The European Impact on Law and Religion in Germany

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1. Introduction

During the first decades after the signature of the Treaty of Rome and of the European Convention on Human Rights many German scholars had the impression that the historically matured legal regime on the relationship between state and Christian churches was more or less resistant to the general increasing influence, transformation and reshaping

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of the domestic legal orders by European law. Particularly with the view to the absence of a direct competence of the European Community for religious issues and specifically for the relationship between state and churches, *Alexander Hollerbach*, expert for the law on the religious communities in Germany, stated in 1989 that «European law has not yet penetrated this matter» (Hollerbach 1989).

However, even at that time, Community law already contained competences for numerous subject-matters whose execution in principle could have an effect on the activities of churches and other religious communities. Therefore, when the process of Europeanization rapidly speeded up in the 1990ies, the fear grew in Germany that Community or European Union law could have negative consequences on the status of churches and other religious communities. *Christoph Link*, director of the Hans Liermann Institute for Ecclesiastical Law in Erlangen, clairvoyantly made the point: «When the churches are only seen as providers of services, as employers, data recipients or arbitrary organizations, the specific nature of their mission, which they also fulfill in these functions, is lost from view» (Link 1997).

Against the background of such warning, the churches called for the preservation of the autonomous regulatory scopes and the safeguarding of the existing state-church structures of the Member States. In effect, a church declaration (Declaration 11) was added to the Amsterdam Treaty of 1997, which demanded respect for the status of the churches and the other religions communities guaranteed by the Member States and forbade its impairment. Finally, it was even possible to expand the content of this church declaration to include a statement on the dialogue

between the churches and other religious communities and the European Union, and in this form to make it the subject of Primary Law (Article 17 TFEU). Thus, it seemed that the most effective security instrument imaginable had been realized in favor of the traditional status quo of state-church law.

Nevertheless, the hopes associated with Article 17 TFEU have not been fulfilled in case law, as not least the two rulings concerning Germany in the *Egenberger* and *I. R. (Head Doctor in a Church Hospital)* cases demonstrate. Instead, the European Court of Justice assumes that Union law is not applied differently in cases involving religion than in other constellations. According to its case law, Union law that is not specific to religion is in principle applied in a regular manner to religiously influenced situations, without church or religious interests being given priority, as intended by Article 17 TFEU. The institutional arrangement between the state and the churches is particularly under pressure when it comes to enforcing the various prohibitions of discrimination under European Union law.

Behind the above-mentioned case law lies the problem, at a fundamental level, that Union law, as a predominantly economically oriented law, encounters historically and culturally evolved legal systems of the Member States. Here, two legal matters collide, each of which follows its own factual logic: the realization of a common market as an instrument of integration on the one hand, and the protection of individual and corporate religious confessions on the other. In this respect, the law of the European Union is functionally oriented, while the traditional state-church law is basically institutional, since it addresses the

churches and other religious communities not only in terms of their fundamental right to freedom, but also and especially as institutions.

In the following, first an overview of the regulatory regime of state-church law in Germany will be given. Then it will be shown what influence the case law of the European Court of Human Rights and the European Court of Justice has on the domestic state-church law. It will be highlighted that the two courts not only follow divergent logics of Europeanization, but are also willing and able to take national state-church law into account to a very different extent. This can be seen in particular in the field of church labor law, which, as a result of the jurisprudence of the European Court of Justice, is the subject of a striking overhaul under European law.

2. Regulatory Regime of the State-Church Relationship in the German Basic Law

German state-church law is the result of historical circumstances, conflicts and experiences. As the heartland of the Reformation and an imperial and federal roof over a multitude of different territories, Germany had to pacify, safeguard and regulate the coexistence of different religious confessions already at an early stage. In the respective epochs, positive law did not present itself as the realization of a certain principle on how to fix the relationship between state and religion, but as the result of a compromise of competing principles, as a stopgap solution for the pragmatic bridging of more or less irreconcilable opposites.

3. State-Church Law as Result of Extended Historical Compromises

In the Augsburg Religious Peace of 1555, the imperial estates wanted to refrain only temporarily from enforcing religious freedom against each other, since they had not yet given up the idea of a religious reunification. In the Peace of Westphalia in 1648, the warring parties, bled dry by the Thirty Years War, wrested a modus vivendi for the confessionally divided Empire. The provisions of this agreement were reached at the negotiating table, not on the drawing board of a concept of confessional-parity coexistence, as the order of which they could subsequently unfold and be understood as having a long-lasting determining effect.

Below the level of imperial law, the territories were able to form their state-church law from a systematic cast, as was done, for example, with a high qualitative standard in the Prussian General Land Law (*Allgemeines Landrecht für die Preußischen Staaten*) of 1789. Even for the church regiment executed by the local sovereigns, which was conceptually built into the state-church law of the Protestant territories, it is significant that this system feature, too, had originally resulted from the pragmatic management of church leadership tasks after the Reformation. Its systematic justification was brought to it only subsequently; it reflects the need for theoretical justification before the demands for historical and rational consistency of legal relations. Accordingly, it was later termed as an episcopal, territorial or collegial *system*.

