Chapter 5

THE EVOLVING JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE PROTECTION OF RELIGIOUS MINORITIES

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The European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR or the Convention) was adopted in Rome on November 4, 1950 primarily by a group of Western European states. As a direct response to the atrocities of the Second World War, the Convention was the first international treaty to provide legally enforceable judicial remedies to individuals whose human rights had been violated. Over the last half century, the ECHR has established itself as the most effective regional system for the protection of human rights in the world. A large part of that success has been linked to the legal, political, and philosophical consensus amongst Western European countries regarding the need to respect and ensure fundamental civil and political freedoms. Since the collapse of communism in the late 1980s, however, the number of states parties to the Convention has increased dramatically. Countries in Central and Eastern Europe, including many from the former Soviet Union, have become members of the Council of Europe and hence the ECHR regime. Thus, for the first time, the laws and practices of states that historically have asserted very different conceptions of human rights have become subject to the scrutiny of the European Court of Human Rights (the Court) in Strasbourg. The question therefore now arises: How will these changes affect the ECHR system and how effective will the Court prove to be
in protecting the rights of religious minorities, and religious freedom more generally, in the new member states across Central and Eastern Europe?

Until 1993, the Court had never found a violation of religious freedom protected under Article 9 of the ECHR. Since then, the Court has found state violations in seven separate instances. In this chapter, we examine the recent decisions under Article 9 and suggest that while the Court has demonstrated an increased willingness to criticize state conduct inconsistent with the Convention, it has maintained a comparatively conservative approach in decisions affecting minority religions. In a number of cases since 1993, the Court has accepted as neutral, and therefore acceptable, laws which serve social goals asserted to be legitimate yet which impact negatively on members of minority religious groups. The Court has also demonstrated a tendency in its reasoning to substitute its own objective determination of the impact of alleged violations on religious practices in place of the actual convictions of affected minorities.

If the rights of religious minorities are to be better protected under the Convention, we suggest that the Court's jurisprudence needs to change in two ways. First, despite the recent influx of states with divergent historical and political traditions regarding religious questions, the Court should nevertheless seek progressively to narrow the margin of appreciation it currently allows to state parties to enforce varying national standards that privilege the majority religious view. In those cases where state action impacts negatively on the rights of religious minorities, the Court should therefore be more rigorous in assessing the justifications advanced by state parties. Second, the Court should be careful to avoid substituting its objective assessment of the impact of state action for the experience of affected minorities and should pay more attention to the harm caused to the values of autonomy and human dignity by limitations on religious freedom.

I. THE EUROPEAN CONVENTION
HUMAN RIGHTS SYSTEM

Bitter experience impressed upon Europeans that the state can fail in its role as the custodian of human rights and become an instrument of oppression, that it can be not only the protector, but also the gravedigger of human rights. In the interest of the defense of these rights, it was felt necessary to give independent international bodies a watching brief over state behavior.¹

The ECHR, a creation of the Council of Europe, was signed in 1950 and entered into force in 1953. The Convention was modeled after the Universal
Declaration of Human Rights (the UDHR,) and also created a comprehensive implementation system which included the provision of remedies for violations. The European Commission of Human Rights and the European Court of Human Rights were established in 1954 and 1959 respectively to interpret and apply the Convention for its member states. Ratification of the Convention is open only to members of the Council of Europe, and in recent times this has become a condition of membership of the Council itself. Article 3 of the Council's statute provides that all member states are obliged to respect the "principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedom." There are now 41 members of the Council of Europe and therefore to the ECHR. This represents a massive increase in membership over the past decade, primarily from countries in Central and Eastern Europe, including many from the former Soviet Union.

The impetus for the creation of the Convention came from a variety of political and historical forces. In the wake of the atrocities of the Second World War, it was clear that the protection of human rights should not be left solely within the discretion of state sovereignty, and that not only aliens but also citizens living in their own country required international protection. In recognition of Europe's history, the Convention was designed to give binding effect to some of the rights and freedoms set out in the UDHR. The Convention additionally arose out of a desire to bring the non-communist countries of Europe together within a common ideological framework of "effective political democracy" with a "common understanding and observance of human rights" and to consolidate their unity in the face of a (then) communist threat by promoting democracy and respect for human rights.

The Convention provides recourse to both states and individuals to bring alleged violations before an international body, and provides an enforcement mechanism to ensure that contracting parties respect their obligations under the Convention. Under Article 25 individuals claiming to be the victim of a violation by a contracting party can petition the Court claiming redress. Until 1998, individual petitions went first to the European Commission of Human Rights, which would determine whether claims were violations of the Convention and therefore admissible for referral to the Court. This procedure was amended in 1997 in order to relieve the increased case load created by the addition of Eastern European signatory states. The Council of Europe abolished the Commission and created a single full-time European Court of Human Rights to which applicants can now petition directly. The Convention and Court thus operate as a supranational system of review of the human rights practices of member states. This is distinct from the judicial review that occurs at a national level in that the Court is limited in the relief that it can provide. It can only determine whether a law and/or its application are compatible with
the Convention, although the European Court also has the special ability to make orders for pecuniary and nonpecuniary damages.

The Court does not establish itself as a court of appeal—it may deal with a matter only after all domestic remedies have been exhausted and within six months from the date on which the final decision has been taken. This mechanism operates as part of the Convention’s general impetus to ensure that primary responsibility for the implementation of the Convention lies with the state parties themselves. This responsibility of states to determine the appropriate national operation of the Convention is often expressed in the doctrine of the “margin of appreciation,” the interpretive principle underlying the Court’s application of ECHR standards. The margin of appreciation encompasses the discretion afforded by the Court to member states to employ varying standards of conventional protections. The doctrine is designed to balance a state’s sovereignty with the need to ensure observance of the Convention and thereby to avoid damaging confrontations between the Court and Contracting Parties. This discretion within the application of the system in effect allows Contracting Parties to limit the operation of the Convention in accordance with national practices.

The doctrine’s operation within the Court’s analysis of justifiable state action has provoked significant debate. Its supporters view it as a necessary and realistic mechanism enabling the Court to engage member states in delicate areas where cultural diversity compels differing application of ECHR standards. This view holds that the doctrine takes account of differing national legal systems—the purpose of an international system being not to attain a strict homogeneity among states but to ensure that European standards are interpreted and applied throughout the region in such a way as to set a common minimum level of protection. The complementary nature of the system is directly related to the rationale underlying the Convention that legitimate national actors are in a superior position to balance the competing interests at stake. In expressing this rationale, Willi Fuhrmann, a current Judge on the Court, states that:

The Convention is predicated on the existence of a community of democratic states governed by the rule of law. Within this system the Court operates as a fail-safe to catch those violations of fundamental rights that escape the scrutiny of the national review bodies. In so doing, it owes a degree of deference to the decisions of democratically elected bodies, sometimes expressed as a margin of appreciation.

