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## **ON SELECTED ISSUES CONCERNING FOUNDATION LAW IN POLAND**

### **INTRODUCTION**

The issue of the legal status and the scope of foundations' rights and duties has recently been widely discussed in Poland. These entities have emerged in public life as parties to significant commercial transactions involving works of art, as well as financing costly civic campaigns in the media supporting the government's current policy towards the judiciary. One of these foundations also transferred significant financial resources to a foundation established abroad. As a result of these activities, even the most liberal circles have been discussing the need to limit the scope of foundations' activities by law and to determine the range of their tasks and competencies. Consideration is also being given to the effectiveness of supervision over foundations by public administration bodies and courts.

This article is an attempt to assess selected aspects of the state of foundation law in Poland in relation to the legal position that the Constitution of the Republic of Poland has afforded foundations. The text contains an analysis of individual statutory solutions in the light of distinguishable patterns of the verification of their compliance with constitutional principles and values.

### **1. CONSTITUTIONAL FREEDOM TO ESTABLISH AND OPERATE FOUNDATIONS**

According to Article 12 of the Constitution of the Republic of Poland,<sup>1</sup> "the Republic of Poland shall ensure the freedom to establish and operate trade unions,

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<sup>1</sup> Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended).

civic and professional organisations of farmers, associations, civic movements, other voluntary associations and foundations”. The Constitution therefore protects “the freedom to establish and operate foundations”. It should be emphasised that the above-mentioned provision is included in Chapter I of the Constitution, expressing the basic principles of the Polish political system, which is not without significance in the process of interpretation of this provision. The establishment of a foundation should also be considered as a form of the founder’s exercising of their property rights, which in turn is subject to protection under Article 64 section 1 of the Constitution.

The presentation of the possibility to establish and operate foundations as a constitutional freedom – and not a constitutional subjective right – means that such a possibility arises from the Constitution itself, and the legislator is obliged and entitled only to create an appropriate legal framework allowing individuals to effectively exercise this freedom, possibly to introduce certain restrictions necessary from the point of view of the public interest or the need to ensure the protection of the freedom or rights of others.<sup>2</sup>

Firstly, the legislator should define the legal framework for the freedom to establish and operate foundations, allowing individuals to exercise this freedom in an effective and undisturbed manner. This framework should be defined as precisely as possible in order to ensure that persons enjoying this freedom are certain about the type of restrictions that apply to them and about the legal consequences of the actions taken. In the case of restrictions of constitutional freedoms, a special role is given to the principle of exclusivity of the statute, which means that the content of the restriction should be the result of a clearly formulated will of the parliament and not of the body applying the law (court, minister or other public administration body).

Secondly, there is no doubt that the activities of foundations should be subject to state supervision. This is a requirement stemming from the principle of the rule of law (Article 2 of the Constitution), which requires the state to create procedures enabling the elimination of cases of violation of the law by its addressees. However, it should be noted that the supervision of foundations should not be analogous to that of associations. With regard to associations, the Constitution explicitly requires the legislator to introduce supervisory measures.<sup>3</sup> The legislator did not provide for a similar regulation with regard to foundations. This circumstance is not without legal significance. The above-mentioned decision of the legislature should be read in such a way that the means of supervision over foundations’ activities should be less intensive than in the case of associations, limited to those strictly necessary from the point of view of the public interest,

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<sup>2</sup> Cf. Article 31 section 3 of the Constitution.

<sup>3</sup> See Article 58 section 3: “The Act shall specify the types of associations subject to judicial registration, the procedure for such registration and the forms of supervision of such associations”.

and the legislator's freedom in this respect is much narrower than in the case of associations and other unions.

Thirdly, the establishment of a foundation is an expression of the founder's will to exercise their property rights in a specific way. This will is subject to constitutional protection and the legislator should recognise this circumstance. Provisions defining the rules of the foundation's operation should ensure that the founder's will, as expressed in the foundation's founding statement, is not thwarted and the foundation's activity is not, as a rule, contrary to the founder's will (even if the founder does not reserve for themselves the power to decide on the foundation's activity in the future).

