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RECONCEPTUALISING THE PLACE OF THE *FORUM INTERNUM* AND *FORUM EXTERNUM* IN ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Caroline Kayleigh Roberts

A dissertation submitted to the University of Bristol in accordance with the requirements for award of the degree of PhD in Law in the Faculty of Social Sciences and Law, School of Law, September 2019.

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ABSTRACT

This thesis explores and challenges the dominant understanding in the literature that there is a clear binary and hierarchical distinction between the absolute *forum internum* and qualified *forum externum* in the architecture of the right to freedom of thought, conscience and religion in Article 9 of the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR).

This thesis argues — based on a detailed analysis of ECHR Article 9, related international instruments and *travaux préparatoires*, and all Article 9 jurisprudence in English and French from the 1960s to the present day — that the traditional understanding of Article 9 in the literature is not founded textually or jurisprudentially. It contends that the *forum internum* and *forum externum* aspects of Article 9 are interrelated and should be understood on a conceptual continuum ranging from the *forum internum* to the *forum externum* because the *forum internum* is always relevant, to some degree, in Article 9 complaints.

Whilst the degree of *forum internum* relevance is the principal factor that the ECtHR uses to ascertain the strength of an applicant's complaint, it is not the determining factor in Article 9 cases; the ECtHR balances factors indicating a violation (primarily, but not only, *forum internum* relevance) with countervailing factors indicating no violation, in order to reach its decision. As such, in terms of grouping Article 9 cases, this thesis suggests that it is easier to understand the jurisprudence if one thinks of it in terms of a series of concentric circles, rather than as a binary framework. In the loose concentric circles model, *forum internum* relevance is strongest and countervailing factors are weakest in the innermost circle, *forum internum* relevance is weakest and countervailing factors are strongest in the outermost circle, and *forum internum* relevance and countervailing factors are at their most contested in the middle circle.

This thesis contends that this radical reconceptualisation of the place of the *forum internum* and *forum externum* in Article 9 and the jurisprudence has implications for both academics and practitioners.

DEDICATION

To my parents, Caroline and Arthur, and my sister, Zara.

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Finally, I am forever grateful to my parents and my sister, for their love, support and encouragement throughout my academic journey. For this reason, this thesis is dedicated to them.

DECLARATION

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's *Regulations and Code of Practice for Research Degree Programmes* and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in this dissertation are those of the author.

Signed: …………………………

Date: ……………………………

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TREATIES, DECLARATIONS AND INSTRUMENTS

UNITED NATIONS

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (25 November 1981) UN Doc A/RES/36/55

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

OHCHR, General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion) (20 July 1993) UN Doc CCPR/C/21/Rev.1/Add.4

UNGA Resolution 217 A(III) Universal Declaration of Human Rights (10 December 1948) UN Doc A/RES/3/217/A

UNGA Resolution on the Elimination of All Forms of Religious Intolerance (22 December 1995) UN Doc A/RES/50/183

COUNCIL OF EUROPE

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950) ETS No.005

Council of Europe, Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (12 October 2013) CETS No.214

TRAVAUX PRÉPARATOIRES

UNITED NATIONS

General Assembly

UNGA, Draft International Covenants on Human Rights: Annotation (1 July 1955) UN Doc A/2929

UNGA, Draft International Covenants on Human Rights: Report of the Third Committee (8 December 1960) UN Doc A/4625

UNGA, Draft International Declaration of Human Rights (29 November 1948) UN Doc A/C.3/379

UNGA, Record of the 127th Meeting (9 November 1948) UN Doc A/C.3/SR.127

UNGA, Thirty-Sixth Session, Third Committee, 43rd Meeting (23 November 1981) UN Doc A/C.3/36/SR.43

Economic and Social Council

UNECOSOC, Commission on Human Rights, Drafting Committee First Session, Summary Record of the Eighth Meeting (17 June 1947) UN Doc E/CN.4/AC.1/SR.8

UNECOSOC, Commission on Human Rights, Drafting Committee, International Bill of Rights Documented Outline (11 June 1947) UN Doc E/CN.4/AC.1/3/Add.1

UNECOSOC, Commission on Human Rights, Drafting Committee, International Bill of Rights, Revised Suggestions Submitted by the Representative of France for Articles of the International Declaration of Rights (20 June 1947) UN Doc E.CN.4/AC.1/W.2/Rev.2

UNECOSOC, Commission on Human Rights, Drafting Committee Second Session, Draft International Covenant on Human Rights (Document E/600) with United States Recommendations (3 May 1948) UN Doc E.CN.4/AC.1/19

UNECOSOC, Commission on Human Rights Drafting Committee, Second Session, Report of the Drafting Committee to the Commission on Human Rights (21 May 1948) UN Doc E/CN.4/95

UNECOSOC, Commission on Human Rights, Drafting Committee, Text of Letter from Lord Dukeston, the United Kingdom Representative on the Human Rights Commission (5 June 1947) UN Doc E/CN.4/AC.1/4

UNECOSOC, Commission on Human Rights, Draft International Covenant on Human Rights, Recapitulation of Amendments to Articles 16, 17 and 18 (26 May 1949) UN Doc E/CN.4/272 [French]

UNECOSOC, Commission on Human, Eight Session, Summary Record of the Three Hundredth and Nineteenth Meeting (17 June 1952) UN Doc E/CN.4/SR.319

UNECOSOC, Commission on Human Rights, Fifth Session, Summary Record of the One Hundred and Sixteenth Meeting (17 June 1949) UN Doc E/CN.4/SR.116

UNECOSOC, Commission on Human Rights, Report to the Economic and Social Council on the Eighth Session of the Commission, (14 June 1952) UN Doc E/2256

UNECOSOC, Commission on Human Rights, Report on the Thirty-First Session, Supplement No.4 (3 February – 7 March 1975) UN Doc E/CN.4/1179

UNECOSOC, Commission on Human Rights, Report on the Thirty-Fifth Session, Supplement No.6 (12 February – 16 March 1979) UN Doc E/CN.4/1347

UNECOSOC, Commission on Human Rights, Second Session, Report of the Working Group on the Declaration of Human Rights (10 December 1947) UN Doc E/CN.4/57

UNECOSOC, Commission on Human Rights Sixth Session, Compilation of the Comments of Governments on the Draft International Covenant on Human Rights on the Proposed Additional Articles (22 March 1950) UN Doc E.CN.4/365

UNECOSOC, Commission on Human Rights, Sixth Session, Summary Record of the One Hundred and Sixty First Meeting (28 April 1950) UN Doc E.CN.4/SR.161

UNECOSOC, Commission on Human Rights, Summary Record of Fourteenth Meeting (5 February 1947) UN Doc E/CN.4/SR.14

UNECOSOC, Commission on Human Rights, Third Session, China: Amendments to the Draft International Declaration on Human Rights (27 May 1948) UN Doc E/CN.4/102

UNECOSOC, Commission on Human Rights Third Session, Collation of the Comments of Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation (1 May 1948) UN Doc E/CN.4/85

UNECOSOC, Commission on Human Rights, Third Session, Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation (22 April 1948) UN Doc E/CN.4/82/Rev.1

UNECOSOC, Commission on Human Rights, Third Session, India and the United Kingdom: Proposed Amendments to the Draft Declaration on Human Rights (24 May 1948) UN Doc E/CN.4/99

UNECOSOC, Commission on Human Rights, Third Session, Observation of Governments on the Draft International Declaration on Human Rights, The Draft International Covenant on Human Rights and Methods of Application: Communication from the French Government (6 May 1948) UN Doc E/CN.4/82/Add.8

UNECOSOC, Commission on Human Rights, Third Session, Report of the Sub-Committee Consisting of the Representatives of France, Lebanon, the United Kingdom and Uruguay on the Consideration of Article 16 of the Draft International Declaration on Human Rights and its Relation to Articles 17 and 18 (7 June 1948) UN Doc E/CN.4/113

UNECOSOC, Commission on Human Rights, Third Session, Summary Record of the Sixtieth Meeting (23 June 1948) UN Doc E/CN.4/SR.60

UNECOSOC, Commission on Human Rights, Third Session, Summary Record of the Sixty-Second Meeting (11 June 1948) UN Doc E/CN.4/SR.62

UNECOSOC, Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Visit to Germany (22 December 1997) UN Doc E/CN.4/1998/6/Add.2

UNECOSOC, Report of the Fifth Session of the Commission on Human Rights to the Economic and Social Council (23 June 1949) UN Doc E/CN.4/350

UNECOSOC, Report of the Third Session of the Commission on Human Rights, Lake Success, 24 May – 18 June 1948 (28 June 1948) UN Doc E/800

COUNCIL OF EUROPE

COE, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights* (Martinus Nijhoff 1975) Volumes I – VIII

COE, European Commission of Human Rights, Preparatory Work on Article 9 of the European Convention on Human Rights (16 August 1956) Doc DH (56) 14

REPORTS

UNITED NATIONS

General Assembly

UNGA, Elimination of all Forms of Religious Intolerance: Interim Report of the Special Rapporteur of the Commission on Human Rights and the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief: Situation in Turkey (11 August 2000) UN Doc A/55/280/Add.1

UNGA, Human Rights Council, Thirty-First Session, Report of the Special Rapporteur on Freedom of Religion (23 December 2015) UN Doc A/HRC 31/18

UNGA, Human Rights Council, Freedom of Religion or Belief: Report of the Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed (5 March 2019) UN Doc A/HRC/40/58

UNGA, Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Greece (7 November 1996) UN Doc A/51/542/Add.1

Office of the High Commissioner

OHCHR, A Study of Discrimination in the Matter of Religious Rights and Practices by Arcot Krishnaswami, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and the Protection of Minorities (1960) UN Doc E/CN.4/Sub.2/200/Rev.1

OHCHR, Statement by the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, during the 67th session of the General Assembly in New York, Item 70 (b), (25 October 2012)

COUNCIL OF EUROPE

Council of Europe, 'European Court of Human Rights Factsheet: Pilot Judgments' (January 2019) <https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf> accessed January 2019

Council of Europe, 'Opinion on the Draft Copenhagen Declaration' (19 February 2018) <https://www.echr.coe.int/Documents/Opinion_draft_Declaration_Copenhague%20ENG.pdf> accessed January 2019

Council of Europe, 'Draft Copenhagen Declaration' (5 February 2018) <https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf> accessed January 2019

Council of Europe, 'Copenhagen Declaration' (12-13 April 2018) <https://rm.coe.int/copenhagen-declaration/16807b915c> accessed January 2019

Council of Europe/European Court of Human Rights, 'Overview of the Court's Case-Law on Freedom of Religion' (30 April 2019) <https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf> accessed April 2019

European Commission, 'Combatting Antisemitism' (European Commission) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/combating-antisemitism_en> accessed December 2018

European Court of Human Rights, 'High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration' <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed January 2019

ORGANISATION FOR SECURITY AND CO-OPERATION IN EUROPE (OSCE)

Organisation for Security and Co-operation in Europe (OSCE), 'Freedom of Religion or Belief: Laws Affecting the Structures of Religious Communities' by Cole Durham (September 1999) <https://www.osce.org/odihr/16698?download=true#f3> accessed November 2018

Organisation for Security and Co-operation in Europe (OSCE), 'Guidelines for Review of Legislation Pertaining to Religion or Belief' (28 September 2004) <https://www.osce.org/odihr/13993?download=true> accessed March 2015

Organisation for Security and Co-operation in Europe (OSCE), 'Guidelines on the Legal Personality of Religious or Belief Communities' (2014) <https://www.osce.org/odihr/139046?download=true> accessed November 2018

TABLE OF CASES, APPLICATIONS AND COMMUNICATIONS

EUROPEAN COURT OF HUMAN RIGHTS AND EUROPEAN COMMISSION OF HUMAN RIGHTS

97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia App no 71156/01 (ECtHR, 3 May 2007)
A v Switzerland (1984) 38 DR 222
Abdulov and Others v Russia (communicated case) App nos 32040/12 47400/12 6731/14 and 6 others (ECtHR, 31 August 2017)
Abrahamsson v Sweden App no 12154/86 (Commission Decision, 5 October 1987)
Administrative Centre of Jehovah's Witnesses of Russia and Kalin v Russia (communicated case) App no 10188/17 (ECtHR, 1 December 2017)
Ahmet Arslan and Others v Turkey App no 41135/98 (ECtHR, 23 February 2010) [French]
Aktas v France App no 43563/08 (ECtHR, 30 June 2009)
Alexandridis v Greece App no 19516/06 (ECtHR, 21 February 2008) [French]
Altun and Others v Turkey App no 54903/10 (ECtHR, 10 July 2018)
Angeleni v Sweden (1986) 51 DR 41
Appel-Irrgang and Others v Germany ECHR 2009-IV 397
AO Falun Dafa and Others v The Republic of Moldova (communicated case) App no 29458/15 (ECtHR, 18 December 2018)
Arrowsmith v United Kingdom (1978) 8 DR 123
Association for Solidarity with Jehovah's Witnesses and Others v Turkey App no 36915/10 8606/13 (ECtHR, 25 May 2016) [French]
Atudorei v Romania App no 50131/08 (ECtHR, 16 Sept 2014)
Atudorei v Romania (communicated case) App no 50131/08 (ECtHR, 15 June 2010)
Autio v Finland App no 17086/90 (Commission Decision, 6 December 1991)
Balci v Turkey App no 48718/99 (ECtHR, 3 October 2002)
Barik Edidi v Spain App no 21780/13 (ECtHR, 26 April 2016) [French]
Bayatyan v Armenia App no 23459/03 (ECtHR, 12 December 2006)
Bayatyan v Armenia App no 23459/03 (ECtHR, 27 October 2009)
Bayatyan v Armenia ECHR 2011-IV 1
Begheluri And Others v Georgia App no 28490/02 (ECtHR, 7 May 2014)
Belcacemi and Oussar v Belgium App no 37798/13 (ECtHR, 11 July 2017) [French]
Beldjoudi v France (1992) Series A no 234-A
Bernard and Others v Luxembourg (1993) 75 DR 57
Biblical Centre of the Chuvash Republic v Russia App no 33203/08 (ECtHR, 12 June 2014)
Biserica Adevărat Ortodoxă Din Moldova and Others v Moldova App no 952/03 (ECtHR, 27 February 2007)
Blumberg v Germany App no 14618/03 (ECtHR, 8 March 2008)
Boffa and 13 Others v San Marino (1998) 92-B DR 27
Bouessel du Bourg v France App no 20747/92 (Commission Decision, 18 February 1993)
Bouyid v Belgium ECHR 2015-V 457
Boychev and Others v Bulgaria App no 77185/01 (ECtHR, 27 January 2011) [French]
Brant and Another v The United Kingdom (1986) 49 DR 44
Broniowski v Poland ECHR 2004-V 1

