

Legal Structures of Public Participation and the Protection of Cultural Heritage in Poland

Poland is a country of average size located in Central Europe. The Baltic Sea lies to the north, and to the south there is a common mountain border with the Czech Republic and Slovakia. Germany is situated to the west and to the east are Ukraine, Belarus, Lithuania and Russia. As a consequence of its geographical-political position, Poland has been involved in almost all the historical events experienced in the European domain. The country has been repeatedly subjected to cultural influences, largely from the west, but has also experienced the distinctive cultural influences of eastern neighbours. This complicated process has left us a unique multicultural heritage, which (as regards immovable objects) has been preserved in the form of 50,000 listed buildings, approximately 115,000 surveyed buildings and about 600,000 other structures possessing cultural significance.¹ It is worth stressing that the number 50,000 given for listed buildings includes practically all monuments constructed before the mid-nineteenth century. For a country with an area of 312,000 square km and nearly 40 million inhabitants this is not many, and that is why the protection of the remains is treated as a special national obligation.

Similarly, although for a different reason, cultural heritage has been protected by our ancestors. During the nineteenth and early twentieth centuries there was a strong patriotic feeling enhanced by hope of the restitution of the independent state. Enlightened people undertook the first attempts at organised protection of the historic patrimony. As they did not have their own state and law that activity was determined by the three foreign legal systems in force at that time in different parts of the Polish lands. Several foundations and associations were organised and registered under German (in the west of the country), Austrian (in the south) and Russian (in the east) laws.²

In legal terms the situation did not change much after the First World War when Poland regained its full independence. For many years German and Austrian laws were maintained in force as still very practical and good enough to serve their purposes.³

After the Second World War the protection of cultural heritage was completely taken over by the totalitarian state. In 1952 all foundations were liquidated and their property was nationalized.⁴ As a matter of fact there was a law which allowed the creation of associations but due to the strict ideological control of any social activity this arrangement was only theoretical and free associations were not founded in practice.

It was only in the second half of the 1980s that changes restored the real meaning behind an association and recalled to life the principle of the foundation. The situation seems to be permanent and it can be said that the major legal structures of public participation in the protection of cultural heritage in Poland are now foundations and associations.

The first of the changes mentioned above referred to foundations. They were restored by the law dated 6 April 1984, amended on 23 February 1991.⁵ Those rules have been the basis for the creation of 112⁶ foundations with the protection of cultural heritage as a main aim. The range of activity of the foundations is widely differentiated. There are foundations created for protecting the heritage of particular regions, places, streets and even single monuments. As an example it is worth mentioning the names of some of them:

- "Libiąz" Foundation. Wrocław (Libiąz is an old cloister in Lower Silesia).
- Foundation for the Protection of Monuments and Assistance for Artists. Częstochowa.
- Foundation for the Protection and Development of the Old Town. Warsaw.
- Foundation for the Protection of the Cultural Heritage. Toruń.
- Foundation for the Protection of Monuments of Podlasie (which is a small region in the east of Poland).
- Foundation for the Renovation of the Town of Śrem. Śrem.
- Foundation "Ostoja", Ługów, in the district Jastków Lubelski.
- Foundation for Piotrkowska Street. Łódź.
- Foundation of the Friends of the Planetarium and Nicolaus Copernicus Museum in Toruń.
- Foundation "Pro Auxilio" for the Popularization and Saving of Monuments.
- Foundation "Fort Grębałów", Cracow.
- Foundation for Supporting the Development of Orthodox Culture.
- Foundation for the Protection of the Evangelic Cemetery. Poznań.
- Foundation "Karczówka". Kielce (Karczówka is a hill with a cloister on it near Kielce).

The ongoing revival of the institution of associations is due to a new law from 1989 on associations.⁷ According to the preamble this act "makes it possible for the citizens, irrespective of their beliefs, to take active participation in public life and to express their various opinions".

