



## Neutrality, Proselytism, and Religious Minorities at the European Court of Human Rights and the U.S. Supreme Court

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### I. THE CRIMINALIZATION OF PROSELYTISM

The existence of every new, non-mainstream, or minority religious group depends on the ability to make its doctrines known and to proselytize new members. Only by persuading people to change their religious affiliation (or in case of atheists or agnostics, to adopt one for the first time) will a group be able to survive as a religious community. While minority religions may on occasion compete against each other for new adherents, for practical reasons, their main target group will be the membership of the majority religion, who may react by lobbying the legislature and the administration to impose restrictions on religious teaching by minorities. This is not only a contemporary phenomenon. Michael McConnell notes that in 18<sup>th</sup> century Virginia, the most intolerant of the colonies, the Church of England was the established church and the authorities blocked efforts by Presbyterians and Baptists to preach their faith.<sup>1</sup> More recently, the prohibition of proselytism came before the European Court of Human Rights in *Kokkinakis v. Greece*.<sup>2</sup>

*Kokkinakis* is a seminal case, not only in its discussion of the issues of religious teaching and proselytism, but also for its discussion of freedom of religion in general. In the first case ever decided under Article 9 of the European Convention on Human Rights, the Strasbourg judges had the chance to spell out, for the first time, the principles governing religious freedom in the Convention context.

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<sup>1</sup> Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1423 (1990).

<sup>2</sup> *Kokkinakis v. Greece*, App. No. 14307/88, 17 Eur. H.R. Rep. 397(1994) [hereinafter *Kokkinakis*].

The applicant was an elderly Jehovah's Witness living in the island of Crete. One day he visited one of his neighbors, who was the wife of the cantor of the local Christian Orthodox church, and engaged in a discussion about God with her. After her husband called the police, the applicant was arrested and charged with the criminal offense of proselytism. The offense was defined in the relevant Greek law as "any attempt to intrude on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety."<sup>3</sup> The applicant was convicted by the trial court and the judgment was upheld by the Court of Appeal and the Court of Cassation. Kokkinakis complained before the Convention organs<sup>4</sup> of a violation of his right to religious freedom under Article 9 of the Convention, as well as violations of Articles 7 (no punishment without law) and 10 (freedom of expression).

## II. PROSELYTISM AT THE STRASBOURG COURT: FACIAL VS. "AS-APPLIED" INCOMPATIBILITY

The European Court of Human Rights dismissed the claims under Articles 7 and 10, but upheld the complaint based on Article 9. It started its analysis by explaining the general principles on freedom of religion:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to 'manifest [one's] religion.' Bearing witness in words and deeds is bound up with the existence of religious convictions. According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour, for example through 'teaching,' failing which, moreover, 'freedom to change [one's] religion or

<sup>3</sup>Anagastikos Nomos 1363/1938 §4 (1938) (Greece) (amended by Nomos 1672/1939 §2), *cited in* Kokkinakis, *id.* at 404.

<sup>4</sup> Before Protocol No. 11 to the European Convention on Human Rights came into force on November 1<sup>st</sup>, 1998, applicants had to lodge their complaints with the European Commission of Human Rights, which could then refer them to the European Court of Human Rights. Protocol No. 11 abolished the Commission and gave applicants direct access to the Court.

belief,' enshrined in Article 9, would be likely to remain a dead letter.<sup>5</sup>

In applying these principles to the facts of the case, the Court noted that the criminal conviction was an interference with the applicant's "freedom to manifest [his] religion or belief"<sup>6</sup> without specifying which aspect of the manifestation of religious beliefs was at stake. The Commission, similarly imprecise in its report, had referred to the applicant as having been convicted because "he was propagating his religious beliefs"<sup>7</sup> without examining whether this propagation was tantamount to teaching under Article 9(1).<sup>8</sup> Yet, neither the Commission nor the Court left any doubt that the dissemination of one's religious views and one's attempt to engage in a conversation about them with another person fall within the ambit of the protected manifestations of religion.

