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before the European Court of Human Rights
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EUROPEAN COURT OF HUMAN RIGHTS
Asociación Española de Abogados Cristianos v. Spain
Application no. 22604/18

OBSERVATIONS
Submitted by the Government of the Republic of Poland
under Article 36 § 2 of the Convention

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I. INTRODUCTION

1. The Government of the Republic of Poland (“the intervening Government”) have the honour of submitting to the European Court of Human Rights (“the Court”) their written comments in the exercise of their right under Article 36 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and Rule 44 of the Rules of Court.

2. The case originates in an application no. 22604/18 against Spain lodged with the Court on 26 April 2018 under Article 34 of the Convention by the Asociación Española de Abogados Cristianos (“the applicant”).

3. On 15 April 2020 the intervening Government were informed that they were granted the requested leave under Rule 44 § 3 of the Rules of Court to make written submissions in the above mentioned case by 30 June 2020.

II. SUBMISSIONS OF THE POLISH GOVERNMENT

A. General remarks

4. The intervening Government should like to note that the issue before the Court involves weighing up the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention, namely the right of the artist to impart to the public controversial art and, by implication, the right of interested persons to take cognisance of such art, on the one hand, and the right of the applicant association to respect for private life, freedom of thought, conscience and religion, on the other hand. In so doing, regard must be had to the margin of appreciation left to the national authorities, whose duty in a democratic society is also to consider, within the limits of their jurisdiction, the interests of the society as a whole (see *Otto-Preminger-Institut v. Austria*, application no. 13470/87, 20 September 1994, § 55). At the same time, the Court examines the case from the angle of discrimination prohibited under Article 14 of the Convention taken together with Article 8 or 9 of the Convention.

5. The intervening Government should like to highlight the need to promote peaceful and mutually respectful relations between and towards believers of various religions. They believe that the lack of respect for individual believers’ dignity and religious feelings is unfortunately too often a reason of societal tensions and may lead to violence and conflicts. It would be useful to recall here the efforts of international organisations, including the Council of Europe and the United Nations, to prevent violence based on religion. On 28 May 2019 the General Assembly of the United Nations, adopted a resolution on designation of 22 August as the International Day Commemorating the Victims of Acts of Violence Based on Religion or Belief (A/RES/73/296). In the resolution, the international community expressed its serious concern about the constant acts of discrimination and violence based on religion or beliefs against individuals and persons belonging to religious communities and recognized the importance of the State’s obligation to ensure freedom of religion, including freedom of religious practice.

6. As a follow-up the Secretary General of the Council of Europe supported this initiative by issuing his statement on the eve of 22 August 2019, indicating, *inter alia*, that “no-one should ever suffer violence due of their faith or beliefs. Freedom of thought, conscience and religion is a human right enshrined in the European Convention on Human Rights. Governments across Europe have a legal duty to uphold it.”

7. The significance of the concept of religious peace in the society was also recognised in the Court’s jurisprudence (see *E.S. v. Austria*, no. 38450/12, judgment of 25 October 2018, § 57). The European Commission against Racism and Intolerance – a Council of Europe’s monitoring body – continuously advocates for effective criminal legislation against hate crimes and hate speech, including those committed on the basis of religion, and for the States’ vigorous efforts to effectively implement this legislation in practice.

8. In this context it is also worth to mention the data gathered by the Organization for Security and Cooperation in Europe (OSCE) regarding the increase in hate crimes in Spain (as well as in other countries) and the growing number of incidents reported year by year in the category of “bias against Christians”.

B. Respect for religious feelings

9. As the Court pointed out in the case of *Kokkinakis v. Greece* (application no. 14307/88, judgment of 25 May 1993, § 31), freedom of thought, conscience and religion, which is safeguarded under Article 9 of the Convention, is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life.

10. The Court presented a view according to which those who decided to choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or minority, could not reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. **However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 of the Convention to the holders of those beliefs and doctrines.** Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.

