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Legal Issues Considered for Changing Italian Foundation Law
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Abstract

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 interest 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 from 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 of 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. Today 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 holds a favourable approach to foundations. In 2001, in the Italian Constitution the so called “principio di sussidiarietà” was introduced, 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, referring 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 the 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, highlighting 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 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 system, the definition of non-distribution constraint, governance and accountability, transparency and reports, supervision and rules about economic activity may also be mentioned.
1. Introduction

This paper deals with Italian foundation law and its need for change.
Firstly, it describes foundation rules in the Civil Code, which was adopted in 1942. It examines the great evolution foundations have undergone, mostly in the last thirty years (paragraph 2).
Consequently, a reform of the Civil Code rules is strongly needed (paragraph 3). Moreover, since 1990 several laws created various foundations, regulated by these laws, while the Civil Code rules are residual (paragraph 4).
Finally, the paper examines the main issues that should be the focus of a new foundation law (paragraph 5).

2. The exiting situation and its evolution

In Italy foundations are ruled by the Civil Code, First Book, adopted in 1942.
At that time, foundations did not play a significant role in Italian society and the totalitarian regime held a hostile approach to them. Afterwards, in the last thirty years, foundations have grown in number and in importance and have become very different from one another.
This great change is due to several reasons. Civil society increased its work in several fields; the state turned to a favourable approach to foundations; fiscal incentives for non-profit organizations were introduced. Nowadays non-profit organizations play a relevant, though not subsidiary, role, in helping the state in many fields, such as culture, education, health and research. In fact, Italian welfare state has faced a financial crisis in recent years.
In 2001 (Constitutional Law no. 3/2001) the so called “principio di sussidiarietà” was introduced in the Italian Constitution (art. 118). According to it, private citizens and organizations can conduct activities for public and general interest, and the state, regions, counties, and municipalities allow these activities.
Moreover, the state created foundations, either by legally transforming public institutions, or by creating new foundations (paragraph 4). All these foundations are regulated by specific laws.

The still-unwritten definition of foundation is “an endowment that must be used to pursue the foundation’s scope and cannot be re-appropriated by the founder”. So, the foundation’s endowment is solely for the foundation’s use. According to the Civil Code, the state controls foundations throughout the life of the foundation. A foundation is created by a notarial deed; it must be registered by the state in order to attain the legal status of a separate body.

Actually, the main characteristics of a foundation, as its definition shows, is its endowment and scope, and the relation between the two. Therefore, the state’s control is particularly focused on the foundation’s endowment and on whether this endowment is sufficient to fulfil the foundation’s goals.

Since the law about registration (decree no. 361/2000) states that the endowment should be sufficient for the scope, but does not fix the amount, registration still requires a discretionary choice. Though the procedure introduced by the decree no. 361/2000 is a less discretionary procedure compared to the one in the Civil Code, the actual needs suggest a simplified non-discretionary registration, similar to the one formulated for corporations by law no. 340/2000 (art. 32) (Paragraph 4). Jurisprudence pronounces that the endowment should be sufficient to pursue the scope of registering the foundation, whereas the promise of future periodic contributions will not be accepted. It has been mentioned that a small endowment is not sufficient as a warranty to creditors.

With registration, foundations become legal entities and legal personalities, which means limited liability for administrators.

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1 Gruppo di Studio Società e Istituzioni, Quasi un decalogo: i principi della riforma del primo libro del codice civile, in Fondazioni e associazioni: proposte per una riforma del primo libro del Codice Civile, Rimini, 1995, p. 245.


The possibility of a foundation not being registered, and therefore not being a legal entity is mostly excluded in Italy by legal scholars and jurisprudence. This is one of the main differences between foundations and associations, which can either register and receive legal personality or not register and have no legal personality. However, differences between foundations and associations have recently become less clear.

As far as the scope is concerned, Italian jurisprudence requires that the foundation’s scope not be generic. The law (art. 1, decree no. 361/2000) states that the scope must be possible and allowed by the law. However, jurisprudence and traditional legal scholars believe that the purpose of a foundation should have public utility, since this can be the only reason for devoting an endowment to a perpetual scope. According to a different opinion foundations can follow a private interest as well, since no rule denies it; this opinion can be even stronger now that foundations conduct economic activities.

Actually, a foundation in Italy can currently pursue both public (i.e., of interest to many people) and private (i.e., of interest to a limited number of people) scopes. This issue is worth considering, and different rules could be stated for these two types of foundations (paragraph 5).

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5 Consiglio di Stato, Sezione II, 27.7.1979, n. 1228.