The Court then turned to the three requirements of Article 9(2). It asserted, without any detailed discussion, that the applicant's criminal conviction was based on the relevant law and pursued the legitimate aim of protecting the rights and freedoms of others. Thus, the Court upheld the facial validity of the challenged law and accepted that at least certain forms of proselytism could, in principle, be made criminal. However, the way the law was applied in the applicant's case was unacceptable. The national courts had based their decision to convict him on a mere reproduction in their judgment of the relevant provision without specifying in what way he had tried to undermine his neighbor's religious beliefs by improper means. The Court concluded that the criminal conviction was disproportionate to the legitimate aim pursued and could not be considered necessary in a democratic society. Thus, according to the majority, there was nothing wrong as such with the law which criminalized proselytism, and any concerns with religious freedom did not extend beyond its specific application to the circumstances of the case.<sup>9</sup>

*Kokkinakis* is an elliptical judgment that leaves the reader with more questions than answers. Issues such as the importance of religious speech, the concept of the rights of others, the vague definition of the criminal offense of proselytism in the relevant statute, and the discriminatory treatment of religious minorities in relation to religious canvassing received very little if any attention. It is on this last issue that I will focus here. My starting point is the statement made by Judge Martens in his partly dissenting opinion that "making proselytism a *criminal offence* [emphasis in original]

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<sup>5</sup> Kokkinakis, *supra* note 2, at 418.

<sup>6</sup> *Id.* at 419.

<sup>7</sup> *Id.* at 411.

<sup>8</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols art. 9(1), 4 Nov. 1950, 213 U.N.T.S. 222. ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom . . . to manifest his religion or belief, in worship, teaching, practice and observance.")

<sup>9</sup> Kokkinakis, *supra* note 2, at 425, 432. Judge Pettiti, who partly concurred, and Judge Martens, who partly dissented, would have found the proselytism statute facially incompatible with the Convention. In a concurring opinion, Judge De Meyer appears to be taking the same view. *Id.* at 429 ("Proselytism, defined as zeal in spreading the faith, cannot be punishable as such.")

would . . . run counter to the strict *neutrality* [emphasis added] which the State is required maintain"<sup>10</sup>. The idea that the state should remain neutral in the field of religion is one that has played a central role in the development of doctrine and case-law under the Religion Clauses of the First Amendment. I will argue that a proper understanding of and a commitment to neutrality in the context of Article 9 of the Convention would have required the Strasbourg Court to declare the proselytism statute challenged in *Kokkinakis* (or any statute similarly designed) incompatible on its face with the Convention, instead of merely holding that its application in the specific case was problematic.<sup>11</sup>

### III. NEUTRALITY AS MINORITY PROTECTION

One reason to prevent the state from dictating which forms of religious teaching are legitimate is the discriminatory potential inherent in such power. In general, governmental interference with religious affairs will be prone to yield majoritarian results reflective of the political influence of various religious groups. Mainstream faiths with a large number of followers can exert greater influence over the political process and thus have their religious needs, sensitivities and concerns taken into account by the legislature and administration. By contrast, minority groups, which frequently attract the disapproval or even the open hostility of religious majorities, have limited power in the context of majoritarian decision-making and can become easy targets.<sup>12</sup> The principle of state neutrality, being a requirement of both the Free Exercise and the Establishment Clauses of the First Amendment, is often invoked by the United States Supreme Court as a safeguard against this eventuality.<sup>13</sup> At its bare minimum, it prohibits the government from treating one religious group more favorably than another or religion more favorably than irreligion.<sup>14</sup> This definition,

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<sup>10</sup> *Id.* at 437 (second emphasis added).

<sup>11</sup> There is considerable literature on the distinction between facial and "as-applied" challenges to the constitutionality of statutes. See generally Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994). For present purposes, it is enough to note that in a successful facial challenge, the court concludes not only that a specific application of a provision is unconstitutional, but that the provision is more generally invalid.

<sup>12</sup> Justice Scalia has admitted that leaving religious minorities to claim protection through the democratic process "will place at a relative disadvantage those religious practices that are not widely engaged in" but found this to be "an unavoidable consequence of democratic government". *Employment Division, Dep't. of Human Resources v. Smith*, 494 U.S. 872, 890 (1990).

