(2012) 14 Ecc LJ 256–271 © Ecclesiastical Law Society
doi:10.1017/S0956618X12000300

The 'Precious Asset': Freedom of Religion Under the European Convention on Human Rights

Nicolas Bratza
President, European Court of Human Rights

The European Court of Human Rights has stated that Article 9 of the European Convention on Human Rights in its religious dimension is not only one of the most vital elements that go to make up the identity of believers and their conception of life but also a precious asset for atheists, agnostics, sceptics and the unconcerned. In the past 20 years, the Court has been called upon to address the scope and content of the Article in a variety of key cases, involving matters as diverse as proselytism, the grant and refusal of registration of religious bodies, the refusal of authorisations for places of worship and prohibitions on the wearing of religious dress or symbols in public places. The Court's case law has not been without its critics, some complaining that the Court has interpreted Article 9 too narrowly and has given too little weight to the freedom to manifest one's religion in teaching, practice and observance. Others, in contrast, have criticised what they see as the excessive weight given to religion when in conflict with other ECHR rights, notably that of freedom of expression. Still others have charged the Court with failing to interpret Article 9 in such a way as to realise its full potential by not engaging with what is meant by the word 'religion'. This article considers some of these criticisms, and the need for the Court to strike a balance between the effective protection of individual rights and the need to respect very different constitutional traditions among the Contracting States.[1]

INTRODUCTION

It is a curiosity that, despite the fundamental importance of the right to freedom of religion and belief, as underlined by the passionate debate that led up to its inclusion in the European Convention on Human Rights (ECHR),[2] and despite the fact that the rights under what became Article 9 of the ECHR

1 This is the revised text of a public lecture given on 29 September 2012 at St Stephen's House, University of Oxford, at the invitation of the Ecclesiastical Law Society as part of the European Consortium for Church and State Research's Twenty-third Annual Congress. The views expressed are personal to the author and are not binding on the European Court of Human Rights. The entire proceedings of the Congress, including Sir Nicolas' address have since been published in M Hill (ed), *Religion and Discrimination Law in the European Union* (Trier, 2012).

2 The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome, 4 November 1950. The European Commission on Human Rights ceased to exist following a remodelling of the Strasbourg institutions and the creation of the newly constituted Court in 1998. For an exhaustive discussion of the operation of the Court, see J Martinez-Torrón, 'Religious liberty in European jurisprudence' in M Hill (ed), *Religious Liberty and Human Rights* (Cardiff, 2002).

figured relatively frequently in the jurisprudence of the European Commission on Human Rights (the Commission) in the 1970s and 1980s, it was not until 1993 that an issue under Article 9 was first addressed directly by the European Court of Human Rights (the Court). This was in the *Kokkinakis* case against Greece, which established the oft-repeated principle that Article 9 protects both religious and non-religious belief. The Court stated that Article 9 is 'in its religious dimension one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned'.[3]

The Court's case law relating not merely to Article 9 itself but more generally to questions touching on religion or religious belief has, in the past 20 years, grown apace. The Court has been called upon to address the scope and content of Article 9 in a wide variety of key cases, involving matters as diverse as proselytism, the grant and refusal of registration of religious bodies, the refusal of authorisations for places of worship and prohibitions on the wearing of religious dress or symbols in public places. It is case law in which the Court has reiterated the central importance played by religious and philosophical belief in European society. But it is also case law that has not been without its critics, some complaining that the Court has interpreted Article 9 too narrowly and has given too little weight to the freedom guaranteed by that Article to manifest one's religion in teaching, practice and observance, whether by the wearing of religious dress, by engaging in evangelism, by practising conscientious objection or by observing religious practices in the course of employment. Others, in contrast, have criticised what they see as the excessive weight given to religion when in conflict with other ECHR rights, notably that of freedom of expression, and of a failure on the part of the Court to pay sufficient regard to the principle of denominational neutrality, particularly in the context of education. Still others have charged the Court with failing to interpret Article 9 in such a way as to realise its full potential by not engaging with what is meant by the word 'religion' (falling back instead on the easier word 'belief') or by avoiding an examination of a complaint under Article 9 altogether, where it can more conveniently be dealt with under another Article of the ECHR, whether Article 8 or Article 11.

