

Introduction

The right to freedom of thought, conscience and religion is protected by Article 9 of the European Convention on Human Rights (ECHR) which provides that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.¹

This book examines the right to freedom of thought, conscience and religion in ECHR Article 9 and the jurisprudence of the European Court of Human Rights (ECtHR) relating to this right.² In doing so, it reappraises the classic understanding of this right and the related jurisprudence in the scholarly literature, and offers an alternative way of understanding the right which is

¹ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted by the Council of Europe on 4 November 1950 and entered into force on 3 September 1953 (ETS 5), Article 9.

² 'ECtHR' will be used to refer to the former, part-time European Commission on Human Rights and the European Court of Human Rights (up to October 1998), and the current permanent, full-time European Court of Human Rights (from 1 November 1998 onwards). 'ECtHR' will also be used to refer to the Court in all its judicial formations (single judge, Committee, Chamber and Grand Chamber). For an explanation of ECtHR operation and statistics in relation to ECHR Article 9, see Heiner Bielefeldt and Michael Wiener, *Religious Freedom under Scrutiny* (Philadelphia, PA: University of Pennsylvania Press, 2019), 154–6.

grounded in the text of Article 9, the *travaux préparatoires* and the ECtHR case law relating to this article.

CONTEXT

Since the turn of the century, there has been a significant increase in the number of Article 9 complaints before the ECtHR. The right to freedom of thought, conscience and religion was once considered to be of limited importance but there is now a substantial and influential body of case law relating to Article 9 covering various issues including blasphemy and criticism of religion or belief, conscientious objection to military service, deprogramming, disclosure of religion or belief, employment sanctions, indoctrination, proselytism, the public display of religious clothing or symbols, and registration of religious communities.

Whilst the growth in Article 9 jurisprudence reflects the increasing caseload of the ECtHR, it also ties in with religion's return to the 'public agenda'.³ Contrary to the secularisation thesis, religion has not declined as societies have advanced;⁴ internationally, and in Europe, the religious landscape has become increasingly diverse.⁵ And, at the same time, there has also been a growth in the number of individuals identifying as non-religious. It is against this background that the protection of the right to freedom of thought, conscience and religion has become a particularly contested issue in Europe. The increasing uneasiness concerning Islam acted as a 'catalyst' for debates,⁶ but discussions have now expanded to cover much wider questions about the relationship between religion, law and society. In addressing Article 9 complaints, the ECtHR often deals with, directly or indirectly, the thorny issue of Church–State relations and controversial questions concerning the place of religion in the public sphere. In recent years, numerous high-profile cases concerning religion in the public sphere have drawn considerable political and media attention and have received extensive treatment from scholars, practitioners and policy makers in Europe and beyond.

³ Carolyn Evans, 'Introduction' in Peter Cane, Carolyn Evans and Zoe Robinson (eds.), *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008), 1.

⁴ For a discussion of the secularisation thesis in relation to law and religion, see Russell Sandberg, *Religion, Law and Society* (Cambridge: Cambridge University Press, 2014), 53–83.

⁵ See, e.g., Camil Ungureanu, 'Europe and Religion: An Ambivalent Nexus' in Loreno Zucca and Camil Ungureanu (eds.), *Law, State and Religion in New Europe: Debates and Dilemmas* (Cambridge: Cambridge University Press, 2012), 332.

⁶ See Effie Fokas, 'Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of the European Court of Human Rights Religious Freedom Jurisprudence' (2015) 4:1 *Oxford Journal of Law and Religion*, 54, 54.

Notably, there has also been a shift in the type of Article 9 complaints before the ECtHR during the twenty-first century. The jurisprudence is no longer largely dominated by individuals who seek to justify behaviour which challenges the *status quo* or access special treatment or exemptions by appealing to their religion or belief.⁷ The vast majority of applications are now brought by individuals and/or religious communities complaining about State interference with the exercise of their right to freedom of thought, conscience and religion.⁸

In an ever-growing number of cases, applicants are fighting for their Article 9 rights against State authorities which, they claim, are actively trying to control them or deprive them of this right. This shift in the type of complaints before the ECtHR is reflected in the outcome of Article 9 cases. Violations of Article 9 were rarely found in the early jurisprudence,⁹ but increasingly the ECtHR is finding that State interference constitutes a violation of the applicants' right to freedom of thought, conscience and religion.¹⁰ In the face of increasingly serious and complex complaints, the ECtHR's role – as a supranational judicial body overseeing the protection of the right to freedom of thought, conscience and religion in Member States – seems, therefore, to be increasingly central.

