From the Outside Looking In: The Jehovah's Witnesses' Struggle for Quasi-Public Status under Germany's Incorporation Law.

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[1] At the heart of the Federal Constitutional Court\'s (FCC) December 19, 2000, decision in the Jehovah\'s Witnesses case lies the future of further integration of an ethnically and spiritually fragmented Germany and the questions regarding what legal/political theoretical framework will best serve this necessary evolution. The FCC has clearly spoken in favor of a diverse vision of German society, but in falling back on an archaic legal theoretical framework to promote that project, the Jehovah\'s Witnesses decision may yet prove to be a case of \"one step forward and two steps back.\"

A. The Case History

[2] The Jehovah\'s Witnesses brought the constitutional complaint seeking to reverse the ruling of the Federal Administrative Court (FAC) that had denied the church the status of a publicly recognized religious association. The case was argued before the FCC on September 20, 2000 (as reported in *German Law Journal*No. 01/2000 – 15 Oct. 2000).

[3] The quasi-public status sought by the Witnesses, known in German as the \"Körperschaft des Öffentlichen Rechts,\" has its constitutional expression in Art. 140 of the German Basic Law, which incorporates Art. 136 through 139 as well as 141 of the Constitution of the Weimar Republic (WC). Pursuant to Art. 137.5 (2) WC, religious organizations other than those already so recognized, may be granted this status upon request if they meet the prerequisite of providing a guarantee of continuity or persistence (\"Gewähr der Dauer\"). The practical benefits of this special status are not insignificant. They include, among other administrative privileges, the right to use the public tax system to collect donations from the association\'s members. The symbolic importance of this quasi-public status is no less important. Germany has continued to develop as a ethically and ethnically diverse community. It should be expected that associations and groups of ethnic, ethical, political and cultural interest will develop into social actors whose main function lies in the channeling of interests and the generation of group identities. The associations will take the lead in the communication of a decentralized society. The willingness to extend the quasi-public status granted under the \"Körperschaft des Öffentlichen Rechts\" to these emerging social actors will, at the very least, serve as one measure of the success of Germany\'s efforts to integrate and embrace its deepening diversity.

[4] Jehovah\'s Witnesses have been active in Germany since the end of Nineteenth century. After their prohibition during the Nazi-Era, the association incorporated anew in West Germany and as recently as 1990 in the former East Germany. In October 1990, Jehovah\'s Witnesses made application for quasi-public status. In April, 1993, the Senate for Cultural Affairs of the City-State of Berlin rejected the request, most prominently citing the Witnesses lack of a \"positive, at least non-distant and non-negative relationship towards the State [public authority].\" Central to this allegation is the Witnesses\' theological rejection of public life including voting.

[5] The Witnesses successfully challenged this decision in the Berlin administrative court. The administrative court dismissed as irrelevant, with respect to questions about granting the quasi-public status to a religious association, all allegations regarding the Witnesses\' distance from public life and potential anti-democratic sentiments. The religious association as such, the court concluded, held the right to reject secular institutions for religious considerations. These religious considerations, the court explained, cannot be subjected to legal scrutiny even if the church is seeking quasi-public status. In the view of the Berlin administrative court the Association did not cross the boundaries of a legally acceptable exercise of religious freedom because its members remained free to participate in public life, though they the Church\'s doctrine discouraged it. The higher administrative district court in Berlin (Oberverwaltungsgericht – OVG) affirmed, concluding that the Witnesses met the consistency requirements and that there was no way to harmonize the agency\'s views with the constitution.

[6] The Federal Administrative Court (FAC) reversed the prior judgments with its decision of June 26, 1997. The FAC found, as had the state administrative courts, that the Witnesses were not exercising their constitutional rights to freedom of religion in a manner that was in conflict with the constitutional order. The FAC nevertheless denied the Witnesses the quasi-public status because the Church\'s doctrine fundamentally questioned the state\'s political institutions. The FAC found that the Witnesses had a basically a positive attitude towards the state, but that it clearly opposed the participation of its members in the electoral process. The Court found that rejection of the state\'s electoral system (as well as other public acts like military or civil service) were part of the Witnesses\' strictly applied doctrine and for proof of this pointed to the Church\'s practice of excommunicating members that chose to participate

in elections. This practice, the FAC concluded, was unacceptably in contradiction with the principle of democracy that constitutes the untouchable core of the Constitution. It was the view of the FAC that, by enforcing this rejection of the state\'s political institutions, the Witnesses sought to weaken the state.

