

## **DRAWING THE LINE BETWEEN PROPER AND IMPROPER PROSELYTISM: THE RIGHT TO ATTEMPT TO CONVINCING ONE'S NEIGHBOR IN EUROPE**

### ***TRAÇANDO A LINHA ENTRE PROSELITISMO PRÓPRIO E IMPRÓPRIO: O DIREITO DE TENTAR CONVENCER O PRÓXIMO NA EUROPA***

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**Submissão em 03/04/2017**

**Aprovação em 14/06/2017**

DOI: <http://dx.doi.org/10.21671/rdufms.v3i1.3305>

**Abstract:** This paper analyzes the legality of restrictions to the practice of proselytism, the attempt to convert people to one's own religion. This issue has caused great controversy during the preparation of human rights instruments and national laws – especially considering that some religions do not accept the right to change one's religion while others have the duty to proselytize as one of their most sacred tenets. As the clashes between different cultures and religions gradually increase in the twenty-first century, international courts have an important role in establishing limits to such practices so that people and States can properly regulate their conduct. The approach adopted by the author to analyse the legality of proselitism and of its restrictions was the examination of the European Court of Human Rights' (ECHR) jurisprudence, alongside bibliographic and documentary research aiming to investigate and explain the criteria adopted to restrict such right. The choice of the ECHR is based on the fact that such Court has a vast jurisprudence on the matter, contrary to other international human rights courts. Each paradigmatic case provides some criteria that, if put together, allow the setting of a framework on the legality of State restrictions to proselitism – even though the Court never clearly established such a framework. After deriving the criteria for the restriction from the decisions, this article concludes that the validity of its restrictions depends upon diverse circumstantial variables primarily relating to the potential for coercion of the message's receiver. Some aspects regarding the limitations to the right to proselytize, however, remain unanswered.

**Keywords:** Proselytism; European Court of Human Rights; Freedom of Religion; Limitations to rights.

**Resumo:** *O presente artigo analisa a legalidade de restrições à prática do proselitismo, a tentativa de converter pessoas a sua própria religião. Este assunto causou controvérsia durante a redação de diversos tratados de direitos humanos e leis nacionais – especialmente considerando que algumas religiões não aceitam a existência de um direito de mudar de religião, enquanto outras pregam o dever de converter outros como um de seus dogmas mais sagrados. Considerando que os choques entre culturas e religiões diferentes aumentam gradualmente no século vinte e um, as cortes internacionais têm um papel importante em estabelecer os limites a tais práticas para que pessoas e Estados possam regular sua conduta propriamente. O artigo visa clarificar os limites estabelecidos até hoje e facilitar tal regulação. A abordagem adotada pela autora para analisar a legalidade do proselitismo e de suas restrições foi realizada mediante exame da jurisprudência da Corte Europeia de Direitos Humanos (CtEDH), acompanhada de pesquisa bibliográfica e documental com o objetivo de investigar e explicar os critérios utilizados para restringir tal direito. A escolha da CtEDH pela autora justifica-se no fato de que esta possui uma vasta jurisprudência no assunto, ao contrário de outras cortes internacionais de direitos humanos. Cada caso paradigmático fornece alguns critérios que, se colocados juntos, permitem a criação de um quadro sobre a legalidade de restrições estatais ao proselitismo – mesmo considerando que a Corte nunca traçou claramente tal quadro. A partir da derivação dos critérios para tal restrição, conclui-se que a permissibilidade de restrições ao direito de proselitizar depende de diversas variáveis circunstanciais primariamente relacionadas com o potencial de coerção do receptor da mensagem. Outros aspectos relacionados a limitação do direito de proselitizar, contudo, continuam sem resposta.*

**Palavras-chave:** *Proselitismo; Corte Europeia de Direitos Humanos; Liberdade religiosa; Restrições a direitos.*

**SUMMARY:** Introduction. 1. Kokkinakis v. Greece: a framework's sketch. 1.1. The Facts. 1.2. The right to try to convince one's neighbor in the European Convention. 1.3. The Court's decision through the application of the three step test on the limitation of rights. 2. Larissis and others v. Greece: the consolidation of (military) authority as a key factor. 2.1. The military. 2.2. The Civilians. 3. United Christian Broadcasters Ltd. v. UK and subsequent progress: religiously neutral prohibitions on proselytism. 4. Religious symbols and the "Proselytising Effect" at educational institutions. 4.1. Proselytism at educational institutions. 4.2. The "Proselytising effect". 4.3. The passive symbol. 5. An exception: Familiar Proselytism. Conclusion. References.

