

REFLECTIONS ON FREEDOM OF RELIGION AND CONSCIENCE – ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*

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Abstract

In this article Judge De Gaetano contributes towards a better understanding of article 9 ECHR (freedom of conscience and religion). The article covers judgments dealing with matters of conscience regarding head-scarves and wearing apparel, as well as conscientious objections to military service and the conflict between secularism and the freedom to outwardly manifest one's religious beliefs.

The article deals with matters which have resulted in dismissal of employees because of their adherence to religious belief or lack of it. Issues dealt with include whether an organist in a Catholic church can be dismissed if he conducts an extra marital affair and whether such dismissal is proportionate when it refers to the main communications officer of the Mormon society; whether a British Airways desk officer can wear a cross in necklace and to what extent states are allowed a wide margin of appreciation in such matters; and whether a marriage registrar can be forced to celebrate civilly a union between persons of the same sex.

1. Introduction

While in many European countries the formal practice of religion – at least of the Christian religion as manifested through the various Churches and other ecclesial communities – is in decline, the same cannot be said about the interest in the concept, and in the actual manifestation, of freedom of thought, of conscience and of religion. Indeed in a number of recent high profile cases, whether decided at domestic level or at the level of the European Court of Human Rights, the principle issue has been the contrast or the alleged conflict between freedom of thought, conscience and/or religion on the one hand, and other equally fundamental rights – foremost those of respect for private life, freedom of expression and the prohibition against discrimination – on the other. The purpose of this short paper is to shed some light on the complexities and intricacies of the issues that the European Court of Human Rights has had to rule on, including the alleged – I would prefer to call it apparent – conflict between freedom of religion and conscience of the one hand, and other rights and freedoms on the other. As one author has stated, “[t]he particular context of many of the cases provides an insight into the rich tapestry of European. . . religious, historical and cultural

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diversity”^{*}.

To be sure, cases coming before the European Court of Human Rights (ECtHR) alleging a breach of Article 9 are not as numerous as cases dealing with other provisions of the Convention. The first judgment finding a violation under Article 9 was only delivered in 1993 in the names *Kokkinakis v. Greece*^{*}. According to the Annual Report for 2013 (published in 2014), from 1959 to 2013 the total number of judgments finding a violation of Article 9 is 52, which is a puny figure when compared to, for instance, the finding of a violation of Article 2 (961 judgments), Article 3 (1,989), Article 6 (9,552) or Article 10 (544). The only other articles of the Convention (and excluding the Protocols) with lesser violations are Article 4 (5 judgments), Article 7 (38), and Article 12 (8).

2. Thought, conscience and religion

The structure of Article 9 is what one could call the classical structure. The first paragraph reiterates in a general way the nature of the right guaranteed or protected – “freedom of thought, conscience and religion” – and also give some non-exhaustive examples of what falls within the general formulation. This right, we are told in the first paragraph, includes the “freedom to change [one’s] religion or belief and [the] 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.” The second paragraph of the article goes on to identify the situations when the right in question can be restricted. It is clear from the wording of the provision that only the external manifestation of religion and beliefs can be restricted, and for such a restriction to comply with the convention it must satisfy the three (again classical) criteria adopted in respect of other provisions of the Convention: the limitation of (or interference with) the right must (i) have a basis in law (which according to standard case law must be a law which is adequately accessible as well as a clear law, that is one which allows a person to foresee with reasonable certainty the possibility of such a limitation); the limitation (ii) must also pursue one of the “legitimate” aims specified in the article, that is to say public safety, or the protection of public order, health or morals, or the protection of the rights and freedoms of others; and finally (iii) the limitation of or interference with the right must be “necessary in a democratic society”, which implies that there must be a pressing social need for the limitation or interference and that the means adopted so to limit or interfere must be proportionate to the legitimate aim pursued.

3. Scope of the protection

Principal object of the protection of Article 9, therefore, is thought and belief, both of which are basically private and personal matters, but which can be manifested and exercised also collectively. It must be made clear, however, that not all “practices” which one chooses to associate with one’s belief or one’s religion fall within the ambit of the protection of Article 9. In a decision of the former Commission, dating to 1978^{*}, in a case brought to Strasbourg by the indefatigable peace activist Mrs Pat Arrowsmith, it was held that “pacifism” was a form of thought or belief which fell within the general ambit of Article 9, but that the distribution of fliers to British soldiers to incite them not to participate in military operations in the then troubled Northern Ireland (a form of instigation to disaffection or to mutiny) was not a practice necessarily linked to such a belief, and was therefore not a practice which merited the protection of Article 9. Similarly, the refusal of a

^{*} Murdoch, J., *Protecting the right to freedom of thought, conscience and religion under the European Convention of Human Rights*, Council of Europe (Strasbourg) 2012, p. 8.

