

Sylvie Langlaude

**The Right of the Child
to Religious Freedom
in International Law**

International Studies in Human Rights

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The Right of the Child to Religious Freedom
in International Law

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The Right of the Child to Religious Freedom in International Law

by

Sylvie Langlaude

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To my Family

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Abbreviations

Am. J. Comp. L.	<i>American Journal of Comparative Law</i>
Am. J. Int'l L.	<i>American Journal of International Law</i>
Ariz. J. Int'l & Comp. L.	<i>Arizona Journal of International and Comparative Law</i>
Ariz. L. Rev.	<i>Arizona Law Review</i>
B.U. L. Rev.	<i>Boston University Law Review</i>
BYU L. Rev.	<i>Brigham Young University Law Review</i>
Cal. L. Rev.	<i>California Law Review</i>
Cal. W. Int'l L.J.	<i>California Western International Law Journal</i>
CLJ	<i>Cambridge Law Journal</i>
CFLQ	<i>Child and Family Law Quarterly</i>
DePaul Law Rev.	<i>DePaul Law Review</i>
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EHRLR	<i>European Human Rights Law Review</i>
EJIL	<i>European Journal of International Law</i>
Emory Int'l L. Rev.	<i>Emory International Law Review</i>
Fam Law	<i>Family Law</i>
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	<i>International and Comparative Law Quarterly</i>
Int'l J. Const. L.	<i>International Journal of Constitutional Law</i>
IR JUR	<i>The Irish Jurist</i>
JR	<i>Judicial Review</i>
L.Q.R.	<i>Law Quarterly Review</i>
MLR	<i>Modern Law Review</i>
McGill L. J.	<i>McGill Law Journal</i>

Abbreviations

NILR	<i>Netherlands International Law Review</i>
NRMs	New Religious Movements
Osgoode Hall L. J.	<i>Osgoode Hall Law Journal</i>
OJLS	<i>Oxford Journal of Legal Studies</i>
OSCE	Organization for Security and Co-operation in Europe
P1-2	Article 2 of Protocol 1 of the ECHR
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
U. Det. Mercy L. Rev.	<i>University of Detroit Mercy Law Review</i>
Web JCLI	<i>Web Journal of Current Legal Issues</i>
Windsor Y. B. Access Just	<i>Windsor Yearbook of Access to Justice</i>
Whittier L. Rev.	<i>Whittier Law Review</i>
Willamette J. of Int'l L. & Disp. Res.	<i>Willamette Journal of International Law & Dispute Resolution</i>

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Foreword

The rights of the child under international law have received considerable attention. Until comparatively recently, the freedom of religion and belief was something of a Cinderella, acknowledged but hidden from view and considered secondary to other, more significant, elements of the human rights framework. If the significance of the freedom of religion and belief is now attaining a higher profile it is true to say that the right of the child to religious freedom remains relatively unexplored. Whilst the rights of parents and legal guardians to have children educated in accordance with their – the parents’ or guardians’ – religious or philosophical convictions is recognised, the idea that the child as a child has distinctive rights to religious liberty (as opposed to a right not to be subjected to religious influence in an onerous or overbearing fashion) has not been the focus of any serious attention.

The publication of this book changes that for good. Children and religion are two extremely emotive subjects yet Sylvie Langlaude does not flinch from tackling her subject head on. The work opens with an exploration of the various understandings of childhood and the place of children to the religious and to their communities. Building on this it then looks at theories of children’s rights, challenging current orthodoxies and developing a paradigm in which children are seen as an integral part of the community or communities into which they are born, valuing them not only for who and what they are but also for what they bring and what they offer – what they *mean* – for the communities of which they are a part. Her approach is intended to place the religious rights of child centre stage in a fashion which takes us beyond the mere application of religious freedom to a child, and which offers a view of religious rights as being more than merely one of the bundle of human rights that children may come to appreciate and engage with as their capacities for rational engagement with competing ideas matures.

The bulk of the book then offers a thoroughgoing presentation and analysis of the manner in which international law has addressed the right of the child to religious freedom. This is a painstaking affair, since there is little direct consideration of this subject by the various human rights bodies and their understandings and approaches have to be carefully teased out from disparate comments and observations. The

Foreword

Human Rights Committee, the Committee on the Rights of the Child, the UN Special Rapporteur and the work of the European Court of Human Rights are looked at in turn. If the conclusions are tentative, this reflects the undeveloped nature of the subject. What is surprising is that so little has been said that bears directly upon the religious rights of children, and that what has been said pays little attention to the religious dimensions of children's perceptions of and desire for religious experience, let alone that of the communities of which they form a part.

There is little doubt that there is an urgent need to think anew about the manner in which human rights law impacts upon children's exposure, experience and expression of religion and belief. This book will be a key text in that thinking.

Malcolm D. Evans

Preface

In the past few years there has been a renewed interest in religion, which includes the relationship between children and religion. In 2006/2007 in the United Kingdom alone, the courts considered the right of a Muslim girl to wear various forms of Islamic dress at school in two cases.¹ In France, as recently as 2004, a law prohibiting children in state schools from wearing clothing and insignia that conspicuously manifest a religious affiliation has generated heated debate.² There is a backcloth of increasing religious conflicts, as illustrated by the ‘war on terror’, and the law on religious freedom is being increasingly discussed academically. However, this book does not seek to be a book on Islam and religious liberty, rather it is a book on the right of the child to religious freedom in international law. This study exposes to critical analysis the current law and aims to produce a definitive statement of what the child’s right to religious freedom is. Children and religion is a topic of analysis and debate. Views differ greatly and include discussions on the nature of rights and the concept of childhood, the role of parents and religious communities, and the duties of the state to the child. Court cases in recent years have dealt with the right to education, the prevention of indoctrination, and the right to wear religious clothing, such as the Islamic headscarf. Other issues include the relationship between children’s rights and parental rights, often over medical treatment, corporal punishment,³ and freedom to join or to leave a religion or religious community. Debates have arisen both at the domestic and the international levels. No answer has been found yet, although it is pressing. An analysis of the child’s right to religious freedom in international law is therefore necessary and current.

1 See *R (on the application of Shabina Begum) v Denbigh High School Governors* [2006] UKHL 15, [2006] 2 WLR 719, House of Lords; *R (on the application of X) v Y High School* [2006] EWHC 298 (Admin).

2 See Chapter 4 on the UN Convention on the Rights of the Child, footnote 56.

3 In the United Kingdom, see *R v Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others* [2005] UKHL 15.

Preface

There are a number of reasons for doing this work. First of all, the right to religious freedom is controversial and matters greatly to children, parents, religious communities and the state. The topic is complicated because it involves theories of rights and the contested concept of childhood. In addition, whereas the individual and the state are the two main actors in traditional international law, examination of the law in this area involves the child, the state, the parents and religious communities. Moreover, it is about religion, which forms the subject-matter of one of the most complex of human rights.

Secondly, a work of this nature and this scale has not been carried out before. Surprisingly, there is no complete analysis of the right of the child to religious freedom in international law, only smaller scale studies. The right of the child has been examined in relation to several international instruments, for example under Article 14 of the UN Convention on the Rights of the Child 1989, or Article 9 and Article 2 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. It has also been explored in domestic jurisdictions (such as France and Italy, or common law countries); or thematically (for example in relation to medical treatment). However, it has not been given general or comprehensive attention. Thirdly, there is currently no clear position in international law, which means that various agencies, bodies, courts and committees have no guidelines to resolve conflicts involving children and religion. This also has repercussions in domestic law, to the extent that international law is implemented through domestic law. Unless necessary, this book avoids gender-specific references to children, who are not referred to as 'he or she' or 'him or her', but as 'they'.

The scope of this book is a study of international law at the United Nations and European levels. There is not very much relevant material from other regional instruments such as the Organization for Security and Co-operation in Europe, or in respect of Africa or America, and most studies on religious freedom focus on the United Nations and Europe. In addition, this book only deals with religious freedom as a human right. It does not consider other approaches, such as the rights of minorities or indigenous groups, or other aspects such as equality or non-discrimination. These areas are less developed in relation to children and religion, and there is less relevant material. Moreover, these angles are largely dependent on the substantive questions discussed in the context of religious freedom, and the right of the child to religious freedom is not typically addressed from these perspectives. These other possibilities would be interesting, but they would obscure the religious freedom aspect and the focus of the study on the child.

Chapter 1 is a sociological examination of what it means for a child to be religious. It argues that children have a religious dimension that the law should not ignore, which is confirmed by studies on the psychology, spirituality and sociology of religious children, and by religions themselves. Chapter 2 creates a theoretical model of the right of the child to religious freedom. It argues that the interest theory is the best theoretical account of the right. The interest of the child is to be nurtured and to have a relationship with parents and religious communities. This means that

the right of the child to religious freedom is the right of every child to be unhindered in their growth as an autonomous religious being in the matrix of parents, religious community and society.

International law cannot be analysed on its own; it needs a framework of reference. Therefore, a body of international legal materials is evaluated against this theoretical model. Chapter 3 considers the work of the Human Rights Committee under Article 18 of the International Covenant on Civil and Political Rights 1966. Chapter 4 considers the work of the UN Committee on the Rights of the Child under Article 14 of the UN Convention on the Rights of the Child. Chapter 5 considers the work of the Special Rapporteur on Freedom of Religion and Belief under the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief 1981. Chapter 6 considers the work of the Strasbourg organs under the European Convention on Human Rights. The concluding chapter pulls this body of international law together. It analyses whether international law matches up with the theoretical model of the child's right to religious freedom established in chapter 2. It argues that the theoretical model in chapter 2 provides a good explanation of the international legal materials and also provides a more satisfactory statement of the right of the child. It finishes by providing a definitive statement of the child's right to religious freedom in international law and attempts to provide some answers to tensions involving children and religion.

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The book generally takes account of information available to me as of 1st April 2007. It has occasionally been possible to take account of later developments. Responsibility for the views expressed, and any errors or omissions, are mine alone.

Part I

Theoretical Model

Chapter 1

Religious Children

Section 1 Introduction

Children have a religious dimension that the law should not be able to ignore. This is confirmed by looking at studies of the psychology, spirituality and sociology of religious children. There are a number of similarities between particular religions regarding the nurture of children, but also some differences. This chapter does not intend to be an exhaustive study but rather to provide a basic framework of what it means for a child to be religious. How children are nurtured matters for children, parents and religious communities, and nurture makes a difference to what it means for them to be religious.

Section 2 General considerations

1 Psychology and spirituality

The psychological study of religion gives an insight into children's thinking on religion. In particular, one stream within the literature – consisting of authors such as Jean Piaget, David Elkind or Ronald Goldman – has argued that faith develops in stages. According to Piaget, conceptions of faith develop in discernible stages which follow a regular sequence related to age.¹ In the early 1960s, Elkind carried out three studies as an example of faith development in order to discover whether there are discernible stages in the development of children's conceptions of their religious denominations and prayer. He argued that every child who is exposed to

1 For example, see J. Piaget, *The Child's Conception of the World* (London: Routledge & Kegan Paul, 1929). In Piaget's view, the year levels at which the stages appear may vary with individual, cultural, or training differences but the sequence which the stages follow is unmodifiable and necessary. Also, see R. Goldman, *Religious Thinking from Childhood to Adolescence* (London: Routledge & Kegan Paul, 1964).

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religious teaching eventually arrives at an understanding of what it means to belong to a particular religious group, that is, a conception of their religious denomination or identity. The question was whether this conception of religious identity was entirely due to the effects of religious instruction or whether its formation was determined to some extent by developmental factors.²

Elkind's three case studies involved Jewish,³ Catholic,⁴ and Protestant (Congregational) children.⁵ Globally, he found that at the first stage, usually ages 5 to 7, children had a global, undifferentiated conception of their religious identity. By the age of 7 to 9, some rather remarkable progress was made in the conceptualisation of religious identity and this identity was seen to be developed through generation and participation. At the third stage, usually ages 10 to 12, children were much more reflective and they had a more abstract conception of their religious denomination. Evidence of religious identity was found in innermost beliefs and convictions and the children referred to initiation, practice and ritual. More specifically, there were slight differences between the three religions. Regarding Jewish children, 5 to 7 year-olds attributed being Jewish to artificialism and moral causality, 7 to 9 year-olds attributed being Jewish to generation and participation, and 10 to 11 year-olds attributed being Jewish to initiation, ritual and participation. Regarding Catholic children, 5 to 7 year-olds had a global, undifferentiated conception of Catholicism, 7 to 10 year-olds considered Catholics as a class of people with characteristic ways of behaving, whilst 11 to 12 year-olds said that being Catholic meant believing in the teachings of the Catholic Church. Finally, for Protestant children, the conceptualisation of the property common to all Protestants and of the compatibility of multiple-class membership developed in three age-related stages, and conceptualisation of means for recognition and attainment of protestant membership showed less clear-cut changes.

In general, the results of the studies were in agreement with Piaget's position. Elkind found that the child's conceptions were constructed, that the process was continuous from early childhood through adolescence, and that mental constructions reflected the interaction of experience and development.⁶ Commentators have noted that 'understanding the continuity of development through childhood and adoles-

2 D. Elkind, *The Child's Reality: Three Developmental Themes* (Hillsdale, New Jersey: Erlbaum, 1978), at 5.

3 D. Elkind, 'The Child's Conception of His Religious Denomination: I. The Jewish child' (1961) 99 *Journal of Genetic Psychology* 209-225.

4 D. Elkind, 'The Child's Conception of His Religious Denomination: II. The Catholic child' (1962) 101 *Journal of Genetic Psychology* 185-193.

5 D. Elkind, 'The Child's Conception of His Religious Denomination: III. The Protestant child' (1963) 103 *Journal of Genetic Psychology* 291-304.

6 D. Elkind, *The Child's Reality: Three Developmental Themes*, at 27.

cence is as vital to understanding spiritual development as it is to recognizing the phases and stages that are also part of this process'.⁷

Asking about 'the common property or properties shared by all members of a particular religious denomination', gave an interesting insight into what children considered it was to be religious. This led to asking what it was to be Jewish, Catholic or Protestant, and how one became so. First-stage children knew that a denominational term pertained to God but they regarded God as the 'Maker' of their denomination as if it were some real object or quality.⁸ For second-stage children, concrete action permeated their thinking and served as a source of answer to all religious questions. This included going to the Temple and to Hebrew School, going to Mass every Sunday and to Catholic School, getting baptised or going to a Protestant church.⁹ For third-stage children religious membership meant more than attending church but signified thought, study, and the observance of a moral and an ethical code. They related more to beliefs and convictions, such as believing in one God and not believing in the New Testament, believing in the truth of the Roman Catholic Church, studying one's religion, receiving communion and first confession, being baptised, worshipping in the Protestant way and following Protestant rules.¹⁰

Elkind concluded that 'the child's reality is different than the adult's'.¹¹ On a psychological level, there are differences between adults and children, and they should not be treated the same. This study is interesting as it points to a different approach to children and religion and it gives an insight into what children consider it is to be religious. This study also points to the fact that, when they are asked, children have some ideas about God, their religious denomination, or participation. Moreover, this clearly shows that being religious has different meanings for children, from the mere idea of God, to participation in religious rituals and actions, and to abstract beliefs and teachings. They related to their denomination in terms of who God was, modes of worship, ways of entry into a denomination, its teaching, and personal beliefs. Elkind also referred to the importance of religious participation and practices:

7 E.C. Roehlkepartain, P.L. Benson, P.E. King and L.M. Wagener, 'Spiritual Development in Childhood and Adolescence: Moving to the Scientific Mainstream' in E.C. Roehlkepartain, P.E. King and L.M. Wagener (eds.), *The Handbook of Spiritual Development in Childhood and Adolescence* (Thousand Oaks, California, USA: Sage Publications, 2005), at 10.

8 D. Elkind, *The Child's Reality: Three Developmental Themes*, at 16.

9 Ibid, at 20. Carol Mumford also argues that with young children the most significant feature of the experience of worship in a religious setting is its atmosphere: C. Mumford, *Young Children and Religion* (London: Edward Arnold, 1979), at 54.

10 D. Elkind, *The Child's Reality: Three Developmental Themes*, at 24.

11 Ibid, at 129.

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What this means, or at least it appears to the writer, is that the child must be shown and not told about religion. He must participate in Church services, perform religious rituals, take part in religious customs, truly celebrate religious holidays and be treated with respect and consideration during such activities. It is the writer's strong conviction that children ought not to be separated from their parents during the Church service but rather that the family worship together. Furthermore, it is an idle and unfounded fantasy to believe that religious emotions will be built within a child who is sent to religious school while his parents avoid Church attendance. For children, religion is first of all feeling and actions are seldom really incorporated within the child if they are not sanctioned by the parents. The Church can provide the form of religious identity but only the parents can give it substance.¹²

Therefore, this study shows that from a psychological point of view, children's capacity for religious beliefs is linked to the parents, religious denomination and religious community.

It is now argued that a lot of the recent work on children has moved from religious concepts to spiritual experience.¹³ Spirituality has many varieties extending beyond formal religion.¹⁴ It is argued that children also build up their own religiosity and worldview, have families and friends, go to school, and interact with these human and other environments.¹⁵ Religion and spirituality are sometimes considered alongside each other. Also, the spiritual movement is faced with a number of similar

12 D. Elkind, 'The Child's Conception of His Religious Identity' (1964) 19 *Lumen Vitae* 635-646, at 646.

13 Personal communication with Donald Ratcliff, 30th August 2005. Spirituality may be given the following definition: 'Spirituality is generally considered to be beliefs, experiences or practices, such as prayer or meditation, that foster a connection with a higher power that transcends daily physical experience, and which may be unrelated to the practices of any religion per se. Religiosity is generally considered to involve following the specific practices, attending services of, or identifying with the beliefs of a specific religion or religious community': L.H. Lippman & J.D. Keith, 'The Demographics of Spirituality Among Youth: International Perspectives' in E.C. Roehlkepartain, P.E. King, L. Wagener and P.L. Benson (eds.), *The Handbook of Spiritual Development in Childhood and Adolescence* (Thousand Oaks, California, USA: Sage Publications, 2005), 109-123, at 110.

14 D. Hay, K.H. Reith & M. Utsch, 'Spiritual Development: Intersections and Divergence With Religious Development' in E.C. Roehlkepartain, P.E. King, L. Wagener and P.L. Benson (eds.), *The Handbook of Spiritual Development in Childhood and Adolescence* (Thousand Oaks, California, USA: Sage Publications, 2005), 46-59, at 48. Examples include new age pursuits, participation in great sport or music festivals, being in the service of life. Similarly religion can be understood more broadly, for instance, as ultimate concern, which may be about nature, its beauty and/or its preservation, improving the lives of the underprivileged.

15 *Ibid*, at 48.

problems to the literature dealing with religion, notably the relationship between children, parents, communities and belonging.¹⁶

In particular, it is suggested that ‘spirituality is not only an individual quest but also a communal experience and phenomenon’.¹⁷ For example, it was said that ‘the significance of religion in adolescent life may be found in their participation in organized religious activities, which provide them with opportunities to interact meaningfully with others within and outside the family’.¹⁸ Moreover, rituals of transition may be the ways by which children gain access to the community.¹⁹ Children’s reactions to prayer, sacraments and rituals include how Jewish children are affected by their central role in opening the Passover meal, how Muslim children experience their obligation to pray to Allah five times a day, or how children in sacramental traditions are affected by first communion or confirmation.²⁰ The process of socialising children into a community involves children, parents and religious community, and parents may have several motivations, including the transmission of deep convic-

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- 16 For example, ‘a tension arises for affiliated liberals between the rights of parents to initiate their children into particular spiritual traditions, or of groups to sustain themselves across the generations, and the right of any children who may be so educated. On the one hand, if the rights of those on the receiving end of such education are only recognized at the age of legal majority (from 18 to 21), then they may by that point have already been denied the possibility of challenging or refusing the value to which they have been exposed. On the other hand, if the right of challenge or refusal is extended at an earlier age (adolescence, the age of reason, or the stage at which they become conscious of choice), then they may not have been sufficiently well exposed for full appreciation of the tradition they are challenging or refusing’: H.A. Alexander & D. Carr, ‘Philosophical Issues in Spiritual Education and Development’ in E.C. Roehlkepartain, P.E. King, L. Wagener and P.L. Benson (eds.), *The Handbook of Spiritual Development in Childhood and Adolescence* (Thousand Oaks, California, USA: Sage Publications, 2005), 73-91, at 81.
- 17 E.C. Roehlkepartain, P.L. Benson, P.E. King and L.M. Wagener, ‘Spiritual Development in Childhood and Adolescence: Moving to the Scientific Mainstream’, at 10.
- 18 S. Verma & M.S. Maria, ‘The Changing Global Context of Adolescent Spirituality’ in E.C. Roehlkepartain, P.E. King, L. Wagener and P.L. Benson (eds.), *The Handbook of Spiritual Development in Childhood and Adolescence* (Thousand Oaks, California, USA: Sage Publications, 2005), 124-136, at 130.
- 19 J.S. Nattis, M.K. Ahluwalia, S.E. Cowie & A.M. Kirkland-Harris, ‘Ethnicity, Culture, and Spiritual Development’ in E.C. Roehlkepartain, P.E. King, L. Wagener and P.L. Benson (eds.), *The Handbook of Spiritual Development in Childhood and Adolescence* (Thousand Oaks, California, USA: Sage Publications, 2005), 283-296, at 289.
- 20 C.J. Boyatzis, D.C. Dollahite & L.D. Marks, ‘The Family as a Context for Religious and Spiritual Development in Children and Youth’ in E.C. Roehlkepartain, P.E. King, L. Wagener and P.L. Benson (eds.), *The Handbook of Spiritual Development in Childhood and Adolescence* (Thousand Oaks, California, USA: Sage Publications, 2005), 297-309, at 301.

tions.²¹ Finally, it is also suggested that the involvement of parent and child in some larger community is essential for the transmission of deep convictions to the next generation.²²

2 Sociology

There is a relative lack of interest in children's religious faith within the sociological literature on religion. For example, in his book on religion in the contemporary world, Alan Aldridge looks at a number of issues that affect religion, such as the definition of religion, the resurgence of fundamentalism, religious identity and meaning, secularisation, and the growth of New Religious Movements (NRMs).²³ By contrast, children do not seem to be a key issue – there are only about ten major references to children in the whole book, most of them referring to bringing children into a religious community.

Another relevant question is whether there is a positive duty on the state to safeguard the child's right to identity as a right to protection of ties that are meaningful to the child.²⁴ Ya'ir Ronen argues that 'preferential protection of the child's ties to a minority culture or to individuals affiliated to that culture is seen as violating the right to identity'.²⁵ This seems to be a very individualistic approach, excessively focused on the individual child. It is sometimes argued that children should be raised in perfect neutrality so that they are able to make a choice when they are of age, and thus this would seem to deny any religious identity to children until they are a certain age.²⁶

However, in many cases, a child will have been brought up in their parents' religion. This is intertwined with the issue of bringing a child into a religious tradition. It is unclear whether the child's religious identity is already formed by the religious community to which their parents belong, or the religious community to which the child belongs, or whether it is formed in accordance to the religion the child chooses to belong to. For example, Lori Leff Mueller contrasts four different views on the acquisition of religious identity: through religious training and indoctrination, through the individual as a more active participant in the process of becoming a

21 Ibid, at 302.

22 Ibid, at 305.

23 A. Aldridge, *Religion in the Contemporary World: A Sociological Introduction* (Cambridge: Polity, 2000).

24 Y. Ronen, 'Redefining the Child's Right to Identity' (2004) 18(2) *International Journal of Law, Policy and the Family* 147-177, at 147.

25 Ibid, at 148.

26 Joel Feinberg, John White and Hugh LaFollette have been proponents, amongst others, of more 'neutrality' in the education of children (see chapter 2, section 3.4: 'Relevance for religious freedom').

religious being, through religious identity, and through one's family and heritage.²⁷ Also, Shauna Van Praagh argues that 'In attempting to accord appropriate respect to the community, then, courts may look for some "true" or essential group identity of the child'.²⁸

In a recent study on children's perspectives on believing and belonging,²⁹ Greg Smith sought to 'explore and examine children's views and perspectives of their own and/or other children's religion, and the extent to which religion contributes to shaping personal identities and social and friendship networks'.³⁰ Overall, children's perspectives on religion related to three dimensions: first, affiliation, identity and belonging; second, the social observance of religion; and third, personal faith and spirituality. The research found that children engaged with religion in different ways; beyond school, the children had devotion times, had religious instruction classes, were introduced to initiation rituals, attended a number of religious activities, followed a particular diet, and participated in festivals.

Affiliation, identity and belonging was defined as encompassing the way people are labelled by themselves and/or others as members of a religion, the affective feelings of identification with a religious tradition, and their willingness or obligation to participate in the rituals and activities associated with that religion.³¹ Muslim children mentioned going to the mosque every day, saying their prayers five times a day,

27 L.L. Mueller, 'Religious Rights of Children: A Gallery of Judicial Visions' (1986) 14 *Review of Law and Social Change* 323-351, at 327-329.

28 S. Van Praagh, 'Religion, Custody, and a Child's Identities' (1997) 35(2) *Osgoode Hall L. J.* 309-378, at 343. She mentions the Canadian case *Avitan v Avitan* (1992), 38 R.F.L. (3d) 382 (Ont. Ct. (Gen. Div.)), where the judge followed the Jewish 'rule' that the child was Jewish because the wife had converted under Orthodox supervision just prior to the birth. Hence, 'Expert evidence from Orthodox rabbis, for example, as to whether a child is truly Jewish may be accepted, and the court thereby may participate in enforcing orthodoxy within a religion in the guise of good-willed acceptance of difference'.

29 G. Smith, *Children's Perspectives on Believing and Belonging* (London: National Children's Bureau for the Joseph Rowntree Foundation, 2005). This small-scale study involved just over 100 children aged 9 to 11, from a wide range of religious backgrounds. It involved three schools in inner city neighbourhoods, in London and the North of England. One school was a voluntary-controlled Anglican school, the second was a voluntary-aided Roman Catholic school, and the third was a local authority school. However, this quantitative study was limited in its coverage, which means that the experience of many children is not considered and that it is not possible to extrapolate to bigger groups of children (page 66). The children in the sample, with few exceptions, were willing to identify themselves as affiliated to a religion. Of 102 children who completed the classroom survey 40% identified themselves and their family as Muslim, 35% as Christian, 10% as Hindu, 4% as Sikh, 3% as other or some mixture and 8% as of no religion (page 14).

30 *Ibid.*, at 2.

31 *Ibid.*, at 23.

or wearing a headscarf. Some Hindu children went to church, and also participated in Hindu rituals at home and at the temple. Sikh children mentioned worship both at the *Gurudwara* and a local Hindu temple and were aware of the identity markers of the Sikh *Khalsa*. The term ‘Christian’ was often used as a default term, regardless of whether children went to church, or actually believed some doctrinal elements of the Christian faith. Some white children said they did not have a religion, yet they said that they believed the basic Christian teaching about God and Jesus Christ; some even attended church activities; on the contrary, black Christian children were often active members of a church with their family.³²

The study defined the social observance of religion as the practice of structured learning, rituals, ceremonies and festivals associated with a religion either in public or within the family.³³ For many children, ‘the social practice of religion may be largely a matter of obligation arising from belonging to a family that was actively involved in a community of faith’.³⁴ Children often referred to activities which they were either expected to do or ‘not allowed’ to do according to the teachings of their religion. They talked about being taken, or being sent to, places of worship, participating in rituals or ceremonies, and attending some classes. The children referred to religious institutions, shared religious practices, stories, beliefs and values which had been transmitted to them by adults; there was also a subjective element when children talked about personal beliefs, ritual practices and spirituality with which they engaged as social actors in their own right, that often drew on religious traditions.³⁵

The study defined personal faith, belief and spirituality as covering the elements of the religious which are located in the mind (or soul) of the individual – beliefs, thoughts, emotions and practices such as private prayer and meditation.³⁶ Some children had a personal faith and accepted the tradition they had been taught, whereas other children had made a personal commitment. Many children also had personal spiritual practices, and prayed or meditated.³⁷

The children were also involved in a number of religious activities. Outside school, family circumstances differed, and this had an impact on religious commitments and practices. For devotion times, there was a difference between very observant Muslim children and other children. Muslim children would spend 15 to 20 hours a week in religious instruction, maybe more, and also had to do homework for

32 Ibid, at 13-18.

33 Ibid, at 23. This also contrasts the argument, considered above, relating to ‘neutrality’ in the education of children.

34 Ibid, at 18.

35 Ibid, at 18-19.

36 Ibid, at 23.

37 Ibid, at 20-22.

the classes at mosque.³⁸ There were also seasonal rituals such as the *Ramadan*, and prayer times which involved ritual washing and wearing suitable Islamic clothes. In contrast, children of other faiths had a much less intense and less time-consuming pattern of devotion. This could include weekly attendance at religious or language classes, and worship/prayer times. Hindu children might also be involved in, or be aware of, older family members who followed a pattern of weekly ritual observance involving partial fasting or abstinence from certain foods or activities such as hair-cuts on specific days.³⁹

For the Christian children who did attend Sunday worship, their experience usually consisted of groups specifically designed for them. Roman Catholic children were likely to attend adult oriented parish mass in which some children played a significant role as ‘servers’ dressed in special robes. Hindu and Sikh children all seemed familiar with religious activities at temples and *Gurudwaras*, religious rituals, lectures from priests and gatherings at festivals and weddings which often included communal meals. However most of them did not attend a religious service as regularly as the Muslims or churchgoing Christians.⁴⁰

Many children also went to clubs run by religious organisations, regular organised leisure activities or clubs in the evenings or at weekends. Some activities were not overtly religious but were held in places of worship, while activities with a clear religious content included church choirs or music groups, or midweek fun clubs run by evangelical churches.⁴¹

Children also spent a part of their time at religious instruction classes. Children from Protestant or evangelical communities generally received very low-key religious instruction: they met in children’s groups running alongside Sunday worship for adults, and these groups included Bible stories, drawing and singing. The Roman Catholic pattern was commonly that of short-term religious instruction for a period of a month or two prior to initiation via first communion. Hindu children reported that they attended heritage language classes (usually in Gujarati) during the weekend at a local temple or Hindu centre. Almost all Muslim children accepted that a pattern of intensive and serious religious and moral instruction within a strict learning environment was part of their Islamic identity, and many of them accepted and owned what they had been taught as true and worthy of obedience.⁴²

Many children mentioned initiation rites and had been either personally involved or been spectators. For Christian children, this included christenings, baptisms or first communions.⁴³

38 Ibid, at 46.

39 Ibid, at 48.

40 Ibid, at 50-51.

41 Ibid, at 52.

42 Ibid, at 53-58.

43 Ibid, at 58.

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Festivals were also very important in children's lives, and many had a common experience of these. However, only a minority of children, mostly Muslims, were able to talk about the religious significance of festivals. Some children referred to cross-faith celebration of festivals, and many children clearly referred to celebrations at home or at a place of worship, such as Christmas and Easter.⁴⁴

Finally, food was an important aspect of everyday domestic and social life, and children recognised the religious significance and social consequences of food regulations.⁴⁵

All of this confirms that there are very good reasons to link children and religious communities, and there are very few 'religious' children who do not belong to a religious community. Thus, a more 'essentialist' conception of religious freedom could be more appropriate and relevant for children. For example, the German Federal Constitutional Court stated in a 1972 decision that religious freedom guarantees more than just the freedom to believe or not to believe – it also guarantees the right to orient one's entire behaviour to the tenets of one's faith and to act according to one's convictions.⁴⁶

In addition, the notion of identity interests 'generally refers to a child's belonging to a community or communities. The significance of identity interests is premised on the idea that children develop a sense of identity as they grow and that connections with individuals and groups inform that identity'.⁴⁷ Moreover, 'children themselves may have an interest in the sustenance of the communities to which they belong',⁴⁸ and they may have a particular relationship to that community, especially through participation in worship rituals, customs and general community activities.⁴⁹ As it is sometimes posited, religious identity can derive from one's family and heritage. Religious belief and affiliation 'pass to a child through participation in the religious life of her parents and siblings – through experiencing the holidays, rituals, and lifestyle associated with the religion of her family'.⁵⁰

However, two sets of concern have been expressed regarding the child's belonging to a religious community. First, there is the question of whether children ought to be protected from the influence of religious communities in some circumstances. For example, 'there has been concern whether the public authorities are under an obligation to protect or shield individuals, in particular minors, from the activities

44 Ibid, at 59.

45 Ibid, at 61.

46 Federal Constitutional Court (BVerfG), 11th April 1972, 2 BvR 75/71; see A.F. von Campenhausen, 'The German Headscarf Debate' [2004] *BYU L. Rev.* 665-699, at 677-678 (footnote 62).

47 S. Van Praagh, 'Religion, Custody, and a Child's Identities', at 357.

48 S. Van Praagh, 'Faith, Belonging, and the Protection of "Our" Children' (1997) 17 *Windsor Y. B. Access Just* 154-203, at 169.

49 Ibid, at 175.

50 L.L. Mueller, 'Religious Rights of Children: A Gallery of Judicial Visions', at 327.

and influence of specific ideologies and beliefs, or otherwise'.⁵¹ Therefore, the nature of the religious community or some religious practices prompts the question whether children ought to be protected and the children's freedom of religious manifestation restricted in certain circumstances, which involves a balancing with the rights of religious communities. Second, enclosing children in a given religious community may preclude the possibility of joining another one. If secular courts impose on children a religious identity, a lifestyle through a monolithic definition, and 'label' children as definitively belonging to one religious community, the children's identity interests may not be respected.⁵²

Section 3 **Specific religions**

1 Christianity

There are a number of common themes that are characteristic of bringing children into the Christian tradition. Generally, they involve church attendance, church-related groups outside school hours (such as Sunday school or mid-week groups), religious education classes, and the nurture of the child into a Christian family (notably through family life), initiation rituals and ceremonies (such as baptism, communion and confirmation).

Being brought up in a Christian family is very important. In a Word of Life community, family life was put forward as very important. This included dedication of the babies to the church or congregation, baptism in their teens, family time when parents would share songs, hymns, prayers and Bible stories with their children.⁵³ It may also be that children accepted the faith at an early age but also realised that witnessing to others was a central act of their faith and therefore started to practise very early.⁵⁴ In another study, some children were interviewed in their evangelical Christian school.⁵⁵ They all emphasised 'commitment, belonging and belief as fundamental to being a Christian and of great importance to them personally'.⁵⁶ What

51 T. Marauhn, 'Status, Rights and Obligations of Religious Communities in a Human Rights Context: A European Perspective' (2000) 34(4) *Israel Law Review* 600-644, at 634.

52 S. Van Praagh, 'Religion, Custody, and a Child's Identities', at 364-365.

53 S. Coleman, 'God's Children: Physical and Spiritual Growth Among Evangelical Christians' in S.J. Palmer & C.E. Hardman (eds.), *Children in New Religions* (New Brunswick: Rutgers University Press, 1999), 71-87, at 76.

54 *Ibid.*, at 83.

55 M. Fletcher and C. Ota, 'Religious Identity and Children's Worldviews' in C. Erricker, J. Erricker, C. Ota, D. Sullivan & M. Fletcher (eds.), *The Education of the Whole Child* (Trowbridge: Redwood Books, 1997), 114-131.

56 *Ibid.*, at 123.

also appeared important was the fundamental role of the family in the nurturing of a religious identity. Interviews showed the role of parents in living out and promoting the values of commitment, belonging and belief. Mandy Fletcher and Cathy Ota pointed out that the nurturing of these children empowered them to feel secure and confident in their identity. They also noted that, to a lesser degree, both the church community and school also contributed to the children's sense of Christian identity.⁵⁷ For the Roman Catholic Church itself, it is very important that children are brought up both in their families and in the church. It emphasises the importance of the family, not just as the sum of its individual members but as a community of parents and children.⁵⁸ The Church emphatically highlights that each child is precious,⁵⁹ and the fact that childhood is not merely a time of life preceding adulthood but an essential period of human life. Children have a place within their families and the Church repeats very strongly that the education of children is a fundamental right and duty of parents.⁶⁰ In particular, children have the right to be educated in the faith,⁶¹ and parents must be free to choose for their children a particular kind or religious and moral education consonant with their own convictions.⁶² In Protestant churches, the situation is similar and there is a strong emphasis on the family and the religious community. The family is generally seen as a vital institution and the best setting to bring up children. All traditions emphasise that children are important and precious. Similarly, in the Coptic Orthodox Church, the family is seen as 'a cradle for the child and childhood is usually described with images of close-knit ties between family members'.⁶³

57 Ibid, at 127.

58 Pope John Paul II, *Letter to Families*, Year of the Family (2nd February 1994), paragraph 17.

59 For example the church celebrates children as a 'splendid gift of God's goodness' and as the 'springtime of the family and society': Pontifical Council for the Family, Jubilee of Families, *Themes for Reflection and Dialogue in Preparation for the Third World Meeting of the Holy Father with Families – Children, Springtime of the Family and Society* (Rome, 14th-15th October 2000), at presentation and no. 1.

60 Pope Paul VI, Declaration on Christian Education *Gravissimum Educationis* (28th October 1965), at paragraph 3: 'parents must be acknowledged as the first and foremost educators of their children. Their role as educators is so decisive that scarcely anything can compensate for their failure in it'.

61 Pontifical Council for the Family, Jubilee of Families, *Themes for Reflection and Dialogue in Preparation for the Third World Meeting of the Holy Father with Families – Children, Springtime of the Family and Society*, at 12.

62 Pope John Paul II, *Letter to Families*, at paragraph 16.

63 N. Stene, 'Becoming a Copt: The Integration of Coptic Children into the Church Community' in N. van Doorn-Harder & K. Vogt (eds.), *Between Desert and City: The Coptic Orthodox Church Today* (Instituttet for sammenlignende kulturforskning (Institute for Comparative Research in Human Culture), Oslo: Novus Forlag, 1997), at 204.

In Mairi Levitt's study of children aged 10 or 11 in Cornwall, England,⁶⁴ the children's main religious activities included attendance at church, other religious groups and meetings such as youth groups or Sunday School, being members of compulsory religious education classes and daily religious assemblies in the Church school. In this study, the church groups were divided between the Anglican church, the Wesley Methodist chapel, the Roman Catholic Church, and a number of smaller denominations with some diversity in activities. For example, the Anglican Church had quite a few different groups for the children during the Sunday morning service whereas older teenagers had a group on a Sunday evening and a monthly service. Young children were more involved than the older ones, who enjoyed being in their group but were reluctant to go to church.⁶⁵ Similarly the Wesley Methodists had a number of groups, some of which were open to all, and there were an important number of children attending whose parents were not churchgoers. In one Anglican family, the daughter was opposed to the religious practice imposed by her mother, which was to attend church and Sunday School. However, the girl seemed to reject the 'boring' practice of Christianity rather than the beliefs. This may indicate that she associated Christianity with religious practices such as church and Sunday School and thus to being religious.⁶⁶ In another family, where the mother had been brought up as a Catholic but was now going to a local Anglican Church, her children sometimes went to church with her and her daughter enjoyed serving at church.⁶⁷ In the case of a 'born again' Christian mother and her family, the activities of the son when he was young very much revolved around religious practices, about which he expressed enthusiasm. This involved going to church, Sunday School, compulsory religious education classes and daily religious assemblies in the Church school.⁶⁸ In another study of a Word of Life community, there were a number of children and youth groups, for different ages, meeting in church or outside, which were designed to encourage children in their faith and understanding. Teaching and the inculcation of beliefs were not neglected and this group aimed to motivate children to think about spiritual or theological issues in concrete terms.⁶⁹

64 M.A.S. Levitt, *Nice When They Are Young': Contemporary Christianity in Families and Schools* (Aldershot: Avebury/Ashgate, 1996). She studied one area of Cornwall and the attitudes and beliefs of a group of families living there who had a child age 10 or 11, in the final year of a local primary school where the study began. All the families were Christian or nominally Christian, not through special selection but reflecting the local population.

65 Ibid, at 66-68.

66 Ibid, at 131-133.

67 Ibid, at 133-135.

68 Ibid, at 138-140.

69 S. Coleman, 'God's Children: Physical and Spiritual Growth Among Evangelical Christians', at 84.

The various ceremonies and rituals of the church are also important. Aldridge has considered the practices of the Roman Catholic Church from a sociological point of view. He referred to the Church's sacraments that were transmitted as an inheritance from 'generation to generation';⁷⁰ he also pointed out that it might be symbolically appropriate that the Church administers sacraments not just to adults but to infants and children as well.⁷¹ Roman Catholics used to be discouraged from marrying outside the faith and the non-Roman Catholic spouse was usually required to state in writing that their children would be baptised as Catholics and brought up in the Catholic faith.⁷² The main rituals of the Roman Catholic Church, particularly baptism, first communion and confirmation, are considered an extremely important way to integrate children in the Church.⁷³ The Church also considers whether the child has some degree of spiritual discernment or discretion of reason. It is said that a child's intelligence develops gradually and catechesis must therefore be adapted to the child's mental development. For example, Pope Pius X dealt with the question of first communion and first confession, looking at the readiness of the child to receive these sacraments.⁷⁴ In defining the age of discretion, Pius X did so largely on the basis of understanding, the intuitions and even the desires of the child themselves, and said that the decision was to lie with the confessor of the child.⁷⁵ In Protestant churches, children are also seen as an integral part of the church, notably through rituals such as baptism, communion or confirmation. Otherwise, children simply participate in the life of the church, which can include worship, learning, fellowship, and so on.⁷⁶ The Coptic Orthodox Church also emphasises rituals of initia-

70 A. Aldridge, *Religion in the Contemporary World: A Sociological Introduction*, at 33.

71 *Ibid*, at 34.

72 *Ibid*, at 196.

73 In medieval England, there were rites of passage such as baptism, communion and confirmation (albeit with perhaps less emphasis than in modern times), children played a role in the liturgy of the church, and religion was also assimilated informally at home, with a focus sometimes centred on family meals and the saying of grace before and after food: see N. Orme, 'Children and the Church in Medieval England' (1994) 45(4) *Journal of Ecclesiastical History* 563-587.

74 Sacred Congregation for the Sacraments, *Decree Quam Singulari* (8th August 1910).

75 Cardinal John Wright, Congregation for the Clergy, *First Confession and First Communion* (7th December 1980).

76 For example, see the *Charter for Children in the Church*, published by the United Reformed Church in 1990, available at <http://www.unitedreformedchurch.co.uk/urchin/charter_children_church.htm> (last visited 17th April 2007). The elements of the Charter are the following: Children are equal partners in the life of the church, the full diet of Christian worship is for children as well as adults, learning is for the whole church, adults and children, fellowship is for all –each belonging to the rest, service is for children to give as well as adults, the call to evangelism comes to all God's people of whatever age, the Holy Spirit speaks powerfully to children as well as adults, the discovery and development of gifts in children and adults is a key function of the church, as

tion and rituals of protection. Rituals performed for children by their parents or the church include the seventh day feast, prayers over the wash-basin, circumcision and a tattooed cross. Rituals where children are themselves active participants include a variety of rituals that ensure their general socialisation as Copts. The pattern is that, whenever adults carry out ritual activities, children are there and participate as family members. These rituals include the veneration of saints, communion, the liturgy with its set prayers, reciting the Creed, and signing oneself with the cross.⁷⁷

Religion in school also plays an important part in children's lives. In Levitt's study, this covered going to a church school, compulsory religious education classes and daily religious assemblies in the church school. Some children who did not go to church even agreed that it was important to have religious assemblies.⁷⁸ However, she argued that religious attitudes, including those with respect to religious education, were more clearly related to church attendance and gender than to attendance at a church school.⁷⁹ In the local church school, the syllabus for religious education was prepared by the headmaster, based on the Bible, and its basic aim was to give children some understanding of the Christian faith. The headmaster also outlined the first aim of the daily assemblies as learning to worship a living God through praise and prayer. In contrast, the teacher responsible for the religious education section at the county junior school summed up the aim of religious education as 'education for life', and there was a daily 'non-denominational' religious assembly.⁸⁰

These various studies on Christian communities show that the recurring elements are to be brought up in a Christian family and to belong to a church community. However, Levitt's study also showed that as children grew older, there was a decline in attendance at church, Sunday School or other groups.⁸¹

2 Islam

There are a number of common themes that are characteristic of bringing children into the Muslim tradition. Generally, they involve rituals and practices (such as dress codes, prayers and diet), a common language, religious instruction, nurture and socialisation into a Muslim family, and a number of initiation rituals and ceremonies. Jochen Bauer made some general findings relating to languages, identity, prayer, the

a church community we must learn to do only those things in separate groups which we cannot in all conscience do together, the concept of priesthood of all believers includes children.

77 N. Stene, 'Becoming a Copt: The Integration of Coptic Children into the Church Community', at 191-199.

78 M.A.S. Levitt, *'Nice When They Are Young': Contemporary Christianity in Families and Schools*, at 113.

79 Ibid, at 119.

80 Ibid, at 93.

81 Ibid, at 100-101.

Qur'an, *madrassah* (a supplementary afternoon school), mosque, and eschatology.⁸² Sissel Østberg also found that the main aspects of Islamic nurture were elements of the purity-impurity complex (i.e. prayer, dress codes, food and fasting), the role of festivals, the place of the mosque and religious education, the role of the family, and the children's own sense of nurture and identity.⁸³

The languages used by the children reflect their position between the different cultures.⁸⁴ Bauer found that they used English, Urdu or Punjabi, depending on which language they felt most comfortable speaking, the families' degree of integration into British life, the patriarchal structure of their families, or the family member to which they were talking.⁸⁵ On the issue of identity, there was a mixture between British/English, Pakistani, Muslim, with no clear-cut allegiance to only one of them.⁸⁶

Prayers are an everyday occurrence for most Muslim children, and Bauer found that it was so natural a part of their life that they hardly mentioned them.⁸⁷ Most children were in families who prayed quite regularly. There was a great difference between the sexes. Boys usually started praying at the age of eight, and prayed either with their parents or alone, and would usually pray more during the festivals of *Id-ul-fitr* (the festival of breaking the fast) and during the fast of *Ramadan*.⁸⁸ Østberg found that prayer was something familiar for all respondent children, 'a taken-for-granted part of their lifeworld, especially connected to Qur'anic teachings and the celebration of *Ramadan*'.⁸⁹ The aim was to establish a relationship with God, but children had a relaxed attitude to prayer, and did not worry much about their lack of practice or skills. Children knew that praying 'was part of what was expected of you as a grown up', and there was a connection with the children's management of identity.⁹⁰

Other religious practices include dress codes. Children knew what they were required to do and observed the prescriptions. Dress codes were a marker and constructor of identity, and there was a link between ritual purity, formal instruction

82 J. Bauer, *Muslim Children in Birmingham: Interviews with Muslim Children* (Warwick Religions and Education Research Unit Occasional Papers 1, University of Warwick: Institute of Education, 1997).

83 S. Østberg, *Pakistani Children in Norway: Islamic Nurture in a Secular Context* (Monograph Series, Leeds: University of Leeds, Community Religions Project, 2003). For the methodology, see chapter 2 of her book.

84 J. Bauer, *Muslim Children in Birmingham: Interviews with Muslim Children*, at 3.

85 *Ibid*, at 3.

86 *Ibid*, at 4.

87 *Ibid*.

88 *Ibid*, at 5.

89 S. Østberg, *Pakistani Children in Norway: Islamic Nurture in a Secular Context*, at 118.

90 *Ibid*, at 145.

and religious traditions.⁹¹ Aldridge refers to the ‘headscarf affair’, when three young Muslim girls were expelled from a public secondary school in France in October 1989;⁹² he draws a link between the French educational system and assimilation, and between the fight against racism and accusations of fundamentalism and obscurantism. Prior to expulsion, the practice in the school was that headscarves were considered acceptable in school, and girls would drop them to their shoulders when entering the classroom. Three girls insisted, in October 1989, to wear their headscarves during class. They were initially suspended from school, followed by negotiations between school officials, the girls’ parents, Islamic religious leaders, Islamic organisations and representatives of the immigrant communities. One of the girls was convinced to revert to previous practice, but the two other girls were only willing to do so after the intervention of the King of Morocco.⁹³ On 25th October 1989, the Minister of Education sought an *avis* (an opinion) from the Conseil d’Etat (the highest court of the administrative order). The Conseil d’Etat, stated that the wearing of signs by which children intended to demonstrate their belonging to a religion was not in itself incompatible with the principle of secularism, in so far as it constituted the exercise of the freedom of expression and of demonstration of religious belief. The Conseil d’Etat also said that the right could be restricted under some circumstances.⁹⁴ The *avis* was followed by a *circulaire* (a directive) of the Ministry of Education in December 1989, and another *circulaire* in September 1994. The *avis* and the *circulaires* did not bring an end to the problem, and schools still found it hard to interpret and apply the guidelines. In the 1990s and early 2000s, administrative courts faced a number of challenges of expulsions of girls from school for wearing the headscarf.⁹⁵

Similarly, food and fasting are inseparable from other aspects of the lifeworld of children. Østberg stated that children knew that the food regulations were Muslim

91 Ibid, at 127.

92 A. Aldridge, *Religion in the Contemporary World: A Sociological Introduction*, at 133-134.

93 D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford: Hart, 2006), at 66-67.

94 Conseil d’Etat, Avis n° 346.893, 27th November 1989.

95 The literature on the headscarf issue in France is extensive. For example, see S. Poulter, ‘Muslim Headscarves in School: Contrasting Legal Approaches in England and France’ (1997) 17(1) OJLS 43-74; S. Lherbier-Lévy, *Le Port de Signes d’Appartenance Religieuse à l’Ecole*, Mémoire présenté sous la direction de Monsieur le professeur Francis Messner, DEA de Droit européen comparé des religions, Université Robert Schuman de Strasbourg, Septembre 2001, available at <<http://www.droitdesreligions.net>>; E.T. Beller, ‘The Headscarf Affair: The Conseil d’Etat on the Role of Religion and Culture in French Society’ (2004) 39(4) *Texas International Law Journal* 581-624; D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe*, Chapter 2.

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rituals, they sometimes knew the meaning behind them, and it was part of their informal socialisation.⁹⁶

Islamic and non-Islamic festivals play a very important role in children's lives. Østberg stressed the importance of the festival of *Ramadan*, with the fast and the celebration of *Id-ul-fitr*,⁹⁷ for the Islamic community, families and children. For Pakistani children in Norway the festival had at least two faces: the fact that they were increasingly visible in mainstream non-Islamic society and strongly contributed to children's social belonging within the Pakistani Community, and that the children's inner religious life was strengthened.⁹⁸ Both children and parents tended to pray and read the Qur'an more often during *Ramadan*, some men and boys went to the mosque while wives and daughters stayed and prayed at home.⁹⁹ Østberg pointed out that the celebration of *Id-ul-fitr* was a significant factor for both boys and girls, to make a Pakistani Muslim identity different from a Norwegian identity,¹⁰⁰ and there were several elements to the festival.¹⁰¹

Reciting the Qur'an plays a very important part in the daily life of most children. Marie Parker-Jenkins argued:

Based around the concept of the ummah [Islamic community], Muslims aspire to keep themselves and their youth faithful through supplementary schools or madrassahs'... Education begins in the home before formal education in school and parents see their role in this matter as one of duty and privilege to ensure their children develop an Islamic consciousness. The demands of imams, and parents to schools are seen as a crucial attempt to ensure that their religious identity is not undermined and that Islamic values are fostered among the young.¹⁰²

96 S. Østberg, *Pakistani Children in Norway: Islamic Nurture in a Secular Context*, at 134.

97 *Id-ul-fitr* is not part of *Ramadan*, but the first day of the next month, *Shawwal*: S. Østberg, 'Islamic Festivals and Non-Islamic Celebrations in the Lifeworld of Pakistani Children in Norway' in H-G. Heimbrock, C.T. Scheilke and P. Schreiner (eds.), *Towards Religious Competence: Diversity as a Challenge for Education in Europe* (Münster: LIT Verlag, 2001), 103-116, at 116 (footnote 2).

98 Ibid, at 105.

99 Ibid, at 105-107.

100 Ibid, at 108.

101 Taking a bath (*ghusl*) in the morning, praying at home (women) or in the mosque (men), sending and receiving *Id*-cards, having new clothes and, for the girls, having hands decorated with *henna*, eating special food, receiving presents and having a party.

102 M. Parker-Jenkins, *Children of Islam: A Teacher's Guide to Meeting the Needs of Muslim Pupils* (Stoke-on-Trent: Trentham Books, 1995), at 35.

Bauer found that all the children who went to a *madrassah* were able to recite at least part of the Qur'an in Arabic and most of them were proud of it.¹⁰³ The *madrassah* was of great importance to the children's Islamic education, and some children said that the mosque/*madrassah* had a greater influence than their parents in shaping them as Muslims.¹⁰⁴ For some children going to the mosque had become a habit, a way of life, a part of their religious and ethnic identity.¹⁰⁵ Many children attended a Qur'an class, learned to read the alphabet in Arabic and learned to recite the Qur'an by heart. Whether children learned at home or in a class, being taught or having read something of the Qur'an contributed to a cultural-religious belonging in the sense of being a marker of belonging to the Muslim community.¹⁰⁶ Moreover, learning to read the Qur'an may be understood as an on-going initiation ritual aimed at making the child a full member of the community and perhaps reaching the level of becoming a *hafiz* (a person who has learned the Qur'an by heart).¹⁰⁷ According to Parker-Jenkins, it is estimated that approximately 90% of all Muslim children between the ages of 5 and 12 attend *madrassahs* at some time in their childhood. Therefore, 'in addition to attending compulsory education in the day, many Muslim children will be learning Arabic in order to read and understand the Qur'an and Islamic principles'.¹⁰⁸

The nurture of Muslim children is also extremely important. For example, Østberg's study was to 'detect patterns of transmission of Islam, and to understand what Islamic nurture *means* to Pakistani children in Oslo with regard to the management of their social and cultural identities'.¹⁰⁹ In her conclusion she stated that 'religious and cultural traditions were mainly transmitted informally through parents and other significant others at home and in the mosque. Norwegian Pakistani children were socialised into becoming Muslims and Pakistanis and they did not distinguish clearly between the two identities.¹¹⁰ Likewise they were socialised into being Norwegian through formal schooling, media influences and inter-action with non-Muslim friends'.¹¹¹ Norwegian Pakistani children had an 'integrated plural identity',¹¹² and

103 J. Bauer, *Muslim Children in Birmingham: Interviews with Muslim Children*, at 6.

104 Ibid.

105 S. Østberg, *Pakistani Children in Norway: Islamic Nurture in a Secular Context*, at 180.

106 Ibid, at 186.

107 Ibid, at 187.

108 M. Parker-Jenkins, *Children of Islam: A Teacher's Guide to Meeting the Needs of Muslim Pupils*, at 30.

109 S. Østberg, *Pakistani Children in Norway: Islamic Nurture in a Secular Context*, at 22 (emphasis in the text).

110 There are interesting similarities between these Norwegian children and Muslim children in Britain in Bauer's study.

111 Ibid, at 223.

112 Ibid, at 218.

belonged to a complexity of social groups.¹¹³ During a Muslim-Christian colloquium on the rights and education of children in Islam and Christianity, Prof. Dr. Abdul Aziz Khayyat talked about the rights and education of the pre-school child as including: announcement of prayer time to the child immediately after birth, shaving the newborn's head on the 7th day after birth, giving a name to the newborn, slaughtering an animal on behalf of the newborn, and circumcising the male child.¹¹⁴ Parents have the duty, responsibility and privilege, with the entire community, to bring up their children in accordance with Islamic principles.¹¹⁵ This includes teaching children morality, responsibility and accountability. Children, especially beyond the age of puberty, are also affected by the five pillars of Islam, perhaps with the exception of compulsory charitable contribution.¹¹⁶

At school, Parker-Jenkins identified the following religious and cultural needs: dress codes, school policy of hair for males and females, physical education dress, school diet, collective acts of worship, prayer room provision, fasting periods, school activities during fasting, religious holidays and Friday prayers.¹¹⁷

In conclusion, it appears that traditions, whether cultural or religious, are transmitted at home through parents, and in the mosque. Children do not necessarily distinguish between multiple identities, and Islamic practice is part of their life.

3 Hinduism

There are a number of common themes that are characteristic of bringing children into the Hindu tradition. Generally, they involve being born into a particular family, religious upbringing, identity and perceiving oneself as being Hindu, religious practices, such as prayers or worship, festivals and initiation ceremonies, food diets, and formal classes.

Being born into a Hindu family remains extremely important. It is suggested that the young ones grow up absorbing, particularly in traditional societies, the value system of their families, and thus become automatically an adherent of the religion of their ancestors, elders and peers. There is no formal point of entry into the group, and young Hindus need not formally pledge and confirm their allegiance to Hindu-

113 Ibid, at 209.

114 A.A. Khayyat, 'The Pre-School Child: Rights and Education', *The Rights and Education of Children in Islam and Christianity*, Acts of a Muslim-Christian Colloquium organised jointly by the Pontifical Council for Interreligious dialogue (Vatican City) and Royal Academy for Islamic Civilisation Research Al Albait Foundation (Amman), held in Amman, Jordan (13th-15th December 1990), at 74-75.

115 M. Parker-Jenkins, *Children of Islam: A Teacher's Guide to Meeting the Needs of Muslim Pupils*, at 31.

116 Ibid, at 25.

117 Ibid, at 59-67 and 118.

ism, which makes it fairly easy to remain Hindu.¹¹⁸ This membership may involve a number of religious beliefs and religious practices, sometimes linked to religious communities. For many Hindu parents in India, the religious upbringing of children is a natural and partly unconscious activity. The home is important, as well as activities such as temple worship and festivals, street processions and religious dramas associated with the latter.¹¹⁹ Most parents referred to language, vegetarianism and family values.¹²⁰ The perceptions of being Hindu vary and several factors appear to be important, including languages and castes.

The identity of Hindu children is defined by firstly, belonging to one particular family and the activities carried out inside the home and secondly, by events and rituals outside the home. The role of the family is crucial, and there are important family structures. There are also specific gender-roles for boys and girls. The degree of involvement in daily worship, whether at the home shrine or in temple activities, is not determined by gender. However, some ritual roles for boys and girls are gender-specific.¹²¹ For example, two life cycle rites single out boys, the first being the shaving of a boy's hitherto uncut hair and the second being his investiture (if he is from certain castes) with the sacred thread (the *Janya* ceremony). Girls are indispensable to certain religious ceremonies, although there are no life cycle rites specific to them.¹²²

What Hindus eat, and their ideas about food, is a significant strand in Hindu tradition. Robert Jackson and Eleanor Nesbitt pointed out that this includes ideas concerning the purity of food, its classification, and one's attitude to diet and meat-eating. Moreover, there is a relationship between diet and the festival calendar. For example, children were accustomed to periodic abstinence to particular foods, whether the families were vegetarian or not. The children were also familiar with the foods that marked particular festivals, or with instances when some family members would observe stricter dietary rules on one day of the week or for a certain period. They found that the 'degree to which children were involved varied but they all accepted as a natural part of life that at certain times someone in the family would

118 W. Menski, 'A. Hinduism' in P. Morgan & C. Lawton (eds.), *Ethical Issues in Six Religious Traditions* (Edinburgh: Edinburgh University Press, 1996), 1-54, at 1-2.

119 R. Jackson & E. Nesbitt, *Hindu Children in Britain* (Stoke-on-Trent: Trentham Books, 1993), at 9. It is worth mentioning that about 70% of Britain's Hindus have family roots in the Indian state of Gujarat and that about 15% (by Kim Knott's calculation, Professor of Religious Studies at the University of Leeds) have roots in Punjab, with other groups e.g. Bengalis, Tamils and Maharashtrians accounting for smaller percentages. Actually, the influx of Tamils in the 1990s will probably have changed the percentages (personal communication with Eleanor Nesbitt, 12th February 2006).

120 *Ibid.*, at 180.

121 *Ibid.*, at 55.

122 *Ibid.*, at 48-49. By Punjabis as well as Gujaratis, young girls are regarded as pure and as embodiments of the goddess and so to be honoured as potential mothers.

be abstaining from particular food neither for medical reasons nor to lose weight but as religious act'.¹²³ Jackson and Nesbitt added that 'although many of the children sometimes ate Western and Indian non-vegetarian food, the majority nevertheless perceived their diet, with an emphasis on vegetarianism, as a key feature of their religion. They shared a common awareness of an association between their religion and patterns of food consumption and avoidance'.¹²⁴ For example, a 12-year-old Gujarati girl said: 'If you're Hindu being religious or not shows in your food, what you cook, not in [not] cutting your hair'. Nesbitt pointed out that in the girl's experience her diet was as decisive a marker of Hindu identity as maintaining uncut hair was of Sikh identity.¹²⁵ The correlation between the strictness of a Hindu's diet and how religious that person was, was taken for granted by many young Hindus.¹²⁶ Young Hindus are caught in the interplay of influences at work on society as a whole,¹²⁷ which meant that children changed as they grew older. Hence, religious and non-religious factors could also come into play.

Festivals are also an important aspect of a distinct group identity. Hindus form only a small proportion of the British population, their festivals and special days usually pass unnoticed and the participation of children accentuate their experience of belonging to a minority.¹²⁸ There are a number of festivals and they differ from one regional, sectarian or caste group to another. For example the festival of *Holi* usually has a higher profile for Gujaratis than for Punjabis. There are also distinctive festivals for the followers of different guru-led movements, in addition to those celebrated by their fellow Gujaratis or Punjabis. Jackson and Nesbitt said: 'Just as Hindu festivals affirm children's sense of belonging to Hindu society, so these annual events strengthen their identity with the *sampradaya* [the guru-led movement] and provide opportunities for learning more of its saints and founders'.¹²⁹ Other festivals include Guru Ravidas's birthday as 'the religious high point of the year, the day when families are most likely to attend the *gurdwara*'. Jackson and Nesbitt added that 'certain annual festivals strengthen and celebrate the children's identity as members of distinct Valmiki and Ravidasi communities'.¹³⁰ Parents are concerned by the cultural identity of their children; children enjoy many Hindu festivals, which have been adapted to today's Britain.¹³¹ In another study, Nesbitt showed that the

123 Ibid, at 66.

124 Ibid, at 70.

125 E. Nesbitt, *Intercultural Education: Ethnographic and Religious Approaches* (Brighton/Portland: Sussex Academic Press, 2004), at 24.

126 Ibid, at 26.

127 Ibid, at 32-34.

128 R. Jackson & E. Nesbitt, *Hindu Children in Britain*, at 75.

129 Ibid, at 79.

130 Ibid, at 81.

131 Ibid, at 89.

‘Schools’ integration of such festivals as Vaisakhi [for Sikhs] and Divali [for Hindu] into curriculum and extra-curricular activity illustrates the way in which education is open to becoming a means of legitimation of minority practices’. However, she also reported a letter from a parent who protested at the school celebrating *Divali*, although he was neither Hindu nor Sikh. This suggests that festivals are important for a child’s religious identity and that ‘there is only a thin line between affirming culture, on the one hand, and nurturing into religion (or at least of being suspected of doing so), on the other’.¹³²

The identity of Hindu children is also defined by activities such as prayer and worship. Jackson and Nesbitt said: ‘None of the children expressed any doubt that God or gods exist. All mentioned praying. Their references to God and to praying were as matter of fact as their account of school sports, eating or watching television. They not only mentioned the religious activity of relatives but spoke from their own personal experience’.¹³³ This covered prayer at the domestic shrine, the children’s peace of mind after reciting sacred words, and visiting the temple to pray. Domestic worship was very important. Hindu homes would install a domestic shrine for special occasions and celebrations. Every home would also have a space specially used for prayer and worship, and this worked as a visual reminder of religious identity. The children referred to this domestic shrine as ‘the temple’ (rather than the public place of worship). There were different patterns of family worship, because the contents of all shrines were different. However, ‘all the children were united by the experience of growing up in homes in which a certain place and certain times were channels of God’s blessing’. The degree to which the domestic shrine and domestic worship impinged on children’s lives varied from family to family.¹³⁴ Children also prayed in different ways. They repeated sacred formulas (*mantra*), said prayers before and after sleeping,¹³⁵ prayed in the supplementary classes they attended and sometimes even prayed spontaneously in their own words. Jackson and Nesbitt also said that children’s experience of worship should not be measured in terms of how they acquired or remembered the words of prayers and hymns.¹³⁶ Young Hindus also described the experience of praying. Their prayers may be nothing like ‘the extempore vocal prayer of Protestant Christianity’ and may just be concerned with the correct repetition of sacred words, yet they testify to the peace of mind that results.¹³⁷ However Nesbitt pointed out that pupils’ spirituality was part of their identity.¹³⁸ Things are changing in Britain though, and Jackson and Nesbitt have shown that the

132 E. Nesbitt, *Intercultural Education: Ethnographic and Religious Approaches*, at 64.

133 R. Jackson & E. Nesbitt, *Hindu Children in Britain*, at 93.

134 *Ibid*, at 95-96.

135 *Ibid*, at 101.

136 *Ibid*, at 97.

137 *Ibid*, at 109.

138 E. Nesbitt, *Intercultural Education: Ethnographic and Religious Approaches*, at 135.

private prayer of Hindu children tends to be in English and have formal features in common with Christian petitionary prayer.¹³⁹

Finally, formal teaching and classes also contributed to Hindu nurture. Jackson and Nesbitt said: 'By attending Hindu supplementary classes children gained a conscious cultural identity as part of a peer group whose 'ethnicity', religion and mother tongue they shared. Much of what they learned was via a 'hidden curriculum', reinforcing nurture at home'.¹⁴⁰ Only a limited number of children went to these supplementary classes, which were a phenomenon of the diaspora (outside India), but 'their potential for reinforcing certain institutional views of the tradition should not be underestimated'.¹⁴¹

However, things are changing for young British Hindus. In more recent research, Jackson and Nesbitt have put more emphasis on individuals having the autonomy to select from a range of cultural or spiritual resources.¹⁴² Thus, Jackson emphasises that there is a strong link between religious and cultural traditions, and there may be different senses of belonging to one religious tradition. Young British Hindus (currently in their teens and twenties) also experience more choice, they belong to a religious minority and are also part of a wider society, variously termed 'secular' and 'post-Christian'.¹⁴³ For example, this was highlighted by the example of a young woman, interviewed at the age of 12 and 21, who displayed marked differences in how she perceived her religion over time.¹⁴⁴

4 Sikhism

For Nesbitt, the boundary line between 'Hindu' and 'Sikh' is often a blurred one, and the cultural matrix is (arguably) the same.¹⁴⁵ There are a number of common themes that are characteristic of bringing children into the Sikh tradition. Generally, they involve being born and nurtured into a Sikh family, worship and prayers, going to

139 R. Jackson & E. Nesbitt, *Hindu Children in Britain*, at 169.

140 *Ibid*, at 150.

141 *Ibid*, at 172.

142 Personal communication with Robert Jackson, 26th January 2006.

143 E. Nesbitt, *Intercultural Education: Ethnographic and Religious Approaches*, at 82. The expressions 'secular' and 'post-Christian' are by Sissel Østberg and Cathy Ota.

144 R. Jackson, *Rethinking Religious Education and Plurality: Issues in Diversity and Pedagogy* (London: RoutledgeFarmer, 2004), at 91. The young woman drew on her family and personal experience as a devotee of Sathya Sai Baba as well as on sources such as Western music in developing her own exploratory spirituality. At the age of 21 she was still connected with her experience of Hindu *bhakti* tradition, maintained a strong social concern consistent with Sathya Sai Baba's teaching; however, she had abandoned ritual practices that she followed as a 12-year-old in the context of family life, preferring the expression of a theistic spirituality rather than what she regarded as the practice of a religion.

145 Personal communication with Eleanor Nesbitt, 12th February 2006.

gurudwara, festivals, initiation ceremonies,¹⁴⁶ special occasions, formal classes, and children's own perceptions of their Sikh identity.

Family and informal nurture are extremely important in the lives of Sikh children, and Nesbitt suggested that this is 'because it is in the family that children absorb most of their parents' tradition'.¹⁴⁷ She mentions the role of family members in raising their children in accordance with Sikh tradition, such as reading parts of scripture or helping them to practise Punjabi. Iconography also plays a key part in Sikh culture, which includes the display of the pictures of the Gurus in homes. Unless the *Guru Granth Sahib* (the Sikh scriptures, the holy book) is displayed in the house, the family's devotion is directed at religious pictures, which provides a focus 'for the physical expression of religious devotion, not simply an assertion of cultural heritage or religious allegiance'.¹⁴⁸ Nesbitt also highlighted the role of food and diet in Sikh nurture, which include food-related regulations.¹⁴⁹ She concluded that 'Sikh children's homes and families shape their religious nurture'.¹⁵⁰ Children had their relatives' and family's examples: praying in front of the pictures, reading or reciting passages from the *Guru Granth Sahib*, listening to a tape-recording, preparing and sharing food, and drinking *amrit*. Nesbitt concluded that children's consciousness was permeated by all this.¹⁵¹

Worship and prayers were also part of informal nurture, whether it was at home or in the *gurudwara*. Daily routines included saying morning prayers, reading the *Guru Granth Sahib*, splashing *amrit* around the house in order to bless it, and saying evening prayers with the lighting of little oil lamps and the burning of incense sticks.¹⁵² There were also weekly sessions of domestic evening worship. On special occasions, the *Guru Granth Sahib* would be 'hosted' by a family following a specific ceremony. The scriptures would either be read over a long period, with breaks, or continuously over two days. Nesbitt said that for all the young Sikhs the *gurudwara* was the location for congregational worship, which would host occasional, daily, weekly or monthly worship. Attendance depended on the people, and young Sikhs

146 For example, initiation to *amrit*, which is holy, sweetened water that is stirred and administered in the rite of initiation to the *Khalsa*; it is said to have miraculous healing powers.

147 E. Nesbitt, *The Religious Lives of Sikh Children: A Coventry Based Study*, at 47.

148 E. Nesbitt, 'Young British Sikhs and Religious Devotion' in A.S. King & J. Brockington (eds.), *The Intimate Other: Love Divine in Indic Religions* (New Delhi, India: Orient Longman, 2005), at 313.

149 There is among an Indian born generation at least a cultural tendency to avoid beef, and otherwise it is only *amritdhari* initiated Sikhs who observe strict dietary rules, although many non-*amritdhari* Sikhs do opt to be vegetarian (personal communication with Eleanor Nesbitt, 12th February 2006).

150 E. Nesbitt, *The Religious Lives of Sikh Children: A Coventry Based Study*, at 62.

151 E. Nesbitt, 'Young British Sikhs and Religious Devotion', at 319.

152 E. Nesbitt, *The Religious Lives of Sikh Children: A Coventry Based Study*, at 68-73.

may go daily with their family to have morning devotions. Weekly Sunday worship also included the participation of children. They would go with their family, wear special clothes, and knew what behaviour was expected both in the prayer hall where the scriptures are enthroned and in the dining area.¹⁵³ This included showing reverence to the *Guru Granth Sahib* and listening to passages being read out loud. On a festival day they would hear relevant stories, hymns and expositions from musicians. In one particular congregation, it also happened that children were informally involved and read in front of the people: they ‘felt no sense of exclusion from leading worship. They learned what to do, including the requirement of bathing beforehand, by frequent participation’.¹⁵⁴ Young people could also be included in monthly worship, usually for larger congregations. Therefore, Nesbitt found that ‘young Sikhs were actively involved in a range of daily and less frequent worship, [almost all] centred upon the words of the Gurus enshrined in the sacred volume, the *Guru Granth Sahib*’.¹⁵⁵ Almost all the children were used to reciting religious formulae, and they translated the reading of scriptures as prayer. There were some resemblances with Hindu tradition too. Nesbitt said that the data indicated the behavioural and affective aspects of their faith in the lives of young Sikhs, such as showing reverence to the sacred volume, respect for the food, enjoyment of some rituals and feeling of security in reciting religious formulae.¹⁵⁶

Festivals are also important in the nurture of children. They include the *gur-purbs* (the anniversaries of the Gurus which are distinctive of the *Panth*, that is, the Sikh community), a number of annual celebrations specific to some congregations and related to *sants* (charismatic Sikh leaders), although they are not universally recognised by the *Panth*, and certain festivals which many Sikhs share with Hindus (namely *Divali* and *Rakhri*) and with western society (Christmas).¹⁵⁷ More importantly, the festival of *Vaisakhi* emerged as an exemplar of the diversity of processes interacting in the nurture of Sikh children. Children were involved in a number of ways: by taking part in the procession, through collective worship in school, Punjabi classes with content about the celebration, cake-cutting, or wearing special clothes. Thus, Nesbitt said that festivals have long provided channels of cultural transmission through ritual, story, fairs and the expressive arts. In the case of Coventry Sikhs in 1992, the festival provided children with the stimulus of highly visual liturgy centred on the renewal of the *nishan sahib* (flagpole and pennant) and they participated fully in the massed procession.¹⁵⁸ Nesbitt described the children as both insiders and outsiders, a part of the family who needed explanation and encouragement, much

153 Ibid, at 80.

154 Ibid, at 81-82.

155 Ibid, at 86.

156 Ibid, at 86-88.

157 Ibid, at 122.

158 Ibid, at 137.

of it in English.¹⁵⁹ In addition, special family occasions such as *sanskars* (life cycle rites surrounding birth, marriage, death, turban-tying and initiation with *amrit*) and birthdays were important in the lives of Sikh children. Increasingly however, festivals may still be relevant, although sometimes adapted to the climate, calendar and other local factors.¹⁶⁰

The formal nurture of children is largely characterised by supplementary classes in Punjabi, run outside school hours by concerned Sikhs. They are not the equivalent of religion classes, like Sunday School in Christian churches.¹⁶¹ They are language classes, as parents want their children to be literate in their mother-tongue, and the linguistic and religious teaching are seen as inseparable.¹⁶² Children learned about their Sikh traditions, moral injunctions, passages about Sikh history, and also about music classes, central to the perpetuation of tradition.¹⁶³ Nesbitt suggested that the formal nurture of the young in the tradition had an important place, that these classes built solidarity and a sense of shared experience, and that they reinforced children's sense of self-identity in terms of ethnicity, faith tradition and mother-tongue.¹⁶⁴

Finally, the identity of Sikh children is also defined by their own 'perception of their faith tradition'.¹⁶⁵ There was a strong association between being Punjabi, speaking Punjabi and being Sikh, and the names Kaur and Singh were distinctive markers of a Sikh. Physical appearance was also relevant, and included the complexion (i.e. the 'brownness') of the skin, wearing Punjabi clothes, long hair for girls, long hair and turban for males, wearing jewellery indicating their Sikh identity (such as a ring or a wrist rosary), or wearing a *kara* (wrist bangle). Some also identified being a 'proper/real Sikh' with wearing the five Ks and initiation to *amrit*. Nesbitt concluded that whereas unfamiliarity with scriptural language may impose a barrier between British young Sikhs and the verbal content of worship, *amrit* retains immediacy and accessibility and is 'an unproblematic feature of their tradition'.¹⁶⁶ Sometimes the degree of Sikhness was associated with the caste/*zat* of the individual, and it is also important to remember that there may be differences between norms and actual practice.

