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New Trends in Religious Liberty and the European Court of Human Rights

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This article analyses recent trends in the jurisprudence of the European Court of Human Rights concerned with the right to freedom of thought, belief and religion (Article 9, European Convention on Human Rights) and the right of parents to respect by the state for their religious and philosophical views in the education of their children (Article 2, Protocol 1).[1] *These developments include notable decisions concerned with protection from religious persecution in Georgia, with religious education in Norway and Turkey and with the display of crucifixes in state schools in Italy. It is apparent that the European Convention religious liberty jurisprudence increasingly stresses the role of the state as a neutral protector of religious freedom. For individuals religious freedom is now also recognised to include not only the right to manifest their religious belief but also freedom from having to declare their religious affiliation. As the religious liberty jurisprudence comes of age, other significant developments, for example in relation to conscientious objection to military service, can be anticipated.*

It has often been remarked that the jurisprudence of the European Court of Human Rights on freedom of thought belief and religion (Article 9) is underdeveloped in comparison, for example, to that on respect for private life (Article 8) or freedom of expression (Article 10). It is now clear, however, that after a comparatively late start, the Article 9 jurisprudence is now undergoing a rapidly changing adolescence. The purpose of this note is to survey several trends that are demonstrated in recent decisions by the Court. In particular three important themes can be emphasised: the emergence of a positive duty upon states to protect religious liberty in addition to the more familiar negative duty not to interfere by their own actions; a growing emphasis on state neutrality in religious matters; and an emergent notion of religious privacy linked to an expanded view of what constitutes interference with individual freedom of religion. These developments are briefly described below, together with an attempt to sketch the potential further development of the jurisprudence, concerning conscientious objection to military service.

1 It serves as a companion piece for a previous overview of recent domestic jurisprudence in the United Kingdom concerning freedom of religion: I Leigh, 'Hatred, Sexual Orientation, Free Speech and Religious Liberty', (2008) 10 Ecc LJ 337–344.

A positive obligation to protect

The European Court of Human Rights has on previous occasions remarked that Article 9 has a positive dimension. In its decision in *Otto-Preminger Institut v Austria*[2] the Court laid the groundwork for an argument that Article 9 encompasses a *positive* obligation upon the state to protect religious freedom (as well as the more familiar negative duty to refrain from interfering with religious liberty):

> the manner in which religious doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines.[3]

This implies that the role of the authorities where there is conflict between religious groups is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.[4] An important 2007 decision of the Court applies this doctrine.

An application was brought by members of the Gldani Congregation of Jehovah's Witnesses following the failure of Georgia state authorities to take action following physical attacks and intimidation of the congregation.[5] In one incident a religious service in October 1999 was interrupted by several dozen Orthodox believers led by a former Orthodox priest ('Father Basil') and 60 Jehovah's Witnesses were beaten and struck with crosses, sticks and belts, sustaining numerous serious injuries. Religious literature was confiscated and burned. One believer was forced to undergo having his head shaved as an act of religious punishment, to the accompaniment of prayers. The whole episode was filmed and broadcast on national television. Following these events it was alleged that a further 138 attacks on Jehovah's Witnesses took place between October and November 2002. These included an incident in which Father Basil and his supporters invaded a courtroom in which criminal proceedings from the earlier episode were taking place and, using iron crosses as weapons, attacked Jehovah's Witnesses, journalists and the foreign observers who were present. The attack again was filmed and broadcast. In a succession of cases convictions by the lower courts for similar incidents were overturned on appeal or remitted for further investigation. In total although 784 complaints had been lodged with the relevant authorities, no careful and serious investigation had been carried out into any of those complaints.

2 *Otto-Preminger Institute v Austria* (1994) 19 EHRR 34.
3 Ibid, para 47.
4 See *Serif v Greece* (2001) 31 EHRR, para 53.
5 *97 members of the Gldani congregation of Jehovah's Witnesses and 4 others v Georgia*, Appl No. 71156/01 (3 May 2007).

