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Is the forum internum *adequately protected in European jurisprudence? Religious confession and conscientious objection to military service reconsidered*

Keith Thompson

Riassunto

A partire dalla disamina delle disposizioni della Convenzione Europea dei diritti dell'Uomo e del Patto sui diritti internazionali civili e politici in tema di libertà di pensiero, di coscienza e di credo e di libertà di manifestazione del credo, il contributo si propone di verificare se la libertà di coscienza è adeguatamente protetta all'interno delle Corti europee, specificamente in materia di obiezione di coscienza al servizio militare.

Parole chiave

Corti europee e obiezione di coscienza; obiezione di coscienza al servizio militare; libertà di coscienza

Abstract

Starting from an examination of the provisions of the European Convention on Human Rights and the Covenant on International Civil and Political Rights regarding freedom of thought, conscience and belief, and freedom to manifest one's beliefs, the contribution proposes to verify whether freedom of conscience is adequately protected within the European Courts, specifically with regard to conscientious objection to military service.

Keywords

European Courts and conscientious objection; conscientious objection to military service; freedom of conscience

1. Introduction

The *European Convention on Human Rights* (the *ECHR*) and the *International Covenant on Civil and Political Rights* (the *ICCPR*) famously distinguish between freedom of thought, conscience and belief (freedom of conscience) and the freedom to manifest that belief (freedom of manifestation). They absolutely protect freedom of conscience, and they provide qualified protection for freedom of manifestation. But where does one draw a line between freedom of conscience and freedom of manifestation, and is it possible for a competent human being to enjoy absolute freedom of conscience if their freedom of manifestation may be limited by the State whenever a government minister thinks limitation necessary?

The two most famous examples of this difficult boundary between freedom of conscience and manifestation may be the cases of the Old Testament prophet Daniel and the 16th century English Chancellor, Thomas More. Daniel was effectively sentenced to death in a Babylonian lion's den because he had been spied engaging in private prayer within the confines of his apartment[1]. Thomas More refused to swear an oath under the *Act of Succession 1534* (UK) which King Henry VIII had made a condition of continued public service. Thomas More's death made him a martyr for freedom of conscience and arguably inspired the North American constitutional idea that [*no religious test sh[ould] ever be required as a Qualification to any*] public office[2].

In this article I identify this boundary set out in the *ECHR* and the *ICCPR* and suggest that the absolute protection of freedom of conscience required in both of those instruments is not achieved unless it operates where it overlaps with freedom of manifestation. In cases of overlap, the more stringent, absolute standard of protection should apply. I assert that it is important for judges and scholars to understand where this overlap arises and the degree of protection it must provide even if it may simultaneously protect manifestations of religion.

I do that in two parts. In the first part I set out the relevant provisions from the *ECHR* and the *ICCPR* and explain the key ideas that define the State's convention-based right to limit freedom of manifestation. The State can only limit freedom of manifestation by law that meets certain specifications (rather than by executive decision); the State's purpose in passing such laws must be

[1] *Holy Bible, Old Testament, Daniel,* 6:4-23.

[2] *United States Constitution*, Article VI, Clause 3.

objectively necessary to achieve an aim stated in the limitation clause (similar to what the Americans like to call a compelling State purpose); and the limitations identified in those necessary laws must be proportionate – meaning that the State cannot achieve its necessary purpose in another less intrusive way.

In the second part, I use two examples to show that this overlap is not just a matter of theory. My first example is the practice of religious confession, and the second is military training and service. Use of the confessional and refusal to make oneself available for military training are manifestations of religious belief that may be limited by the State under the *ECHR* and the *ICCPR*. But denying such practices potentially abrogates the conscience of the individuals concerned.

I conclude that meaningful respect for the freedom of conscience of any human being requires a narrow approach to the State's right to limit the manifestation of conscience, religion and belief. These guarantees must be generously interpreted in favour of the individual against the State if they are to protect human dignity. Anything less, identifies a lack of commitment to the underlying civilisational values that the framers of the *ECHR* and the *ICCPR* intended to protect after the atrocities of WWII. Those forced the whole human race to acknowledge the need for these protections in unison at one remarkable moment in time.

2. *Part One – Freedom of Religion as protected in the ECHR and the ICCPR. Religious freedom in the ECHR*

A) Religious freedom protections in the ECHR

The *ECHR* was *[[o]riginally proposed by Winston Churchill and drafted mainly by British lawyers…based on the United Nations' Universal Declaration of Human Rights*][3]. It was commissioned by the Council of Europe which was formed in 1949, and has been signed by [*[a]ll 47 Member States of the Council…It was signed in Rome in 1950 and came into force in 1953*][4]. Article 9 protects freedom of thought, conscience and religion in the following terms:

[*1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either*

[3] Equality and Human Rights Commission in Scotland, *What is the European Convention on Human Rights*?, 19 April 2017, in *https://www.equalityhumanrights.com/en/what-european-convention-human-rights*.

[4] *Ibidem*.

alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

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

The only limitations placed upon the right to freedom of thought, conscience and religion expressed in Article 9 are:

1. those expressed in the text of sub-Article (2) which are those [*prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others*],

2. those expressed by the words of general limitation on all the rights expressed in the *ECHR* in Article 18:

[*The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed*],

and

3. those implicit in the fact that the member states of the Council of Europe could agree to take away the rights they agreed to confer on [*everyone within their jurisdiction*][5] in 1950.

