

RELIGIOUS LIBERTY AND PROTECTIONS IN EUROPE

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INTRODUCTION

In his remarkably perceptive book, *CAN GOD AND CAESAR COEXIST? BALANCING RELIGIOUS FREEDOM AND INTERNATIONAL LAW*, Father Robert F. Drinan (“Fr. Drinan”) is critical of the decisions of the European Court of Human Rights (“ECHR”) for its lack of deference to the free exercise claims of petitioners to the Court.¹ As a partial answer, he questions whether an international mechanism could better resolve claims of violations of religious liberty.

The failure of the ECHR to address more sensitively infringement of religious liberty is symptomatic of the increasing secularization of Europe, particularly the so-called Old Europe, best exemplified by France, Spain, and Italy. The ECHR has found secularism to be consistent with values underpinning the European Convention on Human Rights and Fundamental Freedoms (“ECHRFF”), in harmony with the rule of law and respect for human rights, and may be necessary to protect a democratic system.²

Despite strong opposition from church leaders in traditionally Catholic countries, Italy enacted legislation permitting abortions in 1978,³ and Spain recently enacted the

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¹ ROBERT F. DRINAN, S.J., *CAN GOD & CAESAR COEXIST? BALANCING RELIGIOUS FREEDOM AND INTERNATIONAL LAW* 86–95 (2004).

² *Leyla Şahin v. Turkey* [GC], 44774 Eur. Ct. H.R. 98, ¶ 114 (2005) available at <http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=1132746FF1FE2A468ACCBCD1763D4D8149&key=17671&sessionId=5786516&skin=hudoc-en&attachment=true>.

³ Gazz. Uff. May 22, 1978, No. 140; see also *Abortion, Contraception, and Maternity Protection*, 29 INT’L DIG. OF HEALTH LEGIS. 589 (1978). The “abortion

most far-reaching legislation in Europe legalizing gay marriage.⁴ Similarly, Ireland, with its strong traditional Catholic population and a Constitution enacted “In the Name of the Most Holy Trinity,”⁵ recognized divorce through a referendum in 1995,⁶ despite a personal plea by the immensely popular Pope John Paul II for its defeat.⁷ In 1995, Ireland also liberalized its laws on sodomy,⁸ and earlier had provided for abortion in limited instances,⁹ despite the efforts of the Church to the contrary.

legalization statute” provides that abortion is legal through the first 90 days of pregnancy, the costs of which are covered by the national health care system. Passed in 1978, a Vatican-backed referendum in 1981 failed to overturn the law. See generally Mary E. Canoles, Comment, *Italy’s Family Values: Embracing the Evolution of Family To Save the Population*, 21 PENN ST. INT’L L. REV. 183, 185–86 (2002).

⁴ See Samuel Loewenberg, *As Spaniards Lose Their Religion, Church Leaders Struggle to Hold On*, N.Y. TIMES, June 26, 2005, at 44. Legislation legalizing same-sex marriage was passed by the Spanish Parliament (Cortes) on June 30, 2005 and officially became legal on July 3, 2005.

⁵ IR. CONST., 1937, pmbl., available at <http://www.taoiseach.gov.ie/upload/static/256.pdf>.

⁶ *Id.* Fifteenth Amendment of the Constitution Act, 1995 (“provide[s] for the dissolution of marriage in certain specified circumstances”). The Family Law (Divorce) Act, 1996, available at <http://www.irishstatutebook.ie/ZZA33Y1996.html>, regulates items such as the grants of decree of divorce and custody (Part II) and income tax treatment of divorced persons (Part IV).

⁷ Daniel Williams, *Pope’s Influence Fails To Match His Popularity; Many European Catholics Are Tuning Him Out*, WASH. POST, Dec. 7, 1995, at A34 (Pope John Paul II urges the Irish “to reflect on the importance for society of the indissoluble character of the marriage bond”).

⁸ Ireland, Criminal Law Amendment Act, 1885, [48 & 49 Vict. c. 69], § 11. Ireland’s sodomy law was repealed in *Norris v. Ireland*, (6/1987/129/180) (Oct. 26, 1988), available at <http://hrw.org/lgbt/pdf/norris.pdf>, following the case of *Dudgeon v. United Kingdom*, 7525/76 (Oct. 22, 1981), available at <http://www.worldlii.org/eu/cases/ECHR/1981/5.html>, after it was found that sodomy laws violated the right to privacy under the European Convention on Human Rights and Fundamental Freedoms. See National Lesbian and Gay Law Association Testimony for Sodomy Law Reform, <http://www.sodomylaws.org/usa/dc/dctestimony16.htm> (last visited Mar. 17, 2006).

⁹ IR. CONST., 1937, Eighth Amendment of the Constitution Act, 1983 (“[a]cknowledge[s] the right to life of the unborn, with due regard to the equal right to life of the mother”), available at <http://www.taoiseach.gov.ie/upload/static/256.pdf>; *Id.* Thirteenth Amendment of the Constitution Act, 1992 (“provide[s] that Article 40.3.3° (the right to life of the unborn) would not limit freedom to travel between Ireland and another state”); *Id.* Fourteenth Amendment of the Constitution Act, 1992 (“provide[s] that Article 40.3.3° . . . would not limit freedom to obtain or make available information relating to services lawfully available in another state”). Theoretically, abortion is legal in Ireland if there is a risk to the life of the mother. However, the body that holds medical licenses in Ireland considers it malpractice for any doctor to perform an abortion.

While secularism is less apparent in some countries of Central Europe such as Poland, the increased influence of the church since the dissolution of the Soviet Union is often attributed to nationalist factors. In Central and Eastern Europe, religion was suppressed under the Soviet domination, and restriction on all religions was a major aspect of the oppression. The Catholic Church was central in the struggle to overturn oppressive Soviet rule, and as the nation gained its independence, the Church emerged as a political and moral force in Polish society.¹⁰ Religion and religious freedom were couched in nationalist overtones. Thus, it has been argued in Eastern Europe that religious freedom is more a collective issue than an individual issue. Religion is one aspect of the ability of the people to regain their national character.¹¹ The western concept of religious liberty, on the other hand, is based on the Eighteenth Century Enlightenment model and is premised on individual rights asserted against an oppressive government and church. It was embodied in the slogan “Liberty, Equality and Fraternity” with a strong emphasis on liberty of the individual.

Church-state relations in Europe range from systems with an established Church, such as England and Greece, to systems of government with a constitutional commitment to secularism, such as France and Turkey. However, the formal relationship between church and state in each of the European states does not necessarily determine the latitude that the state will allow to free exercise of religion claims.

As Europe becomes more secular and less deferential to religious teachings, there is a tendency for states to devalue free exercise claims in the interests of a secular state.¹² The ECHR,

¹⁰ KAREL BLEI, FREEDOM OF RELIGION AND BELIEF: EUROPE’S STORY 146 (Royal Van Gorcum 2002) (“Roman Catholic leaders used to protest openly against violation or curtailment of the Church’s rights . . . where [it] was considered the *guardian of the nation*.”) (emphasis added).

¹¹ Karel Blei, Keynote Presentation at the World Congress of the International Association for Religious Freedom: Religious Freedom, The Basis of All Freedom (July 30, 2002), available at http://www.iarf.net/AboutUs/Congress2002/co_Blei.html.

¹² Similarly, in the United States, as the wall of separation between Church and state has become more rigid, free exercise rights have collided with establishment principles, often giving way to a more robust interpretation of the establishment clause to the detriment of free exercise claims. See generally Thomas A. Schweitzer, *The Supreme Court Rules in Favor of Religious Club’s Right To Meet on Public School Premises: Is This “Good News” for First Amendment Rights?*, 18 *TOURO L.*

in reviewing claims of infringement of religious liberty under Article 9 of the ECHRFF, has generally allowed each state a wide margin of appreciation when issues of religion are involved. Further, the role of national decision-making bodies are given special importance.¹³ This principle will be examined in the context of national legislation regulating newly-formed religions and restricting the wearing of religious garb.

In his book, Fr. Drinan has suggested that an international forum might be utilized to examine claims of infringement of religious liberty.¹⁴ However, while there has been a proliferation in the last decades of international tribunals and international mechanisms to resolve disputes, it is questionable whether such a mechanism is the optimum method to resolve disputes concerning religious liberty in Europe. The principle of subsidiarity, which is counter to hierarchical decision-making, is very much a part of the European tradition and the ECHR, through its margin of appreciation doctrine, reflects national cultures and values. While the Court has repeatedly asserted that it is the ultimate arbiter of guarantees in the ECHRFF, perhaps it is this flexibility that has made the European Court of Human Rights the most effective Court for the protection of human rights.¹⁵

CHURCH-STATE RELATIONS IN EUROPE

The history of religious freedom in Europe is remarkably brief. In most parts of Europe, individual freedom of worship did not exist, at least formally, from the suppression of non-Christian worship with the Theodosian decrees of 378 AD until the Enlightenment of the 18th century.¹⁶ In Western Europe during

REV. 127 (2001).

¹³ Leyla Şahin v. Turkey [GC], 44774 Eur. Ct. H.R. 98, ¶ 109 (Nov. 10, 2005), available at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=1132746FF1FE2A468ACBCD1763D4D8149&key=17671&sessionId=5786516&skin=hudoc-en&attachment=true>; see *infra* notes 183–88 and accompanying text (discussion of margin of appreciation doctrine).

¹⁴ See DRINAN, *supra* note 1, at 5–6, 36–37, 41–43, 47.

¹⁵ See generally Mark W. Janis, *The Efficacy of Strasbourg Law*, 15 CONN. J. INT'L L. 39 (2000).

¹⁶ See Wilhelm Pauck, *The Christian Faith and Religious Tolerance*, 15 CHURCH HIST. 220, 220–24 (1946). Some scholars argue that a semblance of respect for the freedom of religion and conscience in Europe dates back at least to the thirteenth century. See Lance S. Lehnhof, *Freedom of Religious Association: The Right of Religious Organizations To Obtain Legal Entity Status Under the European*

most of the Middle Ages, Roman Catholicism was the official religion and was practiced by the rulers and almost all of their subjects. Other religious practices were deemed heresy. During this period, the infamous crusades were launched and Jews particularly suffered from various restrictions and repeated repression.¹⁷

Following the Reformation, Wars of Religion erupted in many European countries between Catholic and Protestant factions. In most feudal countries, the religion of the ruler was the official religion under the principle of *cuius regio eius religio*.¹⁸ The Treaty of Westphalia of 1648 put an end to the Wars of Religion while providing for guarantees of religious freedom for religious minorities.¹⁹ However, it reinforced the notion that each state would have an established religion, namely that of the sovereign.

In 1789, the French Revolution brought about a dramatic change in the perception of religious freedom and separation of church and state was viewed as a necessary component of democracy and liberty. The *Declaration of the Rights of Man and of the Citizen*²⁰ was greatly influenced by developments in the United States and by the principles embodied in the Declaration of Independence.²¹ However, religious tolerance and pluralism

Convention, 2002 BYU L. REV. 561, 581 n.84 (2002) (citing T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 306–07 (Johan D. van der Vyver & John Witte, Jr. eds., 1996)).

¹⁷ See generally EDWARD H. FLANNERY, *THE ANGUISH OF THE JEWS* (1965) for a discussion of anti-Semitism in the Greek and Roman Empires and the development of certain policies of tolerance. Flannery asserts that religious tensions date back to the early years of the Roman Empire as the Jews and the Christians, each in turn, struggled to gain recognition as *religio licita*. Before the Christian era began, Judaism was recognized as the only “*religio licita* in the empire save the imperial cult itself.” *Id.* at 16–17.

¹⁸ See Edward J. Eberle, *Roger Williams on Liberty of Conscience*, 10 RODGER WILLIAMS U. L. REV. 289, 308 (2005).

¹⁹ See *id.* A notable exception is King Henry IV of France: He demonstrated his religious tolerance by converting from Protestantism to Catholicism, see JACOB BURCKHARDT, *JUDGMENTS ON HISTORY AND HISTORIANS* 152–53 (Harry Zohn trans., 1999), and guaranteed limited freedom for Protestants by signing the Edict of Nantes in 1598 (later repealed by his grandson Louis XIV), see Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 INT’L J. REFUGEE L. 238, 239 (2002).

