

Employing Confessional Theology Professors in Serbia: (Ir)Reconcilability of Religious Freedom, Academic Freedom, and Guarantees of Labour Rights*

Ljubinka Kovačević

Full Professor at the University of Belgrade Faculty of Law

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Abstract: This paper aims to shed light on the ongoing discussion on allowing church authorities to supervise the selection of theology professors at the University of Belgrade Faculty of Orthodox Theology. After providing a summary of the characteristics of the religious ethos employer, particularly confessional theological faculties, the paper outlines the legislative history and social context of regulating the selection and employment of theology professors in Serbia. Special attention is provided to the church authorities' approval (blessing) for the selection of professors, as well as their approval for individuals to engage in the teaching of students. This is followed by a consideration of challenges related to reconciling the religious freedom (and institutional autonomy) of the church on the one side, and the academic freedom of confessional theological faculties and their professors on the other. Finally, the paper explores the issue of protecting these employees' labour rights, particularly in light of risks stemming from employment under ambiguous conditions, the need to more precisely determine the legal ramifications of violating the duty of loyalty (and punishing employees progressively for such violations), and the procedural guarantees necessary for the effective protection from wrongful termination of employment and the right to an effective remedy.

Keywords: Right of Churches to Self-Determination – Religious Ethos Employer – Confessional Theology Faculties – Academic Freedom – Selection and Employment of Theology Professors – Duty of Loyalty – Labour Rights

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FIRST PART

1. Religious Ethos Employer and Prohibition of Discrimination

The effective enjoyment of workers' freedom of religion entails prohibiting the unjustified differentiation of job candidates and employees based on their religion or belief. Protection of employees' right to freedom of religion is ensured through the prohibition of discrimination and the guarantees of workers' rights to dignity and respect for private life, as well as through various labour law institutions, such as the right to a weekly rest period and the right to paid leave during religious holidays. One may also bring up the issue of accommodation of working conditions to the needs of employees as believers (e.g., adjusting work schedules to accommodate an employee's time for prayer), as well as the issue of conscientious objection, which allows members of certain professions, primarily healthcare workers, to refuse to perform certain tasks for religious reasons.

It should be noted that applying the principles of equality and non-discrimination does not exclude every distinction among workers based on religion or belief. Such distinctions may be permitted if prohibiting them could jeopardise the performance of certain work tasks. This specifically applies to jobs where a certain religious affiliation constitutes a genuine and decisive requirement for the successful performance of work tasks. However, reliably determining the fulfilment of this requirement can be a delicate and difficult task; for example, a job candidate may genuinely claim affiliation with Orthodox Church, but the employer may consider that the condition has not been met for reasons such as the candidate being baptised but not regularly attending church, participating in services, taking communion, etc¹.

Another exception to the prohibition of differentiating between workers in cases where a certain religious affiliation is a genuine and decisive occupational requirement is allowed by Dir. 2000/78/EC, which establishes a general framework for equal treatment in employment and occupation. This source of law envisions one more case where differentiation among workers based on religion or belief is permissible². This pertains to situations where religious affiliation or belonging to a particular church or religious community, as well as adherence to their teachings, is established as an occupational requirement for employment with employers whose activities are based on religion.

¹ VICKERS, *Religious freedom, religious discrimination and the workplace*, Hart Publishing, 2016, 183.

² The latter exception is regarded as a subtype of permitted exception from prohibition of differentiating between job candidates due to a genuine and decisive requirement of the job. POTOČNJAK, GRGIĆ, *Izuzeci i opravdanja kod zabrane diskriminacije*, in: POTOČNJAK, GRGUREV, GRGIĆ (eds.), *Perspektive antidiskriminacijskog prava*, Sveučilište u Zagrebu – Pravni fakultet, 2014, 177.