In this article I will touch on, if not answer, some of these criticisms, certain of which seem to me to have some merit. Before doing so, it is worth emphasising that there have always been two challenges for the Court in protecting the rights guaranteed by Article 9, which will not necessarily be felt by national courts charged with the same task. First, it is readily apparent that the 47 Contracting States have very different religious and cultural backgrounds, and

3 *Kokkinakis v Greece*, 25 May 1993, para 31, Series A no 260-A, (1994) 17 EHRR 397.

https://doi.org/10.1017/S0956618X12000300 Published online by Cambridge University Press

the ECHR seeks to ensure that, as far as possible, all such traditions are respected. Second, the ECHR does not endorse or indeed require any particular model of Church–state relations. The Court must therefore strike a balance between, on the one hand, the effective protection of individual rights and, on the other, the need to respect very different constitutional traditions among the Contracting States.

It is, of course, impossible for the Court to provide an all-encompassing answer to these challenges or to predict how it will respond to these challenges in its future case law. Instead, it is perhaps more useful to ask how the Court, in its case law to date, has tried to secure proper respect for a variety of faiths and beliefs in a religiously diverse continent, before focusing on what seem to me to be the more interesting and controversial developments in that case law.

ARTICLE 9: FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

The obvious starting point is the text of Article 9 itself, which, in common with Articles 8, 10 and 11, sets out in the first paragraph the right guaranteed and, in the second, the circumstances in which interferences with that right may be justified. The right guaranteed is one of 'freedom of thought, conscience and religion', and that right is expressed to include both freedom 'to change' one's religion or belief and also freedom, either alone or in community with others and in public or private, 'to manifest' one's religion or belief 'in worship, teaching, practice and observance'.

It is the right 'to manifest' one's religion or beliefs that alone can be subject to 'limitations' under paragraph 2 of the Article, provided such limitations are 'prescribed by law' and are 'necessary in a democratic society' to achieve one of the legitimate aims – these being the interests of public safety, the protection of public order, health or morals and the protection of the rights and freedoms of others.

What then is meant by religion in Article 9? The Commission and Court, in common with the Human Rights Committee under the International Covenant on Civil and Political Rights, have conspicuously avoided any definition of the term, for obvious reasons. The difficulties of achieving a definition that is flexible enough to embrace the immense range of world faiths but, at the same time, precise enough to be capable of practical application would almost certainly prove insuperable. Fortunately, in practice, the lack of a definition has not been problematic. This is largely because, as I have stated, Article 9 protects both 'religion' and 'belief'. This wide protection has enabled the Court to find no difficulty in holding the Article to be applicable not merely to traditional and long-established religions – Hinduism, Christianity, Islam, Judaism, Buddhism, Sikhism, all of which have given rise to issues under the Article – but to other forms of religious movement, including druidism and the

Church of Scientology, as well as to a wide range of philosophical beliefs, notably pacifism, atheism and veganism.

However, even the word 'beliefs' has not been treated as unlimited in scope, the Court requiring that, in order to enjoy protection under the ECHR, a belief must 'attain a certain level of cogency, seriousness, cohesion and importance' and further be such as to be compatible with human dignity. In harmony with this approach, while the philosophy of pacifism has been held to be sufficiently coherent to amount to a protected belief or conviction, an opinion – even a sincerely held one – on assisted suicide was held in the famous *Pretty* case not to have the necessary degree of coherence to constitute a belief protected by the Article.[4]

If the scope of the right guaranteed by Article 9 has not in general proved problematic, the distinction between the holding of a religious belief and its manifestation has shown itself more elusive. That distinction is of some importance, particularly as regards the degree of protection afforded by the ECHR. In contrast to the manifestation of a religion or belief, what has been described as the internal dimension (the *forum internum*) of the right guaranteed – which was defined by the Commission as one 'largely exercised inside an individual's heart and mind' – is inviolate and permits of no restriction, limitation or control by the state. In practical terms, this not only prohibits persecution of a person on the grounds of his or her belief but forbids the use of physical threats or sanctions applied by the state to compel a person to deny, adhere to or change a particular religion or belief. It also prohibits other forms of coercion sufficiently strong as to amount to indoctrination by the state.

However, this internal dimension has been held to go further and to include a guarantee against a requirement to act in a manner contrary to one's religious beliefs or even to manifest or disclose the nature of those beliefs. For instance, in *Buscarini and Others v San Marino* the applicants were required to swear an oath on the Christian Gospels in order to take up their seats in the San Marino Parliament.[5] The Court held that to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs was essentially incompatible with the pluralistic ethos of Article 9 and the ECHR as a whole.[6]

More recently, in the case of *Sinan Işik v Turkey*, the applicant's complaint related to the reference to religion in his identity card, a public document that

