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The Rise of Faith-Based Welfare Providers in Germany and Its Consequences

Josef Hien & Sascha Kneip

Since the 1970s welfare organisations operated by the churches in Germany have evolved into the country's largest employers. While church affiliation and attendance dropped sharply, the churches grew as employers. Caritas and Diakonie, the two largest faith-based welfare providers, enjoy a special status as ecclesiastical employers. They can dismiss employees that do not live in congruence with their worldview such as homosexuals, those who have re-married or those who exit the church. Moreover their employees are exempted from the right to strike. The following is the first study that offers a comprehensive analysis of the phenomenal rise of faith-based welfare providers in Germany and the consequences of their special status for employees. The encompassing analysis of labour-law conflicts in German courts between ecclesiastical employers and their employees shows that the contentiousness of those controversies has increased over time. We explain this with the changed composition in the workforce of Caritas and Diakonie which has, in contrast to former times, today much less connection to the values of the church. Moreover, our analysis of legal cases shows that Caritas and Diakonie so far have been able to successfully defend their special status in front of German courts.

Introduction

In 2009 a Catholic hospital in Düsseldorf fired its head physician. Supposedly, the reason was trivial: he had divorced his wife and married another woman. The doctor sued, asking to be reinstated and won his case in several lower courts. Finally, Caritas, the umbrella organisation of German Catholic charities, brought the case before the country's Constitutional Court, where the head physician lost. The leftist daily *Tageszeitung (taz)*, commented: 'Catholic malpractice still allowed.'¹

In recent years, cases like this one have continued to attract the public's attention. In 2010 a social education worker from the Kolpingwerk, a Catholic social welfare organisation, lost his job because he maintained a profile on the dating site, Gay Romeo. In 2012 a teacher who had come out as a lesbian was let go by the operator of her Catholic kindergarten while she was still on parental leave and thus, under German law, had a right to return to her old job. In the same year, a kindergarten manager was relieved of her duties after she moved in with a new partner following her divorce. In 2015 the lesbian director at a day-care centre lost her job with Caritas because she married her girlfriend. The most hotly debated case in the media concerned a 38-year-old teacher in a home for the handicapped who made pornographic films in her spare

time and then was fired by her employer, Diakonie, the social services arm of the Evangelical (Lutheran) Church in Germany.

The churches argued that the reasons for dismissal were that homosexuality, divorce, or remarriage were not in line with their values as a faith-based employer. In Germany, the two Christian charities can dismiss employees on such matters because they are not 'normal' employers; rather, they are operations run by the two major Christian churches, and as such they enjoy a special legal status enshrined in constitutional law. They can require their employees to pledge to live in accordance with church values. Moreover, they are covered neither by the Works Constitution Act mandating the election of works councils nor by the Personnel Representation Act that mandates employee representation in the public sector. Employees are not allowed to strike or take explicit positions contrary to those of their employer.

The public attention evoked by these and similar cases of dismissal is the result of a surprising growth of faith-based service provision and employment in Germany over the past decades. While the major Christian churches have been losing more and more members and church-goers since the 1970s, during that same period Caritas and Diakonie have tripled their staffs. Today they employ over one million employees. Taken together, these organisations have risen to become the second-largest employer in the Federal Republic (Caritas 2018; Diakonie 2017; Lühns 2006). This makes Germany the country in Europe with the by far largest share of faith-based welfare organisations.

While the empirical phenomenon is growing, comprehensive theorising on why these organisations grow in a secularising environment has not yet taken off. The expansion of faith-based welfare service providers has not been integrated into grand theorising on the evolution of worlds of welfare (Esping-Andersen 1990; Manow and Van Kersbergen 2009). Moreover, we know only very little on the systematic effects that the increasing engagement of faith-based welfare service providers has on their clients, employees and the structure of the care sector. Labour unions, competitors in the caregiving market, and atheist interest groups all have been warning for years that these prerogatives give church-run welfare services unjustified advantages in setting wages and disciplining their staffs (Dahme et al. 2012; Heinze and Schneiders 2013; Kreß 2014). Studies have shown how market-oriented thinking and procedures have insinuated themselves into charitable activity and thus have affected Diakonie and Caritas (Boeßenecker and Vilain 2013; Dahme et al. 2012; Jüster 2014; Lühns 2010; Schroeder 2017). Nonetheless, no comprehensive and systematic empirical study exists that shows the magnitude and the quality of the frictions between religious employers and secularising employees. Moreover, while some specialised research on wage negotiations and collective bargaining rights has been done, almost no research has been carried out that systematically analyses the contentiousness of labour relations as practiced by religiously affiliated employers (exception: Jähnichen, Nagel, and Schneiders 2016).

The current study fills in the blanks. First, it provides a historical institutionalist explanation of the paradoxical increase of faith-based welfare providers in Germany. Second, it gives the first systematic empirical assessment of labour-law conflicts between religiously-affiliated employers and their employees in Germany between 1990 and the present, both concerning the magnitude and quality of the phenomenon. Third, it explores how far the expansion of faith-based welfare service providers in

Germany is in line or breaks with the overarching theoretical framework of Esping-Andersen's three worlds of welfare and in particular with the path dependent development of the conservative continental welfare state cluster.