11. In the case of *Kokkinakis v. Greece* the Court held, in the context of Article 9 of the Convention, that a State may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience and religion of others (*ibid.*, § 48). The respect for the religious feelings of believers as guaranteed in Article 9 of the Convention can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be

regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society. The Convention is to be read as a whole and therefore the interpretation and application of Article 10 of the Convention in the present case must be in harmony with the logic of the Convention (see, *mutatis mutandis*, *Klass and Others v. Germany*, judgment of 6 September 1978, application no. 5029/71, § 68). In the intervening Government's opinion the above principle should apply even more to the provocative use of the very objects of religious veneration.

12. Article 9 of the Convention indicates not only that everyone has the right to enjoy their freedom of religion (positive aspect) but also that everyone has the right not to profess religion (negative aspect). In other words, both believers and non-believers enjoy religious freedom. The Court's previous jurisprudence has assumed that the State may restrict freedom of expression of individuals in order to protect "the rights of others to respect their religious feelings" (see *E.S. v. Austria*, quoted above, § 57).

13. In the case of *Otto-Preminger-Institut v. Austria* the Court ruled that the Austrian courts, ordering the seizure and subsequently the forfeiture of the film, had held it to be an abusive attack on the Roman Catholic religion according to the conception of the Tyrolean public. According to the Court the Austrian courts had due regard to the freedom of artistic expression, which is guaranteed under Article 10 of the Convention and for which Article 17a of the Austrian Basic Law provides specific protection. They did not consider that its merit as a work of art or as a contribution to public debate in the Austrian society outweighed those features which made it essentially offensive to the general public within their jurisdiction. The trial courts, after viewing the film, noted the provocative portrayal of God the Father, the Virgin Mary and Jesus Christ. Therefore the Court decided that the content of the film could not be said to be incapable of grounding the conclusions arrived at by the Austrian courts (*ibid.*, § 56).

14. The Court also took into account the fact that the Roman Catholic religion was the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. The Court emphasised that it was in the first place for the national authorities, who were better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the Court did not consider that the Austrian authorities could be regarded as having overstepped their margin of appreciation in this respect (*ibid.*).

15. In the case of *E.S. v. Austria* (quoted above, see § 52) the Court acknowledged the legitimacy of the criminal law legislation related to hurting religious feelings that aimed at the protection of religious peace and tolerance. The Court also endorsed the domestic court's statement in its judgment that presenting objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion could be conceived as a malicious violation of the spirit of tolerance, which was one of the bases of a democratic society (*ibid.*, § 53). In conclusion the Court found that in that case the domestic

courts had comprehensively assessed the wider context of the applicant's statements, and carefully balanced her right to freedom of expression with the rights of others to have their religious feelings protected and to have religious peace preserved in Austrian society. The Court accepted the domestic courts' finding that the statements of the applicant had gone beyond the permissible limits of an objective debate and classifying them as an abusive attack on the Prophet of Islam, which had been capable of stirring up prejudice and putting religious peace at risk. The Court also accepted their conclusion that the facts at issue contained elements of incitement to religious intolerance and agreed that the domestic courts had put forward relevant and sufficient reasons and found that the interference with the applicant's rights under Article 10 of the Convention did indeed correspond to a pressing social need and was proportionate to the legitimate aim pursued (*ibid*, § 57).

16. The use of criminal law to protect religious feelings is not a unique feature of the Austrian law. Similar regulations are being provided for systems of other countries in the region that have arisen from an identical circle of legal culture and with similar historical conditions. In similar societies there is a convergent level of sensitivity. For example, criminal law protection against offending religious feelings is envisaged, among others, by the legal systems whose citizens predominantly profess the Catholic faith (including Austria, Spain and Poland).

