



**RE: *The Protection of minors against excesses of sects*, Rapporteur: Mr. Rudy Salles  
[AS/Jur (2014) 07]**

**DATE: 03 April 2014**

## **Introduction**

1. Alliance Defending Freedom [ADF] is a legal organization of 2300 allied lawyers, over 40 full time lawyers and has offices internationally including Europe, North America, Latin America and India. ADF enjoys accreditation at the European Parliament, Fundamental Rights Agency (for which it is also represented on the Advisory Panel) and Organization for Security and Co-operation in Europe. ADF has also garnered Consultative Status with the United Nations. ADF has been involved in over forty cases at the European Court of Human Rights and is the leading religious liberties legal organization today practicing before the Court.
2. Institutionally, ADF is greatly concerned with the adoption by the Committee on Legal Affairs and Human Rights of the Report of Mr. Rudy Salles entitled: *The Protection of Minors Against Excesses of Sects*. ADF at the outset notes the severe chilling effect of religious freedom which results when government unduly interferes with church autonomy. To this extent, France provides an example of egregious hyper-monitoring of religious groups by Miviludes, to which the Rapporteur Mr. Salles has concrete connections.
3. The work of Miviludes has led to untold breaches of religious freedom and has literally ruined lives. The case of *Affaire Schmidt c. France*<sup>1</sup> before the European Court of Human Rights gives insight into what improper monitoring of religious life with regard to children entails. Axel and Delwyn Schmidt, as a result of inaccurate reporting that they

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<sup>1</sup> ECHR, *Affaire Schmidt c. France*, application no. 35109/02, judgment of 26 July 2007.

belonged to sect (when in fact their church had officially disbanded and were attending a Presbyterian church at the time of the violation of their parental rights), had their daughter Victoria taken from them for seven years with the accusation that the family belonged to a sect. This was despite the fact that no charges were ever made that either parent physically or mentally abused their daughter. The improper monitoring of so-called sects has also led to churches being punished with oppressive tax penalties, in essence to prevent them from further functioning.<sup>2</sup>

4. Criminal and civil law provide ample protection from potential abuses of minors and other individuals from cults. To provide unfettered discretion to the State to extrajudicially monitor religious groups injures the very substance of religious freedom, parental rights and church autonomy. The following memorandum will outline the importance of these principles with regard to the jurisprudence of the European Court of Human Rights and international law.

### **Religious Freedom: Church Autonomy**

5. European history is marked by very distinct and varying cultures and histories. As a result of this diversity, a number of different church/State models have developed throughout the Council of Europe Member States. These models range from a strict separation of church and secularism<sup>3</sup> on the one hand, to an established State church on the other hand.<sup>4</sup> The establishment of a State church falls within the provisions of the Convention.<sup>5</sup> The Court has even found that a multi-tiered system of church recognition where some churches receive greater benefits from the State than do others is compatible with Article 14 of the Convention.<sup>6</sup>

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<sup>2</sup> See e.g.: ECHR, *Affaire Eglise Evangelique Missionnaire et Salaun v. France*, application no. 25502/07, judgment of 31 January 2013.

<sup>3</sup> E.g.: Turkey. Article 2 of the Turkish Constitution holds that it is a “democratic, secular and social state.” Article 4 makes these basic principles non-derogable. TURK. CONST. Articles 2, 4 (Law No. 2709).

<sup>4</sup> E.g.: The United Kingdom. Cf. *The Act of Settlement*, 12 & 13 Will. 3, c. 2, arts 1-3 (1701) (Eng.).

<sup>5</sup> ECHR, *Darby v. Sweden*, EUR. COMM’N H.R. DEC. & REP. § 47 (1989).

<sup>6</sup> See: ECHR, *Koppi v. Austria*, 10 December 2009, no. 33001/03; ECHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, 31 July 2008, no. 40825/98; ECHR, *Verein der Freunde der Christengemeinschaft and Others v. Austria*, 26 February 2009, no. 76581/01.