Methodologically the study takes a new approach to research on faith-based welfare organisations. Using data from the most extensive legal database in the German speaking world (juris-databank since 1991),² allows us to identify all cases in Germany where employers and employees of faith-based welfare organisations clash in front of labour courts. The database also contains the detailed court verdicts giving us the opportunity to go into a profound analysis of 40 labour conflicts that we identified as pertinent for our study. This helps us to show how labour relations within the charities have qualitatively evolved. To our knowledge, quantitative survey results and the evaluation of data on legal disputes between church-affiliated employers and employees has never been applied to the investigation of the relationship between Germany's secularising society and its churches.

The first part of the article explains the rise of Caritas and Diakonie within the evolution of the German welfare state, with a particular focus on their legal prerogatives. Part two contains the empirical analysis of legal disputes between faith-based employers and their employees. Part three explains why conflicts between labour and employers have increased. Part four concludes.

Caritas and Diakonie in the German welfare state

In 2018 Caritas and Diakonie together had 1,185,582 permanent employees (Deutscher Caritasverband 2018; Diakonie 2017). This means that Caritas, with its 617,193 employees, is the country's single largest private employer and that the two organisations together would be the second-largest employer overall. Since the 1950s the workforces of both charities have grown steadily: Diakonie's staff increased from 33,744 in 1951 to 525,707 in 2018. Caritas's workforce swelled from 106,058 in 1950 to the 659,875 in 2018. This expansion is in stark contrast to the decline in church attendance and membership in Germany. Whereas in 1950 50.4 per cent of all Catholics regularly attended mass on Sunday, today only 9.8 per cent do (Katholische Kirche 2018). Among Protestants, in 2011 only 3.8 per cent regularly went to church. And whereas in 1950 almost all Germans belonged to one of the two major Christian denominations, in 2018 only roughly a third of the citizens were Catholics and another third Protestants (Katholische Kirche 2018). In other words, as the churches have become more significant as employers in the social services sector, they have been compelled to deal with an equally impressive decline in the importance of their 'core business' as churches and organisations that attract worshippers – a phenomenon that could be described as 'the confessional paradox' (Schroeder 2017, 22).

In all European countries, denominationally-affiliated providers of welfare services were running hospitals, poor houses or shelters since the middle ages (Sachße and Tennstedt 1988). Next to municipal providers, the churches had been a major pillar of the European welfare system before the advent of the first modern welfare states (Kahl 2005). Depending on the severity of the state-church conflict when welfare was nationalised in the late 19th century, the churches were either stripped of their welfare apparatus (France), allowed to keep and administer it on behalf of the state (Sweden), or got to

keep some prerogatives that immunised the sector from influence of the state when a compromise to settle the conflict was needed (Fix and Fix 2005; Göcmen 2013). The latter happened in the German case. Bismarck could not win the Culture war against the Catholic Church between 1871 and 1878 and had to subsequently compromise by allowing the Catholic Church to keep parts of its welfare apparatus even when the new Bismarckian social security legislation was introduced in the 1880s (Smith 1995). This set a path for the existence of a partly state reimbursed but otherwise independent faith-based welfare organisations in Germany (Sachße and Tennstedt 2012). The system survived the fall of the German Empire after WWI and continued its service throughout the Weimar republic. The Nazis attempted to eradicate it and were partly successful (Wehler 2008). As a consequence the status of faith-based welfare providers was forcefully reinstated and enhanced after WWII (Gabriel 2016, 26; Hockerts 1977; Abelshauser 1996).

Faith-based welfare was an important pillar of the German welfare state between unification in 1871 and the 1950s but the system was minuscule in size and composition compared to today. The bulk of welfare care services was carried out as unpaid domestic work by women within the patriarchic family structure. Indeed, for Esping-Andersen

the corporatist regimes are also typically shaped by the Church, and hence strongly committed to the preservation of traditional family-hood. Social insurance typically excludes non-working wives, and family benefits encourage motherhood. Day care, and similar services are conspicuously underdeveloped. (Esping-Andersen 1990, 27)

In his seminal 1990 book Esping-Andersen does not explicitly deal with the existence of faith-based welfare providers (also not in his revised argument, Esping-Andersen 1999). Also the specialised literature that further developed his account taking on the task to better explain the idiosyncrasies of the conservative welfare cluster did not go into detail on the role of these faith-based welfare organisations (Manow 2009; Manow and Van Kersbergen 2009; Van Kersbergen 1995). The reason might be that the phenomenon was relatively small up till to the 1970s. However, faith-based welfare service provision, measured in employees of faith-based employees, has almost increased tenfold from 139,802 employees in 1950 to 1,185,582 in 2018 (245,967 in 1970, 451,717 in 1980) (Lührs 2006).

