



## WRITTEN OBSERVATIONS

*Submitted to the European Court of Human Rights  
in the case*

***Emmanouil DAMAVOLITIS v. Greece***  
(Application No. 44913/14)

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## Introduction

According to legal historian François Saint-Bonnet, proselytising qualifies an attitude “*not in itself, but as denounced by its opponents, sometimes its enemies.*”<sup>1</sup> The phenomenon of proselytising is often abusively reduced to religious proselytising. In the current secularised context, proselytising is also a negatively charged notion. From a moral or political point of view, proselytising appears in practice to be illegitimate from the outset. It is important to guard against such a narrow viewpoint in order to objectively apprehend proselytising.

The European Court of Human Rights (hereinafter: "Court" or "European Court") has already ruled in cases against Greece concerning proselytising. The 1993 *Kokkinakis v. Greece* judgment is of particular importance as it was the first judgment on Article 9 of the European Convention on Human Rights (hereinafter: "Convention" or "European Convention") since its adoption.<sup>2</sup> The *Larissis and Others v. Greece* judgment of 1998, which was the first application supported by the ECLJ, supplemented this case law.<sup>3</sup> In these two judgments, the Court distinguished between "Christian witnessing" and "abusive proselytising",<sup>4</sup> then between good and bad proselytising.<sup>5</sup> It therefore went beyond prejudices about proselytising, refusing to forthrightly disqualify it. Proselytising therefore cannot be condemned as such.

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Two elements seem essential to proselytising: the expression of a thought to others in order to convert them to it. Any influence that one person's behaviour may have on another does not therefore correspond to proselytising. The person must intend to make the other person a follower of their religion or belief; the Greek word *prosêlutos* means "newcomer". Professor Farah Safi defines proselytising as “*a disposition of the mind which consists in revealing one's thoughts to others in order to lead them to adopt them in turn, so that the person who proselytizes intends to rally one or more emulators to their cause.*”<sup>6</sup>

### **Prosecutions initiated by the public prosecutor's office and a conviction for "proselytising"**

The present application was filed by Mr. Damavolitis, a Cretan farmer, married and father of six children. He is a Christian, but does not belong to the majority Greek-Orthodox denomination or any other "denominational" movement. Since 2003, he has become friends with his neighbour, Mr. Vamvoukas, because of their common points: family situation, profession, practice of the same hobby. Mr. Damavolitis and Mr. Vamvoukas had discussions

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<sup>1</sup> François Saint-Bonnet, « L'accusation de prosélytisme au XIXe siècle », Dossier 1 : « Le prosélytisme », *Société, Droit & Religion*, no 7, October 2017, p. 2.

<sup>2</sup> *Kokkinakis v. Greece*, no 14307/88, 25 May 1993.

<sup>3</sup> *Larissis and others v. Greece*, no 140/1996/759/958–960, 24 February 1998.

<sup>4</sup> *Kokkinakis*, *op. cit.*, § 48.

<sup>5</sup> *Larissis*, *op. cit.*, § 45.

<sup>6</sup> Farah Safi, *Le prosélytisme intellectuel et le droit pénal*, Institut Universitaire Varenne, Collection des thèses, préface Philippe Conte, 2014, pp. 12-13, no 11.

on religion. Mr. Vamvoukas also discussed religion with a Pentecostal pastor and took the step of requesting baptism.

Mr. Vamvoukas suffered from depression and attempted suicide in December 2006. According to him, these have no connection with his conversion; he even states that his Christian beliefs are against suicide. Mr. Vamvoukas also considers that no third party was responsible for his act. As a friend, Mr. Damavolitis had testified in court during the proceedings relating to the attempted suicide. He referred to his religious discussions with Mr. Vamvoukas and the latter's conversion.

On the basis of this testimony, the public prosecutor alone took the initiative to prosecute Mr. Damavolitis for "proselytising". Mr Vamvoukas, a witness in these proceedings, testified that their religious discussions were free, that he had chosen a different denomination from Mr Damavolitis and that the two friends did not go to church together. The applicant also recounted the social ostracism he had suffered with his family for years as a result of local media coverage of the case. For example, he could no longer enter the cafés in his village and his children had to change schools.

In a judgment of November 2009, Mr Damavolitis was sentenced to four months imprisonment, convertible into a fine of 1,200 euros, and a fine of 400 euros. This judgment was upheld on appeal in September 2011, and then upheld by the Supreme Court of Appeal in November 2013. On 30 May 2014, Mr Damavolitis filed an application with the European Court, alleging a violation of his freedom of religion. In particular, he considers that prohibiting and penalizing proselytising is contrary to Article 9 of the European Convention.

