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Legitimate Regulation of Religion? European Court of Human Rights Religious Freedom Doctrine and the Russian Federation Law “On Freedom of Conscience and Religious Organizations”

*Joseph Brossart**

Can it be anything else but the logical, extreme expression of that Westernism which, since the time of Peter the Great, demoralized both our government and our society, and has already marred all the spiritual manifestations of our national life? Not content to profit by all the riches of European thought and knowledge, we borrowed her spirit, developed by a foreign history and foreign religion. We began idolising Europe, worshiping her gods and her idols!

—*Ivan Aksakov, 1881*¹

INTRODUCTION

On September 26, 1997, Boris Yeltsin signed the draft law “on Freedom of Conscience and Religious Associations” (the 1997 Law). The 1997 Law has been criticized as violating the Russian Constitution and certain human rights conventions.² While many facets of the 1997 Law have been attacked, the portion that has drawn the most criticism is article 27. Article 27 differentiates between religious organizations that meet the formal condition of “hav[ing] documents that confirm their existence in the respective territory for at least fifteen years,” and those that do not.³ Those that qualify can register as “religious organiza-

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¹ Ivan Aksakov, *A Slavophile Statement*, in 2 READINGS IN RUSSIAN CIVILIZATION 378, 379 (Thomas Riha ed., 1964).

² See, e.g., T. Jeremy Gunn, *Caesar's Sword: The 1997 Law of the Russian Federation on the Freedom of Conscience and Religious Associations*, 12 EMORY INT'L L. REV. 43, 46 (1998).

³ RF Law No. 125-F3, art. 27, § 3, reprinted in *Religion Law Official* (Paul Steves, trans.) (visited Mar. 17, 1999) <<http://www.stetson.edu/~psteeves/relnews>> [hereinafter 1997 Law].

tions," while those that do not are merely "religious associations."⁴ While both enjoy the rights of legal personality, religious associations must re-register annually as opposed to simply informing authorities of their continued existence.⁵ Additionally, religious associations do not enjoy the benefit of the portions of the 1997 Law that allow religious organizations to create public educational institutions, to conduct religious rites in hospitals, orphanages, retirement homes and prisons, to manufacture, import or distribute religious literature, to manufacture religious objects, to establish mass-media organizations, to create institutions for professional religious education, or to own property.⁶ Besides the limitations on the religious associations themselves, members of religious associations do not enjoy the benefit of the portions of the 1997 Law that allow members of religious organizations to qualify for alternative military service or teach religion to children with the permission of both parents.⁷ While the restrictions on religious associations are substantial, the only provisions that directly restrict individuals are those regarding conscientious objector status and education of children.⁸ The other provisions are limitations on group rights or group evangelism. This article will examine the provisions of the Constitution of the Russian Federation relevant to the 1997 Law, describe the religious freedom doctrine of the European Court of Human Rights ("ECHR" or "European Court") and, finally, examine how the ECHR religious freedom case law might affect the 1997 Law and defend the 1997 Law from attacks made on the basis of ECHR precedent. While the merits of the 1997 Law are certainly open to debate, it does not violate the right to freedom of thought, conscience and religion under ECHR precedent.

I. THE RUSSIAN CONSTITUTION AND RELIGIOUS FREEDOM

While many have offered their opinions of the constitutionality of the 1997 Law, only the Constitutional Court of the Russian Federation has the power to invalidate it.⁹ Compared to earlier drafts, the version of the 1997 Law that President Yeltsin and the Duma eventually ap-

⁴ *Id.* art. 6.

⁵ *See id.* art. 8, § 9.

⁶ *See id.* art. 27, § 3.

⁷ *See id.*

⁸ *See* 1997 Law, art. 27, § 3.

⁹ The present Constitution of the Russian Federation, adopted by referendum on December 12, 1993, and the Federal Constitutional Law "on the Constitutional Court of the Russian

proved contained fewer restrictions on foreigners and dropped a requirement for religious associations to register with the government.¹⁰ Under the 1997 Law, for example, small private prayer groups are not subject to criminal liability for not registering. As passed, the 1997 Law only requires registration if a religious association intends to become a religious organization.¹¹

The text of the 1993 Russian Constitution provides considerable protection of religious freedom. Some of the more relevant provisions are:

Article 14:

1. The Russian Federation shall be a secular state. No religion shall be declared an official or compulsory religion.

2. All religious associations shall be separate from the state and shall be equal before the law.

Article 19:

2. The state shall guarantee equal human and civil rights and freedoms without regard to . . . attitude toward religion. . . . Any form of restriction of civil rights on the basis of . . . religious affiliation shall be prohibited.

Article 28:

Each person shall be guaranteed freedom of conscience

Federation" define the powers of the Constitutional Court. KONST. RF, arts. 125, 128, § 3 (1993), *reprinted in* CONSTITUTION OF THE RUSSIAN FEDERATION (Vladimir V. Belyakov & Walter J. Raymond eds., 1994); *see also* Federal Constitutional Law No. 1-FKZ, "on the Constitutional Court of the Russian Federation," *Sobr. Zakonod. RF*, 1993, No. 13, Item 1447, *translated in* 31 STATUTES & DECISIONS 8-56, 41-42 (July-Aug. 1995). The powers of the present Constitutional Court are weaker than those of its predecessor. *See* Molly Warner Lien, *Red Star Trek: Seeking a Role for Constitutional Law in Soviet Disunion*, 30 STAN. J. INT'L L. 41, 111 (1994). Stripped of its power to review the validity of laws consistently applied in an unjust manner, the court now has the power to determine only whether a law or certain provisions of a law are incompatible with the Constitution of the Russian Federation. *See* Nikolai V. Vitruk, *The Constitutional Court of the Russian Federation and Protection of the (Constitutional) Fundamental Rights and Freedoms of Citizens*, in THE PROTECTION OF FUNDAMENTAL RIGHTS BY THE CONSTITUTIONAL COURT 284, 287 (1996). Whether the 1997 Law would be found unconstitutional upon Constitutional Court review would depend upon the ability of the Russian government to establish the law as necessary for upholding "morality," "health" or "the rights and lawful interests of other persons." *Id.* The outcome will depend to some degree upon the willingness of the Constitutional Court to look to international human rights standards to interpret articles 2, 17 and 55 of the Russian Constitution. *See infra* notes 12-16 and accompanying text.

¹⁰ Compare the draft "1993 Amendment" in W. Cole Durham et al., *The Future of Religious Liberty in Russia: Report of the De Burght Conference on Pending Russian Legislation Restricting Religious Liberty*, 8 EMORY INT'L L. REV. 1 (1994), with 1997 Law, art. 26.

¹¹ *See* 1997 Law, art. 26.

and freedom of religion, including the right to profess individually or jointly with others any religion or to profess none, to freely choose, hold and propagate religious and other beliefs and to act in accordance with them.

