# AUTONOMY OF WILL AND RELIGIOUS FREEDOM*

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## Introduction

Most of the problems that beset the enjoyment of religious freedom stem either from limitations that are imposed on attempts to follow the dictates of a particular religious belief or from differential treatment that is applied on account of a person holding this or that belief. However, although the fact that someone has a belief[1] is generally a matter that is taken for granted by both those responsible for and those subject to such limitations or treatment, the extent to which there is freedom to choose the belief concerned is itself something that can also be problematic. Thus, notwithstanding the essentially personal nature of the value judgement involved in holding any belief, there have been many instances in which various pressures have been applied to persons in order to secure the apparent adoption by them of a particular one[2]. While the inadmissibility of at least some of the constraints that affect choice of belief is generally acknowledged, there also continues to be a degree of resistance to recognising that – in the absence of any pressure – it is entirely possible for someone to want to change the belief to which he or she adheres and thus to accepting that any exercise of choice need not be a once and for all step. Furthermore, even where there is no actual coercion, the nature of the freedom to make any initial choice of belief is invariably circumscribed by the circumstances in which it is made. This is especially so in the case of choices made during childhood, given the degree of control which parents and the State can enjoy over the education and upbringing of children. However, it is also unlikely that choices made at a later stage will not also be affected by this earlier experience (whether positively or negatively) and by the mental robustness of the person concerned, as well as by the views of those with whom he or she associates. In these circumstances the autonomy of individuals to determine their religious beliefs – as opposed to the ability to manifest them[3] - is unlikely ever to be entirely absolute in character.

This chapter considers the extent to which – despite the problems arising in practice - autonomy regarding religious beliefs is now guaranteed by international human rights norms. In doing so it first examines the nature of the recognition to be found in treaty and other provisions for such a freedom of choice in belief – including the ability to change it – and the way in which this autonomy is seen as inherent in religious freedom, even if it is not explicitly recognised. Consideration is also given to the way in which the interpretation and application of any such freedom must take

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[1] Or non-belief, scepticism and agnosticism.

[2] As is evident from all the annual reports since 1986 to the United Nations Commission on Human Rights of the Special Rapporteur on the implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief; see further 'Enforced change' below.

[3] Constraints on this may, however, have some influence on the willingness to adhere to them; see 'Enforced change' below.

into account international guarantees regarding the right to education, both from the perspective of children and of parents. There is then an examination of the way in which this freedom has been applied in a number of disputes concerned with the education and upbringing of children and pressures that are seen as affecting the wish to keep or change particular beliefs, as well as with attempts to regulate the procedure by which any change is effected[4]. Although the nature of a belief is not material to whether it can be held by someone, particular importance will be seen to be attached to its consistency with pluralistic values when judging whether or not specific constraints on the exercise of choice are legitimate.

## Recognition of a right to autonomy

Although there had been previous guarantees of freedom of religion, it was only in 1948 that explicit recognition was first given at the global level to the possibility of such freedom embodying both an ability to choose the particular faith to which one adhered and the possibility of making a change in any choice that might have been made. This recognition was accorded by the non-legally binding Universal Declaration of Human Rights, Article 18 of which provides in an unambiguous fashion that

> (1) Everyone shall have the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief of his choice …

However, in view of the concentration before the Declaration was adopted on efforts to provide protection for minority religions[5], the absence of earlier pronouncements to this effect is not surprising; the primary concern had been not so much with the making of a choice as with the treatment that flowed from having done so. Nevertheless there was not unqualified support for giving such recognition for freedom as regards choice and change in the Declaration and opposition to it was manifested in unsuccessful attempts by delegates to the Drafting Committee to delete all that followed after the first reference to 'religion' in this provision. This reflected what has been aptly described as

> An irreconcilable conflict between the Muslim States which were not prepared to accept the claim that all individuals were entitled to change their religious beliefs and others for whom this was an essential prerequisite[6].

This is a conflict which not only contributed to abstentions when the Declaration was adopted by the General Assembly[7] but which has also continued to exercise a restraining influence over the elaboration and application of standards at the global level. Thus, while still acknowledging that belief is a matter of 'choice', the instrument intended to transform the civil and political rights provisions of the Universal Declaration into legally binding obligations fails to give any overt recognition to a person being able to change any choice that has been made. Instead Article 18 of the International Covenant on Civil and Political Rights amplifies the

[4] On these issues, see also P Frümer, *La Renonciation Aux Droits et Libertés* (2001), 381-94.
[5] As to which, see M D Evans, *Religious liberty and international law in Europe* (1997), chs 3-6.
[6] *Ibid*, at p 188.
[7] Notably in the case of Saudi Arabia; the others were Albania, Belarus, Bulgaria, Romania, South Africa and the USSR.

meaning of freedom of thought, conscience and religion by merely stating that this right 'shall include freedom to have or to adopt a religion or belief of his choice'[8]. This is a formulation that undoubtedly represented a compromise between the divergent position of States as to whether a change in religion should be possible, with controversy being avoided by the very inexactness of the language that was used[9]. However, the inclusion within the article of the phrase 'or to adopt'[10] does at least hint at the possibility of more than one choice being made and this was certainly sufficient for the United Nations Human Rights Committee to be able to state, in the General Comment which seeks to clarify the meaning of this phrase, that it

> [N]ecessarily entails the freedom to choose a religion or belief, including, *inter alia*, the right to replace one's current religion with another or to adopt atheistic views, as well as the right to retain one's religion or belief[11].

This is a position that was expressed without hesitation and it is also one that does not appear to envisage any qualification on the scope for change; as such it reflects a conception of belief that is entirely personal. However, it is still not a position which commands the assent of all States; for some, at least, the expression of choice involves a commitment from which there is then no escape. The continuing opposition to a guaranteed right to change was undoubtedly a consideration that subsequently prevented the preamble and twelve articles of the Draft International Convention on the Elimination of All Forms of Religious Intolerance adopted by the Commission on Human Rights between 1965 and 1967 from being turned into a legally binding instrument[12]. Furthermore the undoubted lack of agreement on the issue of change prevented the existence of such a possibility from being acknowledged in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief which was adopted by the General Assembly in 1981[13], even though it followed the International Covenant in explicitly recognising that religion was a matter of choice that should not be impaired by any coercion[14]. Significance is sometimes attached to the statement in Article 8 that

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[8] Although it seeks to reinforce the protection afforded this choice by also providing that '(2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion of his choice'.

[9] This is presumably a factor in the only reservations to Article 18 not being particularly connected with the issue of choice or change of religion; they are designed to protect existing law on the rights of convicted persons (Australia), to restrict public religious acts to places of worship and to deny official recognition to establishments for the professional education of ministers of religion (both Mexico).

[10] It was proposed by the United Kingdom; see Evans, *op cit*, n 5, at p 199. See also B G Tahzib, *Freedom of Religion: Ensuring Effective International Legal Protection* (1995), pp 84-86.

[11] General Comment 22 ,48th session, 1995, HRI/GEN/1/Rev.5, para 5.

[12] Thus Article III 1 provided that 'States Parties undertake to ensure to everyone within their jurisdiction the right to freedom of thought, conscience and belief. This right shall include: (a) Freedom to adhere or not to adhere to any religion or belief and to change his religion or belief in accordance with the dictates of conscience without being subjected either to any of the limitations referred to in Article XII or to any coercion likely to impair his freedom of choice or decision in the matter, provided that this sub-paragraph shall not be interpreted as extending to manifestations of religion or belief.

[13] GA Res 36/55. On the deletion of the phrases 'including the right to choose, manifest and change one's religion or belief' and 'or to adopt' from the preamble and first article respectively, see Evans, *op cit*, n 5, at p 237 and Tahzib, *op cit*, n 10, at pp 166-8. The fact that the latter was deleted might be taken to support the conclusion previously discussed concerning the General Comment on Article 18 of the International Covenant on Civil and Political Rights.

[14] Thus Article 1 provides, '(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice …' (2) No

> Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights[15]

but such a savings clause is hardly a positive commitment to autonomy. Certainly it is not going to facilitate freedom of choice and change with regard to religion becoming a rule of customary international law, even if it cannot undermine any treaty commitments relating to this aspect of freedom of religion[16]. However, this omission must be regarded as having been mitigated by the fact that the Special Rapporteur on the implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief has consistently reported on difficulties affecting the ability to change one's religion and the United Nations Commission on Human Rights has on four occasions urged States to provide effective remedies where the right to freedom of thought, conscience, religion or belief, the right to practise freely one's religion 'including the right to change one's religion or belief' is violated[17].

Other global instruments which secure freedom of religion either use the formulation found in the International Covenant on Civil and Political Rights[18] or fail to make any reference at all to 'choice' or 'change' being included within it. The latter is probably not significant where manifestation of an existing religion rather the possibility of it being changed is likely to be the primary concern of the guarantee[19]. It is, however, possibly of some significance in the context of the Convention on the Rights of the Child since the lack of consensus on the issue of choice resulted in this having an even less explicit guarantee than that found in the Covenant; it is merely

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one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice'.

[15] Eg, Tahzib, *op* cit, n 10, at pp 184-5 and D J Sullivan, 'Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination', 82 *AJIL* 487 at 495 (1988).

[16] See Evans, *op cit*, n 5, at p 238.

[17] Article 4(a) of resolutions 1999/39 (26 April 1999), 2000/33 (20 April 2000), 2001/42 (23 April 2001) and 2002/40 (23 April 2002); all were adopted without a vote.

[18] Thus Article 12 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides '(1) Migrant workers and members of their families shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. (2) Migrant workers and their families shall not be subject to coercion which would impair their freedom to have or to adopt a religion of their choice.'