Against this background the European Court of Human Rights concluded that the Georgian authorities had violated Article 9 because of their failure to take the necessary measures to ensure that the group of Orthodox extremists tolerated the existence of the applicants' religious community or to enable them to exercise freely their rights to freedom of religion.[6] The negligence of the police investigation into unlawful acts against the applicants had also breached Article 14 (rights to be secured without discrimination) since the circumstances raised a reasonable doubt as to the attackers' complicity with the State representatives.[7] Moreover, in a more restricted class of cases the treatment of some applicants was sufficiently serious for the lack of protection or investigation by the state authorities to amount to degrading treatment in violation of Article 3 (the right not to be subjected to inhuman or degrading treatment), because the clear objective of the attacks and the filming of them was one of religiously-inspired humiliation.[8] This case plainly involved an extreme set of facts but the invocation of Article 3 by the Court to cover religious persecution is nonetheless highly significant for two reasons.

Firstly, because (unlike Article 9) Article 3 is unqualified right: once conduct reaches the appropriate level of severity no societal interest can justify its curtailment. Although this level of religiously inspired violence is thankfully rare in contemporary Europe the overlap between Article 3 and Article 9 may in some cases prove highly significant for refugees from religious persecution elsewhere in the world, bearing in mind the principle of *non-refoulement*.

Secondly, the Court's response is an appropriate way of dealing with the reality of religious persecution, which in many countries is societal rather than official in nature. The duty placed upon official organs to carry out in effective investigation where breaches of Article 3 are alleged makes it harder for the police and courts to stand by when significant religious conflict is occurring.

Moreover, it is clear from another decision of the Court that the state's duty to stand impartially between religious groups devolves to the actions of individual officials and the courts also. Thus in *Kuznetsov and Others v Russia*,[9] where the Chairwoman of the regional Human Rights Commission (accompanied by police officers in uniform) acted illegally in breaking up a Sunday meeting of the applicant Jehovah's Witnesses and the authorities refused to prosecute, there was a violation of the applicants' rights under Article 9 ECHR. The ECtHR also found a violation of Article 6 (fair hearing) since the domestic courts had failed to state the reasons for their decisions or to demonstrate that the parties had been heard in a fair and equitable manner.[10]

6 Ibid, para 134.
7 Ibid, para 141.
8 Ibid, para 105.
9 Appl No 184/02 (11 January 2007).
10 Ibid, para 85.

Together these judgments take a significant step forward in converting Article 9 into a positive obligation upon the state, building on *Otto-Preminger*. There is, however, something of tension between this emerging strand of Convention jurisprudence and other decisions in which the European Court of Human Rights has allowed for significant curtailment of the exercise of rights by religious groups in order to avoid stirring up religious controversy. Rather than emphasising the state's duty to positively ensure mutual tolerance, on some occasions at least the Strasbourg court has taken the path of least resistance in permitting, under the margin of appreciation doctrine, national authorities to curtail religious expression simply because there is a risk of courting controversy with other, opposed, religious groups.[11]

A new emphasis on state neutrality

Ambiguities about the nature of state neutrality are obvious also in several recent decisions concerning education. The Court has rejected challenges to the French law banning the display of ostensible religious symbols by pupils in schools, whilst finding that the official display of crucifixes in Italian state schools violates the Convention.

The French law on conspicuous symbols aroused enormous controversy when it was adopted in 2004.[12] It took until July 2009 for a series of direct challenges by pupils expelled from schools for wearing religious symbols to reach the ECtHR.[13] Ironically, when they did so the applications were dismissed as inadmissible because by that time the Court had given a full explanation of the relevant principles in a pair of earlier cases dealing with whether a French school could exclude pupils who insisted on wearing the veil in physical education classes.[14] As a consequence of the lottery of litigation therefore the Court did not give full and detailed consideration to the 2004 law since the groundwork was laid out in the earlier cases.