The expansion is connected to the crumbling of Esping-Andersen's classification regime. Since the 2000s, Germany has moved ever further away from its position at the heart of the conservative cluster (Seeleib-Kaiser 2016). Central to the change is the deviation from the male breadwinner centred model of social protection and the strive for more activation (especially of women) in the labour market (Fleckenstein and Seeleib-Kaiser 2011; Henninger, Wimbauer, and Dombrowski 2008). This was done through a family policy reform in the 2000s and an elderly care reform in the 1990s which expanded the possibility for reimbursed care provision (Blome 2017).

This shifted the care burden away from the family (the formerly defining conservative feature in Esping-Andersen's classification). Since the need for care in Germany did not decline someone had to take over the care tasks that were no longer rooted in the family. Faith-based welfare providers were eager to step in to fill a substantive part of the opening care gap. While employment of faith-based welfare providers increased

in elderly and childcare around 50 per cent between the 2000s and the 2010s, the medical sector, previously the sector where faith-based organisations had been most active, did not see any further expansion (see Table 1). This suggests that the care reforms and the expansion of faith-based care services are connected.

Therefore it is not the congruence of the conservative welfare cluster with the prevalence of faith-based welfare service providers that explains their growth in the German case as one might assume from a path dependent development. It is rather the other way around: responsible for the increase of faith-based welfare service providers is the deviation from the familialism inherent in the conservative welfare state model against the backdrop of increasing female labour market participation and value change regarding care within the nuclear family (Blome 2018).

The specific legal status of Caritas and Diakonie

The special legal status of faith-based welfare providers goes back to the 1950s. Against the background of the Nazi dictatorship and its attack on the churches, these got special autonomy and protection after the end of the Nazi regime, first within German basic law and later through a series of legislation pushed by the Christian Democratic governments of the 1950s and 1960s. The special status of the churches has to be understood against the backdrop of a strong surge in religiosity after WWII, since many Germans in the 1950s thought that ‘the third Reich originated in the increasing alienation from God’ (Boesch 2001). This cemented the hegemony of the Christian Democrats and gave the churches excellent political access to lobby preferential legal agreements for them (Emmenegger and Manow 2014).

The Constitution covers the faith-based providers of the churches under Article 140 of the Basic Law and grants certain prerogatives to the denominational welfare associations (Listl 1986). As early as 1952 the Adenauer government exempted Caritas and Diakonie from the state’s Works Constitution and Personnel Representation Acts, thereby granting the Christian churches a special status that clearly went beyond the general protections afforded to ‘ideological enterprises’ under the law and even today continues to influence church-state relations (Kreß 2014). Service-provider enterprises

TABLE 1
EMPLOYEES OF FAITH-BASED WELFARE ORGANISATIONS IN GERMANY 1990–2012 AND
2012–2015

	Elderly	Disabled	Child/youth	Poor relief	Medical	Family
FBO 2000/1990	112,424	81,823	143,256	33,314	263,545	23,616
FBO 2012	164,607	108,183	188,542	37,549	256,748	7,589
	+46.4%	+32.2%	+31.6%	+12.7%	–2.6%	–67.8%
FBO 2015	183,320	119,441	211,679	31,270	260,679	7,372
	+63%	+46%	+48%	–20%	+2%	–3%

Note: Figures are calculated by the author as full-time employment equivalent, following the template of the German federal statistics authority, one part-time employee equals half a full-time employee. Sources: Data for 2000/1990 based on comparing Diakonie data for 2000 with Caritas data for 1991 due to a lack of data on Caritas for 2000; figures for 2012 are from 2012 for Diakonie and Caritas. Numbers for 2015 come from the last available statistic of the Caritas (survey conducted 31 December 2014) and Diakonie (survey conducted 1 January 2016).

under the aegis of Caritas and Diakonie are not covered by collective bargaining agreements. As a general rule, they do not enter into collective labour contracts; instead, they have adopted a method of wage settlements based on parity wage determination in labour law commissions within the so-called 'Third Way' (Lührs 2010). Employers and employees reach decisions in a 'service community,' i.e. through consensus concerning working conditions. The churches argue that these procedures make strikes and lockouts as obsolete as collective agreements or labour union involvement in the wage calculation process.

The special status of the churches extends to the sphere of private lifestyles. The so-called 'loyalty obligation clause' is responsible for the churches' longer reach: Labour law obliges the employees of welfare organisations under church sponsorship actively to represent and live out the values of their employers, not merely on the job, but even in their private lives. Homosexual educators, divorced head physicians, head-scarf-wearing nurses, or leisure-time porn stars all can easily be fired by Diakonie and Caritas, or simply not hired in the first place. These loyalty obligations are protected by a landmark decision handed down by the Federal Constitutional Court in 1985 (Decision of the Constitutional Court BVerfGE 70, 138; see also earlier decisions such as BVerfGE 46, 73, and 53, 366).

The Federal Social Assistance Act of 1961 assigned priority to six private non-profit agencies in the provision of public welfare care, establishing the cost recovery principle, and setting in motion a 'path-dependent' course of development that entailed special rights for all six social not-for-profit organisations: Caritas, Diakonie, Workers' Welfare, the Parity Welfare Association, the Red Cross, and the Central Welfare Office of the Jews in Germany (Heinze and Schneiders 2013). The law cemented the dominance of the two major church-affiliated service providers, Caritas and Diakonie, because they were the most politically well-connected and socially deeply entrenched of the six. Today the two faith-based providers dwarf the other four private non-profit organisations in terms of staff and budget.

