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COMMENTARY: Bayatyan – a European Court judgment with an impact far beyond Armenia

By Derek Brett , Conscience and Peace Tax International

The European Court of Human Rights (ECtHR) has unequivocally declared that conscientious objection to military service is protected under Article 9 ("Freedom of thought, conscience and religion") of the European Convention on Human Rights and Fundamental Freedoms. Derek Brett of Conscience and Peace Tax International <http://www.cpti.ws/> argues, in this personal commentary for Forum 18 News Service, that the ECtHR judgment in favour of Vahan Bayatyan, an Armenian Jehovah's Witness jailed for conscientious objection to compulsory military service has implications far beyond Armenia. He notes that the judgment also has implications for Azerbaijan and Turkey within the Council of Europe, and for states outside the organisation such as Belarus. He suggests that the ECtHR may develop its thinking to directly address the problem of coercion to change a belief such as conscientious objection, as well as to follow the UN Human Rights Committee in strengthening the protection of conscientious objection.

On 7 July, after 61 years of the European Convention on Human Rights and Fundamental Freedoms (ECHR), the European Court of Human Rights (ECtHR) in Strasbourg ruled unequivocally that conscientious objection to military service is protected under the ECHR. In the case of Bayatyan v Armenia (Application no. 23459/03), it found under Article 9 ("Freedom of thought, conscience and religion") that the 2002 conviction of Vahan Bayatyan, a Jehovah's Witness, for his refusal to perform military service, at a time when no alternative was available, was an unnecessary interference with his freedom to manifest his religion. Bayatyan had been jailed from September 2002 to July 2003 for refusal on grounds of conscience to perform compulsory military service.

Of the 17 judges who took part, only the Armenian judge, Alvina Gyulumyan, dissented from this month's Grand Chamber decision. The latest decision overturns a controversial judgment delivered by a seven-person Chamber of the ECtHR in October 2009 (see this author's previous 2009 commentary at http://www.forum18.org/Archive.php?article_id=1377). Bayatyan had been given leave to appeal against this to the Grand Chamber, whose decision is final.

The judgment has been welcomed by human rights defenders in Armenia, but it has not resulted in the freeing of the 69 conscientious objectors who were still jailed there at the time. All had refused the "alternative service" available under a law which was being prepared at the time Bayatyan was jailed, and which he himself was never given the option of performing. But this "alternative service" is not purely civilian in nature, and compared with military service is of a discriminatory duration. Legislation brought forward by the government still does not seem to deal with these inadequacies (see F18News 7 July 2011 http://www.forum18.org/Archive.php?article_id=1591).

When Bayatyan was convicted, there was no alternative to armed military service in Armenia; the alternative service law came into being only in December 2003, six months after he was released on parole having served ten months of a two-and-a-half year sentence. Its inadequacies therefore did not feature directly in this case. The judgment does, though, open the door for the treatment of the current detainees and the adequacy of Armenia's provisions for conscientious objection to military service to be challenged before the ECtHR. It is also directly relevant to the current situation in Azerbaijan and Turkey within the Council of Europe and has implications for Belarus if it aspires to join the Council of Europe. In the longer term, the effects will be felt world-wide.

The Grand Chamber judgment

In making this month's judgment

(<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=887947&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>), the Grand Chamber first considered whether the case law needed to be updated, in line with the concept that the ECHR is a "living instrument", the interpretation of which develops over time. It noted how many states have in recent decades allowed for conscientious objection to military service, and decided that it was no longer adequate for a state to require a conscientious objector to perform military service simply because its laws did not provide for any alternative. It must justify in each individual case the strict necessity for the limitation thus placed on the freedom of thought, conscience and religion.

This is similar to the line which has been taken by the UN Human Rights Committee in interpreting the International Covenant on Civil and Political Rights (ICCPR) (for more details of the arguments involved see again the commentary at http://www.forum18.org/Archive.php?article_id=1377).

"Judgments issued by the European Court cannot be ignored"

Armenia claimed that Bayatyan's conviction had been necessary to protect public order. The ECtHR was dismissive of this argument, noting for example in paragraph 117 that: "The Court, however, does not find [this] to be convincing in the circumstances of the case, especially taking into account that at the time of the applicant's conviction the Armenian authorities had already pledged to introduce alternative civilian service and, implicitly, to refrain from convicting new conscientious objectors".

The ECtHR also noted that "democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position". It went on to argue that "respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society" (see F18News 7 July 2011 http://www.forum18.org/Archive.php?article_id=1591).

This is a strong indication that the ECtHR would not look kindly on continued actions against Jehovah's Witnesses in Armenia over the issue of military service.

The next step in bringing the treatment of conscientious objectors to military service in Armenia into line with international standards may however come through the political organs of the Council of Europe, acting on the reports of Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights.

