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Johns Hopkins University Comparative Nonprofit Research Project - Country Report GERMANY

The Legal and Fiscal Provisions for Nonprofit Activities and Institutions

I. The Constitutional Background

According to the (not yet-) Constitution (termed *Grundgesetz/GG* = Basic Law) of May 23, 1949 the Federal Republic of Germany is

- a democratic and social Federal State (Art. 20 GG),
- a republican, democratic and social Constitutional State (Art. 28 I GG),

which can be characterized as a Social State (*Sozialstaat*). Thus, following the *Sozialstaatsgebot* (instruction to realize the social state) of the *Grundgesetz*, government is obliged to realize this kind of a public-benefit community.

However, this language does not mean that governments of all two levels of statehood (Federal Government on the one hand, State = *Land* Governments on the other hand and, incorporated into the latters' structures but enjoying a certain political and administrative autonomy, local governments) are entitled to organize a welfare state. Not using - deliberately - the terminology of the welfare state ideology in the post-war Constitution is a result of certain experiences in German history.

The feudal state of times before the constitutional state, which, in the beginning, was not yet a democratic state, used to look at itself as a welfare state, caring, by means of a police state, for the welfare of the community and its citizens. In addition, the Constitution-makers of the post-war period were heavily influenced by the recent and painful experiences of an absolute party-dictatorship (with welfare state-ambitions) which had got control of the state and invaded and, in fact, abolished civil liberties and humanitarien values down to the roots.

Thus, the Constitution-makers retreated to a rather liberal concept of organizing public affairs, with a division of labour between state and society and inside the public sector between Federal Government, *Länder* governements and local governments. Basic assumption of the Constitution is an open and pluralistic society wherein Human Rights are the foundation of a humane society, of peace and justice (Art. 1 II GG). Within such a society the individual may freely and publicly develop his or her personality (Art. 2 I GG). According to this concept the state, being a rational system of the use of public power, has neither a monopoly to care for the well-being of the community nor a mandate to act as a guardian of the citizen.

It is, in the first instance, up to society to become aware of

and define public needs and wants and to find solutions for them. In doing so individuals have the Civil or, in Constitutional terms, Basic Rights (*Grundrechte*) to voice their concerns and opinions freely (Art. 5 I GG), to assemble peacefully (Art. 8 GG) and to form associations and societies (Art. 9 I GG), may these be for private or public, political or vocational as well as trade purposes. If, for whatever reasons, there is a public deficit or demand to be observed, it may be up to the citizens'/voters' attention to care for remedy, be this by means of society or polity.

That means, if organized and effective action beyond 'society' is to be considered, a majority of voters is supposed to give respective governments a mandate for such actions. Therefore, the primary task of Federal or State governments is, according to the intentions of the fathers and mothers of the *Grundgesetz*, to care for law and order as the country's spiritual infra-structure as well as to care for the material infrastructure of the land and to secure inner peace, which encompasses also social peace and justice as the basics of the *Grundrechte* ('...to use abilities and energies in favor of the common weal of the German people, enhance its benefits, protect it from damages ... and to exercise justice for everyone' - taken from the official oath of the Federal President and the federal ministers, as stated in Art. 56 GG).

However, this vagueness gives governments, if willing, a rather active role in conflict resolution, and, envisageing future conflicts, in avoiding social unrest. The *Grundgesetz* gives some examples where there is a mandate for governments to regulate or to take up initiative:

- mothers are entitled to special attention and protection by the community, that means society a n d state (Art. 6 IV GG);
- education is a prerogative of the state, however, private schools may be founded (Art. 7 IV GG);
- student aid and the support of the sciences is a public task (Art. 74 No. 13 GG);
- the same applies to securing the economic viability of the country's hospitals (Art. 74 No. 19 a) GG) and
- its system of higher education and research (Art. 91 a) I No. 1 and Art. 91 b) GG).

But it was not only in in these fields that governments (in the 'old' Federal Republic) of all levels felt entitled to become active in 'producing' or providing collective goods, to take over functions which may have been reserved, in the eyes of the fathers and mothers of the Constitution, as a preserve of society. In pursuing such public tasks governments are even entitled to hand out subsidies, make grants or help otherwise with financial means (Art. 104 a) GG).