The pioneering and ultimately not realized Constitution of the Frankfurt Saint Paul's Church (*Paulskirchenverfassung*) of 1848 was again the result of a compromise. It sought a

middle way between the fronts of liberal and conservative religious policy, in which neither of the extreme positions prevailed and which only subsequently proved to be a specifically German model of a liberal religious constitution with a tradition-forming effect.

The present state-church law in Germany stands in this tradition not thanks to a consensus in the constitutional deliberations in Weimar in 1919 and in Bonn in 1948/1949 about realizing such a model of a liberal constitution of religion, but thanks to the repeated reshaping of dissent. Thus, the church articles in the Weimar Constitution (*Weimarer Reichsverfassung*) seemed to be able to accommodate only a «dilatory formulaic compromise» (Schmitt 1928) between pro-state-church and laicist drafts. Furthermore, in 1948/1949 the Parliamentary Council escaped the reopened dissent on state-church law only by the laconic incorporation of central parts of that predecessor solution into Article 140 of the Basic Law (*Grundgesetz für die Bundesrepublik Deutschland*), which presents a double or even multiple extended compromise.

The apparent instability of this «embarrassment result» (Smend 1951) has since been absorbed by its practical proving. In any case, the norms of the Basic Law governing the state-church relationship have remained stable throughout the changes in constitutional policy and social reality. They are among the parts of the text that have remained untouched in the more than 65 amendments to the Basic Law to date.

Even the constitutional amendments in the wake of the reunification of Germany in 1990, which brought together the different sociological conditions of religion in the old Federal Republic and in the German Democratic Repub-

lic, did not touch them. In the constitutional commission for the unification-related revision of the Basic Law, the demands for fundamental intervention in the legal relationship between state and religion, which were certainly raised by individual members, did not find any significant support. This need not be interpreted as a perpetuation of the constitutional dissent that originally underlay the regulations, even if the ideas articulated in dissatisfaction with them appear to be as static as the normative text.

The continuity of the arrangement created by the Weimar Constitution and incorporated into the Basic Law can rather be explained by its ability to regulate a contemporary and appropriate relationship of the state to religion and religious communities, even under changing social circumstances and conditions. However, the regulations of state-church law under the Basic Law are coming under increasing pressure, not only from European law but also, and above all, as a result of the decline in the reputation and importance of the Christian churches among the population. At the same time, churches are considering how to position themselves for the future.

4. Coordinates of the Current State-Church Law

The current provisions of state-church law can be found in various places in the Basic Law, but also in the constitutions of the *Länder*, in statutory law, as well as in concordats and state-church treaties. The Basic Law contains guarantees of religious freedom, prohibitions of discrimination on the grounds of religion, regulations on religious instruction in public schools and on the continued validity of the *Reichskonkordat* of 1933,

as well as institutional provisions on the relationship between the state and religion or religious communities.

Particularly, Article 4 of the Basic Law stipulates that freedom of faith and of conscience and freedom to profess a religious or philosophical creed shall be inviolable. The undisturbed practice of religion shall be guaranteed. No person shall be compelled against his or her conscience to render military service involving the use of arms. Thus, Article 4 of the Basic Law guarantees the freedom of thoughts in matters of religion and ideology, the *forum internum*, and in the *forum externum* the freedom to communicate religious or ideological convictions and the freedom to manifest such convictions by ritual activities and religious customs, namely church services, prayer, celebration of sacraments, processions and pealing of church bells.

Furthermore, the Federal Constitutional Court (*Bundesverfassungsgericht*) has consistently held that Article 4 of the Basic Law gives the individual the extensive right to align his or her whole behavior with the lessons of his or her faith and to act according to his or her inner convictions. Consequently, the guarantee of freedom of religion also covers externally neutral behavior when the bearer of the right in his or her *forum internum* creates a connection with commandments of his or her creed. Typical applications are the wearing of a headscarf or the refusal to participate in co-educative sports lessons or class outings in schools. In such cases, the self-understanding of the affected person is decisive, but he or she must plausibly explain why his or her behavior is motivated by religious or ideological convictions.

The liberal guarantees of Article 4 of the Basic Law are supplemented by negative freedoms enshrined in Article 136

paragraphs 3 and 4 of the Weimar Constitution in conjunction with Article 140 of the Basic Law. They read on the one hand that no person shall be required to disclose his or her religious convictions and that the authorities shall have the right to inquire into a person's membership of a religious society only to the extent that rights or duties depend upon it or that a statistical survey mandated by a law so requires, and on the other hand that no person may be compelled to perform any religious act or ceremony, to participate in religious exercises or to take a religious form of oath.

