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# Jehovah's Witnesses v. Land Berlin: Requiring Religious Communities Seeking Public Corporation Status in Germany to Satisfy the "Meaning and Purpose of Corporation Status" Test

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*Jehovah's Witnesses v. Land Berlin: Requiring  
Religious Communities Seeking Public  
Corporation Status in Germany to Satisfy  
the "Meaning and Purpose of  
Corporation Status" Test*

I. INTRODUCTION

Since 1949, Germany has had a strong commitment to neutrality in church-state relations.<sup>1</sup> Such a commitment to neutrality prevents the German government from being "identified with a[n] [established] Church" and from taking "decisive action in the affairs of religious communities."<sup>2</sup> In contrast "to the strong separationist mold of American church-state relations,"<sup>3</sup> the German neutrality principle still allows a strong form of cooperation between the government and certain religious communities<sup>4</sup> in Germany.<sup>5</sup>

This cooperation between the German government and certain religious communities has resulted in a two-tiered church-state structure in Germany.<sup>6</sup> At one level, religious communi

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1. See Gerhard Robbers, *Minority Churches in Germany*, 10 EUR. CONSORTIUM FOR CHURCH-STATE RES. 153, 156 (stating that the German Basic Law of 1949 obliges the state to "complete neutrality").

2. Gerhard Robbers, *State and Church in Germany*, in STATE AND CHURCH IN THE EUROPEAN UNION 57, 60 (Gerhard Robbers ed., 1996) (stating that the Basic Law, adopted in 1949, structured the German state-church system around neutrality, tolerance, and parity); see also GRUNDGESETZ [Constitution] [GG] art. 137(1) and (3) (F.R.G.).

3. DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 505 (2d ed. 1997).

4. See Martin Heckel, *The Impact of Religious Rules on Public Life in Germany*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 191, 201 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) ("[T]he [German] constitution does not refer to 'the Church,' but speaks simply of 'religious communities'.").

5. See Robbers, *supra* note 2, at 60 (describing Germany's church-state system, in comparison with other European countries, as "a middle of the road approach between that of having a State Church and having a strict separation between Church and State").

6. See *id.* at 61-62 ("The religious communities with large memberships in Germany, but also a considerable number of the smaller religious communities, have the status of public corporations. . . . Other religious communities receive their legal

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ties can be recognized as private organizations under private law.<sup>7</sup> Private organization status is relatively easy to obtain and entitles a religious community to religious freedom protections under the German constitution.<sup>8</sup> At the next level, religious communities can apply for and obtain public corporation status under public law.<sup>9</sup> In order for a religious community to obtain public corporation status, it must satisfy a permanency requirement and demonstrate *Rechtstreue* (loyalty to the law).<sup>10</sup> Public corporation status is more difficult to obtain than private organization status because it entitles the religious community not only to the religious freedoms guaranteed under the German constitution but also to numerous other privileges from the German government.<sup>11</sup>

Because public corporation status confers extensive privileges and prestige on qualifying religious communities, the Jehovah's Witnesses (hereinafter "Witnesses")<sup>12</sup> have sought to

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capacity as a result of the civil law. They will be at the least private registered societies.").

7. *See id.*

8. *See infra* Part II.B.2.a.

9. *See* Robbers, *supra* note 2, at 61-62.

10. *See infra* Part II.B.2.b.

11. *See* W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 4, at 1, 20-21. Durham wrote:

[T]he cooperationist state may provide significant funding to various church-related activities, such as religious education or maintenance of churches, payment of clergy and so forth. . . . The state may also cooperate in helping with the gathering of contributions (e.g., the withholding of 'church tax' in Germany). Cooperationist countries frequently have patterns of aid or assistance that benefit larger denominations in particular.

*Id.* *See also* Robbers, *supra* note 1, at 159. Robbers noted that

[t]he most important rights of the religious communities as corporations under public law are as follows:

- The right to raise church taxes;
- The ability to have civil servants;
- The ability to disciplinary [sic] power over their civil servants;
- The right to create public law things (res sacrae etc.);
- Community organs form public offices;
- Exemption from bankruptcy [sic] law.

*Id.* It should also be noted that as far as the members of religious communities are concerned, it is very prestigious to belong to a religious community that is a public corporation.

12. *See* WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., 1997 YEARBOOK OF JEHOVAH'S WITNESSES 36 (1997) (stating that there are 170,040 Witnesses in Germany out of a population of 81,817,499).

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ob-tain public corporation status in Germany.<sup>13</sup> Most recently, *Land Berlin* (i.e., the State of Berlin, which is structurally similar to a state in the United States) denied the Witnesses' request for public corporation status.<sup>14</sup> Subsequently the Federal Administrative Court of Germany, on June 22, 1995, agreed with *Land Berlin* that the Witnesses were not entitled to public corporation status.<sup>15</sup> Although the court admitted that the Witnesses had met the "permanency" requirement under Articles 137(5) and 140<sup>16</sup> of the Basic Law and that the Witnesses were *Rechtstreue* (loyal to the law),<sup>17</sup> the court denied the Witnesses public corporation status because they failed to meet a hitherto unheard of "meaning and purpose of a corporation" test.<sup>18</sup> The constitutional issues raised by the Federal Administrative Court's decision are now being appealed to Germany's Federal Constitutional Court.<sup>19</sup>

This Note examines the Federal Administrative Court's decision, *Jehovah's Witnesses v. Land Berlin*. Part II provides the background of religious freedom and separation of church and state in Germany. Part III contains the facts of the *Jehovah's Witnesses* case and a detailed paraphrasing of the court's reasoning. Finally, Part IV analyzes the reasoning of the court. This Note concludes that the Federal Administrative Court erred in applying the "meaning and purpose of corporation status" test; instead, the court should have deemed it sufficient that the Witnesses had met both the constitutional

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13. See *Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] [Federal Administrative Court]*, reprinted in 36 *NEUE JURISTISCHE WOCHENSCHRIFT* 2396 (1997) [hereinafter *Entscheidungen*].

14. See *id.*

15. See *id.* (observing that while the holding is probably limited just to Berlin, the Court is the highest administrative court in Germany and will undoubtedly affect whether other *Laender* will confer the status on the Witnesses).

16. See *GRUNDGESETZ [GG] art. 137 (F.R.G.)*, the text of which is reprinted *infra* note 23.

17. See *Entscheidungen*, *supra* note 13, at 2398.

18. See *id.* (stating that the key ingredient of the "meaning and purpose of corporation status" test is cooperation between the religious community and the state).

19. See *Jehovah's Witnesses to Appeal to Germany's Supreme Court*, *AGENCE FRANCE-PRESSE*, Aug. 14, 1997, available in 1997 WL 13377103 ("Germany's Jehovah's Witnesses said Thursday they would appeal to the supreme court after being denied privileges granted to other Christian denominations.").

“permanency” and the *Rechtstreue* (loyalty to the law) requirements.

## II. BACKGROUND

In the post-World War II era, Germany—in part because of the intense desire to distance itself from the tragic events of the National Socialist period—has typically gone the extra mile in protecting human rights.<sup>20</sup> In particular, Germany has established an enviable record in its protection of religious freedom. This section of the Note will examine the establishment and current state of religious freedom and church-state relations in Germany. In addition, this section will briefly examine pertinent religious doctrines of the Witnesses and their history in Germany.

### A. *Religious Freedom in Germany*

In keeping with the expansion of religious freedoms throughout the world,<sup>21</sup> Germany’s law on religious freedom is “liberal in principle and tries to avoid the constraints of anti-religious radicalism.”<sup>22</sup> Beginning in 1919, Germany ratified the so-called Weimar Constitution, which included five articles protecting religious freedom.<sup>23</sup> These articles were later

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20. See KOMMERS, *supra* note 3, at 298. Kommers wrote:

The Basic Law places human dignity at the center of its scheme of constitutional values. Article I (I) declares: “The dignity of man is inviolable. To respect and protect it is the duty of all state authority.” Paragraph 2 underlines the inseparability of human dignity and basic rights: “The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world.” Thus basic rights and human dignity as a normative concept embrace one another in German constitutional law.