In tandem with the significant increase in cases relating to Article 9 before the ECtHR, there has been a substantial growth in the literature relating to this right. Typically, discussions of Article 9 begin by explaining that this article protects the right to freedom of thought, conscience and religion which includes the right to hold or change a religion or belief, and the right to manifest a religion or

⁷ See, e.g., *Cederberg-Lappalainen v. Sweden* App. no 11356/85 (Commission Decision, 4 March 1987); *V v. The Netherlands* (1984) 39 DR 267; *W v. The United Kingdom* App. no 18187/91 (Commission Decision, 10 February 1993); *Logan v. The United Kingdom* (1996) 86-A DR 74.

⁸ For cases brought by individuals, see, e.g., *Larissis and Others v. Greece*, Reports of Judgments and Decisions 1998-I; *Leyla Şahin v. Turkey* ECHR 2005-XI 173; *Ivanova v. Bulgaria* App. no 52435/99 (ECtHR, 12 April 2007); *Folgerø and Others v. Norway* ECHR 2007-III 51; *Sinan Işık v. Turkey* ECHR 2010-I 341; *Grzelak v. Poland* App. no 7710/02 (ECtHR, 15 June 2010); *Bayatyan v. Armenia* ECHR 2011-IV 1; *SAS v. France* ECHR 2014-III 341 (extracts); *Mockutė v. Lithuania* App. no 66490/09 (ECtHR, 27 February 2018). For cases brought by religious communities, see, e.g., *Metropolitan Church of Bessarabia and Others v. Moldova* ECHR 2001-XII 81; *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* ECHR 2001-IX 273; *Moscow Branch of the Salvation Army v. Russia* ECHR 2006-XI 1; *Jehovah's Witnesses of Moscow and Others v. Russia* App. no 302/02 (ECtHR, 10 June 2010); *Biblical Centre of the Chuvash Republic v. Russia* App. no 33203/08 (ECtHR, 12 June 2014); *İzzettin Doğan and Others v. Turkey* App. no 62649/10 (ECtHR, 26 April 2016).

⁹ The first violation of Article 9 was found in 1993 in *Kokkinakis v. Greece* (1993) Series A no 260-A. For discussion of the legacy of this case, see Jeroen Temperman, T. Jeremy Gunn and Malcolm D. Evans (eds.), *The European Court of Human Rights and Freedom of Religion or Belief: The 25 Years Since Kokkinakis* (Leiden/Boston: Brill Nijhoff, 2019).

¹⁰ Bielefeldt and Wiener have explained that by January 2019 the ECtHR had dealt with around 900 cases concerning the right to freedom of thought, conscience and religion and had found a violation of Article 9 in almost half of them; see Bielefeldt and Wiener, *Religious Freedom under Scrutiny*, 155.

belief. This is usually followed by a comment on the structure of the right, noting that the limitation clause in Article 9(2) relates only to the right to manifest religion or belief and not to the right to hold or change a religion or belief.

This architectural feature is considered to reflect a distinction between the internal realm of belief (the *forum internum*) and the external realm of action (the *forum externum*) in the right to freedom of thought, conscience and religion. There is a consensus in the literature that whilst rights in the *forum externum* can be subject to limitations in accordance with Article 9(2), rights in the *forum internum* must always be protected absolutely. As such, it is held that a binary and hierarchical distinction between the *forum internum* and *forum externum* must be observed by the ECtHR at all times to ensure the effective implementation of the right to freedom of thought, conscience and religion.

