

In the case of Manoussakis and Others v. Greece (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Bernhardt, President,  
Mr R. Macdonald,  
Mr N. Valticos,  
Mr S.K. Martens,  
Mr A.N. Loizou,  
Sir John Freeland,  
Mr L. Wildhaber,  
Mr D. Gotchev,  
Mr P. Kuris,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 23 May and 29 August 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

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Notes by the Registrar

1. The case is numbered 59/1995/565/651. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 5 July 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 18748/91) against the Hellenic Republic lodged with the Commission under Article 25 (art. 25) by four Greek nationals, Mr Titos Manoussakis, Mr Constantinos Makridakis, Mr Kyriakos Baxevanis and Mr Vassilios Hadjakis, on 7 August 1991.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Greece recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the

case disclosed a breach by the respondent State of its obligations under Article 9 of the Convention (art. 9).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mr N. Valticos, the elected judge of Greek nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 13 July 1995, in the presence of the Registrar, Mr R. Ryssdal, the President of the Court, drew by lot the names of the other seven members, namely Mr B. Walsh, Mr R. Macdonald, Mr S.K. Martens, Mr A.N. Loizou, Mr F. Bigi, Mr L. Wildhaber and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently, Sir John Freeland and Mr P. Kuris, substitute judges, replaced Mr Bigi, who had died, and Mr Walsh, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Greek Government ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). The Government's and the applicants' memorials reached the registry on 13 and 14 March 1996 respectively. On 15 April 1996 the Secretary to the Commission indicated that the Delegate did not wish to reply in writing.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 May 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr L. Papidas, President, Legal  
Council of State, Agent,  
Mr A. Marinos, Vice-President, Supreme  
Administrative Court,  
Mr P. Kamarineas, Senior Adviser, Legal  
Council of State,  
Mr V. Kondolaimos, Adviser, Legal  
Council of State, Counsel;

(b) for the Commission

Mr C.L. Rozakis, Delegate;

(c) for the applicants

Mr A. Garay, avocat at the Paris Court of Appeal,  
Mr P. Vegleris, honorary member of the Bar  
and emeritus professor at Athens University,  
Mr P. Bitsaxis, of the Athens Bar, Counsel.

The Court heard addresses by Mr Rozakis, Mr Vegleris, Mr Garay, Mr Bitsaxis, Mr Marinos and Mr Kamarineas, and their answers to its question and a question put by a judge.

## AS TO THE FACTS

### I. Particular circumstances of the case

#### A. Background

6. The applicants are all Jehovah's Witnesses and live in Crete.

7. On 30 March 1983 Mr Manoussakis rented under a private agreement a room measuring 88 square metres in a building located in the Ghazi district of Heraklion (Crete). The agreement specified that the room would be used "for all kinds of meetings, weddings, etc. of Jehovah's Witnesses".

8. On 2 June 1983 he laid a complaint against persons unknown at Heraklion police station because the day before the windows of the room had been broken by unidentified persons. On 26 September 1983 he laid a further complaint concerning a similar incident that occurred on 23 September.

9. By an application of 28 June 1983 lodged with the Minister of Education and Religious Affairs the applicants requested an authorisation to use the room as a place of worship. On the same day they went to the chairman of Ghazi District Council to ask him to certify their signatures on the application. He refused, however, on the grounds that the applicants did not reside in his district and that they had failed to show him the document bearing their signatures. Following the intervention of the prefect of Heraklion, the Deputy Minister of the Interior and the Speaker of the Greek Parliament, the chairman withdrew his opposition and agreed to certify the signatures on a new application lodged on 18 October 1983.

10. On 30 July 1983 the Ghazi Orthodox Parish Church notified the Heraklion police authorities that the room was being used as an unauthorised place of worship for Jehovah's Witnesses and informed them of the applications made by the applicants to the Minister. The church authorities asked the police to carry out an inspection of the premises, to take punitive measures against those responsible and above all to prohibit any further meetings until the Minister had granted the authorisation in question.

11. The applicants received five letters from the Ministry of Education and Religious Affairs, dated 25 November 1983 and 17 February, 17 April, 17 June, 16 August and 10 December 1984, informing them that it was not yet in a position to take a decision because it had not received all the necessary information from the other departments concerned.

12. On 3 March 1986 the Heraklion public prosecutor's office instituted criminal proceedings against the applicants under section 1 of Law no. 1363/1938 (anagastikos nomos), as amended by Law no. 1672/1939 (see paragraph 21 below). In particular they were accused of having "established and operated a place of worship for religious meetings and ceremonies of followers of another denomination

and, in particular, of the Jehovah's Witnesses' denomination without authorisation from the recognised ecclesiastical authorities and the Minister of Education and Religious Affairs, such authorisation being required for the construction and operation of a church of any faith".

B. Proceedings in the Heraklion Criminal Court sitting at first instance

13. On 6 October 1987 the Heraklion Criminal Court sitting at first instance and composed of a single judge (Monomeles Plimmeliodikeio) acquitted the applicants on the ground that "in the absence of any acts of proselytism, followers of any faith are free to meet even if they do not have the requisite authorisation".