### **Prohibition of proselytising, a legacy of the Metaxas dictatorial regime**

In 1993, the year of the *Kokkinakis* judgment, Greece was the only Member State to criminalize proselytising.<sup>7</sup> At present, this is also the case in Armenia,<sup>8</sup> a member of the Council of Europe since 2002. In any case, the prohibition of proselytising remains an exception in Council of Europe member states. In Greece, proselytising is prohibited by the 1975 Constitution (Article 13). However, the law currently in force accompanying this prohibition of criminal sanctions is older: it dates from 1938.<sup>9</sup> It was adopted in the context of the 4<sup>th</sup> of August regime of Ioánnis Metaxás from 1936 to 1941. The explicit objective of this regime was a "regeneration of society", through a nationalist policy.<sup>10</sup>

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<sup>7</sup> Partly dissenting opinion from Justice Martens in the case *Kokkinakis*, § 20.

<sup>8</sup> See the « loi de la République d'Arménie sur la liberté de conscience et sur les organisations religieuses » (LRALCOR), 1991, article 8.

<sup>9</sup> See Article 4 of Law 1363/1938, amended by Article 2 of Law 1672/1939.

<sup>10</sup> Harry Cliadakis, *Fascism in Greece – The Metaxas Dictatorship 1936-1941*, p. 47.

It was precisely in 1938 that the most authoritarian laws were passed, so that all authority would emanate from Metaxas, Prime Minister for life.<sup>11</sup> The criminalization of proselytising was only one of the violations of freedom of expression, among others: very strict censorship of the press, "certificates of opinion" issued by the Ministry of Public Security.<sup>12</sup> etc. Moreover, penalizing proselytising was only one of the means of attacking non-orthodox people. For example, in the youth movement set up by the regime, only Greek-Orthodox Christians were admitted and the book most distributed to young people was Adolf Hitler's *Mein Kampf*.<sup>13</sup> Metaxas assumed his rejection of Protestant currents, whose free reading of the Bible could undermine his vision of discipline.<sup>14</sup> In 1939, he considered it his role to appoint the Orthodox Archbishop of Athens.<sup>15</sup>

### **A specific case demonstrating the inadequacy of the *Kokkinakis* jurisprudence**

Faced with the *Kokkinakis* application in 1993, the nine judges of the Chamber appeared very divided. Three of them considered that Article 9 of the Convention had not been violated.<sup>16</sup> Three others considered that the very principle of criminally sanctioning proselytising violated Article 9.<sup>17</sup> The latter three seem to have considered that Article 9 was violated by the case at hand, but not by Greek law per se.<sup>18</sup> The majority adopted this position, finding a violation of the rights of the applicant, who had been convicted of proselytising, but not that the prohibition on proselytising was contrary to Article 9. Although the issue was somewhat different, the same positions within the Court were defended by the judges sitting in the *Larissis* case of 1998.

The Committee of Ministers considered that the Greek Government had properly executed these two judgments.<sup>19</sup> The argument was as follows: "*the prosecutors and the indictment chambers of the courts have adapted their interpretation of Greek law to the requirements of the Court's judgment so that the courts have only had to deal with very few cases of proselytising and no conviction has been handed down in a case similar to the Kokkinakis case*".<sup>20</sup> Similarly, for the *Larissis* case, "*since the release of the judgment in the Larissis et al. case, no public proceedings have been instituted and no convictions have been handed down in similar cases.*"<sup>21</sup>

The present application *Damavolitis v. Greece* shows on the contrary that the requirements laid down by the Court in the 1990s are not a sufficient guarantee for the right to freedom of religion

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<sup>11</sup> *Ibid.*, pp. 48 and 53.

<sup>12</sup> *Ibid.*, p. 48.

<sup>13</sup> *Ibid.*, p. 51.

<sup>14</sup> *Ibid.*, p. 52.

<sup>15</sup> *Ibid.*, p. 54.

<sup>16</sup> These are judges Valticos, Foighel and Loizou.

<sup>17</sup> These are judges Pettiti, De Meyer and Martens.

<sup>18</sup> These are judges Ryssdal, Bernhardt and Lopes Rocha.

<sup>19</sup> Resolution DH (97) 576, adopted by the Committee of Ministers on 15 December 1997, at the 610th meeting of the Ministers' Deputies..

<sup>20</sup> Appendix to Resolution DH (97) 576: Information provided by the Government of Greece during the examination of the *Kokkinakis* case by the Committee of Ministers.