Article 29:

1. Each person shall be guaranteed freedom of thought and speech.

2. No propaganda or agitation inciting . . . religious hatred and enmity shall be allowed. The propaganda of . . . religious . . . supremacy shall be prohibited.

Article 30:

1. Each person shall have the right to association, including the right to establish trade unions to safeguard his/her interests. Freedom of activity of public associations shall be guaranteed.¹²

However, article 55, section 3 of the Russian Constitution contains a counter-balance to these provisions, which also appears in article 3, section 2 of the 1997 Law. Article 55, section 3 of the Russian Constitution provides that:

Human and civil rights and freedoms may be restricted by federal law only to the extent necessary for upholding the foundations of the constitutional system, morality or the health, rights and lawful interests of other persons or for ensuring the defense of the country and state security.¹³

The Russian Constitution also has several provisions dictating how it will be interpreted, some of which incorporate international human rights standards. Article 17 provides: "1. Within the Russian Federation human and civil rights and freedoms *shall be recognized and guaranteed under universally acknowledged principles and rules of international law* and in accordance with this Constitution."¹⁴

Furthermore, article 2 of the Russian Constitution provides: "Human beings and human rights and freedoms shall be of the highest value. Recognition of, respect for, and protection of the human and civil rights and freedoms shall be the duty of the state."¹⁵

¹² KONST. RF, arts. 14, 19, 28–30.

¹³ *Id.* art. 55, § 3; *see also* 1997 Law, art. 3, § 2. Similar language also appears in the European Covenant. *See* Gunn, *supra* note 2, at 74.

¹⁴ KONST. RF, art. 17, § 1 (emphasis added).

¹⁵ *Id.* art. 2.

Finally, article 55 of the Russian Constitution provides:

1. The enumeration in the Constitution of the Russian Federation of fundamental rights and freedoms shall not be interpreted as a denial or diminution of other generally recognized human and civil rights and freedoms.

2. Laws abolishing or diminishing human and civil rights and freedoms shall not be issued in the Russian Federation.¹⁶

The Constitutional Court has yet to interpret the interplay of the provisions of the Russian Constitution which invoke international human rights standards and those which protect religious freedom. Justice Vitruk of the Russian Constitutional Court claims that “[i]n examining all sorts of cases the Constitutional Court bases its action on the provisions of international legal texts on human rights, so it is able, when judging cases on the basis of the Constitution, to respect the democratic norms and standards recognised by the world community.”¹⁷ If the Russian Constitutional Court were to look to international standards in reviewing the 1997 Law, the Court would likely look to the ECHR since the European Court is the international tribunal with the most developed case law in the area of freedom of conscience.

II. THE RELIGIOUS FREEDOM DOCTRINE OF THE EUROPEAN COURT OF HUMAN RIGHTS

European Court interpretations could also be relevant because after Russian Constitutional Court review, a possibility of review by the ECHR remains. Shortly after signing the 1997 Law, President Yeltsin submitted four Council of Europe documents, including the European Convention on Human Rights (“European Convention”), to the Duma for ratification.¹⁸ Ratification of the European Convention would submit Russia to the jurisdiction of the ECHR.¹⁹

Joining the Council of Europe would not make a decision by the Russian Constitutional Court academic. The ECHR consistently affirms

¹⁶ *Id.* art. 55.

¹⁷ Vitruk, *supra* note 9, at 291.

¹⁸ *Russia* (posted September 11, 1997) <<http://www.rferl.org/1997/09/110997.html>>.

¹⁹ Any laws which the Russian Federation expressly reserves from the treaty in ratification would not be subject to the European Convention *ratione temporis*. See [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 57, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter European Convention]; see also FRANCIS G. JACOBS & ROBIN C. A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 19–21 (1996).

that it is for national authorities in the first instance, and in particular the national courts, to interpret and apply domestic law and the constitutionality of domestic laws.²⁰ To this is added a margin of appreciation that the ECHR affords to determinations of member states.²¹ Thus, while the jurisprudence of the ECHR should affect the decision of the Russian Constitutional Court by virtue of articles 2, 17 and 55 of the Russian Constitution,²² the determinations of the Russian Constitutional Court should affect any particular decision regarding Russian legislation by the ECHR by virtue of the margin of appreciation doctrine.

Freedom of thought, conscience and religion is protected by article 9 of the European Convention on Human Rights. Article 9 provides:

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

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.²³

The two major cases in the European system concerning restrictions on religious freedom most relevant to the 1997 Law are *Kokkinakis v. Greece*²⁴ and *Manoussakis v. Greece*.²⁵ Because of the limitation of article 9, paragraph 2, the ECHR has not interpreted the right to freedom of religion broadly. Approximately forty-five cases claiming a violation of article 9 preceded *Kokkinakis* in the ECHR; *Kokkinakis* was the first to result in the finding of an article 9 violation.²⁶ In *Kokkinakis* the ECHR

²⁰ See *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 19, ¶ 40 (1993) (citing *Hadjianastassiou v. Greece*, 252 Eur. Ct. H.R. (ser. A) at 18, ¶ 42 (1992)). *Kokkinakis* was recently affirmed by the ECHR in *Larissis v. Greece*—Euro. Ct. H.R. (ser. A), No. 140/1996/759/958-60, ¶¶ 38, 41, 44 (Feb. 24, 1998).

²¹ See *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 21, ¶ 47.

²² See *supra* notes 12-16 and accompanying text.

²³ European Convention, *supra* note 19, art. 9.

²⁴ 260 Eur. Ct. H.R. (ser. A) (1993).

²⁵ 23 Eur. Ct. H.R. (ser. A) (1996).

²⁶ See T. Jeremy Gunn, *Adjudicating Rights of Conscience under the European Convention on*

found that Greek authorities unfairly applied a law restricting proselytization, but declined to determine whether the law itself violated the European Convention. The relevant Greek law provided:

1. Anyone engaging in proselytism shall be liable to imprisonment and a fine

2. By "proselytism" is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (*eterodoxos*) [sic], with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety.²⁷

Between 1936 and 1993, Minos Kokkinakis, a Jehovah's Witness, was arrested sixty times for proselytism.²⁸ On March 2, 1986, Greek authorities again arrested Mr. Kokkinakis, this time in the home of an orthodox cantor, and later convicted him of violating the law against proselytism for attempting to convert the cantor's wife.²⁹

The European Court followed a three-part inquiry to determine whether article 9 permitted Greece's limitations on proselytism. According to the ECHR, an interference with the exercise of the freedom to manifest religion or belief is contrary to article 9 unless it is "prescribed by law," directed at a "legitimate aim"—the interests of public safety, protection of public order, health or morals, or for the protection of the rights and freedoms of others—and "necessary in a democratic society."³⁰ The ECHR found that the conduct for which Mr. Kokkinakis was arrested was proscribed by law, and that the measure was in pursuit of a legitimate aim, namely, the protection of the rights and freedoms of others.³¹ In analyzing the legitimacy of the aim of the law, the ECHR noted that the limitation on the freedom to manifest religious belief in the second paragraph of article 9 recognizes the possible necessity of restricting religious freedom to reconcile the interests of various groups and to ensure that everyone's beliefs are

Human Rights, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE, LEGAL PERSPECTIVES, 305, 310–11 (Johan D. van der Vyver & John Witte, Jr., eds., 1996).