11 See for example *Murphy v Ireland*, Appl No 44179/98 (10 July 2003), the regrettable decision in which the Court permitted Ireland to ban *all* religious advertising on radio under this justification.

12 Article L 141-5-1 of the Education Code, inserted by Loi no 2004-228 (15 March 2004).

13 Combined admissibility decisions in applications brought by Muslim girl pupils: *Aktas v France*, Appl no 43563/08; *Bayrak v France*, Appl no 14308/08; *Gamaleddyn v France*, Appl no 18527/08; *Ghazal v France*, Appl no 29134/08 (17 July 2009), involving the wearing of the headscarf. *J Singh v France*, Appl no 25463/08 and *R Singh v France*, Appl no 27561/08 (17 July 2009), concerning the wearing of the a 'keski', an under-turban worn by Sikhs. In all these cases, the ban on the wearing by pupils of religious symbols constituted a restriction of their freedom to manifest their religion but one that was justified and proportionate to the aim of protecting the rights and freedoms of others and public order. The complaints under Article 9 were therefore manifestly ill-founded. Nor was there a violation of Article 2 of Protocol No 1 (right to education) in the cases of Aktas, Bayrak, Ghazal, Jasvir Singh and Ranjit Singh.

14 *Dogru v France* Appl No 27058/05 (4 December 2008); *Kervani v France*, Appl No 31645/04 (4 December 2008).

In *Dogru v France*[15] the expulsion of a secondary school pupil who refused to remove her Islamic headscarf during physical education classes was found not to violate Article 9 of the ECHR. The Court found that the decision of the school authorities that wearing a headscarf was incompatible with sports classes for reasons of health or safety was not unreasonable and exclusion was a justified and proportionate response. Although the facts occurred in 1999 the ECtHR nevertheless also had before it the government's submission of the 2004 law banning conspicuous religious symbols. Applying its earlier jurisprudence the Court found that 'the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety'.[16] The Strasbourg Court paid particular attention (as had the French authorities and courts) to the constitutional principle of secularism applicable in France. Protection of this principle, and to a lesser extent protection of heath and safety, was a legitimate aim for restricting the right to manifest one's religion through the wearing of a religious symbol or clothing:

> The Court also notes that in France, as in Turkey or Switzerland, secularism is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, in particular in schools. The Court reiterates that an attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention (*see Refah Partisi (Prosperity Party) and Others*, cited above, § 93). Having regard to the margin of appreciation which must be left to the member States with regard to the establishment of the delicate relations between the Churches and the State, religious freedom thus recognised and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the Convention."[17]

Although the outcome is clear enough, this crucial passage in the judgment is expressed in a rather confused way. Firstly, it appears in a section dealing

15 Ibid. The ECtHR found it was unnecessary separately to examine the complaint based on Article 2 of Protocol No 1.

16 Ibid, para 64, citing especially *Leyla Sahin v Turkey*, Appl No 44774/98 (10 November 2005, Grand Chamber).

17 Ibid, para 72. See also para 71: 'it was for the national authorities, in the exercise of their margin of appreciation, to take great care to ensure that, in keeping with the principle of respect for pluralism and the freedom of others, the manifestation by pupils of their religious beliefs on school premises did not take on the nature of an ostentatious act that would constitute a source of pressure and exclusion . . . In the Court's view, that concern does indeed appear to have been answered by the French secular model.'

with the question of whether the restriction is 'necessary in a democratic society' rather than as a matter of whether protection of a constitutional protection of secularism is a *legitimate aim* (the judgment contains a single sentence dealing with that matter). The structured analysis that ought to apply under Article 9.2 has been neglected, with the prose slipping indiscriminately between questions of legitimacy and proportionality. It would be fairer to say that the Court does not really explain why, given the background of secularism, a prohibition on restrictions of symbols is *necessary*, ie the question of proportionality is not really dealt with rigorously at all.

