

FEDERAL CONSTITUTIONAL COURT

– 2 BvR 1500/97 –



IN THE NAME OF THE PEOPLE

In the proceedings

**on
the constitutional complaint**

of the religious community of the *Zeugen Jehovahs in Deutschland e.V.*, represented by the Council,

– authorised representative: Rechtsanwalt Prof. Dr. Hermann Weber,
Palmengartenstraße 14, Frankfurt am Main-

interested party: the Senator for Economics, Research and Culture, Senate Administration for Science, Research and Culture,

– authorised representatives: Rechtsanwälte Dr. Karlheinz Knauthe und Koll.,
Friedrichstraße 78, Berlin -

against the judgment of the Federal Administrative Court (*Bundesverwaltungsgericht – BVerwG*) of 26 June 1997 – BVerwG 7 C 11.96 –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Limbach,

Sommer,

Jentsch,

Hassemer,

Broß,

Osterloh,

Di Fabio,

held on the basis of the oral hearing of 20 September 2000 by

Judgment

as follows:

1. **The judgment of the Federal Administrative Court of 26 June 1997 – BVerwG 7 C 11.96 – violates the complainant’s right under Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Constitution of the German Reich (*Verfassung des Deutschen Reichs*) of 11 August 1919. It is hereby overturned. The case is referred back to the Federal Administrative Court.**
2. **The Federal Republic of Germany is ordered to refund to the complainant the necessary expenses.**

Reasons

A.

The constitutional complaint relates to the preconditions under which a religious community in accordance with Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Constitution of 11 August 1919 (hereinafter: Weimar Constitution (*Weimarer Reichsverfassung – WRV*)) may obtain the status of a corporate body under public law. 1

I.

1. Article 140 of the Basic Law incorporates Articles 136 to 139 and 141 of the Weimar Constitution into the Basic Law. In accordance with Article 137.5 sentence 1 of the Weimar Constitution, the religious societies which were already corporate bodies under public law prior to the adoption of the Weimar Constitution retain this status. Article 137.5 sentence 2 of the Weimar Constitution determines that other religious societies are granted such status upon application where their constitution and the number of their members offers an assurance of their permanency. 2

2. The status of a corporate body under public law offers a number of powers under public law. In accordance with Article 140 of the Basic Law in conjunction with Article 137.6 of the Weimar Constitution, the religious communities that are corporate bodies are entitled to levy taxes from their members. The organisational capacity gives them the entitlement to form sub-divisions under public law and other institutions with legal capacity. Because of their capacity to be a public-law employer, they may give rise to employment governed by public law. They may create their own law and through dedication create church *res publica*. The parochial right gives the religious community the power to make the membership of a member in a parish dependent solely on taking up residence. 3

The legislature linked a large number of individual benefits with religious communities’ corporate body status (so-called “bundle of privileges”). They include for instance 4

tax breaks (§ 54 of the Tax Code (*Abgabenordnung* – AO), § 13.1 no. 16 of the Inheritance Tax Act (*Erbschaftssteuergesetz* – ErbStG), § 3.1 no. 4 of the Land Tax Act (*Grundsteuergesetz* – GrStG), as well as § 2.3 and § 4 a of the Turnover Tax Act (*Umsatzsteuergesetz* – UStG)), protection from execution in accordance with § 882 a of the Code of Civil Procedure (*Zivilprozeßordnung* – ZPO) and § 17 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz* – VwVG), the consideration under construction planning law of the needs of the religious communities that are corporate bodies as ordered in § 1.5 sentence 2 no. 6 of the Federal Building Code (*Baugesetzbuch* – BauGB), the institutional safeguard of cooperation by the social assistance organisations with the religious bodies that are corporate bodies in § 10 of the Federal Social Assistance Act (*Bundessozialhilfegesetz* – BSHG) and their recognition as independent youth assistance organisations by § 75.3 of the Eighth Book of Social Law (*Sozialgesetzbuch VIII* – SGB VIII).

3. In addition to the corporate bodies brought into being in accordance with Article 140 of the Basic Law in conjunction with Article 137.5 sentence 1 of the Weimar Constitution, many smaller religious and ideological communities have gained the status of corporate bodies in accordance with Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Weimar Constitution. These include for instance the *Alt-Katholische Kirche*, the *Bund Evangelisch-Freikirchlicher Gemeinden (Baptisten)*, the *Bund freier evangelischer Gemeinden*, the *Bund freikirchlicher Pfingstgemeinden*, the *Bund freireligiöser Gemeinden*, the *Bund für Geistesfreiheit in Bayern*, the *Christengemeinschaft*, the *Christliche Wissenschaft*, the *Dänische Seemannskirche in Hamburg*, the *Deutsche Unitarier*, the *Europäisch-Festländische Brüder-Unität (Herrnhuter Brüdergemeinde)*, the *Evangelisch-Bischöfliche Gemeinde in Hamburg*, the *Evangelisch-Methodistische Kirche*, the *Französische Kirche zu Berlin (Hugenottenkirche)*, the *Freigeistige Landesgemeinschaft Nordrhein-Westfalen*, the *Gemeinschaft der Siebenten-Tags-Adventisten*, the *Heilsarmee in Deutschland*, the *Johannische Kirche in Berlin*, the *Kirche Jesu Christi der Heiligen der letzten Tage (Mormonen)*, the *Neuapostolische Kirche*, the *Russisch-Orthodoxe Kirche (Moskauer Patriarchat)*, the *Russisch-Orthodoxe Metropolie von Deutschland*, the *Vereinigung der Mennoniten-Gemeinden* or the *Wallonisch-Niederländische Gemeinde Hanau*.

