

**RELIGIOUS DISCRIMINATION AND SYMBOLISM:  
A PHILOSOPHICAL PERSPECTIVE**

by

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## EXECUTIVE SUMMARY

### The Report

- This report is the product of the Arts-and-Humanities Research Council's *Connected Communities* programme. The specific project being undertaken at the University of Liverpool is entitled *Philosophy of Religion and Religious Communities: Defining Beliefs and Symbols*.
- The aim of the Liverpool project as a whole is to consider the contribution philosophy of religion can make to recent debates surrounding legal cases alleging religious discrimination. Its orienting question runs, 'when, if ever, is it acceptable to prohibit the use of religious symbols?'
- The present report scrutinises in detail the way in which Article 9 of the European Convention of Human Rights has been utilised in recent judgments concerning the uses of religious symbolism.

### The Manifestation Test

- Article 9.1 of the European Convention of Human Rights speaks of the 'freedom, either alone or in community with others and in public or private, to manifest [one's] religion or belief, in worship, teaching, practice and observance.' And many judgments have paid special attention to the concept of 'manifestation' as a means of distinguishing protected from unprotected manifestations of belief.
- In particular, when it comes to uses of religious symbolism, there has been a sharp focus on (what we call) 'the sign-function' of the symbol – that is, the extent to which and the way in which the symbol expresses an underlying belief.

- The necessity test has been a common way of formalising this focus in legal literature: an action counts as a manifestation of a belief only if it is obligated by that belief. We argue that this understanding of the necessity test is mistaken, and engage in a detailed analysis of the cases thought to support it.

### The Practical Turn

- We maintain that, since 1995, Strasbourg jurisprudence, followed, to some extent, by domestic jurisprudence, has displayed what we call ‘the practical turn’. This we analyse as the turn away from seeing actions *solely* in the light of the antecedent beliefs that they manifest to seeing actions and the practices that they compose in their own right *alongside* beliefs.
- The practical turn can, we consider, be given several slightly different detailed readings. One such is that it is the turn from consideration of *high-level theoretical systems of belief* (such as religions), to which actions and practices are considered subservient, to consideration of *individual low-level practical beliefs* on an equal footing with the actions that naturally flow from them.

### Conclusions

- How might the practical turn affect future judgments from the European Court or from domestic courts? We suggest that there will be less reliance in future on expert testimony as to whether a particular action is a manifestation of a particular religion. Instead, we predict, there will be greater willingness to *assume* that a particular action is a manifestation of the person’s religion or belief. Accordingly, most of the legal argument in cases brought under Article 9 will, we predict, turn on (i) the issue of

whether there was interference, i.e. whether the person could manifest the same belief in a different sphere or way or time, or (ii) the issue of whether any interference that there was could be justified under Article 9.2.

## 1. INTRODUCTION

### 1.1 Aims of the Project

This final report is the primary output stemming from the scoping study, *Philosophy of Religion and Religious Communities: Defining Beliefs and Symbols*, based in the Department of Philosophy at the University of Liverpool. The study has been funded by the Arts-and-Humanities Research Council and forms part of their *Connected Communities* programme, which is intended to ‘develop further the distinctive perspectives that arts and humanities can bring to our understanding of communities.’ The study consists in a review of the possible contributions philosophy of religion can make to debates surrounding religious discrimination.<sup>1</sup>

The project as a whole took place between February and October 2012. In addition to this report, it consisted in a collaborative workshop, *Religious Discrimination and Symbolism: Academic and Faith Perspectives*, in late May involving academics from philosophy, theology, legal theory and the social sciences as well as religious practitioners and legal practitioners. The discussion of a draft version of this report both at the workshop and through written submissions during Summer 2012 was incorporated into this, the final version.

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The question ‘when is it acceptable to prohibit the use of religious symbols?’<sup>2</sup> has recently

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<sup>1</sup> A discussion paper concentrating on further research needed in this area will be published shortly on the AHRC website: <http://www.ahrc.ac.uk/Funding-Opportunities/Research-funding/Connected-Communities/Scoping-studies-and-reviews/Pages/Scoping-studies-and-reviews.aspx>.

<sup>2</sup> We would like to thank the Rt Rev. Michael Nazir-Ali for suggesting this phrasing of the question to us as a

become an extremely pertinent one for communities of all faiths in the UK. Indeed, in the past few years, there have been several high-profile cases in the UK alleging discrimination against the wearing of religious symbols. These cases have aroused strong passions and much media interest. We maintain that a painstaking philosophical analysis, informed by the actual views held in faith communities themselves, would help the debate immensely. Therefore, we have investigated the conceptual status of specific religious *symbols*, such as crucifixes and crosses (*Eweida v British Airways*; *Chaplin v Royal Devon and Exeter Hospital NHS Foundation Trust*), niqabs (*Azmi v Kirklees MBC*), karas (*Watkins-Singh v Aberdare Girls' High School Governors*) and chastity rings (*Playfoot v Millais School Governing Body*). The theoretical questions at stake are: are these symbols a mandatory means of manifesting core beliefs or merely a personal choice? And what possibilities are there in between these two? What might it mean for symbols to be ‘intimately linked’<sup>3</sup> to underlying beliefs or of ‘exceptional importance’<sup>4</sup> to the religious believer?

## 1.2 Topicality

Religion is once again a key research theme in the academy and this is due for the most part to its increasing visibility in public discussion. The role religion plays in public life, its relation to secular ideals and interfaith dialogue have become increasingly central issues within the UK in the last decade. In UK academia, nothing symbolises this more than the significant investment by the AHRC and the ESRC in the *Religion and Society* research programme – a £12 million cluster of 75 projects treating the interrelationships between religion and society.<sup>5</sup>

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way of putting the burden of proof on the prohibition of religious freedom, rather than on its practice.

<sup>3</sup> *A v United Kingdom* [1984] 6 E.H.R.R. 558.

<sup>4</sup> *Watkins-Singh v Aberdare Girls' High School Governors* [2008] E.W.H.C. 1865, para 56.

<sup>5</sup> See further <http://www.religionandsociety.org.uk/>. Two of the most significant pieces of research on religious



The visibility of debates around religious discrimination in particular has increased exponentially. Especially high-profile in the UK have been cases involving principled objection by Christians (for the most part) to the provision of certain services. They include a counsellor in Bristol who refused to offer sexual therapy to same-sex couples (*McFarlane v Relate Avon Ltd*), a registrar in Islington who requested to not officiate for same-sex civil partnerships (*Ladele v London Borough of Islington*), and owners of two bed-and-breakfast establishments that refused to rent out double rooms to same-sex couples (*Bull and Bull v Hall and Preddy* and *Black and Morgan v Wilkinson*). At stake in these cases has been a conflict of rights between characteristics protected under the Equality Act 2010 – in particular, a conflict between the protected characteristic of religion and that of sexual orientation. We should note straight-away that the difficult task of balancing competing rights does not fall within the ambit of this report.

From the coming into force of the European Convention on Human Rights<sup>6</sup> in 1953 until 1993, the European Court of Human Rights<sup>7</sup> had never decided a case on the basis of the right to freedom of religion alone.<sup>8</sup> Since then, however, and particularly in the last few years, the number of cases before the ECtHR concerning freedom of religion (and freedom from

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life in the UK relevant to the present study are the University of Derby's 'Religion and Belief, Discrimination and Equality in England and Wales: Theory, Policy and Practice (2000-2010)' run by Prof. Paul Weller and funded by the Religion and Society programme (see <http://www.derby.ac.uk/religion-and-society>) and London Metropolitan University's 'Understanding Equality and Human Rights in relation to Religion or Belief' funded by the Equality and Human Rights Commission [henceforth, EHRC] and led by Dr Alice Donald ([http://www.equalityhumanrights.com/uploaded\\_files/research/rr84\\_final\\_opt.pdf](http://www.equalityhumanrights.com/uploaded_files/research/rr84_final_opt.pdf)). This latter project has recently published its findings. They already appear to be absolutely crucial for future reflection on responses to discrimination.

<sup>6</sup> Henceforth, ECHR.

<sup>7</sup> Henceforth, ECtHR.

<sup>8</sup> *Kokkinakis v Greece* [1993] 17 E.H.R.R. 397; Judge Pettini's partly concurring opinion. See further Javier Martinez-Torron, 'The European Court of Human Rights and Religion' in Richard O'Dair and Andrew Lewis (eds), *Law and Religion* (Oxford: Oxford University Press, 2001), 188; and McGoldrick's comments, 'There was no substantive jurisprudence on freedom of religion until 1993 but since then it has become a torrent.' (Dominic McGoldrick, 'Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?' in *European Law Review* 11.3 (2011): 499)

religion) has increased dramatically. Similar trends are noticeable in the UK courts.<sup>9</sup> This has led to controversial decisions, since the case law remains in a state of emergence and the discomfort of judges dealing with religious matters is palpable.<sup>10</sup>

Additionally, there exist on-going debates in the UK, and also globally, concerning the right of Muslim women to wear religiously sanctioned clothing, including headscarves and veils. Recent years have seen not only controversial legislation passed in Belgium and France<sup>11</sup>, but also the creation of significant legal precedents at both the European (*Şahin v Turkey*) and UK (*Begum v Denbigh High School Governors*) levels. Debate surrounding religious clothing occurs, of course, against background concerns over the sexual politics of Islam, its apparent threatening nature to Western states, and also the hegemony of secular values; nevertheless, one can also point to a more abstract concern with the relation of religious clothing (whether niqab, hijab, or otherwise) to underlying beliefs and the extent to which such clothing is required by Islamic belief. This is the aspect of the debate that concerns us in this report: when does the wearing of a niqab (for example) gain protection from the courts?

Public attention in the UK has been most strongly aroused on the issue of discrimination and symbolism in relation to two cases – those of Nadia Eweida and Shirley Chaplin. Eweida and Chaplin both fell foul of uniform policies at their respective workplaces (British Airways and the NHS) because they openly wore a cross/crucifix around the neck. Both sought protection from the courts, alleging discriminatory policies (both direct and indirect) which prohibited them from displaying symbols that were central to their religious

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<sup>9</sup> See Mark Hill and Russell Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World', *Public Law* (2007, Aut): 488.

<sup>10</sup> See the general comments in Hill and Sandberg [n. 8] 505; Jim Murdoch, *Freedom of Thought, Conscience and Religion: A Guide to the Implementation of Article 9 of the European Convention of Human Rights* (Strasbourg: Council of Europe, 2007), 9; as well as Judge Tulkens' dissenting judgment in *Şahin v Turkey* [2005] 44 E.H.R.R. 5, para O-II6.

<sup>11</sup> See the statement of facts in *Dogru v France* [2009] 49 E.H.R.R. 8.

identities. When they were first heard in the UK courts, these cases provoked much media scrutiny, analysis and reflection. For example, an open letter to *The Telegraph* signed by prominent members of the Church of England, including the Most Rev. Lord Carey and the Rt Rev. Michael Nazir-Ali, stated in March 2010,

For many Christians, wearing a cross is an important expression of their Christian faith and they would feel bereft if, for some unjustifiable reason, they were not allowed to wear it. To be asked by an employer to remove or ‘hide’ the cross, is asking the Christian to hide their faith. Any policy that regards the cross as ‘just an item of jewellery’ is deeply disturbing and it is distressing that this view can ever be taken.<sup>12</sup>

These cases have evinced vigorous reaction from senior members of the Roman Catholic Church as well.<sup>13</sup> Strong opinions have also long been expressed on the opposing side of the debate: already in November 2006 Terry Sanderson (President of the National Secular Society) had complained of Eweida’s stance as suggesting ‘that her religion is more important than anything else.’<sup>14</sup>

And in Autumn 2012 this scrutiny is again on the increase as the two cases received a full hearing at the ECtHR (on 4<sup>th</sup> September) and await judgment. Numerous religious and secular organisations from the UK, Europe and further afield have intervened in the cases on one side or the other; the EHRC, for example, intervened (and held a public consultation on

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<sup>12</sup> Open Letter, ‘The Religious Rights of Christians are Treated with Disrespect’ in *The Telegraph*, 28/03/2010. <http://www.telegraph.co.uk/comment/letters/7528487/The-religious-rights-of-Christians-are-treated-with-disrespect.html>.

<sup>13</sup> See Nick Squires, ‘Cardinal drops out after calling UK “Third World”’ in *The Telegraph*, 15/09/2010. <http://www.telegraph.co.uk/news/religion/the-pope/8004493/Pope-visit-Cardinal-drops-out-after-calling-UK-Third-World.html>.

<sup>14</sup> Terry Sanderson, ‘Christian Bullies Press Their Advantage’, Editorial of the National Secular Society, 24/11/2006. <http://www.secularism.org.uk/editorialchristianbulliespressth.html>.

legal attitudes to religious symbolism in August and September 2011 before doing so<sup>15</sup>). Relatedly, in February 2012 the Christians in Parliament group published *Clearing the Ground: A Preliminary Report into the Freedom of Christians in the UK*, which concluded it was ‘problematic’ that courts did not make ‘allowance for [symbols] that might be widely chosen to express identity with a faith but are not required by it’.<sup>16</sup> Moreover, whether in columns by celebrity politicians bemoaning the treatment of Christians<sup>17</sup> or calls from Christian leaders to wear crosses in solidarity<sup>18</sup>, the protection religious symbols receive is once more newsworthy.

Perhaps the most intriguing intervention into the *Eweida* and *Chaplin* cases is found in David Cameron’s comments in reacting to adverse media coverage of the Government’s Observations on *Eweida* and *Chaplin*. According to reports,

The Prime Minister has made it clear that his view is that people should be able to wear crosses. The Government is obliged to pass on the judgment of the UK courts, but that does not mean we [the Government] agree with it and if the ECtHR does uphold the ban we will consider what further action we must take. We could potentially change the law, though our view is that the existing Equality Act gives people the right already.<sup>19</sup>

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<sup>15</sup> The summary results of this consultation are published at [http://www.equalityhumanrights.com/uploaded\\_files/legal/consultation\\_response\\_summary.pdf](http://www.equalityhumanrights.com/uploaded_files/legal/consultation_response_summary.pdf).