Thanks to this act the fundamental human rights adopted in international legal instruments which have already been binding in Poland for several years have been put into practice.⁸

It is impossible to give data illustrating to what extent the people of Poland are making use of this new opportunity because of the lack of any statistics in that sphere. All that is widely known is the activity of associations with a long tradition and of professional corporations. A good example of the former is the Association of the Protection of Monuments which was originally established in 1906 in Warsaw. An example of the latter is the Association of Conservators of Monuments, which has been active only for a few recent years.

Before considering the characteristics of foundations in more detail we must say that in spite of the special law on foundations there is no legal definition of these structures in Polish law. According to the rules of the law, its typical attributes are: its property, purpose, institutional permanent existence, its status as a legal entity, public usefulness, its non-profit-making and non-corporate character.⁹ On this basis the doctrinal definition of a foundation is constructed and according to it "a foundation is an organizational unit possessing status as a legal entity and property which is used for non-remunerative purposes and must be in the public interest".¹⁰

We cannot however forget that Polish law allows giving of some property with a specified purpose and there is no special need to create a legal person. These situations are expressed in the civil code in the rules about donations and drawing up wills. According to articles 893 and 894 of the civil code the donor can oblige the recipient to act in a certain manner. After the donor's death the execution of this instruction can be supervised by his heirs. When the instruction was made for public good, its execution can also be supervised by the appropriate state agency.¹¹

We have a similar situation in case of wills when such an instruction can be included.¹² Although the civil code does not use the word "foundation" in these cases we must note some similarities from the point of view of analyzed doctrine. It is beyond doubt that the property and a purpose are the most fundamental factors which allow us to distinguish this concept from other legal institutions.

Other criteria serve only additional functions. Sometimes they have even a purely technical nature. Foundations cannot in principle be established and exist without property and without a clearly defined purpose. Both these elements are also absolutely necessary when the donor or testator intends to make an instruction.

So if we agree that the above-mentioned elements are the main components of the concept of foundations, then we can say that in the Polish legal system there are foundations possessing legal status (foundations *sensu stricto*) and foundations which are not legal entities (foundations *sensu lato*). Furthermore, there are other types of foundations:

- foundations of public and private law;
- foundations of public and private utility;
- foundations undertaking economical activity and ones that do not.

Public law foundations can be established by act of parliament or by state bodies authorized to represent the State Treasury. As a good example of the first option the law of 1995 on the establishment of the national foundation called Ossolineum can be given.¹³ The essential element of this law was the provision on property and the state support for its activity. Secondly, the foundation can also be established by ministers or regional authorities, in both cases within the scope of their competence. In this place I should mention that such practice (when for example a minister accomplishes his duties by the establishment of a foundation), although formally possible, is however hardly acceptable by doctrine and public opinion.¹⁴ Private law foundations are created only by private acts of physical or legal persons.

Foundations of public use act for the benefit of society as a whole. They cannot indicate in their charters any individual or even collective beneficiaries. In fact, only such pur-

pose (public good) can be given as a purpose of foundations which have the status of a legal entity. They can also be written down in the instruction which obliges the donee or heir for the activity. But only the heir can act in the private foundation.

According to Polish law foundations can undertake economic activity only to generate additional money for their statutory activity.

Taking everything into account we can say that the typical and representative kind of foundation is that described in the 1984 law. Characteristic attributes are:

- realisation of "socially or economically useful" purposes which are "similar to the interests of the state", especially such as: health protection, the development of economics and science, education, culture and art, social aid, protection of the environment and monuments (art. 1);
- physical persons, independently of citizenship and domicile can be founders as well as legal entities, irrespective of their legal address but the foundation should have its seat on the territory of Poland (art. 2);
- a foundation has the legal personality from the moment of registration in the special register of foundations in the District Court for the city of Warsaw (art. 7,9);
- possibility of undertaking economic activities "only to make possible the realisation of the aims of the foundation", providing that the foundation possesses an initial capital 1000 zl and its economic activity is declared in its statute;
- foundations are under control of the competent ministry or the regional state administration but all the decisions resulting from it can be undertaken only by the court on the suggestion of these bodies (art. 12-14);
- foundations are free from court fees in the procedure of registration, from income tax¹⁵ and from customs duty¹⁶ providing that income and imported goods are to be used for a fulfilment of statutory purposes.