²⁷ *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 12–13, ¶ 9.

²⁸ *See id.* at 8, ¶ 6.

²⁹ *See id.* at 8, ¶¶ 6, 7.

³⁰ *Id.* at 18, ¶ 36.

³¹ *See id.* at 20, ¶¶ 41, 44.

respected.³² The ECHR accepted that the sole aim of the Greek law was to protect the beliefs of others from activities that undermined their dignity and personality.³³

Necessity analysis, the third part of the article 9 inquiry, recognizes that “a certain margin of appreciation is to be left to the Contracting States in assessing the existence and extent of the necessity of an interference.”³⁴ However, the margin of appreciation is subject to review by the European human rights system.³⁵ In reviewing state action that comes within the margin of appreciation, the ECHR sees its task as determining whether the measures taken at the national level were “justified in principle and proportionate.”³⁶ To determine whether the measure is proportionate, the ECHR weighs the requirements of the protection of rights and liberties of others against the prohibited conduct.³⁷

The ECHR recognized that the problem of proselytization might necessitate restrictions on religious freedom even in a democratic society. The ECHR characterized proselytism as “offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or need.”³⁸ The ECHR further called proselytism a “corruption”³⁹ of evangelism that “is not compatible with respect for the freedom of thought, conscience and religion of others.”⁴⁰ However, since Greece had not established any facts to support the conviction against Minos Kokkinakis, the ECHR found that Greece had failed to show that a pressing social need justified *his* conviction. With no pressing social need in the instant case, the conviction was not proportionate to the legitimate aim pursued, and thus was not “necessary in a democratic society.”⁴¹ Still, and significantly for analysis of the 1997 Law, the ECHR was prepared to recognize the legitimacy of the Greek law “if and in so far as [it was]

³² See *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 18, ¶ 33.

³³ See *id.* at 18, ¶ 34.

³⁴ *Id.* at 21, ¶ 47.

³⁵ See *id.*

³⁶ *Id.*

³⁷ See *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 21, ¶ 47.

³⁸ *Id.* at 21, ¶ 48.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 21, ¶ 49.

designed only to punish improper proselytism,"⁴² and allowed the law to stand.⁴³

Three years later, in *Manoussakis v. Greece*,⁴⁴ the European Court found a violation of article 9 in a case involving the application of a Greek law restricting manifestation of religious belief.⁴⁵ The law in *Manoussakis* differed from the 1997 Law in that in practice it allowed more than formal conditions for evaluating religious organizations. The law involved in *Manoussakis* required religious associations that wanted to construct or operate a temple of worship to establish "essential reasons" for the construction or operation.⁴⁶ The essential reasons requirement was fulfilled by submitting an application signed by at least fifty families, from more or less the same neighborhood and living in an area at a great distance from a temple of the same denomination.⁴⁷ Manoussakis and the other applicants, who were Jehovah's Witnesses, had rented a hall for religious meetings.⁴⁸ On June 28, 1983, they applied to the Ministry of Education and Religious Affairs for permission to use the room as a place of worship.⁴⁹ The Ministry asked them to have the signatures on the application certified, which the local authority refused to do.⁵⁰ After numerous political interventions, they submitted a fresh application, and the local authority agreed to certify their signatures.⁵¹ In spite of this, the Ministry never reached a decision on the application.⁵² On March 3, 1986, the applicants were prosecuted for having established a place of worship without the proper authorization.⁵³

As in *Kokkinakis*, the ECHR found the restrictions in this Greek law to be prescribed by law and to have a legitimate aim in protecting

⁴² *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 21, ¶ 48.

⁴³ *See id.* at 21, ¶¶ 49, 25 (Pettiti, J., concurring in part).

⁴⁴ 23 Eur. Ct. H.R. (ser. A) (1996).

⁴⁵ *See id.* at 1365, ¶ 47 ("[T]he Court takes the view that the authorisation requirement under Law no. 1363/1938 and the decree of 20 May/2 June 1939 is consistent with Article 9 of the Convention (art. 9) only in so far as it is intended to allow the Minister to verify whether the formal conditions laid down in those enactments are satisfied." (emphasis added)).

⁴⁶ *Id.* at 1355, ¶ 23.

⁴⁷ *See id.*

⁴⁸ *See id.* at 1351, ¶ 7.

⁴⁹ *See Manoussakis*, 23 Eur. Ct. H.R. (ser. A) at 1351, ¶ 12.

⁵⁰ *See id.* at 1351, ¶ 9.

⁵¹ *See id.*

⁵² *See id.* at 1351-52, ¶ 11.

⁵³ *See id.* at 1352, ¶ 12.

public order.⁵⁴ While the ECHR did not explain its rationale for finding the existence of a legitimate aim in protecting public order, the Greek government's assertion that the law supported public order rested on historical grounds. The government's assertion of its interest is so similar to one which the Russian Federation could plausibly offer as its rationale for the 1997 Law that it merits quotation here:

In the first place, although the notion of public order had features that were common to the democratic societies in Europe, its substance varied on account of national characteristics. In Greece virtually the entire population was of the Christian Orthodox faith, which was closely associated with important moments in the history of the Greek nation. The Orthodox Church had kept alive the national conscience and Greek patriotism during the periods of foreign occupation. Secondly, various sects sought to manifest their ideas and doctrines using all sorts of "unlawful and dishonest" means. The intervention of the State to regulate this area with a view to protecting those whose rights and freedoms were affected by the activities of socially dangerous sects was indispensable to maintain public order on Greek territory.⁵⁵

In its examination of whether the law was "necessary in a democratic society," the ECHR noted that the Greek law's requirement of a determination of whether there is a "real need" allowed far-reaching interference by the political, administrative and ecclesiastical authorities.⁵⁶ Prior to ECHR review, the European Commission in its determination also noted that "[t]he intervention of the Greek Orthodox Church in the procedure raised a complex question under paragraph 2 of article 9."⁵⁷ It appears that the ecclesiastical interference involved was far-reaching, since both the prosecutor's office and the criminal court relied expressly on the lack of the bishop's authorization.⁵⁸

⁵⁴ See *Manoussakis*, 23 Eur. Ct. H.R. (ser. A) at 1362, ¶ 40; see also *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 20, ¶¶ 41, 44.

