Entscheidungen in Kirchensachen

seit 1946

Begründet von

Prof. Dr. Dr. Carl Joseph Hering †

Dr. Hubert Lentz

Herausgegeben von

Prof. Dr. Manfred Baldus
Vorsitzender Richter
am Landgericht Köln a. D.

Prof. Dr. Stefan Muckel
Universitätsprofessor
an der Universität zu Köln

in Verbindung mit dem

Institut für Kirchenrecht
und rheinische Kirchenrechtsgeschichte
der Universität zu Köln

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Vorwort und Benutzungshinweise

Die Sammlung „Entscheidungen in Kirchensachen seit 1946“ (KirchE) veröffentlicht Judikatur zum Verhältnis von Kirche und Staat und zu weiteren Problemkreisen, die durch die Relevanz religiöser Belange gekennzeichnet sind.

Die Vielfalt der Entscheidungsquellen in allen Gerichtszweigen legte es von vornherein nahe, das Werk in erster Linie als ein möglichst auf Vollständigkeit bedachtes Archiv zu konzipieren und es damit gegenüber Fachzeitschriften abzugrenzen, die nur die aktuell bekannt gewordene Spruchpraxis berücksichtigen können.

Die steigende Bedeutung religionsrechtlich relevanter Fragen in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte (EGMR) und des Europäischen Gerichtshofs (EuGH) machte es unerlässlich, auch deren Judikatur in die laufenden Jahrgänge der Entscheidungssammlung aufzunehmen. Dabei werden vornehmlich solche Entscheidungen berücksichtigt, die aus Verfahren in Deutschland hervorgegangen oder sonst von grundsätzlicher Bedeutung sind. Im vorliegenden Sonderband dokumentieren die Herausgeber die einschlägige Rechtsprechung bis Ende 2001. Damit wird dem Benutzer ermöglicht, sich zuverlässig über die Entwicklung der Rechtsprechung auf europäischer Ebene zu informieren und deren Fortführung bis in die Gegenwart zu erkennen. Außer Betracht blieben insbesondere Urteile und Beschlüsse, deren tragende Erwägungen durch spezifische historische oder politische Umstände in dem verfahrensbeteiligten Land bestimmt sind; vgl. z.B. EuGMR, Urteile vom 9.12.1994 - Nr. 10/1993/405/483-484 - (Holy Monasteries ./. Griechenland [Serie A - No. 301A]), vom 10.7.1998 - Nr. 57/1997/841/1047 (Sidiropoulos ./. Griechenland [RJD 1998-IV]), vom 31.7.2001 - Nr. 41340, 41342, 414344/98 (Refah Partisi ./. Türkei [RDJ 2003-II, EuGRZ 2003, 206]).

Die Veröffentlichung erfolgt in einer Amtssprache oder amtlichen Übersetzung, die das Gericht für die Ausgabe der jeweiligen Entscheidung verwendet hat. Ebenso bleibt die von der deutschen Praxis abweichende Form der Entscheidungen und der Abkürzungen gewahrt. Gekürzt wurden die Entscheidungen insbesondere in den Abschnitten zur Prozessgeschichte vor der Kommission bzw. dem Gerichtshof und zu Art. 50 EMRK (Entschädigung etc.). Die Volltexte der Entscheidungen des Europäischen Gerichtshofs für Menschenrechte sind in der Regel über dessen HUDOC-Datenbank (http://hudoc.echr.coe.int.) zugänglich. Dort wurden auch die nicht mit einer amtlichen Quelle nachgewiesenen Entscheidungen der Europäischen Kommission für Menschenrechte recherchiert.

Seit ihrer Gründung (1963) erscheinen die „Entscheidungen in Kirchensachen“ in Zusammenarbeit mit dem Institut für Kirchenrecht und rheinische Kirchenrechtsgeschichte der Universität zu Köln und werden

dort auch redaktionell betreut. Unter denen, die die Arbeiten am vorliegenden Sonderband der Entscheidungssammlung durch ihre Mitwirkung gefördert haben, seien namentlich genannt Dipl.-Bibliothekar Christian Meyer, Oberregierungsrat Dr. Bernd Eicholt und stud. iur. Kerstin Halverscheid, Daniela Schubert, Kerstin Sieberns, Tobias Kollig und David Altmaier. Frau Petra Schäfter (Berlin) sei für die druckfertige Erstellung des Manuskripts gedankt.

Den Benutzern der Sammlung schulden die Herausgeber herzlichen Dank für Hinweise und die Zusendung bisher unveröffentlichter Entscheidungen; sie werden diese Mithilfe auch weiterhin zu schätzen wissen.

Köln, im Sommer 2007 *Stefan Muckel* *Manfred Baldus*

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Abkürzungen und Zitierweise

1. Europäische Kommission für Menschenrechte

Yb	Yearbook of the European Commission on Human Rights (seit 1955)
CD	Collection of Decisions (bis 1974)
DR	Decisions and Reports (ab 1975)

2. Europäischer Gerichtshof für Menschenrechte

Ser. A	Série A des publications de la Cour européenne des droits de l'homme (bis Ende 1995) Der weitere Buchstabenzusatz hinter der Nummer (A-E) erscheint ab 1987.
RJD	Reports bzw. Reports of Judgments and Decisions (seit 1996)

CEDH/ECHR ab 1999

3. Europäischer Gerichtshof

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4. Weitere Abkürzungen

BayVBl	Bayerische Verwaltungsblätter
DÖV	Die Öffentliche Verwaltung
EuGRZ	Europäische Grundrechte-Zeitschrift
EuR	Europarecht
HRLJ	Human Rights Law Journal
KirchE-EU	Entscheidungen in Kirchensachen seit 1946, Sonderband: Europäische Kommission für Menschenrechte, Europäischer Gerichtshof für Menschenrechte, Europäischer Gerichtshof
KuR	Kirche und Recht
NJW	Neue Juristische Wochenschrift
NVwZ	Neue Zeitschrift für Verwaltungsrecht
öarr	Österreichisches Archiv für Recht und Religion
ÖJZ	Österreichische Juristenzeitung
RUDH	Revue universelle des Droits de l'homme

1. Europäische Kommission für Menschenrechte

1

Zur Aufrechterhaltung der Sicherheit und Ordnung im Strafvollzug kann auch einem Gefangenen, der sich zum Buddhismus bekennt, das Tragen eines Kinnbarts und der Besitz einer Gebetsschnur untersagt werden. Yoga-Übungen, soweit mit der Disziplin in der Anstalt vereinbar, sind ihm gestattet. Ein Anspruch auf Bezug von Schrifttum einer anderen Religionsgemeinschaft und auf Bereitstellung religiöser Literatur in der Gefängnisbücherei besteht nicht.

Art. 9, 27 § 2 a.F. EMRK
EKMR, Teilbeschluss vom 15. Februar 1965
- No. 1753/63 (X. ./. Österreich)[1] -

THE FACTS

The Applicant is an Austrian citizen born in 1921 and at present detained in the prison of Mittersteig serving a sentence of 20 years imprisonment for murder. His application concerns the conditions in the prison of Stein (where he was detained until the spring of 1963) and Garsten (where he was detained until 1964).

The Applicant states that he is of Jewish origin but converted to Buddhism. The prison authorities interfere with the exercise of his religion in that they do not allow him to grow a short and chin beard as prescribed by his religion, that he is prevented from doing contemplative yoga exercises and denied permission to receive the prayer-chain which he had to deposit when transferred to prison. He adds that he did not receive permission to pay 30 Austrian Schillings for a subscription to the „Weltmission" as part of the charity to which he is morally obliged and that he cannot get from the prison library or the book deposit the books necessary for a further development of his philosophy of life (Weltanschauung).

(…)

THE APPLICANT'S ALLEGATIONS

Whereas the Applicant alleges violations:
(1) of art. 9, in respect of the facts set out under point 1 above;
(2) (…)

[1] Yb 8, 174.

THE SUBMISSIONS OF THE PARTIES

Whereas the Respondent Government in its observations of 17th September 1964 and the Applicant in his Reply of 2nd October 1964 made the following submissions:

(1) In respect of the alleged violation of art. 9

The Respondent Government submitted that, according to the decision of the Regional Court of Vienna of … 1958 and to the prison register, the Applicant belongs to no religious faith. He had not during his detention in the prisons of Stein, Garsten and Mittersteig notified the prison authorities concerned that he had joined any religious sect. Consequently, the authorities cannot be said to have interfered with his right to free exercise of religion. It was further submitted that for identification purposes he could not be allowed to grow a beard as he did not have a beard prior to his arrest and conviction. The Applicant was at liberty to do yoga exercises provided that they did not interfere with prison discipline. Consequently the allegations made under art. 9 were manifestly ill-founded.

Finally, it was submitted that the Applicant had not exhausted the remedies available to him as he failed to submit his grievances to the Constitutional Court.

The Applicant submitted that the Austrian authorities refused to recognise Buddhist philosophy and practice as a religion. He maintained that the growing of a beard and the possession of a prayer-chain were necessary elements in practising the Buddhist religion. He contested that identification purposes were relevant as several other prisoners had received permission to grow beards.

(2) (…)

THE LAW

In respect of the alleged violations of art. 9

Whereas art. 9 of the Convention provides as follows:

„(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 beliefs 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."

Whereas the Applicant has maintained that the prison authorities have obstructed his freedom to manifest his religion in five different ways, e.g. by not allowing him to grow a chin beard, by preventing him from doing yoga exercises, by denying him a prayer-chain, by not allow-

ing him to subscribe to a periodical „Weltmission", and by refusing him the books necessary for a further development of his philosophy of life,

Whereas, as to the refusal of permission for the Applicant to grow a chin beard, the Commission has taken note of the submissions of the Respondent Government that this refusal was due to the necessity of being able properly to identify the Applicant; whereas the Commission considers that the refusal is thus justified as being a limitation upon the freedom to manifest one's religion „necessary in a democratic society … for the protection of public Order …" within the meaning of par. (2) of art. 9.

Whereas, as to the yoga exercises, the Commission has taken note of the statement in the observations of the Respondent Government of … 1964 that the Applicant is at liberty to do such exercises, provided that they do not interfere with prison discipline;

Whereas, as to the refusal of permission for the Applicant to obtain a prayer-chain the Commission considers that, even supposing that such chain is an indispensable element in the proper exercise of the Buddhist religion, such limitation is justified under the above par. (2) as a measure „necessary in a democratic society … for the protection of public Order", in particular, in the interest of the safety of the prisoner and of the maintenance of discipline in the prison;

Whereas, as to the refusal of permission to subscribe to „Weltmission" the Commission has been informed that this periodical is edited by a Roman Catholic organisation; whereas it follows that by the refusal the Applicant, being himself of Buddhist faith, has not been, in any way, restricted in the exercise of his religion;

Whereas, finally, as to the refusal of permission to obtain certain books, art. 9 does not oblige a Contracting Party to put at the disposal of prisoners books which they consider necessary for the exercise of their religion or for the development of their philosophy of life;

Whereas it follows that this part of the Application is manifestly ill-founded and must be rejected in accordance with art. 27, par. (2) of the Convention.

2

Die schutzwürdigen Belange von Unfallbeteiligten rechtfertigen die gesetzliche Einführung einer Kfz-Haftpflichtversicherung oder entsprechender finanzieller Sicherheiten auch für solche Verkehrsteilnehmer, die aus religiösen Gründen den Abschluss von Versicherungen jeder Art ablehnen.

Art. 9 § 2, 27 § 2 a.F. EMRK
EKMR, Beschluss vom 31. Mai 1967 - No. 2988/66 (X. ./.Niederlande)[1] -

THE FACTS

The Applicant is a Netherlands citizen, born in 1939. He is a farmer and merchant residing at B. He states that by reason of his religious beliefs he has objections of conscience to any form of insurance. According to his religious convictions, prosperity and adversity are meted out to human beings by God and it is not permissible to attempt in advance to prevent or reduce the effects of possible disasters. Consequently, the Applicant does not find it possible to accept any systems of compulsory insurance.

In the present case, he refers to one such system introduced by the Act of 30th May, 1963 on Liability Insurance for Motor Vehicles (Wet aansprakelijkheidsverzekoring motorrijtuigen). According to the provisions of this Act, every user of a motor vehicle must be insured against third party liability. As in other Netherlands legislation on compulsory insurance schemes, there are in the Act of 30th May, 1963 special provisions regarding exemption for those who object, on grounds of conscience, to any form of insurance. Persons who are granted exemption under these provisions do not have to pay an insurance premium but are required to pay an equivalent sum of money as income tax and the Applicant states that these tax payments serve, in fact, to cover the same risks as the insurance system is designed to cover. Consequently, there is not, in the Applicant's opinion, any real exemption, and he states that the German term „Etikettenschwindel" (false labelling) has sometimes been used to describe this procedure. The Applicant concludes that the provisions regarding exemption are not acceptable and that, therefore, his objections of conscience also concern the exemption system provided for by the Act.