## 1. INTRODUCTION

Nowadays, it is an international consensus that the right to freedom of religion includes the right to change one's religion.<sup>1</sup> However, those changes

<sup>1</sup>Several international treaties recognize such a right. See, *inter alia*, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 18; UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 18; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, Article 9; Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Article 12; Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3

will not always merely be the consequence of personal intellectual or emotional causes: sometimes external factors such as the activities of persons, churches or institutions will be of great weight, if not decisive (LERNER, 1998).

The first case concerning freedom of religion to have come before the European Court of Human Rights (ECHR) discussed the issue of proselytism<sup>2</sup>, the right to attempt to change one's religion. This right involves more than the common conflict between Freedom of Religion and Freedom of Expression: it leads to a clash between aspects within the scope of the same right, as freedom of religion encompasses both the freedom to legitimately disseminate religious views (LERNER, 1998) and the right to be protected against religious coercion (HRCEE, 1994).

Such controversies are aggravated by the fact that what constitutes the sacred duty of evangelization for one group may be viewed by another as improper proselytizing (ROBECK, 1996). This happens due to the fact that while some creeds require its adherents to attempt to bring others to their faith<sup>3</sup> (KRISHNASWAMI, 1960), such activity may be highly offensive to people with a different belief (AN-NA'IM, 1996). In this sense, the term "proselytism" has, in many contexts, a decisive negative connotation.

As used in this article, proselytism means bearing witness to a religion (ECHR, 1993), a definition that avoids the notion of *per se* improper conduct. The objective of this article is the determination of what its limits are within the framework of the European Convention of Human Rights, which determination is critical to the achievement of greater toleration and pluralism. For that, a throughout study of the ECHR's jurisprudence, alongside a doctrinal analysis, will be performed.

## 2. KOKKINAKIS V. GREECE: A FRAMEWORK'S SKETCH

### 2.1 THE FACTS

The *Kokkinakis v. Greece* case (1993) was the first decision by international courts on the issue of change of religion. The Applicant, Mr. Kokkinakis, was a Jehovah's Witness arrested more than sixty times for proselyting in Greece.

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rev. 5, 21 I.L.M. 58 (1982), Article 8.

<sup>2</sup> Judge Pettiti mentions on his Partly Concurring Opinion in *Kokkinakis v. Greece* that it "is the first real case concerning freedom of religion to have come before the European Court since it was set up" (ECDH, 1993).

<sup>3</sup> This can be seen, for example, in the Bible: "Go (...) and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything that I have commanded you" (Matthew 28:19,20).

While in freedom, he and his wife called at Mrs. Kyriakaki's home and engaged in a religious discussion with her. Her husband, a cantor at an Orthodox Church, informed the police and the Kokkinakis were arrested. They were found guilty for attempting

[...] to proselytize (...) by taking advantage of their inexperience, their low intellect and their naivety. In particular, they went to the home of Mrs. Kyriakaki (...) and told her they brought good news; by insisting in a pressing manner they gained admittance to the house and began to read a book from the Scriptures (...) encouraging her by means of their judicious, skillful explanations (...) to change her Orthodox Christian beliefs.

This was the Court's understanding - even though Mrs. Kyriakaki clearly expressed that the discussion did not influence her beliefs. The Greek law prohibits proselytism,<sup>4</sup> understanding it as

in particular, any direct or indirect 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 moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety (GREECE, 1939, article 2).

It also establishes that "the commission of such an offence in a school or other educational establishment or a philanthropic institution shall constitute a particularly aggravating circumstance" (GREECE, 1939, article 3).

## 2.2 THE RIGHT TO TRY TO CONVINC ONE'S NEIGHBOUR IN THE EUROPEAN CONVENTION

Article 9 of the European Convention on Human Rights (Convention) encompasses the right to freedom of thought, conscience and religion:

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 [*emphasis added*].

