



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

THIRD SECTION

CASE OF SINDICATUL “PĂSTORUL CEL BUN” v. ROMANIA

(Application no. 2330/09)

JUDGMENT

STRASBOURG

31 January 2012

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
09/07/2013**

This judgment may be subject to editorial revision.

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In the case of Sindicatul "Păstorul cel Bun" v. Romania,

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

Josep Casadevall, *President*,

Egbert Myjer,

Ján Šikuta,

Ineta Ziemele,

Nona Tsotsoria,

Mihai Poalelungi,

Kristina Pardalos, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 13 December 2011,

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

PROCEDURE

1. The case originated in an application (no. 2330/09) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a trade union, Păstorul cel Bun ("The Good Shepherd" – "the applicant union"), on 30 December 2008.

2. The applicant union was represented by Mr I. Gruia, a lawyer practising in Craiova. The Romanian Government ("the Government") were represented by their Agent, Mr R.-H. Radu, of the Ministry of Foreign Affairs.

3. Corneliu Bîrsan, the judge elected in respect of Romania, withdrew from sitting in the case (Rule 28 of the Rules of Court). The President of the Chamber accordingly appointed Mihai Poalelungi to sit as an *ad hoc* judge in his place (Article 26 § 4 of the Convention and Rule 29 § 1).

4. The applicant union alleged that the refusal of its application for registration had infringed the right of its members to form trade unions within the meaning of Article 11 of the Convention.

5. On 31 March 2010 the President of the Third Section decided to communicate the application to the Government. It was also decided that the Chamber would examine the merits of the application at the same time as its admissibility (Article 29 § 1 of the Convention). The parties replied in writing to each other's observations. In addition, third-party comments were received from the Archdiocese of Craiova and the non-governmental organisation European Centre for Law and Justice, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. On 4 April 2008 thirty-five clergymen and lay staff of the Romanian Orthodox Church, the majority of them Orthodox priests in parishes of the Metropolis of Oltenia (a region of south-western Romania), held a general meeting at which they decided to form the Păstorul cel Bun trade union. The relevant parts of the union's constitution read as follows:

"The aim of the union of clergy and lay persons working in parishes or other ecclesiastical bodies within the administrative and territorial jurisdiction of the Metropolis of Oltenia shall be accepted voluntarily and concerns the representation and protection of the professional, economic, social and cultural rights and interests of clergy and lay members of the union in their dealings with the Church hierarchy and the Ministry of Culture and Religious Affairs.

In order to achieve the above aim, the union shall seek to:

- (a) ensure respect for the fundamental rights of its members to work, dignity, social protection, safety at work, rest, social insurance, unemployment benefits, pension rights and other rights laid down in the legislation in force;
- (b) ensure that each of its members is provided with work corresponding to his professional training and skills;
- (c) ensure compliance with the statutory provisions concerning the duration of leave and days of rest;
- (d) promote initiative, competition and freedom of expression among its members;
- (e) ensure the implementation and strict observance of the statutory provisions concerning protection of employment and the rights deriving therefrom;
- (f) apply fully the provisions of Law no. 489/2006 on religious freedom and the legal status of religious denominations, the Statute of the Romanian Orthodox Church and the Holy Canons of the Romanian Orthodox Church;
- (g) negotiate collective and individual labour agreements with the Archdiocese and the Metropolis expressly setting out all the rights and duties of the clergy and laity;
- (h) afford protection to its President and representatives, both during and after their terms of office;
- (i) ensure that it is involved and represented at all levels and on all decision-making bodies, in accordance with the statutory provisions in force;
- (j) use petitions, demonstrations and strikes as means of defending its members' interests and protecting their dignity and fundamental rights;

(k) take legal action against any individuals or other entities that disregard employment legislation, trade-union law, the provisions of the collective agreement drawn up within the Metropolis or employment contracts, if it has proved impossible to resolve the disputes in question by means of negotiation;

(l) ensure the observance and implementation of statutory provisions relating to remuneration and guarantees of decent living conditions;

(m) secure to the clergy and laity the benefit of all the rights enjoyed by other sectors of society;

(n) set up its own mutual-aid funds;

(o) produce and issue publications providing information to its members and defending their interests;

(p) establish and operate cultural, educational and research organisations in the trade-union sphere, as well as social and socio-economic institutions, in accordance with the relevant statutory provisions and in the interests of its members;

(r) raise equity to support its members;

(s) organise and fund religious activities;

(ş) make proposals for elections to local Church bodies and put forward a priest from among its members to take part in the Holy Synod of the Romanian Orthodox Church;

(t) ask the Archdiocese to submit a report on its revenues and expenditure to the Assembly of Priests; and

(ţ) ask the Archdiocesan Council to notify it, on a quarterly or annual basis, of any decisions relating to appointments, transfers and allocation of budgetary resources."

7. In accordance with the Trade Unions Act (Law no. 54/2003), the union's elected president applied to the Craiova Court of First Instance for the union to be granted legal personality and entered in the register of trade unions.

8. The representative of the Archdiocese opposed the application. He acknowledged that the members of the union were employed by the Archdiocese on individual contracts, but argued that the internal regulations of the Orthodox Church, approved by Government Ordinance no. 53/2008, prohibited the establishment of any form of association without the archbishop's prior consent.

9. The union's representative pursued his application, pointing out that the statutory requirements for establishing a trade union, as set out in the Trade Unions Act, were fulfilled and that the Act in question did not bar the professional groups concerned in this case from forming a union.

