Religious Symbols and the European Convention on Human Rights

Abstract

In this article, which draws on our monograph *The Right to Wear Religious Symbols* (Basingstoke: Palgrave, 2013), we examine the development of the case law of the European Court of Human Rights ('the ECtHR') and the now-defunct gateway body the European Commission of Human Rights ('the Commission') concerning the right to wear religious symbols. We contend that the case law exhibits a change over time that we call 'the practical turn'. Our discussion goes right up to the recent case *Eweida v UK*.

Section One: The Structure of A Case Brought Under Article 9

There is no primary legislation in the UK explicitly concerned with religious symbols, so most legal cases concerned with them are brought either under legislation concerning religious discrimination or under the law concerning human rights. In this essay we concentrate exclusively on the latter. In the UK the law concerning human rights is given in the Human Rights Act 1998 ('the HRA') and in the European Convention on Human Rights ('the ECHR'), to which the HRA gives effect. Although Article 10 of the ECHR, which concerns freedom of expression, is relevant to the use of symbols, almost every case concerning religious symbols has been brought under Article 9, which is the article expressly concerned with freedom of thought, conscience, and religion, sometimes in association with Article 14, which prohibits certain forms of discrimination. The English text of Article 9,[1] which is in two paragraphs, reads:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes

1 Both the English and the French versions of the Convention are equally authoritative.

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.[2]

Article 14 does not provide any additional free-standing rights, but rather is parasitic on the other articles of the ECHR, so we shall confine our discussion in what follows to Article 9.

The Two Paragraphs of Article 9

It will have been noted that Article 9 comes in two paragraphs. The first of these establishes the right to freedom of thought, conscience, and religion. The second clause of this first paragraph sets out the two most important freedoms that come within this right: first, the freedom to change one's religion or belief, and, secondly, the freedom to manifest one's religion or belief. The second paragraph of the article explains in what circumstances the second freedom to be mentioned, the freedom to manifest one's religion or belief, may be restricted.

'Thought, conscience and religion'

Article 9 carries the heading 'Freedom of thought, conscience and religion', and its first clause reads 'Everyone has the right to freedom of thought, conscience and religion'. This clause is the

2 <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 5 October 2013.

most important part of the Article, as stated by the Commission in the twin cases of *A v UK*[3] and *C v UK*[4]:

> Art. 9 primarily protects the sphere of personal beliefs and religious creeds, *i.e.* the area which is sometimes called the forum internum.

The clause means that one has total freedom under the ECHR to think whatever one likes, no matter how trivial, scurrilous, immoral, insulting, blasphemous, or treasonable. One implication of this is that a law commanding that one think certain thoughts or hold certain beliefs would violate Article 9, as would an attempt by the state to indoctrinate or brainwash a citizen into thinking certain thoughts or holding certain beliefs. There is no explicit case law on this point, as cases of alleged brainwashing are usually dealt with under other Articles such as Article 3, 5, or 8.[5] The closest one gets to a judicial declaration is what the ECtHR had to say, *obiter*, in the first case to come before it under Article 9, *Kokkinakis v Greece*,[6] about 'improper proselytism':

> It may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.[7]

Also relevant (and slightly stronger) is the *obiter* description in *Kosteski v Former Yugoslav Republic of Macedonia* of the state's 'sitting in judgment on the state of a citizen's inner and personal beliefs' as 'abhorrent' and as smacking 'unhappily of past infamous persecutions'.[8]

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3 *A v UK* (1984) 6 EHRR 558 (Commission Decision, App no. 10295/82, 14 October 1983).

4 *C v UK* [1983] ECHR 19, (1984) 6 EHRR 587 (Commission Decision, App no. 10358/83, 15 December 1983).

5 See, e.g., *Blume v Spain*, [1999] ECHR 90, (2000) 30 EHRR 632. (App no. 37680/97, 14 October 1999.) In this case the Court decided that it was not necessary to examine the case under Article 9 since a violation of Article 5 had already been found: *Blume* 641 [38].

6 *Kokkinakis v Greece*, [1993] ECHR 20, (1994) 17 EHRR 397. (App no 14307/88, 25 May 1993.)

7 *Kokkinakis* 422 [48].

8 *Kosteski v Former Yugoslav Republic of Macedonia* [2006] ECHR 403, (2007) 45 EHRR 31, 720 [39]. (App no. 55170/00, 23 April 2006.)