⁵⁵ *Manoussakis*, 23 Eur. Ct. H.R. (ser. A) at 1362, ¶ 39. Some have argued that the ECHR rejected the idea of historical considerations providing a basis for religious restrictions having a legitimate aim in protecting public order. See, e.g., *Gunn*, *supra* note 2, at 67. This is hard to understand, given that the ECHR found the law in *Manoussakis* to have a legitimate aim. See *supra* notes 45, 54 and accompanying text. A decision recognizing the 1997 Law as having a legitimate aim would therefore be consistent with *Manoussakis*. See *id.*

⁵⁶ *Id.* at 1364, ¶ 45.

⁵⁷ *Id.* at 1364, ¶ 43.

⁵⁸ See *id.* at 1366, ¶ 51.

The ECHR made clear in its holding that it was the ability to exercise discretion, inviting governmental intrusion, that was determinative in the case.⁵⁹ The ECHR asserted that “[t]he right to freedom of religion under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”⁶⁰ That the governmental discretion was determinative is supported by the fact that the ECHR was willing to recognize the legitimacy of the Greek law “in so far as it is intended to allow the Minister to verify whether the *formal conditions* laid down in those enactments are satisfied.”⁶¹ Although the ECHR found an article 9 violation in *Manoussakis*, the case actually extends the ECHR’s willingness to recognize a regulation as legitimate from acceptance of a regulation “if and in so far as [it is] designed only to punish improper proselytism”⁶² to an acceptance of a broader range of regulations on religious practice if they require no qualitative judgments by the government.

III. THE 1997 LAW UNDER THE EUROPEAN COURT OF HUMAN RIGHTS JURISPRUDENCE

As shown by the acceptance by the ECHR in *Manoussakis* of secular criteria for differentiating between religious organizations,⁶³ the ECHR accepts a statute’s potential disparate impact among religious organizations as permissible when such distinctions result from application of secular criteria, even when a statute is expressly aimed at religion.⁶⁴ Under the jurisprudence of the European Court, distinguishing among religions only provides a *prima facie* case for an article 9 challenge—one that can be defeated if the state shows the restriction was prescribed by law, had a legitimate aim, and falls within the margin of appreciation accorded member states for determining whether an act is necessary in a democratic society.⁶⁵ Were the 1997 Law to come before the ECHR, it would stand every chance of being upheld.

⁵⁹ See *id.* at 1365, ¶ 47.

⁶⁰ *Manoussakis*, 23 Eur. Ct. H.R. (Ser. A) at 1365, ¶ 47.

⁶¹ *Id.* (emphasis added).

⁶² *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 21, ¶ 48.

⁶³ See *Manoussakis*, 23 Eur. Ct. H.R. (ser. A) at 1365, ¶ 47.

⁶⁴ See *id.*

⁶⁵ See *supra* notes 9–14 and accompanying text.

A. *Prescribed by Law*

The 1997 Law would certainly pass the first hurdle, the question of being prescribed by law, which has rarely been an issue in article 9 cases. The prescribed by law doctrine is better-developed under article 10 where it requires accessibility and foreseeability.⁶⁶ Accessibility refers to the availability of the law in the sense of knowledge of it and its presentation in a comprehensible form, while foreseeability requires that there must be some general understanding of the situations covered by the law.⁶⁷ As evidenced by its publication in major Russian newspapers⁶⁸ and its bright line rules, the 1997 Law meets these requirements.

B. *Legitimate Aim*

The second part of ECHR article 9 analysis requires the 1997 Law to have a legitimate aim in public safety, the protection of public order, health or morals, or for the protection of the rights and freedoms of others.⁶⁹ Given that it contains only formal conditions like the fifteen-year waiting period, the 1997 Law could be found to have a legitimate aim in protecting public order based upon two rationales. One is the special historical circumstance argument put forward by Greece in *Manoussakis*.⁷⁰ Another is religious restoration, an idea which the ECHR has not previously considered.

1. Special Historical Circumstances

Special historical circumstances have been noted as providing a legitimate reason to allow an even wider margin of appreciation in future article 9 cases.⁷¹ Greece put forward the idea of special historical circumstances as a grounds for the legitimate aim of religious restrictions in *Manoussakis*, and the ECHR recognized the legitimate aim of the Greek law without comment.⁷² Just as Greece argued that restric-

⁶⁶ See JACOBS & WHITE, *supra* note 19, at 224–28.

⁶⁷ See *id.*

⁶⁸ See ROSS, GAZETA, Oct. 1, 1997, available in *Religion Law Official*, *supra* note 3.

⁶⁹ See European Convention, *supra* note 19, art. 9.

⁷⁰ See *supra* note 55 and accompanying text.

⁷¹ See Harold J. Berman, *Religious Rights in Russia at a Time of Tumultuous Transition: A Historical Theory*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 26, at 304.

⁷² See *Manoussakis v. Greece*, 23 Eur. Ct. H.R. (ser. A) at 1362, ¶ 40 (1996).

tions on proselytism had the legitimate aim of protecting a cultural resource which had helped save the country during foreign occupations and which was under attack from foreign religions, Russia likewise has a legitimate aim in protecting a resource which has been its strength in the past and can see it through its present-day crisis.

There is little argument that Russia is living through special historic circumstances. Western journalists have documented the state of affairs in Russia today:

As [the] fortunes [of the Orthodox Church] have prospered, so too have those of other religious organizations, many from abroad, which have flocked to Russia with proselytizing zeal to reap the souls of a beleaguered and confused population [The fall of Marxist ideology] left an ideological vacuum alongside economic collapse. . . . In these conditions people are at their most vulnerable⁷³

The cultural value of traditional faiths to the Russian Federation is hard to overestimate. As a representative of the Moscow Patriarchate said in 1994:

[W]henever there has been a spiritual crisis of this intensity, the people has [sic] turned to the Russian Church. That was true at the time of the Napoleonic Wars. It was true in the First World War. It was true even under Stalin in the Second World War. Now we are in a comparable crisis. Moreover, both the extreme nationalists on the right and the radical democrats on the left can be reconciled on this point, namely, that to meet our spiritual crisis it is important that a strong role be played not only by the Russian Orthodox Church but also by other traditional Russian confessions, confessions that have been tested by repression for seventy-five years and that have forged a fraternal relationship with each other.⁷⁴

To develop an understanding of the historical moment in which the Russian Federation finds itself, a few of the better-known anecdotes describing the spiritual state of the Russian populace follow.

⁷³ Robin Lodge, *Russians Embrace Mystical Heirs to Rasputin*, SUNDAY TELEGRAPH, July 27, 1997, at 24.