17. In Poland freedom of conscience and religion is guaranteed by Article 53 of the Constitution of the Republic of Poland of 2 April 1997. This freedom is due to everyone and results from the inalienable dignity of every human being, which, according to Article 30 of the Constitution, is a source of human and citizen rights and freedoms.

18. The connection between the protection of religious feelings and the freedom of conscience and religion, as well as with inherent dignity was repeatedly noted by the Polish Constitutional Tribunal (for example, in its judgment of 7 June 1994, no. K 17/93, and its judgment of 10 December 2014, no. K 52/13).

19. In addition, the Constitutional Tribunal (judgment of 6 October 2015, no. SK 54/13) found criminal responsibility for offending religious feelings in the Polish Penal Code (Article 196 of the Penal Code) to be consistent with the Constitution, because offending religious feelings was diminishing human dignity. According to the Constitutional Tribunal, the debate on matters related to religion should take place in a civilized and cultural way. The Constitutional Tribunal noted here that the protection of religious feelings was also to be understood as protection of public order.

20. In 2012, the Polish Supreme Court, in the context of examining a case concerning an artist who had torn up the Bible during his concert making comments considered as insulting by some persons, adopted a resolution which provided some clarification on the balancing of various freedoms. It stressed the need to differentiate acts being demonstratively insulting to one's feelings from the expressions consisting of public presentation of opinions that constitute realisation of the freedom of expression and of conscience, also in the form of artistic creation. An expression or behaviour which expresses negative attitude to an object of religious worship or which uses this object as

part of artistic creation, does not constitute an insult to the object of religious worship (and in consequence does not constitute an insult to religious feelings of other persons) if in view of its form it does not contain humiliating or abusive elements. The character of a given expression, behaviour or artistic creation should be assessed in objective manner, by reference to cultural norms binding in a given society. The artistic or scientific goal of the action of the perpetrator is, however, not sufficient to exclude insulting character of this action in view of its form.

21. In the legal culture of Spain, the criminal law contains certain norms aiming at protection against violations of freedom of religion (*ex. Articles 524 and 525 of the Criminal Code of Spain*). In addition, in the Autonomous Region of Navarra, in which the act in question took place, traditional local law, *derecho foral de Navarra*, has been in force for centuries. Historically, this law considered blasphemy a criminal offense even before the protection of the principle of freedom of religion was envisaged by the Criminal Code in force throughout Spain. Despite the historical nature of these provisions of local law, they are the proof of local tradition and the centuries-old legal culture of the inhabitants of this autonomous region. This historic and cultural context should be taken into consideration by the Court.

22. Turning to the present case, its circumstances show that the artist's purpose – as he expressly explained it – was primarily to upset and/or offend the feelings of the Catholics by the use of consecrated Hosts for his artistic installation. When asked why he preferred to participate in 242 Masses to collect over 200 consecrated Hosts while he could have easily acquired them not consecrated, he replied: *me importaba que tuvieran valor para ellos (I wanted them to matter)*. In other words, the artists admitted himself that he decided to use them deliberately as they had a special meaning for the Catholics, compared to the pre-transubstantiation hosts. In the light of the Court's case-law, the artist's behaviour could be classified as a breach of the foundation of a democratic society in bad faith.

23. Indeed, as it transpires from the application, the exhibition, which took place at the turn of 2015 and 2016, caused a lot of public opposition and mass demonstrations of the exhibition opponents. To date, there are reports on the Internet about both the exhibition and mass demonstrations under the slogan *Navarra pide respeto (Navarra asks for respect)*. This shows the scale at which Catholics of Navarre felt offended by the exhibition.

24. In this regard it should be observed that according to Can. 1376 of the Catechism of the Catholic Church “by the consecration of the bread and wine there takes place a change of the whole substance of the bread into the substance of the body of Christ our Lord and of the whole substance of the wine into the substance of His blood”. Therefore, the exhibition in question could be interpreted as deliberately profaning the secret of transubstantiation – the central and key element of the Christian faith, especially for the Catholics.

