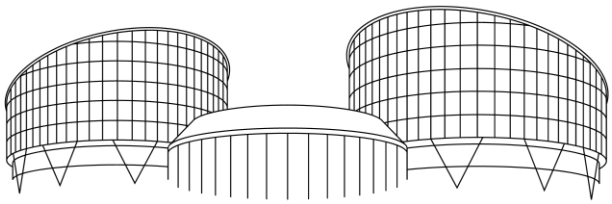

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

**CASE OF SAVEZ CRKAVA "RIJEČ ŽIVOTA" AND OTHERS v. CROATIA**

*(Application no. 7798/08)*

JUDGMENT

STRASBOURG

9 December 2010

**FINAL**

*09/03/2011*

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*
.

**In the case of** Savez crkava "Riječ života" and Others v. Croatia**,**

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President,*
Nina Vajić,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 18 November 2010,

Delivers the following judgment, which was adopted on that date:

## PROCEDURE

1. The case originated in an application (no. 7798/08) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Savez crkava "Riječ života" (Union of Churches "The Word of Life"), Crkva cjelovitog evanđelja (Church of the Full Gospel) and Protestantska reformirana kršćanska crkva u Republici Hrvatskoj (Protestant Reformed Christian Church in the Republic of Croatia) ("the applicant churches"), religious communities incorporated under Croatian law, on 4 December 2007.

2. The applicant churches were represented by Ms I. Bojić, an advocate practising in Zagreb. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. The applicant churches alleged, in particular, that the Government's refusal to conclude an appropriate agreement with them and the resulting inability to provide certain religious services and obtain State recognition of religious marriages conducted by them had breached their right not to be discriminated against in the exercise of their freedom of religion and the rights set forth by law.

4. On 29 January 2009 the President of the First Section decided to communicate to the Government the complaints concerning freedom of religion and the prohibition of discrimination on that account, the general prohibition of discrimination, access to a court and the alleged lack of an effective remedy.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicants are churches of a Reformist denomination which are registered as religious communities under Croatian law and which have their seats in Zagreb (the first and second applicant churches) and Tenja (the third applicant church).

6. The first applicant church has been present in Croatia since 1993, the second since 1989 and the third since the sixteenth century as part of the Reformed Church and since 2001 as an independent church. The applicant churches were entered in the register of religious communities in Croatia on 18 December 2003 (the first applicant church), 3 December 2003 (the second applicant church) and 14 October 2003 (the third applicant church), in accordance with the Religious Communities Act.

7. On 21 June 2004 the applicant churches submitted a request to the Government's Commission for Relations with Religious Communities (*Komisija za odnose s vjerskim zajednicama* – "the Religious Communities Commission") in order to conclude an agreement with the Government of Croatia, as envisaged in section 9(1) of the Religious Communities Act (see paragraph 18 below), which would regulate their relations with the State. They explained that without such an agreement they were unable to provide religious education in public schools and nurseries, to provide pastoral care to their members in medical and social-welfare institutions, as well to those in prisons and penitentiaries, or to perform religious marriages with the effects of a civil marriage.

8. On 23 December 2004 the Government of Croatia adopted an instruction (*zaključak* – "the Instruction") setting out the criteria which religious communities had to satisfy in order to conclude such an agreement with it (see paragraph 19 below).

9. In a letter of 12 January 2005 the Religious Communities Commission informed the applicant churches that they did not satisfy, either individually or jointly, the historical and numerical criteria set out in the above Instruction, that is to say, that they had not been present in the territory of Croatia since 6 April 1941 and that the number of their adherents did not exceed 6,000 (see paragraph 19 above). Referring to section 21 of the 2003 Health Care Act (see paragraph 21 below) and sections 14, 78(1) and 95 of the Enforcement of Prison Sentences Act (see paragraphs 23-26 below), it also remarked that members of religious communities which had not concluded the relevant agreement with the Government of Croatia had a right to receive pastoral care in medical and social-welfare institutions as well as in prisons and penitentiaries.

10. On 10 February 2005 the applicant churches submitted another request to conclude an appropriate agreement with the Government of Croatia, this time addressing it to the Prime Minister directly.

11. In a letter of 15 June 2005 the Religious Communities Commission replied to the applicant churches' request of 10 February 2005, informing them again that they did not satisfy, either individually or jointly, the criteria set forth in the Instruction of 23 December 2004, this time without specifying which particular criteria had not been met. It again referred to section 21 of the 2003 Health Care Act and sections 14, 78(1) and 95 of the Enforcement of Prison Sentences Act, reiterating its opinion that the members of religious communities which had not concluded appropriate agreements with the Government of Croatia had a right to receive pastoral care in medical and social-welfare institutions and in prisons and penitentiaries.

12. The applicant churches then lodged a request for the protection of a constitutionally guaranteed right (*zahtjev za zaštitu ustavom zajamčenog prava*) with the Administrative Court (*Upravni sud Republike Hrvatske*) against the Religious Communities Commission's refusal of 15 June 2005, in accordance with section 66 of the Administrative Disputes Act (see paragraph 28 below). They argued that the refusal, even though it had been given in the form of a letter, constituted "an individual legal act" (that is, a decision), within the meaning of section 66 of the Administrative Disputes Act, that had violated their constitutional right to equality of all religious communities before the law, as guaranteed by Article 41 of the Constitution (see paragraph 16 below).

13. On 12 October 2006 the Administrative Court declared their action inadmissible, holding that the Religious Communities Commission's refusal did not constitute "an individual act" for the purposes of section 66 of the Administrative Disputes Act, and thus was not susceptible to that court's review.

14. The applicant churches then lodged a constitutional complaint, relying again, *inter alia,* on Article 41 of the Constitution and alleging a violation of their constitutional right to equality of all religious communities before the law. On 1 October 2006 the Constitutional Court (*Ustavni sud Republike Hrvatske*) dismissed the applicant churches' constitutional complaint, finding, *inter alia*, that Article 41 of the Constitution was not applicable in the particular case.

15. Meanwhile, on 30 September 2005 the applicant churches filed a petition with the Constitutional Court for an abstract review of constitutionality and legality, asking it to examine the conformity of the Instruction of 23 December 2004 with the Religious Communities Act and Article 41 of the Constitution. On 5 June 2007 the Constitutional Court declared the applicant churches' petition inadmissible, finding that the contested Instruction was not subordinate legislation susceptible to a review of constitutionality and legality.

# II. RELEVANT DOMESTIC LAW

## A. The Constitution

### *1. Relevant provisions*

16. The relevant provisions of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette nos. 56/1990, 135/1997, 8/1998 (consolidated text), 113/2000, 124/2000 (consolidated text), 28/2001 and 41/2001 (consolidated text), 55/2001 (corrigendum) and 76/2010) read as follows:

**Article 14**

"Everyone in the Republic of Croatia shall enjoy rights and freedoms regardless of their race, colour, sex, language, religion, political or other belief, national or social origin, property, birth, education, social status or other characteristics.

All shall be equal before the law."

**Article 16**

"Rights and freedoms may be restricted only by law in order to protect the rights and freedoms of others, the legal order, public morals or health.

Every restriction of the rights and freedoms should be proportional to the nature of the necessity for the restriction in each individual case."

**Article 40**

"Freedom of conscience and religion and freedom to profess faith or other belief publicly shall be guaranteed."

**Article 41**

"All religious communities shall be equal before the law and shall be separated from the State.

Religious communities shall be free to, in accordance with the law, perform religious services publicly, open schools, educational and other institutions, social-welfare and charitable institutions and to administer them, and in their activities enjoy the protection and assistance of the State."

**Article 140**

"International agreements in force, which were concluded and ratified in accordance with the Constitution and made public, shall be part of the internal legal order of the

Republic of Croatia and shall have precedence in terms of their legal effects over the [domestic] statutes. ..."

*2. The Constitutional Court's jurisprudence*

17. In its decisions nos. U-I-892/1994 of 14 November 1994 (Official Gazette no. 83/1994) and U-I-130/1995 of 20 February 1995 (Official Gazette no. 112/1995) the Constitutional Court held that all rights guaranteed in the Convention and its Protocols were also to be considered constitutional rights having legal force equal to the provisions of the Constitution.