159 E. Nesbitt, *Intercultural Education: Ethnographic and Religious Approaches*, at 61-62.

160 R. Jackson & E. Nesbitt, *Hindu Children in Britain*, at 169.

161 E. Nesbitt, *The Religious Lives of Sikh Children: A Coventry Based Study*, at 143.

162 *Ibid.*, at 156.

163 *Ibid.*, at 146.

164 *Ibid.*, at 178.

165 *Ibid.*, at 217. It is worth bearing in mind that different Sikhs emphasise being born into a 'Sikh' family, appearance ('looking like Sikhs'), and initiation with *amrit* to a different extent, and very many draw a distinction between 'Sikhs' and 'proper Sikhs' (personal communication with Eleanor Nesbitt, 12th February 2006).

166 *Ibid.*, at 214.

5 Non-traditional religions

A *Jehovah's Witnesses*

The lives of Jehovah's Witnesses children are considered both in terms of 'childhood socialization',¹⁶⁷ and in terms of religious practices. Aldridge suggests that childhood is treated as an apprenticeship for the adult life of the Jehovah's Witness. The aim is to guard children 'against contamination by the false teachings and ungodly practices of the wider society',¹⁶⁸ and includes withdrawing children from acts of religious worship and assembly in state schools, discouraging close friendships with children born outside the faith, or not attending birthday parties. In Levitt's interview with a family, the boy's social life 'was filled by his religious activities throughout his childhood. The whole family went to meetings at Kingdom Hall twice a week and had a meeting in their own house once a week. Most of these activities were for the whole family together but there had been separate social activities for the older children. His parents aimed to do ten hours visiting a month and [the boy] had been out with his mother on the morning of the first interview, when he was ten'. The boy 'saw himself as a Witness answering questions on his beliefs with "we" rather than "I" and repeating learned phrases'.¹⁶⁹

B *The Church of Jesus Christ of Latter-day Saints*

Mormon children are involved at an early age in the organisational structures of the faith. Boys are incorporated into the priesthood. While girls do not hold the priesthood, they do participate in achievements programs and hold leadership positions in their youth groups. At an early age both girls and boys give talks during Sunday meetings and meet in counsel to address youth group needs and activities.¹⁷⁰ Children are baptised at the age of 8, and there is also an objective career structure for boys going from ordained deacon at 12 to high priest during middle age. Aldridge stresses that the family has a very important role and place in Mormon belief and practice; he also mentions the fact that Mormon dietary laws make eating with *Gentiles* problematic and a factor which is especially important in the socialisation of Mormon children.¹⁷¹

167 A. Aldridge, *Religion in the Contemporary World: A Sociological Introduction*, at 36. Aldridge suggests that this can be 'just as powerful as adult conversion in producing unwavering commitment'.

168 A. Aldridge, *Religion in the Contemporary World: A Sociological Introduction*, at 36.

169 M.A.S. Levitt, 'Nice When They Are Young': *Contemporary Christianity in Families and Schools*, at 136-138.

170 Personal communication with Dagmar Stroh, Legal Coordinator – International Affairs, The Church of Jesus Christ of Latter-day Saints, 28th September 2006.

171 A. Aldridge, *Religion in the Contemporary World: A Sociological Introduction*, at 113.

6 New religious movements

New Religious Movements (NRMs) are different from traditional religions, in that they are fairly recent in years. This means that parents are the first generation, that their children are the second generation, so they are born into the community whereas their parents chose to join. Charlotte Hardman argues that there is not one answer to what it means for a child to belong to a NRM; she points out that all NRMs are different and that children's responses to being brought up within an NRM are different depending on the child and many other factors.¹⁷² Some NRMs that have invited comments in the literature are going to be considered in more detail.

A Wiccas, neopaganism, and the New Age movement

Practices include honouring different figures, initiation to crystals, and festivals. There is a concern to initiate children into the religion while at the same time not forcing it upon them. One mother was concerned about the education and incorporation of her children into the religion. She wanted them to learn about Neopaganism and join in with their parents in the celebration of the seasons and in the practice of magic.¹⁷³ At the same time though, parents wanted their children to follow their own spiritual path, which meant being open about their children's religion.¹⁷⁴ However, Helen Berger pointed out that children were more passive recipients of their families' traditions than they were spiritual seekers, quite like children raised in more traditional religions.¹⁷⁵ In addition, Ceisiwr Serith suggested that children should be integrated through family rituals and daily life practices, rather than being included in rituals geared for adults.¹⁷⁶ There were a number of rituals and practices, most of them revolving around figures such as the Goddess of fertility, the horned God, Mother Earth, or Nature. Festivals include the celebration of the Sabbats, such as the Sabbat of Soheim (Halloween). There were also family celebrations, when children were invited to cast the circle or invoke one of the directions, or read a part of the ritual if they were old enough. Rites of passage included welcoming ceremo-

172 Personal communication with Charlotte Hardman, 3rd March 2006.

173 H.A. Berger, 'Witches: The Next Generation' in S.J. Palmer & C.E. Hardman (eds.), *Children in New Religions* (New Brunswick: Rutgers University Press, 1999), 11-28, at 11.

174 Ibid, at 14. They explain this by their negative experience as children when their own parents forced them to attend religious services that bored them. However one dad said: 'I've asked myself what I would do if my child fell in with the 'wrong' crowd at the delicate age of fifteen and joined a cult of Jesus freaks. It's a frightening thought, and one I have no answer for as yet'.

175 Ibid, at 13.

176 C. Serith, *The Pagan Family: Handing the Old Ways Down* (St Paul, Minnesota: Llewellyn, 1994), at 8.

nies and rituals about the transition from childhood to adulthood.¹⁷⁷ Sabbats and other rituals were routinised and repeated, and traditions were created to teach children.¹⁷⁸ Another study pointed that crystals were an extremely important part of the children's upbringing and they were often associated with healing. Both home and school played a role in the nurturing of children's belief structures and worldviews, and there was a strong link between experience and belief. Finally, this NRM emphasised experiential elements but no doctrinal authority.¹⁷⁹

B International Society for Krishna Consciousness

Being a young member of ISKCON usually involves attending religious activities at the local temple, and being guided by a number of regulative principles.¹⁸⁰ Yet there are a number of difficulties in keeping children in the movement. E. Burke Rochford pointed out that because there was no Hare Krishna schooling system, children and young people had to be sent to state schools, which created difficulties for many of them. For example, children became less interested in attending temple activities, experimented with breaking some regulative principles and began to question their beliefs. They generally did not wear their traditional religious clothing but dressed like nondevotee classmates, many of them anglicised their names or reverted to earlier Christian names, rather than keeping their devotional names. As devotees they had hardly had any contact with nondevotees and many chose to join with the 'outside' youth culture discovered at school. It appears then that attending temple activities, regulative principles, and specific Hare Krishna beliefs formed the main part of their upbringing. Some parents found it difficult that their children had to go to state schools and mix with nondevotee children. Hardman stated that some children brought up in ISKCON were very keen to follow the strict discipline of their parents and take on a total ISKCON identity – much as nuns do when they join orders. Others saw the discipline as being

177 H.A. Berger, 'Witches: The Next Generation', at 18. The author writes: 'The rituals, however, are helping create a community, even if they may not ultimately define a passage from youth to adulthood. It is a community of people who are loosely linked but who share at least the outlines of a common body of rituals. Furthermore, the inclusion in the sacred circles of extended kin and friends—many from outside Wicca—to celebrate the family's life passages affirms Wiccans in their practices' (page 20).

178 Ibid, at 15.

179 For example one girl mentioned that she used incense and Tibetan bells to clear a room of bad energy, and also that her dream-catcher had not worked recently because the family had recently moved and she had hung it too far from her bed: M. Fletcher and C. Ota, 'Religious Identity and Children's Worldviews', at 121.

180 E.B. Rochford, 'Education and Collective Identity: Public Schooling of Hare Krishna Youths' in S.J. Palmer & C.E. Hardman (eds.), *Children in New Religions* (New Brunswick: Rutgers University Press, 1999), 29-50. The aim of the Krishna devotee is to become self-realized by practising *bhakti yoga* (devotion to God). Central to this process are chanting Hare Krishna and living a lifestyle free of meat, intoxicants, illicit sex, and gambling (page 46).

too strong and wished to lead more ‘normal’ lives with boyfriends, girlfriends and so on. Those who break away from the ISKCON umbrella may nevertheless retain some of the culture – such as believing in Krishna and remaining vegetarians.¹⁸¹

C *Osho Ko Hsuan School and Sahaja Yoga*

These two communities can be linked as they both advocate unusual family patterns. The Osho movement was established in the 1970s.¹⁸² It is centred on psychospiritual/personal development, with ‘a combination of Osho’s own meditation and techniques from the human potential movement’. Education is seen as an important basis necessary to its successful implementation and Osho Ko Hsuan School is the only school of the movement. The school has a child-centred philosophy and functions around ‘shared values’. One of the purposes of the school appears to be to produce ‘freedom, creativity, and naturalness’ in children rather than the inculcation of a specific worldview and conditioning. It appears that children are integrated in the movement notably through the school and through certain educational practices, for example the way they are taught and the variety of jobs to do around the school.

The second movement, Sahaja Yoga, also has a distinctive image and model of childhood.¹⁸³ The vast majority of the children, including babies, are integrally involved in the daily ritual practices of the group that take place in the home. Through relationships with family members, parents or other members of the movement, the children learn informally many of the beliefs of the movement, such as the status of the leader. There are also a number of rituals, which include meditation, feet-soaking, ritual postures, and devotional songs.

D *In search of truth*

ISOT is a Christian-based communal group located in California.¹⁸⁴ Its members agree that God has called them to care for children and they have created a special environment for children and families. The importance of commitment is emphasised and expected from members. Although they believe it is essential to their unity to emphasise the whole group as a spiritual entity over separate families, they highly value the parent-child relationship. Children are thus socialised into a group with a strong community element, and the ‘extended’ family is considered to be the best environment to raise children. They are integrated into the community both by living

181 Personal communication with Charlotte Hardman, 3rd March 2006.

182 E. Puttick, ‘Osho Ko Hsuan School: Educating the “New Child”’ in S.J. Palmer & C.E. Hardman (eds.), *Children in New Religions* (New Brunswick: Rutgers University Press, 1999), 88-107.

183 J. Coney, ‘Growing up as Mother’s Children: Socializing a Second Generation in Sahaja Yoga’ in S.J. Palmer & C.E. Hardman (eds.), *Children in New Religions* (New Brunswick: Rutgers University Press, 1999), 108-123.

184 G. Siegler, ‘The Children of ISOT’ in S.J. Palmer & C.E. Hardman (eds.), *Children in New Religions* (New Brunswick: Rutgers University Press, 1999), 124-137.

in it and through more specific religious teaching. Around the age of 8, children are expected to ask the Elders to be baptised. There is also another meaningful rite of passage at puberty when initiates receive symbols that convey their responsibility for the Community and remind them of their covenant with God as a chosen people. Many also hope to receive the ‘gift of tongues’ during one of these rites and they may also receive prophecies that warn the community about the child’s talents, weaknesses, and responsibilities. Aside from this, community life is very important and serves to integrate children and for them to feel that they belong to it. In the end, ‘The ISOTs have managed to retain their youth by encouraging a moral commitment to ISOT beliefs and way of life’.¹⁸⁵

Section 4 Conclusion

These different studies point to the same evidence, the fact that it matters for children to be religious. The reality is that children are not ‘religious’ on their own but are socialised and nurtured into a religious faith, in connection to their family and religious community. The sociological literature has some shortcomings, however, because it is not really concerned with children: this is shown by the small amount of research on children and religion. Still, the few instances that have been covered all point to the socialisation of children within a religious faith. However, Aldridge points out that fewer and fewer of the faithful feel an obligation to pass on their faith to their children and instead believe that children should make up their own minds without undue pressure from their parents. Accordingly, ‘the transmission of religion from generation to generation is [...] becoming far more open and fluid’.¹⁸⁶

The main components of religiosity are believing, acting and belonging: to believe a number of religious beliefs, to act upon one’s faith, or simply to be born into a family from a particular religious tradition. There are a number of common elements amongst these religious traditions. In particular, almost all traditions include informal nurturing within the family and slightly more formal nurturing within a religious community. If a child is brought up within a religious family and the parents pass on their beliefs to the child, the child learns about the religion through living in the family and observing their parents. Children are also initiated by their parents to a number of initiation rituals and to ceremonies and festivals. Parents also bring their child to religious services, usually in a building dedicated to that usage, although there are some exceptions. The religious community itself plays an important role. In addition to formal services, there are a number of groups outside school hours, initiation rituals and ceremonies which take place within, and are performed by, the community itself. Some religions emphasise more formal religious education, where religious beliefs are transmitted. Most religions also emphasise prayer

185 Ibid, at 135.

186 A. Aldridge, *Religion in the Contemporary World: A Sociological Introduction*, at 213.

and worship, and some focus on a number of regulative principles such as food diets and dress codes. Other religions, especially non-European ones, are linked by a common language. For other communities, the mere fact of being born in a particular family is enough to be a member.

Religious traditions accentuate different elements. For Christianity, there is more emphasis on believing religious creeds, there are some regulative principles, and, for certain Christian traditions, being born Christian is an important dimension. In Islam, being born in a Muslim family is an essential identity component. Generally, prominence is given to religious beliefs and to regulative principles and practices. Hinduism and Sikhism stress being born Hindu or Sikh, and religious practices in the family and the community. Non-traditional religions and NRMs emphasise religious creeds and religious practices and ceremonies. In addition, a number of religions, but not all, accept or recognise that children change when they come of age and that some leave the community, choose to have looser ties or abandon a number of religious practices.

Studies on a number of religious communities highlight the nurturing of children, whether at home or in more formal settings, and religious communities and parents are concerned about 'passing on' the faith and beliefs to children. Religious communities are not just an abstract concept of religious people interacting together, but are characterised in a more tangible sense by beliefs, teachings, values, practices and rituals. These communities include both adults and children. Children are significant for religious communities, who care about how children are treated. Hence, it makes sense to say that religious children belong to a matrix including parents and religious community, although it is important to add the societal element when the child comes of age.

Chapter 2

A Model of the Right of the Child to Religious Freedom

Section 1 Introduction

The purpose of this chapter is to create a theoretical framework of the right of the child to religious freedom. First, it is essential to understand the nature of rights and what it means for a child to have rights. Secondly, we need to identify whether the existence of rights is tied to the autonomy of the child. Thirdly, the different components of rights must be identified. This chapter sets out a prima facie statement on the right of the child to religious freedom, whereas a definitive statement will be available when prima facie rights are weighed up against any competing principles.

Section 2 Theories of rights

Children pose particular difficulty for the already complex jurisprudential issue of rights theories. Theories differ on whether children can have, or have, moral or legal rights, what the foundation of these rights is, and what this means in terms of corresponding rights and duties. Rights are sometimes considered as intrinsically good, and this makes it very easy to ascribe rights to children for the sake of political advantage. However, what matters is that rights are instrumental. This means that the child has a right to religious freedom in order to achieve something specific, in particular to be allowed to flourish. The main theories to be considered are non-rights based theories on the legal position of children, the will theory, and the interest theory of rights.

1 Non-rights based theories on the legal position of children

It is sometimes said that children's rights theories are not always the best way to conceptualise the legal or moral position of children; a number of children's rights theorists have proposed alternative theories, notably based on obligations or harm to children.

Michael Freeman summarises and rejects various arguments denying the necessity of thinking in terms of rights when it comes to children.¹ First, there is the argument that the importance of rights and rights-language themselves can be exaggerated. Other morally significant values include love, friendship, compassion, and altruism. In particular, rights would not be appropriate for children, especially in the context of family relationships. However, Freeman points out that we are not in an ideal world, that children are particularly vulnerable and that rights are necessary to protect children's integrity and dignity. Secondly, it is argued that adults have children's best interests at heart and that they already care for children. However, Freeman points out that this idealises adult-child relations, and that adults can abuse their power over children. He says that adults do not always act in children's best interests and that there is a tendency to protect parents' rights over children's rights. Thirdly, childhood is seen as a golden age, synonymous with innocence, which would make it unnecessary to think in terms of rights. However, Freeman points to disease, poverty, exploitation and abuse across the world. On the contrary, Freeman says that rights are important because those who lack rights are 'like slaves, means to the ends of others, and never sovereign in their own right'.²

Thomas Simon focuses on the harm inflicted upon children. He says that 'a focus on obligations and harms does not answer all the complex problems involving children, but it does provide a useful starting point for addressing and acting upon the most serious problems confronting children (and adults)'.³ Harm is not defined, beyond specifying that it must be unnecessary, unjust and serious, and the focus is on the pain and suffering experienced by children.⁴

Onora O'Neill considers obligations owed to children rather than rights.⁵ In particular, she does not challenge the aim of securing positive (legal, institutional, customary) rights for children, but she queries whether children's positive rights are best grounded by appeals to fundamental (moral, natural, human) rights. Rather, she argues that children's fundamental rights are best grounded in a wider account of fundamental obligations. She says that there are imperfect obligations, very important in children's lives, that are not properly taken into account by rights theories.⁶ She

1 M.D.A. Freeman, 'Taking Children's Rights More Seriously' in P. Alston, S. Parker & J. Seymour (eds.), *Children, Rights, and the Law* (Oxford: Clarendon Press, 1992), 52-71, at 55-56.

2 Ibid.

3 T.W. Simon, 'United Nations Convention on Wrongs to the Child' (2000) 8(1) *International Journal of Children's Rights* 1-13, at 1-2.

4 Ibid, at 12.

5 O. O'Neill, 'Children's Rights and Children's Lives' in P. Alston, S. Parker & J. Seymour (eds.), *Children, Rights, and the Law* (Oxford: Clarendon Press, 1992), 24-42.

6 There are two other types of obligations. First, there are universal obligations, owed by all agents to all children, which are perfect and complete, as well as fundamental (in the sense that there are corresponding fundamental rights): for example, the obligation to

defines incomplete or imperfect obligations as obligations that are owed to unspecified children, and gives the example of the fundamental obligation ‘to be kind and considerate in dealing with children, to help and care for them, or to develop their talents’. This means that although all agents may be bound by such obligations, they could not be owed either to all children (since such an obligation could not be discharged) or merely to specified children. This means that there are no corresponding fundamental rights, no rights-holders, and nobody can either claim or waive performance of any right. In particular, a rights perspective may miss important aspects of children’s lives, such as unkindness, cheerfulness or good feeling. These are vital for children’s quality of life, yet may be invisible from a rights perspective. This means that those imperfect obligations are best met by a theory based on obligations. O’Neill finds other problems with right theories. She says that children’s dependence should not be compared to that of oppressed groups, because their ‘oppression’ is not artificially produced although it can be artificially prolonged. In addition, rights theories are not very relevant for children and are unlikely to empower them. If they are too young they will be wholly unable to respond, and if they are old enough they are probably on their way to majority.⁷

Tom Campbell criticises O’Neill: he is not convinced by her argument on imperfect obligations and says that children’s moral rights should not be put aside.⁸ He argues that she pays too much attention to adult duties.⁹ O’Neill may be right in saying that many relationships are not caught by rights, he says, but this takes us nowhere near the conclusion that it is in general unhelpful to children to construe their normative relationships in terms of rights.¹⁰ He argues that O’Neill relies too much on the will theory of rights, and that it is more appropriate to think in terms of rights as interests to be protected. This would meet her claim that rights theories cannot take situations of dependence into account although they are part of children’s lives.¹¹ This also justifies paternalistic interventions because important interests may be served by compulsory interventions which are properly regarded as paternalistic.

refrain from abuse and molestation of children, whether or not they are specifically in your charge. Secondly, there are obligations owed to specified children, also perfect and complete, and children hold corresponding special rights: for example, those who have undertaken to care for specific children will have obligations to them, and those specific children will have a right to care of an appropriate standard.

7 O. O’Neill, ‘Children’s Rights and Children’s Lives’, at 38.

8 T.D. Campbell, ‘The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult’ in P. Alston, S. Parker & J. Seymour (eds.), *Children, Rights, and the Law* (Oxford: Clarendon Press, 1992), 1-23.

9 He says that she makes ‘too much of an aspect of adult duties to children which is best illustrated by the desirability of making an effort to pay some attention to the children of strangers in whose company you happen to be spending some time’: *ibid*, at 13.

10 *Ibid*, at 16.

11 *Ibid*, at 14.

C.A.J. Coady argues that imperfect obligations can be converted to corresponding rights. He says: ‘Why not say that children have a right not to be denied “the genial play of life”, that they have a right to a cheerful environment, a right to consideration and kindness?’¹² He points out that the future of children as adolescents and adults is influenced by childhood, by what children have experienced and how they have been treated. Yet, O’Neill is ‘insufficiently sensitive to this dimension of childhood, she finds it too easy to dismiss the significance of talking of rights which protect the needs children have to a normal development of their potentialities’.¹³

The position of children could be addressed from a non-rights based theory. However, while we should not relate to children exclusively in terms of rights, non-rights based theories on the legal position of children do not help to create a legal framework of the right of the child to religious freedom. If we adopted a non-rights based theory, we could only address the position of children with a set of duties imposed on others. This would ignore the fact that rights carry more moral force than duties and the fact that the language of rights is very important in international law. Adopting a non-rights based theory would make it useless to argue in favour of a right of the child to religious freedom.

2 The will theory

The classic will theory of rights is associated with Immanuel Kant in the 18th century. It proceeded from the claim that rights authorise coercion and concluded that rights protect the autonomous will in abstraction from its particular content. Therefore the assertion of a right amounted to an assertion of both permissibility and inviolability, for it was the conjunction of permissibility and inviolability that linked rights to the justification of coercion.¹⁴ Modern versions of the will theory are associated with the writings of H.L.A. Hart,¹⁵ Nigel E. Simmonds and Hillel Steiner.¹⁶ Hart considered that one individual was being given by the law exclusive control, more or less extensive, over another person’s duty so that the right-holder ‘is a small-scale sovereign

12 C.A.J. Coady, ‘Theory, Rights and Children: a Comment on O’Neill and Campbell’ in P. Alston, S. Parker & J. Seymour (eds.), *Children, Rights, and the Law* (Oxford: Clarendon Press, 1992), 43-51, at 45.

13 Ibid, at 49.

14 I. Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, trans. Mary Gregor, 1991); see explanation and summary by N.E. Simmonds, ‘Rights at the Cutting Edge’ in M.H. Kramer, N.E. Simmonds & H. Steiner (eds.), *A Debate over rights –Philosophical Enquiries* (Oxford: Clarendon Press, 1998), at 192.

15 For example, see H.L.A. Hart, ‘Legal Rights’ in *Essays on Bentham, Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), 162-193.

16 See N.E. Simmonds, ‘Rights at the Cutting Edge’, 113-232; H. Steiner, ‘Working Rights’ in M.H. Kramer, N.E. Simmonds & H. Steiner (eds.), *A Debate over rights –Philosophical Enquiries* (Oxford: Clarendon Press, 1998), 233-301.

to whom the duty is owed'.¹⁷ He added that the fullest measure of control comprises three distinguishable elements: i) the right-holder may waive or extinguish the duty or leave it in existence; ii) after breach or threatened breach of a duty he may leave it 'unenforced' or may 'enforce' it by suing for compensation or, in certain cases, for an injunction or mandatory order to restrain the continued or further breach of duty; and iii) he may waive or extinguish the obligation to pay compensation to which the breach gives rise.¹⁸ In summary, to possess a right is to have control over a duty incumbent upon someone else, with the power to waive or to enforce that right.

The will theory is thought to have a number of advantages, especially the fact that it points to something distinctive about rights. The theory revolves around the choices of the right-holder, and rights are things that may be exercised. Right-holders have a choice about how to exercise their rights, which means that rights ground peremptory and imperative demands that we may make against others. Therefore, rights are more than simply good reasons for others to behave in certain ways.¹⁹ This means that the very existence of a right imposes a duty on someone else and excludes any other consideration.

The will theory emphasises self-expression, self-assertion, sovereignty and moral individualism.²⁰ This idea attributes much importance to will, choice and the ability to control one's behaviour. For example, Alan Gewirth refers to 'prospective purposive agents' and argues that every agent implicitly makes evaluative judgments about the goodness of his purposes and the necessary goodness of the freedom and well-being that are the necessary conditions of his acting to achieve his purposes. Therefore, the abilities to control one's behaviour by one's unforced choice, having knowledge of the relevant circumstances, and reflecting on one's purposes, are necessary to the agent.²¹

However the will theory has been criticised because it would allow all rights to be waived. Moreover it means that those who do not have powers of enforcement and waiver may not be right-holders, which would have far-reaching implications for children. Hart wrote:

These considerations should incline us not to extend to animals and babies whom it is wrong to ill-treat the notion of a right to proper treatment, for the moral situation can be simply and adequately described here by saying that it is wrong or that we ought not to ill-treat them or, in the philosopher's generalized sense of 'duty', that we have a duty not to ill-treat them. If common usage sanctions talk of the rights of animals or babies it

17 H.L.A. Hart, 'Legal Rights', at 183.

18 Ibid, at 184.

19 N.E. Simmonds, 'Rights at the Cutting Edge', at 216.

20 M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (London: Sweet and Maxwell, 2001), at 353.

21 A. Gewirth, *Reason and Morality* (Chicago/London: University of Chicago Press, 1978), at 119-122.

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makes an idle use of the expression ‘a right’, which will confuse the situation with other different moral situations where the expression ‘a right’ has a specific force and cannot be replaced by the other moral expressions which I have mentioned.²²

For Matthew Kramer, the fact that children do not have rights is ‘one of the most arresting theses to which the Will Theory commits its upholders’.²³ He explains that because infants are both factually and legally incompetent to choose between enforcing and waiving their claims against others, and because children older than infants are legally incompetent and sometimes factually incompetent to engage in enforcement/waiver decisions, children do not have the powers to make those decisions. Therefore, given that the will theory insists that claims must be enforceable and waivable by claim-holders if the claims are to count as rights, it leads to the conclusion that children do not have any rights.²⁴ Hart later modified his position and said:

Where infants or other persons not *sui juris* have rights, such powers and the correlative obligations are exercised on their behalf by appointed representatives and their exercise may be subject to approval by a court. But since (a) what such representatives can and cannot do by way of exercise of such power is determined by what those whom they represent could have done if *sui juris* and (b) when the latter become *sui juris* they can exercise these powers without any transfer or fresh assignment; the powers are regarded as belonging to them and not their representatives, though they are only exercisable by the latter during the period of disability.²⁵

For Kramer, Hart was almost acknowledging that infants have rights even though they cannot exercise the powers of enforcing or waiving those rights.²⁶ Campbell objected to Hart’s position that the child would still be less than a possessor of rights.²⁷

Neil MacCormick, a famous proponent of the interest theory, disagreed with both of Hart’s propositions.²⁸ In the first place, he took the example of the right of the

22 H.L.A. Hart, ‘Are There Any Natural Rights?’ in J. Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984), 77-90, at 82 (footnote omitted); first printed in (April 1955) LXIV 2 *The Philosophical Quarterly* 175-191.

23 M.H. Kramer, ‘Rights Without Trimmings’ in M.H. Kramer, N.E. Simmonds & H. Steiner (eds.), *A Debate Over Rights –Philosophical Enquiries* (Oxford: Clarendon Press, 1998), 7-111, at 69.

24 *Ibid.*, at 69.

25 H.L.A. Hart, ‘Legal Rights’, at 184 (footnote 86).

26 M.H. Kramer, ‘Rights Without Trimmings’, at 70.

27 T.D. Campbell, ‘The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult’, at 4.

28 N. MacCormick, ‘Children’s Rights: A Test-Case for Theories of Rights’ in *Legal Right and Social Democracy* (Oxford: Clarendon Press, 1982), 154-166, at 156.

child to care, nurture and love. He argued that the will theory did not work because babies cannot in fact, in morals and in law relieve their parents of their duty towards them in those matters. In the second place, he said that Hart's modified position could not work. There is a need for a third party acting on behalf of the child, but that is usually the parents. From a legal point of view, parents may not be able to issue a self-directed request on the child's behalf, nor waive the child's right as the child's representative. From a moral point of view, he did not see any reason why someone should be able to waive or extinguish parental duties.

For the will theory what matters is whether children have the will or the choice to enforce or waive their rights. Even for Gewirth, children lack abilities to some extent, or they are only potentially such agents, but they will eventually have them in full.²⁹ However, if we adopted the will theory, it would be very difficult for all children to possess rights, because it requires powers of enforcement and waiver that children do not always have. Moreover, it may commit us to the idea that potential powers of enforcement or waiver are what make children important.

3 The interest theory

The interest theory is mainly associated with Jeremy Bentham, Joseph Raz, Neil MacCormick, David Lyons, Tom Campbell and John Eekelaar.³⁰ The interest theory proposes that a right is an interest that is deemed worthy of moral or legal protection or, as MacCormick puts it, a good of such importance that it would be wrong to deny it or withhold it to the individual.³¹ In terms of legal rights this means that the law is envisaged as advancing the interests of the individual on the supposition that it is a good for the individual, and the law has the effect of making it legally wrongful to withhold the good from the individual.³² This can refer to the person's welfare or freedom, or some aspects of it.³³

For Campbell, positive rights are founded on interests of vital significance for human life. He argues that the will theory is an 'outrageous denial of the value signif-

29 A. Gewirth, *Reason and Morality*, at 122. However see his conclusions on the education of children (page 141).

30 See H.L.A. Hart, 'Legal Rights', 162-193; J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986); N. MacCormick, 'Children's Rights: A Test-Case for Theories of Rights', 154-166; D. Lyons, *Rights* (Belmont, California: Wadsworth, 1979); T.D. Campbell, 'The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult', 1-23; J. Eekelaar, 'The Emergence of Children's Rights' (1986) 6 OJLS 161-182.

31 N. MacCormick, 'Children's Rights: A Test-Case for Theories of Rights', at 160.

32 *Ibid*, at 160-161.

33 M.H. Kramer, 'Rights Without Trimmings', at 61-62. In contrast, the basic idea of the will theory is that every right is a vehicle for some aspect of an individual's self-determination or initiative.

ificance of young children', and does not base his theory on rational capacity.³⁴ Susan Wolfson argues that moral (and legal) rights are held by those who have interests which are in some sense intimately and inextricably bound up with their personalities.³⁵ As for John Kleinig, he defines welfare interests as 'those interests which are indispensable to the pursuit and fulfilment of characteristically human interests, whatever those interests might be'.³⁶

The interest theory leaves open the question about who holds duties, what these duties are, and the question of enforcement/waiver. The only question answered by the interest theory concerns the importance of an interest.

Whereas the will theory considers that the existence of a right implies the existence of a correlative duty, the interest theory considers that the existence of a right is the reason to impose a duty on someone. MacCormick confirms that 'recognition of a right involves the imposition of duties on other persons than the right-holder, but what duties, and upon whom, is a matter which in any case needs careful definition in order best to secure the right'.³⁷ Campbell argues that the question is whether children can have 'intrinsic' rights, i.e. rights in themselves, as this intrinsic value would justify the imposition of duties on others. This means that children have rights if their interests are the basis for having rules requiring others to behave in certain ways with respect to those interests. Therefore, to classify rights as intrinsic is to take a view about their justification, and to say that a right is intrinsic is to say that its justification does not depend on its role in securing some other right. Wolfson argues that an interest must involve a capacity to be disposed to form conscious plans and projects.³⁸ It is enough that this capacity is a future one, a not too remote one, or even a past one.³⁹ However, the interest theory does not tie an interest to capacity or make assumptions about autonomy, enforcement and waiver. On the issue of powers of enforcement and waiver, MacCormick contended that they are essentially secondary to, but not constitutive of, rights. On the issue of choice, he added that 'the presumption that people are the best judges of what is good for them and of whether to have it or not is not and should not be extended to children, certainly not to young

34 T.D. Campbell, 'The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult', at 5.

35 S.A. Wolfson, 'Children's Rights: The Theoretical Underpinning of the "Best Interests of the Child"' in M. Freeman & P. Veerman (eds.), *The Ideologies of Children's Rights* (Dordrecht: Martinus Nijhoff Publishers, 1992), 7-27, at 22.

36 J. Kleinig, 'Crime and the Concept of Harm' (1978) 15(1) *American Philosophical Quarterly* 27-36, at 31 (footnote omitted). His candidates for welfare interests are bodily and mental health, normal intellectual development, adequate material security, stable and non-superficial relationships, and a fair degree of liberty.

37 N. MacCormick, 'Children's Rights: A Test-Case for Theories of Rights', at 163-164.

38 S.A. Wolfson, 'Children's Rights: The Theoretical Underpinning of the "Best Interests of the Child"', at 22.

39 J. Kleinig, 'Crime and the Concept of Harm', at 33.

children', because children are not always or even usually the best judges of what is good for them.⁴⁰

This chapter regarding the right of the child to religious freedom adopts the interest theory of rights, which provides a good conceptual account of the child's right to religious freedom. It is then possible to develop a workable framework of the right. It will be necessary to define whether the child has some powers of enforcement or waiver over the right, what interest of the child gives rise to a legal right, who holds duties, and what these duties are. Thus, it is possible to have a carefully crafted right to religious freedom, but a right that does not carry the usual assumptions made by children's rights authors on the capacity and autonomy of the child.

This means that this framework is at odds with a number of writers who argue that there is no independent right of the child to religious freedom.⁴¹ This also means that this framework is at odds with a majority of children's rights authors who argue that the child has an independent right to religious freedom against parents and religious community, and that freedom of choice is the most important issue.⁴² Justice Goldberg once said about the religion clause of the First Amendment to the US Constitution that its basic purpose was 'to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end'.⁴³ In the same way, the child has a right to religious freedom which is not an end in itself, but is a legal means to achieve a greater aim, linked to the wider interests of the child.

Section 3

The autonomy of the child

1 Introduction

It is necessary to consider the issue of autonomy because it is one of the key concepts in children's rights, and because it is often associated with the existence of a right. Despite the fact that the interest theory does not say anything about powers of enforcement and waiver, a number of interest theorists refer to autonomy as an essential element of rights. This is a vestige of the will theory of rights, according to which being a right-holder implies having powers of enforcement and waiver over the right. A number of interest theorists reject the will theory and yet they argue that the issue of autonomy is important. It is thus necessary to show that there is no link between the two, and that the child can have a right without necessarily having powers over it. In particular, the issue of autonomy is related to the issue of com-

40 N. MacCormick, 'Children's Rights: A Test-Case for Theories of Rights', at 166.

41 For example, see R.J. Ahdar & I. Leigh (eds.), *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), Chapter 7.

42 See below section 3 on the autonomy of the child.

43 *Abington School District v Schempp*, 374 US 203, 305 (1963).

petence and decision-making capacities. This has a particular impact on powers of enforcement and waiver, which in the context of the right of the child to religious freedom, relate more especially to freedom of choice. The autonomy of children is related to making life choices, and the age of children raises questions about their competence, both factually and legally. On the one hand, it is argued that the growing decision-making capacities and autonomy of children should be increasingly recognised. On the other hand, it is also argued that their decision-making capacities should not be over-evaluated, and that children should be allowed to be children. Finally, it is claimed that it is sometimes necessary to intervene in order to protect children from harmful decisions. This section argues that the existence of the right of the child is separate from the autonomy and capacity of the child, on the basis that under the interest theory, a right does not necessarily imply powers of waiver or enforcement over it. This then needs to be applied to religious freedom. In particular, chapter 1 showed that freedom of choice is not a key issue for the child, though it becomes relevant later on in the life of the child.

2 Autonomy claims

Throughout all the argument there is much connection between autonomy, decision-making capacities and claims of self-determination. John Eekelaar refers to a child's autonomy interest as 'the freedom to choose his own lifestyle and to enter social relations according to his own inclinations uncontrolled by the authority of the adult world, whether parents or institution'.⁴⁴ Eugene Verhellen emphasises the recognition of autonomy, the right to self-determination of children, and the recognition of their being fully-fledged legal persons.⁴⁵ In particular, Verhellen says that the recognition of self-determination for children is essential to make them more competent, and not vice-versa.⁴⁶ He then distinguishes three trends: radical, reformist, and pragmatic. The radical trend challenges the validity of the argument of incompetence on ethical grounds and argues that there should not be any discrimination, including based on age difference. According to the reformist trend, society heavily underestimates the competence of children to make rational and informed decisions, which should lead to bringing down the age of majority and gradually to granting more rights to children. Finally, the pragmatic trend argues that children should be deemed competent unless incompetence can clearly be demonstrated, which means that they should not bear the burden of proof.

A child's age often leads to a presumption of incompetence, which in turn has repercussions on their legal competence. However this presumption of incompe-

44 J. Eekelaar, 'The Emergence of Children's Rights', at 171.

45 E. Verhellen, 'Changes in the Images of the Child' in M.D.A. Freeman & P. Veerman (eds.), *The Ideologies of Children's Rights* (Dordrecht: Martinus Nijhoff Publishers, 1992), 79-94, at 80. He argued that children should be freer to make decisions, and they should be recognised some rights of self-determination or participation.

46 *Ibid*, at 81.

tence is challenged by a number of children's rights theorists. For example, one could wonder whether it is discriminatory to deny children, i.e. persons under a certain age, rights which they would have if they were over that age and in possession of the capacities they already possess.

In the 1970s, children's liberationists such as John Holt and Richard Farson argued that children had much more factual decision-making powers and a far greater ability for self-determination than was usually thought, and argued that children should be granted the same rights as adults. In the 1980s, authors such as John Harris and Bob Franklin argued that even young children were capable of intelligent thought and of making informed choices.⁴⁷ For example, Hugh LaFollette argues that fairly young children are capable of making some decisions, and treating them as if they had no autonomy impedes their becoming fully autonomous adults.⁴⁸ Very recent works still argue that children are often capable of acting autonomously and in their own best interests.⁴⁹

However, Campbell criticises the redrawing of the boundaries between adulthood and childhood. Rather, he argues that there is a 'transitional period from paradigmatic childhood to full-blown adulthood', which is characterised by physical development, significant capacities for autonomous choice, and he puts this in terms of the autonomy interests of children.⁵⁰

Jill Grime highlights some differences between Campbell and Freeman.⁵¹ Freeman argues that children should be understood as potentially rational and that rights should be attributed on that basis. Campbell argues that such a focus on rationality,

47 J. Holt, *Escape from Childhood: The Needs and Rights of Children* (Harmondsworth: Penguin, 1975); R. Farson, *Birthrights* (New York: Macmillan, 1977); J. Harris, 'The Political Status of Children' in K. Graham (ed.), *Contemporary Political Philosophy* (Cambridge: Cambridge University Press, 1982); B. Franklin (ed.), *The Rights of Children* (Oxford: Blackwell, 1986).

48 H. LaFollette, 'Circumscribed Autonomy: Children, Care, and Custody' in J. Bartkowiak and U. Narayan (eds.), *Having and Raising Children: Unconventional Families, Hard Choices, and the Social Good* (University Park, Pennsylvania: Pennsylvania State University Press, 1999), 137-151, at 149-150.

49 K.A. Bentley, 'Can There Be Any Universal Children's Rights?' (2005) 9(1) *International Journal of Human Rights* 107-123, at 119. Plenty of authors and articles tie the existence of a right to an autonomous status: for example, see A. McGillivray, 'Why Children Do Have Equal Rights: In Reply to Laura Purdy' (1994) 2 *International Journal of Children's Rights* 243-258, at 256: 'Rights are about autonomy, an autonomy based not on unbridled individualism but on relationship and dependence. [...] To be an acknowledged rights-bearer is the mark of humanity'.

50 T.D. Campbell, 'The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult', at 18-19.

51 J. Grime, 'Different Priorities: Child Rights and Globalisation' (2000) 1 *Law, Social Justice and Global Development* (LGD), available at <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/grime/> (last visited 17th April 2007).

or even potential rationality, may exclude some children who do not have that capacity, from having rights; rather the focus should be on autonomy interests.

According to Eekelaar, another way to look at children is to see them as future adults. Eekelaar considers ‘those benefits which the subject himself or herself might plausibly claim in themselves’, makes an imaginative leap and guesses what a child might retrospectively have wanted once they reach a position of maturity.⁵² Using substituted judgment, adult duties towards young children can count as rights if, retrospectively and with the information of the relevant factors and capable of mature judgment, children would want such duties to be exercised towards them.⁵³

This view of the child as a future adult has been strongly criticised by Campbell as being very adult-centred. He criticises retrospective or substituted judgment because they reflect power theories of rights, which only consider the significance of children in terms of their emerging adult-like capacities, or because of their future position. Instead, the focus should be on children, present situations, present happiness and current concerns.⁵⁴

Even when it is claimed that children do not have a right to autonomy, it is argued that they have at least an interest in autonomy. In particular, Jane Fortin says that accepting an interest theory of rights does not involve rejecting the concept of children having an interest in making choices and therefore an interest in autonomy. She says: ‘Children may indeed have rights to self-determination based on their interest in choice, without having a right to complete autonomy’.⁵⁵ David Archard also points out that, even if some children lack the competence required to possess rights of self-determination, their views are still important. In particular, it may be necessary to keep and estimate the child’s competence to make rational choices.⁵⁶

However, the arguments of some children’s rights theorists have been seriously criticised for having an unrealistic view of children’s capacities. Thus, it has been argued that the decision-making capacities of children should not be over-valued, and that ‘children should be allowed to be children’.⁵⁷ This is an amplification of some of Campbell’s arguments, who criticises the redrawing of the boundaries between

52 J. Eekelaar, ‘The Emergence of Children’s Rights’, at 169-170.

53 J. Eekelaar, ‘The Importance of Thinking that Children Have Rights’ in P. Alston, S. Parker & J. Seymour (eds.), *Children, Rights, and the Law* (Oxford: Clarendon Press, 1992), 221-235, at 229.

54 T.D. Campbell, ‘The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult’, at 20-21.

55 J. Fortin, *Children’s Rights and the Developing Law* (London: LexisNexis, Butterworths, 2003), at 21.

56 D. Archard, *Children: Rights and Childhood* (London: Routledge, 1993), at 87.

57 J. Fortin, *Children’s Rights and the Developing Law*, at 5. See also L.M. Purdy, *In Their Best Interests? The Case Against Equal Rights for Children* (Ithaca, NY: Cornell University Press, 1992) and L.M. Purdy, ‘Why Children Shouldn’t Have Equal Rights’ (1994) 2 *International Journal of Children’s Rights* 223-241.

childhood and adulthood and also says that we should not see children as future adults only. For example, Tamar Schapiro says that children do not have the prerogative to waive their right to be protected and helped by adults.⁵⁸ This means that having the substantive right is one thing, and having a right to claim it is another.⁵⁹ Schapiro adds that children are persons but not full ones, are incapable of deliberating well, lacking in reason and unable to make choices which protect and advance their own interests. Harry Brighouse also points to three differences between children and adults: dependence, vulnerability, and the capacity to develop into non-vulnerable and independent adults.⁶⁰

3 Paternalistic interventions

It is necessary to consider claims for paternalistic interventions because they are the other side of the argument. Paternalistic (often welfarist) claims are particularly important when children do have some decision-making capacities. Gerald Dworkin understands paternalism as the ‘interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced’.⁶¹ Moreover, they have a bearing on showing that the existence of a right is separate from the concept of autonomy, that is, that the existence of the right of the child is separate from the autonomy of the child and having power over the right.

The status of children as autonomous beings is contested, and some argue that children do not necessarily know what is best for them, which is also linked to claims about their welfare. Claims in favour of the autonomy of children are not always considered desirable. For example MacCormick said:

the presumption that people are the best judges of what is good for them and of whether to have it or not is not and should not be extended to children, certainly not young children. Neither in law nor in what I take to be sound morality can children’s rights be regarded as carrying the option of waiver or enforcement by themselves or on their behalf. Children are not always or even usually the best judges of what is good for them, so much so that even the rights which are the most important to their long-term well-being, such as the right to discipline or to a safe environment, they regularly perceive as being the reverse of rights or advantages.⁶²

58 T. Schapiro, ‘Childhood and Personhood’ (2003) 45(3) *Ariz. L. Rev.* 575-594, at 576.

59 See D. Gerber, ‘Rights’ (1976) 62 *ARSP* 329-348, at 333.

60 H. Brighouse, ‘How Should Children Be Heard?’ (2003) 45(3) *Ariz. L. Rev.* 691-711, at 699-700.

61 G. Dworkin, ‘Paternalism’ in R.A. Wasserstrom (ed.), *Morality and the Law* (Belmont, California: Wadsworth Publishing, 1971), 107-126, at 108.

62 N. MacCormick, ‘Children’s Rights: A Test-Case for Theories of Rights’, at 166.

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Fortin says that many contemporary writers are now cautious of attributing a moral right to autonomy to children, and paternalism is seen as having an important role in restricting children's powers of self-determination.⁶³ Freeman also points to the limits of the autonomy of children:

Too often writers on children's rights... have dichotomized: there is either salvation or liberation..., either nurturance or self-determination... the one protects children, the other their rights. To take children's rights more seriously requires us to take more seriously than we have done hitherto protection of children and recognition of their autonomy, both actual and potential.⁶⁴

Freeman said that there would be negative consequences for children's integrity if we allowed them to choose actions with the potential to impair their full development.⁶⁵ He advocated the idea of liberal paternalism, to maximise children's independence and autonomy while justifying intervention in some circumstances. In so doing, it is necessary to consider age, variations in intelligence and strength, and limited or incomplete capacities.⁶⁶ Therefore he asks:

what sorts of action or conduct would we wish, as children, to be shielded against on the assumption that we would want to mature to a rationally autonomous adulthood and be capable of deciding on our own system of ends as free and rational beings. We would, I believe, choose principles that would enable children to mature to independent adulthood.⁶⁷

However, Catherine Lowy criticises the 'future-oriented consent' advocated by Freeman. It is unclear who does the consenting in the future, and 'the later source of consent or gratitude for the current intervention will just not be the same person at all'.⁶⁸ She argues that there is a risk that this hypothesis of future approval of present paternalistic intervention may be self-fulfilling. Finally, Lowy argues that we should respect children's current autonomy rather than their mere capacity for autonomy, and that we should not use adult standards of rationality to arrive at harm in the case of children. Eekelaar also finds that welfarist and rights-based status relationships

63 J. Fortin, *Children's Rights and the Developing Law*, at 20.

64 M.D.A. Freeman, 'Taking Children's Rights More Seriously', at 66.

65 *Ibid.*, at 67.

66 M.D.A. Freeman, 'The Limits of Children's Rights' in M.D.A. Freeman & P. Veerman (eds.), *The Ideologies of Children's Rights* (Dordrecht: Martinus Nijhoff Publishers, 1992), 29-46, at 37.

67 M.D.A. Freeman, 'Taking Children's Rights More Seriously', at 67.

68 C. Lowy, 'Autonomy and the Appropriate Projects of Children: a Comment on Freeman' in P. Alston, S. Parker & J. Seymour (eds.), *Children, Rights, and the Law* (Oxford: Clarendon Press, 1992), 72-75, at 73.

are incompatible with the other,⁶⁹ but emphasises choice as central to recognition of human worth.⁷⁰

4 Relevance for religious freedom

A number of authors claim that the right of the child to religious freedom is necessarily tied to the autonomy of the child in religious matters. For example, Geraldine Van Bueren argues that the age at which children can choose a religion for themselves is a key issue.⁷¹ It is also argued that there is a connection between the prevention of indoctrination and religious freedom. For example, LaFollette says that if children are 'indoctrinated' by their parents in religious matters then they are hindered from growing as independent and autonomous adults.⁷² John White argues: 'If the parent has an obligation to bring up his child as a morally autonomous person, he cannot at the same time have the right to indoctrinate him with any beliefs whatsoever, since some beliefs may contradict those on which his educational endeavours should be based'.⁷³ Also, Joel Feinberg has identified the child's right to religious freedom as a sub-species of the child's 'right to an open future', which can be violated if there is religious indoctrination of such severity that the child has little or no chance of leaving that religion for another.⁷⁴ However, Claudia Mills suggested that parents cannot

69 J. Eekelaar, 'Families and Children: From Welfarism to Rights' in C. McCrudden and G. Chambers (eds.), *Individual Rights and the Law in Britain* (Oxford: Clarendon Press, 1994), at 301. He points out that people who surrender to another the power to determine where their own welfare lie have in a real sense abdicated their personal autonomy.

70 J. Eekelaar, 'The Importance of Thinking that Children Have Rights', at 227.

71 G. Van Bueren, *The International Law on the Rights of the Child* (The Hague: Martinus Nijhoff Publishers, Save the Children, 1998), at 156; G. Van Bueren, 'The Right to be the Same, the Right to be Different: Children and Religion' in T. Lindholm, W.C. Durham, Jr. and B.G. Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: a Deskbook* (Leiden: Martinus Nijhoff Publishers, 2004), 561-569, at 561. See also R. Ramanadha, B. Gogineni and L. Gule, 'Humanism and Freedom from Religion' in T. Lindholm, W.C. Durham, Jr. and B.G. Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: a Deskbook* (Leiden: Martinus Nijhoff Publishers, 2004), 699-719, at 715.

72 H. LaFollette, 'Freedom of Religion and Children' (1989) 3(1) *Public Affairs Quarterly* 75-87, available at <<http://www.stpt.usf.edu/hhl/papers/freedom.of.religion.and.children.pdf>> (last visited 17th April 2007).

73 J. White, *The Aims of Education Restated* (London: Routledge & Kegan Paul, 1982), at 166.

74 J. Feinberg, 'The Child's Right to an Open Future' in W. Aiken and H. LaFollette (eds.), *Whose Child? Children's Rights, Parental Authority and State Power* (Totowa, N.J.: Littlefield, Adams, 1980), 124-153, at 125-126. Johan D. van der Vyver also tells of a case that illustrates South African thinking in regard to the religious rights of the child. In *Kotze v Kotze* 2003 (3) SA 628 (T), the Transvaal Provincial Division of the High Court was called upon to endorse a settlement agreement in a divorce action containing the following provision: 'Both parties undertake to educate the minor child (then three years

not guide their children toward one option rather than another: ‘as far as religion is concerned, there is no “neutral” setting, no way of keeping options open’.⁷⁵ It is not suggested either that the choice of religion is entirely a matter for children, even though they may be influenced through parental upbringing.⁷⁶

5 Conclusion

Clearly, there is an inextricable link between autonomy, competence and decision-making capacities. In a way there is a great deal of divergence between some of the different authors discussed above, but in another way they have the same goal, which is to assess the factual and legal competence of children. This in turn has some repercussions on children’s claims to autonomy. It is sometimes argued that children are more rational than is usually admitted and should be granted more autonomy. It is also argued that children have the capacity to be more rational and to act autonomously. One way or another, children’s rationality and competence are being assessed: there are claims for actual and potential autonomy, interests in autonomy, and there tends to be a redefining of the boundaries between childhood and adulthood. Yet this is challenged by those who say that children are not as rational and capable as some children’s rights theorists claim. There does not seem to be, nor could there be, a definitive agreement on the capacities and the autonomy of the child. Yet it appears that rationality creeps back in as a criterion for attributing rights, and ‘children remain constructed as different, as more or less rational’.⁷⁷ Therefore,

old) in the Apostolic Church and undertake that he will fully participate in all religious activities of the Apostolic Church’. The Court refused to make this provision an order of the court, basing its decision on the best interests of the child. The judge said: It is often stated that it is ‘useful’ (if not essential) to ensure that a child belongs to a church, or adheres to a religion and partakes in its activities, so that it can, at a more mature age, at that stage exercise its free choice. There is a fallacy in this argument. It fails to appreciate fully the nature of the human being within the framework of the imposition of religious dogma upon it... If a child is forced, be it by order of the parents, or by order of Court, to partake fully in stipulated religious activities, it does not have the right to his full development, a right which is implicit in the Constitution and which is expressly referred to in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, which is part of the United Nations Convention on the Rights of the Child, of which the State is a signatory’. See J.D. van der Vyver, ‘Municipal Legal Obligations of States Parties to the Convention on the Rights of the Child: The South African Model’ (2006) 20 *Emory Int’l L. Rev.* 9-41, at 26-27.

75 C. Mills, ‘The Child’s Right to an Open Future?’ (2003) 34(4) *Journal of Social Philosophy* 499-509, at 501-503.

76 J. McBride, ‘Autonomy of Will and Religious Freedom’ in J-F. Flauss (ed.), *La Protection Internationale de la Liberté Religieuse – International Protection of Religious Freedom* (Brussels: Bruylant, Publications de l’Institut international des droits de l’homme, Institut René Cassin de Strasbourg, 2002), 93-129, at 112.

77 J. Grime, ‘Different Priorities: Child Rights and Globalisation’.

Campbell makes a good point when he says that ‘there is something seriously incomplete in thinking of children as if their prime significance is the fact that they will one day be adult, or ‘real’ people’.⁷⁸ Furthermore, accepting that children need to develop their decision-making capacities does not mean accepting that they have a right to autonomy.⁷⁹ Both strike the right note: children are important because of things other than their autonomy or their rationality. In summary, it is often claimed that autonomy arguments should be linked to children having powers over their right, especially powers of enforcement and waiver. However this is incorrect: the interest theory makes claims about important interests, but does not commit to any powers of enforcement and waiver. This mistake is made by a number of children’s rights theorists adopting the interest theory when they argue that the existence of a right leads to assumptions about autonomy.

Section 4

Legal framework

1 The important interest of the child as a legal right

We saw earlier that adopting the interest theory provides the best theoretical account of the right of the child to religious freedom. The interest theory has been criticised for failing to define which interests are important enough to be turned into rights. For example, Steiner argues that it is not good to have to define what counts as a benefit, and cultural relativity is the problem.⁸⁰ Kramer responds that the interest theory does not advance any criterion for what should count as the worthiness of an interest but instead puts forward a thesis about the general nature or structure of rights.⁸¹ He adds though that ‘decisions about what counts as a benefit and what counts as a detriment must stem from assumptions concerning what is generally good for human beings’.⁸²

However, even if an agreement may prove difficult, it is possible to make assumptions concerning what is good for the child in matters of religion. Following on from that, it must be possible to determine what the legal right of the child to religious freedom is. According to the model laid down by the interest theory, the right of the child to religious freedom should reflect the ‘important interest’ of the child in religion. It can be argued that the child has a moral right and duty to seek the truth, to have the freedom to do what is right, for example to worship God. However, there is

78 T.D. Campbell, ‘The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult’, at 20.

79 J. Fortin, *Children’s Rights and the Developing Law*, at 11.

80 H. Steiner, ‘Working Rights’, at 294.

81 M.H. Kramer, ‘Rights Without Trimmings’, at 79.

82 *Ibid.*, at 92.

not always agreement on morality, hence a legal right is needed. For adults the right to religious freedom would mean, in particular, the right to worship as they see fit. It is not clear whether this can be faithfully applied to the child. Freedom of worship is an important aspect of the right and yet it reflects autonomy, capacity and choice too much, and does not mirror the reality of what it means for a child to be religious.

A few common points can be drawn from chapter 1. Especially what is meaningful for children is to be able to engage in religious practices with their family and to belong to a religious community. Brighthouse thus says that the child's interest in religious freedom is 'being able to engage on a mature basis with religious claims and practices, and being able to make her own religious judgments'.⁸³ Furthermore, it is in the context of a religious community that most practices can be observed. Thus, it makes sense to say that being part of, or belonging to, a religious community is part of being religious for a child, which is more relevant than autonomy and freedom of choice. Moreover, religious communities and parents are concerned about 'passing on' their faith and beliefs to their children, and Terence McLaughlin said that 'a coherent way of characterising the intention of the parents is that they are aiming at *autonomy via faith*'.⁸⁴

The interest of the child is to be brought up as a religious being, to belong to a religious community, and to interact with parents and the religious community. Accordingly, the (legal) right of the child to religious freedom is the right of every child to be unhindered in their growth as an independent autonomous actor in the matrix of parents, religious community and society.

2 The state as holder of duties

Traditionally, international human rights law has focused on the rights of the individual against the state, and it is the state who has been the duty-bearer of obligations found in international human rights treaties. However, this has changed in recent years, and international law treats an increasing number of third parties and non-state actors as persons or quasi-persons.⁸⁵ This would lead to the potential for more horizontal effect of international human rights law between the individual and third parties.

In relation to the child, it is also argued that the rights of the child have an horizontal effect and that the state is no longer the unique duty-bearer. This would lead to recognising that third parties have duties to the child, which involves defining

83 H. Brighthouse, 'How Should Children Be Heard?', at 705.

84 T.H. McLaughlin, 'Parental Rights and the Religious Upbringing of Children' (1984) 18(1) *Journal of Philosophy of Education* 75-83, at 79 (emphasis in the text).

85 See P.G. Lauren, *The Evolution of International Human Rights, Visions Seen* (Philadelphia: University of Philadelphia Press, 2003), at 275. Paul Gordon Lauren says 'the emergence of a growing number of non-state actors in international politics that confront traditional claims and practices of national sovereignty also presents a new frontier of both opportunities and challenges for human rights'.

who these third parties are. The right of the child to religious freedom involves more than just the child and the state involved. The essential third parties are parents and religious communities.

Van Bueren argues that the international law on the family is changing. Traditionally, international law has sought to safeguard the privacy of the family, yet this 'hands off' approach is slowly changing.⁸⁶ Thus, it is increasingly argued that the child has rights against the family, and that the family has duties towards the child. Particularly in relation to religion, the family plays an important role. The traditional focus of international law has been on the duty of the state to respect the religious and philosophical convictions of the parents in the education of their children.⁸⁷ Also, quite simply, the reality of religious children is that they are brought up and nurtured into a faith by their parents and as 'religious beings' inside the family. Examples taken from chapter 1 show that the family is one of the most important contexts in which there is religious socialisation, which includes the nurture of the child, carrying on a certain way of life, a number of religious practices and rituals, and the transmission of faith. This has been recognised at the international level, especially by the UN Committee on the Rights of the Child which, in its discussions with state parties, has asked a number of questions about the relationship between parents and child in religious matters.⁸⁸

A religious community is also a key actor in relation to the religion of the child. The community gives a certain setting for the formal nurture of the child. Formal socialisation, nurture and religious education are extremely important in a number of religions, in addition to that provided in the home by the family. In addition to formal religious education, a religious community is also the setting of religious practices and rituals, important in developing the religious understanding of the child. Therefore, since the religious community is an important actor, it may be held to have a number of responsibilities towards the child.

86 G. Van Bueren, *The International Law on the Rights of the Child*, at 72.

87 For example, Article 18(4) ICCPR, Article 14(3) ICESCR, P1-2 ECHR.

88 For example, the Committee asked the delegation of Chile whether freedom of religion was accepted by the family and society when children chose a religion different from that of their parents: UN Committee on the Rights of the Child, *Summary Record of the 147th meeting: Chile*, UN Doc. CRC/C/SR.147, at 6 (1994). The Committee was concerned that the Constitution of Croatia guaranteed the right of parents to choose the religion of their children without even mentioning that the child's views should be taken into account: *Summary Record of the 280th meeting: Croatia*, UN Doc. CRC/C/SR.280, at 12 (1996). In the case of Gabon, the Committee wanted to know what the government was doing to ensure that children had the right to express their views on all issues concerning them, as custom prohibited freedom of thought and freedom of conscience within the family: *Summary Record of the 756th meeting: Gabon*, UN Doc. CRC/C/SR.756, at 54 (2003).

This shows that, in addition to the state, third parties may hold correlative duties to the child. Later on this will lead to the question of whether the state has a duty to protect the right of the child against third parties.

However, it is debatable whether third parties are really an issue at all. Indeed, they may have some duties towards children, yet the state is the actor that really matters in international law. If the claim that third parties are bound by the right of the child to religious freedom is justified, it is the state which will be held responsible in international law for its failure to make third parties responsible through domestic law. Therefore, it is the state which is bound by the right of the child to religious freedom and which holds the duties, although the issue of third parties will become relevant when discussing more specifically the positive duties of the state towards the child.

In the process of crafting a framework of the right for the child to religious freedom against the state, there is a major distinction between negative and positive acts, which is well known in jurisprudence. This book adopts the model created by Robert Alexy.⁸⁹ He explains well the distinction between negative and positive rights and in particular, he provides the best existing account of positive rights. It is necessary to determine the negative and positive rights of the child against the state in relation to religious freedom, and the duties of the state towards the child. *Prima facie* rights will only become definitive after they have been balanced with competing interests.

3 Negative rights of the child

The first element of the right of the child to religious freedom is a negative right against the state, which is an obligation of result.⁹⁰ This refers mainly to the right of the child not to be interfered with by the state in their religious freedom. It is possible to distinguish the major aspects of the right of non-interference, especially with indications from chapter 1.

The child has a right to be protected against the intervention of the state. The state must not bring about a state of affairs which would make it impossible or more difficult for the child to enjoy their right to religious freedom. The main relationship of the child is with parents and the religious community they are part of, which means that the state must not interfere with this relationship. The state must not interfere in the nurture of the child, whether informal or formal.

We saw in chapter 1 that the main elements of informal nurture were that children are brought up as religious beings and nurtured into a religious faith by their parents. Faith is informally transmitted through life in the home, worship, prayers,

89 R. Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, trans. Julian Rivers, 2002), at 120-138.

90 *Ibid.*, at 122-126. Alexy uses a formal tripartite distinction: rights that the state should not prevent or hinder certain acts of the right-holder, rights that the state should not adversely affect certain characteristics or situations of the right-holder, and rights that the state should not remove certain legal positions of the right-holder.

initiation rituals and ceremonies. Parallel to informal nurture, formal nurture puts slightly more emphasis on the relationship with the religious community, such as worship, festivals, and a number of initiation rituals and ceremonies. Nurture can also be characterised as more formal when there is specific religious education or instruction, such as religious classes taught by members of the community.⁹¹

This means that children have a right to be brought up as religious beings and nurtured in a religious faith by their parents, and the state must not make this impossible or more difficult. The state must thus refrain from interfering in the informal nurture of the child. It must not make it impossible or more difficult for parents to transmit their religious beliefs to the child. This also means that the state must not interfere when the child takes part in festivals, is initiated to the faith through initiation rituals or ceremonies, or worships with the family or with the religious community (depending on the festival, ritual or ceremony). The state must also refrain from interfering with the formal nurture of the child. This means that it must not prohibit or make it more difficult. For example, this means that there must be no prevention or interference with formal religious education classes. Belonging to a religious community must not be made impossible, for example by being made illegal, or by imposing an age-limit or a test of the 'evolving capacities' of the child.

One particular example of interference with the informal and formal nurture of the child would be that the state makes it illegal for parents to transmit their faith to the child, or set age restrictions for the participation of the child in festivals, ceremonies, initiation rituals or religious education classes. Another example could include a general prohibition on the child wearing religious symbols at school, or to prohibit the child to fast.

Chapter 1 also indicated that when a child is of age, then it is possible that the child might choose to leave the religious community, or choose to engage with a limited range of religious worship or practices only. This means that the state must not interfere with the right of the child to choose another religion or leave the religious community, either by making it illegal, or by making it more difficult.

In addition, children have a right that the state does not adversely affect certain of their characteristics or situations. The religious identity of children falls under this category. For example, the state must not deny the religious identity of children or impose another one on them. This may be relevant in countries where there is a dominant religion. For example, the religion of the child may have to be recorded by law: this may prove problematic if the choice of religions is limited to only a selected few. Another problem could be that the record of religion is dependent upon the religion of the father and the mother but they are different from one another. If children

91 For example, the main groups in Christianity are Sunday School during a church service, or specific children's groups during the week; in Islam, children would attend 15 to 20 hours a week of formal religious education, usually in *madrassahs*, although sometimes delivered by private teachers in people's homes; as for Hinduism and Sikhism, children might attend a weekly language class.

and/or their parents/family abstain from certain types of foods, or fast for religious reasons, then this must also not be affected by the state. Similarly, the state must not affect a situation where the child speaks a particular language at home, notably because they belong to one particular religion.⁹²

4 Positive rights of the child

The second element of the child's right to religious freedom is a positive right against the state, as a counterpart to a negative right against the state. This refers to the right of the child to positive acts by the state. It is part of the role of the state to have overall responsibility for ensuring that society is properly structured. Positive rights carry an obligation of means (which means that the state must take all reasonable means to fulfil its duty), on the basis that it is normally unjust to force the state to be liable for all actions by third parties. Alexy points out that every right to a positive action on the part of the state is a positive right. Entitlements can mean factual or normative performance, and Alexy has grouped positive rights into three categories: protective rights; rights to organisation and procedure; and entitlements in the narrow sense.⁹³

A Protective rights

A right to protection means that children have a right against the state that the state protect them from the interference of third parties. Alexy points out that everything worthy of constitutional protection is a potentially protected interest.⁹⁴ It is sufficient that the state adopts only one protective means to satisfy its duty of protection, and it has discretion in the matter. However, considering what we know of what it means for a child to be religious, it is possible to identify what the protective rights of the child should be.

The issue, then, is about what the state must do in order to protect the child. The key relationship is between child, parents and religious community. There is a presumption that this is an harmonious relationship, but it may not always be the case, so the main protective rights of the child are against parents and religious community.

The relationship of the child with the parents and a religious community is the most important one, and the belonging of the child is key. However, at some point the child comes of age and is able to make personal choices in religious matters. Freedom of choice is an important element of religious freedom, and children must

92 For example a Muslim child could speak Urdu or Bangladeshi, and a Hindu or Sikh child could speak Punjabi.

93 R. Alexy, *A Theory of Constitutional Rights*, at Chapter 9.

94 Protection is varied and can include criminal law, tort law, procedural law, administrative law, or factual action.

be able to choose another religion, or none, to leave the religious community they have been brought into.⁹⁵

The child has a right to protection from both parents and religious community. The state has a duty to protect the child against their parents if the child chooses to change religion, to leave the religious community or to join another one, or on the contrary if the child chooses to stay in the same community whereas the parents change. The state has a duty to protect the child against the religious community if the child chooses to leave the community, even if their parents are staying.

However, leaving a religious community may mean different things. In chapter 1 we saw that all major religions emphasise informal nurture in the family. This means that it may be difficult to ‘leave’ this environment. However, demarcation from elements of religiosity may be more formal in certain religions, such as with religious practices. For example, children can stop practising in the community, choose not to participate in all, or some, religious practices. This means that they have a right against the state to be protected against parents and the religious community if they choose to leave the community, or to engage only partially with it.

There may also be interference by the parents with the right of the child in the case of school religious education, which is closely related to freedom of choice. In a number of countries the school curriculum provides for religious education at school. In some cases it is up to the parents to provide authorisation for their child to be exempted from religious education classes or to choose an alternative subject. In this case, the right to protection of the child may be met by the state in a procedural form. For example, the right to protection of the child may include procedural safeguards according to which it is up to the child to make a choice after a certain age as to whether they want to carry on religious education classes, opt out, or choose an alternative subject.

Finally, the right of the child also covers protection against harmful religious practices. This specifically concerns the body, life and health of the child. In this case, criminal law may be included in state action. However, it may be difficult to define what is harmful and it is unclear who decides what is harmful to the child.

B Procedural rights

Alexy considers that procedural rights are a second subset of the positive right of the individual against the state. He is particularly concerned by the right to the enactment

95 Eekelaar said that ‘the courts should not confine their refusal to intervene on a parent’s behalf to cases where such intervention would harm the child. Once a child approaches the age of discretion it may be considered his right to determine for himself his religious outlook and he should be able to resist parental indoctrination for this reason rather than by pleading his welfare’: J. Eekelaar, ‘What are parental rights?’ (1973) 89 L.Q.R. 210-234, at 223.

of certain procedural norms, addressed to the legislature as rights to law-making.⁹⁶ Therefore, the issue is about what the state has to do in order to help the child to protect their right.

The most relevant procedural rights for the child appear to be court and administrative procedures. Alexy describes them as mostly rights to ‘effective legal protection’, which means that the outcome of the procedure protects the substantive rights of the right-holder affected. Especially what is important is that the child will have a *prima facie* right to procedural norms if these norms can raise the protection of the right of the child to religious freedom. The state must help protect the right of the child to religious freedom by creating procedural rights, which will guarantee more effective legal protection.

As a starting point, the legal regulation of the religious community has an impact on all believers, including children. Regarding court procedures, the child could have a right to standing, i.e. the right to start legal proceedings. This would be particularly relevant when the state interferes with the right to religious freedom of the child, when the state fails to protect the child against the interference of third parties, and when the state fails to give the child any substantive rights needed.

A number of procedural rights could also be granted to the child, especially a right that the child be allowed to participate in decisions affecting their right to religious freedom. In particular, this is needed in relation to education. For example, the child needs a procedural right to make choices in religious education, whether to opt out or choose an alternative subject. It would first be up to the parents to make a decision, then up to the child when they are of age. Also, in countries where the recording of religion is compulsory (for example on identity documents or on school records), then the child needs a procedural right regarding what religion is recorded, with a right to change the record. This may also be applicable in countries where there is a dominant or a state religion, and the religion of the child is determined according to the religion of the father or the mother. If a religious identity is imposed by the state in this way then a procedural right is needed for the child to choose and change their religion. Another important aspect is care and custody, which would lead to recognising a procedural right that the religion of the child is taken into account in care and custody arrangements.

C *Substantive rights*

Finally, Alexy considers that rights to substantive benefits (or entitlements in the narrow sense) are the third subset of the positive right of the individual against the state.⁹⁷ Alexy sets out a model according to which an entitling position is guaranteed

96 He says that there are four types of rights of organisation and procedure: private law powers, court and administrative procedures, organisation in the narrow sense, and state decision-taking. See R. Alexy, *A Theory of Constitutional Rights*, at 314-334

97 Alexy says that entitlements in the narrow sense are rights of the individual against the state to something which the individual could obtain from other private individuals, if

‘if the principle of factual freedom requires it very strongly, and the principles of the separation of powers and democracy as well as competing substantive principles are relatively slightly affected by the constitutional guarantee of the entitling position and the decision of the court which take account of it’.⁹⁸ The issue is whether there is anything substantive that goes with the right of the child to religious freedom, without which the right of the child would be incomplete.

The most important area where the state must provide substantive benefits is that of education. This is particularly important as there is a close relationship between the public nature of the school system and the private nature of religious freedom, and the child may want to carry out certain religious practices at school. Therefore the state must grant substantive rights to the child to make sure that religious freedom is meaningful at school. First, a number of religions have food regulations, whether during religious festivals or on a weekly or daily basis. This means that the state must accommodate the child, for example by providing special food at school. Secondly, a child may want to pray or worship during the day. This means that the state would have to grant a substantive right to something like a prayer room at school. There is also the issue of whether the state should provide for public religious education classes or has a duty to financially support these classes. By granting these substantive rights, the state provides for certain types of education, which have an impact on the religious freedom of the child.

