PROSELYTIZATION IN GREECE (KOKKINAKIS JUDGMENT): CRIMINAL STATUTE VS. "NULLUM CRIMEN NULLA POENA SINE LEGE CERTA"

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Abstract: The landmark case Kokkinakis v. Greece opened a new era of a series of ECHR decisions focused on religious freedom. However, in very few occasions academics and experts have canvassed the technical legal content and principles in the Greek Penal Code on proselytism.

Keywords: Religious Liberty, Freedom of proselytism, Criminal Law, Greece

Resumen: Con el caso Kokkinakis contra Grecia se abrió un fructífero periodo de jurisprudencia del Tribunal Europeo de Derechos Humanos en materia de libertad religiosa y de conciencia. Sin embargo, no ha sido frecuente efectuar —como hace este artículo— un estudio técnico jurídico sobre la ley penal griega sobre proselitismo.

Palabras Clave: Libertad Religiosa, derecho de Proselitismo, Derecho Penal, Grecia.

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1. Anyone engaging in proselytization shall be liable to imprisonment and a fine of between 1,000 and 50,000 drachmas; he shall, moreover, be subject to police supervision for a period of between six months and one year to be fixed by the court when convicting the offender.
2. By 'proselytization' is meant, 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 the other person's inexperience, trust, need, low intellect or naivete.
3. The commission of such an offence in a school or other educational establishment or philanthropic institution shall constitute a particularly aggravating circumstance."

Section 4 of Greek Law No. 1363/38, as amended by Law No. 1672/39

INTRODUCTION

The Kokkinakis judgment, which was the first judgment of the European Court of Human Rights to deal with religious freedom, refers also to the compatibility of the Greek criminal statute of proselytization with the principle of rule of law "nullum crimen nulla poena sine lege certa". Its majority ruled that the relevant Greek case law came to this Court's attention, was published and accessible, that it was stable and that it supplemented the letter of the penal statute in a fashion that enabled the applicant to regulate his conduct in the matter accordingly.

However, Greek case law is neither established nor can it be considered as allowing individuals to regulate their behavior in accordance with the law. Perhaps no other criminal offense has given rise to so many interpretative issues, causing divergent and contradictory opinions expressed by scholars and reflected in case law as much as proselytization. In other words, there is virtually no interpretative issue on which a convergence of opinions can safely be deduced. This may probably constitute one first indication of the vagueness of its description.

The present article examines a controversial issue for the relations between the State and minority creeds, the aforementioned compatibility or incompatibility.

The first chapter presents the interpretative problems related to the particular penal statute. These problems have to do with its maintenance in effect after the enactment of the 1950 Greek Criminal Code, with the legal good that

is being protected, with the subject and the object of the offense, with the legal meaning of the expression "in particular", with the nature of the enumeration of the means of its perpetration, and finally, with the interpretative specification of its evaluative concepts.

In the second chapter, I examine the potential congruence per se of punishable proselytization with the principle of the precise legislative description of the punishable act. The pressing problems that are investigated are those that relate to the possible dual vagueness of the penal statute, that of the type of punishable act and legal good, as well as to the conformity or non-conformity of the evaluative concepts to the criterion of their precise legislative description. I then look into the position of the majority and the minority opinions that were put forth in the Kokkinakis judgment, regarding the principle of the precise description of punishable conduct and its application to the case in question.

I. An Approach to the Interpretative Issues Arising from the Criminal Statute of Proselytization

1. The Force of the Criminal Statute

It has rightly been supported by scholars that the Criminal Code that is currently in force has abrogated art. 4 of Obligatory Law 1363/1938 (*hereafter* O.L. 1363/1938), as this has been replaced by art. 2 of Obligatory Law 1672/1939, for the following reasons: (a) Art. 461 of the Penal Code (*hereafter* PC), which explicitly abrogated any statute amending the Penal Law of 1836, also abrogated this criminal statute, which –as amended– had previously implicitly abolished art. 198 of the Penal Law (*hereafter* P.L.), and (b) Art. 473 of the Penal Code (*hereafter* PC), which abolished any statute contained in special penal laws, as long as it concerned issues– that is, according to the preamble of the Introductory Law of the Penal Code, groups of criminal acts which convey damage or endangerment of the same legal good– which are regulated (that is, according to the aforementioned preamble, exhaustively and not by particular references) by the Penal Code in its Special Provisions, also abrogated the currently in force, at least according to the prevalent legal opinion, statute on proselytization. This is because *first*, the latter statute is related to the subject matter of Chapter 7 of the Penal Code, whose punishable acts involve a violation of the legal good of religious peace; and *second*, from the abovementioned preamble it is evident that the legislator of the Penal Code

purposely omitted to include the crime of proselytization[1] in this legislative code. Consequently, the provision is exhaustive.[2]

Judgment no. 441/1952 of the Court of Cassation (*hereafter* CoC)[3] established the contrary view, which prevailed in case law and in theory. Ac-

[1] The relevant passage in the Preamble (1929/1933, p. 325) is as follows: "Article 198, as long as it concerns the provocation of disputes etc. is replaced by articles 151, 160, 164 of the Draft Law, whereas in what concerns the dissemination of religious beliefs "by illegitimate means" etc., it is completely vague and meaningless, as the punishment of the illegitimate means employed by each particular provision would suffice; finally, the prohibition of preaching in public places is a matter that clearly falls under exclusive police jurisdiction. There was a discussion on whether or not the prohibition of proselytization per se, which is committed against the prevailing religion, as it is mandated in article 1 of the Constitution, should be penalized by criminal statute, but the opposite opinion prevailed, first of all because proselytization is currently not per se punishable under the Penal Code, but only particular cases are provided for, as are those in articles 195, 197, 198 of the Penal Law and of articles 14 and 18 of the law on defamation, cases which may all come under other articles in the Draft Law, and second because the specification of the acts which may be considered to constitute proselytization is very difficult, but also because the State should allow the citizens complete freedom as concerns the matters of religious conviction (and this is why in more recent laws there is no such statute, and finally, because sufficient sanction for the prohibition mandated by the Constitution is provided by the enforcement of the statute via the administration" (Preamble to the Draft of the Greek Penal Code, p. 205). Commenting on this preamble, Korfiatis writes that the legislator of the Penal Code had intended to abolish art. 4 of O.L. 1363/1938, as this was replaced by art. 2 of O.L. 1672/1939, with the rationale that the said preamble was indeed drafted in 1929 and made reference to the Draft Law of the Penal Code of the same year, when this criminal statute had not yet been enacted, however it was promulgated in its entirety together with the Penal Code in 1950. Therefore, it echoes the perceptions held by the penal legislator at the time of its promulgation. This legislator, who was well aware of the force of the aforementioned statute, as effecting amendments to article 198 P.L., at the time of the promulgation of the Penal Code and its related Preamble, expressed himself in this preamble in the manner that he did. *See* Nikolaos Korfiatis, *Proselytization as a Punishable Act in Greece*, 6 ARCHEION NOMOLOGIAS [*Case Law Archives*] 329 (1955). This very persuasive view put forth by Korfiatis refutes the rather unfounded argument of Dim. Karanikas that Ep. Daskalakis had drawn arguments from the "old" preamble of 1929, which refers to the draft of the Penal Code of 1924. *See* Dimitrios Karanikas, *Crimes against Religion*, 37-38 GRIGORIOS PALAMAS 3, 24 (1955).

[2] *See generally* Epameinondas Daskalakis, *The Offense of Proselytization Under the New Penal Code*, 7 NEON DIKAION [*New Law*] 298, 299 (1951); Korfiatis, *supra* note 2, at 330, considers the invocation of article 473 of the Penal Code redundant. *See also* I. PANAGOPOULOS, Religious Tolerance and Proselytization 35-36 (Athens 1960); I. Panagopoulos, *Obligatory Laws on Proselytization*, 1 christianos [*The Christian*] 56 (1961); I. Panagopoulos, *Jehovah's Witnesses-Proselytization*, 1 CHRISTIANOS 9 and 2 CHRISTIANOS 7 (1961). Finally, *see* SIMOS MENAIDIS, The Religious Freedom of Muslims in the Greek Legal Order 150-151 (Ant. Sakkoulas 1990).

[3] *See* 64 THEMIS 103 (1953); 3 Poinika Chronika *[Penal Annals]* 18 (1953); 4 Arheion Nomologias 39 (1953); 8 ARCHEION EKKLISIASTIKOY KAI KANONIKOU DIKAIOU [*Review of Canonical and Ecclesiastical Law*] 271, 272 (1953). *See also* CoC judgment no. 137/1953, 64 THEMIS 617 (1953) and 3 POINIKA CHRONIKA 316 (1953). Finally, *see* CoC judgment no. 289/1953, in 64 THEMIS 1089 (1953) and in 3 POINIKA CHRONIKA 494 (1953); and CoC judgment no. 377/1954, 5 POINIKA CHRONIKA 73 (1955).

cording to this view, art. 4 of O.L. 1363/1938, as it was replaced by art. 2 of O.L. 1672/1939, was not abolished by art. 461 PC, because the aforementioned statute did not amend any statute of the Penal Law. Moreover, it is not included among the statutes being abolished by article 473 PC, and it does not regard a matter being regulated in the Special Provisions of the Penal Code, which contains no statute punishing proselytization.[4] However, another view invokes CoC judgments no. 1151, 1152 and 1153/1947 and claims that it has been accepted that the criminal statute on proselytization which is viewed as being in effect, had abolished art. 198 of the P.L.[5] Nevertheless, it has been argued that the existing criminal statute on proselytization remained in effect concurrently with art. 198 P.L., without amending it, because in the preamble to O.L. 1363/1938 explicit reference is made to the absence of a law relating to the penal protection of the prevailing religion.[6]

Therefore, case law has supported and still supports the punishment of the crime of proselytization by criminal statute, which does not seem to apply, if its arguments, as well as those of the part of theory which aligns itself with it on the particular issue, are compared with the argumentation set forth by the part of theory claiming that the statute is not in effect.

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[4] In Greek legal theory, those who favored this view include ALEXANDROS SVOLOS & GEORGIOS VLACHOS, The Constitution of Greece, Part I, Vol. B΄ 33-34 (Ant. Sakkoulas 1955) who fully support the force of the criminal statute of proselytization, on grounds that it concerns an issue that is not exhaustively regulated in the Special Provisions Section of the Penal Code, but on the contrary, is not even mentioned therein; CHARALAMBOS FRAGISTAS, Elements of Ecclesiastical Law 102-103 (University of Thessaloniki 1968) (maintaining that the criminal statute of proselytization is in effect, because the Penal Code does not regulate the issue of proselytization in any of its sections); Telemachus Philippidis, *Crimes Against Religion Under the Greek Penal Code* 26 THEOLOGIA 223, 248-253 (1955), who is of the opinion that the intent of the penal legislator was the maintenance in effect of the criminal statute on proselytization, because the provisions of articles 198-201 PC protect other legal goods relating to religion, with the exception of the good of religious conscience, and consequently, the regulation of the matter of the endangerment of religious peace in Chapter 7 of the Penal Code is not exhaustive (*id.* at 252); D. Karanikas, *supra* note 2, at 37-38; GEORGIOS GIAKAS, The Crime of Proselytization in Greece 39 (Edessa 1956); Panagiotis Papaevangelou, *About the Proselytization Committed Against Orthodoxy and Its Repressive Measures in Greece*, 43 Grigorios o Palamas 456 (1960); PANAGIOTIS PANAGIOTAKOS, The System of Ecclesiastical Law During Its Enforcement in Greece, Vol. C΄: The Penal Law of the Church 390 (Pournaras Editions 1999) (1962); CHRISTOS SGOURITSAS and KONSTANTINOS GEORGOPOULOS, Constitutional Law, Vol. B΄, Parts a΄ and b΄ 124 (Ant. Sakkoulas 1966); ANASTASIOS MARINOS, RELIGIOUS FREEDOM 205-206 (Athens 1972); KONSTANTINOS VAVOUSKOS, A MANUAL OF ECCLESIASTICAL LAW 289 (Sakkoula 5th ed. 1989); Georgios Poulis, *The Legal Good Under Protection with the Crime of Proselytization*, 33 Poinika Chronika 222, 226-227 (1983); Dimitris Philippou, *The Constitutional Restrictions of Religious Freedom and the Crime of Proselytization (On the Occasion of the Judgment of Kokkinakis v. Greece Issued by the European Court of Human Rights)*, 6 CHRISTIANOS 16 (1994).

[5] *See* PANAGOPOULOS, *supra* note 3, at 35.

[6] *See* Poulis, *supra* note 5, at 226.

2. THE LEGAL GOOD UNDER PROTECTION

Various opinions have been put forth regarding the legal good that is protected by the criminal statute. The divergence of opinion on this matter is due not only to the legal-technical phrasing of the criminal statute on proselytization, but also to the legal and political context of its enactment. A first opinion claims that the protected legal good is primarily the freedom of religious conscience and secondarily the protection of the prevailing religion and public safety.[7] It is true that this ranking between legal goods can very well be overturned in practice and this has in fact already happened to a great extent.

A second view supports that the legal good under protection is public security. The same view incorporates the protection of the prevailing religion among the most fundamental elements of public security.[8] Perhaps this view is the one which is most faithful to the historical will of the legislator, but also to the evaluative system of adjudicators, arguably even today, since it presupposes a significant aspect of the state and official ecclesiastical ideology, that is, the full identification of Orthodox and national conscience.[9] Public security should not permissibly, by virtue of the right to religious freedom which is safeguarded by the constitution and by convention in the context of a democratic society, include the special penal or other protection of the prevailing religion nor should it elevate this religion to a form of state ideology.

According to a third opinion, the criminal statute protects the prevailing religion.[10] Its main argument is that when it was enacted, this punitive

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[7] *See* Philippidis, *supra* note 5, at 252, who indirectly yet clearly seems to recognize –obviously tracing back to the historical will of the penal legislator– the protection of the prevailing religion and public safety as secondary legal goods, arguing that "not only the Orthodox Church of Our Christ, but our very Nation itself is under the utmost danger from the daily growing proselytizing activity of the various sects and creeds, which abuse the freedom, but also the protection granted to them by the Greek State" (*id.* at 258).