The real character of a foundation, as with any non-profit organization, is the non-distribution constraint, that means that profits cannot be distributed to the members but should be devoted to the foundation’s scope and activity. Whatever is the scope of the foundation, the non-distribution constraint is the very nature of foundations, as it is for any non-profit organization. It can even be affirmed that other characteristics of the foundation’s purpose are additional to the non-distribution constraint. However, the Italian Civil Code does not specify whom non-distribution constraint applies to

It is important to affirm that the non-distribution constraint does not mean that a foundation cannot gain profit or conduct profit-making activities, such as economic or enterprise activities, which are currently more and more important for foundation. Therefore, there is no doubt that a foundation can conduct economic activities, which is another important issue (paragraph 5).

The Italian Civil Code deals with the foundation’s scope, but not with its activities. Therefore, activities can be stated in statute or decided, or at least influenced, by the board. Actually, the modern foundation shows a great change as far as the governance is concerned. The Civil Code does not contain a specific rule about the foundation’s governance; it just deals with board members’ liability and limitations to the representation of the foundation (art. 18 and art. 19). Therefore, no rule about the structure of the foundation’s governance is contained in it. The only recognized entity is the board. At that time (1942), foundations were mostly considered to be endowments. Over time, governance has increased in importance.

Actually, modern foundations have introduced other committees, such as the committee for financial control. Some foundations, such as “fondazioni di partecipazione”, which are similar to Italian associations, sometimes have an assembly, which is the typical board for associations, but not for foundations. An auditing committee could be needed, to control the foundation’s activity. The Civil Code does not rule any auditing committee, but states a

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8 Legal scholars (e.g., G. Baralis, Enti non profit: profili civilistici, in Rivista del notariato, 1999, I, p. 1101) give a wide interpretation of the non-distribution constraint, believing it could either be a periodic or final distribution of profits, and high emoluments given to members of boards. In particular, P. Gallo, Istituzioni di diritto privato, 2nd edition, Torino, 2000, p. 138, affirms that in the last-mentioned case the non-profit organization actually conceals a profit organization.
strong external overseeing of foundations, by the government (art. 25 Civil Code). Introducing an auditing committee, internal to the foundation, and reducing external governmental oversight are important issues as well (paragraph 5). Moreover, governance and the decisions of boards have grown in importance and some changes may be suggested (paragraph 5). Nevertheless, the board cannot modify the foundation’s scope. Modifying the scope is the character that differentiates foundations from associations, whose purpose can be modified by members, while for foundations it is determined by statutes made by the founders. However, the topic is worth considering because of the evolution that foundations have undergone, such as conducting economic activities, which require some adaptability to special needs.

Modern foundations often conduct economic activities. This issue is not ruled by the Civil Code, but it was introduced in foundations operating later on. At present, with no rule on this issue in the Civil Code, both legal scholars and jurisprudence express differing opinions. The topic is strictly linked to the non-distribution constraint as the main characteristic of the foundation and the actual foundation’s scope, while the economic activity generates profits. The differing opinions focus on the possibility of a foundation leading economic activity only as a non-dominant activity, or also as the dominant activity, until being the economic activity is the foundation’s sole activity.

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9 Due to the 1942 Civil Code’s hostile approach to foundations, the rather strong government’s supervision is related to the main decisions of foundations; the supervising authority can even revoke administrators who do not respect the foundation’s statute and scope and designate a superindent to manage the foundation until a new board is nominated (art. 25). Actually, the supervisor authority did not exercise its power so often and strongly.


The opinion of the minority of scholars denies the possibility of conducting economic activity as the dominant foundation’s activity. This opinion is based on being the foundations non-economic entities, without the publicity and supervision that enterprises have to observe.\(^{14}\)

The majority of legal scholars affirms now, with no doubt, that a foundation can conduct economic activity, either as dominant, or non-dominant.\(^{15}\) This opinion is based on observing that the Civil Code rule which defines the entrepreneur (art. 2082) does not mention the profit purpose;\(^{16}\) moreover, present legislation allows other entities, different from corporations, to conduct economic activities.

In absence of rules, legal scholars and jurisprudence affirm that the foundations which conduct economic activities should be enrolled in the enterprises’ register, and to foundations whose dominant activity is the economic one, the rules of Civil Code referred to commercial enterprises should be applied (art. from 2188 to 2221).\(^{17}\)

In cases when the economic activity is non-dominant for a foundation, there are different opinions.\(^{18}\) The more recent opinion affirms that the rules of Civil Code referred to commercial enterprises should be applied.\(^{19}\)

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The jurisprudence allows the foundations to conduct economic activities, both as dominant and as non-dominant activities, since it requires a public utility purpose, in contrast with the opinion of most legal scholars. Nevertheless, it requires this activity to respect the statute and the public utility foundation’s scope: the economic activity should be related to this scope. Otherwise, the economic activity cannot be considered a foundation’s activity and people who act are liable.

Foundations can even be a holding, conducting economic activity in order to distribute profits to another entity, which pursue the foundation’s scope. This is allowed both by legal scholars and jurisprudence.