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II.

1. a) The Jehovah's Witnesses have been active since the end of the 19th century – initially under the designation “Bible Students”. In 1927, the community was entered as an association in the register of associations kept at Magdeburg Local Court (*Amtsgericht*) under the name “International Bible Students Association”. The Jehovah's Witnesses were persecuted and prohibited under National Socialism; the entry was deleted. In 1945 they were re-established under the law on associations, and entered once again at Magdeburg Local Court. In 1950, this association was once again prohibited, this time by the Ministry of the Interior (*Innenministerium*) of the GDR.

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Thereupon, the community constituted itself for the area of the then Federal Republic under the name “*Wachturm Bibel- und Traktatgesellschaft, Deutscher Zweig e.V.*”, with its headquarters in Selters/Taunus.

b) The complainant is the “*Religionsgemeinschaft der Zeugen Jehovas in Deutschland e.V.*”. It is headquartered in Berlin and has emerged from the religious community of the Jehovah’s Witnesses in the GDR. The latter, the “Jehovah’s Witnesses in the GDR”, applied for and received “state recognition” from the Council of Ministers (*Ministerrat*) of the GDR, Office for Church-Related Matters (*Amt für Kirchenfragen*), by certificate of 14 March 1990. 7

c) In the course of the constitutional complaint proceedings, the Jehovah’s Witnesses have changed their legal constitution in Germany. The complainant’s area of activity has been expanded to cover Germany as a whole, and was entered on 14 October 1999 in the register of associations kept at Charlottenburg Local Court in Berlin. It is now the spiritual supervisory corporate body for all Jehovah’s Witnesses in Germany. 8

2. a) By letter of 23 October 1990, the complainant asked the *Magistrat* (executive assembly) and *Senat* of Berlin to confirm its legal status as a corporate body under public law, and referred to the certificate of the Council of Ministers of the GDR of 14 March 1990. On 8 April 1991, as a precautionary measure, it additionally applied for the award of corporate rights in accordance with Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Weimar Constitution. 9

b) By notice of 20 April 1993, the Senate Administration for Cultural Matters of the *Land* (state) Berlin rejected the applications. The recognition awarded by the Council of Ministers had allegedly not constituted recognition of corporate body status. There was alleged to be no right to be awarded corporate rights in accordance with Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Weimar Constitution. [...] 10

[...] 11-12

3. a) With its action filed with Berlin Administrative Court (*Verwaltungsgericht*), the complainant applied for a finding that it was a corporate body under public law, alternatively to oblige the *Land* Berlin to award it the legal status of a corporate body under public law. 13

b) By judgment of 25 October 1993, Berlin Administrative Court [...] rejected the main application and granted the alternative application. 14

[...] 15-21

4. By judgment of 14 December 1995, Berlin Higher Administrative Court (*Oberverwaltungsgericht*) rejected [...] the appeals on points of fact and law of the complainant and of the *Land* Berlin. The complainant was said to not possess the status of a corporate body under public law, but could require the *Land* Berlin to award it such status. 22

[...]	23-24
5. In response to the appeal on points of law of the <i>Land</i> Berlin, admitted on the basis of the alternative motion, the Federal Administrative Court by judgment of 26 June 1997 (Decisions of the Federal Administrative Court (<i>Entscheidungen des Bundesverwaltungsgerichts</i> – BVerwGE 105, 117 et seq.) overturned the judgments of the Administrative Court and of the Higher Administrative Court insofar as they obliged the <i>Land</i> Berlin to award the complainant the legal status of a corporate body under public law in the <i>Land</i> Berlin, and rejected the complainant’s action.	25
a) Indications that in the event of its recognition the complainant would not exercise the sovereign rights awarded to it in compliance with the relevant law were allegedly not manifest.	26
b) The objection that the complainant allegedly practised a system of coercion which contradicted the value system of the Basic Law was to be countered by the submission that the constitution did not prescribe a democratic model to the religious communities.	27
Rather, the formation of hierarchical or authoritarian organisational structures was said to be constitutionally protected.	28
c) Whether the complainant met the precondition of “loyalty to the law”, whether in particular the further accusations were justified – that it coercively or otherwise used unfair means to retain in its community members who wished to leave, and impaired children’s best interests by means of its educational principles and practices, was alleged to be irrelevant because the right to receive the rights of a corporate body fail against another standard prescribed by the meaning and purpose of corporate status:	29
d) It could be expected of a religious community which by applying for the award of corporate rights sought closeness to the State, and which wished to use the specific legal forms and means of power to serve its own ends, not to fundamentally question the foundations on which the existence of that very State rested. The community’s stance towards the State had been fundamentally positive, but it refused on principle to participate in state elections. This rejection was said – like refusal to render military and alternative service – to be an expression of a tenet of faith that was to be followed strictly. A Jehovah’s Witness who insisted on participating in state elections could not remain in the community of faith.	30
With the prohibition to participate in elections and the corresponding conduct of its members, the complainant placed itself in a constitutionally unacceptable contradiction of the principle of democracy constituting the state system in the Federation and in the <i>Länder</i> (states), which belonged to the inalienable core of the constitution. To the degree that the complainant influenced or in future would influence citizens’ electoral conduct, it undermined the basis for legitimisation on which the State relied for the exercise of state powers – including the transfer of this power to private individu-	31

