

## COMMENTS

### ADDRESSING RELIGIOUS INTOLERANCE IN EUROPE: THE LIMITED APPLICATION OF ARTICLE 9 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS.

*In Germany they came first for the Communists,  
and I didn't speak up because I wasn't a Communist.  
Then they came for the Jews,  
and I didn't speak up because I wasn't a Jew.  
Then they came for the trade unionists,  
and I didn't speak up because I wasn't a trade unionist.  
Then they came for the Catholics,  
and I didn't speak up because I was a Protestant.  
Then they came for me,  
and by that time no one was left to speak up.<sup>1</sup>*

#### INTRODUCTION

After eighteen years as a school teacher at a French academy, Mrs. Catherine Guyard suddenly found herself the object of intense scrutiny. Why? The local parent-teacher association had called a special meeting. All parents were encouraged to attend this meeting because as the bulletin stated, "Your children will be entrusted to a school teacher who is a member of Jehovah's Witnesses, who are a sect organization. We invite you to discuss this matter on September 2, 1996, at 8:30 p.m. at the school." As a result of this meeting, Mrs. Guyard was forced to resign. Later she discovered that a tract was being distributed to the parents and posted on school information boards with the purpose, as the judge examining the case noted, "to harm the reputation of Mrs. Guyard and to provoke discriminatory attitudes."<sup>2</sup>

Despite constitutional guarantees<sup>3</sup> and international accords,<sup>4</sup> a growing

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1. BARLETT'S FAMILIAR QUOTATIONS 824 (Emily Morison Beck et al. eds., 15th ed. 1980) (attributing the aphorism to Martin Niemoeller).

2. James McCabe, Testimony at the *Deterioration of Religious Liberty in Europe*, before the Commission on Security and Cooperation in Europe (July 22, 1998) (briefing at 11, on file with author). James McCabe is the Associate General Counsel for the Watch Tower Bible & Tract Society.

3. The fundamental right to free exercise of religion is clearly delineated in the Constitution of every member nation of the European Parliament. ALB. CONST. ch. VII ("Fundamental Freedoms and Human Rights"), art. 2; ANDORRA CONST. ch. I (General Principles), art. 6, § 1, art. 11, § 1; AUS. CONST. art. 14(1)(2), art. 15, StGG, (Austrian Constitution provides that those eight churches legally recognized as churches or religious communities have a right to

concern about “dangerous cults” and religiously motivated suicides<sup>5</sup> has

exercise their religions publicly and together), art. 16, StGG, (whereas their adherents are not legally recognized religious confessions, are allowed to exercise their religion in houses only), art. 63(2)StVst.German (However, all inhabitants of Austria have the right to exercise publicly and privately any kind of religious profession freely as far as exercising it would not contradict the public order or moral good); BELG. CONST. Tit. II (Belgians and Their Rights), art. 19, art. 20; BULG. CONST. (1991) art. 37(1)(2)(Freedom of Religion and Belief); CROAT. CONST. ch. III, pt. 1, art. 14, pt. 2, art. 38, art. 40, art. 41; CYPRUS CONST. pt. I (General Provisions), art. 2(3), art. 18; CZECH REP. CONST. ch. II (Human Rights and Fundamental Freedoms), pt. I, art.15, art. 16; DEN. CONST. Pt. VII, §§ 66-70; EST. CONST. ch. II (Fundamental Rights, Liberties and Duties), art. 40, art. 41; FIN. CONST. pt. II (Fundamental Rights, 17 July 1995/969), § 5, § 9; FR. CONST. Title I (On Sovereignty), art. 2, Title XII (On the Community), art. 77; F.R.G. CONST. art. 4, pt. I, II § GG (guarantees all religious communities the same individual, corporate religious freedom), art. 140, § GG with art. 137, pt. I § WRV (separation from the state), art. 140, § GG with art. 137, pt. III, § WRV (the right to church self-determination); GREECE CONST. pt. II (Individual and Social Rights), art. 13, §§ 1-5; HUNG. CONST. ch. XII, art. 60 §§ 1-4, art. 61, §§ 1-4; ICE. CONST. ch.6, art. 62, art. 63, art. 64; IR. CONST. art. 44 (Religion); ITALY CONST. (Italian Constitution, 1948) art. 8 (Religion), art. 19 (Freedom of Religion), art. 20 (Religious Institutions); LAT. CONST. ch. IV (Rights and Obligations of a Person), art. 12, art. 30, art. 35; LIECH. CONST. ch. IV (General Rights and Obligations of Citizens of the Principality), art. 37; LITH. CONST. ch. 2, art. 26, art. 27; LUX. CONST. ch. II, art. 19, art. 20; MACED. CONST. ch. II, pt. 1 (Civil and Political Freedoms and Rights), art. 9; MALTA CONST. ch. IV (Fundamental Rights and Freedoms of the Individuals), pt. 40(1)(2); MOLD. CONST. ch. II (Fundamental Rights and Freedoms), art. 31(2); NETH. CONST. ch. I (Fundamental Rights), art. 6; NOR. CONST. pt. A (Form of Government and Religion), art. 2; POL. CONST. art. 25, art. 53; PORT. CONST. (Third Revision, 1992) pt. I, title 1, art. 13, § 2, art. 41; ROM. CONST. (1991) Title I, art. 29 (Freedom of Conscience); RUSS. CONST. ch. 2 (Rights and Liberties of Man and Citizen), art. 28; SLOVK. CONST. ch. 2, § II (Basic Human Rights and Freedoms), art. 24; SLOVN. CONST. art. 7, art. 41 (Freedom of Conscience); SPAIN CONST. ch. II, § 1 (Basic Rights and Public Liberties), art. 16; SWED. CONST. ch. 2, art. 1; SWITZ. CONST. art. 49(1)(2), art. 50; TURK. CONST. (1982) ch. IV (Freedom of Religion and Conscience), art. 24; UKR. CONST. ch. II (Human and Citizens' Rights, Freedoms, and Duties), art. 34, art. 35; U.K. CONST. pt. 6, § 18 (Freedom of Religion). See CAROLYN R. WAH, EUROPEAN PARLIAMENTARY ENQUETE COMMISSIONS—JUSTIFICATION OF A TWO-TIERED SYSTEM OF RELIGIOUS FREEDOMS (Lili Cole & Peter Danchin eds., forthcoming Jan. 2000) (manuscript at 25 n.1, on file with the Center for Study of Human Rights, Columbia University).

4. See *Universal Declaration of Human Rights*, G.A. Res. 217 A (III) art. 18 (1948) (visited Nov. 5, 1999) <<http://www.un.org/Overview/rights.html>>; *Convention for Protection of Human Rights and Fundamental Freedoms, Council of Europe, Europ. T.S. No. 5, art. 9, § 1 (as amended by Protocol No. 11, Nov. 1, 1998)* (visited Feb. 25, 1999) <<http://www.coe.fr/eng/legal/txt/5e.htm>> [hereinafter *Convention for Protection of Human Rights*]; *Conference on Security and Co-operation in Europe, Final Act, Helsinki, art. 7, Aug. 1, 1975* (visited Nov. 5, 1999) <<http://www.ihf-hr.org/doc/helsinki75.htm>>.

5. For example, the mass suicide/homicides of 69 members of the Order of the Solar Temple (53 members in Canada and Switzerland in 1994 and 16 members in France in 1995) and the subway gassing in Tokyo by the Aoum group in 1995 prompted the French government to begin inquiries into the activities of religious minorities. See James McCabe & Willy Fautré, Testimony at the *Deterioration of Religious Liberty in Europe*, before the Commission on Security and Cooperation in Europe, 9, 15 (July 22, 1998) (on file with author); see also Kirsty Lang, *Cult 'Suicide' 16 May Have Been Murdered*, SUNDAY TIMES (Paris), Dec. 31, 1995, available in LEXIS, News Library, Bglobe File; see also Massimo Introvigne, *Who is Afraid of Religious Minorities? The Social Construction of a Moral Panic*, (visited Feb. 21, 1999) <<http://www.cesnur.org/panic.htm>> (examines the role of the media in facilitating the rise of the current European anti-cult movement).

fanned the flames of religious intolerance in Western Europe. As a result, official government inquiries are delving into the activities of religious groups perceived to be “dangerous cults” and “psycho-groups.”<sup>6</sup>

In 1995, the French National Assembly became the first European government to establish a Parliamentary Commission on Cults designed to identify and investigate the activities of so-called “sects” and “new religions.” After a year long investigation, the French Parliamentary Commission on Cults issued a final report,<sup>8</sup> identifying 172 religious groups as harmful and dangerous cults and also urging legislative action to curtail the activities of these “cults.”<sup>9</sup> The French government took no affirmative legislative action,<sup>10</sup> but instead established the publicly funded Observatory on Cults (*Observatoire inter-ministériel sur les sectes*), allegedly to alert the public about religious groups the government deemed to be “dangerous” and to issue annual surveillance reports on the activities of the groups enumerated in the report as “cults.”<sup>11</sup> The Parliamentary Report that launched this French effort has no legal authority in France, but is frequently cited, both domestically and internationally, as an official determination that the listed 172 groups are dangerous cults.<sup>12</sup> The result of such report has been an increase in religious intolerance and discrimination aimed against the enumerated groups.

As a result, France, and other countries following France’s lead, have begun to strip minority religious groups of their constitutional protections by reclassifying or redefining those organizations as non-religious entities.<sup>13</sup>

6. See McCabe & Fautré, *supra* note 5, at 6, 9 (testimony of Willy Fautré). Instead of recognizing all spiritual movements as “religions,” European governments have begun to categorize all religious minorities as “sects,” “dangerous cults,” and “psycho cults.” These labels serve to propagate the concept that there exists a legal distinction between traditional, mainstream religions and religious minorities. As such, some governments have argued that international and constitutional guarantees of religious liberty and freedom do not apply to “cults” and “sects” because these groups are not “religions.” See Massimo Introvigne, *Blacklisting or Greenlisting? A European Perspective on the New Cult Wars* (visited Jan. 22, 1999) <<http://www.cesnur.org/greenlist.html>>.

7. See McCabe & Fautré, *supra* note 5, at 34, 39. Belgium and Germany soon followed suit. The Belgium Parliamentary Commission on Sects and the German Enquiry Commission on “So-called Sects and Psychogroups” were formed in 1996. See *id.*

8. The final report, also known as the Guyard Report, was published on January 10, 1996 by the French National Assembly. See *id.*

9. See *id.* Similarly, the Belgium Parliamentary Commission issued a 670 paged report identifying 189 “sects” and recommended the creation of two governmental entities to continue monitoring the enumerated “sects.” See *id.* at 86-87; see also WAH, *supra* note 3 (manuscript at 15); U.S. Dept. of State, *Belgium Country Report on Human Rights Practices for 1997* (visited Feb. 2, 1999) <[gopher://gopher.state.gov:70/00ftp%3ADOS...t3A05%20Europe%and%Canada%3A%20Belgium](http://gopher.state.gov:70/00ftp%3ADOS...t3A05%20Europe%and%Canada%3A%20Belgium)>.

10. See U.S. Dept. of State, *France Country Report on Human Rights Practices for 1998* (visited Aug. 18, 1999) <[http://www.state.gov/www/global\\_human\\_rights/1998\\_hrp\\_report/france.html](http://www.state.gov/www/global_human_rights/1998_hrp_report/france.html)>.

11. See McCabe & Fautré, *supra* note 5, at 31-34; see also U.S. Dept. of State, *supra* note 10.

12. See McCabe & Fautré, *supra* note 5, at 9.

13. See WAH, *supra* note 3 (manuscript at 2-3).

Thus, even widely known and recognized religions are being reclassified through legislative action as non-religious organizations, thereby precluding them from the legal protections state-recognized religious groups receive.<sup>14</sup> If this negative trend continues, European governments will create a two-tiered religious system, benefiting only a few religious groups.<sup>15</sup> Such a system will create "a state-sponsored, ecclesiastical hierarchy that positions 'official' churches" recognized by the state, above "their unofficial counterparts," those minority religious groups ultimately labeled as sects or cults.<sup>16</sup>

To prevent further loss of religious freedom, persecuted religious groups should look to the European Convention of Human Rights and Fundamental Freedoms.<sup>17</sup> The European Convention was established in 1950 by the Council of Europe to protect human rights in Europe.<sup>18</sup> Article 9 of the European Convention safeguards religious freedom by guaranteeing freedom of thought, conscience, and religion to all individuals within the member states.<sup>19</sup> Although described as an integral component of "the most progressive international institutions working for the protection of human rights,"<sup>20</sup> until 1993, the European Court of Human Rights had not specifically addressed Article 9.<sup>21</sup> In *Kokkinakis v. Greece*,<sup>22</sup> and, more recently, in *Manoussakis and Others v. Greece*,<sup>23</sup> the European Court elaborated upon the right of religious freedom. Thus, Article 9 may provide a basis for challenging growing religious intolerance in Europe.

Part I of this Comment examines the growing religious intolerance prevalent in France and other Western European countries. Special attention will be given to the role of the French Parliamentary Commission on Cults, nationally sponsored anti-cult organizations, and recently introduced legislation aimed at promoting and legitimizing religious intolerance. Part II discusses the historical context leading to the creation of Article 9 of the European Convention of Human Rights, as well as the legal tests utilized to

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14. "These legal protections would include, but not be limited to, tax benefits, [the] right to own property, and the right to enter into contracts." *Religious Intolerance in Europe Today: Hearing Before the Commission on Security and Cooperation in Europe*, 105th Cong. 34 (1997) (statement of W. Cole Durham, Professor, Brigham Young University).

15. See WAH, *supra* note 3 (manuscript at 2-3).

16. Derek H. Davis, *Religious Persecution in Today's Germany: Old Habits Renewed*, 40 J. CHURCH & STATE 741, 744 (1998).

17. See European Court of Human Rights, *Historical Background, Organisation, and Procedure* (visited Feb. 25, 1999) <<http://www.dhcour.coe.fr/eng/PRESS/New%20Court/infodoc%20revised%202.htm>> [hereinafter *Historical Background*].

18. See *id.* Although signed in 1950, the European Convention on Human Rights and Fundamental Freedoms became effective in 1953. See *id.*

19. See *Convention for Protection of Human Rights*, *supra* note 4.

20. T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 305, 306 (Johan D. van der Vyver & John Witte Jr. eds., 1996).

21. See *id.* at 309-10.

22. 260 Eur. Ct. H.R. (ser. A) (1993).

23. 23 Eur. Ct. H.R. (ser. A) (1996).

determine whether a particular European nation has committed an Article 9 violation. Part III considers the seminal Article 9 case, *Kokkinakis v. Greece*,<sup>24</sup> as well as the more recently decided *Manoussakis and Others v. Greece*<sup>25</sup> case and their implications on future applicants alleging Article 9 violations. Finally, Part IV explores how the application of Article 9 may serve to alleviate the growing religious intolerance in Western Europe, by assessing the viability of the *Tavernier, Gluchowski, Piechota v. France*<sup>26</sup> petition recently submitted to the European Court of Human Rights.