<sup>13</sup> See, e.g., *Comm. for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 793-94 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality.>").

<sup>14</sup> *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion").

however, provides insufficient guidance on how religious freedom disputes should be resolved, because it says very little about the substantive content of the principle. People may agree on their commitment to neutrality but at the same time have significantly differing views about what it requires in any given case.<sup>15</sup>

One way of approaching the normative content of the Religion Clauses is through a minority-protection angle.<sup>16</sup> In short, this is the view that free exercise and non-establishment should be interpreted as counter-majoritarian barriers to protect minority groups and faiths from the antipathy of the majority and/or the special burdens they may face because of otherwise general laws. Thus, their adherents are protected from being marked off as outcasts by official state action and their equal civic status is affirmed. Under such an interpretation, the state, in order to remain genuinely neutral, should not only refrain from directly targeting a minority religion; it should also take into account the impact its policies have on minority faiths and practices, given that by its very nature the democratic decision-making process tends to reflect the values and beliefs of the majority. Neutrality on all matters religious acquires particular value for those who, by reason of their religious affiliation are not (or not fully) within society's mainstream.<sup>17</sup> Equal treatment and the protection of minorities does not need to be the only or the most important principle underlying religious liberty, as it is perfectly conceivable (indeed, this is the better view) that a guarantee of the free exercise of religion and prohibition of establishment, as provided by the First Amendment, serves multiple values and purposes.<sup>18</sup> Instead, it should be seen as one of the various principles that inform our understanding of freedom of religion and the kind of governmental measures it requires or prohibits.

In the majority of cases, the threat for minority denominations and their practices comes from general laws whose aims are secular, but which burden the religious adherent by requiring conduct that her religion prohibits or by prohibiting conduct that her religion requires.<sup>19</sup> It is only rarely that a law will single out and target a religious group or its practices as such. *Church of Lukumi Babalu Aye Inc v. City of Hialeah*<sup>20</sup> provides the most characteristic recent example of a non-neutral law that

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<sup>15</sup> For a discussion of the various conceptions of neutrality and their place in the scholarship and case law on the Religion Clauses, see Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); Michael McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146 (1987).

<sup>16</sup> See, e.g., Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275 (2006); Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919 (2004).

<sup>17</sup> See Laycock, *supra* note 15, at 998 ("That the government aspires to religious neutrality, and that the courts stand ready to hold government to its aspiration, is an important reassurance to religious minorities.").

<sup>18</sup> See KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 5 (2006).

<sup>19</sup> See generally Michael C. Dorf, *Incidental Burdens on Fundamental Rights* 109 HARV. L. REV. 1175 (1996) (discussing laws that are technically neutral but that nonetheless place "incidental burdens" on the exercise of rights).

<sup>20</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

infringes on the freedom of religion of a minority group. The case concerned various city ordinances prohibiting the ritual slaughter of animals which was central to the worship of the Santeria religion. The Supreme Court held that the contested provisions violated the First Amendment as they failed to meet the requirements of neutrality and general applicability and did not serve any compelling secular interests. In relation to neutrality, Justice Kennedy noted that a law which restricts conduct because of its religious motivation cannot be neutral.<sup>21</sup> Although the text of the ordinances did not conclusively point to the lack of any legitimate secular interest, the effect of the law had to be taken into account when assessing its real object, and, in the present case, it was clear that, in practice, the only killings of animals caught by the ordinances were the Santeria sacrifices.<sup>22</sup> Further evidence of the measures' improper object was their over-inclusiveness as they "[proscribed] more conduct than [was] necessary to achieve . . . the legitimate governmental interests in protecting the public health and preventing cruelty to animals."<sup>23</sup> At the same time, the ordinances were also found to be under-inclusive and not generally applicable in relation to both aims: on the one hand, they left unpunished various instances of animal killings for non-religious purposes; on the other, they did not provide for the protection of public health from animal carcasses when the killing had secular motives.<sup>24</sup>