Critics of the doctrine, however, view it as having a pervasive and pernicious effect on the substantive protection of fundamental rights brought about by an attitude of undue judicial deference to the concerns of state values over indi-
individual ones. Some scholars have argued that the deferential attitude assumed by the Court and reflected in the doctrine has resulted in the Court’s abdication of its responsibility to adjudicate complex and sensitive cases, leading it to accept without much reflection the respondent government’s claims. Others have argued that the doctrine represents a principled recognition of moral relativism that is seriously at odds with the concept of the universality of human rights. The operation of the margin of appreciation in the Court’s decisions on religious freedom is discussed further below.

II. THE PROTECTION OF RELIGIOUS FREEDOM UNDER THE ECHR

A. ECHR PROVISIONS CONCERNING RELIGIOUS FREEDOM

The key provision in the Convention dealing with religious freedom—one of the fundamental rights deemed essential to political democracy and individual freedom—is Article 9, which provides that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The exercise of religious freedom in the realm of education is specifically protected under Article 2 of Protocol No. 1 which provides:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

These Articles are complemented by the operation of Article 14, a general non-discrimination provision which provides:
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Several other rights in the Convention provide additional protection to the holding and expression of religious beliefs in various public and private fora: for instance in the expression of one's beliefs within "private and family life," the public expression of religious beliefs within the general protection afforded to freedom of expression, and the freedom of peaceful assembly and association with others. We focus our analysis here primarily on Article 9.

1. THE SCOPE OF PROTECTION IN ARTICLE 9

Article 9(1) provides that everyone has the right to freedom of thought, conscience, and religion. This includes the freedom to change religion or belief, and the freedom to manifest religion or belief in worship, teaching, practice, and observance. The protection in Article 9(1) extends beyond solely religious thought and conscience and protects the rights of conscience of atheists and agnostics. However the schema of protection afforded under Article 9(1) does not extend to every act motivated by religious belief. In Arrowsmith v. United Kingdom, the Court held that the applicant’s dissemination of leaflets to troops urging them not to serve in Northern Ireland was not protected under Article 9(1) as religious "practice" of her pacifism because not every part of the leaflet endorsed pacifist philosophy and it did not constitute a general call for all persons to give up violence. The Court has also consistently found that acts of conscientious objection do not fall within the scope of Article 9(1). Such acts include conscientious objection to military service, to alternative service, to paying taxes used for military purposes, and even to making tax payments to churches.

The Court has held that for a belief to be protected under Article 9 it must attain a "certain level of cogency, seriousness, cohesion and importance." Such beliefs include those pertaining both to conventional and less mainstream religious beliefs: Christianity, Judaism, Islam, Hinduism, Sikhism, and Buddhism, as well as beliefs held by members of the Jehovah’s Witnesses, the Church of Scientology, and the Unification Church fall under the protection of Article 9. If there are doubts as to a religion’s existence, it is for the applicant to demonstrate its existence. For instance, on the basis that the applicant had failed to prove its existence, the Court has disputed the existence of Wicca as a religion.

Finally, the Court has differentiated between practices that occur in civilian and military life. In the 1998 case of Kalac v. Turkey, the Court held that the
applicant’s dismissal from the military for “displaying unlawful fundamentalist opinions” due to his belonging to a particular Muslim sect was not a violation of his freedom to manifest his religion. This was because the military is a particular context that may involve limitations on fundamental rights which would not be acceptable for civilians. In this case, the applicant’s dismissal did not amount to interference with his right to free exercise of religion as he was able to pray five times a day and perform all other religious duties. The Court characterized his dismissal as based on his conduct and attitude rather than on his religious opinions and beliefs.

2. PERMISSIBLE LIMITATIONS UNDER ARTICLE 9(2)

Article 9(2) states that manifestations of religion or belief may be limited if the restrictions are prescribed by law and are necessary in a democratic society. Permissible grounds of limitation include those of public safety, public order, health, or morals, and the protection of the rights and freedoms of others. These limitations relate only to manifestations of thought, conscience, and religion. The right to entertain any thoughts or views is guaranteed absolutely and without limitation. The Court has expressed this distinction in terms of the well-acknowledged difference between the *forum internum* (the sphere of personal beliefs and religious creeds) and the *forum externum* (the sphere where such personal beliefs and religious creeds are physically manifested). The scope of religious liberty is therefore determined in part by the line the Court has drawn between these two spheres.

In drawing that line, another difficulty has arisen. It is often hard to distinguish between manifestations of belief on the one hand, and expressions of conscience on the other. Accordingly, the Court may be required to decide whether a particular action should be protected under Article 9 or Article 10 (or both). Evans has argued that what should strictly be construed as a manifestation under Article 9 are those particular forms of expression relevant only to religion or belief or those akin to religious convictions. Patterns of thought or conscience unrelated to religious conviction would then fall under the protection of freedom of expression in Article 10.

Article 9(2) also provides the framework within which the margin of appreciation doctrine usually arises. It is legitimate in terms of Article 9(2) for states to limit manifestations of religion or belief in the interests of public safety and order, health or morals, and to protect the rights and freedoms of others. The determination of what constitutes a legitimate limitation on this basis appears *ex facie* the wording of Article 9(2) itself, namely conduct prescribed by law and necessary in a democratic society. The court’s determination of whether conduct violates Article 9 therefore follows a two-stage inquiry. The court’s first task is to determine whether challenged governmental action interferes with a right
protected under Article 9(1). If there is no state interference with protected rights, then the application is dismissed. If the Court finds interference, then it proceeds to the second level of determining whether the interference is permissible according to the limitations in Article 9(2). This is determined according to a three part test by which the Court assesses whether the action was (1) prescribed by law, (2) had a legitimate aim, and (3) was necessary in a democratic society. According to the Court’s jurisprudence, conduct is prescribed by law if the relevant rule or prohibition is adequately accessible and foreseeable, and formulated with sufficient precision to enable the individual to regulate his or her conduct. To be considered necessary in a democratic society, impugned conduct must correspond to a “pressing social need” and must be proportionate to the legitimate aim pursued.

Finally, the limitations in Article 9(2) are similar (but not identical) to those contained in the second parts of Articles 8, 10, and 11. All these provisions delineate acceptable limitations of the respective rights. The Court’s determination of limitations under Article 9(2) in this way constitutes part of a larger jurisprudential tradition whereby the Court is called on to decide whether state interference with rights protected under the Convention falls within the margin of appreciation that member states have to determine the legitimate limits on fundamental freedoms necessary in a democratic society. Thus, in the area of religious freedom, the Court has a pivotal role in protecting the rights of religious minorities from the exercise of majority policies or actions that may violate the sphere of religious freedom under Article 9. The extent to which the Court has been prepared to do so is the issue to which we now turn.

III. THE PROTECTION OF RELIGIOUS FREEDOM
BY THE EUROPEAN COURT OF HUMAN RIGHTS

In spite of the significant protections within the Convention relating directly and indirectly to religious freedom, from 1945 until 1993 not a single decision of the Court found a violation of an applicant’s religious freedom. This is a remarkable fact, given that, since its inception, the Commission has registered more than 20,000 applications. In almost fifty years, the European Commission published only forty-five cases in which Article 9 challenges were directly raised. In only four of these forty-five cases did the Commission declare the applications to be admissible, and three of these cases were ultimately held not to warrant a finding of a violation of Article 9. In the remaining case of Darby v. Sweden, the Court found that there had been a violation but based its decision on grounds other than Article 9.