<sup>16</sup> Christians in Parliament, *Clearing the Ground: A Preliminary Report into the Freedom of Christians in the UK*, <http://www.eauk.org/current-affairs/publications/upload/Clearing-the-ground.pdf>, p. 15.

<sup>17</sup> Boris Johnson, ‘It’s a huge mistake to forbid a tiny act of Christian worship’, *The Telegraph*, 12/03/12. <http://www.telegraph.co.uk/comment/columnists/borisjohnson/9137523/Its-a-huge-mistake-to-forbid-a-tiny-act-of-Christian-worship.html>.

<sup>18</sup> Cardinal Keith O’Brien, Easter Sermon 2012, <http://www.archdiocese-edinburgh.com/index.php/cardinal/sermons/433-sermon-easter-2012>.

<sup>19</sup> James Chapman, ‘Cameron calls for a “Christian fightback” over attempts to ban wearing crosses and town hall prayers’, *The Daily Mail*, 4/4/12. <http://www.dailymail.co.uk/news/article-2124787/Cameron-calls-Christian-fightback-attempts-ban-wearing-crosses-town-hall-prayers.html?printingPage=true>.

If there is any substance to such claims, it would suggest that there is much more debate to be had at a policy level – as well as at a legal and social level – about the protection that is (or should be) accorded to religious symbols in the UK. Further analysis of the status of such symbolism under Article 9 of the ECHR is therefore timely and desirable – and the following philosophical study forms part of such analysis.

## 2. SCOPE

### 2.1 Article 9

Article 9 of the ECHR reads as follows,

#### Article 9 – Freedom of thought, conscience and religion

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

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>20</sup>

In the Human Rights Act 1998<sup>21</sup>, the right to religious freedom in the ECHR (as well as all the other rights therein protected) was made directly justiciable in UK courts. Domestic courts must now take account of these Convention rights in their decisions. The protection of religious belief and manifestation accorded in the ECHR is also implicitly affirmed in the UK Equality Act 2010.<sup>22</sup>

The ECHR and domestic legislation protect both religion and belief. Paragraph 10.2 of the Equality Act reads, 'Belief means any religious or philosophical belief and a reference

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<sup>20</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4/11/1950. <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>. This is based almost *verbatim* on Article 18 of the *Universal Declaration of Human Rights*, 10/12/1948 (<http://www.un.org/en/documents/udhr/>) and as such is reproduced in many constitutions around the world.

<sup>21</sup> Henceforth, HRA.

<sup>22</sup> See *Explanatory Notes to Equality Act (2010)*, II.1.10. <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/1/7>.

to belief includes a reference to a lack of belief.<sup>23</sup> Humanism and atheism are given as examples.<sup>24</sup> The reference to ‘lack of belief’ ensures that not only freedom of religion and belief is protected but also freedom of lack of religion.

It is obviously the case that Article 9 and the HRA are not the only way to ensure protection for some uses of religious symbols. While these legal instruments turn freedom of religion into a positive and universal human right, the traditional approach in the UK had been one of common law, defined by ‘negative accommodation’ and ‘passive religious tolerance’.<sup>25</sup> The wider question of whether a particular human right to freedom of religion is the most helpful approach should not be forgotten, even if it is not explicitly addressed in what follows.

## 2.2 The Manifestation Test

Article 9 protects both the right of the individual to hold a religious belief and the right of the individual ‘to manifest his religion or belief’. It gives four examples of such manifestation: worship, teaching, practice and observance.

An initial question therefore concerns the place of the usage of religious symbols among the listed manifestations. In early European cases, there was comparatively little debate surrounding the above list of protected manifestations of religion or belief and, indeed, there was even a suggestion that the list should be interpreted in a non-exhaustive, open manner.<sup>26</sup> Since then, however, the list has become a *closed* one<sup>27</sup> and use of religious

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<sup>23</sup> *Equality Act* (2010), II.1.10.2. [http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga\\_20100015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf).

<sup>24</sup> *Explanatory Notes to Equality Act* [n. 22] II.1.10.

<sup>25</sup> Mark Hill, Russell Sandberg and Norman Doe, *Religion and Law in the United Kingdom* (Alphen: Kluwer, 2011), 25.

<sup>26</sup> See the discussion in Carolyn Evans, *Freedom of Religion under the European Convention of Human Rights* (Oxford: Oxford University Press, 2001), 105-7 and in Malcolm D. Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Strasbourg: Council of Europe, 2009), 12.

<sup>27</sup> See, for example, Hill, Sandberg and Doe’s insistence that ‘the right to manifest one’s religion or belief is limited by Article 9(1) in that the manifestation *must be* ‘in worship, teaching, practice and observance’.’ ([n.

symbols is seen as a form of *practice* – ‘the most amorphous and least well-defined of the categories of protected religious freedom’, as Carolyn Evans puts it.<sup>28</sup> In other words, a ‘practical turn’ in the treatment of the use of religious symbols has become increasingly prominent and we will return to it at length in what follows.<sup>29</sup>

In case law, it is customary to contend that the right to hold a belief is ‘absolute’, whereas the right to manifest it is ‘qualified’.<sup>30</sup> Qualifications of the right to manifest are listed in Article 9(2). It is not our purpose in this report to consider the legitimacy of such qualifications at all, and so Article 9(2) will be for the most part ignored. Our focus is purely on a conceptual analysis of the status of religious symbolism in relation to Article 9(1). The importance of 9(2) here is solely to point out that just because a symbol may initially qualify for protection under Article 9(1), this does not mean that it will in the end be protected. The grounds for discriminating against it may well be justified.

When confronted with a claim under Article 9 concerning the right to *manifest* beliefs, judges have tended to apply four tests. We categorise them as follows:

- (i) Belief test: Initially, claims are judged to engage Article 9 only if the beliefs that are purportedly manifested meet certain criteria. These criteria are ‘a certain level of cogency, seriousness and importance’ as well as being ‘worthy of respect in a democratic society and not incompatible with human dignity’.<sup>31</sup> In short, such beliefs must be ‘a coherent view on a fundamental problem.’<sup>32</sup>

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25] 46; our italics).

<sup>28</sup> Carolyn Evans, ‘The “Islamic Scarf” in the European Court of Human Rights’ in *Melbourne Journal of International Law* 7.1 (2006).

<sup>29</sup> C. Evans notes that the French text has ‘*pratiques*’ for ‘practice’, suggesting a more limited scope for manifestation ([n. 26] 111). See also Buxton LJ’s reference to this point in *Re (Williamson) v Secretary of State for Education and Employment* [2003] Q.B. 1300, 1314, para 35.

<sup>30</sup> The domestic precedent is *R v Secretary of State for Education and Employment Ex p. Williamson* [2005] H.R.L.R. 14, Lord Nicholls at para 16.

<sup>31</sup> *Campbell and Cosans v United Kingdom* [1982] 13 E.H.R.R. 41, para 36.

<sup>32</sup> *X v Germany* [1981] 5 E.H.R.R. 276, para 138.



(ii) Manifestation test: Secondly, the judges ask whether the rites of worship, observances, teachings or practices that allegedly manifest such beliefs can, in fact, be properly designated ‘manifestations of belief’, rather than (for instance) practices which are merely motivated by such beliefs.

(iii) Interference: Thirdly, it needs to be established that the claimant’s right to manifest his or her beliefs was in fact interfered with. It is at this stage that questions surrounding the claimant’s ability to resign or transfer schools (or be educated at home<sup>33</sup>) in order to manifest his or her beliefs freely is considered.

(iv) Justification: Finally, the judges consider the extent to which the State was justified in interfering with the claimant’s rights in line with the limitations on freedom of religion and belief set out in Article 9(2). For instance, was the prohibition of the manifestation necessary in a democratic society?

For the claimant to prove that her right to freedom of religion and belief has been interfered with and so for ‘Article 9 to be engaged’ (as the ECtHR puts it), all three of the first three tests need to be satisfactorily passed. It is then up to the State to demonstrate why such interference was justified.

In this draft report, we limit our investigation solely to the second, manifestation, test – whether a specific use of a religious symbol counts as a manifestation of a belief. This is obviously not to deny that there is much of philosophical interest that can be written about the other three tests: the idea that beliefs that are manifested need to be cogent and important, for example, or the problem of balancing the interests of the individual against those of the State deserve much rigorous scrutiny. Moreover, there is a convincing legal argument that too much stress on the manifestation test (at the expense of justification) might actually be the

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<sup>33</sup> See Arden LJ in *Williamson* [n. 29] para 295.

underlying problem with the outcome of Article 9 cases, especially in the domestic courts.<sup>34</sup> Nevertheless, the fact that so much of the courts' focus in recent and historic cases of religious symbolism has been on the manifestation test justifies our concentration on it.

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Hence, the questions at stake in this report are: what might the Convention mean by a manifestation of belief? And, in the light of the traditional consensus in the case law that 'Article 9.1 does not cover each act which is motivated or influenced by a religion or belief'<sup>35</sup>, by what criteria are protected and unprotected manifestations to be distinguished? That is, what is the threshold for engaging Article 9 and can it be justified? Moreover and more specifically, we are concerned with the following question: are uses of religious symbols, such as crosses, crucifixes, chastity rings and niqabs, to be considered as manifestations of belief and, if so, in what circumstances should their display be protected (with respect to the ECHR and also more generally)?

A final qualification concerning the scope of our report is also necessary. Article 9 protects the right to manifest freedom of religion *or belief*. Therefore, it does not protect just religious beliefs, but any 'philosophical' beliefs which are weighty, serious and cogent enough to qualify for protection. In what follows, however, we do not consider the extent to which the concept of manifestation in Article 9 can be extended beyond the bounds of religion. Yet, whether a rainbow-coloured hairband manifesting one's commitment to gay

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<sup>34</sup> See especially Russell Sandberg's recent comments in his 'Submission to the Consultation on Legal Intervention on Religion or Belief Rights' (Autumn 2011), 2-3 (available at: [http://www.law.cf.ac.uk/clr/research/Russell%20Sandberg%20\(Cardiff%20University\)%20Submission%20to%20the%20Consultation%20on%20Legal%20Intervention%20on%20Religion%20or%20Belief%20Rights.pdf](http://www.law.cf.ac.uk/clr/research/Russell%20Sandberg%20(Cardiff%20University)%20Submission%20to%20the%20Consultation%20on%20Legal%20Intervention%20on%20Religion%20or%20Belief%20Rights.pdf)); Baroness Hale makes this point in *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, para 92-3.

<sup>35</sup> *Arrowsmith v United Kingdom* [1981] 3 E.H.R.R. 218, para 71.

rights or a ribbon manifesting one's commitment to the eradication of cancer is protected under Article 9 remains a pertinent issue. Nevertheless, pragmatically it seems to be the case that non-religious uses of symbolism are typically brought under Article 10, which protects the right to freedom of expression.<sup>36</sup> The case of Vajnai who was imprisoned for exhibiting communist insignia on his jacket at a political rally in Hungary is a case in point.<sup>37</sup> Hence, the consequent fact that all Article 9 cases surrounding symbolism (up to the present) have concerned established religions provides a convenient reason for us to limit our investigation just to cases of this kind.<sup>38</sup>

Hence, our task in this report is a philosophical analysis of the status of religious symbols as manifestations of belief.

### 2.3 The Aims of the Report

The narrowness of our focus in what follows is to be justified as follows. The HRA has made clear that the ECHR is part of the law of the UK and to be followed in the event of any conflict of law. There is no prospect of any change in the ECHR, and the talk of the repeal of the HRA seems to us fanciful. In consequence, the ECHR is not only part of the law as it stands, but also as it will be for a while yet. How, though, can a philosopher be of any practical assistance in the matter of the legal status of the use of religious symbols? It seems to us that Article 9 of the ECHR and its related jurisprudence, which regulate this sphere,

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<sup>36</sup> This is the view taken in David Harris *et al*, *Law of the European Convention of Human Rights* 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2009), 427. For a comparison of the provisions in Article 9 and 10, see Murdoch [n. 10] 9-10, 50-3.

<sup>37</sup> *Vajnai v Hungary* [2010] 50 E.H.R.R. 44. Such insignia engages Article 10 without any explicit test being applied (*ibid*, para 47).

<sup>38</sup> Despite this focus, we would affirm the *National Secular Society's* recent contentions that 'A right to display only symbols of belief that are religion in nature, but not other symbols, breaches the fundamental duty to treat individuals, and their rights of conscience, equally' and 'Acts... should not more readily be held to constitute a manifestation when believed to follow from religious doctrine than when they result from philosophical conviction or rational analysis.' National Secular Society, 'Submissions to the European Court of Human Rights on *Eweida, Chaplin, McFarlane* and *Ladele*', paras 2, 29; available at:

<http://www.secularism.org.uk/uploads/nss-intervention-to-european-court-of-human-rights.pdf>.

employ several concepts on which philosophers of religion – such as ourselves – might usefully comment. It is our hope that this analysis might be of assistance to those involved as practitioners or as legal academics in studying Article 9 and its jurisprudence.

Philosophers, it should be noted, have already contributed to academic debates around legal cases alleging religious discrimination. In political philosophy, Calder and Smith's painstaking analysis of competing understandings of equality and diversity in *Azmi v Kirklees MBC* is illustrative.<sup>39</sup> In philosophy of religion, Roger Trigg's *Religion in Public Life*<sup>40</sup> and *Equality, Freedom and Religion*<sup>41</sup> have already contributed a strong voice to the debate. Much more philosophical work is still required as well. Full analyses of religious discrimination and symbolism should – in addition to what follows – include sustained engagements with the value of a human rights approach to religious conflict, the limits of liberty and the ethics of responding to others' symbols. There is much work still to be done in this area.<sup>42</sup>

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<sup>39</sup> Gideon Calder and Steven R. Smith, 'Differential Treatment and Employability: A UK Case Study of Veil-wearing in Schools' in Calder and Emanuela Ceva (eds), *Diversity in Europe: Dilemmas of Differential Treatment in Theory and Practice* (London: Routledge, 2011), 157-69.

<sup>40</sup> Roger Trigg, *Religion in Public Life: Must Faith be Privatised?* (Oxford: Oxford University Press, 2007).

<sup>41</sup> Roger Trigg, *Equality, Freedom and Religion* (Oxford: Oxford University Press, 2012).