Therefore, foundations conducting economic activity is one of the most important issues nowadays. Many foundations can grow conducting these activities; opinions of scholars and jurisprudence differ between each other; there is no definitive rules.

Italian foundations today are mostly different from the time when the Civil Code was adopted, in 1942. At that time most foundations were created through a person’s will and testament; on the contrary, today foundations are mostly started by institutions (corporations and the public administration or the state itself). In 1942 most foundations did not have big endowment and their beneficiaries were well established; modern foundations often have a broad scope and countless beneficiaries. Foundation’s endowment was considered the most relevant issue; today foundations sometimes initially start with a small endowment and receive periodical contributions to finance their activities. The above-mentioned changes were possible because of the lack of detail in regulations about foundations in the Civil Code, which permitted the supplementation of the rules through statutes. This reliance on statutes resulted in the evolution of foundations, that now suggest modifying the Civil Code, First Book).


3. The need to reform the Italian Civil Code

Paragraph 2 showed that the Italian Civil Code has become sadly outdated when compared to the evolution that foundations have undergone in the last twenty years. Because of this evolution, there is now a clear need of definitive rules, which has been affirmed by scholars, foundation experts and people who work at foundations since the 1960s. Paragraph 5 will discuss the issues that should be the focus of the Civil Code reform. This paragraph intends to underline some needs to reform the First Book of the Civil Code.

One of the most important reasons for this need currently lies in the reform of the Fifth Book of the Civil Code (law no. 6/2003), which concerns corporations. Today, foundations and corporations are becoming more and more similar, since both can legally conduct economic activities; the essential difference between them is the foundation’s non-distribution constraint. In addition, the starting point of recent Italian legislation is activity more than juridical form; modern Italian laws permit different entities, profit or non-profit, to conduct the same activity. Recent Italian legislation focuses on activities, and often introduces fiscal incentives depending on the area of activity (social, cultural, educational, etc.), not differentiating entities according to their juridical form.

The reformed corporation law allows foundations to be transformed into corporations and vice versa. Regulations for foundations and corporations are both outlined in the Civil Code (the First Book and the Fifth Book); since the regulations for corporations have been reformed, the reform of foundations cannot be delayed because both regulations must be

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22 In the 60s the need to reform the First Book was discussed at the meeting in Rome on May 12-14, 1966, organized by Fondazione Olivetti, Fondazione Cini and Istituto Accademico di Roma. Many legal scholars have written on this topic. More recently, among the most specific studies about foundation reform: Gruppo di Studio Società e Istituzioni, Fondazioni e associazioni: proposte per una riforma del primo libro del codice civile, Rimini, 1993; Consiglio Italiano per le Scienze Sociali, Libro Bianco sulle fondazioni in Italia, in Queste Istituzioni, no. 127, 2002; Various Authors, Per una riforma del diritto di associazioni e fondazioni, Atti, Milano, 2005; C. Prele, La fondazione. Evoluzione giuridica di un istituto alla ribalta, Torino, 2007.

23 An important recent instance is the so-called “impresa sociale”, introduced by the decree no. 155/2006), which conducts economic activities for social utility with non-distribution constraint. The “impresa sociale” has specific regulations; the important issue is that the same activity can be led by an entity of the First Book of the Civil Code (as foundations or associations) or by an entity of the Fifth Book of the Civil Code (corporations).
based on the same principles. In fact, the Commission, which wrote the bill to reform corporate law, underlined the need to reform foundation law as soon as possible. Specifically, the 2003 reform introduced into Italian corporate law transparency, accountability, and autonomy; the degree to which these three principles are applied relates to the number or types of interests involved in each corporation’s activity. If the corporation’s activity involves interests belonging to the community at large, the more strict the rules must be; if it involves interests belonging to a smaller and defined group of people, the foundation is more autonomous and its statute states its regulations.

The 2003 law introduced transparency for corporations, and a law dated 1990 stated it for the state and for public administration. On the contrary, Civil Code rules concerning foundations did not deal with transparency, which was an unknown principle at that time when Civil Code was adopted. However, transparency is stated for foundations created in the last twenty years and regulated by specific laws (eg. banking foundations, paragraph 4). It refers to all of the activities of these foundations, and it is also intended as a guarantee for the foundation’s beneficiaries. In fact, it would be difficult for countless beneficiaries from large foundations to maintain their interests by taking their cases to court. In addition, transparency concerns annual reports, which should be publicly disclosed. To state transparency for any foundation is a clear need. Its lack looks unfair and may cause difficulty in fund raising. In fact, it is rather difficult to raise money when no report of the foundation’s activities must be shown.

Transparency in reporting on a foundation’s activities is a more favourable approach to foundations than the hostile Civil Code approach. A transparent foundation can be controlled by beneficiaries and people whose interests are involved in its activity; as a consequence, less government overseeing is needed. Actually, at the moment, foundations that are regulated by specific laws should be both transparent and be overseen by the government. Both of these conditions are probably needed for banking foundations, as to their having large endowments. The modern approach is, the more transparency there is, the less overseeing will be needed.

