

COMMENT: STRANGE BEDFELLOWS? CHINA, GERMANY, AND RELIGIOUS LIBERTY

Hee Eun Lee[†]

When one considers countries around the world that generally uphold human rights and those that do not, many would not probably lump Germany and China into the same category. Germany is generally praised for its commitment to democracy and freedom while China is regularly decried for its human rights abuses by NGOs and Western states. China has been designated by the United States as a “Country of Particular Concern” under the International Religious Freedom Act “for having engaged in or tolerated particularly severe violations of religious freedom.”¹ In the same United States Department of State report for Germany, “there were no reports of abuses of religious freedom.”² Despite these findings, both countries in recent years appear to show striking similarities in their respective governments’ attitudes toward how religious convictions should be treated and dealt with by the law in the context of their respective societies. This short comment will summarize the decision of the European Court of Human Rights in *Konrad v. Germany* and the arguments presented by the German courts justifying a ban on homeschooling. It will also attempt to show that the German position shows a strong resemblance with the rhetoric being utilized in defense of China’s handling of religious freedom. In both cases, the culture³ of each country, as determined by the govern-

[†] Associate Dean and Professor of Law, Handong International Law School; LL.M., New York University School of Law; J.D., M.A. Syracuse University (College of Law, Maxwell School of Citizenship and Public Affairs); A.B., Vassar College.

¹ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *International Religious Freedom Report 2008: China*, U.S. DEPT OF STATE, <http://www.state.gov/j/drl/rls/irf/2008/108404.htm> (last visited Mar. 28, 2014).

² BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *International Religious Freedom Report 2008: Germany*, U.S. DEPT OF STATE, <http://www.state.gov/j/drl/rls/irf/2008/108448.htm> (last visited Mar. 28, 2014).

³ The definition of “culture” utilized for the purposes of this comment is broad. Here is one possible definition: “Culture is the shared knowledge and schemes created by a set of people for perceiving, interpreting, expressing, and re-

ment (in Germany, pluralism, and in China, collectivism), serve as the basis to justify overriding the religious convictions of a few that are apparently a threat to their respective societies.

Konrad v. Germany involved German parents who had strong religious convictions to educate their children at home.⁴ However, under German law, primary school attendance is compulsory. After applying on behalf of their children and being rejected for an exemption with their local school office, the parents made a request to the local administrative court for an exemption which was denied on the grounds that while the Basic Law gave parents both the “freedom of religion and the right to educate their children with regard to religious and philosophical convictions That freedom, however, was restricted by the State’s obligation to provide education and tuition.”⁵ The reasons drawn for overriding the parents’ right was that the:

State’s obligation to [educate] under the Basic Law would not be met if the children had no contact with other children. Attending a primary school, with children from all backgrounds, would enable children both to gain first experiences of society and to acquire social [competence].⁶

The Court concluded that this purpose could not be achieved if the children were educated at home as the children would not have regular contact with other children. The Court further noted that compulsory primary school attendance furthered the interests of the children and served to protect their personal rights, since due to their young age,

sponding to the social realities around them.” JOHN PAUL LEDERACH, *PREPARING FOR PEACE: CONFLICT TRANSFORMATION ACROSS CULTURES* 9 (1995).

⁴ According to the decision, the parents “belong to a Christian community which is strongly attached to the Bible and reject the attendance of private or State schools for religious reasons.” *Konrad v. Germany*, App. No. 35504/03, 8 Eur. Ct. H.R. 1 (2006), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76925#{"itemid":\["001-76925"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76925#{"itemid":["001-76925"]}). The Biblical sources for such reasons likely come from a number of Scriptural references to the responsibilities of Christian parents in the education of their children. *See, e.g.*, “Hear, O Israel: The LORD our God, the LORD is one. Love the LORD your God with all your heart and with all your soul and with all your strength. These commandments that I give you today are to be on your hearts. Impress them on your children. Talk about them when you sit at home and when you walk along the road, when you lie down and when you get up.” *Deuteronomy* 6:4-7 (NIV). “Fathers, do not exasperate your children; instead, bring them up in the training and instruction of the Lord.” *Ephesians* 6:4 (NIV).

⁵ *Konrad*, 8 Eur. Ct. H.R. at 2.