These employers have in common that their activities are guided or inspired by certain religious and moral concepts (known as “religious ethos employer”, or *l’entreprise de tendance* in French and *tendenzbetrieb* in German). These are employers that promote certain religious values. Consequently, they seek employees with specific religious beliefs, because otherwise, they would be unable to stay true to their religion: «professing the religion or belief on which the ethos of the church is founded must appear necessary because of the importance of the occupational activity in question for the manifestation of that ethos or the exercise by the church of its right of autonomy»³. In light of this, EU member states are permitted to retain or introduce regulations that allow for different treatment of workers based on their professional duties in churches and other public or private organisations whose ethos (value system) rests on religion or conviction «where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos»⁴.

The mentioned differential treatment should not serve as justification for discrimination of employees on some other ground. Additionally, Dir. 2000/78/EC confirms the right of churches and organisations to require individuals who work for them to act in good faith or stay loyal to the ethos of the specific church or organisation. For this permissible exception to the prohibition of discrimination to apply to religious ethos employers, they must *genuinely* exhibit a particular religious and ideological identity in their practice, with the religious content of the duty of loyalty necessary for the performance of the entrusted work tasks⁵.

Religious ethos employers belong to a specific church or religious community as institutions. This is because religion is not just an internal conviction and worship but it is also expressed through activities undertaken in the secular sphere for religious reasons. *The* right of churches and religious communities to self-determination includes their prerogatives to organise and perform their activities through responsible institutions, to establish the principles upon which those activities are based, and to select individuals to work in these institutions⁶. These competencies are summarised in *the principle of institutional autonomy of churches and religious communities in relation to the state*. More specifically, it concerns the right to autonomously regulate the internal organisation of the church or religious community, as well as to protect their doctrinal principles and mission⁷.

³ BROCKMANN, *Occupational requirements within churches or religious organisations in Germany*, in *Hungarian Labour Law E-Journal*, 2019, 1, 75.

⁴ Dir. 2000/78, Art. 4, par. 2.

⁵ LOENEN, *Le pluralisme de principe remis en question: L’approche néerlandaise vis-à-vis des expressions de la religion sur le lieu de travail*, in *RDCTSS*, 2016, 2, 39-40.

⁶ ROBBERS, *Germany*, in TORFS (ed.), *International encyclopaedia for religion*, Kluwer Law International BV, 2013, 212.

⁷ ĐUKIĆ, *Zaštita prava na poštovanje privatnog i porodičnog života i autonomija crkava i verskih zajednica*, in *Harmonius*, 2018, 7, 47.

Institutional autonomy of churches and religious communities also includes their right to establish a certain religious affiliation as a requirement for employment in their institutions. If this right were denied, it would undermine the ability of churches and religious communities to “authentically and uncompromisingly” fulfil their mission in accordance with their beliefs and doctrines⁸. According to the German Federal Constitutional Court, this would constitute state interference in the internal affairs of religious communities and a violation of their right to freedom of religion or belief⁹. This is because churches and religious communities, as institutions, lose their identity if they are prohibited from rejecting a job offer or dismissing a person whose behaviour they deem contrary to their teachings¹⁰. Churches and religious communities cannot simply adopt another religious teaching and ethos, unlike a worker who can find another job (i.e., work in another environment) if their behaviour is not aligned with a particular religious teaching¹¹.

Finally, it should be noted that the legal systems of certain European countries distinguish between “religious” (“ideological”) and “neutral” jobs performed on behalf of religious ethos employers¹². In this sense, only employees performing “religious” jobs are expected to share a particular belief, which is not the case for other employees, such as those engaged for cleaning and food preparation in religious schools, as they are not responsible for the spiritual life of the pupils nor do they have the same level of contact with them as their teachers. Similarly, candidates for the position of executive director in a Christian nursing home may be required to belong to the appropriate religious denomination, unlike candidates for the role of gardener at the same institution¹³. Even the role of a church musician is not considered “neutral”, as music cannot be equated with creating an “aesthetical background” for the liturgy, nor can it be said to have the same significance as the singing and prayers of worshippers during the liturgy. Instead, church musicians contribute to the solemnity of the Eucharist, the central activity within the liturgy¹⁴.

⁸ ROBBERS, op. cit., 212.

⁹ ROBBERS, *ibidem*.

¹⁰ ROBBERS, *ibidem*.