In trying to achieve social justice, to organize progress and to modernize society the state, subsequently, was transformed into what is now called an active state, a state of all sorts of social and other services and transfers (*Leistungsstaat*). In becoming used to this rôle the state sooner or later became

(sometimes in just remodelling old instruments) also an interventionist state with steering and re-distribution instruments of many kinds, an institution which tries to canalize the forces of society, especially the economic forces, into a certain direction.

Raison d'être for this was the intention to co-ordinate or even engineer rationally a stable and peaceful development of state and society according to an elitist-vision of the future, which was not only based on the *Sozialstaatsprinzip*, the working principle of the social state, but also on Art. 72 II No. 3 GG, wherein the Constitution-makers postulated a task to especially Federal government to care for the uniformity of the living conditions within the country. At the end all sorts of real or imaginated deficits in society are now looked at as of public relevance, needing governments' attention and action. Only the costs of such programs did restrict the public benefactors in becoming omnipotent, did, in fact, inspire also in Germany a debate on politcal alternatives in the sense of a civic society.

With the re-unification of Germany, that is the accession of the former German Democratic Republic (DDR) to the constitutional reach of the *Grundgesetz* the legal provisions to be detailed below are effective for the whole of the (new) Federal Republic of Germany.

II. Basics of the German Legal System

Whether a country's political system favours government activities over private initiative or allows such activities of private individuals, companies or associations and other institutions in fulfilling public tasks and providing collective goods is to be reflected in its legal system. Therefore, the law of charities and other nonprofits, that means associations and societies, companies and corporations, trusts and foundations, institutions and other lagal entities, the fiscal provisions for all sorts of nonprofit activities, and even the property rights, including the right of succession, do mean more than just technicalities. This all has to be recognized when, for example, considering to enhance the citizens' feeling of responsibility vis-á-vis the common good and to change a country's legal system in order to stimulate private investments and involvement in the charitable and/or nonprofit sector.

As for the technical details of philanthropy, of the 3rd Sector in the Federal Republic of Germany, its legal provisions for activities and institutions, there is one interesting observation to be made at the very beginning: it is, in a sense, a 'mixed economy'. In fact, we have in Germany a system of legal institutions, which are available in two legal systems: in the **private law** system and in the **public law** system.

(1) Private Law

The private law system comprises **Civil Law** as general law and specialized codes like **Commercial Law** or **Labour Law, Trade Law,**

Copy Right etc. Civil Law - in the sense of legal materials applicable to each and everybody - is mainly incorporated in the Civil Law Code (*Bürgerliches Gesetzbuch/BGB* of Aug. 18, 1896, effective since Jan. 1, 1900). Commercial Law is concentrated in the Commercial Law Code (*Handelsgesetzbuch/HGB* of May 10, 1897) and in several specialized codes for corporations, companies or co-operatives, which were separated in the past from the HGB or do regulate legal materials never considered by the HGB-makers.

(2) Public Law

The public law system comprises **Constitutional Law** (*Staatsrecht*) **Administrative Law** (*Verwaltungsrecht*) of the three levels of governments' concerns for public affairs: federal, state and local level, as well as - among others - **Fiscal Law** (*Steuerrecht*) and **Church Law** (*Kirchenrecht*).

In contrast to private law, which is governed by the principle of equality, public law is governed by the principle of subordination. According to this understanding the individual is either incorporated into or subject to systems of public power. Naturally, the relations and interactions among public institutions are also governed by public law. The differentiation between the two legal systems is of more recent times, dates back in Germany to the second half of the 19th century. Therefore, basic institutes and institutions in public law have been taken over from the body of private law. And very often, for the sake of simplicity or economy or for reasons of efficiency, private law also governs the transactions of public law bodies.

(3) Fiscal Law

In **Fiscal Law** the individual feels governments' hand in his/her purse, that means government beeing a partner - in the name of the common good, of affairs which are relevant to all and everybody - in the economic performance or the wealth of the citizens. Therefore, in this body of law the constitutional right of governments to tax, what to tax and to which extent to tax are specified as well as the individual's rights vis-á-vis the fiscal authorities, also the procedures in fiscal courts.