Unlike Article 9 ECHR, Article 4 of the Basic Law does not explicitly mention any limitations of freedom of religion. Therefore, the Federal Constitutional Court argues that the basic right finds its limitations only in conflicting constitutional law. Conversely, a strong opinion in literature holds that the freedom of religion stands under the proviso of qualified law. The representatives of this opinion point to Article 136 paragraph 1 of the Weimar Constitution in conjunction with Article 140 of the Basic Law, reading that civil and political rights and duties shall be neither dependent upon nor restricted by the exercise of religious freedom. They argue that among these duties was the duty to obey the laws. Therefore, the freedom of religion could be restricted by laws that are not directed against a certain religion or ideology but are serving other high purposes.

Article 137 paragraphs 2 and 3 of the Weimar Constitution in conjunction with Article 140 of the Basic Law supplement Article 4 of the Basic Law with regard to religious freedom of association. Article 137 paragraph 2 of the Weimar Constitution guarantees the freedom to form religious societies. Moreover, Article 137 paragraph 3 of the Weimar

Constitution reads that religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community.

This provision has been titled in literature the "lex regia" of the corporate state-church law (Heckel 1966/1967). It can be understood as «the core and center of the church-political system initiated by the Weimar Constitution» (Mikat 1960). It applies to all religious communities regardless of whether they enjoy the rights of a corporation under public law, are associations under private law or do not have legal capacity at all. The constitution does not grant them only a kind of right to self-government, but recognizes their right to self-determination, their complete freedom from state supervision and paternalism.

Concerning non-discrimination, Article 3 paragraph 3 of the Basic Law rules, *inter alia*, that no person shall be favored or disfavored because of faith or religious opinions. Article 33 paragraph 3 of the Basic Law adds that neither the enjoyment of civil and political rights nor eligibility for public office nor rights acquired in the public service shall be dependent upon religious affiliation. No one may be disadvantaged by reason of adherence or nonadherence to a particular religious denomination or philosophical creed. Similarly, Article 136 paragraph 2 of the Weimar Constitution in conjunction with Article 140 of the Basic Law reads that the enjoyment of civil and political rights and the eligibility for public office shall be independent of religious affiliation.

Article 7 paragraphs 2 and 3 of the Basic Law contain rules about religious instruction in public schools. According to these provisions, the legal guardians of a child have

the right to determine the child's participation in religious education. Religious instruction shall form part of the regular curriculum in public schools, with the exception of nondenominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction. The institutional guarantee of religious instruction in public schools finds a territorial limitation in the so-called Bremen Clause of Article 141 of the Basic Law.

However, the institutional provisions of the constitutional regime for the relationship between state and religious communities are predominantly laid down in the Weimar church articles, that are fully valid constitutional law of the Federal Republic of Germany. That regime is characterized by primacy of state law, institutional separation of state and church (Article 137 paragraph 1 of the Weimar Constitution in conjunction with Article 140 of the Basic Law), neutrality in matters of religion, equality of all religions and philosophical creeds, corporate freedom of religion, offer for religious communities of obtaining the status of a corporation under public law (Article 137 paragraph 5 of the Weimar Constitution in conjunction with Article 140 of the Basic Law), and cultural responsibility of the state to the effect that the state assumes responsibility for ensuring that questions of meaning can be asked and that freedom of religion can develop real force.

The principle of neutrality in matters of religion is not explicitly mentioned in the constitution, but it is deduced from the sum of constitutional provisions on the relationship between state and religion. However, its content is

highly disputed. The generally accepted minimum standard is that the state must not identify itself with a certain religion or ideology. It must not take a side in the questions of religious truth. The state is not allowed to express a closeness toward a church or religious community or toward a certain faith. Instead, it must keep an internal and external distance towards any religion or ideology and the institutions representing them. On the other hand, the state must recognize the religious and ideological bindings of its citizens as part of the pluralistic reality and take them into account when deciding about its activities.

On the whole, the German constitution professes neither state-churchism nor laicism (of the French variety), but rather an order that allows cooperation with religious communities (see, for example, the status of a corporation under public law, which allows the exercise of special powers; religious instruction in public schools; theological faculties at state universities; religious services and pastoral work in the army, in hospitals, in prisons or in other public institutions according to Article 141 of the Weimar Constitution in conjunction with Article 140 of the Basic Law) and even does not exclude state support for religious communities, as long as the principles of neutrality and equality are observed. Therefore, one can speak of a benevolent or friendly separation.

5. Special Features of Church Labor Law

The church labor law in Germany has some special features compared to the corresponding law of other European countries. The constitutional point of departure is

the church's right to self-determination under Article 137 paragraph 3 of the Weimar Constitution in conjunction with Article 140 of the Basic Law. That right guarantees regulatory autonomy for the development of church service in the form of a special labor law order.

Thus, the right of self-determination includes the possibility of structuring the service in ecclesiastical institutions, such as Caritas or Diakonia, an ecclesiastical hospital or an ecclesiastical kindergarten, in the form required by the ecclesiastical mission. The following are considered: service and loyalty relationships under membership law (members of religious orders), service and loyalty relationships under public law of corporate religious communities (for instance, church civil service relationships), employment and service relationships under state law, and, possibly, service relationships of religious communities of their own kind. In any way, the religious communities may, within the limits of the law applicable to all, regulate ecclesiastical service according to their own understanding and provide for specific obligations of loyalty, the violation of which may be punished by dismissal or termination of the employment relationship.

