

The construction of law for “foundations” as the responsible body for cultural institutions in Germany exemplified by the foundation Gerhard-Marcks-Stiftung in Bremen

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Abstract

This contribution explains the particularity of a “private, legally responsible foundation” as a construction of German law in the European context. In contrast with forms of purely state-owned organs, the features will be described, which can be beneficial for the undertaking of a cultural institution. Special attention will be paid to a foundation, which has been founded through several founders from which one is a state-organ.

Meanwhile this construction is frequently chosen for creating cultural institutions, because of its great advantages. Experience has shown, that this construction can prove as a protection against the exertion of influence of constantly changing political and financial dependencies, which state-organs are subject to.

The *Gerhard-Marcks-Stiftung*, serving as an example, is one of the oldest foundations of this kind in Germany. Tradition, constitution, form of organisation and experience of the last 35 years - in consideration of other similar institutions in Europe, too - shall be delineated.

Gerhard Marcks belongs, as well as Ernst Barlach, Georg Kolbe and Wilhelm Lehmbruck, to the big and important sculptors of the 20th century in Germany. Born 1889 in Berlin and passed away in 1981 in the Eifel at the age of 92 years, he had almost passed through the whole century with his works. Since the sixties, the more than 70 year-old artist searched for a homestead for his works that he possessed. In 1968, he decided to transfer substantial parts of his life's work to a non-profit, private, legally responsible foundation in connection with the arts association *Kunsthalle Bremen*- one of the oldest institutions of this kind, by private support and the Free Hanseatic City of Bremen.

Dear Ladies and Gentlemen,

I am very thankful to be able to take part in this interesting conference. Thank you very much for the invitation. May I introduce myself: my name is Petra Heimann. I am the Head of Administration of a small, fine Museum in the City of Bremen, a city that inhabits 550 000 citizens in the north of Germany. The “Gerhard-Marcks-Foundation” is housed in a historical, classical building, one of two gatehouses, facing each other, which once served as a border guard to the inner, now ancient city on the eastside of Bremen. In the museum scene the “Gerhard-Marcks-Haus” may appear as a rather small unit, but its meaning as a sculpture museum is unique in the whole north of Germany.

But the peculiarity of this House, that led me here to talk about, is rather the special structural nature. Here we have a private foundation under public law, having legal capacity, erected through several founders, one of them the City of Bremen, which is a state organ.

Please allow me to give you a brief introduction to the Gerhard-Marcks-Haus and the purpose it serves:

Gerhard Marcks belongs, as well as Ernst Barlach, Georg Kolbe and Wilhelm Lehmbruck to the big and important sculptors of the 20th century in Germany. Born in 1889 in Berlin and died in 1981 in the Eifel at the age of 92 years, he has almost passed through the whole century with his works. Since the sixties, the more than 70 year-old Gerhard Marcks searched a homestead for many of his works in his possession. Bremen had bought several of his sculptures throughout the years - most famous are the internationally well known *Bremer Stadtmusikanten* (the Bremen Town Musicians). Thanks to the great and unceasing effort of several admirers he was able to decide in 1969 to transfer substantial parts of his work to a non-profit foundation on

the mentioned premises next to the big Arts Association Kunsthalle Bremen - also one of the oldest institutions of this kind - and its director Dr. Gunter Busch, whom he trusted to look after his museum. Because Gerhard Marcks insisted on finding a solution, where his life's work was not going into a state-owned institution, finally all parties involved in the process agreed with founding a private, legally responsible foundation having three founders: Gerhard Marcks and family, the Arts Association and the Free Hanseatic City of Bremen.

By signing the foundation's constitution the founders agreed, that the 1st founder, Gerhard Marcks, would contribute major parts of his life's work - sculptures, hand drawings and graphic prints, that the 2nd founder, the Arts Association, would provide skilled support, and that the 3rd founder, the Free Hanseatic City of Bremen, would place a suitable building at disposal and cover any expenses aiming to serve the foundation's set purposes. This signed promise of the City of Bremen to proudly look after the works of Gerhard Marcks guarantees the foundation its right to exist in eternity, even if it would ever be questioned through political changes or budgetary restrictions of the Free Hanseatic City of Bremen.