C. Proceedings in the Heraklion Criminal Court sitting on appeal

14. The Heraklion public prosecutor's office took the view that the Criminal Court had incorrectly assessed the facts and accordingly lodged an appeal against the judgment of 6 October 1987.

15. On 15 February 1990 the Heraklion Criminal Court sitting on appeal and composed of three judges (Trimeles Plimmeliodikeio), sentenced each of the accused to three months' imprisonment convertible into a pecuniary penalty of 400 drachmas per day of detention, and fined them 20,000 drachmas each. It noted as follows:

"... the accused had converted the room that they had rented into a place of worship, in other words a small temple intended to serve as a place of devotion for a limited circle of persons as opposed to a public building in which everyone without distinction is free to worship God. Thus they established this place on 30 July 1983 and made it accessible ... to others, in particular, their fellow Jehovah's Witnesses from the region (limited circle of persons), without the authorisation of the recognised ecclesiastical authority and of the Ministry of Education and Religious Affairs. At this place they worshipped God by engaging in acts of prayer and devotion (preaching, reading of the scriptures, praising and prayers) and did not confine themselves to the mere holding of meetings for followers and the reading of the gospel ..."

D. Proceedings in the Court of Cassation

16. On 5 March 1990 the applicants appealed on points of law. They argued, inter alia, that the provisions of section 1 of Law no. 1363/1938, in particular the obligation to seek an authorisation to establish a place of worship, were contrary to Articles 11 and 13 of the Greek Constitution and to Articles 9 and 11 of the European Convention (art. 9, art. 11).

17. In a judgment of 19 March 1991 the Court of Cassation dismissed their appeal on the following grounds:

"The provisions of section 1 of Law no. 1363/1938 and of the royal decree of 20 May/2 June 1939 implementing that Law are contrary neither to Article 11 nor to Article 13 of the 1975 Constitution, for the right to freedom of worship is not unlimited and may be subject to control. The exercise of this

right is subject to certain conditions set down in the Constitution and at law: it must be a known religion, not a secret religion; there must be no prejudice to public order or morals; neither must there be any acts of proselytism, such acts being expressly prohibited in the second and third sentences of Article 13 para. 2 of the Constitution. These provisions are, moreover, not contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms ..., Article 9 (art. 9) of which guarantees freedom of religion but Article 9 para. 2 (art. 9-2) of which authorises such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights of others.

The said provisions ..., which empower the Minister of Education and Religious Affairs, who has responsibility for all denominations and faiths, to investigate whether the above-mentioned conditions are met, are contrary neither to the 1975 Constitution nor to Article 9 of the Convention (art. 9), which do not in any way prohibit investigations of this type; the purpose of such investigations is moreover merely to ensure that the statutory conditions necessary to grant authorisation are met; if these conditions are met, the Minister is obliged to grant the requested authorisation."

18. According to the dissenting opinion of one of its members, the Court of Cassation ought to have quashed the impugned judgment since the applicants could not be accused of a punishable offence as section 1 of the Law was contrary to Article 13 of the 1975 Constitution.

19. On 20 September 1993 the Heraklion police placed seals on the front door of the room rented by the applicants.

## II. Relevant domestic law

### A. The Constitution

20. The relevant Articles of the 1975 Constitution read as follows:

#### Article 3

"1. The dominant religion in Greece is that of the Christian Eastern Orthodox Church. The Greek Orthodox Church, which recognises as its head Our Lord Jesus Christ, is indissolubly united, doctrinally, with the Great Church of Constantinople and with any other Christian Church in communion with it (omodoxi), immutably observing, like the other Churches, the holy apostolic and synodical canons and the holy traditions. It is autocephalous and is administered by the Holy Synod, composed of all the bishops in office, and by the standing Holy Synod, which is an emanation of it constituted as laid down in the Charter of the Church and in accordance with the provisions of the Patriarchal Tome of 29 June 1850 and the Synodical Act of 4 September 1928.

2. The ecclesiastical regime in certain regions of the State shall not be deemed contrary to the provisions of the foregoing paragraph.

3. The text of the Holy Scriptures is unalterable. No official translation into any other form of language may be made without the prior consent of the autocephalous Greek Church and the Great Christian Church at Constantinople."

#### Article 13

"1. Freedom of conscience in religious matters is inviolable. The enjoyment of personal and political rights shall not depend on an individual's religious beliefs.

2. There shall be freedom to practise any known religion; individuals shall be free to perform their rites of worship without hindrance and under the protection of the law. The performance of rites of worship must not prejudice public order or public morals. Proselytism is prohibited.

3. The ministers of all known religions shall be subject to the same supervision by the State and to the same obligations to it as those of the dominant religion.

4. No one may be exempted from discharging his obligations to the State or refuse to comply with the law by reason of his religious convictions.

5. No oath may be required other than under a law which also determines the form of it."

#### B. Law no. 1363/1938

21. Section 1 of Law no. 1363/1938 (as amended by Law no. 1672/1939) provides:

"The construction and operation of temples of any denomination whatsoever shall be subject to authorisation by the recognized ecclesiastical authority and the Ministry of Education and Religious Affairs. This authorisation shall be granted on the terms and conditions specified by royal decree to be adopted on a proposal by the Minister of Education and Religious Affairs.

