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STATE INTERFERENCE IN THE INTERNAL AFFAIRS OF RELIGIOUS INSTITUTIONS

*Johan D. van der Vyver**

On September 8, 2011, a labor court in Germany decided that the dismissal of the medical superintendent at a Catholic hospital was unlawful.¹ The Catholic Church discharged the doctor following his civil divorce and his remarriage.² Because the Church does not recognize the validity of a divorce from marriage, it did not recognize the legality of the doctor's second marriage and therefore condemned him for being engaged in an extramarital (adulterous) relationship with his second wife.³ The doctor contested the legality of his dismissal under the labor laws of Germany and brought suit against the Church before the labor court.⁴

The Church maintained that the doctor's employment contract required him to accept and uphold the basic principles embodied in the religious and moral doctrines of the Church.⁵ The labor court recognized the "obligation of loyalty" of the applicant toward basic doctrines and practices of his employer and decided that the doctor's dismissal would be justified only if, upon balancing the conflicting interests of both parties to the dispute, violation of the loyalty commitment that went with his office and was implicated by the Catholic verdict pronouncing his second marriage to be null and void were found to carry sufficient weight ("*hat*] *ein hinreichend schweres Gewicht*").⁶ The labor court decided that the doctor's dismissal was unjustified and upheld the applicant's complaint.⁷

The decision of the labor court clearly contradicted the internal sphere sovereignty of churches, which for many years constituted a basic principle of German constitutional law. However, the decision of the labor court was

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¹ Bundesarbeitsgericht [BAG] [Federal Labor Court] Sept. 8, 2011, 2 AZR 543/10 (Ger.).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

obviously informed by three recent judgments of the European Court of Human Rights (“ECHR”) relating to the dismissal of church employees for conduct considered by the respective churches to be violations of those churches’ fundamental tenets.⁸

This Article highlights the traditional, constitutional principle of sphere sovereignty (mostly referred to in German jurisprudence as a matter of “self-determination” or, alternatively, of “autonomy”) of religious institutions.⁹ It then considers the judgments of the ECHR and their impact on the internal sphere sovereignty of churches in Germany¹⁰ and concludes with critical comments on the judgment of the labor court in the case of the medical superintendent of a Catholic hospital.¹¹

I. SELF-DETERMINATION/AUTONOMY/SPHERE SOVEREIGNTY OF CHURCHES IN GERMANY

The status of churches and other religious institutions in Germany is governed by the Church Clauses (*die Kirchenartikel*) in the Weimar Constitution of August 11, 1919,¹² which were incorporated into the German Constitution by Article 140 of the *Grundgesetz für die Bundesrepublik Deutschland* of 1949.¹³ Article 137(3) of the Weimar Constitution provides: “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.”¹⁴

Its details were specified in a judgment of the *Bundesverfassungsgericht* of 1985¹⁵ in an appeal against two decisions of the German Federal Labor Court relating to (a) the dismissal of a medical doctor in a Catholic hospital in

⁸ See *infra* Part II.

⁹ See *infra* Part I.

¹⁰ See *infra* Part II.

¹¹ See *infra* Part III.

¹² WEIMAR CONST., arts. 137–41.

¹³ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 140 (incorporating the provisions of Articles 136–39 and 140 into the *Grundgesetz*).

¹⁴ GERHARD ROBBERS, RELIGION AND LAW IN GERMANY 77 (2010). Article 137(3) of the Weimar Constitution reads, “Jede Religionsgesellschaft ordnet und verwaltet ihre Angelegenheiten selbständig innerhalb der Schranken des für alle geltenden Gesetzes. Sie verleiht ihre Ämter ohne Mittwirkung des Staates oder der bürgerlichen Gemeinde.” WEIMAR CONST., art. 137(3).

¹⁵ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 4, 1985, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 70 (138) (Ger.).

