

The (Un)protection of Individual Religious Identity in the Strasbourg Case Law

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Despite the many positive aspects of the European Court of Strasbourg's case law on religious freedom, the Court has not provided an adequate protection of individual religious or moral identity, especially when it is expressed in particular actions in ordinary life, beyond traditional expressions of religiosity such as rites or preaching. Two main factors have contributed to this. One is the old European Commission of Human Rights's doctrine stating that 'neutral' laws of general applicability did not constitute an interference with the rights protected by Article 9 ECHR, even in cases of clear conflict with the individual's moral obligations; the Court has not explicitly accepted this doctrine but seems to have used it on some occasions. The other factor is a peculiar understanding of the 'neutrality' of the public sphere as implying or requiring the exclusion of the visibility of religion, which has served to justify national policies banning the wearing of religious garments or clothing. Significantly, most cases of this nature decided by the European Court involve situations related to the educational environment. However, some recent decisions of the Strasbourg Court (*Ahmet Arslan*, *Lautsi GC*, *Bayatyan*) might be expressive of a change in the Court's jurisprudence.

1. *Introductory Remarks*

The European Court of Human Rights in Strasbourg (hereinafter 'ECtHR' or 'the Court') is probably the court that enjoys most authority and prestige around the globe in the realm of human rights. It is a well-deserved prestige. By and large, the Court has done a great job in the defence of human rights in Europe, both in general and in the particular case of freedom of religion and belief. It has set standards of protection that have had an impact far beyond European borders.

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However, when trying to identify trends with the ECtHR's jurisprudence, it is important to bear in mind that the dynamics of the European Court are very different from, and much more complex than, the dynamics of national constitutional courts.¹ It is not always easy to find logical patterns and stable trends or policies in the case law of the ECtHR, especially because the Court often declares formally and solemnly its attachment to certain general principles, deemed immovable, but then it assesses the factual evidence with such concision and lack of detail that sometimes those same principles could have been used to decide the case the opposite way. General principles tend to be stable but their interpretation and application vary, depending on the composition of the Court, which is not, and cannot be, a 'faceless unit'.²

For many years, the Court of Strasbourg paid little attention to issues related to religious freedom.³ Prior to 1993, there were mainly two relevant cases, both decided in the light of Article 2 of the ECHR's First Protocol—*Kjeldsen* (1976),⁴ related to conscientious objection to sex education in school, and *Campbell and Cosans* (1983),⁵ related to the opposition to having children physically punished at school. Since 1993, with the *Kokkinakis* case,⁶ which involved the right to engage in proselytism, the Court began an itinerary of decisions adopted in the light of Article 9 or in the light of other articles, but with a clear reference to religion—eg Article 8 (right to privacy and family life)⁷ or Article 10 (freedom of expression).⁸ At this stage, we already have a

¹ First, we must consider an obvious quantitative factor: there is a judge for each member State of the Council of Europe. The Court counts 47 judges, distributed into five sections, and can sit in a single-judge formation, in committees of three judges, in chambers of seven judges or in a Grand Chamber of 17 judges. The structure and functioning of the Court is regulated in Section II (arts 19–51) of the European Convention on Human Rights (hereinafter 'ECHR') as amended by the Protocol 11 (in force since 1 November 1998) and Protocol 14 (in force since 1 June 2010). There is also a qualitative factor: the diverse professional, political and cultural background of the judges as well as, frankly speaking, their diverse standing and prestige from a purely legal perspective.

² The expression is of JH Merryman, *The Civil Law Tradition* (2nd edn, Stanford 1985) 37, and is used to describe the traditional conception of courts in the civil law world.

³ There was, however, a certain case law of the formerly existing European Commission of Human Rights on those articles, with an orientation—in my view—not particularly protective of freedom of religion. Indeed, most decisions of the Commission declared those applications inadmissible as 'manifestly ill-founded', thus preventing the possibility of the Court deciding on the merits of those cases. The Commission, which acted as a 'filter' of the cases that could be judged by the Court, disappeared in November 1998, when Protocol 11 to the Convention entered into force. Since then, the Court itself decides the admissibility or inadmissibility of applications. Protocol 14, which entered into force on 1 June 2010, has modified the admissibility procedure with the purpose of rendering it more agile and reducing the caseload of the Court as well as the repetitive or insignificant cases. See the explanatory report to Protocol 14 in: <<http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>> accessed 31 October 2011.

⁴ *Kjeldsen, Busk Madsen and Pedersen v Denmark* (7 December 1976).

⁵ *Campbell y Cosans v United Kingdom* (25 February 1982).

⁶ *Kokkinakis v Greece* (25 May 1993). For an analysis of this landmark decision, see J Martínez-Torrón, 'Libertad de proselitismo en Europa: A propósito de una reciente sentencia del Tribunal europeo de derechos humanos', (1/1994) 'Quaderni di diritto e politica ecclesiastica' 59–71; P Edge, 'The Missionary's Position After *Kokkinakis v Greece*', (1995) 2 Web Journal of Current Legal Issues <<http://webjcli.ncl.ac.uk/articles2/edge2.html>> accessed 31 October 2011; J Gunn, 'Adjudicating Rights of Conscience Under the European Convention on Human Rights', in JD van der Vyver and J Witte (eds), *Religious Human Rights in Global Perspective* (Boston 1996) 305–30. On the problems involved in determining a concept of proselytism in international law, see N Lerner, 'Proselytism, Change of Religion, and International Human Rights' (1998) 12 *Emory International Law Review* 477–561.

⁷ This was the case, for instance, in *Hoffmann v Austria* (23 June 1993), or *Palau-Martinez v France* (16 December 2003). And also in the more recent cases *Obst v Germany* and *Schüth v Germany*, both of 23 September 2011, which I will briefly comment on below.

⁸ For example, *Otto-Preminger-Institut v Austria* (20 September 1994), *Wingrove v United Kingdom* (25 November 1996) and a number of other cases after them. See, for further references a bibliography, J

significant number of cases which, although it is arguable that they constitute a consistent body of judicial doctrine, allow us to identify certain trends in the ECtHR's jurisprudence.⁹

In my opinion, there are some aspects of the European Court's case law on religious freedom that could—and should—be improved. The work of the Court has been good but can be better. Among the improvable aspects of its case law is the protection of individual religious or moral identity, especially when it is expressed in particular actions in ordinary life, beyond traditional expressions of religiosity such as rites or preaching. Freedom of thought, conscience and religion, as all fundamental rights, is primarily an individual right but has also a very significant and visible collective dimension.¹⁰ The fact is that the ECtHR has been particularly attentive to protecting the rights of churches or religious communities, as well as those individual aspects of religious freedom that are linked to the institutional side of religion (eg, worship and teaching) or those that involve the right to be free *from* religion—or from some particular expressions of religion. Nevertheless, the Court has been less sensitive towards other individual aspects of religious freedom that constitute the core of Article 9 of the ECHR, namely the individual's right to decide on matters of religion and morals, and therefore to conduct a life according to the dictates of his own conscience.

2. Some Key General Principles

If we look at the work of the ECtHR in the last two decades, we can see that there are some key general principles repeatedly emphasized by the Court since *Kokkinakis*. Among those principles we can mention the following.

In the first place, the Court has noted the importance of the protection of religious freedom for democratic societies, describing it as a 'precious asset' not only for religious believers, but also for atheists, agnostics or indifferent individuals. This freedom, which has been won at a high price over the centuries, is essential for pluralism, which, in turn, is one of the main characteristics that define democratic societies.¹¹ It is interesting to realize that in these remarks, there is an implicit and significant distinction between

Martínez-Torrón, 'Freedom of Expression versus Freedom of Religion in the European Court of human Rights', in A Sajó (ed), *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (Utrecht 2007) 233–69.

⁹ The bibliography on the ECtHR's case law on religious freedom has been increasing over the years. See generally, among others, MD Evans, *Religious Liberty and International Law in Europe* (Cambridge 1997, reprint 2008); C Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford 2001); 'The European Court of Human Rights and Religion', in R O'Dair and A Lewis (eds), *Law and Religion, Current Legal Issues 2001*, vol 4 (Oxford 2001); and J Martínez-Torrón and R Navarro-Valls, 'The Protection of Religious Freedom in the System of the Council of Europe', in T Lindholm, WC Durham and BG Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Leiden 2004) 209–38.

¹⁰ It is not my intention to argue that the rights of religious or belief groups under Article 9 ECHR are merely derivative in the representation of their individual members. I am just trying to remark that that paying attention to the collective dimension of religious freedom while neglecting the protection of its individual dimension is inappropriate, considering that the European Convention, as other significant international instruments, was initially conceived for the protection of individual rights. The Strasbourg jurisprudence, on the other hand, has been neither entirely clear nor constant in its doctrine about the relationship between the individual and collective dimension of religious freedom. See C Evans (n 9) 12–15.