10. The public prosecutor's office supported the application, expressing the view that the establishment of the union was lawful and that the

Church's internal regulations could not prohibit it, as the priests and lay persons concerned were all employed by the Church and as such were entitled to form an association to defend their rights.

11. In a judgment of 22 May 2008 the court allowed the union's application and ordered its entry in the register of trade unions, thereby granting it legal personality.

12. The court based its decision on the provisions of section 2 of Law no. 54/2003, Article 39 of the Labour Code, Article 40 of the Constitution, Article 22 of the International Covenant on Civil and Political Rights and Article 11 of the European Convention on Human Rights.

13. It noted that the Religious Freedom Act (Law no. 489/2006) allowed religious organisations to operate independently as long as there was no threat to national security, public order, public health, morals and fundamental rights and freedoms. Noting further that it was not disputed that the union's members were employed on contracts, it held that as a result, their right to organise, which was guaranteed by labour law, could not be made subject to their employer's prior consent.

14. Regarding the Church's internal regulations, the court held that the fact that priests had a duty of subordination and obedience *vis-à-vis* their employer under the Church's Statute could not justify restricting a right guaranteed by labour legislation since such a duty did not constitute a measure that was necessary in a democratic society in the interests of national security, public safety, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others.

15. Reviewing the union's constitution, the court found that its establishment was not necessarily a manifestation of a dissident faction within the Romanian Orthodox Church with a disregard for hierarchy and traditions, but that, on the contrary, it might encourage employer-employee dialogue regarding the negotiation of employment contracts, observance of working and non-working hours and the rules on remuneration, protection of health and safety at work, vocational training, medical cover and the right to elect representatives and stand for election to decision-making bodies, in accordance with the special characteristics of the Church and its spiritual, cultural, educational, social and charitable purpose.

16. The Archdiocese appealed against the court's judgment, submitting that the provisions of domestic and international law on which it had been based were not applicable to the present case. It argued that Article 29 of the Constitution guaranteed religious freedom and the autonomy of religious communities and that this principle could not be overridden by freedom of association. It further submitted that by acknowledging the trade union's existence, the court had interfered with the traditional organisation of the Church, thus undermining its autonomy.

17. In a final judgment of 11 July 2008 the Dolj County Court allowed the appeal, quashed the first-instance judgment and, on the merits, refused the application for legal personality and for entry in the register of trade unions.

18. The County Court observed that the Constitution and Law no. 489/2006 guaranteed the autonomy of religious communities and their right to make their own organisational arrangements in accordance with their internal regulations. It further noted that there was no reference to the concept of a trade union in the Statute of the Orthodox Church, which provided that the establishment, operation and dissolution of religious associations and foundations were subject to the blessing of the Church's Synod and that priests had a duty of obedience towards their superiors and could not undertake civil transactions, including those of a personal nature, without their prior written approval.

19. It held that the prohibition on setting up any form of association within the Church without the consent of the hierarchy was justified by the need to protect the Orthodox Christian tradition and its founding tenets, and that if a union were to be established, the Church hierarchy would be obliged to work together with a new body operating outside that tradition and the rules of canon law governing decision-making.

20. Lastly, it noted that under Law no. 54/2003, persons performing management functions were not allowed to form trade unions and, bearing in mind that under the Church's Statute, priests assumed leadership of their parishes, concluded that they were covered by this ban.

II. RELEVANT LAW AND PRACTICE

A. Domestic law

21. The relevant provisions of the Constitution read as follows:

Article 40

"Citizens may freely associate to form political parties, trade unions, employers' organisations and other forms of association."

Article 41

"The right to work shall not be restricted. Everyone is free to choose his or her profession, trade or occupation and workplace.

Employees are entitled to social protection measures. These concern employees' health and safety, working conditions for women and young people, the establishment of a national gross minimum wage, weekly rest, paid annual leave, work performed in

particular or special conditions, vocational training, and other specific situations as provided for by law.

The normal average working day is a maximum of eight hours.

For equal work, women shall receive equal pay to men.

The right to collective labour bargaining and the binding force of collective agreements shall be guaranteed."

Article 29

"Freedom of thought and opinion and freedom of religion shall not be restricted in any form. No one shall be compelled to embrace an opinion or religion contrary to his or her own beliefs.

Freedom of conscience is guaranteed; it must be manifested in a spirit of tolerance and mutual respect.

Religious denominations shall be free and religious communities shall be organised in accordance with their own regulations, subject to the conditions laid down by law.

All forms, means, acts and actions of religious enmity shall be prohibited in relations between religious denominations.

Religious communities shall enjoy autonomy in relation to the State and shall receive State support, including the provision of facilities offering religious assistance in the army, hospitals, prisons, asylums and orphanages."

22. The relevant provisions of the Trade Unions Act (Law no. 54/2003) are worded as follows:

Section 2

"Anyone working on the basis of a contract of employment, including public officials, shall have the right to form or to join trade unions.

The establishment of a trade union shall require a minimum of fifteen employees in the same occupation or branch of activity.

No one shall be compelled to join, not to join or to leave a trade union."

Section 3

"Persons performing management functions or functions involving the exercise of public authority, the judiciary, the military, the police and members of the special forces may not set up trade unions."

