LEGAL ISSUES FACED BY FOUNDATIONS TODAY IN DIFFERENT EUROPEAN COUNTRIES

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This panel includes papers from different European countries on legal issues faced by foundations today.

Papers come from different countries: Italy, Poland and the United Kingdom.

These countries are very different from one another. From a strictly legal point of view, Italy has a strong Civil Law tradition, while United Kingdom is a Common Law country.

While in Italy is a Western European country, where democracy and freedom have been strong principles since the second part of the twentieth century, Poland, located in Eastern Europe has gained democracy more recently. Poland is an interesting country because it has undergone big changes from the fall of the communist régime to democracy.

These characteristics of each country have a great importance in issues faced by foundations.

Despite the differences between these countries, foundations have increased their role and importance in all the countries presenting a paper.

All the papers examine laws, judicial decisions, commentaries, data, foundations’ evolutions and indicate the main legal issues foundations face today in each country.

It is interesting to notice that, in all these countries, foundations face a similar problem: the rules about foundations in Italy, Poland, United Kingdom are outdated, considering the evolution foundations have undergone in last years. Therefore, these countries need to review foundation’s law, because an evolution has undergone in foundation’s framework since the existing laws have been adopted.

In the Common law country, United Kingdom, Charitable foundations are distinct from the more traditional charitable activity of service delivery. Nevertheless, their legal regime is the same as the Charities’ ones, since both are placed them under the general charity regulation of the Charities Acts of 1993 and 2006 which cover all charities as one cohesive group.

A Civil law country, as Italy is, faces the problem of being foundation law adopted in 1942 (Civil Code), when the State had a hostile approach towards foundations. Since then, foundations evolved through statutes’ regulations, and that was possible for the lack of detail in the Civil Code. However, afterwards new principles were introduced into Italian Constitution, and in laws ruling special foundations. Therefore, foundation rules in the Civil Code need to be rewritten, according to the new principles.

In Poland, the law concerning foundations was adopted in 1984. Since then, Poland has undergone big changes in its political régime. Foundations are playing an important role in civil society. However, the 1984 legal framework seem now inadequate to the modern Polish foundations, its goals, its need of fundraising. Therefore, Polish foundations show a need of change their legal framework.

This panel will discuss the papers, examining the situation and legal issues now existing in each country presenting a paper. The papers’ authors can explain and interact. Also, it will interesting to show differences concerning foundation law in Common law countries and in
Civil law countries. Exchanging expertise on each country can give more ideas to develop and help solve legal issues about foundations.

Actually, main legal issues foundations should focus on in the above-mentioned countries are quite similar. Assets and goals, transparency and accountability, governance, supervision, economic activity.
Current legal issues in the regulation of charitable foundations in

England and Wales

Charitable foundations play an important part in the voluntary sector of England and Wales, particularly as enablers of creative and innovative voluntary action. Such grant-giving organisations have a key role in encouraging philanthropy and active citizenship, as well as facilitating capacity building within the third sector and civil society. Charitable foundations, as grant-givers, have purposes which are distinct from the more traditional charitable activity of service delivery. This distinctiveness in terms of purpose, as well as structure, governance and assets means that charitable foundations often face unique legal challenges. In addition, those endowed with sufficient funds to create a foundation often need to be encouraged to do so through a non burdensome regulatory regime, particularly in times of wider social and financial difficulty in society. Yet despite the unique features of charitable foundations and their specific needs, the legal regime for charities in England and Wales does not make separate provision for them, either at the point of their creation or in their operation. Rather, charitable foundations are placed under the all-encompassing general charity regulation of the Charities Acts of 1993 and 2006. Indeed, despite extensive lobbying by the foundation sub-sector in the lead up to the 2006 Act and a recommendation by the Joint Committee on the Draft Charities Bill for lighter regulation for charitable foundations, the legislative reform chose to retain the approach of treating all charitable organisations as a unified group. Whilst allowing for sector cohesion, this approach within English and Welsh charity law fails to adequately meet the legal challenges facing charitable foundations.