4 *Pretty v the United Kingdom*, no 2346/02, ECHR 2002–III, paras 82 and 83, (2002) 35 EHRR 1.
5 *Buscarini and Others v San Marino*, no 24645/94, ECHR 1999–I, Grand Chamber, (2000) 30 EHRR 208.
6 Ibid, para 39. See also *Alexandridis v Greece*, no 19516/06, 21 February 2008, concerning the fact that the applicant was forced to reveal whether he was Orthodox or not when taking the oath of office required to practise as a lawyer before the Athens Court of First Instance.

was frequently in use in daily life.[7] In the view of the Court, it was no answer to the complaint that the space for religion in identity cards could be left blank, since persons with identity cards not containing information about religion would be distinguished against their wishes and on the basis of interference by the public authorities from those whose identity cards contained such an entry. A request for such information not to be included was held by the Court to be closely bound up with an individual's most deeply held and private conviction.

Turning now to the 'external' dimension of the right – the manifestation of religion or belief – the meaning of the word 'manifestation' was examined in the early Commission case of *Arrowsmith v the United Kingdom*.[8] Mrs Arrowsmith, a committed pacifist, had been convicted for handing out leaflets to soldiers encouraging them to refuse to serve in Northern Ireland. In rejecting her claim, the Commission drew a distinction between an act or practice that manifested a religion or belief and one that was merely motivated by such a belief. While any public declaration that proclaimed the idea of pacifism would be considered as a 'normal and required manifestation of pacifist belief', the leaflets in question had expressed not the applicant's own pacifist values but rather her critical observations of government policy. As such, they could not qualify as a manifestation of a belief under Article 9. While this approach may have the advantage of excluding from the protection of Article 9 beliefs that may be regarded as artificial or trivial, it has the disadvantage, as one commentator has put it, of bringing the Court 'dangerously close to adjudication on whether a particular practice is formally required by a religion – a task which its judges, given the relevant theological issues, appear ill-equipped to handle'.[9]

In the new Court, it is perhaps possible to detect a shift in approach and a greater reluctance to enter into the question of whether a particular practice is an indispensible element of a religion or system of belief. Thus, in the case of *Leyla Şahin*, to which I will return a little later, the Court refused to adjudicate on the strongly contested question as to whether, in wearing an Islamic headscarf, the applicant was fulfilling a religious duty and thereby manifesting her faith.[10] The Court proceeded on the assumption that regulations prohibiting the wearing of a headscarf interfered with the applicant's right to manifest her religion, without ruling on whether the decision to wear the headscarf was in every case taken to fulfil a religious duty.[11]

7 *Sinan Işık v Turkey*, no 21924/05, ECHR 2010. See also *Wasmuth v Germany*, no 12884/03, 17 February 2011.
8 *Arrowsmith v the United Kingdom*, no 7050/75, Commission's report of 12 October 1978, Decisions and Reports (DR) 19, p 5, (1978) 3 EHRR 218.
9 D Harris, M O'Boyle and E Bates, *Law of the European Convention on Human Rights* (second edition, Oxford, 2009), p 433.
10 *Leyla Şahin v Turkey*, no 44774/98, ECHR 2005–XI, Grand Chamber, (2007) 44 EHRR 5.
11 Ibid, para 78.

A related area in which the decisions of the Court and Commission have attracted criticism is that of employment and the wish of an employee to practise, share or display his or her religion or belief in the workplace. It is an area where Article 9 rights appear to have been particularly restricted – and perhaps inevitably so, having regard to the conflicting interests of the employer. The ECHR organs have traditionally taken the view that there is no interference with the manifestation of religion or belief when a person voluntarily accepts a position where curbs are placed on the free exercise of religious beliefs and where an employee is free to leave his or her employment so as to continue to follow whatever religious observances he or she wishes.

The Court has been reluctant to recognise any positive obligation on the part of employers to take steps to facilitate the manifestation of belief: for example, by allowing an individual to worship at a particular time during working hours or in a particular manner. In such a case, even where the employee has substantiated the genuineness of his or her claim to belong to the religion,[12] the ECHR organs have frequently invoked the freedom to resign from employment as an answer to the complaint.[13] The assumption that, in the modern employment market, such a choice is a real one has been questioned, and there are perhaps indications in the more recent case law that the freedom to resign from employment will no longer be seen as 'the ultimate guarantee of . . . freedom of religion'.[14]

I have focused thus far on individual rights of freedom of religion and belief, to the exclusion of the collective aspect of Article 9 and the recognition by the Commission and Court not merely that worship with others is the most obvious form of collective manifestation of belief but that a church or other religious organisation is itself capable of exercising rights under the Article. In an oft-repeated statement in the case of *Hasan and Chaush v Bulgaria*, the Court observed that, where the organisation of religious communities is at issue, Article 9 must be interpreted in the light of Article 11, which protects freedom of assembly and association.[15] The Court went on to say this:

> Seen in that perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed the autonomous

12 *Kosteski v 'the former Yugoslav Republic of Macedonia'*, no 55170/00, 13 April 2006, (2006) 45 EHRR 712.

