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West German Constitutionalism and Church-State Relations

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Introduction

The complex structure of church-state relations in West Germany arises out of numerous provisions of the Basic Law that combine features of both separation and accommodation. The Basic Law's separationist features are expressed in various guarantees of religious liberty and in the ban on the establishment of a state church. Its accommodationist features appear in constitutional provisions on religious education as well as in articles, taken over from the Weimar Constitution, that confer upon the established churches a special juridical status enjoyed by no other nongovernmental entity.[1] The arguably diverse goals of the religion clauses are difficult to reconcile, creating dilemmas similar to problems raised by the tension between the "establishment" and "free exercise" clauses of the United States Constitution. In the German understanding, however, these dilemmas collapse under the weight of an interpretative approach that seeks to bring divergent clauses into harmony with one another and with the values of the Basic Law as a whole.

In the interest of both clarity and brevity, I have organized this essay around three principles that define the basic structure of church-state relations in West Germany, namely, neutrality, autonomy, and accommodation. Neutrality steers the state away from identification with the church and commands it to treat all religions equally under the law; autonomy, which is really a subcategory of neutrality, expresses the idea that church and state must remain free to govern their affairs independently of each other; accommodation, finally, not only permits but also requires certain connections or levels of cooperation between church and state. The three concepts, like the religion clauses, join one another in uneasy collaboration. In the hands of the Federal Constitutional Court, however, they have advanced into a relationship of reciprocity and mutual fertilization.

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Neutrality

After examining all the religion clauses of the Basic Law, including the Weimar articles, the Federal Constitutional Court concluded, in a seminal case, that the West German state, "as the home of all citizens, is bound by ideological and religious neutrality."[2] The theme of neutrality resonates through the constitutional law of church-state relations in the Federal Republic. A particular judicial vision of the human personality evokes this theme. Religion is so central to human existence, the Federal Constitutional Court has suggested, that any interference with religious belief or its expression, or any display of partiality for a given belief or set of beliefs, would violate the principle of human dignity that the state is bound, under Article 1, "to respect and protect." After all, religious belief or other conviction held with the force of religious faith deals with ultimate values, touching the very core of the human personality.

Article 4 is the cornerstone of the Basic Law's religious liberty provisions. It guarantees "freedom of faith, conscience, and creed, religious or ideological," secures the "undisturbed practice of religion," and upholds the right of conscientious objection to military service. Unlike several other guaranteed rights, and apart from the paragraph on conscientious objection, Article 4 is cast in absolute terms: it contains no reservation clause limiting freedom of religious belief or exercise, which means that religious expression can be regulated only by some other value explicitly set forth in the Constitution.[3] In this respect, as implied in previous remarks, the Basic Law accords a higher level of protection to religious belief than to expression based on political, social, or economic considerations.

As judicially defined, the concept of neutrality requires both separation of church and state and tolerance of religious diversity. The constitutional command that "[t]here shall be no state church" embraces the core principle of separation although, as we shall see below, its interpretation has avoided the rigid separatism of American constitutional theory. The principle of tolerance, on the other hand, obliges the state to respect and protect all manner of religious belief. Accordingly, the Federal Constitutional Court has

ruled that courts may not compel witnesses to take religious oaths against their will, that the state may not impose a criminal penalty on a husband who allowed his wife to die because of her refusal on religious grounds to accept a blood transfusion, and that an administrative judge violated a Jewish lawyer's right to freedom of conscience when he refused at the latter's request to remove from the courtroom a conspicuously displayed crucifix.[4]

In the German understanding of neutrality, however, the principle of tolerance does not imply indifference to religious belief or its exercise, for freedom of religion, like other fundamental rights, is both negative and positive in character. As the constitutional rulings in the previous paragraph indicate, the negativity of the right prevents the state from *invading* the domain of religious belief. Its positivity, on the other hand, requires the state affirmatively to ensure that the social and cultural milieu is conducive to the expression of religiously inspired thought and activity. If religion is so crucially important to the wholeness of life, furnishing the basis of linkage to transcendent values—that is, if it is an identity-defining attribute of personhood—then under the order of values propounded in the Basic Law the proper constitutionalist agenda is the creation of an environment that encourages persons to manifest their religious personalities. In short, the state should make it easy and not hard for them to practice their religion; they should not have to make sacrifices to exercise the fundamental right of religious freedom.