## I. GROWING RELIGIOUS INTOLERANCE IN FRANCE

*Astonished to find themselves among 172 dangerous cults listed in the French Parliamentary Commission's report, a small non-religious group of mental health professionals called "L'Arbre au Milieu," consulted with their attorney to determine why they were included. During the lengthy trial, the judge managed to elicit from the Parliamentary Commission that they had relied on a list prepared by the Secret Service. The Secret Service, in turn, responded that they had relied on information supplied by a private anti-cult organization. The president of the anti-cult organization replied that he had relied on information provided by the local branches in different cities. In the end, it was determined that the "L'Arbre au Milieu" had been denounced by the local correspondent of the anti-cult organization in a small town. Why? Unhappy with the treatment suggested for her anorexic daughter by a "L'Arbre au Milieu" professional, the correspondent exposed the mental health group as a dangerous cult.*<sup>27</sup>

### A. Development of the French Parliamentary Commission on Cults

The French Constitution explicitly establishes the separation of church and state and protects freedom of religion.<sup>28</sup> Despite these constitutional

24. 260 Eur. Ct. H.R. (ser. A) (1993).

25. 23 Eur. Ct. H.R. (ser. A) (1996).

26. Petition for Petitioners Tavernier, Gluchowski, Piechota v. France, Eur. Comm'n H.R., Sept. 21, 1998 (petition on file with author) [hereinafter *Tavernier*].

27. McCabe & Fautré, *supra* note 5, at 57-58. In October 1998, the court of Rennes (France) declared Bernard Lempert, the founder of "L'arbre du milieu," not guilty of being the guru of a cult. Additionally, Jacques Guyard, rapporteur of the French Parliamentary Commission on Cults, acknowledged that this mental health group should never have been on the French Commission's list of cults. Nevertheless, presently there exists no procedure to remove the group from the original list. See Willy Fautré, *Human Rights Without Frontiers* (visited Nov. 4, 1999) <[http://www.cesnur.org/testi/bryn/\\_fautre.htm](http://www.cesnur.org/testi/bryn/_fautre.htm)>.

28. See RAYMOND ARON, FRANCE: THE NEW REPUBLIC 78, 107 (1960). "France is a Republic, indivisible, secular, democratic, and social. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs." FR. CONST. tit. I, art. 2 (section on sovereignty). "All citizens shall be equal before the law, whatever their origin, their race and their religion. They shall have the same duties." FR. CONST. tit. XII, art. 77 (section on the community). Despite these general provisions, the French State subsidizes private church affiliated schools and provides upkeep for religious buildings constructed prior to 1905. Some cultural associations with religious affiliations may also qualify for these government subsidies. Nevertheless, in three departments of Alsace and Lorraine, the Jewish, Lutheran, Reformed, and Roman Catholic religions enjoy special legal status, as

guarantees, the religiously motivated suicide-homicides of sixty-nine members of the Order of the Solar Temple in Canada, Switzerland, and France<sup>29</sup> spurred the growth of anti-cult organizations<sup>30</sup> and prompted the French National Assembly to establish the Parliamentary Commission on Cults to investigate the activities of so-called “sects” and “new religions.”<sup>31</sup>

Modeled, partly, on the recommendations of what is commonly referred to as the European Parliament’s 1984 Cottrell Report,<sup>32</sup> the French Parliamentary Commission on Cults conducted a year-long investigation and interviewed numerous witnesses during secret hearings.<sup>33</sup> The general secrecy that enshrouded these hearings was viewed as unusual since such steps are generally taken only in matters concerning national defense.<sup>34</sup> Moreover, legal commentators described these hearings as one-sided and distinctly biased towards the anti-cultist’s position.<sup>35</sup> During the twenty closed-door hear-

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well as the privilege of having adherents allocate a portion of their income tax to the recognized church of their choice. See U.S. Dept. of State, *supra* note 10.

29. See McCabe & Fautré, *supra* note 5, at 9. The October 1994 homicide-suicide of 53 members of the Order of the Solar Temple in Switzerland and Canada was soon followed by the December 1995 homicide-suicide of an additional 16 members discovered in the French Alps. See Lang, *supra* note 5. The Order of the Solar Temple is a religious movement believed to have been established in 1976 by spiritual gurus Jo Di Mambo and Luc Jouret. The movement is described as a secret society combining Masonic knighting ceremonies with the pursuit of mystical cosmic forces. See Alex Duval Smith, *This Week Last Year: Signs of Life from the Cult That Kills*, GUARDIAN, Dec. 28, 1996, at 2, available in LEXIS, News Library, Bglobe File.

30. See WAH, *supra* note 3 (manuscript at 2).

31. See McCabe & Fautré, *supra* note 5, at 31-32; U.S. Dept. of State, *supra* note 10.

32. In 1982, the European Parliament commissioned a report investigating the emergence of new religions. The resulting report became known as the Cottrell Report. Although in 1984 the Cottrell Report suggested the establishment of investigatory Parliamentary Committees in each member state of the European Parliament, the report provided no specific guidelines, legal safeguards, or standard procedures. Additionally, the Cottrell Report recommended that the rights of individuals and their religious organizations be subordinated in order to protect the potential victims of unscrupulous religious organizations. As a result, there exists a prevalent lack of uniformity in the manner in which the member states of the European Parliament conduct their investigatory committees. See WAH, *supra* note 3 (manuscript at 2-3).

33. See McCabe & Fautré, *supra* note 5, at 32.

34. See *id.*

35. Massimo Introvigne, Director of CESNUR (Center for Studies on New Religions), argues that these tax-payer funded anti-cult organizations exert tremendous power over Parliamentary Commissions and ultimately have the power to determine which groups will be blacklisted as cults. Anti-cult ideology centers around four main tenets: 1) Cults are not religions, therefore international and constitutional freedom of religion guarantees do not apply to cults; 2) Cults are distinguished from religions because cults use brainwashing techniques to control their adherents, whereas religions respect their members’ freewill; 3) Although most scholars reject brainwashing theories, the real “truth” can be found by interviewing ex-cult members who testify that brainwashing exists. Ex-members are more reliable than scholars because scholars are hired by cults; 4) Not all ex-members are “apostates” (ex-members turned bitter enemies of the movements they have left), therefore private anti-cult agencies are needed to distinguish which ex-members are reliable. See Introvigne, *supra* note 6. The anti-cultist assumption is that large “mainstream” religious are innocuous, and that only new, smaller religious movements pose a danger to society. As such, only minority religious

ings,<sup>36</sup> the Commission failed to call representatives from the academic world such as university professors, ethnologists, sociologists and historians of religions as witnesses.<sup>37</sup> These exclusions permitted the testimony of ex-members or “apostates” of the investigated groups and leaders of the anti-cult movement to receive greater credibility.<sup>38</sup>

In 1996, the Parliamentary Commission on Cults issued a report identifying 172 groups as harmful and dangerous cults and compared these groups to “associations of criminals.”<sup>39</sup> Although allegedly the principal catalyst for the parliamentary inquiry, the report did not list the Order of the Solar Temple as one of the cults under investigation.<sup>40</sup> Instead, the report included among the 172 listed dangerous cult groups: Zen Buddhists, Seventh-Day Adventists, Jehovah’s Witnesses, Quakers, the Church of Scientology, Baháism, Catholic Charismatic Renewal, and most Pentecostal Churches.<sup>41</sup> In response to this lengthy list, the cultural supplement to the well-known French daily newspaper *Le Monde* commented that “religious groups classified as ‘cults’ here [in Europe] would not receive the same treatment elsewhere. Bill Clinton, a Baptist, would be regarded as a cultist in France.”<sup>42</sup>

Notably absent in the lengthy Parliamentary report is the objective criteria applied by the French Commission to evaluate whether a religious organization should be considered a “dangerous cult.” Thus, organizations wishing to challenge their presence on the Commission’s report have found it difficult, if not impossible, to discover why they are listed.<sup>43</sup> Recent attempts to probe into the criteria applied have revealed that in some cases, even the Parliamentary Commission is unable to explain how particular groups came to be listed in the Parliamentary Report.<sup>44</sup>

In addition to the list of 172 cults, the French report also urged legislative action to restrict the activities of the listed religious groups and the establishment of government offices to monitor their activities.<sup>45</sup> Although the French National Assembly rejected the proposed legislation on freedom of

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groups have been targeted. Notably, these same religious organizations under investigation were refused the right to obtain a transcript of the proceedings, as well as the opportunity to present their own witnesses and rebut accusations. See WAH, *supra* note 3 (manuscript at 6-7).

36. See McCabe & Fautré, *supra* note 5, at 32. While the French media insulted and harassed scholars and professors who protested the Parliamentary Commission’s hearings and subsequent report, the media remained silent as to the source of funds used to pay the anti-cultists appearing as witnesses in cult-related court cases and hearings. See Introvigne, *supra* note 6.

37. See McCabe & Fautré, *supra* note 5, at 32.

38. See WAH, *supra* note 3 (manuscript at 8); Introvigne, *supra* note 6.

39. See McCabe & Fautré, *supra* note 5, at 32.

40. See *id.* at 9.

41. See Introvigne, *supra* note 6.

42. *Id.*

43. See McCabe & Fautré, *supra* note 5, at 57-58; Fautré, *supra* note 27.

44. See McCabe & Fautré, *supra* note 5, at 57-58.

45. See U.S. Dept. of State, *supra* note 10.

religion grounds,<sup>46</sup> in 1996 the French government established the publicly funded Observatory on Cults (*Observatoire inter-ministériel sur les sectes*) to allegedly alert the public about groups deemed by the government to be “dangerous” and issue annual reports on the activities of the enumerated religious groups.<sup>47</sup> In October of 1998, French President Jacques Chirac and Prime Minister Lionel Jospin ordered the creation of the Inter-ministerial Mission to Fight Against Sects (*Mission interministerielle de lutte contre les sectes*)<sup>48</sup> to replace the previously established Observatory of Cults because the Observatory had not performed to government expectations.<sup>49</sup> The new publicly funded organization was formed to “predict and fight against actions of sects that . . . threaten public order.”<sup>50</sup> Notably, the newly appointed president of the Inter-ministerial Mission to Fight Against Sects, Mr. Alain Vivien, also serves as the president of the anti-cult movement CCMM (Center Against Mental Manipulations).<sup>51</sup> Soon after his appointment, Vivien openly criticized the Constitution of the United States for permitting limitless religious liberty because the First Amendment “prohibits legislators from making laws on proselytization . . . [and allows] very nefarious interests [to] hide themselves behind an allegedly religious cultism.”<sup>52</sup>

This sentiment was furthered at the Council of Europe’s Parliamentary Assembly Sub-Committee on Human Rights meeting, where Mr. Vivien argued that it was necessary to abandon the label of “new religious movements” and instead refer to unacceptable groups as “coercive sectarian groups” or “criminal coercive sects” in order to clearly identify the totalitar-

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46. *See id.*

47. The Observatory on Cults issued its first report in June 1998. Although the report conceded the impossibility of defining the word “cult,” the report implied that a cult is simply any religious group listed in the Parliamentary Commission’s 1996 report. Additionally, while there were no recourses for an organization to be removed from the Parliamentary Commission’s report, the Observatory of Cults had full discretion to add new movements to the list. Additional recommendations included: advising the Ministry of Education to prevent cults from infiltrating school by regulating any teachers who are members of a cult, instructing the Ministry of Finances to have the Revenue Service regulate the enumerated cults, ordering the National Order of Medical Doctors fight doctors who are “cultists,” instructing notaries public to be cautious in entering deeds involving cults, educating judges as to the evil of cults, and instructing sport and youth groups about the danger of cults. The report not only requested increased taxpayer money be assigned to fight against cults, but also suggested that anti-cult movements be granted legal standing to initiate civil actions against cults and, thus, be permitted to collect monetary damages. *See* Massimo Introvigne, *The French Observatory’s First Yearly Report on Cults: A Disturbing Document* (visited Feb. 21, 1999) <<http://www.cesnur.org/Observatory.htm>>; *see also* U.S. Dept. of State, *supra* note 10.

48. *See Establishing an Inter-Ministerial Mission to Fight Against Sects, Decree No. 98.890, Oct. 7, 1998* (visited Feb. 21, 1999) <<http://www.cesnur.org/decree98.htm>>; *see also* U.S. Dept. of State, *supra* note 10.

49. *See* U.S. Dept. of State, *supra* note 10.

50. *Establishing an Inter-Ministerial Mission to Fight Against Sects, supra* note 48.

51. *See id.*

52. *Anti-Cult Hysteria in France: President of Anti-Cult Mission Attacks First Amendment to the U.S. Constitution* (visited Jan. 22, 1999) <<http://www.cesnur.org/vivien.htm>>.



ian elements to be combated.<sup>53</sup> Due to the negative portrayal of the enumerated 172 religious groups, both by the government sponsored Interministerial Mission to Fight Against Sects and the popular media, scholars have observed that this excessive government intervention in the public discussion on religious beliefs has permitted the French government to adopt the role of religious arbitrator and promote government-sponsored intolerance.<sup>54</sup>

### *B. Impact of the French Parliamentary Commission's Report*

As a result of the Commission's report, the enumerated religious groups have been marginalized and stigmatized by government officials.<sup>55</sup> Members of the religious groups listed in the report have been denied building permits to construct places of worship and the ability to rent public meetings halls. For example, in Lyon (France), municipal authorities refused to rent city facilities to Jehovah's Witnesses although the religious group had been meeting at that particular location for more than twenty years.<sup>56</sup>

Others have faced the loss of their employment specifically due to their religious beliefs.<sup>57</sup> The French Department of Social Welfare refused to renew employment contracts with "childminders" (day care specialists) who are Jehovah's Witnesses because, in their opinion, the "adherence to the faith of Jehovah's Witnesses does not . . . guarantee the safety, the morality, and the conditions of education of the children in their care."<sup>58</sup> This stigma has also extended to custody determinations in divorce proceedings. In eleven separate cases, child custody was denied on the sole basis that the mothers were Jehovah's Witnesses, a suspect religious organization.<sup>59</sup> This climate of intolerance has intensified due to negative media coverage.<sup>60</sup> During the past three years, the popular media has consistently portrayed Jehovah's Witnesses as a religion that breaks up families and whose members have a higher rate of suicide and mental health problems than the general French population.<sup>61</sup>

More recently, the French government has begun to rescind the tax-

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53. Compass Direct, *Global News from the Frontlines, Anti-Cult Movements Threaten Religious Liberty in Europe: Anti-Cult Advocates Influence Council of Europe, Dec. 19, 1997* (visited Feb. 22, 1999) <[http://www.jps.net/hlind/compass/n\\_971219.htm](http://www.jps.net/hlind/compass/n_971219.htm)>.

