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## European Human Rights Law Review

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### Case Comment

#### 97 Members of the Gldani Congregation of Jehovah's Witnesses v Georgia

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**Subject:** Human rights. **Other related subjects:** Criminal procedure. Police

**Keywords:** Criminal investigations; Freedom of thought conscience and religion; Inhuman or degrading treatment or punishment; Police powers and duties; Positive obligations; Prosecutions; Religious discrimination

***\*E.H.R.L.R. 583** On May 3, 2007, the European Court of Human Rights delivered a judgment on the persecution of Jehovah's Witnesses by non-state actors in the state of Georgia: 97 Members of the Gldani Congregation of Jehovah's Witnesses v Georgia.<sup>1</sup> The Court gave a very interesting decision on the scope of the positive obligations of the state under Arts 3 and 9 of the European Convention on Human Rights, which this comment will explore.*

#### Facts

On October 17, 1999, a group of 120 Jehovah's Witnesses were holding a religious meeting in a theatre in *Gldani*, a district of the capital Tbilisi, when a group of Orthodox Christians violently interrupted their meeting. They were led by Father Basil Mkalavichvili, a defrocked priest of the autocephalous Orthodox Church of Georgia. In the past the Synod of the Church had reproached him for acts of aggression towards other members of the Orthodox Church. On the day in question, the group of aggressors (known as the Basilists) entered the theatre, carrying large metal crosses and sticks, while one person was filming the scene. Several dozen Jehovah's Witnesses were beaten with crosses, sticks and belts, one man had his head shaved while the aggressors were praying, and many Jehovah's Witnesses (including children) suffered serious injuries. When some of them eventually managed to escape the premises, they found that the door was surrounded by a cordon of more Basilists, who searched them and threw all their Bibles, religious books and tracts into a fire, forcing them to watch. All the Jehovah's Witnesses said that they were humiliated and verbally insulted.

***\*E.H.R.L.R. 584** At the beginning of the attack, some Jehovah's Witnesses had managed to escape. They went directly to the police station to report that the attack was taking place. The police simply registered the attack but decided not to intervene; one member of the police force even said that if he had been there he would have given the Jehovah's Witnesses an even worse time; other policemen whom they met in the street declared that they would not get involved. In the following few days, the attack that had been filmed by a Basilist was shown on television. It clearly identified many of the aggressors and also showed Father Basil in front of the fire explaining why he was satisfied with the attack. On other occasions he had even boasted that he would tell the police beforehand of attacks that were about to take place.*

#### Procedure at the domestic level

After the attack several Jehovah's Witnesses complained to the town prosecutor, described the attacks and asked that the aggressors be punished. Proceedings were started but twice discontinued on the basis that the aggressors could not be identified. Despite sending five reminders to Georgia's prosecutor, the last one in March 2001, there was no follow-up by the authorities. The applicants were told by the person investigating the case that they should not expect a result in 2001. During that time, the investigation was sent back and forth between the prosecution and the police. The applicants also said that they were not kept informed of the proceedings. The investigator even declared that he could not be impartial because he was an Orthodox Christian--nevertheless he carried on the investigation.

Two Basilists were placed under investigation and sent for trial. Their trial was interrupted by Father Basil and his followers who attacked a number of Jehovah's Witnesses, their lawyers, journalists and

foreign observers present in the courtroom. The judge did not intervene, but adjourned the trial of the two Basilists in order to gather more information. In the meantime, in September 2000, one Jehovah's Witness, who had been attacked in October 1999, had been accused and convicted of disturbing public order. His conviction was eventually overruled by Georgia's Supreme Court in October 2001. Father Basil was placed under investigation in March 2001 and the applicants brought their case to the European Court in June 2001. In a separate case, in January 2005 Father Basil and one of his associates were eventually sentenced to six and four years' imprisonment for attacks committed against other religious communities.<sup>2</sup>

The applicants also claimed that between October 1999 and November 2002, 138 violent attacks were carried out against Jehovah's Witnesses in Georgia and that they recorded 784 complaints with the authorities. The Parliamentary Assembly of the Council of Europe, the UN Committee against Torture, the EU-Georgia Parliamentary Cooperation Committee, the Mediator of Georgia and a number of NGOs issued declarations about the situation.