The origin of foundations in Europe

Around the turning point from the Middle Ages to modern times, Roman law evolved into being the basis of standard law on the European continent, especially the private law which lays great emphasis on the individual's legal status. As Roman law adapted more to historical development and major spiritual tendencies, it became one of the principals of German law, especially of the Civil Code. The old Roman right of ownership extols giving away private property and placing it to a disposal site, forever as holy. (e. g. Gerhard Marcks might as well have kept all his 400 sculptures, 14,000

drawings, and thousands of graphics and let his family inherit the lot to have no financial worries for the rest of their days. But he decided to donate it for the public welfare, giving away the right to ever have it at his disposal again.) This is most honourable and deserves high praise and recognition laid down in the law.

Foundations have a deep-seated tradition. In the Middle Ages they arose from pious thoughts of founders, who had their own salvation in mind as well. Charitable considerations led to social foundations like hospitals, orphanages and other charitable institutions. (e. g. the *Klosterkammer Hannover*, which means "Chamber for Convents in the City of Hanover" , has an extraordinary long history. This special board administrates six large funds, which are the *Hannoverscher Klosterfonds*, which is the monastery fund of the City of Hanover, the *Domstrukturfonds Verden*- which maintains the entire dome of the City of Verden- the *Hospitalfonds St. Benedikti Lüneburg*, a hospital fund in the City of Lüneburg, the *Kloster Unser Lieben Frauen zu Magdeburg* and *Kloster Bergesche Stiftung zu Magdeburg*, two convents near the City of Magdeburg as well as the *Stiftsfonds Ilfeld*, another founders fund in Ilfeld. These assets in the form of convents were donated in the Middle Ages by Guelphic peers, such as the King of Hanover (e. g. some convents were given as a lifelong accommodation and supply for noble, unmarried ladies. These ladies applied themselves to beneficent missions or maintained the facilities of the convent. Still today this founder's purpose is being served, but the unmarried ladies are not noble any more. These assets were growing over hundreds of years up to today).

The variety of founders has recently shifted from mostly state-owned institutions and churches to rather private Persons. Foundations are an important element of burgess commitment and expression of a

free and solidly united burgess society. Socialist societies are not familiar with this element. The flourishing of the foundation scene is dependant on a country's development. Long periods of peace offer a good opportunity for wealth to grow and to get forwarded to next generations. A country with a long history of severe struggles cannot be a good ground for long-term prosperity. In Europe foundations flourished in the 19th century, but got mostly destroyed again in the 20th century for the reasons of two wars, the economical decline with it and the effects of totalitarian rule. The long period of peace since the 2nd World War supports the thought of public welfare again, so in Germany the number of foundations has doubled around every ten years since, many of which have cultural purposes. And around 95 % of all cultural foundations are registered and approved as being charitable. Today the City of Bremen alone houses about 280 foundations.

The German state regards itself as a culture state and therefore sees financing culture as its very own responsibility. Nevertheless there are different views regarding the variety of necessary public cultural offers. This leads to large scopes for the communes in their estimation for their doings, especially in times of decreasing inland revenue and increasing obligations and economical problems. Not yet well established, innovative projects would be the first to suffer, when politics start to put the priority on economical aspects. The public budgetary law can be obstructive for the creativity of state-owned cultural institutions, because of the many administrative regulations, e. g. financial resources, not needed within the current year despite other planning, must be given back and cannot be used for alternative purposes next year.

Foundations can offer a meaningful counterpart to the state, because they can

ensure the fulfilment of a foundation's purpose in an effective, lasting and sustainable way, not depending on fluctuations of the over-all development. Under German law the foundation is the only legal institute, by which a natural person can achieve, to fix her or his will for future generations. Otherwise the scope for influence usually ends 30 years after a person's death, by law. The motivations to establish a foundation is multiplex, ideally or functional, e.g. the moral duty, to return part of the fortune to the polity, the motivation to do something good, out of personal concernment, to make one's mark, to protect assets from the state's access, to back up a collection on a long-term, to eternalize a name or to establish a foundation instead of a desired heir, etc. Nowadays we have large capital to pass on in Germany after more than 50 years without war and destruction. In the last few years German culture sought the attention and interest of foundations because of the general lack of financial resources. An extreme example is the capital city of Berlin, where communal cultural institutions are existentially threatened, because the City of Berlin is completely broke.