What constitutes the practice or exercise of religion was partially settled in the *Rumpelkammer* case,[5] another seminal decision in the church-state area. The case arose in response to a court order prohibiting Catholic clergymen from publicizing, in the pulpit or the religious press, a charitable clothing drive undertaken by a Catholic youth association for the benefit of needy young people in underdeveloped countries. A scrap dealer claimed that the youth group's activity damaged his business in violation of the civil code. In sustaining the complaint against the judicial decree, the Constitutional Court argued that the "exercise of religion" must be "expansively interpreted" to include the church's own conception of what constitutes religious activity if religious freedom is to enjoy adequate breathing space in society.

The court defended its ruling as a natural consequence of the religiously neutral state. This key passage is worth quoting in full:

> In determining what is to be regarded as the free exercise of religion, we must consider the self-image of the [relevant] religious or ideological community. Indeed, the state, which [strives to remain] neutral in religious matters, must interpret basic constitutional concepts in terms of neutral, generally applicable viewpoints and not on the basis of viewpoints associated with a particular confession or creed. However, in a pluralistic society where the legal order considers the religious or ideological self-image [of the individual] as well as the self-image of those performing rituals associated with a particular belief, the state would violate the independence of ideological associations and their internal freedom to organize accorded by the Constitution if it did not consider the way these associations see themselves when interpreting religious activity resulting from a specific confession or creed.[6]

The *Rumpelkammer* court thus concluded that this particular charitable collection, far from being a "mere social transaction," constituted an act of "Christian love" carried out "within the broad framework of religious consciousness." In an earlier case, however, the court was careful to point out that not all church activities fall within the protection of Article 4. For example, churches may be required to pay taxes on the sale of food and drink or on the rental of rooms on church property.[7] The manifest difficulty in distinguishing between church activities based on belief and those calling for normal regulation in the public interest should not obscure the court's general view that any arguably religious cause is presumptively immune from burdensome state regulations.

The neutrality demanded of the state in its treatment of religion finds further expression, finally, in several antidiscrimination clauses of the Basic Law. The framers clearly had the Nazi experience in mind when they prohibited, in Article 3 (3), the conferral of any benefit or burden on any person "because of . . . his religious or

political opinions." Article 33 (3) likewise bans discrimination against any civil or public servant "by reason of his adherence or nonadherence to a denomination or ideology." The Weimar provisions reinforce these antidiscriminatory injunctions by requiring that the "enjoyment of civil and political rights and eligibility for public office shall be independent of religious creed," by the instruction that "[n]o person may be compelled to perform any religious act . . . or to participate in religious exercises," and by the command that "[n]o one shall be bound to disclose his religious convictions." The nondisclosure clause appears to conflict with the Basic Law's directive under Article 7 (3) that religious instruction "form part of the ordinary curriculum in state and municipal schools." That teachers may constitutionally refuse to conduct classes in religion could easily lead to disclosure of one's religious views, but here too the Constitutional Court strains to reconcile competing rights and values.

Autonomy

Just as the state may not prefer one religion or religious belief over another it may not intervene in the affairs of the church. One of the Weimar provisions (Article 137 [3]) directs "[e]very religious community [to] regulate and administer its affairs independently within the limits of law valid for all," a policy that extends from the selection of church officials to the management of church-related institutions. As the *Divided Parish* case underlined, citing the clause just mentioned, "Churches are institutions endowed with the right to self-determination."[8] Accordingly, the *Parish* court refused to review a decision by church authorities to split a religious community served by one parish into two separate parishes. The decision was an internal church affair, said the court, and not an exercise of "public authority," thereby making unavailable any judicial redress of constitutional complaints based on an asserted violation of certain fundamental rights.

Would the principle of self-determination be sustained in the event that a religious community impeded the ability of a pastor to hold a seat in the state or federal parliament? This issue faced Bremen's constitutional court when called upon to decide whether the state's Protestant church could constitutionally require one of its ministers to resign his church office and take a leave of absence during the

time for which he was elected. The court invalidated the church rule on both state and federal constitutional grounds. For present purposes it is sufficient to mention that Article 48 (2) of the Basic Law provides that "no person may be prevented from accepting and exercising the office of an [elected] deputy [to the Bundestag]." On appeal the Federal Constitutional Court quashed the decision of the state court, holding that there was no conflict between the church rule and Article 48 and that the church was free in any event to decide when and under what conditions its ministers could best carry out their spiritual functions.[9] Indeed, the court seemed impressed with the church's own determination not to mix the functions of church and state.

