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Freedom of Religious Association: The Right of Religious Organizations to Obtain Legal Entity Status Under the European Convention

For centuries religious organizations, and particularly new religious organizations, have struggled to gain recognition as legitimate churches and to maintain the status of legal entities in European states.¹ Indeed, the history of almost all religious organizations, and certainly of all the major religions in Europe (i.e., Judaism, Christianity [Catholicism and Protestantism generally, as well as multiple individual sects], and Islam) includes a period of persecution and illegitimacy in their infancies. In a more modern context, one scholar has suggested that each major religion undergoes a process of being a “new” religion, with the attendant difficulties of attaining legitimacy, before slipping slowly into the societal mainstream.² This initial period of infancy—the “dangerous sect stage”—often includes the ominous obstacle of obtaining legal entity status. Since the inability to obtain legal entity status often entails limitations or prohibitions on proselytism, many new religious movements are never able to mount the momentum to graduate from dangerous sect to legitimate religion.

I. THE RIGHT OF RELIGIOUS ORGANIZATIONS TO MAINTAIN A LEGAL ENTITY: AN INTRODUCTION

In the past few years, the international human rights debate has

1. Such struggles date back to the early years of the Roman Empire, as the Jews and the Christians, each in turn, struggled to gain recognition as a *religio licita*. For a discussion of anti-Semitism in the Greek and Roman Empires, and the development of certain policies of tolerance, see EDWARD H. FLANNERY, *THE ANGUISH OF THE JEWS* 3–24 (1985). For a more general discussion on the evolution of the treatment of Jews and Christians in the Roman Empire, see JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM* 2–66 (2001), in which the authors discuss first the struggle of the Jews to attain *religio licita* status in the Roman Empire, and then the struggle of the Christians to finally do the same under Constantine, and finally the establishment of the Christian church within the Roman Empire to such an extent that it was able to persecute Jews and Protestants. Interestingly, the author also notes that the Protestant religions struggled through a similar evolution of treatment from persecutee to persecutor. *See id.* at 117–54.

2. *See* W. Cole Durham, Jr., *The United States Experience with New Religious Movements*, 5 EUR. J. FOR CHURCH & ST. STUD. 213, 217 (1998).

given increased attention to the importance of legal entity status for all types of organizations. The European Court of Human Rights (“European Court”) in particular has made significant strides in recognizing that in order for the freedoms of association and religion—guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention” or “Convention”)³—to be meaningful, they must include a right to maintain legal entity status.⁴ The importance of legal entity status in our increasingly legalistic and bureaucratic world is clear; effective action in this modern setting is difficult without the ability to act collectively with legal personality. Such basic necessities as leasing space, collecting contributions, conducting business with others, producing and distributing materials, obtaining permits and licenses, and participating in political and legal processes are difficult, if not impossible, in most countries without official entity status. Furthermore, legal entity status is particularly important as organizations confront opposition groups, media organizations, and complex bureaucratic states.⁵

These same concerns and obstacles apply to religious organizations, but with even more gravity. While perhaps not as blatantly discriminatory and prejudicial as other forms of open hostility or persecution of religious belief or practice, denial of legal entity status—either through overly burdensome registration requirements, discriminatory application of registration procedures, or explicit denial or revocation of registered status—has a significant impact on a reli-

3. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

4. *See, e.g.*, *Sidiropoulos v. Greece*, 1998-IV Eur. Ct. H.R. 1594, 1614 (“The Court points out that the right to form an association is an inherent part of the right set forth in Article 11 [freedom of association] That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning.”); *Affaire Eglise Metropolitaine de Bessarabie et autres c. Moldova*, App. No. 45701/99, ¶118 (2002), *at* <http://www.echr.coe.int> (“Additionally, one of the ways of exercising the right to manifest one’s religion, especially for a religious community, in the collective sense, is through the possibility of assuring the jurisdictional protection of the community, of its members and their possessions, such that Article 9 must be understood in the light not only of Article 11, but also in the light of Article 6.”) (the case was available only in French at the time this paper went to print—translation by author).

5. For a discussion of some of the difficulties faced throughout Europe by organizations without legal entity status, see *infra* notes 6–11.

gious organization's ability to manifest its religious beliefs. In many countries, a religious community without legal entity status has difficulty renting or owning property to use for religious services, collecting donations, distributing literature and materials, receiving tax benefits, and proselytizing.

Current examples of this struggle for legal entity status by religious groups in Europe are acutely obvious in Russia,⁶ Ukraine,⁷ Bulgaria,⁸ Slovak Republic,⁹ Uzbekistan,¹⁰ and France,¹¹ to name but

6. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, RUSSIA: INTERNATIONAL RELIGIOUS FREEDOM REPORT (October 2001). The report states:

Local authorities continued to restrict the rights of some religious minorities in some regions. Despite court decisions which liberalized its interpretation, the complex 1997 "Law on Religion," which replaced a more generous 1990 law, seriously disadvantages religious groups that are new to the country by making it difficult for them to register as religious organizations, and thus obtain the status of juridical person, which includes the right to establish bank accounts, own property, issue invitations to foreign guests, publish literature, and conduct worship services in prisons and state-owned hospitals.

This report also discusses the treatment of certain religious groups under the current law, including their denial of legal entity status. For a discussion of historical norms in the Soviet Union, see Albert Boiter, *Law and Religion in the Soviet Union*, 35 AM. J. COMP. L. 97, 119–21 (1987) (discussing conditions in the Soviet Union prior to the collapse of communism under the Law on Religious Associations and its use in controlling and persecuting religion). For a discussion of the current issues facing religious organizations in Russia, see generally T. Jeremy Gunn, *Caesar's Sword: The 1997 Law of the Russian Federation on the Freedom of Conscience and Religious Associations*, 12 EMORY INT'L. L. REV. 43 (1998); W. Cole Durham, Jr. & Lauren B. Homer, *Russia's 1997 Law on Freedom of Conscience and Religious Associations: An Analytical Appraisal*, 12 EMORY INT'L L. REV. 101 (1998).

7. One commentator acknowledges that Ukraine is less restrictive than Russia in regulating legal entity status of religious groups, but nevertheless faces difficulties:

Unregistered organizations are without legal standing and thus cannot, for example, invite foreign missionaries, buy or rent property, or publish literature. . . . But registration is not so straightforward in practice. Extra-legal procedures, unwarranted delays, and bureaucratic whims beset the applicant.

....

Even if a religious organization does achieve registration, it remains at the mercy of the government's goodwill to effectuate many of its activities, e.g., renting a meeting facility, inviting foreign missionaries, importing religious literature, avoiding harassment by police or tax auditors, and buying or constructing a building for worship. This is no accident. The procedures require government approval and oversight of a religious organization's even routine activities. Thus the government has arbitrary power to apply pressure against religious organizations at multiple chokepoints.

John Moroz Smith, Note, *The Icon and the Tracts: A Restrained Renaissance of Religious Liberty in Ukraine*, 2001 BYU L. REV. 815, 845–46 (footnote omitted).

8. See Atanas Krussteff, *An Attempt at Modernization: The New Bulgarian Legislation*

a few. Unfortunately it appears that despite a promising wave of international documents declaring the immutability of religious freedom, an increasing number of European states are also simultaneously tightening the noose on new religious movements by imposing increasingly strict restrictions on registration of legal entities, visa issuances, and proselytism.¹² While these examples indicate an increase in governmental regulation of religious entities in some areas of Europe, it is certainly not a problem of recent origin, as governments

in the Field of Religious Freedom, 2001 BYU L. REV. 575, 593–601 (describing the difficulties of registering as a religious legal entity and the penalties for those religious groups that are not “duly authorized”).

9. See generally Martin Dojcar, *The Religious Freedom and Legal Status of Churches, Religious Organizations, and New Religious Movements in the Slovak Republic*, 2001 BYU L. REV. 429 (discussing the importance of registration in the Slovak Republic and the advantages it affords, such as financial support from the government, right of access to public facilities, and other benefits; also discussing the registration requirements in the Slovak Republic, including a requirement that the organization prove that it has at least 20,000 adherents before it can even apply for registration; pointing out that since 1990 only one religious organization has met the registration requirements and been granted registration).

10. See generally Grant Garrard Beckwith, Comment, *Uzbekistan: Islam, Communism, and Religious Liberty—An Appraisal of Uzbekistan’s 1998 Law “On Freedom of Conscience and Religious Organizations,”* 2000 BYU L. REV. 997 (discussing new legislation for religious organizations in Uzbekistan, part of which limits the ability of religious organizations to register and thereby obtain legal entity status).

11. See Hannah Clayson Smith, Comment, *New Religious Movements in France*, 2000 BYU L. REV. 1099, 1119–20, 1130–31 (discussing the implications of France’s new anti-sect policies, and in particular a proposed law, which has subsequently been enacted, that allows the government to dissolve religious organizations if they exhibit certain characteristics that the law considers dangerous).

12. See John Witte, Jr., *A Dickensian Era of Religious Rights: An Update on Religious Human Rights in Global Perspective*, 42 WM. & MARY L. REV. 707 (2001). Witte describes the treatment of new religious movements as follows:

A new war for souls has thus broken out in these regions, a war to reclaim the traditional cultural and moral souls of these new societies, and a war to retain adherence and adherents to the indigenous faiths. In part, this is a theological war: rival religious communities have begun to demonize and defame each other and to gather themselves into ever more dogmatic and fundamentalist stands. The ecumenical spirit of the previous decades is giving way to sharp new forms of religious balkanization. In part, this is a legal war: local religious groups have begun to conspire with their political leaders to adopt statutes and regulations restricting the constitutional rights of their foreign religious rivals. Beneath shiny constitutional veneers of religious freedom for all and unqualified ratification of international human rights instruments, several countries of late passed firm new antiproselytism laws, cult registration requirements, tightened visa controls, and adopted various other discriminatory restrictions on new or newly arrived religions.

Id. at 711 (citations omitted). For an example of this trend in several European states, see discussion *supra* notes 6–11.

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have historically used the power to grant and deny legal entity status as a means of favoring majority religions and dissolving or denying legal entity status to minority religious groups.¹³ While few countries discriminate openly, many of the European statutes governing legal entity status for religious organizations contain strict requirements on qualification for legal entity status, which effectively prohibit many new religious movements from becoming legal entities.¹⁴

Unfortunately, the European Court has not yet directly faced the issue of whether the freedom of association under Article 11 of the European Convention includes a right for religious organizations to maintain legal entity status. Nevertheless, a logical analysis of the European Court's jurisprudence under both Articles 11 and 9 (freedom of religion and belief), as well as the history of both Articles, gives a strong indication that religious organizations have a right to legal entity status under the Convention. This Note will examine the applicability of the European Court's freedom of association cases in the religious context. In particular, Part II will summarize the current state of the law regarding freedom of association under the European Convention as well as its history. Part III will discuss the interrelationship between the freedom of association and the freedom of religion and belief, and the importance of regulating religious organizations in a manner consistent with Article 11 of the Convention. Part IV will discuss the potential limits of these freedoms, and the parameters that a state may properly place on the right of religious organizations to maintain legal entity status. Part V will provide a brief conclusion.

II. ARTICLE 11 AND THE FREEDOM OF ASSOCIATION

At the present time, the liberty of association has become a necessary guaranty against the tyranny of the majority There are no countries in which associations are more needed . . . than those

13. See Paul G. Kauper & Stephen C. Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499, 1510, 1518–20 (1973) (discussing the old system in Europe and the early American colonies of governments granting charters to religious groups, primarily majority religions such as the Catholic Church in England and the established churches in the American colonies; also discussing historic examples of governments using dissolution as a means of persecuting minority religions).

14. See *supra* notes 6–11 (discussing common regulations of legal entity status in various countries of Europe and their effects on new religious movements seeking to establish and retain legal entity status).

which are democratically constituted. In aristocratic nations, the body of the nobles and the wealthy are in themselves natural associations, which check the abuses of power. In countries where such associations do not exist, if private individuals cannot create an artificial and temporary substitute for them, I can see no permanent protection against the most galling tyranny; and a great people may be oppressed with impunity by a small faction, or by a single individual.¹⁵

Recognition of the freedom of association in modern international human rights instruments dates back to the first of those documents, the U.N. Universal Declaration of Human Rights (“Universal Declaration”).¹⁶ Article 20 of the Universal Declaration proclaims, “Everyone has the right to freedom of peaceful assembly and association.”¹⁷ Consistent with every other major international instrument to enumerate fundamental human rights, the European Convention explicitly protects the freedom of association in Article 11.¹⁸

A. *The Text and History*

Article 11 reads as follows:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restric-

15. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 97 (Richard D. Heffner ed., Mentor 1956) (1835). Speaking of America, Tocqueville also wrote:

Nothing, in my opinion, is more deserving of our attention than the intellectual and moral associations in America. The political and industrial associations of that country strike us forcibly; but the others elude our observation, or, if we discover them, we understand them imperfectly It must, however, be acknowledged, that they are as necessary to the American people as the former, and perhaps more so.