Hammarberg argued on 19 July 2011 that "judgments issued by the European Court cannot be ignored" and that "prompt, full and effective execution of the Court's judgments is key for the effective implementation of the European Convention's standards in domestic law" (see http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=154).

Pressure may also come through UN Human Rights Committee consideration of Armenia's report under the ICCPR in July 2012. The Committee has repeatedly encouraged States to ensure that the arrangements for alternative service are entirely under civilian control. In Armenia they are not, even under the latest proposals (see F18News 7 July 2011 http://www.forum18.org/Archive.php?article_id=1591).

Moreover, the Committee ruled on 9 November 1999, in the case of Frédéric Foin v. France (CCPR/C/67/D/666/1995 <http://www.wri-irg.org/node/6140>), that any difference in duration between military and alternative service must be "based on reasonable and objective criteria". This statement in paragraph 10.3 was accompanied by the comment that a difference in duration could not be set in order to test the sincerity of applicants' convictions. The Committee has subsequently described as "punitive" alternative service which lasts 50 per cent longer than military service.

In Armenia, the duration of alternative service, at 42 months, is the longest in the world. So is the difference (18 months) between the length of military and of alternative service.

Implications for Turkey, Azerbaijan and Belarus

No Council of Europe member state will again be able to claim successfully before the ECtHR that it can prosecute conscientious objectors to military service just because it has no appropriate legislation. This applies particularly to Turkey and Azerbaijan.

Turkey has never acknowledged the right of conscientious objection to military service. In 2006 the ECtHR ruled that the repeated imprisonment of Turkish conscientious objector Osman Murat Ülke, and his continuing situation of undocumented "civil death" amounted to inhuman and degrading treatment. But the ECtHR but did not rule on the issue of conscientious objection itself (see F18News 17 March 2010 http://www.forum18.org/Archive.php?article_id=1423).

On 7 July 2010, in an interim directive, the ECtHR instructed Turkey to "suspend all penal actions" against Baris Görmez, a Jehovah's Witness conscientious objector, and "not to execute any sentence issued" until it rendered its final judgment in the Bayatyan case. Turkey ignored this; on 26 January 2011 Görmez was sentenced to imprisonment for the ninth time, having been yet again called up to perform military service. The interim directive had been issued in response to a case filed with the ECtHR in March 2008 by Görmez and three other Turkish Jehovah's Witness conscientious objectors. The ECtHR will probably now move rapidly to declare this case admissible. It will almost certainly be decided in line with the Bayatyan judgment.

Also, now that the ECtHR has stated clearly that conscientious objection to military service is protected under the ECHR, a challenge could be launched to Article 318 of the Turkish Penal Code ("Alienating the population from the armed forces"). This Article has been interpreted by the Turkish courts as criminalising all media reporting on the issue.

Azerbaijan included the right to conscientious objection in its 1995 Constitution, but is still delaying implementation of its commitment (given on joining the Council of Europe) to respect this right. In March 2008, two Jehovah's Witnesses in Azerbaijan who had been imprisoned for their conscientious objection to military service, Mushfiq Mammedov and Samir Husenyov, filed applications to the ECtHR. A third, Farid Mammedov (no relation of Mushfiq) filed his application on 18 July 2011, having had his appeal to the Supreme Court rejected in January 2011 (see F18News 22 February 2011 http://www.forum18.org/Archive.php?article_id=1544). No ECtHR admissibility decision has yet been made, but these cases too will almost certainly be decided in line with the Bayatyan judgment.

Belarus is not at present a member of the Council of Europe, so there is no recourse to the ECtHR for the three conscientious objectors sentenced since January 2009 for refusing military service. The country was also considering introducing an Alternative Service Law (see F18News 29 June 2010 http://www.forum18.org/Archive.php?article_id=1462). But no more has been heard of this following the recent political crackdown. If Belarus is ever to be admitted to the Council of Europe, it is now almost certain that an Alternative Service Law compatible with international standards will first have to be passed.

South Korea, and the Organisation of American States

The implications of the Bayatyan judgment will also resonate far beyond Europe. It will be seen as placing a seal of approval on what the ECtHR called a "virtually general consensus on the question [of conscientious objection to military service] in Europe and beyond". Bayatyan should weigh heavily with the Constitutional Court in South Korea, which is about to adjudicate on the issue. And when the issue next comes before the Inter-American Commission on Human Rights, that body is likely to bring its jurisprudence into line with the ECtHR.

Where next?

Bayatyan is a Jehovah's Witness, as are the other conscientious objectors to military service who currently have cases pending with the ECtHR. However the Court made clear that its new position on conscientious objection to military service did not concern just members of one religious group, or conscientious objection on religious grounds. Paragraph 110 of the Bayatyan judgment stated: "opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9". This definition could include a secular pacifist objector, such as in the Turkish case of Ülke mentioned above.

Coercion the next ECtHR jurisprudential development?

