

9-1-2006

The Questionable Grounds of Objections to Proselytism and Certain Other Forms of Religious Expression

Paul M. Taylor

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Human Rights Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Paul M. Taylor, *The Questionable Grounds of Objections to Proselytism and Certain Other Forms of Religious Expression*, 2006 BYU L. Rev. 811 (2006).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2006/iss3/8>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Questionable Grounds of Objections to Proselytism and Certain Other Forms of Religious Expression

*Paul M. Taylor*¹

I. INTRODUCTION

Proselytism seems to attract singular antagonism in many parts of the world. In some countries, the concern is for the maintenance of traditional state religion, especially where the influx of new religious movements that proselytize is seen to threaten the process of rebuilding or reigniting national identity.² In some countries, national law is inseparable from religious law, and preservation of the orthodoxy of state religion is paramount. In other countries, for example Communist countries, proselytism conflicts with an ideology that does not easily accommodate the assertion of rights of the individual over the interests of the State.

The clearest objections to proselytism have been expressed in the link between extreme forms of proselytism and coercion to change religion. These objections were voiced in the drafting of Article 18 of the Universal Declaration on Human Rights³ (“Universal Declaration”) and Article 18 of the International Covenant on Civil and Political Rights⁴ (“International Covenant”), although not

1. The author is a barrister (England and Wales).

2. Until recently, the protection of state religion has more commonly been a feature of many Islamic countries. However, in numerous countries of the former Soviet Bloc, measures to prevent the emergence of new religious movements, which filled the vacuum left by the abrupt exodus of Communism, include prohibitive registration formalities required for their establishment, as well as widespread prohibitions on religious practice, particularly proselytism.

3. Universal Declaration on Human Rights, G.A. Res. 217A (III), at 74, U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration]. Article 18 of the Universal Declaration reads as follows: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

4. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 55, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter International Covenant]. Article 18 of the International Covenant reads as follows:

extensively in the preparation of the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (“the 1981 Declaration”).⁵ The issue received little attention in the development of the equivalent provision in Article 9 of the European Convention,⁶ since Article 9 simply drew its text from Article 18 of the Universal Declaration in pursuance of the express aim of the European Convention in taking “the first steps for collective enforcement of certain of the Rights stated in the Universal Declaration.”⁷ Article 9 was to be based as much as possible on Article 18 of the Universal Declaration to reduce the risk of devising definitions that were at odds with those in U.N. instruments. Nevertheless, objections to coercive forms of

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Id.

5. Universal Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. Doc. A/RES/36/55 (Nov. 25, 1981) [hereinafter 1981 Declaration].

6. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]. Article 9 of the European Convention reads as follows:

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

2. Freedom to manifest one’s religion or 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.

Id.

7. *Id.* at pmbl. For discussion of the drafting of the European Convention, see MARTINUS NIJHOFF, COUNCIL OF EUR., COLLECTED EDITION OF THE “TRAVAUX PREPARATOIRES” OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1975–85). For commentary, see A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN THE WORLD (1996).

proselytism also have been aired in the European Court's analysis of Article 9 in the concept of "improper" proselytism first developed in *Kokkinakis v. Greece*.⁸

However, the basis of objections to *non-coercive* forms of proselytism and religious expression are less clear; but recent decisions of the European Court in such cases as *Otto-Preminger-Institut v. Austria*⁹ and *Murphy v Ireland*¹⁰ suggest that principles of "respect" may enlarge the scope of the limitation provisions to justify restrictions even on non-coercive forms of proselytism.

Although the notion of "respect" has developed primarily within the context of freedom of expression under Article 10, its application within the limitation grounds of Article 9 would represent a development which could restrict many forms of religious expression, including proselytism. In its response to Article 9 claims, the European Court has liberally supported the legitimacy of the aims claimed by States for restrictions on proselytism on the ground of protection for "the rights or freedoms of others," generally preferring instead to make a substantive finding on the basis of whether the State measure was "necessary in a democratic society."¹¹

If principles of "respect," developed in the context of freedom of expression, are imported wholesale into the freedom of religion, the potential result would be an extremely broad interpretation of the limitation ground, "the rights and freedoms of others," in such a way as to suggest a fundamental departure from universal standards. At the same time, it is necessary to recognize that both the Human Rights Committee and Special Rapporteur have endorsed proselytism as a proper manifestation of religion. The European Court has also given nominal endorsement to proselytism as a legitimate form of manifestation of religion or belief.

Part II of this Article begins by addressing the objections raised against proselytism during the drafting of those U.N. instruments in which the freedom of thought, conscience, and religion is enshrined. These objections are most visible in the early debates and contrast with the support shown by both the Human Rights Committee and Special Rapporteur¹² for proselytism as a legitimate manifestation of

8. 260 Eur. Ct. H.R. (ser. A) (1993).

9. 295 Eur. Ct. H.R. (ser. A) (1994).

10. App. No. 44179/98, 38 Eur. H.R. Rep. 212 (2003) (Commission report).

11. European Convention, *supra* note 6.

12. The Special Rapporteur is appointed by the Commission on Human Rights to

religion, coupled with condemnation of restrictions on proselytism and other forms of religious expression. Part II concludes with an assessment of the objections raised in those debates against proselytism in the light of prevailing U.N. standards. Part III of this article then evaluates the extent to which the notion of “respect” operates as a curb on proselytism, as invoked in the context of hate speech and the limitation provisions applicable to freedom of expression and freedom of religion. Part III plots the development of principles of “respect” in the case law of the European Court and concludes that this development has limited parallel in the practice of the Human Rights Committee. The notion of respect for the religious feelings of others is not itself a right found within the freedom of thought, conscience, and religion, and inappropriate appeals to “respect” could unduly extend the scope of limitation provisions. Part IV suggests various conclusions to be drawn from this discussion.

II. BACKGROUND: U.N. STANDARDS AFFECTING PROSELYTISM

The drafting history of Article 18 of the Universal Declaration and Article 18 of the International Covenant is important to understand—particularly the freedom from coercion as expressed in Article 18(2) of the Covenant.¹³ Karl Partsch has suggested that the purpose of inclusion of the words “the freedom to have or to adopt a religion or belief of his choice,” in Article 18(2) of the International Covenant, was to protect against zealous proselytizers and

examine incidents and governmental action inconsistent with the 1981 Declaration. *See supra* note 5. The title of the “Special Rapporteur on religious intolerance” was changed to “Special Rapporteur on freedom of religion or belief” by the Commission on Human Rights. U.N. Econ. & Soc. Council [U.N. ESCOR], Comm’n on H.R., *Report to the Economic and Social Council on the Fifty-Sixth Session of the Commission*, ¶ 11, U.N. Doc. E/CN.4/2000/L.11/Add.4 (Apr. 20, 2000).