A supervision internal to the foundation, that is an auditing committee, will respect the foundation’s autonomy, and protects beneficiaries and administrators as well, in particular in foundations with interests involving countless beneficiaries. On the contrary, external control, as now stated, shows a hostile approach to foundations, and can be justified by the absence of any internal supervision.

Transparency also tends to guide the decision making process according to specific rules. The foundation’s governance should respect these rules and is consequently accountable
for the decision process. To this extent, transparency and accountability are linked principles, and the reform should inspire to both. Accountability may suggest to introduce new rules concerning governance. These must consider the more significant role that foundation’s governance has gained in recent years (paragraph 2). Because of this change, some legal scholars even suggest a new definition of foundation, more focused on governance than on endowment: “a steady organization created in order to devote an endowment to public utility”24. Special laws regarding special foundations, such as banking foundations, may be models for new governance’s rules (paragraph 5).

Nevertheless, the strict relation between scope and endowment remains an important issue. The main issue related to changing endowment rules is to avoid a discretionary decision for registration (paragraph 2). The presence among modern foundations of the so-called “fondazioni di partecipazione”, that usually begin with a small endowment, but have the capability to raise additional funds, is worth considering25.

As a consequence, the difference between foundation and association is today weaker than in the past. As above-mentioned, many recent laws allow both the first and the latter to pursue the same scope or to conduct the same activity. However, it would be useful to state foundation’s and association’s characters, in order to provide definite rules.

In recent years, since 2003, bills about the reform of the Civil Code, First Book, have been written by commissions settled by various Governments, but none of them has ever been presented to the Parliament, because both the Government and the Parliament ended their terms.

More recently, foundation law reform has gained the attention of the Parliament, which is now discussing a bill proposed by Mr. Michele Vietti, Deputy at the Italian Parliament. A bill was proposed to the Senate as well26 by Ms. Maria Leddi, Senator. Discussion about this bill has not started yet.

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25 Many foundations with small endowment, compared to the foundation’s scope, have been recently registered.

26 The Italian Parliament is composed by two Chambers: the Chamber of Deputies and the Senate, which have the same powers. The Chamber of Deputy and the Senate vote for a bill to become a law.
These two bills differ from each other, but both share a modern and favourable approach to foundations and deal with the main issues that this study mentions.

It is likely that the present Government will propose a bill in the near future, too.

4. Special Foundation Laws

As above-mentioned, since the 90s the state has created foundations, by either transforming public institutions into foundations, or starting new foundations. This study considers the most known cases of both types: the opera theater foundations and the foundations of banking origin, generally and more concisely called banking foundations. It deals with these foundations’ characters that are significant for this study, that is for the foundation in general. In fact, any special law is related to a special type of foundation, and cannot be applied to other foundations. Nevertheless, Italian special foundation laws are quite recent, and thus inspired to modern principles. Therefore, they can provide an example for the Civil Code reform. This statement was mostly affirmed for banking foundations’ law.

Around 1990, Italian government started a significant “privatization” process. The state preferred foundations, to public institutions, and it often offered incentive to corporations and non-profit organizations to participate in these foundations.

In 1996, decree no. 367 transformed opera theater from public entities into foundations. It stated that not only the state and other public entities (region, municipality), but corporations and non-profit organizations as well, participate in these foundations. However, entities different from the state and other public entities have limits regarding their presence on boards, since the majority of members are nominated by the state or other public administration (decree no. 367/1996, art. 10). Referring to this aspect and many others, which show the control and strong presence of the state, and public entities in general, in all the foundations created by the state itself, many legal scholars affirm that it


28 The president of opera theater foundation is the city mayor, as it used to be when the theater was a public entity.
is a “false privatization”\textsuperscript{29}

Other laws created foundations, mostly in cultural fields or in scientific research, many of which follow the above-mentioned model.

Actually, more than ten years after their creation, these foundations mostly failed to attract private partners and resources. As a matter of fact, the biggest problem of privatization in Italy is due to the fact that the state offers incentives to corporations and non-profit organizations to participate in these foundations but also maintains control on the foundation.

The opera theater foundations are an interesting case of “fondazione di partecipazione”. The partners should not necessarily participate in the foundations from its creation and with money. As already mentioned (paragraph 2) this type of foundation, which was created by legal scholars\textsuperscript{30} has some characteristics typical of associations. Its endowment is progressively formed during the life of the foundation; members can join the foundation not only at the beginning but also later and still be called founders. Also, they can participate in the foundations with any kind of contribution: money, work, or expertise. If applied to foundations ruled by Civil Code, later contribution might cause problem for registration, since the endowment sufficient to the scope is required.

