A critical reflection on the "Lautsi case"

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Two preliminary remarks. The first is the case-law I will be speaking about is essentially concerned with the rights of the *individual*, whether he or she is a believer or a non-believer; others will be speaking later today about the position of churches and other religious groups as entities. The second is that one never knows how to pronounce the names of the applicants and even the judges in Strasbourg cases: is 'c' with a cedilla in a Turkish name pronounced 's' or 'z' or 'ch'...? I hope my guesses at some of the pronunciations will not cause too much confusion or embarrassment.

At first sight, article 9 of the European Convention on Human Rights gives the churches and individual Christians all they could ask for:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

However, as with other articles of the Convention, there are some limitations:

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

So religious observance which includes human sacrifices is probably ruled out, but (again, at first sight) there is nothing there to trouble the mainstream churches.

But of course it is not as straightforward as that. I find the decisions of the European Court of Human Rights difficult to predict, but what one can do is to identify a number of arguments which have been used (and sometimes, but not always, accepted by the Court) to limit the apparent breadth of the freedom of religion and belief. The cases are almost always about the 'manifestation' of religion or belief as opposed to the holding of a belief in one's own heart or mind, the *forum internum*.

I list some of the arguments:

1) that the secular nature of the State (and proceedings in the Court are always against the State, not another individual) or the need for the State to preserve a neutral stance

before different creeds, justifies some interference with individual's freedom of religion;

2) that weight has to be given to the rights of non-Christians or members of religious minorities or atheists not to be disturbed in their own beliefs;

3) that a particular practice is not required by, or is not an essential part of the practice of, a religion; and

4) that the applicant has voluntarily put him- or herself into a situation in which certain restrictions on the freedom to manifest his or her religion apply; *volenti non fit injuria*;

As we shall see, arguments 3 and 4 have been much weakened by a very recent decision of the Court.

Analysis is further complicated by the notion of the 'margin of appreciation', which in effect allows the State concerned to make a judgment on the demands of the particular situation in its own country.

The 'secular' argument was prominent in the case of *Leyla Şahin v Turkey*, decided by the Grand Chamber in 2007. The applicant, a woman medical student, had worn the Islamic headscarf throughout the first 4½ years of her university studies. Then the university vice-chancellor, acting under legal powers, issued a circular saying that female students who wore a headscarf or male students with beards were not to be admitted to lectures or examinations. Miss Şahin considered that wearing the headscarf was her religious duty and she was excluded from lectures and examinations. She eventually transferred to Vienna University.

The Court repeated what had been said in earlier cases, that the freedom of thought, conscience and religion is one of the foundations of a democratic society. This freedom was, 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, depended on it. That is very good stuff, so it comes as something of a shock that the court rejected Miss Şahin's application.

The judgment is full of worthy reflections on democracy, but is actually quite thinly argued on the main point. It is based essentially on the role of the State and its secular basis. I quote parts of the judgment:

> ‘The Court has frequently emphasised the State’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that 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 and that it requires the State to ensure mutual tolerance between opposing groups. ... Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance ... Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the domestic context concerned’. The Turkish Constitution describes Turkey as ‘a democratic, secular and social State’. Given that, it was ‘understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn’. This was especially so, in the court’s view, as they had already spoken (in *Dahlab v Switzerland*, which concerned the teacher of a class of small children), of the ‘powerful external symbol’ which wearing a headscarf represented; it might have some kind of proselytising effect, seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality. [The argument there is very odd: any ‘proselytising effect’ seems quite separate from any issue of gender equality.]

There was an excellent dissenting judgment by the Belgian judge, Judge Tulkens, questioning the Court’s reliance on secularism and equality. She argued that 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 — were capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention. Basically, she thought (and I think rightly) that the Court had abdicated its responsibility and merely accepted the view of the Turkish courts. And she failed to see how the principle of sexual equality could justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted.

This case raises in my mind a fundamental question about the ‘secularism’ argument. The Convention exists to protect the rights of individuals (and bodies like churches) as against the State. The freedom of expression, for example to support the restoration of a deposed monarchy, cannot be ‘trumped’, defeated, by a word in the Constitution declaring the State to

be a republic. Why should the description of the State as 'secular', neutral in matters of religion, in itself qualify the freedom of religion?