13. For commentary on the drafting of Article 18 of the Universal Declaration, *supra* note 3, see N. ROBINSON, *UNIVERSAL DECLARATION OF HUMAN RIGHTS: ITS ORIGINS, SIGNIFICANCE, APPLICATION AND INTERPRETATION* (1958); Martin Scheinin, *Article 18*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* (Gudmundur Alfredson & Asbjorn Eide eds., 1999). For commentary on the drafting of Article 18 of the International Covenant, see THEO VAN BOVEN, *DE VOLKENRECHTELIJKE BESCHERMING VAN DE GODSDIENSTVRIJHEID* (1967); Karl J. Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 209–45 (Louis Henkin ed., 1981).

811] *The Questionable Grounds of Objections to Proselytism*

missionaries.¹⁴ This was certainly a reason *proposed* for the adoption of Article 18(2), to support the right to maintain a religion. The focus of the original proposal was unequivocally the right to *maintain* a religion, so that legitimate steps might be taken to dissuade a change of religion.¹⁵ In the end, the Article 18(2) proposal was accepted, with appropriate clarification, to ensure that it merely made explicit something that was already implicit in the original text and was not more restrictive.¹⁶ Some thought it might otherwise be interpreted so as to jeopardize freedom of teaching, worship, practice and observance, or, more importantly, as limiting a person who sought to maintain or change their religion or belief.¹⁷ The Australian delegate wanted it clearly understood “that the expression ‘coercion’ would not include persuasion or appeals to conscience.”¹⁸ Similarly, the Lebanese delegate would only support the proposal if it confirmed the right of others to preach and seek to influence a person either to maintain or to change his religion,¹⁹ as would the United Kingdom delegate, provided that it could not be interpreted as imposing limitations or restrictions on argument and discussion. From the use of the word “coercion,” that possibility, in any event, seemed to be excluded.²⁰ It is evident then that appeals to conscience, preaching, and seeking to influence a person either to maintain or to change his religion were not to be regarded as coercive.

The most direct statement on the interpretation of Article 18(2) was by the Human Rights Committee in paragraph 5 of General

14. Partsch, *supra* note 13, at 211. The text of Article 9 of the European Convention does not include a provision equivalent to Article 18(2) of the International Covenant. *Id.* This is because Article 9 was drawn from Article 18 of the Universal Declaration and was not shaped by the same concerns that initially led to proposals for Article 18(2) of the International Covenant. *Id.*

15. Article 18(2) stems from a two part amendment proposed by Egypt during the Commission’s eighth session in 1952. For the draft under discussion, see U.N. ESCOR, Comm’n on H.R., Annex I, U.N. Doc. E/1992 (1951). The amendment is at U.N. ESCOR, Comm’n on H.R., U.N. Doc. E/CN.4/L.187.

16. U.N. ESCOR, Comm’n on H.R., 8th Sess., U.N. Doc. E/CN.4/SR.319 (1952). For the comments of the delegates of the Commission of the Churches on International Affairs, Lebanon, U.S.S.R., the United Kingdom, and Greece, see *id.* at 5, 8–9, 11 respectively.

17. *Id.* at 6 (Commission of the Churches on International Affairs).

18. *Id.* at 7 (Australia).

19. *Id.* at 8 (Lebanon).

20. *Id.* at 9 (United Kingdom).

Comment No. 22, which adopts a very one-sided emphasis on State-sponsored coercion, or coercion by those emulating State functions.²¹ It describes coercion for the purposes of Article 18(2) in terms of fairly extreme measures, such as “the use or threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs, to recant their religion or belief or to convert.”²² These illustrations do not resemble most imaginable forms of proselytism. Paragraph 5 then goes on to embrace, as coercive, “policies and practices having the same intention or effect.”²³ The examples are interesting because they refer to the denial of facilities generally within the public realm, such as education, medical care, and employment, and rights which are to be safeguarded by the State, noting in particular Article 25 with its focus on participation in democratic and public life. Paragraph 5 therefore suggests that the Human Rights Committee was primarily concerned about coercion imposed by or on behalf of the State by such means as denying facilities of a public nature, rather than private proselytism or missionary activity.

The issue has also been raised in the Krishnaswami study²⁴ (and the resulting 16 Rules) commissioned by the Sub-Commission on

21. U.N. ESCOR, Comm'n on H.R., *General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights*, cmt. 22(48), ¶ 5, U.N. Doc. CCPR/C/21/REV.1/ADD.4 (Sept. 27, 1993) [hereinafter *General Comment No. 22*]. The text of General Comment No. 22 is at Annex 5. General Comments “represent the Human Rights Committee’s accumulated experience of years of consideration of a particular article [T]hey have the potential to be profoundly influential . . . [and] . . . perform a key function of giving some substantive content to the articles concerned.” U.N. ESCOR, Comm'n on H.R., *Paper: Work of the Human Rights Committee Under Article 40 of the Covenant on Civil and Political Rights*, U.N. Doc. A/CONF.157/TBB/2 (June 9, 1993).

22. *General Comment No. 22*, *supra* note 21, ¶ 5.

23. *Id.*

24. U.N. ESCOR, Comm'n on H.R., *Study of Discrimination in the Matter of Religious Rights and Practices* [hereinafter *Study*], U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1960) (*prepared by* Arcot Krishnaswami), *reprinted in* Arcot Krishnaswami, *Study*, 11 N.Y.U. J. INT'L L. & POL. 227 (1978). At the time of this study, Krishnaswami was the Special Rapporteur for the Commission on Human Rights. For further reading, see Sidney Liskofsky, *The UN Declaration on the Elimination of Religious Intolerance and Discrimination: Historical and Legal Perspectives*, in RELIGION AND THE STATE: ESSAYS IN HONOUR OF LEO PFEFFER 440 (James E. Wood ed., 1985); Donna J. Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration of the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487 (1988); J.A. Walkate, *The U.N. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1981) – An Historical Overview*, 1(2) CONSCIENCE & LIBERTY 21 (1989).

Prevention of Discrimination and Protection of Minorities, and by the Sub-Commission when developing Draft Principles²⁵ on the basis of the study. Krishnaswami's Rule I(3) reads: "No one should be subjected to coercion or to improper inducements likely to impair his freedom to maintain or to change his religion or belief."²⁶ The Sub-Commission's Principle I(3) refers to "material and moral coercion."²⁷ At the same time, the Sub-Commission emphasized that, in the event of conflicting religious interests, "public authorities shall endeavor to find a solution reconciling these demands in a manner such as to ensure the greatest measure of freedom to society as a whole."²⁸ It is likely that Principle I(3) was not intended to embrace proselytism and missionary activity, particularly given that Principle I(1) refers to the freedom "to adhere, or not to adhere, to a religion or belief, in accordance with the dictates of his conscience,"²⁹ and that Principle II(8)(a) asserts that "[e]veryone shall be free to teach or to disseminate his religion or belief, either in public or in private."³⁰ The Principle omits the qualification found in Krishnaswami's Rule 10 that only acknowledged the individual's freedom to disseminate "in so far as his actions do not impair the right of any other individual to maintain his religion or belief."³¹ If anything, the Sub-Commission's Draft Principles avoid the connection between the simple dissemination of beliefs and coercion in matters of religion or belief.