25. What is more, the place of the exhibition itself should be taken into account. It was located on the international route called the French Way of Saint James (*Camino de*

Santiago, Camino francés), which has been traversed by crowds of pilgrims from around the world since the Middle Ages. For this reason, the content of the exhibition could offend not only the local Catholic community, but also Catholics and followers of other Christian rites who were following the trail to the place of the traditional grave of the Apostle James in Santiago de Compostela. This trail is one of the oldest and so far the most used pilgrimage routes in Europe.

26. In 1987, by virtue of the Santiago de Compostela Declaration, the Council of Europe established the Way of Saint James as the first European Cultural Route. These routes are local cooperation networks promoting the values of the Council of Europe – human rights, respect for cultural diversity, mutual understanding and cross-border exchange. They are channels of intercultural dialogue that deepen knowledge about the history of Europe and educate about a common European identity. Hundreds of thousands of people from all over the world follow this path every year – both those deeply believing as well as seekers and non-believers. In the case of the exhibition in question – its placement guaranteed a wider range of its impact and broader spread of controversies and abomination.

27. The efforts of the Spanish authorities in maintaining and improving the infrastructure of this route and its promotion in the country and worldwide must be appreciated. It is a great cultural and spiritual heritage of Europe and the world, and in the European dimension – supports the sense of unity and the European identity.

28. However, in the present case, it seems that the protection of freedom of religion and the promotion of tolerance as well as the peaceful coexistence of various groups in a pluralistic society was missing. Numerous manifestations that accompanied the exhibition showed that a large part of society felt afflicted and offended.

29. What is more, unlike in the case of *E.S. v. Austria* (cited above, § 57-58), the domestic courts in the present case did not assess comprehensively “the wider context of the artist’s statements and actions and failed to carefully balance his right to freedom of expression with the rights of others, including the applicant association, to have their religious feelings protected and to have religious peace preserved in the society”.

30. In consequence, the lack of State reaction to such an offensive and provocative use and portrayal of objects of religious worship could be regarded as contrary to the respondent State’s obligations deriving from Article 9 of the Convention.

C. Discrimination on the grounds of religion

31. Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the “rights and freedoms” safeguarded by those provisions. Although the application of Article 14 of the Convention does not presuppose a breach of one or more of such provisions, and to this extent it is autonomous, there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter (see *Petrovic v. Austria*, judgment of 27 March 1998, Reports 1998-II, p. 585, § 22). 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).

32. In this context the intervening Government wish to express their approval for examination of the case at stake from the angle of Article 14 taken together with Article 9 of the Convention.

33. As outlined above, in the circumstances of this particular case the Catholics could have legitimately expected that the manner in which the artist exercised freedom of expression, which was interpreted by them as a deliberate offensive behaviour, be restricted in order to protect the rights of believers to respect their religious feelings. In this context, to determine whether there has been discrimination in relation to respect for religious beliefs, it is necessary to examine the conduct of the city authorities of Pamplona and the court deciding on the case.

34. The city authorities made available their premises to organizers of a controversial exhibition. Therefore, the respondent State would either have to show that in the case of offenses against religious feelings and dogmas of other religions (*e.g.*, Muslims, Jews, Hindus or Buddhists) they would have acted in the same way, *i.e.* would have made available city rooms to organize a similarly controversial exhibition and the insulting use or portrayal of objects of religious veneration directed against other denominations. It is difficult to consider that the objective and reasonable reasons existed, since the exhibition can be interpreted as being focused on a blasphemous and provocative message, while not offering any voice in public debate on issues important to society.