54. See Laila Al-Marayati, *Freedom of Thought, Conscience, Religion or Belief* (visited Feb. 21, 1999) <[http://www.cesnur.org/USGov\\_oct98.htm](http://www.cesnur.org/USGov_oct98.htm)>.

55. See WAH, *supra* note 3 (manuscript at 24); see also International Helsinki Federation for Human Rights, *Annual Report 1999 on France* (visited Nov. 5, 1999) <<http://www.ihfr.org/reports/ar99/ar99fra.htm>>.

56. See McCabe & Fautré, *supra* note 5, at 51.

57. See *id.*

58. *Id.*

59. See *id.*

60. See *id.* at 11.

61. See *id.* at 50.

exempt status of religious groups enumerated in the Commission's report.<sup>62</sup> The government justified these actions by insisting that French law provides tax exemptions only to recognized religious corporations.<sup>63</sup> Since the 172 groups listed in the Parliamentary Report are categorized as "cults" and not "religions," the Minister of Finance has begun to reclassify these groups as commercial enterprises disqualified from the religious tax exemption status.<sup>64</sup>

In 1998, the French government rescinded the tax-exempt status of Jehovah's Witnesses and imposed a special sixty percent tax on all offerings donated to the Jehovah's Witnesses.<sup>65</sup> Additionally, the French government has claimed the religious group owes back taxes and penalties of over fifty million dollars, although an eighteen month government audit revealed no irregularities or commercial activity committed by the group.<sup>66</sup> Thus, even though a number of French administrative courts have identified Jehovah's Witnesses as a well-recognized religion exempt from habitation and property taxes imposed on non-religious buildings, the French government continues to assess penalties against the religious organization.<sup>67</sup> After assessing the current situation, the International Helsinki Federation's 1998 report noted that Jehovah's Witnesses "have been singled out for close scrutiny" and their "fiscal management has been examined with an intensity that suggests harassment."<sup>68</sup>

Nevertheless, the detrimental effects of the French Parliamentary Report have spread far beyond the French borders. Even among Western European countries, scholars have noted an alarming "cross-border or trans-national effect" resulting from the French Report.<sup>69</sup> For example, although French courts have acknowledged that the 1996 French report is not a legal document, a recent court decision in Geneva (Switzerland) upheld an administra-

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62. Currently, Jehovah's Witnesses and the French Evangelical Pentecostal Church of Besançon are the only two religions to have experienced the rescinding of their tax-exempt status. Both these religions are among the 172 organizations/groups listed in the 1996 Parliamentary Report. *See id.* at 9-10, 15. However, in June 18, 1999 the French National Assembly released a report addressing the finances of the 172 religious groups identified in the 1996 Parliamentary Commission's report. *See* U.S. Dept. of State, *Annual Report on International Religious Freedom for 1999: France*, (released by the Bureau for Democracy, Human Rights, and Labor), Sept. 9, 1999 (visited Nov. 3, 1999) <[http://www.cesnur.org/testi/irf/irf\\_france99.htm](http://www.cesnur.org/testi/irf/irf_france99.htm)>.

63. *See* McCabe & Fautré, *supra* note 5, at 9-10. The French law on manual donations (comparable to the "gift tax" in the United States) or transfer tax, is generally applied only to estates. The law dictates that any deed containing either a declaration by the donee or a judicial acknowledgement of a manual donation is subject to a donation tax. Article 795 of this law provides a tax exemption for donations made to religious corporations. *See id.* at 10.

64. *See id.*

65. *See id.* at 9-10.

66. *See id.*

67. *See id.*

68. International Helsinki Federation for Human Rights, *supra* note 55.

69. McCabe & Fautré, *supra* note 5, at 58.

tive decision not to renew a license to operate a private security agency to a Swiss citizen based solely on the fact that he is a member of the Aumist religion and this religion is listed in the French report as a dangerous cult.<sup>70</sup> The reliance on this report is also seen in numerous discriminatory administrative decisions based on the French list.<sup>71</sup> Following the French trend to reclassify and categorize religious groups, Belgium and Germany recently established similar Parliamentary Commissions.<sup>72</sup> Similarly, Austria passed legislation restricting the registration process needed to obtain governmental recognition of religious entities.<sup>73</sup> Even more alarming is the rising anti-cult attitude permeating Eastern European countries seeking admission into the European Union.<sup>74</sup> These Eastern European applicants to the European Un-

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70. *See id.*

71. *See id.*

72. On March 13, 1996, the Belgium House of Representatives established the Belgium Parliamentary Commission "to elaborate a policy in view of combating illegal practices of the sects and the dangers they represent for the society and for individuals." WAH, *supra* note 3 (manuscript at 7). As a result, the Belgium Commission issued a 670 paged report identifying 189 "sects" and recommending the creation of two governmental entities to continue monitoring the enumerated "sects." *See id.* (manuscript at 15). Similarly, the German Commission, assembled on June 12, 1996, conducted investigatory hearings and produced a 1998 report recommending modifications in association and tax laws as a means of controlling religious and non-profit associations. *See id.* (manuscript at 7, 16); Davis, *supra* note 16, at 754.

73. The original 1874 Austrian "Law on Recognition" of churches recognized 13 Austrian religious organizations. These recognized religions were automatically granted exemption from property taxes, entitlement to state-collected church taxes, the right to engage in religious education, and immunity from securing work or residence permits for foreign religious workers acting as ministers, missionaries, or teachers. Under the 1874 law, in order to apply to receive the "recognized" status, the Government determined whether the applicant religious organization met certain religious criteria, operated in full compliance with the Austrian legal code, and did not practice or preach ideas contrary to accepted social customs. Due to the long delays related to applying under the 1874 law, in December 1996 the Austrian Parliament passed a new law allowing non-recognized religions to seek official status as confessional communities. The new law requires additional criteria, such as having a minimum of 300 members and a 20 year observational period before status can be granted. Nevertheless, yet even when approved, applicants would still be without many of the benefits available to the 1874 "recognized" religions. Not only has the constitutionality of this new Austrian law come under question, but experts argue that the law formalizes a "second-class status" for non-recognized groups. *See* U.S. Dept. of State, *Austria Report on Human Rights Practices for 1998 (released by the Bureau of Democracy, Human Rights, and Labor), Feb. 26, 1999* (visited Aug. 18, 1999) <[http://www.state.gov/www/global/hu...ights/1998\\_hrp\\_report/austria.html](http://www.state.gov/www/global/hu...ights/1998_hrp_report/austria.html)>; *see also* Christopher J. Miner, Comment, *Losing My Religion: Austria's New Religion Law in Light of International and European Standards of Religious Freedom*, 1998 BYU L. REV. 607 (1998).

74. For example, although Article 14 of the Russian Constitution prohibits the establishment of a state or compulsory religion, the new law "On Freedom of Conscience and Religious Association," passed in September 1997, threatens to seriously limit the scope of religious freedom. The Russian law creates a "symbolic ranking" by automatically recognizing and granting "first tier" status to the Russian Orthodox Church, the Muslim religion and Judaism. All other religions wishing to obtain legal recognition must wait a minimum of 15 years to receive legal status. During this waiting period, the applicant religious organization is relegated to a second-tiered status, devoid and precluded from any non-profit tax benefits, the right to own property, the right to enter into contracts, and other legal processes vital to carry

ion may soon challenge the imposed requirement of national respect for human rights. For example, the applicants could argue that other European Union members are currently permitted to legally create two-tiered religious systems which distinguish between religions and cults.<sup>75</sup>

Thus, by re-classifying numerous religious organizations as “dangerous cults,” the French Parliamentary Commission on Cults has fostered and encouraged a spirit of intolerance and suspicion throughout the European Continent. Faced with this growing tide of religious intolerance, some persecuted religious groups have begun to look at possible international remedies. Article 9 of the European Convention on Human Rights provides one such viable means of successfully redressing these constitutional violations.

## II. ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

### A. Historical Perspective

Faced with the atrocities committed in World War II, European countries eager to rebuild their ties to one another formed the Council of Europe.<sup>76</sup> The principle objective of the Council was to draft an accord promoting the maintenance and increased recognition of human rights and fundamental freedoms between the various member states.<sup>77</sup> As a result, in 1950, the Council of Europe ratified the European Convention on Human Rights and Fundamental Freedoms (European Convention),<sup>78</sup> in which the creation of Article 9 figured prominently.<sup>79</sup>

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out religious life. See *Religious Intolerance in Europe Today: Hearing Before the Commission on Security and Cooperation in Europe*, *supra* note 14, at 7, 9, 33-34 (statements by Dr. Ekaterina Smyslova, Chief of the Legal Department, Institute of Religion and Law, Moscow & W. Cole Durham Jr., Professor, Brigham Young University).

75. See McCabe & Fautré, *supra* note 5, at 15.

76. See *About the Council of Europe* (visited Mar. 11, 1999) <<http://www.coe.fr/eng/present/about.htm>>; *Statute of Council of Europe* (visited Mar. 11, 1999) <<http://www.coe.fr/eng/legaltx/1e.htm>>. The Council of Europe was established in London on May 5, 1949, “to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress.” *Statute of Council of Europe*, *supra*. Headquartered in Strasbourg, France, the Council of Europe is currently composed of 41 member states: Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, the “former Yugoslav Republic of Macedonia,” Turkey, Ukraine, and United Kingdom. See *The 41 Member States of the Council of Europe* (visited Oct. 22, 1999) <<http://www.coe.fr/eng/std/states.htm>>.

77. See *Convention for Protection of Human Rights*, *supra* note 4.

78. See *Historical Background*, *supra* note 17. Although signed in 1950, the European Convention on Human Rights and Fundamental Freedoms became effective in 1953. See *id.*

79. Article 9 safeguards religious freedom by guaranteeing freedom of thought, conscience, and religion for all individuals within the member states. See *Convention for Protec-*

Once the European Convention became effective in 1953, all state signatories involved in the ratification became legally bound to abide by the terms and conditions of the treaty.<sup>80</sup> The States must provide effective remedies before a national authority and guarantee the rights and freedoms of their individual citizens without discrimination on any ground.<sup>81</sup> After exhausting all domestic judicial remedies, individuals may file complaints alleging breaches of the European Convention against any of the forty-one<sup>82</sup> signatory states.<sup>83</sup> The power of the European Court of Human Rights to review the judgments of domestic judiciaries and ensure that signatory states take appropriate remedial action (i.e. changing national laws or paying compensation for Convention violations) demonstrates the “democratic belief that certain fundamental rights and freedoms of the individual should not be subordinated to the power or narrow political convenience of the State.”<sup>84</sup>

Prior to November 1998, individuals seeking to initiate judicial proceedings in the European Court had to first file their complaints with the European Commission of Human Rights (European Commission).<sup>85</sup> The European Commission would then evaluate and review the validity of each stated claim.<sup>86</sup> If the European Commission deemed the claim admissible as a violation of the European Convention, the European Commission would refer the matter to the European Court of Human Rights.<sup>87</sup> The Court had the authority to reach a judgment and have it referred to the Committee of Ministers for enforcement.<sup>88</sup>

In 1997, the procedure for initiating judicial proceedings changed.<sup>89</sup> The addition of new signatory states<sup>90</sup> increased the case load and prompted fur-

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*tion of Human Rights, supra* note 4. The Irish delegate to the preparatory sessions of the 1949 Convention for the Protection of Human Rights and Fundamental Freedoms noted that “[c]ivil and religious freedom are but two of the fundamental rights of man . . . If the Council of Europe achieves no other end than the guarantee of those two rights, it will have justified its existence.” Gunn, *supra* note 20, at 307 (quoting statement of Mr. Everett, Council of Europe, 1 COLLECTED EDITION OF THE “TRAVAUX PREPARATOIRES” 103-04 (The Hague 1975)).

80. See James T. Richardson, *Minority Religions, Religious Freedom, and the New-Pan-European Political and Judicial Institutions*, 37 J. CHURCH & STATE 39, 42 (1995).

81. See Simeon J. Ling, *Forty Years of European Jurisprudence on Religious Freedom: The European Court of Human Rights Precedent 1* (Oct. 1998) (unpublished manuscript, on file with the *Rutherford Institute*).

82. See *supra* note 76 and accompanying text.

83. See Richardson, *supra* note 80.

84. *The European Convention on Human Rights* (visited Feb. 25, 1999) <<http://www.dhdirhr.coe.fr/intro/eng/GENERAL/ECHR.HTM>>.

85. See Richardson, *supra* note 80, at 42-43.

86. See *id.*

87. See *id.*

88. See *id.*

89. See *Historical Background, supra* note 17.

90. Notably, 18 of the 41 signatories were added after 1990: Albania, Andorra, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Russian Federation, Slovakia, Slovenia, “the former Yugoslav Republic of Macedonia,” and Ukraine. See *The 41 Member States of the Council of Europe, supra* note 76.

ther delays in the court procedure.<sup>91</sup> This prompted debate on the necessity for reform and, as a result, the Council of Europe ratified Protocol No. 11, which created a single full-time new European Court of Human Rights.<sup>92</sup> Today, all applicants file their petitions directly with the European Court which, in turn, determines the admissibility of a petition.<sup>93</sup>

### B. The Scope of Article 9

Although the European Convention includes several provisions that protect the various facets encompassing freedom of conscience,<sup>94</sup> Article 9 acts as the single most important provision guaranteeing the freedom of conscience, belief, and religion.<sup>95</sup> Identified as one of the essential foundations of a democratic society,<sup>96</sup> Article 9 has been held to be "one of the most vital elements that go to make up the identity of believers and their conception of life . . . [as well as] a precious asset for atheists, agnostics, skeptics and the unconcerned."<sup>97</sup>

Most notably, Article 9(1) describes and guarantees the freedom of thought, conscience and religion as a right belonging to *everyone*.<sup>98</sup> This right includes the liberty to change one's religion or beliefs, practice one's religion alone or in the community and manifest these beliefs in worship, teaching, practice and observance.<sup>99</sup> As such, the European Court has found Article 9 to protect "the sphere of personal beliefs and religious creeds [and] . . . acts which are intimately linked to those attitudes, such as acts of

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91. A survey conducted in 1995 revealed that the average case took five years to work its way through the Convention procedure thereby creating an enormous backlog of cases. See Richardson, *supra* note 80, at 43.

92. See *Historical Background*, *supra* note 17.

93. See *id.*

94. See Gunn, *supra* note 20, at 308-09. For example, Article 10 (Freedom of Expression), Article 11 (Freedom of Assembly and Association), and Article 14 (Prohibition of discrimination). See *id.*

95. The full text of Article 9 of the European Convention reads as follows:

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

2. Freedom to manifest one's religion or belief 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.

*Convention for Protection of Human Rights*, *supra* note 4.