[8] *See mainly* GIAKAS, *supra* note 5, at 24, who writes –revealing the perhaps covert intentions of the historical legislator– that "the need to maintain public cohesion and unity by any means forced the State for the sake of its own interest, to prosecute proselytization as an offense" (*id.* at 29), adding that "the Orthodox... Religion constitutes the foundation of national and state subsistence and one of its most fundamental components" (*id.* at 25-26). He further comments that "this of course did not happen out of love for the Church, which in any case the State has not accustomed to such courtesies" (*id.* at 31). *See also* Emmanuel Vrontakis, *Proselytization -Jehovah's Witnesses or Millenarians*, 1 ELLINIKI DIKAIOSYNI *[Hellenic Justice]* 495, 497 (1960).

[9] *See* Giakas, *supra* note 5, at 31.

[10] *See* Karanikas, *supra* note 2, at 25; Nikos Androulakis, *The Punishability of Proselytization and Its Constitutionality (An Advisory Opinion)*, 34 NOMIKO VEMA [*Law Tribune*] 1031, 1032 (1986); ANDREAS LOVERDOS, Proselytization. On the Unconstitutionality of the Penal Legislation Relating to Proselytization [Cahiers of Constitutional Law] 35-39 (Aristovoulos Manesis, Dimitris Tsatsos, Georgios Papadimitriou and Antonis Manitakis eds., Ant. Sakkoulas 1986)

statute corresponded to the constitutional provision prohibiting proselytization (article 1 sect. b΄ of the Constitution of 1911). This opinion is grounded on the theoretical distinction between primary prohibitive and secondary punitive rules[11] and prefers the subjective interpretative theory in penal law.[12] However, it does not make any effort to apply the interpretation that is congruous with the Constitution, which would probably dictate the adoption of the objective interpretative theory of penal law. A fourth view reasonably argues that the legal good being protected is religious peace and indirectly the freedom of religious conscience or religious sentiment.[13]

A fifth opinion considers that from 1938 until 1975 the legal good under protection is the social capacity of the Orthodox Christian, as well as of every follower of a known religion. Since 1975, the freedoms of keeping and changing one's religion are protected, but not the same freedoms of those who have non-religious beliefs.[14] This opinion seeks to apply the legal interpretation that is congruous with the Constitution, advocates the theory of the distinction between primary prohibitive and secondary punitive rules, especially in the period after 1975 and follows the objective interpretative theory of penal law. I espouse this particular view but only in part, mainly in what relates to the post-1975 period. Indeed, the violated legal good is the exercise of the freedom to change religion or beliefs in a way that is consistent with human dignity; but this is not the case for the freedom to maintain one's religion or beliefs, since this is not violated, except in the contrary case of the exercise of the freedom to change religion or beliefs.

However, the interpretation of the term "heterodox" that is adopted by this same view[15] is analogous or expansive, which broadens its range as a punishable act. I believe that its interpretation must be strictly grammatical and logical, as is required in penal law. This term must be taken to signify a mem-

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and Angelos Konstantinidis, *Comments (On the Order of the Magistrates' Court of Athens No. 958/1987)*, 35 POINIKA CHRONIKA 936, 937 (1987).

[11] *See especially* NIKOLAOS HORAFAS, PENAL LAW, VOL. A΄ 24-25 (P. Sakkoula, 9th ed. 1978). *See contra* IOANNIS MANOLEDAKIS, Penal Law, Articles 1-49 of the Penal Code. An Abridged Version of the General Provisions 48-49 (Sakkoula 4th ed. 1996).

[12] *See* NIKOS ANDROULAKIS, Penal Law, General Provisions, Vol. A΄, The Foundations 112-113 (Ant. Sakkoulas 1994).

[13] *See* Korfiatis, *supra* note 2, at 329.

[14] *See* GEORGIOS POULIS, Religious Penal Law ("Yperaspisis" Series, N° 7) 103-105 (Ant. Sakkoula 1996), as well as Poulis, *supra* note 5, at 225 (rightly pointing out that under the force of articles 198, 195 and 149 of the Penal Law of 1836, the crime of proselytization protected the legal goods of state power and the common peace.

[15] MARINOS, *supra* note 5, at 207 and POULIS, *supra* note 15, at 111, disagree. The two scholars identify the heterodox with the believer in a different religion in the criminal statute on proselytization.

ber of a creed, which constitutes a branch of a larger religion, and which differs either in dogma or in religious canons[16] from another creed belonging to the same larger religious body (religion). Examples that could be mentioned here are the different Christian creeds, or the different Muslim creeds, but not a Christian creed in relation to a Muslim creed. The various communities of Old Calendarists comprise different Orthodox Christian creeds both among themselves and in relation to the prevailing religion, since they possess –in their own judgment– their own dogma and their own organization and administration.[17] The prevailing religion is not legitimized to have a say in the doctrine or the organization and administration of the particular communities of Old Calendarists. Therefore, it is conceivable to have proselytization committed by an Old Calendarist against another Old Calendarist belonging to a different creed, against a member of the prevailing religion or of another Christian creed, and vice versa. Besides, by virtue of decision no. 1444/1991 (*en banc*)[18]

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[16] POULIS (*id.*) rules out the commission of proselytization on the part of Old Calendarists.

[17] I believe that the creation of a "schism of organization-administration" is a necessary and sufficient precondition, from the aspect of a right to religious freedom, to consider a discordant religious community as a different creed, regardless of the religious (canon) law of the initial creed, from which the dissenting community broke off. SVOLOS & VLACHOS, *supra* note 5 at 36-37, seem to agree with the possibility of proselytization by an Old Calendarist against a member of the prevailing religion and conversely. MARINOS, *supra* note 5 at 207 and 307, and DIMITRIOS SALACHAS, The Legal Status of the Catholic Church in the Greek Territory 98 (Athens 1978) concur. Among those who disagree are PANAGIOTAKOS, *supra* note 5, at 393 and POULIS, *supra* note 15, at 111.

[18] *See* 35 Ephimeris Dimosiou kai Dioikitikou Dikaiou [*Review of Public and Administrative Law*] 377-382 (1991); 17 To Syntagma *[The Constitution]* 381-391 (1991); 5 Efarmogai Dimosiou Dikaiou *[Applications of Public Law]* 312-315 (1992). *See* IOANNIS D. SARMAS, The Constitutional and Administrative Case Law of the Council of State. A Developmental Study of the Major Issues 292-293 (Ant. Sakkoula, 2d ed. 1994) and Kyriakos Kyriazopoulos, *Is the Existing Greek Legislation Regulating the Founding or Operation of Churches or Temples of Worship of the Followers of Another Creed or Religion Congruous With the European Convention of Human Rights? –An Approach to the Case of Manoussakis v. Greece,* 4 Yperaspisi [*The Defense*] 925, 942-945 (1997). Advocates of the view that the Old Calendarists constitute a distinct religious community include Christos Androutsos, Leonidas Gidopoulos and Alexandros Vamvetsos, *An Advisory Opinion of the Committee Appointed by the Ministry of Education on the Status of Old Calendarists from the Aspect of Ecclesiastical Law*, 5 Dikastiki [*Judges' Journal*] 32, 33-34 (1933), and Athanasios Papathanasopoulos, *Exit from the Church and Legal Status of Old Calendarists,* 30 Ephimeris Ellinon Nomikon [*Greek Lawyers' Journal*] 455, 456-458 (1963). For a contrary view, *see* Konstantinos Georgiadis, *Official Advisory Opinion N° 45/2.11.1932,* 44 Themis 40, 41-42 (1933); Konstantinos Dimitrakakis, *The Legal and Canonical Status of Old Calendarists in Greece*, 7 Dikastiki [*Judges' Journal*] 81, 83 (1935); Konstantinos Tsatsos, *Amendments to Articles 1 and 2 of the Constitution Proposed by the Committee on the Revision of the Constitution*, 25 Ekklesia [*The Church*] 235, 237 (1948); IOANNIS PANAGOPOULOS, The Julian-Gregorian Calendar and the Old Calendarists in the Autocephalous Church of Greece 21-23 (N. Stefanopoulou 1949); Georgios Rammos, Christos Sgouritsas, and Konstantinos Tsatsos, *An Advisory Opinion,* 28 Ekklesia 9, 28 (1951).

of the Council of State (*hereafter* CoS), Old Calendarists comprise a known religion, which is distinguishable from the prevailing religion.

The aforementioned interpretation arises from the very text of O.L. 1363/1938, which distinguishes between dogma and creed in its articles 6 and 12, whereas in article 1 it uses the term "dogma" as inclusive of creed, owing to an obviously unsuccessful legal-technical wording. I should point out that I rule out proselytization in favor of or against the followers of a different religion or those who hold non-religious beliefs.

3. The Subject of the Crime

The conceptual specification of the subject of a particular crime entails, as is well-known, the determination of the type of crime applying the criterion of the subject of its commission, that is, whether or not it falls under the category of ordinary or genuine special crimes. In the first category of crimes, the subject may be any natural person. The second category presupposes the existence of certain capacities, properties or relations,[19] which establish the punishable nature of the act for the first time. Several views have been expressed regarding the subject of the crime. A first opinion claims that the member of the prevailing religion does not constitute a subject,[20] therefore the crime is genuine special, since it includes all other persons who hold religious or non-religious beliefs. A second view argues that atheists cannot constitute a subject of the crime.[21] According to a third view, the subject of commission may be any person, whether s/he is a member of some religion (even of the dominant religion) or s/he holds non-religious beliefs,[22] therefore the crime is ordinary. A fourth view holds that the subject of the crime may be a member of any religion whatsoever;[23] hence the crime is genuine special, since it does not include those who profess non-religious beliefs.

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[19] *See* HORAFAS, *supra* note 12, at 181-183 and MANOLEDAKIS, *supra* note 12, at 263-264.

[20] *See* Karanikas, *supra* note 2, at 25; Krippas, *supra* note 1, at 314-316; KOSTAS KONSTANTINIDIS, Forms of Manifestation of the Crime as Distinct Offenses 106 (Thessaloniki 1982); Androulakis, *supra* note 11, at 1031; LOVERDOS, *supra* note 11, at 35-39; Konstantinidis, *supra* note 11 at 936; Dimitris Tsatsos, *Two Advisory Notes on Church-State Relations and on Religious Freedom*, 15 Dikaio kai Politiki [*Law and Politics*] 195, 201 (1987).

[21] *See especially* Poulis, *supra* note 5, at 228.

[22] *See, e.g.*, Themistoklis Tsatsos, *A Recommendation on Articles 1 and 2 of the Constitution, in* Studies on Constitutional Law 85-95 (To Nomikon– N. Sakkoula 1958); Philippidis, *supra* note 5, at 257; PANAGIOTAKOS, *supra* note 5, at 393; FRAGISTAS, *supra* note 5, at 103; MARINOS, *supra* note 5, at 206; SALACHAS, *supra* note 18, at 98; SPYROS TROIANOS, Lectures in Ecclesiastical Law 99 (Ant. Sakkoula, 2nd ed. 1984); POULIS, *supra* note 15, at 100-103; PANAGIOTIS RIGATOS, Orthodoxy and Proselytization 15 (Patra 1986) and Philippou, *supra* note 5, at 16.

[23] *See* ALEXANDROS SVOLOS & GEORGIOS VLACHOS, The Constitution of Greece, Part I, Vol. A΄ 37 (Ant. Sakkoulas 1978) and POULIS, *supra* note 15, at 100-103.

Nevertheless, my opinion is that the subject of the commission of proselytization is the natural person who has the capacity of member of a religion, which is heterodox in relation to that espoused by the object of the crime. Therefore, all other persons are excluded, whether they have religious beliefs or not. We should not be misled by the general wording of the statute "the one conducting proselytization",[24] since this wording should be combined with the requisite elements of the same statute "on the religious conscience of heterodox persons".[25]

4. The Object (or Victim) of the Crime

The theoretical debate surrounding the object of the crime of proselytization centers on two particular issues. The first concerns the conceptual specification of the object. The second refers to whether or not the object may be susceptible to proselytization and if the object may be unknown, as well as to whether the means must be in a position to bring it about.

Different views have been propounded regarding the conceptual specification of the object of proselytization. One view suggests that the term "heterodox" includes only the members of the prevailing religion.[26] A second opinion excludes atheists from the circle of persons who may constitute objects of the crime.[27] A third opinion claims that the object of proselytization is any natural person, regardless of his or her religious or non-religious convictions.[28] A fourth view contends that the objects of proselytization are the members of different creeds.[29] Finally, a fifth opinion restricts the object to the members of the prevailing religion and to the followers of the known religions only.[30]

But even as to this matter one could develop different arguments. Indeed, it is my opinion that, as in the matter of the subject of the commission, the object of the commission of proselytization is the natural person that has the capacity of a member of a creed that is heterodox in relation to the one espoused by the subject of the crime. Therefore, in this case also, all other persons, whether they have religious beliefs or not, are excluded.

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[24] Art. 4 par. 1 of O.L. 1363/1938.

[25] Art. 4 par. 2 of O.L. 1363/1938, as it was replaced by art. 2 of O.L. 1672/1939.

[26] *See* Karanikas, *supra* note 2, at 25; KONSTANTINIDIS, *supra* note 21, at 106; Androulakis, *supra* note 21; LOVERDOS, *supra* note 11, at 35-39; Konstantinidis, *supra* note 11, at 936; and D. Tsatsos, *supra* note 21, at 200.

[27] *See* Poulis, *supra* note 5, at 228.

[28] *See* Th. Tsatsos, *supra* note 23, at 95; MARINOS, *supra* note 5, at 206; SALACHAS, *supra* note 18, at 98; TROIANOS, *supra* note 23, at 99; RIGATOS, *supra* note 23, at 15.

[29] *See* SVOLOS & VLACHOS, *supra* note 5, at 36-37; FRAGISTAS, *supra* note 5, at 103; POULIS, *supra* note 15, at 111.

