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**The Other Side of the Coin?  
A Critical Examination of the Right Not to Manifest  
Religion or Belief in Article 9 of the European  
Convention on Human Rights**

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*For my Mum, Dad and Sister,  
as an expression of appreciation for their support, encouragement and constant love*

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## **Abstract**

In recent years there has been a considerable increase in Article 9 cases heard by the European Court of Human Rights (ECtHR). As a result, academic literature dedicated to the discussion of freedom of thought, conscience and religion has grown significantly. The majority of Article 9 cases have concerned the right to manifest religion or belief, therefore, this right has been subjected to considerable academic scrutiny. However, the Court has also considered a substantial number of cases concerning the right *not* to manifest religion or belief, yet, in comparison to the right to manifest, the right not to manifest has been almost completely neglected in the literature. This dissertation seeks, for the first time, to redress this imbalance.

This dissertation adopts the approach of close documentary analysis to explore the right not to manifest religion or belief. It juxtaposes both the case law of the ECtHR and the literature on this right, to critically analyse whether the right is understood coherently and protected consistently by the Court. It argues that the presentation of the right not to manifest is confused both in case law and the literature. It also contends that the treatment of this right by the European Commission on Human Rights (ECnHR) and the ECtHR has often been inconsistent. The Court, in particular, has tended to present the right not to manifest as an absolute right which cannot be limited by the state, yet, when it has applied the right to the facts of the case, it has often treated it as a qualified and subjected it to limitations.

This dissertation offers some reasons for the inconsistencies. It also makes some recommendations for the improved understanding and protection of this right. It suggests that the right not to manifest should be reconceptualised as the right to refrain from disclosing religion or belief, and, should be conceived of as an absolute right when no positive ‘action’ has been taken by the claimant on the basis of their religion or belief.

## INTRODUCTION

The right to manifest religion or belief is clearly set out in Article 9 of the European Convention on Human Rights and Fundamental Freedoms (ECHR),<sup>1</sup> is well established in the jurisprudence of the European Court of Human Rights ('ECtHR' or 'the Court')<sup>2</sup> and, in recent years, has been discussed at great length in the related literature.<sup>3</sup> This contrasts sharply with the right not to manifest religion or belief. Whilst this right is not explicitly mentioned in Article 9 it does form part of this article and a significant number of ECtHR cases have revolved around this right.<sup>4</sup> It is striking, however, that compared to the right to manifest, the right not to manifest has been almost completely neglected in the literature on Article 9.

Article 9 is formed of two limbs. Article 9.1 states that this right includes freedom to change religion or belief, and freedom, either alone or in community with others and in public or private to manifest religion or belief, in worship, teaching,

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<sup>1</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221, Article 9.

<sup>2</sup> See *inter alia* *Pendragon v UK* (1998) 27 EHRR CD 179; *Dahlab v Switzerland* ECHR 2001-V 42393; *Leyla Sahin v Turkey* ECHR 2005-XI 44774; *El Morsli v France* App no 15585/06 (ECtHR 4 March 2008); *Dogru v France* ECHR 2008 27058; *Aktas v France* App no 43563/08, *Bayrak v France* App no 14308/08, *Gamaleddyn v France* App no 18527/08, *Ghazal v France* App no 29134/08, *J. Singh v France* App no 25463/08 and *R Singh v France* App no 27561/08 (ECtHR 17 July 2009); *Arslan v Turkey* (1999) 21 EHRR 264; *Eweida and others v United Kingdom* (2013) 57 EHRR 8.

<sup>3</sup> Key texts include M D Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press 1997); C Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press 2001); P Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press 2005) and R Sandberg, *Law and Religion* (Cambridge University Press 2011).

<sup>4</sup> See *inter alia* *Kosteski v Former Yugoslav Republic of Macedonia* ECHR 2006 55170; *Alexandridis c Grèce* App no 19516/06 (ECtHR 21 February 2008) para 38; *Dimitras et autres c Grèce* App nos 42837/06, 3237/07, 3269/07, 35793/07 and 6099/08 (ECtHR 3 June 2010); *Sinan İşik v Turkey* ECHR 2010 21924, para 41; *Grzelak v Poland* ECHR 2010 7710, para 87 and *Wasmuth c Allemange* App no 12884/03 (ECtHR 17 February 2011). This is a considerable amount given the relatively small number of Article 9 cases heard by the ECtHR. See European Court of Human Rights Public Relations Unit, '50 Years of Activity: The European Court of Human Rights, Some Facts and Figures' (ECHR 2010) <[http://www.echr.coe.int/Documents/Facts\\_Figures\\_1959\\_2009\\_ENG.pdf](http://www.echr.coe.int/Documents/Facts_Figures_1959_2009_ENG.pdf)> accessed August 2014.

practice and observance.<sup>5</sup> Article 9.2 qualifies Article 9.1; it states that freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and 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>6</sup>

Article 9 encompasses a wide variety of rights. These rights are generally divided into *forum internum* and *forum externum* rights.<sup>7</sup> *Forum internum* rights relate to the internal realm of freedom of religion or belief and include the right to hold and to change religion or belief.<sup>8</sup> In contrast, *forum externum* rights relate to the external realm of freedom of religion or belief and consist of the freedom, either alone or in community with others and in public or private, to manifest religion or belief in worship, teaching practice and observance.<sup>9</sup>

Despite the variety of rights in Article 9, however, the rapidly growing body of academic literature on the topic of freedom of thought, conscience and religion concentrates almost exclusively on the *forum externum* right to manifest religion or

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<sup>5</sup> This is identical to Article 18 of the Universal Declaration of Human Rights (UDHR) and Article 18.1 of the International Convention on Civil and Political Rights (ICCPR), see Universal Declaration on Human Rights, GA Res. 217A (III), UN Doc. A/3/810 (1948), Article 18; International Covenant on Civil and Political Rights, GA Res 2200A (XXI) 21 UN GAOR Supp (No 16), UN Doc A/6316 (1966), 999 UNTS 171, Article 18.

<sup>6</sup> This has considerable similarities with ICCPR Article 18.3 and ECHR Article 9.2, see *ibid.*

<sup>7</sup> C Evans (n3) 72-73; P Taylor (n3) 19; J Dingemans, C Yeginsu, T Cross and H Masood, *The Protections for Religious Rights Law and Practice* (Oxford University Press 2013) 81; W Fuhrmann, 'Perspectives on Religious Freedom from the Vantage Point of the European Court of Human Rights' (2000) *Brigham Young University Law Review* 829, 831; J Martinez-Torron, 'The (Un)protection of Individual Religious Identity in the Strasbourg Case Law' (2012) *Oxford Journal of Law and Religion* 1, 3.

<sup>8</sup> *Van den Dungen v Netherlands* (1995) DR 80; *CJ, JJ and EJ v Poland* (1996) DR 84, 46. For comment see *inter alia* B Tahzib, *Freedom of Religion Or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff Publishers 1996); C Evans (n3) 72-79; Taylor (n3) 116ff; N Bratza, 'The 'Precious Asset': Freedom of Religion Under the European Convention on Human Rights' (2012) 14 (2) *Ecclesiastical Law Journal* 256, 259; L Peroni, 'Deconstructing 'Legal' Religion in Strasbourg' (2013) *Oxford Journal of Law and Religion* 1, 3

<sup>9</sup> ECHR Article 9.1.

belief and the legitimacy of state restrictions upon this right. This is largely the result of a number of high profile cases concerning government limitations on manifestation of religion or belief in public - particularly the wearing of religious symbols and clothing, in education and employment<sup>10</sup> - heard by the ECtHR since the turn of the century. Such cases have received extensive media coverage<sup>11</sup> and provoked much political<sup>12</sup> and public debate.<sup>13</sup>

However, like the right to manifest, the right not to manifest has also been increasingly claimed before the ECtHR. Applicants have complained that they have been forced to reveal their religion or belief, or have had it revealed on their behalf without their consent, by the state in various contexts including the courtroom,<sup>14</sup> in education<sup>15</sup> and in the provision of identity<sup>16</sup> and wage tax cards.<sup>17</sup> However, these cases have received precious little attention in comparison to right to manifest cases;<sup>18</sup>

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<sup>10</sup> See *Sinan Işık v Turkey* (n4); *Eweida and others v United Kingdom* (n2).

<sup>11</sup> See for instance, D Barrett, 'Christians have no right to wear cross at work, says Government' (*Telegraph* 10 March 2012) <<http://www.telegraph.co.uk/news/religion/9136191/Christians-have-no-right-to-wear-cross-at-work-says-Government.html>> access August 2014; BBC, 'British Airways Christian Employee Nadia Eweida Wins Case' (*BCC News UK* 15 January 2013) <<http://www.bbc.co.uk/news/uk-21025332>> accessed August 2014. For discussion of the role of the media in this respect see N Cox 'Religious Tolerance, the News Media and Respect for the Theist' in N Spencer (ed) *Religion and Law* (Theos 2012).

<sup>12</sup> For a discussion of policy concerns see J Dingemans (n7) 80; C McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (2011) 13 (1) *Ecclesiastical Law Journal* 38. In *SAS v France*, for instance the Court considered Resolution 1743 (2010) and Recommendation 1927 (2010) of the Parliamentary Assembly of the Council of Europe on Islam, Islamism and Islamophobia. See *SAS v France* ECHR 2014 43835.

<sup>13</sup> Sandberg suggests that such cases create 'moral panic', see R. Sandberg, *Religion, Law and Society* (Cambridge University Press 2014) 49,148,153,159. See also C McCrudden (n12) 38.

<sup>14</sup> *Alexandridis c Grèce* (n4); *Dimitras et autres c Grèce* (n4); *Dimitras et autres c Grèce* App nos 34207/08 and 6365/09 (ECtHR 2 November 2011); *Dimitras et autres c Grèce* App nos 44077/09, 15369/10 and 41345/10 (ECtHR 8 January 2013).

<sup>15</sup> *Saniewski v Poland* App no 42393/98 (ECtHR 15 February 2001); *Grzelak v Poland* (n4).

<sup>16</sup> *Sinan Işık v Turkey* (n4).

<sup>17</sup> *Wasmuth c Allemange* (n4).

<sup>18</sup> The most prominent texts are J Dingemans (n7); L Peroni (n8); R C A White R C A and C Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (5<sup>th</sup> edn, Oxford University Press 2010).

perhaps this is because the majority of these cases are unreported<sup>19</sup> and available only in French.<sup>20</sup>

It is concerning that the right not to manifest has largely been ignored outside of ECtHR case law itself. Firstly, it is tremendously difficult to ascertain what this right actually protects. Secondly, the nature of this right, in terms of its place in the *forum internum/ forum externum* distinction, is not clear. And finally, there seems to be a distinct lack of clarity with respect to the ECtHR's treatment of this right when it applies it to the facts of each case.

The robust academic debate concerning the right to manifest has been, and continues to be, extremely useful in identifying the meaning, scope and nature of the right to manifest and the principles developed and consolidated by the Court in respect of its protection.<sup>21</sup> Moreover, such doctrinal research has drawn attention to problems in terms of the protection of the right to manifest by the Court, for instance, conceptual confusion surrounding key terms such as 'manifestation' and the 'margin of appreciation' has been highlighted.<sup>22</sup>

The aim of this dissertation, therefore, is to conduct a systematic analysis of the meaning, scope and nature of the right not to manifest and an evaluation of the way in which this right has been protected by the ECtHR in order to ascertain whether the right

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<sup>19</sup> Unreported cases are not available in Law Reports, such as the European Court of Human Rights *Reports of Judgments and Decisions*, but are available on the ECtHR database, HUDOC. References to unreported cases will be pinpointed by page number where possible.

<sup>20</sup> The following cases are available only in French: *Alexandridis c Grèce* (n4); *Dimitras et autres c Grèce* 2010 (n4); *Dimitras et autres c Grèce* 2011 (n14); *Dimitras et autres c Grèce* 2013 (n14); *Wasmuth c Allemagne* (n4).

<sup>21</sup> J Murdoch, *Protecting the Right to Freedom of Thought, Conscience and Religion under the European Convention of Human Rights* (Council of Europe 2012) 6.

<sup>22</sup> C Evans and P Taylor have argued that the Court gives too much deference to states by relying heavily on the margin of appreciation in manifestation cases, see C Evans (n3) and P Taylor (n3).



not to manifest is understood coherently and protected consistently.<sup>23</sup> It is anticipated that this research will complement research on the right to manifest religion or belief. In light of the above, the research questions for this dissertation are as follows: what is the meaning and scope of the right not to manifest? What is the nature of the right not to manifest and how can it be interfered with? And, how and why has the right not to manifest been protected by the Court?<sup>24</sup>

## **Methodology**

In order to address these questions this dissertation will adopt the legal methodology of close documentary analysis. Firstly, this is the most appropriate methodology for conducting a technical evaluation of primary sources including Article 9 of the ECHR and European Commission on Human Rights (ECnHR)<sup>25</sup> and ECtHR case law relevant to the right not to manifest religion or belief. As noted above, much of the relevant case law is available only in French, therefore it will be necessary to engage with these cases in their original language. In addition, secondary sources, largely in the form of academic comment on Article 9, will also be critically addressed.

Secondly, this methodology is particularly well suited to a systematic analysis of coherency and consistency of legal doctrine with respect to the right not to manifest.

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<sup>23</sup> This dissertation has grown out of earlier conference papers on the topic: C K Roberts, 'On the Right Not to Manifest Religion or Belief in Europe' (Annual Law and Religion Scholars Network Conference, Cardiff University, 14 May 2013); C K Roberts, 'The Other Side of the Coin: The Right Not to Manifest Religion or Belief in Europe' (14<sup>th</sup> Annual AHRI Conference, *Emerging Research in Human Rights*, Human Rights Research Students' Conference, School of Advanced Studies, Human Rights Consortium, University of London, 11 Sept 2013)

<sup>24</sup> Note that this question asks specifically *why* it has been protected *by the Court*, not the wider question of why this right is protected; to answer this broader question it would be necessary to go beyond of the scope of this dissertation's methodology.

<sup>25</sup> The ECnHR functioned until 1998. It acted as a 'filter' for the ECtHR deciding whether applications were admissible or inadmissible. Since 1998 applications have been declared inadmissible or admissible by the Court itself. For further detail see J Martinez-Torron, 'Religious Pluralism: The Case of the European Court of Human Rights' in F Requejo and C Ungureanu (eds), *Democracy, Law and Religious Pluralism in Europe: Secularism and post-secularism* (Routledge forthcoming) 139, footnote 8.

According to this perspective each case forms part a system of interrelated rules rather than unconnected decisions; it focuses on principles and precedents and traces their development through case law. The rigorous and detailed analysis of sources required for this approach is extremely useful in drawing attention to any conceptual ambiguities or contradictions with respect the right not to manifest.

Thirdly, this approach establishes clear boundaries for the research. Close documentary analysis can be criticised, *inter alia* for being rather narrow as it is somewhat insulated from external factors (such as social, economic, political and cultural factors) and considerations of how the law operates in practice. However, because the right not to manifest has been so neglected in the literature on Article 9, it is useful to begin with doctrinal analysis.<sup>26</sup> In fact, whilst advocating an interdisciplinary approach, Sandberg has convincingly argued that a doctrinal analysis needs to come first.<sup>27</sup> This methodological approach, therefore, will allow this research to contribute to the ongoing project of providing doctrinal commentaries on the Article 9 right to freedom of thought, conscience and religion.<sup>28</sup>

## **Approach**

This dissertation will form five chapters. Chapter one will focus on Article 9 of the ECHR. It will begin the process of clarifying and explaining the meaning of key concepts in relation to Article 9, such as ‘religion’ and ‘belief’ and ‘*forum internum*’ and ‘*forum externum*’ which will be essential for the analysis of case law in relation to the right not to manifest in subsequent chapters. This chapter will also review the

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<sup>26</sup> J Smits views doctrinal scholarship as the core legal method. See J Smits *Minds and Methods of Legal Scholarship* (Edward Elgar 2012).

<sup>27</sup> R Sandberg (n3) 206-207.

<sup>28</sup> C Evans (n3); P Taylor (n3); M Evans (n3) have all used this approach.

literature specifically relating to Article 9. The subsequent chapters will then explore the research questions. Chapter 2 will address the first research question concerning the meaning and scope of the right not to manifest, in terms of how the right is presented before it is applied to the facts of the case by the ECnHR and ECtHR, and, how it is described in the literature on Article 9. Chapter 3 will examine the second research question concerning the nature of the right not to manifest. It will assess whether the right not to manifest is considered to be a *forum internum* or *forum externum* right. Again it will analyse the presentation of this right in case law and the way in which it is described in the literature on Article 9.

Both Chapters Four and Five will focus on the third research question concerning the protection of the right not to manifest by the Court. It will therefore take into account the findings in Chapters Two and Three, in order to critically analyse the way in which the Court treats the right not to manifest when it applies this right to the facts of the case in question. A detailed analysis of case law, separated into Commission admissibility decisions and judgements of the ECtHR respectively, will be conducted in Chapters Four and Five in order for separate conclusions regarding these institutions' approaches to be reached.

Finally, the conclusions of each chapter will be brought together into an overall conclusion and the findings will be reflected upon as a whole.

# CHAPTER 1: ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

## Introduction

Before embarking on an examination of the right not to manifest, it is necessary to explore Article 9 in some detail. In the ECHR, Article 9 is the key provision which protects the right to freedom of thought, conscience and religion.<sup>29</sup> This section, therefore, will examine the structure of Article 9, definitions of the terms ‘religion’, ‘belief’, ‘thought’ and ‘conscience’ and also the concepts *forum internum* and *forum externum*.

## Definition of Thought, Conscience, Religion and Belief

Whilst the shorthand ‘religion or belief’ is used in respect of the right not to manifest, it is recognised that Article 9 protects not only ‘religion’ or ‘belief’, but also ‘thought’ and ‘conscience’ too. The ECtHR has repeatedly stressed the importance of the right to freedom of thought conscience and religion both for personal identity and development<sup>30</sup> and for the wellbeing of democratic societies.<sup>31</sup> Yet, clear definitions of the terms ‘religion’, ‘belief’, ‘thought’ and ‘conscience’ are not offered by Article 9 nor

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<sup>29</sup> It is supported by Article 2 of the First Protocol which protects the exercise of religious freedom in education, particularly the rights of parents to ensure that the education of their children is in conformity with their own religious and philosophical convictions. Additional protection of thought, conscience and religion is provided by Article 8, the right to private and family life, Article 10 the right to public expression, Article 11 the right to peaceful assembly and association and also Article 14 which acknowledges that ECHR rights should be free from discrimination, including religious discrimination.

<sup>30</sup> Nussbaum recognises ‘to search for an understanding of the ultimate meaning of life in one’s own way is among the most important aspects of a life that is truly human’, see M C Nussbaum, *Women and human development: the capabilities approach* (Cambridge University Press 2000) 179.

<sup>31</sup> *Kokkinakis v Greece* (n4). For comment see P Edge, ‘Current Problems in Article 9 of the European Convention on Human Rights’ (1996) *Juridical Review* 46, 42; J Dingemans (n7) 979; P Danchin and L Forman, ‘The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities’ in P Danchin and E Cole (eds) *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press 2002), 196.

have they been established by the Court.<sup>32</sup> It might be assumed that such definitions would be fundamental to the development of Article 9 case law but given the controversial nature of these terms it has been exceptionally difficult to reach any consensus;<sup>33</sup> indeed there is no agreed definition in the literature.<sup>34</sup> This is not an issue particular to Article 9; these terms have not been defined in other international human rights instruments which protect freedom of thought, conscience and religion.<sup>35</sup> Most assistance is given in soft law, General Comment 22, which speaks of the right to freedom of thought, conscience and religion as ‘far reaching and profound’, noting the terms ‘belief’ and ‘religion’ are to be ‘broadly construed’, encompassing ‘theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.’<sup>36</sup>

The ECtHR has explicitly denied that it functions to determine what constitutes religion or belief.<sup>37</sup> It has also denied that it can assess the legitimacy of particular

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<sup>32</sup> Several human rights instruments guarantee religion freedom but none define it. For comment see J Gunn, ‘The Complexity of Religion and the Definition of ‘Religion’ in International Law’ (2003) 16 *Harvard Human Rights Journal* 189-190.