The collective terms and conditions of employment can be determined by the religious communities either unilaterally by church law (first way), by collective bargaining agreement (second way) or by labor-law commissions, which in practice are composed of equal numbers of representatives of the church employers and the employees according to the principle of an «ecclesiastical community of service [*kirchliche Dienstgemeinschaft*]» rather than a reconciliation of interests (third way). The large religious communities have generally taken the latter way for em-

ployment and service relationships under private law, but in some cases they have also permitted collective bargaining relationships in line with church law. In the event of a dispute, the third way is decided by a conciliation committee composed on a parity basis. The right to strike is always excluded. The Federal Labor Court has approved this if the trade unions are organizationally involved.

Against the background of European law, particularly the dismissal or termination of the employment relationship due to violations of loyalty obligations appears to be problematic, since this measure could in some cases be qualified as violation of human rights or anti-discrimination rules. Moreover, the German church labor law gives religious communities a great deal of freedom to set their own standards for evaluating duties of loyalty. Accordingly, it is left to the religious communities to determine in a binding manner what the credibility of the church and its proclamation requires, what specific church duties are, what closeness to them means, what the essential principles of the doctrine of faith and morals are and what is to be regarded as a serious violation of them. The state labor court is in principle bound to these church determinations. It is not surprising that the European courts are seeking to limit this broad scope for judgment on the part of religious communities in favor of employee protection.

6. Jurisdiction of the European Court of Human Rights

The European Convention on Human Rights generally does not have the same significance in Germany as it does in many other European countries. It does not have constitu-

tional status, but only the status of simple statutory law of the Federal Republic. However, the Federal Constitutional Court emphasized that the basic rights of the German Basic Law have to be interpreted and applied in the light of the European Convention on Human Rights. Furthermore, the German courts must consider the case law of the European Court of Human Rights in their judgments.

In view of the heterogeneous composition of the Council of Europe, the jurisprudence of the European Court of Human Rights on questions of religion and religious freedom is characterized by a certain restraint. This is not least due to the *margin of appreciation*, an argumentation figure that the European Court of Justice does not recognize in this way. However, the European Court of Human Rights has created a certain uniformity through decades of detailed case law on individual cases in a variety of human rights matters and has had, as a result, a harmonizing effect also on various aspects of the domestic state-church law in the European countries.

Potentially the greatest impact on national state-church law, from a German perspective, comes from legal disputes in which the line of conflict is between the individual and his or her own religious community. Rightly, the third-party interveners in *Károly Nagy v. Hungary* argued that the institutional autonomy of churches is endangered when state courts and the European Court of Human Rights rule on intra-religious disputes (ECtHR, Grand Chamber judgment of 14 September 2017, appl. no. 56665/09, at 59).

However, it is not always easy to determine what are truly intra-religious disputes. It makes a difference whether there is a dispute about who is admitted to ordination to the priesthood, who is allowed to remarry according to church

rites, or who is absolved of sins, or about whether and to what extent those who have worked for the church are also remunerated for it. Labor law issues lie on the borderline between the church's sphere of responsibility and the state's sphere of responsibility.

In the case of *Károly Nagy*, the European Court of Human Rights declared inadmissible the complaint of a pastor of the Reformed Church of Hungary, with which he asserted financial claims after his dismissal from the church service, because there was no claim of the complainant in Hungarian law that could be enforced before state courts. The Grand Chamber was convinced that his claim was based solely on the presbytery's letter of appointment to the pastoral service, that was governed by ecclesiastical and not by state law.

In contrast, Judges *Sajó*, *López Guerra*, *Tsotsoria* and *Laffranque* argued in a joint dissenting opinion that the dismissed pastor should be able to enforce his claims against the church in state courts, because otherwise the door would be opened to uncontrollable arbitrariness in church employment relationships: «Ultimately, this judgment risks endorsing the position that all appointments and service agreements formed with religious institutions that are subject to internal rules fall outside the jurisdiction of the State. Consequently, such agreements are rendered unreviewable and any rights are unenforceable under domestic law. [...] It goes without saying that the Convention requires respect for freedom of religion and that freedom results in the duty to respect church autonomy. It would be unacceptable [...] to allow State authorities to enforce the internal rules of a church. But this does not mean that where a religious organization declares a matter 'internal', such organizations can unilaterally deprive the af-

fected party of State jurisdiction if that relationship is secular. The present case does not concern the appropriateness of the religious teachings of the applicant [... since the pastor was dismissed because a local newspaper reported that he has said that state subsidies had been paid unlawfully to a Calvinist boarding school], nor the appropriateness of his criticism of ecclesiastical authorities on a matter unrelated to religious teachings (which was the basis of the disciplinary proceedings). Church autonomy may require judicial respect for religious doctrine, according to which a priest or pastor provides a non-secular service. But this was not argued by the defendant at all and the claim concerned a secular relationship related to the disciplinary procedure».