<sup>42</sup> There also remains a general question concerning the applicability of philosophical presentations of this material to what goes on in the courts: does the very pragmatism necessitated in deciding these cases *in situ* sit uneasily with a systematic presentation of the fundamental issues? For many of the points in the above paragraph, we would like to thank Harry Bunting, Mark Hill and Patrick Kelly.

### 3. MATTERS OF DEFINITION

To begin, definitions of two key terms are in order.

#### 3.1 Religion

‘Religion’ is of course a much-contested term; we are interested, however, in the way religious symbolism is understood in cases of religious discrimination in the courts of the UK and Europe; therefore, what is at issue, first and foremost, is the courts’ understanding of ‘religion’.

The ECHR and HRA are praised and criticised in equal measure for avoiding a definition of religion.<sup>43</sup> By opening the rights afforded in Article 9 up to freedom of thought, conscience or religion, judges no longer need to distinguish a religion from a non-religious conviction. Both are equally covered. While we agree that the ECHR and HRA do avoid a substantial, doctrinal, definition of religion, nonetheless precisely by understanding religion in line with thought and conscience and precisely by pairing it so tightly with belief, they do provide parameters for defining its formal structure.

In this vein, an initial statement often repeated in European judgments is as follows, ‘Freedom of thought, conscience and religion... is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life.’<sup>44</sup> In *Şahin* (and in many other cases), such a general statement of the significance of religion is supplemented with the following,

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<sup>43</sup> Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Portland, OR: Hart, 2008), 13-22; Harris *et al* [n. 36] 426. Trigg’s criticisms are particularly virulent: ‘The problem is that we are left with little way of deciding what counts as a religion and what does not... Legislators are so anxious to respect diversity and not prejudge the nature of religion that they become bereft of any criteria with which to discriminate between types of belief... [This] opens the floodgates to just about anything.’ ([n. 40] 45-6).

<sup>44</sup> To take one example, *Şahin* [n. 10] para 104.

While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares.<sup>45</sup>

This is a distinction between 'the *forum internum*... the sphere of personal convictions and religious beliefs' and the *forum externum*.<sup>46</sup> The underlying view here seems to be that (insofar as Article 9 is concerned) religion is 'primarily' a matter of belief, and only derivatively a matter of manifesting belief (whether that manifestation consists in acts of worship and assembly or the display of religious symbols). The 'main sphere' of protection is the *forum internum*<sup>47</sup>, whereas the *forum externum* is protected only 'as a secondary matter.'<sup>48</sup> Indeed, as we shall explore in detail in what follows, manifestations of religious belief are traditionally<sup>49</sup> protected only *insofar as* they relate back to antecedent beliefs. Nevertheless, manifestations are still protected and courts have been committed to upholding this protection. As Lord Nicholls puts it in the domestic context,

[Freedom of religion] is not confined to freedom to hold a religious belief. It includes the right to express and practise one's beliefs. Without this, freedom of religion would be emasculated. Invariably religious faiths call for more than belief. To a greater or

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<sup>45</sup> *Ibid*, para 105.

<sup>46</sup> *Kalaç v Turkey* [1999] 27 E.H.R.R. 552, para 34. It is crucial to note that the *forum externum* includes manifestations of belief 'alone' and 'in private'. Hence, this is not a distinction between the public and private spheres, nor is it a distinction between subjective and intersubjective realms, and it certainly does not map on to the Millian distinction between self-regarding and other-regarding actions (even if it is sometimes read that way, see Leonard M. Hammer, *The International Human Right to Freedom of Conscience* (Dartmouth: Ashgate, 2001), 84-7). The ECtHR has itself not always understood this (see the opening statement to *Karaduman v Turkey* [1993] App. 16278/90).

<sup>47</sup> *Pichon and Sajous v France* [2001], cited in Foreign and Commonwealth Office, 'Observations on *Eweida and Chaplin*', 14/10/2011, para 4.

<sup>48</sup> Foreign and Commonwealth Office [n. 47] para 3.

<sup>49</sup> We employ in what follows a common distinction in current legal theory between the early, traditional jurisprudence surrounding the ECHR and more recent developments. Indeed, such a distinction motivates our talk of a practical *turn*. Perhaps the clearest statement of this distinction is to be found in EHRC, 'Submission to the European Court of Human Rights on *Eweida and Chaplin*', September 2011, para 15; available at: [http://www.equalityhumanrights.com/uploaded\\_files/legal/ehrc\\_submission\\_to\\_ecthr\\_sep\\_2011.pdf](http://www.equalityhumanrights.com/uploaded_files/legal/ehrc_submission_to_ecthr_sep_2011.pdf).

lesser extent adherents are required or encouraged to act in certain ways, most obviously and directly in forms of communal or personal worship, supplication and meditation.<sup>50</sup>

Notwithstanding such assertions of the significance of manifestations to religious life, one of the most crucial problems that arises in what follows is the traditional, legal insistence that they are able to be protected only as long as they are considered as secondary derivations of belief.<sup>51</sup>

### 3.2 Symbol

A preliminary note on what we include under the category of ‘symbol’ will situate our discussion more concretely.<sup>52</sup>

First, it is necessary to point out that, at least initially, we are making this category as inclusive as possible. For instance, items of religious dress do not customarily symbolise a belief; to call niqabs ‘symbols of Islam’, even, is something of a stretch. They do not conform to the idea of a symbol as neatly as a Star of David (for example). Take *Hannah Adewole v Barking, Havering and Redbridge University Hospitals NHS Trust*: Adewole, a Christian midwife, refused to wear scrub trousers while in the operating theatre, insisting that Deuteronomy 22:5 forbade her from wearing trousers.<sup>53</sup> Even if she is right about Deuteronomy, it does not follow that her use of trousers was a *symbol* of Christianity in the

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<sup>50</sup> *Williamson* [n. 29] para 16.

<sup>51</sup> Moreover, if this is the conception of religion which arises from Article 9 of the ECHR, the question naturally arises: *is religion actually like this?* It has often been argued that this model of religion is not universal – and, if this argument is correct, this raises a question about Article 9’s ability to protect these other kinds of religion. As Trigg puts it, ‘Not all religion is the same’ ([n. 40] 66) and the priority given to belief over manifestation owes much to John Locke ([n. 41] 100) and certain strands of Protestantism (*ibid*, 42, 100, 117). See also C. Evans [n. 26] 74-5.

<sup>52</sup> On the definition of the symbol in the context of Article 9, see further M. Evans [n. 26] 59-73.

<sup>53</sup> *Hannah Adewole v Barking, Havering and Redbridge University Hospitals NHS Trust* [2011]; summary available at: <http://www.burnetts.co.uk/publications/factsheets/employment-e-bulletin-employment-law-cases-update-2011>.

same way as Shirley Chaplin's crucifix was. Similarly, the wearing of the jilbab or niqab or hijab may signify that one is a Muslim in certain contexts (though some of these garments are worn by others, such as some ultra-Orthodox Jews), but it is not necessarily the case that they are thereby used as religious symbols. They are not worn in order to symbolize anything, rather they are worn in order to protect modesty.

Nevertheless, we will provisionally include these forms of dress under the category of 'symbol' for one simple reason: in the legal cases, they are treated in a very similar manner to more evident forms of symbolism. There is a noticeable continuity between judgments on crosses and judgments on niqabs.

If the above stresses the inclusivity of our use of 'symbol', we do still want to set some conceptual limits to its application. One such limit is that a *symbol must be used as a symbol by someone*. Indeed, it is the use of a symbol which is protected by law not the symbol itself: a cross lying forgotten on a beach requires no protection; the use of it by an individual may do. Something becomes symbolic by its being *used* as a symbol:

Whether something is or is not a religious symbol has relatively little relevance in and of itself when the question at issue is whether that symbol may be displayed in some fashion *by the believer*.<sup>54</sup>

And yet it is not necessary for anyone other than the user of the symbol to recognize it as being used as a symbol. This allows for the use of secret symbols which no one else recognises as such.

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<sup>54</sup> M. Evans [n. 26] 65. Evans goes on to emphasise, as we have not, that the effect the use of a symbol has on others is paramount (*ibid*, 66-9).



Moreover, to be a *religious* symbol, it is necessary that the user intend the item to be a *religious* symbol. Many people wear crosses as mere items of jewellery, without intending that what they wear be worn as a religious symbol. In this case they are not using the cross as a religious symbol, just as it is not normally used as a religious symbol when flown as part of the Union Flag. This is vitally important when what is at issue is the change in meaning of a symbol over time (as discussed in *Lautsi v Italy*<sup>55</sup>): just as the Rod of Asclepius was once used as a religious symbol and is now used exclusively as a secular symbol to refer to the medical profession, so too other symbols cannot be assumed to be still religious just because of their religious heritage. *Intention* to use or display a symbol *religiously* is essential.

A second qualification involves the type of intention, which cannot be merely imaginative or intellectual: in principle any detectable physical object may be used as a symbol (though for many objects this will be totally impracticable), but it is still necessary that the item be *used* as a symbol. It will not do, for example, for someone just to think of an object and intend that that be symbolic. For it actually to become symbolic one has to use it in some way. This ‘in some way’, however, is extremely indeterminate: symbols can be worn, they can be carried<sup>56</sup>, they can be stuck on a wall.

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<sup>55</sup> *Lautsi v Italy* [2011] 54 E.H.R.R. 3. On *Lautsi*, see Dominic McGoldrick’s extended analysis [n. 8].

<sup>56</sup> As in the case of Arthur Blessitt (<http://www.blessitt.com/>), who carried a 12-ft cross around with him wherever he went.

#### 4. MOTIVATION AND MANIFESTATION

##### 4.1 Sign

The symbol is, in part, a sign. That is, a religious symbol is a physical entity of some kind whose use can manifest an underlying religious belief. Symbols make beliefs external and concrete – transfer them from the *forum internum* of the individual’s mind into the *forum externum*, so to speak. And the symbol, once constituted, exists (in part and not necessarily explicitly) to express a belief. It is (to this extent) a sign. The physical object exists to remind the user or other individuals who encounter it of an important religious belief. The object is meant to provoke the individual to attend to this belief once again. This is not the only purpose of symbols (as we shall see), but it is still an important one.

The Sikh Kara is a case in point. In *Watkins-Singh v The Governing Body of Aberdare Girls’ High School*, Silber J explains part of its significance as follows, ‘Sikhs explain [the Kara’s] symbolism as a circle that reminds them of God’s infinity and speak of their being linked (“handcuffed”) by it to God. For many it is a reminder to behave in accordance with religious teaching.’<sup>57</sup> Such is one of the many ways in which the Kara is significant to the Sikh: the very way it is shaped (as a circle) is a visual representation of God’s infinity; it is a way of indicating a belief in the *forum externum*. Similarly in *Playfoot*, much emphasis is placed on Lydia Playfoot’s chastity ring as ‘a sign of commitment to sexual abstinence’<sup>58</sup> and the most contested aspect of *Lautsi v Italy* was whether the crucifix exhibited in Italian classrooms was ‘a religious sign’ or a merely cultural one.<sup>59</sup>

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<sup>57</sup> *Watkins-Singh* [n. 4] para 26. Silber J acknowledges that it was Prof. Eleanor Nesbitt whose testimony brought this home (*ibid*, para 20).

<sup>58</sup> *Playfoot v Millais School Governing Body* [2007] H.R.L.R. 34, para 9 (our emphasis); see also para 12.

<sup>59</sup> *Lautsi v Italy* [2010] 50 E.H.R.R. 42, para 55.

The symbol's function as sign is emphasised again and again by the courts, and this is, of course, a natural consequence of the understanding of religion that seems to underlie Article 9. If manifestations are derivative from antecedent beliefs, then it will be the case that such manifestations are manifestations only to the extent that they remain tethered to and oriented towards such beliefs. As we shall see, crucial to deciding whether a symbol is a manifestation of a belief is the closeness of its relation to such a belief. The *Arrowsmith* case provides a useful example: the reason why Pat Arrowsmith's distribution of leaflets was not deemed a manifestation of her pacifism was that the leaflets did not express clearly enough the underlying pacifist beliefs. The Commission concentrated in particular on the leaflet's recommendations to soldiers in Northern Ireland to go absent without leave which, while it could implicitly be seen as furthering the pacifist cause, 'did not express pacifist views'.<sup>60</sup> This distinction was evidenced, in the Commission's mind, by the fact that the leaflets quoted with approval a soldier who spoke of being 'willing [to fight] for a cause I could believe in'<sup>61</sup> – the situation in Northern Ireland not being one of those causes.

The point is that a distinction emerges here between a symbol whose use may well be consistent with, caused by, or brought about in furtherance of beliefs and one whose use substantially expresses such beliefs. As Commission-member Opsahl points out, this is a distinction 'between manifestation and motivation.'<sup>62</sup> If Arrowsmith's leaflets had been more clearly expressive of her pacifism, then her distribution of them would have been considered a manifestation of her pacifism.<sup>63</sup> Now, *Arrowsmith* is not a case about symbols, but it provides a definitive precedent for subsequent symbolism cases; and the consequences to be drawn from it are as follows: use of a symbol may arise from an underlying belief, i.e. it may

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<sup>60</sup> *Arrowsmith* [n. 35] para 75.

<sup>61</sup> *Ibid*, 72.

<sup>62</sup> *Ibid*, Opsahl's partly dissenting judgment, O2.

<sup>63</sup> There were a number of dissenting opinions which claimed that, as a matter of fact, the leaflets were genuine expressions (i.e. manifestations of belief in pacifism) and therefore engaged Article 9.

be motivated by it, but this is not enough for it to be a manifestation; to be a manifestation it needs also substantially to indicate or express that belief itself. In European jurisprudence, this is what is meant by the belief's being 'intimately linked' to the action.<sup>64</sup> The sign-function of the symbol must be foregrounded for it to be a manifestation of the belief.

Such a way of putting it remains vague, however: how far does this function need to be foregrounded? And how could one measure such foregrounding? In the next section, we will begin to consider much more precise means of distinguishing between protected and unprotected symbols on the basis of their sign-functions.