In a concurring opinion, Justice Scalia, while agreeing that the ordinances did not pass First Amendment scrutiny, disapproved of the part of the majority opinion where Justice Kennedy examined the legislative history of the ordinances, which clearly showed the hostility of the residents and the members of the city council toward the Santeria faith, to infer that the lawmakers' intention was to target this particular group. He stated that the subjective motives of legislators were irrelevant, the only pertinent criterion being the object of the laws at issue.<sup>25</sup> This is a test of legislative aims—a measure will be unlawful if it is directed at constitutionally protected conduct.<sup>26</sup> It does not inquire into the motives and purpose of government actors. Thus, for Justice Scalia, it was the objective fact that the ordinances targeted a particular religious practice that mattered, with the possible evil motives of city officials being neither a sufficient nor a necessary condition for invalidation.

#### IV. DISCRIMINATION IN TEXT AND PRACTICE: EXAMINING KOKKINAKIS

In *Lukumi*, Justice Kennedy noted that the words "sacrifice" and "ritual" used in the Hialeah ordinances may be susceptible to a secular use. Yet, the anti-proselytism statute in *Kokkinakis* lacked even this guise of neutrality, as it was formulated in purely religious terms and singled out religious activity for unfavorable treatment. Put

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<sup>21</sup> *Id.* at 533.

<sup>22</sup> *Id.* at 534-36.

<sup>23</sup> *Id.* at 538.

<sup>24</sup> *Id.* at 544-45.

<sup>25</sup> *Id.* at 558-59 (Scalia J., concurring in part and concurring in the judgment).

<sup>26</sup> Richard H. Fallon, Jr., *The Supreme Court 1996 Term: Foreward: Implementing the Constitution*, 111 HARV. L. REV. 54, 73 (1997).

differently, the Greek law lacked any secular justification, prohibiting, in express language, “conduct because it [was] undertaken for religious reasons.”<sup>27</sup> Given that the anti-proselytism statute clearly targeted religious activity, the text could (and should) have been the starting and final point of the European Court’s scrutiny.<sup>28</sup> It is unnecessary to inquire into the motives of the lawmakers or the administrators, since the impugned law explicitly made a religious classification to impose a burden on a specific activity because it was undertaken for religious purposes. This deprives the law of any credible claim to neutrality. A minimalist, textual approach, of the type usually favored by Justice Scalia, would have been enough to find the statute invalid on its face.

One could try to circumvent the neutrality problem by arguing that a statutory prohibition of religious activity is not necessarily suspicious – that what really matters is whether the statutory classification is formulated in neutral terms, so that it relates to religion in general, rather than to a *specific* religion. The anti-proselytism law in *Kokkinakis*, the argument could say, singles out a kind of religious conduct without reference to any particular faith. Thus, any act of proselytism falling within the ambit of the law would be treated evenhandedly, regardless of the specific religious belief which prompted it.

Even if one were to accept this argument – rejecting the view that the statute’s religious classification renders it non-neutral and arguing instead that only discrimination explicitly sanctioned by the text of the impugned proselytism law is subject to a facial challenge – the statute in *Kokkinakis* still fails to pass the American constitutional muster addressed in *Lukumi*. For textual neutrality does not exhaust the court’s constitutional scrutiny; rather, it is the starting point of a neutrality inquiry that defines the way a textually neutral law is applied. As Justice Kennedy explained:

Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause forbids subtle departures from neutrality and covert suppression of particular religious beliefs. Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt.<sup>29</sup>

The history of the application of the proselytism statute in *Kokkinakis* leaves no doubt as to its real object and the lack of any credible claim to neutrality and evenhandedness. The applicant, since becoming a Jehovah’s Witness in 1936, had

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<sup>27</sup> *Lukumi*, 508 U.S. at 532

<sup>28</sup> *See id.* at 533 (stating that in order “to determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context”).