<sup>33</sup> Indeed Adhar and Leigh have argued that it is essential, see R Adhar R and I Leigh, *Religious Freedom in the Liberal State* (Oxford University Press 2013) 121. Definitions can certainly be useful. Sandberg sets out a number of reasons for definitions including consolidation, clarification, enlargement or limitation, see R Sandberg ‘Religion, Society and Law’ (PhD Thesis, Cardiff University 2010), 85. See also F A R Bennon, *Statutory Interpretation: A Code* (4<sup>th</sup> edn, Butterworths 2002) 479.

<sup>34</sup> For definitions see *inter alia* N Smart, *The Philosophy of Religion* (Oxford University Press 1979); K Greenawalt, ‘Religion as a Constitutional Concept’ (1984) 72 *California Law Review* 753; P W Edge, *Legal Responses to Religious Difference* (Kluwer Law International, 2002) 5-17.

<sup>35</sup> This has been observed by C. Evans (n3) 51, 59-61; M D Evans ‘Human Rights, Religious Liberty, and the Universality Debate’ in R O’Dair and A Lewis (eds) *Law and Religion* (Oxford University Press 2001) 209.

This, however, is not unusual in the human rights context. As Slotte notes, ‘open-endedness is a consequence of the kind of formulations of international treaties that parties in the deliberations have been able to agree to’, see Slotte P, ‘Securing Freedom Whilst Enhancing Competence’ (2011) 6 *Religion and Human Rights* 41.

<sup>36</sup> General Comment No. 22 (48) UN Doc. CCPR/C/21/Rev.1/Add.4 (1993). For a detailed analysis of this document, see B G Tahzib (n8) 307–375. See also ‘Guidelines for Review of Legislation Pertaining to Religion or Belief’ prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion and Belief, in consultation with the Council of Europe’s Commission for Democracy Through Law (Venice Commission), adopted by the Venice Commission at its 59th plenary session (Venice, 18–19 June 2004).

<sup>37</sup> J F Renucci, *Article 9 of the European Convention on Human Rights* (Council of Europe Publishing 2005) 15.

beliefs or the way in which those beliefs are expressed; rather ‘[w]hat it considers taking a stand on are state interventions in people’s lives and whether these are justified.’<sup>38</sup>

One technique used by the ECnHR and the ECtHR to sidestep complex questions of definition is to move quickly to, and concentrate largely upon, the legitimacy of restrictions on ‘manifestations’ according to the permissible limitations in Article 9.2.<sup>39</sup>

It is, however, clear from the case law that the Court protects not only theistic, non theistic and polytheistic ‘classical’ religions<sup>40</sup> but also to ‘new’ religious organisations such as the Church of Scientology.<sup>41</sup> This variety indicates that the Court has a broad understanding of religion and does not necessarily equate it with belief in a god.<sup>42</sup> Nevertheless, some scholars have argued, with some merit it must be said, that there are various other indications in case law that the Court has a particular, Judeo-Christian, understanding of religion.<sup>43</sup>

The Court has also recognised that Article 9 is a ‘precious asset’ for atheists, agnostics, sceptics and the unconcerned<sup>44</sup> and has protected various convictional stances

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<sup>38</sup> P Slotte, ‘What is a Man if He Has Words But Has No Deeds? Some Remarks on the European Convention of Human Rights’ (2011) 11 *Ars Disputandi* 259, 261.

<sup>39</sup> M Evans (n3) 330-2.

<sup>40</sup> The Court has recognised *inter alia* Christianity in *Steadman v UK* (1997) EHRR CD 168; Buddhism in *X v United Kingdom* (1975) 1 DR 41; Hinduism in *ISKON v UK* App No 20490/92 (ECtHR, 8 March 1994); Islam in *X v United Kingdom* (1981)22 DR 27; Judaism in *D v France* (1983)35 DR 199; Sikhism in *X v UK* (1982) 28 DR 5.

<sup>41</sup> *Church of Scientology, Moscow v Russia* (2007) 46 EHRR 304.

<sup>42</sup> For discussion of ‘legal religion’ see W F Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 3; L G Beaman, ‘The Courts and the Definition of Religion: Preserving the Status Quo through Exclusion’ in A L Greil and D G Bromley (eds) *Defining Religion: Investigating the Boundaries Between the Sacred and Secular* (JAI 2003) 203; C Durham Jr. & B Scharffs, *Law and Religion: National, International, and Comparative Perspectives* (Wolters Kluwer 2010) 42.

<sup>43</sup> See broadly P Slotte (n38) and Cavanaugh’s argument that ‘a contingent power arrangement of the modern West [has been mistaken] for a universal and timeless feature of modern existence,’ see T Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (Oxford University Press USA 2009) 58.

<sup>44</sup> *Kokkinakis v Greece* (n4) para 14.

under Article 9 including Druidism, Veganism, Pacifism and Humanism.<sup>45</sup> According to the Court, in order to constitute a ‘belief’ three requirements must be satisfied: it must attain a certain level of cogency, seriousness, cohesion and importance, must relate to a weighty and substantial aspect of human life and behaviour and must be worthy of respect in a democratic society and not be incompatible with human dignity.’<sup>46</sup>

In contrast to ‘religion’ and ‘belief’, there is very little case law concerning ‘thought’ (perhaps because of the overlap with ‘opinion’ in Article 10)<sup>47</sup> and ‘conscience’, which usually only appears in the context of ‘conscientious objection’.<sup>48</sup> The Court has stated that ‘not all opinions or convictions constitute beliefs in the sense protected by Article 9(1) of the Convention,’ but further clarity has not been offered.<sup>49</sup> This is problematic because the framing of Article 9 has led to a debate about whether manifestation of ‘thought’ and ‘conscience’ is actually protected by this article.<sup>50</sup>

Given the lack of consensus in respect of the meaning of the terms ‘religion’, ‘belief’, ‘thought’ and ‘conscience’ in Article 9, they will be understood broadly in this dissertation.

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<sup>45</sup> See *Pendragon v UK* (n2); *W v UK* App no 18787/93 (ECtHR 10 February 1993); *Arrowsmith v the United Kingdom* (1978) 19 DR 5; *Folgero and others v Norway* ECHR 2207-VIII 15472 respectively.

<sup>46</sup> *Campbell and Cosans v UK* (1982) 4 EHRR 293, para 26. Hambler has suggested that ‘sincerity’ and ‘consistency’ have now become the crucial criteria for assessing whether or not a religion or belief is to be recognised as such for in order to access Article 9 protection, see A Hambler, ‘Establishing Sincerity in Religion and Belief Claims: A Question of Consistency’ (2011) 13 (2) *Ecclesiastical Law Journal* 146. This argument may, however, need reviewing in light of *Eweida* (n3) para 81.

<sup>47</sup> The concept of beliefs ‘is not synonymous with the words “opinions” and “ideas”, such as those utilised in Article 10...’, see *Campbell and Cosans V UK* (n46) para 36.

<sup>48</sup> A very restricted meaning was adopted in *Johnston and others v Ireland* (1986) Series A no 122.

<sup>49</sup> *Pretty v United Kingdom* ECHR 2002-III 2346 para 82.

<sup>50</sup> For comment on difficulties in distinguishing between manifestations of belief and expressions of conscience see P Danchin and L Forman (n31) 158.

## **The *Forum Internum* and *Forum Externum***

It has been suggested that within the architecture of all the core freedom of thought, conscience and religion articles the ‘abiding and fundamental distinction to be observed at all times’ is that between the *forum internum* and *forum externum*.<sup>51</sup> These concepts have become essential for understanding the nature of rights in Article 9. However, they are not actually found in the text of Article 9 itself, are referred to infrequently in case law and their scope is somewhat contentious in the literature.<sup>52</sup>

The ECtHR has stated that ‘Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*.’<sup>53</sup> It is sometimes referred to as the ‘private sphere’ of religion or belief but this can be somewhat misleading because it is conceptually narrower than this; it means specifically the realm of internal thought, conscience, religion and belief of each individual.<sup>54</sup> The *forum internum* is said to include (but is not restricted to) the right to hold or not hold<sup>55</sup> and the right to change<sup>56</sup> religion or belief. It has also been recognised that the *forum internum* encompasses a number of other rights, including the right not to

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<sup>51</sup> P Taylor (n3) 292. See also e.g., T Lindholm and others, ‘Introduction’ in T Lindholm and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers 2004) xxxvii; J D van der Vyver ‘The Relationship of Freedom of Religion or Belief Norms to Other Human Rights’ in *ibid*, 121; H Bielefeldt, ‘Freedom of Religion or Belief: A Human Right Under Pressure’ (2012) *Oxford Journal of Law and Religion* 1, 8; D Harris, M O’Boyle, E Bates and C Buckley, *Harris D, O’Boyle and Warbrick: Law of the European Convention on Human Rights* (3<sup>rd</sup> edn Oxford University Press 2014) 594.

<sup>52</sup> In (21<sup>st</sup> case law the concept *forum internum* appears only in five cases including the Concurring Opinion of Judge Pinto de Albuquerque in *Krupko and others v Russia* ECHR 2014 26587, para 5 and *Sinan Işik v Turkey* 42. The concept of *forum externum* appears only in *Nolan and another v Russia* ECHR 2009 2512, para 59 and in the concurring opinion of Judge Pinto de Albuquerque in *Krupko and others v Russia* (n52) para 5-6.

<sup>53</sup> *C v the United Kingdom* (1983) 37 DR 142; *Valsamis c Grèce* ECHR 1996-VI 21787 para 48.

<sup>54</sup> N Lerner, *Religion, Beliefs and International Human Rights* (Orbis Books 2000) 121; P Taylor (n3) 115-202; W Fuhrmann (n7) 831; Torron (n25) 3. See also P Danchin who speaks of it as the ‘internal dimension’ in P G Danchin ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’ (2008) 49 *Harvard International Law Journal* 249, 261.

<sup>55</sup> *Kokkinakis v Greece* (n4) para 31.

<sup>56</sup> See *Jakóbski v Poland* ECHR 2010 18429.



be compelled to be involved in religious activities, or compelled to show allegiance to a religion or belief, even symbolically, against one's will.<sup>57</sup>

Article 9 also protects the *forum externum* which relates to the external, often collective dimension of freedom of thought, conscience and religion.<sup>58</sup> It comprises the right to manifest one's religion or belief in public or private<sup>59</sup> and therefore has been referred to as 'the sphere where personal beliefs and religious creeds are physically manifested.'<sup>60</sup> Various tests have been developed by the Court to ascertain what constitutes as a 'manifestation'. In *Arrowsmith v United Kingdom* it was stated that in order for '...an act which is inspired, motivated or influenced by a religion or belief' to count as a 'manifestation' within the meaning of Article 9, it 'must be intimately linked to the religion or belief in question', but not necessarily a fulfilment of a duty mandated by a religion.'<sup>61</sup> More recently the Court has spoken of the necessity of 'a sufficiently close and direct nexus between the act and the underlying belief'<sup>62</sup> but there remains no fixed criterion for determining what counts as a 'manifestation'.<sup>63</sup> Essentially a manifestation is a 'positive action' taken by an individual on the basis of their religion or belief.

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<sup>57</sup> See *Darby v Sweden* ECHR 1990 11581 paras 50-51 and Taylor who speaks of the rights as forming the 'residual scope' of the forum internum see P Taylor, (n3)115ff.

<sup>58</sup> See *Nolan and another v Russia* (n52) para 59; J Witte and M C Green, *Religion and Human Rights: An Introduction* (Oxford University Press 2011) 259.

<sup>59</sup> For manifestations of religion see *Leyla Sahin v Turkey* (n2) and *Eweida v United Kingdom* (n2); for manifestation of belief see *Pendragon v UK* (n2).

<sup>60</sup> Concurring opinion of Judge Albuquerque to *Krupko and Others v Russia* (n52) Concurring opinion, para 6. He explains that it has four constituent components: time, space and institutional and substantive components. It relates to 'free access to space and meaningful times for members of the community gather and worship, and organization and direction of religious worship and dissemination of religious beliefs, ethical principles and moral teachings without outside constraint'. See also P Danchin and L Forman (n31) 198. Similarly, Fuhrmann uses the phrase 'to the outside world', see W Fuhrmann (n7) 831.

<sup>61</sup> *Arrowsmith v the United Kingdom* (n45) 45.

<sup>62</sup> *Eweida v United Kingdom* (n2) para 82; *SAS v France* (n12) para 55.

<sup>63</sup> It is particular debated whether manifestations of 'thought' or 'conscience' are protected in Article 9. The literal, comprehensive and hybrid view is set out clearly in R Sandberg (n33) 110ff.

In sum, therefore, Article 9 protects both ‘the right to determine, at the individual and collective level, what one’s religion or belief is (*forum internum*) and the ways and importance of the manifestation of it (*forum externum*).’<sup>64</sup> M. Evans has drawn a useful distinction between the right to freedom of thought, conscience and religion which is ‘passive’ and the right to manifest a religion or belief which is ‘active’.<sup>65</sup>

Recognising the distinction between the *forum internum* and *forum externum* is not just important for understanding the nature of these rights; whether a right is a *forum internum* right or a *forum externum* right is of legal significance (and thus crucial to the Court) because the scope and type of State action is understood differently in relation to each of these.<sup>66</sup> Unlike *forum externum* rights, *forum internum* rights, such as the right to hold, or change a religion or belief, cannot be subject to limitations under Article 9.2.<sup>67</sup> Any interference with these, so called ‘passive’, *forum internum* rights by the state -except during war or other national emergency- is considered an abuse of state power.<sup>68</sup> As Slotte neatly put it, ‘a man who has faith but no deeds is a believer who enjoys absolute protection under human rights law.’<sup>69</sup>

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<sup>64</sup> M Kiviorg, ‘Religious Autonomy in the ECHR’ (2009) IV *Derecho y Religion* 131, 133.

<sup>65</sup> M D Evans (n3) 284; J Fawcett, *The Application of the European Convention on Human Rights* (2<sup>nd</sup> edn Oxford University Press 1987) 244.

<sup>66</sup> M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2<sup>nd</sup> edn, Engel 2005) 412; N Bratza (n8) 259.

<sup>67</sup> For further discussion see C Evans (n3) 68-79; P Taylor (n3) 115-202; P van Dijk, *Theory and Practice of the European Convention on Human Rights* (4<sup>th</sup> edn Intersentia 2006) 752-3; M D Evans, ‘Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions’ in P Cane, C Evans and Z Robinson (eds) *Law and Religion in Theoretical and Historical Context* (Cambridge University Press 2008) 298-314; N Bratza (n8) 259, D Harris, M O’Boyle, C Warbrick and E Bates, *Harris D, O’Boyle and Warbrick: The Law of the European Convention on Human Rights* (2<sup>nd</sup> edn Oxford University Press 2009), 605.

<sup>68</sup> See ECHR Article 15. However, C Evans has pointed out that it is difficult to imagine a situation which would necessitate state interfere with the *forum internum* of individuals, see C Evans (n3) 165. Murdoch

Given that *forum internum* rights in Article 9 relate to the internal sphere of religious freedom, it may seem questionable how they can ever be interfered with by the state. It was common to assert that *forum internum* rights could only be affected by invasive and dystopic State action. Krishnaswami, for instance, considered any intervention in this domain to be not only illegitimate but ‘impossible’ except for ‘invasive mind-altering techniques, such as brainwashing or systematic indoctrination’.<sup>70</sup> Indeed, the *Travaux Préparatoires* reveal Article 9.1 was conceived of as a ‘bulwark against the dehumanizing techniques adopted in a police state.’<sup>71</sup> Furthermore, in the case of *Kalac v Turkey* the Court actually used such a narrow definition of freedom of religion, it was, as C. Evans noted, difficult to ‘see how any but the most totalitarian State could breach it.’<sup>72</sup> Together, this led scholars such as M. Evans to conclude that ‘[p]rovided that individuals are able to continue in their beliefs, the *forum internum* remains untouched and there will be no breach of Article 9(1)’.<sup>73</sup>

However, these statements are questionable in several respects; principally they reflect a narrow understanding of the *forum internum* as relating solely to the right to hold and to change a religion or belief. Using a wider understanding of the *forum internum* Tazhib suggested that in addition to the use or threat of physical force or prosecution to compel individuals to hold to, recant or convert from, their religion or

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suggests that it is ‘not entirely inconceivable’ in light of *Riera Blume and others v Spain* ECHR 1999-II 37680, paras 31-35, see J Murdoch (n21) 13.

<sup>69</sup> Slotte (n38) 268.

<sup>70</sup> A Krishnaswami, *Special Rapporteur* of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Study of Discrimination in the Matter of Religious Rights and Practices’ E/CN.4/Sub.2/200/Rev.1 (1960) 16. This has been recently reiterated by T Asad, see T Asad, ‘Thinking about Religion, Beliefs and Politics’ in R A Orsi (ed) *The Cambridge Companion to Religious Studies* (Cambridge University Press 2012) 44.

<sup>71</sup> Council of Europe, *Collected Edition of The ‘Travaux Préparatoires’ of the European Convention on Human Rights* (Martinus Nijhoff 1975–85) Vol 1, 200 and 222.

<sup>72</sup> C Evans (n3) 79.

<sup>73</sup> M Evans (n3) 297.

belief<sup>74</sup> - which are clear violations of the *forum internum*-<sup>75</sup> the state could also interfere with this *forum* through discrimination on the basis of holding or not holding a certain religion or belief, prohibition on membership of certain religions or beliefs under law and compulsion to reveal one's religion or belief or to have it revealed without one's consent.<sup>145</sup>

This analysis is more congruent with the developments in case law over the past fifteen years; the *forum internum* is now understood to encompass a number of additional rights which can be violated in various ways. Broadly speaking, compulsion in the realm of religion or belief is considered to be a *forum internum* issue. Article 9 protects the right to be able to make choices with respect to religion or belief *voluntarily*, without any sort of compulsion;<sup>76</sup> the ECtHR has found therefore that in addition to indoctrination and coercion to change religion, compulsion to act contrary to one's conscience and to be involved in religious activities also constitute interferences with the *forum internum*.<sup>77</sup>

In contrast to *forum internum* rights, the so called 'active' *forum externum* right to manifest is a qualified right and can be limited for the reasons listed in Article 9.2. Article 9.2 is similar to limitation clauses in other qualified ECHR articles, such as the right to respect for private and family life (Article 8), but is much less permissive, which indicates the drafters of the ECHR thought the right to manifest should only be limited in a small number of circumstances.<sup>78</sup> Given that manifestations of religion or

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<sup>74</sup> B G Tahzib (n8) 25–7.

<sup>75</sup> *CJ, JJ and EJ v Poland* (n8); *Ivanova v Bulgaria* (2008) 47 EHRR 54.

<sup>76</sup> For discussion see R Adhar and I Leigh (n33) 46. For wider context see Council of Europe, *Yearbook of the European Convention on Human Rights* (Council of Europe 1 July 1993) 63.

<sup>77</sup> See *inter alia*, *Darby v Sweden* (n57) paras 50-51. For discussion see M Evans (n3) 298; C Evans (n3) 88, 97.