As of publication of the royal decree referred to in the preceding paragraph, temples or other places of worship which are set up or operated without complying with the decree ... shall be closed and placed under seal by the police and use thereof shall be prohibited; persons who have set up or operated such places of worship shall be fined 50,000 drachmas and sentenced to a non-convertible term of between two and six months' imprisonment.

...

The term "temple" as referred to in this Law ... shall mean

any type of building open to the public for the purpose of divine worship (parish or otherwise, chapels and altars)."

22. The Court of Cassation has held that the expression "place of worship" within the meaning of these provisions refers to a "temple of a relatively small size, established in a private building and intended to be used for divine worship by a limited circle of persons as opposed to a building open to the public for the worship of God by everyone without distinction. By operation of a temple or a place of worship under the same provisions is meant the actions by which the temple or place of worship are made accessible to others for the purpose of worshipping God" (judgment no. 1107/1985, Pinika Khronika, vol. 56, 1986).

C. The royal decree of 20 May/2 June 1939

23. Section 1 (3) of the royal decree of 20 May/2 June 1939 provides that it is for the Minister of Education and Religious Affairs to verify whether there are "essential reasons" warranting the authorisation to build or operate a place of worship. To this end the persons concerned must submit through their priest an application giving their addresses and bearing their signatures certified by the mayor or the chairman of the district council of their place of residence. More specifically, section 1 of the decree provides as follows:

"1. In order to obtain an authorisation for the construction or operation of temples not subject to the legislation on temples and priests of parishes belonging to the Greek Orthodox Church, within the meaning of section 1 of the Law (1672/1939), the following steps must be completed:

(a) An application shall be submitted by at least fifty families, from more or less the same neighbourhood and living in an area at a great distance from a temple of the same denomination, it being assumed that the distance makes it difficult for them to observe their religious duties. The requirement of fifty families shall not apply to suburbs or villages.

(b) The application shall be addressed to the local ecclesiastical authorities and must be signed by the heads of the families, who shall indicate their addresses. The authenticity of their signatures shall be certified by the local police authority, which following an inquiry on the ground shall attest that the conditions referred to in the preceding sub-paragraph are satisfied ...

(c) The local police authority shall issue a reasoned opinion on the application. It shall then transmit the application, with its opinion, to the Ministry of Education and Religious Affairs, which may accept or reject the application according to whether it considers that the construction or use of a new temple is justified or whether the provisions of the present decree have been complied with.

2. ...

3. The provisions of paragraph 1 (a)-(b) above shall not apply to the issue of an authorisation for the construction or operation of a place of worship. It shall be for the Minister of Education and Religious Affairs to determine whether there are essential reasons warranting such authorisation. In this connection the persons concerned shall address to the Ministry of Education and Religious Affairs through their priest a signed application, the authenticity of the signatures being certified by the mayor or the chairman of the district council. The application shall also indicate the addresses of the persons concerned ..."

#### D. Case-law

24. The Government communicated to the Court a series of judgments by the Supreme Administrative Court concerning the authorisation to construct or operate temples or places of worship.

It appears from these judgments that the Supreme Administrative Court has on several occasions quashed decisions of the Minister of Education and Religious Affairs refusing such authorisation on the ground that Jehovah's Witnesses in general engaged in proselytism (judgment no. 2484/1980); or that some of those seeking the authorisation had been prosecuted for proselytism (judgment no. 4260/1985); or again because there was an Orthodox church close to the proposed place of worship (4km in the same town) (judgment no. 4636/1977) and the limited number of Jehovah's Witnesses (8) compared to the total population (938) (judgment no. 381/1980).

25. The Supreme Administrative Court has also held that the requirement that the signatures be certified by the relevant municipal authority (royal decree of 20 May/2 June 1939 - see paragraph 23 above) does not constitute a restriction on the right to freedom of religion guaranteed under the Greek Constitution and the European Convention (judgment no. 4305/1986). On the other hand, failure to comply with that requirement justifies a refusal to grant the authorisation (judgment no. 1211/1986). Finally the silence of the Minister of Education and Religious Affairs for more than three months following the lodging of an application constitutes failure on the part of the authorities to give a decision as required by law and amounts to an implied rejection, which may be challenged by an application for judicial review (judgment no. 3456/1985).

Authorisation by the local Metropolitan is required only for the construction or operation of temples and not for other places of worship.

26. In its judgment (no. 721/1969) of 4 February 1969 the Supreme Administrative Court sitting in plenary session stated that Article 13 of the Constitution did not preclude prior verification by the administrative authorities that the conditions laid down by that Article for the practice of a faith were satisfied. However, that verification is of a purely declaratory nature. The grant of the authorisation may not be withheld where those conditions are satisfied and the authorities have no discretionary power in this respect. The prior authorisation of the local Metropolitan for the construction of a temple (see paragraph 25 above) is not an "enforceable administrative decision", but a "preliminary finding" by a representative of the



dominant religion who is familiar with the true position regarding religious practice in the locality. The decision rests with the Minister of Education and Religious Affairs who may decide to disregard the Metropolitan's assessment if he considers that it is not supported by reasons in conformity with the law.

The Supreme Administrative Court subsequently confirmed this case-law holding, inter alia, that the "authorisation" of the local Metropolitan was a mere opinion which did not bind the Minister of Education and Religious Affairs (judgment no. 1444/1991 of 28 January 1991).