#### 4.2 Types of Motivation

In many of the cases concerning whether certain uses of religious symbols really count as manifestations of the underlying beliefs, one deciding factor has been the nature of the relation that holds between belief and action. The looser the relation, the less likely the use of the symbol is to be considered a manifestation of the belief. This is what we were beginning to get at in the previous section by referring to the *Arrowsmith* case and the need articulated therein for the sign-function of the symbol to be foregrounded, i.e. for the use of the symbol to 'express' clearly and substantially the belief from which it derives. In the present section, we explore this further by providing a typology of the various kinds of relationship that can exist between the use of a symbol and the belief.

##### *(a) Motivation*

All symbols are to some extent arbitrarily connected to the beliefs that underlie them – that is, it will never be entirely justifiable why symbol X expresses belief Y in terms of the content of

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<sup>64</sup> *A v United Kingdom* [n. 3].

that belief alone. What is at issue therefore is the extent to which the symbol is *also* motivated by the underlying belief and the *type* of motivation that gives rise to it.

If there is one thing on which the case law has traditionally been unanimous, however, it is that motivation alone is insufficient.<sup>65</sup> Just because the exhibition of a symbol is motivated by a religious belief does not mean it will count as a manifestation for the purposes of Article 9. We have already seen this in respect to Pat Arrowsmith: her leaflets may have been motivated by her pacifism, but this was insufficient. The leaflets needed substantially to express this belief in pacifism in order for their distribution to count as a manifestation of the underlying pacifism. And between *Arrowsmith v United Kingdom* in 1978 and *Şahin v Turkey* in 2005, this insistence that motivation alone does not guarantee that something is a manifestation was enshrined in European case law.<sup>66</sup>

*(b) The Expression Test*

If motivation alone is insufficient, what form must this motivation take for the use of the symbol arising from it to count as a manifestation for the purposes of Article 9? This, as we have already indicated, is a matter of controversy. There are broadly speaking, however, two basic options (although in the following sections of this report we wish to complicate matters further): either the use of the symbol expresses a belief or it is required by a belief. The latter category is included as a sub-class of the former, but a particularly stringent one. To begin, we consider the idea of expression; we then turn to the idea of the mandatory use of a symbol.

In *Arrowsmith*, as we have seen, a merely motivated action is contrasted with an action that ‘expresses’ its underlying belief and so would be counted as a manifestation for

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<sup>65</sup> We will see in what follows that recently there has been a remarkable reversal of this position.

<sup>66</sup> In the domestic context, see *Williamson* [n. 29] para 266.

the purposes of Article 9. The judgment reads, ‘The Commission finds that the leaflets *did not express* pacifist views [even though they were motivated by them]. The Commission considers, therefore, that the applicant, by distributing the leaflets, did not manifest her belief in the sense of Article 9(1).’<sup>67</sup> What might it have been for Arrowsmith to have expressed her pacifist beliefs? As we have already suggested, she would have done so if the leaflets had clearly and substantially referred to or set out those beliefs. Above all, it is important to note that such language does *not* require that the use of the symbol be obligated or required by the belief; merely that it be a substantial reproduction of it in the *forum externum*.

Our analysis above is controversial: in the case law and in legal theory, one again and again comes across the assertion that *Arrowsmith* established the infamous necessity test, for which only actions that are obligated by beliefs are counted as manifestations.<sup>68</sup> We see no evidence for such an identification in the *Arrowsmith* judgment itself. To claim that only actions that give expression to beliefs are manifestations is *not* to claim that only actions that are necessitated by beliefs are manifestations.<sup>69</sup>

Again, it is important to emphasise that *Arrowsmith* is not a case about symbolism, although it is a case about religio-philosophical practice. What is more, the idea of expression as articulated above remains vague and difficult to apply. This is one reason why commentators often collapse the expression test into the necessity test.

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<sup>67</sup> *Arrowsmith* [n. 35] para 75 (our emphasis).

<sup>68</sup> To the extent that the necessity test is named the *Arrowsmith* test. See *Williamson* [n. 26] 1373, para 266, per Arden LJ; *Vickers* [n. 43] 98; EHRC [n. 49] para 13.

<sup>69</sup> C. Evans comes the closest to pointing this out: ‘The test that was applied by the Commission in *Arrowsmith* is not completely clear on the face of the judgment... By excluding actions that are merely motivated or influenced by belief, the Commission suggested that a very direct link is needed between the belief and the action if the action is to be considered a “practice” under Article 9. This has come to be interpreted in later judgments of the Commission as a type of “necessity” test... although the case itself does not make clear whether the applicant needs to show a necessary or merely a strong, direct link between the action and the belief’ ([n. 26] 115).

### 4.3 The Necessity Test

The most stringent way of conceiving the threshold of protected manifestations is the view that, in order for a use of a symbol to count as a manifestation for the purposes of Article 9, its use must be somehow obligated, necessitated, or required by an underlying belief. That is, the belief/action relationship should not be one of mere motivation, but should be such that the belief *obliges* the individual to use the symbol: ‘if belief, then use of symbol’ in the same way as ‘if fire, then smoke’. There is a necessity to this relationship which makes it almost impossible properly to hold the belief without acting on it by using the symbol. In other words, for any religious worldview, the use of mandatory symbols counts as a manifestation and the use of non-mandatory symbols does not count as a manifestation.

In response to this, it should be noted, first, that there is no hint of the necessity test in the judgment of *Arrowsmith* itself. As we stated in the previous section, the test set out in the text of the judgment concerns whether or not the action in question (distributing some particular tracts) expressed the belief in question (pacifism). The word ‘necessity’ does not appear in the section of the judgment (paras 67 – 96) dealing with Article 9 (and the word ‘necessary’ appears there only in the quotation of Article 9 itself).

It might at first seem that the dissenting judgment of Opsahl shows that he read the judgment from which he dissented as advocating the necessity test:

One cannot in my opinion generally exclude from Article 9 all acts which are declared unlawful according to the law of the land if they do not *necessarily* manifest a belief, provided they are clearly motivated by it... I consider that Article 9 must, in principle, be applicable to a great many acts which are not, on their face, necessarily manifesting the underlying or motivating belief, if that is what they *genuinely* do... The opinion of the Commission seems to imply that Article 9 is inapplicable mainly

because one might have done what the applicant did without sharing her belief in pacifism... The fact that the campaign and the leaflets also appealed to those other than pacifists does not create any contradiction, in my opinion, between her belief on the one hand and her participation in the campaign and the language of the leaflets on the other. Her acts were not only consistent with her belief, but genuinely and objectively expressed it when seen in their context. In my view, everyone is entitled to have their acts examined under the Convention in the context of their individual circumstances. It follows that the protection of Article 9 may have to be denied to one person but granted to another for the same acts, whether it is for distribution of the same leaflets, or for other alleged manifestations of a belief.<sup>70</sup>

The fact that Opsahl italicizes ‘necessarily’ may mislead the reader into thinking that here Opsahl has identified the judgment of the majority (from which he is partly dissenting) as employing the necessity test. In fact, by ‘necessarily manifest’ and ‘necessarily manifesting’ a belief Opsahl is not referring to a situation in which it is obligatory on the believer to express his or her belief in a particular action. Rather, he is referring to actions that *could be* manifestations of a particular belief but *need not be*. It is for this reason that Opsahl, in the first sentence of paragraph 3, accuses the Commission of reasoning that because a non-pacifist could have distributed the same pamphlets as Arrowsmith distributed, her distribution of them did not manifest pacifism.

Although, as we noted above, some have thought that *Arrowsmith* itself is the source of the necessity test,<sup>71</sup> a commoner view is that the test sprang up subsequently to *Arrowsmith*

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<sup>70</sup> *Arrowsmith* [n.35]; Opsahl’s partly dissenting judgment, O2-3.

<sup>71</sup> For example, Arden LJ (in *Williamson* [n. 29] para 266) claims, ‘The act must be one which his beliefs require him to carry out [...]. The Arrowsmith test draws a distinction between acts which the beliefs require to be performed and are integral to those beliefs and acts which are merely inspired by the beliefs. It is not enough to make the acts manifestations of religious beliefs that they are motivated or influenced by the actor’s religious beliefs.’



(despite taking its name). Nevertheless, we strongly deny that there is *any* decision of the ECtHR or the Commission that supports this view.<sup>72</sup> Carolyn Evans has provided a lengthy defence of the view we are rejecting.<sup>73</sup> She cites five European judgments that, she asserts, implement the necessity test as a test for whether an action is or is not a manifestation or practice of a belief. We shall consider each in turn.

(a) *Khan v United Kingdom*

Evans states that in *Khan* the applicant's complaint that there had been a breach of his rights to freedom of religion and to marry and found a family was 'dismissed by the Commission, in part for the reason that Islam merely permitted marriage at an earlier age than the British law, it did not require it'.<sup>74</sup> What the text of the judgment actually says, however, is rather different:

While the applicant's religion may allow the marriage of girls at the age of 12, marriage cannot be considered simply as a form of expression of thought, conscience or religion, but is governed specifically by Article 12.<sup>75</sup>

It is plain that there is simply no mention of necessity here. It is also worth noting that Evans's own formulation does not prove her point: she states merely that the application was dismissed by the Commission for the reason that the action was not necessary. She does not state that the Commission concluded that the action was not a manifestation or a practice because of its alleged non-necessity.

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<sup>72</sup> The domestic situation is more complicated, since judgments surrounding discrimination are often framed in terms of mandatory practices. For reasons of space, we do not discuss these cases in what follows.

<sup>73</sup> Evans [n. 26] 116 – 118.

<sup>74</sup> *Ibid*, 116.

<sup>75</sup> *Khan v United Kingdom* [1986] App. 111579/85.

*(b) X v Austria*

Evans writes:

In *X v Austria* the Court held that the decision of the German government to prohibit followers of the so-called ‘Moonie sect’ from setting up a legal association was not an interference in religious freedom or the right to worship in association with others because it was not necessary to the practice of their beliefs that they be allowed to form a legal association.<sup>76</sup>

Again, this falls short of proving her own thesis: this does not say that the Court decided that the formation of ‘a legal association’ was not obligatory for members of the Moonie sect and so not a manifestation or practice of their beliefs. Indeed, Evans herself refers to the ‘practice of their beliefs’ when, by her lights, there was no practice there at all. The headnote for the judgment removes the confusion here:

Article 9 of the Convention: Prohibition of an association with a religious aim. No factors showing that the legal structure of an association was necessary for the manifestation of the religion in question.<sup>77</sup>

The use of ‘necessary’ in this headnote is not part of an assertion that the banned action had to be necessary *to have counted as a manifestation of the religious belief*. The headnote is asserting that there was no *interference* with the right to manifest religious belief since the banned action was not necessary: the applicant could have manifested his religious belief in a different way, and, hence, his rights were unaffected. This is also the point of the judgment,

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<sup>76</sup> Evans [n. 26] 116.

<sup>77</sup> *X v Austria* [1981] App. 8652/79.

which makes explicit the connection with interference.<sup>78</sup> To clarify the point: the applicant's freedom to manifest his religious beliefs would have been interfered with only if there had been no other way to manifest the beliefs in question, i.e. if the joining an association with that precise legal structure had been necessary to manifest the beliefs at all. So the necessity test applies only to the question of interference, not, *pace* Evans, to the question of manifestation or practice.<sup>79</sup>

*(c) X v United Kingdom*

Evans cites this third case in support of her view that the necessity test shows whether or not an action is a manifestation (or perhaps a practice) of a belief. The totality of the relevant section of the judgment reads:

The applicant has produced statements to the effect that communication with other Buddhists is an important part of his religious practice. But he has failed to prove that it was a necessary part of this practice that he should publish articles in a religious magazine.<sup>80</sup>

It needs to be noted that the judgment does not state that his publishing articles in a religious magazine failed to be a manifestation of his Buddhist beliefs in virtue of its not being a necessary part of his Buddhist practice. Rather, the judgment simply notes the fact that the applicant did not prove this. We submit, therefore, that the best way to read this passage is as saying that there was no interference with the applicant's religious freedom since he was free

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<sup>78</sup> The judgment states: 'it has [not] been shown that the dissolution of the association in which the sect wanted to organise itself did as such interfere with the manifestation of [the applicant's] religion' (*ibid*).

<sup>79</sup> This is, in fact, quite consistent with Evans's own analysis of this case. Note also that on p. 180 Evans comes closer to seeing the necessity test, as we do, *as one for interference, not for manifestation in general or for practice in particular*.

<sup>80</sup> *X v United Kingdom* [1974] App. 5442/72.

to manifest his Buddhist practice in many other ways. There would have been interference only if his Buddhist practice had obligated him to publish the articles, in which case he would obviously have been prevented from fully manifesting his practice.

*(d) D v France*

Evans's fourth case does explicitly deal with the manifestation question. This is the relevant part of the Commission's decision:

The Commission has first to consider whether the applicant, in refusing to hand over the letter of repudiation to his ex-wife in order that the religious divorce may be established, was thereby manifesting his religion or belief in observance or practice, within the meaning of Article 9, para 1 of the Convention. In this respect the Commission notes that the applicant does not allege that in handing over the letter of repudiation he would be obliged to act against his conscience, since it is an act by which divorce is regularly established under Jewish law; he alleges only that by reason of his family's special status he would forfeit for all time the possibility of re-marrying his ex-wife.<sup>81</sup>

It is true that the word 'obliged' could be highlighted here and taken in such a way as to indicate that his refusal was no manifestation since it was not *obliged* by his conscience. It seems to us, however, that it is more plausible to see the Commission contrasting on the one hand acting against *conscience*, which would be a manifestation of religion for the purposes of Article 9, with on the other hand, the more personal reasons the applicant actually put forward, viz. his worry that he'd not be able to remarry his ex-wife. The Commission, we

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<sup>81</sup> *D v France* [1983] App. 10180/82.

suggest, did not see this personal reason as a *bona fide* manifestation of any *religious* belief. A further point to note is that the Commission also did not believe that the applicant was manifesting Judaism since the Jewish authorities declared that he was not.<sup>82</sup>

*(e) Ahmad [X] v United Kingdom*

The final case cited by Evans is one in which, she asserts, the necessity test is applied to determine whether an action counts as ‘worship’ for the purposes of Article 9. She writes:

The case involved the refusal of a school to rearrange its timetable to give a Muslim teacher a 45-minute extension of the lunch hour on Friday afternoons to allow him to attend prayers at a Mosque. While the case was ultimately decided on other grounds, the Commission suggested that no Article 9 issue was raised because the applicant had not shown that it was a *requirement* of the religion that he attend Friday prayers.<sup>83</sup>

Again, it should be noted that Evans’s summary here does not prove her stated point, viz. that the necessity test is a test for whether an action counts as a manifestation (in this case as worship), for the purposes of Article 9. One should also note that the UK government conceded from the outset that attending the mosque to worship *did* amount ‘to manifesting religion in worship’.<sup>84</sup> These are the Commission’s comments that refer to the necessity test:

In the case of a person at liberty, the question of the ‘necessity’ of a religious manifestation, as regards its time and place, will not normally arise under Article 9. Nevertheless, even a person at liberty may, in the exercise of his freedom to manifest

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<sup>82</sup> *Ibid.*

<sup>83</sup> Evans [n. 26] 117.