Definition of a foundation

A foundation is a legal entity, in which a certain stock of assets becomes independent to serve the founder's purpose.

Founders can be single persons, groups, companies, associations or public bodies. Founding can happen while the founder is alive or after his death through his will.

Possible is either the construction of a foundation with legal capacity under civil or public law or a non-independent foundation under civil or public law. (The latter is at hand in cases of smaller assets either as a support to an already existing foundation or to be embedded within an existing administration organisation, which can legally act on its behalf.)

The major elements of a foundation are its purpose, which rules the alignment, the assets and the organisation. These points, as well as its name and headquarters are laid down by the founder. According details are set out in its constitutive documents.

For achieving legal capacity, state approval must be obtained.

Other than with associations or companies with limited liability or constituted under civil law there are no associates or members, who govern the foundation. It is held and administered by the multiple-headed foundation board exclusively following the aims set out in the constitution.

Assets can be immovable property as well as financial assets, but also non-financial assets such as works of art, collections of books etc.

A foundation with the purpose led by social, cultural, scientific, charitable or religious intentions which serve the public welfare can claim tax privileges if accepted as such from the tax authority.

Structure and constitution

While establishing a foundation it is very important to character the turnout in the constitution by the means of achieving most possible effectivity and flexibility. Eventually it is the formulation that accounts for the foundation's distinctiveness and openness for developments in the future.

Depending on the given situation the decision will be made for either

- the contribution foundation to be chosen, when there are no sufficient assets to serve the set purposes. Then an annual financial contribution is needed to serve the foundation's purpose.

or

- the capital foundation, best, when a sufficient amount of assets can be brought into the foundation. Then the annual capital interest is used to serve the foundation's purpose. The more cost-intensive the

purpose is, the larger the amount of assets needed (e.g. with a capital interest of 5 % the capital requirements per year must get multiplied with the factor 20 in order to achieve the necessary foundation capital).

Cultural foundations in Germany are usually foundations under public law, having legal capacity or - more rarely - under civil law, having legal capacity.

Foundations under public law are erected by sovereign actor through legal transaction, requesting government approval. The law on foundations in the Civil Code and the federal countries foundation laws are not applicable here. The foundation's legal relationship conforms to its act of construction and the constitution.

Recently more and more cultural foundations under public law get constructed without appreciable assets, e. g. museums, libraries, memorials, operas or colleges. These foundations have only non-financial assets, which do not generate income of capital interest or rent. So they permanently depend on state-granted contributions, which will only get granted for the budgetary year. There is no commitment to granting future allowances and the foundations have no long-term guarantee for their existence, because they depend on current values of politics (e. g. with a decreasing number of visitors, a foundation might question the existence of a museum, rather than making the effort to make it attractive to the public again). The fulfilment of the purpose is dependant on the inflow of public financial resources. Contributions, like e.g. 'funding gap financing', can be coupled with set conditions. A right to a say or controlling rights can be imposed on the foundation as well as restrictions on wage pay for personnel, obligatory use of logos and banners. Even questioning the number of projects can become subject between commune and foundation.

Politics alone decides on occupation of the

foundation board seats by sending the members.

Moreover these foundations can get abolished anytime by law or statutory instrument.

(An example for a meaningful foundation under public law is the *Stiftung Preussischer Kulturbesitz*, which administers former Prussian cultural assets, like buildings, art collections and libraries. Initially the prior aim was to maintain and keep the cultural assets of the former Prussian state. From the collections and archives of the Prussian state arose seventeen museums, the National Library of the City of Berlin, the *Geheimes Staatsarchiv*, the secret national archive and a range of research institutions. But since the German reunion the major task has become the joining of collections, which have been disjunct. The foundation gets supported up to 75 % by the Federation and up to 25 % by all federal lands. The costs for buildings, e. g. upkeeps for the museums island in Berlin, are fully taken over by the Federation).

In contrary to this type of foundation, there is the foundation under civil law, having legal capacity, which attends commercial interests but in any case serves public needs. For the last few years these private foundations have strongly gained importance within culture promotion.

This foundation comes into being by signing onto the register of associations of the county court.