As the Applicant is a merchant, he urgently needs a car for his business. On 1965, he was convicted by the Magistrate's Court (Kantonrechter) of Harderwijk for driving a motor vehicle without an insurance and he was sentenced to a fine of 50 guilders or, in default, 10 days' detention. The motor vehicle was confiscated with the order that the proceeds from the sale of the vehicle should be handed over to the Applicant. Finally, the Applicant was also disqualified from driving motor vehicles for a period of six months.

On appeal, this judgment was confirmed, on 1966, by the Regional Court (Arrondissementsrechtbank) of Zwolle. The Applicant lodged a further

[1] Yb 10, 472. Mit ähnlicher Begründung verneinte die Kommission eine Verletzung von Art. 9 EMRK durch Einführung von Pflichtbeiträgen zur Altersvorsorge; Beschluss vom 14.12.1962 - No. 1497/62 - (Reformierte Kirche von X. ./. Niederlande), Yb 5, 286. Vgl. auch EKMR KirchE-EU S. 66 (Pflichtmitgliedschaft in einer Pensionskasse).

appeal (beroep in cassatie) with the Supreme Court (Hoge Raad), and invoked in particular his objections of conscience to insurance systems. On 1966, this appeal was rejected by the Supreme Court.

The Applicant alleges that the Supreme Court's decision violates the Convention, in particular its art. 9, since for him one of the practices of his religion and religious beliefs is to abstain from participation in the insurance system concerned.

THE LAW

Whereas the Applicant complains of the system of compulsory motor insurance introduced by the Netherlands Act of 30th May, 1963;

Whereas he objects not only to the primary obligation to participate in the insurance scheme but also to the character of the exemption system provided for in the Act in regard to conscientious objectors;

Whereas the Applicant alleges that, as a result of the Act concerned and its application to him, he is the victim of a violation of art. 9 of the Convention;

Whereas art. 9 of the Convention provides as follows:

„(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."

Whereas the Commission has examined the Application in relation to art. 9 of the Convention and has had regard to its previous decisions in similar cases (see, in particular, Yb 5, pages 278 and 286, CD, Vol. 18, p. 40);

Whereas in the present case the question first arises as to whether the facts alleged could be considered to concern „the right to freedom of thought, conscience and religion" as guaranteed by par. (1) of art. 9;

Whereas, in so far as this provision is involved, the Commission finds it clear that the Netherlands legislation concerned and its application in the present case are justified under par. (2) of art. 9;

Whereas in this respect the Commission has noted that the purpose of the compulsory motor insurance scheme is to safeguard the rights of third parties who may become victims of motor accidents; and whereas par. (2) of art. 9 expressly permits such limitations of the freedom to manifest one's religion or beliefs as are necessary in a democratic society „for the protection of the rights and freedoms of others";

Whereas it follows that the present Application is manifestly ill-founded within the meaning of art. 27, par. (2) of the Convention.

Now therefore the Commission declares this Application inadmissible.

3

Das Recht auf Ehe iSv Art. 12 EMRK begründet keinen Anspruch auf Anerkennung einer nur unter Beachtung religiöser Vorschriften geschlossenen Ehe im weltlichen Rechtskreis.

Art. 9, 12, 27 § 2 a.F. EMRK
EKMR, Beschluss vom 18. Dezember 1974
- No. 6167/73 (X. ./. Deutschland)[1] -

THE FACTS

The applicant is a German citizen born in 1924 and living in Heidelberg.

The applicant complains that the German authorities do not recognise his marriage with Mrs Y. The registrar of marriages refused to make an entry in the family record (Familienbuch) because the applicant had not married under the forms prescribed by Sec. 11 of the Law on Marriages (Ehegesetz). The applicant complained to the competent District Court (Amtsgericht) which rejected his complaint on May 1972. The applicant's appeal (Beschwerde) was rejected by the Regional Court (Landgericht) Heidelberg on September 1972. A further appeal (weitere Beschwerde) was rejected by the Court of Appeal (Oberlandesgericht) Karlsruhe on March 1973. The latter court stated in its decision that in the opinion of the applicant he is married to Y. because he had intercourse with her only after having read out verse 16 of the 22nd chapter of the second book of Moses in the Old Testament. The Court held that the right to marriage as guaranteed under art. 6 (1) of the Constitution (GG) only referred to the conclusion of marriage in the form provided by the legislator in Sec. 11 of the Law on Marriages. In the opinion of the court art. 6 (GG) not only gives the State the right but even creates the obligation for the State to set up regulations for marriages as it is a social institution. Therefore, so the court concluded, the necessity of contracting a marriage in proper form before the registrar of marriages was justified under constitutional law.

The applicant's constitutional appeal was rejected by a group of three judges of the Federal Constitutional Court on June 1973 as being clearly ill-founded.

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[1] DR 1, 64.

The applicant alleges a violation of most of the articles of the Convention and especially of art. 9 (1).

THE LAW

The applicant has complained that the German authorities do not recognise his marriage contracted according to a special religious ritual and not in the forms prescribed by the Law on Marriages.

It is true that art. 9 (1) of the Convention secures to everyone the right to freedom of religion: However, in this case this provision cannot be considered without having regard to art. 12 which provides that „Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right". Marriage is not considered simply as a form of expression of thought, conscience or religion but is governed by the specific provision of art. 12 which refers to the national laws governing the exercise of the right to marry.

In the present case the applicant was not denied the right to marry. He was only requested to marry under the forms prescribed by German law. There is consequently no appearance of a violation of the Convention, especially of art. 9 (1) and 12.

An examination by the Commission of this complaint as it has been submitted, including an examination made ex officio, does not therefore disclose any appearance of a violation of the rights and freedoms set out in the Convention and in particular in the above article.

It follows that the application is manifestly ill-founded within the meaning of art. 27 (2) of the Convention.

For these reasons, the Commission declares this application inadmissible.

4

Das einem Strafgefangenen auferlegte Verbot, an den Herausgeber einer buddhistischen Zeitschrift Manuskripte zum Zwecke der Veröffentlichung zu übersenden, verletzt nicht die Religionsfreiheit und überschreitet auch nicht das unter den Bedingungen des Strafvollzugs erforderliche Maß an Einschränkungen der Meinungsfreiheit.

Art. 8, 9, 10, 27 § 2 a.F. EMRK
EKMR, Beschluss vom 20. Dezember 1974
- No. 5442/72 (X. ./. Vereinigtes Königreich)[1] -

[1] DR 1, 41.

Der in der Amtlichen Sammlung nur stichwortartig wiedergegebene Sachverhalt ist im Wesentlichen folgender:

Der zu einer fünfjährigen Freiheitsstrafe verurteilte Antragsteller ist - wie der Gefängnisbehörde bekannt - buddhistischen Glaubens. Nachdem er dem Herausgeber einer buddhistischen Zeitschrift ein Manuskript zur Veröffentlichung übersandt hatte, untersagte ihm die Behörde die Übermittlung weiterer Manuskripte.

Mit der Beschwerde macht er geltend, die Veröffentlichung der Zeitschriftenartikel diene der Kontaktpflege mit seinen Glaubensgenossen und gehöre damit zur Religionsausübung. Unter diesen Umständen sei auch eine Einschränkung seines Rechts auf Briefverkehr und freie Meinungsäußerung nicht gerechtfertigt.

THE LAW

The applicant, while a prisoner at D., was refused permission to send out articles for publication in a Buddhist magazine. He claims that this constitutes a violation of art. 8, 9 and 10 of the Convention.

The Commission has first examined the complaint in the light of art. 9 of the Convention. Art. 9 provides:

> *„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.“*

However, the Commission notes that, while the applicant was detained in prison, the authorities did what they could to find a Buddhist minister for him (the applicant has not suggested otherwise) and that they eventually allowed him to write an extra letter to a Buddhist every week when it was not possible to find a minister. There is no indication of any interference with the applicant's right to freedom of thought, conscience or religion.

The applicant has produced statements to the effect that communication with other Buddhists is an important part of his religious practice. But he has failed to prove that it was a necessary part of this practice that he should publish articles in a religious magazine. Viewed in the light of art. 9 the complaint is manifestly ill-founded.

The Commission has next considered the complaint within the terms of art. 8 which provides for respect for correspondence. It is not clear whether the applicant originally intended to allege that at one time he had been refused permission to write to Mr Y., the Buddhist publisher. Whether or not this complaint formed part of his original submission, it is clear that the applicant has not pursued it. The respondent Govern-

ment, in their observations, have denied that the applicant was ever refused permission to write and he does not now contradict them.

The applicant was told that he would not be allowed to send out material for publication but there is no indication of interference with his letters, as such, and the complaint is again manifestly ill-founded with respect to this article.

Finally, the Commission has reviewed the matter under art. 10, which provides

> *„1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …*
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary."*

The applicant was prevented by Rule 33 of the Prison Rules, as applied by the authorities, from enclosing with his letters to the Buddhist publisher, Mr Y., any material intended for publication, even though he was to receive no money in the event of its publication.

The Commission considers that this might constitute an interference with the applicant's freedom of expression, his right to impart information and ideas without interference.

However, the Commission recognises the extra work and the administrative difficulties of checking all material that might be sent out by prisoners for the purpose of publication and the potential security risk involved without careful control being exercised. The Rule, duly prescribed by law, is necessary for the maintenance of prison discipline and the Commission concludes that the Rule is necessary in a democratic society for the prevention of disorder or crime within the meaning of art. 10 (2).

The Commission considers that, for the same reasons, the application of Rule 33 to the applicant was reasonable. The Commission is not of the opinion that the applicant's situation in the particular circumstances warranted a special exception to the Rule.

The Commission finds therefore that the applicant's complaint does not disclose any appearance of a violation of the rights and. freedoms set out in the Convention and in particular in art. 8, 9 and 10.

It follows that the application is manifestly ill-founded within the meaning of art. 27 (2) of the Convention.

For these reasons, the Commission declares this application inadmissible.

5

Zur Frage des Rechtschutzes für einen Geistlichen gegen Anordnungen des staatlichen Kirchenministeriums in religiösen Angelegenheiten (hier: Verbot, die Taufe eines Kindes von der Teilnahme seiner Eltern am Religionsunterricht abhängig zu machen).

In einem staatskirchlichen System wird der individuellen Religionsfreiheit der Geistlichen durch die freie Entscheidung über den Eintritt in den Kirchendienst und die Möglichkeit des Kirchenaustritts Rechnung getragen.

Art. 6, 9 EMRK

EKMR, Beschluss vom 8. März 1976 - No. 7374/76 (X. v. Dänemark)[1] -

SUMMARY OF THE RELEVANT FACTS

The applicant is a clergyman in the State church of Denmark (Folkekirchen) and the incumbent of a particular parish. He made it a condition for christening children that the parents attended five religious lessons.

The Church Ministry, being of the opinion that the applicant had no right to make such conditions, advised him to abandon this practice or to hand in his resignation. When the applicant refused, the Ministry, set up a consistory court of an advisory character. The applicant unsuccessfully requested that the proceedings should take place in public before a consistory court with judicial authority. The public prosecutor's office, however, held the opinion that the case was of a mere disciplinary character and had no criminal law implications.

The consistory court postponed the examination of the examination of the case pending the decision of the Commission on the admissibility of the present case.

The applicant complains in particular of a violation of his freedom of conscience and claims that he is being denied a right to a fair trial as the decision is left to the Church Ministry's discretion.

THE LAW (Extract)

1. The applicant first complains that, as a clergyman in the State Church of Denmark, he has been requested by the Church Ministry under threat of sanctions to abandon a certain practice of christening. He alleges in this respect a violation of art. 9 of the Convention.

Art. 9 grants to everyone the right to freedom of thought, conscience and religion including the freedom to manifest his religion or belief in worship, teaching, practice and observance. The Commission considers it

[1] DR 5, 157.

conceivable that a dismissal of a State official for disobedience could in given circumstances raise an issue under this article. However, for the following reasons in the circumstances of the present case no such issue arises.

A church is an organised religious community based on identical or at least substantially similar views. Through the rights granted to its members under art. 9, the church itself is protected in its right to manifest its religion, to organise and carry out worship, teaching practice and observance, and it is free to act out and enforce uniformity in these matters. Further, in a State church system its servants are employed for the purpose of applying and teaching a specific religion. Their individual freedom of thought, conscience or religion is exercised at the moment they accept or refuse employment as clergyman, and their right to leave the church guarantees their freedom of religion in case they oppose its teachings.

In other words, the church is not obliged to provide religious freedom to its servants and members, as is the State as such for everyone within its jurisdiction.

The Commission therefore holds that freedom of religion within the meaning of art. 9 (1) of the Convention does not include the right of a clergyman, in his capacity of a civil servant in a State church system, to set up conditions for baptising, which are contrary to the directives of the highest administrative authority within that church, i.e. the Church Minister.

It follows that the applicant's above complaint does not fall within the scope of art. 9 of the Convention.