Taking a legal perspective this paper will examine the current regulation of charitable foundations in England and Wales, focusing in particular upon the distinctive legal challenges for charitable foundations which have arisen out of, or which remain unresolved by, the recent overhaul of English and Welsh charity law. It will also consider how the sector regulator, the Charity Commission for England and Wales, treats charitable foundations in practice. In so doing this paper will consider whether the distinctiveness of purpose of charitable foundations and the unique legal issues which arise in relation to their creation, asset management and distribution, their governance regimes and organisational structures deserve more sensitive and tailor-made recognition by regulators.

This paper, though focussed on English and Welsh law, will be of interest to an international audience as a comparative approach to how charitable foundations are treated within the legal regime of two specific common law countries (e.g. compared with common law regimes in Ireland, Scotland, USA, Canada and Australia) as opposed to the legal regime in a civil law country (e.g. Italy, France etc). That comparison will be directly apparent through the overall panel of which this paper forms a part.

This paper will draw upon the recent English jurisprudence including the Charities Act 2006, the legislative debates leading up to Act, the Joint House of Commons and House of Lords Committee Scrutiny Reports, submissions by the Association of Charitable Foundations to legislative consultation, as well as current reports on the regulation of charities and literature on the role and distinctiveness of charitable foundations in philanthropy as grant-giving organisations and the legal and economic challenges they face.

SOURCES:
1st, 2nd, 3rd Readings of the Charities Bill in the House of Commons and the House of Lords (Hansard)


Memorandum from the Association of Charitable Foundations to the Joint Committee on the Draft Charities Bill (DCH 23) (2004)

HM Treasury and the Cabinet Office, The future role of the third sector in social and economic regeneration: final report Cm 7189 (2007)

Association of Charitable Foundations & Charities Aid Foundation, Grant-making by Trusts and Charities (2007)


Throughout the last 20 years, Poland has undergone a fundamental transformation from the debt-ridden, underdeveloped, Soviet-satellite country to the dynamic constitutional democracy with thriving market and growing space for civil empowerment and participation. In that process, not only do civil society agents need to keep up with that pace, but they have also been required to grow strong and capable in the time span much shorter than their Western counterparts.

In Poland, the current concept of forming non-profit entities by citizens had come into force several years before the fall of the communist régime and during the following transitional period, through the 1984 Law on Foundations and the 1989 Law on Associations. These regulations have not been fundamentally revised since, hence some of their aspects do not seem to be adequate twenty odd years later. The structure and roles of foundations reflect the dynamics of the transition from one political system to the other and the condition of the society as well. In the mid-nineties, when the number of established foundations rapidly increased, foundations have been typically established by founders with limited resources, and this trend has not changed significantly since. As a result, a vast majority of foundations are based on a minimal founding capital and designed to rely on continuous fundraising. Therefore, functional differences between foundations and associations (that are primarily driven by voluntary efforts of the members) are often blurred. Determining to what extent the change of legal framework may facilitate distinguishing foundations from other forms of civil activity is a challenge, since that change should not limit the constitutional liberty of establishing foundations (Article 12 Polish Constitution).

The 1984 Law on Foundations states that foundations are established to serve ‘realization of socially and economically charitable goals in accordance with the basic interests of the Republic of Poland’ (Article 1). At present, it could be considered the possibility of creating foundations for the sole founder’s and his immediate environment’s benefit, as well. Diversifying types of foundations according to their goals can lead to diversify prerogatives such as tax advantages.

The growing disparity between how the law frames foundations and what seems to be the need that it should outline, has not been met with substantial changes in the legal structure that would provide a response to the above challenges. Several attempts to reformulate the regulations bring the unavoidable change closer. The research outlines the discrepancies between the legal model of a foundation and its actual and desired functions, which subsequently serves as a basis for assessment what is the possible direction of change.

This paper is based on the overview of legal acts shaping the function, operation and role of foundations in Poland. Also, relevant literature is overviewed in order to provide commentaries and judicial decisions on the subject when necessary; quantitative data and case studies will be brought. Additionally, a set of online surveys on how the legal framework should be changed, that were conducted in 2008 and 2009 will be used to present the views of experts and practitioners.

This paper will therefore outline the disparity between the present foundation law and today foundation’s needs in terms of regulation, focusing on the most important legal issues. These are: redefining what a foundation is in terms of goals; the need of a minimal founding capital (if in accordance to the constitutional liberty of starting foundations); deregulation in establishing foundations; the possibility of self-regulation; supervision. A draw from foreign models could be helpful in redesigning legal framework of Polish foundations.