*Id.*

21. See Durham, *supra* note 11, at 3.

22. Heckel, *supra* note 4, at 192 (emphasis deleted). Some evidence suggests that antireligious radicalism may yet exist in Germany, however, particularly in regard to the Scientologists. For further reading see generally WHAT AMERICA NEEDS TO KNOW ABOUT DISCRIMINATION IN GERMANY (1997); Emily A. Moseley, *Defining Religious Tolerance: German Policy Toward the Church of Scientology*, 30 VAND. J. TRANSNAT’L L. 1129 (1997); A *Sham in Our Midst*, DIE ZEIT, Aug. 23, 1996 <<http://gsar.org/g60823ae.htm>>; Ray Moseley, *In Germany, Scientology Distrusted and Very Unwelcome*, CHI. TRIB., Feb. 16, 1997, available in 1997 WL 3521474; *The Scientology Problem*, WALL ST. J. INTERACTIVE ED., Mar. 25, 1997 <<http://www2.dgsys.com/~alerma/wsj.html>>. But see Richard Behar, *The Thriving Cult of Greed and Power*, TIME, May 6, 1991, available in 1991 WL 3118352.

23. See GRUNDGESETZ [GG] art. 136-139, 141 (F.R.G.). The pertinent Article for

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incorporated into the German *Grundgesetz* (i.e., the Basic Law or Constitution) of 1949 by Article 140.<sup>24</sup> The centerpiece of religious protectionism in the 1949 Basic Law is Article 4, which reads: “(1) Freedom of faith, of conscience, and of creed, religious or ideological, shall be inviolable. (2) The undisturbed practice of religion is guaranteed. (3) No one may be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.”<sup>25</sup>

Before a religion and its members can enjoy the religious freedom guarantees of Articles 4 and 140, however, it must first be classified as a religious community. It is the right and duty of the state to make the final determination of whether a particular organization is a religion.<sup>26</sup> In doing so, the state is “bound” by that religious community’s “*definitions* and understanding of their [own] ‘belief,’ ‘confession,’ and ‘religious practice.’”<sup>27</sup> On the other side, the qualifying religious

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this Note is Article 137, which states:

- (1) There shall be no state church.
- (2) Freedom of association to form religious bodies is guaranteed. The union of religious bodies within the territory of the Reich shall not be subject to any restrictions.
- (3) Every religious body shall regulate and administer its affairs independently within the limits of the law valid for all. It shall confer its offices without the participation of the state or the civil community.
- (4) Religious bodies shall acquire legal capacity according to the general provisions of civil law.
- (5) Religious bodies shall remain corporate bodies under public law insofar as they have been such heretofore. The other religious bodies shall be granted like rights upon application, if their constitution and the number of their members offer an assurance of their permanency. If several such religious bodies under public law unite in one organization, such organization shall also be a corporate body under public law.
- (6) Religious bodies that are corporate bodies under public law shall be entitled to levy taxes in accordance with *Land* law on the basis of civil taxation lists.
- (7) Associations whose purpose is the cultivation of a philosophical ideology shall have the same status as religious bodies.
- (8) Such further regulation as may be required for the implementation of these provisions shall be incumbent on *Land* legislation.

*Id.* at art. 137.

24. Article 140 states that “The provisions of Articles 136, 137, 138, 139, and 141 of the German Constitution of August 11, 1919, shall be an integral part of this Basic Law.” *Id.* at art. 140.

25. *Id.* at art. 4.

26. See Heckel, *supra* note 4, at 203.

27. *Id.* at 204.

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community has “to be in fact by its spiritual contents and its outer appearance a religion and a religious community.”<sup>28</sup>

*B. Church-State Relations in Germany*

*1. Cooperation between the church and state, and the principles of neutrality, tolerance, and parity*

As mentioned in the introduction, Germany is widely known as a “cooperationist regime.”<sup>29</sup> In other words, the Basic Law separates church from state, but the government still cooperates with religious communities in important ways.<sup>30</sup> Cooperation is “structured around three basic principles: neutrality, tolerance, and parity.”<sup>31</sup> Neutrality requires that the state not be partial towards any one religious community nor pass judgment on that community’s religious beliefs.<sup>32</sup> Tolerance requires the state to “maintain a sphere of positive tolerance that makes room for the religious needs of the society.”<sup>33</sup> Finally, parity obligates the state to “treat equally all religious communities.”<sup>34</sup>

*2. The two-tiered structure of church-state relations*

Although every religious community qualifies for protection under Article 4 and is thereby treated with neutrality, tolerance, and parity by the state, a religious community that does not qualify for corporation status does not enjoy the same state-conferred privileges that qualifying religious communities do. In fact, members of many minority religions often feel like second-class citizens<sup>35</sup> because the state can “treat or support

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28. Robbers, *supra* note 1, at 166.

29. See *supra* note 5 and accompanying text; see also Durham, *supra* note 11, at 20.

30. See Robbers, *supra* note 2, at 60.

31. *Id.*

32. See *id.* (“Neutrality therefore means, more than anything else, non-intervention: the State is not allowed to take decisive action in the affairs of religious communities.”).

33. *Id.* The phrase “make room for” is an awkward translation from the German word *Einräumung*. It essentially means “accommodation.”

34. *Id.*

35. See Durham, *supra* note 11, at 24 (“[T]here is always a sense in [cooperationist] regimes that smaller religious communities have a kind of second-class status, and to the extent that public funds are directly supporting programs of major churches, there is a sense that members of religious minorities are being

[religious communities] differently according to their secular performance.”<sup>36</sup> In other words, religious communities that have a significant impact on society—those which build and maintain hospitals, for example—may receive special treatment from the government.

In theory, the state does not decide which religious communities will be given preferential treatment under the Basic Law. Instead, when a religious community obtains the valid status of a religion under Article 4, the community may choose between one of two classifications: a private society under private law<sup>37</sup> or a public corporation under public law.<sup>38</sup>

*a. Private society under private law.* A large number of minority religions in Germany have the status of a private society under private law.<sup>39</sup> To obtain this status, an organization must satisfy four requirements: (1) the organization must have at least two members and be founded with long-lasting goals; (2) the organization must comply with the constitutional order; (3) in accordance with the words “religious community,” the organization’s cause and purpose must create a common religion for its members; and (4) the organization must intend to perform its tasks thoroughly.<sup>40</sup> As for deciding who is entitled to the status of a private society under civil law, the German government and, if necessary, the German courts, make the final determination.<sup>41</sup> When a religious community obtains the status of a private society under private law, the German government guarantees both freedom of faith and that “the peculiarities of a religion must be taken into account. Where necessary, the civil law conditions

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coerced to support religious programs with which they do not agree.”).

36. Heckel, *supra* note 4, at 197.

37. See Robbers, *supra* note 2, at 60.

38. See *id.* at 61-62. Robbers also notes that there is a major difference between religious public corporations and regular public corporations: “Unlike other public corporations, the religious communities with this status are not integrated in the State’s structure. They retain their complete autonomy, even as public corporations.” *Id.*

39. See Josef Jurina, *Die Religionsgemeinschaft mit privatrechtlichem Rechtsstatus* [The Religious Communities with Private Right Status], in HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND [FEDERAL REPUBLIC OF GERMANY’S HANDBOOK ON CHURCH-STATE RIGHTS] 689, 689 (Joseph Listl & Dietrich Pirson eds., 2d ed. 1994).

40. See *id.* at 690-94.

41. See *id.* at 694-95.



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must be adjusted to meet the religious requirements.<sup>42</sup> In other words, if a particular aspect of the religious community conflicts with the civil law, the civil law may be adjusted for the religious community rather than requiring the religious community to conform to the civil law.

*b. Public corporation under public law.* Under Article 137(5), religious societies are entitled to corporation status upon a showing of permanency.<sup>43</sup> They are also required to demonstrate *Rechtstreue*,<sup>44</sup> which consists of three parts: first, the religious community must satisfy Article 9(2) of the Basic Law;<sup>45</sup> second, it must be in harmony with the existing law;<sup>46</sup> and, third, the religious community must show that its actions and works are within inherent constitutional limits that ensure religious freedom.<sup>47</sup>

A religious community must apply for public corporation status in each German *Land*.<sup>48</sup> Each *Land* can choose which government organization will decide whether to award or deny public corporation status.<sup>49</sup> For example, in Berlin the *Landesregierung* (legislative body) makes the decision, while in Bavaria it is the minister for education and cultural affairs who

42. Robbers, *supra* note 2, at 62 (Robbers directs the reader to compare his statement with BVerfGE 83, 341); *see also* the *Ba-hai* case, BVerfGE 83, 341 (354); *infra* note 153 and accompanying text.