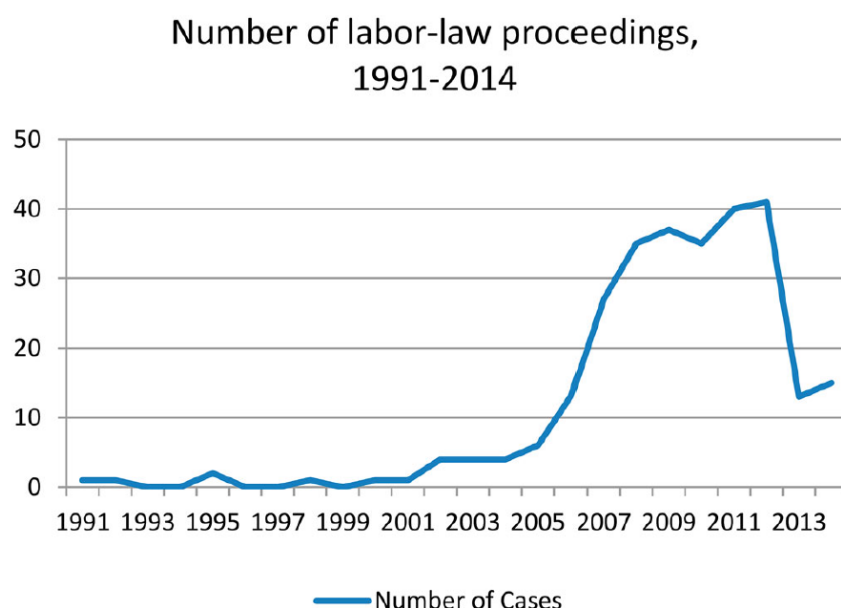
Conflicts over modernisation in the courts

Secular employers generally do not care what their employees do in their free time, or how they arrange their private lives, or what they think about religion and morality. But in the ecclesiastical sector issues of that kind play a central role in the development of labour relations. A landmark decision reached by the Federal Constitutional Court in 1985 (BVerfGE 70, 138) reinforced the rights of self-determination enjoyed by the churches, thus underscoring the special obligations of loyalty incumbent upon church employees. Moreover, the generally valid laws on termination and collective bargaining rights, as well as the Law of Personnel Representation either do not apply to them, or apply only to a limited extent (see above). In light of the previously discussed processes of change, our empirical analysis must try to answer two interconnected questions. First, given the ongoing trend toward greater social diversity, how stable is the special status of denominational welfare providers? And second, how do state courts deal concretely with the unequal treatment meted out to church versus non-church employees? That is, from a legal point of view, how do they respond to acts of discrimination practiced by church employers?

A search for controversies involving labour law in the juris-databank for the period from 1991 to 2014 turns up 281 cases that were officially recorded (cf. Figure 1). Even a cursory review of the cases indicates that, as time went on, there was a sharp increase in the number of cases adjudicated by German labour courts, especially after 2005. The number of recorded cases reached its zenith in the years 2008–2012. Until 2005 at most five lawsuits per year were recorded, but the frequency of labour-law litigation had risen to 41 cases annually by 2012. The great majority of those documented in the databank did not concern ‘discrimination’ issues focusing on the special status of churches and the loyalty obligation like the ones to be examined in the following pages. Rather, most of them were ‘ordinary’ labour-law controversies that in principle could arise in any business enterprise. The legal issues adjudicated in such instances included conflicts over pay-scale classifications, enforced redundancy, consultation rights for employee representatives, the concerns of handicapped individuals, disputes over work time, claims for special compensation, bonus payments, rules on supplementary benefits, the calculation of pension benefits, and the like. Roughly 85 per cent of the cases examined fall into this category of ‘ordinary’ controversies.

Now, if one studies the cases more carefully and is on the lookout for facts in the case pointing to possible acts of discrimination, nearly 40 cases may be identified in which the churches’ special status or that of denominational welfare-providers plays a crucial role. Relying on the Equal Treatment Law (AGG), we mean by such discriminatory facts the unequal treatment of individuals by employers on the basis of their gender, race, ethnic origin, religion, world-view, handicap, age, or sexual identity. In addition, we include under the rubric of ‘discrimination’ the withholding of rights to which employees are otherwise entitled by the Basic Law in non-church-related sectors, such as the right to express their opinions freely, the right to the free development of their personalities, the right to protection of marriage and family, and the right

FIGURE 1
LABOUR-LAW CASES INVOLVING CHURCH-AFFILIATED EMPLOYERS AND EMPLOYEES.
SOURCES: JURIS-DATABANK, AUTHORS’ EVALUATION