The Court’s reluctance to find violations of religious freedom is demonstrated in several other cases prior to 1993. The pattern that emerges indicates that the Court attempted wherever possible to decide cases on grounds other
than under Article 9. In cases where Article 9 claims were made together with
claims under the freedom of expression protection in Article 10, the Court and
the Commission invariably decided the case on the latter basis. In the Darby
case, a Finnish citizen working in Sweden was forced to pay taxes to support
the Lutheran Church of Sweden even though Swedes could claim exemption
from the tax. The applicant claimed violations under Article 9, Article 1 (right
to peaceful enjoyment of property) and discrimination under Article 14. The
Court found a violation of Articles 1 and 14, but held that it was unnecessary to
examine the Article 9 claim.

This pattern is demonstrated even more starkly in the case of Hoffman v.
Austria, where Ingrid Hoffman—a Jehovah’s Witness—alleged violations of
Article 8 (right to respect for private and family life) and Article 9 in conjunc-
tion with Article 14 after the Austrian Supreme Court awarded custody of her
two children to their Catholic father. The decision was based primarily on
Hoffman’s religious faith, which the Austrian court felt would unduly prejudice
the children due to her religious opposition to blood transfusions and the
potential social and psychological effects on the children of belonging to a reli-
gious minority such as the Witnesses. While the Court accepted that there had
been differential treatment based on religion, its ultimate decision avoided a
finding under Article 9 by holding the state’s interference to be a violation of
the applicant’s rights under Article 8.

It was not until the historic 1993 case of Kokkinakis v. Greece that the Court
held for the first time that a state’s conduct violated Article 9. This forty-eight
year lacuna indicates a significant disjuncture between principle and practice
in ECHR jurisprudence on questions involving freedom of religion or belief.
It indicates the Court’s unwillingness to risk confrontations with member states
on sensitive issues pertaining to deeply entrenched church-state arrangements
and in relation to the treatment of minority faiths. However, since the Kokkinakis
decision in 1993 the Court has exhibited a greater willingness to scrutinize state
conduct under Article 9 and to narrow the operation of the margin of appreci-
cation, at least in relation to more clearly established violations.

A. KOKKINAKIS V. GREECE

After becoming a Jehovah’s Witness in 1936, Mr. Minos Kokkinakis, a retired
Greek businessman, was arrested more than sixty times for proselytism. In re-
response to his activities in religious matters, Kokkinakis served a total of 31
months in prison for convictions relating to acts of proselytism, conscientious
objection, and holding a religious meeting in a private house. The case that
came before the European Court concerned Kokkinakis’ conviction for pros-
elytism following a conversation he had with the wife of the local cantor for
which he was sentenced to four months imprisonment (convertible to a pecu-
niary penalty) as well as a fine. The Crete Court of Appeal upheld this sentence, reducing his sentence to three months, and converting it into a pecuniary penalty. The Crete Court reasoned that:

It was proved that, with the aim of disseminating the articles of faith of the Jehovah's Witnesses sect . . . to which the defendant adheres, he attempted, directly and indirectly, to intrude on the religious beliefs of a person of a different religious persuasion from his own, [namely] the Orthodox Christian faith, with the intention of changing those beliefs, by taking advantage of her inexperience, her low intellect and her naivety.44

Kokkinakis appealed to the Court of Cassation alleging the unconstitutionality of the law.45 The Court rejected Kokkinakis's appeal holding that the law prohibiting proselytism not only did not contravene the Greek Constitution, but also was:

[F]ully compatible with [the Constitution's recognition] of the inviolability of freedom of conscience in religious matters and provides for freedom to practice any known religion, subject to a formal provision . . . prohibiting proselytism in that proselytism is forbidden in general whatever the religion against which it is directed, including therefore the dominant religion in Greece . . . the Christian Eastern Orthodox Church.46

Kokkinakis then applied to the European Commission on Human Rights, alleging violations of Articles 7, 9, and 10 of the Convention.47 He argued that the Court of Cassation had consistently denied challenges to the constitutionality of the law against proselytism in spite of wide support for its unconstitutionality within legal literature.48 According to information provided to the European Court by Kokkinakis, between 1975 and 1992, 4,400 Jehovah's Witnesses were arrested, 1,233 were committed for trial, and 208 convicted.49 By a majority of 6–3, the Court held that that there had been a violation of Article 9; they voted 8–1 that there had not been a violation of Article 7; and they held unanimously that the state should pay Kokkinakis the equivalent of approximately $1,700 for nonpecuniary damages and $12,000 for costs and expenses.50

The Court recognized that bearing witness is a legitimate manifestation of religious conviction and acknowledged that freedom to change one's religion or belief would be a "dead letter" if this did not in principle include the right to try to convince one's neighbor through teaching.51 The Court argued, however, that freedom to manifest one's religion or belief implicitly recognizes that in a democratic society in which several religions coexist within the same population it may be necessary to place restrictions on this freedom in order to
reconcile the interests of the various groups and to ensure that everyone's beliefs are respected.

In applying the two-stage enquiry set out above, the Court first held that the sentence imposed on Kokkinakis amounted to an interference with his freedom to manifest his religion or belief under Article 9. Having found state interference, the Court proceeded to the second level of determining under the three-part test whether the interference was permissible according to the limitations in Article 9(2). First, the Court accepted that the interference was prescribed by law and stated that the law's vagueness was offset by a body of settled domestic case law that enabled the applicant to regulate his conduct accordingly. Second, the Court accepted that Greece had a legitimate aim in criminalizing proselytism in order to protect the rights and freedoms of others. Third, in determining whether the law was necessary in a democratic society, the Court considered whether the impugned measures were justified and proportionate to the task of protecting the rights and freedoms of others. The Court drew a distinction between bearing Christian witness and "improper proselytism," holding that the former corresponded to "true evangelism . . . [while] the latter represents a corruption or deformation of it." The Court held that the criteria adopted by the Greek legislature in creating the law against proselytism were reconcilable insofar as they were designed to punish only improper proselytism. Rather than decide whether the proselytism in the present case should be defined as improper, however, the Court stated that the Greek court's reasoning as to Kokkinakis's liability under the law was not sufficiently precise in that it did not specify why Kokkinakis's proselytism was improper. In the circumstances, the Court held that the conviction had not been shown to be justified by a pressing social need, nor to be proportionate to the legitimate aim pursued.

B. CRITIQUE OF KOKKINAKIS

In spite of the groundbreaking nature of the Court's finding of a violation of Article 9, the Kokkinakis decision has been widely criticized for not going far enough. The Court's 6–3 split decision, and the sharply divergent dissenting and concurring opinions, spoke of the divisions amongst the judges regarding the perceived dangers of intruding into questions of religion in member states. These divisions find expression in the narrow basis for the decision and the fact that the final holding avoided dealing with all but the factual particularities of the case. A number of the judges criticized the majority's reasoning on these grounds. For example, Judge Pettiti criticized the majority both for not finding the Greek law itself contrary to Article 9 for lack of legal certainty, and for the factual basis of its holding, which left too much room for a repressive interpretation by the Greek courts in future. Pettiti argued that it was possible to define
"impropriety," "coercion," and "duress" more clearly and to describe the full scope of religious freedom and bearing witness under the ECHR.

