Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

A Yezidi Clergyman's Right to Refuse to Testify?

Question(s) at stake:

Whether a Yezidi clergyman present at a reconciliation meeting has the right to refuse to give evidence.

Outcome of the ruling:

A Yezidi clergyman who is present at a reconciliation meeting has no right to refuse to give evidence because such participation is not a pastoral activity.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Testimony

Tag(s):

- Yezidi
- Pastoral care
- Clergyman
- Right to refuse to testify

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Germany

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Federal Court of Justice, 4th Criminal Division, Judgement of 15 April 2010 4 StR 650/09 (BGH 4. Strafsenat, Urteil vom 15. April 2010, 4 StR 650/09)

Link to the decision:

https://www.hrr-strafrecht.de/hrr/4/09/4-650-09.php

ECLI:

No ECLI number / ECLI number unknown

Date:

15 April 2010

Jurisdiction / Court / Chamber:

Federal Court of Justice, 4th Criminal Division

Remedy / Procedural stage:

Appeal on points of law

Previous stages:

- Regional Court Münster, Judgment of 18 June 2009, 1 KLs 30/Js 202/08 (27/08)

Subsequent stages:

- Regional Court Münster

Branches / Areas of law:

Law of criminal procedure

Facts:

In January 2008, Svetlana A separated from her husband Niyazi A, whose family believed that this had been because of a suspected relationship of Svetlana with another man, Elyas C. On 26 April 2008, Fikret A, Niyazi A's cousin, and Elyas C got into a fight. Elyas C. allegedly threatened Fikret A. with a gun. The following

day, a reconciliation meeting was held between the members of the A and C families, but without Fikret A. and Elyas C. As both families were members of the Yezidi community two Yezidi clergymen were also present in the meeting. In August 2008, Niyazi A. ran into Elyas C. and his wife who were shopping together. An argument broke out between them, after which both sides called the police. They initially waited for the police in their cars. But Niyazi A. also called his relatives, some of whom had been present at the reconciliation talks. When they arrived, the argument was still ongoing. As the Elyas C and his wife tried to drive away in their car, Fikret A. rammed his car into theirs. When Elyas C. got out, Niyazi A. and his relatives attacked Elyas C., Niyazi A. stabbed him 11 times with a knife, after which Elyas C died at the scene of the event.

The five perpetrators were convicted of murder (Section 212 of the German Penal Code). They appealed on points of law restricting their appeal to the legal consequences on the grounds that the two Yezidi clergymen had been wrongly granted the right to refuse to testify in court and that the sentence might have been more favourable for them had the two clergymen been heard.

Ruling:

In January 2008, Svetlana A separated from her husband Niyazi A, whose family believed that this had been because of a suspected relationship of Svetlana with another man, Elyas C. On 26 April 2008, Fikret A, Niyazi A’s cousin, and Elyas C got into a fight. Elyas C. allegedly threatened Fikret A. with a gun. The following day, a reconciliation meeting was held between the members of the A and C families, but without Fikret A. and Elyas C. As both families were members of the Yezidi community two Yezidi clergymen were also present in the meeting. In August 2008, Niyazi A. ran into Elyas C. and his wife who were shopping together. An argument broke out between them, after which both sides called the police. They initially waited for the police in their cars. But Niyazi A. also called his relatives, some of whom had been present at the reconciliation talks. When they arrived, the argument was still ongoing. As the Elyas C and his wife tried to drive away in their car, Fikret A. rammed his car into theirs. When Elyas C. got out, Niyazi A. and his relatives attacked Elyas C., Niyazi A. stabbed him 11 times with

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Main quotations on cultural or religious diversity:

- “However, even if the requirement of full-time pastoral work is waived, in the present case it would appear that the activity of the witnesses Sü. and D. that is bound to a status as described above does not seem unproblematic because these witnesses derive their entitlement to pastoral activity from their membership of a caste to which – according to the submission of the appeal on points of law– about a third of the Yezidis belong. However, the Criminal Division does not have to decide conclusively whether such ‘clergymen’ can be classified as professionals within the meaning of Section 53 para 1, sentence 1, no. 1, of the Code of Criminal Procedure.” (para. 31)
- “In any case, their participation in the ‘reconciliation talk’ was not a pastoral activity within the meaning of Section 53 para. 1, sentence 1 no. 1 of the Code of Criminal Procedure”. (para. 32)
- “It is true that assistance in families, also through dispute resolution or an attempt at atonement, can be attributed to the area of pastoral care in individual cases [...] In view of the special features of the case, however, the Criminal Division rules this out here. The subject of the talks was – both according to the statements of Fikret A., Fuad C. and S. as well as according to the findings of the verdict and the submission of the appeal – the settlement and end of an argument between the accused Niyazi A. and Elyas C. However, they themselves did not take part in this discussion; the initiative for the ‘reconciliation talks’ did not come from them as the direct parties to the dispute. For this reason alone, it is far from the case that the