### **\*E.H.R.L.R. 585 The European Court's decision**

#### **Article 3**

The applicants argued that the attacks constituted inhuman and degrading treatment and that the inaction of the authorities led to generalised violence against Jehovah's Witnesses in the country.

The Court first restated the importance of Art.3 in the Convention system. Generally, the responsibility of the state is engaged only when the acts have been committed by people exercising a public function. Nonetheless, Art.1 provides that States Parties to the Convention shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. This includes the duty to take necessary measures to prevent torture as well as inhuman or degrading treatment or punishments, including those carried out by non-state actors. This also includes the duty to carry out an official investigation, efficiently and rapidly, even in the case of acts carried out by non-state actors.

In first considering the treatment received by the applicants, the Court proceeded to distinguish the applicants on the basis of the severity of the treatment received. Some applicants produced extracts from their medical files and the ill-treatment received by two of the applicants was shown on the video recording. Others gave a detailed description of the treatment received and produced medical reports; the Government did not challenge the facts submitted by these applicants and the Court considered that this constituted sufficiently strong, clear and concordant inferences to establish a "reasonable doubt" that these individuals were subjected to ill-treatment. The Court found that 25 applicants, and the children of some of the applicants, had received inhuman treatment within the meaning of Art.3.

The Court also found that 14 applicants had received degrading treatment within the scope of Art.3. The aim of the aggressors was to humiliate and terrorise the applicants and prevent them from holding religious meetings. However, the applicants had not specified the nature and seriousness of the treatment received, which made it impossible to assess whether it reached the threshold of *inhuman* treatment.

The Court did not find a breach of Art.3 in respect of applicants who escaped the attack, those who did not submit statements in relation to the ill-treatment inflicted, those who had not complained first to the domestic authorities and those whose identity was unclear.

The Court then considered the inaction of the authorities. There was no proof that the police knew of the attack beforehand but a decision was made not to intervene to interrupt the attack and protect the applicants. When the police eventually went to the meeting place, most of the attacks had already occurred. Following on from this, the Court found that the authorities had neither been diligent nor effective in carrying out their response. Only 11 applicants out of 42 were accepted as civil party to the proceedings.<sup>3</sup> The other applicants never received an explanation, although they had given details of the treatment they and their children received.

**\*E.H.R.L.R. 586** Regarding the 11 applicants party to the proceedings, their claim was not considered to have been dealt with properly. It was sent back and forth between the police and the prosecutor. The person investigating the case declared that he could not be impartial because he was an Orthodox Christian, yet he carried on with the investigation. In addition, the applicants were not

kept informed of their case. Finally, the authorities discontinued the proceedings on the grounds that the aggressors could not be identified, despite the fact that the video showed very clearly who they were, Father Basil was very outspoken about his activities and the police did not arrest anyone when it went to the meeting place. Overall, the authorities were grossly negligent in their handling of the case. The fact that Father Basil and a Basilist were condemned in January 2005 in another case of religious violence against Baptists could not absolve the state of Georgia of its responsibility in the *Gldani* case. In conclusion, the Court found that the authorities had failed in their positive obligations under Art.3 in respect of 42 applicants.

### **Article 9**

The applicants complained that there was a breach of their right to manifest their religion through prayers, meetings and collective rituals.

The Court restated that the state must be a neutral and impartial organiser of religions and cannot assess the legitimacy of religious beliefs. Abusive pressure on others is not allowed. The role of the authorities is not to remove the cause of tension by eliminating pluralism; rather it is to ensure that the competing groups tolerate each other. The state also cannot diminish the role of a faith or a church to which people adhere.