¹¹ ROBBERS, *ibidem*.

¹² SARGEANT, LEWIS, *Employment law*, Pearson Education, 2006, 241.

¹³ SARGEANT, LEWIS, *ibidem*.

¹⁴ ECtHR, September 23, 2010, Case *Schüth v. Germany* (Application no. 1620/03), ECLI: CE:ECHR:2010:0923JUD000162003, par. 52.

2. Selection and Employment of Theology Professors and Church Authorities Oversight: General Considerations

Churches and religious communities have a pedagogical meaning, making religious education one of their most important missions. Through the educational system, they can reach younger generations, transmit spiritual experiences, and properly present and instil the values upon which a particular religious teaching is based. Therefore, individuals involved in teaching religious courses must enjoy the special trust of the church or religious community, as evidenced by the approval for selection and employment of religious education teachers, issued by the competent church authority. A similar principle applies to the study of confessional theology at academic institutions, although states differ in how church and state authorities cooperate regarding the selection of theology professors. This issue is important for the exercise and protection of the labour rights of theology professors, the quality of university education, and the effective exercise of the rights and freedoms of students, as well as those of churches and religious communities¹⁵.

The institution of the *church's consent to the selection of theology professors* is rooted in the history of relations between the state, the church, and universities in Europe, as first universities were founded under the auspices of the church during the Middle Ages.¹⁶ The church enabled the development of universities, primarily because the status of professors of theology, as the first discipline to be studied at many European universities, as well as the status of professors of other sciences and the degrees earned at universities - became recognised because of the church's approval¹⁷. The original purpose of church control was related to the quality of teaching, as the academic standards we know today did not exist at that time¹⁸. This was followed by the control of the accuracy (purity) of the teaching, ensuring that the instruction aligned with what the competent church authority deemed correct; however, both aspects of control were intertwined and connected¹⁹. That being said, the reasons for church oversight of teaching and the religious and moral qualities of professors are not merely historical. In contemporary states, they are linked to religious freedom and the right of churches and religious communities to self-determination²⁰.

Different European countries have different models of studying theology. Some countries offer the study of confessional theology, while others do not. As for countries in the first group, specific national historical, legal, and political circumstances influence whether

¹⁵ AVRAMOVIĆ, *Religious education in public schools and religious identity in post-communist Serbia*, in *APFB*, 2016, 3, 38-39.

¹⁶ RAKITIĆ, *O poreklu obaveznog blagoslova za izbor profesora bogoslovskih fakulteta – nacionalni i uporedni plan*, in *APFB*, 2022, 1, 313 *et seq.*

¹⁷ RAKITIĆ, *op. cit.*, 315-321.

¹⁸ BREMER, *Crkveni pristanak za nastavnike teologije – Razmišljanja sa strane*, in *APFB*, 2023, 1, 179.

¹⁹ BREMER, *ibidem*.

²⁰ RAKITIĆ, *op. cit.*, 338.

confessional theology is studied at universities/faculties founded by a church or religious community, or whether it can also be studied at state (public) universities/faculties. In certain countries, the relevant church authorities participate in the selection of theology professors and in deciding whether the selected candidates are allowed to teach, while in others, this is not permitted. The first subgroup, without exception, includes countries where teaching is organised and conducted by churches or religious communities, as well as some countries where confessional theology is studied under the auspices of state universities. In this way, states recognise the importance of the autonomy of churches and religious communities in selecting individuals suitable for imparting knowledge of a particular religious doctrine. Therefore, in addition to pedagogical and didactic-methodological qualifications for teaching, as well as other skills and abilities required by state law, future professors must also have approval from the relevant church or religious community. This approval generally consists of prior consent, confirming the (religious and/or moral) suitability of the candidate to be selected and employed as a theology professor. E.g., the vast majority of Catholic theological faculties in Germany belong to state universities, but they are subject to both public and Church law²¹. The Bishop of the Roman Catholic Church determines, in the form of *nihil obstat*, that there are no doctrinal or moral obstacles for an individual to be selected or appointed as a professor²². A comparable solution applies to the only state Catholic theological faculty in France: the Catholic Faculty (*Faculté de théologie catholique*) in Strasbourg²³. On the other hand, due to particular historical circumstances, there are no theological faculties within state universities in Italy; instead, there are private confessional universities that contribute to the development of education and research, as well as to the education of young people, in accordance with the principles of Catholic doctrine²⁴. Comparisons are also complicated in European countries with a predominantly Orthodox population, by the fact that in some of them, theological faculties are not part of state universities (Russia), or they are not confessionally defined (Greece). An opposite approach exists in Romania, where several confessional theology faculties