Foundations of banking origin, or banking foundations, were created by steps. Banking used to be led by a public institution. At first, law no. 218/1990 and decree no. 356/1990 separated banking activity, conducted by a corporation, and shareholdings in the corporation, belonging to another entity. Later evolution, by law no. 461/1998 and decree no. 153/1999, introduced more regulations about these foundations, the so called banking foundations, that should now no more hold major shareholdings in the banking corporation. As the Constitutional Court strongly affirmed, banking foundations are non-


Banking foundations have greatly change the realm of Italian foundations. Banking foundations have large endowments; they are mostly grant making; although, as time goes on, also function as operating foundations. On the contrary, most Italian foundations do not have large endowments and frequently have fund raising difficulties; they are mostly operating foundations.

Also, banking foundations are important as far as their rules are concerned. They are new rules, that can be suitable to modern foundation. In fact, the law about banking foundations introduced innovations according to the foundation’s evolution (paragraph 2). It represents a change, for instance, as far as governance is concerned, since it distinguishes between three different functions: setting strategies and programs; managing the activities; auditing. Therefore, banking foundations have: a board of governors, which determines strategies and programs, and verify results of the activity, being responsible for the pursuit of the foundation’s purposes, moreover, it has some specific functions, such as modifying the statute; an executive committee, which acts according to the board of governors’ decisions and manages the foundation’s operations; an auditing committee, whose functions are not specified by the law (decree no. 153/1999, art. 4). On the contrary, other foundations, also created by the state and ruled by a specific legislation, do not have this kind of governance: their governance is more similar to the one ruled in the Civil Code for common foundations. An exemption are foundations created by the Minister of Culture, which affirm the partnership of the state with private citizens, non-profit organizations, and corporations.

Actually, transparency inspires the whole legislation on foundations of banking origin. Governance members should have certain requirements. The foundation’s governance should respect rules about the decision making process and consequently should be accountable for it.

31 The nature of banking foundations has been debated for some years. Even before the law called them “foundations”, ie. under law n. 218/1990 and decree n. 456/1990, a very minor opinion affirmed their foundation’s nature (P. Rescigno, La fondazione e I gruppi bancari, in Banca, impresa, società, n. 3, 1992, pp. 398-99), while according to the majority of scholars banking foundations were public entities, like they used to be before the 1990 regulations (F. Merusi, Dalla cassa di risparmio alle fondazioni, in Metacon, 1993, p. 15; S. Cassese, La ristrutturazione delle banche pubbliche e gli enti conferenti, in La legge 30 luglio 1990, n. 218, Associazione fra le Casse di Risparmio Italiane, p. 34; F. Belli – F. Mazzini, voce Fondazioni bancarie, in Digesto delle discipline privatistiche, Sezione Commerciale, Agg., 2000, p 310). Later, under decree no. 153/1990, their non-profit nature was debated, since the belief of their banking activity was still strong. Finally, the Constitutional Court affirmed their nature of non-profit organizations (decisions no. 300 and 301/2003).
Decree no. 153/1999 expressly defines the non-distribution constraint within banking foundations (art. 8). In particular, this rule refers to all the people, especially members of boards, to whom non-distribution constraint applies. It excludes the remuneration that these people receive for their activities.

Also, another recent law, related to social enterprises (decree no. 155/2006) specifies the people to whom non-distribution constraint applies (members of boards, associates, partners, workers, co-operators). Concerning the emoluments of board members, the decree states that emoluments higher than those currently paid in enterprises operating in the same or similar fields, could violate the non-distribution constraint, unless the social enterprises have specific needs for a higher level of competence, and in this case, the emolument can be increased by only 20% (art. 3).

As far as the scope is concerned, special legislation about banking foundations abandoned the name “public utility”; in contrast, it requests “social utility and the promotion of economic development” (decree n. 153/1999, art. 2).

Some special laws actually deal with activity as well, which on the contrary is not considered by the Civil Code. Decree no. 153/1999 specifies the fields of activity of banking foundations. Nevertheless, in Italian law activity is mostly intended as a specification of scope. In fact, about banking foundations, it has been observed that the sectors of activity are explications of the social utility, which is already affirmed by a rule. This belief was also affirmed by the Constitutional Court (decision no. 500/1996), even though at that time, banking foundations were not unanimously considered to be non-profit organizations.

Thus, banking foundations can conduct several activities, and they should choose their most significant activities in their statutes; the activities' fields include culture, education, health, and research and many other field of social utility. Banking foundations mostly play a grant making role, giving grants to organizations that operate in those fields. They do not play a subsidiary role to the state, but they can clearly help in many fields, especially in hard years for the welfare state, due to the lack of resources the state can devote to it.

Special laws concerning specific foundations expressly mention the possibility to conduct

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economic activity (eg. for opera theater foundation- decree no. 367/1996, art. 3) and for banking foundations in limited cases, that is related to enterprises in the fields of the foundations’ activity (decree no. 153/1999, art 1 and art. 3).

