WRITTEN OBSERVATIONS

submitted to the European Court of Human Rights
in the case

Ţîmpău and Popa v. Romania

(Cases N° 70267/17 and N° 18424/18)

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1. The applicants, Doina Tîmpău and Lorica Popa, are two Romanian citizens who worked as catechists in Romanian public schools, where they were teaching religion, an optional class. In this case, it was the Christian Orthodox religion.
2. The mission of teaching religion in public schools is organized jointly by the Romanian state and religions it recognizes. Teachers are subject to the dual authority of the Ministry of Education, and the authorities of the religion they teach. Each religion can develop its own curriculum, which must then be validated by the Ministry of Education.[i] Each religion chooses its teachers, granting them with an endorsement to teach. For the Orthodox Church, the local archbishop chooses the teachers of the Orthodox Christian religion.
3. This endorsement can be revoked, as happened to the applicants, as their archbishop considered that Doina Tîmpău had used indecent and vulgar language, and was constantly reprimanding the pupils, whilst Lorica Popa was deemed a bad teacher, with only 46 % of the pupils choosing the Orthodox religion class. The application did not detail the specific facts alleged against both teachers.
4. Following the decision of the archbishop, said schools stopped employing the applicants, as well as paying them their salaries. The applicants challenged this decision before the domestic courts, in vain.
5. Before the ECHR, the applicants challenged the fact that the loss of endorsement could not be challenged before the civil courts, seeing this as a violation of their right of access to a court guaranteed in Article 6 § 1 (civilian component) of the Convention.
6. Furthermore, the applicants considered that the reasons for this loss of endorsement, as well as its consequences on their professional life and their income, caused harm to their private life, in violation of Article 8 of the Convention.
7. We will examine both these complaints in turn.

I. The accusation relating to access to a court (Article 6)

8. The guarantee of access to a court depends on the existence of a civil "*right*," under the definition of the Convention. Thus, it is appropriate to search whether the endorsement of the archbishop to teach religion can be referred to as a civil right in the charge of the applicants.
9. In the Orthodox (and Catholic) Church, archbishops have the sole responsibility of the teaching of religion. Being the successors of the Apostles, they received that responsibility from Jesus Christ. Teaching is one of the main specific pastoral duties of the archbishop that he can delegate to a cleric and, additionally, to a lay person. Teaching religion is neither a secular nor lay act, but an entirely religious one, like the prayer or the celebration of the sacraments are. No Christian believer, Catholic or Orthodox, lay or cleric has the right to teach religion, if no endorsement has been granted to them by the local archbishop. There is no possibility of teaching without an episcopal endorsement: it provides a mission and a title to religious teachers. It is up to the archbishop to choose the people who have the capacity to teach, in accordance with the Church's criteria, and to eventually revoke that endorsement, if the people chosen do not meet the said criteria.

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10. The decision of the Orthodox archbishop to grant certain people the canonic endorsement of catechists is of religious character. Thus, it takes place in the scope of the autonomy of religious communities. This is confirmed by Article 9 of the European Convention, which explicitly mentions teaching among the religious practices whose freedom is guaranteed: "*worship, teaching, practice and observance of rituals*." The State cannot interfere in the process of religion teaching, in any case in the properly religious part of this teaching, *i.e.* the establishment of the content and the teaching methods, and of the criteria to be accepted as a teacher. Of course, the State remains duly qualified for everything but religious matters, especially concerning public security and order.

11. The requirement of the endorsement of the Orthodox archbishop to teach Orthodox religion is provided for by law.

12. According to the Constitution of Romania, in its Article 32 § 7: "*The State shall ensure the freedom of religious education, in accordance with the specific requirements of each religious cult. In public schools, religious education is organized and guaranteed by law.*" This guarantee restores the freedom of religious teaching that had been erased in 1948 by decree No. 175/1948, on the day of the establishment of the Communist State, deleting at the same time private and religious schools, and "purging" their curriculum, the teaching staff and the libraries. [ii] In its first Article, the 1968 Romanian Law on Education specified that the aim of teaching was dialectal materialism, *i.e.* atheism.