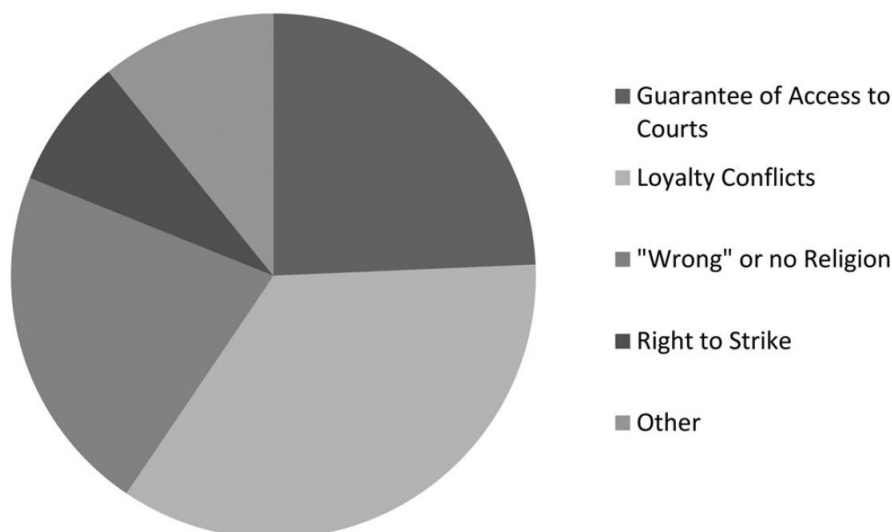
to strike. Hence, in the following pages all cases will be classified as instances of discrimination in which (a) the employee in question works for a church-affiliated employer, and (b) there is some question as to whether civil liberties protections are being applied to this group of employees as well. Figure 2 categorises the cases of discrimination identified in our study according to the type of legal dispute at stake.

Basically, discrimination cases can be divided into four categories. They involve questions of: guarantees of access to the courts, loyalty conflicts in the widest sense, the right to strike, and the position of employees who do not belong to the relevant denomination or have no religion at all. Questions of court access involve first and foremost church employees carrying out an 'evangelising mission' (above all priests, nuns, parish assistants, etc.). However, this ecclesiastical 'core personnel' lies outside the focus of our analysis since their legal status is quite specific and differs categorically from the employees of the great ecclesiastical welfare service providers. In the following pages we will therefore undertake a closer qualitative study of the three remaining categories.

Loyalty Conflicts Involving Caritas and Diakonie

Most of the highly charged labour-law conflicts that have attracted publicity can be classified under the rubric of 'loyalty conflicts'. All cases in which employees clash with their employers on account of individual behaviour that does not conform to church standards fall into this category. Typically, they involve suits brought by employees requesting protection against dismissal by their employers. Usually such employees have been terminated, whether or not through due process of law, because of causes like marital infidelity, remarriage, bigamy, or homosexuality that has become public knowledge. A classic in this genre is the previously-mentioned case of the chief physician who remarried and was fired. The teacher in a Protestant home for the handicapped who lost her job because she made pornographic films was terminated for the same reason: that she violated the loyalty obligation. In almost all cases

FIGURE 2
DISCRIMINATION CASES AS DISTINGUISHED BY TYPE OF LEGAL DISPUTE. SOURCE:
AUTHORS' OWN DIAGRAM BASED ON JURIS-DATABANK



concerning behaviour that flouts that obligation, German labour courts have decided against the employee, ruling that a violation of the loyalty obligation had taken place.

The example of the chief physician living in a new relationship shows how influential the Federal Constitutional Court's jurisprudence has been in such cases. The Constitutional Court found that the labour courts had not given sufficient weight to the churches' right of self-determination. In the case of the teacher who made pornographic movies, the labour court even adopted the sexual morality of the Protestant Church. The behaviour of the plaintiff, the court said,

is incompatible with the church's code of sexual ethics as laid down in the guidelines for church life and thus amounts to a serious personal moral lapse [...] Those guidelines stipulate that sexual life requires a spiritual and emotional relationship in addition to the physical-sexual relationship. (Labour Court Augsburg, AZ: 10 Ca 1518/14, translated)

Although labour courts sometimes concede that the facts of the case demonstrate unambiguous acts of discrimination, they usually point to the prevailing legal norms as the reason that they do not (cannot) provide redress for it. For example, another Labour Court admitted that an applicant had been turned down for a job as a Catholic teacher because she was in a registered life partnership, and that she was thus at a disadvantage vis-à-vis the other applicants, but then – invoking the exceptional status of the churches in the General Equal Treatment Act – the court ruled that such discrimination was legal.

When trying to balance conflicting positions under constitutional law in certain specific cases, labour courts occasionally have found in favour of employees. For example, in 2012 a Labour Court handed down a verdict favouring a lesbian director of a Catholic kindergarten, who – in an unusual move – had been fired during her parental leave time; another labour court vindicated a social worker employed by the Kolpingwerk who had been dismissed for seeking a partner through a gay internet dating site; the Higher Labour Court found in favour of the plaintiff in a case involving the partner of a deceased homosexual chief nursing officer who asked for a surviving dependent's pension. In general, though, outcomes have been mixed in cases featuring loyalty conflicts. Whereas the lower courts sometimes tend to side with the rights of employees in weighing the merits of different constitutional law positions, superior courts have reversed most of the verdicts favouring the plaintiffs in such cases. In 2014 the Federal Constitutional Court yet handed down a ruling that reaffirmed its earlier landmark decision of 1985 and thereby obliged the higher courts, above all, to assign greater weight to the rights of the churches. It is noteworthy that especially Caritas, more than other charities, has been involved in cases featuring loyalty conflicts.