There are slightly different regulations for church foundations. They are bound by the law concerning the Catholic church¹⁷ and the Orthodox church¹⁸ in Poland.

Finally we must mention that in Poland agencies of foreign foundations may be established if they realise the same purposes as Polish foundations (art. 19). They must obtain permission from the Ministry and can undertake economic activities.¹⁹

If we want to characterise the associations, we must say that they have a corporate character, which is their main difference from foundations. The property is then not the most important aspect of the association, but the people proclaiming it, who can put this way into practice one of the most fundamental human rights - the freedom to form associations. In the view of the new law on associations this right can now be "limited only by laws in case of needs resulting from the necessity to assure public security and order and the protection of health or morality, or rights and freedom of other people" (art. 1. 2). The next provision of this law defines association as a free, self-governing and permanent association with a non-profit purpose (art.2. 1).

The basic attributes of associations are:

- voluntariness, which means the freedom to create such institutions, join or leave them,²⁰
- self-governing;

- durability, which means that the most important issue is the purpose of the association, not the present number of members;
 - non-profitability with the reservation that they can get money from their own businesses or properties, and receive donations or grants, on condition that they are exclusively used for their main statutory activity and not for personal needs of their members;
 - only physical persons (Polish or foreigners), not legal entities, can be members of associations;²¹
 - it is not possible to create certain organisations (e.g. political parties, churches etc.) as associations;
 - the regional authority indirectly controls associations;
 - associations have some tax privileges, as do foundations.
- These characteristics describe mainly associations possessing the status of a legal personality. This is given by the court during the process of registration in the regional court. The application for registration should be submitted by a minimum of 15 persons and must enclose the statute of the association (art. 8 and 9). It is also possible to create associations which are not legal entities, but the legal position of them is very poor. They cannot, among other things, create their organisational units, undertake economic activity and receive donations, grants or subsidies. Their only property consists of the membership fees (art. 42).

It is worth adding that international associations, acting as Polish ones, also can be created in Poland. On the other hand, Polish associations can associate with international organisations, if this is not contrary to international agreements concluded by Poland (art. 5).

Our analysis of legal structures of peoples' participation in the protection of cultural heritage shows that, according to Polish law, associations have more opportunities than foundations. As a main rule, membership is not limited as it is in foundations. Moreover, associations can possess property, which can consist, among other things, of cultural property - bought or obtained in another way. In other words, an association can obtain monuments, keep them in a proper state and open them to the public. There is almost no difference between associations and foundations in respect to taxes. Both of them can undertake economic activities and receive subventions and donations. The donor can deduct such gifts from his income before taxation (up to 10% of the income).

Footnotes

- 1 All figures received from the Monuments Documentation Centre in Warsaw.
- 2 Foundations were regulated by §§ 80 - 88 of German Civil Code (BGB) and by § 221 and § 646 of Austrian Civil Code (ABGB). Associations were governed by §§ 21 - 79 of BGB, Austrian law on associations of 1867 and Russian law on associations of 1906.
- 3 Only Russian laws were immediately substituted by new Polish regulations: decree on foundations of 1919 and decree on associations of the same year. The first unilateral law on associations for the whole country was introduced in 1932. Law on foundations was unified only in 1947.
- 4 Decree dated 24 April 1952. Journal of Laws of the Republic of Poland 1952, no. 25, entry 172.
- 5 Law dated 6 April 1984 on foundations. Journal of Laws of the Republic of Poland 1991, no. 46, entry 203.
- 6 This figure is valid for 23 January 1997, when it was received from the office of the Principal Inspector for Monuments in Warsaw.