[7] The association brought its case before the Federal Constitutional Court by way of constitutional complaint directed against the decision of the FAC.

B. The FCC\'s Resolution of the Freedom of Religion Issues

[8] The holding of the FCC has two parts. The first undertook the necessary requirements for attaining the quasi-public status as those requirements relate to the Witnesses\' compatibility with the legal order, especially the obligation to safeguard the fundamental constitutional rights of its members. The second part is summarized by a sentence as short and as challenging as possibly could have been imagined: \"An additional loyalty towards the State can not be found in the [German] Basic Law.\"

[9] The FCC found that the decision of the FAC violated the Witnesses\' fundamental rights in Art. 140 German Basic Law in connection with Art. 137.5(2) WC. The FCC concluded that the Witnesses met the first requisite of these constitutional provisions, i.e. the guarantee of continuity. The Court made very clear that this criteria is fulfilled only if the association in question has a constitution from which follows, through the integration of its members, its structure and \"philosophy\" and which establishes a certain stability as to its ongoing existence. The FCC found that there is considerable room for deviation within this standard, for example from a secular group\'s statute or constitution to the religious beliefs and convictions outlined by the Witnesses\' founding documents. The variation on this standard permitted by the FCC is of particular importance when, for example, the applicant association purports to believe in a nearing end of the world which could be interpreted as an admission by the applicant association that it lacks (in fact does not intend to have) enduring stability and persistence. With the permissive standard established by the FCC, such a \"problem\" is solved.

[10] The FCC stressed the preeminent role of the constitutional provisions guaranteeing religious freedom in a secular state such as Germany. From this followed all the rationales that the Court employed in testing whether the Witnesses should be granted the quasi-public status of a recognized religious association. The FCC explained that the associations, in their distinctiveness from the state and in their autonomy in relation to its claims to social guidance and control, reserve a sensitive place within the constitutional order. They remain free as to their beliefs but the power they exercise over their constituencies falls under state scrutiny. The FCC emphasized that the quasi-public status provided to some religious associations by the German constitution represented an expression of the former of these values (religious freedom) and not the latter (societal control). The quasi-public status is meant to reinforce the autonomy and independence of the qualifying religious associations, which remain distinct from the state. The FCC explained that the religious associations that qualify for quasi-public status attain a public standing altogether different than the public recognition extended to secular entities. The publicly recognized religious associations do not partake in state tasks and they are not fit into the state\'s [administrative and bureaucratic] organization. The quasi-public status does not expose the qualifying religious associations to the state\'s scrutiny or control.

[11] The FCC explained, however, that some societal control accompanied a grant of the quasi-public status, especially in light of the public benefits that attend this status, including: the right to tax, even though indirectly through the state organized tax-collection system; the rights extended to employers; and the right to lay down a charter pertaining to the association\'s convictions and beliefs. According to the FCC, these public benefits require a degree of social control, to ensure that a qualifying association\'s members are not deprived, in the application of these public functions, of fundamental rights. One requirement is that the religious association must faithfully observe and adhere to the legal order. This is justified as the publicly recognized associations exercise public rights. The FCC found that the Witnesses fulfill this requirement.

[12] The FCC, in remarkable brevity, also addressed requirement that a qualifying religious association must not jeopardize the intangible, constitutionally protected rights to human dignity (Art. 1 Basic Law) and the principles of democratic government (Art. 20 in connection with Art. 79.3 Basic Law): \"[w]hether a religious association will fail in its request of public recognition depends on its behavior, not its beliefs.\" The FCC held that this requirement cannot be tested by general or abstract analysis but only by concrete review in each specific case.