Id. at 201.

16. G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

17. *Id.* art. 20.

18. European Convention, *supra* note 3, art. 11.

tions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.¹⁹

The text of Article 11 follows closely the pattern of other international religious freedom provisions. The general pattern includes the following elements: (1) a definition of the protected human right; (2) a prohibition on all state intrusion upon that right unless the intrusion is “prescribed by law” and “necessary in a democratic society” in pursuit of certain legitimate state interests; and (3) a listing of which objectives qualify as legitimate state interests in infringing upon the particular right at issue. This first element establishes when a state had infringed upon the right, and the last two elements establish the three-step analysis used to determine whether the state is justified in infringing upon the right and may therefore avoid liability. This three-step analysis applies equally to infringements of Article 11 and Article 9 freedoms.

First, the state must show that the infringement is prescribed by law. This means that a state may not infringe upon religious freedoms and hide behind administrative discretion but must explicitly, either in written or judicially created law, prescribe the act or policy that intrudes upon the Article 9 right.

Second, the state must show that the intrusion is in pursuit of a legitimate aim. The legitimate aim must be one that is specifically mentioned in the Article itself. Interestingly, the lists of legitimate aims differ amongst the various provisions, apparently in recognition of the unique risks that each human right could pose should it be abused.

The history of Article 11 indicates that the drafters of the European Convention considered the freedom of association and assembly to be among the most fundamental human rights and included the general protections of Article 11 in the very earliest drafts.²⁰ In fact, the only disagreement among the drafters appears to have been the question of whether to mention trade unions in the freedom of association clause (as it now appears), to provide a separate provision specifically protecting the right to join trade unions, or to leave the

19. *Id.*

20. See statement by Mr. Teitgen (Aug. 19, 1945), in 1 COLLECTED EDITION OF THE TRAVAUX PRÉPARATOIRES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 167–68 (1975).

discussion of trade unions out completely.²¹ The fact that several drafts make no mention of trade unions and that other drafts separate the right to join trade unions from the more general right of assembly and association gives a strong indication that the drafters of the Convention did not intend to limit the scope of the freedom of association to trade unions alone.

Third, the state must show that the intrusion is necessary in a democratic society, which has been interpreted as requiring a showing that the means used by the state are “proportionate to the legitimate aim pursued” and meet a “pressing social need.”²² This test appears to set a very high bar, particularly in cases under Articles 9 and 11 where the list of legitimate aims is so short.

*B. The Court’s Article 11 Jurisprudence:
An Expansion of Associative Rights*

As the cases below will illustrate, the European Court has vigorously protected Article 11 freedoms and has only rarely upheld governmental intrusion upon associative rights. Since a majority of the association cases has resulted in decisions in favor of the private parties, the cases give plentiful guidance as to what types of associations are protected and very little guidance regarding the kinds of threats that will justify state intrusion on the freedom of association.

Nevertheless, the European Court’s Article 11 jurisprudence includes some significant indications of the direction that the court is heading in this area of the law. Most significantly, while the court has never been asked to resolve the question directly, the court appears willing to recognize the right of religious organizations to register and retain legal entities as part of the freedom of association.

I. Freedom and Democracy Party

In the case of *Freedom and Democracy Party v. Turkey*,²³ the European Court considered whether Turkey had justifiably dissolved the ÖZDEP Party, a political party committed to establishing a de-

21. See 4 COLLECTED EDITION OF THE TRAVAUX PRÉPARATOIRES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 52–64 (1975); 1 COLLECTED EDITION OF THE TRAVAUX PRÉPARATOIRES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 207 (1975).

22. See *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) ¶ 49 (1993).

23. *Freedom and Democracy Party v. Turkey*, App. No. 23885/94 (1999), at <http://www.echr.coe.int>.

mocratic assembly that is more representative of the minority peoples of Turkey, and specifically the Kurds.²⁴ The Turkish Constitutional Court dissolved the party on the grounds “that its programme was apt to undermine the territorial integrity of the State and the unity of the nation and violated both the Constitution and sections 78(a) and 81(a) and (b) of the Law on the regulation of political parties.”²⁵

The ÖZDEP Party then appealed to the European Court. The court held that while the state was acting in pursuit of a legitimate state aim—protecting national security and territorial integrity, preventing disorder, and protecting the rights and freedoms of others—the dissolution of the ÖZDEP Party was not “necessary in a democratic society.”²⁶ In particular, the court held that it could find nothing in the party’s program that could be considered a call to violence or a rejection of democratic government.²⁷ Similarly, the court held that there must be a “pressing social need” and that merely calling for governmental reform does not create such a need without some threat of violence.²⁸ Based upon these findings, the court found a violation of Article 11.²⁹

Essentially *Freedom and Democracy Party* stands for the general rule that the freedom of association cannot be impeded until the association poses a threat to democratic order. Such a rule strikes the necessary balance between the freedom of the individual and the danger that associations with malicious intent can pose to a democratic state. While most associations pose no realistic threat to democratic order, occasionally some do. An example of a dangerous asso-

24. *See id.* ¶ 8.

25. *Id.* ¶ 14.

26. *Id.* ¶ 48.

27. *See id.* ¶ 40.

28. *See id.* ¶ 44. The court noted:

[T]he Court has previously held that one of the principal characteristics of democracy is the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State’s population and to take part in the nation’s political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.

Id.

29. *See id.* ¶ 48.

ciation will be discussed later, in the case of *Refah Partisi and Others v. Greece* (“Welfare Party Case”).³⁰

2. United Communist Party of Turkey

In the nearly identical case of *United Communist Party of Turkey v. Turkey* the court addressed the Turkish Constitutional Court’s dissolution of the United Communist Party of Turkey (“TBKP”), the eventual successor of another dissolved successor of the ÖZDEP Party.³¹ In analyzing the case, the European Court made an initial holding that has significance for religious groups seeking to rely upon Article 11. The court explicitly rejected the claim of the Turkish government that Article 11 applied only to trade unions.³² The government had argued that since the language of Article 11 refers to the “freedom of association with others, including the right to form and to join trade unions . . . ,” the right of association was intended largely for the purpose of protecting trade unions and therefore excluded political parties from the scope of Article 11.³³ The court rejected this argument, and held that “trade unions are but one example among others of the form in which the right to freedom of association may be exercised.”³⁴ The court further explained that

even more persuasive than the wording of Article 11 . . . is the fact that political parties are a form of association essential to the proper functioning of democracy. In view of the importance of democracy in the Convention system, . . . there can be no doubt that political parties come within the scope of Article 11.³⁵

While some may argue that political parties maintain a more critical role in democratic political processes than religious organizations, it could also be argued that religious groups are also “essential to the proper functioning of democracy.” As the court later stated in this same case, “there can be no democracy without pluralism.”³⁶

30. App. Nos. 41340/98, 41342/98, 41343/98, 41344/98 (2001), at <http://www.echr.coe.int> [hereinafter Welfare Party Case]; see discussion *infra* Part II.C.

31. *United Communist Party of Turkey and Others v. Turkey*, 1998-I Eur. Ct. H.R. 1.

32. See *id.* ¶¶ 24–25.

33. *Id.*

34. *Id.*

35. *Id.* ¶ 25.

36. See *id.* ¶ 43.

Considering the importance granted to the protection of religious pluralism by the drafters of the Convention, it is hard to argue that they did not intend for religious groups to play an essential role in the functioning of democratic government under the Convention.³⁷

Beyond this initial holding, the court came to a similar conclusion regarding the dissolution of the TBKP as it did with the ÖZDEP Party. Among the government's reasons for dissolving the TBKP were the party's alleged attempts to incite the public to violence in order to protect the interests of the Kurdish minority in the government, as well as the party's use of the term "communist" in its party name.³⁸ The court rejected the claim that the use of a particular term is sufficient grounds for dissolution.³⁹ The court also held that, similar to the ÖZDEP Party, the TBKP's program did not sufficiently pose a threat to national security or other legitimate interests of the state.⁴⁰

3. Sidiropoulos

The two cases discussed above provide a general understanding of the types of associations and organizations that will be protected by Article 11. Those cases left only two important issues unresolved: (1) the outer boundary, or limits, of Article 11 freedoms, and (2) a specific guarantee that the freedom of association guarantees a right to maintain a legal entity. The first of these issues was not resolved until very recently with the court's decisions in the *Welfare Party Case*, discussed in the next section. The second of these issues was resolved in the case of *Sidiropoulos v. Greece*.⁴¹

In *Sidiropoulos*, the court established the important principle that the freedom of association includes a right to form and maintain a legal entity.⁴² The case began when a group of Greek citizens of Macedonian descent attempted to form a non-profit association called the "Home of Macedonian Civilisation."⁴³ The participants listed their objectives in their memorandum of association as

37. See discussion *infra* Part III.A.

38. See *United Communist Party of Turkey*, 1998-I Eur. Ct. H.R. ¶ 49.

39. See *id.* ¶¶ 53-54.

40. See *id.* ¶ 60.

41. *Sidiropoulos v. Greece*, 1998-IV Eur. Ct. H.R. 1594, 1616-17.

42. See *id.* ¶ 40.

43. See *id.* ¶ 7.

(a) the cultural, intellectual and artistic development of [the association's] members and of the inhabitants of Florina in general and the fostering of a spirit of cooperation, solidarity and love between them; (b) cultural decentralisation and the preservation of intellectual and artistic endeavours and traditions and of the civilisation's monuments and, more generally, the promotion and development of [their] folk culture; and (c) the protection of the region's natural and cultural environment.⁴⁴

Despite these ostensibly peaceful intentions, the Florina Court of First Instance refused the application for registration on the grounds that “[s]ome of the founder members of the association . . . have engaged in promoting the idea that there is a Macedonian minority in Greece . . .”⁴⁵ The Greek court further submitted that “the true objective of the aforementioned association is not the one indicated in clause 2 of the memorandum of association but the promotion of the idea that there is a Macedonian minority in Greece, which is contrary to the country's national interest and consequently contrary to law.”⁴⁶

In holding that this refusal of legal entity status violated Article 11, the European Court again followed the traditional three-step analysis.⁴⁷ After finding that the intrusion was prescribed by law, the court considered whether the state was pursuing a legitimate aim and concluded that the government had acted to protect its national security and to prevent disorder.⁴⁸ However, this decision seems largely justified primarily by the conflict then raging in the Balkans. The European Court stated that in light of the Balkan situation the Greek Court of Appeals legitimately based its refusal on its fear that a Macedonian nationalist group might pose a revolutionary threat.⁴⁹ Without the threatening nature of that context it is quite possible the European Court's analysis could have ended with a determination that there was no legitimate aim in denying the application. It is also significant that at one point in the analysis the court pointed out that the state's objective of “upholding . . . Greece's cultural traditions

44. *Id.* ¶ 8.

45. *Id.* ¶ 10.

46. *Id.*

47. *Id.*

48. *See id.* ¶ 39.

49. *See id.*

and historical and cultural symbols” was not a legitimate aim.⁵⁰

Having determined that the state was pursuing a legitimate interest, the court turned to whether the denial of legal entity status was necessary in a democratic society. The court began this part of the analysis by asserting, “That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning.”⁵¹ Turning then to whether there was a “pressing social need” requiring interference and whether the means used to interfere were “proportionate to the legitimate aim pursued,” the court determined that there was no evidence that the applicants posed a threat to the country and therefore no pressing need existed.⁵² In explaining that the existence of a cultural minority attempting to protect its culture did not threaten any of these state interests, the court stated “the existence of minorities and different cultures in a country was a historical fact that a ‘democratic society’ had to tolerate and even protect and support according to the principles of international law.”⁵³

The *Sidiropoulos* case marks a significant step in Article 11 jurisprudence since it firmly links the right to legal entity status with the freedom of association under Article 11. The case is also significant in that it indicates the direction the court is taking in expanding the specific elements of the freedom of association under Article 11 and in vigorously enforcing Article 11 freedoms generally.