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

<sup>4</sup>Especially, Article 13(2) of The Constitution of Greece, 18 April 2001, available at: <http://www.hri.org/docs/syntagma/artcl25.html#A13>, accessed on 03.02.2017.

of public order, health or morals, or for the protection of the rights and freedoms of others.

Although the Convention does not explicitly state that there is a right to disseminate one's religion<sup>5</sup>, the Court begins its ruling in *Kokkinakis* by stating that, without the right to try to convince one's neighbour through teaching, the right to change one's religion or belief would be a dead letter. Nevertheless, in democratic societies, it may be necessary to place restrictions on this freedom in order to reconcile the interest of the various groups and ensure that everyone's beliefs are respected (EDGE, 1998). As in Article 9(2), those limitations need to comply with a three-step test, composed by three questions: (i) is the restriction prescribed by law? (ii) does it pursue legitimate aims? and (iii) is it necessary in a democratic society?

### 2.3 THE COURT'S DECISION THROUGH THE APPLICATION OF THE THREE STEP TEST ON THE LIMITATION OF RIGHTS

Preliminarily, it is important to highlight that the Court jumped directly to the application of the three step test without analysing if improper proselytism is a form of manifestation protected by article 9(1). The legitimacy of a right's restriction under 9(2) is only at issue when that right is protected by the Convention. An alternative way of procedure could have been to ask whether the act of proselytism in question was a legitimate exercise of the right to manifest one's religion or belief.<sup>6</sup>

The Court first proceeds to the analysis of the Greek legislature forbidding proselytism and states that it is compatible with international standards and that the criteria adopted by it are reconcilable with the Court's criteria for distinguishing "bearing Christian witness" from "improper proselytism": While the former corresponds to an essential mission and a responsibility of every Christian, the latter represents a deformation of it. It may take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need. It may even entail the use of violence or brainwashing, thus being incompatible with respect for the freedom of thought, conscience and religion of others. Therefore,

<sup>5</sup>In opposition to the American Convention, which explicitly states that there is a right to disseminate one's religion. See Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Article 12. Available at: <http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>, accessed on 03.02.2017.

<sup>6</sup>This was only done by the Court in 2013, in *Kasymakhunov and Saybatalov v. Russia*, nos. 26261/05 and 26377/06, 14 March 2013, available at: <http://hudoc.echr.coe.int/eng?i=001-117127>, accessed on 03.02.2017. An analysis of this practice in *Kokkinakis* can be found in Evans (2001).

the Court understood that the prohibition of the Greek law was only applicable to what was understood as improper proselytism, which can be restricted under 9(2).

It must be highlighted that the Court's definition does not embrace all aspects included in the Greek legislation. However, as the law was explicitly considered an adequate way of curbing improper proselytism, its elements will be added to the courts understanding for the purposes of this paper.<sup>7</sup> The definition presented by the Greek law and the acquiescence by the Court are questionable for two main reasons: its haziness and its criminal character, whose combination is particularly dangerous.

The usage of the wording "any direct or indirect attempt" by the Greek law is questionable, seen that it provides a blanket prohibition on the right to proselytize, as noticed and criticized by some Judges in Court.<sup>8</sup> Moreover, the term "by taking advantage of his inexperience, trust, need, low intellect or naivety" found in the law allows the state to arrogate to itself the right to assess a person's weakness in order to punish a proselytizer, which can lead to authoritarian interference. It is known that the Court reiterates on its jurisprudence that the wording of many statutes must not be absolutely precise,<sup>9</sup> but the Court also frequently considers that a law can only fulfill the foreseeability criteria "if formulated with sufficient precision to enable any individual to regulate his conduct".<sup>10</sup>

The haziness of the law is aggravated by its criminal sanctions. Even though other international courts demand the usage of restrictive and univocal terms in the formulation of criminal law,<sup>11</sup> the Court seems to ignore that the Greek law virtually implies a criminal sanction for lawful forms of expression. It may be

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<sup>7</sup> Understanding what the Court meant by accepting the Greek definition on proselytism is particularly troublesome seen that it also took into consideration the previous decisions from Greek Courts to define proselytism. A criticism of this approach can be found in Gunn (1996).

<sup>8</sup> See, for example, Judge Pettiti on his Partly Concurring Opinion and Judge Valticos on his Dissenting Opinion in the *Kokkinakis v. Greece case*, judged by EDCH, on the 25<sup>th</sup> of May of 1993.