96. See Kokkinakis, 260 Eur. Ct. H.R. (ser. A) at 17, ¶ 31.

97. *Id.*

98. See *Convention for Protection of Human Rights*, *supra* note 4.

99. See *id.*

worship or devotion.”<sup>100</sup>

Nevertheless, Article 9(2) delineates the circumstances in which a government may limit an individual’s freedom to outwardly manifest religious beliefs.<sup>101</sup> To be permitted, the government must prove that the restriction is prescribed by law and considered necessary in a democratic society. In order to be deemed “necessary,” the restriction must further a legitimate aim such as public safety, the protection of public order, health, morals, or the protection of the rights and freedoms of others.<sup>102</sup> Thus, Article 9 establishes a subtle distinction between the absolute freedom of religion and the *manifestations* of religion or beliefs, which may be regulated, subject to the enumerated conditions imposed in Article 9(2).<sup>103</sup>

### C. Application of Article 9 Prior to 1993

In order to determine whether an Article 9 violation has occurred, the European Court follows a two-step analysis.<sup>104</sup> First, the Court evaluates whether the challenged governmental action restricts a right of conscience under Article 9(1).<sup>105</sup> If no identifiable right of conscience is restricted, the Court dismisses the application. Nevertheless, if a restriction is identified, the Court then analyzes whether Article 9(2) permits the restriction.<sup>106</sup>

Despite these measures, the European Commission has accepted and published very few Article 9 rights of conscience and religion claims.<sup>107</sup> Fewer claims have reached the European Court.<sup>108</sup> From 1955 to 1993, the

100. Ling, *supra* note 81, at 6-7 (quoting *C. v. United Kingdom*, 37 Eur. Ct. H.R. at 147 (1983)). Despite seemingly clear and straightforward language, Article 9(1) has been subject to intense interpretation and scholarly debate. Although Article 9 is generally understood to protect the individual’s absolute “right to thought, conscience, and religion,” sometimes known as *forum internum*, the extent to which Article 9 guarantees the right to externally display or act upon these beliefs is more narrowly construed. See P. VAN DIJK & G.F.H. VAN HOOF ET AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 541-54 (1998) (examining the application of Article 9(1)); see also *Arrowsmith v. United Kingdom*, App. No. 7050/75, 19 Eur. Comm’n H.R. 5 (1980) (holding that although the Petitioner’s pacifist beliefs fell “within the ambit of the right to freedom of thought and conscience,” the actual act of distributing anti-military leaflets to British troops was not a “manifestation” of her beliefs because the leaflets contained arguments unrelated to her pacifist views).

101. See Gunn, *supra* note 20, at 309. Similar permissible governmental restrictions are mentioned in Articles 7, 8, 10, and 11 of the European Convention. See *id.*

102. See *Convention for Protection of Human Rights*, *supra* note 4.

103. See W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES* 1, 29 (J.D. van der Vyver & J. Witte, Jr. eds., 1996).

104. As previously discussed, prior to the changes in November 1998, the European Commission would also have applied this two-step analysis when reviewing applications to the European Court. See *Historical Background*, *supra* note 17.

105. See Gunn, *supra* note 20, at 312-15.

106. See *id.*

107. See *id.* at 310.

108. See *id.*

European Commission published only forty-five cases directly involving Article 9 challenges out of 20,000 claims submitted.<sup>109</sup> Of the forty-five cases,<sup>110</sup> the Court determined that an Article 9 violation occurred only once, in *Kokkinakis v. Greece*.<sup>111</sup> Thus, *Kokkinakis* became the first case decided by the European Court on the basis of Article 9. In only one additional case, *Manoussakis and Others v. Greece*,<sup>112</sup> has the Court found a breach of Article 9. Therefore, religious minorities seeking to address the rising religious intolerance in Europe should examine the reasoning and rationale provided in *Kokkinakis* and *Manoussakis* in order to evaluate the potential success of a future Article 9 challenge.

### III. THE EUROPEAN COURT SPEAKS: AN ANALYSIS OF ARTICLE 9 *KOKKINAKIS V. GREECE* AND *MANOUSSAKIS AND OTHERS V. GREECE*

After over forty years of silence, in 1993, the European Court of Human Rights spoke out in behalf of religious freedom in the seminal Article 9 case, *Kokkinakis v. Greece*.<sup>113</sup> Since that time, in only one additional case, *Manoussakis and Others v. Greece*,<sup>114</sup> has the European Court found a breach of Article 9. Taken in conjunction, an analysis of *Kokkinakis* and *Manoussakis* provides useful insight into the substantive tests applied by the European Court to determine Article 9 violations, as well as the potential viability of a present day Article 9 claim to curtail the rising religious intolerance in Europe.

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109. See *id.* at 309-10. Researcher T. Jeremy Gunn, from the National Committee for Public Education and Religious Liberty, was unable to ascertain what percentage of the 20,000 applications raised rights of conscience (Article 9) claims. From this analysis, Gunn concluded, the "European Court has too often treated rights of conscience as an awkward inconvenience to be tolerated rather than as a matter of fundamental importance." *Id.* at 308.

110. Of the 45 cases, only five cases proceeded beyond the initial procedures: *Karnell and Hardt v. Sweden*, App. No. 4733/71, 14 Y.B. Eur. Conv. on H.R. 676 (Eur. Comm'n) (1971); *Darby Case*, 187 Eur. Ct. H.R. (ser. A) (1990); *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) (1993); *Hoffman v. Austria*, 255-C Eur. Ct. H.R. 68 (ser. A) (1993) (Eur. Comm'n); *Grandrath v. Federal Republic of Germany*, App. No. 2299/64, 10 Y.B. Eur. Conv. on H.R. 626 (Comm. Ministers) (1967). See Gunn, *supra* note 20, at 310; *Historical Background*, *supra* note 17 (describing the application procedure). Of those five cases, three resulted in findings that Article 9 violations did not occur. In *Karnell and Hardt v. Sweden*, a successful negotiation between the parties precluded the need for any further judicial proceedings. In *Grandrath v. Federal Republic of Germany*, the Commission found there was no violation of any article of the Convention. In *Hoffmann v. Austria*, both the Commission and the Court found only an Article 8 violation. See Gunn, *supra* note 20, at 310. However, the Court found that only one of the two remaining cases that it reviewed constituted an actual Article 9 violation. The Article 9 violation was found in *Kokkinakis*, whereas in *Darby*, the Court found the church tax to have violated the petitioner's rights under Article 14 (right to equal treatment). See *id.*

111. 260 Eur. Ct. H.R. (ser. A) (1993).

112. 23 Eur. Ct. H.R. (ser. A) (1996).

113. 260 Eur. Ct. H.R. (ser. A) (1993).

114. 23 Eur. Ct. H.R. (ser. A) (1996).



*A. Kokkinakis v. Greece*

As the first case in which the European Court of Human Rights identified an Article 9 violation, *Kokkinakis v. Greece*,<sup>115</sup> provides perception into the factual circumstances that may give rise to an Article 9 violation as well as the limitations that a state may impose on the rights of conscience under the European Convention.<sup>116</sup>

The *Kokkinakis* case involved an elderly Jehovah's Witness couple, Minos and Elissavet Kokkinakis, who visited the wife of the cantor of the local Greek Orthodox church in Sitia, Crete.<sup>117</sup> The cantor's wife invited Mr. and Mrs. Kokkinakis into her home and listened to their religious beliefs and citations from Bible passages. The cantor, upon hearing of the visit, promptly called the police and asked that the Kokkinakis be arrested and prosecuted under the Greek anti-proselytism law.<sup>118</sup> After dismissing the defendants' ob-

115. 260 Eur. Ct. H.R. (ser. A) at 18.

116. See Gunn, *supra* note 20, at 318.

117. See *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 8, ¶ 7.

118. See *id.* at 8, ¶ 8. Religious proselytism is prohibited under both the Greek Constitution and Greek criminal law. The 1975 Greek Constitution establishes the Greek Orthodox Church as the "dominant religion in Greece" (Article 3), while also guaranteeing freedom of religion (Article 13) subject to a prohibition against proselytism:

Freedom of conscience in religious matters is inviolable. The enjoyment of personal and political rights shall not depend on an individual's religious beliefs. There shall be freedom to practice 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.

*Id.* at 11, ¶ 13 (translation of art. 13, ¶¶ 1-2 of the Greek Const.). Proselytism was first made a criminal offense in 1938 during the rule of the Greek dictator Metaxas by section 4 of Law no. 1363/1938. A year later, this law was expanded in section 2 of Law no. 1672/1939, providing:

1. Anyone engaging in proselytism shall be liable to imprisonment and a fine of between 1,000 and 50,000 drachmas; he shall, moreover, be subject to police supervision for a period of between six months and one year to be fixed by the court when convicting the offender. The term of imprisonment may not be commuted to a fine.

2. By "proselytism" is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (*heterodoxos*), with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naïvety.

3. The commission of such an offense in a school or other educational establishment or a philanthropic institution shall constitute a particularly aggravating circumstance.

*Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 12, ¶ 16. (translation of Greek Law No. 1672/1939, § 4). Notably, Minos Kokkinakis, the applicant in the 1993 *Kokkinakis v. Greece* case, was

jection that the anti-proselytism law was unconstitutional, the Lasithi Criminal Court found Mr. and Mrs. Kokkinakis guilty of proselytism and sentenced them each to four months imprisonment, imposed a fine of 10,000 drachmas, and ordered the destruction of their religious booklets.<sup>119</sup>

On appeal, the Crete Court of Appeal quashed Mrs. Kokkinakis's conviction due to a lack of evidence that she had attempted to proselytize Mrs. Kyriakaki.<sup>120</sup> However, the Court of Appeal upheld Mr. Kokkinakis's conviction, but reduced his sentence to three months imprisonment, on the basis that he had taken advantage of Mrs. Kyriakaki's "inexperience, her low intellect and her naïvety" in order to undermine her religious beliefs.<sup>121</sup> Although Mr. Kokkinakis again appealed, challenging the constitutionality of the anti-proselytism law, the Court of Cassation rejected his plea and dismissed the appeal.<sup>122</sup>

Thus, having exhausted all remedies under Greek law, in 1988 Mr. Kokkinakis applied for relief to the European Commission for Human Rights.<sup>123</sup> Finding Mr. Kokkinakis's application to be admissible, the Commission unanimously found that his rights under Article 9 of the European Convention had been violated and referred the case to the European Court.<sup>124</sup> There, by a vote of six to three, the Court found that the anti-proselytism law, as applied to Mr. Kokkinakis, interfered with his freedom to manifest his beliefs and raised an Article 9 violation.<sup>125</sup> As a result, the Court awarded Mr. Kokkinakis \$1700 for his non-pecuniary damages<sup>126</sup> and \$12,000 for costs and expenses.<sup>127</sup>

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also the first Jehovah's Witness to be convicted under the 1938 law. Between 1938 and 1986, Mr. Kokkinakis was arrested more than 60 times for proselytism and, as a result, imprisoned for more than five and a half years. *See id.* at 8, ¶ 6; Gunn, *supra* note 20, at 319-21.

119. *See Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 8-9, ¶ 9.

120. *See id.* at 9, ¶ 10.

121. *Id.* Interestingly, the dissent in both the Crete Court of Appeals and the Court of Cassation argued that Mr. Kokkinakis's conviction should be quashed because there was no evidence to indicate that Mrs. Kyriakaki, a cantor's wife, "was particularly inexperienced in Orthodox doctrine" and, as such, there was insufficient proof to fulfill one of the elements of the anti-proselytism crime. *Id.*

122. *See id.* at 10, ¶ 12.

123. *See id.* at 15, ¶ 25.

124. *See id.* at 15-16, ¶ 26. Mr. Kokkinakis originally applied to the Commission claiming that his conviction for proselytism was in breach of his rights as secured in Article 7, 9, and 10 as well as those delineated in Article 5 ¶1 and Article 6 ¶¶ 1, 2. When declaring the *Kokkinakis* application admissible on Dec. 7, 1990, the Commission excluded the arguments based on Articles 5 and 6, as ill-founded. Although the Commission, on Dec. 3, 1991, unanimously held that there had been a violation of Article 9, no violations were found under Articles 7 or 10. *See id.*

125. *See id.* at 22, ¶ 50.

126. *See id.* at 18, ¶¶ 59-60. A total of 400,000 Greek drachmas or approximately \$1700 U.S. at the 1993 exchange rate. *See Gunn, supra* note 20, at 321.

127. *See Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 23, ¶¶ 59, 60. A total of 2,789,500 Greek drachmas or approximately \$12,000 U.S. at the 1993 exchange rate. *See Gunn, supra* note 20, at 321.

Unlike previous cases,<sup>128</sup> the European Court immediately held that Mr. Kokkinakis's conviction constituted an interference with his "freedom to manifest [his] religion" as delineated in Article 9(1).<sup>129</sup> Next, the Court undertook a three-part inquiry to determine whether Article 9(2) permitted such an interference.<sup>130</sup> First, the Court examined whether the proselytism for which Mr. Kokkinakis was punished was in fact "*prescribed by law*,"<sup>131</sup> thereby providing sufficient notice that the activity was prohibited.<sup>132</sup> Second, the Court assessed whether the Greek government had a "*legitimate aim*" in restricting this activity.<sup>133</sup> Finally, the Court determined whether the restriction, namely, the Greek anti-proselytism law, was of a type that is "*necessary in a democratic society*."<sup>134</sup>

### 1. "*Prescribed by Law*"

The Court began by analyzing whether, as "prescribed by law," there was sufficient notice that proselytism was prohibited.<sup>135</sup> Rejecting the applicant's argument that the lack of objective criteria created an unduly vague law containing "'extendible, catch-all' expressions . . . designed to ensure that non-Orthodox Christians were permanently gagged,"<sup>136</sup> the Court instead found that the wealth of national case law defining "proselytism" as well as the need to keep pace with changing circumstances precluded the necessity for a more precise statute.<sup>137</sup> The dissent disagreed, arguing instead that since the prosecution was able to successfully prosecute Mr. Kokkinakis despite the failure to prove one of the elements of the crime,<sup>138</sup> the law failed to give

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128. Prior to *Kokkinakis*, in order to determine the existence of an Article 9(1) interference, the European Court would first have analyzed whether the applicants' questioned activity (i.e. the Kokkinakis's proselytizing) was a religiously motivated action (within the *forum externum*) or a manifestation of a belief (within the *forum internum*). See Gunn, *supra* note 20, at 322.

129. See *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 18, ¶ 36.

130. See *id.* Prior to *Kokkinakis*, the Court had previously delineated this three-step inquiry in an Article 10(2) freedom of expression case involving obscenity. See Gunn, *supra* note 20, at 322 n.83 (citing Müller and Others, 133 Eur. Ct. H.R. (ser. A) at 20-23, ¶¶ 29-37 (1988)).