Table 2 shows the procedural process and outcome of the discrimination cases analysed in this paper, organised according to the type of court that heard the case and from the point of view of the employee-plaintiff. In each instance one line represents one proceeding before German courts, including appeals to higher courts (depending on the case, the relevant court involved may be as high as the Federal Constitutional Court or the European Court of Human Rights). The dark fields indicate judgments in favour of the employers' side (and/or to the detriment of the employees), while light fields indicate judgments in favour of the employee (and/or to the detriment of the

Table 2
SUCCESS AND FAILURE IN DISPUTES BROUGHT BEFORE LABOUR COURTS
INVOLVING RELIGIOUSLY-AFFILIATED EMPLOYERS

	Labour Court	Higher Labour Court	Federal Labour Court	Federal Constitutional Court	European Court of Human Rights
Access to the Courts					X
					X
					X
					X
					X
					X
					X
					X
Loyalty Obligation				X	X
				Court refused to review	
				X	X
				X	X
				X	X
				Court refused to review	
				Court refused to review	
					X
				Compromise Settlement	X
				Compromise Settlement	X
				Compromise Settlement	X
				X	X
“Wrong” Religion				X	X
				Compromise Settlement	X
				X	X
				X	X
				Compromise Settlement	X
				Compromise Settlement	X
				X	X
				X	X
Right to Strike				Court refused to review	X
				X	X
				X	X
Other				Complaint retracted	X
				X	X
				X	X
				X	X

Source: authors' table

Decision pro employer

Decision pro employee

X = Court was not involved

employers' side). The left-hand column also distinguishes the cases in respect to the key legal issue involved. In respect to violations of the loyalty principle, lower courts clearly are much more inclined to render pro-employee verdicts than are higher courts that obviously feel obliged to follow the rulings of the Federal Constitutional Court more strictly. Only the European Court of Human Rights proposed a different line of interpretation in important cases (as does recently also the European Court of Justice). A similar picture emerges in the area of 'wrong' or 'abandoned' religion and/or non-membership in the relevant confessional family (see below). Only when it comes to the right to strike can one discern a trend toward a more pro-employee jurisprudence.

The Right to Strike

In two parallel proceedings in 2013 the Federal Labour Court declared illegal an across-the-board prohibition on strikes in ecclesiastical organisations. The court affirmed that, under certain circumstances, such church-affiliated bodies would have to accept strikes organised by labour unions. Because the Works Constitution Act does not apply to church-affiliated operations, these verdicts represent a relevant change in the legal situation in Germany. One case in particular illustrates the roundabout ways and specific conditions under which the situation in this area of the law has been altered. It began back in 2010 in a Labour Court and eventually ended up before the Federal Constitutional Court. In the original proceedings the matter at issue was the status of the right to strike in hospitals organised under private law and run by Diakonie, all of which refused to engage in collective bargaining over wages. When the church-affiliated employer sued, the labour court initially ruled that labour unions had no right to go on strike against such ecclesiastical establishments because of the right of self-determination granted to churches. According to the court, the Third Way does not provide for a right to strike, even if 'the presence of an ecclesiastical church community is not continuously in evidence.' In 2011 the Higher Labour Court did not want to concur fully with this line of reasoning. It ruled that strikes were not prohibited in principle; their permissibility would depend upon how closely related the institution (and the groups of persons in question) threatened with a strike were to the church's evangelising mission. The Federal Labour Court, balancing the differing legal positions in light of the German Constitution, ruled that there was no general prohibition on strikes against church-affiliated hospitals, but then again it linked permission to strike to specific conditions. Although the Court decided that the Third Way generally disallows strikes, it noted that such a prohibition would not exist unless labour unions had been included in the relevant ecclesiastical wage-setting commissions and the outcome of Third Way negotiations had not been stipulated as a binding minimal condition. Finally, the Federal Constitutional Court refused to hear a constitutional complaint by the labour union ver.di against the previously mentioned verdict which, from the union's point of view, constituted at most a partial victory. By declining to consider ver.di's complaint, the Constitutional Court effectively let stand the ruling of the Federal Labour Court.

In parallel litigation conducted between 2010 and 2012, the Marburg Federation (a union representing physicians) successfully asserted its right to strike against a Protestant hospital. Unlike the previous case, this one concerned a configuration of fact and

law in which wage agreements had been concluded under the Second Way, i.e. between a church-affiliated employer and a labour union. Here, the Federal Labour Court concurred with the outcome of the lower court's decision. The Court affirmed that the churches' right of self-determination in principle could justify a prohibition of the right to strike, but only if the church had entered into wage agreements on condition that absolute labour peace should prevail. In 2011 another Labour Court saw the matter in a rather different light in a case with similar facts, but this time under the rules of the Third Way. It concluded that in principle strike measures should not be outlawed, because – again in principle – the Third Way did not establish any constitutionally acceptable way to reconcile the freedom of association with the ecclesiastical right of self-determination.