Judge Martens further suggested that the Court's judgment touched only incidentally on what was the crucial question in the case: whether Article 9 allows member states to criminalize attempts to induce somebody to change his or her religion. Martens argued that human dignity and freedom are basic to the idea of human rights, and that the freedom of thought, conscience, and religion enshrined in Article 9(1) are essential to that dignity and freedom. Martens argued that this freedom is absolute and that the Convention leaves no room whatsoever for interference by the state. It is not the concern of the state whether someone wishes to change their religion, nor whether someone attempts to induce another to change their religion. To allow the state to interfere by making proselytism a criminal offence "would not only run counter to the strict neutrality which the state is required to maintain in this field but also create the danger of discrimination when there is a dominant religion."

These views may be contrasted with the dissenting opinion of Judge Valticos who argued that freedom to manifest one's religion did not include the right to attempt "persistently to combat and alter the religion of others, [and] to influence minds by active and often unreasonable propaganda." For Valticos, the Jehovah's Witnesses are a "sect . . . involved [in] . . . systematic attempt[s] at conversion and consequently an attack on the religious beliefs of others," and the applicant a "militant Jehovah's Witness, a hardbitten adept of proselytism, a specialist in conversion." Thus, in Valticos' opinion, proselytism constitutes the "rape of the beliefs of others."

From both the majority and minority judgments in the case, we can make two general observations. First, the reasoning of the judges demonstrates a conscious attempt to avoid the normative and theoretical questions raised by the complex issue of state regulation of proselytism, and a willingness to find a violation only on the basis of the specific facts of the case. Recent scholarship has analyzed the difficulty of deciding whether state restrictions on proselytism are consistent with international human rights law. For example, Stahnke has argued that in conflicts involving proselytism, the rights and interests of the source, the target, and the state can be arrayed against one another. The rights of the "source" include the freedom to manifest religion and belief and the right to freedom of expression. The rights of the "target" include the freedom to change religion; the freedom to receive information; the freedom to have or maintain a religion; and the freedom from injury to religious feelings. The interests of the state include the protection of a dominant religious tradition or political ideology; the preservation of public order; and the protection of consumers from the influence of ignorance, misrepresentation, and fraud in the religious "marketplace."
On the basis of these conflicting rights and interests, Stahnke has proposed a framework to assist decisionmakers in disentangling the factors that have been used to draw the line between proper and improper proselytism. His framework involves four interrelated variables: (1) the attributes of the source; (2) the attributes of the target; (3) where the action alleged to be improper proselytism takes place; and (4) the nature of the action. Each of these variables may be laid out on a scale that will "provide a starting point for a more focused discussion on the range of choices available to states consistent with international human rights standards."99 It was the Court's failure to define the term "improper proselytism" or to analyze in any depth these conflicting rights and interests that Judge Pettiti was most critical of in Kokkinakis. In developing the notion of "coercion" that underlies this area of human rights law, these factors need to be considered in order to establish a sound analytical approach consistent with evolving ECHR jurisprudence. The failure to do so will perpetuate the current low level of protection for the rights of minority religious groups in many European member states. As Stahnke concludes:

Proselytism is a controversial activity, in that it is likely to result in controversy between sources and targets, and between religious or political communities that may become identified with either. In many cases, the rights of religious minorities are opposed by the interests of the dominant religious or political group. Conflicts arise between religions and between denominations within religions. The state may wish to take sides or feel compelled to join in these controversies. The dynamics of state involvement depends upon the relationship that exists between the state itself and particular religious groups. Such a mix of forces creates a situation in which the rights of religious dissenters, minorities, or nonbelievers are particularly at risk.60

The second observation is that the Kokkinakis decision, and the case law of the Court under Article 9 more generally, reveals a bias toward protecting traditional and established religions and a corresponding failure to protect the rights of minority, nontraditional, or unpopular religious groups. In 1996, Jeremy Gunn suggested that a summary review of the Court's jurisprudence revealed a consistent pattern of rejecting Article 9 claims, and this included a persistent denial of applications from religions that could be classified as new, nontraditional, or minority, as well as a distinct pattern of an institutional bias toward traditional religions.61 In this way those religions established within a state, either because they are an official religion or have a large number of adherents, are far more likely to have their core doctrines recognized as manifestations. Evans has argued that religions whose devotions take different forms—for example, sexual intercourse or refusal to pay taxes to a centralized
system hostile to their beliefs—are more likely to have their devotions excluded from the protection of Article 9 as non-manifestations.62

This issue is illustrated by the facts of the Kokkinakis case itself where proselytism—a practice central to the beliefs of Jehovah’s Witnesses—is criminalized under Greek law. Although the Court found a violation of Article 9, the majority judgment does not address the central question of the legitimacy of the Greek state’s criminalization of a fundamental manifestation of a minority’s religious beliefs. The Court has, however, subsequently moved closer to addressing this question. In Larissis v. Greece,63 the applicants were officers in the same unit of the Greek air force and were followers of the Pentecostal faith, which adheres to the principle that it is the duty of all believers to engage in evangelism. They were charged with proselytism of a variety of army and civilian individuals, and convicted by the Permanent Air Force Court in 1992 for offences of proselytism under the same law that was at issue in Kokkinakis. The applicants brought the case before the Court alleging violations of, inter alia, Articles 7, 9, 10 and Article 14 read together with Article 9.

The Court held 7–2 that the proselytism conviction of the Pentecostal servicemen was a violation of Article 9 only in relation to the proselytism of civilians. To the extent, however, that the officers had engaged in improper proselytism of their military subordinates, their conviction was justified due to the power differential within the military environment that altered the legitimacy and propriety of their actions.64 In defining “improper proselytism” as the “offering of material or social advantage or the application of improper pressure with a view to gaining new members of a Church,” the Court stated that:

[T]he hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power.65

The Court therefore determined that circumstances may arise in which the state would be justified in taking special measures to protect the rights and freedoms of subordinate members of the armed forces. In the case of normal civilian life, however, the Court found it of “decisive significance that the civilians whom the applicants attempted to convert were not subject to pressures and constraints of the same kind as the airmen.”66 While the Court again avoided addressing the question of whether the law against proselytism was itself in violation of the Convention, the implication of the Court’s reasoning is that
criminalizing proselytism outside of exceptionally "coercive" circumstances is an illegitimate interference with the freedom to manifest religious beliefs and practices.

Despite the hesitancy evident in the reasoning in these cases, it is apparent that the Court's history of non-engagement with religious freedom ended with the Kokkinakis decision in 1993. The remainder of this chapter is devoted to analyzing these post-1993 decisions and to assessing their impact on the protection of minority religions within the context of the margin of appreciation doctrine.