In other situations it has not been so easy to draw a clear line between the sacred and the secular. The relevant clause of the Weimar Constitution guarantees the church's autonomy "within the limits of the law valid for all," a clause that subjects the church and its institutions to all valid laws enacted in pursuit of the general welfare. Cases involving labor relations and the management of institutions loosely associated with the church have caused the greatest difficulty here. Do trade unionists have the right to enter church institutions such as charitable foundations, nursing homes, and hospitals in order to distribute leaflets and other information pertaining to union membership and the rights of workers? May a state require all hospitals, including those under religious auspices, to adopt specified accounting and managerial practices? May a hospital run by a Catholic order of nuns prefer its own religiously based system of staff codetermination over the one prescribed by state law? May a Catholic hospital dismiss a physician known for his advocacy of the right to abortion?

In all of these cases, the Federal Constitutional Court ruled in favor of the churches and against the applicable state law, in three instances overruling decisions of the Federal Labor Court.[10] Any state policy, the court suggested, that compromises the mission of the church, detracts from its religious identity, or undermines its public credibility as a religious institution committed to a given way of life, interferes with the autonomy of the church in violation of the Basic Law. The result in these cases must be understood in terms of the Constitutional Court's image of the church as a copart-

ner with the state in caring for the needs of its citizens. Because it provides for a people's spiritual needs, "the church is crucially important to the life of the state and society,"[11] and thus deserves a special margin of appreciation when its institutional claims conflict with otherwise valid state law. This perspective does not diminish the importance of the state's own public policies. If otherwise valid state interests can be justified by compelling social or economic reasons and do not affect core church functions or the self-identity of institutions under the church's control, they are likely to be upheld.

The policy of nonintervention, however, does not reach as far as the American principle of nonentanglement. Some supervision of the church is bound to occur within a constitutional order that confers a special legal status on religious associations, empowering them to exercise certain public functions. The church's autonomy is obviously limited to the extent that the discharge of *these* functions invites state regulation in the public interest. By the same token, when the church exercises authority conferred by law—e.g., levying taxes on its members—state supervision may be necessary for the proper administration of the resulting rules. It may also be necessary, as noted below, to insure that the church administers a state sanctioned practice so as not to interfere with the free exercise of religion.

Accommodation

The scheme of church-state relations under the Basic Law of the Federal Republic of Germany conforms to a deeply rooted German tradition. In this tradition, which emphasized the complementarity if not the unity of a people's spiritual and physical existence, the church enjoyed a rank coordinate with the state in the governance of society. As institutions of equal rank within what was assumed to be a common universal community, they ordered their joint endeavors and settled their disputes by means of concordats or treaties, a practice that continues to this day. Although the theory of coordination would be eclipsed in the course of time by the rising tide of rationalism and secularism, leading to the complete supremacy of the state in public affairs, the churches would in the twentieth century retain many of their old connections to the political city.[12]

Thus, as noted at the outset, West Germany combines elements of both separation and accommodation. The Basic Law prohibits the establishment of a state church—its separationist tilt—but it nevertheless confers upon religious groups the status of "corporate bodies under public law," in which capacity they "shall be entitled to levy taxes [on wage earners] in accordance with the state (*Land*) law on the basis of civil taxation lists." In addition, the Constitution reaffirms the right of the church to own property, to establish affiliated institutions, and to receive "state contributions" as prescribed by law. It also obliges the state to recognize Sunday and other religious holidays as "days . . . of spiritual edification," and guarantees the church's right to provide religious services, when needed, in prisons, hospitals, and other public institutions. These provisions of the Weimar Constitution, carried over into the Basic Law, are best understood in the light of history, that is, not only as an effort to secure the autonomy of the church in the face of Bismarck's *Kulturkampf* but also to compensate the church for the financial losses it had sustained by the state's seizure of church property and the dissolution of religious orders and congregations.

The Basic Law itself provides for still other connections between church and state. Article 7, although placing the "entire educational system under state supervision," confers upon parents the "right to decide whether [their children] shall receive religious instruction," makes such instruction "a part of the ordinary curriculum in state and municipal schools," and permits the establishment, subject to state approval, of publicly supported denominational schools. Religious instruction is not permitted in purely secular schools, although in other public or interdenominational schools such instruction "shall be given in accordance with the tenets of the religious communities." As noted above, however, parents may decline to have their children attend classes in religion, just as the Basic Law bars the state from compelling a teacher to conduct such classes.