As far as indoctrination is concerned there was a relevant *obiter* statement in the Chamber judgment of the ECtHR in *Lautsi v Italy,* where the Chamber spoke of:

> an obligation on the State's part to refrain from imposing beliefs, even indirectly, in places where persons are dependent on it or in places where they are particularly vulnerable.[9]

Even though no case has been brought to Strasbourg in this respect we do have some guidance in the *Travaux Préparatoires* for the ECHR, which state with respect to Article 9:

> the Committee wished to protect all nationals of any Member State, not only from "confessions" imposed for reasons of State, but also from those abominable methods of police enquiry or judicial process which rob the suspected or accused person of control of his intellectual faculties and of his conscience.[10]

'Manifest his religion or belief'

Although the first clause is the most important part of Article 9 of the ECHR, almost every case concerns one of the later clauses, in particular the clause that affords the freedom to manifest one's religion or belief, in worship, teaching, practice, and observance. It should be noted first that 'religion or belief' is narrower in scope than 'thought, conscience and religion'; 'religion or belief', unlike 'thought, conscience and religion', does not cover every opinion that anyone might ever entertain. What, then, is meant by 'religion or belief'? First it should be noted that the word 'belief' in 'religion or belief' is added to make it clear that the protection of Article 9 extends beyond

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9 *Lautsi v Italy*, [2009] ECHR 1901, (2010) 50 EHRR 42, 1062 [48]. (App no 30814/06, Chamber judgment of 3 November 2009.) This judgment was subsequently overturned by the Grand Chamber: [2011] ECHR 2412, (2012) 54 EHRR 3, 18 March 2011.

10 'Establishment of a collective guarantee of essential freedoms and fundamental rights' [12], Doc. 77, 05 September 1949; available on-line at <http://assembly.coe.int/ASP/Xref/X2H-DW-XSL.asp?fileid=36&lang=EN> accessed 31 October 2013.

religions to non-religious beliefs. It is best to understand 'belief' to include absence of belief as well: the earlier quotation from the *Lautsi* judgment would seem to show this, since here imposing a belief on a young child would most naturally be seen as constituting an infringement of one's freedom to lack that belief, rather than as an infringement of one's freedom to hold an incompatible belief.

Strasbourg has, wisely, nowhere attempted to define 'religion'.[11] The Court has, however, made some remarks in elucidation of the meaning of 'belief', most notably in *Campbell v UK*.[12] In fact, this case did not directly concern Article 9, but rather Article 2 of Protocol No. 1, which talks of 'religious and philosophical convictions'. Nevertheless, the case is relevant, since the Court remarked that:

> In its ordinary meaning the word 'convictions' […] is more akin to the term 'beliefs' (in the French text: '*convictions*') appearing in Article 9 —which guarantees freedom of thought, conscience and religion—and denotes views that attain a certain level of cogency, seriousness, cohesion and importance.[13]

The link here established between 'convictions' in Article 2, Protocol No. 1, and 'beliefs' in Article 9, shows that it is necessary for a belief to 'attain a certain level of cogency, seriousness, cohesion and importance' in order for its manifestations to qualify for protection under Article 9. Having defined 'convictions', the Court then continued to define the phrase 'philosophical convictions':

> Having regard to the Convention as a whole […] the expression 'philosophical convictions' in the present context denotes, in the Court's opinion, such convictions as are worthy of respect in a 'democratic society' and are not incompatible with human dignity.[14]

This is not setting the bar particularly high, and few beliefs have been found to fail, the most

11 The Commission explicitly dodges the question of whether Druidism is a religion in *Chappell v UK* (1988) 10 EHRR 510 (App no. 12587/86, Commission Decision, 14 July 1987).

12 *Campbell v UK* [1982] ECHR 1, (1982) 4 EHRR 293. (App nos 7511/76 and 7743/76; 25 February 1982.)

13 *Campbell* [36].

14 *Campbell* [36].

famous exception being in the case of *Salonen v Finland*,[15] where the applicants wished to name their daughter 'Ainut Vain Marjaana' ('the one and only Marjaana'), which wish the Commission found, drawing on language from *X v Germany*,[16] not to be 'a manifestation of any belief in the sense that some coherent view on fundamental problems can be seen as being expressed thereby'.[17] Almost identical language was adopted by the Court in *Blumberg v Germany* in connection with a doctor's refusal to perform a medical examination.[18]

Forum Externum: The Manifestation Test

Once we have determined, however, that the phrase 'religion or belief' has been satisfied, we do not yet know whether the particular action at issue in the case is a manifestation of the religion or belief. Even once that has been established, it remains to be seen whether there has been an interference with that manifestation, and, if so, whether the interference was justified.