<sup>21</sup> Resolution ResDH (2004)80 adopted by the Committee of Ministers on 22 December 2004 at the 906th meeting of the Ministers' Deputies; Appendix to Resolution ResDH (2004)80: Information provided by the Government of Greece during the examination of the *Larissis* case by the Committee of Ministers.

of Greeks. Indeed, a prosecutor prosecuted Mr. Damavolitis for the mere fact of having spoken to Mr. Vamvoukas about his faith in private discussions. The applicant had been convicted of "proselytising" even though Mr. Vamvoukas had not complained of any infringement of his rights. The conviction was all the more surprising in that Mr. Vamvoukas had chosen a different Christian group from that of Mr. Damavolitis, which testified to the strength of his personal choice.

The very existence of this case shows the clear-sightedness of certain judges of the Court. According to Judge Pettiti, the *Kokkinakis* judgment "leaves too much room for a later, repressive interpretation by the Greek courts, whereas it is the exercise of public action which must also be controlled"<sup>22</sup> Five years after the judgment, in 1998, Judge Repik found that "*national courts have failed to remedy the inadequacies of the law*", that the case law already presented « *considerable vagueness* », and that "*behavior in which there is nothing abusive (...) is too often prosecuted and even convicted*".<sup>23</sup>

### **Is Greek law compatible with conventional requirements?**

So far, as Justice Martens pointed out in relation to the *Kokkinakis* judgment, the case-law "*addresses only incidentally (...) the key question in this case: does Article 9 allow Member States to criminalize the attempt to induce someone to change their religion?*".<sup>24</sup> In the present case, *Damavolitis v. Greece*, the Court can no longer fail not to go beyond its case-law of the 1990s in order to answer this key question in principle.

Is Greek law penalizing proselytising, which is isolated in Europe and a legacy of an authoritarian regime, compatible with the right to freedom of religion? These observations will show that criminalizing proselytising violates not only the rights of the person who practices it (I) but also those of the person who is the object of such proselytising (II).

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<sup>22</sup> Partly concurring opinion of Judge Pettiti in the *Kokkinakis* case.

<sup>23</sup> Partly dissenting opinion of Justice Repik in the *Larissis* case.

<sup>24</sup> Partly dissenting opinion of Judge Martens in the *Kokkinakis* case.

## **I- Prohibition of proselytising violates the rights of the proselytizer**

### **A- Proselytising is an exercise of the freedoms to manifest one's religion or beliefs and to communicate information or ideas.**

Proselytising is not an autonomous notion in the case law of the European Court. It is therefore necessary to start from the Greek law of 1938, which defines proselytising broadly and extensively: "*particularly, any direct or indirect attempt to penetrate the religious consciousness of a person of a different faith (heterodoxos) with the aim of modifying the content of that consciousness.*"<sup>25</sup> In domestic law, proselytising therefore corresponds to the usual definition: expressing a thought to another person with the aim of bringing about their conversion. Despite the adverb "particularly", proselytising seems to be understood in Greek law as solely religious.

On the basis of this definition in domestic law, the problem must be formulated in terms of subjective rights.<sup>26</sup> Proselytising amounts to "*communicating information or ideas*" (Article 10 of the Convention) and "*manifesting one's religion or belief ... in public or in private*", in particular through "*education*" (Article 9). It also means encouraging others to exercise their own "*freedom to receive (...) information or ideas*" (Article 10) and "*freedom to change their religion or belief*" (Article 9). Thus, proselytising is, by definition, a practice that is doubly protected by the freedoms of expression and religion or belief.

In the *Kokkinakis and Larissis* cases, the Court had examined the question solely in the context of Article 9, holding that no separate issue arose in the context of Article 10. It is true that Article 9 is the most protective for those who engage in proselytising. Indeed, according to the Court "*in regard to Article 9 (art. 9), the freedom to manifest one's religion (...) includes in principle the right to try to convince one's neighbor, for example by means of "teaching"*".<sup>27</sup> Proselytising is even essential to the purpose of the freedoms enshrined in Article 9; the Court thus considers that "*testimony, in word and deed, is linked to the existence of religious beliefs...*".<sup>28</sup> Similarly, in the case of *Nasirov and Others v. Azerbaijan*, decided in February 2020, the Court dismissed "*the reasoning of the domestic courts that the use of the religious literature in question was limited to the internal purposes of the religious organization at its registered office and that the books could not be distributed in public places to persons who were not members [of that organization]*".<sup>29</sup> Judge De Meyer goes even further by considering that proselytising is inseparable from "*the essence of the freedom of every person to manifest*

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<sup>25</sup> Article 4 § 2 of the law no. 1363/1938.