Certainly, in modern Italian foundations economic activities can be considered as a useful income, in particular for foundations in cultural fields, who often have problems related to lack of resources.

The foundation’s economic activity is ruled for banking foundation by decree no. 153/1999. This decree affirms the need for this activity to be related within the foundation’s scope as specified by statutes and in fields of the foundation’s activity (art. 1 and art. 3). Similarly, banking foundations’ major shareholdings in corporations are possible only for corporations whose sole activity is the economic one related to the banking foundation, as above-specified (art.6). This rule, quite recent, when compared to the Civil Code, conforms the jurisprudence’s opinion just mentioned, about how the need for the economic activity is to be related to the foundation’s scope. Banking foundations can conduct related economic activities directly, or indirectly through a corporation, which will be linked to the banking foundation, as conducting its related economic activity. This issue has been examined by the European Court of Justice\textsuperscript{33}. Fiscal incentives to banking foundations, when leading an economic activity, can be in contrast with Article 87 (1) EC that prohibits aid which affects trade between Member States and distorts or threatens to distort competition. The Court stated that “the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset. On the other hand, an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof, must be regarded as taking part in the economic activity carried on by the controlled undertaking and must therefore itself, in that respect, be regarded as an undertaking within the meaning of Article 87 (1) EC”. Also the Italian Courts have dealt with this matter before and after this decision of the European Court of Justice.

The expression “related to the foundation’s scope”, which can have different meanings, in

\textsuperscript{33} Many decisions, eg. 10.1.2006, C-222/04.
the decree n. 153/1990 about banking foundations contains a strict definition. Related economic activity means being directly linked to the purposes enumerated in statute (so an accessory activity will be forbidden); moreover the related activity should work only (and not just mostly) for the direct (and not indirect) accomplishment of the foundation’s scope; finally, it can work only in the foundation’s fields of activity.

It is interesting to notice that decree no. 153/1999, art. 10, mentioned the need to reform the First Book of the Civil Code. Unfortunately, ten years have passed since then, and the reform has not yet been approved. In fact, decree no. 153/1999, art. 10, states that the supervision of banking foundations belongs to the Minister of Economy until the First Book of the Civil Code will be reformed and until the banking foundations remain the major shareholder or maintain the control, directly or indirectly, of bank corporations. Nowadays, most banking foundations do not hold major shareholdings in the bank, and are non-profit organizations, as affirmed by the constitutional Court: the Minister of Economy’s supervision does not have any more reason to exist. However, recent decree no. 78/2010, art. 52, affirms that banking foundations will be overseen by the Minister of Economy until the Civil Code reform, though they are not a bank corporation’s major shareholders.

According to modern opinion that supervising authorities should not have too large power, supervision of banking foundations has been almost unanimously criticized by legal scholars in last years.

As stated from the beginning of this paper, in the last twenty years, specific laws, referring to specific types of foundations, have been approved. These laws are more recent than the Civil Code and, as a consequence, contain more modern principles. For any specific foundation ruled by a specific law, the Civil Code rules are residual. When the Civil Code will be changed, the specific rules will remain to regulate the specific foundation they were written for. At that point, a whole revision of foundation law may be

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useful, to coordinate a renewed Civil Code and specific legislation. This topic concerns the future.
After Civil Code reform, specific laws may still need to be adopted, if the topic is so specific to require it. However, a Civil Code inspiring to modern principles, should be suitable for most possible situations, and may reduce the need for specific laws.

5. The Focus of New Foundation Law

After describing the foundation’s evolution, the need for a change and the suggestions that special laws can represent, this section examines the main legal issues that should be the focus of a new foundation law in Italy. The first issue concerns the need for more clearly stated rules, under the civil law point of view.
As above-mentioned, recent law considers activity and not juridical form as the starting point. The first consequence, already mentioned, is that different juridical forms can conduct the same activity, the difference among them becoming weaker. Then, since the law generally regulates the entity which conducts the activity, the second consequence is that a juridical form is ruled differently according to the type of activity.
Actually, in Italy, recent legislation about non-profit organizations was firstly aimed at introducing fiscal incentives, both to the organization itself, or to donors. Fiscal advantages, especially advantages for donors, are intended to be a great aid to non-profit organizations in a country where individual and enterprises’ philanthropy does not have any tradition, but is at its very beginning. People working in foundations who are used to dealing with a lack of funds and the problems of fund raising, issues very difficult to solve in Italy, consider fiscal incentives as one of the most important issues for a foundation. Also, it must be said that recent rules about fiscal incentives can be a reason for the fact that foundations are growing in number.
However, fiscal incentives frequently refer to foundations conducting special activity, and sometimes are temporary. Therefore, the need to write an organic legislation about fiscal non-profit law is an issue worth considering. Moreover, they sometimes create entities that are equally relevant for fiscal law, but are different from one another from a civil law point
of view. The most important example is Onlus (non-profit organization of social utility). However, a reasonable legal approach to foundation law suggests applying fiscal incentives to clearly defined legal entities, regulated by the renewed civil rules. Since this study shows the need to reform civil foundation law, it is important to underline that this reform should be considered prior to any fiscal reform. Only after rewriting foundation laws according to modern principles and needs, can fiscal law be reviewed and reorganized. Otherwise, it will be just an arrangement of law, instead of an organic law, which is what is needed.