(4) Church Law

Church Law recognizes the historic autonomy of the main Churches in the country (Catholic Church, Prostestant Churches). Not only does the *Grundgesetz* guarantee (in Art. 4) religious freedom, but also does it extend (in Art. 140) the rights of the churches from the former so-called *Weimar Constitution/WRV* (of Aug. 11, 1919) into modern times. In these provisions (Art's 136 through 141) it is postulated that there is no more a State Church (*Staatskirche*). Instead, the churches do enjoy autonomy to the widest extent, only subject to the laws of the land in general. Existing churches maintain their public law status. New religious communities, normally subject to Civil Law, may gain

that status from the state by demonstrating by their constitution and membership that there is a certain guarantee for duration of existence. The churches with public law status do even enjoy the right to tax their members (Art. 137 VI WRV), the fisc being helpful in collecting these levies (for a fee).

III. BGB-Provisions For Nonprofit Activities

It has already been mentioned above that citizens do enjoy the basic rights to assemble peacefully and to form associations and societies. They may also voice their concerns freely in speech and in writing. A free press is guaranteed and there is no censorship. All this is helpful also for nonprofit and charitable activities.

What concerns the activities resulting from making use of these rights, they are more of a person-to-person relationship, that means helping people in need by paying attention. In order to make material transfers for their benefit the problem of property rights arises. In this respect Art. 14 I GG stipulates that private property is guaranteed by the Constitution, as well as the right of succession. But there is (in para. II) an expectation added: private property is an obligation, in using it one should keep the welfare of the community in mind. Obviously, the Constitution-makers did not want to enforce a general commandment on property owners how to use their material wealth. Instead, they paved a way for infringements of property rights by the law-makers short before confiscation or nationalization. Naturally, even in these cases a compensation has to be paid.

(1) Transfers For Nonprofit Purposes

What concerns material transfers for the benefit of the community or persons in need the BGB contains several instruments for such activities. Donations in general (*Schenkung* - para's 516 through 534 BGB, according to German law a contract) by living benefactors are being considered as well as inheritances and bequests in the law of succession (*Erbrecht* - para's 1922 through 2385 BGB). In both cases the principle of the autonomy of the individual prevails.

However, the rights of near relatives/family members have to be considered, especially in the law of succession. The donor or testator is not totally free in making such unselfish transfers. Parents, the spouse and children (as compulsory beneficiaries), if not heirs, are entitled to receive at least half of the estate, however, not in kind. Instead, they have a claim (e. g. against a charitable foundation) to be compensated by the heir in monetary terms. Thus, a benefactor can only make use (in the will) of half of his/her fortune for nonprofit purposes.

Donations of (living) individuals (e. g. to a charity) may be subject to similar claims. First of all, they are, for assessing the legal portion of this class of compulsory beneficiaries, to be incorporated into the estate if being transferred (to the

donee) within 10 years before the donor's death. In the end, this procedure reduces the portion of the heir. However, in some cases even the donee may be responsible to compensate the beneficiaries, for example if the heir is not obliged to do so. Thus, the donor's charitable foundation, set up within the time-span mentioned above and entrusted at that time with most of his/her fortune, may be obliged to pay back part of capital. Again, the original donation has not to be handed out to the beneficiaries. The charity can avoid that by compensating in cash.

(2) Private Law Institutions

As for the legal instruments to use for nonprofit purposes the BGB cares for associations (*Vereine* - para's 21 through 79), foundations and trusts (*Stiftungen* - para's 80 through 88).

Only in recent times instruments of the commercial law have been recognized as serving the same aims. Stock corporations (*Aktiengesellschaft/AG*), to a minor extent, and especially the limited liability company/public limited company (*Gesellschaft mit beschränkter Haftung/GmbH*) can be construed for nonprofit purposes (in subduing their capitalistic specialities).

Co-operatives (*Genossenschaften*), from the very beginning, do lack this capitalistic momentum since they are not aiming at making a profit to be distributed, but only trying to enhance the economic undertakings of their (small business, craftsmen, farmers etc.) members. Although being engaged in business activities, they are liciensed by the legal order not for profit. However, only in a wider sense do they belong to the nonprofit sector.