In the constitution regulations are laid down, regarding liquidation, e. g. in case of fulfilment of the purpose or by concordant consent of all founders (in case of the "Gerhard-Marcks-Foundation" the liquidation of the foundation can only be decided if all founders agreed and in that case the purpose would then just be forwarded to the City of Bremen).

If the foundation got constructed with non-financial assets like works of art and needs to receive allowances, these are not subject to

public contribution law. Therefore the financial management is not restricted with plenty of administrative regulations, budget-controlling and other conditions, which foundations under common law have to comply with.

The foundation-board alone makes all decisions, e. g. regarding budget planning, need and pay of personnel and the entire content-related work (in our case the City of Bremen takes part in the decision as one of three members of the board, so it has to find agreement with the other two, that rather have the foundations purpose in mind than the financial situation of the City of Bremen).

The occupation of the foundation board seats and further committees happens through the founders, the occupation of the succession happens through elections of the remaining foundation board-members. Possible is the tie-down to appoint persons holding certain offices. Its existence gets characterized by the constitution only.

Public private partnership

More and more, the promotion through the budget of the federal government, of its lands and the communities is under pressure to keep costs low. This has even increased through the restructuring and construction of the cultural institutions in the newly-formed East German federal states. As a result of that, private financial promotion of culture has become increasingly necessary. (Right now the City of Bremen discusses the reduction of resources and even the closing down of cultural institutions).

As a method to fulfil communal tasks public - cultural as well as other - institutions enter liability partnerships. The so called Public Private Partnership (PPP) is a cooperation of public authorities and the private sector regularized by contract. PPP can mean foundations or other public institutions coming to an agreement with private organisations, persons or companies, who offer financial support or volunteering on projects of

common interest. This can range from deals with sponsors supporting certain one-time projects up to creating a limited corporation in order to be the bearer of a cultural institution (e. g. the Paula Modersohn-Becker Museum in Bremen, the first museum worldwide to apply itself to the works of a female artist. Paula Modersohn-Becker (1876-1907) is of outstanding significance for the start into modern arts in Germany. Beside her works the museum houses the substantial collection of works of the sculptor, craftsman and architect Bernhard Hoetger (1874-1949). The museum is a company with limited liability composed of a foundation, the commune and a bank establishment).

But also the foundation itself can be created as a PPP, like the Gerhard-Marcks-Foundation, having three founders, one of which is a municipality, subject to public law.

Contrary discussions are raised on the consequences the growth of Public Private Partnership has in Germany and Europe. Critics say that it is primarily being used by public authorities to master the increasing funding short-falls. The state's term “cultural basic supply,” which means taking care that quality and impact of cultural performances are secured, is in danger to be more misunderstood as an indispensable minimum. And there are signs that cultural politics aiming primarily on economical efficiency, prefer the established to the experimental projects. Nevertheless the results show that high expectations regarding increase of efficiency, speed-up effects and optimization of total project costs are met.

Foundations in other European countries

In France

The French definition of a foundation is an act, where one or several natural persons or corporate bodies appoint manors, rights and funds to an irreversible purpose, which

serves the realisation of a deed of general interest without any intention to make profit. A foundation must necessarily be equipped with assets, which distinguish themselves in an association standing for regrouping of natural or corporate bodies with the intent to run a communal project. Along with the foundation's constitution the founder erects a new entity, which he determines. The term "foundation" is legally protected and can only be used by three types of foundations:

- public utility foundations

Necessary is a non-profit aim, a certain basic endowment and an administrative or supervisory board with a director.

- enterprise foundations

It is a legal entity, intended for companies constituted under civil law or for associations under commercial law or both. The enterprise foundation will be founded for the period of 5 years, reducible to a period of at least 3 years.

- non-autonomous foundations, erected under aegis.

The first law on foundations entered in force in 1987 and it covers public utility organisations in general and state-approved foundations of public utility. With the modification in 1990 corporate foundations were introduced, which can mean the founding of one or more private or public corporations, cooperatives or mutual societies for the public benefit purpose. In order to promote private giving, in 2003, a new law has been enacted.