## B. The Religious Communities Act

*1. Relevant provisions*

18. The relevant provisions of the Act on the Legal Status of Religious Communities (*Zakon o pravnom položaju vjerskih zajednica*, Official Gazette no. 83/2002 – "the Religious Communities Act"), which entered into force on 24 July 2002, read as follows:

**Section 1**

"A church or a religious community of a different name (hereafter 'religious community') within the meaning of this Act is a group of natural persons who exercise freedom of religion by the equal public performance of religious ceremonies and by other manifestations of their faith (hereafter 'adherents') and is entered in the register of religious communities in the Republic of Croatia."

**Section 5**

"(1) Religious communities operating as legal persons on the day of the entry into force of this Act (hereafter 'existing religious communities') shall be entered in the register [of religious communities] upon their submission of an application for registration.

(2) Congregations which on the day of the entry into force of this Act do not operate as religious communities or which are established after the entry into force of this Act (hereafter 'newly established religious communities') shall be entered in the register [of religious communities] upon their submission of an application for registration. An application for registration in the register [of religious communities] may be submitted by those congregations which, before submission of such an application, have operated for at least five years as associations with legal personality."

**Section 9**

"(1) Issues of common interest for the Republic of Croatia and one or more religious communities may also be regulated by an agreement made between the Government of the Republic of Croatia and the religious community.

(2) With a view to implementing [legal] instruments regulating relations between the State and religious communities, as well as other issues of interest for the status and operation of religious communities, the Government of the Republic of Croatia shall establish a Commission for Relations with Religious Communities."

*(d) Religious education and teaching of religion in educational institutions*

**Section 13(1) and (2)**

"(1) In nurseries, at the request of parents or guardians, the curriculum of nursery education shall include teaching of religion. Teaching of religion shall be organised in accordance with the law and with an agreement between the religious community and the Government of the Republic of Croatia.

(2) In elementary schools and high schools, at the request of parents or guardians of pupils younger than 15 years and on the basis of a joint declaration by students of 15 years of age or above and their parents or guardians, a religious education course shall be organised as an optional course in accordance with the prescribed curriculum and an agreement between the religious community and the Government of the Republic of Croatia."

*(e) Pastoral care in medical and social-welfare institutions*

**Section 14**

"The right of a religious community to provide pastoral care to its members in medical and social-welfare institutions shall be guaranteed. The manner of exercising this right shall be regulated by an agreement between the religious community and the founder of those institutions."

*(f) Pastoral care in prisons and penitentiaries*

**Section 15**

"The right of a religious community to provide pastoral care to its members in prisons and penitentiaries shall be guaranteed. The manner of exercising this right shall be regulated by an agreement between the religious community and the Government of the Republic of Croatia."

*(g) Pastoral care in the armed forces and the police*

**Section 16**

"A religious community shall have the right to provide pastoral care to its members serving in the armed forces and the police, as well as to other persons permanently

employed in the armed forces and the police, and to members of their families under the conditions and in the manner regulated by an agreement with the Government of the Republic of Croatia."

### *2. The Government of Croatia's Instruction of 23 December 2004*

19. The Government of Croatia's Instruction (*zaključak*) of 23 December 2004 setting out the criteria which religious communities have to satisfy in order to conclude an agreement with it ("the Instruction" – not published in the Official Gazette) reads as follows:

**I N S T R U C T I O N**

"1. For the conclusion of an agreement on issues of common interest for the Republic of Croatia and one or more religious communities, made between the Government of the Republic of Croatia and a religious community, it is necessary for one or more religious communities wishing to conclude the agreement to satisfy one of the following two conditions:

- they were active in the territory of the Republic of Croatia on 6 April 1941 and have continued to operate in continuity and legal succession, and the number of [their] adherents exceeds six thousand, according to the last census,

- they are a historical religious community of the European cultural circle (Catholic Church, Orthodox Church, Evangelical Church in the Republic of Croatia, Reformed Christian Church in Croatia, Islamic Community in Croatia, Jewish Community in the Republic of Croatia).

2. A church or a religious community that secedes or has seceded from a church or a religious community shall be regarded as a new church or religious community, and its secession or establishment shall be taken as the beginning of its activities.

3. The Commission for Relations with Religious Communities shall be responsible for the implementation of this instruction."

## C. The Family Act

20. The relevant provisions of the Family Act (*Obiteljski zakon*, Official Gazette nos. 116/2003, 17/2004, 136/2004 and 107/2007), which entered into force on 22 July 2003, read as follows:

**CELEBRATION OF MARRIAGE**

**Section 6**

"Marriage shall be celebrated ... in a civil or a religious form."

**Section 8**

"Marriage in religious form with the effects of civil marriage shall be performed by the minister of a religious community with which the Republic of Croatia has regulated legal issues in this respect."

**Section 23**

"A marriage celebrated in religious form in accordance with the provisions of section 8 ... of this Act shall from the date of [its] celebration have all the effects of a civil marriage as prescribed by this Act."

## D. The Health Care Act

21. Section 21 of the former 2003 Health Care Act (*Zakon o zdravstvenoj zaštiti*, nos. 121/03, 48/05 (corrigendum), 85/06 and 117/08), which was in force between 6 August 2003 and 1 January 2009, provided that in the exercise of his or her right to health care, during a stay in a medical institution, every person had the right – in accordance with that Act and other subordinate legislation on compulsory health insurance – to a diet in accordance with his or her belief and the right to perform acts of worship in the areas provided for that purpose. In the case of death, everyone had the right to be treated in accordance with religious and other customs expressing piety to the deceased.

22. Section 22 of the new 2008 Health Care Act (*Zakon o zdravstvenoj zaštiti*, nos. 150/2008, 155/2009 and 71/2010), which entered into force on 1 January 2009, contains provisions identical to those of section 21 of the former 2003 Health Care Act (see the preceding paragraph).

## E. The Enforcement of Prison Sentences Act

23. The relevant provisions of the Enforcement of Prison Sentences Act (*Zakon o izvršavanju kazne zatvora*, nos. 128/99, 55/00, 59/00 (corrigendum), 129/00, 59/01, 67/01 (corrigendum), 11/02 (corrigendum), 190/03 (consolidated text), 76/07, 27/08 and 83/2009) provide as follows.

24. Section 14 provides that every prisoner has, under the conditions set forth in the Act, *inter alia*, the right to profess his or her faith and to consult an authorised cleric.

25. Section 78(1) provides that prisoners have the right to a diet in accordance with their religious demands, providing that such diet is feasible in the particular prison or penitentiary.

26. Section 95 provides that a prison or penitentiary where a large number of prisoners of the same faith are serving their sentences must provide their cleric, at least once a week, with an adequate place and time for worship.

## F. The Government of Croatia Act

27. The relevant provisions of the Act on the Government of the Republic of Croatia (*Zakon o Vladi Republike Hrvatske*, Official Gazette nos. 101/1998, 15/2000, 117/2001, 199/2003 and 77/2009 – "the Government of Croatia Act"), which entered into force on 5 August 1998, read as follows:

**Section 30**

"The Government shall issue decisions (*odluke*), rulings (*rješenja*) and instructions (*zaključci*) on matters that cannot be regulated by decrees.

A decision shall be adopted to regulate particular issues within the competence of the Government or to order measures, give consent to or confirm acts of other authorities or legal entities, and to decide on other matters which cannot be regulated by subordinate legislation.

An instruction shall be adopted to define the Government's position on issues concerning the implementation of an established policy, and to determine the tasks of State administrative bodies.

A ruling shall be adopted to decide on appointments or dismissals or other individual matters within the Government's purview."

**Section 31**

"Decrees and rules of procedure shall be published in the Official Gazette. They shall enter into force on the eighth day from the date of their publication, unless the instruments in question provide for some other date [as the date] of their entry into force.

Decisions, rulings and instructions may be published in the Official Gazette if the Government so decides when adopting these instruments."