According to Art. 19 III GG the so-called basic rights do apply also to juridical persons as far as they, as originally human rights, are applicable to such an artificial construct.

a) Registered Associations

Although the BGB does not define an association, such organisations are generally understood to be voluntary alliances of a number of individuals (or juridical persons) in order to accomplish jointly and for a longer time a certain goal. They may be legal entities or not. If so, they, as well as similar corporate bodies in commercial law, do enjoy the status of a juridical person. That status, in general, has to be granted by the state. In the case of the nonprofit association (*Idealverein* - para. 21 BGB), however, this is an institution elaborated in non-contentious jurisdiction (*jurisdictio voluntaria/Reichs-gesetz über die Angelegenheit der freiwilligen Gerichtsbarkeit /FGG*): the local civil court (*Amtsgericht*), where the entity is supposed to have its seat. This court is neither part of government(s) nor of related public authorities. Among other civil affairs it is responsible for entering - after reviewing the lawful procedure of its founding - the association into a special register (*Vereinsregister*) with which juridical

personality is being conferred.

The term *Idealverein* which is widely used in literature, but not in the BGB itself, is misleading, since not only 'ideal', that means public interest-/nonprofit aims are to be pursued by such an association. Any lawful activity which is in line with the country's moral code can be the content, the purpose of an association.

Associations with economic aims (*wirtschaftliche Vereine* - para. 22 BGB) have to be registered with a state (*Land*) authority. This kind of coming into existence legally is known as the system of concession (*Konzessionssystem*). The law-makers at the turn of the century felt that for economic activities the citizens should turn to the legal instruments of commercial law since they are more appropriate for entering into risks and for being involved in market transactions. There, the argument goes, the legal order provides for more and stricter instruments to enable a juridical person to take part in business affairs and to protect the public at large from fraud and other misdemeanours. With the (misleading) term of 'aims to be pursued by business activities' in para. 22 BGB the BGB-makers intended to restrict associations to get too much involved in business. Therefore, the number of such associations is not very large.

However, in pursuing its ideal purposes an association may enter in such business activities which are helpful in fulfilling these (ideal) aims (*Nebenzweckprivileg* - related business activities are acceptable).

As for the internal organisation the statute-makers do enjoy a wide freedom of action (Vereinsautonomie). This means that the rules set up to run the association do have, internally, the quality of laws. This is especially true for the decision-making process where the principle of majority voting is to be applied. However, what concerns the affairs of the general assembly there is a certain minority protection provided by the law.

In addition, the association does enjoy the privilege to run its affairs by elected officers/directors (or one person only) according to the rules laid down in the statutes, which is to be seen as a realisation of the principle of self-government. The statutes have to provide for a membership assembly and a board of directors. A membership or general assembly is a must to be incorporated in the statutes, since such a body is treated in the BGB as one of two necessary legal instruments/organs (*Vereinsorgane*) of the juridical person. The other one is the board of directors who do represent the association in outside transactions. Annual meetings, however, are not necessary, instead, it is sufficient to hold meetings every second year.

Normally the association is open for new members which guarantees that the entitiy as such does go on despite a change in membership. However, the statutes may restrict the number of members or may ask for special qualities of would-be members to fulfil. This provision has led to constructions, especially in the nonprofit sector, where a charity has only, say, ten (voting) members (seven being the minimum for registration) and

does register thousands of donors on computer lists, sending them fund-raising materials and quasi-annual reports as if being members in the association. On the other hand, such options might be very helpful for governments (or business) to branch out with certain activities into the nonprofit sector by using private law-regulations in organizing a kind of 'private' or third party government.

A membership fee is not necessary to raise for running the association. Instead, in the eyes of the law-makers before the turn of the century, the voluntary involvement of the members and directors as well as donations and bequests, obviously, were sufficient to keep things going.

b) Associations Not Registered

For purposes not intended to last for long, for more informal interactions of (perhaps very small) groups of individuals or juridical persons the BGB (in para. 54) provides also an instrument: the unincorporated association/association not registered (*nichtrechtsfähige Vereine*). In such cases the people interested to band together for a time not specified in the statutes and to organize common activities do not want to undergo the difficulties of registering the institution and, lateron, to comply with the rules set up in the BGB for the registered association. For such initiatives the BGB forsees special regulations, especially in the field of representing the organization by its directors. In order to qualify as an association the entity is supposed to have at least a statute elaborating a corporate organisation, a membership assembly and a board of directors (one person is also acceptable). Again, membership may change, giving the organisation a certain stability beyond actual members.