⁷⁴ Berman, *supra* note 71, at 303. For examples of the Russian Orthodox Church acting as a cultural resource for Russia, see NICHOLAS V. RIASANOVSKY, *A HISTORY OF RUSSIA*, 169–71, 526, 588 (4th ed. 1984).

A prime example of the inability of Russians to discern between legitimate religions and hucksters is the popularity of spiritual hypnotists in Russia today. The first to have widespread appeal was Anatoly Kashpirovsky, who conducted televised weekly hypnotic seances in the late 1980s. At his height, Kashpirovsky drew an audience estimated up to 200 million people.⁷⁵ Kashpirovsky mesmerized the country. For those for whom the weekly seances were not enough, he encouraged them to put a glass of water in front of the television to absorb his powers so as to be able to drink it later in the week. It is hard to appreciate how widespread and deep Kashpirovsky's appeal was; even *Pravda*, the official paper of the Communist party, published a half-page article praising him.⁷⁶ Eventually the government came to be concerned enough that it ordered his seances removed from television. Still, Kashpirovsky remained popular enough to be elected to the Duma in 1993.⁷⁷ Yevgenia Dvitashvili, or Dzhuna, as she is popularly known, is the current version of Kashpirovsky. She is Russia's best-known mystic today, appearing on televised seances.⁷⁸ There are many others, however, who gather smaller followings.⁷⁹

Cults have also sprung up in Russia. One is the "White Brotherhood," a cult founded by Marina Tsvygun, who claimed to have a vision during an abortion revealing to her that she is "Maria Devi Khristos," the reincarnation of both the Virgin Mary and Christ.⁸⁰ Her husband, Yuri Krivonogov, claims to be the reincarnation of both John the Baptist and John the Apostle.⁸¹ Her husband worked for both the Kiev Institute of Psychology and Physiology and the Kiev Institute of Cybernetics in Ukraine, which were said to be involved in developing drugs for psychological warfare.⁸² One of the cult's rites was to take a tablet which they referred to as "the water of the River Jordan."⁸³ The pill

⁷⁵ See David Remnick, *The Hypnotic Tonic of Russia's Dr. Feelgood*, WASH. POST, Oct. 12, 1989, at C1. The population of the Soviet Union in 1984 was 273.8 million. See COUNTRIES OF THE WORLD AND THEIR LEADERS Y.B. 1191 (Frank E. Bair ed., 1987).

⁷⁶ See Adrian Berry, *Mysticism an "Ominous" Sign of the Soviet Times*, DAILY TELEGRAPH, July 25, 1991, at 8.

⁷⁷ See Lodge, *supra* note 73.

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See generally Andrew Higgins, *Kiev Waits for Day After The End*, INDEPENDENT, Nov. 14, 1993, at 16. See also Matthew Campbell, *Hold the Front Page—This Could Be Our Very Last Edition*, SUNDAY TIMES, Nov. 14, 1993, available in 1993 WL 11419251.

⁸¹ See Higgins, *supra* note 80.

⁸² See *Kiev Cult Leader Fed Followers a "Truth Drug,"* DAILY TELEGRAPH, Nov. 12, 1993, at 14.

⁸³ *Id.*

ceremony was likely the cause of the zombie-like state of the followers who could be observed standing on street corners handing out literature, asking for donations and chanting their hypnotic mantra to themselves. The cult leaders predicted the end of the world was to be November 14, 1993. Interestingly, all followers who wished to avoid the final judgement were to commit suicide on November 11, 1993. The cult claimed to have 150,000 followers throughout the Soviet Union.⁸⁴ What might have been a mass suicide was averted by arresting the leaders of the cult, all of the followers who gathered with them to take over Kiev's oldest cathedral, as well as anyone who looked like a follower.

Aum Shinrikyo, the cult behind the nerve gas attacks on the Tokyo subway, is another concern. Aum Shinrikyo has considerable support in Russia where the cult may have as many as 35,000 members.⁸⁵ Prior to the 1997 Law, the Russian Federation had no legal means of controlling the cult. Aum Shinrikyo even had a radio station in eastern Russia which it used for broadcasts into Japan.⁸⁶ Other, better known, less threatening, but actively proselytizing cults have established themselves in Russia. The Jehovah's Witnesses, Hare Krishnas, the Church of Scientology, as well as the Unification Church of Sun Myung-Mun, have all made strong efforts to gather converts in Russia.⁸⁷ When President Yeltsin vetoed the last draft version of the 1997 Law prior to the one he approved, foreign papers recognized the event as an "unexpected boost to hard-line radical sects."⁸⁸

Cults have been able to prosper in the Russian Federation because for seventy years militant atheism was the official religion of the Soviet Union, and the Communist Party was the established Church. It was an avowed task of the Soviet state, led by the Communist Party, to root out from the minds and hearts of the Soviet people all belief systems other than Marxism-Leninism.⁸⁹ The sudden end of Soviet tyranny created a vacuum which all kinds of things have rushed in to fill. Russia, instead of learning to deal with pluralism overnight, needs time to heal. As a representative of the Moscow Patriarchate said, "Russia

⁸⁴ See *Ukraine Seizes Chiefs of End-of-World Cult*, N.Y. TIMES, NOV. 12, 1993, at A9.

⁸⁵ See R. Jeffery Smith, *Japanese Cult Had Network of Front Companies, Investigators Say*, WASH. POST, NOV. 1, 1995, at A8; see also Lodge, *supra* note 73, at 24.

⁸⁶ See *Asahara Radio Message: "Ready for Death,"* DAILY YOMIURI, MAR. 23, 1995, at 1.

⁸⁷ See generally Oxana Antic, *The Spread of Modern Cults in the USSR*, in RELIGIOUS POLICY IN THE SOVIET UNION 252 (Sabrina Petra Ramet ed., 1993).

⁸⁸ Lodge, *supra* note 73.

⁸⁹ See Berman, *supra* note 71, at 289.

needs time to recover her health before they descend upon us. The Russian Orthodox Church is like a very sick person that is only beginning to recover her health."⁹⁰

Demanding protection for the vulnerable, the Russian Orthodox Church has recognized that the choice for every individual to choose one's religion or ideology and to change one's choice "must not be imposed upon us from the outside, especially by exploiting the difficult economic situation of our people or through harsh pressures on human beings."⁹¹ "The state, whose task is to protect the freedom of its own citizens" should be "more scrupulous in its support of non-traditional religious groups, many of which act in direct violation of the law and create totalitarian structures which entirely paralyze the will of the people involved in them."⁹²

2. Religious Restoration

Besides the special historical circumstance argument, Russia may also be able to utilize a religious restoration argument in a potential defense of the 1997 Law. Much has been made of the value the ECHR places on pluralism in article 9 cases.⁹³ However the ECHR has recognized other features of democratic societies, such as the spirit of tolerance.⁹⁴ Indeed, there are some other features which are unique to democratic societies emerging from communist regimes. Under ECHR jurisprudence Russia may have a legitimate interest in protecting public order by restoring the indigenous religious culture destroyed during 70 years of communist rule. A period of religious protectionism, like economic protection of a developing industry, should be allowed to restore Russia's religious-cultural mix, lest Westernism finish Communism's work.