The narrow nature of these limitations may be contrasted with the different and lesser protections which are provided to aliens under Article 10, 11 and 14 in relation to the freedoms of expression, assembly and association and non-discrimination. For while the rights to freedom of expression and assembly and association protected by Articles 10 and 11 for [*everyone within their jurisdiction*] may like Article 9 only be limited by law that is necessary [*in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others*], the protection provided to aliens is less. That is, Article 16 says member states can [*impos[e]… restrictions on the[ir] political activity*]. All of these restrictions reflect and implement the general limitation which was expressed and accepted in the *Universal Declaration of Human Rights* (*UDHR*) in 1948. That general limi-

[5] European Court of Human Rights, *European Convention on Human Rights*, 2 October 2013, in *The Council of Europe https://www.echr.coe.int/documents/convention_eng.pdf*. Article 16 acknowledges that the "High Contracting Parties" to the *ECHR* may restrict the "political activity of aliens" despite the provisions of Articles 10, 11 and 14, which does not appear to impose the same non-derogation standard on member states before limitations of alien rights are lawful, as is expressed in relation to freedom of thought, conscience and religion in Article 9(2).

tation in Article 29(1) and (2) provided:

[*(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations].

While critics have suggested that the instrumental conferral of human rights upon those subject to the jurisdiction of any polity makes those rights implicitly smaller than when those rights are merely acknowledged as part of the inherent birthright of every human being[6], it is submitted that this academic distinction is trifling in the case of the *ECHR* since the likelihood that all 47 member states of the Council of Europe would agree to revoke them at the same time is remote[7]. While the language of the *ECHR* has led some commentators to suggest the human rights it sets out were conferred on individuals, the *ECHR* and *ICCPR* were both conceived on the basis that they were recognising what the American Declaration of Independence called "self-evident" rights.

But what do these three limitations on the rights conferred by Article 9 of the *ECHR* mean in practice? It is submitted that we may disregard the limitation expressed in point 3 for the reason of remoteness already explained. Limitation 2 above is more significant since Article 18 where it is set out, presents as a reminder at least to the judicial institutions expected to interpret the provisions of the *ECHR*, that they should preserve the spirit and intent of the whole of the *ECHR* as originally framed. Since the European Court of Human Rights (European Court) has developed a 'margin of appreciation' doctrine in deference to the autonomy of member states, and since that doctrine has been arguably applied by the European Court to dilute the protection of Article 9 in some cases, perhaps religious manifestation is not as secure as a plain reading of the words of Article 9 suggest.

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[6] The American Declaration of Independence presents as an example of an instrument that acknowledges pre-existing natural or human rights given its opening words – "We hold these truths to be self-evident, that all men are created equal". Those words of course, are at least twice ironic since they do not mention women and since many of those who signed the Declaration owned slaves at the time.

[7] Of course, individual member states could revoke these rights, but it would take at least a majority of those states to disestablish the view that these rights had lost their status as principles of international law because of their widespread acceptance. On human rights principles achieving status as international law generally, see Gillian Triggs (*International Law: Contemporary Principles and Practice* (LexisNexis Butterworths, 2006), where she has written that "many of the provisions of the ICCPR" have achieved "customary law status" including the "rights of minorities to enjoy their own culture, profess their own religion [and] to use their own language" (ibid 14.5 and 14.8).

Carolyn Evans has noted the European Court's justification of its 'margin of appreciation' doctrine as a recognition that [*Contracting States have the primary obligation for the protection of human rights*]. In practice, this means that [*State authorities are…in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty'*]. [*[W]hilst the adjective 'necessary'…is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible'. 'ordinary', 'useful', 'reasonable' or 'desirable'*][8]. The consequence is that [*the judgments in this line of cases do give the State a lot of room to move in responding to popular displeasure*][9] although [*the States is not given complete flexibility to decide when an action to restrict religious freedom*]. Evans sees Greek cases as examples of the limits of the margin of appreciation doctrine since in that country, the national authorities [*ha[ve] arguably pushed past the level of consensus that has been achieved among European States by more vigorously promoting its national Church*][10]. The consequence has been that the European Court has found [*that the actions of Greece in prosecuting particular individuals…were not necessary in a democratic society*][11].

More recently, Paul Taylor remarked on the difference between the religious freedom jurisprudence of the European Court and the Human Rights Committee of the United Nations. The Committee's [*repudiation*] of the margin of appreciation doctrine [*is unambiguous*] as it has worked [*to keep faith with the clear meaning of the [ICCPR] text*] and this has [*yielded conspicuous divergence in Committee and European Court outcomes*][12].

The European Court's religious freedom decisions have necessarily engaged with the limitation words expressed in Article 9 itself. The key elements of the limitations there expressed are found in the words "prescribed by law" and "necessary" for the purposes set out in the remaining words of the clause. The words "prescribed by law" seem simple enough. Freedom of thought, conscience and belief may not be abrogated by any of its member state governments without formal legislative action. But it is unclear from cases

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[8] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights*, Oxford University Press, Oxford, 2001, p. 142 quoting in part *Handyside v The United Kingdom,* 24 Eur.Ct. H.R. (ser.A) (1976).

[9] *Ivi,* p. 71.

[10] *Ivi,* p. 144.

[11] *Ivi,* p. 45.

[12] Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights, The UN Human Rights Committee's Monitoring of ICCPR Rights,* Cambridge University Press, Cambridge, 2020, pp. 14-16.

decided to date whether legislative action extends beyond deliberate parliamentary action and formal regulation drafted at the instance of the executive, to include lesser administrative action which implements policy without the formality that is implicit when Acts of the legislature or subordinate regulation have to be considered and drafted. The "prescribed by law" words appear to mean that those who drafted and signed the *ECHR* relied on the deliberation of parliaments to protect freedom of thought, conscience and religion. That logic appears reasonable given the immediate post WWII context and the proximity of Nazi administrative excess in issuing Executive Orders that sent many to their deaths in concentration camps during the preceding decade[13]. But would a decree by a Prime Minister or other national leader qualify as a measure prescribed by law? Isn't it more likely that the *ECHR* drafters used the words "prescribed by law" to insist on some measure of legislative oversight or review before implementation of measures intended to limit freedom of thought, conscience and religion? Since those drafters were primarily British and since subordinate legislation enacted by the English executive had to be approved by their Parliament to be valid[14], it appears the protection the drafters envisaged rested upon drafting and deliberation as formal law making steps that would provide the only practical protection available against demagogic executive excess.