25. U.N. ESCOR, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Draft Principles on Freedom and Non-Discrimination in the Matter of Religious Rights and Practices*, ¶ 51-160, U.N. Doc. E/CN.4/800, U.N. Doc. E/CN.4/Sub.2/206, Annex (1960) [hereinafter *Draft Principles*]. The text of the Draft Principles may be found in Krishnaswami, *supra* note 24, Annex 1.

26. Krishnaswami, *supra* note 24, at 227.

27. *Draft Principles*, *supra* note 25, at Principle I(3). This shaped the proposals for what ultimately became Article 1(2) of the 1981 Declaration. *See supra* note 5. The representative of Cyprus proposed that this provision read: "The use of physical or moral compulsion for the purpose of making a person change or preventing him from changing his religion is prohibited." U.N. Doc. E/CN.4/1347, ¶ 18 (1979). In order to distinguish coercion from persuasion and in order to promote religious tolerance, the Indonesian delegate proposed that Article 1(2) read: "No one shall be subject to coercion or any kind of persuasion which would impair his freedom to have or to adopt a religion or belief of his choice. Therefore, any act which leads to such practices is inadmissible." U.N. Doc. A/C.3/36/SR.34, ¶ 32 (1981).

28. *Draft Principles*, *supra* note 25, Principle IV(1).

29. *Id.* Principle I(1).

30. *Id.* Principle II(8)(a).

31. Krishnaswami, *supra* note 24, at 279.

It has been a matter of concern to the Special Rapporteur whenever restrictions have been placed on any form of proselytism, preaching, or the propagation of belief, as communicated to many countries.³² In an assessment of communications between 1988 and

32. Some of the countries to which the Special Rapporteur has communicated his concern over restrictions on proselytism include: China, U.N. ESCOR, Comm'n on Human Rights, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* [hereinafter *Implementation*], ¶ 41, U.N. Doc. E/CN.4/1994/79 (Jan. 20, 1994); Malaysia, U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 44, U.N. Doc. E/CN.4/1993/62 (Jan. 6, 1993); U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 59, U.N. Doc. E/CN.4/1990/46 (Jan. 22, 1990); Egypt, U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 57, U.N. Doc. E/CN.4/1991/56 (Jan. 18, 1991); Nepal, U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 53, U.N. Doc. E/CN.4/1989/44 (1989); U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 63, U.N. Doc. E/CN.4/1990/46 (Jan. 22, 1990); U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 79, U.N. Doc. E/CN.4/1991/56 (Jan. 18, 1991); Elimination of all Forms of Religious Intolerance, G.A. Res. 56/253, ¶ 54, U.N. Doc. A/56/253 (July 31, 2001); Malawi, U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 43, U.N. Doc. E/CN.4/1993/62 (Jan. 6, 1993); Bulgaria, U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 22, U.N. Doc. E/CN.4/2001/63 (Feb. 13, 2001); Russian Federation, U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 56, U.N. Doc. E/CN.4/1999/58 (Jan. 11, 1999); U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 35, U.N. Doc. E/CN.4/2000/65 (Feb. 15, 2000); Maldives, U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 73, U.N. Doc. E/CN.4/1999/58 (Jan. 11, 1999); Uzbekistan, U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 83, U.N. Doc. E/CN.4/1999/58 (Jan. 11, 1999); U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 334, U.N. Doc. E/CN.4/2005/61/Add.1 (Mar. 15, 2005); Saudi Arabia, U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 10, U.N. Doc. E/CN.4/2000/65 (Feb. 15, 2000); Israel, U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 56, U.N. Doc. E/CN.4/2000/65 (Feb. 15, 2000); Lao People's Democratic Republic, U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 88, U.N. Doc. E/CN.4/2000/65 (Feb. 15, 2000); Sudan, *Implementation*, G.A. Res. 51/542, ¶ 73, U.N. Doc. A/51/542/Add.2 (Nov. 11, 1996); Myanmar, U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 55, U.N. Doc. E/CN.4/2003/66 (Jan. 15, 2003); Azerbaijan, Elimination of all Forms of Religious Intolerance, G.A. Res. 57/274, ¶ 14, U.N. Doc. A/57/274 (July 15, 2002); United Arab Emirates, U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 45, U.N. Doc. E/CN.4/2004/63 (Jan. 16, 2004); India, U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 58, U.N. Doc. E/CN.4/1997/91/Add.1 (Feb. 14, 1997).

As a result of the Special Rapporteur's visit to Iran, he endorsed the recommendations of Mr. Abid Hussain, the Special Rapporteur on freedom of opinion and expression, who considered that: "Any prior restraint on freedom of expression carries with it a heavy presumption of invalidity under international human rights law. Any institutionalization of such restraint adds further weight to this presumption." In his opinion, the protection of the right of freedom of opinion and expression, and the right to seek, receive, and impart information, would be better served not by routinely submitting specific types of expression to prior scrutiny, as is currently the case, but rather by initiating action after publication, if and when required. U.N. ESCOR, Comm'n on Human Rights, *Implementation*, ¶ 96, U.N. Doc. E/CN.4/1996/95/Add.2 (Feb. 9, 1996) (quoting U.N. ESCOR, Comm'n on Human

1995, the Special Rapporteur observed that Article I of the 1981 Declaration “accounts for the second highest number of violations[,] . . . mainly cases of prohibition of proselytizing, of possessing certain religious objects and cases of forced conversions.”³³

The Special Rapporteur has also criticized restrictions on the work of foreign missionaries in a variety of countries and appears to be more concerned about restrictions on missionary work than its supposed coercive effect.³⁴ In his study, when considering particularly vulnerable categories such as orphans or deprived school children, Krishnaswami was fully aware of the risk that material

Rights, *Implementation*, ¶ 40, U.N. Doc. E/CN.4/1996/39/Add.1 (Nov. 21, 1995)); *see also* U.N. ESCOR, Comm’n on Human Rights, *Implementation*, ¶ 37, U.N. Doc. E/CN.4/1993/62 (Jan. 6, 1993); U.N. ESCOR, Comm’n on Human Rights, *Implementation*, ¶ 51, U.N. Doc. E/CN.4/1995/91 (Dec. 22, 1994).