6. Religious freedom has not come easily to Europe. It has come over centuries with much blood spilled and much ink spent. With the evolution of human rights treaty law following World War II, freedom of thought, conscience and religion found its place among the substantive rights enumerated in many of the primary human rights treaties of the 20<sup>th</sup> Century, including the European Convention of Human Rights. These instruments recognized the dangers inherent in States seizing absolute power and restraining individual liberties and the common good. The substance of all these documents was the same; that States cannot be entrusted with unfettered discretion to govern over individual actions or to ensure that a worldview is implemented which conforms to its own specific set of values. This same principle, however, must be applied equally to the treaty bodies and courts entrusted with safe-guarding the rights enumerated in these documents, including the Parliamentary Assembly of the Council of Europe.
7. Freedom of thought, conscience and religion is a fundamental right protected by several seminal international human rights treaties.<sup>7</sup> The European Court of Human Rights has elevated the rights guaranteed by Article 9 to being one of the cornerstones of a democratic society.<sup>8</sup> Article 9 has taken the position of a substantive right under the European Convention.<sup>9</sup>
8. The United Nations Human Rights Committee has rightfully stated that freedom of thought, conscience and religion is a “profound” and “far reaching” right of a “fundamental character”; one which State Parties may not suspend or derogate from even in times of public emergency pursuant to Article 4.2 of the ICCPR.<sup>10</sup>
9. This Court, in *Hasan and Chaush* correctly held:

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<sup>7</sup> See e.g.: *European Convention of Human Rights*, Article 9; *International Covenant on Civil and Political Rights*, Article 18; and *Universal Declaration of Human Rights*, Article 18;

<sup>8</sup> ECHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31: AFDI, 1994, p. 658.

<sup>9</sup> *Kokkinakis op.cit.*, ECHR, 23 June 1993, *Hoffmann v. Austria*, Series A, No. 255-C: JDI, 1994, p. 788; *Otto-Preminger-Institut, op. cit.*; ECHR, 26 September 1996, *Manoussakis and Others v. Greece*, Reports 1996-IV: AFDI, 1996, p. 749.

<sup>10</sup> HRC, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion* (1993) [1],

available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

The Court recalls that religious communities traditionally and universally exist in the form of organized structures. They abide by rules which are often seen by followers as being of divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention,<sup>11</sup>

10. Article 9 of the Convention stands alone in that it is the only fundamental right which recognizes the relationship between the individual and the transcendent. It therefore protects the most profound and deeply held conscience and faith based beliefs. In *Metropolitan Church of Bessarabia and Others v. Moldova*, it was held that: “a State's duty of neutrality and impartiality, as defined in its case-law, is incompatible with any power on the State's part to assess the legitimacy of religious beliefs, and requires that conflicting groups tolerate each other...”<sup>12</sup> This idea of State neutrality and allowance for Article 9 religious freedoms is echoed by the Court in *Serif v. Greece*: “The Court recalls that freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”<sup>13</sup>

11. The European Court of Human Rights has further defined Article 9 to require States to restrain themselves from interfering with church autonomy or the right to manifest religious beliefs: “[F]acts demonstrating a failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers' freedom to manifest their religion within the meaning of Article 9 of the

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<sup>11</sup> ECHR, 26 October 2000, *Hasan & Chaush v. Bulgaria* (Appl. No. 30985/96), § 62.

<sup>12</sup> ECHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, Appl. no. 45701/99., § 123.

<sup>13</sup> ECHR, *Serif v. Greece*, application no. 38178/97, judgment of 14 December 1999, § 49.

Convention.”<sup>14</sup> It therefore strains credulity for the Parliamentary Assembly of the Council of Europe to recommend Member States to embark on a process of monitoring the legitimacy of religious beliefs and in essence “doing theology”. Such monitoring would strike at the very heart of the State neutrality principle.

12. Different treatment is discriminatory, for the purposes of Article 14, if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realized”<sup>15</sup> It follows from the principle of non-discrimination that “[t]he right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”<sup>16</sup>
13. The clear and unwavering jurisprudence of the European Court of Human Rights regarding State neutrality towards religious groups, coupled with the growing number of judgments from the Court against High Contracting Parties for improperly monitoring religious groups, stands in sharp contrast to the recommendations set forth by Mr. Salles. As Member States are bound by the Convention, so too should PACE be held to a standard whereby its reports and recommendations do not contradict the governing law of Europe regarding religious liberty. The Report on *The Protection of Minors Against Excesses of Sects* should therefore be categorically rejected by the Parliamentary Assembly.