[30] *See* Philippidis, *supra* note 5, at 257-258 and PANAGIOTAKOS, *supra* note 5, at 393-394.

As concerns the matter of whether the object of proselytization should be susceptible to proselytization or whether this object may be unknown, as well as the matter of whether the means that was used was sufficient to bring it about (that is, whether the unaccomplished attempt is punished like proselytization is), two divergent opinions have been set forth. According to the first, attempt unaccomplished is punishable like proselytization is, namely, with the penalty of the attempt that has been elevated to an accomplished crime; hence the crime is one of abstract endangerment.[31] The contrary opinion asserts that in the case of proselytization, an accomplished attempt is punishable under the general provisions on accomplished attempt,[32] or, according to other theorists, it remains unpunished,[33] therefore we are dealing with a crime of potential endangerment or abstractly particular endangerment.[34]

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[31] *See* Karanikas, *supra* note 2, at 25; MARINOS, *supra* note 5, at 219-220; Anastasios Marinos, *The Concept of Religious Proselytization under the New Constitution,* 25 Elliniki Dikaiosyni 4, 16 (1984). It seems that Marinos suggests the punishment of an unaccomplished attempt with the penalty of attempt, because of the use of "dishonest" means toward the intrusion into the religious conscience of a heterodox person with the purpose of changing it. Similarly, *see* TROIANOS, *supra* note 23, at 99. *See also* CoC judgment no. 59/1956, 4 Nomiko Vima 737 (1956), 6 Poinika Chronika 202 (1956) and 11 Archeion Ekklisiastikou kai Kanonikou Dikaiou [*Review of Ecclesiastical & Canonical Law*] 174-175 (1956). According to this judgment, the act of sending Jehovah's Witnesses pamphlets to Orthodox priests, with the proposal that they study them and apply them, constitutes proselytization, even if these priests cannot be considered naïve and ignorant of the Orthodox dogma. Marinos applauds this decision, because he believes that the attempt to influence the conscience of an Orthodox minister is dishonest, even if it is certain that the influence will not be accomplished (*id.* at 16). Poulis criticizes the opinion expressed by Marinos, arguing that every dishonest conduct is not necessarily criminal: *see especially* POULIS, *supra* note 15, at 106 and Georgios Poulis, *Freedom of Religious Conscience and Proselytization*, 2 Yperaspisi 255 (1997). *See indicatively* the following judgments which hold that it is indifferent whether or not the passive subject of the act is susceptible to proselytization: CoC judgment no. 165/1956, 6 Poinika Chronika 374 (1956), 7 Archeion Nomologias 463 (1956) and 12 Neon Dikaion 753 (1956) and Athens Criminal Court order no. 51487/1986, 37 Poinika Chronika 342 (1987). *See also* characteristically the following decisions ruling that the object of the crime may be completely unknown to the subject: CoC judgments no. 528/1950, DIMITRIOS BAKOULAS, AREIOS PAGOS CASE LAW, VOL. A! 234-235 (Athens 1974) and 289/1953. Finally, CoC judgment no. 55/1958 and the Athens Criminal Court order no. 51487/1986 rule in favor of the view that the means for the commission of proselytization need not be able to accomplish it.

[32] MANOLEDAKIS, *supra* note 12 at 345-360 and IOANNIS MANOLEDAKIS, The Legal Good as a Central Concept of Penal Law 112 (Sakkoula 4th ed. 1998), is right to point out that even the statute on the punishment of unaccomplished attempt (43 PC) introduces a case of punitive deviation based on unfair conduct (subjective unfairness) and not on damage or the particular endangerment of a legal good, that is, not on objective unfairness.

[33] Commenting on the preparatory acts of proselytization, Philippidis, *supra* note 5 at 257, writes that the term "indirect effort" does not include them. As a consequence, these have not been elevated to a distinct offense that is punishable with the penalty of the completed crime and for this reason remain unpunished.

[34] *See* HORAFAS, *supra* note 12 at 242, n. 4), Konstantinidis, *supra* note 27 at 123 and POULIS, *supra* note 15 at 106-107. Christos Sideris, *The Forms of Fulfillment of the Objective Elements*

I concur with the second view, because proselytization constitutes a case of an attempt which has been elevated to a distinct crime,[35] whereas the preparatory acts have not been elevated to an accomplished crime. If we adopt the first view, it leads us to the unconstitutionality of the crime of proselytization, both from the aspect of art. 7 par. 1 of the Constitution (*hereafter* C.), which does not seem to prohibit the establishment of crimes of abstract endangerment

of the Crime of Proselytization, 43 Poinika Chronika 241, 245 (1993) believes that the crime of proselytization presupposes a personal relationship between its subject and its object. Poulis rightly points out that the conversion of the proselytized person's conscience due to the conduct of the proselytizer suffices for the fulfillment of the objective substance of the crime in the context of a personal communication between them. By "conversion of conscience" he means that the object of the crime began to doubt his or her own religious beliefs or at least began to question the truthfulness of the beliefs held by the subject of the offense: *see* POULIS, *supra* note 15 at 105-106 and 113-115; Poulis, *supra* note 32, at 241, 256-258; GEORGIOS POULIS, Legislative Texts of Ecclesiastical Law 166 (Sakkoula 3rd ed. 1999). I believe that contemplation on the truthfulness of the beliefs held by the subject cannot fall under the scope of the concept of the acts that mark the beginning of committing intrusion, for the reason that this contemplation is not tantamount to the breakdown of the religious conscience of the object of the crime. I believe that the said contemplation constitutes a preparatory act, therefore it may either remain unpunished or it may be punished by the penalty of attempt unaccomplished, depending on the opinion adopted. Simply listening on the part of the heterodox or simple conversation of the subject with the former can under no circumstances be construed as constituting an unaccomplished attempt. Both listening and conversation are legitimate means of disseminating a religion. The opinion that in this case one should consider applying the statute on unaccomplished attempt has been supported by PANAGIOTIS CHRISTINAKIS, The Attempt to Commit an Ecclesiastical Crime 478 (Athens 1978), Alexandros Kostaras, *An Inquiry and a Reply On Attempt Unaccomplished*, *in* Problems Relating to Attempt in Penal Law [*First Scientific Meeting of the Departments of Penal and Criminological Sciences of the Universities of Thessaloniki and Thrace, Komotini 25-26.11.1994, Workshop on Criminal Law and on Criminal Procedure Law of the Law School of the University of Thrace*] 73-76 (Ant. Sakkoula 1995), POULIS, *supra* note 15, at 166 and ALEXANDROS KOSTARAS, Attempt Unaccomplished. Dogmatic Grounds and Interpretative Treatment 254-255 (Ant. Sakkoula 1997). Kostaras, agreeing with Poulis, points out that the general statute on attempt unaccomplished is implemented in cases where proselytization is directed against, for example, a deaf mute person or a priest. See CoC judgment no. 1304/1982, 33 Poinika Chronika 502 (1983) which quashes, on grounds of absence of specific reasoning and legal basis, a judgment which –among other things– does not specify whether or not the objects of the crime were susceptible to a change in their religious beliefs.

[35] In Greek law, the term "effort" is used interchangeably with the term "attempt". *See* HORAFAS, *supra* note 12, at 316; PANAGIOTAKOS, *supra* note 5, at 395; Krippas, *supra* note 1, at 317; POULIS, *supra* note 15, at 113; Philippou, *supra* note 5, at 16; KOSTARAS, *supra* note 35, at 254-255. Krippas suggests that the head of a religion that conducts proselytization be punished, either as a principal, or as an accomplice or even as an instigator. That is, he proposes that the commission of proselytization by "intermediaries" be punished. He grounds this proposal on the phrase "indirect attempt" contained in the criminal statute (*id.* at 318-319). Judge S. Martens argues, and I agree with his argument, that the act of direct or indirect attempt not only broadens the definition significantly, but also further enhances its vagueness (Série A: Arrêts et Décisions, vol. 260, par. 5, p. 34).

in general, even if they constitute a punitive deviation in the context of a liberal penal system,[36] and from the aspect of art. 13 par. 1 C.

It is true that crimes of abstract endangerment are grounded on the wrongfulness of a particular conduct and sometimes on the wrongfulness of thought itself.[37] Consequently, if the crime of proselytization was taken to be one of abstract endangerment, it would no doubt be used to pursue the prosecution of the thought of the subjects of commission, in which case art. 7 par. 1 C. would have been violated.[38] In other words, these subjects would not be punished for an act they had committed that would violate or would endanger in the particular empirical case –and not as an abstract possibility under the judgment of the legislator– the freedom to change the religious conscience of heterodox persons in a dignified manner. On the contrary, they would possibly be punished because they would have religious beliefs that differed from those of the religious majority or because they would display a conduct that would not have been liked by this majority or by its members who hold administrative or judicial positions in the state mechanism. Any such conduct that would not be acceptable by them could arbitrarily be characterized as "illegitimate" or "immoral".

To the extent that the penal chastisement of conduct that has been arbitrarily characterized as "illegitimate" or "immoral" aimed at prohibiting the exercise of the freedom to disseminate a religion by a potential change of the religious conscience of heterodox persons, would constitute an apparent violation of the right to religious freedom. Therefore, viewing proselytization as a crime of abstract endangerment constitutes a form of grounding or expanding punishability by analogy, that is prohibited by art. 7 par. 1 C., as it relates to a violation of an individual right. Such a view would not seem odd during the period of enactment of the special penal law punishing proselytization, since the state regime of the time was totalitarian and authoritarian,[39] but it is unacceptable in the context of a liberal and democratic regime that is firmly rooted in the current Constitution.

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[36] *See* IOANNIS MANOLEDAKIS, The Legal Good as a Central Concept of Penal Law 45 and 50-53 (Sakkoula 4th ed. 1998).

[37] *Id.* at 37.

[38] *See especially* Ioannis Manoledakis, *Article 7 par. 1 of the Constitution and Penal Laws, in* Constitutional Liberties in Practice [*Association of Greek Constitutional Law Theorists, 1st Conference, Athens, 13-15 October 1983*] 121 (Ant. Sakkoula 1986).

[39] MANOLEDAKIS, *supra* note 33, at 122, accurately observes that authoritarian penal systems are interested in controlling citizens' convictions through the abstract evaluation of conduct.

5. THE LEGAL MEANING OF THE EXPRESSION "IN PARTICULAR"

Three different views have been propounded concerning the meaning of the expression "in particular" which is included in the definition of the crime of proselytization. The first view claims that the expression "in particular" does not refer exclusively to the means of commission. Indeed, if it referred to them, it would not have been placed after the word "proselytization" and before the objective elements, but after the description of the act and before the enumeration of the means of commission. On the contrary, it refers, in a covert way, to the objective substance of the offense so that it allows the subjection under the scope of its statute not only of the illegitimate, but also of the legitimate means of practicing the freedom of disseminating religion.[40] This view is completely reasonable, if one takes into consideration the grammatical and constitution wording of the relevant statute. This was most probably the will of the historical legislator of that authoritarian regime.

A second view holds that the expression "in particular" refers exclusively to the means for the commission of proselytization. Otherwise, the relevant criminal statute would contravene art. 7 C.[41] However, it should be noted that this view was set forth at the time of the enforcement of the 1952 Constitution, that is, when the principle that was enforced was "nullum crinem nulla poena sine lege" and not "...sine lege certa", as is required by the current Constitution. But this view is further bifurcated into two different opinions. The first one, which appears to be adopted as prevalent by case law, holds that the enumeration of the means is indicative.[42] A second opinion, which I find more accurate,

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[40] *See* Krippas, *supra* note 1, at 204-205, writing: "...the view expressed by Katras may not be accepted, quite simply because in analyzing a purely criminal statute (the one on proselytization of article 4 of O.L. 1363/1938) he introduces the concept of 'mission', in order to exclude from punishable acts a particular category of quasi proselytizing acts, which would perhaps be considered punishable, if they weren't characterized as missionary...". *See also* Christoforos Christoforidis, *Proselytization in Favor of the Prevailing Religion,* 22 Elliniki Dikaiosyni 10, 11-13 (1981), asserting that both illegitimate and legitimate means are included in the means that are listed indicatively, and Velissarios Karakostas, *The Constitutional Foundations of Religious Freedom and the Possibility of Revision of the Relevant Statutes (Interpretative Issues of Emphasis and Tension on Religious Freedom),* 26 Diki 817, 835-837 (1995). Judge S. Martens expressed the view that the expression "in particular" essentially allows the criminal prosecution of acts that are not covered by the legislative definition of proselytization (260 Série A: Arrêts et Décisions 34).

[41] *See* SVOLOS & VLACHOS, *supra* note 5, at 34.

[42] *See* Alexandros Svolos, *A Commentary (on Judgment N° 2276/1953 of the Council of State),* 10 Neon Dikaion 208, 209 (1954); Karanikas, *supra* note 2, at 24-25; Tsatsos, *supra* note 23, at 95; Panagopoulos, *supra* note 3, at 8; PANAGIOTAKOS, *supra* note 5, at 395-396; FRAGISTAS, *supra* note 5, at 103; ANASTASIOS Christophilopoulos, Greek Ecclesiastical Law 76 (Athens 1965); MARINOS, *supra* note 5, at 208-209, and Marinos, *supra* note 56, at 11; VAVOUSKOS, *supra* note 5, at 288; TROIANOS, *supra* note 23, at 98; IOANNIS KONIDARIS & SPYRIDON

argues that the expression "in particular" should be considered as if non-written, in the sense that the criminal statute includes a restrictive or exclusive enumeration of the means of commission. Otherwise, the particular criminal statute would contravene the constitutional principle of the legitimacy of crimes.[43]

This interpretative problem is inextricably connected to the one concerning the definition of the punishable act of proselytization. Is it safe to say that the definition exhausted with the direct or indirect attempt of intrusion on the religious conscience of a heterodox or does it also include the means of intrusion? In other words, are the means actually means of committing the act or are they means of intrusion? According to one opinion, the relevant criminal statute first defines proselytization and then lists the means indicatively.[44] The contrary view holds that the attempt of intrusion, as well as intrusion itself, is not a wrongful act, since it is identified with the freedom of expressing one's opinions (art. 14 par. 1 C.).[45] I agree in part with this section of the opinion, having some reservations only as to the identification of the attempted intru-

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TROIANOS, Ecclesiastical Legislation 938 (Ant. Sakkoula 1984); Krippas, *supra* note 1, at 314; LOVERDOS, *supra* note 11, at 31, n. 24.