The 'proselytising' issue was one of many in *Lautsi v Italy*, the well-known case on the display of the crucifix in Italian schoolrooms in obedience to a royal decree. The case was primarily concerned with the right to have children educated in accordance with the parents' religious or philosophical conventions, but that right is interpreted in harmony with our article 9. The case makes a nice contrast to the *Şahin* case, for here the State was anxious to *allow* a religious practice and not suppress it; and the freedom of religion asserted was the freedom of non-believers and not that of someone following what she saw as a religious duty. It is well established that the freedom to believe and the freedom not to believe (negative freedom) are both protected by article 9. Italy, like Turkey, has secularism, *laicita*, as a constitutional principle, despite the fact that the word does not appear in its Constitution; Italy is, perhaps oddly to the outsider, 'a Republic founded on work'.

In the first hearing before a Chamber of the Court, the Italian Government relied on two arguments. The first was that although the cross was certainly a religious symbol, it had other connotations. It also had an ethical meaning which could be understood and appreciated regardless of one's adhesion to the religious or historical tradition, as it evoked principles that could be shared outside Christian faith. The message of the cross was therefore a humanist message which could be read independently of its religious dimension and was composed of a set of principles and values forming the foundations of our democracies. As the cross conveyed that message, it was perfectly compatible with secularism. I note that the argument was in terms of the cross; a crucifix with the figure of Christ is less easily explained as a humanist symbol. The second argument was the margin of appreciation argument in relation to questions closely linked to culture and history.

The Chamber said almost nothing about the margin of appreciation, instead holding that negative freedom of religion was not restricted to the absence of religious services or religious education. It extended to practices and symbols expressing, in particular or in general, a belief, a religion or atheism. That negative right deserves special protection if it is the State which expresses a belief and dissenters are placed in a situation from which they cannot extract themselves if not by making disproportionate efforts and acts of sacrifice. The practice of displaying the crucifix was incompatible with the State's duty to respect neutrality in the exercise of public authority.

The Grand Chamber accepted that 'by prescribing the presence of crucifixes in State-school classrooms – a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity – the regulations confer on the country's majority religion preponderant visibility in the school environment' but nonetheless reversed the earlier decision. There were two main reasons.

The first was that 'a crucifix on a wall is an essentially *passive* symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality'. As a commentator has observed, an Islamic headscarf is treated as *prima facie* a means of proselytism or indoctrination but not a crucifix because, unlike a headscarf, it is a 'passive symbol'. Like that commentator, I find the supposed distinction between 'passive' and other symbols wholly unpersuasive.

The second was the margin of appreciation point: 'The Court concludes in the present case that the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools speaks in favour of that approach.' Again, the argument is puzzling: why does the absence of a consensus mean that the right cannot be recognised at the supra-national, Convention, level? Is the margin of appreciation triggered by, or only by, the absence of consensus?

Assessing the *Lautsi* decision is complicated by the educational aspects of the issues. But, this time in support of the outcome in the case if not its reasoning, I do have a problem with the notion of a *negative* freedom of religion. In a tolerant and pluralist society, is one's freedom really threatened or limited by clothing, symbols or even language indicating allegiance to another religion? Does the practice of Queen Elizabeth II to give an emphatically Christian address on State radio and television each Christmas Day limit the freedom of religion of her non-Christian subjects? The answer in each case is surely 'no', and the court should recognise that and not hide behind the 'margin of appreciation' to avoid some clear thinking.

Next we can look at the argument that a particular practice is not required by, or is not an essential part of the practice of, a religion *or belief*. It is important to stress the reference to 'belief': it may be that 'religions' can be seen as rather tidier; they tend to come with a code of doctrine and of ethical rules, whereas 'beliefs' may vary almost infinitely. I am not sure

that distinction can be maintained, and we do not want to get into the whole issue of defining what qualifies as 'a religion'. But the Convention language speaks of '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'. And does raise the question as to what are the public practices that are 'manifestations' of religion or belief, an issue with which the courts are usually unwilling to address, and which in *Leyla Şahin v Turkey* the court refused to decide.

An early Commission decision, *Arrowsmith v United Kingdom* concerned the activities of a committed pacifist – and pacifism clearly is a 'belief' – in distributing pamphlets discouraging soldiers from serving in Northern Ireland. The Commission held that speaking out about pacifism in general terms would be protected by article 9, but that Ms Arrowsmith's actions were motivated by her opposition to Government policies. I would comment that that distinction cannot be generalised: would an Irish Catholic issuing pamphlets against the Irish Government's proposals to amend the law on abortion be protected?

