

CHARITY IN GERMANY
Attempting a Legal Definition
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I. Introduction

Legally defining charity in Germany in the context of a conference that focusses predominantly on a legal tradition of anglo-saxon common law, requires a certain shift of tables, since Germany, like all continental Europe, Scotland, Latin America, and other parts of the world is a country with a tradition of Roman law. Moreover, Germany is a federal country, and some aspects of the legal framework for charities are governed by state rather than federal law. Also, increasingly, European law, i.e. the set of intergovernmental agreements on the European Union, is influencing and indeed superseding national law. Furthermore, a very large portion of what is generally described as charitable service providing, is organized and managed by one of the established Churches¹, all of which enjoy a high degree of autonomy under the German constitution². And finally, charity in Germany, indeed as in most other cultures, is deeply rooted in history, so charity law has developed over centuries and certainly lacks the systematic approach that some new areas of legal regulation intend to provide.

For all these reasons, a short overview can be no more than an attempt to paint a general picture and point to some key elements. It will certainly have to miss out on many details. The endeavour however is of particular interest at this moment in history, since as elsewhere, academics, practitioners, and policy makers have begun to see the need for reforming the overall framework of charitable activities, and indeed, a Commission of the Federal Parliament,³ on which I had the honour to serve and which presented its report four months ago, passed a recommendation to the effect that the fiscal laws governing tax exempt organizations be thoroughly revised, while admitting that the details and indeed the basic system of new legislation would still have to be established. So what I can present to you today is the status quo of today with some remarks on its weaknesses and some thoughts on possible changes.

¹ Most particularly the Roman Catholic Church, the Protestant Christian Churches of Lutheran, Calvinist and Unionist denominations, and the Jewish community

² the *Grundgesetz* of 1949; for church autonomy see Art. 4, 140

³ *Enquete-Kommission des Deutschen Bundestages zur Zukunft des buergerschaftlichen Engagements*

II. The Nature of a Charity

In the course of history, there has been a constant change in public opinion on what actually constitutes a charity. The notion of a *pia causa* as used in the Middle Ages included any deed pleasing to God, be it help to the needy, embellishment of a church, educating the young, or even defending Christendom against the infidels. This general approach has remained unchanged, while the rise of the state to its present importance all over Europe narrowed the scope of any personal voluntary action for society until, towards the end of the 20th century, the welfare state and socialist society were both perceived as failing to provide all services necessary to modern society. Germany has a strong tradition of a welfare state, and indeed East Germany was one of the most rigid socialist societies. But Germany also invented the principle of subsidiarity as an historical compromise between government supremacy and non-governmental i.e. basically church-based service provision in the area of health and social services. However, this principle never did extend to other areas like education, research, or the arts. In these areas, voluntary action was always very much restricted to what was either deemed irrelevant or useful to the government. Even sports clubs gained tax exemption in the 1910s on the grounds that they were aiding the war effort. The fact that many tax exempt organizations do not provide services at all, but constitute self help or advocacy groups, has never been systematically included in German charity law. So while the European Commission⁴ not only lists service providing, self help, advocacy, and intermediary activities as the four valid forms that associations and foundations can express themselves in, and particularly welcomes the advocacy groups' involvement and contribution, German lawmakers and government administrators to this day are not at all sure whether anything beyond service provision is ultimately legitimate. The even more modern concept of charity as a contribution to democratic society as such, regardless of the actual activity, as developed by Robert Putnam⁵ and others, is still a long way from becoming a theoretical basis for legislation. Charity is

⁴ in its 'Communication on the Role of Associations and Foundations in Europe', 1997

⁵ Robert Putnam, *Making Democracy Work*, Princeton/New Jersey, 1993

widely seen as a servant to government; the extraordinarily high level of government funding is taken as proof for this⁶.

Under these circumstances, it is hardly surprising that in attempting to define the legal nature of a charity, the first point of reference is fiscal law, more so, since fiscal engineering has become one of the prime instruments of government policy. Fiscal law in Germany limits charity in the sense that it be tax exempt to legal entities as defined in the law on corporate taxation⁷. Natural persons' charitable activities are not tax exempt, notwithstanding the possibility to deduct donations to recognized charities from their taxable income. Legal entities can apply for and be granted tax exemption by the tax authorities if by statute and actual activity they come within the detailed conditions for charitable activity laid down in the general tax law⁸. From this, it is clear that it is within the authority of the state to define what constitutes a charitable proposition as a public purpose and who may thus be entitled to tax exemption. However, tax law alone will not suffice to describe the legal framework of charitable organizations. Since they are legal bodies, civil law will apply first.