Historically, the Court and the Commission have been reluctant to find manifestations, and reluctant to find interference. The classic example of the first reluctance is the case of *Arrowsmith v UK*.[19] At para 71 of the judgment the Commission stated:

> the term 'practice' as employed in Article 9 (1) does not cover each act which is motivated or influenced by a religion or a belief. […] However, when the actions of individuals do not actually express the belief concerned they cannot be considered to be as such protected by Article 9 (1), even when they are motivated or influenced by it.[20]

15 *Salonen v Finland* (1997) 90 DR 60. (App no 27868/95, 2 July 1997.)

16 *X v Germany* (1981) 24 DR 137, 138. (App no 8741/79, 10 March 1981).

17 *Salonen* 67.

18 *Blumberg v Germany*, Unreported, App no 14618/03 (ECtHR, 18 March 2008), 4.

19 *Arrowsmith v UK* [1978] ECHR 7, (1981) 3 EHRR 218. (App no 7050/75, 12 October 1978.)

20 *Arrowsmith* 228–9.

So the Commission here establishes, and is later followed by the Court in holding,[21] that in order for an action to count as a protected practice of a belief it must 'express' (later 'directly express'[22]) the belief in question; it is not sufficient for the action to be motivated or influenced by the belief. Neither the Commission nor the Court has given any direct pronouncement as to what it is for an action to express a belief, though clues may be gleaned from the individual judgments.

Forum Externum: Interference and the Specific-Situation Rule

Let us turn now to the second hurdle to be cleared, the question of whether there was in fact interference with the applicant's human rights. The classic case here was until 2013 a case declared inadmissible on 3 December 1996 by the Commission, *Konttinen v Finland*.[23] The Commission's report stated:

> The Commission would add that, having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post. The Commission regards this as the ultimate guarantee of his right to freedom of religion.[24]

The Commission stated that the applicant's rights were not interfered with since he was free to go and manifest his religion in another job. (This line of argument was, in fact, taken from precedent: the case of *Ahmad v UK*.[25]) While the decision in *Konttinen* (like that in *Ahmad*) was taken only by the Commission, not seven months later, on 1 July 1997, the Court endorsed the thrust of the Commission's reasoning in the leading case of *Kalaç v Turkey*:

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21 See, e.g., *Skugar v Russia* [2009] ECHR 2159. (App no 40010/04, 3 December 2009.)

22 See, e.g., *Eweida v UK* [2013] ECHR 37 [82]. (App no. 48420/10, 15 January 2013.)

23 *Konttinen v Finland* (1996) 87 DR 68. (App no 24949/94, 3 December 1996.)

24 *Konttinen* 75.

25 *Ahmad v UK* (1982) 4 EHRR 126 (Commission Decision). (App no 8160/78, 1 March 1981; also sub nom *X v UK*.)

> Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account. […] In choosing to pursue a military career Kalaç was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians.[26]

The Court here suggested that the reason why Kalaç's rights were not violated was simply to do with his 'specific situation': he had chosen to become a military judge and, in so choosing, implicitly accepted restrictions on the exercise of his freedom.

The phrase 'specific-situation rule' was adopted by commentators to cover the Court's case law that whether or not prevention of a certain manifestation of one's religion constituted interference with one's rights depended on the specific situation in question, such as whether the prevention of the manifestation had occurred in the context of paid employment.

The specific-situation rule was definitively overturned only in the 2013 case of *Eweida v UK*.[27] There the Court stated:

> there is case-law of the Court and Commission which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under Article 9 § 1 and the limitation does not therefore require to be justified under Article 9 § 2. […] Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether

26 *Kalaç v Turkey* [1997] ECHR 37, (1999) 27 EHRR 552, 564 [27–8]. (App no 20704/92, 1 July 1997.)

27 *Eweida v UK* [2013] ECHR 37, (2013) 57 EHRR 8. (App nos 48420/10, 59842/10, 51671/10, 36516/10, decision of 15 January 2013.)

or not the restriction was proportionate.[28]

All this means that while interference with the applicant's human rights must still be found in order that a violation may be found, the specific-situation rule is no longer a good guide to whether or not interference has taken place.