(An example for a cultural foundation in France is the Royaumont Foundation (Gouin-Lang) for the promotion of culture. It was founded in 1964 by patrons Henry and Isabel Gouin. Its first aim is to preserve and enhance the historic monument it received as an endowment, and between 1977 and 2002

almost 15 million were channelled into its investment programmes. Founded in 1228 by the young Louis IV "Royaumont" was listed in 1927 and is now the best-preserved Cistercian abbey in the Ile de France region. The Foundation elected to revitalize its inheritance by placing it in the service of a cultural project. Redefined in 1978 and substantially expanded in 2000, the project now covers the three main areas music, contemporary dance and a multidisciplinary centre. The project's primary objective is to support and monitor the work of professional artists by designing research & experimental, training, creation and production programmes. The foundation is supported by the General Council of Val d'Oise, the DRAC Ile-de-France - Ministry of Culture and of Communication, and the Ile-de-France Region. It is a member of the Association of Cultural Encounter Centre).

In Switzerland

The Swiss foundation law is widely known as one of the most liberal. Therefore in Switzerland foundations are a very common form of organisation. According to Swiss law the purpose is practically not limited. In contrary to other foundations family foundations and clerical foundations do not need to enter on the commercial register and are not subject to the state supervision. It is the essential feature of foundations, not to have a supreme controlling body. On principal they are subject to state supervision. The supervision must pursue the will of the founder.

Special significance has the foundation in the form of a personnel provision foundation for employees serving the purpose to cover the corporate pension scheme, which is compulsory since 1985. For this form of foundation particular regulations apply.

(An example for a meaningful Swiss foundation is the *Abegg-Stiftung Bern*. This foundation is a historico-cultural institute,

founded in 1967 by the Swiss textile industrialist Werner Abegg. Its primary aim is the scientific exploration of old textiles and its applied arts. Besides a museum for textiles and handcrafts of all eras, the foundation runs a library as well as workshops for fabric conservation, which has become widely known for its skills).

In Great Britain (Focus on England and Wales)

In difference to most other European countries the British law has different roots and has no origins in the Roman law. British law is not codified and primarily a case law based on precedent. English law is meant to be less systematic and abstract but rather problem-orientated. The British common law emerged from times of the Norman conquest in 1066. There is no one legal form for foundations in Great Britain. They may occur as associations, trusts, companies Royal Charter bodies or those, created by Act of Parliament. Using the term foundation usually denotes an endowed grant-making charity taking the form of a trust, but this is not always the case. Not the legal form of a foundation matters greatly, but rather the fact, whether the purposes are regarded as of public or charitable benefit. General requirements for museums are: the set-up for the benefit of the public and the satisfying criterion of merit. Charitable purposes are not precisely defined in common law. In order to get exempt from tax an institution has to register with the Charity commission, who defines charitable purposes as relief of poverty, advancement of education and of religion and other purposes of public benefit (which develops in line with changing social conditions of society). In this country an institution cannot serve private interests as well as public ones. Only charitable trusts are allowed to exist in perpetuity.

Around the end of the 19th and beginning of the 20th century philanthropical foundations

arose in Great Britain and the United States. Their characteristics were the intention to contribute to the public welfare, the application of scientific rudiments and methods regarding social problems, the promotion of these aims through dedication of large assets and the attempt to receive public acknowledgement of a status of public utility for their deeds. Between 1870 and 1930 large-scale foundations became very influential social institutions. Their associates made them to promoters of applied social sciences. In the public this was not welcomed. Foundations were criticised as often undemocratic establishments, escaping from public control, primarily following the interests of the social elites. Nevertheless these foundations had a high bearing on socio-political research and tried to apply principal knowledge on the solution of social problems.

(An Example is the London Community Foundation, which is a public foundation serving donors and charities primarily in London and Middlesex County. While the Foundation was established in 1954, it wasn't until 1979 when Mr. J. Allyn Taylor, currently the Foundation's Honorary Chair, took on the challenge to activate the Foundation as a retirement project. The Foundation now holds over \$31 million in endowed funds, and has granted over \$10 million to charitable causes since 1979. The London Community Foundation and its donors strengthen their community by making strategic and effective grants, building and managing a permanent endowment, and serving their community as a resource and partner. The foundation regards itself as becoming a leader in community development, innovative granting, and endowment building - and the best choice for people who want to leave a permanent legacy to their community).