<sup>29</sup> *Id.* at 534 (citations and internal quotation marks omitted).

been “arrested more than 60 times for proselytism,” interned by the administrative authorities and convicted by the criminal courts. Between 1975 and 1992, 4,400 Jehovah’s Witnesses were arrested; 1,233 of whom were committed for trial while 208 were convicted.<sup>30</sup> On the other hand, the government was unable to refer to any cases where individuals were prosecuted for proselytism directed against religions other than the dominant Christian Orthodox, let alone cases where members of the dominant religious group were prosecuted for efforts to convert adherents of minority faiths.<sup>31</sup> It is clear that not only the potential for discrimination was inherent in the contested law, but that its actual operation was so obviously discriminatory that it could not withstand the most feeble neutrality scrutiny on the basis of application.

As Judge Martens explained in his dissenting opinion, “under the Convention all religions and beliefs should, as far as the State is concerned, be equal...making proselytizing a *criminal offense* would not only run counter to the strict neutrality which the State is required to maintain in this field but also create the danger of discrimination when there is one dominant religion. The latter point is tellingly illustrated by the file that was before the Court.”<sup>32</sup> Because the Greek proselytism statute overtly targeted religion by singling out and punishing a particular religious activity,<sup>33</sup> with the aim of protecting the majority religion and impeding the efforts of other faiths to disseminate their doctrines, the European Court of Human Rights should have declared it incompatible with the Convention on its face. Instead, contrary to the *Lukumi* Court, it failed even to discuss its practical application, and seems to have accepted that the statute’s facial neutrality was enough to save it. Yet, the acceptance of a facial challenge would not have required any kind of judicial activism by the European Court; a minimalist approach focused on the *effect* of the law under review, like the one espoused by Justice Scalia in *Lukumi*,<sup>34</sup> would have sufficed.

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<sup>30</sup> Kokkinakis, *supra* note 2, at 399, 406 (listing these statistics, which are provided to the European Court of Human Rights by the applicant and undisputed by the Government).

<sup>31</sup> *See id.* at 431 (Valticos J., dissenting, who voted against the finding of a violation of the Convention, and in a rather unconvincing effort to justify the fact that all prosecutions and convictions were aimed at the protection of the dominant religion, argued that this was reasonable since the majority of the population were Orthodox Christians and thus were targeted by minority groups: “Admittedly, the Government’s representative was not able to give concrete evidence concerning other religions, but that is not surprising since the Orthodox religion is the religion of nearly the whole population and sects are going to fish for followers in the best-stocked waters”).

<sup>32</sup> *Id.* at 437 (Martens, J., dissenting) (emphasis in the original).

<sup>33</sup> *See* GREENAWALT, *supra* note 18, at 42 (asserting that a statute targets religion if it explicitly or implicitly singles out a religious activity).

<sup>34</sup> *See Lukumi*, 508 U.S. at 558 (Scalia J., concurring in part and concurring in the judgment, stating that “[the] First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted”).

## V. GERRYMANDERING AND RELIGIOUS MINORITIES

An important aspect of Justice Kennedy's opinion in *Lukumi* is the idea that Hialeah's ordinances constituted a form of "religious gerrymandering" in that they constituted "an impermissible attempt to target petitioners and their religious practices."<sup>35</sup> For instance, the ordinances carefully proscribed activities related to certain religious groups, while sparing activities practiced by others. The Court's concern about religious gerrymandering not only relates to individual religious liberty but also equality among religious groups.<sup>36</sup> When the state expresses hostility towards a particular religious group, either by adopting overtly discriminatory measures or by more subtle gerrymanders, it puts into question the equal civic status of its members. In other words, it fails to recognize them as equal members of the community.<sup>37</sup>

In *Lukumi*, the statements of various city officials recorded in the minutes of meetings of the city council are a telling example of how the antipathy that a majority of the population may feel towards a minority group can easily translate into state action against the minority group. The president of the council asked: "What can we do to prevent the Church from opening?"; one councilman said that in pre-revolution Cuba "people were put in jail for practicing this religion"; another stated that the Santeria devotees "are in violation of everything this country stands for"; a third councilman expressed that "I don't believe the Bible allows [the sacrifice of animals]"; the chaplain of the local police department found the Santeria religion to be a "foolishness", "an abomination to the Lord"; and the city attorney concluded that "this community will not tolerate religious practices which are abhorrent to its citizens."<sup>38</sup>