<sup>26</sup> See on this topic : Xavier Souvignet, « Prosélytisme et Cour européenne des droits de l'homme, prosélytisme de la Cour européenne des droits de l'Homme ? », *Société, Droit & Religion*, n° 7, *op. cit.*, pp. 57-59.

<sup>27</sup> *Kokkinakis*, *op. cit.*, § 31.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Nasirov and Others v. Azerbaijan*, no. 58717/10, 20 February 2020, § 64 (free translation).

*his or her religion*”<sup>30</sup> ; similarly, according to Judge Pettiti, the Court of Appeal Freedom of religion and conscience does imply the acceptance of proselytising, even if it is “bad.”<sup>31</sup>

Moreover, according to the Court, the State does not have any “*power of appreciation (...) as to the legitimacy of religious beliefs or the ways in which they are expressed*”.<sup>32</sup> It is clearly established in case law that “*the role of the authorities in this case is not to remove the cause of tension by eliminating pluralism, but to ensure that groups opposed to each other tolerate each other*”.<sup>33</sup>

Admittedly, the exercise of the rights enshrined in Articles 9 and 10 of the Convention may be subject to certain limitations, pursuing legitimate and proportionate aims. Proselytising can therefore be restricted and limited, in order to prevent abuses. However, the general prohibition of proselytising goes beyond these limitations by removing certain rights recognized in Articles 9 and 10.<sup>34</sup> The prohibition of proselytising also creates a *chilling effect*, i.e. it deters people from legitimately exercising their rights for fear of sanctions. According to Judge Repik, “*a believer who devotes himself to spreading his religious faith never knows with certainty whether his behavior falls under the law or not. The law does not offer a sufficient degree of precision and therefore predictability, cannot guarantee legal certainty and equal treatment of litigants or protect them against the arbitrariness of the enforcement authorities.*”<sup>35</sup>

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The prohibition of proselytising is more generally contrary to international law. The former Special Rapporteur on religious intolerance, Abdelfattah Amor, visited Greece in June 1996, when he criticized the fact that “*proselytising is prohibited in general*” even though it “*is in the very nature of religions*”.<sup>36</sup> It considered this prohibition to be contrary to the right to freedom of religion, in particular to the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.<sup>37</sup> He concluded as follows: “The removal of the legal ban on proselytising is highly recommended.”<sup>38</sup>

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<sup>30</sup> Concurring opinion of Justice De Meyer in the *Larissis* case.

<sup>31</sup> Partly concurring opinion of Judge Pettiti in the *Kokkinakis* case.

<sup>32</sup> *Imbragim Ibragimov and Others v. Russia*, no. 1413/08 and 28621/11, 28 August 2018, § 90. See also: *S.A.S. v. France* [GC], no. 43835/11, 1 July 2014, § 127.

<sup>33</sup> *Imbragim Ibragimov, op. cit.*, § 90.

<sup>34</sup> In his partly dissenting opinion in the *Kokkinakis* judgment, Justice Martens stated: “It is true that the freedom to proselytize may be abused, but the decisive question is whether this justifies the enactment of a repressive provision that generally punishes what the State regards as ‘bad’ proselytizing” (§ 16).

<sup>35</sup> Partly dissenting opinion of Justice Repik in the *Larissis* case.

<sup>36</sup> United Nations General Assembly, UN Doc. A/51/542/Add.1, “Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,” November 7, 1996, §§ 11 and 12.

<sup>37</sup> *Ibid.*, § 134.

<sup>38</sup> *Ibid.*

## **B- Generally prohibiting religious proselytising is tantamount to outlawing and discriminating against missionary religions**

In the *Kokkinakis* judgment, the European Court recognized the link between proselytising and "religious convictions".<sup>39</sup> However, some religious beliefs are not proselytized. This is for example the case of Judaism, which stems from a Covenant between God and a particular people; it can *accept* converts without seeking them.<sup>40</sup> Moreover, as Professor Safi reminds us, "*the purpose of proselytising is to associate a new follower with any opinion and not only with a religious one*".<sup>41</sup> In fact, some convictions are proselytising, without being exclusively religious in nature. Sociologist Jules Monnerot, for example, described communism as "*an enterprise of sectarian proselytising, of underground warfare and of the direction of consciences*".<sup>42</sup>

By penalizing religious proselytising, Greek law thus constitutes double discrimination. Not only does it restrict the freedom of expression and religion of adherents of a missionary religion only, but it also applies only to beliefs and discourse of a religious, not a philosophical or political, nature. Thus, unlike the applicant, a communist may well seek to convert others to his belief.