¹¹ See *Kokkinakis* (n 6) s 31.

freedom of religion and belief, on the one hand (Article 9 ECHR), and freedom of expression, on the other hand (Article 10 ECHR). While the latter refers to the ‘freedom to hold opinions and to receive and impart information and ideas without interference’,¹² the former includes also the freedom to express one’s beliefs through practical conduct—‘worship, teaching, practice and observance’¹³—including the right to proselytize.¹⁴ Thus, in comparison with Article 10 ECHR, Article 9 ECHR offers a higher protection. However, not all ideas qualify as convictions that deserve the higher protection guaranteed by Article 9 ECHR, but only those with ‘a certain level of cogency, seriousness, cohesion and importance’.¹⁵

In connection with the understanding of religious freedom as embracing aspects related to the external expression of beliefs, there is a second principle: the absolute protection of individuals’ freedom to choose their religion or belief. The Strasbourg jurisdiction has recognized that religious freedom comprises two dimensions. The internal dimension (*forum internum*) consists in the freedom of all persons to hold the religion or belief of their choice. The external dimension (*forum externum*) consists in the freedom to manifest one’s religion or belief externally, ‘either alone or in community with others’, ‘in public and in private’, ‘in worship, teaching, practice and observance’.¹⁶ While the external manifestation of religion or belief is susceptible to being subject to limitations, under the conditions of Article 9.2 ECHR,¹⁷ the internal dimension of religious freedom is absolute and cannot be restricted.¹⁸ A number of consequences derive from it, among them the prohibition of State religious or moral indoctrination of students through the educational system against the parents’ wishes¹⁹—and, obviously, the right to change religion, which is specifically mentioned by the text of Article 9.1 ECHR.

¹² See art 10.1 ECHR.

¹³ See art 9.1 ECHR.

¹⁴ The right to proselytism is recognized by the Court as far as no coercive, abusive or fraudulent means are used. See *Kokkinakis* (n 6) and also *Larissis v Greece* (24 February 1998). On the problems involved in determining a concept of proselytism in international law, see N Lerner, ‘Proselytism, Change of Religion, and International Human Rights’ (1998) 12 *Emory International Law Review* 477–561.

¹⁵ See *Campbell and Cosans v United Kingdom* (25 February 1982) s 36; this decision applied and interpreted art 2 of the First Protocol—the parents’ right to have their children educated in accordance with their religious or philosophical convictions.

¹⁶ See art 9.1 ECHR.

¹⁷ In particular, limitations on religious freedom must be ‘prescribed by law’, pursue one of the legitimate aims stated by art 9.2 ECHR and be ‘necessary in a democratic society’—in the interpretation of the Court, respond to a ‘pressing social need’. See, for further details, J Martínez-Torrón, ‘Limitations on Religious Freedom in the Case Law of the European Court of Human Rights’ (2005) 19 *Emory International Law Review* 587–636, and the bibliography there cited. See also M Nowak and T Vospernik, ‘Permissible Restrictions on Freedom of Religion or Belief’, in Lindholm, Durham and Tahzib-Lie (eds) (n 9) 147–72.

¹⁸ This doctrine was initially proposed by the European Commission of Human Rights (*C v United Kingdom*, Dec Adm 10358/83, in ‘Decisions and Reports’ 37, 147ff), but later adopted by the Court (see, for instance, implicitly, *Kokkinakis* (n 6) s 33 and, explicitly, *Saniewski v Poland*, ECtHR, Dec Adm 40319/98, 26 June 2001, The Law s 1). It has also been adopted by other international institutions (see OSCE and Venice Commission, *Guidelines for the Review or Legislation Pertaining to Freedom of Religion or Belief*, 2004, II.B.1, 10). See MD Evans (n 9) 298–314; and C Evans (n 9) 68–79. See also, for an interesting and expansive interpretation of the *forum internum*, PM Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge 2005) 115–202.

¹⁹ This has been the traditional interpretation of art 2 of the First Protocol to the ECHR by the European Court long before *Kokkinakis*, in particular since the decision *Kjeldsen, Busk Madsen and Pedersen v Denmark* (7 December 1976), to which I refer in more detail below (see nn 41–44 below and accompanying text). This doctrine was reaffirmed in more recent cases involving religious education: see especially *Folgerø v Norway* (29 June 2007) and *Zengin v Turkey* (9 October 2007), both decided in favour of the applicants (for a comment

A third important principle is non-discrimination—no individual or group shall be subject to discrimination on the ground of its religion or beliefs.²⁰ This principle is clearly stated in Article 14 ECHR and the European Court has often applied it with liberality. For instance, we find broad interpretations of the equality principle in cases such as *Hoffman*, *Tsavachidis* or *Grzelak*, with respect to individuals,²¹ and *Canea Catholic Church* or *Religionsgemeinschaft der Zeugen Jehovas*, with respect to churches.²² Also, in *Thlimmenos*,²³ the Court declared that the principle of equality obliges the States to treat differently persons whose situations are significantly different. On the contrary, the decisions *Cha'are Shalom Vê Tsedek*, *Konrad* and *Leyla Şahin*²⁴ show that the Court has sometimes adopted a rather restrictive view of equality in order to justify the States' margin of appreciation to understand the content of the rights guaranteed by the European Convention and their limitability.

Fourthly, we can mention the principle of religious autonomy of churches and religious groups. One of the implications of religious autonomy is the freedom of religious groups to freely operate in society and to have reasonable access to the resources that are normally available to religious organizations in every country, for instance, the right to obtain legal personality in civil law²⁵ as well as to open places of worship and meeting.²⁶ Other important consequence is that churches must be free from State or other interference when conducting their own affairs—eg, in the appointment of religious leaders, in schism within or from another church, or in the selection of personnel with religious

on those decisions, see MA Jurdado and S Cañameres, 'La objeción de conciencia en el ámbito educativo. Comentario a la Sentencia del Tribunal Europeo de Derechos Humanos Folgerø v Noruega'; and J Martínez-Torrón, 'La objeción de conciencia a la enseñanza religiosa y moral en la reciente jurisprudencia de Estrasburgo', both in (2007) 15 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* <www.iustel.com> accessed 15 December 2011.

²⁰ See, for further details, comments and references, Martínez-Torrón and Navarro-Valls (n 9) 218–22.

²¹ *Hoffmann v Austria* (23 June 1993) (the religion of parents cannot be taken into account by judges when deciding on the assignation of children's custody in divorce proceedings); *Tsavachidis v Greece* (21 January 1999) (a person cannot be subject to secret surveillance by national intelligence service on the mere grounds of religious membership); *Grzelak v Poland* (15 June 2010) (the refusal to participate in confessional religious instruction in a public school cannot be reported in a way that discloses indirectly the beliefs of a student or stigmatizes him).

²² *Canea Catholic Church v Greece* (16 December 1997) (right to obtain legal personality and to appear in court in conditions comparable to other religious communities); *Religionsgemeinschaft der Zeugen Jehovas et al v Austria* (31 July 2008) (refusal of the status of religious society under public law on the ground of the doctrines held by a church is discriminatory—see also *Verein der Freunde der Christengemeinschaft et al v Austria* (26 February 2009)).

²³ *Thlimmenos v Greece* (6 April 2000) (the criminal sentence of a conscientious objection to military service must be distinguished from convictions for ordinary criminal offences for the purposes of disqualification for public offices).

²⁴ *The Jewish Liturgical Association Cha'are Shalom Vê Tsedek v France* (27 June 2000) (the Court held that the refusal to a minority Jewish community of a special permit for slaughter of animals according to the Hebrew tradition, while this permit had been granted to the organization representing the majority of Jewish communities, did not infringe the principle of equality); *Konrad et al v Germany*, ECtHR Dec Adm 35504/03, 11 September 2006 (the prohibition of home schooling does not violate the equality principle with respect to the parents' rights to determine the religious and philosophical orientation of their children's education); *Leyla Şahin v Turkey* (10 November 2005) (the prohibition of wearing female Islamic headscarves at University is not discriminatory against Muslim women who desire to wear it on conscience grounds). I will refer to the latter decision in more detail below; see n 56–60 and accompanying text.

²⁵ See *Moscow Branch of the Salvation Army v Russia* (5 October 2006) and *Church of Scientology Moscow v Russia* (5 April 2007); see also the cases cited in n 23, above.

²⁶ See *Manoussakis v Greece* (26 September 1996) and *Pentidis and Others v Greece* (9 June 1997).

functions.²⁷ The nuances of the latter aspect are manifold and have generated an interesting and controversial case law in recent years, especially when religious autonomy is confronted with the competing interests of churches' employees and their rights under State labour law.²⁸

3. *Freedom to Act in Accordance with One's Own Conscience*

As indicated above, one of the aspects of freedom of religion and belief that needs better recognition and protection by the ECtHR is individual religious identity.

Religious identity is not just a matter of choosing one's personal beliefs or experiencing a sense of 'belonging' to a community or tradition. As religious or moral beliefs tend to be manifested in practical conduct, religious identity finds its natural development in personal actions of different kinds. Restricting these actions imposes a limitation on religious identity, and this is something that may be done only under certain conditions, stated in Article 9.2 ECHR. However, the Strasbourg jurisdiction, despite its above-mentioned emphasis on the significance of freedom of religion or belief, has, at times, interpreted the consequences of religious identity restrictively, in two different ways.

First, such restriction has been accomplished by avoiding the test imposed by the limitation clause of Article 9.2 ECHR. This has occurred when religious actions have an impact in the public sphere, and, in particular, when there is a situation of conflict with other legal provisions not aimed directly at imposing limitations on religious practices. When the exercise of religious freedom collides with a 'neutral law' (ie, a law that pursues a legitimate secular interest and does not attempt per se to restrict religious freedom), the Strasbourg jurisdiction has sometimes held that Article 9.1 ECHR does not offer any protection to those actions and the State 'neutral law' automatically prevails, without the need to justify it under Article 9.2 ECHR.²⁹

In addition, even in the case of laws that are aimed at restricting certain religious expressions, the Court has held that those legal restrictions are reasonable when they seek to guarantee the 'neutrality' of the public sphere, understood as synonymous with 'secularity', ie, as implying absence of visible signs of religion. The consequence has been that limitations on manifestations of religion—for instance, the prohibition of religious symbols or garb—have been easily justified under Article 9.2 ECHR, with the implication that religion cannot be a part of the public sphere, which should be presided over by a 'secularity' that permits the presence of non-religious ideas or signs but not of their religious equivalent.