Carolyn Evans has noted however that no challenge to State limitation of freedom of manifestation [*has succeeded because a restriction on freedom of religion or belief was not prescribed by law*][15], but that may have been because there was a formal law passed in each case. Certainly there were anti-

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[13] Note that legislators and judges did not control executive excess during the Weimar Republic and Nazi government of 1930s and 1940s Germany. Discussion of judicial complicity in Nazi excess was the focus of the Hart-Fuller debate in 1958 (Hla Hart, *Positivism and the Separation of Law and Morals*, in *Harvard Law Review,* 71, 1958, p. 593 and Lon Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, in *Harvard Law Review,* 71, 1958, p. 630. One of the questions they canvassed was whether the case of "the grudge informer" (1949) demonstrated that judicial adherence to the precepts of legal positivism facilitated Nazi excess because there were no moral constraints on the passage of positive laws. For examples of more contemporary discussion of that debate see David Dyzenhaus, *The Grudge Informer Case Revisited*, in *New York University Law Review,* 83, 2008, p. 1000 and Martin Krygier, *The Hart-Fuller Debate, Transitional Societies and the Rule of Law*, in *Rethinking the Rule of Law after Communism*, edited by Adam Czarnota, Martin Krygier, Wojciech Sadurski, Central European University, Budapest 2010.

[14] The current procedures for Parliamentary approval of secondary legislation in the United Kingdom are set out in "Statutory Instruments Procedure in the House of Commons" (*https://www.parliament.uk/about/how/laws/secondary-legislation/statutory-instruments-commons/*) and "Statutory Instruments Procedure in the House of Lords" (*https://www.parliament.uk/about/how/laws/secondary-legislation/statutory-instruments-lords/)*. The governing legislation is the *Statutory Instruments Act 1946* (UK).

[15] Carolyn Evans, *Freedom of Religion under the European Convention*, cit., p. 139.

proselytism and place of worship regulation laws in the *Kokkinakis*[16] and *Manoussakis*[17] cases and the jurisprudence focused on whether those laws were necessary or not. Evans thus concluded that [*the 'prescribed by law' requirement has [had] little*] impact on religious freedom jurisprudence in Europe[18], but that has not been true in relation to "necessity" as in the Greek cases cited where the local authorities overreached[19]. The "necessity" language in Article 9 of the *ECHR* has engaged the European Court in proportionality analysis and the European Court has considered whether a challenged law was really necessary even after due deference had been given to the State's margin of appreciation. In these cases, Evans has observed that although [*[a] vaguely worded law criminalizing proselytism…was not proportionate to the aim of protecting a small number of vulnerable people*][20], the reasons why the law was disproportionate have not been made a matter of clear principle – as would have been the case for example, if the Court had found that these laws [*could have been drafted in a [less restrictive] way*][21]. What the Court has more subjectively and generally decided depending on the facts of individual cases, is whether challenged laws were necessary at all[22].

Paul Taylor has argued in 2005 that although [*freedom from coercion to act contrary to one's religion or belief is protected within the "forum internum"*] only [*superficial recognition is given to the "forum internum"…by the Strasbourg organs…[because] the practice has been to avoid affirming that such compulsion falls within the "forum internum" because [then]…it would not be subject to permissible limitations*][23].

In more recent analysis (2018) Janneke Gerards has suggested that since 2013, the European Court has been using a doctrine of incrementalism to defer to member states' interests previously achieved using the margin of appreciation doctrine. Under this new incremental approach, fact specific decision making accommodates the different value that different member states accord to different human rights in their individual constitutional arrangements wi-

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[16] European Court of Human Rights, *Kokkinakis v Greece* 260-A Eur, Ct, H.R. (ser. A) (1993).

[17] European Court of Human Rights, *Manoussakie and others v Greece* 17 Eur. Ct. H.R. (ser.A) 1347 (1996-IV).

[18] Carolyn Evans, *Freedom of Religion under the European Convention*, cit., pp. 141-142.

[19] *Ivi*, pp. 144-145.

[20] *Ivi*, p. 146.

[21] *Ibidem*.

[22] *Ivi*, p. 145.

[23] Paul Taylor, *Freedom of Religion, UN and European Human Rights Law and Practice*, Cambridge University Press, Cambridge, 2005, p. 119.

thout setting inflexible precedents. While the European Court still feels an obligation to [*set minimum standards of fundamental rights protection for 47 states…the Court's [incremental] approach…allows it to apply these standards in such a way as to take due account of national diversity and national constitutional values*][24].

Religious freedom protections in the ICCPR

The *ICCPR* had a long gestation. It was expected even before the United Nations was formed, that there would need to be a separation between an aspirational declaration of human rights and any binding commitments. However, it is unlikely that those who framed the *UDHR* anticipated that 18 years would elapse between their success and the adoption of the counterpart guarantees in conventional form. That delay was only partly a consequence of the difficulty state parties had in turning their aspirations into binding commitments. It was also a consequence of the difficulty that arose between east and west about the relative importance and practicality of implementing Economic, Social and Cultural Rights versus the Civil and Political rights which would limit the power of states parties. And while the final Covenant drafts were settled in 1954, they were not adopted until 1966 with the further delay manifesting lingering international hesitation about the commitments involved.

Article 18 of the *ICCPR* provides:

[*1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions].