This lack of clarity is perhaps is partly to blame for the confused approach taken later in *Lautsi v Italy*,[18] a case from a country that does *not* have a constitutional provision requiring secularism in the same way as Turkey, France or Switzerland.

The *Lautsi* decision caused widespread consternation in Italy and a number of other countries, such as Greece and Ireland, when the ECtHR found that the display of crucifixes in state schools was incompatible with the state's duty of neutrality in the exercise of public services, particularly in the field of education, and therefore violated Article 2 of Protocol No. 1 (the right of education in accordance with parent's religious and philosophical convictions) taken in conjunction with Article 9. The applicant alleged that the display of the crucifix clashed with her convictions and violated the right of her children not to profess the Catholic religion.[19] The Italian government had argued successfully before the domestic courts that the crucifix had acquired a neutral and secular meaning as well as its religious significance by reference to Italian history and traditions, representing tolerance.[20] The Strasbourg Court found, however, that the crucifix had 'a plurality of meanings among which the religious meaning is predominant'[21] and that 'the presence of crucifixes in the classrooms goes beyond the use of symbols in specific historical contexts'.[22] The European Court of Human Rights accepted that that the applicant's concern that the display of the crucifix was 'a signal that the state is on the side of the Catholic religion' was a tenable one, not least because the Catholic Church officially ascribed this meaning to it.[23]

The display of the crucifix in the classroom was 'necessarily perceived as an integral part of school and can therefore be regarded as a "powerful external symbol"'.[24] Students could easily feel as a result that they were being

18 *Lautsi v Italy*, Appl No 30814/06 (3 November 2009).
19 Ibid, para 53.
20 Administrative Court of Veneto, No 1110 March 17, 2005, §16.
21 *Lautsi*, para 51.
22 Ibid, para 52.
23 Ibid, para 53.
24 Ibid, para 54, citing *Dahlab v Switzerland*, Appl no 42393/98 (15 February 2001).

educated in a school characterised by a religious environment and this could be 'emotionally disturbing' to students from minority religions and those professing no religion. It is clear that the fact that students were *compelled* to attend classes in rooms where crucifixes were prominent weighed with the Court:

> The presence of the crucifix can be easily interpreted by students of all ages as a religious symbol and they will feel they are being educated in a school environment characterized by a particular religion. What may be encouraging for some religious students can be emotionally disturbing for students from other religions or those who profess no religion. This risk particularly affects students belonging to religious minorities. The negative freedom is not limited to the absence of religious services or religious instruction. It covers the practices and symbols expressing, in particular or in general, a belief, a religion or atheism. This negative right deserves special protection if the State expresses a belief and if a person is placed in a situation from which he cannot escape or only by an effort and cost that are disproportionate.[25]

It is clear then that in the ECtHR's view by requiring the displaying of crucifixes in its schools the Italian state was aligning itself with the Catholic church and that this compromised its duty of neutrality:

> The state is obliged to religious neutrality in public education where attendance is required irrespective of religion and must seek to instill [sic] in students critical thinking. The Court does not see how display in classrooms of public schools of a symbol that it is reasonable to associate with Catholicism (the majority religion in Italy) could serve the educational pluralism that is essential to the preservation of a 'democratic society' as conceived by the Convention.[26]

In reasoning thus the Court seems to have imported a strong duty of state neutrality-through-separatism that cannot be found in the Convention text. It is hard to avoid the conclusion that the ideal pattern of state-religion relations that the Court appears to have in mind is a secular state. The difficulty, of course, is that this ignores the context in which previous dicta about neutrality were given; namely in decisions applying the margin of appreciation to states, such as Turkey and France, that do have a constitutional guarantee of secularity. Why states that have chosen a different constitutional pattern in order to protect

25 Ibid, para 55.
26 Ibid, para 56.

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human rights, religious liberty included, should all be squeezed into the same mould is far from obvious. Secularism may be one way to protect religious liberty but there is certainly room for debate about whether it is the only or best way.

