Religious Courts in the Jurisprudence of the European Court of Human Rights

MICHAŁ RYNKOWSKI[1]
University of Wrocław

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The jurisprudence of the European Court of Human Rights (ECtHR) on religious freedom is well known and is the subject of frequent comment.[2] The aim of this paper is to present an overview of a particular aspect, where the ECtHR had to consider a dispute in which a religious court was involved at an earlier stage. In these cases, *nolens volens*, the ECtHR had to adjudicate upon the competence and procedure of these courts and tribunals. To date, there have only been nine such cases, of which only three have led to a judgment. Yet, from the remaining six which were declared inadmissible or manifestly ill-founded, there is something to be learned about the approach of the ECtHR to religious courts.

At first glance, the cases seem to have nothing in common: the applicants were Danish, English, Finnish (two applicants), Greek, Italian, Slovak, German and a woman with dual Turkish–French citizenship. Five of them were priests, one a verger, the rest of undefined professions. The religious affiliations of the applicants were also different: (Roman) Catholics, Orthodox, Church of England, Lutheran, Jewish and one unspecified. This reflects European religious diversity, save for the absence of Muslims and Jehovah's Witnesses. The subject matter also differed:

i. Disciplinary proceedings linked to the suspension or removal of a priest from a parish: (*X v Denmark, Tyler, Skordas, Šupa, Ahtinen*);
ii. Welfare insurance of a verger (*Helle*);
iii. Difficulties in proceedings before (Catholic) religious courts and, later, the Italian courts (*Pellegrini*);
iv. Handover of premises and documents belonging to a religious community following the election of a new board (*Kohn*);
v. Parental rights and child abduction (*Eskinazi*).

1 I am grateful to Professor Mark Hill QC for commenting on this article in draft.
2 Only about forty applications between 1959 and 2011 resulted in a judgment; the rest were declared inadmissible: see <http://www.echr.coe.int/Documents/Overview_2011_ENG.pdf>, accessed 15 June 2015.

A common feature was the fact that the application to the ECtHR effectively constituted an appeal against the decision of a religious court. Owing to the variety of systems of religious jurisdictions and the fact that courts of the same denomination are treated differently in various states (for example, Catholic courts in Italy, in Germany or in France), the ECtHR could not adopt a 'one-size-fits-all' solution. On the contrary, each case received detailed scrutiny.

In *Tyler*, courts of the Church of England were determined to be impartial and independent within the meaning of Article 6 of the European Convention on Human Rights (ECHR).[3] Mr Tyler was accused of conduct unbecoming a clerk in holy orders: charges of adultery were found proved in a consistory court on two occasions, the second being a re-hearing following an appeal.[4] He brought the case to Strasbourg, claiming that the Church of England was both prosecutor and a judge, and therefore not impartial. Based on the explanations provided by the UK government, the (then) European Commission of Human Rights confirmed that consistory courts of the Church of England when exercising disciplinary jurisdiction are impartial and independent within the meaning of Article 6 hence it declared the application manifestly ill-founded and inadmissible.

In *Helle*, the cathedral chapter of the Evangelical-Lutheran Church of Finland, which exercises an appellate jurisdiction from decisions of parish councils, was not considered impartial because a bishop presides *ex officio*. Mr Helle, after decades of work for the Church as a verger, discovered that he had not been employed full-time, hence his social insurance and pension rights were lower than he had expected.[5] He appealed against a decision of the parish council to the cathedral chapter, and thereafter applied to the ECtHR. It is implicit that the ECtHR did not perceive the cathedral chapter to be an impartial court within the meaning of Article 6 because the bishop presided *ex officio*. However, as the judgments of the cathedral chapter were within the remit of the supervisory jurisdiction of the Finnish Highest Administrative Court, there was no violation of Article 6. Interestingly, in the procedurally similar case of *Ahtinen v Finland*, the ECtHR sidestepped the issue, declaring the status of priest not to be a civil right protected by the ECHR.[6]

Decisions of the Greek Orthodox courts are not subject to the control of state courts. In *Skordas*, a Greek Orthodox priest found himself in conflict with the local bishop, who prohibited him from celebrating masses.[7] The priest launched proceedings in the state civil and criminal courts, including the Council of State. The ECtHR declared that domestic remedies had not been exhausted, as not all

3 *Tyler v United Kingdom* App no 21283/93 (ECtHR, 5 April 1993).
4 This matter pre-dated the system of disciplinary tribunals introduced by the Clergy Discipline Measure 2003.
5 *Helle v Finland* App no 20772/92 (ECtHR, 19 April 1997).
6 *Ahtinen v Finland* App no 48907/99 (ECtHR, 23 September 2008).
7 *Skordas v Greece* App no 48895/99 (ECtHR, 15 June 2000).

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of the various actions which the priest had initiated in the state courts had been determined. The priest had founded his application on Article 3 (torture), Article 4 (slavery and forced labour) and Article 9 (religious freedom). He did not refer to Article 6, which may explain its failure.

The courts of the Roman Catholic Church (such as the Roman Rota) were considered in one case (*Pellegrini*).[8] Ms Pellegrini was called to appear in nullity proceedings brought by her husband in a Catholic marriage tribunal. Under Italian law, judgments of the Rota are recognised by the state courts (a procedure known as *delibazione*). Ms Pellegrini challenged this decision before the ECtHR, claiming that that the Catholic courts and tribunals violated Article 6 so far as the procedural rights of litigants were concerned. For example, she was summoned to appear before the (Catholic) court without being told what the subject of the case was; she was not informed about the right to be represented by a lawyer; and she did not receive all the court documents. The ECtHR acknowledged that neither the Holy See nor the State of the Vatican City were party to the ECHR, therefore the Court addressed its remarks to Italian courts, indicating that care should be exercised in recognising the judgments of ecclesiastical courts.