[43] *See* GEORGIOS MOURIKIS, The Inviolability of the Free Expression of Religious Conscience 39-41 (1947); Alexandros Vamvetsos, *Comments on Judgment No. 2276/53 of the Council of State,* 65 Themis 400 (1954); Philippidis, *supra* note 5, at 256; POULIS, *supra* note 35, at 165; POULIS, *supra* note 15, at 111-112. *See also* Nikos Paraskevopoulos, *Comments on Mytilini Judicial Council Order No. 112/1982),* 37 Armenopoulos 411, 412 (1983), pointing out that the restriction of the punishable scope of proselytization solely to the means of commission listed in the law is indisputable, since the principle *"nullum crimen nulla poena sine lege certa"* was introduced to the current Constitution for the first time. *See also* Sideris, *supra* note 35, at 242. Philippidis writes that the intention of the historical legislator was not the indicative enumeration of the means of commission and that the word "particularly" did not refer to the objective substance and the means, but possibly connected par. 1 and par. 2 of the relevant criminal statute, and also that the same word would no doubt have "slipped into" the text inadvertently, i.e. through an oversight, which is not uncommon in our legislation. However, it is my understanding that if Philippidis wished to follow the legal interpretation that is congruous with the Constitution and the objective interpretive method in penal law, it was probably not necessary for him to attribute to the historical legislator intentions which he was not likely to have.

[44] *See* note 43.

[45] *See* POULIS, *supra* note 15, at 107-108, and POULIS, *supra* note 35, at 164-165. Poulis underlines the following: "The basic and fatal error of theory is that too much of the discussion has focused on the definition of proselytization and then on the indicative enumeration of the means of its commission. It was nearly forgotten that the definition that had to be given referred to punishable proselytization and not proselytization in general... Thus, the direct or indirect attempt of intrusion on the religious conscience of the heterodox person was regarded as a definition of the act, whereas the references of the statute about provisions, exploitation of need, etc. were considered to constitute the means for the commission of the act. This is a mistake because: the legislator utilizes, although rarely, an indicative enumeration of the means for the commission of the act after having previously stipulated, in the body of the statute, the act which constitutes the crime. But this is not the case with proselytization because the direct or indirect attempt of intru-

sion with the aforementioned freedom. I think that the attempt of intrusion identifies with the freedom to disseminate one's religion or convictions with a potential change of another person's religious conscience.[46] The same opinion, as it unfolds, very aptly argues that the concept of the punishable act of proselytization is comprised not only of the attempt of intrusion, but also of the means of intrusion. This is because the means of commission, which constitute a form of "attendant circumstances" surrounding the commission of the act, are components of the legal-technical structure of the crime.[47]

6. THE MEANS OF COMMISSION OF THE CRIME

The means of commission of the crime of proselytization are the following: the granting of any and all kinds of provision, the promise to grant any and all kinds of provision,[48] moral support,[49] material assistance,[50] the use of

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sion on the religious conscience of a heterodox is not a legally wrongful act nor does it signify wrongfulness...On the contrary, it constitutes an act that is safeguarded by the Constitution (see article 14 par. 1 C.)[...] Consequently, the act that operatively constitutes the "subject matter", i.e. the basis of the crime, should be sought elsewhere. And it is precisely this "elsewhere" that lies in the granting of provisions, the exploitation of need, etc., that is, in those elements which comprise, combined with the attempted intrusion, the punishable act and at the same time constitute the key difference between punishable and non-punishable proselytization. Thus, we can schematically denote proselytization using the formula of the definition ***X=C+z***, where **X** stands for punishable proselytization, **C** denotes non-punishable proselytization and **z** is the distinctive difference between punishable and non-punishable proselytization. According to this schema, punishable proselytization (**X**) is the attempt of intrusion on the conscience of a heterodox (**C**), when it is accomplished with the granting of provisions, the exploitation of need, and so on (**z**)."

[46] *See* Articles 13 par. 2 sect. 1 C., art. 9 par. 1 ECHR, and art. 18 par. 2 ICCPR. *See also* articles 18 art. 1 of the Universal Declaration and 1 par. 1 of the 1981 Declaration of the United Nations General Assembly of the United Nations Organization for the Elimination of All Forms of Intolerance and of Discrimination that are Based on Religion or Belief [hereafter Declaration of 1981].

[47] *See* Philippidis, *supra* note 5, at 255-256, POULIS, *supra* note 35, at 164-165; POULIS, *supra* note 15, at 107-108; Sideris, *supra* note 35, at 242-243.

[48] *See* Sideris, *supra* note 35, at 243-244, writing that the indirect attempt of intrusion on the religious conscience by a simple promise does not contain any substantive demerit and for this reason it should be very narrowly interpreted. That is, it should apply if the following requirements hold: (1) the promise should be serious, (2) it should refer to a particular provision, (3) it should refer to the immediate future, and (4) certainty concerning the fulfillment of the promise should arise from the relationship between subject and object.

[49] Sideris, *id.* at 244, is right to note that moral support is a conduct of support and assistance in a particular ordeal of the victim of the crime. POULIS, *supra* note 15, at 108 expresses a similar opinion, considering that moral support may be any psychological support in an ordeal and more generally in a time of crisis in the life of a person – a support which is not limited to an emotional state, but is manifested in outward acts.

[50] Sideris (*id.*) develops the reasonable argument that in the case of material assistance, there is the element of the ordeal of the victim of the crime, but in relation to a deprivation of basic necessities.

fraudulent means, or by taking advantage of his inexperience, trust,[51] need, low intellect or naïvety of the victim of proselytization. According to a reasonable argument, the first four means of commission unacceptably interdict the freedom of expression of one's religion or beliefs in the form of compliance with one's religious conscience (*practice*), a compliance that consists in the mutual assistance and solidarity among citizens, even of different religion.[52] The aforementioned concepts which constitute the means of commission are evaluative and, consequently, in order for the court to conduct the methodologically correct subjection of the facts to the major premiss of the legal syllogism, the interpretation of the evaluative concepts must be particularized in the major premiss. In a large number of its decisions, the Greek Court of Cassation (*Areios Pagos*) does not proceed with the interpretive particularization of the aforementioned evaluative concepts in the major premiss. This is also pointed out by the European Court on Human Rights (*hereafter* European Court) in the *Kokkinakis* case.

The European Court specifically notes that Kokkinakis' conviction violated the principle of the proportionality of the measure of penal sentencing to the pursued purpose of public interest which consists in the protection of the rights and freedoms of others. That is, this conviction was not proven to constitute a necessary measure in a democratic society or, put differently, to be justified, under the circumstances of the case, by a pressing social need. Although the Greek courts accepted the criminal liability of the defendant, they did not sufficiently determine the manner in which Kokkinakis had tried to change the religious conscience of his neighbor by abusive means, and were content with the reproduction of the requirements of the relevant criminal statute in their decisions. Nevertheless, the European Court itself ruled that the facts of the cases do not constitute any form of abusive exercise of the defendant's freedom to disseminate religion.[53]

The absence of the interpretive particularization of the evaluative concepts of the means of commission from the reasoning of the court decision certainly constitutes the interpretive error of avoidance of statutory interpretation, since the statutes are simply reproduced in the text of the decision, when they

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POULIS (*id.*) means roughly the same thing when he writes that the expression "material assistance" denotes moral support accompanied by the granting of a provision.

[51] POULIS, *id.* at 110, takes the term "trust" to mean familiarity. Sideris, *id.* at 245, sees a form of trust in the psychological relations of dependence, developed especially in educational establishments, boarding schools, and orphanages.

[52] *See* SALACHAS, *supra* note 18, at 99.

[53] See 260 Série A: Arrêts et Décisions 21-22 (par. 49).

definitely need to be interpreted before their implementation.[54] At the same time, it violates art. 93 par. 3 sect. 1 C., stipulating that the judicial decision ought to be specifically and thoroughly reasoned. In addition, the same absence casts a reasonable doubt on the abuse of judicial power, giving rise to suspicion of the application of the principle of expediency in the exercise of judicial power, dictated by the political and religious evaluative system of the agents of this power, in violation of the fundamental principle of rule of law and more particularly, of the principle of legitimacy.

Another methodological error consisting in the erroneous interpretation and implementation of the law is the judge's discretionary power to determine new kinds of means of commission of the crime of proselytization, in addition to those that are explicitly mentioned, through the general standard of "unlawful or morally reprehensible means",[55] a standard that is open to interpretation. Put differently, the judge may not, on the basis of the evaluative concepts mentioned in the law, devise through interpretation, in the particular case, other evaluative concepts that are not provided for in the statute.

As concerns the meaning of these evaluative concepts, several viewpoints have been expressed in theory. In particular, two opinions have been put forward concerning the meaning of "provisions of any kind".[56] A first opinion claims that provisions may be material or non-material.[57] A second and sounder opinion suggests that provisions may only be material or economic, in the sense that they are monetary or may otherwise be evaluated in monetary terms.[58]

As for the concept of fraudulent means, yet again, two different views have been expressed. A first view holds that fraudulent means are representations of both factual events and evaluative allegations as real.[59] A second opinion, that finds me in agreement, posits that only factual events are included in the concept of representations.[60]

The aforementioned evaluative concepts must be interpreted by the courts with excessive care, so that the criminal statute on proselytization will not

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[54] *See especially* ANNA PSAROUDA-BENAKI, The Evaluative Components of the Objective Elements of the Crime 66 (P. Sakkoula 1971); IOANNIS GIANNIDIS, The Justification of the Decisions of Penal Courts. The Theoretical Foundations, Part a΄ 143-145 (Ant. Sakkoula 1989); Marianos Karasis, *The Logical Problem in the Subordinate Legal Syllogism*, 5 Aissymnetes 79-83 (1994); POULIS, *supra* note 15, at 110; Philippou, *supra* note 5, at 20.

[55] *See* Marinos, *supra* note 32, at 11.

[56] *See* POULIS, *supra* note 15, at 108, arguing (and probably rightly so), that "provision" is a non-pure evaluative concept, because it requires an intellectual process and not an evaluation.

[57] *See* MARINOS, *supra* note 5, at 209-210.

[58] *See* Sideris, *supra* note 35, at 243 and POULIS, *supra* note 15, at 108.

[59] *See* MARINOS, *id.* at 210-211.

[60] *See* POULIS, *id.* at 108-109.

result, in the process of its implementation, in a curtailment of religious freedom.[61] However, here one can reasonably wonder about what exactly is the "mind meter" that will be used to "mind read" or measure an audience or an individual relative to these concepts.[62] In the context of the aforementioned view, the following views, interpreting the exploitation of inexperience and the exploitation of need, seem to move, more or less, in the right direction. According to one opinion, the concept of abuse of inexperience refers mainly to issues of religious nature,[63] or, according to another opinion, which I consider more sensible, it refers exclusively to such matters, however it cannot be equated with the lack of special knowledge on religious matters.[64] This need must be conceived of as immediate and imperative, under one view,[65] permanent or temporary, mainly of an economic nature, personal or real -or according to another, and more widely recognized viewpoint,[66] only of an economic nature, a need which may relate either to the object of the crime or to its relatives according to art. 13c PC.

As concerns low intellect and naïvety, two opinions have been set forth, that diverge depending on the circumstances and either converge conceptually themselves, or converge with other evaluative concepts that also refer to the relevant criminal statute. For some scholars, low intellect applies when the object of the crime has a permanent or temporary condition of psychological instability, which is related to the possibility of changing his or her religious beliefs.[67] For others, low intellect is the immaturity that has to do mainly with religious matters and which exceeds the limits of inexperience.[68] On the concept of naïvety, some have argued that it is the frivolity because of which the object of the crime is influenced in matters of religion.[69] Another strand of theory holds that low intellect is an intellectual weakness of the object, which obstructs him or her from understanding either the differences among religions or the consequences of a decision to change his or her religion.[70] I do, however, think that the limits between low intellect and naïvety are rather hazy, especial-

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[61] *See* SVOLOS & VLACHOS, *supra* note 5, at 34, n. 21.
[62] *See* SALACHAS, *supra* note 18, at 99-100.
[63] See Sideris, *supra* note 35, at 245.
[64] *See* POULIS, *id.* at 109-110 (emphasizing that methodologically speaking, both inexperience relating to religious matters, and its abuse by the subject of commission with a particular act, should be interpretatively specified).
[65] *Id.*
[66] *See* Sideris, *supra* note 35, at 246.
[67] *See* POULIS, *id.*
[68] *See* Sideris, *id.*
[69] *See* POULIS, *id.*
[70] *See* Sideris, *id.*

ly when the court is called upon to decide on them without the expert opinion (testimony) of expert witnesses like psychologists or psychiatrists.

II. PUNISHABLE PROSELYTIZATION AND THE PRINCIPLE OF THE EXACT DESCRIPTION OF THE PUNISHABLE ACT

1. THE VAGUENESS OF THE CRIMINAL STATUTE

Following the analytical presentation of the plethora of interpretative issues arising from the criminal-law provision of proselytization and of the versions of interpretation that have been proposed towards resolving them, as well as after a critical examination of such issues, it is now possible to proceed with the investigation of the congruence or discord of this offense with the principle of the legitimacy of crimes. Even if a particular citizen, or more generally an ordinary person, sought the legal advice of the competent authorities on the concept of the criminal offense of proselytization, in order to adjust his conduct accordingly, the unjustifiably large number of interpretative problems and the relevant logically feasible views that have been set forth in theory and case law, demonstrate that the person seeking the advice would not be able to adjust his conduct to the law.