The Court found that because of their religious beliefs, the applicants were attacked, humiliated and seriously beaten. Their religious books were confiscated and burned, while the applicants were forced to watch. All the applicants were then confronted by the complete indifference and inaction of the authorities, simply because their religion was seen as a threat to Orthodox Christianity. With nothing to do and no one to turn to, the applicants were unable to exercise their rights in the domestic court system.

The Court considered that the authorities' negligence led to the generalisation of violence against religious minorities in Georgia. The Court concluded that the authorities failed in their obligation to take necessary measures to ensure that the group of Orthodox extremists led by Father Basil tolerated the existence of the community of Jehovah's Witnesses and allowed them to exercise their rights to religious freedom. In conclusion, the Court found that the authorities had failed in their positive obligations under Art.9 in respect of 96 applicants.

### **Article 14 read in conjunction with Articles 3 and 9**

The applicants complained that the actions of the Basilists were tolerated and that the authorities did not act because of the applicants' faith. The Court restated that different treatment is discriminatory unless it is justified. It considered that the police's refusal to intervene during the attack and the complete indifference of the authorities during the proceedings was largely due to the applicants' religious faith. The acts were extremely serious and the applicants were not treated equally before the law. The government did not justify any of this, which, for civil society, led to doubts about the authorities' *\*E.H.R.L.R. 587* complicity with the aggressors. The Court found a violation of Art.14 read in conjunction with Arts 3 and 9.

### **Analysis**

The decision of the Court is welcome, although not very surprising considering the ill-treatment received and the reaction of the authorities. Not to find a violation would have been tantamount to a denial of the obligation. This is a straightforward case where a violation was found because the State knew about the violations and yet failed to act. It remains to be seen what positive obligation would be imposed if the state should, perhaps, have known about a situation in advance.

Brice Dickson refers to the "diagonal effect" of human rights, which is basically a procedural approach. International human rights law normally allows claims against the state; although it imposes on states a duty to take necessary measures in order to guarantee certain rights, it does not identify these situations.<sup>4</sup> The *Gldani* case brings to light more of these situations. What is really interesting in this judgment is the way the Court dealt with the positive obligations of the state under Arts 3 and 9. The issue of positive obligations is an increasingly important one under Convention caselaw and has recently been considered at length by Alastair Mowbray.<sup>5</sup> In both sets of issues, under Arts 3 and 9, the positive obligations were an implied duty to ensure that the rights guaranteed were real, practical and enforced.

Regarding Art.3, the Court chose not to rely on Art.13 about the right to receive an adequate remedy; rather it used a combination of Arts 1 and 3 to impose a positive obligation on Georgia. The Court relied on *A v United Kingdom* and *Z v United Kingdom*,<sup>6</sup> which were both cases involving a failure to protect children by the state. In *A*, a nine-year-old boy had been caned on several occasions by his stepfather, who was arrested and charged with assault occasioning actual bodily harm. However, the stepfather successfully used the defence of reasonable chastisement in court. The Court held that the United Kingdom was in breach of its obligations under Art.3 because it permitted the defence of reasonable chastisement and failed to provide adequate protection for the child in this case. In *Z*, the Court found a breach of Art.3 because social services failed to protect four children who suffered from long-term and serious abuse and neglect at the hands of their parents. In both cases, the Court held that the obligation on States Parties under Art.1, taken in conjunction with Art.3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. In addition, these measures should provide effective protection, in particular of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.