As we will see, in both cases, the effect of those lines of decision is the unequal treatment of people with religious convictions in comparison with people with non-religious convictions, and of religious minorities in comparison with religious

²⁷ See *Serif v Greece* (14 December 1999); *Hasan and Chaush v Bulgaria* (26 October 2000); *Metropolitan Church of Bessarabia v Moldova* (13 December 2001); *Agga v Greece* (17 October 2002); *Supreme Holy Council of the Muslim Community v Bulgaria* (16 December 2004).

²⁸ See *Schüth v Germany* and *Obst v Germany*, both of 23 September 2010; also *Siebenhaar v Germany* (3 February 2011). For an interesting comment on this type of cases and on which should be the right way to deal with them from the ECHR perspective, when those cases had not yet been decided by the European Court, see G Robbers, 'Church Autonomy in the European Court of Human Rights: Recent Developments in Germany', (2010–11) 26 *Journal of Law and Religion* 281–320.

²⁹ Martínez-Torrón and Navarro-Valls (n 9) 228–36.

majorities. The former occurs when the public space is designed in such a way that it fulfils completely the aspirations of atheists or agnostics, or simply of people that do not care much about the expression of their religious ideas, but does not correspond to the expectations of religious believers who remain actively engaged with their respective religions. The latter occurs because the laws considered 'neutral' usually conform—as does any law—to the ethical values that are dominant in a determined social environment at a certain moment. Neutral laws will rarely conflict with the morals or life practices of the major churches, but they can more often cause conflicts with minority religious groups that engage in conduct that is socially atypical.³⁰ To hold that a neutral law must automatically prevail and that the state is under no obligation to justify denial of exemptions from the general application of the law as a measure 'necessary in a democratic society' would constitute, in practice, a risk for the rights of minorities, and generally for those whose conscientious beliefs are threatened.

4. Neutral Laws and Moral Obligations: the Indirect Restriction of Religious Freedom

Part of the problem arises from the interpretation given in Strasbourg to the terminology utilized by the European Convention—and most other international texts—that describe the content of freedom of thought, conscience and religion. Among the aspects of this freedom that deserve protection, Article 9.1 ECHR mentions the right to manifest one's religion or belief in *practice*. The most obvious interpretation of this term seems to be that Article 9 guarantees the right of individuals to behave in accordance with the dictates—and prohibitions—of their own conscience. It does not seem accurate to interpret the term *practice* as the mere practice of rites, considering that the ritual dimension of religious freedom is present in other words used by Article 9, in particular, the terms *worship* and *observance*. The French version of Article 9 ECHR is even clearer in that respect, for it refers explicitly to 'le culte, l'enseignement, les pratiques et l'accomplissement des rites'.

On the other hand, elementary considerations of equality lead to understand that *practice* should be guaranteed in the same manner, irrespective of whether it is based on the tenets of an institutional religion or derives from strictly personal beliefs and regardless of whether the individual's conscience is grounded on religious or on non-religious beliefs. This broad construction of the right to manifest one's belief in *practice* has been proposed by the General Comment of the Committee of Human Rights on Article 18 of the 1966 UN International Covenant on Human Rights.³¹ I am afraid, however, that the attitudes of the ECtHR—and of the European Commission of Human Rights before it—have been different with regard to Article 9 ECHR.³²

³⁰ This is the reason why Muslims and Jehovah's Witnesses, for instance, experience frequent problems in European countries.

³¹ See General Comment No 22: The right to freedom of thought, conscience and religion (art 18): 30/07/93; CCPR/C/21/Rev 1/Add 4, General Comment No 22. The General Comment on art 18 was adopted by the Committee on 20 July 1993. For an analysis of the text, see BG Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Boston 1996) 307–75.

³² See also MD Evans (n 9) 293–314; C Evans (n 9) 110–32.

The crucial issue is understanding the relative protection of the freedom of individuals to act or practice according to the dictates of their own conscience (*forum externum*), as opposed to the absolute protection granted to the freedom to choose one's religion or beliefs (*forum internum*). In my opinion, the framework proposed by the Strasbourg jurisdiction is not the most desirable. The old Commission's approach consisted mainly in drawing a line of separation between the concepts of *manifestation* and *motivation*. From this perspective, the European Convention would not necessarily guarantee the right to perform any particular external act that is a consequence of one's belief. In other words, the term *practice* does not include each and every act motivated or influenced by a religion or belief.³³

The foregoing approach seems reasonable in the abstract, for behaviour *obliged* by conscience—which seems to be the behaviour protected by Article 9 ECHR—is different from behaviour simply *permitted* or *encouraged* by conscience. Nevertheless, the truth is that the Strasbourg case law has traditionally adopted a rather restrictive attitude in interpreting this distinction.³⁴ It has tended to consider that the protective umbrella of Article 9 ECHR does not necessarily extend to people's behaviour that is imposed by their own conscience, especially when a person attempts to adapt his conduct to his moral obligations in ordinary life, but his behaviour does not strictly consist in religious teaching or directly correspond to specific ceremonial practices.³⁵

In this regard, the European Court has often drawn implicitly a distinction between the State's actions that have a *direct* and an *indirect* impact on religious freedom.

In the Court's view, the State interferes with the exercise of freedom of religion or belief when an individual's behaviour is prevented or punished by a law or by other State activity *directly* aimed at restricting the manifestation, the worship or the expansion of certain or of all religions. In these cases, the European Convention requires that the State justify the interference on the individual's freedom according to Article 9.2 ECHR, proving that the

³³ This doctrine has been repeatedly stated by the Commission and later assumed by the Court. The first of the Commission's decisions enunciating this doctrine was *Arrowsmith v United Kingdom*, in 19 'Decisions and Reports' 19–20 (EComHR, Rep Com 7050/75 [1981], 12 June 1979) (concerning a British pacifist sentenced to a term of imprisonment for having distributed illegal leaflets among English soldiers in Northern Ireland). With regard to the Court's decisions, see *Kalaç v Turkey* (1 July 1997) s 27 (with respect to the compulsory retirement of a military officer because of his allegedly fundamentalist Islamic views); *Hasan and Chaush v Bulgaria* (26 October 2000) s 60 (concerning an internal dispute about religious leadership in a Muslim community).

³⁴ For further details on this approach of the Strasbourg jurisdiction, see J Martínez-Torrón, 'La giurisprudenza degli organi di Strasburgo sulla libertà religiosa' (1993) *Rivista internazionale di diritti dell'uomo* 335ff.

³⁵ Moreover, the Court has stated that certain professional situations voluntarily assumed may entail additional specific restrictions on religious freedom; this occurs particularly within 'a system of military discipline that by its very nature implie[s] the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians'. (*Kalaç v Turkey* s 28). The case involved the compulsory retirement of an officer of the Turkish army, decreed by the Supreme Military Council, for his alleged membership of an Islamic fundamentalist movement supporting ideas contrary to the constitutional principle of secularism. The European Court held that the applicant had not been punished because of his religious beliefs or practices—on the contrary, he was permitted to observe the 'normal' religious duties of Islam—but rather because his 'conduct breached military discipline and infringed the principle of secularism'. Therefore, the Court concluded, 'the applicant's compulsory retirement did not amount to an interference with the right guaranteed by Article 9 since it was not prompted by the way the applicant manifested his religion' (ibid ss 30–31). For a more extensive comment on this case, see J Martínez-Torrón, 'Islam in Strasbourg: Can Politics Substitute for Law?' in WC Durham and others (eds), *Islam, Europe and Emerging Legal Issues* (Aldershot 2012 (forthcoming)).

restrictive measures are ‘necessary in a democratic society’. This was indeed the approach of the Court when it decided in favour of the applicant in the *Kokkinakis* case,³⁶ because the Greek courts, based on the national laws against religious proselytism, had sentenced a Jehovah’s Witness without enough evidence that he had been engaged in ‘improper proselytism’, ie, in trying to convert people through abusive or deceitful means. For the ECtHR, to apply the law indiscriminately against proselytism was equivalent to restricting, without due justification, the freedom to manifest one’s religion or beliefs in teaching. The same occurred in the *Buscarini* case,³⁷ where the Court held that requiring newly elected members of Parliament to swear allegiance to the Constitution on the Gospels, on pain of forfeiting their parliamentary seats, was contrary to the provisions of Article 9 ECHR, which ‘entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion’. In the ECtHR’s view, the religious oath requirement could not be considered ‘necessary in a democratic society’, for it amounted to imposing on the applicants an obligation to declare their belief in a religion that was not their own.

However, the approach of the Commission and the Court has been very different with regard to facially ‘neutral’ laws of general applicability that pursue legitimate secular goals. Albeit, by definition, neutral laws are not aimed at interfering with a particular religion or belief, in practice, the legal duties imposed by them may clash with the moral obligations that govern the lives of certain individuals, and consequently may cause, as an *indirect* but unavoidable effect, a restriction of these persons’ right to practice their religion or belief.³⁸ The immediate consequence is that a moral burden is placed upon the shoulders of these people, as they must choose between disobedience to the law and disobedience to their conscience—one receives a worldly punishment, the other entails a spiritual sanction. The Strasbourg Court, following a previous doctrine held by the Commission, has apparently tended to deny that Article 9 ECHR offers any protection in those situations, indicating that there has not been any State interference with religious freedom. Its analysis can be summarized as follows: it is not necessary to judge whether the State has provided a legitimate justification (according to Article 9.2 ECHR) for the legislation under attack because the right to freedom of thought, conscience and religion (according to the description of its content in Article 9.1 ECHR) has not actually been (directly) violated.