⁹⁰ *Id.* at 303.

⁹¹ Letter of Patriarch Alexi to members of the Russian Supreme Soviet (July 14, 1993) (*quoted in* Berman, *supra* note 71, at 298).

⁹² *Id.*

⁹³ See *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 26 (1993) (Pettiti, J., concurring in part); see also *Gunn*, *supra* note 2, at 67; Holly Cullen, *The Emerging Scope of Freedom of Conscience*, 1997 *EURO. L. REV. HRC* 32, at 34.

⁹⁴ *Otto-Preminger-Institute v. Austria*, 19 Eur. Ct. H.R. 47 (ser. A) at 34 (1995). The European Convention is not alone in recognizing other features of democratic societies. The American Declaration of the Rights and Duties of Man states in its Preamble that a principle aim of the signatories is the "creation of circumstances that will permit [man] to achieve spiritual . . . progress." American Declaration of the Rights and Duties of Man, art. III, O.A.S. Res. XXX, *adopted by* Ninth Int'l Conf. of Am. States, Bogota (1948).

A concrete illustration is the rebuilding of the Christ the Savior Cathedral in Moscow.⁹⁵ While the use of state funds to build a cathedral would normally violate First Amendment Establishment doctrine in the United States, this might not be the case if it was the government which dynamited the building in 1931 without making just compensation. The Russian Orthodox Church was not disestablished by constitutional process but by a cruel and arbitrary power determined to eradicate the church altogether.⁹⁶ In 1914, the Russian Orthodox Church was the largest of all national churches in the world and the largest Christian church in the world after the Roman Catholic Church.⁹⁷ By 1939 the Russian Orthodox Church was one of the weakest churches in Christendom.⁹⁸ The repression finally eased in the late 1980s when from 1985 to 1987 the Orthodox Church opened or reopened a total of 29 parishes.⁹⁹ In 1988, the church registered 809 new parishes. In the first nine months of 1989, the Orthodox Church registered 2,185 new parishes.¹⁰⁰ By 1993 the number of new and reopened parishes in the Moscow Patriarchate surpassed 7,000.¹⁰¹

Simply returning church property and restoring buildings does not reestablish the *status quo ante*. To fulfill the need for priests, the number of theological schools grew from four to thirty-eight.¹⁰² It will be some time before the church begins to recover the number of priests necessary to effectively minister to such a large flock and establish the philosophical and theological foundation necessary to resist the wide range of offerings available in a pluralistic society. As a letter from Orthodox clergy and laymen to Mikhail Gorbachev and Patriarch Pimen expressed in May 1987, "Immobilized, mute and timid for so many years, [the church] has to learn all over again how to walk and talk."¹⁰³

⁹⁵ See Daniel Williams, *Letter from Russia; Moscow Celebrates 850 Years With Soviet-Style Pageantry*, WASH. POST, Sept. 6, 1997, at A11.

⁹⁶ See Paul Valliere, *Russian Orthodoxy and Human Rights*, in RELIGIOUS DIVERSITY AND HUMAN RIGHTS 278, 304 (Irene Bloom et al. eds., 1996).

⁹⁷ See *id.* at 279.

⁹⁸ See *id.*

⁹⁹ See *id.* at 298.

¹⁰⁰ See *id.*

¹⁰¹ See Valliere, *supra* note 96, at 298.

¹⁰² See *id.* at 298.

¹⁰³ *Id.* at 295.

3. Legitimacy of Historical Arguments

As the American Anthropological Association stated in 1947 in its comment on the draft U.N. Declaration on the Rights of Man, *Statement on Human Rights*, "The Individual realizes his personality through his culture, hence respect for individual differences entails a respect for cultural rights."¹⁰⁴ Recognizing the same problem in the similar circumstances which confronted the newly-independent countries of the 1960's, the association noted that on first contact with European and American power, many nations were awed and partially convinced of the superior ways of the Europeans and Americans. By the time these peoples were freed from oppressive regimes they saw the limitations of the American and European systems of rights, and discovered new values in old beliefs they had been led to question.¹⁰⁵ Russia today is similar to the newly independent colonies of thirty years ago.

The Western approach to rights is simply foreign to most Russians. Ivan Aksakov, for example, described the foundation of Western constitutionalism as "[an] antagonism between the people and a power imposed by conquest. . . . It is a mere agreement; a compromise between two camps hostile to each other, mistrusting each other; a kind of treaty, surrounded with all sorts of conditions."¹⁰⁶ Aksakov's thoughts are still representative of nationalists in Russia today.¹⁰⁷ In the end the issues of religion and policy facing Russia must be settled in a way that makes sense to the Russians themselves.¹⁰⁸

To understand the Russian perception of the 1997 Law, one must consider that the law actually manifests progress in the area of religious freedom in the tide of Russia's history. Aside from the 1990 Law "on

¹⁰⁴ American Anthropological Association, *Statement on Human Rights*, reprinted in THE PHILOSOPHY OF HUMAN RIGHTS 116, 118 (1988).

¹⁰⁵ See *id.*

¹⁰⁶ Valliere, *supra* note 96, at 282.

¹⁰⁷ Most Russian Orthodox thinkers, such as Khomiakov, Kireevsky, Dostoevsky, Leontiev, Fyodorov and Solzhenitsyn, have held that a community based on *sobornost'* and *lichnost'*, ("wholeness" and "personhood") is ethically superior to a community based on the social contract and individual rights. *Sobornost'* is the theological expression of an emphasis on community responsibility for the individual. *Sobornost'* is "the Orthodox vision of salvation in Christ which comes about through incorporation into his sacramental community, the church, the 'body of Christ.'" Valliere, *supra* note 96, at 281. The Orthodox emphasis on community as an essential part of salvation does not exclude a recognition of personality. However, *lichnost'*, the Orthodox recognition of the individual, is more an expression of personalism than individualism. See *id.* at 281-82.

¹⁰⁸ See *id.* at 303.

Religious Associations,” the 1997 Law may be the most liberal Russia has ever known.¹⁰⁹ The Law “on Tolerance,” which was in force from 1905–1918, is the only other law which approaches a similar level.¹¹⁰ The 1905 Law was more liberal in some areas, and less liberal in others.¹¹¹ The 1905 Law was superceded by the first piece of Soviet legislation on religion, the decree of the Soviet of People’s Commissars “on Separation of the Church from the State and the Schools from the Church” in January, 1918.¹¹² This decree revoked the recognition of religious associations as legal entities. It also forbade the public teaching or studying of religion.¹¹³ Put in perspective of the 400 years over which religious freedom has developed in the West, the developments in Russia in the last decade can only be viewed as progress.