IV. THE MARGIN OF APPRECIATION AND THE PROTECTION OF MINORITY RELIGIONS

Benvenisti has argued that where the rights of minorities are concerned, no margin of appreciation is appropriate since acquiescing to the views of national institutions merely assists majorities in burdening politically powerless minorities. He states that:

One of the main justifications for an international system for the protection of human rights lies in the opportunity it provides for promoting the interests of minorities . . . . Whereas "national" interests (defined as such by majority controlled institutions) often prevail in national courts, they may be deemed less compelling when reviewed by detached external decision-makers. To grant margin of appreciation to majority-dominated national institutions in such situations is to stultify the goals of the international system and abandon the duty to protect the democratically challenged minorities. 67

It is generally agreed that the Court has applied a narrower margin of appreciation in cases involving rights deemed fundamental to political democracy on the premise that, given Europe's historical legacy, it should exercise stricter oversight over these fundamental rights. 68 This has not been the case, however, in the Court's treatment of religious freedom. As we have seen, the first half-century of the Court's existence did not see a single decision finding a violation of Article 9 by a member state. European countries have enjoyed an autonomy in relation to religious matters which, in the absence of any judicial decisions to the contrary, has amounted to almost complete discretion.

This history of avoidance has given way in the past decade to a greater willingness on the part of the Court to address allegations of human rights violations under Article 9 and related provisions. Since 1993, the Court has found violations of Article 9 in six cases—four of which have occurred in the
past few years. The margin of appreciation within which states can legitimately interfere with religious freedom has thus self-evidently narrowed. In a famous passage in Kokkinakis, the majority judgment affirmed that:

[F]reedom of thought, conscience and religion is one of the foundations of “a democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conceptions of life . . . . The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends upon it.70

The question that we address in this section is the extent to which this recognition of the importance of religious freedom may extend to protect the rights of minority or unpopular religious groups. We argue that the Court’s latest decisions, while clearly more open to issues of religious freedom than during the pre-1993 era, nevertheless exhibit two inconsistent and under-protective trends.

A. STATE JUSTIFICATIONS FOR MEASURES LIMITING THE RIGHTS OF MINORITY RELIGIONS

First, the Court has too readily accepted state justifications for measures that impact negatively on religious minorities, often systematically so. The criminalization of proselytism in Greece is one example of this. As discussed above, the majority’s decision in Kokkinakis was based strictly on the vagaries of the facts presented and the Court readily legitimated the law itself as providing the certainty and foreseeability required to guide potential infringers. In the later 1996 case of Manoussakis v. Greece,71 the Court again accepted the legitimacy of the Greek government’s regulation of religious practice in requiring explicit civil authorization in order to open a public place of worship. While it noted that there was significant evidence that Greece has tended to use its laws to impose rigid or prohibitive conditions on the practice of religious beliefs by certain non-Orthodox movements, in particular Jehovah’s Witnesses, its finding of a violation was again limited to the facts of the case.72

Factual findings by the Court, while providing relief to the immediate applicant, cannot realistically alter state conduct that causes systemic violations of the rights of religious minorities. This is especially the case where the main perpetrator of systemic discrimination against a religious minority is the government itself. If the Court is to be more effective in its stated objective of promoting and protecting religious pluralism, it must take stronger steps to protect the right of religious minorities to practice their beliefs freely and with-
out interference. There have been some recent positive movements in this
direction, notably in one case in 2000 involving the newly admitted Eastern
European state of Bulgaria.

In Hasan & Chaush v. Bulgaria, the applicants contended that the Bul-
garian state authorities had interfered twice with the organizational life of the
Muslim community: first, in February 1995, in replacing the legitimate leader-
ship of the community led by the first applicant; and second, during the
ensuing years, by refusing recognition of the reelected leadership of the first
applicant. The court was therefore faced with the question of whether the or-
ganization and leadership of the Muslim community in Bulgaria implicated
the freedom to manifest religion under Article 9. In holding that participation
in the organized life of the religious community is a protected manifestation,
the Court stated that Article 9 must be interpreted in the light of Article 11,
which safeguards associative life against unjustified state interference. The be-
liever’s right to freedom of religion encompasses the expectation that the com-
munity will be allowed to function peacefully, free from arbitrary state in-
tervention. The autonomous existence of religious communities is indispens-
able for pluralism in a democratic society and is thus an issue at the very heart of
the protection that Article 9 affords. This concerns not only the organization of
the community as such but also the effective enjoyment of the right to freedom
of religion by all its active members. If the organizational life of the community
were not protected by Article 9, all other aspects of the individual’s freedom of
religion would become vulnerable. Accordingly, the Court unanimously held
that Bulgaria’s interference with the leadership of the Bulgarian Muslim com-

Central to the Court’s reasoning in Hasan & Chaush was the idea that the
state must remain neutral in the domain of religion. Except in exceptional
circumstances, Article 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. State action favoring one leader of a divided religious community
or undertaken with the purpose of forcing the community to come together
under a single leadership against its own wishes would likewise constitute an
interference with freedom of religion. The state’s action in registering the new
leadership of the Bulgarian Muslim community and refusing to recognize the
leadership of an elected representative had the effect of favoring one faction of
the Muslim community by granting it the status of the single official leadership
to the complete exclusion of the previously recognized leadership. Thus, the
acts of the authorities operated, in law and in practice, to deprive the excluded
leadership of any possibility of continuing to represent at least part of the Mus-
lim community and of managing its affairs according to the will of that part of the community.

A related decision earlier in 1997 indicates that the Court may gradually be becoming stricter in its scrutiny of state justifications for actions that impact adversely on the freedom of minority religions. In Serif v. Greece, the Court held that the state’s interference with the Muslim community’s leadership amounted to an interference with the applicant’s right under Article 9(1) “in community with others and in public to manifest his religion in worship and teaching.” The case arose in 1985 after one of the two Muslim religious leaders of Thrace died and the state appointed a Mufti ad interim whose successor was later confirmed by the President of the Republic in the post of Mufti of Rodopi. In December 1990, after the authorities failed to respond to requests to organize elections for the post of Mufti, two independent Muslim members of parliament organized elections at the mosques. As a result of those elections, the applicant was appointed Mufti of Rodopi, and he challenged the lawfulness of the state-elected Mufti. In the interim, the President of the Republic passed a law by which the manner of selection of the Muftis was changed. The public prosecutor then initiated criminal proceedings against the applicant for having usurped the functions of a minister of a “known religion” and for having publicly worn the uniform of a minister without having the right to do so. The court of first instance imposed a commutable sentence of eight months imprisonment, which the applicant appealed. The court of appeal (the Criminal Court of Thessaloniki) upheld the conviction and imposed a sentence of six months imprisonment to be commuted to a fine. The applicant then appealed to the Court of Cassation, which rejected his appeal, and the case finally was brought to the European Court.