Fourthly, the essence of a foundation is the separation of assets for the achievement of public benefit objectives. This is the basic function of foundations within civil society. As a consequence, the legislator should ensure that the political functions of foundations are not distorted in practice and that these institutions operate in a manner consistent with their role in civil society. The role of foundations established by the State Treasury as the founder, either by way of a statute or by way of a legal transaction, remains problematic.<sup>4</sup>

When analysing the Foundations Act from the perspective presented above, it should be concluded that many of its provisions raise significant constitutional doubts.

## 2. COMMENTARY ON ARTICLE 1

1. According to Article 1 of the Foundation Act of 6 April 1984,<sup>5</sup> the establishment of a foundation is possible for the achievement of objectives "consistent with the fundamental interests of the Republic of Poland". This is an imprecise provision and also gives the court excessive freedom in assessing the permissibility of establishing a given foundation. It is unclear how to determine the set of "interests of the Republic of Poland", which would have a "basic" character. It is not clear whether this interest is determined by the registry court or whether it is, for example, the preference of the current political majority in power. This type of condition contained in the Foundations Act is an obvious relic of the communist state. The essence of a foundation in a democratic state and a pluralist civil society should be the achievement of the goals set by the founder, and not the goals of the state itself, as defined in principle by the current parliamentary majority. Consequently, the assessment of the foundation's objectives should be carried out

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<sup>4</sup> Cf. H. Izdebski, *Fundacje i stowarzyszenia. Komentarz, orzecznictwo, skorowidz* [*Foundations and associations. Commentary, case law and glossary*], Warsaw 2001, p. 61.

<sup>5</sup> Consolidated text: Journal of Laws of 2018, item 1491.

solely from the point of view of their legality. For comparison, it is worth pointing out Article 58 section 2 sentence 1 of the Constitution, which states that “Associations whose purpose or activity is contrary to the Constitution or a statute shall be prohibited”. Therefore, it is not constitutionally permissible to refuse the registration of an association due to the incompatibility of its objectives with any “interests” or norms other than legal norms. In addition, these are norms established by the Constitution or the parliament and not by the executive (for example, the refusal to register an association whose purpose would be contrary to a minister’s regulation is unacceptable). There are no reasons to adopt a different (lower) standard for foundations. Therefore, Article 1 of the Foundations Act – insofar as it provides that the freedom to establish and operate foundations may be exercised where it is justified by the pursuit of objectives consistent with the “fundamental interests of the Republic of Poland” – should be declared incompatible with Articles 12 and 64 section 1 of the Constitution.

The fact that the above doubts are not hypothetical is confirmed by the situation which took place in Poznań in 2017, as reported by the media. A court referendary refused to register a foundation whose purpose was to help transgender persons, claiming that this goal was not illegal in itself, but it could not be considered as an objective convergent with the fundamental interests of the Republic of Poland.<sup>6</sup> Such a decision, based solely on the political views and worldview preferences of a court referendary, is clearly unacceptable in a democratic and pluralist society. However, the permissibility of making such decisions is written into Article 1 of the Foundations Act.

2. On the one hand, Article 1 of the Foundations Act allows for the establishment of foundations for, among other things, “economically useful” purposes. On the other hand, a foundation may only pursue business activity of a complementary nature (“to the extent to which its objectives are to be achieved” – Article 5 section 5 sentence 1 of the Act).<sup>7</sup> The Foundations Act is internally contradictory in this respect, which in itself is inconsistent with the principle of correct legislation, resulting from Article 2 of the Constitution (the clause of a democratic state governed by the rule of law). Moreover, it is doubtful whether it is possible to establish foundations solely for “economically useful” purposes, which is not ruled out by Article 1 of the Act. The essence of a foundation is to carry out civic and charitable activity, to put it in the broadest sense, and not to achieve economic goals. In the light of Article 12 of the Constitution, a foundation is a civil society institution and not a means of generating profit. If someone wants to use their assets for this type of purpose, they should take recourse to the form of a commercial law company and not a foundation.

<sup>6</sup> See press release: <http://wiadomosci.ngo.pl/wiadomosc/2078110.html> (accessed: 12.12.2018).