In the light of their reserved power over the fields of culture and education, the states (*Länder*) are free to adopt policies based on their various religious and political traditions. Nearly all the state governments have negotiated treaties or concordats with the Protestant churches and the Vatican—in recent years such treaties

have been concluded with the Jewish community and other religious groups—covering such matters as the legal status of churches, religious education in the public schools, construction of confessional schools, observance of religious holidays, maintenance of church property, appointment of bishops, and dismissal of members of theological faculties.[13] Needless to say, any detailed reference to these church-state agreements, or to the decisions of state constitutional courts interpreting them, would take us far afield. It is sufficient to note that any comprehensive treatment of church-state relations in West Germany would have to take this massive body of law into account.

Two problems, nevertheless, have warranted the special attention of the Federal Constitutional Court, one dealing with the church tax and the other with religious activities in state schools. The typical complaint against the church tax is that its application to a particular person violates freedom of conscience or religion. Invariably, the court strikes down the tax when applied to "unchurched" persons or to others who have given formal notice of their withdrawal from the church. The system itself, however, is beyond constitutional challenge. As presently operated, state revenue offices collect the tax on behalf of the churches and then distribute the proceeds to the major denominations proportionate to their respective memberships. The tax takes the form of an eight to ten percent surcharge, withheld by the employer, on a wage earner's net income tax, but here too the court has exercised considerable vigilance, in one case nullifying the levy on the income of the spouse who filed a joint income tax return with his "churched" wife but who himself was not a member of the church.[14]

The educational context has also been a fertile source of constitutional rulings. As with the church tax, religious education is sanctioned by the Constitution; it enjoys a legitimate place within the public school curriculum so long as the state respects the religious or nonreligious choices of students and teachers. Indeed, most constitutional commentators defend such instruction as a manifestation of the free exercise of religion. As the *Concordat* case made clear, however, freedom of religion does not *obligate* the state to establish confessional schools.[15] It may, if it chooses, even in opposition to a national treaty, establish interdenominational schools as the standard form of elementary and secondary education

so long as the need for religious education can be met within this framework. The problem is that this need cannot as a practical matter be extended to all religious groups. Small Christian sects often do not meet those imperatives of size and durability that would constitutionally entitle them to religious instruction in public schools. Whether and to what extent religious instruction or separate confessional schools shall be provided for some 300,000 Moslem students—the children of foreign workers resident in West Germany—is presently a troubling constitutional issue.

Equally troubling is the problem of religious influences or practices outside the structure of formal religious education. Two cases are considerably important here. In the first, the Constitutional Court upheld the right of the state to establish interdenominational schools with a general Christian orientation; in the second, it sustained the validity of a nondenominational prayer in such schools. In each case the court sought to reconcile the "constitutional value of [religious] tolerance" with the "safeguarding of state independence in matters of school organization." Christian references within the context of secular courses, said the court, do "not refer to the truth of belief" but rather to "the recognition of Christianity as a formative cultural and educational fact." The court cautioned, however, that public schools may not be transformed into "missionary schools," "may not require any commitment to articles of Christian faith," and must "remain open to other ideological and religious ideas." In the prayer case too, said the court, tolerance required equal concern and respect for the rights of believers and unbelievers; participation in prayer must be voluntary and the exercise ordered in such a way as to preserve the rights of all. As in most cases such as this, the court scrutinizes the facts carefully in an effort to reconcile the negative right to be free of religious compulsion with the positive right to religious expression.[16]

Conclusion

The German perspective on church-state relations, as this brief survey shows, contrasts sharply with the official American position, which is one largely of dogmatic separation. Indeed, any attempt in Germany to drive church and state into sharply divided

compartments, where the twain shall never meet, would in the prevailing view seriously offend the freedom to practice one's religion. An echo of this prevailing German attitude can be heard in those American constitutional cases where the Supreme Court has had to balance the value of nonestablishment against claims asserted under the free exercise clause.

Both German and American constitutionalism require the state to be neutral with respect to religion, but neutrality means different things in the two systems. To Americans neutrality means toleration and no public support; to Germans it means encouragement and at least some public support. The American perspective reflects an essentially negative view of religion's role in the nation's public life, whereas the German perspective sees religion as a needed participant in the public sphere. Finally, the Basic Law adheres to the principle of separation, but in the German understanding of the term this does not imply the impenetrable wall of disassociation erected in American constitutional law. The German system permits and even encourages a measurable degree of cooperation between throne and altar so long as each respects the autonomy of the other and the state favors no one religion over another.

