

Religious Entities as Legal Persons – Country Report: Germany*

1.

German legal system allows Churches and religious communities to obtain a legal status in two ways. One has to distinguish a status of private law and another of public law:

- According to Article 140 of the Basic Law (BL) with Article 137 Section 4 of the Constitution of the Weimar Republic (CWR), religious communities may obtain a legal status due to general provisions of civil law. Through these regulations, all types of organisations of private law are made available to Churches and religious communities (the chosen term “general provisions” bans any specific regulations concerning Churches and religious communities as they applied before 1919). In practice however, the majority opt for the status of a registered association (§§ 21 ss. BGB [Civil Code]). Another possibility is the status of a non-registered association (§ 54 BGB) which is no legal person but, apart from this, equal to a registered association in most aspects.
- Specific to German law is the status of a public law corporation. Article 140 BL with Article 137 Section 5, Subsection 1 CWR statutes that those Churches and religious communities which were given a certain legal status before 1919 may maintain the status they have held before that date. According to Subsection 2 of the same provision, that status has to be granted to other religious communities if they guarantee durability by their constitution and by the number of their members.

Both options have in common that Churches and religious communities have a legal title for one of them. The institute of an “approval” or “recognition” is an out-dated category since 1919. Although the State – necessarily –

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has to cooperate for the constitution of a Church or religious community as a legal person (registration in the register of associations, granting of the status of a public law corporation), that cooperation is limited to the scrutiny of the legal conditions. No margin of discretion or appreciation is given to the State.

Regarding the constitution of a religious community as a registered association the community has a legal title itself by means of statute or derived from constitutional law. Moreover, the individual adherents of the community may appeal to the constitutionally guaranteed freedom of association (Article 9 Section 1 BL). This basic right is superposed by that of religious freedom (Article 4 Section 1 and 2 BL; Article 140 BL with Article 137 Section 2 CWR) if the community is exclusively a religious community (and not a mere religious association which observes only some isolated religious aims). As foreigners are as well entitled to appeal to religious freedom, citizenship is not relevant for the constitution of a Church or religious community as a registered association.

Different to the granting as a registered association the granting of the status as a public law corporation is not an act of exercising basic laws. Citizens can not associate themselves in order to form a legal person of public law. However the Constitution grants religious communities the corresponding legal position as an institutional one (Article 140 BL with Article 137 Section 5 Subsection 2 CWR) which depends on the named conditions.

Historically the majority of Churches in Germany were constituted as public law corporations before 1919 (Catholic Church, Protestant *Landeskirchen*, Jewish communities). To all of them the mentioned institutional guarantee of continued recognition as a corporation of public law does apply (Article 140 BL with Article 137 Section 5 Subsection 1 CWR). Apart from that, there is no difference in law between “historical” Churches and “new” religious communities: The latter ones may also apply for the granting of the status as a public law corporation. In order to obtain this status they need not have proved “good” in the private law status for certain time. The legal requirement of “guarantee of durability” however causes that only such religious

communities can obtain public law status which have consolidated in Germany.

That bipolar system of legal status concerning Churches and religious community applies in its principles in the whole country. The competence of the federal States (*Länder*) is limited to legislation about the details, especially about the procedure rules (respective to the status of public law corporation, see Article 140 BL with Article 137 Section 8 CWR).

2.

The fact that a Church or religious community has been constituted as a legal person is of course documented (as legal consequences depend on that fact). There is nonetheless no general “register of religious communities”. This has different reasons: Since there are different options for Churches and religious communities to obtain a legal status, several registers exist. The register of associations contains all registered associations without any further specification if they are religious ones or not. In a similar matter, the authorities concerned hold registers of all Churches and religious communities being public law corporations. But all the registers are decentralized and – at least officially – not combined in a general and central register. The competence for the register of associations is with the Magistrates’ Courts and for the register of public law corporations is with the Departments of Education of the *Länder*.

Registration is however never a condition to be enabled to work within the country as a Church or religious community. Religious freedom (or to be precise: freedom of religious association) does not depend on registration. Registration is, on the other hand, relevant for the assertion of legal positions as well for general legal acting.

In order to obtain the status of a legal person certain criteria have to be met depending on the legal status in question. The criteria for the most commonly opted for legal statutes can be distinguished as following:

- In order to be granted the status of a registered association, a Church or religious community has to fulfil the requirements of the Civil Code (§§ 55

ss.). The minimum number of members is seven (§ 56). Also necessary are by-laws which contain at least the aim, the name and the residence of the association (§ 57). Furthermore provisions should be made on granting and abrogation of membership, on fees to be paid by the members, on the constitution of the board and on the convocation of the members' assembly (§ 58). It is the board's duty to depose a demand of registration for the association at the Magistrates' Court which is obliged to register the association if the named formal requirements are fulfilled. There is no control of the association's aim in material, especially not concerning its doctrine. On the other hand, aim and action of the association must not interfere with criminal law, constitutional order or the spirit of international friendship (Article 9 Section 2 BL). An association may be forbidden on count of these reasons according to provisions of public association law (§ 3 Associations' Statute). It thus corresponds with the principle of the coherence of legal order if an association that could be forbidden by the mentioned reasons immediately is not registered.