23. Under the Religious Freedom Act (Law no. 489/2006), freedom to practise religious beliefs is guaranteed. The relevant provisions of the Act read as follows:

Section 1

"The Romanian State shall respect and guarantee the right to freedom of thought, conscience and religion of any person within the territory of Romania, in accordance with the Constitution and international treaties to which Romania is a party."

Section 5

"Members of religious communities shall be free to choose the form of association in which they wish to practise their faith – religious community, association or group – in accordance with the terms and conditions of this Act.

Religious communities, associations and groups shall be required to observe the Constitution and the law and not to threaten public safety, public order, health, morals and fundamental rights and freedoms."

Section 8

"Recognised religious communities shall have the status of charitable corporations. Under the provisions of the Constitution and this Act, they shall be organised and shall operate independently in accordance with their own statutes or canons."

Section 10

"The State shall contribute, on request, to the remuneration of clergy and lay staff of recognised religious communities, according to the number of worshippers and the actual needs of the communities."

Section 17

"On a proposal by the Ministry of Culture and Religious Affairs, the Government shall grant the status of a State-recognised religious community to religious associations which, through their activities and number of members, are of public interest and of proven sustainability and stability.

The State shall recognise statutes and canons to the extent that their content does not threaten public safety, public order, health, morals and fundamental rights and freedoms."

Section 23

"Religious communities shall select, appoint, employ and dismiss staff in accordance with their own statutes, codes of canon law and regulations.

Religious communities may impose disciplinary sanctions on their employees, in accordance with their own statutes, codes of canon law and regulations, for breaches of the community's doctrine or moral principles."

Section 24

"Employees of religious communities who are insured within the State insurance scheme shall be subject to the legislation on the State social-insurance system."

Section 26

"Matters of internal discipline shall be exclusively subject to the provisions of internal regulations and canon law."

24. The State-Funded Remuneration Act (Law no. 330/2009) contains provisions on the remuneration of the clergy and lay staff. It provides that the State is to contribute to the remuneration of clergy members and lay persons employed by recognised religious communities. Thus, the State pays clergy employed by recognised religious communities a monthly stipend equivalent to between 65% and 80% of the salary of a secondary-school teacher. The State also covers all social contributions payable by employers in respect of members of the clergy.

25. As regards lay staff, Law no. 330/2009 provides that they are to receive a monthly allowance equivalent to the national guaranteed minimum wage. This allowance and all social contributions payable by employers in respect of these employees are covered by local government budgets. Clergymen holding senior positions receive a higher stipend.

26. The Statute of the Romanian Orthodox Church, adopted by the Church's Synod in November 2007 and approved by Government Ordinance no. 53 of 16 January 2008, replaced the previous Statute, which dated from 1949. The relevant provisions read as follows:

Article 6

"The Patriarchate is made up of dioceses and archdioceses, grouped into metropolises."

Article 12

"The Holy Synod shall take decisions on the establishment, organisation and dissolution of national ecclesiastical associations and foundations ... It shall grant or refuse its blessing for the establishment, organisation and dissolution of Orthodox associations and foundations that operate in dioceses and have their own governing bodies."

Article 43

"The parish is the community of believers, clergy and laity, within a specified geographical territory and subject to the canonical, legal, administrative and economic authority of the diocese or archdiocese. It is led by a priest appointed by the bishop."

Article 50

"Without the bishop's prior written consent, the priest may not represent the parish in court proceedings or in dealings with the authorities or third parties. By virtue of the oath of obedience taken at the time of their ordination, members of the clergy and monks may not take part in court proceedings save with the prior written permission of the bishop."

Article 52

"Priests and other church staff have the rights and are bound by the obligations set forth in the Holy Canons, this Statute, church regulations and the decisions of the archdiocese."

Article 88

"The bishop ... shall order the appointment, transfer or dismissal of clergy and lay staff in the various parishes ... He shall ensure the observance of discipline by members of the clergy and lay staff in his diocese, whether directly or through ecclesiastical bodies."

Article 123

"Members of the clergy shall serve the diocese in accordance with the duties they have freely assumed and with the vows and the solemn public undertaking they have read out and signed prior to their ordination. Before commencing their pastoral functions, they shall receive a decision from the bishop setting out their rights and duties."

Without the bishop's blessing, no priests, deacons or monks may form, be members of or take part in associations, foundations or other organisations of any kind.

The status of priest, deacon or monk is incompatible with the pursuit of any other personal activities of an economic, financial or commercial nature that are contrary to Orthodox Christian morals and the interests of the Church."

Article 156

"By virtue of the autonomy of religious communities under the law, the ecclesiastical courts shall resolve matters of internal discipline. Their decisions are not subject to appeal in the civil courts."

B. Domestic practice*1. Case-law of the domestic courts*

27. In a judgment of 19 September 2005 the High Court held that it had jurisdiction to review the lawfulness of the dismissal or enforced retirement

of Orthodox priests, seeing that employees of the Orthodox Church were covered by the general social-security scheme and, as a result, the statutory provisions on social insurance. That position was confirmed in two judgments delivered by the Cluj and Iași Courts of Appeal on 3 February 1998 and 3 June 2008 respectively.

28. In its judgment of 3 June 2008 the Iași Court of Appeal was required to determine a case in which the appellant, an Orthodox priest, challenged his enforced retirement on grounds of age, arguing that the measure was motivated by his membership of the Sfântul Mare Mucenic Gheorghe union of Orthodox clergy. It rejected the priest's argument, observing that the decision on his enforced retirement had been taken before the union had been established.