[19] As in Article 14 of both the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons and Article 4 of the International Labour Organisation's Convention No 107 concerning the Protection and Integration of Indigenous and Other tribal and Semi-Tribal Populations in Independent Countries; the first two provisions refer to an obligation on Contracting States to accord the persons concerned 'treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children' and the last states that 'In applying the provisions of this Convention relating to the integration of the population concerned: (a) due account shall be taken of the cultural and religious values and of the forms of social control existing among these populations, and of the nature of the problems which face them both as groups and as individuals when they undergo social and economic change'. For similar reasons it is not of any consequence that it is only stated in Article 7 of Framework Convention for the Protection of National Minorities that 'The Parties shall ensure respect for the right of every person belonging to a national minority to freedom … of thought, conscience and religion'.

provided that 'States Parties shall respect the right of the child to freedom of thought, conscience and religion'[20]. Despite the complete silence on the matter, there would appear to be some scope for choice afforded by the recognition in Article 14(2) of the Convention that the 'evolving capacities of the child' are to be a constraint on the rights and duties of parents and legal guardians to provide education to the child in the exercise of his or her right to freedom of thought, conscience and religion[21]. However, it is evident from a number of reservations to the Convention that this view will not be accepted by all States[22] Moreover it cannot be assumed that the need to take account of evolving capacities would also extend to requiring acceptance of a change in any choice already made, even if this possibility would seem to be consistent with the recognition of a developing capacity to decide matters for oneself[23].

At the regional level the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child are entirely silent on the question of 'choice' and 'change'[24] but the American Convention on Human Rights and the European Convention on Human Rights both follow the original approach of the Universal Declaration in stating respectively that the right to freedom of religion

[20] See G van Bueren, *The International Law on the Rights of the Child* (1995), pp 156-9.

[21] The African Charter on the Rights and Welfare of the Child also provides in Article 9(2) that 'Parents and, where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child'.

[22] These are potentially capable of depriving it of much value: Bangladesh ratified 'the Convention with a reservation on article 14, paragraph 1; Brunei Darussalam expressed reservations to provisions of the Convention, Article 14 in particular, 'which may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam; Djibouti stated that it did not 'consider itself bound by any provisions or articles that are incompatible with its religion and its traditional values'; Indonesia stated that it would apply Article 14 'in conformity with its Constitution'; Iran reserved 'the right not to apply any provisions or articles of the Convention that are incompatible with Islamic laws and the internal legislation in effect'; Iraq's ratification was 'subject to a reservation in respect of article 14, paragraph 1, as allowing a child to change his or her religion runs counter to the provisions of the Islamic Shariah'; Kuwait expressed 'reservations on all provisions of the Convention that are incompatible with the laws of Islamic Shariah and the local statutes in effect'; the Maldives made a reservation to Article 14(1) 'since the Constitution and the laws of the Republic of Maldives stipulate that all Maldivians should be Muslims'; Morocco made 'a reservation to the provisions of article 14, which accords children freedom of religion, in view of the fact that Islam is the State religion'; Qatar entered a general reservation ' in respect of any provisions that conflict with the provisions of the Islamic Shariah' Saudi Arabia entered 'reservations with respect to all such articles as are in conflict with the provisions of Islamic law'; the Syrian Arab Republic had reservations on the provisions which are not in conformity with its legislation 'in particular the content of article 14 related to the right of the child to freedom of religion'; and the United Arab Emirates stated that it 'shall be bound by the tenor of [Article 14] to the extent that it does not conflict with the principles and provisions of Islamic law' Similar reservations by Malaysia and Pakistan were subsequently withdrawn. See also Van Bueren, *op cit*, n 20, at p 158..

[23] See the declaration by Belgium that it interpreted Article 14(1) as meaning that, 'in accordance the relevant provisions of article 18 of the International Covenant on Civil and Political Rights … and article 9 of the European Convention … the right of the child to freedom of thought, conscience and religion implies also the freedom to choose his or her religion or belief" and the similar declaration by the Netherlands and the Netherlands Antilles that this article 'shall include the freedom of a child to have or adopt a religion or belief of his choice as soon as the child is capable of making such choice in view of his or her age or maturity'. Such an interpretation might be seen as being endorsed by the reservations referred to in the preceding note.

[24] Article 8 of the former states that 'Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms' while Article 9(1) of the latter simply provides that 'Every child shall have the right to freedom of thought conscience and religion'.

includes 'freedom to maintain or to change one's religion or beliefs'[25] and 'freedom to change his religion or belief'[26]; the absence of any specific reference to 'choice' can hardly be material since this is something that must be inherent in the possibility of making a change[27]. Moreover recognition of the ability to change one's religion is also found at the European level in undertakings of a non-legal character made by members of the Organisation for Co-operation and Security in Europe[28] and the European Union[29].

Some limit on the initial scope for choice of religion has, however, inevitably been set by the influence which international provisions also accept that parents (or legal guardians) should have over the education of their children, notwithstanding that that the latter are also included amongst those benefiting from all the guarantees of freedom of thought, conscience and religion that are not specifically directed to them. Thus, while Universal Declaration is unusual in making no specific mention of religion in this context[30], this is explicitly recognised not only in the provision in the Convention on the Rights of the Child already considered[31] but also in many other global and regional instruments guaranteeing freedom of religion. Thus a duty to respect the liberty of parents and legal guardians 'to ensure the religious and moral education of their children in conformity with their own convictions' is found in both the International Covenant on Civil and Political Rights[32] and the International Covenant on Economic, Social and Cultural Rights[33]. This obligation is also echoed in the UNESCO Convention Against Discrimination in Education[34] and in a specific

[25] Article 13, which also provides that 'No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs'

[26] Article 9.

[27] The converse is not necessarily true; see Evans, *op cit*, n 5, at p 238.

[28] Thus it was reaffirmed under Principle 9, paragraph 4 of the Document of the Copenhagen Meeting of Representatives of the Participating States of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (1990) that 'everyone will have the right to freedom of thought, conscience and religion. This right includes freedom to change one's religion or belief ….'.

[29] Article 10(1) of the Charter of Fundamental Rights of the European Union provides that 'Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom …'

[30] Article 26(3) only provides that 'Parents shall have a prior right to choose the kind of education that shall be given to their children'

[31] Article 20 of which further provides that, when providing alternative care for 'a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment … due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background'. See also Article 24 of Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, which provides that 'Where the nationality of the child differs from that of the prospective adoptive parents, all due weight shall be given to both the law of the State of which the child is a national and the law of the State of which the prospective adoptive parents are nationals. In this connection due regard shall be given to the child's cultural and religious background and interests'.

[32] Article 18(3).

[33] Article 13(3).

[34] The States Parties agreed in Article 5(1)(b) that 'It is essential to respect the liberty of parents and, where applicable, legal guardians, firstly to choose for their children institutions other than those maintained by public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their convictions'.

obligation with respect to any parent who is a migrant worker[35], as well as in similar provisions in the American Convention on Human Rights[36] and the European Convention on Human Rights[37]. It was also a commitment that would have been expected of States in the Draft International Convention on the Elimination of All Forms of Religious Intolerance[38] but has been most extensively acknowledged in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Thus Article 5 of the latter not only stipulates that parents (or legal guardians)

> have the right to organise the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up

but also provides that

> Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.

However, not only does that last phrase set a potentially important limit on the influence of parents and legal guardians but the Declaration also seeks to impose other, positive obligations on them regarding the approach to his or her education and upbringing. Thus

> He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow man.

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[35] Article 12(4).

[36] Article 13(4) provides that 'Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions'.

[37] Protocol 1, Article 3 provides that 'In the exercise of any function which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'. Reservations to this obligation have been made by Greece, Malta, Romania and the United Kingdom ('only in so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure' with the addition in the case of Malta 'having regard to the fact that the population of Malta is overwhelmingly Roman Catholic'), Moldova (interpreting the provision 'as precluding additional financial obligations for the State in respect of philosophically or religiously oriented schools, other than those provided for in domestic legislation', Sweden (it 'could not grant to parents the right to obtain, by reason of their philosophical convictions, dispensation for their children from the obligation of taking part in certain parts of the education in public schools, and also to the effect that the dispensation from the obligation of taking part in the teaching of Christianity in these schools could only be granted for children of another faith than the Swedish church in respect of whom a satisfactory religious instruction had been arranged') and the former Yugoslav Republic of Macedonia ('the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions cannot be realised through primary private education'). See also the commitment expressed in 1989 in the Concluding document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe to respect 'the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions' (Questions Relating to Security in Europe: Principle 16, para 7).

[38] Article IV provides that '1. States Parties undertake to respect the right of parents and, where applicable, legal guardians, to bring up in the religion or belief of their choice their children or wards who are as yet incapable of exercising the freedom of choice guaranteed under Article III, paragraph 1(a).

A further limitation on the influence of parents and legal guardians is the requirement that

> Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health, or to his full development.

Taken together, these provisions set potentially significant constraints on the ability of parents and legal guardians to determine a child's religion considerations, albeit not in favour of freedom for the child but in order to ensure that the religion in which he or she is inculcated is broadly acceptable to society at large, even if not generally shared[39]. Although the Declaration is not legally binding, these provisions are capable of shaping the interpretation of less specific provisions regarding parental rights over education, not least because those are not expressed in absolute terms, unlike freedom of thought, conscience and religion[40]. Moreover, similar limitations (if not ones that are so expansively phrased) are to be found in a number of other instruments that are legally binding, such as the International Covenant on Economic, Social and Cultural Rights[41], the Convention on the Rights of the Child[42], the UNESCO Convention Against Discrimination in Education[43], the African Charter on Human and Peoples' Rights[44], the African Charter on the Rights and Welfare of the Child[45] and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights[46].

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[39] The Declaration also insists that, while due account shall be taken of the expressed wishes of parents and legal guardians in the matter of religion or belief where a child is not under their care, the best interests of the child will still be 'the guiding principle' (Art 5(4)).

[40] International provisions tend to acknowledge the possibility of imposing limits on the manifestation of a religion but not on other aspects of this freedom.