<sup>9</sup> See, *inter alia*, *The Sunday Times v. the United Kingdom* (no. 2), 26 November 1991, Series A no. 217, available at: <http://hudoc.echr.coe.int/eng?i=001-57583>, accessed on 03.02.2017.

<sup>10</sup> In *Ahmet Yıldırım v. Turkey* (no. 3111/10, ECHR 2012, available at <http://hudoc.echr.coe.int/eng?i=001-115705>, accessed on 03.02.2017), a law was considered inappropriate for resulting in a virtually unlimited interference on Freedom of Expression while not considering the collateral effects of restricting a large quantity of information. Therefore, the Greek law should have been considered inappropriate for producing arbitrary effects as the Turkish law was.

<sup>11</sup> The IACtHR notably did so in *Castillo Petruzzi et al. v. Peru* (IACrHR, 30 May 1999 §121, available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_52\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_52_ing.pdf), accessed on 03.02.2017); *Lori Berenson Mejía v. Peru*, (IACrHR, 25 November 2004 §125, available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_119\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_119_ing.pdf), accessed on 03.04.2017); *Ricardo Canese v. Paraguay*, (IACrHR, 31 August 2004 §124, available at [http://corteidh.or.cr/docs/casos/articulos/seriec\\_111\\_ing.pdf](http://corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf), accessed on 03.04.2017) amongst other cases.

asked whether the very principle of applying a criminal statute to proselytism is compatible with Article 9 of the Convention (PASQUALUCCI, 2006). Criminal sanctions provide an excessive burden to the proselytisers, especially the ones belonging to religious minorities.<sup>12</sup>

Despite the fact that it should have forestalled the analysis in the first prong as the national law was not adequately prescribed, the Court continued its analysis and found that no issues arose under the legitimacy of the aims pursued. However, it finally finds a violation of Article 9 on the grounds that the State's actions were not justified in the circumstances by a pressing social need. The Greek Courts have established the Applicant's liability by merely reproducing the wording of the law and did not specify how the accused had used improper means. According to the ECHR, "none of the evidence shows that Georgia Kyriakaki (...) was particularly inexperienced in Orthodox Christian doctrine, being married to a cantor, or of particularly low intellect or naivety". Therefore, the Court ended up doing exactly what Judge Pettiti criticized on his vote and assessed Mr. Kokkinaki's proselytism based on Ms. Kyriakaki's mentality while deciding one of the most polemic cases on its history.<sup>13</sup> Its understandings on this case are still applied, as it could be observed in the case *Jeovah's Witnesses of Moscow v. Russia* (2010), which bears considerable similarities with the *Kokkinakis* case.

### 3. LARISSIS AND OTHERS V. GREECE: THE CONSOLIDATION OF (MILITARY) AUTHORITY AS A KEY FACTOR

Judge Pettiti highlighted the importance of expanding the Court's understanding on improper proselytism in *Kokkinakis*. An opportunity for this arose in 1988, when the case *Larissis v. Greece* was brought to the Court. The Applicants were officers in the Greek Air Force and followers of the Pentecostal Church, which adheres to the principle that it is the duty of all believers to engage in proselytism. They allegedly tried to convert three men: Mr. Antoniadis, Mr. Kokkalis and Mr. Kafkas. Mr. Antoniadis affirmed that he felt obliged to take part in religious discussions promoted by the Applicants considering that they were his superior officers. Very differently, Mr. Kokkalis was not under direct command of any of them. Regarding Mr. Kafkas, no Applicant ever approached him. Some civilians

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<sup>12</sup> Concern expressed by Judge Pettiti on his Partly Concurring Opinion and Judge Martens on his Partly Dissenting Opinion in *Kokkinakis*. Available at: <http://hudoc.echr.coe.int/eng?i=001-57827>, accessed on 04.01.2017.

<sup>13</sup> Lerner (1998) points out that the division of the nine-judge Chamber and the criticism by legal commentators reflects and underscores the controversial nature of the case.

also complained about the Applicants' proselytizing activities. The Greek courts classified all aforementioned acts as improper proselytism.