²⁰ Available at <http://www.justice.gouv.fr/anglais/europe/addhc.htm>.

²¹ Nine of the original thirteen colonies maintained government-sponsored churches and state-established religions. LEONARD W. LEVY, *THE ESTABLISHMENT*

did not make great gains in Western Europe until after World War II, and in Eastern Europe not until after the demise of the Soviet Union.²²

The United States, on the other hand, comprised of persons coming from diverse religious traditions, and in some instances fleeing religious persecution, rejected the concept of established religion and instead provided in its Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]”²³ It is therefore ironic that Europe is becoming more secular in its approach while the United States is embracing faith-based initiatives and a closer cooperation between church and state.²⁴

Recent polls indicate that just under 21% of Europeans believe that religion plays a “very important role” in their lives, compared to 60% of Americans.²⁵ Unlike the United States with its Washington prayer breakfasts and various other religious ceremonies in public life, most countries in Europe prefer to keep religious rituals outside of the rituals of government.

The debate over whether a reference to God or Christianity should be included in the recent draft of the Constitution for the European Union²⁶ sparked a debate on both sides of the Atlantic.

CLAUSE: RELIGION AND THE FIRST AMENDMENT 1–11 (2d ed. 1994).

²² Peter Juviler, *Freedom and Religious Tolerance in Europe*, 24 MICH. J. INT’L L. 855, 859 (2003) (reviewing PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE (Peter G. Danchin & Elizabeth A. Cole eds., 2002)).

²³ U.S. CONST. amend. I. The Constitution also bans religious tests for public office. U.S. CONST. art. VI, cl. 3.

²⁴ See Thomas Bray, *The Pope vs. Dictatorship of Relativism*, N.Y. SUN, Apr. 27, 2005, at 9.

Catholicism may be paying a price for having been the officially established church in many European countries. Thinking it had a monopoly on religion, it grew fat, careless and corrupt, leading to a severe reaction against all religion – unlike in the United States, where religion has mostly been a private matter and intense competition among churches is the rule.

Id. The White House Office of Faith-Based and Community Initiatives, created by Executive Order 13199 and enacted on January 29, 2001, is charged with strengthening the partnership between the Federal government and faith-based and community groups. President George W. Bush also created Centers for Faith-Based and Community Initiatives in ten cabinet departments in subsequent executive orders.

²⁵ Loek Halman, *The European Values Study: A Third Wave*, at 12 (EVS WORC Tilburg University 2001), available at http://spitswww.uvt.nl/web/fsw/evs/documents/EVS_SourceBook.pdf; PewResearchCenter, *Pew Global Attitudes Project*, <http://pewglobal.org/reports/display.php?ReportID=167>.

²⁶ Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) [hereinafter “EU Const. Treaty”], available at <http://europa.eu.int/eur-lex/>

At the end of his term as President of the Commission of the European Union in 1994, Jacques Delors called on churches in Europe to discuss the question of what is Europe's "Heart and Soul."²⁷ In contrast, the preamble to the draft of the Constitution as originally proposed by Valery Giscard d'Estaing, the principle draftsman of the draft Constitution, "specified that Europe's inheritance was 'nourished first by the civilizations of Greece and Rome, characterised by spiritual impulse always present in its heritage and later by the philosophical currents of the Enlightenment.'"²⁸ He stated that the constitution is intended to numerate the values adhered to by all the component parts of the European Union.²⁹

Because of the objections raised by the Vatican and numerous politicians and intellectuals,³⁰ the key sentence of the preamble was revised and now acknowledges that inspiration is drawn from "the cultural, religious and humanist inheritance of Europe" and defines Europe as a "continent open to culture, learning and social progress[.]"³¹

On the one hand, there is support from the mostly Catholic countries, including Ireland, Italy, and Poland, for a more specific recognition of Europe's religious roots. These states support a Christian or Judeo-Christian reference in the preamble. On the other hand, there is a conviction, held most tenaciously by France and Belgium, that church and state must be totally separate. Quite simply, religion does not belong in the fundamental governing document of the relations of European countries.³²

lex/JOhtml.do?uri=OJ:C:2004:310:SOM:EN:HTML. Although many refer to the text as either a constitution or a draft constitution, it is technically more accurate to describe it as a constitutional treaty.

²⁷ *More Heart and Soul Needed in European Integration, Says Delors*, EUR. REP., No. 1987, Oct. 26, 1994; see also Blei, *supra* note 11.

²⁸ John Coughlan, *God and Caesar in the New Europe*, AMERICA: THE NAT'L CATH. WKLY., Aug. 4, 2003, <http://www.americamagazine.org/gettext.cfm?articleTypeID=1&textID=3085&issueID=446>.

²⁹ Elizabeth F. Defeis, *A Constitution for the European Union? A Transatlantic Perspective*, 19 TEMP. INT'L & COMP. L.J. 351, 380 n.241 (2005).

³⁰ Coughlan, *supra* note 28.

³¹ EU Const. Treaty, *supra* note 26, at pmb1.

³² Defeis, *supra* note 29, at 381; Richard Bernstein, *Letter from Europe: Continent Wrings Its Hands Over Proclaiming Its Faith*, N.Y. TIMES, Nov. 12, 2003, at A4; Kenneth L. Woodward, *An Oxymoron: Europe Without Christianity*, N.Y. TIMES, June 14, 2003, at A15.

The Preamble of the Constitution of the United States is much simpler and straightforward. The drafters were determined that religious differences not impede the adoption of a new Constitution and thus, God is not mentioned in the preamble or the Constitution itself. The Preamble starts with the statement “We the People[,]” thus affirming sovereignty in the people and sets forth the purposes of the Constitution: “to form a more perfect Union, establish [j]ustice, insure domestic [t]ranquility, provide for the common defence, promote the general [w]elfare, and secure the [b]lessings of [l]iberty[.]”³³ The religion clauses of the First Amendment prohibit the establishment of religion and guarantee free exercise. They are augmented by the provision prohibiting religious tests for public offices.³⁴

Pope Benedict XVI’s disappointment with the failure to mention Christian roots in the preamble to the EU Constitution is discussed in *The Europe of Benedict in the Crisis of Cultures*.³⁵ Pope Benedict states, “Europe has developed a culture which excludes God from the public conscience in a way never before known to humanity[.]”³⁶ He argues, “Europe is trying to build its future on an ideal of freedom which contains many contradictions and which pushes religion into the private sphere, where it has no relevance.”³⁷

The interaction between the churches and the European Union is set forth in the draft Constitution as follows:

- (1) The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
- (2) The Union equally respects the status under national law of philosophical and non-confessional organisations.
- (3) Recognising their identity and their specific contribution, the

³³ U.S. CONST. pmbl.

³⁴ *Id.* amend. I; *see supra* note 23. “[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” U.S. CONST. art. VI, cl. 3.

³⁵ *Pope Says Europe Is Getting Confused About Freedom*, ANSA English Media Service, Rome, Italy, June 22, 2005 (citing POPE BENEDICT XVI, *THE EUROPE OF BENEDICT IN THE CRISIS OF CULTURES* (Editrice Vaticana 2005)).

³⁶ *Id.*

³⁷ *Id.*

Union shall maintain an open, transparent and regular dialogue with these churches and organisations.³⁸

While the first two paragraphs restate a declaration attached to the 1997 Treaty of Amsterdam,³⁹ the third is an innovation that recognizes the important contribution of churches and encourages dialogue between the European Union and churches.

The delicate relationship between both well-established churches, such as the Roman Catholic Church, and emerging religious movements, such as sects and minority belief systems, and the state usually falls into one of three categories⁴⁰: A) national church systems (e.g. England, Denmark, Greece); B) concordatarian⁴¹ or systems of separation and cooperation (e.g. Germany, Belgium, Spain, Italy, Poland, Portugal); or C) separate or secular (e.g. France, the Netherlands, Ireland). However, the formal relationship does not necessarily determine the degree of deference that the state accords to religious practices.

A. *Established Religion and Church/State Relations*

An established church or state religion is a religious body or creed officially endorsed by the state. The support of an established church varies from mere endorsement or financial support with freedom for others to practice, to the prohibition on other church operations and persecution of adherents of other churches. In Europe, Catholic and Protestant denominations vied for state sponsorship, and in the sixteenth century, the principle of *cuius regio eius religio* was included in the treaty that marked the Peace of Augsburg in 1555.⁴² Thus, the religion

³⁸ EU Const. Treaty, *supra* note 26, at 36 (Art. I-52).

³⁹ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter Amsterdam Treaty], available at <http://europa.eu.int/eur-lex/lex/en/treaties/dat/11997D/htm/11997D.html>.

⁴⁰ Silvio Ferrari, *The Emerging Pattern of Church and State in Western Europe: The Italian Model*, 1995 BYU L. REV. 421, 421 (1995); see also Alenka Kuhelj, *Religious Freedom in European Democracies*, 20 TUL. EUR. & CIV. L.F. 1, 15–16 (2005).

⁴¹ Ferrari, *supra* note 40, at 421 n.1. Concordats are formal agreements between church and state. Many scholars agree that concordats afford stronger protection to churches than state laws as they are given the same weight of authority as international treaties.

⁴² See Gerhard Robbers, *The Permissible Scope of Legal Limitations on the*

of the sovereign was deemed the religion of the state although a degree of religious liberty was allowed for other religions.

Today, most European countries have disestablished the state Church. For example, the Roman Catholic Church was disestablished in Austria in 1918, in Spain in 1978, and in Italy in 1984.⁴³ Ireland disestablished the Church of Ireland (Anglican) in 1871.⁴⁴ With the fall of the communist regime, countries in Central and Eastern Europe have redefined the relationship between Church and state, and not a single state has adopted the established Church model.⁴⁵

In Europe, the established church can be illustrated by the Church of England which is the official Christian church in England. It also acts as the senior branch of the worldwide Anglican community. Although the British Monarch has the title of "Supreme Governor" of the Church of England, in practice, effective leadership is vested in the Archbishop of Canterbury.⁴⁶ The Church of England does not receive any direct government support but relies on donations and on the income from its various public endorsements. However, the government does provide some support, such as tax relief for renovations of religious buildings. Religious groups need not register with the government, but, since the advancement of religion is considered to be a charitable function, they are classified as charities and as such enjoy a wide range of tax benefits. State funding is provided for approximately 7,000 so-called "faith schools" which are, for the most part, Anglican, Catholic, or Methodist schools, although the government has also funded Muslim, Sikh, Greek Orthodox, and Seventh Day Adventist schools.⁴⁷

Freedom of Religion or Belief in Germany, 19 EMORY INT'L L. REV. 841, 868–69 (2005).

⁴³ Reference.com, State Religion, http://www.reference.com/browse/wiki/state_religion (last visited November 5, 2006).

⁴⁴ *Id.*

⁴⁵ Silvio Ferrari, *Conclusion, Church and State in Post-Communist Europe*, in LAW AND RELIGION IN POST-COMMUNIST EUROPE 414 (Silvio Ferrari, W. Cole Durham, Jr. eds., Peeters 2003).

⁴⁶ BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2005: UNITED KINGDOM (Nov. 8, 2005), available at <http://www.state.gov/g/drl/rls/irf/2005/51589.htm> [hereinafter STATE DEP'T, U.K. REPORT]; see James W. Torke, *The English Religious Establishment*, 12 J.L. & RELIGION 399, 411–12, 416–17, 421, 435 n.174 (1995–1996).