## G. The Administrative Disputes Act

28. The Administrative Disputes Act (*Zakon o upravnim sporovima*, Official Gazette of the Socialist Federal Republic of Yugoslavia no. 4/1977, and Official Gazette of the Republic of Croatia nos. 53/1991, 9/1992 and 77/1992) in its relevant part provides as follows:

**Section 66**

"A request for the protection of a constitutionally guaranteed right or freedom ... if such a right or freedom has been violated by a final individual act [that is, decision], and no other judicial protection is secured, shall be decided by the [Administrative Court], by applying *mutatis mutandis* the provisions of this Act."

29. Sections 67-76 provide for special proceedings for the protection of constitutionally guaranteed rights and freedoms from unlawful factual (physical) acts of public authorities, if no other judicial remedy is available. Under the case-law of the domestic courts, the protection against unlawful "acts" also includes omissions (for example, the Administrative Court in its decision no. Us-2099/89 of 21 September 1989 and the Supreme Court in its decision no. Gž-9/1993 of 6 April 1993 held that failure of the administrative authorities to carry out their own enforcement order constituted an "unlawful act" within the meaning of section 67 of the Administrative Disputes Act).

30. Section 67 provides that such proceedings are to be instituted by bringing an "action against an unlawful act" (*tužba za zaštitu od nezakonite radnje*) in the competent municipal court. The action must be brought against the public authority to which the factual act (or omission) is imputable (the defendant).

31. Section 73 provides that the court decides on the merits of the case by a judgment. If it finds in favour of the plaintiff, the court orders the defendant to desist from the unlawful activity and, if necessary, orders *restitutio in integrum*.

32. Section 74 provides that in proceedings following an "action against an unlawful act" the court is to apply, *mutatis mutandis*, the provisions of the Civil Procedure Act.

## H. The Obligations Act

### *1. The relevant provisions*

33. The relevant part of the Obligations Act (*Zakon o obveznim odnosima*, Official Gazette, nos. 35/2005 and 41/2008 – "the 2006 Obligations Act"), which entered into force on 1 January 2006 and abrogated the former 1978 Obligations Act (see the next paragraph), reads as follows:

**Rights of personality**

**Section 19**

"(1) Every natural person or legal entity is entitled to the protection of its rights of personality (*prava osobnosti*) under the conditions provided by law.

(2) Rights of personality within the meaning of this Act are the right to life, to physical and mental health, reputation, honour, dignity, name, privacy of personal and family life, liberty, etc.

(3) A legal entity shall have all the above-mentioned rights of personality – apart from those related to the biological character of a natural person – and, in particular,

the right to a reputation and good name, honour, name or company name, business secrecy, entrepreneurial freedom, etc."

**Mandatory conclusion and mandatory contents of a contract**

**Section 248(1)**

"If a party is bound by law to enter into a contract, the other interested party may request that the contract be entered into without delay."

**Request to desist from a violation of rights of personality**

**Section 1048**

"Anyone may request a court or other competent authority to order the cessation of an activity which violates his or her rights of personality and the elimination of its consequences."

34. The text of section 157(1) of the former 1978 Obligations Act (*Zakon o obveznim odnosima*, Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 29/1978, 39/1985 and 57/1989, and Official Gazette of the Republic of Croatia no. 53/1991 with subsequent amendments – "the 1978 Obligations Act") was nearly identical to the text of section 1048 of the current 2006 Obligations Act, and read as follows:

**Section 157(1)**

"Anyone may request a court or other competent authority to order the cessation of an activity which violates his or her rights of personality."

*2. The position of legal scholars and the case-law*

35. Among Croatian legal scholars there is no consensus as to which rights, apart from those enumerated in section 19 of the Obligations Act, are to be considered rights of personality. It is, however, common ground that the following rights of natural persons fall into that category: the right to life, the right to physical and mental integrity (health), the right to liberty, the right to reputation and honour, the right to privacy of personal and family life, the right to secrecy of letters and personal manuscripts, the right to personal identity (in particular the rights to one's image, voice and name) and the moral rights of the author. It would appear that only these rights have so far been interpreted as rights of personality by the Croatian courts in the application of section 157 of the former 1978 Obligations Act and section 19 of the current 2006 Obligations Act. The issue whether other rights guaranteed by the Constitution may, at this point, be qualified as rights of personality remains largely disputed.

## I. The Anti-Discrimination Act

36. The relevant part of the Anti-Discrimination Act (*Zakon o suzbijanju diskriminacije*, Official Gazette, no. 85/2008), which entered into force on 1 January 2009, reads as follows:

**Section 16**

**Common provisions**

"Anyone who considers that his or her right has been violated because of discrimination may seek the protection of that right in the proceedings in which that right is being decided as the main issue, or may also seek protection in special proceedings referred to in section 17 of this Act."

**Section 17**

**Special actions for protection against discrimination**

"(1) A person claiming to be a victim of discrimination under the provisions of this Act shall be authorised to bring an action and seek:

1. a declaration that the defendant has violated the plaintiff's right to equal treatment or that the activities the defendant has undertaken or failed to undertake may directly result in the violation of the right to equal treatment (action for declaration of discrimination);

2. the cessation of activities which violate or may violate the plaintiff's right to equal treatment, or to undertake activities which eliminate discrimination or its consequences (action to desist from or eliminate discrimination);

3. compensation for pecuniary and non-pecuniary damage caused by the violation of the rights protected by this Act (action for damages);

4. publication in the media of the judgment declaring the violation of the right to equal treatment, at the defendant's expense.

(2) Unless this Act provides otherwise, the court shall decide on claims referred to in paragraph 1 of this section by applying the provisions of the Civil Procedure Act.

(3) Claims referred to in paragraph 1 of this section may be brought together with claims for the protection of other rights to be determined in civil proceedings if all those claims are interrelated and if the same court has jurisdiction based on subject matter in respect of them, regardless of whether such claims fall to be examined in regular or special civil proceedings, except in cases of disturbance of possessions. In that case, regulations relevant to the type of dispute in question shall apply, unless otherwise provided by this Act.

(4) ..."

# III. OTHER RELEVANT MATERIALS

## A. Report on the Implementation of the Constitutional Act on the Rights of National Minorities

37. The relevant part of the Report on the Implementation of the Constitutional Act on the Rights of National Minorities and the Expenditure of Means Allocated in the State Budget of the Republic of Croatia for 2009 for the Needs of National Minorities (*Izvješće o provođenju Ustavnog zakona o pravima nacionalnih manjina i o utrošku sredstava osiguranih u državnom proračunu Republike Hrvatske za 2009. godinu za potrebe nacionalnih manjina*), which the Government of the Republic of Croatia submitted to the Croatian Parliament on 1 July 2010, reads as follows:

> **4. The right to manifest religion and establish religious communities**
>
> "To date, the Republic of Croatia has concluded four international agreements [concordats] with the Holy See ...
>
> ...
>
> The Government of the Republic of Croatia also concluded six agreements on issues of common interest with churches and religious communities, and in this way has regulated relations with another 15 churches and religious communities.
>
> ...
>
> Churches which have regulated relations with the State of Croatia:
>
> 1. receive regular annual financial support,
>
> 2. can teach religion courses in schools, and teach religion in nurseries,
>
> 3. can celebrate marriage in religious form with the effects of a civil marriage.
>
> ...
>
> All other religious communities have the right to provide pastoral care in medical and social-welfare institutions, prisons and penitentiaries, as well as in the armed forces."

## B. Agreements concluded between the Government of Croatia and religious communities

38. The Government of Croatia has to date concluded agreements on issues of common interest, as envisaged in section 9(1) of the Religious Communities Act, with the following religious communities:

- the Serbian Orthodox Church, on 20 December 2002 (Official Gazette, no. 196/2003);

- the Islamic Community in Croatia, on 20 December 2002 (Official Gazette, no. 196/2003);

- the Evangelical Church in the Republic of Croatia and the Reformed Christian Church in Croatia, on 4 July 2003 (Official Gazette, no. 196/2003);

- the Evangelical (Pentecostal) Church in the Republic of Croatia (together with the associated Church of God in the Republic of Croatia and the Alliance of Pentecostal Churches of Christ in the Republic of Croatia), the Christian Adventist Church in the Republic of Croatia (together with the associated Seventh-day Adventists Reform Movement) and the Alliance of Baptist Churches in the Republic of Croatia (together with the associated Church of Christ), on 4 July 2003 (Official Gazette, no. 196/2003);

- the Bulgarian Orthodox Church, the Croatian Old Catholic Church and the Macedonian Orthodox Church, on 29 October 2003 (Official Gazette, no. 196/2003), amended on 23 September 2004 (Official Gazette, no. 141/2004); and

- the Jewish (Religious) Community Beth Israel in Croatia, on 24 October 2008.

