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## **Expert Committee on Legislation and Implementation Analysis of the European Court of Human Rights Decision: *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria***

On 31 July 2008, the European Court of Human Rights (ECHR) issued a important decision regarding religious freedom and religious registration laws in the case

*Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*. Jehovah's Witnesses (JW) had filed an application complaining on two points: first they have been denied registration and therefore the right to become a legal entity for 20 years (even though they had obtained it when the application was filed) and second, once they were officially registered, they were denied the more consolidated status of "religious society" with its special privileges because they did not fulfil the 10 year registration requirement per the law.

The decision articulated around these arguments is therefore two fold: first the Court ruled on the alleged violation of Article 9 read (right to religious freedom) in conjunction with Article 11 (right of association) because of the non registration, and then on the alleged violation of Article 9 read in conjunction with Article 14 (right to not be discriminated against) because of the discriminatory refusal to be granted "religious society" status.

### As regards Article 9 read in conjunction with Article 11:

Article 9 read in conjunction with Article 11 infers that the right of association applies to religious followers and that religious freedom must also be guaranteed through the autonomy of religious communities. The Court reinstated its jurisprudence in this regard:

"Since religious communities traditionally exist in the form of organized structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Indeed, 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 affords (see *Hasan and Chaush*, cited above, § 62)."

The European Court has constantly ruled that religious communities should be granted the right to register in order to be able to conduct their affairs fairly. As the OSCE reminded in its Guidelines for the Review of Legislation pertaining to Religion and Beliefs:

“Because of the typical importance of legal personality, a series of decisions of the European Court of Human Rights recognized that access to such a status is one of the most important aspects of the right to association,<sup>1</sup> and that the right to association extends to religious associations. Undue restrictions on the right to legal personality are, accordingly, inconsistent with both the right to association and freedom of religion or belief”.

In the present case, JW submitted that the refusal of the Austrian authorities to grant them legal personality by conferring on them the status of a religious society violated their right to freedom of religion. In 1978, some of the applicants applied for recognition of JW as a religious society under the 1874 Recognition Act, thereby seeking to have legal personality. After complex proceedings, on 20 July 1998 JW was granted legal personality under the Religious Communities Act, which had been passed on 10 January 1998.

The Court had to determine first whether there had been an interference with the applicants’ right to freedom of religion, and then whether these limitations were acceptable under Article 9.2 of the Convention.

JW complained that due to the refusal of the Austrian authorities to grant legal personality until 1998, JW could not have been established as a legal entity and, thus, could not have entered into legal relations, concluded contracts or acquired assets. Thus, they could not hire the necessary religious ministers and were not entitled to perform their pastoral work for believers in hospitals or prisons.

The Government maintained that there had been no interference with the applicants’ rights under Article 9 because JW had eventually been granted legal personality and the members of the Jehovah’s Witnesses had not been hindered in practising their religion individually and could have set up an association having an organisational structure and legal personality.

The Court disagreed and ruled that the fact that no instances of interference with the community life of the Jehovah’s Witnesses have been reported during that period and that the JW’s lack of legal personality might have been compensated in part by running auxiliary associations was not decisive and decided that there had been an interference with the applicant’s rights.

The Court then found that, although the limitations were prescribed by law and pursued a legitimate aim of protection of public order and safety, they were not necessary in a democratic society. It underlined that some 20 years had elapsed until legal personality was eventually conferred on JW.

Since the Government had not relied on any “relevant” and “sufficient” reasons justifying this failure, it found that the denial of registration for 20 years went

beyond what would have amounted to a “necessary” restriction on the applicants’ freedom of religion.

The Court reaffirmed its long standing jurisprudence on the importance of granting of legal personality to religious communities:

“Court reiterates that 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 affords (see Hasan and Chaush, cited above, § 62).”

Considering the importance of such right to operate as a legal entity, the Court ruled in the present case that:

**“There is an obligation on all of the State’s authorities to keep the time during which an applicant waits for conferment of legal personality for the purposes of Article 9 of the Convention reasonably short”.**

As regards Article 9 read in conjunction with Article 14:

Article 9 read in conjunction with Article 14 infers that nobody can be discriminated on the basis of one’s religion or religious beliefs.

The Court restated in the present decision its interpretation of this principle:

“Moreover, a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (ibid., § 30).”

