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'Unauthorised' clergy, criminal sanctions and Article 9 ECHR: Tothpal and Szabo

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Introduction

Romanian criminal law makes it an offence to act as a cleric without due authorisation from a religious organisation. Article 23 § 4 of Law no 489/2006 provides that:

> "The exercise of the priestly office or any other function that involves the exercise of the priestly prerogatives without the authorisation or the explicit agreement of religious structures with or without legal personality shall be punished as provided criminal law"[28].

Furthermore, Article 281 of the former Romanian Criminal Code, in force until 1 February 2014 – which was carried over into the current Penal Code as Article 348 – made the illegal practice of a profession an offence, in these terms:

> "The illegal practice of a profession or any other activity for which the law requires an authorisation … shall be punished with imprisonment [*ranging*] from one month to one year or a fine" [29 & 30].

In ***Tothpal and Szabo v Romania*** **[2019] ECHR 157** (French only), the Court considered applications from two ministers, Bela Tothpal and Csongor Szabo, who had been suspended from the exercise of ministry by their respective Churches. Because of the similarity of the facts, the cases were joined under Article 42(1) of the Rules.

Tothpal

Mr Tothpal was the Lutheran pastor in Arad. Following disciplinary proceedings, the Lutheran Church dismissed him and appointed a new pastor. Mr Tothpal continued to conduct services for some of the members of the community.

In March 2010, the Lutheran Church and the parish, represented by the new pastor, lodged a criminal complaint against him for the unlawful exercise of the duties of a cleric. The public prosecutor's office gave a discontinuance decision but nonetheless noted that priestly duties could only be performed with the agreement of the relevant religious organisations and that Mr Tothpal's permission had been withdrawn – and gave him an administrative fine of 1,000 Romanian lei (some 235 euros). The complainants challenged that order and the Arad Court of First Instance imposed a criminal fine of 4,000 on Mr Tothpal of 4,000 lei (some 900 euros). The court of appeal upheld that judgment on the grounds that Mr Tothpal had conducted specific Lutheran religious ceremonies despite the legal obstacle to him doing so because of his dismissal.

Szabo

In 1995, Mr Szabo was appointed as parish minister of the Reformed Church in Băiţa. In 2008, following a dispute, the Reformed Church terminated his contract of employment, dismissed him from the ministry and banned him from conducting religious services. A new minister was appointed to the parish. In February 2009, the Reformed Church lodged a criminal complaint against Mr Szabo for the unlawful exercise of the duties of a minister. The public prosecutor's office dismissed the complaint, noting that the Băiţa Reformed community had been split since 2008 and that some of the congregation had deliberately followed Mr Szabo and attended his services, which differed from the usual Reformed Church service. The Reformed Church appealed.

The Gherla Court of First Instance convicted Mr Szabo of unlawfully exercising the duties of a cleric. It found that he had acted in a manner incompatible with Christian teachings and had fomented controversy within the Băiţa Reformed community. The court sentenced him to an immediate two-month custodial sentence on the grounds that only imprisonment could induce him to think about his conduct and mend his ways by fasting and praying for at least 40 days, after which he could be released on licence. Mr Szabo appealed, and the Cluj Court of Appeal ruled that, having regard to the rifts in the Băiţa Reformed community, imprisoning Mr Szabo would be liable to exacerbate the conflict.

The arguments

Before the ECtHR, the applicants alleged that their criminal conviction for the unlawful exercise of the duties of a minister of religion amounted to a violation of their right to freedom of religion, contrary to Article 9 ECHR and contrary to religious pluralism. Mr Tothpal invited the Court to draw a distinction between the activity of a minister of religion in a professional sense and his activity in the biblical sense, arguing that he was acting as the spiritual leader of a group of people who were following him willingly [43]. Mr Szabo said that he had intervened at the request of part of the community to guide, but not to celebrate the Reformed rite or to make financial gain. In this regard. The criminal law did not specify the duties of a minister or the criteria for determining them, it was not based on objective criteria and judges had no theological training from which to make an objective assessment [44].

The Government accepted that the applicants' criminal convictions had interfered with their right to freedom of religion, but the offence in question was in accordance with the provisions of Law No 489/2006 and the Criminal Code and had pursued the legitimate goal of protecting the rights of others, specifically those concerned churches and their faithful. The national courts had delivered reasoned decisions and held that the applicants had continued to celebrate the specific rituals of their respective religions; they had also balanced the fundamental rights of the parties, giving priority to respect for the autonomy of religious communities. Their criminal convictions were justified by a pressing social need and were not disproportionate [45].

The judgment

The convictions of the two applicants had been an interference with their right to freedom of religion under Article 9 ECHR and the Government had admitted that fact [46]. The interference was "prescribed by law"; and the Court was prepared to accept that the interference pursued the legitimate aim of protecting the rights of Churches and their members [46 & 47]. As to whether the interference was "necessary in a democratic society", the Court had recently summarised the principles applicable in this field in the case *SAS v France*. In particular, it had emphasised the role of the state as a neutral and impartial organizer of the exercise of various religions, faiths and beliefs and had and stated that this role helped to ensure public order, religious harmony and tolerance in a democratic society [49].

In the present case, the impugned acts used to justify the criminal conviction of the applicants came within the religious sphere: they were criticized for having provided religious services and participating in marriage ceremonies, baptisms or burials (paragraphs 15 and 26 above). They had not engaged in the performance of acts likely to produce legal effects, nor had the Government argued before the Court that, under Romanian law, the applicants had jurisdiction to carry out such acts. As for the criminal conviction of Mr Tothpal for fraudulent management of the property of the parish, the Court considered that that was not relevant to the consideration of the current application because that sentence had been imposed after a separate criminal prosecution that had been the subject of a separate application with the Court, No 55662/13, [*which had been* ***struck out*** *in 2014*] [50].

The applicants had consistently claimed to have acted with the support of a part of their communities and the Government did not dispute in its observations to it – and the Court had previously said that punishing a person for merely acting as the religious leader of a group that willingly followed him could hardly be considered compatible with the demands of religious pluralism in a democratic society [51]. Nor had it been established that the split of the two communities had created tensions or confrontations requiring action on the part of state authorities. In condemning the two applicants for their religious activities, the Romanian authorities had *de facto* placed part of the religious communities of the cities of Arad and Băiţa under the auspices of the Lutheran and Reformed Churches – excluding the faithful who wished to attend the services at which the applicants officiated [52].

The sentences imposed on the applicants had not been justified by "a pressing social need" and the interference with their right to manifest their religion collectively in public by worship and teaching was not "necessary in a democratic society". There had therefore been a violation of Article 9 of the Convention [53].

Court decision and other documents available at
https://hudoc.echr.coe.int/eng#{"itemid":["001-191069"]}