In the *Gldani* case, the Court found that the threshold to breach Art.3 was reached in 42 cases; it differentiated between inhuman and degrading treatment, depending on *\*E.H.R.L.R. 588* the level of seriousness and how the applicants substantiated their case.<sup>7</sup> Twenty-five applicants demonstrated that they had received inhuman treatment; this included the children of some of the applicants, whom the Court found that the State had an active duty to protect. In respect of 14 other applicants there was a reasonable doubt whether they had reached the level of inhuman treatment, and the Court found that they did not demonstrate that they reached that level: the Court found that they had only received degrading treatment. On the issue of humiliation, the applicants had been verbally assaulted: for example they were called "traitors to the nation" or told that they were going to die for Jehovah. The Court clearly engaged with an analysis of how much the applicants had suffered and it was not enough simply to have been present at the religious meeting for Art.3 to be breached.

Regarding the second aspect of Art.3, the State had missed the opportunity to address the inaction of the police at the investigation phase. The aggressors were private parties and the Court accepted that the police did not take part in the attacks. Yet the lengthy proceedings showed an appalling lack of concern on the part of the authorities, the police, the prosecution and the investigator. The Court easily found a breach of the positive obligation on the State to investigate the attack in an efficient and diligent manner, which applies to acts committed by State agents as well as acts committed by private parties. The Court relied on *Assenov v Bulgaria* and *MC v Bulgaria*.<sup>8</sup> In *Assenov* the applicant argued that he had been ill-treated by police officers but that the authorities failed to investigate his allegations properly. The Court found that despite his arguable claim that he had been beaten by police officers the investigation was not sufficiently thorough and effective to meet the requirements of Art.3. In particular, it found that the investigation failed to take evidence described in the medical certificate seriously enough and that it failed to question witnesses of the incident. The case of *MC* concerned an allegation of rape of the applicant, a 14-year-old girl, by private parties. She complained to the police but the two men were not prosecuted. The Court found that the authorities had a duty under Arts 1 and 3 to investigate allegations of ill-treatment committed by private parties. It considered that the authorities failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made. The Court also found that the authorities had attached undue importance to "direct" proof of rape, attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors, and had handled the investigation with significant delays.

The obligation to carry out an effective investigation is particularly well developed in respect of Art.2 of the Convention and the duty to undertake investigations into killings *\*E.H.R.L.R. 589* by State agents or private parties.<sup>9</sup> In the *Gldani* case, there are similarities between the Court's treatment of this obligation under Art.3 and under Art.2. In particular, the aim of the implied duty to undertake investigations is to ensure that the right under the article is not rendered meaningless by the lack of effective recourses--the right must be practical and effective. Common elements between the *Gldani* case and the Court's caselaw under Art.2 include the institutional independence of investigators and the quality of inquiries into the alleged facts.<sup>10</sup> Mowbray argued that this aspect of the Court's caselaw under Art.3 is "less well developed and more uncertain" than the corresponding obligation under Art.2.<sup>11</sup> Certainly, the *Gldani* case is a step towards more clarity in the caselaw under Art.3.



Regarding the Art.9 claim, this is the first case where the Court has explicitly found that a State has actually failed in its positive duties under Art.9. However, a number of cases have acted as “stepping stones” to defining the State's discretion to protect the religious sensibilities of believers. In *Church of Scientology and 128 of its Members v Sweden*,<sup>12</sup> the European Commission stated that religions did not have a right to be free from criticism; however, the Commission did not exclude that criticism or “agitation” against a church or religious group could reach such a level that it might endanger freedom of religion and engage State responsibility. In *Otto-Preminger Institute v Austria*,<sup>13</sup> 14 years later, the Court repeated the view that religions 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 Court added that the responsibility of the State could be engaged in extreme cases, when the effect of particular methods of opposing or denying religious beliefs were such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.

Carolyn Evans argues that the Court has granted States a wide margin of appreciation to take action in order to protect people's religious sensibilities.<sup>14</sup> Prior to the *Gidani* case, the State was under no obligation to protect religious sensibilities or feelings, but had discretion should it choose to do so. Here, the ill-treatment received had reached such a level that the State no longer enjoyed a discretion but was under a real duty to act.