focus of the talks was on the inner peace of the parties to the dispute and their reconciliation in the sense of forgiveness. Moreover, the participation of the witnesses Sü. and D. – corresponding to the activity of dispute mediators or arbitration boards appointed for social or cultural reasons – was limited to recommending the withdrawal of the criminal charge of threatening behaviour or demanding proof of a relationship between Elyas C. and Svetlana A. and – since these were not presented – urging an end to the dispute for such 'formal' reasons. Care based on religious motives and objectives in the sense of spiritual guidance – which serves to care for the spiritual well-being of the person in search of assistance and in need of help in life or faith – or a 'dialogue with the pastor ... [in the] core area of private life' […] did not lie herein." (para. 35)

Main legal texts quoted in the decision:

**Domestic Law **

- Art. 4 of the German Constitution Basic Law
- Section 53 Abs. 1 sentence 1 No. 1 Code of Criminal Procedure

International Law

- Art. 9 European Convention of Human Rights

Cases cited in the decision:

**Relevant German case law **

Constitutional Court

- Constitutional Court, Order of 12 May 2009, 2 BvR 890/06 (BVerfG, Beschluss vom 12. Mai 2009, 2 BvR 890/06)
- Constitutional Court, Order of 25 January 2007, 2 BvR 26/07 (BVerfG, Beschluss vom 25. Januar 2007,2 BvR 26/07)

- Constitutional Court, 3 March 2004, 1 BvR 2378/98, 1BvR 1084/99 , BVerfGE 109, 279-391 (BVerfG 1 BvR 2378/98, 1BvR 1084/99 v.3.3.2004, BVerfGE 109, 279-391.
- Constitutional Court, Judgment of 24 September 2003 2BvR 1436/02, BVerfGE 108, 282, 299 (BVerfG, Urteil vom 24. September 2003 - 2 BvR 1436/02, BVerfGE 108, 282, 299);

Federal Court of Justice

- Federal Court of Justice, Judgment of 4 February 2010, 4 StR 394/09 (BGH, Urteil vom 4. Februar 2010 - 4 StR 394/09);
- Federal Court of Justice, Order of 15 November 2006, StB 15/06, BGHSt 51, 140, 142 (BGH Beschluss vom 15.11.2006, StB 15/06, BGHSt 51, 140, 142);

Relevant European Court of Human Rights Case Law

- ECHR, Judgment of 31 July 2008 40825/98 [Jehovah`s Witnesses./. Österreich] (EGMR, Urteil vom 31. Juli 2008, 40825/98 [Zeugen Jehovas ./. Österreich]).

Commentary

A Yezidi Clergyman’s Right to Refuse to Testify?

This judgment of the Federal Court of Justice deals with the question of the right to refuse to testify, which can become particularly important in the case of immigrants. It goes against the previously prevalent opinion on an important point and thus possibly initiates a change in case law. Section 53 of the German Code of Criminal Procedure (CCP) grants clergy the right to refuse to testify about what has been entrusted to them in their capacity as pastors. The prevailing, but not uncontroversial, opinion until then assumed that clergy within the meaning of this provision are only the clergy of a religious community that is recognized in Germany as a religious body under public law (Fateh-Moghadam 361). In Germany, the Catholic and Protestant churches are recognized as such bodies, as are many other small Christian communities, e.g., Jehovah’s Witnesses or the

New Apostolic Church. Jewish communities are also recognized. Outside the Judeo-Christian sphere, however, recognition is rare. The Baha'i, for example, are recognized as a religious body under public law. Today, the most prominent religious community not recognized as a corporation under public law is Islam, whose adherents number in the millions in Germany today, but also others such as the Yezidis in this case.