Essen,¹⁶ and (b) the dismissal of an accountant at a Catholic youth hostel in Munich.¹⁷ The doctor was dismissed because he publicly testified to his personal view on abortions (which was in conflict with official Church policy on the matter),¹⁸ and the accountant was dismissed because he defected from the Catholic Church.¹⁹

The *Bundesverfassungsgericht* decided that the provisions of Article 137(3) of the Weimar Constitution apply not only to churches and their independent components but also to other institutions, irrespective of their legal construction, which, in view of their purpose and disposition, are self-evidently, according to perceptions of the church, associated with the church in a certain way and can be required to undertake and execute a component of the church's calling.²⁰ The constitutional guarantee of "the right to self-determination" remains of vital importance for the purpose of specifying these labor relations and includes the competence of churches to require their employees to uphold the prevailing principles included in the religious and ethical doctrines of the church.²¹ Employees of churches are accordingly bound to uphold "loyalty commitments" (*Loyalitätsobliegenheiten*) toward the churches and the principles for which they stand.²²

Churches, like all other persons, must execute their freedom of contract subject to state labor laws.²³ This does not mean, however, that state labor law will necessarily, in all instances, trump the right to self-determination of a church.²⁴ It is therefore necessary to strike a balance between the conflicting interests inherent in obligatory labor practices and the demands of

¹⁶ Bundesarbeitsgericht [BAG] [Federal Labor Court] Oct. 21, 1982, 2 AZR 591/80; Bundesverfassungsgericht [BAG] [Federal Labor Court] Oct. 21, 1982, 2 AZR 628/80.

¹⁷ Bundesarbeitsgericht [BAG] [Federal Labor Court] Mar. 23, 1984, 7 AZR 249/81.

¹⁸ 2 AZR 591/80.

¹⁹ 7 AZR 249/81.

²⁰ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 4, 1985, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 70 (162) ("Diese Selbstordnungs- und Selbstverwaltungsgarantie kommt nicht nur den verfaßten Kirchen und deren rechtlich selbständigen Teilen zugute, sondern allen der Kirche in bestimmter Weise zugeordneten Einrichtungen ohne Rücksicht auf ihre Rechtsform, wenn sie nach kirchlichem Selbstverständnis ihrem Zweck oder ihrer Aufgabe entsprechend berufen sind, ein Stück des Auftrags der Kirche wahrzunehmen und zu erfüllen.").

²¹ *Id.* at 164 ("Die Verfassungsgarantie des Selbstbestimmungsrechts bleibt für die Gestaltung dieser Arbeitsverhältnisse wesentlich. . . . Dazu gehört weiter die Befugnis der Kirche, den ihr angehörenden Arbeitnehmern die Beachtung jedenfalls der tragenden Grundsätze der kirchlichen Glaubens- und Sittenlehre aufzuerlegen.").

²² *See, e.g., id.* at 139–41.

²³ *Id.* at 166.

²⁴ *Id.*

ecclesiastical autonomy, and in this process a special premium is to be placed on the personal image or self-esteem of churches (*Selbstverständnis der Kirchen*):²⁵

It after all remains constitutional to leave it up the Church itself to take binding decisions as to what “the credibility of the Church and the advocacy thereof” requires, what constitutes “specific ecclesiastical matters”, what the “closeness” of such matters entails, what is included in the “essential principles of faith-related and ethical doctrine”, and what should be regarded as—at times, serious—violations.²⁶

II. JUDGMENTS OF THE ECHR

On September 23, 2010, the ECHR handed down judgments in two distinct cases based on similar facts, but, in respect to which, the ECHR came to exact opposite conclusions. Both applicants were employees of church institutions and were dismissed because they were involved in extramarital relations.²⁷ The complaints against their dismissals were based on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”), which protects the right of everyone “to respect for his private and family life, his home and his correspondence.”²⁸

The ECHR upheld the dismissal of Michael Heinz Obst, Director for Europe in the Department of Public Relations of the Church of Jesus Christ of Latter-day Saints (the Mormon Church) on the basis that the labor courts of Germany, in reviewing the legality of his dismissal, adequately considered the impact of the applicant’s discharge on his personal and family life.²⁹ The

²⁵ *Id.* (“Dabei ist dem Selbstverständnis der Kirchen ein besonderes Gewicht beizumessen.”).

²⁶ Johan D. van der Vyver, Remarks at the Second International Consortium for Law and Religion Studies Conference 5 (Sept. 10, 2011) [hereinafter van der Vyver, Constitutional Protection], available at <http://www.celir.cl/v2/ICLARS/Johan%20D.%20van%20der%20Vyver.pdf> (translating Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 4, 1985, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 70 (138) (Ger.)).