Section 5 Conclusion

It is now possible to arrive at a *prima facie* statement of the right of the child to religious freedom. The right of the child to religious freedom is based on the interest of the child to be unhindered in their growth as an independent autonomous actor in the matrix of parents, religious community and society. It is the state which is the holder of duties in traditional international human rights law, yet parents and the religious community are important third parties. We saw that the child has a right to religious freedom that is separate from the idea of autonomy, and children do not necessarily have powers of enforcement over their right. On the other hand, we saw that the child comes of age at some point, which needs to be taken into account. This is a consequence but not the ‘raison d’être’ of the right. The general content of the right is as follows.

First, the child has negative rights against the state. Considering that the most important right for the child is the idea of belonging and the nurture of the child, the state has a duty not to interfere in the relationship between child, parents and religious community, nor with the child’s decision to leave the religious community.

only he had sufficient financial means, and if only there were sufficient offers on the market. *Ibid.*, at 334-348.

98 *Ibid.*, at 344.

Chapter 2

In addition, the state must not adversely affect the characteristics and situations of the child such as religious identity, food and linguistic rituals or habits. Second, the child has positive rights against the state. Children have a right that the state protects them in the enjoyment of their right to religious freedom, which is especially a right to be protected against unwarranted interference by third parties, i.e. parents and the religious community. The child also has procedural rights, which are especially relevant in terms of court and administrative procedures. Equally, the child has rights to substantive benefits, especially in relation to education.

This chapter sets out only a *prima facie* statement of the right of the child to religious freedom. A body of international legal materials will now be analysed, and a more definitive statement of the right will emerge as these *prima facie* rights are weighed up against any competing principles.

Part II

International Law

Chapter 3

The ICCPR

Section 1 Introduction

The purpose of this chapter is to provide an overview of the protection of religious liberty under Article 18 of the International Covenant on Civil and Political Rights (ICCPR), which says:

1. Everyone 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. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The approach of the Human Rights Committee (HRC) will then be analysed to see whether it matches the theoretical model of the right of the child to religious freedom in chapter 2. The structure of this chapter will be to consider Article 18 and its interpretation by the HRC, to then apply it to children. The reason for choosing this structure is that children are not a focus for the HRC, which makes it difficult to integrate the topic of children into the work of the HRC.

Section 2 Freedom of choice

Freedom of choice is an important issue under the ICCPR and the second limb of Article 18(1) says: ‘the right to freedom of thought, conscience and religion... shall include freedom to have or to adopt a religion or belief of his choice’. The *travaux préparatoires* show that there was an immense struggle over the drafting, especially as Muslim countries challenged the very idea of renouncing Islam. Although more explicit language was excluded from the text of Article 18(1), it has generally become accepted that it embraces the right to change religion.¹ The HRC has embraced this view in paragraph 5 of its General Comment 22 on religious freedom:

the freedom to ‘have or to adopt’ a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief.

However, some authors disagree: it is claimed that the evidence in support of this is not wholly convincing, that there is in fact no consensus and that it is disingenuous to suppose so.² Still, the HRC has frequently considered the issue in state

1 For example, see the *Krishnaswami Study*, UN Doc. E/CN.4/Sub.2/200/Rev.1 (1960) pre-ICCPR and the *Odio Benito Report*, UN Doc. E/CN.4/1987/Sub.2/1987/26, paragraph 200 (1987) post- ICCPR.

2 M.D. Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997), at 202: the text of Article 18 ‘is open to the interpretation that it allows an individual to continue in a faith, to adopt a faith, but not to abandon a faith already held’, and M.D. Evans, ‘Human Rights, Religious Liberty, and the Universality Debate’ in R. O’Dair & A. Lewis (eds.), *Law and Religion* (Oxford: Oxford University Press, 2001), 205-226, at 218. Similarly, it is argued that there is a far from consistent approach towards autonomy of religious belief in global and regional instruments: J. McBride, ‘Autonomy of Will and Religious Freedom’ in J-F. Flauss (ed.), *La Protection Internationale de la Liberté Religieuse – International Protection of Religious Freedom* (Brussels: Bruylant, Publications de l’Institut international des droits de l’homme, Institut René Cassin de Strasbourg, 2002), 93-129, at 103.

reports and has expressed its concern in relation to Jordan,³ Libya,⁴ Yemen,⁵ and Morocco,⁶ amongst others. The HRC suggested once that a person should be able to decide before the age of 16:

Concerning the freedom of religion, [Mr. Sadi] joined Mr. Herndl in asking whether the Cypriot authorities were aware of the Committee's general comment on article 18 of the Covenant, and suggested that its contents might provide guidance in amending domestic legislation relevant to that article. The current provision on religions deemed to

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- 3 Human Rights Committee, *Concluding Observations: Jordan*, UN Doc. CCPR/C/79/Add.35 (1994).
 - 4 Human Rights Committee, *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CCPR/C/79/Add.45, at 13 (1994): 'The severe punishments for heresy (which are said not to have been used) and the restrictions on the right to change religion appear to be inconsistent with article 18 of the Covenant'. *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CCPR/C/79/Add.101, paragraph 16 (1998): 'Notwithstanding the statement contained in the State party's report and reiterated by the delegation that "all Libyans are Muslims by birth and heredity", the Committee stresses that it is incumbent on the State party to ensure that all individuals subject to its jurisdiction enjoy their right to freedom of thought, conscience and religion under article 18 of the Covenant'.
 - 5 Human Rights Committee, *Concluding Observations: Yemen*, UN Doc. CCPR/CO/75/YEM, at 20 (2002): 'The Committee notes with concern the violations of freedom of religion or belief and inter alia the violation of the right to change one's own religion (art. 18 of the Covenant). The State party should ensure that its legislation and practice are in line with the provisions of the Covenant and in particular that the right of persons to change their religion if they wish so, is respected'. *Concluding Observations: Yemen*, UN Doc. CCPR/CO/84/YEM, at 18 (2005): 'The Committee reiterates its concern about the prohibition of Muslims converting to another religion, in the name of social stability and security. Such a prohibition is in violation of article 18 of the Covenant, which does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice, and of article 26, which prohibits discrimination on the ground of religion. The State party should review its position and take all necessary measures to ensure the freedom of all persons to choose a religion or belief, including the right to change one's current religion or belief'.
 - 6 Human Rights Committee, *Concluding Observations: Morocco*, UN Doc. CCPR/CO/82/MAR, paragraph 21 (2004): 'The Committee is concerned about the de facto limitations on the freedom of religion or belief, including the fact that it is impossible, in practice, for a Muslim to change religion. It recalls that article 18 of the Covenant protects all religions and all beliefs, ancient and less ancient, major and minor, and includes the right to adopt the religion or belief of one's choice. The State party should take steps to ensure respect for freedom of religion or belief and to ensure that its legislation and practices are fully in conformity with article 18 of the Covenant'.

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be secret, as well as that according to which it was only after the age of 16 that a person might decide on his or her choice of religion, might usefully be reviewed.⁷

A related issue is freedom from coercion, and Article 18(2) provides that ‘no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice’. Paragraph 5 of the General Comment adds:

Article 18(2) bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. 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, are similarly inconsistent with Article 18(2). The same protection is enjoyed by holders of all beliefs of a non-religious nature.

It appears that Article 18(2) applies to coercion exercised by or on behalf of the state in denying facilities of a public nature, but does not cover private missionary activity as a source of coercion.⁸ Examples include restricting access to education, medical care, employment, the conduct of public affairs, voting and being elected at genuine periodic elections, and public service in one’s country. In addition, the HRC emphasises coercion in the context of public functions.⁹

In *Hudoyberganova v Uzbekistan*,¹⁰ the HRC dealt with the prohibition of wearing religious clothing at university under Article 18(2). The applicant was a university student and as a practising Muslim, she dressed appropriately, in accordance with the tenets of her religion, and in the second year of her studies started to wear a headscarf. The university adopted new regulations, according to which students had no right to wear religious dress, and she was eventually excluded. The HRC said:

The Committee has noted the author’s claim that her right to freedom of thought, conscience and religion was violated as she was excluded from University because she refused to remove the headscarf that she wore in accordance with her beliefs. The Committee considers that the freedom to manifest one’s religion encompasses the right to wear clothes or attire in public which is in conformity with the individual’s faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of Article 18(2), which prohibits any

7 Human Rights Committee, *Summary Record of the 1335th meeting: Cyprus*, UN Doc. CCPR/C/SR.1335, paragraph 15 (1994).

8 P.M. Taylor, *Freedom of Religion, UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005), at 47.

9 *Ibid*, at 47.

10 *Raihon Hudoyberganova v Uzbekistan*, Communication 931/2000 (2005).

coercion that would impair the individual's freedom to have or adopt a religion. As reflected in the Committee's General Comment No. 22 (para.5), policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with Article 18(2). It recalls, however, that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others (Article 18(3)). In the present case, the author's exclusion took place on 15 March 1998, and was based on the provisions of the Institute's new regulations. The Committee notes that the State party has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of Article 18(3). Instead, the State party has sought to justify the expulsion of the author from University because of her refusal to comply with the ban. Neither the author nor the State party have specified what precise kind of attire the author wore and which was referred to as 'hijab' by both parties. In the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of Article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the State party, that there has been a violation of Article 18(2).¹¹

The HRC has also expressed its concern on a number of occasions about coercion to maintain a religion or belief. For example, it asked the delegation of Cyprus whether the statement in its report to the effect that 'the use of physical or moral compulsion for the purpose of making a person change, or preventing him from changing, his religion is prohibited', was compatible with the Covenant, for it was possible in the case of certain religions such as Islam to resort to persuasion to prevent someone from changing their religion.¹² It also expressed its concern at the impediment placed upon the freedom to change one's religion in Morocco.¹³ The HRC is also concerned by the issue of apostasy which, as Taylor puts it, is one of the most direct forms of coercion to maintain one's religion.¹⁴ For example, it asked the delegation of Sudan whether the crime of apostasy in Sudan, defined as advocating abandonment of Islam

11 Ibid, paragraph 6.2. This communication is discussed in more detail in section 4 on limitations.

12 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/34/40, paragraph 388 (1979).

13 Human Rights Committee, *Concluding Observations: Morocco*, UN Doc. CCPR/C/79/Add.44, at 14 (1994).

14 P.M. Taylor, *Freedom of Religion, UN and European Human Rights Law and Practice*, at 50.

by a Muslim, was considered by Sudan to be compatible with Article 18.¹⁵ It added that the imposition in the State party of the death penalty for apostasy was incompatible with Article 6 ICCPR.¹⁶ The HRC has also asked Iran whether it was possible for a Muslim to renounce their religion, to become an atheist or to convert to another religion or whether measures were applied in such a case according to Islamic law.¹⁷ The HRC noted that under the Muslim Code of Religious Law in Egypt, it appeared that Muslims who converted to another religion were considered legally dead, so it requested information on the legal status of such converts.¹⁸

There is a connection between freedom of choice in Article 18(1) and freedom from coercion in Article 18(2). Coercion refers more specifically to state coercion, the denying of facilities, pressure to maintain a religion or belief, and punishment for apostasy. Whatever the origins of Article 18(2), it cannot be interpreted as endorsing steps to impair the individual's choice to leave a religion,¹⁹ and it is a measure that prohibits coercion and pressure on the individual's *forum internum*.

We have seen that Article 18(2) does not deal with private coercion, but only applies to state coercion. However, the HRC has also dealt with the issue of private pressure to change religion. This related to missionary activities, social concerns and inducements, which were a concern during the drafting process. In particular, it has been questioned whether proselytism amounts to coercion.²⁰ In the end, the HRC does not accept Article 18(2) as an anti-proselytism measure, but sees proselytism as a manifestation of one's religion or belief.

The HRC's interpretation of the right to have or to adopt a religion or belief of one's choice in Article 18(1) undoubtedly supports the right to choose the religion or belief of one's choice, the right to replace one religion or belief with another, and the right to maintain a religion. State coercion that would impair the individual's choice is prohibited, but missionary work, proselytism, and the propagation of one's religion or belief is a manifestation of religion or belief that can only be restricted under Article 18(3). The main issues emerging from the work of the HRC in this respect involve the specification and application of these rights in individual circumstances.

15 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/46/40, paragraph 501 (1991).

16 Human Rights Committee, *Concluding Observations: Sudan*, UN Doc. CCPR/C/79/Add.85, at 8 (1997).

17 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/37/40, paragraph 316 (1982).

18 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/39/40, paragraph 301 (1984).

19 P.M. Taylor, *Freedom of Religion, UN and European Human Rights Law and Practice*, at 45.

20 *Ibid*, at 54-111.

Section 3 Freedom of manifestation

The issue of what range of beliefs qualify for protection under Article 18 is related to the definition of religion and belief. Specifically, there is a difference between the first limb of Article 18(1) (which refers to ‘freedom of thought, conscience and religion’) and the third limb of Article 18(1) (which refers to ‘religion or beliefs’). Therefore, the question is whether any expression of thought or conscience is included within the manifestation of religion or belief. Malcolm Evans suggests that the trend has been towards adopting an expansive, inclusive approach which, whilst accepting that not all forms of thought and conscience will count as a ‘belief’ for the purposes of manifestation, sees the range of beliefs which attracts that right as extending beyond those which are deemed ‘religious’ in nature.²¹ Paragraph 1 of the General Comment is, theoretically, quite generous:

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in Article 18(1) is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in Article 4(2) of the Covenant.

However, references to ‘definite religious practices’ and ‘institutional characteristics’ in paragraph 2 suggest, paradoxically, a fairly restrictive approach:

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.

21 M.D. Evans, ‘The United Nations and Freedom of Religion: The Work of the Human Rights Committee’ in R.J. Ahdar (ed.), *Law and Religion* (Aldershot: Ashgate, 2000), 35-61, at 40. Evans adds that the concept ‘religion and belief’ is narrower than ‘thought and conscience’, and that ‘belief’ may encompass more than ‘religion’, depending on what is understood by ‘religion’.

However, not all commentators view the issue as important.²² The HRC has accepted claims relating to Roman Catholicism,²³ Islam,²⁴ Hinduism,²⁵ Hare Krishnas,²⁶ humanism,²⁷ traditional religions,²⁸ political beliefs,²⁹ ‘enemy-benefiting beliefs’,³⁰ and the right for a teacher to put forward his views on ‘liberation theology in disagreement with the views of the church authorities who had appointed him’.³¹ The HRC has rejected claims relating to Sikhism,³² the Church of Scientology,³³ anti-Semitic views,³⁴ and fascism.³⁵ The HRC has also dismissed claims relating to ‘a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug’,³⁶ the right to think on legal issues or develop one’s own legal ideas, conclusions or objections, as well as one’s right to hold opinions without interference on any legal issue and the right to express one’s opinion in any court before any judge,³⁷ the right to die with dignity,³⁸ the right to maintain tradition within the Royal Cana-

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- 22 See P.M. Taylor, *Freedom of Religion, UN and European Human Rights Law and Practice*, at 205-206 for a summary of different views.
- 23 *Waldman v Canada*, Communication 694/1996 (1999); *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*, Communication 1249/2004 (2005).
- 24 *Patterson Matthews v Trinidad and Tobago*, Communication 569/1993 (1998); *Allan Henry v Trinidad and Tobago*, Communication 752/1997 (1998); *Boodoo v Trinidad and Tobago*, Communication 721/1997 (2002); *Raihon Hudoyberganova v Uzbekistan*.
- 25 *A.R. Coeriel and M.A.R. Aurik v the Netherlands*, Communication 453/1991 (1994).
- 26 *Sergei Malakhovsky and Alexander Pikul v Belarus*, Communication 1207/2003 (2005).
- 27 *Leirvåg et al v Norway*, Communication 1155/2003 (2003).
- 28 *Francis Hopu and Tepoaitu Bessert v France*, Communication 549/1993 (1997).
- 29 *Yong-Joo Kang v Republic of Korea*, Communication 878/1999 (2003).
- 30 *Tae-Hoon Park v Korea*, Communication 628/1995 (1999). The expression ‘enemy-benefiting beliefs’ is from P.M. Taylor, *Freedom of Religion, UN and European Human Rights Law and Practice*, at 209-210.
- 31 *Delgado Páez v Colombia*, Communication 195/1985 (1990).
- 32 *Karnel Singh Bhinder v Canada*, Communication 208/1986 (1989).
- 33 *Paul Arenz & Thomas and Dagmar Röder v Germany*, Communication 1138/2002 (2004).
- 34 *Malcolm Ross v Canada*, Communication 736/1997 (2000).
- 35 *MA v Italy*, Communication 117/1981 (1984).
- 36 *M. A. B., W. A. T. and J.-A. Y. T. v Canada*, Communication 570/1993 (1994).
- 37 *Elizabeth Hruska v Czech Republic*, Communication 1191/2003 (2003).
- 38 *Manuela Sanlés Sanlés v Spain*, Communication 1024/2001 (2004).

dian Mounted Police,³⁹ and the claim of a mother who said that her children had been removed from her because she was a born-again Christian.⁴⁰

The third limb of Article 18(1) provides that the right to freedom of thought, conscience and religion shall include ‘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’.⁴¹ It extends only to religion or belief, which means that it does not extend to thought and conscience.⁴² Tahzib-Lie points out that freedom of manifestation is an external freedom and is certainly not strictly a personal and intimate matter of the individual.⁴³ Nowak also states that the manifestation of religion may be termed the active component of one’s religious freedom, as opposed to the passive component, which consists of mere adherence to certain beliefs.⁴⁴ At first sight, paragraph 4 of the General Comment is, again, quite generous:

The freedom to manifest religion or belief may be exercised ‘either individually or in community with others and in public or private’. The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of

39 *Riley et al. v Canada*, Communication 1048/2002 (2002).

40 *Buckle v New Zealand*, Communication 858/1999 (2000).

41 See Human Rights Committee, *General Comment No. 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, paragraph 9 (2004): ‘The Committee considered the relationship between individual and collective religious freedom: ‘The beneficiaries of the rights recognized by the Covenant are individuals. Although, with the exception of article 1, the Covenant does not mention [the] rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as the freedom to manifest one’s religion or belief (article 18), the freedom of association (article 22) or the rights of members of minorities (article 27), may be enjoyed in community with others. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights’.

42 However, the manifestation of thought and conscience can be considered under Article 19.

43 B.G. Tahzib-Lie, ‘Interdiction of Religious Discrimination –Problems that Members of Minority Religions and Belief Communities Experience in the Exercise of Their Freedom of Religion or Belief’ in J-F. Flauss (ed.), *La Protection Internationale de la Liberté Religieuse – International Protection of Religious Freedom* (Brussels: Bruylant, Publications de l’Institut international des droits de l’homme, Institut René Cassin de Strasbourg, 2002), 57-91, at 59.

44 M. Nowak, *CCPR Commentary* (Kehl (Germany): N.P. Engel, 1993), at 315-319.

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places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.

However, Taylor argues that the illustrations of manifestation in paragraph 4 are fairly traditional, in that they focus principally on ritual and ceremonial aspects of manifestation.⁴⁵ The HRC has expanded upon the General Comment in a number of cases and discussions with state parties. Indeed, it gives a broad understanding to the meaning of worship, both individually and collectively, inside or outside specific places of worship.⁴⁶ For example, the HRC asked Korea ‘whether Koreans had free access to houses of worship and whether Koreans continued to attend them’.⁴⁷ In *Boodoo v Trinidad and Tobago*, the HRC held:

As to the author’s claim that he has been forbidden from wearing a beard and from worshipping at religious services, and that his prayer books were taken from him, the Committee reaffirms that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts. In the absence of any explanation from the State party concerning the author’s allegations [...], the Committee concludes that there has been a violation of Article 18 of the Covenant.⁴⁸

Boodoo highlights the issue of freedom of worship in prison. More generally, the HRC pays attention to freedom of worship in a community. It has also dealt with a registration issue in *Malakhovsky and Pikul v Belarus*.⁴⁹ The applicants submitted

45 P.M. Taylor, *Freedom of Religion, UN and European Human Rights Law and Practice*, at 220.

46 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/38/40, paragraph 74 (1983).

47 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/39/40, paragraph 382 (1984).

48 *Boodoo v Trinidad and Tobago*, at paragraph 6.1.

49 *Sergei Malakhovsky and Alexander Pikul v Belarus*. The authors were members of the Minsk Vaishnava community (community of Krishna consciousness), one of seven such communities registered in Belarus. The applicable law distinguished between a reg-

that the refusal to register their religious association amounted to a violation of their freedom of religion under Article 18(1&3) and freedom of association under Article 22(1-2).⁵⁰ The HRC noted that:

the State party's law distinguishes between religious communities and religious associations, and that the possibility of conducting certain activities is restricted to the latter. Not having been granted the status of a religious association, the authors and their fellow believers cannot invite foreign clerics to visit the country, or establish monasteries or educational institutions. Consistent with its General Comment, the Committee considers that these activities form part of the authors' right to manifest their beliefs.⁵¹

The concept of worship may also extend to less traditional forms of worship, and the HRC seems to include the veneration of the dead and the destruction of sacred sites. In *Hopu and Bessert v France*, the authors claimed that by failing to protect an ancestral burial ground which played an important role in their heritage, the authorities had violated their private and family lives and the right to enjoy their own culture.⁵² In *Vakoumé v France*, the authors argued that the construction of a hotel complex on ancestral burial grounds constituted a violation of their right to freedom of thought, conscience and religion.⁵³ It may be that in these two cases, the HRC adopted a rather

istered religious community and a registered religious association. The authors stated that certain activities which were essential to the practice of their religion may only be undertaken by a religious association. According to the domestic statute on 'freedom of conscience and religious organizations', and the Decree of the Council of Ministers on 'approval of invitation of foreign clerics and their activity in Belarus', only religious associations were entitled to establish monasteries, religious congregations, religious missions and spiritual educational institutions, or invite foreign clerics to visit the country for the purposes of preaching or conducting other religious activity (paragraph 2.1).

50 They also noted that the process of unsuccessfully pursuing the registration of the association took two years, which is said to be evidence of a discriminatory policy of the State party towards religious minorities.

51 *Sergei Malakhovsky and Alexander Pikul v Belarus*, at paragraph 7.2.

52 *Francis Hopu and Tepoaitu Bessert v France*. The HRC found a violation of the authors' right to family and privacy. However, in a dissenting opinion, some Committee members said that 'this claim could raise the issue of whether such failure by a State party involves denial of the right of religious or ethnic minorities, in community with other members of their group, to enjoy their own culture or to practise their own religion' (individual opinion by Committee members David Kretzmer and Thomas Buergenthal, co-signed by Nisuke Ando and Lord Colville, at paragraph 3). Of course, only Article 27 was raised; nonetheless it appears that freedom of manifestation of religion or belief in practice could include the protection of ancestral burial grounds.

53 *Vakoumé v France*, Communication 822/1998 (2000), at paragraphs 3.6 & 3.7. The authors claimed that veneration of the dead was a manifestation of religion and tradition inherent in their lifestyle, beliefs and culture, and that the destruction of the sacred site

restrictive approach: indeed, it is regrettable that in the first instance it did not consider the case under Article 18 and failed to consider the community's right to enjoy their own culture or to practise their own religion, and that in the second instance the case was inadmissible *ratione tempore*.

Observance under Article 18(1) notably covers the right to wear clothes or attire in public which is in conformity with one's religion or beliefs. The HRC has dealt with the Islamic headscarf in *Hudoyberganova v Uzbekistan*,⁵⁴ and its analysis of the French report;⁵⁵ the Sikh turban in *Singh Bhinder v Canada*,⁵⁶ and *Riley v Canada*;⁵⁷ Rastafarian dreadlocks;⁵⁸ and the Islamic beard in *Boodoo v Trinidad and Tobago*.⁵⁹ The right to a change of surname into a religious name in order to fulfil religious requirements is also indirectly mentioned in *Coeriel and Aurik v the Netherlands*.⁶⁰ The display of symbols and the observance of holidays and days of rest is

violated their right to freedom to manifest their religion or beliefs in worship and the observance of rites. The case was declared inadmissible because of the non-exhaustion of domestic remedies.

- 54 *Raihon Hudoyberganova v Uzbekistan*. The case is discussed above in section 1 on freedom of religious choice. See also Human Rights Committee, *Concluding Observations: Sudan*, UN Doc. CCPR/C/79/Add.85, at 22 (1997) 'The Committee expresses concern at official enforcement of strict dress requirements for women in public places, under the guise of public order and morality, and at inhuman punishment imposed for breaches of such requirements. Restrictions on the liberty of women under the Personal Status of Muslims Act, 1992 are matters of concern under articles 3, 9 and 12 of the Covenant'.
- 55 Human Rights Committee, *Summary Record of the 1599th meeting: France*, UN Doc. CCPR/C/SR.1599, paragraph 59 (1997): the HRC asked about the right of students in state schools to dress in conformity with their religious practices, and about what was known as the 'Islamic headscarf' question.
- 56 *Karnel Singh Bhinder v Canada*. The author was a Sikh who was required by his religion to wear a turban, but health and safety legislation required him to wear a hard hat at work. The HRC found that if the requirement that a hard hat be worn was regarded as raising issues under Article 18, then it was a limitation that was justified by reference to the grounds laid down in Article 18(3).
- 57 *Kenneth Riley et al. v Canada*.
- 58 Human Rights Committee, *Summary Record of the 1623rd meeting: Jamaica*, UN Doc. CCPR/C/SR.1623/Add.1, paragraph 51 (1997): it appears that the HRC asked Jamaica a question about Rastafarians, because a representative of the country answered: 'In reply to the question concerning religious discrimination against Rastafarians [sic] in private and State schools, he said that students with dreadlocks were admitted to all schools. The issue had been raised in an individual case many years previously and the Ministry of Education had ruled in the student's favour'.
- 59 *Boodoo v Trinidad and Tobago*.
- 60 *A.R. Coeriel and M.A.R. Aurik v the Netherlands*. The authors had adopted the Hindu religion, and they claimed that in order to become Hindu priests, it was compulsory to change their first names into Hindu names, in accordance with the requirements of their religion. As the authorities refused, the authors argued that their rights under Article 18,

mentioned in paragraph 4 of the General Comment.⁶¹ Regarding the freedom not to manifest or not to practise a religion, the HRC told Zambia that the requirement to sing the national anthem and salute the flag as a condition of attending a state school, despite conscientious objection, appeared to be an unreasonable requirement and to be incompatible with Articles 18 and 24.⁶²

Article 18(1) also covers a range of teaching activities. In *Ross v Canada*,⁶³ a schoolteacher denigrated the faith and beliefs of Jews, and called upon others to hold those of the Jewish faith and ancestry in contempt. He expressed his anti-Semitic views through a number of publications. The state maintained that the author's claim fell outside Article 18, because his opinions did not express religious beliefs and certainly did not fall within the tenets of the Christian faith. The state also argued that the author's published opinions were not 'manifestations of a religion, as he did not publish them for the purpose of worship, observance, practice or teaching of a religion'.⁶⁴ The HRC dealt with the claim primarily under Article 19,⁶⁵ although the restriction was justified under Article 19(3). As for the author's claim under Article

inter alia, had been violated. The HRC dismissed the case under Article 18(3), which suggests that it implicitly accepted that freedom of manifestation includes the right to a change of surname into a religious name in order to fulfil religious requirements.

- 61 On the issue of religious symbols displayed by the state, see Human Rights Committee, *Summary Record of the 2404th meeting: Bosnia and Herzegovina*, UN Doc. CCPR/C/SR.2404, paragraph 22 (2006): 'Contrary to what had been suggested in the State party's written replies, in certain returnee areas the local authorities continued to use religious symbols in a provocative manner. In the town of Stolač, for example, a large cross was being displayed on the premises of the municipal authorities, which created a hostile environment for Muslims returning to a previously predominantly Muslim community. In order to promote sustainable return, those issues needed to be addressed urgently'. Also, see Human Rights Committee, *Concluding Observations: Bosnia and Herzegovina*, UN Doc. CCPR/C/BIH/CO/1, paragraph 25 (2006).
- 62 Human Rights Committee, *Concluding Observations: Zambia*, UN Doc. CCPR/C/79/Add.62, paragraph 18 (1996). Article 24 provides: '1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality'.
- 63 *Malcolm Ross v Canada*.
- 64 *Ibid*, at paragraph 6.5.
- 65 Article 19 provides '1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are neces-

18, the HRC found that the actions taken against the author ‘were not aimed at his thoughts or beliefs as such, but rather at the manifestation of those beliefs within a particular context’.⁶⁶ However the restriction was justified under Article 18(3).⁶⁷

As for proselytism, we saw that the HRC considers that it is a manifestation of religion or belief. This was confirmed in *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*.⁶⁸ A religious community made an application for incorporation, which was refused. It was argued that incorporation would necessarily result in imposing unnecessary and improper pressures on distressed and needy people, and because the propagation and spreading of Christianity would impair the very existence of Buddhism.⁶⁹ The HRC said:

the Committee observes that, for numerous religions, including according to the authors, their own, it is a central tenet to spread knowledge, to propagate their beliefs to others and to provide assistance to others. These aspects are part of an individual’s manifestation of religion and free expression, and are thus protected by Article 18(1), to the extent not appropriately restricted by measures consistent with paragraph 3.

Incorporation of the community would give a number of benefits, including construction of places of worship and freedom of proselytism. The authors advanced, and the state party did not refute, that incorporation of the community would better enable them to realise the objects of their community, religious as well as secular. Accordingly, there was a restriction of the authors’ rights to freedom of religious practice and to freedom of expression. Proselytism is thus a manifestation of one’s religion or belief that is to be protected.

sary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals’.

66 *Malcolm Ross v Canada*, at paragraph 11.8.

67 However, see P.M. Taylor, *Freedom of Religion, UN and European Human Rights Law and Practice*, at 260. Taylor says that the HRC made a ‘surprisingly imprecise assessment of the author’s anti-Semitic publications, because of what the state claimed and because the author himself did not characterise his publications as “teaching”’.

68 *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*.

69 The Supreme Court held that the challenged provisions of the Bill ‘create a situation which combines the observance and practice of a religion or belief with activities which would provide material and other benefits to the inexperience [sic], defenseless and vulnerable people to propagate a religion. The kind of [social and economic] activities projected in the Bill would necessarily result in imposing unnecessary and improper pressures on people, who are distressed and in need, with their free exercise of thought, conscience and religion with the freedom to have or to adopt a religion or belief of his choice as provided in article 10 of the Constitution’ (paragraph 2.2).

The right to write, issue and disseminate religious publications is undoubtedly recognised by the HRC. For example, it asked Yugoslavia whether religious communities had the right to print and disseminate religious materials and publications,⁷⁰ and Japan whether the various religious communities had the right to print and distribute their writings.⁷¹

As regards practice, the HRC has considered the possibility of training and appointing leaders. For example, it has asked why the appointment of Roman Catholic bishops in Czechoslovakia needed government approval,⁷² why the designation of the Grand Rabbi in Tunisia was subject to the issuance of a decree,⁷³ and why Zaire needed to ensure that leaders possessed appropriate theological credentials.⁷⁴ It also stated that there were some shortcomings in the observance of Article 18 by Morocco, in particular the restrictions affecting the Bahais' right to profess and practise their belief and limitations on inter-religious marriage.⁷⁵

The HRC's interpretation of Article 18(1) undoubtedly supports the right of the religious believer to manifest their religion. The main issues emerging from the HRC's work are thus fairly traditional. They include freedom of worship, inside or outside places of worship, freedom of worship in prison, worship in a community, the requirement for a religious community to be registered by the state if necessary, and less traditional forms of worship. Observance covers religious clothing and personal appearance, days of rest, ceremonies and religious names. Article 18(1) also covers a range of teaching activities such as proselytism, including inviting religious clerics to visit, establishing monasteries and educational institutions, or disseminating religious publications.

Section 4 Limitations

Article 4(2) says that Article 18 can never be derogated from, even in time of public emergency which threatens the life of the nation.⁷⁶ Whereas the *forum internum* is

70 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/33/40, paragraph 379 (1978).

71 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/37/40, paragraph 70 (1982).

72 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/41/40, paragraph 356 (1986).

73 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/42/40, paragraph 137 (1987).

74 *Ibid.*, at paragraph 285.

75 Human Rights Committee, *Concluding Observations: Morocco*, UN Doc. CCPR/C/79/Add.44, at 14 (1994).

76 General Comment 29 on states of emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), paragraph 7, recalls that the reference in Article 4(2) to Article 18, a

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absolute and cannot be subject to any limitation,⁷⁷ restrictions to freedom of manifestation must be justified under Article 18(3), which provides: ‘Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’. Paragraph 8 of the General Comment states:

Article 18(3) permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted. In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in Articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in Article 18. The Committee observes that Article 18(3) is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint. States parties’ reports should provide information on the full scope and effects of limitations under Article 18(3), both as a matter of law and of their application in specific circumstances.

This establishes that three requirements must be fulfilled: the restriction must be prescribed by law, designed to achieve one of the enumerated purposes, and necessary. The HRC has dealt with these elements in a number of communications.⁷⁸

provision that includes a specific clause on restrictions in its paragraph 3, demonstrates that the permissibility of restrictions is independent of the issue of derogability. Even in times of most serious public emergencies, states that interfere with the freedom to manifest one’s religion or belief must justify their actions by referring to the requirements specified in Article 18(3).

77 Although it could fall under Article 19 and freedom of expression.

78 For example, see Human Rights Committee, *Summary Record: Ukraine*, UN Doc. CCPR/C/SR.2407, paragraph 44 (2007): the Committee asked what restrictions to free-

In *Singh Bhinder v Canada*, the HRC found that if the requirement that a hard hat be worn was regarded as raising issues under Article 18, then it was a limitation that was justified by reference to the grounds laid down in Article 18(3).⁷⁹ The HRC did not accept the author's argument that any safety risk ensuing from his refusal to wear safety headgear was confined to himself; however, some authors call into question whether the restriction satisfied the public safety test and the necessity test of Article 18(3).⁸⁰ On the issue of public safety, the HRC has also addressed social attitudes and cultural and religious practices hampering the enjoyment of human rights by women.⁸¹

In *Delgado Páez v Colombia*,⁸² the HRC held that the author's right to profess or to manifest his religion had not been violated, and that Colombia may, without violating this provision of the Covenant, allow the Church authorities to decide who may teach religion and in what manner it should be taught. The religious community and the applicant were two private parties: there was no state action, and the collective body prevailed over the individual applicant.

In *Coeriel & Aurik v the Netherlands*, the HRC considered that the regulation and the change of surnames was a matter of public order and that restrictions were therefore permissible under Article 18(3).⁸³ However, it is almost as if the finding of a legitimate ground for restricting the enjoyment of the freedom of manifestation was sufficient in itself, and the HRC did not make clear whether the restriction was necessary, in particular whether it was proportionate to the legitimate aim pursued.⁸⁴

dom of religion that could be imposed in case of emergency, and whether they were compatible with Article 4 of the Covenant.

79 *Karnel Singh Bhinder v Canada*, at paragraph 6.2.

80 B.G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (The Hague: Martinus Nijhoff Publishers, 1996), at 296; Malcolm Evans draws attention to the fact that health and safety legislation therefore seem to fall within the scope of legitimate restrictions: M.D. Evans, 'The United Nations and Freedom of Religion: The Work of the Human Rights Committee', at 51; see also S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights* (Oxford: Oxford University Press, 2000), at 378, where it is said that the laws were not in fact proportionate to the enumerated end.

81 Human Rights Committee, *Concluding Observations: Zimbabwe*, UN Doc. CCPR/C/79/Add.89, at 12 (1998).

82 *Delgado Páez v Colombia*, at paragraph 5.7. It involved a teacher of religion and ethics who claimed that the school had dismissed him because of his progressive ideas in theological and social matters, and that his freedom to manifest his religion under Article 18 had been infringed.

83 *A.R. Coeriel and M.A.R. Aurik v the Netherlands*, at paragraph 6.1.

84 M.D. Evans, 'The United Nations and Freedom of Religion: The Work of the Human Rights Committee', at 51; B.G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection*, at 301.

Yong-Joo Kang v Republic of Korea involved an ‘oath of law-abidance’ system, ‘with a view to alter the political opinion of an inmate by offering inducements of preferential treatment within prison and improved possibilities of parole’. The HRC held that the state failed to justify the system as being necessary for any of the permissible limiting purposes enumerated in Articles 18 and 19, and so it restricted freedom of expression and of manifestation of belief on the discriminatory basis of political opinion.⁸⁵

In *Ross v Canada*, the HRC noted that there was a legal framework for the proceedings which led to the author’s removal from a teaching position. It then found that the restrictions imposed on the applicant were for the purpose of protecting the ‘rights or reputations’ of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance.⁸⁶ Finally, it found that there was no breach of Articles 19 and 18. It said:

The final issue before the Committee is whether the restriction on the author’s freedom of expression was necessary to protect the right or reputations of persons of the Jewish faith. In the circumstances, the Committee recalls that the exercise of the right to freedom of expression carries with it special duties and responsibilities. These special duties and responsibilities are of particular relevance within the school system, especially with regard to the teaching of young students. In the view of the Committee, the influence exerted by school teachers may justify restraints in order to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory. In this particular case, the Committee takes note of the fact that the Supreme Court found that it was reasonable to anticipate that there was a causal link between the expressions of the author and the ‘poisoned school environment’ experienced by Jewish children in the School district. In that context, the removal of the author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance. Furthermore, the Committee notes that the author was appointed to a non-teaching position after only a minimal period on leave without pay and that the restriction thus did not go any further than that which was necessary to achieve its protective functions.⁸⁷

In *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*, the HRC looked at whether the restriction of the authors’ right ‘to spread knowledge, to propagate their beliefs to others and to provide assistance to others’ was justified. It held:

85 *Yong-Joo Kang v Republic of Korea*, at paragraph 7.2.

86 *Malcolm Ross v Canada*, at paragraph 11.5.

87 *Ibid*, at paragraph 11.6.

In the present case, the State party has not sought to justify the infringement of rights other than by reliance on the reasons set out in the decision of the Supreme Court itself. The decision considered that the Order's activities would, through the provision of material and other benefits to vulnerable people, coercively or otherwise improperly propagate religion. The decision failed to provide any evidentiary or factual foundation for this assessment, or reconcile this assessment with the analogous benefits and services provided by other religious bodies that had been incorporated. Similarly, the decision provided no justification for the conclusion that the Bill, including through the spreading knowledge of a religion, would 'impair the very existence of Buddhism or the *Buddha Sasana*'.⁸⁸

The HRC found that the grounds advanced were insufficient to demonstrate that the restrictions in question were necessary for one or more of the enumerated purposes, and consequently there was a breach of Article 18(1).

In *Hudoyberganova v Uzbekistan*, the HRC dealt with the applicant's exclusion from her university for wearing the Islamic headscarf. It found that her exclusion was based on the provisions of the university's new regulations. The HRC deals with the communication under both Articles 18(2) and 18(3). The applicant was denied state facilities in education, and this was sufficient to find a breach of Article 18(2). The HRC found that the restriction was not justified under Article 18(3); this suggests that the applicant was manifesting her religion when she was wearing the headscarf, although the HRC does not say so explicitly. The state did not provide any grounds according to which her exclusion was justified, which led to a breach of Article 18(2). It is also very important to note how the HRC qualifies its findings: it reiterates the right of the state to limit expressions of religion and belief in the context of Article 18, what it said was context-specific, and academic institutions have a right to adopt specific regulations relating to their own functioning. This suggests that similar restrictions may be justified if necessary and properly justified by the state. Dominic McGoldrick stated that it is a 'default decision' and that it must be interpreted very carefully.⁸⁹

In *Malakhovsky and Pikul v Belarus*, the authors' application to have their Hare Krishna's community registered as a religious association was denied by the state. It argued that they did not meet the requirement to have an approved legal address, which satisfied certain health and fire safety standards necessary for premises used for purposes such as religious ceremonies. The HRC found that this precondition came under public safety. The HRC found that the authors' rights under Article 18(1) had been violated:

88 *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*, at paragraph 7.3.

89 D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford: Hart, 2006), at 230.

The Committee notes, however, that the State party has not advanced any argument as to why it is *necessary* for the purposes of Article 18(3), for a religious association, in order to be registered, to have an approved legal address which not only meets the standards required for the administrative seat of the association but also those necessary for premises used for purposes of religious ceremonies, rituals, and other group undertakings. Appropriate premises for such use could be obtained subsequent to registration. The Committee also notes that the argument of the State party in its comments on the communication that the authors' community sought to monopolize representation of Vishnuism in Belarus did not form part of the domestic proceedings. Also taking into account the consequences of refusal of registration, namely the impossibility of carrying out such activities as establishing educational institutions and inviting foreign religious dignitaries to visit the country, the Committee concludes that the refusal to register amounts to a limitation of the authors' right to manifest their religion under Article 18(1) that is disproportionate and so does not meet the requirements of Article 18(3).⁹⁰

The HRC has dealt with a range of limitations, but it is only in the latest cases that it has imposed more stringent conditions. Unlike the European Court of Human Rights, it appears that the HRC has so far avoided 'any concept of respect for the religious beliefs of others as a ground of limitation'.⁹¹

Section 5 Education

The ICCPR deals with the issue of education and parental convictions under Article 18(4), which provides:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

90 *Sergei Malakhovsky and Alexander Pikul v Belarus*, at paragraph 7.6, emphasis in the text. Ruth Wedgwood observed: 'the state party's new "grandfathering" rule is also highly problematic – as an added obstacle to free religious practice in Belarus. It is hard to imagine why a newer faith should be forbidden to engage in religious education, and thus the demand for 20 years of prior practice is doubtful. It is difficult to fathom why ten "communities" could be a prerequisite to educational activity, especially since one "community," such as that in Minsk, may be larger than many small separate communities' (individual opinion by Ruth Wedgwood, concurring).

91 See P.M. Taylor, *Freedom of Religion, UN and European Human Rights Law and Practice*, at 82.

At the time of the drafting, the intention was to protect parental rights against state ideological indoctrination.⁹² Tad Stahnke pointed out that the ‘coercive relationship’ between parents and children is generally left untouched by states, and international human rights instruments recognise that parents have a considerable interest in influencing the religious upbringing of their children.⁹³ Therefore, we have to bear in mind that the context is the protection of parental rights against the state and not the rights of children against their parents. The HRC pays a great deal of attention to whether parental rights are respected by the state, and it has often asked whether parental wishes are respected in the education of their children, for example in relation to the USSR,⁹⁴ Bulgaria,⁹⁵ the Ukrainian SSR,⁹⁶ Morocco,⁹⁷ Iceland,⁹⁸

92 G. Van Bueren, *The International Law on the Rights of the Child*, at 159.

93 T. Stahnke, ‘Proselytism and the Freedom to Change Religion in International Human Rights Law’ [1999] *BYU L. Rev.* 251-353, at 330 (footnote 220).

94 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/33/40, paragraph 425 (1978): regarding the USSR, concern was expressed on the realisation of the rights of parents to ensure the religious education of their children in conformity with their own convictions. See also Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/45/40, paragraph 109 (1990).

95 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/34/40, paragraph 127 (1979): ‘With reference to article 38(3) of the Bulgarian Constitution to the effect that parents have the right and obligation to attend to the communist education of their children, it was argued that this provision may not be in conformity with article 18(4) of the Covenant. The view was expressed that, whereas in practice most societies educated their children in their own philosophy or religion, parents could not, according to the letter and spirit of the Covenant, be legally obliged to bring up their children in accordance with any particular ideology. Questions were asked whether, having received a communist education, children were compelled to become communists and whether parents who failed to comply with article 38(3) of the Constitution would have to face sanctions. The hope was expressed, however, that the Bulgarian representative would explain the socialist approach to all matters pertaining to the question of religion as raised in the Committee and, in particular, the guiding role of the Communist party as set forth in the Bulgarian Constitution’.

96 *Ibid*, UN Doc. A/34/40, paragraph 263 (1979): the Committee asked what was the legal regime in force governing religious education in the light of the right of parents to ensure the religious and moral education of their children in conformity with their convictions as provided for in the Covenant.

97 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/37/40, paragraph 146 (1982): the HRC asked what the role of parents and guardians was in ensuring the religious and moral education of children.

98 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/38/40, paragraph 113 (1983): ‘Information was sought on the legal provision relating to the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions’.

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Hungary,⁹⁹ Portugal,¹⁰⁰ Iran,¹⁰¹ Romania,¹⁰² and New Zealand.¹⁰³ Paragraph 6 of the General Comment provides:

The Committee is of the view that Article 18(4) permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in Article 18(4), is related to the guarantees of the freedom to teach a religion or belief stated in Article 18(1). The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with Article 18(4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.

This appears to link Article 18(4) with freedom of manifestation under Article 18(1), which is an error. There is a difference between freedom of manifestation in teaching under Article 18(1) and the duty to respect parental wishes under Article 18(4), and there is an obvious difference between teaching and receiving.¹⁰⁴ Moreover, this means that such a right would then be subject to the limitations in Article 18(3), which would then be inconsistent with paragraph 8 of the General Comment.¹⁰⁵

The HRC told Norway on three occasions that the second sentence of Article 2(2) of the Constitution (according to which ‘The Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same’) was incompatible with Article 18, and should

99 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/41/40, paragraph 398 (1986): ‘With reference to [freedom of thought, conscience and religion], members of the Committee noted that, in Hungary, religion was considered to be a private affair of citizens and asked whether parents could freely decide on the religious education of their children or whether an authorization was required’.

100 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/45/40, paragraph 156 (1990): the Committee requested information concerning the right of parents to bring up their children in accordance with their own beliefs.

101 Human Rights Committee, *Summary Record of the 1252th meeting: Iran*, UN Doc. CCPR/C/SR.1252, paragraph 19 (1994): ‘Lastly, could parents freely choose the religious teaching received by their children?’

102 Human Rights Committee, *Summary Record of the 1767th meeting: Romania*, UN Doc. CCPR/C/SR.1767, paragraph 70 (1999).

103 Human Rights Committee, *Summary Record of the 2015th meeting: New Zealand*, UN Doc. CCPR/C/SR.2015, paragraph 51 (2005): the HRC wondered what guarantees existed, notably concerning parents’ right to provide their children with religious and moral education in accordance with their own beliefs.

104 M.D. Evans, *Religious Liberty and International Law in Europe*, at 220.

105 P.M. Taylor, *Freedom of Religion, UN and European Human Rights Law and Practice*, at 177.

be repealed.¹⁰⁶ However, it is not clear whether it addressed the right of the parents to bring up their children as they wish, or the right of the children not to be brought up automatically in the Evangelical-Lutheran religion.

Tahzib emphasises some points mentioned in the General Comment.¹⁰⁷ First, the HRC only dealt with parental liberty and the curriculum of state schools rather than the rights of children and private schools.¹⁰⁸ Secondly, states are forbidden from pursuing an aim of indoctrination in state schools that does not respect the religious convictions of parents. Also, states are not obliged to offer in state schools the type of religious and moral instruction desired by the parents for their children, and states are not required to pay for alternative instruction in any other religion or belief.¹⁰⁹ Furthermore, Articles 18(4) and 26 give states the choice between excluding instruction in a particular religion or belief from the curriculum, or including instruction in a particular religion or belief provided non-discriminatory exemptions or alternatives are available, such as instruction in the general history of religions, or ethics.

The HRC has maintained a consistent line in its General Comment, cases and analysis of state reports. With reference to freedom of conscience and religion, including the issue of religious education, the Committee recommended Slovenia to take the General Comment into account.¹¹⁰ The General Comment confirmed *Hartikainen v Finland*, which dealt with the validity of compulsory alternatives to religious instruction in public schools under Article 18(4).¹¹¹ In its examination of state

106 Human Rights Committee, *Concluding Observations: Norway*, UN Doc. CCPR/C/79/Add.27, paragraph 10 (1993); UN Doc. CCPR/C/79/Add.112, paragraph 13 (1999); UN Doc. CCPR/C/NOR/CO/5, paragraph 15 (2006).

107 B.G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection*, at 327-331.

108 However, see Human Rights Committee, *Summary Record of the 1847th meeting: Ireland*, UN Doc. CCPR/C/SR.1847, paragraph 58 (2001): ‘Mr. AMOR drew attention to the statement in paragraph 228 of the report that the Education Bill recognized the right of schools to maintain their own distinctive “characteristic spirit” and asked how the state ensured that teaching did not become indoctrination in private schools, and in religious schools in particular’.

109 For a critique of opt-out clauses, see A. Mawhinney, ‘The Opt-Out Clause: Imperfect Protection for the Right to Freedom of Religion in Schools’ (2006) 7 *Education Law Journal* 102.

110 Human Rights Committee, *Concluding Observations: Slovenia*, UN Doc. CCPR/C/79/Add.40, paragraph 18 (1994).

111 *Hartikainen v Finland*, Communication 40/1978 (1981), no violation of the Covenant, at paragraph 10.4: ‘The Committee does not consider that the requirement of the relevant provisions of Finnish legislation that instruction in the study of the history of religions and ethics should be given instead of religious instruction to students in schools whose parents or legal guardians object to religious instruction is in itself incompatible with Article 18(4), if such alternative course of instruction is given in a neutral and objective way and respects the convictions of parents and guardians who do not believe in

reports, it asked Iraq whether individuals who did not wish to participate in religious education were obliged to do so,¹¹² and Norway whether religious instruction was compulsory in schools.¹¹³ If religious education classes are optional, children who do not attend them must not be made to feel like the ‘black sheep’ of the class.¹¹⁴ It also asked Poland whether children who attended schools were given the opportunity to receive religious teaching and, if so, whether parents took advantage of that possibility.¹¹⁵ The HRC told Costa Rica that it was concerned at the pre-eminent position accorded to the Roman Catholic Church, and that the National Episcopal Conference had the power to effectively impede the teaching of religions other than Catholicism and the power to bar non-Catholics from teaching religion in the public school curricula.¹¹⁶

As regards the possibility of alternatives, it asked Hungary whether parents would have to obtain permission from the state if the parent wished their child to receive religious instruction other than that provided in schools.¹¹⁷ In the context of allegations of discrimination against members of minority religions, including in the field of education, the HRC expressed its concern that state school students in Greece were required to attend instructional classes in the Christian Orthodox religion and could only opt out after declaring their religion.¹¹⁸ The HRC also sug-

any religion. In any event, paragraph 6 of the School System Act expressly permits any parents or guardians who do not wish their children to be given either religious instruction or instruction in the study of the history of religions and ethics to obtain exemption therefrom by arranging for them to receive comparable instruction outside of school’.

- 112 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/35/40, paragraph 135 (1980).
- 113 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/33/40, paragraph 240 (1978).
- 114 Human Rights Committee, *Summary Record of the 1936th meeting: Ireland*, UN Doc. CCPR/C/SR.1936, paragraph 30 (2001). See also Human Rights Committee, *Summary Record of the 1960th meeting: United Kingdom of Great Britain and Northern Ireland*, UN Doc. CCPR/C/SR.1960, paragraph 50 (2002): the HRC referred to religious instruction and collective prayers, which must have a broadly Christian character, and to the possibility of exemption at the request of the parents. Noting that Christianity was the main religion in the country, the Committee was concerned that those who did not want to take part in collective prayers might be rejected.
- 115 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/35/40, paragraph 54 (1980).
- 116 Human Rights Committee, *Concluding Observations: Costa Rica*, UN Doc. CCPR/C/79/Add.31, paragraph 9 (1994).
- 117 Human Rights Committee, *Annual Report to the General Assembly*, UN Doc. A/35/40, paragraph 314 (1980).
- 118 Human Rights Committee, *Concluding Observations: Greece*, UN Doc. CCPR/CO/83/GRC, paragraph 14 (2005). It added that the state party should take measures to ensure full respect for the rights and freedoms of each religious community, in conformity with

gests that parents should not have to disclose their religious or philosophical beliefs when requesting an exemption for their children, and it should be enough for them to state that religious instruction is incompatible with their beliefs.¹¹⁹ In *Leirvåg v Norway*,¹²⁰ the HRC had to examine the Norwegian exemption system from a course on Christian Knowledge and Religious and Ethical Education. It found a breach of Article 18(4) because the exemption scheme was not practicable.¹²¹ In addition to the existence of religious education classes and the possibility of exemption, the HRC is also concerned by the contents of the classes. For example it said:

[Mr. Amor] also wondered whether religious instruction was given in all public schools and to all pupils, whether its content was based on the religious beliefs of pupils and at what level of schooling it was given. Where such instruction was not imparted in public establishments, were there courses in ethics? He also inquired about the impact of the multi-denominationalism of Kyrgyz society on primary and secondary education and whether the school system truly reflected the composition of society. Private religious schools were certainly legitimate, but the State had a duty to ensure that freedom of religion was not misused for non-religious purposes. In the circumstances, did the Kyrgyz authorities exercise any kind of supervision over what was done or taught in such establishments, bearing in mind that, in some countries, private religious schools had at times been used for military or paramilitary training purposes.¹²²

In Slovenia, there was no religious education in state schools but teaching on religions and morals in relation to religions. The HRC asked if these were the main reli-

the Covenant. It also encouraged the state party to hold consultations with representatives of minority religions, in order to find practical ways to permit religious instruction to be given to those desiring such opportunities, but pupils not wishing to attend religious education classes should not be obliged to declare their religion.

119 Human Rights Committee, *Summary Record of the 1786th meeting: Ireland*, UN Doc. CCPR/C/SR.1786, paragraph 20 (1999).

120 *Unn and Ben Leirvåg et al v Norway*.

121 The HRC found that the teaching of CKREE could not be said to meet the requirement of being delivered in a neutral and objective way, unless the system of exemption in fact leads to a situation where the teaching provided to those children and families opting for such exemption will be neutral and objective. However, it considered that even in the abstract, the present system of partial exemption imposed a considerable burden on persons in the position of the authors, insofar as it required them to acquaint themselves with those aspects of the subject which are clearly of a religious nature, as well as with other aspects, with a view to determining which of the other aspects they may feel a need to seek – and justify – exemption from. In the end, the scheme did not ensure that education of religious knowledge and religious practice were separated in a way that made the exemption scheme practicable.

122 Human Rights Committee, *Summary Record of the 1843rd meeting: Kyrgyzstan*, UN Doc. CCPR/C/SR.1843, paragraph 19 (2001).

gions represented in Slovenia, what the teaching generally consisted of, and whether religious people were teaching it or whether atheists could as well.¹²³ It also asked Bosnia and Herzegovina whether the state had the right to monitor religious education in private institutions with the aim of preventing religious extremism.¹²⁴ Finally, the Committee has linked the state of religious violence in a country to school curricula and the content of school textbooks.¹²⁵

It appears that the HRC has a well-defined religious education policy. Parental convictions must be respected. If there is mandatory religious education in state schools, there will be a breach of Article 18(4) unless there is an exemption system or an alternative. If there is an alternative, such as a course on the general history of religions or ethics, it must be taught in a neutral and objective way.

The HRC has also dealt with the funding of private religious schools.¹²⁶ In *Waldman v Canada*, it found a breach of Article 26:

the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes

123 Human Rights Committee, *Summary Record of the 2289th meeting: Slovenia*, UN Doc. CCPR/C/SR.2289, paragraph 40 (2005).

124 Human Rights Committee, *Summary Record of the 2404th meeting: Bosnia and Herzegovina*, UN Doc. CCPR/C/SR.2404, paragraph 31 (2006).

125 Human Rights Committee, *Summary Record of the 2408th meeting: Ukraine*, UN Doc. CCPR/C/SR.2408, paragraph 45 (2006): ‘Turning to the issue of freedom of religion, [the Committee] had been informed that, following the return of Tatars to Crimea, there had been cases of anti-Tatar and anti-Muslim violence, which had been encouraged by the Ukrainian Orthodox Church. Although the State had not directly incited that violence, it was responsible for protecting vulnerable and minority groups. Efforts should be made to avoid stereotyping of national and ethnic groups in school textbooks. [The Committee] considered the statement that anti-Semitism did not exist in the State party to be something of an exaggeration. Efforts must be made to improve awareness of religious diversity and the dangers of anti-Semitism through school curricula, particularly by providing education on the Holocaust’. Also, see *Concluding Observations: Ukraine*, UN Doc. CCPR/C/UKR/CO/6 (2006).

126 See *Grant Tadman et al v Canada*, Communication 816/1998 (1999), at paragraph 6.2. The HRC noted that the authors, while claiming to be victims of discrimination, did not seek publicly funded religious schools for their children, but on the contrary sought the removal of the public funding to Roman Catholic separate schools. It held that if this were to happen, their personal situation in respect of funding for religious education would not be improved, therefore they had not sufficiently substantiated how the public funding given to the Roman Catholic separate schools at present caused them any disadvantage or affected them adversely. Their claim was declared inadmissible.

that the material before it does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria.¹²⁷

Martin Scheinin added in a concurring opinion that, in general, arrangements in the field of religious education that are in compliance with Article 18 are likely to be in conformity with Article 26 as well, because non-discrimination is a fundamental component in the test under Article 18(4).

It appears that the HRC adopts a fairly strict approach to Article 18(4), and is protective of parental rights in the education of their children. It is wary of state indoctrination of children through education, critical of the absence of exemptions or alternatives, and concerned by non-discrimination in education.

Section 6 Application to children

Lopatka argues that Article 18 does not apply to children, 'since it leaves the decision – as to the kind of religion and morality in which a child is to be brought up – to parents'.¹²⁸ Yet this seems to be an error: Article 18 rights apply to 'everyone', and Article 18(4) simply means that parents have rights against the state that it should not interfere with their parental discretion and how they decide to ensure the religious and moral education of their children in conformity with their own convictions. The right of the child to religious freedom is the right of every child to be unhindered in their growth as an independent autonomous actor in the matrix of parents, religious community and society, and it is necessary to consider the extent to which the HRC respects this right.

127 *Arieh Hollis Waldman v Canada*, at paragraph 10.6: the authors argued, *inter alia*, that under Article 26 when a right to publicly financed religious education is recognised by a State party, no differentiation should be made among individuals on the basis of the nature of their particular beliefs; that under Article 18(1) the financial hardship they experienced in order to provide their children with a Jewish education significantly impaired, in a discriminatory fashion, the enjoyment of the right to manifest one's religion, including the freedom to provide a religious education for one's children, or to establish religious schools; that under Article 18(3) a limitation established to protect morals may not be based on a single tradition therefore this violation was not sustainable in this case; and that under Article 18(4) the full and direct public funding of Roman Catholic schools in Ontario did not equally respect the liberty of non-Roman Catholics to choose an education in conformity with a parent's religious convictions, contrary to Article 18(4) taken together with Article 2.

128 A. Lopatka, 'Appropriate Direction and Guidance in the Exercise by a Child of the Rights to Freedom of Expression, Thought, Conscience and Religion' in E. Verhellen (ed.), *Monitoring Children's Rights* (The Hague: Martinus Nijhoff Publishers, 1996), 287-292, at 289.

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First, the HRC has said and implied very little about children, and there is a lack of material concerning them. According to the body of material considered above, it is possible to summarise what the HRC has said about children. Regarding freedom of choice, the HRC suggested once that legislation should allow a person under the age of 16 to decide their religion. However, the HRC did not say what should happen before the age of 16, whether it would go much lower, whether it would actually permit an age-limit, or whether it would rather look at the child's evolving capacities. It suggested that 16 was too high to make a decision, yet it did not give a solution. It did not make a difference between young children and children who are of age, it just referred to freedom of choice itself. The HRC also referred once to the prevention of coercion, and recalled that in the past, children had been accepted in schools administered by the Roman Catholic Church only if they were prepared to observe the precepts of that religion. The HRC also stated that the provision of the Constitution of Norway, according to which parents had to bring up their children in the Evangelical-Lutheran religion, was incompatible with Article 18. However the HRC did not specify whether it referred to the rights of parents or the rights of children.

As regards freedom of manifestation, the HRC implicitly referred to the right of pupils to wear the Islamic headscarf in French schools and Rastafarian dreadlocks in Jamaican schools. This is interesting, as the HRC does not usually refer to children's freedom of manifestation; clearly there was an issue in France and Jamaica, and the HRC suggests that children may have a right to wear religious clothing/headgear. It also stated that there was a breach of Articles 18 and 24 if the child was forced to sing the national anthem or to salute the national flag.

As regards restrictions on freedom of manifestation, children are referred to when the HRC states that Article 18(4) rights cannot be restricted under Article 18(3), but that is only implicit and children are only subject to the parents' rights. The HRC also referred to children in *Ross*, as a limitation to the applicant's freedom of manifestation, and said that Jewish children have a right to have a school system free from bias, intolerance and prejudice. Here, children were at the centre of the HRC's reasoning as to why the applicant's freedom of manifestation had to be limited.

As regards education, the HRC has once asked whether children who attended school were given the opportunity to receive religious teaching and if so, whether parents took advantage of that opportunity. This question is not in conformity with traditional international law, according to which there is no positive duty upon the state to guarantee religious education to children. However, this was probably due to the context of communist Poland and has not been reiterated by the HRC, which means that the reference to children is not worth bearing in mind. The HRC also said that pupils who were exempted from religious education should not be made to feel excluded, and the HRC referred to pupils required to expressly state their religion in order to opt out of denominational instructional classes: these are the only two references to children and religious education, and show that they have a role, even if minimal and limited.

Those appear to be the only references to children in the whole of the HRC's analysis of Article 18. This shows that children are not centrally part of the picture; on a number of occasions the HRC refers to children's rights and on other occasions children are only referred to implicitly or indirectly. On the whole, there is neither consistency nor any clear line of argument. There are references to children yet they are too sporadic and limited to be able to get any sense of direction about what the HRC is saying regarding children.

Secondly, there would be a number of problems if the HRC's analysis were directly applied to children and if the HRC treated children in the same way as adults. One problem of the HRC's analysis is its emphasis on freedom of choice, which is considered as a right in itself, against the state, and there is no link whatsoever with the religious community. It is unclear how appropriate this is to children who are not of age, and to children who come of age and are then able to make their own religious choices. There is far too much stress on independence rather than on dependence. As for freedom from coercion, some of the HRC's approach would work well for the child, for example that the state could not compel the child to adopt or to maintain a religion, one way or the other, and could not deny them public benefits. However, we have also seen that the HRC does not deal with what some call 'private coercion', that is, missionary activities, proselytism or social inducements, under Article 18(2). On the contrary it considers that these activities fall under freedom of manifestation in Article 18(1). The right of the child to religious freedom includes a duty on the state to protect the child against third parties. However, if there is no duty on the state to address private coercion then it may fail to fulfil its protective duty to the child, in that the right of the child may not be protected or there may be an interference in the nurture of the child.

Another problem is that the HRC's analysis of Article 18(1) is focused on the individual religious believer. The HRC focuses on the individual's right to worship individually, on the choice of the individual to wear religious clothing or headcovering, and issues such as the individual's choice to change their name, have days of rest, holidays or attend ceremonies and rituals for religious reasons, and the freedom to tell others about one's religion or belief, teach or proselytise. However, before a child comes of age, it is not systematically a question of the child deciding to join a religious community or to worship in a particular way, or about the child consciously deciding to change their name or to have holidays or days off school for religious reasons. Because of their age, decision-making capacities or competence, a child does not react and relate to religion in the same way as an adult. This is not reflected by the HRC, which has a very one-sided view of religious freedom.

Some elements of the HRC's approach reflect much of the religious practices that the child participates in. The HRC pays a great deal of attention to freedom of worship, to ritual and ceremonial aspects of religious freedom, and to customs. The HRC is likely to recognise freedom to proselytise in the same way as it does for adults. If the child is the proselytiser, then the HRC's approach seems fine. However, if the child is the proselytised, then we saw earlier that there may be clashes with the

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nurture of the child and their relationship with parents and religious community. The state cannot be held responsible for everything that happens between the child and third parties. However, it can be held responsible if the interference with the child's right renders the right 'meaningless' and the state does not act. Therefore, it is suggested that this could be an issue. In addition, parts of the HRC's analysis are, at first sight, irrelevant to the child, such as the training and appointing of leaders, or the dissemination of religious publications.

The HRC's approach on limitations is also fairly restrictive. The five elements of the protection of public safety, order, health, or morals or the fundamental rights and freedoms of others do not necessarily fit in with the theoretical model in chapter 2. If *Singh Bhinder* were applied to the child, there would be no clear guidance about who would assess what is detrimental to the child. It is unclear whether it would be the parents, the religious community, the state, or even the courts, which might lead to a risk of the intrusion of the state into the child's beliefs or nurture. Moreover, this would apply to children of all ages, and there would be no distinction between young children and children who have come of age. It is also unclear whether the restrictions would be for the benefit of others or for the benefit of the child himself. It is also risky if the state makes its own assessment of what it considers endangers the health and safety of the child. It may or may not interfere with the negative rights of the child but there is a risk that the HRC or the state substitute their own assessment for that of the child or the parents or the religious community, and interfere in their relationship. As the HRC dismissed the claim in *Coeriel* so easily for adults then it is likely that it would dismiss it easily for children too, which would mean that the child's nurture could be restricted too easily under the pretence of public order. There may also be a risk that the HRC looks into the child's beliefs, following *Hudoyberganova* when it looked at 'what precise kind of attire the author wore and which was referred to as "hijab" by both parties'. In *Malakhovsky and Pikul* the HRC could have been more stringent in its analysis of the state restriction, which may have negative repercussions on the religious community and its members, including children.

The HRC's analysis of education and religious education would also be problematic, as the focus is almost exclusively on the parents. There is more or less nothing on the rights of the child in education, which would make it a problem when the child comes of age. In addition, all this reflects something in the school system, whether parental rights are respected or not, and whether children are indoctrinated by the state, rather than the nurture of the child. Another problem would be that the HRC accepts education in religion that is neutral and objective, yet it may be difficult to define what neutral and objective really means and this may cause problems when the child comes of age.

In addition there is hardly anything in the HRC's analysis on positive rights, whether protective, procedural or substantive. It is a problem if the child is not entitled to positive acts by the state. For example, there is hardly anything on protective

rights, and there is not much emphasis on the rights and freedoms of others, which means that the child would not be entitled to positive acts by the state.

Children are different from adults, and a number of problems would arise if the text of Article 18 and its interpretation by the HRC were applied to children.

Thirdly, one cannot really criticise the HRC for treating adult applicants like adults, and the real question is whether the HRC would be sensitive to the child dimension of the case if it had a child applicant before it.

Regarding freedom of choice, it suggested once that legislation should allow a person under the age of 16 to decide their religion. In the light of the importance given by the HRC to freedom of choice, the HRC might accept the claim brought by a teenager or a child who has come of age, or an adult in relation to a teenager. However this runs the risk of seeing it from an individualistic perspective, and may push it too far. It is unlikely though that the HRC would accept the claim of a younger child, because of the importance of parental rights in education. In the event that the claim of a young child was accepted (or more likely, the claim of a child who has come of age, or an adult, regarding a time when they were a young child), the HRC might not recognise the importance of nurture and miss the child dimension of the case.

Regarding state coercion, the state may force the child to accomplish acts that it considers neutral but that the child considers against their conscience. In that case, the HRC is likely to accept that the state should not coerce the child in this way. However, it is a possibility that the HRC accepts the claim on the basis of parents' rights rather than the child's rights. If there was something like a policy of forced conversions of a religious minority, there are no doubts that the HRC would accept the claim—the question is whether it would be on the basis of parents' or children's rights. In some countries religion is recorded by law, and this may cause problems with the legal identity or status of the child. In almost all cases, there will be a link with how the parents' religion is recorded. This means that the HRC is at risk of not taking the child dimension of the case into account if it does not consider the child's claim but the parents' claim instead. It is unlikely that the HRC would accept the claim regarding a young child that the state should allow him to change the religion that has been recorded by law, and it is much more likely that the child's claim would be absorbed by the parents' claim, and be treated as an appendix. The HRC is likely to condemn state pressure on the child to adopt or maintain a religion, state interference with the identity or legal personality of the child, and it is likely to condemn the denial of public facilities. This can be seen through the emphasis of the HRC on the prevention of coercion and we can see that it is concerned by the identity, legal status and position of believers.

Regarding private coercion, let us imagine that the state wants to address what it may consider as private coercion of the child. For example, it may make it legally impossible for parents to raise their children in accordance with their own convictions, on the basis that telling children under a certain age about religion is coercive or indoctrinating. The HRC is likely to find a breach of parental rights, yet it risks

being insensitive to the child dimension of the case, i.e. the child's own right to be raised in accordance with their parents' religious beliefs. However, there is also a possibility that the HRC might accept the importance of these state measures, because of the importance of the prevention of coercion – this would not be defensible. Also, the state may want to protect the child against proselytism by third parties outside the family. If the child claims that they have a right to be protected against the religious beliefs of others, the HRC may want to protect children and accept the claim. If the claim is brought by or concerns a young child, then it is likely to consider the child as an appendix to the parents. If the claim is brought by or concerns a child who has come of age, then the HRC is likely to accept the claim. The HRC may also decide not to address private coercion, and it could be on the basis that it does not normally address private coercion. The reaction of the HRC may also depend on who is proselytising the child, what is being done, and the age of the child.

Regarding freedom of manifestation, let us imagine that the state prohibits the child from wearing religious clothing, symbols or headgear at school. We saw before that the issue has been considered by the HRC. Therefore it might accept a claim by a child that the state has infringed the child's right to religious freedom. If the claim is brought by a young child (or concerns a young child), the HRC is likely to tie it to parental rights and miss the child dimension of the case. If the claim is brought by a child who has come of age (or concerns such a child), the HRC might accept the claim and acknowledge the child dimension of the case. If it is the parents who force a certain dress code on the child, then a claim brought by a young child is not likely to succeed (because of the importance of parental rights) whereas the HRC is likely to accept the claim of an older child. In *Hudoyberganova*, the HRC referred to the 'kind of attire the author wore and which was referred to as "hijab" by both parties', the right of a state party to limit expressions of religion and belief in the context of Article 18, the specifics of the context, and the right of academic institutions to adopt specific regulations relating to their own functioning. The HRC may consider the age of the child wanting to wear the headscarf, the type of headscarf or even religious practice, or whether the child may have been pressurised when making a decision, the potential impact of the child's manifestation on other people, such as other pupils in the school, or any detrimental effects on the life or schooling of the child; the HRC may extend this to other religious symbols and other religious communities. Also, if a child applicant claims that the state has restricted their proselytising activities, the HRC may reject the claim. In the light of *Ross* and *Sister Immaculate Joseph*, it may consider the impact of the child's manifestation of their beliefs on others, such as pupils, or the impact on the wider context, such as the atmosphere in school. In another context, the HRC may not be so strict, except if it was shown that the child had coercively or otherwise improperly propagated religion to vulnerable people. If the child claims that religious ceremonies or religious practices have been interfered with by the state, the HRC is likely to accept a claim, in the light of the importance it gives to religious practices. It might consider the child's claim as a subset of the parents' claim, and this would take into account the child dimension of the case if

the HRC considers the nurture of the child. If there are some restrictions on minority children to practise and study their religion, the HRC is likely to consider the claim more globally, as an aspect of the religious minority or of the parents in general rather than the child's claim.

Regarding religious education, the child may bring a claim about withdrawal from classes. Considering the importance given by the HRC to freedom of choice, the emphasis on exemptions, and the individualistic tendency of the HRC, the HRC is likely to grant the claim of a child who has come of age. However, it is unlikely to grant a similar claim by a young child, especially because of parental rights. Considering the right to receive religious education classes, it is unlikely to grant such a right to a child applicant, perhaps because of its reluctance sometimes to recognise the importance of nurture and of transmission of religious beliefs from parents to children. Considering the right not to disclose one's religion in order to be exempted from religious education classes, the claim of a young child is likely to be assimilated to the parents' claim, in which case the HRC might miss the child dimension of the case, whereas the claim of an older child would probably be granted.

This means that at times the HRC might recognise the child dimension of the cases, and at other times it might not. There are instances where the HRC might accept the claims of a child against the state, and might accept the claim of a child who has come of age (for example in relation to freedom of choice, protection against third parties, freedom of manifestation, or religious education classes) and this would be acceptable. There are other instances where the HRC might focus on the wrong actors. For example, the HRC is often likely to hide behind parental rights if a young child makes a claim against the state (for example in relation to state coercion, or the right of the child to be brought up in his parents' religion, or freedom of manifestation). However, a young child may have rights against the state, and this means that the HRC might miss the child dimension of the case. In particular, taking the wrong approach is more likely to lead to the wrong substantive decision. It is one thing to say that the child has an independent right, and accept to go through the parents when the child is young; it is another thing to deny the child an independent right and treat them as an appendix to the parents. There are other instances too where the HRC might accept the claim of a young child against their parents (for example in relation to freedom of choice), which would not be acceptable and the HRC might miss the child dimension of the cases. In conclusion then, it is very difficult to predict how the HRC might react if it had more cases concerning children. However, in the light of what we know of the HRC's approach, there are instances where the HRC would take the child dimension of the cases into account, and other instances where it would not, especially because it might focus on the wrong actors.