29. In a judgment of 4 February 2010 the High Court of Justice and Cassation, on an appeal by an Orthodox priest against the refusal of the Labour Inspectorate to review the application of labour law by the diocese (his employer), upheld the refusal, holding that in matters of internal discipline, the provisions of internal regulations alone were applicable.

2. Domestic practice concerning the establishment of trade unions within the clergy

30. In a final judgment of 4 October 1990 the Medgidia Court of First Instance ordered the entry of Solidaritatea, a union of Orthodox clergy of the Archdiocese of Tomis (Constanța), in the register of trade unions and granted it legal personality.

31. It further appears from the reasoning of the Iași Court of Appeal's above-mentioned judgment of 3 June 2008 that the Sfântul Mare Mucenic Gheorghe union of Orthodox clergy was entered in the register of trade unions and granted legal personality as a result of a final judgment delivered on 5 June 2007 by the Hârlau Court of First Instance.

C. International law

32. Romania ratified the revised European Social Charter on 7 May 1999. Article 5 of the Charter, concerning the right to organise, is worded as follows:

"With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this Article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations."

33. Article 12 § 1 of the Charter of Fundamental Rights of the European Union reads as follows:

"Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests."

34. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation reads as follows, in so far as relevant:

Whereas:

"...

(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No. 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

(5) It is important to respect such fundamental rights and freedoms. This Directive does not prejudice freedom of association, including the right to establish unions with others and to join unions to defend one's interests.

...

(24) The European Union in its Declaration No. 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity. ..."

Article 4

Occupational requirements

"1. ... Member States may provide that a difference of treatment which is based on [religion or belief] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force ... or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. ...

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

35. The applicant union submitted that the Dolj County Court had infringed its right to organise as guaranteed by Article 11 of the Convention, which provides:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

36. The Government contested that argument.

A. Admissibility

37. The Court observes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant union

38. The applicant union submitted that the sole purpose of its establishment, as reflected in its constitution, was to protect the non-religious, economic interests of the clergy and lay staff of the Church. It emphasised that it did not challenge the Church's tenets, hierarchy or operating methods and that it did not represent or seek to represent or replace either the Church or its followers or leadership, but had been set up outside the structure of the Church purely in order to represent its own members, who were Church employees, in their economic and administrative dealings with their employer and the Ministry of Culture and Religious Affairs.

39. The applicant union thus maintained that both the Government's submissions and the County Court's findings in refusing its application for registration stemmed from confusion between the religious freedom of believers and the Church and the trade-union rights of Church employees. Contending that the two spheres were distinct, it asserted that religious freedom could not justify a restriction of fundamental social rights.

40. It also rejected the contention that priests performed management functions in their parishes and were accordingly barred from joining trade unions by Law no. 54/2003. In any event, it pointed out that the union also included lay employees of the Church.

41. Lastly, the applicant union argued that the refusal to register it did not accord with national practice, since similar trade unions had been allowed to form both before and after the change of political regime in 1989.

42. In view of these considerations, the applicant union submitted that the provision of the Statute of the Church requiring the employer's blessing for a union to be set up was unlawful since it infringed the rights and freedoms guaranteed by the Constitution and the Convention. It contended that the clergy and laity were not among the groups to which the exceptions in the second paragraph of Article 11 applied and concluded that the refusal to register their trade union had caused them to suffer unjustified discrimination in relation to other categories of workers.

(b) The Government

43. The Government accepted that the refusal to register the applicant union had constituted interference with its right to freedom of association as protected by Article 11 of the Convention, but contended that such

interference had been justified as it was prescribed by law, pursued a legitimate aim and was necessary in a democratic society.

44. As to whether the interference had been lawful, the Government stated that the refusal to register the union had been justified by the provisions of the Trade Unions Act (Law no. 54/2003) and the Statute of the Orthodox Church, as approved by Government Ordinance no. 53 of 16 January 2008.

45. As to whether a legitimate aim had been pursued, the Government observed that the impugned measure was justified by the need to protect the Romanian Orthodox Church. Accordingly, the interference had pursued the legitimate aim of acknowledging the freedom and autonomy of religious communities.

46. As to whether the measure was necessary in a democratic society, the Government pointed out that the autonomy of religious communities was essential for pluralism in a democratic society.

47. They submitted that all forms of association existing within the Church had to comply with the Church's own rules, and observed in that connection that the Statute of the Orthodox Church provided for different forms of association aimed at assisting priests in airing their grievances. They also explained that priests performed management functions in their parishes and received a stipend on that account as part of their salary.

48. Observing that, on entering the Church, members of the clergy took an oath by which they freely assumed their religious vocation, the Government argued that if they subsequently took the view that the structures provided for in the Church's Statute no longer accorded with their conscience, their freedom of religion encompassed the possibility of relinquishing their duties or even leaving the Church.

49. Lastly, the Government submitted that State intervention in regulating relations between priests and the Church would have infringed the overriding principle of the autonomy of religious communities. In this connection they observed that in two cases relating to access to a court for priests wishing to complain about the termination of an employment contract and a transfer respectively, the Court had held that the internal autonomy of the Church and its decision-making independence should prevail (they cited *Dudová and Duda v. the Czech Republic* (dec.), no. 40224/98, 30 January 2001, and *Ahtinen v. Finland*, no. 48907/99, 23 September 2008). They further observed that, in view of the importance of the autonomy of religious communities, the State was required to refrain from interfering in the organisation of the Church. This had not been the case, for example, in *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria* (nos. 412/03 and 35677/04, 22 January 2009).