43. In accordance with Article 137(5), religious societies "shall be granted . . . [public corporation status], if their constitution and the number of their members offer an assurance of their permanency." GRUNDGESETZ [GG] art. 137(5) (F.R.G.).

44. *See* Entscheidungen, *supra* note 13, at 2397 ("Wegen der mit dem Korporationsstatus verbundenen staatlichen Begünstigung setzt die Anerkennung einer Religionsgemeinschaft als Körperschaft des öffentlichen Rechts über die in Art. 137 V 2 WRV genannten Merkmale hinaus zunächst deren, Rechtstreue voraus.").

45. *See id.*; *see also infra* note 90 and accompanying text; GRUNDGESETZ [GG] art. 9(2) (F.R.G.) ("Article 9 . . . (2) Associations whose purposes or activities conflict with criminal laws or are directed against the constitutional order or the concept of international understanding are prohibited.").

46. *See* Entscheidungen, *supra* note 13 at 2397; *see also infra* note 91 and accompanying text.

47. *See* Entscheidungen, *supra* note 13 at 2397; *see also infra* note 92 and accompanying text.

48. *See* Paul Kirchhof, *Die Kirchen und Religionsgemeinschaften als Körperschaften des öffentlichen Rechts* [*The Churches and Religious Communities as Corporations Under Public Law*], in HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 651, 686 (Joseph Listl & Dietrich Pirson eds., 2d ed. 1994); *see also* GRUNDGESETZ [GG] art. 137(8) (F.R.G.).

49. *See id.* at 686-89.

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decides.<sup>50</sup> In addition, each *Land* can determine how many members a religious community must have to satisfy the “permanency” requirement.<sup>51</sup> Because the ultimate determination of public corporation status is placed with each state, inconsistent treatment has resulted as states have interpreted the same permanency requirement differently. For example, the Christian Science religion has public corporation status in Bavaria, but not in the adjacent *Land* Baden-Württemberg.<sup>52</sup>

*C. The Jehovah's Witnesses' Struggle for Religious Status in Germany*

One minority religion that is noticeably absent from the public corporation status list of every *Land* is the Jehovah's Witnesses. The Witnesses, familiar with struggles between church and state, have had to endure discrimination and persecution throughout the world.<sup>53</sup> The Witnesses have played a major role in challenging religious intolerance in the courts of the United States<sup>54</sup> and before the European Court of Human

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50. *See id.* at 687.

51. *See* Robbers, *supra* note 1, at 164-65 (“It would be necessary, however, that [the religious community] would be sufficiently big, since the collection of church taxes by the state is only worthwhile, if there are enough members to tax, otherwise expenses would be inadequately high. In Northrhine-Westfalia the law requires a size of at least 40.000 members, in Bavaria at least 25.000.”).

52. *See id.* at 159-64 (citing a now somewhat dated list of which religious communities have been recognized as public corporations by each state).

53. *See* M. JAMES PENTON, *APOCALYPSE DELAYED: THE STORY OF THE JEHOVAH'S WITNESSES* 143-45 (2d ed. 1997) (noting that Witnesses have historically faced discrimination in almost every country they have been in, but currently face tremendous persecution for refusing to support “one-party dictatorships”).

54. *See id.* at 136, 143 (summarizing the major court battles the Witnesses fought in the United States); *see also* *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (holding that a Witness' refusal to work on the Sabbath, her subsequent firing, and a refusal to award her unemployment compensation benefits violated the free exercise clause of First Amendment); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (holding that Witnesses were free to distribute literature without having to pay a city imposed preaching tax); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *rev'g* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (holding that Witness schoolchildren had to salute the American flag); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (holding that religious freedom principles allowed the Witnesses to go door to door trying to convert new members).

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Rights.<sup>55</sup> Even still, the Witnesses continue to face persecution in many countries generally considered to be tolerant.<sup>56</sup>

The first major struggle the Witnesses faced in Germany began with the rise of Hitler and the Third Reich. Because the Witnesses refused to support the Nazi government, salute the Nazi flag, and fight in the War, they were placed in concentration camps and received treatment comparable to that experienced by the Jews.<sup>57</sup> After the War, the Witnesses were granted religious freedom under Article 4. Within the last seven years, however, the Witnesses have faced a new type of discrimination in Germany: the denial of public corporation status because of their religious beliefs.

The religious doctrine that has been the source of recent controversy in Germany stems from the teachings of Pastor Russell, the founder of the Jehovah's Witnesses.<sup>58</sup> Russell taught that all Christians should separate themselves from the world, or more specifically that "Bible students should avoid voting, holding public office, or enlisting in military service."<sup>59</sup> Although Russell's teachings remain in force, they are

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55. See, e.g., *Hoffmann v. Austria*, 255 Eur. Ct. H.R. (ser. A) (1993) (holding that the Austrian courts violated international law by denying Mrs. Hoffman custody of her children solely because she was a Witness); *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) (1993) (holding that a Greek law restricting a Witness' freedom to proselytize violated article 9 of the European Convention).

56. See, e.g., *Jehovah's Witnesses in France: Testimony Submitted at a Briefing on the Deterioration of European Religious Liberty Before the Commission on Security and Cooperation in Europe*, July 22, 1998 (testimony of James M. McCabe, associate general counsel for Watch Tower Bible & Tract Society of Pennsylvania) (on file with author).

57. See PENTON, *supra* note 53, at 142. Penton quotes John S. Conway, who commented:

The resistance of the Witnesses was centred chiefly against any form of collaboration with the Nazis and against service in the army. . . . [I]t was no surprise when a special law was passed in August 1938 laying down that refusal or incitement to refuse to serve in the armed forces was to be punishable by death, or in lesser cases by imprisonment or protective custody. Since such refusal was an article of belief for Jehovah's Witnesses, they were thus all practically brought under sentence of death. Many in fact paid the penalty; others were sentenced to enforced service with the troops, while others were consigned to lunatic asylums, and large numbers were transported to Dachau.

*Id.* (quoting JOHN S. CONWAY, *THE NAZI PERSECUTION OF THE CHURCHES: 1932-1945*, at 196-97 (1968)).

58. See PENTON, *supra* note 53, at 14-46 (giving a brief history of Pastor Russell).

59. *Id.* at 138.

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tempered by the complimentary belief that the “ostensible object of all governments organized among men has been to promote justice and the well-being of all the people” and that “[Jehovah’s] followers ought to obey secular authority to a great extent.”<sup>60</sup> Along these lines, Russell urged his followers to render obedience to the laws of their land “without murmur.”<sup>61</sup> Therefore, while it is no exaggeration to say that Witnesses absolutely refuse to vote, it is also fair to say that they are generally loyal to their respective governments.<sup>62</sup> However, it is not just the Witnesses’ refusal to vote that has been criticized, but also its doctrine that members who do vote must leave the organization.<sup>63</sup> It is in fact this doctrine that led Germany’s Federal Administrative Court in *Jehovah’s Witnesses v. Land Berlin*<sup>64</sup> to reject the Jehovah’s Witnesses’ appeal for status as a public corporation.

### III. *JEHOVAH’S WITNESSES v. LAND BERLIN*

#### A. *The Facts*

In March 1990, the Minister of Interior for the former German Democratic Republic (GDR) revoked a forty-year ban on the Jehovah’s Witnesses.<sup>65</sup> This revocation recognized the Witnesses as a legal religious community which could meet and worship together in the GDR.<sup>66</sup> Seven months later (October 1990), after the GDR had reunited with West Germany, the Witnesses applied for public corporation status in *Land Berlin*.<sup>67</sup> For six months the Witnesses waited for a response from the *Landesregierung*, Berlin’s governing body authorized to grant corporation status.<sup>68</sup> On April 8, 1991, the Witnesses

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60. *Id.*

61. *Id.* at 138-39.

62. *See id.* at 140 (“Since 1962 Jehovah’s Witnesses have been model citizens in some ways.”).