39. Relations with the Catholic Church are regulated by four concordats concluded with the Holy See:

- the Agreement between the Holy See and the Republic of Croatia on Legal Issues (Official Gazette – International Agreements, no. 3/1997);

- the Agreement between the Holy See and the Republic of Croatia on Pastoral Care of Catholic Believers [who are] Members of the Armed Forces and the Police (Official Gazette – International Agreements, no. 2/1997),

- the Agreement between the Holy See and the Republic of Croatia on Cooperation in the Field of Education and Culture (Official Gazette – International Agreements, no. 2/1997),

- the Agreement between the Holy See and the Republic of Croatia on Economic Issues (Official Gazette – International Agreements, no. 18/1998).

### C. The 2001 census

40. According to the last census of 2001 the Bulgarian Orthodox Church has eight members, the Croatian Old Catholic Church 303 and the Macedonian Orthodox Church 211.

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 9

41. The applicant churches complained that they had been discriminated against because, unlike other religious communities with which the Government of Croatia had concluded agreements on issues of common interest, as referred to in section 9(1) of the Religious Communities Act, they were not: (a) allowed to provide religious education in public schools and nurseries, (b) allowed to provide pastoral care to their members in medical and social-welfare institutions, prisons and penitentiaries, or (c) entitled to have religious marriages they performed recognised by the State as equal, in terms of their legal effects, to civil marriages. In particular, they argued that certain religious communities such as the Bulgarian Orthodox Church, the Croatian Old Catholic Church and the Macedonian Orthodox Church, which did not satisfy the criteria set forth in the Government's Instruction of 23 December 2004, had nevertheless concluded agreements with the State and were thus allowed to provide the above religious services and were entitled to the official recognition of religious marriages performed by them. They relied on Article 14 of the Convention, taken together with Article 9. Those Articles read as follows:

**Article 14**

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

**Article 9**

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

42. The Government contested these arguments. They argued that domestic remedies had not been exhausted, that the Articles relied on were not applicable to certain complaints, and that, in any event, all the applicant churches' complaints were manifestly ill-founded.

## A. Admissibility

### *1. Non-exhaustion of domestic remedies*

#### (a) The arguments of the parties

43. The Government first argued that the applicant churches had failed to exhaust domestic remedies. They submitted, in particular, that the applicant churches could have brought a civil action for mandatory conclusion of a contract under section 248 of the Obligations Act, an action for the protection of rights of personality under section 1048 of the same Act (see paragraph 33 above), or an action under the Anti-Discrimination Act (see paragraph 36 above).

44. The applicant churches admitted that they had not exhausted all existing domestic remedies but wondered how many different legal actions, according to the Government, they should have undertaken in order to comply with Article 35 § 1 of the Convention. In turn, they submitted that they had exhausted all remedies which had been available to them at the given time and which had had realistic prospects of success. In particular, they had initiated the relevant proceedings in Croatia long before the 2006 Obligations Act and the Anti-Discrimination Act had entered into force. In any event, it would have been unreasonable to expect them to resort to remedies the effects of which had never been proved by even a single example in the case-law (there was no evidence on the application of the Anti-Discrimination Act in practice), and whose effectiveness, even theoretically speaking, was difficult to envisage. For example, since the Religious Communities Act did not provide for an obligation for the Government of Croatia to enter into agreements with religious communities, the applicant churches submitted that therefore they could not have relied on section 248 of the Obligations Act. Lastly, the applicant churches submitted that using the remedies suggested by the Government would have required them to institute another set of proceedings, from the very beginning, in order to protect their rights, and to wait patiently for a few more years in order to "test" yet another remedy.

#### (b) The Court's assessment

45. As regards the action for mandatory conclusion of a contract under section 248 of the Obligations Act, it is sufficient for the Court to note that this provision applies only to situations where one party is bound by law to enter into a contract (see paragraph 33 above), whereas section 9(1) of the Religious Communities Act provides only that issues of common interest may be regulated by an agreement (see paragraph 18 above) and thus does not bind the State to enter into such an agreement.

46. As regards the action for the protection of rights of personality, the Court notes that under Croatian law it is not clear whether the freedom from

discrimination or freedom of religion could be qualified as such a right (see paragraph 35 above), and that, in any event, section 1048 of the Obligations Act provides only for the possibility of a court ordering the cessation of an activity infringing rights of personality (see paragraph 33 above). In these circumstances, the Court considers that it was incumbent on the respondent Government to provide examples of cases in which section 1048 of the 2006 Obligations Act or section 157 of the former 1978 Obligations Act had been applied by the courts in order to protect individuals from discrimination or interferences with their freedom of religion and/or of cases in which those provisions had been interpreted to extend to protection against omissions. However, the Government failed to do so.

47. Lastly, as regards the action under the Anti-Discrimination Act, the Court notes that the applicant churches lodged their application with the Court on 4 December 2007, whereas the Anti-Discrimination Act entered into force on 1 January 2009 (see paragraph 36 above). In this connection the Court reiterates that the issue whether domestic remedies have been exhausted is normally determined by reference to the date when the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V). While it is true that this rule is subject to exceptions which may be justified by the specific circumstances of each case (see, for example, *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX; and *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002-VIII), the Court considers, having due regard to the subsidiary character of the Convention machinery, that in the present case there are no special circumstances to justify making an exception to that rule.

48. In the light of the foregoing, and given that the Government did not rely on any other possible remedies (see paragraphs 119-123 below), it follows that their objection of failure to exhaust domestic remedies must be dismissed.

### *2. Applicability*

#### (a) The arguments of the parties

##### *(i) The Government*

49. The Government averred that Article 9 could not be interpreted to mean that the State must allow religious education in public schools and nurseries or recognise religious marriages.

50. In particular, the Government argued that while teaching was one of the forms of manifestation of religion referred to in Article 9 § 1 of the Convention, neither the wording of that Article nor the Court's case-law indicated that the State was obliged to allow religious education in public schools or nurseries.

51. The Government further argued that while celebration of a religious marriage was also one of the forms of manifestation of religion as it

amounted to "observance" within the meaning of Article 9 § 1 of the Convention, the recognition of such marriages as equal to civil marriages in terms of their effects was not among the rights guaranteed by that Article. In other words, a religion was manifested through celebration of a religious marriage, and not through the official recognition of such a marriage.

52. In conclusion, the Government submitted that the right to religious education in public schools and nurseries and the right to obtain State recognition of religious marriages went beyond the scope of Article 9 of the Convention.

53. As to the applicability of Article 14 of the Convention, the Government noted that under the Court's case-law that provision had effect solely in relation to other rights safeguarded by the Convention and thus had no independent existence. That being so, and given their view that the right to provide religious education in public schools and nurseries and the right to have religious marriages recognised by the State was beyond the scope of Article 9 of the Convention, the Government concluded that Article 14 was equally inapplicable to that part of the application.

*(ii) The applicant*

54. The applicant churches contested in particular the Government's contention that Article 14 of the Convention was inapplicable because the right to provide religious education in public schools and nurseries and the right to the official recognition of religious marriages were outside the scope of Article 9 of the Convention. They averred that in a situation in which certain religious communities had been granted such rights, there was clearly a positive obligation to grant the same rights to other religious communities in a comparable situation.

**(b) The Court's assessment**

55. The Court reiterates that Article 14 of the Convention has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, for example, *Van Buitenen v. the Netherlands*, no. 11775/85, Commission decision of 2 March 1987, and *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, § 86, ECHR 2000-VII).