131. See *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 18, ¶ 37.

132. See Gunn, *supra* note 20, at 322.

133. See *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 20, ¶ 42. According to Article 9(2), these "legitimate aims" include: "the interests of public safety," "the protection of public order, health, or morals," and "the protection of the rights and freedoms of others." *Convention for Protection of Human Rights*, *supra* note 4.

134. See *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 20, ¶ 45.

135. See *id.* at 18, ¶ 37.

136. *Id.* at 19, ¶ 38.

137. See *id.* at 19, ¶ 40.

138. One of the elements of Greek Law no. 1363/1938, § 4 (amended by Law no. 1672/1939, § 2) prohibiting proselytism, is defined as the undermining of another's religious beliefs "by taking advantage of his inexperience, trust, need, low intellect or naivety." The fact that the cantor's wife herself testified that her discussion with the Kokkinakis did not

proper notice of what was actually prohibited and thus was not adequately “prescribed by law.”<sup>139</sup>

## 2. “*Legitimate Aim*”

Next, the Court considered whether the anti-proselytism law advanced a “legitimate aim” as delineated under Article 9(2).<sup>140</sup> The applicant argued that “religion was part of the ‘constantly renewable flow of human thought’ and to exclude this topic from public debate would result in a ‘strange society of silent animals that [would] think but . . . not express themselves, that [would] talk but . . . not communicate, and that [would] exist but . . . not co-exist.’”<sup>141</sup> Nevertheless, the Court accepted, without elaboration, the Greek government’s rationale that the anti-proselytism law had been established for the “legitimate aim” of protecting the rights and freedoms of its citizens from “attempts to influence them by immoral and deceitful means.”<sup>142</sup>

## 3. “*Necessary in a Democratic Society*”

Finally, the Court examined whether the restriction was of a type that is “necessary in a democratic society.”<sup>143</sup> Under this prong of the three-part test,

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influence her beliefs and that she was the wife of a religious leader in the community, supports the argument that this element was not proven. *See Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 10, ¶ 10; *see also* Gunn, *supra* note 20, at 324. Regarding the determination of this element, Judge Pettiti observed that the law gave the government the right to assess the alleged victim’s weakness in order to punish a proselytizer. Judge Pettiti argued that this element constituted “an interference that could become dangerous if resorted to by an authoritarian State.” *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 25 (Pettiti, J., partly concurring).

139. *See* Gunn, *supra* note 20, at 324. Judge Pettiti’s partly concurring opinion questioned the very legality of the Greek law in that “the haziness of the definition [of proselytism] leaves too wide a margin of interpretation for determining criminal penalties.” *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 26 (Pettiti, J., partly concurring). Discussing the validity of such laws, Judge Pettiti argued the following:

Proselytism is linked to freedom of religion; a believer must be able to communicate his faith and his beliefs in the religious sphere as in the philosophical sphere. Freedom of religion and conscience is a fundamental right and this freedom must be able to be exercised for the benefit of all religions and not for the benefit of a single Church, even if this has traditionally been the established Church or ‘dominant religion’

*Id.* Furthermore, Judge Pettiti perceived that “the only limits on the exercise of this right [should be] . . . where there is an attempt to coerce the person into consenting or to use manipulative techniques.” *Id.* Even in such cases, this action “must be punished in positive law as ordinary criminal offenses. Proselytism cannot be forbidden under cover of punishing such activities [. . .] because attempting to make converts is not in itself an attack on the freedom and beliefs of others or an infringement of their rights.” *Id.*

140. *See Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 20, ¶ 42.

141. *Id.* at 20, ¶ 43.

142. *Id.* at 20, ¶¶ 42, 44.

143. *See id.* at 20, ¶ 45.

the Court attempts to determine whether the measures taken at the national level are justified in principle and proportionate to the perceived danger. In effect, the Court balances the need to protect the rights and liberties of the general population against the conduct for which the applicant stands accused. In doing so, the Court strives to look at the impugned judicial decision against the background of the case as a whole.<sup>144</sup>

Applying this method, the Court in *Kokkinakis* determined that although a government may distinguish between bearing Christian witness and improper proselytism,<sup>145</sup> in this instance, the Greek courts had not sufficiently specified in what way the accused had attempted to convince his neighbor by improper means.<sup>146</sup> As the Greek government had not shown that Mr. Kokkinakis's conviction was justified by a pressing social need, and that additionally, the contested measure did not appear to have been proportionate to the legitimate aim pursued, the Court found that there was a breach of Article 9 of the European Convention.<sup>147</sup>

#### 4. Analysis

As the first case to have identified an Article 9 violation in the forty years of the European Court's existence, the *Kokkinakis* decision is clearly of great importance. Some have suggested that the European Court's decision signals the beginning of a more expansive judicial interpretation of the rights of conscience.<sup>148</sup> Nevertheless, the lack of delineated rationale accompanying the *Kokkinakis* decision suggests that the European Court has continued to treat rights of conscience as "an awkward inconvenience to be tolerated rather than as a matter of fundamental importance."<sup>149</sup> As such, three recurring weaknesses can be identified.<sup>150</sup> First, the *Kokkinakis* case indicates that the European Court has failed to require governments to impose less restrictive burdens on issues of conscience.<sup>151</sup> For example, instead of finding the Greek anti-proselytism law to be *per se* in violation of Article 9,<sup>152</sup> the

144. *See id.* at 21, ¶ 47.

145. *See id.* at 21, ¶ 48. The European Court based its distinction between "Christian witness" and "improper proselytism," on the 1956 World Council of Churches report which defined "true evangelism" "as an essential mission and a responsibility of every Christian and every Church." *Id.* This same report defined "improper proselytism" as a corrupted form of true evangelism which may take the form of offering material or social advantages with a view of gaining new members or exerting improper pressure on people by the use of violence or brainwashing. *See id.*

146. *See id.* at 21, ¶ 49.

147. *See id.* at 21-22, ¶¶ 49-50.

148. *See Gunn, supra* note 20, at 315.

149. *Id.* at 308.

150. *See id.* at 325.

151. *See id.*

152. Judge Pettiti, in his partly concurring opinion, argued that "the current criminal legislation in Greece on proselytism was in itself contrary to Article 9." *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 25 (Pettiti, J., partly concurring). Likewise, authors van Dijk and van Hoof

*Kokkinakis* Court based the Article 9 violation on the fact that the Greek courts had not sufficiently proven all the elements of the anti-proselytism crime of which Mr. Kokkinakis stood accused.<sup>153</sup> The Court's opinion suggests that Mr. Kokkinakis still could have been properly arrested, prosecuted, convicted, fined and jailed for his fifteen minute conversation with the cantor's wife under the current anti-proselytism law.<sup>154</sup> Thus, instead of requiring governments to follow the least restrictive means when limiting the exercise of the fundamental right of freedom of conscience, *Kokkinakis* suggests that the European Court is willing to accept any rationale provided by the government to support the restriction.<sup>155</sup>

Additionally, the *Kokkinakis* decision suggests a bias against non-mainstream religions.<sup>156</sup> Until the *Kokkinakis* case, all applications to the European Commission from religions that could be labeled "new," "minority," or "nontraditional" were denied.<sup>157</sup> Furthermore, even in *Kokkinakis* when examining whether the anti-proselytism law was "justified in principle," the Court held that a distinction could be made between bearing Christian witness and improper proselytism.<sup>158</sup> Thus, the Court implies that separation exists between acceptable Christian witness and other forms of unacceptable proselytism.<sup>159</sup> Finally, this distinction suggests the European Court's continued deference to state-established religions and general unwillingness to analyze laws that benefit religions favored by the State.<sup>160</sup> This contention is supported by the European Commission's opinion that "a State Church system cannot in itself be considered to violate Article 9 of the Convention [because] such a system . . . existed there [in the Contracting State] already when the Convention was drafted and when they became parties to it."<sup>161</sup> Thus, although *Kokkinakis* carries the distinction of being the first European Court case to have found a breach of Article 9, the lack of analysis

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observe that "[i]n concentrating on the *application* of the legislation the Court sidestepped the issue of whether the legislation as such constituted a breach of Article 9." VAN DIJK & VAN HOOF ET AL., *supra* note 100, at 541-54.

153. See *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 21, ¶ 49.

154. See *Gunn*, *supra* note 20, at 325.

155. See *id.* at 325-27.

156. See *id.* at 327.

157. See *id.* at 311. Although *Hoffmann v. Austria* involved a religious minority group, the case was decided on Article 9 grounds by the European Commission, not the European Court. See *Hoffmann v. Austria*, 225-C Eur. Ct. H.R. (ser. A) (1993).

158. See *supra* note 145 and accompanying text.

159. See *Gunn*, *supra* note 20, at 328. Further evidence of a bias towards religious minority groups is found Judge Valticos dissenting opinion. In his dissent, Judge Valticos describes "proselytism" as the "rape of the beliefs of others," and characterizes the 77 year old Mr. Kokkinakis as a "militant Jehovah's Witness, a hardbitten adept of proselytism, a specialist in conversion . . . [who] swoops on [the cantor's wife]." *Kokkinakis*, 260 Eur. Ct. H.R. at 31 (Valticos, J., dissenting).

160. See *Gunn*, *supra* note 20, at 329.

161. Darby Case, 187 Eur. Ct. H.R. (ser. A) at 17, ¶ 45 (1990); see also *Gunn*, *supra* note 20, at 329.

indicates the failure of the Court to consider the rights of conscience as matters of fundamental importance.<sup>162</sup>

### *B. Manoussakis and Others v. Greece*

Since the *Kokkinakis* decision, in only one other case has the European Court identified an Article 9 violation.<sup>163</sup> In *Manoussakis*, the applicants petitioned the Minister of Education and Religious Affairs to grant authorization to use a rented room as a place of worship “for all kinds of meetings, weddings, etc. of Jehovah’s Witnesses.”<sup>164</sup> Despite a three year delay, the Minister of Education and Religious Affairs continued to withhold issuance of the permit on the basis that it had not received all the necessary information from the other government departments involved.<sup>165</sup> Meanwhile, the Heraklion public prosecutor’s office, instigated by the local Ghazi Orthodox Parish Church, commenced criminal proceedings against the applicants for having “established and operated a place of worship for religious meetings . . . without the authorization from the recognized ecclesiastical authorities and the Minister of Education and Religious Affairs.”<sup>166</sup>

162. See Gunn, *supra* note 20, at 306.

163. See *Manoussakis and Others v. Greece*, 23 Eur. Ct. H.R. (ser. A) (1996).

164. *Id.* at 1351, ¶ 7.

165. See *id.* at 1351-52, ¶ 11.

166. *Id.* at 1352, ¶ 12. Greek Law no. 1363/1938 § 1 (as amended by Law no. 1672/1939) required all religious denominations, with the exception of the State sanctioned Greek Orthodox Church, apply to the Minister of Education and Religious Affairs for authorization. The Minister, in turn, would evaluate whether there were “essential reasons” warranting the authorization to build or operate a place of worship:

The construction and operation of temples of any denomination whatsoever shall be subject to authorization by the recognized ecclesiastical authority and the Ministry of Education and Religious Affairs. This authorization shall be granted on the terms and conditions specified by royal decree to be adopted on a proposal by the Minister of Education and Religious Affairs.

As of publication of the royal decree referred to in the preceding paragraph, temples or other places of worship which are set up or operated without complying with the decree . . . shall be closed and placed under seal by the police and use thereof shall be prohibited; persons who have set up or operated such places of worship shall be fined 50,000 drachmas and sentenced to a non-convertible term of between two and six months’ imprisonment.

*Id.* at 1354, ¶ 21 (quoting Greek Law no. 1363/1938, § 1 (as amended by Law no. 1672/1939)). The Royal Decree of 20 May/2 June 1939 § 1 (3) delineates the process by which applicants request authorization to build or operate a place of worship. Interestingly enough, the State sanctioned Greek Orthodox Church is exempt from this application process:

1. To obtain an authorization for the construction or operation of temples not subject to the legislation on temples and priests of parishes belonging to the Greek Orthodox Church, within the meaning of Section 1 of Law no. 1672/1939, the following steps must be completed:

(a) An application shall be submitted by at least fifty families, for more or

The Heraklion Criminal Court acquitted the applicants on the ground that "in the absence of any act of proselytism, followers of any faith are free to meet even if they do not have the requisite authorization."<sup>167</sup> On appeal by the Heraklion prosecution, the court reversed the original decision and sentenced each of the applicants to three months imprisonment and fined them each 20,000 drachmas.<sup>168</sup> The applicants appealed to the Court of Cassation arguing that the requirements to register a place of worship were contrary to the Greek Constitution<sup>169</sup> and Article 9 and 11 of the European Convention.<sup>170</sup> The Court of Cassation dismissed their appeal on the grounds that the regulatory duties of the Minister of Education and Religious Affairs did not violate the free exercise of religion as these duties were in place merely to ensure that the statutory conditions to grant authorization were met.<sup>171</sup>

The applicants subsequently applied to the European Commission<sup>172</sup> and their petition was deemed admissible. Soon after, the Commission unanimously expressed the opinion that there had been a breach of Article 9 and referred the case to the European Court.<sup>173</sup> Dismissing the Greek government's contention that the applicants had failed to exhaust domestic remedies,<sup>174</sup> the Court proceeded to identify an interference with the exercise of

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less the same neighborhood and living in an area at a great distance from a temple of the same denomination, it being assumed that the distance makes it difficult for them to observe their religious duties. The requirement of fifty families shall not apply to suburbs or villages.

(b) The application shall be addressed to the local ecclesiastical authorities and must be signed by the heads of the families, who shall indicate their addresses. The authenticity of their signatures shall be certified by the local police authority, which following an inquiry on the ground shall attest that the conditions referred to in the preceding sub-paragraph are satisfied.

(c) The local police authority shall issue a reasoned opinion on the application. It shall then transmit the application, with its opinion, to the Ministry of Education and Religious Affairs, which may accept or reject the application according to whether it considers that the construction or use of a new temple is justified or whether the provisions of the present decree have been complied with.

*Id.* at 1355, ¶ 23 (citing the Royal Decree of 20 May/2 June 1939, § 1).

167. *Id.* at 1352, ¶ 13.

168. *See id.* at 1352, ¶ 15. Approximately \$100 U.S. at the 1996 exchange rate. *See id.*

169. GREEK CONST. pt. II (Individual and Social Rights), art. 13, §§ 1-5.

170. *See Convention for Protection of Human Rights, supra* note 4.

171. *See Manoussakis*, 23 Eur. Ct. H.R. (ser. A) at 1353, ¶ 17.

