

# THE FREEDOM TO MANIFEST RELIGIOUS BELIEF: AN ANALYSIS OF THE NECESSITY CLAUSES OF THE ICCPR AND THE ECHR

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## INTRODUCTION

Freedom of religion, though forming part of the “core” of most conceptions of human rights, continues to remain a “particularly controversial right.”<sup>1</sup> While religious liberty is now viewed by the international community as a “privilege that is so foundational and precious that it should be guaranteed by international law,” its scope and function remain open to significant debate and disagreement.<sup>2</sup> Some attribute this tension in part to religious claims to “possession of [] absolute truth,” which may result in lack of respect for the freedom of members of other faiths.<sup>3</sup> In addition, some religious authorities view conversion to other religions as punishable heresy, and thus reject religious freedom as antithetical to their core religious values.<sup>4</sup>

In addition to these specifically religious reasons for narrowing the scope of religious freedom, governments in many regions of the world actively deny religious liberty. This denial ranges from the

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1. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 309-10 (1993).

2. ROBERT F. DRINAN, CAN GOD & CAESAR COEXIST?: BALANCING RELIGIOUS FREEDOM AND INTERNATIONAL LAW 1 (2004).

3. NOWAK, *supra* note 1, at 310.

4. Daniel Philpott, *Religious Freedom and the Undoing of the Westphalian State*, 25 MICH. J. INT'L L. 981, 992 (2004).

genocide of religious minorities<sup>5</sup> to rigid restrictions on churches' governance and practice.<sup>6</sup> Even more passively, it can take the form of a government's refusal to officially recognize a church (after repeated applications for such recognition), thereby significantly inhibiting the church's ability to function as a church body.<sup>7</sup>

The most severe restrictions on religious freedom leave no doubt as to their violation of international human rights provisions as embodied in Article 18 of the International Covenant on Civil and Political Rights (ICCPR) and Article 9 of the European Convention on Human Rights (ECHR). However, because these documents allow governments to limit religious freedom under certain circumstances, less egregious impingements involve close questions as to whether they are justifiable restrictions under the "necessity" provisions of the ICCPR and the ECHR.

This Article will examine whether the restrictions on religious freedom found in a number of current legislative statutes around the world—and defended on any of a number of the "necessity" grounds—are justifiable under the necessity clauses of the ICCPR and the ECHR.<sup>8</sup> The focus of the Article will be on the manifestation of religious belief, rather than on the freedom to believe privately whatever one wishes (recognized by both instruments as a right that may never be limited by government). Part I will describe the relevant textual provisions of the ICCPR and the ECHR, along with commentary interpreting those texts, and will describe general principles of law developed by the Human Rights Committee (HRC) and the European Court of Human Rights (EC) in deciding cases under the two instruments. Part II will describe and examine HRC and EC case law as it has developed principles for evaluating whether legislation restricting religious freedom is justifiable under the

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5. See generally Nathan A. Adams, IV, *A Human Rights Imperative: Extending Religious Liberty Beyond the Border*, 33 CORNELL INT'L L.J. 1 (2000) (providing detailed descriptions of the slaughter of religious minorities in Armenia, Bosnia, and Sudan, as well as other instances of slavery, forced labor, and torture of religious minorities).

6. See Philpott, *supra* note 4, at 991 (describing such practices in China during the mid to late 1990s).

7. See *Metro. Church of Bessarabia v. Moldova*, App. No. 45701/99, 35 Eur. H.R. Rep 306, 332 (2002) (holding that such a refusal did violate church members' freedom of religion).

8. This Article will examine the laws of several states, but will not be concerned with whether each state is bound by either the ICCPR or the ECHR. The concern is with certain types of laws and whether they pass muster under these two significant human rights instruments and the judicial bodies that exercise jurisdiction over the disputes arising under them.

necessity clauses. Part III will evaluate several current laws and argue that certain recurring language in the laws is problematic under the ICCPR and the ECHR. Part IV will describe and critique the “principle of secularism” as a distinct justification for restricting religious freedom. This Part will argue that the principle of secularism as it is being defined and applied, particularly in EC jurisprudence, is not a sufficient justification for restrictions on religious freedom. Finally, Part V will consider the case of a Swedish pastor who was convicted for preaching against homosexuality as a test case for application of the laws discussed in Part III and the principle of secularism discussed in Part IV. This part will contend that the Swedish pastor’s conviction was not justifiable under the ECHR and the ICCPR necessity clauses, and that to the extent the laws discussed in Part III and the principle of secularism discussed in Part IV can be read to proscribe the pastor’s sermon, they violate the two instruments and should not be given effect.

## I. THE ICCPR AND THE ECHR

### A. The Right

Article 18 of the ICCPR and Article 9 of the ECHR both declare that everyone shall have the right to freedom of thought, conscience, and religion.<sup>9</sup> Both also declare that this freedom is individual and

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9. International Covenant on Civil and Political Rights art. 18, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, *available at* <http://www.ohchr.org/english/law/pdf/ccpr.pdf> [hereinafter ICCPR]. Article 18 of the ICCPR states:

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.*; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> [hereinafter ECHR]. Article 9 of the ECHR states:

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.

collective, embracing the private, inner-life of religious belief (the *forum internum*<sup>10</sup>), as well as the public manifestation of religious belief, individually or in community, in the form of worship, observance, practice, and teaching.<sup>11</sup> The *forum internum* is inviolable in both documents and subject to none of the possible limitations to which the manifestation of religion is subject. Manfred Nowak calls freedom of religion and belief in the private realm “passive” freedom, in that states are prohibited “from dictating or forbidding confession to or membership in a religion or belief.”<sup>12</sup> The other part of this private realm not subjected to restriction under the ICCPR is practice that does not touch upon the freedom and sphere of privacy of others, but instead “primarily relates to the practice of religious rituals and customs in the home, either alone or in community with others.”<sup>13</sup>

The freedom to manifest one’s religion or belief in worship, observance, practice, and teaching is the more public freedom of religion that is subject to limitation under both Article 18 and Article 9. According to the EC, the freedom to manifest one’s religion protects acts which are “intimately linked” to religious belief, “such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form.”<sup>14</sup> The term “practice” does not, according to the Court, “cover any act which is motivated or influenced by a religion or belief,” and one does not necessarily have the right “to behave in the public sphere in a manner dictated by a religion or a conviction.”<sup>15</sup> According to Nowak, worship under the ICCPR means the “typical form of religious prayer

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

*Id.*

10. P. VAN DIJK & G.J.H. VAN HOOFF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 541 (1998).

11. *See* ICCPR, *supra* note 9, art. 18.; ECHR, *supra* note 9, art. 9.

12. NOWAK, *supra* note 1, at 317. This freedom, according to Nowak, not only confers the right to select from among existing religions or beliefs but also includes the “*negative freedom* not to belong to any such group or to live without religious confession.” *Id.* (emphasis in original).

13. *Id.* at 319.

14. *Valsamis v. Greece*, App. No. 21787/93, 24 Eur. H.R. Rep. 294, 307 (1997).

15. *Id.* Van Dijk and van Hoof say that while the European Commission on Human Rights puts a “broad interpretation” on the terms “religion” and “belief,” “this does not mean that every individual opinion or preference is a ‘religion or belief.’” Instead, the concept has in mind views that “attain a certain level of cogency, seriousness, cohesion and importance.” VAN DIJK & VAN HOOFF, *supra* note 10, at 548.

and preaching, i.e., freedom of ritual”; observance “covers processions, wearing of religious clothing . . . , prayer and all other customs and rites of the various religions”; and teaching “is understood as every form of imparting the substance of a religion or belief.”<sup>16</sup> In the General Comments to the ICCPR, “practice” seems to overlap with both observance and teaching, and includes the “freedom to choose [] religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.”<sup>17</sup> Nowak, in recognition of the need for “practice” not to include every action or omission motivated by religion or belief, says, “Religious practice may thus be said to be only that conduct obviously related to a religious conviction.”<sup>18</sup>

## B. The Restrictions

Because the public manifestation of religion has the potential to interfere with the rights of others or to pose a danger to society, it is not absolute. Using slightly different language, both Article 18 of the ICCPR and Article 9 of the ECHR subject the manifestation of religion or belief to such limitations that are “prescribed by law” and are necessary in the interests of public safety to protect public order, health, or morals, or to protect the fundamental rights and freedoms of others.<sup>19</sup> The General Comments to Article 18 say that these limitations are to be strictly interpreted such that only the listed restrictions are allowed.<sup>20</sup> Further, limitations must be “directly related and proportionate to the specific need on which they are predicated,” and “may not be imposed for discriminatory purposes or applied in a discriminatory manner.”<sup>21</sup> One author points out that almost all of the ICCPR limitation clauses use the word “necessary,” indicating that restrictions on rights “are permissible only when they

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16. NOWAK, *supra* note 1, at 321.

17. Human Rights Comm., *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18)*, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993), available at <http://www.unhcr.ch/tbs/doc.nsf/0/9a30112c27d1167cc12563ed004d8f15?OpenDocument> [hereinafter *General Comment No. 22*].

18. NOWAK, *supra* note 1, at 321.

19. ICCPR, *supra* note 9, art. 18, ¶ 3; ECHR, *supra* note 9, art. 9, ¶ 3.

20. *General Comment No. 22*, *supra* note 17, at ¶ 8.

21. *Id.*

are essential, i.e., inevitable.”<sup>22</sup> Accordingly, the EC has narrowly construed the “prescribed by law” requirement in order to circumvent hiding religious freedom violations behind domestic law. In *Kalaç v. Turkey*, the Court said that the requirement is designed to ensure “a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 2.”<sup>23</sup>

### C. Pluralism as Axiomatic

Both the EC and the HRC have indicated that the principle of pluralism is fundamental when considering the justifiability of a restriction on religious freedom. The EC has indicated that government restrictions on religious freedom may be necessary at times in order to “reconcile the interests of differing groups and to ensure respect for the convictions of all.”<sup>24</sup> The “State must remain neutral and impartial,” however, with an aim to the “maintenance of pluralism and the proper functioning of democracy,” rather than with an aim to “remove the cause of the tensions by doing away with pluralism.”<sup>25</sup> In the context of the freedom of association, the restriction of which requires justifications similar to Article 9, the EC has said, “The autonomy of religious communities is in fact indispensable to pluralism in a democratic society.”<sup>26</sup>

In *Kokkinakis v. Greece* and *Manoussakis v. Greece*, the EC even more explicitly affirmed religious pluralism as a guiding principle when answering the question of whether a law restricting religious freedom is “necessary in a democratic society.” In *Manoussakis*, the EC recognized a “margin of appreciation” in assessing whether contracting states could restrict religious liberty, but noted that “[i]n delimiting the extent of the margin of appreciation . . . the Court must have regard to what is at stake, namely the need to secure true religious pluralism, an inherent feature of the notion of a democratic

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22. Alexandre Charles Kiss, *Permissible Limitations on Rights*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 308 (Louis Henkin ed., 1981).