The turning point from 9(1) to 9(2)

Although, as we have said, the specific-situation rule was definitively overturned only in 2013, the turning point from considerations of the first paragraph of Article 9 (9(1)) to the second (9(2)) seems to have come some nine years earlier, in the case of *Şahin v Turkey*, which was decided by the Chamber of the ECtHR in 2004 and by the Grand Chamber in 2005.[29] What is noteworthy about this case is that precedent would have suggested that the Court spent a long time deciding under 9(1) whether (I) Şahin's actions were really manifestations of a protected belief and (II) Turkey had interfered with her manifestation of that belief by taking the steps that it did. Instead, the Court, both at the initial Chamber level and at the later level of the Grand Chamber, bypassed these questions and went straight to consideration of whether any interference that there might have been was justified under 9(2). The key passage is in para 71 of the Chamber's judgment:

> 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.[30]

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28 *Eweida v UK* [83].

29 *Şahin v Turkey* [2004] ECHR 299, (2005) 41 EHRR 8 (Chamber); [2005] ECHR 819, (2007) 44 EHRR 5 (GC). (App no 44774/98, 29 June 2004 (Chamber), 10 November 2005 (Grand Chamber).)

30 *Şahin* (2004/5) 14 [71].

The Grand Chamber went on specifically to quote and approve this passage,[31] which has, indeed, set the tone for subsequent decisions.[32]

The final step in a claim brought under Article 9 is to decide whether the interference was justified under one of the conditions laid out in the second paragraph of Article 9:

> 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.

Rather than discuss how an application might succeed or fail under this rubric, however, we shall instead now turn to our main topic in this paper, the shift that we perceive in Strasbourg jurisprudence away from deciding cases under the first paragraph of Article 9 towards the second paragraph. More particularly, we discern a trend away from spending most of the judicial time and effort on the first three questions (whether there is a genuine religion or belief at issue, whether the action is a manifestation of the religion or belief, and whether there has been interference with the action) in favour of assuming manifestation and, more recently, interference, and spending most of the judicial time and effort on the question of justification. This shift we dub 'the practical turn'.

Section 2: The Practical Turn

We see the practical turn, then, as a turn away from making judgments on religious practices *solely* in the light of the antecedent beliefs that they manifest to considering them in their own right

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31 *Şahin* (2005/7) 120 [78].

32 E.g. *Dogru v France* [2008] ECHR 1579, (2009) 49 EHRR 8, 193 [47–8] (App no 27058/05, 4 December 2008), *Jakóbski v Poland* [2010] ECHR 1974, (2012) 55 EHRR 8, 239–40 [45] (App no 18429/06, 7 December 2010), and *Kovalkovs v Latvia* [2012] ECHR 280 (App no 35021/05, ECtHR, 31 January 2012, unreported).

alongside beliefs. We also maintain that this shift has a theoretical basis that is mirrored in changing attitudes to religion in the anthropology, sociology, and philosophy of religion.

The Paradox of Motivation

A helpful way to understand this practical turn is through the fate of the concept of motivation in cases brought under Article 9 after 2005. To put it bluntly, the concept of motivation, which had a clearly defined position in the previously mentioned *Arrowsmith* case (motivation was there deemed insufficient to constitute manifestation), now plays a far more haphazard, marginal, and sometimes even paradoxical role.

The most recent high-profile case brought under Article 9, *Eweida v UK*, illuminates this sharply. The ECtHR here seems to insist—rather bizarrely—that motivation is both sufficient *and* insufficient to characterize the wearing of a cross as a manifestation of religion. Thus, when it comes to the status of Nadia Eweida's cross, the Court states:

> It was not disputed in the proceedings before the domestic tribunals and this Court that Ms Eweida's insistence on wearing a cross visibly at work was motivated by her desire to bear witness to her Christian faith. Applying the principles set out above, the Court considers that Ms Eweida's behaviour was a manifestation of her religious belief, in the form of worship, practice and observance, and as such attracted the protection of Article 9.[33]

The implication seems to be that there is something in the first sentence of this passage—presumably the fact that her wearing of the cross was *motivated* by a religious desire—that, conjoined with the general principles the Court had set out earlier, constitutes proof that this

33 *Eweida* 245 [89].

wearing of the cross counts as a manifestation of religion for the purposes of Article 9. And yet when one turns to the section, 'General principles under Article 9 of the Convention',[34] one finds it very explicitly stated that a motivated practice does *not* in itself constitute a manifestation: 'Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief.'[35] In other words, the ECtHR is happy to make clear that it is faithful to the principle (taken from *Arrowsmith*) that motivation is insufficient to constitute manifestation *at the same time as* it suggests that motivation is here sufficient to pass the manifestation test.