^{*} Decided on 25 May 1993.

^{*} *Arrowsmith v. the United Kingdom*, 12 October 1978.

Quaker, also a pacifist, to pay taxes because he was not given an assurance by the tax authorities of the United Kingdom that his fiscal contributions to the exchequer would not be used for military purposes, could not be considered a “religious practice”*. Therefore his conviction by the domestic courts for failing to pay taxes was not in breach of Article 9.

The case law of the ECtHR on the subject of freedom of thought, conscience and religion was very well summed up by the Fourth Section of the Court in *Eweida and Others v. the United Kingdom* *:

“81. The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance Provided this is satisfied, the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed. . .

“82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a “manifestation” of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1 (see *Skugar and Others v. Russia (dec.)*, no. 40010/04, 3 December 2009 and, for example, *Arrowsmith v. the United Kingdom*, Commission’s report of 12 October 1978, *Decisions and Reports* 19, p. 5; *C. v. the United Kingdom*, Commission decision of 15 December 1983, DR 37, p. 142;). . . . In order to count as a “manifestation” within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question....”.

Skugar and Others v. Russia, mentioned in the above excerpt, is a rather bizarre case. The applicants, who claimed to be members of the Russian Orthodox Church, had objected to the fact that they had been assigned a fiscal number which, according to them, was a combination of the numbers which indicated the Antichrist in the Apocalypse of St. John. At domestic level the matter went right up to the Russian Constitutional Court. The ECtHR, in its decision declaring the application inadmissible, went so far as to refer to a declaration of the Synod of the Russian Orthodox Church which had referred to this “belief” – which appears to have been prevalent in some quarters at the time – as mere superstition. The ECtHR reiterated that acts or omissions that did not directly express a particular belief or religious faith, or which were only remotely linked to a precept of faith, did not fall within the protection of Article 9. On the contrary, therefore, an act which is intimately linked to a religion or to a particular faith would be a “manifestation” within the meaning of Article 9. In this sense one can think of, for example, liturgical or devotional acts which are generally recognised as forming an important part of a particular religion or faith – to give an example with a Catholic background, the celebration of the Eucharist (Mass), or the procession with the Eucharist on the feast of Corpus Christi.

* *C. v. the United Kingdom*, 15 December 1983.

* 15 January 2013.

4. The case of Leyla Şahin

However, the “manifestation” of a religion or a belief, to which Article 9 refers, does not require that the particular act be mandated as part of the doctrine (or dogma) of that religion or faith. For instance, the use of the head scarf to cover the head – a practice followed by millions of Muslim women but which is not a doctrinal precept or an essential requisite to be a Muslim* – is a manifestation of one’s belief within the meaning of Article 9, and was so held to be by the ECtHR in the case of *Leyla Şahin v. Turkey**. The facts of that case – which, to my mind, was wrongly decided by the Grand Chamber when it concluded that there had not been a violation of the applicant’s right under the article in question – can be summarised as follows: the applicant was a medical student at the University of Bursa, in Turkey, and had for four years been wearing the head scarf without encountering any problem. She then moved to another university, that of Istanbul. At this new university, the Vice-Rector issued, in February 1998, a circular which, while invoking the Turkish Constitution and various decisions of the Supreme Administrative Court of Turkey, prohibited all female students to cover their head within the confines of the university, and also prohibited all male students from wearing the beard. On the basis of this prohibition, the applicant was, in March of that same year, prohibited from sitting for the examination in oncology. The Grand Chamber put to itself a number of questions. Was there an interference with the applicants’ right to manifest her religion? The GC’s answer was in the affirmative. Was the interference based on a law – “prescribed by law”? Again the GC said yes: the circular of the Vice-Rector of the university could be regarded as a law since it invoked for its very justification a provision of the Turkish Constitution and several judgments of the Supreme Administrative Court. Nevertheless, reading the judgment, it is clear that the law which had, as it were, inspired the circular (a law dated 9 April 1991) had been passed after a judgment of the Turkish Constitutional Court which had propounded a form of historic and aggressive secularism which is absent in almost all European States (even in the highly secularised France). Did the interference have a legitimate aim? Yes, said the GC: referring in particular to the aforementioned judgment of the Turkish Constitutional Court which had found that the use of the headscarf “could not be reconciled with the principle of sexual equality implicit, inter alia, in republican and revolutionary values”*, the GC held, in one of the shortest and tersest paragraphs of the entire judgment, that the interference with the applicant “pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order, a point which is not in dispute between the parties”*. Finally, and more crucially, was the restriction “necessary in a democratic society”? Was there an element of proportionality between the aim and the means used to achieve that aim? Again, and quite surprisingly in my view, the GC said yes: the principles of secularism and equality, and the wish of the authorities to preserve the secular nature of state institutions, justified the measure in question.

