

The concept of foundations in Malta has by now become widespread, with the number of foundations increasing considerably. A foundation consists in the creation of a fund destined to be used, under the supervision of administrators, for the attainment of a specific purpose. Foundations are entities which have a separate juridical personality from that of the founder and the Board of Administrators. This principle has been considered and developed by our local Courts over the years in a number of judgements.

In the judgement *Padre Giuseppe Cauchi noe v. Salvatore Cilia et*,¹ delivered by the Court of Appeal on the 1st October 1926, the Court indirectly implied that a foundation is an entity having a separate juridical personality. In fact, in this particular case the Court stated that the administration of the foundation should be conducted as a distinct personality. In a subsequent judgement, *Sacerdot Nazzeno Curmi et noe v. L-Illu. u Rev. Mons. Kan. Giuseppe dei Marchesi Depiro noe et*,² also delivered by the Court of Appeal on the 12th February 1936, the Court held that Maltese Laws recognizes certain entities as being moral persons having a separate juridical personality. A more direct reference to foundations as being moral persons having a separate juridical personality was made in the judgement *Dottor Enrico Cauchi v. Giuseppe Pullicino*, delivered by the Court of Appeal on the 30th January 1939.³

A person within the context of any legal system has a number of rights and obligations pertinent to it and foundations are not an exception. This is proved by the fact that they are recognized as being moral persons with a separate juridical personality. Once a foundation is an operative moral person within the context of society the natural consequence is that such foundations are to be regulated by statute, like any other person. Even though this is the most logical perspective to be given to foundations, to date, most of these entities are not regulated by statute.

There are certain foundations which are regulated by statute and these are ecclesiastical foundations regulated by

the Canon Code. It is only public and private foundations which are not regulated in any manner other than by the constitutive instrument creating them. Once ecclesiastical foundations are regulated by statute it is evident that foundations in themselves need to and can be regulated by law.

Why do foundations need to be statutorily regulated? Simplistically put foundations need to be statutorily regulated due to the question of accountability. The very nature of foundations and the purpose for which they are created show that the fiduciary element is intrinsic to the set up of these entities. This fiduciary element can be safeguarded only through increased accountability, which can be ensured only through specific legislation.

The authorities have noted the fact that due to the increase in operative foundations, statutory regulation is no longer an option but it is a must. In view of this fact, by virtue of Legal Notice No. 308/91, a Permanent Law Reform Commission was set up for the specific purpose of drawing up a report and subsequent draft of a law regulating foundations. This Draft has in fact been drawn up and currently it is pending before Parliament awaiting to be enacted into law. It must be noted that this Draft refers specifically to public foundations and not to private foundations. This article in fact, refers specifically to public foundations.

Since the Draft is aimed at increasing the accountability of foundations, the first step towards this end is the more pronounced publicity of these entities.

To date, foundations are created by means of a constitutive act an instrument must be drawn up by means of a public deed *ad validitatem*. The same constitutive instrument which must then be registered in the Public Registry by means of a note of enrolment in accordance with the Notarial Profession and Notarial Archives Act. Foundations also entail an act of endowment, which act generally takes the form of a testamentary disposition. The testamentary disposition also necessarily requires the intervention of a notary and the will containing such disposition is also registered in the

¹ *Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta*, Vol. XXVI, i, 554.

² *Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta*, Vol. XXIX, i, 475.

³ *Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta*, Vol. XXX, i, 289.

Public Registry or the Registry of the Second Hall Civil Court as the case may be.

By means of the requirement of the public deed *ad validitatem*, public faith is attested to foundations, and the consequent requirement of registration in the Public Registry ensures a certain degree of publicity resulting in the accountability of foundations. Even though there is this element of solemnity, statutory regulation is required in order to increase the accountability of foundations, an accountability which as it stands today, is not enough to safeguard against abuse.

In the Draft put forth by the Permanent Law Reform Commission, the first element pertinent to foundations is that foundations are set up either by a public deed or by a will. This requirement *ad validitatem*, already existent today, shall become a statutory element and it shall become a statutory obligation, without which the foundation would not be valid at law. The element of registration too is sought to be enshrined within a law, but the Draft proposes a different form of registration from that applicable today.