<sup>7</sup> For more information see J. Dominowska, *Prowadzenie działalności gospodarczej przez fundacje. Studium prawne [The conducting of business activities by foundations. A legal study]*, Warsaw 2016, *passim*.

### 3. COMMENTARY ON ARTICLE 3

1. The provision of Article 3 section 1 sentence 1 of the Foundations Act states that “The declaration of will to establish a foundation should be made in the form of a notarial deed”. On the other hand, a foundation acquires legal personality only upon its entry into the National Court Register.<sup>8</sup> The Foundations Act makes no reference to the status of the foundation and the persons responsible for its activities in the period between the effective making of a declaration of will and entry in the National Court Register. This causes significant practical problems, the solution to which involves the use of complex techniques for interpreting legal regulations (such as analogy). Constitutional freedoms should not be regulated in such a questionable way. Therefore, the legislator has failed to ensure the adequate protection of the freedom of establishment and operation of foundations in this respect, which justifies the conclusion that we are dealing with a breach of Article 12 and Article 64 section 1 of the Constitution.

2. In accordance with Article 3 section 2 of the Foundations Act, “In the declaration of will on the establishment of a foundation, the founder should indicate the purpose of the foundation and the assets allocated for its accomplishment”. This provision raises two kinds of doubts. First of all, it does not explicitly oblige the founder to hand over to the foundation – after making an effective declaration of will on the establishment of the foundation – the assets designated for the realisation of the foundation’s objectives. Secondly, the registry court is not in a position to examine whether the funds declared in the declaration of will on the establishment of the foundation are sufficient to achieve the objectives of the foundation indicated in this declaration. This leads to the conclusion that the Foundations Act does not guarantee that the newly established foundation will be able to function effectively within civil society. Moreover, such a loophole is an incentive to abuse the institution of a foundation for the purpose of circumventing the law (tax law, for instance). Therefore, it should be considered that the legislator has failed in this respect to create a proper framework for exercising the freedom to establish and operate foundations, thus violating Article 12 and Article 64 section 1 of the Constitution.

3. The provision of Article 3 section 3 of the Foundations Act indicates which assets may be used for achieving the purposes of the foundation: “money, securities, as well as movable and immovable property handed over to the foundation”. This provision significantly – and at the same time, without any justification – limits the catalogue of property rights which may be earmarked for the attainment of the foundation’s objectives. Its wording implies, for example, that a foundation cannot transfer the right of perpetual usufruct of real estate or property rights on

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<sup>8</sup> See Article 7(2) of the Act.

intangible assets. It is also unacceptable for a foundation to obtain property rights as a result of concluding a contract, such as lease, rental, lending or leasing. This limitation does not have any rational justification in the need to protect constitutional values, which leads to the conclusion that it is incompatible with Article 12 and Article 64 section 1 of the Constitution.

#### 4. COMMENTARY ON ARTICLE 5

1. The provision of Article 5 section 1 of the Foundations Act defines the issues which should be regulated in the statutes of the foundation, as well as those which are optional. It can be argued that the more matters that are left to the founder's discretion,<sup>9</sup> the broader the scope of freedom to establish and operate a foundation. However, this would be a significant simplification. The legislator should define the framework for exercising the freedom to establish and operate foundations in such a way that foundations effectively fulfil the role assigned to them in civil society. It should be recognised that the provision analysed, firstly, is excessively imprecise as to what should be included in the statutes and, secondly, does not require the inclusion in the statutes of provisions which guarantee the proper functioning of foundations within civil society.

According to the above-mentioned provision, the statutes of a foundation should specify, among other things, the "composition and organisation of the management board". The management board is the only statutory body of the foundation authorised to manage its activity and represent it externally (Article 10 of the Act). However, the legislator did not specify whether the board should be made up of several persons or whether it may consist of one member. In addition, the Act does not state anything about whether only a natural person can be a member of the management board, or whether it can also be a legal person. This gives rise to disputes in jurisprudence and practice, which should not happen in the case of the foundation's most important body responsible for its activities.<sup>10</sup>

The analysed provision stipulates that the statutes may specify, among other things, the conditions of merger of the foundation with another foundation. However, it is not clear whether this is an example, or whether the statutes may provide for the possibility of merging with an organisational unit other than a foundation – for example, with an association. It is also open to dispute whether a foundation