56. The Court further reiterates that the Convention, including its Article 9 § 1, cannot be interpreted so as to impose an obligation on States to have the effects of religious marriages recognised as equal to those of civil marriages (see *X. v. Germany*, no. 6167/73, Commission decision of 18 December 1974, Decisions and Reports (DR) 1, pp. 64-65; *Khan v. the United Kingdom*, no. 11579/85, Commission decision of 7 July 1986, DR 48, pp. 253 and 255; *Spetz and Others v. Sweden*, no. 20402/92,

Commission decision of 12 October 1994; and *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 102, 2 November 2010).

57. Likewise, the right to manifest religion in teaching guaranteed by Article 9 § 1 of the Convention does not, in the Court's view, go so far as to entail an obligation on States to allow religious education in public schools or nurseries.

58. Nevertheless, the Court considers that celebration of a religious marriage, which amounts to observance of a religious rite, and teaching of a religion both represent manifestations of religion within the meaning of Article 9 § 1 of the Convention. It also notes that Croatia allows certain religious communities to provide religious education in public schools and nurseries and recognises religious marriages performed by them. The Court reiterates in this connection that the prohibition of discrimination enshrined in Article 14 of the Convention applies also to those additional rights, falling within the wider ambit of any Convention Article, for which the State has voluntarily decided to provide (see *E.B. v. France* [GC], no. 43546/02, § 48, ECHR 2008-...). Consequently, the State, which has gone beyond its obligations under Article 9 of the Convention in creating such rights cannot, in the application of those rights, take discriminatory measures within the meaning of Article 14 (see, *mutatis mutandis*, *E.B. v. France*, cited above, § 49). It follows that, although Croatia is not obliged under Article 9 of the Convention to allow religious education in public schools and nurseries or to recognise religious marriages, the facts of the instant case nevertheless fall within the wider ambit of that Article (see, for example and *mutatis mutandis*, *Thlimmenos v. Greece* [GC], no. 34369/97, §§ 40-43, ECHR 2000-IV; *Löffelmann v. Austria*, no. 42967/98, §§ 46-48, 12 March 2009; and *Gütl v. Austria*, no. 49686/99, §§ 31-33, 12 March 2009). Accordingly, Article 14 of the Convention, read in conjunction with Article 9, is applicable to the present case.

59. It follows that the Government's objection to the applicability of Article 14 of the Convention must also be dismissed.

*3. Whether the complaints are manifestly ill-founded*

**(a) The arguments of the parties**

60. As regards the applicant churches' complaint concerning pastoral care in medical and social-welfare institutions, prisons and penitentiaries, the Government submitted that the Religious Communities Act undoubtedly guaranteed the right to provide such care to all religious communities. The fact that certain religious communities had not concluded an appropriate agreement with the Government of Croatia did not mean that they were in any way prevented from exercising that right. This was so because the right at issue was not created by such agreements but was directly guaranteed by law.

61. The Government further submitted that, in addition to the Religious Communities Act, the right to pastoral care was also recognised under certain special legislation, in particular by the Health Care Act and the Enforcement of Prison Sentences Act (see paragraphs 21-26 above).

62. In any case, the Government observed, the applicant churches had not claimed that any of their members had ever been denied the right to pastoral care in the institutions in question.

63. Lastly, the Government emphasised that the Religious Communities Commission had on several occasions clearly informed the applicant churches that they were entitled to provide pastoral care in medical and social-welfare institutions, and also in prisons and penitentiaries, regardless of the fact that they had not concluded an agreement with the Government of Croatia (see paragraphs 7 and 11 above).

64. In the light of the above, the Government concluded that the applicant churches had the right to pastoral care in medical and social-welfare institutions, as well as in prisons and penitentiaries, and that therefore their complaints on that account were manifestly ill-founded.

65. The applicant churches did not comment on this issue.

**(b) The Court's assessment**

66. The Court notes that sections 14 and 15 of the Religious Communities Act guarantee to all religious communities the right to provide pastoral care to their members in medical and social-welfare institutions, prisons and penitentiaries (see paragraph 18 above). While it is true that those sections also provide that this right is to be exercised in a manner regulated by the relevant agreements, the Government explained that members of religious communities which had not concluded such agreements also had a right to receive pastoral care in the institutions in question. This interpretation is corroborated by the Report on Implementation of the Constitutional Act on the Rights of National Minorities of 1 July 2010 (see paragraph 37 above), and the letters of 12 January and 15 June 2005 from the Religious Communities Commission to the applicant churches (see paragraphs 7 and 11 above).

67. The Court is also mindful of the Government's argument (see paragraph 62 above), which remained uncontested, that the applicant churches had not claimed, by citing concrete examples, that the right to provide pastoral care had ever been denied to them.

68. In these circumstances, and having regard to the relevant provisions of the Health Care Act and the Enforcement of Prison Sentences Act (see paragraphs 21-26 above), which constitute *leges speciales* in relation to the Religious Communities Act, it cannot but be concluded that the applicant churches have the right to provide pastoral care to their members in medical and social-welfare institutions, prisons and penitentiaries, and that this right has not been hindered in any way.

69. It follows that the applicant churches' complaints, in so far as they concern pastoral care in medical and social-welfare institutions, prisons and penitentiaries, are inadmissible under Article 35 § 3 as manifestly ill-founded and must therefore be rejected pursuant to Article 35 § 4 of the Convention.

70. On the other hand, to the extent that the applicant churches' complaints concern religious education in public schools and nurseries and official recognition of religious marriages, they are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Furthermore, these complaints are not inadmissible on any other grounds. They must therefore be declared admissible.

## B. Merits

### *1. The arguments of the parties*

#### (a) The Government

71. The Government argued that the difference in treatment between the applicant churches and the religious communities with which the Government of Croatia had entered into agreements on issues of common interest had an objective and reasonable justification.

72. The Government explained that forty-two religious communities had been registered in Croatia and that, in practice, it was not feasible to allow each of them to provide religious education in public schools and nurseries or to have religious marriages they performed officially recognised. For this reason, the State had to enjoy a margin of appreciation as regards the conditions to be fulfilled by religious communities in order to be granted those privileges.

73. In this connection the Government relied on the Conclusions of the Seminar on Church-State Relations in the Light of the Exercise of the Right to Freedom of Religion, organised in Strasbourg on 10 and 11 December 2001 by Mr Alvaro Gil-Robles, the former Council of Europe Commissioner for Human Rights. In those conclusions the participants acknowledged that certain religious communities could be granted a special status. This did not constitute discrimination provided that cooperation between those religious communities and the State was based on objective and reasonable criteria such as their historical or cultural relevance, representativeness or usefulness to society as a whole or to a large or specific sector of the population. The Government further cited the example of Austria, where the right to provide religious education in public schools and nurseries was granted only to thirteen religious communities which had been granted the special status of religious societies.

74. The Government further maintained that, contrary to the applicant churches' arguments, the religious communities which had concluded agreements with the Government of Croatia, and thus had been allowed to provide religious education in public schools and nurseries and conduct religious marriages with the effects of a civil marriage, satisfied either the specific historical and numerical criteria or the cultural criterion set forth in the Instruction of 23 December 2004, that is, they had either been active in the territory of Croatia on 6 April 1941 and had at least 6,000 adherents, or they belonged to the European cultural circle (see paragraph 19 above). This meant that those religious communities in their long-standing presence in the territory of Croatia had made a contribution to religious and cultural diversity and gained a certain level of trust and recognition in society.

75. In particular, the Government submitted that the Serbian Orthodox Church, the Bulgarian Orthodox Church, the Croatian Old Catholic Church, the Macedonian Orthodox Church, the Islamic Community in Croatia, the Evangelical Church in the Republic of Croatia, the Reformed Christian Church in Croatia and the Jewish Community Beth Israel in Croatia each satisfied the cultural criterion as they were all "historical religious communities of the European cultural circle". It was true that the remaining religious communities with which an agreement on issues of common interest had been concluded, that is, the Evangelical (Pentecostal) Church in the Republic of Croatia, the Christian Adventist Church in the Republic of Croatia and the Alliance of Baptist Churches in the Republic of Croatia and the associated churches (see paragraph 38 above), each had fewer than 6,000 adherents. However, the Government pointed out that those religious communities had entered into the agreement jointly, a possibility provided for by section 9 of the Religious Communities Act (see paragraph 18 above). In that way, the total number of their adherents had reached 6,316, thus exceeding the threshold of 6,000. More importantly, apart from that numerical criterion, those small religious communities satisfied the historical criterion, that is to say, they had been active in Croatia before 6 April 1941.