What is the picture that emerges from these statements and the ordinances that followed? On the one hand, there is a dominant group of citizens which expresses its religious sentiments through mainstream choices and takes itself to be the representative of the true and proper values of the community. On the other, there is a religious minority whose beliefs and practices are seen not merely as different or

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<sup>35</sup> *Id.* at 535 (stating that "[the] Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders" (citing *Walz v. Tax Comm'r of New York City* 397 U.S. 664, 696 (1970))). While measures adopted with a view of disadvantaging a religious group will violate the Free Exercise Clause, those that aim at favoring a religious group will amount to impermissible religious gerrymandering which violates the Establishment Clause. See *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 729 (1994) (invalidating the creation of a special school district for a religious community and asserting that "[there] is no serious question that the legislature configured the school district with purpose and precision, along a religious line." This explicit religious gerrymandering violates the First Amendment Establishment Clause").

<sup>36</sup> See Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on Lukumi*, 69 TUL. L. REV. 335, 350 (1994); *Walz*, 397 U.S. at 696 (Harlan, J., concurring) (stating that "[neutrality] in its application requires an equal protection mode of analysis").

<sup>37</sup> See Karst, *supra* note 36, at 355.

<sup>38</sup> *Lukumi*, 508 U.S. at 541-42. (quoting taped excerpts of Hialeah City Council Meeting, June 9, 1987).

even bizarre but as irreconcilable with these dominant values and the forms of religiosity they permit. Participation in such a minority religion places the believer not just in the fringe of society but outside the community altogether. In 1942, Louis Lusky noted that, "such dislike [against minorities] arises not because the members of the groups have done or threatened acts harmful to community, but because membership in the group is itself considered a cause for distrust or even hostility."<sup>39</sup>

In its effort to unearth religious gerrymandering, Justice Kennedy explained, the Court may rely on "both direct and circumstantial evidence... Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body."<sup>40</sup> I have suggested that in *Kokkinakis*, a restrained, minimalist approach, focusing on the object of the proselytism statute without an examination of the motivation of the lawmakers or its legislative history, would have given the European Court of Human Rights sufficient grounds to declare the law incompatible with the Convention on its face. The argument for incompatibility would only be further strengthened if we look into the statute's background and history.

The statute was enacted by a dictatorial government in 1938 and constituted part of a series of legislative measures directed against dissenters. For instance, during the inter-war years Jehovah's Witnesses had been convicted not only under the proselytism statute but also contemporary statutes for the "prevention of communism" and for the "preservation of social order."<sup>41</sup> The group was seen as dangerous for the state and its established church and was subjected to officially sanctioned persecution alongside groups that posed similar threats, albeit on non-religious grounds.

At the Commission stage, the evidence presented by the applicant on the statute's history and background led Commissioner Frowein to note in his partly dissenting opinion: "It is not disputed that the legislation was originally designed to protect the Orthodox Church."<sup>42</sup> In assessing the governmental policy supporting the statute and the climate in which it was adopted, Commissioner Frowein performed an exercise similar to the one conducted by Justice Kennedy in *Lukumi*; the rule under scrutiny was placed in its historical and social context so as to demonstrate the real objectives of the legislator and its effects on specific groups.<sup>43</sup>

Now, what does this contextual inquiry reveal about the proselytism statute in *Kokkinakis*? I think it leaves no doubt that the prohibition of proselytism was a form of religious gerrymandering, in the sense that, although it did not expressly target by name a particular group, it imposed a targeted burden on the basis of religious

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<sup>39</sup> Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 2 (1942).

<sup>40</sup> *Lukumi*, 508 U.S. at 540. (citing *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977)).

<sup>41</sup> *Kokkinakis*, *supra* note 2, at 406-07.

<sup>42</sup> *Id.* at 416.