In the Christian religion, that of Mr. Damavolitis, the apostolate is a religious obligation, inseparable from worship. In the *Kokkinakis* judgment, the European Court had recognized that "*Christian witness (...) corresponds to true evangelization, which a report drawn up in 1956 within the framework of the World Council of Churches describes as the 'essential mission' and 'responsibility of every Christian and every church'...*".<sup>43</sup> Even more fundamentally, Jesus Christ asked his apostles: "*Go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to observe all that I have commanded you*".<sup>44</sup> Forbidding this apostolate therefore amounts to making an important part of Christian religious practice illegal.

The current ban on proselytising in Greece covers all religions, but is inherited from an ever-present state desire to protect only the majority religion. Historically, constitutional and legislative provisions only prohibited proselytising against Orthodox Christianity. Thus, according to Article 1 of the Greek Constitution of 1864, as revised in 1911, "*The dominant religion in Greece is that of the Eastern Orthodox Church of Christ (...). Proselytising and any other intervention prejudicial to the dominant religion are prohibited.*" This article was retained in the 1952 Constitution. The Greek Constitution of 1975, which is currently in force, has

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<sup>39</sup> *Kokkinakis*, *op. cit.*, § 31.

<sup>40</sup> On these distinctions, see : Arvind Sharma, *Problematising religious freedom*, Springer, 2011, p. 177.

<sup>41</sup> Farah Safi, « Propos introductifs », *Société, Droit & Religion*, n° 7, *op. cit.*, p. XI.

<sup>42</sup> Jules Monnerot, *Sociologie du communisme*, Paris, Gallimard, 1949, p. 25.

<sup>43</sup> *Kokkinakis*, *op. cit.*, § 48.

<sup>44</sup> Gospel according to Matthew, chapter 28: 19-20.



retained the first sentence of this article,<sup>45</sup> but banned proselytising in general and not only against the majority religion.<sup>46</sup> This constitutional prohibition of proselytising is therefore no longer officially intended to protect a particular religious denomination. The same is true of the 1938 law, which provides for sanctions to enforce the prohibition.

In the 1990s, the Special Rapporteur on religious intolerance reported numerous prison sentences for thousands of evangelical Christians and Jehovah's Witnesses,<sup>47</sup> even though no condemnation of Orthodox Christians has been reported to him. While there are currently fewer convictions, the bias against non-Orthodox appears to have persisted, as evidenced by the present case. In the Court's jurisprudence, this policy may be considered discriminatory, because of its "*disproportionate prejudicial effects on a group of persons*".<sup>48</sup>

State protection of a majority religion or ideology by prohibiting proselytising is a classic scheme. According to Professor Xavier Souvignet, the very fact of legally qualifying an act as "proselytising" presupposes "*first of all a non-neutral, or at least not purely neutral, legal and political framework that can grasp it as such...*".<sup>49</sup> This framework can be either dependent on a majority, institutionalized or highly influential religion, or it can be dependent on a "*particularly demanding conception of values*".<sup>50</sup> In these two cases, proselytising can be condemned because "*it is the irruption of the Other, who is both a minority and asserted*".<sup>51</sup> Historically, the prohibition of proselytising has often resembled an "*abuse of a dominant position*", a "*rejection of otherness*" or a "*distrust of the powerful*".<sup>52</sup>

While the prohibition and criminalization of proselytising violates the rights of the proselytizer, it is also important to look at the person who is the object of the proselytising. It is in the name of the latter, in order to protect his or her rights, that proselytising is prohibited. Indeed, Greece claims to protect "*the conscience of others with regard to activities that infringe their dignity and personality*".<sup>53</sup> However, as will be shown below, the rights of the person who is the object of proselytising are also violated by the general prohibition of this practice.

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<sup>45</sup> See Article 3 § 1 of the Greek Constitution of 1975: "*The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928*" (free translation).

<sup>46</sup> See Article 13 § 2 of the Greek Constitution of 1975: "(...) Proselytizing is forbidden" (free translation).

<sup>47</sup> Assemblée générale des Nations unies, Doc. A/51/542/Add.1, *op. cit.*, §§ 79-80, 88.

<sup>48</sup> *D.H. and others v. the Czech Republic* [GC], no. 57325/00, § 175.

<sup>49</sup> Xavier Souvignet, *op. cit.*, p. 56.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> François Saint-Bonnet, *op. cit.*, pp. 2-4.