Yet, the ECtHR's understanding and application of the *forum internum* and *forum externum* distinction has been criticised extensively, and it is increasingly being argued that it is undermining rather than enhancing the protection of the right to freedom of thought, conscience and religion. On the one hand, commentators have claimed that it has led to the ECtHR treating the *forum externum* as a second-order concern and frequently permitting State restrictions on the right to manifest religion or belief. On the other hand, commentators have claimed that it has led to the ECtHR being so focused on the *forum externum* that it has failed to offer absolute protection to *forum internum* rights; it has been suggested that it either ignores the relevance of the *forum internum* in Article 9 complaints or inappropriately subjects the *forum internum* to limitations under Article 9(2). Overall, the ECtHR's approach to Article 9 complaints has been labelled as 'incoherent' and 'inconsistent' in the literature,¹¹ and outcomes have been described as 'ad hoc'.¹²

Furthermore, conceptual critiques of the *forum internum* and *forum externum* distinction in Article 9 have also been advanced, in which commentators

¹¹ See, e.g., Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001), 2, 4, 179, 185–6, 202; Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005), 118–9; Merlin Kiviorg, 'Religious Autonomy in the ECHR' (2009) IV *Derecho y Religión* 131; Marisa Iglesias and Camil Ungureanu, 'The Conundrum of Pluralism and the Doctrine of the Margin of Appreciation: the Crucifix "Affair" and the Ambivalence of the ECtHR' in Ferron Requejo and Camil Ungureanu (eds.), *Democracy, Law and Religious Pluralism in Europe: Secularism and Post-Secularism* (Abingdon/New York: Routledge, 2014), 105; Alison Mawhinney, 'Coercion, Oaths and Conscience: Conceptual Confusion in the Right to Freedom of Religion or Belief' in Frank Cramner, Mark Hill QC, Celia Kenny and Russell Sandberg (eds.), *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe* (Cambridge: Cambridge University Press, 2016), 205.

¹² Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' (2010) 26:1 *Journal of Law and Religion* 321, 340.

have argued that the notion of a binary and hierarchical distinction between the *forum internum* and the *forum externum* does not reflect reality for many individuals for whom having a religion or belief is understood to be intimately connected with manifesting it.

These growing criticisms appear to be concerning given the ECtHR's important role in ensuring the enjoyment of ECHR Article 9. However, it is notable that despite increased attention on the right to freedom of thought, conscience and religion in the literature, there has been very little interrogation of the core premises that underpin doctrinal analyses of freedom of religion or belief in Article 9 in recent years. Significantly, the fundamental question – what is the law in relation to freedom of religion or belief? – has not been fully explored.

This book addresses this important doctrinal question. In doing so, it argues that claims in the scholarly literature that there is, or should be, a binary and hierarchical distinction between the absolutely protected *forum internum* and the qualified *forum externum* in Article 9 and the related ECtHR jurisprudence is not textually or jurisprudentially founded. Instead, it contends that the evidence suggests that the *forum internum* and *forum externum* aspects of Article 9 are deeply interrelated, and this feature of ECHR Article 9 is understood by the ECtHR and informs its nuanced and holistic approach to the protection of the right to freedom of thought, conscience and religion.

STRUCTURE OF THE BOOK

This book forms three parts. Part I examines the understanding of the right to freedom of thought, conscience and religion and the protection to be offered under this right in i) the literature, ii) the text of ECHR Article 9, provisions in related international instruments and the relevant *travaux préparatoires* and, iii) in the ECtHR's general principles concerning ECHR Article 9. Part II examines the ECtHR's application of its general principles concerning ECHR Article 9 to the facts in a wide range of cases concerning the right to freedom of thought, conscience and religion. Part III brings together the arguments from the comprehensive analysis of the materials in Parts I and II, and takes the reappraisal of the understanding of ECHR Article 9 and the related ECtHR jurisprudence a step further by emphasising the importance of the facts in Article 9 cases.