<sup>43</sup> See Karst, *supra* note 36, at 348.

affiliation. The hostility of both the state and a large segment of society toward Jehovah's Witnesses led to the enactment of a rule, which directly and intentionally harmed the aspect of the free exercise of religion—religious canvassing and solicitation—that is the hallmark of their practice. Given this hostile treatment, Jehovah's Witnesses would qualify for the type of judicial protection envisaged by Justice Stone for "discrete and insular minorities" in footnote four of *Carolene Products*.<sup>44</sup> When prejudice against these vulnerable groups makes it impossible for them to rely on the political process for to protect their rights, it is appropriate for the courts to subject governmental measures to a more exacting scrutiny. The minority groups referred to by Justice Stone are not merely the losers in a political struggle; they are the *habitual* losers whose insularity means that majoritarian processes cannot be trusted to protect their members.<sup>45</sup>

Indeed, in *Minersville School District v. Gobitis*,<sup>46</sup> decided two years after *Carolene Products*, Justice Stone recognized that Jehovah's Witnesses were a "discrete and insular minority" in need of protection by the courts.<sup>47</sup> The case concerned a challenge by Jehovah's Witnesses to a school rule requiring all pupils to salute the flag. Writing for the majority, Justice Frankfurter conceded that the rule affected a right of profound importance for the individual—freedom of conscience and religion—but held that courts were not the appropriate arena to debate issues of educational policy "so long as the remedial channels of the democratic process remain open."<sup>48</sup> In his dissent, Justice Stone pointed out that when the Court refrains from passing upon legislation where it may be possible for affected individuals to have recourse to the political process, it:

[S]urrender[s] the constitutional protection of the liberty of small minorities to the popular will...Here we have such a small minority entertaining in good faith a religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern.<sup>49</sup>

In the first decades of the 20<sup>th</sup> century, Jehovah's Witnesses faced widespread prosecution both from state authorities and private people.<sup>50</sup> While, in theory, the claimants in *Minersville* could have lobbied the administration and the legislature on the issue of the flag salute requirement, in reality, their position in the political

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<sup>44</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>45</sup> Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1296 (1982).

<sup>46</sup> *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

<sup>47</sup> See Berg, *supra* note 16, at 934-35.

<sup>48</sup> *Minersville*, 310 U.S. at 599.

<sup>49</sup> *Id.* at 606 (Stone, J., dissenting).

<sup>50</sup> See Berg, *supra* note 16, at 934.

community was so marginal and weak that it would have been unreasonable to expect the political branches of government to lend an objective, let alone a sympathetic ear, to their requests. Therefore, it was appropriate and necessary for courts to step in and offer them the constitutional protection the political process denied them.

## VI. CONCLUSION

An analysis that takes into account a minority group's distinct position in a community and its possible vulnerability, such as the one employed by Justice Kennedy in *Lukumi*, requires the consideration of the equal protection aspect. This element is conspicuously absent from the judgment of the majority in *Kokkinakis*. Although the applicant had submitted evidence demonstrating both the lack of neutrality in the conduct of the state towards Jehovah's Witnesses and the government's clear hostility to and persecution of the group's members, the *Kokkinakis* majority did not consider this relevant for the assessment of the statute's facial compliance with religious freedom. Consequently, the law that had served as the main tool of gerrymandering against a religious minority has been left intact.<sup>51</sup>

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<sup>51</sup> In a later case concerning the right of Jehovah's Witnesses to establish places of worship, the European Court of Human Rights did acknowledge that the authorities were using existing legislation to restrict their religious activities: "It appears from the evidence and from the numerous other cases cited by the applicants and not contested by the Government that the State has tended to use the possibilities afforded by the above-mentioned provisions [on the establishment of places of worship] to impose rigid, or indeed prohibitive, conditions on practice of religious beliefs by certain non-Orthodox movements, in particular Jehovah's Witnesses. Admittedly, the Supreme Administrative Court quashes for lack of reasons any unjustified refusal to grant an authorisation, but the extensive case-law in this field seems to show a clear tendency on the part of the administrative and ecclesiastical authorities to use these provisions to restrict the activities of faiths outside the Orthodox Church." *Manoussakis v. Greece*, 23 Eur. H.R. Rep. 387, 408 (1996). This is the first time that the Court stated that an administrative practice in general, as opposed to a specific application of a legislative provision, gave rise to concerns about religious freedom and the ability of minority faiths to practice their beliefs.