A case often cited is *Kalaç v Turkey*, decided in 1997. The applicant held a senior post in the legal service of the Turkish air force and was dismissed on the ground that his conduct and attitude 'revealed that he had adopted unlawful fundamentalist opinions'. The Court held that there had been no breach of article 9, but only on the basis of further elaboration of the accusations against him, that the applicant had given a fundamentalist sect legal assistance, had taken part in training sessions for them and particularly had intervened on a number of occasions in the appointment of servicemen who were members of the sect. The court said, quite rightly, that 'Article 9 does not protect every act motivated or inspired by a religion or belief'. It held, moreover, that the applicant's dismissal had not been prompted by the way he manifested his religion; it was on account of his conduct and attitude and so his article 9 rights were not interfered with.

It is interesting to compare that case with *Bayatyan v Armenia*, decided by the Grand Chamber in 2011. It held, on the application of a Jehovah's Witness, that Armenia was in breach of article 9 in failing to accommodate conscientious objectors to military service by providing some alternative form of civilian service. The court emphasised that the applicant sought to be exempted from military service not for reasons of personal benefit or convenience but on the ground of his genuinely held religious convictions. The Grand Chamber did not refer to the principle that 'Article 9 does not protect every act motivated or

inspired by a religion or belief', but the effect of the decision is that it did protect this particular action motivated by religious conviction. What I find very interesting is that the Court side-steps that issue. What it says is this:

> [T]he Court notes that art 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 art 9.

What the Court is doing there is holding that religious belief can lead to an individual taking a position of principle which *itself* constitutes a 'belief' which is protected by article 9. I am not at all clear what limits there are to the possibilities opened up by that.

I think the Court is, consciously or not, avoiding deciding cases on the express basis of religious belief. The case will usually be decided on the basis of the necessary balancing of the rights of others or (as was crucial in the *Bayatyan* case) whether the interference with article 9 rights was necessary in a democratic society. [In that case it was held that it was not necessary, and the Court took into account the EU Charter which generally copies the Convention but has an express reference to a right of conscientious objection.]

That brings us to the argument that the applicant has voluntarily put him- or herself into a situation in which certain restrictions on the freedom to manifest his or her religion apply. It was an element in *Kalaç v Turkey*, where the Court said, 'In choosing to pursue a military career Kalaç was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians'.

There has been a long series of cases applying a similar principle, especially in employment cases. Some examples:

In *Kontinnen v Finland* (where an employee on the state railways had become a member of the Seventh-day Adventist Church and objected to working on Saturdays), the Commission held that the applicant, as a civil servant of the State Railways, had a duty to accept certain obligations towards his employer, including the obligation to observe the rules governing his working hours. It took the view that he was not dismissed because of his religious convictions *per se* but for having refused to respect his working hours.

In *X* v *Denmark* a clergyman was held to have accepted the discipline of his church when he took office in the church, and his right to leave the church guaranteed this freedom of religion.

Outside the employment context, in *Kjeldsen v Denmark*, parents' philosophical and religious objections to sex education in state schools was rejected on the ground that they had the freedom either to send their children to state schools or to educate them at home.

In *Ahmad v United Kingdom* the Commission dismissed an article 9 claim by a Muslim who had absented himself from his school teaching duties to attend prayers: he had not brought his religious requirements to the employer's notice when seeking employment and he was at all times free to seek other employment which would accommodate his religious observance.

I have to say that the decisions on article 9 are not easy to reconcile one with another. The Court has an approach to precedent, to its own earlier decisions, which is not quite what a lawyer brought up in the common law tradition expects to find. But there is some greater clarity to be found in the important group of cases decided by the Court in January of this year, and generally known, from the name of the first applicant, as *Eweida v United Kingdom.* I summarise the facts as briefly as I can:

Ms Eweida, a Coptic Christian, worked in the check-in staff of British Airways, a private company. Although Sikhs were allowed to wear turbans and bracelets with their uniform, and Muslim women the headscarf, 'jewellery', including in her case a small cross worn around the neck, was forbidden. She was suspended from work. Although British Airways did later amend their rules in the face of considerable press criticism, the English courts found that she had no remedy.

Ms Chaplin also wished to wear her cross as a necklace; she worked as a nurse in a State hospital. Necklaces were forbidden under the hospital rules to avoid any risk of injury to patients.

Ms Ladele was a registrar of marriages, an officer of the local authority. She believed that same-sex unions were contrary to the law of God but was required to conduct same-sex 'civil partnership' ceremonies, or (by way of compromise) administrative work and simple registration of civil partnerships as opposed to ceremonies. She declined and was faced with possible dismissal.

Mr McFarlane's case also concerned same-sex relationships. He was employed by Relate, a private counselling organisation. He was dismissed because he had failed to give an assurance that he would provide counselling to those in a same-sex relationship.