⁴⁷ STATE DEP'T, U.K. REPORT, *supra* note 46. Religious education in publicly maintained schools is mandated and syllabi are required to reflect the predominant

In the public service, the British government seeks to accommodate religious practices. For example, the Prison Service permits Muslim employees to take time off during their shifts to pray.⁴⁸ However, new sects, such as the Church of Scientology, “[do] not come within the charity law definition of a religion[,]” and thus the Prison Service does not facilitate prison visits by their ministers.⁴⁹ However, prisoners may practice their religion consistent with good order and discipline.⁵⁰

While the fact that the Church of England is an established church appears to have little or no effect in terms of infringement on the exercise of other religions, Greece, which recognizes the Eastern Orthodox Church of Christ as the state religion, has encountered difficulties, particularly with respect to its ban on proselytizing⁵¹ and its regulation of places of worship.⁵² Legal and administrative burdens are placed on non-Orthodox religious organizations. For example, in order to establish a “house of prayer” for religions other than the Orthodox Church, Judaism, or Islam, the Civil Code’s provisions pertaining to corporations must be complied with.⁵³

In Greece, as in the United States, the parameters of religious freedom are often developed in the context of the activities of Jehovah’s Witnesses.⁵⁴ In *Kokkinakis v. Greece*,⁵⁵ Kokkinakis was convicted of proselytism because he went to the home of the wife of the local Greek Orthodox Center cantor and

place of Christianity. However, the teachings and practices of other principle religions in the country must be taken in account and the syllabi must be non-denominational and must not attempt to convert students.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 1975 Syntagma [SYN] [Constitution] art. 13(2) (Greece); see *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 11 (1993); BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2005: GREECE (Nov. 8, 2005), <http://www.state.gov/g/drl/rls/irf/2005/51555.htm> [hereinafter STATE DEP’T, GREECE REPORT]; see also Adam M. Smith, *The Perplexities of Promoting Religious Freedom Through International Law: A Review of Robert Drinan’s Can God and Caesar Coexist?*, 30 N.C. J. INT’L L. & COM. REG. 733, 754 (2005) (book review) (demonstrating that “[m]ore than employing a narrow interpretation of religious freedom, the ECHR has, at times, been inordinately hostile to religious dissenters claiming violations of their rights”).

⁵² STATE DEP’T, GREECE REPORT, *supra* note 51.

⁵³ *Id.*

⁵⁴ See, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁵⁵ 260 Eur. Ct. H.R. (ser. A) at 7 (1993).

told her about the Jehovah's Witnesses. There was no evidence that she was particularly vulnerable or that her religious views were affected in any way. Greek law defines proselytizing as:

in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (eterodoxos), 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 naïvety.⁵⁶

The ECHR held that although there was a right to proselytize, the state could prohibit "improper proselytism" since its aim was the "protection of the rights and freedoms of others."⁵⁷ The Court held that there was a right to try to convince others of one's religious beliefs because otherwise the freedom to change one's religion "would be likely to remain a dead letter."⁵⁸ The Court acknowledged the existence of a margin of appreciation under European supervision and held that the aim of the Greek legislation in seeking to prohibit "improper proselytism" was a proper purpose because its aim was the protection of the rights and freedoms of others.⁵⁹ However, the means adopted by Greece were not necessary in a democratic society.

B. Cooperative Church-State Relations

Cooperation between Church and state in Europe is sometimes expressed through a Concordat or agreement between the civil authorities and a religious organization. The best known and most widely-discussed is the Concordat agreed to by the Catholic Church and the Italian government.

Prior to the adoption of the Italian Constitution in 1947, relations with the Catholic Church in Italy were governed by the Lateran Treaty or Concordat of 1929, which recognized Catholicism as the state religion and the independence of Vatican

⁵⁶ *Id.* at 16 (citing Greek Law 1672/1939).

⁵⁷ *Id.* at 44, 48.

⁵⁸ *Id.* at 31.

⁵⁹ *Id.* at 47–50; see also Natan Lerner, *How Wide the Margin of Appreciation? The Turkish Headscarf Case, the Strasbourg Court, and Secularist Tolerance*, 13 WILLAMETTE J. INT'L L. & DISPUTE RES. 65, 81–82 (2005).

City.⁶⁰ In 1984, the Concordat was amended and, although it formalized the principle of a secular state, it nonetheless accorded the Roman Catholic Church certain privileges.⁶¹ For example, Catholic teachers, paid by the state, are selected by the Church to provide instruction in “hour of religion” classes taught in the public schools.⁶² An “intesa” or accord can also be entered into by non-Catholic confessions which grant certain privileges, such as funding through taxpayers check offs and providing “ministers of religion” with “automatic access to state hospitals, prisons, and military barracks.”⁶³ Such intese were entered into between the State and the Waldesian Church (1984), Adventists and Assembly of God (1988), Jews (1989), and Baptists and Lutherans (1995).⁶⁴

⁶⁰ Lateran Treaty, Italy-Vatican, Feb. 11, 1929, O.V.T.S. 161, Eur. T.S. No. 590019.

⁶¹ See Gazz. Uff., Supplemento Ordinario, No. 85, Apr. 10, 1985; Acta Apostolicae Sedis, Vol. LXXVII, No. 6, (June 3, 1985), Art. 9; Agreement to Amend the 1929 Lateran Concordat, Italy-The Holy See, art. 9, Feb. 18, 1984, 24 I.L.M. 1589, 1589–97 (1985). The agreement between the Italian Republic and the Holy See to amend the 1929 Lateran Concordat, signed on Feb. 18, 1984, was ratified on June 3, 1985 and approved by the Italian Parliament into law (no. 121) on March 25, 1985. *Id.* at 1589; see generally BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2005: ITALY (Nov. 8, 2005), available at <http://www.state.gov/g/drl/rls/irf/2005/51560.htm> [hereinafter STATE DEP’T, ITALY REPORT].

⁶² STATE DEP’T, ITALY REPORT. The Agreement further states:
In relation to Article 9:

- (a) The teaching of Catholic religion in the schools indicated at Paragraph (2) shall be given—in conformity with the doctrine of the Church and with respect for the freedom of conscience of the pupils—by the teachers who are recognized by the ecclesiastical authority as being qualified thereto and who are appointed, in agreement therewith, by the school authority.

In infant and elementary schools, this teaching may be given by the class teacher, if recognized by the ecclesiastical authority as being qualified thereto and if willing to do it.

- (b) By means of a subsequent understanding between the competent school authorities and the Italian Bishops Conference, it shall be determined:

- (1) the teaching prospectus of Catholic religion in public schools of every order and grade;
- (2) the organization of this teaching, also with respect to its position in the school time table;
- (3) the criteria for selecting the textbooks;
- (4) the requirements of professional qualification for the teachers.

Agreement to Amend the 1929 Lateran Concordat, *supra* note 61, at 1597.

⁶³ See STATE DEP’T, ITALY REPORT, *supra* note 61; see also Law No. 1159 [on Non-Catholic Religions Permitted Within the State] and Implementation Decree No. 289, June 24, 1929, available at <http://www.religlaw.org/template.php?id=82>.

⁶⁴ STATE DEP’T, ITALY REPORT, *supra* note 61.

Since the fall of Communism, other countries, such as Poland, have chosen the bi-lateral route to govern relations between church and state. Relations between the Catholic Church and Poland are regulated by the Concordat of 1993, signed by the Holy See and Poland and ratified in 1998.⁶⁵ The government and the Catholic Church meet regularly to discuss Church-state relations.⁶⁶ While the Constitution provides for “freedom of conscience and religion . . . to everyone,”⁶⁷ the Catholic Church has continued to play a major role in Polish society and politics, and in many respects Polish national identity derives from Catholicism. Indeed, in line with Catholic teachings and despite the pro-choice stance of the EU, Poland has passed one of the most restrictive abortion laws in the European Union.⁶⁸

C. *The Secular State and Church/State Relations*

The separate or secular state is exemplified by France. After a turbulent history of religious oppression, France defined itself as a secular state in the French Law of 1905.⁶⁹ The Law provides: “The Republic ensures the liberty of conscience. It guarantees the free exercise of religion, under restrictions prescribed by the interest in public order [and] . . . does not recognize, remunerate, or subsidize any religious denomination.”⁷⁰

“Laïcité,” a uniquely French principle, is difficult to define but generally summarizes the prevailing beliefs regarding the proper relationship between the French state and religion.⁷¹ One

⁶⁵ Concordat, Pol-The Holy See, July 28, 1993, signed by Mr. K. Skubiszewski, Minister for Foreign Affairs of the Republic of Poland and the Reverend J. Kowalczyk, the Apostolic Nuncio, in Warsaw.

⁶⁶ Krystyna Daniel, *The Church-State Situation in Poland After the Collapse of Communism*, 1995 BYU L. REV. 401, 409–10 (1995).

⁶⁷ CONST. OF THE REPUBLIC OF POLAND art. 53, sec. 1, available at <http://www.sejm.gov.pl/prawo/konst/angielski/konse.htm> (last visited Mar. 17, 2006).

⁶⁸ See Alicia Czerwinski, *Sex, Politics, and Religion: The Clash Between Poland and the European Union over Abortion*, 32 DENV. J. INT'L L. & POL'Y 653, 660 (2004).

⁶⁹ Law on the Separation of Churches and the State of Dec. 9, 1905, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 11, 1905, p. 7205. For the current version of the 1905 law, as amended, see <http://www.legifrance.gouv.fr/texteconsolide/MCEBW.htm> (last visited Mar. 17, 2006).

⁷⁰ Jacques Robert, *Religious Liberty and French Secularism*, 2003 BYU L. REV. 637, 640 (2003) (citation omitted).

⁷¹ T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 420 (2004).

scholar has explained the term as affirming that: “(1) religion is fundamentally incompatible with the institutions of the secular French Republic, (2) religion potentially undermines one’s loyalty to the state, and (3) the public manifestation of one’s beliefs should be confined to the private and not the public sphere.”⁷² It rests on three related values: “liberty of conscience, equality of rights in spiritual and religious choices, and neutrality of political power.”⁷³ The laïcité status has been hailed by President Jacques Chirac as the “cornerstone of the Republic, the bundle of our common values of respect, tolerance, and dialogue, to which I call all of the French to rally.”⁷⁴ Ironically, this affirmation of laïcité was made in a speech calling for a law that would prohibit children from wearing conspicuous religious clothing in public schools.

This commitment to secularism, however, does not require that all support for religion be abolished. For example, religious ministers may be paid by the state when they render services to the general public.⁷⁵

However, in some states which profess a complete separation between church and state, a dominant Church continues to exercise much political influence. Despite Ireland’s professed system of separation, the church exerts a much stronger influence than in Denmark, which maintains a national church system,⁷⁶ and indeed religion continues to permeate judicial and political discussion.

The Irish Constitution was adopted in 1937 and originally contained what is known as the “special position” clause, which

⁷² Peter Cumper, *Book Review: Regulating Religion—Case Studies from Around the Globe*, 13 WILLAMETTE J. INT’L L. & DISPUTE RESOL. 87, 104 (2005) (reviewing REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE (James T. Richardson ed., 2004)).

⁷³ Gunn, *supra* note 71, at 466.

⁷⁴ *Id.* at 428. For an excellent discussion of laïcité in France, see T. Jeremy Gunn, *Under God but Not the Scarf: The Founding Myths of Religious Freedom in the United States and Laïcité in France*, 46 J. CHURCH & ST. 7 (2004). See also REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE 27–28 (James T. Richardson ed., 2004).

⁷⁵ Jacques Robert, *Religious Liberty and French Secularism*, 2003 BYU L. REV. 637, 641 (2003).

⁷⁶ BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2005: DENMARK (Nov. 8, 2005), available at <http://www.state.gov/g/drl/rls/irf/2005/51549.htm> (“The Constitution stipulates that the Evangelical Lutheran Church is the national church, the reigning monarch shall be a member [of] the church, and the state shall support it.”).

recognized the special position of the Roman Catholic Church as the faith professed by a majority of Irish citizens. It also recognized and listed other religious denominations including the Church of Ireland, the Presbyterian Church, and the Jewish Congregation that were in existence at the time of the adoption of the Constitution. In 1972, through constitutional amendment, those provisions were eliminated.⁷⁷ However, the Constitution provides: “The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.”⁷⁸ It also provides that “[f]reedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.”⁷⁹ Further, the State “guarantees not to endow any religion”⁸⁰ and “shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.”⁸¹

Under these provisions, while the state cannot establish a state religion or prefer one religion over another, it can provide financial assistance to denominational schools and can carve out an exception from a rule of general application to accommodate free exercise claims. Indeed, it did so as early as 1972 through legislation permitting kosher butcher shops to remain open while other shops were required to close.⁸²

The influence of the church in Irish society and political life is undisputed, and the Republic of Ireland is historically and culturally a Catholic nation. All of the debates on abortion, divorce, and gay rights were accompanied by Church pronouncements and acknowledged Church involvement.⁸³

⁷⁷ IR. CONST., 1937, Fifth Amendment of the Constitution Act, 1972, *available at* <http://www.taoiseach.gov.ie/upload/static/256.pdf> (“Remove[s] from the Constitution the special position of the Catholic Church and the recognition of other named religious denominations.”).