als.

The objection that there was no legal obligation in the Federal Republic of Germany to participate in parliamentary elections is said to be devoid of effect. The constitution imposed on all citizens the responsibility to exercise their right in fact. 32

Further, the complainant reportedly disavowed the significance of Article 4 of the Basic Law by submitting that its attitude towards elections was a direct expression of its freedom of religion that was protected by fundamental rights, and may therefore not be linked to legal consequences acting to its disadvantage. The scope for discretion guaranteed by Article 4.1 and 4.2 of the Basic Law was said to benefit a religious community without restriction, regardless of whether or not it was recognised as a corporate body under public law. 33

III.

In its constitutional complaint, the complainant alleges a violation of Article 3.1 and 3.3, as well as of Article 4.1 and 4.2 of the Basic Law in conjunction with Article 140 of the Basic Law and Article 137.5 sentence 2 of the Weimar Constitution. 34

1. The constitutional complaint is alleged to be admissible. It is alleged not to be directly based on the violation of Article 140 of the Basic Law in conjunction with Article 137.5 of the Weimar Constitution. The complainant could however allege a violation of Article 4 of the Basic Law. The award of the legal form was alleged to be a special form of the “state furtherance of fundamental rights”, which in the same way must benefit all religious communities which held the fundamental right under Article 4 of the Basic Law. It was a part of the protection of the religious freedom of association that, if it met the preconditions for award, a religious community could choose freely among the forms of organisation offered.[...] 35

2. The constitutional complaint is also alleged to be well-founded. 36

a) The complainant is alleged to meet all preconditions for award explicitly named in the constitution. Its eschatological orientation did not place in question the assurance of its permanency in view of the fact that it had been in existence for more than one century. Moreover, in accordance with its self-perception the complainant presumed that it would survive beyond the end of the world. ... 37

b) The right-creating construction of the Federal Administrative Court to develop in addition to the requirement of “loyalty to the law”, a further unwritten precondition for award and to require special “loyalty to the State” was alleged not to be covered by the constitution. It was alleged that the preconditions of corporate status included not only “loyalty to the law”, but also “capacity to exercise sovereign powers”, “worthiness for recognition” or “dignity”. If one took a closer look, however, one would see that these terms were no more than a different description of the requirement of “loyalty to the law”. If one wished to consider them to be an additional substantive criterion, this would become an inadmissible quality test. ... The principle of strict parity would be 38

undermined if content-related and confession-related aspects were to be used as delimitation criteria with the aid of an additional, unwritten precondition for the award.

Moreover, the complainant was also alleged to meet such preconditions. Its perception of the State, which did not differ fundamentally from that of other Christian religious communities, in particular from that of the major Churches, permitted one to recognise fundamental acceptance of the fundamental constitutional order.

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c) With the newly-developed criterion of “loyalty to the State”, the Federal Administrative Court was alleged to require not only a fundamentally positive perception of the State and unreserved acceptance of the results of the democratic process, but over and above this an affirmation of active participation in the democratic process. This was said to create a two-tier system, encompassing on the one hand constitutional religious communities, and on the other religious communities of a lower status, which could call into question the legitimisation of the entire state’s law on Churches. Corporate status however did not give rise to a special “closeness to the State”, but was an expression of state promotion of fundamental rights. Article 140 of the Basic Law in conjunction with Article 137.5 of the Weimar Constitution was alleged to also contain a strict decision on parity. This was alleged to be seen in conjunction with Article 140 of the Basic Law in conjunction with Article 137.1 of the Weimar Constitution. Churches as corporate bodies under public law were alleged not to be more or less state churches. The award of corporate body status therefore may not be made to depend on a specific link to the State.

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Refusal to participate in elections was moreover allegedly not an expression of a lack of loyalty. Since in the area of application of the Basic Law there was no legal obligation to participate in elections, linking the principle of democracy to the aspect of “loyalty to the State” entailed a non-permissible re-interpretation of the principle of democracy, changing it from a structural principle of the state system to a requirement of participation aimed at society.