Whether state neutrality requires the removal of religious symbols depends on a number of implicit stages in the Court's reasoning: that symbols have a coercive power over those who observe them that engages Article 2 of Protocol No. 1 (this has in effect already been conceded in earlier jurisprudence on the wearing of the veil by teachers[27]), that the display of a symbol is irreconcilable with religious pluralism, and that removal of crucifixes is itself an act of religious neutrality. On the last point it can certainly be argued that different connotations apply to the removal of religious symbols than to their introduction. The move will be widely interpreted as a promoting a distinctive secular vision, that religious adherents may themselves feel threatened by. The Court's answer to this is that:

> The display of one or more religious symbols cannot be justified either by the request of other parents who want religious education consistent with their beliefs, nor, as the Government argues, by the necessity of a necessary compromise with political parties of Christian inspiration. Respect for beliefs of parents in education must take into account compliance with the beliefs of other parents.[28]

Quite reasonably, however, it may be asked why in balancing the respective beliefs of differing groups of parents the state is bound under the neutrality doctrine to tilt towards the minority view so that is the majority that must 'take account' of others' beliefs, rather than vice versa. Nor is it clear in any event that this has to be a zero-sum game that results in the total removal of all crucifixes in all classrooms, rather than accommodating, for example, specific objections or permitting some local discretion. The limits of the state's duty have, moreover, been left rather vague:

> The Court believes that the required display of a symbol of a given religious confession in *the exercise of public functions relating to specific situations under government control*, particularly in classrooms, restricts the right of parents to educate their children according to their beliefs and the right of schoolchildren to believe or not believe. The Court considers that this constitutes a violation of these rights because the restrictions are

27 *Dahlab v Switzerland*, Appl No 42393/98 (15 February 2001).
28 *Lautsi*, para 56.

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> inconsistent with the duty of the State to respect neutrality in the exercise of its public functions, particularly in the field of education.[29]

If the law remains in this degree of uncertainty a series of challenges to the symbolic effect of other historical or cultural associations between state institutions and Christianity or theism in general in a proliferation of First Amendment style litigation can be expected. The *Lautsi* judgment is undoubtedly both highly significant and controversial and is certain to be appealed to the Grand Chamber. It is to be hoped that the Grand Chamber brings much greater focus and clarity to bear than the generalised basis on which the decision rests.

The same tendencies towards a strong duty of neutrality bordering on favouring secularism can be seen in recent cases on religious education in state schools.

Religious education, neutrality and privacy

The *Folgerø* judgment, in which the Grand Chamber of the European Court of Human Rights divided 9:8 concerning the compatibility of religious education in Norway, is perhaps the most important on this issue for the past 20 years.[30] In *Folgerø* v *Norway* a challenge was brought by a group of humanist parents to the arrangements for religious education in Norwegian state schools. Norway had introduced a compulsory course on 'Christian Knowledge and Religious and Ethical Education (or 'KRL') in 1997 which was designed to provide a general introduction to Christianity (which occupied around 55% of the teaching) and to other major world religions and outlooks, including non-religious life stances. The parents objected to the failure to allow a total exemption from the course. The state contended, however, that a total exemption would defeat the objectives of promoting dialogue among pupils from various faiths, and of providing all pupils with a basic knowledge of the religions covered in the course. Successive challenges brought by the parents before the Norwegian Court's failed. Both the European Court of Human Rights and the UN Human Rights Committee,[31] to which a similar complaint was brought, concluded, however, that the course was insufficiently objective not to require the possibility of an exemption and that the partial opt-out scheme established by

29 Ibid, para 57 (emphasis added).

30 *Folgerø and Others v Norway*, Appl No 15472/02 (29 June 2007). For another significant development see Organisation of Security and Cooperation in Europe, *Toledo Guiding Principles on Teaching about Religion and Beliefs in Public Schools* (Warsaw, 2007).