Which brings me to ask myself a number of questions. Does secularism necessitate the concealment or, indeed, the suppression of every reference to religion in public places? Does secularism, directly or indirectly, confuse freedom of religion with freedom from religion (this was, to a certain extent, the problem that the GC faced in *Lautsi and Others v. Italy**, even though the main issue there was Article 2 of Protocol no. 1)? Would not freedom from religion amount to an inversion of liberty and become in effect an imposition on the pretext of protecting freedom of thought? And, finally, can conflicts, or presumed conflicts, between religious beliefs and their manifestation on the one hand, and the State’s duty and obligation of neutrality in religious matters on the other, not be resolved by application of the principle of “reasonable accommodation”?

* And which is not to be confused with the *burqa* or the *niqab*.

* 10 November 2005.

* Para. 39.

* Para. 99.

* 18 March 2011.

5. Reasonable accommodation

The principle of “reasonable accommodation” is found, for instance, enshrined in the United States Civil Rights Act of 1964 in the context of the hiring, firing and other terms and conditions of employment (organisations whose purpose or character are primarily religious are, however, exempted from the requirement of applying this principle). It works by requiring the parties to seek to balance conflicting interests. The principle has been adopted and applied in Canada in cases involving freedom of religion. One of the first cases requiring religious accommodation in Canada* involved a woman who objected to working from Friday evening to Saturday evening when she became a Seventh Day Adventist, as her religion required her to respect this day as a day of rest from work. Her position, however, required her to work at some point in that period to remain a full-time employee. The Supreme Court of Canada* concluded that the Ontario Human Rights Code implicitly required the employer to demonstrate that it had tried to accommodate her to the point of undue hardship (for the said employer), something which the employer had not done. “The Court essentially integrated the concept of reasonable accommodation, then found only in academic writing and American cases, into Canadian law because the Code was silent on the matter”*. In 1990, a group of Royal Canadian Mounted Police veterans sought a court order to stop accommodating the wearing of turbans and other religious requirements for Sikh officers. The veterans were of the view that allowing officers to wear turbans and other religious symbols would affect their appearance of neutrality. The Federal Court of Canada, however, held* that the wearing of the turban did not create a situation of coercion or compulsion to participate in the officers’ religion or concern about bias and did not violate the rights of members of the public and other officers.

The principle of reasonable accommodation was also applied by the Supreme Court of Canada in the case *Multani v. Commission scolaire Marguerite-Bourgeoys**. A school board had refused to allow a student to wear a kirpan to school. The Supreme Court concluded that the student’s freedom of religion, protected under section 2(a) of the Canadian Human Rights Charter, had been violated. The next step was to balance the competing values in question under section 1 of the Charter*, and the Supreme Court chose to use a duty to accommodate analysis as an analogy to assist in this balancing. “In the schoolyard context, the Court found that a complete ban on kirpans was not a reasonable option considering the low risk a kirpan posed to school security if certain conditions were put in place, such as ensuring that it be sewn into the boy’s clothes at all times. In addition the Court noted the other items regularly available at schools that could be used as weapons, such as scissors, pencils or baseball bats. Thus, the school board’s rule impaired the student’s right beyond the minimal extent permitted under section 1 of the Charter, and the board’s decision was reversed”*.

As can be seen from the above, the principle of reasonable accommodation bears certain similarities to the proportionality test adopted by the ECtHR. Was either the test of proportionality or that of reasonable accommodation applied in the *Leyla Şahin* case? In my view, not really. The ECtHR seems to have preferred to defer to the views of the domestic authorities by applying

* This and other Canadian cases referred to are taken from the background paper *An Examination of the Duty to Accommodate in the Canadian Human Rights Context* (by Laura Barnett and others) Library of Parliament (10 January 2012) Legal and Legislative Affairs Division, Parliamentary Information and Research Service, Publication no. 2012-01-E.

* *Ontario Human Rights Commission v. Simpsons-Sears Ltd.* [1985] 2 S.C.R. 536.

* *Op.cit.* p. 7.

* *Grant v. Canada (Attorney General)* (1995), 120 D.L.R. (4th) 556 (F.C.A.).

* [2006] S.C.J. No. 6

* Section 1 reads as follows: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

* *An Examination of the Duty to Accommodate in the Canadian Human Rights Context, op. cit.*, p. 8.

the principle of the “margin of appreciation”*, a principle that can, as is known, be extended and contracted to suit the conclusion that the Court wants to reach. I can do no better than refer to Judge Tulkens’ dissenting opinion on this score:

“4. On what grounds was the interference with the applicant’s right to freedom of religion through the ban on wearing the headscarf based? In the present case, relying exclusively on the reasons cited by the national authorities and courts, the majority put forward, in general and abstract terms, two main arguments: secularism and equality. While I fully and totally subscribe to each of these principles, I disagree with the manner in which they were applied here and to the way they were interpreted in relation to the practice of wearing the headscarf. In a democratic society, I believe that it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other.