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Insofar as the decision not to participate in state elections was religiously motivated, there was specific protection of not only the propagation of this faith conviction, but also of its practice, namely by Article 4 of the Basic Law in conjunction with the Church’s right of self-determination (Article 137.3 of the Weimar Constitution). The practice of this faith-related conviction was said not to document the fact that the basis of the existence of the state was fundamentally placed in question. As the writings of the Jehovah’s Witnesses are alleged to document, their understanding of religious neutrality – with the consequence of non-participation in elections – did not mean that they rejected elections as forming the basis of the democratic state. The Jehovah’s Witnesses, rather, accepted the results of democratic elections as forming the basis of state authorities which were also legitimate in the light of their religion.

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[...]

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	IV.	
[...]		44-54
	B.	
	I.	
The constitutional complaint is admissible. In particular, the complainant may submit the constitutional complaint.		55
1. As an association aiming to profess and promote a religious creed and to proclaim the belief of its members, the complainant is a holder of the fundamental right of the freedom of religion under Article 4.1 and 4.2 of the Basic Law. The holding of fundamental rights is independent of the acquisition of legal capacity as a registered association under private law (see Decisions of the Federal Constitutional Court (<i>Entscheidungen des Bundesverfassungsgerichts – BVerfGE</i>) 24, 236 (247); 99, 100 (118)), which did not take place until later in these proceedings.		56
2. A violation of the freedom of religion guaranteed in Article 4.1 and 4.2 of the Basic Law is possible. The principle of state neutrality towards the various religions and denominations (BVerfGE 93, 1 (16)) also follows from the freedom of religion. It is not ruled out that the Federal Administrative Court not only incorrectly interpreted and applied Article 140 of the Basic Law in conjunction with Article 137.5 of the Weimar Constitution with its requirement of loyalty to the State, but at the same time overstepped to the disadvantage of the complainant the boundaries which are imposed by the principle of neutrality on the State when evaluating manifestations of religious life.		57
	II.	
[...]		58
	C.	
The constitutional complaint is well-founded. The impugned judgment of the Federal Administrative Court violates the complainant’s constitutional right under Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Weimar Constitution.		59
	I.	
In adjudicating on an admissible constitutional complaint, the Federal Constitutional Court (<i>Bundesverfassungsgericht</i>) is not restricted to examining whether the fundamental rights and rights equivalent to fundamental rights listed in Article 93.1 no. 4.a of the Basic Law and § 13 no. 8.a and § 90 of the Federal Constitutional Court Act (<i>Bundesverfassungsgerichtsgesetz – BVerfGG</i>) have been violated. Rather, the impugned ruling can be examined from any amenable viewpoint for its constitutional unobjectionability (established case-law; see BVerfGE 99, 100 (119)). The constitution-		60

al standard for examining the right of a religious community to the award of the status of a corporate body under public law is contained in Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Weimar Constitution.

II.

1. As a written prerequisite for the award of the status of a corporate body under public law, Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Weimar Constitution requires the “assurance of its permanency”. A religious community which wishes to become a corporate body under public law must by its constitution and the number of its members favour the prognosis that it will also continue to exist in the long term. The basis for this assessment is the current number of members of the religious community and its constitution in other aspects.

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In this, the term “constitution” relates to more than that the legal statutes should meet the requirements of legal transactions. “Constitution” in the context of Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Weimar Constitution also refers to the actual condition of a community, its constitutional structure ... The actual overall condition of a religious community may offer an authoritative basis for an assessment of the future existence to which Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Weimar Constitution relates above all. In accordance with the will of the Weimar National Assembly (*Nationalversammlung*), this assessment was not to be based on a coincidental, external criterion, but on the “more profound factor of the content of its constitution” [...].

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For the assessment of permanency, therefore, in addition to the criterion of the number of members, the actual overall condition of the community is to be evaluated. To this end, further indicators were named: Sufficient funding, a minimum period of existence and the intensity of religious life (see BVerfGE 66, 1 (24)[...]). Such indicators are helpful if they are not schematically applied and do not disturb the overall assessment required by Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Weimar Constitution. What is more, no circumstance may be incorporated into the assessment the evaluation of which is denied to the religiously and ideologically neutral State.

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2. On this basis, the submission of the *Land* Berlin does not give rise to any doubts as to the assessment of the nonconstitutional courts that the complainant offered an assurance of its permanency.

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a) A formal precondition that a religious community striving for the status of a corporate body under public law must initially prove itself as a registered association does not ensue from Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Weimar Constitution. Corporate body status can certainly also be a suitable legal form for those religious communities which are unable or unwilling to acquire the status of a registered association, for instance because their inner structure and organisation, as required by their religious self-perception, conflicts with requirements

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of the law on associations (see BVerfGE 83, 341 (356-357)).

