# Non-Religious Practice and Observance and the European Convention on Human Rights

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## General

Article 9 of the ECHR protects not only the right to freedom of religion but also freedom of thought and conscience. As the European Court of Human Rights consistently comments this is 'a precious asset' no less for atheists and agnostics than for religious believers.[1] Like religious beliefs, non-religious beliefs are worthy of protection under Art 9 if they pass the test of cogency and seriousness- as did, for example, the parent's secularist beliefs in the Italian school crucifixes case (*Lautsi v Italy* Appl No 30814/06, Grand Chamber, 18 March 2011). Freedom of religion or belief is singled out for (qualified) additional protection under Article 9 for 'worship, teaching, practice and observance' that manifests that freedom.

As between religious and non-religious beliefs the state has a duty of neutrality which is ' incompatible with any power on the State's part to assess the legitimacy of religious beliefs.' [2] As regards the right of parents to have their children educated in accordance with their religious and philosophical convictions (Article 2 of Protocol 1 to the Convention[3]):

> 'The State . …must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might not be considered as respecting parents' religious and philosophical convictions.' [4]

Non-religious beliefs have featured in two distinct types of claim at ECHR level: through positive manifestation of those beliefs and though claims to exemption from standard practices reflecting the majority religious position.

## Manifestation of non-religious beliefs

So far as the first- positive manifestation of beliefs- is concerned: this includes the right in exercise of freedom of expression (Art 10) to *criticise* religions. However, as is well-known from the controversial blasphemy jurisprudence the Court maintains that some state restrictions on this right can be justified under the margin of appreciation if the purpose is to protect other people from having their religious beliefs insulted (*Otto-Preminger Institute* v. *Austria;* [5] *I.A. v Turkey*[6]). *In Otto-Preminger* the court stated:

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[1] *Kokkinakis v. Greece* (1993) 17 EHRR 397, para. 31:
' As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.'

[2] *Manoussakis v. Greece (1996)*, 23 EHRR. 387, 400.

[3] 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.'

[4] *Kjeldsen Busk Masden and Pedersen v Denmark*, 7 December 1976, para. 53.

[5] *Otto-Preminger Institute v. Austria* (1995) 19 EHRR 34.

[6] Appl.no 42571/98, 13 Dec. 2005.

> [t]he respect for the religious feelings of believers as guaranteed in Article 9 [of the ECHR] can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration.[7]

This reasoning has come under attack from two quite different directions. Most critics argue that it is too protective of religious feelings, and amounts to the judicial creation of a right- absent from the Convention text- not to be offended. As three dissenting judges in *IA v Turkey* argued 'the time has perhaps come to "revisit" this case-law, which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press'.[8]

The second line of attack is that such protection should not only apply to *religious* feelings but also to attacks directed towards non-religious beliefs. In a notable separate Concurring Opinion in *Wingrove* v. *United Kingdom*[9], Judge Petitti argued that protection from offence should be extended to cover: '… both of religious beliefs and of philosophical convictions. … Profanation and serious attacks on the deeply held feelings of others or on religious or secular ideals can be relied on under Article 10 para. 2 (art. 10-2) in addition to blasphemy'.

Judge Petitti was clearly concerned to remove any special protection for religion by broadening the categories of offence. He referred in his Concurring Opinion to '… the use of a figure of symbolic value as a great thinker in the history of mankind (such as Moses, Dante or Tolstoy) in a portrayal which seriously offends the deeply held feelings of those who respect their works or thought' as justifying judicial supervision. Nevertheless the approach is problematic: for those concerned about introducing into the Convention a new right not to be offended, it goes in precisely the wrong direction by broadening and applying to secular ideas the notion of religious offence.

In principle the right to manifest one's non-religious beliefs should confer equal recognition on non-religious rituals (for example, ceremonies to name children or humanist funerals). It should be borne in mind, however, that people claiming the right to manifest their non-religious beliefs face the same potential hurdle that applies to manifestation of religious beliefs, that of demonstrating an intimate connection between their practice and belief to satisfy the *Arrowsmith* doctrine (*Arrowsmith v United Kingdom* Application 7050/75 (1978)).

The right not to be discriminated against on grounds of religion in the enjoyment of Convention rights (Art 14) could be invoked if the state fails to confer equal recognition to these forms of manifestation of non-religious belief. This is especially likely to be relevant in the case of rituals and observances where national law embodies a high degree of cooperation between state and religious authorities for the convenience of majority population drawn from a dominant religious group.

**Exemption from standard practices reflecting the majority religious position**

The second type of claim is in effect a question of conscience and can arise in various contexts eg non-participation in communal/ public element of religious observance - ( public prayers as in the recent Bideford case, decided in fact on other grounds, and exemption from swearing religious oaths of office (see *Buscarini v San Marino* (2000) 30(2) EHRR 208)).

Claims for exemption based on non-religious belief raise difficult questions. The most obvious way to accommodate such claims is through an opt-out from the contested practice

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[7] para. 47.
[8] Joint Dissenting Opinion of Judges Costa, Cabral Barreto and Jungwiert, para. 8.
[9] (1997) 24 EHRR 1.

(as occurs, for instance, in relation to religious education and collective worship in schools). This method parallels the long-standing approach to some minority religious and philosophical beliefs, notably conscientious objection to military service. It is clear, though, that for the state to require an individual to publicly identify with minority religious or non-religious beliefs as a condition of exemption may itself violate Article 9: see *Alexandridis v Greece*.[10] Increasingly legal objections are raised against the adequacy of opt-out provisions on the grounds that – especially as regards children in the case of religious education- that to invoke them involves stigmatism and, it is argued, that therefore instead state practices should be altered so that the clash of conscience does not arise in the first place (for example by changing the religious education syllabus to make it more 'objective' See eg *Grzelak v Poland Appl No. 7710/02 (15 June 2010)* and *Hasan and Zengin v Turkey* (2008) 46 EHRR 44*)*.

This approach in turn, however, raises the prospect of a so-called "secularists' veto" on certain religious observances. A veto of this kind was recently been rejected in one prominent instance, the unsuccessful challenge to the crucifix in Italian schoolrooms- the 2011 Grand Chamber decision in *Lautsi v Italy*. The *Laut*si decision gives priority to state discretion under the margin of appreciation in framing practices that reflect beliefs of the majority religious group. The decision appears to make clear that states are free to adopt a secular or separationist approach to religion[11] but that this is not an inherent requirement of freedom of religion and belief at the European level. Although some have criticised the decision on this basis, it should be noted, that the margin of appreciation works in a parallel way within officially secular states to deny protection for religious observance/ manifestation by religious groups in schools and universities (see *Dogru v France* Application No. 27058/05 (4 December 2008); *Dahlab v Switzerland, Application no.* 42393/98, (15 February 2001);*Sahin v Turkey* (2007) 44 EHRR 5).

[10] *Alexandridis v. Greece*, Application no. 19516/06, (21 February 2008).
[11] Or to have an established religion or to adopt a cooperative model.