*“5. As regards, firstly, secularism, I would reiterate that I consider it an essential principle and one which, as the Constitutional Court stated in its judgment of 7 March 1989, is undoubtedly necessary for the protection of the democratic system in Turkey. Religious freedom is, however, also a founding principle of democratic societies. Accordingly, the fact that the Grand Chamber recognised the force of the principle of secularism did not release it from its obligation to establish that the ban on wearing the Islamic headscarf to which the applicant was subject was necessary to secure compliance with that principle and, therefore, met a “pressing social need”. Only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention. Moreover, where there has been interference with a fundamental right, the Court’s case-law clearly establishes that mere affirmations do not suffice: they must be supported by concrete examples (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 89, ECHR 1999-VI). Such examples do not appear to have been forthcoming in the present case.”*

There have been two other important cases which have dealt with the question of religious dress in public places as a form of manifestation of one’s religious belief, and these have come to different conclusions. The first case is *Ahmet Arslan and Others v. Turkey*, decided by the Second Section of the Court on 23 February 2010. In this case, the members of a particular religious sect had the practice of going about in public dressed in a peculiar way denoting membership of the sect. This included – at least for men – a turban, wide pantaloons and a black tunic, and holding a staff in their hand (ostensibly in imitation of the Prophets). The ECtHR held that the applicants’ conviction for having worn the clothing in question clearly fell within the ambit of Article 9 since the applicants were members of a religious group and considered that their religion required them to dress in that manner. Accordingly, the Turkish courts’ decisions had amounted to interference with the applicants’ freedom of conscience and religion, the legal basis for which was not contested (the law on the wearing of headgear and regulations on the wearing of certain garments in public). As in the case of *Leyla Şahin*, the Court held that it could be accepted, particularly given the importance of the principle of secularism for the democratic system in Turkey, that this interference pursued the legitimate aims of protection of public safety, prevention of disorder and protection of the rights and freedoms of others. However the Court noted that the sole reason given by the Turkish courts to justify the interference had consisted in a mere reference to the legal provisions and, on appeal, to a finding that the disputed conviction was in conformity with the law. The Court further emphasised that this case concerned punishment for the wearing of particular dress in public areas that were open to all, and not, as in other cases that it had had to judge, the regulation of the wearing of religious symbols in public establishments, where religious neutrality might take precedence over the right to manifest one’s religion. The Court found that there was no evidence that the

* “122. In the light of the foregoing and having regard to the Contracting States’ margin of appreciation in this sphere, the Court finds that the interference in issue was justified in principle and proportionate to the aim pursued.”

applicants represented a threat to public order or that they had been involved in proselytism by exerting inappropriate pressure on passers-by during their gatherings in the public open spaces. In the opinion of the Religious Affairs Organisation, their movement was limited in size and amounted to “a curiosity”, and the clothing worn by them did not represent any religious power or authority that was recognised by the State. Accordingly, the Court considered that the necessity for the disputed restriction had not been convincingly established by the Turkish Government, and held that the interference with the applicants’ right of freedom to manifest their convictions had not been based on sufficient reasons. It held, by six votes to one, that there had been a violation of Article 9.

6. Full face covering

Compare this case with the more high profile – and more recent – one of *S.A.S. v. France*, decided by the GC on 1 July 2014. In issue here was a prohibition under French law to cover one’s face in public and therefore a prohibition which includes the use of the *burqa* and the *nijab*. The Press Release issued by the Registrar of the Court on the same day of the publication of the judgment accurately sums up the issues and the findings of the Court. In its judgment the GC accepted that the interference pursued two of the legitimate aims listed in Articles 8 and 9: “public safety” and the “protection of the rights and freedoms of others”. As regards the aim of “public safety”, the Court noted that the French legislature had sought, by passing the Law in question, to satisfy the need to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud. It considered, however, that the ban was not “necessary in a democratic society” in order to fulfil that aim. In the Court’s opinion, in view of its impact on the rights of women who wished to wear the full-face veil for religious reasons, a blanket ban on the wearing in public places of clothing designed to conceal one’s face could be regarded as proportionate only in a context where there was a general threat to public safety. The Government had not shown that the ban introduced by the Law of 11 October 2010 fell into such a context. As to the women concerned, they were thus obliged to give up completely an element of their identity that they considered important, together with their chosen manner of manifesting their religion or beliefs, whereas the objective alluded to by the Government could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property was established, or where particular circumstances prompted a suspicion of identity fraud.