<sup>78</sup> C Evans (n3) 45, 49.

belief are in the *forum externum* they may have societal consequences which necessitate state regulation. This is illustrated by the case of a nurse who's right to manifest – through wearing a cross around her neck – was limited on the basis of the health and safety of staff and patients on a hospital ward.<sup>79</sup> Theoretically, therefore, the division between *forum internum* and *forum externum* rights allows for 'manifestations' of religion or belief to be limited by the state in some instances 'without undoing the right to freedom of religion itself.'<sup>80</sup>

Despite this, it is debatable whether the distinction between the *fora* is so clear in practice. In cases where a violation of Article 9 is claimed the Court tends to ask the following questions: is the form of religion or belief one which is protected by Article 9? Does the alleged interference concern manifestation of religion or belief? And if so, is the interference with Article 9 justified according to the list of legitimate limitations in Article 9.2?<sup>81</sup> These questions appear straightforward but the Court has struggled greatly with their application. There are numerous, separate but linked, debates concerning the Court's approach to Article 9 cases, for instance, there are debates about the Court's understanding of what constitutes 'religion' or 'belief', about what constitutes a 'manifestation' and its application of Article 9.2 limitations.<sup>82</sup> Of most

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<sup>79</sup> *Eweida v United Kingdom* (n2) para 98. See also the more recent case of *SAS v France* in which the Court upheld the French law prohibiting the concealment of the face in public places, see *SAS v France* (n12) para 157.

<sup>80</sup> P Slotte (n38) 268.

<sup>81</sup> A slightly different list is set out in J Dingemans and others (n7) 81.

<sup>82</sup> The debates can be found throughout the literature on Article 9. Recent examples include R Sandberg, 'The Adventures of Religious Freedom: Do Judges Understand Religion?' (21 March 2012) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2032643](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2032643)> accessed August 2014; R Sandberg, 'A Question of Belief' in N Spencer (ed) *Religion and Law* (Theos 2012); B Scharffs, 'Symposium Introduction: The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights: Legal, Moral, Political and Religious Perspectives' (2011) 26 (1) *Journal of Law and Religion* 249; H Bielefeldt, 'Misperceptions of Freedom of Religion or Belief' (2013) 35 (1) *Human Rights Quarterly* 33; M Weiner, 'Human Rights Committee v European Court of Human Rights' (Symposium on The Manifestation of Religion or Belief in the Public Sphere, Oxford University, 14 June 2014); M A Geldon,

relevance to the research questions here is the debate the Court's sometimes confused application of the *forum internum* and *forum externum* distinction.<sup>83</sup>

C. Evans has criticised the ECnHR and ECtHR for treating the distinction between the *forum internum* and *forum externum* as 'self evident and needing little in the way of explanation' whereas in reality it has struggled to distinguish clearly between them.<sup>84</sup> She argued that the opposition between belief and practice -as evidenced in the formulation in *Kokkinakis v Greece* (repeated in every Article 9 case since) which stated that freedom of religion entails, *inter alia*, freedom to *hold* or not to hold religious beliefs and to *practice* or not to practice a religion-<sup>85</sup> is unhelpful because it failed to appreciate the intimate connection between belief and practice.<sup>86</sup> More recently Petkoff has contended that human rights law has defined the reach of these spheres by 'overemphasizing their distinctiveness...' and he stresses, instead, the interdependency of the *fora*.<sup>87</sup> Indeed, it seems logical to recognise that these *fora* are inextricably linked, for instance, the right to hold a religion or belief implies the right to manifest this.<sup>88</sup> The great extent to which beliefs impact on actions, however, has rarely been recognised explicitly by the Court.<sup>89</sup>

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'Religious Freedom – A Second Class Right?' (Oxford Journal of Law and Religion Summer Academy in Law and Religion, Oxford University, 23-27 June 2014).

<sup>83</sup> Recently been helpfully critiqued by M Evans in 'The Form Internum and the Forum Externum of the Freedom of Religion under International Law' (Law's Imagining of Religion: A Debate Across Disciplines, The Human Rights Center of Ghent University, Ghent 23rd September 2014)

<sup>84</sup> C Evans (n3) 2001 72

<sup>85</sup> *Kokkinakis v Greece* (n4) para 31.

<sup>86</sup> C. Evans (n3) 76, 201. This was pointed out earlier by Moens who stated that belief and actions are not clearly 'separate and distinguishable notions' see G. Moens, 'The Action-Belief Dichotomy and Freedom of Religion' (1989) *Sydney Law Review* 195.

<sup>87</sup> P Petkoff, *Forum Internum and Forum Externum in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights* (2012) 7 *Religion and Human Rights* 183, 183- 213.

<sup>88</sup> See D Harris, M O'Boyle, C Warbrick and E Bates (n67) 428 and P Petkoff (n87).

<sup>89</sup> According to S Fish, '[b]eliefs are something that you have, 'in the sense that there can be no distance between them and the acts that they enable', see P Slotte (n38) 123. This was recently noted in the separate opinion of Judge Pinot de Albuquerque in *Krupko v Russia* (n52) para 5-6.

Yet, it can certainly be argued that on occasions the Court has struggled to distinguish between *forum internum* and *forum externum* rights. It has, as Gursel has pointed out, sometimes viewed the *forum internum* right to have (or not have) a belief and the *forum externum* right to manifest it, as synonymous.<sup>90</sup> Evidence of the Court's confusion concerning the engagement of the *forum internum* or *forum externum* is well illustrated by *Buscarini v San Marino*.<sup>91</sup> In this case the applicants complained they had been forced to swear an oath on the Christian Gospels in order to take their seats in Parliament; this, they claimed, was a 'premeditated act of coercion' directed at their freedom of conscience and religion and demonstrated that the exercise of a fundamental political right was subject to publically professing a particular faith.<sup>92</sup> The Court recognised the requirement to take an oath on the Gospels was equivalent to obliging the applicants to '*swear allegiance to a particular religion*' which it stated was not compatible with Article 9.<sup>93</sup>

It seems therefore that this complaint should have been treated as engaging the *forum internum* right to hold or not to hold a religion or belief. However, it was treated as a *forum externum* right to manifest complaint. Limitations applicable only to *forum externum* rights were therefore considered and it was decided that in this case, the limitations could not be regarded as 'necessary in a democratic society'; this approach was highly confusing given the applicants had not complained of a limitation on the right to manifest but rather that they had been forced to swear allegiance to a religion

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<sup>90</sup> E D Gürsel, 'Distinction Between the Freedom of Religion and the Right to Manifest: A Legal Medium to Regulate Subjectivities' (2013) 22 *Social and Legal Studies* 377, 388.

<sup>91</sup> *Buscarini v San Marino*, App no 24645/94 (ECtHR, 18 February 1999).

<sup>92</sup> *Ibid*, para 37.

<sup>93</sup> *Ibid*, para 39. J Martinez Torron (n25) footnote 26 notes that 'it amounted to imposing on the applicants an obligation to declare their belief in a religion that was not their own'.

that was not their own.<sup>94</sup> The language of manifestation, therefore, seems inherently inappropriate here. There is a distinct sense that the right to manifest means the right to manifest *one's own* religion.<sup>95</sup> In *Buscarini* the applicants were compelled to publically swear allegiance a religion that was not their own. It seems more logical to view this as engaging the *forum internum* right *not to hold* a religion or belief.

C. Evans attempted to make sense of *Buscarini* through a consideration of 'active' and 'passive' rights. She applied M. Evans' distinction between active and passive elements of Article 9 to the right to manifest itself. She explained that the *forum externum* 'right to manifest a religion can be exercised in both an active and passive manner'; whilst the active aspect is formed of an individual asserting a right to act in a particular way, the passive aspect is formed of an individual asserting a right *not* to act in a particular way.<sup>96</sup> C. Evans seems to have understood passive rights to be the direct opposite of the active rights to right manifest religion or belief in worship, teaching, practice or observance. This appears congruent with the 'right to practice or not to practice' mentioned in the *Kokkinakis* judgment<sup>97</sup> and case law in which, for instance, the right to participate in religious education includes the right not to participate of religious education.<sup>98</sup> This led her to conclude, however, that compulsion to take a religious oath in *Buscarini* did not constitute a passive right to manifest<sup>99</sup> because the right not to be required to swear on the Gospels did not correspond to one of the forms

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<sup>94</sup> *Buscarini v San Marino* (n91) paras 39-40.

<sup>95</sup> This exact phrase is used in M Shaw, *International Law* (7<sup>th</sup> edn Cambridge University Press 2014) 205.

Reference to right to manifest one's religion can be found throughout the literature, see *inter alia* J Renucci (n37) 27.

<sup>96</sup> C Evans (n3) 105.

<sup>97</sup> *Buscarini v San Marino* (n91) para 31.

<sup>98</sup> See J Fawcett (n65) 238; P Van Dijk and G J Van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer 1984) 398. See way in which opting out was of religious education was treated as a *forum externum* right in *Grzelak*.

<sup>99</sup> C Evans (n3) 105.



of ‘active’ manifestation in Article 9.1. Instead, therefore, she argued that in *Buscarini* there was an interference with the *forum internum* right to hold or not hold a religion or belief.<sup>100</sup>

C. Evans, Taylor and Murdoch have all used *Buscarini* as example of the Court’s improper treatment of *forum internum* complaints as *forum externum* complaints.<sup>101</sup> This mischaracterisation of complaints is not just of academic concern but important in practice because it could have a real impact in terms of the protection of *forum internum* rights. As Taylor has rightly noted, one risk of treating coercion complaints as manifestation complaints is that applicants are obliged to prove that their non compliance with the law *expressed* their religion or belief and, therefore, that the *practice* of their religion or belief was illegitimacy restricted according to Article 9.2.<sup>102</sup> In reality, however, applicants who complain of compulsion usually protest against being compelled to do something (i.e. take a religious oath) which would *not* constitute a manifestation of their religion or belief; such an mischaracterisation of the issue can therefore pose ‘an insurmountable hurdle’ to justice.<sup>103</sup> In *Buscarini* this was not the case because a violation of Article 9 was found despite the unsatisfactory reasoning. However it must be noted that the Court’s approach meant the decision rested on the question of the *legitimacy* of the interference alone; if the Court had treated it as a *forum internum* right to hold or not to hold a religion or belief instead, the question of the legitimacy of interference would not have arisen at all.<sup>104</sup>

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<sup>100</sup> Ibid.

<sup>101</sup> C Evans (n3) 73; P Taylor (n3) 116ff; Murdoch (n21) 14-15.

<sup>102</sup> P Taylor (n3) 127.

<sup>103</sup> Ibid.

<sup>104</sup> Except in accordance with ECHR Article 15.

Overall, academics have argued that the Court has a poor understanding of *forum internum* rights and the ways in which they can be interfered with by the state. C. Evans has argued that the ECnHR and ECtHR have failed to take the *forum internum* seriously thus allowing States act ‘very repressively’ before finding an interference with the *forum internum*.<sup>105</sup> In addition, Taylor has contended that the Court has not developed ‘clear or consistent principles’ to enable *forum internum* rights to be recognised<sup>106</sup> and this has undermined the ‘absolute, unimpugnable and fundamental nature of the *forum internum*’ through the ‘persistent avoidance of principles that permit the *forum internum* rights to be asserted by applicants’.<sup>107</sup>

The question now is whether these texts are still relevant. They are certainly in need of review in light of the numerous Article 9 cases which have been heard by the Court since their publication. Recently, for instance, Peroni has argued that the Court protects the *forum internum* very strongly indeed.<sup>108</sup> The following chapters will explore which of these analyses are correct, if any, with respect to the right not to manifest religion or belief.

## **Conclusion**

This introductory chapter has explored the meaning and scope of Article 9, the terms religion, belief, thought and conscience the concepts *forum internum* and *forum externum*. It has found that there is considerable ambiguity in relation to the understanding and application of these key concepts. It has identified serious issues

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<sup>105</sup> C Evans (n3) 78, 201.

<sup>106</sup> P Taylor (n3) 115.

<sup>107</sup> Ibid, 202.

<sup>108</sup> L Peroni (n8) 3. See also *Larrissis and others v Greece* ECHR 1998-13 23372, para 45; *Kokkinakis v Greece* (n4); *Church of Scientology, Moscow v Russia* (n41) para 72; *Eweida v United Kingdom* (n2) para 80.

concerning the Court's ability to distinguish between the *fora* in practice. This chapter has, therefore, drawn attention to the lack of clarity with respect to the understanding and application of fundamental concepts in Article 9. This provides a background against which the coherency of understanding and consistency of protection of the right not to manifest must be considered in the subsequent chapters.

## CHAPTER 2: MEANING AND SCOPE OF THE RIGHT NOT TO MANIFEST

### Introduction

This chapter will address the first research question concerning meaning and scope of the right not to manifest, in terms of how the right is presented before it is applied to the facts of the case by the ECnHR and ECtHR, and, how it is described in the literature on Article 9. It must be noted that in contrast to the right to manifest, which is mentioned twice in Article 9, the right not to manifest is not mentioned at all. However, it has been recognised as forming part of this article<sup>109</sup> and a significant number of ECtHR cases have revolved around this right.<sup>110</sup> The lack of explicit reference to the right not to manifest is not unusual in the context of the ECHR. Rights ‘not to’ or ‘negative’ rights are not clearly set out in any Convention articles even though it is generally understood they are inherent within many of them.<sup>111</sup> For instance, the ECtHR has held the right to join trade unions (protected under Article 11) includes the right not to be compelled to join an association.<sup>112</sup> Similarly, ‘negative’ rights have been upheld in the context of the International Covenant on Civil and Political Rights (ICCPR), for example, it has been observed that the right to refuse to divulge one’s ideas is part of the right to hold

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<sup>109</sup> *Alexandridis v Grèce* (n4) para 38; *Sinan Işik v Turkey* (n4) para 41; *Grzelak v Poland* (n4) para 87; *Wasmuth v Allemange* (n4) 50.

<sup>110</sup> See *inter alia* *Saniewski v Poland* (n15); *Alexandridis v Grèce* (n4); *Grzelak v Poland* (n4); *Işik v Turkey* (n4); *Wasmuth v Allemange* (n4); *Dimitras v Grèce* 2010 (n4); *Dimitras v Grèce* 2011 (n14); *Dimitras v Grèce* 2013 (n14).

<sup>111</sup> ‘It cannot however be suggested (to take some obvious examples) that articles 3, 4, 5 and 6 confer an implied right to do or experience the opposite of that which the articles guarantee,’ see *Pretty v United Kingdom* (n49) para 6.

<sup>112</sup> See *Young and others v United Kingdom* ECHR 1981-IV 7601, para 51. See also Davis, who argued that ‘marriage would not be a right is there were not an equal and opposite right not to marry, in H Davis, *Human Rights Law Directions* (Oxford University Press 2009) 390, 395.

an opinion.<sup>113</sup> However, having said this, rights ‘not to’ are rarely referred to in the literature on the ECHR and there is no consensus on the meaning of ‘negative’ rights. This section will explore whether the right not to manifest can be considered the opposite side of the coin, conceptually speaking, to the right to manifest religion or belief.

## **Understanding of the Right Not to Manifest in Case Law**

In law, there is always a gap between the text and the meaning.<sup>114</sup> However, given that concepts derive meaning from the concepts with which they are associated, it is sensible to analyse the right not to manifest in light of the right to manifest. In both Article 9.1 and 9.2 the verb ‘to manifest’ -a transitive verb which expresses an action in relation to a direct object (in this case, religion and belief)- is used in its infinite form. Article 9 protects the ‘freedom *to manifest* religion or belief in worship, teaching, practice and observance’ both in public and private.<sup>115</sup> Active exercise of the right to manifest is usually performed externally, directed to the outside world;<sup>116</sup> indeed, *Kokkinakis* speaks of ‘bearing witness in words and deeds’.<sup>117</sup> There has been much case law concerning state limitations on this right and even state pressure on individuals *not to manifest* religion or belief.<sup>118</sup> Given this ‘active’ nature of the right to manifest, does the right not to manifest mean the right not to act in certain ways?

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<sup>113</sup> This was also noted in the drafting of General Comment 22. 3, see UN Doc, CCPR/C/SR. 1166 (1992), para 17 and 22.

<sup>114</sup> J Rivers, ‘Doctrinal Research as a Method’ (2014 Legal Methods and Methodologies Conference, University of Bristol, 16 September 2014).

<sup>115</sup> Article 9.1.

<sup>116</sup> M Nowak (n66) 430–431.

<sup>117</sup> *Kokkinakis v Greece* (n4) para 31.

<sup>118</sup> For case law relating to pressure *not* to manifest religion or belief see *M M v Bulgaria* (1997) 90 DR 56. This is discussed in S Langlaude, *Right of the Child to Religious Freedom in International Law* (Martinus Nijhoff Publishers 2007) 217.

### I. Interpretation One: not to be coerced to act in certain ways

The right not to manifest has not, so far, been used in ECtHR case law to refer to the choice whether to manifest or not to manifest *one's own* religion or belief in worship, teaching or practice.<sup>119</sup> It has, however, been used in the context of forced 'manifestation' of convictions or opinions contrary to one's own.

In both *Valsamis c Grèce* and *Efstratiou c Grèce* the applicants complained that being disciplined for refusing to participate in a school parade on Greek National Day - on the basis that it contradicted their pacifist beliefs as Jehovah's Witnesses- violated their right to manifest religion or belief under Article 9.<sup>120</sup> In the summary of the applicants' arguments the ECtHR stated in each case that the applicant asserted that Article 9 'guaranteed her right to the negative freedom *not to manifest*, by gestures of support, any convictions or opinions contrary to her own.'<sup>121</sup> The appeal to the *forum externum* right to manifest and the use of the language of manifestation - in the form of the 'negative freedom not to *manifest*' - in this case seems entirely inappropriate.<sup>122</sup> It perhaps would have been more fitting to characterise it as a *forum internum* complaint

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<sup>119</sup> This is the way it seems to have been understood by Human Rights Committee Member Sir Nigel Rodley and others: 'My understanding of the thinking behind this evolution is the freedom of thought, conscience and religion embraces the right not to manifest as well as the right to manifest one's conscientiously held beliefs. Compulsory military service without possibility of alternative civilian service implies that a person may be put in a position in which he or she is deprived of the right to choose whether or not to manifest his or her conscientiously held beliefs...', see Individual opinion of Committee member Sir Nigel Rodley, jointly with members Mr. Krister Thelin and Mr. Cornelis Flinterman (concurring) in *Atasoy and Sarkut v Turkey*, Human Rights Committee, UN Doc CCPR/C/104/D/1853-1854/2008 Communications nos 1853/2008 and 1854/2008 (29 March 2012).

Also in relation to ICCPR Article 28, UNESCO suggested that the expression 'to manifest his religion or belief' should be replaced with 'to manifest or not to manifest religion or belief', see *Travaux Préparatoires* on ICCPR Article 28, UN Doc E/CN.4/1989/WG.1/CRP.1, (1989), 22-23.

<sup>120</sup> *Valsamis c Grèce* (n53) para 6; *Efstratiou c Grèce* ECHR 1996-69 24095, para 4. The texts of both decisions are almost identical, as indeed were the facts at issue.

<sup>121</sup> *Valsamis v Grèce* (n53) para 34; *Efstratiou c Grèce* para 35.