Simple logic suggests that the right to legal entity status established in *Sidiropoulos* would not be limited to non-religious organizations, but rather would protect religious and non-religious organizations equally in their efforts to maintain and retain legal entity status. Nevertheless, the extension of this right to legal entity status to religious organizations requires the resolutions of two additional potential counter-arguments. The first issue is how far Article 11 extends: in other words, what types of associative activity will justify state intrusion, and, more specifically, whether this is the type of activity in which religious organizations are likely to engage. This first issue was largely clarified in the *Welfare Party Case* and will be discussed in the

50. *Id.* ¶¶ 37–38.

51. *Id.* ¶ 40.

52. *Id.* (“There was nothing in the case file to suggest that any of the applicants had wished to undermine Greece’s territorial integrity, national security or public order.”).

53. *Id.* ¶ 41.

next subsection. The second potential issue involves the interplay between the freedom of association and the freedom of religion and whether there is a potential argument that religious organizations should be treated differently—less favorably—than other types of associations. This second issue will be addressed in Part III. Without clarification from the European Court on both of these issues, religious organizations have previously had little success in defending the existence of a right to legal entity status.⁵⁴

C. Welfare Party Case: *The Final Piece of the Article 11 Puzzle*

As discussed in the previous section, a potential problem with the court's Article 11 jurisprudence was the lack of a definition of the limits of the freedom of association. The *Welfare Party Case* defines the types of acts a group must perform, and the kinds of threats to the state it must pose, before the state may justifiably deny the group the freedom to associate.

1. *An introduction and a disclaimer*

It is important to note at the outset that the *Welfare Party Case* has significant implications on other fronts and is likely to receive criticism from several directions. It is likely, for example, that those concerned about the ability of Islamic states to function comfortably in the European system and about the compatibility of certain Islamic doctrines with the principles of the European Convention, will sharply criticize the case. While this issue is beyond the scope of this paper, it is worthwhile to note a few examples of the court's misunderstanding of several Islamic principles, since these misunderstandings led to the court's conclusion that the Welfare Party posed a threat to the sovereignty and security of Turkey.

For example, the court defined the term "jihad" as a doctrine "whose primary meaning is a holy war, to be waged until the total domination of Islam in society is secured."⁵⁵ While the court was obviously relying on several speeches by Welfare Party officials, in which they describe the concept of jihad as a potentially violent campaign, the court failed to recognize this as an extreme minority

54. See generally Cole Durham, *Freedom of Religion and Belief: Laws Affecting the Structuring of Religious Communities*, 4 ODIHR BACKGROUND PAPER (1999) (discussing the various international documents used to argue for such a right and the relative strengths and weaknesses of such arguments).

55. Welfare Party Case, *supra* note 30, ¶ 74.

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the court failed to recognize this as an extreme minority view. Most Islamic scholars agree that there are at least two, and perhaps several, possible definitions of jihad.⁵⁶ The most common definition of jihad is a struggle, usually a struggle for justice, righteousness, or a better way of life.⁵⁷ The court appears to have ignored this more popular form of jihad and concluded prematurely that jihad means a violent “holy war.”⁵⁸ Similarly, the court made mistaken assumptions about the concept of the “sharia.”⁵⁹

56. See, e.g., ENCYCLOPEDIA OF POLITICS AND RELIGION 425 (Robert Wuthnow ed., 1998) (“The Islamic idea of *jihad*, which is derived from the Arabic root meaning ‘to strive’ or ‘to make an effort,’ connotes a wide range of meanings, from an inward spiritual struggle to attain perfect faith to an outward material struggle to promote justice and the Islamic social system.”); MALISE RUTHVEN, ISLAM: A VERY SHORT INTRODUCTION 118–46 (1997). Ruthven explains *jihad* in the following way:

Jihad, like the word *fatwa*, is an Islamic term that has entered the contemporary lexicon, not least because of its use by modern Islamist movements, some of which have been actively involved in terrorism, kidnapping and other violent activities. In its primary meaning the word means ‘exertion’ or ‘struggle’, and its use in the traditional Islamic discourse is very far from being confined to military matters. The usual translation ‘holy war’ is therefore misleading. Many forms of activity are included under the term. In the classical formulations the believer may undertake jihad ‘by his heart; his tongue; his hands; and by the sword’—the foremost of these being the first.

Id. at 118.

57. See RUTHVEN, *supra* note 56, at 118; HUSSEIN KHALID AL-HUSSEIN & AHMAD HUSSEIN SAKR, INTRODUCING ISLAM TO NON-MUSLIMS, available at <http://www.usc.edu/dept/MSA/reference/glossary/term.JIHAD.html> (last visited Nov. 12, 2001).

58. See Welfare Party Case, *supra* note 30, ¶¶ 68, 74.

59. For example, the court makes the sweeping statement, “The sharia provisions concerning, among other matters, criminal law, corporal punishment as a criminal penalty and the status of women were not compatible with the Convention.” *Id.* However, the sharia is generally defined as the concept of having no separation between the rule of government and the law of God. As one author has put it, “In principle this remarkably comprehensive scheme allows no ultimate distinction between religion and morality, law and ethics. All are seen as proceeding directly from the command of God, though there is room for humans to argue about the details.” RUTHVEN, *supra* note 56, at 86. While closer examination of the implications under the Convention of instituting the sharia should be left to those more familiar with the complexities of the sharia, it is sufficient to note here that it is unclear that the sharia is *per se* incompatible with the principles of the Convention. Several authors identify the flexibility of the sharia as a potential means of adapting its application in the modern world. See *id.* at 75; ALFRED GUILLAUME, ISLAM 167–93 (1990). Professor Guillaume specifically discusses the history of changes that have taken place under sharia rule in countries such as Egypt, Algeria, Jordan, and Lebanon, including grants of increasingly equal rights to women, changes in property law, and changes in the criminal law. See GUILLAUME, *supra*, at 171–93. His discussion of the rule of law in countries such as Algeria under the rule of the French are particularly instructive in this context, since they indicate the potential for congruence between Western principles of democracy and *laïcité* and the doctrines of the sharia.

These mistaken conclusions threaten to create a dangerous dichotomy between the Convention's protection of religious freedom and its protection of the rule of law. While it is clearly appropriate for the court to allow a state to prosecute and punish those who legitimately threaten the sovereignty of the state, even if done in the name of religion, a broad condemnation of jihad or sharia would presumably include many activities, within the more peaceful definitions of those terms, which pose no threat whatsoever to public safety, public order, health or morals, or the rights and freedoms of others. Such a policy would potentially allow state condemnation of religious activities that would otherwise be protected under the Convention, such as proselytism.⁶⁰

Considering the troubling implications of the *Welfare Party Case* for the future of Islamic countries under the European Convention, some will undoubtedly question the viability of the case as respected precedent. However, it is important to recognize that the case nevertheless provides useful precedent for use in interpreting the European Convention. Despite the troubling implications of the court's treatment of important Islamic doctrines, the actual holding of the case turns largely on the extreme nature of the acts committed by the Welfare Party, and not on the Islamic nature of those acts. As discussed in more detail below, the court's conclusions about the dangers presented by the Welfare Party were likely justified on the facts, since the party officials appeared, at least arguably, to be encouraging violent removal of the Turkish government and the establishment of a theocratic government. Therefore, the court's mistaken attribution of these violent and undemocratic characteristics to concepts commonly practiced and adhered to by traditional, nonviolent Muslims is not essential to the holding of the case.

It is essential that critics of the case not overlook the implications of the case for the freedoms of association and religion. Despite some of the potentially troublesome dicta, the actual holding of the court identifies several important standards under the Convention that relate to the freedoms of association and religion. In particular, the case establishes the outer limits of the freedom of association. Before examining those limits specifically, a brief introduction to the facts of the case is helpful.

60. The European Court has affirmatively protected the right of religious groups to engage in proselytism. *See Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) (1993).

561] *Legal Entity Status Under the European Convention*2. *The facts*

At first glance the *Welfare Party Case* does not appear to be that different factually from other Article 11 cases dealing with the dissolution of political parties, and particularly the Turkish cases, which essentially pose the question of whether the state—Turkey—was justified in dissolving a political party.⁶¹ However, there are some important, yet perhaps subtle, differences that explain the very different outcomes.

Before continuing, it is important to recognize the unique geographical genesis of the case. Turkey is uniquely situated among the states governed by the European Convention. With over 65 million inhabitants, Turkey is one of the largest members of the European Convention.⁶² More significantly in this context, Turkey's population is approximately 99% Muslim, most of which are Sunni.⁶³ Not only is it unique in comparison to the predominantly Christian rest of Europe, but it is also unique in that no other signatory to the Convention claims any religion as such a vast majority.⁶⁴

These unique qualities pose particularly interesting issues for Turkey in its attempts to assimilate into Europe. First, it must operate in a system of rules, both written and unwritten, and laws, both positive and natural, that are premised upon Christian principles and values. The delegates involved in drafting the Convention came from Christian countries, and while they were certainly concerned with protecting all peoples, the issues facing their predominantly Christian constituencies undoubtedly influenced them. The second issue posed by Turkey's unique position under the Convention is the application of the Western principles of *laïcité* and liberal democracy in a country with a long history of being an Islamic state. Despite the earnest

61. See discussion of cases cited *supra* Part II.B.

62. See Department of State, Bureau of European and Eurasian Affairs, *Background Note: Turkey* (Oct. 1999), at http://www.state.gov/www/global/human_rights/irf/irf_rpt/irf_turkey.html.

63. See U.S. DEP'T OF STATE, 2000 ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: TURKEY, at http://www.state.gov/www/global/human_rights/irf/irf_rpt/irf_turkey.html (Sept. 2000).

64. Not even Italy's 85% Roman Catholic or Greece's 94–97% Greek Orthodox populations control such a commanding majority. See U.S. DEP'T OF STATE, 2000 ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: ITALY, at http://www.state.gov/www/global/human_rights/irf/irf_rpt/irf_italy.html (Sept. 2000); U.S. DEP'T OF STATE, 2000 ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: GREECE, at http://www.state.gov/www/global/human_rights/irf/irf_rpt/irf_greece.html (Sept. 2000).

efforts of many in Turkey to adapt to these unfamiliar structures and principles, there are many that would prefer a return to the theocratic ways of the past.⁶⁵

It was in this historical and demographic context that Turkey began its struggle with political parties aimed at restoring the Islamic theocracy of prior times. This struggle began long before the Welfare (Refah) Party was ever organized, since the Welfare Party was merely the successor, in a line of successors, of a previously dissolved party.⁶⁶ The establishment of the Welfare Party followed the dissolution of the National Order Party (Milli Nizam Partisi) and the National Salvation Party (Milli Selamet Partisi), both of which were dissolved by the Turkish Constitutional Court for advocating the establishment of a theocratic, Islamic regime.⁶⁷ With each dissolution the majority of the parties' members banded together and initiated another party, seeking essentially the same objectives, although changing the official statements of the party to reflect a less revolutionary or violent platform.⁶⁸

In January 1998, the Constitutional Court dissolved the Welfare Party and banned six of its leaders, including the party chairman and coalition government leader Necmettin Erbakan, from political life for five years.⁶⁹ At the time of its dissolution, the Welfare Party held the plurality position in the legislature with 158 of the 450 seats.⁷⁰ The Constitutional Court's rationale for its decision was that the party was "a 'centre' . . . of activities contrary to the principles of secularism."⁷¹ As the basis of this rationale, the Constitutional Court cited a long list of activities, public statements, and policies of the party and its leaders, which the court characterized as threats to the secular state.⁷² Included on this list were such things as the wearing of Islamic headscarves by party leaders during official actions, statements by Mr. Erbakan and others advocating the establishment of a

65. The Welfare Party itself maintained as its platform a desire to establish the sharia and a multijudicial system in which at least the Muslims in Turkey would be ruled civilly by a Muslim government. *See* Welfare Party Case, *supra* note 30.

66. *See* Niyazi Öktem, *Religion in Turkey*, 2002 BYU L. REV. 371, 395-400.

67. *See id.* at 395-96.

68. *See id.*

69. *See* Welfare Party Case, *supra* note 30, ¶¶ 22, 29.

70. *See id.* ¶ 10.

71. *Id.* ¶ 11.