63. *See* Entscheidungen, *supra* note 13, at 2398 (“Wie die Kl. in der mündlichen Verhandlung vor dem erkennenden Senat bestätigt hat, kann ein Zeuge Jehovas, der auf der Teilnahme an staatlichen Wahlen beharrt, nicht in ihrer Gemeinschaft verbleiben.”).

64. *See* Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] [Federal Administrative Court], reprinted in 36 NEUE JURISTISCHE WOCHENSCHRIFT 2396 (1997).

65. *See id.* at 2396.

66. *See id.*

67. *See id.*

68. *See id.*

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sent a precautionary letter to *Land Berlin* renewing their request that, in accordance with Article 137(5), they be recognized as a public corporation.<sup>69</sup>

Although the *Landesregierung* had received these letters from the Witnesses, it did not release its decision denying their request until two years later.<sup>70</sup> The *Landesregierung* maintained that the Witnesses were not entitled to corporation status based on their legal status as a religious community in the former GDR. First, although Witnesses were legally recognized, public corporation status, as such, was nonexistent under the former regime; further, the Unification Treaty failed to recognize the Witnesses as having any corporation rights. More fundamentally, the *Landesregierung* also maintained that Article 137(5) was not relevant because the beliefs of the Witnesses were at odds with the Constitution. That is, in the view of *Landesregierung*, the Witnesses did not adhere to the principles of tolerance and had a structurally negative understanding of the State.<sup>71</sup>

Consequently, the Witnesses brought a claim against *Land Berlin* in the Berlin State Administrative Court demanding public corporation status. The court held for the *Land Berlin* on the issue of the Witnesses' status in the GDR and under the Unification Treaty, but held that the Witnesses were indeed entitled to public corporation status in accordance with Article 137(5).<sup>72</sup>

Both parties appealed to the Berlin State Court of Administrative Appeals, which affirmed the holding of the Berlin State Administrative Court.<sup>73</sup> The parties then appealed to the Federal Administrative Court (the highest court in the hierarchy of administrative courts in Germany). The Federal Administrative Court held that, although the Witnesses satisfied the permanency and *Rechtstreue* requirements, they nevertheless were not entitled to corporation status because

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69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.*; *see also* Entscheidung des Verwaltungsgerichts Berlin [VG Berlin] [State Administrative Court] (F.R.G.), *reprinted in* NvwZ 5, 609.

73. *See* Entscheidungen, *supra* note 13, at 2396; *see also* Entscheidung des Oberverwaltungsgerichts Berlin [OVG Berlin] [State Court of Administrative Appeals] (F.R.G.), *reprinted in* NVwZ 5, 478.

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they failed a new test which the court dubbed the “meaning and purpose of corporation status” test.

*B. The Federal Administrative Court's Reasoning*

*1. The Rechtstreue requirement*

While there was no serious debate that the Witnesses satisfied the “permanency” requirement, *Land Berlin* did argue that the Witnesses failed the *Rechtstreue* requirement. The court began its discussion of this issue by noting that a religious community that is *Rechtstreue* must satisfy three elements. First, in accordance with Article 9(2), the religious community's activities must not be criminal in nature, must not be contrary to the constitutional order, and must not contradict fundamental norms of society.<sup>74</sup> Second, because public corporation status includes a transfer of state taxing power to the religious community, the community must be in harmony with existing law.<sup>75</sup> Third, the religious community, through its actions and works, must uphold the constitutionally protected rights of both its own devotees and outsiders.<sup>76</sup>

The arguments of the *Land Berlin* focused on this third element. First, the *Land* argued that the Witnesses failed to satisfy the *Rechtstreue* requirement because they imposed an unconstitutional *Zwangssystem* (compulsory system) upon their members.<sup>77</sup> The court rejected this argument for three reasons: first, a religious community's doctrines do not have to follow a democratic model to qualify for public corporation status; second, the German constitution protects the way in which a religious community structures its hierarchy or positions of authority;<sup>78</sup> and third, Article 4 protects the freedom of every person to join and remain with whatever religious community the individual chooses.<sup>79</sup> Next, the *Land Berlin* claimed that the Witnesses violated the constitution because they harmed the

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74. See *Entscheidungen*, *supra* note 13, at 2397.

75. See *id.*

76. See *id.*

77. See *id.* at 2398 (“*Der Bekl. will der Kl. die gebotene Rechtstreue des weiteren mit dem Hinweis absprechen, diese praktiziere ein Zwangssystem, das der Wertordnung des Grundgesetzes widerspreche.*”).

78. See *id.*; see also *Robbers*, *supra* note 2, at 62-64 (discussing the important role of “self-determination” for religious communities in Germany).

79. See *Entscheidungen*, *supra* note 13, at 2398.

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well-being of their children through restrictive methods of child rearing.<sup>80</sup> The court agreed that child abuse, if proven, would violate the third element of *Rechtstreue*; but the *Land's* accusations were unproven and could only be properly decided by a court of guardianship.<sup>81</sup>

In short, the court held that all of the *Land's* accusations were without merit and that the Witnesses satisfied both the permanency and the *Rechtstreue* requirements. Surprisingly, however, the court held that the Witnesses were not entitled to public corporation status.<sup>82</sup>

## 2. *The meaning and purpose of "corporation status"*

Earlier in its opinion, the court observed that when a religious community obtains public corporation status, it graduates from private law to public law.<sup>83</sup> Coming under the jurisdiction of the public law, however, does not mean that the state will impose additional burdens on the religious community. Rather, when a religious community obtains public corporation status, the state will reinforce the religious community's individuality and independence and promote the religious community's freedom.<sup>84</sup> This reinforcement and promotion requires cooperation between church and state; this cooperation is the essence of the "meaning and purpose of corporation status."<sup>85</sup>

There are two elements of cooperation that the court believed necessary to fulfill the meaning and purpose of corporation status: (1) reciprocal respect between the church and state, and (2) *Staatstreue* (loyalty to the state). Concerning the element of reciprocal respect, the court reasoned that if the

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80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.* at 2397 ("Durch die Verleihung des Korporationsstatus wird die rechtliche Existenz, die äußere Ordnung und Verwaltung sowie grundsätzlich das gesamte Wirken der Religionsgemeinschaft, soweit davon Rechtswirkungen im staatlichen Bereich ausgehen, dem öffentlichen Recht unterstellt.").

84. *See id.* at 2398.

85. *Id.* ("Wie bereits dargelegt, stellt sich der Korporationsstatus für diejenigen Religionsgemeinschaften, die ihn nicht besitzen, als ein Kooperationsangebot des Staates dar; dabei besteht der Zweck der Kooperation in der Förderung der anzuerkennenden Religionsgemeinschaften, weil ihr Wirken zugleich im Interesse des Staates liegt.").

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state is going to bestow certain privileges on the religious community, it can expect the religious community not to question the foundation of that state's existence.<sup>86</sup> In other words, a religious community that is at odds with the fundamentals of democracy cannot respect the state of Germany. Without this reciprocal respect, cooperation between the church and state would be impossible.<sup>87</sup> While the court never did say explicitly whether the Witnesses satisfied the "reciprocal respect" element, in light of the court's "loyalty to the state" discussion, it is doubtful the court believed that the Witnesses respected the state.

The second element of cooperation, loyalty to the state, was the deciding issue in the court's analysis and merits a detailed review. The court began by admitting that the Witnesses were not negatively disposed towards the state—rather, in principle, they were positively disposed towards the state.<sup>88</sup> But, the court was troubled by the Witnesses's refusal to participate in government elections and their excommunication of any member who did participate.<sup>89</sup>

Coming to the heart of its analysis, the court reasoned that this doctrine concerning member participation in the democratic process was in direct conflict with a fundamental democratic principle central to the constitution,<sup>90</sup> namely that all acts of the state, to have force, must be validated by the will of the people. The will of the people, in turn, is conveyed to the state through the system of a representative-parliament democracy and, more specifically, through the election of

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86. *See id.* The court reasoned:

*Ebenso wie der Staat sich mit der Gewährung des Korporationsstatus nicht in die Angelegenheiten der Religionsgemeinschaften einmischt, sondern im Gegenteil deren Eigenständigkeit stützt und fördert, kann umgekehrt von der Religionsgemeinschaft, die mit Antrag ihrem nach Art. 140 GG i.v. mit Art. 137 V 2 WRV die Nähe zum Staat sucht und dessen spezifische rechtliche Gestaltungsformen und Machtmittel für ihre Zwecke in Anspruch nehmen will, erwartet werden, daß sie die Grundlagen der staatlichen Existenz nicht prinzipiell in Frage stellt.*

*Id.*

87. *See id.*

88. *See id.*

89. *See id.*; *see also* text accompanying *supra* note 63.