The criminal statute on proselytization is obviously and blatantly contrary to the fundamental principle "*nullum crimen nulla poena sine lege certa*",[71]

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[71] *See* JOHN W. MONTGOMERY, The Repression of Evangelism in Greece: European Litigation vis-à-vis a Closed Religious Establishment 61-67 and 88-97 (University Press of America 2001). *See also* Kyriakos Kyriazopoulos, *Book Review of John Warwick Montogomery's* The Repression of Evangelism in Greece: European Litigation vis-à-vis a Closed Religious Establishment 44 Journal of Church and State 154 (2002).

[72] Those who concur include PANAGOPOULOS, *supra* note 3, at 36; Panagopoulos, *supra* note 3, at 7; LOVERDOS, *supra* note 11, at 32-35, 44-47 and 53; Andreas Loverdos, *On Proselytization*, *in* Religious Freedom 130 (K. Beis ed., Eunomia Verlag 1997). LOVERDOS, *id.* at 44-49, aptly confirms the clash of the criminal provision on proselytization and the principle of "*nullum crimen nulla poena sine lege certa*", reasoning that in the case law there exists considerable confusion owing to the fluidity of the criteria used to identify the legal good under protection, to the contradictory reading which the evaluative concepts expressed by the means of commission may be open to, and to the fluidity of the description of the punishable act of proselytization. This fluidity is not cured by the constitutional harmonization of the aforementioned statute, because it is unacceptable to expand the area of punishability to cover the gaps in the punishment of proselytization in favor of the prevailing religion or among the members of other known religions. *See also* Poulis, *supra* note 32, at 247-248, 250-251 and 259, arguing that the phrasing of the criminal statute on proselytization is very vague and, as a consequence, rules out the required guaranteeing function of the description of the punishable act (*id.* at 247-248). Moreover, he acknowledges that there is no

which is safeguarded in art. 7 par. 1. C.[72] and which also constitutes an individual right, as well as in par. 5.18 of the Document of the Copenhagen Meeting.[73] This principle, according to the aforementioned Document, is considered one of the cornerstones of the rule of law. The same criminal statute also contravenes the principle "*nullum crimen nulla poena sine lege*", which is recognized by art. 7 par. 1 of the European Convention on Human Rights (*hereafter* ECHR) and by art. 15 par. 1 International Covenant on Civil and Political Rights (*hereafter* ICCPR). Because this statute, as it is implemented by Court of Cassation case law, punishes religious convictions and religious conduct, violates *a contrario* the principle of the foreseeability of offenses and constitutes a characteristic case of dual vagueness.

2. The Dual Vagueness of the Penal Statute

Case law typically classifies the criminal offense of proselytization under the crimes of abstract endangerment. This shows that the particular crime, under the pretext of the increased protection of any legal good whatsoever, aims at the punishment: (a) of religious conduct, even if it is lawful, of the members of creeds that are different from the prevailing religion and (b) of the religious conviction that is different from that of the prevailing religion. Consequently, the aforementioned classification of the particular criminal offense violates the

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essential definition of proselytization to be found in the relevant criminal statute, because attempt is distinct from the means of commission and the latter include moral support (*id.* at 250-251 and 259). In the past, the same scholar had adopted the view that the relative vagueness in the description of the crime of proselytization did not extend to the affirmation of its unconstitutionality (*see* Poulis, *supra* note 5, at 229). Finally, *see* Ippokratis Mylonas, *Translation – Comments (on the Case of Kokkinakis versus Greece)*, 4 Yperaspisi 158, 193 (1994). Among those who disagree we find MARINOS, *supra* note 5, at 106 and Marinos, *supra* note 56, at 10-11, with the rationale that the expression "in particular" does not pave the way for the construction of the objective elements of most crimes, but refers to the means of commission, which in any case must be "dishonest" and "immoral", since this is the kind of terminology that is found in statutes of the Penal Code. Paraskevopoulos, *supra* note 44, at 412, successfully counters these arguments by pointing out that the description of the means or kinds of commission of an offense may be absent in the penal statute itself, insofar as the outcome of the subject's action (which constitutes the damage to the legal good) is clearly defined. *See also* Krippas, *supra* note 1, at 314, holding that the principle "*nullum crimen nulla poena sine lege*" is not violated by the indicative or vague reference to the means or kinds of commission –a reference that is permissible in penal law. The aforementioned reply given by Paraskevopoulos to Marinos applies *ad hoc* for this opinion as well.

[73] Par. 5.18 of the Copenhagen Document provides: "No one shall be accused, tried or convicted for any crime, unless the crime is prescribed by law, which defines the elements of the crime with clarity and precision". *See* 29 International Legal Materials (*hereafter* ILM) 1309 (1990); 11 Human Rights Law Journal (*hereafter* HRLJ) 234 (1990); ARIE BLOED (ed.), The Conference on Security and Cooperation in Europe. Analysis and Basic Documents (1972-1993) 443 (Kluwer Academic Publishers & the Europa Institute 1993).

fundamental principle enshrined in art. 7 par. 1 C. as concerns the prohibition of the criminal prosecution of the thought and the conduct which is not offensive to any actual legal good. These prohibitions are derived from the aforementioned principle.[74]

In essence, it is not the act causing the social harm that is punished, but the religious conduct and the religious thought of the natural persons that are not members of the prevailing religion.[75] Such religious conduct and religious thought are apparently undesirable to the agents of political power.[76] The general phrasing of the relevant penal statute cannot refute the aforementioned conclusion, since the implementation of the statute in practice attributes a rather hypocritical character to the generality of its wording.

The principle of legitimacy of crimes requires that the crime be prescribed by law. *A contrario*, the court must not convict the defendant if the penal statute prescribing the crime has already been abolished,[77] however -according to the most sensible opinion-, the crime of proselytization has been abolished since the Penal Code began to take effect. In the Kokkinakis case,[78] both the European Commission of Human Rights (*hereafter* European Commission) and the European Court neglected to examine *ex officio* whether the Greek courts continue to implement the penal statute on proselytization, which is no longer in force.[79]

The dual vagueness of the penal statute of proselytization lies in the description of the punishable act (vagueness of the type of punishable act) and further in the specification of the protected legal good(s) (vagueness of the type

[74] *See* Manoledakis, *supra* note 39, at 121; MANOLEDAKIS, *supra* note 33, at 131-132.

[75] *See* ARISTOVOULOS MANESIS, Constitutional Rights, vol. A΄: Individual Liberties – Lectures (Sakkoulas 4th ed. 1982); Manoledakis, *id.* at 121 and 129; MANOLEDAKIS, *supra* note 12, at 35; IOANNIS MANOLEDAKIS, A General Theory of Penal Law, vol. A, II 44 (Sakkoula 1976); NIKOS PARASKEVOPOULOS, State of Mind and Culpability in Penal Law 13-26 (Sakkoula 1987); KOSTAS KONSTANTINIDIS, Penal Law and Human Dignity 64 (Thessaloniki 1987); KOSTAS CHRYSOGONOS, Individual and Social Rights 200 (Ant. Sakkoula 1998).

[76] *See* Manoledakis, *supra* note 39, at 124.

[77] *See* Patrice Rolland, *Article 7, in* La Convention Européenne des Droits de l'Homme: Commentaire Article par Article 293, 295 (Luis Edmond Pettiti et al. eds., Economica 1995).

[78] *See* Adamantia Pollis, *Greece: A Problematic Secular State, in* Legal Issues of Religious Otherness in Greece 165 (D. Christopoulos ed., Kritiki 1999).

[79] *See* the decision of the European Commission of Human Rights of 24/9/1963 on the admissibility of the appeal of X. against the former Federal Republic of Germany, 6 Annuaire 589 (1963).

[80] *See* PSAROUDA-BENAKI, *supra* note 55, at 60; Nikos Androulakis, *Nullum Crimen Sine Lege Certa,* 23 Poinika Chronika 513, 515-516 (1973); *see also* ANDROULAKIS, *supra* note 13, at 137; Manoledakis, *supra* note 39, at 125-132; Phaedon Vegleris, *Vague Penal Law: Conflict with Article 7 par. 1 of the 1975 Constitution. Ministerial Decision Imposing Penal Sanctions for Failure to Comply with Administrative Duties by Reference to Penal Law, Without an Explicit and Specific Authorization for this Purpose: A Clash with Articles 7 par. 1 and 43 par. 2 of the Constitution (An Advisory Opinion),* 35 Nomiko Vema 691, 692 (1987).

of legal goods).[80] However, the Court of Cassation has ruled that the specification of the elements of the penal offense of proselytization does not contravene art. 7 C., since these elements are clear and only the means of commission are provided for indicatively.[81]

There is no consensus in theory regarding the legal good that is being protected by the penal statute on proselytization; in fact, an unjustifiably large number of opinions that are, as expected, contradictory with each other have been set forth. This means that the statute is vague in relation to the protected legal good. It is evident from case law that the protected legal good is the prevailing religion as a fundamental element of public order.

Under the current Constitution, the aforementioned legal good seems to be covert, that is, it isn't declared in court decisions. Nonetheless, the general wording of the prohibition of proselytization with the specification that proselytization against the prevailing religion is also punished. However, there are seemingly no decisions that punish members of the prevailing religion for proselytization against heterodox persons. The above-mentioned formula is facilitated by the fact that the legal good that is safeguarded by the Constitution is no longer differentiated from the legal good that is protected by the penal statute.

The description of the punishable act, as it is evident from the (similarly) inexcusably many and inevitably clashing opinions, is phraseologically and conceptually vague, since it has the character of a general standard[82] in relation to an excessively large number of interpretative issues –as we have already noted in the previous section– such as: the subject and the object (or victim) of the crime, the legal meaning of the expression "in particular", the nature of the enumeration of the means of commission, the specification of the act of proselytization itself, the evaluative concepts which characterize the means of commission. If we were to exclude these interpretative issues, perhaps in practice the existence of no other issue would be conceivable. The vague wording of the penal statute with terms that are charged by religious prejudices, in

[81] *See* CoC judgments no. 309/1957, 8 Poinika Chronika 18 (1958) and 498/1961, 12 Poinika Chronika 212 (1962).

[82] *See* MANESIS, *supra* note 76, at 197-198; Manoledakis, *supra* note 39, at 125-126; Manoledakis, *supra* note 76, at 38-52; Nikos Androulakis, *The New Constitution and Criminal Justice, in* The Influence of the Constitution of 1975 on Private and Public Law [*Publications of the Hellenic Institute of International and Foreign Law, N° 9*] 70 (Athens 1976); Alexandros Mangakis, *An Interpretation of Law 774/78 on the Suppression of Terrorism and the Protection of the Democratic Regime*, 28 Nomiko Vema 1018 (1980); PRODROMOS DAGTOGLOU, Constitutional Law: Individual Rights, Vols. A΄– B΄ 263-264 (Ant. Sakkoula 1991); CHRYSOGONOS, *supra* note 76, at 201; Christos Dedes, *The Concept of the Term "Law" in the Penal Statutes of the Constitution*, 1 To Syntagma 235, 236-237 (1975); Christos Dedes, *The Penal Statutes of the Constitution*, 1 To Syntagma 472 (1975).

combination with the evaluative system of the judge, unquestionably aims at the inadmissible expansion of its punishability in the implementation of the relevant statute.[83]

3. THE CONFORMITY OF THE EVALUATIVE CONCEPTS TO THE CRITERION OF THEIR PRECISE LEGISLATIVE DESCRIPTION

The evaluative concepts which denote the means of commission can in no way be considered to meet the criterion of the precise legislative description of the concepts of this kind, namely to the criterion of their uniform interpretation and implementation, on the basis of the criteria of the law itself.[84] The content of these concepts cannot arise from an intellectual process, with the only possible exception of the granting of provisions. But even the latter concept, if the relevant case law is taken into consideration, cannot be viewed as non-purely evaluative, without any reservation. However, it is inadmissible for a penal statute to contain evaluative concepts, for whose relevant definition neither the statute itself nor the other laws or common practical experience offer no standards of judgment.[85]

The penal statute on proselytization does not contain its own criteria of interpretative particularization of the evaluative concepts.[86] The content of these concepts consists of a factual basis, whose evaluative characterization or judgment hinges on social morality. This evaluative characterization, according to the constitutional concept of the abuse of the freedom to disseminate one's religion or religious beliefs, should not be conducted on the basis of social morality, but on the basis of public morality, which is extensively discussed

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[83] *See* Manoledakis, *supra* note 39, at 131-132. Daskalakis makes the reasonable argument that the letter of the penal statute on proselytization leaves "the judge with extensive discretion to judge and to scrutinize anything that is unfathomable and all the free range to be misled to erroneous judgments drawn on intolerance, religionism or excessive zeal to support the religion that he adheres to, factors by which the judge is many times unconsciously misled" (*see* Katholiki, n°. 984/21-10-1955). *See further* SALACHAS, *supra* note 18, at 98.

[84] *See* PSAROUDA-BENAKI, *supra* note 55, at 61-62. *See also* Loukas Loukaidis, *Nullum Crimen Sine Lege Certa (The Prohibition of Vagueness in Criminal Offenses)*, 3 Cyprus Law Review 474, 479-481 (1983), positing that the rule "*nullum crimen nulla poena sine lege certa*" rules out the utilization of manifestly broad terms, whose breadth of conceptual range creates vagueness in relation to the cases that they refer to (*id.* at 481). Finally, *see* Dionysios Spinellis, *Issues from the Influence of the Constitution of 1975 on Penal Law*, *in* Five Years of Implementation of the 1975 Constitution 213, 219-220 (Law Faculty of the Democritus University of Thrace 1981).

[85] *See* Vegleris, *supra* note 81, at 693.

[86] *See* Loukaidis, *supra* note 85, at 483, correctly pointing out that in the cases where it is practically impossible to achieve the requisite precise wording of the elements of a criminal offense, the legislator should have added clearly defined legal criteria, which would guide the judge in the interpretation and implementation of these elements in particular cases.

below. This is dictated by the fact that it isn't just any punishable act that is being punished, but the abusive exercise of an individual right.