In *Šupa*, a Slovak state court, as part of a complex set of proceedings, made reference to Catholic jurisprudence in the Supreme Tribunal of the Apostolic Signatura.[9] The ECtHR was able to avoid making any substantive determination as to the status of proceedings of the Signatura by declining to entertain the application owing to the delay in making it.[10]

In *Kohn* and *Eskinazi* the ECtHR tacitly recognised the competence of the Arbitration and Administrative Court of the Central Jewish Council in Germany and of rabbinical courts in Israel respectively.[11] In *Kohn*, the question related to the property (rooms and equipment) of the association after a change of governance. The German courts claimed that the state courts were authorised to intervene, notwithstanding the autonomy of the religious community, since the question as to which of the boards was legitimate engaged civil rights. The ECtHR came to the conclusion that the Arbitration and Administrative Court of the Central Jewish Council was properly authorised to decide conclusively in such a case.

In *Eskinazi*, a French–Turkish citizen stayed with her daughter in Turkey despite the explicit request of the father, a French–Israeli citizen, who wanted them to return to Israel. On the application of the father, rabbinical courts in

8 *Pellegrini v Italy* App no 30882/96 (ECtHR, 20 July 2001).
9 *Šupa v Slovakia* App no 72991/01 (ECtHR, 6 February 2007).
10 The time ran from the final determination of the final court of record in Slovakia, notwithstanding that a reference was pending before the Slovakian Constitutional Court.
11 *Kohn v Germany* App no 47021/99 (ECtHR, 23 March 2000); *Eskinazi v Turkey* App no 14600/05 (ECtHR, 6 December 2005).

Tel Aviv (Batei Hadîn Harabaniim Haezorim) ordered Ms Eskinazi to return to Israel with her daughter. The Turkish courts recognised these orders as valid and therefore ordered Ms Eskinazi to return to Israel. Ms Eskinazi challenged these orders in the ECtHR, which had to investigate the legal position of rabbinical courts in Israel (they not being a party to the ECHR). The ECtHR determined that in Israel there is a parallel jurisdiction of state and religious courts, between which a plaintiff may choose. All of these courts are under the supervision of the Israeli Supreme Court, sufficient for the purposes of compliance with Article 6.

The ECtHR avoided taking any position on the role of the consistorial court of the Danish National Church in *X v Denmark*.[12] Before baptising children, a priest required their parents to attend a special course of five hours, which was deemed by the church authorities unjustified and hence illegal. The priest was asked to stop or he would be forced to resign. The priest claimed that his freedom of religion had been infringed. However, the ECtHR determined that the status of priest is a civil right and not therefore covered by Article 6.

The absence of any consistent jurisprudence is interesting, and it is noteworthy that the judgments do not cross-refer to one another. The two Catholic tribunals mentioned, namely the Roman Rota (*Pellegrini*) and the Apostolic Signatura (*Šupa*), are housed in Vatican territory (on the Piazza della Cancellaria in Rome) and are not subject to the jurisdiction of the ECtHR, hence the judicial restraint. The court was more robust when dealing with the Evangelical-Lutheran Church of Finland.

With the exception of *Skordas* and *Eskinazi*, the cases were of a financial character or related to property. There is very little ECtHR jurisprudence on matters of religious doctrine. The application by the serial litigator Revd Paul Williamson concerning the ordination of women priests did not relate to church courts and was summarily declared inadmissible.[13] There are also several cases in the ECtHR which have touched upon religious law but not the jurisdiction of church courts as such.[14]

12 *X v Denmark* App no 7374/76 (ECtHR, 8 March 1976).

13 *Williamson v United Kingdom* App no 27008/95 (ECtHR, 17 May 1995). Mr Williamson had alleged several violations of his Article 9 rights in addition to asserting that the Priests (Ordination of Women) Measure 1993 was a breach of British constitutional law.

14 See *Karlsson v Sweden* App no 12356/86 (ECtHR, 8 September 1988), appeal to the government against an administrative decision of a cathedral chapter; *Cha'are Shalom Ve Tsedek v France* App no 27417/95 (ECtHR, 27 June 2000), religious slaughtering of animals; *Duda and Dudova v Czech Republic* App no 40224/98 (ECtHR, 30 January 2001), the application of the internal law of the Hussite Church by state courts. In four cases brought against Germany the internal laws of various churches were discussed but not their courts: *Schüth v Germany* App no 1620/03 (ECtHR, 23 September 2010); *Obst v Germany* App no 425/03 (ECtHR, 23 September 2010); *Baudler v Germany* App no 38254/04 and *Reuter v Germany* App no 39775/04 (ECtHR, 6 December 2011).

A picture seems to emerge of the ECtHR placing reliance on the idea of separation of powers, and of the independence and impartiality of courts and tribunals (and the judges who sit in them) for the purposes of Article 6. While no single principle has been enunciated to date, of one thing we can be certain: there is likely to be no shortage of litigation for both civil and ecclesiastical lawyers in the years ahead, both in the domestic courts and in Strasbourg.

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