<sup>53</sup> *Kokkinakis, op. cit.*, § 34.

## II- The prohibition of proselytising violates the rights of the person who is the object of proselytising

### A- The right to change one's religion or belief is inseparable from the right to receive information or ideas

Article 9 § 1 of the European Convention explicitly recognises - as does the Universal Declaration of Human Rights of 1948 (hereinafter: "Universal Declaration") - a right to conversion through "*freedom to change religion or belief*". Article 10 § 1 also recognises "*freedom of opinion*", which is part of the internal forum. If, as we have seen, the freedom to manifest one's religion may be subject to limitations, since it concerns the actions of the person (*external forum*), this is not the case for the freedom to change religion. Indeed, the latter belongs to the *internal forum*, whose protection is unlimited, since the adoption of a religion is a matter of the person's own conscience. The freedom to change religion is not incidental or secondary. For the Lebanese philosopher and diplomat Charles Malik, who wrote article 18 recognising freedom of religion in the Universal Declaration, the essence of this freedom is mainly the "right to become" and not the "right to be".<sup>54</sup> More generally, human rights are to be seen "*in dynamic terms*"; "*the idea of the right to change is central to his arguments in favour of fundamental rights and freedoms*".<sup>55</sup>

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When a state prohibits proselytising to the point of punishing religious discussions between two adult friends and volunteers, it prevents people from receiving information or ideas about religions. Article 10, which protects the right to receive information or ideas, can at this level be read in the light of the - absolute - right to change one's religion as well as the right to freedom of opinion. In the case law of the Court, "*the freedom to receive information (...) essentially prohibits a government from preventing someone from receiving information that others aspire or may consent to provide to them*".<sup>56</sup> This freedom may be subject to limitations provided for in the Convention, but may not be limited for the purpose of undermining absolute and unconditional rights belonging to the *internal forum*, such as the right to change religion. It is for this reason that the Court recalls the importance of the "*right to try to convince one's neighbour, for example by means of 'teaching', without which the 'freedom to change religion or belief' enshrined in Article 9 might otherwise remain a dead letter*".<sup>57</sup>

The importance of the freedom to proselytise to enable people to freely exercise their right to change their religion is attested to by numerous testimonies. For example, in February 2021,

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<sup>54</sup> See on this topic: Habib v. Malik, *The challenge of human rights: Charles Malik and the Universal Declaration*, Oxford: Charles Malik Foundation: Centre for Lebanese Studies, 2000, p. IX. See also his speech, quoted on p. 240, to the 1968 World Council of Churches in Geneva.

<sup>55</sup> *Ibid.* p. IX (free translation). See also his speech, quoted on p. 47, at the meeting of February 1, 1947, as part of the preparatory work for the Universal Declaration.

<sup>56</sup> *Leander v. Sweden*, no. 9248/81, 26 mars 1987, § 74 This has been reaffirmed in several more recent Grand Chamber judgments, for example *Gillberg v. Sweden* [GC], no. 41723/06, 3 April 2012, § 83.

<sup>57</sup> *Ivanova v. Bulgaria*, no. 52435/99, 12 April 2007. See also: Kokkinakis, *op. cit.*, § 31

the ECLJ broadcast audio testimonies of converts to Christianity.<sup>58</sup> One of them explains: "I was converted thanks to a classmate; we were discussing 'religion' (...). I told her: "*I heard that there is a book called the Bible, what is it? She told me: "It is the Word of God" "(...) [before] "in Islam, I was not told anything at all about the texts; I was forced to recite verses [from the Koran]..."*. Another tells: "*Personally I converted because someone dared to offer me the Gospels in the street; it was a Protestant. This was the revelation, because everyone had told me bad things about Christianity, in the media, in my Muslim environment. There was contempt for Christians and Jews. It was automatic: you had to despise them, to have hatred against them (...) The beauty of God had been hidden from me*".