²¹ RAKITIĆ, op. cit., 328.

²² RAKITIĆ, *ibidem*. The engagement of theology professors at Roman Catholic theological faculties is regulated by concordats concluded with the Holy See. The Church's consent is a prerequisite for the selection of theology professors: in accordance with the *Codex iuris canonici* (1983), anyone teaching theological disciplines at any faculty must have a *mandatum*, while the corresponding approval for professors at church faculties is referred to as *missio canonica*, since they do not teach based on their own authority but on a mission received from the Church. In this sense, all professors must also receive the Holy See's approval in the form of *nihil obstat* (nothing prevents [the individual from being a theology professor]) before they receive a permanent position or are promoted to the highest rank. However, if the Church authority revokes *nihil obstat*, the state, according to the concordat, is obliged to exclude the individual from teaching theology at the university. In many countries, this does not result in the automatic termination of the individual's employment; instead, there is a possibility of transferring them to another position. RAKITIĆ, op. cit., 325-326.

²³ RAKITIĆ, op. cit., 329.

²⁴ VENTURA, *Italy*, in TORRES (ed.), *International encyclopaedia for religion*, Kluwer Law International BV, 2013, 152.

operate within state universities, and the Educational Commission of the Holy Synod of the Romanian Orthodox Church approves the selection and appointment of professors²⁵. This brief comparative overview, based on Rakitić's research findings, shows that in countries where the selection and employment of theology professors depend on the approval of the relevant church authority, it is considered an expression of the church's freedom to operate and the right to religious freedom²⁶. In this sense, given the nature of a theology professor's work and its relevance to the mission of spreading a particular church's teachings, the requirement for church authority approval is *not* seen as an undue burden on those who choose this vocation²⁷. Moreover, the autonomy of churches and religious communities presupposes the right of church authorities to assess the circumstances under which approval can be granted, as well as their right to evaluate whether an individual's behaviour and way of life align with the church's or religious community's teachings²⁸. Theology professors, therefore, have a *duty of loyalty* to the church, with the church authority retaining the right to revoke the approval for participation in teaching if an individual is living in a way that contradicts religious teachings and could consequently endanger the church's credibility²⁹. If this right were denied, the ability of churches and religious communities to 'authentically and uncompromisingly' fulfil their mission according to their beliefs and doctrines would be undermined³⁰. This would amount to state interference in the internal affairs of churches and religious communities and a violation of their right to freedom of religion or belief³¹. This is because churches and religious communities would lose their identity if they were prohibited from denying or revoking approval to individuals whose behaviour they deem contrary to their teachings³². Unlike an employee who can find another job if their behaviour does not align with specific religious teaching, churches and religious communities cannot find another religious teaching or ethos³³. Finally, it is important to recognise that granting approval for teaching is understood as a recommendation for work in theological science, as it is believed that the candidate will realise the hope placed in them. This hope also entails freedom of intellectual thought. Such freedom has historically enabled the advancement of theological thought, particularly in overcoming misunderstandings and heresies³⁴. Like everything else, the church is also subject to

²⁵ RAKITIĆ, op. cit., 330.

²⁶ Croatian Constitutional Court, May 22, 2013, Case U-III-702/2009, par. 10.2.3.

²⁷ ECtHR, October 4, 2016, Case Travaš v. Croatia (Application no. 75581/13), ECLI:CE:ECHR:2016:1004JUD007558113, par. 111.

²⁸ ECtHR, October 4, 2016, Case Travaš v. Croatia, cit., par. 67.