50. In the light of these considerations, the Government concluded that a fair balance between the applicant union's individual interest (in securing

recognition of its right to freedom of association) and the State's obligation (to respect the autonomy of religious communities) had not been upset.

2. The third parties' observations

(a) The Archdiocese of Craiova

51. The third-party intervener submitted that the right guaranteed by Article 11 of the Convention was not absolute and that the protection of religious freedom could justify restrictions on the exercise of the right to freedom of association where the latter called into question the principle of the autonomy of religious communities.

52. It asserted that within the Romanian Orthodox Church, priests performed their duties by virtue of a freely undertaken prior agreement in the form of an oath taken by each member of the clergy. The parties concerned were not bound by a contract governed by labour law and, accordingly, Church employees could not rely on employment legislation to demand the establishment of a trade union to defend rights falling specifically under labour law. As regards subordination to the Church hierarchy, the intervener maintained that this simply entailed free and devoted submission to the faith.

53. The intervener further stated that court decisions in various European countries, among them France, had acknowledged that relationships resulting from the specific mission of the Church were different from those deriving from labour law.

(b) European Centre for Law and Justice (ECLJ)

54. The ECLJ submitted that in accordance with the principle of the autonomy of religious communities, the Church could legitimately prohibit its clergy from forming a trade union if it considered such a body to be harmful to the community.

55. It pointed out that the obligation to act in good faith and with loyalty to the ethos of the Church had been recognised both in Council Directive 78/2000/EC of 27 November 2000 and in the Court's case-law.

56. Accordingly, it contended that the proportionality of any interference with the right to organise had to be assessed with due regard to this ethos. By joining a church, believers and the clergy freely accepted a duty of obedience, which entailed waiving certain fundamental rights and freedoms, including the possibility of forming a trade union or any other association without prior approval from the hierarchy. The State should therefore respect this vow of obedience and recognise the Church's legitimate interest in not allowing its clergy to form a union that would undermine its structure and impair the essence of its beliefs.

3. *The Court's assessment*

(a) **General principles concerning the content of the right to organise**

57. The Court reiterates that the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights it protects. In addition, it entails a positive obligation to secure the effective enjoyment of these rights (see *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, § 41, ECHR 2002-V).

58. As regards trade-union freedom, which is a particular aspect of freedom of association, the Court reiterates that Article 11 of the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. A trade union must thus be free to strive for the protection of its members' interests, and the individual members have a right, in order to protect their interests, for the trade union to be heard (see *National Union of Belgian Police v. Belgium*, 27 October 1975, §§ 39-40, Series A no. 19, and *Swedish Engine Drivers' Union v. Sweden*, 6 February 1976, §§ 40-41, Series A no. 20). If, as a result of a refusal to register a trade union, a State failed to comply with its positive obligation to secure these rights to the applicants under domestic law, its responsibility should be engaged under Article 11 of the Convention (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 110, ECHR 2008).

59. Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under the Article in question or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are similar (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 98, ECHR 2003-VIII).

(b) **Application of the above principles in the present case**

60. The Court notes that the Dolj County Court based its refusal to register the applicant union on an ecclesiastical rule, set forth in the Church's Statute, prohibiting the clergy from engaging in any form of association without the consent of the Church hierarchy. It found that banning the clergy and laity from forming trade unions was in accordance with the provisions of domestic law governing the right to organise and was justified by the need to protect the Orthodox Christian tradition and to ensure that the Church hierarchy was not obliged to work together with a new body operating outside the rules of canon law concerning decision-making.

61. The Court reiterates that the mere fact that the legislation prohibits certain categories of employees from forming trade unions is not sufficient to warrant such a radical restriction (see, *mutatis mutandis*, *Tüm Haber Sen and Çınar v. Turkey*, no. 28602/95, § 36, ECHR 2006-II, and *Demir and Baykara*, cited above, § 120).

62. Accordingly, it must first consider from the standpoint of Article 11, taking into account the specific situation of the Romanian Orthodox Church, whether clergy and lay persons employed by the Church may enjoy trade-union rights to the same extent as other employees.

63. The Court observes in this connection that Article 11 allows the State to impose restrictions on the right to organise solely in the case of the three groups of persons referred to in paragraph 2 *in fine*, namely members of the armed forces, the police or the State administration, and on condition that such restrictions are lawful.

64. In the present case the Court notes that priests and lay staff carry out their duties within the Romanian Orthodox Church under individual employment contracts. They receive salaries that are mainly funded from the State budget and they are covered by the general social-insurance scheme. The Court further observes that the legal status of Church employees has not been challenged in the domestic courts and that the civil courts have relied on this status when examining the lawfulness of the dismissal or enforced retirement of Church employees in certain circumstances (see paragraphs 8 and 27 *et seq.* above).

65. The Court considers that a relationship based on an employment contract cannot be "clericalised" to the point of being exempted from all rules of civil law (see, *mutatis mutandis*, *Schüth v. Germany*, no. 1620/03, § 70, ECHR 2010). It concludes that members of the clergy, and *a fortiori* lay employees of the Church, cannot be excluded from the scope of Article 11 of the Convention. The national authorities may at most impose "lawful restrictions" on them in accordance with Article 11 § 2.