<sup>122</sup> There is a debate about whether manifestation in Article 9 includes manifestation of thought or opinion. See also P Danchin and L Forman for a discussion of the difficulties of distinguishing between manifestations of belief and expressions of conscience, in P Danchin and L Forman (n31) 158.

about coercion to act contrary to one's conscience.<sup>123</sup> In the earlier case of *Darby v Sweden* which concerned compulsion to pay church tax, the ECnHR widened the scope of the *forum internum* to encompass protection from being compelled to be involved in religious activities, or compelled to show allegiance to a religion or belief, even symbolically, against one's will; the Commission stressed that resistance to coercion in this respect did not constitute a manifestation of any sort.<sup>124</sup>

Despite the language of manifestation to describe the complaints, however, it seems that the complaints were treated as relating to a *forum internum* right in both *Valsamis* and *Efstratiou*.<sup>125</sup> This is evident from the language of the decision; the Court ruled that the requirement to attend the school parade did not amount to interference with the *right to freedom of religion* (because, in the Court's opinion, it concerned 'innocuous participation in a public function'<sup>126</sup>) and thus, like the Commission, found no breach of Article 9.<sup>127</sup> It is also evident from the fact that there was no consideration of *forum externum* limitations under Article 9.2. However, that the phrase 'not to manifest' has not been used again in connection with coercion to act contrary to one's conscience suggests that the Court misused this phrase in these two cases in 1996.

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<sup>123</sup> This is how C Evans (n3)78 and P Taylor (n3) 175 interpret these cases.

<sup>124</sup> *Darby v Sweden* (n57) annex to the decision of the Court, paras 50-51. P Taylor (n3) 156.

<sup>125</sup> P Taylor (n3) 117.

<sup>126</sup> T Parker, 'The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR' (2006) 17 *Duke Journal of International Law* 91, 16. This decision has been sensibly critiqued by J Martinez-Torron and R Navarro-Valls in 'The Protection of Religious Freedom in the System of the European Convention on Human Rights' (1998) 3 *Helsinki Monitor* 25, 34.

<sup>127</sup> In Taylor's words, 'the Court...simply disagreed with the assertion that attendance at the procession constituted coercion against the applicant's conscience', see P. Taylor (n3) 174

As noted above manifestation both in public (i.e. in a community building) and private (i.e. in one's home) is protected by Article 9.<sup>128</sup> However, because ECtHR cases have largely turned on manifestation *in public* much less attention has been paid to manifestation in private. Slotte has questioned whether this has had the effect of '...rendering manifestation logically irreconcilable with a private sphere of human life' and points out that with respect to the private sphere the term 'practice' is now often used instead of 'manifestation'.<sup>129</sup> Interestingly, in her discussion of the 'public/private' distinction, Slotte commented that 'to manifest' can be rephrased as 'to reveal' or 'to show' among other things.<sup>130</sup>

A broader interpretation of 'to manifest' certainly fits with both the syntax of Article 9.1 and the dictionary definition of 'manifest'<sup>131</sup> which reads 'to make (a quality, fact, etc) evident to the eye or to the understanding; to show plainly, disclose, reveal.'<sup>132</sup> Such an interpretation allows for forms of manifestation other than those listed in Article 9.1 to be encompassed. Importantly it may be understood to include *disclosure* of information relating to religion or belief. Indeed, some 'right to manifest' cases have actually turned on this interpretation; in *X v United Kingdom* the applicant complained that the failure of prison authorities to record his belief violated his right to manifest his religion or belief.<sup>133</sup> Additionally, in *Sofianopolous and Others v Greece*

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<sup>128</sup> *Kokinakkis v Greece* (n4) para 31. In *SAS v France* the Court noted that Article 9 includes the right of individuals to choose freely to wear or not to wear religious clothing in private or in public, see *SAS v France* (n12) para 16.

<sup>129</sup> P Slotte, 'Waving the 'Freedom of Religion or Belief' Card, or Playing it Safe: Religious Instruction in the Cases of Norway and Finland' (2008) 3 *Religion and Human Rights* 33, 61. Nowak also preferred to 'practice' rather than 'manifest' in this context, see M Nowak (n66) 418, footnote 60.

<sup>130</sup> P Slotte (n129) 61.

<sup>131</sup> The question of whether there is a legal definition of a word is important because the general principle is that if a word used in a legal document does not have a technical meaning it retains its popular meaning which can be deduced from its dictionary definition. See R Sandberg (n33), 85.

<sup>132</sup> See 'to manifest' in *Oxford Dictionary of English* (3<sup>rd</sup> edn Oxford University Press 2010).

<sup>133</sup> *X v United Kingdom* (1977) 11 DR 55.



the applicants argued that the prohibition on disclosure of religion or belief on identity cards prevented them from manifesting their religion or belief.<sup>134</sup> If the right to manifest can, therefore, be interpreted broadly as the right to reveal or disclose, can the right not to manifest be interpreted as the right *not* to reveal or disclose religion or belief?

## II. Interpretation Two: not to reveal or disclose religion or belief

The ECnHR and ECtHR have heard numerous complaints in which the right not to reveal or disclose information concerning religion or belief has been claimed. Confusingly, there has been no conceptual consistency between or even within these cases with respect to the phrasing of this right. The following will examine ECtHR references to these rights in chronological order in order to trace any conceptual development.

### a. Right to remain silent as to one's beliefs

In the case of *CJ, JJ and EJ v Poland*, which concerned disclosure of religion or belief on school reports, both the applicants and the Court understood Article 8 as guaranteeing a right to remain silent about one's convictions<sup>135</sup> (which is different from 'the right to remain silent'<sup>136</sup>). Later, in *Saniewski v Poland*, in which the applicant complained that his school report forced him to 'make a public statement of his beliefs' contrary to Article 9, the Commission again spoke of 'the right to remain silent as to one's beliefs'.<sup>137</sup>

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<sup>134</sup> The Court, however, disagreed that this constituted a manifestation, see *Sofianopolous and Others v Greece* ECHR 2002 1998.

<sup>135</sup> *CJ, JJ and EJ v Poland* (n8).

<sup>136</sup> The right to remain silent in respect of questioning has been raised numerous times in relation to Article 6, see for instance *Sharkunov and Mezentsev v Russia* ECHR 2010-892 75330. It has also been raised in relation to a forced apology to a newspaper in *Feldek v Slovak Republic* APP no 2952/95 (ECtHR, 1 June 2000).

<sup>137</sup> *Saniewski v Poland* (n15) pages 4, 5, 7.

**b. Right not to disclose or reveal one's religion or belief**

The Court has also spoken of compulsion to 'disclose' or 'reveal' religion or belief. This formulation has similarities with the provision in General Comment 22.3 which states that 'no one can be compelled to reveal his thoughts or adherence to religion or belief.'<sup>138</sup> In *Folgerø and Others v Norway*, for instance, which concerned opting out of religious education, the Court noted *obiter dicta* that the obligation on parents to disclose detailed information about their religion or belief might mean that they would feel compelled to disclose or reveal their religion or belief.<sup>139</sup>

**c. Right not to manifest one's religious belief**

The first appearance of the right not to manifest to mean disclosure of religion or belief was in *Sofianopolous and Others v Greece*; the applicants referred to the 'negative aspect' of the positive right to manifest religion or belief on identity cards, 'in other words the right not to manifest them.'<sup>140</sup> The phrase was next used in the same way in *Spampinato v Italy* in which the applicants, following a complaint about disclosure on a wage tax card, argued that 'the right not to manifest one's religious beliefs fell within the scope of Article 9 of the Convention'.<sup>141</sup> In this case the Court spoke both of the obligation to indicate a religious affiliation and 'an obligation to manifest one's beliefs...'<sup>142</sup>

The case of *Alexandridis c Grèce* was the first case in which the Court itself used the phrase the 'right not to manifest'. The applicant complained that he had been forced to reveal his convictions in order to take an oath which infringed his right not to

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<sup>138</sup> General Comment 22.3 (n36).

<sup>139</sup> *Folgero and others v Norway* (n45) paras 64, 98.

<sup>140</sup> *Sofianopolous and others v Greece* (n134).

<sup>141</sup> *Spampinato v Italy* App no 23123/04 (ECtHR, 5 October 2006) page 2.

<sup>142</sup> *Ibid*, page 6.

manifest his convictions under Article 9.<sup>143</sup> In response, the Court confirmed the existence of such a right, explaining that ‘freedom to manifest religious beliefs also has a negative aspect, namely the right of the individual not to be compelled to state his faith or his religious beliefs and not be forced to behave in a way which could be inferred that he held - or did not - such beliefs.’<sup>144</sup> In terms of the scope of this right, it covers both statements and acts respectively. Later in the judgment, this negative aspect was referred to as the ‘right not to be compelled to manifest religious beliefs.’<sup>145</sup>

This presentation of the right not to manifest as the ‘negative aspect’ of the right to manifest implies that there is a positive right to state one’s faith and therefore provides support for the broader interpretation of ‘to manifest’ to mean ‘to reveal’ or ‘to disclose’. This formulation in *Alexandridis* has become the generally accepted way to refer to the right not to manifest in ECtHR cases from 2008 onwards. Conceptually speaking, therefore, *Alexandridis* marks a turning point in terms of the clarification and use of this phrase.

In *Sinan Işık v Turkey*, which concerned the disclosure of religion or belief on identity cards, the applicant complained that ‘he had been obliged, without his consent and in breach of the right to freedom of religion and conscience, to disclose his belief

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<sup>143</sup> ‘...son droit de ne pas manifester ses convictions’, *Alexandridis c Grèce* (n4) para 3

<sup>144</sup> ‘Or la Cour considère que la liberté de manifester ses convictions religieuses comporte aussi un aspect négatif, à savoir le droit pour l’individu de ne pas être obligé de faire état de sa confession ou de ses convictions religieuses et de ne pas être contraint d’adopter un comportement duquel on pourrait déduire qu’il a – ou n’a pas – de telles convictions.’ Ibid, para 38.

<sup>145</sup> ‘...droit de ne pas être contraint de manifester ses convictions religieuses’, ibid, para 41. The Court’s use of this formulation may have been influenced by the *Special Rapporteur’s* Report published a few months before, which mentioned that the right to freedom of religion and belief also includes the right not to manifest a religion or belief, see Report of the *Special Rapporteur* on Freedom of Religion or Belief, Asma Jahangir (Addendum) Mission to the United Kingdom of Great Britain and Northern Ireland, a/hrc/7/10/add.3 (7 February 2008) para 69.

because it was mandatory to indicate his religion on his identity card.<sup>146</sup> This formulation may have been influenced by Article 24 of the Turkish Constitution which stated ‘[n]o one shall be compelled to....reveal his religious belief and convictions....’<sup>147</sup> In response to the complaint, the Court declared that it would examine this case ‘from the angle of the negative aspect of freedom of religion and conscience, namely the right of an individual not to be obliged to manifest his or her beliefs’.<sup>148</sup> Elsewhere it used the phrase ‘the right not to disclose one’s religion or beliefs’<sup>149</sup> interchangeably with the ‘principle of freedom not to manifest one’s religion or belief’.<sup>150</sup>

The Court also expanded on the separate elements of the right not to manifest – namely disclosure through statements or acts- set out in *Alexandridis*; in *Işik* the Court explained the right not to manifest includes the right ‘not to be obliged to disclose his or her religion or beliefs’ *and* the right ‘not to be obliged to act in such a way that it is possible to conclude that he or she holds -or does not hold- such beliefs’.<sup>151</sup> There was, therefore, a considerable lack of conceptual consistency in this case. Perhaps it indicates that the Court felt the formulation ‘the right not to manifest’ was not widely understood so complemented this phrase with references to ‘disclosing’ or ‘revealing’ religion or belief.

Later in the same year, in *Grzelak v Poland*, the applicant complained that his religion affiliation had been revealed through his school report.<sup>152</sup> The Court repeated the formulations set in *Alexandridis* in this respect but spoke mainly of the ‘right of

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<sup>146</sup> *Sinan Işik v Turkey* (n4) para 22.

<sup>147</sup> *Ibid*, para 13.

<sup>148</sup> *Ibid*, para 41.

<sup>149</sup> *Ibid*, para 42.

<sup>150</sup> *Ibid*, para 52.

<sup>151</sup> *Ibid*, para 41.

<sup>152</sup> *Grzelak v Poland* (n4).

pupils not to be compelled...to reveal their religious beliefs of lack thereof'.<sup>153</sup> It was only in the concluding sentence that the Court referred to the 'right not to manifest religion or beliefs'.<sup>154</sup>

The most recent case to use the 'right not to manifest' was *Wasmuth c Allemange*; the applicant complained that the requirement to indicate his religion or belief on his wage tax card infringed his right not to declare his religion or belief.<sup>155</sup> Again the framing of this complaint may have been influenced by national law which stated that '[n]o one is required to declare their religious beliefs'.<sup>156</sup> In contrast to earlier cases, in this case the Court spoke only of the 'right of the individual not to manifest his religious beliefs';<sup>157</sup> it used no other formulation at all to describe this right.

These cases seem to show a gradual trend from 2008 onwards towards a greater use of 'the right not to manifest' by the ECtHR. However, other formulations have remained prominent. In fact, the three cases of *Dimitras et autres c Grèce* in 2010, 2011 and 2013, in which complaints were raised about religious oath taking, the Court did not use the formulation 'the right not to manifest' at all, rather spoke solely of the 'obligation to disclose or reveal religious beliefs'.<sup>158</sup> It may well be that the conceptual inconsistency in the above cases reflects the particular constructions in the State Constitutions in question or perhaps represents linguistic variation on the part of the Court. However, given the frequent use of the language of 'disclosure' it is possible to argue that expressions referring to the 'disclosure' of religion or belief are preferred by

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<sup>153</sup> Ibid, para 87, 92.

<sup>154</sup> Ibid, para 100.

<sup>155</sup> '...son droit de ne pas déclarer ses convictions religieuses' *Wasmuth c Allemange* (n4) para 15.

<sup>156</sup> Section 136 of the Weimer Constitution, 'Nul n'est tenu de déclarer ses convictions religieuses', *ibid*, para 25.

<sup>157</sup> '...le droit de l'intéressé à ne pas manifester ses convictions religieuses', *ibid*, para 61.

<sup>158</sup> *Dimitras et autres c Grèce* (2010) (n4); 2011 (n14); 2013 (n14).

the Court over the expression ‘the right not to manifest’. It is certainly clearer to understand what the Court is referring to when it uses ‘disclosure’ and the language of disclosure, as opposed to the language of manifestation, seems to be much more suited to describe the imparting of *information* regarding religion or belief through either statements or acts.<sup>159</sup>

## **Understanding of the Right Not to Manifest in the Literature**

Whilst there have been some references to the right not to be compelled to reveal one’s religion<sup>160</sup> and to protection against compulsion to disclose one’s religion or belief<sup>161</sup> in key texts on freedom of thought, conscience and religion, there has been almost no discussion of the meaning or scope of these rights in the literature. C. Evans touched upon these rights in her discussion of *Bernard v Luxemburg* but the discussion was limited.<sup>162</sup> Even Taylor, who explicitly promised to discuss the right not to be compelled to reveal one’s religion or belief,<sup>163</sup> provided very little actual discussion of this right and furthermore, the limited discussion focused largely on Human Rights Committee (HRC) decisions rather than ECtHR case law. Most recently, Clayton and Tomlison have stated that ‘[a]rticle 9 embraces a right to freedom from any compulsion to express thoughts or change an opinion or divulge convictions’ but have not explained what is meant by this right.<sup>164</sup>

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<sup>159</sup> ‘To disclose’ means ‘to make (secret or new) information known’, see ‘disclose’ in *Concise Oxford English Dictionary* (11<sup>th</sup> edn Oxford University Press 2006)

<sup>160</sup> C Evans (n3) 81; Slotte (n38) 268.

<sup>161</sup> P Taylor (n3) 342.

<sup>162</sup> C Evans (n3) 96-98, 102, 201.

<sup>163</sup> P Taylor (n3) 120.

<sup>164</sup>R Clayton R and H Tomlinson, *The Law of Human Rights* (Oxford University Press 2000) 974, para 14.49.

Some texts, whilst not referring explicitly to the right not to manifest have been useful in highlighting the growth of right not to manifest cases and, therefore, give credence to this dissertation research topic. The new and now leading practitioner text on freedom of thought, conscience and religion by Dingemans and others describes a number of right not to manifest cases, but does not actually use the phrase ‘right not to manifest’ at all.<sup>165</sup> In terms of gaining an understanding of the acceptance of this right (in its various formulations) across Europe Doe’s *Law and Religion in Europe*, which identifies shared principles in Europe, is most helpful. Doe identifies the right not to declare religion or belief<sup>166</sup> as the eighth ‘Principle of Religion Law Common to the States of Europe’.<sup>167</sup> It must be noted that given the purpose of his book, Doe’s emphasis is on European State Constitutions rather than ECtHR case law, however, his discussion of the way in which this right has been explicitly protected in various ways in the Constitutions of Spain, Slovenia, Romania is important as it serves to show that States such as Poland and Germany are not unusual in protecting this right explicitly in their Constitutions (as referred to in relation to the formulations used in *Grzelak* and *Wasmuth*, above).<sup>168</sup>

There are very few explicit reference in the literature to the phrase ‘the right not to manifest’. Where it has appeared it is usually as a quotation from the judgments in *Valsamis*, *Efstratiou*, *Işik* or *Grzelak* and any discussion as to what this phrase means is

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<sup>165</sup> J Dingemans and others (n7), 97-99.

<sup>166</sup> N Doe, *Law and Religion in Europe* (Oxford University Press 2011) 45.

<sup>167</sup> Ibid, Appendix.

<sup>168</sup> Spain: Const, Art 16; Organic Law 15/1999 of 13 December, Art 7: ‘no one may be forced to disclose details of his ideology, religion or beliefs...’; Solvenia: CCt, Decision no U-I-92/01 (February 2002): provided that persons could freely declare their religion or decline to do so; Romania: Law 489/2006: ‘it is hereby forbidden to compel an individual to declare their religion, in any relationship with public authorities or private-law legal entities’, see Ibid, 47-8.

lacking.<sup>169</sup> One exception is the new section entitled ‘A Right Not to Manifest a Religion’ in *Jacobs, White and Ovey: The European Convention on Human Rights*.<sup>170</sup> Whilst this section again gives weight to the growing importance of this right, it seems to demonstrate a seriously confused understanding of the meaning and scope of this right. It opens with the statement that ‘Article 9 also prevents a Contracting Party from imposing obligations on citizens in relation to participation in national life which offend their religious beliefs, unless these obligations are necessary in a democratic society.’<sup>171</sup> As argued above, this particular interpretation of ‘not to manifest’ is exclusive to *Valsamis* and *Efstratiou*. The cases described as ‘right not to manifest’ cases in this section of the book - including *Buscarini*, *Dimitras*, *Işik* and *Grzelak* - are not congruent with this 1996 interpretation of the phrase. As demonstrated above, *Buscarini* is a case either about the right to manifest (this is how the Court treated it) or a case about acting contrary to one’s conscience (this is how it is has been interpreted since). It is not a case about an obligation to participate in national life. Neither are *Dimitras*, *Işik* and *Grzelak*; in these cases the right not to manifest is synonymous with right not to reveal or disclose religion or belief through statements or acts.

This section in *Jacobs, White and Ovey: The European Convention on Human Rights* is therefore considerably confused with respect to the meaning and scope of the right not to manifest. The explanation in this text book is misleading. Given that this of one of the leading textbooks on the ECHR for both students and practitioners, the lack of accurate and insightful commentary here is concerning.

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<sup>169</sup> See T Parker (n126) 16; P Cumper, ‘Religious Education in Europe in the Twenty-First Century’ in M Hunter-Henin (ed) *Law, Religious Freedoms and Education in Europe* (Ashgate 2012), 214.

<sup>170</sup> B Rainey, E Wicks and C Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (6<sup>th</sup> edn, Oxford University Press 2014), 426ff.

<sup>171</sup> *Ibid.*



Perhaps there has been reluctance in the literature to engage with cases which use the phrase the right to manifest (or its variants) because the majority of these cases are only available in French. They must, therefore, be analysed in their original language which may explain why there are very few references to this right and almost no analysis of related case law. In light the points made in this section, now is the opportune time, therefore, to fill this gap in literature with an up to date and detailed examination of the right not to manifest which draws together the previous literature but also reviews this in light of the developments in case law in this field.