The Special Rapporteur has also addressed the restrictions on proselytism in Greece. U.N. ESCOR, Comm’n on Human Rights, *Implementation*, ¶ 43, U.N. Doc. E/CN.4/1990/46 (Jan. 22, 1990); U.N. ESCOR, Comm’n on Human Rights, *Implementation*, ¶ 32, U.N. Doc. E/CN.4/1993/62 (Jan. 6, 1993). In the Special Rapporteur’s report on his visit to Greece he commented that “in practice the religious freedom of minorities is severely undermined, given the manner in which proselytism is viewed.” *Implementation*, G.A. Res. 51/542, ¶¶ 12, 25, U.N. Doc. A/51/542/Add.1 (Nov. 7, 1996). In his conclusions and recommendations, removal of the legal prohibition against proselytism was very strongly recommended. *Id.*

33. U.N. ESCOR, Comm’n on H.R., *Implementation*, ¶ 27, U.N. Doc. E/CN.4/1996/95 (Dec. 15, 1995).

34. For example, the Special Rapporteur commented that in Sudan, “many obstacles are said to be hampering the work of local priests and missionaries who are endeavouring to bring moral and spiritual comfort to the population near El Obeid and in the Nubian mountain area.” U.N. ESCOR, Comm’n on H.R., *Implementation*, ¶ 75, U.N. Doc. E/CN.4/1994/79 (Jan. 20, 1994). Similar concerns were addressed by the Special Rapporteur to Bhutan concerning the ban on practicing Christianity. U.N. ESCOR, Comm’n on H.R., *Implementation*, ¶ 21, U.N. Doc. E/CN.4/1995/91 (Dec. 22, 1994). Likewise, in Nepal, the Government sought to justify the ban on “involuntary” conversion from Hinduism resulting from “financial enticement and other temptations.” U.N. ESCOR, Comm’n on H.R., *Implementation*, ¶ 66, U.N. Doc. E/CN.4/1994/79 (Jan. 20, 1994). Restrictions on the work of foreign missionaries were also noted by the Special Rapporteur in relation to Bangladesh, U.N. ESCOR, Comm’n on H.R., *Implementation*, ¶ 15, U.N. Doc. E/CN.4/2000/65 (Feb. 15, 2000), Belarus, *id.* ¶ 16, India, *id.* ¶ 46, and Niger, U.N. ESCOR, Comm’n on H.R., *Implementation*, ¶ 107, U.N. Doc. E/CN.4/2001/63 (Feb. 13, 2001). However, he also referred to the possibility “that minorities themselves may occasionally be sources” of the intolerance towards other religious communities. *Id.* ¶¶ 131, 184. For other restrictions on proselytism recently noted by the Special Rapporteur (in spite of assertions that improper inducements were offered), *see* U.N. ESCOR, Comm’n on H.R., *Implementation*, ¶ 94, U.N. Doc. E/CN.4/2004/63 (Jan. 16, 2004), referring to Sri Lanka, and U.N. ESCOR, Comm’n on H.R., *Implementation*, ¶ 77, U.N. Doc. E/CN.4/2003/66/Add.1 (Jan. 9, 2003), referring to Algeria.

inducement might render missionary work open to the accusation of coercion, but applauded the work of missionaries, who have achieved remarkable results in many parts of the world where children would not otherwise have been educated. He did not rule out the possibility of isolated cases of improper inducements amounting even to outright bribes. However, in the wider realm of missionary hospitals, schools, and orphanages, he concluded that

where the prior right of parents or guardians to decide whether or not their children shall attend religious instruction is conceded, and where the institutions in question advance social welfare, the advantages obtained by such educational and humanitarian activities can hardly be considered to constitute a material inducement to a change of religion or belief.³⁵

The notion of improper “inducement” is elusive and casts largely unsubstantiated doubt over missionary and humanitarian work.

In short, although there were proposals in the drafting of Article 18(2) for a basis to oppose influences to change religion, and for an explicit right to maintain a religion, the characterization of proselytism and missionary work as coercive was not sustained. Instead, it may be said that the focus of the Article is predominantly on State coercion in religious choice rather than private acts of proselytism. This is supported by paragraph 5 of General Comment No. 22, which makes no reference at all to such activities.³⁶ Although Article 18(2) is a general measure to prevent any coercion that would interfere with the individual’s religious choice, there is strong endorsement for proselytism as a proper manifestation of religion and consistent criticism for restrictions on proselytism.

III. “RESPECT” AS A RESTRICTION ON PROSELYTISM

Of course, the right to manifest religion or belief is subject to specific limitation provisions. “The rights and freedoms of others” (or equivalent terminology) appears as a ground of limitation in Articles 8, 9, 10, and 11 (and in Article 2 of the Fourth Protocol) of the European Convention,³⁷ and in Articles 18, 19, 21, and 22 of the International Covenant.³⁸ In each case, the limitation provision

35. Krishnaswami, *supra* note 24.

36. *General Comment No. 22*, *supra* note 21.

37. European Convention, *supra* note 6.

38. International Covenant, *supra* note 4.

operates, where appropriate, to justify State restriction of the exercise of the freedoms guaranteed in those Articles. However, appropriate limits to the “rights of others” must be observed. This Part argues that, in a review of those cases which have invoked general notions of respect for the religious feelings of others within this ground of limitation, such respect is not itself a right found within the freedom of thought, conscience, and religion, and that inappropriate appeals to “respect” could unduly extend the scope of limitation provisions.

Consistency with the traditionally recognized content of the freedom of thought, conscience, and religion may easily be achieved by an interpretation of “respect” that is confined to ensuring that the *effect* of the manifestation of religion or belief, or the exercise of freedom of expression, does not impinge on the known content of that freedom (or indeed other freedoms). This is quite different from a right to “respect for one’s religious feelings” as such. Such a right might instead be said to stem more generally from the “duties and responsibilities” to which the freedom of expression is subject. Neither the International Covenant nor the European Convention includes an explicit right to have one’s beliefs respected or a right not to be offended by the expression of religious beliefs by others. However, given recent developments, European Court decisions regarding the notion of “respect” deserve close analysis, particularly in the context of hate speech and severe blasphemous expression.

A. Hate Speech Constraints

There has been some, though limited, use of the term “respect” to support restrictions on hate speech.³⁹ Article 20 of the

39. Certain distinctions are important to make. In the context of the drafting of the Convention on religious intolerance, the point was rightly made that criticism of one religion by the adherents of another religion was not necessarily an incitement to hatred and that a distinction had to be made between propagating one religion and fostering or inciting hatred against another. *Implementation*, ¶ 61, U.N. Doc. E/CN.4/940 (1967). A different distinction was made in the drafting of the 1981 Declaration when Egypt opposed the U.S.S.R. proposal which contemplated a right to criticize religious beliefs on the basis that this gave rise to intolerance. *Implementation*, ¶ 39, U.N. Doc. E/CN.4/1292; E/1978/34 (1978). For a summary of measures to combat racist and hate speech, see Danilo Türk & Louis Joinet, *The Right to Freedom of Opinion and Expression: Current Problems of its Realization and Measures Necessary for its Strengthening and Promotion*, in STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION (Sandra Coliver ed., 1992). See also KENT GREENAWALT, *SPEECH, CRIMES AND THE USES OF LANGUAGE* (1989); A. Garay, *Liberté religieuse et prosélytisme: l'expérience Européenne*, 17 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 144 (1994); R. Genn, *Legal*