It will be seen that two of the applicants were employed by State and two by private bodies; in the second type of case the issue is whether the State failed to take appropriate steps to prevent the private employer from infringing the applicants' Convention rights.

The UK Government relied on a number of the arguments that we have identified. First, that behaviour which was motivated or inspired by religion or belief, but which was not an act of practice of a religion in a generally recognised form, was not protected by article 9. The visible wearing of a cross was not a generally recognised form of practising the Christian faith, still less one that was regarded as a mandatory requirement. Similarly, Mr McFarlane's objection to providing psycho-sexual therapy to same-sex couples could not be described as the practice of religion in a generally recognised form.

In the alternative, the Government argued that even if the visible wearing of the cross, or the refusal to offer specific services to homosexual couples, were a manifestation of belief and thus a right protected by article 9, there had been no interference with this right in respect of any of the applicants. Each of the present applicants had been free to seek employment elsewhere; and Ms Eweida and Ms Chaplin had both been offered other posts by their current employers at the same rate of pay which involved no restriction on their freedom visibly to wear a cross. This issue attracted particular attention from the various persons and groups allowed to intervene: the Christian groups held that it was quite wrong for an employee to be forced to make the invidious choice between his or her job and faith. The National Secular Society, unsurprisingly, took a different approach, emphasising that the 'freedom to resign is the ultimate guarantee of freedom of conscience'.

Finally, the Government argued that the measures taken by the employers had been proportionate to a legitimate aim in each case.

The Court held in favour of Ms Eweida (the check-in lady) by 5 votes to 2; against Ms Chaplin (the nurse) unanimously; against Ms Ladele (the marriage registrar) by 5 votes to 2; and against Mr McFarlane (the counsellor) unanimously. But more important than the actual decisions on the facts, where the 'margin of appreciation' was a factor of importance, are the clarifications of the law made by the Court.

On the issue of what is a manifestation of a religion, the judgment says this:

> ‘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’.

On the relevance of the possibility of resignation, the Court made a definite break with the past:

> It is true, as the Government point out ..., that there is case-law of the Court and Commission which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under Article 9(1) and the limitation does not therefore require to be justified under Article 9(2). ...[I]n cases involving restrictions placed by employers on an employee’s ability to observe religious practice, the Commission held in several decisions that the possibility of resigning from the job and changing employment meant that there was no interference with the employee’s religious freedom. However, the Court has not applied a similar approach in respect of employment sanctions imposed on individuals as a result of the exercise by them of other rights protected by the Convention, for example the right to respect for private life under Article 8; the right to freedom of expression under Article 10; or the negative right, not to join a trade union, under Article 11. Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.

Two judges (dissenting in Ms Eweida’s case), Judge Bratza, the UK judge, and Judge David Thor Björgvinsson, seem to go even further: they say that ‘A restriction on the manifestation of a religion or belief in the workplace may amount to an interference with Article 9 rights which requires to be justified, even in a case where the employee voluntarily accepts an employment or role which does not accommodate the practice in question’ as well as the cases in which the individual could resign or move to a different position.

There is one other, and rather odd, feature of the cases. It was in Ms Eweida’s case, the one case in which the applicant succeeded, that the employer was most accommodating, and eventually amended its uniform code to meet her wishes. One commentator, Mark Hill, has suggested that Ms Eweida’s success might actually discourage employers from making concessions, for fear that their original approach would be dismissed, in any balancing of interests, as of no crucial importance. I think Mark Hill’s fear is probably exaggerated, but the same two judges did comment critically of the majority’s approach on this point.

Finally, I should mention a puzzling passage in the judgment of two judges who dissented on different grounds (Judge Vučinić and Judge de Gaetano) who distinguished between religious and conscientious beliefs:

> As one of the third party intervenors in this case – the European Centre for Law and Justice (ECLJ) – quite pointedly put it: "[J]ust as there is a difference in nature between conscience and religion, there is also a difference between the prescriptions of conscience and religious prescriptions." The latter type of prescriptions – not to eat certain food (or certain food on certain days); the wearing of the turban or the veil, or the display of religious symbols; attendance at religious services on certain days – may be subject to limitations in the manner and subject to the conditions laid down in Article 9(2). But can the same be said with regard to prescriptions of conscience? We are of the view that once that a *genuine* and *serious* case of conscientious objection is established, the 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).

I must admit that I do not really know what that means. It seems to place the dictates of conscience above those of religion; and it ignores what is surely obvious, that religious beliefs may be conscientiously held: the two cannot be separated.

So I end in some puzzlement, as indeed I began. Is there something, I ask, about the freedom of religion which presents particular difficulties? And if so, why?