2. The applicant further complains that he is being denied access to a court of law or alternatively a consistory court with judicial authority in order to challenge the decision of the Church Ministry to dismiss him if he did not abandon the practice referred to above. He does not accept that the disciplinary proceedings take place before the consistory court which has been constituted in his case, since this court has a fact-finding function only and the determination of the charge will be left to the Church Minister's discretion. In consequence the applicant would allegedly have lesser chances of avoiding dismissal. He also suggests that the purpose behind the choice between these different forms of proceedings is found in the Church Ministry's alleged aims at establishing what it considers to be the correct practice in relation to the christening ritual, rather than simply disciplining him or charging him with a criminal offence.

The applicant refers in this respect to art. 6, par. 1, of the Convention which secures to everyone that in the determination of his civil rights and obligations or of any criminal charge against him he is entitled to a fair and public hearing before an impartial tribunal.

As far as the applicant would like to have issues of faith or religious practice decided by a tribunal, within the meaning of art. 6, par. 1, of the Convention, the Commission is of the opinion that disputes on such issues do not involve the determination of civil rights and obligations of a criminal charge, within the meaning of the said provision.

As far as the applicant claims the right not to be dismissed from his function as a civil servant, the Commission refers to its previous case-law according to which litigation concerning access to or dismissal from civil service falls outside the scope of art. 6, par. 1, of the Convention (see, for example, No. 3937/69, CD 32, p. 61).

It follows that art. 6, par. 1, of the Convention does not apply to this part of the application.

6

Die straßenverkehrsrechtliche Helmpflicht für Motorradfahrer ist als Beschränkung der Religionsfreiheit im Sinne von Art. 9 § 2 EMRK nach wie vor gerechtfertigt, auch nachdem die Gesetzgebung Ausnahmen zugunsten von Sikhs als Turbanträgern zugelassen hat.

Art. 9 § 2 EMRK
EKMR, Beschluss vom 12. Juli 1978
- No. 7992/77 (X. ./. Vereinigtes Königreich)[1] -

SUMMARY OF THE FACTS

The applicant, an Indian citizen, lives in the United Kingdom. The applicant, a sikh, is required by his religion to wear a turban.

Between 1973 and 1976, he was prosecuted, convicted and fined twenty times for failing to wear a crash helmet when riding his motor cycle.

He complains that the requirement to wear a crash helmet, which obliges him to remove his turban, whilst riding his motor cycle interferes with his freedom of religion.

At the end of 1976 an amendment to the legislation exempted sikhs from wearing crash helmets.

THE LAW

The applicant complains that the Motor Cycle (Wearing of Helmets) Regulations 1973 violated his right to freedom of religion by penalising

[1] DR 14, 234.

him for failing to remove his turban and put on a crash helmet when riding his motor cycle.

Art. 9 of the Convention provides that

„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 in 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".

The Commission considers that the compulsory wearing of crash helmets is a necessary safety measure for motor cyclists. The Commission is of the opinion therefore that any interference that there may have been with the applicant's freedom of religion was justified for the protection of health in Accordance with art. 9 (2).

The facts that Sikhs were later granted an exemption to the traffic regulations does not in the Commission's opinion vitiate the valid health considerations on which the regulations are based.

The Commission concludes therefore that the penalisation of the applicant for failing to comply with these regulations did not constitute a violation of art. 9 of the Convention.

For these reasons, the Commission declares the application inadmissible.

7

Eine Gesellschaft mit beschränkter Haftung kann als ein auf Gewinnerzielung ausgerichtetes Unternehmen nicht in den Schutzbereich des Art. 9 § 1 EMRK fallen.

EKMR, Beschluss vom 27. Februar 1979
- No. 7865/77 (Company X. ./. Schweiz)[1] -

SUMMERY OF THE RELEVANT FACTS

The limited liability company X. runs a printing office in the Canton of Zürich.

The commune in which the company is registered obliges it to pay an ecclesiastical tax both in favour of the Roman Catholic and Protestant Reformed churches, both recognised in the Canton of Zürich. The compe-

[1] DR 16, 85.

tent Zürich authorities have confirmed the communal decision. A public law appeal to the Federal Court, lodged by the applicant company was rejected.

THE LAW (Extract)

The applicant, a limited liability company, registered in E. in the Canton of Zürich, complains that the cantonal and federal authorities infringe its rights secured by art. 9 of the Convention, in that they oblige it, as a corporate body to pay ecclesiastical taxes intended for both Christian Churches - the Roman Catholic church and the Protestant Reformed church recognised in the Canton of Zürich.

Art. 9, par. 1 of the Convention, which guarantees to every-one the right to freedom of thought, conscience and religion, stipulates that this right implies the freedom to manifest its religion or belief … and specifies that this freedom shall be subject to limitations only under the conditions set out under par. 2 of that provision.

Moreover, according to art. 25, par. 1, of the Convention the Commission may receive petitions inter alia from any non-governmental organisation claiming to be the victim of a violation by one of the High Contracting Parties that has recognised the competence of the Commission in this respect, of the rights set forth in the Convention.

Even supposing that the applicant's claim may fall within the ambit of art. 9 of the Convention, the Commission is nevertheless of the opinion that a limited liability company given the fact that it concerns a profit-making corporate body, can neither enjoy nor rely on the rights referred to in art. 9, par. 1, of the Convention.

It follows that in this respect, the application is incompatible with the provisions of the Convention and must be rejected under art. 27, par. 2 of the Convention.

8

Auch an einer weltanschaulich neutralen Schule darf ein Lehrer seine moralische und religiöse Auffassung im Unterricht kundtun, jedoch hat er das Erziehungsrecht der Eltern zu achten und insbesondere ein Verhalten zu meiden, das als aggressiv (*offensive*) verstanden werden oder bei den Schülern Verwirrung stiften kann.

Art. 10 §§ 1, 2 EMRK
EKMR, Beschluss vom 1. März 1979
- No. 8010/77 (X. ./. Vereinigtes Königreich)[1] -

[1] DR 16, 101.

SUMMARY OF THE RELEVANT FACTS

From 1971 to 1975 the applicant was a teacher in a public secondary school, in charge of English and mathematics.

He received warnings from the headmaster for having given religious education during class hours, having held „evangelical clubs" on the school premises and for having worn stickers carrying religious and anti-abortion slogans on his clothes or briefcase.

After numerous interviews and exchanges of notes with the headmaster in the course of which the applicant, setting out his strong beliefs, declared himself unwilling to change his behaviour, his dismissal was decided by the competent County authority. The applicant's appeals to the Employment tribunals were unsuccessful.

THE LAW (Extract)

The applicant [also] claims that his dismissal was due to the expression of his views to his headmaster, contrary to art. 10 of the Convention which secures to everyone the right to freedom of expression. However, par. 2 of art. 10 states that „the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

It is clear from the documents submitted by the applicant, in particular the decisions of the Industrial Tribunal and the Employment Appeal Tribunal and letters sent to the applicant by his headmaster dated 10 May 1974 and 13 November 1974 that he was dismissed because of his refusal to comply with specific instructions. In particular the letters mentioned above indicate that the only aspect of the applicant's views that were objectionable was his insistence that he should instruct his classes in them. Accordingly, the Commission is satisfied that there is no evidence in support of the complaint that the applicant was dismissed because of the expression of his views to his headmaster.

Nevertheless the Commission notes that an important factor in the dispute between the applicant and the headmaster concerned the latter's instruction to the applicant not to advertise by posters or stickers on school premises his political, moral or religious beliefs.

The Commission considers that this instruction constitutes an interference with the applicant's freedom of expression. However the Commission is of the opinion that school teachers in non-denominational schools

should have regard to the rights of parents so as to respect their religious and philosophical convictions in the education of their children. This requirement assumes particular importance in a non-denominational school where the governing legislation provides that parents can seek to have their children excused from attendance at religious instruction and further that any religious instruction given shall not include „any catechism or formulary which is distinctive of any particular religious denomination“ (see Education Act 1944, sec. 25 and 26).

In the present case the posters and „stickers“ objected to, reflected the applicant's strong Evangelical beliefs and his opposition to abortion. The Commission notes from the observations of the respondent Government that some of the „stickers“ worn on the applicant's lapel and on his briefcase were considered offensive to female members of staff and disturbing to children. Having regard to the particular circumstances of the case, the Commission considers that the interference with the applicant's freedom of expression is justified as being necessary in a democratic society for the protection of the rights of others within the meaning of art. 10, par. 2, of the Convention.

9

Eine Kirche (hier: Scientology) ist als solche befähigt, Rechte aus Art. 9 EMRK als Beschwerdeführerin geltend zu machen.

Die Gewährleistung freier Religionsausübung erstreckt sich nicht auf Werbeanzeigen, die - ungeachtet eines religiösen Gegenstandes - nach ihrer Gestaltung auf einen kommerziellen Zweck ausgerichtet sind.

Art. 9, 10, 14, 27 § 2 a.F. EMRK
EKMR, Beschluss vom 5. Mai 1979 - No. 7805/77
(Church of Scientology u.a. ./. Schweden)[1] -

SUMMARY OF THE FACTS

The application was introduced by the „Church of Scientology“ in Sweden and by X., one of the ministers.

In 1973, the applicant church placed an advertisement in its periodical which is circulated amongst its members which read as follows:

„Scientology technology of today demands that you have your own E-meter. The E-meter (Hebbard Electrometer) is an electronic instrument for measuring the mental state of an individual and changes of the state.

[1] DR 16, 68.

There exists no way to clear without an E-meter. Price: 850 CR. For international members 20% discount: 780 CR."

The applicants define the E-meter as follows „A religious artifact used to measure the state of electrical characteristics of the ‚static field' surrounding the body and believed to reflect or indicate whether or not the confessing person has been relieved of the spiritual impediment of his sins".

Having received various complaints, the Consumer Ombudsman (Konsumentombudsmannen), basing himself on the 1970 Marketing Improper Practices Act (Lagen om otillbörlig marknadsföring) introduced an action before the Market Court (Marknadsomstolen) requesting an injunction against the applicants prohibiting the use of certain passages in the advertisement for the E-meter. After having heard expert witnesses, the Court granted the injunction. A petition for the reopening of the case (Resning) was rejected by the Supreme Court.

THE LAW

[1] The Church of Scientology and Pastor X. claim that the injunction by the Market Court on 19 February 1976 relating to their advertisements of the Hubbard Electrometer (E-meter) violates their freedom of religion and expression in a discriminatory way contrary to art. 9, 10 and 14 of the Convention.

[2] However, before the Commission can consider these complaints two preliminary matters should be clarified. The first matter concerns the question of who can properly be considered as the applicant in the present case.

Under art. 25 (1) of the Convention the Commission may receive petitions from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention. Pastor X. is such a person.

In respect of the Church, the Commission has previously applied the rule according to which a corporation being a legal and not a natural person is incapable of having or exercising the rights mentioned in art. 9 (1) of the Convention (see Appl.-No. 3796/66, CD 29, p. 70). The Commission has considered that the Church itself is protected in its rights under art. 9 through the rights granted to its members (see Appl.-No. 7374/76, DR 5, p. 157). In accordance with this view it would be open to named individual members of the Church to lodge an application under art. 25, in effect, on the Church's behalf. This would cover for example the five named members of the governing board who decided to lodge the application.

The Commission, however, would take this opportunity to revise its view as expressed in Appl.-No. 3798/68. It is now of the opinion that the

above distinction between the Church and its members under art. 9 (1) is essentially artificial. When a church body lodges an application under the Convention, it does so in reality, on behalf of its members. It should therefore be accepted that a church body is capable of possessing and exercising the rights contained in art. 9 (1) in its own capacity as a representative of its members. This interpretation is in part supported from the first paragraph of art. 10 which, through its reference to „enterprises", foresees that a nongovernmental organisation like the applicant Church is capable of having and exercising the right to freedom of expression.

Accordingly, the Church of Scientology, as a nongovernmental organisation, can properly be considered to be an applicant within the meaning of art. 25 of the Convention.

[3] The second preliminary matter relates to whether the applicants have complied with the requirements concerning exhaustion of domestic remedies and with the six months' rule in art. 26. *(wird ausgeführt)*

[4] The applicants complain of an unjustified interference with a right to express a religious opinion in the context of the advertisement for sale of an E-meter.

Art. 9 (1) provides inter alia that everyone has the right to freedom of religion. This right includes the freedom to manifest his religion or belief in worship, teaching, practice and observance.

It is clear that the effect of the Market Court's injunction only concerns the use of certain descriptive words concerning the E-meter, namely that it is „an invaluable aid to measuring man's mental state and changes in it". The Market Court did not prevent the Church from selling the E-meter or even advertising it for sale as such. Nor did the Court restrict in any way the acquisition, possession or use of the E-meter.

The issue, therefore, to be determined is whether the restriction actually imposed on the commercial description of the E-meter could be considered to constitute an interference with the manifestation of a religious belief in practice within the meaning of art. 9 (1).