International Covenant imposes a restriction on all activities amounting to the “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”⁴⁰ In debating paragraph 7 of General Comment 22,⁴¹ which deals with the interrelation between manifestation of religion and hate speech, the issue of “respect” for the beliefs and religions of others was aired briefly. It was quickly realized that Article 20 imposes a restriction not rooted in “respect” for the beliefs and religion of others, but on the freedom to manifest religion or belief; in that the prohibition on hate speech might operate as a brake on manifestation.⁴² Having raised the issue of respect by individuals for the beliefs and religions of others, the Human Rights Committee defined the limits of such respect by reference to the scope of Article 20.⁴³

One source of material in which the notion of “respect” has played a part concerns the restriction in a number of countries on the promotion of revisionist ideas. These have resulted in claims under the European Convention and the Optional Protocol.⁴⁴ The Human Rights Committee has generally upheld the protection of the reputation of others as an appropriate ground of limitation on freedom of expression. For example, in *X. v. Federal Republic of Germany*,⁴⁵ since the murder of the Jews was a “known historic fact,” the applicant was prevented from asserting that the Holocaust was a piece of Zionist swindle. The European Commission found that the restriction was justified by the protection of the reputation

Developments—Helsinki Process—Advance in International Outlawing of Incitement to Racism and Religious Hatred, 24 PAT. OF PREJ. 97 (1990); P. Rumney, *Incitement to Racial Hatred and the Problem of Social Exclusion*, 5(2) C.I.L. 89 (2000-01); E. Steiner, *Blasphemy and Incitement to Hatred Under the European Convention*, 6 K.C.L.J. 143 (1995).

40. International Covenant, *supra* note 4, at art. 20. Article 20(2) of the International Covenant reads: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” *Id.*

41. *General Comment No. 22*, *supra* note 21, ¶ 7.

42. See ¶ 23, U.N. Doc. CCPR/C/SR. 1207 (1993) ¶ 23 (Mrs. Higgins); ¶ 23 (Mr. Herndl), ¶ 30 (Mr. Pocar); ¶ 33 (Ms. Chanet).

43. For discussion on the interrelation between Articles 18–20 of the International Covenant, *supra* note 4, see Brice Dickson, *The United Nations and Freedom of Religion*, 44 INT’L & COMP. L.Q. 327, 340 (1995).

44. See Jonathan Cooper & Adrian M. Williams, *Hate Speech, Holocaust Denial and International Human Rights Law*, 6 EUR. H.R. L. REV. 593 (1996).

45. *X. v. Federal Republic of Germany*, App. No. 9235/81, 29 Eur. Comm’n H.R. Dec. & Rep. 194 (1982).

of others within Article 10 of the European Convention,⁴⁶ although it is to be observed that this ground of limitation is specific to Article 10 and has no equivalent in Article 9. A similar conclusion was reached in the Optional Protocol case of *Faurisson v. France*⁴⁷ involving the denial of the Holocaust by a university professor. The Human Rights Committee likewise examined this in the framework of freedom of expression, and found that France could properly rely on the limitation provision in Article 19(3)(a) of the International Covenant.⁴⁸ Referring to General Comment No. 10, the Committee noted that the protection of the rights or reputation of others as a limitation ground may relate not only to the interests of other persons, but also those of the community as a whole.⁴⁹ The Human Rights Committee concluded that “[s]ince the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the *respect* of the Jewish community to live free from fear of an atmosphere of anti-Semitism.”⁵⁰ The Human Rights Committee’s reference to “respect” in this context recognizes the right of a community to live free from hatred. In the more recent decision of *Ross v. Canada*,⁵¹ the Human Rights Committee made no reference at all to “respect” in the case of an Article 19 claim concerning a schoolteacher’s statements which denigrated the faith and belief of Jews and called on others to hold those of the Jewish faith and ancestry in contempt.⁵² Restrictions against such speech were for the purpose of “protecting the ‘rights and reputations’ of persons of Jewish faith,

46. *Id.* at 198. It should be observed that this limitation is specific to Article 10 and has no equivalent in Article 9. European Convention, *supra* note 6. See also *Marais v. France*, App. No. 31159/96, 86 Eur. Comm’n H.R. Dec. & Rep. 184 (1996); *T. v. Belgium*, App. No. 9777/82, 34 D&R 158 (1983). For further discussion of the legal implications of revisionist speech, see Stephen Roth, *Denial of the Holocaust as an Issue of Law*, 23 ISR. Y.B.H.R. 215.

47. *Faurisson v. France*, Views of U.N. Human Rights Comm., Commc’n No. 550/1993, 84, U.N. Doc. A/52/40 vol. 2 (Nov. 8, 1996).

48. *Id.* at 84–85.

49. *Id.* at 96.

50. *Id.* (emphasis added).

51. *Ross v. Canada*, Views of Human Rights Comm., Commc’n No. 736/1997, 69, U.N. Doc. A/56/40 vol. 2 (Oct. 18, 2000). See also *Zündel v. Canada*, Decision of Human Rights Comm., Commc’n No. 953/2000, 483, U.N. Doc. A/58/40 vol. 2 (July 27, 2003), which concerned a limited restriction on the hiring of the Parliament buildings by the author who had been active for many years in Holocaust denial (held inadmissible *ratione materiae*).

52. *Ross*, Views of Human Rights Comm., Commc’n No. 736/1997 at 70.

including the right to have an education in the public school system free from bias, prejudice and intolerance.”⁵³

From these cases involving hate speech—even those determined as a matter of freedom of expression—the term “respect” has been applied in a limited way to protect the reputation of others. However, various members of the Human Rights Committee have warned of the dangers of allowing limitation clauses to be invoked too readily in the case of offensive or unpopular speech which falls outside the prohibition against hate speech in Article 20 of the International Covenant. The concurring opinion of Human Rights Committee members Ms. Evatt and Mr. Kretzmer (co-signed by Mr. Klein) in *Faurisson* reflects these concerns:

The power given to States parties under article 19, paragraph 3, to place restrictions on freedom of expression, must not be interpreted as licence to prohibit unpopular speech, or speech which some sections of the population find offensive. Much offensive speech may be regarded as speech that impinges on one of the values mentioned in article 19, paragraph 3 (a) or (b) (the rights or reputations of others, national security, public order, public health or morals). The Covenant therefore stipulates that the purpose of protecting one of those values is not, of itself, sufficient reason to restrict expression. The restriction must be *necessary* to protect the given value.⁵⁴

Mr. Lallah would have preferred the decision in *Faurisson* to have been made under the stricter framework of Article 20(2) rather than Article 19(3), since

[r]ecourse to restrictions that are, in principle, permissible under article 19, paragraph 3, bristles with difficulties, tending to destroy the very existence of the right sought to be restricted. The right to freedom of opinion and expression is a most valuable right and may turn out to be too fragile for survival in the face of too frequently professed necessity for its restriction in the wide range of areas envisaged under paragraphs (a) and (b) of article 19, paragraph 3.⁵⁵

There would certainly appear to be support for choosing to determine restrictions on offensive speech within the scope of

53. *Id.* at 84.

