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Membership of an association: contract and status

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Joining an association implies the conclusion of a « contract of status » between the future member and the association, the former agreeing to join the latter, and the latter agreeing to receive him or her into its ranks. The ability to participate in the decisions of the association or to request the convening of a general assembly depends on membership, and it is preferable for the association to keep a register of members, to avoid uncertainties and disputes in this regard.

Summary

[1] The Parish A. is a Swiss association according to Art. 60 CC. According to its statutes, it distinguishes between parishioners – who adhere to the faith recognized by the Parish and attend the services – and members who can participate in the general assembly, who must also (i) contribute financially or in nature (ii) be domiciled in the region and (iii) be over the age of 18.

[2] The Parish is managed by the 11-member Council. Nine members are elected by the General Assembly and two are members *ex officio*: the Rector, who presides over the Council and the General Assembly (appointed by the Church), and the *marguiller*, a lay person in charge of the maintenance of the church. The Council's duties include convening the General Assembly and keeping the register of members.

[3] The Parish has encountered financial difficulties, particularly due to the restoration of its church. At a first General Assembly in 2016, a membership fee was discussed but not decided upon, as the item was not on the agenda. A second General Assembly in 2017 could not be held because of a dispute over the membership of some parishioners who had refused to leave the premises.

[4] 107 people – whose status as members or «simple» parishioners is disputed – then asked for an extraordinary General Assembly to be called, whose agenda would be the institution of a special control on the restoration of the church, the exclusion of four members of the Council, the election of a *marguiller ad interim*, modification of the statutes and a decision on relations with a third company. In a second step, they requested that the exclusion of

members be put to a vote, and the election of a president for the General Assembly.

[5] The dispute mainly concerns the membership status of the 107 signatories of the call for an extraordinary General Assembly, with the Parish asserting that the quorum for convening it is not met.

[6] The application was rejected at first instance by the Geneva courts, but this decision was overturned on appeal, and the cantonal court ordered the convening of the General Assembly. The Parish appeals to the Federal Court.

Analysis of the Federal Court

[7] Disputes relating to the convening of a General Assembly are not of a pecuniary nature. The other conditions being met, the recourse in civil matters is admissible (c. 1).

[8] The convening of a General Assembly if one-fifth of the members request it (Art. 64(3) CC) is one of the few mandatory provisions of association law, which otherwise leaves a great deal of room for maneuver in organizational matters (c. 3).

[9] In procedural terms, the convening of a General Assembly is an act of non-contentious jurisdiction, which does not have the material effect of *res judicata*, but an organizational effect, making it possible to override the unjustified refusal of an organ. Only the formal conditions are verified by the court seized – here the demand to have an extraordinary General Assembly convened with a particular agenda (c. 3.4.1.1).

[10] The summary procedure applies, as does the inquisitorial maxim, which does not, however, exempt the parties from cooperating in establishing the facts (c. 3.4.1.2).

[11] The status of «member» and not only of «parishioner» is decisive and contentious here. The law does not fix the conditions under which a person may join an association. There is a consensus that this is a matter of a contract of status: i.e. a bilateral legal act by which the candidate and the association reciprocally and concordantly express their intent to see the candidate join the association. Once the contract has been concluded, the candidate becomes a member, and its relations with the association are regulated by the statutes. However, the association is not obliged to accept a candidate unless otherwise provided for in the articles of association (c. 3.1-3.3).

[12] The contract of status is not subject to any particular form (Art. 70(1) CC and Art. 11 CO *e contrario*), unless otherwise provided in the articles of association. An exchange of oral or even tacit expressions of will is sufficient, unless otherwise provided for in the Articles of Association (c. 3.3.1).

[13] In the case at hand, the application for membership did not need to take a particular form, and the conditions set were difficult to prove, typically the contribution made to the association: the statutes did not fix a minimum amount, and voluntary work was a form of contribution (c. 3.3.3.3).

[14] The Parish only recognized the membership status of 22 persons out of 157 listed members (14%, i.e. less than the 20% threshold set by Art. 64 (3) CC). However, another 20 people claimed to become members, of whom 1 0 *prima facie* met the conditions for membership, which would be sufficient (32 members, or 20.38%). These declarations were not accompanied by any other means of proof, but the Parish kept a register of its members, which it refused to produce. Partial redactions, preserving the personality of the members, were however conceivable. The judge could therefore conclude without arbitrariness that the quorum was met by assessing the evidence at his disposal (c. 3.4.2).