E. Application for judicial review in the Supreme Administrative Court

27. Sections 45, 46 and 50 of Presidential Decree no. 18/1989 codifying the legislative provisions on the Supreme Administrative Court of 30 December/9 January 1989 govern applications for judicial review of acts or omissions by the administrative authorities:

Section 45

Acts which may be challenged

"1. An application for judicial review alleging ultra vires or unlawful action is available only in respect of enforceable decisions of the administrative authorities and public-law legal persons and against which no appeal lies to another court.

...

4. Where the law requires an authority to settle a specific question by issuing an enforceable decision subject to the provisions of paragraph 1, an application for judicial review is admissible even in respect of the said authority's failure to issue such decision.

The authority shall be presumed to refuse the measure either when any specific time-limit prescribed by the law expires or after three months have elapsed from the lodging of the application with the authority, which is required to issue an acknowledgment of receipt ... indicating the date of receipt. Applications for judicial review lodged before the above time-limits shall be inadmissible.

An application for judicial review validly lodged against an implied refusal [on the part of the authorities] is deemed also to contest any negative decision that may subsequently be taken by the authorities. Such decision may however be challenged separately.

..."

Section 46

Time-limit

"1. Except as otherwise provided, an application for judicial review must be made within sixty days of the day following the date of notification of the impugned decision or the date of publication ..., or, otherwise, of the day following the day on which the applicant acquired knowledge of the decision. In the cases provided for in paragraphs 2, 3 and 4 of section 45, time begins to run when the time-limits prescribed in those provisions have expired.

..."

Section 50

Consequences of the decision

"1. The decision allowing an application for judicial review shall declare the impugned measure void, which entails its general nullity, whether it is a general or individual measure.

2. The rejection of an application does not preclude the lodging of a new application against the same measure by another person with locus standi.

3. In the case of failure to take action, where the Supreme Administrative Court allows the application, it shall refer the case back to the relevant authority so that it can take the action incumbent on it."

PROCEEDINGS BEFORE THE COMMISSION

28. The applicants applied to the Commission on 7 August 1991. They complained of violations of Articles 3 and 5, Article 6 taken together with Article 14 (art. 3, art. 5, art. 14+6), and Articles 8, 9, 10 and 11 of the Convention and of Article 1 of Protocol No. 1 (art. 8, art. 9, art. 10, art. 11, P1-1).

29. On 10 October 1994 the Commission declared the application (no. 18748/91) admissible as regards the complaint based on Article 9 (art. 9), but inadmissible for the rest. In its report of 25 May 1995 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a breach of that Article (art. 9). The full text of the Commission's opinion is reproduced as an annex to this judgment (1).

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Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-IV), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

30. In their memorial the Government requested the Court

"to dismiss the application, mainly as being inadmissible due

to non-exhaustion on the part of the applicants of the domestic remedies provided for by domestic law, which are entirely effective, as it has always been proven in practice, - and as legally invalid and unfounded in so far as its merits are concerned, since, as it was proven, the rulings of section 1 of the Law of Necessity no. 1363/1938 and its respective executive decree agree to and are compatible with the protected right referred to in Article 9 (art. 9) of the European Convention on Human Rights within the framework of paragraph 2 of this Article (art. 9-2) - in abstracto in the case under consideration - and further the penalisation provided for by law and applied in this instance of the violations of these provisions through mild sanctions is commensurate with the purposes pursued within the framework of such paragraph (art. 9-2)".

AS TO THE LAW

#### I. THE GOVERNMENT'S PRELIMINARY OBJECTION

31. The Government contended primarily, as they had done before the Commission, that the applicants had failed to exhaust the domestic remedies inasmuch as they had twice neglected to challenge in the Supreme Administrative Court - under sections 45 paras. 1 and 4 and 46 para. 1 of Decree no. 18/1989 (see paragraph 27 above) - the implied refusal by the Minister of Education and Religious Affairs to grant them the authorisation sought. After three months the Minister's silence constituted an implied rejection in respect of which an appeal lay to the Supreme Administrative Court for abuse of power. The time-limit and starting-point for lodging such an appeal were clearly defined in the relevant provisions and were therefore perfectly well known to the applicants. If they had applied to the Supreme Administrative Court, they would undoubtedly have obtained the authorisation and no court would then have convicted them. Yet they had deliberately neglected to do so because their real aim had been to challenge the relevant national legislation before the Convention institutions.

32. The applicants maintained that even if they had lodged an appeal on the ground of abuse of power, the procedure concerning the establishment of a place of worship would not have reached a conclusion.

33. The Court notes in the first place that in their appeal on points of law the applicants relied exclusively on the incompatibility of section 1 of Law no. 1363/1938, which had served as the basis for their conviction, with Article 9 of the Convention (art. 9) and Article 13 of the Greek Constitution. The Court of Cassation dismissed that complaint, finding that the Heraklion Criminal Court sitting on appeal had correctly construed and applied the above-mentioned provision (art. 9) (see paragraph 17 above). There can therefore be no doubt that the applicants exhausted the domestic remedies in respect of their conviction in the criminal proceedings.