Bruno v Sweden App no 32196/96 (ECtHR, 28 August 2001)
Bukharatyan v Armenia App no 37819/03 (ECtHR, 10 January 2012)
Buldu and others v Turkey App no 14017/08 (ECtHR, 3 June 2014) [French]
Bulski v Poland App nos 46254/99 31888/02 (ECtHR, 30 November 2004) [French]
Bulski v Poland App nos 46254/99 31888/02 (ECtHR, 9 May 2006) [French]
Buscarini v San Marino ECHR 1999-I 605
C v The United Kingdom (1983) 37 DR 142
Campbell and Cosans v United Kingdom (1982) Series A no 48
Cederberg-Lappalainen v Sweden App no 11356/85 (Commission Decision, 4 March 1987)
Cevik v Turkey App no 39443/98 (ECtHR, 9 July 2002) [French]
Cha'are Shalom ve Tsedek v France App no 27417/95 (ECtHR, 27 June 2000)
Chapman v United Kingdom ECHR 2001-I 41
Chappell v The United Kingdom (1987) 53 DR 241
Chardonneau v France App no 17559/90 (Commission Decision, 29 June 1992) [French]
Chester v The United Kingdom App no 14747/89 (Commission Decision, 1 October 1990)
Choudhury v The United Kingdom App no 17439/90 (Commission Decision, 5 March 1991)
Christian Religious Organisation of Jehovah's Witnesses in the NRK v Armenia (communicated case) App no 41871/10 (ECtHR, 15 March 2018)
Christensen v Russia (communicated case) App no 39417/17 (ECtHR, 4 September 2017)
Church of Scientology v Sweden (1980) 21 DR 109
Cisse v France ECHR 2002-III 19 (extracts)
CJ, JJ and EJ v Poland (1996) 84-B DR 46
Conscientious Objectors v Denmark (1977) 9 DR 117
CR v Switzerland App no 40130/98 (ECtHR, 14 October 1999) [French]
Cyprus v Turkey ECHR 2001-IV 1
Dahlab v Switzerland ECHR 2001-V 447
Dakir v Belgium App no 4619/12 (ECtHR, 11 July 2017)
Darby v Sweden (1988) 56-B DR 173
Darby v Sweden App no 11581/85 (1989) Report 31
Darby v Sweden (1990) Series A no 187
Dimitras v Greece App no 11946/11 (ECtHR, 19 April 2018)
Dimitras and Gilbert v Greece no 36836/09 (ECtHR, 2 October 2014) [French]
Dimitras and Others v Greece App no 42837/06 and 4 others (ECtHR, 3 June 2010) [French]
Dimitras and Others v Greece (no 2) App no 34207/08 and 6365/09 (ECtHR, 3 November 2011) [French]
Dimitras and Others v Greece (no 3) App no 44077/09 and 2 others (ECtHR, 8 January 2013) [French]
Dimitras and Others v Greece App no 46009/11 (ECtHR, 27 June 2017) [French]
Dimitrov v Bulgaria App no 47829/99 (ECtHR, 23 September 2004)
Dogru v France App no 27058/05 (ECtHR, 4 December 2008)
Dojan and Others v Germany App nos 319/08 2455/08 7908/10 and 2 others, (ECtHR, 13 September 2011)
Dubowska and Skup v Poland App nos 33490/96 34055/96 (Commission Decision 18 April 1997)
Duman v Turkey App no 42788/98 (ECtHR, 3 October 2002)
Dzikowski v Poland App no 38799/11 (ECtHR, 15 May 2018)

E and GR v Austria (1984) 37 DR 42
Ebrahimian v France ECHR 2015-VIII 99
Efstratiou v Greece App no 24095/94 (Commission Decision, 16 October 1995)
Enver Aydemir v Turkey App no 26012/11 (ECtHR, 7 June 2016) [French]
Erçep v Turkey App no 43965/04 (ECtHR, 22 November 2011)
Evangelical Christian Church New Generation in Blagoveshchensk v Russia (communicated case) App no 73458/11 (ECtHR, 6 July 2017)
Eweida and Others v United Kingdom ECHR 2013-I 215 (extracts)
Fadini v Switzerland App no 17003/90 1826/91 (Commission Decision, 8 January 1993)
Feti Demirtaş v Turkey App no 5260/07 (ECtHR, 17 January 2012) [French]
Fernandez Martinez v Spain ECHR 2014-II 449
Folgerø And Others v Norway ECHR 2007-III 51
Foquet v France (communicated case) App no 59227/12 (ECtHR, 2 October 2017) [French]
Francesco Sessa v Italy ECHR 2012-III 165
Fränklin-Beentjes and CEFLU-Luz da Floresta v Netherlands (communicated case) App no 28167/07 (ECtHR, 25 October 2012)
Fränklin-Beentjes and CEFLU-Luz da Floresta v Netherlands App no 28167/07 (ECtHR, 6 May 2014)
GG v Italy App no 42414/98 (ECtHR, 7 May 2002)
Glazov LRO and Others v Russia (communicated case) App no 3215/18 (ECtHR, 7 May 2018)
Gottesmann v Switzerland (1984) 40 DR 287
Grandrath v Germany (1966) 10 Yearbook 626
Greens and MT v The United Kingdom ECHR 2010-VI 57 (extracts)
Grzelak v Poland App no 7710/02 (ECtHR, 15 June 2010)
Guerra and Others v Italy ECHR 1998-I 210
Gülbahar Özer and Yusuf Özer v Turkey App no 64406/09 (ECtHR, 29 May 2018)
Güler and Uğur v Turkey App no 31706/10, 33088/10 (ECtHR, 2 December 2014)
Guzzardi v Italy (1980) Series no A 39
GZ v Austria App no 5591/72 (Commission Decision, 2 April 1973)
Handyside v United Kingdom (1976) Series A no 24
Hamarattürk v Turkey App no 18673/91 (Commission Decision, 10 January 1995) [French]
Hamidovic v Bosnia and Herzegovina App no 57792/15 (ECtHR, 5 December 2017)
Hasan and Chaush v Bulgaria ECHR 2000-XI 117
Hasan and Eylem Zengin v Turkey App no 1448/04 (ECtHR, 9 October 2007)
HB v The United Kingdom App no 11991/86 (Commission Decision, 18 July 1986)
Herrmann v Germany App no 9300/07 (ECtHR, 20 January 2011)
Herrmann v Germany App no 9300/07 (ECtHR, 26 June 2012)
Heudens v Belgium App no 24630/94 (Commission Decision, 22 May 1995)
Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v Bulgaria App nos 412/03 35677/04 (ECtHR, 22 January 2009)
Iglesia Bautista El Salvador and Ortega Moratilla v Spain App no 17522/90 (Commission Decision, 11 January 1992)
Iorga and Moldovan v Romania App nos 15350/05 19452/05 (ECtHR, 9 April 2013)
Ivanova v Bulgaria App no 52435/99 (ECtHR, 12 April 2007)
İzzettin Doğan and Others v Turkey App no 62649/10 (ECtHR, 26 April 2016)
Jafarov and Others v Azerbaijan (communicated case) App no 406/12 (ECtHR, 12 March 2018)

Jehovah's Witness of Moscow and Others v Russia App no 302/02 (ECtHR, 10 June 2010)
JL v Finland App no 32526/96 (ECtHR, 16 November 2000)
Johansen v Norway ECHR 1996-III 979
Julin v Finland App no 17087/90 (Commission Decision, 6 December 1991)
K v The Netherlands App no 15928/89 (Commission Decision, 13 May 1992)
K and V v The Netherlands App no 11086/84 (Commission Decision, 16 July 1987) [French]
Kahramanyol v Turkey App no 38385/97 (ECtHR, 4 June 2002)
Kalaç v Turkey ECHR 1997-IV 1199
Kati v Turkey App no 39323/98 (ECtHR, 9 July 2002) [French]
Karaduman v Turkey App no 16278/90 (Commission Decision, 3 May 1993)
Karakuzey v Germany App no 26568/95 (Commission Decision, 16 October 1996)
Keller v Germany App no 36283/97 (Commission Decision, 4 March 1998)
Kervanci v France App no 31645/04 (ECtHR, 4 December 2008)
Kervanci v Turkey (communicated case) App no 79690/11 (ECtHR, 27 September 2017)
Khan v United Kingdom App no 11579/85 (Commission Decision, 7 July 1986)
Khlaifia and Others v Italy App no 16483/12 (ECtHR, 15 December 2016)
Kjeldsen, Busk Madsen and Pedersen v Denmark (1976) Series A no 23
Klein v Germany App no 10138/11 (ECtHR, 6 April 2017)
*Knudsen v Norway (*1985) 42 DR 247
Kokkinakis v Greece (1993) Series A no 260-A
Konrad v Germany ECHR 2006-XIII 355
Kontakt-Information-Therapie and Hagen v Austria (1988) 57 DR 81
Konttinen v Finland App no 24949/94 (Commission Decision, 3 December 1996)
Köse and 93 Others v Turkey ECHR 2006-II 339
Kosteski v The Former Yugoslav Republic of Macedonia App no 55170/00 (ECtHR, 13 April 2006)
Krupko and Others v Russia App no 26587/07 (ECtHR, 26 June 2014)
KS v The United Kingdom App no 45035/98 (ECtHR, 7 March 2002)
Kudła v Poland ECHR 2000-XI 197
Kurtulmuş v Turkey ECHR 2006-II 297
Kustannus Oy Vapaa Ajattelija AB and Others v Finland (1996) 85-A DR 29
Kuznetsov v Ukraine App no 39042/97 (Commission Decision, 20 October 1998)
L'Assocation 'Sivananda de Yoga Vedanta' v France App no 30260/96 (Commission Decision, 16 April 1998) [French]
L'Association Spirituale Per L'Unificazione Del Mondo Cristiano v Italy App no 11574/85 (Commission Decision, 5 October 1987)
Lachiri v Belgium App no 3413/09 (ECtHR, 18 September 2018) [French]
Lautsi and Others v Italy App no 30814/06 (ECtHR, 3 November 2009)
Lautsi and Others v Italy ECHR 2011-III 61
Larissis and Others v Greece ECHR 1998-I 362
Leela Forderkreis EV and Others v Germany App no 58911/00 (ECtHR, 6 November 2008)
Leyla Şahin v Turkey App no 44774/98 (ECtHR, 29 June 2004)
Leyla Şahin v Turkey ECHR 2005-XI 173
Logan v The United Kingdom (1996) 86-A DR 74
Lundberg v Sweden App no 36846/97 (ECtHR, 28 August 2001)
McFeely and Others v The United Kingdom (1980) 20 DR 44

Manoussakis v Greece ECHR 1996-IV 1346
Mansur Yalçin and Others v Turkey App 21163/11 (ECtHR, 16 September 2014)
Manushaqe Puto and Others v Albania App nos 604/07 34770/09 43628/07 and 1 other (ECtHR, 31 July 2012)
Maria Atanasiu and Others v Romania App nos 30767/05 33800/06 (ECtHR, 12 October 2010)
Martins Casimiro and Cerveira Ferreira v *Luxembourg* App no 44888/98 (ECtHR, 27 April 1999) [French]
Masaev v Moldova App no 6303/05 (ECtHR, 12 May 2009)
Meral v Turkey App no 39336/98 (ECtHR, 9 July 2002) [French]
Metodiev and Others v Bulgaria App no 58088/08 (ECtHR, 15 June 2017)
Metropolitan Church of Bessarabia and Others v Moldova ECHR 2001-XII 81
Milshteyn v Russia (communicated case) App no 1377/14 (ECtHR, 16 June 2017)
MM v Bulgaria App no 27496/95 (Commission Decision, 10 September 1996)
MM v Bulgaria App no 27496/95 (Commission Report, 9 July 1997)
Mockutė v Lithuania App no 66490/09 (ECtHR, 27 February 2018)
Moscow Branch of the Salvation Army v Russia App no 72881/01 (ECtHR, 5 April 2007)
MSS v Belgium and Greece ECHR 2011-I 255
Murphy v Ireland ECHR 2003-IX 1 (extracts)
N v Sweden App no 23505/09 (ECtHR, 20 July 2010)
Natoli v Italy App no 26161/95 (Commission Decision, 15 May 1998)
NF v Italy App no 37119/97 (ECtHR, 25 November 1999)
Niemietz v Germany (1992) Series A no 251-B
Nolan and K v Russia App no 2512/04 (ECtHR, 12 February 2009)
Nowak and Krynicki v Poland App no 32932/02 (ECtHR, 23 June 2009)
Omkarananda and the Divine Light Zentrum v Switzerland (1981) 25 DR 105
Otto-Preminger Institut v Austria (1994) Series A no 295-A
Özcan v Turkey App no 39337/98 (ECtHR, 9 July 2002) [French]
Papageorgiou and Others v Greece (communicated case) App nos 4762/18 6140/18 (ECtHR, 12 March 2018) [French]
Papavasilakis v Greece App no 66899/14 (ECtHR, 15 September 2016)
Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania ECHR 2005-I 209
Peers v Greece ECHR 2001-III 275
Pendragon v The United Kingdom App no 31416/96 (Commission Decision, 19 October 1998)
Perry v Latvia App no 30273/03 (ECtHR, 8 November 2007)
Peters v Netherlands App no 22793/93 (Commission Decision, 30 November 1994)
Petrou and Konstantinou v Cyprus App nos 24120/94 25506/94 (Commission Decision, 27 November 1995)
Philis v Greece (1991) Series A no 209
Phillip Williamson and others v UK App no 55211/00 (ECtHR, 2000)
Pichon and Sajous v France ECHR 2001-X 381
Pingen v Germany (communicated case) App no 11344/16 (ECtHR, 16 March 2016)
Pitkevich v Russia App no 47936/99 (ECtHR, 8 February 2001)
Polanco Torres and Movilla Polanco v Spain App no 34147/06 (ECtHR, 21 September 2010) [French]
Powell and Rayner v The United Kingdom (1990) Series A no 172
Pretty v The United Kingdom ECHR 2002-III 155

Rasul Jafarov v Azerbaijan App no 69981/14 (ECtHR, 17 March 2016)
Refah Partisi (The Welfare Party) and Others v Turkey ECHR 2003-II 267
Reira Blume and Others v Spain ECHR 1999-II 539
Reira Blume and Others v Spain 37680/97, ECHR 1999-VII 1
Religionsgemeinschaft Der Zeugen Jegovas and Others v Austria App no 40825/98 (ECtHR, 31 July 2008)
Religious Community of Jehovah's Witnesses of Kryvyi Rih v Ukraine (communicated case) App no 21477/10 (ECtHR, 22 November 2017)
Sakir v Greece App no 48475/09 (ECtHR, 24 March 2016) [French]
Samara Lro and Others v Russia (communicated case) App nos 15962/15 24622/16 2861/15 and 4 others (ECtHR, 4 September 2017)
Saniewski v Poland App no 40319/98 (ECtHR, 26 June 2001)
SAS v France ECHR 2014-III 341 (extracts)
Schilder v The Netherlands App no 2158/12 (ECtHR, 16 October 2012)
Schüth v Germany ECHR 2010-V 397
Schmutz v Switzerland App no 61780/10 (ECtHR, 10 December 2013)
Sengülec v Turkey App no 39331/98 (ECtHR, 9 July 2002) [French]
Seven Individuals v Sweden (1982) 29 DR 104
Sidiropoulos and Others v Greece ECHR 1998-I 1594
Siebenhaar v Germany App no 18136/02 (ECtHR, 3 February 2011) [French]
Sinan Işik v Turkey ECHR 2010-I 341
Sipahioglu v Turkey App no 31245/96 (Commission Decision, 11 May 1999) [French]
Skugar and Others v Russia App no 40010/04 (ECtHR, 3 December 2009)
Smith and Grady v The United Kingdom ECHR 1999-VI 45
Sofianopoulos, Spaïdiotis, Metallinos and Kontogiannis v Greece ECHR 2002-X 455
Stankov and the United Macedonian Organisation Ilinden v Bulgaria ECHR 2001-IX 273
Stedman v The United Kingdom (1997) 89-A DR 104
Stefanov v Bulgaria App no 32438/96 (ECtHR, 3 May 2001)
Supreme Holy Council of the Muslim Community v Bulgaria App no 39023/97 (ECtHR, 16 December 2004)
Suter v Switzerland (1986) 51 DR 162 [French]
Svyato-Mykhaylivska Parafiya v Ukraine App no 77703/01 (ECtHR, 14 June 2007)
Tagiyev and Others v Azerbaijan (communicated case) App no 66477/12 (ECtHR, 31 October 2017)
Tahta v Turkey App no 39068/97 (ECtHR, 4 June 2002) [French]
Tarhan v Turkey App no 9078/06 (ECtHR, 17 July 2012) [French]
Thlimmenos v Greece App no 34369/97 (Commission Report, 4 December 1998)
Thlimmenos v Greece ECHR 2000-IV 263
Tlapak and Othes v Germany App nos 11308/16 11344/16 (ECtHR, 22 March 2018)
Tsavachidis v Greece App no 28802/95 (Commission Report, 28 October 1997)
Tsirlis and Kouloumpas v Greece ECHR 1997-III 909
Tyrer v The United Kingdom (1978) Series A no 26
Ülke v Turkey App no 39437/98 (ECtHR, 24 January 2006)
Universelles Leben e.V v Germany App no 29745/96 (Commission Decision, 27 November 1996)
United Communist Party of Turkey and Others v Turkey ECHR 1998-I 1