Chapter 4

The UNCRC

Section 1 Introduction

The United Nations Convention on the Rights of the Child (the Convention) is a child-specific treaty and Article 14 provides for the right of the child to freedom of thought, conscience and religion:

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 14(2) on the evolving capacities of the child appears to be the guiding principle, along the substantive issues of freedom of choice, freedom of manifestation, and education. The key actors are the child, the parents and the state, and the text of Article 14 suggests that there are various sets of relationships.¹ A first reading of the text of Article 14 suggests that the child has rights against the state under Article 14(1) and Article 14(3), and that parents have rights against the state under

1 See D. Gomien, 'Whose Right (And Whose Duty) Is It? An Analysis of the Substance and Implementation of the Convention on the Rights of the Child' (1989-1990) 7 *New York Law School Journal of Human Rights* 161-175, at 162. Gomien suggests that the Convention departs from the traditional forms of international human rights law in two important ways. First, it introduces the idea that in some instances, private individuals may be held to have an affirmative duty to act. Second, it departs from the position 'that states themselves are the parties bound to ensure that treaty provisions are upheld and that individual violators are held accountable for their actions'.

Article 14(2).² Eva Brems also suggests that the state has a duty under Article 14(2) to ensure that parents exercise their right of direction ‘in a manner consistent with the evolving capacities of the child’.³ In addition, it is essential to see how the United Nations Committee on the Rights of the Child (the Committee) has interpreted the text of Article 14. Considering that the right of the child to religious freedom is the right of every child to be unhindered in their growth as an autonomous independent actor in the matrix of parents, religious community and society, we shall see that the analysis of the Committee is problematic for four main reasons: the concept of the evolving capacities of the child is interpreted far too broadly, there is too much focus on the child as an autonomous religious believer, the Committee has an impoverished understanding of religion, and the Committee is fairly inconsistent throughout its analysis of Article 14.

It is necessary to put Article 14 in the context of the whole Convention. The Convention was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20th November 1989 and it entered into force on 2nd September 1990.⁴ The Committee was established through Article 43, and it has no mandate to accept and review individual complaints. There is a reporting system, according to which states parties undertake to submit to the Committee reports on the measures they have adopted which give effect to the rights recognised in the Convention and on the progress made on the enjoyment of those rights (Article 44(1) of the Convention). The Committee holds three sessions a year; it has published ten General Comments,⁵ and has held sixteen Days of General Discussion.⁶ Regarding the reporting process, the first Summary Records were published in October 1992 and the first Concluding Observations in February 1993.

This chapter only considers the right to religious freedom as a human right. It does not deal with other issues, unless the Committee itself draws a link between religious freedom and these issues. It also does not examine Article 14 in relation to

2 David Smolin argues that the language of Articles 12-17 generally supports the viewpoint that these provisions exist in relation to the state and not in relation to the family: D.M. Smolin, ‘Overcoming Objections to the Convention on the Rights of the Child’ (2006) 20 *Emory Int’L L. Rev.* 81-110, at 96.

3 E. Brems, ‘Article 14: The Right to Freedom of Thought, Conscience and Religion’ in A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (eds.), *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff Publishers, 2006), 1-39, at 29.

4 There is also an Optional Protocol on the sale of children, child prostitution and child pornography (entry into force on 18th January 2002) and an Optional Protocol on the involvement of children in armed conflict (entry into force on 12th February 2002).

5 Available at <<http://www.ohchr.org/english/bodies/crc/comments.htm>> (last visited 17th April 2007).

6 Available at <<http://www.ohchr.org/english/bodies/crc/discussion.htm>> (last visited 17th April 2007).

other Convention articles, unless relevant. On the whole, the Committee does not say very much on religious freedom as a human right and it is clearly not an issue for the Committee. In fourteen years of Summary Records and Concluding Observations, this chapter is virtually all that the Committee has said on religious freedom as a human right. In addition, it is worth noting that there is not very much on education, despite the potential for more.

The structure of this chapter will be to consider first the tensions underlying Article 14 (section 2). The rest of the chapter will focus on freedom of choice (section 3), freedom of manifestation (section 4), restrictions to freedom of manifestation (section 5) and education (section 6). The reason for this structure is that it is typical of human rights provisions on religious freedom,⁷ it was discussed this way during the *travaux préparatoires* and it is a useful analytical tool to separate the main issues arising under Article 14.

Section 2 Underlying tensions

The aim of this section is to analyse the guiding principles used by the Committee in its analysis of Article 14 and we will see that there is not much coherence. The Convention itself hosts a bundle of concepts that should guide the analysis of the rights of the child. There is Article 3 on the best interests of the child,⁸ Article 5 on the evolving capacities of the child⁹ and Article 12 on the participatory rights of the

7 See Article 18 ICCPR, Article 1 of the 1981 Declaration, Article 9 ECHR, and Article 12 of the American Convention on Human Rights.

8 Article 3 UNCRC provides:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

9 Article 5 UNCRC provides: ‘States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention’.

child.¹⁰ There is, however, no indication of how tensions, if any, should be solved.

The same applies to Article 14, in which no guidelines are found to resolve tensions. Articles 3, 5 and 12 should theoretically apply to the interpretation of Article 14, yet the Committee is not clear on how this should be done. According to Article 14(2), the evolving capacities of the child should be the guiding principle for the interpretation of Article 14. However, there is no coherence in the Committee's analysis, and no hierarchy of norms. The Committee uses the concepts of evolving capacities, best interests and participation, in addition to reacting to age-limits imposed by states, yet never resolves any of the subsequent tensions between any of these concepts. In addition, there are some tensions between parents' and children's rights. The Convention is not always clear on parents' rights either. Examples of these tensions can be found in the provisions of Article 18 of the Convention,¹¹ and even in Article 14(2), which provides that the state 'shall respect the rights and duties of the parents [...] to provide direction to the child'. We will see that there are bundles of theoretical concepts, but that neither the Convention nor the Committee are very coherent in their analysis of Article 14.

It will be seen that the concept of evolving capacities has a prominent place in the Committee's analysis, complemented by participatory rights and age-limits. It is then right that a study of Article 14 is put within the context of the guiding principles of the Convention, especially Article 14(2) on the evolving capacities of the child.¹² Article 14(2) provides:

States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

10 Article 12 UNCRC provides:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

11 Article 18(1) UNCRC provides: 'States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern'.

12 It has been argued that Article 14 is one example of the vagueness, ambivalence and inconsistency that characterise the Convention: see S. Almog & A.L. Bendor, 'The UN Convention on the Rights of the Child Meets the American Constitution: Towards a Supreme Law of the World' (2004) 11(3) *International Journal of Children's Rights* 273-289, at 276.

Looking at the *travaux préparatoires* does not shed a great deal of light on the issue of the child's evolving capacities, as there appears to have been a consensus on the issue. The mention of the child's evolving capacities in what was first known as Article 7*bis* appeared for the first time in 1984. A Canadian proposal introduced the issue and said that the child's freedom of thought, conscience and religion was subject to the authority of the parents or legal guardian to provide direction to the child in the exercise of his right in a manner consistent with the evolving capacities of the child.¹³ Subsequently, a text from Denmark, Finland, Norway and Sweden substituted parental 'authority' with parental 'wishes, freedoms and rights'.¹⁴ Finally, the new draft prepared by an informal open-ended working party did not bring many changes to what there was before,¹⁵ and said: 'this right is subject to the authority of the parents or legal guardians to provide direction to the child in the exercise of this right in a manner consistent with the evolving capacities of the child' (paragraph 3 of the proposal). During the discussion it was agreed that 'authority' be replaced by 'rights and duties'.¹⁶ No further divergence happened and the provision was adopted at the second reading. LeBlanc argues that the drafters of the Convention wanted to strike a balance between the rights of the child and those of the parents, and the compromise reached was to recognise parental rights 'in a manner consistent with the evolving capacities of the child'.¹⁷

At first sight, the text of Article 14(2) suggests that there is only one set of relationships, involving parents against state. However, it soon becomes apparent that the Committee has interpreted Article 14(2) as a second set of relationships involving the child against the parents. A third set of relationships exists involving the child against the state, according to which the state should respect the child's evolving capacities and right to religious freedom. Brems also argues that the state, furthermore, has a duty to ensure that parents act in conformity with Article 14(2). It is worth noting that Article 14(2) seems to be a specific example of Article 5 of the Convention on the evolving capacities of the child and the Committee refers to Article 5.¹⁸ The study of Article 14(2) needs to be put within the wider context of the

13 1984 report of the Working Group, UN Doc. E/CN.4/1984/71, paragraph 13.

14 *Ibid*, paragraph 13: '3. The States Parties shall, subject to the evolving capacities of the child, respect the wishes, freedoms and rights of the parents or legal guardians in the exercise of these rights of the child and shall ensure the freedom to manifest religion or belief, in a manner not incompatible with public safety, order, health and morals'.

15 *Ibid*, paragraph 17.

16 *Ibid*, paragraph 27.

17 L.J. LeBlanc, *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights* (Lincoln: University of Nebraska Press, 1995), at 172.

18 Hafén and Hafén argue that in Article 14, as arguably in general under Article 5, 'the parental rights recognized by the CRC apparently extend only to giving parents a role in enforcing the right the CRC grants to the child, without recognizing an independent parental right. This approach illustrates the tendency of the CRC's autonomy model to

Convention. In particular, the family is very important for the Convention and on occasion the Committee refers to parental rights.

1 Importance of the family and parental rights

The importance of the family in the Convention may be a reason why Article 14 provides ‘States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction...’ In particular, paragraph 5 of the Preamble states:

the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.

This reflects Article 16(3) UDHR.¹⁹ Moreover, during the *travaux préparatoires* on Article 5, an Australian and American text proposed: ‘to help the child enjoy the rights enumerated in this Convention, States parties undertake to protect the family as the natural and fundamental unit of society’. The US delegation explained that it attached great importance to the family as the natural and fundamental group unit of society.²⁰ The Committee in its analysis of state reports has confirmed this principle. For example, it mentioned

the concern of the Convention to uphold the family and not to interfere in family life or to change the place of the child in the family [...] The Convention thus viewed the family as an essential and inseparable part of the rights of the child.²¹

The state should pay special attention to enhancing the role of the family in the promotion of children’s rights.²² It should also make efforts to strengthen family ties and the capacity of parents to fulfil their role in contributing to the protection of children’s rights and providing, in a manner consistent with the evolving capacities

view parents as trustees of the state who have only such authority and discretion as the state may grant in order to protect the child’s independent rights’: see B.C. Hafen & J.O. Hafen, ‘Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child’ (1996) 37(2) *Harvard International Law Journal* 449-491, at 470.

19 Article 16(3) UDHR provides: ‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State’.

20 1987 report of the Working Group, UN Doc. E/CN.4/1987/25, paragraphs 100-101.

21 UN Committee on the Rights of the Child, *Summary Record of the 403rd meeting: Australia*, UN Doc. CRC/C/SR.403, at 50 (1997).

22 UN Committee on the Rights of the Child, *Concluding Observations: Yemen*, UN Doc. CRC/C/15/Add.102, at 22 (1999).

of the child, appropriate direction and guidance in the exercise by the child of Convention rights.²³ Moreover, there is no contradiction between policies favourable to the family and insistence on children's rights.²⁴

The Committee refers on a number of occasions to parental rights. For example, the Committee suggested to Mauritius that parents have a Convention right to raise children according to their religious beliefs.²⁵ The Committee noted that Norwegian parents who wished their children to be exempted from traditional religious education had to say so explicitly, that this procedure exposed the faith of the children involved, and that it did not accord with their right to privacy.²⁶ In a context where religious culture and ethics were compulsory topics in state educational institutions, the Committee referred to the parents' right 'to withdraw their children from classes of that nature'.²⁷ Parents in Italy (especially foreign parents) should be made aware that the teaching of Roman Catholicism was not compulsory at school,²⁸ and the Committee also opened up the possibility of opting out of religious education in Japan at the request of either the child or the parents.²⁹ It furthermore told Germany that many parents in the new Länder were probably atheists and, if religious instruction was compulsory in primary schools, it might raise serious problems.³⁰ The mention by Bulgaria of striking a balance between parental rights to bring up their children

23 UN Committee on the Rights of the Child, *Concluding Observations: Sierra Leone*, UN Doc. CRC/C/15/Add.116, at 49 (2000).

24 UN Committee on the Rights of the Child, *Summary Record of the 200th meeting: Denmark*, UN Doc. CRC/C/SR.200, at 55 (1995).

25 UN Committee on the Rights of the Child, *Summary Record of the 333rd meeting: Mauritius*, UN Doc. CRC/C/SR.333, at 64 (1996): the Committee asked whether Mauritians understood the provisions of the Convention relating to their right to raise children according to their religious beliefs.

26 UN Committee on the Rights of the Child, *Summary Record of the 150th meeting: Norway*, UN Doc. CRC/C/SR.150, at 28 (1994) and *Concluding Observations: Norway*, UN Doc. CRC/C/15/Add.23, at 9 (1994). The door was left open as to whether the Committee was talking about the privacy of the parents, of the children, or both.

27 UN Committee on the Rights of the Child, *Summary Record of the 701st meeting: Turkey*, UN Doc. CRC/C/SR.701, at 60 (2001).

28 UN Committee on the Rights of the Child, *Summary Record of the 840th meeting: Italy*, UN Doc. CRC/C/SR.840, at 62 (2003) and *Concluding Observations: Italy*, UN Doc. CRC/C/15/Add.198, at 29 (2003).

29 UN Committee on the Rights of the Child, *Summary Record of the 465th meeting: Japan*, UN Doc. CRC/C/SR.465, at 6 (1998): 'Did Japanese legislation allow children, at their own or their parents' request, not to follow religious instruction or to attend religious ceremonies in educational institutions?'

30 UN Committee on the Rights of the Child, *Summary Record of the 244th meeting: Germany*, UN Doc. CRC/C/SR.244, at 56 (1995).

according to their beliefs on the one hand, and the general hostility of the population towards NRMs on the other, attracted no comment from the Committee.³¹

The Committee also referred to parental rights when it commented on the declaration and reservation of Algeria and Syria to the Convention.³² Algeria's interpretative declaration of Article 14 (1-2), states that 'a child's education is to take place in accordance with the religion of its father'. Syria's reservation states: 'The Syrian Arab Republic has reservations on the Convention's provisions which are not in conformity with the Syrian Arab legislations and with the Islamic Shariah's principles, in particular the content of article (14) related to the Right of the Child to the freedom of religion, and articles 2 and 21 concerning the adoption'. The Committee told Algeria that the reasons on which Algeria had based its statements on interpretation of the Convention were not clear. It held that Article 14 granted parents the right to provide direction to the child in the exercise of their right to freedom of thought, conscience and religion, and that this provision, therefore, was not at variance with the Algerian Family Code, which stipulated that children should be raised according to the religion of their father.³³ The Committee told Syria that the right to give religious education was therefore neither prohibited nor at risk. Syria's concern seemed unjustified and the reservation should perhaps be reconsidered.³⁴

In both cases, the Committee insisted that Article 14(2) protected parental rights and that the declaration and reservation were not justified. The Committee understood the issue as being between parents and the state. According to the Committee, parents have important rights in relation to the education of their children, and it is acceptable to raise children in the religion of their father. However, these comments can only work if the interests of the state and those of the parents coincide. This is not always the case and a state may have no interest in or intention of guaranteeing parental rights in education. For example, the state itself may have an interest in the matter, e.g. to maintain a state with a particular religious denomination. The Committee's comments look as if they are an excuse to reject the countries' declaration and reservation, considering that the usual emphasis of the Committee is on the rights of the child, as will be seen later on. It should be noted however, that the Committee has reneged on its position on Algeria's declaration, but for different

31 UN Committee on the Rights of the Child, *Summary Record of the 347th meeting: Bulgaria*, UN Doc. CRC/C/SR.347, at 11 (1997).

32 See Office of the High Commissioner on Human Rights, *Declarations and Reservations to the Convention on the Rights of the Child*, <<http://www.unhchr.ch/html/menu2/6/crc/treaties/declare-crc.htm>> (visited 17th April 2007).

33 UN Committee on the Rights of the Child, *Summary Record of the 387th meeting: Algeria*, UN Doc. CRC/C/SR.387, at 14 & 27 (1997).

34 UN Committee on the Rights of the Child, *Summary Record of the 360th meeting: Syrian Arab Republic*, UN Doc. CRC/C/SR.360, at 26 (1997).

reasons.³⁵ In general, the Committee asks states to withdraw their reservations to the Convention,³⁶ as it did in relation to the reservations of Jordan,³⁷ and Malaysia for example.³⁸

Despite the importance of the family and the Committee's references to parental rights, another view of the family is emerging. The principle of the privacy of the family must not be an excuse to limit interventions.³⁹ The privacy of the family

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- 35 UN Committee on the Rights of the Child, *Concluding Observations: Algeria*, UN Doc. CRC/C/15/Add.269, paragraphs 37-38 (2005): 'With reference to the findings of the UN Special Rapporteur on freedom of religion or belief during his visit to Algeria in 2002 (E/CN.4/2003/66/Add.1) and the interpretative declaration of the State party to article 14 of the Convention, the Committee is concerned that the right of the child to freedom of thought, conscience and religion is not fully respected and protected. In the light of article 14 of the Convention, the Committee recommends that the State party respect the right of the child to freedom of thought, conscience and religion by taking effective measures to prevent and eliminate all forms of discrimination on the grounds of religion or belief and by promoting religious tolerance and dialogue in society. The Committee recommends the State party to ensure that children can obtain a dispensation from compulsory religious education'.
- 36 UN Committee on the Rights of the Child, *Day of General Discussion on the Right of the Child to be Heard*, paragraph 14 (2006): 'The Committee urges States parties that have made reservations on the application of articles 12, 13, 14, 15 and 17 of the Convention to consider their withdrawal'.
- 37 UN Committee on the Rights of the Child, *Summary Record of the 1188th meeting: Jordan*, UN Doc. CRC/C/SR.1188, paragraph 28 (2006). The reservation provides: 'The Hashemite Kingdom of Jordan expresses its reservation and does not consider itself bound by articles 14, 20 and 21 of the Convention, which grant the child the right to freedom of choice of religion and concern the question of adoption, since they are at variance with the precepts of the tolerant Islamic Shariah'. The Committee asked whether there had been any debate on the State party's withdrawal of its reservation to Article 14, and said that a close reading of that article revealed that it could be interpreted in a manner that was not inconsistent with the sharia.
- 38 UN Committee on the Rights of the Child, *Summary Record of the 1216th meeting: Malaysia*, UN Doc. CRC/C/SR.1216, paragraph 42 (2007). The reservation provides: 'The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 1, 2, 7, 13, 14, 15, [...], 28, [paragraph 1 (a)] 37, [...] of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia'. The Committee asked whether the body in charge of reviewing the country's reservation to Article 14 had considered the practice of other Muslim countries; it also asked about the coexistence of judicial and Islamic systems, and whether efforts were made to unify the sharia, considering that interpretation of it varied according to different schools.
- 39 UN Committee on the Rights of the Child, *Concluding Observations: Marshall Islands*, UN Doc. CRC/C/15/Add.139, at 26 (2000): 'the Committee expresses its concern that the principle of respect for the privacy of the family, guaranteed by the Constitution and

should not be a barrier to the rights of the child and the child's best interests are not necessarily served by remaining in the family.⁴⁰ The views of children must also be taken into account, and the aim is to strike a balance between the parents' prerogatives and those of children within the family.⁴¹ Therefore, interventions into family life are possible for the benefit of the child. There must also be a balance between children's and parents' rights: Article 3(1) can be interpreted only as indicating that the child's interests should be paramount.⁴²

The Committee is not always consistent in its analysis of the relationship between parents' and children's rights, and it sometimes looks as if it depends on the country report being examined. It appears that the family is a very important institution and that the rights of the child should be envisaged in this context. However, the Committee argues that it is necessary to strike a balance between parents' and children's rights. A new model of the family is emerging, according to which parents' rights, prerogatives and interests must generally give way to the child's if there is a conflict.

2 Evolving capacities and religious freedom

Article 14(2) on the evolving capacities of the child is supposed to be the principle guiding the interpretation of Article 14, yet the Committee refers to and uses other concepts too. The *travaux préparatoires* show that Article 14(2) was drafted to be a serious limitation of parental rights and the Committee makes it clear that the focus must be on the individual child. We also saw earlier that Article 14(2) is a specific

customary practice, may limit interventions within the family which, in accordance with article 9 of the Convention, may be in the best interests of the child'.

- 40 UN Committee on the Rights of the Child, *Summary Record of the 456th meeting: Hungary*, UN Doc. CRC/C/SR.456, at 35 (1998) – in the context of administering corporal punishment to children.
- 41 UN Committee on the Rights of the Child, *Summary Record of the 410th meeting: Uganda*, UN Doc. CRC/C/SR.410, at 3 (1997).
- 42 UN Committee on the Rights of the Child, *Summary Record of the 244th meeting: Germany*, UN Doc. CRC/C/SR.244, at 42 (1995). It is worth noting, that Article 3(1) refers to the best interests of the child as 'a primary consideration', whereas the Committee referred to the child's interests as 'paramount'. The Committee also said that there is scarcely any country in the world that has so far succeeded in implementing the best interests' standard, even if it is enshrined in legislation. Part of the problem consists of the fact that there is no watertight definition of 'best interests', and it is for each state to create its own definition on a case-by-case basis: see *Summary Record of the 680th meeting: Egypt*, UN Doc. CRC/C/SR.680, at 2 (2001). On the concept of best interests, see M. Guggenheim, 'Ratify the U.N. Convention on the Rights of the Child, but don't expect any miracles' (2006) 20 *Emory Int'l L. Rev.* 43-68, at 63-64. He argues that children are better protected by laws restricting the exercise of government authority. The concept of best interests means that cases decided by courts on the basis of the children's best interests would give courts far too broad discretion.

application of Article 5 of the Convention, although the Committee does not usually refer to it. The Committee seems quite strict in its interpretation of Article 14(2), in that parents must respect the evolving capacities of the child and not go beyond what is necessary to provide direction and guidance to the child.

The Committee was concerned that Norway regarded Article 5 as applicable only from the parents' point of view, and it emphasised 'the need for guidance to take into account the evolving capacities of the child including the exercise of his rights'.⁴³ This was confirmed in the case of Poland.⁴⁴ It suggested that children should be regarded as autonomous individuals fully entitled to enjoy their rights and that too much emphasis on parents might undermine the principle of the child's best interests,⁴⁵ which is fundamental to the Convention.⁴⁶ It is also important that the exercise of parental rights should not be such as to jeopardise children's right to participation in their own development,⁴⁷ especially as Articles 5 and 12 are indissociable.⁴⁸

The Committee has applied these principles to Article 14. The Committee's guidelines regarding the form and content of reports to be submitted by states parties, read, on Article 14: 'Please provide information on the exercise of the right to freedom of thought, conscience and religion by children, and the extent to which the child's evolving capacities are taken into consideration'.⁴⁹ Parents (and others) should also be encouraged to offer 'direction and guidance' in a child-centred way,

43 UN Committee on the Rights of the Child, *Summary Record of the 150th meeting: Norway*, UN Doc. CRC/C/SR.150, at 42 (1994).

44 UN Committee on the Rights of the Child, *Summary Record of the 193rd meeting: Poland*, UN Doc. CRC/C/SR.193, at 35 (1995): 'Furthermore, the provisions of the Family and Guardianship Code concerning the rights and duties of parents were not fully consistent with article 5 of the Convention. The Code seemed to place the emphasis on the right of parents to provide guidance to their children in exercising their rights. In fact, the emphasis should be on the actual exercise of the rights by the children'.

45 UN Committee on the Rights of the Child, *Summary Record of the 701st meeting: Turkey*, UN Doc. CRC/C/SR.701, at 25 (2001): 'According to the information received by the Committee, parental authority was still very strong in Turkish society. To what extent were children regarded as autonomous individuals fully entitled to enjoy their rights? The Committee would welcome information on the practical situation of children and their right to participate in decisions taken at school and at home'.

46 UN Committee on the Rights of the Child, *Summary Record of the 228th meeting: Sri Lanka*, UN Doc. CRC/C/SR.228, at 23 (1995).

47 UN Committee on the Rights of the Child, *Summary Record of the 256th meeting: Holy See*, UN Doc. CRC/C/SR.256, at 10 (1995).

48 UN Committee on the Rights of the Child, *Summary Record of the 255th meeting: Holy See*, UN Doc. CRC/C/SR.255, at 31 (1995).

49 Report of the Secretary-General, *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties*, UN Doc. HRI/GEN/2/Rev.3, page 76 (2006).

through dialogue and example, in ways which enhance young children's capacities to exercise their rights.⁵⁰

It does not fully correspond to the Convention that parents are free to provide a religious and moral education to their children, as Article 14 says that 'parents are entitled to provide *direction* to the child in the exercise of their right'.⁵¹ The Committee also told Bangladesh that parents have rights of guidance, based on a child's evolving capacities, but that in principle the right to freedom of religion is non-derogable.⁵² Unless we interpret this as meaning that parental direction is a derogation from the child's freedom, the meaning of the Committee's statement is unclear. The Committee asked Indonesia to explain the meaning of the phrase 'under the direction of his/her parents in a manner consistent with his/her evolving capacities', which qualified the child's right to freedom of worship, thought and expression under article 6 of the Child Protection Act.⁵³ It is not clear what the Committee meant, as article 6 of the Child Protection Act seemed to be in conformity with Article 14(2). Finally, the Committee suggests that freedom of religion should be the child's responsibility, depending on their development, and not tied to parental authority.⁵⁴

3 Other interactions within Article 14

Article 14(2) mentions parental rights of direction but other elements come into play too. The Committee does not define what it means by 'evolving capacities' and it is a framework rather than a threshold. In addition, the Committee uses the concepts of age-limits and participatory rights to help its analysis. Surprisingly, it hardly ever refers to Article 3 and the best interests of the child, despite the fact that this is one of the Convention's guiding principles. In fact, the Committee is incoherent in its approach to all these concepts, and there is no clear line of argument.

A *The best interests of children*

The principle of the best interests of the child is one of the Convention's guiding principles, together with Article 5 on evolving capacities and Article 12 on participatory rights. However, the Committee does not give much thought to the best interests of the child in relation to Article 14. On one occasion, it reminded Togo that it cared about the welfare and well-being of children, and that protection must be afforded

50 UN Committee on the Rights of the Child, *General Comment No. 7 on Implementing Child Rights in Early Childhood*, UN Doc. CRC/C/GC/7, paragraph 17 (2005).

51 UN Committee on the Rights of the Child, *Summary Record of the 277th meeting: Republic of Korea*, UN Doc. CRC/C/SR.277, at 31 (1996), emphasis in the text.

52 UN Committee on the Rights of the Child, *Summary Record of the 380th meeting: Bangladesh*, UN Doc. CRC/C/SR.380, at 19 (1997).

53 UN Committee on the Rights of the Child, *Summary Record of the 920th meeting: Indonesia*, UN Doc. CRC/C/SR.920, paragraph 53 (2004).

54 UN Committee on the Rights of the Child, *Summary Record of the 638th meeting: Djibouti*, UN Doc. CRC/C/SR.638, at 10 (2000).

against traditional religious or cultural practices that might be harmful to their development.⁵⁵ It also told France that a 2004 law prohibiting the wearing of religious symbols in state schools,⁵⁶ was not in conformity with the child's right to manifest their religion, the principle of the best interests of the child and the child's right to education.⁵⁷ However, it has been argued that 'a ban on religious display via the law,

55 UN Committee on the Rights of the Child, *Summary Record of the 421st meeting: Togo*, UN Doc. CRC/C/SR.421, at 60 (1997).

56 Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics (J.O n° 65 du 17 mars 2004, page 5190) – Law n° 2004-228 (15th March 2004) prohibiting children in public schools from wearing clothing and insignia that 'conspicuously manifest a religious affiliation' (Official Journal n° 65, 17th March 2004, page 5190). The literature on the 2004 law is extensive. For example, see D.H. Davis, 'Reacting to France's Ban: Headscarves and Other Religious Attire in American Public Schools' (2004) 46 *Journal of Church and State* 221-232; T.J. Gunn, 'Religious Freedom and Laïcité: A Comparison of the United States and France' [2004] *BYU L. Rev.* 419-506; T.J. Gunn, 'Under God but Not the Scarf: The Founding Myths of Religious Freedom in the United States and Laïcité in France' (2004) 46 *Journal of Church and State* 7-24; M.M. Idriss, 'Laïcité and the Banning of the 'Hijab' in France' (2005) 25(2) *Legal Studies* 260-295; W. Shadid & P.S. Van Koningsveld, 'Muslim Dress in Europe: Debates on the Headscarf' (2005) 16(1) *Journal of Islamic Studies* 35-61; D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford: Hart, 2006), at 282. In France, the law is widely supported by politicians and by French people, and it has attracted a great of commentaries from all over the world. It is also important to note that a *circulaire* (directive) was issued by the Minister of Education on 18th May 2004; it says, amongst other things that 'the prohibited signs and dress are those by which the wearer is immediately recognizable with regard to his or her religion, such as the Islamic veil, whatever its name, the kippah or a crucifix of manifestly exaggerated dimensions' (translation by Eva Brems in 'Above Children's Heads The Headscarf Controversy in European Schools from the Perspective of Children's Rights' (2006) 14(2) *International Journal of Children's Rights* 119-136, at 120). The *circulaire* was challenged before the Conseil d'Etat, which rejected the application. It found that there was no breach of Article 9 ECHR and Article 18 ICCPR and that the measure was in accordance with the objective of public interest to maintain the principle of laïcité in state schools: Conseil d'Etat, applications 269077-269704, 8th October 2004, *Union française pour la cohésion nationale*. Jessica Fournier argues that an 'outright prohibition on practicing an element of one's religion does not seem to further any goal of creating an inclusive and compassionate society. Instead, cultural accommodations and legal concessions can help to integrate Muslims into European society without requiring them to sacrifice all their cultural and legal autonomy': J. Fournier, 'Banning Legal Pluralism by Passing a Law' (2006) *Hastings International and Comparative Law Review* 233-249, at 249

57 UN Committee on the Rights of the Child, *Summary Record of the 967th meeting: France*, UN Doc. CRC/C/SR.967, paragraphs 26, 35, 42 (2004) & *Summary Record of the 968th meeting: France*, UN Doc. CRC/C/SR.968, paragraph 82 (2004) & *Concluding Observations: France*, UN Doc. CRC/C/15/Add.240, paragraphs 25-26 (2004)

from the “outside”, ensures the protection of children from fundamentalist pressure yet does not enforce a break in religious ties’.⁵⁸ Theoretically, the concept of the best interests of the child overrides other considerations, yet it remains to be seen what it means in relation to Article 14 and religious freedom. Shulamit Almog and Ariel Bendor argue that the ‘Convention too does not provide any determination of this conceptual difficulty’. The approach to best interests is usually determined by adults, i.e. the parents or a court and it is a very paternalistic and protectionist approach.⁵⁹

B *The participatory rights of children*

Article 12 provides that children should be heard and the Committee confirms that it is very important to recognise the significance of children’s participation. It is often stated that the right of children to participate is guaranteed, provided that children are mature. However, this argument is sometimes used to deny children that very right, whereas children must be given the opportunity to learn participatory skills at every stage of their development.⁶⁰ Adam Lopatka recalls that the Convention imposes an obligation on states to assure children who are capable of forming their own views, the right to express them freely in all matters affecting them.⁶¹ However, there is no threshold; the Committee just states that children must be listened to and heard regarding their religion and that they must be able to say what they think, although the Committee is not clear about what should be done with the child’s views.

The Committee also says on a number of occasions that the participatory rights of children are not taken into account, especially regarding Articles 13 to 15.⁶² The Committee expressed its concern about parental rights to decide on a child’s religion in Burkina Faso, which appeared to be in conflict with the right of the child to have their views taken into account. The fact that parental authority prevailed even after the child had been emancipated or removed from the jurisdiction of their parents

58 P. Weil, ‘A Nation in Diversity: France, Muslims and the Headscarf’ (25th March 2004), available at <<http://www.opendemocracy.net/debates/article-5-57-1811.jsp>> (last visited 17th April 2007).

59 S. Almog & A.L. Bendor, ‘The UN Convention on the Rights of the Child Meets the American Constitution: Towards a Supreme Law of the World’, at 278.

60 UN Committee on the Rights of the Child, *Summary Record of the 283rd meeting: Finland*, UN Doc. CRC/C/SR.283, at 38 (1996).

61 A. Lopatka, ‘Appropriate Direction and Guidance in the Exercise by a Child of the Rights to Freedom of Expression, Thought, Conscience and Religion’ in E. Verhellen (ed.), *Monitoring Children’s Rights* (The Hague: Martinus Nijhoff Publishers, 1996), 287-292, at 288.

62 UN Committee on the Rights of the Child, *Concluding Observations: Yemen*, UN Doc. CRC/C/15/Add.102, at 19 (1999); *Concluding Observations: Ireland*, UN Doc. CRC/C/15/Add.85, at 35 (1998); *Concluding Observations: Mexico*, UN Doc. CRC/C/15/Add.112, at 23 (1999); *Concluding Observations: Guinea*, UN Doc. CRC/C/15/Add.100, at 18 (1999).

was also of particular concern to the Committee.⁶³ The Committee also expressed its concern that the Constitution of Croatia guaranteed the right of parents to choose the religion of the child without even mentioning that the child's views should be taken into consideration.⁶⁴

The report of Lesotho stated that children were not free to choose their place of worship and when parents changed churches, the children had to follow, even if they liked the church they were attending. The Committee only commented that some traditional practices and attitudes could limit the implementation of children's rights to express their views and to participate in the decision-making process.⁶⁵ The Committee asked Gabon what the government was doing to ensure that children had the right to express their views on all issues concerning them, considering that custom prohibited freedom of thought and conscience within the family.⁶⁶ The Committee also told Guinea that freedom of opinion and religion were matters of concern in a society such as Guinea's, in which children were considered to be answerable to their parents and their families until they reached the age of 21.⁶⁷

C *Age-limits*

The Committee also pays a great deal of attention to age-limits imposed by states, usually regarding the child's choice of religion or religious education. States must allow the child, in law or in fact, to choose a religion or join a religious organisation. For example, its guidelines regarding the form and content of reports to be submitted by states parties provide that states are requested to provide relevant information on the minimum legal age defined by the national legislation for choosing a religion or attending religious school teaching.⁶⁸ The Committee uses its comments on age-limits to lower the decision-making capacities of the child, yet it does not really give any answers regarding what states should do. The Committee criticises, but gives no framework.

The Committee told Iceland that the age at which a person was deemed competent to decide on membership of a religious organisation (16 or 18, the Committee

63 UN Committee on the Rights of the Child, *Summary Record of the 136th meeting: Burkina Faso*, UN Doc. CRC/C/SR.136, at 34 (1994).

64 UN Committee on the Rights of the Child, *Summary Record of the 280th meeting: Croatia*, UN Doc. CRC/C/SR.280, paragraph 12 (1996).

65 UN Committee on the Rights of the Child, *Concluding Observations: Lesotho*, UN Doc. CRC/C/15/Add.147, at 27 (2001).

66 UN Committee on the Rights of the Child, *Summary Record of the 756th meeting: Gabon*, UN Doc. CRC/C/SR.756, at 54 (2003).

67 UN Committee on the Rights of the Child, *Summary Record of the 517th meeting: Guinea*, UN Doc. CRC/C/SR.517, at 64 (1999).

68 Report of the Secretary-General, *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties*, UN Doc. HRI/GEN/2/Rev.3, page 71 (2006).

was not clear) was excessively high.⁶⁹ The Committee also suggested that preventing minors under the age of 15 from participating in religious rituals without the consent of their parents or the people acting for them was a hindrance to religious freedom.⁷⁰ In Colombia, a child was not free to practise a particular religion or not to practise any religion until the age of 18 and the Committee wondered whether this was consistent with Articles 12 and 14.⁷¹ The Committee also asked Uzbekistan and Greece what domestic legislation permitted children to do and at what age they were able to act upon their faith by joining a religious group.⁷² Similarly, it asked Hungary whether children had the right to come into contact with other cultures or to choose their religion from a certain age.⁷³

In Iceland, the state report indicated that parents could not change the religious denomination of a child over 12 unless the opinion of the child had been sought. The Committee asked on what basis the age of 12 had been chosen.⁷⁴ However, the Com-

69 UN Committee on the Rights of the Child, *Summary Record of the 856th meeting: Iceland*, UN Doc. CRC/C/SR.856, at 16 (2003). The state report stated that a 1999 bill on religious associations provides for a higher age limit, 18 years instead of 16, for deciding on membership of a religious association, to be in conformity with the increase in the age at which people become legally competent to manage their personal affairs.

70 UN Committee on the Rights of the Child, *Summary Record of the 786th meeting: Belarus*, UN Doc. CRC/C/SR.786, paragraph 70 (2002). The delegation replied that the choice of 15 was in the interests of the child, especially because of problems related to recently-formed sects, and the Committee did not pursue the matter further: *Summary Record of the 787th meeting: Belarus*, UN Doc. CRC/C/SR.787, paragraph 32 (2002).

71 UN Committee on the Rights of the Child, *Summary Record of the 114th meeting: Colombia*, UN Doc. CRC/C/SR.114, at 28 (1995).

72 UN Committee on the Rights of the Child, *Summary Record of the 744th meeting: Uzbekistan*, UN Doc. CRC/C/SR.744, at 11 (2001): the Committee asked whether a 16-year-old could go to a mosque or church without hindrance and whether certain mosques were off limits to minors; the delegation replied that the state guaranteed the children's right to practise any religion, but that such acts had to take place outside school. UN Committee on the Rights of the Child, *Summary Record of the 753rd meeting: Greece*, UN Doc. CRC/C/SR.753, at 75 (2002): the Committee asked whether Greek children over 16 enjoyed freedom of association, in particular the right to join political parties, trade unions or religious groups.

73 UN Committee on the Rights of the Child, *Summary Record of the 455th meeting: Hungary*, UN Doc. CRC/C/SR.455, at 25 (1998).

74 UN Committee on the Rights of the Child, *Summary Record of the 273rd meeting: Iceland*, UN Doc. CRC/C/SR.273, at 12 (1996). The delegation replied it could always been asked why a particular age had been chosen and not another. Icelandic children rarely raised questions of religious belief until the time of their confirmation approached, and they had the absolute right to refuse to be confirmed. Moreover, parents had to obtain the child's written consent to change their denomination (paragraph 27).

mittee does not say whether it thinks that 12 is not an appropriate age, or whether the country should take the evolving capacities of the child into account.⁷⁵

The report of Germany indicated that at the age of 10, a child must be heard prior to a change in religious denomination; the same applied to the withdrawal of the child from religious instruction in the event that the parents themselves are in disagreement. At the age of 12, a child could no longer be forced to take religious instruction in another denomination against their will, and at the age of 14, a child had the right to freely choose their religious denomination (except in the Land Bavaria, where a juvenile may not withdraw from religious instruction in school until the age of 18).⁷⁶ First, the Committee wanted to make sure that when a child was heard after 10, it was followed up, as no information had been given as to what happened once the child had given their views. Secondly, the Committee wanted ‘elucidation of the statement’ concerning 12-year-olds. Thirdly, regarding the last point on choice of religious freedom, the Committee said that the measure under which children could freely choose their religious denomination at the age of 14, except in the Land Bavaria, where they had to be aged 18 to do so, did not seem to be in keeping with article 14(3) of the Convention. The Committee asked whether the Federal Government had made any attempt to alert the Bavarian authorities to that anomaly.⁷⁷

The Committee wanted to know to what extent Article 14 was implemented in everyday life in Slovenia: there should be no age limit placed on taking children’s views into account during civil proceedings; the sole criterion should be whether or not children in such circumstances were able to understand the issues involved.⁷⁸ In China, the Committee was concerned that Tibetan Buddhist, Uighur and Hui children had restrictions placed on their ability to study and practise their religion and some children had been detained for participating in religious activities. In particular, the Committee recommended that the state repeal any ban instituted by local authorities on children of any age from participating in Tibetan religious festivals or receiving religious education, repeal any ban instituted by local authorities on children of any age from attending mosques or receiving religious education throughout the mainland, and take all necessary measures to ensure that children may choose whether to participate in classes on religion or atheism.⁷⁹ The Committee also told Finland that children should be allowed to choose their religion before reaching the age of

75 It is also possible that it was satisfied by the delegation’s reply.

76 UN Committee on the Rights of the Child, *Initial Report of States Parties Due in 1994: Addendum: Germany*, UN Doc. CRC/C/11/Add.5, at 13 (1994).

77 UN Committee on the Rights of the Child, *Summary Record of the 244th meeting: Germany*, UN Doc. CRC/C/SR.244, at 57 (1995).

78 UN Committee on the Rights of the Child, *Summary Record of the 938th meeting: Slovenia*, UN Doc. CRC/C/SR.938, paragraph 58 (2004).

79 UN Committee on the Rights of the Child, *Concluding Observations: China*, UN Doc. CRC/C/15/Add.271, paragraphs 44-45 (2005).

majority.⁸⁰ Similarly the Committee was concerned that persons below the age of 18 in Denmark could not join a religious community against their parents' wishes.⁸¹

4 Conclusion

Considering that the right of the child to religious freedom is the right of every child to be unhindered in their growth as an autonomous independent actor in the matrix of parents, religious community and society, the analysis of the Committee is problematic for several reasons. First, the Committee is incoherent in its analysis of Article 14(2). For example, it was unclear in its analysis of the rights of children and parents in relation to the declaration and reservation of Algeria and Syria. The evolving capacities of the child should be the overarching principle guiding Article 14 and yet the Committee refers to participatory rights and age-limits. It does not clarify the relationship between these three different concepts and there is no clear line of argument.

Secondly, the Committee has also a tendency to treat the child as an autonomous religious believer, with only tenuous links with family and religious community. This is translated by far too much intervention within the family, and the Committee presumes far too quickly that the family is not always acting in the best interests of the child in religious matters. This means that the Committee limits parental rights and that much of the right of the child to religious freedom is a right against the child's parents. The Committee indirectly refers to the horizontal effect of religious freedom when it talks about the participatory rights of the child and makes some blanket statements on participation and to the fact that the family has to let the child be 'freer'. This has nothing to do with age-limits, but the focus is on the child being able to participate and to exercise their right.

Thirdly, in analysing Article 14(2) and the concept of the evolving capacities of the child, the Committee creates a set of rights and duties of children against their parents, yet there is no definition of 'direction and guidance'. Parents are encouraged to develop their child's evolving capacities, yet it is not completely clear what the child's own development means. In addition, the Committee reacts to the imposition of age-limits by the state, yet it does not say what these limits should be. This seems to be also an indication that the Committee wants to lower the age-limit, without necessarily forging a connection with the child's evolving capacities.

80 UN Committee on the Rights of the Child, *Summary Record of the 1068th meeting: Finland*, UN Doc. CRC/C/SR.1068, paragraph 17 (2005).

81 UN Committee on the Rights of the Child, *Summary Record of the 1072nd meeting: Denmark*, UN Doc. CRC/C/SR.1072 paragraph 54 (2005). The state replied that the legal guardian of the child decided their religious denomination and that the child could not choose their religion. However, if the child decided that they did not want to follow their parents' or guardian's religion then they had no means to prevent them from doing so: *Summary Record of the 1073rd meeting: Denmark*, UN Doc. CRC/C/SR.1073, paragraph 79 (2005).

Section 3 Freedom of choice

The text of Article 14 does not refer to the right of children to have, adopt, or maintain the religion or belief of their choice, or to change their religion or belief, as it is provided in other international human rights instruments (such as Article 8 UDHR, Article 18 ICCPR or Article 9 ECHR). However, the Committee has interpreted Article 14 as including the right of children to choose their religion. Freedom of choice covers all the main religious communities, yet the Committee appears to be more cautious towards new religious movements (NRMs). For example, the Committee believed that, since Ukraine had become independent, there had been a sharp increase in the number of religious groups, some of which targeted children, upon whom they had a pernicious influence by discouraging them from attending school or from receiving medical assistance. It asked whether there was such a problem and, if so, what measures had been taken to address it.⁸² It asked Bulgaria what was being done in the family and schools in terms of children's vulnerability and attraction to NRMs and how children were affected by such religions.⁸³ It also told Lithuania that it had received disturbing reports concerning the activities of a religious sect that had targeted children. It asked whether the government was aware of that phenomenon, and how it would address it. It also asked whether children's associations were free to operate independently and whether there were any requirements for registration or legal constraints on their activities.⁸⁴ Yet Brems argues that the right to join a small religious group that some label a sect is protected to the same extent as the right to join one of the major world religions. She adds that this matter is to be distinguished from that of the restriction of certain manifestations of a religion, which may be allowed for example if they have a harmful effect on minors.⁸⁵

1 The travaux préparatoires

The first proposal discussed at the 1983 Working Group mentioned the child's freedom to have or to adopt a religion or belief of their choice.⁸⁶ However, some speakers

82 UN Committee on the Rights of the Child, *Summary Record of the 240th meeting: Ukraine*, UN Doc. CRC/C/SR.240, paragraph 10 (1993).

83 UN Committee on the Rights of the Child, *Summary Record of the 346th meeting: Bulgaria*, UN Doc. CRC/C/SR.346, paragraph 73 (1997).

84 UN Committee on the Rights of the Child, *Summary Record of the 684th meeting: Lithuania*, UN Doc. CRC/C/SR.684, paragraph 10 (2001).

85 E. Brems, 'Article 14: The Right to Freedom of Thought, Conscience and Religion', at 20.

86 1983 report of the Working Group, UN Doc. E/CN.4/1983/62, paragraph 52: the United States proposal (E/1982/12/Add.1, part C, paragraph 118) read as follows: '1. The States Parties to the present Convention shall ensure that the child has the right to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in

expressed doubts as to whether it should be the responsibility of the state to ensure that the child has the right to freedom of thought, conscience and religion. In many countries, it was said, children follow the religion of their parents and do not generally make a choice of their own.⁸⁷ As no agreement was reached on the proposal, a revised version put forward the child's right 'to have a religion or whatever belief of his choice', and did not mention the child's freedom to adopt a religion or whatever belief of their choice.⁸⁸ It appears that the US were ready to drop 'freedom to adopt' in order to reach an agreement. Various proposals were then advanced: a Canadian text did not mention the issue at all, and a text from Denmark, Finland, Norway and Sweden came back to 'the right to have or to adopt a religion or whatsoever belief of his choice'.⁸⁹ In the discussion, the Holy See said, commenting on the Canadian text, that the right of the child to have or to choose a religion or belief was not explicit enough.⁹⁰

Moreover, an informal open-ended working party prepared a new draft, and it mentioned 'the right to have or to adopt a religion or whatsoever belief of his choice'.⁹¹ There were minor textual amendments, and a US amendment that the child 'be free from coercion which would impair his freedom in this respect' was eventually withdrawn. There was not much discussion, and it appears that there was not much difficulty in including the child's right to have or to adopt a religion or belief of their choice.⁹²

The situation changed in 1986-1987 with Bangladeshi and Moroccan representatives commenting that the article 'appears to infringe upon the sanctioned practice of a child being reared in the religion of his parents',⁹³ and that 'On the question of religion, the rule adopted in Moroccan legislation is that the child shall follow the religion of his father. In this case, the child does not have to choose his religion, as the religion of the State is Islam'.⁹⁴ Despite a comment by the United Nations Edu-

public or private, to manifest his religion or belief in worship, observance, practice and teaching'.

87 UN Doc. E/CN.4/1983/62, paragraph 55.

88 Ibid, paragraph 57: '1. The States Parties to the present Convention shall ensure that the child has the right to freedom of thought, conscience and religion, including the right to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest, in a manner not incompatible with public order and morals, his religion or belief in worship, observance, practice and teaching'.

89 1984 report of the Working Group, UN Doc. E/CN.4/1984/71, paragraph 13.

90 Ibid, paragraph 15.

91 Ibid, paragraph 17: this consolidated text was generally considered to be a useful basis for discussion.

92 Ibid, paragraphs 24-27.

93 UN Doc. E/CN.4/1986/39, annex IV.

94 UN Doc. E/CN.4/1987/WG.1/WG.35.

cational, Scientific and Cultural Organization (UNESCO) that ‘the freedom to have or to adopt a religion’ should be replaced by ‘the freedom to have or not to have, to adopt or not to adopt a religion’,⁹⁵ opposition was still strong. Two new proposals at the second reading in 1989 did not mention the child’s freedom to have and adopt a religion or belief of their choice.⁹⁶ During the discussion and adoption at the second reading, it was recalled that the drafting group had been unable to reconcile the various views and positions of delegations and this is shown by the fact that the mention of the child’s freedom was simply removed.⁹⁷ Even if it was stressed that the article should not engage in establishing standards lower than those already set, it was also said that some could not accept any provision giving the child a freedom to choose and change their religion or belief, and that it was only on the basis of the last proposal that any discussion could be productive.⁹⁸

Observing that a consensus was not possible and that the provision was close to not being adopted at all, the less controversial paragraphs were adopted and Article 14 as it stands was passed. Following the adoption of the article, the observer for Sweden issued a final statement and said that his delegation had joined in the consensus on the understanding that the right to freedom of thought, conscience and religion, as laid down in Article 18 ICCPR, should include freedom to have or to adopt a religion or belief of one’s choice.⁹⁹ Both the Netherlands and Belgium attached a similar interpretive declaration.¹⁰⁰ LeBlanc said that this more expansive

95 UN Doc. E/CN.4/1989/WG.1/CRP.1, page 22.

96 UN Doc. E/CN.4/1989/WG.1/WP.4: proposal submitted by Algeria, Egypt, Iraq, Jordan, Kuwait, Libyan Arab Jamahiriya, Morocco, Oman, Pakistan and Tunisia, and E/CN.4/1989/WG.1/WP.68: proposal submitted by the drafting group on Article 7 *bis* composed of Bangladesh, China, the Holy See, Mexico, Morocco, the Netherlands and Poland, which were joined by the delegations of the United States of America, the Union of Soviet Socialist Republics, Argentina, Algeria, Egypt, Tunisia and two representatives of non-governmental organisations (found in the 1989 report of the Working Group, UN Doc. E/CN.4/1989/48, paragraph 280).

97 UN Doc. E/CN.4/1989/48, paragraph 281.

98 *Ibid*, paragraphs 285-286.

99 *Ibid*, paragraph 289.

100 Declaration of the Netherlands: ‘It is the understanding of the Government of the Kingdom of the Netherlands that article 14 of the Convention is in accordance with the provisions of article 18 of the International Covenant on Civil and Political Rights of 19 December 1966 and that this article shall include the freedom of a child to have or adopt a religion or belief of his or her choice as soon as the child is capable of making such choice in view of his or her age or maturity’.

Interpretative declaration of Belgium: ‘The Belgian Government declares that it interprets article 14, paragraph 1, as meaning that, in accordance with the relevant provisions of article 18 of the International Covenant on Civil and Political Rights of 19 December 1966 and article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, the right of the child to freedom of

interpretation was not prohibited, but that, in fact, in view of Article 41 (which calls for the application of domestic or international laws that are more conducive to the realisation of the rights of the child), was not necessary.¹⁰¹ Nevertheless, the *travaux préparatoires* show a clear divide between Muslim countries and other countries on the issue of the right of the child to have, adopt or choose a religion and it may have been a reason for these declarations. A consensus could not be reached, and the issue was dropped for fear of not adopting the article at all.

2 The recognition of the right

Most of the time the Committee is very clear: children have the right to select the religion of their choice, this choice must be of their own free will and it is very closely linked to participatory rights under Article 12. The Committee's view on freedom of choice is that 'freedom of religion include[s] freedom to choose and change one's religion. No interpretation of such freedoms could restrict it to the possibility of holding one specific religion'.¹⁰²

The Committee has adopted the same line in relation to Morocco's reservation, which provides: 'The Kingdom of Morocco, whose Constitution guarantees to all the freedom to pursue his religious affairs, makes 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'. The Committee replied:

The reservation to article 14 indicated that the Government of Morocco did not have an answer to the question of the extent of a child's freedom in determining his religion. The existence of the reservation cast doubts on the enjoyment of freedom of religion in Morocco. [The Committee] therefore urged the Government to reconsider the reservation. With regard to Morocco's reservation to article 14, [it] pointed out that it was within the Committee's mandate to explain the interpretation of that article as it applied to all countries. It was not up to individual countries to interpret the Convention as they saw fit. States were allowed to formulate reservations, provided that such reservations did not conflict with the Convention's aims and objectives. [It] suggested that the discussion of the reservation should continue when the Committee considered issues relating to the civil rights of children, including the right to freedom of expression. Flexibility was certainly one of the keys to understanding and the Committee might find that the problem lay with the wording of the reservation.¹⁰³

thought, conscience and religion implies also the freedom to choose his or her religion or belief'.

101 L.J. LeBlanc, *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights*, at 171.

102 UN Committee on the Rights of the Child, *Summary Record of the 317th meeting: Morocco*, UN Doc. CRC/C/SR.317, paragraph 51 (1996).

103 *Ibid*, paragraphs 51 and 60.

This answer shows that the Committee will not accept any challenge to the child's freedom of choice. The fact that some Muslim conceptions of religious freedom do not include freedom of choice does not make any difference for the Committee and one could speculate whether the Committee is prejudiced when dealing with some religious communities, notably Islam.¹⁰⁴ Kamran Hashemi said:

As was expected from the beginning, in practice [Muslim legal tradition] has not been in any conflict with the provisions of Article 14. That is the reason why none of the reserving Muslim states have a reference in their reports to the practical aspects of their reservations. By the same token, the Committee has never raised any concern on the issue of changing or choosing religion by children with regard to the reports of Muslim states.¹⁰⁵

However, considering the Committee's comment on the reservation of Morocco, Hashemi's statement is not correct and the Committee is concerned by the extent of freedom of choice in Muslim countries, at least in Morocco.

The Committee clarifies the rules on what it means for the child to have freedom of choice in the family and in law. It asked Jamaica whether children became Rastafarian of their own free will;¹⁰⁶ it asked Korea about the measures taken to familiarise children with other cultures and about the legislative provisions allowing a child to freely choose their own religion¹⁰⁷ and it also suggested that the child

104 S. Harris-Short, 'Listening to 'The Other''? *The Convention on the Rights of the Child*' (2001) 2 *Melbourne Journal of International Law* 304-350, at 336-337. Sonia Harris-Short argues that the Concluding Comments have, with only very limited exceptions, presented non-Western cultures and traditions in an entirely negative light.

105 K. Hashemi, 'Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation' (2007) 29(1) *Human Rights Quarterly* 194-227, at 218.

106 UN Committee on the Rights of the Child, *Summary Record of the 880th meeting: Jamaica*, UN Doc. CRC/C/SR.880, at 19 (2003): the delegation replied that, while children were free to choose their own religion, they usually took the religion of their parents (paragraph 20).

107 UN Committee on the Rights of the Child, *Summary Record of the 277th meeting: Republic of Korea*, UN Doc. CRC/C/SR.277, at 44 (1996): 'what provisions of the legislation [allow] a child freely to choose his own religion?', and in *Concluding Observations: Republic of Korea*, UN Doc. CRC/C/15/Add.51, at 14 (1996), the Committee insisted that there was not an effective implementation of the civil rights and fundamental freedoms of children, including freedom of thought, conscience and religion. Similarly, the Committee restated that the child's freedom to choose their religion is a right: *Summary Record of the 815th meeting: Seychelles*, UN Doc. CRC/C/SR.815, at 70 (2002). In *Summary Record of the 880th meeting: Jamaica*, UN Doc. CRC/C/SR.880, at 21 (2003), the Committee reiterated that freedom of choice must also be guaranteed by law. See

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must be free not to have a religion.¹⁰⁸ Moreover, the child's right to choose a religion must rely upon a rights-based approach, as opposed to 'an approach based upon concern for the welfare or protection of the child as a passive subject of the law'.¹⁰⁹ The Committee has also asked a number of times whether freedom of religion was accepted by the family and society when children chose a religion different from that of their parents,¹¹⁰ and whether children's freedom of expression and freedom of religion were considered to be a right or whether the culture in the country was more controlling.¹¹¹ These instances suggest that both the state and the parents can be and are duty-holders. Sometimes the Committee is not specific and asks very general questions about the child's freedom of choice, in which case both the state and the parents could be concerned. Clearly, the state is the duty-holder when the Committee refers to introducing legislative measures to guarantee the right of the child. In other instances, it seems that the parents are duty-holders and that they are responsible for the child's freedom of choice.

Summary Record of the 1182nd meeting: Ireland, UN Doc. CRC/C/SR.1182, paragraph 9 (2006).

- 108 UN Committee on the Rights of the Child, *Summary Record of the 255th meeting: Holy See*, UN Doc. CRC/C/SR.255, at 33 (1995).
- 109 UN Committee on the Rights of the Child, *Summary Record of the 717th meeting: Monaco*, UN Doc. CRC/C/SR.717, at 62 (2001).
- 110 UN Committee on the Rights of the Child, *Summary Record of the 147th meeting: Chile*, UN Doc. CRC/C/SR.147, at 6 (1994). There are many instances, for example: *Summary Record of the 277th meeting: Republic of Korea*, UN Doc. CRC/C/SR.277, at 44 (1996): 'what provisions of the legislation [allow] a child freely to choose his own religion?'; *Summary Record of the 455th meeting: Hungary*, UN Doc. CRC/C/SR.455, at 25 (1998): 'does the child have the right ... to choose his religion from a certain age?'; *Summary Record of the 815th meeting: Seychelles*, UN Doc. CRC/C/SR.815, at 70 (2002): 'drawing attention to the restrictions on the child's right to choose his or her religion...'; *Summary Record of the 607th meeting: Grenada*, UN Doc. CRC/C/SR.607, at 42 (2000): the Committee asked 'whether children were free to join a religion different to that of their parents'; *Summary Record of the 638th meeting: Djibouti*, UN Doc. CRC/C/SR.638, at 14 (2000): the Committee asked 'whether the child was able to change his religion'; *Summary Record of the 717th meeting: Monaco*, UN Doc. CRC/C/SR.717, at 62 (2001): 'the Convention sets out a rights-based approach to children, as opposed to an approach based upon concern for the welfare or the protection of the child as a passive subject of the law [and] the principle should apply to a child's right to choose a religion'.
- 111 UN Committee on the Rights of the Child, *Summary Record of the 693rd meeting: Dominican Republic*, UN Doc. CRC/C/SR.693, at 30 (2001). The delegation replied that although most families were Catholic, the freedom of children to choose their religion and to express their views was guaranteed by the Constitution: *Summary Record of the 694th meeting: Dominican Republic*, UN Doc. CRC/C/SR.694, at 2 (2001).

3 The influence of age

The Committee also ties in freedom of choice with age. It refers to the different ages at which the child should be allowed to choose their religion. The child must be able, in law and in practice, to choose their religion or the religious community they want to join and they must be free not to have a religion. In addition, the child's views should be considered within the family. For example, it asked Colombia whether a child under 18 years old was entitled to express their views on religious matters.¹¹² It also told Germany that there were no indications of what happened once the child had made their views known about a change in religious denomination at the age of 10 and that there should be more information. It also wanted elucidation of the statement that, at the age of 12, children could no longer be forced to take religious instruction in another denomination against their will. However, the Committee was not more precise and did not say, for example, whether the choice of 12 was inappropriate or whether the Committee referred to something else. Finally, the measure under which children could freely choose their religious denomination at the age of 14 (except in the Land Bavaria, where they had to be 18 to do so) did not seem to be in keeping with Article 14(3) and the Bavarian authorities should be alerted to that 'anomaly'.¹¹³ The Committee pays attention to age-limits and to the participatory rights of the child. It is also a matter of choice and children must be able to choose to attend religious education classes or to choose their religion. It appears that the Committee found the age of 14 was not in accordance with Article 14(3).

When dealing with Belgium, the Committee suggested that children should not have to wait until they are 18 to be able to choose their religion¹¹⁴ and it told Finland that children should be allowed to choose their religion before reaching the age of majority.¹¹⁵ The Committee hinted that it was a breach of the child's religious freedom if minors under the age of 15 were not allowed to participate in religious rituals without the consent of their parents or the people acting for them.¹¹⁶ The Committee also asked Uzbekistan whether children were able to practise their religion openly

112 UN Committee on the Rights of the Child, *Summary Record of the 114th meeting: Colombia*, UN Doc. CRC/C/SR.114, at 23 (1995).

113 UN Committee on the Rights of the Child, *Summary Record of the 244th meeting: Germany*, UN Doc. CRC/C/SR.244, at 57 (1995).

114 UN Committee on the Rights of the Child, *Summary Record of the 223rd meeting: Belgium*, UN Doc. CRC/C/SR.223, at 27 (1995).

115 UN Committee on the Rights of the Child, *Summary Record of the 1068th meeting: Finland*, UN Doc. CRC/C/SR.1068, paragraph 17 (2005); *Summary Record of the 1202nd meeting: Kenya*, UN Doc. CRC/C/SR.1202, paragraph 31 (2007).

116 UN Committee on the Rights of the Child, *Summary Record of the 786th meeting: Belarus*, UN Doc. CRC/C/SR.786, at 70 (2002). The delegation replied that the choice of 15 was in the interests of the child, especially because of problems related to recently-formed sects, and the Committee did not pursue the matter further: *Summary Record of the 787th meeting: Belarus*, UN Doc. CRC/C/SR.787, at 70 (2002).

and freely, by asking whether a 16-year-old could go to a mosque or church without hindrance and whether certain mosques were off limits to minors.¹¹⁷ It also asked Greece whether children over the age of 16 enjoyed freedom of association, in particular the right to join political parties, trade unions or religious groups.¹¹⁸

The issue has also arisen in Iceland. In 1996, the Committee asked how the child's views were taken into account in practice with respect to decisions on a child's joining or leaving a religious denomination. Moreover, as parents could not change the religious denomination of a child over 12 unless their opinion has been sought first, the Committee asked why this age had been chosen and the delegation replied that children started raising questions of religious belief when their confirmation approached, i.e. around the age of 12.¹¹⁹ In 2003, the state report stated that a 1999 bill on religious associations provided for a higher age limit, 18 instead of 16, for deciding on membership of a religious association; it added that it was in conformity with the increase in the age at which people become legally competent to manage their personal affairs. The Committee told the delegation that setting the age at which children were deemed competent to decide membership of a religious organisation at 16 or 18 was excessively high.¹²⁰

All instances so far have been fairly general questions from the Committee about the child's freedom of choice, and both state and parents are the duty-holders, except when the Committee comments on age-limits imposed by the state, in which case it is the state that is the duty-holder.

The Committee expressed its concern that the Constitution of Croatia guaranteed the right of parents to choose the religion of their children without even mentioning that the child's views should be taken into account.¹²¹ It also told the

117 UN Committee on the Rights of the Child, *Summary Record of the 744th meeting: Uzbekistan*, UN Doc. CRC/C/SR.744, at 11 (2001). The delegation replied that the state guaranteed the children's right to practise any religion, but that such acts had to take place outside school.

118 UN Committee on the Rights of the Child, *Summary Record of the 753rd meeting: Greece*, UN Doc. CRC/C/SR.753, at 75 (2002). See *Concluding Observations: Japan*, UN Doc. CRC/C/15/Add.231, paragraphs 30-31 (2004): 'The Committee is concerned about restrictions on political activities undertaken by schoolchildren both on and off school campuses. It is also concerned that children below the age of 18 require parental consent to join an association. The Committee recommends that the State party review legislation and regulations governing activities undertaken by schoolchildren on and off campus and the requirement for parental consent to join an organization, in order to ensure the full implementation of articles 13, 14 and 15 of the Convention'.

119 UN Committee on the Rights of the Child, *Summary Record of the 273rd meeting: Iceland*, UN Doc. CRC/C/SR.273, at 2, 12 & 27 (1996).

120 UN Committee on the Rights of the Child, *Summary Record of the 856th meeting: Iceland*, UN Doc. CRC/C/SR.856, at 16 (2003).

121 UN Committee on the Rights of the Child, *Summary Record of the 280th meeting: Croatia*, UN Doc. CRC/C/SR.280, at 12 (1996). The Committee also asked whether children

delegation of Malaysia that article 12.4 of the federal Constitution, which provided that the parent or legal guardian of the child has the right to decide the religion of the child, was incompatible with Articles 14 and 12.¹²² The Committee asked Djibouti whether children's freedom of religion was their responsibility, depending on their development, and whether they were able to change their religion.¹²³ The Committee also drew a link between best interests, freedom of religion and the fact that the child lived in a society where they were answerable until they were 21.¹²⁴ Finally, the Committee wanted to know what Gabon was doing to ensure that children had the right to express their views on all issues concerning them, as custom prohibited freedom of thought and freedom of conscience within the family.¹²⁵ In these last instances, it looks as if there is much more of a horizontal effect, and parents (or even society in general) appear to be the duty-holders. The Committee is even suggesting that the state has a duty to adopt positive measures to guarantee the child's freedom of choice within the family.

However, the Committee showed its inconsistency when it dealt with the report of Algeria. We saw earlier that the country has attached an interpretative declaration to Article 14 (1-2) (which provides that 'a child's education is to take place in accordance with the religion of its father'). The Committee held that Article 14 was not at variance with the Algerian Family Code, which stipulated that children should be raised according to the religion of their father.¹²⁶ However, this appears rather contradictory, as the Committee usually says that children have the right to choose the religion of their choice and parental rights should not hinder their choice. After the Committee's comments on Morocco's reservation, this suggests that the Committee

could get any help if they wanted to choose a religion different from their parents' but were faced to their refusal.

- 122 UN Committee on the Rights of the Child, *Summary Record of the 1216th meeting: Malaysia*, UN Doc. CRC/C/SR.1216, paragraph 33 (2007). It added that in case of incompatibility between national law and the Convention, it was better to apply international human rights instruments ratified by the country.
- 123 UN Committee on the Rights of the Child, *Summary Record of the 638th meeting: Djibouti*, UN Doc. CRC/C/SR.638, at 10 (2000). Djibouti relied that it had attached a reservation to the Convention because of the article which stipulated that children had the right to change religion, and that this might lead to heresy. Only children of interfaith marriages were allowed to choose their religion (paragraph 36). The Committee replied that this interpretation was erroneous, and that a simple concern should not be the cause of a reservation to a Convention article (paragraph 64). However, the Committee did not explain here what it meant by erroneous interpretation.
- 124 UN Committee on the Rights of the Child, *Summary Record of the 517th meeting: Guinea*, UN Doc. CRC/C/SR.517, at 64 (1999).
- 125 UN Committee on the Rights of the Child, *Summary Record of the 756th meeting: Gabon*, UN Doc. CRC/C/SR.756, at 54 (2003).
- 126 UN Committee on the Rights of the Child, *Summary Record of the 387th meeting: Algeria*, UN Doc. CRC/C/SR.387, at 14 & 27 (1997).

does not have a clear idea of the extent of the right of children in Islamic countries to choose their religion, as well as the extent of parental direction.

The Committee has also linked freedom of choice to freedom of manifestation. Following Belgium's interpretative declaration, the Committee said that Article 14(3) provides for freedom of manifestation. Considering that this declaration was not necessary, it wanted to know whether the government had attached such a reservation to the ECHR.¹²⁷ This is rather surprising, considering that freedom of choice is usually tied to the *forum internum*. If freedom of choice is included in Article 14(3), it implies that there is a possibility of limitation. We should rather consider that the Committee erred, and that freedom of choice is not included in freedom of manifestation but is rather linked to Article 14(1).

4 Conclusion

Considering that the right of the child to religious freedom is the right of every child to be unhindered in their growth as an autonomous independent actor in the matrix of parents, religious community and society, the analysis of the Committee is problematic for several reasons. First, the Committee is correct when it says that freedom of choice is important, because the child will become an autonomous religious actor at some point. However, the problem is that the Committee thinks that it is one of the most important issues regarding children's religious freedom, whereas it is only important when the child comes of age.

Secondly, the Committee seems to consider that freedom of choice is applicable to any child, without distinction. The Committee also refers to the child's participation and to taking the child's views into account, yet this is too broad: there is no clear delimitation, and it is not helping to determine whether the child is of age. There is much emphasis on age-limits but the Committee is not clear about their purpose. It usually challenges the imposition of age-limits by states and often argues that they are too high. However, this just seems to be another way to increase the child's autonomy with no reference to the child's evolving capacities.

Thirdly, the Committee is not always consistent: the principle guiding the analysis of Article 14 and freedom of choice should be the concept of the evolving capacities of the child and yet it is not used by the Committee at all, which only refers to participation, to taking the child's views into account and to age-limits.

Fourthly, the Committee also seems at times to have a limited understanding of religion. For example, it insists very much on children being able to leave the religious community they have been brought into by their parents, to adopt the religion of their choice, or to leave it.

Finally, we have also seen that both the state and the parents are duty-holders. At times the Committee is clear that the responsibility falls on the state, including the duty to introduce positive measures for the right of the child. At other times the

127 UN Committee on the Rights of the Child, *Summary Record of the 223rd meeting: Belgium*, UN Doc. CRC/C/SR.223, at 26 (1995)

Committee points out that the responsibility falls on the parents, and sometimes on the state as well when it has to make sure that freedom of choice is guaranteed within the family. It is acceptable if there is a duty on the state, as the child must have a sphere of liberty in their religious freedom, which the state must not interfere with. However, it is more problematic when there are unlimited duties on the parents. Indeed, this would mean a ‘blanket’ freedom of choice for the child against their family, and there would be no reference to the child’s evolving capacities or to when they come of age. It is also a problem when the Committee is not clear about who the duty-holder is, as there is potentially a risk that it would apply to parents. The Committee is also not very clear on what the duties of the state and the parents are. It only suggests that the state has a duty to guarantee that the child’s freedom of choice is real and that the family accepts the child’s choice. As for the parents, the Committee only suggests that they have to accept and guarantee the child’s choice.

Section 4

Freedom of manifestation

Article 14 UNCRC is similar to Article 18 ICCPR in that it also provides for the child’s freedom of manifestation, but only in relation to the limitations clause. Article 14(3) provides:

Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

As Malcolm Evans pointed out, it is nearly meaningless to say that a person may adhere to a religion or hold a belief, but that they are not able to conduct themselves in a fashion that reflects those views. Moreover, ‘religion and belief are not “irrational add-ons” to the human condition which the rational state does best to marginalize, but are often core components of the make-up and sense of identity of individuals and the composition of societies of which they form a part’.¹²⁸ We will first consider the different religions and beliefs which are protected by Article 14 and then consider what the Committee has said about the substantive right of children to manifest their religion. The structure of ‘worship, observance, practice and teaching’ is used here as an analytical tool.

128 M.D. Evans, ‘Freedom of Religion or Belief and Permissible Limitations’ (17-18 July 2003) *OSCE Supplementary Meeting on Freedom of Religion or Belief* (Hofburg, Vienna), Document ODIHR.GAL/57/03

1 The travaux préparatoires

The first proposal discussed at the 1983 Working Group was introduced by the US in 1982 and was very comprehensive.¹²⁹ However it became more restricted with a text from Denmark, Finland, Norway and Sweden, which did not specify how it was possible for the child to manifest his or her religion or belief and which furthermore linked it to possible limitations of the child's freedom.¹³⁰ Finally, an informal open-ended working party prepared a new draft and it mentioned the child's 'freedom, either individually or in community with others and in public or private to manifest his religion or belief, in conformity with public safety, order, health and morals'.¹³¹ Once again, there is no mention of the various possibilities of manifestation and manifestation is linked with limitations. The discussion attracted only minor textual changes and a proposition from the US and Australia to add 'and the right to have access to education in the matter of religion or belief' at the end of the paragraph.¹³² Despite comments by UNESCO and the United Nations Children's Fund (UNICEF),¹³³ a new proposal at the second reading in 1989 deleted the reference to

129 1983 report of the Working Group, UN Doc. E/CN.4/1983/62, paragraph 52. The United States proposal (E/1982/12/Add.1, part C, paragraph 118) read as follows: '1. The States Parties to the present Convention shall ensure that the child has the right to freedom of thought, conscience and religion, including the 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. [...] 4. The States Parties to the present Convention shall ensure that the child has: (a) the freedom to worship or assemble with others in connection with his religion or belief; (b) the freedom to make, to acquire and to use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief; (c) the freedom to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of his religion or belief; and (d) the freedom to establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels'.