23. *Kalaç v. Turkey*, App. No. 20704/92, 27 Eur. H.R. Rep 552, 560 (1999).

24. *Metro. Church of Bessarabia v. Moldova*, App. No. 45701/99, 35 Eur. H.R. Rep. 306, 335 (2002) (citing *Kokkinakis v. Greece*, App. No. 14307/88, 17 Eur. H.R. Rep. 397, 419 (1994)).

25. *Id.*

26. *Id.* at 336.

society.”<sup>27</sup> In *Kokkinakis*, the EC said that freedom of religion “is one of the foundations of a democratic society” and “the pluralism indissociable from a democratic society which has been dearly won over the centuries depends on it.”<sup>28</sup> The General Comments to Article 18 of the ICCPR do not use the term pluralism, but require that states parties proceed with an attitude of “equality and non-discrimination” toward all religions.<sup>29</sup> Further, in a dissenting opinion in *Westerman v. Netherlands*, an HRC member argued that “conscientious objection is based on a pluralistic conception of society in which acceptance rather than coercion is the decisive factor.”<sup>30</sup>

Professor W. Cole Durham has called the principle of pluralism a “fundamental axiom of international human rights.”<sup>31</sup> Professor Michael McConnell, in analyzing U.S. religious liberty jurisprudence, has advocated an “animating principle [of] pluralism and diversity” over the “maintenance of a scrupulous secularism in all aspects of public life touched by government” that in his view has too often typified U.S. Supreme Court religious liberty jurisprudence.<sup>32</sup> He has also said, “My position is that the Religion Clauses do not create a secular public sphere . . . . Rather, the purpose of the Religion Clauses is to protect the religious lives of the people from unnecessary intrusions of government, whether promoting or

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27. *Manoussakis v. Greece*, App. No. 18748/91, 23 Eur. H.R. Rep. 387, 407 (1997) (citing *Kokkinakis*, 17 Eur. H.R. Rep. at 418).

28. *Kokkinakis*, 17 Eur. H.R. Rep. at 418 (emphasis and punctuation removed). Though Article 18 of the ICCPR does not contain the phrase “necessary in a democratic society” in its limiting language, the idea of “necessity” is certainly present and seems to present the same basic question as posed in the ECHR. In discussing the choice to leave out the particular phrase in the ICCPR, one scholar has noted that, “It is difficult . . . to find a basis for concluding that the omissions are significant.” Kiss, *supra* note 22, at 306. Alexandre Charles Kiss also offers possible explanations for the omission while retaining the essential meaning of the phrase. See *id.* at 490 n.67.

29. *General Comment No. 22*, *supra* note 17, ¶ 8.

30. Human Rights Comm. Decision, No. 682/1996, at ¶ 9.3, U.N. Doc. CCPR/C/67/D/682/1996 (1999) (dissenting opinion by committee member H. Solari Yrigoyen).

31. W. Cole Durham, Jr., *Religious Pluralism as a Factor in Peace*, 2003 FIDES ET LIBERTAS 43, 44. Durham argues that pluralism is essential to peace, because peace in a pluralistic world “is best maintained through building structures of mutual understanding and respect.” *Id.* Arguing along similar lines, Nathan Adams says “religious tolerance may be essential to ensure the continued viability of the international rule of law.” Adams, *supra* note 5, at 34. While Durham and Adams ultimately disagree as to the propriety of religious “absolutism,” both see pluralism as essential to peace.

32. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 116 (1992).

hindering religion. It is to foster a regime of religious pluralism, as distinguished from both majoritarianism and secularism.”<sup>33</sup> According to McConnell, his religious pluralism view of the religion clauses in the U.S. Constitution contrasts with the Warren and Burger Courts’ “mission to protect democratic society from religion.”<sup>34</sup> While this view is in specific reference to religious liberty in the United States, it echoes the ECHR’s view of an “indissociable” union between democratic society and religious pluralism.<sup>35</sup>

The commentators mentioned above are careful to note that protecting a robust pluralism does not require relativizing belief. Durham specifically argues that states “should insist on tolerance and mutual respect among citizens, but may not insist that believers compromise or relativize their commitment to the truths in which they believe.”<sup>36</sup> He warns against the view that would equate exclusivist truth claims with “extremism,” and notes that a religious community “can claim that its beliefs are true without believing that its beliefs may be imposed on others.”<sup>37</sup> McConnell similarly eschews the idea that protecting pluralism means requiring religious claims to be “tamed, cheapened, and secularized” in order to find a place alongside the beliefs of fellow citizens in public life.<sup>38</sup> Applying these principles to the EC and HRC, one must not mistake the EC’s recognition of the government’s role in ensuring “mutual tolerance” as a requirement that religions relativize the fundamental tenets of their religion. Indeed, in the context of freedom of expression, the

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33. *Id.* at 117. Echoing the “autonomy of religious communities” sentiment of the ECHR, McConnell adds that religious pluralism is “to preserve what Madison called the ‘full and equal rights’ of religious believers and communities to define their own way of life, so long as they do not interfere with the rights of others, and to participate fully and equally with their fellow citizens in public life without being forced to shed their religious convictions and character.” *Id.* (citing 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834) (statement of James Madison, June 8, 1789)).

34. *Id.* at 120.

35. Note that the pluralistic view espoused by Durham, McConnell, and the ECHR should not be confused with an “unimpaired flourishing” view of religious liberty, since a pluralistic view of religion will still admit to government restriction in appropriate circumstances. *See generally* Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 TEX. L. REV. 577 (1996) (offering a very interesting critique of this view and an equally interesting espousal of their “equal regard” religious liberty approach).

36. Durham, *supra* note 31, at 51.

37. *Id.*

38. McConnell, *supra* note 32, at 127. He says, “The Court does not object to a little religion in our public life. But the religion must be tamed cheapened, and secularized . . . . Authentic religion must be shoved to the margins of public life.” *Id.*



Court has said that protection extends not only to popular views, “but also to those that offend, shock or disturb.”<sup>39</sup>

Accepting religious pluralism in principle does not answer the more specific question of whether and to what extent government may legitimately constrain religious freedom as an exercise of necessity in particular cases. However, a commitment to genuine religious pluralism should limit a government’s ability to restrict religious freedom on the ground that public manifestation of religious ideas or practice somehow constitute a *per se* threat to democratic government. To the extent that pluralism as a prescriptive norm is “indissociable” from democracy itself, a government restriction on manifestations of religious belief—ostensibly because such a restriction is “necessary” to protect that society—bears the burden of showing that a true, identifiable necessity exists to justify the restriction. Specifically, a government must show that curbing religious freedom in a particular instance will not violate the axiomatic principle of religious pluralism, and by extension, democracy itself. Such a view does not preclude appropriately specific justifications for curbing religious freedom, but guards against an inversion of the principle that would view robust expression of religious ideas and practice as somehow inimical to a democratic society, and thus subject to restriction simply by virtue of its religious nature or the content of the religious expression.

#### D. Margin of Appreciation and Level of Scrutiny

Finally, the EC and the HRC have had to determine how they should apply these principles in particular cases. In order to “balance general societal interests against the interests of the individual or group adversely affected by the state’s action,” the EC has begun to develop standards of review guided by its “margin of appreciation” doctrine.<sup>40</sup> Under the doctrine, national governments are given some discretion as to the manner in which they implement ECHR rights.<sup>41</sup>

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39. *Refah Partisi v. Turkey*, App. Nos. 41340/98, 41342/ 98, 41343/98, and 41344/98, 36 Eur. H.R. Rep. 1, 32-33 (2003).

40. Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT’L L. REV. 391, 446, 451 (2001).

41. *Id.* at 451. Donoho calls the doctrine “one of the EC[]’s primary tools for accommodating diversity, national sovereignty, and the will of domestic majorities, while enforcing effective implementation of rights under the European Convention.” *Id.* The EC has noted that the substance of the notion of public order “varied on account of national characteristics.” *Manoussakis v. Greece*, App. No. 18748/91, 23 Eur. H.R. Rep. 387, 405 (1997).

When a state's law falls "within a predictably amorphous range of acceptable alternatives," the Court is likely to uphold the state's law as within the margin of appreciation.<sup>42</sup> Similarly, the HRC has indicated its willingness to look at "context" in assessing alleged violations of the ICCPR. In *Hudoyberganova v. Uzbekistan*, the Committee concluded that there had been a violation of Article 18 of the ICCPR, and noted that it had reached its decision "duly taking into account the specifics of the context."<sup>43</sup>

While the margin of appreciation recognizes the freedom of European states to exercise some measure of sovereignty, the level of discretion given to the national government depends to a large degree on the content of the right at issue.<sup>44</sup> The more fundamental the right, the more specifically the limitation must be tailored to the aim sought and the more the means chosen must be proportional to a legitimate end.<sup>45</sup> The scrutiny encouraged by the ICCPR is similar in its requirement that a restriction on religious liberty be "proportional in severity and intensity to the purpose being sought."<sup>46</sup> Importantly for purposes of this Article, the EC has specified that restrictions on religious freedom "call for *very strict scrutiny* by the Court."<sup>47</sup> Thus, while the Court will consider the margin of appreciation and take restrictions on religious freedom on a case-by-case basis because of

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42. Donoho, *supra* note 40, at 452.

43. Human Rights Comm. Decision, No. 931/2000, ¶ 6.2, U.N. Doc. CCPR/C/82/D/931/2000 (2005) (holding that a practicing Muslim woman had a right to wear her headscarf during classes at a state institution). One of the dissenters in the case agreed with the need "to take into account the context in which the restrictions contemplated by those clauses [the "necessity" clauses contained in Articles 12, 18, 19, 21, and 22] are applied" but criticized the Committee for saying that it had taken context into account when the state party offered no explanation for the basis on which it was seeking to justify the restriction on religious dress. *Id.* at Individual Opinion (dissenting) by Comm. Member Sir Nigel Rodley.

