

The positive obligations of a State to uphold religious freedom as guaranteed by the ECHR

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1. Factual background

This case comment aims at analysing and critiquing the recent judgement of the ECtHR in *Svyato-Uspenskyy*.² The case concerned a potential violation of the applicant community's right to religious freedom under article 9 ECHR. The State was found in breach for failing to take the necessary steps to protect the exercise of the said right by the religious community. The Applicant was a religious community in Ukraine, that belonged to the Ukrainian Orthodox Church which was associated with the Patriarchate of Moscow. Further to this, the Applicant owned and used a church building in the village of Ptycha. Due to the invasion of Crimea by Russia, tensions escalated between the Ukrainian Orthodox Church which was associated with the Moscow Patriarchate, and the Ukrainian Orthodox Church which was associated with the Kyiv Patriarchate (the UOC KP).

In response to such tensions between the villagers, the Ptycha Village Council gave authorization for the shared use of the church building by the Applicant and the UOC KP, recommending an alternate schedule. Nonetheless, the Rivne Regional Commercial Court set aside the said decision of the Village Council, since it was taken without the Applicant's consent. Criminal proceedings were also instigated against UOC KP members following

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² *Religious Community of Svyato-Uspenskyy Parish of Rivne Eparchy of Ukrainian Orthodox Church in Ptycha Village of Dubensky District v. Ukraine*, 8906/19, 9.10.2025 ('Svyato').

complaints by the Applicant. A freezing order was issued by the Rivne City Court which prohibited the use of the church building by both members of the Moscow or Kyiv Patriarchates. The freezing order was upheld on appeal.

However, in 2018 the freezing order was lifted by the Dubno City and District Court, citing that there was insufficient evidence to show that there was a continued risk of the church building being destroyed. Following this decision, there was an intrusion in the church building. Criminal proceedings were instigated against unknown persons due to, inter alia, criminal property damage and injuries caused to a person on the church premises. Another freezing order was issued again prohibiting the use of the church building. In light of this, the Applicant filed an appeal arguing that the evidence showed that it was the UOC KP which was a threat of causing the destruction of the church building and that the authorities, instead of protecting them, merely penalised them without just cause. The appeal was rejected and a further appeal to the Supreme Court was also rejected.

In early 2019, the Orthodox Church of Ukraine was established, with the blessings of the Ecumenical Patriarch of Constantinople. Following this, both the Applicant and the UOC KP eventually joined the Orthodox Church of Ukraine. Despite this, the ECtHR found that since the deposed original community leaders of the Applicant, who had lodged the application before the ECtHR, had filed evidence showing that the Applicant continued to exist *de facto* as a religious group, they had *victim status* and their case was accordingly held to be admissible, with the intent to continue their case regarding article 9 ECHR.³

2. The ruling

The ECtHR ruled that there was a violation of article 9 of ECHR by Ukraine. Determinative to the judgement was the fact that the Ukrainian authorities had chosen to prohibit altogether

³ Ibid, paras.55-56.

the use of the church building, in an attempt to eliminate tension caused by the competing religious communities, thus completely preventing the Applicant from practising their religious freedom. Nonetheless, the ECtHR held that this was not the correct approach and reiterated that *'the role of the authorities in situations of conflicts between several religious groups is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other'*.⁴ Additionally, it was decisive that the Ukrainian authorities, besides banning the use of the church building, had not taken any investigative measures at large (with the exception of one investigative step, which was the medical examination of the victim) despite the fact that the identities of the offenders were known. Therefore, the ECtHR stated that it had not been shown that the authorities took sufficient steps to ensure the peaceful enjoyment of the rights guaranteed by article 9 ECHR by the applicant community.⁵

However, the ECtHR took notice that Ukraine had faced a considerable challenge in complying with its obligations under article 9 ECHR in view of the long-lasting and intense dispute over the use of the church building.⁶ Despite this, the ECtHR indicated that, since the attack which took place on 2/4/2018 on the church building was trespassing on private property, and was not a public demonstration, there was no indication that the authorities were faced with the challenge of balancing the rights under articles 9 and 11 ECHR.⁷ The ECtHR highlighted that in a democratic society some restrictions can be necessary on the right to manifest religious beliefs, with the aim of achieving reconciliation with other groups interests and ensure that everybody's rights are respected.⁸ Considering this, it emphasised the role of a State: *'...as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and has stated that this role is conducive to public order, religious harmony and tolerance in a*

⁴ Ibid, para.87.

⁵ Ibid, para.89.

⁶ Ibid, para.82.

⁷ Ibid, para.86.