The "prescribed by law" and "necessary" limitation language in relation to the manifestation of religion or belief itself took its form from the *UDHR* are is found in Article 18(3). It is not focused directly on protecting religious belief.

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[24] Janneke Gerards, *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, in *Human Rights Law Review,* 18, 2018, pp. 495, 512-513.

The UN Human Rights Committee has not developed a "margin of appreciation" doctrine like that applied by the European Court and now embodied in the text of the *ECHR* which moderates the rigour of these human rights standards in deference to state sovereignty.

Paul Taylor explains that although the Human Rights Committee has made isolated mentions of "a certain margin of discretion" (and similar terminology), any application of a doctrine comparable to the margin of appreciation applied by the European Court has been positively and repeatedly rejected.[25]

One thing that the European Court and the Human Rights Committee have in common is that the "inner" component of freedom of thought, conscience and religion under the *ECHR* and *ICCPR* is not susceptible to any form of limitation[26]. It is only the manifestation of religion that can be limited if all the terms of the applicable limitation provision are met. The main avenue for scrutinising the application of measures which restrict the freedom beyond the scope permitted by the limitation terms is through the complaints procedure of the First Optional Protocol, for individuals. The process for reviewing non-compliant legislation is the Human Rights Committee review process established under article 10 with the State concerned. However, neither of these procedures results in the invalidation of the non-compliant State legislation. Offending legislation is simply stated to be incompatible or non-compliant with the relevant articles of the Convention. Neither ratification of the *ICCPR* nor accession to the optional protocols confers authority on the Human Rights Committee to overrule the sovereignty of the State concerned. The consequences of such incompatibility or non-compliance are thus not comparable to US Supreme Court jurisprudence. US Supreme Court review invalidates federal and state legislation found inconsistent with the First Amendment free

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[25] Paul Taylor, *A Commentary on the ICCPR*, cit., pp. 16-19.

[26] Though this is the conventional reading of Article 9(1) of the European Convention, Carolyn Evans has gone to great lengths to show both that it is not simple to draw a line between freedom of belief and freedom of manifestation in practice (Carolyn Evans, *Freedom of Religion under the European Convention,* cit., pp. 72-102). Paul Taylor discusses the ambit of Article 18(2) under the heading "The Inviolate Realm of Article 18", but his analysis and summary of the UN Human Rights Committee cases in relation to proselytism, missionary activity, humanitarian work, compulsory military service and conscientious objection in other contexts, does not identify engagement with the question of where the line should be drawn between inviolate freedom of belief and limitable freedom of manifestation. Note that although all the rights to freedom of religion set out in Article 18 of the *ICCPR* are said to be non-derogable under Article 4(2), that provision means only that the kinds of public emergency set out in Article 4(1) do not justify State parties from suspending or diluting the rights under the specific articles named in Article 4(2) even in those emergency cases. In earlier work, Taylor observed more simply that "it is trite law that the forum internum is subject to unqualified protection in all the key international instruments" (Paul Taylor, *Freedom of Religion*, cit., p. 115) and that "interference with the *forum internum* may not be justified in any circumstances" (ivi, p. 144).

exercise guarantee, if strict scrutiny analysis reveals that challenged laws singled out particular religious practice for limitation[27].

3. *Part Two – Religious Freedom in Practice*

Although the internal and external aspects of freedom of thought, conscience and religion are differentiated conceptually in both the *ECHR* and the *ICCPR*, as Carolyn Evans has noted it is difficult to maintain [*a neat distinction between the internal and external realm*] in practice[28]. That is because [*every 'great religion is not merely a matter of belief; it is a way of life; it is action' and…one of the most 'scathing rebukes in religion is reserved for hypocrites who believe but fail to act'*][29]. Carolyn Evans has added that [*the idea that beliefs and actions are separate and distinguishable…is controversial*] even though they are treated that way in both the *ECHR* and the *ICCPR*, and in United States jurisprudence[30]. But she does note US Chief Justice Burger's acknowledgement [*that belief and action cannot be neatly confined in logic tight compartments'*][31].

Carolyn Evans' examples where the supposedly neat thought-manifestation compartments don't work very well include:

Wisconsin v Yoder in the United States where the Amish [*wanted an exemption from*] the rule that [*all children…attend compulsory schooling until the age of 16…because they felt that the last two years of education interfered with the children's ability to integrate into the Amish religious and social community*][32]

[*two cases brought by Jehovah's Witness children [in Greece] who were*

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[27] See for example *Employment Division v Smith* 494 US 872 (1990) and *Church of the Lukumbi Babayu Aye v City of Hialeah* 508 US 520 (1993).

[28] Carolyn Evans, *Freedom of Religion under the European Convention,* cit., p. 77. See also Paul Taylor, *Freedom of Religion*, cit., pp. 115-120.

[29] *Ivi,* p. 75 quoting Harrop A. Freeman, *A Remonstrance for Conscience*, in *University of Pennsylvania Law Review*, 106, 1958, pp. 806, 822.

[30] *Ivi,* pp. 74-75 referring to *Reynolds v US* 98 US 244, 250 (1878) and *Cantwell v Connecticut* 310 US 296, 303-304 (1940).

[31] *Ivi,* p. 75 citing *Wisconsin v Yoder* 406 203, 200 (1972). Paul Taylor says that "[m]ost commentators readily acknowledge certain specific components of the *forum internum* beyond the mere choice or religion" and notes Harris, O'Boyle and Warbrick's division of the *forum internum* into further subparts namely: protection against being required to reveal one's beliefs, protection against the imposition of penalties for holding beliefs, and protection against indoctrination, at least where indoctrination involves positive action directed against the individual (*Freedom of Religion*, 116 referring to David Harris, Michael O'Boyle, Colin Warbrick, *Law of the European Convention on Human Rights,* Butterworth, London, 1995, pp. 360-362.