²⁷ *Obst v. Germany*, Eur. Ct. H.R. (2010), http://www.echr.coe.int/echr/Homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Obst” in the “Case Title” box and “Germany” in the “Respondent State” box); *Schüth v. Germany*, Eur. Ct. H.R. (2010), http://www.echr.coe.int/echr/Homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Schüth” in the “Case Title” box and “Germany” in the “Respondent State” box).

²⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter European Convention].

²⁹ *Obst*, Eur. Ct. H.R. at 17.

ECHR noted that the effect on the applicant's personal and family life would be minimal because Mr. Obst was still relatively young and should be able to find alternative employment without too much hassle.³⁰ The ECHR also noted that Mr. Obst, upon accepting the position of Director for Europe, was, or should have been, aware of the special premium placed by the Mormon Church on marital fidelity.³¹ His dismissal by the Mormon Church could therefore not be faulted.

In the case of Bernhard Josef Schüth, organist and choirmaster of the Catholic congregation of St. Lambert in Essen, Germany, the ECHR came to the opposite conclusion.³² The marriage of Mr. Schüth had broken down in 1995, he subsequently lived with another woman in an extramarital relationship, and, at the time of his dismissal by the Church, that other woman was expecting his baby.³³ The ECHR paid special attention to the question of whether the labor courts of Germany considered the impact of his dismissal on his personal and family life and noted that the legal protection afforded to the rights of the applicant by the European Convention was never mentioned in proceedings before the labor courts.³⁴ The labor courts consequently failed to strike a balance between the interests of the Catholic Church and the rights of the applicant.³⁵ The signature of Mr. Schüth on his contract of employment could not be interpreted as an indisputable undertaking to lead a life of abstinence following the breakup of his marriage or in the event of a divorce.³⁶ The fact that the applicant would have only limited opportunities to find alternative employment received special emphasis in the ECHR opinion (at the time, the applicant had a temporary job at a Protestant congregation).³⁷ Because the labor court neglected to strike a balance between the rights of the applicant with respect to his private and family life and the interests of the Church, the ECHR decided that respect for the private and family life of Mr. Schüth, as protected by Article 8 of the European Convention, had been violated.³⁸ His discharge consequently constituted a violation of the European Convention.³⁹

³⁰ *Id.*

³¹ *Id.* at 17–18.

³² *Schüth*, Eur. Ct. H.R.

³³ *Id.* 2.

³⁴ *Id.* at 25.

³⁵ *Id.* at 27.

³⁶ *Id.* at 26.

³⁷ *Id.* at 27.

³⁸ *Id.*

³⁹ *Id.*

More recently, in *Siebenhaar v. Germany*, the ECHR reiterated the principles outlined in *Obst* and *Schiith*.⁴⁰ In this instance, however, the applicant's rights in contention were based on the freedom of thought, conscience, and religion guaranteed by Article 9 of the European Convention.⁴¹ Astrid Siebenhaar was employed by a day-care center of a congregation in Pforzheim of the Evangelical (Lutheran) Church, and she was discharged by church authorities when they learned that she was a member of the Universal Church of Humanism and also conducted primary education classes within that religious sect.⁴² The ECHR, following the same reasoning as in *Obst*, decided that her dismissal did not amount to a violation of the freedom of religion provisions of the European Convention.⁴³

It is important to emphasize that the ECHR does not have jurisdiction over the Mormon Church, the Roman Catholic Church, or the Lutheran Church.⁴⁴ Instead, "it can only adjudicate compliance by High Contracting Parties (Member States of the Council of Europe) with their obligations under the European Convention."⁴⁵

However, the ECHR has developed the "doctrine of positive obligation," based on Article 1 of the European Convention, which provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention."⁴⁶ In virtue of this provision, High Contracting Parties are not only obliged to refrain from human rights violations through state action, but they must also put laws and procedures in place that will protect the rights and freedoms of their nationals against infringement by non-state perpetrators.⁴⁷ In *Obst*, the ECHR referred to the

⁴⁰ *Siebenhaar v. Germany*, Eur. Ct. H.R. (2011), http://www.echr.coe.int/echr/Homepage_EN (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Siebenhaar" in the "Case Title" box and "Germany" in the "Respondent State" box).