76. On the contrary, the applicant churches were relatively "young" religious communities, which had been active in Croatia since 1993 (the first applicant church), 1989 (the second) and 2001 (the third). Unlike the religious communities with which the Government of Croatia had entered into relevant agreements, the applicant churches had not even been mentioned in the 2001 census. As regards the third applicant church, the Government pointed out that it was a completely new religious community, and could not be considered to have been active since the sixteenth century in the territory of Croatia as part of the Reformed Church. This was so because the Instruction of 23 December 2004 clearly specified that a church or religious community that seceded or had seceded from a church or a religious community was to be regarded as a new church or religious

community, and its secession or establishment was to be taken as the beginning of its activities (see paragraph 19 above).

77. In the light of the above considerations, the Government concluded that there had been no violation of Article 14 taken in conjunction with Article 9.

**(b) The applicant churches**

78. The applicant churches submitted that treating them differently from the religious communities which had concluded appropriate agreements with the Government had had neither reasonable nor objective justification. They first contested the Government's argument that it was not feasible to allow every religious community to provide religious education in public schools and nurseries and to have marriages they celebrated recognised by the State (see paragraph 72 above).

79. As regards the right to provide religious education in public schools and nurseries, the applicant churches referred to the Agreement between the Government of Croatia and the Bulgarian Orthodox Church, the Croatian Old Catholic Church and the Macedonian Orthodox Church of 29 October 2003, from which it followed that the State allowed religious education classes to be held even outside schools provided that they conformed to the same pedagogical standards as the classes held in schools. Therefore, having regard to the possibility of holding such classes on the premises of religious communities, the Government could not argue that it was not feasible to organise religious education in public schools and nurseries for all religious communities. Given that the core of their complaint was the fact that their members could not have their grades from religious education classes registered in their diplomas, the applicant churches explained that they would have accepted an arrangement whereby religious education classes could be organised outside school premises. It followed that it would take very little effort for the religious education being provided on the applicant churches' premises to have the same effect as religious education provided on the premises of the religious communities with which the appropriate agreements had been concluded.

80. As regards the State recognition of marriages celebrated in religious form, the applicant churches submitted that the Government had failed to clarify why it was impracticable to recognise all religious marriages, irrespective of the religious community within which they had been celebrated. Such an argument was absurd because recognising all marriages performed by a church minister of any religious community would only decrease the workload of the competent State authorities (registrars).

81. As to the Government's argument that there was a consensus among the Contracting States that certain religious communities could have a special status and that such treatment was not discriminatory if cooperation between certain religious communities and the State was based on objective and reasonable criteria, such as historical and cultural significance,

membership or benefits to society (see paragraph 73 above), the applicant churches argued that they all had historical and cultural significance, and were beneficial to society. In particular, the applicant churches had been making a significant contribution to society through work with drug addicts and alcoholics, marriage and family counselling, financial aid to the socially disadvantaged, and by promoting moral standards, encouraging non-smoking and alcohol-free lifestyles and prompting individuals to work and earn a living.

82. The applicant churches further disagreed with the Government's argument (see paragraphs 74-75 above) that all religious communities with which the appropriate agreements had been concluded complied with the criteria set forth in the Instruction of 23 December 2004. In the applicant churches' submission, it was a well-known fact that, for example, the Macedonian Orthodox Church had separated from the Serbian Orthodox Church in 1958, which did not mean that it had stopped being Orthodox. Likewise, the separation of the Old Catholic Church from the Roman Catholic Church had not called into question its Catholicism. Despite the fact that those churches had been created through separation or schism they had, in the view of the Religious Communities Commission, apparently retained their character as "historical religious communities of the European cultural circle" for the purposes of the Instruction of 23 December 2004 (see paragraph 19 above), and the Government of Croatia had therefore concluded agreements with them on issues of common interest. However, when the third applicant church (the Protestant Reformed Christian Church in the Republic of Croatia), which had separated from the Reformed Christian Church in 2001 (a religious community specifically listed in the Instruction as "a historical religious community of the European cultural circle" – see paragraph 19 above), had sought the conclusion of such an agreement, its request had been denied.

83. As to the Government's argument that they had not been listed in the 2001 census (see paragraph 76 above), the applicant churches submitted that certain religious communities with which the relevant agreement had been concluded, such as the Reformed Christian Church in Croatia and the Evangelical (Pentecostal) Church in the Republic of Croatia, had not been listed in that census either. Moreover, contrary to the Government's argument, certain religious communities which had concluded such an agreement, for example the Evangelical (Pentecostal) Church in the Republic of Croatia, the Church of God and the Alliance of Pentecostal Churches of Christ in the Republic of Croatia, had not existed in Croatia before 6 April 1941 and thus did not fulfil the historical criterion (see paragraph 19 above) set forth in the Instruction of 23 December 2004.

84. In conclusion, the applicant churches contended that they had been discriminated against in the exercise of their freedom of religion, contrary to Article 14 of the Convention, and invited the Court to find a violation of that provision.

*2. The Court's assessment*

85. The Court reiterates that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. However, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see, for example, *Oršuš and Others v. Croatia* [GC], no. 15766/03, §149, ECHR 2010-...). In particular, the conclusion of agreements between the State and a particular religious community establishing a special regime in favour of the latter does not, in principle, contravene the requirements of Articles 9 and 14 of the Convention, provided that there is an objective and reasonable justification for the difference in treatment and that similar agreements may be entered into by other religious communities wishing to do so (see *Alujer Fernández and Caballero García v. Spain* (dec.), no. 53072/99, ECHR 2001-VI).

86. The Court notes that it was not disputed between the parties that the applicant churches were treated differently from those religious communities which had concluded agreements on issues of common interest with the Government of Croatia, under section 9(1) of the Religious Communities Act. The Court sees no reason to hold otherwise. Accordingly, the only question for the Court to determine is whether the difference in treatment had "objective and reasonable justification", that is, whether it pursued a "legitimate aim" and whether there was a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised (see, for example, *Oršuš and Others*, cited above, § 156).

87. The Court notes that in the case of *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria* (no. 40825/98, 31 July 2008) it had an opportunity to examine criteria (in particular, the ten-year waiting period) which a religious community (*Religionsgemeinschaft*) that already had legal personality had to satisfy in order to obtain a status – specifically, the status of a religious society (*Religionsgesellschaft*) – entitling it to various privileges (such as, *inter alia*, the right to provide religious education in public schools), not available to other religious communities which did not have that status. It held:

> "92. ...Given the number of these privileges and their nature, ... the advantage obtained by religious societies is substantial and this special treatment undoubtedly facilitates a religious society's pursuance of its religious aims. In view of these substantive privileges accorded to religious societies, 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 if a State sets up a framework for conferring legal personality on religious groups to which a specific status is linked, all religious groups which so wish must have a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner."

88. The Court also found that the imposition of such criteria raised delicate questions, as the State had 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. Therefore, such criteria called for particular scrutiny on the part of the Court (see *Religionsgemeinschaft der Zeugen Jehovas*, cited above, § 97).

89. The Court observes that the applicant churches in the present case found themselves in a situation comparable to that of the first applicant in the *Religionsgemeinschaft der Zeugen Jehovas* case. They are also religious communities which already have a legal personality but were unable to obtain a similar privileged status that would entitle them to provide religious education in public schools and nurseries and to have religious marriages they perform recognised by the State.

90. In that case the Court found that the ten-year waiting period had been applied to the first applicant but not to the Coptic Orthodox Church, which had been registered as a religious community in 1998 but obtained the status of a religious society in 2003. The Court therefore held that the waiting period had not been applied on an equal basis, which led it to find a violation of Article 14 of the Convention read in conjunction with Article 9 (see *Religionsgemeinschaft der Zeugen Jehovas*, cited above, §§ 95 and 98).