The Commission is of the opinion that the concept, contained in the first paragraph of art. 9, concerning the manifestation of a belief in practice does not confer protection on statements of purported religious belief which appear as selling „arguments" in advertisements of a purely commercial nature by a religious group. In this connection the Commission would draw a distinction, however, between advertisements which are merely „informational" or „descriptive" in character and commercial advertisements offering objects for sale. Once an advertisement enters into the latter sphere, although it may concern religious objects central to a particular need, statements of religious content represent, in the Commission's view, more the manifestation of a desire to market goods for profit than the manifestation of a belief in practice, within the proper sense of that term. Consequently the Commission considers that the

words used in the advertisement under scrutiny fall outside the proper scope of art. 9 (1) and that therefore there has been no interference with the applicants' right to manifest their religion or beliefs in practice under that article.

It follows therefore that this complaint must be rejected as incompatible with the provisions of the Convention within the meaning of art. 27 (2).

[5] The restrictions imposed on the applicants' advertisements rather fall to be considered under art. 10. Art. 10 (1) secures to everyone the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by a public authority.

In the Commission's view the applicants are not prevented from holding their opinion on the religious character of the E-meter. However, they were imparting ideas about that opinion and the Market Court prohibited them from continuing to use a certain wording. This was an interference with the applicants' freedom to impart ideas under art. 10 (1).

Art. 10 (2) permits restrictions on the exercise of these freedoms as are prescribed by law and are necessary in a democratic society, inter alia, for the protection of health or morals and for the protection of the reputation or rights of others.

In assessing whether the requirements of art. 10 (2) have been respected the Commission must have regard to the principles developed in the jurisprudence under the Convention (e.g. Handyside Case, Judgment by the European Court of Human Rights, 7 December 1977, par. 42-59). It observes first, therefore, that the basis in law for the injunction issued by the Market Court was the Marketing (Improper Practices) Act 1970. Consequently, the Commission finds that the restriction imposed on the applicants' freedom to impart ideas was prescribed by law within the meaning of art. 10 (2) of the Convention.

The Marketing Act aimed at protecting the rights of consumers. This aim is a legitimate aim under art. 10 (2), being for the protection of the rights of others in a democratic society.

The remaining question to be examined concerns the „necessity" of the measure challenged by the applicants. It emerges from the case law of the Convention organs that the „necessity" test cannot be applied in absolute terms, but required the assessment of various factors. Such factors include the nature of the right involved, the degree of interference, i.e. whether it was proportionate to the legitimate aim pursued, the nature of the public interest and the degree to which it requires protection in the circumstances of the case.

In considering this question the Commission again attaches significance to the fact that the „ideas" were expressed in the context of a commercial advertisement. Although the Commission is not of the opinion that commercial „speech" as such is outside the protection conferred by

art. 10 (1), it considers that the level of protection must be less than that accorded to the expression of „political" ideas, in the broadest sense, with which the values underpinning the concept of freedom of expression in the Convention are chiefly concerned (see Handyside Case, supra cit, par. 49).

Moreover, the Commission has had regard to the fact that most European countries that have ratified the Convention have legislation which restricts the free flow of commercial „ideas" in the interests of protecting consumers from misleading or deceptive practices. Taking both these observations into account the Commission considers that the test of „necessity" in the second paragraph of art. 10 should therefore be a less strict one when applied to restraints imposed on commercial „ideas".

The Commission notes that the applicants' periodical in which the advertisement appeared was circulated in 300 copies to members of the Church. However the Market Court concluded that the advertisements were designed to stimulate the interests both of persons outside the Church as well as its own members in acquiring an E-meter and were thus designed to promote its sales. In arriving at this conclusion the Court had regard to the following factors:

1. that the magazine although distributed only to members might be spread by members to other persons who could be enticed to purchase an E-meter

2. that the advertisement does not appear to limit sale of an E-meter to members only or priests only or those studying for the priesthood.

3. in the advertisements readers are encouraged to seek „international membership" which has the advantage of entitling such members to lower prices for books, tape recordings and E-meters. Such statements were not limited either to priests or those studying for the priesthood.

Finally the Market Court deemed that the advertisements were misleading and that it was important to safeguard the interest of consumers in matters of marketing activities by religious communities and especially in the present case where the consumer would be particularly susceptible to selling arguments.

The Commission considers that in principle it should attach considerable weight to the above analysis and findings of the Market Court.

The Commission further notes that the Market Court did not prohibit the applicants from advertising the E-meter and did not issue the injunction under penalty of a fine. The Court chose what would appear to be the least restrictive measure open to it, namely the prohibition of a certain wording in the advertisements. Consequently, the Commission cannot find that the injunction against the applicants was disproportionate to the aim of consumer protection pursued.

Having regard to the above, the Commission therefore accepts that the injunction granted by the Market Court was necessary in a democratic society for the protection of the rights of others, i.e. consumers.

[6] The applicants claim finally that the injunction by the Market Court was discriminatory and contrary to art. 14 of the Convention.

Art. 14 provides as follows:

> *„The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.“*

It appears that the Consumer Ombudsman had received a number of complaints from the public against the applicant Church in relation to the E-meter and other matters. He therefore instituted proceedings before the Market Court. The case file does not, consequently, disclose that the authorities singled out the applicants for special attention. Nor is there any indication that the authorities have deliberately refrained from intervening against comparable advertisements by other religious communities. The application does not, therefore, disclose that the applicants have been subjected to any differential treatment.

In these circumstances there is no basis for any further examination of the complaint in the light of art. 14.

[7] It follows therefore that the applicants' complaints under art. 10 and art. 14 in conjunction with art. 9 and art. 10 must be rejected as manifestly ill-founded within the meaning of art. 27 (2) of the Convention.

For these reasons, the Commission declares this application inadmissible.

10

Die Gewährleistung von Religionsfreiheit schützt religiöse Bekenntnisse nicht vor jeder Form von Kritik, jedoch kann ein Eingreifen des Staates geboten sein, wenn hierdurch die Entfaltung von Religionsfreiheit in der Öffentlichkeit gefährdet erscheint.

Die Rechtsschutzgarantie eröffnet für eine Personengruppe den Zivilrechtsweg wegen Ansprüchen auf Schutz der eigenen Ehre (right to protect its own reputation) nur, wenn dies auch im nationalen Recht vorgesehen ist.

Eine Kirche oder ihre Mitglieder können, wenn sie sich in ihrer sozialen Geltung beeinträchtigt sehen, aus der Gewährleistung von Religionsfreiheit kein zivilprozessuales Klagerecht wegen Volksverhetzung nach schwedischem Recht („hets mot fokgrupp“) herleiten.

Art. 6, 9 EMRK
EKMR, Beschluss vom 14. Juli 1980 - No. 8282/78
(Church of Scientology u.a. ./. Schweden)[1] -

SUMMARY OF THE RELEVANT FACTS

In November 1975, a local Swedish newspaper published certain statements made by a Professor of theology in the course of a lecture, including the following passage: „Scientology in the most untruthful movement there is. It is the Cholera of spiritual life. That is how dangerous it is".

In May 1976, the Church of Scientology requested the Chancellor of Justice (Justieiekanselern) to initiate criminal proceedings for „agitation against a group" („hets mot fokgrupp"). He refused the request pointing out that a request of that kind ought to be addressed to the public prosecutor in due time and not, as in the present case, four days before the expiring of the period of limitation.

In August 1976, the Church instituted proceedings for damages against the publisher of the newspaper concerned. After the judge of first instance and the court of appeal had held that the Church was a competent plaintiff, the Supreme Court held on appeal that it was not qualified to bring an action since the protection of a group could not be obtained through the civil proceedings in question.

THE LAW (Extracts)

1. The Commission notes first of all, that this application is brought by two applicants, namely the Church of Scientology on the one hand, and 128 named applicants, on the other. The Commission recalls that in Application No. 7805/77 (X. and Scientology v. Sweden, DR 16, p. 68; KirchE-EU S. 18) it recognised the competence of a Church body to lodge an application in its own capacity.

2. The applicants complain of the decision of the Swedish Supreme Court to the effect that the Church of Scientology had no competence to bring either civil or criminal proceedings in respect of alleged „agitation" against it contrary to Chapter 16, sec. 8, of the Penal Code and Chapter 7, sec. 4, of the Freedom of the Press Act.

3. Art. 9 of the Convention secures the right to „freedom of thought, conscience and religion". It further states that „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".

4. The Commission does not consider that it is an element of the concept of freedom of religion, as set forth in this provision that the Church

[1] DR 21, 109.

of Scientology or its individual members should be able to bring civil or criminal proceeding based on alleged ‚agitation' against it as a group contrary to provisions of the Swedish Criminal law. It considers that this provision seeks to protect the manifestation of religious beliefs in worship, teaching, practice and observance and the freedom to change one's religion.

5. The Commission is not of the opinion that a particular creed or confession can derive from the concept of freedom of religion a right to be free from criticism. Nevertheless the Commission does not exclude the possibility of criticism or ‚agitation' against a church or religious group reaching such a level (hat it might endanger freedom of religion and where a tolerance of such behaviour by the authorities could engage State responsibility. However, the Commission does not consider that such an issue arises on the facts of the present case. In reaching this conclusion it notes that the remarks reported in the newspaper article were made in the course of an academic lecture by a professor of theology and not in a context which could render the remarks inflammatory. Moreover, it has not been shown that either the Church of Scientology or its members have been prevented in any way as a consequence of these published remarks from „manifesting their beliefs" in the ways enumerated by this provision.

6. *Accordingly, this complaint must be rejected as manifestly ill-founded under art. 27 (2) of the Convention.*

Art. 6

[16] The applicants have also complained that the inability of the applicant Church of Scientology to institute „civil" proceedings for damages in the present case raises an issue of „access to court" under art. 6 (1) of the Convention.

[17] Art. 6 (1) provides *inter alia* that

> *„In the determination of his civil rights and obligations of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

However, the question arises whether or not the proceedings the applicant sought to bring involved the determination of „civil rights" within the meaning of this provision.

[18] The Commission notes that the European Court of Human Rights in the König case reaffirmed the autonomous nature of the concept of „civil rights" and obligations. However, the Court attached certain weight to the Status and character of the right in question under national law. It stated as follows:

> *„... it nevertheless does not consider that, in this context, the legislation of the State concerned is without importance. Whether or not a right is to be regarded*

as civil within the meaning of this expression in the Convention must be determined by reference to the Substantive content and effects of the right - and not its legal classification - under the domestic law of the State concerned. In the exercise of its supervisory function, the Court must also take account of the object and purpose of the Convention and of the national legal system of the other Contracting States ..." (Judgment of 21 June 1978, par. 89).

[19] The right, whose vindication is sought, in the present case concerns the protection of a group from „expressions of contempt" or protection of the reputation of the group. The Commission notes that national legislation and the Swedish Supreme Court does not recognise such a „right" entitling the group to seek damages in civil proceedings before national courts. Although the Commission has held on several occasions that the right of an individual to protect his reputation can be regarded as a ‚civil right' within the meaning of art. 6 (1), (see e.g. Application No. 7116/75, DR 7. 90) it must attach importance to the characterisation of the right of the group under Swedish law. Moreover, in the exercise of its supervisory jurisdiction, the Commission sees no reason to conclude otherwise. Accordingly, it does not consider that the right of the group in the present case to protect its reputation can be considered a „civil right" under art. 6 (1).

[20] Finally, insofar as this complaint concerns the right of the named individuals in the application to bring proceedings, the Commission notes that under Swedish law it would have been open to them to bring an action for defamation as distinct from the civil proceedings actually instituted on the grounds that the remarks against the Church of Scientology adversely affected their reputation. This it could not be claimed that they were denied access to Court.

[21] It follows therefore that this part of the application must be rejected as incompatible ratione materiae with the provisions of the Convention, and in respect of the individual applicants, manifestly ill-founded, both under art. 27 (2).

11

Der Begriff „Ausüben" (practice) in Art. 9 § 1 EMRK deckt nicht jede Handlung, die durch Religion oder Weltanschauung motiviert oder beeinflusst ist. Der persönliche Wunsch, auf dem eigenen Grundstück bestattet zu werden, ist als solcher noch nicht Ausdruck von Religion oder Weltanschauung.

Art. 8, 9 EMRK
EKMR, Beschluss vom 10. März 1981
- No. 8741/79 (X. ./. Deutschland)[1] -

SUMMARY OF THE FACTS

The Hamburg administrative authorities refused the applicant the right to have his ashes scattered on his own land on his death. The Administrative Court quashed this decision allowing the applicant to stipulate that his ashes provided they were contained in an urn, be buried on his land. However the Administrative Court of Appeal quashed this judgment and ruled in the same sense as the administrative authorities. The applicant's subsequent appeals were rejected in last instance by the Federal Constitutional Court. The applicant died in the course of the proceedings before the Commission and his son has continued the proceedings in his own name.

THE LAW

The original applicant complained that he was denied the right to practice his religious belief by having his ashes scattered on his own land after his death and that he was obliged to be buried against his personal convictions in a cemetery with Christian symbols. In this connection, he alleged violations of art. 8 and 9 of the Convention.