The applicants submitted that the status of a religious community finally conferred upon JW in 1998 was inferior to the status held by religious societies, as religious communities were subject to more severe State control in respect of their religious doctrine, their rules on membership and the administration of their assets pursuant to the 1998 Religious Communities Act.

The applicants further complained of the discriminatory nature of section 11 of the 1998 Religious Communities Act. This provision amended the 1874 Recognition Act in that it introduced further requirements for recognition as a religious society. In particular, it requires the existence of the religious association for at least twenty years in Austria and for at least ten years as a registered religious community; a minimum number of two adherents per thousand members of the Austrian population (at the moment, this means about 16,000 persons); the use of income and other assets for religious purposes, including charity activities; a positive attitude towards society and the State; and

no illegal interference as regards the association's relationship with recognised or other religious societies.

The Court first observed that under Austrian law, religious societies enjoy privileged treatment in many areas, such as exemption from military service and civilian service, reduced tax liability or exemption from specific taxes, facilitation of the founding of schools, and membership of various boards. Given the number of these privileges and their nature, in particular in the field of taxation, the advantage obtained by religious societies is substantial and this special treatment undoubtedly facilitates a religious society's pursuance of its religious aims. Therefore, the obligation under Article 9 of the Convention incumbent on the State's authorities to remain neutral in the exercise of their powers in this domain requires therefore that all religious groups must have a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner.

The Court found that there was no doubt that Article 14 of the Convention, taken in conjunction with Article 9, was applicable in the present case. The Court then noted that the Federal Minister for Education and Cultural Affairs, on 1 December 1998, dismissed the request for recognition of JW as a religious society, on the ground that it had not existed as a registered religious community for a minimum of ten years.

*It is important to note that the issue here at stake is different from that of registration under examination in the first part of the case, as JW had already been granted registration as religious community. It refers to the accession to a higher level of recognition by the Austrian authorities.*

In this regard, under international human rights standards, registration as legal entity represents the base level status allowing religious entities to carry out their affairs fairly and the granting of which allows no differential treatment, whereas more consolidated or upper level status such as financial aids or tax exemption can be granted on a more discretionary basis. The ODIHR Background Paper 1999/4 presented at the OSCE Review Conference in September 1999 addressed this issue<sup>2</sup>:

“So long as base level entities have the full measure of freedom to carryout their affairs - a vital caveat - it seems unlikely that the differential treatment accorded "upper tier" entities will be held to violate core international religious freedom standards. It is of course important that such "upper tier" schemes be implemented in ways that are sensitive to the rights and equality concerns of smaller religious groups. But given the prevalence of such systems, and the importance of the consensus in OSCE affairs, it is reasonable to expect that the OSCE commitments requiring that "communities of believers [be given] ... recognition of the

status provided for them in their respective countries" will be deemed to be satisfied by granting access to "base level" entities."

However, the Court found in the present case that the imposition of a waiting period before a religious association that has been granted legal personality can obtain a more consolidated status as a public-law body raises delicate questions, as the State has a duty to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom and in its relations with different religions, denominations and beliefs (see Metropolitan Church of Bessarabia and Others, cited above, § 116).

Such a waiting period therefore called for particular scrutiny on the part of the Court.

Finally, the Court accepted that, "in exceptional circumstances", a period might be necessary before the granting of such more consolidated status, "such as would be in the case of newly established and unknown religious groups".

However, it found that it hardly appeared justified "in respect of religious groups with a long-standing existence internationally which are also long established in the country and therefore familiar to the competent authorities, as is the case with the Jehovah's Witnesses". In respect of such a religious group, the authorities should be able to verify whether it fulfils the requirements of the relevant legislation within a considerably shorter period.

In addition, the JW maintained that the government did not really deem that waiting period necessary since the Coptic Orthodox Church was granted the status of religious society by a specific law in 2003 whereas this Church had only existed in Austria since 1976 (so 17 years of existence instead of 20 per the law) and had been registered as a religious community in 1998 (5 years of registration instead of 10 per the law). The Court found that this fact showed that the Austrian State did not consider the application on an equal basis of such a waiting period to be an essential instrument for pursuing its policy in that field, and concluded to violation of Articles 9 and 14.

**1Sidiropoulos v. Greece (1998); United Communist Party of Turkey v. Turkey (1998); Gorzelik v. Poland, § 55 (2001).**

**2"Freedom of religion or belief: Laws affecting the structuring of religious communities" by Cole Durham**