Although the law-makers of yesteryear wanted the association not registered to be treated like a society (*Gesellschaft* - para's 705 through 740 BGB), a personal construct without juridical personality for reaching a common goal by investing material resources into a joint venture, this concept is no longer valid in jurisdiction and literature. There is, almost from the beginning, a clear tendency to be observed that more and more the rules for registered associations are being applied to these entities. At the turn of the century the politcal class of the country intended to have asssociations being registered and, thus, being under regulation, even control of the authorities. Associations not registered would have escaped these ambitions of a conservative/liberal political class. Subduing them to the legal procedures of the society, which does not fit at all the requirements of an open membership organisation, was looked at as making it difficult for them to live up to the expectations of the founding members and the members lateron. Coming out of secrecy by registration should have made life for them easier. But this concept did not work from the beginning. Therefore, the courts lateron felt entitled to retreat to the rules of the registered association in regulating this non-juridical person. Para. 54/First Sentence with its reference to the society (*Gesellschaft*) is no longer relevant.

c) Foundations

The system of concession introduced for economic associations does apply also to creating a foundation (*Stiftung*). Such an entity has to be registered (and lateron is regulated) by a state (*Land*) authority. In the first case, with the nonprofit association, the citizens do have a right to get their intentions through the court if they fulfill the legal requirements, commonly known as the system of normative rules (*Normativsystem*). This is not true for a foundation to undergo the administrative procedures of getting juridical personality. Although the courts, in recent times, did restrict the authorities' powers to grant or not to grant juridical personality, thus narrowing the gap between registration of an association and granting juridical personality to the foundation, there is still some room for arbitration.

As long as the BBG stipulates in § 80 that there has to be a special act of a state (*Land*) authority for setting up a foundation one cannot speak of a full freedom to establish foundations (*Normativsystem*), may the donor otherwise enjoy a wide freedom in organizing the foundation and, especially, entrusting that entity with aims to his/her likes, as long as these are in line with the law in general or are not in contradiction with good morals.

The foundation is an instrument of Civil Law, to be used by, originally, private individuals (or juridical persons) and to be endowed with their private wealth. The Civil Law Code-regulations, however, are very sketchy (para's 80 through 88 BGB and a couple of references here and there in the huge bulk of BGB-clauses). But quite some legal elements from the body of the law of associations (*Vereinsrecht*) do apply to foundation law (*Stiftungsrecht*) as well.

What brought public law into play is to be seen in the aims of the foundation: being of public interest. The law-makers before the turn of the century could not conceive a civic society wherein an individual could apply his/her wealth for all sorts of private or public benefit aims. These could be in contrast of what government ("the State") had defined to be in the interest of the common good. As with the association and in line with an old tradition of philosophical thoughts of the state as the guardian or tutor of the individual, it was intended to avoid pluralilstic, perhaps controversial or even counter-productive initiatives in the public interest. The bourgeoisie, having wrestled power from the feudal classes and ecclesiastical forces in getting - more or less democratically, that means in elections - control of the state tried to protect its accomplishments against the old social forces and, especially, new social forces, that is the working class.

The German *Reich*, being a federal state, had a rather weak federal governement in the beginning. In order to gain acceptance among the *Bundesstaaten* (Federal States) it had to restrict itself in concentrating too much power in central administrative units. Therefore, foundations in general were thought to be a preserve of the States. Their coming into

exixtence and their regulation had to be left to state authorities, being tightly connected with their public law system. However, this reasoning can be seen as a very early realization of the principle of subsidiarity according to which the social or political unit nearest to a problem, obviously the one with the most problem solving-capacity, is supposed to take over a task at first hand before a more distant, but more powerful unit may take over. Today, legal experts have come to the conclusion that the Länder preserve in respect to regulating foundations is an outdated concept. Under the governance of the *Grundgesetz* the federal unit in the republic is entitled to regulate foundation law as a federal law. If the federal law makers would do so, they have, more or less, to adhere to the liberal principles elaborated in the law of associations.

What makes the foundation a *Stiftung*, what legal elements the donor has to observe when contemplating to set up such an entity in law is the following:

- there has to be a clear intention to set up a foundation, laid down in the declaration of foundation (*Stiftungs-geschäft*),
- which implies that the institution to come into existence is to last for a period of great length (theoretically 'for ever'),
- most important however, being the raison d'être of the institute: the donor has to state in this founding document the aim(s) of the foundation (being in the public interest),
- resources (in kind or cash) have to be vested (commonly by the donor - other grantors, if legally committed to invest, are acceptable), the income of which is supposed to enable the foundation lateron to fulfil the stated aims adequately,
- there has to be some sort of organizational set-up, elaborated in the statutes as the governing instrument of the foundation, with which individuals come into power (as a board of directors or trustees as the only necessary organ of the juridical person - according to the BGB one person may be sufficient) and derive their respective offices from.