1. Art. 9 § 1 of the Convention provides that everyone has the right to freedom of thought, conscience and religion. This right includes the freedom to manifest his religion or belief in worship, practice and observance.

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[1] DR 24, 137. Die im vorliegenden Beschluss und auch sonst von der EuCommHR und dem EuCHR häufig zitierte Entscheidung in dem Verfahren Arrowsmith ./. Vereinigtes Königreich (Nr. 7050/75, DR 8, 123 u. DR 19, 5 [Report 12.10.1978]) betrifft keine Religionssache, sondern die Frage, ob das Verteilen von Flugblättern pazifistischen Inhalts den Schutz aus Art. 9 EMRK genießt. Sie wird aber offenbar als richtungweisend für die Eingrenzung des Schutzbereichs von Art. 9 EMRK angesehen; vgl. z.B. in diesem Band die Entscheidungen S. 56, S. 66, S. 70, S. 87, S. 110, S. 123, S. 155, S. 169, S. 301. Die Kernstelle EuCommHR DR 19, 5, Ziff. 71, lautet: „The Commission considers that the term 'practice' as employed in Article 9.1. does cover each act which is motivated or influenced by a religion or a belief. It is true that the public declarations proclaming generally the idea of pacifism and urging the acceptance of a commitment to non-violence may be considered as a normal and recognised manifestation of pacifist belief. However, when the actions of individuals do not actually express the belief concerned they cannot be considered to be as such protected by Article 9.1, even when they are motivated or influenced by it."

The question arises whether the applicant's wish to have his ashes scattered in his garden may fall within the ambit of the right to freedom to religion and may therefore be seen as a belief protected by art. 9 § 1.

The applicant saw a violation of art. 9 in the obligation to be buried in a public cemetery. The Commission observes, however, that the applicant is not obliged to have a religious funeral and a tomb with Christian symbols. On the contrary he is free to have his tomb decorated according to his personal wishes. Art. 9 § 1 of the Convention does not confer on him the right to prevent other people from individually decorating their tombs in a public cemetery including the decoration with religious symbols.

It remains to be determined whether or not the applicant's wish to be buried on his own land according to his religious beliefs is protected by art. 9 § 1 as being the manifestation of a belief in practice. The Commission recalls that the term „practice" as employed in art. 9 § 1 does not cover each act which is motivated or influenced by a religion or a belief (cf. Arrowsmith v. the United Kingdom, Report of the Commission, par. 71).

The Commission considers that in the present case the applicant's wish to be buried on his own land cannot be considered as a manifestation of belief in practice in the sense of art. 9 § 1 of the Convention. The desired action has certainly a strong personal motivation. However, the Commission does not find that it is a manifestation of any belief in the sense that some coherent view on fundamental problems can be seen as being expressed thereby. The decisions of the German authorities and courts did not interfere with the exercise of his rights under this provision.

2. The applicant's complaint must also be examined under art. 8 of the Convention which secures to everyone the right to respect for his private live.

It may be doubted whether or not this right includes the right of a person to choose the place and determine the modalities of his burial. Whilst those arrangements are made for a time after life has come to an end, this does not mean that no issue concerning such arrangements may arise under art. 8 since persons may feel the need to express their personality by the way they arrange how they are buried. The Commission therefore accepts that the refusal of the German authorities to allow the applicant to have his ashes scattered in his garden on his death is so closely related to private life that it comes within the sphere of art. 8 of the Convention.

The next question which must be answered in the present case is whether the contested decision of the German authorities which was in accordance with the legislation on cemeteries constitutes an interference with the right to respect for private life of the original applicant.

While a large proportion of the law existing in a given State has some immediate or remote effect on the individual's possibility of freely pursu-

ing the development and fulfilment of his personality, not all of these can be considered to constitute an interference with the right to respect for private life in the sense of art. 8 of the Convention.

The Commission notes that in the present case the legislation on cemeteries gives everybody a certain freedom in choosing the means of his burial. Although burials of corpses and crematorial ashes out-side cemeteries are generally forbidden, exceptions are permitted in particular cases. Everybody can choose between a burial of his corpse or a cremation. There is no obligation to have a religious funeral and a tomb with Christian symbols.

The legislation concerning cemeteries is intended to protect public interest. The legislator had regard to such factors as to securing a peaceful resting place for human remains, an adequate treatment of corpses and crematorial ashes, the protection of public health and public order and also urban and road planning.

In this respect the Commission observes that there is not one Member State of the Convention which has not, in one way or an-other, set up legal rules in this matter. The German Federal Constitutional Court has referred to the regulation for burials in other European countries. It can be seen therefrom that the choice of the circumstances and of the place of burial is generally not left solely to the individual's discretion. The Commission therefore finds that not every regulation for burials constitutes an interference with the right to respect for private life.

It considers that art. 8 § 1 of the Convention cannot be interpreted as meaning that burials of corpses or crematorial ashes are, as a principle, solely a matter of the persons directly concerned.

In view of this situation the Commission does not find that the legislation on which the refusal of the original applicant's request was based constitutes an interference with his right to respect for his private life.

An examination by the Commission of the application as it has been submitted does not therefore disclose any appearance of a violation of the rights and freedoms set out in the Convention and in particular in the above articles.

It follows that the application is manifestly ill-founded within the meaning of art. 27, par. 2 of the Convention.

For these reasons, the Commission declares this application inadmissible.

12

Die Gewährleistung freier Religionsausübung „allein oder in Gemeinschaft mit anderen" schließt beide Handlungsformen als gleichrangig ein und eröffnet für die Staatsgewalt keine Wahlmöglichkeit.

In Anbetracht der Erfordernisse eines Schulsystems kann ein Lehrer die Berücksichtigung persönlicher Gebetszeiten (hier: Freistellung zur Teilnahme am muslimischen Freitagsgebet) jedenfalls dann nicht verlangen, wenn er das Dienstverhältnis in dieser Hinsicht vorbehaltlos begründet hat.

Art. 9, 14, 27 § 2 a.F. EMRK
EKMR, Beschluss vom 12. März 1981
- No. 8160/78 (X. ./. Vereinigtes Königreich)[1] -

THE FACTS (Auszug)

[1] The applicant, a citizen of the United Kingdom, was born in India in 1940. He is a school teacher by profession and living in London.

[2] The applicant is a devout Muslim. It is the religious duty of every Muslim to offer prayers on Fridays and, if considerations of distance permit, to attend a mosque for this purpose.

[3] From September 1968 until April 1975 the applicant was employed by the Inner London Education Authority (ILEA) as a full-time primary school teacher. His contract did not specify days or hours of attendance. His employment was subject to the rules and regulations of the ILEA which provide for standard school hours of 9.30 a.m. to 12.30 p.m. and 2 p.m. to 4.30 p.m. from Monday to Friday. School governors may, however, vary school hours to suit local circumstance and, in practice, the lunch hour in certain schools is shortened to less than one-and-a-half hours. Accordingly, the extent of the lunch break varies from school to school.

[4] From his appointment in 1968 until 1972 the applicant was employed, in Division 8 of the ILEA, at the W. School for Maladjusted Children, which was some distance away from any mosque. During that period he made no request to be allowed time off for attending a mosque.

[5] After one year's study leave the applicant returned to the W. School and was then advised that he was being moved to another school in the Division. He states that it was at this point that he decided that, if he was to move, then he might sensibly move to a school located near a mosque.

[6] After his transfer, in February 1974, to Division 5 of the ILEA the applicant found himself nearer to mosques. At his first school in that Division, a school for maladjusted children in which he was a supernumerary teacher, the headmaster allowed him to be absent from school for a short period after the mid-day break on Fridays in order to attend prayers at a mosque. The applicant had a teaching period after the Friday mid-day break but his colleagues did not object to his having time off

[1] DR 22, 27.

to attend the mosque and were prepared to accommodate him in this respect.

[7] The applicant was next employed, still as a supernumerary teacher, at the C. School. There, according to the judgment of the Court of Appeal, „he did not at first ask for permission to attend a mosque for Friday prayers but the headmistress, Miss G., heard of his intention to do so and obtained advice from the Divisional Office that she could not stop him from going but should not give him permission to do so, and on his later asking for permission to go she gave him these answers and insisted that he should be back by 1.30, at the end of the mid-day break, but he never returned before 2.20 with the result that Friday afternoon teaching periods had to be adjusted until he returned and, although this adjustment was not difficult, the other staff, Miss G. said, had to accommodate him all the time". The applicant states at par. 2 of his petition to the Commission that Friday prayers „took place at 1.00 p.m. and lasted for about one hour, and involved an absence of about three quarters of an hour from the afternoon teaching session".

[8] With regard to the above statement of the Court of Appeal, the applicant has in the present proceedings submitted that he „did inform the headmistress on the Friday that he wished to attend the mosque. Accordingly, it is not quite correct to imply that he did not approach her for permission. At this point the applicant told the headmistress what had happened at other schools. The headmistress stated that it would not be a problem for her to arrange but that she would require the ILEA to consent. It was she who suggested that the applicant write to the ILEA. It is wrong to state that Friday afternoon teaching periods had to be adjusted until the applicant returned because, at this time, the applicant was not a class teacher. He had no timetable. His role was to approach a class with an existing teacher and to pick out a group for special tuition, e.g. to do reading."

[9] According to the Court of Appeal, the applicant „was next employed at the Primary School where he asked for similar permission to attend a mosque for Friday prayers and the headmaster, Mr W., refused this request and reported his refusal to the Divisional Office, but the (applicant) disregarded the refusal and attended the mosque with the result that on one Friday the headmaster had a class without a teacher until the (applicant) returned."

[10] The applicant submits with regard to the above statement of the Court of Appeal that he „was a supernumerary teacher. Each form had a class teacher and, accordingly, it cannot be correct that the headmaster had a class without a teacher until he returned".

[11] The applicant was next employed, still as a supernumerary teacher, at the U. Primary School for one term from September 1974. The headmaster, having previously consulted the Divisional Office, refused his request to be allowed to attend a mosque on Fridays. The applicant

attended the mosque in spite of this refusal, and the deputy headmaster reported that there were grumbles about this from the staff.

[12] Finally, for the first term of 1975, the applicant was employed as a stand-in teacher at a Roman Catholic primary school in U. The headmaster was informed by the Divisional Office that the applicant had been refused permission to be absent during school hours on Fridays. The applicant (who at this school was allowed to use a room for prayers) continued to take time off on Fridays.

[13] During his employment in Division 5 of the ILEA the applicant, by letter of 5 April 1974, formally claimed the right to go to the mosque for Friday prayer. He invoked the Education Act 1944 and requested that the necessary arrangements be made in the school time-table.

[14] By letter of 9 October 1974 the ILEA informed the applicant that his only recourse was to relinquish full-time employment and to apply for appointment as a part -time temporary terminal teacher to work four-and-a-half days a week only. By a further letter of 29 October the ILEA refused to grant the applicant leave of absence „for any part of Friday afternoon sessions".

[15] By letter of 13 January 1975 the ILEA finally informed the applicant that, if he continued to take time off on Friday afternoons, there would be no alternative but to vary his appointment from full-time to four-and-a-half days week.

[16] In response to this letter the applicant wrote on 27 January 1975 that he preferred to be dismissed rather than accept part-time teaching. On 29 January he gave notice of resignation to take effect at the beginning of the Easter holidays.

[17] The applicant was unemployed from April to December 1975. Shortly after his resignation, because of financial pressure, he reapplied to the ILEA to take up their offer of a part-time teaching post. The ILEA refused for the nine months referred to but following the Tribunal hearing agreed to take the applicant on. He became re-employed on the basis of a four-and-a-half day week, spending two-and-a-half days in one school and two days in another school. For the remainder of his old contract salary was deducted for every Friday afternoon that he was absent.

[18] On 7 July 1975 the applicant appealed to an Industrial Tribunal, contending that his resignation, having been brought about by the conduct of the ILEA, constituted unfair dismissal, within the meaning of the Trade Union and Labour Relations Act 1974.

[19] The Tribunal heard evidence from an Islamic religious leader, Dr P., who stated that Friday prayers to the Muslim were like Saturday to the Jew or Sunday to the Christian. To absent oneself from Friday prayer was a sin, so much as that, in an Islamic country like Saudi Arabia, to absent oneself three times running without an excuse was to run the risk of beheading. The only acceptable excuses were to be a woman, a child, a traveller, a slave or to be sick. In fact no beheading for failure to attend

Friday prayers was carried out in Saudi Arabia because everyone complied with this obligation. Dr P. considered that, if there were three other Muslims in the school, the applicant could pray with them, but if not, he was required to attend a mosque, unless it was too far from the school; in that case he could say prayers in a quiet place of worship at the school. Dr P. stated that negotiations were pending with the Department of Employment whereby employees would be allowed to go to the mosque as a matter of right. Some employers in the Midlands apparently allowed it already.

[20] Mr A., Assistant Education Officer of the ILEA, stated in evidence that he knew of no negotiation at national level as mentioned by Dr P. The ILEA must have hundreds of Muslim teachers, and none had ever before complained that the present problem existed.