III. Charities in Civil Law

Since in the tradition of Roman law, there has to be a principle of definition, and since fiscal law and civil law are closely intertwined albeit not always perfectly concurrent, it is necessary to discuss the status of charities under civil law before entering into a full discussion of the fiscal implications. This is a complicated task, as the status of legal entity under fiscal law is not restricted to legal persons under civil and public law. Whereas civil law, as laid down in the Civil Code⁹ of 1900, basically recognizes four forms of legal persons, the corporation¹⁰, the registered association,¹¹ the civil law

⁶ see the findings of the Johns Hopkins Comparative Nonprofit Sector Project, as in: Lester Salamon, Helmut K. Anheier, Regina List, Stefan Toepler, S. Wojciech Skolowski and Associates, *Global Civil Society, Dimensions of the Nonprofit Sector*, Baltimore MD: The Johns Hopkins Center for Civil Society Studies, 1999; Chapter 5: Germany

⁷ *Koerperschaftssteuergesetz*, § 1

⁸ *Abgabenordnung*, §§ 51-68

⁹ *Buergerliches Gesetzbuch*

¹⁰ *Handelsgesellschaft*

¹¹ *eingetragener Verein*

foundation¹², and the cooperative society¹³, tax law lists two other forms, the non-registered association¹⁴, and the non-autonomous foundation¹⁵ as relevant legal entities, both of which are highly important as legal forms for charitable activities. It is therefore important to point out that legal personality under civil law is not the only way for a charity to meet the requirements of fiscal law.

Of these forms, the association is by far the most numerous one. The right to associate is a constitutional right¹⁶. The legal form of association is with very few exceptions restricted to not-for-profit, while not necessarily tax exempt activities. Associations are membership organizations and are bound by law to democratic procedures within the organization. Over 500,000 registered associations exist in Germany, the number of non-registered associations is estimated at again 500,000. Registration is with the courts and involves filing the statutes and the names of legal representatives but not of annual reports. Registration results in becoming a fully operational legal personality and regulates on liability and contractual obligations. Members of non-registered associations remain personally fully liable.

The form of registered association has become the standard form of organizing a charity and has superseded all previous forms like Royal Charters, Privileged Societies etc., which of course did exist up to the 19th century. Our largest nonprofits, the social welfare umbrella organizations,¹⁷ are organized in this fashion, but there is an increasing feeling that a legal form that serves a local membership organization perfectly well, may perhaps not be appropriate for a multi-million turnover service provider with a paid staff of 400,000¹⁸.

¹²*Stiftung buergerlichen Rechts*

¹³*eingetragene Genossenschaft*

¹⁴*nicht eingetragener Verein*

¹⁵*nicht rechtsfaehige Stiftung*, also termed *rechtlich unselbstaendige Stiftung*, *treuhaenderische Stiftung*, *fiduziarische Stiftung*

¹⁶ *Grundgesetz*, Art. 9

¹⁷ *Spitzenverbaende der freien Wohlfahrtspflege*: Caritas, German Red Cross etc.

¹⁸ German Caritas, including all its branches and affiliated organizations, is the largest non governmental employer in the country, larger than even the biggest corporations.

While not as numerous by far, foundations are the other notable legal form charities may take. While not expressly mentioned in the constitution, the right to set up a foundation can be derived from the general personality rights as laid down in Art. 2. Unlike common law countries, Germany, since the 19th century has accorded foundations a distinct legal personality. However, foundations may be and are created under different legal forms as well, while on the other hand, foundations may serve other than charitable purposes with the exception of purely commercial ones. In practice, 98 % of all autonomous and non-autonomous foundations are tax exempt.

Foundations are by their nature the oldest charities still in existence. The oldest ones on record go back to the 10th century A.D. The original form is the non-autonomous one, known in common law as the trust. It was only in the post-napoleonic complete reorganization of the law that the specific form of autonomous foundations was introduced, the definitive difference being that autonomous foundations do not have outside owners or members. They are self-owned. To compensate for this, they are subject to government supervision under civil law as well as the fiscal supervision that includes all legal and indeed natural persons. Supervision is regulated by state („*Laender*“) law and differs from state to state while not in principle, but in some details. State supervision is in all cases restricted to the observance of the law and of the founder's will as laid down in the statutes, and may not include interference with the actual activities. The underlying logic is perfectly sound in that the government, acting in the interest of the public, takes on the long-term task of ensuring the fulfilment of the founder's will in the absence of owners or members. It must be pointed out however that instances of government agencies overstepping their authority are far from rare.