13. 1989 saw the reintroduction of religion in Romanian public education, in the context of a transition towards democracy, according to a liberal approach providing optional religious education, at the choice of the pupils' parents, and in accordance with their confession.[iii] After a short period of time, during which the religious teaching was technically compulsory, it became optional again in 2005.[iv] Law N° 489/2006 concerning religious freedom and the general regime of cults[v] organizes and regulates the teaching of religion in public schools. According to its Article 32, "*(2) The religion-teaching staff in public schools shall be appointed in agreement with the denomination they represent, under the law. (3) In case a teacher commits serious violations of his denomination's doctrine or morals, that denomination can withdraw its agreement that he teaches religion, which will lead to the termination of that person's labor contract.*"[vi]

14. Article 26 of law N° 489/2006 concerning religious freedom and the general regime of cults stipulates that "*internal discipline matters are subject to bylaws and canonic regulations exclusively*."[vii] In this case, it was indeed a matter of internal discipline that caused the withdrawal of the catechist's mission.

15. The statutes of the Romanian Orthodox Church, in Article 119 § 5, specifies that "*if a teacher, cleric or lay person, among those who teach the discipline of religion, commits deviations from the doctrine and morals of the Church, following a disciplinary investigation procedure, the Romanian Orthodox Church may revoke the endorsement to teach religion, resulting in the termination of the individual work contract*."[viii] This Article stipulated that clerics and lay people are equal when it comes to the potential revocation of the endorsement to teach religion. This measure of the Statutes of the Romanian Orthodox Church is part of the State law.

16. It results from these provisions that there is no civil right, in Romanian law, to exercise the profession of catechists; this activity is being regulated by the

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statutory and canonic provisions of the Orthodox Church. The fact that the act of the civil authorities was tied to the decision of the archbishop is precisely to avoid that the civil authorities substitute themselves to the archbishop in his power of internal administration of the Church.

17. In its consistent case law,[ix] the Court judges that "*Article 6 § 1 of the Convention governs only 'disputes' relating to civil rights and obligations which can be said, at least arguably, to be recognized under domestic law.*"[x] The Court insists on the fact that it does not have the right to create, through its case law, civil rights that are not recognized in the internal order.

18. According to its well established case law,[xi] the civil courts can therefore decline jurisdiction with regard to decisions of a religious nature, in order to prevent the civil authorities from becoming religious. The European Court has confirmed this position in the decisions of December 6, 2011, in the cases *Baudler v. Germany*, *Reuter v. Germany*, and *Muller v. Germany*,[xii] as well as in the decision of the Grand Chamber made on September 14, 2017 in *Károly Nagy v. Hungary.*[xiii]

19. As Judge Pinto de Albuquerque recalled it in his dissenting opinion outside the *Nagy* case:

> *In the majority of the cases, the Court has concluded that Article 6 in its "civil" limb was not applicable, since there had been no "right" recognized, at least on arguable grounds, under domestic law. In these cases, the Court has confined itself to verifying whether the measure adopted by the ecclesiastical authorities and subject to ecclesiastical law could be amenable to judicial review by domestic courts according to the state of domestic law, and whether that position was clear and settled. In those cases, in which the Court concluded that the measure was not subject to judicial review, it endorsed the domestic courts' finding that judicial review would encroach on the autonomy of the Church, irrespective of whether the claims also had a pecuniary nature (for instance the pecuniary effects triggered by the measure contested, such as dismissal or early retirement).*

20. Article 6 is still applied to all acts that do not result from religion, especially in the majority of cases other than "*worship, teaching, practice and observance of rituals*."

21. This case did not seem to contain any particular elements that were likely to require adopting another solution, as long as only matters of internal discipline within the cults were clearly involved.

II. The accusation relating to the applicants' privacy (Article 8)

22. In the absence of legal precedents on the involved cases, it is difficult to reproach the domestic courts for not having protected the applicants from the consequences of the disputed decisions on their private and family lives. Indeed, judging on the consequences of religious decisions on the private lives of the applicants would be a way of circumventing the incompetency of civil authorities with regard to the decisions. This would establish the civil authorities as judges in religious matters.

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23. It followed that the Court could only proceed with the examination of Article 8 if it first found that the applicants had a civil right in Romania to work as catechists.

24. In the absence of such a civil right, the review of the Court could only be limited to verifying the absence of abuse on the part of the religious authorities, *i.e.,* verifying that the religious authorities did not misuse their power for a purpose other than religious.