It would be inaccurate to affirm that there is a conclusive doctrine of the European Court on the issue of conflicts between ‘neutral laws’ and individuals’ freedom of conscience, but we can observe, in some cases, traces

³⁶ See n 7, above.

³⁷ *Buscarini et al v San Marino* (18 February 1999).

³⁸ This is the case of the different types of conscientious objection. For a recent extensive analysis of conscientious objections in international and comparative law, with numerous bibliographical and case law references, see R Navarro-Valls and J Martínez-Torrón, *Conflictos entre conciencia y ley: las objeciones de conciencia* (Madrid 2011; 2d edn forthcoming in January 2012). At the same time, we should not forget that significant religious persecutions have been carried out in the past two centuries under the pretext of laws that were formally neutral and of general applicability. See WC Durham, ‘Perspectives On Religious Liberty: A Comparative Framework’, in n 6 (Boston 1996) 33.

of the foregoing mode of reasoning. Significantly, these cases involve problems arising within the educational environment.³⁹

The first of them is *Kjeldsen*, in 1976.⁴⁰ It concerned the opposition of some students' parents to compulsory sex education for teenagers in the public schools of Denmark, intended to prevent undesired pregnancies among teenagers. They unsuccessfully claimed an exemption from those classes for their children, not because they objected to sex education as such but, on the contrary, because they thought this education was so important, and with so significant moral connotations, that it should be imparted by the family and not by the school.⁴¹ The case was decided—in favour of the respondent government—in the light of Article 2 of the First Protocol, and the Court proposed a restrictive interpretation of the parents' rights with regard to the religious and philosophical orientation of their children's education. In brief, the Court held that the State was free to organize the educational system, and particularly the curricula of public schools, even if the religious or philosophical convictions of parents were disregarded. The fact that some parents objected, upon grounds of conscience, to certain contents of the school curriculum, did not grant them any right to require of the State a special exemption of those educative contents for their children. Consequently, the State was not obliged either to grant such exemption or to justify its refusal. The State's power to control the educational environment, as indicated above, was only limited by the prohibition of indoctrination of students against their parents' wishes.⁴² Such interpretation of the parents' rights under the ECHR offered by the Court was strongly contested by one of the judges of the Court⁴³ in a dissenting opinion, noting that the text of Article 2 of the First Protocol contains no indications that it is exclusively aimed at prohibiting indoctrination through State schools. On the contrary—the dissenting judge remarked—this article requires generally that the State respects the parents' convictions, without any reference to the aim pursued by the public organization of the educational system, and, therefore, the Court should have focused on merely examining if the parents' beliefs had been actually restricted or ignored (and in case, may I add, they should have verified if there was a legitimate ground for that limitation, following by analogy the limitation clause of Article 9.2 ECHR).

³⁹ We could perhaps add, out of the educational environment, the case of *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (27 June 2000), in which the Court sustained the French policy of refusing a special permit for slaughter of animals according to the Hebrew tradition to an ultra-orthodox minority Jewish community, while granting it to the organization representing the majority of Jewish communities. However, in this case the ECtHR focused on the interpretation of the equality principle rather than on the 'neutrality' of the challenged measure. The Court declared that there was no interference with the rights of the ultra-orthodox community because they could easily obtain *glatt* meat—at a higher price—importing it from Belgium, and that the unequal treatment of both Jewish organizations was justified under Article 14 ECHR on the ground of the protection of public health and public order. Seven of the seventeen judges of the Grand Chamber wrote a joint dissenting opinion considering that the principle of equality had been violated.

⁴⁰ *Kjeldsen, Busk Madsen and Pedersen v Denmark* (7 December 1976).

⁴¹ For a more detailed discussion of the *Kjeldsen* decision, see Navarro-Valls and Martínez-Torrón (n 38) 253–55. See also MD Evans (n 18) 342–43 and 355–56; C Evans (n 18) 90–93.

⁴² See *Kjeldsen* (n 40) s 53.

⁴³ Judge Alfred Verdross, a renowned Professor of International Law from Austria.

In any event, more than thirty years later, the ECtHR's interpretation of Article 2 of the First Protocol was reaffirmed in the decisions *Folgerø* and *Zengin*.⁴⁴ And, prior to them, in 1996, the twin decisions *Efstratiou* and *Valsamis*,⁴⁵ dealing with a relatively similar problem, held on to the Court's doctrine on the automatic subjection to neutral rules. These cases had their origin in the applications of two Greek secondary school students, both Jehovah's Witnesses, who refused, for religious reasons, to participate in the school parades organized during the national festival to commemorate the outbreak of war between Greece and Fascist Italy in 1940. They argued that their conscience prohibited them from being present in a civic celebration in which a war was remembered and in which military and ecclesiastical authorities took part. The two students were denied permission to be absent from the parade, and their failure to attend was punished by one day's suspension from school. The European Court decided the case in the light both of Article 9 of the Convention and of Article 2 of the First Protocol (as interpreted in *Kjeldsen*). The decision sustained the Greek government's position, especially considering two facts. One was the moderate punishment imposed to the students, which could not amount to a deprivation of the right to education. The other was that the Court could 'discern nothing, either in the purpose of the parade or in the arrangements for it, which could offend the applicants' pacifist convictions'.⁴⁶ The Court noted additionally—without any further comment—that the European Commission considered, in its report on the case, that Article 9 'did not confer a right to exemption from disciplinary rules which applied generally and in a neutral manner and that, in the instant case, there had been no interference with the applicant's right to freedom to manifest her religion or belief'.⁴⁷

In my opinion, the Commission's interpretation of Article 9 ECHR inverts the logical order of concepts in this matter. It is universally accepted that human rights must be construed broadly. Therefore, in order to understand the exact meaning of the freedom to manifest one's religion or belief in *practice*, it seems that we should approach the question in the following sequence: (i) according to Article 9.1 ECHR, freedom to practice one's religion or belief must be understood as protecting, in principle, every act of the individual when he obeys the dictates of his own conscience; but (ii) Article 9.2 ECHR—limitations on religious liberty—shall be utilized, when necessary, as a corrective element for a freedom that, by its own nature, tends to be exercised in an undefined and unpredictable way.

Thus, we manage to reconcile two paramount interests that are inclined to conflict with each other: the maximum degree of initial protection of the freedom of belief and the security that the legal order demands. Furthermore, we introduce an important assumption: the State has the burden of proof with

⁴⁴ *Folgerø v Norway* (29 June 2007) s 85 (g) & (h); and in *Zengin v Turkey* (9 October 2007) ss 51–52. These two cases involved parents' objections against allegedly neutral religious instruction in Norway and Turkey, respectively. See n 20, above.

⁴⁵ *Efstratiou v Greece* (18 December 1996) and *Valsamis v Greece* (18 December 1996). The texts of both decisions are almost identical, as indeed were the facts in issue.

⁴⁶ *Efstratiou* *ibid* s 32; *Valsamis* *ibid* s 31.

⁴⁷ *Efstratiou* *ibid* s 37; *Valsamis* *ibid* s 36.

regard to the necessity of a restrictive measure, ie, it must affirmatively prove that, in a particular case of conflict, it is ‘necessary in a democratic society’ to restrict the exercise of religious freedom. Following this approach would obstruct the development of policies that ignore the needs of religious freedom and are harmful not only to individuals but also to minority groups and, in general, to groups with distinctive beliefs.

In any event, it should be remarked that the Court neither subscribed to nor rejected explicitly the Commission’s interpretation of Article 9 ECHR in *Efstratiou* and *Valsamis*. The Commission’s view might be expressive of a certain state of mind in the Strasbourg jurisdiction, in a line of continuity with *Kjeldsen*. However, we might as well infer from other decisions that the Court is hesitating about which path it should follow beyond the strict borders of the educational environment. In this regard, we should remember that the Commission’s restrictive interpretation of freedom of conscience seems to contradict the Court’s own words in the *Hasan and Chaush* case: ‘[...] but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.’⁴⁸ And, certainly, behaviour in accordance with the dictates of one’s own conscience in daily life is an evident, and most important, expression of freedom of religion and belief.

There is another aspect in the ECtHR’s reasoning in *Efstratiou* and *Valsamis* that is problematic and not easy to reconcile with State neutrality in religious matters. When the Court examined the arguments of the applicants, it declared that the parades that the Jehovah’s Witnesses morally disapproved of were merely civic acts without any particular political or ideological connotation and, consequently, they could not offend the pacifist convictions of the students.⁴⁹ Thus, the Court, in effect, substituted its judgment for the conscience of the persons involved, defining what was ‘reasonable’ for them to believe with regard to their participation in a national commemorative ceremony. In my opinion, this is a gross mistake.⁵⁰ In assessing claims arising from individual conscience, it is unacceptable for a secular court to determine which beliefs are ‘reasonable’ and which are not. Naturally, it is necessary to verify—as far as possible—that parties are sincere, that they are not deceitfully alleging moral convictions they do not actually or genuinely hold in order to avoid fulfilling a legal duty. But this does not mean that a secular court is competent to elucidate when the beliefs of a person are sufficiently consistent from an ‘objective’ point of view. Religious viewpoints do not need to meet a reasonableness threshold in order to qualify as a basis for asserting Article 9 rights. This is in contradiction with what the ECtHR affirmed, the very same year of *Efstratiou* and *Valsamis*, reflecting a deeply rooted notion of Western

⁴⁸ *Hasan and Chaush v Bulgaria* (26 October 2000) s 78. See also, 4 years before, *Manoussakis v Greece* (26 September 1996) s 47. The only difference between those two paragraphs is the reference to ‘exceptional cases’ contained in *Hasan*.