90. *See* Entscheidungen, *supra* note 13, at 2398; *see also infra* notes 123-125 and accompanying text.



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representatives to parliament.<sup>91</sup> Therefore, the Witnesses' basic religious views disregarded not only the political necessity of elections but also the constitutional significance of parliamentary elections.<sup>92</sup> In addition, the court reasoned that because the Witnesses continue to have, or in the future will win, influence over the behavior of German citizens, the state's executive power, because of its reliance on the will of the people, will inevitably weaken.<sup>93</sup> Because the Witnesses do not recognize the aforementioned legitimate, democratic demands of the state on its citizens, the court held that the Witnesses were not loyal to the state and did not stand in a position to cooperate with the state.<sup>94</sup>

In its conclusion, the court addressed one final argument: how does refusing to vote constitute disloyalty to the state when there is no law requiring citizens to vote?<sup>95</sup> The court responded that even though there is no law requiring citizens to participate in elections, this did not mean that the state did not care whether its citizens participated in elections.<sup>96</sup> Moreover, the court noted that the state's constitution puts the responsibility on all citizens to legitimize the government's actions through their right to vote.<sup>97</sup> This responsibility is only diminished if a citizen abstains from voting as an expression of political will.<sup>98</sup> The Witnesses, however, do not object to participation in voting because of the prevailing political conditions (i.e., who is running for which parties), but rather they object as a matter of principle based upon their belief.<sup>99</sup>

## IV. ANALYSIS

It is the position of this Note that the German Federal Administrative Court's decision was incorrect and should be reversed by the Federal Constitutional Court for the following three reasons: (1) the court should not have applied the

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91. *See* Entscheidungen, *supra* note 13, at 2398; *see also infra* note 134.

92. *See* Entscheidungen, *supra* note 13, at 2398.

93. *See id.* at 2398-99.

94. *See id.* at 2399.

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*

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“meaning and purpose of the corporation status” test; (2) even if the application of this test was correct, the court’s reasoning with respect to “accountability to the will of the people” was unconvincing; and (3) the court’s analysis is fundamentally inconsistent with ideals of religious freedom.

A. *The “Meaning and Purpose of Corporation Status” Test Should Not Have Been Applied*

The “meaning and purpose of corporation status” test should not have been applied for two reasons. First, the test requires the unnecessary showing of *Staatstreue* (loyalty to the state), and second, it sets an unreachable standard for other religious communities.

1. *The “meaning and purpose of corporation status” test requires the unnecessary showing of Staatstreue (loyalty to the state)*

The Federal Administrative Court noted that the “meaning and purpose of corporation status” test focused on whether the state and the religious community would be able to cooperate with each other.<sup>100</sup> Furthermore, the court explained that cooperation consisted of two elements: respect and loyalty.<sup>101</sup> Concerning loyalty, the more important element, the court held that the Witnesses did not bring the “lasting cooperation of essential loyalty” to the state.<sup>102</sup>

However, as important as “loyalty to the state” may seem in deciding whether a religious community should receive the status of a public corporation, the court should never have reached this issue since it is not an element of the *Rechtstreue* requirement; the court simply failed to justify its introduction of the new *Staatstreue* test. As one scholar has noted, although the state may legitimately require a sort of “enhanced” *Rechtstreue*, it cannot force a religious community to satisfy a

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100. See *supra* Part III.B.2.

101. See *Entscheidungen*, *supra* note 13, at 2398 (noting that cooperation, of course, is the meaning and purpose of public corporation status).

102. *Id.* (“Die Kl. bringt dem demokratisch verfaßten Staat nicht die für eine dauerhafte Zusammenarbeit unerlässliche Loyalität entgegen”).

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*Staatstreue* requirement.<sup>103</sup> The *Staatstreue* requirement simply has no basis in statutory law.

Although the court did not specify why it imposed the additional requirement of *Staatstreue*, it is apparent that the court was worried that the wrong organization may end up with too much power.<sup>104</sup> However valid this concern may be, especially in preventing the resurgence of something akin to National Socialism, requiring *Staatstreue* of a religious community is not the solution. First, the *Rechtstreue* requirement is sufficiently strong to protect the state from abusive organizations. For example, one scholar has argued that the Witnesses' refusal to vote, among other things, violated the *Rechtstreue* requirement.<sup>105</sup> While the scholar's conclusion that the Witnesses were not *Rechtstreue* relies on questionable sources,<sup>106</sup> the article does demonstrate that the long-established *Rechtstreue* requirement is capable of addressing the same issues with which the court was concerned in this case. Second, although the court was justified in wanting to keep the privileges of public corporation status from the wrong religious communities, the court's application of *Staatstreue* shows how the requirement can be used to discriminate against religions that are peaceful and law abiding. In the case of the Witnesses, history seems to suggest that they are not a threat

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103. See *id.* at 11 (“*Es darf die erhöhte Rechtstreue gegenüber allgemeiner Rechtstreue aber nicht unter der Hand zu einer erhöhten Staatstreue mutieren.*” (General *Rechtstreue* can mutate into an enhanced *Rechtstreue*, but it can't mutate into an enhanced *Staatstreue*)); see also *Jehovah's Witnesses to Appeal to Germany's Supreme Court*, *supra* note 19 (“Jehovah's Witnesses lawyer Hermann Weber argued in Thursday's statement that Germany's 1949 constitution did not make religious privileges conditional on loyalty to the state.”).

104. See *infra* note 153.

105. See Christoph Link, *Zeugen Jehovas und Körperschaftsstatus [Jehovah's Witnesses and Corporation Status]*, 43 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT 1, 23-53 (1998). The large majority of Link's article is spent trying to prove “*erhebliche Zweifel an der Rechtstreue der Religionsgemeinschaft der Zeugen Jehovas*” (considerable doubt as to the *Rechtstreue* of the religious community of the Jehovah's Witnesses). *Id.* at 23. Whether or not Link makes his point, it would seem strange that Link would spend his entire article showing how the Witnesses were not *Rechtstreue*, including their refusal to vote, if he agreed with the court that it was unnecessary to consider *Rechtstreue* because the Witnesses failed the “meaning and purpose of corporation status” test.

106. Link relies heavily on sources that assume a negative posture toward the Witnesses (i.e., former members).

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to democracy; rather the Witnesses have suffered tremendous persecution at the hands of antidemocratic groups.<sup>107</sup>

It is also important to mention that it has been argued that the meaning and purpose of the public corporation status cannot be reduced to the “[s]tate’s offer to cooperate with the religious community. Cooperation, as important as it is, is a consequence of corporation status, not the meaning and purpose of corporation status.”<sup>108</sup> In other words, the issues of cooperation should be worked out after public corporation status has been given, not unilaterally decided by one party before the other party has an opportunity to prove it self.

2. *The “meaning and purpose of corporation status” test is unreachable by other religious communities*

The Federal Administrative Court’s application of the “meaning and purpose of corporation status” establishes too high a standard for other religious communities seeking public corporation status.<sup>109</sup> Most directly, given that the court’s deci

107. When Germany has not upheld democracy, the Witnesses have not fared well. For example, under the National Socialists the Witnesses were murdered, *see supra* note 57 and accompanying text, and under the former German Democratic Republic the Witnesses were banned as a religion, *see supra* note 65 and accompanying text. Hopefully, the court’s treatment of the Witnesses is not a sign of the times.

108. Gerhard Robbers, *Sinn und Zweck des Körperschaftsstatus im Staatskirchenrecht* [Meaning and Purpose of Corporation Status in Church-State Law], in *FESTSCHRIFT FÜR MARTIN HECKEL* (Karl-Hermann Kästner et al. eds., forthcoming 1999) (“*Es darf der Sinn und Zweck des Körperschaftsstatus nicht auf ein Angebot des Staates zur Kooperation mit der Religionsgemeinschaft reduziert werden. Kooperation, so wichtig sie ist, ist eine Folge des Körperschaftsstatus, nicht dessen Sinn und Zweck.*”).