⁴¹ *Id.* at 1.

⁴² *Id.* at 2.

⁴³ *Id.* at 15.

⁴⁴ Van der Vyver, Constitutional Protection, *supra* note 26, at 7.

⁴⁵ *Id.*

⁴⁶ European Convention, *supra* note 28, art. 1.

⁴⁷ *See, e.g., A v. United Kingdom*, 1998-IV Eur. Ct. H.R. at 7, http://www.echr.coe.int/echr/Homepage_EN (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "25599/94" in the "Application Number" box); *HLR v. France*, 1997-III Eur. Ct. H.R. 745, 758. Many years ago, an American court subscribed to the same idea by proclaiming, "Denying includes inaction as well as action, . . . the omission to protect, as well as the omission to pass laws for protection." *United States v. Hall*, 26 F.Cas. 79, 81 (C.C.S.D. Ala. 1871). However, the principle of state action ultimately prevailed in the United States.

principle of positive obligation as “the adoption of measures aimed at respect for the private life, even in mutual relations between individuals,”⁴⁸ and it added that “it is required of the State, as a component of its positive obligation under Article 8, to recognize the complainant’s right to respect for his private and family life as against measures enforced by the Mormon Church for his dismissal.”⁴⁹ Germany complied with its positive obligation by establishing labor courts, making provision for the review of judgments of those courts by the *Bundesverfassungsgericht*,⁵⁰ affording to the applicant the opportunity to take his case to a labor court to contest the legality of his dismissal in view of the rights associated with his ecclesiastical duties, and balancing an applicant’s competing interests against those of the church.⁵¹ In *Obst*, the ECHR decided that Germany, through its labor courts, complied with its positive obligation by taking into account the right of the applicant to his private and family life and violation thereof by the Mormon Church;⁵² and in *Siebenhaar* the ECHR came to a similar conclusion, holding that the German labor courts adequately considered the effect of the applicant’s dismissal in relation to her freedom of religion.⁵³

In *Schüth*, the ECHR came to the opposite conclusion: the labor court did not balance the entire scope of the conflicting interests at issue because it made no mention of the family life of the applicant⁵⁴ and “the interests of the ecclesiastical employer [were] not weighed up against the right of the Applicant to respect for his private and family life as guaranteed by Article 8 of the European Convention, but [the labor court] only considered his interests

⁴⁸ Van der Vyver, Constitutional Protection, *supra* note 26, at 8 (translating *Obst v. Germany*, Eur. Ct. H.R. at 15 (2010), http://www.echr.coe.int/echr/Homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Obst” in the “Case Title” box and “Germany” in the “Respondent State” box) (“L’adoption de mesures visant au respect de la vie privée jusque dans les relations des individus entre eux.”)); *see also* *Siebenhaar v. Germany*, Eur. Ct. H.R. at 11–12 (2011), http://www.echr.coe.int/echr/Homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Siebenhaar” in the “Case Title” box and “Germany” in the “Respondent State” box); *Schüth v. Germany*, Eur. Ct. H.R. at 21–22 (2010), http://www.echr.coe.int/echr/Homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Schüth” in the “Case Title” box and “Germany” in the “Respondent State” box).

⁴⁹ Van der Vyver, Constitutional Protection, *supra* note 26, at 8 (translating *Obst*, Eur. Ct. H.R. at 15 (“L’Etat était tenu, dans le cadre de ses obligations positives découlant de l’article 8, de reconnaître au requérant le droit au respect de sa vie privée contre la mesure de licenciement prononcée par l’Eglise mormone.”)); *see also* *Siebenhaar*, Eur. Ct. H.R. at 12; *Schüth*, Eur. Ct. H.R. at 22.

⁵⁰ *Obst*, Eur. Ct. H.R. at 16; *see also* *Siebenhaar*, Eur. Ct. H.R. at 12–13; *Schüth*, Eur. Ct. H.R. at 23.

⁵¹ *Obst*, Eur. Ct. H.R. at 16; *see also* *Siebenhaar*, Eur. Ct. H.R. at 12–13; *Schüth*, Eur. Ct. H.R. at 23.