[41] Article 13 (1); 'the States Parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace'.

[42] Article 29 (1) states that 'States Parties agree that the education of the child shall be directed to … c. The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own'. However, see the interpretative declaration by Algeria requiring Article 14 of the Convention to be interpreted in accordance with a law stipulating that a child's education is to take place in accordance with the religion of its father.

[43] Article 5(1)(a) stipulates that 'Education shall be directed to the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace'.

[44] Thus, while Article 17(3) provides that 'The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State', Article 18 states that '(1) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morals. (2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community'.

[45] Article 11 (4) provides that 'States Parties to the present Charter shall respect the rights and duties of parents and, where applicable, legal guardians to choose for their children's schools, other than those established by public authorities, which conform to such minimum standards as may be approved by the State, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child'.

[46] Article 13 (1) Everyone has the right to education. (2) States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice

Thus there is far from a consistent approach towards autonomy of religious belief in global and regional instruments. Some recognise both freedom to choose and to change, while others only accept the former and others are either unintentionally or deliberately silent on this matter. Furthermore, even where the right to choose is accepted, it is evident that there is not an obligation to ensure absolute freedom in this regard as the interests of parents and of society may also have to be taken into account, at least as far as shaping the environment in which any choice is made. Nevertheless support for a relatively extensive notion of autonomy does appear to be gaining ground, even if the resolve of many of those States opposed to this development is far from weakening.

## Initial choice

The degree to which there is freedom to exercise choice will depend, in the first instance, on whether or not particular religions are regarded as unacceptable in the State concerned. A hostile attitude to a religion, although more likely to affect aspects of manifestation than personal belief, will make it more difficult for persons to discover the beliefs concerned and to feel confident about adopting them. However, notwithstanding that there is no basis in international guarantees for limiting the particular beliefs that individuals hold, it has been confirmed that some controls over the environment in which they might develop can be justified. This is most likely to affect the ability of parents and legal guardians to influence their children but, apart from these situations, efforts continue to be made to ensure that this influence is not generally undermined by that of others[47]. Although the influence exercised by parents and legal guardians is by no means absolute, concern about protecting it has tended to preclude serious consideration being given as to how any conflict between them and their children as to how the initial choice should be exercised.

### *Official restrictions*

Notwithstanding the existence of State religions in many of the parties to international guarantees of freedom of religion and the potential for these in practice, if not in law, to determine what choice can initially be made, those guarantees do not have any specific provisions concerning them. However, the interpretation of the latter makes it clear that a special status for a particular religion is not objectionable so long as there continues to be freedom to choose to belong to some other religion or to none at all. Thus the United Nations Human Rights Committee indicated in its General Comment on Article 18 of the International Covenant on Civil and Political Rights that

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and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace. (4) In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above. (5) Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties'.

[47] See further Evans, *op cit*, n 5, pp 345-62 and Tahzib, *op cit*, n 10, pp 175-9.

> The fact that a religion is recognised as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers[48]

The apparent failure to respect this approach – whether by limiting official recognition to only certain religions or by the proscription of particular ones - has lead to adverse comment in concluding observations on one periodic report by it[49] and by the Committee on the Rights of the Child in respect of periodic reports by two States under the Convention on the Rights of the Child[50], as well as by the Special Rapporteur on the implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief[51]. Similar objections have been raised to practices which also have the effect of constraining the choice of religion that can be made[52] Furthermore, although there appears to be no instance of objection being taken to the existence of a State religion in proceedings brought by individuals, this is probably because the opportunity to institute them lies only in respect of States where membership of such a religion is not obligatory[53].

Nevertheless the overriding concern for the best interests of the child – already seen to be an explicit requirement of some guarantees and one which is implied into others – is capable of justifying restrictions on the promotion of a particular religion and, as a consequence, of preventing the adoption or confirmation of any belief in it. Thus in *Hoffman v Austria*[54] it was accepted that a legitimate aim would be pursued if an award of parental rights were to be determined by reference to the possibility of a risk to health and other adverse consequences as a result of the child concerned being brought up by a mother who was a Jehovah's Witness[55]. However, in this particular

[48] Loc *cit* n 11, para 9. See also its related statement that 'If a set of beliefs is treated as official ideology in constitution, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedom under article 18 or any other rights recognised under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it' (*ibid*, para 10).

[49] 'The Committee notes with concern that every Lebanese citizen must belong to one of the religious denominations officially recognised by the Government and that this is a requirement in order to be eligible to run for public office' (CCPR/C/79/Add.78, para 23 (5 May 1997).

[50] Indonesia (CCPR/C/15/Add.25, para 13, 24 October 1994) and Iran (CRC/C/15/Add.123, para35, 28 June 2000).

[51] Eg, the general reference to the fact that 'Discrimination is carried to extreme when the law declares certain religions or denominations to be unlawful and punishes the act of belonging to or practising them' (E/CN.4/1987/35, para 32, 24 December 1986) and a specific reference to the situation in Bhutan that 'According to the information received, Christianity is officially banned' (E/CN.4/1995/91, p 21, 22 December 1994).

[52] See the concern of the Committee on the Rights of the Child about the effect on the freedom of religion of non-Buddhist children resulting from 'the fact that children considered poor are channelled towards monastic Buddhist schools and are offered no alternative educational opportunity' in its concluding observations on the initial report of Myanmar (CRC/C/15/Add.69, para 16, 24 January 1997).

[53] *Cf Darby v Sweden*, 23 October 1990, in which there was a successful challenge to an obligation to contribute to the financing of a State religion when the exemption for non-believers did not apply to non-resident taxpayers; a violation was found to exist in respect of the prohibition of discrimination taken with the right to property. In *Hoffman v Austria*, 23 June 1993 the European Court did not address one aspect of the domestic ruling in a dispute over parental rights, namely, that Jehovah's Witnesses were not 'a recognised religious community' (para 15); *cf* nn 48 and 49. .

[54] 23 June 1993.

[55] In this case the possible concerns were 'the possible effects on their social life of being associated with a particular religious minority and the hazards attaching to the applicant's total rejection of blood

case the decisive consideration in refusing the mother these rights was seen actually to be more her religion than the harm that might flow from exposure to it[56] and this was thus a violation of the right to respect for family life taken in conjunction with the prohibition of discrimination[57]. Nevertheless in other circumstances a refusal or deprivation of parental rights because of the risk posed to a child by a religion might be more well-founded[58] and a constraint could thus be imposed in practice on both the ability of the parents to determine his or her religion and on his or ability to choose one for him or herself.

*Respect for parental convictions*

The imposition of constraints on education and upbringing by parents and legal guardians might not only be designed to prevent harm to the child but also to affect how a child relates to society and is more generally educated. The legitimacy of their imposition is underpinned by the objectives set for education in a number of international guarantees regarding tolerance and respect for diversity that have already been noted[59]. Although such objectives are more likely to be used to permit the provision of something additional to that provided by parents or legal guardians themselves and of which they might not approve, they could also be the basis for greater interference with the upbringing of children where this is – or is likely to be - in a manner that is at odds with them, including a deprivation of custody[60]. However, the latter will undoubtedly only arise in extreme situations, with the former being the more usual form of intervention through, for example, classes concerned with sex education[61], religious knowledge[62] and moral and social education[63]. Notwithstanding

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transfusions not only for herself but – in the absence of a court order – for her children as well' (*ibid*, para 32). The case was, however, determined by reference to the prohibition of discrimination and the duty to respect family life (Articles 14 and 8 of the European Convention) and only the European Commission addressed the applicability of the duty to respect parental convictions, finding that no issues arose under Protocol 1, Article 2.

[56] The Court was divided in its assessment of the considerations that influenced the national rulings; Judges Mifsud Bonnici, Matscher and Valticos dissented because they saw the consequences for the children as the decisive one.

[57] The question of whether the children should, in any event, be brought up in the faith in which they had been baptised (Roman Catholicism) was not pursued.

[58] Nevertheless, in showing this, due account would need to be taken of the European Court's observation in *Metropolitan Church of Bessarabia and Others v Moldova*, 13 December 2001 that 'in principle the right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs' (para 117).

[59] See text at n 30.

[60] In this connection, see the acceptance in *Refah Partisi (The Welfare Party) and Others v Turkey*, 31 July 2001 that the dissolution of a political party for seeking to undermine the principle of secularism was not a violation of freedom of association. See also General Comment 1 of the Committee on the Rights of the Child that the agreement in Article 29 of the Convention on the Rights of the Child that education should be directed to a wide range of values 'overcomes the boundaries of religion, nation and culture built across many parts of the world … part of the importance [of Article 29(1)(d)] lies precisely in its recognition of the need for a balanced approach to education and one which succeeds in reconciling diverse values through dialogue and respect for difference' (CRC/GC/2001/1, para 4, 17 April 2001). This would, therefore, displace the more general obligation to take account of the expressed wishes of parents and legal guardians in the matter of religion or belief where a child is not under their care; see n 31. See also Comm No 858/1999, *Buckle v New Zealand*, Views of the United Nations Human Rights Committee, 21 September 1998, in which it was found that the applicant's complaint that she had been deprived of her children because she was a new born Christian had not been substantiated.

[61] *Kjeldsen, Busk Madsen and Pedersen v Denmark*, 7 December 1976.

the public interest in the provision of these classes, the requirement to respect parental convictions where education is provided by persons other than themselves will impose some limits[64]. Thus parents and legal guardians can object both to deliberate indoctrination in a religion other than their own and to other forms of instruction and activities where these might affect the beliefs that they are themselves seeking to inculcate[65]. This certainly means that there cannot be any requirement to attend instruction in a particular religion against the wishes of parents or legal guardians; as the United Nations Human Rights Committee stated in its General Comment on Article 18 of the International Covenant on Civil and Political Rights, the provision of such instruction

> is likely to be inconsistent with article 18.4 unless provision is made for non-discriminatory exemption or alternatives that would accommodate the wishes of parents and guardians[66].