The BGB does not differentiate between types of foundations, except such foundations the administration of which is entrusted to a public authority. For them the right of representation and the responsibilities for transactions are in accordance with those in administrative law. Neither does the BGB differentiate between those (traditional) foundations which run a (mostly) social institutiton (*Anstalttsstiftung*) or those (more modern) foundations (*Kapitalstiftung*) which derive an income from investment (for distribution to a stated constituency: either a class of individuals or charitable or nonprofit or public institutions). The law-makers of the BGB had the latter type in mind and referred the *Anstaltsstiftung* to the regulations about capital foundations.

Interesting enough, although dating back to legal traditions of the 19th century with such special regulations for the institutional type of foundations and historically the predecessor of today's *Stiftungen*, the modern *Land* foundation laws did follw suit in this respect the Civil Law Code

principle. On the other hand, the law-makers of these laws, which are part of the body of *Land* Administrative Law, did continue with some ancient specialities:

- community or local foundations (*örtliche/kommunale Stiftung*), which fullfil their aims within the community and are administered by local government (while their BoT may be constituted by a majority of independent citizens),
- church foundations (*kirchliche Stiftung*), which are, concerning aims and administration, closely connected with a Church (in fact are 'accepted' by that Church as 'belonging' to its institutions and establishments - in the sense of Art. 138 II WRV),
- family foundations (*Familienstiftung*), whose recipients of generosity are to be found among worthy family members.

What is common to these specialities in the German foundation world is their coming into existence by state authorization. Lateron however, the *Land* authority for regulating these foundations may be different. In the case of local foundations they are subject, instead, to the rules set up for state regulation of local governments. Since the Churches (as public law bodies) are supposed to enjoy autonomy in internal affairs to the widest extent state regulation is substituted by church regulations (being incorporated in special ecclesiastical foundation laws). Only if such regulations do exist the *Land* authority gives way to Church authority. Finally, in the case of family foundations, in most Federal States the foundation law is less stringent with them than with charitable foundations. This negligeant approach is based on the assumption that in family foundations does exist something like a controlling or supervisory interest of family members to care for an orderly management, thus, relieving governement from the task of regulating this kind of (rather private) foundations. An older traditon of legal thinking even contemplated the family members eligible for foundation support to be a corporate body next to the foundation, thus voicing a lawful interset in running the foundation's affairs. Government intervention in family affairs was deemed unthinkable. Such family foundations, therefore, were placed in quite some older legal systems, especially that of the former Prussia, under a very mild regulation of the courts.

The German world of foundations is a sort of a mixed economy. Therefore, there are some realizations which have names to mention shortly. Fellowship funds or foundations, scientific foundations, welfare trusts or foundations, arts foundations etc. are self-explenatory. With the so-called company foundation (*Unternehmensstiftung* or *Unternehmensträgerstiftung*) the case is different. In such cases the endowment of the foundation is a business, be it the foundation owning and running the business or just owning the (majority of) shares in a company. With such an arrangement the donor intends to perpetuate his personal values in running a business beyond his death, entrusting the BoT with this task and introducing government to guarantee just this. The ideal solution for such intentions would have been the family foundation with almost no state regulation caring for the business of the donor and restricting the distribution of income to family members to a minimum, creating something like a

savings bank for company purposes. Among experts, especially lawyers, using this instrument for nominally charitable purposes only is heavily contested. State regulation authorities have become very cautious in recent times in granting approval to such intentions. However, judged from the rich literture of consultants and in academic papers there seems to be great interest among entrepreneurs for such solutions to guarantee continuity in running a business. However, realizations of this type of foundation/business-connection are rather scarce (perhaps about two hundred).

d) Trusts

Although the German Civil Law Code, in difference from the law of registered associations (in para. 54 BGB), does not know of the unincorporated version of a foundation, that is the trust (an entity not being a juridical person), this instrument not only does exist, but is also to be found, more or less in secret, in the BGB. Already in the process of formulating the BGB the law-makers felt they should not regulate the law of material transactions or dispositions in full. Instead, custom, jurisdiction and interpretation by the legal profession should have its ways and says in shaping new instruments and legal institutes. However, it was recognized from the beginning that trusts did exist since old times and that there is some regulation in public law of the States, especially when such entities were administered by public institutions (local community, a Church or a university as traditional corporate trustees for private individuals' intentions to help in the long run, that is foundationwise, with their material wealth to achieve certain aims in the public interest).