The three cases outlined here show that the most notable evolution in ecclesiastical labor law seems to concern the issue of the right to strike. If one assumes that the decisions of the Federal Labour Court take precedence, a tilt toward a pro-employee position is discernible, although not to the extent that the churches' right of self-determination is called into question in any fundamental way. This 'new' approach to balancing the rights in question has, however, already influenced other discrimination issues as well (see note 1). All of the legal controversies over the right to strike in our study concerned welfare service-providers under the aegis of Diakonie.

Non-Membership or No Religion

One last conflict zone that affects both Caritas and Diakonie in equal measure involves cases of lack of religion ('wrong' or 'abandoned' religion), i.e. cases in which a person is not a member of the church community in question. Typically at stake here are cases of Muslim employees who were fired (mostly because they wore head scarves for religious reasons), Christian employees terminated after leaving the church, or would-be employees without any religious ties who already felt discriminated against during the selection process.

Labour courts have been seriously divided over such issues, especially when Muslim job applicants or employees have been plaintiffs, as the following example illustrates. A Muslim woman had applied for a temporary position as a social education worker. As she describes the circumstances, she was turned down for the job because she refused to join a Christian church. The Labour Court found in favour of the plaintiff on the grounds that she was the victim of religious discrimination, but the Higher Labour Court reversed that verdict, arguing that the applicant in any case was objectively unqualified for the position. The Federal Labour Court agreed with that viewpoint, even though during the proceedings no party disputed that the potential employer, knowing nothing of the applicant's religious affiliation, had declared her to be qualified for the job. In another case, a Muslim nurse at a welfare centre complained of discrimination when she was fired on account of her religion. In this instance a labour court found her termination to be illegal, because her employer knew about her religious affiliation at the time she was hired. The church-affiliated employer decided not to appeal the verdict.

The parties to such disputes argue quite frequently about whether employees can be forbidden to wear head scarves for religious reasons. In a case involving a nurse who worked at a Protestant hospital, a Labour Court initially ruled in favour of the plaintiff. But then the Higher Labour Court overturned that decision, arguing that the church's

right of self-determination and/or the loyalty obligation implied by it allowed the employer to ban the wearing of head scarves. And if the nurse should refuse the order to stop wearing one, the court said, 'her labour services are not being offered in a way that suits the position,' and thus it is logically consistent for her employer to fire her. In a similar case involving a head scarf-wearing Muslim nurse in an institution under the aegis of Caritas, another Labour Court found the plaintiff's termination to be illegal because it was discriminatory. But here too the Higher Labour Court reversed the verdict, pointing to the church's right of self-determination. The legal proceedings ultimately concluded with an out-of-court settlement.

Furthermore, if an employee chooses to leave a church, that decision constitutes a serious offense against church principles. A social education teacher who worked for Caritas decided to leave the Catholic Church in the wake of the sexual abuse scandal, and cited the scandal explicitly as the reason for his decision. Labour courts, even as high up the judicial ladder as the Federal Labour Court, saw leaving the Church as a serious offense against loyalty, for which termination might be an appropriate punishment. A nurse who worked in a home for the aged run by Caritas and who also decided to leave the Church suffered a similar fate. Both the labour court and the Higher Labour Court considered the woman's terminations to be legal, on the grounds that leaving the Church represents a serious violation of the loyalty rule in light of the broader mission of a Christian community of service.

To sum up, we may conclude that employees always will face an uphill battle in German labour courts when they do not belong to the same denomination as their employer or have chosen to leave it. As in the area of general violations of the loyalty rule, state labour courts generally have adopted the line of argument taken by both Christian churches that their right of self-determination entitles them to discriminate against Muslims and apostates.

Explanations

To summarise, over the course of time there has been a clear increase in labour-law conflicts between denominational employers and their employees. Whereas there was only one such controversy that reached the Federal Labour Court between 1950 and 1970, between 1970 and 1986 the number rose to eleven, of which two reached an even higher tribunal: the Federal Constitutional Court (Listl 1986). In the period that we investigated (1991–2014), we identified 281 cases that were adjudicated by German labour courts. Many of the conflicts covered in that number are 'ordinary' labour-law controversies having little to do with the special status of church-affiliated employers in the German welfare state. Legal controversies over wage classifications and enforced redundancy or conflicts over working time show how far the 'profaning' of church-affiliated welfare providers already has gone. On the other hand, among the cases we studied there were a non-trivial number of legal disputes that directly dealt with the special status of Caritas and Diakonie. Of these, quite a few featured classic 'discriminatory facts' indicating unequal treatment of plaintiffs due to their not belonging to the relevant religion, remarrying, or having the 'wrong' sexual identity.

Is the numerical increase in labour law conflicts just a reflection of the overall increase in employees of faith-based welfare organisations? The figures indicate that

the increase in conflicts, especially value conflicts, is disproportionally higher than the increase of employees. This leads to the question why there has been such a sharp increase in the conflict potential of labour relations.