In fact, the European Court of Human Rights applies a very lenient standard in such cases. Technically, the issue is access to a state court. The prerequisite for the application of Article 6 of the European Convention on Human Rights is that there is a claim in domestic law that can be brought before a court. The European Court cannot create new claims. However, the dispute as to whether a claim exists under state law must be capable of being litigated in national courts. If the national courts declare the relevant claim inadmissible, the European Court of Human Rights reserves only an arbitrariness review: «The Court recalls that it is primarily for the national authorities, in particular the courts, to resolve problems of interpretation of domestic legislation. The Court's role is limited to verifying whether the effects of such interpretation [that a claim is inadmissible] are compatible with the Convention. That being so, save in the event of evident arbitrariness, it is not for the Court to question the interpretation of the domestic law by the national courts» (ECtHR,

Grand Chamber judgment of 14 September 2017 – *Károly Nagy v. Hungary*, at 62).

This line of jurisprudence has generally resulted in the dismissal of claims directed against the authorities of religious communities. Examples are the complaints of the former Salvation Army officers *Müller* (ECtHR, judgment of 6 December 2011, appl. no. 12986/04) and the two Protestant pastors *Baudler* (ECtHR, decision of 6 December 2011, appl. no. 38254/04) and *Reuter* (ECtHR, decision of 6 December 2011, appl. no. 39775/04) against Germany, who had resisted the termination of their missionary service, their placement on leave of absence or retirement due to complaints of their territorial leader or a disagreement with their respective parishes. Also worth mentioning are the cases of *Dudová and Duda v. Czech Republic* and *Ahtinen v. Finland*. The former involved the termination of pastoral service for the Czechoslovak Hussite Church and the payment of back wages (ECtHR, decision of 30 January 2001, appl. no. 40224/98); the latter involved the transfer of a pastor of the Evangelical Lutheran Church to a parish 100 kilometers away from his former parish (ECtHR, judgment of 23 September 2008, appl. no. 48907/99). The Court declared these appeals inadmissible as well.

The Court's restraint in interpreting Article 6 of the European Convention on Human Rights, when it comes to the demarcation between state law and ecclesiastical law, has the effect of sparing the autonomy of religious communities as defined in the respective state. The decisions in the *Obst* and *Schüth* cases against Germany go into a similar direction. They concerned dismissals of church employees for the violation of a previously agreed moral code. *Obst* and *Schüth* were

dismissed because of their private lives; they both were engaged in an extramarital relationship. Their cases raised the question of the extent of the loyalty obligation established by the church employer. The German labor courts did not withdraw the dismissals. *Obst* and *Schüth* went to the European Court of Human Rights by claiming that their right to private life and family life in Article 8 of the European Convention on Human Rights was violated. The Court balanced this right against the Conventional rights of the churches and came to two different decisions.

In the case of *Obst*, the European Court of Human Rights saw no violation (ECtHR, judgment of 23 September 2010, appl. no. 425/03). *Obst* grew up as a Mormon and married in accordance with Mormon rites. He knew that marital faithfulness was essential for the Mormon Church. Moreover, he was under special loyalty obligations as he held the position of the Mormon Church's director of public relations for Europe (see also ECtHR, judgment of 3 February 2011, appl. no. 18136/02 – *Siebenhaar v. Germany*).

In the case of *Schüth*, the Court came to the conclusion that the German labor courts have violated Article 8 of the European Convention on Human Rights (ECtHR, judgment of 23 September 2010, appl. no. 1620/03). *Schüth* was organist and choir leader in a Catholic parish located in a big city. He separated from his wife, lived with a new partner, had a child from her, and a second child was on the way. The parish dismissed him due to adultery and bigamy. The first two instance labor courts held that the dismissal was unjustified because *Schüth* was no leading staff and, therefore, not under increased loyalty obligations. However, the Federal Labor Court quashed these decisions by stressing the

Church's freedom of contract and its right to define loyal duties and what constitutes a breach of such duties. The European Court of Human Rights took the view that the German courts at the end did not sufficiently examine the interests of the church employee, who *de facto* led a family life with his new family and had only limited opportunities of finding a new job due to his special qualifications, and the closeness of his work to the church's task of proclaiming the Gospel.

Thus, the Court did not rule that respect for privacy would always prevail over the autonomy of the religious community, but only that both rights had to be weighed against each other by the courts. Therefore, the Court stated only a procedural violation of Article 8 of the European Convention on Human Rights, not a substantive one, even if the ruling did meet with criticism from the Federal Constitutional Court with regard to the question of the extent to which the proximity of an activity to the mission of proclamation should be subject to state evaluation (see Federal Constitutional Court, BVerfGE 137, 273, 329).

The procedural nature of the violation is also reflected in the follow-up decision in the *Schüth* case to Article 41 of the European Convention on Human Rights: «[T]he Court considers that the only basis for awarding just satisfaction in the present case is that the labor courts, in weighing the interests of the complainant and those of the church employer, did not take into account all the relevant aspects and did not sufficiently explain their reasoning. It recalls that it is not its task to speculate on the conclusions that the German labor courts would have reached if they had weighed the matter in accordance with the Convention» (ECtHR, decision of 28 June 2012, appl. no. 1620/03, at 23).