31 *Leirvåg v Norway*, UN Human Rights Committee, CCPR/C/_/D/_1155/2003, Communication No 1155/2003 (23 November 2004), available at <www.unhchr.ch/tbs/doc.nsf/(Symbol)/6187ce3d?c00917758c1256f7000526973?Opendocument>, accessed 24 May 2010. The Human Rights Committee ruled that there was a violation of the right of parents to secure the religious and moral education of their children in conformity with their convictions under Art 18.4 of the International Covenant on Civil and Political Rights.

Norway did not prevent violations of the claimants' right to have their children educated in accordance with their religious and philosophical convictions. The judgment of the Grand Chamber of the European Court of Human Rights is noteworthy for the serious division that it produced over fundamental questions: the Court ruled by a majority of 9:8 that there had been a violation of Protocol 1 Article 2 of the Convention (the right of parents to have their children educated in accordance with their religious and philosophical convictions).

The majority applied the standard of whether the syllabus was critical, objective and pluralistic in its treatment of religions. They found that:

> notwithstanding the many laudable legislative purposes stated in connection with the introduction of the KRL subject in the ordinary primary and lower secondary schools, it does not appear that the respondent State took sufficient care that information and knowledge included in the curriculum be conveyed in an objective, critical and pluralistic manner for the purposes of Article 2 of Protocol No. 1'.[32]

Pluralism and objectivity did not require that equal treatment be given to all religions and philosophies. The Grand Chamber found that it was within the margin of appreciation of the Norwegian government to adopt a syllabus that devoted greater attention to Christianity than to other religions.[33] This did not *in itself* constitute a departure from the necessary principles of pluralism and objectivity amounting indoctrination.

However, on closer analysis the curriculum was unbalanced to the extent that it raised concerns: there was a clear difference in the depth of knowledge required concerning Christianity as compared to other religions, which in the majority's view undermined the objective of 'understanding, respect and the ability to maintain dialogue between people with different perceptions of beliefs and convictions'.[34] The minority opinion, by contrast recognises greater discretion for a state to give preference to the historic majority religion:

> The notion of pluralism embodied in these provisions should not prevent a democratically elected political majority from giving official recognition to a particular religious denomination and subjecting it to public funding, regulation and control. Conferring a particular public status on one denomination does not in itself prejudge the State's respect for parents' religious and philosophical convictions in the education of their children,

32 *Folgerø*, para 102.
33 Ibid, para 89.
34 Ibid, para 95.

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> nor does it affect their exercise of freedom of thought, conscience and religion.[35]

Whereas the majority had emphasised the predominance of Christianity in the syllabus, the minority stressed that the duty on teachers to present all religions and philosophies from the standpoint of their particular characteristics applied equally. Differences in the treatment of religions were quantitative rather than qualitative and these differences were within the margin of appreciation, having regard to the place of Christianity as the state religion in Norway and to Norwegian history.[36] In any event the dissenting judges noted that other religions made up roughly half the subject matter of the curriculum. The minority disagreed also concerning the partial exemption provisions, finding them not to be excessively burdensome or intrusive,[37] and that to allow exemption by observation fell within the national margin of appreciation.

Folgerø has already been followed by a further decision in which the European Court of Human Rights ruled unanimously that Turkey's system of religious education violated the rights of a parent from the Alevi stream of Islam.[38] The key issue in this instance was not the legal favouritism given to one religion. Rather, it was the way in which the religious education syllabus was implemented, which the court found was insufficiently critical, objective and pluralistic. Although the Court found[39] that the 'intentions' behind syllabus for 'religious culture and ethics' course (which referred to secularism, freedom of thought and religion, and fostering toleration) were compatible with the principles of pluralism and objectivity enshrined in Protocol 1 Art. 2, the execution of the course nonetheless violated these. The portrayal of Islam was limited to the Sunni understanding and gave no recognition to the Alevi faith until the 9th grade.[40] Moreover, exemption from the course appeared to be only available to parents of children who identified themselves as Christian or Jewish.