54. *Faurisson*, Views of U.N. Human Rights Comm, Commc’n No. 550/1993 at 84.

55. *Id.* (Mr. Lallah, concurring).

811] *The Questionable Grounds of Objections to Proselytism*

Article 20(2)⁵⁶ (or Article 5 of the International Covenant,⁵⁷ or Article 17 of the European Convention⁵⁸ in severe cases) when justified by the content of the speech. However, in considering limitations on freedom of expression in the interests of the protection of the “reputation” or “rights of others” outside the realms of hate speech, European jurisprudence appears to have departed from the practice of the Human Rights Committee by widening the concept of “the rights and freedoms of others” to suggest there may exist a right to have one’s religious beliefs “respected.”

B. The Development of “Respect” in European Jurisprudence

The most significant use of “respect” has occurred within European case law—in the context of freedom of expression, not freedom of religion—in response to instances of severe blasphemous expression by media dissemination. For example, in *Otto-Preminger-Institut v. Austria*,⁵⁹ the European Court supported a ban on distribution of a film representing an extreme form of ridicule of the Christian Eucharist. The European Court applied criteria found in Article 10 rather than Article 9, in particular the “duties and responsibilities” on those exercising their freedom of expression found in Article 10(2).⁶⁰ It was in relation to such duties and responsibilities that it considered it appropriate to include “an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.”⁶¹

1. Distinguishing between Articles 9 and 10

The European Court’s judgment in *Otto-Preminger* is open to criticism for failing to distinguish issues under Articles 9 from those under Article 10.⁶² When examining whether the interference had a

56. International Covenant, *supra* note 4, art. 20(2).

57. *Id.*

58. European Convention, *supra* note 6, art. 17.

59. *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) (1994).

60. *Id.* ¶ 49.

61. *Id.*

62. European Convention, *supra* note 6.

legitimate aim, the Court referred to those “who choose to exercise the freedom to manifest their religion” when only Article 10 was at issue. The Court also mentioned “respect for the religious feelings of believers as guaranteed in Article 9” as if it was a recognized right within Article 9 and thereby constituted a ground of limitation under Article 10:

Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the 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 rights guaranteed under Article 9 (art. 9) to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold them from exercising their freedom to hold and express them.⁶³

The distinction between Articles 9 and 10 was clarified in the case of *Wingrove v. United Kingdom*.⁶⁴ The maker of a film entitled *Visions of Ecstasy* claimed that the refusal of a British Board of Film Classification certificate needed for the lawful video distribution of the film amounted to violation of Article 10 of the European Convention.⁶⁵ Most of the film’s duration was given over to denigrating imagery of the figure of the crucified Christ.⁶⁶ The Board refused classification because of its blasphemous content, measured by the United Kingdom’s concept of blasphemy.⁶⁷ The European Court took as its starting point the purpose of the Board in protecting against the treatment of a religious subject in such a manner “as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the

63. *Otto-Preminger* ¶ 47.

64. *Wingrove v. United Kingdom*, 24 Eur. H.R. Rep. (1996).

65. *Id.* ¶¶ 11–13.

66. *Id.* ¶ 9.

67. *Id.* ¶ 13.

811] *The Questionable Grounds of Objections to Proselytism*

contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented.”⁶⁸

In upholding this as a legitimate aim, the European Court accepted that it undoubtedly corresponded to that of the protection of “the rights of others” within the meaning of Article 10(2) and noted that this “is also fully consonant with the aim of the protections afforded by Article 9 to religious freedom.”⁶⁹ In doing so, the Court deliberately avoided equating “respect for the religious feelings of believers” with the guarantees in Article 9, as it had in its decision in *Otto-Preminger*.⁷⁰ It also avoided discussion on whether this constituted a ground of limitation for the purposes of Article 9(2). The European Court emphasized, as it had done in *Otto-Preminger*, that the duties and responsibilities in Article 10(2) in the context of religious beliefs include a duty to avoid as far as possible an expression that is, in regard to objects of veneration, “gratuitously offensive to others and profanatory.”⁷¹ The European Court then concluded that because the film amounted to an attack on the religious beliefs of Christians, which was insulting and offensive, the refusal of a classification certificate was within the State’s “margin of appreciation” under Article 10.⁷² In his concurring opinion, Judge Pettiti emphasized the importance of this approach and commented as follows:

Article 9 (art. 9) is not in issue in the instant case and cannot be invoked. Certainly the Court rightly based its analysis under Article 10 (art. 10) on the rights of others and did not, as it had done in the *Otto-Preminger-Institut* judgment combine Articles 9 and 10 (art. 9, art. 10), morals and the rights of others.⁷³

There does not appear to be room to conclude that Article 9 includes a general right to be protected from offensive expression, although it is clear that the protection of Article 9 provides a basis for restriction where the effect of such an expression is to impair the enjoyment of Article 9 freedoms. Even though the judgment in *Otto-Preminger* did not distinguish Article 9 rights from Article 10

68. *Id.* ¶ 15.

69. *Id.* ¶ 48.

70. *Id.* ¶ 46.

71. *Id.* ¶ 52.

72. *Id.* ¶ 63.

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

responsibilities, the Court still chose in that case to illustrate the need to ensure the peaceful enjoyment of Article 9 rights unequivocally by reference to conventionally accepted Article 9 rights, namely the right to hold and express religious beliefs, which in extreme cases could be impaired.⁷⁴ This is simply to acknowledge that there is a responsibility to ensure that the *effect* of the exercise of freedom of expression does not impinge on known Article 9 freedoms, or indeed on other freedoms. This is quite different from a right to “respect for one’s religious feelings” as such.

2. *Distinction between proper and improper proselytism*

In *Otto-Preminger*, the Court explained that a State may legitimately consider it necessary to take measures aimed at repressing certain conduct judged to be “incompatible with the respect for the freedom of thought, conscience and religion of others,” citing as appropriate authority paragraph 48 from the case of *Kokkinakis v. Greece*.⁷⁵ The European Court’s analysis in paragraph 48 of *Kokkinakis* of “the rights and freedoms of others” may be read in terms of coercion impairing free religious choice, amounting to interference with the *forum internum*.⁷⁶ This reading of *Kokkinakis* is substantiated by the description of “improper proselytism” in paragraph 48, which describes it in terms of “offering material or social advantages,” “improper pressure on people in distress or in need,” and “violence or brainwashing,” all of which the Court stated are “incompatible with respect for the freedom of thought, conscience and religion of others.”⁷⁷

74. *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) (1994).

75. *Id.* ¶ 47 (quoting *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) ¶ 48 (1993)). *Kokkinakis* involved the conviction of a Jehovah’s Witnesses missionary for proselytizing under a Greek statute that prohibited proselytism. *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A). Paragraph 48 of the *Kokkinakis* decision is also consistent with the Court’s references in *Larissis v. Greece*, 65 Eur. Ct. H.R. (ser. A) (1998), to “improper pressure” applied to subordinate airmen and the equivalent “pressures and constraints” that were not applied to civilians. *Id.* The Court observed that airmen must not only have felt constrained, perhaps obliged to enter into religious discussions with the applicants, but also possibly ‘even to convert to the Pentacostal faith.’ *Id.* ¶ 53.