[32] *Ivi,* p. 76.

punished for refusing to take part in what they perceived to be a military parade][33]

[*Darby v Sweden in which the Commission held that being forced to pay taxes to a Church to which one did not belong had serious implications for the "forum internum"*][34]

[*Tsavachidis v Greece [where]…the secret police [conducted systematic surveillance] of a person on the basis of his religion or belief*][35]

[*Knudsen v Norway [where a state]…employment board [declined] to give a position [in the state church] to a pastor who opposed the ordination of women, on the grounds that in the new position he might have to work with female assistant priests*][36], and

[*Kjeldsen, Busk, Madsen and Pederson v Denmark [where]…the integration of sexual education into the [curriculum was said to make that education]…compulsory*][37].

For Carolyn Evans, [*the crucial question is the point at which an action by the State is so intrusive that it is held to interfere, not merely with a person's right to manifest a religion, but also with his or her right to have a religion or belief*][38]. Her reflective summary is that [*States have to act very repressively before the Court or Commission will hold that they have interfered with the "forum internum"…the exception [being] the Darby case*][39], and she has noted Professor Malcolm Evans' view that [*people have to expect to 'pay a price' for their religion or belief, and the mere imposition of some burden on a person who is trying to practice their religion or belief is insufficient to be a breach of the first part of Article 9(1)*][40].

That view also resonates with Paul Taylor's oblique reference to the absence of separation between the *forum internum* and the *forum externum* in the UN Human Rights Committee's jurisprudence when referring to Sir Nigel

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[33] *Ivi*, p. 77 citing *Valsamis v Greece*, (ser. A) 2312 (1996-VI) and European Court of Human Rights, *Efstratiou v Greece* (ser. A) (1996-VI).

[34] *Ivi*, p. 77 (European Court of Human Rights, *Darby v Sweden* (ser. A) (1990).

[35] *Ivi*, p. 79 (, *Tsavachidis v Greece* App. No. 28802/95, , 4 March 1997, unreported).

[36] *Ivi*, p. 84 (European Commission on Human Rights, *Knudsen v Norway* App. No. 11045/84, Dec & Rep. 247 (1985).

[37] *Ivi*, pp. 90-91 (European Court of Human Rights, *Kjeldsen, Busk, Madsen and Pederson v Denmark* (ser. A)(1982).

[38] *Ivi*, p. 78.

[39] *Ibidem*.

[40] *Ivi* citing Malcolm D. Evans, *Religious Liberty and International Law in Europe*, Cambridge University Press, Cambridge, 1997, chapter 1.

Rodley's [*Individual Opinion in Atasoy v Turkey*][41]. For while [*sensitive to the principle that every one is entitled to refuse to disclose their religion or belief…[in that case] disclosing beliefs was the cost of avoiding being put in a position of having to deprive another person of life*][42].

The bottom line appears to be giving efficacy to all rights as Paul Taylor has written in the introduction to his Commentary on the *ICCPR* about the indivisibility of rights. The *UDHR* was never intended [*as a menu from which States could pick and choose*][43]. In practice, that means that parties cannot pick and choose rights or parts of rights that suit them either. As was explained in the Vienna Declaration in 1993, and as Paul Taylor notes [*in the aftermath of the Cold War*]:

[*All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems to promote and protect all human rights and fundamental freedoms*][44].

The words that stand out however are "fair and equal". But it is not easy to see how the margin of appreciation doctrine operative in Europe squares with the requirement that indivisible human rights be fair and equal. Indeed, there is a certain irony to the idea that foundational human rights would ever defer to state interests since both the *ECHR* and the *ICCPR* were largely developed in response to state excesses on European soil during World War II. But perhaps this irony is not a significant cause for concern since, the European Court has found since Carolyn Evans wrote her book that the termination of a swimming pool manager at a government school breached [*her right to freedom of belief because her employment had been terminated on account of her religious beliefs*] even though the government had insisted that [*the termination…was…simply the result of a justified amendment of the requirements for her post*][45]. As Carolyn Evans had anticipated, the European Court has found breaches of the *ECHR* when State repression of religious freedom went so far

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[41] Paul Taylor, *A Commentary on the ICCPR*, cit., p. 509.

[42] *Ibidem*.

[43] *Ivi*, p. 5.

[44] *Ivi*, pp. 5-6 quoting the *Vienna Declaration and Programme of Action* 12 July 1993, A/CONF. 157/23 [5].

[45] European Court of Human Rights, *Ivanova v Bulgaria* App. No. 52435/99, 12 April 2007 [84], [86].

as to obviously breach the *forum internum*[46].

Paul Taylor agrees that both the European institutions and the UN Human Rights Committee have preferred to decide cases engaging the *forum internum* [*on the basis of manifestation or discrimination, rather than on the basis of interference with the "forum internum"*]. He has also recognised a distinction in the jurisprudence under both the ECHR and the ICCPR when applicants claim [*'direct'…forum internum violation*] as opposed to when claims when the *forum internum* claim only arises indirectly, such as when the *forum internum* provides a basis for supporting restrictions on a limitation ground such as the "rights and freedoms of others"[47]. *Forum internum* rights are much more readily recognised, particularly in the European institutions, when the claim is only indirect[48].

I now consider these concerns that the *forum internum* is not well understood or protected in even the international human rights courts with two relatively universal examples where I believe the *forum internum* is unequivocally engaged – religious confession and conscientious objection, though I concede that the first as a Christian practice is not as universal as the second.