### 3.1 THE MILITARY

The Court joined its judgment in *Kokkinakis* with its understandings of the military life, by stating that:

The Court notes that the hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power. (ECHR, 1988)

Aiming to avoid the risks that the superior-subordinate relationship can degenerate, the Court understood that, even if pressure is not consciously applied, any restriction to proselytism is justified. Thus being, all actions performed by the Applicants (including reading the Bible, polite encouragement, tenet explaining, questioning, criticism of other religions, delivery of papers) are, in the military context, improper proselytism.

The Court also found that "even Kafka, who said that was not coerced, must have felt to a certain extent constrained, perhaps obliged to enter into religious discussions with the Applicants, and possibly even to convert to the Pentecostal faith" (ECHR, 1988), thus proving that the target's opinion is irrelevant to assess proselytism. The Court attempts to disclaim its understanding by stating that "not every discussion about religion or other sensitive matters between individuals of unequal rank will fall within this category" (ECHR, 1988), but leaving unanswered what those permissible situations would be.

### 3.2 THE CIVILIANS

With specific regard to the complaining civilians, none of the evidence indicates that they felt obliged to listen to the Applicants or that their behavior was improper in any way because they are not linked by any superior-subordinate relationship. The Court stated that the civilians whom they attempted to convert were not subject to pressures and constraints of the same kind as the airmen, even though "the prestige of the officers' uniform may have had an effect even on



civilians”.<sup>14</sup> This shows that only a very high degree of social authority could imply in the same “improper pressure” verifiable within the military environment.

It is important to highlight one specific civilian, Mrs. Zounara. Although she was in an “extreme state of distress” during her conversations with the Airmen, the Court did not find it established that her mental condition was such that she was in need of any special protection from the evangelical activities of the Applicants or that they applied improper pressure on her. Therefore, it remains unclear the reason why Ms. Kyriakaki’s mental condition was an issue in *Kokkinakis* while Ms. Zounara’s, which was considerably worse, was not.

#### **4. UNITED CHRISTIAN BROADCASTERS LTD V. UK AND SUBSEQUENT PROGRESS: RELIGIOUSLY NEUTRAL PROHIBITIONS ON PROSELYTISM**

In *United Christian Broadcasters Ltd v. UK* (2000), the ECHR found that prohibiting all religious bodies, regardless of their beliefs, from applying for a national radio license is not a violation of Article 10. Although this case was ruled on Freedom of Expression and lacks the word “proselytism”, it fits the Court’s definition and matters to our analysis. The Applicant was a charitable company whose aim is to promote religious broadcasting in the UK, thus intending to promote proselytism on the radio. By deciding favorably to the law that forbids any licensing to bodies with religious nature, the Court defined that proper proselytism can be completely prohibited if this prohibition is done in a non-discriminatory way.

This understanding was further developed in *Murphy v. Ireland* (2003)<sup>15</sup>, in which the Court stated that even the most innocuous<sup>16</sup> text, such as an event’s announcement<sup>17</sup>, can be forbidden by a neutral law. It is important to highlight that even facially neutral laws may entail discriminatory effects (ECHR, 2014).

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<sup>14</sup> This concern was expressed by Judge Valticos on his Partly Dissenting Opinion joined by Judge Morenilla in *Larissis*. Available at <http://hudoc.echr.coe.int/eng?i=001-58139>, accessed on 03.04.2017.

<sup>15</sup> The case has some substantial differences, such as the fact that the Applicant could have otherwise advanced his views both orally and in writing, in the print media and in public assembly. He could also have appeared on radio and television and have transmitted the video by satellite and other means. However, this does not affect this analysis.

<sup>16</sup> This adjective was even used by the Government when it agreed that “the advertisement appeared innocuous and that it was to some extent simply informational”.

<sup>17</sup> The advertisement curbed by the law has the following message: “What think ye of Christ? Would you, like Peter, only say that he is the son of the living God? Have you ever exposed yourself to the historical facts about Christ? The Irish Faith Centre are presenting for Easter week an hour long video by Dr Jean Scott Phd on the evidence of the resurrection from Monday 10th - Saturday 15th April every night at 8.30 and Easter Sunday at 11.30am and also live by satellite at 7.30pm.”