44. *See* Donoho, *supra* note 40, at 454-55. Donoho says the ECHR has developed a "hierarchy of rights, deeming some so fundamental to a democratic society that little discretion is allowed to national governments." *Id.*

45. *See id.* at 454. Donoho also notes that "the Court's jurisprudence for balancing individual and state interests is strikingly similar to that utilized by the U.S. Supreme Court when faced with similar issues." *Id.* at 454 n.179.

46. NOWAK, *supra* note 1, at 325 (emphasis removed). One commentator has urged the formation of an international compelling interest test in order to limit the justifications a state can offer for restricting religious freedom. He says such a test "presumptively excludes justifications for violations of religious liberty on grounds of subversion, order, immorality, or disrespect for religion or a religious figure, while permitting the state to demonstrate compelling reasons for departing from this rule to address internationally recognized problems like terrorism, sectarian violence, and female genital mutilation." Adams, *supra* note 5, at 63.

47. *Manoussakis v. Greece*, App. No. 18748/91, 23 Eur. H.R. Rep. 387, 407 (1997) (emphasis added).

the inherently fact-sensitive balancing between the right and the government necessity, the government bears the heavy burden of showing that a limitation is actually “necessary” and that it is narrowly tailored toward that necessary end.

## II. JUDICIAL APPLICATION: SPECIFIC CASES<sup>48</sup>

Before moving to an assessment of current laws in light of the above-mentioned general principles, the Article now proceeds to a brief examination of specific EC cases that have considered when and if a restriction on religious freedom meets the necessity requirements. In *Metropolitan Church of Bessarabia v. Moldova*, the EC found that the government’s refusal to officially recognize the Church of Bessarabia was an interference with its freedom of religion.<sup>49</sup> The EC said that the government was pursuing a legitimate aim of protecting against the revival of long-standing rivalries between Russia and Romania which could endanger the social peace and territorial integrity of Moldova.<sup>50</sup> However, refusal to recognize the applicant church was not a legitimate means to fulfill this aim because the government was not acting neutrally and impartially, its concerns about national security and territorial integrity were “purely hypothetical,” and the significant consequences for religious freedom were not proportionate to the legitimate aim pursued.<sup>51</sup> Thus, the EC upheld the ICCPR and ECHR requirement that a restriction be proportionate to its goal.

In *Manoussakis v. Greece*, the EC found a violation of Article 9 when Jehovah’s Witnesses were prosecuted for “establish[ing] and operat[ing] a place of worship without first obtaining the authorization[] required by law.”<sup>52</sup> The government argued that the authorization measures, which included the Greek Orthodox Church in the approval process and criminalized the use of a non-authorized place of worship, served to protect public order and the rights of others.<sup>53</sup> This was the case, the government contended, because the Orthodox church had played a vital role in Greek history, because

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48. Research for this Article did not uncover any significant HRC cases for this particular section. The discussion on secularism below does include several HRC cases.

49. *Metro. Church of Bessarabia v. Moldova*, App. No. 45701/99, 35 Eur. H.R. Rep., 306, 332 (2002).

50. *Id.* at 334.

51. *Id.* at 339-41.

52. *Manoussakis*, 23 Eur. H.R. Rep. at 387.

53. *Id.* at 405.

virtually the entire population of Greece was Christian Orthodox, and because “sects sought to manifest their ideas and doctrines using all sorts of ‘unlawful and dishonest’ means,” and were “socially dangerous.”<sup>54</sup> The EC said that “States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population,” and held that the protection of public order was a legitimate aim under the circumstances.<sup>55</sup> However, the EC held that Article 9 had been violated because the law had been used to “impose rigid, or indeed prohibitive, conditions on practice of religious beliefs by certain non-orthodox movements” and “to restrict the activities of faiths outside the Orthodox church.”<sup>56</sup> The EC concluded by saying that the convictions had such a “direct effect on . . . freedom of religion that [they] cannot be regarded as proportionate to the legitimate aim pursued, nor, accordingly, as necessary in a democratic society.”<sup>57</sup> The case illustrates the limits of the margin of appreciation doctrine when the impact on religious freedom is direct and not narrowly tailored to a legitimate aim.

In *Kokkinakis v. Greece*, the EC overturned the conviction of a Jehovah’s Witness who was convicted of improper proselytism after he and his wife engaged in a religious discussion with a woman in his home.<sup>58</sup> The government argued that it had to “protect a person’s religious beliefs and dignity from attempts to influence them by immoral and deceitful means.”<sup>59</sup> The EC made a distinction between bearing “Christian witness and improper proselytism,” with the former involving “true evangelism” and the latter involving improper pressure and possibly even the “use of violence [and] brainwashing.”<sup>60</sup> The EC said that the Greek law was proper insofar as it was designed to punish only the latter, but that Greece had not sufficiently specified the way in which the applicant “had attempted to convince his neighbor by improper means.”<sup>61</sup> The EC thus concluded that the applicant’s conviction was not justified “by a pressing social need”

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54. *Id.*

55. *Id.*

56. *Id.* at 408.

57. *Id.* at 409.

58. *Kokkinakis v. Greece*, App. No. 14307/88, 17 Eur. H.R. Rep. 397, 397 (1994).

59. *Id.* at 421.

60. *Id.* at 422.

61. *Id.*

and that the law was not “proportionate to the legitimate aim pursued or . . . for the protection of the rights and freedoms of others.”<sup>62</sup>

In *Valsamis v. Greece*, a Jehovah’s Witness student in the state secondary education school refused to take part in the celebration of the National Day school parade commemorating the outbreak of war between Greece and Italy in 1940.<sup>63</sup> Her parents contended that pacifism is a “fundamental tenet of their religion and forbids [even indirect] conduct or practice associated with war.”<sup>64</sup> The school had previously exempted her from attendance at religious education lessons and Orthodox Mass, but suspended her from school for one day for failure to attend the parade.<sup>65</sup> The applicant argued that Article 9 guaranteed her right to the “negative freedom not to manifest, by gestures of support, any convictions or opinions contrary to her own” and that the punishment “stigmatised and marginalised her.”<sup>66</sup> The EC rejected the argument and held that Article 9 did not confer a right to exemption from disciplinary rules which were applied generally and neutrally, and that there had been no interference with her right to manifest her religion.<sup>67</sup> The ECHR Commission decision from which the student appealed had noted that Article 9 protects “only acts and gestures of individuals which really express the conviction in question.”<sup>68</sup>

In *Hasan v. Bulgaria*, Muslim believers sought to replace the leadership of their religious organization, thereby causing divisions in the Muslim community.<sup>69</sup> Soon thereafter, the Bulgarian government declared the election of the leader of one of the factions null and void, removed him from the position, and set up a temporary governing body pending the election of a new permanent Muslim leader.<sup>70</sup> The applicants argued that the religious community should

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62. *Id.*

63. *Valsamis v. Greece*, App. No. 21787/93, 24 Eur. H.R. Rep. 294, 298 (1997).

64. *Id.* at 297.

65. *Id.* at 298.

66. *Id.* at 317.

67. *Id.* In *A. v. United Kingdom*, the EC rejected a claim of exemption from paying taxes, some of which would be used to fund the military, on pacifist grounds. The EC said that the obligation to pay taxes is “a general one which has no specific conscientious implications in itself . . . Article 9 does not confer . . . the right to refuse on the basis of her convictions to abide by legislation . . . which applies neutrally and generally in the public sphere, without impinging on the freedoms guaranteed by Art. 9.” *A. v. United Kingdom*, App. No. 10295/82, 6 Eur. H.R. Rep. 558 (1984).

68. *Valsamis*, 24 Eur. H.R. Rep. at 306.

69. App. No. 30985/96, 34 Eur. H.R. Rep. 1339, 1347 (2002).

70. *Id.*

be allowed to organize according to its own rules, including choosing its own leaders.<sup>71</sup> The government argued that it “had a duty to maintain a climate of tolerance and mutual respect” between independent religious institutions, and that the state’s functioning in this capacity had no bearing on the Muslims’ right to practice their religion.<sup>72</sup> The EC ruled against the Bulgarian government, noting that religious communities traditionally exist in organized structures and find meaning in religious ceremonies and the religious ministers conducting those ceremonies<sup>73</sup>: “Participation in the life of the community is thus a manifestation of one’s religion.”<sup>74</sup> The EC also noted that “but for very exceptional cases, the right to freedom of religion . . . excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”<sup>75</sup> The EC held that the interference was not “prescribed by law” in that it was “arbitrary and was based on legal provisions which allowed an unfettered discretion to the executive, and did not meet the required standards of clarity and foreseeability.”<sup>76</sup>

This short list of cases shows the EC’s commitment to impose exacting scrutiny on any restrictions to religious freedom, particularly with regard to the proportionality test. If a government is pursuing a legitimate aim, but is doing so by direct proscription of religious freedom when other means may be available, the law will not stand. However, *Valsamis* indicates that the Court will not defer to religious sensibilities when the law does not explicitly restrict one’s right to manifest religion, but is instead a generally applicable law that requires what the Court views as rather innocuous participation in a public function. The Article now moves to an analysis of whether legislation currently on the books in certain states, and ostensibly grounded in the “necessity” exceptions of the ICCPR and ECHR, is in fact faithful to the tenets of those documents and the jurisprudence interpreting them.

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71. *Id.* at 1357.

72. *Id.* at 1357-58.

73. *Id.* at 1358-59.

74. *Id.* at 1359.

75. *Id.* at 1362. “State action favoring one leader of a divided religious community or undertaken with the purpose of forcing the community to come together under a single leadership against its own wishes” is an interference with freedom of religion. *Id.*

76. *Id.* at 1365.