⁴⁹ See *Valsamis* (n 45) ss 31, 37; *Efstratiou* (n 45) ss 32, 38.

⁵⁰ See also C Evans (n 9) 120–24.

legal culture, about the incompetence of public authorities to pronounce on the truth or falsity of a religious dogma or a moral belief.⁵¹

In the above-mentioned decisions, the European Court did not seem to be fully aware of the fundamental philosophy underlying the protection of religious liberty. The reason why the freedom of each individual conscience must be respected is not that it is objectively correct. Freedom of conscience must be respected because it is considered a fundamental area of the individual's autonomy in democratic societies and, consequently, nobody may interfere with the individual's conscience as long as other prevailing juridical interests are not endangered. This applies also to those cases in which the moral position held by individuals is stricter than the official doctrine of the religion to which they belong.⁵² What freedom of religion or belief protects is, precisely, the right to choose the truth(s) in which one is willing to believe. Hence, Article 9.2 ECHR provides that the state may restrict the exercise of that freedom only when it is 'necessary in a democratic society'.

In other words, States are not obliged to respect and protect religious freedom because they deem the convictions of their citizens to be correct, or even convenient. They are obliged to protect the freedom to believe and to act accordingly because this freedom constitutes an essential element of a democratic system. The protection of that freedom is a paramount *public* interest and not merely a *private* interest of individuals and groups. This is something that is easily understood with regard to other liberties—for instance, the freedom of expression or the freedom of association—but is sometimes inexplicably ignored when dealing with religious liberty.

5. The Concept of State Neutrality

In addition to what has been noted earlier, further restrictions of individual expressions of religious beliefs have been legitimized by the ECtHR as a consequence of its understanding of State neutrality and, more generally, the neutrality of the public sphere. To consider that State neutrality towards religious ideas is a requirement of the protection of religious freedom seems reasonable, especially when neutrality is conceived as the State's incompetence to judge the truth or falsity of religious doctrines. But it is less reasonable when the Court tends to understand neutrality in a way that justifies prohibitions of personal expressions of religious belief in public, particularly in educational environments, adopted—allegedly and surprisingly—in the interest of peace and tolerance.⁵³

⁵¹ See n 49, above and accompanying text.

⁵² This was the situation, for instance, in two interesting cases decided long ago by the United States Supreme Court: *Negre v Larsen*, 401 US 437 (1971), a case involving a Catholic's conscientious objection to take part in the Vietnam War; and *Thomas v Review Board of the Indiana Employment Security Division*, 450 US 707 (1981), a case involving a steel company worker's conscientious objection to be transferred to a department directly involved in the fabrication of turrets for military tanks. See on these cases, among Spanish legal literature, R Palomino, *Las objeciones de conciencia: Conflictos entre conciencia y ley en el derecho norteamericano* (Madrid 1994) 74–79 and 192–94, respectively.

⁵³ For an interesting recent reflection on the different notions of State neutrality, in scholarship as well as in comparative law, and the difficulties in finding an operative definition of this principle, see R Palomino, 'Religion and Neutrality: Myth, Principle, and Meaning' (2011) 3 Brigham Young University Law Review 657–89.

We can see expressions of this attitude of the Court in cases, on the use of personal religious symbols in school, decided in the last decade. In *Dahlab*, in 2001,⁵⁴ the ECtHR declared inadmissible the application of a Swiss teacher in a public primary school, converted to Islam, who had been prohibited from wearing the veil on her head that she considered prescriptive when teaching to her students, in application of a cantonal law aimed at preserving the secular character of public schools. The Court's analysis began by recognizing that imposing on teachers the prohibition of carrying 'powerful' religious symbols constituted an interference with the applicant's religious freedom and the State had to provide a sound justification under Article 9.2 ECHR. Nevertheless, the European Court shared the opinion of the Swiss Federal Court on the consequences of the neutrality principle (*laïcité*). In particular, the ECtHR accepted that this principle entailed some restrictions on the civil servants' right to manifest their religion or belief, especially in the educational environment, where students may be more easily influenced and 'religious peace' must be protected with extreme care.

In my opinion, the Court showed too much respect for the State's margin of appreciation in the *Dahlab* case. First, the 'religious peace' of the school did not seem to have suffered any serious threat, for the applicant wore the Islamic *foulard* during approximately five years until she was prohibited from doing so by the (female) general director of primary schools of Geneva's canton. In all those years, there were apparently no problems caused at the school by the applicant's veil. There was no evidence of even a single complaint by the students or the students' parents or other colleagues. Secondly, it is not easy to understand why the principle of *laïcité* (secularism) should require, in a country like Switzerland enjoying religious peace, that no religious personal symbols are visible in the teachers' clothing, instead of permitting that students can see in their own school a reflection of the religious pluralism existing in Swiss society. As long as teachers respect the students' belief and do not attempt to proselytize them, the presence of religious pluralism in school seems to be more consistent with a neutral attitude of the State and, on the other hand, more instructive for students than the fictional absence of religion on the part of school personnel.

A few years after *Dahlab*, and holding on to the same notion of neutrality, arose the most important case until now on the use of personal religious symbols: *Leyla Şahin*, first decided by a Chamber of seven judges and later, by the Grand Chamber of seventeen judges, confirming the Chamber's decision.⁵⁵ The case also referred to the wearing of the Islamic headscarf by women, and had a remarkable impact on public opinion, inside and outside Turkey, through the attention paid by the media.⁵⁶

⁵⁴ *Dahlab v Switzerland*, ECtHR, Dec Adm 42393/98, 15 February 2001. *Dahlab* was declared inadmissible by the Court as 'manifestly ill-founded' in a lengthy decision that, as sometimes occurs, actually went into the merits on the case.

⁵⁵ *Leyla Şahin v Turkey*, 29 June 2004 (Chamber's decision), and *Leyla Şahin* (n 24) (10 November 2005) (Grand Chamber's decision). The Chamber's decision was adopted unanimously and the Grand Chamber's decision by sixteen votes to one.

⁵⁶ We must note that, while there are certain hesitations in many European countries about how to deal with Muslim women's attire in public places, in Turkey, the headscarf issue has become a symbol of, and a battlefield for, the political struggles between those who defend the citizens' freedom to manifest the signs of their Islamic

The applicant, Leyla Şahin, was a female Muslim medical student who had moved to Istanbul University in her fifth year, where she, for the first time, was subjected to disciplinary proceedings by the University authorities, based on rules that prohibited the use of headscarves by women—as well as beards by men. The aim of the pertinent regulations was to reduce the ‘visibility’ of Islam at the University facilities, thereby allegedly guaranteeing the ‘secular atmosphere’ of the public University. The disciplinary measures adopted against her included denying her access to written examinations and suspension from the University for a semester. After an unsuccessful legal over a year and a half, to win recognition of her right to dress according to what she considered a religious and moral duty, she abandoned her medical studies in Turkey and pursued them at the University of Vienna, in Austria.

The ECtHR applied in a lenient way its traditional doctrine of the national margin of appreciation and sustained the Turkish government’s position. According to the Court, the Turkish authorities had acted within a legitimate margin of discretion when they considered that imposing certain policies contrary to the wearing of religious garb at the University was a restriction of the students’ religious freedom, which was ‘necessary in a democratic’ society in the meaning of Article 9.2 ECHR. In the eyes of the Court, the prohibition of wearing Islamic headscarves at the Turkish University was justified by the protection of the constitutional principle of secularism (*laïcité*), conceived as a guarantee of democracy and a safeguard against a possible advance of Muslim radicalism in Turkey.⁵⁷ The ECtHR agreed with the Turkish government’s argument that the veto on personal religious symbols served to generate a climate of tolerance and to avoid a social pressure on female students who refused to wear the headscarf.

It is not my intention to deal with the various deficiencies of the rationale of this case in detail (including defects in the evaluation of the facts, which was not particularly careful).⁵⁸ Here, it suffices to note that the ECtHR made use of bizarre and hypothetical arguments such as ‘the impact which wearing such

faith in public and those others who maintain that the preservation of secular democracy in Turkey requires a firm grip on banning any visible expression of religion—particularly of Islam—in the public space. See Ö Denli, ‘Between Laicist State Ideology and Modern Public Religion: The Head-Cover Controversy in Contemporary Turkey’, in Lindholm, Durham and Tahzib-Lie (eds) (n 17) 497–511; R Bottoni, ‘The Origins of Secularism in Turkey’ (2007) 9 Ecclesiastical Law Journal 175–86.

⁵⁷ Some attempts in 2008 to change the law were declared unconstitutional by the Turkish Constitutional Court. In February 2008, the Turkish Parliament approved a change in the Constitution that would allow female students to wear their headscarves at University. The constitutional change received a wide support—it was approved by 411 of the 550 members of parliament, far beyond the required two thirds of parliament. In June 2008, the Constitutional Court declared the measure unconstitutional for violation of the principle of secularism (sources: Reuters, BBC, The New York Times, Human Rights Watch). For a brief comment on these events, see I Dagi, ‘The AK Party, Secularism and the Court: Turkish Politics in Perspective’ (2008) 18 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 1–9.