The Court confirmed the principle in Kokkinakis that while religious freedom is primarily a matter of individual conscience, it also includes, inter alia, freedom in community with others and in public to manifest one’s religion in worship and teaching. In applying the two-stage test under Article 9, the Court stated that it was unnecessary to consider whether the interference in issue was prescribed by law because it was in any event incompatible with Article 9 on other grounds. On the question of whether the interference served a legitimate aim, the Court accepted the government’s argument that the limitation was justified in order to protect public order. In considering whether the interference was necessary in a democratic society, however, the Court reiterated the principle in Kokkinakis that freedom of thought, conscience, and religion is one of the foundations of a democratic society and of the indissociable pluralism upon which a democratic society depends. The Court acknowledged that it may be necessary to impose restrictions on religious freedom to reconcile the interests of various religious groups, but any such restrictions must correspond
to a "pressing social need" and must be "proportionate to the legitimate aim pursued."

In the opinion of the Court, punishing a person for the mere fact that he acted as the religious leader of a group that willingly elected him could not be considered compatible with the demands of religious pluralism in a democratic society. While there was an official state-appointed Mufti, the Court recalled that there was no indication that the applicant attempted at any time to exercise the judicial or administrative functions for which the legislation on the Muftis and other Ministers of "known religions" makes provision. As in Hasan & Chaush, the Court stated that it did not consider that in democratic societies the state is required to take measures to ensure that religious communities remain or are brought under a unified leadership. The Greek government had argued that its intervention was warranted in order to prevent tension among the Muslims in Rodopi, and between the Muslims and Christians of the area as well as between Greece and Turkey. The Court noted that these concerns were not supported on the facts and that nothing could be adduced to warrant qualifying the risk of tension between Muslims and Christians and between Greece and Turkey as anything more than a remote possibility. Thus, the Court unanimously held that there had been a violation of Article 9 and ordered the payment of 2,700,000 drachmas in damages.

B. OBJECTIVE VERSUS SUBJECTIVE ASSESSMENT OF THE IMPACT OF "NEUTRAL" LAWS OF GENERAL APPLICATION

The second discernible trend in Article 9 cases post-Kokkinakis is that the Court has tended to substitute the actual experience of affected minorities with its own objective assessment of the impact of state action. In a series of recent decisions, the Court has rejected an applicant's claim on the basis that the impugned conduct did not constitute an interference with religious freedom, in spite of the applicant's clear subjective experience to the contrary. For example, in the twin cases of Efstratiou v. Greece and Valsamis v. Greece, the Court held that requiring students to take part in school parades commemorating the outbreak of war between Greece and Italy in 1940 was not an interference with their or their parent's pacifist convictions as Jehovah's Witnesses. The Court also held that suspending pupils for refusing to march in such parades did not violate their freedom of religion in that the disciplinary rules applied generally and in a neutral manner. Important to the Court's reasoning was the finding that such measures had a limited duration and therefore a limited impact.
The result of these decisions was that, in accordance with what the Court deemed to be “objective criteria,” the legitimate societal objective of achieving national unity was held to outweigh the deeply held religious convictions of the Witness children and their parents against participation in the parade. The majority judgment justified its finding of the limited impact of requiring the applicant's attendance by reiterating that the parade served the “dominant public interest.” This was because the commemoration of national events served both pacifist and public interests, and because the presence of military representatives at the parade did not alter its nature as an expression of national values and unity.77 Furthermore, the majority suggested that the applicant’s religious interests were being adequately addressed by other means such as exemption from religious-education lessons and the Orthodox mass.

This reasoning, however, directly contradicts the subjective experience of the applicants concerned. This fact was recognized in the dissenting opinion in Efstratiou, which argued that the applicant’s perception of the symbolism of the parade, and her religious and philosophical convictions, had to be accepted by the Court unless they were clearly unfounded or unreasonable. The applicant’s experience of being forced to participate in the parade was very clearly contrary to her “neutralist, pacifist and thus religious beliefs.”78 In the circumstances, there was no basis for regarding her participation as necessary in a democratic society, even if the public event was for most people an expression of national values and unity.

In our view, the Court’s reliance on an objective element in Article 9 cases concerning religious minorities (particularly small or unpopular religious minority groups) is incorrect as a matter of principle. It requires the Court to breach its duty of neutrality and to determine violations on the basis of which beliefs it regards as “reasonable” and which it does not. The Spanish scholars Martínez-Torrón and Navarro-Valls have argued strongly against such an approach:

Naturally it is necessary to verify—as far as possible—that nobody is deceitfully alleging untrue moral convictions to get rid of a legal duty. But a very different thing is to sustain that a secular court is competent to elucidate when the beliefs of a person are consistent enough from an “objective” point of view. . . . The reason why the freedom of each individual conscience must be respected is not that it is objectively correct—the courts would then have to judge the truth of the alleged beliefs as a sort of new Inquisition. Freedom of conscience must be respected because in modern democratic societies it is considered an essential area of the individual’s autonomy, and consequently the legal system has determined not to interfere in the individual’s conscience as far as other prevailing juridical interests are not in danger.79
Neutral laws of general application will usually conform to the dominant ethical values in a given society at a given point of time. Thus, they will not often conflict with majority religious values or morality. They will, however, cause conflicts with minority religious values and practices that are socially atypical. The fact that the Court has fashioned an approach whereby "neutral" laws will automatically prevail, and whereby the state is under no obligation to justify that its refusal to grant exemptions from the application of such laws is a measure that is "necessary in a democratic society," constitutes a significant risk for the rights of minorities.\(^8\)

It is interesting to compare the approach of the Court on this point to comparable jurisprudence under the First Amendment to the United States Constitution. In the celebrated decision of *West Virginia State Board of Education v. Barnette*,\(^9\) the U.S. Supreme Court held that a resolution of the Board of Education making the flag salute a regular part of the school program and requiring all teachers and pupils to participate was unconstitutional. As in *Efre\(\text{st}at\text{iou}*\), the case involved Jehovah’s Witnesses who were conscientiously opposed to saluting the flag. Justice Jackson, in his opinion for the Court, noted that the flag salute in connection with the pledge of allegiance required "affirmation of a belief and an attitude of mind." While avoiding the question of whether nonconformist beliefs would exempt individuals from the duty to salute, and deciding the case instead on the basis of unjustified interference with freedom of expression, Jackson stated that: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."\(^10\)

It is important to note that the measure at issue in *Efter\(\text{st}at\text{iou}*\) was not a criminal law of general application, which may raise other concerns, but an ordinary school regulation issued by the Ministry of Education and Religious Affairs.\(^11\) Thus, the recent controversial decision of the U.S. Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*,\(^12\) where the State of Oregon was permitted to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, is not on point here. Furthermore, it is clear that in instances where a restriction on the free exercise of religion includes a restriction on freedom of expression (or is a case of "compelled expression"), the First Amendment has been held to bar the application of even neutral, generally applicable laws to religiously motivated action.\(^13\) The European Court in *Efirstat\(\text{iou}*\) failed to consider these arguments and thus failed to protect the free exercise rights of the applicants in the case.