As above-mentioned, several non-profit organizations exist now in Italy. It would be useful to write a “code of non-profit organizations”, whatever their juridical form is. However, only some juridical forms are relevant for civil law; others have civil implications, but do not need to be ruled in the civil code. If a “code of non-profit organizations” is adopted, it would be relevant for juridical forms ruled by the Civil Code, and therefore this would need to be changed as well. It is important to notice that the Italian civil law tradition, which regulates the general rules, that would be applied to most cases, is the Civil Code.

Therefore, the reform should refer to the Civil Code, the First Book, by entirely rewriting and not merely correcting some of the rules. In fact, as above-mentioned, the reform of foundation law should be inspired in favour of foundations. This principle comes directly from the 1948 Italian Constitution, which was written just a few years after the Civil Code was adopted and which introduced more democratic principles. More recently, a change in the Constitution introduced the so-called “principio di sussidiarietà” (paragraph 2).

Also, European decisions should also be observed. In particular, the decisions of the European Commission, such as the Action Plan for Company Law and Corporate

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35 Decree no 460/1997 created Onlus. Onlus should have special characters, the most relevant being non-distribution constraint, can be different civil law entities (associations, foundations, non-registered associations, etc.), should conduct their activity in specified fields. Non-discretionary special registration is required. If an Onlus is a foundation, it should register both as an Onlus and as a foundation.


37 This solution has been mentioned by A. Nuzzo, *La riforma del Titolo II del libro I del Codice Civile e un’unica Autorità di vigilanza per le Fondazioni*, speech delivered to the 20th Congresso nazionale dell’ACRI, Bolzano, 22-23 giugno, 2006.
Governance in 2003 and all the work of EFC regarding the proposal of a statute for the European Foundation, should also be considered.

Unlike the present Civil Code rules, foundations should be regulated by clear rules. This means that the characteristics of foundations must be clearly stated, and the new rules must clarify every aspect of a foundation. Rules should not be too detailed, since they should apply to any foundation. When foundation’s characters are stated, only entities that show to have them can be registered as foundations. It will be difficult, then, to abuse the term “foundation”, using it to name hybrid entities, or even different legal entities, as it occurs at present.

Amongst foundation’s characters, the non-distribution constraint is the very essence of a foundation, and it is worth not only mentioning, but also clearly defining its meaning by the reform of the Civil Code.

The reformed Civil Code can provide modern rules about scope. A clear statement about scope should suffice, while enumerating the fields of a foundation’s activity seems to be quite unusual for general law like the civil code. By the way, this should grant foundation autonomy.

Endowment is worth considering and needs clear rules.

A minimum amount for a foundation to start its activity could be stated, as it is ruled for corporations, also depending on the type of activity the foundation intends to conduct. An initial minimum amount stated by the law is required by non-discretionary registration as well. It could even be specified whether the endowment should be fully given at the foundation’s start or whether it can be paid at different times. In the latter case, the statute can determine when and whom will later contribute, or can simply determine the possibility of giving money to the foundation’s endowment after the foundation’s creation, as in the mentioned case of the “fondazione di partecipazione”. By this statement, registration of “fondazioni di partecipazione” would not be denied.

Moreover, endowment could be considered during the life of the foundation, when it conducts its activity. This aspect seems to be quite important for foundations that conduct economic activities, which are the risky ones. In reforming the Civil Code, this activity can be used as an example to show that when an endowment becomes insufficient and the foundation’s scope cannot be pursued, the foundation’s dissolution (as stated in the Civil Code, art. 27) may not necessarily be the only solution. In fact, since foundations in Italy are more operating foundations than grant-making foundations and economic activity is becoming increasingly more important, when the endowment becomes insufficient, the foundations can either be dissolved or re-established. The starting point for considering
these cases in the reform, however, should also be the accountability of the board members. Foundations are legal and autonomous entities that give administrators limited liability. Large endowment losses may suggest a different solution about the limited liability of administrators.

One of the biggest challenges of the reform of the Civil Code is determining whether to focus on maintaining uniform rules for all types of foundations (as in the 1942 Civil Code) or whether to provide different rules for different types of foundations.