United Christian Broadcasters Ltd v United Kingdom App no 44802/98 (ECtHR, 7 November 2000)
Usta v Turkey App no 57084/00 (ECtHR, 21 February 2008)
V v Netherlands (1984) 39 DR 267
Vallianatos and Others v Greece ECHR 2013-VI 125
Van Den Dungen v The Netherlands (1992) 80-A DR 147
Van Schijndel and Others v The Netherlands App no 30936/96 (Commission Decision, 1 September 1997)
Vavřička v Czech Republic (communicated case) App nos 47621/13 3867/14 73094/14 and 3 others (ECtHR, 7 September 2015) [French]
Vereniging Rechtswinkels Utrecht v the Netherlands (1986) 46 DR 200
Vogt v Germany (1996) Series A no 323
Vojnity v Hungary App no 29617/07 (ECtHR, 12 February 2013)
W v The United Kingdom App no 18187/91 (Commission Decision, 10 February 1993)
Wasmuth v Germany App no 12884/03 (ECtHR, 17 February 2011) [French]
X v Austria (1972) 40 DR 50
X v Autria [sic] (1981) 26 DR 89
X v Federal Republic of Germany (1970) 37 Collection 119
X v Federal Republic of Germany (1972) 40 Collection 25
X v Federal Republic of Germany (1974) 1 DR 64
X v Federal Republic of Germany (1977) 9 DR 201
X v Germany (1966) 22 Collection 1
X v Latvia ECHR 2013-VI 319
X v Netherlands App no 1068/61 (Commission Decision, 14 December 1962)
X v The United Kingdom (1974) 1 DR 41
X v The United Kingdom (1976) 5 DR 100
X v The United Kingdom (1977) 11 DR 55
X v The United Kingdom (1978) 14 DR 234
X v The United Kingdom (1981) 22 DR 27
X v The United Kingdom (1982) 28 DR 5
X and Church of Scientology v Sweden (1979) 16 DR 68
X (Ross) v The United Kingdom App no 10295/82 (Commission Decision, 14 October 1983)
Yanasik v Turkey (1993) 74 DR 22
Yilmaz v Turkey App no 37829/05 (ECtHR, 3 April 2007) [French]
Young, James and Webster (1982) Series A no 55
Zeynep Tekin v Turkey App no 41556/98 (ECtHR, 29 June 2004) [French]

INTRODUCTION

The purpose of this thesis is to explore and challenge the dominant understanding of the right to freedom of thought, conscience and religion as found in Article 9 of the European Convention on Human Rights (ECHR)[1] and the protection of this right by the European Court of Human Rights (ECtHR).[2]

ECHR Article 9 comprises two sections. Article 9.1 provides:

> '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.'[3]

Article 9.2 sets out the limitation clause:

> '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.'[4]

A. The Background and the Problem

Since the turn of the century, there has been a significant increase in the number of Article 9 complaints before the ECtHR.[5] 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, thus reflecting the 'rapidly increasing judicialization of religion.'[6] The ECtHR's jurisprudence on Article 9 covers a wide range of topics, including limitations on the display of religious symbols or clothing in public spaces, dissolution of religious communities, refusals to act contrary to one's conscience and forced disclosure of religion or belief. Whilst violations of Article 9 were rarely found in the early jurisprudence,[7] in an ever-

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950) ETS No.005.

[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 a detailed discussion of the organisation, practice and procedure of the ECtHR, see D Harris and others, *Harris O'Boyle & Warbrick: Law of the European Convention on Human Rights* (4th edn, OUP 2018) 107-132.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950) ETS No.005.

[4] Ibid.

[5] This is representative of the increased workload of the ECtHR in general.

[6] 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, 61, 64.

[7] 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, *The European Court of Human Rights and Freedom of Religion or Belief: The 25 Years Since Kokkinakis* (Brill 2019).

growing number of cases the ECtHR is finding that State interference constitutes a violation of this right.[8] In addition, the importance of Article 9 jurisprudence is increasingly being recognised outside of the ECtHR; in recent years numerous high-profile cases concerning religion in the public sphere have drawn considerable political and media attention across Member States in Europe and beyond.

This growth in Article 9 jurisprudence ties in with the global resurgence of religion.[9] Contrary to the 'secularisation thesis'[10] religion has not declined as societies have advanced; internationally, and in Europe, the religious landscape has become increasingly diverse.[11] And, paradoxically, as the number of those adhering to religions has increased so too has the number of those claiming no religious adherence. Since the turn of the century the protection of the right to freedom of thought, conscience and religion has become a particularly contested issue in Europe.[12] The increasing uneasiness concerning Islam acted as a 'catalyst' for debates[13] but debates have now expanded to cover much wider questions about the relationship between religion, law and society.

More and more, the exercise of the right to freedom of religion or belief is coming into conflict with States which claim that it is necessary to restrict the exercise of this right in order to pursue legitimate aims under Article 9.2, particularly the protection of public order and the rights and freedoms of others. Notably, there has been a significant shift in the types of applicant bringing Article 9 complaints to the ECtHR during the twenty-first century. Article 9 jurisprudence no longer largely concerns individual applicants who seek to justify behaviour which challenges the *status quo*, or to access special treatment or exemptions by appealing to

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[8] 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, 321.

[9] See e.g., Carolyn Evans, 'Introduction' in Peter Cane, Carolyn Evans and Zoe Robinson (eds) *Law and Religion in Theoretical and Historical Context* (CUP 2008), 1.

[10] This idea, that religion would decline as societies advanced, is an important theme in sociology of religion. For a detailed discussion of the secularisation thesis in relation to law and religion, see Russell Sandberg, *Religion, Law and Society* (CUP 2014) 53-83.

[11] 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* (CUP 2012), 332.

[12] See e.g., Karl-Heinz Ladeur and Ino Augsberg, 'The Myth of the Neutral State and the Individualization of Religion: The Relationship between State and Religion in the Face of Fundamentalism' (2007) 8 German Law Journal 143; Heiner Bielefeldt, 'Misperceptions of Freedom of Religion or Belief' (2013) 35 Human Rights Quarterly 33, 67; 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.; Kristin Henrard, 'How the European Court of Human Rights' Concern Regarding European Consensus Tempers Effective Protection of Freedom of Religion' (2012) 4:3 Oxford Journal of Law and Religion 398, 398.

[13] 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.

their religion or belief.[14] Rather, in an ever growing number of cases individuals,[15] and religious communities,[16] are fighting for their right to freedom of thought, conscience and religion against State authorities which, they claim, are actively trying to control them or deprive them of this right. 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 the face of ever more complex and pressing issues.[17]

In tandem with the significant increase in cases relating to Article 9 before the ECtHR there has been a substantial growth in academic literature relating to this right. Most discussions of Article 9 begin with a description of the structure of this article and there is an overriding consensus in the literature that Article 9 can be divided into two realms: the internal realm (*forum internum*) and the external realm (*forum externum*). This distinction is understood to be central to the protection of Article 9 rights in practice because, it is held, rights in the *forum internum* must always be protected absolutely whereas rights in the *forum externum* can be subjected to limitations in certain circumstances in accordance with Article 9.2. According to commentators, this binary and hierarchical distinction between the *forum internum* and the *forum externum* is the 'abiding and fundamental' distinction[18] which must be observed at all times to ensure effective implementation of Article 9.

But herein lies a serious problem. Increasingly commentators are arguing that the ECtHR's understanding and application of the *forum internum* and *forum externum* distinction is undermining rather than enhancing the protection of Article 9. In terms of cases concerning the right to manifest (which dominate the literature) commentators claim that the ECtHR treats the *forum externum* as a second order concern and allows States to restrict this right whenever they desire to do so. However, when commentators have examined the *forum internum* they have also claimed that the ECtHR fails to adequately protect this absolute realm by ignoring the relevance

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[14] See, e.g., *Cederberg-Lappalainen v Sweden* App no 11356/85 (Commission Decision, 4 March 1987); *V v 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.

[15] See e.g., *Larissis and Others v Greece* ECHR 1998-I 362*; 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 Işik 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).

[16] 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* App no 72881/01 (ECtHR, 5 April 2007); *Jehovah's Witness 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).

[17] The importance of the ECtHR is noted by Renucci, see Jean-François Renucci, 'Article 9 of the European Convention on Human Rights' Human Rights Files No 20 (Council of Europe 2005) <https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-20(2005).pdf> accessed July 2015, 59.

[18] Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005) 292.

of the *forum internum* in Article 9 complaints or inappropriately subjecting it to limitations under Article 9.2. Overall, it is claimed, Article 9 jurisprudence is 'incoherent' and 'inconsistent'.[19]

Added to this, in recent years, commentators have increasingly advanced conceptual critiques of the *forum internum* and *forum externum* distinction, calling into question the very notion of a binary and hierarchical distinction between belief and action in Article 9 because, they argue, it does not reflect the understanding of religion or belief for individuals in reality, in which having a belief is understood to be intimately connected with manifesting it.

Such criticisms are deeply concerning given the ECtHR's important role in protecting the right to freedom of thought, conscience and religion in the face of serious challenges made by States. The right to freedom of religion or belief is a fundamental human right. If the understanding of Article 9 and the protection of this right by the ECtHR in practice is really as problematic as the literature suggests, this is not simply an academic concern; there are tangible human rights implications and as such, this is a question which needs to be addressed.

However, there is a substantial gap in the literature. To date, there has not been a comprehensive analysis of the understanding of the *forum internum* and the *forum externum* in Article 9, in the related *travaux préparatoires* or in Article 9 jurisprudence. Two of the seminal monographs on freedom of religion or belief which emphasise the centrality of the binary and hierarchical *forum internum* and *forum externum* distinction, and criticised the ECtHR's understanding and application of the distinction,[20] are both limited in their analyses (because the *forum internum* and *forum externum* distinction is not the focus of these texts) and are considerably dated in light of the exponential growth in Article 9 jurisprudence over the past twenty years. And, the more up to date publications which engage with the *forum internum* and *forum externum* distinction concentrate almost exclusively on cases concerning the right to manifest religion or belief.[21] This thesis seeks to redress this.

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[19] See e.g. Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 1 and throughout; Paul Taylor, *Freedom of Religion* (CUP 2005) 117; Merlin Kiviorg, 'Religious Autonomy in the ECHR' (2009) 4 Derecho y Religion 131, 131; Alison Mawhinney, 'Coercion, Oaths and Conscience' in Frank Cramner and others (eds) *The Confluence of Law and Religion: interdisciplinary Reflections on the Work of Norman Doe* (CUP 2016) 205.

[20] Carolyn Evans, *Freedom of Religion* (OUP 2001); Paul Taylor, *Freedom of Religion* (CUP 2005).

[21] See e.g., Peter Petkoff, 'Religious Symbols Between the *Forum Internum* and the *Forum Externum*' in Silvio Ferrari and Rinaldo Cristofori (eds) *Law and Religion in the 21st Century: Relations Between States and Religious Communities* (Ashgate 2010) 297; Pamela Slotte, 'What is a Man if he has Words but has no Deeds? Some Remarks on the European Convention on Human Rights' (2011) 11 Ars Disputandi 259; Peter Petkoff, '*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with Particular Reference to the Jurisprudence of the European Court of Human Rights' (2012) 7 Religion and Human Rights 183; Celia G Kenny, 'Public Space, Private Face: Veiling as a Challenge for Legal Reasoning' in Russell Sandberg, *Religion and Legal Pluralism* (Routledge 2015); Meadhbh McIvor, 'Carnal Exhibitions: Material Religion and the European Court of Human Rights' (2015) 17:1 Ecclesiastical Law Journal 3.

B. Research Questions and Methodology

The purpose of this thesis is to address the gap in the literature by updating and extending the analysis and, in light of the findings, reviewing the understanding of Article 9 and the protection of this right by the ECtHR. More specifically, it considers whether the claims made in the literature that i) there is a binary and hierarchical distinction between the *forum internum* and *forum externum* and that ii) the understanding and application of the distinction by the ECtHR is undermining the protection of Article 9 rights, stands up to scrutiny or whether there is a better way of understanding the right to freedom of thought, conscience and religion and Article 9 jurisprudence.[22] To do this, this thesis addresses the following research questions:

1. How is the right to freedom of thought, conscience and religion in ECHR Article 9 and the protection of this right by the ECtHR presented in the literature?
2. How is the right to freedom of thought, conscience and religion presented in the text of ECHR Article 9, the related international instruments and the relevant *travaux préparatoires*?
3. How is the right to freedom of thought, conscience and religion presented and protected in practice by the ECtHR? Does the jurisprudence reflect the presentation in the literature or the presentation in the text of ECHR Article 9 and relevant *travaux préparatoires*?
4. What does this reveal about the right to freedom of thought, conscience and religion in ECHR Article 9?

This thesis, like much of the literature relating to the right to freedom of thought, conscience and religion, is doctrinal in nature. However, unlike other studies, this thesis comprehensively examines all Article 9 jurisprudence, available both in English and in French, from the 1960s to present day.[23] And, in addition, it undertakes a thorough analysis of the text of ECHR Article 9, the related international instruments — including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief

[22] The idea for this thesis emerged out of the author's LLM dissertation which discussed the *forum internum* and *forum externum* in the context of the right not to manifest, see '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' (Aberystwyth University 2014) <https://cadair.aber.ac.uk/dspace/bitstream/handle/2160/30063/Roberts_Caroline.pdf?sequence=2&isAllowed=y> accessed July 2019.

[23] Previous commentaries on Article 9 have largely restricted the analysis to case law available in English which means that a significant proportion of relevant case law available only in French has been neglected. This thesis seeks to redress this by examining case law in English *and* in French. When citing cases available only in French (or the French version) the citation includes '[French]'.

(1981 Declaration) — and the relevant *travaux préparatoires*. In terms of secondary material, this thesis examines a wide range of academic commentary and practitioner material relating to the right to freedom of religion or belief.

Taken together, this material forms the basis for updating, extending and reviewing the understanding of Article 9 and its protection by the ECtHR in this thesis.

C. Contributions to Knowledge

This thesis makes the following significant original contributions to knowledge. Firstly, it challenges the orthodoxy that there is a binary and hierarchical distinction between the absolute *forum internum* and qualified *forum externum* in ECHR Article 9 which must be observed at all times to ensure adequate protection of the right to freedom of thought, conscience and religion, by demonstrating that textually and jurisprudentially there is a lack of support for this interpretation. Building upon a recent, deeply valuable, interpretation of ICCPR Article 18 in the literature,[24] this thesis argues that the evidence in relation to ECHR Article 9 reveals that the *forum internum* and *forum externum* are deeply interrelated and as such should be understood on a conceptual continuum ranging from the *forum internum* to the *forum externum*. The *forum internum* is never irrelevant in Article 9 claims; it is just that the extent of its relevance depends on the ECtHR's consideration of the facts.

Flowing from this, this thesis argues that the degree of *forum internum* relevance is the principal factor that the ECtHR uses to ascertain the strength of an applicant's claim. It contends that the ECtHR takes into account *forum internum* relevance when considering the facts in Article 9 complaints, from the outset of the assessment. Rather than asking, 'is this a complaint engaging the *forum internum* or *forum externum*?', the primary question for the ECtHR seems to be, 'how relevant is the *forum internum* in this case on the basis of the facts?'.

However, *forum internum* relevance is not the only factor that the ECtHR takes into consideration when determining Article 9 cases; the ECtHR balances factors indicating a violation of Article 9 (primarily, but not only, *forum internum* relevance) with countervailing factors indicating no violation of Article 9, in order to reach its decision. As such, Article 9 protection can be helpfully understood on a spectrum, ranging from a very high to a very low degree of protection. Where the ECtHR considers that *forum internum* relevance is strongest and countervailing factors are weakest, it offers a very high degree of protection. Where it considers that *forum internum* relevance is weakest and countervailing factors are strongest, it offers a very

[24] See Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016), 76, 82-89, 93, 98, 290-291, 486-487, 566-567.

low degree of protection. Where the strength of *forum internum* relevance and countervailing factors are contested, the ECtHR offers protection ranging from a very high to a very low degree depending on the way in which it balances the factors.

In light of this, this thesis argues that a useful way of grouping the cases — according to the ECtHR's characterisation — is a loose concentric circles model comprising three circles. The innermost circle represents *forum internum* relevance at its strongest and countervailing factors at their weakest, the outermost circle represents *forum internum* relevance at its weakest and countervailing factors at their strongest and the middle circle represents *forum internum* relevance and countervailing factors at their most contested. In the middle circle, *forum internum* relevance and countervailing factors may both be strong or both be weak. Whilst this thesis argues that the ECtHR balances in all Article 9 cases, cases which fall into the middle circle are 'harder' (relatively speaking) than cases which fall into the innermost or outermost circles because the balancing exercise is more difficult in such cases.

Given the ECtHR's nuanced approach to the protection of Article 9, this thesis argues that the loose concentric circles model, which groups cases according to the ECtHR's characterisation, is more conducive to a coherent interpretation of Article 9 jurisprudence than a binary framework.