SOURCES:
Henryk Cioch, Prawo Fundacyjne (Foundations's Law), Zakamycze, 2005

Hubert Izdebski, Fundacje i Stowarzyszenia, (Foundations and Associations), Anna Piechowiak ECO, 2004

In Italy foundations have been growing in number and importance in the last thirty years.

This phenomenon is due to several reasons. The first is the growing interests of individuals and groups to be involved in activities that benefit the community at large. Therefore, non-profit organizations were created (foundations, associations or other organizations): the State encouraged this phenomenon, since it happened when the State suffered for a lack of resources to devote to the welfare state. The second reason is that the State, since 1990, has started foundations itself, either by legally transforming into foundations public institutions, mostly in the arts and culture fields, or by creating new foundations, like banking foundations.

While foundations created by the State in the last twenty years are regulated by specific laws, any other foundation is ruled by the Civil Code, adopted in 1942. At that time, the approach towards foundations was hostile: for this reason, foundations must be registered following a discretionary procedure, and are supervised by the State or at the local level (Region). The Civil Code contains weak rules about foundations, especially as far as governance is concerned, and it does not mention whether a foundation can conduct economic activities or not.

The lack in detail in the Civil Code permitted the supplementation of rules through statutes, that determined a great evolution in foundations. Today, foundations in Italy are quite different from the Civil Code framework: they are frequently started by institutions (corporations, the public administration, the State), while at the time when the Civil Code was adopted they were mostly created by a person’s will or testament; they often start with a small endowment and receive periodical contributions; they often have a broad scope and countless beneficiaries; they often conduct economic activity, and are therefore more similar to corporations.

Today the State has a favourable approach to foundations. In 2001, in Italian Constitution was introduced the so called “principio di sussidiarietà”, according to which private citizens and organizations can conduct activities for public and general interest, and the state, regions, counties, and municipalities can allow these activities (Article 118 Italian Constitution). Moreover, many fiscal advantages were introduced for non-profit organizations, such as foundations, both for the organizations and for the donors.

Other principles, introduced in Italian law in the last years, cannot apply to foundations, even if they would be very important for them. The most important ones are transparency and accountability. These principles were introduced for the public administration’s and the corporations’ activity, but not for non-profit organisations’ activity. They are stated in special laws, referred to special types of foundations created by the State, such as banking foundations, but they are not written in the Civil Code, because their need was not present when the Civil Code was adopted. Special laws related to special foundations, such as banking foundations, can therefore serve as a model for changing Civil Code’s rules.

Another important reality that should be considered is the various types of foundations now existing in Italy. The biggest difference lies in the interests that are involved in the foundation’s activity: foundations can pursue private interests, belonging to a small number of people, or can involve interests belonging to the community at large. While the first can be autonomous in defining their rules in statutes, the latter should be more strictly ruled, in order to protect the various interests involved.

This paper will start from the existing situation of foundations in Italy and its evolution; therefore, it will consider that the Civil Code, that is the general law about foundations, has become outdated and needs to be reviewed. It will also consider the many special laws related
to special foundations, remarking the relevant difference between them and the Civil Code framework, as well as considering some characteristics of special foundations, unknown when the Civil Code was adopted. It will consider commentaries of legal scholars, especially about the need of reforming the Civil Code, and judicial decisions. It will also deal with the bills that are now at the attention of the Italian Parliament on the Civil Code reform.

Then, this paper will examine any issue that should be the focus of a new foundation law. Among them the introduction of different types of foundations, a less discretionary registration’s system, the definition of non-distribution constraint, governance and accountability, transparency and reports, supervision, rules about economic activity can be mentioned.

SOURCES:


Ristuccia, S., Fondazioni e associazioni. Proposte per una riforma del libro primo del Codice Civile, a cura del Gruppo di Studio Società e Istituzioni, Rimini, 1995.

Zoppini, A., Problemi e prospettive per una riforma delle associazioni e fondazioni di diritto privato, in Rivista di diritto civile, II, 2005, pp. 365-367.