It will be interesting to watch the further development of the jurisprudence. One part of Bayatyan's original complaint was that the primary goal of his prosecution was to coerce him into abandoning his religious and conscientious objection to military service. In December 2006 the ECtHR had ruled this part of the complaint inadmissible, claiming there was no evidence for it. This was a very strange decision, given that Bayatyan's sentence had been increased on appeal partly on the grounds that he had not repented of his "crime". Also at the time of his appeal an offer had been made to drop all charges if he now withdrew his objection and consented to perform military service (see again the commentary at http://www.forum18.org/Archive.php?article_id=1377).

The inadmissibility decision was not subject to review by the Grand Chamber, so this aspect of the case was not directly addressed in the latest judgment.

Previously, in the January 2006 Ülke v. Turkey judgment, the Court had likewise ignored the effect of the repeated prosecution – trial – punishment cycle in applying strong coercion to a person to change his beliefs. Nevertheless, this month's Bayatyan judgment does refer to the findings of the UN Working Group on Arbitrary Detention in relation to both Ülke (Opinion No. 36/1999 – available at <http://www.wri-irg.org/node/1600>) and four Israeli conscientious objectors (Opinion No. 24/2003 – available at <http://www.wri-irg.org/node/6481>). In both cases, the Working Group found that the authorities' actions "would be tantamount to compelling someone to change his/her mind for fear of being deprived of liberty if not for life, then at least until the age at which citizens cease to be liable for military service."

In its 2001 Report to the UN Commission on Human Rights (E/CN.4/2001/14 <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2001/14&Lang=E>) the Working Group stated that: "repeated incarceration in cases of conscientious objectors is directed towards changing their conviction and opinion, under threat of penalty. The Working Group considers that this is incompatible with Article 18 ["Freedom of thought, conscience and religion"], Paragraph 2, of the International Covenant on Civil and Political Rights, under which no one shall be subject to coercion which would impair his freedom to have or adopt a belief of his choice".

Unfortunately, an explicit coercion provision does not exist in the ECHR. But it would be difficult for the ECtHR to deny that coercion breaches the spirit and purpose of Article 9 of the ECHR.

The right to change one's beliefs

Although silent on coercion, Article 9 is unequivocal in stating that freedom of thought, conscience and religion includes freedom to change one's religion or belief. This would imply that a genuine change of belief by someone who had originally volunteered for military service is protected. This view is supported by the Council of Europe's Committee of Ministers, who on 24 February 2010 adopted Recommendation CM/Rec(2010)4 on the human rights of members of the armed forces (see). This included at paragraph 42 the stipulation that: "Professional members of the armed forces should be able to leave the armed forces for reasons of conscience".

The Bayatyan case could therefore have implications not only for the diminishing number of Council of Europe member states which still have conscription, but also for those with all-volunteer armed forces.

Will ECtHR reasoning follow UN Human Rights Committee?

Finally, it will be interesting to see whether the reasoning of the ECtHR develops in line with the latest approach taken by the UN Human Rights Committee. In March 2011, faced with communications from 100 imprisoned Jehovah's Witness conscientious objectors in South Korea, the UN Human Rights Committee ruled that: "The right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion". (UN Document CCPR/C/101/D/1642-1741/2007, accessible at http://www.wri-irg.org/system/files/Views_24_March_2011_0.pdf). In other words, it is part of the right and not just a manifestation of religion or belief.

Under Article 9 of the ECHR it is only the freedom to manifest one's religion or belief which may be limited in certain circumstances. The freedom of thought, conscience and religion itself is not subject to limitations. So if in a future case the ECtHR followed the reasoning now adopted by the Human Rights Committee, it would not even have to consider and dismiss arguments that limitations on conscientious objection to military service were necessary on grounds of public order, or for any other reason.

The Bayatyan judgment will continue to have implications in Armenia and far beyond. (END)

- Derek Brett, Conscience and Peace Tax International <http://www.cpti.ws>, contributed this comment to Forum 18 News Service. Commentaries are personal views and do not necessarily represent the views of F18News or Forum 18. PDF and printer-friendly views of this commentary can be accessed from http://www.forum18.org/Archive.php?article_id=1597.

For reporting and analyses of freedom of thought, conscience and belief in places named in this commentary, see:

for Armenia and the unrecognised entity of Nagorno-Karabakh
<http://www.forum18.org/Archive.php?query=&religion=all&country=21>;

for Turkey <http://www.forum18.org/Archive.php?query=&religion=all&country=68>;

for Azerbaijan <http://www.forum18.org/Archive.php?query=&religion=all&country=23>;

and for Belarus <http://www.forum18.org/Archive.php?query=&religion=all&country=16>.

A compilation of Organisation for Security and Co-operation in Europe (OSCE) freedom of religion or belief (including conscientious objection) commitments can be found at http://www.forum18.org/Archive.php?article_id=1351.

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