As to the “protection of the rights and freedoms of others”, the French Government referred to the need to ensure “respect for the minimum set of values of an open democratic society”, listing three values in that connection: respect for gender equality, respect for human dignity and respect for the minimum requirements of life in society (the notion of “living together”). While dismissing the arguments relating to the first two of those values, the Court accepted that the barrier raised against others by a veil concealing the face in public could undermine the notion of “living together”. In that connection, it indicated that it took into account the State’s submission that the face played a significant role in social interaction. The Court was also able to understand the view that individuals might not wish to see, in places open to all, practices or attitudes which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, formed an indispensable element of community life within the society in question. The Court was therefore able to accept that the barrier raised against others by a veil concealing the face was perceived by the respondent State as breaching the right of others to live in a space of socialisation which made living together easier. It added, however, that in view of the flexibility of the notion of “living together” and the resulting risk of abuse, it had to engage in a careful examination of the necessity of the measure at issue.

Proceeding with that examination, the Court had to ascertain, in particular, whether the ban was proportionate to the aim pursued. It admitted that it might appear excessive, in view of the small number of women concerned, to opt for a blanket ban. It further noted that the ban had a significant

negative impact on the situation of women who chose to wear the full-face veil for reasons related to their beliefs, and that many national and international human rights bodies regarded a blanket ban as disproportionate. The Court also stated that it was very concerned by indications that the debate which preceded the adoption of the Law of 11 October 2010 had been marked by certain Islamophobic remarks. It emphasised in this connection that a State which entered into a legislative process of this kind took the risk of contributing to the consolidation of the stereotypes which affected specific groups of people and of encouraging the expression of intolerance, when it had a duty, on the contrary, to promote tolerance. The Court reiterated that remarks which constituted a general, vehement attack on a religious or ethnic group were incompatible with the Convention's underlying values of tolerance, social peace and non-discrimination and did not fall within the right to freedom of expression that it protected.

While the Court was aware that the disputed ban mainly affected certain Muslim women, it nevertheless noted that there was no restriction on the freedom to wear in public any item of clothing which did not have the effect of concealing the face and that the ban was not expressly based on the religious connotation of the clothing in question but solely on the fact that it concealed the face. In addition, the sanctions provided for by the Law were among the lightest that could have been envisaged: a fine of 150 euros maximum and the possible obligation to follow a citizenship course, in addition to or instead of the fine. Furthermore, as the question whether or not it should be permitted to wear the full-face veil in public places constituted a choice of society, France had a wide margin of appreciation. In such circumstances, the Court had a duty to exercise a degree of restraint in its review of Convention compliance, since such review led it to assess a balance that had been struck by means of a democratic process within the society in question. In the Court's view, the lack of common ground between the member States of the Council of Europe as to the question of the wearing of the full-face veil in public places supported its finding that the State had a wide margin of appreciation. The ban complained of could therefore be regarded as proportionate to the aim pursued, namely the preservation of the conditions of "living together". The Court held that there had not been a violation of either Article 8 or Article 9 of the Convention. One wonders whether it was even necessary in this case to invoke the margin of appreciation of the State.

7. Proselytism

The right of a religious community to manage its own affairs has never really been put in doubt by the ECtHR*. Likewise the Strasbourg Court has accepted that a State may, for historical or social reasons, have a special relationship with a particular church, as, for instance is the case in the United Kingdom where the Queen is the head of the Church of England, or in some Nordic countries which have a form of State church*. In such special circumstances the court has recognised that the state may confer certain benefits or particular privileges, especially in fiscal matters*, to these churches, provided that the benefit or privilege in question did not violate other people's rights. In *Kokkinakis v. Greece*, already referred to, the ECtHR noted that the "privilege" granted to the autocephalous Greek Church consisted in a provision in the Greek Constitution and in a particular law which, together, prohibited any proselytism to the detriment of the said Church. The applicant, born in 1936 into an Orthodox family, had become a Jehovah Witness and had been prosecuted and sent to prison several times for openly trying to convert people to his particular faith. The Strasbourg Court found that there had been a breach of Article 9 because the Greek courts, in condemning the applicant according to the existing domestic laws, had never attempted to verify whether there existed a pressing social need to prevent his proselytising activities and nor had the

* See, for instance, *Sindicatul "PĂSTORUL CEL BUN" v. Romania* 9 July 2013.

* See, for instance, the opinion of the European Commission of Human Rights of 23 October 1990 in *Darby v. Sweden*.

* *Ásatrúarfélagið v. Iceland* (dec.), 18 September 2012.

respondent Greek government shown that there existed any such need. The measure was, therefore, disproportionate. More specifically, the ECtHR in *Kokkinakis* affirmed that “bearing Christian witness” was an essential mission and a responsibility of every Christian and of every church, provided that such proselytism did not degenerate into an improper form of proselytism, which could be restrained by the state:

“31. As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

“While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions.