130 1984 report of the Working Group, UN Doc. E/CN.4/1984/71, paragraph 13: '2. These rights shall include in particular the right to have or to adopt a religion or whatsoever belief of his choice, and *freedom, either individually or in community with others and in public or private, to manifest his religion or belief*, and the right to have unimpeded access to education in the matter of religion and belief of his choice. 3. The States Parties shall, subject to the evolving capacities of the child, respect the wishes, freedoms and rights of the parents or legal guardians in the exercise of these rights of the child and *shall ensure the freedom to manifest religion or belief, in a manner not incompatible with public safety, order, health and morals*' (emphasis added).

131 *Ibid*, paragraph 17: this consolidated text was generally considered to be a useful basis for discussion.

132 *Ibid*, paragraph 25 (eventually, the proposition was not accepted).

133 UN Doc. E/CN.4/1989/WG.1/CRP.1, pages 22-23: UNESCO said that the expression 'to manifest his religion or belief' should be replaced by 'to manifest or not to manifest religion or belief'; UNICEF commented that the *travaux préparatoires* did not indicate

the child's freedom to manifest their religion or beliefs,¹³⁴ while another proposal provided for such freedom.¹³⁵ Eventually, Article 14 as it stands, was adopted at the second reading. After the adoption of the article, the observer for Sweden issued a final statement and said that his delegation had joined in the consensus on the understanding that the right to freedom of thought, conscience and religion, as laid down in Article 18 ICCPR, should notably include freedom to manifest one's religion or belief in worship, observance, practice and teaching.¹³⁶ It is worth pointing out that Article 14(3) neither mentions the freedom to manifest 'either individually or in community with others and in public or private', nor 'worship, observance, practice and teaching'.

2 Scheme of protection

The issue of what range of beliefs qualify for protection under Article 14 is related to the definition of religion and belief. There is a difference between Article 14(1) (which refers to 'freedom of thought, conscience and religion') and Article 14(3) (which refers to 'religion or beliefs'). Therefore, the question is whether manifestations of thought or conscience are included within Article 14(3). The Committee makes it clear that there is a link between religion and belief. For example, the Committee refers to the practice of religion in total freedom,¹³⁷ discrimination on the grounds of religion or beliefs,¹³⁸ accommodating the practice of a religion different from the state religion,¹³⁹ the difficulty of assembling religious congregations,¹⁴⁰ the risks of restrictions on the freedom to manifest one's religion,¹⁴¹ or the fact that reli-

any reason for the omission of the words 'in worship, observance, practice and teaching' after the phrase 'to manifest his religion or belief', so the Working Group may wish to consider whether they should be inserted.

134 UN Doc. E/CN.4/1989/WG.1/WP.4: proposal submitted by Algeria, Egypt, Iraq, Jordan, Kuwait, Libyan Arab Jamahiriya, Morocco, Oman, Pakistan and Tunisia.

135 Doc. E/CN.4/1989/WG.1/WP.68 (found in the 1989 report of the Working Group, UN Doc. E/CN.4/1989/48, paragraph 280).

136 UN Doc. E/CN.4/1989/48, paragraph 289.

137 UN Committee on the Rights of the Child, *Summary Record of the 196th meeting: Jamaica*, UN Doc. CRC/C/SR.196, at 57 (1995).

138 UN Committee on the Rights of the Child, *Concluding Observations: Iran*, UN Doc. CRC/C/15/Add.123, at 35-36 (2000).

139 UN Committee on the Rights of the Child, *Summary Record of the 434th meeting: Libyan Arab Jamahiriya*, UN Doc. CRC/C/SR.434, at 45 (1998).

140 UN Committee on the Rights of the Child, *Summary Record of the 848th meeting: Vietnam*, UN Doc. CRC/C/SR.848, at 74 (2003).

141 UN Committee on the Rights of the Child, *Concluding Observations: Uzbekistan*, UN Doc. CRC/C/15/Add.167, at 35-36 (2001).

gious practice is an intrinsic part of many religions.¹⁴² The Committee firmly equates religion and beliefs: it makes clear that freedom of manifestation does not extend to thought and conscience but is limited to religion and belief.

3 Worship

Freedom of worship is extremely important for the Committee, whether it is privately or collectively, in a specific place of worship, at home or somewhere else. The Committee tackles both freedom of worship and the public/private divide when it says that freedom of manifestation must not be restricted to the privacy of one's home. In the Maldives, the fact that non-Muslims can practise their religion in the privacy of their homes suggests religious discrimination, as it implies that they are prevented from doing so in public.¹⁴³ The Committee also referred to the case of a pupil in Japan who was said to have been marked absent from a class taught on a Sunday whereas he was attending mass, and also asked whether legislation specifically recognised the child's right to freedom of thought, conscience and religion.¹⁴⁴ This also means that there is a link between freedom of thought, conscience and religion, children's freedom to manifest their religion through worship, and the refusal to accomplish certain acts (even if they are *a priori* neutral and of general application). Here, the Committee goes further than the text of Article 14 and is more in accordance with the first proposal of the *travaux préparatoires*, which referred to the freedom to observe days of rest and to celebrate holidays and ceremonies in accordance with religion or belief.¹⁴⁵ There is also a link between freedom of worship and non-discrimination. Indonesia indicated that freedom of religion applied to the recognised religions. The Committee noted that some religions were not recognised, including the Baha'i faith, and asked about the status of children belonging to a religion not recognised by the state, particularly with regard to their right to worship or to go to school.¹⁴⁶ Schoolteachers in Kyrgyzstan, in the context of the war on terror, had apparently recommended children not to pray at home. The Committee

142 UN Committee on the Rights of the Child, *Summary Record of the 299th meeting: China*, UN Doc. CRC/C/SR.299, at 34 (1996); *Summary Record of the 865th meeting: Eritrea*, UN Doc. CRC/C/SR.865, at 86 (2003).

143 UN Committee on the Rights of the Child, *Summary Record of the 466th meeting: Maldives*, UN Doc. CRC/C/SR.466, at 75 & 81 (1998). The delegation replied that the reasons were practical rather than discriminatory, the reason being that there are no churches, synagogues or temples in the country. The Committee did not pursue the matter.

144 UN Committee on the Rights of the Child, *Summary Record of the 465th meeting: Japan*, UN Doc. CRC/C/SR.465, at 6 (1998).

145 1983 report of the Working Group to the Commission on Human Rights (E/CN.4/1983/62), US proposal made in 1982 (E/1982/12/Add.1, part C, para. 118), paragraph 4.c.

146 UN Committee on the Rights of the Child, *Summary Record of the 80th meeting: Indonesia*, UN Doc. CRC/C/SR.80, at 67 (1993).

said it was essential that teachers transmitted a positive message about all religions, including Islam, and that recommending not to pray could be counter-productive.¹⁴⁷ Finally, the Committee referred to problems of registration faced by religious communities. In Turkmenistan, it recommended that the state respect the right of the child to freedom of religion. It should ensure that all religious organisations are free to exercise their right to freedom of religion or belief subject only to the limitations provided for in Article 14. The Committee further recommended that the state prevent, prohibit and punish any violent attack on religious activities, including demolition of places of worship.¹⁴⁸

4 Observance

Observance can cover a number of things and the Committee has focused on religious clothing.¹⁴⁹ The Committee has dealt with the issue of religious clothing in a number of instances. In France, the Committee examined the problem in relation to the right to education in a non-discriminatory manner and privacy.¹⁵⁰ As for Tunisia, the Committee said that it was aware of instances of violations such as the exclusion of girls from school for wearing veils, and asked how the authorities dealt with them.¹⁵¹ It also asked Singapore whether there was a school dress code, and if so, whether it allowed children to exercise their freedom of expression and freedom of religion.¹⁵² It stated that banning schoolteachers from wearing headscarves in schools

147 UN Committee on the Rights of the Child, *Summary Record of the 988th meeting: Kyrgyzstan*, UN Doc. CRC/C/SR.988, paragraph 23 (2005).

148 UN Committee on the Rights of the Child, *Concluding Observations: Turkmenistan*, UN Doc. CRC/C/TKM/CO/1, paragraphs 33-34 (2006). See *Summary Record of the 966th meeting: Democratic People's Republic of Korea*, UN Doc. CRC/C/SR.966, paragraph 53 (2004): the Committee 'asked whether churches had to register with the Government or comply with any other regulations'.

149 It is also interesting to note the decision of the Supreme Court of Canada, *Multani v Commission Scolaire Marguerite-Bourgeois* [2006] 1 S.C.R. 256, 2006 SCC 6. The Court struck down an order of a Quebec school authority that prohibited a Sikh child from wearing a kirpan (a ceremonial sword or dagger) to school as a violation of freedom of religion under section 2(a) of the Canadian Charter of Rights and Freedoms.

150 UN Committee on the Rights of the Child, *Summary Record of the 140th meeting: France*, UN Doc. CRC/C/SR.140, paragraph 37 (1994): 'Please specify the measures taken to ensure the right to education in a non-discriminatory manner for children who wear the Islamic veil. Please indicate also how the publicity given to this problem by the media could interfere with the enjoyment of the rights recognized by article 16 of the Convention, and what measures have been taken in this connection'.

151 UN Committee on the Rights of the Child, *Summary Record of the 789th meeting: Tunisia*, UN Doc. CRC/C/SR.789, paragraph 13 (2002) & *Concluding Observations: Tunisia*, UN Doc. CRC/C/15/Add.181, paragraph 29 (2002).

152 UN Committee on the Rights of the Child, *Summary Record of the 909th meeting: Singapore*, UN Doc. CRC/C/SR.909, at 19 (2003).

did not contribute to the child's understanding of the right to freedom of religion and to the development of an attitude of tolerance as promoted in the aims of education under Article 29.¹⁵³ The Committee also considered the 2004 French law prohibiting the wearing of religious symbols in state schools:

The Committee notes that the Constitution provides for freedom of religion and that the law of 1905 on the separation of church and State prohibits discrimination on the basis of faith. The Committee equally recognizes the importance the State party accords to secular public schools. However, in the light of articles 14 and 29 of the Convention, the Committee is concerned by the alleged rise in discrimination, including that based on religion. The Committee is also concerned that the new legislation (Law No. 2004-228 of 15 March 2004) on wearing religious symbols and clothing in public schools may be counterproductive, by neglecting the principle of the best interests of the child and the right of the child to access to education, and not achieve the expected results. The Committee welcomes that the provisions of the legislation will be subject to an evaluation one year after its entry into force. The Committee recommends that the State party, when evaluating the effects of the legislation, use the enjoyment of children's rights, as enshrined in the Convention, as a crucial criteria in the evaluation process and also consider alternative means, including mediation, of ensuring secular character of public schools, while guaranteeing that individual rights are not infringed upon and that children are not excluded or marginalized from the school system and other settings as a result of such legislation. The dress code of schools may be better addressed within the public schools themselves, encouraging participation of children. The Committee further recommends that the State party continue to closely monitor the situation of girls being expelled from schools as a result of the new legislation and ensure they enjoy the right of access to education.¹⁵⁴

Obviously this is a very carefully drafted observation: it does not say that France is in breach of its obligations under the Convention but 'merely expresses a concern that the Law may be counterproductive'.¹⁵⁵ Dominic McGoldrick suggests that a child's perspective might start from the question 'Shouldn't schools teach children the value of diversity and difference?'¹⁵⁶ However, this does not seem to be the right starting

153 UN Committee on the Rights of the Child, *Summary Record of the 927th meeting: Germany*, UN Doc. CRC/C/SR.927, paragraph 36 (2004) & *Concluding Observations: Germany*, UN Doc. CRC/C/15/Add.226, paragraphs 30-31 (2004).

154 UN Committee on the Rights of the Child, *Concluding Observations: France*, UN Doc. CRC/C/15/Add.240, paragraphs 25-26 (2004); see also *Summary Record of the 967th meeting: France*, UN Doc. CRC/C/SR.967, paragraphs 26, 35, 42 (2004) & *Summary Record of the 968th meeting: France*, UN Doc. CRC/C/SR.968, paragraph 82 (2004).

155 D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe*, at 282.

156 *Ibid.*, at 278.

point and it is submitted that issues involving children, religion and schools (including the Islamic headscarf) are better considered from a religious liberty perspective before considering other ‘side avenues’ – this would be more in line with the theoretical model of the right of the child to religious freedom in chapter 2.

The Committee has envisaged the issue of religious clothing in a number of ways, under the right to education, the right to privacy, freedom of expression, freedom of religion and the best interests of the child. The Committee has also related this issue to the prevention of discrimination and intolerance. It seems that it is only in recent cases that the Committee has clearly said that the freedom of manifestation of the child was engaged.

5 Teaching

The Committee requested clarification because it was hard to assemble congregations in Vietnam or to give children religious education.¹⁵⁷ It appears then that issues concerning teaching have not arisen before the Committee much at all, or that the Committee has chosen not to make an issue of it.

6 Practice

The Committee uses this heading as a ‘catch-all’ provision for a range of religious practices. It reiterates that freedom of religious practice is a right and that children must not be restricted by their age. The Committee is concerned by religious practice and it often looks at the child’s freedom to manifest their religion or beliefs under this head. It said that restrictions on religious practice were not consistent with the principle of freedom of religion as a whole, ‘in so far as religious practice was an intrinsic part of many religions’.¹⁵⁸ Moreover, the child’s lack of practice of a religion or lack of religious affiliation must not hinder other rights, such as non-discrimination and privacy.¹⁵⁹ The Committee told Colombia that preventing a child from practising a religion or not practising a religion was not in accordance with Articles 12 and Article 14¹⁶⁰ and it asked Jamaica whether Rastafarian children could

157 UN Committee on the Rights of the Child, *Summary Record of the 848th meeting: Vietnam*, UN Doc. CRC/C/SR.848, at 74 (2003).

158 UN Committee on the Rights of the Child, *Summary Record of the 299th meeting: China*, UN Doc. CRC/C/SR.299, at 34 (1996).

159 UN Committee on the Rights of the Child, *Concluding Observations: Greece*, UN Doc. CRC/C/15/Add.170, at 45 (2002).

160 UN Committee on the Rights of the Child, *Summary Record of the 114th meeting: Colombia*, UN Doc. CRC/C/SR.114, at 28 (1995).

practise their religion freely.¹⁶¹ It also asked Sao Tome and Principe how the Civil Code regulated children's religious practice.¹⁶²

Religious practice is also an issue in countries where there is a state/majority religion. Problems often arise in relation to issues such as discrimination and integration. For example, the Committee asked Libya how the right of a person with different religious beliefs could be accommodated in practice, as Islam was the only religion in the state.¹⁶³ In Myanmar, the Committee was concerned that religion and ethnic origin were indicated on identity documents.¹⁶⁴ Furthermore, the Committee recalled that the right to practise one's religion included the right not to practise, as well as the right not to be forced to practise another religion, and this right also applied to indigenous children and those from ethnic minorities.¹⁶⁵ For example, Christian children had been forced to attend services at mosques in the Comoros.¹⁶⁶ In Japan, the problem arose in relation to a pupil who had reportedly been expelled from school for refusing to participate in kendo exercises. The Committee asked whether legislation allowed children, at their own or their parents' request, not to follow religious instruction or to attend religious ceremonies in educational institutions and whether it did specifically recognise the child's right to freedom of thought, conscience and religion.¹⁶⁷ It also asked the Netherlands (Aruba) for more infor-

161 UN Committee on the Rights of the Child, *Summary Record of the 196th meeting: Jamaica*, UN Doc. CRC/C/SR.196, at 57 (1995).

162 UN Committee on the Rights of the Child, *Summary Record of the 955th meeting: Sao Tome and Principe*, UN Doc. CRC/C/SR.955, at 21 (2004).

163 UN Committee on the Rights of the Child, *Summary Record of the 432nd meeting: Libya*, UN Doc. CRC/C/SR.432, at 45 (1998). The importance of freedom of religious practice is also highlighted by the reaction of the delegation of Bhutan who, under allegations that Christians had had either to abandon their faith or to leave the country, affirmed that 'such allegations were totally unfounded and, quite of the contrary, people of Bhutan were free to practise whatever religion they wanted': *Summary Records of the 114th-115th meetings: Bhutan*, UN Doc. CRC/C/SR.114-115, at 60 & 19 (2001).

164 UN Committee on the Rights of the Child, *Summary Record of the 959th meeting: Myanmar*, UN Doc. CRC/C/SR.959, paragraph 24 (2004) & *Concluding Observations: Myanmar*, UN Doc. CRC/C/15/Add.237, paragraphs 34-35 (2004).

165 UN Committee on the Rights of the Child, *Summary Record of the 666th meeting: Islamic Federal Republic of the Comoros*, UN Doc. CRC/C/SR.666, at 10 (2001): the Committee draws a link between the right to practise, Koranic schools, so-called modern schools, and the type of education parents preferred.

166 UN Committee on the Rights of the Child, *Summary Record of the 665th meeting: Islamic Federal Republic of the Comoros*, UN Doc. CRC/C/SR.665, paragraph 38 (2000).

167 UN Committee on the Rights of the Child, *Summary Record of the 465th meeting: Japan*, UN Doc. CRC/C/SR.465, at 6 (1998). The delegation replied that Kendo formed part of obligatory physical exercise, but if a child did not wish to participate for religious reasons, the Ministry of Education considered that they should be able to engage in other forms of physical exercise (paragraph 11).

mation concerning the right of children to refuse life-saving medical treatment for religious or personal reasons.¹⁶⁸ The Committee also noted that in some provinces of China, children did not have the right to engage in religious activities, in particular in Tibet where they had been imprisoned because of their religious practice. It asked whether China recognised the right of minority children to practise their religion, whether religious practices were authorised in the family and if children were arrested because of their religious practice or that of their parents.¹⁶⁹

Finally, the issue of age is extremely relevant in relation to the child's freedom of manifestation. The Committee suggested that preventing minors under 15 from participating in religious rituals without the consent of their parents or the people acting for them, was a hindrance to religious freedom,¹⁷⁰ and setting the age at which children are deemed competent to decide membership of a religious organisation at 16 or 18 was excessively high.¹⁷¹ The Committee also asked whether 16-year-olds could practise their religion openly and freely or join religious groups.¹⁷² Brems argues that the capacity to observe a religion is probably acquired at a younger age than the capacity to choose a religion as such.¹⁷³ However, she makes the mistake of thinking that there is a clear divide between choosing and observing a religion, whereas the reality is that children are brought up within a religious community and participate in its rituals and practices.

7 Conclusion

Considering that the right of the child to religious freedom is the right of every child to be unhindered in their growth as an autonomous independent actor in the matrix of parents, religious community and society, the analysis of the Committee is problematic for several reasons. First, there are only a limited number of instances dealing with manifestation and there is no clear and consistent analysis of freedom

168 UN Committee on the Rights of the Child, *Summary Record of the 928th meeting: The Netherlands (Aruba)*, UN Doc. CRC/C/SR.928, paragraph 65 (2004). The delegation replied that when parental religious convictions threaten the child's health, e.g. in case of refusal of vaccination, parental authority could be revoked: *Summary Record of the 929th meeting: The Netherlands (Aruba)*, UN Doc. CRC/C/SR.929, paragraph 43 (2004).

169 UN Committee on the Rights of the Child, *Summary Record of the 1063rd meeting: China*, UN Doc. CRC/C/SR.1063, paragraph 64 (2005).

170 UN Committee on the Rights of the Child, *Summary Record of the 786th meeting: Belarus*, UN Doc. CRC/C/SR.786, at 70 (2002).

171 UN Committee on the Rights of the Child, *Summary Record of the 856th meeting: Iceland*, UN Doc. CRC/C/SR.856, at 16 (2003).

172 UN Committee on the Rights of the Child, *Summary Record of the 744th meeting: Uzbekistan*, UN Doc. CRC/C/SR.744, at 11 (2001) & *Summary Record of the 753rd meeting: Greece*, UN Doc. CRC/C/SR.753, at 75 (2002).

173 E. Brems, 'Article 14: The Right to Freedom of Thought, Conscience and Religion', at 31.

of manifestation. It is true that to an extent the Committee reacts to state reports and to discussions with the delegations; yet, it has had the opportunity to raise issues and develop a coherent body of materials and has so far missed it.

Secondly, the Committee does not use the concept of the evolving capacities of the child whereas it should be one of the guiding principles throughout the analysis of Article 14. Instead, the Committee refers to Article 12 and the participatory rights of the child, to age-limits and is incoherent in its approach.

Thirdly, because the Committee refers to participatory rights, the child's freedom of manifestation seems to be quite 'open-ended' in that it applies to almost all children and is fairly discretionary. It may well be that freedom of manifestation applies to very young children: this is good in itself, but may become an issue if it is implemented outside any relationship with parents and religious community. This means that the Committee may consider the child as a small adult, with no reference to the child's evolving capacities, or to what it means for a child to be religious. Instances where the child may be treated as an autonomous religious believer include when the family is the duty-holder, for example when there is a blanket permission for the child to join a religious community without parental consent.

Section 5 Limitations

There are no permissible limitations of the *forum internum* and nothing is provided for restrictions in states of emergency. However, states are allowed to restrict freedom of manifestation in delimited circumstances, under Article 14(3). The Committee is very clear that the state must stick to the conditions of Article 14(3), although the Committee itself sometimes makes some exceptions.

The Committee has dealt with the issue of limitations to freedom of manifestation in a number of instances. It told China that the implementation of the child's right to freedom of thought, conscience and religion should be ensured in the light of the holistic approach of the Convention and that limitations on the exercise of this right can only be placed in conformity with Article 14(3) of the Convention.¹⁷⁴

174 UN Committee on the Rights of the Child, *Concluding Observations: China*, UN Doc. CRC/C/15/Add.56, at 17 (1996).

The Committee reiterated its position to Saudi Arabia¹⁷⁵ and Iran.¹⁷⁶ The Committee expressed its concern that the Indonesian authorities ‘seem to give a wide interpretation to limitations for “lawful purposes” of the exercise of the rights to freedom of religion, expression and assembly, which may prevent the full enjoyment of such rights’.¹⁷⁷ Here, the Committee complies strictly with the exact wording of Article 14(3) and does not tolerate any exceptions.

The Committee has sometimes linked freedom of association and freedom of religion,¹⁷⁸ and the Committee reiterated the necessity of complying with the limitation clauses in the context of freedom of association in Article 15(2).¹⁷⁹ In this case,

175 UN Committee on the Rights of the Child, *Concluding Observations: Saudi Arabia*, UN Doc. CRC/C/15/Add.148, paragraph 31 (2001): ‘The Committee emphasizes that the human rights of children cannot be realized independently from the human rights of their parents, or in isolation from society at large. In light of articles 14 and 30 of the Convention and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (General Assembly resolution 36/55), the Committee is concerned at the restrictions on the freedom of religion, and that restrictions on the freedom to manifest one’s religion do not comply with the requirements outlined in article 14, paragraph 3’.

176 UN Committee on the Rights of the Child, *Concluding Observations: Islamic Republic of Iran*, UN Doc. CRC/C/15/Add.123, paragraph 35 (2000): ‘The Committee emphasizes that the human rights of children cannot be realized independently from the human rights of their parents, or in isolation from society at large. In light of article 14 of the Convention, the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (General Assembly resolution 36/55), Commission on Human Rights resolution 2000/33, the Human Rights Committee’s General Comment 22, and concurring with the findings of the Human Rights Committee (CCPR/C/79/Add.25) and the Committee on Economic, Social and Cultural Rights (E/C.12/1993/7), the Committee is concerned at the restrictions on the freedom of religion, and that restrictions on the freedom to manifest one’s religion do not comply with the requirements outlined in article 14, paragraph 3. The Committee is especially concerned at the situation of members of non-recognized religions, including the Baha’is, who experience discrimination in areas of, *inter alia*, education, employment, travel, housing and the enjoyment of cultural activities’.

177 UN Committee on the Rights of the Child, *Concluding Observations: Indonesia*, UN Doc. CRC/C/15/Add.25, at 13 (1994).

178 For example, the Committee dealt with the right of Greek children to join a religious group under the right to freedom of association: UN Committee on the Rights of the Child, *Summary Record of the 753rd meeting: Greece*, UN Doc. CRC/C/SR.753, at 75 (2002).

179 UN Committee on the Rights of the Child, *Concluding Observations: Kyrgyzstan*, UN Doc. CRC/C/15/Add.127, at 31-32 (2000). The Committee was concerned that persons under the age of 18 were restricted in their freedom of association and it recommended that the state ensure that any restrictions which were imposed complied strictly with limitations that were in accordance with Article 15(2).

the wording of Article 15(2) being slightly different from that of Article 14(3), the protection would differ. If this approach was followed, it may be possible to limit the right of the child to join religious groups on other grounds than that of Article 14(3), such as national security.

The Committee has also dealt with specific cases of restrictions. It suggested that the arrest of Jehovah's Witnesses in Eritrea, including children, was a limitation of religious freedom.¹⁸⁰ The Committee did not say whether it concerned freedom of manifestation, but if this were the case, it would suggest that the conditions of Article 14(3) were not fulfilled. The Committee asked Belarus to clarify what it meant by restrictions imposed on freedom of thought, conscience and religion because of public safety and order.¹⁸¹ Also, the Committee did not comment when Lebanon and Panama told the Committee that their national constitutions provided for limitations on freedom of religion on the grounds of public order/morals and Christian morals.¹⁸²

The Committee insists that the wording of Article 14(3) is strictly applied, and it pushes forward a rigorous interpretation of the limitation clauses. Not very much has come before the Committee, which does not seem very willing to defer to the claims of states. The exception could be when the Committee uses articles other than Article 14, yet there have not been many instances. It is still unclear to what extent the Committee would restrict children's manifestation of their religion in order to protect the right and freedoms of others, or in order to protect children against themselves. In this last case, the Committee may use the principle of the best interests of the child, although it is not sure who would be interpreting the principle.

Section 6 Education

Education is a very important issue for the Committee, and religious education is a particular application of it. The Committee is concerned by the following issues: whether children have the possibility to be instructed in their own religion, whether there is a possibility to opt out of religious education or to choose an alternative subject, the contents of religious education lessons, the age and evolving capacities

180 UN Committee on the Rights of the Child, *Summary Record of the 865th meeting: Eritrea*, UN Doc. CRC/C/SR.865, at 86 (2003). The Committee indicated that freedom of expression and freedom of religion were not fully upheld, that they should be fully respected for all children and that violations should be prevented: *Concluding Observations: Eritrea*, UN Doc. CRC/C/15/Add.204, at 29-30 (2003).

181 UN Committee on the Rights of the Child, *Summary Record of the 786th meeting: Belarus*, UN Doc. CRC/C/SR.786, at 64 (2002).

182 UN Committee on the Rights of the Child, *Summary Record of the 289th meeting: Lebanon*, UN Doc. CRC/C/SR.289, at 42 (1996) & *Summary Record of the 354th meeting: Panama*, UN Doc. CRC/C/SR.354, at 84 (1997).

of children, the impact of parental rights and interests, and whether rights are given to children of the same denomination i.e. whether some children are discriminated against.

1 The travaux préparatoires

The first reference to religious education is found in the discussions of the 1983 Working Group, when several speakers supported the idea of including in the draft convention a specific provision on the right of the child to freedom of thought, conscience and religion, as well as access to religious education.¹⁸³ However, other speakers thought that a specific provision on religious education and the right to practise religion was not necessary in the draft convention, since the matter was already covered by other proposals.¹⁸⁴ A revised proposal from the US delegation linked the child's access to education in the matter of religion or belief to the wishes of the parents and also introduced a proposition about the religious and moral upbringing of children by their parents.¹⁸⁵ A 1984 text from Denmark, Finland, Norway and Sweden proposed that the child should have 'unimpeded access to education in the matter of religion and belief of his choice'.¹⁸⁶ This proposal changes the focus completely from parents' to children's rights. However, the Holy See said that the US proposal was not sufficiently affirming of the right of the parents to give the child a religion or a philosophical belief and to educate him therein, whereas the Scandinavian text did not adequately acknowledge and emphasise the relationship of rights and respect for the family environment.¹⁸⁷

A new draft prepared by an informal open-ended working party took these comments on board and simply proposed that states undertake to have respect for the liberty of the child and his or her parents, or, when applicable, legal guardians, to ensure the religious and moral education of the child.¹⁸⁸ There were disagreements about the US delegation's proposal that 'unimpeded access thereto, in conformity with their own convictions' be added at the end of the paragraph.¹⁸⁹ Eventually, only 'in conformity with their own convictions/convictions of their choice' was left, and

183 1983 report of the Working Group, UN Doc. E/CN.4/1983/62, paragraph 53.

184 *Ibid*, paragraph 54.

185 *Ibid*, paragraph 57: '2. States Parties [...] shall ensure 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. 3. The States Parties to the present Convention undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'.

186 1984 report of the Working Group, UN Doc. E/CN.4/1984/71, paragraph 13.

187 *Ibid*, paragraph 15.

188 *Ibid*, paragraph 17.

189 *Ibid*, paragraph 31.

the US representative explained that the phrase was meant to clarify that education was to be in conformity with both the parents' and the child's convictions, in order to provide a buffer for the family and to prevent a religious belief and education from being foisted on the child, possibly by state interference.¹⁹⁰ It was also agreed that 'the right to have access to education in the matter of religion or belief' would be appended to the draft article¹⁹¹ and the US representative explained that it was important to protect access to the right, in addition to the right itself.¹⁹²

In 1989 a text removed 'the right to have access to education in the matter of religion or belief';¹⁹³ a Mexican proposition eliminated the proposal that states undertake to have respect for the liberty of the child and their parents regarding the religious and moral education of the child in conformity with their own convictions;¹⁹⁴ and the observer for Egypt referred to a seminar on the rights of the child held in November 1988 in Alexandria, saying that closer attention should be given to encouraging the mental and spiritual education of the child.¹⁹⁵ Eventually, the final text only retained the proposal that states undertake to have respect for the liberty of the child and his or her parents regarding the religious and moral education of the child in conformity with their own convictions (paragraph 3 of the proposal),¹⁹⁶ but it was not possible to arrive at an agreement and this part of the draft article was not voted upon. Finally, following the adoption of the article, the observer for the Holy See stated that 'the right of parents to give their child a religious and moral education in conformity with their personal beliefs forms part of the right to manifest one's religion and this right of religious and moral education must be respected by States'.¹⁹⁷

The *travaux préparatoires* show that the issue of religious education and upbringing of children was not an area of consensus. It was not possible to reach an agreement on whether to emphasise the rights of parents to educate their children in conformity with their own convictions, or whether education should be in conformity with both the parents' and the child's convictions. It seems that both were important during the *travaux préparatoires*, and the Committee takes both into account.

190 Ibid, paragraph 33.

191 Ibid, paragraph 25.

192 Ibid, paragraph 26.

193 UN Doc. E/CN.4/1989/WG.1/WP.4: proposal submitted by Algeria, Egypt, Iraq, Jordan, Kuwait, Libyan Arab Jamahiriya, Morocco, Oman, Pakistan and Tunisia.

194 UN Doc. E/CN.4/1989/WG.1/WP.28.

195 UN Doc. E/CN.4/1989/48, paragraph 16.

196 Ibid, paragraph 280.

197 Ibid, paragraph 290; the representative of Italy stated that her delegation associated itself with the declaration made by the observer for the Holy See (ibid, paragraph 291).

2 Instruction in the child's own religion

There are a handful of references on whether the state provides for children to be able to receive religious education, sometimes in their own religion. In the Democratic People's Republic of Korea (North Korea), the Committee wanted to know how many children belonged to a religious minority, and whether they received religious instruction.¹⁹⁸ However, this comment may be due to the Committee's perception of the state of religious freedom in the country. The Committee asked the Republic of Korea (South Korea) to provide information on any mechanisms in place to ensure that children in school may receive instruction in their own religion,¹⁹⁹ and it asked Poland whether it was true that Catholic children in state schools were given the opportunity to have religious instruction, while those of other religions were not.²⁰⁰ It also asked Liechtenstein whether secondary school students, other than Protestant or Catholic, had the possibility to have a general religious instruction and it wished to have more information on religious instruction in primary schools, where there was a significant number of foreign pupils.²⁰¹ At times, this only suggests that the Committee probably wants to check on the state of religious freedom in the country and uses the possibility of having religious education as a test. At other times, this suggests that the state must make sure that children receive instruction in their own religion. However, this appears to contradict traditional international law, according to which there is no positive duty upon the state to provide children with religious education in accordance with their own religion or with parental wishes. In any case, for the Committee this is a right of the child or the parents against the state.

3 Choice and opting-out

Brems argues that the 'choice with regard to religious education is less radical than that with regard to the membership of a religion. Hence, the capacity to make a choice with regard to religious education is probably reached sooner than the capacity to make that other, more fundamental choice of membership of a religion'.²⁰² However,

198 UN Committee on the Rights of the Child, *Summary Record of the 965th meeting: Democratic People's Republic of Korea*, UN Doc. CRC/C/SR.965, paragraph 26 (2004).

199 UN Committee on the Rights of the Child, *Summary Record of the 277th meeting: Republic of Korea*, UN Doc. CRC/C/SR.277, at 28 (1996).

200 UN Committee on the Rights of the Child, *Summary Record of the 827th meeting: Poland*, UN Doc. CRC/C/SR.827, at 50 (2002).

201 UN Committee on the Rights of the Child, *Summary Record of the 1092nd meeting: Liechtenstein*, UN Doc. CRC/C/SR.1092, paragraph 4 (2006). The delegation replied that secondary school students could choose between Protestant or Catholic instruction: a new class called 'Religion and Culture' was open to everyone and exemptions were possible: *Summary Record of the 1092nd meeting: Liechtenstein*, UN Doc. CRC/C/SR.1092, paragraph 24 (2006).

202 E. Brems, 'Article 14: The Right to Freedom of Thought, Conscience and Religion', at 30.

Brems underestimates the importance of religious education and the sphere of liberty needed from state interference in this area.

Religious education must not be compulsory, and if religious education classes are provided by the state, there must be measures for exemption in place. The majority of the Committee's concerns are about whether religious education classes are compulsory in schools and whether there is a possibility of exemption or the possibility of alternative classes. Compulsory religious instruction is contrary to Article 14.²⁰³ For example, the report of Belize provided that religious instruction in the Christian religion shall be given in every government school and in every assisted school unless parents objected in writing;²⁰⁴ the Committee said that Article 14 rights were not given effect when religious education was virtually compulsory.²⁰⁵ The Committee told Turkey that there appeared to be some restriction of freedom of thought, conscience and religion, given that religious culture and ethics were compulsory topics in state educational institutions.²⁰⁶ In Slovenia, most of the population was Roman Catholic and the Committee enquired whether religious education in schools was compulsory and, if so, what allowance was made for children of other religions or those who professed no religion.²⁰⁷ Children must be able to obtain a dispensation from compulsory religious education.²⁰⁸

The Committee asks about the practical measures of replacement taken by the state. For example, it asked Italy about the measures taken or considered to solve the problem of organising religious instruction schedules in schools or providing for replacement subjects for students who chose not to have religious instruction,²⁰⁹

203 UN Committee on the Rights of the Child, *Summary Record of the 943rd meeting: Japan*, UN Doc. CRC/C/SR.943, paragraph 5 (2004).

204 UN Committee on the Rights of the Child, *Initial Report of States Parties Due in 1992: Belize*, UN Doc. CRC/C/3/Add.46, at 232 (1997).

205 UN Committee on the Rights of the Child, *Summary Record of the 513th meeting: Belize*, UN Doc. CRC/C/SR.513, at 19 (1999).

206 UN Committee on the Rights of the Child, *Summary Record of the 701st meeting: Turkey*, UN Doc. CRC/C/SR.701, paragraph 60 (2001). The delegation replied that these courses did not represent religious instruction per se, but rather classes in ethics and the history of religion: *Summary Record of the 702nd meeting: Turkey*, UN Doc. CRC/C/SR.702, paragraph 14 (2002).

207 UN Committee on the Rights of the Child, *Summary Record of the 938th meeting: Slovenia*, UN Doc. CRC/C/SR.938, paragraph 50 (2004). The delegation replied that there was no religious education in state schools. There were compulsory lessons of 'ethnic and civic education' but lessons mentioning religion were optional.

208 UN Committee on the Rights of the Child, *Concluding Observations: Algeria*, UN Doc. CRC/C/15/Add.269, paragraphs 37-38 (2005). See *Summary Record of the 1182nd meeting: Ireland*, UN Doc. CRC/C/SR.1182, paragraph 9 (2006).

209 UN Committee on the Rights of the Child, *Summary Record of the 236th meeting: Italy*, UN Doc. CRC/C/SR.236, at 38 (1995); the delegation pointed out that there was now complete freedom of choice in the matter of religious instruction (paragraph 51).

South Korea whether the government had any plans to provide for alternative subjects for students in school who chose not to have religious instruction,²¹⁰ and Finland whether the government was considering taking any measures to respond to those students who expressed a preference for ethical, moral and philosophical instruction over religious education.²¹¹ Moreover, if it is possible to choose an alternative subject to religious education, such as ethics, the school must allow for such a choice in an adequate way, as the Committee highlighted to Poland.²¹² Finally, it is contrary to Article 14(3) to prevent a child who has chosen to receive religious education from giving it up before the end of the school year.²¹³ On occasion, the Committee did not say anything about existing procedures for exemption, which suggests it favours situations where there is an option for the child between religious education and an alternative subject, or between attending religious education or not. For example, Montserrat stated that primary and secondary schools gave catechism classes, but persons of other religions were free not to attend; the Falklands stated that religious instruction was prohibited, but that courses in comparative religion were provided in order to give children an idea of the world's different religions; whereas in Slovakia, optional courses on ethics had been introduced in primary and secondary school programmes and students could choose between those courses and religious instruction.²¹⁴ In Italy and Norway, there was a risk that children, especially in elementary schools, suffer from stigmatisation if they abstained from religious instruction.²¹⁵ In Myanmar, the Committee was concerned that Christian or Muslim children too poor to go to state primary schools were sent to Buddhist monasteries, which 'enabled the

210 UN Committee on the Rights of the Child, *Summary Record of the 277th meeting: Republic of Korea*, UN Doc. CRC/C/SR.277, at 28 (1996); *Summary Record of the 1030th meeting: Bosnia-Herzegovina*, UN Doc. CRC/C/SR.1030, paragraph 26 (2005).

211 UN Committee on the Rights of the Child, *Summary Record of the 283rd meeting: Finland*, UN Doc. CRC/C/SR.283, at 24 (1996); *Summary Record of the 1044th meeting: Costa Rica*, UN Doc. CRC/C/SR.1044, paragraph 16 (2005) & *Concluding Observations: Costa Rica*, UN Doc. CRC/C/15/Add.266, paragraphs 25-26 (2005).

212 UN Committee on the Rights of the Child, *Concluding Observations: Poland*, UN Doc. CRC/C/15/Add.194, at 32 (2002): 'the Committee is concerned that, despite regulations guaranteeing that parents can choose for their children to attend ethics classes instead of religion classes in public schools, in practice few schools offer ethics courses to allow for such a choice and students require parental consent to attend ethics courses'.

213 UN Committee on the Rights of the Child, *Summary Record of the 280th meeting: Croatia*, UN Doc. CRC/C/SR.280, at 12 (1996).

214 UN Committee on the Rights of the Child, *Summary Record of the 648th meeting: United Kingdom of Great Britain and Northern Ireland (Overseas Dependent Territories and Crown Dependencies)*, UN Doc. CRC/C/SR.648, at 65 & 70 (2000) and *Summary Record of the 664th meeting: Slovakia*, UN Doc. CRC/C/SR.664, at 34 (2001).

215 UN Committee on the Rights of the Child, *Concluding Observations: Italy*, UN Doc. CRC/C/15/Add.198, at 29 (2003); *Summary Record of the 1036th meeting: Norway*, UN Doc. CRC/C/SR.1036, paragraph 14 (2005).

teachings of Buddhism to be instilled in children'. Therefore, the Committee was alarmed that non-Buddhist children had no alternative educational opportunity and this challenged their right to freedom of religion.²¹⁶

The Committee was concerned about the exemption process in Norway. The general principle was that pupils might be exempted for parts of the teaching if the parents applied in writing for such exemption on the grounds that these parts involved the practice of a religion or support for a particular philosophy of life. 15-year-old pupils may themselves apply for an exemption; in the case of 'obviously religious activities', parents did not have to state their reasons, but they had to if they wished an exemption for more than obviously related activities.²¹⁷ However, the Committee asked why a child could be only partially exempted from compulsory religious and ethical education. It suggested that parental request for exemption violated the child's freedom, and asked about the steps that the authorities intended to take to guarantee respect for freedom of thought, conscience and religion.²¹⁸ It appears that the possibility of 'limited' exemption was not acceptable and infringed freedom of thought, conscience and religion, probably because of the difficulty in distinguishing what was 'obviously religious' from what was not.

Choice in religious education is part of the child's religious freedom and the Committee considers that compulsory religious education classes violate Article 14 rights.²¹⁹ It must be possible to opt out at the request of the child or the parents, or the school system must provide for an alternative subject, such as ethics, morals, or the history of religions. The reasons for such a choice must not be revealed; if exemption is possible, it must be total and from the totality of the subjects concerned, and procedures in place must be real, practical and effective. This covers a duty against the state to provide exemptions or alternatives to religious education classes.

At the same time, the Committee asked Bolivia whether non-Catholic children were compelled to receive Catholic instruction in public schools and it asked Norway whether freedom in religious education lessons was ensured to non-members of the

216 UN Committee on the Rights of the Child, *Summary Record of the 359th meeting: Myanmar*, UN Doc. CRC/C/SR.359, at 15 & 26 (1997) and *Concluding Observations: Myanmar*, UN Doc. CRC/C/15/Add.69, at 16 (1997).

217 UN Committee on the Rights of the Child, *Initial Report of States Parties Due in 1998: Norway*, UN Doc. CRC/C/70/Add.2, at 138 & 140 (1998).

218 UN Committee on the Rights of the Child, *Summary Record of the 625th meeting: Norway*, UN Doc. CRC/C/SR.625, at 55 (2000).

219 On the general issue of choice in education, the Committee commented on the situation in Ireland. It said: 'Although Ireland had become more multicultural in many ways, [it] noted that 93 per cent of primary schools were Roman Catholic, and [it] wondered what choices were available to religious minorities and non-religious families', UN Committee on the Rights of the Child, *Summary Record of the 1182nd meeting: Ireland*, UN Doc. CRC/C/SR.1182, paragraph 9 (2006).

Norwegian church.²²⁰ This is a bit unclear and it suggests that it does not matter if children are forced to have religious education; it also presumes the religious identity of these children, either as Catholic or as members of the Norwegian church. In Morocco, the Committee wanted to make sure that non-Muslim children were not forced to attend courses in religious and civic education.²²¹ The Committee asked for the elucidation of the statement that in Germany, 12-year-old children could no longer be forced to take religious instruction in another denomination against their will,²²² but it is unclear whether the Committee means that it is acceptable that children are forced to take religious instruction in their denomination or whether it wants more details about the practical application of the exemption measures. The Committee asked Lesotho whether children who attended a school of a denomination other than their own were obliged to attend religious education classes at their school or whether it was possible for them to exercise their right to freedom of religion.²²³ Therefore the Committee emphasises that choice in religious education is part of the child's right to freedom of religion, although the Committee suggests that there is no such freedom of choice for children within their own religious denomination.

In a number of instances, the Committee refers to parental rights, although the relationship with children's rights can be unclear. For example, the Committee noted that many parents in the new Länder in Germany were probably atheists and if religious instruction was compulsory in primary schools it would raise serious problems.²²⁴ The Committee was concerned that many foreign parents in Italy were unaware that the teaching of Roman Catholicism was not compulsory and it wondered how the government intended to raise awareness that opting out was a possibility.²²⁵ The Committee also told Turkey that it was difficult in practice for parents to exercise their right to withdraw their children from classes in religious culture

220 UN Committee on the Rights of the Child, *Summary Record of the 52nd meeting: Bolivia*, UN Doc. CRC/C/SR.52, at 14 (1993). The delegation replied that teaching of the Catholic religion was not compulsory in state schools but exempted children were required to do other things: *Summary Record of the 53rd meeting: Bolivia*, UN Doc. CRC/C/SR.53, at 28 (1993); UN Committee on the Rights of the Child, *Summary Record of the 149th meeting: Norway*, UN Doc. CRC/C/SR.149, at 52 (1994).

221 UN Committee on the Rights of the Child, *Summary Record of the 881st meeting: Morocco*, UN Doc. CRC/C/SR.881, at 11 (2003).

222 UN Committee on the Rights of the Child, *Summary Record of the 244th meeting: Germany*, UN Doc. CRC/C/SR.244, at 57 (1995).

223 UN Committee on the Rights of the Child, *Summary Record of the 685th meeting: Lesotho*, UN Doc. CRC/C/SR.685, at 48 (2001).

224 UN Committee on the Rights of the Child, *Summary Record of the 244th meeting: Germany*, UN Doc. CRC/C/SR.244, at 56 (1995).

225 UN Committee on the Rights of the Child, *Summary Record of the 840th meeting: Italy*, UN Doc. CRC/C/SR.840, at 62 (2003) and *Concluding Observations: Italy*, UN Doc. CRC/C/15/Add.198, at 29 & 30 (2003).

and ethics.²²⁶ In Norway, the fact that parents had to say explicitly that they wished their children to be exempted from traditional religious education, thus exposing the faith of the children involved, was not in accordance with their right to privacy.²²⁷ However, the reliance on the right to privacy seems unusual and not strong enough. The Committee also asked the delegation of Swaziland what measures were being taken to ensure the application of the provision forbidding places of education from enforcing their religious beliefs on children without their or their guardians' consent.²²⁸

The Committee also emphasises the child's evolving capacities in relation to education, both in law and in practice. The Committee also uses some guiding principles when dealing with the education of the child and it often refers to the age or the capacities of the child to make decisions. For example, it wants the opinion of the child to be taken into account when choosing a confessional or non-confessional school, or in the choice of a moral and religious education.²²⁹ It also suggested that a child capable of discernment should be allowed not to attend religious education courses.²³⁰ The Committee asked Panama at what age children were free to decide to stop going to the catechism classes that their parents had obliged them to attend.²³¹ It also told Antigua and Barbuda that children should not require the consent of their parents or guardians to receive religious instruction in a religion other than their own.²³² The Committee also suggested that, from a certain age, children should be able to choose their religion and be exempted from religious education not corresponding to their faith.²³³ The Committee puts a great emphasis on age and the

226 UN Committee on the Rights of the Child, *Summary Record of the 701st meeting: Turkey*, UN Doc. CRC/C/SR.701, at 60 (2001).

227 UN Committee on the Rights of the Child, *Summary Record of the 150th meeting: Norway*, UN Doc. CRC/C/SR.150, at 28 (1994) and *Concluding Observations: Norway*, UN Doc. CRC/C/15/Add.23, at 9 (1994).

228 UN Committee on the Rights of the Child, *Summary Record of the 1173rd meeting: Swaziland*, UN Doc. CRC/C/SR.1173, paragraph 29 (2006).

229 UN Committee on the Rights of the Child, *Summary Record of the 223rd meeting: Belgium*, UN Doc. CRC/C/SR.223, at 25 (1995).

230 UN Committee on the Rights of the Child, *Summary Record of the 310th meeting: Cyprus*, UN Doc. CRC/C/SR.310, at 9 (1996).

231 UN Committee on the Rights of the Child, *Summary Record of the 355th meeting: Panama*, UN Doc. CRC/C/SR.355, at 12 (1997). See *Summary Record of the 1113th meeting: Thailand*, UN Doc. CRC/C/SR.1113, paragraph 23 (2006): children must be able to decide whether to receive the religious instruction of their choice.

232 UN Committee on the Rights of the Child, *Summary Record of the 993rd meeting: Antigua and Barbuda*, UN Doc. CRC/C/SR.993, paragraph 23 (2004).

233 UN Committee on the Rights of the Child, *Summary Record of the 1101st meeting: Lithuania*, UN Doc. CRC/C/SR.1101, paragraph 36 (2006). The delegation replied that parents were free to give their children the religious education of their choice. At the age of

child's evolving capacities. It makes clear that children's opinion in the matter must be sought, that when they are old and mature enough they must be allowed to choose what to do, and they must not have to ask for parental permission. This is a right of the child against both state and parents.

Despite what the Committee has said on parental rights, the Committee strongly highlights the relationship between parents' rights and children's rights, parental direction and the child's views and evolving capacities. For example, it told Poland that parental direction must be in accordance to the child's evolving capacities and that students should not require parental consent to attend alternative courses to religious education.²³⁴ Article 5 should not be applicable only from the parents' point of view and it is important to take into account the evolving capacities of children, including the exercise of their rights.²³⁵ When South Korea said that parents were free to provide a religious and moral education to their children, the Committee recalled that this did not correspond fully to Article 14, 'under which parents were entitled to provide *direction* to the child in the exercise of his or her right to freedom of thought, conscience and religion. It was important that the child's views should be taken into account in that regard'.²³⁶ The Committee also suggested to Norway that exemption following parental request violated the child's right to religious freedom, presumably because it should be up to children themselves to ask for an exemption.²³⁷ It also suggested to the Bahamas that there might be a breach of the child's religious freedom if it was up to the parents to decide whether or not the child has religious instruction at school.²³⁸ Slovenia's report had indicated that religious and moral education was adapted to children's age and level of growth, their freedom of conscience and their

14, children have the right to choose themselves whether to follow religious instruction classes of traditional religious communities or lessons in morals: *Summary Record of the 1103rd meeting: Lithuania*, UN Doc. CRC/C/SR.1103, paragraph 8 (2006).

- 234 UN Committee on the Rights of the Child, *Concluding Observations: Poland*, UN Doc. CRC/C/15/Add.194, paragraph 32 (2002): 'the Committee is concerned that, despite regulations guaranteeing that parents can choose for their children to attend ethics classes instead of religion classes in public schools, in practice few schools offer ethics courses to allow for such a choice and students require parental consent to attend ethics courses' and 'the Committee recommends that the State party ensure that all public schools permit children, in practice, to choose freely whether to attend religion or ethics classes with parental direction provided in a manner consistent with the child's evolving capacities' (paragraph 33).
- 235 UN Committee on the Rights of the Child, *Summary Record of the 150th meeting: Norway*, UN Doc. CRC/C/SR.150, at 42 (1994).
- 236 UN Committee on the Rights of the Child, *Summary Record of the 277th meeting: Republic of Korea*, UN Doc. CRC/C/SR.277, at 31 (1996), emphasis in the text.
- 237 UN Committee on the Rights of the Child, *Summary Record of the 625th meeting: Norway*, UN Doc. CRC/C/SR.625, at 55 (2000).
- 238 UN Committee on the Rights of the Child, *Summary Record of the 1013th meeting: Bahamas*, UN Doc. CRC/C/SR.1013, paragraph 13 (2005).

religious or other commitment or belief.²³⁹ However, the Committee asked who was responsible for choosing the child's religion or belief and after what age children were free to decide for themselves to change or to abandon that belief.²⁴⁰ As Van Bueren puts it, to consider the right of children to be educated in accordance with their religious and philosophical convictions is an 'unusual approach', as traditional international law considers state duties and parental rights in education.²⁴¹

4 Contents of religious education

Like other international bodies and institutions,²⁴² the Committee is concerned about what type of religious instruction is delivered to children at school, in particular the conditions of teaching and the aims of religious education.

The Committee controls whether religious education is satisfactorily taught. For example, it asked about the training received by the religious leaders and whether they taught independently or as government employees.²⁴³ It also considers whether religious education is taught in church-run schools only or whether state schools also provide such teaching. The Committee inquired about the content of the religious syllabus in state-run schools in Lesotho, following allegations that religious education provided in schools was not always appropriate and that the curriculum, especially in church-run schools, was not supervised in all cases by the government.²⁴⁴ The Committee also highlighted the requirement that Koranic schools must respect national school curricula and the aims of education;²⁴⁵ it asked whether the curriculum of Koranic schools was compatible with that of conventional schools and whether Koranic schools were monitored.²⁴⁶ It suggested that Koranic schools

239 UN Committee on the Rights of the Child, *Initial Report of States Parties Due in 1993: Slovenia*, UN Doc. CRC/C/8/Add.25, at 46 (1995).

240 UN Committee on the Rights of the Child, *Summary Record of the 337th meeting: Slovenia*, UN Doc. CRC/C/SR.337, at 52 (1996).

241 G. Van Bueren, *The International Law on the Rights of the Child* (The Hague: Martinus Nijhoff Publishers, Save the Children, 1998), at 159.

242 See the work of the UN Special Rapporteur on Freedom of Religion and Belief, and the OSCE/ODIHR Programme on Tolerance and Non-Discrimination.

243 UN Committee on the Rights of the Child, *Summary Record of the 323rd meeting: Nigeria*, UN Doc. CRC/C/SR.323, at 53 (1996); *Summary Record of the 785th meeting: Niger*, UN Doc. CRC/C/SR.785, at 57 (2002).

244 UN Committee on the Rights of the Child, *Summary Record of the 685th meeting: Lesotho*, UN Doc. CRC/C/SR.685, at 50 (2001) and *Summary Record of the 686th meeting: Lesotho*, UN Doc. CRC/C/SR.686, at 37 (2001).

245 UN Committee on the Rights of the Child, *Concluding Observations: Ivory Coast*, UN Doc. CRC/C/15/Add.155, at 51 (2001).

246 UN Committee on the Rights of the Child, *Summary Record of the 882nd meeting: Morocco*, UN Doc. CRC/C/SR.882, at 50 (2003); *Summary Record of the 1206th meeting: Mali*, UN Doc. CRC/C/SR.1206, at 54 (2007).

should not privilege religious instruction to the detriment of professional or scientific instruction.²⁴⁷ It also told China that it was better to provide religious education as an elective in state schools rather than in religious schools, since the latter sometimes failed to provide objective instruction in certain subjects.²⁴⁸

In addition, the Committee refers to the aims of education. For example, the Committee asked Cyprus for some information on the content of religious education courses provided in schools. Given the great diversity of religions practised in the country, it was important that religious instruction promote religious equality and should be provided not only to Orthodox Christians (the majority of children), but also to groups of different religions.²⁴⁹ Religious education should present the values common to all religions, rather than focusing on any one religion, thereby encouraging the social integration of all believers.²⁵⁰ There should also be attempts made to draw on factors common to different religions in order to prevent religion from acting as a factor of separation and religious instruction in schools should not lead to the separation of children belonging to different religions.²⁵¹ The Committee asked Algeria whether the content of religious education in all schools was closely monitored and whether the government planned to modernise religious schools.²⁵² The Committee even suggested that, instead of giving religious instruction classes and delivering exemptions, schools could raise the awareness of children to the existence of religion and thus teach a culture of tolerance that would reduce xenophobia.²⁵³

247 UN Committee on the Rights of the Child, *Summary Record of the 739th meeting: Gambia*, UN Doc. CRC/C/SR.739, at 83 (2002); *Summary Record of the 1183rd meeting: Benin*, UN Doc. CRC/C/SR.1183, paragraph 56 (2005).

248 UN Committee on the Rights of the Child, *Summary Record of the 1064th meeting: China*, UN Doc. CRC/C/SR.1064, paragraph 42 (2005).

249 UN Committee on the Rights of the Child, *Summary Record of the 310th meeting: Cyprus*, UN Doc. CRC/C/SR.310, at 9 & 47 (1996).

250 UN Committee on the Rights of the Child, *Summary Record of the 284th meeting: Finland*, UN Doc. CRC/C/SR.284, at 28 (1996).

251 UN Committee on the Rights of the Child, *Summary Record of the 236th meeting: Italy*, UN Doc. CRC/C/SR.236, at 45 (1995). See *Concluding Observations: Ivory Coast*, UN Doc. CRC/C/15/Add.252, paragraph 37 (2005): 'The Committee recommends that the State party encourage and facilitate children to exercise their right to freedom of expression, including their right to freedom of association and to freedom of peaceful assembly, so that children can freely discuss, participate and express their views and opinions in all matters affecting them'.

252 UN Committee on the Rights of the Child, *Summary Record of the 1056th meeting: Algeria*, UN Doc. CRC/C/SR.1056, paragraph 44 (2005). The delegation replied that the contents of religious education had been checked and that everything that was contrary to universal values of tolerance had been taken off: *Summary Record of the 1057th meeting: Algeria*, UN Doc. CRC/C/SR.1057, paragraph 65 (2005).

253 UN Committee on the Rights of the Child, *Summary Record of the 1036th meeting: Norway*, UN Doc. CRC/C/SR.1036, paragraph 17 (2005).

5 Conclusion

Considering that the right of the child to religious freedom is the right of every child to be unhindered in their growth as an autonomous independent actor in the matrix of parents, religious community and society, the analysis of the Committee is problematic for several reasons. First, the Committee is far too vague on the issue of the evolving capacities of children and taking their views into account. By nature, it does not say exactly how to assess whether the child has the evolving capacities or the discernment necessary to make a decision. Secondly, the Committee treats the child as an autonomous religious believer, which means that much of the right of the child is against the parents. The Committee really restricts parental rights without reasons or justification. Thirdly, the Committee has a limited understanding of religion. This can be seen through its statements on the aims of education, tolerance, non-discrimination and pluralism. This means that the Committee is almost redefining what the child should or should not be taught in religious education lessons.

Section 7 Conclusion

The Committee said that ‘children’s right to freedom of expression, belief and religion would become a reality when the children themselves became more aware of their rights and knew that they could enforce them’.²⁵⁴ Article 14 is about the right of the child to freedom of thought, conscience and religion. It is a very controversial issue, as proved by the *travaux préparatoires*, yet the Committee tries to be much firmer than the *travaux préparatoires*.

Article 14(2) is supposed to be the guiding principle of Article 14, and everything should be interpreted in accordance with children’s evolving capacities. However, the Committee refers to the participatory rights of children and to age-limits, which can be quite confusing. The Committee highlights the importance of the family, yet this is overshadowed by its interventionist stance in the privacy of the family to protect the best interests of children. Freedom of choice comes across as being the major issue throughout the analysis of Article 14. The Committee is very firm on the right of children to choose the religion of their choice. However, instead of referring to the evolving capacities of children, it refers to age-limits imposed by states, to the participatory rights of children and to taking their views into account. The Committee also considers whether children have the freedom to manifest their religion, and it has so far considered fairly traditional issues such as worship, religious clothing, or practice. However, the Committee does not refer to the evolving capacities of children but to age-limits imposed by states, to the participatory rights of children and to taking their views into account. Regarding education, the Committee stresses parental rights, yet it emphasises again the importance of freedom of choice. In particular,

254 UN Committee on the Rights of the Child, *Summary Record of the 83rd meeting: Peru*, UN Doc. CRC/C/SR.83, at 21 (1994).

the Committee underlines the need for exemption from or alternatives to religious education. There is a substantial stress on the choice of children against parents and state, and the Committee emphasises children's own decision-making, in accordance with their evolving capacities, discernment, and evolution.

It is hard to avoid the conclusion that the Committee is fairly erratic and inconsistent in its analysis of Article 14. There is not really a systematic analysis of the right of the child to religious freedom. Of course the Committee comments on what is before it, yet there is no consistent stream of questions. The Committee can be random and the questions very much depend on the country whose report is being examined. Moreover, the guiding principle overarching Article 14 should be the concept of the evolving capacities of children, yet the Committee is not always sure what to do with it, nor how to use it in relation to certain parts of children's religious freedom. In particular, it relies on participatory rights and age-limits yet there is no clear understanding of how these different concepts fit in together. In addition, the Committee is not always sure about who the duty-holders are. On some occasions it is clear that it is the state; on other occasions it is clear that it is the parents, but otherwise the Committee asks open-ended questions, which makes it harder to determine who holds which duties.

Considering that the right of the child to religious freedom is the right of every child to be unhindered in their growth as an autonomous independent actor in the matrix of parents, religious community and society, it is necessary to consider whether the Convention matches this model. The analysis of Article 14 by the Committee faces a number of problems. First, one of the main issues is the Committee's understanding of the concept of evolving capacities, participatory rights and age-limits. In itself, the concept of evolving capacities is acceptable because it can then fit in with children when they come of age. However, the Committee gives this concept a far too broad, wide and elastic meaning, and it uses it to give too much autonomy to young children, without justification. In the same way, the Committee uses participatory rights in a way that is vague and expandable too, whereas age-limits are necessarily arbitrary. All this does not fit with the theoretical model of the right of the child in chapter 2, according to which children come of age at some point, but not as early as the Committee seems to think.

Secondly, the Committee treats the child as an autonomous religious believer. Most of the analysis is about children making their own individual choices and there is considerable emphasis on autonomy and rationality. It is also a problem that the family is bound by human rights standards and that children have rights against their parents even before coming of age. From the start, there seems to be a presumption that the family is not always in the best interests of the child, and that children are best placed to know what is best for them in religious matters. There is too much focus on children being able to organise their religion autonomously and this also means too much intervention within the family. This analysis is carried out regarding freedom of choice and education, although there is not enough evidence about freedom of manifestation.

Chapter 4

Thirdly, the Committee has an impoverished understanding of religion. This is obvious as it insists so much on freedom of choice, on leaving the religious community children have been brought into by their family, on choosing whether to attend religious education classes, and on the freedom not to have a religion. This gives the impression that the Committee objects to the idea of the child being a religious believer, as if there were something harmful in having a religion. This is repeated when the Committee deals with the aims of education and it sometimes seems to consider that there is something inherently biased and intolerant in religions that the child should not be taught about. However, this puts religions in a negative light, and it also tends towards excessive intervention into the child's and the parents' beliefs.

Chapter 5

The Special Rapporteur

Section 1 Introduction

In 1986, the Commission on Human Rights declared that it was ‘Seriously concerned by frequent, reliable reports from all parts of the world which reveal that, because of governmental actions, universal implementation of the Declaration [on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief] has not yet been achieved’.¹ In the same resolution, the Commission established the mandate of the Special Rapporteur on Religious Intolerance, and there have been three post-holders since then: Mr Angelo Vidal d’Almeida Ribeiro (Portugal, 1986-1993), Mr Abdelfattah Amor (Tunisia, 1993-2004) and Ms Asma Jahangir (Pakistan, 2004-present).² The Commission requested the Rapporteur to examine incidents and governmental actions in all parts of the world which were inconsistent with the provisions of the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (the Declaration),³ and to recommend measures to remedy any such breaches, including the promotion of a dialogue between communities of religion or belief and their governments.⁴

The Special Rapporteur on Freedom of Religion and Belief is part of the UN system. The Commission on Human Rights (now the Human Rights Council) has

- 1 Commission on Human Rights, Resolution 1986/20 (1986), third paragraph of the preamble (resolution renewed ever since).
- 2 The name was changed in 2001 to Special Rapporteur on Freedom of Religion and Belief: Commission on Human Rights, *Elimination of All Forms of Religious Intolerance*, UN Doc. E/CN.4/RES/2001/42, paragraph 11 (2001).
- 3 Derek Davis argues that the Declaration is one of the most important documents protecting religious freedom in the international setting: D.H. Davis, ‘The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief’ [2002] *BYU L. Rev.* 217-236, at 217.
- 4 Commission on Human Rights, Resolution 1986/20 (1986), paragraph 2.

established a number of ‘special procedures’, which is the general name given to the mechanisms established to address either specific country situations or thematic issues in all parts of the world. Currently, there are 28 thematic and 13 country mandates in place. Although the mandates given to special procedure mechanisms vary, they usually are to examine, monitor, advise, and publicly report on human rights situations in specific countries or territories (known as country mandates), or on major phenomena of human rights violations worldwide (known as thematic mandates). Various activities can be undertaken by special procedures, including responding to individual complaints, conducting studies, providing advice on technical cooperation, and engaging in general promotional activities. Special procedures are carried out by an individual (called Special Rapporteur, Special Representative of the Secretary-General, Representative of the Secretary-General, Representative of the Commission on Human Rights, or Independent Expert) or by a working group. The mandates of the special procedures are established and defined by the resolution creating them. Mandate-holders of the special procedures serve in their personal capacity, and do not receive salaries or any other financial retribution for their work. The independent status of the mandate-holders is crucial in order to be able to fulfil their functions in all impartiality.

In the discharge of the mandate,⁵ the Special Rapporteur on Freedom of Religion and Belief receives information on specific allegations of human rights violation. He or she transmits urgent appeals and communications to states with regard to cases that represent infringements of or impediments to the exercise of the right to freedom of religion or belief, asking for clarification. The main activities consist of sending communications, undertaking fact-finding country visits,⁶ drafting

5 For a discussion and overview of the mandate and the work of the Rapporteurs, see B.G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (The Hague: Martinus Nijhoff Publishers, 1996), at 199-212; M.D. Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997), at 245-261; A. Amor, ‘The Mandate of the UN Special Rapporteur’ (1998) 12(2) *Emory Int’l L. Rev.* 945-950; C. Evans, ‘The Special Rapporteur on Freedom of Religion or Belief’ in N. Ghanaea (ed.), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Leiden/Boston: Martinus Nijhoff Publishers, 2004), 33-55; T. van Boven, ‘The United Nations Commission on Human Rights and Freedom of Religion or Belief’ in T. Lindholm, W.C. Durham, Jr. and B.G. Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: a Deskbook* (Leiden: Martinus Nijhoff Publishers, 2004), 173-188; C. Evans, ‘Strengthening the Role of the Special Rapporteur on Freedom of Religion or Belief’ (2006) 1(1) *Religion & Human Rights, An International Journal* 75-96.

6 Since the beginning of the mandate: China, Pakistan, Iran, Sudan, Greece, India, Australia, Germany, USA, Vietnam, Turkey, Bangladesh, Argentina, Algeria, Georgia, Romania, Nigeria, Sri Lanka, France, Azerbaijan, the Maldives, Tajikistan, and a consultation with the Catholic Church at the Vatican.

thematic studies, and participating in international conferences.⁷ Under Jahangir's mandate, a total of 64 communications were sent to 34 different countries during the period from 1st December 2005 to 30th November 2006.⁸ Of these communications, 27 were urgent appeals and 37 were letters of allegation. Moreover, 39 of the communications, which addressed allegations of multiple human rights violations, were transmitted together with other special procedures. Jahangir raised a number of issues with the governments.⁹ In addition, the Special Rapporteur submits annual reports to the Commission on Human Rights (now the Human Rights Council) and General Assembly on the activities, trends and methods of work.¹⁰ Since the beginning of the mandate, more than 35 annual reports have been published. The office of the Special Rapporteur devised and uploaded an online digest of the framework for communications, which includes categories on parental rights and on the vulnerable

7 A. Jahangir, *Report of the Special Rapporteur on freedom of religion or belief to the Human Rights Council*, UN Doc. A/HRC/4/21, paragraph 6 (2006).

8 Afghanistan, Algeria, Angola, Australia, Bangladesh, Belarus, Belgium, Bhutan, China (People's Republic of), Democratic People's Republic of Korea, Eritrea, France, Georgia, Germany, Guatemala, Guinea-Bissau, India, Indonesia, Islamic Republic of Iran, Kazakhstan, Kyrgyzstan, Malaysia, Nepal, Pakistan, the Russian Federation, Saudi Arabia, Serbia and Montenegro, Somalia, Tajikistan, Thailand, Turkmenistan, the United States of America, Uzbekistan and Viet Nam.

9 Freedom to adopt, change or renounce a religion or belief as well as freedom from coercion; the right to manifest one's religion or belief; freedom to worship; places of worship; registration; and the freedom of religion or belief of vulnerable groups such as detainees, minorities, children and women. As in previous years, the Special Rapporteur has received an important number of reports alleging discrimination on the basis of religion or belief, including inter-religious discrimination, intolerance, as well as gender discrimination. The Special Rapporteur has also sent communications to some Governments requesting information on legislative issues, including draft laws and recently adopted bills dealing with the registration of religious organizations and the prohibition of so-called 'unlawful conversion'. A significant proportion of the communications concerned cases in which violations of the right to freedom of religion or belief were coupled with violations of other human rights. For instance, there have been cases where freedom of expression was also violated and where the situation concerned intra-religious conflicts and/or incitement to religious hatred. There were further communications sent with regard to alleged cases of torture or ill-treatment of persons held in custody on the basis of their religion or belief, one case of death in custody, as well as recurring cases of religiously motivated forms of punishment. See A. Jahangir, *Report of the Special Rapporteur on freedom of religion or belief to the Human Rights Council*, UN Doc. A/HRC/4/21, paragraphs 11-12 (2006).

10 See <<http://www.ohchr.org/english/issues/religion/index.htm>> (last visited 17th April 2007).

Chapter 5

situation of children.¹¹ Malcolm Evans summarised the work and the mandate of the Special Rapporteur:

the Special Rapporteur is not an agent of enforcement. Rather, his role is to investigate, comment and advise upon the manner in which States adhere to the standards set out in the Declaration. [...] Given the scope of the mandate and its relationship with the Declaration, it is not surprising that the work of the Special Rapporteur tends not to address directly questions such as the definition of religion or belief or of the legitimate scope of the freedom of manifestation. Moreover, to the extent that the mandate is bound up with questions of discrimination in the enjoyment of rights, attention is drawn away from these questions.¹²

We saw that the mandate given to the Rapporteur in 1986 was to examine incidents and governmental actions in all parts of the world which were inconsistent with the provisions of the Declaration. The Declaration refers to children in Article 5, which provides:

1. The parents or, as the case may be, the legal guardians of the child have the right to organise the life within 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.
2. 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.
3. The child shall be protected from any form of discrimination on the ground of religion or belief. 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 men.
4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle.
5. 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, taking into account article 1(3) of the present Declaration.

11 Available at <<http://www.ohchr.org/english/issues/religion/standards.htm>> (last visited 17th April 2007).

12 M.D. Evans, *Religious Liberty and International Law in Europe*, at 247.

However the Declaration, and Article 5 in particular, have not been used consistently. If Ribeiro, in his role as Special Rapporteur relied on the Declaration, and on Article 5 in relation to parental rights, his successors, Amor and Jahangir have hardly ever used it as a framework of reference.

The aim of this chapter is to understand how the Rapporteurs handle cases involving children. This involves examining whether children are an important element of their work, whether they are singled out, and what the themes considered are.

A major part of the work depends on communications and on the Rapporteurs' focus on thematic issues. It is not possible to divide the work along the lines of scheme of protection, freedom of religious choice, freedom of manifestation, permissible limitations, and religious education, as this would not reflect the work of the Rapporteurs. As a result, a number of themes have been chosen in this chapter, the ones that reflect most accurately the occasions on which children are considered. These vary from education, exemptions in religious education, the contents of education, discrimination in education, to forced conversions, religious practices and persecution. This also includes an analysis of references to the right of parents to organise the life within the family in accordance with their religion or belief, and to age-limits, issues that are briefly dealt with by the Rapporteurs.

We will see that there is no direct emphasis on the right of the child to religious freedom. At all stages, children are considered as part of a group and hardly ever in their own right. Children are considered as belonging to a community, which means that the Rapporteurs relate to children as part of their communities rather than in their own right.

Section 2

Underlying tensions

Donna Sullivan pointed out that Article 5 reflects 'the laudable desire to deter interference by the state or attempts to convert children, especially orphans, from the beliefs held by their parents', and does not define 'child' or when children come of age.¹³ Nazila Ghanea points out that any differentiation between 'children' from birth to age 18 or their level of maturity is undeveloped.¹⁴ The issue covers any standards specific to children, such as age-limits or evolving capacities, and the relationship between parents and children.

13 D.J. Sullivan, 'Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1988) 82(3) *Am. J. Int'l L.* 487-520, at 513.

14 N. Ghanea, 'The 1981 Declaration: Some Observations' in N. Ghanea (ed.), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Leiden/Boston: Martinus Nijhoff Publishers, 2004), at 19-20.

The Declaration does not provide for specific standards applicable to children. Moreover, the issue has only occupied a small part of the Rapporteurs' analysis, who briefly refer to age-limits. There is one general reference by Ribeiro in 1986, who mentioned 'religious meetings in which children and young people participate [that] require official permission',¹⁵ and all three Rapporteurs referred to age-limits in China.