In addition, at no time, either in the national courts or before the Commission, did the applicants complain about the authorities' failure to take a decision granting or rejecting their applications of 28 June and 18 October 1983 (see paragraph 9 above).

The Minister of Education and Religious Affairs had replied to them in writing on five separate occasions, informing them that he was in the process of examining their file (see paragraph 11 above). The Court observes that there was neither an express decision, nor silence, from the authorities such as would have caused the period prescribed in section 46 para. 1 of Decree no. 18/1989 to commence and the applicants were left in a state of uncertainty from 18 October 1983 onwards.

The Court recalls that the only remedies that Article 26 of the Convention (art. 26) requires to be exhausted are those that are available and sufficient and relate to the breaches alleged (see the judgments of *Ciulla v. Italy* of 22 February 1989, Series A no. 148, p. 15, para. 31, and *Pine Valley Developments Ltd and Others v. Ireland* of 29 November 1991, Series A no. 222, p. 22, para. 48). Moreover, an applicant who has availed himself of a remedy capable of redressing the situation giving rise to the alleged violation, directly and not merely indirectly, is not bound to have recourse to other remedies which would have been available to him but the effectiveness of which is questionable.

The Court observes that the applicants could have been in some doubt as to the starting-point of the periods prescribed in sections 45 para. 4 and 46 para. 1 of Decree no. 18/1989 (see paragraph 27 above). After their second application of 18 October 1983 the Minister of Education and Religious Affairs replied to them on 25 November 1983, and therefore before the expiry of the three-month period from the lodging of the application (section 45 para. 4 of the above-mentioned decree). The authorities did not therefore remain silent in a way that amounted to an implied refusal to grant the authorisation requested.

The Court considers further that, even supposing that the Supreme Administrative Court had allowed their application, there is nothing to indicate that they would have obtained the authorisation sought, as the authorities did not in practice always comply with the decisions of the Supreme Administrative Court. The example cited by the applicants in their memorial, concerning the judgment of 29 October 1985 (no. 4260/1985) of the Supreme Administrative Court, is telling in this respect. The Supreme Administrative Court had quashed a decision of the Minister of Education and Religious Affairs refusing to grant Jehovah's Witnesses an authorisation to operate a place of worship and had referred the case back to the authorities for them to consider whether the statutory conditions for granting such an authorisation were satisfied. On 7 January 1986 the persons concerned submitted a new request to the Minister together with a copy of the Supreme Administrative Court's judgment. On 3 July 1986 the Minister informed them that he was not "in a position to grant them the authorisation requested". A second request, dated 20 January 1987 was likewise rejected by the Minister in the following terms: "... we refer you to the reply given in our earlier letter ... of 3 July 1986."

34. In these circumstances an application for judicial review of the alleged implied refusal of the authorities cannot be regarded as an effective remedy. As the applicants exhausted the domestic remedies, the objection falls to be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION (art. 9)

35. The applicants maintained that their conviction by the Heraklion Criminal Court sitting on appeal infringed Article 9 of the Convention (art. 9), according to which:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

A. Whether there was an interference

36. The validity of the private agreement concluded by the applicants on 30 March 1983 (see paragraph 7 above) is not in dispute.

The applicants' conviction by the Heraklion Criminal Court sitting on appeal for having used the premises in question without the prior authorisation required under Law no. 1363/1938 was therefore an interference with the exercise of their "freedom ..., to manifest [their] religion ..., in worship ... and observance". Such interference breaches Article 9 (art. 9) unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in paragraph 2 (art. 9-2) and was "necessary in a democratic society" to attain such aim or aims.

B. Justification of the interference

1. "Prescribed by law"

37. In the applicants' submission, Law no. 1363/1938 and its implementing decree of 20 May/2 June 1939 lay down a general and permanent prohibition on the establishment of a church or a place of worship of any religion - the law uses the term "faith" - other than the Orthodox religion. They maintained that this prohibition could only be lifted by a formal decision or a specific discretionary measure.

This discretionary power was, in their view, clearly derived from section 1 of Law no. 1363/1938, which empowers the Government to grant or to refuse the authorisation, or to remain silent in response to an application duly submitted, without setting any limit as to time or establishing any substantive condition.

They argued that a law which made the practice of a religion subject to the prior grant of an authorisation, whose absence incurred liability to a criminal sanction, constituted an "impediment" to that religion and could not be regarded as a law designed to protect freedom of religion within the meaning of Article 13 of the Constitution. As regards freedom of religion and worship, the Constitution purported to be more, or at least not less, protective than the Convention because

the only grounds on which it permitted restrictions to be placed on the practice of any "known religion" were "public order" and "public morals" (see paragraph 20 above).

In addition, the applicants pointed to the unusual character, as regards Greek public and administrative law, of the procedure established by Law no. 1363/1938 for the construction or the operation of a place of worship. It was the only procedure in respect of which provision was made for the intervention of two authorities, administrative and religious. They criticised the manner in which the Supreme Administrative Court interpreted this Law, namely in the context of the restrictions, suggestions and directives of the Constitution, and the importance attached by that court to compliance with the conditions laid down by the royal decree of 20 May/2 June 1939 for submitting in due form applications for authorisation together with all that those conditions entailed in terms of inquisitorial process and the difficulty in obtaining such authorisation. The wording of this decree conferred a number of different discretionary powers, each of which was sufficient basis for a negative response to the application.