35. The intervening Government further note that in case of the domestic court deciding the case, it is quite important to pay attention to the use of wording “small white round objects” for description of consecrated Hosts in the judgment. The definition used indicates that the domestic court failed to distinguish between consecrated Hosts and the hosts before the transubstantiation, which may reveal the personal beliefs or lack of specific knowledge of the judge and constitute a key issue in deciding whether there has been discrimination in the present case. In this particular case the Catholics expressed their indignation at the profanation of the religious objects they worshiped. A reinterpretation of the beliefs of Catholics made by domestic courts, in the way that the consecrated Host is only a “small white round object” constituted actually a negative assessment by the State authority of the legitimacy of a given belief and actually led to a finding that the act of profanation prohibited by criminal law did not take place, even though the exhibition struck at the heart of the religious beliefs of a particular denomination of Christianity.

36. As a result, the domestic court’s ruling in fact violated the State’s obligation to refrain from assessing the legitimacy of the religious views and its obligation to respect the freedom to manifest religion or belief (see *Manoussakis and Others v. Greece*, no. 18748/91, judgment of 26 September 1996, § 47; *Hasan and Chaush v. Bulgaria* [GC], 30985/96, judgment of 26 October 2010, §78; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], no. 41340/98 et al, judgment of 13 February 2003, § 91). The approach

adopted by the domestic court can hardly be reconciled with the principle of the State neutrality and impartiality.

37. As it was already stated above, according to Can. 1376 of the Catechism of the Catholic Church “the substance of the body” of God the Son, Jesus Christ was at stake here according to the believers. In this context, the exhibition in question could be interpreted – by those who believe in the transformation of bread into the body of Christ – as a deliberate profanation of the secret of transubstantiation. The court however failed to address this aspect and in consequence the decision adopted at the domestic level cannot be considered as a comprehensive examination of the case meeting the standard required by the Court (compare *E.S. v. Austria*, quoted above, § 57).

38. Therefore, in the present case, there is a space for arguing that discrimination based on the religion of the applicant actually took place, given the views expressed by the domestic judge deciding the case, which ignored the point of view of believers based on the teaching of Catholic Church and could have been an interpretation of the facts dictated by personal prejudice. Resolving disputes between artistic freedom and religious freedom requires that the law be applied neutrally to religion. It also requires taking into account the teaching of respective denomination in order to assess the extent of possible violations of religious freedom of respective followers.

39. Moreover, the intervening Government note that in this case the domestic court failed to unmask the possible discriminatory motives and intentions behind the acts of the artist. In this context they recall the Court’s jurisprudence according to which, when investigating violent incidents, State authorities have an additional duty under Article 3 of the Convention to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have also played a role in the events (see *Abdu v. Bulgaria*, no. 26827/08, judgment of 11 March 2014, § 44).

40. Furthermore, the Court has previously found under Article 8 of the Convention that acts of violence such as inflicting minor physical injuries and making verbal threats may require the States to adopt adequate positive measures in the sphere of criminal-law protection (see *Sandra Janković v. Croatia*, no. 38478/05, judgment of 5 March 2009, § 47). The Court also considered that a similar obligation might arise in cases where alleged bias-motivated treatment did not reach the threshold necessary for Article 3 of the Convention, but constituted an interference with the applicant’s right to private life under Article 8 of the Convention, that is, when a person makes credible assertions that he or she has been subjected to harassment motivated by racism, including verbal assaults and physical threats. In this connection it stressed that **the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies** (see *R.B. v. Hungary*, no. 64602/12, judgment of 12 April 2016, § 84).

41. The intervening Government believe that a similar approach should equally be applied in respect of the possible discriminatory motive on grounds of “religion” bearing in mind that this premise is also protected by Article 14 of the Convention. Hence, the positive

obligation of the State authorities to carefully examine and effectively investigate into a possible discriminatory motive based on religion should apply to acts falling under the scope of Article 3 and 8 of the Convention. Moreover they propose that the positive obligation of an effective investigation should also encompass acts falling under the scope of Article 9 of the Convention in the circumstances similar to the present case.

D. Discrimination in conjunction with respect for the right to private life

42. Furthermore, the present case can be also a good starting point for deliberations on discrimination in conjunction with respect for the right to respect for private life.