72. *See id.* ¶ 25.

theocratic regime and a multijuridical system in which citizens are governed by the laws of their respective religions, incitement of the public to a holy war (“jihad”), statements allegedly inciting the people to a violent overthrow of the government, and other similar acts and statements.⁷³ The government alleged that these facts illustrated a threat to the social order, and perhaps the national security of the state, and that therefore the dissolution was necessary.⁷⁴

In response to these allegations, the applicants alleged that the state had violated Article 11 in dissolving the party since the party posed no direct threat to the state and since the statements by certain leaders were taken out of context.⁷⁵ In holding that the dissolution was not a violation of Article 11, the European Court rejected the applicants’ assertions that the statements were taken out of context and assumed that the incitements to establish a new form of theocratic government were legitimate.⁷⁶ The court further concluded that the party’s threats and political aims were “neither theoretical nor illusory, but achievable.”⁷⁷ This is the critical finding that makes the *Welfare Party Case* different from other previous Article 11 cases because in no previous case had the court found that the association posed a credible threat to the state.⁷⁸ The importance of the legitimacy of the threat is illustrated by the court’s careful identification of the factual grounds upon which it based its decision, explaining that it was not the specific actions or statements of the party leaders that justified dissolution, but rather the aim of the party in establishing a theocratic government.⁷⁹

3. *The Welfare Party Case and the parameters of Article 11*

In discussing the specific limits to the freedom of association established by this case, it is important to note the significant differences between the *Welfare Party Case* and those cases in which the suspect association simply subscribed to policies contrary to government policy, such as the treatment of cultural minorities.⁸⁰ The court

73. *See id.*

74. *See id.* ¶¶ 59–63.

75. *See id.* ¶¶ 54–55.

76. *See id.* ¶¶ 76–77.

77. *See id.* ¶ 77.

78. *See* cases discussed *supra* Part II.B.

79. *See* *Welfare Party Case*, *supra* note 30, ¶ 73.

80. For a discussion of these other Article 11 cases, see discussion *supra* Part II.B.

went into great detail in discussing the nature of the specific factual allegations and was careful not to make its decision on unfounded accusations or unattainable aims, but rather on “achievable” objectives.⁸¹ It therefore appears that the outer limit of Article 11 consists of some requirement that the association pose a credible and legitimately dangerous threat to the democratic nature or order of the state.

It is also clear that the court’s approval of the government action was limited to a narrow set of facts. In upholding the state’s intrusion upon the Welfare Party’s freedom of association, the court was careful to point out that the dissolution of a political party is a “drastic measure and that measures of such severity [should] be applied only in the most serious cases.”⁸² The court’s historic practice of strictly scrutinizing state intrusions upon the freedom of association, and rarely upholding such intrusions, substantiates this statement.⁸³ The court’s decision in the *Welfare Party Case*, although resulting in an affirmance of the state intrusion, should not be seen as a reversal or diminishment of the court’s previously strong respect for the freedom of association, but rather as defining the extreme limit of that freedom. Rather than discouraging groups from associating, the case should comfort those groups by finally defining the parameters within which their actions will be protected.

Knowledge of this outer limit is essential if people are to feel free to exercise their freedom to associate under Article 11. After the *Welfare Party Case*, groups can confidently evaluate the nature of their organization and determine whether it falls within the parameters established by the cases. The case not only strengthens the right of association generally under Article 11, but also strengthens the more specific argument that, with this newly defined parameter of Article 11, the Convention as a whole provides for an implicit right of religious organizations to maintain a legal entity.

III. FREEDOM OF ASSOCIATION IN THE RELIGIOUS CONTEXT

Having discussed the parameters of Article 11, including the right to a legal entity under *Sidiropoulos* and the newly defined outer

81. See *Welfare Party Case*, *supra* note 30, ¶ 77.

82. *Id.* ¶ 82.

83. See discussion of cases *supra* Part II.B (illustrating the court’s vigorous enforcement of Article 11 freedoms).

limit of those rights under the *Welfare Party Case*, there remains only the final logical step of determining whether there is some reason that would specifically exclude religious organizations from these otherwise general protections. Whatever the arguments in favor of treating religious groups less favorably—or more skeptically—might be, they are not supported by the European Court’s interpretation of the European Convention. In fact, the court’s jurisprudence indicates the very opposite—that religious organizations should receive *more favorable* treatment than other types of associations.

Several factors support the conclusion that religious associations are entitled to at least the same, and probably a higher, level of protection under Article 11 than other types of associations, and some factors directly support the proposition that religious associations are entitled to legal entity status. These factors include: (A) the traditionally protected role that religion and religious tradition have played throughout European history; (B) the political commitment of the member states to recognize the legal entity status of religious associations under the Vienna Concluding Document; (C) the language of Article 14 of the Convention, which prohibits discrimination in granting and protecting of the rights under the Convention; (D) the language and case law of Article 9 of the Convention itself, which grants more favorable protection to religious freedoms; and (E) recent cases of the European Court discussing the interplay between the freedoms of association and religion.

A. *Religious Liberty as a European Tradition*

The history of Europe is a study in religious history.⁸⁴ Several

84. Some semblance of European respect for the freedom of religion and conscience dates back at least as far as the thirteenth century. See T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 306–07 (Johan D. van der Vyer & John Witte, Jr. eds., 1996) (citing C.A. MACARTNEY, NATIONAL STATES AND NATIONAL MINORITIES 157–75 (1934); PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 25–37 (1991); András Baka, *The European Convention on Human Rights and the Protection of Minorities Under International Law*, 8 CONN. J. INT’L L. 227 (1993); Hurst Hannum, *Contemporary Developments in the International Protection of the Rights of Minorities*, 66 NOTRE DAME L. REV. 1431, 1431–34 (1991); Carol Weisbrod, *Minorities and Diversities: The ‘Remarkable Experiment’ of the League of Nations*, 8 CONN. J. INT’L L. 359 (1993)). Some might argue that the tradition potentially dates back to the practice in the Roman Empire under which Jews were “[e]xempt from many external acts of the Roman cult and released from all secular activities on the Sabbath, [and] they were held only to prayers for the emperor. Before the Christian era began, Judaism was recognized as the only *religio licita* in the empire

European churches—including the Catholic Church, the Anglican Church, several Protestant and Orthodox churches, and many others—gained prominence as a result of their privileged position in states throughout Europe. It is because of this very tradition of associative protection that several religious groups resist government policies that classify or register religious groups as the same type of association as other, non-religious associations. They fear being relegated to a status on par with non-religious associations as opposed to their historical position of special protection. Such tradition suggests that religious associations have historically maintained *avored* statuses and should be afforded more protection—or, at the very least, the same—protection as other, non-religious, associations.

Such a favored status is consistent with the strong tradition of religious freedom in Europe. As the United Nations Human Rights Committee announced in a General Comment,

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18(1) is far-reaching

save the imperial cult itself.” FLANNERY, *supra* note 1, at 16–17. The Romans also granted Jews “all privileges necessary for complete practice of their way of life not only in occupied Palestine but also in Rome and throughout the Diaspora.” *Id.* at 16; *see also* NOONAN, *supra* note 1, at 19–20 (“The Romans granted to the Jews special ‘privileges and immunities’—a phrase that was to make its way into the United States Constitution, Art. IV, § 1, and Amend. XIV, § 1. This policy of special consideration for the Jews in Roman law began with the approach by Judas after the attempted annihilation of the Jews by Antiochus Epiphanes.”); PETER GARNSEY & RICHARD SALLER, *THE ROMAN EMPIRE: ECONOMY, SOCIETY AND CULTURE 169–70* (1987) (suggesting that while the Romans were generous in their accommodations to the Jews, the policies of tolerance, which were initiated under Judas Maccabee in 161 B.C.E., and later promoted by Julius Caesar, Augustus, and Claudius were really motivated by political objectives:

It was from political considerations that toleration was adopted and later abandoned in favour of confrontation. . . . The Romans were interested in embarrassing and weakening Syria, and agreed to a declaration of friendship. In the following century, the Jews lent valuable military assistance first to Caesar and then to Octavian in the civil wars, moved by outrage at Pompey’s capture of Jerusalem and violation of the Holy of Holies, and by the diplomatic necessity of rallying to the victor of Actium. The outcome was a series of official edicts and letters to Greek cities in the East instructing them to permit resident Jews to observe their traditional religion.

Id.).

Flannery points out that these policies did not eliminate anti-Semitism but that the Jews were treated poorly throughout the period of the Roman Empire. *See* FLANNERY, *supra* note 1, at 3–24. However, it was not until Galerius issued the Edict of Toleration for Christians in 311 C.E., and Constantine and Licinius issued the Edict of Milan in 313 C.E., that the Roman Empire made affirmative steps to end centuries of Christian persecution. *See* NOONAN, *supra* note 1, at 38. For a discussion of Constantine’s policy of Christian toleration, *see* KENNETH SCOTT LATOURETTE, *A HISTORY OF CHRISTIANITY* 86 (1953).

and profound; it encompasses freedom of thoughts on all matters, personal conviction and the commitment to religion of belief, whether manifested individually or in community with others. . . . The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4(2) of the Covenant.⁸⁵

This sentiment is echoed in the *travaux préparatoires* (essentially the legislative history) of the European Convention itself. Perhaps the most definitive statement of the purpose and importance of protecting religious freedom in the European Convention was articulated in the first session of the Consultative Assembly by a delegate from Ireland:

Civil and religious freedom are but two of the fundamental rights of man. Notwithstanding this, it is sad to reflect that in many countries in Europe to-day those elementary freedoms are denied to many citizens. If the Council of Europe achieves no other end than the guarantee of those two rights, it will have justified its existence. There are many other rights to which citizens can bring an indisputable claim, but to my mind they are merely subdivisions of those.⁸⁶

Mr. Everett followed this statement with a plea that all of the Representatives attending the Assembly “pledge themselves to secure for all citizens, and particularly for any minority in their country, . . . freedom from discrimination on account of religious or political opinion.”⁸⁷ The classification of certain rights as “fundamental” was clearly important to the drafters. Mr. Teitgen of France, in the opening address of the first session of the Consultative Assembly, articulated the ideal goal of the Convention of “drawing up for Europe a complete code of all the freedoms and fundamental rights; all the individual freedoms and rights, and all the so-called social freedoms and rights.”⁸⁸ He was careful to clarify, however,

85. CCPR General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18), para. 8, U.N.H.C.H.R., 48th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), at <http://www.unhchr.ch/tbs/doc.nsf>.

86. Statement of Mr. Everett (Aug. 19, 1945), in 1 COLLECTED EDITION OF THE TRAVUAX PRÉPARATOIRES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 102–04 (1975). Mr. Everett’s comments are particularly enlightening considering the significance of the religious struggles in Ireland at the time.

87. See *id.* at 104.

88. See Statements of Mr. Teitgen (Aug. 19, 1945), in 1 COLLECTED EDITION OF THE

A full and complete realisation of this aim would, however, be something beyond our powers.

. . . Failing this, however, let us be content with the minimum which we can achieve in a very short period, and which consists of defining the seven, eight or ten fundamental freedoms that are essential for a democratic way of life and which our countries should guarantee to all their people.⁸⁹

The drafters found it necessary to limit their efforts to protecting the few most important and “fundamental” freedoms. Included on the list of these freedoms, which Mr. Teitgen articulated in his address, were the “freedom of religious belief, practice and teaching; [and] freedom of association and assembly.”⁹⁰

The discussion then turned to the issue of which rights would be included among these “fundamental freedoms.” From the statements already quoted, and in many others, it is obvious that religious freedoms were unquestionably considered to be among those most basic fundamental rights to be protected.⁹¹ Nevertheless, several of the initial delegates articulated a concern about the abuse of the freedoms granted by the Convention. In the first session of the Consultative Assembly, a delegate from Greece warned that “human freedom, just because it is sacred, must not become an armoury in which the enemies of freedom can find weapons which they can later use unhindered to destroy this freedom.”⁹² There was a concern, as there is with the grant of any right or freedom, that the rights would be abused to the point of diluting the value of the freedom itself.

While there was legitimate concern about certain individuals infringing on the rights of others, the more apparent fear seems to have been that individuals would use these new freedoms to establish threats to the states themselves. This fear is evident in a statement made by a delegate from the United Kingdom, referring to an address by Winston Churchill before the Assembly: “We do not desire

TRAVUAX PRÉPARATOIRES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 44 (1975).

89. *Id.*

90. *Id.* at 46.