That a religious community which wishes to become a corporate body under public law is not yet organised as a registered association may no longer be an indication among others in light of the necessary overall assessment of permanency. In the case of the complainant, this circumstance is unsuited to challenge the positive assessment of the nonconstitutional courts. 66

b) Also the eschatological faith of the complainant does not stand in the way of a positive assessment of the assurance of its permanency. In any case, the religiously and ideologically neutral State would not be permitted to take the complainant at its word and deny its permanency because of the end of the world, which is near according to its beliefs. Only the question of whether a religious community could indeed manage to ensure its continued existence even in the event of a specifically prophesied apocalypse failing to take place would be amenable to state assessment. This might lead disappointed members to leave, and hence possibly endanger the continued existence of the religious community. From this point of view, the complainant certainly cannot be denied the assurance of its permanency. The number of its members is not impaired although an apocalypse the occurrence of which it had calculated has failed several times to take place. 67

III.

For awarding the status of a corporate body under public law to a religious community – in the framework of the fundamental values of the constitution – further requirements not explicitly named in Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Weimar Constitution must be met. 68

1. Article 140 of the Basic Law declares the Weimar church articles as elements of the Basic Law. Their interpretation has now to be led by the evaluations of the Basic Law (BVerfGE 19, 226 (236); 53, 366 (400)). In particular, the Weimar church articles are an element of the law on religious organisations and the state's law on churches that are enshrined in the Basic Law, which has incorporated the fundamental right to the freedom of religion in the list of directly binding fundamental rights without requiring the adoption a specific Act of Parliament, and hence has considerably strengthened it in comparison with the Weimar Constitution (see BVerfGE 33, 23 (30-31)). The guarantees of the Weimar church articles are based functionally on using and realising the fundamental right to freedom of religion (Article 4.1 and 4.2 of the Basic Law; see BVerfGE 42, 312 (322)). 69

2. In the context of the Basic Law, the status of a corporate body under public law offered to the religious communities in Article 137.5 sentence 2 of the Weimar Constitution is a means to develop the freedom of religion [...] The status of a corporate body under public law is to support the independence of the religious communities. The religious communities with public law status are granted fundamental rights to the same degree as religious communities with a private law legal form. In their relationship 70

with the State they form part of society (see BVerfGE 53, 366 (387); 70, 138 (160-161)). That they can exercise their activity free of the imposition of state will and influence sets the stage and creates the framework in which the religious communities can make their contribution to the foundations of the State and society [...]

In the State established by the Basic Law, which is neutral as regards religious and ideological creeds, and in which no state church or state religion exist (Article 140 of the Basic Law in conjunction with Article 137.1 of the Weimar Constitution), religious communities that have the status of a religious body under public law differ fundamentally from corporate bodies under public law in the administrative sense and in the sense that administrative law and the law of government organisation describes this concept. They do not exercise state functions, are not integrated in the organisation of government, and are not subject to state supervision (see BVerfGE 18, 385 (386); 19, 1 (5); 30, 415 (428); 42, 312 (332); 66, 1 (19-20)).

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3. Compared to the definition of a corporate body under public law in the general understanding, this term in the regulatory context of Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Weimar Constitution serves only as an “umbrella term” (BVerfGE 83, 341 (357)). It is however more than an empty formula because it also lends to the religious communities that are corporate bodies a special legal status which goes beyond that of religious communities with a private law constitution: Having corporate body status, they are granted certain sovereign powers, both as against their members – such as in the right to levy taxes and capacity to be public-law employers – and – in the power to dedicate – as against others. What is more, the public law roles lend them a special status in societal perception [...] These benefits enable the religious communities to shape their organisation and activities in accordance with the religious principles that govern the way in which its members see themselves, and to obtain the resources necessary for this, such as funding.

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The benefits with greater possibilities to exert influence however increase the risk that they may be misused to the detriment of their members’ freedom of religion or to the disadvantage of other interests that are protected by the constitution. When determining the preconditions under which a religious community can gain the status of a corporate body under public law, the responsibility of the State which the Basic Law imposes on it must therefore also be brought to bear. It obliges it to respect and protect human dignity as the essential constitutional principle and highest fundamental value of the free, democratically constituted basic order (Article 1.1 of the Basic Law, see on this BVerfGE 96, 375 (398)) whilst obliging it to protect the basic values of the constitution (see BVerfGE 40, 287 (291-292)).

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4. The wording of Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Weimar Constitution does not rule out that the right of conferment [of the status of a corporate body under public law] granted in this guarantee is subject to further restrictions from the context of the Basic Law. The Parliamentary Council (*Parlamentarische Rat*) when taking over the Weimar church articles neither exam-

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ined the question of the preconditions for conferment, nor did it pay attention to adjusting Article 137 of the Weimar Constitution substantively to the system of the Basic Law. It contented itself with avoiding duplicate guarantees ([...] see [...] BVerfGE 83, 341 (354-355) on the religious freedom of association) by editorial amendments of the subsequent Article 4 of the Basic Law.

That the written conferment preconditions do not end the matter is as a result also not doubted in the case-law and reference material. In accordance with the virtually unanimous view, corporate body status is certainly to be denied if the preconditions are met under which it would be necessary to prohibit a private association in accordance with Article 9.2 of the Basic Law (see for instance BVerwGE 105, 117 (121-122); [...]). It would also not be comprehensible that associations which are corporate bodies under public law should be subject in this respect to less strict obligations than private associations.