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<sup>9</sup> For the legal position of the founder see D. Bugajna-Sporczyk, E. Dzbeńska, I. Janson, M. Sztokier-Łabuszewska, *Fundacje i stowarzyszenia. Prawo i praktyka [Foundations and associations. Law and Practice]*, Warsaw 2005, p. 28 *et seq.*

<sup>10</sup> Cf. P. Suski, *Stowarzyszenia i fundacje [Associations and Foundations]*, Warsaw 2006, p. 396.

can transform itself into another organisational unit by operation of its statutes – into a commercial law company, for example.<sup>11</sup>

According to the provision in question, the statutes of a foundation may provide for “the establishment of other foundations’ bodies alongside the board”. However, the legislator has not specified the scope of powers of these “other bodies” (in practice, these are various types of founders’ councils, programme councils, committees, and chapters). It is therefore acceptable to authorise these “other bodies” to exercise significant influence over decisions taken by the management board, for example, by requiring consent for a specific board decision or by providing for the possibility of dismissing the board at any time. Thus, a situation may occur where the *de facto* body in charge of the foundation’s activity is a body other than the management board, which is an obvious circumvention of Article 10 of the Act. Moreover, the supervisory measures provided for in the Foundations Act concern only resolutions of the management board (Article 13) or the activities of the management board (Article 14), whereas Article 5 section 1 of the Act provides for the possibility of actually transferring the power to manage the foundation to bodies other than the management board. In such circumstances, the legal responsibility for running the foundation’s affairs becomes illusory. This illusion is somehow inscribed in the Foundations Act.

The admissibility and conditions for changing the purpose or the statutes of a foundation are exclusively optional elements of the statutes. The legislator does not resolve how to proceed if the statutes do not contain these elements. It is disputed whether in this case the purpose or the statutes can be changed at all, and whether this can be done by the management board (on the basis of the general competence norm contained in Article 10 of the Act) or by the body supervising the foundation. Moreover, the Act does not stipulate that a possible change in the foundation’s purpose (even if it is a change made in the procedure provided for in the statutes) should not lead to the thwarting of the founder’s will through a complete reformulation of the original objectives of the foundation. This is another example of a loophole in the Foundations Act, leading to the violation of the constitutional standards adopted for the protection of the freedom to establish and operate foundations.

2. The statutes of the foundation do not have to provide for a liquidation procedure (this follows from Article 15 section 2) or determine the use of the foundation’s assets after its liquidation (this follows from Article 5 section 4 and Article 15 section 4). In the meantime, the foundation liquidation procedure is regulated in the Foundations Act only in a residual manner.<sup>12</sup> There is no reference, even if appropriate, to the application of the provisions of the Commercial Companies

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<sup>11</sup> Cf. H. Cioch, *Prawo fundacyjne [Foundation law]*, Warsaw 2011, p. 10 *et seq.*

<sup>12</sup> See Article 15 of the Law on Foundations.



Code<sup>13</sup> or the co-operative law.<sup>14</sup> Once again, the question arises as to whether this loophole should be filled by analogy and, if so, which rules should be applied. This has been left to the full discretion of the court. This is a violation of a constitutional standard, which requires that the legal framework for the freedom of establishment and operation of foundations be defined by the parliament by way of a statute and not left to be freely determined by the bodies applying the law.

3. The provision of Article 5 section 5 sentence 1 of the Foundations Act states that a foundation may conduct business activity, but only “to the extent necessary to achieve its objectives”.<sup>15</sup> The phrase “to the extent necessary to achieve its objectives” is so unclear that it is even impossible to determine its meaning. The consequence is that the supervisory authorities and the registry courts sometimes determine for themselves whether the scope of the foundation’s business goes beyond this “extent”. However, the foundation itself is not able to predict whether the size of its business activity will be considered by the supervisory authorities and the court as excessive in relation to its statutory activity.