### **Parental Rights and International Law**

14. ADF has been at the forefront of defending parents from abuses by the State regarding parental rights, specifically in the area of education. The question of parental rights and education, read in the light of the proposed Salles Report, provides perhaps one of the greatest gaps in European law today: that being between the clear protections provided to parents in international law with regard to education on the one hand, and aggressive

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<sup>14</sup> ECHR, 26 October 2000, *Hasan & Chaush v. Bulgaria* (Appl. No. 30985/96), § 78.

<sup>15</sup> ECHR, *Case of Kosteski v. The Former Yugoslavia Republic of Macedonia*, application no. 55170/00, judgment of 13 April 2006, § 44. See also: *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24, and ECHR, *Camp and Bourimi v. the Netherlands*, application no. 28369/95, judgment of 3 October 2000, § 37.

<sup>16</sup> ECHR, 26 September 1996, *Manoussakis v. Greece* (RJD 1996, p. 1346), § 47.

encroachments of those rights by Member States on the other. Adoption of the Salles Report would further damage the rights of European parents in educating their children according to their own religious and philosophical convictions. Examples of such abuses abound in the casework of Alliance Defending Freedom.

15. In Salzkotten, Germany, 14 Christian parents were imprisoned, some for more than 40 days and most on multiple occasions, simply for opting their 9-10 year old children from 2 days of mandatory “sexual education” classes.<sup>17</sup> Also in Germany, a 15 year old girl was placed in a mental institution for wishing to be home educated. The reason for her police detention and subsequent committal to the Nuremberg mental facility was the false diagnosis by a single practitioner that the young girl in question had “schoolphobia.”<sup>18</sup> In Sweden, a seven year old boy was taken off of an airplane bound for Sweden by police and social services simply for being home educated. The family was relocating to India to do missionary work with orphanages. The police had no warrant and the family was accused of committing no crimes when young Domenic Johansson was taken from his parents nearly four years ago.<sup>19</sup> In Spain, the Zapattero government initiated mandatory classes known as “education for citizenship” which indoctrinated young children with a bombardment of material promoting homosexual behavior, hypersexual behavior, communism and which aggressively mocked the Catholic Church. What was perhaps even more shocking was that the government refused all requests for parental opt-outs of the classes despite more than 50,000 complaints from parents, hundreds of law suits and ultimately a class action style law suit at the European Court of Human Rights.<sup>20</sup>
16. The forces behind the oppression of parental rights and the ideological indoctrination of our children have but one goal in mind: to steal the hearts and minds of this generation despite the parents’ best attempts to the contrary. A quote from a prominent humanist in the 1930’s set out this goal in a most straightforward manner: “Education is thus our most powerful ally of humanism, and every public school is a school of humanism. What can

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<sup>17</sup> See: <http://www.adfmedia.org/News/PRDetail/4690?AspxAutoDetectCookieSupport=1>.

<sup>18</sup> See: <http://www.wnd.com/2008/03/59947/>.

<sup>19</sup> See: <http://www.adfmedia.org/News/PRDetail/3607>.

<sup>20</sup> See: <http://adfmedia.org/News/PRDetail/5315>.

the theistic Sunday school, meeting for an hour once a week, and teaching only a fraction of the children, do to stem the tide of a five-day program of humanistic teachings?”<sup>21</sup>

17. When the State becomes the arbiter of acceptable child-rearing, it becomes the dictator of public opinion and social direction, thereby defrauding democracy. This is not an issue of child abuse or neglect; rather, it is a matter of conscience, belief, preference, and ideology. If the State asserts a right to determine which beliefs a parent can or cannot instill in his or her own children, it infringes upon a fundamental liberty upon which the social order is established. Liberty, rightly understood, cannot be vested in the State itself, for such becomes tyranny or fascism. The State’s role is to recognize, respect, and protect liberty: the liberty of the individual, the family, and the people at large.
18. This legal trend, as pursued by the Salles Report—the State taking over parents’ role as the custodians and guides for their children’s development—threatens religious liberty and freedoms of conscience, belief, and even speech. For if the State can dictate what a child believes; it can control the contours of speech in society at large. In effect, the State gains a monopoly on socially-acceptable principles and dialogue, and excludes from the public sphere dialogue on issues they label as “fundamentalist” or “abnormal” beliefs. This is not through direct regulation—at least not yet—but through regulating the family, which is the atom of society and the seedbed of future citizens.
19. Numerous international documents confirm parents as primary and principal educators of their children. By that fact alone, parents have the greatest rights and the greatest responsibility in the education of their children. State institutions should assist them in this task; schools must seek the cooperation of parents and should not in any case artificially displace the rights of children and the rights of parents by imposing on the children an education contrary to the one they receive from their parents.
20. The Universal Declaration of Human Rights, Article 26 (3), states that, “Parents have a prior right to choose the kind of education that shall be given to their children.”
21. The United Nations Convention on the Rights of the Child clearly states that among the most important rights of the child, besides the right to life, are precisely the right to parental love and the right to education. The Convention also explicitly notes that the