⁵⁸ See, for a detailed analysis, the chapters by TJ Gunn and others in the collective book *Islam, Europe* (n 35). See also N Lerner, ‘How Wide the Margin of Appreciation? The Turkish Headscarf Case, the Strasbourg Court, and Secularist Tolerance’ (2005) 13 *Willamette Journal of International Law and Dispute Resolutions* 65–85; B Chelini-Pont and E Tawil, ‘Brèves remarques sur l’arrêt Leyla Sahin’ (2006–07) 2 *Annuaire Droit et Religions* 607–11; T Lewis, ‘What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation’ (2007) 56 *International and Comparative Law Quarterly* 395ff. Among Spanish legal literature, see S Cañamares, *Libertad religiosa, simbología y laicidad del Estado* (Pamplona 2005) 179–80; I Briones, ‘El uso del velo islámico en Europa: un conflicto de libertad religiosa y de conciencia’ (2009) 10 *Anuario de Derechos Humanos—Nueva Época* 17–82; J Martínez-Torrón, ‘La cuestión del velo islámico en la jurisprudencia de

a symbol, which is presented or perceived as a compulsory religious duty, may have on those who chose not to wear it⁵⁹ (curiously, the Court did not mention the same reasoning in the opposite direction, ie, the impact of the ban of headscarf on those who do choose to wear it—obviously a massively more intrusive restraint). That argument implies, ultimately, a view that perceives religion predominantly as a potential factor of conflict, especially considering that there was no evidence (let alone sufficient evidence) of the intolerant atmosphere that wearing headscarves would allegedly generate at the University, or of any real pressure on uncovered female students on the part of their female or male schoolmates. As in *Dahlab*, the Court seemed to take for granted that the neutrality of the public sphere is best served when religion is absent or at least ‘invisible’. The paradoxical consequence of this reasoning is to assume that a climate of tolerance and respect can be achieved through the intolerance towards a particular form of religious expression, and then to conclude on the basis of mere hypotheses that there is clear evidence of a ‘pressing social need’.

In spite of its flaws and of the many criticisms received, the rationale of *Leyla Şahin* has not remained an isolated episode in the life of the ECtHR. The principles and perspective present in *Leyla Şahin* have been subsequently used by the Court to decide against the applicants in other cases of students or teachers that had diverse sanctions imposed for wearing Islamic headscarves at school in Turkey⁶⁰ and also in France, where the restrictive policies on the use of religious garb in public schools (but not at the University) were confirmed and reinforced by the 2004 law on religious symbols.⁶¹

Thus, in the cases *Dogru* and *Kervanci*, in 2008,⁶² involving two 12-year-old female students of French public schools who refused to remove their headscarf in physical education classes, the ECtHR declared, by a unanimous decision, that the disciplinary measure adopted against the applicants—their expulsion from school—was justified in the light of the principle of proportionality, and, consequently, there was no violation either of their religious freedom or of their right to education. The rationale of the Court, following explicitly and repeatedly

Estrasburgo’ (2009) 4 *Derecho y Religión* 94–98. See also the dissenting opinion of Judge Tulkens to the Grand Chamber decision.

⁵⁹ *Leyla Şahin* (n 55) s 108 and *Leyla Şahin* (n 55) s 115.

⁶⁰ *Köse and 93 other applicants v Turkey*, ECtHR, Dec Adm 26625/02, 24 January 2006; *Kurtulmus v Turkey*, ECtHR, Dec Adm 65500/01, 24 January 2006. See Martínez-Torrón (n 58) 98–101.

⁶¹ *Loi n 2008-224*, 15 March 2004. The ECtHR provides a general overview of the debate, as well as of the most relevant legislation and case-law, in ss 17–32 of the ‘twin’ decisions *Dogru* and *Kervanci* (n 62). For an analysis of the situation in the first years of the public debate about the Islamic headscarf in France, see D Le Tourneau, ‘La laïcité à l’épreuve de l’Islam: le cas du port du “foulard islamique” dans l’école publique en France’ (1997) 28 *Revue Générale de Droit* 275–306. For a critical assessment of the 2004 law in France, see A Garay, ‘Laïcité, école et appartenance religieuse: pour un bilan exigeant de la loi n 2004-228 du 15 Mars 2004’ (2005) 4 *Cahiers de la Recherche sur les Droits Fondamentaux: Quel avenir pour la laïcité cent ans après la loi de 1905?* 33–48; B Chelini-Pont and TJ Gunn, *Dieu en France et aux Etats-Unis. Quand les mythes font la loi* (Paris 2005). The issue has attracted also the attention of Spanish scholars; see, among others, Cañamares (n 58) 70ff; A González-Varas Ibáñez, *Confessioni religiose, diritto e scuola pubblica in Italia. Insegnamento, culto e simbologia religiosa nelle scuole pubbliche* (Bologna 2005) 229ff; MJ Ciáurriz, ‘Laicidad y ley sobre los símbolos religiosos en Francia’ in A Motilla (coord), *El pañuelo islámico en Europa* (Madrid 2009) 91ff.

⁶² *Dogru v France* and *Kervanci v France*, both of 4 December 2008. For a comment on those decisions, see B Chelini-Pont and D Girard, ‘Le voile musulman et la conception française de l’Etat laïc’ (2009) 19 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 1–11; Martínez-Torrón (n 58) 103–07.

the doctrine set up by *Leyla Şahin*, underscored the importance of the principle of secularism in France, as in Turkey, and elaborated on the necessity of preserving the atmosphere of neutrality at school as a way of protecting the rights of other members of the school community. It also insisted on recognizing a broad margin of discretion to national authorities when they apply restrictive measures to religious freedom or freedom of expression in that context.

It is worth mentioning that the Court, surprisingly enough, seemed to share the perspective of some French courts, which attributed to the applicants the creation of a climate of tension at the school with their 'intransigent' attitude.⁶³ That is, it would seem that those guilty of causing the tense situation were the women that could be the victims of a violation of a fundamental right and not those who interfered with their religious freedom (let us not forget that the applicants' claim was not ungrounded, for the ECtHR accepted, like the French government, that there had been an interference with the applicants' religious freedom, although it finally reached the conclusion that the interference was justified under Article 9.2 ECHR).⁶⁴ And it is even more shocking that the European Court renounced all control on the use of the national margin of appreciation in the light of the principle of proportionality with respect to the fact that the school authorities had rejected, without providing any reason, the applicants' suggestion to wear a hat or balaclava instead of a headscarf.⁶⁵ There is nothing in these decisions reflecting the sensible criteria of the *least restrictive means* proposed by the authority in the United States,⁶⁶ or of the *minimal impairment* doctrine elaborated by the Canadian jurisprudence,⁶⁷ which require, when a limitation on religious freedom is inevitable, a search for the least invasive alternative.⁶⁸

⁶³ See *Dogru and Kervanci* (n 62) ss 13 and 74.

⁶⁴ cf *ibid* ss 34 and 46–48.

⁶⁵ cf *ibid* 75.

⁶⁶ There has been a tendency to assume that the 'least restrictive means' test died along with the 'compelling state interest test' in the aftermath of the US Supreme Court's decision in *Employment Division, Dep't of Human Resources v Smith*, 494 US 872 (1990). However, reinstatement of that test remains in effect in federal settings, see *Gonzales v O Centro Espirita Beneficente Uniao Do Vegetal*, 546 US 418 (2006). In fact, a majority of jurisdictions within the United States have retained heightened scrutiny, typically including a variant of the least restrictive means or narrow tailoring requirements. See WC Durham Jr and RT Smith, 'Religion and State in the United States at the Turn of the Twenty-First Century' in S Ferrari and R Cristofori (eds), *Law and Religion in the 21st Century* (Farnham 2010) 79–110; WW Bassett, WC Durham Jr and RT Smith, *Religious Organizations and the Law* (Mason 2010) s 2.66.

⁶⁷ See N Lerner (n 58) 84–85; J Woehrling, 'L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse' (1998) 43 McGill Law Journal 325ff; WC Durham Jr, 'Freedom of Religion: The United States Model' (1994) 42 American Journal of Comparative Law Supp 624ff. The issue of the least restrictive alternatives for religious freedom, in the context of a deep analysis of the use of the principle of proportionality, has been studied by J Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 Emory International Law Review 465–98. For an interesting application of this criterion by the Canadian Supreme Court, see the decision *Multani v Commission scolaire Marguerite Bourgeoys*, 2006 SCC 6, JE 2006-508, related to the wearing of a Sikh kirpan (a religious object that resembles a small dagger) within the school premises. For a comment on this decision, see A Decroix, 'Les symboles religieux au sein des établissements scolaires: l'exemple du port du kirpan dans les écoles canadiennes' (2006–07) 2 Annuaire Droit et Religions 337–43; S Cañamares Arribas, 'Simbología religiosa en la escuela. Comentario a la sentencia del Tribunal Supremo de Canadá Singh-Multani c Marguerite-Bourgeoys (Commission Scolaire)' (2006) 11 Revista General de Derecho Canónico y Derecho Eclesiástico del Estado 1–11.