D. Thesis Structure

This thesis comprises eight chapters which form three parts. Part I examines the *presentation* 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, the related international instruments and the relevant *travaux préparatoires* and, iii) in ECtHR jurisprudence. Part II examines the protection of the right to freedom of thought, conscience and religion in *practice* by analysing a wide range of Article 9 cases. Part II is organised according to the loose concentric circles model; it analyses cases where one would expect *forum internum* relevance to be at its strongest and countervailing factors at their weakest, cases where one would expect *forum internum* relevance to be at its weakest and countervailing factors at their strongest and, cases where one would expect *forum internum* relevance and countervailing factors to be at their most contested. Part III brings together the findings from the comprehensive analysis of the primary materials in Parts I and II, to advance the alternative approach to the understanding of ECHR Article 9 and reconceptualise the place of the *forum internum* and *forum externum* in Article 9 jurisprudence.

PART I: THE RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

CHAPTER 1. THE *FORUM INTERNUM* AND *FORUM EXTERNUM*: THE LITERATURE

Introduction

This chapter conducts a detailed examination of the notion of the *forum internum* and *forum externum* distinction in the literature relating to freedom of thought, conscience and religion. In order to set the wider background, it begins by exploring the literature concerning related international instruments (UDHR Article 18 and ICCPR Article 18) before critically analysing literature relating specifically to ECHR Article 9. This chapter demonstrates that there is a clear consensus in the literature that a binary and hierarchical distinction between the *forum internum* and *forum externum* is central to the understanding and protection of the right to freedom of thought, conscience and religion. In terms of ECHR Article 9, specifically, it is understood to be a fundamental feature of the architecture of this provision and a central doctrine of the ECtHR.

Despite this emphasis on the centrality of the *forum internum* and *forum externum* distinction to the understanding and protection of Article 9, however, the ECtHR's application of the distinction is being increasingly criticised and, importantly, the very existence of such a distinction in ECHR Article 9 is coming under attack in the literature for undermining rather than enhancing the protection of Article 9 rights. The second section of this chapter explores the serious criticisms of the *forum internum* and *forum externum* distinction in the literature and discusses some of the limited suggestions made by commentators aimed at improving the understanding and protection of Article 9 rights within the *forum internum* and *forum externum* framework.

In the third section, this chapter takes a step back to explore how this traditional approach to understanding Article 9 and the protection of this article by the ECtHR has come to dominate. Through a close, chronological analysis of the references to, and discussions of, the *forum internum* and *forum externum* in the literature relating to Article 9 this chapter will demonstrate that the centrality of the *forum internum* and *forum externum* distinction is a notion which has developed over time. Rather than revealing, as one would expect, that the *forum internum* and *forum externum* distinction is a notion rooted in evidence, this analysis shows that commentators have perpetuated the distinction largely through intertextual reliance rather than close engagement with the text of ECHR Article 9, the relevant *travaux préparatoires* or the vast body of Article 9 case law. On the whole, commentators have tended to view statements made about the *forum internum* and *forum externum* distinction in two seminal texts (published in 2001[1] and

[1] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001).

2005[2] and based on limited evidence) as a the 'final word', adding to this a largely conceptual critique of the notion in recent years.

This discussion of the serious limitations and gaps in the literature relating to Article 9, propels the thesis forwards by contending that it is now time to carefully engage with the primary materials in order to review claims made about the centrality of the *forum internum* and *forum externum* distinction to the understanding and protection of Article 9 by commentators, and the 'problems' they claim have emerged as a result of this distinction. Overall, this chapter provides the basis for the analysis of ECHR Article 9, relevant *travaux préparatoires* and Article 9 jurisprudence in this thesis.

A. The Origins and Meaning of '*Forum Internum*' and '*Forum Externum*'

Whilst the terms '*forum internum*' and '*forum externum*' look like Latin legal terms they do not have legal definitions; they are not defined in legal dictionaries, nor do they appear in dictionaries of Latin legal terms. Before examining the meaning of *forum internum* and *forum externum* in the literature relating to the right to freedom of thought, conscience and religion it is, therefore, useful to briefly examine the ordinary meaning and origins of these terms.

In modern usage, 'forum' is usually used to describe 'a meeting or medium where ideas and views on a particular issue can be exchanged.'[3] Originally, however, the Latin noun '*forum'* (pl. *'fora'*) referred to a 'public square or marketplace used for judicial and other business' in Roman cities[4] and in Late Middle English, referred specifically to 'what is out of doors', typically an enclosure surrounding a house.[5] The Latin adjective '*internum'* describes that which is 'inward' or 'internal', whereas the term '*externum'* describes that which is 'outward' or 'external'.[6] Latin dictionaries explain that the adjective *internum* (from '*inter'* meaning between or among) means inward or internal, and also domestic or civil [7] and the adjective *externum* (from '*exter'* meaning 'outward' or 'outside') means external and also foreign, alien and strange.[8]

Research is shedding light on the meaning and origins of these terms when used together as '*forum internum'* and *'forum externum*', however, there is some disagreement in different

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[2] Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005).
[3] *Oxford English Dictionary* (7th edn, OUP 2015).
[4] Ibid.
[5] *Oxford Advanced Learner's Dictionary* (9th edn, OUP 2015). The term *forum* itself derives from the Proto-Indo-European '*d^{h}worom*', meaning enclosure, courtyard or something enclosed by a door, see Fernando López-Menchero, *Proto-Indo-European Etymological Dictionary* (Indo-European Language Association 2012) 55; Andrew L Sihler, *New Comparative Grammar of Greek and Latin* (OUP 1994) para 184.
[6] *Oxford English Dictionary* (7th edn, OUP 2015).
[7] 'internum' in Charlton T Lewis and Charles Short, *A New Latin Dictionary* (Harper and Brothers Publishers 1981).
[8] 'externus' in Charlton T Lewis and Charles Short, *A Latin Dictionary* (OUP 1963).

disciplines. In the field of political theory and philosophy, Furmurescu, for instance, argues that the distinction between the *forum internum* and *forum externum* originated in, and was central to, the Medieval understanding of the self.[9] The *forum internum* represented the individual's internal reality, the 'forum of conscience, authenticity and freedom, subject to no one and punishable by no one except God' which could not be controlled or regulated, not even by the Church,[10] whereas the *forum externum* represented the individual's external appearance, 'the forum in which the individual identified himself and was identified…' in community.[11] Others argue that the *forum internum* and *forum externum* distinction emerged in Cartesian epistemology to refer to the mind (or conviction) and to outward, publicly observable behaviour, respectively.[12]

In the field of law and history, specialists in canon law, such as Gerosa,[13] Makinen and Pihlajamaki,[14] and Petkoff,[15] argue that the terms originated in canon law and represented different ways in which the Medieval Church exercised jurisdiction; in the ecclesiastical court (the *forum externum*) and the court of penance (the *forum internum*) or forum of conscience (*forum conscientiae*).[16] Petkoff suggests that the terms first appeared at the Council of Trent,[17] however, Müller argues that the idea of a distinction between the internal and external forum in canon law in the late Middle Ages is a 'modern myth'.[18] She contends that the 'articulation of a neat distinction between private and public church proceedings' — between a *forum externum*

[9] Alin Fumurescu, *Compromise: A Political and Philosophical History* (CUP 2013) 10, 12, 119, 166.
[10] Ibid, 10. See Alin Fumurescu, 'The Role of Political and Self Representation in Compromise' in Christian F Rostbøll and Theresa Scavenius (eds) *Compromise and Disagreement in Contemporary Political Theory* (Routledge 2017).
[11] Alin Fumurescu, *Compromise: A Political and Philosophical History* (CUP 2013) 10. Furmurescu traces this antithesis to Aquinas, arguing that 'dialectic' formed the basis of individualism in the West, ibid.,10. See also FR Ankersmit, *Aesthetic Politics: Political Philosophy Beyond Fact and Value* (Stanford University Press 1997) 247, 249.
[12] FR Ankersmith, *History and Tropology: The Rise and Fall of Metaphor* (University of California Press 1994) 69, 70, 104. See also TM Lennon, *The Plain Truth: Descartes, Huet, and Skepticism* (Brill 2008) 38; Peter G Danchin, 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law' (2008) 49:2 Harvard International Law Journal 249, 263.
[13] Libero Gerosa, *Canon Law* (LIT Verlag Munster 2002)157ff.
[14] Virpi Makinen and Heikki Pihlajamaki, 'The Individualization of Crime in Medieval Canon Law' (2004) 65 (4) Journal of the History of Ideas 525, 531.
[15] Peter Petkoff, '*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with Particular Reference to the Jurisprudence of the European Court of Human Rights' (2012) 7 Religion and Human Rights 183, 184, 202.
[16] Joseph Goering, 'The Internal Forum and the Literature of Penance and Confession' (2004) 56 Traditio 175, 175-176; Alexander Murray A, 'Confession before 1215' (1993) 3 Transactions of the Royal Historical Society 51, 51. Makinen and Pihlajamaki explain that 'non-criminal sins were a matter of inner forum (*forum internum*), the sacrament of confession' whereas crimes against canon law were a matter for the ecclesiastical court (*forum externum*), see Virpi Makinen and Heikki Pihlajamaki, 'The Individualization of Crime in Medieval Canon Law' (2004) 65 (4) Journal of the History of Ideas 525, 531.
[17] Peter Petkoff, '*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with Particular Reference to the Jurisprudence of the European Court of Human Rights' (2012) 7 Religion and Human Rights 183, 187.
[18] Wolfgang P Müller, 'The Internal Forum of the Later Middle Ages: A Modern Myth?' (2015) 33:4 Law and History Review 887, 912.

and *forum internum* — did not fully develop until early modernity.[19] Whatever the precise origins, Canon 196 of the 1917 Code of Canon Law[20] and Canon 130 of the 1983 Code of Canon Law,[21] which relate to the power of jurisdiction in the Church, make a distinction between the *forum internum* and the *forum externum*.

Whilst this brief overview reveals that the precise meaning and origin of the terms *forum internum* and *forum externum* is debatable[22] what is clear, however, is that these terms have a spatial meaning; the *forum internum* is consistently presented as an internal realm (whether the individual's internal reality or the realm of the mind, or conscience) whereas the *forum externum* is the external realm (whether the individual's external appearance, the realm of public, observable behaviour or the realm in which individuals are punished for crimes). And, what is more, in each of the disciplines in which the terms *forum internum* and *forum externum* are discussed, they are generally used in conjunction, as a pair, suggesting a relationship between them.

To understand the meaning of these terms in the specific context of the human right to freedom of thought, conscience and religion it is essential to begin with a detailed examination of the way in which the terms have been used in the literature; it is to this that this chapter will now turn.

B. The Traditional Approach to the Right to Freedom of Thought, Conscience and Religion in the Literature

In discussions of the right to freedom of thought, conscience and religion in international human rights instruments, the literature typically refers to a distinction between the *forum internum* (the 'internal realm' of the mind) and the *forum externum* (the 'external realm' of action).[23] It is

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[19] Ibid. Sullivan also argues that the *forum internum* and *forum externum* dichotomy is an 'early modern bifurcation', see Winnifred Sullivan and others, *Politics of Religious Freedom* (University of Chicago Press 2015) 6.

[20] Edward Peters, 1917 Pio-Benedictine Code of Canon Law: In English Translation with Extensive Scholarly Apparatus (Ignatius 2001), Canon 196.

[21] Canon Law Society of America, Code of Canon Law, Latin-English Edition, New English Translation (Canon Law Society of America 1999), Canon 130. See also Matúš Nemec and Vojtech Vladár, 'The Essentials of Canon Law' (Trnavská univerzita v Trnave, Právnická fakulta 2013) <http://iuridica.truni.sk/sites/default/files/dokumenty/zahranicne-vztahy/en/publications/pdf/01Canon%20Law.pdf> accessed February 2015, paras 32-33. See also Arthur Canon, 'Canon Law and Moral Theology' (1962) 22 Jurist 319, 319-320.

[22] For Little, Sachedina and Kelsay it was the result of a 'complicated interweaving of classical Greco-Roman and Christian notions' from Aquinas to Luther, Roger Williams and John Locke, see David Little, Abdulaziz Sachedina and John Kelsay, 'Human Rights and the World's Religions: Christianity, Islam and Religious Liberty' in Irene Bloom, J Paul Martin and Wayne L Proudfoot (eds) *Religious Diversity and Human Rights* (Columbia University Press 1996) 218-25.

[23] Bahia Tahzib-Lie, 'The European Definition of Religion or Belief' (1998) 9 Helsinki Monitor 17, 17; Willi Fuhrmann, 'Perspectives on Religious Freedom from the Vantage Point of the European Court of Human

difficult to overemphasise the centrality of the *forum internum* and *forum externum* distinction; it has become the agreed conceptual framework, or the 'traditional terminology'[24] underpinning discussions of this right in the UDHR, ICCPR and ECHR so much so it is now, as Petkoff points out, 'almost inconceivable to consider freedom of religion or belief without coming across at least one reference to the *forum internum* and *forum externum*.'[25]

It is, then, odd (to say the least) that so central a distinction is not clearly made in the texts of the legal instruments; neither the term *forum internum* nor the term *forum externum* appears in UDHR Article 18, ICCPR Article 18 or ECHR Article 9. Yet, commentators argue that the notion of an internal and external realm is evident in the structure of these articles.[26] It is explained that each of these provisions distinguish between the right to freedom of thought, conscience and religion (in the *forum internum*) and the right to manifest religion or belief (in the *forum externum*).[27] This distinction between the *forum internum* and the *forum externum* which is understood to be 'spelled out'[28] in these provisions, is believed to be a 'foundational'[29] or

Rights' [2000] Brigham Young University Law Review 829, 831; Javier Martínez-Torrón, 'The European Court of Human Rights and Religion' in Richard O'Dair and Andrew Lewis (eds) *Law and Religion: Current Legal Issues 2001 Volume 4* (OUP 2001) 198; Carolyn Evans, *Freedom of Religion* (OUP 2001) 73; Leonard Hammer, 'Selective Conscientious Objection and International Human Rights' (2002) 36 Israel Law Review 145, 149; Paul Taylor, *Freedom of Religion* (CUP 2005) 19; Jan Rothkamm, 'Religious Freedom in Time of Conflict: An Overview of International Legislation and a Discussion of Recent Cases' (2007) 46 Military Law and Law of War Review 261, 261; Merilin Kiviorg, 'Religious Autonomy in the ECHR' (2009) 4 Derecho y Religion 131, 133; Javier Martínez-Torrón, 'The (Un)protection of Individual Religious Identity in the Strasbourg Case Law' (2012) 1:2 Oxford Journal of Law and Religion 363; Javier Martínez-Torrón, 'Religious Pluralism: The Case of the European Court of Human Rights' in Ferron Requejo and Camil Ungureanu (eds) *Democracy, Law and Religious Pluralism in Europe* (Routledge 2014) 125; Julie Maher, 'Eweida and Others: A New Era for Article 9? (2014) 63:1 International and Comparative Law Quarterly 213, 215; D Harris and others, *Harris O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 594.

[24] Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (OUP 2016) 76.

[25] Peter Petkoff, '*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with Particular Reference to the Jurisprudence of the European Court of Human Rights' (2012) 7 Religion and Human Rights 183, 184.

[26] Paul Taylor, *Freedom of Religion* (CUP 2005) 19; Todd Parker, 'The Freedom to Manifest Religious Beliefs: An Analysis of the Necessity Clauses of the ICCPR and the ECHR' (2006) 17:1 Duke Journal of Comparative and International Law 91, 93-94; Pamela 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, 38; Pamela Slotte, 'What is a Man if he has Words but has no Deeds? Some Remarks on the European Convention on Human Rights' (2011) 11 Ars Disputandi 259, 268; Malcolm D Evans, 'Advancing Freedom of Religion or Belief: Agendas for Change' (2012) 1:1 Oxford Journal of Law and Religion 5, 5.

[27] W Cole Durham Jr and JT Beatty, 'Book Review: Evans MD, Religious Liberty and International Law in Europe' (2001) 16 (2) Journal of Law and Religion 623, 630; Natan Lerner, 'The Nature and Minimum Standards of Freedom of Religion or Belief' in W Cole Durham Jr and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004), 67-8 (relying upon R Lillich, Human Rights Instruments (William S Hein & Company 1983) para 490.2); Malcolm D Evans, 'Advancing Freedom of Religion or Belief: Agendas for Change' (2012) 1:1 Oxford Journal of Law and Religion 5, 9.

[28] Theo van Boven, 'The United Nations Commission of Human Rights and Freedom of Religion or Belief' in W Cole Durham Jr and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 176.