Regarding China, Ribeiro referred to a 'Public Notice Concerning the Strengthening of Control of Christian Activities in the Whole Country' which indicated, amongst other things, that 'It is not allowed to coerce anyone, especially young people and children under the age of 18 to accept religion'.¹⁶ In addition, he noted that being at least 18 years old was one of the nine requirements and qualifications to join monasteries and nunneries.¹⁷

Amor also asked about the reasons for the non-recognition of the right to religious education and belief for young people under 18, which was contrary to the Declaration and Article 14 UNCRD.¹⁸ With regard to the right to manifest one's religion, he recommended that amendments be made to the pertinent legal texts, such as article 36 of the Constitution, so as to provide a constitutional guarantee of respect for freedom to manifest one's religion or belief in accordance with Article 1(1) of the Declaration.¹⁹

Jahangir pointed out that the Chinese authorities compelled a local imam to put in his office an instructional display outlining banned activities, which included

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- 15 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1987/35, paragraph 50 (1986).
 - 16 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1993/62, page 22 (1993); see also *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1992/52, page 8 (1991); *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1993/62, page 5 (1993).
 - 17 *Ibid*, UN Doc. E/CN.4/1993/62, page 14 (1993). The Commission on Ethnic and Religious Affairs informed the Rapporteur that persons under the age of 18 were able to become monks providing they did so voluntarily and had their parents' consent: A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1995/91, page 125 (1994).
 - 18 *Ibid*, UN Doc. E/CN.4/1995/91, page 115 (1994).
 - 19 *Ibid*, UN Doc. E/CN.4/1995/91, page 132 (1994). However, the authorities replied: 'The provisions of the Chinese Constitution and other legislative texts relating to freedom of religion and belief apply to all Chinese citizens, including persons under the age of 18': *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. A/51/542, page 26 (1996).

teaching religion ‘privately’, allowing children under the age of 18 to attend a mosque, and allowing Islam to influence family life and birth planning behaviour.²⁰ She also acknowledged the Concluding Observations adopted by the UN Committee on the Rights of the Child on 24th November 2005 further to the second periodic report submitted by China.²¹ Both Amor and Jahangir noted that children under the age of 18 were not allowed to attend a mosque in China.²²

Regarding parental rights, Ribeiro relied on the Declaration during his mandate, and in particular he tied parental rights and the education of children to Article 5. He referred to a number of cases where parents were not allowed to bring up their children in conformity with their convictions. He referred to one case where ‘the authorities have separated children from parents belonging to a religious sect not officially registered, in order to prevent parents from bringing up their children in accordance with their religious beliefs’,²³ and to instances where some children from one particular religious community had been forcibly abducted from their parents.²⁴ In Iran, members of the Baha’i faith in a number of towns had been notified that they had to stop bringing up their children according to Baha’i moral and spiritual values.²⁵ In Pakistan, it was reported that an Ahmadi imparting religious education to his children would be liable to capital punishment as this would amount to religious propaganda aiming to make the children apostates.²⁶ In the USSR, it was alleged ‘that in numerous cases, Baptists, Pentecostals and Adventists have been deprived of their parental rights and had some or all of their children taken into the care of

20 A. Jahangir, *Civil and Political Rights, including the Question of Religious Intolerance*, UN Doc. E/CN.4/2005/61/Add.1, paragraph 67 (2005).

21 A. Jahangir, *Civil and Political Rights, including the Question of Religious Intolerance*, UN Doc. E/CN.4/2006/5/Add.1, paragraph 107 (2006): reference to UN Committee on the Rights of the Child, *Concluding Observations: China*, UN Doc. CRC/C/15/Add.271, paragraphs 44-45 (2005).

22 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2004/63, paragraph 39 (2004); A. Jahangir, *Civil and Political Rights, including the Question of Religious Intolerance*, UN Doc. E/CN.4/2005/61/Add.1, paragraph 67 (2005).

23 A. Vidal d’Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1987/35, paragraph 67 (1986).

24 *Ibid.*, UN Doc. E/CN.4/1987/35, paragraph 67 (1986).

25 A. Vidal d’Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1992/52, paragraph 51 (1991).

26 A. Vidal d’Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1993/62, page 82 (1993).

the State'.²⁷ About new religious movements (NRMs), he stated that these movements benefited from all the guarantees attaching to respect for the right to freedom of thought, conscience and religion; yet he added that the secular activities of some of these movements and the effects of such activities on the health and physical integrity of their members had to be closely monitored by governments.²⁸ This may reflect Article 5(5) of the Declaration which proscribes practices harmful to children's health and full development. Sullivan argues that 'parental rights concerning children's religious education and upbringing should be construed primarily as the responsibility to safeguard children's religious freedom'.²⁹

Amor also referred to interferences by the state with the family, although he did not specifically mention Article 5. For example, 'Egyptian courts have reportedly upheld the principle that Muslims cannot change their identity document in order to record their conversion to another religion. As a result, married men who are no longer Muslims must register their children as Muslims'.³⁰ In Algeria, the offspring of mixed marriages are automatically registered as having their father's religion.³¹ He also referred to the case of a Christian mother in Jordan who was deprived of custody of her children on the grounds that her husband had converted to Islam before his death and that, since her children had therefore automatically become Muslims, they should be placed in the care of her brother, who had converted to Islam several years previously.³² In addition, Amor dealt with incidents involving

27 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1988/45, page 7 (1988). The reply was that there had been no case in which any person had been deprived of his parental rights and his children placed under state guardianship for religious reasons (page 15).

28 Ibid, UN Doc. E/CN.4/1988/45, paragraph 8 (1988).

29 D.J. Sullivan, 'Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination', at 513.

30 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1995/91, page 35 (1994).

31 A. Amor, *Civil and Political Rights, including the Question of Religious Intolerance: Visit to Algeria*, UN Doc. E/CN.4/2002/66/Add.1, paragraph 74 (2003): 'The special, and sometimes difficult, position of many foreign non-Muslim women who have married Algerians and live in Algeria, and of the children of mixed marriages, was emphasized by several of the people interviewed. While some of these women continue to attend church and even take their children, they are nonetheless exceptional cases; on the other hand, they are often put under pressure by their in-laws who, refusing to accept that they are different, confine them to the house or press them to convert. The offspring of mixed marriages have no choice, since they are automatically registered as having their father's religion'.

32 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2003/66, paragraph 53 (2003).

NRMs, especially domestic proceedings against ‘The Family’ in Australia,³³ Spain,³⁴ and France.³⁵

Finally, Jahangir also pointed out that in the Democratic People’s Republic of Korea, parents were reportedly afraid to pass on their faith to their children, as sporadic refugee accounts suggested believers were still punished for practising their faith in secret.³⁶ In Belarus, ‘the religion law allegedly criminalizes the “attraction of minors to religious organizations and also the teaching of religion to them against their will or without the agreement of their parents or guardians”. It has been reported that local authorities are demanding that religious organizations supply the names and dates of birth of all their Sunday school children’.³⁷ Also in Tajikistan, she took note of the draft law entitled ‘About the freedom of conscience and religious unions’, whose article 10 allows religious education only for children who are older than 7 years old.³⁸ Recently Jahangir made a very interesting comment regarding

33 For example, see A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1994/79, paragraph 34 (1994). In the three countries, the authorities had raided several communities of ‘The Family’, and a number of parents and individuals had been arrested and put in detention. The children were taken away into care, questioned and made to undergo medical examinations, and the authorities also had issues with home schooling practiced in the communities.

34 Ibid, UN Doc. E/CN.4/1994/79, paragraph 46 (1994).

35 Ibid, UN Doc. E/CN.4/1994/79, paragraph 51 (1994).

36 A. Jahangir, *Civil and Political Rights, including the Question of Religious Intolerance*, UN Doc. E/CN.4/2005/61/Add.1, paragraph 74 (2005).

37 Ibid, UN Doc. E/CN.4/2005/61/Add.1, paragraph 34 (2005). See the reply (paragraph 42): ‘Finally, the Government stresses that article 39 of the Act has established liability for the induction of juveniles into religious organizations and the teaching of religion to juveniles against their will and without the consent of the parents or persons acting in loco parentis. Nevertheless, article 5 of the Act specifies that parents or persons acting in loco parentis are entitled by mutual consent to bring up their children in accordance with their own attitude towards religion. The State may not interfere in the upbringing of a child based on the particular religious views of the parents or persons acting in loco parentis, except in cases where inducement to perform religious acts directly threatens the child’s life and health or violates his or her legal rights. This provision is consistent with article 18, paragraph 4, of the International Covenant on Civil and Political Rights, which recognizes the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. With regard, in particular, to the question about the requirement of local authorities that religious organizations should provide lists with the names and dates of birth of children attending Sunday schools, it is pointed out that this has not been made compulsory and information has only been requested about the number of study groups and the approximate number of children attending such schools’.

38 A. Jahangir, *Report of the Special Rapporteur on freedom of religion or belief, Addendum: Summary of cases transmitted to Governments and replies received*, UN Doc. A/

the relationship between parents and children. She noted that with regard to children, the choice of religion was restricted by the parents' rights to determine their child's religion up to an age where the child is capable of doing so on his/her own, in accordance with Article 18(4) of the Covenant.³⁹ This is the first reference by the Rapporteur to a possible conflict between parents and children, and this suggests a shift from a focus on parental rights only. In November 2006, at the 25th anniversary commemoration of the adoption of the 1981 Declaration, Jahangir said:

Another question in this regard seems to have been left out by the drafters [of the UDHR, the ICCPR and the 1981 Declaration]; I am referring to the legal position of children. Who is competent to decide whether children could or should change their religion or belief? Should it be the parents' decision until the child has attained the age of majority? Or do children reach a kind of 'maturity in religious matters' earlier? Are there strict or case-by-case age limits concerning the question whether children wish to retain their religion against the will of their parents or if they want to convert to a different religion or to adopt atheistic views? The texts of Article 18 of the ICCPR and of the 1981 Declaration do not help us further, however, they leave it open to the States to establish the precise determination of the thresholds. There are many examples where this threshold has been discussed how a child can convert, where a child's opinion is taken. But this is a question for us to go further into and I would in my future reports be looking at it. There is however in the Convention on the Rights of the Child two articles that deal with it and we have to see how we can develop it and how we can bring it together with the Declaration and tie it together so that we can get a kind of a future direction in this regard.⁴⁰

Jahangir refers to some of the issues that surround the issue of the right of the child to choose the religion or belief of their choice, and advocates a 'flexible approach', in line with Articles 12(1) and 14(2) UNCRC. In her report on the mission to the Maldives, Jahangir also relied on the UNCRC regarding the issue of freedom of choice. She said:

The Maldives has entered a reservation to article 14, paragraph 1, of the CRC which requires States parties to respect the right of the child to freedom of religion or belief. The reservation states that, 'The Government of Republic of the Maldives expresses its reservation [...] since the Constitution and the Laws of the Republic of the Maldives

HRC/4/21/Add.1, paragraph 286 (2007).

- 39 A. Jahangir, *Elimination of all Forms of Religious Intolerance*, UN Doc. A/60/399, paragraph 54 (2005).
- 40 A. Jahangir, Speech delivered at the 25th Anniversary Commemoration of the adoption of the 1981 Declaration on the elimination of intolerance and discrimination based on religion or belief, 25th November 2006, held in Prague, Czech Republic. See <<http://www.tolerance95.cz/1981declaration/index.php>> for more information (last visited 17th April 2007).

stipulate that all Maldivians should be Muslims'. The Special Rapporteur emphasizes that the rights in the CRC are not limited to children who are Maldivian citizens. The Convention confers rights on all children within the jurisdiction of the Maldives, including non-citizens, who may well adhere to religions other than Islam. The Special Rapporteur also notes that the text of the reservation specifically reserves article 14, paragraph 1, which comprises the right to have or adopt a religion or belief of one's choice.⁴¹

Jahangir is not very clear but she seems to suggest that the child has the right to have or adopt a religion or belief of their choice, and that the reservation of the Maldives to Article 14(1) should be withdrawn.

It is clear from the Rapporteurs' analysis that the state must not prohibit a child under the age of 18 from joining a religious community. In addition, they are consistent in their analysis of parental rights: they emphasise parents' rights against the state to bring up their children in accordance with their own convictions. Whether or not the basis for this is in Article 5, parents have a right to pass on their faith to their children. In addition, the status of children should not be affected because of their parents' status. However, it is only recently that potential conflicts between parents and children have been addressed by Jahangir.

Section 3

Education, exemptions and parental rights

Education and religious education were heavily emphasised by Ribeiro and Amor, but also recently by Jahangir. In particular, they stress the prohibition of religious education or its imposition on children without possibility of exemptions. The Declaration provides for parental rights in education under Article 5(2).

In the early stages of his mandate, Ribeiro stated that religious education was linked to Article 5.⁴² In particular he said: 'The right of children to have access to education in the matter of religion or belief in accordance with the wishes of his parents or guardians is frequently infringed. Thus, in several countries, the State places certain restrictions on the enjoyment of this right'.⁴³ This includes making it

41 A. Jahangir, *Report of the Special Rapporteur on freedom of religion or belief, Addendum: Mission to the Maldives*, UN Doc. A/HRC/4/21/Add.3, paragraphs 25 and 59 (2007).

42 For example, A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1990/46, paragraph 105 (1990); *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1992/52, paragraph 171 (1991).

43 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1987/35, paragraph 68 (1986).

impossible for children to receive religious education outside the family circle.⁴⁴ It was said that religious instruction was not authorised by the Chinese authorities in Tibet,⁴⁵ and it was alleged that the teaching of religion in schools was forbidden in Bulgaria.⁴⁶ A number of Czech priests had reportedly been arrested for imparting, in their own homes, courses of religious instruction to children.⁴⁷ In the USSR, it was reported 'that Soviet legislation forbids religious indoctrination of children outside the home, and that registered congregations therefore give up the right to teach religion to children'.⁴⁸ In Burundi, classes had reportedly been abolished in all primary and secondary schools.⁴⁹ Ribeiro also pointed out that religious education was sometimes made more difficult in relation to certain groups of children, for example the Baha'is in Iran,⁵⁰ and Muslims in Bulgaria.⁵¹ In addition, religious education must not be imposed on children by the authorities:

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- 44 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1989/44, paragraph 98 (1989); *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1987/35, paragraph 68 (1986): 'religious instruction for children is tolerated only in private within the family'.
- 45 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1988/45, paragraph 51 (1988). The reply was that 'Schools for general education do not have a religious curriculum. If the parents desire, however, they are fully entitled to impart religious knowledge to their children in the family. The Government does not prohibit such religious instruction': *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1989/44, paragraph 35 (1989).
- 46 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1988/45, page 4 (1988). The authorities replied that 'No religious subjects are taught at school. But parents are free to give their children the religious instruction they deem necessary at home' (page 10).
- 47 *Ibid*, UN Doc. E/CN.4/1988/45, paragraph 51 (1988).
- 48 *Ibid*, UN Doc. E/CN.4/1988/45, page 7 (1988). The reply was that, in accordance with the principle of the separation of Church and State and of Church and schools, it was forbidden in the Soviet Union to offer religious instruction of any kind in schools and other public teaching institutions. If the parents or guardian so desired, a child may receive religious instruction within the family (pages 13-14).
- 49 *Ibid*, UN Doc. E/CN.4/1988/45, page 5 (1988). The reply was that the establishment of catechism classes was allowed (paragraph 21).
- 50 *Ibid*, UN Doc. E/CN.4/1988/45, page 5 (1988): 'Since the 1983 ban on all Baha'i administrative and community activities, classes where Baha'i children used to receive religious instruction have allegedly been prohibited'.
- 51 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc.

Sometimes, children are not only denied access to the religious education in accordance with the choice of their parents, but are also compelled to receive teaching on a religion or belief against their wishes. Thus, in several countries, an attempt is being made to inculcate in children, within the general framework of school programmes, values inherent in a particular ideology or belief, which may be incompatible with the religious beliefs of the parents.⁵²

Ribeiro gave three examples, without giving the names of the countries. In one country, pupils belonging to an outlawed religious community were abducted by the religious education instructors in school, where instruction was given on the officially recognised faith, and forcibly converted to that faith. In another country, pupils belonging to a religious minority were compelled to attend religious instruction courses in a faith different from their own. Finally, in another country religious instruction was made compulsory in kindergarten, arousing protests from many educational organisations.⁵³ Accordingly, he suggested that Article 5 was restricted when it was impossible in practice for the children of unbelievers to benefit from public education not involving compulsory religious education.⁵⁴ He also suggested to Ireland that there could be a problem with the interweaving of religious instruction with secular education.⁵⁵ Similar instances have arisen in countries where Islam is the majority religion. In Turkey, it was alleged that non-Muslim pupils had been compelled to follow Muslim religious courses in Diyarbakir.⁵⁶ In various areas of Sudan, he noted that Islam was taught as a compulsory subject starting at the level of nursery school, which was reported to be a prerequisite for entry into primary school.⁵⁷

E/CN.4/1990/46, paragraph 27 (1990).

- 52 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1987/35, paragraph 68 (1986).
- 53 Ibid, UN Doc. E/CN.4/1987/35, paragraphs 68-69 (1986).
- 54 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1989/44, paragraph 98 (1989).
- 55 Ibid, UN Doc. E/CN.4/1989/44, paragraph 45 (1989): 'It has been alleged that the interweaving of religious instruction with secular education as advocated by the Roman Catholic hierarchy and the Department of Education leads to an effective denial of the exercise of the constitutionally-guaranteed right of parents to send their children to any school which is publicly funded without having them receive religious instruction'.
- 56 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1988/45, page 6 (1988). The country replied that the allegation was entirely unfounded (page 11).
- 57 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1993/62, page 92 (1993): 'As concerns the freedom of education, the Special

Amor also puts a great emphasis on the issue of religious education, and this leads on from the weight given to tolerance and non-discrimination in education.⁵⁸ For example, the authorities must not obstruct religious instruction. He pointed out that in Turkey, it may be necessary to require permission to run religious education classes and this could even lead to the closure of some religious communities.⁵⁹ In Armenia, permission for a teacher to provide religious instruction was said to depend on the approval of the national Orthodox Church.⁶⁰ In Pakistan, there seemed to be a difference of opportunities between Muslims and non-Muslims.⁶¹ Amor also

Rapporteur was informed that in Juba, Equatoria, Islam is taught as a compulsory subject starting at the level of nursery school, which is reported to be a prerequisite for entry into primary school. Non-Muslim children in the towns of Juba, Malakal, Raja, Renk and Wau are allegedly also required to learn Arabic and study Islam. Non-Muslim students have reportedly been harassed in public schools and often graded unfairly. It has also been alleged that security forces from the north have at times brought non-Muslim children to Islamic religious schools (khalwas) against the wishes of their parents'. The reply was that the allegation was untrue (page 95). Similar allegations about Sudan were repeated in A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1994/79, paragraph 75 (1994): 'In the schools children are forced to study the Islamic faith on pain of corporal punishment or expulsion from school. Furthermore, in the food distribution centres, the most vulnerable sectors of the population – children, women and elderly people – are said to be forced to learn the Koran in order to obtain food rations'.

- 58 For general guidelines on religious education, see A. Amor, *Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UN Doc. A/CONF.189/PC.2/22, paragraphs 49-59 (2001).
- 59 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/57/274, paragraph 53 (2002): a directive in Turkey reportedly declared that conducting Sunday schools, Bible schools or other religious education without permission from the Turkish Education Ministry was punishable with fines and prison sentences. In another instance, the New Testament Church in Turkey was closed because it did not have a legal basis and its activities were harmful to society, and religious education was provided to children without the authorities' approval: *Elimination of All Forms of Religious Intolerance*, UN Doc. A/58/296, paragraphs 99-100 (2003). In this last case, the Special Rapporteur said that he wished to be kept informed of subsequent proceedings (paragraph 101).
- 60 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/52/477, page 10 (1997); repeated in *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1998/6, paragraph 63 (1998).
- 61 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/54/386, paragraph 75 (1999): 'The curriculum of secondary schools apparently includes mandatory Islamic instruction for Muslim students, who must take exams on the subject. Reportedly, students from non-Muslim communities are denied this opportunity with regard to their own religions. Students in non-Muslim private schools can receive religious instruction, but this is not officially recognized at the national level'; repeated in *Civil*

encouraged holding consultations with minorities in order to find practical solutions to facilitate the teaching of minority religions to those desiring such instruction.⁶² In Brunei Darussalam, the authorities were said to have imposed restrictions on the teaching of the history of religions and other subjects related to religion in non-Muslim educational institutions and to require that Islam be taught there.⁶³

Like Ribeiro, he emphasised that religious instruction should not be compulsory. For example, ‘the compulsory nature of religious instruction raises the question of respect for belief, in particular of non-believers, when no exemption or alternative measure, such as civic or moral education, is provided for’.⁶⁴ Therefore, a problem arises with imposing a particular kind of religious instruction on members of another faith without giving them the right to be excused from that instruction.⁶⁵ In Turkey, it appeared that Muslim religious education was compulsory for the Assyro-Chaldeans, a Christian minority,⁶⁶ and that in the Maldives, school curricula included the mandatory teaching of Islam.⁶⁷ Amor noted with satisfaction ‘the legislation adopted to grant recognition to the religious holidays of the Christian, Jewish and Muslim communities, to allow exemptions on religious grounds in schools and to guarantee the right to conscientious objection for reasons of belief’.⁶⁸ He noted that in Sudan,

and Political Rights, including Religious Intolerance, UN Doc. E/CN.4/2000/65, paragraph 79 (2000).

- 62 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2001/63, paragraphs 49-51 (2001): this followed on from a comment from representatives of the Muslim community in Athens, who had reportedly complained of the absence of religious instruction in Islam in school curricula.
- 63 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/52/477, page 10 (1997); repeated in *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1998/6, paragraph 63 (1998).
- 64 *Ibid*, UN Doc. E/CN.4/1998/6, paragraph 43 (1998).
- 65 *Ibid*, UN Doc. E/CN.4/1998/6, paragraph 43 (1998).
- 66 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1995/91, page 102 (1994). The reply was that there was no discrimination in the school system, in particular against the Assyro-Chaldeans, who were the victims of the PKK: *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1996/95, paragraph 55 (1995). He also noted that allegations according to which the demands of the Syriacs (and in fact the entire Assyro-Chaldean community) for exemption from religious instruction in the public schools are often ignored: *Elimination of All Forms of Religious Intolerance: Visit to Turkey*, A/55/280/Add.1, paragraph 157 (2000).
- 67 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2001/63, paragraph 99 (2001).
- 68 A. Amor, *Civil and Political Rights, including the Question of Religious Intolerance: Visit to Argentina*, UN Doc. E/CN.4/2002/73/Add.1, paragraph 125 (2002). In relation

religious education was compulsory in public schools and was determined by the religion of the pupils. This meant that it did not seem to allow for any dispensation from religious instruction, an omission that appeared to raise problems with regard to people's free will.⁶⁹ He also considered the teaching of Christianity and Christian ethics in Norway, reported to be mandatory in primary and secondary schools.⁷⁰ Dispensations must be granted by the authorities, not only to foreign parents,⁷¹ but also to parents who were originally Muslim but had become atheist,⁷² and to pupils who were baptised Orthodox but were not observant or had become atheist.⁷³ In addition, Amor organised the International consultative conference on school education in

to the visit to Greece, he noted with satisfaction that minorities could be excused from Orthodox religious classes: *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Visit to Greece*, UN Doc. A/51/542/Add.1, paragraph 146 (1996).

- 69 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Visit to Sudan*, UN Doc. A/51/542/Add.2, paragraph 54 (1996).
- 70 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2001/63, paragraph 109 (2001): 'Pursuant to the Religious Knowledge and Education in Ethics Act of October 1995, the teaching of Christianity and Christian ethics is reported to be mandatory in primary and secondary schools. On special grounds, exemptions from specific religious activities such as prayer may be granted, but students may not forgo instruction in the subject as a whole. It is reported that representatives of the Muslim Council and the Humanist Association contested this law in the courts; their challenge was dismissed at first instance and is now at the appeal stage'.
- 71 A. Amor, *Civil and Political Rights, including the Question of Religious Intolerance: Visit to Algeria*, UN Doc. E/CN.4/2002/66/Add.1, paragraph 133 (2003): 'On the subject of compulsory religious education, the Special Rapporteur's attention was drawn to one case in which the children of a foreign couple were refused a dispensation. During their discussions with the Special Rapporteur, the Minister of Education and Ministry staff expressed astonishment and said they were prepared to grant such dispensations; the Special Rapporteur was given this commitment in writing'.
- 72 *Ibid*, UN Doc. E/CN.4/2002/66/Add.1, paragraph 133 (2003): 'On the other hand, Algerian children of originally Muslim but now atheist parents would not be allowed the benefit of such an arrangement [being granted a dispensation] given Algeria's interpretative declaration relating to article 14 of the Convention on the Rights of the Child which states that a child must be brought up in its parents' religion'.
- 73 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2001/63, paragraph 49 (2001): 'Primary and secondary school curricula include compulsory instruction in the Orthodox religion for pupils of that faith. This then raises the question as to whether pupils who were baptized Orthodox but are not observant or have become atheist should be exempted'.

relation to freedom of religion or belief, tolerance and non-discrimination,⁷⁴ and the final document stated:

Noting the right of parents, families, legal guardians and other legally recognized caregivers to choose schools for their children, and to ensure their religious and/or moral education in conformity with their own convictions, and with such minimum educational standards as may be laid down or approved by the competent authorities, in a manner consistent with the procedures followed in the State for the application of its legislation and in accordance with the best interest of the child.⁷⁵

It is interesting that this document does not mention the right of the child to choose and the right not to receive religious education against their convictions, but only the parents' right to have their children educated in accordance with their own convictions.

Jahangir noted that expatriate school pupils in the Maldives who chose not to study Islam were unable to pass their end of year school exams; Islam formed an integral part of the school curriculum and it had been alleged that alternative subjects were not offered to expatriate school pupils. She said that the paradox seemed to be that a large percentage of schoolteachers in the Maldives were expatriate themselves. However, the Government maintained that expatriate students who chose not to follow Islamic Studies and Dhivehi language could opt not to do so.⁷⁶ Finally, she was also concerned that state schools were carrying out mandatory instruction in the Georgian Orthodox faith and requiring children to pray in Georgian Orthodox churches. There were reports too of children being baptised by Orthodox priests

74 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2002/73 (2002), Appendix pages 42-47. The Conference was held in Madrid from 23rd to 25th November 2001 on the occasion of the 20th anniversary of the Declaration. Asma Jahangir returned to the Final Document in relation to the preventive facets of the mandate. She said that there had been promising follow-up activities by Governments and NGOs during global meetings of experts and exchanges of minds on regional levels, but that these implementation efforts need a fresh impetus in order to further develop strategies on how religious intolerance and discrimination can be prevented and how freedom of religion or belief can be promoted through education. She wanted to emphasise the need to devise a strategy for the prevention of discrimination and intolerance based on religion or belief: A. Jahangir, *Report of the Special Rapporteur on freedom of religion or belief to the Human Rights Council*, UN Doc. A/HRC/4/21, paragraph 29 (2006).

75 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2002/73, page 42, paragraph n (2002).

76 A. Jahangir, *Report of the Special Rapporteur on freedom of religion or belief, Addendum: Mission to the Maldives*, UN Doc. A/HRC/4/21/Add.3, paragraph 48 (2007).

without the prior permission of their parents. She referred to parental rights in education and to the Madrid Final Document.⁷⁷

The Rapporteurs apply straightforward rules on religious education: they acknowledge the importance of the right, the prohibition of coercion, and the right to be granted an exemption. Ribeiro acknowledges parental rights under Article 5, whereas the use of Article 5 is only implicit for Amor. The sense of religious identity of the child stands out, i.e. whether the child is considered to be part of a religious community, and whether religious education is aimed at keeping the child within that community. However, the Rapporteurs see that through the lens of parental rights, not children's rights. Religious education appears to be a right of the parents against the state, even if Amor and Jahangir do not really use Article 5.

Section 4 Content of education

In addition to how religious education is delivered, Ribeiro and Amor consider the nature and content of education. Ribeiro insists that there should be no political or ideological interference, and that one religion should not be preferred over another, whereas Amor is adamant that there should be education in tolerance and non-discrimination, and argues that education in tolerance is best acquired by young children. Jahangir has also considered the issue.

Ribeiro suggested that the curriculum should include instruction on international and national standards in respect of freedom of religion and belief, and education should be aimed at inculcating, from early childhood, a spirit of tolerance and respect for the spiritual values of others.⁷⁸ He also referred to authorities that endeavour to promote an ideology or a particular religious movement to the detriment of the others.⁷⁹ There was a problem when the Egyptian Minister of Education stated that programmes of religious instruction would be revised to bring them in line with Islamic principles.⁸⁰ It is also difficult when specific branches of a religion are pre-

77 A. Jahangir, *Report of the Special Rapporteur on freedom of religion or belief, Addendum: Summary of cases transmitted to Governments and replies received*, UN Doc. A/HRC/4/21/Add.1, paragraphs 146-151 (2007).

78 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1987/35, paragraph 106 (1986).

79 *Ibid.*, UN Doc. E/CN.4/1987/35, paragraph 36 (1986). Several examples were given: in one country, the study of the science of religion had been included in the school curriculum, in what had been viewed by the religious authorities as an attempt to make the rational prevail over the spiritual; in another the textbooks urge students to shun certain religious beliefs in favour of the general principles comprising the regime's official ideology.

80 *Ibid.*, UN Doc. E/CN.4/1987/35, paragraph 51 (1986).

ferred to others, for example in Iraq, where state religious education preferred Sunni to Shiite precepts despite the fact that the majority of school children belonged to the Shia faith.⁸¹ Ribeiro noted that, alongside other measures, this compromised the religious identity and heritage of the Shiite community.

Amor suggested that one of the aims of education in tolerance was the prevention of indoctrination, which meant that the school system should be sheltered from any political and ideological interference.⁸² He put a particular emphasis on school curricula and textbooks:

As to the use of education to promote the protection of and respect for freedom of religion or belief in order to strengthen peace, understanding and tolerance among individuals, the essential components should be school curricula and textbooks on education for tolerance, in particular religious tolerance, and for non-discrimination on racial grounds [...] In these particularly difficult times, the Special Rapporteur believes that far greater attention should be paid to educating children in tolerance and invites the international community, States and all interested parties to consider ways and means of using schools to reinforce the prevention of intolerance and discrimination on the basis of religion or conviction.⁸³

Amor considers that compulsory religious and ethics courses should be free of any ideological framework and any political bias in favour of a particular religious persuasion, so as to guarantee the principle of educational pluralism.⁸⁴ In Germany, granting public status to the Muslim community would allow the teaching of Islam to be introduced in state schools, in order to provide genuine religious instruction

81 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1992/52, paragraph 55 (1991); repeated in *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1993/62, page 44 (1993).

82 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1996/95, paragraph 65 (1995).

83 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2003/66, paragraphs 142-143 (2003).

84 A. Amor, *Elimination of All Forms of Religious Intolerance: Visit to Turkey*, UN Doc. A/55/280/Add.1, paragraph 133 (2000). *Elimination of All Forms of Religious Intolerance: Visit to Bangladesh*, UN Doc. A/55/280/Add.2, paragraph 105 (2000): 'it is recommended that the State revise its primary-school textbooks and curricula, in order to ensure that the religious and ethnic diversity of Bangladesh are reflected in such a way that each religion is presented in an objective manner, and in order to promote the values of tolerance and nondiscrimination. This education policy should help ensure that the values of tolerance and nondiscrimination become fixed in the people's minds...'

free from indoctrination and regimentation.⁸⁵ In Turkey, compulsory religious and ethics courses posed a problem in that they affected non-Hanafi Muslims who were subjected to instruction based on a Hanafi conception of Islam and that did not reflect the diversity of Islamic rites within Turkish society.⁸⁶ Amor also blamed the Sudanese Government for Islamising education.⁸⁷ In addition, Amor pays attention to the portrayal of religions. In Thailand, ‘the textbooks in public schools allegedly provide information on Buddhism only, and thus do not reflect the diversity of religious sensitivities and affiliations in the country’,⁸⁸ whereas certain public schools in some cantons of Switzerland were said to run courses on the Church of Scientology in which it was described as a sect.⁸⁹ In Nicaragua, there was allegedly a campaign by the Catholic Church to introduce Catholic textbooks in public schools. These textbooks would appear to preach a message of intolerance towards other religions.⁹⁰ In Saudi Arabia, some of the textbooks for use in schools reportedly made disparaging references to religious beliefs other than Wahhabi and to Shiite beliefs in particular.⁹¹ In Iran, the Christian religion was said to be denigrated, particularly in religious

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- 85 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Visit to Germany*, UN Doc. E/CN.4/1998/6/Add.2, paragraph 91 (1997).
- 86 A. Amor, *Elimination of All Forms of Religious Intolerance: Visit to Turkey*, UN Doc. A/55/280/Add.1, paragraphs 17 & 132 (2000).
- 87 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1995/91, page 81 (1994).
- 88 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/52/477, page 8 (1997); repeated in *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1998/6, paragraph 59 (1998). Thailand refuted the allegations and emphasised, amongst other things, that the general school curriculum enabled all pupils to receive instruction in the main religions, that it attached great importance to the implementation of universal religious principles, and that pupils could choose to learn about one or more religions other than Buddhism (paragraph 90).
- 89 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/52/477, page 8 (1997); repeated in *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1998/6, paragraph 59 (1998). Switzerland replied that the members of the Church of Scientology were not treated in a discriminatory manner in comparison with other religious communities, particularly in the area of public and private education (paragraph 89).
- 90 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/52/477, page 9 (1997).
- 91 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1995/91, page 16 (1994).

instruction classes in state schools.⁹² Amor also referred to the attitude of Greek religious education textbooks towards religions other than the Orthodox Church,⁹³ and to the curriculum and textbooks of an optional course on religions in Bulgaria that paid more attention to the Bulgarian Orthodox Church than other religions.⁹⁴

The final document of the International consultative conference on school education in relation to freedom of religion or belief, tolerance and non-discrimination, which recommends both general and more targeted measures and calls for contributions from States and all social actors, should provide a framework for actions aimed at making schools places for learning peace, understanding and tolerance among individuals, groups and nations, as a means of developing respect for diversity.⁹⁵ According to Linos-Alexandre Sicilianos, the main ideas of the final document are tolerance and pluralism in religious instruction, the acceptance of diversity in matters of religion or belief, respect for the religions and beliefs of others, the promotion of respect for the religions and beliefs of others, the eradication of prejudices and the importance of combating stereotypes based on religion, belief, and ethnic, racial, national and cultural belonging. Considering that attitudes are greatly influenced at the primary and the secondary school stage, the document encourages the diffusion of these ideas through school curricula, textbooks and teaching methods, in order to strengthen mutual understanding and tolerance.⁹⁶ In particular, the final document puts much emphasis on education in tolerance. Amor stated that he would continue to take whatever initiative or action is necessary to shield schools throughout the world from intolerance and discrimination on the basis of religion or belief and from all forms of indoctrination into religious or pseudo-religious attitudes, so that schools can become conduits of knowledge, respect and tolerance for others in

92 Ibid, UN Doc. E/CN.4/1995/91, page 51 (1994).

93 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/58/296, paragraph 51 (2003): religious education textbooks allegedly referred to Jehovah's Witnesses as an 'anti-national mechanism', to 'Protestant sects of North America, the "worst form of heresy"', as 'agents of the CIA', to the 'papal' (Catholic) Church as 'deviant' for 'its attempts to draw nearer to the Orthodox Church' through the Uniate Church and to Islam as 'belligerent'.

94 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/54/386, paragraph 49 (1999): 'Since 1998, the Ministry of Education has reportedly introduced an optional course on religions into the secondary school curriculum. It is alleged that this course, designed to reflect all religions, in fact pays more attention in the textbooks to the Bulgarian Orthodox Church. The Muslim community is said to have complained of the inadequate treatment accorded to Islam in the course and its textbooks'.

95 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2003/66 (2003), paragraph 108.

96 L-A. Sicilianos, 'La Liberté de Diffusion des Convictions Religieuses' in J-F. Flauss (ed.), *La Protection Internationale de la Liberté Religieuse – International Protection of Religious Freedom* (Brussels: Bruylant, Publications de l'Institut International des Droits de l'Homme, Institut René Cassin de Strasbourg, 2002), 205-229, at 226.

the interests of human rights and thus of international understanding and cooperation in the service of peace.⁹⁷

Jahangir considered the issue in the report on her visit to Azerbaijan. The authorities had seriously taken up the task of introducing a curriculum in schools on the teachings of religions, and the objective would be to promote the ideals of a pluralistic society. The Special Rapporteur said: 'The efforts to produce a curriculum for schools on the teaching of religions can be extremely useful in order to further strengthen the general level of religious tolerance that exists in Azerbaijan. It should be fully supported by all parts of the Government and shared with other countries that are looking for a model curriculum'.⁹⁸ Finally, in her report to the Human Rights Council in December 2006, she said:

The principles contained in the 1981 Declaration need to be further disseminated among lawmakers, judges and civil servants but also among non-State actors. It is of the utmost importance to promote the ideals of tolerance and understanding through education, for example by introducing human rights standards in school curricula and through the training of the teaching staff. Religious tolerance can only be acquired if people learn from their earliest childhood about the existence and distinctive characteristics of other religious or faith-based communities. There is an urgent need to eliminate the root causes of intolerance and discrimination and to remain vigilant with regard to freedom of religion or belief worldwide. It is equally crucial to depoliticize issues relating to religion or belief and to bring the discussion fully within the framework of human rights. The Special Rapporteur would like to reiterate that most situations of religious intolerance stem either from ignorance or from misleading information. In her opinion, the right orientation to education is crucial for promoting religious harmony. Unfortunately, she regularly receives allegations about schoolbooks which display, and even encourage, a lack of respect for members of non-traditional religious minorities or for religions that differ from the predominant religion in the country. The authorities concerned are called to promptly remove any passages from schoolbooks that run counter to religious tolerance or to withdraw such books. In this regard, the 2001 Madrid Final Document on School Education in relation with Freedom of Religion and Belief, Tolerance and Non-discrimination offers important guidance for a desirable education of tolerance.⁹⁹

97 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2003/66 (2003), paragraph 114.

98 A. Jahangir, *Report of the Special Rapporteur on freedom of religion or belief to the Human Rights Council, Addendum: Mission to Azerbaijan*, UN Doc. A/HRC/4/21/Add.2, paragraphs 77 and 105 (2006).

99 A. Jahangir, *Report of the Special Rapporteur on freedom of religion or belief to the Human Rights Council*, UN Doc. A/HRC/4/21, paragraphs 49-50 (2006).

Section 5

Discrimination against children in education

During the time of the mandate, the Rapporteurs have highlighted discriminatory cases against minority children, especially in the school context. Targeted communities include in particular Jehovah's Witnesses, Seventh-day Adventists, the Church of Scientology, the Ahmadis and the Baha'is.

Ribeiro is particularly concerned at discrimination in school, harassment of pupils or teachers, and expulsions from school. He stated:

Discrimination in education may take a variety of forms. It may occur in the form of vexations suffered at school by the children of believers on the part of teachers or other pupils; in certain countries, young believers are excluded from access to higher education. Sometimes, the discovery of a student's adherence to a particular religious denomination may lead to his expulsion from the university. Elsewhere, women belonging to a certain religious congregation do not have the right to train to become nurses. In one country, even access to education is denied to members of an outlawed sect; a decree issued by the Ministry of Education stipulates that access to teaching establishments is reserved for members of officially recognized religions. Accordingly, hundreds of students at all levels, primary, secondary and higher, were expelled from educational establishments for belonging to this sect. It was proposed that they should be readmitted provided they abjured their faith.¹⁰⁰

This is applicable to both children and students, yet this shows that children are the focus of religious discrimination. Discrimination in education takes different forms. For example, children may be denied admission to school because they belong to one particular religious community. Thus, in Iran, 'Baha'i children are allegedly denied admission to the State school system and to university unless they formally convert to Islam or one of the other officially recognized religions'.¹⁰¹ In Pakistan, it was alleged that Ahmadis had been denied admission to schools.¹⁰² Students have been expelled from school because they belonged to a given religious community, such

100 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1987/35, paragraph 65 (1986).

101 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1988/45, page 5 (1988); A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1990/46, paragraph 50 (1990).

102 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1988/45, page 6 (1988).

as the Baha'is in Indonesia,¹⁰³ and Jehovah's Witnesses in Zaire,¹⁰⁴ and Burundi.¹⁰⁵ In the USSR, it had been alleged that the children of religious believers were subjected to various forms of harassment and discrimination at school,¹⁰⁶ and in Greece, young Jehovah's Witnesses were victims of manifestations of religious intolerance in schools, such as psychological pressure.¹⁰⁷

Amor focuses on discrimination in the school context, including the coercion of children, tensions, intolerance and extremism. For example, Seventh-day Adventist children were expelled from school in Azerbaijan,¹⁰⁸ the children of Scientol-

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- 103 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1992/52, paragraph 49 (1991): 'Des enfants baha'is auraient été expulsés de l'école et leurs livres saisis'. Allegations repeated in *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1993/62, page 35 (1993).
- 104 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1992/52, paragraph 75 (1991).
- 105 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1991/56, paragraph 43 (1991): 'Pierre Kibina-Kanwa, headmaster of Nyabihanga primary school, is alleged to have expelled pupils who were Jehovah's Witnesses and whom he wanted to force to salute the national flag'. The government replied that the Jehovah's Witnesses were breaking the law, that their teachings had already been rejected by the people to whom they were directed, and that the State had no other alternative than to comply with the deepest wishes of the people (paragraph 44).
- 106 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1988/45, page 7 (1988).
- 107 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1990/46, paragraph 43 (1990). The government replied: 'On the question of alleged harassment or psychological pressure against Jehovah's Witnesses in schools, nothing of the sort has been reported, although it could be that the well-known tendency of members of this particular religious community to propagate their religious faith in order to convince others may perhaps have been the cause of some friction among pupils in some schools' (paragraph 44).
- 108 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2003/66, paragraph 14 (2003): 'On 9 June 2002, an Adventist family, Pastor Vahid Nagiev, his wife and their four children were allegedly deported from Nakhichevan to Baku by a number of policemen, including the chief of police of Nakhichevan. The police produced no order in writing and allegedly accompanied their instructions with threats, claiming that the Adventists could be preparing terrorist actions against President Aliiev, who was due to visit on 15 June. The family appealed to the State Committee for Relations with Religious Organizations in Baku in late July 2002, but reportedly has

ogists were reported to have been discriminated against at local kindergartens in Germany,¹⁰⁹ and young Jehovah's Witnesses were verbally insulted and physically attacked in Greece.¹¹⁰ In the USA, since 11th September 2001, there have been reports of significant tensions in schools in some parts of the country where Arab-Muslim Americans or other students had problems with other students and in a few cases with teachers and administration also.¹¹¹ In Pakistan, non-governmental sources claimed that minorities were discriminated against in the school system, especially in rural

still not been allowed to return home. In September 2001, three of their children were allegedly barred from attending school on the grounds that they were Adventists and the family was allegedly threatened with deportation in October 2001'.

- 109 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1995/91, page 13 (1994): 'On 27 March 1994, the two children of a Scientologist, Lydia Walter, aged 6 and 3, were allegedly the victims of discriminatory acts at the local kindergarten. At the initiative of the group called 'Sect Info Essen', the governing board is said to have specifically requested that there should be no contact with Scientologists. The children were reportedly banned by the rest of the school and their parents informed that the children would be sent home unless they signed a sworn written statement that they would not 'promote' Scientology orally, in writing or by any other means. The contract was also to state that their children were not 'welcome' in the kindergarten. A poster in front of the school is said to have read 'We don't want Scientology' and the school allegedly announced that it would hold an anti-Scientology demonstration with the group 'Sect Info Essen' in April 1994'. Also, see *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Visit to Germany*, UN Doc. E/CN.4/1998/6/Add.2, paragraph 72 (1997): '... creating a climate of intolerance reflected in particular in physical and verbal harassment of Scientologists' children in schools, and indeed their expulsion, even from kindergartens'.
- 110 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1995/91, page 42 (1994): 'In addition, according to the information received, in schools young Jehovah's Witnesses are victims of manifestations of religious intolerance (verbal insults, physical attacks), and it is alleged in particular that the books used for religious instruction denigrate the religion of the Jehovah's Witnesses'. Allegations repeated in A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Visit to Greece*, UN Doc. A/51/542/Add.1, paragraph 95 (1996).
- 111 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/57/274, paragraph 33 (2002). The government replied: 'There have been new reports of incidents of harassment in schools directed at persons perceived to be Arab Americans or of Middle Eastern or South Asian origin. For this reason, the Department of Education is taking extensive action to remind schools of their responsibilities to protect students from harassment and violence and to reach out to those who may be harassed to ensure that they know how to report harassment if it occurs' (paragraph 34).

areas.¹¹² In Egypt, Muslim and Christian children had had to be separated because of religious extremism.¹¹³ Religious minorities in Georgia, in particular Evangelists, Jehovah's Witnesses and Baptists, had also been the victims of intolerance.¹¹⁴ Discrimination can also be indirect, such as expelling children from school because of the conversion of their parents from Islam to Christianity.¹¹⁵ There have also been instances when a religious community tried to proselytise or convert the children of another religious community, or to enforce compliance with a number of rules. In Egypt for example, the public education curricula was allegedly discriminatory in so far as Christian pupils were obliged to memorise verses of the Qur'an as part

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- 112 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Visit to Pakistan*, UN Doc. E/CN.4/1996/95/Add.1, paragraphs 59-60 (1996): '59. According to non-governmental sources, minorities are discriminated against in the school system, especially in rural areas. In particular, school textbooks and syllabuses are said to exclude an eclectic view of religions (for instance by omitting any reference to minority leaders who have made a historical contribution to Pakistan), for the benefit of the State religion. 60. The Special Rapporteur was informed by the authorities of measures taken to assist minorities in the field of education, such as the Special Fund for the Welfare and Uplift of Minorities [...] and the Minorities Welfare Fund, which offer study grants to students from minorities. The authorities have also sent a letter replying to the questionnaire sent by the Special Rapporteur to Governments concerning freedom of religion and belief in primary and secondary schools'.
- 113 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1995/91, page 35 (1994): 'Religious extremism is also reported to be manifest in schools, despite the directive of the Ministry of Education. In some schools, Christian and Muslim children have allegedly been separated and have no common activities. In others, Christians are said to be subjected to constant victimization and pressure. In March 1993, the two-week expulsion of four pupils from a secondary school for playing a cassette containing anti-Christian comments in class reportedly caused anti-Christian riots and petrol-bomb attacks on the local church, in which at least 52 Christians were injured'.
- 114 A. Amor, *Civil and Political Rights, including the Question of Religious Intolerance: Visit to Georgia*, UN Doc. E/CN.4/2004/63/Add.1, paragraph 100 (2003): 'The Special Rapporteur has been informed that many schoolchildren belonging to religious minorities, in particular Evangelists, Jehovah's Witnesses and Baptists, have been threatened, insulted and physically assaulted at school because of their religion. Those responsible for such acts of intolerance are either other schoolchildren or teachers and principals at the schools concerned'.
- 115 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/54/386, paragraph 74 (1999); repeated in A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2000/65, paragraph 79 (2000). In Pakistan, a Muslim woman who converted to Christianity was allegedly harassed by Muslim clerics and other Muslims, and the woman's children were said to have been expelled from their schools because of her conversion. The police were informed of these developments but allegedly took no action.

of their Arabic studies.¹¹⁶ In Sudan, non-Muslim pupils faced pressure to study the Qur'an, whilst Christians and animists faced pressure to comply with the Islamic dress code.¹¹⁷ Protestant representatives in Greece said that they were subjected to the proselytism of the Orthodox Church, which permeated the school system.¹¹⁸ Regarding Argentina, Amor showed that there was a link between the absolute right of freedom of belief and the right not to be compelled in prayers and religious ceremonies.¹¹⁹ He also emphasised the need to make allowances for the religious, ethnic and cultural diversity of the Sudanese population and to respect such diversity in the classroom by reflecting it in the curricula and the treatment accorded to the teachers and pupils of the non-Muslim communities.¹²⁰ With respect to education and non-discrimination, he stated: 'The policy of assimilating the children of minorities, thereby making them lose their identity, is a most harmful form of discrimination because it sows the seeds for the continuation of discriminatory attitudes beyond the generations practising them at any given time'.¹²¹

116 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1995/91, page 35 (1994).

117 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Visit to Sudan*, UN Doc. A/51/542/Add.2, paragraph 94 (1996).

118 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Visit to Greece*, UN Doc. A/51/542/Add.1, paragraph 82 (1996).

119 A. Amor, *Civil and Political Rights, including the Question of Religious Intolerance: Visit to Argentina*, UN Doc. E/CN.4/2002/73/Add.1, paragraph 161 (2002): 'Concerning cases and situations where freedom of belief is violated, specifically those relating to obligatory prayers and religious ceremonies in State educational establishments, the Special Rapporteur recommends respect for international law in this matter, in other words, the guaranteeing of freedom of belief as an absolute right. The State is therefore called on to investigate the cases and situations in question and to take all appropriate steps, for example, to ensure that prayers and religious ceremonies are not obligatory and to make arrangements for pupils who are non-believers or do not wish to take part in religious activities at school. Precautions should also be taken to ensure that such arrangements do not constitute a source of marginalization or passive discrimination against non-believers and non-practitioners'.

120 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Visit to Sudan*, UN Doc. A/51/542/Add.2, paragraph 151 (1996). Of course, Amor was referring to the Sudanese population, yet this call to make allowance for diversity seem to reflect a general concern.

121 A. Amor, *Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference*, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc. A/CONF.189/PC.2/22, paragraph 85 (2001).

Jahangir pointed out that Ahmadiyya children attending Muslim schools in Sri Lanka were rarely accepted, and some Christians complained that in public schools children were forced to perform certain Buddhist rituals in violation of their freedom of religion.¹²²

There is a great emphasis on minorities, and children are usually considered part of the religious minority and community to which they belong. It is also clear that there is a link between forced conversions, risk to identity as members of religious minorities, and threats to religious minorities themselves.

Section 6 Forced conversions

Instances of forced conversions have been considered by the three Rapporteurs. Examples include children who are removed from their parents or families, girls who are married to a member of a different religion, and boys who are kidnapped and circumcised.

Ribeiro stated that ‘girls from families of a certain religious minority are sometimes forced, against the wishes of their families and their own will, to marry members of the majority religion and to adopt their faith’.¹²³ In one country, pupils belonging to an outlawed religious community were abducted by the religious education instructors in school, where instruction was given in the officially recognised faith and the pupils were forcibly converted to that faith.¹²⁴ In Iran, Baha’i children were allegedly denied admission to the state school system unless they formally converted to Islam or one of the officially recognised religions and some Baha’i children had allegedly been kidnapped and placed in Muslim homes where they could be compelled to embrace Islam.¹²⁵ In Pakistan, there were cases of Christian children who were forcibly converted to the Muslim faith, working as domestic servants, such as a nine-year old boy employed in a workshop owned by a Muslim.¹²⁶

122 A. Jahangir, *Civil and Political Rights, including the Question of Religious Intolerance: Mission to Sri Lanka*, UN Doc. E/CN.4/2006/5/Add.3, paragraphs 101 & 108 (2005).

123 A. Vidal d’Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1987/35, paragraph 67 (1986).

124 *Ibid*, UN Doc. E/CN.4/1987/35, paragraph 69 (1986).

125 A. Vidal d’Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1988/45, page 5 (1988).

126 A. Vidal d’Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1993/62, paragraph 48 (1993).

The approach adopted by Amor is fairly similar. In Pakistan, according to non-governmental sources, Christian and Hindu girls and women (especially those working as servants or nurses) were the victims of rape and kidnapping to convert them by force to the Muslim religion.¹²⁷ Amor stated that all cases of abuse or rape against girls and women, especially those belonging to minorities, should be duly punished.¹²⁸ In Myanmar, the state reportedly practised a policy of intolerance and discrimination, notably against Christian minorities, which involved the conversion of children to Buddhism.¹²⁹ In Bangladesh, two under-age Hindu girls were reportedly kidnapped by Muslims and forced to sign promises that they would convert to Islam.¹³⁰ In Pakistan, in 2002, a Lahore High Court Justice reportedly ruled that a 14-year-old, who was allegedly kidnapped, gang-raped by Muslim militants and forcibly converted to Islam, had voluntarily married one of her aggressors, despite concrete evidence proving that she was under age and therefore unable to marry or convert to another faith without parental consent. At the initial hearing, the district judge had reportedly nullified the marriage on the basis that, as a minor, the girl was unable to marry without the consent of her parents.¹³¹ In Sudan, Nubian children were reported to have been taken from their parents, held for a week in camps, and during this period the boys were reported to have been circumcised in a public ceremony.¹³² Also in Sudan, non-Muslim children were said to be kidnapped in the streets and forced to convert to the Muslim religion in Islamisation centres. Moreover, in the 'peace camps' created by the authorities in the southern states, non-Muslims, especially children, were reportedly subject to religious indoctrination and even circumcision and Arabisation of their names, and eventually forced into conversion to Islam. Those converted were then expected to become Muslim fighters in the jihad and were even used as

127 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Visit to Pakistan*, UN Doc. E/CN.4/1996/95/Add.1, paragraph 66 (1996): according to reports, the police did not proceed with the necessary investigations leading to the arrest of the perpetrators, while in some cases police officials were reported to be personally involved in rape cases.

128 *Ibid*, UN Doc. E/CN.4/1996/95/Add.1, paragraph 86 (1996).

129 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. A/53/279, paragraph 61 (1998); repeated in *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/1999/58, paragraph 81 (1999). Myanmar stated, without explanation, that the allegations of intolerance and discrimination against religious minorities were baseless and totally false (see both documents, respectively paragraphs 62 and 82).

130 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/58/296, paragraph 20 (2003).

131 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2003/66, paragraph 63 (2003).

132 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1994/79, paragraph 75 (1994).

slaves, according to non-governmental sources, although their reports were often inconsistent.¹³³ It had also been reported that teachers in Saudi Arabia tried to intimidate and coerce their Shiite pupils into converting to Wahhabism.¹³⁴

Jahangir described forced conversions as ‘unacceptable’,¹³⁵ and as ‘one of the most serious forms of violation of the right to freedom of religion or belief’.¹³⁶ Regarding missionary activities, she stated that they cannot be considered a violation of the freedom of religion or belief of others if all involved parties are adults able to reason on their own and if there is no relation of dependency or hierarchy between the missionaries and the objects of the missionary activities.¹³⁷ She sent two communications to Indonesia stating that Christian organisations had been accused by Muslims of trying to convert children to the Christian faith, but she made no comment on the relationship between missionaries and children.¹³⁸ A case also arose in Bangladesh, where it was reported that a 14-year-old Hindu girl was abducted by Muslims, apparently married one of the men and converted to Islam. The Rapporteur required more information and linked her response to Article 18(2) ICCPR on the prohibition of coercion, Article 5(1) of the 1981 Declaration and Article 14(2) of the UNCRC on parental rights and the upbringing of children.¹³⁹

133 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Visit to Sudan*, UN Doc. A/51/542/Add.2, paragraphs 78 & 106 (1996). The authorities and the non-governmental observers consulted in an official context maintained that there was complete freedom of religion, excluding any discrimination or intolerance towards non-Muslims, in a context of coexistence between the Muslim and non-Muslim communities. They said several times that Islam was against enforced compliance of any kind and that accusations of Islamisation of the south, application of the Shariah to non-Muslims, circumcisions, forced or induced conversions and slavery were therefore quite unfounded (paragraph 79).

134 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1995/91, page 16 (1994).

135 OHCHR, ‘Build Space and Create Religious Tolerance – UN Expert, INTERVIEW – Asma Jahangir, Special Rapporteur on religious freedom or belief’ (Nr. 5 – MAY 2005), *Respect – The Human Rights Newsletter* – page 7, available at <<http://www.ohchr.org/english/about/publications/docs/issue5respect.pdf>> (last visited 17th April 2007).

136 A. Jahangir, *Civil and Political Rights, including the Question of Religious Intolerance*, UN Doc. E/CN.4/2005/61, page 2 (2004).

137 A. Jahangir, *Elimination of all Forms of Religious Intolerance*, UN Doc. A/60/399, paragraph 67 (2005).

138 A. Jahangir, *Civil and Political Rights, including the Question of Religious Intolerance*, UN Doc. E/CN.4/2006/5/Add.1, paragraphs 151-153 (2006).

139 A. Jahangir, *Report of the Special Rapporteur on freedom of religion or belief, Addendum: Summary of cases transmitted to Governments and replies received*, UN Doc. A/HRC/4/21/Add.1, paragraphs 39-42 (2007).

Forced conversions are linked to forced marriage, abduction, threats, denial or withdrawal of public services, forced circumcision and forced change of name. All three Rapporteurs are very clear on the issue of forced conversions. This may result in a claim against the state for its own actions or for failing to protect children against actions by third parties, such as members of religious communities.

Section 7

Religious practices

The three Rapporteurs tackle religious practices that have been targeted, regulated or banned altogether by the authorities. A number of these practices directly touch upon the lives of children, such as the circumcision of male infants, days of rest, baptisms, dress codes, prayers, religious pictures, and haircuts.

Ribeiro dealt with infringements of the right to have, to manifest and to practise the religion or belief of one's choice under Articles 1 and 6 of the Declaration. He stated that the freedom to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief, allowed the faithful to perform a series of ceremonies and religious customs that often have cultural and traditional connotations. Sometimes a conflict of interest was visible between religious and health requirements, particularly in the case of children. Thus, in one country, the courts decided in certain cases against ritual practices when the latter were believed to constitute a direct danger to children's lives.¹⁴⁰ Ribeiro linked the circumcision of male children or infants to Article 5 and the parents' right to bring up children in accordance with the religion or belief they had chosen.¹⁴¹ This had not always been allowed,¹⁴² for example in Bulgaria.¹⁴³ In Albania, a priest was allegedly executed for baptising a child in a labour camp at the parents' request, another

140 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1987/35, paragraph 57 (1986).

141 Ibid, UN Doc. E/CN.4/1987/35, paragraph 67 (1986).

142 Ibid, UN Doc. E/CN.4/1987/35, paragraph 67 (1986): 'In a certain country, for instance, parents belonging to a particular ethnic and religious community are forcibly prevented, in spite of their beliefs, from performing certain rites on their children, such as the circumcision of male children'.

143 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1988/45, page 4 (1988): 'Some Islamic practices have allegedly been penalized, especially the circumcision of male infants'. The Government replied: 'Circumcision is not prohibited in Bulgaria. On the contrary, it is practised and performed by qualified people at medical establishments in order to safeguard the health of those wishing to subject themselves to this operation. There is no discrimination whatsoever with regard to circumcised children in the educational establishments or outside them' (page 10). See also paragraphs 31 and 33 of the same document.

priest received a sentence termed ‘life until death’ for having baptised two newborn children,¹⁴⁴ and another was allegedly imprisoned after having baptised the child of a member of his family.¹⁴⁵ Yet, a year later, Ribeiro also noted that the higher number of baptisms given both to adults and children in Eastern Europe reflected the new climate of religious freedom.¹⁴⁶ He also referred to the failure of the authorities, in certain areas, to take account of religious requirements concerning days of rest.¹⁴⁷ In one country, ‘a petition was presented to the authorities to enable the members of a sect to be exempted from sitting for examinations on a certain week-day considered by their faith as a complete day of rest, to which the authorities agreed’.¹⁴⁸ Regarding dress codes, it was alleged in Iran that Armenian girls of the Christian faith were forced to attend school with an Islamic veil down to their waist.¹⁴⁹ On the other hand, a 12-year-old girl of Iraqi origin, a practising Muslim living in France, was refused access to a public school for wearing the headscarf. He noted that she wore the headscarf by personal religious conviction and that she had practised gymnastics at primary school while wearing the headscarf, without any problem.¹⁵⁰

Amor dealt with the regulation of baptisms, days of rest, dress codes, forced prayers, haircuts and religious pictures. He pointed out that a Serbian Orthodox bishop had reportedly been arrested and sentenced to five days in solitary confine-

144 Ibid, UN Doc. E/CN.4/1988/45, page 4 (1988).

145 A. Vidal d’Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1991/56, paragraph 36 (1991). The authorities replied that his name was not mentioned in the relevant records and that he was unknown (paragraph 37).

146 A. Vidal d’Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1992/52, paragraph 173 (1991).

147 A. Vidal d’Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1987/35, paragraph 57 (1986).

148 Ibid, UN Doc. E/CN.4/1987/35, paragraph 57 (1986).

149 A. Vidal d’Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1991/56, paragraph 69 (1991): ‘Starting with the academic year 1985-1986, it is alleged that parents were forced to sign papers promising not to allow their daughters to attend school without an Islamic veil, despite the fact that Armenian girls of Christian faith attended school wearing scarves covering their hair and neck. The Prelacy and Church protested, but it is reported that the girls had to give in and start wearing veils coming down their waist’.

150 A. Vidal d’Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1992/52, paragraph 38 (1991).

ment for attempting to perform a baptism on his nephew in a Macedonian Orthodox church.¹⁵¹

In addition, children are affected in relation to days off school.¹⁵² In Ukraine, ‘Seventh Day Adventists reportedly encounter difficulties in educational institutions in the case of examinations scheduled for the Sabbath’.¹⁵³ In Australia, the ‘Muslim representatives said that they had requested official recognition of religious days so that believers, i.e. adults in the workplace and young people in school, who so wished did not have to work on those days’, and he asked how requests by minorities could be reconciled with the concerns of the majority.¹⁵⁴ Similar problems arose in Romania for Seventh-day Adventists and Muslims, respectively on Saturdays and Fridays.¹⁵⁵ Amor only considers the issue from the perspective of education and minorities. He looks at, firstly, educational issues and the organisation of teaching, and secondly, at children as belonging to minorities and how reconciliation is possible between the majority and the minority. At no point does the Rapporteur appear

151 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2004/63, paragraph 48 (2004); repeated in A. Jahangir, *Civil and Political Rights, including the Question of Religious Intolerance*, UN Doc. E/CN.4/2005/61/Add.1, paragraph 241 (2005). See the reply that he could not perform religious ceremonies since he was no longer a priest (paragraph 249).

152 A. Amor, *Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UN Doc. A/CONF.189/PC.2/22, paragraph 84 (2001): ‘Examples relating to the organization of teaching are also worthy of note. First, there is the thorny question of weekly restdays, which poses a particularly acute problem in multi-denominational classes. Do pupils not belonging to the majority religious group have the right to a holiday on the day celebrated as a holiday by their religion? Admittedly, the organization of differentiated restdays poses serious problems, particularly when there is a great religious diversity in one and the same school’.

153 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2000/65, paragraph 98 (2000).

154 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Visit to Australia*, UN Doc. E/CN.4/1998/6/Add.1, paragraph 37 (1997). Also, ‘Questions are sometimes asked about ... recognition of Muslim religious days in school’ (paragraph 44).

155 A. Amor, *Civil and Political Rights, including the Question of Religious Intolerance: Visit to Romania*, UN Doc. E/CN.4/2004/63/Add.2, paragraph 57 (2003): ‘Several religious minorities described to the Special Rapporteur the problems they had encountered because of their religious traditions or practices. Seventh-Day Adventists explained how they had been faced with a situation in which children from their community had been told they had to sit school exams on a Saturday, which is their day of prayer. The Supreme Court finally found in their favour in 1999 and they had had no such problems since then. Members of the Muslim community, meanwhile, explained to the Special Rapporteur that although there were no official rules concerning their day of prayer, many of them managed to come to some kind of arrangement on a case-by-case basis’.

to look at the issue from a religious freedom perspective and at the right of children to be exempted from school on a certain day for religious reasons.

Whilst the issue of religious clothing and distinctive symbols is addressed in one instance, this was related to the organisation of teaching and to ‘the observation of certain religious rites or dress codes by some pupils in multi-denominational classes’.¹⁵⁶ He ties in prejudicial practices with the freedom to wear or not to wear distinctive symbols referring to a religion, amongst other practices.¹⁵⁷ He particularly highlights problems in Iran,¹⁵⁸ Algeria,¹⁵⁹ and Kyrgyzstan.¹⁶⁰

Amor has also referred to instances involving children and prayers; for example, in one monastery in Myanmar, ‘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’.¹⁶¹ Amor considered this to be a violation of freedom of thought,

156 A. Amor, *Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UN Doc. A/CONF.189/PC.2/22, paragraph 84 (2001).

157 A. Amor, *Civil and Political Rights, including Religious Intolerance: Study on the Freedom of Religion or Belief and the Status of Women from the Viewpoint of Religion and Traditions*, UN Doc. E/CN.4/2002/73/Add.2, paragraph 73 (2002).

158 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Visit to the Islamic Republic of Iran*, UN Doc. E/CN.4/1996/95/Add.2, paragraph 42 (1996). The Rapporteur said: ‘With regard to the dress code, the Special Rapporteur emphasizes that the various community traditions and behaviour concerning dress should not be turned into a political instrument and that flexible and tolerant attitudes should be shown so that the richness and variety of Iranian dress can be manifested without coercion. In particular, in the field of education, and especially in minority schools, the Special Rapporteur recommends freedom of dress on the understanding that this should obviously not be exercised in a manner contrary to its purposes’ (paragraph 97).

159 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1995/91, page 10 (1994): ‘It is further alleged that women are being threatened so as to make them respect the Islamic dress code and that a growing number of women have been killed in attacks by Islamists. Katia BENGHANA, a 17-year-old high school student, is said to have been shot to death at Blida on 28 February 1994 after being threatened for failing to wear the hijab (Islamic scarf)’.

160 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/58/296, paragraph 73 (2003): ‘In a communication dated 22 May 2003, the Special Rapporteur transmitted information that Muslim girls had been called before the school principal because they were veiled. Their religious books had been confiscated and they had been threatened with expulsion if they continued to wear the veil. In the town of Bazar-Kurgan, Muslim students had reportedly been beaten by their teacher for practicing Islam’.

161 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/52/477, paragraph 33 (1997); repeated in A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1996/95/Add.2, paragraph 42 (1996).

conscience and religion or belief. In Bhutan, ‘Buddhism is said to enjoy preferential status. In the schools, the practice of this religion is reportedly compulsory for all, on pain of sanctions’.¹⁶² In India, a young Dalit girl had allegedly been thrown into a well by three men for praying in a temple.¹⁶³

Regarding haircuts and religious pictures, Native American children in America have been asked in certain schools to cut their hair,¹⁶⁴ and Amor tied this in with discrimination and intolerance in the field of religion.¹⁶⁵ In addition, a teacher in Cuba had reportedly prohibited her students from bringing religious pictures to class.¹⁶⁶

Jahangir has dealt with the issue of religious symbols at length. To start with, she referred to a 2004 law in France that prohibits state school students from wearing clothing and insignia that conspicuously manifest a religious affiliation.¹⁶⁷ In addition to various criticisms concerning the compatibility of this law with international law and in particular freedom of religion or belief, and its potentially discriminatory

nation of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UN Doc. E/CN.4/1998/6, paragraph 62 (1998).

- 162 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. A/53/279, paragraph 43 (1998); the government explained that religious instruction and practice were not part of the curriculum except in monastic schools, and that a prayer to the Goddess of Wisdom, who is common to both Buddhism and Hinduism, was recited each morning in all schools and that evening prayers were recited in boarding schools at the secondary level. The Government stated that these prayers had not posed any problem (paragraph 44). Allegations repeated in A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/1999/58, paragraph 44 (1999), and reply of the Government paragraph 45.
- 163 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2004/63, paragraph 60 (2004).
- 164 A. Amor, *Civil and Political Rights, including Freedom of Expression: Visit to the United States of America*, UN Doc. E/CN.4/1999/58/Add.1, paragraph 66 (1998).
- 165 *Ibid*, UN Doc. E/CN.4/1999/58/Add.1, paragraph 85 (1998).
- 166 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/56/253, paragraph 32 (2001). Cuba replied that the allegations were a fabrication and that it was “impossible for students to be punished for bringing to class symbols, emblems or other distinctive signs, expressing of the freedom of religion or conviction they enjoyed” (paragraph 33).
- 167 Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics (J.O n° 65 du 17 mars 2004, page 5190) – Law n° 2004-228 (15th March 2004) prohibiting children in public schools from wearing clothing and insignia that ‘conspicuously manifest a religious affiliation’ (Official Journal n° 65, 17th March 2004, page 5190). See chapter 4, section 2.3.1 for more information on the law.

character, she said that school could not seriously be dissociated from society.¹⁶⁸ The Rapporteur acknowledged the Concluding Observations of the UN Committee on the Rights of the child on the second periodic report of France which, regarding the 2004 law, was concerned by the alleged rise in discrimination, the neglect of the principle of the best interests of the Child, and the right of the child to have access to education.¹⁶⁹ She pointed out that Muslim girls were disproportionately affected, that the Sikh community was also concerned by the law, and that there were feelings of oppression.¹⁷⁰ Jahangir also said: ‘The law is appropriate insofar as it is intended, in accordance with the principle of the best interests of the child, to protect the autonomy of minors who may be pressured or forced to wear a headscarf or other religious symbols. However, the law denies the right of those minors who have freely chosen to wear a religious symbol to school as part of their religious belief’.¹⁷¹

Eva Brems makes three observations about the Special Rapporteur’s approach. First, Jahangir starts from the perspective of women and girls’ right to wear the headscarf but she does not refer to other school pupils. Second, ‘the advantage of being outside a court setting is that broader policy issues may be taken into account, such as in this case the problem of stigmatization and religious intolerance’. Third, Jahangir’s approach is different to that of the European Court of Human Rights in that she considers that ‘headscarf bans may lead to radicalization among French Muslims, especially as the bans are sometimes implemented in an abusive manner’, whereas the Court rather sees the threat of fundamentalism in Turkey as a reason to justify the ban.¹⁷²

Jahangir has also considered the issue more generally, for example, pupils in primary and secondary schools run the risk of being expelled from the public school

168 A. Jahangir, *Civil and Political Rights, including the Question of Religious Intolerance*, UN Doc. E/CN.4/2005/61/Add.1, paragraphs 110-113, especially 113 (2005). See the reply of the French government (paragraphs 114-121).

169 A. Jahangir, *Civil and Political Rights, including the Question of Religious Intolerance*, UN Doc. E/CN.4/2006/5, paragraph 46 (2006): reference to reference to UN Committee on the Rights of the Child, *Concluding Observations: France*, UN Doc. CRC/C/15/Add.240, paragraphs 25-26 (2004).

170 A. Jahangir, *Civil and Political Rights, including the Question of Religious Intolerance: Mission to France*, UN Doc. E/CN.4/2006/5/Add.4, paragraphs 47-72 (2006).

171 *Ibid.*, UN Doc. E/CN.4/2006/5/Add.4, paragraph 99 (2006). Jahangir made the same statement in *Elimination of all forms of religious intolerance*, UN Doc. A/61/340, paragraph 62 (2006), and added that legislation which imposes dress codes on women or men on religious grounds is also in clear violation of the right to freedom of religion or belief and the principle of the 1981 Declaration (paragraph 63). See also *Report of the Special Rapporteur on freedom of religion or belief to the Human Rights Council*, UN Doc. A/HRC/4/21, paragraph 36 (2006).

172 E. Brems, ‘Above Children’s Heads The Headscarf Controversy in European Schools from the Perspective of Children’s Rights’ (2006) 14(2) *International Journal of Children’s Rights* 119-136, at 128.

system, and they may invoke their right to education. Furthermore, the rights of parents or legal guardians to organise life within the family in accordance with their religion or belief and bearing in mind the moral education which they believe should inform the child's upbringing may also be at stake under Article 5(1).¹⁷³

Jahangir also considered restrictions on the freedom to wear religious symbols, and children may have to be protected against others. Schoolchildren are generally considered vulnerable in view of their age, immaturity and the compulsory nature of education. In addition, parental rights are put forward as justification for limiting teachers' positive freedom to manifest their religion or belief. In all actions concerning children, the best interests of the child shall be the primary consideration. University students, however, have normally reached the age of majority and are generally considered to be less easily influenced than schoolchildren, and parental rights are usually no longer involved.¹⁷⁴ In addition, she also considered the right of children not to wear a religious symbol or not to comply with a dress code,¹⁷⁵ and the pressure of women and girls in Iraq, including non-Muslims, to wear a veil or headscarf and to wear the traditional abaya.¹⁷⁶

The three Rapporteurs are consistent in their analysis, and they protect the rights of individuals to act in accordance with their religious beliefs. In particular, they emphasise religious practices and what is characteristic of belonging to a religious community or religious minority.

Section 8 Persecution

Lastly, the three Rapporteurs have highlighted a high number of cases involving the persecution, harassment, and arrests of religious believers by the authorities, or clashes between believers or religious communities, in which children are often incidental victims.

Ribeiro reported that during a police raid on one village in China, several hundred Catholic villagers were severely beaten by the police, that children allegedly suffered serious injuries and that two youths died following the incident.¹⁷⁷ In Ethio-

173 A. Jahangir, *Civil and Political Rights, including the Question of Religious Intolerance*, UN Doc. E/CN.4/2006/5, paragraphs 39 & 52 (2006).

174 Ibid, UN Doc. E/CN.4/2006/5, paragraph 56 (2006).

175 Ibid, UN Doc. E/CN.4/2006/5, paragraph 39 (2006); *Report of the Special Rapporteur on freedom of religion or belief, Addendum: Mission to the Maldives*, UN Doc. A/HRC/4/21/Add.3, paragraph 52 (2007).

176 A. Jahangir, *Civil and Political Rights, including the Question of Religious Intolerance*, UN Doc. E/CN.4/2006/5/Add.1, paragraph 212 (2006).