Interference

25. It is true that the Court decided, in several cases, that the loss of a religious employment could cause problems in the private and family lives of the people involved. The Court held that the reason for the loss of employment was directly related to the marital situation of the applicants, which violated the internal discipline of the religions involved, while being protected by Article 8 of the Convention, in terms of respect for private and family life. This was the case, for example, of a case involving the loss of employment of catechists, because of their marriage or of their public statements.[xiv] The Convention guarantees freedom of marriage and freedom of expression. Thus, punishing someone on account of the exercise of these freedoms is an interference in the exercise of these rights. It was a different matter in the present cases because the reason for the loss of employment as a catechist did not target the exercise of rights that are guaranteed by the Convention, but the professional errors and inadequacies. Needless to say, the Convention does not guarantee the right to make professional errors and inadequacies. From then on, the cause of cancellation of the employment as a catechist did not violate the Conventional rights of the applicants. They both kept the possibility to challenge the loss of their endorsement before the religious authorities and canonic courts.

26. Therefore, Article 8 could be affected by the decision of the archbishop only regarding the consequences of the loss of employment as a catechist on the private and family life. It would then be a matter of a very stretchable application of Article 8, extending its scope to any event leading to patrimonial consequences.

The legality of the interference

27. The requirement to receive the endorsement from the archbishop to teach the Orthodox religion is provided for by law, as examined above, especially by law No. 489/2006, concerning the freedom of religion and the general scheme of cults. The same law applies to the Romanian Orthodox Church, who "*may revoke the endorsement to teach religion, resulting in the termination of the individual work contract*" (see § 16 above).

28. In other cases, the Court verified if the applicant was aware of the extent of religious duties that they had taken out when accepting an employment, constituting a "*heightened duty of loyalty*"[xv], and the breach of which caused the loss of their employment or endorsement. These were obligations of a religious nature, namely respect of the teaching, dogma and discipline of the church. In these cases, the Court verified that the applicant knew about their commitments

and could therefore assume that the breach of said commitments would result in the loss of their mission or employment.

29. In this case, it was not necessary to look for the existence of a "*heightened duty of loyalty*" because the loss of the catechist's endorsement did not result from breaches of religious obligations, but from professional breaches.

The legitimacy of the aim of interference

30. The legitimate aim of the measure being disputed was therefore to respect the rights of others, in particular the right to freedom of religion of pupils and their parents – which includes the right of children to receive quality religious education in accordance with the requirements of their religion – and the right of the Romanian Orthodox Church to respect for its institutional autonomy in the matter of religious education, which includes the right to provide religious education in accordance with the requirements of its religion. These rights are guaranteed by Articles 9 and 11 of the Convention, as well as by Article 2 of the First Additional Protocol.

31. Regarding the basis and content of institutional autonomy, it was worth recalling the Court's case law, as summarized by the Grand Chamber in *Fernandez-Martinez v. Spain* [GC]:

> *127. As regards the autonomy of faith groups, the Court notes that religious communities traditionally and universally exist in the form of organised structures. Where the organisation of the religious community is in issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion encompasses the expectation that they will be allowed to associate freely, without arbitrary State interference. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the Convention affords. It has a direct interest, not only for the actual organisation of those communities but also for the effective enjoyment by all their active members of the right to freedom of religion. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable (see Hasan and Chaush, cited above, § 62; Metropolitan Church of Bessarabia and Others v. Moldova, N° 45701/99, § 118, ECHR 2001-XII; and Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria, N° 412/03 and 35677/04, § 103, 22 January 2009).*
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> *128. Concerning more specifically the internal autonomy of religious groups, Article 9 of the Convention does not enshrine a right of dissent within a religious community; in the event of any doctrinal or organisational disagreement between a religious community and one of its members, the individual's freedom of religion is exercised by the option of freely leaving the community (see Miroļubovs and Others, cited above, § 80). Moreover, in this context, the Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of*

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various religions, faiths and beliefs, and has stated that this role is conducive to public order, religious harmony and tolerance in a democratic society, particularly between opposing groups (see, among other authorities, Hasan and Chaush, cited above, § 78, and Leyla Şahin v. Turkey [GC], N° 44774/98, § 107, ECHR 2005-XI). Respect for the autonomy of religious communities recognised by the State implies, in particular, that the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image or unity. It is therefore not the task of the national authorities to act as the arbiter between religious communities and the various dissident factions that exist or may emerge within them (see Sindicatul "Păstorul cel Bun", cited above, § 165).