⁷⁸ *Id.* art. 44.1.

⁷⁹ *Id.* art. 44.2.1°.

⁸⁰ *Id.* art. 44.2.2°.

⁸¹ *Id.* art. 44.2.3°.

⁸² Kathryn A. O’Brien, Comment, *Ireland’s Secular Revolution: The Waning Influence of the Catholic Church and the Future of Ireland’s Blasphemy Law*, 18 CONN. J. INT’L L. 395, 405 (2002).

⁸³ *Id.* at 406–07, 412, 417–18.

RELIGIOUS LIBERTY IN PRACTICE IN EUROPE

Whether or not any of these models are more or less favorable to religious freedom will be examined in two contexts: the regulation of cults or sects and the prohibition on public displays of religious symbols and dress codes.

A. Regulation of New Religious Movements

New religious movements have become a focus of regulation and legislation in several countries in Western Europe and, as Fr. Drinan points out, have been subjected to restrictions.⁸⁴ Under the United States model, the government does not enact legislation to protect individuals from undue pressure or coercion by religious groups. Rather, unacceptable or dangerous behavior is handled under the state penal codes or the civil laws.⁸⁵ In Europe, on the other hand, several states have enacted legislation to “protect” its citizens from the activities of cults or sects, and curb activities that the state deems potentially harmful.

France, arguably the most secular state in Europe, has enacted the most draconian regulation of new religion.⁸⁶ The Anti-Cult Movement in France is dominated by two associations: UNADFI, the National Union of Associations for the Protection of the Family and the Individual, and the CCMM, the Center Against Mental Manipulation.⁸⁷ While both organizations began as voluntary organizations, they now work closely with State agencies and receive State subsidies.⁸⁸

In 1996, a parliamentary commission issued a report on so-called cults and identified 172 groups as cults, including the Jehovah’s Witnesses, the Church of Scientology, and the Theological Institute of Neims (an evangelical Christian Bible college).⁸⁹ Following the report, a Cult Observatory was established, and in 1998, the Inter-Ministerial Mission to Combat Cults (“MILS”) was established to assist public

⁸⁴ DRINAN, *supra* note 1, at 157–58.

⁸⁵ REGULATING RELIGION, *supra* note 74, at 2–3.

⁸⁶ See James A. Beckford, ‘*Laïcité, Dystopia, and the Reaction to New Religious Movements in France*, in REGULATING RELIGION, *supra* note 74, at 31; see also Jacques Robert, *supra* note 75, at 652–55.

⁸⁷ Beckford, *supra* note 86, at 31.

⁸⁸ *Id.*

⁸⁹ *Id.* at 30; DRINAN, *supra* note 1, at 157–58.

authorities to deal with cults.⁹⁰ Finally, in 2001, the French Parliament enacted the About-Picard Law that, among other provisions, provided for the dissolution of religious groups for various reasons, including endangering the life or the physical or psychological well-being of a person, placing minors at mortal risk, violating another person's freedom, dignity, or identity, practicing illegal medicine or pharmacology, false advertising, and fraud and falsification.⁹¹ The Anti-Cult Movement in France enjoys wide public support⁹² and is attributable at least in part to the laïcité underpinnings of the French State, which requires the exclusion of religion from state institutions and the substitution of principles of rationality and morality. Since cults are by definition anti-national they are viewed as a danger to the state. Thus, the French government has been most aggressive in warning and protecting its citizens from cults and in enacting laws and regulations to impede their growth.

Borrowing on the French experience, other European nations have initiated commissions or regulations affecting cults. In Germany, a cooperation State, the "Sects and Psychogroups" Commission has issued a report pertaining to cults, which recommended direct public funding of private counseling and information centers to counter the influence of cults. It also recommended that a new office be established to monitor "new

⁹⁰ Beckford, *supra* note 86, at 30.

⁹¹ Law No. 2001-504 of June 12, 2001, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 13, 2001, p. 9337, available at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX9903887L>. Named after French parliament members Nicolas About and Catherine Picard, the About-Picard Law includes the following descriptive text: "*tendant à renforcer la prévention et la répression des mouvements sectaires portant atteinte aux droits de l'homme et aux libertés fondamentales*" ("intended to reinforce the prevention and repression of sectarian [cultic] movements that infringe on human rights and fundamental freedoms"). *Id.* (emphasis added).

⁹² *But see* Senator Gordon H. Smith, *Religious Freedom and the Challenge of Terrorism*, 2002 BYU L. REV. 205, 208–09 (2002).

This new law was passed by the French Senate on May 30, 2001, and creates a vague crime, originally called 'mental manipulation.' The law criminalizes teachings that may result in acts of 'psychological dependency'—even if these actions are freely chosen—if others might view the teachings as harmful to the believer. This legislation was widely criticized by leading Catholic and Protestant leaders in France, by leading figures within the Council of Europe, and by countless human rights organizations.

Id.

religious and ideological communities and psychogroups.”⁹³ Finally, in September 2001, the Associations Act, which permits the government to ban organizations with criminal objectives or activities against the constitutional order or international understanding, was amended to apply to religious associations that previously had been exempted from the law.⁹⁴ Not surprisingly, the first religious organization to be targeted was an Islamic community charged with promoting hatred against the Jews and Israel. However, in the Parliamentary debates concerning the amendment, the Church of Scientology was mentioned as a possible target.

Belgium, another secular state, has also moved to restrict the activities of cults.⁹⁵ Italy, a state with a Concordat agreement,⁹⁶ and the Netherlands, a secular state, both exhibit a much more tolerant view of cults.⁹⁷ Poland seems to follow the French model of regulating sects, although its law is much more tolerant than the French model.⁹⁸

The ECHR has interpreted Article 9 of the ECHRFF, which pertains to religious freedom, to protect Druidism,⁹⁹ pacifism,¹⁰⁰ veganism,¹⁰¹ Islamism,¹⁰² the Krishna Consciousness

⁹³ Final Report of the Enquete Commission on “So-called Sects and Psychogroups”: New Religious and Ideological Communities and Psychogroups in the Federal Republic of Germany (Wolfgang Fehlberg and Monic Ulloa-Fehlberg, trans. 1998), available at http://www.csj.org/infoserv_articles/german_enquete_commission_report.htm.

⁹⁴ See Verena Zöller, *Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights*, 5 GERMAN L.J. 469, 488–90, available at http://www.germanlawjournal.com/pdf/Vol05No05/PDF_Vol_05_No_05_469-494_special_issue_Zoeller.pdf (last visited Mar. 17, 2006).

⁹⁵ REGULATING RELIGION, *supra* note 74, at 24; see also BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2005: BELGIUM (Nov. 8, 2005), <http://www.state.gov/g/drl/rls/irf/2005/51543.htm> (last visited Mar. 17, 2006) (“[T]he Government continued to observe and research groups that a parliamentary commission’s unofficial report labeled ‘harmful sects.’”).

⁹⁶ See Michael W. Homer, *New Religions in the Republic of Italy*, in REGULATING RELIGION, *supra* note 74, at 203.

⁹⁷ Richard Singelenberg, *Foredoomed To Failure: The Anti-Cult Movement in the Netherlands*, in REGULATING RELIGION, *supra* note 74, at 213.

⁹⁸ Agnieszka Kościńska, *Anti-Cult Movements and Governmental Reports on “Sects and Cults”: The Case of Poland*, in REGULATING RELIGION, *supra* note 74, at 267.

⁹⁹ A.R.M. Chappell v. United Kingdom (1987, App 12587/86) 53 DR 241.

¹⁰⁰ Arrowsmith v. United Kingdom, App. No. 7050/75, 19 Eur. Comm’n H.R. Dec. & Rep. 5, 6–7, 19–20 (1978) (pacifist protest).

¹⁰¹ X v. United Kingdom, 3 Eur. Comm’n H.R. Dec. & Rep. 62 (1975) (right of

movement,¹⁰³ Jehovah's Witnesses,¹⁰⁴ the Divine Light Zentrum,¹⁰⁵ and the Church of Scientology¹⁰⁶. With respect to the Church of Scientology, the Commission has upheld a ban on the Church of Scientology advertising an "E-Meter" on the basis that the scientific claims were misleading.¹⁰⁷ The Commission ruled that the state was regulating the commercial and not religious activities of the Church¹⁰⁸ and accepted the fact that the Church fell under the protection of Article 9 of the Convention pertaining to religious freedom with little discussion.

B. Regulation of Dress Codes and Religious Symbols

Dress codes, which in effect ban the wearing of Islamic headscarves, have been the focus of attention throughout Europe, and legislation regulating dress with religious significance has been enacted in several states. Although challenged as violating the free exercise of religion guaranteed in the European Convention on Human Rights and Fundamental Freedoms, the Grand Chamber of the European Court of Human Rights, in an expansive ruling, has upheld the right of a state to ban the wearing of the headscarf in universities.

The issue of whether Muslim girls could wear their scarves in the classroom first surfaced in France in 1989 when Lionel Jospin, the Education Minister, asked the *Conseil d'Etat* court to render a judgment on the matter.¹⁰⁹ The *Conseil* ruled that

free expression does not include right to incite others to desert army, to murder officers, and to supply weapons to the enemy).

¹⁰² Ahmad v. United Kingdom, 4 Eur. H.R. Rep. 126, 127, 132–33 (1981).

¹⁰³ ISKCON v. United Kingdom, 76-A D.R. 90, 92, 105–08 (1994).

¹⁰⁴ Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) (1993).

¹⁰⁵ Omkarananda v. Switzerland, 25 Eur. Comm'n H.R. Dec. & Rep. 105, 106, 117 (1981) (imprisonment of leader of religious group which he led in acts of criminal violence).

¹⁰⁶ X & Church of Scientology v. Sweden, 16 Eur. Comm'n H.R. Dec. & Rep. 68, 70 (1979); Keir Starmer, EUROPEAN HUMAN RIGHTS LAW: THE HUMAN RIGHTS ACT OF 1998 AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 131 (1999).

¹⁰⁷ X & Church of Scientology, 16 Eur. Comm'n H.R. Dec. Rep. at 71–72.

¹⁰⁸ *Id.* at 72.

¹⁰⁹ Elisa T. Beller, *The Headscarf Affair: The Conseil d'État on the Role of Religion and Culture in French Society*, 39 TEX. INT'L L.J. 581, 583–84 (2004).

The *Conseil d'État* is one of three high courts in France, the other two being the *Cour de Cassation*, the final venue for appeals of cases involving two private parties, and the *Conseil Constitutionnel*, the tribunal that decides the constitutionality of laws under consideration by the parliament. Together, these three courts serve the roles that in the United States are performed by the Supreme Court, as well as some additional functions.

wearing ostentatious religious garb that “constitute[d] an act of intimidation, provocation, proselytising, or propaganda; threaten[ed] the dignity and freedom of students or other members of the educational community[;] or disrupt[ed] the school’s normal functioning” was prohibited.¹¹⁰

When the issue came before the *Conseil* in March 1995, the *Conseil* upheld a school regulation that banned headscarves during classes in physical education as not unduly restrictive. The *Conseil* held that the regulation did not have the effect of outlawing headscarves as the students and their parents claimed. However, the students’ refusal to remove their scarves constituted an interference with the normal functioning of their education and was a disruptive violation of the school’s order.¹¹¹ Consequently, the girls’ expulsion was upheld.¹¹²

In the wake of this controversy, President Jacques Chirac appointed a commission, the Stasi Commission, to examine the issue of laïcité. In 2003, the commission issued its report and recommended that wearing a headscarf in public schools be prohibited. The ban, as drafted in the Stasi Report, states in part:

In respect for freedom of conscience, and the pure character of the institutions, behaviours and signs expressing a religious or political affiliation are prohibited in schools and colleges. Any appropriate sanction is to be taken after the pupil is invited to conform to his obligations. The prohibited behaviours and religious signs are open signs, such as large crosses, veils, or

Id. at 602. “In its judicial function, the *Conseil d’État*’s word is always considered definitive, not merely one opinion that the government must take into consideration.” *Id.* at 603.