172. Applicants alleged violations of Articles 3 and 5, Article 6 taken together with Article 14, as well as Articles 8, 9, 10, and 11 and Article 1 of Protocol No. 1. The application was declared admissible based solely on Article 9. *See Manoussakis*, 23 Eur. Ct. H.R. (ser. A) at 1358, ¶¶ 28-29.

173. *See id.* at 1358, ¶ 29.

174. *See id.* at 1358-60, ¶¶ 31-33. The Court rejected the Government's argument that the applicants had failed to exhaust domestic remedies on the basis that the applicants' application for authorization for a place of worship had been "left in a state of uncertainty" for over 16 years. The Court additionally noted that "the authorities did not in practice always



freedom to manifest religion under Article 9(1). As such, the European Court set about analyzing this interference under the three-prong test set forth in *Kokkinakis*.<sup>175</sup>

### 1. "Prescribed by Law"

The applicants challenged the substantive provisions of the Greek law as not adequately "prescribed by law" because of the "general and permanent prohibition on the establishment of a church or a place of worship of any religion other than the Orthodox religion."<sup>176</sup> As this legal prohibition could only be lifted once reviewed and authorized by the Minister of Education and Religious Affairs, the applicants argued that this lengthy process constituted an impediment to freedom of religion because it permitted a wide range of discretionary abuse due to the lack of affirmative conditions of review and the time constraints imposed.<sup>177</sup> Despite these arguments, the Court did not rule on whether the interference was "prescribed by law,"<sup>178</sup> but merely indicated that "in any event, it [the Greek law] was incompatible with Article 9 of the Convention on other grounds."<sup>179</sup>

### 2. "Legitimate Aim"

Next, the government contended that the challenged law served the "legitimate aim" of fostering public order and the rights and freedoms of others.<sup>180</sup> National support for the Greek Orthodox Church, the government alleged, promoted "public order" since the Church had kept alive the national conscience and Greek patriotism during periods of foreign occupation.<sup>181</sup> Additionally, the government argued that to maintain public order it was necessary to protect its citizens from various sects manifesting their ideas through "unlawful and dishonest" means.<sup>182</sup>

Although the Court recognized that individual States are permitted to

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comply with the decisions of the Supreme Administrative Court." *Id.* at 1360, ¶ 33.

175. 260 Eur. Ct. H.R. (ser. A) at 18, ¶ 36.

176. *Manoussakis*, 23 Eur. Ct. H.R. (ser. A) at 1361, ¶ 37.

177. *See id.* at 1361-62, ¶¶ 37, 38.

178. *See id.* at 1362, ¶¶ 37-38. In his concurring opinion, Judge Martens argued that the case would have been best decided on the basis of the "prescribed by law" prong, as the applicants' complaint was one of general, not individual, injustice (i.e., the general obstruction to obtaining authorization for a place of worship for Jehovah's Witnesses). Judge Martens suggested that this approach is compatible with the Court's general belief that the "prescribed by law" analysis should include an assessment of the quality of the law invoked as a justification for the interference in question. As such, Judge Martens would find the Greek law (no. 1363/1938) to be *per se* incompatible with Article 9. *See id.* at 1369, ¶¶ 1-3 (Martens, J., concurring).

179. *Id.* at 1362, ¶ 38.

180. *See id.* at 1362, ¶ 39.

181. *See id.*

182. *See id.*

verify whether a particular organization is carrying on harmful activities under the guise of pursuing religious aims, it also noted that Jehovah's Witnesses had already been defined as a "known religion" under Greek law.<sup>183</sup> Nevertheless, the Court concluded with no further analysis that the challenged law pursued the "legitimate aim" of promoting public order.<sup>184</sup>

### 3. "Necessary in a Democratic Society"

In determining whether the challenged law is "necessary in a democratic society," the Court first analyzed whether the measures taken at the national level were justified in principle, and second, whether the restriction imposed was proportionate to the legitimate aim pursued pursuant to Article 9(2).<sup>185</sup> Due to the blatant restrictions imposed on freedom of religion, the Court indicated that the Greek law called for "very strict scrutiny by the Court."<sup>186</sup>

When examining whether the Greek law was justified in principle, the Court noted that these measures "allow[ed] far-reaching interference by the political, administrative and ecclesiastical authorities with the exercise of religious freedom," due to the virtually unfettered discretion conferred upon government officials.<sup>187</sup> Despite the contention that the Minister of Education and Religious Affairs was under a strict duty to grant authorization once the three conditions in Article 13 of the Greek Constitutional were satisfied,<sup>188</sup> the Court noted that the Minister's discretionary ability to defer his reply indefinitely<sup>189</sup> or refuse his authorization without further explanation indicated otherwise. As such, the Court dictated that the Greek law was consistent with Article 9 only in so far as it permitted the Minister to verify whether the

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183. See *id.* at 1362, ¶ 40. By distinguishing "movements . . . [conducting] activities which are harmful to the population" from "known religions," such as Jehovah's Witnesses, the Court implicitly suggests that a government may be permitted to give preferential treatment to State-recognized religions. *Id.*

184. See *id.* Judge Martens, in his concurring opinion, observed that when a State-sanctioned religion exists, "public order arguments may easily disguise intolerance." *Id.* at 1369, ¶ 6 (Martens, J., concurring).

185. See *id.* at 1364, ¶ 44.

186. *Id.* The concurring opinion by Judge Martens observed that "the substance of the 'necessary in a democratic society' is a balancing exercise of the elements of the individual case." *Id.* at 1369, ¶ 2 (Martens, J., concurring). Thus, it would appear that this prong balances the government's perceived need for the law against the impact that said law would have on the applicant (the individual). See *id.*

187. *Id.* at 1364, ¶ 45.

188. See *id.* at 1365, ¶ 46. Article 13 required the following three conditions: the applicant must be from a known religion, there must be no risk of prejudicing public order or public morals, and there must be no danger of proselytism. See *id.* (citing the GREEK CONST. art. 13, ¶ 2).

189. See *id.* at 1364, ¶ 45. For example, although Mr. Manoussakis and his companions had applied for the Minister's authorization in March 1983, the Court noted that "to date [August 1996] . . . the applicants have not received an express decision." *Id.* at 1366, ¶ 51. Thus, the applicants had waited 13 years and still received no reply. See *id.*

formal Constitutional conditions were satisfied.<sup>190</sup> Thus, the Court forcefully held that “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 are legitimate.”<sup>191</sup>

When analyzing whether the restriction imposed is proportionate to the legitimate aim pursued pursuant to Article 9(2), the Court observed a “clear tendency on the part of the administrative and ecclesiastical authorities to use these provisions to restrict the activities of faiths outside the Orthodox Church.”<sup>192</sup> As a result, the Court rejected the government’s reliance on the applicants’ failure to comply with a legal formality as a basis for justifying their conviction. The Court also found the degree of severity of the sanction to be immaterial.<sup>193</sup>

Thus, the Court unanimously found an Article 9 violation on the basis that “the impugned conviction had such a direct effect on the applicants’ freedom of religion that it cannot be regarded as proportionate to the legitimate aim pursued, nor, accordingly, as necessary in a democratic society.”<sup>194</sup>

#### 4. Analysis

The *Manoussakis* decision provides some optimism as to the Court’s growing willingness to analyze cases alleging Article 9 violations. Unlike the divided *Kokkinakis* decision,<sup>195</sup> the *Manoussakis* Court unanimously found a breach of Article 9.<sup>196</sup> The inclusion of detailed rationale guiding the reader through the Court’s analysis of the parties’ arguments also suggests an increasing awareness by the Court of the need to define the scope of Article 9 for future petitioners.

Despite the unanimous decision, the *Manoussakis* decision reflects the European Court’s continued deference to state-established religions. As in *Kokkinakis*, the *Manoussakis* Court declined to find the Greek registration law to be *per se* in violation of Article 9, notwithstanding the “clear tendency on the part of the administrative and ecclesiastical authorities to use these provisions to restrict the activities of faiths outside the Orthodox

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190. *See id.* at 1365, ¶ 47. The concurring opinion of Judge Martens advocated the stance that the “prior authorization” requirement to open places of worship should in no way “enable authorities to evaluate the tenets of the applicant community,” rather “authorization should always be given, unless very exceptional, objective and insuperable grounds of public order make that impossible.” *Id.* at 1369, ¶ 6.

191. *Id.* at 1365, ¶ 47.

192. *Id.* at 1365, ¶ 48.

193. *See id.* at 1366, ¶ 52.

194. *Id.* at 1366, ¶ 53. The Court awarded 4,030,100 drachmas (approximately \$17,000 U.S. at the 1996 exchange rate). *See id.*

195. *See Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 24. The Court in *Kokkinakis* found an Article 9 violation by a vote of six to three. *See id.*

196. *See Manoussakis*, 23 Eur. Ct. H.R. (ser. A) at 1367.

Church.”<sup>197</sup> By upholding the Greek law, the European Court validated the Greek constitutional provision requiring all religious groups, except for the state sponsored Orthodox Church, to register their places of worship. This rationale suggests that had the Minister of Education and Religious Affairs more efficiently processed the place of worship applications for religious minorities, the Greek government could validly waive this requirement for the Greek Orthodox Church while continuing to demand that all other religious minorities duly register. Thus, instead of requiring governments to uniformly apply registration requirements, the *Manoussakis* decision reflects a continued deference to state sponsored religions.

Despite the continued deference, the inclusion of detailed rationale has permitted the rights encompassed in Article 9 to become more clearly defined, thereby allowing future applicants greater opportunity to submit successful claims to the European Court of Human Rights.

### C. The Legacy of *Kokkinakis* and *Manoussakis*

As a result of the *Kokkinakis* and *Manoussakis* decisions, member states charged with Article 9 violations have shown an increased willingness to seek the conciliatory resolution delineated in Article 38 of the European Convention.<sup>198</sup> Article 38 encourages the respective parties to attempt to formulate a friendly settlement.<sup>199</sup> Parties willing to negotiate not only accelerate the resolution process, but also actively participate in forging a mutually beneficial agreement in accord with Article 9 principles.

The viability of Article 38 is illustrated by the success of a recent friendly settlement reached on March 9, 1998 between the Christian Association of Jehovah’s Witnesses and Bulgaria.<sup>200</sup> The applicant association ap-

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197. *Id.* at 1365, ¶ 48.

198. The full text of Article 38 (previously numbered Article 28, prior to the enactment of Protocol 11), “Examination of the case and friendly settlement proceedings” reads as follows:

1. If the Court declares the application admissible, it shall:

(a) pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;

(b) place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.

2. Proceedings conducted under paragraph 1b shall be confidential.

*Convention for Protection of Human Rights, supra* note 4.

199. See VAN DIJK & VAN HOOF ET AL., *supra* note 100, at 178-92.

200. See European Commission of Human Rights, *App. No. 28626/95, Christian Association Jehovah’s Witnesses against Bulgaria, Report of the Commission (adopted Mar. 9, 1998)* (visited May 30, 1999) <<http://www.dhcour.coe.fr/hudoc/Vie...icmode=&Related-Mode=0&X=530204815>>.

plied to the European Commission after the Bulgarian Council of Ministers refused to re-register the religious association under the amended Bulgarian law and the Bulgarian Supreme Court dismissed subsequent appeals.<sup>201</sup>

Once the petition was declared admissible, the European Commission invited the parties to negotiate a friendly settlement in accord with Article 38 of the Convention. The exchange of correspondence and proposals soon led to several meetings and conferences between the parties, culminating in a friendly settlement approved by the European Commission on March 9, 1998.<sup>202</sup> The settlement permitted the applicant association to duly register<sup>203</sup> and established the framework for future conferences to address and resolve arising concerns.<sup>204</sup>

The growing awareness of the responsibilities delineated in Article 9 is similarly illustrated by the recent friendly settlement reached between Mr. Tsavachidis and Greece.<sup>205</sup> After approving the settlement achieved by the *Tsavachidis* applicant, the court noted that the *Kokkinakis* and *Manoussakis* "rul[ings] under Article 9 of the Convention . . . clarified the nature and extent of the Contracting States' obligations."<sup>206</sup> Thus, the friendly settlements

201. *See id.* The applicant had duly registered with the Bulgarian government in 1991, as required under the Persons and Family Act. In 1994, this same Act was amended, requiring religious associations to re-register subject to the consent of the Council of Ministers. The applicant applied to the Council of Ministers to re-register. After some delay, on June 28, 1994 the Council of Ministers refused the authorization with the sole rationale that the decision was based on the amended Act. *See id.* The applicant association did not receive an official copy of this decision, but only became aware of the decision, when police action was taken in the town of Haskovo on August 5, 1994. *See id.* On September 15, 1994 the applicant appealed the Ministers' decision, but the Supreme Court subsequently dismissed the appeal. As a result of the Supreme Court decision, the applicant became subject to arrests, dispersal of meetings held in public and private locations and confiscation of religious material. *See id.* Thus, the applicant applied to the European Commission of Human Rights alleging breaches of Articles 6, 9, 10, 11, and 14. *See id.*

202. *See id.*

203. *See id.* In exchange for withdrawing the application to the European Commission, the Bulgarian government resolved to provide alternative civil service to conscientious objectors. Additionally, the applicant association agreed to refrain from dictating health care to its members (although it had not previously done so), thus assuring the full exercise of free will and liberty of choice of its members. *See id.* The Bulgarian government additionally promised to officially register the Christian Association of Jehovah's Witnesses as a religious organization, as long as said organization continued to abide by all national laws applying to religious entities. *See id.* The government also agreed to withdraw all arrests or accusations previously filed against members of the applicant association and the Director of Religious Affairs resolved to abide by all the terms of the friendly settlement. *See id.*

204. *See id.* As a result of the friendly settlement, on May 17, 1999, the parties held their first joint conference in Sofia (Bulgaria). Interview with James McCabe, Esq., in San Diego, Cal. (May 31, 1999).

205. *See* European Court of Human Rights, *Case of Tsavachidis v. Greece*, App. No. 28802/95, Jan. 21, 1999 (visited Feb. 24, 1999) <<http://www.dhcour.coe.fr/hudoc/Vie...icemode=&RelatedMode=0&X=225030911>>. Mr. Tsavachidis applied to the European Court asserting that the Greek National Intelligence Service kept him under surveillance because he was one of Jehovah's Witnesses and he was responsible for organizing religious meetings of his faith. *See id.*

206. *Id.*

reached in Bulgaria and Greece suggest that the Court's prior "clarification" served to emphasize and remind member states of their obligation to abide by the principles expressed in Article 9. Ideally, as the European Court demonstrates an increasing willingness to analyze alleged Article 9 violations, member states will strive to rectify incidents of religious intolerance on a national level instead of waiting until future petitioners apply to the European Court.