109. *See* Ingrid Brunk Wuerth, *Private Religious Choice in German and American Constitutional Law*, 31 *VAND. J. TRANSNAT’L L.* 1127, 1131 (1998) (“The [Jehovah’s Witnesses] case is widely viewed as an important precedent for how the German states and courts will resolve bids by Muslim groups for this status.”) (referring to Gregor Thusing, *Kirchenautonomie und Staatsloyalität* [Church Autonomy and Loyalty to the State], in 51 *DIE OFFENTLICHE VERWALTUNG* 25, 25 (1998)); *cf.* Robbers, *supra* note 1, at 170. Robbers wrote:

In the future questions will arise from Islam. As a religion, its groups have the same rights as Christian or other groups have. There must be no discrimination. On the other hand it seems, that — involuntary — some kind of discrimination may spring from the very traits of the legal system. This system has its origins and prevailing roots in Christianity. The way of thinking, the institutional framework of this legal system sometimes may make it difficult for religious groups based in different cultural backgrounds to fit in.

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sion will have a tremendous effect on the Witnesses' ability to obtain corporation status in other *Länder* (states),<sup>110</sup> the court should abide by generally accepted legal standards instead of imposing previously unknown legal standards.

The decision will also have an adverse impact on groups other than the Witnesses. Because the court failed to adequately define the "meaning and purpose of corporation status" test, religious communities trying to determine whether they can obtain the status of a public corporation will find it hard to understand what exactly the Federal Administrative Court's decision requires.<sup>111</sup> Furthermore, disqualification of a religious group from public corporation status based on the state's subjective determination that a group's doctrine is not in "harmony" with state policy could effectively disqualify many other religions. For example, some of Islam's teachings could be viewed as being inconsistent with the policies of the state.<sup>112</sup> Muslim<sup>113</sup> communities have had a difficult time finding

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. . . .

Up to now it has not been possible to install religious instruction, because there had been no official partner in muslim groupings with whom school authorities were able to confer in adequate legal terms. This seems to be a result of the non-existence of an official structure of Islam groups which would provide for representation. *Similar problems arise regarding the registration as corporations under public law.*

*Id.* (emphasis added).

110. See JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 565 (1994) (table showing the structure of Germany's court system).

111. See Wuerth, *supra* note 109, at 1166. Wuerth wrote:

[T]he court appeared to draw a clear distinction between "rights" and "privileges," one it has rejected elsewhere, to explain why its conclusion did not violate the free exercise rights of the Jehovah's Witnesses. This would present a classic unconstitutional conditions problem, except that it is unclear in what sense status as a corporation under public laws is really a "privilege." Furthermore, it is unclear in what sense the conditions imposed go beyond the parameters of the subsidy itself, which, after all, has as its overarching goal the promotion of democracy.

*Id.*

112. See Johan D. van der Vyver, *Introduction to Legal Dimensions of Religious Human Rights: Constitutional Texts*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES*, *supra* note 4, at xi, xxx ("In Islam there is no divide between state and church, and law and religion signifies one and the same modality of life.").

113. See Robbers, *supra* note 2, at 57 ("Islam in Germany had, in 1987, approximately 1.65 million members, mostly foreign workers and their families, but also about 100,000 German nationals. It is however thought that there are now about

acceptance in Western Europe, let alone recognition as a public corporation in Germany<sup>114</sup>—this decision may further contribute to that trend. Most generally, the denial of the Witnesses' application based on grounds which the law had not recognized up to that point, and which the parties had not even raised, sets a dangerous precedent which makes any religious group's appeal for public corporation status uncertain.

The Federal Administrative Court's "meaning and purpose of corporation status" test also results in impermissible privileging of traditional, mainstream religions.<sup>115</sup> Although the court used seemingly harmless terms such as "loyalty" and "cooperation," it is evident that the court was grasping at an unusually strong definition of these terms.<sup>116</sup> In the case of the Witnesses, the court would not bestow the status of a public corporation on them unless the Witnesses abandoned their long-held belief that one should abstain from voting. In the case of Islam, the court's logic could be used to deny the Islamic community the status of a public corporation unless that community abandoned its belief that there should be no separation between church and state.<sup>117</sup> In both circumstances, the court could be seen as attempting to coerce a religious community into abandoning its religious belief by withholding

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2.5 million Moslems living in Germany.").

114. See W.A.R. SHADID & P.S. VAN KONINGSVELD, *RELIGIOUS FREEDOM AND THE POSITION OF ISLAM IN WESTERN EUROPE* 4 (1995). The authors wrote:

[A]round the beginning of the eighties . . . [i]t was suggested that a connection existed between Islamic "fundamentalism", as it was developing in many Islamic countries, . . . and between the migrant groups in Western Europe originally coming from the Islamic world. . . . People started to question the possible impact of Islam on West-European secular democracies. . . . The ensuing discussions were usually related to such themes as the position of women, the compatibility of Islam with democracy and human rights, and the ties Muslim migrants had with their countries of origin.

*Id.*; see also *supra* note 106; *infra* note 145 and accompanying text.

115. See Robbers, *supra* note 108, at 16 ("Die Konsequenz wäre ein grundgesetzorientiertes neues Staatskirchentum, das Institut der Staatskirche würde ersetzt durch das einer 'Verfassungskirche.'").

116. See Entscheidungen, *supra* note 13, at 2398 ("Eine solche Kooperation ist ohne ein Mindestmaß an gegenseitigem Respekt nicht vorstellbar.") (emphasis added); see also *supra* Part III.B.2.

117. See SHADID & KONINGSVELD, *supra* note 114 and accompanying text; see also van der Vyver, *supra* note 112, at xxx ("In Islam there is no divide between state and church, and law and religion signifies one and the same modality of life.").

public corporation status. This sort of treatment by the court—and ultimately the state—is difficult to reconcile with the concept that “[s]eparation brings about emancipation. It frees the churches from state dominance.”<sup>118</sup>

*B. Even if the Court Was Correct in Applying the  
“Meaning and Purpose of Corporation” Test, the  
Court’s Application Was Unconvincing*

Even if the “meaning and purpose of corporation status” test is an apt factor in determining whether religious communities can receive public corporation status, the court’s application of the test was unconvincing.

*1. Direct conflict with accountability*

The Federal Administration Court reasoned that the Witnesses’ abstinence from voting fails the “meaning and purpose of corporation status” test because it contradicts the democratic principle that all acts of the state are accountable to the will of the people.<sup>119</sup> In other words, the state can legitimately “demand” elections to legalize and democratize its actions and institutions.<sup>120</sup> If the Witnesses are allowed to continue to exercise or win influence (i.e., by conversion) over the “good behavior of the citizens,” then the legitimate basis of the state’s “demands” will be weakened.<sup>121</sup> Therefore, because the Witnesses disregard the importance of the state’s legitimate “demands” on its citizens, the court held that the Witnesses cannot obtain the status of a public corporation and be recognized as a “cooperative” partner of the state.<sup>122</sup>

This analysis, however, cannot be upheld for three reasons: (1) the court based its arguments on statutes and case law that

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118. Heckel, *supra* note 4, at 199.

119. *See infra* note 131 and accompanying text.

120. *See infra* note 152 and accompanying text.

121. *See* Entscheidungen, *supra* note 13, at 2398-99 (“Denn [die Kl.] schwächt zwangsläufig in dem Umfang, in dem [die Kl.] auf das Wohlverhalten der Bürger Einfluß nimmt oder künftig gewinnt, die Legitimationsbasis, auf die der Staat für die Ausübung der Staatsgewalt—einschließlich der Übertragung dieser Gewalt an Private—angewiesen ist.”).

122. *See id.* at 2399 (“Da [die Kl.] die aus dem Demokratieprinzip folgenden legitimen Ansprüche des Staats an seine Bürger nicht anerkennt, kann [die Kl.] nicht verlangen, von ihm als Körperschaft des öffentlichen Rechts und damit als sein Kooperationspartner anerkannt zu werden.”).

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do not condemn the Witnesses' abstinence from voting; (2) the court's holding rested on the assumption that Witnesses would someday exert enough influence over the citizens of Germany to cripple the democratic electoral system; and (3) the court effectively admitted that it was denying the Witnesses public corporation status in order to curb the organization's effect on German citizens.