66. Such restrictions are to be construed strictly and can be justified only by convincing and compelling reasons. In determining whether there is a "necessity", and hence a "pressing social need", for the purposes of Article 11 § 2, States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it (see *Sidiropoulos and Others v. Greece*, 10 July 1998, § 40, *Reports of Judgments and Decisions* 1998-IV).

(i) *Whether the measure was prescribed by law and pursued a legitimate aim*

67. The Court notes that the refusal to register the applicant union was based on domestic law, and more specifically the Trade Unions Act (Law no. 54/2003) and the Religious Freedom Act (Law no. 489/2006), as interpreted by the Dolj County Court in the light of the Statute of the Orthodox Church. Furthermore, in so far as the refusal sought to prevent a

disparity between the law and practice concerning the establishment of trade unions for Church employees, the Court can accept that the measure in question was aimed at preserving public order, which encompasses the freedom and autonomy of religious communities (see, *mutatis mutandis*, *Negrepontis-Giannisis v. Greece*, no. 56759/08, § 67, 3 May 2011).

68. The Court considers that the interference in issue may be regarded as "prescribed by law" and as pursuing a legitimate aim for the purposes of Article 11 § 2 of the Convention. It thus remains to be determined whether it was "necessary in a democratic society".

(ii) *Whether the measure was necessary in a democratic society*

69. The Court reiterates that the adjective "necessary" within the meaning of Article 11 § 2 of the Convention implies the existence of a "pressing social need". It further reiterates that in determining whether a restriction of the right to organise meets a "pressing social need", it must ascertain whether there is plausible evidence that the establishment or activities of the trade union in question represent a sufficiently imminent threat to the State or to a democratic society (see *Tüm Haber Sen and Çınar*, cited above, § 40, and *mutatis mutandis*, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 104, ECHR 2003-II).

70. When carrying out its scrutiny, the Court's task is not to take the place of the competent domestic courts but to examine the measure in issue from the standpoint of Article 11 and in the light of the case as a whole in order to determine whether the reasons given to justify it were "relevant and sufficient" and whether it was "proportionate to the legitimate aim pursued". It must then satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see, *mutatis mutandis*, *Ahmed and Others v. the United Kingdom*, 2 September 1998, § 55, *Reports* 1998-VI, and *Goodwin v. the United Kingdom*, 27 March 1996, § 40, *Reports* 1996-II).

71. In the present case the Court notes that the civil courts had jurisdiction to rule on the validity of the application for the applicant union to be granted legal personality (contrast *Dudová and Duda* (dec.), cited above). It further observes that the reasons given by the court for refusing the application were, firstly, the need to protect the Orthodox Christian tradition, its founding tenets and the rules of canon law concerning decision-making and, secondly, the fact that priests were barred by law from taking part in trade unions because they performed management functions in their parishes.

72. Regarding the second point, the Court observes that the parties disagreed as to whether priests performed management functions. In any event, it finds it unnecessary to determine this factual question, which it

considers of secondary importance in reaching its decision in the present case (see, *mutatis mutandis*, *Negreponti-Giannisis*, § 70). It will therefore assess the existence of a "pressing social need" and the relevance of the reasons given to justify the interference complained of in relation to the first consideration referred to by the County Court.

(α) Whether there was a "pressing social need"

73. The Court observes that the applicant union's constitution did not contain any passages that were critical of the faith or of the Church. On the contrary, it specified that the union intended to observe and apply in full the provisions of civil law and ecclesiastical rules, including the Statute and canons of the Church. Nor does it appear from the material submitted by the parties that the union's leaders or its members have made any disrespectful comments about the Orthodox faith or the Church.

74. Admittedly, the autonomy of religious communities referred to by the Government is essential for pluralism in a democratic society and is at the very core of the protection afforded to them by Articles 9 and 11 of the Convention. The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000-XI).

75. In the present case the Court observes that the applicant union's demands related exclusively to defending the economic, social and cultural rights and interests of salaried employees of the Church. Recognition of the union would therefore not have undermined either the legitimacy of religious beliefs or the means used to express them.

76. The Court therefore considers that the criteria defining a "pressing social need" were not met in the instant case, since the County Court did not establish that the applicant union's programme, as set out in its constitution, or the positions adopted by its members were incompatible with a "democratic society", let alone that they represented a threat to democracy.

(β) Whether the interference was based on "relevant and sufficient" reasons and was proportionate

77. The Court observes that the reasons given by the County Court to justify the interference were of a purely religious nature. Unlike the first-instance court, the judges who considered the appeal by the Archdiocese referred solely to the Church's Statute and the need to preserve the rules of canon law concerning decision-making in order to ensure that the Church leadership was not confronted with a new body alien to tradition.

78. The County Court did not examine the repercussions of the employment contract on the employer-employee relationship, the distinction between members of the clergy and lay employees of the Church or the

compatibility of the ecclesiastical rules prohibiting union membership with the domestic and international regulations enshrining the right of employees to belong to a trade union. In the Court's opinion, however, such questions were of particular importance in the present case and, on that account, should have been explicitly addressed and taken into consideration in weighing up the interests at stake (see, *mutatis mutandis*, *Ruiz Torija v. Spain*, 9 December 1994, § 30, Series A no. 303-A; *Schüth*, cited above, § 73; *Obst v. Germany*, no. 425/03, §§ 48 and 51, 23 September 2010; and *Negrepontis-Giannisis*, cited above, § 72).