The constitutive instrument of the foundation, due to its very nature, is of a public character and once it is registered in the Public Registry, it becomes susceptible to public scrutiny. However the degree of public scrutiny to which foundations are subjected today is not enough to ensure their accountability. It must be kept in mind that all documents of a public character are registered in the Public Registry in accordance with the law and the constitutive instruments of foundations are not distinguished from other such documents. Therefore if the exact details of the foundation are not known, the element of publicity sought to be acquired by registration is lost.

The only solution available for increased publicity and a consequent increase in the accountability of foundations, is by the creation of a Registry pertinent specifically to foundations. In this manner, all the constitutive instruments of foundations shall be registered in this Registry and all the information pertinent to them, both as to their creation and operation, shall be localized in one specialized unit.⁴

Why is the element of publicity of the constitutive instrument of a foundation so important? The constitutive instrument of a foundation contains the basic elements on which the foundation is created, namely the purpose for which the foundation has been constituted, the powers and duties of the Board of Administrators, the mode of operation of the foundation and the factors which could give rise to the termination of the foundation. These are but some of the elements which refer directly to the accountability of the foundation, therefore it is necessary that they be known to the public and be easily susceptible to public scrutiny. Adequate and facilitated

public scrutiny does not only enable the verification of the legality of the foundation, but it is a fundamental element to the increase of the accountability of foundations.

Registration of the constitutive instruments shall serve as a verification process since they shall become susceptible to the scrutiny of a superior statutory organ. In fact, the Registry shall be run by a Registrar whose main function shall be to monitor the foundations at the moment of creation, during operation and also at the moment of termination. By means of registration, the Registrar verifies that the legal conditions required for a foundation to exist have been fulfilled.

With the introduction of the Registry, foundations shall no longer become operative as soon as the constitutive instrument is created. In fact, registration shall no longer be an automatic consequence of the drawing up of the constitutive instrument by means of a public deed. A foundation shall be created as a moral operative person and consequently registered only once the constitutive instrument is vetted and approved by the Registrar. This means that the Registrar shall be in a position to refuse the registration of a foundation if this foundation is not created according to law.

The legal validity of the foundation shall be evidenced by the issue of a certificate of registration and the relative distinguishing number of the said foundation. The certificate of registration shall be conclusive evidence that all the requirements, in respect of registration and of matters incidental thereto, have been complied with. The certificate of registration shall allow the foundation to begin to operate. Prior to the issue of such a certificate any acts, other than acts of mere preservation carried out by the Board of Administrators shall not bind the foundation. This shows that the new concept of registration shall also be beneficial to the interests of the foundation itself.

A foundation shall be allowed to be registered if the objects of the foundation are lawful, not in violation of the public policy of Malta, not aimed at the achievement of immoral ends and not intended solely for making profit. These elements have always been at the core of many foundations created in Malta, however, their importance shall be by far more pronounced once they are introduced in a law regulating foundations. Statutory regulation of foundations shall crystallize the position of foundations, thus leaving less space for abuse and arbitrary interpretation of practices which may be prejudicial to the interests of third parties.

The element of publicity is intrinsic to the nature of foundations and it is of the utmost importance for the accountability of these entities. In order to enhance this element, the Draft imposes the obligation on the Registrar to publish in the Government Gazette all details pertinent to foundations,

⁴ This Registry shall operate on similar lines as the Malta Financial Services Centre.

including the name of the founder, the name of the foundation, the date of the constitutive instrument, the name of the Notary who drew up the relative constitutive instrument, the registered office and the date of registration of the foundation.

Rendering public the details of the foundation is not the only manner of rendering these entities more accountable while protecting the foundation itself. The Draft in fact, also enshrines the powers and duties of the Board of Administrators, which powers and duties shall become statutory powers and obligations.

As already stated above, foundations are a moral person, which moral person must be administered by individuals in order to be operative within society. The role of the Board of Administrators within the foundation is the very life source of the entity. The Board of Administrators portrays itself as the owner of the foundation *vis-à-vis* third parties, whilst *vis-à-vis* the foundation, it is an *organo servente*.