129. The Court further reiterates that, but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate (see Hasan and Chaush, cited above, §§ 62 and 78). Moreover, the principle of religious autonomy prevents the State from obliging a religious community to admit or exclude an individual or to entrust someone with a particular religious duty (see, mutatis mutandis, Svyato-Mykhaylivska Parafiya v. Ukraine, N° 77703/01, § 146, 14 June 2007).

130. Lastly, where questions concerning the relationship between State and religions, on which opinion in a democratic society may reasonably differ widely, are at stake, the role of the national decision-making body must be given special importance (see Leyla Şahin, cited above, § 109). This will be the case in particular where practice in European States is characterised by a wide variety of constitutional models governing relations between the State and religious denominations (see Sindicatul "Păstorul cel Bun", cited above, § 138).

The proportionality of the interference

32. The interference aims for the respect of the autonomy of religious communities. However, as the Court recalled in *Fernandez Martinez*, there are some limits to the principle of said autonomy:

132. That being said, a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights to respect for their private or family life compatible with Article 8 of the Convention. In addition, the religious community in question must also show, in the light of the circumstances of the individual case, that the risk alleged is probable and substantial and that the impugned interference with the right to respect for private life does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. Neither should it affect the substance of the right to private and family life. The domestic courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the

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circumstances of the case and a thorough balancing exercise between the competing interests at stake (see, mutatis mutandis, Sindicatul "Păstorul cel Bun", cited above, § 159).

33. Assuming that Article 8 would be applicable in the present case, the Could would then have to verify each of those criteria.

34. We can easily assume that all these criteria were respected, except the one focusing on the detailed examination of the domestic courts and that has been discussed with regard to Article 6.

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[i] Jonas Mercier, « *En Roumanie, les cours de religion ne sont plus obligatoires* » (in English: "*In Romania, religious classes are no longer compulsory*"). *La Croix*. Published on September 28, 2015. Available here (FR).

[ii] For all these historical and cultural information, see: Iuliana Conovici, Laurenţiu Tănase, Manuela Gheorghe, "*Religious education in public schools in Romania: historical background*". EUREL website. Published on October 2, 2012. Available here (EN).
See also: Emanuel P. Tăvală "*Religion and public education in Romania*" in Gerhard Robbers, *Religion in public education*. Proceedings of the Trèves conference (From November 11, 2010, to November 14, 2010).

[iii] Emanuel P. Tăvală, « *État et Églises en Roumanie* » (In English: "*State and Churches in Romania*"), in Gerhard Robbers (edn.), *État et Églises dans l'Union européenne* (In English: "*State and Churches in the European union*"). May 2011. P. 12.

[iv] Jonas Mercier, *op. cit.*

[v] The text of this law is available at: https://www.legirel.cnrs.fr/spip.php?article461&lang=en

[vi] Unofficial translation.

[vii] The translation of this section of the law is taken from the Court's ruling *Sindicatul "Păstorul cel Bun" v. Romania* [GC], N° 2330/09. Published on July 9, 2012. § 29.

[viii] Unofficial translation.

[ix] See especially the decisions made on December 6, 2011, on the cases: *Baudler v. Germany* (N° 38254/04), *Reuter v. Germany* (N° 39775/04) and *Müller v. Germany* (N° 12986/04).

[x] For example, see *Boulois v. Luxembourg* [GC]. N° 37575/04. April 3, 2012. § 90 ; *Denisov v. Ukraine* [GC]. N° 76639/11. September 25, 2018. § 44 ; *Bilgen v. Turkey*. N° 1571/07. March 9, 2021. §§ 56 et 63.

[xi] See: *Dudova and Duda v. Czech Republic* (Dec.). N° 40224/98. January 30, 2001 ; *Ahtinen v. Finland.* N° 48907/99. September 23, 2008.

[xii] See footnote 9.

[xiii] *Károly Nagy v. Hungary* [GC]. N° 56665/09. September 14, 2017. Dissenting opinion of Judge Pinto de Albuquerque. § 15.

[xiv] *Fernández Martínez v. Spain* [GC]. N° 56030/07. June 12, 2014.

[xv] *Ibid.*, § 131.

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