For years . . . the *Conseil*’s was the single most important voice in deciding which precedents, laws, and principles were paramount in adjudicating this complex and delicate matter As the highest legal institution with jurisdiction over the actions of the French state, the *Conseil d’État* wielded obvious power—and, at least as importantly, credibility—in shaping the government’s position toward Muslim apparel in public schools.

Id. at 609.

¹¹⁰ *Id.* at 584 (internal quotation marks omitted).

¹¹¹ *Id.* at 619 (citing *Conseil d’État*, Mar. 10, 1995, Lebon at 123). “The decision also mentions that the father of the two girls in question had participated in a demonstration outside the school. . . . [which the *Conseil*] says aggravated the girls’ original offense in refusing to remove their scarves.” *Id.* at 619 n.252.

¹¹² *Id.* at 619. “The *Conseil d’État* has also invoked Article 9 in a decision upholding the ruling that a woman cannot wear a headscarf in her photograph for official identification because in such an instance the interest in public order outweighs the interest in religious freedom.” *Id.* at 621.

kippas. Discrete signs are not included, for example medals, small crosses, stars of David, hands of Fatimah, or a small Koran.¹¹³

Following the recommendation, in September 2004, France enacted a law banning the display of “conspicuous” religious symbols from the classrooms of all French public schools.¹¹⁴ Although the ban formally covers every religious group, it is generally perceived that the real purpose of the legislation is to prevent Muslim schoolgirls from wearing the Islamic veil or hijab¹¹⁵ in the classroom. France, which has one of Western Europe’s largest Muslim populations,¹¹⁶ argues that the prohibition is consistent with France’s commitment to secularism and neutrality in the public sphere.¹¹⁷ Herve Mariton, a deputy in Parliament from Chirac’s party, explains: “This neutrality equals a kind of politeness. Politeness in the public sphere means you do what is necessary to make others who are different feel at ease.”¹¹⁸

Although the French law on religious dress and symbols had strong public support and passed by an overwhelming majority in the French Parliament,¹¹⁹ “[u]ntil recently, press reports

¹¹³ COMMISSION DE REFLEXION SUR L’APPLICATION DU PRINCIPE DE LAÏCITE DANS LA REPUBLIQUE, RAPPORT AU PRESIDENT DE LA REPUBLIQUE 58–59 (2003), available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf> (internal quotation marks omitted), translated in Kristen Walder, *France: Human Rights, Religious Freedoms & a Secular Society?*, 12 BUFF. WOMEN’S L.J. 11 (2004).

¹¹⁴ Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], Mar. 17, 2004, at 5190. The law states, “In public schools, the wearing of symbols or clothing by which students conspicuously . . . manifest a religious appearance is forbidden.” Beller, *supra* note 109, at 581.

¹¹⁵ Though there are important differences between them, the terms headscarf, veil, and hijab are used interchangeably throughout this article.

¹¹⁶ Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, Address at the Ninth Annual Frankel Lecture, in 42 HOUS. L. REV. 1, 14 n.46 (referencing Milton Viorst, *The Muslims of France*, FOREIGN AFF., Sept.–Oct. 1996, at 78, which states that the exact population figure is unknown because the French government has interpreted its secularist constitutional mandate as prohibiting the government from inquiring about the religious affiliation of its citizens); see also Walder, *supra* note 113 at 12.

¹¹⁷ See Beller, *supra* note 109, at 582; see also Gunn, *supra* note 71, at 462–63.

¹¹⁸ Tom Hundley, *France in Hot Debate over Muslim Scarves*, CHI. TRIB., Dec. 4, 2003 at 29.

¹¹⁹ See Keith B. Richburg, *French Senate Approves Ban on Religious Attire*, WASH. POST, Mar. 4, 2004, at A14. The lower chamber of French Parliament approved the ban by a margin of 494 to 36. Elaine Sciolino, *French Assembly Votes To Ban Religious Symbols in Schools*, N.Y. TIMES, Feb. 11, 2004, at A3. The French

suggested that French school authorities were unwilling to impose the new law too rigidly.¹²⁰ One teenage Muslim girl's act of cutting off all of her hair in protest of the ban attracted international headlines,¹²¹ and "members of France's Sikh community also joined Muslims in calling for repeal of the controversial law."¹²²

In Germany, the Federal Constitutional Court declared a Baden-Württemberg administrative prohibition on teachers wearing headscarves in public state schools¹²³ *insufficient*¹²⁴ because it was ambiguous and required elected legislatures to create a "sufficiently clear legal basis"¹²⁵ for prohibiting the ban.¹²⁶ The Court never addressed the issue of whether or not the prohibition was valid, but instead ordered local legislatures to re-write the laws. However, the Court failed to provide the state legislatures with guidance on how to conform. As a result, "laws in . . . Germany's sixteen federal states [*Bundesländer* or *Länder*] must be amended if a particular state's law does not declare directly that the state . . . prefers not to legislate on whether a Muslim teacher may or may not wear a headscarf while teaching . . ."¹²⁷ In response, three states submitted draft laws to provide a legal basis for prohibiting teachers from wearing headscarves while teaching.¹²⁸ "The potential for conflict therefore remains considerable, and once an opponent of the ban has exhausted all domestic remedies . . . , she is free to

Senate reaffirmed the ban by a majority vote of 276 to 20. French President Jacques Chirac also announced his support for such a law. Richburg, *supra*.

¹²⁰ Cumper, *supra* note 72, at 106.

¹²¹ *Id.*; see also Press Release, Assembly for the Protection of Hijab, ProHijab Supports Cennet Doganay (Mar. 10, 2004), <http://www.prohijab.net/english/press-release-cennet-doganay.htm>.

¹²² Cumper, *supra* note 72, at 106; see also Tom Heneghan, *French Sikhs Upset as Schools Bar Hair Coverings*, REUTERS NEWS, Sept. 7, 2004, available at <http://in.news.yahoo.com/040907/137/2fxt5.html>.

¹²³ See *Kopftuch-Urteil* [Headscarf Decision] (Sept. 24, 2003), BVerfGE 108, 282, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], NJW 56 (2003), 3111, 2 BvR 1436/02 (F.R.G.).

¹²⁴ Axel Frhr. von Campenhausen, *The German Headscarf Debate*, 2004 BYU L. REV. 665, 666 (2004).

¹²⁵ *Id.*

¹²⁶ See Headscarf Decision, *supra* note 123.

¹²⁷ von Campensausen, *supra* note 124, at 667.

¹²⁸ See *id.*

submit her complaint to the European Court of Human Rights.”¹²⁹

The European Court of Human Rights first addressed the issue of whether a ban on religious garb was a violation of Article 9 of the European Convention on Human Rights in the Swiss case of *Dahlab v. Switzerland*.¹³⁰ In that case, the ECHR upheld a ban on religious garb worn by teachers. The ECHR held that “the head scarf produced a proselytizing effect, and wearing it appeared to be a requirement imposed upon women by a precept of the Koran difficult to reconcile with the principle of gender equality.”¹³¹ The Chamber stressed that the headscarf was a “powerful external symbol” and held that “a democratic State should be allowed to limit the right to wear the Islamic head scarf if it found wearing it was incompatible with the protection of rights and freedoms of others, public order and public safety.”¹³²

In *Leyla Şahin v. Turkey*,¹³³ the ECHR squarely addressed the issue of whether the state could ban the wearing of the hijab by university students. Because of the importance of the issue, the case was referred to the Grand Chamber, which affirmed the judgment in November 2005.¹³⁴ In its discussion, the Court granted the state a wide margin of appreciation and upheld the ban as consistent with the principles of secularism and equality.¹³⁵ The petitioner, a medical student at Istanbul University, challenged a restriction on wearing the Islamic

¹²⁹ See Cumper, *supra* note 72, at 106 (discussing ban on headscarves in France). The issue of banning headscarves also surfaced in Italy. See Ian Fisher, *Italian Woman's Veil Stirs More than Fashion Feud*, N.Y. TIMES, Oct. 15, 2004, at A3.

¹³⁰ 2001-V Eur. Ct. H.R. 447, 451 (2001) (reviewing prohibition barring a primary school teacher in Geneva from wearing an Islamic headscarf).

¹³¹ Jónatas E. M. Machado, *Freedom of Religion: A View from Europe*, 10 ROGER WILLIAMS U. L. REV. 451, 488–89 (2005).

¹³² *Id.* at 488.

¹³³ 44774 Eur. Ct. H.R. 98, ¶ 114 (2005) available at <http://cmiskp.echr.coe.int/tkp197/viewhbkkm.asp?action=open&table=1132746FF1FE2A468ACCBCD1763D4D8149&key=17671&sessionId=5786516&skin=hudoc-en&attachment=true>. The same day as the Şahin decision, the Court decided unanimously to strike the companion case of *Zeynep Tekin v. Turkey*, 41556 Eur. Ct. H.R. 98 (2004), which also alleged violations of Article 9 of the European Convention on Human Rights by a second-year nursing student at the University of Ege for wearing the Islamic headscarf instead of the regulation headwear required by the Higher-Education Authority.

¹³⁴ The Grand Chamber consists of a seventeen-judge panel.

¹³⁵ See *Şahin*, 44774 Eur. Ct. H.R. 98, at ¶¶ 114, 116, 122.

headscarf in higher education institutions on the grounds that it violated rights and freedoms guaranteed under the European Convention on Human Rights and Fundamental Freedoms. The petitioner did not claim a right for “all women to wear the Islamic headscarf in all places,”¹³⁶ but rather that University students were “discerning adults who enjoyed full legal capacity and were capable of deciding for themselves what was appropriate conduct.”¹³⁷ This choice, she argued, was based on religious conviction and that she had not sought to influence fellow students or to undermine their rights and freedoms.¹³⁸ The petitioner also argued that the ban violated her right to an education, but this argument was rejected by the Court.¹³⁹

Turkey, on the other hand, argued that the ban was based on the two principles of secularism and gender equality.¹⁴⁰

The Court focused on the issues raised under Article 9 of the Convention which provides:

- (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.¹⁴¹

The Court noted that wearing the Islamic headscarf is a relatively recent phenomena in Turkey that began in the 1980s and was a subject of much debate in that country that has both political and religious significance. Those favoring the headscarf view it as a duty or form of expression linked to religious identity. Those favoring the ban regard the “headscarf as a symbol of a political Islam” that threatens civil order, seeks to

¹³⁶ *Id.* at ¶¶ 1, 3, 15, 73.

¹³⁷ *Id.* at ¶ 101.

¹³⁸ *Id.* at ¶ 101.

¹³⁹ Article 2 of Protocol No. 1 of the Convention guarantees the right to an education. *See id.* at ¶ 152.

¹⁴⁰ *Id.* ¶ 112.

¹⁴¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, 213 U.N.T.S. 222, art. 9, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

establish a religious regime, and undermines rights acquired by women under the Republican system.¹⁴²

The Court surveyed the law in several European states and noted that national legal systems had reached different results with respect to the ban on headscarves.¹⁴³ For example, a ban on headscarves was upheld by the courts in Belgium on the grounds that principles of equality and neutrality of state education take precedence over freedom of religion.¹⁴⁴ The Court also took note of the French law of 2004 that prohibits the headscarf in state primary and secondary schools,¹⁴⁵ referred to the legal debate in Germany concerning the headscarf,¹⁴⁶ and noted that in the United Kingdom, the Islamic headscarf is generally accepted.¹⁴⁷

Turning to the situation in Turkey, the Court noted that the Turkish Republic was founded on the principle that the state should be secular (*laïcité*). An important feature of the Republican system was the status accorded to women's rights; women were granted equality in the enjoyment of individual rights in the Constitution of Turkey.¹⁴⁸

¹⁴² *Şahin*, 44774 Eur. Ct. H.R. 98, at ¶ 35. The Court has been criticized because it ignored the fact that in Turkey, the ban was imposed at the instigation of the military rather than by the democratically-elected government. See T. Jeremy Gunn, *Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights* 28 (July 4, 2005) (conference paper, on file with The Strasbourg Conference), <http://www.strasbourgconference.org/papers/Sahin%20by%20Gunn%2021%20by%20T.%20Jeremy%20Gunn.pdf>.