91. *See, e.g.*, Statement of Mr. Fayat (Aug. 19, 1945), *in* 1 COLLECTED EDITION OF THE TRAVUAX PRÉPARATOIRES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 86 (1975).

92. Statement of Mr. Maccas (Aug. 19, 1945), *in* 1 COLLECTED EDITION OF THE TRAVUAX PRÉPARATOIRES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 108 (1975).

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by sentimentality in drafting to give evilly disposed persons the opportunity to create a totalitarian Government which will destroy human rights altogether.”⁹³ To protect against this evil, the drafters included a general limitations provision, which eventually became Article 17 of the Convention.⁹⁴

The extent to which each individual freedom or right may specifically be limited by a state is outlined in each article. As discussed in the previous section, in the case of Article 9, states are allowed only those limitations that are in the interests of public safety, protection of public order, health or morals, or the protection of the rights and freedoms of others.⁹⁵ While the interest of national security is mentioned in most of the other articles as a legitimate aim of states in limiting those freedoms, the drafters declined to allow such an aim in the case of limitations on religion and belief.⁹⁶ This suggests that while the abuse of rights posed a certain threat to national security and other state interests, the exercise of religious rights were seen as less of a threat.

It is also clear from the *travaux* that although the drafters were concerned about threats to state interests, the purpose of the Convention itself was to accord rights to individuals and not to the states themselves. Professor Francis Jacobs, in his study of the proper method of interpretation of the European Convention, reaches a similar conclusion.⁹⁷ He suggests,

the provisions should be interpreted objectively; for ‘ . . . the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of the individual human beings from infringement by any of the High Contracting Parties

93. Statement of Mr. Maxwell-Fyfe (Aug. 19, 1945), in 1 COLLECTED EDITION OF THE TRAVUAX PREPARATOIRES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 118 (1975).

94. See European Convention, *supra* note 3, art. 17. Article 17 states: Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

95. *Id.*

96. See *id.*

97. See FRANCIS G. JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 16–20 (1975).

than to create subjective and reciprocal rights for the High Contracting Parties themselves.⁹⁸

He therefore appears to agree that the Convention's primary purpose is to protect individual human rights rather than State interests.⁹⁹

In considering early statements by delegates to the drafting Conventions, an early European Court stated that

it clearly appears from these pronouncements that the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe.¹⁰⁰

These sentiments of the Convention drafters are consistent with several recent decisions of the European Court, of which the following is an illustrative example: "The Court recalls that freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention. The pluralism indissociable from a democratic society, which has been dearly won over centuries, depends on it."¹⁰¹

98. *Id.* (citing the Pfunders Case, 4 Y.B. Eur. Conv. on H.R. (Eur. Comm'n on H.R.) 116, 138 (1960)).

99. Professor Jacobs also points out that "any general presumption that treaty obligations should be interpreted restrictively since they derogate from the sovereignty of the States is not applicable to the Human Rights Convention." *Id.* He then draws a further conclusion that the Convention must be interpreted in a 'dynamic' manner, in light of developments in social and political attitudes. *See id.* at 18 (providing several examples of this expansive mode of interpretation, including the inclusion of racial discrimination within the concept of degrading treatment in Article 3, even though the drafters may not have had racial discrimination in mind). In making this conclusion Professor Jacobs recognizes that the "object and purpose" of the Convention was not "solely to protect the individual against the threats to human rights which were then prevalent, with the result that, as the nature of the threats changed, the protection gradually fell away. Their intention was to protect the individual against the threats of the future, as well as the threats of the past." *Id.* It cannot be argued, he suggests, that the obligations of the Contracting Parties have been extended without their consent, since this expansive mode of interpretation is consistent with their intention rather than an expansion of their intentions. *See id.* ("It cannot be objected to that this interpretation extends the obligations of the Contracting States beyond their intended undertakings. On the contrary, this approach is necessary if effect is to be given to their intentions, in a general sense.").

100. *See Pfunders Case*, 4 Y.B. Eur. Conv. on H.R. at 138.

101. *Hasan and Chaush v. Bulgaria*, App. No. 30985/96, ¶ 60 (2000), at <http://www.echr.coe.int>.

Given the traditionally favored position of religion and religious organizations in Europe, it is not unrealistic to conclude that the freedom of association is merely an extension to non-religious associations of the same type of treatment that religious associations have traditionally received.

B. The Vienna Concluding Document

The second factor suggesting that religious associations should be entitled to greater protection under Article 11 than other types of associations is that all of the member states of the Convention have agreed to grant all religious associations some type of legal status.¹⁰² The Vienna Concluding Document includes, in Article 16.3, a political commitment on behalf of all of the participating states to “grant upon their request to communities of believers, practising or prepared to practise their faith within the constitutional framework of their States, recognition of the status provided for them in their respective countries.”¹⁰³ While this agreement is outside the scope of the European Convention it nevertheless acts as a political commitment of the participating states to recognize religious associations with at least some type of legal status.

The only apparent justification for state intrusion upon this right would be in the case of a religious association whose practice threatens the constitutional order of the country. In the words of Article 16.3 itself, the “communities of believers” must be “practising or prepared to practise their faith within the constitutional framework of their states.”¹⁰⁴ This limitation is consistent with the limitation established in the *Welfare Party Case* and will be discussed further in Part IV.

This commitment indicates the willingness of the international community, and the member states of the European Convention specifically, to make the crucial connection between the freedom of religion and the right to recognition as a legal entity. The Vienna Concluding Document was signed in 1989, nearly thirty-six years after the signing of the European Convention. If nothing else, this

102. See Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, 28 I.L.M. 527, art. 16.3 (1989) [hereinafter Vienna Concluding Document].

103. *Id.*

104. *Id.*

document serves as an indication of the consensus among the European states that the right to legal entity status is an important part of religious freedom.

C. Article 14 and Religious Discrimination

A third factor suggesting that religious organizations should receive at least the same level of associative freedom under the Convention as other associations is the prohibition of discrimination based on religion, found in Article 14 of the Convention.¹⁰⁵ Article 14 reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.¹⁰⁶

Article 14 is essentially a supplemental protection to all of the other articles of the Convention by prohibiting state discrimination in protecting, granting, or interfering with the substantive rights identified in those other articles. For example, if a state were to grant the right of legal entity status to certain religious groups, or at least to the dominant religious group, then Article 14 would appear to prohibit the state's discrimination against minority or new religions in granting that right.

An example of the court's application of Article 14 is found in *Hoffmann v. Austria*.¹⁰⁷ In that case, the applicant, a Jehovah's Witness, complained that the Austrian Supreme Court had violated her rights under Articles 8, 9, and 14, as well as under Article 2 of Protocol No. 1.¹⁰⁸ The claim involved the Austrian court's granting custody of her children to her husband after their divorce.¹⁰⁹ In refusing to grant her custody, the Austrian court opined that the father would be better able to protect the children's interests since Jehovah's Witnesses refused to authorize blood transfusions, and since the children could be labeled "social outcasts" as Jehovah's Witnesses.¹¹⁰

105. See European Convention, *supra* note 3, art. 14.

106. *Id.*

107. 255 Eur. Ct. H.R. (ser. A) at 48 (1993).

108. See *id.*

109. See *id.* at 53-54.

110. See *id.*

The European Court held that the Austrian Supreme Court's decision violated Article 8, which protects the right of individuals to a "respect for his private and family life, his home and his correspondence."¹¹¹ Considering this right in conjunction with the prohibition on discrimination based on religion found in Article 14, the court found that the distinction based upon religion was not justified by any legitimate state aim, and therefore the applicant had been unjustly deprived of her right of noninterference with family life.¹¹²

A similar analysis would apply in the Article 11 context. If an association were denied legal entity status, as required by Article 11, on the basis of the association's religious nature, there would appear to be a violation of Article 14. This analysis would apply equally in the situation of one religious association being denied registration while others were not, as it would in the situation of all religious associations being denied registration while other, non-religious, associations were not.

D. Article 9 and the Freedom of Religion

As discussed above,¹¹³ European history is a study in the development of religious freedom, and it was with this backdrop of historical developments in religious tolerance¹¹⁴ that the European Convention was opened for signature in 1950.¹¹⁵ Included among the fundamental freedoms protected by the European Convention is the freedom of "thought, conscience and religion" found in Article 9.¹¹⁶ Both the text of Article 9 and the court's recent cases interpreting Article 9, indicate the paramount position that religious freedom must play in the comprehensive scheme of rights articulated by the Convention.

1. Article 9: A textual analysis

The text of Article 9 reads as follows:

111. European Convention, *supra* note 3, art. 8.

112. *See id.* at 58–61.

113. *See supra* Part III.A.

114. This is not to suggest that Europe, or any of the European states, has been exemplary in consistently implementing and executing policies of religious freedom. The Crusades, the Inquisition, and the Third Reich are but a few of the more dramatic examples of the fallibility of European religious tolerance.

115. *See* European Convention, *supra* note 3.

116. *Id.* art. 9.

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

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.¹¹⁷

Article 9 specifically guarantees all people the "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."¹¹⁸ The only limitations that a state is permitted to impose upon this freedom are those that "are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health and morals, or for the protection of the rights and freedoms of others."¹¹⁹

It is important to note that the very language of Article 9 envisions the right to practice religion "in community with others," and not just "in private."¹²⁰ As the European Court has recognized, "religious communities traditionally and universally exist in the form of organized structures."¹²¹ The court has reiterated this principle as recently as the spring of this year (2002).¹²² To deny religious associations the opportunity to operate as legal entities effectively denies them the right to operate in our legalistic society.

Another significant textual point is that the list of legitimate aims that a state may claim in infringing upon the rights articulated in Ar-

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *See* Hasan and Chaush v. Bulgaria, App. No. 30985/96, ¶ 62 (2000), at <http://www.echr.coe.int>.

122. *See* Affaire Eglise Metropolitaine de Bessarabie et autres c. Moldova, App. No. 45701/99, ¶ 118 (2002), at <http://www.echr.coe.int> ("Since religious communities traditionally exist in the form of organized structures, Article 9 must be interpreted in light of Article 11 of the Convention.") (translation by author).

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Article 9 is the shortest of all of the provisions in the Convention.¹²³ Therefore, states have the fewest possible legitimate aims when the intrusion affects a religious right.

Essentially this second prong of the test is similar to the concept in American law requiring strict scrutiny of governmental intrusion upon certain fundamental rights.¹²⁴ Under American law, in a case involving fundamental rights, the state must show that it was pursuing a “compelling state interest” in infringing upon the plaintiff’s fundamental right.¹²⁵ Similarly, under the European Convention, the state must show that it was pursuing one of the explicitly allowed legitimate aims. The logical conclusion of this comparison is that in cases involving fundamental freedoms for which states have the fewest possible legitimate aims upon which to base an intrusion, the European Court should apply the strictest scrutiny. Furthermore, a plain reading of the Convention’s text should lead the reader to the conclusion that governmental interference with religious freedoms should be more highly scrutinized than similar intrusions on other freedoms.¹²⁶

This textual analysis seems to indicate a clear intent by the drafters to vigorously protect the freedom of thought, conscience, and

123. The only legitimate aims permitted under Article 9 are the interests of public safety, the protection of public order, health, or morals, and the protection of the rights and freedoms of others. *See* European Convention, *supra* note 3. All of the other articles of the Convention include longer lists, including such legitimate aims as national security, territorial integrity, the economic well-being of the country, and prevention of crime. *See id.* arts. 6, 8, 10, 11, 12.

124. The “strict scrutiny” standard of review arises in several areas of American law, but some of the more common examples include the judicial review of state statutes relying upon classifications of certain suspect classes such as race and gender, *see, e.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *United States v. Virginia*, 518 U.S. 515 (1996), as well the practice of the courts until recently of scrutinizing state laws infringing religious practices under a strict scrutiny standard, *see, e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963).

125. *See* cases cited *supra* note 124.

126. For example, a state might reasonably prohibit a political party from distributing literature if the government could show that the literature threatened national security, since the protection of national security is a legitimate aim under Article 10 for intruding upon the freedom of expression. *See* European Convention, *supra* note 3, art. 10. In contrast, the state might *not* be able to justify such a prohibition on the distribution of religious literature as part of proselytism efforts, since the distribution is likely a manifestation of religious belief and since the protection of national security is not a legitimate aim under Article 9. *See id.* art. 9; *see also* discussion *infra* Part III.D.2.c (discussing cases in which the European Court has indicated that the Article 10 freedom of expression should sometimes receive less protection than the Article 9 freedom of thought, conscience, and belief).

belief. This indication is fortified by a historic analysis of the Convention's drafting.