This conflict in the position of the Board of Administrators may be the source of abuse to the detriment of the beneficiaries and also of the foundation itself. The Board of Administrators should exercise its function with the best interests of the foundation and beneficiaries in mind, therefore it must administer the affairs of the foundation in such a manner to be always within the parameters of the law. Thus the Board of Administrators itself should operate so as to curtail the possibility of abuse. This may be done only once the powers and duties of the Board are clearly delineated in a law relative to foundations.

Statutory regulation shall render the position of the Board of Administrators more susceptible to public scrutiny and this shall serve as a deterrent to abuse. Once the powers of the Board of Administrators are clearly delineated in a future law relating to foundations, there shall be less space for unfounded interpretation and consequent application of too far reaching powers which can only result in abuse.

The Board of Administrators shall also be susceptible to the scrutiny of the Registrar who shall have the authority to intervene directly and effectively in the appointment and removal of any person on the Board of Administrators. Once the conditions pertinent to the appointment and removal of a person from the Board of Administrators shall be enshrined within the future law, these shall gain the force of statutory provisions, thus they cannot be ignored without the consequent sanction in case of non-observance. This in itself allows the Board of Administrators to operate normally while ensuring that this is done within the parameters of the law and with a view to curtail abuse. In fact, the Permanent Law Reform Commission, with particular reference to maladmin-

istration, in its report suggests that in situations involving breaches of duty of a sufficiently serious character there should be a power of removal to enable the checking of abuse.⁵

Even though statutory regulation shall increase the accountability of the Board of Administrators, the aim of a future law relating to foundations is not to render the Board of Administrators a mere figurehead with no say in the administration of the foundation. Statutory regulation simply wants to increase the monitoring of the operations of the Board of Administrators to enable it to function in the best interests of the foundation.

Once the powers and duties are clearly delineated in a law relative to foundations, any constitutive instrument which does not conform with such statutory provisions shall be subjected to amendment, in default of which, the foundation would not be issued with a certificate of registration and the said foundation would not be constituted for purposes of operation.

In its report on the Draft, the Permanent Law Reform Commission specifically states that it should also be possible for the Registrar to exercise his discretion where the provision made in the constitutive instrument for the administration of a foundation proves inadequate.⁶ This in itself already shows the beneficial effects which statutory regulation shall have on the whole institute of foundations.

The Permanent Law Reform Commission also seeks to curtail the possibility of collusion between the founder and the Board of Administrators. This is a very important factor within the context of the increased accountability of both the foundation and the Board of Administrators. The Draft under Section 29 (4) provides that any provision in the constitutive instrument exempting an administrator from, or indemnifying him against, any liability in respect of negligence, default or breach of duty of which he may be guilty shall be void. Provided that a foundation may indemnify an administrator against any liability incurred by him in defending any proceedings in which judgement is given in his favour or in which he is acquitted.

By means of statutory regulation, foundations shall be rendered more accountable also at the moment of termination. Accountability at this stage is very important since the rights and benefits of the beneficiaries, third parties and the foundations themselves are directly at stake.

The termination of a foundation may occur due to the 'expiry of the life span' of the foundation as contemplated in the constitutive instrument or due to other circumstances, such as for example, financial problems which lead to the dissolution and winding up of the foundation.

⁵ The Permanent Law Reform Commission Report No. 2. Law Relating to Foundations 1992, p. 32.

⁶ The Permanent Law Reform Commission Report No. 2. Law Relating to Foundations 1992, p. 21.

Even though foundations are created for the purpose of attaining an aim beneficial to a particular sector of society, it does not mean that foundations must not be dissolved and wound up, particularly when this becomes necessary due to financial. It must be kept in mind that foundations depend largely on donations made to them by third parties, therefore foundations can be considered to be a burden on the economy of society. This burden is not necessarily prejudicial to society, provided it remains of a sustainable nature, but once a foundation can no longer be self-sufficient despite the donations made to it, the burden on the economy does not remain sustainable and therefore the only logical conclusion is the dissolution and winding up of the foundation.