### III. LEGISLATION “NECESSARY TO PROTECT PUBLIC SAFETY, ORDER, HEALTH, OR MORALS OR THE FUNDAMENTAL RIGHTS AND FREEDOMS OF OTHERS”

#### A. Legislation

Silvio Ferrari says that in the last ten to twenty years a new breed of religiously motivated terrorists, willing to kill in the name of God, has appeared.<sup>77</sup> This reality has occasioned a pressing need to find a balance between the values of freedom and security, to determine how to “reconcile religious freedom and national security in a way that makes it possible to simultaneously enjoy them both.”<sup>78</sup> Many governments around the world have adopted measures that are ostensibly “necessary to ensure national security and public order, and life, health, morals, rights and freedoms of other citizens” are protected from extremist religions or religious ideas.<sup>79</sup> Ferrari identifies three broad types of government intrusion into religious liberty since the September 11, 2001 terrorist attacks on the United States: (1) government creation of laws restricting a variety of fundamental rights that indirectly affect religious liberty, such as laws making it more difficult to obtain visas, thereby inhibiting missionary activities; (2) government scrutiny of religious organizations, including the examination of internal operations of religious organizations to ascertain whether the organization might be a front for terrorist activity; and (3) government intrusion into religious beliefs, such as the investigation of subversive doctrine that is “tainted with intolerance, and opposes the democratic fundamentals of civil society.”<sup>80</sup>

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77. Silvio Ferrari, *Individual Religious Freedom and National Security in Europe After September 11*, 2004 BYU L. REV. 357, 358.

78. *Id.* at 359.

79. See, e.g., The Law of the Republic of Uzbekistan On Freedom of Worship and Religious Organizations (New Version) art. 3, as published in NARODNOYE SLOVO (Tashkent, Uzb.), May 15, 1998, translated in <http://www.stetson.edu/~psteeves/relnews/uzbeklaw.html>.

80. Ferrari, *supra* note 77, at 361.

Examples of such restrictive legislation abound.<sup>81</sup> In Russia, the Federal Law on Counteracting Extremist Activity<sup>82</sup> forbids “the creation and operation of social and religious associations or other associations which have goals or actions directed at the conduct of extremist activity.”<sup>83</sup> Such prohibited extremist activities include “propaganda of exclusivity, advocating either supremacy or inferiority of citizens on the basis of religion, social, racial, national, religious or linguistic affiliation.”<sup>84</sup> This prohibition is not limited under the law to those acts committed in public, and one commentator contends that religious groups could face extremism accusations based on private doctrinal discussions during regular worship services if the group claims exclusive truth based on the “superiority” of its doctrine.<sup>85</sup>

Another example is the Maintenance of Religious Harmony Act enacted in Singapore in 1990.<sup>86</sup> For the purpose of protecting religious harmony (and by extension public safety, order, and so on), the Act gives the state the power to issue a restraining order against any religious representative who excites “disaffection against the President or the Government while, or under the guise of, propagating or practising any religious belief.”<sup>87</sup> Such an order can restrain the religious representative from addressing a congregation or publishing any text without prior permission of the state authorities.<sup>88</sup>

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81. In addition to the legislation specifically discussed, testimony before the Congressional Human Rights Caucus indicated that Sri Lanka, Bangladesh, and some states in India have all passed or are considering passing anti-conversion legislation that threatens prosecution for sharing one’s faith with another. *Anti-Conversion Legislation in India: Staff Briefing Before the Congressional Human Rights Caucus & Task Force for Int’l Religious Freedom*, July 21, 2006 (statement of Angela C. Wu, Dir. of Int’l Advocacy, the Becket Fund), available at <http://becketfund.org/files/581fd.pdf> [hereinafter Wu].

82. *Sobranie Zakonodatel’sstva Rossiikoi Federatii [SZ RF] [Russian Federation Collection of Legislation] 2002, No. 30, Item 3031.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Maintenance of Religious Harmony Act, Chapter 167A, available at <http://statutes.agc.gov.sg/> (Search “Go To Cap No.” for “167A”) (last visited Oct. 3, 2006). See also Ferrari, *supra* note 77, at 369-70.

87. Ferrari, *supra* note 77, at 369-70.

88. *Id.* The Bulgarian Consolidated Draft Law on Religious Denominations is an example of a more procedurally focused effort to curtail religious activity by, among other things, enacting very difficult registration procedures applied to non-Bulgarian Orthodox churches where non-registration makes practicing one’s religion freely virtually impossible. For a



A third example of legislation limiting religious liberty using the necessity language of the ICCPR and the ECHR is the Law of the Republic of Uzbekistan on Freedom of Worship and Religious Organizations.<sup>89</sup> The law lays out numerous guarantees of religious freedom that are qualified with significant restrictions in the name of national security, public order, life, health, morals, and rights and freedoms of others. For example, Article 5 of the law outlaws “actions aimed at converting believers of one religion into another” and declares inadmissible “the use of religion for anti-state and anti-constitutional propaganda . . . and for other actions against the state, society and individual.”<sup>90</sup>

Finally, since at least 1998, France has actively sought to restrict the development of new religious movements (NRMs). In 2000, the French National Assembly unanimously approved a law that created a civil mechanism for the dissolution of religious entities, placed restrictions on the locations of specified “new religious movements,” prohibited dissemination of information regarding new religious movements, and criminalized “mental manipulation” or brainwashing.<sup>91</sup> The effects of this and other initiatives targeting religious minorities include, among other things, harassment in the workplace, harassment at school, heightened investigations of religious organizations’ financial management systems, imposition of excessive taxes on donations to religious organizations, and denial of child custody to a parent based on the parent’s religion.<sup>92</sup>

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discussion of the law, see Atanas Krussteff, *An Attempt at Modernization: The New Bulgarian Legislation in the Field of Religious Freedom*, 2001 BYU L. REV. 575, 589-600.

89. See The Law of the Republic of Uzbekistan On Freedom of Worship and Religious Organizations, *supra* note 79.

90. Grant Garrard Beckwith, Note, *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, 1042.

91. Law No. 2001-504 of June 12, 2001, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 13, 2001, p. 9337; see also Hannah Clayson Smith, Note, *Liberte, Egalite, et Fraternite at Risk For New Religious Movements in France*, 2000 BYU L. REV. 1099, 1118-22.

92. Smith, *supra* note 91, at 1116-17 nn.95-101 (detailing instances of each of these effects and noting at least eleven cases in which mothers were denied custody of children in divorce proceedings because they were members of a NRM).

## B. Legitimate or Illegitimate Restrictions on Religious Freedom?

### 1. *Facially Invalid?*

a. **Overbreadth and Vagueness.** The initial question in evaluating the laws laid out in Part III.A. is whether, to borrow categories from U.S. constitutional law, the laws are facially invalid under the ICCPR or the ECHR. In the United States, a plaintiff may challenge the facial validity of a law regulating speech by arguing that it is either unconstitutionally overbroad or unconstitutionally vague.<sup>93</sup> Overbreadth requires a showing that a law punishes a “‘substantial’ amount of protected free speech, ‘judged in relation to the statute’s plainly legitimate sweep.’”<sup>94</sup> Such a showing invalidates the entire law “out of concern that the threat of enforcement of an overbroad law may deter or ‘chill’ constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.”<sup>95</sup> Overbreadth is rarely found, however, because the U.S. Supreme Court recognizes that blocking application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct, could have substantial social costs. Thus, the “strong medicine” of overbreadth invalidation is used sparingly.<sup>96</sup>

The related doctrine of vagueness allows a challenge to a law that is not a “sufficiently definite warning as to the proscribed

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93. It is important to note that while overbreadth and vagueness doctrines apply primarily, if not exclusively, to freedom of speech in U.S. jurisprudence, international law protections of freedom of religion specifically include manifestations involving speech, namely teaching religious points of view. See NOWAK, *supra* note 1, at 321. One commentator has noted that international law “expressly links religious liberty with virtually every major human right, including, inter alia, freedom of association, freedom of speech, the norm of non-discrimination, [and] due process.” Adams, *supra* note 5, at 23.

94. *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

95. *Id.* at 119. This chilling effect may cause people to “abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.” *Id.* (citation omitted).

96. *Id.* at 120. The Court says, “Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech,” thus limiting the doctrine to content-based legislation. *Id.* at 124. Sullivan and Gunther question whether the overbreadth doctrine functions as “simply one application of strict scrutiny” to the extent that overbreadth cases typically emphasize the availability of more carefully tailored means to achieve legislative ends, a hallmark of strict scrutiny analysis. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 1298-99 (14th ed. 2001).

conduct when measured by common understanding and practices.”<sup>97</sup> Kathleen Sullivan and Gerald Gunther point out that the doctrine draws on the procedural due process requirement of adequate notice, but is also aimed at preventing selective enforcement.<sup>98</sup> The Court has said the purpose of the vagueness doctrine is to prevent “arbitrary and discriminatory enforcement” of a law.<sup>99</sup> It has found laws unconstitutional for vagueness where essentially “no standard of conduct is specified at all,” and as a result “men of common intelligence must necessarily guess at [their] meaning.”<sup>100</sup>

b. “Prescribed by Law” Though the ICCPR and the ECHR use the phrase “prescribed by law” rather than overbreadth and vagueness, the terms have analogous aspects. In *Kokkinakis v. Greece*, the applicant argued that the absence of any description of the “objective substance” of the offense of proselytism “would tend to make it possible for any kind of religious conversation or communication to be caught by the provision” and that the vague language risked “extendability” by the police and the courts to permissible exercises of religious freedom.<sup>101</sup> The EC rejected this contention, noting “that the wording of many statutes is not absolutely precise” and “that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague.”<sup>102</sup> The EC further noted that the existence of a body of settled national case law sufficiently enabled the applicant to regulate his conduct according to the law.<sup>103</sup> Though the Court rejected the overbreadth and vagueness contention, its discussion indicates the possibility that a law may be struck down under the ECHR if it does not sufficiently enable citizens to regulate their conduct under the law.<sup>104</sup>

In *Metropolitan Church of Bessarabia v. Moldova*, the EC further explained the concept of “prescribed by law,” saying:

[T]he expression ‘prescribed by law’ . . . not only requires that an impugned measure should have a basis in domestic law, but also refers to the quality of the law in question, which must be

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97. *Jordan v. DeGeorge*, 341 U.S. 223, 231-32 (1951).

98. SULLIVAN & GUNTHER, *supra* note 96, at 1299.

99. *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

100. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (quoting *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926)).

101. App. No. 14307/88, 17 Eur. H.R. Rep. 397, 419 (1994).

102. *Id.* at 420.