“According to Article 9 (art. 9), freedom to manifest one's religion is not only exercisable in community with others, "in public" and within the circle of those whose faith one shares, but can also be asserted "alone" and "in private"; furthermore, it includes in principle the right to try to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief", enshrined in Article 9 (art. 9), would be likely to remain a dead letter.” (emphasis added)

And in para. 48 it added:

“48. First of all, a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.

“Scrutiny of section 4 of Law no. 1363/1938 shows that the relevant criteria adopted by the Greek legislature are reconcilable with the foregoing if and in so far as they are designed only to punish improper proselytism, which the Court does not have to define in the abstract in the present case.”

Compare and contrast the abovementioned case with another case against Greece, *Larissis and Others v. Greece* decided five years later*, where in a case also involving acts of proselytism the Court – quite correctly in my view – was of the view that there had been no violation of Article 9. The case stemmed from a judgment of a Greek military tribunal which had sentenced to imprisonment senior military officers of the Greek Air Force to periods of imprisonment for having attempted to convert men who were their subordinates to the Pentecostal faith. The ECtHR took into account two particular circumstances: the first was military hierarchy, in the sense that a person who was in a subordinate military relationship to a senior officer or officers would feel constrained to say “yes” to his superior officers out of fear of possible later repercussions. In fact evidence had shown that persons approached by the applicants had felt so pressured. In a military context, such advances by superior officers could easily become a form of harassment. The second particular

* 24 February 1998.

circumstance was that in this case the domestic tribunals – the military courts – had weighed in the balance the competing rights, that is the right of the applicants to manifest their own faith on the one hand and the right of their subordinates not to be molested on the other, and in their judgments had advanced relevant and sufficient reasons justifying the interference with the applicants' Article 9 rights.

8. *Obst v. Schüth*

The importance of the way the domestic courts handle and justify their decisions is highlighted by two judgments delivered on the same day – 23 September 2010 – by the Fifth Section of the ECtHR. Although dealing primarily with Article 8 of the Convention, they both have a religious or church related background. These are the cases of *Obst v. Germany* and *Schüth v. Germany*. In a nutshell, in both cases we have the right of a religious community to manage its own affairs on the one hand, and an employee's right to respect for his private life on the other.

Mr Obst was a senior member (an elder) of the Mormon Church in Germany and was employed by that church as director of public relations for Europe. At some point in time he drew the attention of his immediate superior that his matrimonial life was in crisis, and that he had committed adultery. A few days later he was sacked without notice. He was subsequently also excommunicated by his church. He applied to the German labour courts and these, in essence, held that his dismissal had been justified because, through his behaviour, he had failed to observe the contractual obligations he had assumed when signing the contract, foremost being his duty of loyalty to the Mormon community. The domestic courts also held that his dismissal was necessary to maintain the credibility of the church, in view of the fact that he occupied a senior post (director of public relations for Europe), and was also an elder of the church and therefore knew very well what the consequences would be in the event of an extra-conjugal affair. Consequently no warning or notice was necessary for his dismissal.

Mr Schüth, on the other hand was a Catholic and had been organist and maestro di cappella for the Catholic Parish of St Lambert in Essen since 1980. In 1994 he separated from his wife and a year later began to cohabit with a lady friend. One of his sons, who attended a nursery school, revealed to his class friends that his father was soon going to have another baby boy, and from here the information made its way to the parish priest. Mr Schüth was summoned by the dean of the parish, and after a meeting of the parish council, he was dismissed from his post. After an interminable series of referrals from one labour court to another, the German Federal Constitutional Court in July 2002 confirmed the judgment of the Federal Labour Court to the effect that the dismissal was justified.

Both the Mormon and the Catholic applied to the ECtHR. At face value, one might have assumed that the outcome in Strasbourg would have been the same in both cases. But it was not. Why did the Fifth Section find a violation of Article 8 in the case of Mr Schüth but not in the case of Mr Obst? The reason is quite simple and perfectly legitimate. In the case of *Obst* the German Labour Courts had examined in great detail all the circumstances of the case, including the contrasting rights of the Mormon community on the one hand and of the applicant on the other. They had, as already noted, given particular weight to Mr Obst's high profile and delicate role in that community. In the case of Mr. Schüth, on the other hand, the domestic tribunals – probably exhausted by the numerous referrals on procedural matters from one court to another – had, on the merits, limited themselves to noting that the applicant had not adhered to his contract of work in respect of an obligation of a general nature. They never examined or took into consideration the fact that Schüth was not employed in a catechetical role, or as a counsellor, or in some other role intimately linked with the faith of the parish. Nor did they consider the effect that his dismissal would have on his family, nor the fact that throughout the fourteen years in which he had served as organist and

choir master he had never challenged or criticised the church's teaching on marriage. Reading the judgment in the case of *Schiith* the almost inescapable conclusion is that had the domestic courts taken into consideration and weighed all these factors, a decision on their part that the dismissal had been justified would in all probability been upheld by the ECtHR and the finding of the latter Court would also have been of non-violation of Article 8.