38. The Court notes that the applicants' complaint is directed less against the treatment of which they themselves had been the victims than the general policy of obstruction pursued in relation to Jehovah's Witnesses when they wished to set up a church or a place of worship. They are therefore in substance challenging the provisions of the relevant domestic law.

However, the Court does not consider it necessary to rule on the question whether the interference in issue was "prescribed by law" in this instance because, in any event, it was incompatible with Article 9 of the Convention (art. 9) on other grounds (see, *mutatis mutandis*, the *Funke v. France* judgment of 25 February 1993, Series A no. 256-A, p. 23, para. 51, and paragraph 53 below).

## 2. Legitimate aim

39. According to the Government, the penalty imposed on the applicants served to protect public order and the rights and freedoms of others. In the first place, although the notion of public order had features that were common to the democratic societies in Europe, its substance varied on account of national characteristics. In Greece virtually the entire population was of the Christian Orthodox faith, which was closely associated with important moments in the history of the Greek nation. The Orthodox Church had kept alive the national conscience and Greek patriotism during the periods of foreign occupation. Secondly, various sects sought to manifest their ideas and doctrines using all sorts of "unlawful and dishonest" means. The intervention of the State to regulate this area with a view to protecting those whose rights and freedoms were affected by the activities of socially dangerous sects was indispensable to maintain public order on Greek territory.

40. Like the applicants, the Court recognises that the States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population. Nevertheless, it recalls that Jehovah's Witnesses

come within the definition of "known religion" as provided for under Greek law (see the Kokkinakis v. Greece judgment of 25 May 1993, Series A no. 260-A, p. 15, para. 23). This was moreover conceded by the Government.

However, having regard to the circumstances of the case and taking the same view as the Commission, the Court considers that the impugned measure pursued a legitimate aim for the purposes of Article 9 para. 2 of the Convention (art. 9-2), namely the protection of public order.

### 3. "Necessary in a democratic society"

41. The main thrust of the applicants' complaint is that the restrictions imposed on Jehovah's Witnesses by the Greek Government effectively prevent them from exercising their right to freedom of religion. In terms of the legislation and administrative practice, their religion did not, so they claimed, enjoy in Greece the safeguards guaranteed to it in all the other member States of the Council of Europe. The "pluralism, tolerance and broadmindedness without which there is no democratic society" were therefore seriously jeopardised in Greece.

They contended that the Jehovah's Witnesses' movement should be presumed - even if the presumption was a rebuttable one - to respect certain moral rules and not in itself to prejudice public order. Its doctrines and its rites abided by and extolled social order and individual morality. Accordingly, the political authorities should intervene only in the event of abuse or perversion of such doctrines and rites, and should do so punitively rather than preventively.

More particularly, their conviction had been persecutory, unjustified and not necessary in a democratic society as it had been "manufactured" by the State. The State had compelled the applicants to commit an offence and to bear the consequences solely because of their religious beliefs. The apparently innocent requirement of an authorisation to operate a place of worship had been transformed from a mere formality into a lethal weapon against the right to freedom of religion. The term "dilatatory" used by the Commission to describe the conduct of the Minister of Education and Religious Affairs in relation to their application for an authorisation was euphemistic.

The struggle for survival by certain religious communities outside the Eastern Orthodox Church, and specifically by Jehovah's Witnesses, was carried on in a climate of interference and oppression by the State and the dominant church as a result of which Article 9 of the Convention (art. 9) had become a dead letter. That Article (art. 9) was the object of frequent and blatant violations aimed at eliminating freedom of religion. The applicants cited current practice in Greece in support of their contentions, giving numerous examples. They requested the Court to examine their complaints in the context of these other cases.

42. According to the Government, in order to resolve the question of the necessity of the applicants' conviction, the Court should first examine the necessity of the requirement of prior authorisation, which owed its existence to historical considerations. In their view, the former presupposed the latter. The applicants' true aim was not to

complain about their conviction but to fight for the abolition of that requirement.

There were essential public-order grounds to justify making the setting up of a place of worship subject to approval by the State. In Greece this control applied to all faiths; otherwise it would be both unconstitutional and contrary to the Convention. Jehovah's Witnesses were not exempt from the requirements of legislation which concerned the whole population. The setting up of a church or a place of worship in Greece was, so the Government affirmed, often used as a means of proselytism, in particular by Jehovah's Witnesses who engaged in intensive proselytism, thereby infringing the law that the Court had itself found to be in conformity with the Convention (see the above-mentioned Kokkinakis judgment).

The sanction imposed on the applicants had been light and had been motivated not by the manifestation by them of their religion but by their disobedience to the law and their failure to comply with an administrative procedure. It was the result of the applicants' culpable neglect to have recourse to the remedy available under the Greek legal system.

Finally, the Government referred to the fact that various States parties to the Convention had legislation containing restrictions similar to those enacted in Greece in this field.

43. The Commission considered that the authorisation requirement introduced by Law no. 1363/1938 might appear open to criticism. In the first place, the intervention of the Greek Orthodox Church in the procedure raised a complex question under paragraph 2 of Article 9 (art. 9-2). Secondly, classifying as a criminal offence the operation of a place of worship without the authorities' prior authorisation was disproportionate to the legitimate aim pursued, especially when, as in this case, the underlying cause of the applicants' conviction lay in the dilatory attitude of the relevant authorities.