[15] The cantonal court could therefore rightly order the convening of the General Assembly. The only point in the cantonal decision that the Federal Court did not find acceptable was the election of the Rector. Although the election of the executive board is in principle a competence of the General Assembly (Art. 65(1) CC), this provision is not mandatory. The statutes provide here that the Rector is appointed by the church hierarchy. Since this is clearly outside the competence of the General Assembly, the corresponding decision would be null and void (Art. 75 CC). This item must therefore be removed from the agenda of the General Assembly (c. 5.2–5.3).

[16] The election of the *marguillier* should in principle also be removed from the competence of the general assembly, but this is an election *ad interim*, which is not provided for – nor *a fortiori* excluded – by the statutes. The

possible nullity of this element is not obvious (c. 5.3).

[17] The appeal is admitted on the election of the Rector only. The Federal Court orders a new General Assembly to be held on the Sunday following the 40th day after the notification of the judgment, keeping the other items on the agenda (c. 6).

Commentary

[18] It is no coincidence that the conflict between the Parish and its members focuses on two of the few mandatory provisions of the law of association (Art. 64 para. 3 and Art. 75 CC). This judgment illustrates the tension between the almost total flexibility of the law of association and the need for a legal framework and recourse to the judge when the situation requires it.

[19] The Church is founded on the notion of community (the Greek root of the French «église» or the Italian «chiesa», ἐκκλησία, means «assembly»). However, this idea is not immediately superimposable on an association in the sense of civil law. For reasons of legal certainty – but above all in the interest of the institution as well as its members – it is necessary to know precisely who is and who is not a member of an association and can participate in forming the will of the legal person. Otherwise, there is a too great risk that third parties may interfere without right in the affairs of the association.

[20] The opposite extreme, where the conduct of the association is left to a few individuals with no control over the members – especially since the members cannot prove their membership or voting rights – is also undesirable.

[21] The articles of association should therefore provide criteria for determining who is and who is not a member, and it is preferable to maintain a register of members. Here, such a register had to be kept according to the statutes, and it is surprising that the Parish refused to produce it, even if it was redacted. The judge could therefore validly consider that the absence of counter-evidence meant (i) that no register was kept, (ii) that the register was not up to date, or (iii) that the register was not properly kept and would have led to challenges by the members, and therefore that its probative value was limited.

[22] The payment of a membership fee – which must be provided for in the statutes (Art. 71 CC) – is not an obligation. Since the adoption of Art. 75a CC, put in force on 1st June 2005, the existence of membership fees no longer has any impact on the debts of the association or its members (the old law provided that members could be held liable for the debts of the association in the absence of statutory membership fees: GEISSBÜHLER GRÉGOIRE, L'association insolvable: quelles responsabilités? in Heckendorn Urscheler Lukas / Topaz Druckman Karen (eds.), Les difficultés économiques en droit, Schulthess 2015, p. 315 ff.).

[23] A contribution fixed in advance (and independent of the collection at the end of the religious service or spontaneous contributions), however, retains an important probative value. By sending an invoice for the membership fee, the association shows that it recognizes the recipient as a member, and the recipient shows that he or she is a member of the association by paying – and then obtaining a receipt, if necessary.

[24] The desire to preserve the more modest members can be taken into account by, for example, providing for an essentially symbolic membership fee – in the primary sense of the term – and by continuing to encourage other benefits in favor of the association, in money or in kind.

[25] This type of relationship is not restricted to the religious sphere. A parallel can be drawn with student associations: the statutes generally provide that members «may» be all persons with student status in a given faculty or program (e.g. a law or philosophy students' association). In the absence of proof of membership, the association may either become unmanageable because it is unable to determine who its members are, or it may be restricted to a few uncontrolled insiders. In either case, the association's representativeness is diminished.

[26] The status contract is also an interesting figure, because it is ephemeral (despite the necessarily lasting nature of participation in an association): it only exists for the time of accession, and disappears as soon as it is concluded – legal relations then being governed by the statutes.

[27] Its completion is governed by the general part of the law of obligations: most cases will fall under the classical

contract law theory of offer and acceptance – both the member and the association can start negotiations, even if the first hypothesis seems more common. It is also possible to envisage, if the association offers to any interested and eligible person to join it, whether it is an invitation to make an offer (Art. 7 CO; if the association must then «validate» the application), or even a kind of conditional public promise (Art. 8 CO; if the association intends to be bound as soon as a member offers to join it). The latter generally may be assumed less quickly.

[28] The articles of association may not directly bind the applicant before the conclusion of the contract of status or impose special conditions, as the applicant is not already a member of the association. In order to overcome this difficulty, the statutes must be considered as an integral part of the contract, as could be the case with general conditions. This makes it possible to reconcile the law of obligations and the law of the association, and to incorporate any reservations of form or other conditions of membership.

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