The residual nature of the provisions of the Foundations Act with regard to the possibility of conducting business activity by foundations also fails to make it clear in practice whether the scope of business activity should be precisely defined in the foundation deed or in the statutes, and whether it may overlap, even to a small extent, with the scope of statutory activity. This is a debatable issue, both in jurisprudence and in case law. The same can be said about the organisational forms in which a foundation can conduct business activity. Specialists in the field of foundation law debate issues such as whether a foundation may be a shareholder in a capital company. However, this matter is so important from the point of view of the proper functioning of foundations in civil society that leaving it outside the unambiguous statutory regulation should be regarded as a violation of the constitutional standard of protection of the freedom to establish and operate foundations.

4. According to Article 5 section 6 of the Foundations Act, “the Council of Ministers may, by way of a regulation, provide for reliefs and exemptions on account of the allocation of profits from the foundation’s business activities to the performance of its statutory tasks, other than those provided for in other acts”. This is an unequivocally unconstitutional provision. It grants unlimited freedom to the Council of Ministers to enact regulations which should have a statute as their source.

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<sup>13</sup> Act of 15 September 2000 – Commercial Companies Code (consolidated text: Journal of Laws of 2017, item 1577, as amended).

<sup>14</sup> Act of 16 September 1982 – Cooperative Law (consolidated text: Journal of Laws of 2018, item 1285).

<sup>15</sup> Conducting business activity should result from the provisions of the statute – see Article 5 section 1 of the Law on Foundations.



Firstly, according to Article 217 of the Constitution, the definition of “the rules for granting reliefs and amortisations and the categories of entities exempt from taxes shall take place by way of a statute”. It follows from this provision that, although the determination of reliefs and exemptions may be transferred for regulation in a sub-statutory act (in particular an executive regulation to a statute), in such cases a statute should specify the rules for granting reliefs and the categories of entities exempted from taxes. The Foundations Act does not do this, which means that Article 5 section 6 of this Act is incompatible with Article 217 of the Constitution.

Secondly, in accordance with Article 92 section 1 of the Constitution, the provision authorising the adoption of a regulation should specify the so-called guidelines for the content of the regulation.<sup>16</sup> There is no doubt that Article 5 section 6 of the Foundations Act does not meet this requirement. It is also not possible to reproduce the guidelines on the basis of other provisions of the Act. This means that the provision in question is incompatible with Article 92 section 1 of the Constitution.

## 5. COMMENTARY ON ARTICLE 10

Article 10 of the Foundations Act states that “the foundation’s management board manages its activities and represents the foundation externally”. Neither the aforementioned provision nor any other provision of the Foundations Act indicates the standards that should be followed by the management board when making decisions concerning the foundation’s activity. In particular, there are no legal guarantees that the management board will act in a manner consistent with the will of the founder. Moreover, there is no obligation on the part of the management board to follow the principle of preserving the so-called ‘basic assets’ of the foundation. In other words, the management board is not obliged to carry out its activities in such a way that the foundation’s assets are sufficient to achieve the will of the founder and the objectives of the foundation. As a consequence, it should be considered that apart from the above-mentioned issues, the legislator has failed to create an adequate framework for exercising the freedom to establish and operate foundations.

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<sup>16</sup> W. Brzozowski, *Wytyczne dotyczące treści rozporządzenia (uwagi na tle formułowania upoważnień ustawowych)* [Guidelines on the content of the regulation (comments on the formation of statutory authorizations)], “Przegląd Sejmowy” 2013, No. 4, pp. 75–76.

## 6. COMMENTARY ON ARTICLE 12 SECTION 4

According to Article 12 section 4 of the Foundations Act, “the Minister of Justice shall define, by way of a regulation, the framework scope of the report referred to in section 2, including in particular the most important information on the foundation’s activities during the reporting period enabling the assessment of the correctness of the foundation’s achievement of its statutory objectives”. This provision is inconsistent with Article 92 section 1 of the Constitution, which defines the principles of permissibility of issuing executive regulations to statutes.

Firstly, the provision in question does not define precisely the scope of the matters to be regulated in the regulation. It is not clear what the term “framework scope” of the report means, especially as the term “in particular” is used by the legislator in the description of this scope. The restriction of the legislative freedom of the Minister of Justice is therefore apparent.