¹⁴³ *Şahin*, 44774 Eur. Ct. H.R. 98, ¶¶ 55–69. For example, the Court compared the prohibition against “the wearing of signs or dress by which pupils [in State primary and secondary schools] overtly manifest a religious affiliation” in France with cases in Austria, Germany, the Netherlands, Spain, Sweden, Switzerland, and the United Kingdom where “State education authorities *permit* Muslim pupils and students to wear the Islamic headscarf.” *Id.* ¶¶ 56, 58 (emphasis added).

¹⁴⁴ *Id.* ¶ 57. “Pupils are in principle allowed to wear religious signs. However, they may do so only if human rights, the reputation of others, national security, public order, and public health and morals are protected . . .” *Id.*

¹⁴⁵ *Id.* ¶ 56.

¹⁴⁶ *Id.* ¶ 59 (“[W]here the debate focused on whether teachers should be allowed to wear the Islamic headscarf, the Constitutional Court stated . . . that the lack of any express statutory prohibition meant that teachers were entitled to wear the headscarf.”).

¹⁴⁷ *Id.* ¶ 61 (“In the United Kingdom a tolerant attitude is shown to pupils who wear religious signs. Difficulties with respect to the Islamic headscarf are rare.”). *But see* R (Shabina Begum) v. Head Teacher and Governors of Denbigh High School [2004] EWCA (Civ) 199, [2005] 1 W.L.R. 3372 (Eng.) (holding that a fifteen-year-old Muslim girl was permitted to wear a hijab to school, but could not wear a jilbab, a long flowing garment, that was in contravention of the British school's uniform policy).

¹⁴⁸ *Şahin*, 44774 Eur. Ct. H.R. 98, ¶¶ 30–32.

The Court proceeded on the assumption that the restriction constituted an interference with a right to manifest one's religion and that it was prescribed by law. However, it found that the aim of the measures was legitimate, namely protecting the rights and freedoms of others and protecting public order.¹⁴⁹ It then considered whether the restriction was necessary in a democratic society.

The petitioner argued not only that the headscarf did not threaten public order, but also that the dress restriction was applied in a discriminatory manner in that Jewish students were permitted to wear a skull cap and Christian students to wear crucifixes.¹⁵⁰ The government, on the other hand, stressed that protection of the secular state was essential. It argued "that the Islamic headscarf had become a sign that was regularly appropriated by religious fundamentalist movements for political ends and constituted a threat to the rights of women."¹⁵¹ The government also pointed out that Istanbul University had been the scene of violent confrontations between opposing radical groups and that authorities "sought to preserve the institution's neutrality" by banning the wearing of religious signs.¹⁵²

In analyzing this issue, the Court noted that in areas involving Church-state relations the margin of appreciation left to the states is particularly important.¹⁵³ With respect to restricting the wearing of religious symbols, the rules vary widely from state to state and there is no uniform conception of the protection of "the rights and freedoms of others" and of "public order."¹⁵⁴ The Court observed that the interference was based on two principles: secularism and equality. The Constitutional Court of Turkey had previously stated that secularism in Turkey was the guarantor of democratic values, including religious freedom and equality, and in particular gender equality.¹⁵⁵

¹⁴⁹ *Id.* ¶¶ 84–99.

¹⁵⁰ *Leyla Şahin v. Turkey*, 44774/98 Eur. Ct. H.R. 299, ¶ 88 (29 June 2004) (Chamber Judgment).

¹⁵¹ *Id.* ¶ 93.

¹⁵² *Id.* ¶ 96.

¹⁵³ *Id.* ¶¶ 109–10.

¹⁵⁴ *Id.* ¶ 109.

¹⁵⁵ *Id.* ¶¶ 109–11. *But see* Lerner, *supra* note 59, at 85. Professor Natan Lerner is critical of the lack of European supervision with respect to its application of the margin of appreciation.

The Court agreed with the Constitutional Court of Turkey in its assessment that wearing the headscarf, in the Turkish context, could be viewed as a compulsory religious duty and could have a negative impact on those who choose not to wear it.¹⁵⁶ Thus, the restriction met a pressing social need and furthered the legitimate aims of “protection of rights and freedoms of others” and “maintenance of public order.”

The Court concluded that the principle of secularism was the primary motivator of the dress ban.¹⁵⁷ Turkey was therefore permitted to conclude that to permit the headscarf would run counter to values of pluralism, respect for rights of others, and, in particular, equality before the law of men and women.

Judge Françoise Tulkens of Belgium, the sole dissenter, while agreeing that secularism and equality were fundamental principles, disagreed with the abstract and general context in which the principles were evaluated by the Court. She argued that the issue of whether the interference was necessary in a democratic society must be evaluated *in concreto*.¹⁵⁸

Judge Tulkens further noted that the petitioner did not challenge the principle of secularism nor did her acts, conduct, or attitude contravene that principle. She noted that the ban was upheld because of threats posed by “extremist political movements.”¹⁵⁹ It is vital, she said, “to distinguish between those who wear the headscarf and ‘extremists’ who seek to impose the headscarf as they do other religious symbols.”¹⁶⁰ Further, she questioned the connection between promoting equality and banning the headscarf. Noting that the debate about the

¹⁵⁶ *Şahin*, 44774 Eur. Ct. H.R. 98, ¶ 115.

¹⁵⁷ *Id.* ¶ 116.

¹⁵⁸ *Id.* ¶ 2 (Tulkens, J., dissenting). Judge Tulkens argued that the Court’s review must be evaluated:

by reference to three criteria: first, whether the interference . . . was appropriate; second, whether the measure that has been chosen is the measure that is the least restrictive of the right or freedom concerned; and, lastly, whether the measure was proportionate . . . entail[ing] a balancing of the competing interests.

Id.

¹⁵⁹ *Id.* ¶ 10.

¹⁶⁰ *Id.* Furthermore, Judge Tulkens drew a distinction between university students and school pupils, opining that the former “might reasonably be expected to have a heightened capacity to resist pressure[.]” *Id.*

headscarf did not take into account the opinions of women, she characterized the Court's assessment as "paternalism."¹⁶¹

Judge Tulkens was particularly critical of the wide margin of appreciation accorded to the States because of the diversity of practice in Europe.¹⁶² She noted that in "none of the member States has the ban on wearing religious symbols extended to university education" because those individuals are "less amenable to pressure."¹⁶³ She argued that a certain level of European supervision seemed to be completely absent from the judgment and was necessary since the right to freedom of religion is, and should be, an issue of importance to all the member States, and not merely a "local" issue.¹⁶⁴

The European Court of Human Rights is effectively the court of last appeal and the verdict will have a major impact since more than 1,000 women from Turkey have filed similar applications.¹⁶⁵ The decision was roundly denounced by human rights groups as a clear infringement on the right to religious practice and expression. "The European Court has let down thousands of women who will be prevented from studying in Turkey's universities."¹⁶⁶

One noted scholar of religious liberty has argued that the decision of the ECHR denies women the right of free choices and notes "[t]he European Court of Human Rights should be adopting principled decisions permitting manifestations of freedom of conscience and belief—and not adopting the same choice-suppressing measures favored by the dreaded fundamentalists."¹⁶⁷

¹⁶¹ *Id.* ¶ 12. Judge Tulkens "fail[ed] to see how the principle of sexual equality [could] justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted." *Id.*

¹⁶² *Id.* ¶ 3 (asserting that there is a "lack of a European consensus" regarding regulations on the "wearing of religious symbols in educational institutions").

¹⁶³ *Id.*

¹⁶⁴ *Id.* Judge Tulkens concluded that "European supervision [could not], therefore, be escaped simply by invoking the margin of appreciation." *Id.*

¹⁶⁵ *Court Backs Turkish Headscarf Ban*, BBC NEWS, Nov. 10, 2005, <http://news.bbc.co.uk/2/hi/europe/4424776.stm>.

¹⁶⁶ Human Rights Watch, *Turkey: Headscarf Ruling Denies Women Education and Career*, HUM. RTS. NEWS, (Nov. 16, 2005), <http://hrw.org/english/docs/2005/11/16/turkey12038.htm>.

¹⁶⁷ Gunn, *supra* note 142, at 29; see also Benjamin D. Bleiberg, *Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in Leyla Şahin v. Turkey*, 91 CORNELL L. REV. 129, 162 (2005). "The most obvious effect of the ECHR's ruling is to effectively preclude an

In the United States, the Court of Appeals for the Third Circuit upheld the banning of religious garb worn by public school teachers in the classroom in *United States v. Board of Education for the School District of Philadelphia*.¹⁶⁸ The Court rejected the argument that the ban constituted invidious discrimination and held that the garb statute advanced a compelling interest in maintaining the appearance of religious neutrality in the public school classroom.¹⁶⁹ However, it is clear that a ban imposed on graduate students as opposed to teachers would be set aside. Justice Sandra Day O'Connor, who has been most influential in charting the appropriate balance between church and state, has articulated a centrist approach of "preserving religious liberty to the fullest extent possible in a pluralistic society."¹⁷⁰

1. An International Tribunal and the European Tradition of Subsidiarity

The European Court of Human Rights is effectively the court of last resort for claims of infringements of religion arising under the European Convention. As Fr. Drinan points out and as the above discussion illustrates, the ECHR has been extremely deferential to state justification for infringement of free exercise claims and has been roundly criticized for its embrace of secularism.¹⁷¹ One wonders, however, whether an international tribunal could be more effective in resolving such issues. The activities of the recently established international criminal

entire class of women from pursuing higher education in Turkey. Although the ECHR may have intended to protect women, the court did not adequately anticipate the repercussions of its actions." *Id.*

¹⁶⁸ *United States v. Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882, 894 (3d Cir. 1990).

¹⁶⁹ *Id.* at 884, 893. In March 2004, the U.S. government filed a complaint on behalf of a Muslim girl who was twice sent home from school for wearing a headscarf. Assistant Attorney General Alexander Acosta said in a statement, "[w]e certainly respect local school systems' authority to set dress standards, and otherwise regulate their students, but such rules cannot come at the cost of constitutional liberties. . . . Religious discrimination has no place in American schools." *US Opposes Oklahoma Headscarf Ban*, BBC NEWS, Mar. 31, 2004, <http://news.bbc.co.uk/2/hi/americas/3585377.stm>.

¹⁷⁰ *McCreary County v. ACLU*, 125 S. Ct. 2722, 2746 (2005) (O'Connor, J., concurring).

¹⁷¹ See DRINAN, *supra* note 1, at 90–92.

tribunals give little reason for optimism and the effectiveness of such tribunals has been called into question.¹⁷²

The Special Criminal Tribunal established for Rwanda was imposed by a Security Council Resolution and required compliance by all United Nations Member States.¹⁷³ Yet in Yugoslavia, the most sought after and notorious war criminals remain at large and appear to be supported by the state apparatus.¹⁷⁴ In Rwanda, while a few of the most highly-placed criminals have been brought to justice, the vast majority will be tried through local traditional courts set up to handle the accused.¹⁷⁵ It is these courts that have the most support from

¹⁷² Compare Ivana Nizich, *International Tribunals and Their Ability To Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 ILSA J. INT'L & COMP L. 353, 356 (2001) (“[A]lmost all informed, objective observers of the Balkans in the past decade are befuddled as to why the ICTY has not prosecuted crimes committed in obviously abusive areas but has often focused on less-significant sites and persons, and why has it taken so long to indict those that have been indicted.”) and Ken Roth, *It's Worth Bringing Tyrants to Justice*, INT'L HERALD TRIBUNE, Aug. 10, 2005, available at <http://www.iht.com/articles/2005/08/09/opinion/edroth.php> (“Critics argue that the threat of prosecution compels dictators to cling to power rather than step down.”) with Edith M. Lederer, *Security Council Told To Stop Complaining About High Cost of War Crimes Tribunals*, ASSOCIATED PRESS, Oct. 7, 2004, available at <http://www.globalpolicy.org/intljustice/general/2004/1007cost.htm> (quoting Prince Zeid Al Hussein: “With an international community prepared to spend almost one trillion U.S. dollars a year on weapons that historic companion of war how can we say that anything we have spent thus far on justice, the surest companion of peace, is too expensive?”) and Andrew A. Jacovides, *International Tribunals: Do They Really Work for Small States?*, 34 N.Y.U. J. INT'L L. & POL. 253, 261 (2001).