Not being a legal entity itself the trust German style has to rely for property rights questions and material transactions on a natural or juridical (private law- or public law-) person. Assets are to be held (as owner, but in trust) by that 'person' which normally fulfils the entity's purposes. Only for public law-juridical persons does exist a system of regulation and observation: the internal bureaucratic supervision of the superior authority. For private law trustees there is almost no such regulation. Theoretically, it exists in civil law a certain *Land* authority, which may differ in respect to its bureaucratic 'home' slightly from one Land to the other. But in order to become active, this authority has to know about such trusts and about abuses in their management. Since there is no instrument to help these authorities in achieving such knowledge the regulation in the BGB is a rather lame affair.

The background for these legal provisions is to be found in the law of donations among living individuals (or juridical persons) and in the law of succession in the BGB (para's 525 and 1940 BGB respectively). If material transactions have been made in the public interest there is, finally, a public (*Land*) authority to care for the (deceased) donor's will to be fulfilled. To invest the property transferred and to use only the proceeds in the public interest would be such (contract or testamentary) instructions of deceased (or otherwise dissolved) donors. To

care for the fulfilment of these private provisions is one of the functions of the State authority. However, it has no such legal title in changing, if necessary, a trust's purposes or to dissolve that entity.

Only in two State laws do we find reference to trusts: the State of North-Rhine Westphalia and the (at the end democratic) DDR (the law of which is now the common foundation law for the five new *Länder*) do mention this instrument in two paragraphs, which gave it nominal acceptance in public law. But since the Land law-makers have to observe certain restrictions when touching private law-affairs (as being a preserve of federal law), their regulation does concentrate mainly on such units in trusteeship of public bodies.

There are three basic questions facing trustors and trustees considering to enter into a trust agreement:

- Who is (generally) to guarantee the fulfilment of the aims of a trust under a private law-agreement and (especially) who is to care for the trust's existence if the private trustee goes out of business?
- What happens in a contract relationship (as trust document) with the trust capital if the trustor (the trustor's heirs or the trustor's custodian in bankruptcy) reclaims that capital?
- Which regulations take effect when the trust instrument needs a remodelling in order to guarantee a lawful procedure in the interest of the trustor/donor?

So far, the few precedents in the courts have tried to maintain the will of the donor, that is the trust as his/her instrument for doing good beyond personal existence, although the special regulations for enacting the trust (law of succession, contract law, administrative law) had to be used. Legal literature, however, advocates to use foundation law in analogy.

V. Public Law

(1) Administrative Responsibilities vis-á-vis Associations

Although associations may be founded according to the system of normative rules freely and independently from state intervention, there does exist a remainder of the age of tight regulation of the coming into existence of associations and societies and their day-to-day affairs. The federal Law of Associations (*Vereinsgesetz* of August 5, 1964) does give, in the interest of the *ordre public*, special *Land* authorities or the Federal Ministry of Interior a mandate to check the applications at the courts (*Vereinsregister*) and to postpone registration until some objections have been cleared and perhaps adjusted by the founders. In such cases of objection the founders or the association not yet registered have to be informed of these objections and are intitled to react to them, either in conforming to them or in going to the courts. Political parties or religious groups are excluded from this regime. Trade unions and employers' federations do enjoy also some special privileges.

(2) Legal Institutions

Most important among public law regulations concerning Nonprofit Sector institutions is Administrative Law (*Verwaltungsrecht*) which is to be found in Federal as well as in *Land* laws. Federal as well as State governments do have basicly three legal institutions at hand to organize public interest activities outside their own bureaucracies:

- corporations (*Körperschaften des öffentlichen Rechts*),
- institutions (*Anstalten des öffentlichen Rechts*) and
- foundations (*Stiftungen des öffentlichen Rechts*).