A similar view has also been taken by the European Court and Commission of Human Rights of any classes or other activities that might be seen as an attempt to indoctrinate children in, or against, a particular religion where this is against the wishes of their parents. However, as regards instruction in a particular religion, there would actually have to be a requirement to attend this before the parental rights could

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[62] Appl 10491/83, *Angelini v Sweden*, 51 DR 41 (1986). This case was dealt with only under Article 9 of the European Convention because of a reservation to Protocol 1, Article 2 (see n 37) but the issue was essentially the same as the former provision also provided 'protection against indoctrination of religion by the State, be it in education at school or in any other activity for which the State had assumed responsibility' (p 48); see also 'Enforced change' below.

[63] Appl 17187/90, *Bernard and Others v Luxembourg*, 75 DR 57 (1993); the lessons were to 'involve the study of human rights in particular and should be organised in such a way as to guarantee a plurality of opinions' (p 75).

[64] At least where the convictions are not contrary to the tolerance requirement just discussed. There will be a need to demonstrate that the convictions being invoked 'have a certain level of cogency, seriousness, cohesion and importance' (*Campbell and Cosans v United Kingdom*, 25 February 1982, para 36, but this may be more difficult where they have a philosophical rather than religious basis. The attainment of the appropriate level in the case of philosophical convictions was doubted, but did not prove decisive, in Appl 10491/83, *Angelini v Sweden*, 51 DR 41 (1986), Appl 13887, *Graeme v United Kingdom*, 64 DR 158 (1990) and Appl 17187/90, *Barnard and Others v Luxembourg*, 75 DR 57 (1993).

[65] These can also be seen as amounting to indoctrination in a particular religion and thus would be objectionable as attempts to force the child to abandon his or her beliefs; see also 'Enforced change' below.

[66] Loc *cit*, n 11, para 6. Eg, see the exemption of the children of Jehovah's Witnesses from religious education and attendance at Orthodox Masses approved by the European Court in *Efstratiou v Greece* and *Valsamis v Greece*, both 18 December 1996. The focus on Christianity in religious knowledge classes was not found in Appl 10491/83, *Angelini v Sweden*, 51 DR 41 (1986) to amount to indoctrination in the Christian religion and an objection to the refusal of exemption from participation in them was thus not upheld. However, the Committee on the Rights of the Child has twice expressed concern about the process of providing exemptions to those children and parents who do not wish to participate in parts of a religious education course, including the impact on their privacy by having to expose their faith (concluding observations on the initial and second periodic reports; CRC/C/15/Add.23, para 9, 25 April 1994 and CRC/C/15/Add.126, para 26, 28 June 2000). *Cf* Appl 17187/90, *Bernard and Others v Luxembourg*, 75 DR 57 (1993) in which an exemption from an obligation for children to attend moral and social education was refused where the request was not based on religious belief but on philosophical thought based on reason. In the European Commission's view 'in making exemption conditional on adherence to religious belief, the legislature did not … treat freedom of religion more favourably than the other freedoms in set forth in Article 9 of the Convention … the possibility of exemption from the two courses of instruction in question extended to the category of pupils professing a religious belief is justified by the State's obligation to respect religious and philosophical convictions.

be considered to have been violated and this was not demonstrated in *C J, J J and E J v Poland* [67] as attendance at religious instruction was on a voluntary basis. Nevertheless the ruling in that case is surprising for the lack of importance attached to the possible need to provide protection against informal but potentially powerful pressures to conform. Thus one of the applicant children, while not attending religious instruction class on her father's instruction, had had to spend time alone in the school corridor, as well as to explain repeatedly to teachers why she was not with her class. Furthermore one teacher had told her that it would be better if she attended the instruction and other pupils had also asked her incessantly why she did not attend[68]. Ultimately this broke her resolve and she decided, against her parents' will to attend the instruction but, without even commenting on the issue of such pressure being admissible, no violation of her right to freedom of religion was found to have occurred[69].

The prohibition on compulsory instruction in a religion against a parent's wishes would not, however, preclude a requirement to receive

> instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way[70].

Moreover, as the European Court made clear in *Kjeldsen, Busk Madsen and Pedersen v Sweden*, parents are not entitled to object to the integration into the school curriculum of 'information or knowledge of a directly or indirectly philosophical kind' since

> It seems very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications. The same is true of religious affinities if one remembers the existence of religions forming a very broad dogmatic and moral entity which has or may have answers to every question of a philosophical, cosmological or moral nature

[67] Appl 233380/94, 84 DR 46 (1996).

[68] There had been a refusal to change the time of the class – which was in the middle of the day - so that child could come later or leave earlier and avoid such pressure. This might have been unduly disruptive of the school planning but neither alternative ways of protecting the child from such pressure nor the propriety of the questioning by teachers (*cf* the discussion of proselytism in 'Enforced change' below) appear to have been considered.

[69] No complaint was made in respect of Protocol 1, Article 2 but see n 62. Although the parents ultimately allowed the second applicant child to attend an ethics course, this might have been made obligatory for reasons already considered. In Appl *X v United Kingdom*, 11 DR 160 (1977), the European Commission was prepared to assume that 'it is possible to deduce from Article 2 of the First Protocol an obligation on the public authorities not to transfer parental authority over a child to persons who do not share the convictions of its original parents in the matter of education' (p 168) but may have gone against the specific obligation in some other provisions (see n 31) in stating that this obligation ceased with adoption as parental authority had been transferred. However, it did not find any failure to comply with this negative obligation. In *Olsson v Sweden*, 24 March 1988 the Court accepted that parents did not lose their parental rights when a child was taken into public care – without addressing the issue of adoption - but did not find any divergence from their wishes. *Eriksson v Sweden*, 22 June 1989 a complaint about an alleged failure to provide a religious upbringing of a child taken into care which corresponded with that of the religion that her mother adopted after that occurred was found to be unsubstantiated because the issue had not been raised with the domestic authorities.

[70] General Comment No 22, *loc cit*, n 11, para 6. This reflects the earlier finding in Comm No 40/1978, *Hartikainen v Finland*, Views of the United Nations Human Rights Committee, 9 April 1981 that a requirement to attend instruction in the history of religions and ethics instead of religious instruction did not violate Article 18.

With the only condition being that

> information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner[71]

so that it does not amount to actual indoctrination. The latter was not considered to have occurred in that case as the integrated sex education provided in State schools did not seek to advocate a particular kind of sexual behaviour or encourage particular practices. Although it was also emphasised that that parents were still able to guide their children in accordance with their own convictions, this would only be important if the education might have the effect of leading them in a direction contrary to those convictions. It is perhaps much more significant that there remained

> a duty to take the utmost care to see to it that parents' religious and philosophical convictions are not disregarded at [the implementation] level by carelessness, lack of judgment or misplaced proselytism[72].

Furthermore, in pointing out that parents continued to have the option either of entrusting their children to private schools where this approach to sex education was not required or of educating them at home, the Court was perhaps underlining that there was no real constraint, even though this would really only matter if there was in reality an element of indoctrination which it had already found not to have taken place[73].

There was also a failure to establish that this had occurred in *Efstratiou v Greece* and *Valsamis v Greece*[74] which both concerned a requirement by schools to take part in a parade as part of National day celebrations – in some of which military representatives could take part - and the imposition of disciplinary penalties on the children of Jehovah's Witnesses for having failed to do so because their parents considered that this would have been inconsistent with their pacifist objectives. It was evident that there was no direct indoctrination in views that were not pacifist but in concluding that there was

> Nothing , either in the purpose of the parade or in the arrangements for it, which could offend the applicants' pacifist convictions[75]

the Court was not only arrogating to itself the power to determine what were there convictions but also failing to ask itself whether the compulsory involvement was really consistent with the objective stance appropriate to instruction and related activities[76]. Nevertheless it is always likely to be much harder to demonstrate that

[71] 7 December 1976, para 53.
[72] *Ibid*, para 54.
[73] This was found to have occurred in the classes in moral and social education considered in Appl 17187/90, *Bernard and Others v Luxembourg*, 75 DR 57 (1993) or in those in religious knowledge (which focused on Christianity) examined in Appl 10491/83, *Angelini v Sweden*, 51 DR 41 (1986).
[74] Both 18 December 1996.
[75] *Ibid*, para 32.
[76] Judges Thór Vilhjálmsson and Jambrek dissented as they did not consider the school activities to be neutral. See also Appl 17187/90, *Bernard and Others v Luxembourg*, 75 DR 57 (1993), in which the European Commission considered that it was not evident that a requirement to attend moral and social classes entailed a failure to respect the applicants' philosophical convictions; in its view the lessons were to 'involve the study of human rights in particular and should be organised in such a way as to guarantee a plurality of opinions' (p 75).

activities other than formal instruction could lead a child away from the beliefs in which parents are entitled to inculcate them. Certainly the influence accorded to pupils does not guarantee that children should be entirely immunised from other influences and the duty of respect does not entail any positive duty to provide education that caters for specific parental convictions; it remains an obligation only to abstain from indoctrination[77].

*Choice by children*

The assumption underlying the duty to respect parental convictions is that, in the event that this is their wish, they should normally be able to determine the religion to which a child initially adheres. So far both the elaboration of standards and the adjudication of disputes has concentrated on the extent to which this influence might be diluted or restrained by extra-familial sources. Thus, although many of the cases in which objection has been raised to particular instruction or school activities have been concerned with the right of the child under Article 9 of the European Convention not to be indoctrinated as much as the duty to respect parental convictions under Protocol 1, Article 2[78], there has been no suggestion that the choice of religion is entirely a matter for the child – even if there is an entitlement for parents to influence him or her through the upbringing that they provide - or, despite the recognition in the Convention of the Rights of the Child of the significance of his or her evolving capacities, that the making of a choice should be deferred until a child is competent to understand fully the implications of that choice[79]. Nonetheless the need to give the child a more decisive voice in this matter is discernible in the failure of the European Commission in *C J, J J and E J v Poland*[80] to comment adversely on the fact that, in a dispute about religious instruction contrary to parental wishes, a twelve-year old child had decided to attend the classes despite her parents' objection. This may reflect the fact that no complaint had been made with respect to the duty to respect parental convictions under Protocol 1, Article 2 but it is perhaps also an implicit recognition that it may be more appropriate for the child to decide on his or her religion, particularly where there is in any event an obligation to permit this to be changed in the course of a person's life[81].