Secondly, as already explained above, the necessary condition for compliance with the Constitution of the provision authorising the adoption of a regulation is the inclusion of guidelines on the content of the regulation. It is clear that Article 12 section 4 of the Foundations Act does not meet this condition.

## 7. COMMENTARY ON ARTICLE 13

1. As explained above, it is the legislator’s duty to provide adequate procedural guarantees to ensure the legality of the foundation’s activities. For this reason, the definition of the supervisory bodies and granting them the right to apply to the court for the repeal of the foundation’s resolution is the correct solution. However, the analysed provision does not meet the above-mentioned constitutional standard for the reasons presented below.

First of all, the competent minister or starost is not obliged to apply to the court for repealing a resolution which – it should be emphasised – is “grossly contrary” to the purpose of the foundation, its statutes or the provisions of law. The analysed provision grants the aforesaid authorities only the possibility – and not the obligation – to go to court. The use of this option is not subject to any statutory requirements. The supervisory authorities have been granted unlimited discretion in this respect.

Secondly, as explained above, in practice the activity of the management board may be significantly limited by other bodies of the foundation provided for in the statutes.<sup>17</sup> It is these bodies (for example, the Founders’ Council, the Chapter) that

<sup>17</sup> See Article 5 section 1 of the Foundations Act.

can actually decide on the foundation's activity. However, the analysed provision does not provide for the possibility of subjecting the legality of the resolutions adopted by such bodies to judicial review, which means that a significant part of the resolutions adopted by the foundation's bodies remains unverifiable in court proceedings from the point of view of their compliance with the foundation's objectives, statutes and the law.

Thirdly, the provision in question confers on the competent minister or starost the power to go to court if a resolution of the management board is "grossly" contrary to the provisions of the law. This means that a resolution that violates the law but cannot be considered a "gross" violation is not subject to appeal before a court.

To sum up, it should be stressed that Article 13 of the Foundations Act introduces a discretionary and at the same time incomplete, incoherent and rather lax system of supervision over the legality of the foundation's activity. Numerous resolutions of the foundation's bodies may function in the legal order and are not appealable in court, despite the fact that they violate the law. On the other hand, the competence of the supervisory bodies to challenge resolutions of the management board is optional and its use is in no way directed by statutory prerequisites. Therefore, the legislator has not fulfilled its obligation to ensure effective supervision over the activities of foundations, which is its obligation resulting from Article 12 of the Constitution, as well as from the general principle of the rule of law (Article 2 of the Constitution).

2. In the case of provisions defining the framework for the exercise of constitutional freedoms, the principle of subsidiarity, as expressed in the preamble to the Constitution, is particularly important. It means that the State should interfere in the exercising of freedoms only where this is necessary, and the stated purpose cannot be achieved by other means – that is, without interference by public authorities. The principle of subsidiarity would speak in favour of each foundation being obliged to establish in its statutes an internal audit body (such as a supervisory board or audit committee), which should first of all react to cases of violation of the law by the foundation. The lack of such an obligation in the Foundations Act results in the inconsistency of the regulations with the constitutional principle of subsidiarity.

## 8. COMMENTARY ON ARTICLE 14

According to Article 14 section 1 of the Foundations Act, "If the activity of the management board of the foundation materially violates the provisions of law or the provisions of its statutes or is inconsistent with its purpose, the body referred to in Article 13 (competent supervising minister or starost) may set an appropri-

ate time limit for the rectification of such irregularities in the board's activity or may demand that the board of the foundation be changed within a specified time limit". The following drawbacks of the above-mentioned provision should be pointed out.

First, the supervisory authorities have only the possibility – and not the obligation – to take the measures provided for in this provision in a situation where the foundation's governing board violates the law, its statutes, or engages in activities contrary to the purpose of the foundation. This possibility is not subject to any statutory requirements, so the supervisory authorities have unlimited freedom in this respect.

Secondly, the provision analysed here allows the supervisory authorities to respond only to infringements of the law committed by the management board and not by other bodies of the foundation, which, according to the statutes, may have a significant and sometimes decisive influence on the foundation's activities.