⁶ *Id.*

they could not foresee the consequences of their parent's decision to home school them.⁷

The parents then brought their case to the Administrative Court of Appeal which dismissed their appeal on essentially the same grounds as the local administrative court noting that the parents' right to educate their children was "on an equal footing" with the State's constitutional obligation to provide children with education.⁸ However, the Court of Appeal framed the issue not as to whether homeschooling was as good as an education provided for by the State, but rather, which kind of education would inculcate children with particular societal values. "Schools represented society, and it was in the children's interest to become part of that society."⁹ The court opined that "[t]he parents' right to education did not go as far as to deprive their children of that experience."¹⁰ Though the parents objected to certain parts of the public school curriculum on religious grounds and argued that their children would be exposed to religious influences that were opposed their convictions, these were not enough to get an exemption for their children.¹¹

The parents eventually brought their case to the Federal Constitutional Court which dismissed their constitutional complaint. In its opinion, the Court "stressed that the State's obligation to provide [for] education did not only concern the acquisition of knowledge, but also the education of responsible citizens who participate in a democratic . . . society."¹² It found that an education that exposed children to everyday experiences with other children in school was a more effective way of achieving the goal of allowing children to acquire the skills to live in a pluralistic society.¹³ It also found that the parents' right to educate their children could be interfered with by the State "given the general interest of society [to provide] parallel societies based on separate philosophical convictions," and noted that German society had an interest in assimilating minorities, and that such assimilation required that minorities not exclude themselves from the rest of society.¹⁴

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ *Id.* Here, the Baden Wurttemberg Administrative Court of Appeal found that the "school's obligation of neutrality would prevent the applicant children from any indoctrination against their will." *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

After losing their case in the Federal Constitutional Court, the parents then brought the matter to the European Court of Human rights where they principally argued that the German authority's refusal to permit the homeschooling of their children violated Article 2 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms that provides that "the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."¹⁵ The Court observed that the purpose of the provision is in "safeguarding pluralism in education which is essential for the preservation of the 'democratic society' as conceived by the Convention."¹⁶ It added that, "[i]n view of the power of the modern State, it is above all through State teaching that this aim must be realized."¹⁷

Without dealing with the specific legal analysis of the European Court of Human Rights which ultimately denied the parents the right to homeschool on the basis of the language of the Convention, its protocols, and case law of the Court, I would like to focus attention on the part of the decision where the Court affirms the reasoning of the German courts about the purpose of primary school education as follows:

In the present case, the Court notes that the German authorities and courts have carefully reasoned their decisions and mainly stressed the fact that not only the acquisition of knowledge but also integration into and first experiences of society are important goals in primary-school education. The German courts found that those objectives could not be met to the same extent by home education, even if it allowed children to acquire the same standard of knowledge as provided by primary-school education. The Court considers that this presumption is not erroneous and falls within the Contracting States' margin of appreciation in setting up and interpreting rules for their education systems. The Federal Constitutional Court stressed the *general interest of society in avoiding the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society*. The

¹⁵ *Id.* at 5 (citing Article 2 of the First Protocol: Right to Education, <http://www.yourrights.org.uk/yourrights/the-human-rights-act/the-convention-rights/article-2-of-the-first-protocol-right-to-education.html>).

¹⁶ Konrad, 8 Eur. Ct. H.R. at 6.

¹⁷ *Id.*

Court regards this as being in accordance with its own case-law on the importance of pluralism for democracy.¹⁸

What can be observed, then, from the Court's decision is the view that in society, the state has priority over all other actors in the education of primary school aged children because education is not ostensibly about the attainment of knowledge, but with the integration of individuals into a pluralistic society. The German law here reveals, with the blessing of the European Court of Human Rights in its application of the margin of appreciation, that the priority to uphold a culture of pluralism should be achieved in part through primary school education. The strong implication here is that parents who choose and desire to primarily educate their children based on their religious convictions through homeschooling somehow threatens the culture of pluralism because taking children away from others risks the creation of adults who might form groups that would challenge pluralistic society. Thus, to avoid that situation and to promote the existence of a pluralistic society, parental religious convictions as they relate to education do not need to be fully recognized because the greater good—a tolerant, pluralistic society—as seen through the prism of pluralism mediated by the government, would not be otherwise realized if children were educated at home pursuant to the parents' religious beliefs.