While *Eweida* provides a particularly recent occurrence of this apparent contradiction, a similarly slap-dash treatment of the concept of motivation is present in almost every case concerning religious practice brought since 2005. As we suggested earlier, *Şahin* provides the crucial precedent. In para 66, the ECtHR explicitly cites *Arrowsmith*, and recites its fundamental principle, 'Article 9 does not protect every act motivated or inspired by a religion or belief.'[36] Despite this, five paragraphs later, the Court now argues as follows:

> 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.[37]

As Gilbert writes of these remarkable words, 'The Court declined … to distinguish between an act

34 *Eweida* 242–4 [79]–[84].
35 *Eweida* 243 [82].
36 *Şahin* [2004/5] 124–5 [66].
37 *Şahin* [2004/5] 125–6 [71].

being motivated by a religious belief or as being a manifestation of that belief.'[38] Five paragraphs after re-affirming the traditional jurisprudence of the manifestation test that motivation is insufficient to constitute manifestation, the ECtHR completely discards this principle: motivation is now seemingly sufficient.

Moreover, the reversal is even more flagrant, since the judgment employs the very same language as *Arrowsmith* to make the opposite point. The language used in the English version of *Arrowsmith* is 'motivated or influenced by a religion or a belief',[39] 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, especially as the Chamber has just cited this passage from *Arrowsmith*. It is therefore hard to see the Court's treatment of manifestation in *Şahin* as anything other than a repudiation of the view taken by the Commission in *Arrowsmith at the very same time as it explicitly affirms it*.

This is odd, to say the least. Nevertheless, our contention is that the practical turn provides a way of understanding this post-2005 jurisprudence that to some extent resolves the mess just detailed. It is a way of making sense of this recent treatment of the category of motivation. In short, what we contend is that the concept of motivation, and indeed the manifestation test in general, are no longer as central to the deliberations of the Court: since 2005, judges have paid far less attention to the question of whether a religious practice is merely motivated by a belief or expresses one—and this accounts for its slap-dash and haphazard treatment in the subsequent judgments.

Religion as Practice and/or Belief

The key to understanding the practical turn is to look at shifts in theoretical debates around religion, for these have seemingly proven influential for the judges. Crudely put, researchers in the

38 H. Gilbert (2006) 'Redefining Manifestation of Belief in *Leyla Şahin v Turkey*', *European Human Rights Law Review*, 3, 315.

39 *Arrowsmith* 228 [71].

anthropology, sociology, and philosophy of religion have become increasingly suspicious of any description of religion that places too great an emphasis on belief. Religion is not always like that. A helpful gloss on this is provided by the account of Islam that emerges from Orhan Pamuk's 2002 novel on the headscarf controversies in Turkey, *Snow*. As the protagonist, who has returned to rural Turkey from Westernized Europe and is experiencing something like a conversion back to Islam, is told in no uncertain terms by an ultra-secularist:

> Even if you did believe in God, it would make no sense to believe alone. You'd have to believe in Him as the poor do; you'd have to become one of them. It's only by eating what they eat, living where they live, laughing at the same jokes and getting angry whenever they do that you can believe in their God. If you're leading an utterly different life, you can't be worshipping the same God they are. God is just enough to know that it's not a question of reason or logic but how you live your life.[40]

Or, as a self-proclaimed religious terrorist puts it later in the novel, 'If you worship God like a European, you're bound to be a laughing stock … First try to be like everyone else, then try to believe in God.'[41] What is being criticized here is 'the idea of a solitary, Westernised individual whose faith in God is private'[42]—that is, the idea that an appeal to certain beliefs held privately in one's consciousness can be sufficient to describe religion adequately. Pamuk's characters suggest that there are alternatives; for example, a form of Islam that privileges communal ways of living over private beliefs. On this latter view, it is the social practices one engages in that constitute one's religious identity. Part of the significance of the practical turn, we are arguing, is that it places more emphasis on the communal, practical, and public nature of religion.