13 See, for example, *Stedman v the United Kingdom*, no 29107/95, Commission decision of 9 April 1997, unreported.

14 See *Konttinen v Finland*, no 24949/94, Commission decision of 3 December 1996, Decisions and Reports (DR) 87-A, p 68; *Karlsson v Sweden*, no 12356/86, Commission decision of 8 September 1988, unreported; *Knudsen v Norway*, no 11045/84, Commission decision of 8 March 1985, Decisions and Reports (DR) 42, p 247. Compare *Ivanova v Bulgaria*, no 52435/99, 12 April 2007, (2007) 47 EHRR 1173.

15 *Hasan and Chaush v Bulgaria*, no 30985/96, ECHR 2000–XI, Grand Chamber, para 62, (2002) 34 EHRR 55.

> existence of religious communities is indispensible for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.[16]

Cases reflecting this vital element of autonomy have tended to relate to state interference in one of three key areas: the internal organisation of the religious community, including the selection of its leaders; the grant or refusal of official recognition to certain faiths in national law; and the regulation by the state of places of worship. In each area the Court has consistently stressed the need for state neutrality.

As to the first of these areas, the Court's case law has frequently involved the intervention by the state in internal disputes within a religious community. In the *Hasan and Chaush* case itself, following a dispute within the Bulgarian Muslim community as to who should be its national leader, the Government's intervention effectively to replace the applicant who had been elected to the office with another, previous holder of the post was held to be in violation of Article 9, the intervention being found to have been arbitrary and based on legal provisions that allowed an unfettered discretion to the executive.[17] Violations have been found even where the aim of the intervention was one of avoiding intra-faith conflict, the Court emphasising that the existence of tensions within a divided religious community is one of the 'unavoidable consequences of pluralism' and that the role of the authorities in such circumstances is not to intervene to remove the cause of tension by eliminating pluralism but to ensure that the competing groups tolerate each other[18] – something, I am afraid, that experience has sometimes shown to be easier said than done.

Similarly, the grant of official recognition, including the requirement of registration of religious communities, has been a source of much case law. The Court has emphasised that, while the imposition of a requirement of state registration is not in itself incompatible with freedom of religion, despite the risk of the discriminatory treatment of minority faiths, the state must remain neutral and impartial and must not appear to be assessing the comparative legitimacy of different beliefs.[19]

Similar care has been exercised by the Court to ensure that the regulation of places of worship, on planning grounds or otherwise, is not used for ulterior purposes and, in particular, that such powers are not exercised arbitrarily or with the aim of penalising minority groups. In the leading case of

16 Ibid.
17 See, in particular, ibid, paras 86 and 87.
18 See *Serif v Greece*, no 38178/97, ECHR 1999–IX, para 53, (1999) 31 EHRR 561. See also *Agga v Greece (no 2)*, nos 50776/99 and 52912/99, 17 October 2002; *Supreme Holy Council of the Muslim Community v Bulgaria*, no 39023/97, 16 December 2004, (2004) 41 EHRR 23.
19 *Metropolitan Church of Bessarabia and Others v Moldova*, no 45701/99, ECHR 2001–XII, paras 116 and 117.

Manoussakis v Greece, the Court found on the evidence that the possibilities afforded by domestic law to impose rigid and even prohibitive conditions on the practice of religious beliefs by certain non-Orthodox movements was incompatible with Article 9, not least because the applicants had been waiting over a decade for such permission to be granted and because such authorisation could only be granted with the approval of a local Orthodox bishop.[20]

To my mind, three issues have become areas of special interest as a result of more recent case law of the Court, and the remainder of this article focuses on each of them in turn. The areas are conscientious objection, the wearing of religious dress or symbols and the conflict of rights.

CONSCIENTIOUS OBJECTION

As early as 1964, in the *Grandrath* case, the Commission examined a complaint by a Jehovah's Witness who alleged a violation of his Article 9 rights on the ground that the authorities had imposed on him a service that was contrary to his conscience and religion and had punished him for his refusal to perform such service.[21] In rejecting his claim the Commission observed that, while Article 9 guaranteed the right to freedom of thought, conscience and religion in general, Article 4 of the ECHR (the prohibition of slavery and forced labour) contained a provision that expressly dealt with the question of compulsory service, exacted in the place of military service, in the case of conscientious objectors. The conclusion that Article 4 left a choice to Member States whether or not to recognise conscientious objectors and that Article 9 could not accordingly be interpreted as guaranteeing a right to conscientious objection was upheld in several subsequent decisions of the Commission and came to be regarded as established case law.