Part I

The first chapter reviews the commentary relating to the right to freedom of thought, conscience and religion, and challenges the classic approach to ECHR Article 9 and the related jurisprudence in the literature. The chapter

begins by discussing the origin and meaning of the terms ‘*forum internum*’ and ‘*forum externum*’ before examining the way in which these terms have been understood in relation to Article 9 and the related ECtHR jurisprudence in the literature. It also explores the various criticisms raised by commentators relating to the ECtHR’s understanding and application of the distinction, and notes some suggestions made by commentators to address the issues they have identified. Finally, it examines the way in which the classic approach to the right and its protection by the ECtHR has evolved in the literature. This chapter questions the veracity of claims that there is, or should be, a clear binary and hierarchical distinction between the *forum internum* and the *forum externum* in ECHR Article 9 and the related ECtHR jurisprudence, and suggests that a review of the understanding of this article and related case law is not only necessary but overdue.

The second chapter focuses on the text of ECHR Article 9 and other related international provisions protecting the right to freedom of thought, conscience and religion, and explores their drafting history through an examination of the relevant *travaux préparatoires*. Drawing upon a recent, deeply valuable contribution to the understanding of Article 18 of the International Covenant on Civil and Political Rights (ICCPR),¹³ this chapter seeks to demonstrate that it is more faithful to the primary materials explored in this chapter to understand the *forum internum* and *forum externum* aspects of the right to freedom of thought, conscience and religion in ECHR Article 9 in terms of a relationship rather than in terms of a binary and hierarchical distinction.

The third chapter focuses on the understanding of the right to freedom of thought, conscience and religion in the ECtHR’s general principles concerning Article 9. It contends that the ECtHR recognises the relationship between the *forum internum* and the *forum externum*, intuitively understanding that, because actions flow from the *forum internum*, the *forum internum* is always relevant to some extent in Article 9 claims. Consequently, it explains, the ECtHR conducts a balancing exercise in all Article 9 cases, weighing up factors pointing to a violation of Article 9 (primarily, but not only, the impact of State measures on the applicant’s *forum internum*) with countervailing factors pointing away from a violation of Article 9 to reach its decision.

As such, this chapter argues that protection offered to the *forum internum* can more helpfully be understood on a spectrum ranging from a very high to a very low degree depending on the balance of factors. It suggests that a useful way of grouping the cases is a loose concentric circles model comprising

¹³ See Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (Oxford: Oxford University Press, 2016), 76–7, 82–4, 486–7.

three circles. The innermost circle represents *forum internum* relevance is at its strongest and countervailing factors at their weakest and, therefore, a very high degree of *forum internum* protection. The outermost circle represents *forum internum* relevance is at its weakest and countervailing factors at their strongest and, therefore, a very low degree of *forum internum* protection. The middle circle represents *forum internum* relevance and countervailing factors at their most contested (either because both *forum internum* relevance and countervailing factors may be strong, or both *forum internum* relevance and countervailing factors may be weak) and, therefore, *forum internum* protection ranging from a high to a low degree depending on the way in which the ECtHR balances the factors.

Part II

The chapters in Part II – which analyse the way in which the ECtHR applies its general principles concerning Article 9 in cases in which applicants have raised complaints under this article – follow the loose concentric circles model. The fourth chapter focuses on cases concerning deprogramming, coercive psychiatric treatment, indoctrination, and sanctions on employment due to religion or belief affiliation. These are the kinds of cases one would expect to fall into the innermost circle in the loose concentric circles model, where there is strongest *forum internum* relevance and weakest countervailing factors and, therefore, a high degree of *forum internum* protection. Through this analysis, this chapter aims to demonstrate that the ECtHR's approach is consistent with its general principles concerning Article 9. Even in these kinds of cases, the ECtHR does not offer *absolutely* absolute protection to the *forum internum* but, rather, balances the factors indicating a violation (primarily, but not only, *forum internum* relevance) with countervailing factors in order to reach its decision, and only offers a very high degree of protection where it considers *forum internum* relevance to be strong and countervailing factors to be weak.