[21] On 10 November 1975 the Industrial Tribunal dismissed the application, holding „that as a matter of contract the applicant was bound to be in school on Friday afternoons" and that he was required „to work full-time". Clause 9 of the ILEA Staff Code[1] could not in the Tribunal's view cover regular Friday absence to pray in the mosque. Nor could the applicant, for this purpose, rely on sec. 30 of the Education Act 1944.[2] The Tribunal also considered „whether on general grounds the respondents were being unreasonable and whether, despite the contract of employment, they could or should have accommodated him and adjusted his timetable accordingly" and found on balance „that the respondents were not being unreasonable".

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[1] „Religious observance: teachers other than supply teachers … who, for reasons of conscience, have objections to working on a particular day in term time, it being a day of special obligation in their religion, shall be allowed leave with pay on the understanding that such leave shall be restricted to days which are generally recognised in their religion as days when no work may be done."

[2] Without a proviso, which does not appear relevant in the present case. Section 30 reads as follows: „Subject as hereinafter provided, no person shall be disqualified by reason of his religious opinions, or of his attending or omitting to attend religious worship, from being a teacher in a county school or in any voluntary school, or from being otherwise employed for the purposes of such a school; and no teacher in any such he school shall be required to give religious instruction or receive any less emolument or be deprived of, or disqualified for, any promotion or other advantage by reason of the fact that he does or does not give religious instruction or by reason of his religious opinions or of his attending or omitting to attend religious worship: Provided that, save in so far as they require that a teacher shall not receive any less emolument or be deprived of, or disqualified for, any promotion or other advantage by reason of the fact that he gives religious instruction or by reason of his religious opinions or of his attending religious worship, the provisions of this Section shall not apply with respect to a teacher in an aided school or with respect to a reserved teacher in any controlled school or special agreement school".

[22] The applicant's petition for a review of this decision was on 10 December 1975 refused by the Tribunal.

[23] The applicant now appealed, on points of law, to the Employment Appeal Tribunal, again relying on the above provisions. He stated *inter alia* that, as he had always been back at school at 2.15 p.m. on Fridays, his attendance at the mosque meant that he missed the first period on those afternoons (from 1.30 to 2.15 p.m.). In the discussions prior to his resignation he had pointed out that, as he had free periods during the week, his time-table could easily be arranged to insert a free period for the first part of Friday afternoon. He thus was asking only for three-quarters of an hour off in every week, and without pay.

[24] The Employment Appeal Tribunal dismissed the appeal on 8 June 1976, substantially on the grounds already given by the Industrial Tribunal in its decision of 10 November 1975.

[25] Leave to appeal to the Court of Appeal (on points of law) was refused by the Employment Appeal Tribunal on 21 July, but granted by the Court of Appeal on 26 July 1976.

[26] On 22 March 1977 the Court of Appeal (Lord Denning, Master of the Rolls, Lord Justice Scarman and Lord Justice Orr) dismissed the appeal. Lord Justice Scarman dissenting.

[41] The Court of Appeal did not give leave to appeal to the House of Lords.

[42] On 14 July 1977 the House of Lords, on report of their Appeal Committee, refused the applicant's petition for leave to appeal to their Court.

COMPLAINT

The applicant contends that the interpretation, by the Tribunals and the Court of Appeal of sec. 30 of the Education Act 1944 contravenes art. 9 of the Convention. The construction of sec. 30 as held by the Court of Appeal „would mean that a Muslim, who took his religious duty seriously, could never accept employment as a full-time teacher, but must be content with the lesser emoluments of part-time service, and would thus also be excluded from opportunities for promotion".

THE LAW

Preliminary observations

[1] The applicant complains that he was forced to resign from his post as a full-time school teacher because he was refused permission to attend a mosque for congressional prayer, and thus to miss about 45 minutes of classwork in the beginning of the afternoon, on those Fridays which are

school days. The Government submit, as a preliminary observation, that the Convention does not protect the right as such to employment.

[2] According to the Commission's case-law, the right to hold a position in public service is not as such guaranteed by the Convention (see Appl.-No. 3788/68, Coll. 35, 56 (71), with further references) but the dismissal of a State official may in certain circumstances raise an issue under specific Convention provisions, such as art. 9 (Appl.-No. 7374/76 - X. v. Denmark, DR 5, 157-158, KirchE-EU S. 12) or art. 10 (Appl.-No. 8010/77 - X v. the United Kingdom DR 16, 101, KirchE-EU S. 16). The Commission considers that this jurisprudence applies also in case of alleged forced resignation, or variation of employment, like that of the present applicant. It here notes that, in the United Kingdom, the legislation prohibiting unfair dismissal may also be invoked by employees who claim that they have been unfairly forced to resign. The Commission has consequently examined the applicant's complaint, that he was forced to resign from full-time employment, under the specific provisions of art. 9 and of art. 14 in conjunction with art. 9 of the Convention.

[3] With regard to the applicant's claim, that the school authorities should have arranged their time-table so that he could attend Friday prayers, the Commission further observes that the object of art. 9 is essentially that of protecting the individual against unjustified interference by the State, but that there may also be positive obligations inherent in an effective „respect" for the individual's freedom of religion *(cf. mutatis mutandis* the judgment of the European Court of Human Rights in the Marckx case, p. 15, par. 31).

As to Art. 9 of the Convention

[4] The freedom of religion guaranteed by art. 9 (1) of the Convention includes the right of everyone to manifest his religion in worship „either alone or in community with others". The applicant's complaint is confined to the freedom to manifest his religion in worship „in community with others". The Government accept that attending the mosque amounts to manifesting religion in worship „in community with others" but suggest that it may suffice to satisfy art. 9 (1) if the right to manifest one's religion „alone" is granted; the interpretation that both possibilities must always be available would have serious implications for the employment of persons belonging to religious minorities which do not have many places of worship. The applicant contests this interpretation.

[5] The Commission has examined the ordinary meaning of the guarantee of the freedom of religion in par. I in the context both of art. 9 of the Convention as a whole, taking into account the object and purpose of the Convention. It notes that the right to manifest one's religion „in community with others" has always been regarded as an essential part of the freedom of religion and finds that the two alternatives „either alone

or in community with others“ in art. 9 (1) cannot be considered as mutually exclusive, or as leaving a choice to the authorities, but only as recognising that religion may be practised in either form. It observes at the same time that the freedom of religion is not absolute but under the Convention subject to the limitations of art. 9 (2). The Commission concludes that the applicant may under art. 9 (1) claim the right to manifest his religion „in community with others“.

[6] It is, however, disputed between the parties whether the applicant's attendance of Friday prayers at the mosque on school days was during the relevant period-from his transfer to Division 5 of the ILEA until his resignation in 1975-required by Islam and thus a „necessary part“ of his religious practice. The Government submit that Islam would have permitted the applicant's absence from the mosque because of his contractual obligation to teach at the school, and that his attendance at the mosque was therefore not „necessary“ in the sense of the Commission's case-law (Appl.-No. 5442/74, DR 1, pp, 41-42). The applicant replies that Appl.-No. 5442/74, concerning a prisoner, is not a good analogy for his present application and that, in any case, he was during the relevant period required by Islam to attend prayers at the mosque.

[7] The Commission observes that its decision in Appl.-No. 5442/74 took into account that applicant's situation as a detained person. In the case of a person at liberty, the question of the „necessity“ of a religious manifestation, as regards its time and place, will not normally arise under art. 9. Nevertheless, even a person at liberty may, in the exercise of his freedom to manifest his religion, have to take into account his particular professional or contractual position. The parties' submissions in the present case concerning the „necessity“ of the applicant's attendance at the mosque are connected with their discussion of his special contractual obligations as a teacher.

[8] The applicant states that it is the religious duty of every Muslim to offer prayers on Fridays and, if considerations of distance permit, to attend a mosque for this purpose. A mere contractual obligation cannot excuse absence - a man cannot willingly put himself into a position where he cannot attend. When the applicant commenced his employment with the ILEA in 1968 there was only one mosque in the London area and it was physically impossible for him to work with the ILEA and to attend Friday prayers. After his transfer, in February 1974, to Division 5 he found himself nearer to mosques. He was then obliged by his religion to attend Friday prayers.

[9] The Commission observes, however, that, in 1968, the applicant, of his own free will, accepted teaching obligations under his contract with the ILEA, and that it was a result of this contract that he found himself unable „to work with the ILEA and to attend Friday prayers“. The contract, and the teaching obligations it implied, continued until its termination in 1975. Between 1968 and 1974 the applicant-without ever rais-

ing this issue with the ILEA-accepted that, because of the contract, he was prevented from attending the mosque during school time. The Commission does not consider that the applicant has convincingly shown that, following his transfer in 1974 to a school „nearer to mosques", he was required by Islam to disregard his continuing contractual obligations vis-à-vis the ILEA, entered into six years earlier in 1968 and accepted throughout the years, and to attend the mosque during school time.

[10] In its interpretation and application of art. 9 of the Convention, the Commission does not, however, find it necessary to pursue this matter further - e.g. by obtaining expert evidence as suggested by the applicant - because it considers that, even if such religious obligation were assumed, it could not, for the reasons given below, justify the applicant's claim under this provision in the circumstances of the present case.

[11] The Commission has already stated that the freedom of religion, as guaranteed by art. 9, is not absolute, but subject to the limitations set out in art. 9 (2). Moreover, it may, as regards the modality of a particular religious manifestation, be influenced by the situation of the person claiming that freedom. The Commission has recognised this in the case of a detained person (Appl.-No. 5442/74, DR 1, pp. 41-42) and in the case of a person with special contractual obligations (Appl.-No. 7374/76, DR 5, pp. 157-158, KirchE-EU S. 12). The latter application was brought by a Danish clergyman who had been required by his church to abandon a certain practice of christening. The Commission then stated, with regard to the clergyman's claim to freedom of religion in the performance of his functions, that the freedom of religion of servants of a State church „is exercised at the moment they accept or refuse employment as clergymen, and their right to leave the church guarantees their freedom of religion in case they oppose its teachings" (Application No. 7374/76, loc. cit. p. 158).

[12] The Commission observes that both the present case and Application No. 7374/76 concern persons with special contractual obligations, but that the present case is distinct from Appl.-No. 7374/76 in particular in two respects: firstly, it does not concern religious manifestations in the course of the performance of professional functions, but absence from work for the performance of such manifestations; secondly, it does not relate to a religious dispute but to a coincidence of teaching obligations and religious duties. In 1968 the applicant, by his contract with the ILEA as interpreted by the domestic courts, accepted teaching obligations including duties on Fridays. According to the applicant, the teaching obligations did not from the beginning, but only following his transfer in 1974 conflict with his religious duty to attend congressional prayers at the mosque.

[13] The Commission considers that its reasoning in Appl.-No. 7374/76 cannot automatically be applied in the present case but must be adapted to its particular circumstances. It finds that, in the present case, the

ILEA was during the relevant period (1974/75) in principle entitled to rely on its contract with the applicant. However, the question arises whether, under art. 9 of the Convention, the ILEA had to give due consideration to his religious position.

[14] The Commission here notes that the applicant did not, when he was first interviewed for his teaching position, nor during the first six years of his employment with the ILEA, disclose the fact that he might require time off during normal school hours for attending prayers at the mosque. The Government state that such a disclosure might have resulted in the applicant being offered only part-time employment. The applicant submits that the United Kingdom should not operate a system in which a job applicant must indicate his religion and thus risk not to be appointed because of his religious obligations. The Commission observes that the present case does not raise the general issue of the confidentiality of information concerning one's religion, but the question whether an employee should inform his employer in advance that he will be absent during a part of the time for which he is engaged. It considers it relevant for the appreciation of the parties' position during the relevant period that the applicant had at no time before and during the first six years of his employment brought to the attention of the ILEA his wish to have time off during normal school hours for attending prayers at the mosque.

[15] Referring to its decision on Application No. 7374/76, the Commission further observes that, throughout his employment with the ILEA between 1968 and 1975, the applicant remained free to resign if and when he found that his teaching obligations conflicted with his religious duties. It notes that, in 1975- the applicant did in fact resign from his five-day employment and that he subsequently accepted a four-and-a-half day employment enabling him to comply with his duties as a Muslim on Fridays.

[16] The applicant points out that his present employment means less not only as regards his pay but also concerning his pension rights, chances of promotion and security of employment. He submits that his case could have been better solved by a re-arrangement of the school timetable permitting his absence for about 45 minutes at the beginning of the afternoon sessions on Fridays. The Government contest this possibility.

[17] The Commission, in its consideration of the parties' submissions, has had regard not only to the particular circumstances of the applicant's case but also to its background, as described in the pleadings. It notes that, during the relevant period, the United Kingdom society was with its increasing Muslim community in a period of transition. New and complex problems arose, *inter alia,* in the field of education, both as regards teachers and students. The parties agree that the applicant's case is not an isolated one and that it raises questions of general importance.