⁸ Ibid, para.76.

democratic society.⁹ Hence, the State has an obligation to make sure that there is mutual tolerance between opposing groups.¹⁰ With regards to the State's positive obligations, it was reiterated that: '*...the responsibility of the State may be engaged where religious beliefs are opposed or denied in a manner which inhibits those who hold such beliefs from exercising their freedom to hold or express them. In such cases the State may be called upon to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of those beliefs*'.¹¹

Accordingly, it ruled that Ukraine had breached its positive obligations regarding article 9 ECHR, since it had banned altogether the use of the church building, preventing draconically the Applicant from manifesting their religious beliefs and not investigating the matter properly.¹²

3. Positive obligations: too much State weight-lifting?

The analysis and reasoning provided by the ECtHR appears consistent with a series of previous judgements regarding the positive obligations of States.¹³ Nonetheless, on a deeper analysis of the facts of relevant judgements, it is maintained that the ECtHR has overreached its powers by interpreting the positive obligations of the State too widely. In particular, the ECtHR cited its judgement in *Georgian Muslim Relations*,¹⁴ where it was, *inter alia*, ruled that Georgia had breached its positive obligations under article 9 ECHR.¹⁵ However, the two cases ought to have been distinguished. In *Georgian Muslim Relations*, the applicants were prevented by the local community from operating a Muslim boarding school and were being discriminated upon in a

⁹ Ibid, para.77.

¹⁰ Ibid, para.77.

¹¹ Ibid, para.78.

¹² Ibid, paras. 80-90.

¹³ B. Rainey, P. McCormick and C. Ovey, *Jacobs, White, and Ovey, The European Convention on Human Rights*, 8th edition, OUP, 2021), pp. 484-486; *Hasan and Chaush v. Bulgaria*, (GC) 30985/1996, 26.10.2000; *Begheluri and others v. Georgia*, 28490/2002), 7.10.2014.

¹⁴ *Georgian Muslim Relations and Others v. Georgia*, 24225/19, 30.11.2023, para.82.

¹⁵ Ibid, para.100.

series of unfortunate events where the authorities had failed to effectively take action to protect their rights.¹⁶ In contrast, in the present case, there was no issue of discrimination, nor a protracted series of actions and/or protests against the Applicant. On the contrary, the State was merely trying to ease tension and had no mal intention, nor had it sided with either of the competing groups.¹⁷ Therefore, it is argued that the ECtHR has unnecessarily widened the scope of positive obligations, thereby creating burdensome and quite unpredictable legal obligations on States.

Nonetheless, it is understood that the intention of the ECtHR was to apply the general principles established in its case-law: that in the context of religious freedom and competing religious rights, the State must act as *neutral and impartial organizer*, aiming at not removing tension by eliminating pluralism, but by ensuring that competing religious groups have *mutual tolerance*.¹⁸ This is also in line with the case-law of the ECtHR on positive obligations of Member States.¹⁹ Despite, however, the reasoning and justifications provided by the ECtHR, the present case should have been distinguished, since Ukraine did not defeat pluralism – if it had defeated pluralism, it would have promoted one group to dominate over the other.

Moreover, the current case can be distinguished from the case of *Serif*,²⁰ where the authorities had appointed a religious leader (Mufti) in the Muslim minority community in Thrace, whilst a part of the Muslim community supported another person to act as Mufti and, in fact, he was elected to that position.²¹ The elected Mufti was criminally prosecuted.²² In the present case,

¹⁶ Ibid, paras. 98-100.

¹⁷ See on discriminatory behaviour by State authorities and their unwillingness to intervene: *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 others v. Georgia*, 71156/2001, 3.5.2007.

¹⁸ *Shahin v. Türkiye*, (GC) 44774/98, 10.11.2005, paras.106-107.

¹⁹ A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford: Hart Publishing, 2004; M. Florczak-Wator, 'The Role of the European Court of Human Rights in Promoting Horizontal Positive Obligations of the State', (2017) 17(2) *International and Comparative Law Review*: 39–53.

²⁰ *Serif v. Greece*, 38178/1997, 4.12.1999.

²¹ Ibid, paras.8-12.

²² Ibid, paras.13-19.

Ukrainian authorities, contrary to the Greek authorities in *Serif*, did not favour one over the other competing groups –they merely attempted to ease tension, and pluralism was maintained since the Applicant could practise their religion in another of the myriad churches present in the majority Christian-Orthodox Ukraine. Hence, the Ukrainian authorities were merely acting as a conductor of neutral mediation.²³

It is an established legal norm that States must act as neutral mediators in clashes between competing religious groups.²⁴ Acting as a neutral mediator requires the lack of favouritism and bias, allowing, however, the State to intervene and take necessary action.²⁵ Alas, such an approach of imposing positive obligations on States must have certain delineated limits, since otherwise, it raises the issue of *democratically unelected and unaccountable judges*,²⁶ who are disconnected with the factual matrix of events, imposing extreme burdens and obligations on States, leading to a chilling effect on the powers of effective State administration.

²³ *Supreme Holy Council of the Muslim Community v. Bulgaria*, 39023/97, 16.12.2004, paras.80-84; See also: J. Murdoch, 'Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights', Strasbourg: Council of Europe, Strasbourg, 2012, pp. 28-30.

²⁴ See for example: *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 others v. Georgia*, 71156/2001, 3.5.2007; *Shahin v. Türkiye*, (GC) 44774/98, 10.11.2005.

²⁵ *Ibid.*

²⁶ B. Dickson, 'Positive obligations and the European Court of Human Rights' (2010) 61(3) *Northern Ireland Legal Quarterly*: 203-208, 205.