2. *Article 9 jurisprudence past and present*

Despite the general tradition of respect for religious pluralism in Europe, until recently the European Convention, and Article 9 specifically, had proven to be an ineffective shield in the defense of religious freedom, particularly in the hands of new religious movements. It has only been in the last decade—approximately since the European Court took a more active role in deciding cases, as opposed to the European Commission—that Article 9 has regained vitality in practice.

One scholar has pointed out that from the inception of the European Commission—a body whose function is essentially to screen cases for the European Court of Human Rights and decide which cases are “admissible”—to 1993, approximately forty-five cases were published in which applicants raised an Article 9 claim.¹²⁷ In none of these cases did the European Commission find a violation of Article 9.¹²⁸

A few cases serve as representative samples. In the case of *C. v. United Kingdom*, the European Commission held that the rights outlined in Article 9(1) “include only ‘the sphere of personal beliefs and religious creeds [that] is sometimes referred to as the *forum internum*’ as well as those ‘acts linked’ to the *forum internum*.”¹²⁹ Professor Gunn points out that prior to *Kokkinakis*, using this narrow interpretation of Article 9, the European Commission had declared every application brought by a conscientious objector inadmissible as being outside the scope of Article 9, including conscientious objections to military service and policy, to alternative service, to compulsory taxes used to fund the military, to compulsory insurance taxes, and to compulsory voting laws.¹³⁰

127. See Gunn, *supra* note 84, at 309–10.

128. See DONNA GOMIEN, JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS 289 (1995). In the book, Ms. Gomien charts the cases brought before the European Court through 1994, organizing them alphabetically, numerically, and by country of origin. The number of cases alleging an violation of Article 9 contrast starkly with the number of claims made under other articles.

129. See Gunn, *supra* note 84, at 313 n.36 (quoting *C. v. United Kingdom*, App. No. 10358/83, 37 Eur. Comm’n H.R. Dec. & Rep. 142, 147 (1983)).

130. See *id.* at 311 n.24 (citing *Arrowsmith v. United Kingdom*, App. No. 7050/75, 19

A similar line of cases further illustrates the Commission's use of a narrow interpretation of the freedom of conscience under Article 9. In *Ahmad v. United Kingdom*, the European Commission denied a claim by a Muslim schoolteacher who had been denied a schedule change in order to attend the Friday prayers mandated by Islam.¹³¹ In rendering this decision, the Commission announced that there was no violation of Article 9 since the teacher was aware of the restrictions when he accepted the position, and since he had the ability to resign if it was absolutely necessary for him to attend.¹³² Essentially the Commission interpreted Article 9 as allowing a state to infringe upon the religious freedom of its employees so long as it does so through contract and allows the employee to resign. Such a reading of Article 9—essentially recognizing the right to believe but not to practice those beliefs—falls far short of the protection generally accorded “fundamental” rights. It seems completely inconsistent with the “fundamental” nature of the freedoms protected in the Convention to say that the right to have certain beliefs does not entitle one to practice those beliefs. Yet the early European Commission clearly gave little protection to religious liberty under the ac-

Eur. Comm'n H.R. Dec. & Rep. 5 (1980) (pacifist protest); *C. v. United Kingdom*, App. No. 10358/83, 37 Eur. Comm'n H.R. Dec. & Rep. 142 (1983) (Quaker war tax); *Grandmaison and Fritz v. France*, App. Nos. 11567/85 and 11568/85, 53 Eur. Comm'n H.R. Dec. & Rep. 150 (1987) (war protest); *N. v. Sweden*, App. No. 10410/83, 40 Eur. Comm'n H.R. Dec. & Rep. 203, 207 (1983) (nonaffiliated pacifist exemption); *X. v. Austria*, App. No. 5591/72, 43 Eur. Comm'n H.R. Dec. & Rep. 161 (1973) (Catholic exemption); *Conscientious Objectors v. Denmark*, App. No. 7565/76, 9 Eur. Comm'n Dec. & Rep. 117 (1977) (pay equality); *Grandrath v. Federal Republic of Germany*, App. No. 2299/64, 8 Y.B. Eur. Conv. on H.R. (Eur. Comm'n on H.R.) 324, 336 (1962), 10 Y.B. Eur. Conv. on H.R. (Comm. Ministers) 626, 630 (1967) (adopting decision of Commission) (requirement for Jehovah's Witness official); *Johansen v. Norway*, App. No. 10600/83, 44 Eur. Comm'n H.R. Dec. & Rep. 155, 162 (1985); *X. v. the Federal Republic of Germany*, App. No. 7705/76, 9 Eur. Comm'n H.R. Dec. & Rep. 196 (1977) (Jehovah's Witness); *Reformed Church of X. v. Netherlands*, App. No. 1497/62, 5 Y.B. Eur. Conv. on H.R. (Eur. Comm'n) 286, 288 (1962) (old age insurance); *X. v. the Netherlands*, App. No. 1988/66, 10 Y.B. Eur. Conv. H.R. (Eur. Comm'n on H.R.) 472 (1967) (automobile insurance); *X. v. Netherlands*, App. No. 2065/63, 8 Y.B. Eur. Conv. on H.R. (Eur. Comm'n on H.R.) 266, 270 (1965) (automobile insurance); *X. v. Austria*, App. No. 1753/63, 8 Y.B. Eur. Conv. on H.R. 174 (1965) (Eur. Comm'n on H.R.); *X. v. Austria*, App. No. 1718/62, 8 Y.B. Eur. Conv. on H.R. 168 (1965) (Eur. Comm'n on H.R.)).

131. *Ahmad v. United Kingdom*, App. No. 8160/78, 4 Eur. H.R. Rep. 126 (1981) (Eur. Comm'n). For a more detailed discussion of this case, see Gunn, *supra* note 84, at 314–16.

132. *See id.*

tion/belief distinction.¹³³ For example, in a subsequent case, the Commission declared “if the requirements imposed upon a person [employed] by the church should be in conflict with his convictions he should be free to leave his office, and the Commission regards this as an ultimate guarantee of his right to freedom of thought, conscience and religion.”¹³⁴

The significance of these cases is that the Article 9 issues never reached the European Court because the Commission determined that the rights claimed by the applicants fell outside the scope of Article 9. It was not until 1993 that the European Court of Human Rights—which, at the time, was beginning to play a more active role in hearing cases—found the first violation of Article 9, in the case of *Kokkinakis v. Greece*.¹³⁵

Despite the Commission’s historical reluctance to vigorously protect the freedom of conscience and belief, the court’s decisions on the subject in the last decade—since *Kokkinakis*—indicate an increased willingness to protect religious freedom. Perhaps the most appropriate place to start in analyzing this modern trend is where the trend itself began, with *Kokkinakis*.

*a. Kokkinakis v. Greece.*¹³⁶ In March of 1986, Mr. Minos Kokkinakis and his wife, both Jehovah’s Witnesses, engaged in a discussion with Mrs. Kyriakaki in her home.¹³⁷ Mrs. Kyriakaki’s husband, a cantor at the local Orthodox Church, notified the police of the Kokkinakis’s proselytism, for which they were then arrested and prosecuted under Law No. 1363/1938, which prohibited proselytism.¹³⁸ After exhausting his appeals in Greece, Mr. Kokkinakis applied for relief from the European Court.¹³⁹

For the first time since the inception of the European Court and European Commission, the court found a violation of Article 9 and

133. Such a strict application of this belief/action distinction is essentially a fiction since most religious beliefs require some at least implicit requirement of behavior in conformity therewith.

134. *Karlsson v. Sweden*, App. No. 12356/86, 57 Eur. Comm’n H.R. Dec. & Rep. 172, 175 (1988), cited in *Gunn*, *supra* note 84, at 315; see also *Knudsen v. Norway*, App. No. 11045/84, 42 Eur. Comm’n H.R. Dec. & Rep. 247 (1985); *X. v. Federal Republic of Germany*, App. No. 8741/79, 24 Eur. Comm’n H.R. Dec. & Rep. 137, 138 (1981).

135. 260 Eur. Ct. H.R. (ser. A) (1993).

136. *Id.*

137. See *id.* ¶ 7.

138. See *id.*

139. See *id.* ¶¶ 9–12.

awarded Mr. Kokkinakis damages.¹⁴⁰ In a six to three vote, the majority of the court held that the right to proselytize—so long as it is done properly, without brainwashing, corruption, or violence—was protected by Article 9, since such a practice is an important manifestation of certain religious beliefs.¹⁴¹ This point was best articulated in a concurring opinion by Judge Pettiti:

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.”¹⁴²

Perhaps the most important aspect of the case is the court’s willingness to invoke Article 9. In a paragraph that parts dramatically from the Commission’s historically apathetic treatment of religious issues, the court announced:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.¹⁴³

As encouraging as these words are, the court’s analysis is even more so. Specifically the court avoided two of the misguided patterns that previous courts, and the European Commission, had followed in addressing Article 9 cases, by (1) not avoiding the Article 9 claim in favor of other provisions and by (2) widening the scope of freedoms protected by Article 9.

In his application, Mr. Kokkinakis alleged violations of Articles 7,

140. *See id.* ¶¶ 49–50. For a discussion of the significance of the case, as well as its encouraging and discouraging implications for the freedom of conscience, see generally Gunn, *supra* note 84.

141. *Kokkinakis*, 260 Eur. Ct. H.R. (Ser. A) ¶ 48.

142. *Id.* (Pettiti, J., concurring).

143. *Id.* ¶ 31.

9, 10, and 14.¹⁴⁴ Rather than avoiding the Article 9 issue, the court began with Article 9, found that it had been violated, and therefore found no need to discuss other articles.¹⁴⁵ While future courts would continue to leave potential Article 9 violations untested in favor of resolution on other grounds, such cases can be explained either as growing pains or simply fact situations more closely tied to the freedoms protected in other articles.¹⁴⁶ In any case, the *Kokkinakis* analysis paved the way for future courts to give stricter heed to Article 9 claims.

Not only did the case discontinue this first errant pattern, but it also widened the scope of the freedoms protected by Article 9. Whereas the European Commission had previously limited Article 9 protection to beliefs and manifestations closely tied to beliefs (the internal forum), the *Kokkinakis* court broadened the scope enough to protect Mr. Kokkinakis's proselytism—an act that while clearly a tenet of his faith is perhaps less easily tied directly to a religious belief than the need to pray.¹⁴⁷

While immediately following the release of the *Kokkinakis* decision some scholars showed concern that the case did not go far enough,¹⁴⁸ *Kokkinakis* was an important first step in a better direc-

144. *See id.* ¶ 27.

145. *See id.* ¶¶ 28–57.

146. *See, e.g.,* Freedom and Democracy Party v. Turkey, App. No. 23885/94, at <http://www.echr.coe.int> (1999) (finding a violation of Article 11); Canea Catholic Church v. Greece, 1997-VII Eur. Ct. H.R. 2843 (finding a violation of Article 6); United Communist Party of Turkey and Others v. Turkey, 1998-I Eur. Ct. H.R. (finding a violation of Article 11).

147. *See Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) ¶ 48 (concluding that “bearing Christian witness,” or proselytism, “corresponds to true evangelism, which . . . the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church”). Compare this with the Commissions's pre-*Kokkinakis* decisions in which it construed the Article 9 freedoms very narrowly. *See* cases discussed *supra* Part III.D.2. The most glaring comparison—as mentioned in the text—is to the court's decision in *Ahmad*, upholding the denial of a schoolteacher's request for a change in schedule allowing him to participate in Friday prayers. *See Ahmad v. United Kingdom*, App. No. 8160/78, 4 Eur. H.R. Rep. 126 (1981) (Eur. Comm'n).