44. As a matter of case-law, the Court has consistently left the Contracting States a certain margin of appreciation in assessing the existence and extent of the necessity of an interference, but this margin is subject to European supervision, embracing both the legislation and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate.

In delimiting the extent of the margin of appreciation in the present case the Court must have regard to what is at stake, namely the need to secure true religious pluralism, an inherent feature of the notion of a democratic society (see the above-mentioned Kokkinakis judgment, p. 17, para. 31). Further, considerable weight has to be attached to that need when it comes to determining, pursuant to paragraph 2 of Article 9 (art. 9-2), whether the restriction was proportionate to the legitimate aim pursued. The restrictions imposed on the freedom to manifest religion by the provisions of Law no. 1363/1938 and of the decree of 20 May/2 June 1939 call for very strict scrutiny by the Court.

45. The Court notes in the first place that Law no. 1363/1938 and the decree of 20 May/2 June 1939 - which concerns churches and places



of worship that are not part of the Greek Orthodox Church - allow far-reaching interference by the political, administrative and ecclesiastical authorities with the exercise of religious freedom. In addition to the numerous formal conditions prescribed in section 1 (1) and (3) of the decree, some of which confer a very wide discretion on the police, mayor or chairman of the district council, there exists in practice the possibility for the Minister of Education and Religious Affairs to defer his reply indefinitely - the decree does not lay down any time-limit - or to refuse his authorisation without explanation or without giving a valid reason. In this respect, the Court observes that the decree empowers the Minister - in particular when determining whether the number of those requesting an authorisation corresponds to that mentioned in the decree (section 1 (1) (a)) - to assess whether there is a "real need" for the religious community in question to set up a church. This criterion may in itself constitute grounds for refusal, without reference to the conditions laid down in Article 13 para. 2 of the Constitution.

46. The Government maintained that the power of the Minister of Education and Religious Affairs to grant or refuse the authorisation requested was not discretionary. He was under a duty to grant the authorisation if he found that the three conditions set down in Article 13 para. 2 of the Constitution were satisfied, namely that it must be in respect of a known religion, that there must be no risk of prejudicing public order or public morals and that there is no danger of proselytism.

47. The Court observes that, in reviewing the lawfulness of refusals to grant the authorisation, the Supreme Administrative Court has developed case-law limiting the Minister's power in this matter and according the local ecclesiastical authority a purely consultative role (see paragraph 26 above).

The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate. Accordingly, the Court takes the view that the authorisation requirement under Law no. 1363/1938 and the decree of 20 May/2 June 1939 is consistent with Article 9 of the Convention (art. 9) only in so far as it is intended to allow the Minister to verify whether the formal conditions laid down in those enactments are satisfied.

48. It appears from the evidence and from the numerous other cases cited by the applicants and not contested by the Government that the State has tended to use the possibilities afforded by the above-mentioned provisions to impose rigid, or indeed prohibitive, conditions on practice of religious beliefs by certain non-Orthodox movements, in particular Jehovah's Witnesses. Admittedly the Supreme Administrative Court quashes for lack of reasons any unjustified refusal to grant an authorisation, but the extensive case-law in this field seems to show a clear tendency on the part of the administrative and ecclesiastical authorities to use these provisions to restrict the activities of faiths outside the Orthodox Church.

49. In the instant case the applicants were prosecuted and convicted for having operated a place of worship without first

obtaining the authorisations required by law.

50. In their memorial the Government maintained that under section 1 (1) of the decree of 20 May/2 June 1939 an authorisation from the local bishop was necessary only for the construction and operation of a church and not for a place of worship as in the present case. An application to the Minister of Education and Religious Affairs, indeed one such as that submitted by the applicants, was sufficient.

51. The Court notes, nevertheless, that both the Heraklion public prosecutor's office, when it was bringing proceedings against the applicants (see paragraph 12 above), and the Heraklion Criminal Court sitting on appeal, in its judgment of 15 February 1990 (see paragraph 15 above), relied expressly on the lack of the bishop's authorisation as well as the lack of an authorisation from the Minister of Education and Religious Affairs. The latter, in response to five requests made by the applicants between 25 October 1983 and 10 December 1984, replied that he was examining their file. To date, as far as the Court is aware, the applicants have not received an express decision. Moreover, at the hearing a representative of the Government himself described the Minister's conduct as unfair and attributed it to the difficulty that the latter might have had in giving legally valid reasons for an express decision refusing the authorisation or to his fear that he might provide the applicants with grounds for appealing to the Supreme Administrative Court to challenge an express administrative decision.

52. In these circumstances the Court considers that the Government cannot rely on the applicants' failure to comply with a legal formality to justify their conviction. The degree of severity of the sanction is immaterial.

53. Like the Commission, the Court is of the opinion that the impugned conviction had such a direct effect on the applicants' freedom of religion that it cannot be regarded as proportionate to the legitimate aim pursued, nor, accordingly, as necessary in a democratic society.

In conclusion, there has been a violation of Article 9 (art. 9).