The Federal Court of Justice’s ruling opposes restricting the right to refuse to testify to the clergy of religious communities that are recognized as corporations under public law and grants this right to the clergy of all religious communities. One gets the impression that the Federal Court of Justice, which in the end rejected the right to refuse to testify in this case on other grounds, was particularly interested in taking a position on whether only clergymen of religious communities recognized under public law may be granted the right to refuse to testify or whether this right belongs to the clergy of all religious communities. This is the focus of the argument made by the Federal Court of Justice. In its reasoning, it draws, to an unusually large extent, on the case law of the Federal Court of Justice, the Federal Constitutional Court, and the European Court of Human Rights. On the one hand, it deals with the wording, purpose, and history of the provision, which would not justify a restriction of the right to refuse to testify. Concerning the purpose of the provision, it not only addresses the purpose that is decisive for it, namely the protection of the relationship of trust between the clergyman and the person seeking pastoral advice, which is required because of the human dignity of the person seeking pastoral care. This follows from the fact that the inviolability of human dignity includes the recognition of an absolutely protected core area of private life. The Court also mentions other purposes such as protection of the clergyman from a conflict situation, professional freedom, preservation of the functioning of his profession. Furthermore, the Federal Court of Justice uses the argument of the constitutional requirement of the ideological and religious neutrality of the state. After all, it concludes that a differentiation between clergy of religions that are recognized as public-law corporations and clergy for whom this is not the case is inadmissible (see in detail also Fateh-

Moghadan 361-370).

The Federal Court of Justice regards as justified the concern of the previous majority opinion that the clergyman's right to refuse to testify should remain an exceptional right and that the criteria for its determination must be quickly and objectively verifiable, but it assumes that this concern can be taken into account when determining who is to be considered a clergyman. Here, the Federal Court of Justice also holds the general opinion that a clergyman does not necessarily have to have been ordained in the sense of canon law and that it is sufficient if his religious community has assigned him the task of a clergyman, thereby granting him a prominent position in the community. The necessity of being bound to a special status is also confirmed by the fact that the right to refuse to testify under Section 53 is, by its place in the system of the law, a right to refuse to testify for professional reasons. Furthermore, the religious community must impose on the clergyman a mandatory obligation of silence about everything he learns in a pastoral conversation. Without such an obligation, a right to refuse to testify would make no sense. In this case, the Federal Court of Justice did have doubts about the Yezidi clergymen's status as clergymen in the sense of German law, because their status as clergymen does not derive from the conferral by the community, but rather from their membership in a caste to which about one third of all Yezidis belong. However, it leaves this question open and examines whether the Yezidi clergy acted in a pastoral capacity in the specific case. Already, in view of the fact that the two conflicting parties were not present at the mediation talks and had not initiated them, it was clear to the Court that a pastoral meeting had not taken place. The fact that such a reconciliation meeting took place in public, albeit not fully public, and that the clergyman was not bound by secrecy, did not need to be mentioned.

The judgment means that in deciding about the existence of a right to refuse to testify, courts will increasingly have to be prepared to examine the status of clergymen and the existence of pastoral care between clergymen and other individuals, including in the case of members of religious communities outside the Judeo-Christian sphere that are mostly not recognized as public-law corporations.

In Christianity, pastoral care is one of the clergy's professional tasks. In other religions, e.g., Islam, this was traditionally not the case and this was a matter for the family or other trusted persons. So it was not a given that the *imam* (or *mufti*) is tasked with pastoral care by virtue of his office. Of course, this does not preclude him from being asked for pastoral advice in individual cases, but this is done on the basis of trust in precisely this person, not on the basis of his office. It is remarkable, however, that developments are underway here. Islamic communities in Europe are looking with particular interest at the prison or hospital chaplaincy that is common here, and there are various attempts to establish professional Muslim chaplaincy as well. This could lead to the question of the right of a chaplain who does not come from a Christian-Jewish context to refuse to testify being raised again and again in the future, also from this point of view.

Literature related to the main issue(s) at stake:

Specific legal literature addressing the case

- Fateh-Moghadam, Bijan. 2019. *Die religiös-weltanschauliche Neutralität des Strafrechts – Zur strafrechtlichen Beobachtung religiöser Pluralität*. Tübingen: Mohr Siebeck.

General legal literature on the topic that may not directly be connected with the case

- Fischedick, Walter. 2008. "Das Beicht-und Seelsorgegeheimnis – Zur Legitimation und Reichweite des Zeugnisverweigerungsrechts für Geistliche." *Die Öffentliche Verwaltung* 61 (14): 584–591.
- Fischedick, Walter. 2006. *Die Zeugnisverweigerungsrechte von Geistlichen und kirchlichen Mitarbeitern*. Frankfurt et al.: Peter Lang.

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