After all, from a German perspective, the European Court of Human Rights is quite gentle on national church law by limiting its review of possible human rights violations to arbitrariness and by proceduralizing that review. The Court is obviously guided by the conviction that it is better if the impetus for structural changes in the traditional church-law system comes from within rather than from outside. The latter is only necessary if the solutions in the individual case are obviously inadequate, as it was in *Schüth v. Germany*. *Vis-à-vis* the national courts, the European Court of Human Rights acts as a super-revision instance in matters of labor law. By virtue of its jurisdiction, national labor courts have to examine more closely in cases of termination of church employees with a duty of loyalty whether the interests of both parties are sufficiently taken into account and balanced.

7. Jurisdiction of the European Court of Justice

At first glance, Union law seems to leave ample room for the continuation of the autonomy of churches and other religious communities, even in the German style. Article 17 TFEU assures the churches in Primary Law that the «Union respects and does not prejudice the status under national law of churches [...] in the Member States». The religious tolerance expressed with this clause recognized on the one hand that collective and corporate religious freedom, which is often linked with identities of states or nations, may have a stabilizing effect on the Union level as well, and on the other hand that the traditional sets of rules for the status and the activities of churches and other religious communi-

ties in the Member States are of elementary importance for religious peace and religious plurality in Europe. In Union law correlates with this thought Article 10 of the Charter of Fundamental Rights, which also protects the collective «freedom, [...] in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance».

According to a controversial view, the term "status" in Article 17 TFEU does not only mean the pure legal corporate status, as it is standardized in Germany in Article 140 in conjunction with Article 137 paragraph 5 of the Weimar Constitution, but the entire relationship between state and church, which has developed differently in the respective constitutional systems. In this sense, Article 17 TFEU is a negative provision of competence: The Union must not interfere with the institutional freedoms granted by national legal systems to the churches and other religious communities there. Rather, in questions of the status of churches and other religious communities, an area of derogation from Union law applies.

In Secondary Law, this principle seemed to find corresponding expression in various church exception clauses, such as Article 4 paragraph 2 of the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, which is linked to the various national laws on professional activities in ecclesiastical institutions and seems to formulate an exception to the general prohibition of discrimination in this respect. After all, Article 17 TFEU, as a tolerance edict of European Primary Law, appeared to be the starting point and measure of all secondary legislation and interpretation.

However, the European Court of Justice does not take this reading of Article 17 TFEU into account in the *Egenberger* and *I. R. (Head Doctor in a Church Hospital)* cases. The Court noted that the secondary legislator had been aware of Article 17 TFEU – or the Amsterdam Declaration on Churches as precursor – when adopting the Council Directive 2000/78/EC, but had nevertheless structured Article 4 of the Directive with objective legal requirements and refrained from exempting the churches from anti-discrimination obligations.

The Court thus ultimately reverses the relationship between Primary and Secondary Law: It is not Secondary Law that is measured against Primary Law requirements, but, conversely, Primary Law is interpreted on the basis of Secondary Law. According to this interpretation method, any limitation of competences by the Treaty on the Functioning of the European Union simply becomes meaningless if the secondary legislator blindly disregards it. This is methodologically untenable, supports the thesis that some acts of Secondary Law are *ultra vires*, and can also be refuted in terms of the limited legislative intent in enacting the Council Directive 2000/78/EC and the potentially extremely far-reaching consequences of this reading.

The elementary importance of Article 17 TFEU for religious peace and religious plurality in Europe is misunderstood when the norm is referred to in the *Egenberger* decision merely in an obligatory manner, and when it is examined in more detail in the *I.R. (Head Doctor in a Church Hospital)* decision, but is reduced to a programmatic clause without effective content, which does not set any tangible limits to the European Union's possibilities for shaping Secondary Law in the church legal sphere. This marginalization of a

historically highly charged and enriched principle of Primary Law marks a fundamental shift in the balance of power between the European Union and the Member States, which affects the balance of power between the Member States and the churches, as far as the latter – as in Germany – were previously endowed with comprehensive autonomies. Thus, from the relatively free space for theological considerations in church labor law, associated with great institutional trust, the focus shifts to an external detailed control based on the rationalistic standards of state law.

The decision in the *Egenberger* case takes aim at the denominationally differentiated hiring practices of church institutions (ECJ, Grand Chamber judgment of 17 April 2018, C-414/16). Ms. *Egenberger*, who is non-denominational, applied for a position offered by the Protestant Association for Diakonia and Development in Germany. The task consisted of preparing an expert opinion on the elimination of all forms of racial discrimination. It included representing the Diakonia *vis-à-vis* politicians and the public and coordinating internal opinion-forming processes. The job advertisement stated that applicants should be members of the Protestant Church or another Christian church. Ms. *Egenberger* was not invited for an interview and as a result was not hired. She sued for compensation on the grounds of alleged discrimination.