⁵² *Obst*, Eur. Ct. H.R. at 16.

⁵³ *Siebenhaar*, Eur. Ct. H.R. at 14–15.

⁵⁴ *Schüth*, Eur. Ct. H.R. at 25.

of remaining in the employ of the Church.”⁵⁵ Therefore, the protection afforded to him did not comply with the positive obligation of Germany as a High Contracting Party to the European Convention.

The question decided by the ECHR was therefore not primarily whether the Mormon, Catholic, or Lutheran Churches violated the Convention provisions relating to a person’s right to respect for their private and family life,⁵⁶ or with a view to freedom of religion,⁵⁷ but whether Germany adequately secured that right and freedom from infringement by the churches concerned. Proceedings in the German labor courts, and not the discriminatory practices of the concerned churches, were therefore at issue.

III. IMPACT OF THE EUROPEAN CONVENTION ON THE INTERNAL SPHERE SOVEREIGNTY OF CHURCHES

The human rights decrees of the European Convention reach far into the domestic enclave of private (non-state) institutions. Member States of the Council of Europe must secure the rights and freedoms enunciated in the Convention against infringements by the state, but also on the horizontal front of person-to-person relations. The state does so in labor relations through the agency of its labor courts. The labor courts must ensure that the concerned rights and freedoms are not violated through labor-related decisions and action. The judgments of the ECHR in *Obst*, *Schiith*, and *Siebenhaar* added a particular dimension to the principles that Germany is required to demand of its labor courts: the effects of dismissal of an employee, for whatever reason, on the personal and family life, or on religious freedom, of the employee. This particular constraint on the constitutional right of a church institution to require loyalty of its workers with regard to the principles and practices upheld by the church as part of its confession of faith places a special burden on the “right to self-determination” of religious institutions. A church institution might be constrained, in view of human rights standards derived from the European Convention, to put up with the services of someone who commits marital infidelity,⁵⁸ who is an active member of a sect whose beliefs and practices are

⁵⁵ Van der Vyver, Constitutional Protection, *supra* note 26, at 8–9 (translating *Schiith*, Eur. Ct. H.R. at 25 (“Les intérêts de l’Eglise employeur n’ont ainsi pas été mis en balance avec le droit du requérant au respect de sa vie privée et familiale, garanti par l’article 8 de la Convention, mais uniquement avec son intérêt d’être maintenu dans son emploi.”)).

⁵⁶ European Convention, *supra* note 28, art. 8.

⁵⁷ *Id.* art. 9.

⁵⁸ See *Obst*, Eur. Ct. H.R.; *Schiith*, Eur. Ct. H.R.

at odds with those of the employer church,⁵⁹ who publicly contradicts established dogma of the church,⁶⁰ or who terminates his or her membership of the church.⁶¹

On the other hand, labor courts are only required to take account of the effect of the dismissal of an employee on his or her personal and family life, or freedom of religion, and to ask whether the consequences of the employee's conduct with regard to the spiritual calling of the church was of such a nature as to justify the negative effects his or her dismissal would have on his or her personal and family life or religious freedom. The game might not be worth the candle after all.

The recent decision of the labor court in the case of the medical superintendent who divorced his wife and remarried perhaps reflects excessive sensitivity of the labor court to the judgments of the ECHR. German labor courts have now been informed of their obligation to find an appropriate balance between the protected rights of church employees under threat of dismissal against their expected loyalty to the internal doctrinal and morally based predilections of the concerned religious institution. It is perhaps unfortunate that the self-determination of religious institutions within their internal household has been placed under stress. Religious perceptions and practices that have lost touch with the times can best be remedied through deliberation and persuasion; legal coercion in matters of faith is bound to be counterproductive.

⁵⁹ See *Siebenhaar v. Germany*, Eur. Ct. H.R. (2011), http://www.echr.coe.int/echr/Homepage_EN (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Siebenhaar" in the "Case Title" box and "Germany" in the "Respondent State" box).

⁶⁰ 2 AZR 591/80 (Ger.); 2 AZR 628/80 (Ger.).

⁶¹ 7 AZR 249/81 (Ger.).