103. *Id.*

104. *Id.*

adequately accessible and foreseeable, that is to say, formulated with sufficient precision to enable the individual . . . to regulate his conduct.<sup>105</sup>

To meet these requirements, a domestic law “must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention . . . . Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.”<sup>106</sup> Thus, as with the overbreadth and vagueness doctrines, the “prescribed by law” requirement of both the ECHR and the ICCPR guards against laws that do not provide sufficient warning as to what conduct the law proscribes.

c. “Necessary.” Another way to challenge facial validity under the ICCPR or the ECHR would be to argue that the law in question could never be necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of others or, to use the language of the ECHR, the law could never be “necessary in a democratic society.”<sup>107</sup> Thus, it must be struck down as facially invalid.

d. Analysis of National Legislation for Facial Invalidity. A facial validity challenge depends upon the specific wording of the statute in question. For this reason, the analysis here will assess the facial validity of the several representative statutes described above. Turning first to the question of necessity, none of the statutes would likely fail as facially invalid under the ICCPR or ECHR on the ground that the restrictions could *never* be necessary in a democratic society. One could imagine any number of scenarios under which even the most restrictive language of the statutes might be necessary. For example, Russia’s Law on Counteracting Extremist Activity forbids “propaganda of exclusion, advocating either supremacy or inferiority of citizens on the basis of religion.”<sup>108</sup> One can easily imagine a situation in which members of one religion might propagate

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105. App. No. 45701/99, 35 Eur. H.R. Rep 306, 333 (2002). The Court has also described the concept as providing “a measure of legal protection in domestic law against arbitrary interferences by public authorities.” *Kalaç v. Turkey*, App. No. 20704/92, 27 Eur. H.R. Rep 552, 560 (1999).

106. *Metro. Church of Bessarabia*, 35 H. R. Rep. at 333.

107. See ECHR, *supra* note 9, art. 9, ¶ 2.

108. See *Sobranie Zakonodatel’sstva Rossiikoi Federatii [SZ RF] [Russian Federation of Collection of Legislation] 2002 No. 30, Item 3031.*

their religious beliefs in such a demeaning or aggressive way that others' fundamental rights—to privacy or to their own religious freedom—are violated. On a broader scale, the tensions that sometimes exist between religions could, based upon active spreading of disparaging ideas about a competing religion, lead to unrest that threatens the public order or safety. It would then be necessary for the government to restrict such propaganda and advocacy.<sup>109</sup> Further, research for this Article did not discover a single case in which a law was declared facially invalid on this ground.

Although vagueness and overbreadth are closer questions, the examples referenced here would likely survive an overbreadth challenge as well. Though the laws might apply to religious expression that the government could not *in some cases* justify restricting, the plainly legitimate sweep of these laws in relation to that possibility would likely protect them from an overbreadth challenge. The exception to this conclusion would be the Uzbek provision prohibiting “actions aimed at converting believers from one religion to another.”<sup>110</sup> In *Kokkinakis*, the EC expressly allowed proselytizing where a religious believer expressed his ideas in an inoffensive way, and there was no evidence that he had taken advantage of the “inexperienced, feebleness of mind, and ingenuousness” of the other person.<sup>111</sup> Thus, a blanket ban on attempting to convert another, without specifying what would constitute an impropriety, might fail a facial validity challenge based on overbreadth.

The vagueness question, with which the ECHR has dealt explicitly, may be a closer question because a religious organization or one of its members could easily have difficulty determining what activities or teaching of its religion might count as “exclusionary” or “anti-state.” For example, imagine that a debate occurred between an atheist and a Christian at a public institution. Suppose the atheist argued that being a moral person and having a theoretical basis for moral opinions does not require belief in a higher power. In response, the Christian argued that a philosophically sound moral system requires the existence of a higher power. He went on to argue that among the higher power “options,” the God of Christianity is the

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109. A similar argument would apply to the restrictions on NRMs in France and the anti-propaganda provisions of the Singapore law. See *supra* notes 91, 86.

110. See Beckwith, *supra* note 90.

111. *Kokkinakis v. Greece*, App. No. 14307/88, 17 Eur. H.R. Rep. 397, 414 (1994).

most rational explanation for a moral system and for being a moral person. Assume also that the Christian did not explicitly condemn other religious viewpoints, nor did he attempt to persuade audience members to convert to Christianity. The aim was a religious explanation for morality, held out as superior to other religious or non-religious explanations.

The question with respect to vagueness (or “prescribed by law”) is whether the law is “formulated with sufficient precision” to enable citizens to regulate conduct accordingly.<sup>112</sup> It is not clear whether the foregoing example of the debate at a public institution could be prosecuted as extremist under Russia’s law prohibiting “propaganda of exclusivity, advocating either supremacy or inferiority of citizens on the basis of religion,” because the statute is not clear about these terms.<sup>113</sup> As such, the law does not put the Christian debater sufficiently on notice that he could be prosecuted. The Becket Fund for Religious Liberty criticized Sweden’s Law Against Expression of Disrespect on similar “no objective assessment” grounds: “This law prohibits the expression of ‘disrespect’ towards favored minority groups” but “lacks any objective standard for identifying disrespect.”<sup>114</sup> A similar lack of objective standard exists with regard to “exclusion” in the Russia statute, “propaganda” in the Uzbekistan statute, and “disaffection” in the Singapore statute.<sup>115</sup> Even so, it is not clear that the EC would invalidate any of these measures on vagueness grounds given its care to note that laws cannot account for every eventuality.<sup>116</sup> Further, because the language in each of the statutes can be construed as furthering a legitimate aim of government (proscribing treatment of other citizens as inferior on the basis of religion), it is unlikely they would be struck down as facially invalid on vagueness grounds. Rather than invalidating a law based on necessity, overbreadth, or vagueness, it can be predicted that the

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112. *Metro. Church of Bessarabia*, App. No. 45701/99, 35 Eur. H.R. Rep. 306, 333 (2002). This is, of course, a separate question from the question of whether the prohibition’s aim is legitimate even if it is not vague.

113. See *Sobranie Zakonodatel’sstva Rossiikoi Federatii [SZ RF] [Russian Federation Collection of Legislation]* 2002 No. 30, Item 3031.

114. Peng Voong, Speech at the United Nations 61st Comm’n on Human Rights (April 14, 2005) (transcript available at <http://www.becketfund.org/index.php/article/386.html>).

115. See Part III.A for the full language of each of these statutes.

116. *Metro. Church of Bessarabia*, 35 Eur. H.R. Rep. at 333 (“The level of precision required of domestic legislation—which cannot in any case provide for every eventuality—depends to a considerable degree on the content of the instrument in question, the field which it is designed to cover and the number and status of those to whom it is addressed.”).

EC would want to adjudicate an “as-applied” claim to determine the necessity of the statute under the particular circumstances, and whether any conviction under the statute was proportional to the aim pursued.

2. *Invalid “As-Applied”?* The nature of an “as-applied” inquiry depends on the facts of particular cases. However, hypothetical situations to which these laws may apply can be instructive. It seems clear that Russia’s prohibition on “exclusion,”<sup>117</sup> for example, could easily be applied to proscribe the Christian debater’s claim that Christianity is a superior basis for morality as compared to other religions. It is equally clear that such an application would violate the ICCPR and the ECHR. Insofar as the speech was an explanation of a religiously motivated belief, the EC would probably rule as it did in *Kokkinakis* by saying that expression of religious conviction absent overt pressure or coercion cannot be punished as criminal.<sup>118</sup> Further, prosecution of such a manifestation of religious belief would likely be scrutinized very closely, in part because it would constitute a “direct effect” on freedom of religion. As such, it would violate the principle of proportionality unless the necessity the government puts forth was closely connected to a legitimate aim (and the more direct the restriction, the more difficult this is to show). The debater would have to show that the views he expressed in the speech were intimately tied to his religious belief, since not every opinion or preference qualifies as a belief under the instruments.<sup>119</sup> Because the speech involved “some coherent view on fundamental problems”<sup>120</sup> and was “obviously related to religious conviction,”<sup>121</sup> he would satisfy this requirement. Thus, to justify prosecuting the debater, the government would have to show some specific necessity, under the circumstances, that made the restriction necessary.<sup>122</sup>

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117. See *Sobranie Zakonodatel'stva Rossiikoi Federatii [SZ RF] [Russian Federation Collection of Legislation]* 2002 No. 30, Item 3031.

118. See *Kokkinakis v. Greece*, App. No. 14307/88, 17 Eur. H.R. Rep. 397, 414 (1994).

119. See VAN DIJK & VAN HOOF, *supra* note 10.

120. *Id.*

121. NOWAK, *supra* note 1, at 321.

122. The Article discusses in detail below the question of whether such a speech at a public institution would qualify as an endorsement of a particular religious view and thus as proscribable to protect the secular nature of the state. On the facts of this hypothetical, such a debate would not be seen as an endorsement by the school due to the nature of debate.

Beyond this particular hypothetical, the Singapore Maintenance of Religious Harmony Act's prohibition of exciting disaffection could easily be applied to restrain religiously motivated opposition to government policy or practice.<sup>123</sup> Because many religious traditions (not to mention democratic principles generally) view actively opposing unjust or immoral government action or cultural tendencies as essential to their mission, this proscription could easily curtail important religious freedoms. In addition, many traditions actively attempt to persuade individuals and government of the correctness of their views on a whole host of issues that touch the political arena. Much of this activity could be viewed under these laws as subversive, and thus proscribable merely for being in conflict with a government policy or declaration. What if a citizen of the United States opposed the U.S. Supreme Court decision in *Lawrence v. Texas*, in which the Court struck down a state law prohibiting consensual sodomy, and distributed fliers in the community condemning the decision and expressing moral disagreement with homosexual sodomy?<sup>124</sup> Under the language at issue, the government could easily construe the act as spreading disaffection against the government. However, such activity is expressly allowable under the ICCPR, and without some justification beyond the substantive religious disagreement, such as advocacy of violence, other forms of disruptive dissent, or violation of others' rights, the restriction would violate the instrument.<sup>125</sup>

Similarly, while France's NRM law allows dissolution of new religious entities ostensibly to guard against abuse of the religious freedoms of others, a government's power of heightened investigation and dissolution of religious entities simply *because they are new* illegitimately restricts religious freedom absent some particularized necessity for the restriction.<sup>126</sup> In addition, singling out members of NRMs for individualized restriction simply because of membership in a minority religious group, without showing a specific "pressing social need," is illegitimate.<sup>127</sup> By extension, such restrictions restrain the freedom of those who may want to convert to an NRM, thus causing a

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123. See Ferrari, *supra* note 77, at 370 for the text of the Singapore statute.