Zengin confirms the impression that the Court is now prepared to engage in systematic and probing analysis, including of the proportions of time devoted in the classroom to each religion and the specific exercises undertaken. This showed that only 15 pages of the relevant course-book was devoted to other religions in general and that the Alevi steam of Islam received virtually no acknowledgement. Both the exercises to be undertaken by the pupils and the general approach were entirely from the Sunni perspective. It is clear that the Court

35 *Folgerø*, Joint Dissenting Opinion, p 51.
36 Ibid, p 52.
37 Cf *CJ, JJ and EJ v Poland*, No 23380/94, Commission decision of 16 January 1996, DR 84, p 46, holding no violation of Articles 8 or 9 despite the applicant's claim that their daughter had been stigmatised by reason of claiming exemption from religious education classes.
38 *Zengin v Turkey*, Appl No 1448/04 (9 October 2007).
39 Ibid, para 59.
40 Ibid, para 67.

of Human Rights does not take assertions that the objective of religious education is to instil cultural knowledge or fostering toleration at face value.

The decision also demonstrates the dangers of making provision according to religious labels and failing to provide for minority variations. (Non-Muslims were not required to attend the classes in religious culture and ethics in Turkish schools, but no equivalent conscience provisions were available to minority Muslim groups). It is plain that the European Court of Human Rights now has considerable unease with educational systems in which the state officials apply religious or denominational labels to pupils that affect their entitlements. This extends also to anything that in effect requires pupils or parents to identify their religious affiliation to the state in order to claim legal benefits.

The same concern about state-enforced disclosure of religious affiliation arose in a quite different context in *Alexandridis v Greece*.[41] The European Court of Human Rights held in that case that the procedure by which an advocate taking a professional oath to be admitted to practice law could opt to make a 'solemn declaration' rather than swearing an oath on the Gospels violated Article 9 by requiring the advocate in effect to reveal his religious affiliation. The affirmation process was an exceptional one instituted in effect against a societal assumption that every Greek lawyer was a Christian Orthodox and would wish to take an oath on the Gospels.[42] The Court found that the process for making an alternative 'solemn declaration' violated freedom of religion, by in effect requiring an advocate to reveal his or her religious affiliation. It is clear then that the Court takes the view that freedom of religion includes the right *not* to manifest one's religious convictions, although Article 9 speaks only of the right to manifest them.[43]

Once again then, the creative potential of Article 9 can be seen at work. Finally we turn to one field that stands poised for further development of the Article 9 jurisprudence: conscientious objection to military service.

Conscientious objection

As is well known, the text of the European Convention fails to refer to conscientious objection *per se* and expressly exempts military service from being treated as forced labour under Art. 4.[44] In a 1966 case from Germany, the ECtHR found

41 *Alexandridis v Greece*, Appl No 19516/06 (21 February 2008).
42 Ibid, para 36.
43 Ibid, para 38.
44 Art 4 ECHR:
'2 No one shall be required to perform forced or compulsory labour.
'3 For the purpose of this article the term "forced or compulsory labour" shall not include:
...
'b any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; ...
'd any work or service which forms part of normal civic obligations.'

that conscientious objectors do not have the right to exemption from military service, but that each contracting state may decide whether or not to grant such a right.[45]

The tendency towards increasing recognition of conscientious objection[46] can be seen, however, in later decisions. The Court has found that, although Article 9 does not confer a right of conscientious objection as such, nevertheless conscientious objection falls within its ambit. This means that, where states do recognise conscientious objection, they must do so in a way that is not discriminatory. Article 14 of the Convention prevents discrimination in the enjoyment of Convention rights on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Differences in the length of alternative service relative to the period of conscription that cannot be objectively justified may therefore breach Article 14.[47] Moreover, conscientious objectors from different religious groups must be treated even-handedly, as the ECtHR has recently reiterated in a series of challenges from Austria, holding that to deny religious leaders in the Jehovah's Witnesses exemptions enjoyed by ministers in recognised religious societies violated Article 14 in conjunction with Article 9.[48]