79. The Court accepts that under the Convention, an employer whose ethos is based on religion may impose special duties of loyalty on its employees. It also acknowledges that when signing their employment contract, employees bound by such a duty of loyalty may accept a certain restriction of some of their rights (see *Ahtinen*, cited above, § 41, and *Schüth*, cited above, § 71).

80. However, it reiterates that a civil court reviewing a penalty imposed following a breach of such duties cannot, on the basis of the employer's autonomy, refrain from carrying out a proper balancing exercise between the interests at stake in accordance with the principle of proportionality (see *Schüth*, cited above, § 69).

81. As regards the contention that signing the employment contract gave rise to an implicit limitation of the right to organise, the Court considers that such a limitation cannot be accepted as valid since it would strike at the very substance of the freedom guaranteed by Article 11 of the Convention (see, *mutatis mutandis*, *Young, James and Webster v. the United Kingdom*, 13 August 1981, § 52, Series A no. 44).

82. In any event, the Court notes that in the present case neither the Government nor the Archdiocese argued in the domestic proceedings or before the Court that the contracts signed by Church employees contained a clause of this nature (see, *mutatis mutandis*, *Schüth*, cited above, § 71). It further observes that the County Court's refusal to register the trade union was based not on the clauses of the employment contracts but on the provisions of the Church's Statute, which entered into force in 2008, after the various employees belonging to the union had taken up their duties within the Orthodox Church.

83. In addition, the Court notes that the relevant international regulations, in particular the fifth recital of Council Directive 78/2000/EC, do not allow infringements of freedom of association, including the right to establish unions with others and to join unions to defend one's interests (see paragraph 34 above).

84. The Court is mindful of the particular background to the present case, especially in view of the position occupied by the Orthodox faith in the history and tradition of the respondent State. However, this cannot by itself justify the need for the interference, especially as the applicant union

did not seek to challenge that position in any way and the right of Orthodox Church employees to join a trade union has already been recognised on at least two occasions by the domestic courts (see paragraphs 30 and 31 above and, *mutatis mutandis*, *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, no. 46626/99, § 58, ECHR 2005-I).

85. Although such recognition predated the entry into force of the Statute of the Orthodox Church, the fact remains that the establishment of two unions within the Orthodox clergy had been permitted and not deemed unlawful or incompatible with democracy.

86. Having regard to those circumstances, the Court considers that the grounds relied on by the County Court do not appear sufficient to justify the refusal of the applicant union's application for registration (see, *mutatis mutandis*, *Schüth*, cited above, § 74; *Siebenhaar v. Germany*, no 18136/02, § 45, 3 February 2011; and *Obst*, cited above, § 51).

(iii) *Conclusion*

87. Accordingly, in the absence of a "pressing social need" and sufficient reasons, the Court considers that a measure as drastic as the refusal to register the applicant union was disproportionate to the aim pursued and consequently unnecessary in a democratic society.

88. There has therefore been a violation of Article 11 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

89. 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

90. The applicant union claimed 20,000 euros (EUR) by way of "compensation", without specifying its nature. It stated that this amount represented the subscription fees it had been unable to receive from its members because of the refusal to register it.

91. The Government objected to the claim, contending that it was excessive and unrelated to the subject matter of the case.

92. Observing that domestic law allows a case to be reheard if the Court has found a violation of an applicant's rights, the Court considers that the most appropriate form of redress would, in principle, be the reopening, at the applicant union's request, of the proceedings for its registration in accordance with the requirements of Article 11 of the Convention.

93. That apart, it reiterates that the frustration felt by members of a body that has been dissolved or prevented from acting may be taken into account under Article 41 of the Convention (see, for example, *Dicle for the Democratic Party (DEP) of Turkey v. Turkey*, no 25141/94, § 78, 10 December 2002, and *Presidential Party of Mordovia v. Russia*, no. 65659/01, § 37, 5 October 2004).

94. As to the losses sustained, the Court observes that, in view of the uncertainty surrounding the number and duration of its subscriptions, it cannot speculate on the total sum the applicant union could have received if its application for registration had been allowed.

95. Ruling on an equitable basis, the Court awards the applicant union EUR 10,000 to cover all heads of damage. This sum will be paid to Mr Ionel Gruia, who will be responsible for transferring it to the applicant union or, should the latter not acquire legal personality, its founding members.

B. Costs and expenses

96. The applicant union claimed EUR 5,000 for the costs and expenses incurred before the domestic courts and the Court.

97. The Government objected to this claim, submitting that the applicant union had not provided any documents substantiating the amount claimed.

98. In view of the lack of supporting vouchers, the Court dismisses the claim.

C. Default interest

99. The Court considers it appropriate that the default interest rate 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

1. *Declares* the application admissible unanimously;
2. *Holds* by five votes to two that there has been a violation of Article 11 of the Convention;
3. *Holds* by five votes to two
 - (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, EUR 10,000 (ten thousand euros), covering all heads

of damage, plus any tax that may be chargeable, to Mr Ionel Gruia, the representative of the Păstorul cel Bun trade union, who shall be responsible for transferring that sum to the aforementioned union or, as appropriate, its founding members;

(b) that the above amount is to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

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

4. *Dismisses* unanimously the remainder of the applicant union's claim for just satisfaction.

Done in French, and notified in writing on 31 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Judges Ziemele and Tsotsoria is annexed to this judgment.