In more recent times, and in order to escape from their self-imposed straitjacket, the ECHR organs have had recourse to Articles other than Article 9 in order to provide some measure of protection to conscientious objectors. Thus in *Ülke v Turkey*, and again in *Taştan v Turkey*, the prohibition against ill-treatment in Article 3 of the ECHR was invoked by the Court, which found that the repeated use of prosecution and imprisonment for a refusal to serve in the armed forces and the requirement that a 78-year-old man should perform such service amounted to degrading treatment.[22]

Just as importantly, recourse was had to the prohibition on non-discrimination – contained in Article 14 of the ECHR – in *Thlimmenos v*

20 *Manoussakis and Others v Greece*, no 18748/91, 26 September 1996, Reports of Judgments and Decisions ECHR 1996–IV, (1996) 23 EHRR 387.
21 *Grandrath v Germany*, no 2299/64, Commission report of 12 December 1966, Yearbook 10, p 626.
22 *Ülke v Turkey*, No 39437/98, 24 January 2006, (2006) 48 EHRR 1128; *Taştan v Turkey*, No 63748/00, 4 March 2008.

Greece.[23] The applicant had been convicted for his refusal on religious grounds to wear a military uniform. He was then excluded from exercising the profession of a chartered accountant on the basis that he had a criminal conviction. The Court interpreted Article 14 as prohibiting not merely the *different* treatment of persons in analogous situations but also the *like* treatment of persons who were *not* analogous. With some ingenuity, the Court held that the applicant's conviction on conscientious grounds differed from other serious and morally reprehensible offences that might render a person unsuitable to enter the profession. In the Court's view, there were no objective and reasonable justifications for treating the applicant in the same way as other persons convicted of felonies. The failure of Greece to introduce exceptions to the blanket restriction on entry to the profession accordingly violated Article 14.

It was not until July 2011 that the Court finally grappled with the question of whether the *Grandrath* principle and reasoning could still be maintained. In *Bayatyan v Armenia*, the applicant – once again, a committed Jehovah's Witness – was summoned to appear for military service.[24] He indicated that, while he was fully prepared to perform alternative civilian service – which did not in fact at that time exist in Armenia – he was not willing to serve in the military. He was charged and convicted of draft evasion and sentenced to 30 months' imprisonment.

By a majority of 16 to 1, the Grand Chamber finally overruled *Grandrath*. The Court noted that almost all states that still had compulsory military service recognised the right to conscientious objection. The right could also be claimed on the basis not only of religious belief but of a relatively broad range of personal beliefs of a non-religious nature. The Court further found that the earlier interpretation of Article 4 did not reflect its true purpose or meaning, which was merely to elucidate the notion of 'forced or compulsory labour'. The Article neither recognised nor excluded a right of conscientious objection and had no diluting effect on the rights guaranteed by Article 9. Those guarantees had been violated by the treatment of the applicant, who, to stay faithful to his convictions, risked criminal sanctions. A system that did not introduce alternatives to compulsory military service failed to strike a fair balance between the interests of the society as a whole and the sincere beliefs of the applicant as a member of a minority religious group.

RELIGIOUS DRESS AND SYMBOLS

The issue of prohibitions or restrictions on the wearing of religious dress or symbols has had a relatively long history. It arose first in the case of

23 *Thlimmenos v Greece*, no 34369/97, ECHR 2000–IV, Grand Chamber, (2000) 31 EHRR 411.
24 *Bayatyan v Armenia*, No 23459/03, 7 July 2011, Grand Chamber.

Karaduman v Turkey in 1993, which concerned the withholding by Ankara University of a degree certificate because the applicant, a devout Muslim, had refused to supply an identity photograph showing herself bare-headed.[25] The Commission's rejection of her Article 9 complaint turned on the question of whether the requirements complained of constituted an interference with the exercise of her freedom of religion. In holding that it did not, the Commission laid emphasis essentially on the matter of consent; by choosing to pursue her higher education in a secular university, a student submitted to the university rules and, according to those rules, students were required to forbear from wearing headscarves. What is of some interest in the case is the Commission's observation, which we find echoed in later cases, of the necessity to ensure harmonious co-existence between students of different beliefs, the Commission noting that, especially in countries where the great majority of the population owe allegiance to one particular religion, manifestations of the symbols of that religion may constitute pressure on students who do not practise that religion or who adhere to another faith.