A theoretical parallel to Pamuk's challenge to belief-centric accounts of religion can be found in the

40 O. Pamuk, *Snow*, trans. M. Freely (London: Faber, 2004), p. 208.
41 *Ibid*, p. 334.
42 *Ibid*, p. 63.

work of the philosopher of religion, Roger Trigg; moreover, Trigg explicitly frames this as a critique of, among other things, the traditional jurisprudence surrounding Article 9. For Trigg, '[w]hen religion is pitted against rights, religion is often sidelined.'[43] That is, judges have tended to minimize the significance of religion by understanding it through the alien and distorting categories of human rights, i.e. by understanding it as a matter for the individual rather than the community, a matter of beliefs held in the individual's private conscience rather than public practices, and a matter of autonomously chosen beliefs rather than those into which we are brought up.[44] On all three counts, according to Trigg, the courts' language of the autonomous beliefs of individuals is falsifying the nature of religion: not only misunderstanding it, but playing down its centrality to public life and human existence in general—reducing it, that is, to one more freely held opinion. For Trigg, nothing is more symptomatic of this than the phrase found in the ECHR (as elsewhere): 'religion or belief'. This is to make explicit the idea that a religion can be legally treated as a specific type of belief—and thereby to play out this reduction of religion.

It is the distinction so often made in the jurisprudence respecting Article 9 between the *forum internum* and the *forum externum* that is seen to be most problematic here, particularly since, as we mentioned earlier, the ECtHR has been quick to insist that 'religious freedom is *primarily* a matter of individual conscience [i.e. of the *forum internum*].'[45] Trigg's criticism is again representative: 'From many religious points of view, the contrast between belief and manifestation is obnoxious.'[46] In other words, if the ECHR frames religion in terms of a distinction between a *forum internum* that is accorded priority and a derivative domain of public manifestations, it is necessary to ask: *is religion always or even usually like this*? If it turns out to be the case, as Pamuk and Trigg insist, that this model of religion is a parochial one, this raises a question about Article 9's ability to protect every form of religion, and so it puts both the legitimacy and the effectiveness of the ECHR's protection of religious freedoms into question.

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43 R. Trigg (2012) *Equality, Freedom and Religion* (Oxford: Oxford University Press), p. 8.
44 For examples of these arguments, see *ibid*, pp. 14, 42.
45 *Şahin* 125 [105]; our emphasis.
46 Trigg, *Equality*, pp. 101–2.

Our contention is that the practical turn undertaken in ECtHR jurisprudence since 2005 is one way in which Strasbourg has in fact responded to these concerns. By marginalizing the question whether a practice is merely motivated by or genuinely expresses an antecedent belief, the ECtHR has ultimately undermined any idea that religion is always primarily a matter of belief. Since 2005, judges are no longer as interested in legitimating religious practices with respect to their links to beliefs. Since being motivated by a belief is seemingly viewed as both sufficient and insufficient for manifestation, it can no longer be a crucial criterion for assessing religious practices; rather, practices are now to be considered far more in their own right, not as signs of belief. This, then, responds, in a fairly precise manner, to the worries of those like Trigg and Pamuk, and it does so by re-focusing attention on how one practises, rather than on what one believes.

Perhaps the most compelling evidence for this argument is to be located in the significance *Kokkinakis* has come to have for jurisprudence since 2005. It is in this judgment that the 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.'[47] The point is that bearing witness to one's faith is not necessarily identical with expressing religious beliefs: a Jewish skull cap may not express a particular Jewish belief, but it nevertheless acts as a symbol that bears witness to the wearer's religion. Bearing witness is (partly at least) about proclaiming one's participation in a community, rather than just about making private beliefs public. To put it in Pamuk's terms, it is about religious ways of life. Shirley Chaplin's justification of her wearing of a crucifix at work makes this aspect of religious practices 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.'[48]

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

47 *Kokkinakis* 418 [31].
48 *Chaplin v Royal Devon and Exeter NHS Foundation Trust* [2010] ET 1702886/2009 (unreported).

people.[49] Note the use of 'part' here: the Kara is also a reminder of specific Sikh beliefs (God's infinity, most obviously) and the cross can be a reminder of Jesus's Crucifixion and Resurrection. Again, Pamuk's *Snow* illustrates this. Teslime, an adolescent girl committed to wearing a headscarf in spite of secular pressures otherwise, is described as follows, 'Teslime was the one most dedicated to the struggle for her religion and the Word of God. For her, the headscarf did not just stand for God's love; it also proclaimed her faith and preserved her honour.'[50] The headscarf not only expressed a belief in God's love, it bore witness to her faith: while such functions of a religious practice can often collapse back into each other so as to become indistinguishable, we contend that keeping them separate explains some of what is going on in the practical turn. It is a turn towards seeing practices in their own right as partially independent of beliefs.