The reasoning in *Efirstat\(\text{iou}*\) is also inconsistent with the later case of *Busc\(\text{a}r\text{nini v. San Marino}*\),\(^14\) in which the Court held that a compulsory oath on the Gospels for recently elected members of parliament was in violation of Article 9.
In that case, the applicants were elected to the parliament of the Republic of San Marino in elections held on May 30, 1993. They requested permission to take the required oath without making reference to any religious text. Having taken the oath in writing and omitting any reference to the Gospels, the General Grand Council of the State held their oaths to be invalid and a resolution was adopted ordering the applicants to retake the oath on the Gospels on pain of forfeiting their parliamentary seats. The applicants complied with the Council's order and took the oath on the Gospels, albeit objecting that their right to freedom of religion and conscience had been infringed. The applicants then brought the case to the European Court on the grounds that in the Republic of San Marino at the material time the exercise of a fundamental political right such as holding parliamentary office was subject to publicly professing a particular faith in violation of Article 9.

The Court commenced its reasoning by emphasizing the importance of religious freedom in a democratic society not only for believers but also for atheists, agnostics, skeptics, and the unconcerned. Article 9 protects the freedom to hold or not to hold religious beliefs and to practice or not to practice a religion. Requiring the applicants to take an oath on the Gospels did constitute a limitation within the meaning of Article 9(2) since it required them to swear allegiance to a particular religion on pain of forfeiting their parliamentary seats. The Court stated that it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs and unanimously held that the limitation could not be regarded as "necessary in a democratic society" and was in violation of Article 9.

Is it possible to reconcile, as a matter of principle, the different results in Efstratiou and Buscarini? Why should the freedom of conscience of atheists or agnostics in refusing to take a religious oath be protected while the religious and philosophical convictions of a minority religious group not be protected in the case of compulsory attendance at a national parade? One answer may be that Buscarini involved questions of fundamental civil and political rights in addition to the issue of individual freedom of conscience whereas in Efstratiou and Valsamis this element was lacking. Alternatively, we may conclude that Efstratiou and Valsamis were wrongly decided and pose a risk to the rights of minority religions, especially—as in the case of the Jehovah's Witnesses—small and unpopular religious groups.

This danger was illustrated recently in the case of Jewish Liturgical Association Cha'are Shalom ve Tsedek v. France. In this case Cha'are Shalom ve Tsedek, the applicant association, alleged a violation of Article 9 on account of the French authorities' refusal to grant it the approval necessary for access to slaughterhouses to perform ritual slaughter in accordance with the ultra-orthodox religious prescriptions of its members. It further alleged a viola-
tion of the nondiscrimination norm in Article 14 in that only the Jewish Consistorial Association of Paris (the ACIP), of which the large majority of Jews in France are members, had received the approval in question.

In applying the two-stage test, the Court first found that the French authorities’ action fell under Article 9 since ritual slaughter must be within the right to manifest one’s religion in observance. The Court held, however, that the state’s refusal of a license to the applicant association did not constitute an interference with their freedom to manifest their religion. The Court stated that there would only be an interference with the freedom to manifest religion if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable. Since it had not been established that Jews belonging to the applicant association could not obtain glatt meat elsewhere, or that the applicant could not supply them with such meat by reaching an agreement with the ACIP, the refusal of approval did not constitute a violation of Article 9.

The Court further held under the second stage of the test that even if this restriction could be considered an interference with the freedom to manifest religion, it was compatible with Article 9(2). The impugned measure was prescribed by law, and pursued the legitimate aim of protecting public health and public order. This was because state regulation of the exercise of worship was found to be conducive to religious harmony and tolerance. In light of France’s margin of appreciation, particularly in relation to the delicate relationship between the state and religions, the restriction could not be considered excessive or disproportionate. The Court accordingly voted 12–5 that there had been no violation of Article 9(2).

In relation to the claim of discrimination under Article 14, the Court held that the difference of treatment that resulted from the measure was limited in scope. Insofar as there was any difference of treatment, it pursued a legitimate aim and there was “a reasonable relationship of proportionality between the means employed and the aim sought to be realized.” Such difference of treatment therefore had an objective and reasonable justification that accorded with ECHR nondiscrimination standards. Thus, the Court ruled 10–7 that there had been no violation of Article 9 taken together with Article 14.

The divergence of views between the majority and dissenting opinions in the case reflected significant disagreement among the judges. The dissenting opinion started from the position that tension in a divided religious community is one of the unavoidable consequences of the need to respect pluralism. In such a situation the role of the public authorities is not to remove any cause of tension by eliminating pluralism, but to take all necessary measures to ensure that the competing groups tolerate each other. The dissenting judges therefore found it particularly inappropriate to hold that the applicant association could
have reached an agreement with the ACIP in order to perform ritual slaughter under cover of their approval. That argument amounted to discharging the state, the only entity empowered to grant approval, from the obligation to respect religious freedom. Given that the ACIP represented the majority current in the Jewish community, it was the least well-placed organization to assess the validity of minority claims and to act as an arbiter. The dissenting judges also stated that the fact that glatt meat could be obtained by other means was irrelevant in assessing whether the scope of the state’s act in question was aimed at restricting the free exercise of religion. Finally, the dissenting judges disagreed with the majority’s finding that there was no unfair discrimination because the interference was of “limited effect” and the difference of treatment was “limited in scope.” They stated that:

Where freedom of religion is concerned, it is not for the European Court of Human Rights to substitute its assessment of the scope or seriousness of an interference for that of the persons or groups concerned, because the essential object of Article 9 of the Convention is to protect individuals’ most private convictions.91

The government had justified its refusal of a license on the low level of support for the applicant association, which had only about 40,000 adherents, all ultra-orthodox Jews, out of 700,000 Jews living in France. Its representativeness, in their submission, could not be compared with that of the ACIP, which represented nearly all the Jews in France. The refusal to approve the applicant had therefore been regarded as necessary for the protection of public order so as to avoid the proliferation of approved bodies that did not provide the same safeguards as the ACIP. The dissenting judges could not see, however, how granting the approval in question would have threatened to undermine public order. Muslim communities living in France which also practice ritual slaughter but are less well structured than the Jewish communities had been granted approval liberally by the authorities without it ever being alleged that the number of approved bodies would threaten public order or health.

The minority concluded by reiterating that while they accepted that states enjoy a margin of appreciation in this area, in Manoussakis the Court had emphasized that in delimiting the extent of the margin of appreciation concerned it had to have regard for the need to secure true religious pluralism, which is an inherent feature of the notion of a democratic society. The withholding of approval from the applicant association, while granting such approval to the ACIP and thereby conferring on the latter the exclusive right to authorize ritual slaughterers, amounted to a failure to secure religious pluralism or to ensure a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Thus, in their view the difference
in treatment between the applicant and the ACIP had no objective and reason-
able justification and was therefore disproportionate and a violation of Article
14 taken together with Article 9.