76. The *forum internum* is taken to denote the internal and private realm against which no State interference is justified in any circumstances, while the *forum externum*, or right of manifestation, may be restricted by the State on specified grounds.

77. *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) ¶ 48.

811] *The Questionable Grounds of Objections to Proselytism*

These illustrations are reminiscent of the descriptions of coercion that would impair religious choice given in the U.N. context by Krishnaswami and by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Krishnaswami's Rule 1(3) refers to "improper inducements"⁷⁸ and the Sub-Commission's Draft Principle I(3) refers to "material or moral coercion."⁷⁹ Furthermore, in paragraph 33 of the *Kokkinakis* judgment, in which the Court first invoked the notion of "respect" in relation to proselytism, the Court was at pains to differentiate Article 9 from other Convention Articles (namely Articles 8, 10, and 11) by virtue of the absolute nature of that part of the right to freedom of thought, conscience, and religion which may not be subject to limitation, i.e. the *forum internum*.⁸⁰ By contrast, all rights covered by Articles 8, 10, and 11 are subject to limitation provisions. The right of the applicant in *Kokkinakis* to manifest his religion or belief in Article 9 must inevitably avoid encroaching upon those rights of others in Article 9 which are absolute. The Court recognized "that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."⁸¹

It may be said that the European Court in *Kokkinakis* was simply reiterating the need to respect *forum internum* rights by ensuring that they be protected against interference.⁸² It would be appropriate

78. Krishnaswami, *supra* note 24, at 278.

79. *Draft Principles*, *supra* note 25, at Principle I(3).

80. *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) ¶ 33.

81. *Id.* See also the partly concurring opinion of Judge Pettiti in *Kokkinakis*:

[b]elievers and agnostic philosophers have a right to expound their beliefs, to try to get other people to share them and even to try to convert those whom they are addressing.

The only limits on the exercise of this right are those dictated by respect for the rights of others where there is an attempt to coerce the person into consenting or to use manipulative techniques.

Id. (Pettiti, J., concurring).

82. *Id.* Judge Martens, partly dissenting in *Kokkinakis*, explained what he understood coercion to mean in this context:

to give “respect” that meaning—in the context of ensuring that chosen beliefs are “respected”—whenever there is a possibility that the right to free religious choice might be at risk of impairment by means of coercion. “Respect” in this sense would simply denote assurance against interference with the *forum internum*, but would extend equally to assurance against interference with the right to manifestation, as was suggested in *Otto-Preminger*. Few would contest that proselytism is aimed ultimately at presenting an alternative religious choice. Assuming there is no likelihood of interference with the right to manifestation by the person proselytized—and it is difficult to imagine how proselytism could have the effect of inhibiting manifestation by others—the decisive issue is whether proselytism is “improper” by virtue of being coercive in impairing the religious choice of others, and thereby constitutes “*improper pressure*,” to use the language of the Court.⁸³ The *Kokkinakis* judgment may not be said to extend “the rights and freedoms of others” to include a right to have their beliefs “respected” in any sense beyond the accepted boundaries of the *forum internum* (it did not address possible effects on the ability of the subject to manifest their own beliefs) and the judgment did not suggest that Article 9 extends to a right to be free from persuasion by others that falls short of coercion impairing free religious choice, or even a right not have one’s own beliefs criticized.

In short, the propagation of belief, even if hostile to other faiths, is protected within established parameters. First, it must not constitute hate speech. Secondly, in the case of freedom of expression through film and other powerful media, certain duties and responsibilities must be observed to avoid gratuitous and extreme offense. Finally, the recognized rights and freedoms of others must be “respected” in the sense that those freedoms must not be impaired. In the case of proselytism, *Kokkinakis* suggests that the relevant rights and freedoms of others are primarily those that protect against interference with the *forum internum*, namely coercion in religious choice. *Otto-Preminger* raised the possibility of

Coercion in the present context does not refer to conversion by coercion, for people who truly believe do not change their beliefs as a result of coercion; what we are really contemplating is coercion in order to make somebody join a denomination and its counterpart, coercion to prevent somebody from leaving a denomination.

Id. ¶ 17 (Martens, J., partly dissenting).

83. *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) ¶ 48.

811] *The Questionable Grounds of Objections to Proselytism*

interference with others' right to manifestation, but it is difficult to imagine how proselytism could have this effect. Both cases use the principle of "respect" to denote protection generally against the impairment of clearly established rights and freedoms. That concept of "respect" is therefore limited by the content of those freedoms, and there does not appear to be any recognition of a right to respect for one's religious feelings or beliefs as such.

3. The importance of particular means of expression and particular contexts

Restrictions on certain forms of religious expression have been upheld by the European Court owing to the sensitivities of particular media (particularly broadcast media) or particular contexts (such as the armed services or state education). These restrictions deserve special comment because they inevitably influence the outcome of individual decisions.

a. Medium of expression. The importance of the medium through which a religious message is communicated is illustrated by the case of *Murphy v. Ireland*⁸⁴ in which the Court upheld, under Article 10, a blanket prohibition on religious advertising through broadcast media. The Court's decision turned primarily on the applicant's "means of expression" and not the message itself, the central issue being whether a prohibition of a certain type (advertising) of expression (religious) through a particular means (the broadcast media) could justifiably be prohibited in the particular circumstances of the case.⁸⁵

b. Armed services. As to particular contexts, the only case in which the European Court has found that restrictions on proselytism did not violate Article 9 was *Larissis v. Greece*.⁸⁶ *Larissis* concerned evangelism by Pentecostal air force officers directed towards subordinate airmen. In upholding the restrictions, the Court did not follow the Commission's ground of justification, namely that of "ensuring that the three airmen's religious beliefs were respected,"⁸⁷ but did support the legitimate aim of "protecting the rights and

84. *Murphy v. Ireland*, App. No. 44179/98, 38 Eur. H.R. Rep. 212 (2002).

85. *Id.* ¶ 72.

86. *Larissis v. Greece*, 65 Eur. Ct. H.R. (ser. A) (1998).

87. *Id.* ¶ 44.

freedoms of others.”⁸⁸ The Court considered the “particular characteristics of military life and its effects on the situation of individual members of the armed forces” to be decisive.⁸⁹ By the same token, in relation to restrictions on the proselytizing of civilians, which did result in a finding of violation of Article 9, it was crucial that the civilians were not subject to pressures and constraints of the same kind as airmen.⁹⁰ The difference was expressed as: “[W]hat would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power.”⁹¹

Prominent in the “rights and freedoms of others” in these particular circumstances appears to be freedom from coercion in religious choice, given that the Court observed that airmen must not only have felt constrained, perhaps obliged, to enter into religious discussions with the applicants, but also possibly “even to convert to the Pentacostal faith.”⁹²

c. Parental rights. A quite different and more explicit concept of “respect” for religious convictions is found in the context of the protection enjoyed by parents in relation to the state education of their children. Parents are entitled to ensure that their own religious and philosophical convictions are respected in their children’s education by virtue of Article 18(4) of the International Covenant, and Protocol 1, Article 2 of the European Convention.⁹³ Issues arise principally in relation to the content of teaching on religious or philosophical matters within the school curriculum and, to a lesser extent, compulsion in administering school discipline.⁹⁴ However, it

88. *Id.* ¶ 49.