### III. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

54. Under Article 50 of the Convention (art. 50),

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

#### A. Non-pecuniary damage

55. The applicants claimed firstly a sum of 6,000,000 drachmas for

non-pecuniary damage.

56. Neither the Government nor the Commission expressed a view on this claim.

57. The Court considers that the applicants sustained non-pecuniary damage, but that the finding of a violation of Article 9 (art. 9) constitutes sufficient reparation.

#### B. Costs and expenses

58. The applicants sought 4,030,100 drachmas in respect of their costs and expenses incurred in the proceedings in Greece and Strasbourg and provided details of this expenditure.

59. The Government argued that the sum awarded under this head should cover only the expenses incurred in connection with the criminal proceedings and those stemming from the proceedings before the Convention institutions. However, those expenses were the consequence of the applicants' culpable and unlawful conduct and the deliberate violation of national legislation.

60. The Delegate of the Commission did not give an opinion on this matter.

61. Having regard to its decision concerning Article 9 (art. 9) (see paragraph 53 above), the Court finds the claim reasonable and accordingly allows it in its entirety.

#### C. Default interest

62. According to the information available to the Court, the statutory rate of interest applicable in Greece at the date of the adoption of the present judgment is 6% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Dismisses the Government's preliminary objection;
2. Holds that there has been a breach of Article 9 of the Convention (art. 9);
3. Holds that the present judgment in itself constitutes just satisfaction for the non-pecuniary damage alleged;
4. Holds that the respondent State is to pay the applicants, within three months, in respect of costs and expenses, 4,030,100 (four million, thirty thousand and one hundred) drachmas on which sum simple interest at an annual rate of 6% shall be payable from the expiry of the above-mentioned three months until settlement.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 September 1996.

Signed: Rudolf BERNHARDT  
President

Signed: Herbert PETZOLD  
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the concurring opinion of Mr Martens is annexed to this judgment.

Initialled: R. B.

Initialled: H. P.

#### CONCURRING OPINION OF JUDGE MARTENS

1. I completely share the views expressed in the Court's judgment, but I would have preferred to decide the merits on the basis of the "prescribed by law" requirement, that is to decide the issue which the Court leaves open (see paragraph 38 of its judgment).

2. The substance of the "necessary in a democratic society" requirement is a balancing exercise of the elements of the individual case. However, as follows from paragraph 38 of the Court's judgment, the very essence of the applicants' complaints is not one of individual, but one of general injustice: what they complain of is not so much the harassment they have been subjected to, but, basically, the obstruction to setting up a Jehovah's Witnesses chapel in general. The "prescribed by law" requirement is therefore more suitable to do justice to what - also in the Government's opinion - is the essential thesis of the applicants, viz. that the Law of Necessity no. 1363/1938 is incompatible with Article 9 (art. 9), either per se or in any event as consistently applied by the competent authorities.

3. I suggest that this approach, although perhaps a little innovatory, is in line with the Court's doctrine that part of its task under the "prescribed by law" requirement is to assess the quality of the law invoked as a justification for the interference under examination.

4. Turning now to the applicants' thesis that the Law of Necessity no. 1363/1938 is incompatible with Article 9 (art. 9), I agree with counsel for the Government that the first question to be discussed is whether under Article 9 (art. 9) there is room at all for "prior restraint" in the form of making the construction or operation of a place of worship conditional on a prior governmental authorisation and of making such construction or operation without such authorisation a criminal offence.

5. As in the province of Article 10 (art. 10), I am opposed to answering this question outright in the negative. It is conceivable that the operation - and a fortiori the construction - of a place of worship in a particular area may raise serious public-order questions and that possibility, in my mind, justifies not wholly excluding the acceptability of making such operation or construction depend on a prior governmental authorisation.

6. Nevertheless, I think that here, where freedom of religion is at stake - even more than in the province of Article 10 (art. 10) -, the question is very delicate, for public-order arguments may easily disguise intolerance. It is all the more sensitive where there is an

official State religion. In such cases it should be absolutely clear both from the wording of, and from the practice under the law in question that the requirement of a prior authorisation in no way whatsoever purports to enable the authorities to "evaluate" the tenets of the applicant community; as a matter of principle the requested authorisation should always be given, unless very exceptional, objective and insuperable grounds of public order make that impossible.

7. The Government have tried to convince us that the Law of Necessity no. 1363/1938 meets these admittedly strict requirements, but in vain. Counsel for the Government has alleged that under that Law there is no room for discretion, but he has at the same time made it clear that it required the authorities to scrutinise whether the application arose from genuine religious needs or as a means of proselytising and, moreover, whether the tenets of the applicant community were acceptable. And indeed, the requirement that there should be at least fifty families from more or less the same neighbourhood illustrates not only that there is ample room for discretion but also that the Law of Necessity no. 1363/1938 goes much further than is permissible in respect of prior restraint of freedom of religion. On top of this there is the involvement of the clerical authorities of the dominant religion in the authorisation procedure which - even if they were confined to a strictly advisory role (which I doubt) - implies in itself that the Law in question does not meet the above-mentioned strict requirements and is incompatible with Article 9 (art. 9).

8. In sum, I find that the applicants rightly say that the Law of Necessity no. 1363/1938 is per se incompatible with Article 9 (art. 9).