Interestingly, the same logic implicit in the German refusal to allow homeschooling can also be found in Chinese arguments about why particular human rights, such as religious freedom, are not fully recognized in parts of Asia. In the effort to promote a collectivist (i.e., harmonious) society (as opposed to the individualism that is found in the West), religious freedoms such as the right to worship in a place of one's choosing do not need to be fully recognized because the greater good—social harmony—as seen through the prism of collectivism mediated by the government, would be threatened. The government of China said as much in its official view of religious freedom published in 1997 where it stated:

Religion should be adapted to the society in which it is prevalent. This is a universal law for the existence and development of religion. Now the Chinese people are building China into a modern socialist country with Chinese characteristics. The Chinese government advocates that religion should adapt to

¹⁸ *Id.* at 7 (emphasis added).

this reality. However, such adaptation does not require citizens to give up religious belief, nor does it require any religion to change its basic doctrines. Instead, it requires religions to conduct their activities within the sphere prescribed by law and adapt to social and cultural progress. This conforms to the fundamental interests of religious believers as well as to those of the various religions themselves.¹⁹

Essentially, the Chinese government's position is that one can practice his or her religion so long as it is consistent with Chinese society and culture as understood by the Chinese government. Indeed, this position on religion has been consistently applied as seen in a crackdown in 2011 involving Protestant home churches in Beijing. After government officials prevented a congregation from holding an outdoor Palm Sunday service, a local Communist Party sponsored newspaper ran an editorial that warned members of the congregation that, "Chinese society attaches great importance to harmony, and those with religious beliefs should adhere even more strongly to this harmony." It added that, these church members "should not cause any public disturbances through their own religious activities which will put them at odds with society."²⁰ For China in particular, it is believed that "the individual was to be yielding not assertive, and both rights and duties were negotiable and subsumed in the commitment to harmony."²¹

Is not that what the German Federal Constitutional Court essentially stated in describing why compulsory primary school education was necessary in Germany? It declared that there was "a general interest of society in avoiding the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society." Apparently from the German government's perspective, there is a real concern that homeschooling children will eventually create a class of citizens who will not be integrated into

¹⁹ INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, WHITE PAPER—FREEDOM OF RELIGIOUS BELIEF IN CHINA, § II (1997), <http://www.fmprc.gov.cn/ce/ceun/eng/zt/dqwt/t28618.htm>.

²⁰ Mark MacKinnon, *Fears of uprisings prompt China's Easter Crackdown*, THE GLOBE & MAIL (April 17, 2011, 9:31 PM), <http://www.theglobeandmail.com/news/world/fears-of-uprisings-prompt-chinas-easter-crackdown/article576940/>.

²¹ R. RANDLE ET AL., HUMAN RIGHTS IN CONTEMPORARY CHINA 21 (1986). *But see* Stephen C. Angle, *Human Rights and Harmony*, 30 HUM. RTS. Q. 76 (2008) (arguing that human rights and the concept of harmony in Confucian thought are consistent and observes that Chinese political rhetoric has focused on "uniformity" which is distinct from the concept of harmony).

German society (i.e., emergence of parallel societies). My guess is that the government is worried that these parallel societies will put themselves at odds with German society, eventually leading to some kind of social disturbance.²² That does not seem to be very different from the Chinese government's expressed concerns about the need for harmony between individuals and their society²³ and the requirement that those with religious convictions conform themselves for the benefit of social harmony.

It seems to me that the rationale of the German courts expressed in the *Konrad v. Germany* decision and the views expressed by the Chinese government in relation to religious belief are similar in at least three regards: First, in both cases, the government is the arbiter of what the culture is in a particular society; second, is the government's determination that there is a threat to society and culture in the exercise of a person's, family's, or congregation's exercise of religious conviction without any real investigation as to whether the threat is real; and third, that the combination of the first two points quite easily leads to abuses to an interference with freedom of religion that can be easily justified by the government. Maybe Germany and China are not such strange bedfellows after all.

²² There are a number of assumptions made in the German decision that are troubling. Among them include the assumption that homeschooling necessarily will result in the creation of parallel societies and another is that the purpose of education is not primarily "the acquisition of knowledge, but also the education of responsible citizens who participate in a democratic and pluralistic society." I have my doubts that there is any evidence that could be submitted to show with any degree of certainty that Christian homeschooled children present the kind of threat to Germany society as the decisions make it seem to appear and do not think that the purpose of education is so easily encapsulated by the reasoning of the German courts.

²³ *Chinese Minister Zhao Qizheng Views Country's Human Rights Progress*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE U.S. (Oct. 23, 2003), <http://us.china-embassy.org/eng/zl/zgrq/t36644.htm>.