It is for all these reasons that the European Court in the *Kokkinakis* case inferred from the freedom to change religion a right to proselytise. Professor Souvignet explains that, "...against a background of inherent theory (...) combined with absurd reasoning tending to give useful effect to the consecrated freedom to 'change religion'", the Court thus "[twisted] the logic induced by the wording of Article 9 § 1 by shifting the focus from the convert (the holder of the right to change religion) to the proselyte (the holder of the right to try to convince): or rather, it considered them jointly and severally."<sup>59</sup> As Justice Martens reminds us: "*Whether or not someone is considering changing religion is not a matter for the state and, therefore, whether or not someone is trying to induce others to change their religion should in principle not be a matter for the state either....*"<sup>60</sup> Some academics go even further, claiming that missionary religions, by offering new religious options in a given situation, promote freedom of religion.<sup>61</sup>

Countries that penalise proselytising generally aim, sometimes explicitly, to penalise changing religion.<sup>62</sup> By way of illustration, Morocco prohibits proselytising, through the offence of "*undermining the faith of a Muslim*", and the jurisprudence testifies to the objective of combating apostasy.<sup>63</sup> Many similar examples could be cited, both in the Maghreb (Algeria) and in the Gulf countries (United Arab Emirates) or in the Shiite countries (Iran). The representative of Saudi Arabia, followed by other Muslim states, had already opposed the recognition of a freedom to change religion in the Universal Declaration, because "*proselytising has historically caused a lot of bloodshed and wars*."<sup>64</sup> These States undertake to prohibit proselytising for strictly religious reasons,<sup>65</sup> thus refusing to distinguish between religion, on

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<sup>58</sup> Youtube Channel ECLJ « Officiel », « [De l'islam au Christ : la persécution des convertis en France](#) ».

<sup>59</sup> Xavier Souvignet, *op. cit.*, pp. 59-60. Inherency theory is the idea that a "hidden" right can be logically deduced from another "shown" right.

<sup>60</sup> Partly dissenting opinion of Judge Martens in the *Kokkinakis* case, § 14.

<sup>61</sup> See : Arvind Sharma, *op. cit.*, p. 80.

<sup>62</sup> Tad Stahnke, *op. cit.*, p. 628: "in certain countries, the treatment of apostasy overshadows and determines that of proselytism." Nazila Ghanea, "Apostasy and Freedom to Change Religion or Belief". In Tore Lindholm, Cole W. Durham, Bahia Tahzib-lie et al. (dir.), *op. cit.*, p. 669: "Some groups are so opposed to the risk of apostasy that they become intolerant of any kind of proselytizing effort."

<sup>63</sup> On this topic, see : « [Musulman converti : il fuit le Maroc pour être baptisé](#) », RCF, 11 February 2021.

<sup>64</sup> Quoted in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, 2001, p. 155.

<sup>65</sup> Tad Stahnke, *op. cit.*, pp. 618-622.

the one hand, and politics and law, on the other. The same is true of the prohibition of apostasy or blasphemy.<sup>66</sup>

More generally, the exchange of religious ideas, which allows people to exercise their freedom to change their religion, must be protected by law in a democratic society, characterised by tolerance, pluralism and openness, according to the European Court. For this reason, according to Professor Safi, proselytising can be seen not as a threat but “*as a sign of progress and democratic exchange.*”<sup>67</sup>

## **B- Proselyte abuses may be punished by other criminal offences, adapted to each situation**

While it is legitimate to restrict abusive methods of influence, it is not fair to achieve this objective by targeting believers. Thus, according to Judge Martens, “*even in cases of coercion for religious purposes ... there is no justification ... for making coercion in the religious sphere per se a criminal offence.*”<sup>68</sup> Indeed, in order not to discriminate on the basis of conviction or religion, the guilty party to such coercion must be prosecuted, according to Judge Martens, on the basis of ordinary criminal law provisions, not targeting the religious motive for such coercion. However, the Greek law of 1938 mentions certain questionable methods of influence, but penalises them only when the objective is religious proselytising.<sup>69</sup>

In fact, other judges of the Court, on the contrary, revealed their anti-religious bias, basing their support for the Greek law of 1938 on prejudice. Thus, Justices Foighel and Loizou criticised “*the persistent efforts of some fanatics to convert others to their beliefs...*”<sup>70</sup> For his part, Judge Valticos described Mr. Kokkinakis, the applicant in the case of the same name, as a contemptuous “*militant follower of Jehovah's Witnesses, a hard-boiled proselytizer, a specialist in conversion, a martyr in correctional institutions, whose previous convictions had only hardened his militancy (...), [a] skillful promoter of a faith which he wished to spread, [exposing] his intellectual merchandise*”.<sup>71</sup> For this judge, Greek law should therefore protect his “*dream victim, a naive woman, wife of a singer of the Orthodox Church*” with a “*simple soul.*”<sup>72</sup>

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<sup>66</sup> See on this topic : Grégor Puppink, « Blasphémer : un droit de l’homme ? », in Ludovic Danto et Cédric Burgun (dir.), *Le blasphème : Le retour d’une question juridique oubliée entre droits sacrés et droits civils*, Artège Lethielleux, 2020, [available online](#).