Undoubtedly, evaluative concepts possess a conceptual core that is widely accepted, but they also have a wide "environment", where it is possible, in the context of a pluralistic society, to observe substantial differences of opinion.[87] Nonetheless, it is unacceptable to carry out the evaluation on the basis of the judge's subjective assessments and criteria. Particularly in relation to the crime of proselytization, which constitutes a curtailment of the freedom to disseminate one's religion or beliefs, I believe that we shouldn't resort to the "overwhelmingly prevailing" among the conflicting assessments as a basis for the evaluation.[88] This is because this view does not take into consideration that in what concerns the protection of human rights, the rule of majority is not applied.[89]

Public morality is particularized as an obligation of the governed, in the context of the exercise of their own individual rights, and more particularly, of their religious freedom, to respect the religious beliefs or worldviews of others. Public morality cannot, by definition, proceed with the evaluative characterization of the factual bases of the aforementioned evaluative concepts in a fashion that fulfills the criterion of their precise legislative description. In other words, the above-mentioned evaluative concepts do not refer to precise legal or extralegal rules of easily specified content.[90]

As a consequence, the percentage of the judge's subjective evaluation, in relation to the means of commission of the crime of proselytization, exceeds the limits of his or her judicial power concerning the authorized interpretation.[91] That is, it exceeds the judge's diagnostic task and is equated with the

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[87] *See* ANROULAKIS, *supra* note 13, at 143 and Spinellis, *supra* note 84, at 143.

[88] *See* ANDROULAKIS, *id.*

[89] *See* the European Court of Human Rights judgments of 18.12.1996 on Efstratiou and Valsamis versus Greece, par. 27 [European Court of Human Rights, Cases of *Valsamis/Efstratiou v. Greece* (74/1995/580/666), http://www.echr.coe.int]. These two judgments can also be found in: 3 Quaderni di Diritto e Politica Ecclesiastica (*hereafter* QDPE) 769-773 (1997). *See also* Resolution 800 (1983) of the Parliamentary Assembly of the Council of Europe, 4th Division: The Legal Rules of Democracy, elem. g.

[90] *See especially* PSAROUDA-BENAKI, *supra* note 55, at 68-69. *See also* POULIS, *supra* note 15, at 112, who is right to point out that "a penal law which does not even prescribe a particular conduct as punishable, but such conduct is interpretatively deduced as "immoral" and "dishonest" [*see* Marinos, *supra* note 56, at 11)], is blatantly unconstitutional, since the Constitution requires not only the prescription, but also the precise description of the punishable act".

[91] *See* Loukaidis, *supra* note 85, at 482, arguing that filling in the gaps resulting from the use of unclear, vague and unreasonably general standards in the specification of the elements of a criminal offense, by way of court interpretation, is incompatible with the principle "*nullum crimen nulla poena sine lege certa*". He further adds that the courts' power of interpretation should be limited to a clarification of the elements of the offense, in view of implementing the law in accordance with the will of the legislator.

lawmaking task of the legislator. The judge should have no discretionary power whatsoever[92] regarding the specification of these evaluative concepts, or, what is more, regarding the interpretative derivation *in concreto*, on the basis of these same concepts, of other evaluative concepts not provided for explicitly in the law. Thus, the enforcer of the law is the one who rather determines which act constitutes punishable proselytization, whereas the legislator should do so forcibly, composing the concept of the crime with elements of sufficient notional clarity.[93]

The expression "in particular" contained in the penal statute on proselytization, as it follows from a part of theory and from settled case law, allows the *pro rata* implementation of the punishable act by its expansion to other acts that are not provided for explicitly and, therefore are not punishable.[94] This statute "legitimizes" the arbitrary characterization, on the part of a judge, of an act as a crime, and consequently, the arbitrary restrictive intervention of the State regarding both the right of dissemination and the right to change religion or beliefs.

4. THE PRINCIPLE OF THE PRECISE DESCRIPTION OF PUNISHABLE CONDUCT

The principle of the precise description of punishable conduct, as held by the majority of the European Court in its judgment for the Kokkinakis case,[95]

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[92] *See* PSAROUDA-BENAKI, *supra* note 55, at 65-71.

[93] *See* Mangakis, *supra* note 83, at 1018.

[94] *See* SVOLOS & VLACHOS, *supra* note 5, at 101-104; MANESIS, *supra* note 76, at 198; Loukaidis, *supra* note 85, at 476-477. *See also* Stavros Stavrou, *Proselytization and the Right to Religious Freedom (On the Occasion of the Judgment of the European Court of Human Rights on the Appeal of "Kokkinakis versus Greece"* 43 Poinika Chronika 964, 972 (1993); Philippou, *supra* note 5, at 18.

[95] *See* Charalambos Papastathis, *Le Régime Constitutionnel des Cultes en Grèce, in* Le Statut Constitutionnel des Cultes dans les Pays de l'Union Européenne, Actes du Colloque, Université de Paris XI, 18-19/11/1994 153, 155 (Consortium Européen: Rapports Religions-État ed., Giuffrè Editore 1995); see also Charalambos Papastathis, *Stato e Chiesa in Grecia, in* Stato e Chiesa nell' Unione Europea 77, 87 (G. Robbers ed., Nomos Verlagsgesellschaft 1996); Charalambos Papastathis, *Tolerance and Law in Countries with an Established Church* 10 Ratio Juris 108, 111-112 (1997). For Greek translations of the Kokkinakis judgment, *see* Mylonas, *supra* note 73, at 159-187; 42 Nomiko Vema *[Law Tribune]* 528 (1994); 43 Poinika Chronika 1055 (1993). For the French version of the Kokkinakis judgment, *see also* 5 Revue Universelle des Droits de l'Homme *(hereafter* RUDH*)* 251 (1993) and 3 Quaderni di Diritto e Politica Ecclesiastica 734 (1994). For analyses of the Kokkinakis judgment, *see* Stavrou, *supra* note 95, at 964-977; Altana Filou-Patsantara, *The Offense of Proselytization in the European Court of Human Rights (Article 4 of Obligatory Law 1363/1938)*, 19 To Syntagma 821, 822-833 (1993); Anastasios Marinos, *The Issue of Religious Proselytization Under a New Crisis, in* Macedonian Distinction Award to the Archbishop of the Americas Iakovos on his Fifty-Year Contribution to Orthodoxy and the Greek Nation 331, 332-344 (1993); Anastasios Marinos, *Proselytization...Continued*, 35 Elliniki Dikaio-

does not constitute a necessary complement to the principle of legitimacy of crimes and penalties, but it arises interpretatively from the latter.[96] However, there was a dissenting opinion claiming that the need to have the crime defined as clearly as possible in law does not constitute a consequence, but an integral part of the principle secured by art. 7 par. 1 ECHR.[97] According to the same and widely accepted opinion, the same Court should investigate not only if the criminal conviction of the applicant was grounded on a pre-existing and clearly defined statute of penal law, but also if it was congruous with the principle of the restrictive interpretation of penal legislation. This principle is also safeguarded in art. 7 par. 1 ECHR.[98]

The European Court further holds that the condition for legislative precision is satisfied when the individual can foresee the penal evaluation of an act from the wording of the relevant statute and additionally, if the need arises, with the assistance of the courts' interpretation.[99] The penal statute on pros-

syni 1, 2-6 (1994); Anastasios Marinos, *La Notion du Prosélytisme Religieux Selon la Constitution*, 47 Revue Hellénique de Droit International 377, 378-379 (1994). *See also* Philippou, *supra* note 5, at 20-38. Finally, for comments on the Kokkinakis judgment, *see Note (to the Kokkinakis judgment)*, 42 Nomiko Vema 538 (1994); Ismini Kriari-Catranis, *Freedom of Religion Under the Greek Constitution*, 47 Revue Hellénique de Droit International 397, 410-411 (1994).

[96] *See* 260 Série A: Arrêts et Décisions 22 (par. 52).

[97] *See* Judge S. Martens (260 Série A: Arrêts et Décisions, 33, par. 4). The European Commission of Human Rights appears to concur with Martens' opinion (*id.* at 45, par. 44).

[98] 260 Série A: Arrêts et Décisions 34-36, pars. 6-11. Martens holds that the Greek courts did not respect the principle of the restrictive interpretation of penal law in the Kokkinakis case, on the three following grounds: (a) the applicant's conviction was based on the view that the mere proclaiming of religious beliefs differing from those of the person addressed proclaiming of religious beliefs differing from those of the person addressed implies intention to convert. (b) The conclusion of the Greek courts regarding the applicant's intent to change his interlocutor's beliefs was not grounded on a finding of the exact words he had directed to her nor was it established on the incompatibility of what he had told her with what she believed; and (c) The applicant's conviction was based on the view that the mere proclaiming of one's faith to a heterodox person whose experience in religious matters or whose mental capacities are less than those of the proclaimer makes the latter guilty of proselytization (*id.*). Jochen Frowein and A.D' Almeida Ribeiro, members of the Commission, expressed the partly dissenting opinion that the criminal statute on proselytization contravenes art. 7 par. 1 of the European Convention, because it leaves very large room for interpretation. This is confirmed by the judgments of Greek courts on the Kokkinakis case, as well as by other similar judgments. Thus, they held that pacifism and the reading out loud passages from the New Testament, as well as the distribution of Jehovah's Witnesses pamphlets to an Orthodox priest constitute proselytization. The latter case demonstrates that the interpretation of the aforementioned statute allows its implementation on any expression of opinion in favor of a particular religion. Moreover, the arrest by police of 1,919 Jehovah's Witnesses over a period of seven years reveals not only that the relevant legislation is implemented expansively, but also that in practice its main target is Jehovah's Witnesses (260 Série A: Arrêts et Décisions 22).

[99] *See* 260 Série A: Arrêts et Décisions 22, par. 52. *See also* the judgment of the European Commission of Human Rights on the admissibility of the application 31363/96 of Norberto Manzanares Mayandia versus Spain (91-A *D.R.* 49-51).

elytization belongs to the category of laws that do not demonstrate absolute exactness, because of the need to avoid its excessive rigidity and to have the statute keep pace with changing circumstances.[100] The interpretation and implementation of this statute depend on the case law of the Greek courts.[101] Based on the knowledge that came to this Court's attention regarding the relevant Greek case law,[102] its majority held that this case law was published[103] and accessible, that it was stable and that it supplemented the letter of the penal statute in a fashion that enabled the applicant to regulate his conduct in the matter accordingly.[104]

The above-mentioned Court repeated this same reasoning in the case of *Larissis and others versus Greece*.[105] In its judgment for the particular case, the Court recalls its finding in the Kokkinakis case and mentions that the definition of the offence of proselytization, together with the settled body of national case-law interpreting and applying it, satisfy the conditions of certainty and

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[100] Mylonas, *supra* note 73, at 192, makes the good point that the European Court refrained from conducting a detailed and substantiated analysis of the matters of precision of the penal statute of proselytization, preferring to mention the significance of the statute's interpretation by the courts.

[101] Judge S. Martens, disagreeing with the majority of the European Court of Human Rights, maintains that case law cannot supplement guarantees against the arbitrary persecutions and convictions, which are not provided by the text of the law itself, especially if the political or religious atmosphere in a country changes (260 Série A: Arrêts et Décisions 34, par. 5).

[102] *See* 260 Série A: Arrêts et Décisions 13-14, par. 17-20.

[103] From the Greek court decisions which the European Court cites as published in the Kokkinakis case, four are unpublished and they are the following: Thessaloniki Court of Appeals judgment no. 2567/1988, Florina Criminal Court order no. 128/1989, Larissa Criminal Court order no. 357/1990 and Patra Court of Appeal judgment no. 137/1988 [*see* Mylonas, *supra* note 73, at 188]. It should, however, be noted that Patra Court of Appeal judgment no. 137/1988 has been published in IOANNIS KONIDARIS, Legal Theory and Practice Concerning "Jehovah's Witnesses" 74 and 252-253 (Ant. Sakkoula, 3rd ed. 1991). Moreover, the Kokkinakis judgment has two mistaken references concerning the publication of the following two Greek court decisions: (a) CoC judgment no. 271/1932, Themis XVII, instead of the correct reference Themis 44, and (b) Aegean Court of Appeal judgment no. 2950/1930, Themis B΄ instead of the correct Athens Court of Appeal judgment no. 2950/1930, THEMIS 42. It also cites judgment no. 2276/1953 as a CoC judgment, when it is judgment no. 2276/1953 delivered by the Council of State, further neglecting to mention the publication of the latter case: 10 Neon Dikaion 210 (1954). Moreover, it does not make reference to the publication of CoC judgment no. 1155/1978, 29 Poinika Chronika 264 (1979) and 27 Nomiko Vema 457 (1979), Larissa Court of Appeal judgment no. 749/1986, 41 Armenopoulos 1072 (1987) and Trikala Criminal Court order no. 186/1986, 40 Armenopoulos 1000 (1986). *See also* Mylonas, *id.* It should be noted that CoC judgment no. 1155/1978 has been published in two different law reviews (*id.*), as well as in KONIDARIS, *id.* at 62 and 103-104. The same holds for Larissa Court of Appeal judgment no. 749/1986, which has also been published (in excerpts) in 35 Nomiko Vema 1283 (1987), and also in KONIDARIS, *id.* at 161-170.

[104] *See* 260 Série A: Arrêts et Décisions 19, par. 40.

[105] Cour Européenne des Droits de l'Homme, *Affaire Larissis et autres c. Grèce* (140/1996/759/958-960), pp. 11-16 (printed version).

foreseeability prescribed by Article 7 ECHR. In fact, the same judgment adds that the European Court sees no reason to revisit this issue, if one takes into consideration that it hasn't been persuaded that the position in Greek law has become any less clear in the period of five years since its previous relevant evaluation. Nonetheless, the Court reached this conclusion without taking into account the full range of the relevant published Greek case law, but only of a small section,[106] and consequently, its conclusion is erroneous.

Since the European Court was compelled to resort to Greek case law on proselytization, it did not judge the respective Greek legislation as sufficiently clear. Indeed, Greek case law (at least published case law) on this matter appears to be neither settled nor solid; further, it is not possible to consider that it enables individuals to regulate their conduct in accordance with the law.