This case shows that Art.9 points to a more “complete” right to religious freedom. In the Court's caselaw so far, decisions have been concerned with State interference with the religious freedom of individual believers or religious communities. As the Court pointed out, religious freedom is not complete when the State merely refrains from interfering with the lives of believers. Article 9 also includes a positive duty on **\*E.H.R.L.R. 590** the state to ensure that the right is not rendered meaningless. Here the ill-treatment was so severe that the applicants' right to religious freedom was almost devoid of its meaning. This is reminiscent of *Dubowska v Poland*,<sup>15</sup> another case involving an offence to religious beliefs. The Commission held that there was no breach of Art.9 and that the applicants were not inhibited from exercising their freedom to hold and express their beliefs. In the *Gidani* case the applicants were prevented from exercising their religious beliefs and from meeting together.

There is a fine line between taking necessary measures to ensure that one religious community tolerates another and interfering with a community's religious beliefs. The Court repeated the view that Art.9 excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate. However, the State has a positive duty to ensure that religious communities and their members are able to exercise their right to religious freedom. This case also involved the breach of another Convention article and the two are linked; it is very likely that the Court would have found a breach of Art.9 on its own. However, it is also likely that for a religious community to be prevented from enjoying its rights under Art.9 to such a level, actions against that religious community would have to be extremely serious anyway.

The responsibility of the State will not always be engaged. If the State has an obligation of result regarding negative rights, it only has an obligation of means regarding positive rights.<sup>16</sup> This is because the State cannot be responsible for everything that happens between private individuals. However, it can sometimes be held responsible. What happened in this case was that the State failed to offer protection against the inhuman and degrading treatment received, it failed to undertake a diligent and efficient investigation of the applicants' complaints, and it failed to ensure that the Basilists tolerate the Jehovah's Witnesses and allow them a peaceful enjoyment of their right to religious freedom. Robert Alexy has argued that positive rights include rights to protection, rights to procedures and rights to substantive benefits.<sup>17</sup> In the *Gidani* case the applicants were not protected by the police against the attack and their procedural rights were ineffective. The authorities did not even take reasonable steps to fulfil their positive obligations.

The Court clearly reiterated that Georgia had a duty to protect people within its jurisdiction and secure protection against ill-treatment, even inflicted at the hands of private parties. The applicants suffered ill-treatment. Even though they actually went to the police station to say that the attack was currently taking place, the police decided not to intervene. When it eventually went there it was already too late. This decision clearly shows the positive obligation on States actively to protect their citizens and to **\*E.H.R.L.R. 591** prevent any foreseeable risk of present or future harm, including when it is inflicted by private parties.

## Conclusion

This case is in line with a new trend within the Court's caselaw, which is less focused on individual cases and much more concerned with State as the neutral and impartial organiser of religion.<sup>18</sup> So far, in 2006/2007 alone, the Court has delivered judgments in at least five cases involving the legal recognition and registration of religious communities: *Religious Association "Jehovah's Witnesses--Romania" (Organizația Religioasă "Martorii lui Iehova-România") v Romania*,<sup>19</sup> *Moscow Branch of the Salvation Army v Russia*,<sup>20</sup> *Church of Scientology Moscow v Russia*,<sup>21</sup> *Biserica Adevărat Ortodoxă din Moldova v Moldova*<sup>22</sup> and *Svyato-Mykhaylivska Parafiya v Ukraine*.<sup>23</sup> These cases indicate that States are increasingly required to take a more active role in the regulation of religious affairs within their territory. The *Gdani* case shows that this includes positive obligations to ensure that competing groups tolerate each other without assessing the legitimacy of religious beliefs--there is a fine line here and the Court may have to supervise this in the future. The issue of positive obligations is becoming increasingly important in human rights law as the traditional actors in international law change, to now include private parties and non-state actors.

I am grateful to Julian Rivers for his comments. All errors are mine.