[13] The FCC roundly dismissed the FAC\'s holding that a certain \"loyalty\" to the state was necessary for a religious association to qualify for the quasi-public status. Drawing on the constitutional provisions concerning religious freedom, the FCC concluded that: \"[s]een with the eyes of the state, freedom laid down in constitutional rights, is formal freedom.\" The FCC meant that, in light of this freedom, a religious association cannot be required to conform its behavior to some degree of \"loyalty\" towards the state. The FCC went further in dismissing the concept of loyalty

with regard to religious associations and declared the term to be much too vague and as such to be too easily instrumentalized in demanding not only a specific type of behavior from a religious association but also a specific doctrinal perspective. This possibility would result in an approximation of the religious associations with the state that the constitution neither demands nor accepts. In trying to define the measures by which the conformity of an association with the constitution may be tested, the FCC, with great sensitivity and foresight, denied the existence of any rules establishing a duty on the part of a religious association to cooperate with the state. The FCC concluded that it is the task of the reviewing administrative court in a given case to explore whether a specific religious association violates any constitutional rights or stands at odds with the public order.

[14] With respect to the FAC\'s handling of the Witnesses\' application for quasi-public status, the FCC affirmed the FAC\'s conclusion that the Witnesses\' belief that the secular state is \"part of Satan\'s world\" is protected under religious freedom. The FCC found that it is in neither the state\'s nor the Court\'s competence to rule on the \"constitutionality\" of such religious beliefs. As regards the actual behavior of the Witnesses, especially as regards the control it exercises over its constituents (and in light of its potential application of the public authority granted it by quasi-public status), the FCC found that the Witnesses accept the [German] state as an order that is, like other authoritative forces, transitory but tolerated by God. The FCC found this minimum level of acceptance of state authority and public order sufficient to qualify the Witnesses for quasi-public status.

[15] In this context the FCC also addressed the Witnesses\' doctrinal prohibition on participation in elections. The FCC found that the Constitution establishes a right to participate in the democratic elections but not an obligation to do so. The FCC concluded that the Witnesses\' non-participation touches upon the constitutional principles of democracy, not in their normative meaning, but in their factual preconditions. The non-participation is in no way political, the Court concluded, in that it is neither based on a political conviction nor is it intentionally directed towards a weakening of the democratic order. The FCC found that instead of pursuing an alternative political order, the Witnesses simply reject the political order. For the Court, this doctrinal posture represented a life in \"Christian neutrality\" beyond life in the polity that is not directed against the constitutional order.

C. The Theoretical Implications of the FCC\'s Decision

[16] The FCC emphasized the overriding importance of religious freedom in a secular state and stressed the importance of keeping a religious association free of state influence. The FCC explained that this division between the state and religious associations \"provides the precondition and the framework in which the Associations can contribute their share to the foundations of State and Society.\" The FCC supported this construct with references to the writings of Ernst-Wolfgang Böckenförde, a highly renowned scholar of Constitutional Law and Jurisprudence who served as Justice on the FCC from 1983 to 1995.

[17] The Court thus alluded, without further comment, to a very intricate strand of constitutional legal theory that presupposes the existence of two separate spheres: State and Society. This separation, which does not resonate as strongly in the Anglo-American legal tradition, goes beyond the idea that there is a difference between the public and the private spheres of society. Instead, the theory establishes a measurement of the nature and quality of political organization. The theory envisions two realms, one where politics reign and the other governed by the seemingly unbound forces of individual freedom and market mechanisms. One consequence of the theory is a fundamental understanding of the role of the state and, respectively, all other actors. While the market sphere will eventually be understood as naturally free and its members autonomous, any influence by the state must be understood as an unwarranted intervention and a deviation from the dualistic conception just sketched. The center-liberal school of legal thought, to which Professor Böckenförde can be counted as a member, has, in spite of the experience of the social market state with a vastly expanded welfare and interventionist state, not entirely given up the imagery of a clear division between State and Society. For those who subscribe to the dualistic theory, the public-private dualism is the prerequisite of individual freedom. The theory demands a compelling reason for each public intervention in the private sphere. The historical intertwining of both realms through increased public intervention into the market, and the resulting \"mixed polity\" of the social-welfare political system that dominates in Europe and in Asia, has made it difficult to sustain this theoretical distinction in practice.