<sup>84</sup> *Ahmad [X] v United Kingdom* [1982] 4 E.H.R.R. 126, 132, para 4.

his religion, have to take into account his particular professional or contractual position.<sup>85</sup>

It should be noted that the Commission here suggests that the question of necessity will not normally arise in the case of a person at liberty. This immediately shows that the Commission cannot be considering necessity as a test for manifestation as then it would always arise (whether an applicant were at liberty or not). Rather, this, the rest of the paragraph, and the statement of the Commission's judgment at paragraph 23,<sup>86</sup> show that the question of necessity arises in connection with *interference* – has the state interfered with the applicant's freedom to manifest his or her religion? In the case of a person at liberty the presumption will be that the state has not, though, as the Commission asserts, one can voluntarily restrict one's own freedom by adopting a restrictive contract or profession. In either case, there will be no interference if the action in question was optional – one can simply manifest one's religion or belief in a different manner.

(f) *Cha'are Shalom Ve Tsedek v France*

Finally, we wish to consider a case too recent to be discussed in Evans's book but that might nevertheless be thought at first glance to support her thesis. In this case a religious diet was allowed to be a manifestation of the religion, but it was held that in order for that manifestation to be interfered with it would have to be impossible for the applicants to follow that diet. Although at first glance the judgment in this case might seem to support Evans's understanding of the necessity test, we maintain that it supports our understanding, viz. that it

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<sup>85</sup> *Ibid*, para 7.

<sup>86</sup> 'The Commission concludes that there has been no interference with the applicant's freedom of religion under Article 9 (1) of the Convention' (*ibid*, para 23). Note that the decision concerns interference, not simply manifestation.

is a test that applies to interference, not to manifestation. The key section from the judgment is as follows:

It is not contested that ritual slaughter, as indeed its name indicates, constitutes a rite or 'rite' [the word in the French text of the Convention corresponding to 'observance' in the English], whose purpose is to provide Jews with meat from animals slaughtered in accordance with religious prescriptions, which is an essential aspect of practice of the Jewish religion... The Court will first consider whether, as the Government submitted, the facts of the case disclose no interference with the exercise of one of the rights and freedoms guaranteed by the Convention... In the Court's opinion, there would be interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable.<sup>87</sup>

It might seem at first as though the use of the phrase 'an essential aspect of practice of the Jewish religion' in the first sentence quoted supports Evans' understanding of the necessity test as being relevant to manifestation. We submit, however, that the Court bases its acceptance of the diet in question as a manifestation of religion on the common-sense point that ritual slaughter must be a rite, which is a form of manifestation mentioned in the Convention under the English word 'observance' and the French word 'rite'. In our opinion the use of the word 'essential' is looking forward to what comes in paragraph 80 in which the Court holds that religious freedom is interfered with only if it is *impossible* for the diet to be adhered to. This is the other side of the interference test: for interference to have taken place

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<sup>87</sup> *Cha'are Shalom Ve Tsedek v France* [2000] App. 27417/95, paras 73, 75, 80.

it must be that the applicant had no other option in that (i) his or her religion obliged him to perform the action, and (ii) the action was impossible for the applicant to perform.

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All five cases put forward by Carolyn Evans have been examined in detail. It has been shown that none of them supports her contention that the European Court or Commission have at times adopted the view that whether a given action counts, for the purposes of Article 9, as a manifestation depends on whether it is *obligated* by the belief in question. We further deny that Strasbourg has produced any such cases at all. Rather, we affirm that the question of whether one is obligated by the belief in question is to be assessed in deciding whether there has been interference with one's rights to religious freedom: if one's action is not obligated then one is presumed to be free to manifest one's religion in another way, and, hence, it is presumed that there has been no interference with one's religious freedom. We suggest that the case of *Cha'are Shalom Ve Tsedek v France* forms evidence for this understanding.

Thus, the necessity test is somewhat of a myth, and yet this has not stopped it coming under sustained attack in legal theory. Vickers calls the necessity test 'unfortunate'<sup>88</sup>, Torron calls it 'inadequate' and 'a grave and dangerous mistake'<sup>89</sup>, Cumper speaks of it as 'extremely narrow'<sup>90</sup>, and C. Evans says that it provides 'an inappropriately limited and conservative approach'<sup>91</sup>, concluding that the necessity test is 'unclear in its scope, uncertain in its

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<sup>88</sup> Vickers [n. 43] 98.

<sup>89</sup> Torron [n. 8] 199, 201.

<sup>90</sup> Peter Cumper, 'The Public Manifestation of Religion or Belief: Challenges for a Multi-Faith Society in the Twenty-First Century' in Richard O'Dair and Andrew Lewis (eds), *Law and Religion* (Oxford: Oxford University Press, 2001), 321.

<sup>91</sup> C. Evans [n. 26] 50.



application and inconsistent in its usage.’<sup>92</sup> A recent forceful critique of the necessity test is given in the intervention by the EHRC to the ECtHR: ‘The Commission is concerned that the interpretation of domestic discrimination legislation by the United Kingdom courts does not satisfy Article 9, in particular by setting too high a threshold for interference.’ The intervention continues by claiming that while it is true that ‘manifestation of a religious belief has also traditionally only been protected if it is *required* by the particular religion’, this is an ‘*early restrictive approach to manifestation*’ which should be abandoned.<sup>93</sup> However, what we have shown at length is that *all such criticisms miss the point*: the necessity test (as a test for manifestation) never existed. It cannot be abandoned by the ECtHR, for Strasbourg has never employed it.

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<sup>92</sup> *Ibid*, 202.

<sup>93</sup> EHRC [n. 49], paras 3, 13, 15.

## 5. EVIDENCE FOR A CHANGING JURISPRUDENCE: THE PRACTICAL TURN

While the necessity test (for manifestations) is a myth, this is not true of the expression test or the fundamental distinction between motivation and manifestation. These have been central to how the ECtHR has traditionally deliberated on Article 9.1. Nevertheless, since 2005 a radical shift has occurred in the European jurisprudence on manifestation. The very framework of the ECtHR's approach to this issue has dramatically changed. In short, the founding distinction between mere motivation which is not protected under Article 9 and full-blown manifestation which is so protected appears now to be unimportant. Since the landmark decision in *Şahin v Turkey*, the ECtHR now seems to protect some merely motivated practices *as* manifestations. That is, one can identify a surprising shift in European judgments, from explicitly stating in *Arrowsmith* that it is not sufficient for an action to be a manifestation that it be motivated or inspired by a religious or philosophical belief to the apparent implicit acceptance of the opposite view in *Şahin*. In what follows, we will argue that such a shift – what we are calling ‘the practical turn’ – has far-reaching consequences for a philosophical understanding of the belief/practice relation. To begin, however, we rehearse the evidence for the practical turn.

### 5.1 *Şahin v Turkey*

*Şahin v Turkey* established this sea-change in the treatment of manifestation by the ECtHR. In the Chamber's judgment in *Şahin* it included this startling paragraph, which was later quoted approvingly by the Grand Chamber,<sup>94</sup>

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<sup>94</sup> *Şahin v Turkey* [2007] 44 E.H.R.R. 5, 120, para 78.

The applicant said that, by wearing the headscarf, she was obeying a religious precept and thereby manifesting her desire to comply strictly with the duties imposed by the Islamic faith. Accordingly, her decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief and, without deciding whether such decisions are in every case taken to fulfil a religious duty, the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion.<sup>95</sup>

The startling thing about this paragraph of the judgment is that there is no discussion of whether Leyla Şahin's decision is intimately linked to her religious beliefs, or whether it counts as a direct expression of them. Rather, the Chamber states that Şahin's decision 'may be regarded as motivated or inspired by a religion or belief' – this is almost exactly the language used in *Arrowsmith* and there declared to be *insufficient* for manifestation. The language used in the English version of *Arrowsmith* is 'motivated or influenced by a religion or a belief'<sup>96</sup>. But the French version has 'motivé ou inspiré par une religion ou une conviction', and the French version of *Şahin* uses exactly these words. The use of the same language cannot be a coincidence. It is hard to see it as anything other than a repudiation of the view taken by the Commission in *Arrowsmith* that there is a significant difference between an action manifesting a belief and one merely motivated by a belief.

What is meant by the phrase 'without deciding whether such decisions are in every case taken to fulfil a religious duty'? Our suggestion is that the Court is declining to get embroiled in the question whether wearing the veil is mandated for women in Islam and the

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<sup>95</sup> *Şahin* [n. 10] paras 125-126.

<sup>96</sup> *Arrowsmith* [n. 35] para 71.

question whether wearing the veil is always a religious action.<sup>97</sup> How is this relevant to the Court's proceeding on the assumption that there has been an interference? The point, we submit, is this: had Şahin stated that for her the wearing of the veil in university were merely optional there would have been no interference, since she could have manifested her religion in another way, e.g. by wearing the veil at home. But the Court is assuming that she really did feel that she had no choice and that, in consequence, her religious rights were being interfered with: she really did have to choose between her religion (as she saw it) and her studies at Istanbul University. Hence, also our answer to this question: why does the judgment say 'the Court proceeds on the *assumption* that the regulations... constituted an interference' (italics added)? We suggest that it is because the Court is declining to question Şahin's word; rather than engage in theological argument over whether the veil really is mandated, it simply proceeds on the assumption that Şahin accurately represents her own position.

Howard Gilbert's 'Redefining Manifestation of Belief in *Leyla Şahin v Turkey*' draws attention to the novelty of this judgment. In Gilbert's terminology, *Şahin* is the first case not to put in train the whole apparatus of the 'exclusion clause' in relation to Article 9.1 – that is, what we have labelled the manifestation and interference tests, which, as Gilbert points out, are not explicitly called for by the wording of Article 9.1, even though they have traditionally formed a consistent part of the ECtHR's approach.<sup>98</sup> He writes,

The Court declined to consider the relevance of the situation, neither did it attempt to distinguish between an act being motivated by a religious belief or as being a manifestation of that belief. In other words, it made no attempt to operate the

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<sup>97</sup> The Chamber notes some of the disagreements over these questions at para 31, followed by the Grand Chamber at para 35 of its judgment.

<sup>98</sup> Howard Gilbert, 'Redefining Manifestation of Belief in *Leyla Şahin v Turkey*' in *European Human Rights Law Review* (2006): 308-9.

‘exclusion clause’ upon Art 9.1. Instead, it accepted the view of the applicant that wearing an Islamic headscarf was a manifestation of her belief.<sup>99</sup>

Indeed, Gilbert asserts that the judgment in *Şahin* systematically misreads earlier judgments by transposing the apparatus of the exclusion clause from 9.1 to 9.2.<sup>100</sup> This is, he concludes, an ‘overturning of the established jurisprudence’<sup>101</sup>; he continues, ‘The judgment of *Şahin* is to be welcomed in that the Court has finally recognised that the application of its self-inspired ‘exclusion clause’ to Art. 9.1 is no longer valid.’<sup>102</sup>

To repeat, the startling thing about the judgment is nothing to do with the necessity test, which here remains unchanged as the preferred means of assessing *interference*, but to do with the use of the language of *Arrowsmith* to make an inference (from being motivated or inspired by a belief to being a manifestation of that belief) that had been *explicitly forbidden* in *Arrowsmith*. In addition to being approvingly quoted by the Grand Chamber, the startling paragraph has also been cited in three other cases. We discuss each briefly in turn.

### 5.2 *Dogru v France*

In this case, the Court found that the ban on wearing the headscarf during physical education and sports classes was a ‘restriction’ on the exercise by the applicant of her right to freedom of religion,<sup>103</sup> and based this contention on the sole fact that wearing the headscarf could be regarded as ‘motivated or inspired by a religion or religious belief’, citing *Şahin*.

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<sup>99</sup> *Ibid*, 315.

<sup>100</sup> *Ibid*, 310-11.

<sup>101</sup> *Ibid*, 318.

<sup>102</sup> *Ibid*, 325. See further M. Evans [n. 26] 65-6.

<sup>103</sup> *Dogru v France* [n. 11] para 48.

### 5.3 Jakóbski v Poland

In this case, Jakóbski had been denied the right by the Polish courts to vegetarian meals in prison. The Polish government justified this by alleging that, although vegetarianism was a practice ‘encouraged’ by the tradition of Buddhism to which Jakóbski subscribed, it was not ‘prescribed’ by that tradition. Against this, Jakóbski stated that he ‘adhered strictly to the Mahayana Buddhist dietary rules which *required* refraining from eating meat’,<sup>104</sup> and that since ‘he *could not* eat meat for religious reasons he depended on food parcels from his family’ and was throwing away the meals served to him.<sup>105</sup> The Buddhist Mission in Poland sent a letter to the prison authorities supporting Jakóbski’s request for a meat-free diet, submitting that ‘the Mahayana Buddhists had a serious moral problem when they were forced to eat meat’ and that ‘[a]ccording to the rules, a Mahayana Buddhist should avoid eating meat’.<sup>106</sup> It should also be noted that the the Szczecin Prisons Inspector himself wrote a letter to Jakóbski stating that the prison authorities were not ‘obliged to provide an individual with special food in order to meet the specific *requirements* of his faith’.<sup>107</sup> The final factor to consider is that Jakóbski himself, while quoting Shakyamuni Buddha to the effect that ‘[a] disciple of the Buddha must not deliberately eat meat’, also maintained that the ‘Buddha was a teacher who gave suggestions and directions but never orders’.<sup>108</sup>

The ECtHR avoided pronouncing directly on the question of necessity, and also avoided giving a detailed argument for Jakóbski’s diet’s being a manifestation of his religious views. Instead, the Court upheld the complaint on the grounds that ‘observing dietary rules can be considered a direct expression of beliefs in practice in the sense of Article 9’.