91. In the present case, the Religious Communities Commission refused to conclude an agreement on issues of common interest with the applicant churches because it found that they did not satisfy the cumulative historical and numerical criteria set forth in the Instruction of 23 December 2004 (see paragraphs 7, 11 and 19 above). The Government of Croatia nevertheless entered into such an agreement with the Bulgarian Orthodox Church, the Croatian Old Catholic Church and the Macedonian Orthodox Church (see paragraph 38 above), which jointly had 522 adherents according to the 2001 census (see paragraph 40 above) and thus did not meet the numerical criterion. The Government explained that this was so because the Religious Communities Commission established that those churches had satisfied the alternative criterion of being "historical religious communities of the European cultural circle" (see paragraphs 19 and 75 above). However, the Government provided no explanation as to why the applicant churches, which are of a Reformist denomination, were not qualified as "historical religious communities of the European cultural circle" by the Religious Communities Commission. Therefore, it has to be concluded, as also submitted by the applicant churches (see paragraph 82 above), that the criteria set forth in the Government's Instruction of 23 December 2004 were not applied on an equal basis to all religious communities.

92. The foregoing considerations are sufficient to enable the Court to conclude that the difference in treatment between the applicant churches and those religious communities which had concluded agreements on issues of common interest with the Government of Croatia and were therefore entitled to provide religious education in public schools and nurseries and to have religious marriages they performed recognised by the State did not have any "objective and reasonable justification".

93. There has accordingly been a violation of Article 14 of the Convention taken in conjunction with Article 9.

## II. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION TAKEN ALONE

94. The applicant churches also complained that the fact that they had not been allowed to provide religious education in public schools and nurseries, to provide pastoral care to their members in hospitals, social-welfare institutions, prisons and penitentiaries, or to have religious marriages they celebrated recognised by the State as equal to civil marriages, amounted to a violation of Article 9 of the Convention.

95. The Court considers that it follows from its above findings (see paragraphs 56-57 and 66-69 above), that these complaints are inadmissible under Article 35 § 3 as manifestly ill-founded and must therefore be rejected pursuant to Article 35 § 4 of the Convention.

## III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 12 TO THE CONVENTION

96. Under Article 1 of Protocol No. 12 to the Convention, the applicant churches raised the same complaints as under Article 14 (see paragraph 41 above). Article 1 of Protocol No. 12 reads as follows:

> "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

97. The Government contested these arguments. They argued that the applicant churches had failed to exhaust domestic remedies, that Article 1 of Protocol No. 12 was inapplicable to certain complaints, and that, in any event, all the applicant churches' complaints were manifestly ill-founded.

### A. Admissibility

#### *1. Non-exhaustion of domestic remedies*

98. The Government and the applicant both relied on the arguments summarised in paragraphs 43-44 above.

99. The Court refers to its findings under Article 14 of the Convention (see paragraphs 45-48 above), which apply with equal force to the complaints made in the context of Article 1 of Protocol No. 12 to the Convention.

100. It follows that the Government's objection of failure to exhaust domestic remedies must be dismissed.

*2. Applicability*

**(a) The arguments of the parties**

101. The Government noted that Article 1 of Protocol No. 12 to the Convention prohibited discrimination in relation to "any right set forth by law". While its scope was therefore broader than that of Article 14, it was not unlimited. The Government submitted that for Article 1 of Protocol No. 12 to be applicable it was first necessary to establish whether the right in question was actually "set forth by law". That being so, the Government pointed out that the Religious Communities Act and the Family Act provided for a possibility rather than an obligation to conclude an agreement between the Government of Croatia and one or more religious communities on issues of common interest in order to regulate, *inter alia*, religious education in public schools and nurseries and recognise the civil effects of religious marriages. Accordingly, the applicant churches could not claim that they had "any right set forth by law" in this regard.

102. The applicant churches averred that the right to provide religious education in public schools and nurseries was guaranteed by the Religious Communities Act, just as the right to conduct religious marriages with the effects of civil marriage was guaranteed by the Family Act. Hence, those rights were "set forth by law" within the meaning of Article 1 of Protocol No. 12 to the Convention, which was therefore applicable.

**(b) The Court's assessment**

103. The Court notes that whereas Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol No. 12 introduces a general prohibition of discrimination.

104. It is important to note that Article 1 of Protocol No. 12 extends the scope of protection not only to "any right set forth by law", as the text of paragraph 1 might suggest, but beyond that. This follows in particular from paragraph 2, which further provides that no one may be discriminated against by a public authority. According to the Explanatory Report on Article 1 of Protocol No. 12, the scope of protection of that Article concerns four categories of cases, in particular where a person is discriminated against:

> "i. in the enjoyment of any right specifically granted to an individual under national law;
>
> ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;

iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);

iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot)."

The Explanatory Report further clarifies that:

"... it was considered unnecessary to specify which of these four elements are covered by the first paragraph of Article 1 and which by the second. The two paragraphs are complementary and their combined effect is that all four elements are covered by Article 1. It should also be borne in mind that the distinctions between the respective categories i-iv are not clear-cut and that domestic legal systems may have different approaches as to which case comes under which category."

105. Therefore, in order to determine whether Article 1 of Protocol No. 12 to the Convention is applicable, the Court needs to establish whether the applicant churches' complaints fall within one of the four categories mentioned in the Explanatory Report.

106. In this connection the Court reiterates that sections 14 and 15 of the Religious Communities Act guarantee "the right" to (all) religious communities to provide pastoral care in medical and social-welfare institutions, prisons and penitentiaries. As already noted above, those sections further provide that this right is to be exercised in a manner regulated by an agreement between a religious community and the founder of a medical or social-welfare institution or, as regards prisons and penitentiaries, with the Government (see paragraph 18 above). It follows that the conclusion of such an agreement is not a necessary condition for the right to be created. Rather, the agreement only regulates the manner in which the right is to be exercised. The Court therefore finds that this complaint does concern a "right specifically granted under national law" and, consequently, that Article 1 of Protocol No. 12 to the Convention is applicable to it.

107. In contrast to those provisions, there is nothing in the text of section 13 of the Religious Communities Act or the text of sections 6, 8 and 23 of the Family Act conferring on religious communities the authority to provide religious education in schools and nurseries or to have religious marriages celebrated by them officially recognised, as a matter of right. The religious communities which are entitled to do so were granted those privileges exclusively on the basis of agreements on issues of common interest concluded with the Government of Croatia. As already noted above (see paragraph 45), section 9(1) of the Religious Communities Act does not bind the State to enter into such agreements, therefore leaving their conclusion at the discretion of the State. Thus, it cannot be argued that the applicant churches' complaints that they were not granted the same privileges also concern a "right specifically granted to them under national law". However, the Court considers that those complaints nevertheless fall under the third category specified in the Explanatory Report as they concern alleged discrimination "by a public authority in the exercise of discretionary

power" and that, consequently, Article 1 of Protocol No. 12 to the Convention is applicable to them.

108. It follows that the Government's objection to the applicability of Article 1 of Protocol No. 12 to the Convention must also be dismissed.

*3. Whether the complaints are manifestly ill-founded*

109. The Government repeated their above arguments (see paragraphs 60-64) that the applicant churches had not in any way been prevented from exercising their right to provide pastoral care in medical and social-welfare institutions, prisons and penitentiaries, whereas the applicant churches remained silent on the issue (see paragraph 65 above).

110. The Court refers to its above findings under Article 14 of the Convention (see paragraphs 66-68 above), which apply with equal force to the same complaints made in the context of Article 1 of Protocol No. 12 to the Convention.

111. It follows that the applicant churches' complaints, in so far as they concern pastoral care in medical and social-welfare institutions, prisons and penitentiaries, are inadmissible under Article 35 § 3 as manifestly ill-founded and must therefore be rejected pursuant to Article 35 § 4 of the Convention.

112. On the other hand, to the extent that the applicant churches' complaints concern religious education in public schools and nurseries and official recognition of religious marriages, they are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Furthermore, these complaints are not inadmissible on any other grounds. They must therefore be declared admissible.