Non-autonomous foundations are legally owned by their trustees. Since trust law in Germany is far less developed than in the U.K. or the U.S., the range of possible activities and the legal potential of such a trust is severely limited. Also, trusteeship is commonly vested in a sole legal person, rarely in a sole natural person, and more rarely still in more than one person. Still, for a grant making charity of small or medium size and endowed with liquid assets, the non-autonomous form is perfectly sufficient, and,

since these trusts are not subject to civil law supervision, do not have the often quite cumbersome procedures of annual general meetings to deal with, and only require a very modest endowment, they are considered the easiest possible way of organizing a German charity.

One further aspect of foundations needs to be mentioned. While the number of autonomous and non-autonomous foundations in Germany can be estimated at about 12,000, there exist about 100,000 foundations under church law that are commonly not included among the foundations at all. The legal owner of nearly every parish church in Germany is such a foundation, and numerous others, often centuries-old are tithes that in former times provided for the living of the local clergy. About all these, we know very little, since they come under the constitutional autonomy of the churches and are neither regulated nor of course supervised by government authorities. It is only when these foundations enter into activities beyond the sheer promulgation of the faith that they are treated by the government. And indeed, some of our largest charitable institutions are foundations of this type. In this context, it is interesting to note that the Churches do not usually consider themselves being private civil society organizations at all.

While the forms so far discussed are predominantly designed for and used by not-for-profit, other, corporate forms in particular, can attain tax exempt status if they conform to the same rules. In recent years, the not-for-profit limited company¹⁹ has become a serious option when organizing related businesses of foundations and associations and in setting up new charities. Tax exempt public companies²⁰ are rare but do exist; strangely but for good reason, several zoological gardens are organized in this fashion. These companies are of course in every way subject to corporate law as well as charity law. Cooperative societies today do not exist as tax exempt by their own will as expressed by their lobbying organizations, but there is now an undercurrent to revise this rigid position. This may seem exceedingly complicated, and would be more so if all the little details and historical remnants were to be included. Public bodies that

¹⁹ *Gemeinnuetzige GmbH*

²⁰ *Gemeinnuetzige AG*

perform basically the same services have also gone unmentioned although the large number of irregularities and borderline cases would merit dealing with them at some length.

IV. Charities under Fiscal Law

It has already been stated that German law grants tax exemption to legal entities in view of their charitable disposition and activity. Tax exemption²¹ entails exemption from income tax²², potentially from estate tax²³, and inheritance tax²⁴. It does not entail exemption from VAT, and the exemption from income tax is restricted to income from an endowment, from donations, and from certain related businesses, such as the operation of a hospital or a museum. The clause on related business has in recent years come under severe criticism from the European Union who see it as an impediment to fair competition, and the enforcement of substantial changes is to be expected.

Exemption is granted provided the legal entity meets very specific requirements in two very distinct fields. Primarily, the entity has to serve one or several purposes specified in the law. The law first groups charities under three headings:

1. charities serving the public good,²⁵
2. charities serving individuals in need,²⁶
3. charities serving church purposes²⁷.

While church purposes remain unspecified, and individuals in need are defined as being in need on the grounds of illness, age or financial deprivation, serving the public good

²¹ *Steuerbeguenstigung*

²² *Einkommensteuer*

²³ *Vermoegenssteuer*, currently not levied.

²⁴ *Erbschaftssteuer*

²⁵ *Gemeinnuetzige Zwecke*

²⁶ *Mildtaetige Zwecke*

²⁷ *Kirchliche Zwecke*

presents the biggest problem of definition. It is most specifically in this area that a complete revision is called for, since the existing list of purposes has been added to so often and for so many different reasons that a common definition is hardly apparent and indeed does not appear in the law at all. For no apparent reason, the purposes are grouped under three headings each of which comprise very diverse activities. A more detailed list of activities is only partly to be found in the law and has been modified by government without direct involvement of parliament. While obviously unofficial comprehensive lists exist for practical purposes, the legal sources are scattered over the most surprising legal documents²⁸. The list includes classical charitable purposes such as health, social services, the arts, youth care, education, and nature conservation, as well as some new ideals like ecology, and some rather absurd purposes such as amateur radio transmitting, flying model airplanes, or breeding dogs or playing chess within a membership organization. Interestingly, goals such as building democracy, furthering voluntary or community action and similar general purposes find no mention at all.