[29] Peter G Danchin and Louis Blond, 'Unlawful Religion? Modern Secular Power and the Legal Reasoning in the *JFS* case' (2014) 29 Maryland Journal of International Law 419, 467; Bernadette Rainey, Elizabeth Wicks

‘classical’[30] distinction; it is described as the ‘fundamental organising concept’[31] and the ‘most well-entrenched feature’ of the right to freedom of religion or belief.[32] As such, commentators continually assert that there is a ‘double side’ [33] to freedom of thought conscience and religion, consistently stressing the distinction between the internal and external ‘realm’,[34] ‘sphere’,[35] ‘elements’,[36] ‘components’,[37] ‘domains’[38] or ‘provinces’.[39]

This distinction between ‘inner and outer freedoms’,[40] is understood to be ‘of foundational importance to international legal thinking about freedom of religion or belief’[41] because the ‘two dimensions’[42] have ‘different degrees of legal protection.’[43] It is very common to see the statement that the *forum internum* is an absolute realm which must not be interfered with by the State in any way under any circumstances, whereas the *forum externum* is a qualified realm which can be limited by the State in certain circumstances. In Taylor’s words — which are representative of the literature on the whole — this distinction between the unrestricted *forum internum* and restricted *forum externum* is the ‘abiding and fundamental’, ‘inescapable and

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and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) 412.

[30] Grégor Puppinck, *Conscientious Objection and Human Rights*: *A Systematic Analysis* (Brill Research Perspectives 2017) 10.

[31] Alison Mahwinney, ‘Coercion, Oaths and Conscience’ in Frank Cramner and others (eds) *The Confluence of Law and Religion: interdisciplinary Reflections on the Work of Norman Doe* (CUP 2016) 205.

[32] Peter G Danchin and Louis Blond, ‘Unlawful Religion? Modern Secular Power and the Legal Reasoning in the *JFS* case’ (2014) 29 Maryland Journal of International Law 419, 467
Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) 412.

[33] Javier Martínez-Torrón, ‘The European Court of Human Rights and Religion’ in Richard O’Dair and Andrew Lewis (eds) *Law and Religion: Current Legal Issues 2001 Volume 4* (OUP 2001) 198, footnote 39.

[34] Manfred Nowak and Tanja Vospernik, ‘Permissible Restrictions on Freedom of Religion or Belief’ in W Cole Durham Jr and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 147.

[35] Malcolm D Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 203; A Glogowska-Balcerzak and MJ Wasiński, ‘Druids, Scientologists and Wiccans – Religions, Beliefs and Their Manifestation in Strasbourg Jurisprudence’ (2015) 1 Studia Humanitas <http://st-hum.ru/content/glogowska-balcerzak-wasinski-mj-druids-scientologists-and-wiccans-religions-beliefs-and> accessed March 2016.

[36] Willi Fuhrmann, ‘Perspectives on Religious Freedom from the Vantage Point of the European Court of Human Rights’ [2000] Brigham Young University Law Review 829, 831; Peter Cumper and Tom Lewis, ‘Taking Religion Seriously’? Human Rights and *Hijab* in Europe – Some Problems of Adjudication’ (2008) 24 Journal of Law and Religion 599, 604; D Harris and others, *Harris O’Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 594.

[37] Kendal Davis, ‘The Veil That Covered France’s Eye: The Right to Freedom of Religion and Equal Treatment in Immigration and Naturalization Proceedings’ (2010) 10 Nevada Law Journal 732, 746.

[38] Bahia Tahzib-Lie, ‘The European Definition of Religion or Belief’ (1998) 9 Helsinki Monitor 17, 17.

[39] Leonard Hammer, ‘Selective Conscientious Objection and International Human Rights’ (2002) 36 Israel Law Review 145, 149.

[40] Bahia Tahzib-Lie, ‘The European Definition of Religion or Belief’ (1998) 9 Helsinki Monitor 17, 17.

[41] Pamela Slotte, ‘What is a Man if he has Words but has no Deeds? Some Remarks on the European Convention on Human Rights’ (2011) 11 Ars Disputandi 259, 268.

[42] Peter Petkoff, ‘Legal Protection of Sacred Places as a Medieval Gloss- Towards Working ‘Soft Law’ Guidelines under Public International Law’ (2011) 167 Law and Justice 27, 36

[43] Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016) 63.

immutable distinction in the architecture of all core freedom of religion articles', which must 'be observed at all times'.[44]

i. The *Forum Internum* and *Forum Externum*: Literature Relating to UN Instruments

In the literature relating to UDHR Article 18 and ICCPR Article 18, the *forum internum* — the 'internal and private realm'[45] or the 'inner dimension'[46] — is juxtaposed with 'outward manifestations of one's religion or belief'[47] in the *forum externum*. UN Special Rapporteurs on Freedom of Religion or Belief have consistently used the terms *forum internum* and *forum externum* to refer to the 'internal dimension of a person's religious or belief related conviction'[48] and the 'external manifestations of religious or philosophical conviction' respectively.[49]

In the literature relating to ICCPR Article 18, in particular, it is constantly emphasised that the distinction between the *forum internum* and the *forum externum* is of 'legal significance'[50] because these realms are afforded different levels of protection. The *forum internum* is described as an 'absolute'[51] realm which benefits from 'unconditional protection'[52] or 'status'.[53] According to commentators, 'no interference is justified under any circumstances' with

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[44] Paul Taylor, *Freedom of Religion* (CUP 2005) 19, 292.
[45] Ibid.,19.
[46] Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016) 64, 76, footnote 3. Van Boven, for instance, defines forum internum as the 'realm of the mind', the realm which ensures the 'spiritual integrity and conscience of the human person', see Theo van Boven, 'The United Nations Commission of Human Rights and Freedom of Religion or Belief' in W Cole Durham Jr and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 176.
[47] All Party Parliamentary Group on International Religious Freedom (eds Malcolm D Evans and others) 'Article 18: An Orphaned Right' (unknown) <https://appgfreedomofreligionorbelief.org/media/Article-18-An-Orphaned-Right.pdf> accessed August 2015. See also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engels 2005) 411. Cf. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engels 1993).
[48] OHCHR, Statement by the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, during the 67th session of the General Assembly in New York, Item 70 (b), (25 October 2012); See also UNGA, Human Rights Council, Freedom of Religion or Belief: Report of the Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed (5 March 2019) UN Doc A/HRC/40/58, para 31. See also The Annual Report cited in Olivier De Schutter International Human Rights Law: Cases, Materials, Commentary (2nd edn, CUP 2014) 398.
[49] Heiner Bielefeldt, 'Freedom of Religion or Belief – A Human Right under Pressure' (2012) 1:1 Oxford Journal of Law and Religion 15, 7, 8.
[50] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn NP Engels 2005) 412, Daniel Moeckli and others (eds), *International Human Rights Law* (1st edn, OUP 2010) 223.
[51] David Little, 'Does the Human Rights to Freedom of Conscience, Religion and Belief has Special Status?' [2001] Brigham Young University Law Review 603,605; All Party Parliamentary Group on International Religious Freedom, (eds Malcolm D Evans and others) 'Article 18: An Orphaned Right' (unknown) <https://appgfreedomofreligionorbelief.org/media/Article-18-An-Orphaned-Right.pdf> accessed August 2015; Heiner Bielefeldt, 'Freedom of Religion or Belief – A Human Right under Pressure' (2012) 1:1 Oxford Journal of Law and Religion 15, 8.
[52] UNGA, Human Rights Council, Thirty-First Session, Report of the Special Rapporteur on Freedom of Religion (23 December 2015) UN Doc A/HRC 31/18, para 77.
[53] Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016) 22, 84, 383.

this 'internal, private realm of the individual'[54] not even for reasons of national security or in an emergency[55] and it can be 'subject neither to coercion nor to limitations.'[56] It is emphasised that no limitations 'whatsoever' are permitted in respect of the right to have or adopt a religion or belief of one's choice.[57] This is believed to be one of the 'few unconditional norms within international human rights law.'[58] That these are 'inalienable' freedoms[59] is considered 'apodictic'.[60]

The *forum internum,* it is explained, has 'long been held…to be absolutely beyond state regulation';[61] for Gunn, the claim that the *forum internum* merits absolute protection has 'virtually become a platitude',[62] and for Taylor, it is 'trite law' that the *forum internum* is 'subject to unqualified protection in all the key international instruments'.[63] According to Danchin, the 'inviolability' of the *forum internum* is 'unchallenged and unchallengeable', it is the 'basic claim' relating to freedom of thought, conscience and religion.'[64]

In contrast, the *forum externum* which embraces 'public manifestation of religious belief',[65] is described as a qualified realm. Manifestations of religion or belief 'may be limited' in accordance with ICCPR Article 18.3.[66]

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[54] David Little, 'Religion, Human Rights and Public Reason: Protecting the Freedom of Religion or Belief' in John Witte and M Christian Green (eds) *Religion and Human Rights: An Introduction* (OUP 2011) 128.
[55] Peter Petkoff, '*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with Particular Reference to the Jurisprudence of the European Court of Human Rights' (2012) 7 Religion and Human Rights 183. See also Heiner Bielefeldt, 'Freedom of Religion or Belief – A Human Right under Pressure' (2012) 1:1 Oxford Journal of Law and Religion 5, 8.
[56] Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016) 560. See also Sylvie Langlaude, *The Right of the Child to Religious Freedom in International Law* (Martinus Nijhoff Publishers 2007) 70.
[57] Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016) 68.
[58] Ibid.
[59] Thomas M Krapf, 'Lost Opportunities and Missed Targets' in Peter Petkoff and Julian Rivers (eds) *Changing Nature of Religious Rights in International Law* (OUP 2015) 127.
[60] See Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016), 64, 68, 80.
[61] W Cole Durham Jr and Carolyn Evans, 'Freedom of Religion and Religion-State Relations' in Tushnet M, Fleiner T, and Saunders C (eds) *Routledge Handbook to Constitutional Law* (Routledge 2013) 248; Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016) 64.
[62] T Jeremy Gunn, 'Book Review: Taylor P, Freedom of Religion: UN and European Human Rights Law and Practice' (2008) 23 Journal of Law and Religion 101, 102.
[63] Paul Taylor, *Freedom of Religion* (CUP 2005) 115.
[64] Peter G Danchin, 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law' (2008) 49:2 Harvard International Law Journal 249, 262.
[65] Peter van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, Intersentia 1998) 54; Todd Parker, 'The Freedom to Manifest Religious Beliefs: An Analysis of the Necessity Clauses of the ICCPR and the ECHR' (2006) 17:1 Duke Journal of Comparative and International Law 91, 93-4.
[66] Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016) 560.

ii. The *Forum Internum* and *Forum Externum*: Literature Relating to the ECHR

There are striking similarities between the literature relating to the right to freedom of thought, conscience and religion in UN instruments and the literature relating to ECHR Article 9. Article 9 is perceived to include 'two elements',[67] or 'spheres',[68] namely the *forum internum* and *forum externum*, and the distinction between these two realms is considered to be 'foundational'.[69] The *forum internum* is variously described as the 'internal dimension of religiosity',[70] 'the inner sphere of belief',[71], the 'sphere of inner conviction',[72] 'an individual's inner faith and conscience',[73] the 'locus of religious belief and conscience'[74] and as a 'psychic' freedom.[75] It is explained that 'the *forum internum*, by strict definition, refers to that which is internal to the individual, it is a sphere of activity which is private or 'personal';[76] it relates 'to matters of internal conscience',[77] the 'inner world'[78] and is 'largely exercised inside an individual's heart and mind.'[79]

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[67] D Harris and others, *Harris O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 594.
[68] A Glogowska-Balcerzak and MJ Wasiński, 'Druids, Scientologists and Wiccans – Religions, Beliefs and Their Manifestation in Strasbourg Jurisprudence' (2015) 1 Studia Humanitas <http://st-hum.ru/content/glogowska-balcerzak-wasinski-mj-druids-scientologists-and-wiccans-religions-beliefs-and> accessed March 2016.
[69] Peter G Danchin and Louis Blond, 'Unlawful Religion? Modern Secular Power and the Legal Reasoning in the *JFS* case' (2014) 29 Maryland Journal of International Law 419, 467; Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) 412.
[70] Esra Demir Gürsel, 'The Distinction Between the Freedom of Religion and the Right to Manifest Religion: A Legal Medium to Regulate Subjectivities' (2013) 22 Social & Legal Studies 377, 379. See also Julie Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?' in Loreno Zucca and Camil Ungureanu (eds) *Law, State and Religion in New Europe: Debates and Dilemmas* (CUP 2012) 285.
[71] Jan Rothkamm, 'Religious Freedom in Time of Conflict: An Overview of International Legislation and a Discussion of Recent Cases' (2007) 46 Military Law and Law of War Review 261, 261
[72] Malcolm D Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Council of Europe/Martinus Nijhoff 2009) 8.
[73] Kendal Davis, 'The Veil That Covered France's Eye: The Right to Freedom of Religion and Equal Treatment in Immigration and Naturalization Proceedings' (2010) Nevada Law Journal 10
[74] Saba Mahmood and Peter G Danchin, 'The Politics of Religious Freedom: Contested Genealogies' (2014) 113:1 The South Atlantic Quarterly 1, 3.
[75] Aileen McColgan, 'Religion and (In)equality in the European Framework' in Loreno Zucca and Camil Ungureanu (eds) *Law, State and Religion in New Europe: Debates and Dilemmas* (CUP 2012) 219.
[76] Jim 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) 12.
[77] Carolyn Evans, *Freedom of Religion* (OUP 2001) 101.
[78] Peter van Dijk and others, *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 754.
[79] Donna Gomien, *Short Guide to the European Convention on Human Rights* (Council of Europe 1991) 69. See also D Harris and others, *Harris O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 594, footnote 30; Françoise Tulkens, 'Freedom of Religion under the European Court of Human Rights: A Precious Asset' [2014] Brigham Young University Law Review 509, 513.

In contrast the *forum externum,* the 'sphere of external manifestation', [80] is described as the 'external, often collective dimension of freedom of thought, conscience and religion'[81] or the 'outward expression'[82] of religion or belief. It is the 'external dimension of religiosity',[83] the physical manifestation,[84] the area in which the *forum internum* can be 'exteriorized'[85] or the area where an individual's personal beliefs 'emerge into the open'.[86] In Puppinick's words, 'the *forum internum* pertains to the being of the person, and the *forum externum* to the person's doings.'[87]

Throughout the literature relating to Article 9, it is again repeatedly emphasised that this 'double character' or 'double side'[88] of the provision is legally significant because of the different degrees of protection to be offered to rights within the *forum internum* and rights within the *forum externum*.[89] There is a clear consensus that *forum internum* rights are absolute (they cannot be subject to any limitations), whereas *forum externum* rights are qualified (and can be limited in accordance with Article 9.2).[90] This, it is claimed, is a 'clear implication' from the text of Article 9[91] and evident if one follows the 'letter of Article 9'.[92]

To unpack this, the *forum internum* is understood to represent the 'internal and private realm against which no State interference is justified in any circumstances';[93] it is a realm which

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[80] Carolyn Evans*, Freedom of Religion* (OUP 2001) 72; Malcolm D Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Council of Europe/Martinus Nijhoff 2009) 9.
[81] John Witte Jr and M Christian Green, *Religion and Human Rights* (OUP 2011) 259
[82] Peter G Danchin, 'Religious Freedom in the Panopticon of Enlightenment Rationality' in Winnifred Sullivan and others (eds) *Politics of Religious Freedom* (University of Chicago Press 2015) 176.
[83]Esra Demir Gürsel, 'The Distinction Between the Freedom of Religion and the Right to Manifest Religion: A Legal Medium to Regulate Subjectivities' (2013) 22 Social & Legal Studies 377, 378-9.
[84] Peter G Danchin and Lisa Forman, 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities' in Peter G Danchin and Elizabeth A Cole (eds) *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press 2002) 198.
[85] Julie Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?' in Loreno Zucca and Camil Ungureanu (eds) *Law, State and Religion in New Europe: Debates and Dilemmas* (CUP 2012) 293.
[86] Tom Lewis, 'What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation' (2007) 56 International and Comparative Law Quarterly 395, 400.
[87] Grégor Puppinck, *Conscientious Objection and Human Rights*: *A Systematic Analysis* (Brill Research Perspectives 2017) 11.
[88] Javier Martínez-Torrón and Rafael Navarro-Valls, 'The Protection of Religious Freedom in the System of the European Convention on Human Rights' (1998) 3 Helsinki Monitor 25 31, footnote 22.
[89] Nicolas Bratza, 'The "Precious Asset": Freedom of Religion under the European Convention on Human Rights' (2012) 14:2 Ecclesiastical Law Journal 256, 259.
[90] Peter W Edge, 'The European Court of Human Rights and Religious Rights' (1998) 47 International and Comparative Law Quarterly 681, 681.
[91] Jim 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) 18.
[92] Javier Martínez-Torrón, 'Religious Pluralism: The Case of the European Court of Human Rights' in Ferron Requejo and Camil Ungureanu (eds) *Democracy, Law and Religious Pluralism in Europe* (Routledge 2014) 126-7.
[93] Paul Taylor, *Freedom of Religion* (CUP 2005) 19, 115. See also Peter Petkoff, '*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with Particular Reference to the Jurisprudence of the European Court of Human Rights' (2012) 7 Religion and Human Rights 183, 187.