*a. Statutes and case law do not support the court's arguments.* To prove that the Witnesses' prohibition against voting is an "unacceptable conflict" against the very existence of the constitution, the Federal Administrative Court relied on three articles from the German constitution: Article 20(2),<sup>123</sup> Article 28(1),<sup>124</sup> and Article 79(3).<sup>125</sup> The language of these articles, however, does not support the court's ultimate conclusion that the Witnesses are in direct conflict with democratic principles. First, although Article 20(2) explains the importance that voting and elections hold for "state authority," the article declares that "state authority" is brought to pass by other means: "specific legislative, executive, and judicial organs."<sup>126</sup> Thus, interpreting Article 20(2) in a light most favorable to the court's analysis, one could argue that the Witnesses are in partial conflict with this article.<sup>127</sup> For example, although the Witnesses do not participate in the state's electoral system, they do "emanate" state authority through legislative, executive and judicial organs. Indeed, as

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123. See GRUNDGESETZ [GG] art. 20(2) (F.R.G.). Article 20(2) states: "All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive, and judicial organs." *Id.*

124. See GRUNDGESETZ [GG] art. 28(1) (F.R.G.). Article 28(1) states:

The constitutional order in the *Länder* must conform to the principles of republican, democratic, and social government based on the rule of law, within the meaning of this Basic Law. In each of the *Länder*, counties, and municipalities, the people must be represented by a body chosen in general, direct, free, equal, and secret elections.

*Id.*

125. See GRUNDGESETZ [GG] art. 79(3) (F.R.G.) ("Amendments of this Basic Law affecting the division of the Federation into *Länder*, the participation on principle of the *Länder* in legislation, or the basic principles laid down in Articles 1 and 20, shall be inadmissible."):

126. *Id.* at art. 20(2).

127. See *id.* Article 20(2) does not contain any language indicating that German citizens are *required* to vote.



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the current litigation indicates, the Witnesses have no qualms about using the judicial system of the state.

Likewise, Articles 28(1) and 78(3) do not further the court's argument. Article 28(1) insists that "the people must be represented by a body."<sup>128</sup> Such language may intimate that if the people do not choose a representative body they are violating the constitution. But, the sentence continues by stating that the legislature should be "chosen in general, direct, free, equal, and secret elections."<sup>129</sup> Thus, despite the court's conclusion, the elections are to be "free" and not required. Finally, Article 79(3) does not lend support to the court's argument that the Witnesses' refusal to vote violates democratic principles because it only states that Article 20 cannot be amended by Germany's lawmakers.<sup>130</sup> The Witnesses' beliefs cannot be construed as an amendment to the Constitution; thus Article 79(3) does not apply.

Moreover, the case law cited by the Federal Administrative Court does not support its argument that the Witnesses' prohibition against voting is in direct conflict with the democratic principle that all acts of the state must be held accountable to the will of the people. First, the court cites a Federal Constitutional Court case, decided on June 26, 1990, to support its ruling that the acts of state authority must be held accountable to the will of the people.<sup>131</sup> Indeed, the case that the court cites does support this proposition, but the Federal Constitutional Court also said that, besides voting and elections, the people can also exercise "sovereignty" through the "organs" (i.e., legislative, executive and judicial functions) of the state.<sup>132</sup> Moreover, the case gave no indication whether an

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128. *Id.* at art. 28(1).

129. *Id.*

130. *See id.* at art. 79(3).

131. *See* Entscheidungen, *supra* note 13, at 2398 ("[A]lle Akte der Staatsgewalt sich auf den Willen des Volkes zurückföhren lassen und ihm gegenüber verantwortet werden müssen (BVerfGE 83, 60 [72 f.] = NJW 1991, 159).").

132. *See* Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 60, 83 (F.R.G.). The court reasoned:

*Art. 20 Abs. 2 Satz 2 GG . . . legt fest, daß das Volk die Staatsgewalt, deren Träger es ist, außer durch Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausübt. Das setzt voraus, daß das Volk einen effektiven Einfluß auf die Ausübung der Staatsgewalt durch diese Organen hat. Deren Akte müssen*

organization refusing to allow its members to vote stood in an acceptable conflict with the principles of democracy.

Another case that the Federal Administrative Court relied upon was the Federal Constitutional Court's decision on September 9, 1976.<sup>133</sup> At first glance, this case does support the court's argument that parliamentary elections are the means by which a representative democracy is sustained.<sup>134</sup> Interestingly, however, the Federal Constitutional Court's decision also addresses an issue mentioned above: the importance of "free" elections under Article 20(2).<sup>135</sup> Specifically, the case states that elections only promote the democratic purpose of article 20(2) when they are "free" (i.e., free from compulsion and impermissible pressure).<sup>136</sup>

Finally, the court observed that the reason the Witnesses objected to voting was because of their doctrine of "Christian neutrality in political matters."<sup>137</sup> This same doctrine, the court continued, caused the Witnesses to object to military and civil service.<sup>138</sup> What the court did not say, however, is that Article 4(3) of the basic law prevents anyone from being compelled "against his *conscience* to render military service involving the

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*sich daher auf den Willen des Volkes zurückführen lassen und ihm gegenüber verantwortet werden.*

*Id.* at 71-72.

133. See Entscheidungen, *supra* note 13, at 2398 ("Die für das staatliche Handeln benötigte demokratische Legitimation wird dem Staat im System der repräsentativ-parlamentarischen Demokratie vor allem durch die Wahlen zum Parlament vermittelt (BVerfGE 44, 125 [138 ff., 140] = NJW 1977, 1054).").

134. See Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] BVerfGE 44, 125 (140) (F.R.G.) ("Die Regierung und die sie tragenden politischen Kräfte im Parlament ebenso wie die Opposition werden bei ihrem Verhalten stets auch den Wähler im Blick haben.").

135. See GRUNDGESETZ [GG] art. 20(2) (F.R.G.). Significantly, this section of the case's analysis mentioned nothing about the requirement of "free" elections in Article 28(1). See, e.g., *supra* note 124 and accompanying text.

136. See *supra* note 134. The court said:

*Wahlen vermögen demokratische Legitimation im Sinne des Art. 20 Abs. 2 GG nur zu verleihen, wenn sie frei sind. Dies erfordert nicht nur, daß der Akt der Stimmabgabe frei von Zwang und unzulässigem Druck bleibt, wie es Art. 38 Abs. 1 GG gebietet, sondern ebenso sehr, daß die Wähler ihr Urteil in einem freien, offenen Prozeß der Meinungsbildung gewinnen und fällen können (vgl. BvVrfGE 20, 56 [97]).*

Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] BVerfGE 44, 139 (F.R.G.).

137. *Id.*

138. See *id.*

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use of arms.”<sup>139</sup> Thus, combining Article 4(3) and the court’s decision produces an odd result. On the one hand, if the very existence of Germany’s democracy were under threat by an invading force, the constitution would protect the Witnesses’ “conscientious” decision not to fight in the military. On the other hand, the Witnesses’ “conscientious” objection not to vote stands in direct conflict with democracy, even though the Witnesses support those who are elected into government positions.<sup>140</sup>

*b. Can the Witnesses potentially cripple Germany’s electoral system?* Based in part on the assumption that in the future the Witnesses could cripple the democratic electoral system by converting large numbers of German citizens,<sup>141</sup> the Federal Administrative Court denied the Witnesses the status of a public corporation.<sup>142</sup> Taking an insupportable approach, the court seemed to believe that, by refusing to confer the status of a public corporation upon the Witnesses, this religious community would be unable to cripple the electoral system.<sup>143</sup> The fact remains, however, that the Witnesses could potentially cripple the system regardless of whether they gain the status of a public corporation.<sup>144</sup> Therefore, it seems odd that the Witnesses were denied public corporation status on the basis of a Witness doctrine that will continue to be taught to new German converts regardless of whether the Witnesses have public or private status.

*c. Curbing the Witnesses’ growth in Germany.* The court’s assumption that denying the Witnesses public corporation status will preserve the democratic electoral system only makes sense if the court is trying to stunt the Witnesses’ growth in

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139. GRUNDGESETZ [GG] art. 4(3) (F.R.G.); *see supra* note 25 and accompanying text (emphasis added).