So far the circumstances in which a child has any say in the initial choice of religion appears only to have given rise to limited concern on the part of the

[77] See Appl 13887/88 *Graeme v United Kingdom*, 64 DR 158 (1990), which concerned the placing of a child with special educational needs in a special school despite his mother's religious and philosophical convictions regarding integrated schooling for disabled children. The Commission left open 'the question whether the applicant's disagreement with the education authorities about the appropriate school for her son could be said to be based on deep-founded philosophical convictions rather than a difference of view as to the best way of providing the boy with an education. Even assuming that the applicant's philosophical convictions may be at issue in this part of the present case, the Commission refers to the dominant character of the child's right to education in article 2 of Protocol No. 1 to the Convention' (p 165).

[78] In some instances this was the only option; see n 62. In any event a child cannot claim to be a victim of a failure to respect his or her parents' convictions; *Eriksson v Sweden*, 22 June 1989 and *Simpson v United Kingdom*, 64 DR 188 (1989), although the latter ruling did seem to admit the possibility of the child being an indirect victim of such a failure.

[79] Or that there can be a change in religion made where a choice has already been made.

[80] Appl 23380/94, 84 DR 46 (1996).

[81] See further Van Bueren, *op cit*, n 20, 156-62 and 240-45. However, this issue has not featured in cases concerned with children being taken into public care or being adopted; see n 69.

Committee on the Rights of the Child. Thus it has occasionally raised questions about whether enough has been done to ensure what it has termed 'the participatory rights of children' under Article 14 of the Convention on the Rights of the Child are sufficiently respected by 'society at large'[82], without indicating whether this would have any effect on the ability of children to make a choice of religion that differed from that which their parents wanted. This was also not a matter considered when it commented adversely on the need for a formal parental request in order for children to be able to abstain from compulsory religious education; its concern was with the impact of this process on the right to privacy of the parents rather than the ability of their children to choose for themselves[83]. It has, however, been concerned about the freedom of religion of poor non-Buddhist children when the only educational opportunity they were being given in Myanmar was in monastic Buddhist schools but there was no indication at all in its concluding observations as to whether or not this was being done with the approval of their parents[84].

**Making a change**

A change in belief may sometimes entail a dramatic conversion but could equally be no more than the inevitable outcome of a gradual, but almost imperceptible, loss of commitment. Whatever the circumstances, it would seem appropriate for the exercise of the freedom to make a change – where there is an obligation to secure it as part of freedom of religion - to be principally a matter for the individual concerned[85]; it should thus generally be effective without there being a need for any approval on the part either of the religion to which he or she had previously adhered or of any public authority. Indeed the apparent existence of a need for such approval or of a complete inability to make any change has been the basis for the expression of concern by the United Nations Human Rights Committee when making its concluding observations on a number of periodic reports under the International Covenant on Civil and Political Rights[86]. However, there may well be some situations in which a requirement that the making of a change in religion has to be effected in a formal manner in order to be recognised would not be considered to be incompatible with the freedom of religion of the person concerned. On the other hand the freedom to make a change is essentially about the need to ensure that a person's beliefs are not constrained by enforced membership of a particular religion. Such freedom may not entirely prevent the religion from continuing to view a person

[82] Concluding observations on the initial report of Guinea (CRC/C/15/Add.100, para18, 10 May 1999, the second periodic report of Yemen (CRC/C/15/Add.102, para 19, 10 May 1999) and the initial report of Malta (CRC/C/15/Add.129, para 27, 28 June 2000).

[83] It was felt that their privacy was endangered by the need to expose their faith; CRC/C/15/Add.23, para 9, 25 April 1994.

[84] Concluding observations on the initial report of Myanmar (CRC/C/15/Add.69, para 16, 24 January 1997); see, however, n 104.

[85] As has been seen from the development of international guarantees, the ability to change is most likely to be accepted where freedom of religion is seen as something that is essentially individual rather than collective in character.

[86] Eg those made in respect of the third report of Jordan (CCPR/C/79/Add.35, para 10, 10 August 1994), the second report by the Libyan Arab Jamahiriya (CCPR/C/79/Add.45, para 13, 23 November 1994), the fourth report of Morocco (CCPR/C/79/Add.113, para 22, 1 November 1999) and the third report of Yemen (CCPR/CO/75/YEM, para 20, 12 August 2002). See also the comments of the Special Rapporteur on the implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief cited at n 104.

who has left as one of its members and it does not extend to exercising choice about doctrine and practices at the same time as remaining a member of that religion[87].

*A formal process*

The requirement of a formal process of change is most likely to arise and to be justifiable in those countries where a person's religion has legitimately become a matter of official record, whether on account of some publicly-organised scheme of support for churches[88], the beneficial or other consequences flowing from being a member of a minority (or indeed the majority) religion[89] or the grant of some exemption from certain public duties because of a conflict between them and the dictates of the faiths concerned[90]. In any of these situations the moment of change needs to be established, at least for the purpose of determining whether the liabilities, benefits or exemptions are applicable, and thus some kind of formal process may be required.

Certainly this seems to have been the basis for the absence of any objection by the European Commission of Human Rights in *Gottesmann v Switzerland*[91] to a refusal by the Swiss tax authorities to accept that the applicant and his wife were not Roman Catholics and thus not liable to pay the church tax in the municipality where they were then living. After moving to that municipality, neither the applicant nor his wife had declared any church membership in their tax returns but they had merely scored through the space in them for religious details and had also crossed out the words 'Roman Catholic' on their voting cards. In the view of the tax authorities such action was not considered to amount to clear and unambiguous indications of their having left a church. It was only when the applicant wrote 'none' under 'Religion' in his 1977 tax return that he was held to have clearly notified them of his wish to leave the Roman Catholic Church and to be entitled to receive exemption from liability thereafter. Nevertheless, in view of the personal and individual nature of such a decision, the tax authorities would still not take his signature on that return as also amounting to an indication of his wife's decision to leave that church; she was thus held to have remained a member of the church until she explicitly stated her decision to do so. The Federal Court, in a challenge to this ruling, accepted that each religious denomination could specify the formalities involved but it also insisted on the need for a declaration of the wish to leave a church and, in the absence of any regulation by

[87] Public order considerations are unlikely to be regarded as justifying regulation of a change of religion. As the Court observed in *Serif v Greece*, 14 December 1999, tension may be created in situations where a religion or any other community becomes divided but 'this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other' (para 53). Such tension may, however, be an acceptable basis for regulating any manifestation of different beliefs.

[88] The acceptability of an obligation to support through taxation the church to which one belongs was not impugned in *Darby v Sweden*, 23 October 1990 but a requirement of certain non-members to provide such support was found to be a violation of the prohibition of discrimination taken together with the right to property; the significance of the requirement for the applicant's freedom of religion was not addressed by the Court.

[89] Such as where issues of personal status are delegated to religious bodies in the case of such persons.

[90] See the failure to observe a requirement to exempt members of 'known religions' from military service which was found in *Tsirlis and Kouloumpas v Greece*, 29 May 1997l to have resulted in the applicants being detained in breach of the right to liberty and security of the person.

[91] Appl 10616/83, 40 DR 284 (1984).

municipal or cantonal law, the approach of the tax authorities was thus upheld. In finding no incompatibility with Article 9 of the European Convention on Human Rights, the Commission emphasised that the right to leave the Roman Catholic Church had not been in dispute and that there was indeed a constitutional guarantee against being obliged to pay tax in respect of a church of which one was not a member[92]. However, in its view

> the domestic authorities have a wide discretion to decide on what conditions an individual may validly be regarded as having decided to leave a religious denomination. It accordingly does not consider arbitrary the domestic courts' refusal to recognise a decision to leave a religious denomination unless such decision is unambiguously intimated, where no formality for that purpose is prescribed in cantonal law[93]

It was undoubtedly significant that the need for the formal declaration concerned only the relationship of the applicant and his wife with the tax authorities and did not otherwise involve them being held out to the world as Roman Catholics, let alone involve them in fulfilling any particular requirements of that faith; there was really no limit on the choice of religion but only a requirement to fulfil an earlier indication of a wish to be treated as Roman Catholics.

However, it is not clear from the ruling how it had actually been previously established that the applicant and his wife had come to be officially recognised as Roman Catholics - they claimed that they had never expressly declared their membership of the church in the municipality where they were living at the time of the dispute - but it is likely that some formal indication would have had to have been given to the tax authorities in respect of their previous municipality for the liability to arise in the first place. Although it might be reasonable to regard that as effective until a contrary indication is given, there would presumably still be limits both on the degree of formality that could be required[94] and the extent of the delay that might be imposed on this taking effect[95]. However, in situations where the personal status of those belonging to a particular religion is delegated to its institutions, the retention of the latter's jurisdiction in respect of such status over someone who has made explicit his or her wish to leave that religion might continue to be justified by the interests of others[96]. Nevertheless such jurisdiction could not be insisted upon if it necessarily entailed an effective obligation to subscribe to beliefs that were no longer accepted, such as where the religion did not permit divorce and a marriage between two of its adherents could not be set aside by the secular authority.