‘does not belong to the sphere of state power.’[94] Indeed, it is described as a ‘domain outside of a state’s control’[95] and a ‘hands off’ area for States.[96] The rights to hold and to change a religion or belief are understood to be the most intensely protected aspects of religious liberty, falling within the ‘inner core’,[97] and are ‘absolute’[98] and ‘unfettered’.[99] Indeed, commentators consistently emphasise that the *forum internum* is ‘subject to no limitations’,[100] it is ‘unrestricted’[101] and guaranteed without qualification.’[102] It is understood to be a ‘largely sacrosanct’,[103] or ‘untouchable’[104] realm, a ‘private, autonomous sphere of religion or belief.’[105]

In contrast, the *forum externum* (usually used interchangeably with manifestation) is understood to be a ‘qualified’ realm, in which rights can be interfered with, or ‘overridden’[106] if in accordance with Article 9.2.[107] It is explained that once a person has left the ‘refuge’ of the

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[94] Pamela Slotte, ‘What is a Man if he has Words but has no Deeds? Some Remarks on the European Convention on Human Rights’ (2011) 11 Ars Disputandi 259, 268.

[95] Peter Petkoff, ‘*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with Particular Reference to the Jurisprudence of the European Court of Human Rights’ (2012) 7 Religion and Human Rights 183, 189.

[96] Pamela Slotte, ‘The Religious and the Secular in European Human Rights Discourse’ in Jan Klabbers (ed) *Finnish Yearbook of International Law: Volume 21* (Bloomsbury 2010) 249. See also Françoise Tulkens, ‘Freedom of Religion under the European Court of Human Rights: A Precious Asset’ [2014] Brigham Young University Law Review 509, 513.

[97] Renata Uitz, ‘Rethinking *Deschomets v France:* reinforcing the protection of religious liberty through personal autonomy in custody disputes’ in Eva Brems E (ed), *Diversity and European Human Rights: Rewriting the Judgments of the ECHR* (CUP 2012) 173, 179.

[98] Claudia Morini, ‘Secularism and Freedom of Religion: The Approach of the European Court of Human Rights’ (2010) 43 Israel Law Review 611, 613; Norman Doe, *Law and Religion in Europe* (OUP 2011) 44; Pamela Slotte, ‘What is a Man if he has Words but has no Deeds? Some Remarks on the European Convention on Human Rights’ (2011) 11 Ars Disputandi 259, 268; Erica Howard, *Law and the Wearing of Religious Symbols: European Bans of the Wearing of Religious Symbols in Education* (Routledge 2011) 16-17; Ben-Oni Ardelean, ‘Liberty: The *Forum Internum* of Faith and Belief’ (2013) 9:5 European Journal of Science and Theology 23, 27.

[99] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) 412.

[100] Carolyn Evans, *Freedom of Religion* (OUP 2001) 96.

[101] Paul Taylor, *Freedom of Religion* (CUP 2005) 19.

[102] Peter van Dijk and others, *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 752.

[103] Jim 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) 84.

[104] Tom Lewis, ‘What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation’ (2007) 56 International and Comparative Law Quarterly 395, 400; Peter Cumper and Tom Lewis, ‘Taking Religion Seriously’? Human Rights and *Hijab* in Europe – Some Problems of Adjudication’ (2008) 24 Journal of Law and Religion 599, 605.

[105] Peter Petkoff, ‘*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with Particular Reference to the Jurisprudence of the European Court of Human Rights’ (2012) 7 Religion and Human Rights 183, 189.

[106] Jean L Cohen and Celia Laborde (eds) *Religion, Secularism and Constitutional Democracy* (Columbia University Press 2016) 29.

[107] It is constantly emphasised in the literature that the limitation clause in Article 9.2 relates *only* to the *forum externum*, not to rights in the *forum internum*, see Javier Martínez-Torrón and Rafael Navarro-Valls, ‘The Protection of Religious Freedom in the System of the European Convention on Human Rights’ (1998) 3 Helsinki Monitor 25, 31, footnote 22.

forum internum, and beliefs 'emerge into the open,'[108] 'there might be circumstances in which his belief through manifestation could be challenged.'[109] Unlike *forum internum* rights*,* the *forum externum* right to manifest is 'not absolute' because manifestations of religion or belief may have 'societal consequences which necessitate state interference,' for instance, they can 'potentially interfere with the rights of others or pose a danger to society'.[110]

In the literature, it is common to see the terms *forum internum* and *forum externum* used interchangeably or synonymously with absolute and qualified protection.[111] When commentators speak of a right as a *forum internum* right, they usually mean that it is an absolute right, and when they speak of a right as a *forum externum* right they usually mean that it is a right which can be limited.

In addition to being central to the architecture of Article 9, it is widely understood that this distinction between the *forum internum* and the *forum externum* is a 'doctrine'[112] of the ECtHR. Martínez-Torrón, for instance, explains that the Strasbourg institutions have 'for many years…distinguished between two different and complementary aspects of the right recognised by Article 9,' the 'internal aspect (*forum internum*)' and the 'external aspect (*forum externum*).'[113] And, according to Peroni, the ECtHR understands religion 'in terms of a binary opposition between belief and practice,'[114] referred to as the *forum internum* and *forum externum* in 'Strasbourg jargon.'[115] Elsewhere, it is claimed that the ECtHR has 'drawn a line',[116] or more

[108] Tom Lewis, 'What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation' (2007) 56 International and Comparative Law Quarterly 395, 400.
[109] Peter Petkoff, '*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with Particular Reference to the Jurisprudence of the European Court of Human Rights' (2012) 7 Religion and Human Rights 183,188.
[110] Claudia Morini, 'Secularism and Freedom of Religion: The Approach of the European Court of Human Rights' (2010) 43 Israel Law Review 611, 613.
[111] Mari Stenlund and Pamela Slotte, 'Is there a Right to Hold a Delusion? Delusions as a Challenge for Human Rights Discussion (2003) 16:4 Ethical Theory and Moral Practice 829.
[112] See Javier Martínez-Torrón, 'The (Un)protection of Individual Religious Identity in the Strasbourg Case Law' (2012) 1:2 Oxford Journal of Law and Religion, 363, 366 footnote 18; Javier Martínez-Torrón and Rafael Navarro-Valls, 'The Protection of Religious Freedom in the System of the European Convention on Human Rights' (1998) 3 Helsinki Monitor 25, 31; Javier Martínez-Torrón, 'The European Court of Human Rights and Religion' in Richard O'Dair and Andrew Lewis (eds) *Law and Religion: Current Legal Issues 2001 Volume 4* (OUP 2001) 198 footnote 39.
[113] Javier Martínez-Torrón, 'Religious Pluralism: The Case of the European Court of Human Rights' in Ferron Requejo and Camil Ungureanu (eds) *Democracy, Law and Religious Pluralism in Europe* (Routledge 2014) 126-7. See also Javier Martínez-Torrón, 'Religious Liberty in European Jurisprudence' in Mark Hill (ed) *Religious Liberty and Human Rights* (University of Wales Press 2002) 117.
[114] Peroni describes a 'binary opposition between belief and practice', see Lourdes Peroni, 'Deconstructing 'Legal' Religion in Strasbourg' (2014) 3:2 Oxford Journal of Law and Religion 235, 236.
[115] Ibid.
[116] Peter G Danchin and Lisa Forman, 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities' in Peter G Danchin and Elizabeth A Cole (eds) *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press 2002) 198. See also, Peter van

emphatically, a 'substantial dividing line'[117] between these two spheres. It is a distinction which is understood to be 'well-acknowledged' by the ECtHR;[118] commentators claim it is one which has been 'stressed'[119] by the ECtHR[120] and is 'imperative in the judgments of the Court.'[121] Crucially, it is widely believe that this distinction between the *forum internum* and *forum externum* is the 'correct' understanding of Article 9 and that the application of the distinction is crucial for the protection of Article 9 rights in practice.

However, despite the heavy emphasis on the centrality of the *forum internum* and *forum externum* distinction commentators are increasingly arguing that the ECtHR's understanding and application of the distinction is problematic; rather than enhancing the protection of Article 9 rights the *forum internum* and *forum externum* distinction, it is claimed, is increasingly undermining it. It is to the criticisms of the *forum internum* and *forum externum* distinction that this chapter will now turn.

C. Criticisms of the *Forum Internum* and *Forum Externum* Distinction in the Literature

Commentators have, for some time, criticised the ECtHR's understanding and application of the *forum internum* and *forum externum* distinction claiming that the failure to clearly delineate the scope of the *forum internum* and the ways in which this realm can be interfered with, has led to poor protection of this absolute realm. More recently, however, the *forum internum* and *forum externum* distinction itself has come under criticism. Commentators have argued that the binary and hierarchical distinction between the *forum internum* and the *forum externum* in Article 9 is not the most suitable way of approaching religion or belief and has led to poor protection of the right to manifest religion or belief.

Dijk and Fried van Hoof (eds) *Theory and Practice of the European Convention on Human Rights* (1st edn, Intersentia 1984) 298.

[117] Françoise Tulkens, 'Freedom of Religion under the European Court of Human Rights: A Precious Asset' [2014] Brigham Young University Law Review 509, 511.

[118] Peter G Danchin and Lisa Forman, 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities' in Peter G Danchin and Elizabeth A Cole (eds) *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press 2002) 198.

[119] Javier Martínez-Torrón and Rafael Navarro-Valls, 'The Protection of Religious Freedom in the System of the European Convention on Human Rights' (1998) 3 Helsinki Monitor 25, 31.

[120] According to Doe, 'Strasbourg has developed a rich jurisprudence' around the notion of a *forum internum* and *forum externum* distinction' see Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011) 44.

[121] Pamela Slotte, 'International Law and Freedom of Religion or Belief: Origins, Presuppositions and Structure of the Protection Framework' in Silvio Ferrari (ed) *Routledge Handbook of Law and Religion* (Routledge 2017) 110.

This section focuses on criticisms of the ECtHR's understanding and protection of Article 9 and explores some suggestions made by commentators to improve the understanding of Article 9 and the protection of this right.

i. Poor *Forum Internum* Protection

The argument that the ECtHR offers poor protection to the *forum internum* will be examined in detail later in this thesis but, for now, it is worth noting that for many commentators it is problematic that the ECtHR has not clearly distinguished between rights which they believe fall into the absolute *forum internum* and rights which fall into the qualified *forum externum*. This 'failure' on the part of the ECtHR to clearly set out the scope of the *forum internum* is, it is held, largely the cause of poor protection of rights in the *forum internum*.

a. Failure to Define the Scope of the Forum Internum

Both C Evans and Taylor argued that despite the ECtHR's emphasis on the *forum internum* as the primary realm, the ECtHR has often failed to identify when *forum internum* rights are engaged. For C Evans, writing in 2001, the *forum internum* played 'almost no practical role in Article 9 cases' and its scope was so narrow it was difficult to envisage how a State could interfere with it 'short of brainwashing.'[122] And, according to Taylor, the 'unimpugnable and fundamental nature of the *forum internum*' was 'undermined by European institutions through the persistent avoidance of principles that permit *forum internum* rights to be asserted by applicants.'[123]

Both C Evans and Taylor argued that a key problem in the jurisprudence was the treatment of complaints engaging the *forum internum* (which, they argued, should be protected absolutely) as complaints engaging the *forum externum* (which, they argued, can be limited under Article 9.2).[124] This, they contended, seriously undermined the protection under Article 9 and the focus on the *forum externum* at the detriment of the *forum internum*, reflected the ECtHR's more widespread assumption that in Article 9 complaints the 'issue of interference with the *forum internum* is not in question'.[125]

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[122] Carolyn Evans, *Freedom of Religion* (OUP 2001) 74.
[123] Paul Taylor, *Freedom of Religion* (CUP 2005) 202.
[124] Regarding *Buscarini v San Marino*, for instance, C Evans, Taylor and Mawhinney all claim the ECtHR treated a *forum internum* complaint as a *forum externum* complaint, see Carolyn Evans, *Freedom of Religion* (OUP 2001) 73-74; Paul Taylor, *Freedom of Religion* (CUP 2005) 345; Alison Mawhinney, 'Coercion, Oaths and Conscience' in Frank Cramner and others (eds) *The Confluence of Law and Religion: interdisciplinary Reflections on the Work of Norman Doe* (CUP 2016) 209.
[125] Carolyn Evans, *Freedom of Religion* (OUP 2001) 102. According to Strong, Evans demonstrates that the 'absolute' right is 'circumscribed in many European cases', see S I Strong, 'Book Review: Evans C, Freedom of Religion Under the European Convention on Human Rights' (2002) 61 Cambridge Law Journal 477, 478.

b. Failure to Recognise the Relevance of the Forum Internum

A further criticism of the jurisprudence in the literature is that it fails to appreciate the way in which the *forum internum* and the *forum externum* are related, and thus to recognise the relevance of the *forum internum* in Article 9 complaints. Whilst there is such a distinction in theory, it is claimed, its application in practice is problematic because a 'neat distinction between the internal and external realm' is difficult to maintain.[126] C Evans, for instance, explained that according to the wording of Article 9 a 'distinction must be drawn between the general right to freedom of religion or belief and the right to manifest that religion or belief,'[127] and spoke of centrality of the *forum internum* and *forum externum* 'distinction', 'division' or 'dichotomy' in Article 9, but argued that the divide was not as self-evident in reality; in particular, she criticised Article 9 jurisprudence on the grounds that 'the distinction between belief and action is not as clear and simple as the cases suggest.'[128]

For C Evans the ECtHR failed to recognise, and reflect in its case law, the complex relationship between belief and action.[129] 'It is not clear,' she contended, 'that the first limb of Article 9 [i.e. the *forum internum*] simply becomes irrelevant once some manifestation is in question';[130] in some cases, limitations on manifestation may be so severe that they not only interfere with the *forum externum* but *also* the *forum internum* (a point which has been reiterated by later commentators[131]). In particular, she argued that there were some serious issues with the ECtHR's approach to complaints about being forced to act contrary to one's conscience, contending that in these cases both the *forum internum* and the *forum externum* may be engaged,[132] and criticised the ECtHR for its narrow focus on the question of whether manifestation had been legitimately limited by the State.

These arguments were later developed by Taylor who drew attention to the perceived problematic nature of the binary *forum internum* and *forum externum* distinction in the protection of Article 9 rights. Like C Evans, Taylor also argued that refusals to act contrary to one's religion or belief have been awkwardly 'shoehorned' into the category of manifestation by the ECtHR so that these complaints can be limited under Article 9.2. This, he contended, reflected the ECtHR's 'marked tendency to focus on the manifestation of belief to the exclusion of other aspects of

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[126] Carolyn Evans, *Freedom of Religion* (OUP 2001) 77.
[127] Ibid., 76.
[128] Ibid., 201.
[129] Ibid., 201.
[130] Ibid., 76.
[131] See Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, OUP 2013) 125.
[132] And she emphasises, it is 'not so easy to draw a line between external pressure inducing forcible change or inner belief and external pressure obliging action that runs counter to that inner belief', see Carolyn Evans, *Freedom of Religion* (OUP 2001) 72.