The fifth chapter focuses on cases in which States have restricted the activities of individuals or communities due to concerns about religiously motivated harm. Firstly, it explores cases concerning sexual relations with minors, corporal punishment of children, compulsory vaccination refusal, and ceremonial use of illegal substances. These are the kinds of cases one would expect to fall into the outermost circle in the loose concentric circles model, where there is weakest *forum internum* relevance and strongest countervailing factors and, therefore, a low degree of *forum internum* protection. This chapter seeks to demonstrate that the ECtHR's approach in such cases is as expected.

However, through an analysis of cases concerning allegations of threats to national security, challenges to rights and freedoms of members, and transgressions of health and safety laws, this chapter also aims to show that where the ECtHR considers the harm in question is not substantiated, or State actions are disproportionate, in balancing the factors indicating a violation with countervailing factors, the ECtHR can, and does offer a higher degree of protection to the *forum internum* under Article 9.

The sixth and seventh chapters examine cases which one would expect to fall into the middle circle in the loose concentric circles model, where both *forum internum* relevance and countervailing factors may both be strong or both be weak and, as such, for the degree of protection offered to the *forum internum* to depend heavily on the way in which the ECtHR balances the factors. Chapter 6 explores cases concerning limitations on proselytism, and the wearing of religious clothing and symbols, and Chapter 7 examines cases in which applicants have objected to acting contrary to, or to disclosing, their religion or belief. These chapters seek to show that, again, the ECtHR's approach is consistent with its general principles concerning Article 9 as the ECtHR balances factors indicating a violation (primarily, but not only, *forum internum* relevance) with countervailing factors to reach its decision. Given that such cases are highly fact sensitive, the level of *forum internum* protection offered ranges from a high to a low degree depending on the particular circumstances of the case.

Part III

Part Three draws together the central threads in the preceding chapters relating to the relationship between the *forum internum* and the *forum externum*, and the usefulness of the loose concentric circles model for grouping Article 9 cases, and takes the analysis a step further.

Chapter 8 draws particular attention to the importance of context in ECtHR jurisprudence relating to ECHR Article 9. It contends that in taking different approaches and reaching different outcomes in ostensibly similar Article 9 cases, the ECtHR is not necessarily being inconsistent. Rather, its approach can be explained by recognising the significance of the facts; the facts help the ECtHR identify what is at stake in a particular case and respond accordingly. In developing this, this chapter explores the importance placed on contextual differences between, and within, Member States by the ECtHR in Article 9 cases, and refers the major role the facts play in cases concerning other ECHR articles too. It then considers some of the broader cultural, social and political factors the ECtHR may legitimately take into account in Article 9

assessments, before reflecting on the impact of the increased focus on the local context in declarations on reform of the ECHR system on the ECtHR. Finally, the chapter concludes with some remarks on the implications of the reappraisal of ECHR Article 9 and the related ECtHR jurisprudence in this book for academics and legal practitioners in the field.

MATERIALS

This book examines Article 9 jurisprudence available in English and in French over a sixty-year period from 1961 to 2021.¹⁴ It also examines jurisprudence relating to other ECHR articles to the extent that the material is relevant to the understanding of Article 9.¹⁵ In addition, it analyses the text of ECHR Article 9, related international provisions – including Article 18 of the Universal Declaration of Human Rights (UDHR), Article 18 of the ICCPR and Article 1 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the 1981 Declaration) – and the relevant *travaux préparatoires*. Taken together, this material forms the basis for updating, extending and reappraising the understanding of Article 9 and its protection by the ECtHR in this book.¹⁶

¹⁴ When referring to cases available only in French (or the French version of the case) the citation includes '[French]'. Where citations include '[French]' and cited material is in English the translations are the author's own.

¹⁵ Article 9 claims are often raised in conjunction with other ECHR articles, and these articles will be addressed where appropriate.

¹⁶ This book is based on the author's PhD thesis entitled 'Reconceptualising the Place of the *Forum Internum* and *Forum Externum* in Article 9 of the European Convention on Human Rights' (PhD thesis, University of Bristol, 2020), available at: <https://bris.on.worldcat.org/oclc/1151697318>.

PART I

THE UNDERSTANDING OF THE RIGHT TO FREEDOM OF
THOUGHT, CONSCIENCE AND RELIGION IN ECHR ARTICLE 9