E.H.R.L.R. 2007, 5, 583-591

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1. (Application No.71156/01), judgment of May 3, 2007.
  2. See Forum 18, "Georgia: Two leaders of religious violence finally sentenced--but what about the others?", available at [http://www.forum18.org/Archive.php?article\\_id=503](http://www.forum18.org/Archive.php?article_id=503) [last visited June 26, 2007].
  3. Being a "civil party" to judicial proceedings is traditionally a procedure of civil law systems. This usually allows the victim to become a party to the proceedings, to be kept informed of the carrying out of the proceedings, and sometimes to get more compensation.
  4. See B. Dickson, "The Horizontal Application of Human Rights" in A. Hegarty, and S. Leonard (eds), *Human Rights: An Agenda for the 21st Century* (London: Cavendish, 1998), p.65.
  5. See *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004).
  6. *A v United Kingdom* (1999) 27 E.H.R.R. 611, [22]; *Z v United Kingdom* (2002) 34 E.H.R.R. 3, [7].
  7. See the summary of judicial distinctions provided by Mark Janis, Richard Kay and Anthony Bradley in *European Human Rights Law, Text and Materials* 2nd edn, (Oxford: Oxford University Press, 2000), p.102. Following *Ireland v United Kingdom* (1979-80) 2 E.H.R.R. 25, inhuman treatment is associated with premeditation; long duration; intense physical and mental suffering; and acute psychiatric distress. Degrading treatment is associated with feelings of fear, anguish and inferiority; humiliating and debasing; breaking physical or moral resistance.
  8. *Assenov v Bulgaria* (1999) 28 E.H.R.R. 652 and *MC v Bulgaria* (2005) 40 E.H.R.R. 20.
  9. See *McCann v United Kingdom* (1996) 21 E.H.R.R. 97; *Kelly v United Kingdom* (App. No.30054/96), judgment of May 4, 2001.
  10. For a summary of the Court's caselaw under Art.2 see A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004), pp.27-40.
  11. A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004), p.64.
  12. *Church of Scientology and 128 of its Members v Sweden* (1980) 21 DR 109.
  13. *Otto-Preminger Institute v Austria* (1995) 19 E.H.R.R. 34, [47].
  14. C. Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001), p.71.
  15. *Dubowska v Poland* (App. No.33490/96), decision of April 18, 1997.
  16. This distinction is better known to civilian lawyers. Negative rights imply a duty to achieve a given result, for example the duty not to torture an individual. Positive rights only imply a duty to take adequate measures; for example the state is not under a duty to prevent all murders by private individuals but it has a duty to have an efficient criminal justice system to investigate such murders and prevent them as far as possible.
  17. See R. Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers, (Oxford: Oxford University Press, 2002), Ch.9.
  18. See M.D. Evans, "Believing in Communities, European Style" in N. Ghanea (ed), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Leiden/Boston: Martinus Nijhoff Publishers, 2004), pp.133-155; S. Langlaude, "Indoctrination, Secularism, Religious Liberty and the ECHR" (2006) 55(4) *International and Comparative Law Quarterly* 929-944.
  19. *Religious Association "Jehovah's Witnesses--Romania" (Organizația Religioasă "Martorii lui Iehova-România") v Romania* (App. Nos. 63108/00-62595/00-63117/00-63118/00-63119/00-63121/00-63122/00-63816/00-63827/00-63829/00-63830/00-63837/00-63854/00-63857/00-70551/01), decision of July 11, 2006.
  20. *Moscow Branch of the Salvation Army v Russia* (App. No.72881/01), judgment of October 5, 2006.
  21. *Church of Scientology Moscow v Russia* (App. No.18147/02), judgment of April 5, 2007.
  22. *Biserica Adevărat Ortodoxă din Moldova v Moldova* (App. No.952/03), judgment of February 27, 2007.
  23. *Svyato-Mykhaylivska Parafiya v Ukraine* (App. No.77703/01), judgment of June 14, 2007.