#### IV. APPLYING ARTICLE 9 TO ADDRESS RELIGIOUS INTOLERANCE IN FRANCE

Despite advances in the application of Article 9, an immediate solution to the current infringement of religious freedom in France is unforeseeable due to the lengthy legal process. To submit an application to the European Court of Human Rights, petitioners must first exhaust all domestic remedies as required by Article 35 of the European Convention.<sup>207</sup> As such, the respondent state is provided the opportunity to redress the alleged violation within the framework of its own domestic legal system.<sup>208</sup> However, due to the lengthy legal process,<sup>209</sup> targeted religious minorities may suffer irreparable damage before their petitions are brought before the European Court.<sup>210</sup> Thus, in order to attempt to expedite the legal procedure, persecuted religious minorities in France have sought both domestic and international

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207. The full text of Article 35 (previously numbered Article 26, prior to the enactment of Protocol No.11) reads as follows:

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that is anonymous; or is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.
4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

*Convention for Protection of Human Rights, supra* note 4.

208. See VAN DIJK & VAN HOOF ET AL., *supra* note 100, at 127.

209. In 1995, the average case took five years to work its way through the Convention procedure. See Richardson, *supra* note 80, at 43. In *Kokkinakis*, approximately seven years elapsed between Mr. Kokkinakis's original 1986 proselytism conviction and the 1993 European Court decision. Likewise, in *Manoussakis*, the Petitioners waited 10 years to be heard by the European Court. See *supra* Part III.A-B.

210. See U.S. Dept. of State, *supra* note 10. Discriminatory tax claims asserted against the Church of Scientology in 1994-1995 forced several Scientology churches into bankruptcy in France. See *id.*

remedies. An examination of the *Tavernier, Gluchowski, Piechota v. France*<sup>211</sup> petition recently submitted to the European Court of Human Rights, illustrates the domestic and international hurdles faced as religious minorities seek legal remedies to curtail the increased religious intolerance in Europe.

#### A. Domestic Remedies in France

After forty years of silence, in 1993 the European Court first articulated and defined the rights expressed in Article 9.<sup>212</sup> The recent *Kokkinakis* and *Manoussakis* decisions serve to reinforce the responsibility of each member state to safeguard the religious freedom of all European citizens.<sup>213</sup> Therefore, as a prominent founding member state of the European Convention,<sup>214</sup> the French judiciary should adhere to the principles embodied in Article 9 when reviewing petitions involving the discrimination and persecution of religious minorities.<sup>215</sup> Ideally, French courts will respond to the European Court's interpretation of Article 9 and the friendly settlements reached in Bulgaria and Greece and seek resolution on a national level.<sup>216</sup>

Nevertheless, recent legal challenges in France indicate that French courts are unwilling to address the issue of increased national religious intolerance.<sup>217</sup> Despite some success in pursuing libel and slander suits against representatives of the national anti-cult organization,<sup>218</sup> French courts have

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211. See *Tavernier*, *supra* note 26.

212. See *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 22.

213. See *id.*

214. See *supra* note 76 and accompanying text.

215. The French Constitution, under Article 55, automatically incorporates ratified international treaties into the French national legal system and grants treaties and international agreements precedence over national legislation. As such, Article 9 would take precedence over all French legislation with the exception of the French Constitution. See WALTER CAIRNS & ROBERT MCKEON, INTRODUCTION TO FRENCH LAW 13-14 (1995). In reality, although the *Court de Cassation* has accepted treaties over national *lois* (law) since 1975, the *Conseil d'Etat* (the highest French court of administrative jurisdiction) did not accept the supremacy of treaties over domestic legislation until 1989. See VAN DIJK & VAN HOOF ET AL., *supra* note 100, at 17. However, even if a French court were to rule in favor of a petitioner of a religious minority, this outcome might not impact future cases brought by religious minorities because French courts generally do not rely on jurisprudence, as does the legal system in the United States. See CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 41-43 (1996).

216. See *supra* Part III.

217. See *Tavernier*, *supra* note 26.

218. See *id.* (petition at 7). Numerous slander and libel suits have successfully been brought against representatives of the national anti-cult organization UNADFI by the national Association of Jehovah's Witnesses in France, under the French legislation of 1881 governing the freedom of the press. For example, on January 15, 1997, the chairwoman of the UNADFI branch in Northern France, Mrs. Lydwine Ovigneur, was found guilty of slander by the Appeal Court of Douai for having stated on public radio that "as for the guru, the director, the group in Brooklyn that directs Jehovah's Witnesses, it's not a guru, it's a group of 12 individuals. In my opinion, those people are drug dealers, procurers (pimps), and pro-slavery." *Id.*

demonstrated a general reluctance to abide by constitutional,<sup>219</sup> statutory,<sup>220</sup> and international<sup>221</sup> provisions protecting freedom of religion.

Recently, the *Conseil d'Etat*,<sup>222</sup> the highest French court of administrative jurisdiction, rejected a complaint submitted by Petitioners Tavernier, Gluchowski and Piechota, that alleged that the French government had violated the Petitioners' right to freedom of religion.<sup>223</sup> The complaint stated that the government's sponsorship of the anti-cult organization "National Union of Associations for the Defense of the Family and the Individual" (*Union Nationale des Associations pour la Defense des Familles et de l'Individu*) (UNADFI)<sup>224</sup> violated the Petitioners' right to freedom of religion.<sup>225</sup> The Petitioners argued that the endowment of official government recognition and "public interest" status to the UNADFI constituted a blatant government

219. See *supra* note 28 and accompanying text.

220. The French law (*loi*) of 1905 delineates the separation between Church and State in the following provision:

Sont punis d'une amende de 10,000 Francs, ceux qui, par voies de fait, violences ou menaces contre un individu, soit en lui faisant craindre de perdre son emploi ou d'exposer un dommage à sa personne, sa famille, ou sa fortune, l'auront déterminé à exercer ou à s'abstenir d'exercer un culte, à faire partie ou à cesser de faire partie d'une association cultuelle, à contribuer ou à s'abstenir de contribuer aux frais d'un culte.

FR. law of 1905, Dec. 9, 1905, art. 31.

221. See *supra* notes 4 and 215 and accompanying text.

222. See CAIRNS & MCKEON, *supra* note 215, at 40-42. As the supreme court within the administrative hierarchy, the *Conseil d'Etat* acts as a court of first instance, a court of appeal, and a court of *cassation* (to review a point of law). See *id.* at 41; see also DADOMO & FARRAN, *supra* note 215, at 89-95.

223. See *Tavernier*, *supra* note 26 (petition at 4).

224. See *id.* As a result of the report published by the Enquete Commission in 1996, the French government issued an administrative regulatory decree on April 30, 1996 granting official recognition to the "National Union of Associations for the Defense of the Family and the Individual" as a charitable organization serving the public interest. The UNADFI's alleged purpose is "to prevent and defend families and individuals from the practices exercised by groups, movements and organizations having the nature of destructive cult groups/sects." *Id.* The official government recognition confers upon the UNADFI's greater legal capacity, authorization to acquire property free of charge, greater flexibility in property management, and exemption from the value-added tax, the trade tax, the tax on donations and testamentary bequests, and the corporation tax. See *id.* In effect, the Petitioners argue, this specific tax regime becomes a form of government "subsidy" and economic assistance to the anti-cult organization. In addition to the economic benefits, the government recognition of the UNADFI as "serving the public interest" conveys a special "seal of approval" which legitimizes and provides respectability in the public's eye and leads to general public support. See *id.*

225. See Supplementary Petition for Tavernier, Gluchowski, Piechota v. France, Eur. Comm'n H.R., Nov. 4, 1998 (supplementary pleading at 4, on file with author). On March 23, 1998, the *Conseil d'Etat* rejected the petition submitted by Petitioners Mr. Georges Tavernier, Mr. Louis Piechota, and Mr. Philippe Gluchowski and issued a decision holding that the "official recognition of an association as a charity serving the public interest does not of itself infringe upon freedom of conscience and religion." *Id.* (supplementary pleading at 2). The absence of rationale supporting the *Conseil d'Etat*'s decision prompted the Petitioners to apply to the European Court of Human Rights on September 21, 1998, alleging an infringement of their rights as outlined in Article 9, 11, and 13 of the European Convention. See *id.*



sanction of the UNADFI's vigorous campaign to fight "destructive cult groups/sects."<sup>226</sup> Additionally, the Petitioners alleged that the government sponsorship had embroiled the French government in the debate about what criteria distinguish a religion from a cult group or sect.<sup>227</sup> Nevertheless, the *Conseil d'Etat* held that "official recognition of an association as a charity serving the public interest does not of itself infringe upon freedom of conscience and religion."<sup>228</sup> The court failed to state whether state sponsorship of an organization devoted to campaigning and targeting religious minorities constitutes an infringement of protected religious liberties.<sup>229</sup> Therefore, although France espouses to be a fervent supporter of religious freedom, the current prevalent anti-cult sentiment has made it increasingly difficult, if not impossible, for religious minorities to successfully defend their right to religious freedom on a national level.<sup>230</sup> Thus, religious minorities seeking international remedies have applied to the European Court of Human Rights.

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226. *Tavernier, supra* note 26 (petition at 5-7). This campaign includes: writing to the Mayor in Lens urging him not to rent the Bollaert stadium to Jehovah's Witnesses, denying and opposing the accounts of surviving Jehovah's Witnesses who were deported and interned in Nazi concentration camps, actively interfering with efforts to obtain places of worship, writing and distributing a letter to non-Witnesses dissuading them from studying the Bible with Jehovah's Witnesses, intervention in divorce and child custody proceedings when one spouse is a Jehovah's Witness, and alerting and attracting media support for the UNADFI's anti-Witness campaigns. *See id.*

227. *See id.*

228. *Id.* (petition at 2).

229. *See id.* (petition at 2-4).

230. Despite the legal difficulties, religious minorities have continued to pursue domestic remedies in the French courts under the following French Penal Codes sections:

Article 431-1 [1]: Hindering, in a deliberate manner and with the use of threats, the exercise of the rights of expression, work, assembly or demonstration is punishable by one year of misdemeanor imprisonment and by a fine of 100,000 francs.

Article 432-4 [1]: A person exercising governmental authority or entrusted with a mission in the public service who, in the performance or on the occasion of performing his or her duties or mission, arbitrarily orders or performs an act prejudicial to individual liberty is liable to a penalty of seven years of misdemeanor imprisonment and to a fine of 700,000 francs.

Article 432-7: Discrimination as defined in Article 225-1, when committed with respect to a natural person or legal entity by a person exercising governmental authority or entrusted with a mission in the public service, in the performance or on the occasion of performing his or her duties or mission, is punishable by three years of misdemeanor imprisonment and by a fine of 300,000 francs when it consists of: 1. Refusing the benefit of a right granted by law; 2. Hindering the normal exercise of any economic activity.

EDWARD A. TOMLINSON, THE FRENCH PENAL CODE OF 1994, 128, 140-41, 217, 224-25, 232-33, 248 (1999).

## B. Application to the European Court

### 1. Procedural Hurdles

To submit an application to the European Court of Human Rights, all petitioners must abide by the procedural admissibility conditions set forth in Article 35 of the European Convention.<sup>231</sup> These conditions require petitioners to exhaust all domestic remedies prior to applying to the European Court.<sup>232</sup> Petitioners must also submit the application within six months from the date when the final national decision was issued.<sup>233</sup> Additionally, Article 35 excludes applications submitted anonymously, those containing an issue substantially similar to those previously examined by the Court, or a matter presented to another international forum.<sup>234</sup> Applicants are also precluded from submitting applications which are not compatible with the provisions of the European Convention, ill-founded, or in some manner an abuse of the right to lodge an application with the European Court.<sup>235</sup> Of these requirements, the exhaustion of local remedies rule appears to be the most difficult to overcome due to the lengthy legal process religious minorities will likely face when seeking domestic remedies.<sup>236</sup>

Although the exhaustion of local remedies rule is designed to permit "the Respondent State . . . an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual,"<sup>237</sup> the European Court has indicated that the rule be applied with flexibility.<sup>238</sup> This would permit each case to be evaluated "in the light of its particular facts."<sup>239</sup> When judging whether a particular applicant has exhausted all domestic remedies, the European Court must take into account not only the particular remedies available in the legal system of the member state, but also the general legal and political context and the personal circumstances of the applicants.<sup>240</sup> Thus, when various domestic remedies are available to a particular applicant, the Court has dictated that Article 35 may be applied "to reflect the practical realities of the applicants' position,"<sup>241</sup> thereby permitting the applicants to exhaust only the remedy or remedies which are reasonably likely to be effective.<sup>242</sup>

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231. See *supra* note 206 and accompanying text.

232. See *id.*

233. See *id.*

234. See *id.*

235. See *id.*; see also VAN DIJK & VAN HOOFF ET AL., *supra* note 100, at 108-62 (detailed discussion on each admissibility condition under Article 35).

236. See *supra* note 206 and accompanying text.

237. VAN DIJK & VAN HOOFF ET AL., *supra* note 100, at 127.

238. See *id.* at 128.

239. *Id.*

240. See *id.*

241. *Id.* at 134.

242. See *id.*

For example, in *Manoussakis*,<sup>243</sup> the Greek government argued that the applicants failed to exhaust domestic remedies because they allegedly declined to challenge the implied refusal by the Minister of Education and Religious Affairs in the Supreme Administrative Court.<sup>244</sup> The European Court rejected the government's assertions because the petitioners' application for a place of worship had been left in a state of uncertainty for over sixteen years,<sup>245</sup> and "the authorities did not in practice always comply with the decision of the Supreme Administrative Court."<sup>246</sup> As such, the European Court held, "an applicant who has availed himself of a remedy capable of redressing the situation giving rise to the alleged violation . . . is not bound to have recourse to other remedies which would have been available to him but the effectiveness of which is questionable."<sup>247</sup>

Similarly, in the recent *Tavernier* application submitted to the European Court, Petitioners Tavernier, Gluchowski, and Piechota argue that all local remedies have been exhausted because the *Conseil d'Etat*, the supreme administrative court in France, rejected their petition by a decision issued on March 23, 1998.<sup>248</sup> If the *Tavernier* application is deemed admissible by the European Court, the French government will likely counter that Petitioners have not exhausted all domestic remedies because they can seek an appeal or search for an alternative judicial forum to advance their claim. As in *Manoussakis*, the Petitioners can rebut this assertion by reasoning that it is unnecessary to seek an alternative recourse or remedy if the effectiveness of such alternative is questionable.<sup>249</sup> Indeed, as the highest administrative court in France rejected the petitioners' application, it is unlikely that any alternative judicial forum in France would be willing to vocally disagree with the highest court. Additionally, the current national anti-cult movement would likely preclude any potential relief for targeted religious minorities. Due to these "practical realities,"<sup>250</sup> Petitioners may persuasively argue that the general legal and political context precludes their ability to receive a fair and unbiased judgment in France.<sup>251</sup>

## 2. Substantive Hurdles

Once the procedural admissibility requirements have been overcome in the *Tavernier* application, the European Court will likely analyze the alleged

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243. 23 Eur. Ct. H.R. (ser. A) (1993).