I have no hesitation in maintaining the position that the proliferation of international tribunals ought to and can be to the benefit of small states, and that in solving a dispute through third-party settlement, a small state is at much less of a disadvantage in relation to a large and powerful state in a court of law or an arbitral tribunal than in any other manner of dispute resolution. . . . [a]nd, to quote . . . Secretary-General Kofi Annan's statement of September 28, 2000, “the language of global society is international law.”

Id.

¹⁷³ SCOR 955 (1994), available at <http://65.18.216.88/ENGLISH/basicdocs/statute/2004.pdf>.

¹⁷⁴ See generally Human Rights Watch, *Balkans: Srebrenica's Most Wanted Remain Free*, HUM. RTS. NEWS, June 29, 2005, <http://hrw.org/english/docs/2005/06/29/bosher11228.htm> (chronicling the various sightings and arrest attempts for both Mr. Mladic and Mr. Karadic).

¹⁷⁵ Q&A: *Rwanda's Long Search for Justice*, BBC NEWS, Mar. 10, 2005, <http://news.bbc.co.uk/2/hi/africa/3246291.stm>.

Traditional community courts, called *gacaca*, meaning the small lawn where village elders congregate to solve disputes, have been introduced to speed up the trial process. Suspects are taken to the villages where they

Rwandan citizens.¹⁷⁶ Other nations have dealt with accountability for international crimes through methods chosen by their elected representatives. For example, in South Africa, a Truth and Reconciliations Commission was effectively utilized to deal with those charged with apartheid¹⁷⁷ despite appeals to the Constitutional Court of South Africa that such a procedure violated rights guaranteed in the South African Constitution.¹⁷⁸

The judgments of the International Court of Justice have often been ignored and the Court has been uneven in its efforts and effectiveness. However, it is widely noted that the decisions of the ECHR have been respected in each instance by the affected Member States.¹⁷⁹

Central to the European system for the protection of human rights is the principle of subsidiarity, which defines the relationship between the Courts and the states parties. The principle of subsidiarity as it applies to the European Convention has been described by a senior officer with the European Court's Registry in the following manner:

The object and purpose of the [European] Convention is to achieve the 'collective enforcement' . . . of those fundamental freedoms which are enshrined in the Convention [The]

allegedly committed their crimes and confronted directly by their accusers. . . . The trials are not overseen by legally qualified judges but local people respected for their integrity. Some called it 'mob justice' as suspects will not have access to lawyers and will have to represent themselves, but Human Rights Watch agreed that it was necessary despite the legal shortcomings.

Id.

¹⁷⁶ See John Hopkins University Center for Communications Programs, *CCP: Gacaca Program in Rwanda*, <http://www.jhuccp.org/africa/rwanda/gacaca.shtml#5> (last visited Mar. 17, 2006) (detailing the number of Rwandans that were either informed or in agreement with the Gacaca election process). *But see* Robert Walker, *Rwanda Still Searching for Justice*, BBC NEWS, Mar. 30, 2004, <http://news.bbc.co.uk/2/hi/africa/3557753.stm>. "I think Gacaca does not ease tensions in the beginning. It increases them. Who likes to be pointed out as a killer?" says Klaas de Jonge, of Penal Reform International, who is coordinating a research project assessing the effectiveness of the Gacaca courts." *Id.*

¹⁷⁷ See Promotion of National Unity and Reconciliation Act, No. 34 of 1995 (1995), available at <http://www.polity.org.za/html/govdocs/legislation/1995/act95-034.html?rebookmark=1>.

¹⁷⁸ See Azanian Peoples Organisation (AZAPO) & Ors v. President of the Republic of South Africa & Ors [1996] ICHRL 53 (25 July 1996), available at <http://www.worldlii.org/int/cases/ICHRL/1996/53.html>.

¹⁷⁹ FRANCIS G. JACOBS & ROBIN C.A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 407 (1996) ("The track record of compliance with decisions of the Court . . . has been impressive.").

normative and procedural rules were in no way intended to take the place of national human-rights provisions and machinery, but were clearly designed to add a supplementary and ultimate remedy to those safeguards which the internal law of the Convention States afford to the individual.¹⁸⁰

The European Convention on Human Rights and Fundamental Freedoms (“ECHRFF”)¹⁸¹ was drafted and adopted shortly after the promulgation of the Universal Declaration of Human Rights (“UDHR”).¹⁸² When it became clear that the binding agreements to implement the UDHR would not be adopted for some time, the European nations drafted the ECHRFF. However, as Fr. Drinan points out, the ECHR allows each state a “margin of appreciation” in interpreting the provisions of the Convention.¹⁸³ The doctrine of margin of appreciation, or deference to national legislators, is rooted in national case law concerning judicial review of legislative action.¹⁸⁴ The margin of appreciation doctrine is premised on two assumptions. First, even in democratic societies, what is necessary to further a state’s interest may vary from state to state;¹⁸⁵ second, the states’ own view of what is necessary is

¹⁸⁰ LOUIS HENKIN ET AL., HUMAN RIGHTS 552 (citing Herbert Petzold, *The Convention and the Principle of Subsidiarity*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 41, 43 (R. St. J. McDonald et al. eds., 1993)).

¹⁸¹ The European Convention on Human Rights and Fundamental Freedoms (“ECHRFF”) was signed on November 4, 1950 and entered into force on September 3, 1953. Further, it “was composed of representatives of the European Union governments, the European Parliament, national Parliaments, the European Commission, and observers from the European Court of Justice and the Council of Europe. It was a wise decision to include such observers as it ensured the constructive collaboration both of the European Court of Justice and of the European Court of Human Rights.” Hans Christian Krüger, *The European Union Charter of Fundamental Rights and the European Convention on Human Rights: An Overview*, in THE EU CHARTER OF FUNDAMENTAL RIGHTS (Steve Peers and Angela Ward eds., 2004).

¹⁸² JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 12 (1999) (“[The] Third General Assembly adopted the Declaration at just about midnight on December 10, 1948, with a vote of 48 to 0 and 8 abstentions.”).

¹⁸³ DRINAN, *supra* note 1, at 90.

¹⁸⁴ See generally Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 115–17 (2005).

¹⁸⁵ See, e.g., Leyla Şahin v. Turkey [GC], 44774 Eur. Ct. H.R. 98, ¶ 114 (Nov. 10, 2005), available at <http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=1132746FF1FE2A468ACCBCD1763D4D8149&key=17671&sessionId=5786516&skin=hudoc-en&attachment=true>.

entitled to some deference by an international court.¹⁸⁶ In *Handyside v. United Kingdom*,¹⁸⁷ the Court discussed the margin of appreciation doctrine as follows:

[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinion on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of “necessity” in this context.¹⁸⁸

In cases concerning the relationship between the church and state the Court has said:

Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, especially in view of the diversity of the approaches taken by national authorities on the issue. It is not possible to discern throughout Europe a uniform conception of the significance of religion in society and the meaning or impact of the public expression of a religious belief will differ according to time and context. Rules in this sphere will consequently vary from one country to

[T]he Court considers this notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention[.]

Id.

¹⁸⁶ *See id.* ¶ 109.

¹⁸⁷ 24 Eur. Ct. H.R. (ser. A) (1976), available at <http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=1132746FF1FE2A468ACCBCD1763D4D8149&key=12039&sessionId=6076873&skin=hudoc-en&attachment=true>.

¹⁸⁸ *Handyside*, 24 Eur. Ct. H.R. (ser. A), ¶ 48.

another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the domestic context concerned.

[T]his margin of appreciation goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate.¹⁸⁹

Clearly the most effective fora are those established with the support of people most closely affected. Building upon these experiences, the newly established International Criminal Court ("ICC") incorporates the principle of complementarity, which provides that the ICC shall have jurisdiction only when national courts are unable or unwilling to prosecute.¹⁹⁰

Moreover, just as the principle of subsidiarity favors national courts in Europe over submission to the ECHR, the principle would also militate against referral of religious claims to an international forum rather than a local or regional forum.

The Catholic Church originally espoused the principle of subsidiarity through the teachings of Pope Pius XI. In his 1931 Encyclical, *Quadragesimo Anno*, the Pope said that:

It is a fundamental principle of social philosophy, fixed and unchangeable, that one should not withdraw from individuals and commit to the community what they can accomplish by their own enterprise and industry. So, too, it is an injustice and at the same time a grave evil and a disturbance of right order, to transfer to the larger and higher collectivity functions which can be performed and provided by lesser and subordinate bodies. Inasmuch as every social activity should, by its very nature, prove a help to member of the body social, it should never destroy or absorb them.¹⁹¹

It is the duty of the government to care for the common welfare of its constituents. While the principle of subsidiarity

¹⁸⁹ *Sahin*, 44774 Eur. Ct. H.R. 98, ¶¶ 109–110 (citations omitted).

¹⁹⁰ Rome Statute of the International Criminal Court art. 17(1) (a)–(b), July 17, 1998, 2187 U.N.T.S. 90, available at <http://www.un.org/law/icc/statute/romefra.htm>.

¹⁹¹ Pope Pius XI, *Quadragesimo Anno*, [An Encyclical Letter on Reconstruction of Social Order], ¶ 79 (May 15, 1931), reprinted in 3 THE PAPAL ENCYCLICALS 1903–1939, at 428 (Claudia Carlen Ihm ed., 1990).

was originally formulated in the economic context, subsidiarity has been applied to advocating political change,¹⁹² health care reform,¹⁹³ social communication,¹⁹⁴ humanism,¹⁹⁵ fighting crime,¹⁹⁶ organization of corporate culture,¹⁹⁷ global civil society,¹⁹⁸ transnational authorities,¹⁹⁹ globalization,²⁰⁰ agriculture,²⁰¹ education,²⁰² public policy,²⁰³ balanced markets,²⁰⁴

¹⁹² See Richard R. Gaillardetz, *The Ecclesiological Foundations of Modern Catholic Social Teaching*, in MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES & INTERPRETATIONS 72, 84–85 (Kenneth R. Himes, O.F.M. ed., 2005) (citing and quoting Pope Paul VI, *Octogesima adveniens*) (“It is up to these Christian communities . . . to discern the options and commitments which are called for in order to bring about the social, political, and economic changes seen in many cases to be urgently needed.”); see also Kenneth R. Himes, *The Local Church as a Mediating Structure*, in 12 SOC. THOUGHT 23, 25–26 (1985).

¹⁹³ See Fr. Place, *Health Care: Essential Building Block of a Free Society*, in 29 ORIGINS CNS DOCUMENTARY SERVICE 49, 52 (1999).

¹⁹⁴ Pontifical Council for Social Communications, *Ethics in Communications*, 30 ORIGINS CNS DOCUMENTARY SERVICE 49, 54 (2000) (“Principles of social ethics like solidarity, subsidiarity, justice and equity, and accountability in the use of public resources and the performance of roles of public trust are always applicable.”).

¹⁹⁵ See Bishop Loverde, *Advocates of the “New Humanism,”* in 30 ORIGINS CNS DOCUMENTARY SERVICE, 286, 287 (2000) (quoting John Paul II, Address to University Professors (2000)) (“The humanism which we desire advocates a vision of society centered on the human person and his inalienable rights, on the values of justice and peace, on a correct relationship between individuals, society and the state, on the logic of solidarity and subsidiarity.”).

¹⁹⁶ U.S. Bishops, *Responsibility, Rehabilitation and Restoration: A Catholic Perspective on Crime and Criminal Justice*, in 30 ORIGINS CNS DOCUMENTARY SERVICE, 389, 396 (2000).

[Subsidiarity] encourages communities to be more involved. Criminal activity is largely a local issue and, to the extent possible, should have local solutions. Neighborhood-watch groups, community-oriented policing, . . . neighborhood treatment centers and local support for ex-offenders all can be part of confronting crime and fear of crime in local communities.

Id.

¹⁹⁷ See Fr. William Byron, *Trust and Integrity in Organizations*, in 34 ORIGINS CNS DOCUMENTARY SERVICE 118, 120 (2004).