*Continued treatment as a member*

The freedom to change one's religion is, however, unlikely to be an impediment to the church to which one had belonged from continuing to regard any

[92] *Cf* the situation in *Darby v Sweden*, n 88.
[93] *Loc cit*, n 91, at pp 289-290.
[94] An excessive degree of formality would undoubtedly have been entailed if the tax authorities in the *Gottesmann* case had, instead of accepting the 'None' under the 'Religion' heading in the tax return, insisted on a declaration witnessed by a notary.
[95] Thus it might be acceptable to allow a liability to support a particular religion to be terminated only with effect from the end of the fiscal year in which notice of a change in religion was given but exemption from military service on account of beliefs ought to apply once the change resulting in the conscientious exemption is established.
[96] Ie, a spouse or children.

person wishing to make such a change as one of its members, so long as this did not result in any liability to support it or in any disadvantage regarding the treatment of the person concerned by the secular authorities. This might be significant not only as regards the ability of the person concerned resuming religious practice without needing to fulfil a formal admission procedure but also for the purpose of determining whether his or her offspring are eligible for certain benefits. It would also mean that the religion could regard the conduct of the person renouncing his or her faith as sinful but no sanction could be applied in respect of this that conflicted with that person's rights under the secular law[97]. Furthermore both the right to change one's religion and other relevant rights (such as those regarding life and liberty) would be engaged by any failure of State authorities to take appropriate action against anyone attempting to impose impermissible sanctions or encouraging their imposition[98].

*Freedom only to leave*

The freedom to change religion does not, however, extend to an ability to insist on being able to depart from particular requirements of the religion to which one belongs while at the same time remaining within it. In the view of the European Commission of Human Rights, the individual freedom of thought, conscience or religion of the clergymen in a church

> is exercised at the moment they accept or refuse employment as clergymen, and their right to leave the church guarantees their freedom of religion in case they oppose its teachings. In other words, the church is not obliged to provide religious freedom to its servants and members, as is the State as such for everyone within its jurisdiction[99].

A clergyman could thus not invoke his right to freedom of religion to support a claim that he was entitled to insist on setting up conditions for baptising which were contrary to the directives of his church's highest administrative authority or to take objection to the threat of sanctions if he failed to abandon them; the church was always free to enforce uniformity in matters of worship, teaching practice and observance. On the same basis a complaint by a parish about a bar on using a particular form of the liturgy was also found not to entail a failure to protect freedom of religion[100]. At the same time the emphasis in these and other similar cases on the

[97] Thus, while no objection could be taken to any social opprobrium or moral condemnation resulting from a person's departure, there should be no State offence of apostasy or heresy. See the concern of the United Nations Human Rights Committee about the latter in its concluding observations on the second periodic report of the Libyan Arab Jamahiriya under the International Covenant on Civil and Political Rights (CCPR/C/79/Add.45, para 13, 23 November 1994). Although the offence of blasphemy may be compatible with the guarantee of freedom of expression, this is to provide protection against treatment of a religious subject that is calculated to cause outrage (*Wingrove v United Kingdom*, 25 November 1996) and there is no right derivable from freedom of religion to require that someone be prosecuted for blasphemy (Appl 17439/90, *Choudhury v United Kingdom*, (1991) 12 *HRLJ* 172).

[98] On the permissibility of attempts to deprogramme persons who have been 'brainwashed' against a religion, see the discussion of *Riera Blume and Others v Spain*, 14 October 1999 in 'Enforced change' below.

[99] Appl 7374/76, *X v Denmark*, 5 DR 157 at 158 (1976).

[100] Appl 24019/94, *Finska Församligen I Stockholm and Hautaniemi v Sweden*, 85 DR 94 (1996), which concerned a prohibition against the use of the liturgy of the Finnish Church as a result of the Church assembly's decision to adopt a Finnish translation of the liturgy of the Church of Sweden. The prohibition was thus aimed at providing rules for the liturgy used in Finnish-speaking parishes belonging to the Church of Sweden. In the European Commission's view, the applicant parish was a part of the Church of Sweden and as such 'is obliged to comply with the Church assembly's decisions

importance of there being freedom to leave the churches concerned [101], even where a person has assumed a ministerial function in them, underlines the fundamental nature of this aspect of freedom of religion[102].

## Enforced change

A corollary of the freedom to choose one's religion is the prohibition on the use of coercion to make a change in it – whether by recanting an existing belief or converting to another one - and this is undoubtedly implicit in those guarantees of freedom of religion that do not explicitly state this. The notion of coercion has been widely defined by the United Nations Human Rights Committee in its General Comment, covering not only 'the use or threat of physical force or penal sanctions' but also

> Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant[103]

and it is likely to cover any measure that has the effect of overwhelming the will of the persons concerned. In many cases this may be effected by State authorities themselves but in others it could be through other bodies who act with the acquiescence or encouragement of those authorities. Instances of physical coercion have been noted by the Special Rapporteur on the implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief and the United Nations Human Rights Committee on a number of

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concerning, *inter alia*, the manner in which religious services shall be conducted ... It has not been established that the applicant parish would be prevented from leaving the Church of Sweden if it were unable to accept the liturgy of that Church' (p 97).

[101] See Appl 11045/84, *Knudsen v Norway*, 42 DR 247 (1985), in which the European Commission observed that; if the requirements imposed upon a clergyman by the church were in conflict with his convictions then 'he is free to relinquish his office as clergyman ... and the Commission regards this as an ultimate guarantee of his right to freedom of thought, conscience and religion' (p 257). However, that case concerned a refusal to carry out certain administrative duties and it was not established that the applicant had actually been under any pressure to change his views. See also Appl 12356/86 *Karlsson v Sweden*, 57 DR 172 (1988), in which the Commission stated that 'if the applicant's views on women priests and thus his intentions regarding co-operation with female colleagues is found to be incompatible with the views generally held by the church in question the latter is not obliged to accept the applicant as its servant. On the other hand if the requirements imposed upon a person by the church should be in conflict with his convictions he should be free to leave his office, and the Commission regards this as an ultimate guarantee of his right to freedom of thought, conscience and religion' (p 175). There was, however, no evidence of pressure on the applicant to change his views and his views did not disqualify him from the post of vicar for which he had applied but he was found not to have the qualifications necessary for it and so case fell outside scope of Article 9. A similar complaint was found inadmissible in Appl 27008/95, *Williamson v United Kingdom* (17 May 1995). All these cases have concerned State churches but the same approach would be required where there are doctrinal disputes involving members or ministers of non-established churches.

[102] See also the refusal of the European Court in *Serif v Greece*, 14 December 1999, to accept that someone could be punished for merely acting as the religious leader of a group that had willingly followed him when there was no attempt to perform functions on behalf of the State.

[103] *Loc cit*, n 11, para 5. Article 25 is concerned with access to the public service and political participation. The protection against coercion is supposed also to be enjoyed 'by holders of all beliefs of a non-religious nature'.

occasions[104] but it is not something that has so far been seen in proceedings before any of the global and regional human rights tribunals. Nevertheless these have recognised as unacceptable a number of other forms of compulsion to effect a change, notably in respect of the application of preconditions for certain activities. There have also been efforts to set some limits to the use of persuasion that can be used where attempts are being made to seek converts, generally giving a useful indication of the point at which conduct bearing on the adoption of a different religion from that currently held ceases to be a matter of legitimate encouragement and influence and amounts to an unacceptable degree of pressure.

*Obligatory requirements*

An instance of an unacceptable precondition can be seen in *Buscarini v San Marino*[105] which concerned a requirement that persons elected to the Parliament had to take an oath on the Gospels before they could take up their seats. In the Court's view, this was

> tantamount to requiring … elected representatives of the people to swear allegiance to a particular religion, a requirement which is not compatible with Article 9 of the Convention. … it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs[106].

An oath is not a requirement to be taken lightly and thus its effect here would be to require at least some successful candidates – including the applicants in this case – to renounce their religion[107]. It is also implicit in the finding in *Serif v Greece*[108] that it

[104] Thus in 1998 the Special Rapporteur reported that 'The freedom to change one's religion is also being violated: (a) In Qatar and Kuwait, according to allegations based on several sources, the conversion of a Muslim to another religion is strictly prohibited and in Qatar it is punishable by death; (b) In India and Israel, legislation banning conversion has been drafted; (c) In Egypt, a Muslim who had converted to Christianity was reportedly arrested and interrogated in order to force him to give information about the activities of converts; (d) In India, a Hindu who converted to Christianity is said to have been attacked by Hindu extremists; (e) In Iraq, a young Christian woman was reportedly forced to marry a Muslim and convert to Islam; (f) In Myanmar, there are reports that the army has tried to conduct campaigns to convert Christians in the State of Chin to Buddhism. In one monastery, children are said to have been forced to repeat Buddhist prayers every day and some parents are said to have been paid sums of money in exchange' (E/CN.4/1998/6, para 62, 22 January 1998). Similarly the Committee noted that it had 'received no satisfactory answer regarding the destruction of places of worship or cemeteries and the systematic persecution, harassment and discrimination of the Baha'is' (comments on the second periodic report of Iran, CCPR/C/79/Add.25, para 16, 3 August 1993) and it has expressed its 'deep concern' about 'the increase in the number of acts of religious intolerance and harassment of religious minorities of various creeds, particularly Jehovah's Witnesses' (concluding observations on the second periodic report of Georgia, CCPR/CO/74/GEO, para 17, 19 April 2002).

[105] 18 February 1999.

[106] *Ibid*, at para 39. See also the concern of the United Nations Human Rights Committee about a requirement to belong to one of the religious denominations officially recognised by the Government in order to be eligible to run for public office'; concluding observations on second periodic report of Lebanon, CCPR/C/79/Add.78, para 23 (5 May 1997).