89. *Id.* ¶ 50.

90. *Id.* ¶ 59.

91. *Id.* ¶ 51.

92. *Id.* ¶ 53.

93. For the origins and drafting of Protocol 1, Article 2, see J.E.S. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 411–16 (1987). *See also* 1981 Declaration, *supra* note 5, art. 5(2); Conference on Sec. & Cooperation in Eur. [CSCE], *Concluding Document of the Vienna Meeting of the Representatives of the Participating States*, ¶ 16(k) (Jan. 17, 1989).

94. *See* Desmond M. Clarke, *Freedom of Thought in Schools: A Comparative Study*, 35 INT’L & COMP. L.Q. 271 (1986). Clarke provides a review of the secular/neutral models for religious education in the U.S. and France, compared with that in Ireland (where there is no network of secular schools). *Id.* He places particular emphasis on the role of State funding and

should not be forgotten that the true context for evaluating the scope of Protocol 1, Article 2 is its underlying aim to prevent indoctrination by, at worst, totalitarian governments, with due regard for the requirements of pluralism. As the European Court stressed in the Danish Sex Education Case,⁹⁵ the second sentence of Protocol 1, Article 2 “aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the ‘democratic society’ as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.”⁹⁶

One inevitable consequence of pluralism is the visible evidence of different religions throughout society. However, the Court’s rationale in *Dahlab v. Switzerland*⁹⁷ for supporting the prohibition on a teacher wearing an Islamic headscarf in a state school—on the limitation grounds of the rights and freedoms of others as well as public order and public safety—sadly illustrates that the stigma attached to proselytism is such that it may easily be invoked to support restrictions on any form of religious expression in the context of state education. The potential harm of wearing a headscarf was described by the Court in the following, quite extraordinary, terms:

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant’s pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of

risks of indoctrination. *Id.* For a discussion about the return of religious teaching in the educational system of the Federal Republic of Yugoslavia to rectify the historical exclusion from the educational system of any religious teaching, see Boris Milosavljevic, *Relations Between the State and Religious Communities in the Federal Republic of Yugoslavia*, 2002 BYU L. REV. 311.

95. *Kjeldsen v. Denmark*, 23 Eur. Ct. H.R. (ser. A) (1976).

96. *Id.* ¶ 50.

97. App. No. 42393/98, 2001-V Eur. Ct. H.R. 1 (2001).

tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.⁹⁸

This serves to illustrate the risks of exaggeration of the possible effects of proselytism in the context of State education.

The particular means of expression chosen for proselytism, or the particular context in which it occurs, may therefore justify greater restriction than in other circumstances, but care must be taken not to apply principles developed, for example, to support the need for order and discipline in the armed services or to ensure respect for parental convictions in education, to proselytism outside those circumstances.

IV. CONCLUSION

Proselytism is a subject that undoubtedly raises considerable concern, both to those who regard it as a fundamental freedom deserving of the widest protection and to those motivated by fears that it might constitute coercion affecting religious choice. It warrants careful assessment. The question is precisely how these concerns should be reflected in the development of those freedoms associated with religious expression, in particular in the use of limitation provisions.

While in principle the right to “teach” and the right to propagate one’s beliefs are recognized freedoms within Article 9 of the European Convention, uncertainty as to the true meaning of “proselytism” (given its negative connotations) led to an unworkable distinction in the *Kokkinakis* case between those recognized rights and “improper proselytism.”⁹⁹ The distinction was not clarified in the subsequent *Larissis* case, but there is no doubt about the Court’s notional support for the right to teach and to propagate one’s beliefs.¹⁰⁰ However, the Court has, in recent years, introduced the concept of “respect” to support restrictions on certain forms of expression. To the extent that the limitation ground of “the rights and freedoms of others” is relevant to proselytism consisting of the persuasive portrayal of beliefs under Article 9, it was argued that it is primarily applicable to fundamental interference with the *forum*

98. *Id.* at 13.

99. *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) ¶ 48 (1993).

100. *Larissis v. Greece*, 65 Eur. Ct. H.R. (ser. A) (1998).

internum, namely freedom from coercion in religious choice. This would produce consistency with Article 18(2) of the International Covenant. That ground of limitation would also be appropriate where the effect of a particular form of expression under Article 10 is so extreme as to inhibit the enjoyment of any recognized rights. However, the limitation provisions applicable generally to freedom of expression are of concern unless suitably contained. In the *Wingrove* case, the European Court corrected the inappropriate application to Article 9 of principles separately developed under Article 10,¹⁰¹ when previous case law such as *Otto-Preminger* equated “respect for the religious feelings of believers” with the guarantees in Article 9.¹⁰²

It is likely that the European Court will in the near future face a new range of claims based upon measures prohibiting disparagement or vilification of religious groups or their belief systems.¹⁰³ It is in this context that tolerance plays such an important role but not so as to restrict freedom of expression unduly. The balance is encapsulated in the familiar principle that freedom of expression applies “not only to ‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb; such are the demands of pluralism, tolerance, and broadmindedness without which there is no ‘democratic society.’”¹⁰⁴

Looking back over the historical treatment of proselytism, the link between extreme forms of proselytism and coercion to change religion appears to have been made principally in the early U.N. debates and in the European Court’s concept of “improper” proselytism. However, when evaluating current U.N. standards, as reflected by the Human Rights Committee and in the work of the Special Rapporteur, there does not appear to be any discernable correlation between proselytism and coercion. This paper submits

101. *Wingrove v. United Kingdom*, 24 Eur. H.R. Rep. (1996).

102. *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) ¶ 47 (1994).

103. For a critique of Australia’s anti-vilification laws, see Patrick Parkinson, Law Professor, Univ. of Sydney, Australia, *Enforcing Tolerance: Vilification Laws and Religious Freedom in Australia*, Paper Given at the Eleventh Annual International Law and Religion Symposium: Religion in the Public Sphere: Challenges and Opportunities, (Oct. 5, 2004), <http://www.iclrs.org/symposium/2004/ParkinsonPaper2004.doc>.

104. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 18 (1976); *see also* *Murphy v. Ireland*, App. No. 44179/98, 38 Eur. H.R. Rep. 212 (2002).

that it is time to reassess and redefine proselytism by reference to its true nature. At the same time, proper constraints should be observed when appealing to notions of “respect” within the limitation provisions.¹⁰⁵

105. This paper has drawn on material from PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE (2005), reproduced with permission from Cambridge University Press.