148. Some of the criticism has focused on the ardent nature of the dissenting opinions, which show strong support for maintaining a narrow interpretation of Article 9 freedoms—one narrow enough to regard proselytism as non-religious behavior. *See generally Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) (Valticos, J., dissenting). Professor Gunn has also suggested that even the analysis used by the court in reaching the conclusion that Article 9 had been violated indicates that the court did not give the Article 9 issue much concern. *See Gunn, supra* note 84, at 321–26. Professor Gunn examines the court's three-step analysis and determines that “the Court's reasoning in these three steps shows that it made no effort to understand or interpret the scope of the fundamental right to manifest a belief. Rather, the Court sought an acceptable

tion.¹⁴⁹

*b. Manoussakis v. Greece.*¹⁵⁰ One case to follow in the direction set by *Kokkinakis* was *Manoussakis v. Greece*.¹⁵¹ In August 1991, Mr. Manoussakis, a Jehovah's Witness, filed an application before the European Court alleging violations of Articles 3, 5, 6, 8, 9, 10, 11, and 14.¹⁵² His claim arose from his prosecution for operating a place of worship without the authorization of the Minister of Education and Religious Affairs in violation of a Greek law.¹⁵³ Following the example of *Kokkinakis*, the court began its analysis with a discussion of the Article 9 issues and held that there was indeed a violation.¹⁵⁴ The court held that the Greek government tended to use the law under which Mr. Manoussakis was prosecuted "to impose rigid, or indeed prohibitive, conditions on practice of religious beliefs by certain non-Orthodox movements, in particular Jehovah's Witnesses."¹⁵⁵ This holding was an important step in reversing the commission's previous practice of allowing governments to favor established churches and disadvantage new religious movements.¹⁵⁶

The *Manoussakis* decision also made significant strides in widening the scope of the freedoms protected by Article 9 when it stated, "The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."¹⁵⁷ This statement is encouraging when considered in light of the court's attempts in *Kokkinakis* to broaden the scope of Article 9 freedoms.

compromise for a politically difficult problem." *Id.* at 322–23. He then discusses the failure of the court to address Mr. Kokkinakis's claim that the Greek statute could not be prescribed by law since it was too vague. Such a finding could potentially have prevented the future application of the statute in equally intrusive ways, but the court avoided such a broad finding regarding the statute in general and based its decision on the specific facts of Mr. Kokkinakis's case. *See id.* at 323–24.

149. *But cf.* Gunn, *supra* note 84, at 325 ("The *Kokkinakis* decision exemplifies the failures of the European Court to take seriously rights of conscience in its jurisprudence.").

150. 1996-IV Eur. Ct. H.R. 1346, ¶ 28.

151. *Id.*

152. *See id.* ¶ 28.

153. *See id.* ¶¶ 6–12.

154. *See id.* ¶¶ 35–53.

155. *Id.* ¶ 48.

156. For a discussion of the application of the Convention to new religious movements, see Smith, *supra* note 11; Gunn, *supra* note 84, at 308–12.

157. *Manoussakis*, 1996-IV Eur. Ct. H.R. ¶ 47.

As discussed above, prior to *Kokkinakis*, the protections of Article 9 had largely been limited to the internal forum, or to limited external expressions that were very closely tied to beliefs,¹⁵⁸ whereas the *Kokkinakis* court expanded that view somewhat in protecting proselytism activities.¹⁵⁹ In holding that states do not have the discretion to determine the legitimacy of particular religious practices, the *Manoussakis* court essentially broadened the scope of Article 9 freedoms even farther than *Kokkinakis*. In *Manoussakis*, the court not only extended Article 9 protection to actions as opposed to beliefs, but also stated that states could not even inquire into the legitimacy of actions as expressions of beliefs.¹⁶⁰ Obviously, such a standard must have its bounds, and states clearly have legitimate reasons, having nothing to do with religion, for regulating zoning and other property uses. Nevertheless, the *Manoussakis* court went quite far in holding that those legitimate aims were not proportionate to the denial of the Jehovah's Witnesses' right to maintain a place of worship.

This holding has particular significance for religious organizations seeking recognition as a legal entity, since such status is often required in order to lease or own property for worship. The holding would appear to limit states' ability to question the religious nature of organizations seeking registration as churches or other forms of legal entities.

*c. Otto-Preminger-Institute v. Austria*¹⁶¹ and *Wingrove v. UK*.¹⁶² The court made another significant step in two other post-*Kokkinakis* cases: *Otto-Preminger-Institut v. Austria*¹⁶³ and *Wingrove v. UK*.¹⁶⁴ In these cases the court faced the difficult question of whether religious justifications should be sufficient grounds to infringe upon Article 10 freedom of expression.¹⁶⁵ In both cases the respective government had either denied permits for distribution, or had banned certain videos and films because the content of the films

158. See discussion *supra* Part III.D.2.

159. See *supra* note 147 and accompanying text.

160. See *Manoussakis*, 1996-IV Eur. Ct. H.R. ¶ 47.

161. 295 Eur. Ct. H.R. (ser. A) at 3 (1994).

162. 1996-V Eur. Ct. H.R. 1937 (1996).

163. See *Otto-Preminger-Institut*, 295 Eur. Ct. H.R. (ser. A) at 3.

164. See *Wingrove*, 1996-V Eur. Ct. H.R. 1937.

165. For a discussion of these cases and their significance for the interplay between Article 10 and Article 9 freedoms, see Willi Fuhrmann, *Perspectives on Religious Freedom from the Vantage Point of the European Court of Human Rights*, 2000 BYU L. REV. 829, 835-37.

was offensive to the religious beliefs of a majority of the people and violated blasphemy laws.¹⁶⁶ The applicants in both cases claimed violations of their freedom of expression under Article 10. However, in both cases, the court upheld the governmental action based on the rationale that, since the films were attacks upon religion, “the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines.”¹⁶⁷ The court was careful in *Wingrove* to point out that while not every law banning or controlling anti-religious expression will be upheld under the Convention, there are nevertheless justifiable circumstances in which such religious principles will warrant an infringement upon freedom of expression.¹⁶⁸

While at least one commentator has suggested that one should not “conclude from these cases that where there are competing Convention interests, considerable weight is attached to the Article 9 interest” and that the cases merely stand for the proposition that “the relationship between freedom of expression and freedom of religion should be decided by democratic governments,”¹⁶⁹ such a conclusion seems unavoidable. Although the cases may not go so far as creating a religious exception to the Article 10 freedom of expression, they certainly go at least as far as holding that where there are competing Article 10 and Article 9 interests, the Article 9 interest should be given considerable weight. How else could the court have justified the applicants’ clearly established Article 10 rights? There was no question that the applicants’ freedom of expression had been intruded upon. The decisions rested on determinations that the intrusions were necessary in a democratic society.

These cases also have important implications for religious organizations seeking to maintain legal entity status. In addressing the potential argument that religious associations are less deserving of Arti-

166. See *Otto-Preminger-Institut*, 295 Eur. Ct. H.R. (ser. A) at 8–9; *Wingrove*, 1996-V Eur. Ct. H.R. at 1943–44.

167. *Otto-Preminger-Institut*, 295 Eur. Ct. H.R. (ser. A) at 18; see also *Wingrove*, 1996-V Eur. Ct. H.R. at 1956–57.

168. See *Wingrove*, 1996-V Eur. Ct. H.R. at 1957–59 (restating the requirement that the governmental means must be proportional to the anti-religious nature of the material it is regulating).

169. Fuhrmann, *supra* note 165, at 837.

cle 11 protection than other, non-religious, associations it is important to note that the European Court has indicated that Article 9 may hold a paramount place among the rights guaranteed by the Convention.

d. Other cases. In addition to these most influential cases are several post-*Kokkinakis* cases illustrating the court's broadening view of Article 9's importance. Most recently the court found Article 9 violations in 1999 in *Serif v. Greece*¹⁷⁰ and in 2000 in *Thlimmenos v. Greece*¹⁷¹ and *Hasan and Chaush v. Bulgaria*.¹⁷² In all three of these cases the court followed the three-step analysis of *Kokkinakis*, and in all three cases the court began its analysis with Article 9.¹⁷³ While the viability and strength of *Kokkinakis* may have been questioned in 1993,¹⁷⁴ and while some of those concerns remain valid, the consistency of these recent cases indicate that the *Kokkinakis* decision was, if arguably nothing more, an encouraging turn in the road of Article 9 jurisprudence—a turn toward the direction intended by the text and indicated by the *travaux préparatoires* of the Convention.¹⁷⁵

E. The Interplay Between Articles 9 and 11

The final, and perhaps most persuasive, factor suggesting that religious organizations should have a right to legal entity status under Article 11 is the fact that the court has explicitly ruled that the free-

170. App. No. 38161/97 (Eur. Ct. H.R. 1999), at <http://www.echr.coe.int>.

171. App. No. 34369/97 (Eur. Ct. H.R. 2000), at <http://www.echr.coe.int>.

172. App. No. 30985/96 (Eur. Ct. H.R. 2000), at <http://www.echr.coe.int>.

173. In *Thlimmenos*, the court technically bases its decision on “Article 14 of the Convention taken in conjunction with Article 9,” finding discrimination based on religion. *Thlimmenos*, App. No. 34369/97, ¶ 49.

174. Writing in 1993, without the benefit of these more recent cases, Professor Gunn, cited and quoted repeatedly in Part III.D.2, discussing the European Commission's historical reluctance in enforcing Article 9 freedoms, identifies the encouraging aspects of the *Kokkinakis* decision, but ultimately questions whether it really indicates the court's willingness to seriously address Article 9 issues. See Gunn, *supra* note 84, at 325–30 (“The *Kokkinakis* decision exemplifies the failure of the European Court to take seriously rights of conscience in its jurisprudence.”). With the benefit of these more recent cases, my position is that while there was, and is, reason to question the seriousness with which the *Kokkinakis* court addressed the issues, the more recent cases indicate that *Kokkinakis* has played an enduring role in correcting at least some of the court's prior errant patterns.

175. Recall the previous textual and historic analyses of Article 9 *supra* Part III.D.1–2, suggesting that the intent of the drafters of the Convention was for the freedom of thought, conscience, and belief to maintain a paramount place among the fundamental rights protected by the Convention.

dom of religion must be applied in a manner consistent with the freedom of association under Article 11. The two best examples of this rule are the cases of *Hasan and Chaush*¹⁷⁶ and *Metropolitan Church of Bessarabia*.¹⁷⁷ These cases have both been announced in the previous two years and are strong indications of the court's current willingness to grant religious organizations associative freedom.

1. Hasan and Chaush v. Bulgaria

In this case, the applicants, Hasan and Chaush, alleged that the Bulgarian government had effectively forced their replacement as leaders of their Muslim religious denomination.¹⁷⁸ In 1992, Mr. Hasan had been elected to be the Chief Mufti of Bulgarian Muslims, and the Bulgarian Directorate of Religious Denominations had registered him as such.¹⁷⁹ In 1994, the followers of a previous mufti, Mr. Gendzhev, organized a national conference and elected Mr. Gendzhev to be the Chief Mufti of Bulgarian Muslims, and the Directorate of Religious Denominations, despite complaints by Hasan, registered the Gendzhev as the new official leader of the Bulgarian Muslims.¹⁸⁰ It appears from the European Court's opinion that the government's "motivation behind this act had been the understanding that the Muslim religion in Bulgaria could have only one leadership and one statute."¹⁸¹ In other words, the Bulgarian government refused to officially recognize—or grant registered status to—more than one legitimate Muslim religious denomination. Despite their appeals to Bulgarian courts, Hasan and Chaush were unable to receive relief. The European Court, hearing the appeal, held that the government's actions violated Article 9.¹⁸²

The significance of this case lies partially in the court's determination of whether to apply Article 9 or Article 11. While the applicants had urged the court to apply Article 9 and find a violation of their religious freedom, the Bulgarian government urged the court to simply apply Article 11 and find that "not every act motivated by

176. *Hasan and Chaush*, App. No. 30985/96.

177. *Affaire Eglise Metropolitaine de Bessarabie et autres c. Moldova*, App. No. 45701/99 (2002), at <http://www.echr.coe.int>.

178. *See Hasan and Chaush*, App. No. 30985/96, ¶ 3.

179. *See id.* ¶ 13.

180. *See id.* ¶¶ 15–16, 23.

181. *See id.* ¶ 28.

182. *See id.* ¶ 89.

religious belief could constitute a manifestation of religion, within the meaning of Article 9.”¹⁸³ Essentially the Bulgarian government was arguing that Article 9 did not apply because the dispute involved the applicants’ participation in the religious denomination and not a manifestation of their religious belief. The government was arguing that the right to participate in a religious association is not part of the Article 9 freedoms.