[18] The Government state that separate education systems are administered in England, Wales, Scotland and Northern Ireland and that in none of these countries is the system a centralised one. Teachers are employed either by individual local education authorities or by individual schools and there appears to be no generally agreed practice for dealing with requests by teachers of any religious group (including Muslim teachers) for leave of absence from work in order to meet the requirements of their religion. The Council of Local Education Authorities in England and Wales are at present considering whether to issue guidelines on the subject.

[19] The Commission accepts that the school authorities, in their treatment of the applicant's case on the basis of his contract with the ILEA, had to have regard not only to his religious position, but also to the requirements of the education system as a whole; it notes that the complex education system of the United Kingdom was during the relevant time faced with the task of gradual adaptation to new developments in its society. The Commission is not called upon to substitute for the assessment by the national authorities of what might be the best policy in this field but only to examine whether the school authorities, in relying on the applicant's contract, arbitrarily disregarded his freedom of religion.

[20] It is in this perspective that the Commission has considered the parties' conflicting submissions concerning the applicant's conduct, and his treatment by the school authorities, from his transfer to Division 5 of the ILEA in 1974 until his resignation in 1975. It observes that the Government rely on facts as established in the judgment of the Court of Appeal (see above par. 7 and 9 of „The Facts"); that the judgment was submitted by the applicant when he introduced the application: and that the Court's establishment of the facts was not then, but only in 1980, disputed by the applicant (see par. 8 and 10 of „The Facts"). The Commission also notes from the Government's submissions that the Court relied on evidence given in the domestic proceedings and observes that, in the present proceedings, the applicant has offered no evidence to the contrary. It concludes that, in these circumstances, it must base its examination on the facts as established by the domestic court.

[21] The Commission accordingly notes that the applicant, at his first school in Division 5, was allowed to be absent for a short period after the Friday mid-day break in order to attend prayers at the mosque, but that serious difficulties arose as a result of his unauthorised absence, for the same purpose, from the schools at which he was subsequently employed. The Commission further notes the applicant's various suggestions, as to how the school authorities could and should have solved his problem, and the Government's answers thereto.

[22] Having regard also to the requirements of the education system as described by the Government, the Commission does not find that in 1974/75 the ILEA - or, in their independent capacity, the schools of its

Division 5 at which he was employed - in their treatment of the applicant's case on the basis of his contract did not give due consideration to his freedom of religion.

[23] The Commission concludes that there has been no interference with the applicant's freedom of religion under art. 9 (1) of the Convention.

As to Art. 14 in conjunction with Art. 9 of the Convention

[24] When addressing himself to the Commission the applicant only invoked art. 9 of the Convention. The Commission, noting that in the domestic proceedings his case was dealt with under sec. 30 of the Education Act 1944 as one of alleged religious discrimination, has considered the application also under art. 14 in conjunction with art. 9 of the Convention.

[25] It is not the Commission's task in this connection to express any view on the interpretation and application of national legislation, such as the Education Act 1944, by the competent domestic courts, but only to consider whether the result of this application constitutes discrimination in the sense of art. 14 of the Convention.

[26] Art. 14 safeguards individuals or groups of individuals, placed in comparable situations, from all discrimination in the enjoyment of the rights and freedoms set forth in the other normative provisions of the Convention (Judgment of the European Court of Human Rights in the National Union of Belgian Police case, p. 19, par. 44, with further reference).

[27] It does not appear from the applicant's submissions that, as regards the fulfilment of his contractual teaching obligations in 1974/75, he was either individually or as a member of his religious community treated less favourably by the education authorities than individuals or groups of individuals placed in comparable situations. The applicant refers in his submissions to the position of Jewish *children,* but he has not shown that other *teachers* belonging to religious minorities, e.g. Jewish teachers, received a more favourable treatment than he himself.

[28] The Commission further observes in respect of the general question of religious and public holidays, discussed in the parties' submissions, that, in most countries only the religious holidays of the majority of the population are celebrated as public holidays. Thus Protestant holidays are not always public holidays in Catholic countries and vice versa.

[29] The Commission concludes that there is no appearance of a violation of art. 14 in conjunction with art. 9 of the Convention. It follows that the application, both if considered under art. 9 and if examined under art. 14 in conjunction with art. 9, is manifestly ill-founded within the meaning of art. 27 (2) of the Convention.

For these reasons, the Commission declares this application inadmissible.

13

Sind religiöse Vereinigungen vom Geltungsbereich eines staatlichen Vereinsgesetzes ausgenommen, dann begründet ein vereinsrechtlich begründetes Verbot einer solchen Vereinigung keinen Verstoß gegen Art. 9 EMRK.

Art. 9, 11 EMRK
EKMR, Beschluss vom 15. Oktober 1981 - No. 8652/79 (X. ./. Österreich)[1] -

SUMMARY OF THE FACTS

The applicant, a follower of the Moon sect, founded an association in Vienna in 1973 called „Gesellschaft zur Vereinigung des Weltchristentums" (the Society for Uniting World Christianity). It was dissolved on 4 January 1974 by the competent police authority for activities outside the scope of its statutory aims (art. 24 of the Associations Act (Vereinigungsgesetz) and for having the characteristics of a religious community, which communities are not authorised by law to take the form of an association (art. 3 of the Associations Act).

Shortly afterwards the applicant announced the foundation of another association called „Gesellschaft zur Förderung der Vereinigungskirche" (the Society for the Promotion of the Union Church) whose statutory aim had been defined slightly differently.

The notification of this second association was made to the local administration (Magistrat) in Vienna which prohibited it, this decision being upheld by the Ministry of the Interior. However, by a judgment of 10 June 1975 the Constitutional Court quashed the decision because the local authority had no jurisdiction in the matter.

The case e referred to the competent police authority which again prohibited the association under art. 6 (1) of the aforementioned Act, which prohibits the foundation of an association which seeks to continue the illegal activities of an association which has previously been dissolved by the authorities.

Having unsuccessfully appealed to the Ministry of the Interior, the applicant further appealed to the Constitutional Court, invoking, in particular art. 11 and 14 of the Convention. In a decision of 27 September 1978, the Constitutional Court dismissed the appeal noting that the association had been dissolved in accordance with art. 6, par. I of the said Act and not art. 3(a), which had not been applicable to the case. It found the dissolution justified under art. 11, par. 2 of the Convention.

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[1] DR 26, 89.

THE LAW

1. The applicant who founded and acted as chairman of two associations intended to provide the organisational framework for the Moon sect in Austria complains of the dissolution of these associations by the authorities which he considers to be in violation of his freedom of religion as guaranteed by art. 9 and of his freedom of association as guaranteed by art. 11 of the Convention.

2. As regards the first of these associations, called „Gesellschaft zur Vereinigung des Weltchristentums" (Society for Uniting World Christianity) which was dissolved on 4 January 1974, the applicant has not exhausted the domestic remedies available to him as required by art. 26 of the Convention, and accordingly the applicant's above complaints insofar as they may be understood as relating to the dissolution of this association must be rejected under art. 27 (3) of the Convention.

3. As regards the prohibition of the second association, called „Gesellschaft zur Förderung der Vereinigungskirche" (Society for the Promotion of the Union Church), the applicant has exhausted the domestic remedies available to him by lodging a constitutional appeal. The Constitutional Court's decision was communicated to him on 20 December 1978 and the present application, filed on 12 June 1979, has therefore been brought within the six months period envisaged by art. 26 of the Convention. The Commission is therefore called upon to deal with the substance of the applicant's above complaints insofar as they are related to the prohibition of the second association.

4. The applicant's principal complaint is that there has been an unjustified interference with his freedom of association contrary to art. 11 of the Convention. The relevant parts of this article read as follows:

> *(1) Everyone has the right to … freedom of association with others …*
> *(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others …*

a) The association founded by the applicant under the name „Gesellschaft zur Förderung der Vereinigungskirche" was prohibited by the authorities. There can therefore be no doubt that there has been interference with the applicant's right to freedom of association within the meaning of the first paragraph of the above article.

b) The question is then whether this interference can be justified under the second paragraph of the article. This paragraph requires, first, that any restriction of the freedom in question should be prescribed by law, secondly, that it should pursue one of the purposes enumerated there, and thirdly, that it should be necessary in a democratic society.

As regards these requirements, the Commission notes that according to the Constitutional Court the decisive reason justifying the prohibition of the association in question was its continuation of the illegal activities of the formerly dissolved association founded by the applicant. This prohibition was based on art. 6 (1) of the Associations Act and hence „prescribed by law" within the meaning of art. 11 (2) of the Convention. The Commission also considers that it is justifiable under this provision, namely as being necessary in a democratic society for the prevention of disorder, to prohibit an association because it unlawfully continues the activities of a dissolved association. The application of art. 6 (1) of the Associations Act does not therefore in itself give rise to a problem under the Convention.

c) The applicant in the present case claims, however, that this provision was wrongly applied to him and that the true reason why the second association founded by him was prohibited was the fact that like the first association it constituted a religious community, excluded from the application of the Associations Act by virtue of its art. 3 (a). This exclusion of religious communities from the application of the Associations Act would have left him without any legal possibility to organise the group represented by him as an entity recognised by law and having legal personality because there are no alternative forms of organisation available for non-recognised religious communities.

In this connection the Commission first notes the Government's argument that it is not open to the applicant to challenge the application of art. 3 (a) of the Associations Act in this case because in the domestic proceedings he failed to do so at the appropriate time, namely in connection with the dissolution of the first association founded by him The Commission considers, however, that it can leave open the difficult question whether or not the applicant has actually exhausted all domestic remedies in this respect. For even assuming that by his constitutional appeal against the prohibition of the second association he did in fact exhaust the domestic remedies in conformity with art. 26 of the Convention, it nevertheless appears from the Constitutional Court's decision itself that art. 3 of the Associations Act was not considered as decisive. The Constitutional Court even stated that in the case before it art. 3 (a) had not been actually applied by the administrative authorities nor had it been applicable („ergibt sich, dass bei der Erlassung des angefochtenen Bescheides § 3 lit. a VG nicht angewendet wurde und auch nicht anzuwenden war").

This decision by the Constitutional Court was the final domestic decision in the applicant's case and therefore the decision which the Commission must take as the starting point for its examination under the Convention. It shows that the Associations Act was applied in such a way as to allow, in principle, for the establishment even of religious organisations as associations under the Act, notwithstanding the terms of art. 3

(a) thereof. The availability of alternative forms of legal organisation is therefore irrelevant. The applicant's complaint that he was barred from having the group represented by him registered as an association because it was a religious community and that his freedom of association as guaranteed by art. 11 of the Convention has thereby been violated is consequently manifestly ill-founded within the meaning of art. 27 (2) of the Convention.

5. The applicant has finally complained that the prohibition of the association founded by him also amounted to an unjustified interference with his and the association's freedom of religion as guaranteed by art. 9 of the Convention.

The Commission observes, however, that in the present case it has not been substantiated by the applicant that there has been any interference with his freedom of religion as a follower of the Moon sect; in particular it has been shown that the dissolution of the association in which the sect wanted to organise itself did as such interfere with the manifestation of his religion or belief in worship, teaching, practice and observance. As the Government have stressed, the practice even of a non-recognised religion is fully guaranteed in Austria by art. 63 (2) of the Treaty of St. Germain independently from any form of registration. The applicant's allegations of harassments by the police cannot be taken into account in this respect because it is clear from his submissions that these allegations, even if they were substantiated, concern the treatment of other persons and not of the applicant himself. It follows that the applicant's complaint of unjustified interferences with his right to freedom of religion as guaranteed by art. 9 of the Convention is also manifestly ill-founded.

For these reasons, the Commission declares the application inadmissible.

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Eine Regelung des staatlichen Familienrechts, die eine körperliche Züchtigung von Kindern zwar sanktionslos, aber allgemein verbietet, stellt noch keinen Eingriff in das Elternrecht (familiäre und schulische Erziehung u.a. nach der eigenen religiösen oder weltanschaulichen Überzeugung) dar.

Art. 8 § 1, 9 § 2, 27 § 2 a.F. EMRK, 2 Erstes Zusatzprotokoll
EKMR, Beschluss vom 13. Mai 1982 - No. 8811/79 (X. ./. Schweden)[1] -

[1] DR 29, 104.

THE FACTS

The applicants, three couples and one divorcee, are all resident in Sweden and have children aged between 20 months and 12 years. They all belong to a Protestant free church congregation in Stockholm. As such the applicants believe in „traditional" means of bringing up their children and in particular, as an aspect of their religious doctrine, they believe in the necessity of physical punishment of their children, which they justify by reference to Biblical texts (e.g. Proverbs 13:12, Hebrews 12:6) and doctrinal works such as Luther's Large Catechism and Summa Theologiae Moralis (Mekkelbach).

The applicants complain at the restrictions which are imposed by Swedish law on the corporal punishment of children, which are as follows:

Under the Swedish Penal Code, Chapter 3, sec. 5 and 6 (Brottsbalken) the offences of assault and aggravated assault are respectively defined.