Therefore:

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<sup>104</sup> *Jakóbski v Poland* [2012] 55 E.H.R.R. 8, 233, para 7 (our emphasis).

<sup>105</sup> *Ibid*, para 10 (our emphasis).

<sup>106</sup> *Ibid*, para 11.

<sup>107</sup> *Ibid*, para 17 (our emphasis).

<sup>108</sup> *Ibid*, paras 35-36.

Without deciding whether such decisions are taken in every case to fulfil a religious duty, as there may be situations where they are taken for reasons other than religious ones, in the present case the Court considers that the applicant's decision to adhere to a vegetarian diet can be regarded as motivated or inspired by a religion and was not unreasonable.<sup>109</sup>

It will be noted that this is a loose quotation from *Şahin* with the addition that the belief was not unreasonable, and an explanation of the phrase, 'Without deciding whether such decisions are taken in every case to fulfil a religious duty'. Here the explanation is that, just as one might wear the veil for political reasons, so one might adopt a vegetarian diet for non-religious reasons, in which case Article 9 would not necessarily be of assistance. The main point, though, is that, even though the Court states that 'it has already held that observing dietary rules can be considered a direct expression of beliefs in practice in the sense of Article 9',<sup>110</sup> it again seems to think it sufficient to establish manifestation merely to point to the action's being 'motivated or inspired by a religion' (and not being unreasonable). Again, the distance travelled from the doctrine of *Arrowsmith* is as large as the distance travelled from the words is small.

#### 5.4 Kovaļkovs v Latvia

The final case that follows *Şahin* in the respect outlined above is *Kovaļkovs v Latvia*.<sup>111</sup> In this case, the applicant, who was in prison in Latvia, complained of an 'inability to read religious literature, to meditate and to pray because of being placed in a cell together with

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<sup>109</sup> *Ibid*, para 45.

<sup>110</sup> *Ibid*, para 45, citing *Cha'are Shalom Ve Tsedek* [n. 87] paras 73-74.

<sup>111</sup> *Kovaļkovs v Latvia* [2012] App 35021/05.

other prisoners' and that his incense sticks had been removed.<sup>112</sup> The Court found interference with Kovaļkovs's rights in these regards. For us, the interesting point is that the question of manifestation is dealt with summarily, as follows:

The Court considers that the applicant's wish to pray, to meditate, to read religious literature and to worship by burning incense sticks can be regarded as motivated or inspired by a religion and not unreasonable.<sup>113</sup>

Once more we have the same language as in *Şahin* with no attempt to argue for Kovaļkovs's actions' being manifestations of his religious beliefs. Indeed, the Court goes on to state that the interference with Kovaļkovs's freedom to pray, meditate, and read religious literature, did not 'go against the very essence of the freedom to manifest one's religion', and that the incense sticks of which he had been deprived were 'not essential for manifesting a prisoner's religion'.<sup>114</sup>

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The practical turn therefore consists in a stark reversal of the way in which the ECtHR has dealt with the question of manifestation since 2005. Motivation alone is no longer – in

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<sup>112</sup> *Ibid*, para 60.

<sup>113</sup> *Ibid*, citing *Jakóbski* [n. 104] para 45.

<sup>114</sup> *Ibid*, paras 67-68. This last point is perhaps the clearest refutation there is in the Strasbourg case-law of C. Evans's contention that it is necessary for an action to be a manifestation that it be essential. At this point, it might be replied that this point also refutes our earlier suggestion that the necessity test pertains to interference, since the Court had found interference, as well as manifestation, in *Kovaļkovs*. Our answer to this response is that the Court here is prepared to consider *degrees* of interference: 'what needs to be balanced is the *degree* of the interference with the applicant's right to manifest his religion on the one hand and the rights of other prisoners on the other hand... The interference with the applicant's right is not such as to *completely* prevent him from manifesting his religion.' (*Ibid*, para 67) The Court also referred to 'the *minor* interference with the applicant's freedom to manifest his religion' (*ibid*). We submit that to establish *complete* interference one would have to establish that the prohibited action were absolutely necessary for one, but that one could establish *partial* interference if the prohibited action were important, but not essential.



apparent opposition to earlier case law – insufficient to establish manifestation. However, why label this a *practical* turn? As we will argue in the final sections of this report, the reason for the reversal described above is that the question of motivation or even expression is no longer central to the ECtHR's concerns. That is, the strangeness of the tension between recent appeals to motivation as sufficient to establish manifestation and the rejection of precisely this position in judgments prior to 2005 is lessened somewhat, once one realises that the question of motivation and expression are no longer what is at stake. Instead, it is a matter of practices, their significance in religious life and the extent to which they are generally recognised.

What is taking place, we contend, is that the whole framework of understanding a manifestation as *a sign of an underlying belief* has been marginalised and a new theoretical paradigm is now being used for understanding the status of manifestations. This change involves a reorientation of the question of symbolism away from treating the symbol as a sign derivative of a high-level belief towards treating uses of the symbol differently. Or, as the UK Government has phrased it, what now matters is whether the use of a symbol is a genuinely recognised practice, rather than a manifestation of a belief. This is a shift away from treating the use of a symbol as derivative from a high-level belief towards treating it as a practice

## 6. THREE INTERPRETATIONS OF THE PRACTICAL TURN

The previous section described the practical turn in European jurisprudence on manifestation since 2005; the present section is concerned with understanding it. That is, what are the models by which one can explain the stark reversal that has led to practices merely motivated by religious beliefs now being protected under Article 9? The following therefore presents three such models. They are not intended to stand in opposition to each other; they are rather meant as mutually reinforcing and complementary attempts at explaining the practical turn. Indeed, the weakness of any one of these models taken in isolation is to be offset by the strengths of the others.

### 6.1 ‘Generally Recognised Practices’: The UK Government’s Position in *Eweida* and *Chaplin*

Intriguingly, the most sustained attempt at present to make sense of the ECtHR’s shift in jurisprudence is to be found in the UK Government’s ‘Observations on *Eweida*, *Chaplin*, *McFarlane* and *Ladele*’. Here we find the Government responding very explicitly to the practical turn and drawing out its consequences. It now claims the relation of a manifestation to an antecedent belief is not really what is at issue in Article 9:

A number of the Interveners make submissions on the test for determining whether there is a ‘manifestation’ of religion or belief within the meaning of Article 9. In particular, it is suggested that it should not be necessary for a practice to be doctrinally mandated by a religion for it to constitute a ‘manifestation’... Whether or

not a practice is compulsory according to religious doctrine (in a sense of being a rule that adherents must follow) is not the critical question in these cases.<sup>115</sup>

This is an important admission and on the back of it, instead of considering manifestations in terms of their relationships with antecedent beliefs, the Government now proposes the following alternative:

In order to come within Article 9 an Applicant must show that the manifestation in question is a religious practice in a generally recognised form. Not every act motivated by a religion is a 'practice' of the religion. The distinction can be illustrated as follows. The wearing of a kippa (or skull cap) by some Orthodox Jewish men is a Jewish religious practice (as is not working on Sunday for some Christians or wearing a headscarf for some Muslim women). On the other hand, if a Jewish man wears a Star of David on a necklace, that may be an act motivated by his religion and by a desire to communicate membership of the faith, but it is not a form of 'practice' of the Jewish religion.<sup>116</sup>

Notice how the word 'belief' or any reference to the *forum internum* of individual conscience is absent here. The debate has definitively moved to a different terrain – the territory of practices rather than that of belief/manifestation relations. Nevertheless, the change of terrain does not lead to an anything-goes scenario in which all of the old rules are torn up: there is a conscious attempt here to provide some form of continuity by establishing a threshold, even

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<sup>115</sup> Foreign and Commonwealth Office, 'Observations on *Eweida, Chaplin, McFarlane and Ladele*', 14/10/2011, paras 3-4. This is distinct from the document cited in n. 47.

<sup>116</sup> *Ibid*, para 5. (It should be noted that the Government does not seem to have fully taken on board the change in Strasbourg's approach to the 'merely motivated' question.)

if there is an implicit recognition that the old paradigm by which religious symbols were understood in the courts is no longer the best.

The threshold the Government set for the manifestation test in its ‘Observations’ is worth exploring at length. Embracing the practical turn, the Government offers a threshold consonant with it by way of the concept of ‘general recognition’. Uses of symbols are to be protected when they are generally recognised as religious practices:

The words ‘practice or observance’ used in Article 9 are intended to connote, as the Court has interpreted it, what in ordinary language is regarded as a generally recognised ‘practice’ – the wearing of prescribed clothing, a dietary rule, abstaining from work on a certain day, where these are matters which the religion requires or specifically encourages and which have some doctrinal basis.<sup>117</sup>

Now, there remains some reference here to the beliefs’ being manifested – and this certainly does limit which manifestations engage Article 9. It is our contention, however, that the majority of the work is being done by the phrase ‘generally recognised practice’. To this extent, practices are being assessed on their own terms and in their own right. What matters is the recognition afforded to such practices.

What does this mean? ‘General’ here seems to be functioning as a means of indicating public awareness of such practices. To use the Government’s own example, since it is generally recognised that Orthodox Jewish men wear kippas or, in other words, since there is public awareness that Orthodox Jewish men wear kippas, this practice passes the manifestation test and (other things being equal) will engage Article 9.

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<sup>117</sup> *Ibid.* Thus James Eadie QC, representing the Government at the ECtHR hearing of *Eweida, Chaplin, Ladele* and *McFarlane* on 04/09/12, spoke of ‘the importance [of the crucifix or cross] as a Christian symbol’ not being contested; rather, at stake is whether it is ‘a generally recognised form’ of Christian symbolism.

Unsurprisingly, the Government here is drawing on Strasbourg precedent. The first Strasbourg judgment to use the phrase ‘in a generally recognised form’ was the Commission’s decision in *A v United Kingdom* which stated simply:

Art. 9 primarily protects the sphere of personal beliefs and religious creeds, *i.e.* the area which is sometimes called the forum internum. In addition, it protects acts which are intimately linked to these attitudes, such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form.<sup>118</sup>

This language was also employed in the contemporaneous and almost-identical Commission case *C v United Kingdom*<sup>119</sup> and two Commission cases hard on their heels: *V v Netherlands*<sup>120</sup> and *Vereniging Rechtswinkels Utrecht v Netherlands*.<sup>121</sup> The first time the Court used the language was in the linked cases of *Valsamis v Greece*<sup>122</sup> and *Efstatiou v Greece*.<sup>123</sup> Although the Commission had adopted the same language in its admissibility judgment in *Valsamis*, the Court contents itself with merely quoting the language as used in Greece’s submissions, it does not explicitly endorse the language itself. Likewise, in the 1999 cases of *Kalaç v Turkey*<sup>124</sup> and *Canea Catholic Church v Greece*<sup>125</sup> the Court merely quotes without comment the language from the earlier reports of the Commission. It was not, in fact, until 2001 in *Zaoui v Switzerland*,<sup>126</sup> followed later that year by *Pichon and Sajous v*

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<sup>118</sup> A [n. 3].

<sup>119</sup> *C v United Kingdom* [1984] 6 E.H.R.R. CD587.

<sup>120</sup> *V v Netherlands* [1984] App. 10678/83.

<sup>121</sup> *Vereniging Rechtswinkels Utrecht v Netherlands* [1986] App. 11308/84.

<sup>122</sup> *Valsamis v Greece* [1997] 24 E.H.R.R. 294.

<sup>123</sup> *Efstatiou v Greece* [1996] App. 24095/94.

<sup>124</sup> *Kalaç* [n. 46].

<sup>125</sup> *Canea Catholic Church v Greece* [1999] 27 E.H.R.R. 521.

<sup>126</sup> *Zaoui v Switzerland* [2001] App. 41615/98.

*France*,<sup>127</sup> that the Court explicitly used for itself the language from the earlier judgments of the Commission. Since then it has, however, been repeated in at least six Court cases: *Lazzarini and Ghiacci v Italy*,<sup>128</sup> *Porter v United Kingdom*,<sup>129</sup> *Kuznetsov v Russia*,<sup>130</sup> *Ribeiro v Portugal*,<sup>131</sup> *Skugar v Russia*,<sup>132</sup> and *Dautaj v Switzerland*<sup>133</sup>.

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There are some obvious and extremely serious problems with setting the threshold for the manifestation test in terms of general recognition. First, a direct consequence is that idiosyncratic or highly personal practices are not protected under Article 9, yet this seems both to subvert the letter of the ECHR and also to go against its spirit.<sup>134</sup> In terms of UK legislation concerning indirect discrimination, Elias J is perfectly explicit that this is a consequence of his view:

[The] ability to make generalised statements does not necessarily apply to those with religious or philosophical beliefs... A philosophical or religious belief may be highly personal; it may be shared by very few people indeed... We recognise that this means that if someone holds subjective personal religious views, he or she is protected only by direct and not indirect discrimination.<sup>135</sup>

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<sup>127</sup> *Pichon* [n. 47].

<sup>128</sup> *Lazzarini and Ghiacci v Italy* [2002] App 53749/00.

<sup>129</sup> *Porter v United Kingdom* [2003] 37 E.H.R.R. CD8.

<sup>130</sup> *Kuznetsov v Russia* [2009] 49 E.H.R.R. 15.

<sup>131</sup> *Ribeiro v Portugal* [2004] App 16471/02.

<sup>132</sup> *Skugar v Russia* [2009] App 40010/04.

<sup>133</sup> *Dautaj v Switzerland* [2007] App 32166/05.

<sup>134</sup> Compare the comments of Arden LJ in *Williamson* [n. 29] para 269.

<sup>135</sup> *Eweida v British Airways plc* [2008] WL 4975445, paras 50, 57.