5. The Possibility to Foresee Penal Evaluation from the Interpretation of the Court of Cassation

Contrary to the assessments of the majority of the European Court about Greek case law,[107] the Court of Cassation accepts that the listing of the means of commission of the crime is indicative and not exhaustive. The European Court erroneously draws the conclusion, based on CoC judgment no. 997/1975, which happens to omit the expression "in particular" from the definition of proselytization it cites, that the Greek Court of Cassation, changing its theretofore case law,[108] acceded to the restrictive listing of the means of commission.[109] This decision refers directly to the definition of proselytization of the relevant penal statute, whose letter includes the adverbial phrase "in particular", without ruling out any specific interpretative meaning of this phrase. The three judgments of the Court of Cassation that have been issued from 1975 to 1979 and that omit the phrase "in particular",[110] do not constitute a turning

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[106] It should be pointed out that the ambitious effort of the European Court to present Greek case law on proselytization in a detailed manner cannot be deemed successful, since out of the 39 published decisions in the period spanning from 1951-1991, it limits itself to the reference of only 8 decisions: *see* Mylonas, *supra* note 73, at 188.

[107] *See* 260 Série A: Arrêts et Décisions 166, par. 19.

[108] Before the current Constitution, *see* CoC judgments no. 1082/1946 (2nd Division), 58 Themis 148 (1947); no. 945/1947 (2nd Div.), 14 Ephimeris Ellinon Nomikon 464 (1947); no. 1943/1947 (2nd Div.) (*unpublished*); no. 1049/1947 (2nd Div.), 15 Ephimeris Ellinon Nomikon 100 (1948); no. 1212/1948 (2nd Div.), 16 Ephimeris Ellinon Nomikon 29 (1949); no. 309/1957, 8 Poinika Chronika 18 (1958); and no. 54/1958, 8 Poinika Chronika 273 (1958).

[109] *See* Stavrou, *supra* note 95, at 970 and 972-973; Philippou, *supra* note 5, at 19-20.

[110] The following three CoC judgments completely leave out the expression "in particular": judgments no. 997/1975, 26 Poinika Chronika 380 (1976); no. 1035/1975, 26 Poinika Chronika 391 (1976); and 238/1979 (4th Div.), 27 Nomiko Vema 1160 (1979) and 29 Poinika Chronika 463 (1979).

point in case law,[111] since starting from 1978, the same expression has been repeated over and over again in its judgments.[112]

The case law of the Court of Cassation does not appear to rule out the impermissible *pro rata* expansion of punishability in the direction of the criminalization of lawfully exercising the freedom to disseminate religion or belief,[113] by way of the indicative listing of the means of commission.[114] From this indicative listing, Court of Cassation case law deduces the nature of the means of commission, on which it grounds the extension of punishable proselytization by analogy. Thus, the means of commission are unlawful,[115] morally rep-

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[111] *Cf.* Trikala Criminal Court order no. 186/1986, 40 Armenopoulos 1000 (1986). It is worth pointing out that this order mentions the following: "...pursuant to the provision of article 7 of the Constitution, it is clear that in order for proselytization to be punishable under criminal law, the manner and the means by which it is conducted need to be prescribed by law. Therefore, one cannot characterize as proselytization every single action of a heterodox, which aims at proclaiming the beliefs of his or her sect or religion..."

[112] Under the current Constitution, the phrase "in particular" seems to introduce the punishable act in CoC judgments no. 1155/1978 (4th Div.) and 704/1988 (*the Kokkinakis case*), 38 Poinika Chronika 776 (1988), whereas the same expression introduces the means of commission in CoC judgments no. 1304/1982 (*id.*); 840/1986 (5th Div.), 34 Nomiko Vema 1269 (1986) and 36 Poinika Chronika 767 (1986); and 1266/1993 (*the Larissis case*), 43 Poinika Chronika 1017 (1993). *Cf.* Athens Criminal Court order no. 3720/1961, 12 Poinika Chronika 43 (1962); Mytilini Criminal Court order no. 364/1967, 9 Elliniki Dikaiosyni 636 (1968); Edessa Criminal Court order no. 25/1984, 35 Poinika Chronika 422 (1985) and 39 Armenopoulos 56 (1985). *See also* Athens Criminal Court order no. 51487/1986, *supra* note 32 (holding that the means of commission are listed indicatively, in the sense that they aim at changing the content of the religious conscience of a heterodox person); Chania Criminal Court order no. 172/1986, 37 Poinika Chronika 120 (1987) and 35 Nomiko Vema 119 (1987); Athens Criminal Court order no. 958/1987, 37 Poinika Chronika 935 (1987).

[113] LOVERDOS, *supra* note 11, at 32 argues that the indicative listing of the means of commission has many times given the courts the opportunity to steer away from the meaning and the letter of the particular statute. This has, for example, happened in cases where acts such as "the crafty explanation of books" or "the distribution of printed material free of charge and speeches" were deemed to constitute proselytization.

[114] *See* Stavrou, *supra* note 95, at 971-972.

[115] *See* CoC judgments no. 1082/1946 (2nd Div.), 58 Themis 148 (1947) [possession, display and sale of issues of the magazine "Skopia" (The Watchtower) of the Jehovah's Witnesses], 945/1947 (2nd Div.) (*supra* note 109), 1212/1948 (2nd Div.) (*supra* note 109) (gatherings organized by the convicted persons in their homes and in the streets, as well as teaching and analysis of Millenarian books), 289/1953 (sale of Millenarian books and magazines, as well as teaching and analysis of their content). *But see* Athens Criminal Court order no. 3720/1961, holding that the distribution of religious booklets of the "sects", either gratis or for a trivial cost, does not constitute unlawful means. *See also* Mytilini Criminal Court order no. 364/1967, holding that the distribution of booklets of any creed, insofar as the booklets contain religious teachings and an indication of the respective creed, do not constitute proselytization. Finally, *see* Edessa Criminal Court order no. 25/1984 (which is of similar content with the latter).

rehensible and unlawful,[116] any manner of intrusion whatsoever,[117] unlawful or other similar manners of influencing religious beliefs,[118] means that are enticing, deceitful or merely misleading.[119]

The Court of Cassation has considered as unlawful means the sale to adherents of the Eastern Orthodox Church of books and reading material pertaining to the Jehovah's Witnesses (Christian Jehovah's Witnesses comprise a creed which has already been recognized by the courts and by the administration in Greece, as well as by the European Court)[120] and the exercise of their freedom to spread their faith to the Orthodox. In another case, the sale of Millenarian reading material was not considered to constitute unlawful and immoral means.[121] Sending Jehovah's Witnesses booklets free of charge to Orthodox clergymen was considered to be a means of commission, in the sense of "any manner of intrusion whatsoever" on the religious conscience of a heterodox. The distribution of Millenarian books, free of charge or sold at a minimal price, to the Orthodox was considered as means of commission in the sense of an unlawful or other similar manner of influence of religious beliefs. Sending Millenarian reading material to persons of Orthodox faith free of charge was considered as enticing, deceitful or simply misleading means.

It is evident that none of the aforementioned acts constitutes the meaning of punishable abusive proselytization. This is because neither the offer, gratis or for a small charge, of a booklet or book of a particular faith nor the exercise of the freedom of spreading faith *per se* –regardless of any subjective moral evaluations of Orthodox as to the manners of exercise– constitute an abusive exercise of this same freedom. As a consequence, these cases cannot come under any of the evaluative concepts denoting the means of commission of the crime of proselytization.

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[116] *See* CoC judgment no. 1943/1946 (2nd Div.-unpublished), which does not view the sale of booklets of Millenarian content as proselytization. *Cf.* Mytilini Criminal Court order no. 112/1982, 37 Armenopoulos 410 (1983).

[117] *See* CoC judgment no. 309/1957 (free mailing of Jehovah's Witnesses booklets to Orthodox clergymen).

[118] *See* CoC judgment no. 54/1958 (distribution of Millenarian books free or nearly free of charge). *Cf.* CoC judgment no. 1155/1978 (4th Div.).

[119] *See* CoC judgment no. 55/1958, 8 Poinika Chronika 274 (1958) (sending Millenarian booklets free of charge).

[120] *See* Athanasios Reppas, *Religious Freedom as It Is Experienced by Jehovah's Witnesses in Greece, in* Religious Freedom, 307, 330-337 (K. Beis ed., Eunomia Verlag 1997).

[121] Certain lower courts held that the means of commission are unlawful because of their "moral caliber", that is, because they are incompatible with the "traditional spirituality and tolerance of the Orthodox Church [Athens Criminal Court order no. 3720/1961, Mytilini Criminal Court order no. 364/1967, and Edessa Criminal Court order no. 25/1984].

6. THE EUROPEAN COURT AND THE INTERPRETATIVE PARTICULARIZATION OF THE EVALUATIVE CONCEPTS BY THE COURT OF CASSATION

The European Court, in its treatment of the general Greek case law on proselytization, neglected to examine the issue of whether or not the evaluative concepts denoting the means of commission of proselytization are interpretatively particularized by the Greek courts or, if they indeed are, whether they are particularized in a scientific manner. The answer to this question is affirmative in the majority of published judgments delivered by the Court of Cassation. As noted by a dissenting opinion that was expressed by the European Court, the arbitrary subjection of facts to the law masks an extension of the punishability by analogy on the basis of some "interpretative" approach, which the court simply does not specify in its judgment.[122]

Certain judgments delivered by the Court of Cassation do not particularize at all one or several of the evaluative concepts prescribed in the penal statute, but introduce additional means of commission. Such means not provided for in law are the free sending of Jehovah's Witnesses books and their accompanying letter to adherents of the Orthodox faith[123] or the free distribution of booklets.[124] However, most Court of Cassation judgments proceed to categorize the factual incidents under the aforementioned evaluative concepts, without previously particularizing them interpretatively.

The exercise of the freedom of Jehovah's Witnesses to spread their faith to the Orthodox comes under all the means prescribed by the penal statute on proselytization,[125] namely the abuse of low intellect,[126] the abuse of inexperience and the exploitation of low intellect and naïvety,[127] the use of fraudulent means, the abuse of inexperience and the exploitation of low intellect and naïvety,[128] the abuse of inexperience and the exploitation of low intellect.[129]

The distribution, free of charge or with charge, trivial or not, of booklets or books of Jehovah's Witnesses to the Orthodox is classified under abuse of inexperience and exploitation of low intellect and naïvety,[130] the use of fraudulent means, the abuse of inexperience and the exploitation of low in-

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[122] *See* Judge S. Martens (Série A: Arrêts et Décisions, vol. 260, pp. 35-36). *See also* Stavrou, *supra* note 95, at 974.
[123] *See* CoC judgment no. 165/1956.
[124] *See* CoC judgment no. 1035/1975.
[125] *See* CoC judgment no. 945/1947 (2nd Div.).
[126] *See* CoC judgment no. 1212/1948 (2nd Div.).
[127] *See* CoC judgment no. 441/1952.
[128] *See* CoC judgments no. 289/1953 and 238/1979 (4th Div.).
[129] *See* CoC judgments no. 840/1986 and 704/1988.
[130] *See* CoC judgments no. 441/1952 and 238/1979 (4th Div.)

tellect and naïvety,[131] the abuse of inexperience and taking advantage of low intellect.[132]

Sending booklets free of charge on the part of Jehovah's Witnesses (or 7th Day Adventists) to persons of Orthodox persuasion "fits into" the standards of fraudulent means,[133] use of immoral and fraudulent means or the exploitation of one's low intellect, naïvety or inexperience,[134] the abuse of inexperience or low intellect,[135] the abuse of inexperience.[136] Nonetheless, the characterization "without fail" on the part of a judge of the victim of the crime of proselytization as "a person of low intellect" or "a naïve person", in order to find the subject of the penal offense guilty, offends the dignity of the former and reveals an unacceptable religious and ideological "protection" of the citizens on the part of the State. This regime is aptly termed *religious protectionism.*[137]

The above-mentioned decisions do not make any interpretative particularization of the evaluative concepts under which they "classify" the facts of each case. They refer only to the subjective moral evaluations of Orthodox persons and not to objective rules of public morality, in view of evaluating the factual basis of these concepts, which they typically make no mention of. In only a few cases do they refer to the factual basis of an evaluative concept, again without evaluating this basis by objective rules of public morality.[138] Thus, they quite possibly contravene article 93 par. 3 C., which states that all court judgments must be specifically and thoroughly reasoned.[139] There are very few Court of Cassation judgments that point to the omission of the interpretative particularization of the evaluative concepts denoting the means of commission –which is something that, methodologically speaking, should have taken place.[140]

7. The Reasonableness of the Interpretation of the Crime under Case Law

The fundamental principle of rule of law generates the principle of security of law, from which, in turn, are derived the principle of precision of

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[131] *See* CoC judgment no. 289/1953.
[132] *See* CoC judgments no. 997/1975 and 840/1986.
[133] *See* CoC judgment no. 59/1956.
[134] *See* CoC judgment no. 309/1957.
[135] *See* CoC judgment no. 55/1958.
[136] *See* CoC judgment no. 53/1973, 23 Poinika Chronika 367 (1973).
[137] *See* Ph. Vegléris, *Quelques Aspects de la Liberté de Religion en Grèce,* 6 Revue Trimestrielle des Droits de l' Homme 555, 556-566 (1995).
[138] *See* CoC judgments no. 997/1975 and 1035/1975.
[139] *See* Mylonas, *supra* note 73, at 193.
[140] *See* CoC judgments no. 1084/1974, 25 Poinika Chronika 316 (1975); no. 1155/1978 (4th Div.) and 1304/1982.

law and the principle of the restrictive interpretation of penal statutes.[141] In the Kokkinakis case, the European Court, after affirming that neither the first condition (of sufficient precision and clarity, that is, the text of the law itself)[142] nor the second condition, that is the context of the law or the conjunction of the particular statute with other statutes of the same law,[143] were met, resorted to the third condition, namely to the interpretation on the basis of case law.[144] But it failed to verify whether or not the interpretative power of the Greek courts in proselytization cases has moved within reasonable limits or whether it has actually exceeded them.[145] In other words, it neglected to examine whether or not the interpretation of the crime of proselytization on the part of Greek case law was indeed reasonable.[146]

The vagueness as to the specification of the protected legal good or goods, the similar vagueness as to the description of the punishable act, and especially the lack of a uniform interpretation and application of the evaluative concepts denoted by the means of commission, make it clear that the case-law interpretation of the crime of proselytization cannot be viewed as reasonable. This is because the case-law interpretation does not clarify or does not merely adapt the elements of the particular crime to the new circumstances, which may reasonably fall under the original concept of the criminal offense[147] –but

[141] *See* Rolland, *supra* note 78, at 295; *see also* MANFRED NOWAK, U.N. Covenant on Civil and Political RIGHTS: CCPR Commentary 275-277 (N.P. Engel 1993).