[107] *Cf* the importance attached by the Court in *Riondel v Switzerland*, Admissibility Decision, 14 October 1999 to the fact that neither a person holding a licence to operate a private security firm nor his employees had been required to abandon their convictions and abandon their involvement with a sect when accepting that a link with the latter could be a justifiable basis for withdrawing the licence; the beliefs of the sect were seen by the authorities as having a destabilising effect on public order, particularly having regard to the right of security guards to carry a gun. On the acceptability of

could not be acceptable to punish someone for merely acting as the religious leader of a group that willingly followed him in circumstances where there was no attempt to perform functions entrusted by the State to ministers of 'known religions'. In effect such punishment would be an attempt to force the leader (and his followers) to abandon certain beliefs[109].

However, limitations on the ability to fulfil particular requirements of a religion will not be seen as objectionable where these not only serve a legitimate aim but also cannot be considered to amount to the imposition of any pressure on the persons affected by them to abandon that religion. The latter is most likely to be established where there is an element of choice in pursuing the activity subject to the particular restrictions. Thus in *Dahlab v Switzerland*[110] and *Tekin v Turkey*[111] a prohibition on wearing headscarves while respectively teaching in a primary school and undertaking university studies was justified by the need for neutrality. Similarly in *X v United Kingdom*[112] there was no violation of Article 9 when a teacher who was a Muslim was not allowed to attend the Mosque on Friday afternoons because he had classes scheduled at that time; in the Commission's view, he had accepted the position of his own free will and was 'free to resign if and when he found that his teaching obligations conflicted with his religious duties'[113].

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religious and other oaths, see J-F Flauss, 'Les serments d'allégeance à l'épreuve de la Convention européenne des droits de l'homme', (2000) *Rev trim dr h* 266.

[108] 14 December 1999.

[109] See also the observation by the Court in that case (para 52) and also in both *Hasan and Chaush v Bulgaria*, 26 October 2000 and *Metropolitan Church of Bessarabia and Others v Moldova*, 13 December 2001 (paras 78 and 117 respectively) that the State did not need to take measures to ensure that religious communities are brought under a unified leadership. It is equally improbable that a State would be regarded as justified in interfering with the management of associations, notwithstanding that it might be more convenient for the authorities if they did not have to deal with a multitude of bodies. The *Hasan* case concerned a re-designation of the leadership of a religious community, without any criteria or procedural safeguards, at the behest of a breakaway group, which was found to be an interference with the community's freedom of religion that was not prescribed by law. In the *Bessarabia* case a failure to recognise a church was found not to be necessary in a democratic society.

[110] Admissibility Decision, 15 February 2001.

[111] Admissibility Decision, 2 July 2002.

[112] Appl 8160/78, 22 DR 27 (1981).

[113] *Ibid*, at p 360. See the similar conclusion in Appl 24949, *Kontinen v Finland*, 87 DR 68 (1996) which concerned the dismissal of Seventh Day Adventist who had absented himself from work on Saturdays pursuant to the teachings of his church. The Commission emphasised that as an employee he had to accept certain obligations towards his employer and that he had not been dismissed because of religious convictions. Refusal to work was not protected by Article 9; 'Nor has the applicant shown that he was pressured to change his religious views or prevented from manifesting his religion or belief … [and] ... having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post … this [is] an ultimate guarantee of his right to freedom of religion' (p 75). See also Appl 7992/77, *X v United Kingdom*, (1978) 14 DR 234 (in which it was held that an obligation for motorcyclists to wear a safety helmet could also not be regarded as compelling someone to abandon a religion which required them to wear turbans when outdoors) and *Pichon and Sajous v France*, Admissibility Decision, 4 October 2001 (in which there was a refusal to accept that pharmacists could object to being required to dispense medically prescribed products as to do so was contrary to their religious beliefs). Particular importance was attached in the latter case to the existence of other ways in which the applicants could manifest their belief. See also M*artins Casimiro and Cerveira Ferreira v Luxembourg*, Admissibility Decision, 27 April 1999 in which the refusal to exempt a child who was a Seventh Day Adventist from attending school on Saturdays was upheld on the basis that it was a proportionate interference to secure the child's right of instruction.

Although standing for election to parliament (as in the *Buscarini* case) is as much a matter of choice as taking up a particular employment or studies, the situation in the former is presumably to be distinguished on the basis that this is not only an opportunity specifically guaranteed to all citizens by the Convention[114] but no other comparable opportunities existed, as might be the case with employment and education. Nevertheless the existence of such opportunities should not be too readily assumed and it may be that in at least some instances a prohibition on wearing religious dress – where this is considered to be a fundamental requirement of the religion concerned – could have the effect of requiring someone to abandon an aspect of his or her belief in order to secure access to education or employment and would thus be no less objectionable than the oath requirement in *Buscarini*[115]. Certainly this is likely to be the case where the prohibition is quite general in its reach and thus undoubtedly comes within the policies or practices condemned by the United Nations Human Rights Committee in its General Comment[116].

A positive requirement to disregard a requirement of a religion might in some circumstances cause a person to abandon a belief and the unacceptability of such a form of pressure could thus indirectly support a claim for a right of conscientious objection to be recognised as an element of freedom of religion, notwithstanding that the reference to military service in the forced labour provisions in Articles 8(3) and 4(3) of the International Covenant on Civil and Political Rights and the European Convention on Human Rights respectively points to such recognition not being

[114] Protocol 1, Article 3. But note also the importance attached by the Court in *Kalaç v Turkey*, 1 July 1997 to the ability of a soldier, within the bounds imposed by the requirements of military life, to fulfil the obligations which constitute the normal forms through which a Muslim practices his religion. In this case the treatment of assistance to fundamentalists as an infringement of the principle of secularism and a breach of military discipline was not a violation of Article 9.

[115] *Cf* Appl 16278/90 *Karaduman v Turkey*, 74 DR 93 (1993) in which the refusal to issue a degree certificate to a female student when she submitted an identity photograph of herself wearing a Muslim headscarf was found not to interfere with her freedom of religion on the basis that she had chosen to pursue her higher education in a secular university and had thus to comply with its regulations. However the European Commission emphasised that a certificate was not something to be used to manifest religious beliefs but to certify a student's capacities. *Cf* the expression of concern by the Committee on the Rights of the Child in its concluding observations on the initial report of Greece 'at reports of administrative and social pressures being placed on children from religious minorities including, for example, the requirement that a student's secondary school graduation certificate indicate, where this is the case, that the student does not practise the Greek Orthodox religion' (CRC/C/15/Add.170, para 44, 2 April 2002). See also its concern about 'regulations prohibiting the wearing of a headscarf by girls in schools' in its concluding observations on the second periodic report of Tunisia (CRC/C/15/Add.181, para 29, 13 June 2002). It does not appear that importance attached to neutrality in any of the cases where the wearing of headscarfs was prohibited also led to similar prohibitions on the wearing of other religious symbols such as crosses.

[116] See the concern expressed by the United Nations Human Rights Committee in its concluding observations on Tunisia's second periodic report under the International Covenant on Civil and Political Rights about 'regulations prohibiting the wearing of a headscarf by girls in schools … [and its recommendation that it take] all necessary measures to ensure the full implementation of the right to freedom of thought, conscience and religion' (CRC/C/15/Add.181, paras 29 and 30, 13 June 2002). See also the concerns expressed in its concluding observations on Kuwait's initial report 'about other instances of discrimination, in particular the naturalization of Muslim applicants exclusively [and] that the legal consequence of a conversion from Islam to another religion may result in the loss of Kuwaiti nationality'(CCPR/CO/69/KWT, para 18 27 July 2000). In addition see its concern in the concluding observations on the fourth periodic report of Germany 'that membership in certain religious sects as such may in some Länder of the State party disqualify individuals from obtaining employment in the public service, which may in certain circumstances, violate the rights guaranteed in articles 18 and 25 of the Covenant' (CCPR/C/79/Add.73, para 16, 8 November 1996).

obligatory[117]. However, such a claim does not appear to have been explicitly advanced and faith seems may have been reinforced rather than questioned in cases where conscientious objection from military service is not recognised or any exemption is improperly applied[118].

*Other forms of persuasion*

Measures such as physical coercion, penal sanctions and mandatory conditions are not the only ones that will lead to a change of religion being seen as enforced. Such a view can equally be taken of techniques that are more seductive when the particular context in which they are used or the capacity of the person affected makes them inappropriate[119]. As the cases concerned with education and related school activities have indicated[120], deliberate inculcation in children of a set of values against the wishes of parents will generally be unacceptable. The principal focus of the rulings has generally been on the alleged disregard of the duty to take account of the philosophical and religious convictions of parents when implementing the right to education but many of the cases also involved an alleged violation of freedom of religion under Article 9 of the European Convention on Human Rights, underlining the point that this guarantee could also be engaged by any indoctrination against any person's will and not just that of parents in respect of their children[121]. Nor is this an issue of relevance only in respect of those who are particularly vulnerable to influence – whether on account of their youth (as in the case of school children) or weakness resulting from simplicity or trauma – as even the more strong-minded may have a breaking point when it comes to resisting entreaties by others and some protection for them may also be required.

This is especially true of the pressure that can be exerted by religions and their adherents when seeking converts. Indeed concern about this possibility was a factor

[117] See, eg, Appl 2299/64, *Grandrath v Federal Republic of Germany*, 10 *YbECHR* 626 (1966).

[118] See, eg, *Tsirlis and Kouloumpas v Greece*, 29 May 1997.

[119] See also the unspecified possibility envisaged by the Court in *Otto-Preminger-Institut v Austria*, 20 September 1994 that 'in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to *hold* them' (para 47, emphasis added). In that case it was not suggested that this would have been the effect of the film whose prohibition was being contested but concern about respect for the religious feelings of believers was found to be a sufficient justification for such a measure limiting freedom of expression. *Cf Federation Chretiene des Temoins de Jehovah v France*, Admissibility Decision, 6 November 2001 where the applicant organisation was found not to be a victim for the purpose of complaining about criticism of Jehovah's witnesses in a report by a parliamentary committee. See also Appl 8282/78, *Church of Scientology and 128 of its members v Sweden*, 21 DR 109 (1980) – a particular creed or confession could not derive from the concept of freedom of religion a right to be free from criticism but the Commission did 'not exclude the possibility of criticism or 'agitation' against a church or religious group reaching such a level that it might endanger freedom of religion and where a tolerance of such behaviour by the authorities could engage State responsibility' (p 111). However, this was not true of a newspaper report of remarks made in an academic lecture by a professor of theology – stating that 'Scientology is the most untruthful movement there is. It is the cholera of spiritual life. That is how dangerous it is' - that was not in a context that could render them inflammatory.