*A) Does religious confession engage the f*orum internum*?*

The question for the purposes of this section of this article, is whether there are aspects of the practice of religious confession which should fall within the *forum internum* protection of Article 9(2) of the *ECHR* and Article 18(1) and/or (2) of the *ICCPR* – even though the practice of religious confession is also a manifestation of religion within the meaning of those two articles? Or is legislative derogation from the *forum internum* aspects of religious confession part of the 'price religious believers should pay' for practising their religion as Professor Malcolm Evans and Sir Nigel Rodley would have it? That is, in a European Court of UN Human Rights Committee case that had to consider laws that impacted on religious confession practice, would the relevant courts simply set aside the *forum internum* claim because the option is available to resort to a manifestation based assessment; or would they treat those issues as nothing more than an aspect of the manifestation of religion?

To enable that discussion, it is necessary to analyse what happens when a

[46] Carolyn Evans, *Freedom of Religion under the European Convention,* cit., pp. 76-79.

[47] Paul Taylor, *Freedom of Religion*, cit., p. 119.

[48] *Ivi,* pp. 119-120.

religious believer engages in religious confession. First, to sense either a wish or a need to confess, the believer must perceive that she has sinned against moral and/or criminal law. The refined sensitivities of some believers and the teachings of their faiths may suggest formal religious confession is required for all sin, or there may be a distinction between minor and major sins with only the latter "requiring" confession. If the believer feels no need for confessional formality for whatever reason, all of these processes will occur within the mind (*forum internum*) of the believer and will be practically inaccessible to the state, and not capable of legitimate restriction under the *ECHR* and the *ICCPR*. If the believer feels the need to shrive herself and consult with a member of the clergy in that process, she will make observable arrangements to do so, possibly including an appointment and travel, though the underlying intention may also affect her choice of clothing and demeanour. Making an appointment, arrangements to travel and choosing conservative clothing for the appointment may all be considered manifestations of religion. But if the place chosen for confession and its clergy are generally available at publicly notified times, even a spy watching will not be certain that the travel, choice of clothing and demeanour are manifestations of religion until the penitent physically enters the church or knocks on the door of a confessional booth within that building[49].

Without even more detailed discussion of internal confessional process and variety, the question under both the *ECHR* and *ICCPR* is which parts of these examples of confessional practice may be regulated by the state as manifestations and which are off limits because they are internal to the mind of the penitent? If a member of the clergy physically hears a confession expressed, is that utterance a manifestation and may it then be regulated including by passage of laws which force the cleric to record, disclose or report its contents?

If an uttered confession is a manifestation, the question then becomes whether the requirement of record, disclosure or report is prescribed by law and whether that law is necessary to achieve what the Americans have called a compelling government interest. In Australia, the Royal Commission into Institutional Responses to Child Sexual Abuse opined that laws requiring the report of religious confessions disclosing child sexual abuse in any way were

[49] Note that even knocking on the door of a confessional booth does not reveal intent within the human mind. Though in Anglo-American common law we say that it is necessary to prove intent to convict criminals of the most serious crimes, in fact we do not prove intent even when judges and juries find persons accused guilty of such crimes beyond reasonable doubt. We simply adduce and prove the occurrence of additional facts from which judges and juries deduce or infer that the accused had the necessary intent from their experience of human life and nature.

necessary to protect the rights and interests of children[50]. But the *ICCPR* legitimacy claimed for that recommendation was suspect on a number of grounds including that the Commission's own data revealed that other laws had almost extinguished the occurrence of the targeted abuse, their data suggesting regular confession of such crime was flawed, and it is also unclear whether such disclosure would prevent harm to children[51].

But would it be legitimate to require all religious believers to disclose their sins to a member of the clergy, and if not, at what point does the State become entitled to obtain a report if the disclosure of sin was voluntary[52]? Does it make any difference if the penitents concerned would not have confessed if they knew their confidentiality would not be respected; if their faith did not require confession, or if they merely sought assistance in improving their lives and character? If non-religious speech may be limited at the instance of any court or enforcement authority, does freedom of thought, conscience and belief add anything to general jurisprudence about freedom of speech in the religious confession context?

It is submitted that a significant part of any assessment of the *forum internum* aspects of religious confession should consider the relative harms that follow. In particular, what harms flow to an individual who is denied the practice whether it occurs within the confines of her mind or whether it involves manifest aspects – and what harm the legislating State would suffer if its proscriptive legislation were ruled to offend the religious freedom protection afforded by either the *ECHR* or the *ICCPR*. What harms would flow to that society? What loss of character reform in its citizens would be prevented if the law were upheld?

Carolyn Evans has noted that the *Arrowsmith* test developed by the European Commission demands sufficient connection between the belief and its manifestation. It [*requires applicants to show that the actions restricted by the State were necessary manifestations of their religion or belief*][53]. The *Ar-*

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[50] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Failure to Report Offence,* in *https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/factsheet_-_criminal_justice_report_-_failure_to_report_offence.pdf*.

[51] Anthony Keith Thompson, *The Persistence of Religious Confession Privilege*, in *Research Handbook on Law and Religion*, edited by Rex Ahdar, Edward Elgar Publishing, Cheltenham, UK, 2018.

[52] Note that Professor J. Noel Lyon has observed that the admission of confessional evidence is so similar to the admission of confessions made to the Police under duress as to merit express common law condemnation (J. Noel Lyon, *Privileged Communications – Penitent and Priest*, in *Criminal Law Quarterly,* 7, 1964-1965, p. 327).