Eight years later, in 2001, in the case of *Dahlab v Switzerland*, the new Court was faced with a refusal to allow a teacher of a class of small children to wear the Islamic headscarf.[26] Once again, the complaint was rejected. This time, any interference with the applicant's Article 9 rights was held to be justified. The Court here laid emphasis on the 'powerful external symbol' that the wearing of the headscarf represented. Not only could it be seen, in the Court's view, as having some kind of proselytising effect – since it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality – but 'it could not easily be reconciled with the message of tolerance, respect for others and equality and non-discrimination that all teachers in a democratic society should convey to their pupils'.

It was in the case of *Leyla Şahin v Turkey* that the Grand Chamber first directly and controversially addressed the question of the clash between the individual right to manifest one's religion through dress and the demands of secularism and gender equality. The applicant, a practising Muslim and a fifth-year medical student at Istanbul University, was refused access to a written examination because she was wearing an Islamic headscarf, contrary to a circular issued by the Vice-Chancellor of the University. She was also refused permission on the same grounds to enrol in a course and to attend various lectures. She complained under Article 2 of Protocol No 1 that the prohibition was an unjustified interference with her right to education and, under Article 9, that it obliged her to choose between her religion and her education.

25 *Karaduman v Turkey*, no 16278/90, Commission decision of 3 May 1993, DR 74, p 93.
26 *Dahlab v Switzerland* (dec), no 42393/98, ECHR 2001–V.

Under Article 9 the Court once again proceeded on the basis that there had been an interference with her ECHR rights and accepted that the interference was both lawful and that it pursued the legitimate aim of protecting the rights and freedoms of others. The crucial question was thus whether the interference had been 'necessary in a democratic society'. The majority found that it had. They noted that the interference was based in particular on two legitimate aims – the principles of secularism and equality, which were at the heart of the Turkish Constitution. Secularism was seen as the guarantor of democratic values in the state. It prevented state authorities from manifesting a preference for a particular religion or belief by ensuring its role as one of impartial arbiter; and it also helped to protect individuals from external pressures exerted by extremist movements in a country where religious symbols had taken on political significance. However, the Court was also influenced by the emphasis on the protection of women in the Turkish constitutional system, a value consistent with the key principle of gender equality underlying the ECHR. The Court held that, in the context of Turkey,

> where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including … the Islamic headscarf, to be worn.[27]

The judgment evoked a single but powerful dissent from Judge Tulkens. It was her view that the applicant had never had any intention of calling into question the principle of secularism and that there was no evidence to indicate that she had contravened that principle or that her wearing of the headscarf had led to any disruption within the university. While the need to prevent Islamism was not disputed, in her view the mere wearing of a headscarf could not be associated with fundamentalism. But Judge Tulkens was particularly critical of the reasoning of the majority on gender equality, finding that it was not the Court's role to make general pronouncements about a religion or religious practice, a practice that, in the case of the applicant, she must (in the absence of proof to the contrary) be taken to have freely adopted. 'Paternalism' of this sort, she said, ran counter to the case law of the Court, which had developed a real right to personal autonomy.

Judge Tulkens was not alone in her criticism of the judgment. A scathing critique by one commentator claimed it to be flawed in numerous respects:

27 *Leyla Şahin*, para 116.

https://doi.org/10.1017/S0956618X12000300 Published online by Cambridge University Press

> inadequate application of the margin of appreciation doctrine; narrow interpretation of the freedom of religion; imposition of fundamental secularism; adverse implications on a Muslim woman's right to education; and promotion of the image of Islam as a threat to democracy.[28]

Whether all or any of these criticisms are justified, I prefer to leave to others to judge. Whatever one's views as to the correctness of the *Leyla Şahin* judgment, the principles established in the case – in particular the importance of secularism in state educational institutions – have continued to be applied to reject claims relating to the disciplining or expulsion of pupils from schools in Turkey and France for refusing to remove headscarves.[29] In a recent case against Turkey, however, in which the members of a religious group had assembled in the streets of Ankara dressed in their traditional black garb of a turban, *salvar* and tunic, their prosecution and conviction was found by the Court to have violated their rights under Article 9.[30] The Court distinguished this case from the earlier ones on the grounds that the applicants were ordinary citizens and had no public functions, that they posed no threat to public order and that their presence alone could not be said to put pressure on passers-by or to amount to improper proselytism. As I shall indicate, this may be far from the Court's last word on the question of the wearing of religious dress or symbols.