The Practical Turn in Action: *Jakóbski* and *Kovaļkovs*

The very framework of the ECtHR's approach to the manifestation test has dramatically changed over the last eight years. In short, the founding distinction between mere motivation, which was not protected under Article 9, and full-blown manifestation, which was so protected, appears now to be relatively unimportant. To conclude, we wish to draw this out with respect to two cases.

In the 2010 case of *Jakóbski v Poland*,[51] Jakóbski had been denied the right by the Polish courts to vegetarian meals in prison. What is striking is the fact that in its ratio the ECtHR eschewed any scrutiny of the nature of the manifestation at all. The manifestation test was bypassed. That is, the ECtHR avoided giving a detailed argument for Jakóbski's diet's being a manifestation of his religious views, merely observing that dietary rules could be considered 'a direct expression of beliefs in practice in the sense of Article 9'.[52] Therefore:

> the Court considers that the applicant's decision to adhere to a vegetarian diet can be

49 '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.' *R (Watkins-Singh) v Aberdare Girls' High School Governors* [2008] EWHC 1865, [2008] 3 FCR 203, [26].

50 Pamuk, *Snow*, p. 121.

51 *Jakóbski v Poland* [2010] ECHR 1974, (2012) 55 EHRR 8. (App no 18429/06, 7 December 2010.)

52 *Jakóbski* 239 [45].

> regarded as motivated or inspired by a religion and was not unreasonable.[53]

It will be noted that this is a loose quotation from the passage from *Şahin* quoted earlier with the addition that the belief was not unreasonable. (And this addition cannot be a crucial part of the Court's ratio since there was no suggestion in *Arrowsmith* that the applicant's action was unreasonable, even though the Commission found it not to be manifestation of a belief.) The main point is that the Court 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.

Another recent case that makes the practical turn explicit is *Kovaļkovs v Latvia*.[54] 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 other prisoners' and that his incense sticks had been removed.[55] 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 by means of a repetition of the language of *Jakóbski*:

> 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. The Court notes that Article 9 of the Convention lists the various forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. At the same time, it does not protect every act motivated or inspired by a religion or belief.[56]

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.

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53 *Jakóbski* 239–40 [45].
54 *Kovaļkovs v Latvia* [2012] ECHR 280, App no 35021/05 (ECtHR, 31 January 2012, unreported).
55 *Kovaļkovs* [60].
56 *Kovaļkovs* [60]–[1], citing *Jakóbski* 239–40 [45].

What both cases exemplify is a stark reversal of the way in which the ECtHR has dealt with the question of manifestation since 2005. This is particularly evident in the speed with which they proceed to questions surrounding Article 9(2). The manifestation test, as well as the belief test and test for interference, are bypassed in the name of a far-more detailed consideration of the cases in respect to the justification stage. Once more, there is a theoretical background to this 'turn': the clamour in legal theory for the ECtHR to weigh up cases under Article 9(2), rather than hastily barring them at the earlier stages, is long-standing.[57] The belief test, the manifestation test, and the specific-situation rule that the Court and Commission had originally built up around Article 9(1) are neither called for by the text of the Article itself nor strictly necessary, and so it is to the credit of Strasbourg judgments since 2005 that this has come to be recognized.

Moreover, to repeat, this recognition is made possible by the shift in the way the belief/practice relation is treated. Motivation alone is no longer—in apparent opposition to earlier case-law—insufficient to establish manifestation. What is taking place, we have argued, is that the whole framework of understanding a manifestation as *a sign of an underlying belief* has been relatively marginalized and a new theoretical paradigm is now being used for understanding the status of manifestations. This change involves a reorientation of the question of religious practices away from treating them as signs derivative of high-level beliefs to a consideration of religion as (partially at least) a way of life.

57 See, for example, R. Sandberg (2011) *Law and Religion* (Cambridge: Cambridge University Press), pp. 86–7.