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<sup>21</sup>Charles F. Potter, *Humanism: A New Religion* (New York: Simon and Schuster, 1930).

rights of parents are not juxtaposed to the rights of children. Moreover, the parents, being the ones who love their children most, are those most called upon to decide on the education of their children. The pertinent excerpts of the Convention read thus:

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

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

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, **States Parties shall render appropriate assistance to parents and legal guardians** in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.[Emphasis added]

22. Equally pertinent, the International Covenant on Civil and Political Rights states in Article 18 (4) that, “The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

23. Further, the Convention against Discrimination in Education holds in Article 5(1)(b) that it is essential that States, “respect the liberty of parents and, where applicable, of legal

guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their conviction.”

24. The European Convention of Human Rights, Protocol 1, Article 2, mirrors this same idea: “In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” The term philosophical convictions are interpreted by the European Convention of Human Rights as a whole<sup>22</sup> and extend to include pedagogical beliefs; those being the parents’ beliefs as to the best way of educating their children.
25. Undoubtedly, therefore, parents must be at the centre of the decision making process when it comes to curricula which deeply affect the value system of the child. The school systems should therefore work on harmonizing institutional education with parental upbringing.
26. The proposals put forth by Mr. Salles have already led to the aforementioned abuses of parental rights. Practically speaking, if the recommendations of Mr. Salles were adopted by Member States, we would thereafter see even greater limitations placed on parental rights with regards to opt-outs of ideologically offensive classes, home education on confessional school autonomy.

### **Confessional Schools**

27. The safeguarding of the possibility of pluralism in education is essential for the preservation of a democratic society.<sup>23</sup> Parents must be able to choose their children’s

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<sup>22</sup> ECHR, 25 February 1982, *Campbell and Cosans v. the United Kingdom*, Series A, No. 48, § 36: CDE, 1986, p. 230.

<sup>23</sup> ECHR, *Kjeldsen, Busk Madsen and Pederson v. Denmark*, Judgment of 7 December 1976, Application No. 5095/71, 5920/72, 5926/72, § 50.

schools, whether public or private.<sup>24</sup> While State subsidization of private or confessional schools is not guaranteed by Protocol 1, Article 2<sup>25</sup>, the right to establish private or confessional schools is.<sup>26</sup> Alternative forums for education, such as home schooling, must also be recognized as falling within the weighty protections afforded to parental rights within the corpus of international law.

28. In private schools, religious and philosophical teaching may be entirely independent with the caveat that the State may lay down certain conditions relating to the qualifications of teachers, the teaching of certain subjects or the internal organizations of schools.<sup>27</sup> While religious indoctrination is forbidden in schools<sup>28</sup>, the State does not have any discretion to determine whether religious beliefs or the means used to express those religious beliefs is legitimate.<sup>29</sup> The State may only demand that any teaching be provided in an objective, critical and pluralistic manner.<sup>30</sup> Nor does the fact that private or confessional schools exist excuse the State of respecting the rights of parents with regard to the raising of their children according to their own religious and philosophical beliefs.<sup>31</sup>
29. The requirement to maintain religious or confessional schools is of fundamental importance to the maintenance of a religiously pluralistic society.<sup>32</sup> Protocol 1, Article 2 does not allow a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme.<sup>33</sup> That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the

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<sup>24</sup> ECHR, 5 December 1990, *Graeme v. the United Kingdom*, 64 DR 158.

<sup>25</sup> See e.g.: ECHR, *X and Y v. the United Kingdom*, App. No. 9461/81, Eur. Comm'n H.R. Dec. & Rep. 210 (1982).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Kjeldsen, Busk Madsen and Pederson v. Denmark*, *op. cit.*

<sup>29</sup> ECHR, *Manoussakis and Others v. Greece*, Reports 1996-IV: AFDI, 1996, p. 749, § 47.

<sup>30</sup> *Kjeldsen, Busk Madsen and Pederson v. Denmark*, *op. cit.*, § 53.