We wonder whether the Government would want to be so bold in asserting this consequence of its recent interpretation of Article 9; yet such a consequence is surely inevitable.<sup>136</sup>

Moreover, the idea that only ‘generally recognised’ practices are protected under Article 9 is extremely problematic when it comes to new or non-mainstream religions. It may be generally recognised that Orthodox Jewish men wear kippas,<sup>137</sup> but which of the practices of Scientology or even the Baha’i faith are generally recognised? ‘General recognition’ depends on two elements, which it seems unnecessary for a religion to meet for its practices to be protected. First, the religion would need to have evolved established and settled practices. Again, it seems contrary to the intention of Article 9 that religions in the process of emergence be excluded from protection. Secondly, the religion would need to be visible in the relevant jurisdiction, since for a judge, the State, employers, or the public at large, to consider a religious practice ‘generally recognised’, some acquaintance with the religion is necessary. Of course, safeguards could be built in to protect against discrimination against new or minority religions; it would surely always be easier, however, for there to be general recognition of a Jewish or Muslim practice than of a Baha’i or Jain one. It is not surprising therefore that Sir Nicolas Bratza suggested that the Government’s treatment of manifestation in the *Eweida* and *Chaplin* cases could be termed a ‘rather narrow approach’ at the recent hearing.

There is a further problem here that the deployment of the concept of ‘general recognition’ raises – and this is its reliance on some form of religious literacy on the part of both judges and the public at large. If the threshold for the protection of religious practices is whether there is general recognition of their occurrence, the ‘recognition’ involved needs to

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<sup>136</sup> Elias J’s argument has been heavily criticised in legal theory. See Sandberg [n. 34] 4; Vickers [n. 43] 130; Lucy Vickers, ‘Religious Discrimination in the Workplace: An Emerging Hierarchy?’, *Ecclesiastical Law Journal* 11.2 (2010): 288-9.

<sup>137</sup> The fact that non-Orthodox Jewish men do not suggests, of course, that manifestations have to be defined (at least) at the level of sub-religions (i.e. denominations).

be religiously informed and not ignorant of faith communities and their practices. Such a state of ignorance is precisely what many religious groups fear may well be the case, however. The *Clearing the Ground* inquiry by the group Christians in Parliament group, for example, insists repeatedly that ‘there is a high level of religious illiteracy which has led to many situations where religious belief is misunderstood and subsequently restricted’<sup>138</sup>, continuing that ‘the first significant theme that emerged from our evidence sessions was the deep and widespread level of religious illiteracy in public life.’<sup>139</sup> If religious illiteracy is indeed the norm, then it is questionable whether the ‘general recognition’ threshold can really protect freedom of religion adequately.

## 6.2 The Participatory Symbol

It is our contention that to get to the heart of the practical turn a philosophical discussion of the concept of the symbol itself is helpful. As we shall see, in many ways a fuller understanding of what the symbol is and its relation to believers and their beliefs pushes one automatically in the direction of a practical turn – that is, one no longer conceives the symbol in terms of its sign-function alone; its role in establishing community becomes equally significant. So, a short theoretical summary of the structure of the symbol may well provide some orientation here. We do not intend such theory as a straightjacket into which all treatments of religious symbols by the courts need to be inserted; rather, our intention is to provide some rough guidelines for understanding the practical turn.

In *Lautsi v Italy*, the applicants – drawing on a German judgment<sup>140</sup> – make the following general claims about symbols which we find plausible: ‘All symbols [give] material form to a cognitive, intuitive and emotional reality which [go] beyond the

<sup>138</sup> Christians in Parliament [n. 16] 6.

<sup>139</sup> *Ibid.*, 14.

<sup>140</sup> *BVerfGE* 93.1, 1/5/1995.



immediately perceptible.’ The applicants go on to speak of the symbol as having ‘an evocative character’ and, in the case of religious symbolism, serving ‘as “publicity material”’ for the contents of religious faith.<sup>141</sup> Symbols are materialisations of a reality that is not immediately perceptible. German theory employs the term *Darstellung* to designate this process: symbols present to the senses something which (left to its own devices) cannot be perceived.<sup>142</sup>

A symbol is therefore something sensible and accessible to the individual using it. It is used when a sensible, accessible entity is made to relate in some way to one or more imperceptible ‘realities’. In general, we will dub the relation that holds between the symbol and the things that it symbolises, one of *expression*. As we will soon suggest, what is absolutely crucial to the constitution of the symbol is that this relation of expression is not singular or simple, but rather symbols necessarily relate to more than one reality in more than one way. This is what is meant by the ‘double intentionality’ of the symbol – a concept that will form the heart of our analysis. A survey of the history of theories of the symbol will show the extent to which a number of very different expressive relations cluster around the concept of the symbol.

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The turning point in the history of the symbol is 1790, in particular, §59 of Immanuel Kant’s *Critique of Judgment*. Before that moment, there existed the ‘classical symbol’ and afterwards, alongside the various forms of the classical symbol, ‘the romantic symbol’. The classical symbol existed in roughly three forms:

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<sup>141</sup> *Lautsi* [n. 55] para 42.

<sup>142</sup> See further Immanuel Kant, *Critique of Judgment*, trans. Werner Pluhar (Indianapolis: Hackett, 1987), 5:351-2.

- (i) First, ‘symbol’ designated those phenomena in the world around us which point to a supernatural or divine presence. Such a usage was popular among neo-Platonic philosophers: Proclus, for example, defines symbols as ‘heavenly things on earth in a terrestrial form’<sup>143</sup> Symbols provided a point of mediation between the world and what transcends it. Early Christian theologians also deployed ‘symbol’ in this way: Pseudo-Dionysius speaks of symbols as ‘perceptible things [needed] to lift us up into the domain of conceptions’.<sup>144</sup>
- (ii) Etymologically, the Greek word, *σύμβολον* [*sumbolon*], signifies a token used in communities (and particularly secret societies or esoteric cults) as a member’s passkey. That is, such symbols were badges that revealed one’s belonging to a specific community.<sup>145</sup> It is precisely for such reasons that Rufinus, an early Christian theologian, contends that the Christian creeds were dubbed ‘symbols’ (a name for them which persisted until the nineteenth century in all European languages):

The name [early Christians] decided to give [the Apostles’ Creed], for a number of excellent reasons, was symbol... from the fact that in those days, as the Apostle Paul vouches and as is testified in *Acts*, numerous vagabond Jews, posing as apostles of Christ were going about preaching, their motive being the desire for gain or gluttony. They used the name of Christ, but their message did not conform to the traditional outline. The Apostles therefore prescribed the creed as a badge for distinguishing the

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<sup>143</sup> Quoted in Nicholas Halmi, *The Genealogy of the Romantic Symbol* (Oxford: Oxford University Press, 2007), 107.

<sup>144</sup> Pseudo-Dionysius, ‘The Ecclesiastical Hierarchy’ in *The Complete Works*, trans. Colm Luibheid (New York: Paulist Press, 1987), 376d.

<sup>145</sup> See Hans-Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall (London: Continuum, 2004), 63.

man who preached the truth about Christ in harmony with their rule.<sup>146</sup>

Symbols are the means by which one tests whether or not someone belongs to a community. This early use of the term ‘symbol’ (more than any other) illustrates the *performativity* of the concept. To recite the Apostle’s Creed was both declaratively to assert the truth of the statements contained therein, but also performatively to assert one’s membership of a specific Church through the very act of speaking.

- (iii) Finally, there is the representative symbol. In mathematics, ‘ $x$ ’ and ‘+’ are named symbols; similarly in logic, ‘&’ and ‘ $F(x)$ ’ are named symbols – and this is because they are signs which represent a class of quantities or operations or entities. Such a usage of ‘symbol’ as a representative sign is widespread.<sup>147</sup>

As we have already suggested, a paradigm shift in understanding the symbol occurred in 1790 with the publication of Kant’s *Critique of Judgment*. The theory of the symbol outlined there (along with developments of such a theory in the work of Goethe, Schelling and Coleridge – to name but three) has become central to our own thinking about the concept ever since. The ‘romantic symbol’ became a popular concept for understanding art, religion, knowledge and even dreams and medicine in the nineteenth and twentieth centuries.<sup>148</sup> For our purposes, its influences in theology (through the work of Paul Tillich and Karl Rahner) and religious studies (Mircea Eliade) are particularly significant for contemporary considerations of religious symbolism.

What did the romantic symbol look like? Very crudely put, it synthesised the different

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<sup>146</sup> Rufinus, *A Commentary on the Apostle’s Creed*, trans. J.N.D. Kelly (London: Longmans, 1955), 30.

<sup>147</sup> In art, representative symbols are employed in the allegorical tradition as attributes of a figure which allow one to recognise the underlying meaning (for example, the lamb in paintings of St John the Evangelist); in epistemology, there was traditionally a form of knowledge dubbed ‘symbolic cognition’ in which knowledge of the world was obtained through signs.

<sup>148</sup> See Michael Titzmann, ‘Allegorie und Symbol im Denksystem der Goethezeit’ in Walter Haug (ed), *Formen und Funktionen der Allegorie: Symposium Wolfenbüttel 1978* (Stuttgart: Metzlersche, 1979), 643.

uses of the classical symbol into one complex and multi-faceted whole. The romantic symbol evokes the supersensible, acts out membership of a community, and represents a class of objects. Take, for example, Goethe's 'discovery' of the symbol in a 1797 letter to Schiller:

[Symbols] are eminent cases which in characteristic variety, stand as the representative of many others, embrace a certain totality in themselves... and thus, from within as well as from without, lay claim to a certain oneness and universality.<sup>149</sup>

The tortuousness of Goethe's sentence structure alone suggests the complexity of his concept of the symbol. The symbol represents a class of objects, but at the same time it is a self-sufficient and self-enclosed totality, and finally it lays claim to universality. In short, symbols express meaning in a variety of ways – by referring to a class of objects, by evoking something universal, even by cutting themselves off from the outside.

This is most clearly articulated in Paul Ricoeur's conception of the 'double intentionality' of the symbol<sup>150</sup> – although often, as in the above case, one is tempted to speak of a triple or even quadruple intentionality. The symbol has *meaning* in two different ways; it possesses a dual capacity. The Bulgarian-French theorist, Tzvetan Todorov, makes similar claims for the complex manner in which the symbol generates meaning through his distinction between direct and indirect signification.<sup>151</sup>

How are we to understand these various modes of meaning-creation that are found in the symbol? Paul Tillich's criteria for recognising a symbol are helpful here. First, a symbol

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<sup>149</sup> J.W. Goethe and Friedrich Schiller, *Correspondence Between Schiller and Goethe*, trans. L. Dora Schmitz (London: Bell, 1914), 1:372-3.

<sup>150</sup> Paul Ricoeur, *The Conflict of Interpretations*, trans. Don Ihde (Evanston: Northwestern University Press, 1974), 289.

<sup>151</sup> Tzvetan Todorov, *Theories of the Symbol*, trans. Catherine Porter (Ithaca: Cornell University Press, 1982), 203; also *Symbol and Interpretation*, trans. Catherine Porter (London: Routledge, 1983), 11. See further Curt Müller's *Die geschichtlichen Voraussetzungen des Symbolbegriffs in Goethes Kunstanschauung* (Leipzig: Mayer, 1937), 14.

is a sign. Before anything else, symbols possess a ‘representative function’<sup>152</sup> that means they indicate or express something (typically a belief). Secondly, however, the symbol is more than a sign. It operates as a sign, but also in additional ways. This is precisely what Ricoeur’s conception of the ‘double intentionality’ of the symbol is attempting to articulate: Ricoeur claims that the symbol ‘presents a first or literal intentionality that, like every significant expression, supposes the triumph of the conventional sign over the natural sign. . . . But upon this first intentionality there is erected a second intentionality.’<sup>153</sup> As far back as 1801, A.W. Schlegel speaks in a very similar manner of symbolic signification: ‘A second... intuition is built into language on the basis of the first representation of the sensible world.’<sup>154</sup> Over and above the sign-function of the symbol, the symbol works in another way.

What is this second way? For Tillich, symbols ‘participate in the power and the meaning of what they symbolize and signs do not’<sup>155</sup>: this participation in what they express gives symbols an ‘innate power’.<sup>156</sup> As well as expressing a belief, symbols participate in a meaning; they possess an ontological connection to it and, consequently, perform this meaning within themselves.<sup>157</sup> Now, there are a number of highly controversial philosophical moves in the above and there is, of course, little need for the courts to take account of some

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<sup>152</sup> Paul Tillich, ‘Religious Symbols and our Knowledge of God’ in *Main Works* vol. 4, ed. John Clayton (New York: De Gruyter, 1987), 396-7.

<sup>153</sup> Ricoeur [n. 150] 289.

<sup>154</sup> A.W. Schlegel, *Vorlesungen über schöne Literatur und Kunst (Berlin 1801-1804)* in *Kritische Ausgabe der Vorlesungen*, ed. Ernst Behler (Paderborn: Schöningh, 1989), 1:211.

<sup>155</sup> Paul Tillich, ‘The Word of God’ in *Main Works* vol. 4, 412.

<sup>156</sup> Paul Tillich, ‘The Religious Symbol’ in *Main Works* vol. 4, 254. The difference can be measured in the attention we pay to the symbol as opposed to the sign. Gadamer defines signs as follows: ‘*Pure indication...* is the essence of the sign... It should not attract attention to itself in such a way that one lingers over it, for it is there only to make present something that is absent and to do so in such a way that the absent thing, and that alone, comes to mind.’ ([n. 145] 145) The ‘innate power’ of the symbol, however, means that it draws attention to itself, as well as expressing an external meaning. The German *Sinnbild* suggests this to the extent that it implies an image which is already itself meaningful.