CONFLICT OF RIGHTS

Critics of the Court's judgments have argued that too much weight has been given to religious belief and too little to other rights, such as freedom of expression and the right to education. Three cases deserve special mention – the related cases under Article 10 of *Otto-Preminger-Institut v Austria* and *Wingrove v the United Kingdom*, and the controversial judgment of the Court in *Lautsi v Italy*.[31]

In the first case, the Salzburg authorities, at the prompting of the Catholic diocese, ordered the seizure and forfeiture of a film portraying God, Christ and the Virgin in a highly satirical manner. In rejecting the applicant association's complaint of a breach of its right to freedom of expression, the Court emphasised the protection of religious beliefs and the responsibility of the

28 A Vakulenko, 'Islamic headscarves and the European Convention on Human Rights: an intersectional perspective', (2007) 16 *Social & Legal Studies* 190, with further references therein.

29 *Köse and Others v Turkey* (dec), no 26625/02, ECHR 2006–II; *Dogru v France*, no 27058/05, 4 December 2008, (2008) 49 EHRR 179; *Kervanci v France*, no 31645/04, 4 December 2008.

30 *Ahmet Arslan and Others v Turkey*, no 41135/98, 23 February 2010.

31 *Otto-Preminger-Institut v Austria*, no 13470/87 20 September 1994, Series A no 295-A, (1994) 19 EHRR 34; *Wingrove v the United Kingdom*, no 17419/90 25 November 1996, Reports of Judgments and Decisions 1996–V, (1996) 24 EHRR 1; *Lautsi v Italy*, no 30814/06, 18 March 2011, Grand Chamber.

state to ensure the peaceful enjoyment of those rights under Article 9. It found that the measure pursued the legitimate aim of protecting others from being insulted in their religious feelings, observing that 'in the context of religious opinions and beliefs, there may legitimately be included an obligation to avoid as far as possible expressions which are gratuitously offensive to others'.[32] Moreover, the seizure was found to be necessary, since there was a very high proportion of Catholics in the Austrian Tyrol and since there had been sufficient publicity about the film for the public to have an idea of its subject matter, so that the proposed screening was 'public' enough to cause offence. In the view of the Court, the measures taken to ensure religious peace in the region and to protect persons who might feel under attack were within the margin of appreciation of the authorities. This subordination to the freedom of majority religious beliefs has been strongly criticised as being at odds with the emphasis that the Court has frequently placed on pluralism and religious tolerance and as introducing the new and unacceptable concept of the right to the peaceful enjoyment of religion free from offensive criticism.

If the *Otto-Preminger* case can itself be explained on its own facts as being a decision influenced by the risk of public outrage and the preserving of religious peace in a particularly sensitive region, the same cannot be said of the *Wingrove* case. This concerned a refusal to award a certificate permitting the distribution of a short video depicting Saint Teresa's erotic visions of Christ on the Cross. The certificate had been refused not on grounds of obscenity but on grounds of blasphemy. Here there was no risk of public outrage being caused to Christians by a video that was likely, in any event, to have a very limited market, whatever its artistic merits. The Court nevertheless upheld the decision to refuse a certificate on the grounds that it served the legitimate aim of protecting the rights of others not to be gratuitously offended in their religious beliefs. The questions may be asked whether the Court struck a fair balance between the conflicting ECHR rights and, in particular, whether the distinction drawn between expressions critical of or hostile to a religion or its members for which no exemption can reasonably be expected and those that are 'gratuitously offensive' to the religion concerned constitutes a sound basis for the Court's resolution of the conflict.

The *Lautsi* case is very different. The case concerned a complaint by the applicants – a mother and her two children who were non-believers – about the fixing of crucifixes to the wall in the classrooms of the state school in Italy attended by the children. They complained that this infringed their right to education and teaching in conformity with the religious and philosophical convictions of the parents under Article 2 of Protocol No 1, as well as their right to freedom of thought, conscience and religion under Article 9.

32 *Otto-Preminger-Institut*, para 49.

https://doi.org/10.1017/S0956618X12000300 Published online by Cambridge University Press

The judgment of the Chamber of the Court, which upheld the applicants' complaint, caused shockwaves throughout Europe.[33] The Chamber held that the state had an obligation to refrain from imposing beliefs, even indirectly, in places where persons were dependent on it or in places where they were particularly vulnerable, including state schools. The compulsory and highly visible presence in classrooms of crucifixes, whose meaning was predominantly religious, not only clashed with the secular convictions of the mother but was also capable of being emotionally disturbing for non-Christian pupils and those without religious belief. In the view of the Chamber, the state had a duty to uphold confessional neutrality in compulsory public education, which had to seek to inculcate in pupils the habit of critical thought. Further, the display of crucifixes could not serve the educational pluralism that was essential for the preservation of 'democratic society', and it was incompatible with the state's duty to respect neutrality.