The Federal Labor Court decided to ask the European Court of Justice for a preliminary ruling about the meaning of Article 4 paragraph 2 of the Council Directive 2000/78/EC. The preliminary questions were aimed at whether Article 4 paragraph 2 subparagraph 1 of the Council Directive 2000/78/EC allows that a church employer has the power

under domestic law to authoritatively determine whether a particular religion of an applicant constitutes a «genuine, legitimate and justified occupational requirement» in the sense of the provision. Furthermore, what requirements arise in the case of a negative answer to the first question with regard to the nature of the activity or the context in which it is carried out, under consideration of the organization's ethos, as «genuine, legitimate and justified occupational requirements» in accordance with Article 4 paragraph 2 subparagraph 1 of the Directive.

The European Court of Justice answered the first question in the negative and derived from Article 9 of the Council Directive 2000/78/EC, which rules the defense of the anti-discrimination rights, and Article 47 of the Charter of Fundamental Rights, which guarantees the right to an effective remedy and to a fair trial, the necessity that not the churches but independent courts must decide on the existence of a justification within the meaning of the Directive. This decision could not be a matter of church autonomy recognized by the Member States, since otherwise the control of compliance with the criteria set forth in Article 4 paragraph 2 subparagraph 1 of the Directive would come to nothing if it were ultimately entrusted to the necessarily partisan churches as actors of an intended unequal treatment.

The judgment specifies four requirements with regard to the standard of justification: First, the justification must be measured against the nature of the activity in question or the circumstances of its exercise. There must be the objectively verifiable existence of a direct link between the denomination-related condition of employment and the activity. Second, essential in this regard is the requirement when denom-

inational affiliation is necessary because of the importance of the occupational activity for the manifestation of the ethos or the exercise by the church or religious organization of its right of autonomy. Third, the requirement would lack legality if, in reality, an extraneous goal is being pursued without reference to the ethos or the exercise of the right to church autonomy. Fourth, the criterion of denominational affiliation is justified if the church or religious organization can demonstrate that the asserted danger of an impairment of its ethos or its right to autonomy is probable and substantial. This circular line of argument is not least problematic against the background of the traditional standpoint that the right to autonomy under national state-church law is already violated, or at any rate significantly affected, by judicial review of the church's position.

In concrete terms, it can be deduced from the judgment of the European Court of Justice that the determination that all activities at an ecclesiastical institution require denominational affiliation solely as a result of the theologically formed concept of the community of service, which has predominantly been considered possible in German church labor law, would be discriminatory and not permissible. This fundamentally distinguishes the Court's objective, activity-based approach to justification from the institutional approach to justification based on church autonomy that has been recognized in German church labor law to date. The required qualitative examination of individual activities shows that there are categories of activities for which a religious affiliation must not be made a prerequisite for employment.

In fact, the Federal Labor Court in its follow judgment in the *Egenberger* case examined in great detail the weight and

rationalistic plausibility of the church's position. It came to the conclusion that already in view of the job profile, there were reasonable doubts as to whether the position is essential under European Union law. But in any event the occupational requirement was not justified, because in the specific case there was no probable and substantial danger that the ethos of the church employer would be compromised (Federal Labor Court, judgment of 25 October 2018, 8 AZR 501/14; a constitutional complaint is pending before the Federal Constitutional Court under file no. 2 BvR 934/19).

The decision of the European Court of Justice in the *I. R. (Head Doctor in a Church Hospital)* case concerned obligations of loyalty to the church employer (ECJ, Grand Chamber judgment of 11 September 2018, C-68/17). *J. Q.* was a head doctor in a Catholic hospital. After the divorce of his first marriage, he married his new partner in a civil ceremony before the registry office without his first marriage having been annulled according to Canon Law. The hospital dismissed him because he was a Catholic and his action was against the principles of the Catholic Church. The hospital had other head doctors who were not Catholics and need not fear negative consequences in case of re-marriage. This raised the question whether church employers are allowed to use different loyalty standards depending on the denomination of their employees. Accordingly, the Federal Labor Court asked the European Court of Justice whether Article 4 paragraph 2 subparagraph 2 of the Council Directive 2000/78/EC is to be interpreted as meaning that the (Catholic) Church can decide with binding effect that a church organization such as the hospital in the present proceedings is to differentiate, in connection with the requirement that

employees in managerial positions act in good faith and with loyalty, between employees who belong to the same church and those who belong to another faith or to none at all.

The European Court of Justice applied essentially the same standards in the *I. R.* case as in the *Egenberger* case. It argued that the requirement at issue concerned the respect to be given to a particular aspect of the ethos of the Catholic Church, namely the sacred and indissoluble nature of religious marriage. Adherence to that notion of marriage did not appear to be necessary for the promotion of the hospital's ethos, bearing in mind the occupational activities carried out by the head doctor, namely the provision of medical advice and care in a hospital setting and the management of the internal medicine department which he headed. Therefore, it did not appear to be a genuine requirement of that occupational activity within the meaning of Article 4 paragraph 2 subparagraph 1 of the Council Directive 2000/78/EC.