43. There is no uniform definition of “private life” in the Court’s case-law. This is a broad concept that cannot be defined exhaustively. The Court has identified, in its case-law, individual situations that fall within this scope. It applied the concept of the right to private life to various situations, such as the right to surname, protection of image and reputation, the opportunity to know family origin, physical and mental integrity, sexual and social identity, sexual life and sexual orientation, healthy natural environment, self-determination and autonomy of a person, protection before searching and seizing property, the secrecy of telephone conversations, or marital status.

44. The common denominator for the above situations falling under Article 8 § 1 of the Convention is that they constitute an important element of human identity. Undoubtedly, respect for one’s beliefs, including religious ones is such an element. As the Court noted in the case of *Otto-Preminger-Institut v. Austria*, religion is an important element in building the identity of believers and their concept of life. Violation of this freedom – as outlined above – can also be considered a violation of private life, which is closely related to the identity of the individual shaped by religion.

45. In addition, it is worth noting that the law protects the so-called personal rights. The catalogue of personal rights usually includes, among others, the right to honour and good name, worship of the deceased person, and sometimes even friendship and family ties. Civil law provides the individuals with the legal framework to demand legal protection against insulting their good name, the memory of their deceased loved ones, as well as against unlawful activities that weaken their relationship with loved ones. In many countries, criminal law also protects the honour and good name of individuals, including, for example, criminal liability for the offense of defamation. At the core of civil and criminal legal protection is the assumption that these are fundamental values for every human being. For believers, religious feelings are also included in the group of fundamental values. Faith is the value that is just as important and sometimes even more so as relationships with family or friends and respect for a good name. That is why in some countries the list of personal goods also includes religious feelings, and criminalization of insult of religious feelings is also foreseen.

46. To provide a domestic example, Polish Civil Code in its Article 23 establishes an open catalogue of personal rights, which in turn enables the domestic courts to offer legal

protection to one's religious feelings under this head. Furthermore, the Polish criminal law provides in Article 196 of the Criminal Code an offense of insult of religious feelings.

47. Values of fundamental importance for believers deserve the same protection as values of fundamental importance for non-believers. Consequently, a discriminatory behaviour with regard to one's right to respect his/her religious feelings may also constitute discrimination in exercising one's right to private life, which is an inseparable element of professed religion or lack thereof.

48. In this situation the intervening Government welcomes the scope of the application in question and awaits the Court's judgment in this case, hoping that it will elaborate more on the issue of overlapping ranges of application of Article 8 and 9 of the Convention.

III. CONCLUDING REMARKS

49. Having in mind the circumstances of the present cases, as well as the context of the general concerns, the intervening Government wish to ask the Court to accept the above submission and to include it into the case-files. Simultaneously they should like to express their hope that the above submission will help the Court to examine the cases in a broader context.

50. In particular the intervening Government wish to emphasise as follows:

- in specific cases, the State should recognise that it has a positive obligation to protect the religious feelings of believers against verbal and non-verbal statements against their religion, which have no intellectual value, do not serve to develop public debate, but are only directed at ridiculing and humiliating the followers of a given religion;

- the State should not favour believers or non-believers. In particular, the State should not organize or support events that are obviously offensive to a part of society and which do not serve public debate but are intended solely to humiliate a given social group. This could be the case here, where the Pamplona city authorities supported a controversial exhibition that turned out to be offending Catholics' religious feelings. In addition, in this category of cases religious feelings and beliefs that were to be violated should be interpreted by the domestic courts taking into account the teachings of the followers of respective denominations;

- religious feelings are fundamental values for everyone. They determine personal identity and affect every sphere of human life, in particular private life. Due to their nature, religious feelings may be recognized also as part of the right to respect for private life. The Government awaits de Court's judgment on the matter whether discrimination of the right to respect for religious beliefs could be considered as a simultaneous discrimination of the right to private life, of which religion is an inseparable element.


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