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5. The boundaries within which a religious community may act freely as a corporate body under public law are drawn in the constitution, particularly by means of its fundamental value decisions. These rulings include the freedom of religion, from which Article 140 of the Basic Law in conjunction with Article 137.5 of the Weimar Constitution ultimately draws its justification as strengthening the development of fundamental rights-based freedom, the prohibition of any state church or state religion (Article 140 of the Basic Law in conjunction with Article 137.1 of the Weimar Constitution) as well as the principles of the religious and ideological neutrality of the State and the parity of the religions and confessions.

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IV.

A religious community which wishes to become a corporate body under public law must be true to the law. It must offer an assurance that it will comply with the valid law, in particular that it will exercise the sovereign powers assigned to it only in compliance with the constitutional and other statutory ties.

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1. [...] It already follows from the binding of all public power to the law and the constitution (Article 20.3 of the Basic Law) that a religious community as a corporate body under public law must offer an assurance that it will exercise sovereign rights assigned to it in accordance with the constitutional and other statutory prerequisites.

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This obligation to adhere to the rule of law does not fail because religious communities which are corporate bodies use the sovereign powers assigned to them not to implement state tasks – as would a public law institution carrying out public tasks – but for their own purposes. Under the Basic Law, any exercise of sovereign power is bound by the constitution and by the statutory system.

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2. Admittedly, outside the area of sovereign action, loyalty to the law may also be demanded of religious bodies that are corporate bodies. Each association, as every citizen, has the civil duty to respect the laws. Violation of this duty is penalised only by

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the sanction provided for by the respective statute, and prohibition of the association is only ordered under the special preconditions determined in Article 9.2 of the Basic Law. It may however be expected of an association which appears in a public law guise that it does not need to be persuaded to act in line with the law by being threatened with state sanctions and coercive mechanisms. Otherwise, one would not only have to fear that this association would also not exercise its sovereign powers in line with the law. The State must, rather, consider and ensure that the rights of third parties are not violated by means of the actions of public law bodies, even if such attribution to public law is rather formal in nature.

3. Having said that, not each individual breach of the law questions assurance of conduct that is true to the law. Also the religious bodies that are corporate bodies may have differences of opinion with state authorities clarified by the courts as to where the boundary lies in individual cases that is imposed by the law on the freedom of religion (Article 4.1 and 4.2 of the Basic Law) and on the right of religious self-determination (Article 140 of the Basic Law in conjunction with Article 137.3 of the Weimar Constitution) [...]

Furthermore, many religions which in principle recognise the authority of state statutes for themselves nevertheless have a reserve benefiting their conscience and their decisions based on their beliefs, and when conflict becomes unavoidable ultimately insist on paying greater heed to the precepts of faith than to the principles of the law. Such reservations are an expression of the absolute nature of principles of faith, which are not untypical of religions. They are also known of some old and new religious bodies that are corporate bodies, and it is not ruled out that, depending on the circumstances of the individual case, they are under the protection of Article 4 of the Basic Law. Out of consideration for the freedom of religion, which is ultimately served by the status of a corporate body under public law under Article 140 of the Basic Law in conjunction with Article 137.5 of the Weimar Constitution, they are not obstacles to awarding this status at least so long as the religious community is basically willing to respect the law and to subject itself to the constitutional order.

V.

A religious community which wishes to acquire the status of a corporate body under public law must offer in particular an assurance that its future conduct will not endanger the fundamental constitutional principles set forth in Article 79.3 of the Basic Law, the fundamental rights of third parties which are entrusted to the protection of the State, or the fundamental principles of the liberal law on religious organisations and state law on churches that are enshrined in the Basic Law.

1. a) Article 79.3 of the Basic Law removes the principles set out in Article 1.1 and Article 20 of the Basic Law from any amendment. The Basic Law hence in addition to the principle of human dignity entrenched in Article 1.1 of the Basic Law and the core of the following fundamental rights encompassed within it (see BVerfGE 84, 90

(120-121); 94, 12 (34)) also declares other guarantees to be inalienable which are determined in Article 20 of the Basic Law. These include the principles of the rule of law and of democracy (see BVerfGE 89, 155 (182); 94, 49 (103)). In the long term, the State may not accept a systematic impairment or endangerment of those principles set up in permanence by the Basic Law, even from a religious community which is a corporate body under public law.

b) The religious bodies that are corporate bodies – where they act outside the area of the sovereign powers assigned to them – are not bound directly by the individual fundamental rights [...] The granting of the status of a corporate body under public law however obliges them to respect the fundamental human rights as specified by the constitutional order. The Basic Law places human dignity and other fundamental rights under the protection of the constitution. In this way, it obliges the State to protect human life and physical integrity (BVerfGE 56, 54 (73); 79, 174 (201-202); 88, 203 (251)). Children can claim protection from the state for their fundamental right under Article 2.1 and Article 2.2 sentence 1 of the Basic Law; in this context, the best interests of the child form the orientation for state protection under Article 6.2 sentence 2 of the Basic Law (BVerfGE 99, 145 (156)). Article 4.1 and Article 4.2 of the Basic Law require the state to protect individuals and religious communities against attacks and hindrances by members of other faiths or competing religious groups (BVerfGE 93, 1 (16)).

