеко. Сегодня наверняка недостаточен был бы тот минимум, который определён в ст. 16 французской Декларации прав человека и гражданина 1789 г., гласит, что конституция должна гарантировать права личности и разделение властей. Конституция не может также ограничиваться описанием действительности, т. е. петрификацией существующей общественной, политической и экономической системы. Тогда её необходимо было бы перманентно изменять и постоянно фиксировать новые институты, иначе она стала бы тормозом развития и утратила своё значение.

2. Степень общего характера формулировок, содержащихся в конституции

Чем более общими являются формулировки, содержащиеся в конституции, и тем самым многозначными, тем её изменения происходят реже. «Уже Наполеон I констатировал, что лаконичная конституция более прочна и легче приспосабливается к текущим условиям. Позже выдающийся историк и политолог Жак Бенвиль писал, что когда однозначность права чрезмерно радикальна, она не благоприятствует компромиссам. А ведь политика постоянно требует отступлений и полумер»[1]. Подтверждением этого тезиса может служить Конституция Соединённых Штатов 1787 г.

Общий характер конституционных формулировок всегда обеспечивает нахождение консенсуса в их применении[2]. Это благоприятствует её постоянству, выполнению ею интеграционной функции. Ни одна конституция не лишена также пробелов, «иногда умышленно создаваемых для того, чтобы политические силы в государстве, а также парламент и правительство, как политические органы, могли свободно развивать свою деятельность»[3]. При этом они должны учитывать актуальные реалии и взгляды, ценности, принимаемые в данное время обществом.

3. Степень судейской активности

Здесь речь идёт о роли верховного суда или суда конституционного в приспособлении конституции к нуждам общественного развития. Чем более активен суд, дающий толкование положений конституции, тем легче избежать необходимости проведения изменения конституции, поскольку можно просто изменить значение, приписываемое её нормам. Убедительным доказательством, подтверждающим этот тезис, являются Соединённые Штаты. Там Верховный суд часто видоизменяет содержание конституционных норм в ходе их интерпретации. Экземплификацией этого является отмена в 1954 г. расовой сегрегации в публичной школьной системе Соединённых Штатов в силу решения Верховного суда, вынесенного, кстати, после 60 лет применения им иного толкования конституции. Это предотвратило социальные волнения и превращение конституции в ограничитель общественных перемен.

* Стаття друкується мовою оригіналу