⁶⁸ A similar permissive attitude towards the State margin of appreciation was already present in three other cases declared inadmissible by the ECtHR, following the trail left by *Leyla Şahin*, which also related to conflicts caused by the wearing of religious garb, but this time with regard to rules or procedures of public safety instead of rules on school clothing. Those rules imposed indirectly a limitation on certain religious practices, but they had a lesser actual impact on the lives of the applicants. In two of these cases, the conflict was caused by the refusal of male Sikhs to remove their turban from their heads, either to pass the security controls before entering

In any event, *Dogru* and *Kervanci* have soon influenced the subsequent case law of the ECtHR, as we can see in six recent decisions of 2009, rendered on the same date and related to similar factual circumstances. In all of them, the applicants were students that had been expelled from school, in diverse French towns, and in application of the 2004 law against personal religious symbols in public schools, for persistently wearing religious clothing.⁶⁹ The ECtHR, in six almost identical decisions that explicitly follow the rationale of *Dogru* and *Kervanci*, found that the disciplinary measures against the students were justified, despite the fact that now the prohibition of religious clothing was not limited to the sports classes but extended to all school hours and premises. The only difference with *Dogru* and *Kervanci* is that the Court did not consider it necessary to deal with those six applications in a full decision on the merits and chose the more expeditious way of declaring them inadmissible as ‘manifestly ill-founded’. This choice implies, in practice, a total and unconditional endorsement of the controversial French law of 2004. This is important to note, for this law is explicitly aimed at imposing a limitation on a concrete aspect of the exercise of religious freedom and its *raison d’être* is the interest in reducing the visibility of religion (especially Islam) in the public school environment.

6. State Neutrality and Religious Identity: is there a Recent Shift in the Court’s Case Law?

An analysis of the Strasbourg case law reveals that, seemingly, the Court has sometimes denied that Article 9 ECHR protects conscientious objections against ‘neutral’ laws, and some other times it has justified national policies aimed at imposing a conception of the public sphere that excludes the visibility of religion. It is not easy to avoid the impression that former references of the ECtHR to pluralism, and to the central role that pluralism plays in a democracy, risk yielding to an exclusionary concept of neutrality. By nature, pluralism is inclusive, and tends to reflect the plurality of positions—religious or not—actually existing in society.⁷⁰ On the contrary, the notion of neutrality proposed by the Turkish and French interpretations of secularism (*laïcité*),

the boarding area in the Strasbourg airport (*Phull v France*, ECtHR, Dec Adm 35753/03, 11 January 2005) or to take an identity photo that could be considered valid for the renewal of a driver licence (*Mam Singh v France*, ECtHR, Dec Adm 24479/07, 13 November 2008). In the third case, the applicant was a Moroccan Muslim woman who was refused a visa to travel to France and join her husband because, when asked to remove her headscarf at the French consulate for identification purposes, she declined to do it in the presence of an agent other than a woman (*El Morsli v France*, ECtHR, Dec Adm 15585/06, 4 March 2008). In all these cases, the applicants had suggested different ways to make their religious duties compatible with security rules, but the ECtHR not even considered the possibility that French authorities had exceeded their margin of appreciation when they rejected those suggestions *tout court* and without any possible alternative.

⁶⁹ In four of these decisions, the applicants were female Muslim students that felt morally obliged to wear a headscarf: *Aktas v France*, ECtHR, Dec Adm 43563/08; *Bayrak v France*, ECtHR, Dec Adm 14308/08; *Gamaleddyn v France*, ECtHR, Dec Adm 18527/08; *Ghazal v France*, ECtHR, Dec Adm 29134/08. In the other two, the applicants were male Sikh students that had been expelled for wearing a *keski*—a more discreet garb that is usually worn under the turban characteristic of Sikhs (*Jasvir Singh v France*, ECtHR, Dec Adm 25463/08, and *Ranjit Singh v France*, ECtHR, Dec Adm 27561/08). The six decisions were rendered on 30 June 2009.

⁷⁰ See S Ferrari, ‘The New Wine and the Old Cask: Tolerance, Religion and the Law in Contemporary Europe’ (1997) 10 *Ratio Juris* 75–89.

ratified by the Court, is exclusive of religion in some areas of public life, particularly in educational settings—virtually any ideological or philosophical position may be visible, as far as it is not religious. The result of these policies can be described as ‘mutilated’ pluralism and does not seem compatible with real neutrality but rather with that deformation of neutrality that makes it, always and necessarily, synonymous with ‘secularism’.

It is true that the European Court has not actively supported this exclusive notion of neutrality and has only applied the traditional margin of appreciation doctrine, trying not to impose unnecessary uniform European patterns on national systems of relations between State and religion. However, the mere fact that the ECtHR justified the French and Turkish secularist policies that limit expressions of religious identity, without enough evidence of a danger for public order, might denote a certain agreement with the philosophy underlying those policies—that the public sphere is better organized, and ‘less problematic’, when religion is absent. Indeed, other decisions⁷¹ seem to indicate some ambivalence of the Court, which has been at times very careful to protect the individuals’ *right not to disclose*, even indirectly, their religion or beliefs—an aspect of religious freedom which is *implicit* in Article 9 ECHR—but has not always shown the same zeal in protecting individuals’ *right to express* their religion or beliefs in *practice*, ie, the right to adjust their conduct in ordinary life to their moral tenets, an aspect that is *explicit* in Article 9 ECHR. We should not forget that, while on its face a right not to disclose is less likely to interfere with the rights of others than a right to manifest, both can give rise to impermissible discrimination on the ground of religion or belief.

Sometimes, it has been suggested that this attitude could be explained by the declared interest of French and Turkish secularist policies in restricting the visibility of some symbols of Islam that could be understood as offensive for women (the female headscarf especially) or even as expressions of Islamic extremism, and that could exert pressure on people, especially on Muslims who refuse to wear those symbols.⁷² But the fact is that a similar notion of neutrality inspired the Chamber’s decision in the *Lautsi* case (2009),⁷³ seemingly implying that the neutral organization of the public school system compels the State to eliminate all visible religious symbols, and the crucifix in particular, out of respect for the secularist convictions of some parents or students.

Fortunately, the Grand Chamber decision in the same case, in 2011, when overruling the Chamber’s judgment, denied that this exclusive notion of neutrality was the only acceptable one and pointed out that neutrality could

⁷¹ See *Grzelak v Poland*, 15 June 2010 (indirect disclosure of a student’s belief in the school reports through reporting his refusal to participate in confessional religious instruction); *Alexandridis v Greece*, 21 February 2008 and *Dimitras et al v Greece*, 3 June 2010 (oath formulas); *Sinan İşik v Turkey*, 2 February 2010 (mention of religion in identity cards). For a comment on *Dimitras*, see A López-Sidro, ‘Libertad religiosa y juramento en el Tribunal Europeo de Derechos Humanos. el caso Dimitras y otros contra Grecia’ (2010) 24 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 1ff; for a comment on *Sinan İşik*, see Z Combalá, ‘Relación entre laicidad del Estado y libertad religiosa: a propósito de la jurisprudencia reciente del Tribunal Europeo de Derechos Humanos’ (2010) 24 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 1 ff.

⁷² See Martínez-Torrón (n 35).

⁷³ See especially *Lautsi v Italy* (3 November 2009) ss 56–57.

also be achieved by a school environment that is inclusive and, therefore, open to visible expressions of both majority and minority religions or worldviews.⁷⁴ According to the Grand Chamber, the decision about the presence of religious symbols in public schools falls within the State margin of appreciation and the mere display of a crucifix in classrooms, as a sign of the religion of the majority of the Italian population, is not sufficient to conclude that there is a process of indoctrination. This is especially true, taking into account that the Italian school environment was open to practices and visible expressions of other minority religions—for instance, students could freely wear Islamic headscarves, and optional religious education of creeds other than Catholic could be organized at school.⁷⁵ The *subjective* feeling of some students about the crucifix—the Court added—was not enough to challenge the legitimacy of a school setting that was *objectively* built according to an open and inclusive concept of neutrality.⁷⁶

In my opinion, *Lautsi* (GC) would have been even better if it had elaborated more on some points remarked in the concurring opinions of two judges. In particular, the idea that coercion should be the test to a violation of freedom of religion or belief, and not the subjective feeling of offence experienced by some persons in the presence of some religious symbols. Just as religious believers do not have the right to be free from criticism, atheistic believers do not have the right to be free from exposure to symbols—personal or institutional—that may offend their convictions or feelings.⁷⁷ In addition, it would have been useful if the Court had said more clearly that the value protected by the Convention is religious freedom and not secularism, however legitimate and traditional the latter may be in some European States.⁷⁸ Separationism is not included in the ECHR, only the State neutrality described above in this paper is, as a condition for the respect of religious freedom.⁷⁹ Finally, I would have also welcomed a more explicit statement by the Court about the fact that erasing all religious symbols from the school ‘panorama’ is not neutral but rather supportive of secularist ideologies over alternative religious worldviews.⁸⁰ Indeed, once the Court has recognized secularism as ‘philosophical conviction’ within the meaning of Article 9 ECHR and Article 2 of the First Protocol,⁸¹ probably the most coherent option is a pluralist and inclusive school environment, and

⁷⁴ See especially *Lautsi v Italy* (GC) (18 March 2011) § 74. See, on the *Lautsi* Grand Chamber decision, and from different perspectives, V Turchi, ‘La pronuncia della Grande Chambre della Corte di Strasburgo sul caso Lautsi C. Italia: post nubila Phoebus?’ (2011) *Stato, Chiese e pluralismo confessionale* <www.statoeChiese.it> accessed 15 December 2011, where further bibliographical references, especially to Italian legal literature, can be found; and P Ronchi, ‘Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*’ (2011) 13 *Ecclesiastical Law Journal* 287–97. See also the interesting essay, comparing the Strasbourg and the US approach to institutional religious symbols, written by J Witte Jr and NL Arold, ‘Lift High the Cross?’ Contrasting the New European and American Cases on Religious Symbols on Government Property’ (2011) 25 *Emory International Law Review* 5–55. In Spain, see S Cañameres Arribas, ‘Los símbolos religiosos en el espacio público: entre la amenaza real y la mera sospecha’ (2011) 20 *El Cronista del Estado Social y Democrático de Derecho* 60–67; S Meseguer Velasco, ‘Símbolos religiosos en colegios públicos: ¿hacia dónde camina la jurisprudencia europea?’ (2011) 5 *Anuario Jurídico Villanueva* 202–13.