9. The dictates of conscience

Conscience is not something that is necessarily tied to a particular religion or a particular faith. Conscience is what enjoins a person, at the appropriate moment, to do good and to avoid evil. In essence it is a judgment of reason whereby a physical person recognises the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed. This rational judgment of what is good and what is evil, although it may be nurtured by religious beliefs, is not necessarily so, and persons with no particular religious beliefs or affiliations make such judgments constantly in their daily lives. Just as there is a difference between conscience and religion, there is also a difference between the prescriptions of conscience and religious prescription. The latter type of prescriptions – not to eat certain food*, or certain food on certain days; the wearing of the turban or the veil; attendance at religious services on certain days – these may be subject to limitations in the manner and subject to the conditions laid down in the second paragraph of Article 9. But can the same be said with regard to prescriptions of conscience? In my view* when a genuine and serious case of conscientious objection is established, a State is obliged to respect the individual's freedom of conscience both positively (by taking reasonable and appropriate measures to protect the rights of the conscientious objector) and negatively (by refraining from actions which punish the objector or discriminate against him or her).

If the number of cases coming up before the ECtHR and invoking Article 9 is relatively small, the number of cases in which specifically freedom of conscience had been examined is even smaller. I will here limit myself to two cases: *Bayatyan v. Armenia*, decided by the GC on 7 July 2011, and the aforementioned *Eweida and Others v. the United Kingdom*.

In *Bayatyan* the ECtHR recognised in clear terms for the first time the right to conscientious objection to compulsory military service. The applicant, a Jehovah Witness, was sentenced to thirty months imprisonment for having refused to perform military service. In the course of his trial he had repeatedly expressed his wish and readiness to perform alternative civil service, but at the time domestic law did not provide for such an alternative (even though the Armenian Government had already declared its intention to legislate in that respect). The *locus classicus* of this judgment are paragraphs 110 and 111:

“110. In this respect, the Court notes that Article 9 does not explicitly refer to a right to conscientious objection. However, it considers that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 Whether and to what extent objection to military service falls within the ambit of that provision must be assessed in the light of the particular circumstances of the case.

* See *Jakoski v. Poland* 7 December 2010, where the Fourth Section of the ECtHR found a violation of Article 9 when Polish prison authorities persistently refused, for no valid reason, to supply a simple meat-free diet to a prisoner who adhered to the Mahayana Buddhist faith.

* I have already expressed this view, together with Judge Vučinić, in the joint partly dissenting opinion in *Eweida and Others v. the United Kingdom* (see f.n. 5 *supra*).

“111. The applicant in the present case is a member of the Jehovah’s Witnesses, a religious group whose beliefs include the conviction that service, even unarmed, within the military is to be opposed. The Court therefore has no reason to doubt that the applicant’s objection to military service was motivated by his religious beliefs, which were genuinely held and were in serious and insurmountable conflict with his obligation to perform military service. In this sense, and contrary to the Government’s claim. . . the applicant’s situation must be distinguished from a situation that concerns an obligation which has no specific conscientious implications in itself, such as a general tax obligation. . . . Accordingly, Article 9 is applicable to the applicant’s case.” (emphasis added)

10. Eweida and Others

A serious and insurmountable conflict between her conscience and a less important or vital form of public service – that of marriage registrar – was also experienced by Ms Ladele, one of the four applicants in the *Eweida* case, but in her respect the court preferred to wash its hands in the principle of the “wide margin of appreciation” that States enjoy in how to resolve conflicting rights*. The *Eweida* case concerned four applicants, and perhaps the first mistake that the ECtHR made was to group the four applications together, as this, in my view, prevented the Court from dealing in depth with the two applications concerning conscientious objection. Two of the applicants – Eweida and Chaplin – complained that they were not being allowed to manifest their religious beliefs in view of the prohibition to wear a small cross or crucifix on a chain round the neck. Eweida was employed with British Airways and worked at a check-in desk. Chaplin was a nurse. The restriction upon Eweida, allegedly based solely upon the company’s corporate image (the company had already made allowances in respect of the wearing of the turban by Sikhs) was clearly disproportionate (and discriminatory). In fact, while Eweida’s case was being heard by the English courts, British Airways did change its “policy” on the wearing of a cross such as the one she wanted to wear, but the English courts, basing themselves upon domestic law, refused to recognise that there had been any lack of proportionality in the whole affair. The ECtHR found (by five votes to two) a violation of Article 9 in respect of Eweida, and moreover that it was not necessary in the circumstances to examine the case under Article 14. The Court found unanimously that there was no violation in respect of Ms Chaplin. Ms Chaplin, in a totally irrational and unreasonable way, kept insisting that the cross should be held by a chain round her neck, even though such a chain could present a danger in handling her hospital patients. She was offered the possibility of having the manifestation of her religious belief – the cross – sewn into her clothes, or attached to them by Velcro, but she refused. She was, in effect, refusing a very reasonable accommodation. It is difficult to see how the Court could have come to a different conclusion.