V. CONCLUSION

The Court's decision in Kokkinakis and the cases that have followed it constitute
the early stages of ECHR jurisprudence in the area of religious freedom. We
have attempted to identify both the progress that has been made to date and
the areas where changes are required if the rights of religious minorities are to
be better protected. For this to occur, there will need to be some reconsideration
of the current operation of the doctrine of the margin of appreciation both in
scrutinizing state justifications for restrictive measures and in assessing their
impact on affected minority groups. There are already indications that this is
the direction in which the Court's reasoning is moving. In Manoussakis, the
Court employed a more searching judicial inquiry of the alleged violation than
had been used in Kokkinakis, and stressed the necessity of placing state restric-
tions on religious freedom under "strict scrutiny." The choice of this term is
most likely an intentional reference to the doctrine of strict scrutiny that char-
acterizes U.S. constitutional law regarding the rights of "discrete and insular
minorities when ordinary political processes cannot be relied upon to achieve
this end." This doctrine requires judges to review legislative means and ends
by asking whether an enactment is justified by a compelling state interest,
whether the means necessarily achieve their ends and whether any less consti-
tutionally restrictive alternatives are available. As the Court's jurisprudence
evolves, this kind of strict scrutiny approach to Article 9 cases is, in our view,
the best means by which to guard against the harm caused by violations of the
rights of minority religious groups to the values of autonomy and human dignity
that underlie the ECHR.

ENDNOTES

1. Peter Leuprecht, Innovations in the European System of Human Rights Protection
8 TRANSNAT'L L. & CONTEMPO. PROBS. 313, 314 (1998)
3. Toby Mendel, The Strasbourg Safeguard, TRANSITIONS ON LINE, June 1, 2000

4. Rudolf Bernhardt, Human Rights and Judicial Review: The European Court of
Human Rights in David M. Beatty (ed.), HUMAN RIGHTS AND JUDICIAL REVIEW:
European Court of Human Rights 217


5. See the Preamble to the Convention, which states that "[t]he Governments signatory hereto, being Members of the Council of Europe ... Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and best maintained on the one hand by an effective political democracy and on the other by the common understanding and observance of the Human Rights upon which they depend."


7. Article 34 permits contracting parties to refer alleged breaches of the provisions of the Convention by another contracting party. Like the similar inter-state reporting provisions under the ICCPR and ICESCR, very few states have ever availed themselves of this mechanism.


10. Article 36 of the Convention.


15. Zwaak, above n. 12, 75.

16. Fionauala Ní Aoláin and Oren Gross, From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights, unpublished manuscript on file with the authors.

17. Ibid. 3.


19. Article 8 provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

"2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic
well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others."

20. Article 10 provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers [...]."

"2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

21. Article 11 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."

22. In Buscarini v. San Marino, the Court held that the right to religious freedom includes the right not to hold religious beliefs and the right not to practice religion. See also Kokkinakis v. Greece, 260-A Eur. Ct. H.R. (Ser. A) 17, ¶ 31 (1993).


30. Evans, above n. 28, 290.
38. It is not known how many of these cases raised claims under Article 9.
39. See Gunn, above n. 36, 310.
43. Ibid. ¶ 6. In addition to these convictions, between 1960 and 1970 Kokkinakis was arrested four times and prosecuted but not convicted.
44. Ibid. ¶ 10. This judgment accorded with s. 2 of Law No. 1672/1939 which defined “proselytism” as meaning: “Any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion . . . with the aim of undermining those beliefs, either by any kind of inducement or promise of moral support or material assistance, or by fraudulent means or by taking advantage of his experience, trust, need, low intellect or naivety.”
45. Article 13 of the Greek Constitution of 1975 states that:
   “1. Freedom of conscience in religious matters is inviolable. The enjoyment of personal and political rights shall not depend on an individual’s religious beliefs.
   “2. There shall be freedom to practise any known religion; individuals shall be free to perform their rites of worship without hindrance and under the protection of the law. The performance of rites of worship must not prejudice public order or public morals. Proselytism is prohibited. [Emphasis added].”
46. Kokkinakis, ¶ 12.
47. Article 7 provides that: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”
52. Kokkinakis, ¶ 48.
53. Ibid.
54. Kokkinakis, ¶ 13-14 k. m.
55. Kokkinakis, ¶ 15.
58. Ibid. 275-325.
59. Ibid. 326.
60. Ibid. 338-9.
61. Gunn, above n. 36, 311. See, in particular, the list of cases in support of this proposition in n. 28. Gunn notes further that the Commission has declared inadmissible every application brought by a conscientious objector.
62. Evans, above n. 28.
64. Larissis, ¶ 55.
65. Larissis, ¶ 51.
66. Larissis, ¶ 59.
67. Benvenisti, above n. 18, 850.
68. Ní Aoláin and Gross, above n. 16, 18.
69. Twenty-two cases alleging violations of religious freedom have come before the Court since 1993. In five of these cases, the Court has found a violation of Article 9, while in one case the Court has found a violation of both Articles 9 and 14. Of the remaining cases, the Court has found no violation of Article 9 in five cases; has made its determination on some other basis under the Convention in eight cases; has found no violation of Article 10 in relation to religion in two cases; and has recorded a friendly settlement regarding an alleged Article 9 violation in one case.
70. Kokkinakis, above n. 42, ¶ 31.
72. Manousakis, ¶ 48. The Court identified three relevant factors: (1) the excessive discretion that Greek authorities had to estimate the need to open a place of worship; (2) the lack of a specified term to decide on the permit, which could indefinitely delay the application; and (3) the fact that the Greek Orthodox Church intervened in the decision-making process. See also Canea Catholic Church v. Greece, December 16, 1997, where the Court held that governments cannot unreasonably discriminate between religious confessions regarding the requirements they must comply with to be acknowledged as juridical persons, in particular where legal personality is crucial to assert their rights before civil courts.
74. Having decided the case on this part of the Article 9 test, the Court found it unnecessary to examine whether there was a legitimate aim or whether the government’s action was necessary in a democratic society.
77. Efstratiou, ¶ 32.
80. Ibid. at 14.
81. 319 U.S. 624 (1943).
82. 319 U.S. 624, 642 (1943).
83. Circular No. C1/1 of January 2, 1990 which exempted schoolchildren who were Jehovah’s Witnesses from attending religious-education classes, school prayers and Mass, but not national events.
85. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating compulsory school attendance laws as applied to Amish parents who refused on religious grounds to send their children to school); Wooley v. Maynard, 430 U.S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs).
87. Subsequently the Grand Council passed a law providing newly elected members with a choice between the traditional oath and one in which the reference to the Gospels was replaced by the words “on my honour.”
88. See also Thlimmenos v. Greece, 31 E.H.R.R. 15 (2001) (where the Court held unanimously that Greece’s refusal to appoint the applicant, a Jehovah’s Witness, as a chartered accountant due to a prior criminal conviction for refusal on account of his religious beliefs to wear a military uniform, violated Articles 9 and 14).
90. Jewish Liturgical Association Cha’are Shalom Ve Tsedek, ¶ 74.
91. Ibid. ¶ 2 (joint dissenting opinion of Bratza, Fischbach, Thomassen, Tsatsa-Nikolovska, Pantiru, Levits, and Traja JJ.)
92. Manoussakis, ¶ 44.