The explanation is that the values advocated by the churches as employers and those held by their employees have started to diverge over time.

The staffing of Caritas and Diakonie has changed drastically since the 1950s. In 1960, of the 72,929 employees of Diakonie, 32.4 per cent were actually deacons or deaconesses. These were by definition in congruence with the worldview of their employer. By 1970 the percentage of religious core personnel in caregiving already had fallen to 15.7 per cent and by 1990 to only 2.3 per cent. We find a similar sharp decline in the religious element of the workforce of Caritas. In 1950 Caritas employed 60,447 friars and nuns and 45,611 professional lay care workers. Between 1970 and 1980 the professional lay care workers had increased from 137,938 to 251,010 and religious personnel had decreased to 13 per cent. In 1990 only 6.5 per cent of Caritas staff was religious personnel. Today, nuns, deaconesses, and friars have largely disappeared from Caritas and Diakonie (Lührs 2006). The statistical offices of the two faith-based employers have even abolished the category from their spreadsheets after it fell under the threshold of one per cent in the mid-2000s. This means that the staff of Caritas and Diakonie has become normal professional care staff and is today no longer in a guaranteed value congruence with either Caritas or Diakonie. Moreover, both Caritas and Diakonie have, due to a shortage in professional care workers, permanent recruitment problems and cannot be too picky with whom they hire.

A 2006 survey sampling 2.600 employees of Caritas and Diakonie revealed that only 20 per cent were even aware of the religious background of their employers when they applied for the job. Only 11.2 per cent had explicitly chosen Caritas or Diakonie as their employer on account of the organisations' religious backgrounds (Lührs 2008, 52). In a study conducted among 2000 employees of the Caritas association in the diocese of Würzburg, only 20 per cent agreed with the statement that 'the Church has a right to tell you what to do and what not to do' (Ebertz and Segler 2016). Ninety percent of the Catholic employees questioned 'did not regard it as reasonable to renounce their own spiritual quest in order to follow the Church's direction and guidance' (ibid.).

While we have an explanation for why value-conflicts between faith-based welfare providers and their employees have increased, we can only speculate why lower German courts rule sometimes in favour of employees but that the verdicts are almost always reversed by higher German courts. The higher courts are generally more obliged to the rulings of the Constitutional Court since their task is to unify the rulings of the lower courts and to bring them in line with constitutional jurisdiction. As a result, under the current case law of the FCC, they often rule against employee's rights and interests. This is, however, largely speculation and we call on legal scholars to provide an answer to this question in the future.

Conclusion

The study offered a comprehensive analysis of the phenomenal rise of faith-based welfare providers in Germany and the consequences of their special status for

employees. The encompassing analysis of labour-law conflicts in German courts between ecclesiastical employers and their employees shows that the contentiousness of those controversies has increased over time. We explain this with the changed composition in the workforce of Caritas and Diakonie which has, in contrast to former times, today much less connection to the values of the church. Moreover, our analysis of legal cases shows that Caritas and Diakonie so far have been able to successfully defend their special status in front of German courts.

On 17 April 2018, the European Court of Justice (ECJ) in a preliminary ruling (case c-414/16 – Egenberger) held that the European Council Directive 2000/78/EC – that has established a general framework for equal treatment in employment and occupation – constitutes applicable law not only to normal employers, but also to churches and faith-based organisations ('church or other organisation whose ethos is based on religion or belief'). The court ruled that, first, labour disputes where religion constitutes a 'genuine, legitimate and justified occupational requirement' must be open to effective judicial review, that, second, this faith-based occupational requirement has to be connected to the 'nature of the occupational activity', and that, third, a national court hearing the labour dispute between an employee and a faith-based organisation is obliged to ignore the national law if it is not possible to interpret it in conformity with European law. Although this ruling may not shake the legal situation in Germany from scratch, it will have consequences for the way labour disputes with faith-based organisations will be settled in the future. German courts will no longer be able to reject legal complaints by just stating that the sued party is a faith-based organisation and that therefore the usual standards of anti-discrimination law are not applicable. The now settled case of the fired head physician (see note 1) might be a harbinger for a deep transformation of the German model in the years to come.

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Notes

1. In February 2019, however, the German Federal Labor Court ruled after a preliminary ruling of the European Court of Justice – and thereby bypassing the Federal Constitutional Court – that the dismissal was a prohibited discrimination under European law. The case thus came to an end after 10 years of legal disputes before German and European courts.

2. The juris databank is the most extensive legal databank in the German-speaking world. It includes more than a million decisions. Among them are all of the verdicts handed down by the Federal Constitutional Court and the five Federal Superior Courts, as well as some decisions of the lower courts. To be sure, the only decisions included in the databank are those that the documentation sections of the courts in question consider worthy of being documented and are therefore upload into it. Thus, we should assume that the databank contains extensive but not complete documentation. A search of the databank reveals a total of 281 documents for the years 1991–2014. For the period from 1991 to 2000, only five verdicts were found; hence, nearly all of the verdicts discussed here come from the years between 2001 and the present.

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