<sup>31</sup> *Id.*, at 25, 28.

<sup>32</sup> See e.g.: Natan Lerner, *Group Rights and Discrimination in International Law*, Chapter 10 (1991) noting the overwhelmingly strong lobby in favor of guarantees for religious education under the *Minorities Treaty* established by the League of Nations.

<sup>33</sup> *Kjeldsen, Busk Madsen and Pederson v. Denmark*, *op. cit.*, § 52. See also: *Case of Folgero and Others v. Norway*, App. No. 15472/02, judgment of 29 June 2007., § 84(c).

performance of all the “functions” assumed by the State. The verb “respect” means more than “acknowledge” or “take into account”.<sup>34</sup>

30. As the Court held, “It is in the discharge of a natural duty towards their children - parents being primarily responsible for the “education and teaching” of their children - that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.”<sup>35</sup> Second and equally pertinent, that “democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”<sup>36</sup>

31. Therefore, while States may set minimum standards in education they cannot, as the Salles Report recommends, monitor curricula which would stifle religious teaching or exercise within education. Such a deprivation would likely hinder the evolving capacities of the child and be to the detriment of the best interests of the child standard set in international law.<sup>37</sup> Furthermore, as the Council of Europe has recently stated that: “history has proven that violations of academic freedom...have always resulted in intellectual relapse, and consequently in social and economic stagnation.”<sup>38</sup>

32. Both the European Court of Human Rights and the International Covenant on Economic, Social and Cultural Rights guarantee the right of establishment of private schools.<sup>39</sup> The right to establish private educational institutions also assumes the right of parents to choose between public and private education; or between different private or confessional schools. Again, the distinction would be illusory and therefore meaningless is some level of academic freedom was not allowed in the development of school curriculum. The

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<sup>34</sup> *Case of Folgero and Others v. Norway, op. cit.*

<sup>35</sup> *Id.*, § 84(e).

<sup>36</sup> *Id.*, § 84(f).

<sup>37</sup> See e.g.: United Nations, *Convention on the Rights of the Child*, , G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* 9.2.1990, Article 14.

<sup>38</sup> Parliamentary Assembly of the Council of Europe, Recommendation 1762, *Academic Freedom and University Autonomy*, 30 June 2006, § 4.3.

<sup>39</sup> See e.g.: ECHR, 5 December 1990, *Graeme v. the United Kingdom*, 64 DR 158; ECHR, *X and Y v. the United Kingdom*, App. No. 9461/81, Eur. Comm’n H.R. Dec. & Rep. 210 (1982). See also: ICESCR, *supra n.* 21, Article 13(4).

chilling effect of the proposed policies of Mr. Salles would indeed directly violate the clear meaning of these provisions in international law.

## **Home Education**

33. The right to education and respect for parental authority over their children assumes some level of freedom. One aspect of this right is that State schools cannot exercise a monopoly in education. As Article 13 of the International Covenant on Economic, Social and Cultural Rights dictates: “The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.”<sup>40</sup> Among the educational options that should be made available to all parents because of international norms is the right to home educate.
34. Home schooling has taken the place of a customary international right among the vast majority of democratic nations. The level of coordination and infrastructural support within the home education sphere casts grave shadows on any argument that mandatory school attendance is a legitimate means of protecting public order. The cases in which ADF has defended home schooling parents who have been imprisoned, sought refugee status or had their children put into foster care (all cases where any physical or mental abuse or proof of neglect was lacking) stands in stark contrast to the extreme acts of the State in separating families in the name of ideology.

## **Conclusion**

35. The following memorandum has laid out the international treaty law and jurisprudence regarding parental rights and church autonomy. Both concepts are central to the enjoyment of freedom of thought, conscience and religion which requires a duty of State neutrality. The proposal of Mr. Salles strikes at the very heart of these protections and creates a climate ripe for abuse by State actors. This memorandum has also outlined egregious violations of both religious freedom and parental rights which have occurred as

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<sup>40</sup> United Nations, *International Covenant on Economic, Social and Cultural Rights*, New York, 16 December 1966.

a result of the same policies being promoted by the Salles Report. For a free and democratic Europe, one in which people of all faiths and philosophies can enjoy equal protection under the law, Alliance Defending Freedom urges the Members of the Parliamentary Assembly of the Council of Europe to reject the Report on *The Protection of Minors Against Excesses of Sects*.