[120] See 'Initial choice' above.

[121] In Appl 233380/94, *C J, J J and E J v Poland*, 84 DR 46 (1996) a complaint by a father about the religious instruction provided at the school his daughters attended was rejected partly on the basis that he had not been indoctrinated in any way rather than because he was not competent to make such a complaint. The applicant had relied upon Article 9 rather than Protocol 1, Article 2; see 'Initial choice' above.

behind some of the opposition to acceptance of any explicit recognition of the freedom to change as an element in freedom of religion. However, although the ability to seek converts is accepted as part of the guarantee of this freedom[122], it is also clear from case law that it is still open to States to set some boundaries as to means that might be used for this purpose and indeed a failure to set some could entail a violation of the religious freedom of those affected by the techniques being used[123]. This has become particularly clear in the consideration given by the Court to the application of the offence of proselytism in Greek law. This has been defined as involving direct and indirect attempts to intrude on the religious beliefs of a person with a different religious persuasion with the aim of undermining those beliefs

> either by any kind of inducement or promise of an inducement or moral support or moral assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naïvety[124].

The Court, while not endorsing such a definition in the cases coming before it, accepted in *Kokkinakis v Greece* that there was a distinction 'between bearing Christian witness and improper proselytism'[125] so that active efforts to seek converts through evangelism as such were not impermissible.

However, it did not indicate whether it thought that the pressure that led to a conviction for proselytism in the *Kokkinakis* case was improper – a violation of Article 9 being founded only on the fact that the domestic courts had themselves not sufficiently specified what had been the objectionable conduct on which the conviction was based – but it seems improbable that there was any at all since, even though there was no invitation by the woman who was the object of his attentions to discuss the applicant's religion and she claimed not to understand what was being said to her, she was certainly familiar with the doctrine of her own religion and she was not considered by at least one Greek judge to be either of low intellect or particularly naïve. Furthermore, after having urged her to convert and having preached a sermon to her, he left her house after at most fifteen minutes. Moreover the woman subsequently made it clear that she did not feel in any way that her beliefs had been influenced[126]. In other words the encounter does not seem to have gone beyond the mere expression of some ideas; there was neither pressure nor exploitation of a weakness. A different view might have been taken if these ideas had been propounded in a manner more akin to a harangue or the numbers involved might be viewed as intimidating[127]. However, even then the character or status of the individual being addressed should also be an important factor. The situation in *Kokkinakis* might be

[122] As the Court observed in *Kokkinakis v Greece*, 25 May 1993 the ability to manifest one's religion 'includes in principle the right to try to convince one's neighbours, for example, through "teaching", failing which, moreover "freedom to change [one's] religion or belief" enshrined in Article 9, would be likely to remain a dead letter' (para 31).

[123] However, this remains an implicit rather than an explicit element of the reasoning in cases concerned with the admissibility of efforts to control attempts at conversion.

[124] Law No 1363/1938, section 4.

[125] 25 May 1993, para 48.

[126] It is perhaps also significant in this case that the complaint that led to the prosecution came not from the woman visited but her husband. The Court did not address the entitlement of the woman under Article 9 to entertain the possibility of changing her religion.

[127] The applicant had only been accompanied by his wife.

contrasted with an aspect of that considered in *Larissis v Greece*[128] where it was accepted that there could be a need to

> protect lower-ranking airmen from improper pressure applied to him by the applicants in their desire to promulgate their religious beliefs[129]

The impropriety came not so much from the fact that the applicant officers were espousing the merits of their religion to their subordinates and encouraging them to attend their church as from the fact that the hierarchical relationship undoubtedly meant that the latter might feel obliged to listen to the former and to act on their suggestions. This was in marked contrast to the other objects of the applicants' attention, namely, civilians of whom at least one had actually sought them out[130]. None of them could be regarded as under any duty to listen – no actual pressure had been suggested – and so punishment for expounding their beliefs was a violation of their freedom to manifest their religion and not something required to protect the religious autonomy of those to whom they were speaking. This was true even of one of the civilians who was acknowledged to be in a state of distress at the time that she was in contact with the applicants; it was not established that her mental condition was such that she needed special protection from their evangelical activities. Thus, although it is clear that there is a duty to protect persons from undue influence, the existence of the latter is not something that ought to be too readily be assumed; it will be essential to demonstrate that the 'victim' is genuinely at risk either because of a significant dependence on the person attempting to persuade him or her or because of particular vulnerability[131]. In the absence of this there can be no justification for providing protection that is not actually required[132].

Although in *Kokkinakis* the Court referred approvingly to a report of the World Council of Churches describing 'brain-washing' as an improper form of pressure[133], it did not take up the opportunity presented in *Riera Blume and Others v Spain*[134] to explore further what this actually entails. The latter case concerned the treatment of persons who had joined a group which had allegedly brought about a

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[128] 24 February 1998.

[129] *Ibid*, at para 54.

[130] Judge Valticos dissented, however, as he considered that the military rank of the applicants could still have exercised an influence over these persons. See also the willingness of the Court in *Dahlab v Switzerland*, Admissibility Decision, 15 February 2001 to accept that, notwithstanding the difficulty of assessing the impact of symbols on the freedom of conscience and religion of children aged between four and eight, the wearing of a Muslim headscarf by a teacher might have some sort of proselytising effect at an age when children were clearly influenced.

[131] On this question, see also N Lerner, 'Proselytism, Change of Religion and International Human Rights', 12 *Emory ILR* 477 (1998).

[132] See the claim by the government in *Al-Nashif v Bulgaria*, 20 June 2002 that the susceptibility of the Muslim community to influence made it necessary to protect its members against Islamic fundamentalism. The basis for this as a justification for the applicant's deportation was not explored as violations of Articles 5(4) and 8 of the European Convention on Human Rights were established as a result of the failure of the legal regime being used to provide the necessary safeguards against arbitrariness. Interests in property might, however, be a basis to require attempts at persuasion to be halted even if there is no risk of these having any influence. See also *Zaoui v Switzerland*, Admissibility Decision, 18 January 2001, in which the Court found that a prohibition on the spreading in Switzerland of Islamic fundamentalist propaganda linked to the overthrow of the Algerian government was not a violation of the right to freedom of expression.

[133] *Loc cit*, n 125, para 48.

[134] 14 October 1999.

complete change in their behaviour, leading them to break off all ties with their family and friends and inciting them to prostitution and other activities designed to obtain money for it. Certain family members of these persons, with the complicity of the police, had kept them for ten days in a hotel, each of them in a separate room under the permanent supervision of a specially recruited person so that they could undergo a process of 'deprogramming' by a psychologist and a psychiatrist. This detention had no legal basis and thus was a violation of Article 5(1) of the European Convention on Human Rights. However, the Court considered that that detention was also at the core of the applicants' complaints regarding Article 9 of the Convention and that it was not necessary to examine the case further from the perspective of this provision. Yet the object of the detention undoubtedly ought to have been seen as of more significance. Its illegality would necessarily have precluded the possibility that this could have involved a limitation on freedom of religion that was prescribed by law but there are clearly issues still to be addressed as to whether such deprogramming could have either a legitimate aim or could be seen as necessary in a democratic society, as well as the question of whether the methods employed by the group were themselves admissible.

In the light of the rulings in *Kokkinakis* and *Larissis* it seems improbable that such methods would have been considered acceptable in a case complaining about the use by a religion seeking to convert someone. It was not established that this had occurred to the applicants in this case but, given that this was the basis for the enforced deprogramming, it would have been helpful for the Court to have clarified whether it was legitimate to use comparable methods in order to re-establish the status quo ante. In such circumstances they could well be admissible, particularly be analogy with the treatments accepted as a means of helping persons to overcome addiction and mental illness[135]. However, in the absence of 'brainwashing' techniques being shown to have been used by the group to which the applicants had joined, the Court ought to have found the attempt to overcome their will to be a violation of Article 9.

## Conclusion

Notwithstanding the absence of an entirely wholehearted commitment to securing autonomy as regards religion at the global level, it is evident that there are considerable efforts being made at both that level and the regional one to ensure that a person's choice is not unduly constrained. The principal qualification on this concerns the environment in which as choice can be made, with acceptance of certain restrictions on exposure to religions perceived to be dangerous for the health and well-being of the child and that of society in general. However, although there is considerable attention to setting limits on State control in this regard, there is still a failure to see the issue of choice as primarily a matter for the child. This is an undoubted reflection of the manner in which global and regional guarantees are framed but it is an approach that is not necessarily the only one that might be adopted. Nevertheless, despite the enduring hostility in some quarters to an ability to change one's religion, there is not only increasing recognition that this is an entitlement but also a willingness to condemn prohibitions and practical constraints on its exercise. The main problem remains, however, the existence of various pressures on persons to

[135] Eg, see *Herczegfalvy v Austria*, 24 September 1992.

change their religion against their will. Particular attention is being given to addressing explicit efforts in this direction, with improper forms of pressure as much as the use of physical force and penal measures being frequently condemned, but there remains some reluctance to acknowledge the potential effect that some official requirements might have on adherence to one's religion. There is also still a need for guidance on the appropriate response where persons have been forced to change their religion. However, notwithstanding these shortcomings, respect for religious autonomy has become much more assured at the normative level, even if national practice has a some way to go in meeting its requirements.