124. 539 U.S. 558, 578 (2003).

125. See *General Comment No. 22*, *supra* note 17, ¶ 7.

126. *Id.* ¶ 2; see also *id.* ¶ 8 (stating that necessity clauses are exhaustive, such that restrictions not listed are not allowed); see also Smith, *supra* note 91 (giving examples of restrictions on the locations of new religious movements in France).

127. *Kokkinakis v. Greece*, App. No. 14307/88, 17 Eur. H.R. Rep. 397, 422 (1994) (holding that the government must show that the applicant's conviction was justified in the circumstances by a pressing social need).



substantial violation of a person's freedom to believe what he or she wants and the freedom to belong to the religion of one's choice. The treatment of religious minority groups in France is exactly the type of religious discrimination that the ICCPR and the ECHR forbid. The language of these laws and others like them, while probably not facially invalid, pose serious risks of restricting religious activity for reasons other than the necessity required under the ICCPR and the ECHR. Whether the laws are ultimately compatible with the instruments in practice depends in large part on whether the governments administering them actually require a showing of necessity before pursuing prosecutions for religious expression under those laws. Given the phraseology of many of the laws and the ways they have been put into practice thus far in places like France, it cannot be predicted that the ICCPR and the ECHR's protections for religious expression will be properly followed, and the broad language of the laws will be at least partly to blame.

#### IV. THE "PRINCIPLE OF SECULARISM"

##### A. Legislation and Case Law

In addition to laws curtailing religious freedom under the specific necessities of the ICCPR and the ECHR, some governments justify curtailing religious freedom under the "principle of secularism." This principle contains the notion that government and society must be protected from religious overreaching in order to preserve the secular nature of government and the public. For example, France's "law on secularism" went into effect on September 2, 2004 and reads as follows: "In public [primary and secondary schools], the wearing of symbols or clothing through which the pupils ostensibly manifest a religious appearance is prohibited."<sup>128</sup> Since then, a total of forty-eight students have been expelled under the law, most of them Muslim girls who refused to remove their religious headscarves in class.<sup>129</sup> In banning the wearing of religious symbols, one French official said that one purpose of the law was to encourage "mutual

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128. *France—Banning Religious Attire—United Shiks*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/index.php/case/96.html> (last visited Oct. 5, 2006). See also Law No. 2004-228 of March 3, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], March 17, 2004, p. 5190.

129. See *French Schools Expel 48 Over Headscarf Ban*, EXPATICA, [http://www.expatica.com/actual/article.asp?subchannel\\_id=58&story\\_id=15996](http://www.expatica.com/actual/article.asp?subchannel_id=58&story_id=15996) (last visited Oct. 5, 2006).

respect,” thus implying that wearing a religious symbol to school is disrespectful to those of other religions.<sup>130</sup> Similarly, in 2003, a Swedish pastor was convicted and sentenced to one month imprisonment under a Swedish law banning disrespectful speech.<sup>131</sup> Though the principle of secularism was not invoked explicitly in the case, the idea of protecting others from offense and disrespect echoes one of France’s justifications for its “secularism” laws.

While research for this Article did not identify any HRC cases dealing explicitly with this issue, the HRC has indirectly considered the question in one case. In *Riley v. Canada*, the Committee found in favor of the Canadian Government, which had allowed a Sikh member of the Royal Canadian Mounted Police (RCMP) to wear his turban in place of the traditional “mountie” Stetson and forage cap that comprised the standard uniform.<sup>132</sup> Two retired RCMP officers brought the complaint, arguing that the display of such a symbol by the national police constituted a state endorsement of religion by granting “special status” to the Sikh adherent. The officers claimed that in order to protect their rights under Article 18 of the Covenant, “the State should remain secular.”<sup>133</sup> In rather conclusory fashion, the Committee held that “the authors [of the complaint] have failed to show how the enjoyment of their rights under the Covenant has been affected by allowing a Khals Sikh officer to wear religious symbols.”<sup>134</sup> In so holding, the HRC rejected the idea that a “principle of secularism” required prohibiting a manifestation of religious belief by a member of a state-controlled institution.<sup>135</sup>

In a similar clash, Turkey removed the air force high command’s director of legal affairs for “having adopted unlawful fundamentalist

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130. *Id.*

131. See *Sweden—Criminalizing Religious Speech—Åke Green*, BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/index.php/case/93.html> (last visited Oct. 5, 2006); see also discussion *infra*, Part V.

132. Decision of the Human Rights Comm., No. 1048/2002, ¶ 4.2, U.N. Doc. CCPR/C/74/D/1048/2002 (2002).

133. *Id.* ¶ 3.3.

134. *Id.* ¶ 4.2.

135. Interestingly, in *Goldman v. Weinberger*, the U.S. Supreme Court gave significantly more deference to military regulations that interfere with the rights of service personnel. 475 U.S. 503, 509 (1986). The Court held that prohibiting a Jewish commissioned officer from wearing a yarmulke under an air force dress code regulation did not violate his religious liberty. *Id.* at 504. The regulations “reasonably and evenhandedly regulate dress in the interest of the military’s perceived need for uniformity. The First Amendment therefore does not prohibit them from being applied to petitioner even though their effect is to restrict the wearing of the headgear required by his religious beliefs.” *Id.* at 510.

opinions.”<sup>136</sup> The Turkish government argued that the dismissal constituted a disciplinary sanction for failure to “uphold the secular nature of the state.”<sup>137</sup> In upholding the dismissal, the EC said, in *Kalaç v. Turkey*, that the compulsory retirement was not an interference with the freedom of religion or belief, but “was intended to remove from the military legal service a person who had manifested his lack of loyalty to the foundation of the Turkish nation, namely secularism, which it was the task of the armed forces to guarantee.”<sup>138</sup>

Following *Kalaç*, in *Başpınar v. Turkey*, the EC found that the discharge of a non-commissioned officer of the army was not a violation of his rights under Article 9 of the ECHR.<sup>139</sup> The applicant contended that his dismissal was based on his religious convictions and the fact that his wife attempted to get a social security card with a photograph showing her carrying an Islamic scarf.<sup>140</sup> The government asserted as its grounds for dismissal the applicant’s membership in sects known to have “unlawful fundamentalist tendencies,” his attendance at “ideological” meetings, and his disciplinary offences while in the army. According to Turkey, “any attitude or conduct such as the applicant’s antisocial character or his wife’s . . . Islamic scarf had not been taken as the sole basis for his discharge from the army.”<sup>141</sup>

In response, the applicant argued that the principle of secularism should guarantee freedom of religion and conscience rather than operating as a bar to manifestation of religious belief.<sup>142</sup> The EC recognized that religion is one of the foundations of a democratic society, but said that where “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.”<sup>143</sup> Further,

The Court considers that in choosing to pursue a military career the applicant was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing

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136. *Kalaç v. Turkey*, App. No. 20704/92, 27 Eur. H.R. Rep. 552, 552 (1997).

137. *Id.* at 559.

138. *Id.* at 563.

139. App. No. 45631/99, 36 Eur H.R. Rep. CD1 (2003).

140. *Id.* at CD4.

141. *Id.*

142. *Id.*

143. *Id.* at CD5.

on certain of the rights and freedoms of the members of the armed forces limitations which could not be imposed on civilians.<sup>144</sup>

The EC said that states may forbid “an attitude inimical to an established order reflecting the requirements for military service” and require “a duty for military personnel to refrain from participating in the Islamic fundamentalist movement.”<sup>145</sup> Finally, the EC noted with approval that the Supreme Military Council’s dismissal order was not based on religious beliefs or opinions or performance of religious duties, but rather on “his conduct and activities in breach of military discipline *and the principle of secularism.*”<sup>146</sup>

The EC has also developed the principle of secularism in analyzing alleged violations of Article 11 of the ECHR, which delineates the freedom of assembly and association and uses limitation language similar to that of Article 9.<sup>147</sup> In *Refah Partisi (the Welfare Party) v. Turkey*, the EC rejected a challenge brought under Article 11 by a Turkish political party that had been dissolved by Turkish authorities.<sup>148</sup> The European court noted that the Turkish Constitutional Court dissolved the party, and banned its leaders from holding similar office in any other party for five years, “on the ground that it had become a ‘centre’ of activities contrary to the principles of secularism.”<sup>149</sup> In support of the holding, the Constitutional Court cited numerous speeches given by members of the party advocating violent overthrow of the government.<sup>150</sup> The Turkish court also noted that “secularism was one of the indispensable conditions of democracy” and that “[i]ntervention by the State to preserve the

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144. *Id.*

145. *Id.*

146. *Id.* at CD6 (emphasis added).

147. According to the ECHR,

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

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

ECHR, *supra* note 9, art. 11.

148. App. Nos. 41340/98, 41342/98, 41343/98, and 41344/98, 37 Eur. H.R. Rep. 1 (2003).

149. *Id.* at 9

150. *Id.* at 13-17.

secular nature of the political regime had to be considered necessary in a democratic society.”<sup>151</sup> Further,

Conferring on the State the right to supervise and oversee religious matters cannot be regarded as interference contrary to the requirements of a democratic society . . . . Secularism, which is also the instrument of the transition to democracy, is the philosophical essence of life in Turkey. Within a secular State religious feelings simply cannot be associated with politics, public affairs and legislative provisions. Those are not matters to which religious requirements and thought apply.<sup>152</sup>

The EC held in favor of the Turkish government, and in doing so discussed the relationship between democracy and religion. First, the Court reiterated the necessity of placing restrictions on religion “in order to reconcile the interests of various groups and ensure that everyone’s beliefs are respected.”<sup>153</sup> Second, it noted “the State’s role as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs,” but found that this duty “is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs.”<sup>154</sup> Third, the Court said “that in a democratic society the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety,”<sup>155</sup> and it may “impose on its serving or future civil servants . . . the duty to refrain from taking part in the Islamic fundamentalist movement, whose goal and plan of action is to bring about the pre-eminence of religious rules.”<sup>156</sup> Finally, the Court said that “the freedoms guaranteed by Art. 11, and by Arts. 9 and 10 of the Convention, cannot deprive the authorities of a State in which an association, through its activities, jeopardizes that State’s institutions, of the right to protect those institutions.”<sup>157</sup>

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151. *Id.* at 13.