## **Conclusion**

This section has explored the second research question concerning the meaning and scope of the right not to manifest, through a systematic engagement with ECtHR case law in which this phrase and its variants have been used. It has found that it is now well established that Article 9 includes not only a right *to* but also a right *not to*, manifest religion or belief but the meaning of this latter right is unclear.<sup>172</sup>

This section has found that the phrase ‘not to manifest’ has been used to refer to the right not to be coerced to act contrary to conscience, but in recent years has become synonymous with the right to remain silent with respect to one’s religion or belief, the right not to be forced to reveal or disclose religion or belief or to be forced to act in such a way that religion or belief can be inferred.<sup>173</sup> There has however been a remarkable

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<sup>172</sup> I Leigh, ‘New Trends in Religious Liberty and the European Court of Human Rights’ (2010) 12 *Ecclesiastical Law Journal* 226, 277.

<sup>173</sup> Legal texts and their meanings are constantly being re-articulated and renegotiated, see N McCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (2<sup>nd</sup> edn Oxford University Press, 2009); J Smits (n26). This also provides evidence for the argument that the meaning of human rights are not static,

lack of consistency with respect to the use of the phrase ‘the right not to manifest’ in case law and a variety of alternative phrases have been used in conjunction with, and sometimes instead of, this phrase. The right has also been largely neglected in the literature on Article 9. Where it has been discussed the meaning of the right has been misrepresented. In light of the findings in this chapter, the next question to ask, therefore, is whether this conceptual variation and confusion on the part of the Court has impacted on the understanding of the nature of the right not to manifest.

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but as Slotte has pointed out, evolve over time with respect to content as a result of case law, see P Slotte (n129) 37.

## CHAPTER 3: THE NATURE OF THE RIGHT NOT TO MANIFEST

### Introduction

This chapter will examine the second research question concerning the nature of the right not to manifest. It will assess whether the right not to manifest is considered to be a *forum internum* or *forum externum* right according to the Article 9 framework. Again it will analyse the presentation of this right in case law and the way in which it is described in the literature on Article 9. It has been noted above that the right to manifest is a *forum externum* right. If the right not to manifest is opposite to the right to manifest in terms of nature then this would mean that it is a *forum internum* right. This chapter will explore whether this is the case.

### The Nature of the Right Not to Manifest

Whilst there has been significant misunderstanding in the literature with respect to the meaning and scope of the right not to manifest, there has been remarkable consensus with respect to the nature of this right. Where academics have mentioned the right not to manifest (in its various forms) they have frequently stated that it is a *forum internum* right, according to which no State interference is ever legitimate. In 1984 van Dijk and van Hoof stated that the significance of the absolute guarantee of inner freedom of thought conscience and religion [the *forum internum*], implies that one cannot be subjected to ‘...any form of compulsion to express thoughts, to change opinion, or to divulge a religious conviction...’<sup>174</sup> It has also been recognised as a *forum internum*

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<sup>174</sup> P Van Dijk and G J Van Hoof (n98) 541-2

right by Taylor, who spoke of it as a ‘residual right’ of the *forum internum*<sup>175</sup> and by Bratza who has stated that the internal dimension of freedom of thought, conscience and religion includes a ‘guarantee against a requirement to act in a manner contrary to one’s religious beliefs or even to manifest or disclose the nature of those beliefs.’<sup>176</sup> Most recently, Harris, O’Boyle and Warbrick have emphasised that ‘the state must respect the right not to disclose one’s religion or belief because such an obligation falls within the *forum internum* of each individual.’<sup>177</sup>

Ascertaining the nature of the right not to manifest from case law, however, is somewhat more complicated than assertions in the literature suggest. Firstly, it is not immediately apparent from the way in which the right not to manifest has been framed in case law that it is a *forum internum* right. When the right not to manifest was first recognised by the ECtHR in *Alexandridis* it was described as the ‘negative aspect’ of the positive right to manifest; the Court explained that ‘the right to manifest religious beliefs also has a *negative aspect* namely the right of the individual not to be compelled to state his faith or his religious beliefs and not to be forced to behave in a way which could be inferred that he held - or did not - such beliefs.’<sup>178</sup> This construction - ‘the negative aspect’ of the right to manifest – is somewhat problematic because it may be read as implying that the right not to reveal or disclose one’s religion is actually *part of* the right to manifest and thus also a *forum externum* right to which limitations under Article 9.2 apply. According to Doe it is the *forum internum* right to hold a religion or belief (rather than the *forum externum* right to manifest<sup>179</sup>) which encompasses the right

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<sup>175</sup> P Taylor (n3) 120, 177, 185.

<sup>176</sup> N Bratza (n8) 259.

<sup>177</sup> D Harris and others (n59) 597.

<sup>178</sup> ‘...*un aspect negative*’, *Alexandridis c Grèce* (n4) para 38.

<sup>179</sup> N Doe (n166) 49.

not to disclose religion or belief; this indicates that he also considers this right to be a *forum internum* right.<sup>180</sup> However, he does point to the confused situation with respect to the nature of this right in a footnote in which he comments that the right not to reveal or disclose religion or belief can also be ‘conceived of as a form of manifestation’ but does not elaborate on what he means by this.<sup>181</sup>

The language in the rest of *Alexandridis* indicates that despite the characterisation as the ‘negative aspect’ of the right to manifest, the right not disclose religion or belief was conceived of as a *forum internum* right. Firstly, the Court clearly stated that it is ‘not permissible for State authorities to interfere with *freedom of conscience* of an individual by enquiring about his religion or belief, or obliging him to manifest his religion or belief, especially in the context of oath taking in order to perform certain functions.’<sup>182</sup> The reference to ‘freedom of conscience’ in this statement firmly places the right not to manifest in the *forum internum*. Secondly, the terms ‘compulsion’ and ‘obligation’ feature prominently in this case; such language highlights the involuntary nature of disclosure of religion or beliefs and highlights that it is a *forum internum* rather than *forum externum* issue.<sup>183</sup> Thirdly, the fact that the statement regarding the impermissibility of State interference is not qualified in any way, further indicates that the Court considered the right not to manifest to be a *forum internum* right, with which interference is impermissible (thus clearly setting it apart from limitable *forum externum* rights).

The first and only explicit reference to the *forum internum* nature of this right is in *Işık*. However, whilst it did refer to the right not to manifest elsewhere, at the point at

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<sup>180</sup> Ibid, 48.

<sup>181</sup> N Doe (n166) 45, footnote 42.

<sup>182</sup> *Alexandridis c Grèce* (n4) para 39.

<sup>183</sup> Ibid: *contraint* paras 23, 36-41; *obligé* paras 3, 21, 28 35-38, 41, 46, 48.

which the Court referred to the *forum internum* it stated that it was the ‘right not to disclose one’s religion or belief’ which fell ‘within the *forum internum* of each individual’.<sup>184</sup> Perhaps there was a conscious avoidance of the language of manifestation in this statement in order to increase clarity. In this case the Court did not characterise the right not to manifest as a ‘negative aspect’ of the right to manifest religion or belief, so avoided the implication that it was part of the right to manifest. However, it did introduce the idea that this right constituted a ‘negative aspect’ of freedom of religion.<sup>185</sup> It is not clear what the Court meant by this particular formulation, the ‘negative aspect of freedom of religion’.

In light of the above, it is possible to reach the conclusion that the right not to manifest is generally understood to be a *forum internum* right; it is, therefore, the opposite side of the coin, in terms of its nature, to the *forum externum* right to manifest. However, the characterisation in *Alexandridis* of this apparently *forum internum* right as an *aspect* of the *forum externum* right to manifest was inherently problematic, and it was only possible to ascertain the *forum internum* nature of the right from an examination of semantics. Whilst the unequivocal statement in *Işık*, that the right not to reveal religion or belief is a *forum internum* right was helpful, it did not solve the problem of the nature of the of the right not to manifest entirely, because it introduced a new level perplexity in the phrase statement that the right constituted a ‘negative aspect’ of the ‘right to freedom of religion’.

Such a lack of clarity on the part of the Court in respect to the nature of this right is concerning in terms of the protection of this right. As noted above, the *forum*

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<sup>184</sup> *Sinan Işık v Turkey* (n4) para 42. See also L Peroni (n8) 3, footnote 3.

<sup>185</sup> *Sinan Işık v Turkey* (n4) para 41.

*internum/forum externum* distinction is of legal significance because the scope and type of state action is understood differently in relation to the two;<sup>186</sup> whilst *forum externum* rights can be limited by the state in accordance with Article 9.2, state interference with *forum internum* rights is considered unacceptable. It is therefore essential for the Court to recognise at the outset in its judgements whether it is dealing with a *forum internum* or *forum externum* right.

### **Interference with the Right Not to Manifest**

The central purpose of the ECHR is to protect individuals from illegitimate state interference.<sup>187</sup> The legitimacy of state interference with the right to manifest religion or belief has been discussed and debated at length in the literature on Article 9.<sup>188</sup> In contrast, almost no attention has been paid to situations in which the right not to manifest religion or belief could be violated. Pavone has commented that states should ‘not contribute to an environment that pressures individuals to declare their religious affiliation...’ but he did not elaborate on this.<sup>189</sup> Additionally, Slotte has mentioned that

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<sup>186</sup> M Nowak (n66) 412.

<sup>187</sup> M Evans, ‘Workshop 4: Propagation of Religion or Belief’ (25th Anniversary Commemoration on 25 November 2006 of the adoption of the 1981 Declaration on the elimination of intolerance and discrimination based on religion or belief, Prague, 25 November 2006) <<http://tolerance95.cz/1981declaration/download.php>> accessed August 2014.

<sup>188</sup> Permissible limitations have been discussed at length by numerous academics including J Martinez-Torron, ‘Limitations on Religious Freedom in the Case Law of the European Court of Human Rights’ (2005) 19 *Emory International Law Review* 587; M Nowak and T Vospernik, ‘Permissible Restrictions on Freedom of Religion or Belief’ in Lindholm T and others. (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Brill Academic Publishers 2004); P Cumper, ‘The public manifestation of religion or belief: challenges for a multi-faith society in the 21<sup>st</sup>’ in A Lewish and R O’Dair (eds) *Law and Religion* (Oxford University Press 2001) 311.

Country specific discussions have been offered by *inter alia* M Kiviorg, ‘The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Estonia’ (2005) 19 *Emory International Law Review* 753; M Kotiranta, ‘Religion and the Secular State in Finland’ in Martinez-Torron J and Durham W, *Religion and the Secular State: National Reports* (Intermin Edition Issued for the Occasion of the XVIIIth International Congress of Comparative Law, International Centre for Law and Religion Studies 2010).

<sup>189</sup> T Pavone, ‘Redefining Religious Neutrality: *Lautsi vs Italy* and the European Court of Human Rights (*Strasbourg* Consortium 16 February 2011) 7 <<http://www.strasbourgconsortium.org>> accessed August 2014

coercion or compulsion to disclose religion or belief is also an interference with the *forum internum* but did not provide an example of this type of interference.<sup>190</sup>

At the UN level, the current *Special Rapporteur for Religion and Belief* has commented that compulsory indication of religion affiliation on passports constitutes an abuse of freedom of religion or belief.<sup>191</sup> Furthermore, during the drafting of General Comment 22.3 attention was drawn to areas in which the protection of freedom from compulsion to reveal one's thoughts or adherence to religion or belief, could be problematic. It was suggested that the state may need information about an individual's religion or belief in order to plan education, to prepare identity documents or to provide medical treatment.<sup>192</sup> One delegate concluded that in light of these points the state could be authorised to 'request such information when necessary'.<sup>193</sup> There is, however, a significant difference between a *request* by the state for information concerning religion or belief and *compulsion* to reveal such information. Given that General Comment 22.3 protects against compulsion to reveal, any exemptions were deliberately omitted by the delegates in the drafting of this provision.

## **Conclusion**

This chapter has addressed the second research question concerning the nature of the right not to manifest. It has found that there is a general consensus in the literature that the right not to manifest is a *forum internum* right. However, it has found that the presentation of the nature of this right in the case law is much less clear. It has found that unnecessary confusion has been created by the description of the right as the

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<sup>190</sup> P Slotte (n38) 268 and (n129) 45.

<sup>191</sup> H Bielefeldt (n51) 12.

<sup>192</sup> *Travaux Préparatoires* on General Comment 22, UN Doc. CCPR/C/SR. 1166 (1992) 2 para. 5, 15.

<sup>193</sup> *Ibid.*



‘negative aspect’ of the right not to manifest or the ‘negative aspect’ of freedom of religion. However, as a result of an exploration of semantics in the case law it can be concluded that the right not to manifest is a *forum internum* right and therefore the opposite of the *forum externum* right to manifest.

The confusion identified in both Chapter Two and Three with respect to the meaning, scope and nature of the right not to manifest raises the question of whether this has had an impact in terms of the protection of the right not to manifest by the Court. At this point, it seems fitting to pose a hypothesis: is it the case that if the meaning, scope and nature of the right not to manifest is not adequately understood then right not to manifest will not be adequately protected (i.e. as a *forum internum* right)? This hypothesis will be tested in the following chapters.

## **CHAPTER 4: PROTECTION OF THE RIGHT NOT TO MANIFEST - ADMISSIBILITY DECISIONS OF THE COMMISSION**

### **Introduction**

Both Chapters Four and Five will focus on the third research question concerning the protection of the right not to manifest. Through an analysis of case law in which the right not to manifest (and its variants) have been raised explicitly, it will discuss complaints alleging that this right has been violated by the State and will critically evaluate the response of the ECnHR and ECtHR to these complaints. The cases for examination will be divided into admissibility decisions of the Commission and judgments of the ECtHR. In both chapters cases will be examined chronologically in thematic groups in order to allow for trends to be identified not only through time but also in terms of the type of complaint made. Both chapters will also test the hypothesis that if the meaning, scope and nature of the right not to manifest is not adequately understood then right not to manifest will not be adequately protected as a *forum internum* right.

This particular chapter will conduct a detailed analysis of Commission admissibility decisions concerning the right not to manifest relating to school reports and opting out of church tax.

#### **a. School Reports**

The right not to manifest has been raised, numerous times, in relation to school reports. In *CJ, JJ and EJ v Poland* the second and third applicants complained *inter alia* that their school reports for the year 1992/1993 had revealed their religion or belief and this constituted an infringement of the right to remain silent about one's convictions under

Article 8.<sup>194</sup> In response the Commission examined the complaints under Article 8 (rather than Article 9), stating unequivocally that Article 8 protected the right to remain silent as regards to one's convictions on religious matters.

In this case the Commission found that the religion or belief of neither the second, nor the third applicant, had been disclosed by their school reports. Firstly, given the second applicant's report did not list the subject 'religion/ethics' at all, the fact that she had opted not to take these classes only became apparent when the report was compared with other pupils' school reports. Secondly, the Commission reasoned that whilst there was a mark for 'religion/ethics' on the third applicant's report, the layout of the report meant that it could not be deduced which of the two class had actually been attended. It therefore decided that these complaints were manifestly ill founded.

The Commission's treatment of the right not to manifest religion or belief in this case can be criticised. Firstly, it characterised the right as a qualified right under Article 8 rather than a *forum internum* right under Article 9. This indicates a failure to recognise the meaning, scope and *forum internum* nature of the right not to manifest religion or belief, according to which no limitations are permissible. Secondly, disclosure of religion or belief *in part* was considered to be a relatively insignificant intrusion on privacy which could be justified under the qualified Article 8 right. In fact, it noted that the act of choice with respect to the taking or not taking of religion or ethics classes as a school subject by its very nature involved to a certain degree a declaration as to the applicant's preferences with respect to religion or belief without revealing his or her *actual* religion or beliefs. Whilst it must be conceded that this is true to some extent, as C. Evans has rightly pointed out, this reasoning in this case (that

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<sup>194</sup> *CJ, JJ and EJ v Poland* (n8). Note there are no page numbers or paragraph references for this case.

disclosure in part was a relatively insignificant intrusion) fails to recognise that being forced to reveal religion or belief, even in part, to the state could have serious implications for the *forum internum* in certain religiously intolerant societies.<sup>195</sup>

Later in 2001 in *Saniewski v Poland* another complaint about disclosure of religion or belief via a school reports was raised.<sup>196</sup> The applicant complained *inter alia* that the absence of a mark for the course in religion on his 1996/1997 school report revealed that he did not follow this course and thus obliged him ‘to make a public statement of his beliefs’ breaching his freedom of thought and conscience (Article 9).<sup>197</sup> In response the Court examined the complaint under Article 9 but left the existence of the right not to manifest under this right an open question.<sup>198</sup> This contrasts with the approach of the Commission in *CJ, JJ and EJ v Poland* in which the existence of a right to remain silent as to one’s religious beliefs was identified under Article 8.<sup>199</sup> These two cases therefore display a lack of conformity regarding the Commissions’ approach and attitude towards to the right not to manifest.

Nevertheless, the Court treated responded in a similar way in both cases. It reasoned that the school report in question left blank spaces listed for marks in other subjects such as ‘informatics’, ‘music’ and ‘fine arts’, and as such, it found that no conclusion could be drawn on the basis of the report as to whether the applicant refused to attend ‘religious/ethics’ classes or whether these were just not organised in his school

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<sup>195</sup> C Evans (n3) 96. See also K Boyle and J Sheen, *Freedom of Religion or Belief: A World Report* (Routledge 1997) 358-65.

<sup>196</sup> *Saniewski v Poland* (n15) page 1.

<sup>197</sup> *Ibid*, page 5.

<sup>198</sup> *Ibid*, page 6.

<sup>199</sup> *CJ, JJ and EJ v Poland* (n8).

year.<sup>200</sup> In addition, it noted that the applicant had not demonstrated that the school report would have ‘any material impact’ on his interests (i.e. that he would have to show it to future educational institutions or employers).<sup>201</sup> Overall, it is not clear whether the Commission understood the right as a *forum internum* or *forum externum* right; it simply stated that there was no interference with the applicant’s rights and freedoms guaranteed by Article 9 of the Convention and it therefore rejected the complaint as manifestly ill founded.<sup>202</sup> Again the Commission’s approach can be criticised here. The failure to recognise the existence of a right not to manifest religion or belief under Article 9, means that it is open to the same criticisms in this respect as outlined above in relation to *CJ, JJ and EJ v Poland* in which it was treated as an Article 8 right.

#### **b. Church Tax**

Whilst the right not to manifest was not explicitly raised in the case of *Gottesmann v Switzerland*, which concerned notification of change of religion in order to avoid payment of tax, it useful to note this case here. <sup>203</sup> In *Gottesmann* the applicant complained that ‘the domestic authorities arbitrarily imposed formalities governing the notification of their decision to leave the Roman Catholic Church...’<sup>204</sup> In response, the Commission established that for the purposes of Article 9, domestic authorities have ‘a wide discretion’ in this respect and concluded that the imposition of the legal requirement to notify the State of a change of religion in order to administer the

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<sup>200</sup> *Saniewski v Poland* (n15). This certainly seems sensible reasoning on the part of the Court; it is actually surprising how this complaint reached the ECtHR.

<sup>201</sup> *Ibid.*

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

<sup>203</sup> *Gottesman v Switzerland* (1984) 40 DR 284.