Even if very concise, this description showed that foundations governed by the Civil Code are currently very different in types, activities and beneficiaries. Differences amongst foundations today is much stronger than in the past. Of course, the choice about having different rules for different types of foundations does not actually involve the foundations regulated by specific laws. However, it is difficult to believe that uniform rules in the Civil Code will work now and in the future.

It can be observed that recent legislation, such as the reform of corporate law, allowing the transformation of non-profit organizations into corporations, denies this possibility for associations which received contributions from public administrations or any kind of donations in some kind linked to public funds (art 2500-octies Civil Code). This rule, written for associations and strangely not for foundations, shows a trend to distinguish among types of associations and foundations.

The different types of foundations are the starting point of a serious modern foundation law.

This approach can be definitely appreciated, because it is the same one which inspired the corporation reform. Entities whose activity involves interests belonging to the community at large, or which have countless beneficiaries should be more diligently and more strictly ruled, in order to protect the various interests involved. On the contrary, foundations which pursue private interests, belonging to a small number of people, can be less strictly ruled and more autonomous in defining their rules in statutes. Autonomy will be granted for these types of foundations. Nevertheless, the interests of the community at large involved in a foundation’s activity, limit the autonomy, in order to protect the beneficiaries. Therefore, private foundations will have a larger autonomy and fewer rules, while the autonomy of foundations with interests involving the community will be limited by mandatory rules. In fact, a mandatory rule can be justified only when it effectively protects
basic interests of the community. If the reform differentiates foundations in types, it should define types, specifying their characters.

Foundations pursuing scope belonging to the community at large need rules that can ensure the stability and continuity in carrying on the scope; therefore the statute can be modified only in accessory or instrumental parts, within the limit of better accomplishing the original purpose. Besides the dissolution, the transformation of the foundation into another type of non-profit organization, which can assure the destination of the endowment to the foundation’s scope, could be introduced, according to many legal scholars’ and jurisprudence’s opinion, especially after the transformation from a non-profit into a profit organization is introduced.

Beneficiaries of this type of foundations are often countless or even non-determined and their acting before a court can be difficult. Rules protecting them are needed, in particular introducing transparency and their possibility to act upon an auditing committee to verify that the foundation’s tasks and duties are accomplished. Another possible protection of beneficiaries could even be their presence on the foundation’s board.

Referring to the foundations with interests involving countless beneficiaries or the community at large, principles introduced for banking foundations, and for corporations by the 2003 reform as well, can be surely taken as an example, since they both are inspired to transparency and accountability. These principles provide inspiration for governance and oversight, that should be as much as possible internal to the foundation.

As above-mentioned, the new rules should recognize a broad autonomy to private foundations, from the first moment of writing their statutes and during the whole of the foundation’s life. The statutes have no imperative rule as far as organizations, operating procedures, beneficiaries’ rights and the protection of the interests involved in the

38 M. Vietti, Flessibilità & Trasparenza, in Guida alle Nuove Società, La riforma di Spa, Srl e Cooperative, Il Sole 24 Ore, February 2003. Mr. Vietti is former President of the Commission for reforming corporation law. As a Deputy at the Italian Parliament, Mr. Vietti presented a bill about the reform of associations and foundations in the Civil Code.

foundation’s activities. The founder’s interference during the foundation’s life could be stronger. Only to private foundations, and not to other types of foundations, which serve the community at large, should the reform allow for transformation into corporations, as already stated for associations.

Lastly, one of the most important issues is the foundation’s economic activity. The need for considering and clearly ruling it in the Civil Code is definitely significant. Different solutions can apply to private foundations and to foundations that pursue scope belonging to the community at large. Various solutions can be chosen: the economic activity can be the foundation’s scope, it can be conducted in order to give profit to the foundation; be an instrument to reach the foundation’s purpose; being related or un-related to the foundation’s scope.

The most relevant issues to focus on are: organization, in order to efficiently and correctly manage the social enterprise, and therefore clearly define tasks and accountability of boards; applications of the rules of the Civil Code dealing with the commercial entrepreneur (in any case of economic activity conducted by a foundation, even in case of non-dominant or related activity, or less). Many scholars agree with the entire application of rule of the commercial entrepreneur, that means also to register into the enterprise register\(^\text{40}\). However, this rule could generate some problems as far as the bankruptcy’s risk is concerned: for foundations dealing with economic activity, the interests of creditors need to be protected as well as the interests of foundation’s beneficiaries or third parties. About this issue, the bill states rules, in order to diminish the bankruptcy’s risk, such as the above-mentioned endowment maintenance and accountability of members of boards.

However, separate financial records for the economic activities and the social ones are required, as at present already stated by the specific legislation referring to some specific types of foundations (eg., opera theater foundations).

For foundations whose activity involves interests belonging to the community at large, stricter rules are preferred. The statement of the legislation on banking foundations, which requires the economic activity to be related to the public utility foundation’s scope, similarly to jurisprudence’s opinion, as above-mentioned, could be a workable solution for these foundations as well.