Development of European foundations

In the last few years the European

foundations faced a new development. Since the early nineties the meaning of foundations increased considerably. According to the Watson Wyatt study about 50 % of the registered foundations have been erected after 1990 in Italy and Germany alone. Other countries like Belgium, Finland, France and Sweden recorded an increase of 19 to 29 %. The European Foundation Centre, which counts about 200 members by now, is coordinating a number of initiatives to overcome traditional barriers, e. g. through a decree of a practice codex or through introduction of a European foundation statute.

In many countries important development took place, for example the new “Charities Bill” in Great Britain (a bill to modernise the definition of charity and confirm that public benefit is the foundation of charity, to modernise the Charity Commission, to create a new tribunal for appeals against Charity Commission decisions, to avoid the problems of dual regulation under both charity and company law and so on) or the “Swiss Code of Best Foundation Practice” in Switzerland (25 suggestions of experts for a modern and professional foundation management supporting three principals: effective enforcement of the foundation's purpose, Checks and Balances as well as transparency) or the suggestions of the Italian bank foundation ACRI for the strengthening of transparency and corporate accountability of bank foundations.

Development of German foundations

The Federal Association of German Foundations states, that because of the large spectrum of the cultural landscape in Europe, smaller foundations are needed, being close to the burgesses, rather than very large nationally or internationally and dominantly working foundations as seen in the U. S. In Germany the newest development shows the vast founding of locally working burgess foundations, giving many people the chance

to act responsibly, although not every person is wealthy.

In times of state and communities under pressure to keep costs low, the Public Private Partnership spreads widely. In order to meet as equals, the public and private partners have to carefully choose the form of cooperation. Joining a public body with a foundation under private law or moreover with the financial support of further private partners, has proved to be a very good solution. The advantages of planning safety within a solid cooperation and the chance to lay down distinct purposes in the constitution through the founders, has been recognized more and more. Today, in times of empty German public purses, the construction of a capital foundation is not at hand for public authorities and the founding of a contribution foundation is an alternative in the cultural field.

Despite its 35 years of age the “Gerhard-Marcks-Foundation” is actually giving a good example for Public Private Partnership. Throughout the years the three founders had their confrontations and struggles regarding to where the journey is heading. As people and the political situation changed within the public body, the views on the importance of the foundation's purpose varied, and the City of Bremen tried to freeze the sum of financial backing over the years. As the number of visitors of the museum decreased, the City of Bremen started to revalue the foundation through its effect on the town's tourism. As long as the 1st founder Gerhard Marcks lived the looking after of his collection was the only given purpose. But after his death the 2nd founder, the City of Bremen, encouraged the foundation board to widen the purpose in the constitution towards showing arts exhibitions of other meaningful sculptors as well and extending the building at the 2nd founders cost, so that more visitors will get attracted to come not only into the museum but also to the City. This is a unique change in the scene

of sculptural arts foundations. Especially, because the emphasis was laid on the widening of the purpose towards extension of exhibiting (with a commercial thought in mind), rather than the extension of collecting other art works (with a spiritual thought in mind). Since then the house is showing exhibitions on sculptural works four times a year as well as showing ever changing Gerhard Marcks art-work-exhibitions in the attic. Although the number of visitors increased after the change, the meaning of the house within the cultural scene in Bremen stays subject to the discussions the City of Bremen stresses. Being under pressure to keep costs low, there is a constant attempt to abscond from the promise to bear all costs of

the institution. As a foundation under public law, the house would have been in a weak position, while its purpose is questioned. But as a foundation under private law with its wise constitution the house is safe: The City of Bremen is committed to bear all current expenses of the institution and in case of liquidation of the foundation, which can only be decided by all three founders agreeing, the foundation's purpose would just be forwarded to the City of Bremen. Although the frictions between the partners will continue, the fact of having three founders on the board guarantees to the foundation, that the life's work of Gerhard Marcks stands on solid ground and will not be endangered by political trends or commercial considerations.

About the author

Ms. Petra Heimann, born 2nd of January 1962, is qualified as Special Assistant in Economical and Tax Advisory Professions. She completed the vocational baccalaureat diploma in social work. After attending a traineeship she went abroad to live and work in Ireland and England. Back in Germany since 1991 she chose explicitly employments in smaller foundations and a charity association leading the accounting departments and doing controlling. Since 2001, she is the Head of Administration of the Gerhard-Marcks Foundation.