[142] *See* the judgment of the European Commission on the admissibility of applications n^{os} 8603/79, 8723/79 and 8729/79, which were tried jointly, of the applicants Camillo Crociani, Bruno Palmiotti, Mario Tanassi and Antonio Lefebvre d' Ovidio respectively, versus Italy (22 *Décisions et Rapports* [hereafter *D.R.*] 189).

[143] *See* the judgments of the European Commission of 4-12-1978 on the admissibility of application of X versus Austria (16 *D.R.* 143-144), and of 4-12-1988 on the admissibility of application n° 14.192/1988 of Delande v. Belgium (*see* Rolland, *supra* note 78, at 296, n. 3).

[144] *See* the European Court judgment of 24-5-1988 of "Müller et al. v. Switzerland" [133 Série A: Arrêts et Décisions, par. 29]. See also the European Commission's decision of 4-4-1974 on the admissibility of application 5493/1972 of Richard Handyside versus the United Kingdom, 17 ANNUAIRE 291 (1974).

[145] Judge Pettiti expressed the opinion that, even if it is accepted that the foreseeability of the law in Greece as it might apply to proselytes was sufficient, the fact remains that the haziness of the definition leaves too wide a margin of interpretation for determining criminal penalties (260-A Série A: Arrêts et Décisions 26).

[146] Rolland, *supra* note 78, at 296-297, emphasizes that the hitherto case law of the European Commission contains only a few positive references allowing the conceptual clarification of "reasonable interpretation".

[147] It has also been argued that even the clarification or the adjustment of the elements of a criminal offense to the new circumstances, which may reasonably fall under the original concept of the offense, is not completely congruous with the principle "*nullum crimen nulla poena sine lege certa*". The reason is that the court is thus empowered to proceed to an impermissible supplementation of the offense, after being influenced by the particular facts of the case [*see* Loukaidis, *supra* note 85, at 485].

rather it modifies these elements of the offense to the detriment of the defendant (analogy *in malam partem*) through the indicative listing of the "unlawful or immoral" means that are detached from the punishable act.[148] Thus, both the principle of the legitimacy of crimes and the principle derived from it, which is that of the restrictive interpretation of penal statutes, are violated.[149]

What is worse, or perhaps what is better, is that the initial concept of the crime of proselytization no longer exists, since it had to be constitutionally adjusted and the objective interpretation of penal law had to be implemented on the part of case law and of some theorists. These interpretative adjustments were driven by the need to maintain the particular penal statute in effect, given that there were several unconstitutional facets in the will of the authoritarian historical legislator. The above-mentioned indicative listing is combined with the utilization of intrinsically pure evaluative concepts. The evaluation of the factual basis of these concepts is taken up by social morality, which is largely determined by a seemingly Orthodox Christian evaluative system.

The proportionate expansion of punishability to the detriment of those charged with proselytization, through the indicative listing of the means of commission, is further enhanced by the classification of the particular penal offense, on the part of a certain fraction of case law and theory, among the crimes of abstract endangerment.[150] Both the interpretation by analogy *in malam partem*,[151] and the crimes of abstract endangerment constitute elements or legal tools of an authoritarian and totalitarian regime, which today must be rooted out. Indeed, these elements are incompatible with –if not harmful to – the liberal and democratic state that is established by the current Constitution, as well as to the concept of the "democratic society", in the context with which it is mentioned in the European Convention.

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[148] See the decision of the European Commission of 7-5-1982 on the admissibility of the application of *X Ltd v. the United Kingdom* (28 D.R. 87); the decision of 6-3-1989 on the admissibility of the application numbered 13079/1987 of *G. versus the former Federal Republic of Germany* (60 D.R. 262). *Cf.* the judgment of the European Court of 26-4-1979 *Sunday Times v. the United Kingdom*, 217 Série A: Arrêts et Décisions 27-31, pars. 48-56.

[149] *See* the decision of the European Commission of 20-7-1957 on the admissibility of application n° 217/1956, 1 Annuaire 239-240 (1955-1956-1957).

[150] *See* MANESIS, *supra* note 76, at 198-199, who points out that the preclusion of the proportionate implementation of penal laws to the detriment of the defendant in essence safeguards private freedom in the context of the liberal and democratic regime established by the Constitution –in contrast with authoritarian regimes, where the above mentioned form of analogy is acceptable, since it allows criminal prosecutions that are unleashed on the basis of political criteria.

[151] *See* the decision of 22-4-1965 of the European Commission of Human Rights on the admissibility of application n° 1852/1963 of *X versus Austria*, 8 Annuaire 199 (1965) and the decision of 24-9-1963 on the admissibility of *X versus Belgium*, 6 Annuaire 587-589 (1963).

8. THE NON-APPLICATION OF THE THEORY OF THE "FOURTH DEGREE" IN THE KOKKINAKIS CASE

The European Court moreover failed to apply the so-called "fourth degree" theory, even if one of the claims invoked in the Kokkinakis case was the breach of art. 7 par. 1 ECHR. According to this theory, the lawmaking bodies at Strasbourg are not competent to examine the factual or legal errors of national courts, that is, the correct implementation of domestic law on the part of the latter. Nonetheless, an exception to this principle is provided for in cases where the aforementioned errors entail a possible violation of the rights enshrined in the European Convention.[152] As concerns art. 7 ECHR, insofar as it prohibits the interpretation by analogy *in malam partem*, the European Commission and the European Court are always required to investigate whether or not the national courts have interpreted and applied domestic law reasonably, that is, not arbitrarily.[153]

Both CoC judgment no. 704/1988 (on the Kokkinakis case) and the vast majority of proselytization cases adjudicated by the Court of Cassation do not interpret national law relating to the particular crime on the basis of a systematic interpretative method (the hierarchy of the sources of law). This is because these decisions expand punishability by analogy to the detriment of the defendants, by way of the means of commission which are taken to be listed indicatively, and are disassociated from the punishable act. These means are denoted with evaluative concepts, whose factual basis is evaluated with the criterion of social morality, which is decisively influenced by the expediency of the special protection afforded to the prevailing religion to the disadvantage of minority creeds, even by the current Constitution that has abolished this special protection.

Therefore, in the Kokkinakis case, the European Court evaded the inquiry into the constitutionality of the penal statute on proselytization under the lens of articles 7 par. 1, 13 pars. 1-2 and 4 par. 1 C., although it should have proceeded with such an inquiry. By contrast, it limited itself to recalling that the

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[152] *See* the decision of the European Commission of 12-7-1971 on the admissibility of application n° 4080/1969 of *X versus Austria* (38 Recueil de Décisions de la Commission Européenne des Droits de l'Homme [*hereafter* Recueil] 4). *See also* FRANCIS JACOBS and ROBIN WHITE, The European Convention on Human Rights 166 (Clarendon Press 2nd ed. 1996).

[153] *See* the decision of the European Commission of 22-4-1965 on the admissibility of application n° 1852/1963 of *X versus Austria*, 8 Annuaire 190 and 198 (1965); the decision of 3-4/10/1972 on the admissibility of application n° 4681/1970 of *Murphy versus the United Kingdom* (43 Recueil 1); the decision of 14/12/1972 on the admissibility of application n° 5327/1971 of *X versus the United Kingdom* (43 Recueil 85). *See further* JACOBS & WHITE, *id.*; Stavrou, *supra* note 95, at 973-974.

implementation of domestic law is left primarily to the national authorities, and more particularly, to the domestic courts,[154] and that the Greek courts had held that the aforementioned statute was constitutional. Nonetheless, the systematic interpretation of domestic law, in the case of punishable proselytization,[155] called for a contrary course of action.

Conclusion

The penal statute of proselytization is obviously and blatantly contrary to the fundamental principle *"nullum crimen nulla poena sine lege certa"*, which is safeguarded by art. 7 of the Greek Constitution and by par. 5.18 of the Document of the Copenhagen Meeting. Indeed, this statute, as it is implemented by the case law of the Court of Cassation, punishes religious thought and religious conduct, violates *a contrario* the principle of the foreseeability of crimes and constitutes a characteristic case of dual vagueness. The punishment of religious thought and religious conduct arises from the nearly established classification of the penal offense of proselytization under crimes of abstract endangerment. The principle of the foreseeability of crimes is violated *a contrario* for the reason that penal courts implement the aforementioned penal statute, whereas the latter has been abrogated, according to the most correct opinion.

The dual vagueness of the penal statute of proselytization lies in the description of the punishable act and furthermore in the specification of the protected legal good or goods. In theory there is no consensus regarding the legal good that is protected by the particular statute, whereas an unjustifiably large number of different opinions (that -quite expectedly– contradict each other) have been put forth. From the case law it follows, expressly or covertly, under the current Constitution, that the protected legal good is the prevailing religion as an integral element of public security. The description of the punishable act, as it arises from the similarly unjustifiably many and divergent opinions, is phraseologically and conceptually vague, since it has the nature of a general

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[154] The European Court refers to the decision of 16-12-1992, *Chatzianastasiou versus Greece*, 252 Série A: Arrêts et Décisions, par. 42 (260 Série A: Arrêts et Décisions 19, par. 40). *Cf.* the decision of the Commission of 29-3-1960 on the admissibility of the *application n° 458/1960 versus Belgium* (2 Recueil 4-6).

[155] In the case of the crime of proselytization, domestic law consists of articles 7 par. 1, 13 pars. 1-2 and 4 par. 1 of the Constitution, articles 7 par. 1, 9 and 14 ECHR, articles 15 par. 1, 18, 2 par. 1, 26 and 27 ICCPR and article 4 of O.L. 1363/1938, as it was replaced by article 2 of O.L. 1672/1939. Furthermore, articles 18 par. 1 and 2 of the Universal Declaration, 1-4 of the Declaration of 1981 and par. 5.18 of the Document of the Copenhagen Meeting should be used as criteria for the interpretation of domestic law.

standard in relation to an excessively large number of interpretative issues, such as: the subject and the object of the crime, the legal meaning of the word "in particular", the nature of the enumeration of the means of commission, the specification of the act of proselytization itself, and the evaluative concepts that denote the means of commission.

The evaluative concepts which are utilized to express the means of commission, can under no circumstances be perceived to meet the criterion of the precise legislative description of the concepts of this kind, namely the criterion of their uniform interpretation and implementation on the basis of the criteria set by the law itself. Evaluative concepts do not refer to legal or extralegal rules that are clear and of an easily specified content. The content of these concepts consists of a factual basis, whose evaluative characterization hinges on social morality –a morality which could very well be intolerant. Thus, evaluative characterization should not take place on the basis of social morality, but rather on the basis of public morality. This conclusion is dictated by the fact that it isn't just any punishable act that is punished, but the abusive exercise of an individual right. However, public morality, in the context of a pluralistic society where significant differences of opinion may be noted, cannot by definition proceed in the evaluative characterization of the factual bases of the aforementioned evaluative concepts in a manner that satisfies the criterion of their precise legislative description. As a consequence, the percentage of the judge's subjective evaluation, in respect of the means of commission of the crime of proselytization, exceeds the limits of his or her diagnostic task and is equated with the lawmaking task of the legislator.

The European Court on Human Rights held that the penal statute did not violate the principle *"nullum crimen nulla poena sine lege"* of art. 7 par. 1 of the European Convention of Human Rights. The particular judgment of the Court was predicated on the reasoning that the relevant Greek case law was published and accessible, as well as consistent, and it supplemented the letter of the penal statute in a manner that allowed the applicant to regulate his or her conduct accordingly. Nevertheless, the European Court came to this conclusion without taking into consideration the full body of the relevant and published Greek case law, but only a small portion of it, and for this reason, its conclusion is erroneous. Greek case law, at least the published one, neither is established nor can it be considered as allowing individuals to regulate their behavior in accordance with the law.

The European Court has failed to investigate whether the interpretation of the crime of proselytization on the part of Greek case law was reasonable. The case law interpretation does not clarify or simply adjust the elements of the particular crime to the new circumstances, which may reasonably be sub-

ject to the initial concept of the criminal offense. But it rather modifies, to the detriment of the defendant, these elements of the offense through the indicative enumeration of the "unlawful or immoral" means that are detached from the punishable act. The case law of the Court of Cassation does not preclude the impermissible proportionate expansion of punishability, in the direction of the penalization of ways of legally exercising the freedom to spread religion or belief, by way of the indicative enumeration of the means of commission.

In its examination of the Greek case law on proselytization, the European Court did not look into the matter of whether the evaluative concepts which denote the means of commission of proselytization are particularized interpretatively by the Greek courts or, if they are, whether or not they are particularized in a scientific manner. Certain judgments delivered by the Court of Cassation do not at all particularize one or more of the evaluative concepts prescribed by the penal statute, introducing additional means of commission. However, most decisions issued by the Court of Cassation proceed in subjecting the facts of each case to the aforementioned evaluative concepts, without having previously particularized them interpretatively.

The vagueness of the penal statute of proselytization and its implementation in case law comprise a form of unacceptable limitation of the freedom of minority religions to spread their faith and consequently a form of discrimination on grounds of religion. It should be emphasized that, as it seems, there isn't a single member of the prevailing religion that has hitherto been convicted of proselytization.