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Religious communities which are corporate bodies have public law status and are equipped with certain sovereign powers. Therefore they have special powers and a greater influence in the state and society. They are therefore more closely associated than other religious communities with the special duties of the Basic Law required to protect third-party rights. These duties prohibit the award of the status of a corporate body under public law to a religious community against which the State would be entitled or indeed obliged to act to safeguard legal interests that are protected by fundamental rights.

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c) The status of a corporate body under public law is a means to facilitate and develop the freedom of religion. For the religious bodies that are corporate bodies, it gives rise to a preferential legal status. It is entrenched in the liberal state law on churches contained in the Basic Law. This state law on churches has as its main reference the freedom of religion. It has abolished state church and state religion. It complies with the principles of the religious and ideological neutrality of the State and the parity of the religions and denominations, and it guarantees that corporate body status does not reduce the freedom of religious constitutional law as a whole. This constitution places limits on corporate body status, and the religious communities with preferential status must also respect these boundaries. Their conduct may not impair or endanger these principles of the liberal state law on churches. The Basic Law prohibits awarding the status of a corporate body under public law to a religious community which does not offer an assurance of leaving untouched the prohibition of a state church, as well as the principles of neutrality and parity.

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2. The content of legal requirements that are placed on a religious community which seeks to become a corporate body under public law must be drafted such that for their part they do not become a contradiction of the fundamental values of the constitutional religious law and the state's law on churches. 88

a) Whether an applicant religious community is to be refused corporate body status depends not on its beliefs, but on its conduct. The principle of religious and ideological neutrality (see BVerfGE 19, 206 (216); 93, 1 (17)) prohibits the State from evaluating as such the beliefs and teachings of a religious community. For a lack of insight and suitable criteria, the neutral State may not regulate or determine anything in the area of genuinely religious matters (BVerfGE 12, 1 (4); 41, 65 (84); 72, 278 (294); 74, 244 (255)). This admittedly does not prevent it from evaluating the actual conduct of a religious community or of its members by secular criteria, even if such conduct is ultimately religious in its motivation. It is a matter of the individual case whether the beliefs and teachings of the community, insofar as they manifest themselves externally, permit conclusions to be drawn here concerning the conduct to be expected of them. 89

b) The fundamental principles established in Article 20 of the Basic Law and the principles of the law on religious organisations and of the state's law on churches are already by their origin and content structural instructions of state order. Only as such do they deserve protection. They contain no instructions for the internal structure of a religious community. 90

Over and above this, it would contradict the freedom of religion and the right of self-determination of the religious communities guaranteed in Article 140 of the Basic Law in conjunction with Article 137.3 of the Weimar Constitution to demand for instance that the internal structure of a religious community that is a corporate body must be democratically constituted, or to subject its statements regarding other religions and religious communities to the principle of neutrality. Moreover, the religious communities that are constituted as corporate bodies under public law are free to organise their relations with other religions and religious communities in accordance with their own religious self-perception, as long as they do not impair the regulatory framework established by the constitution which also forms the foundation of their own religious freedom. This would be the case, for instance, if they attempted to form a system of theocratic rule. 91

c) Requiring loyalty to the State on the part of the religious bodies that are corporate bodies over and above the requirements that have been named is not necessary to protect the fundamental constitutional values, and moreover is incompatible with them. 92

The actions and the status of a religious body that is a corporate body remain characterised by the fundamental rights-based freedom of Article 4.1 and 4.2 of the Basic Law unless constitutional restrictions are required. The holder of this freedom may determine whether and how they use their freedom. Fundamental right-based freedom, from the State's point of view, is formal freedom. The holder of the fundamental 93

right need not orientate its activity in line with the interests of the State. This would however be demanded of a religious community which had to orientate its activities “loyally” to the goals of the State, its constitutional order and the values set out therein [...].

Over and above this, the demand that a religious body that is a corporate body must be loyal to the State is a legal point of difficulty. “Loyalty” is a vague term amenable to an extraordinary number of possible interpretations, ranging through to the expectation that the religious community must adopt specific state goals or regard itself as the guardian of the State. The term namely relates to an inner disposition, to a notion, and not merely to external conduct. Hence, it not only endangers legal certainty, but it also leads to a drawing together of religious community and State which is neither required nor permitted by the state’s law on churches that is enshrined in the Basic Law.