152. *Id.* at 18-19.

153. *Id.* at 33.

154. *Id.*

155. *Id.*

156. *Id.* at 34. The Court emphasized the context of Turkey where measures taken to prevent undue pressure on students may be legitimate under Article 9(2). *Id.* This regulation may include limiting the manifestation of the rites and symbols of the majority religion by “imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others.” *Id.*

157. *Id.* at 34-35.

In its construction of Articles 10 and 11, the EC noted two other aspects of the protection of individual rights that round out the picture. First, freedom of expression in Article 10 “is applicable, subject to para. 2, 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.”<sup>158</sup> As the HRC notes in its General Comments to the ICCPR, an integral part of religious freedom is the freedom to express religious views, whether through publication and dissemination of religious materials, or through religious teaching.<sup>159</sup> Thus, the spirit of the religious freedom protections in both the ICCPR and the ECHR includes the freedom to espouse religious ideas and practice religious activity that may be unpopular with majority religions or society at large, again subject to the necessity limitations in both instruments. As the Becket Fund for Religious Liberty said in a recent Legal Memorandum to the government of Sri Lanka, “Although [religious] beliefs may be unsettling to some, the freedom to discuss and disseminate such controversial beliefs—orally or in writing, privately or in public, individually or in community—is firmly embedded in the freedom to manifest religious belief.”<sup>160</sup>

Second, in *Özdep v. Turkey*, the EC found that Turkey had violated Article 11 of the Convention (freedom of association) by dissolving the Freedom and Democracy Party of Turkey.<sup>161</sup> The Court called it “essential” that it found nothing in the *Özdep*’s program “that can be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles.”<sup>162</sup> Further, as the Court noted, “It is the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.”<sup>163</sup> Thus, when unpopular ideas do not explicitly threaten a democratic government or the rights of others, they are protected under Article 11 of the ECHR.

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158. *Id.* at 33. See also *Özdep v. Turkey*, App. No. 23995/94, 31 Eur. H.R. Rep. 674, 701 (2001).

159. *General Comment No. 22*, *supra* note 17, ¶ 4.

160. Memorandum from Emilie L. Kao, Dir. of Int’l Advocacy, The Becket Fund for Religious Liberty, to President Chandrika Bandaranaike Kumaratunga and Prime Minister Mahinda Rajapakse, Sri Lanka 7 (July 22, 2004) (on file with the Becket Fund for Religious Liberty), available at <http://www.lankaliberty.com/efforts/SLOpinionLetter.pdf>.

161. 31 Eur. H.R. Rep. at 705.

162. *Id.* at 702.

163. *Id.* at 703.

## B. Analysis of Secularism

There are significant problems with the principle of secularism as a ground for restriction of religious liberty, and with the EC's enforcement of the principle. The first, and most obvious, is that neither the ICCPR nor the ECHR list defending secularism in principle as a ground upon which the manifestation of religious belief may be restricted. As discussed above, the necessity clauses are to be construed "strictly" as an exhaustive list of possible justifications.<sup>164</sup> Thus, defending the secular nature of the government from religious influence, without a more specific showing that such influence is actually a threat to the public welfare, is not a sufficient reason to curtail religious freedom.

Second, the principle of secularism contradicts the "axiomatic" principle that robust religious pluralism is fundamental to democracy.<sup>165</sup> To the extent that the principle of secularism functions as an exclusionary mechanism for public expression of religious views, it is in conflict with the robust pluralism embraced by both the ECHR and the ICCPR. The pluralism embodied in these instruments is normative rather than descriptive. That is, it is not merely an observation that different religions exist, but rather a requirement that governments allow religions to flourish in society so long as this flourishing does not violate specifically defined limits. Such limits may not, however, require a religious believer to change his or her manifestation of religious belief and practice based simply on suspicion of religiously informed opinions or specific religious groups, or in keeping democratic government free from the influence of religious ideas.

Central to the notion of pluralism is full participation in public life without being required to leave religious motivations or beliefs in private.<sup>166</sup> Thus, the Turkish government's position in *Refah Partisi* that "religious feelings simply cannot be associated with politics, public affairs and legislative provisions"<sup>167</sup> is incompatible with the concept of pluralism as indissociable from democracy. The EC's

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164. See Kiss, *supra* note 22, at 308.

165. See *supra* Part I.C for a discussion of religious pluralism as fundamental to democracy.

166. Note that here the Article is not speaking of active efforts to install a theocratic form of government in place of a democratic form of government. This would clearly require restriction. Rather, the Article refers to religiously informed and even explicitly religious ideas put forth in hopes of helping shape a more effective democratic society.

167. *Refah Partisi v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98, and 41344/98, 37 Eur. H.R. Rep. 1, 19 (2003).

endorsement of such a view is in conflict with its explicit endorsement of religious pluralism and its duty to require specific necessity to curtail religious freedom. To the extent that Turkey and France, in their application of the principle of secularism, are simply shielding government and other citizens from the influence of committed religious believers, they violate the principle of pluralism, and by extension, the principles of democracy. Still more, to the extent that Turkey excludes participation in public government on the basis of certain religious practices or on the basis of membership in a religious group, or put a different way, conditions participation in public government on disavowal of such belief or membership, it violates the principle of pluralism.

In its cases before the EC on this subject, Turkey seems to equivocate the notions of “secularism” and “democracy.” In doing so, the basic argument is this: protecting democracy in Turkey requires protecting government from the influence of religion, because in order to thrive as a democratic country we must keep our government “neutral” (meaning secular). Thus arguing for the principle of secularism is merely arguing for the principle of democracy. The EC seems to endorse this equivocation as within the margin of appreciation for Turkey by speaking of the democratic “context” in Turkey.<sup>168</sup> Turkey is right to think that human rights are linked to the protection of democratic government in the ICCPR and the ECHR.<sup>169</sup> However, neither instrument endorses the view that human rights, and particularly religious freedom, are linked to the protection of *secular* government, when secular means protected from the influence of religion.<sup>170</sup> So long as protecting democracy (or secularism) consists of restricting religious expression that seeks to influence or criticize government (as in Turkey) or merely seeks to

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168. See *Başpınar v. Turkey*, App. No. 45631/99, 36 Eur. H.R. Rep. CD1, 5 (2003).

169. *United Communist Party of Turkey v. Turkey*, App. No. 19392/92, 26 Eur. H.R. Rep. 121, 148 (1998). The Court stated:

Democracy is without doubt a fundamental feature of the European public order. That is apparent, first from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights.

*Id.*

170. See, e.g., *Refah Partisi*, 37 Eur. H.R. Rep. at 1. Note that when the Article says human rights are not linked to protection of secular government, it is not meant to imply that they are linked to *religious* government instead. The argument is not that government should be run by religion, but that democratic government does not necessarily entail secular government to the exclusion of active participation of religious adherents and religious views.



express religious sensibility in public (France's ban on religious symbols in public schools), it is not justifiable under the ICCPR or the ECHR.

Indeed, even the expression of a sentiment such as, "I would like my religion to hold a dominant place in government" or "according to the dictates of my religion, it *should* provide the rules by which our government operates," without more, would not overcome the "pressing social need" requirement of both the ICCPR and the ECHR. Theoretically, a large religious group's expression of such sentiments and intent to act on them could pose a threat to public order. Without an express threat of "undemocratic" activity, however, a mere possibility that such sentiment would threaten the public order or the fundamental rights of another would usually be too attenuated (and thus not pressing enough) under certain EC cases to require the group to dissolve or discontinue dissemination of the views.<sup>171</sup> Thus, in *Refah Partisi*, the EC should have focused solely on the problematic violent statements of the political party rather than on a generalized need to protect the secular nature of the state from unpopular and critical views.<sup>172</sup> Similarly, in *Kalaç* and *Başpınar*, the EC should not have entertained the idea that membership in a certain religious group or the failure to uphold the principle of secularism as such could be grounds (even if not the sole ground) for dismissal from a government position. This is not to say that such dismissals could not occur if the nature of the religious expression is truly threatening. However, the EC's decisions in deference to the principle of secularism set dangerous precedent for restriction solely on the basis of membership in a religious group.

Turkey and France might argue that the government has a legitimate interest in protecting the secular character of government from religious influence because to do otherwise would give the appearance of an endorsement or establishment of religion. However, the ICCPR and the ECHR religion clauses do not forbid establishing a state religion so long as that establishment does not discriminate against other religions or curtail the religious freedom of

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171. See *Özdep v. Turkey*, App. No. 23995/94, 31 Eur. H.R. Rep. 674, 702 (2001) (emphasizing the need for a call for violence or active rejection of democratic principles).

172. See *Refah Partisi*, 37 Eur. H.R. Rep. at 17. One of those convicted of inciting the people to hatred on the ground of religion had said the following in Parliament: "If you attempt to close down the *Iman-Hatip* theological colleges while the Welfare Party is in government, blood will flow. It would be worse than in Algeria. I too would like blood to flow. That's how democracy will be installed. . . . I will fight to the end to introduce sharia." *Id.*

members of the non-state or majority religion.<sup>173</sup> Even assuming a state has a legitimate interest in avoiding an establishment of religion (and this author believes it does), the EC “principle of secularism” cases do not involve the danger of government-established religion. Instead, they all involve the religious manifestations of individuals or groups that express ideas in opposition to the government or expressive of unpopular religious viewpoints. The motivation of the Turkish government in each instance has been expressly to insulate government from religious views.<sup>174</sup> Turkey has put on no evidence that the removal of individuals from positions in government was necessitated by a need to avoid the appearance of an establishment of religion. Similarly, there is no evidence that France’s ban on religious symbols was motivated by this concern, and even if it was, the ban is on individuals wearing religious symbols rather than the public school displaying religious symbols. Thus, the religious expression the law curtails would not be mistaken for government endorsement of any particular religious viewpoint.

Finally, as noted above, the necessity clauses of both instruments have in view a “pressing social need” to justify restrictions on religious liberty.<sup>175</sup> Thus, a *per se* principle of excluding religious manifestation in public institutions (such as a blanket ban on wearing religious symbols) cannot possibly be justified under a strict construal of the necessity doctrine.<sup>176</sup> While a situation may arise in which religious tensions in a public school, for instance, were so high that a temporary ban would be justified to maintain order or to protect others’ fundamental rights, the proscription would need to be more narrowly tailored than a blanket ban. The government would have to show the “pressing social need,” and the ban would have to be proportionate to the need. Such a showing would be burdensome without something more than the assumption that wearing religious symbols might convey disrespect of the religious views of another.

