

Federal Constitutional Court – Press Office

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Decision of 28 October 2009 – BvR 462/06

A professor of theology who has renounced his faith has been unsuccessful in his appeal against being excluded from theological instruction.

Since 1983 the plaintiff has been a professor at the theological faculty of a university in Lower Saxony, and was initially hired for the teaching, research and advanced teaching of 'The New Testament'. After he publicly renounced his faith he was required instead to teach 'The History and Literature of Early Christianity'. This subject was assigned to the university's Institute of Special Research, and the plaintiff's classes were listed as 'outside the curriculum concerned with the instruction of theologians'. The plaintiff's appeals against this decision have remained unsuccessful in all courts.

The First Senate of the Federal Constitutional Court rejected the plaintiff's constitutional appeal, concluding that by assigning him an alternative subject, the exclusion of a dissenting professor of theology from the confessionally controlled education of theologians is compatible with academic freedom. The ecclesiastical right of self-determination and the faculty's right to maintain its identity as a theological faculty and to fulfill its duty in the instruction of theologians may in this present case be rated higher than the scientific freedom of the plaintiff.

The decision is based essentially on the following considerations:

For academic teachers the basis of academic freedom, as granted by Art 5 Section 3.1 GG (German Constitution) is the right to represent their subject in teaching and research. This freedom is also inevitably affected by the nature of the task assigned them. A change in subject therefore necessarily touches on their freedom to teach. When the plaintiff was reassigned the subject 'The History and Literature of Early Christianity' in place of the subject 'The New Testament', and was thus excluded from the confessionally controlled instruction of theologians, his academic freedom was affected. This freedom was additionally interfered with by his reassignment from a core subject to an educationally non-relevant fringe subject, hence allotting him a significantly less important position in the university's program of research and education. This represents the state's reaction to the specific assertions made and positions adopted. It is a situation such as this that gives rise to the danger which Art.5 section 3.1 (GG) is intended to

prevent.

The interference with academic scientific freedom, however, is justified in relation to both the churches' right of self-governance (Art.140 GG w/ Art. 137 section 3 WRV) (Weimar Constitution of 1919) and the faculty's rights as protected by Art.5 section 3 GG. The right of self-governance of religious communities limits the academic freedom of professors of theology. The German Constitution allows the teaching of theology as a science at state-run universities. Where there are state theological faculties, the right of self-governance of each religious community has to be respected when its theology is the object of its confessionally controlled instruction. The office of a professor with a theological faculty may therefore be bound by its confession. It is not and may not be the duty of a state, which is from a religious standpoint neutral, to judge the confessional conformity of theological instruction. This is rather the right of the confessional community itself.

The plaintiff's academic scientific freedom is also qualified by the faculty's right, protected by Art.5 section 3 GG, to preserve its identity as a theological faculty and to fulfill its duties with regard to the education of theologians. For a theological faculty, the task of research and education is essentially defined by the confessional conformity of the education it imparts. The existence of a theological faculty would be under threat if the church could no longer view the faculty's curriculum, especially in a core subject such as 'The New Testament', as being in accordance with the teaching of the church, and in consequence stopped accepting the faculty's graduates as pastors or priests, and did not allow teachers of religion taught by this faculty to give confessional instruction. Moreover, protestant faculties are mostly expected by the church – unlike the Catholic Church with its fixed teaching – to maintain the confessional conformity of instruction themselves.

The university's position and the courts's decisions have resulted in an accurate assessment of the plaintiff's academic scientific freedom and the opposing constitutional considerations, and have thereby upheld the principle of a balance between the two.

The plaintiff's reassignment from the confessionally bound subject 'The New Testament' to the confessionally neutral free subject 'The History and Literature of Early Christianity' and his removal from the instruction of theological students takes into account the churches' right of self-governance and maintains the proper functioning of the theological faculty. The reassignment to a new subject is reasonable because the plaintiff retains his position as an academic teacher, and he has been assigned a subject that which is largely similar. He continues to be allowed to offer lectures, to research and publish in a field of his own choosing, and to convey the results of his

research to students. Neither do the consequences for the plaintiff's position of his change of subject make the measure unreasonable. The fact, however, that the plaintiff's new subject is not considered to be within the university's program of curricula and examinations substantially affects his freedom to teach. Academic teachers have the right to participate in the official study program and the advancement of students. The courts have deemed, however, that it would be constitutionally acceptable to make an appropriate inclusion of the plaintiff's new subject in the curriculum and examination program, and that the realization of this wish is not the subject of this present case but of future negotiations.