[18] To this trend, the left-liberal thinkers have reacted in basically two ways. First, Jürgen Habermas lead a very strong and influential school of legal and political thinking that continued to place the individual at the center of their theory while at the same time acknowledging the fact of multiple dependencies in which the individual is captured, including the state. This theory accepted the existence of the public and private spheres, except that they would now be understood as depending on each other and of being intricately interwoven. A second liberal strand in legal theory radicalized the idea of a functionally fragmented society and went on to fundamentally demystify the alleged public-private distinction. In viewing \"society\" as encompassing various systems (different social functions and practices) including economy, politics, science, education, religion, art, and law; the state or \"public\" order becomes nothing but a semantic shell for the attempts to formulate claims of authority. While Habermas would insist on a normative

understanding of the principle of the \"individual\'s private sovereignty\" as the legitimizing foundation of state actions, proponents of the other strand (Niklas Luhmann, Karl-Heinz Ladeur and Gunther Teubner) turn to the respective forms of norm production and communication that can be located within each of society\'s functional areas. The ideal of democratic governance that was, for many, traditionally embodied in the public-private dualism has become a semantic artifact for the description of politics in a hierarchically structured society. For the proponents of the second theory, different social systems continuously enter the social practices of individuals who are in search of procedural principles and modes of self-regulation. This theory views the task of the political (public or state) realm as consisting of developing adequate forms of regulating these autonomous fields of social practice.

[19] The more conservative strand of liberal thought is not yet ready to give up the central ideal of a state (public) authority reigning over the anarchistic battles of a (private) market society. Implicitly agreeing that mankind has a continuing need for protection and guidance from the state, the centrist liberals turn to a normative understanding and a renewed idealization of the function of the state. This state will then take on the role of reinforcing a certain quality of social coherence and unity. Above the hard-edged competitiveness ruling society, the state will possesses the quantum right to intervene in the private realm in order to protect and empower. The state, seen in this light, contributes its share to the foundations of public and private life. Similarly, as the FCC seems to embrace in its Jehovah\'s Witnesses decision with its reference to Professor Böckenförde, the religious associations (and other private interest groups or individuals) also contribute to the foundation.

[20] What follows, however, from this theory is the belief in a theoretical framework that purports to be able to clearly explain what belongs to the public and private spheres. The difficulty of maintaining this framework could not be better represented than by the issues presented in and resolved(?) by the FCC in the Jehovah\'s Witnesses case. The law that creates the quasi-public status seeks to weave a boundary between a religious association\'s autonomy to exist in and exercise its spiritual beliefs while at the same time enjoying publicly recognized status. The FCC has sought to fashion a system in which the two realms do not meet, as if the public-private distinction is based on a natural allocation of societal order.

[21] With its decision, the FCC seems to have pulled off this difficult (or impossible) high-wire routine. The decision has been praised by the Press as a \"Magna Charta of Political Liberalism.\" What escapes the legal theory, however, is the nuts and bolts challenge posed by the Witnesses\' application for quasi-public status: whether Germany will succeed in understanding itself as an increasingly fragmented and diverse society. Has the FCC promoted this necessary objective by falling back on construct of the eroded public-private dualism? There should be healthy skepticism that this framework will provide effective guidance in dealing with more and more cases of cultural and social diversity.

For more information:
Federal Constitutional Court\'s Benetton Shock-Ads Decision (German) on-line:
www.bundesverfassungsgericht.de/entscheidungen

English language version of the Basic Law on-line:
www.uni-wuerzburg.de/law/gm00000\\
(1) Because some of the press coverage of the case missed the legal subtleties of the case, this newsletter feels compelled to emphasize that the Jehovah\'s Witnesses case in no way implicated the Witnesses\' constitutionally guaranteed right to freely worship as they choose. This right to freedom of religion is firmly grounded in the secular nature of the Federal Republic and its fundamental, constitutional commitment to neutrality in religious matters. The AP story that ran in the International Herald Tribune on December 20, 2000, claimed that with the decision \"[t]he Jehovah\'s Witnesses won a second chance Tuesday from Germany\'s high court to prove they should be recognized as a religion.\" As explained in the present commentary, the case opened the door for the Witnesses to be granted the special status of a quasi-public religious association with unique privileges, but in no way was their status as a religion in question.