## 5. RELIGIOUS SYMBOLS AND THE “PROSELYTISING EFFECT” AT EDUCATIONAL INSTITUTIONS

### 5.1 PROSELYTISM AT EDUCATIONAL INSTITUTIONS

In cases as *Folgerø and others v. Norway* (2007) and *Hasan and Eylem Zengin v. Turkey* (2007), any proselytism at schools was considered misplaced proselytism.<sup>18</sup> The Court considered that educational institutions should not be an arena for preaching or missionary activities, but a meeting place for different religious and philosophical convictions where pupils could gain neutral knowledge about their respective thoughts and traditions in consonance with Article 2 of Protocol n<sup>o</sup>1 to the European Convention (A2P1). According to it, the students also have the right to be exempted from any slightly non neutral form of education:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The neutrality guaranteed by the A2P1 is not limited to the school curriculum, but also extends to “the school environment”. As primary and secondary schooling are compulsory, the State should not impose on pupils, against their will and without their being able to extract themselves, the symbol of a religion with which they do not identify (ECHR, 2009). In doing so, the respondent Government violated A2P1 and Article 9 of the Convention.

### 5.2 THE “PROSELYTIZING EFFECT”

The Court made an equivalence in *Dahlab v. Switzerland* (2001) between bearing oral witness and other religiously motivated actions. Therefore, it understood that the mere act of wearing an Islamic headscarf can be considered proselytism for generating a so called “proselytizing effect”. This finding is reflected by the facts of the case: a teacher was prohibited from wearing a headscarf while teaching because it would interfere with the religious beliefs of her pupils.

The Court understood that the measure was legitimate because, as school teachers are both participants in the exercise of educational authority and

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<sup>18</sup> This term was firstly mentioned in 1976, when the Court heard the complaints of parents with strong Christian beliefs about compulsory sex education in Danish State Schools. However, the concept is not developed and the Court decided that the sex education lessons did not amount to indoctrination. See *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, Series A no. 23, available at: <http://hudoc.echr.coe.int/eng?i=001-57509>, accessed on 03.05.2017.

representatives of the state, the State aimed to ensure its educational system's neutrality (and ultimately the neutrality of the State itself). Therefore, it held that

[even though] it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children, (...) it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran.

This case seems to outgrow the Court's understanding in *Larissis* and establishes that the sense of authority and the role-model perception can lead to improper pressure even between civilians. However, this justification does not apply, *inter alia*,<sup>19</sup> to the *Leyla Şahin v. Turkey* case, to which the Court provided the same decision. Ms. Şahin was a student at a university and, as pointed out by Judge Tulkens (ECHR, 2004)<sup>20</sup>, did not have the same influence in the school environment as a teacher so that the Islamic headscarf did not generate a proselytizing effect in the classroom. It was not worn as an ostentatious or aggressive measure to exert pressure, provoke a reaction or spread propaganda that could hurt the beliefs of others. Also, she was surrounded by adults, and not children, as Ms. Dahlab was.

This decision makes it unclear whether the authority of the teacher and the naivety of the children were really the key factors on which the Court based its understanding in *Dahlab* and *Şahin*. The motivations behind those cases are further obscured in *Lautsi v. Italy* (2009).

### 5.3 THE PASSIVE SYMBOL

In *Lautsi v. Italy* (2009), the ECHR ruled that the requirement in Italian law stating that crucifixes should be displayed in classrooms does not violate the European Convention. It states that there is no evidence that the display of a religious symbol on classroom walls may have an influence on pupils whose convictions are still in the process of being formed. In other words, to have a visible crucifix in a classroom was not enough to denote a process of indoctrination.

<sup>19</sup> Compare with *Köse v. Turkey* (dec.), no. 26625/02, ECHR 2006-II, available at: <http://hudoc.echr.coe.int/eng?i=001-102151>, accessed on 03.06.2017; *Kervanci v. France*, no. 31645/04, 4 December 2008, available at: <http://hudoc.echr.coe.int/eng?i=001-90048>, accessed on 03.06.2017; *Aktas v. France* (dec.) no. 43563/08, 30 June 2009, available at: <http://hudoc.echr.coe.int/eng?i=001-61055>, accessed on 03.06.2017; and *Ranjit Singh v. France* (dec.) no. 27561/08, 30 June 2009, available at: <http://hudoc.echr.coe.int/eng?i=001-61055>, accessed on 03.06.2017.