177 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1990/46, paragraph 36 (1990): 'It has been reported that several hundred Catho-

pia, it was reported that Amhara Ethiopian citizens who belonged to the Orthodox Christian faith, including children, were subjected to persecution in the Arba Gugu region involving numerous cases of summary executions.¹⁷⁸ Ribeiro mentioned that Nepalese citizens of Christian faith and alien Christians, including children, suffered ill-treatment and discrimination, were detained without formal charges, beaten up, were ordered to sign confessions and asked to recant their faith.¹⁷⁹ In Pakistan, a 16-year-old Ahmadi was reportedly captured, beaten, accused of proselytism and imprisoned.¹⁸⁰ In Burundi, the persecution of Jehovah's Witnesses continued and the most recent acts of violence were said to include the arrest and beating up of two secondary school students and a young girl.¹⁸¹ He also mentioned the ill-treatment of Muslims of all ages, including children, used as porters in Myanmar.¹⁸²

Amor pointed out that in Pakistan, on 25th December 2002, two masked men were said to have thrown an explosive device into a Presbyterian church in Chianwali during a children's Christmas service. Three children were reportedly killed and 16 other children and adults were wounded.¹⁸³ In Iran, 17-year-old boys and girls in a Baha'i class were allegedly arrested by the police and released after several hours of interrogation.¹⁸⁴ In Kazakhstan, Baptists were declared to be a 'dangerous cult' and children were taken away from their parents.¹⁸⁵ He said that Reverend Bitrus

lic villagers were severely beaten by police on 18 April 1989 during a police raid on the village of Youtong, in Luancheng district, Hebei province. Over 300 of them, including old people and children, were allegedly injured during the raid. Eighty-eight allegedly suffered serious injuries and two youths are reported to have died following the incident. In addition, 32 persons are reported to have been taken away by police and are believed to be detained'.

178 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1993/62, paragraph 29 (1993); repeated in A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1994/79, paragraph 48 (1994).

179 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1991/56, paragraph 79 (1991); notably, convictions for having converted to Christianity or for propagating it.

180 Ibid, UN Doc. E/CN.4/1991/56, paragraph 81 (1991).

181 Ibid, UN Doc. E/CN.4/1991/56, paragraph 45 (1991).

182 A. Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1993/62, paragraph 45 (1993).

183 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/58/296, paragraph 84 (2003).

184 Ibid, UN Doc. A/58/296, paragraph 59 (2003).

185 Ibid, UN Doc. A/58/296, paragraph 67 (2003): 'For example, on 8 September 2002, members of the National Security Committee are said to have raided the apartment of

Manjang of the Church of Christ in Nigeria was reportedly gunned down along with his son, his daughter-in-law and a six-month-old child in front of his home in Rim, Plateau State.¹⁸⁶ In Sri Lanka, two Seventh-day Adventists, a pastor and his son, were reportedly arrested and were said to have been detained since then on the basis of apparently unjustified suspicion of involvement in terrorist activities.¹⁸⁷ In China, Amor referred to the case of Catholics that were reportedly compelled, after having been kept in detention for several days, to sign Catholic Patriotic Association membership forms while the police reportedly threatened to have their children expelled from school if they refused.¹⁸⁸ In Pakistan, five ahmadiyah, including a child, were reportedly killed by unidentified armed men while they were leaving a mosque after morning prayers in the village.¹⁸⁹ In Nigeria, people were injured in clashes between Christian and Muslim students at a secondary school.¹⁹⁰ In India, he referred to allegations of acts of vandalism in Mumbai in June 1999 by members of Shiv Sena against Sacred Heart School, apparently in order to disrupt Christian activities on behalf of children.¹⁹¹ He alludes to the attacks led by Bassilists in Geor-

a Baptist pastor, Kormangazy Abduratov, during a bible study meeting. Although the authorities have reportedly refused to permit the registration of this church, the security forces accused it of not being registered and took several participants in the meeting away for interrogation. These events were filmed and subsequently broadcast on television with comments that the Baptists were a “dangerous cult” and took children away from their parents’.

186 Ibid, UN Doc. A/58/296, paragraph 81 (2003).

187 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/54/386, paragraph 37 (1999): ‘Two Seventh Day Adventists, including a pastor and pastor’s son, were reportedly arrested in 1998 and are said to have been detained since then on the basis of apparently unjustified suspicion of involvement in terrorist activities. The Special Rapporteur would like to receive the views and comments of the Government of Sri Lanka as soon as possible’.

188 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/55/280, paragraph 15 (2000).

189 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2001/63, paragraph 75 (2001).

190 A. Amor, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/1995/91, page 65 (1994): ‘The Special Rapporteur has been informed that nearly 65 people were injured in clashes between Christian and Muslim students at a secondary school in Kano, capital of the State of Kano, on 9 February 1994. The clashes allegedly broke out after a heated argument between extremist and moderate Muslim students about the importance of participating in prayer. The incidents allegedly occurred when a Christian student joined in the discussion to defend one of his Muslim schoolmates who was being accused of not performing his religious duties’.

191 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2000/65, paragraph 47 (2000).

gia (followers of the teaching of a priest excommunicated by the Georgian Orthodox Church) against Jehovah's Witnesses, including women and children, during religious services.¹⁹² One instance in Indonesia involved the attack of a Christian village by 500 Muslim extremists, where clashes are said to have caused the deaths of 127 Christians (including women and children) and eight Muslims.¹⁹³ Similarly, it was reported that violent confrontations apparently took place between young members of the Christian and Muslim communities in Kenya.¹⁹⁴ In Bangladesh, it was alleged that religious minorities, especially the Hindus, were the victims of repeated attacks and that more than 100 Hindu girls had been abducted and/or raped.¹⁹⁵ Amor said in 2003: 'Stressing that women and children are still too often the victims of acts of discrimination and religious violence, the Special Rapporteur is particularly concerned at the sometimes negative role played by the press in the spread of religious intolerance. The media continue to promote an often incorrect, negative image of certain religious groups and have sometimes incited hatred of many such groups, including Muslims'.¹⁹⁶

Jahangir pointed out that in Iran, the entire family of a Christian leader was taken into custody.¹⁹⁷ Finally, the police reportedly raided a Baptist service in Bal-

192 A. Amor, *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2001/63, paragraph 42 (2001). See the government's reply and other allegations paragraphs 43-48.

193 Ibid, UN Doc. E/CN.4/2001/63, paragraph 75 (2001). In *Civil and Political Rights, including Religious Intolerance*, UN Doc. E/CN.4/2003/66, paragraph 43 (2003), there were reports of other clashes between Muslims and Christians, which led to violence against Christians and the deaths of a number of people, including a baby.

194 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/56/253, paragraph 48 (2001): 'The incidents are said to have broken out after Muslim adolescents destroyed some wooden kiosks that were considered to be too close to a mosque. A church and a clinic were reportedly burned down and the International Christian Centre and two other churches were damaged. Twenty-eight people are said to have been hurt, including the Archbishop, David Gitari. It is claimed that the police took no action'. See government's reply paragraph 49.

195 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/57/274, paragraph 17 (2002).

196 A. Amor, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/58/296, paragraph 138 (2003).

197 A. Jahangir, *Civil and Political Rights, including the Question of Religious Intolerance*, UN Doc. E/CN.4/2005/61/Add.1, paragraph 138 (2005): 'On 14 June 2004, the Special Rapporteur sent a communication in relation to information according to which on 23 May 2004, the Iranian police arrested Khosroo Yusefi, a Protestant pastor, along with his wife Nasrin and two teenage children, an 18-year-old son and a daughter aged 15. The arrests allegedly took place in Chalous, a town on the Caspian Sea coast in northern Iran. The family reportedly remained imprisoned without known charges. Reportedly, dozens of members from two of Pastor Yusefi's church groups were jailed in the first week of

kanabad (Turkmenistan). Everyone present was brought to a police station, accused of breaking the new religion law by worshipping without state registration, and some members were subsequently given fines. One woman was reportedly threatened that her children would be taken from her and put in a children's home.¹⁹⁸ Jahangir related the case of more than 80 adults and children of the Huichol indigenous community who had converted to the Christian gospel and were expelled from their houses. It was suggested that if the government did not intervene, the 18 families would have to find somewhere else to survive until the end of the school year. It was also said that the State Commission on Human Rights of the State of Jalisco had looked at the request under the violation of right to education of the evangelical children.¹⁹⁹ In China, there had been many cases of arrests of Christians, including a woman with her three children.²⁰⁰

Children are considered as part of a family, a religious community or minority, but not in their own right. The allegations that are sent to the Rapporteurs concern the persecution of groups of people, rather than the persecution of children themselves.

Section 9

Beyond the current approach

Despite the above, a number of issues have not been addressed by the Rapporteurs. It is thus necessary to consider how they might react if they had more cases concerning children before them. In particular, it is essential to look at whether they might be sensitive to the child dimension of the cases if they had a child applicant.

Firstly, there is the issue of choice of religion. For example, at what age should children be able to choose their religion, or able to join the religious community of their choice? This is an issue that has only been addressed briefly by Jahangir. Considering what she said on children who come of age, the Rapporteurs might grant the claim of a child who has come of age and wants to choose their religion, place of worship, or have their participatory rights taken into account. However, in the light of the importance given to parental rights, the claim of a young child is unlikely to be granted.

Secondly, there is the issue of ceremonies and religious practices. Do children have a say in the matter and do they have a right not to participate in ceremonies and religious practices? The Rapporteurs are unlikely to grant the claim of a small child. Yet considering what Jahangir said about freedom of choice, they might grant the claim of a child who has come of age, and an older child should be able to get pro-

May and later released. However, the arrest of 23 May allegedly marked the first time that the entire family of a Christian leader had been taken into custody'.

198 Ibid, UN Doc. E/CN.4/2005/61/Add.1, paragraph 264 (2005).

199 Ibid, UN Doc. E/CN.4/2005/61/Add.1, paragraphs 167-168 (2005).

200 A. Jahangir, *Civil and Political Rights, including the Question of Religious Intolerance*, UN Doc. E/CN.4/2006/5/Add.1, paragraph 83 (2006).

tection from the state. In addition, the issue of religious clothing imposed by parents has not been addressed by the Rapporteurs (who have focused on religious clothing imposed or prohibited by the state or by schools), and it is likely that they might address the issue in the same way as other religious practices. As for proselytism by the child, it is likely that the Rapporteurs might accept the child's claim, in the light of the importance given to religious practices.

Thirdly, there is the issue of conscientious objection. Does a child have a right not to perform certain 'neutral' acts because of their religious beliefs? In the light of the importance given to the transmission of parental beliefs to children and the prevention of forced assimilation, the Rapporteurs might grant the claim of a child applicant. To take the child dimension of the case into account, the Rapporteurs would have to consider parental beliefs for a young child, and the personal beliefs of a child who has come of age.

Fourthly, there is the issue of the proselytism of the child. Does the child have a right to be protected against the religious beliefs of others? It is likely that a child of any age has rights against the state to be protected against proselytism that threatens the child's right to religious freedom and nurture. The extent of protection might depend on the nature of the proselytism though, and it is possible that the Rapporteurs grant the claim of a young child more easily than the claim of a child who has come of age. In addition, does the child have a right to be told about other religions? According to Amor's view of education, the child should certainly be taught about religions in 'a spirit of tolerance'.

Fifthly, there is the issue of education. For example, does the child have a right to withdraw from religious education classes against parental wishes? As there has been so much emphasis given to parental rights in education, it is unclear what the Rapporteurs might do. It is possible that they might adopt the same approach as for ceremonies and religious practices. On the one hand, if they did not accept the claim of a child who has come of age then the child dimension might be ignored. On the other hand, it is unlikely that they might grant the claim of a young child, which seems correct. In addition, what about states which try to impose a policy of religious neutrality on schools and parents, in respect of children, in the name of freedom or equality? It would be a problem if Amor's approach was developed too far, as it is probable that he would emphasise religious neutrality and the protection of children. Otherwise, this does not seem to be a problem for Ribeiro and Jahangir. Moreover, considering that every Rapporteur emphasises the importance of the transmission of parental beliefs and religious beliefs in a religious community or minority, it is likely that the Rapporteurs might take the child dimension into account, and grant a parents' claim on behalf of their young child, and perhaps on behalf of an older child too.

Finally, there is the issue of the transmission of the parents' religious beliefs to their children. For example, do children have a right to be brought up in their parents' religion? The three Rapporteurs stress parental rights during their mandate, but never the child's rights. It is unclear what the Rapporteurs might say, but at least they would emphasise the child as part of a religious community or minority. They

would not take the child dimension into account if they did not accept the claim of a child applicant that they have a right to be brought up in their parents' religion, and this may also be applicable to specific issues such as custody.

Section 10 Conclusion

It is essential to bear in mind the nature of the working methods of the Rapporteurs when considering how they handle cases involving children. Clearly the approach of the three Rapporteurs varies over the years. For example, Ribeiro emphasises Article 5 and parental rights. Yet the Declaration has hardly been used by Amor, and Jahangir now uses other sources on freedom of religion or belief, such as Article 18 ICCPR or General Comment 22.

There are two main problems with the Rapporteurs' approach. Firstly, Amor had a specific view of education, which has some bearing on the relationship between education and religion. Amor strongly emphasised education during the time of his mandate, which can be seen in communications to states, the questionnaire on education sent to states and the 2001 Madrid Conference. He had a peculiar view of education, and really emphasised education in tolerance and non-discrimination. There was so much emphasis on the issue that it detracted attention from other violations of religious freedom. In addition, Amor appeared to think that religions can be intolerant in and of themselves and have negative influences, which revealed an impoverished understanding of religious freedom and slightly denatures the right itself. Whilst this may be understandable, it does create tensions, and it may be dangerous for parental rights. Secondly, the issue of children who have come of age has not really been addressed by the Rapporteurs, and there is little on the child's relationship with society, i.e. on the child as an independent actor. However, this is a problem because children come of age at some point, and this should be reflected in their right to religious freedom.

On the whole, there is no direct emphasis on the right of the child to religious freedom. Children are considered as belonging to a religious community, a group or a religious minority, rather than in their own right. It is true that it does not exactly reflect an independent right of the child to religious freedom. Some questions and issues do not emerge from the work of the Rapporteurs yet, it is likely that they could be built upon in the future. On the whole, this seems correct, and it reflects the child dimension of the right of the child to religious freedom, which is to grow as an independent autonomous actor in the matrix of parents, religious community and society. If the Rapporteurs had more cases concerning children, it is likely that they might take account of the child dimension in most cases. In particular, it is probable that they might accept most claims brought by children who have come of age, whereas at the same time protecting parental rights and the transmission of religious beliefs to both young and older children. On the whole then, the Rapporteurs' approach is defensible, and it reflects quite well what the right of the child to religious freedom should look like.

Chapter 6

The ECHR

Section 1 Introduction

This chapter examines the approach of the European Court of Human Rights (the Court) to the right of the child to religious freedom, mostly under Article 9 of the European Convention of Human Rights (the Convention).¹ Article 9 is not the only article dealing with religious freedom, and Article 2 of Protocol 1 (P1-2) comes into play. Under Article 9, the scheme of protection of religious freedom is deceptively simple. The first limb of Article 9(1) provides for an absolute right to freedom of thought, conscience and religion, whereas the second limb of the article adds a qualified right to manifest one's religion or beliefs. Article 9(2) specifies that restrictions are possible, under some circumstances, to freedom of manifestation. Article 9 provides:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Finally, P1-2 deals with parental religious and philosophical convictions in relation to education and teaching:

1 For a good analysis of the weak protection given by the Court to Article 9, and 'the inability of the Court to put its finger on quite why religious freedom is valued in the first place', see T. Lewis, 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56(1) ICLQ 395-414.

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

Article 9 applies to ‘everyone’, including children. It is necessary to consider the general approach of the Court to religious freedom, and see what differences it makes in the context of children. Considering that the right of the child to religious freedom is the right of every child to be unhindered in their growth as an independent autonomous actor in the matrix of parents, religious community and society, it will be shown that the approach of the Court is not satisfactory because it usually fails to take the child dimension of the cases into account. The Court has an understanding of religion and belief that is tailored to an adult set of beliefs, the Court ignores children when they are applicants, and silences them when they are directly or incidentally affected. Considering the Court’s approach, it is possible to adopt a rather pessimistic view on how the Court is likely to respond to future cases concerning children.

Section 2 Scheme of protection

1 Introduction

In order to understand the range of beliefs that qualify for protection under Article 9, it is necessary to understand the Court’s approach to the application of what amounts to a religion or a belief. The meaning and scope of application of Article 9(1) has been frequently discussed in the past,² yet rarely in relation to children. This section will show that the Court has an understanding of religion and belief that is tailored to an adult set of beliefs.

2 Article 9 caselaw

Not all forms of belief are covered by Article 9(1), although the European Commission of Human Rights (the Commission) and the Court have been fairly generous in their approach. Although the Commission and the Court have not defined the concept of religion or belief, vague notions are not enough, and some basic level of coherence must be satisfied. In *Arrowsmith v the United Kingdom*,³ the Commission

2 M.D. Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997), at 284-293; G. Gonzalez, *La Convention Européenne des Droits de l’Homme et la Liberté des Religions* (Paris: Economica, 1997), at 39-63; C. Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001), at 51-66.

3 *Arrowsmith v the United Kingdom*, Commission, Application 7050/75, 19 DR 5 (1978).

accepted that freedom of manifestation extended to non-religious beliefs (pacifism in this case) but it was to be understood that not all ideas or views can fall into the notion of ‘belief’. Also, in *Campbell and Cosans v the United Kingdom*,⁴ in the context of P1-2, the Court equated the word ‘conviction’ with ‘belief’ and said that a belief was not synonymous with the words ‘opinions’ or ‘ideas’. The belief in question had to ‘attain a certain level of cogency, seriousness, cohesion or importance’,⁵ and any views require more than firmness.⁶ However, Carolyn Evans criticised this test for being ‘relatively unsophisticated’, and she argued that religion is not merely a set of intellectual propositions but may have moral, ethical, supernatural, communal or symbolic role in people’s lives.⁷

The Commission and the Court have accepted claims brought under Article 9 regarding Jehovah’s Witnesses,⁸ Christianity,⁹ Islam,¹⁰ and veganism.¹¹ It has dismissed claims regarding Quakerism,¹² Hinduism,¹³ Judaism,¹⁴ a number of new reli-

4 *Campbell and Cosans v the United Kingdom*, Court, Applications 7511/76-7743/76 (1982).

5 *Ibid*, at paragraph 36.

6 *Pretty v the United Kingdom*, Court, Application 2346/02 (2002), paragraph 82. The Court stated that the firmness of the applicant’s views concerning assisted suicide were not in doubt but that not all opinions or convictions constituted beliefs in the sense protected by Article 9(1).

7 C. Evans, *Freedom of Religion under the European Convention on Human Rights*, at 65-66.

8 *Kokkinakis v Greece*, Court, Application 14307/88 (1993); *Larissis and others v Greece*, Court, Applications 23372/94-26377/94-26378/94 (1998); *Manoussakis v Greece*, Court, Application 18748/92 (1996); *Christian Federation Jehovah’s Witnesses in France v France*, Court, Application 53430/99 (2001).

9 *Cyprus v Turkey*, Court, Application 25781/94 (2001); *Metropolitan Church of Bessarabia and others v Moldova*, Court, Application 45701/99 (2001); *Greco-Catholic Parish Sâmbăta Bihor v Romania*, Court, Application 48107/99 (2004); *Moscow Branch of the Salvation Army v Russia*, Court, Application 72881/01 (2004).

10 *Serif v Greece*, Court, Application 38178/97 (1999); *Hasan and Chaush v Bulgaria*, Court, Application 30985/96 (2000); *Agga v Greece (n° 2)*, Court, Applications 50776/99-52912/99 (2002); *Supreme Holy Council of the Muslim Community v Bulgaria*, Court, Application 39023/97 (2004).

11 *C.W. v the United Kingdom*, Commission, Application 18187/91 (1993). However it went on to dismiss the case.

12 *C v the United Kingdom*, Commission, Application 10358/83, 37 DR 142 (1983).

13 *ISKCON and others v the United Kingdom*, Commission, Application 20490/92, 76-A DR 90 (1994).

14 *Cha’are Shalom Ve Tsedek v France*, Court, Application 27417/95 (2000).

Chapter 6

gious movements (NRMs),¹⁵ beliefs in assisted suicide,¹⁶ disciplinary reprimands,¹⁷ environmentalist/ecological beliefs,¹⁸ druidism,¹⁹ atheism,²⁰ agnosticism,²¹ opposition to abortion,²² Buddhism,²³ Scientologists,²⁴ Moonies,²⁵ freethinkers,²⁶ and political propaganda.²⁷

In addition, the Court has dealt with the ‘political’ manifestation of sharia law in *Refah Partisi (The Welfare Party) and others v Turkey*:

sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it... the introduction of sharia [is] difficult to reconcile with the fundamental principles of democracy... It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts... In the Court’s view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded

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- 15 *Omkarananda and Divine Light Zentrum v Switzerland*, Commission, Application 8118/77, 25 DR 105 (1981).
 - 16 *Sanlés Sanlés v Spain*, Court, Application 48335/99 (2000); *Pretty v the United Kingdom*.
 - 17 *Cserjés v Hungary*, Court, Application 45599/99 (2001).
 - 18 *Chassagnou and Others v France*, Court, Applications 25088/94-28331/95-28443/95 (1999).
 - 19 *A.R.M. Chapell v the United Kingdom*, Commission, Application 12587/86, 53 DR 241 (1987); *Arthur U. Pendragon v the United Kingdom*, Commission, Application 31416/96 (1998).
 - 20 *Lena and Anna-Nina Angelini v Sweden*, Commission, Application 10491/83, 52 DR 41 (1986); *Zenon Bernard and Others v Luxembourg*, Commission, Application 17187/90, 75 DR 57 (1993).
 - 21 *C.J., J.J. and E.J. v Poland*, Commission, Application 23380/94, 84-A DR 46 (1996).
 - 22 *Borre Arnold Knudsen v Norway*, Commission, Application 11045/84, 42 DR 247 (1985).
 - 23 *X v Austria*, Commission, Application 1753/63, 16 Collections 20 (1965); *X v the United Kingdom*, Commission, Application 5442/72, 1 DR 41 (1974).
 - 24 *X and the Church of Scientology v Sweden*, Commission, Application 7805/77, 16 DR 68 (1979); *Church of Scientology and 128 of its Members v Sweden*, Commission, Application 8282/78, 21 DR 109 (1980).
 - 25 *X v Austria*, Commission, Application 8652/79, 26 DR 89 (1981).
 - 26 *Kustannus Oy Vapaa Ajattelijä Ab and Others v Finland*, Commission, Application 20471/92, 85-A DR 29 (1996).
 - 27 *Zaoui v Switzerland*, Court, Application 41615/98 (2001).

as an association complying with the democratic ideal that underlies the whole of the Convention.²⁸

It appears then that there is a substantive exclusionary test for some religions and beliefs which do not comply with the Court's understanding of democracy of human rights. In the future, this might have some implications for religious beliefs which are based upon revealed scripture.²⁹

Article 9 does not protect the manifestation of every aspect of a person's conscience but embraces only those manifestations which are based upon the range of beliefs that are held to be akin to religious convictions. The distinction is vital since it is the key to distinguishing between the forms of belief which give rise to the freedom of manifestation and those which do not.³⁰ More importantly, some forms of religion or belief will not be protected by Article 9 if they do not respect democracy.

3 Application to children

It has been shown what the caselaw requires in terms of cogency or seriousness. A number of religions and beliefs have been considered under Article 9, and there are some general limitations concerning the acceptability of some forms of religion or belief. The question that faces the Court is how this caselaw applies to children. An analysis of the right of the child to religious freedom needs to take into account what it means for a child to be religious. This section will show that the Commission and Court have an understanding of religion and belief that is tailored to an adult set of beliefs, which does not reflect how children engage with religion and belief.

Firstly, the *Campbell and Cosans* test requires the belief in question to 'attain a certain level of cogency, seriousness, cohesion or importance'. This emphasises religion as a defined set of beliefs,³¹ and this appeals to adults. Thus, '*Belief*' religion typically emphasizes the importance of individuals having a proper understanding

28 *Refah Partisi (The Welfare Party) and Others v Turkey*, Court, Applications 41340/98-41342/98-41343/98-41344/98 (2003), paragraph 123.

29 M.D. Evans, 'Believing in Communities, European Style' in N. Ghanea (ed.), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Leiden/Boston: Martinus Nijhoff Publishers, 2004), 133-155, at 153. In *Kalifatstaat v Germany*, Application 13828/04 (2006), the Court considered the dissolution of an Islamic religious community under Article 11. The Court accepted the arguments of Germany that the community rejected democracy and the rule of law. The community also wanted to install a regime based on the sharia, which was not in accordance with the principles of democracy under the Convention. Accordingly, the dissolution of the community was proportionate to the aim pursued and the complaint was declared ill-founded.

30 M.D. Evans, *Religious Liberty and International Law in Europe*, at 286; *Arrowsmith v the United Kingdom*.

31 T.J. Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law' (2003) 16 *Harvard Human Rights Journal* 189-215, at 200: 'Religion as belief'

of doctrines'.³² It is unclear whether the same requirement should apply to children. Depending on the religion at issue and the age of the children in question, they will have been 'introduced' to religion in different ways. Children do not always relate to religion or belief in the same way as adults, but approach religion or belief in different ways. In some cases, children's religious beliefs may be less coherent than those of adults, and thus they would fail the cogency or seriousness test. From a religious perspective, of course, children may be better able to 'connect' with spiritual matters than adults.

Secondly, it is worth thinking about the place of thought and conscience in the lives of children. Geraldine Van Bueren distinguishes between the right to freedom of thought and conscience and the right to freedom of religion and belief, and considers conscientious objection to military service under the heading of thought and conscience. She argues that because 'Registration for military service usually occurs when an individual is between 16 and 18 years of age [...] the status of conscientious objection in international law is particularly relevant to young people'.³³ However, considering the various efforts that have been made to bring an end to child soldiers in international law, the right of the child to conscientious objection to military service is an inappropriate focus.

Thirdly, the range of beliefs considered under Article 9 may fail to take account of the place of children within the family. Indeed, children's religious beliefs may be related to parental religious beliefs and to the role of parents in the religious upbringing of their children.

Fourthly, the nature of some beliefs and their 'acceptability' for children may be questioned, either by parents or by the Court. For example, it is unclear whether parents or the Court would find some non-traditional religions or NRMs acceptable or suitable for children. The Court is very protective of children and, for example, has suggested that a purely Koranic religious upbringing may be indoctrinating.³⁴ Moreover, the Court has laid down general restrictions on beliefs that do not respect democracy. Therefore, it may be that in practice children do not benefit from a wide range of beliefs, but only from those that are considered 'legitimate' by parents or the Court.

Other ways to engage with religion or belief may reflect better what it means for a child to be religious. Jeremy Gunn argues that religion has three different facets that are of particular importance: religion as *belief*, religion as *identity*, and religion

pertains to the convictions that people hold regarding such matters as God, truth, or doctrines of faith' (emphasis in the text).

32 Ibid, at 200 (emphasis in the text).

33 G. Van Bueren, *The International Law on the Rights of the Child* (The Hague: Martinus Nijhoff Publishers, Save the Children, 1998), at 152.

34 *Çiftçi v Turkey*, Court, Application 71860/01 (2004).

as *way of life*.³⁵ We saw that religion as *belief* is characteristic of the approach of the Court, but the two other approaches may be more appropriate. According to Gunn, ‘religion as *identity* emphasizes affiliation with a group. In this sense, *identity* religion is experienced as something akin to family, ethnicity, race, or nationality. *Identity* religion thus is something into which people believe they are born rather than something to which they convert after a process of study, prayer, or reflection’.³⁶ The Court does not consider whether it should deal with the individual beliefs of children, that of the parents, or both. Shauna Van Praagh stated: ‘For any given religious community—whether large, generally integrated, and liberal, or small, insulated, and traditional—ongoing existence and strength depend literally and rhetorically on “its” children’.³⁷ She adds that ‘In attempting to accord appropriate respect to the community, then, courts may look for some “true” or essential group identity of the child’.³⁸ Accordingly, it may be useful for the Court to understand when children belong to religious communities through parental affiliation, which may give them a religious identity. Belonging to a religious community is also linked to religion as a way of life, which is associated with ‘actions, rituals, customs, and traditions that may distinguish the believer from adherents of other religions’.³⁹ Examples include living in monasteries or religious communities, the observation of rituals, praying five times a day, eschewing the eating of pork, or circumcising males.

4 Conclusion

The caselaw reflects the emphasis given to an adult set of beliefs. Whether the Court is looking at the cogency or seriousness of the beliefs, or at a number of religions and beliefs, these principles are not easily applicable to children. Given the opportunity, the Court may want to address the right of the child to religious freedom differently, in particular taking into account issues of religious identity, belonging to a religious community, and religion as a way of life. This would better reflect the right of the child to religious freedom, which is the right of every child to be unhindered in their

35 T.J. Gunn, ‘The Complexity of Religion and the Definition of “Religion” in International Law’, at 200-205.

36 *Ibid*, at 201 (emphasis in the text).

37 S. Van Praagh, ‘Religion, Custody, and a Child’s Identities’ (1997) 35(2) *Osgoode Hall L. J.* 309-378, at 336.

38 *Ibid*, at 343. She mentions the Canadian case *Avitan v Avitan* (1992), 38 R.F.L. (3d) 382 (Ont. Ct. (Gen. Div)), where the judge followed the Jewish ‘rule’ that the child was Jewish because the wife had converted under Orthodox supervision just prior to the birth. Hence, ‘Expert evidence from Orthodox rabbis, for example, as to whether a child is truly Jewish may be accepted, and the court thereby may participate in enforcing orthodoxy within a religion in the guise of good-willed acceptance of difference’.

39 T.J. Gunn, ‘The Complexity of Religion and the Definition of “Religion” in International Law’, at 204.

growth as an independent autonomous actor in the matrix of parents, religious community and society.

Section 3 Freedom of religious choice

1 Introduction

Article 9(1) provides for the freedom to change religion or belief, and it is linked to the freedom to have or to adopt the religion or belief of one's choice. Much of the guidance available from caselaw concerns adults, whereas children may face specific issues relating, for example, to coercion or to being brought up in a religious community.

2 Article 9 case law

Freedom of choice needs to be related to the prevention of coercion or violence, the freedom to proselytise, and the acceptability of some religions. Tad Stahnke pointed out that 'The touchstone of the framework is the notion of coercion. It is a basic assumption that an individual should be able to make a considered and unrestrained choice in matters of religious belief and affiliation'.⁴⁰ Accordingly, there is no real freedom of choice if there is coercion of the individual. One important question is at what point expression by one person amounts to coercion of another to relinquish their religious beliefs.⁴¹ From an adult perspective, the Court protects the *forum internum* of the individual,⁴² and it applies the principle of respect.⁴³

The Court has stated that it is not permissible to use violence to prevent people from joining the religion or belief of their choice. In *Riera Blume v Spain*,⁴⁴ the applicants, who were over the age of 18 at the material time, had joined a group known by the name of Centro Esotérico de Investigaciones. The families thought that their children had been ensnared by this group and that those who ran the group managed to bring about a complete change of personality in their followers. Eventually, the families, with the cooperation of the police, detained their children against their will in order to 'deprogramme' them. Once the 'children' had regained their freedom, they lodged a complaint before the national courts against all persons who had taken part in depriving them of their liberty. However, the national courts rejected their claims.

40 T. Stahnke, 'Proselytism and the Freedom to Change Religion in International Human Rights Law' [1999] *BYU L. Rev.* 251-353, at 330.

41 *Ibid.*, at 290.

42 See *C v the United Kingdom; Darby v Sweden*, Court, Application 11581/85 (1990); *Buscarini and others v San Marino*, Court, Application 24645/94 (1999).

43 M.D. Evans, 'Believing in Communities, European Style', at 141.

44 *Riera Blume and others v Spain*, Court, Application 37680/97 (1999).

Before the Court, the applicants maintained that there had been a violation of Article 5(1) on account of their having been detained against their will, and they also argued that the ‘deprogramming’ measures to which they were subjected during their detention amounted to a violation of Article 9. The Court did not examine Article 9 but concluded that the applicants had been deprived of their liberty, in violation of Article 5(1). Although it is regrettable that Article 9 was not examined, it can be argued that the Court established the principle of the prevention of violence and coercion in religious matters.

Recently the Court had to engage with the issue of adults joining a religious community without parental consent. In *Šijakova and others v the Former Yugoslav Republic of Macedonia*,⁴⁵ the applicants’ children, all of whom were over the age of 18, joined the monastic order of the Macedonian Orthodox Church, of which the applicants were practising members. They alleged that their children left their homes and joined the monastic order without the applicants’ prior knowledge or consent. The applicants lodged a complaint before the Constitutional Court, requesting it to assess the constitutionality of the internal rules of the Church. They claimed, *inter alia*, that they had been deprived of their right as parents to receive care from their children in the event of illness or in old age because the religious canons of the order allegedly forbade contacts between monks and their parents. They further argued that the internal regulations of the Church were incompatible with a number of constitutional rights. The Constitutional Court rejected the complaint on the ground that it did not have the jurisdiction to review the constitutionality of the Church’s internal rules. It also reiterated the right of every individual to express their religious beliefs freely and to decide on the manner in which to practise their faith. Before the European Court the applicants alleged, *inter alia*, a violation of their rights under Article 9, asserting that if they expressed an opposing thought or the slightest disagreement with their children in holy orders the latter would consider them heretics and possessed by the devil. The applicants also maintained that if they were to change their religious convictions and beliefs this could result in a complete termination of their relations with their children.

As the Court rejected the complaint for non-exhaustion of domestic remedies, the Article 9 claim was not examined; the Court simply relied upon the fact that the children were over the age of 18 to dismiss the application. It is a matter of regret that the Court did not engage Article 9 and the right to change religion or belief. Furthermore, the Court did not take into account the relationship between the parents and the children, nor the responsibility that the parents felt for their children, even if they were over 18. There was no state action, and the issue whether the freedom to have or to adopt the religion or belief of one’s choice calls for a positive undertaking by

45 *Šijakova and others v the Former Yugoslav Republic of Macedonia*, Court, Application 67914/01 (2003).

the state is unresolved. However, considering the traditional position of the Court on pluralism and the ‘market place’ in religious belief,⁴⁶ this is unlikely.

The text of Article 9 provides for the positive right to change one’s religion or belief, but nothing is provided that prohibits coercion which would impair freedom of the individual’s choice, such as what can be found in Article 18(2) ICCPR. However, as Paul Taylor points out, this has not prevented the development of an equivalent right under Article 9.⁴⁷ In particular, the Court has had to address the relationship between coercion and proselytism. In cases such as *Kokkinakis v Greece*,⁴⁸ and *Larissis and others v Greece*,⁴⁹ the Court highlighted that the right to proselytise was to be safeguarded.⁵⁰ Peter Edge suggests that the freedom to hold a belief is based on freedom of choice, so that it can be violated if freedom of choice is reduced, for example by improper pressure or brainwashing.⁵¹ However, this is too strong: the Court suggested that the state is allowed to take measures to prevent coercion, but is not under a duty to do so under the Convention.

Finally, the Court has recently laid down some rules about the relationship between law and religion, including the acceptability of some religions. The Court said in *Refah Partisi*:

the Convention institutions have expressed the view that the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention.⁵²

46 M.D. Evans, ‘Believing in Communities, European Style’, at 145.

47 P. Taylor, ‘The Basis for Departure of European Standard under Article 9 of the European Convention on Human Rights From Equivalent Universal Standards’ [2001] 5 *Web JCLI*, available at <<http://webjcli.ncl.ac.uk/2001/issue5/taylor5.html>> (last visited 17th April 2007).

48 *Kokkinakis v Greece*.

49 *Larissis and others v Greece*.

50 Taylor suggests, however, that the Court’s reasoning led to some uncertainty as to the true meaning of ‘proselytism’ (given its negative connotations), which led to an unworkable distinction between those recognised rights and ‘improper proselytism’: P.M. Taylor, *Freedom of Religion, UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005), at 112.

51 P.W. Edge, ‘Religious Rights and Choice under the European Convention on Human Rights’ [2000] 3 *Web JCLI*, available at <<http://webjcli.ncl.ac.uk/2000/issue3/edge3.html>> (last visited 17th April 2007).

52 *Refah Partisi (The Welfare Party) and others v Turkey*, paragraph 93.

As a result, attitudes that do not respect human rights will not ‘necessarily’ be considered to be legitimate manifestations of religious belief. Thus, secularism can now be seen as a legitimate ground to restrict certain manifestations of religion or belief. However, Kevin Boyle states: ‘While it is clear that the Court had in mind the case of Turkey, unease should be registered at such a proposition. The concept of secularism is not at all easy to define, and especially in Turkey where it was an imposed ideology from the beginnings of the Turkish state to counter the traditional Muslim culture’.⁵³ The Court also recalled in *Leyla Şahin v Turkey* that ‘the principle of secularism in Turkey is undoubtedly one of the fundamental principles of the State, which are in harmony with the rule of law and respect for human rights’.⁵⁴ The freedom to exercise choice also depends on the acceptability of particular religions.⁵⁵

Therefore, the Court lays down general limitations on religious freedom. Religions that do not respect the rule of law, human rights and democracy will not be protected by Article 9; under the Convention system it is not legitimate to join religions that do not accept human rights, it is only legitimate to join ‘acceptable’ religions or adhere to ‘acceptable’ ideologies. It appears then that the Court is developing a typology of what is acceptable or not. This is a disturbing trend in the caselaw of the Court as the understanding of what is acceptable or not, especially in matters of religious freedom, differs widely.

3 Application to children

Van Bueren considers that, for children, two important issues are the freedom to choose a religion that is different from the state religion, or the family religion, and the age at which children are able to choose their religion.⁵⁶ She adds: ‘The key issue is whether children have the right to be different—different from their respective community’s majority belief and different from the religious beliefs of their individual families’.⁵⁷

53 K. Boyle, ‘Human Rights, Religion and Democracy: The Refah Party Case’ (2004) 1(1) *Essex Human Rights Review* 1-16, at 14. He added that ‘Human rights cannot trump what people regard as authentic meaning to such an extent that it imposes an ideology such as secularism’.

54 *Leyla Şahin v Turkey*, Court, Application 44774/98 (2004), paragraph 99.

55 See J. McBride, ‘Autonomy of Will and Religious Freedom’ in J-F. Flauss (ed.), *La Protection Internationale de la Liberté Religieuse – International Protection of Religious Freedom* (Brussels: Bruylant, Publications de l’Institut international des droits de l’homme, Institut René Cassin de Strasbourg, 2002), 93-129, at 104.

56 G. Van Bueren, *The International Law on the Rights of the Child*, at 156-159.

57 G. Van Bueren, ‘The Right to be the Same, the Right to be Different: Children and Religion’ in T. Lindholm, W.C. Durham, Jr. and B.G. Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: a Deskbook* (Leiden: Martinus Nijhoff Publishers, 2004), 561-569, at 561.

Existing caselaw is helpful regarding the prohibition of coercion and violence, the inviolability of the *forum internum*, the freedom to proselytise, and general limitations on the acceptability of some religions. The Court has had adult applicants and has not had to deal with children. It is unclear whether the Court should reach the same decisions regarding children. It is not always obvious that children are factually able to make decisions, or whether they have (or even need) enough information at their disposal to make an informed choice. Children face specific issues, and the child dimension of the case should be considered when necessary. We have seen that the Court dismissed the applicants' claims in *Šijakova* and therefore, the issue of children joining a religion or a religious community without their parents' prior knowledge or consent has never arisen before the Court, and is unresolved. It remains to be seen whether the Court will reach a similar decision in the case of children under the age of 18. In general, the Court adopts a protectionist stance towards children. This makes it unlikely that the Court will let minors join all religious communities. The Court also laid down general limitations on the acceptability of some religions in *Refah Partisi*. This leads to the conclusion that if religious freedom is restricted for adults, then the likelihood of it being more restricted for children is even greater. Such a stance can be evidenced through an analysis of the views of coercion and the induction of children into a religious tradition.

A Meaning of coercion for children

We saw earlier that there is no real freedom of choice for the individual if there is coercion, and one wonders whether this applies to children. For example, Stahnke argues that children fall into the category of people who may be susceptible to a change in religious beliefs, 'as they might be susceptible to persuasion in any matter'.⁵⁸ Jeremy McBride also suggests that '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'.⁵⁹ Yet the meaning of coercion is unclear for children. For example, is it coercion when parents tell their children that following one particular god is the truth and that all other gods are false ones? Or when children are made to undergo religious rituals such as baptism or circumcision?

Accordingly, there is disagreement concerning the meaning of coercion in the context of children. Relevant issues include the definition of proselytism and its relationship with teaching, the age and evolving capacities of children, the place of children in the family (for example the fact that children are usually under parental authority), the nature of teaching received (such as religious doctrines), the taking of

58 T. Stahnke, 'Proselytism and the Freedom to Change Religion in International Human Rights Law', at 335.

59 J. McBride, 'Autonomy of Will and Religious Freedom', at 93-94.

children to religious ceremonies, the performing of religious rituals, and the author of the teaching (inside or outside the family).

In particular, the Court has linked the proselytism of children, neutrality in education, and the prevention of indoctrination. In *Dahlab v Switzerland*,⁶⁰ the Court adopted a position on the legitimacy of state action to restrict someone's freedom of manifestation in order to protect children that it confirmed in *Çiftçi v Turkey*.⁶¹ The Court balanced the rights of the children with the rights of the father in *Çiftçi* and the teacher in *Dahlab*. In both cases, this has led the Court to consider the interests of children to be protected from proselytism and indoctrination, which is quite revealing in terms of the approach of the Court to the relationship between children and religion.

In *Dahlab* the applicant, who was a primary school teacher who had converted to Islam, started wearing the Islamic headscarf (including during her professional duties), and was dismissed for so doing. She was regarded by the Swiss Federal Court as a personification of the state school, a representative of the state and someone who had freely accepted a position that involved some limitations on their rights.⁶² She argued that the measure prohibiting her from wearing the headscarf in the performance of her teaching duties infringed her freedom to manifest her religion.⁶³ In determining the matter the Court adopted a 'balancing' exercise:

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils. Accordingly, weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case

60 *Dahlab v Switzerland*, Court, Application 42393/98 (2001).

61 *Çiftçi v Turkey*.

62 D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford: Hart, 2006), at 131.

63 She further complained that the Swiss courts had erred in accepting that the measure had a sufficient basis in law and in considering that there was a threat to public safety and to the protection of public order. She observed that the fact that she wore an Islamic headscarf had gone unnoticed for four years and did not appear to have caused any obvious disturbance within the school.

and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable.

The Court further stated that the measures were within the country's margin of appreciation. The Court had regard for the 'tender age of the children', aged between four and eight. It found that at that age, children wonder about many things and are more easily influenced than older pupils. Also, because it was 'a powerful external symbol', a ban was permitted and the Court found that the restriction on the teacher's manifestation of her religious beliefs was justified.⁶⁴

This appears to be linked to the principle of respect,⁶⁵ in order to ensure that the 'proselytised' (i.e. the children), stand up to the 'proselytiser' (i.e. the teacher).⁶⁶ Moreover, this is what Natan Lerner calls a 'captive audience' case,⁶⁷ as the children were, first, very young and second, at school and under the authority of Mrs Dahlab. The state argued that preventing the applicant from wearing the Islamic headscarf while teaching was necessary in order to preserve religious harmony in the school. This was accepted, although there had been no complaints from any child, parent or academic colleague about her behaviour during the four years she had worked there as a teacher, wearing the headscarf.

In the Court's view children need special protection, especially when they are at school, principally because they are entrusted to the teacher's care. Accordingly they should not be proselytised at school. This suggests that children should be taught in a context of religious harmony, and this may also make it necessary to protect children against different religious viewpoints from those they might already hold.

This case gives us an insight into what the Court views as 'indoctrination'. It implied that wearing the Islamic headscarf in front of young children at school has an impact on children's freedom of conscience and religion, and actually is a form of indoctrination and proselytism. The Court favours the right to have one's religious beliefs respected. This includes, in its view, a right to be taught in a neutral context

64 Eva Brems argues that the Court's rhetoric and discussion in *Dahlab* on the meaning and effects on the Islamic headscarf on Muslim women is hostile vis-à-vis Islam. She suggests that the Court was not well informed and was not careful in the way it expressed its opinion. E. Brems, 'The Approach of the European Court of Human Rights to Religion' in T. Marauhn (ed.), *Die Rechtsstellung des Menschen im Völkerrecht: Entwicklungen und Perspektiven* (Tübingen, Germany: Mohr Siebeck, 2003), 1-19, at 15-16.

65 M.D. Evans, 'Believing in Communities, European Style', at 140-144.

66 This reflects the stigma that is attached to proselytism, instead of reflecting genuine pluralism or different religious traditions: P.M. Taylor, *Freedom of Religion, UN and European Human Rights Law and Practice*, at 172.

67 N. Lerner, *Religion, Beliefs and International Human Rights* (MaryKnoll, NY: Orbis Book, 2000), 110-116.

and to be free from proselytism at school, or what Antje Pedain refers to as ‘the negative right of the pupils and their parents to be free from exposure to unwanted religious influences’.⁶⁸

A similar issue has arisen before the UN Committee on the Elimination of Discrimination against Women,⁶⁹ and in domestic jurisdictions such as Germany or the United Kingdom.⁷⁰ In Germany, in the *Ludin* case, the Federal Constitutional Court considered the case of an Afghan refugee, who had taken German nationality.⁷¹ She undertook teacher training but the Stuttgart Higher School Authority refused her application to be appointed to a teaching position in a school on the basis that she was not prepared to give up wearing a headscarf during lessons. In brief, the majority of the Constitutional Court decided that Länder had the power to ban the headscarf by law. However in Mrs Ludin’s case, there was no legislation regulating the issue and thus she was entitled to wear the headscarf in class. Dominic McGoldrick points out that the majority considered that there was insufficient empirical data to indicate any harmful influence of the headscarf on children. He also argues that it appears to be the case that little is known about the effects of religious symbols worn by teachers on the development of children.⁷² Matthias Mahlmann, commenting on the case, said:

The Court displays a welcome sociological sensitivity by reviewing the empirical evidence for the consequences of a head scarf or other attributes for this matter worn by teachers. To declare any empirical evidence irrelevant, as the dissenting opinion does, seems hardly convincing. If there is hard empirical evidence that a head scarf (or a kippa, a turban, a monk’s or a nun’s habit) worn by one of the various teachers children have in their lives does not influence them at all, if there is perhaps even data that the confrontation with a different religion in reality instead of only in text books might even foster their understanding and their responsible decision about their own religious beliefs (which, by the way, they are supposed to be able to reach at the age of 14 in German law, because this is the age of a child’s personal determination in religious and

68 A. Pedain, ‘Do Headscarfs Bite?’ (2004) 63(3) CLJ 537-540, at 537.

69 Committee on the Elimination of Discrimination against Women, *Rahime Kayhan v Turkey*, Communication 8/2005 (2006).

70 *Azmi v Kirklees Metropolitan Council*, appeal n° UKEAT/0009/07/MAA, 30th March 2007, Employment Appeal Tribunal.

71 Federal Constitutional Court (BVerfG), *Ludin*, 24th September 2003, 2 BvR 1436/02. For more explanation of the judgment, see A.F. von Campenhausen, ‘The German Headscarf Debate’ [2004] *BYU L. Rev.* 665-699; D. Schiek, ‘Just a Piece of Cloth? German Courts and Employees with Headscarves’ (2004) 33 *Industrial Law Journal* 68-73; D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe*, at 111-119.

72 D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe*, at 113.

church matters) – could there be any justification for forbidding it? Is the same not true for the contrary? This factual point is important because much depends on the question of what kinds of effect a head scarf has on children. There is a psychological conviction widespread in discussions that children identify especially in early age with the teacher and are thus prone to be influenced by him or her. Another concern is that other Muslim girls not wearing head scarves might be intimidated by a teacher wearing such a scarf. Different effects are certainly imaginable as well. Children have not only one teacher, but many, and accordingly various influences play a role. The behaviour and appearance of a teacher is the object of discussions with other children, with parents and other adults. Additionally, children have minds of their own and certainly do not copy any behaviour of their teachers who they might like or dislike. They might love the way the teacher explains counting but dislike the head scarf (or like the jokes of a teacher but not his monk's habit or his kippa). It is not surprising that the Court decided to find out what is known in this area of child psychology and it is noteworthy that it came to the conclusion, after reviewing some evidence, that actually little is known about the effect of religious symbols worn by teachers on the development of children.⁷³

The case of *Çiftçi v Turkey* dealt with access by a child to a form of religious education, but is more revealing of the general stance of the Court to children and religion. Domestic legislation provided for mandatory religious education classes from primary school onwards, but it required pupils to have finished their elementary education in order to be able to attend Koranic classes. The applicant's son was under 12 at the time; he had not finished his primary education, and the father unsuccessfully applied for an exemption. The Court found that the issue was the child's right to education under P1-2 and dismissed the claim.

As *Çiftçi* is set in the context of P1-2, it is worth summarising the approach of the Court on P1-2. P1-2 applies to the whole school curriculum and covers religious and philosophical convictions, including parental opposition to corporal punishment,⁷⁴ and 'any set of beliefs which are seriously held and which, in the opinion of the Strasbourg organs, are worthy of respect in the educational context'.⁷⁵ The state is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions.⁷⁶ This does not affect the right of parents to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions. Also,

73 M. Mahlmann, 'Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case' (2003) 4(11) *German Law Journal* 1099-1116, at 1110.

74 *Campbell and Cosans v UK*.

75 M.D. Evans, *Religious Liberty and International Law in Europe*, at 352.

76 *Kjeldsen, Busk Madsen and Pedersen v Denmark*, Court, Applications 5095/71-5920/72-5926/72 (1976), paragraph 53.

parents have the right to set up private schools and they also have the right to send their children to private schools that provide an education better suited to their faith or opinions.⁷⁷ However, the threshold is extremely high and parents cannot object to a neutral curriculum. Their convictions must not conflict with the fundamental right of the child to education,⁷⁸ and they cannot seek to ‘insulate’ a child from education which critically examines the foundations of their beliefs or which seeks to explain the basis of other faiths or philosophies in a general and comparative fashion.⁷⁹

In *Çiftçi*, the Court held that requiring children to have finished primary education before attending Koranic classes was aimed at their acquisition of a certain level of ‘maturity’. Under P1-2, the state undertakes to have respect for the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions. The Turkish system provided that children who did not fulfil the requirements provided by the legislation could always attend religious education in primary schools linked to the national education system, and this was the focus of the challenge in the case. However, the Court found that this requirement was not an attempt at indoctrination aimed at preventing religious education. On the contrary, it added:

The Court considers that, far from amounting to an attempt at indoctrination, that statutory requirement is in fact designed to limit the possible indoctrination of minors at an age when they wonder about many things and, moreover, when they may be easily influenced by Koranic study classes.

The first set of questions raised by the Court relate to the extent of the respect due to parental convictions. Whereas state indoctrination that does not respect parental religious and philosophical convictions in education and teaching is prohibited, parents cannot object to a neutral curriculum, and their convictions must not conflict with the fundamental right of the child to education.⁸⁰ The general focus of P1-2 is on the child’s right to education, and the Court found that the right to education of the applicant’s son had not been violated. However, parents have to reach such a high threshold in order to prove state indoctrination that the protection given by P1-2 is almost rendered meaningless.

Secondly, with its statement on indoctrination, which is at the core of the decision, the Court confirmed its stance on maintaining neutrality in the education of children. The Court used quite strong language when it said that the requirements

77 *Graeme v UK*, Commission, Application 13887/88, 64 DR 158 (1990).

78 *Campbell and Cosans v the United Kingdom*, paragraph 36; *Martins Casimiro and Cerveira Ferreira v Luxemburg*, Court, Application 44888/98 (1999).

79 M.D. Evans, *Religious Liberty and International Law in Europe*, at 356-357.

80 *Kjeldsen, Busk Madsen and Pedersen v Denmark*; *Martins Casimiro and Cerveira Ferreira v Luxemburg*; *Jimenez Alonso and Jimenez Merino v Spain*, Court, Application 51188/99 (2000).

were aimed at preventing the indoctrination of children, as they were of an age when they asked many questions as well as being easily influenced by Koranic classes. The Court's position suggests that a form of religious schooling can be contrary to the child's right to education. Niyazi Öktem suggested that the legislative requirement was adopted in the context of refraining fundamentalism.⁸¹

In the Court's view, a complementary religious upbringing can be indoctrinating, but the decision is not very clear. The Court has suggested that a complementary religious upbringing can be indoctrinating when children are too young, and it endorsed a minimum age limit of twelve for attendance at Koranic classes. The decision of the Court suggests that a complementary religious upbringing is not appropriate for children before they reach a certain age. This shows that the Court's approach has shifted from respecting parental convictions in education to protecting the child against indoctrination, including that undertaken by parents and private religious education classes; in doing this it permits a form of 'neutrality' in the education of children. The problem, however, is that the Court does not define what it means by 'neutrality'. Further, we can question whether neutrality really exists in matters of faith, especially because religions are fundamentally different.⁸² There is no agreement on what neutrality is or on whether it is achievable, and Anat Scolnicov says:

Liberals wish to provide children with a neutral education, but encounter a problem of defining neutrality in education. Can we choose neutrality in education as a meta-value, without choosing neutrality as a value in itself? Can neutrality be imparted as a negative capability – do not be prejudiced against any religious viewpoint, rather than a positive capability – be neutral in your religious and philosophical convictions?⁸³

81 N. Öktem, 'Religion in Turkey' [2002] *BYU L. Rev.* 371-403, at 397. She points out that mandating eight years of secular education for all children was one among other measures introduced by the Government in 1997 in order to contain fundamentalism.

82 See J. Rivers, 'Religious Liberty and Education: Coping with Diversity', *International Conference Human Rights and Our Responsibilities Towards Future Generations: an Inter-Religions Perspective*, organised by the Future Generations Programme in collaboration with UNESCO and the Mediterranean Academy of Diplomatic Studies at the Foundation for International Studies (Valletta, Malta, 6th-8th May 1999). Julian Rivers points out that 'there is no such thing as neutrality in matters of faith. To pretend that there is is to deny the existence of fundamental differences and ultimately to devalue the faiths themselves. However, there can be consensus and compromise, and neutrality is to be understood in this sense'.

83 A. Scolnicov, 'Children's Right to Freedom of Religion in a Multi-Religious Society', paper presented at the 2001 International CESNUR Conference 'The Spiritual Supermarket: Religious Pluralism in the 21st Century' (London, 19th-22nd April 2001), available at <<http://www.cesnur.org/2001/london2001/scolnicov.htm>> (last visited 17th April 2007), footnotes omitted.

In *Çiftçi* the Court tried to protect children from the influence of religion until they were old enough to understand. It tried to control the influence imposed on them and supported what it thinks is in their best interests. However, the result reached is inappropriate because it puts too much emphasis on neutrality (although it is very difficult to define), and because children cannot be brought up in a neutral fashion. Moreover, neutral education at school might not be favourable to the religious upbringing of children and what is deemed to amount to neutrality may be hostile to religious communities. For example, it does not take into account the interests of the Islamic community that children are taught the Koran at an early age.

These two cases are revealing of the stance of the Court on coercion. Children are incidentally concerned in *Dahlab* and directly affected in *Çiftçi*, and yet their rights and interests are ignored. The aim of *Dahlab* and *Çiftçi* appears to be to withdraw children from any religious influence at school, whether it is through teaching or the actions of others and what the Court considers to be proselytism. These cases show that the state has a very wide margin of appreciation and that the Court is not really willing to intervene in matters of protection of the rights and freedoms of others, especially in the case of children. However, in these cases the result reached is inappropriate because it puts too much emphasis on neutrality and the prevention of indoctrination, notions that are very difficult to define. What is to be highlighted is the treatment by the Court of the impact of teaching or the headscarf on children. The Court enforces what it thinks is in the best interests of the children and tries to control the influence imposed on them. The Court ignores the child dimension of the cases, and does not reflect the right of the child to religious freedom. The emphasis on neutrality does not reflect what it means for a child to be religious or the relationship with parents and religious community.

The Court's approach to religious education can also shed some light on its understanding of the meaning of coercion. It is also interesting because there are cases brought by children. Regarding religious education, states are entitled to provide classes in one particular religion. Members of other faiths must be able to obtain an exemption,⁸⁴ but the same principle does not apply to atheists.⁸⁵ Furthermore, it is not possible to require an exemption from general classes in the general history of religions, ethics, morality or society.⁸⁶ In addition, the state is not under a duty to provide religious education classes or parallel classes such as ethics.⁸⁷

In *C.J., J.J. and E.J. v Poland*,⁸⁸ a 12-year-old girl was the second applicant, in addition to her father and her sister. Religious instruction was given on a voluntary

84 *Karnell and Hardt v Sweden*, Commission, Application 4733/71, 14 YB Convention on HR 676 (1971).

85 *Lena and Anna-Nina Angelini v Sweden*.

86 *Zenon Bernard and others v Luxembourg; X v Belgium*, Commission, Application 17568/90, Inf. Note 107, p.3 (1992).

87 *Bulski v Poland*, Court, Applications 46254/99-31888/02 (2006).

88 *C.J., J.J. and E.J. v Poland*.

basis and she chose to not attend the classes. As they were held in the middle of the day, she had to wait in the corridor, and felt pressured by her peers and the teachers.⁸⁹ This broke her resolve and she finally decided, against her parents' will, that she wished to attend the course. The Commission decided that her Article 9 rights were not breached because children were not obliged to attend religious instruction, and she decided herself to attend the course.⁹⁰ However, the Commission did not really consider whether there was a link between the girl's distress and her decision to start attending classes.

In *Folgerø and others v Norway*,⁹¹ the applicants complained that the refusal of the domestic authorities to grant the children a full exemption from the KRL subject (Christianity, Religion and Philosophy) violated their rights under the Convention. In particular, they claimed that the children's compulsory attendance at religious instruction unjustifiably interfered with their and their parents' right to freedom of conscience and religion under Article 9. It further violated the parents' right under the second sentence of P1-2 to ensure such education and teaching in conformity with their own religious and philosophical convictions. Moreover, the manner in which the granting of exemption operated required parents to describe in detail the parts of the education or teaching which conflicted with their own convictions, and thereby reveal aspects of their own life stance, which had the effect of stigmatising the children or putting them in a situation as 'go-betweens', in breach of their right to respect for private life under Article 8. What is interesting here is that the children were applicants and they claimed that their rights under Article 9 had been breached. However, when the Court assessed their claim, it said: 'A central part of their application concerns the right to education under Article 2 of Protocol No. 1, which provision lays down different standards, protecting the varying interests of parents and children. The parents, on the one hand, and the children, on the other hand, submitted observations that were, at least in part, separate from one another. The Court finds that the children's complaint in this regard cannot be viewed as identical to that of the parents'.⁹² On the one hand, the Court declared that the children's and their parents' claims were not identical, which is to be welcomed as the Court recognised that they have separate rights and interests. On the other hand, the Court did not refer at all to the children's claims under Article 9, but only to their right to

89 She had to explain repeatedly to the passing teachers why she was not in her class and tell them that this was because she did not attend religious instruction. Once a teacher in the school common room told her that it would be better for her if she attended the religious instruction. Other pupils asked incessantly why she did not attend the course.

90 It added that the emotional distress felt by the girl did not attain the threshold of inhuman or degrading treatment under Article 3.

91 *Folgerø and others v Norway*, Court, Application 15472/02 (2004); *Folgerø and others v Norway*, Court, Application 15472/02 (2006).

92 The Court went on to declare the application admissible in regard of the children because of the failure to exhaust domestic remedies.

education, which, it is submitted, is not defensible, as the right to religious freedom and the right to education are two completely different issues.⁹³

B Bringing a child into a religious tradition

It can also be argued that bringing a child into a religious tradition has consequences on the child's freedom of choice. On first inspection, the Convention does not object to a child being brought up in a religious tradition. Hence, in 1967 the Commission rejected a claim to cancel the applicant's baptism administered when he was a child.⁹⁴ However, Gérard Gonzalez argued that the cancellation of a baptism must be allowed: leaving a church must be allowed, and it is understandable that the convert's new convictions are 'injured' because the baptism means church membership.⁹⁵ Gonzalez is right, but only to the extent that baptism has legal consequences, otherwise it is no business of the state to interfere with the internal rules of religious communities.

The Court indirectly dealt with parents bringing up their children in their religion in five custody cases: *M.M. v Bulgaria*,⁹⁶ *Hoffmann v Austria*,⁹⁷ *Palau-Martinez v France*,⁹⁸ *F.L. v France*,⁹⁹ and *Deschomets v France*.¹⁰⁰ All five cases involved a custody dispute over the children and a challenge to the mothers' religious beliefs and involvement in a minority religion.

In *M.M. v Bulgaria*, the applicant argued that the domestic courts had clearly indicated that her involvement with the Warriors of Christ had been the relevant fact motivating their decisions. The courts were in fact compelling the applicant to give up her beliefs if she wanted her child back. She thus complained under Article 9 that the judicial decisions in her case constituted an indirect coercion on her to change her religious beliefs and not to manifest them. The Commission declared the complaint admissible, although eventually a friendly settlement was reached.¹⁰¹

93 In this 2004 admissibility decision, the Court found that the application should be limited to the parents' general complaint about the lack of possibility to obtain a full exemption from the *KRL* subject. The Court repeated in a February 2006 decision that this raised complex issues of law and fact, which should be examined on the merits, under Article 9 and the second sentence of P1-2, and under Article 14 taken in conjunction with Articles 8 and 9 and the second sentence of P1-2.

94 *X v Iceland*, Commission, Application 2525/65, 18 Collections 33 (1967).

95 G. Gonzalez, *La Convention Européenne des Droits de l'Homme et la Liberté des Religions*, at 94.

96 *M.M. v Bulgaria*, Commission, Application 27496/95, decision (1996).

97 *Hoffmann v Austria*, Court, Application 12875/87 (1993).

98 *Palau-Martinez v France*, Court, Application 64927/01 (2003).

99 *F.L. v France*, Court, Application 61162/00 (2005).

100 *Deschomets v France*, Court, Application 31956/02 (2006).

101 *M.M. v Bulgaria*, Commission, Application 27496/95, report (1997).

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In *Hoffmann v Austria* the mother had joined the Jehovah's Witnesses, a divorce was later pronounced, followed by a custody dispute. The Court said:

the Supreme Court considered 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 transfusions not only for herself but – in the absence of a Court order – for her children as well; that is, possible negative effects of her membership of the religious community of Jehovah's Witnesses. It weighed them against the possibility that transferring the children to the care of their father might cause them psychological stress, which in its opinion had to be accepted in their own best interests.¹⁰²

The Court found that the Supreme Court had discriminatorily based its decision on the mother's belonging to the Jehovah's Witnesses and the adverse effects on the children. The difference in treatment was not justified and there was a breach of Article 8 in conjunction with Article 14. It is interesting to note that there had been an agreement between the parents concerning the religious upbringing of the children, following the 1985 Federal Law on the Religious Education of Children. The Austrian Supreme Court found that, despite the fact they were brought up by the mother according to the principles of the Jehovah's Witnesses' teaching, they did not belong to this confession.

In *Palau-Martinez v France*, similar facts were at issue, and the French Court of Appeal ruled that it was 'in the children's interests to avoid the constraints and prohibitions imposed by a religion whose structure resembles that of a sect'.¹⁰³ Amongst other things, the Court of Appeal had taken into account the fact that the children were brought up by the mother as Jehovah's Witnesses, which included proselytising activities. However, the European Court noted:

the absence of any direct, concrete evidence demonstrating the influence of the applicant's religion on her two children's upbringing and daily life and, in particular, of the reference which the Government alleged was made in the Court of Appeal's judgment to the fact that the applicant took her children with her when attempting to spread her religious beliefs. In this context, the Court cannot accept that such evidence is constituted by the Court of Appeal's finding that the applicant 'does not deny that she is a Jehovah's Witness or that the two children were being brought up in accordance with the precepts of this religion'.¹⁰⁴

The Court found a violation of Article 8 in conjunction with Article 14. Again, it considered the discriminatory basis of the judgment of the Court of Appeal against

102 *Hoffmann v Austria*, paragraph 32.

103 *Palau-Martinez v France*, paragraph 13.

104 *Ibid*, paragraph 42.

the mother, as it had based its decision on her religion. The Court only commented on the children's welfare. It said that it could not accept 'that such evidence is constituted by the Court of Appeal's finding that the applicant "does not deny that she is a Jehovah's Witness or that the two children were being brought up in accordance with the precepts of this religion"'. The Court did not go as far as saying that it was absolutely legitimate for the mother to bring her children along with her in her proselytising activities. It found that there was no practical, direct evidence that the applicant's religion had influenced her children's upbringing or daily life, and there was not enough evidence of harm.

In *FL v France*, the mother was a member of the Raelian movement. The domestic courts decided that the children would reside with the mother, but it imposed some limits on some of the child-rearing practices of the mother. For example, she could not put her children in contact with other members of the movement, and she could not take them to a number of meetings. She argued that the prohibition to welcome Raelians at home was a breach of Article 8 in conjunction with Article 14. She further argued, under Article 9 in conjunction with Article 14, that she was not allowed to manifest her religious convictions and to practise her religion individually and collectively at home, because she was not allowed to introduce her children to other Raelians. She added that she was discriminated against because she was a Raelian. The Court found that the restrictions were justified under Articles 8 and 9. Regarding Article 8, the Court notably stated that the children were very young at the time, which was important because young children are easily influenced, especially by their family. Regarding Article 9, the Court considered again that the children were very young and did not have the capacity to differentiate between their parents' beliefs, and that the restriction of the applicant's practice was minimal.

In *Deschomets v France*, the mother belonged to the Brethren church, and some of the religious practices imposed on the children were called into question. She argued under Article 8 that her private life had not been respected although her maternal qualities had not been called into question; she argued under Article 9 that the domestic authorities had had a limited view of her religion and religious practices imposed by the church; she also argued under P1-2 that she was not able to share her religious convictions with her children, who had always been brought up in that faith. However, the Court found that the best interests of the children had been taken into account by the domestic authorities, and that the intervention in the applicant's family life was justified. The Court did not examine Article 9 and P1-2.

These five cases are similar in that in all of them the children were directly affected by the outcome, yet the Court completely ignored the child dimension of the cases. The Court did not take into account whether the children belonged to one particular religion, nor whether they had a right to be brought up in a religious tradition. Should the Court have considered the earlier parental agreement concerning the children's religious education in *Hoffmann*? It did not say whether the children were born Roman Catholic, whether the mother could change their religion or whether she actually did so by bringing them to Jehovah's Witnesses' meetings. The Court

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gave no guidance on whether a religion is acquired by birth, when the parents agree to raise their child in one particular religion for example, or by participating in the rituals of one religious community, or whether it is acquired by faith, or by any other means. In *Palau-Martinez* the Court did not say whether the children had a right to be raised in the mother's beliefs and to belong to the Jehovah's Witnesses' community, or conversely, whether they had a right not to be raised in the mother's beliefs. The Court did not say whether children had an independent right to religious freedom. It also failed to mention the Jehovah's Witnesses and their interest in bringing children into their community. In *F.L.* and *Deschomets*, the Court did not take the children into account, although they were directly affected, and paid no attention to their right to religious freedom and to their relationship with the mother and the relevant religious community.

4 Conclusion

The Court has given general guidance on the prevention of coercion and violence, proselytism, the inviolability of the *forum internum*, and the acceptability of certain religions. These cases have been brought by adults and it is unlikely that they are directly applicable to children, because different issues are raised. The Court has only had the opportunity to address cases brought by children through education and custody. In all these cases involving children, they had important rights and interests, yet the Court seemingly ignored them. It can be argued that the Court also completely misunderstood the meaning of coercion in education, and did not address the right of children to be brought into a religious tradition. The Court suggests that children must be old enough to be proselytised, which may be dangerous, especially if it is a right of children against parents.

Section 4 Freedom of manifestation

1 Introduction

Freedom of manifestation is a very important part of the right to religious freedom and the Court stated in *Kokkinakis v Greece*:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to 'manifest [one's] religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions. According to Article 9, freedom to manifest one's religion is

not only exercisable in community with others, ‘in public’ and within the circle of those whose faith one shares, but can also be asserted ‘alone’ and ‘in private’; furthermore, it includes in principle the right to try to convince one’s neighbour, for example through ‘teaching’, failing which, moreover, ‘freedom to change [one’s] religion or belief’, enshrined in Article 9, would be likely to remain a dead letter.¹⁰⁵

It is an important aspect of the right to religious freedom because it is pointless to have the right to believe without having the right to live in accordance with those beliefs. It remains to be seen then what the general approach of the Court to freedom of manifestation is, and how it bears upon children.

2 Article 9 caselaw

A Traditional caselaw on individual believers

The Court has been fairly cautious in its approach, ‘focussing on those elements of observance and ritual which are central to the lives of believers, rather than on activities that are motivated by the religious beliefs’.¹⁰⁶ Accordingly, it can be argued that the freedom to manifest religion or belief has a very limited scope and provides little protection to non-traditional forms of practice.¹⁰⁷ Firstly, freedom of teaching is protected, including the right to try to convince one’s neighbour, for example through ‘teaching’.¹⁰⁸

Secondly, a recent trend in the caselaw is that, ‘where a form of activity is clearly within the scope of a ‘manifestation’ – for example, a service of worship – the Court is increasingly willing to take a broad and ‘purposive’ approach to matters which are incidental to the effective exercise of that right’.¹⁰⁹ This includes ‘the possibility of possessing premises’,¹¹⁰ the construction of a prayer-house,¹¹¹ taking holidays or

105 *Kokkinakis v Greece*, paragraph 31.

106 M.D. Evans, ‘Believing in Communities, European Style’, at 138.

107 C. Evans, *Freedom of Religion under the European Convention on Human Rights*, at 132.

108 *Kokkinakis v Greece*, paragraph 31; *Larissis v Greece*, paragraph 38.

109 M.D. Evans, ‘Believing in Communities, European Style’, at 139-140.

110 See *Iglesia Bautista “El Salvador” and Jose Aquilino Ortega Moratilla v Spain*, Commission, Application 17522/90, 72 DR 256 (1992); *Canea Catholic Church v Greece*, Court, Application 25528/94 (1997). This last case suggests that there may be aspects of legal personality to which a church is entitled without complying with any formalities, and taken together with freedom of association cases it helps establish a fairly strong right to entity status under the Convention: see C. Durham, ‘Freedom of Religion or Belief: Laws Affecting the Structuring of Religious Communities’ (OSCE Review Conference, September 1999, ODIHR Background Paper 1999/4).

111 *Vergos v Greece*, Court, Application 65501/01 (2004): the Court said that the authorities’ refusal to ‘designate the area’ for the construction of the applicant’s prayer-house

days off work for religious reasons,¹¹² and not having meetings for religious worship unlawfully disrupted.¹¹³ It also includes the possibility for a prisoner to participate in weekly religious services and to receive the visit of a priest,¹¹⁴ although there is no breach if the prisoner can follow the service from his cell.¹¹⁵ The Court also linked freedom of worship to freedom of movement in *Cyprus v Turkey*.¹¹⁶

Thirdly, the issue of practice is an important part of freedom of manifestation and the grounds to determine the scope of practice are found in *Arrowsmith v the United Kingdom*.¹¹⁷ In what is now known as the ‘*Arrowsmith test*’, the Commission set up an important test to distinguish a practice which is a manifestation of a religion or belief, from the broad range of actions which are merely motivated or inspired by them. Accordingly, in order to qualify as a practice under Article 9, a very direct link is needed between the belief and the action.¹¹⁸ However, it can be difficult to prove the necessity of an action, and it has happened that the Court substitutes its judgement for that of the applicant, in cases such as *Valsamis v Greece* and *Efstratiou v*

amounted to an interference with the exercise of his right to the ‘freedom to manifest his religion through worship and observance’.