²⁹ ECtHR, October 4, 2016, Case Travaš v. Croatia, *ibidem*.

³⁰ ROBBERS, op. cit., 212.

³¹ ROBBERS, *ibidem*.

³² ROBBERS, *ibidem*.

³³ ROBBERS, *ibidem*.

³⁴ BREMER, op. cit., 181.

change, but its uniqueness lies in the fact that faith requires there to be ‘something unchangeable, something enduring within it’, and it is the church’s task to uncover this³⁵. Since confessional theological faculties are established to transmit church teachings to future generations, it is crucial that students at these faculties acquire knowledge that the church considers essential for its survival³⁶.

A breach of the duty of loyalty can manifest not only in improper teaching of students but also in behaviour that could cause a real disruption in the activities of the church or religious community. Termination of employment, in this sense, represents a particularly severe consequence of a breach of the duty of loyalty, because the dismissed worker has minimal opportunities for finding new employment, given that their qualifications are highly specialised, and the church or religious community holds a dominant position in this area³⁷. In this regard, the ECtHR particularly considers this fact when examining breaches of the duty of loyalty, along with the nature of the specific job, the duration of employment, the seniority of the employee, the employer’s awareness of the employee’s personal circumstances, and the publicity that a particular case has received³⁸.

The principle of the institutional autonomy of church and religious communities in relation to the state was confirmed, for example, in the judgment of the ECtHR in the case *Fernández-Martínez v. Spain*, regarding the church authorities’ decision not to recommend the re-employment of an individual in the post of religious education teacher. The individual was also a priest, and so a particularly high degree of his loyalty to the church was expected. The Court held that public authorities cannot act as arbitrators in disputes that arise within a church or religious community, nor can they assess the legitimacy of how religious beliefs are expressed. Moreover, it was confirmed that the guarantee of freedom of religion does not include a “right of dissent”, in the sense of a particular member of a religious community having the right to disagree with its teachings or organisation³⁹. If such disagreement does exist, the guarantee of freedom of religion implies the individual’s ability to leave the religious community⁴⁰. On the other hand, the state must not exert pressure on a religious community to accept or exclude an individual from its fold⁴¹. In light of these principles, the ECtHR concluded that the candidate’s adherence to an idea that seemed to undermine the doctrinal consistency of the Catholic Church resulted in a justified termination of employment; moreover, it concluded that the revocation of the ap-

³⁵ BREMER, op. cit., 186.

³⁶ WILLIAMS, *Academic freedom in church-related academic institutions: the management of tensions*, in *Didache*, 2008, 2, 12.

³⁷ ECtHR, June 12, 2014, Case *Fernández-Martínez v. Spain* (Application no. 56030/07), ECLI:CE:ECHR:2014:0612JUD005603007, par. 144.

³⁸ BROCKMANN, op. cit., 84.

³⁹ ECtHR, June 12, 2014, Case *Fernández-Martínez v. Spain*, cit., par. 128.

⁴⁰ ECtHR, June 12, 2014, Case *Fernández-Martínez v. Spain*, *ibidem*.

⁴¹ ECtHR, June 12, 2014, Case *Fernández-Martínez v. Spain*, cit., par. 129.

proval for a new employment contract was intended to protect the rights and freedoms of the Catholic Church. The Spanish Constitutional Court reached a similar conclusion when it ruled on the revocation of the mandate for hiring a Catholic religious education teacher in a public school who had divorced and was living with another man. On that occasion, the Constitutional Court concluded that church authorities have the freedom to assess whether a particular individual is suitable to teach religious education on behalf of the Catholic Church in a public school. This assessment is not based solely on the teacher's pedagogical abilities but also on their personal circumstances, as «teaching religious education goes beyond the mere transmission of knowledge and includes the transmission of faith, which must be demonstrated through the teacher's personal life»⁴².

⁴² Spanish Constitutional Court, Case 38/2007, in MARTINEZ-TORRÓN, *Spain*, in TORRES (ed.), *International encyclopaedia for religion*, Kluwer Law International BV, 2018, 178.