West Germany provides Americans with an interesting model of how a liberal, pluralistic democracy—and a highly secularized one at that—might order the relationship between church and state. Indeed, the accommodationist stance of German constitutional law is often defended as a means of maintaining pluralism and diversity in the face of powerful secularizing trends toward social uniformity and moral rootlessness. Secular critics of the current modus vivendi have pointed out, however, that the church's financial connection to the state allows it to exert excessive influence in the political realm. Some religious critics, on the other hand, see the influence running the other way, with the church serving as a captive of the liberal state, aligning itself with existing power structures and compromising its spiritual mission. There is probably some truth in both propositions. Still, the system appears to work to the benefit of both church and state and in the absence of the agitated political strife often stirred up by the religious presence in American politics. Church and state are separate in Germany but no Berlin wall divides them. Their

[1]Article 140 of the Basic Law incorporates Articles 136, 137, 138, 139, and 141 of the Weimar Constitution of 1919. These articles reaffirm various liberties of conscience and specify in considerable detail the rights and privileges of religious organizations. Under Article 140, the Weimar articles constitute "an integral part of this Basic Law," placing them on the same plane of constitutional legality and protection as any other provision of the Basic Law.

[2]See Church Construction Tax Case, Judgment of December 14, 1965, 19 *Entscheidungen des Bundesverfassungsgerichts* (hereafter cited as BVerfGE), p. 216.

[3]In the *Tobacco-Atheist* case, for example, the Federal Constitutional Court sustained the denial of parole to a prisoner, an ex-Nazi stormtrooper, because he promised to reward his fellow inmates with packages of tobacco if they would abandon their religious faith. The Court felt that such tactics, which appeal to the lowest of human instincts, violated the Basic Law's "general order of values," especially the principle of human dignity. "A person who exploits the special circumstances of penal servitude and promises and rewards someone with luxury goods in order to make him renounce his beliefs," said the Court, "does not enjoy the benefit of the protection of Art. 4, Sec. 1, of the Basic Law." See 12 BVerfGE 4-5 (1960). The quotation is from the English translation of this case, which appears in Walter F. Murphy and Joseph Tanenhaus, *Comparative Constitutional Law* (New York: St. Martin's Press, 1977), p. 467.

[4]See, respectively, *Witness Oath Case*, 33 BVerfGE 23 (1972), *Blood Transfusion Case*, 32 BVerfGE 98 (1971), and *Crucifix Case*, 35 BVerfGE 366 (1973).

[5]24 BVerfGE 236 (1968).

[6]Ibid., pp. 247-248. The translation of this passage has been taken from Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham and London: Duke University Press, 1989), p. 449.

[7]*Watch Tower Bible and Tract Society Case*, 19 BVerfGE 229 (1965).

[8]18 BVerfGE 385 (1965).

[9]*Bremen Evangelical Church Case*, 42 BVerfGE 312 (1976).

[10]See, respectively, *Union Recruiting Case*, 57 BVerfGE 220 (1981), *Marien Hospital Case*, 53 BVerfGE 366 (1980), *Goch Hospital Case*, 46 BVerfGE 73 (1977), and *St. Elizabeth Hospital Case*, 70 BVerfGE 138 (1985).

[11]See *Evangelical Church Case*, supra note 9 at 331.

[12]An excellent treatment of the "coordination theory" and its contemporary manifestations, including sharp criticisms of the theory, is contained in Klaus G. Meyer-Teschendorf, *Staat und Kirche im pluralistischen Gemeinwesen* (Tübingen: J. C. B. Mohr [Paul Siebeck], 1979, pp. 1-52.

[13]The terms and interpretation of these treaties embrace a large portion of *Staatskirchenrecht*, a major subject of legal study in Germany often taught by constitutional lawyers. The best and most up-to-date study of these church-state agreements is Joseph Listl, *Die Konkordate und Kirchenverträge in der Bundesrepublik Deutschland*. 2 vols. (Berlin: Duncker & Humbolt, 1987).

[14]For a summary of the leading cases, see Ingo von Münch, *Grundgesetz Kommentar*, second edition (Munich: Verlag C. H. Beck, 1983), vol. 3, pp. 1326-1334.

[15]6 BVerfGE 309 (1957).

[16]The two cases are the *Interdenominational School Case*, 41 BVerfGE 29 (1975) and *School Prayer Case*, 52 BVerfGE 223 (1979). An English translation of these cases appears in Kommers, supra note 6, at pp. 466-477.