Article 9(1)'.[133] When faced with a 'binary choice between recognising the *forum internum* and characterising the applicant's position in some way, no matter how inappropriately, as a form of manifestation', the ECtHR, Taylor contends, has done the latter.[134]

ii. Poor *Forum Externum* Protection

In the literature, Article 9 is understood to focus on the 'individual right to develop and adhere to a religious identity'[135] rather than to outwardly manifest religion or belief. In other words, a distinction has been drawn between the 'private' *forum internum* and the 'public' *forum externum*, and whilst the *forum internum* is protected absolutely, it is held, the *forum internum* can be subject to limitations under Article 9.2.[136]

a. A Problematic Conceptual Distinction

It is argued that this conceptual distinction between the *forum internum* and the *forum externum* and the emphasis on the *forum internum,* suggests that States can limit manifestation of religion or belief 'without being seen to "undermine" or "undo" the right to freedom of religion itself.'[137] In other words, it is claimed that the distinction implies that regardless of restrictions in the *forum externum*, the *forum internum* remains untouched.

However, the idea that a 'line' can be drawn between the *forum internum* and *forum externum* is, it is increasingly argued in the literature, a problematic notion. There is a growing feeling amongst commentators that it is 'often hard to distinguish' between the *forum internum* and the *forum externum*,[138] contending that in practice, the distinction is 'elusive'[139] or blurry.[140] In strictly applying the *forum internum* and *forum externum* distinction in Article 9 complaints the ECtHR is failing, it is claimed, to adequately protect Article 9 rights, particularly the right to manifest religion or belief.

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[133] Paul Taylor, *Freedom of Religion* (CUP 2005) 127.
[134] Ibid., 199.
[135] Ronan McCrea, *Religion and the Public Order of the European Union* (OUP 2010) 10, 105.
[136] In the literature, *forum internum* and *forum externum* are sometimes used synonymous with the 'private sphere' and 'public sphere' respectively, see e.g. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engels 1993) 314.
[137] Pamela Slotte, ''What Is A Man If He Has Words But Has No Deeds?' Some Remarks on the European Convention on Human Rights' (2011) 11 Ars Disputandi 259, 268.
[138] Peter G Danchin and Lisa Forman, 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities' in Peter G Danchin and Elizabeth A Cole (eds) *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press 2002) 198.
[139] Nicolas Bratza, 'The "Precious Asset": Freedom of Religion under the European Convention on Human Rights' (2012) 14:2 Ecclesiastical Law Journal 256, 259.
[140] Lourdes Peroni, 'Deconstructing 'Legal' Religion in Strasbourg' (2014) 3:2 Oxford Journal of Law and Religion 235, 252.

An increasing number of commentators, particularly those taking an interdisciplinary approach,[141] argue that the *forum internum* and *forum externum* distinction is no longer a satisfactory paradigm for approaching the right to freedom of thought, conscience and religion because it separates the holding of a religion or belief from its manifestation in artificial way, arbitrarily privileging the former over the latter. Even Martínez-Torrón, who explains that 'the case law of Strasbourg emphasises that it is necessary to distinguish between the internal and external aspects of religious liberty,' has argued that the binary and hierarchical understanding of religion, which he believes is advanced by the ECtHR, 'is not the most desirable.' [142]

In 2001, C Evans observed that the Court chose the 'cerebral, internal and theological over the active, symbolic and moral dimensions of freedom of religion or belief'[143] but was undecided whether this was a conscious choice on the part of the ECtHR or simply an 'assumption about the nature of religion',[144] pointing out that the ECtHR did not justify its approach or demonstrate 'any awareness that this is anything but self-evident.'[145] A number of more recent commentators have been much more critical of the understanding of religion or belief they believe to be conveyed through the *forum internum* and *forum externum* distinction. Peroni, for instance, contends that the notion of 'legal' religion at the ECtHR, particularly the imagining of 'religion in terms of a binary opposition between belief and practice' — or between the *forum internum* and the *forum externum* — has led to the 'automatic privileging' of the *forum internum* over the *forum externum*.[146] This she claimed is evident from the ECtHR's emphasis on the *forum internum* as the primary realm[147] and is 're-affirmed in the Court's well-known principle that the protection of the *forum internum* is 'absolute and unqualified', whereas the *forum externum* can be subject to limitations.[148] A similar argument is made by Ferrari who

[141] Commentators are increasingly drawing on methodological approaches from fields such as philosophy and anthropology to critique the *forum internum* and *forum externum,* see e.g., Meadhbh McIvor, 'Carnal Exhibitions: Material Religion and the European Court of Human Rights' (2015) 17:1 Ecclesiastical Law Journal 3.
[142] Javier Martínez-Torrón, 'The (Un)protection of Individual Religious Identity in the Strasbourg Case Law' (2012) 1:2 Oxford Journal of Law and Religion 363, 363.
[143] Carolyn Evans, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Mark W Janis and Carolyn Evans (eds) *Religion in International Law* (Martinus Nijhoff Publishers 2004) 385, 396.
[144] This observation was, for Sanderson, 'most disturbing', see MA Sanderson, 'Book Review: Evans C, Freedom of Religion Under the European Convention on Human Rights' (2002) Modern Law Review 141, 141.
[145] Carolyn Evans, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Mark W Janis and Carolyn Evans (eds) *Religion in International Law* (Martinus Nijhoff Publishers 2004) 385, 396.
[146] Peroni claims that the ECtHR works on the basis that belief and action 'belong to two different and independent realms', see Lourdes Peroni, 'Deconstructing 'Legal' Religion in Strasbourg' (2014) 3:2 Oxford Journal of Law and Religion 235, 237.
[147] Ibid., 248. Peroni refers to the standard recital here; the standard recital is discussed in detail in Chapter Three of this thesis.
[148] Ibid., 237.

contends the *forum internum* and *forum externum* distinction 'erects an artificial boundary'[149] between different ways of conceiving and experiencing religion;'[150] he criticises the ECtHR for failing to justify why one is privileged over the other and for failing to recognise that belief and practice are 'mutually dependent' and 'cannot be neatly separated from each other.'[151] Kenny describes the *forum internum* and *forum externum* distinction as a 'fallacy of dualism' explaining that the complexity of the relationship between the *forum internum* and the *forum externum* 'makes it highly difficult to sustain the idea that a useful distinction can be made between the *forum internum* and *forum externum*'.[152]

On the whole, therefore, it is increasingly being claimed that it is a 'dubious proposition that religion can be neatly packaged' into belief and action;[153] more and more commentators are arguing that it is not possible for belief and action to be 'surgically kept apart' [154] in 'logic tight compartments'.[155] Indeed, Petty suggests the *forum internum* and *forum externum* distinction is an example of law as a literature of caricature.[156]

It is contended in the literature that the ECtHR's treatment of the *forum internum* and *forum externum* as 'separate entities', and its privileging of the former over the latter, has had a negative impact on the protection of the right to manifest religion or belief, notably that it has led to the emergence of a problematic spatial distinction between the public and private spheres, and to a problematic bias against certain forms of religion. These claims will be looked at in the following sections.

b. A Problematic Spatial Distinction

The conceptual distinction between the *forum internum* and *forum externum* in Article 9 has, commentators argue, facilitated,[157] or been definitive for, the emergence of a spatial distinction

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[149] Aaron R Petty, 'Religion, Conscience and Belief in the European Court of Human Rights' (2013) 48:4 The George Washington International Law Review 807, 833.
[150] Silvio Ferrari, 'Law and Religion in a Secular World: A European Perspective' (2012) 14:3 Ecclesiastical Law Journal 355, 367.
[151] Aaron R Petty, 'Religion, Conscience and Belief in the European Court of Human Rights' (2013) 48:4 The George Washington International Law Review 807, 833.
[152] Celia G Kenny, 'Public Space, Private Face: Veiling as a Challenge for Legal Reasoning' in Russell Sandberg, *Religion and Legal Pluralism* (Routledge 2015) 221, 223, 224.
[153] JES Fawcett, *The Application of the European Convention on Human Rights* (2nd edn, OUP 1987) 238-39; Gabriel Moens, 'The Action-Belief Dichotomy and Freedom of Religion' (1989) 12 Sydney Law Review 195; Donna J Sullivan, 'Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1988) 82:3 American Journal of International Law 487, 500-510.
[154] Iona Cismas, *Religious Actors in International Law* (OUP 2014), 29.
[155] Gabriel Moens, 'The Action-Belief Dichotomy and Freedom of Religion' (1989) 12 Sydney Law Review 195, 208.
[156] Aaron R Petty, 'Religion, Conscience and Belief in the European Court of Human Rights' (2013) 48:4 The George Washington International Law Review 807, 834.
[157] Peter Cumper and Tom Lewis, 'Taking Religion Seriously'? Human Rights and *Hijab* in Europe – Some Problems of Adjudication' (2008) 24 Journal of Law and Religion 599, 605.

between the public and private spheres, and lent 'weight to the privatisation of religion.'[158] The *forum internum* and *forum externum* distinction, with the emphasis on the private realm, is seen to have contributed to the 'hiving off' of religion to the private sphere,[159] so that religion remains 'behind closed doors rather than in public.'[160] It is believed that through the distinction the emphasis is on manifestation in private (i.e. in one's home or a religious building) rather than manifestation in public (i.e. in the street, in places of education or work)[161] and, as such, the former enjoys greater protection than the latter. When individuals cross the 'spatial divide',[162] from the private to the public sphere, it is believed that the State often intervenes to limit manifestation.

There is considerable literature on religion in the private and public spheres.[163] Much of the debate concerning religion in the public and private spheres tends to concentrate on broad questions of religion-state relations and associated issues of secularism and state neutrality.

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[158] See Peter Petkoff, '*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with Particular Reference to the Jurisprudence of the European Court of Human Rights' (2012) 7 Religion and Human Rights 183, 183; Peter Petkoff, 'Religious Symbols Between the *Forum Internum* and the *Forum Externum*' in Silvio Ferrari and Rinaldo Cristofori (eds) *Law and Religion in the 21st Century: Relations Between States and Religious Communities* (Ashgate 2010) 297, 302-4; Pamela Slotte, International Law and Freedom of Religion or Belief: Origins, Presuppositions and Structure of the Protection Framework' in Silvio Ferrari (ed) *Routledge Handbook of Law and Religion* (Routledge 2017) 111.

[159] Nadirsyah Hosen and Richard Mohr, *Law and Religion in Public Life: The Contemporary Debate* (Routledge 2011) 242.

[160] Alice Donald, Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for Optimism? (2013) 2:1 Oxford Journal of Law and Religion 50, 51.

[161] See T Jeremy Gunn, 'Religious Symbols and Religious Expression in the Public Square' in Derek H Davis (ed) *The Oxford Handbook of Church and State in the United States* (OUP 2010) 278-279. See also Pamela 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, 62.

[162] Pamela 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, 62.

[163] See e.g., Rajaji Gogineni and Lars Gule, 'Humanism and Freedom From Religion' in W Cole Durham Jr and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 705-707; Roger Trigg, *Religion in Public Life: Must Faith be Privatized?* (OUP 2009); Denise Meyerson, 'Why Religion Belongs in the Private Sphere, not the Public Square' in Peter Cane, Carolyn Evans and Zoe Robinson (eds) *Law and Religion in Theoretical and Historical Context* (CUP 2008); Nadirsyah Hosen and Richard Mohr, *Law and Religion in Public Life: The Contemporary Debate* (Routledge 2011); David Little, 'Religion, Human Rights and Public Reason: Protecting the Freedom of Religion or Belief' in John Witte and M Christian Green (eds) *Religion and Human Rights: An Introduction* (OUP 2011); Christopher McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (2011) 13:1 Ecclesiastical Law Journal 26; Dominic McGoldrick, 'Religion in the European Public Square and in European Public Life: Crucifixes in the Classroom? (2011) 11:3 Human Rights Law Review 451; Roger Trigg, 'Religion in the Public Forum' (2011) 13:3 Ecclesiastical Law Journal 274; Chiara Botticі and Benoit Challand, 'Islam and the Public Sphere: Public Reason or Public Imagination?' in Lorenzo Zucca and Camil Ungureanu (eds) *Law and State and Religion in the New Europe: Debates and Dilemmas* (CUP 2012); Susanna Mancini and Michel Rosenfeld, 'Unveiling the Limits of Tolerance: Comparing the Treatment of Majority and Minority Religious Symbols in the Public Sphere' in Lorenzo Zucca and Camil Ungureanu (eds) *Law and State and Religion in the New Europe: Debates and Dilemmas* (CUP 2012); Julie Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?' in Loreno Zucca and Camil Ungureanu (eds) *Law, State and Religion in New Europe: Debates and Dilemmas* (CUP 2012); Clarke E Cochran, *Religion in Public and Private Life* (Routledge 2015); Gila Stopler, 'Religion-State Relations and Their Effects on Human Rights: Nationalization, Authorization, and Privatization' (2017) 6:3 Oxford Journal of Law and Religion 474.

Whilst related, such discussions are often not directly relevant to the exploration of the understanding of *forum internum* and *forum externum* in Article 9 in this thesis and, as such, the analysis must be limited here.[164] The key point in the privatisation debate is that commentators often argue that the notion of a spatial divide between the private and the public sphere is not one which is readily apparent to believers, particularly for those for whom the display of religious clothing or symbols in public is central to their faith.[165]

The idea that religion or belief can be compartmentalised in such a way, or 'left at the door', when entering the public sphere,[166] is seen as deeply problematic. Adhar and Leigh, for instance, contend that believers 'may experience the world differently', i.e. without boundaries between private and public spheres.[167] They argue that such a distinction means individuals receive 'the contradictory message that society thinks it is important that they can believe what they choose, but it is not sufficiently important to be able to act on those beliefs,'[168] especially not in public.

c. A Problematic Bias

Related to this, it is claimed that the *forum internum* and *forum externum* distinction, leads to a bias at the ECtHR towards orthodoxy and against orthopraxy, i.e. towards doctrine and against practice.[169] It is argued that 'for the most part, religious faith [at the ECtHR] is understood as being analogous to various kinds of intellectual convictions';[170] it essentially about 'intellectual assent' and that actions based on religion or belief are somehow 'separate'.[171] Slotte explains that

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[164] Questions of religion–state relations and the notions of secularism and state neutrality will be discussed, where relevant to the understanding of the *forum internum* and the *forum externum*, in the analysis of the case law in Part II of this thesis.

[165] Petkoff, compares different approaches to ethnicity and race and to religion, see Peter Petkoff, 'Religious Symbols Between the *Forum Internum* and the *Forum Externum*' in Silvio Ferrari and Rinaldo Cristofori (eds) *Law and Religion in the 21st Century: Relations Between States and Religious Communities* (Ashgate 2010) 297, 299. See also Peter Cumper and Tom Lewis, 'Taking Religion Seriously'? Human Rights and *Hijab* in Europe – Some Problems of Adjudication' (2008) 24 Journal of Law and Religion 599, 606-7.

[166] For a discussion of this idea see, Mark Bell, 'Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace' (2017) 17:4 Human Rights Law Review 784.

[167] Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, OUP 2013), 125. Kenny explains that veiling is an issue which 'straddles' public and private spheres, see Celia G Kenny, 'Public Space, Private Face: Veiling as a Challenge for Legal Reasoning' in Russell Sandberg, *Religion and Legal Pluralism* (Routledge 2015) 217.

[168] Ibid. See also Pamela Slotte, 'What is a Man if he has Words but has no Deeds? Some Remarks on the European Convention on Human Rights' (2011) 11 Ars Disputandi 259.

[169] Lucy Vickers, 'The Relationship between Religious Diversity and Secular Models: An Equality Based Perspective' in Marie-Claire Foblets and others (eds) *Belief, Law and Politics: What Future for Secular Europe?* (Ashgate 2014) 124.

[170] Pamela Slotte, 'The Religious and the Secular in European Human Rights Discourse' in Jan Klabbers (ed) *Finnish Yearbook of International Law: Volume 21* (Bloomsbury 2010) 247. See also Carolyn Evans, *Freedom of Religion* (OUP 2001) 63, 75-76, 313.