<sup>204</sup> *Ibid*, page 286.

payment of levies to a particular denomination did not constitute a violation of Article 9 (1).<sup>205</sup>

As Taylor rightly noted, this decision was consistent with other decisions regarding the change of religious affiliation to be revealed in order to avoid the payment of such tax.<sup>206</sup> However, what is interesting is that the Commission did not consider that such administrative arrangements oblige individuals to reveal their religion or belief to the state and therefore may interfere with the right to or the right not to manifest. Taylor suggested that it would have been useful if the Commission had offered some guidance on the role of such administrative formalities to prevent their misuse<sup>207</sup> because, whilst ‘notification of a change of religion may be an innocuous stipulation in most European countries’, in some it ‘could result in exposure to discrimination’.<sup>208</sup> He suggested that the emphasis on the importance of protection against compulsion to reveal religion or belief both in General Comment 22.3 and also in the HRC’s periodic reports may lead to future ECtHR judgements taking into account the importance of compulsion to reveal one’s religion or belief ‘even if only for apparently harmless administrative purposes following a change of religious membership.’<sup>209</sup> Whether this has been recognised by the ECtHR will be explored in the next chapter.

## **Conclusion**

This section has explored the third research question concerning the protection of the right not to manifest in light of Commission admissibility decisions. It has found a great

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<sup>205</sup> P Taylor (n3) 40.

<sup>206</sup> See *E & G R v Austria* (1984) 37 DR 42 in which it was decided that an applicant’s right to freedom of religion was not infringed by the payment of a similar tax.

<sup>207</sup> P Taylor (n3) 40.

<sup>208</sup> *Ibid*, 41-42.

<sup>209</sup> *Ibid*.

deal of inconsistency in terms of this right; the right to remain silent as to one's convictions has been treated as a qualified Article 8 right<sup>210</sup> and its existence under Article 9 has been left an open question. In terms of the hypothesis set out above, this chapter provides support for the view that if the meaning, scope and nature of the right not to manifest is not adequately understood then the right not to manifest is not adequately protected as a *forum internum* right.

These cases also seem to provide evidence for the arguments made by C. Evans and Taylor with respect to the ECnHR's and ECtHR's poor protection of the *forum internum*. Writing in 2001, C. Evans argued that the Commission and the Court failed to recognise the importance of the *forum internum* and lacked a sophisticated understanding of the different ways in which the *forum internum* could be infringed so much so it played 'almost no practical role in Article 9 cases.'<sup>211</sup> In particular, Evans contended that the *forum internum* implications for individuals as a result of the state church system and in the education of children had been overlooked by the Court.<sup>212</sup> Later in 2005, Taylor argued that whilst it was recognised that protection against coercion formed part of the *forum internum* the Commission and the Court failed to recognise or protect other *forum internum* rights. As he rightly argued case law indicated that even compulsion to reveal one's belief, widely considered to be a *forum internum* right, has been subjected to limitation provisions.<sup>213</sup> This, he concluded, led to the 'unimpugnable and fundamental nature of the *forum internum* to be undermined'.<sup>214</sup>

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<sup>210</sup> Ibid, 202.

<sup>211</sup> C. Evans (n3) 205

<sup>212</sup> Ibid.

<sup>213</sup> P Taylor argues that coercion to reveal one's beliefs, generally understood to fall within the *forum internum*, has been subjected to limitation provisions under Article 9.2 or dealt with under other ECHR articles, see P Taylor (n3) 202.

<sup>214</sup> Ibid.

The next chapter will examine whether these analyses remain relevant to the protection of the *forum internum* right not to manifest in light of the more recent judgements of the ECtHR with respect to the right not to manifest religion or belief.



## CHAPTER 5: PROTECTION OF THE RIGHT NOT TO MANIFEST – JUDGMENTS OF THE ECtHR

### Introduction

This chapter will examine ECtHR judgments relating to the right not to manifest religion or belief, concerning oath taking, identity cards, school reports and opting out of church tax. The hypothesis -that if the meaning, scope and nature of the right not to manifest is not adequately understood then it will not be adequately protected as a *forum internum* right- will again be tested in light of this case law.

#### a. Oath Taking

The first case to raise the right not to manifest in the context of oath taking was *Alexandridis c Grèce*.<sup>215</sup> In this case the applicant had been required to take an oath in order to be entitled to practice law.<sup>216</sup> The oath was normally taken on the Christian Gospel but it was also possible to make a solemn declaration instead.<sup>217</sup> Alexandridis complained *inter alia* about this process; he argued the structure, whereby the Christian oath was the ‘default’ option, meant that in order to make a solemn declaration he was obliged to reveal that he was not an Orthodox Christian.<sup>218</sup> He claimed that this process infringed the right not to manifest religion or belief and thus claimed a violation of Article 8, 9 and 14 of the ECHR.<sup>219</sup>

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<sup>215</sup> *Alexandridis c Grèce* (n4).

<sup>216</sup> *Ibid*, para 21.

<sup>217</sup> *Ibid*.

<sup>218</sup> *Ibid*, para 35.

<sup>219</sup> ‘*Le requérant allègue qu’il a été obligé de révéler ses convictions religieuses lors de la procédure de prestation du serment professionnel prévue par les articles 1 et 22 du code des avocats, au mépris des articles 8, 9 et 14 de la Convention*’, *ibid*, para 21.

The Court examined this complaint concerning forced manifestation of religion or belief under Article 9 alone;<sup>220</sup> the point of law at issue was whether the way in which the process of swearing in before the domestic court required the applicant to reveal his religious beliefs, in violation of Article 9.<sup>221</sup> The ECtHR considered that the assumption that lawyers in Greece were Orthodox Christians, and therefore would take a religious oath of office, meant that when the applicant asked to make a solemn declaration instead, he was forced by the process, to reveal his religion or belief *in part*, i.e. that he was not an Orthodox Christian.<sup>222</sup> The Court examined relevant domestic law and found that it supported the applicant's complaint. Article 19 of the Civil Service Code stated that when an oath is required it is in principle a religious oath; in order to be allowed to make a solemn declaration it stipulates that individuals are 'forced to say that they are atheists or their religion forbids swearing'.<sup>223</sup>

As Chapter Two explained, *Alexandridis* represented a turning point in terms of the clarification and use of the phrase the 'right not to manifest'; the Court stated that 'the freedom to manifest religious beliefs also has a negative aspect, namely the right of the individual not to be compelled to state his faith or his religious beliefs and not to be forced to engage in conduct in which it could be inferred that he has –or does not have– such beliefs.'<sup>224</sup> And, as Chapter Three demonstrated there are various indicators that the Court understood the right as a *forum internum* right in this case. In addition to these linguistic hints discussed above, the way in which the Court found a violation of Article 9 supports this argument. The Court held that the obligation on the applicant to reveal

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<sup>220</sup> Ibid.

<sup>221</sup> Ibid, para 35.

<sup>222</sup> Ibid, para 39.

<sup>223</sup> Ibid, para 37.

<sup>224</sup> Ibid.

that he was not an Orthodox Christian in order to make a solemn declaration ‘infringed his right not to be compelled to manifest his religious beliefs’.<sup>225</sup> It was on this basis alone that it found a violation of Article 9 of the Convention; there was no consideration of limitations applicable only to *forum externum* rights under Article 9.2.<sup>226</sup>

It is important to stress just how strongly the right not to manifest was protected by the Court here. Alexandridis was obliged to reveal his religion or belief *in part* (i.e. that he was not an Orthodox Christian); he was not obliged to reveal his *actual* religion or belief, to say that he was atheist or that his religion prohibited swearing. For the Court, this was sufficient to constitute a violation of the *forum internum* right not to manifest, and thus Article 9. The fact this decision was unanimous suggests there was consensus amongst the judges that the threshold for the violation of the right not to manifest religion or belief was low. Moreover, it was enough to show the state had created a situation in which individuals were forced to reveal they did not hold a particular belief; it was not necessary to prove the state had *coerced* an individual to reveal their actual religion or belief. In both *CJ, JJ and EJ* and *Saniewski* there was a notion that the applicant must show evidence of ‘suffering’ as a direct result of the disclosure of information relating to religion or belief in order for a violation of Article 8 or 9 to be found on this basis.<sup>227</sup> However, the decision in *Alexandridis* demonstrated that evidence of ‘suffering’ was not necessary; simply, an interference with this *forum internum* right itself was enough to constitute a violation.

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<sup>225</sup> Ibid, para 41.

<sup>226</sup> Ibid.

<sup>227</sup> *CJ, JJ and EJ* (n8); *Saniewski* (n15).

Remarkably, there has been almost no discussion of this case in the literature, perhaps because it is unreported and available only in French.<sup>228</sup> Temperman has argued generally that certain oath schemes -which have a religious oath as the ‘default’ option and a secular affirmation the ‘tolerated exception’- are objectionable from a human rights perspective because there is a presumption that ‘normal’ officers believe in the particular god/s sworn to.<sup>229</sup> This can mean that non believers or members of minority religions, in requesting to make a solemn declaration, are forced to reveal that they do not share the dominant faith. He insightfully points out that this is problematic because of the risk such individuals may be ostracised or suffer other repercussions<sup>230</sup> and those affected may decide to surrender their conscience and not speak out.<sup>231</sup>

Two years later Alexandridis, along with Dimitras and others appeared in *Dimitras et autres c Grèce*, the first in a series of cases concerning oath taking in order to testify in Greek courts.<sup>232</sup> Again a complaint was made about the process itself. The Greek court had presumed that the applicants were Orthodox Christians, therefore, in order for them to make a solemn declaration they had been forced to reveal their religion or belief *in part*, i.e. that they were not Orthodox Christians. Furthermore, in some situations had been obliged to reveal their *actual* religion or belief. This, they claimed, violated their right not to reveal their religion for belief.<sup>233</sup>

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<sup>228</sup> N Bratza (n8) 259.

<sup>229</sup> J Temperman refers to both *Alexandridis* and *Buscarini* as examples of respectively optional and compulsory religious oath schemes, see J Temperman, ‘Religious Symbols in the Public School Classroom’ in J Temperman (ed) *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Brill 2012), 167.

<sup>230</sup> *Ibid*, 168.

<sup>231</sup> In Turkey for instance, the Law on Legal Procedure obliges individuals to take an oath on ‘God and honour’ in court. This applies to *everyone* who attends court, see M Yildirim ‘Turkey’ in J Dingemans and others (n7) 256ff

<sup>232</sup> *Dimitras et autres c Grèce* (2010) (n4) 2011 (n14) and 2013 (n14).

<sup>233</sup> *Dimitras et autres c Grèce* 2010 (n4) para 80.

Again, the Court treated this complaint under Article 9 alone. The Court found the applicants' complaints to be substantiated. It noted that they had not only been obliged to reveal that they were not Orthodox Christians<sup>234</sup> but sometimes had to *convince* officials that they were not Orthodox Christians by stating their actual religion or belief.<sup>235</sup> Indeed, in some instances the words 'Orthodox Christian' had been crossed out in the minutes and handwritten references, explicitly stating their religion or belief, had been entered.<sup>236</sup> Unlike *Alexandridis*, in which religion or belief was revealed *in part*, in *Dimitras*, therefore, applicants had sometimes been forced to reveal their religion or belief *in full*. The Court found this practice enshrined in domestic law; Articles 218 - 220 of the Code of Criminal Procedure which regulated oath taking, required individuals to *give details* about their religion or belief in order to avoid having to take the religious oath.<sup>237</sup>

The Court repeated the formulation set in *Alexandridis* that individuals have a right not to be obliged to manifest their religion or beliefs and a right not to be obliged to act in such a way that their religion or belief can be deduced.<sup>238</sup> It reiterated that 'State authorities have no right to intervene in the field of freedom of conscience of the individual and seek his religious beliefs, or force him to express his beliefs about the divinity'.<sup>239</sup> For reasons noted in the analysis of these statements in *Alexandridis* in Chapter Three, this presentation of the right places it the *forum internum*. Furthermore, in *Dimitras* the Court held that 'requiring the applicants to reveal their religious

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<sup>234</sup> Ibid, para 45.

<sup>235</sup> Ibid, para 65-69

<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid, para 28.

<sup>239</sup> Ibid.

convictions in order to be allowed to make a solemn declaration had interfered with their *freedom of religion*' i.e. their *forum internum* right.<sup>240</sup>

Given this presentation of the right not to manifest as a *forum internum* right, the Court's conclusion in this case was striking. The Court introduced Article 9.2 limitations which are appropriate only to *forum externum* rights; it decided that the interference with the right not to manifest was neither justified nor proportionate to the aim pursued.<sup>241</sup> The reasoning in the first part of *Dimitras*, therefore, appears to completely contradict the reasoning in the second half. It seems that despite the clear reliance on *Alexandridis* the Court fundamentally misunderstood the approach and the implications of the language in the previous case. Such a misunderstanding of the nature of the right not to manifest could have had serious implications for the protection of this right in *Dimitras*. In the opinion of the Court the interference was prescribed by law and pursued a legitimate aim under Article 9.2; the violation of Article 9 was found solely on the basis that it was not considered to be justified or proportionate.<sup>242</sup> Had the Court found differently on this point, then the decision would have been very different.

In Chapter One some of the problems with treating *forum internum* rights as *forum externum* rights were highlighted in relation to the Court's approach in *Buscarini* in which the Court treated a complaint about compulsion to take a religious oath as a *forum externum* manifestation issue.<sup>243</sup> The Court's approach in *Dimitras* is somewhat more confusing than its approach in *Buscarini* however. This is because the Court did

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<sup>240</sup> '...la Cour conclut qu'il y a eu en l'espèce une ingérence dans l'exercice, par les requérants, de leur liberté de religion, protégée par l'article 9 de la Convention', Ibid, para 80.

<sup>241</sup> 'La Cour conclut que l'ingérence litigieuse n'était pas justifiée dans son principe ni proportionnée à l'objectif visé', ibid, para 81.

<sup>242</sup> 'La Cour conclut que l'ingérence litigieuse n'était pas justifiée dans son principe ni proportionnée à l'objectif visé', *Dimitras et autres c Grèce* 2010 (n4) para 88.

<sup>243</sup> *Buscarini v San Marino* (n91).

not treat the complaint as a *forum externum* issue from the outset. Rather it began by (implicitly) recognising the *forum internum* nature of the right not to manifest. The introduction of considerations applicable to the *forum externum* right to manifest in the second part of the judgement appears therefore not only inappropriate but illogical.

The applicants did not complain that their *forum externum* right to manifest had been restricted, but on the contrary, complained that they had been *compelled to manifest* their religion or belief.<sup>244</sup> As Taylor has accurately noted, ‘a legal requirement compelling the applicant to act in a particular way is not comparable to a restriction which limits the applicant’s chosen outward manifestation of belief’.<sup>245</sup> Whilst the *forum externum* reasoning did not, in this case, prove to be an ‘insurmountable hurdle’, because a violation of Article 9 was found nonetheless, it is concerning that because of the approach alone a very different conclusion could have been reached.

It is worth noting that further *Dimitras et autres v Grèce* cases were examined by the ECtHR in 2011<sup>246</sup> and 2013.<sup>247</sup> In both of these cases the Court considered the decision in the first *Dimitras* decision at length and reached the same conclusion, on the basis that the interference with the right not to manifest was not justified or proportionate to the aim pursued.<sup>248</sup> Despite the clear contrast with the *forum internum* approach of *Alexandridis*, at no point in either of these later cases did the Court

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<sup>244</sup> ‘*Qui plus est, les articles 218 et 220 du code précité ne prévoient aucune exception pour les témoins qui sont orthodoxes mais pour lesquels prêter le serment prévu par l'article 218 serait contraire à leurs convictions. Dans ce cas aussi, la lettre des articles précités laisse entendre qu'ils seraient obligés de prêter un type de serment en contradiction avec leurs croyances religieuses*’, *Dimitras et autres c Grèce* 2010 (n4) para 85.

<sup>245</sup> P. Taylor (n3) 128.

<sup>246</sup> *Dimitras et autres c Grèce* 2011 (n14).

<sup>247</sup> *Dimitras et autres c Grèce* 2013 (n14).

<sup>248</sup> ‘*La Cour considère que la même conclusion quant à l’existence d’une ingérence à la liberté de religion s’applique dans le cas d’espèce*’, see *Dimitras et autres c Grèce* (2011) (n4) para 29 and *Dimitras et autres c Grèce* (2013) (n14) para 22.

recognise or review the inconsistent way in which the right not to manifest religion or belief was treated in the first *Dimitras* case.

Again, all *Dimitras* cases are only available in French and there is almost no commentary on them in the literature. One exception is Peroni's recent article in which he commented that this group of cases ('the Greek cases') are 'remarkable' because of the clear willingness on the part of the Court to 'protect applicants against the slightest possibility that may coerce them into revealing their (non-) religious beliefs.'<sup>249</sup> Such a summary seems questionable. Indeed in *Alexandridis* the Court offered strong protection to this *forum internum* right but this was based on the existence of compulsion to disclose religion or belief in part. Moreover, in the *Dimitras* cases, in which the applicants were sometimes forced to reveal their religion or belief in full, the Court's decision hinged solely on the question of proportionality which actually considerably reduced the level of protection afforded to this right in these cases.

### **b. Identity Cards**

The only case to date to have raised the right not to manifest in connection with identity cards is *Sinan Işik v Turkey*. Recording of religious affiliation is a common feature of identity cards.<sup>250</sup> In *Sinan Işik v Turkey* the applicant complained firstly, that the government had refused to change his religious affiliation from 'Muslim' to 'Alevi' on his identity card and secondly, that he had been obliged, without his consent and in breach the right to freedom of religion and conscience, to disclose his belief because it

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<sup>249</sup> L Peroni (n8) 4.

<sup>250</sup> For further examples see International Humanist and Ethical Union (IHEU), *Freedom of Thought 2012: A Global Report on Discrimination Against Humanists, Atheists and the Non- Religious* (International Humanist and Ethical Union 2012) 23.



was mandatory to indicate his religion on his identity card.<sup>251</sup> This latter complaint will form the focus of this section.

As noted in Chapter Three the statement in this case, that the right not to disclose one's religion or beliefs fell within the *forum internum* of each individual, clarified the nature of the right not to manifest<sup>252</sup> as did the statement that the Court would examine the complaint from the angle of the 'negative aspect of freedom of religion and conscience, namely the right of an individual not to be obliged to manifest his or her beliefs'.<sup>253</sup>

The Court rejected the Turkish government's argument that the indication of religion on identity cards in 'no way constituted a measure aimed at compelling any individual to disclose his or her beliefs...'<sup>254</sup> Instead, it observed that according to domestic legislation at the material time, the applicant was, like all Turkish citizens, obliged to carry an identity card indicating his religion; this public document had to be shown at the request of any public authority, private enterprise or in the context of other formalities.<sup>255</sup> The frequent use of the identity card, therefore, meant the applicant was forced to disclose his religious beliefs *de facto* every time he used it.<sup>256</sup>

The Court considered the impact of such disclosure in the context of the Article 14 right to be free from discrimination. The Court noted that that the indication of religious beliefs on official documents (not just ID cards) exposed the bearer to the 'risk of discriminatory situations in their religions with the administrative authorities.'<sup>257</sup> In

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<sup>251</sup> *Sinan Işık v Turkey* (n4) para 22.

<sup>252</sup> *Ibid*, para 42.

<sup>253</sup> *Ibid*, para 41.

<sup>254</sup> *Ibid*, para 35.

<sup>255</sup> *Ibid*, para 40.

<sup>256</sup> *Ibid*, para 50.

