A Sign of the Times

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Formerly, the European Court of Human Rights was seldom concerned with religion. The Court polices the European Convention on Human Rights (ECHR) in the countries of the Council of Europe and Article 9 of the ECHR protects freedom of religion, but religious matters had rarely disturbed the Court. However, over the last twenty years, this has changed dramatically. Cases concerning religion, argued under Article 9 and other Convention rights, are now commonplace.[1] The Court has described freedom of religion as 'one of the foundations of a "democratic society" within the meaning of the Convention'[2] and has emphasized 'the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs'.[3]

Indeed in recent years a number of claimants have appeared before the Court because they have been prevented from manifesting their religion in everyday life. Typically, they have been stopped from wearing religious dress or symbols at work or school. A number of these cases have been unsuccessful because the Court has invoked the Specific Situation Rule. This rule recognises that a person's Article 9 rights may be influenced by the particular situation of the individual claiming that freedom. This principle is not of universal application: it only applies where someone has voluntarily submitted themselves to a system of norms, usually by means of a contract. This voluntary submission creates a 'specific situation' which limits the claimant's right to manifest their religion. The Court has applied this rule in relation to claimants who have voluntarily entered into a contract of employment,[4] those who voluntarily submit to military service,[5] those who voluntarily enrol at a university,[6] and in relation to those in jail.[7] The Court holds that once the claimant has voluntarily entered such a situation, then they cannot subsequently claim a breach of Article 9. So, for instance, once an employee has agreed to a contract of employment which includes Sunday working, they cannot subsequently claim that the Sunday working infringes their right to freedom of religion.

The Specific Situation Rule is not always consistently applied by the Court. Occasionally the Court has gone further, imposing an 'impossibility test'. Most notably, in *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France*[8] the Court commented that an 'alternative means of accommodating religious beliefs had … to be "impossible" before a claim of interference under article 9 could succeed'. However, this decision has not been followed. And some of the most recent decisions have gone to the other extreme and have not relied on the Specific Situation Rule at all. In recent cases concerning the Islamic headdress, the Court has accepted that the ban constituted an interference with the applicant's right to manifest her religion but has held that the ban was justified.[9]

These recent cases aside, there is a body of case law which shows that where a religious believer voluntarily submits to a non-religious situation, then this includes their agreement that their religious behaviour will be curtailed. So, if a Christian agrees to a contract of employment that includes a uniform policy excluding religious symbols, they cannot subsequently argue that being prevented from wearing crucifix breaches their Article 9 rights. However, interestingly, the Court has never developed this to cover the converse situation. The Religious Situation Rule would cover the situation where a non-believer voluntarily submits to a religious situation. If a non-believer enters a place of worship, a faith school or a religious bookstore, then surely their voluntary submission should be an answer to any claim that the religious setting breaches their Article 9 rights. However, a recent decision of the Court suggests that this logic will not be followed.

In *Lautsi v Italy*[10]a parent argued that displaying a crucifix in the State school attended by her children violated her right to ensure that their education conformed with her religious and philosophical convictions, contrary to Article 9

and Article 2 of the First Protocol, which protects the religious and philosophical beliefs of parents.[11] The Government maintained that the crucifix was not only a religious symbol but also the 'standard of the Catholic Church' and that as the Catholic Church was the only Church named in the Constitution it was therefore a symbol of the Italian state itself. The Italian courts agreed. The Administrative Court held that the crucifix was a symbol both of history, of Italian culture and identity, of the principles of equality, freedom and tolerance and of the secular state. However, the European Court of Human Rights disagreed. The Court concluded that there has been a breach of Article 2 of the First Protocol taken with Article 9. The Court held that a confessional symbol in the classroom restricted the right of parents to educate their children according to their beliefs and the right of the children to believe or not. What might be encouraging for some students could be emotionally disturbing for others, particularly those from religious minorities.

Lautsi v Italy is shortly to be considered again by the European Court of Human Rights – this time by the Grand Chamber.[12] How might the judgment differ if the suggested Religious Situation Rule is applied? It might be said that Lautsi in choosing the school for her child to attend voluntarily submitted to the ethos of that school, including the religious symbols. Much of the argument will hinge upon the nature of the school. The fact that it is a State school does not necessarily mean that it does not have a religious ethos of some description. Moreover, the judgment of the Italian Administrative Court seems to suggest that identification with the Crucifix is part of the culture of the Italian State and consequentially of the Italian State education system. It might be said that by voluntarily submitting to the Italian way of life, Lautsi agreed to the underlying religious aspects of that way of life. If the decision in *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* [13] is applied to the case, then it may be said that Lautsi's claim would fail since it was not impossible for her to ensure that her children were educated in an environment where there were no confessional symbols.

In short, there seems to be a basic inconsistency here. On the one hand, the Court has prevented believers from bringing faith into secular situations on the grounds that the believer has voluntarily entered the secular environment. On the other hand, the Court has allowed non-believers to remove faith from religious situations without considering that the non-believer has voluntarily entered the religious environment. The Religious Situation Rule would redress this imbalance and would be particularly useful in cases concerning faith schools and religious organisations. The Religious Situation Rule may be influential, pointing out that when someone voluntarily enters the religious realm they cannot automatically insist on secular standards. However, it is important that the Religious Situation Rule does not become a blunt instrument which allows courts to avoid the complex factual issues. The impossibility test in *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* [14] is a step too far for both the Specific Situation Rule and the Religious Situation Rule. Moreover, it must remain the case that these principles are not of universal application: they only apply in the rare situation where someone has clearly voluntarily submitted themselves to a system of norms, usually by means of a contract. This is important since courts in the UK seem to have forgotten this in relation to the Specific Situation Rule – but that is a different story.[15] If the Court is to continue make use of the Specific Situation Rule then it should also consider the suggested Religious Situation Rule.

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[1] See the Law and Religion Scholars Network (LARSN) Case Database: http://www.law.cf.ac.uk/clr/networks/lrsncd.html

[2] *Kokkinakis v Greece* (1994) 17 EHRR 397

[3] *Refah Partisi v Turkey* (2003) 37 EHRR 1.

[4] *Stedman v United Kingdom* (1997) 5 EHRLR 544; *Ahmad v United Kingdom* (1981) 4 EHRR 126.

[5] *Kalaç v Turkey* (1997) 27 EHRR 552.

[6] *Karaduman v Turkey* (1993) 74 DR 93.

[7] *X v United Kingdom* (1974) 1 D& R 41 (on the basis that the prisoner had broken his contract with society).

[8] (2000) 9 BHRC 27.

[9] See *Şahin v Turkey*(2005) 41 EHRR 8 and *Dogru v France* [2008] ECHR 1579

[10] [2009] ECtHR (Application No. 30814/06).

[11] The judgment is available only in French. I am indebted to Frank Cranmer for his summary of the decision.

[12] A Grand Chamber consists of seventeen rather than seven judges: see Article 27 of the ECHR.

[13] (2000) 9 BHRC 27.

[14] (2000) 9 BHRC 27.

[15] See *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, as critiqued by M Hill and R Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' [2007] *Public Law* 488 and R Sandberg, 'The Changing Position of Religious Minorities in English Law: The Legacy of *Begum*' in R Grillo *et al* (ed) *Legal Practice and Cultural Diversity* (Aldershot*:* Ashgate) 267