## B. Merits

*1. The arguments of the parties*

113. The Government and the applicant both relied on the arguments summarised in paragraphs 71-84 above.

*2. The Court's assessment*

114. The Court has already found that the difference in treatment between the applicant churches and those religious communities which had concluded agreements on issues of common interest with the Government of Croatia and were therefore entitled to provide religious education in public schools and nurseries and to have religious marriages they performed recognised by the State amounted to discrimination in breach of Article 14 taken together with Article 9 of the Convention (see paragraphs 92-93 above).

115. Having regard to that finding, the Court considers that it is not necessary to examine separately whether, in this case, there has also been a violation of Article 1 of Protocol No. 12 to the Convention (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 51, ECHR 2009-...).

## IV. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 AND ARTICLE 13 OF THE CONVENTION

116. The applicant churches further complained that they had not had access to a court or an effective remedy as they had not been able either to challenge the Government's Instruction of 23 December 2004 before the Constitutional Court, or to challenge the refusal of the Religious Communities Commission to grant their request to conclude an appropriate agreement before the Administrative Court. They relied on Article 6 § 1 and Article 13 of the Convention, the relevant parts of which read as follows:

**Article 6 § 1**

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

**Article 13**

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

### *1. The arguments of the parties*

117. By referring again to the remedies the applicant churches had failed to exhaust for the purposes of Article 35 § 1 of the Convention (see paragraph 43 above), the Government argued that these complaints were manifestly ill-founded. The fact that the applicant churches had resorted to inappropriate remedies in order to protect their rights did not mean that they had not been granted access to a court or that they had not had an effective remedy.

118. The applicant churches did not specifically address this issue. However, it follows from their arguments adduced in reply to the Government's objection concerning exhaustion of domestic remedies (see paragraph 44 above) that they contested the Government's submissions and maintained their view that they had been denied the right of access to a court and had not had an effective remedy for the protection of their rights.

*2. The Court's assessment*

119. The Court first notes that sections 67-76 of the Administrative Disputes Act (see paragraphs 29-32 above) provide for an "action against an unlawful act", a judicial remedy open to anyone who considers that his or her rights or freedoms guaranteed by the Constitution have been violated by a public authority and that no other judicial remedy is available. Together with the remedy available under section 66 of the same Act (to which the applicant churches resorted – see paragraphs 12 and 28 above), they represent remedies of last resort, to be used in the absence of any other judicial protection, against decisions (the remedy under section 66 of the Administrative Disputes Act) or other (factual) acts or omissions ("action against an unlawful act") of public authorities capable of violating constitutionally guaranteed rights or freedoms. The rationale behind those remedies is that constitutional rights and freedoms are so precious that they cannot be left unprotected by the courts.

120. The Court further notes that it has already found the "action against an unlawful act" to be an effective remedy in Croatia in respect of other rights guaranteed by the Convention (see *Hackbarth v. Croatia* (dec.), no. 27897/02, 3 November 2005). It has reached the same conclusion also in respect of similar remedies in other States Parties (see *X. v. Austria*, no. 2742/66, Commission decision of 30 May 1967, Collection 23, p. 99).

121. Given that the right of equality of all religious communities before the law is guaranteed by Article 41 of the Croatian Constitution (see paragraph 16 above), and having regard to the rationale behind the "action against an unlawful act" as described above (see paragraph 119), the Court considers that it cannot be argued that such an action would have lacked prospects of success. It reiterates in this connection that the "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for an applicant (see, for example, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI; and *Amann v. Switzerland* [GC], no. 27798/95, § 88, ECHR 2000-II) and that the mere fact that an action has very limited prospects of success is not equivalent to depriving the plaintiff of the right of access to a court (see *X v. the United Kingdom*, no. 7443/76, Commission decision of 10 December 1976, DR 8, pp. 216, 217). Consequently, it cannot be said that the applicant churches lacked access to a court or an effective remedy. The fact that the domestic courts have not yet had a chance to deal with Article 41 of the Constitution in the context of an "action against an unlawful act" does not make any difference. Had the applicants brought such an action, the only possible ground for the domestic courts to declare their action inadmissible would be a finding that another judicial avenue of redress was available to them. However, such a finding would only reinforce the Court's view that the applicant churches had access to a court and had an effective remedy at their disposal.

122. The finding that the applicant churches had access to a court and an effective remedy for the purposes of Article 6 § 1 and Article 13 of the Convention in the form of an "action against an unlawful act", does not call into question the Court's above finding that the Government's objection of failure to exhaust domestic remedies must be dismissed (see paragraph 48 above). This is so because under Rule 55 of the Rules of Court and the Court's case-law (see, for example, *Mooren v. Germany* [GC], no. 11364/03, §§ 57-59, ECHR 2009-...), a plea of inadmissibility on account of non-exhaustion of domestic remedies is subject to the rule of estoppel, that is to say that such a plea "must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application". Since the Government never argued that the applicant churches should have brought an "action against an unlawful act" under sections 67-76 of the Administrative Disputes Act, the Court could not have taken that remedy into account when examining the Government's objection concerning non-exhaustion of domestic remedies. However, the Court is not prevented from doing so when examining whether the applicant churches' complaints under Articles 6 § 1 and Article 13 of the Convention are manifestly ill-founded or not, which is an issue going to the merits of the case that, even at the stage of the admissibility, must be determined without regard to the attitude of the respondent State (see, for example and *mutatis mutandis*, *Morel v. France*, (dec.), no. 54559/00, ECHR 2003-IX; *Acquaviva v. France*, 21 November 1995, § 45, Series A no. 333-A; *H. v. France*, 24 October 1989, § 47, Series A no. 162-A; and *Panikian v. Bulgaria*, no.29583/96, Commission decision of 10 July 1997, DR 90, pp. 109 and 114).

123. It follows that these complaints are inadmissible under Article 35 § 3 as manifestly ill-founded and must therefore be rejected pursuant to Article 35 § 4 of the Convention.

## V. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

124. Lastly, the applicant churches complained that their inability to provide religious education in public schools and nurseries, as well as to celebrate marriages with the same effects as civil marriages, had violated their rights under Article 12 of the Convention and Article 2 of Protocol No. 1, taken alone and in conjunction with Article 14 of the Convention. Article 12 of the Convention reads as follows:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

Article 2 of Protocol No. 1 to the Convention reads as follows:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the

right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

125. The Court reiterates that solely the members of a religious community, as individuals, can claim to be victims of a violation of the right to marry or the right to education, rights which by their nature are not susceptible of being exercised by a religious community itself. Therefore, the applicant churches as religious communities cannot themselves allege a violation of either of these rights (see *Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden*, no. 11533/85, Commission decision of 6 March 1987, DR 51, p. 125, and *Scientology Kirche Deutschland e.V. v. Germany*, no. 34614/97, Commission decision of 7 April 1997).

126. It follows that these complaints are incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4.

## VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

127. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

128. The applicant churches claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

129. The Government contested that claim.

130. The Court finds that the applicant churches must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards them each EUR 9,000 under that head, plus any tax that may be chargeable on that amount.

### B. Costs and expenses

131. The applicant churches also claimed 33,137 Croatian kunas (HRK) for the costs and expenses incurred before the Court.

132. The Government contested this claim.

133. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award

the sum of EUR 4,570 for the proceedings before the Court, plus any tax that may be chargeable to the applicant churches on that amount.

### C. Default interest

134. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints under Article 14 taken in conjunction with Article 9 of the Convention and Article 1 of Protocol No. 12 thereto, in so far as they concern religious education in public schools and nurseries and State recognition of religious marriages, admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 14 taken in conjunction with Article 9 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 1 of Protocol No. 12 to the Convention;

4. *Holds*

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:

(i) to each applicant church, EUR 9,000 (nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) to the applicant churches jointly, EUR 4,570 (four thousand five hundred and seventy euros), plus any tax that may be chargeable to the applicant churches, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant churches' claim for just satisfaction.

Done in English, and notified in writing on 9 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Søren Nielsen<br>Registrar | Christos Rozakis<br>President |