<sup>257</sup> *Ibid*, para 43.

support it referred at length to the Supreme Administrative Court's judgment in *Sofianopolous and Others v Greece* in which it was noted that the 'recording of religion in identity cards opens the way to positive or negative discrimination and thus creates the risk of interference with religious equality.'<sup>258</sup>

Whilst the Court recognised that, since the complaint, changes had been made to the Civil Registry Services Act (2006) –so that individuals could also have information amended, deleted or leave the religion or belief on the ID card blank- this remained unsatisfactory.<sup>259</sup> The Court noted that the fact a religion box remained meant that the issue of disclosure remained.<sup>260</sup> For the Court a blank box had 'specific connotation' and could lead to individuals standing out against their will from those who chose to have their religion or belief recorded on their identity card.<sup>261</sup> Furthermore, it noted that legislation required individuals who wanted to change or remove information regarding their religion or belief to submit a written statement to the government, a process which

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<sup>258</sup> *Sofianopolous and others v Greece* (n134) page 3. See also *F H v Sweden* ECHR 2009 32621. In this case the applicant claimed that as a Christian he would be at risk of being killed if sent back to Iraq because his identity card would explicitly denote that fact. Whilst the Court did not agree with the risk of persecution in this as a result of this detail on the ID card, even if the applicant were not to manifest his religious beliefs openly, it is likely that his religious affiliation would become known to others as he would have to show his identity card to the authorities in the course of everyday life.

<sup>259</sup> *Sinan İşik v Turkey* (n4) para 48.

<sup>260</sup> *Ibid.*

<sup>261</sup> *Sinan İşik v Turkey* (n4) para 51. Given the linguistic similarities, it is likely that the Court may also have been influenced by the Supreme Administrative Court of Greece in *Sofianopolous* here too - had observed that a refusal to record religion or belief on identity cards reveals, 'indirectly and almost publicly, one aspect of their thoughts on religious matters' and they are also distinguished from those individuals who do disclose their religion or belief on their ID cards. *Sofianopolous v Greece* (n134) page 3. M Yildirim has noted that in the context of employment, the existence of a space for religion on identity cards can lead to pressures on individuals from various sources. In Turkey the Public Registry is organised on the basis of familial relationships. In some situations, such as for employment purposes, it is necessary to submit a 'family population document' which details the religious affiliation of the individuals' close family members, including information such as whether they have changed their religion or belief on their ID card or whether they have left the section blank. The result of this system is that some individuals have felt pressure in respect of their religion or belief, see M Yildirim 'Turkey: Time to End State Recording of Individual's Religious Affiliation' (*Forum 18*, 8 Oct 2010) <[http://www.forum18.org/archive.php?article\\_id=1496](http://www.forum18.org/archive.php?article_id=1496)> accessed August 2014

could again constitute disclosure of information concerning an aspect of the individual's attitude to religion.<sup>262</sup>

That the Article 8 right to privacy was also considered by the Court is revealed through the language used in this case. The Court spoke of religion of belief as one of the 'most intimate' aspects of an individual.<sup>263</sup> This echoes the language in *Folgerø v Norway* in which complaints under Article 2 of Protocol 1 concerning opting out of compulsory religious education were raised. The Court had noted *obiter dicta* that information about personal religious and philosophical convictions concerned 'some of the most intimate aspects of private life.'<sup>264</sup>

The Court found that the Article 14 and 8 implications were 'undoubtedly at odds with the principle of freedom not to manifest one's religion or belief'; it therefore concluded that there had been a violation of Article 9 on the basis that the ID card contained an indication of religion, regardless of whether it was obligatory or optional.<sup>265</sup> Again, therefore, the Court clearly recognised and strongly protected the *forum internum* right not to manifest.

For Judge Barreto however, this constituted an excessive approach; he argued that the majority went beyond the case law upon which they relied in reaching their decision.<sup>266</sup> He contended that an individual should be 'at least compelled to disclose his or her religion' in order for a violation of Article 9 to be found; since the change to legislation individuals could leave the box blank, therefore there was no compulsion to

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<sup>262</sup>In support of this reasoning the Court referred to the *obiter dicta* in in *Folgero* and *Zengin* mentioned above, see *Sinan Işik v Turkey* (n4), para 49.

<sup>263</sup> *Ibid*, para 51.

<sup>264</sup> *Folgero and others v Norway* (n45) para 98.

<sup>265</sup> *Sinan Işik v Turkey* (n4) para 52.

<sup>266</sup> Dissenting Opinion of Judge Cabral Barreto, *Sinan Işik v Turkey* (n4) 3.2.

disclose religion or belief.<sup>267</sup> There is however a serious flaw in Baretto's argument. He claimed the findings went beyond earlier case law, however, he only explicitly referred to the cases of *Folgerø v Norway* and *Zengin v Turkey*. In the former case, the Court noted *obiter dicta* that the system for opting out of compulsory religious education did not, in principle, actually force parents to reveal their religion or belief, but in reality made it highly likely that they felt some compulsion to reveal details about it.<sup>268</sup> In the latter, the Court held *obiter dicta* 'the fact that parents must make a prior declaration to schools stating that they belong to the Christian or Jewish faith in order for their children to be exempted from the classes in question may raise a problem under Article 9.'<sup>269</sup> At no point did Judge Barreto refer, as the Court did, to *Alexandridis*. As explained above, in *Alexandridis* the Court found a violation of the right not to manifest on the basis that the applicant was forced to reveal his religion or belief in part, i.e. that he was not a member of a particular religion; *Alexandridis* was not compelled to actually disclose his religion or belief. In light of this, the findings in both *Alexandridis* and in *Işik* are consistent. By leaving the box on the ID card blank, individuals are forced to reveal their religion or belief in part, namely, that they do not belong to one of the optional religions.

### **c. School Reports**

In *Grzelak v Poland* the right not to manifest was again explored in relation to school reports.

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<sup>267</sup> He stated that 'religious beliefs fall within the *forum internum* of each individual and an issue may be raised under Article 9 of the Convention if a person is compelled to disclose them to the authorities', *ibid.*

<sup>268</sup> *Folgero and others v Norway* (n45) 63, 98. See also *Leirvåg and others v Norway*, Human Rights Committee, UN Doc CCPR/C/82/D/1155/2003, Communications nos 115/2003 (24 November 2004)

<sup>269</sup> *Zengin and another v Turkey* ECHR 2007-XI 1448, 73.

The third applicant raised a number of complaints under Article 9, including the complaint that the lack of a mark for religion/ethics on his school report through his school career meant that he was forced to reveal his religious convictions (or lack of) each time his school reports were read and this ‘stigmatised’ him among other pupils.<sup>270</sup> This complaint therefore has similarities with *CJ, EJ and JJ v Poland* and *Saniewski*.

In response the Court repeated the formulation set out in *Alexandridis*<sup>271</sup> and explained that an interference with the negative aspect of the right to manifest may occur when the State brings about a situation in which individuals are obliged, directly or indirectly, to reveal they are non believers.<sup>272</sup> The Court added that this negative obligation on the part of the state was ‘all the more important when such an obligation occurs in the context of the provision of an important public service such as education’, an observation found *mutatis mutandis*, in *Alexandridis*.<sup>273</sup> It considered that the lack of a mark for ‘religion/ethics’ on the school report might be read as showing the applicant’s lack of religious affiliation.<sup>274</sup> Therefore, it concluded that the state’s margin of appreciation (with respect to the provision of religious education in school) had been exceeded as the ‘very essence of the third applicant’s right not to manifest his religion or convictions under Article 9 was infringed.’<sup>275</sup>

To this decision, Judge Björgvinsson submitted a dissenting opinion, in which he argued there was no violation of Article 9 on this basis because the applicant was not subjected to any kind of indoctrination or pressure by authorities regarding his religion

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<sup>270</sup> *Grzelak v Poland* (n4) paras 49, 65.

<sup>271</sup> *Ibid*, para 87.

<sup>272</sup> The specific reference to ‘non believers’ here probably reflects the fact that the applicants were ‘declared agnostics’. *Ibid*, para 8.ii.

<sup>273</sup> *Ibid*, para 87.

<sup>274</sup> *Grzelak v Poland* (n4) para 95.

<sup>275</sup> *Ibid*, 100. This is an awkward sentence which reflects the fact that the *forum internum/forum externum* issues were not dealt with separately in this case. This problem is discussed in the Partly Dissenting Opinion of Judge David Thor Björgvinsson, *Ibid*, para 3.

or beliefs, neither did he show that he had, or would, suffer detriment which would amount to interference.<sup>276</sup> Such an argument is however, as Chapter Three demonstrated, based on a very narrow and now outdated understanding of *forum internum* rights and the ways in which they can be violated. Furthermore, the reference to evidence of suffering repeats the reasoning in the earlier cases of *CJ*, *EJ* and *JJ* and *Saniewski* and ignores the jurisprudence of *Alexandridis* in which a violation was found simply on the basis of being forced to reveal religion or belief in part; evidence of ‘suffering’ was not necessary.

Judge Björgvinsson also referred to *Saniewski* in his argument that there were insufficient grounds for finding differently in *Grzelak*. Indeed there were some similarities, between the cases, but they also had significant differences. Importantly, in *Saniewski* marks were missing for other subjects which meant that no conclusions could be drawn from the report itself as to whether the applicant decided not to take religion or ethics classes or whether they were simply not offered in that particular year.<sup>277</sup> In *Grzelak*, the situation was different. As religious education classes were widely available at that time the fact that marks were missing for ‘religion/ethics’ indicated that he did not take the classes and thus, was likely that he would be regarded as a person without religious beliefs.<sup>278</sup> Furthermore, in the *Grzelak* case a change in the rules meant that marks for ‘religion/ethics’ were included in the calculation of the pupil’s average mark for the school year. As the Court perceptively noted, this meant that opting out of religious education when ethics classes were not available might have an

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<sup>276</sup> Partly Dissenting Opinion of Judge David Thor Björgvinsson, Ibid.

<sup>277</sup> *Saniewski v Poland* (n15) pages 2, 6.

<sup>278</sup> *Grzelak v Poland* (n4) para 95.

adverse impact on students' academic achievement overall and put them under some pressure to take religious education classes.<sup>279</sup>

In *Grzelak* the majority showed a clear understanding of the meaning, scope and nature of the right not to manifest religion or belief. The Court again offered strong protection to the right not to manifest religion or belief when it was revealed in part by state authorities.

#### **d. Church Tax**

The case of *Spampinato v Italy*, in 2006, was the first opting out of payment of church tax case to explicitly raise the issue of the right not to manifest religion or belief.<sup>280</sup> The applicants complained *inter alia* under Articles 9 and 14 that when they completed their tax returns - on which they were required to select whether to allocate eight thousandths of their income tax to the State, the Catholic church or to one of the representative institutions of five other religious groups- they were obliged to manifest their religious beliefs.<sup>281</sup> The Court, however, was 'unable to share the applicants' view that the provision in question entailed an obligation to manifest one's religious beliefs...'<sup>282</sup> It noted that according to domestic law<sup>283</sup> individuals could choose whether or not to make a choice concerning the allocation of income tax, and as such the provision in question did not 'entail an obligation to manifest one's beliefs.'<sup>284</sup> The complaint was

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<sup>279</sup> Ibid, para 96.

<sup>280</sup> *Spampinato v Italy* (n141).

<sup>281</sup> Ibid, page 2.

<sup>282</sup> Ibid, page 6.

<sup>283</sup> Section 47.3 of Law no.222 of 1985 in Ibid, page 6.

<sup>284</sup> A summary of this case is provided in I Leigh, 'The European Court of Human Rights and Religious Neutrality' in G D'Costa, M Evans, T Modood and J Rivers, *Religion in a Liberal State* (Cambridge University Press 2013), 43. It is also mentioned in A J Gutierrez, 'Freedom of Thought, Conscience and Religion' in J G Roca and Santolaya (eds), *Europe of Rights: A Compendium on the European Convention of Human Rights* (Brill Nijhoff 2012), 357 and D Harris, M O'Boyle, E Bates and C Buckley (n51) 597.

therefore declared inadmissible. At no point in this case, therefore, did the Court consider that the right not to manifest religion or belief could be engaged by compulsion to reveal religion or belief in part.

The next case in which the issue of manifestation of religion or belief was raised in relation to payment of church tax was in *Wasmuth v Allemange* in 2011 (i.e. post *Alexandridis* jurisprudence).<sup>285</sup> In this case, the applicant complained that his religion or belief was revealed by his tax card violating his right not to disclose his religious belief and also his right to privacy.<sup>286</sup> The card listed six religious organisations entitled to receive tax; on Wasmuth's card the mark '- ' appeared in the section entitled 'church tax levy'; this informed his employer that no tax was to be deducted in this respect. This, he argued, revealed that he did not belong to one of the six congregations or had opted out of the payment of church tax altogether.<sup>287</sup>

The Court examined this complaint under Article 9. It repeated the formulation set out in *Alexandridis* - and thus ostensibly recognised the *forum internum* nature of the right not to manifest.<sup>288</sup> It explicitly stated that the obligation imposed on the applicant to provide the information in question on his wage-tax card had interfered with his right not to indicate his religious beliefs.<sup>289</sup> Despite this, however, the Court actually considered the legitimacy of limitations on this right under Article 9.2; it concluded that

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<sup>285</sup> *Wasmuth c Allemange* (n4).

<sup>286</sup> '...son droit de ne pas déclarer ses convictions', *ibid*, para 41. Wasmuth also claimed that this constituted a violation of Article 8; he considered the collection, use or disclosure of personal data with respect to religion or belief to be an interference with the right to respect for private life, *ibid*, para 71.

<sup>287</sup> It is possible to opt out of paying church tax by leaving the one's church. To leave, however, it is necessary to make a formal declaration stating one's intentions to leave; this must be confirmed in the form of a legally validated certificate from the state. Leaving a church, is therefore, a legal act and is noted in civil and church registers, see L Bloß, 'European Law of Religion- organisational and institutional analysis of national systems and their implications for the future European Integration Process' (Jean Monnet Working Paper, NYU School of Law, 2003).

<sup>288</sup> *Wasmuth c Allemange* (n4) para 50.

<sup>289</sup> *Ibid*, para 55.



the obligation to provide the information on the wage tax card had a legal basis in domestic law and pursued a legitimate aim of protecting the rights of churches and religious societies to levy church tax.<sup>290</sup> With respect to the question of proportionality it considered that the information provided on the tax card was ‘of limited informative value’ as it ‘simply indicated that the applicant did not belong to one of the six churches or religious societies authorised to levy tax’.<sup>291</sup> This it held, did not ‘allow the authorities to draw any conclusions as to his religious or philosophical practice’; Wasmuth was not forced to give reasons for his non-membership or to reveal his religious or philosophical beliefs.<sup>292</sup> Furthermore, it observed that the card was not for general use but rather only for use in relations between the taxpayer, tax authorities and the employer.<sup>293</sup> Therefore, it decided there had been no violation of Article 9.<sup>294</sup>

This reasoning contrasts sharply with that in *Alexandridis*, *Işık* and *Grzelak* and its conclusion seems to be completely at odds with these earlier cases. Arguably, one particularly unsatisfactory feature of this judgement is that the Court noted *obiter dicta* that in situations where interference with the right not to manifest is more significant, the balancing of interests might lead to a different conclusion.<sup>295</sup> This implies that in cases where an individual may have been forced to reveal his actual religion or belief or give details about it, the Court would treat the right as a *forum externum* right and

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<sup>290</sup> Ibid, para 55.

<sup>291</sup> Ibid, para 58.

<sup>292</sup> The federal court had left it an open question whether the indication ‘-’ placed on the tax card could be described as information on the belonging to a religion (*d’information sur l’appartenance à une religion*), *ibid*, para 11.

<sup>293</sup> Ibid, para 59.

<sup>294</sup> Para 74-. The Court actually used the reasoning in relation to Article 9 to find no violation of Article 8 either, *ibid*, para 75.

<sup>295</sup> ‘*La Cour n’exclut cependant pas qu’il pourrait y avoir de situations dans lesquelles l’ingérence dans le droit de l’intéressé à ne pas manifester ses convictions religieuses paraîtra plus significative et dans lesquelles la mise en balance des intérêts en jeu pourrait l’amener à parvenir à une conclusion différente.*’, *ibid*, para 61.

subject it to limitations under Article 9.2, rather than a *forum internum* right. This case shows that Taylor's prediction that European decisions might take into account the importance of compulsion to reveal one's religion or belief in the future, 'even if only for apparently harmless administrative purposes...' has not occurred.<sup>296</sup>

Judges Berro-Lefèvre and Kalaydjieva argued, in their dissenting opinions, that this case should have followed the jurisprudence in *Işik* in which interference was considered to be a violation of the *forum internum* right not to manifest.<sup>297</sup> They also drew attention to the possible Article 14 implications of the forced disclosure of the applicant's religion or belief through the wage tax card, noting that it could have adverse impacts on the applicant's chances of finding or keeping a job.<sup>298</sup> In contrast to the Court, therefore, they found a violation of Article 9 in this case.

*Wasmuth*, therefore, provides another example of the way in which the right not to manifest has been presented as a *forum internum* right, but has been treated as a *forum externum* right (i.e. subjected to limitations). Again, this case, available only in French, has not yet been analysed in the literature. It certainly seems to provide support for the hypothesis that if the meaning, scope and nature of the right not to manifest is not recognised and it is subjected to Article 9.2 reasoning, then the right not to manifest is not adequately protected as a *forum internum* right.

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<sup>296</sup> P Taylor (n3) 40.

<sup>297</sup> 'Tout comme la chambre, je n'ai aucun doute sur l'existence d'une ingérence : la mention litigieuse « -- » permet ipso facto de déduire que le requérant ne partage pas, ou ne partage plus les dogmes d'une église ou d'une société religieuse habilitée à prélever l'impôt cultuel', Opinion Dissidente De La Juge Berro-Lefèvre À Laquelle Se Rallie La Juge Kalaydjieva, *Wasmuth c Allemange* (n4).

<sup>298</sup> The implications of disclosure of religion or belief upon employment as a result of the wage tax card were discussed in *Schiith v Germany*. The Court reiterated that, 'as a result of the wage-tax card that an employee must present and which contains certain personal data, an employer is automatically informed, to some extent, of the employee's personal and family situation', see *Schiith v Germany* ECHR 2010 1620, para 73.

In light of the cases so far, it is necessary to review the literature again. C. Evans had argued that following *Buscarini*, it was unlikely that the Court would develop a more sophisticated understanding of the *forum internum*<sup>299</sup> and that the State would have to act ‘very repressively indeed’ before the Court would find a violation.<sup>300</sup> The findings in *Alexandridis*, *Dimitras*, *Işik* and *Grzelak* have certainly proved this earlier prediction to be wrong. However, the cases above do provide evidence (with respect to the right not to manifest, at least) to support C. Evans’ suggestion that the adoption of a privacy rationale would improve the recognition and protection of *forum internum* rights by the ECtHR.<sup>301</sup>

In fact, recently Peroni has argued that the increased weight given to privacy and autonomy, by the Court with respect to religion and belief has led to a more vigorous protection of the *forum internum*.<sup>302</sup> He argues that the Court has been ‘highly protective of the ‘negative aspect’ of the right to manifest one’s religion’ protecting the ‘the private character of applicants’ (non) religious beliefs by protecting them against forced access and exposure’.<sup>303</sup> A similar observation was made by Martinez-Torron who suggests that ‘the Court has been very careful to protect the individual’s right not to disclose, even indirectly, religion or beliefs.’<sup>304</sup> However, whilst this may be an accurate reflection of the Court’s approach in *Alexandridis*, *Işik* and *Grzelak* (and at a stretch, the *Dimitras* cases) this does not represent the apparently, ‘deviant’ judgment in

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<sup>299</sup> C Evans (n3) 74.

<sup>300</sup> Ibid, 78.

<sup>301</sup> Ibid, 32.

<sup>302</sup> See L Peroni (n8).

<sup>303</sup> Ibid, 6. See also P Petkoff who speaks of the private autonomous sphere of religion or belief, P Petkoff (n87).

<sup>304</sup> J Martinez-Torron, (n25), 21.

*Wasmuth* in which no violation was found on the basis of disclosure of religion or belief in part.