Thirdly, Article 14 section 1 of the Foundations Act does not provide for an appeal procedure. The Foundation cannot appeal to court if the supervisory body takes the actions referred to in this provision, or where it is not justified by any circumstances (this conclusion is also confirmed in Article 14 section 4, which allows the management board to submit to the court only a motion to repeal the decision on the suspension of the board and the appointment of an administrator). This gives the supervisory authorities excessive freedom to influence the foundation's activities and even allows the foundation to be harassed by accusing the management board of acting in violation of the law, the statutes or the objectives of the foundation. It should be remembered that the supervisory bodies are usually active politicians, which means that the law gives the possibility to exert political pressure on foundations. This possibility should absolutely be ruled out in the light of Article 12 of the Constitution.

## 9. COMMENTARY ON ARTICLE 15

The provision of Article 15 of the Foundations Act concerns the liquidation of foundations. The Act is unclear and incomplete in this respect, which gives rise to numerous practical doubts.

Firstly, the concepts by which the circumstances justifying the winding-up of a foundation are determined are not clear. In specific situations, it is not always clear whether the "objective for which the foundation was established" has been achieved. Even more unclear is the phrase "in the event of exhaustion of the financial resources and assets of the foundation". In particular, it is difficult to determine what is meant by "financial resources". The Act does not define this term

and does not use it in other provisions.<sup>18</sup> It is also unclear in which situation the “exhaustion” of financial resources or the foundation’s assets applies – whether it is a total lack of resources or a significant decrease therein.

Secondly, it is difficult to indicate the reasons why a foundation cannot be dissolved by way of a decision of its governing bodies, for the reasons indicated in its statutes. This solution violates Article 12 of the Constitution. Every constitutional freedom – including the freedom to establish and operate a foundation – has a negative aspect; that is to say, the person who has exercised a given freedom should be able to renounce the exercise of that freedom at any time.

Thirdly, the Foundations Act does not specify the rules and procedures for the liquidation of foundations, nor does it even refer in this respect to the appropriate application of the provisions of other laws (such as the Commercial Companies Code). In practice, this leads to the need to resort to analogy, which is the source of numerous disputes as to which provisions of the Commercial Companies Code should be applied to the liquidation of foundations, and to what extent.

## **10. ACT OF 15 SEPTEMBER 2017 ON THE NATIONAL FREEDOM INSTITUTE – CENTRE FOR CIVIL SOCIETY**

Foundations, as non-governmental organisations, need financial resources to achieve their goals. The sources for obtaining these funds are significantly limited by law (and likewise in the case of foundations conducting business activity – this activity can only be complementary to the statutory activity). One of the main sources of funding for foundations are competitions for various types of grants from the state budget, local government budgets or EU funds. Recently, new procedural solutions in this area came into effect in Poland. The Act of 15 September 2017 on the National Freedom Institute – Centre for Civil Society<sup>19</sup> led to the situation where funds for foundations’ activities are distributed on the basis of unclear political decisions, which in principle are not subject to any predictable rules, allowing foundations to plan their activities rationally.

This is due to the fact that, in accordance with the provisions of the aforementioned Act, the management of the so-called “programmes supporting the development of civil society”, including the organisation of competitions for grants, is the responsibility of the newly established body of the state, the National Freedom Institute. This body is only seemingly formed as independent of government

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<sup>18</sup> See in particular Article 3 section 2 of the Foundations Act, which requires the foundation deed to define the “assets” allocated to the attainment of the foundation’s objective and not the “financial resources”.

<sup>19</sup> Consolidated text: Journal of Laws of 2018, item 1813.

administration. The director of this Institute is appointed by the Chairman of the Committee for Public Benefit, who is a member of the Council of Ministers, and is therefore an active politician.<sup>20</sup> The Director of the Institute is under the full authority of the Chairman of the Committee, who may in principle dismiss him at any time. Another body of the National Freedom Institute is the Council, with the majority of members appointed by the Chairman of the Committee, and the others by the President of the Republic of Poland and the Minister of Finance. A member of the Council can be dismissed from their role at any time and replaced by another person.