The French Education Minister’s claim that the law calls for “mutual respect” assumes that France can show that religious symbols worn by public school students in France cause others to feel

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173. See ICCPR, *supra* note 9, art. 18; ECHR, *supra* note 9, art. 9.

174. See *Refah Partisi*, 37 Eur. H.R. Rep. at 19.

175. The language of both documents reflects this in requiring a “necessity” to justify a restriction on religious liberty. See *supra* note 9.

176. As noted above, the French law reads: “In public [primary and secondary schools], the wearing of symbols or clothing through which the pupils ostensibly manifest a religious appearance is prohibited.” *France—Banning Religious Attire—United Sikhs*, *supra* note 128.

disrespected.<sup>177</sup> It further ignores the fact that a wholly different intent in religious symbolism is likely the motivation for most wearers of religious symbols. Even if France could show that wearing such symbols caused others to feel disrespected, to justify the blanket ban France must then show that: (1) causing another to feel disrespected by wearing a religious symbol is a violation of a fundamental right to not feel disrespected (a difficult showing); (2) the alleged disrespect caused by the religious symbols was stirring up the school so as to create a threat to public order; or (3) wearing religious symbols violated some well-ensconced moral order in France.<sup>178</sup> Obviously, such a showing would be nearly impossible. The EC's acceptance of the principle of secularism as a justification for restricting religious liberty is not a faithful reading of the ICCPR and the ECHR, and improperly makes room for illegitimate justifications for those restrictions.

#### V. ÅKE GREEN: A CASE STUDY IN THE APPLICATION OF “NECESSITY” LEGISLATION AND THE PRINCIPLE OF SECULARISM

The case of Åke Green in Sweden provides a test case for the fitness of the principles analyzed above. Green is a pastor in Sweden who was sentenced to one month imprisonment for preaching and publishing a sermon containing “‘contemptuous expression’ toward homosexuals.”<sup>179</sup> In the sermon, Green called widespread practice of homosexuality “‘a deep cancerous tumor in the entire society’ and

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177. See *supra* Part IV.A for a description of this official's defense of the law on these grounds.

178. See ICCPR, *supra* note 9, art. 18. “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.” *Id.*

179. See Voong, *supra* note 114. Lest the Green case be viewed as anomalous, in July 2006, two Australian pastors faced jail time for publicly comparing Christianity with Islam. See *Aussie Pastors Face Jail Sentences for Expressing Beliefs*, THE BECKET FUND FOR RELIGIOUS LIBERTY, Aug. 14, 2006, <http://becketfund.org/index.php/article/520.html?PHPSESSID=d5e9038d6ce5bb50b184af4da8feaddf>. As of this writing, the case has not been resolved. Similarly, in July 2006, four sisters from Mother Theresa's Missionaries of Charity were arrested in India for offering to pray for AIDS patients in hospitals. See Wu, *supra* note 81. On July 21, 2006, The Becket Fund for Religious Liberty testified before the Congressional Human Rights Caucus that at least five Indian states have recently begun enforcing or strengthening anti-conversion laws, and that Sri Lanka and Bangladesh have recently proposed anti-conversion laws modeled after the Indian laws. See *id.*

equated it with pedophilia.”<sup>180</sup> Green lambasted the practice of homosexuality and lamented that “[o]ur country is facing a disaster of great proportions.”<sup>181</sup> Green’s conviction came under a Swedish law prohibiting the expression of disrespect towards favored minority groups.<sup>182</sup> The conviction and sentence were overturned by the Swedish Appeals Court (Göta Hövrett) in February 2005, which said that “it is not the role of a government composed of men to declare what is orthodoxy by punishing those who publicly teach one religious view of what is right, even if that view may offend others.”<sup>183</sup> It held that Green “had a right to preach ‘the Bible’s categorical condemnation of homosexual relations as a sin,’ even if that position was ‘alien to most citizens’ and even if Green’s views could be ‘strongly questioned.’”<sup>184</sup> The government petitioned Sweden’s Supreme Court to reexamine the case, and the Swedish court unanimously acquitted Green of all charges.<sup>185</sup>

The Green case starkly raises the question of whether government may restrict clearly unpopular religious expression. The Becket Fund for Religious Liberty argued as Amicus Curiae that Green’s religious expression “falls squarely within the protections of Article 18” of the ICCPR.<sup>186</sup> The brief argued that in preaching the sermon, Green was “fulfilling his role as a leader of his congregants to further their faith by teaching Christian doctrine and applying it to their lives.”<sup>187</sup> With regard to whether proscribing the conduct was necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, the brief argued that Green, “[f]ar from engaging in any conduct that put others at risk . . .

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180. Keith B. Richburg, *Swedish Hate-Speech Verdict Reversed: Sermon Condemning Homosexuals Ruled Not Covered By Law*, WASH. POST, Feb. 12, 2005, at A16.

181. *Id.*

182. Brottsbalken [BrB] [Criminal Code] 16:8 (Swed.), translated in <http://www.legislationline.org/upload/legislations/59/94/4c405aed10fb48cc256dd3732d76.pdf>.

183. Voong, *supra* note 114.

184. Richburg, *supra*, note 180.

185. See *Criminal Conviction for Preaching Overturned by Swedish High Court*, THE BECKETT FUND FOR RELIGIOUS LIBERTY, Nov. 29, 2005, <http://becketfund.org/index.php/article/450.html>; see also Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 p. 805 (Swed.), available at <http://www.hogstadamstolen.se/2005/Dom%20pa%20engelska%20B%201050-05.pdf>.

186. Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Åke Green at 2-3, Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 p. 805 (Swed.), available at [http://www.becketfund.org/pdfs/333\\_39.pdf](http://www.becketfund.org/pdfs/333_39.pdf).

187. *Id.*

did nothing more than proclaim a religious viewpoint.”<sup>188</sup> The fact that his viewpoint was controversial and offended some people “does not remove his religious teaching from Article 18’s protections.”<sup>189</sup> Finally, the brief noted that many religions “make claims of absolute truth in prescribing certain views to be correct and certain conduct to be either moral or immoral” and such propensity “may inevitably cause offense.”<sup>190</sup> However, “Article 18 provides that it is not the role of a government composed of men to declare what is orthodoxy by punishing those who publicly teach one religious view of what is right, *even if* that view may offend others.”<sup>191</sup>

Is the Becket Fund’s position correct under the ICCPR and the ECHR, or did this manifestation of religious belief cross into the realm of restriction? Given the Swedish Supreme Court’s decision in Green’s favor, the case will likely go no further. If the case had made it to the HRC or the EC, however, the conviction most likely would not have been upheld under the ICCPR or the ECHR. First, the case did not involve the type of “influence” on government from a position of civil authority or civil servant that the Turkey cases did. Thus, the government of Sweden would not have been able to defend the conviction on the ground that it was protecting democratic (or “secular”) principles of government from undue religious influence. Second, while the sermon used rather offensive language, it did not advocate harm to homosexuals or threaten public disorder if the laws on homosexuality in Sweden were not changed. Therefore, Sweden could not have defended the conviction on the public order grounds. Third, the sermon was not a threat to the public moral order (assuming a majority acceptance of homosexuality). Disagreeing with a moral order is not equivalent to threatening a moral order, and more than a showing that the sermon challenged the public moral order would be required to restrict the law on that ground. This conclusion is supported by the EC position that even opinions that may shock and offend deserve protection.<sup>192</sup>

Finally, Sweden’s best argument may have been the one France has made to defend its secularism law, namely that the sermon

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188. *Id.* at 4.

189. *Id.*

190. *Id.* at 5.

191. *Id.* (emphasis in original).

192. See *Refah Partisi v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98, and 41344/98, 37 Eur. H.R. Rep. 1, 33 (2003).

“disrespects” homosexuals and causes offense to them.<sup>193</sup> The facts show that this has clearly been the result of the sermon; in other words, Sweden is not just guessing that the view may offend many people. However, subjective feelings of disrespect in general do not amount to a justification for restriction of religious freedom under the plain language of the ICCPR and ECHR. Had Green gone into a personal harangue directed towards an individual homosexual using the same language he used in the sermon, the case would pose a different challenge. Such a personal and specific attack would quite possibly violate the fundamental rights of another and thus be subject to restriction. However, the distinction between a personal attack and a sermon denouncing homosexuality generally is an important one, because the former implicates others’ rights in a way that the latter does not. In this case, the Becket Fund’s argument that Green should not be restricted in teaching religious tenets of his faith to his congregation would likely have prevailed in front of either judicial body. This is only speculation. Some of the deferential language used by the EC in the Turkey cases could have been applied in principle here and might have caused the case to go the other way. Even so, the ICCPR and the ECHR do not have in mind such expression as a ground for government restriction of the freedom to manifest religious belief.

## CONCLUSION

The ICCPR and the ECHR are designed to give significant protection to public manifestation of religious belief. The laws of certain countries pose threats to this protection because of their amorphous language and because they potentially allow restrictions on the manifestation of religious belief when a “necessity” for such restriction does not in fact exist. It is difficult to conclude exactly which laws pose the greatest risk of being applied illegitimately to curtail religious expression, but the EC and the HRC have generally made the right decisions on this score and have developed principles for curtailing the more egregious extensions of these laws restricting religious liberty. The principle of secularism, however, is not sufficient, without more, to restrict religious belief under the ICCPR and the ECHR, and the EC has used language in its decisions that gives inappropriate deference to government attempts to defend

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193. See *supra* Part IV.A for a description of this official’s defense of the law on these grounds.

restrictions on secularism grounds. Åke Green's conviction in Sweden was overturned before it reached the international courts, but other cases involving similar issues may soon give them a chance to decide the extent to which governments may restrict the expression of unpopular religious doctrine.<sup>194</sup> Hopefully, either court would strike down convictions similar to Green's and would take care to provide a careful analysis to give future guidance in assessing the appropriate balance between religious liberty and legitimate government restrictions on that liberty.

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194. See *supra* note 179 for descriptions of Australian pastors and Indian nuns who have been arrested for religious expression.