¹⁹⁸ Fr. John Coleman, *Globalization’s Challenge*, in 34 ORIGINS CNS DOCUMENTARY SERVICE 322, 326 (2004) (“Catholic voices endorse a notion of global civil society and embrace the concept of subsidiarity in any global governance regime.”).

¹⁹⁹ Drew Christiansen, S.J., *Commentary on Pacem in terris (Peace on Earth)*, in MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES & INTERPRETATIONS 217, 240 n.51 (Kenneth R. Himes, O.F.M. ed. (2005) (“[W]hile the idea of a universal or transnational political authority is an expression of the Catholic belief in the one human family and by virtue of historical conditions an increasingly necessary ideal, it is an ideal conditioned and limited by the principle of subsidiarity.”).

²⁰⁰ See John Paul II, *Pastores Gregis*, 33 ORIGINS CNS DOCUMENTARY SERVICE 353, 387 (2003).

²⁰¹ U.S. Bishops, *For I Was Hungry and You Gave Me Food: Catholic Reflections*

international debts,²⁰⁵ responsible citizenship,²⁰⁶ the church itself,²⁰⁷ citizen participation in the energy crises of the early 1980s,²⁰⁸ production in the economy,²⁰⁹ and world political

on *Food, Farmers, and Farmworkers*, in 33 ORIGINS CNS DOCUMENTARY SERVICE 510, 515 (2004) (“In the case of agriculture, solidarity and subsidiarity lead us to support and promote smaller, family-run farms not only to produce food but also to provide a livelihood for families and to form the foundation of rural communities.”).

²⁰² Pontifical Council for the Family, *The Truth and Meaning of Human Sexuality*, in 25 ORIGINS CNS DOCUMENTARY SERVICE 529, 535 (1996) (“[T]he mission of education must always be carried out in accordance with . . . the principle of subsidiarity.”); see also Bishops of Colorado, *The Christian Coalition’s Catholic Alliance*, in 25 ORIGINS CNS DOCUMENTARY SERVICE 574, 576 (1996) (“In keeping with the principles of liberty and subsidiarity, the Catholic Alliance asserts that parents have the right and responsibility to direct the education of their children[.]”).

²⁰³ See Theodore McCarrick, *Religion in Foreign Affairs*, in 26 ORIGINS CNS DOCUMENTARY SERVICE 563, 564–65 (1997).

²⁰⁴ John Paul II, *Toward a Balanced, Well-Regulated World Market*, in 27 ORIGINS CNS DOCUMENTARY SERVICE 42, 43 (1997) (“[I]t is essential that political activity assure a balanced market in its classical form by applying the principles of subsidiarity and solidarity, according to the model of the social state.”).

²⁰⁵ See USCC Administrative Board, *A Jubilee Call for Debt Forgiveness*, in 28 ORIGINS CNS DOCUMENTARY SERVICE 793, 795 (1999).

²⁰⁶ See Administrative Board of the National Catholic Welfare Conference, *Statement on Social Problems* ¶ 16 (Nov. 28, 1937), reprinted in 1 PASTORAL LETTERS OF THE UNITED STATES CATHOLIC BISHOPS: 1792-1940, at 425 (Hugh J. Nolan ed., 1984). “The tendency of our time is to make more and more demands on government. Citizens and groups should not ask the government to do for them what they can do for themselves. Sound social policy requires government to encourage citizens to assume as much personal responsibility as possible.” *Id.*

²⁰⁷ See Committee on Conciliation and Arbitration, *Procedures Adopted by the General Membership of the National Conference of Catholic Bishops* ¶ 3 (Nov. 14, 1979), reprinted in 4 PASTORAL LETTERS OF THE UNITED STATES CATHOLIC BISHOPS 1975-1983, at 331 (Hugh J. Nolan ed., 1984) (“It shall be the secondary function of the Bishops’ Committee on Conciliation and Arbitration to be available as a resource to assist, upon request, with the development and improvement of local-level structures for the resolution of disputes.”).

²⁰⁸ See Committee on Social Development and World Peace, United States Catholic Conference, *Reflections on the Energy Crisis* ¶ 24 (Apr. 2, 1981), reprinted in 4 PASTORAL LETTERS OF THE UNITED STATES CATHOLIC BISHOPS 1975-1983, at 444, 461 (Hugh J. Nolan, ed., 1984).

Generally speaking, the smaller the entity responsible for a particular decision—individual rather than group, state rather than federal government, local distributor rather than multinational corporation—the better chance an informed citizenry has of affecting it. . . . [T]hose holding authority in the public and private sectors should be constantly looking for ways to center energy decision making as near the grass roots as possible. While adopting this course might lessen efficiency, it should produce results more satisfactory to the people and ultimately to the institutions that serve them.

Id.

order.²¹⁰ *Quadragesimo Anno* further states that lower levels of society should address issues where they are capable of doing so.²¹¹

Pope John Paul II has stated that:

Many issues [can and ought] to be brought to fruitful agreement on the continental or regional or other intermediate level. The need for global solutions to many problems should not blind us to the possibilities of resolving problems and building a better future on adequate rather than all-encompassing standards of living. In fact, applying the notion

²⁰⁹ John XXIII, *Mater et Magistra*, [Encyclical of Pope John XXIII on Christianity and Social Progress], ¶ 117 (May 15, 1961), reprinted in 5 THE PAPAL ENCYCLICALS 1958-1981, at 72 (Claudia Carlen Ihm, ed., 1990).

The State and other agencies of public law must not extend their ownership [of private property] beyond what is clearly required by considerations of the common good properly understood, and even then there must be safeguards. Otherwise private property could be reduced beyond measure, or, even worse, completely destroyed.

Id. This encyclical is also available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_15051961_mater_en.html (last visited Mar. 17, 2006).

²¹⁰ John XXIII, *Pacem in Terris*, [Encyclical of Pope John XXIII on Establishing Universal Peace in Truth, Justice, Charity, and Liberty], ¶ 140 (Apr. 11, 1963), reprinted in 5 THE PAPAL ENCYCLICALS, *supra* note 209, at 122-23.

The same principle of subsidiarity which governs the relations between public authorities and individuals, families and intermediate societies in a single State, must also apply to the relations between the public authority of the world community and the public authorities of each political community. The special function of this universal authority must be to evaluate and find a solution to economic, social, political and cultural problems which affect the universal common good. These are problems which, because of their extreme gravity, vastness and urgency, must be considered too difficult for the rulers of individual States to solve with any degree of success.

Id. This encyclical is also available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html (last visited Mar. 17, 2006).

²¹¹ Pius XI, *supra* note 191, at 428.

The supreme authority of the State ought . . . to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of 'subsidiary function,' the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.

Id.

of subsidiarity, we can see that there are many groups and peoples who can solve their own problems better at a local or intermediate level, and that such action moreover gives them a direct sense of participation in their own destinies. This is a positive advance and one to which we all should be sensitive.²¹²

One theologian has posited that:

We now have reached a point in history where the principle of subsidiarity with respect to the common good must be applied to the states themselves in their relation to the global community. In the present intensified exchange among nations, the principle of subsidiarity may assist us in overcoming socially dangerous and ethically unjustifiable political divisions. It can also prevent the imposition of an international authority that ignores the particular economic and cultural interests of individual nations and contributes no more to the global common good than a universally resented international police corps.²¹³

The principle of subsidiarity has been incorporated into the jurisprudence of the European Union and now applies to virtually all aspects of Union activities. Subsidiarity, as a limitation on conferred Union power, was introduced into Union Law in 1992 in the Maastricht Treaty, which stated that in areas outside the EU's exclusive competence, it should take action "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."²¹⁴ The subsidiarity principle as articulated in the Maastricht Treaty was criticized by several member states, especially Great Britain and Denmark, because it was "too vague a principle to be relied upon in law."²¹⁵ However, in response to a Danish referendum rejecting the Maastricht agreement, the European Council

²¹² John Paul II, Presentation to H.E. Mr. Salim Ahmed Salim, President of the General Assembly of the United Nations (Aug. 22, 1980), *reprinted in* PERMANENT OBSERVER MISSION OF THE HOLY SEE TO THE UNITED NATIONS, PATHS TO PEACE: A CONTRIBUTION ¶ 1418, at 221 (1987).

²¹³ Louis Dupré, *The Common Good and the Open Society*, in CATHOLICISM AND LIBERALISM, at 192–193 (R. Bruce Douglass & David Hollenbach eds., 1994); *see also supra* note 199.

²¹⁴ Maastricht Treaty, art. 3b, Feb. 7, 1992, 1992 O.J. (C191) 1, 31 I.L.M. 253 (1992), *available at* <http://www.eurotreaties.com/maastrichtec.pdf>.

²¹⁵ Euro-know.org, Subsidiarity, <http://www.euro-know.org/dictionary/s.html#Subsidiarity> (last visited Mar. 17, 2006).

created a set of guidelines to reinforce the subsidiarity principle, including the requirement of an explanatory statement to the Council that showed justification of the initiative in accordance with subsidiarity. The draft constitution for the EU retains, reinforces, and strengthens principles of subsidiarity,²¹⁶ and requires consultation with national parliaments before action is taken at the national level.²¹⁷ However, it was primarily dissatisfaction with the increasing directives from Brussels ignoring subsidiarity and with the weakening of local initiatives that led to the resounding rejection of the draft Constitution in

²¹⁶ See EU Const. Treaty, *supra* note 26, art. I-11. "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality." *Id.*

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Id. art. I-11-3.

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution.

Id. art. II-111-1. "National Parliaments shall ensure that the proposals and legislative initiatives submitted under Sections 4 and 5 of this Chapter comply with the principle of subsidiarity, in accordance with the arrangements laid by the Protocol on the application of the principles of subsidiarity and proportionality." *Id.* art. III-259.

²¹⁷ See *id.* Protocol on the Application of the Principles of Subsidiarity and Proportionality, art. 5. "Draft European legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality." *Id.*

Any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.

Id. art. 6. "Where reasoned opinions on a draft European legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments . . . the draft must be reviewed." *Id.* art. 7. "The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act . . ." *Id.* art. 8

France and the Netherlands, despite the fact that the Constitution itself was little understood by the peoples of Europe.²¹⁸

Religious freedom is at the apex of rights of the individual and, at least in the European context, the principle of subsidiarity would seem to prefer protection at the local or regional level rather than an international forum.

CONCLUSION

Europe, whether old or new, is becoming increasingly secular. While religious beliefs remain sacrosanct, religious liberty, or the freedom to express religious beliefs, is devalued. Although Europe has embraced three models of church-state relations, these models do not necessarily correlate with the protections afforded with religious liberty. The most secular state, France, with its commitment to the ideology of *laïcité*, has been most restrictive of religious liberty as opposed to religious belief. Greece, with an established Church, has also been criticized for its restrictions on religious liberty particularly with respect to its ban on proselytizing. However, other countries, such as Italy, with a system of cooperation, or the United Kingdom, with an established Church, have been cited as responsive to claims of infringement of religious liberty. The European Court of Human Rights has affirmed that secularism is a value that a state may advance even when acts prescribed by law run counter to claims of religious liberty. However, the expansive decision was rendered in the context of a state firmly committed to a policy of secularism that was subjected to violent confrontations. The Court might in the future refine or limit its ruling to the particular political situation in Turkey that the Court faced.

In Europe, the principle of subsidiarity first articulated in papal encyclicals is entrenched both in European Union Law and in the practice of the ECHR and its institutions. This principle prefers local or regional fora for protection of rights rather than international courts.

²¹⁸ See Press Release, European Union Committee of the Regions, EU Should Implement Democratic Safeguards in Stalled Constitution Now Without Waiting for Ratification, Says CoR President (Nov. 17, 2005), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=COR/05/128&format=PDF&aged=1&language=EN&guiLanguage=en>.

In Europe, respect for human rights is protected at the regional or national level with well-developed legal systems and traditions. Despite criticisms of some of the decisions of the ECHR, and while variations among the states exist, encompassed within the margin of appreciation is a common shared value which surfaces when infringements on human rights are alleged. Thus, an international forum for claims of infringement of religious liberty would run counter to deeply established traditions in Europe.