<sup>20</sup> See Judge Tulkens' Dissenting Opinion on *Leyla Şahin*, available at: <http://hudoc.echr.coe.int/eng?i=001-70956>, accessed on 03.06.2017.

The Court argued that a crucifix on a wall is essentially a passive symbol which implicitly does not affect the *forum internum* of the children, who would remain free to “believe or not believe”. It cannot be compared to the influence on pupils comparable to the one held by teachers, which would differentiate the *Lautsi* from the *Dahlab* case. However, the contradiction with *Şahin* is evident. The presence of crucifixes in schools is capable of infringing religious freedom and schoolchildren’s right to education to a greater degree than religious apparel that a teacher might wear. In the latter example, the teacher in question may invoke her own freedom of religion, which the State must also respect. The public authorities cannot, however, invoke such a right.<sup>21</sup>

As the Court ignored this while analyzing *Lautsi* (2009), it appeared to have evolved its *Dahlab* (2001) understanding and that having passive religious symbols within the classroom would now be allowed. This impression was proved wrong in 2014, when the Court reiterated its ruling on Muslim garment in *S.A.S. v. France* (2014).<sup>22</sup> This practice denotes a double standard whose analysis is beyond the scope of the present paper.

## 6. AN EXCEPTION: FAMILIAR PROSELYTISM

In all of its cases on proselytism, the Court pointed to the importance of protecting the recipient’s psychological health from the purported stress exerted by any authority perception during a proselytizing act. An exception to this principle could be observed in *Vojnity v. Hungary* (2013), which ruled on a parent’s right to try to attempt to convince his child to adopt his religion. The standard for this situation to substantiate a risk of actual harm is very high, and mere unease, discomfort or embarrassment which the child may have experienced on account of his father’s attempts to transmit his religious beliefs are not enough to amount to improper proselytism. Therefore, the Court considered it unreasonable to separate a child from his father only due to the latter’s proselytizing attempts seen that providing religious education is the parents’ right.

## CONCLUSION

In considering the European Court’s cases on proselytism presented throughout this paper, it is possible to observe the outlines of an emerging

<sup>21</sup> See Judge Malinverni’s Dissenting Opinion joined by Judge Kalaydjieva in *Lautsi*, available at: <http://hudoc.echr.coe.int/eng?i=001-104040>, accessed on 03.06.2017.

<sup>22</sup> In this case, the Court ruled that the French ban on face covering did not violate ECHR’s provisions on right to privacy or freedom of religion.

framework. As every individual should be able to make a free and unrestrained choice on religious matters, the benchmark of this framework is the notion of coercion. This notion demands the analysis of four variables in order to draw the line between proper and improper proselytism<sup>23</sup>: The existence of any form of violence or threats (1); the possibility of abandoning the interaction (2); the characteristics of the recipient (3); and the characteristics of the message (4).

When it comes to the existence of any form of violence or threats (1), the more proselytism interferes with that ability to freely choose, the more improper the act is. Coercion exists in a variety of forms, but committing violent acts or threatening anyone with it is the most direct one. There was no case so far in the European Court in which the source acted violently towards the target, but this criteria is clearly established in *Kokkinakis*<sup>24</sup> and further reiterated.

It is also important to analyse the possibility of the listeners to abandon the interaction (2). In case of a so called “captive audience” – when simply leaving the speaker is not possible – even an apparently harmless speech becomes a form of coercion and improper proselytism. This happens when the target is either unable to leave a determined place or there is a good incentive to be in a good relation to the source (STAHNKE, 1999). Therefore, the confinement might take physical and psychological forms, being, in most cases, an association of them.

In *Larissis*, it was established that almost<sup>25</sup> any form of proselytism is improper in the military environment basically because the hierarchical relation is such that the target may not be able to exercise free choice in accepting or resisting the change in beliefs proffered by an hierarchically superior source. However, the authority constant in the military environment cannot be observed in the relationship between militaries and civilians and hardly amounts to improper proselytism.

A midterm on the notion of authority is observed in the educational environment due to its mandatory character. For the Court, any proselytism in schools can be considered misplaced proselytism<sup>26</sup> in any of the following three

<sup>23</sup> For a similar analysis regarding the United Nations framework, see Stahnke (1999).