The court rejected the government’s argument and applied Article 9. In doing so the court stated,

religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one’s religion, protected by Article 9 of the Convention.¹⁸⁴

Having recognized the importance of the right of association to an effective exercise of religious freedom, the court went on to clarify that the protections of Article 11 are necessary to protect individuals’ freedom of religion. The court stated:

Where the organisation of the religious community is at issue, Article 9 must be interpreted in the light of Article 11 of the Convention which safeguards associative life against unjustified State interference. . . . Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable.¹⁸⁵

The obvious conclusion is that the court refused to apply either Article 9 or Article 11 exclusively, and declared,

the Court does not consider that the case is better dealt with solely under Article 11 of the Convention, as suggested by the Government. Such an approach would take the applicants’ complaints out of their context and disregard their substance. . . . Insofar as they touch upon the organisation of the religious community, the Court

183. *See id.* ¶ 57.

184. *Id.* ¶ 62.

185. *Id.*

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reiterates that Article 9 must be interpreted in the light of the protection afforded by Article 11 of the Convention.¹⁸⁶

While it was not directly at issue in the *Hasan and Chaush* case, one of the “protections afforded by Article 11” is the right to register a legal entity.¹⁸⁷ As the *Sidiropoulos* court pronounced, “That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning.”¹⁸⁸

Read together, as they must be, these two cases establish the unmistakable conclusion that religious entities are entitled to register as a legal entity as part of their rights under both Article 9 and Article 11. This conclusion is further strengthened by one of the court’s most recent cases, *Metropolitan Church of Bessarabia v. Moldova*.¹⁸⁹

2. Metropolitan Church of Bessarabia v. Moldova

The *Metropolitan Church of Bessarabia* case is the most recent cases to address the issue of freedom of religious association and the first to directly address the right of religious associations to register as a legal entity. The case involves the efforts of the members of the Metropolitan Church of Bessarabia in Moldova to register with the Moldavian government as a recognized church. The Church of Bessarabia is an Orthodox congregation with 117 congregations in Moldova, three in the Ukraine, one in Lithuania, one in Latvia, two in Russia, and one in Estonia.¹⁹⁰ The church applied for registration with the Moldavian government several times but was repeatedly denied registration on the grounds that it was not a separate religion, but rather a schism of the Metropolitan Church of Moldova.¹⁹¹

The church then sought relief in the Moldavian courts and while intermediary courts initially reversed the government’s decision, the Supreme Court of Justice—the highest court in Moldova—

186. *Id.* ¶ 65.

187. *See* *Sidiropoulos v. Greece*, 1998-IV Eur. Ct. H.R. 1594, 1614–15.

188. *Id.*

189. *Affaire Eglise Metropolitaine de Bessarabie et autres c. Moldova*, App. No. 45701/99 (2002), at <http://www.echr.coe.int>.

190. *See id.* ¶ 12.

191. *See id.* ¶¶ 13–30.

eventually upheld the refusal of registration.¹⁹² The Supreme Court of Justice held that the church had failed to meet certain procedural requirements, and that

in any case, the Government's refusal to grant the applicants' request did not constitute a violation of their freedom of religion as guaranteed by the international treaties, and in particular Article 9 of the European Convention on Human Rights, since the interested parties were Orthodox Christians and could manifest their beliefs within the Metropolitan Church of Moldova, which the Government had recognized in a decision on February 7, 1993.¹⁹³

The Supreme Court further held that "additionally, the applicants could manifest their beliefs freely, that they had access to churches, and that they had not shown proof of any obstruction of the exercise of their religion."¹⁹⁴

The church again applied for relief with the government and received a letter from the Prime Minister refusing their request and indicating "that the Metropolitan Church of Bessarabia did not constitute a sect within the meaning of the law, but a schismatic group of the Metropolitan Church of Moldova."¹⁹⁵ The church then applied to the European Court.

After citing the facts and allegations of both sides, and after noting that under Moldavian domestic law only registered churches can practice their religion in Moldova, the European Court addressed the case under Article 9. While the church alleged that failure to recognize the church prohibited them from practicing their religion, the government argued that the applicants, as an Orthodox Christian Church, did not practice a unique religion since the Christian Orthodox Church was already recognized by the government.¹⁹⁶ Following its traditional mode of analysis, the court determined that the refusal to register the church constituted an interference with the church's freedom of religion, that the interference was prescribed by law, and that it was in furtherance of the legitimate state aims of protecting order and public security.¹⁹⁷

192. *See id.* ¶ 26.

193. *Id.* (translation by author).

194. *Id.* (translation by author).

195. *Id.* ¶ 28 (translation by author).

196. *See id.* ¶ 98.

197. *See id.* ¶¶ 106, 110, 113.

In analyzing the final question of whether the interference was necessary in a democratic society, the court recognized that to require a divided religious community “to place itself, against its will, under a single leadership, would equally constitute an infringement of religious freedom.”¹⁹⁸ The court then reiterated the principles established in *Hasan and Chaush*:

[R]eligious communities traditionally exist in the form of organized structures; Article 9 must be interpreted in the light of Article 11 of the Convention which protects associations [or this could be interpreted: associative life] from all unjustifiable interference from the State. Seen in this light, the right of the faithful to religious freedom, which includes the right to manifest their religion collectively, assumes that the faithful are able to associate with one another freely, without arbitrary interference from the State. In effect, the autonomy of religious communities is indispensable to pluralism in a democratic society and thus finds itself at the heart of the protection offered by Article 9.¹⁹⁹

Additionally, one of the ways of exercising the right to manifest one’s religion, especially for a religious community, in the collective sense, is through the possibility of assuring the jurisdictional protection of the community, of its members and their possessions, such that Article 9 must be understood in the light not only of Article 11, but also in the light of Article 6.²⁰⁰

The court then concluded that since only registered religious congregations are allowed such privileges as having legal personality, the right to produce and sell specific religious objects, and the right to hire officials and employees, effectively only registered congregations may organize and function.²⁰¹ Furthermore, the court noted, without legal personality the church cannot participate in the legal system to protect its interests. Based on these conclusions, the court

198. *Id.* ¶ 117 (translation by author).

199. *Id.* ¶ 118 (translation by author).

200. *Id.* (translation by author). In referring to Article 6, the court cites the European Commission report in the case of *Canea Catholic Church v. Greece*, in which the Commission stated that it “cannot see any plausible reason for the fact that in 1996, the Greek Catholic Church still does not enjoy a precise legal status—which obviously deprives it of the ability to guarantee the effective protection of its possessions used to manifest its freedom of religion.” *Canea Catholic Church v. Greece*, 1997-VIII Eur. Ct. H.R. 2843, 2868.

201. *Affaire Eglise Metropolitaine de Bessarabie et autres c. Moldova*, App. No. 45701/99, ¶ 129 (2002), at <http://www.echr.coe.int>.

held that the refusal of registration had such serious consequences on the applicants' religious liberty that the state interferences could not be justified as proportional to the legitimate aim sought nor as necessary in a democratic society.²⁰²

This case sets an important precedent for religious associations seeking legal entity status. The court essentially held that refusal of legal entity status violates the Convention—in the *Bessarabia* case under Article 9, but presumably the court could have reached the same conclusion under Article 11 as well—if such refusal effectively prohibits the religious association from practicing its religion, such as by an inability to participate in the legal system, to hire and pay employees, to produce and distribute religious materials, to gather in meetings, etc. It is difficult to imagine a legislative scheme that would refuse registration of religious associations and yet not deprive that association of one of these essential rights or privileges. At the very least, legislation that refuses recognition or registration will almost always deny the religious association the right to participate in the legal system as an entity, which is essential to rent facilities, pay employees, etc.

It is not surprising that this most recent case makes the most persuasive argument that religious associations are entitled to legal entity status. As the history of Article 9 and Article 11 indicates, the court's jurisprudence under both articles has been heading in this direction. Having answered the question of whether such a right exists, the only remaining issue for the European Court will be to establish what limits a state may justifiably place on this right.

IV. ACCEPTABLE LIMITATIONS ON THE RIGHT OF LEGAL ENTITY STATUS

The European Court has essentially established two separate standards for identifying a justifiable limitation upon the right of a religious association to maintain legal entity status. In order for a state to deny registration or official recognition to a religious group, it must satisfy either of these narrow exceptions. The first was established in the *Welfare Party Case*, and the second in the *Bessarabia Case*.

202. *See id.* ¶ 130.

561] *Legal Entity Status Under the European Convention*A. *The Welfare Party Case and Threats to Democratic Order*

As discussed above, in the *Welfare Party Case*, the court upheld the dissolution of the Welfare Party based on the conclusion that the Welfare Party had exhibited a realistic and actual intention of establishing a theocratic government with a plurality of legal systems, as well as a reasonably unambiguous stance toward the use of violence to gain power.²⁰³ While the court cautioned that the dissolution of a political party—and presumably the refusal to initially recognize or subsequently dissolve other types of associations—was a “drastic measure and that measures of such severity might be applied only in the most serious cases,”²⁰⁴ it was nevertheless convinced of the wisdom of dissolution in this case, due to the dangerous threat that the Welfare Party posed to the democratic order of the state.

This holding reveals the first exception to, or limitation on, the right to legal entity status: a state may deny such status when the group poses a threat to the democratic order of the state. As the court stated,

since the pluralism of ideas and parties is itself an inherent part of democracy, a State may reasonably forestall the execution of such a policy [the removal of secular government and establishment of a plurality of legal systems], which is incompatible with the Convention’s provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country’s democratic regime.²⁰⁵

It is important to note two limitations that the court put on this already narrow exception. First, it cautioned that the threat must be neither “theoretical nor illusory, but achievable.”²⁰⁶ This limitation would prevent the dissolution of organizations that have radical or revolutionary, yet unrealizable, objectives.

Second, the court cautioned that the margin of appreciation granted the states in this type of a matter is narrow.²⁰⁷ Given the diversity of situations among the member states, the European Court has traditionally granted a “margin of appreciation” within which

203. See *Welfare Party Case*, *supra* note 30, ¶ 81.

204. *Id.* ¶ 82.

205. *Id.* ¶ 81.

206. See *id.* ¶ 77.

207. See *id.* ¶ 81.

each state may implement the rules of the Convention. This margin of appreciation allows for some flexibility in implementation while maintaining the integrity of the substantive rules. Usually the margin of appreciation is intended to include conduct and policies that would be accepted by a consensus of the member states.²⁰⁸ In the case of denying legal entity status, in the *Welfare Party Case* the court explained that the margin of appreciation must be narrow, meaning that it will tolerate very little deviation on the part of the member states.²⁰⁹

In summary, the first exception to the general right of legal entity status is that a state may deny such status to any organization that poses a realistic objective of threatening the democratic, or pluralistic, order of the state.

B. The Bessarabia Case and Retention of the Ability to Practice Religion

The second exception is found in the *Bessarabia* case. In that case, the court invalidated the Moldavian government's attempts to deny legal entity status to the Metropolitan Church of Bessarabia, but based that decision on the premise that denial of registration would effectively prohibit the church from practicing certain aspects of its religion.²¹⁰ It is therefore conceivable that the court would allow a state to deny registration or legal entity status to a religious group if doing so would not prohibit the group from doing any of the things listed in the *Bessarabia* case, such as having legal personality, participating in the legal system, hiring and paying employees, producing and distributing religious materials, etc.

From a practical perspective this exception seems difficult to realize, since denial of registration almost always includes a denial of legal personality. Without legal personality, a religious association would usually be unable to perform many of the necessary functions of a typical religious organization.

208. A good example of a consensus position on this issue might be the specific language of the Vienna Concluding Document, which requires that each state grant all religious organizations the type of legal status it has established for other religious organizations. *See* Vienna Concluding Document, *supra* note 102.

209. *See* *Welfare Party Case*, *supra* note 30, ¶ 81.

210. *See* *Affaire Eglise Metropolitaine de Bessarabie et autres c. Moldova*, App. No. 45701/99, ¶ 129 (2002), at <http://www.echr.coe.int>.

V. CONCLUSION

Considering the narrowness of the exceptions and the European Court's willingness to protect religious associations from unjustified state interference, it seems clear that the general right of religious associations to maintain legal status is likely to be explicitly and vigorously protected throughout the foreseeable future. Unfortunately it is not clear that all of the member states are currently operating under systems that comply with the standards discussed in this paper. As the court continues to pursue these principles, it is likely that several states will have to modify their registration processes to accommodate all religious associations. Arbitrary limitations on registration, such as requiring a minimum number of adherents, a minimum amount of time in the country, or even certain nationality requirements, appear to be in jeopardy of being challenged and condemned by the European Court. In our increasingly legalistic and regulatory world, it is only without these unjustified restrictions on legal status that religious association will truly be free.

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