<sup>157</sup> Adams brings out this performative aspect of the symbol well: ‘The universal [meaning] becomes not something previously there... [but] something *generated* by the particular [image] as the seed generates the plant.’ The emphasis is not so much on an artefact which bears traces of meaning beyond it, but rather of ‘symbolic activity’ producing the meaning it bears. Hazard Adams, *The Philosophy of the Literary Symbolic* (Tallahassee: Florida University Press, 1983), 19.

of this more metaphysical speculation. Nevertheless, we contend that the idea that symbols participate as well as express is significant. We contend that some form of very weak ‘double intentionality’ is a necessary aspect of symbolism. The role of participation in the classical symbol is helpful: symbols consolidate one’s membership in a community. Indeed, Tillich himself recognises this crucial aspect of symbolism: symbols gain and retain power only insofar as they are recognised by a ‘group unconscious.’<sup>158</sup> Indeed, for him, the consequence of such a claim is that individuals cannot consciously choose symbols: ‘The symbol... possess[es] a necessary character. It cannot be exchanged. It can only disappear when, through dissolution, it loses its inner power.’<sup>159</sup>

The conclusion of this theoretical excursus is the following: symbols are fundamentally complex and they generate meaning in more than one way. Schematically, one can speak of the ‘sign-function’ of a symbol (it expresses beliefs like an ordinary sign) and the ‘participation-function’ of a symbol (it is a token of membership in a community).

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It is therefore important to stress that both legally and theoretically the sign-function of the symbol does not exhaust its properties – even if traditionally when it comes to Article 9 this property of the symbol has been foregrounded to the extent of obscuring other characteristics. Over and above the sign-function of the symbol, the symbol works in another way. As we have seen theoretically, it possesses a ‘double intentionality’. The practical turn can be read as an implicit acknowledgement of the complexity of the symbol – whether it is merely motivated by a prior belief is not all that is at issue.

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<sup>158</sup> Tillich [n. 152] 398.

<sup>159</sup> Tillich [n. 156] 254.

It is in *Kokkinakis v Greece* that the religious right to bear witness to one's faith was established on the basis of Article 9: 'Bearing witness in words and deeds is bound up with the existence of religious convictions.'<sup>160</sup> Article 9 protects the individual's act of bearing witness and of course the wearing of religious symbols forms one way of bearing witness; it is a way of exhibiting in the *forum externum* one's commitment to a faith and one's belonging to a faith community. The judgment in *Lautsi v Italy* speaks in this regard of the "identity-linked" value' of symbols.<sup>161</sup> The way Shirley Chaplin justifies her wearing of a crucifix at work makes this participation-function particularly clear: 'Christians are called by the Bible and God to tell others about their faith and the wearing of a Cross is a visible means of manifesting that calling... If others know I am a Christian because they see the Cross on my necklace, I tend to focus more on my actions and words to keep them as consistent as possible.'<sup>162</sup>

Part of why a Christian wears a cross is to bear witness to his or her position in the Christian community and part of why a Sikh wears a Kara is to bear witness to membership of a Sikh people. Note the use of 'part' here: as we have already seen, the Kara is also a reminder of specific Sikh beliefs (God's infinity, most obviously) and the cross is a reminder of Jesus's Crucifixion and Resurrection. That is, these symbols have a sign-function as well as a function of bearing witness. We contend that it is essential that these two functions be kept separate, even if they sometimes seem to collapse into each other: a symbol can express a specific religious belief or it can make known one's belonging to a particular community; and symbols are often chosen precisely because they do both. A symbol need not do both, however: a secret symbol worn under one's clothes may well remind the user of a specific

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<sup>160</sup> *Kokkinakis* [n. 8] para 31; quoted in the domestic context in *Begum* [n. 34] para 26.

<sup>161</sup> *Lautsi* [n. 55] para 15.

<sup>162</sup> *Chaplin v Royal Devon and Exeter NHS Foundation Trust* [2010] ET 1702886/2009.

belief that he or she has, but it does not particularly bear witness to his or her faith, whereas a Jewish skull cap may not put the user in mind of a particular Jewish belief, but it nevertheless acts as a symbol which identifies the wearer as Jewish.<sup>163</sup>

Hence, one should separate out the sign-function of the symbol from its capacity to bear witness. The symbol has a ‘double intentionality’, operating as sign, and also as a badge or emblem of one’s identity. What, however, is the point of separating out these two functions? What more does it gain us?

The sign-function of the symbol expresses a religious belief; the participation-function of the symbol makes manifest a religious identity. The purpose of the latter is not to instruct or remind the viewers of the symbol of a particular belief, but to identify the user as a member of a particular community. And – this is the key move – there is very little reason to reduce this participation-function of bearing witness to a matter of belief (at least, not to theoretical religious beliefs, as opposed to specific practical ones). Insofar as a symbol bears witness to the user’s membership of a religious community, it seems odd to claim that it is manifesting a private belief in the theoretical truths of that religion. As Trigg puts it, ‘It is not just what I believe, but a question of which religious community, if any, I choose to identify with.’<sup>164</sup> The symbol is a token of belonging to or participation in something public and intersubjective; to reduce it (in this respect) to the expression of something intensely personal and subjective sits uncomfortably with this. In short, the community, rather than a private belief, becomes the referent of one’s symbol.<sup>165</sup> Hence, the practical turn can be read in terms of a growing emphasis on the symbol’s participation-function alongside its sign-function.

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<sup>163</sup> The Coptic practice of tattooing the inside of one’s wrist to indicate membership of the religious community is a particularly clear example of the participation-function of the symbol. Our thanks to Rt. Rev. Michael Nazir-Ali for this example.

<sup>164</sup> Trigg [n. 41] 47.

<sup>165</sup> Underlying this suggestion is again a question of whether Article 9 gets religion right. Is not the communal nature of religion at least as fundamental as the existence of a set of cogent beliefs in the *forum internum*? See



### 6.3 Low-Level or Practical Beliefs

Nevertheless, one cannot proceed too far in a shift in emphasis from the sign-function to the participation-function of the symbol, for practices have to have *some* connection with mental states. The above two models – insofar as they treat symbols independently of their relation to beliefs – have their limits. They require supplementation by an additional model that explains the way understanding of the belief/practice relation itself has been changed in the practical turn.

Therefore, we need to distinguish (with Arden LJ<sup>166</sup>) the religious practice of wearing the cross (say) from the merely cosmetic practice of wearing the cross. The latter is not eligible for protection under Article 9.1, while the former may well be. The only way to distinguish between these two practices – which may outwardly be indiscernible – is with reference to the *forum internum*. It is not, *pace* Arden LJ, quite so clear that the distinction has to be by way of beliefs, rather than by intentions, or intentions taken together with beliefs, but it must go by way of some mental state or other(s).

We are now in a position to present another formulation of our main point, the point that jurisprudence has recently exhibited a practical turn. In this version, the practical turn consists in a turn away from high-level theoretical religious beliefs (e.g. the belief that Jesus died on a cross for the salvation of humans) towards specific practical beliefs (e.g. the belief that it would be good to wear the cross).<sup>167</sup> We submit that the practical turn remains highly important even on this way of conceptualizing it. The key inquiry in the case law has shifted from the question ‘what is the connection between the high-level theoretical religious belief and this action?’, a question that it was often very hard to answer, to the question ‘does this practice, as expressing this specific low-level practical belief, constitute a generally

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*ibid.*, 14, 36.

<sup>166</sup> *Williamson* [n. 30] para 269.

<sup>167</sup> On this distinction between lower and higher-level beliefs, see further Gilbert [n. 98] 320-1.

recognized religious practice?'. We suggest that, while the second question is still difficult, it is more tractable than the first question, and more likely to yield a fruitful line of inquiry.

It should be clear that this alternative formulation of the practical turn does do justice to the data: the Strasbourg case-law, as we have seen, shows a marked shift away from considering the thorny question of whether the action manifests a religion or a system of philosophical belief. The suggestion here is that the shift is explained by the fact that, rather than asking whether an action or practice such as wearing a veil (as in *Şahin* and *Dogru*), following a vegetarian diet (as in *Jakóbski*), or burning incense sticks (as in *Kovaļkovs*), is an expression of a high-level religious system (such as Islam, Buddhism, or Vaishnavism), the Courts are now more interested in taking the belief as being simply the low-level practical belief 'for religious reasons, I ought to, or it would be good for me to, wear the veil/abstain from pork/burn incense'. If we consider this low-level practical belief there is little difficulty in establishing a connection of the requisite sort between the action or practice on the one hand and the belief on the other. This is not to say that there are no more difficult questions; in fact, it becomes harder to establish that the low-level practical beliefs are distinctively religious or philosophical, such that they are eligible to come under the protection of Article 9.1 – though we submit that establishing that a given low-level practical belief is *religious or philosophical* is still easier than establishing that a given action directly expresses a certain high-level theoretical *religion or philosophy*. (This is because to establish that a particular belief is religious or philosophical necessitates only establishing that the belief has *some connection or other* with a religion or philosophy; it is not the case that there is a *certain substantive relation* (such as direct expression) that must be established between the belief and a religion or philosophy to show that the belief is religious or philosophical.) Under the older jurisprudence that question was rather easier, since the high-level belief systems under

consideration were usually clearly generally recognised religions or philosophies, though that was not always the case, as *Chappell v United Kingdom* shows.<sup>168</sup>

We do not assert that the only correct way to read the practical turn is as a turn from consideration of high-level theoretical systems of belief (such as Islam or pacifism) to low-level practical beliefs (such as the belief that one ought to wear the veil or that it would be a good idea to distribute tracts urging the withdrawal of troops). We also believe that the more radical reading of the practical turn as a turn away from practices as manifestations of beliefs towards practices as subject to assessment in their own right is a possible reading. But even here it must be stressed that there is no sense in which the turn to considering practices in their own right irrespective of beliefs should *replace* the focus on the belief/manifestation relation. In terms of the use of symbols we have been discussing, this would be merely to turn from one simplistic paradigm for understanding the symbol to another – from an exclusive concentration on the symbol's sign-function to an exclusive concentration on its participation-function. The new model would be just as bad as the old model in neglecting the inherent complexity (or more precisely duplicity) of religious symbolism. What is needed, of course, is an understanding of the uses of religious symbols which bears in mind both of their functions: their capacity to express beliefs in the *forum internum* and their capacity to signal participation in religious communities. Both are integral characteristics of what a symbol is – and consequently legal cases surrounding the protection of the uses of symbols need to bear both in mind.

There is also, of course, an overriding legal reason why the practical turn could never take place entirely *at the expense of* the belief/manifestation relationship: the text of Article 9

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<sup>168</sup>The Commission has not found it necessary to decide whether or not Druidism can be classified as a religion within the meaning of Article 9.1' *Chappell v United Kingdom* [1988] 10 E.H.R.R. CD510. It should be added that in *Pendragon v UK*, ([1999] 27 E.H.R.R. CD179, 184), the Commission did accept that the Druid assembly in question 'was of a religious nature'.

itself understands religious practices (including uses of symbols) as manifestations of belief. What is more, one reason why the reference to antecedent beliefs remains important is because, as we have just suggested, practices are the particular practices that they are (religious practices rather than, say, merely cosmetic practices) only in virtue of their being motivated by particular beliefs or other mental states that will likely be accompanied by beliefs. To repeat, this does not in any way subvert the practical turn, because the beliefs in question here are not high-level theoretical beliefs (e.g. about the existence of a deity), but, rather, low-level practical beliefs (e.g. about the desirability of wearing a particular symbol to express one's belief in a deity and to effect or signal one's membership in a particular religious community).

Courts need therefore to retain these concepts, no matter what else they also consider. The belief/manifestation relation is not going to vanish. Moreover, even the Government's 'Observations' still retains reference to such concepts, even though it stresses so emphatically the integrity of practices irrespective of the (high-level, theoretical) beliefs from which they ultimately derive. Hence, it speaks of practices being 'motivated' by beliefs or 'encouraged' by beliefs.<sup>169</sup>

And yet the point still stands that whether beliefs manifest practices does not seem to be where the rigours of the manifestation test are now being applied. While the practical turn does not mean the neglect of the belief/manifestation relation, it may well mean its marginalisation when it comes to testing for protection under Article 9.

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<sup>169</sup> Foreign and Commonwealth Office [n. 115] paras 4-5, repeating *Jakobski* [n. 104] para 45.

So, the question again recurs: if the belief/manifestation relation is no longer the paradigm for setting the threshold for protection, what is? How – after the practical turn – are protected and unprotected symbols to be distinguished? And it is with such a question that this report ends, for as yet nothing has emerged in European jurisprudence to suggest that after the practical turn there is a stable and settled threshold for distinguishing protected from unprotected manifestations under Article 9. This final part of the report has sketched three models that try to frame the question about thresholds in ways appropriate to the shift that has occurred since 2005. However, a consistent answer to this question is still lacking.<sup>170</sup>

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<sup>170</sup> For further details on recommendations and suggestions for future research emerging from the present project, see our AHRC discussion paper (n.1).

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Please do get in contact with the authors if you have any feedback or if you are interested in discussing the findings further. There is also an online questionnaire on the impact this research has had on your work and life available at

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## APPENDIX I: QUESTIONS FROM THE WORKSHOP

At the collaborative workshop in May 2012, which formed part of the present project, we presented the following questions for discussion.

1. Is it desirable to distinguish legally between two outwardly similar practices (for example, religious wearing of the cross and cosmetic wearing of the cross), such that one is legally protected and the other not?
2. If the answer to (1) is 'yes', how should such a distinction be made? In the light of beliefs? Intentions? Or beliefs taken together with intentions?
3. Is it desirable to distinguish legally between central or more widely recognized religious practices and those that are peripheral or less widely recognized?
4. If the answer to (3) is 'yes', how should such a distinction be made?
5. How should the law deal with cases in which there is a well-recognized and central religious practice that can take more than one particular form, such that no particular form of it is well-recognized and central? (For example, in *Williamson* it was mooted that disciplining one's children was, in general, a well-recognized and central religious practice, but that there was no particular way of disciplining one's children that was a well-recognized and central religious practice.)
6. Is it desirable for the law to individuate practices at the level of religions, or to allow for practices common to different religions, and, indeed, common to many different parts of society? (For example, should one think in terms of a common practice of 'observing a weekly day of rest', or rather of different practices of 'observing the Jewish Sabbath', 'observing the Christian Lord's Day', etc.?)

7. Is there a good reason to isolate religious and philosophical practices from political or cultural practices?
8. Is the turn in jurisprudence to considering practices going to disadvantage those in new religions or small sub-religions whose practices are not widely followed, but who would have had greater protection had the law considered just their beliefs?
9. Should the practical turn in jurisprudence be halted, abandoned, or reversed?
10. If the answer to (9) is 'yes', what should replace it? The older jurisprudence which focuses just on the relation between manifestation and antecedent beliefs? Or something else entirely?