⁷⁵ See especially *Lautsi* (n 74) ss 70–72, 74.

⁷⁶ *ibid* s 66.

⁷⁷ See concurring opinion of Judge Power.

⁷⁸ *cf* concurring opinion of Judge Bonello.

⁷⁹ See above the beginning of s 5.

⁸⁰ *cf* concurring opinion of Judge Power.

⁸¹ See *Lautsi* (n 74) s 58.

not an allegedly 'neutral' environment that excludes the visibility of religion, therefore giving pre-eminence to secularist views.⁸² This is applicable to the institutional display of the crucifix or other religious symbols, as well as to the personal wearing of religious garments as, for example, Islamic headscarves or Sikh turbans.

On the other hand, we should note that the past ECtHR support of active secularist policies, as well as its doctrine on the automatic supremacy of neutral laws over religious objections, mainly apply to education cases and, to a lesser extent, to public safety cases.⁸³

It is significant that, in recent years, the European Court has declined to support strict secularist policies, out of the educational environment, aimed at erasing the visibility of religion in the public square, as the case of *Ahmet Arslan* demonstrates.⁸⁴ In this case, the ECtHR held that forbidding the wearing of religious garment in the public square was a disproportionate limitation on religious freedom. The applicants were part of a religious Muslim group called *Aczimendi tarikan*, which gathered in Ankara, in 1996, coming from diverse Turkish regions, to participate in a religious ceremony in a mosque. They were arrested for walking around the city wearing the characteristic garment of their community—turban, loose pants (*saroual*) and tunic, all of black colour, and a cane in memory of Prophet Muhammad. Later, in the judicial hearing, most of them refused to uncover their head before the judge. The applicants were sentenced to a moderate fine (equivalent to 4 USD) in application of two old laws of 1925 (on the use of hats) and 1934 (on the use of religious attire). The sentence, however, was never executed. According to the Turkish government, the doctrines of that religious group were aimed at the replacement of the current democratic regime by a Sharia-based regime, and the arrest and prosecution of the applicants were justified by the aforementioned laws on religious attire and by the need to preserve public order and avoid acts of religious provocation or proselytism. The ECtHR, though recognizing and emphasizing the importance of the secularity principle for Turkish democracy, decided in favour of the applicants, taking into account that the *Aczimendi*'s attire was mandatory according to their beliefs and judging that the State interference in their religious freedom was not proportionate. In the Court's view, the government had not proved the alleged existence of a danger for the democratic principles and for the public order, because the applicants were ordinary citizens, without any specific public position of representation or responsibility, who had just worn their religious dress in public streets and places open to all. The Court noted that this circumstance was essential to

⁸² If the secularist notion of neutrality were the only legitimate option in the organization of the public school environment, it would imply that the State is obliged in practice to organize public schools in accordance with a specific philosophical conviction, with exclusion of all other convictions, religious or philosophical.

⁸³ See n 69, above.

⁸⁴ *Ahmet Arslan et al v Turkey* (23 February 2010). We could also recall other cases in which the ECtHR considered disproportionate and unjustified some sanctions imposed by the Turkish authorities on parliamentary representatives, politicians, religious leaders or journalists for publicly defending the use of female Islamic headscarf and openly criticizing the restrictions imposed by Turkish law. These decisions are: *Kavakçı v Turkey*, *Ilicak v Turkey* and *Silay v Turkey*, all of them decided on 5 April 2007 with almost identical reasoning; *Gündüz v Turkey* (4 December 2003); *Erbakan v Turkey* (6 July 2006); *Güzel v Turkey* (27 July 2006) and *Kutular v Turkey* (29 April 2008). See Martínez-Torrón (n 58) 101–03.

distinguish this case from other cases—especially *Leyla Şahin*—in which the applicants had worn religious garb in the specific environment of educational institutions.

And more recently, with respect to the automatic predominance of neutral laws over individual conscience, the Grand Chamber decision on *Bayatyan v Armenia*⁸⁵ demonstrates that, at least in milieus other than education, the Court's trend might be switching towards a stronger protection of freedom of conscience *vis-à-vis* State laws that pursue legitimate secular goals. The *Bayatyan* case had its origin in the application of an Armenian citizen, a Jehovah's Witness, who refused to comply with his military service for conscience reasons and, although prepared to perform alternative civil service, was sentenced to two and a half years of prison—in those times, Armenia had not yet enacted its legislation on the civil service available to conscientious objectors to military service. Without going here into the details of the decision,⁸⁶ it is interesting to note that the Court, applying the doctrine of the European Convention as 'living instrument', explicitly departed from the prior and well established case law of both the European Commission and the European Court of Human Rights. In brief, that case law maintained that, as neither military service nor alternative civilian service could be considered 'forced or compulsory labour' in the light of Article 4.3(b) ECHR, conscientious objections to those services did not fall within the scope of protection of Article 9 ECHR. That reasoning was not persuasive at all, but it took quite a few years for the Court to realize it. In *Bayatyan*, the Grand Chamber made clear that it was not the purpose of Article 4 ECHR to restrict or nuance the protective scope of Article 9 ECHR, and that this was even more obvious, taking into account how the protection of conscientious objectors' rights had evolved in the Council of Europe area.⁸⁷ The ECtHR judged the case exclusively in the light of Article 9 ECHR and decided in favour of the applicant.

Two of the arguments used by the Court are particularly relevant here. First, although Article 9 ECHR does not specifically mention conscientious objection, freedom of conscience is protected by that article when there is 'a serious and insurmountable conflict' with legal duties and is based on a 'conviction or belief of sufficient cogency, seriousness, cohesion and importance'.⁸⁸ Secondly, the penalties imposed on the applicant could not be deemed a measure 'necessary in a democratic society', especially taking into account that there were other alternatives to accommodate the competing interests of the State

⁸⁵ *Bayatyan v Armenia* (GC) (7 July 2011). The Grand Chamber overruled the previous Chamber decision, of 27 October 2009. Let us note, incidentally, that the only dissenting opinion in *Bayatyan* Chamber's decision was written by Judge Power, who also wrote an interesting concurring opinion in n 74. In *Bayatyan*, the Grand Chamber essentially accepted Judge Power's analysis.

⁸⁶ See in that respect, in the context of the former case law of the ECtHR and of the European initiatives to protect conscientious objection to military service, R Navarro-Valls and J Martínez-Torrón, *Conflictos entre conciencia y ley: las objeciones de conciencia* (2nd edn Madrid 2012) (forthcoming). See also, for the European Commission and the European Court's case law on conscientious objection to military service prior to *Bayatyan*, C Evans (n 9) 170–79; J Martínez-Torrón, 'El derecho de libertad religiosa en la jurisprudencia en torno al Convenio Europeo de Derechos Humanos' (1986) 2 *Anuario de Derecho Eclesiástico del Estado* 451–53.

⁸⁷ See especially *Bayatyan* (GC) ss 100–03.

⁸⁸ *ibid* s 110.

and the conscientious objector.⁸⁹ The Court referred those arguments to the particular situation of an objector to military service, but no doubt they are applicable to all other types of conflicts between individual conscience duties and neutral laws, provided that those moral obligations are grounded on a 'conviction or belief of sufficient cogency, seriousness, cohesion and importance'. It would be unsustainable to affirm that the ECtHR's reasoning is valid only for objection to military service or for those other convictions that the Court decides to select in the future as 'deserving' a qualified protection by Article 9 ECHR, among other reasons because the Court itself has declared repeatedly that States are not competent to assess the legitimacy of beliefs and the means to express them⁹⁰—if the State cannot make such an assessment, even less can the Court do so. The relevant factor is not to count on the sympathy or acquiescence of the Court but to verify that the conflict of conscience is grounded on beliefs—religious or not—'of sufficient cogency, seriousness, cohesion and importance'.

It is difficult to judge at present if the last Court's decisions on *Ahmet Arslan*, *Lausi* (GC) and *Bayatyan* are a turning point in the Strasbourg case law, opening the door to a deeper comprehension of religious and ideological pluralism that includes a higher protection of individual conscience rights and a more inclusive notion of the neutrality of the public sphere, or if those decisions merely reflect the uncertainties of an international court that navigates without clear points of reference through the increasing complexities of the relations between religion, law and society. Personally, I wish they were indeed indicative of a change of direction in the ECtHR's jurisprudence, which would be applicable also to education cases. It is certainly justifiable, and desirable, that the Court has a particular sensitivity on education issues, probably keeping in mind that minors tend to be more vulnerable and there is a greater need to guarantee their protection against indoctrination or religious pressure. However, in my opinion, and precisely because the realm of education is so special, the Court should put particular emphasis on construing a concept of pluralism and neutrality that protects, in practice, the religious identity of all and not only of those who identify with strictly secular positions.

⁸⁹ *ibid* s 125.

⁹⁰ See n 48 and accompanying text.