<sup>67</sup> Farah Safi, « Propos introductifs », *op. cit.*, p. XII.

<sup>68</sup> Partly dissenting opinion of Judge Martens in the Kokkinakis case, § 17.

<sup>69</sup> Article 4 § 2 of the law no. 1363/1938: “*either by any kind of benefit or promise of benefit or moral or material help, or by fraudulent means, or by abusing his inexperience or confidence, or by taking advantage of his need, his intellectual weakness or his naivety*”.

<sup>70</sup> Joint dissenting opinion of Judges Foighel and Loizou in the Kokkinakis case.

<sup>71</sup> Dissenting opinion of Judge Valticos in the Kokkinakis case.

<sup>72</sup> *Ibid.*

In the present case it was Mr. Vamvoukas whom the Greek courts had sought to protect from the influence of his neighbour, the applicant, by applying the 1938 Act. However, many other provisions of ordinary criminal law, not only applying to believers, might make it possible to protect Mr. Vamvoukas, in so far as that was necessary. For example, did Mr. Damavolitis' influence have an impact on Mr. Vamvoukas' choice to commit suicide? Did he abuse his weakness? Mr. Vamvoukas explains that no, saying that the religion Mr. Damavolitis promoted prompted him not to commit suicide. However, this cannot be judged by applying a law criminalising religious proselytising. Some provisions that do not target religion are sufficient. For example, the Greek legislator has made it a criminal offence to incite others to commit suicide.<sup>73</sup> The fact that a suicide or attempted suicide is caused by a believer or non-believer, of a majority or minority religion, should not lead to a difference in treatment.

Judge Pettiti has already considered various areas of law that can be used to penalise the abuse of proselytising believers without targeting them because of the religious content of their message. The aim is to make it possible to repress these abuses more effectively and fairly. Thus, he explains: "*Criminal policy could be conducted using the specific incrimination technique targeting acts of coercion and the activity of certain sects that genuinely infringe on the freedom and dignity of the person. The protection of minors may be the subject of specific penal provisions. The protection of adults can be ensured by tax and social legislation, by common law in terms of misleading advertising, failure to assist persons in danger, assault and battery (even physical), whether intentional or through negligence.*"<sup>74</sup> He completed as follows: "*Other inadmissible behaviours such as brainwashing, violations of labour law, violations of public health, incitement to debauchery, which are found in the practices of certain pseudo-religious groups, must be sanctioned in positive law by the qualifications of ordinary criminal law*".<sup>75</sup>

The same objectives can thus be achieved with precise and non-discriminatory legal tools. Exceptionally, provisions may penalise the expression of a message not because of its religious character, but on the basis of its content, whether or not based on religion. The European Court thus accepts that speech inciting hatred should be punished,<sup>76</sup> as well as racist comments and messages,<sup>77</sup> negationists,<sup>78</sup> antisemitic<sup>79</sup> or homophobic.<sup>80</sup> Such sanctions, because of the very content of these speeches and in the absence of a direct victim, are debatable and discussed. Some see these sanctions, when they are abusive, as a kind of excommunication of those who

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<sup>73</sup> Greek Penal Code, Article 301: "*Whoever persuades another to commit suicide, if the suicide has been committed or attempted, as well as whoever has provided assistance in its execution, which otherwise would not have been possible, shall be punished by imprisonment.*"

<sup>74</sup> Partly concurring opinion of Judge Pettiti in the *Kokkinakis* case.

<sup>75</sup> *Ibid.*

<sup>76</sup> See : *Féret v. Belgium*, no. 15615/07, 16 July 2009.

<sup>77</sup> See : *Glimmerveen and Hagenbeek v. Netherlands* (dec.), nos. 8348/78 et 8406/78, 11 October 1979.

<sup>78</sup> See : *D.I. v. Germany* (dec.), no. 26551/95, 26 June 1996.

<sup>79</sup> See : *Pavel Ivanov v. Russia*, no. 35222/04, 20 February 2007.

<sup>80</sup> See : *Vejdeland and others v. Sweden*, no. 1813/07, 9 February 2012.

do not share a sacred ideal of "living together".<sup>81</sup> While it is not legitimate to prohibit proselytising in favour of a "majority religion", reproducing the same approach in favour of an ersatz of a civil "majority religion" can be just as damaging to freedoms. In both cases, freedom of expression and freedom of religion must be protected even when their exercise is not in line with the dominant *Weltanschauung*.

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<sup>81</sup> Grégor Puppink, « Blasphémer : un droit de l'homme ? », *op. cit.*, p. 12.