Under the general principle that any of these purposes has to be furthered by a legal entity, there exist a whole range of other rules to be observed. Again, some are obvious, such as that the public good has indeed to be furthered, and exclusively so. E.g. operating a museum is a charitable purpose only, if the museum is open to the public. Also, the statutes have to contain a stringent non-distribution clause, and there are restrictions on the percentage of management costs. Here again, there have been changes in recent years. A significant one is that professional fundraising involving much higher costs is now permissible.

Furthermore, an exempt entity must on principle carry out its charitable purposes itself. The collection and redistribution of funds to other exempt institutions is regarded as an legitimate exception. This indeed applies to all grant making foundations, but it is one of the reasons why grant making has never been seen as the prime purpose, let alone as the definitive element of a foundation in Germany. Moreover, an exempt

²⁸ While the basic legal source is the general tax law (*Abgabenordnung*), § 52, most of the recognized charitable purposes are listed more comprehensively in an annex to a government regulation on income tax, as they concern tax deduction for donors: *Anlage 1 zu § 48 Abs. 2 der Einkommensteuer-*

entity is compelled to spend its income within a year after the end of the year in which it has been received. This, obviously, is one of the rare instances, where rules for foundations differ from those that apply to other exempt bodies. They are not expected to spend their endowment; indeed there is no rule as to the percentage of it that has to be spent. Nor are there rules governing the nature of the investments. Generally speaking, however, there is no distinction in tax law between public charities and private foundations. Private foundations become public charities following their recognition as tax exempt bodies.

One other rule is also notable by its absence. While tax exempt bodies are required to file annual statements with the tax authorities, these are not made public. Nor are these bodies in any way compelled to publish any information whatsoever on their statutes, activities, finances, officers or any other matter. While those who are active in fund raising usually find it serves their interest to provide at least some information to the general public, those who are not, e.g. endowed foundations, more often than not are decidedly secretive²⁹. When the latest very minor reform of foundation law was enacted in 2002³⁰, it was suggested that a publication clause be introduced. The foundation lobby was successful in suppressing this suggestion.

Finally, the effect of tax exemption on donations should be mentioned. For the majority of listed purposes, tax exemption entails deductability of donations on the part of the donor. Following the principle of utility to the state, different purposes carry differing quotas of deductability, i.e. donations to research and the arts, as well as to help to individuals in need may be deducted up to 10% of the donor's taxable income, while 5% are permitted for all other purposes. Donating an endowment to a foundation, since 2000 carries a much higher and not income-related deductability³¹.

Durchführungsverordnung: Verzeichnis der Zwecke, die allgemein als besonders foerderungswuerdig im Sinne des § 10b Abs. 1 des Einkommensteuergesetzes anerkannt sind (ab 01.01.2000

²⁹ Less than 10% of all German foundations publish an annual report, less than 30% will provide figures on their endowment or budget on request. See Rainer Sprengel, *Statistiken zum deutschen Stiftungswesen, ein Forschungsbericht*, Berlin: Maecenata, 2001.

³⁰ *Gesetz zur Modernisierung des Stiftungsrechts 2002 (Bundesgesetzblatt I, S. 2634)*

³¹ *Gesetz zur weiteren steuerlichen Foerderung von Stiftungen 2000 (Bundesgesetzblatt I, S. 1034)*

V. Conclusion

As has been demonstrated, the principle of a charity in the German sense is that it is a legal entity destined to become active in the interest of society at large, theoretically disregarding private interests. The activity may extend to numerous fields, and distinctions as to the legal treatment of different activities are made only in regard to their usefulness to the state. The legal entities involved can be of very diverse nature, and again, preference to particular forms is accorded for reasons of public interest as defined by the state only. Civil law and tax law are intertwined while making some differences in regard to the nature of a legal entity. Over the past 25 years, charity legislation has undergone numerous amendments, none of which has changed the principle of recognition as developed in the 19th century, while many have been introduced for political reasons. A thorough revision in the light of recent societal development, the emergence of Civil Society as a separate agent of public affairs and a driving force of social change, has been suggested but not yet accomplished.

Whether a different systematic approach will be introduced as regards deductability of donations, whether tax exemption will in future be granted for reasons of approach, motive, and contribution to civil society rather than for those of usefulness to the state, whether consequently the not-for-profit, non-distribution aspect will gain supremacy over the charitable purpose aspect, whether new civil law forms will be developed like in Italy, and whether judgement on eligibility will pass from the tax authorities to an independent body like in the U.K., remains to be seen.