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For the same reasons, it cannot be an aim in accordance with the Basic Law to award corporate body status in order to use privileges to persuade a religious community to cooperate with the State. The Basic Law explicitly prescribes cooperation of the State with the religious communities in some instances – for instance in the levying of church tax (Article 140 of the Basic Law in conjunction with Article 137.6 of the Weimar Constitution) or in religious instruction (Article 7.3 of the Basic Law) – and permits it in other areas. However, it does not impose this on the religious communities as a prerequisite. Whether they accept such offers or seek to keep their distance from the State is left to their religious self-perception. On the other hand, it depends on the characteristics of the cooperation on offer in each case, and on the concrete instructions as to the constitution based on neutrality and parity, as to which religious communities they are open to. That the Basic Law makes religious instruction and institutional pastoral work accessible in principle to all religious communities however shows that it does not allot benefits and opportunities to cooperate depending on the legal form in which a religious community is constituted. There is no automatic linkage between the status of a corporate body under public law and state benefits which are not already guaranteed by this status itself (“privileges”).

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3. The examination as to whether in accordance with its current and anticipated conduct a religious community offers the assurance not to impair or endanger the fundamental constitutional principles set forth in Article 79.3 of the Basic Law, the fundamental rights of third parties which are entrusted to the protection of the State and the fundamental principles of the law on religious organisations and of the state’s law on churches entrenched in the Basic Law, is contingent on a complex prognosis. A large number of elements must be combined and evaluated for this. Mathematical precision cannot be achieved. The presumption that a danger to the abovementioned protected interests would only emerge from a combination of many individual circumstances would be not untypical of such a prognosis. On the other hand, isolated shortcomings do not by themselves place a question mark over the required assurance. Here, the nonconstitutional courts are obliged to carry out a typifying overall

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view and evaluation of all circumstances which are significant to the decision on corporate body status.

VI.

According to these standards, the impugned judgment of the Federal Administrative Court violates the complainant's right under Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Weimar Constitution. 97

1. The Federal Administrative Court is however correct to presume that the complainant cannot be denied corporate body status because of its fundamental attitude vis-à-vis the State alone. That the complainant, in its religious teachings, regards any political system, and hence also the constitutional order of the Basic Law, as a "part of Satan's world" [...], is not decisive. The religiously and ideologically neutral State may not evaluate beliefs and teachings as such. Rather, it is the actual conduct of the religious community that is decisive. In this actual conduct, the complainant recognises the State of the Basic Law, as well as other "authorities" as a transitional order that is tolerated by God. The Basic Law does not require agreement with or involvement in the State over and above this. 98

2. The religious prohibition of participation in state elections does not justify *per se* denial of corporate body status. 99

The content of the principle of democracy which is inalienable in accordance with Article 79.3 of the Basic Law includes that the implementation of state tasks and the exercise of state powers must originate from the people within the State (BVerfGE 89, 155 (182)). This is contingent on the free choice of people's representatives as a basic act of democratic legitimisation (see BVerfGE 44, 125 (140)). 100

The Basic Law expects its citizens to also avail themselves of the possibilities of democratic participation open to them. However, it has refrained for good reasons from designing this priority responsibility as a legal obligation. Consent of the citizen to the state order created by the Basic Law, without which liberal democracy could not exist, cannot be coerced by an obligation to obey, or indeed by sanctions. The essence of democracy is the free spiritual debate (see BVerfGE 69, 315 (344-345)). It creates the motivating powers which are adequate, and indeed probably more than adequate, to ensure citizens' willingness to take part in democratic elections. 101

The reticence of the complainant as to state elections hence does not affect the normative content of the principle of democracy, but its actual preconditions. It is neither politically reasoned, nor is it intended to weaken democracy. The complainant does not intend to replace democracy by another state form. It does not draft or pursue a political manifesto; on the contrary, it pursues an apolitical concept of life. The efforts of the complainant do not target the free constitutional order, but a life beyond the political community in "Christian neutrality". 102

This interpretation of the complainant's manifesto and goals is also confirmed by ac- 103

tual developments. One would anticipate that the stance of the complainant in its practical consequences would have a negative impact on the democratic legitimisation of state power demanded by the principle of democracy by elections, were it to be able to deter large sections of the eligible population from participating in state elections. However, this has not been the case in more than one hundred years of its existence. In its stance, aiming at distance restricted to religiously founded statements and refraining from political options, the complainant evidently does not influence non-members. For this reason, its conduct towards state elections is a point of view which whilst it can be considered in the necessary typifying overall view, does not by itself lend weight to the presumption of an endangerment to the inalienable content of the principle of democracy.

3. The judgment of the Federal Administrative Court hence violates Article 140 of the Basic Law in conjunction with Article 137.5 sentence 2 of the Weimar Constitution. The ruling is based on this violation of the constitution because in accordance with the facts and dispute to date it cannot be determined whether or not the complainant should be denied the status of a corporate body under public law for other reasons. 104

In particular, it remained open in the nonconstitutional proceedings whether the complainant – as asserted by the *Land* Berlin – impairs children’ best interests by the educational practices it recommends, or forces members who wish to leave to remain in the community by coercion or with means disapproved of by the Basic Law, and hence impairs the state protection of the fundamental rights entrusted to it. 105

VII.

[...] 106-108

D.

This decision was passed unanimously. 109

Limbach	Sommer	Jentsch
Hassemer	Broß	Osterloh
	Di Fabio	

**Bundesverfassungsgericht, Beschluss des Zweiten Senats vom 19. Dezember 2000
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