The Italian Government's referral of the case to the Grand Chamber attracted an unprecedented number of interventions by some 10 states, as well as 33 Parliamentarians and 6 non-governmental organisations, some strongly critical of the judgment, others strongly supporting it. The Grand Chamber accepted that the decision whether crucifixes should be present in state school classrooms formed part of the functions assumed by the state in relation to education and teaching and that the crucifix was, above all, a religious symbol. It also accepted that the reference to the historical traditions within a state could not relieve the state of its obligation to respect the rights and freedoms prescribed by the ECHR. However, the preponderant visibility given to the majority religion in the school environment could not be seen, in the view of the majority of the Court, as a process of indoctrination. A crucifix on a wall was an essentially passive symbol and could not be deemed to have an influence on pupils comparable to indoctrination or participation in religious activities. On this ground, it was distinguished from the powerful external symbol in the *Dahlab* case. Moreover, the greater visibility that the presence of the crucifix gave to Christianity in schools had to be seen in a context where the school environment in Italy was opened up to other religions and beliefs, where religious education was optional and where the presence of crucifixes was not alleged to have encouraged the development of teaching practices with a proselytising tendency. The Grand Chamber accordingly found that there had been no violation of Article 9. This judgment has also not been without its strong critics, many complaining that the Court failed adequately to protect the very principles of secularism, pluralism and neutrality that, in other contexts, it had held to be paramount requirements in the area of religion.

33 *Lautsi v Italy*, no 30814/06, 3 November 2009.

CONCLUDING REMARKS

This brings me back to my initial question: how has the Court responded to the challenges that it has faced in securing proper respect for a variety of faiths and beliefs in a religiously diverse continent? In general, I believe that the balance sheet is positive – strong and bold in the protection of collective rights against state interference; less bold, perhaps, in securing individual religious rights, particularly where these are in conflict with other rights and public interests.

Two cases against the United Kingdom are currently pending in the Court, which will further test its response to the challenges presented under Article 9. They have the common thread of a conflict between the requirements of religious belief and obligations imposed by the law or by the requirements of employment. In one (*Eweida* and *Chaplin*) the two applicants are practising Christians and believe that the visible wearing of a cross is an important part of the manifestation of their faith.[34] The first was employed by British Airways on a check-in desk; the second was employed as a nurse on a geriatric ward in a state hospital. Both were refused permission by their employers to wear a crucifix, albeit on different grounds, and when they protested were moved to different employment positions. Both unsuccessfully complained in the Employment Tribunal of indirect discrimination on religious grounds.

In the second case (*Ladele* and *McFarlane*) the two applicants, who are also practising Christians, refused to carry out certain duties in the course of their employment that they felt would condone homosexuality.[35] The former had been employed by a London Borough as a Registrar and had the function of conducting civil marriage ceremonies and registering such marriages. She was dismissed for refusing to conduct civil partnership ceremonies, being unable to reconcile her Christian beliefs with taking a direct and active part in enabling same-sex unions to be given formal legal recognition. The second applicant worked as a counsellor for Relate, a national organisation that provides a confidential sex-therapy and relationship-counselling service. He was dismissed for refusing to provide sexual counselling to same-sex couples on the basis of a deep and genuine belief that homosexual activity was sinful and that he should do nothing that directly endorsed such activities.

The cases are not only factually and legally interesting and difficult. They have also provoked a strong public reaction within the United Kingdom, the Court having been flooded by an exceptional number of requests to intervene in the proceedings from both individuals and non-governmental organisations.

34 Nos 48420/10 and 59842/10, lodged on 10 August and 29 September 2010. Statement of facts and questions to the parties are available from the Court's communicated cases collection at <http://www.echr.coe.int/echr/en/hudoc/>, accessed 5 December 2011.

35 Nos 51671/10 and 36516/10, lodged on 27 August 2010 and 24 June 2010.

Whether I will still be a judge on the Court when the cases come to be decided I am not sure. What I *am* sure of is that, whatever the result, the Court's decisions will provide ample material for another article in the future. In the meantime, one hopes that Article 9 will continue to be a precious asset, whether for believers, non-believers or, as it was put in *Kokkinakis*, the unconcerned.

https://doi.org/10.1017/S0956618X12000300 Published online by Cambridge University Press