There are signs in another decision – from Armenia, a country that does not recognise conscientious objection to military service – that the time may be approaching when there is pressure to reconsider the ECtHR's basic approach under Article 9 towards conscientious objection. The applicant, a Jehovah's Witness, was convicted for failure to perform military was service and imprisoned. Armenia had undertaken to introduce alternative service for conscientious objectors within three years of acceding to the Council of Europe in 2000. The prosecution in this case took place in 2002 when alternative service had not yet been introduced – indeed there remain doubts about how satisfactorily the undertaking has been implemented.[49] Nevertheless, applying

45 *Grandrath v Federal Republic of Germany, European Commission of Human Rights*, 23 April 1965, 10 Yearbook of the European Convention on Human Rights, 626.

46 H Born and I Leigh, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel*, (Warsaw, 2008), ch 10. <www.osce.org/item/30553.html>.

47 *Autio v Finland*, European Commission of Human Rights (6 December 1991) 72 *Decisions and Reports*, 245; *Julin v Finland*, European Commission of Human Rights (6 December 1991) (unpublished); *Raninen v Finland*, European Commission of Human Rights (7 March 1996) 8 *Reports of Judgments and Decisions* 2821–2822, para 55.

48 The failure to exempt members of Jehovah's Witnesses who as elders or deacons were performing a similar function to exempted ministers of religion from recognised religious societies in relation to liability for compulsory civilian service (as an alternative to compulsory military service, which they were excused as conscientious objectors) violated Article 14 taken together with Article 9: *Gütl v Austria*, Appl No 49686/99 (12 March 2009); *Lang v Austria*, Appl No 28648/03 (19 March 2009); *Löffelmann v Austria*, Appl No 42967/98 (12 March 2009).

49 Judge Power noted that 'the Parliamentary Assembly of the Council of Europe was disappointed to note in 2007 that current law still does not offer conscientious objectors any guarantee of 'genuine alternative service of a clearly civilian nature, which should be neither deterrent nor punitive in character' as provided for by Council of Europe standards. The Assembly was 'deeply concerned to note

its earlier jurisprudence the Strasbourg court determined that the refusal to allow alternative service did not violate the applicant's rights under Article 9.[50] The decision is significant, however, for a strong dissenting opinion from Judge Power, who held that Article 9 applied and that Armenia had 'offered no justification as to what, if any, "pressing social need" existed which necessitated the incarceration of the applicant in the particular circumstances of this matter'.[51] This is a principled position and is consistent with the Court's view in the discrimination decisions that conscientious objection falls within the ambit of Article 9. The 'living tree' doctrine would indeed allow the question to be revisited in the light of the clear trend towards recognition of a human right of conscientious objection that has gathered pace since 1950.

that for lack of a genuine form of civilian service, dozens of conscientious objectors, most of whom are Jehovah's Witnesses, continue to be imprisoned, since they prefer prison to an alternative service not of a truly civilian nature'. PACE Monitoring Committee Resolution 1532 (2007): Dissenting Opinion of Judge Power, n 6.

50 *Bayatyan v Armenia* [2009] ECtHR, Appl No 23459/03 (27 October 2009).

51 Ibid, Dissenting Opinion of Judge Power, para 7. See also the Concurring Opinion of Judge Fura, who pointed out that it was 'somewhat surprising that the Court's case-law under Article 9 is not more developed' and who raised the possibility that the Grand Chamber might 're-examine the issue/revisit the case-law/and maybe to take a step further and to state that to sentence someone who refuses to do military service on grounds of conscience would be in violation of Article 9. Present day conditions might have changed and lead to such a conclusion, at least when the sentence includes prison.' (paras 2 and 7).