140. *See supra* note 71 and accompanying text.

141. Such an assumption is unlikely because so long as one German does not convert to the Witnesses’ beliefs, the democratic electoral system will continue to function.

142. *See Entscheidungen, supra* note 13, at 2398-99.

143. *See id.*

144. Just because the Witnesses will not be a public corporation, and enjoy all of the benefits thereof, does not mean the Witnesses will be exiled from the German society. Instead, the Witnesses will continue to function as a society under private law, converting members, distributing religious materials, and meeting together, just like they always have for the past fifty years.

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Germany. Indeed, the Federal Administrative Court implied that by denying the Witnesses the status of a public corporation, the organization's influence on the German citizenry will be curbed.<sup>145</sup> The Court's concern, whether valid or invalid, is an obvious violation of "[t]he German [s]tate-[c]hurch legal basis . . . structured around three basic principles: neutrality, tolerance, and parity."<sup>146</sup>

2. *Participation in elections is not mandatory, but choice to participate is required*

The Federal Administration Court concluded its analysis by addressing an objection that the Witnesses raised: why was the organization's refusal to participate in elections grounds for denying it the status of a public corporation when German citizens are not legally required to vote?<sup>147</sup> The Witnesses' argument has merit, but the court dismissed it by saying that even though there is no legal requirement for citizens to vote, the state has an interest in seeing that its citizens are active voters.<sup>148</sup> Besides, the court reasoned, not voting was acceptable only when a voter objected to the political conditions (i.e., the voter didn't like or agree with any of the candidates running for office), not when the voter objected to the very principle of voting.<sup>149</sup>

Although the state does have a strong interest in seeing that its citizens support the electoral process, the state's power is limited to just that: an interest. There are no laws which allow the government subtly to compel its citizens to vote (e.g., by denying their religion public corporation status). To be sure, the Federal Administrative Court was quite correct that there is a distinction between an objection to the political climate and

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145. See *Entscheidungen*, *supra* note 13, at 2398-99.

146. *Robbers*, *supra* note 2, at 60.

147. See *Entscheidungen*, *supra* note 13, at 2399 ("Hiergegen kann die Kl. nicht mit Erfolg einwenden, daß in der Bundesrepublik Deutschland keine Rechtspflicht zur Beteiligung an den Parlamentswahlen besteht.").

148. See *id.* ("[D]as Fehlen einer solchen Rechtspflicht besagt nicht, daß der demokratisch verfaßte Staat der Beteiligung der Bürger an den Wahlen „neutral“ oder indifferent gegenüber ist.").

149. See *id.* ("[D]as Fernbleiben von der Wahl [kann] auch Ausdruck einer politischen Willensbekundung sein. Die Kl. lehnt indes die Wahlteilnahme nicht nach Maßgabe der jeweiligen politischen Verhältnisse, sondern prinzipiell ab.").

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an objection to the principle of voting.<sup>150</sup> But, the distinction, as this case demonstrates, is not critical. For example, the Witnesses could easily be seen as objecting to the “political climate” because Jehovah is not the current governor, or because Jehovah is not running for office.

*C. The Federal Administrative Court's Decision is  
Fundamentally Inconsistent with the Ideals  
of Religious Freedom*

The court's decision should be reversed because it is fundamentally inconsistent with the ideals of religious freedom in at least three ways: (1) the decision contradicts the fundamental structure of Article 4; (2) it is inconsistent with religious pluralism and respect for divergent religious beliefs; and (3) it modifies the religious freedom the drafters of the Basic Law intended to foster.

As previously mentioned, Article 4 is Germany's freedom of religion clause. The article declares “freedom of faith, of conscience, and of creed, religious or ideological, shall be inviolable. The undisturbed practice of religion is guaranteed.”<sup>151</sup> In addition, as already mentioned, Article 4 is structured around the three principles of neutrality, tolerance, and parity. Keeping these ideals of German religious freedom in mind, let us review the court's decision. First, the court found that the Witnesses had fulfilled the permanency requirement of the constitution. The court then found that the Witnesses had fulfilled the three elements of the *Rechtstreue* requirement.

Finally, despite the fact that the Witnesses were positively disposed towards the *Länder*, the court decided that the Witnesses were not entitled to public corporation status because their refusal to vote contradicted the meaning and purpose of corporation status. It is difficult to reconcile the court's decision with Article 4 because, on one hand, the German constitution says that one can adopt whatever religious beliefs one wants to adopt, and the state is committed to treat that belief with neutrality, tolerance, and parity; on the other hand, the court is saying that the state will not tolerate a

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150. *See id.*

151. GRUNDGESETZ [GG] art. 4 (F.R.G.).

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religious belief that causes its adherents not to vote and may persuade other German citizens not to vote. Therefore, either the court's decision is at odds with the fundamental religious freedoms of Article 4, or the fundamental religious freedoms of Article 4 are severely limited.

The court's decision also conflicts with the ideals of religious freedom because it is inconsistent with religious pluralism and respect for divergent belief systems.<sup>152</sup> While it is clear that religious pluralism does exist in Germany, and there is respect for some divergent belief systems, the court's decision is evidence that these two fundamentals of religious freedom are still not fundamental in Germany. In short, religious pluralism and respect require a society to accept and even welcome nontraditional counter-cultural religious beliefs.

The third way the court's decision conflicts with the ideals of religious freedom in Germany is by subverting the intentions of the drafters of the Basic Law. The intention of the Basic Law drafters is recited in the *Ba-hai* case, in which the Federal Constitutional Court said that the drafters of the 1949 Basic Law did not intend to grant partial religious freedom.<sup>153</sup> To the contrary, the drafters fully intended to erase the scars of National Socialism by granting religious communities full religious freedom.<sup>154</sup> What the Federal Administrative Court's decision has done, however, is grant partial religious freedom to the Witnesses. In other words, the only way the court would allow the Witnesses to obtain public corporation status is if the Witnesses abandoned one of their fundamental beliefs. Therefore, if the only way for the Witnesses to obtain public corporation status conflicts with the intention of the drafters of the Basic Law, then the court's decision must be fundamentally inconsistent with religious freedom.

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152. See generally Durham, *supra* note 11, at 13 (“[T]here must be some measure of (1) pluralism, (2) economic stability, and (3) political legitimacy within the society in question. In addition, (4) there must be some willingness on the part of differing religious groups and their adherents to live with each other.”).

153. See Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 83, 341 (354) (F.R.G.) (“*Die Intention des Verfassungsgebers war nach der Erfahrung der Religionsverfolgung durch das NS-Regime darauf gerichtet, Religionsfreiheit nicht nur in bestimmten Teilfreiheiten, sondern voll zu gewaehrlisten.*”).

154. See *id.*

## V. CONCLUSION

The Federal Administrative Court should have awarded the Witnesses the status of a public corporation because the Witnesses met the constitutional “permanency” and *Rechtstreue* requirements. Instead, the court refused to award the Witnesses the status of a public corporation because the Witnesses failed the court’s “meaning and purpose of corporation status” test. The court, however, should not have applied the “meaning and purpose of corporation status” test for the following reasons. First, the test should not have been applied because it requires the unnecessary showing of *Staatstreue* (loyalty to the state) and establishes too high a standard for other, non-certified religious communities. Second, even if the court was correct in applying the “meaning and purpose of corporation status” test, the court’s application was flawed and unconvincing because the court rested its arguments on statutes and case law that do not condemn the Witnesses’ prohibition on voting. Third, the court’s holding erroneously embraced the assumption that granting the Witnesses the status of a public corporation would allow them to exert enough influence over the citizens of Germany in the future to cripple the democratic electoral system. Finally, the court did not convincingly dispose of the Witnesses’ argument that the Witnesses should not be denied public corporation status for prohibiting its members from voting because the state did not legally require its citizens to vote.

In conclusion, the court’s decision violates fundamental principles of religious freedom because it contradicts the fundamental structure of Article 4, is inconsistent with religious pluralism and respect for divergent religious beliefs, and modifies the religious freedom that the drafters of the Basic Law intended to foster. In short, the Federal Constitutional Court should reverse the Federal Administrative Court’s decision, respect the Witnesses’ fundamental religious beliefs, and put Germany back on pace with the commendable record of religious freedom which it has maintained since the conclusion of World War II.

*Scott Kent Brown II*