A foundation operates in accordance with the will of the founder and therefore, if he decides that a foundation is to exist only for a particular period of time, then his will must be adhered to. By virtue of the increased publicity revolving round these entities, the will of the founder may be adhered to with increased ease. Once the constitutive instrument is subjected to public scrutiny, in particular to the scrutiny of the Registrar, the termination of the foundation cannot be left in abeyance due to lack of knowledge of such a disposition by the founder. Thus the Board of Administrators shall be bound to dissolve and wind up a foundation once its term is over. If this is not done by the Board, the Registrar may decide ex officio to terminate the existence of the foundation.

This ex officio discretion may be exercised by the Registrar even in those cases where the foundation must be wound up due to financial difficulties it has experienced. This ex officio discretion allows for the increased protection of the rights of the beneficiaries and third parties linked in any manner with the foundation concerned.

The Registrar shall publish in the *Government Gazette* a notice stating that he is in the process of dissolving and winding up a particular foundation. Quite obviously, at this stage the Registrar is acting only on the basis of prima facie evidence and he shall take a final decision only once it is definitely determined that the foundation must be dissolved and wound up.

One of the most important innovations to be introduced by a future law relating to foundations is the obligation imposed on the Board of Administrators to register in the Registry the audited accounts of the foundation.

The financial operation of foundations, due to their very nature, is very important and the benefit of having such audited accounts subjected to public scrutiny, in particular to the scrutiny of the Registrar, may be felt most at the moment of termination. The Registrar shall be in a position to examine these audited accounts from one year to the other and if he encounters any form of irregularity, he can commence verification proceedings into the affairs of the foundation. If

these verifications provide an indication of financial problems then he may initiate further proceedings which shall finally translate themselves into dissolution and winding up if these prove necessary.

These audited accounts may also give indications of maladministration and the Registrar in this case, without proceeding with the termination of the foundation, may commence verification proceedings into the operation of the Board of Administrators and possibly proceed with the removal of the said Board and with the appointment of a new Board who would be more competent to administer the affairs of the foundation in accordance with the law.

The process of dissolution and winding up of foundations shall be statutorily provided for in the future law relating to foundations. For there to be complete transparency in the settling of the affairs of the foundation at this particular stage, the process of dissolution and winding up of the foundation is to be carried out by a liquidator who shall be appointed by the Board of Administrators, by the Registrar or by the Appeal Board, which shall be the judicial body before which all matters relating to foundations are to be channelled.

When the foundation is to be dissolved and wound up due to mismanagement of the Board the liquidator shall be appointed by the Registrar. In all other cases for there to be increased accountability, a liquidator nominated by the Board should be appointed only once there is the final approval of the Registrar. In this case, increased accountability of the Board of Administrators may be ensured if the future law relative to foundations were to provide for the personal liability of the members of the Board towards the creditors of the foundation in those cases where the foundation is dissolved, wound up and struck off, due to maladministration of the Board of Administrators.

The process of dissolution and winding up, shall be carried out in accordance with the law and the liquidator shall be obliged to operate as dictated by the law and also within the time limits imposed by the said law. Once the liquidator shall be subjected to the law relating to foundations, it is clear that he too shall be accountable for his actions and decisions. He shall be accountable to the foundation, the beneficiaries and the State. This accountability is of the utmost importance, since the ultimate realization of the assets of the foundation shall be under his control and the main aim of his position is to dissolve and wind up the said foundation in a manner that shall be the least prejudicial to the beneficiaries and interested third parties. The final step following the dissolution and winding up of the foundation shall be the striking off of the name of the foundation from the Registry, thus rendering its termination complete and effective.

All the above is but a general outlook of the benefits that would derive from a future law relating to foundations. The

maximum effect of such statutory regulation of foundations may only be fully determined by a complete reading of the Draft. However, for the accountability of foundations to be complete, a number of amendments should be introduced within the said Draft so as to make good for a number of lacunae which still exist, particularly with reference to the administration of foundations. These amendments however, should also consider the introduction of other options particularly relative to the stage of termination of a foundation.

The Draft merely takes into account the dissolution, winding up and striking off of foundations. However, these can be just as accountable if instead of dissolution, winding up and striking off being the only remedy in case of financial difficulties, foundations could be allowed to perform mergers, thus protecting the benefits they give to the particular section of society concerned, which after all, is the main aim behind the very creation of foundations.