Sec. 5 provides:

„A person who inflicts bodily injury, illness or pain on another person, or renders him unconscious or otherwise similarly helpless, shall be sentenced for assault to imprisonment for at most two years or in cases where the offence is a petty one, to pay a fine."

Sec. 6 provides:

„If the offence mentioned in sec. 5 is considered grave, the sentence shall be for aggravated assault to imprisonment for at least one and at most ten years".

The applicants contend that the scope of the application of the criminal offence of assault to cases of parental chastisement of their children was uncertain until January 1979 but that it was widely considered and the applicants believe that parents had a degree of immunity in this respect, which excluded chastisement such as boxing a child's ears, from the scope of the offence.

Hence they refer to the decision of a municipal court which in 1975 acquitted a father who had been accused of maltreating his three year old daughter on the grounds that he had not been proved to exceed „the right of corporal chastisement that a guardian has towards a child in his custody."

On 1 January 1979, however, the Swedish Parliament adopted a new second paragraph to Chapter 6, sec. 3, of the Code of Parenthood (Föräldrabalken) as a result of which sec. 3 now reads:

„A custodian shall exercise the necessary supervision over the child with due regard to the child's age and other circumstances.

The child shall not be subjected to corporal punishment or any other form of humiliating treatment".

Although the Code of Parenthood is not part of the Penal Code and its obligations are incomplete, in that no sanction attaches to their breach, the applicants contend that their rights and freedoms under the Convention have been and continue to be prejudiced both by the express terms and effect of the addition to Chapter 6, sec. 3, of the Code of Parenthood and also by the effect which it has had on the interpretation of the criminal law and in particular of Chapter 3, sec. 5, of the Penal Code.

The new legislation was described by the Swedish Standing Committee on Law Procedure in its official commentary (LU 1978/79, p. 5) as removing the uncertainty that existed (as a result of an amendment to the law in 1966) as to the extent to which mild corporal rebukes of children by their guardians are punishable. As a result of this legislation, the applicants contend that the legal position under the criminal law has now been made clear, that acts of chastisement directed at children by their parents are illegal to the same extent that such acts would be if exercised against an adult.

The applicants set out the following analysis of the legal consequences of corporal chastisement of children by their parents:

1. Manhandling to rescue:

These are acts such as pulling a child away from a fire which are, in the words of the Swedish Standing Committee on Law Procedure (1978/9:11, p. 5) „necessary if the parents are to fulfil their obligation to supervise the child". The intention of such acts is never to punish and they have no consequences under criminal law or the Code of Parenthood.

2. Slight forms of chastisement:

These are acts which are covered by the general prohibition in the Code of Parenthood but do not amount to petty assault under the Penal Code. The applicants describe these as utterly lenient physical expressions of disapproval.

3. Ordinary chastisement:

These are acts such as blows, beatings, boxing the ears which the applicants contend must now be regarded as assault contrary to the Penal Code by virtue of its reinterpretation arising from the amendment to the Code of Parenthood.

4. Maltreatment of children:

This category has always been punishable under criminal law and is exemplified by ordinary chastisement which unintentionally causes injury and has exceeded its natural limits.

The applicants maintain that ordinary chastisement has now become included within the scope of ‚assault' as a criminal offence in Sweden and that parents no longer have a greater immunity from criminal sanction

in imposing such ordinary chastisement on their children than they have if the same acts were committed on a stranger. They also maintain that slight forms of chastisement, although not criminally punishable, are breaches of the Code of Parenthood which might lead the applicants to lose custody of their children.

The introduction of the 1979 legislation was accompanied by a considerable amount of publicity about its ideological justification and, in particular, the Central Social Board of Stockholm, to whom the legislation was submitted for consideration, maintained that „special efforts of information" should be mounted in respect of „extreme religious groups which have argued for so-called loving chastisement as a systematic part of the upbringing of children".

The applicants also anticipate that they will be faced with a dilemma in the education of their children, who will be taught at school to regard their parents' values as antisocial and criminal. None of the applicants has been prosecuted under the present state of Swedish criminal law nor have any of them lost the custody of their children.

They contend that they are unable to take legal proceedings to challenge the state of the law in Sweden and that therefore they need do no more to comply with the requirements of art. 26 of the Convention.

COMPLAINTS

The applicants complain that the state of Swedish law resulting from the introduction of the 1979 legislation by the Swedish Government makes the corporal punishment and humiliating treatment of children by their parents a criminal offence to the same extent as if such acts were committed against strangers. They maintain that this state of the law violates their rights to respect for family life, to freedom of religion and to respect for their rights to ensure that their children's education and teaching is in conformity with their own religious and philosophical convictions.

The applicants maintain that they are victims of legislation and a state of the law which is incompatible with art. 8 and 9 of the Convention and art. 2 of the First Protocol even though they have not been prosecuted for assaulting their children. They submit that the terms of the legislation and the state of the law are sufficiently precise to re quire them to alter their conduct. Thus the applicants know that if they chastise children as their consciences and religious convictions dictate, they may be liable to criminal prosecution for assault. Accordingly they maintain that they are directly, immediately and individually affected by the mere state of the law.

Furthermore, the applicants point out that they are unable to challenge the 1979 legislation or the state of the criminal law, which are the law of the land and unimpeachable before the Swedish courts. Conse-

quently they are unable to seek domestic remedies. They also refer to the consequences which would follow if they were not regarded as victims under art. 25 in that they would have to wait to be prosecuted under the present state of the law, which they maintain is incompatible with the Convention, and they would risk not only the public ignominy associated with such proceedings, but also the risk of being declared unsatisfactory guardians of their children and losing custody of them for breaching the Code of Parenthood before being able to bring their application to the Commission.

They accordingly submit that they are victims within the terms of art. 25, have no domestic remedies to exhaust and invoke art. 8 and 9 and art. 2 of the First Protocol.

THE LAW

1. Art. 25 of the Convention

The applicants complain that under the Code of Parenthood they are forbidden from corporally punishing their children. They further complain that under Swedish criminal law the boundary of criminal assault is the same whether the act is committed against a stranger or by a parent in chastising its child. They maintain that their ideological disagreement with these provisions results in their being victims of a continuing violation of their rights under art. 8 and 9 of the Convention and art. 2 of the First Protocol.

The respondent Government has raised the question whether the applicants are victims within the meaning of art. 25 of the Convention, without submitting any specific arguments on this question.

The Commission, like the Court, has consistently held in its case-law that the very existence of legislation may justify an applicant in claiming to be a victim within the meaning of art. 25 of the Convention of a violation of one of its normative provisions where the legislation continuously and directly affects him. Hence in the Marckx case (Series A Judgments and Decisions, Vol. 31, p. 13, par. 27) the Court held: „Art. 25 of the Convention entitles individuals to contend that a law violates their rights by itself in the absence of an individual measure of implementation if they run the risk of being directly affected by it".

In the present case the applicants are all parents who have the custody of children. They are therefore all *ipso facto* affected -by the provisions of the Code of Parenthood and, in the light of their firm religious convictions as to the appropriateness of physical chastisement of children by their parents they are, in the Commission's view, clearly directly affected by the provisions of the Code and the state of the criminal law in Sweden which they submit criminalises behaviour which they regard as necessary and proper:

The Commission therefore concludes that the applicants have shown that they may claim to be victims of violations of the rights and freedoms guaranteed by the Convention within the meaning of art. 25 of the Convention.

2. Art. 26 of the Convention

The applicants contend that their application concerns the state of Swedish criminal and parental law. They have not been subjected to proceedings implementing the law but equally have not instituted proceedings themselves to challenge it, since this is not possible in Sweden. They contend that the requirement of art. 26 of the Convention as to the exhaustion of domestic remedies does not apply to them.

The respondent Government have not disputed the applicants' contention and the Commission finds that, since the applicants were unable to challenge the state of Swedish law in Sweden, the requirement of art. 26 of the Convention as to the exhaustion of domestic remedies is therefore inapplicable.

3. Art. 8 of the Convention

The applicants complain that the present state of Swedish criminal law and the amendment of the Code of Parenthood interfere with their right to respect for private and family life as guaranteed by art. 8 which provides:

> *„1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
> *2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

In the applicants' view the interference which they allege the criminalisation of the physical chastisement of their children constitutes with their rights under the first paragraph of this article cannot be justified under the terms of the second paragraph. The respondent Government argue however that the present state of the criminal law of assault, like all other normal provisions of the criminal law, cannot be regarded as constituting an interference with the applicants' right to respect for their family and private lives as guaranteed by art. 8, par. 1, of the Convention. Alternatively the respondent Government contend that any interference which arises is justifiable under the terms of its second paragraph.

The applicants further contend that the 1979 amendment of the Code of Parenthood constituted a further interference with their rights under art. 8, par. 1, which is equally unjustifiable under art. 8, par. 2. The Government contend that the amendment in question, which is an incomplete law, with no relevance to criminal law and no accompanying sanction, cannot be regarded as an interference with the applicants' rights, under this article or can be justified under its second paragraph.

The Commission will examine first the applicants' complaints relating to the Code of Parenthood and in particular to the second paragraph to Chapter 6, sec. 3 of the Code. In the applicants' submission this provision makes even slight forms of corporal chastisement illegal. They maintain that the existence and operation of this law constitutes an interference with their right to respect for family life as guaranteed by art. 8, par. 1, of the Convention.

The Commission recalls its analysis of the scope of the concept of interference in its Report on Appl.-No. 7525/76, Dudgeon against the United Kingdom, where it found (par. 90):

> *„In accordance with the Court's case-law in the Klass case … an applicant may only complain of the actual effects of the law on him. If in reality it does not affect him at all, he cannot complain. Or its effects may be slight and not such as to interfere with his right to private life. When he complains of the existence of penal legislation, the question whether he runs any risk of prosecution will be relevant in assessing the existence, extent and nature of any actual effects on him. On the other hand the mere fact that a penal law has not been enforced by means of criminal proceedings, or is unlikely to be so enforced, does not of itself negate the possibility that it has effects amounting to interference with private life. A primary purpose of any such law is to prevent the conduct it proscribes, by persuasion or deterrence. It also stigmatises the conduct as unlawful and undesirable. These aspects must also be taken into consideration."*

The Commission must examine the scope and operation of the Code of Parenthood on the basis of the parties' submissions in the light of these criteria. It notes first that the applicants do not contend that light corporal rebukes are breaches of the Swedish criminal law of assault (Chapter 3, sec. 5 and 6, of the Penal Code). Nor have they established any instance of such behaviour being regarded as „molestation" (Chapter 4, sec. 7, of the Penal Code).

The present case does not therefore concern the operation of the criminal law. No question arises of a „risk of prosecution" as a result of the operation of the Code of Parenthood as it did in the Dudgeon case referred to above. The Commission must therefore consider the effects of the Code on the applicant's ability to express and implement their own convictions in the upbringing of their children, in the light of the background and aims of the Code.

The Commission notes first that Sweden is the only Member State of the Council of Europe which has introduced legislation prohibiting all corporal punishment of children by their parents including light corporal rebukes.

The Commission's evaluation of the Code's effect must start from the premise that parental rights and choices in the upbringing and education of their children are paramount as against the state. This is inherent in the terms of the guarantee of respect for family life contained in art. 8, par. 1, since the upbringing of children is a central aspect of family life. The same principle is clearly reasserted in art. 2, First Protocol, the text and interpretation of which by the organs of the Convention leaves the primacy of the parental role in no doubt.

The applicants concede that the scope of permissible parental punishment of their children was uncertain before the amendment to the Code in question and the Government sought by this provision to discourage acts of violence against children by the imposition of the Code's general prohibition of corporal punishment of all kinds.

The applicants contend, however, that this prohibition is contrary to their convictions, which support the use of corporal punishment of their children where appropriate.

They have submitted that the amendment of the Code extended the boundary of the criminal law and also increased the risk that parents who merely used light corporal chastisement may lose the custody of their child but they have not been able to submit any details of reported, or unreported, cases before the Swedish courts to substantiate either claim and which relate directly to light corporal rebukes.

The Government on the other hand have described the amendment to the Code as an incomplete law. They have stressed that it has no accompanying sanction and that it has neither directly, nor indirectly, affected the scope or interpretation of Swedish criminal law. For this reason they have not been able to provide the Commission with any concrete example of the operation of the Code or its interpretation and application by Swedish courts or authorities.

The Government have submitted that it was only by complete prohibition of all corporal punishment that criminal acts of violence against children could be effectively discouraged, since these might arise where a parent exceeded the legitimate non-criminal sphere of light corporal rebukes unintentionally or otherwise. Although the legitimacy of non-criminal light corporal rebukes was not challenged in itself, the Government did not wish to encourage corporal punishment even in this sphere, for fear of such excesses.

In recognition of the difference between what may properly be called violence and is prohibited by the criminal law and the legitimate non-criminal sphere, the prohibition imposed by the amendment to the Code of Parenthood is not accompanied by any sanction or other legal implica-