- 112 *Kosteski v the former Yugoslav Republic of Macedonia*, Court, Application 55170/00 (2006).
- 113 *Kuznetsov and others v Russia*, Court, Application 184/02 (2007).
- 114 *Poltoratskiy v Ukraine*, Court, Application 38812/97 (2003), paragraph 167; *Kuznetsov v Ukraine*, Court, Application 39042/97 (2003).
- 115 *Indelicato v Italy*, Court, Application 31143/96 (2000).
- 116 *Cyprus v Turkey*, paragraph 245: ‘It has not been contended by the applicant Government that the “TRNC” [Turkish Republic of Northern Cyprus] authorities have interfered as such with the right of the Greek-Cypriot population to manifest their religion either alone or in the company of others. Indeed there is no evidence of such interference. However, the restrictions placed on the freedom of movement of that population during the period under consideration considerably curtailed their ability to observe their religious beliefs, in particular their access to places of worship outside their villages and their participation in other aspects of religious life’.
- 117 *Arrowsmith v the United Kingdom*. Pat Arrowsmith was a committed pacifist and she claimed that she was entitled to distribute leaflets to troops in a British army camp, in which she advocated the view that they should not serve in Northern Ireland. She was subsequently convicted under the Incitement to Disaffection Act 1934 (UK). Arrowsmith claimed that her conviction was a breach of Article 9, as this article would give her the right to express her pacifist beliefs in this practice.
- 118 For Malcolm Evans, the key to understanding what amounts to a manifestation for the purposes of Article 9 lies in determining the scope of a ‘practice’, whereas Carolyn Evans argues that the *Arrowsmith test* only applies to practice. See M.D. Evans, *Religious Liberty and International Law in Europe*, at 306; C. Evans, *Freedom of Religion under the European Convention on Human Rights*, at 117-119.

Greece.¹¹⁹ However, it is a dangerous trend to restrict freedom of manifestation to generally accepted forms.¹²⁰ In addition, to the extent that this development in the caselaw is in line with the distinction between manifestation and motivation, it can be questioned whether the distinction between manifestation and motivation is tenable. The Court tends to interpret freedom of manifestation in a way that is increasingly restrictive, and it is not favourable to less standard forms of manifestation and more individualistic expressions of belief. This includes the claim of pharmacists who refused to sell forms of contraception because of their religious beliefs,¹²¹ sincerely held views on assisted suicide,¹²² payment of taxes,¹²³ and displaying one's religion on identity documents.¹²⁴

Finally, the issue of religious clothing has recently arisen in *Leyla Şahin v Turkey*. The applicant was, at the material time, a fifth-year medical student at the University of Istanbul. She came from a traditional family of practising Muslims and considered it her religious duty to wear the Islamic headscarf. In 1998, a circular from the Vice-Chancellor of the University stated that students with beards or wearing the Islamic headscarf would be refused admission to lectures, courses and tutorials. The applicant was also denied access to various lectures and written examinations because she was wearing a headscarf, and eventually, she was excluded from the University. The issue of headscarves has also arisen in other recent cases before the Court.¹²⁵

The applicant submitted that the ban on wearing the Islamic headscarf in higher-education institutions constituted an unjustified interference with her right to freedom of religion and, in particular, her right to manifest her religion. The Court had regard to the protection of the rights and freedoms of others and the absence of pressure and indoctrination, gender equality, and arguments derived from the principles of secularism. The Court found that the applicant's freedom to manifest her religious

119 *Efstratiou v Greece*, Court, Application 24095/94 (1996); *Valsamis v Greece*, Court, Application 21787/93 (1996).

120 It may well be that the *Arrowsmith* test disadvantages members of certain types of religious organisations over committed and obedient members, or individuals who do not accept all the teachings of their religion or who believe that their religion places additional demands on them: C. Evans, *Freedom of Religion under the European Convention on Human Rights*, at 122.

121 *Pichon and Sajous v France*, Court, Application 49853/99, admissibility decision (2001).

122 *Pretty v the United Kingdom*, paragraph 82.

123 *Bruno v Sweden*, Court, Application 32196/96, admissibility decision (2001).

124 *Sofianopoulos, Spaidiotis, Metallinos and Kontogiannis v Greece*, Court, Applications 1988/02-1997/02-1977/02 (2002).

125 *Tığ v Turkey*, Court, Application 8165/03 (2005); *Kurtulmuş v Turkey*, Court, Application 65500/01 (2006); *Ilıcak v Turkey*, Court, Application 15394/02 (2007); *Kavakçı v Turkey*, Court, Application 71907/01 (2007).

beliefs in wearing the Islamic headscarf had been interfered with, but it concluded that the measure was necessary in a democratic society. Accordingly, there was no breach of Article 9. The Court used the principle of respect when dealing with the rights and freedoms of others, and it said:

when examining the question of the Islamic headscarf in the Turkish context, there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it.¹²⁶

The Court restricts the manifestation of the religious beliefs of the applicant in order to protect the rights and freedoms of others. The Court gives a very wide meaning to indoctrination and pressure, and this has repercussions for the individual believer. The Court sees Miss Şahin as being on the verge of indoctrinating other students.¹²⁷ Also, it does not seem to pay attention to the applicant's religious beliefs and the sense of identity she can derive by wearing the Islamic headscarf.

The Court went further and dealt with Turkey's argument that it had to ban the Islamic headscarf because of the principles of secularism. The Grand Chamber agreed with the Turkish Constitutional Court that secularism, as the guarantor of democratic values, was the meeting point of liberty and equality. It was one of the fundamental principles of the Turkish State, in harmony with the rule of law and respect for human rights. For this reason, preventing the applicant from wearing the Islamic headscarf was justified.¹²⁸ The Grand Chamber agreed with the approach taken by the Section Chamber, and it emphasised gender equality, the impact that the Islamic headscarf (which is presented or perceived as a compulsory religious duty) may have on those who choose not to wear it, and the political significance that the headscarf had taken in recent years.¹²⁹ The Grand Chamber said:

Having regard to the above background, it is the principle of secularism, as elucidated by the Constitutional Court [...], which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before

126 *Leyla Şahin v Turkey*, paragraph 115.

127 McGoldrick argues that it is not really suggested that the headscarf is inherently offensive to other individuals, or that anyone is physically hurt or threatened by it. However, some may be offended by its symbolism: D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe*, at 250.

128 For McGoldrick 'the Court effectively decided that particular individuals, or even the majority of them, had to pay the price for maintaining the general principle of secularism because that principle was in their long-term interests': *ibid*, at 289.

129 For a discussion of the Islamic headscarf and gender equality, see J. Marshall, 'Freedom of Religious Expression and Gender Equality: *Şahin v Turkey*' (2006) 69(3) MLR 452-461.

the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.¹³⁰

McGoldrick makes three points. Firstly, the Court accepted that state parties may take a stance (in accordance with the Convention provisions) against extremist political movements, based on their historical experience; secondly, secularism was considered by the Court to be the paramount principle that needed to be considered, and thirdly, Turkey was acting within its margin of appreciation.¹³¹ When comparing the position of the Court with that of the Human Rights Committee in *Hudoyberganova v Uzbekistan*, McGoldrick submits that it is unlikely that the position of the HRC would significantly differ from the answer of the Court in *Şahin*.¹³² However, we have considered above that the HRC has a different approach, and it may well adopt a different way of looking at this sensitive issue.

The position of the Court in *Şahin* has been seriously criticised. In her dissent, Judge Françoise Tulkens of Belgium questioned the general and abstract appeal to secularism, and doubted that the ban was proportionate. She agreed that secularism was an essential principle but said that it did not release the Court from carrying a full analysis of the necessity and the proportionality of the ban.¹³³ On the facts, she found that the Court had not supported its analysis with concrete examples. She found problematic that the Court simply accepted that wearing the headscarf contravened the principle of secularism as in doing so, it took position on an issue that had been the subject of much debate across Europe. The Court did not address the applicant's argument that she did not dispute the principle of secularism, it did not distinguish between school pupils and students, and it also did not show that the applicant wore the headscarf in order to provoke a reaction, to proselytise or undermine the convictions of others. Judge Tulkens also pointed out that the Court did not point to anything that could have suggested fundamentalist views on the part of Miss Şahin, and it did not prove that the ban promoted sexual equality. In the end, she found that the Court had not shown that the ban was proportionate.

The imposition of secularism is considered by a majority of the Court an appropriate way to regulate religious freedom. This position, if taken further, also seems to involve 'protecting' some groups of people from the religious views of others. It acknowledges the imposition of a one-size-fits-all policy on religious clothing at uni-

130 *Leyla Şahin v Turkey*, paragraph 116.

131 D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe*, at 167-168.

132 *Ibid*, at 169.

133 It is worth pointing out that on the issue of proportionality, the Court never really analysed the issue, whereas less restrictive alternatives would have been possible.

versity, despite the applicant's personal motivations,¹³⁴ and what can be described as Turkey's 'particular brand of militant secularism'.¹³⁵ The acceptance of this version of secularism by the Court leads to a conception of religious freedom that relegates religion to the private sphere of the individual only, to the detriment of other views of religious freedom which are equally valid. For example, Ingvil Thorson Plesner pointed out that making

this notion of secularism a superior principle with which the state policies and definition of rights should be in compliance, may undermine human rights and hence conflict with the dual purpose that secularism is – or should be – aiming to secure in the first place; the equal freedom and rights of all inhabitants to live according to their conceptions of 'the good', and peaceful coexistence in a plural society.¹³⁶

Rather than the mere non-intervention of the authorities and the Court in the religious beliefs of the applicant in wearing the Islamic headscarf, it appears that the Court imposes its own interpretation of the meaning and merits of the Islamic headscarf, and supports a 'much stronger degree' of privatisation of religious expression.¹³⁷ Plesner suggests that the Court has shifted from a liberal to a fundamentalist form of secularism.¹³⁸ Liberal secularism, or open *laïcité*, defines religion as a private issue in the sense that it is neither a public responsibility nor right to enforce a religious (or non-religious) doctrine or practice on its citizens, because religion or belief is a matter of personal conscience and identity. Liberal secularism does not prohibit individual manifestations of religion or belief in the public sphere or even inside public institutions. This was reflected in the Court's caselaw until recently. However, she points out that the Court seems to have shifted its caselaw to fundamentalist secularism, or strict *laïcité*, which assumes that religion is a private issue in the sense that religious manifestations should be kept within the realm of private areas, like private homes and the places of worship of the faith communities. This implies a divide between the public and the private sphere, and has serious implications for the right to freedom of religion or belief.¹³⁹

134 A. Pedain, 'Do Headscarfs Bite?', at 537-539: notably the fact that she complies with a duty that follows from her relationship with Allah/God.

135 Ibid, at 540.

136 I.T. Plesner, 'The European Court on Human Rights between Fundamentalist and Liberal Secularism' (Strasbourg Conference), available at: <[http://www.strasbourgconference.org/papers/Plesner%27s%20Strasbourg%20paper%20\(revised\).pdf](http://www.strasbourgconference.org/papers/Plesner%27s%20Strasbourg%20paper%20(revised).pdf)>, pages 3-4.

137 Ibid, page 15.

138 Ibid.

139 On different conceptions of *laïcité* in France, see M.M. Idriss, 'Laïcité and the Banning of the 'Hijab' in France' (2005) 25(2) *Legal Studies* 260-295 at 261-262. He distinguishes an interpretation of *laïcité* according to which the state will not openly support a particular religion within the public sphere, and a more aggressive interpretation where

The issue of headscarves in educational institutions has also arisen in before the domestic jurisdictions of several European countries, such as the United Kingdom. A parallel can be drawn with the House of Lords' decision in *R (on the application of Shabina Begum) v Denbigh High School Governors*.¹⁴⁰ Miss Shabina Begum was a pupil at Denbigh High School in Luton where the majority of pupils were Muslims. The school uniform allowed the shalwar kameeze with the headscarf. However, the applicant argued that this was not sufficient and that her Muslim beliefs required her to wear the jilbab, which is a more covering form of dress. This was not accepted by the school, and Begum was told not to come back to school until she complied with the school uniform. She commenced judicial review proceedings and sought a declaration a) that the school had unlawfully excluded her from school, b) that the school and Luton Borough Council had unlawfully denied her access to education in violation of P1-2 ECHR, and c) unlawfully denied her right to freedom of religion under Article 9 ECHR.

She was unsuccessful in the High Court, the case was reversed on appeal by the Court of Appeal, but finally she lost in the House of Lords. In particular, the House of Lords rejected the procedural approach adopted by the Court of Appeal.¹⁴¹ In determining whether there was an interference with her Article 9 rights, the majority of the House of Lords (Lords Bingham, Scott and Hoffmann) relied on Strasbourg jurisprudence on 'contracting-out/opting-out' cases.¹⁴² Thus Lord Bingham said:

The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience [...] Even if it be accepted that the Strasbourg institutions have erred on the side of strictness in rejecting complaints

the state maintains its religious neutrality by restricting religious freedom, in the interests of public order.

140 [2006] UKHL 15, [2006] 2 WLR 719, House of Lords. For a fuller commentary, see M.M. Idriss, 'The House of Lords, *Shabina Begum* and Proportionality' [2006] JR 239-245; D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe*, Chapter 6; S. Knights, *Freedom of Religion, Minorities and the Law* (Oxford: Oxford University Press, 2007), Chapter 4.

141 For a critique of the Court of Appeal's approach, see T. Poole, 'Of Headscarves and Heresies: the Denbigh High School Case and Public Authority Decision-Making under the Human Rights Act' [2005] *Public Law* 685-695; T. Linden & T. Hetherington, 'Schools and Human Rights: The Denbigh High School Case' (2005) 6 *Education Law Journal* 229.

142 For example, on employment cases, see *Ahmad v the United Kingdom*, Commission, Application 8160/78 (1981) and *Stedman v the United Kingdom*, Commission, Application 29107/95 (1997). For more detail, see S. Knights, *Freedom of Religion, Minorities and the Law*, Chapter 5.

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of interference, there remains a coherent and remarkably consistent body of authority which our domestic courts must take into account and which shows that interference is not easily established.¹⁴³

The majority held that the applicant had chosen to go to Denbigh High School, and was fully aware of the school's uniform policy. There were other schools in the area that would have allowed her to wear the jilbab and it would not have been difficult for her to attend one of these schools. Accordingly, there was no interference with her right to manifest her belief in practice or observance.¹⁴⁴ The minority, Lord Nicholls and Baroness Hale, disagreed and argued that there was an interference with her freedom of manifestation. Baroness Hale stated:

Most of your lordships take the view that Shabina Begum's right to manifest her religion was not infringed because she had chosen to attend this school knowing full well what the school uniform was. It was she who had changed her mind about what her religion required of her, rather than the school which had changed its policy. I am uneasy about this. The reality is that the choice of secondary school is usually made by parents or guardians rather than by the child herself. The child is on the brink of, but has not yet reached, adolescence. She may have views but they are unlikely to be decisive. More importantly, she has not yet reached the critical stage in her development where this particular choice may matter to her.¹⁴⁵

What is also interesting about Baroness Hale's speech is her emphasis on age, and it almost looks as if less weight should be given to Shabina Begum's beliefs because she was not yet an adult. Baroness Hale said:

Important physical, cognitive and psychological developments take place during adolescence. Adolescence begins with the onset of puberty; from puberty to adulthood, the 'capacity to acquire and utilise knowledge reaches its peak efficiency'; and the capacity for formal operational thought is the forerunner to developing the capacity to make autonomous moral judgments. Obviously, these developments happen at different times and at different rates for different people. But it is not at all surprising to find adolescents making different moral judgments from those of their parents. It is part of growing up. The fact that they are not yet fully adult may help to justify interference with the choices they have made. It cannot be assumed, as it can with adults, that these choices are the product of a fully developed individual autonomy.¹⁴⁶

143 Paragraphs 23-24.

144 The House of Lords also found that there was no breach of P1-2, and that she had been unlawfully excluded.

145 Paragraph 92.

146 Paragraph 93.

All five Law Lords agreed, however, that the restriction was justified. Lord Bingham stated that the school ‘had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive unthreatening and uncompetitive way’.¹⁴⁷ Further, the uniform policy was found to be accepted by mainstream Muslim opinion, the House of Lords decided not to substitute its judgment to that of the school, and the measure was not disproportionate.

The school said that it had been approached by non-Muslim pupils saying that they were afraid of people wearing the jilbab, as they perceived this form of dress to be associated with extreme views. It had also been approached by some Muslim girls saying that they did not wish to wear the jilbab, as this would identify them as belonging to extreme Muslim sects. If fear is clearly not a good reason to ban the headscarf, it may well be that only real evidence of communal pressure could be a legitimate reason.¹⁴⁸ This shows that there are similar arguments at different levels, whether the distinction is between girls wearing the Islamic headscarf and those not wearing it, or between girls wearing one form of the Islamic headscarf and girls wearing a form seen to be more in conformity with requirements of the Muslim faith. This argument related to pressure was also accepted by the House of Lords, which considered that the school was entitled to consider that the rules about uniform were necessary for the protection of the rights and freedoms of others.¹⁴⁹

For McGoldrick, the decision suggests that when public institutions take decisions very carefully and take relevant considerations into account, then courts will not interfere on human rights grounds lightly.¹⁵⁰ Mohammad Mahzer Idriss points out that the decision ‘is not very tolerant of the rights of religious minorities’ in that ‘it fails to appreciate that the Muslim community in this country is very diverse when dress code is involved’.¹⁵¹ Yet he argues that the school’s decision was understandable, that the applicant’s conduct was very confrontational from the beginning, that the House of Lords’ decision allows schools to decide their own uniform policy, and that the House of Lords correctly applied Strasbourg jurisprudence.

However, it is submitted that the decision that there was no interference with Shabina Begum’s Article 9 rights was wrong. There was an interference with her right to freedom of manifestation, and the House of Lords should not have relied on Strasbourg ‘contracting-out’ jurisprudence usually applicable to employment cases. Indeed, it is difficult to compare education to employment cases in terms of freedom of choice, and a pupil may not have choice in education that a worker has. In addi-

147 Paragraph 34.

148 A. Scolnicov ‘A Dedicated Follower of (Religious) Fashion?’ (2005) 64(3) CLJ 527-529 at 528-529.

149 Especially paragraphs 58 and 94.

150 D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe*, at 204.

151 M.M. Idriss, ‘The House of Lords, *Shabina Begum* and Proportionality’, at 244-245.

tion, it is also submitted that the decision does not pay enough attention to minority religious beliefs.

Again in the United Kingdom, a similar case was decided by the High Court on 21st February 2007 in *R (on the application of X) v Y High School*.¹⁵² The applicant was a 12-year-old Muslim girl. When she entered her second year at the school, in September 2006, she wished to wear the niqab (which covers the entire face and head save for the eyes) when she attended the school and while she was being taught by male teachers or likely to be seen by men. The applicant had three older sisters who had all attended the same school in previous years and had been permitted to wear the niqab. In October 2006, the headteacher told the applicant and her parents that she was not allowed to attend school while she was wearing the niqab, and she effectively stopped attending school from that date. She was offered a place in another school that would have allowed her to wear the niqab but she did not take up the offer (the school was another selective entry girl's grammar school, its results in public examinations were well above the average, the local authority would provide transport to and from the school and this would take about 25 minutes from home). The applicant commenced judicial review proceedings and claimed that the school had acted unlawfully because a) the refusal to allow her to wear the niqab at school constituted a breach of her rights under Article 9 ECHR, b) she had a legitimate expectation that she would be permitted to wear the niqab at school and she would probably not have applied to the school had she known that she would not be permitted to do so, and c) her three sisters had been in a similar position but she had been treated differently from them with no good reason.

Silber J found that there was no interference with the applicant's Article 9 rights because she had been offered a place at another school. She would have been allowed to wear the niqab there and therefore to manifest her religion, but had not taken up the offer.¹⁵³

Even though there was no interference with Article 9, he still considered the relevance of Article 9(2) and proportionality. He found that in any case the approach of the school could be justified under Article 9(2). There were some educational factors which meant that teaching could be more difficult when teachers were unable to see the face of a girl with a niqab; the school emphasised its school uniform policy in order to promote 'uniformity and an ethos of equality and cohesion'; there were a number of security issues; and the school was wary to avoid pressure being applied on other girls to wear the niqab. The school had carefully drafted its uniform policy,

152 *R (on the application of X) v Y High School* [2006] EWHC 298 (Admin) (Silber J).

153 The judge found that Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing; that there were a number of ECHR cases to the same effect; and that there was no decision of English courts or the ECHR in which it was held that there was an infringement of person's article 9 rights when he or she could without excessive difficulty manifest or practise their religion as they wished in another place or in another way (see paragraphs 30-39).

and the judge found that it was not his place to dictate the school what it should have done. Therefore, he found that the rule prohibiting the wearing of niqabs was proportionate to the objectives sought.¹⁵⁴

Regarding the legitimate expectation claim, the judge found that among all the girls subject to the uniform policy in the school, only the applicant's three older sisters had worn the niqab, and no one subject to the uniform policy had worn it since July 2002. No one had worn it after September 2002, when the new headteacher had been appointed, and she had different views on the uniform policy. Therefore, the applicant did not have a legitimate expectation that she would be allowed to wear the headscarf and even if there was a legitimate expectation, the school pursued legitimate aims and its response was proportionate.¹⁵⁵

Regarding the similar treatment claim, the judge found there were good reasons for having treated the applicant differently from her sisters. There was a substantial time gap between the last time one of her sister had last worn the niqab and the applicant started wearing it in September 2006; a new headteacher had been appointed in September 2002 and she had different views from the previous headteacher on the uniform policy, and a new uniform policy had been implemented and was strictly followed. In any case, the school had a substantial margin of appreciation and was entitled to change its policy, and the claimant had failed to satisfy the very high threshold for irrationality.¹⁵⁶

In conclusion, the girl's claim failed on all three grounds. For the claim on religious freedom, Silber J relied on the *Begum* case and relevant ECHR caselaw. It is submitted that he was wrong to find that there was no interference with the applicant's Article 9 rights, for the same reasons as the House of Lords was wrong in *Begum*.

Following *Begum* and *X v Y*, it appears that British courts are not willing to require schools to accommodate all religious symbols and in particular versions of the Islamic headscarf that are considered more 'extreme' by some Islamic groups. It appears sufficient that schools have widely consulted and have adopted a uniform policy that is carefully thought through. This allows schools a wide discretion in the matter; it may well represent mainstream Muslim beliefs but, once again, such decisions are not very tolerant of minority beliefs.

B *Recent caselaw on religious communities*

In the recent past, the Court has been called on to deal with 'questions concerning the compatibility of entire legal regimes regulating religious affairs within a state'.¹⁵⁷

154 See paragraphs 46-100.

155 See paragraphs 101-129.

156 See paragraphs 130-138.

157 M.D. Evans, 'Believing in Communities, European Style', at 144.

It has been wary of state intervention, state non-recognition and lack of protection of religious communities.

First, the Court has considered state interference in the leadership of religious communities. In *Serif v Greece*, it argued that ‘punishing a person for the mere fact that he acted as the religious leader of a group that willingly followed him can hardly be considered compatible with the demands of religious pluralism in a democratic society’.¹⁵⁸ The two cases of *Hasan and Chaush v Bulgaria*, and *Supreme Holy Council of the Muslim Community v Bulgaria*, were brought (oddly enough) by two rival leaders who both complained that the authorities had arbitrarily intervened in the affairs of the Muslim community in Bulgaria. The Court found a breach of Article 9 in both cases, and stated that state measures favouring a particular leader of a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion.¹⁵⁹ In January 2007, the Court declared admissible the claim of an American church leader established in Latvia, who claimed that the government had prevented him from carrying out leadership religious activities.¹⁶⁰

Secondly, quite apart from issues of leadership, the Court has considered cases about the non-recognition of religious communities, relating to the creation, recognition and sometimes registration of religious organisations as legal entities. In countries where such requirements are needed, legal entity status confers privileges

158 *Serif v Greece*, paragraph 51. See *Agga v Greece (n° 2)*; *Agga v Greece (n° 3)*, Court, Application 32186/02 (2006) and *Agga v Greece (n° 4)*, Court, Application 33331/02 (2006).

159 *Hasan and Chaush v Bulgaria*, paragraph 78; *Supreme Holy Council of the Muslim Community v Bulgaria*, paragraph 96.

160 *Robert Philip Perry v Latvia*, Court, Application 30273/03 (2007). The applicant was an American church leader who established himself in Latvia with his family and created a Protestant religious community. The community was legally registered and the applicant was granted a temporary residence permit that allowed him to carry out public activities of a religious character. Later on, he sought to renew his permit, but it was refused on the basis that a residence permit could not be granted to someone who was militant in a terrorist or violent organisation, who was a danger for national security or public order, or who was a member of a secret organisation working against the state. No other justifications were given. He was later granted a residence permit that did not allow him to carry out his religious activities. Accordingly, he had to step down from his leadership position, and become an ordinary member of the church. Before the Court, the applicant relied on Article 9 and argued that the interference with his right to manifest his religion was illegal and disproportionate. He had been allowed to stay in Latvia but had been deprived of the right to preach and to exercise his functions as church leader. He argued that his rights as leader were different from those of an ordinary church member. He also considered that the interference was not provided for by law, did not pursue a legitimate aim, and was disproportionate. He also relied on Articles 14 and 8. The claim has been declared admissible.

and benefits to religious communities. When the required status is not granted, it may be much more difficult for religious communities to operate efficiently within the framework given by the state, such as the ability to engage in legal acts. For example, in *Metropolitan Church of Bessarabia and others v Moldova*,¹⁶¹ the applicant church was Orthodox and attached to the Romanian rather than the Russian Patriarchate. The government refused to recognise the church on the grounds that it was not a religious denomination in the legal sense but a schismatic group within the Metropolitan Church of Moldova. It argued that the dispute could be resolved only by the Romanian and Russian Orthodox Churches, and that any recognition of the Metropolitan Church of Bessarabia would provoke conflicts in the Orthodox community. The Court found a breach of Article 9 on the grounds that the refusal of the state amounted to a lack of neutrality and impartiality.

The Court also found a breach of Article 9 in the case of *Biserica Adevărat Ortodoxă din Moldova and Others v Moldova*.¹⁶² The applicants, who had formed the 'True Orthodox Church in Moldova' obtained registration of the Church in the domestic court system, but the government body responsible for the registration of the Church refused to comply. The applicants (the Church and a number of its members) subsequently made requests for the enforcement of the final judgement, but the government department never complied with court orders for enforcement. The applicants also submitted a new request for the registration of the Church, accompanied with a new set of documents, but received no reply. They complained that the refusal of the state authorities to register the Church amounted to a violation of their right to freedom of religion under Article 9(1), as well as a breach of Article 11(1), Article 6(1), Article 1 of Protocol 1, Article 13, and Article 14 taken in conjunction with Article 9. The Court first found that there was an interference with the right of the applicant Church and the other applicants to freedom of religion. It stated that despite the adoption of the judgments in favour of the applicants, the authorities' failure to register the Church and therefore to endow it with legal personality prevented the Church and its followers from carrying out a number of essential functions. The Court then considered whether the interference had been prescribed by law. It said:

since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords [...] In addition

161 *Metropolitan Church of Bessarabia and others v Moldova*.

162 *Biserica Adevărat Ortodoxă din Moldova and Others v Moldova*, Court, Application 952/03 (2007).

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tion, one of the means of exercising the right to manifest one's religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judicial protection of the community, its members and its assets, so that Article 9 must be seen not only in the light of Article 11, but also in the light of Article 6.¹⁶³

The Court noted that the domestic courts had accepted the applicants' claims and ordered the registration of the Church, they had rejected all the arguments advanced by the government against registration, they had even rejected on three occasions the authorities' requests to re-open the proceedings, and the enforcement authority continuously insisted on the enforcement of the judgement.¹⁶⁴ The Court concluded that the refusal to register the applicant Church had no legal basis under Moldovan law, and that the interference was not prescribed by law.¹⁶⁵

The problem is also apparent in Russia under the 1997 Federal Law on Freedom of Conscience and Religious Associations.¹⁶⁶ In *Church of Scientology Moscow and others v Russia*,¹⁶⁷ and *Moscow branch of the Salvation Army v Russia*,¹⁶⁸ the Church of Scientology and the Salvation Army complained that they had followed the procedures and requirements to be re-registered under the law but that the authorities had refused to grant them the requisite legal status. In both cases, the Court has found a violation of Article 11 read in the light of Article 9. Moreover, further legal action resulted in the dissolution of the Jehovah's Witnesses in the city of Moscow.¹⁶⁹ The question of recognition of the existence of religious and belief communities 'is not a condition that has to be fulfilled before manifestation may occur, but is an inte-

163 Ibid, paragraph 34.

164 Ibid, paragraph 35.

165 The Court did not examine the claims under Article 11, Article 6(1) and Article 9 taken in conjunction with Article 14. It found a breach of Article 1 of Protocol 1 because there was a failure to enforce the final judgement of the domestic court within a reasonable time, and because the applicants had to wait almost four years to obtain the money owed to them under the final judgement in their favour. The Court also found a breach of Article 13 because no available remedy was available to them.

166 Law 'On Freedom of Conscience and Religious Associations' (as amended of 6th July 2006), Federal Law, 26th September 1997, n° 125-FZ. See T.J. Gunn, 'Caesar's Sword: The 1997 Law of the Russian Federation on the Freedom of Conscience and Religious Associations' (1998) 12(1) *Emory Int'l L. Rev.* 43-99; J. Brossart, 'Legitimate Regulation of Religion: European Court of Human Rights Religious Freedom Doctrine and the Russian Federation Law on Freedom of Conscience and Religious Organizations' (1999) 22(2) *Boston College International and Comparative Law Review* 297-321.

167 *Church of Scientology Moscow and others v Russia*, Court, Application 18147/02 (2007).

168 *Moscow Branch of the Salvation Army v Russia*.

169 *Religious Community of Jehovah's Witnesses in the City of Moscow*, Judicial Chamber for Civil Cases of the Moscow City Court (16th June 2004, Civil Case No. 33-9939).

gral part of the process of facilitating the manifestation of religion or belief'.¹⁷⁰ The issue has also arisen before the Court in cases from Bulgaria,¹⁷¹ and Romania,¹⁷² and before the UN Human Rights Committee in a case from Belarus.¹⁷³

The Court has also dealt with property-related issues. In *Greco-Catholic Parish Sămbăta Bihor v Romania*,¹⁷⁴ the Court dealt with a disagreement between the Orthodox and Catholic communities over the possession of premises. The Catholic community (the applicant) complained that the refusal of the domestic court to judge the application regarding alternative religious services between Greek-Catholic and Orthodox communities breached the freedom of faith of the Greek-Catholic believers in the parish. The Court has declared the complaint admissible. The idea of possessing premises is linked to legal personality,¹⁷⁵ and to the enjoyment of freedom of manifestation, which may lead the Court to recognise the importance for believers to meet and gather together, especially in a designated building.

The Court has dealt with the persecution of religious communities by third parties in *97 Members of the Gldani Congregation of Jehovah's Witnesses and Four Others v Georgia*.¹⁷⁶ The Court considered attacks suffered by the religious community of the Jehovah's Witnesses. During a meeting, they were violently attacked by a defrocked Orthodox priest and his followers. The police did not intervene promptly,

170 M.D. Evans, 'Freedom of Religion or Belief and Permissible Limitations' (17th-18th July 2003) *OSCE Supplementary Meeting on Freedom of Religion or Belief* (Hofburg, Vienna), Document ODIHR.GAL/57/03. Also, see W.C. Durham, Jr., 'Facilitating Freedom of Religion or Belief through Religious Association Laws' in T. Lindholm, W.C. Durham, Jr. and B.G. Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: a Deskbook* (Leiden: Martinus Nijhoff Publishers, 2004), 321-405, at 321; L.S. Lehnhof, 'Freedom of Religious Association: The Right of Religious Organizations to Obtain Legal Entity Status Under the European Convention' [2002] *BYU L. Rev.* 561-609.

171 *Lotter and Lotter v Bulgaria*, Court, Application 39015/97 (2004): case involving the refusal of the authorities to re-register the Jehovah's Witnesses' organisation in Bulgaria and the authorities' attempt to expel the applicants (members of the Jehovah's Witnesses) from the country. Following a friendly settlement between the authorities and the applicants, which included the registration of the Jehovah's Witnesses as an association, the case was struck out of the list.

172 *Religious Association "Jehovah's Witnesses – Romania" (Organizația Religioasă "Martorii lui Iehova-România") and others v Romania*, Court, Applications 63108/00-62595/00-63117/00-63118/00-63119/00-63121/00-63122/00-63816/00-63827/00-63829/00-63830/00-63837/00-63854/00-63857/00-70551/01 (2006), struck out of the list, a friendly settlement was reached.

173 Human Rights Committee, *Sergei Malakhovsky and Alexander Pikul v Belarus*, Communication 1207/2003 (2005).

174 *Greco-Catholic Parish Sămbăta Bihor v Romania*.

175 For example, *Canea Catholic Church v Greece*.

176 *97 Members of the Gldani Congregation of Jehovah's Witnesses and Four Others v Georgia*, Court, Application 71156/01 (2007).

the believers were then unable to secure help by the authorities and proceedings before the domestic courts were unfruitful. The Court found a violation of Article 9 in respect of all the applicants and it found that they had been attacked, humiliated and beaten up because of their religious beliefs. The authorities were completely inactive and did not take any steps to protect them and to punish the perpetrators of the attacks. The Court recognised that negligence by the authorities led to other attacks across Georgia, by the same Orthodox group. The Court concluded that the authorities had failed to take the necessary measures to ensure that Jehovah's Witnesses enjoy their right to religious freedom and that this group of Orthodox believers tolerate Jehovah's Witnesses.¹⁷⁷

The Organization for Security and Cooperation in Europe,¹⁷⁸ and the Council of Europe,¹⁷⁹ have also dealt with issues related to religious communities, and this suggests that there is a new dimension to Article 9 across Europe. The recent case-law highlights the fact that the Court has been developing a new approach to religious freedom, which is much more community-oriented. This is an important move, because it emphasises the significance of collective religious freedom, essential for a religious community, in opposition to religious freedom being only a matter for the individual believer. Also, there is a difference between individuals and religious communities. Quite simply, an individual has a personal sphere of religious liberty, whereas the very existence of religious communities is a public matter and has an external dimension, which means that some sort of relationship with the state is needed. Julian Rivers emphasised the importance of collective religious liberty:

Collective religious liberty is not simply an aggregation of individual members' interests. Rather, it is the set of rights, immunities, privileges, and powers held by a religious association as such. Collective religious liberty in this sense is the liberty of a community of people sharing a common religious faith to organize themselves and structure their corporate life according to their own ethical and religious precepts.¹⁸⁰

177 The Court also found a violation of Article 3 in respect of some of the applicants.

178 *Guidelines for Review of Legislation Pertaining to Religion or Belief*, prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in consultation with the European Commission for Democracy through law (Venice Commission), adopted by the Venice Commission at its 59th Plenary Session (Venice, 18th-19th June 2004), welcomed by the OSCE Parliamentary Assembly at its Annual Session (Edinburgh, 5th-9th July 2004).

179 For example, see A. Gil-Robles, Commissioner for human rights, Conclusions on the Seminar Concerning Church-State Relations in the Light of the Exercise of the Right to Freedom of Religion (Strasbourg, 10th-11th December 2001), available at: <<https://wcd.coe.int/ViewDoc.jsp?id=981163&BackColorInternet=99B5AD&BackColorIntranet=FBF45&BackColorLogged=FFC679>> (last visited 17th April 2007).

180 J. Rivers, 'Religious Liberty as a Collective Right' in R. O'Dair & A. Lewis (eds.), *Law and Religion* (Oxford: Oxford University Press, 2001), 227-246, at 231.

When cases are brought by religious communities and concern their very existence, the Court is willing to intervene, and it does not leave a great margin of appreciation to the state. Indeed, it is more eager to restrict the actions of the state that are not considered to be in accordance with Article 9 and the *forum internum* or the *forum externum* of the religious community. It is true that a number of decisions so far are only at the admissibility level. However, this should not be mistaken as unimportant, as they give an indication of the Court's general stance towards communities. This new approach points out that participation in the life of a religious community is important and is a manifestation of one's religion. Accordingly, the new approach by the Court has an impact, not only on religious communities, but also on individual believers who belong to them, including children.

3 Application to children

Most of the cases before the Court have been brought by adults. Yet a number of cases concern children, and a distinction can be established between children who are manifesting a religion and children who are potentially affected by someone else's manifestation of a religious belief. When children are manifesting a religion, the state has a wide margin of appreciation to restrict their freedom of manifestation. When children are potentially affected by someone else's manifestation of a religious belief, the state has an even broader margin of appreciation in order to protect children. It will be shown that the Court is less willing to be critical of the state in the second case than in the first.

A Children manifesting a religion

There are cases where the applicants are children and they claim that their rights to freedom of manifestation under Article 9 have been breached. This is interesting as it allows us to examine how the Court takes children into account and whether it applies a specific reasoning to them. The only two cases in this category are *Valsamis v Greece* and *Efstratiou v Greece*.¹⁸¹ In *Efstratiou*, the applicants were a pupil and her two parents, all three Jehovah's Witnesses. The girl had been suspended from school for one day, on account of her failure to take part in a school parade on ground of her religious beliefs.¹⁸² The parents complained of a breach of P1-2 and the girl of a breach of Article 9, but the Court found no violation of these two articles.

Regarding the P1-2 claim, the Court noted that the girl was exempted from religious education lessons and the Orthodox Mass, at the request of her parents. However, it added that it could discern nothing, either in the purpose of the parade or in the arrangements for it, which could offend the applicants' pacifist convictions to

181 *Valsamis v Greece* and *Efstratiou v Greece*. The facts and outcomes are similar so only *Efstratiou* will be discussed.

182 Parade on Greece National Independence Day, commemorating the outbreak of the war between Greece and fascist Italy.

an extent prohibited by the second sentence of P1-2.¹⁸³ It found that there had been no breach of P1-2.

Regarding the Article 9 claim, Sophia Efstratiou argued that it ‘guaranteed her right to the negative freedom not to manifest, by gestures of support, any convictions or opinions contrary to her own. She disputed both the necessity and the proportionality of the interference, having regard to the seriousness of the penalty, which stigmatised her and marginalized her’.¹⁸⁴ Nevertheless, the Court dismissed her application:

The Court notes at the outset that Miss Efstratiou was exempted from religious education and the Orthodox Mass, as she had requested on the grounds of her own religious beliefs. It has already held [...] that the obligation to take part in the school parade was not such as to offend her parents’ religious convictions. The impugned measure therefore did not amount to an interference with her right to freedom of religion either.¹⁸⁵

It found that there had been no breach of Article 9. However, Judges Thor Vilhjalmsson and Jambrek dissented. They claimed that what should have mattered is not whether the parade could, but whether the parade actually did offend the applicants’ convictions. They argued that it was the applicants’ perception of the symbolism of the school parade and its religious and philosophical connotations which should have been the basis of the finding, unless it was obviously unfounded and unreasonable (which it was not in this case).¹⁸⁶ Therefore, the Court should not have substituted its own opinion to that of the applicants and dismissed the evidence they had submitted concerning the interference of the parade with their religious beliefs. Stephanos Stavros points out that ‘questioning applicants’ claims that engaging in a particular activity runs counter to their beliefs constitutes an approach which is not free from danger and controversy’.¹⁸⁷

The Court dealt first with the parental claim, then with the girl’s claim, and clearly, there is a link between the two. In essence, the Court dealt with the girl’s claim in the same way it dealt with the parents’ claim. The Court does not mention an independent right to religious freedom for the girl. Visibly, the Court’s finding

183 Paragraph 32; moreover, the Court added that ‘Such commemorations of national events serve, in their way, both pacifist objectives and the public interest. The presence of military representatives at some of the parades which take place in Greece on the day in question does not in itself alter the nature of the parades’.

184 Paragraph 35.

185 Paragraph 38.

186 B. Petranov, ‘Recent Developments on Freedom of Religion or Belief under the European Convention on Human Rights’ (1997) 11 *INTERRIGHTS Bulletin* 90-92 & 124, at 91.

187 S. Stavros, ‘Freedom of Religion and Claims for Exemption from Generally Applicable, Neutral Laws: Lessons from Across the Pond?’ [1997] *EHRLR* 607-627, at 614.

that the parents' religious convictions were not offended did have an impact on the Court's finding that the girl's religious convictions were not offended either. As there is a difference between P1-2 and Article 9, this highlights that it was not a proper treatment of the child's claim. The Court did not take into account the girl's claim about her negative freedom not to manifest, and considered that her exemption from religious education and the Orthodox Mass was sufficient.

On the one hand, the girl's own religious beliefs in relation to religious education and the Orthodox Mass in school were tackled independently. On the other hand, however, the girl's claim was treated like an 'appendix' to her parents' claim as the Court found that because the parents' religious convictions were not offended, the girl's religious convictions were not offended either. This shows that the Court's treatment of the case is not focused on the child at all. The girl has rights and interests at stake yet they are completely ignored by the Court.

B Children potentially affected by a manifestation

The Court has dealt with instances where children are the ones affected by someone else's freedom of manifestation. The cases falling into that category are *Dahlab v Switzerland*, *Çiğçi v Turkey*, and *Martins Casimiro and Cerveira Ferreira v Luxembourg*. The state has a very wide margin of appreciation in order to protect others, and the Court is not willing to intervene to restrict the state. We saw earlier that the Court used the principle of respect in *Dahlab* and *Çiğçi*, where it restricted the teacher's and the father's freedom of manifestation for the benefit of the children.

In *Casimiro*, the applicants were the parents and their son, all members of the Seventh-day Adventists, who consider Saturday a day of total rest. The parents sought a dispensation for their son that he would not have to attend school on Saturdays. Their request was denied by the authorities and the applicants argued that this amounted to a breach of their right to practise their religion freely under Article 9.

The Court found that there were two sets of issues: the parents' right to freedom of religion under Article 9 and the child's right to education under P1-2. It stated that the refusal to grant the dispensation could be regarded as a restriction on the applicants' right to manifest their religion freely. In the event, the Court found that the interference was justified under Article 9(2). It recalled that states had a duty to protect the child's right to education. When there was a conflict between the parents' right to respect for their religious convictions and the child's right to education, the interests of the child prevailed. Therefore, the Court argued that the restriction was proportionate to the objective achieved, i.e. the rights and freedoms of others, notably the child's right to education.

However, it is important not to lose sight of the importance of freedom of worship and the observance of religious rites. Thus, what about the importance for the child, as a member of his religious community, to worship with his parents and other people? The child, being a member of this religious community, had a particular interest in being able to engage with its rituals. Moreover, nothing was said about the

religious community itself, its interest in having Saturdays free for worship, and the preservation of its existence.

The case engaged with the right of the parents to practise their religion freely, especially freedom of worship and observance, by going to church on Saturdays and taking their child with them. The Court recognised that the child was also a Seventh-day Adventist like his parents but it did not act upon it. Through the right to education the Court acknowledges some of the child dimension of the case, yet it only considered P1-2 in relation to the child. This shows that, in this case, the child's right to religious freedom was not part of the Court's framework of reference. This can be contrasted with the approach of the UN Committee on the Rights of the Child in a similar instance.¹⁸⁸ We can see the outcome of what the Court considers to be the best interests of the child, but we do not 'hear' the child himself. The child is present but silenced, and no reference is made to the relationship of the child with parents and religious community. It may well be that the effect of P1-2 is actually to reduce the level of protection for religious parents and children.

4 Conclusion

Two trends have emerged, and it is not possible to focus only on freedom of manifestation by children. When children are applicants and manifest a religion, it can be argued that the Court ignores the child dimension of the cases by not dealing properly with the claim brought by the children. Further, it is submitted that when children are affected by someone else's manifestation of religion, the Court ignores the child dimension of the cases by silencing their rights and interests.

Section 5 Beyond the current approach

Despite the above, a number of issues have not been addressed by the Court. It is thus necessary to consider how it would react if it had more cases concerning children to determine. In particular, it is essential to look at whether the Court might be more sensitive to the child dimension of the cases if it had a child applicant before it.

Firstly, there is the issue of religious symbols. For example, would a child be allowed to wear religious symbols or headgear at school? If the *Şahin* case was applied to children, the Court may decide that it is specific to the country and the sit-

188 In Japan, in the case of a pupil who was said to have been marked absent from a class taught on a Sunday whereas he was attending mass, the Committee asked whether the legislation specifically recognised the child's right to freedom of thought, conscience and religion. See UN Committee on the Rights of the Child, *Summary Record of the 465th meeting: Japan*, UN Doc. CRC/C/SR.465, at 6 (1998). However, whereas in *Casimiro* the parents wanted a weekly exemption, it is not known here whether the child was regularly absent from class or whether it happened only once.

uation, thus quite narrow in its application.¹⁸⁹ However, it is probable that the Court might take into account the nature of the religious symbols or headgear, its meaning for the applicant and for others, and the likely impact on the rights and freedoms of others. This makes it very likely that it might dismiss the claim brought by a child, whatever the age of the child.

Secondly, there is the issue of proselytism. For example, how would the Court react to a claim by a child that the state has restricted their proselytising activities? The Court is likely to consider the nature of the proselytising activities, the context (for example, if it is at school), and who is being proselytised. It will also consider whether there is an appearance or a risk of pressure for others. For example, in the light of *Şahin*, the Court may decide that a child wearing an Islamic headscarf, or religious symbols more generally, is a proselytising act in itself and may be prohibited. Other instances of children manifesting their religion through proselytism may be raised. For example, there is door-to-door proselytism, like in *Kokkinakis*. The issue arose in the American case *Prince v Massachusetts*,¹⁹⁰ where the guardian of a child was convicted for violating child labour law when she took the child with her to sell religious literature in the street. The United States Supreme Court found that the state of Massachusetts could not prohibit a child from exercising her constitutional right to practise her religion on the public streets. However, it argued that the state could limit parental freedom and authority in things affecting the child's welfare including, to some extent, matters of conscience and religious conviction.¹⁹¹ It concluded that 'Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves'.¹⁹² In these circumstances, the Court might consider what it thinks is in the child's best interests.

189 See D.C. Decker and M. Lloyd, 'Case Comment Leyla Şahin v Turkey' [2004] EHRLR 672-678, at 677: 'Another curious aspect is that the Court's judgment might actually be quite narrow in its application. The Court stated that its analysis of the headscarf question was in the "Turkish context". Does this somehow imply that the Court might not have similar findings in a case originating in France or Germany? The judgment seems to place a great emphasis on the history of Turkey's break from the Ottoman Empire's Islamic core. The Court also noted the more recent manifestation of the headscarf as being of a political nature. This may indicate that the judgment only applies to Turkey. Future challenges to the French law in the Court may not yield the same outcome because the Court rested its judgment thoroughly on the peculiarity of Turkish history'.

190 *Prince v Massachusetts*, 321 U.S. 158 (1944).

191 *Ibid*, at 167.

192 *Ibid*, at 170. See K.W. Colby, 'When the Family Does Not Pray Together: Religious Rights within the Family' (1982) 5 *Harvard Journal of Law and Public Policy* 37-90; L.L. Mueller, 'Religious Rights of Children: A Gallery of Judicial Visions' (1986) 14 *Review of Law and Social Change* 323-351.

Thirdly, there is the issue of religious practices. For example, does the child have a say, and could they bring a claim that they do not want to participate in certain religious practices, against parental wishes? The Convention protects parental rights in education, thus theoretically, it would not necessarily grant the child's claim. However, some religious practices are not always protected by the Court, which means that it might take into account the 'importance' of the religious practice, e.g. whether it falls clearly within the scope of a manifestation or not – this is likely not to be defensible. In addition, the Court is very likely to take into account the age of the child, for example when it wants to protect the child's right to education. At first sight, the Court may grant a claim regarding a child who has come of age, but not necessarily a claim regarding a child who has not come of age, which means that the approach of the Court may be mixed.

Fourthly, there is the issue of religious education. For example, will the Court accept the claim of a child who wants to withdraw from religious education classes against parental wishes? The Court is likely to grant the claim of a child who has come of age but not necessarily a claim regarding a child who has not come of age. In the final analysis, considering the importance given to the right of the child to education, it is likely to act in accordance with that which it thinks to be in the child's best interests. In addition, what about states which try to impose a policy of religious neutrality on schools and parents, in respect of children, in the name of freedom or equality? In the light of the Court's caselaw, it is likely to accept such a policy, which means that it may not take into account the child dimension of the case.

Fifthly, there is the issue of the child's choice of religion. For example, would a child be allowed to choose their religion from a certain age? As has been argued, the Court does not always take the child's interests into account, and it appears to be uncertain how to act in such cases. One possibility is that the Court would grant a claim regarding a child who has come of age, but not a claim regarding a child who has not come of age.

Sixthly, there is the issue of forced conversions. The issues are clearer here, and it is likely that the Court would accept claims brought by a child, whatever the age, regarding forced marriages, kidnappings and circumcision. This is also related to the legal identity or status of the child. In such a case, the Court is likely to accept a claim against the state that the legal identity or status of the child should not depend on the child's or their parents' religion.

Finally, there is the issue of medical treatment. For example, does a child have a right to refuse or accept medical treatment because of their religious beliefs? In the light of how the Court has handled children's cases, it is likely to act in accordance with that which it thinks to be in the child's best interests, without taking into account the child dimension of the case and the child's right to religious freedom.

Section 6 Conclusion

At all stages of the procedure, it has been argued that the Court usually fails to take the child dimension of the cases into account, and its interpretation of Article 9 fails to do children justice in relation to their religion. The caselaw is tailored to an adult set of beliefs, the Court ignores children when they are applicants, and it silences them when they are directly or incidentally affected. The approach of the Court is inappropriate. In most instances, its reasoning does not reflect what it means for a child to be religious and it does not take into account the relationships between child, parents, religious community and society. Considering the Court's approach, it is possible to adopt a rather pessimistic view on how the Court is likely to respond to future cases concerning children.

Chapter 7

Concluding Chapter

This concluding chapter seeks to provide a definitive statement of the right of the child to religious freedom in international law. The first section provides a restatement of the scope of the right of the child, the second section shows that the theoretical model in chapter 2 is more attractive than other views, and the third section provides suggested answers to tensions involving children and religion. Many would expect a model of the right of the child to religious freedom to be centred on the autonomy of the child in religious matters. However, this is not the case, and we saw that the right of the child to religious freedom is based on the interest of the child to be unhindered in their growth as an independent autonomous actor in the matrix of parents, religious community and society. It is possible to have a model that emphasises, at the same time, the child's independent right to religious freedom and the relationship between child, parents and religious community.

To start with, it is worth reiterating the theoretical model of the right of the child to religious freedom put forward by chapter 2. The legal right of the child to religious freedom is the right of every child to be unhindered in their growth as an independent autonomous actor in the matrix of parents, religious community and society. The state is the holder of duties in international law, and parents and religious communities are important third parties. The issue of autonomy is separate from the right of the child, who has a right to religious freedom without necessarily having powers of enforcement or waiver over it. However, the right of the child must reflect that the child comes of age at some point. Finally, the right of the child is composed of both negative and positive rights against the state. The child has a negative right that the state should not interfere in the relationship between child, parents and religious community, and the child has positive rights to protection, procedures and substantive benefits.

A number of conflicts involving children and religion have arisen in international law. These include the transmission of religious beliefs from parents to children; parental rights in education; the choice by the child of their religion; religious education and issues of age-limits, exemptions and choice; education in tolerance; ceremonies, religious practices, and initiation rituals; the coercion of children and

the meaning of coercion; forced attendance at religious services; forced conversions, including the denial of benefits; restrictions on freedom of worship; conscientious objection for religious reasons to 'neutral' acts; the legal identity and status of the child; and the imposition of neutrality by the state on parents and children in the education of children. At the same time, a number of potential conflicts involving children and religion have not arisen as yet in international law. These include providing specific food or prayer rooms at school; the refusal of medical treatment; adoption and care-matching practices; and proselytism by the child. These conflicts and tensions have been approached by international law in a number of ways. On the whole, the body of international law sometimes, but not generally, reflects the theoretical model of the right of the child to religious freedom, yet we have seen that there are differences between the four bodies/committees/court and inconsistencies with the theoretical model. A number of views have emerged. Sometimes, international law does partly reflect the theoretical model. According to one view that has emerged in international law, children are not 'agents' and all conflicts involving children and religion can be seen through the lens of other actors such as parents. According to another view, children are the most important agents and there is a substantial emphasis on autonomy.

First of all, it is possible to provide a restatement of the scope of the right of the child to religious freedom in international law.

Article 18 of the International Covenant on Civil and Political Rights (ICCPR) is the general provision on religious freedom in the UN system. Everyone is included and this covers children too. However, because of the working methods of the Human Rights Committee (the HRC), its work through communications, and the reporting system, Article 18 is difficult to apply directly to children.

The HRC has not said very much about children. It suggested that children under the age of 16 should be able to choose their religion, and it said that parents should not be obliged by law to bring their children up in one particular religion. It referred to the right of pupils to wear the Islamic headscarf or Rastafarian dreadlocks at school, and added that singing the national anthem or saluting the national flag should not be compulsory. Children also have a right to have a school system free from bias and intolerance. Pupils who are exempted from religious education should not be made to feel excluded, and they must not have to disclose their religion in order to opt out of denominational instructional classes. These are the only references to children in the whole of the HRC's analysis, and it is not possible to get a consistent picture of the HRC on children and religion.

Secondly, a number of problems would emerge if the HRC's approach were directly applied to children. In particular, there is too much emphasis on freedom of choice, too much focus on the individual religious believer, the approach to restrictions is fairly limited, the focus of education is almost exclusively on parents, and there is little on positive rights.

Thirdly, if the HRC had more cases concerning children, at times it might recognise the child dimension of the cases, and at other times it might not. There are instances where the HRC might accept the claims of a child against the state, and might accept the claim of a child who has come of age (for example in relation to freedom of choice, protection against third parties, freedom of manifestation, or religious education classes) and this would be acceptable. There are other instances where the HRC might focus on the wrong actors. For example, the HRC is often likely to hide behind parental rights if a young child makes a claim against the state (for example, in relation to state coercion, or the right of the child to be brought up in their parents' religion, or freedom of manifestation). However, this means that the HRC might miss the child dimension of the case and forget that a young child may have rights against the state. In particular, taking the wrong approach is more likely to lead to the wrong substantive decision. There are other instances too where the HRC might accept the claim of a young child against their parents (for example, in relation to freedom of choice), which would not be acceptable and the HRC might miss the child dimension of the cases. In conclusion then, it is very difficult to predict how the HRC might react if it had more cases concerning children. However, in the light of what we know of the HRC's approach, there are instances where the HRC might take the child dimension of the cases into account, and other instances where it might not, especially because it might focus on the wrong actors.

The approach of the HRC to children is mixed, and it does not always match up with the theoretical model. In a way, children have a place and exist as agents, although there is little on the independent right of the child to religious freedom. It does reflect parental rights in education, which is appropriate. Also, there is a risk that it insists too much on the autonomy of children. The HRC reflects the duty of non-interference by the state, but there is little on positive rights.

Article 14 of the United Nations Convention on the Rights of the Child (UNCRC) is specific to children and religion in the UN system. The Committee on the Rights of the Child (the Committee) considers a variety of issues, including freedom of choice, freedom of manifestation and education. However, four problems in the interpretation of the right by the Committee mean that the approach of the Committee to children and religion is inappropriate. First, the principle guiding the interpretation of Article 14 should be the evolving capacities of the child. This is acceptable in itself, as it reflects the fact that the child comes of age at some point. However, this is not reflected in the practice. In particular, there are some underlying tensions in the work of the Committee, and it is incoherent in its handling of these guiding principles. In particular, the Committee has interpreted the concept of autonomy far too broadly, for example, by constantly expanding the application of the principle. It has applied it to its analysis of Article 14. The Committee has applied this to freedom of choice, and stated that it is a right for all children, without distinction, and the concept of evolving capacities is expandable. The Committee also applies this to freedom of manifestation in an open-ended fashion, for example, by applying it to very young

children without necessarily linking it to family and religious community. In the same way, the Committee is far too vague on the issue of the evolving capacities of the child and taking their views into account as regards religious education.

Secondly, the Committee has a tendency to treat the child as an autonomous religious believer. There are only tenuous links with family and religious community, and too much intervention within the family in order to 'protect' the child. In addition, the Committee creates a set of rights of the child against the family. The Committee also suggests that freedom of manifestation may be implemented against the family. In the same way, rights in education also seem to be applicable against parents. Most of the analysis of the Committee is about children making their own individual choices, and there is considerable emphasis on autonomy and rationality. It is also a problem that the family is bound by human rights standards, and that children have rights against their parents even before coming of age.

Thirdly, the Committee has an impoverished understanding of religion. For example, it is implicit in its analysis that being religious may be negative for children and insists very much that the child must be able to leave a religion. This can also be seen through its statements on the aims of education, tolerance, non-discrimination and pluralism. This puts religions in a negative light, and it may tend to excessive intervention in the child's and the parents' beliefs.

Fourthly, the Committee is not always coherent and at times it has missed the opportunity to develop a consistent analysis of the right of the child to religious freedom. For example, it could be argued that it has missed the opportunity to raise issues, which means that there is no consistent analysis of the substance of the right. In addition, there is not always a clear understanding of who the relevant duty-holders are.

The approach of the Committee is not appropriate, and these four factors do not reflect the theoretical model of the right of the child to religious freedom in chapter 2. The answer to children and religion that emerges is lost to the autonomy viewpoint. At the very least, the Committee emphasises the independent right of the child to religious freedom, yet there is too much emphasis on autonomy and freedom of choice. At times, the Committee reflects the duty of the state not to interfere with the right of the child, yet there is little on positive rights. Finally, the Committee does not usually reflect the relationship between child, parents and religious community, but treats children as small adults and as autonomous individual believers.

The Special Rapporteur on Freedom of Religion and Belief is another UN agent that considers children and religion. The approach of this agent is different from the ICCPR and the UNCRC, because the role of the Special Rapporteurs (three individuals to date) is to investigate, comment and advise upon the manner in which states adhere to the standards set out in the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief 1981. There have been three different approaches to the mandate. On the whole, the approach of the Special Rapporteurs is welcome because it is a balanced posi-

tion, centred on parental rights in education and the child as member of a religious community. The state must not prohibit a child under the age of 18 from joining a religious community, and it is also suggested that the child can choose their religion when they are capable of doing so on their own (which still begs the question of who decides this). In addition, all Rapporteurs emphasise parental rights in education, and parents have a right against the state to bring up their children in accordance with their own convictions. There is a strong emphasis on education in the work of the Special Rapporteurs. Parental rights in education must be respected, and exemptions must be possible. In addition, Special Rapporteur Amor stresses education in tolerance and non-discrimination. The Rapporteurs also highlight the prevention of discrimination against children in education, especially as members of religious minorities or communities. They are clear on the prohibition of forced conversions, linked to forced marriage, abduction, threat and denial or withdrawal of public services, circumcision and change of name. The persecution of religious believers is also condemned, although the persecution of children is incidental to that of other believers. Finally, when dealing with religious practices, the Rapporteurs emphasise the circumcision of male infants, days of rest, baptisms, dress codes, prayers, religious pictures, and haircuts, seen from the perspective of belonging to a religious community or religious minority. However, there are two problems with the Rapporteurs' approach, Amor's view on education (which may have negative repercussions on parental rights) and the fact that there is little for children who come of age. Children are hardly ever considered in their own right and they are usually considered as part of the larger community to which they belong, whether family, religious community or religious minority. It is true that this does not really reflect the fact that children come of age at some point; however, the Rapporteurs are likely to accept most claims of children who have come of age.

On the whole, the Rapporteurs' approach to children and religion is welcome, and it reflects quite well the theoretical model of the right of the child to religious freedom in chapter 2. Although children are usually considered as part of a group, and the independent right of the child to religious freedom is not always reflected, there are signs that the Rapporteurs might reflect it in the future, if given the opportunity. However, although the Rapporteurs have dealt with negative rights to non-interference, there is little on the right of the child to positive acts by the state.

Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is the general provision on religious freedom in the Convention system. Article 9 applies to 'everyone', including children. The approach of the European Court of Human Rights (the Court) is not satisfactory because it usually fails to take the child dimension of the cases into account. The Court has an understanding of religion and belief that is tailored to an adult set of beliefs, it ignores children when they are applicants, and silences them when they are directly or incidentally affected. If the Court has more cases concerning children in the future, we can have little confidence that it will take the child dimension of the

cases into account. Regarding freedom of choice, the Court has only had the opportunity to address cases brought by children through education and custody. In all these cases involving children, they had important rights and interests, yet the Court ignored them. It misunderstands the meaning of coercion in education, and does not address the right of children to be brought into a religious tradition. The Court suggests that children should not hear about a religion before a certain age, which may be dangerous if it is a right held by children against their parents. Regarding freedom of manifestation, the Court ignores the child dimension of the cases by not dealing properly with the claims brought by children. When children are affected by someone else's manifestation of religion, the Court ignores the child dimension of the cases by silencing their rights and interests. On the whole, the Court fails to do children justice in relation to their religion: it does not really reflect the independent right of the child to religious freedom and it does not reflect either the relationship between child, parents and religious community.

In the future, if it has more cases concerning children, the Court is likely to fail to do children justice. For example, it is likely to dismiss the claim of a child against the state that it has restricted their freedom to wear religious clothing at school, and it is likely to restrict the proselytising activities of the child. It may also step in regarding a claim of the child that they want to discontinue a number of religious practices, and it might step in regarding issues such as medical treatment. In addition, it is likely to accept a state-imposed policy of 'neutrality' of education on schools and parents, which would not be defensible. However, it may accept the claim against the parents of a child who has come of age regarding freedom of choice and freedom to withdraw from religious education. It is likely to accept claims brought by children regarding forced conversions, and this would be defensible.

The Court does not always reflect the theoretical model, and it certainly fails to do children justice in their relationship with parents and religious community. The Court fails to take account of their rights, and it sometimes steps in to consider what it thinks is in children's best interests.

We have just reiterated the current body of international law on children and religion. We saw that the four bodies sometimes, but not generally, reflect the theoretical model of the right of the child. Despite this, and despite the fact that there are differences of approaches amongst these bodies, the theoretical model is more attractive than other views. It is attractive because it expresses the international legal materials better, and because it provides a plausible and complete statement of the right of the child to religious freedom.

The theoretical model in chapter 2 provides a good explanation of the international legal materials. In general, the four bodies adopt a balanced position regarding the position of children: children 'exist' in law, and not everything is seen through the lens of others such as parents. Under the ICCPR, the HRC refers to children as having rights to religious freedom (e.g. the right to wear the Islamic headscarf at school). Under the UNCRC, the Committee sees the child as the key actor of the

right to religious freedom (even to the detriment of other important actors). Under the ECHR, the child is also an actor (even if the Court does not properly understand the rights and interests of the child). This is slightly more difficult for the Special Rapporteurs, as children are often envisaged in relation to a religious minority or community; however, Asma Jahangir has recently referred to the rights of children to choose their religion from a certain age, and the Rapporteurs are likely to take the child dimension of the cases if they have more cases regarding children in the future.

In addition, these four bodies generally adopt a reasonable position regarding the autonomy of the child. Under the ICCPR, there is a risk of too much autonomy, yet it is not the exclusive focus of concern for the HRC. The Special Rapporteurs do not over-emphasise autonomy, as the child is usually considered as part of a religious community or minority. Under the ECHR, there is not much emphasis on the autonomy of the child; the Court often fails to take the child dimension of the cases into account; it often misunderstands the rights and interests of the child in relation to their religion and steps in with what it thinks is in the best interests of the child; there is some focus on autonomy as the Court is concerned that the child should not be indoctrinated but able to make an informed decision when older. Under the UNCRC, however, there is a substantial focus on autonomy; this should not necessarily be the approach under Article 14, yet this is how it has been interpreted by the Committee. However, this approach is not followed by the three other bodies, and the UNCRC stands alone in its autonomy approach.

The theoretical model also provides a more satisfactory statement of the right of the child, and this book has advanced the advantages of this model. It sees the child as the holder of an independent right to religious freedom, whatever the age of the child. According to one view, the child does not have an independent right to religious freedom, and it is argued that all conflicts involving children and religion are to be seen through the lens of other actors (such as parents, religious community, other third parties, or the state). For example, it is sometimes argued that children do not have a right to religious freedom because they are brought up by their parents into one particular faith and adopt their parents' religion. However, this does not mean that they do not have a right against the state (for example that it does not interfere with the nurture of children, or that it acts positively for children). It simply means that the right of the child to religious freedom has a different basis from the right to religious freedom of an adult, which is often based on the autonomy of the individual to make religious choices (or at least this is how the law, including international law, views religious freedom). Children are 'agents', and international law certainly reflects this. It is then correct that a theoretical model of the right of the child to religious freedom should reflect the rights and interests of the child, not for the sake of it, but as a means to safeguard the interest of the child to flourish as a religious being.

We saw that the right of the child to religious freedom is the right of every child to be unhindered in their growth as an independent autonomous actor in the matrix

of parents, religious community and society. This reflects the nurture of the child by parents and religious community, as well as the fact that the child comes of age at some point and should be able to make personal choices in religious matters. This is not based on an imaginary model of what the right of the child to religious freedom should look like, nor on what human rights lawyers think is best for the child. It does not over-emphasise autonomy, which only becomes an issue when the child comes of age. On the contrary, the theoretical model is based on the real lives of children, on the reality of what it means for a child to be religious.

This model provides a definitive statement of the right of the child. It defines the key actors, that is, the state with parents and religious community as important third parties. It is thus possible to create a set of rights and duties against the state. It integrates the concept of autonomy into the concept of children's rights. However, autonomy is not the ultimate foundation of the right but only becomes relevant when the child comes of age. This is attractive in that it is a balanced position: it neither states that a child cannot have an independent right to religious freedom, nor does it state either that the autonomy of the child in religion is the most important aspect. This model sets out that the child has a right to religious freedom whatever their age and decision-making capacities, and not only when they come of age. This is useful in terms of the rights of a young child against the state (and sometimes against parents and religious community). This means that the child does not go from having no right to religious freedom when being young to having a right to religious freedom when coming of age. It is important though to remember that autonomy is not a key feature of the right of the child, and that it only emerges as relevant across the developing life of the child.

The theoretical model should be at the centre of the right of the child to religious freedom. It is now possible to arrive at a restatement of the right of the child and attempt to provide suggested answers and solutions to conflicts and tensions involving children and religion. Any attempt to provide answers must be informed by the theoretical model and what the right of the child to religious freedom should be. As the theoretical model is adopted in international law, we are likely to come up with a number of answers. We have seen before that the child comes of age at some point, which should be reflected in the right of the child. However, it can be difficult to define when the child comes of age. This involves drawing lines between the right of the child and other competing interests, which is a difficult exercise. However, the state does not have complete discretion in the matter (which would void the right of its meaning), and its approach must be informed by the theoretical model. The right of the child to religious freedom is composed of both negative and positive rights.

First, regarding the transmission of religious beliefs from parents to children, the child has a right against the state to be brought up in their parents' faith and beliefs. This means that the child does not have a right to be protected from their parents' beliefs: it is not coercive or indoctrinating in itself to bring a child into a

religious community, and the child does not have a right against their parents that they should be old and mature enough to hear about religion.

Secondly, the child has a right that the state does not intervene in their nurture. This includes religious practices, ceremonies, initiation rituals, and freedom of worship. The state is not allowed to interfere with the diet and dress codes of the child. It cannot prohibit the baptism or circumcision of the child, and it is not allowed to prohibit the child from worshipping in a specific building or in the home or from praying. Similarly, the state is not allowed to prevent, prohibit, or make it more difficult for parents to initiate their child in these practices, ceremonies, rituals, and worship. In the same way, the state must not prohibit these activities or impose any age-limits or test on the evolving capacities of the child which would restrict the right of the child. This also includes the right of the child to tell others about their religion. All this is at the core of the negative rights of the child against the state. Therefore, if the state considers that it is necessary to interfere with these rights, there is a heavy burden lying on the state to justify any interference with the right of the child.

Thirdly, the child has a right that the state does not interfere in their education. The state cannot prevent or prohibit parents from bringing up their child in accordance with their own religion and convictions. The state is not allowed to prohibit parents from giving religious education at home or in the religious community. Similarly, it cannot impose tests on the evolving capacities of the child, or age-limits according to which religious education would not be possible before a certain age. The state must also refrain from imposing on parents and children a policy of neutrality in the education of children at school, which would interfere with the relationship between child, parents and religious community. In addition, the state must not interfere with the education of the child at school. If the state provides religious education classes, whether denominational or not, they might interfere with the nurture of the child at home or in the religious community. Accordingly, the child has a right to complete exemption. If the child is young, it is up to the parents to decide and withdraw their child from these classes, and when the child comes of age then the decision is up to them. The issue is to know when the child comes of age, and who decides so. The state may have a margin of appreciation to decide upon an age-limit or a range of ages according to which the child comes of age, yet this must allow flexibility. According to the theoretical model, the state does not have complete discretion but must recognise that children come of age at different times; in this the state must follow the approach of the theoretical model.

Fourthly, the state must not interfere with the right of the child through coercion, forced conversion, and persecution. The state is not allowed to forcibly convert the child through forced marriages, abduction and kidnappings. The child has a right that the state does not force them to undergo initiation rituals, attend services of worship or religious ceremonies. In addition, the state must not force the child to accomplish 'neutral' acts that the child considers to be in contradiction with their religious beliefs, and there is a burden on the state to justify any interference.

Fifthly, the child also has a right that the state does not affect their legal identity or status because of their religion. In countries where religion is recorded by law, the child has a right not to disclose it, and a procedural right to change their religion on the records. In addition, when the record of the child's religion depends on the parents' religion, the child has a right to change the records. The state may have a margin of appreciation in deciding when the child comes of age, but its discretion is not complete, and its approach must be informed by the theoretical model.

International law does not say anything about the right of the child to refuse medical treatment for religious reasons.

In addition, the child has positive rights against the state. It is worth remembering that whereas negative rights carry an obligation of result, positive rights only carry an obligation of means, which means that the state must only take all reasonable steps to protect the child's rights.

First, the child has a right that the state protects them against their parents in certain circumstances. This applies to both refusing religious education classes and joining a religious community. We saw that when the child comes of age, they have a right to decide for themselves whether to attend religious education classes, withdraw from them or choose an alternative, even if this is against parental wishes. This means that the state must protect the child's choice, but only when the child comes of age. This includes a procedural right for the child to decide at school. The state has a margin of appreciation, but not complete discretion, to decide. Its approach must be flexible and be informed by the theoretical model.

Similarly, this applies to positive membership of the child in a religious community. The state has a duty to protect the choice of the child to join the religious community of their choice, but only after the child has come of age. When the child is of age, they have the right to choose, even if this is against parental wishes, and the state must justify any intervention by reference to the right of the child.

The child also has a right to be protected by the state against other third parties. For example, the state must protect the child against persecution, coercion, and forced conversions, which are likely anyway to infringe other rights in addition to religious freedom. The right of the child includes a duty upon the state to require third parties to refrain from interfering with the child's right. The child also has a right that the state should protect them against harmful practices imposed by third parties, such as parents or religious community, which endanger the life or health of the child.

Secondly, the child also has procedural rights regarding custody, adoption, and care-matching practices. This is an area where the state is particularly active because of the cases that arise before the courts. We have seen before that the child has the right to be brought up in their parents' religion. As regards custody, the child must be able to carry on in the religion they have practised or been brought into. This means that the child has a right to be heard before coming of age, and a right that wishes be acted upon when coming of age. The state has a margin of appreciation in the matter

but not complete discretion. It must provide a range of ages regarding the wishes of the child to be heard and to be acted upon, and its approach must be informed by the theoretical model. International law does not give an answer to adoption and care-matching practices. However, any answer must be informed by the theoretical model, and it is likely that international law adopts a similar approach as custody.

Thirdly, the child has rights to a number of substantive benefits from the state. This does not include the right of the child to receive religious instruction at school, general classes or classes in their own religion. International law does not give an answer to the right of the child to receive substantive benefits from the state, i.e. specific food or prayers rooms at school.

We have seen that the relevant parties have rights that are equally weighted and relevant, at least to start with. It will be necessary to adjudicate these rights through an analysis based on proportionality. These different weights need to be tested in order to arrive at a concrete outcome. In the end, any restriction of a right by the state will need to be proportionate, that is, it must be a measure capable of pursuing a legitimate aim, it must be the least intrusive measure, and it must be worth it. Through this analysis, we will end up making judgments, and the outcomes of these judgments will express the weight to be given to different rights. Perhaps more could have been said in terms of weighting different rights; however, this book has given the model to follow in international law, and the working out of specific situations, including in domestic law, is best left to future research.

In conclusion, we have seen that the right of the child to religious freedom in international law is a very complex issue. As we said in the introduction, it is controversial, it does matter to children, parents, religious communities and the state how cases are handled, and it involves theories of rights. In addition, the equation involves the child, the state, the parents and religious communities rather than just the child against the state. Finally, it is about religion, which forms the subject-matter of one of the most complex of human rights. However, the right of the child in international law as it has been interpreted by different bodies and courts is unsatisfactory. It reflects an impoverished understanding of the right of the child, and the right has not been taken seriously enough. The issue of when the child comes of age is complicated, and it is very difficult to draw lines. In some instances, the state has to justify any interference with the right of the child, and in other instances it has a margin of appreciation to provide a range of solutions. There are also questions that international law is silent about. However, in all these instances, the approach of the state must be informed by the theoretical model. The right of the child to religious freedom is very important, and it needs to be taken more seriously than it has been until now.

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