[53] Carolyn Evans, *Freedom of Religion under the European Convention,* 180 referring to European Commission on Human Rights, *Arrowsmith v The United Kingdom* App. No. 7050/75, 19,

rowsmith test, in effect, shifts the burden of proving necessity from the State to the individual, and she asks why the State does not have to justify, not only its conduct, but also the necessity of its laws and their case-by-case implementation under the limitation provisions of both the *ECHR* and the *ICCPR*?[54] Though she concludes in relation to tax case that [*the fact that a law is general and neutral is a powerful factor in encouraging the Commission to hold that there has been no breach of Article 9*], the Commission's mere assertion that such generality and neutrality [*ha[d] no specific conscientious implications in itself…[since]no tax payer can influence of determine the purpose for which his or her tax contributions are applied*] begs the conscience question[55]. She says these arguments are unconvincing and circular since they ignore the fact [*that taxes have serious implications for conscience*][56].

There have not been as yet, any cases about religious confession in either the European institutions or the UN Human Rights Committee. But while there have been cases about conscientious objection to military training and service in those institutions, discussion of how the inviolable *forum internum* is appropriately protected has not advanced very far.

B) Does conscientious objection to military training and service engage the forum internum?

If anything, the line between the *forum internum* and the *forum externum* gets even more difficult when it comes to conscientious objection because the engagement of conscience in the objection cannot be acknowledged for government purposes until it is expressed. And yet even the expression, "conscientious objection", identifies that the objection to military engagement is seated in the individual's subjective thought, conscience and belief. The underlying point is that to punish someone for an omission to engage in military training or service as a manifestation even if they say nothing, is to deny the subjective validity of their protected thought, conscience and belief.

The argument that punishing such omission or refusal for any reason breaches the *forum internum*, is stronger under the *ICCPR* than the *ECHR* since Article 18(2) of the *ICCPR* arguably denies the State the right or power to co-

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1978, Dec. & Rep. 5.

[54] Carolyn Evans, *Freedom of Religion under the European Convention,* cit., pp. 180-183.

[55] *Ivi,* p. 182 citing the Commission's judgment in European Commission on Human Rights, *C v the United Kingdom*, App. No. 10358/83, Dec. & Rep., pp. 142, 147.

[56] *Ibidem*.

erce if such coercion might impair that individual's right [*to have or to adopt a religion or belief of his choice*]. For while it is arguable that Article 18(2) requires an individual to state the basis of such refusal to be entitled to claim the right, that requirement of a positive assertion of religion or belief by any individual is ironic if such revelation would lead to an objective assessment of that religion or belief, as that would deny that individual's subjective belief and defeat the protection intended.

Paul Taylor has explained the UN Human Rights Committee's initial unwillingness to recognise that conscientious objection was protected under the inner aspects of Article 18 (1) of the *ICCPR* may trace to the non-adoption of such a specific right during the debates when Article 18 was being drafted[57]. But he has added that

[*in paragraph 11 of General Comment No. 22 the Human Rights Committee made explicit reference to Article 18…and it confirmed that compulsory military service would interfere with both the first and second part of Article 18(1) of the ICCPR, even though coercion in matters of military service is acknowledged to be permissible under Article 8(3)(c)(ii) of the ICCPR...successive resolutions of the Commission on Human Rights serve to put…beyond question that conscientious objection to military service is a matter firmly within the ambit of Article 18 of the ICCPR*][58].

Carolyn Evans has traced the evolution of the European Court's jurisprudence in relation to conscientious objection to military training and service in some detail. While initially Article 4 of the ECHR justified the European Commission in finding that Article 9 did not compel States [*to recognize conscientious objectors*][59], developments in international law saw the Parliamentary Assembly of the Council of Europe call on member States in 1976 to release persons with profound objections to military service from those obligations as a logical consequence of the fundamental rights of the individual guaranteed in Article 9[60]. Later the Council of Ministers similarly [*recognized the right to conscientious objection to military service (though not exemption from alternative service) as arising from Article 9*][61] and those political decisions seem to

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[57] Paul Taylor, *Freedom of Religion*, cit., p. 151, see particularly n. 131.

[58] *Ivi,* pp. 151-152.

[59] Carolyn Evans, *Freedom of Religion under the European Convention*, cit., pp. 170-171.

[60] *Ivi,* p. 175 quoting Res. 337 (1976) of the Council of Europe, Cons. Ass., Eighteenth Ordinary Session (Third Part), Texts Adopted (1967); Parliamentary Assembly Res. 816 (1977), 7 Oct. 1977, reprinted in Council of Europe, Collected Texts 222-223 (1987).

[61] *Ivi,* p. 176 referring to Committee of Ministers, Recommendation No. R(87) 8, Council of Europe, H/NF (87) 1, 160 (9 Apr. 1987).

provide context for the Commission's new approach in *Tsirlis and Kouloumpas v Greece*[62] and *Thlimmenos v Greece*[63]. While in the first case there was still confirmation that [*ministers [of religion] do not have a right to conscientious objection*], in the second case because there was [*no option of substitute service at the time…the applicant's conviction amounted to an interference with his right to manifest his religion*][64]. When the second case was further heard by a Grand Chamber of the European Court, those judges focused on the fact that the Jehovah's Witness minister had been treated differently than Orthodox ministers who were granted exemptions from military service without difficulty. The clear discrimination arising in Greek Jehovah's Witness cases meant the Court did not have to examine [*whether sanctions on conscientious objectors to compulsory military service may in itself infringe the right to freedom of thought, conscience and religion guaranteed in Article 9(1)*][65].

Thus the European Commission and Court were able to avoid defining the metes and bounds of the inviolable *forum internum* even though it is clearly engaged when issues of conscientious objection to military service and training arise. However, the UN Human Rights Committee has gone somewhat further since. Paul Taylor's summary of the consequences of a series of cases since 2008 is now

[*that 'repression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibits the use of arms, is incompatible with article 18(1)' [and that approach is]…firmly embedded within the Committee's jurisprudence*][66].