- 7 Law dated 7 April 1989 on associations. Journal of Laws of the Republic of Poland 1989, no. 20, entry 104, amended: Journal of Laws of the Republic of Poland 1990, no. 14, entry 86.
- 8 The preamble of this law refers to them directly, in particular to the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966. The latter act was formally ratified by Poland in 1977. See: Journal of Laws of the People's Republic of Poland 1977, no. 38 entries 167 and 168.
- 9 See in particular: A. Wasilewski: Prawna problematyka fundacji. Zagadnienia podstawowe. Państwo i Prawo 1984, nr 9, p. 27, H. Cioch: Pojęcie i rodzaje fundacji. Wybrane zagadnienia na tle prawnoporównawczym. Państwo i Prawo 1987, nr 2, p. 69, B. Sagan, J. Strzępka: Prawo o fundacjach - komentarz. Katowice 1992, p. 13-15, A. Kidyba: Fundacje i stowarzyszenia. Zagadnienia podstawowe. Warsaw 1995, p. 10.
- 10 See: D. Bugajna-Sporczyk, I. Janson: Zakładamy fundację. Praktyczny komentarz do ustawy o fundacjach, akty wykonawcze i orzecznictwo, wzory pism procesowych, wzorcowy statut. Warsaw 1996, p. 14.
- 11 Art. 893: "A donor may impose upon the donee an obligation to act or inact in a specified manner, without making anyone a beneficiary (instruction)". Art. 894: (§ 1: "A donor, who has performed an obligation resulting from a contract of donation, may demand fulfilment of such commission unless its exclusive aim is to benefit the donee"; § 2: "After the donor's death the donor's heirs may demand fulfilment of the commission, and if the commission is in respect of public interest - a competent state agency may also so demand".
- 12 Art. 982: "In the will a testator may impose upon the heir or the legatee an obligation to act or inact in a specified manner, without making anyone a beneficiary (testamentary instruction)". Art. 985: "Any of the heirs or the executor of the will may demand performance of the instruction, unless the sole object of the instruction is to benefit the person charged with it. If the aim of the instruction is of public interest - a competent state agency may also demand performance of the instruction".
- 13 Law dated 5 January 1995 on the foundation - National Ossolinski Institute. Journal of Laws of the Republic of Poland 1995, no. 23, entry 121. According to this law the foundation received a historic library "Ossolineum" in Wrocław with a building and all its belongings (art. 7. 1). Art 11. 2 obliges the State to cover the library's ordinary expenses including purchase of Polish manuscripts, maps, numismatics and works of art.
- 14 See, for example, D. Bugajna-Sporczyk, I. Janson, op. cit. p. 20.
- 15 See art. 17. 1. 4 of the law dated 15 February 1992 on income tax of legal persons. Journal of Laws of the Republic of Poland 1992, no. 106, entry 482. It should be however noted that the economic activity of foundations is as such treated like regular activity of other legal persons.
- 16 See art. 14. 15 of the law dated 28 December 1989 on customs. Journal of Laws of the Republic of Poland 1989, no. 75, entry 445.
- 17 Law dated 17 May 1989 on the relation of the State to the Catholic church in the Republic of Poland. Journal of Laws of the Republic of Poland 1989, no. 29, entry 154.
- 18 Law dated 4 July 1991 on the relation of the State to the Autocephalic Orthodox Church in the Republic of Poland. Journal of Laws of the Republic of Poland 1991, no. 66, entry 287.
- 19 Council of Ministers regulation dated 6 February 1976 on the conditions, procedure and competent State agency to issue permissions for foreign physical and legal persons to open their representative offices on the territory of the Republic of Poland for carrying out economic activities. Journal of Laws of the Republic of Poland 1976, no. 11, entry 63 and 1984, no. 26, entry 133.
- 20 This aspect is specially underlined by H. Izdebski, op. cit. p. 96.
- 21 There is an exception to this rule which allows communes to create associations to "support the idea of territorial self-governing and defend their own interests". See art. 84 of the law dated 8 March 1990 on territorial self-governing. Journal of Laws of the Republic of Poland 1990, no. 16, entry 95.