It follows from the above that, through a system of links between seemingly independent bodies and the government, the activities of the National Freedom Institute are in fact completely subordinated to the will of the parliamentary majority. Meanwhile, it is this body that decides on numerous competitions and grants to non-governmental organisations. Therefore, a legal mechanism has been created to stimulate the development of civil society institutions – including foundations – based on the criterion of the compatibility of the objectives and activities of these institutions with the political and philosophical views of the current governing majority. This mechanism goes against the assumptions of the legislator, contained in Article 12 of the Constitution. In a democratic country based on the principle of support for civil society institutions, the funds for the activities of these institutions should be allocated through transparent competition procedures organised and conducted by independent bodies. The Act on the National Freedom Institute clearly deviates from this standard.

## 11. CONCLUSIONS

The provisions of the Polish Foundations Act and the provisions concerning the financing of foundations violate the constitutional standards of the Republic of Poland.

First of all, the Foundations Act contains many loopholes, the filling of which requires the use of complicated interpretation techniques (for example, the application by analogy of some provisions of the Civil Code<sup>21</sup> or the Commercial Companies Code). This is a source of numerous disputes both in jurisprudence and in practice. This, in turn, creates uncertainty as to foundations' activities and leads to a situation where a significant part of the legal framework of foundations'

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<sup>20</sup> See Article 34a(2) of the Act of 24 April 2003 on public benefit activity and volunteerism (consolidated text: Journal of Laws of 2018, item 450, as amended).

<sup>21</sup> Act of 23 April 1964 – Civil Code (consolidated text: Journal of Laws of 2018, item 1025, as amended).

activities is *de facto* determined by the case law. Meanwhile, the source of regulations defining the legal framework for exercising constitutional freedom (in this case, the freedom to establish and operate foundations, Article 12 of the Constitution) should be an unambiguous decision of the legislator, and not of law enforcement bodies

Secondly, the Polish Foundations Act does not ensure that this institution is and will be used properly as an element of civil society in a modern democratic state. This is due to the non-regulation of certain important issues and the regulation of others in a residual or excessively imprecise manner. The essence of a foundation should be to implement the founder's will through the attainment of socially beneficial objectives. The Foundations Act does not guarantee the preservation of this essence.

Thirdly, the functioning of foundations is significantly – and increasingly – influenced by executive bodies, run by active politicians. In this respect, there are unclear rules of supervision over foundations' activities, and excessive powers to issue the executive regulations included in the Foundations Act, as well as the rules of allocation of funds towards grants by the National Freedom Institute, which are based on a disproportionate discretionary freedom of decision-making.

For the above reasons, it is necessary to postulate the adjustment of the Polish statutory regulation, dating back to the period of the Polish People's Republic, to the constitutional standards introduced by the Constitution of 1997 and enshrined in the case law of the Constitutional Tribunal.

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## ON SELECTED ISSUES CONCERNING FOUNDATION LAW IN POLAND

### Summary

This paper is an attempt to assess selected aspects of the state of foundation law in Poland in relation to the legal position that the Constitution of the Republic of Poland has granted them. The text analyses selected statutory solutions in the light of separable patterns for reviewing their compliance with constitutional principles and values.

In the author's opinion, the provisions of the Polish Foundations Act and the regulations concerning the financing of foundations violate the constitutional standards of the Republic of Poland. In particular, it has been found that foundation law contains many loopholes, the filling of which requires the use of complicated interpretation techniques, which makes it impossible to ensure that the institution of the foundation is being and will be used properly as an element of civil society in a modern democratic state. Moreover, the opinion was presented that the functioning of foundations is excessively influenced by executive bodies, run by active politicians. This concerns, first of all, the unclear principles of supervision over foundations' activities, and excessive powers to issue the executive regulations included in the Foundations Act, as well as the principles of the allocation of funds towards grants by the National Freedom Institute, based on a disproportionate freedom of decision making.

For these reasons, the author postulates the adjustment of the Polish statutory regulation, dating back to the period of the Polish People's Republic, to the constitutional standards introduced by the Constitution of 1997 and enshrined in the case law of the Constitutional Tribunal.

### KEYWORDS

foundation, founder, Constitution of the Republic of Poland, supervision over foundations, civil society

### SŁOWA KLUCZOWE

fundacja, fundator, Konstytucja Rzeczypospolitej Polskiej, nadzór nad fundacjami, społeczeństwo obywatelskie