## **Conclusion**

This chapter has analysed the way in which the right not to manifest religion or belief has been protected in the case law of the ECtHR. It found that in *Alexandridis* the Court clearly recognised and protected the *forum internum* nature of this right. This case has been used a precedent in all subsequent right not to manifest cases. There has, since 2008, been somewhat of a trend in case law to find a violation of Article 9 on the basis of compulsion to disclose religion or belief. This trend can even be seen in the cases of *Dimitras*, in which the right not to manifest was subject to limitations applicable only to *forum externum* rights. Despite, it seems, fundamentally misunderstanding the reasoning in *Alexandridis*, and thus considerably reducing the level of protection offered to the right not to manifest, the Court nevertheless found a violation of Article 9. However, the case of *Wasmuth* represents a challenge to this post 2008 trend. The Court again subjected this apparently *forum internum* right to limitations applicable only to *forum externum* rights. Despite finding an interference with the right not to manifest, the Court concluded that, according to Article 9.2 limitations this interference did not constitute a violation of Article 9. This inconsistency in the approach to and protection of the right not to manifest in judgments of the ECtHR, therefore, provides further support that if the meaning, scope and nature of the right not to manifest is not recognised then the right will not be adequately protected as a *forum internum* right.

So to the answer to the question of whether the right not to manifest is the opposite to the right to manifest in terms of protection the answer must be both yes and no; whilst it is always presented as a *forum internum* right in case law, it is actually

sometimes protected as a *forum internum* right and sometimes as a *forum externum* right. The current situation is therefore problematic because there is no predictability in terms of the protection of this right.

## OVERALL CONCLUSIONS

This dissertation has explored the following research questions: what is the meaning and scope of the right not to manifest? What is the nature of the right not to manifest and how can it be interfered with? And, how and why has the right not to manifest been protected by the Court? The hypothesis, that if the meaning, scope and nature of the right not to manifest is not adequately understood, then the right will not be protected adequately by the Court as a *forum internum* right, was also posed. In order to address the research questions and hypothesis it was necessary to engage with a significant amount of ECtHR case law not yet analysed, and available only in French, and a wide variety of literature on Article 9.

The first chapter explored fundamental concepts in Article 9. It found a significant lack of consensus concerning key terms such as ‘religion’ and ‘belief’,<sup>305</sup> and drew attention to some methods used by the Court in order to avoid defining these terms.<sup>306</sup> It also found some serious confusion with respect to the Court’s understanding and application of the *forum internum* and *forum externum* distinction.<sup>307</sup> This chapter therefore provided a contextual background against which the Article 9 right not to manifest was analysed in the subsequent chapters.

Chapter Two explored the first research question concerning the meaning and scope of the right not to manifest, in terms of the way in which it was presented in case law and described in the literature. It discovered that the right not to manifest refers to the right not to disclose information relating to religion or belief through statements or acts, rather than the right not to manifest religion or belief through worship, teaching,

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<sup>305</sup> See R Adhar R and I Leigh (n33) 121; N Smart (n34); K Greenawalt (n34); P W Edge (n34) 5-17.

<sup>306</sup> M Evans (n3) 330-2.

<sup>307</sup> See *Buscarini v San Marino* (n91).

practice or observance. However, it revealed tremendous conceptual variation with respect this phrasing of this right in case law and a fundamental misunderstanding of this right in literature.<sup>308</sup> It argued that the language of manifestation to describe this right is misleading and unhelpful. In order for the right not to manifest to be considered the opposite of the right to manifest it is necessary to stretch the ‘to manifest’ beyond its usual meaning, to include ‘to disclose’ and ‘to reveal’.

Chapter Three examined the second research question concerning the nature of the right not to manifest, in terms of the distinction between *forum internum* and *forum externum* rights, again according to how it was presented in case law and in the literature. It found that in the literature it is generally considered to be a *forum internum* right,<sup>309</sup> however, this is far from clear from the way it is described in case law. It drew attention to the problematic description of this right as the ‘negative aspect’ of either the right to manifest or freedom of religion.<sup>310</sup> A close examination of semantics in this chapter revealed that generally speaking the right not to manifest was conceived of as a *forum internum* right and therefore could be considered the opposite to *forum externum* right to manifest, in terms of its nature.

Following this, Chapter Four and Five examined the third research question concerning how and why the right not to manifest was protected by the ECnHR and ECtHR when the right was applied to the facts of the case in question. Chapter Four examined how and why the right not to manifest was treated in admissibility decisions of the Commission. It found that the Commission was reluctant to recognise the existence of the right not to manifest and when it did do so, it examined the right under

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<sup>308</sup> B Rainey, E Wicks and C Ovey (n170) 426ff.

<sup>309</sup> P Van Dijk and G J Van Hoof (n98) 541-2; P Taylor (n3) 120, 177, 185; N Bratza (n8) 259; D Harris and others (n51) 597.

<sup>310</sup> *Alexandridis c Grèce* (n4) para 38; *Isik v Turkey* (n4) para 41.

Article 8, thus treating it as a qualified, *forum externum* right. Chapter Five analysed how and why the right was protected in judgements of the ECtHR. It found that following *Alexandridis* in 2008, the Court presented the right to manifest in all subsequent cases as a *forum internum* right which could not be limited by the state. However, when it applied the right to the facts of the case, the Court often treated this right as a qualified right and subjected it to limitations under Article 9.2. This chapter therefore demonstrated inconsistencies not only between judgements but within judgements. In sum, in terms of protection of this right these chapters found that the right not to manifest was considered opposite to the *forum externum* right to manifest when treated as a *forum internum* right, but the same as the right to manifest when treated as a *forum externum* right. In light of these findings it would be interesting to conduct further research on the consistency of the ECtHR's approach towards other Article 9 rights.

At this point it is worth reflecting on reasons for the apparently confused and contradictory case law concerning the right not to manifest. The most obvious explanation is that the Court is simply unable to distinguish clearly and consistently between the *fora*. Indeed, the contradictory reasoning *within Dimitras* and *Wasmuth*, may support the view that the Court lacks the necessary 'intellectual and conceptual architecture to deal with the increasingly challenging Article 9 cases.'<sup>311</sup> There are however some other possible explanations.

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<sup>311</sup> C Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' (2011) 26 (1) *Journal of Law and Religion* 321.



One possibility is that the inconsistencies in case law relating to the right not to manifest indicate that the Court no longer considers the *forum internum/forum internum* distinction to be useful. Indeed, the distinction between these *fora* was, as noted in Chapter One, introduced by the Court and it has occasionally struggled to apply this distinction in practice since.<sup>312</sup> It may be that, given the variation and complexity of Article 9 case law, the Court is moving away from the protection of some rights as *forum internum* and others as *forum externum*. There is an emerging view that certain Article 9 rights do not need to be protected as absolute rights because protections under Article 9.2 are ‘robust’ and therefore a violation will be found, if necessary, regardless of the approach. Indeed, the fact that a violation of Article 9 was found in both *Alexandridis* and *Dimitras*, despite the different approaches, certainly provides evidence for this.

Another possibility is that the consideration of Article 9.2 limitations in *Wasmuth* is an attempt to ‘reign in’ the level of protection offered to the right not to manifest in earlier cases. The Court had strongly protected not only the right not to reveal religion or belief in *full* but also the right not to reveal religion or belief in *part* (i.e. that an individual did not adhere to a particular religion or belief).<sup>313</sup> Dissenting voices in earlier cases had certainly criticised this latter approach.<sup>314</sup> Perhaps given the issue in *Wasmuth* was about disclosure of religion or belief in part, the Court reduced the level of protection offered from absolute, to qualified, protection on this basis. A reduction in the extent of protection offered to rights can be seen elsewhere in Article 9 case law. In the extremely controversial case of *Lautsi v Italy* in 2009, for instance, the Court

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<sup>312</sup> See P Petkoff (n87). L Peroni has argued that the use of the formulation ‘right not to *manifest*’ reflects the difficulties in clearly separating the *fora*, L Peroni (n8) 4.

<sup>313</sup> *Alexandridis v Grèce* (n4); *Sinan Işik v Turkey* (n4); *Grzelak v Poland* (n4) para 87.

<sup>314</sup> Dissenting Opinion of Judge Cabral Barreto, *Sinan Işik v Turkey* (n4) 3.2.

permitted wide state latitude in respect of the right to manifest<sup>315</sup> but this was significantly reduced by the Grand Chamber in 2011.<sup>316</sup>

Whatever the case may be it is essential for the Court to clarify the understanding and protection of the right not to manifest religion or belief in order to become a more consistent and reliable guarantor of this right. In light of the findings in this dissertation, it is recommended that two significant changes need to be made.

The first suggestion is that the right not to manifest should be reconceptualised as the right to refrain from disclosing religion or belief.<sup>317</sup> This dissertation has argued that it is difficult to ascertain the meaning of this right from its description as the right *not to manifest* religion or belief. Alston has perceptively highlighted problems of defining something by what it is *not* rather than what it *is*.<sup>318</sup> This is further problematic with respect to the right not to manifest because, as the cases analysed above have revealed, this right does not protect the choice not to *manifest* religion or belief in public or in private in the common sense (i.e. in worship, teaching, practice or observance). Rather it protects the right not to be forced to *reveal* or *disclose* religion or belief. This is

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<sup>315</sup> *Lautsi v Italy* (2009) 50 EHRR 1051. For insightful analysis of this case see *inter alia* M Piechowiak, 'Negative Freedom of Religion and Secular Views in Light of the Case of *Lautsi vs Italy*' (2011) *Warsaw School of Social Sciences and Humanities* 35; G Puppink, 'Lautsi v Italy: The Leading Case on Majority Religions in European Secular States' (Annual International Law and Religion Symposium, Utah, 2-6 Oct 2010); G Andreescu and L Andreescu, 'The European Court of Human Rights' Lautsi Decision: Context, Contents, Consequences' (2010) 26 *Journal for the Study of Religions and Ideologies* 47; Z Calo, 'Pluralism, Secularism and the European Court of Human Rights' (2010) 26 *Journal of Law and Religion* 101; J H Weiler, 'Lautsi: Crucifix in the Classroom Redux' (2010) 1 *European Journal of International Law* 1.

<sup>316</sup> *Lautsi v Italy* (2012) 54 EHRR 21. For comment see T Pavone (n189).

The political dimension of the ECtHR is an important factor to bear in mind. As Weiler has quite rightly pointed out the Court is '...a dialogical partner with the Member States Parties to the Convention...' so the Court needs 'to listen and be seen to be listening', see J H H Weiler (n317) 1.

<sup>317</sup> This term is used in the Article 11 (f) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Res 36/55, 36 UN GAOR Supp (No 51), UN Doc A/36/684 (1981).

<sup>318</sup> For an excellent discussion of the problems of defining something by what it is *not* rather than what it *is*, see generally P Alston, 'The Not-a-cat' Syndrome: Can the Human Rights Regime Accommodate Non-State Actors' in P Alston (ed) *Non-State Actors and Human Rights* (Oxford University Press 2005).

something different from manifestation in the usual sense. The language of manifestation therefore seems entirely inappropriate to describe this right. It would be much more logical for the Court to move away from the phrase ‘right not to manifest’ altogether and use the language of disclosure instead. It also seems necessary to move away from the problematic characterisation of this right as the ‘negative aspect’ of either the right to manifest, or of freedom of religion. There does not seem to be a good reason to further complicate the understanding of the nature of this right by framing it as a right ‘not to’, or a ‘negative’ Article 9 right.<sup>319</sup> Rather this right could be framed in a positive way so that it is clear that it is a right in and of its own, instead of part of another Article 9 right. Bearing these points in mind, therefore, it is suggested that this right should be referred to as the right *to refrain* from disclosing religion or belief.<sup>320</sup>

The second suggestion is that the absolute right to refrain from disclosing religion or belief should only be applied in situations where there has been no positive action on the part of the claimant on the basis of religion or belief. In light of the case law analysed above it seems that the right to refrain from revealing religion or belief to the state, whether in full or in part, should be treated as an absolute right. This should apply in all situations where there has been no action on the part of the claimant. In contrast, where there has been some positive action on the part of the claimant on the basis of their religion or belief, for instance opting out of certain legal duties such as military

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<sup>319</sup> The meaning of ‘negative’ rights in Article 9 is far from widely understood.

<sup>320</sup> The phrase the ‘right to withhold information about religion or belief’ has been used in relation to Article 18 in C Heyns, P W Edge and F Viljoen, *Legal Responses to Religious Difference* (Martinus Nijhoff Publishers 2002), 48. This is, however, somewhat problematic because it does not obviously encapsulate the right not to *act* in such a way that religion or belief can be deduced which is also encompassed by the right not to manifest (*Sinan İşik v Turkey* (n4) para 41). The phrase ‘right to refrain from a religious affiliation’ used in Article 24 of Slovakian Constitution, see *Klein v Slovakia* App no 72208/01 (ECtHR, 21 October 2006) para 30.

service or payment of taxes, then it should be treated as a qualified right.<sup>321</sup> This argument is based on the understanding that the rationale for the protection of the right to refrain from disclosing religion or belief is privacy (i.e. the protection against unwarranted State interference in the personal sphere). Once an individual has positively ‘acted’ on the basis of their religion or belief, i.e. they have specifically requested to opt out the payment of church tax on the basis of their religion or belief, then it can be argued that in doing so they have actually manifested their religion or belief, and thus moved the issue from the *forum internum* to the *forum externum*. They are no longer simply holding a religion or belief ‘silently’ and thus entitled to absolute protection from state interference<sup>322</sup> but rather, instead, to qualified protection according to the right to manifest.<sup>323</sup>

This is congruent with the Court’s jurisprudence elsewhere. Requests to access special privileges granted by domestic law on the basis of religion or belief, such as time off from public employment, for instance, have been considered to be manifestations of religion or belief. Furthermore, such requests must be substantiated by the individual through the disclosure of his or her religion or belief.<sup>324</sup> This was set out in *Kosteski v Former Yugoslav Republic of Macedonia* which concerned absence from

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<sup>321</sup> This is similar to M Nowak’s argument that freedom of conscience enjoys absolute protection as long as the actions of an individual do not affect the ‘rights and freedoms of others’. According to Nowak, once freedom of conscience leaves the ‘sphere of privacy, as in the case of refusal to perform legal duties (e.g., duty to pay taxes or serve in the military), they are protected by Art. 18 only when they represent a practice or some other form of public manifestation of a religion or a belief. But even in this case, they are subject to the limitations found in para. 3.’ See M Nowak (n66) 315.

<sup>322</sup> See P Slotte (n38) 268.

<sup>323</sup> In addition to active and passive manifestations, Hambler also speaks of a ‘negative manifestation’ which he categorises as taking the form of request for time off to fulfil religious obligations or abstention from certain duties for reasons of religious convictions, see Hambler in Dingemans and others (n7) 88.

<sup>324</sup> J Murdoch notes that forcing an individual to disclose his beliefs may only undermine this aspect of Article when the state ‘cannot advance any compelling justification for this’; he suggests that such a justification may arise when a individual seeks to take advantage of a ‘special privilege’ available in domestic law on the grounds of religion or belief, see J Murdoch, *Freedom of Thought, Conscience and Religion: A Guide to the Implementation of Article 9 of the European Convention on Human Rights* (Council of Europe 2007) 13.

work during a religious holiday.<sup>325</sup> The Court recognised that the ‘notion of the state sitting in judgment on a citizens inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions’ but stated that where an individual seeks to enjoy a special right bestowed by domestic law, it was ‘not oppressive or in any fundamental conflict with freedom of conscience to require some level of substantiation...and if that substantiation is not forthcoming to reach a negative conclusion.’<sup>326</sup> Practically, this makes sense because if the right to refrain from disclosing religion or belief was protected as a *forum internum* right in circumstances where claims were made by an applicant on the basis of their religion or belief in order to access a special right, states would not be able to seek substantiation for such claims; such privileges could, therefore, become abused. This approach is consistent with the developing views of some HRC Committee Members. Recently, in *Kim et al v Republic of Korea*, for instance, it was explained that ‘[t]he absolute right not to be compelled to reveal one’s thoughts or belief is the right to remain silent and *not the right to raise claims vis-à-vis the State without giving any reasons.*’<sup>327</sup>

However, in order for this suggestion to assist in clarifying the current situation it would be necessary for the scope of ‘positive actions’ on the basis of religion or belief (or manifestations) to be clarified. As Peroni has pointed out, currently it is difficult to

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<sup>325</sup> Ibid.

<sup>326</sup> *Kosteski v Former Yugoslav Republic of Macedonia* (n4) para 33. In this case no violation was found, however, in similar future cases the Court might find differently in light of *SAS v France*, in which the Court stressed, in respect of the government’s request for *proof* of religion or belief, that ‘the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs of the ways in which those beliefs are expressed’, see *SAS v France* (n12) paras 54-55 and also the earlier case of *Eweida and others v United Kingdom* (n2) para 81.

<sup>327</sup> Individual Opinion of Committee member Mr. Walter Kälin (concurring) (Appendix III), *Kim et al v Republic of Korea*, Human Rights Committee, UN Doc CCPR/C/106/D/178/2008 Communication no 1786/2008 (1 February 2013)., (my emphasis). A similar view was expressed in the Individual opinion of Committee member Sir Nigel Rodley, jointly with members Mr. Krister Thelin and Mr. Cornelis Flinterman (concurring) (Appendix II), *Atasoy and Sarkut v Turkey* (n119).

identify the parameters of manifestation.<sup>328</sup> This is of concern here because even the ‘belief- centred’ cases (examined above) could be interpreted as revolving around some form of ‘external action’ which may be interpreted as a manifestation of religion or belief. For instance, a request to make a solemn declaration rather than take a religious oath could be considered a special request (and thus a manifestation) made on the basis of religion or belief.<sup>329</sup> In order to avoid such a broad interpretation, and therefore to avoid the right to refrain from disclosing religion or belief from becoming a hypothetical rather than actionable right, it would be necessary to set out precisely which specific requests for exemptions from legal duties constitute manifestations.<sup>330</sup>

In terms of the cases examined above, it is hypothesised that if the Court had referred to the right not to manifest as the right to refrain from disclosing religion or belief, and treated it as an absolute right where there had been no action on the part of the claimant, then, actually, the decisions would have remained the same. However, the presentation of the right, in terms of its meaning and nature, would have been much clearer and the treatment of the right when applied to the facts of the case would have been more consistent. This is because the significant conceptual variation with respect to the description of this right would have been avoided, as would have the confusing construal of this right as a ‘negative aspect’ of another Article 9. Finally, the contradictory reasoning within the judgements would have been avoided. At the outset, there would have been clear recognition at the outset of the case that this is to be treated as an absolute right where there has been no action on the part of the applicant, and as a

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<sup>328</sup> L Peroni (n8) 18.

<sup>329</sup> Ibid.

<sup>330</sup> J Murdoch pointed out that in *Kosteski v former Yugoslavia of Macedonia*, the qualification ‘privilege or entitlement not commonly available’ suggests a restricted application of this principle, see J Murdoch (n322) 20.

qualified right when the applicant has sought to access special privileges on the basis of religion or belief.

This dissertation has, for the first time, systematically analysed the right not to manifest religion or belief. It has discovered that ECtHR judgements often appear confused and contradictory with respect to this right, in that the Court always presents the right not to manifest as an absolute right, yet in some cases, treats it as a qualified right and subjects it to limitations under Article 9.2. It was suggested that in order to improve the understanding and protection of the right not to manifest this right should be reconceptualised as the right to refrain from disclosing religion or belief. It was also suggested that the right to refrain from disclosing religion or belief should be treated as an absolute right in situations where there has been no positive action on the part of the claimant on the basis of their religion or belief.

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