Indeed, the 1997 Law is actually no more regressive than the reality of religious freedom in Russia prior to its enactment. According to the U.S. State Department, about one-fourth of Russia’s eighty-nine regional governments had passed restrictive laws and decrees violating the 1990 Law “on Religious Associations” by limiting or restricting the activities of religious groups, or by requiring registration.¹¹⁴ Prior to passage of the 1997 Law, local governments were preventing religious gatherings.¹¹⁵ There were numerous instances in which local authorities refused to register the passports of foreign missionaries.¹¹⁶

An advantage of recognizing the legitimate aim of the 1997 Law as lying in restoration of public order is that under this theory it would not be justifiable indefinitely. The formal conditions of the law do impose unequal hardships on certain religions. An example is the requirement of ten members to register a group. The ten member requirement is reminiscent of the *dvadsatka* requirement of the 1929 Soviet law “on Religious Associations.”¹¹⁷ In order for a group to be

¹⁰⁹ Law of the Russian Soviet Socialist Republic “on Freedom of Worship” (Oct. 25, 1990), translated in 33 J. CHURCH & ST. 191, 191–201 (1991) and in RELIGION IN THE SOVIET REPUBLICS 31 (Igor Troyanovsky, ed., 1991).

¹¹⁰ “On the Establishment of the Principle of Religious Tolerance,” *Polnoe Sobranie Zakonov Rossiiskoi Imperii*, 3d series, vol 25, no. 26126 (1905), arts. I(4), II, IX.

¹¹¹ See Berman, *supra* note 71, at 288.

¹¹² Valliere, *supra* note 96, at 285.

¹¹³ See *id.*

¹¹⁴ See U.S. State Department, *United States Policies in Support of Religious Freedom: Focus on Christians* (visited July 22, 1997) <http://www.state.gov/www/global/human_rights/970722_relig_rpt_christian.html>.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See Valliere, *supra* note 96, at 286.

allowed to use religious buildings or objects, all of which the government had nationalized, the 1929 Law required religious associations of no fewer than twenty believers to register and take formal responsibility for the property.¹¹⁸ The 1997 Law similarly requires a group of at least ten individuals to register a religious association.¹¹⁹ Like the *dvadsatka*, this group of ten does not correspond to the canonical institution of any church.¹²⁰

The fifteen-year waiting requirement on being recognized is also tilted in favor of hierarchical churches like the Orthodox Church or the Catholic Church. For religious groups which lack a hierarchical structure, where each mission is structurally independent, moved by the spirit, each new work would require fifteen years of waiting. The Pentecostals, who have been present throughout the Soviet Union in sufficient numbers for a sufficient period of time to satisfy the requirements of the 1997 Law, will never be as free to grow and expand as the hierarchical churches because of their lack of a hierarchical structure.¹²¹

It is unquestionable that the 1997 Law is both inequitable and debilitating for certain types of religious organizations. Thus, the 1997 Law, if justifiable at all, is not justifiable indefinitely. If the historical moment creates the legitimate aim of the 1997 Law, it can only be allowed to stand as long and to the extent that the historical moment lasts.

C. *Necessity in a Democratic Society*

The ECHR also likely would find the 1997 Law to be necessary in a democratic society. In necessity analysis, the third part of the article 9 inquiry, "[t]he Court's task is to determine whether the measures taken at national level were justified in principle and proportionate."¹²² This standard has recently been expressed as "whether the reasons relied upon by the national authorities to justify the measures interfering with the applicant's freedom . . . are relevant and sufficient . . ."¹²³ *Kokki-*

¹¹⁸ See *id.*

¹¹⁹ See 1997 Law, art. 8, § 3.

¹²⁰ See Valliere, *supra* note 96, at 286.

¹²¹ In practice, umbrella "centralized religious organizations," which have the power to establish religious organizations, might be used to circumvent the restrictions. See 1997 Law, art. 8, § 6. Thus, the law will have the positive effect of fostering inter-denominational unity.

¹²² *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 20, ¶ 47 (1993).

¹²³ *Wingrove v. United Kingdom*, 19 Eur. Ct. H.R. 1958, ¶ 59 (1996). *Wingrove* was an article 10 case. See *id.* The *Wingrove* court additionally stated: "[A] wider margin of appreciation is

nakis and *Manoussakis* show the willingness of the ECHR not only to recognize a law as proscribed by law and to have a legitimate aim, but also to recognize the proportionality of formal restrictions on article 9 freedoms in necessity analysis.

Necessity analysis also recognizes that “a margin of appreciation is to be left to Contracting States in assessing the existence and extent of the necessity of an interference.”¹²⁴ Scholars believe that the margin of appreciation doctrine will continue to be an important feature of article 9 case law generally.¹²⁵ As *Manoussakis* demonstrates, a state’s interference must be great to invoke action by the European Court in article 9 questions. While the Greek government lost in *Manoussakis*, the case presented few conceptual or political difficulties in comparison with issues such as proselytization.¹²⁶ Since *Manoussakis*, the European Commission has continued to take a restrictive view of the concept of manifestation of religion.¹²⁷

Like the law involved in *Manoussakis*, the 1997 Law invokes only formal criteria—a fifteen-year waiting period.¹²⁸ The law does not appear to allow ecclesiastical interference of the type the law in *Manoussakis* did.¹²⁹ While the implementing regulations may alter the situation, civil authorities appear to have no discretion in approving applications under the law.¹³⁰ The ECHR might consider the severity of whatever criminal sanctions are eventually attached to the 1997 Law as disproportionate, but the ECHR did not consider this factor in *Manoussakis*.¹³¹ Thus, the 1997 Law would likely fall within the realm of what the European Court has found to be necessary in a democratic society.¹³²

Some scholars have criticized the cases establishing a wider margin of appreciation in religious freedom cases.¹³³ However, this viewpoint

generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, *especially*, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of ‘the protection of the rights of others’ in relation to attacks on their religious convictions.” *Id.* at 1957–58, ¶ 58 (emphasis added).

¹²⁴ *Id.* at 21, ¶ 53.

¹²⁵ See, e.g., Cullen, *supra* note 93, at HRC 34–35. See also Berman, *supra* note 71, at 304

¹²⁶ See Cullen, *supra* note 93, at HRC 35.

¹²⁷ See *id.*

¹²⁸ See 1997 Law, art. 27, § 3.

¹²⁹ See *supra* notes 56–58 and accompanying text.

¹³⁰ See 1997 Law, art. 12, § 1.

¹³¹ See Cullen, *supra* note 93, at HRC 34.

¹³² See *supra* notes 33–42, 55–61 and accompanying text.