The other two applications concerned in reality not a manifestation of a religious belief but an issue of conscience. Mr McFarlane considered homosexual relations as amounting to a sin. This notwithstanding, he opted to take up employment with a private organisation which was in the business of giving advice of a psycho-sexual nature to its clients. Already at the start of his employment he had exhibited some hesitation to give advice to same-sex couples, but he seems to have eventually overcome this hesitation. Some years later, while still employed, he undertook a special course in psycho-sexual therapy. His hesitations re-emerged, and after several meetings with officials of the organisation, it became clear that he was not prepared to advise same-sex couples. He was dismissed from the organisation. Even here the ECtHR was of the view that there was no violation of Article 9, a primary consideration being the fact that when he decided to take up employment with the organisation it was evident that he would be called upon to advise same-sex couples as well as different sex couples. Mr McFarlane could not, therefore, invoke his conscientious objection after taking up the employment – in much the same way as a person who

* See in particular paras. 105 and 106 of the *Eweida* judgment.

voluntarily enlists as a soldier cannot later invoke his conscience to avoid participating in lawful military operations and combat.

Ms Ladele's case was, however, totally different. She started working with the London Borough of Islington in 1992. When in 2002 she became a marriage registrar, her duties did not include officiating at same-sex partnerships. In 2002 there was nothing which indicated or suggested that marriage registrars would in future have to officiate at these partnerships. Moreover when the Bill proposing same-sex partnerships became law in 2004, local authorities were only required to provide a "sufficient number" of registrars for the purpose, and in fact many local authorities decided to assign the task to those officials who had no objection to so officiating. But the Borough of Islington, succumbing to a political correctness clearly at variance with the principles and values of the Convention, decided to appoint all its marriage registrars as officials for same-sex partnerships. At first Ms Ladele managed to make informal arrangements whereby she would swap her same-sex partnership duties with those of other registrars who had no problems of conscience in this regard. However some of her colleagues objected to this, and the Borough insisted that Ms Ladele sign an undertaking that she would in future not have any objection to officiating at same-sex marriages. She refused, insisting – in my view, and in the view of the Judge Vučinić who joined me in the dissenting opinion, correctly – that the Borough could very easily accommodate her conscientious objection without in any way affecting the services which it provided. The Borough dug in its heels, and after fifteen years of impeccable and loyal service she was fired.

Only the first instance Employment Tribunal in the U.K. found in favour of Ms Ladele, holding that the local authority had "placed a greater value on the rights of the lesbian, gay, bisexual and transsexual community than it placed on the rights of [Ms Ladele] as one holding an orthodox Christian belief".^{*} The Employment Appeal Tribunal and the Court of Appeal, however, found for the Borough – clearly the principle of reasonable accommodation had not yet filtered through to the Palace of Westminster and the House of Lords. As has already been indicated, the ECtHR, although finding that Ms Ladele's conscientious objections was a serious one shared by millions of others – in the Courts words, she held an "orthodox Christian view" on the matter – it preferred to invoke the margin of appreciation principle:

"The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights. . . In all the circumstances, the Court does not consider that the national authorities, that is the local authority employer which brought the disciplinary proceedings and also the domestic courts which rejected the applicant's discrimination claim, exceeded the margin of appreciation available to them. . . ."^{*}

11. Tentative conclusions

From the state of the current case law one may draw the following conclusions on the matter of freedom of conscience and conscientious objection: (i) Conscientious objection to military service seems to be more important, in the context of the Convention, than an equally serious and genuine conscientious objection to intimate homosexual relations; (ii) a public employee (and possibly even a private employee) may possibly be sacked for refusing to provide a service to which that employee has a genuine, serious and well-founded objection on grounds of conscience; and (iii) and perhaps more worryingly, the concrete right to freedom of conscience protected by Article 9 seems somehow to be hierarchically subordinate to third party abstract rights to equality of treatment. It should be recalled that Ms Ladele had never refused to provide a service to any person on the grounds of the sexual orientation of that person, nor had she attempted to obstruct such a service

^{*} See para. 28 of the *Eweida* judgment.

^{*} Para. 106.

provided by others, nor had she spoken out against the service or against people participating in it – she had only tried to adhere to her conscience which dictated to her in a cogent, serious, coherent and impelling way that direct participation by her in same-sex ceremonies was an evil to be avoided.