- The criteria for the granting of the status as a public law corporation is the "guarantee of durability" (Article 140 BL with Article 137 Section 5 Subsection 2 CWR). The first requirement in this context is a temporal one. According to the jurisprudence, it is fulfilled if a religious community has either an existence of at least 30 years or has been present in Germany at least 30 years. The BL names as further indications for "guarantee of durability" a "constitution" and the "number of members". "Constitution" does not only mean provisions on organisation in the sense of by-laws but, but also, the existence of the community in law and in fact. A religious community applying for that status is therefore required to have clear organisational structures and competent hierarchies able to decide on internal matters of doctrine, and to order authoritatively and to act as competent partners of the State. Concerning the "number of members" there is a guiding-number of one part pro mille of the population of the *Land* competent for granting of that status. According to unanimous opinion the BL contains furthermore an unwritten requirement of legal loyalty: A reli-

gious community applying for a public law status may not revolt against legal order or interfere with existing law. On the other hand, an exceeding loyalty to the State is not required as the Federal Constitutional Court has ruled in a quite controversial verdict ("Jehovas'-Witnesses-Case", 2000).

Especially the status of a public law corporation is connected with a number of legal advantages. The only explicit one is listed in Article 140 BL with Article 137 Section 6 CWR which grants the right to raise Church tax with support of the State in administration and execution. Moreover, the status of a public law corporation involves several so-called corporation rights as for instance the:

- + right to employ civil servants and to constitute an employment regime of public law nature;
- + competence to erect sub-entities of public law;
- + right to establish an autonomous legislation on the own affairs of Churches and religious communities which is also binding for the legal order of the State;
- + parish right (i.e. right of the Church to oblige ipso iure all the members living in a certain area;
- + right to create public ecclesiastical property, especially Church buildings and Church bells, to which the public property law of the State applies.

Moreover, Statue law also contains a number of provisions granting legal advantages to Churches and religious communities having the status of a public law corporation. The reasons for those advantages are quite different, and they are usually referred to as a "bundle of privileges" since there are advantages in tax law, employment law, social law, building law and media law.

Especially in the domain of tax priviligation, religious communities of civil law are in practise treated the same way as those of public law. The common requirement is the granting of a charitable organisation status to which also religious communities organised as registered associations are entitled.

Every tax-payer may reduce his income tax by the amount he donates to civil law communities as well as by the Church tax he pays to public law corporations.

Contrary to these regulations, State contributions are not linked to the legal status of the concerned Churches or religious communities (in practise, the Catholic Church, the Protestant *Landeskirchen* and the Jewish communities are entitled). Neither are exemption clauses of general employment law which are in principle applicable to all Churches and religious communities. As German law has introduced obligatory civil marriage in the 1870's ("Kulturkampf") the State does not allow to any Church or religious community to officiate marriages with civil effect. On the other hand, only Churches and religious communities with the status of public law corporations are entitled to own special burial-grounds.

Civil association law as well as provisions concerning the status of public law corporations are part of the federal legal order. Insofar, the federal system of Germany is irrelevant. The "historical" Churches are therefore privileged since they are granted the maintenance of their status as public law corporations directly by the BL. Apart from this, legal requirements for the granting of a legal status (civil or public) law are identical.

Due to the lack of a general and central "register of religious communities" only approximate specifications on the organisational and legal structure of Churches and religious communities can be given: The most commonly known public law corporations are the Catholic Church (or to be precise: their dioceses and parishes, about 26,5 millions inhabitants or 32,1 %), the Protestant *Landeskirchen* (about 26,2 millions inhabitants or 31,7 %) and the Jewish communities (about 100.000 inhabitants or 0,1 %). Furthermore, several smaller Christian (Evangelical free churches, Orthodox Churches) and as well as non-Christian communities (some philosophical organisations) are organized as public law corporations¹. Concerning civil law

¹ See an actual and complete overview in the web: www.uni-trier.de/~ievr/religionsgemeinschaften.htm.

communities there are only some very approximate estimations; which roughly sum up to about 2,5 millions inhabitants (most of them being members of Muslim communities).

3.

Churches and religious communities may take legal actions in a nearly every domain regardless of their legal status: They may sign contracts, own real property and act as an employer. Special restrictions applying exclusively to religious entities do not exist. As the jurisprudence treats non-registered associations the same way as registered ones, the first may also benefit from the whole set of legal actions available.