J.C.M.
S.Q.

JOINT DISSENTING OPINION OF JUDGES ZIEMELE AND TSOTSORIA

1. We do not share the view of the majority that there was a violation of Article 11 in that the applicants were prevented from establishing the trade union in question. At the outset, it is important to point out that the question has arisen in a very particular context. The applicants are 35 clergymen and lay employees of the Romanian Orthodox Church (see paragraph 6). Therefore the main question is whether and in what manner the clergy and other employees of a Church have the right to form trade unions. Secondly, what is the role of the State from the point of view of its obligations under the Convention?

2. The Court has repeatedly stated that States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups (see, for example, *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 107, ECHR 2005-XI). It has also acknowledged that participation in the organisational life of the community is a manifestation of one's religion, protected by Article 9 of the Convention. For these reasons, the Court has held that under Article 9, interpreted in the light of Article 11, the right of believers to freedom of religion encompasses the expectation that the community will be allowed to function free from arbitrary State intervention in its organisation. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the Convention affords. Were the organisational life of the community not protected by Article 9, all other aspects of the individual's freedom of religion would become vulnerable (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 62, ECHR 2000-XI; *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, § 118, ECHR 2001-XII; and *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, nos. 412/03 and 35677/04, § 103, 22 January 2009). In our view this case raises a relatively new issue for the Court as regards the autonomous existence of the religious community in view of a proposal to establish a trade union by some members of that community.

3. We note that in Romania members of the clergy, with some exceptions, have the right to form trade unions and that such unions have indeed been registered (see paragraph 84 of the judgment). Nevertheless, there is a certain procedure that has to be followed. In accordance with the 2007 Statute of the Romanian Orthodox Church, as recognised by Government Ordinance no. 53/2008, members of the clergy have to receive the blessing of the Bishop for the establishment of, or participation in, associations, foundations or other organisations (see paragraph 26). In the

present case, the domestic courts took into account the explanations of the Archbishop as regards the requirement of his blessing, as well as explanations about the duties of priests within the hierarchy of the Church, and decided that they could not grant the registration of the trade union since it would be contrary to the requirements of the Statute of the Romanian Orthodox Church.

4. The majority of the Chamber found that the establishment of the particular trade union would not have interfered with the legitimacy of religious beliefs or the manner of their expression (see paragraph 75). In their view, the national courts had not sufficiently proved that the trade union's constitution was incompatible with democratic society or even represented a threat to democracy (see paragraph 76). Secondly, the majority paid particular attention to the analysis carried out by the domestic courts and considered that they had not made a sufficiently careful analysis of all the pertinent arguments (see paragraph 86). Admittedly, one could see problems in the manner in which the Court of Appeal reasoned. We could agree with the argument that, for example, members of the clergy and lay employees of the Church might need to be distinguished. Certainly, this derives from the wording of the Statute of the Church, which provides for the special procedure only in relation to the clergy. There is also an important question as to what law should apply with respect to this dispute, since the facts of the dispute arose before 2008, when the Government took note of the new Statute of the Church, and whether the applicants were aware of the limitations that might be imposed on their rights before that date. It seems that the Court of Appeal did not pay attention to these aspects. At the same time, the applicants themselves did not argue that the clergy and lay employees should be distinguished as to their rights, nor did they attempt to create two different trade unions. The Government did submit that the national courts had tried to identify the nature of the trade union and that it was a difficult question because of the mixed composition of the group of individuals concerned. Finally, the courts came to the conclusion that the intention was to create a trade union within the Church. This conclusion is not contested by the applicants. Their argument is that the trade union did not have any plans to contradict the religious dogma or structure of the Church. The applicants argued that the main purpose was the defence of their social and economic rights.

5. Indeed, the text of the trade union's constitution is of particular importance in the case (see paragraph 6). In this text one can read that the trade union plans to ensure that all members of the trade union have work which corresponds to their professional training and skills. Among other things, the constitution also mentions that the trade union will organise and finance religious activities. It naturally talks about the right to strike and states that the Archbishop has to report on promotions, transfers and budgetary issues. We consider that in the light of these elements of the trade

union's constitution the national courts could reasonably consider that its creation would challenge the traditional hierarchical structure of the Church and the manner in which decisions were taken within it. The constitution does not show that the sole purpose of the trade union members was to communicate with the State authorities in view of the fact that they had employment contracts which were in some manner recognised by the State. It also transpires from the various submissions of the parties to be found in the case file that in the background to this case there were disagreements within the Church. If that is the case, the national courts are certainly better placed to assess the facts.

6. In conclusion, the Chamber seems to have answered the question posed above (see point 1 above) in the affirmative, based on the importance of the right to form trade unions and the reading of paragraph 2 of Article 11, which spells out only three groups of individuals whose right to form trade unions may be restricted (see paragraph 63). Unfortunately, the Chamber does not examine the main tension that the facts present, namely the collision between the principle of the autonomous existence of a religious community, as protected by Articles 9 and 11, and the right to form trade unions, as protected by Article 11 (see point 2 above). While we agree with the majority that it is important to find the right balance between, on the one hand, the freedom of religion of the Church and its members, and its autonomy, and, on the other, the protection of fundamental human rights, we do not find that the assessment by the national courts of this very delicate situation was unreasonable. Consequently, we do not find a violation of Article 11 and we do not endorse the just satisfaction awarded.