In all cases the authority may decide to give legal personality to the body created or not. The legal consequences are to be treated as already detailed for the comparable Civil Law situation. An institution with legal personality has to be based on an act of law or at least on a comparable authorization of the public creator. Therefore, lacking this power, local governments are not entitled to set up such entities. They have to restrict themselves to create bodies without legal personality or to ask 'their' respective *Land* government for help in making such a law.

That law or act does constitute the organization and gives it its statutes. As in public authorities such entities are in respect to their functioning restricted by law or statute to their stated aims, which means the validity of the *ultra vires doctrine* for public law-bodies. What concerns regulation, that is checking of the fulfilment of aims and auditing the fiscal affairs of these entities Federal and State laws often are vague, except that the regulatory authority is stated (mostly the authority which initiated the entity). In such cases the instruments provided for by the federal Law on Budgetary Principles (*Haushaltsgrundsätzegesetz* of August 19, 1969), the Federal or Land Budget Laws (*Bundeshaushaltsordnung/Landeshaushaltsordnungen*) or special Land Organization Laws (*Landesorganisationsgesetze*) are to be used. For the so-called local foundations the state laws on local communities (*Gemeindeordnungen*) do provide the legal framework, incorporating even some aspects of the civil law foundations (mostly concerning regulation).

Mostly the entities of public law are intended for use of public authorities. However, individuals are not excluded from making use of them. But they do not have a legal right to do so. They have to seek the consent of the authorities concerned in order to get their intentions through the respectiv registration or approval process. It is a favour of government to admit individuals to the state of public law. In such cases the individual(s) have to concede that their intentions are to be incoporated into a bureaucratic net, 'belonging' to a certain public authority and being part of the State's institutions and service units.

(a) Corporations

There is no special body of laws, neither in Federal nor in State legislation, which defines the different legal forms and establishes the rules for setting them up. Instead, it is common practice and case law as well as legal opinion that certain features are typical. According to this the *Körperschaft des öffentlichen Rechts* is supposed to be a corparate body, that is having members, enjoying legal personality (or not) and being created by act of law or comparative legislative initiative for pursuing public interests (while certain private interests may be acceptable).

One more typified corporate body is the public law-co-operative (*Genossenschaft*), mostly found in the field of forestry, hunting, fishing, water protection, and diking. For several types federal laws do provide a general framework, while the Land laws care for the details, especially for their coming into existence and their regulation. Insofar the situation is comparable with that of the civil law foundations.

This is especially true for the initiative to bring them into existence. The founding impetus does have to come from individuals. The state just accepts this and, in approving their aims as being in the public interest, does grant the privilege of a public law institution, which includes automatically certain fiscal privileges.

(b) Institutions

The *Anstalt des öffentlichen Rechts* (enjoying legal personality or not) is supposed to be a unit of material goods and qualified personell for handling these in the interest of a permanent public aim, closely connected with a given authority. The element of duration brings the *Anstalt* close to the *Stiftung*. Typical institutions of this kind are public hospitals and savings banks as well as public radio and TV stations. The university German style is a mixed economy: corporation on the one hand, thus enjoying a certain degree of autonomy in internal affairs by decision-making of its members (teaching staff, administrative staff and students), and *Anstalt* on the other hand, thus being subject to government's regulations what concerns some of their inner structures and the use of finance.

(c) Foundations

Normally the *Stiftung des öffentlichen Rechts* is - or used to be - the brainchild of an individual, providing his/her private fortune for a public aim of his/her choice and entrusting the management of the entity to a public authority. Some more private elements are acceptable, such as a board of directors or trustees (consisting even in the majority of private individuals), preference among the beneficiaries of foundation largesse for members of the donor's family or place of birth, administration of certains assets according to the will of the donor etc. More stringent than in civil law is the fact that the

aims of such foundations are really to be of public interest.

Under the regime of a democratic state such public law foundations did gain more and more autonomy in the recent past. The courts did establish rules of condact for their management and regulation, limiting the authorities' powers to intervene. This was especially true in cases where the Land Foundations Law, as in several, mostly southern German States, do invite individuals to set up also public law foundations. Here, the courts felt invited to protect the donor's case vis-â-vis government. Therefore, in these States, where the *Land* Foundation Law provides also for a set of rules for this type of foundation there is almost no difference in the regulation and in the attitude of government vis-â-vis such foundations.