In the Court's view, all the requirements of Article 4 paragraph 2 subparagraph 1 of the Council Directive 2000/78/EC must also be met for justification under Article 4 paragraph 2 subparagraph 2 of the Directive. This is already a methodologically dubious step when considering only Secondary Law, since the systematics of both subparagraphs are ultimately not taken into account. Instead, Article 4 paragraph 2 subparagraph 2 of the Council Directive 2000/78/EC is basically rendered empty of content and meaning by its parallelism with Article 4 paragraph 2 subparagraph 1 of the Directive.

The components of the justification test also essentially correspond to those outlined for the area of recruitment practice with regard to the *Egenberger* case. It should be em-

phasized in that context that the immediate object of the decision was exclusively the *unequal treatment* with regard to loyalty requirements based on denomination. If Catholic employees are expected to be more loyal than their Protestant, Muslim or non-denominational colleagues by the Catholic bearer of an institution, the differentiation based on denomination must be justified.

The European Court of Justice's view does not mean that conceivable expansions of loyalty obligation to all employees have been rejected. It is possible, however, that even in the case of generally applicable but faith- or ethos-based loyalty requirements, indirect discrimination could be considered on the grounds that compliance with them is structurally easier for a denominational employee than for a non-denominational one. This is a consideration that is mirrored in the second rule of the *Achbita* decision of the Court in the field of individual freedom of religion (ECJ, Grand Chamber judgment of 14 March 2017, C-157/15).

At the end, the Federal Labor Court declared *J. Q.*'s dismissal unlawful. It made the rather sweeping assertion that by providing consultation and medical care in the internal medicine department of the hospital, the head doctor was not participating in the determination of the ethos and was not contributing to the ecclesiastical proclamation mission (judgment of 20 February 2019, 2 AZR 746/14). This dictum involves a state judgment about the determination of ethos and its promulgation, tying in with the European Court of Justice's remark, worthy of criticism in view of the function of Article 267 TFEU, that acceptance of the Catholic understanding of marriage is not necessary for the manifestation of ethos in medical care. Such a line of argument

goes far beyond a legitimate external proportionality test by weighing an accepted church position against counter rights on the employee side. Instead, already the scope of the legal interest to be weighed on the church side is determined by the Court. Thus, a state institution ultimately enters the field of theology and becomes interpreter of religion.

As a result, the narrowing of the institutional autonomy space also shrinks the tolerance for purely theological patterns of justification to a barely recognizable minimum. The decisions of the European Court of Justice in the *Egenberger* and *I. R. (Head Doctor in a Church Hospital)* cases and especially the transposition decisions of the Federal Labor Court breathe a strictly rationalist spirit. The possibility of theological patterns of reasoning seems to be cut off wherever a conflict with the requirements of European law arises. This is especially true for anti-discrimination law. In fact, there appears to be no longer any room for a purely theological justification of unequal treatment in personnel decisions in the regulatory area of the Council Directive 2000/78/EC.

8. Conclusion

While the jurisprudence of the European Court of Human Rights leaves a great deal of leeway in shaping the national state-church law systems, not least due to the margin of appreciation granted to the Convention states, the jurisprudence of the European Court of Justice overrides the traditional particularities of state-church law in the Member States and leads to a shortening of the autonomy of churches

and other religious communities in the national legal spheres. As regards the situation in Germany, this is particularly true for the field of church labor law.

When religion-unspecific EU law encounters religion-based circumstances, it applies normally. It does not consider religion as something special. The guarantee of religious freedom laid down in Article 10 of the Charter of Fundamental Rights and the reserve of competence of the Member States in the areas of religion and churches guaranteed in Article 17 TFEU play at best a subordinate role in the case law of the European Court of Justice for the interpretation and application of Union law that is not specific to religion. In this context, Article 17 TFEU in particular would have opened up the possibility of forming a functional equivalent to the margin of appreciation in fundamental rights issues recognized by the European Court of Human Rights.

European Union law is shaped by an equality paradigm. If institutions governed by national state-church law come into the field of force of the Union's anti-discrimination law, the European Court of Justice has so far shown little consideration for historical imprints or religious-cultural idiosyncrasies. Moreover, it cannot be seen that the European Court of Justice reflects in any way on the religious and cultural longtime consequences of its jurisdiction, namely on securing the profile of religious institutions by means of loyalty requirements and denominational clauses. This ignorance of the Court's own case law complicates traditional forms of state ethos management in the religious field.

At the end, perhaps the supreme and constitutional courts of the Member States, with their great experience in dealing with traditional sets of rules, can tame the Eu-

ropean Court of Justice. They can remind it that a certain sense for the religious and its manifold forms of inculturation is necessary in order to avoid an over-unitarization of the systems of law and religion of the Member States and, at the same time, to keep European institutions capable of acting in the long term on the normative basis of equal freedom of the individual.

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