¹³³ See, e.g., Gunn, *supra* note 2, at 96.

is rooted in a concept of rights which only protects individual liberties, a position which is a minority on the ECHR. Justice Pettiti argued in a partly concurring opinion in *Kokkinakis* that the Greek law facially contravened article 9 of the European Convention.¹³⁴ Justice Pettiti claimed that the only limits on the right to expound personal beliefs are those limits dictated by the respect for the rights of others where there is an attempt to coerce the person into consenting or the use of manipulative techniques.¹³⁵ While Justice Pettiti's argument seems based on an emphasis on individual rights, he calls for the ECHR to refer to Europe's Christian tradition for guidance in determining the permissible limits on proselytization.¹³⁶ According to Justice Pettiti:

The forms of words used by the World Council of Churches, the Second Vatican Council, philosophers and sociologists when referring to coercion, abuse of one's rights which infringes the rights of others and the manipulation of people by methods which lead to a violation of conscience, all make it possible to define any permissible limits of proselytism. They can provide the member states with positive material for giving effect to the Court's judgment in future and fully implementing the principle and standards of religious freedom under Article 9 of the European Convention.¹³⁷

Scholars look for support of an individual rights concept of article 9 in the words of the *Kokkinakis* decision which praised the value of pluralism.¹³⁸ This approach fails to recognize that the ECHR views both pluralism and freedom of religion as valuable for the whole of society. According to the ECHR:

Freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life, *but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned.* The plural-

¹³⁴ *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 26 (1993) (Pettiti, J., concurring in part).

¹³⁵ *See id.*

¹³⁶ *See id.*

¹³⁷ *Id.* at 28 (Pettiti, J., concurring in part).

¹³⁸ *See Gunn, supra* note 2, at 67.

ism indissociable from a democratic society, which has been dearly won over the centuries, depends upon it.¹³⁹

The ECHR continued, “[F]reedom to manifest one’s religion . . . includes *in principle* the right to try to convince one’s neighbor, for example through ‘teaching,’ failing which, moreover, ‘freedom to change [one’s] religion or belief,’ enshrined in article 9, would be likely to remain a dead letter.”¹⁴⁰ Yet in *Kokkinakis*, the ECHR allowed the restrictions against proselytization to stand. *Manoussakis* also emphasized the “pluralism, tolerance and broad-mindedness without which there is no democratic society”¹⁴¹ while allowing Greece’s religious registration law to stand. These decisions, as well as the decisions in *Otto-Preminger-Institute v. Austria*¹⁴² and *Wingrove v. United Kingdom*¹⁴³ are reconcilable only upon recognizing that pluralism is not the ultimate end of democratic society under the European Convention.

Even if pluralism exists to serve society, there will be circumstances where democratic societies may have needs more pressing than diversity. The European Commission on Human Rights has also “interpreted the concept of manifestation of religion narrowly, most notably in *Arrowsmith v. United Kingdom*,”¹⁴⁴ where it asserted that article 9 does not protect each act which is motivated or influenced by a religion or belief.¹⁴⁵ The Commission’s approach demonstrates that the idea of freedom of conscience in the European Convention is not based primarily on the interests of the individual.¹⁴⁶ “While the Court refers both to individual and social justifications for freedom of religion, the balance seems to be towards the social. The assertion that freedom of conscience is a foundation of European democratic societies and the high value placed on pluralism, which is a social rather than personal value, both support a social justification.”¹⁴⁷ Understanding that the value involved is a social one shows the compatibility of the recent criticized decisions of the ECHR with *Kokkinakis* and *Manoussakis*.¹⁴⁸

¹³⁹ *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 17, ¶ 31 (Pettiti, J., concurring in part) (emphasis added).

¹⁴⁰ *Id.* (emphasis added).

¹⁴¹ *Manoussakis v. Greece*, 23 Eur. Ct. H.R. (ser. A) at 1363, ¶ 41 (1996).

¹⁴² 295 Eur. Ct. H.R. (ser. A) at 47 (1994).

¹⁴³ 19 Eur. Ct. H.R. 1937 (ser. A) (1996).

¹⁴⁴ App. No. 7050/75, 3 Eur. H.R. Rep. 218 (Commission Report).

¹⁴⁵ Cullen, *supra* note 93, at 33, *quoting Arrowsmith*, App. No. 7050/75, 3 Eur. H.R. Rep. 218.

¹⁴⁶ *See id.*

¹⁴⁷ *Id.* at 34.

¹⁴⁸ For criticism of these decisions *see Gunn, supra* note 2, at 69 n.91.

Even the words of the Second Vatican Council, to which Justice Pettiti refers,¹⁴⁹ provide support for restricting religiously motivated action in the name of the religious freedom of a democratic society. *Dignitatis Humanae*, the declaration on religious liberty adopted at the Second Vatican Council, recognizes that "in spreading their religious belief and in introducing religious practices everybody must at all times avoid any action which seems to suggest coercion or dishonest or unworthy persuasion when dealing with the uneducated or poor. Such a manner of acting must be considered an abuse of one's own right and an infringement of the rights of others."¹⁵⁰ Restrictions for the purpose of the protection of public morality increase the ability of man to realize the basic good of religion by creating or maintaining an environment conducive to pursuit of the basic good.¹⁵¹

CONCLUSION

The 1997 Law can be upheld under the principles which protect religious freedom in the European Convention on Human Rights. The express adoption of international human rights law into the Russian Constitution means that the 1997 Law could be upheld by the Russian Constitutional Court as well. That the 1997 Law might pass the restrictions of the Russian Constitution may strike people of other cultural backgrounds as patently violating the letter and the spirit of the Russian Constitution. Such a categorization ignores the fact that every legal tradition represents a synthesis of universal notions of rights with concrete historical conditions and commitments.¹⁵² Indeed, if the historical experience of a people with respect to a matter is sufficiently important that it constitutes a foundation of the constitution itself, then it may even justify departure from the ordinary meaning of the words of particular constitutional norms.¹⁵³ To whatever degree the 1997 Law is not a just law, it exposes a weakness in ECHR jurisprudence. Were

¹⁴⁹ See *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 26 (Pettiti, J., concurring in part).

¹⁵⁰ Declaration on Religious Liberty § 4 in VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 800, 803 (Austin Flannery, O.P., gen. ed., 1992).

¹⁵¹ See George Van Masehove, S.J., *The Grounds for Religious Freedom*, in RELIGIOUS LIBERTY: AN END AND A BEGINNING 156 (John Courtney Murray, S.J., ed., 1966).

¹⁵² See Valliere, *supra* note 96, at 303.

¹⁵³ See Berman, *supra* note 71, at 300.

it to come under ECHR Review, it would challenge the court to articulate principles which explain why this law, in contrast to the laws considered in all previous article 9 cases, should be invalidated.