Taylor's conclusion reflects the Committee's fundamental switch from findings that conscience interference was nothing more than an [*unjustified restriction on external manifestation*] to [*findings of violation on the inner aspect of Article 18(1)*][67]. While there were still some dissenters on the Committee in *Jeong et al. v Korea*[68] and *Atasoy and Sarkut v Turkey*[69] cases decided respectively in 2011 and 2012, in the *Young-kwan and Others v Korea*[70]

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[62] European Court of Human Rights *Tsirlis and Kouloumpas v Greece* 35, (ser. A) (1997-III).

[63] European Commission on Human Rights, *Thlimmenos v Greece* App. No. 34369/97, 4 Dec. 1998, unreported.

[64] Carolyn Evans, *Freedom of Religion under the European Convention*, 176-177.

[65] *Ivi,* p. 178.

[66] Paul Taylor, *A Commentary on the ICCPR*, cit., p. 510.

[67] *Ivi,* p. 508.

[68] *Jeong et al. v Korea* CCPR/C/101/D/1642-1741/2007, 24 March 2011.

[69] *Atasoy and Sarkut v Turkey* CCPR/C/104/D/1853-1854/2008, 29 March 2012.

[70] *Young-kwan and Others v Korea* CCPR/C/112/D/2179/2012. 15 October 2014.

case decided in 2014, the Committee responded to submissions premised in the old manifestation language that [*the distinguishing feature of military service…is that it implicates individuals in a self-evident level of complicity with a risk of depriving others of life*][71]. While the Committee did not engage with South Korea's concern that this *forum internum* reasoning could be extended [*to justify the refusal to pay taxes or to resist mandatory education*][72] in the decision in the *Young-kwan* case, there are indications that the UN Human rights Committee will not ignore *forum internum* issues when they arise in future cases, but it is still unclear how the Committee will develop its jurisprudence. Those Committee members are certainly now referencing the prohibition on coercion of conscience in Article 18(2) when that issue arises in other cases[73].

C) Should the forum internum be interpreted broadly or narrowly?

If the *forum internum* is interpreted narrowly, it presents as a dead letter. Interpreted narrowly, the best the *forum internum* can do is lead courts to a more liberal interpretation of the freedom to manifest and a closer review of whether the relevant restriction imposed was really necessary within the meaning of applicable limitation provisions in the *ECHR* and the *ICCPR*. But neither of those interpretive consequences recognise the *forum internum* as a human right that adds significant weight to the others. Is the European Court's practice of treating the *forum internum* as a trivial aspect of the freedom to manifest sufficiently respectful of the drafter's intentions? And in the case of the ICCPR, does it [*keep faith with the clear meaning of the [ICCPR's] text*] as Paul Taylor has noted the UN Human Rights Committee has insisted[74]? Must courts protect individuals from revealing their beliefs, protect them from all penalties that follow holding those beliefs and also protect them from the imposition of any form of indoctrination contrary to their beliefs, as Harris, O'Boyle and Warbrick have suggested[75]? Though Professor Malcolm Evans and Sir Ni-

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[71] Paul Taylor, *A Commentary on the ICCPR*, cit., p. 510 quoting from para [7.3] of the decision in *Young-kwan and Others v Korea*.

[72] Paul Taylor, *A Commentary on the ICCPR*, cit., p. 510.

[73] *Ivi*, pp. 512-513 citing cases engaging with conscience in a variety of different ways from Rwanda, Costa Rica, Ireland, Israel, Bahrain and Algeria.

[74] *Ivi,* p. 16. Taylor earlier noted this trivialisation of the *forum internum* when Malcolm Evans concluded that "[p]rovided…individuals are able to continue in their beliefs, the *forum internum* remains untouched" (*Freedom of Religion*, 116 quoting Malcolm D. Evans, *Religious Liberty in Europe*, cit., p. 295).

[75] David Harris, Michael O'Boyle, Coling Warbrick, *Law of the European Convention*, cit.,

gel Rodley think not, increasing secular pressure on traditional religious belief suggest that courts in countries committed to the observance of international human rights standards particularly as expressed in the *ICCPR*, are likely to be forced to confront these nuances of *forum internum* meaning as the 21st century unfolds. And perhaps that unfolding will track the development of the European Court's jurisprudence in relation to conscientious objection which denied Article 9 of the *ECHR* required States to recognise conscientious objectors for three decades, but eventually upheld Jehovah's Witness conscientious objection claims [*on the basis of a combination of Article 9 and 14*][76].

4. *Conclusion*

In this article I have suggested that the protection of freedom of thought, conscience and belief intended under Article 9 of the ECHR and Article 18 of the ICCPR is incomplete and unsatisfactory. That is because the European Court and the UN Human Rights Committee have not adequately spelled out the nature of the inviolable protection that is said to be required for the *forum internum* under those instruments.

While the recognition that is now afforded to conscientious objection under both instruments suggests there is hope that a more complete *forum internum* jurisprudence will develop, it is to be hoped that development will not be the consequence of increased legal cases flowing from the persecution of religious believers in States that are parties to these instruments. That development is necessary both to protect the consciences of religious and ethical believers in State parties and to teach other nations best practice in human rights law.

Though some commentators think that requiring people to disclose their beliefs is the price of holding those beliefs in the first place, that view mocks the *ICCPR* affirmation that any coercion which impairs freedom of thought, conscience and belief is inconsistent with UN human rights principles.

The UN Human Rights Committee's recent conscientious objection jurisprudence creates some hope since that Committee has recognised that laws which violate the *forum internum* may be invalid for that reason alone. It is to be hoped that any European Court or Human Rights Committee review of the practice of religious confession would recognise that this harmless practice should be absolutely protected as part of the human *forum internum*.

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pp. 360-362.

[76] Carolyn Evans, *Freedom of Religion under the European Convention*, cit., pp. 170-177.