<sup>24</sup> *Kokkinakis v. Greece*, §48, 25 May 1993, Series A no. 260-A, available at: <http://hudoc.echr.coe.int/eng?i=001-57827>, accessed on 04.01.2017.

<sup>25</sup> The usage of the word “almost” derives from the following unclear paragraph of *Larissis*: “not every discussion about religion or other sensitive matters between individuals of unequal rank will fall within this category”. See *Larissis and Others v. Greece* §51, 24 February 1998, Reports of Judgments and Decisions 1998, available at <http://hudoc.echr.coe.int/eng?i=001-58139>, accessed on 03.04.2017.

<sup>26</sup> *Folgerø and Others v. Norway* [GC], no. 15472/02, ECHR 2007-III, available at: <http://hudoc.echr.coe.int/eng?i=001-81356>, accessed on 03.05.2017.

forms: *through curriculum, teaching and the environment*. In *Folgerø*, the Court held that the school *curriculum* imposed on students needs to be religiously neutral or it would amount to a State's authoritarian indoctrination on children. In *Dahlab*, the Court established that due to a *teacher's* authority and the role-model perception, she should not be allowed to wear her Muslim headscarf, which would present a "proselytizing effect" towards children and influence on their beliefs.

This "effect" becomes controversial when it comes to the educational *environment*. In *Leyla Şahin*, the Court held that even when a student wears a headscarf amongst peers, it is still a form of improper and misplaced proselytism. The "proselytizing effect" arises from the fact that the headscarf appears to be imposed on women by a precept which is laid down in the Koran. However, in *Lautsi*, the Court argued that the mandatory display of crucifixes in classrooms was not a violation of the environment's neutrality seen that it is a passive symbol.

As many scholars have observed, the Grand Chamber's judgment in *Lautsi* stands in tension with the court's judgment in Islamic garments cases (BHUTA, 2014) (DANCHIN, 2011). As it would confirm again in *S.A.S.*, the court thus construes the usage of religious symbols as an act of proselytizing when a Muslim headscarf is worn in a public school or university but not when the state itself officially adopts a Christian religious symbol in its public schools (MAHMOOD; DANCHIN, 2014). Therefore, the European jurisprudence is inconclusive when it comes to the impropriety of the "proselytizing effect".

It is also important to highlight that the naturally coercive relationship between parents and children is left untouched seen that they have the right to educate them according to their beliefs.

While analysing proselytism, it is also important to look at the characteristics of its target (3). Someone may be more susceptible to improper pressure when it is on distress or need, as presented in *Kokkinakis*. The amount of distress needed to cause improper pressure was yet not established by the Court, as observed in *Larissis*.

However, the target's perception seems to be irrelevant for the Court to analyse the propriety of some act. Even though Mr. Kafkas affirmed in *Larissis* that he was not coerced by the source's discourse, the ECHR considered that they he was submitted to improper pressure.

Even when there is no violence, no threats, no obligation on the interaction and no significant vulnerability on the recipient, the proselytizing act may be

improper due to some characteristics on the message (4).<sup>27</sup> However, as was established in *Christians* and in *Murphy*, when the State's prohibition is neutral, this criteria does not need to be analysed.

The message can amount to improper pressure when it offers material and social benefits, or even happens within philanthropic institutions or hospitals (implicit content). The same happens when there are fraudulent methods implied on its contexts, such as lies or false pretexts. Some examples of normally allowed messages mentioned in *Larissis* are to read the Bible, polite encouragement, tenet explaining or questioning and delivery of papers.

This paper concludes that freedom of choice is a paramount consideration in order to draw the line between proper and improper proselytism. States must consider these criteria in order to establish a decision-making framework consistent with the principles of tolerance and respect.

However, some issues regarding the school environment and the source's characteristics remain unanswered and the Court is still unable to make explicit its interpretation of proselytism in relation to freedom of religion under Article 9.<sup>28</sup> Therefore, this study urges the Court towards clearer standards so that people can regulate their conduct, and the State, its restrictions.

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<sup>27</sup> It is important to consider that this message does not need to be oral and is able to take form of any religiously motivated actions.

<sup>28</sup> Judge Pettiti on his Partly Concurring Opinion in *Kokkinakis*, available at: <http://hudoc.echr.coe.int/eng?i=001-57827>, accessed on 04.01.2017.

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