244. See *Manoussakis*, 23 Eur. Ct. H.R. (ser. A) at 1358, ¶ 31.

245. *Id.* at 1359-60, ¶ 33.

246. *Id.* at 1360, ¶ 33.

247. *Id.* at 1359, ¶ 33.

248. See *Tavernier*, *supra* note 26 (petition at 4-5).

249. See *Manoussakis*, 23 Eur. Ct. H.R. (ser. A) at 1359, ¶ 33.

250. VAN DIJK & VAN HOOF ET AL., *supra* note 100, at 134.

251. See *id.* at 128.

Article 9 breach under the three-pronged test applied in the *Kokkinakis*<sup>252</sup> and *Manoussakis*<sup>253</sup> decisions. To do so, the European Court will first examine whether the French government's sponsorship of the UNADFI is in fact "prescribed by law."<sup>254</sup> The Court will then assess whether the French government has a "legitimate aim" in officially supporting an anti-cult organization.<sup>255</sup> Finally, the Court will determine whether the Government's official recognition and sponsorship of the UNADFI is "necessary in a democratic society."<sup>256</sup>

a. "Prescribed by law"

Unlike the *Kokkinakis*<sup>257</sup> and *Manoussakis*<sup>258</sup> cases, the *Tavernier* petition does not contest a specific codified law.<sup>259</sup> Instead, the Petitioners challenge the French government's official recognition of the UNADFI, an organization which blatantly campaigns against "destructive cult groups/sects."<sup>260</sup> As the French Constitution precludes the government from legislating or legally restricting the religious activities of its citizens,<sup>261</sup> Petitioners argue that the UNADFI serves to accomplish what the government cannot legally achieve.<sup>262</sup> Thus, Petitioners assert that the French government has violated Article 9 of the European Convention by sanctioning the UNADFI's campaign to target and eradicate religious minorities.<sup>263</sup>

In response to the Petitioners' arguments, the French government will likely counter by arguing that the alleged Article 9 breach is completely unfounded because the *Tavernier* petition fails to set forth a particular French law which allegedly infringes on the Petitioners' religious liberties.<sup>264</sup> Furthermore, even if the administrative action of granting official recognition to the UNADFI is scrutinized as a 'national law,' the French government will contend that the government cannot be held responsible for the actions of a private organization because the rights embodied in Article 9 apply solely to

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252. 260 Eur. Ct. H.R. (ser. A) (1993).

251. 23 Eur. Ct. H.R. (ser. A) (1996).

254. See *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 18, ¶ 36.

255. *Id.*

256. See *id.*

257. 260 Eur. Ct. H.R. (ser. A) (1993).

258. 23 Eur. Ct. H.R. (ser. A) (1996).

259. See *Tavernier*, *supra* note 26 (petition at 4-5).

260. *Id.*

261. See *supra* note 27 and accompanying text.

262. See *Tavernier*, *supra* note 26 (petition at 4-5).

263. See *id.* Petitioners do not challenge the right of the UNADFI, as a private organization, to express their opinion. However, when the French State becomes involved in criticizing religious denominations, whether directly or by means of a third party, Petitioners assert that this action directly violates both constitutional and statutory provisions in France. See *id.* (petition at 12).

264. See *id.* (petition at 12).

the actions taken by European governments, not private citizens.<sup>265</sup>

In response to these arguments, the European Court is likely to take into consideration various factors to determine whether the Petitioners have overcome the threshold “prescribed by law” requirement. In *Manoussakis*, the European Court chose not to rule on whether the Greek decree endowing the Minister of Education and Religious Affairs with discretionary powers to grant or deny applications to build places of worship was “prescribed by law.”<sup>266</sup> Instead, the European Court briefly indicated that, “in any event, [the Greek law] was incompatible with Article 9 of the Convention on other grounds.”<sup>267</sup> Likewise, the European Court could find that the French Parliament not only bestowed “public interest” recognition upon the UNADFI, but also conveyed discretionary duties “to prevent and defend families and individuals from the practices exercised by groups, movements and organizations having the nature of destructive cult groups/sects.”<sup>268</sup> If such were the case, not only would the French Parliament be sponsoring the UNADFI’s activities, but also, in essence, empowering the UNADFI as a tool of the French government.<sup>269</sup> The fact that the UNADFI existed and vocally expressed its anti-cult perspectives prior to receiving “public interest” status, lends credence to the Petitioners’ argument that, in the face of an admitted inability to openly legislate and pass an ‘anti-cult’ law, the French government instead chose to designate a private organization to pursue a campaign against religious minorities.<sup>270</sup>

#### b. “Legitimate Aim”

Assuming the European Court concedes the existence of a French law or administrative decree, the European Court will next undertake an analysis of whether the existence of a government sponsored anti-cult organization serves the “legitimate aim” of fostering public order, health, or morals and the rights and freedoms of others.<sup>271</sup> The Petitioners will assert that an organization which blatantly campaigns against religious minorities cannot possibly be pursuing the “legitimate aim” of promoting the rights and freedoms of all French citizens.<sup>272</sup> Further, the Petitioners may strengthen their

265. *See id.*

266. *See Manoussakis*, 23 Eur. Ct. H.R. (ser. A) at 1362, ¶ 38.

267. *Id.*

268. *Tavernier*, *supra* note 26 (petition at 4).

269. *See id.* (petition at 11-12). In support of the UNADFI, the French Minister of the Interior commented, “I therefore consider that, contrary to the petitioners’ claims, the nature of UNADFI, which provides valuable assistance to the public authorities, as a charity serving the public interest is sufficiently established and justified its official recognition in this capacity.” *Id.* (petition at 12).

270. *See* Supplementary Petition for Tavernier, Gluchowski, Piechota, *supra* note 225 (supplemental pleading at 4).

271. *See Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 18, ¶ 36.

272. *See Tavernier*, *supra* note 26 (petition at 10).

argument by referring to the thirty-eight enclosures included in their petition which document the pervasive anti-cult campaign carried out by the UNADFI throughout France.<sup>273</sup>

However, the French government will likely defend its sponsorship of the UNADFI on the basis that the national anti-cult association assists in protecting French citizens from nefarious cults which prey upon innocent and naïve individuals.<sup>274</sup> The French government will undoubtedly refer to the recent cases of religiously motivated mass suicides to emphasize the urgent and legitimate need to protect the French public.<sup>275</sup>

In *Kokkinakis*, the European Court found the Greek anti-proselytism law to have the "legitimate aim" of protecting citizens from "attempts to influence them by immoral and deceitful means."<sup>276</sup> Similarly, the European Court is likely to determine that the government sponsored UNADFI also has the "legitimate aim" of "provid[ing] valuable assistance to the public authorities"<sup>277</sup> in their "determination to use all legal means to fight against certain actions by sectarian groups and their leaders."<sup>278</sup> Unlike the wealth of Greek national law which defined "proselytism" in the *Kokkinakis* case,<sup>279</sup> Petitioners may counter that neither the French government nor the UNADFI have defined the objective criteria to be used to determine which minority religions should be categorized as "dangerous."<sup>280</sup> Furthermore, for the French government to endeavor to evaluate and distinguish "religions" from "cults" would clearly embroil the government in a debate at odds with the spirit and letter of Article 9.<sup>281</sup>

Nevertheless, the growing acceptance of parliamentary commissions and observatories established to investigate religious organizations suggests that the European Court is likely to disregard the Petitioners' assertions. Recently, the Parliamentary Assembly of the Council of Europe<sup>282</sup> recommended the formation of a European Observatory on Cults and New Religious Movements to investigate new religious movements in Europe.<sup>283</sup>

273. *See id.* (petition at "list of enclosures").

274. *See supra* note 5 and accompanying text.

275. *See id.*

276. *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 20, ¶ 42.

277. *Tavernier*, *supra* note 26 (petition at 11).

278. *Id.* (petition at 12).

279. *See Kokkinakis*, 260 Eur. Ct. H.R. at 19, ¶ 40.

280. *See Tavernier*, *supra* note 26 (petition at 8).

281. *See id.*

282. The Parliamentary Assembly acts as the statutory organ of the Council of Europe. *See An Assembly for the Whole of Europe* (visited Nov. 7, 1999) <[http://stars.coe.fr/a\\_propos/Presentation/Assembley\\_E.htm](http://stars.coe.fr/a_propos/Presentation/Assembley_E.htm)>. Although not directly involved in the European Court's decision making process, members of the European Court on Human Rights are elected by the Parliamentary Assembly. *See Sessions and Sitings* (visited Nov. 7, 1999) <[http://stars.coe.fr/a\\_propos/Presentation/Sessions\\_E.htm](http://stars.coe.fr/a_propos/Presentation/Sessions_E.htm)>.

283. *See Committee on Legal Affairs and Human Rights, Illegal Activities of Sects, Parliamentary Assembly Report, Doc. 8373, Apr. 13, 1999* (visited Aug. 20, 1999) <<http://stars.coe.fr/doc/doc99/edoc8373.htm>>.

Although the Parliamentary Assembly does not take part in the judicial deliberations of the European Court, the issuance of this alarming recommendation by the legislative body of the Council of Europe suggests the perpetuation of a disturbing trend to deny religious freedom to organizations perceived to be “new religious movements.”<sup>284</sup>

c. “*Necessary in Democratic Society*”

In determining whether the creation of a government sponsored anti-cult organization can be defined as “*necessary in a democratic society*,” the European Court will likely first analyze whether the measures taken in France were justified in principle, and second, whether the restriction imposed is proportionate to the legitimate aim pursued.<sup>285</sup> In doing so, the European Court will strive to balance the perceived danger against the measures taken at the national level.<sup>286</sup>

When examining whether the state sponsorship of the UNADFI is justified in principle, the French government will likely reiterate the government’s duty to protect its citizens from the insidious ploys of dangerous cults preying on the innocent and inexperienced. Although the concept of establishing an observatory on religious minorities might appeal to legislators attempting to protect their constituents from dangerous mind-manipulating cults, the Petitioners will assert that both the national constitution and international agreements prohibit government intermeddling in religious affairs.<sup>287</sup>

In *Manoussakis*, the Court characterized the challenged law as having a “general policy of obstruction.”<sup>288</sup> Likewise, the Petitioners in *Tavernier* may also argue that the government sponsorship of the UNADFI obstructs the religious freedom guaranteed to all French citizens because the UNADFI openly targets and campaigns against specific “undesirable” religious minorities.<sup>289</sup> By endowing the UNADFI with authority to “defend families and individuals from . . . destructive cult groups/sects,” the Petitioners will argue that the French government has empowered a private organization with the authority to determine which religious minorities should be targeted and what tactics will be used against these organizations. As it is unknown how the UNADFI determines which religious groups to surveil, religious minorities have little recourse when subjected to attack by the UNADFI. Thus, Petitioners will argue that the restrictions imposed are not proportional to the alleged legitimate aim of protecting French citizens from dangerous cults because the sponsorship of the UNADFI permits the French

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284. See *id.*

285. See *Manoussakis*, 23 Eur. Ct. H.R. (ser. A) at 1364, ¶ 44.

286. See *Gunn*, *supra* note 20, at 322.

287. See *Tavernier*, *supra* note 26 (petition at 9).

288. See *Manoussakis*, 23 Eur. Ct. H.R. (ser. A) at 1363, ¶ 38.

289. See *Tavernier*, *supra* note 26 (petition at 10).

government to assume the role of religious arbitrator and become involved determining what factors distinguish "religions" from "cults."<sup>290</sup>

The French government will counter that in the face of numerous cult induced mass suicides, the government has a duty to take steps to protect French citizens from the influence of dangerous cults.<sup>291</sup> Instead of creating anti-cult legislation as some members of the Commission initially suggested, the French government sought to separate itself from the debate by granting official recognition to a well established organization. The UNADFI allegedly is dedicated "to prevent[ing] and defend[ing] families and individuals from the practices exercised by groups, movements and organizations having the nature of destructive cult groups/sects."<sup>292</sup>

The Petitioners can assert that if sectarian groups are accused with "offenses under the law," it is the duty of the state prosecutor, and not a private organization, to investigate and prosecute those individuals that violate the law.<sup>293</sup> Nevertheless, in light of the recommendation recently released by the Parliamentary Assembly of the Council of Europe, the European Court is likely to deem government sponsorship of a private anti-cult organization as "necessary in a democratic society."<sup>294</sup>

#### *d. Analysis*

Although the *Kokkinakis* and *Manoussakis* decisions provide some optimism regarding the European Court's growing willingness to examine alleged violations of Article 9, the current European anti-cult sentiment suggests that the *Tavernier* petition faces substantial obstacles. As the Parliamentary Assembly of the Council of Europe recently issued a recommendation proposing the creation of a European Observatory on Cults and Sects, it is unlikely that the European Court will rule in a manner opposing the Assembly's recommendation.<sup>295</sup> Thus, religious minorities continue to shoulder the burden of advancing and defending the fundamental right to freedom of thought, conscience, and religion guaranteed in Article 9 of the European Convention on Human Rights and Fundamental Freedoms.

#### CONCLUSION

The European Convention on Human Rights and Fundamental Freedoms purports to advance the maintenance and increased recognition of human rights and fundamental freedoms. Once the European Convention became effective, all State signatories became legally bound to abide by the

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290. *See id.*

291. *See supra* note 5 and accompanying text.

292. *Tavernier*, *supra* note 26 (petition at 4).

293. *See id.* (petition at 11).

294. *See supra* note 279 and accompanying text.

295. *See id.*



terms and conditions of the treaty. This, in turn, permitted individuals who had exhausted all domestic remedies to file complaints in the European Court of Human Rights to seek redresses for alleged breaches of the Convention.

As a signatory member, France is bound to abide by all the conditions of the European Convention, including Article 9, which guarantees the freedom of thought, conscience and religion. Nevertheless, the current rise of religious intolerance, fomented in part by the French Parliamentary Enquete Commission's report and the increasing activism of publicly funded anti-cult groups, has created a two-tiered religious system which legally strips religious minorities of their constitutional rights. Therefore, affected religious minorities in France should apply to the European Court arguing that the current discriminatory trends violate Article 9.

Although over forty years passed before the European Court identified the first Article 9 violation, the *Kokkinakis* and *Manoussakis* cases provide some optimism that the European Court is now more willing to interpret and analyze the rights of conscience as delineated in Article 9. Nevertheless, both *Kokkinakis* and *Manoussakis* indicate that the European Court continues to give great deference to the "legitimate aim" advanced by the government to justify restricting rights of conscience. Thus, persecuted religious minorities should continue to pursue both domestic and international remedies in order to increase the likelihood of curtailing the rising religious intolerance in Europe.

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