[171] Danchin explains that the *forum internum* and *forum externum* distinction 'both constructs and reflects the idea of an inviolable inner realm separate from one's action', see Peter G Danchin, 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law' (2008) 49:2 Harvard International Law Journal 249, 263.

the *forum internum* and *forum externum* distinction presents us 'with an understanding of a religious person whose faith is an inner state of mind clearly distinguishable from manifestations of faith, such as rites and rituals, symbols, clothing, teaching or observance of certain food choices.'[172] This distinction is, for Trigg, an 'obnoxious' distinction because it does not reflect lived experience and contradicts the self-understanding of believers.[173]

Recently, it is being increasingly claimed that the structure of Article 9 disadvantages certain religions, particularly those which have an emphasis on manifestation. Indeed, in the literature the *forum internum* and *forum externum* distinction has been described as a 'biased and historically contingent' distinction which depends on '*a priori* assumptions.'[174] The ECtHR has been criticised for working with a 'pietistic',[175] largely Protestant Christian view of religion[176] and, as a result, for privileging Post-Reformation Protestant Christianity[177] 'which places more emphasis on the internal holding of faith than the outward display of it'.[178] It is contended that the ECtHR 'valorizes disembodied, autonomous, and private forms of religiosity, while side-lining embodied, habitual and public forms.'[179] The practical result of this structural bias is, it is claimed, that the ECtHR is more ready to protect 'voluntarist, private and individualist' forms of

[172] Pamela Slotte, 'The Religious and the Secular in European Human Rights Discourse' in Jan Klabbers (ed) *Finnish Yearbook of International Law: Volume 21* (Bloomsbury 2010) 249. See also, Pamela Slotte, 'International Law and Freedom of Religion or Belief: Origins, Presuppositions and Structure of the Protection Framework' in Silvio Ferrari (ed) *Routledge Handbook of Law and Religion* (Routledge 2017) 110-111.
[173] Roger Trigg, *Equality, Freedom and Religion* (OUP 2012) 100. Trigg argued that the distinction reflects a typically 'Protestant' understanding of religion as chiefly affecting the inner sanctum of an isolated individual', ibid. See also Daniel Hill and Daniel Whistler, *The Right to Wear Religious Symbols* (Palgrave 2013) 18.
[174] Aaron R Petty, 'Religion, Conscience and Belief in the European Court of Human Rights' (2013) 48:4 The George Washington International Law Review 807, 833, 835; See also Peter Cumper and Tom Lewis, 'Taking Religion Seriously'? Human Rights and *Hijab* in Europe – Some Problems of Adjudication' (2008) 24 Journal of Law and Religion 599, 605-606.
[175] Pamela Slotte, 'The Religious and the Secular in European Human Rights Discourse' in Jan Klabbers (ed) *Finnish Yearbook of International Law: Volume 21* (Bloomsbury 2010) 271. See also Carolyn Evans, *Freedom of Religion* (OUP 2001) 63, 75-76, 313.
[176] See e.g., Roger Trigg, *Equality, Freedom and Religion* (OUP 2012) 100; Ronan McCrea, 'Religion, Law and State in Contemporary Europe: Key Trends and Dilemmas' in Marie-Claire Foblets and others (eds) *Belief, Law and Politics: What future for a secular Europe?* (Ashgate 2014) 92.
[177] Michael J Perry, 'The Morality of Human Rights: A non-religious grounds' (2005) 27 Dublin University Law Journal 63, 66.
[178] Tom Lewis, 'What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation' (2007) 56 International and Comparative Law Quarterly 395 (relying on Peter W Edge and Graham Harvey (eds) *Law and Religion in Contemporary Society: Communities, Individualism and the State* (Ashgate Publishing Ltd 2000) 7-8). Cumper and Lewis explain that 'no surprise that human rights, with its origins in Enlightenment thought should place less value on the outward manifestation of religious belief than the internal holding of such belief,' ibid. See also the discussion of justification by faith alone in GR Elton, *Reformation Europe 1517-1559* (Fontana 1963) 47-9; Patrick Collinson, *Reformation* (Weidenfeld and Nicolson 2005) 155-171.
[179] Lourdes Peroni, 'Deconstructing 'Legal' Religion in Strasbourg' (2014) 3:2 Oxford Journal of Law and Religion 235, 237.

belief[180] rather than forms which are communitarian or organisational in orientation'[181] (and thus, it is less likely to protect the manifestation of religion or belief in the public sphere).[182]

As such, minority beliefs, especially those which place particular emphasis on external manifestation, ritual rather than intellectual assent[183] and on material objects,[184] are, it is claimed, 'relegated to second place.'[185] The ECtHR is seen as being 'unsympathetic to non-Christians,'[186] indeed commentators have argued that it is more difficult for 'fringe' or New Religious Movements (NRMs) to get protection.[187] And, Danchin, for instance, has argued that 'by subsuming or tacitly incorporating Christian or post-Christian norms into the meaning and scope of Article 9' the ECtHR 'has placed in jeopardy and marginalised the religious freedom claims of Muslim (and other religious) communities.'[188] This has been reiterated more recently by Berry[189]

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[180] Malcolm D Evans, 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions' in Peter Cane, Carolyn Evans and Zoe Robinson (eds) *Law and Religion in Theoretical and Historical Context* (CUP 2008) 313-314. See also Carolyn Evans, *Freedom of Religion* (OUP 2001) 63, 75-76, 313; Pamela Slotte, 'The Religious and the Secular in European Human Rights Discourse' in Jan Klabbers (ed) *Finnish Yearbook of International Law: Volume 21* (Bloomsbury 2010) 271.

[181] Malcolm D Evans, 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions' in Peter Cane, Carolyn Evans and Zoe Robinson (eds) *Law and Religion in Theoretical and Historical Context* (CUP 2008) 313-314. See also McIvor who describes religion at the ECtHR as 'private, voluntary, individual, textual and believed', see Meadhbh McIvor, 'Carnal Exhibitions: Material Religion and the European Court of Human Rights' (2015) 17:1 Ecclesiastical Law Journal 3, 4 (citing Winnifred Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 5).

[182] See Peter Cumper and Tom Lewis, 'Taking Religion Seriously'? Human Rights and *Hijab* in Europe – Some Problems of Adjudication' (2008) 24 Journal of Law and Religion 599.

[183] Malcolm D Evans, 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions' in Peter Cane, Carolyn Evans and Zoe Robinson (eds) *Law and Religion in Theoretical and Historical Context* (CUP 2008) 313-314.

[184] McIvor argues that 'Article 9's inbuilt privileging of the *forum internum* over the manifestation of religion or belief seems to have made it difficult for the Court to protect objects used for religious purposes', see Meadhbh McIvor, 'Carnal Exhibitions: Material Religion and the European Court of Human Rights' (2015) 17:1 Ecclesiastical Law Journal 3, 12. See also Sylvie Bacquet, 'Religious Symbols and the Making of Contemporary Religious Identities' in Russell Sandberg (ed) *Religion and Legal Pluralism* (Routledge 2016).

[185] Berry, for instance, claims that secular and Christian beliefs are prioritised by the ECtHR over minority beliefs, see Stephanie Berry, 'A 'Good Faith' Interpretation of the Right to Manifest Religion? The Diverging Approaches of the European Court of Human Rights and the UN Human Rights Committee' (2017) 37:4 Legal Studies 672, 673.

[186] Aaron R Petty, 'Religion, Conscience and Belief in the European Court of Human Rights' (2013) 48:4 The George Washington International Law Review 807, 825.

[187] M Evans argues that it is 'more difficult' for '"fringe" religions or NRMs to benefit from human rights protection than it is for more mainstream religious traditions to do so', see Malcolm D Evans, 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions' in Peter Cane, Carolyn Evans and Zoe Robinson (eds) *Law and Religion in Theoretical and Historical Context* (CUP 2008) 313-314. See also Malcolm D Evans and Peter Petkoff, 'A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights' (2008) 36 Religion, State and Society 205, 214.

[188] Peter G Danchin, 'Islam and the Secular Nomos of the ECtHR' (2011) 32:4 Michigan Journal of International Law 663, 663-747. See also 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* (CUP 2012), 332-333.

[189] Stephanie Berry, 'A 'Good Faith' Interpretation of the Right to Manifest Religion? The Diverging Approaches of the European Court of Human Rights and the UN Human Rights Committee' (2017) 37:4 Legal Studies 672, 688.

and by Gunn[190] in their analyses of the ECtHR's approach in French and Turkish headscarf cases in particular.

iii. Incoherent and Inconsistent Jurisprudence

Both C Evans and Taylor have argued that the protection of Article 9 is incoherent and inconsistent.[191] Indeed, it is the thesis of C Evans' monograph.[192] Later commentators have continued in this vein.[193] In terms of the *forum internum,* for instance, commentators have criticised the ECtHR for its 'confused' approach of offering absolute protection to *forum internum* rights in some cases, but in other similar cases, inappropriately treating *forum internum* rights as *forum externum* rights and considering the legitimacy of interference under Article 9.2.[194] And the Grand Chamber has been criticised for 'ignoring' *forum internum* complaints (even when a violation of Article 9 has been found by the Chamber) by focusing on complaints under different ECHR articles in its judgment.[195]

In terms of the *forum externum*, particularly the right to manifest religion or belief, commentators have argued that the ECtHR's approach is haphazard and unpredictable because in some cases it offers very strong protection against interference but in other, similar cases, even cases of the same 'type' (for instance 'religious clothing cases') it has not found interference with or a violation of Article 9.[196] In respect of religious symbols, for instance, Ronchi claims that

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[190] T Jeremy Gunn, '"Principle of Secularism" and the European Court of Human Rights: A Shell Game' in Jeroen Temperman, T Jeremy Gunn and Malcolm D Evans, *The European Court of Human Rights and Freedom of Religion or Belief: The 25 Years Since Kokkinakis* (Brill 2019).

[191] Carolyn Evans, *Freedom of Religion* (OUP 2001) throughout especially 1, 73-74, 200; Paul Taylor, *Freedom of Religion* (CUP 2005) e.g., 117, 345. Taylor does concede that in conscientious objection cases this might have 'less to do with intellectual sloppiness' and more to do with concern that if absolute protection was offered against objections, then it would not be possible for the State to interfere at all, see T Jeremy Gunn, 'Book Review: Taylor P, Freedom of Religion: UN and European Human Rights Law and Practice' (2008) 23 Journal of Law and Religion 101, 103.

[192] Carolyn Evans, *Freedom of Religion* (OUP 2001) 1.

[193] See e.g., Merlin Kiviorg, 'Religious Autonomy in the ECHR' (2009) 4 Derecho y Religion 131, 131; Alison Mawhinney, 'Coercion, Oaths and Conscience' in Frank Cramner and others (eds) *The Confluence of Law and Religion: interdisciplinary Reflections on the Work of Norman Doe* (CUP 2016) 205, 209. See also 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, 339.

[194] See e.g., Alison Mahwinney, 'Coercion, Oaths and Conscience' in Frank Cramner and others (eds) *The Confluence of Law and Religion: interdisciplinary Reflections on the Work of Norman Doe* (CUP 2016).

[195] See e.g., Jeroen Temperman, '*Lautsi II:* A Lesson in Burying Fundamental Children's Rights' (2011) 6 Religion and Human Rights 279.

[196] Some attempts have been made at reconciling cases, see for instance, Teresa Sanader, 'Religious Symbols and Garments in Public Places – a Theory for the Understanding of *SAS v France*' (2015) 9 Vienna Journal on International Constitutional Law 186; Kristin Henrard, 'How the European Court of Human Rights' Concern Regarding European Consensus Tempers Effective Protection of Freedom of Religion' (2012) 4:3 Oxford Journal of Law and Religion 398, 431.

there is an 'incoherent approach of double standards'[197] at the ECtHR and Petkoff argues that the jurisprudence is 'not terribly consistent.'[198]

In working with the notion that there is a strict, binary and hierarchical distinction between the *forum internum* and the *forum externum* commentators have struggled to reconcile these ostensibly contradictory outcomes. Some suggestions made by commentators to improve the protection of Article 9 will be examined in the next section.

iv. Suggestions made by Commentators

The criticisms brought against the *forum internum* and *forum externum* distinction by commentators are deeply troubling because these criticisms relate to very real issues in terms of the practical protection of the right to freedom of thought, conscience and religion by the ECtHR, not just to academic concern for consistency and coherence in the jurisprudence. Numerous suggestions have, however, been made by commentators to address the problems they have identified in order to improve the understanding and protection of Article 9.

a. Clarify and Rigorously Apply the Distinction

Commentators who highlight problems with the application of the *forum internum* and *forum externum* distinction often call for the ECtHR to more precisely delineate the scope of the *forum internum* and *forum externum*[199] because, they argue, this would encourage better and more consistent Article 9 protection. C Evans, for instance, called for the ECtHR to develop a more sophisticated definition of the meaning and scope of the *forum internum*, to offer clarification regarding the ways in which the *forum internum* could be interfered with,[200] and to take 'the claims of applicants more seriously' especially when complaints relate to the *forum internum*.[201] More recently, Mawhinney argued that the ECtHR needs to apply the distinction between the *forum internum* and *forum externum* more conscientiously and have 'greater respect for the structure of the right'.[202] In an effort to address this 'problem' in the jurisprudence, commentators have drawn up their own 'lists' of rights which fall into the *forum internum* and the *forum*

[197] Paolo Ronchi, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*' (2011) 13:3 Ecclesiastical Law Journal 287, 296-297.
[198] Peter Petkoff, 'Religious Symbols Between the *Forum Internum* and the *Forum Externum*' in Silvio Ferrari and Rinaldo Cristofori (eds) *Law and Religion in the 21st Century: Relations Between States and Religious Communities* (Ashgate 2010) 297, 300.
[199] Carolyn Evans, *Freedom of Religion* (OUP 2001) 205.
[200] Ibid.
[201] Ibid.
[202] Alison Mahwinney, 'Coercion, Oaths and Conscience' in Frank Cramner and others (eds) *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe* (CUP 2016), 217.

externum, but such lists remain largely idiosyncratic, created on the basis of what commentators think ought to fall into the *forum internum* or *forum externum.*[203]

b. Seek Forum Internum Protection Under Other ECHR Articles

Other commentators have been less optimistic about improving protection under Article 9 and have suggested looking elsewhere for *forum internum* protection. Taylor, writing in 2005, argued that it was 'notoriously difficult' for applicants to claim that *forum internum* rights had been violated under Article 9, contending that this was evidenced by 'no claim ever succeeding Article 9 before the ECtHR.[204] To address the problem of the ECtHR continually 'shoehorning' complaints concerning direct *forum internum* interference into the category of manifestation (or in other words, treating *forum internum* complaints as *forum externum* complaints) Taylor suggested that it was 'necessary to consider a parallel means of protection when *forum internum* rights are at issue.'[205] Relying on the ECtHR's approach in *Thlimmenos v Greece*,[206] which he considered to be a 'significant landmark',[207] Taylor argued that protection of *forum internum* rights could be improved by using the right to freedom from discrimination under Article 14 in conjunction with Article 9. This, he suggested, provied 'a useful basis on which to defend against interference with *forum internum*, without having to artificially establish an eligible form of manifestation' (in order to gain protection under Article 9).[208]

c. Emphasise the Forum Internum and Forum Externum Relationship

Commentators who have advanced a more conceptual critique — concerning the very existence of a *forum internum* and *forum externum* distinction (and the implications of this) in Article 9 — have been less forthcoming with practical recommendations to address the problems in the jurisprudence. Generally speaking, when suggestions for improvements have been offered, these are limited to calls to move away from understanding the *forum internum* and *forum externum* distinction as binary and hierarchical one, to a more relational understanding of the *forum internum* and *forum externum* in Article 9. Cismas, for instance, argues that the *forum internum* and the *forum externum* should be understood as 'inherently interlinked'.[209] And Petkoff, argues

[203] Taylor argues for an enlarged *forum internum* and identifies a number of rights in what he calls the 'residual scope' of the *forum internum,* see Paul Taylor, *Freedom of Religion* (CUP 2005) 115.
[204] Ibid., 201.
[205] Ibid.
[206] In this case the ECtHR found a violation of Article 14 in respect of an accountant who was barred from the profession due to a previous conviction for refusing to perform military service. The ECtHR observed in the *obiter dicta* that his refusal to perform military service could be construed as a manifestation of religion or belief under Article 9, see *Thlimmenos v Greece* ECHR 2000-IV 263.
[207] Paul Taylor, *Freedom of Religion* (CUP 2005) 201.
[208] Ibid.
[209] Iona Cismas, *Religious Actors in International Law* (OUP 2014) 29.

that rather than two distinct realms, the *forum internum* and *forum externum* in Article 9 should be understood, as they were, and continue to be understood in canon law, as two interrelated elements, in a 'dialogical relationship'.[210] However, these commentators have stopped short of showing *how* this would or could work in practice at the ECtHR.

v. Reflecting on the Suggestions

The main problem with the suggestions that have been made in the literature so far is that commentators tend to only address the issues which they themselves have highlighted. To date, no commentator has offered a way forward which addresses a significant number of the serious issues raised in respect of the understanding of the right to freedom of thought, conscience and religion and the protection of this right by the ECtHR. Furthermore, the criticisms and recommendations made by commentators all tend to be rooted in the idea that the *forum internum* and *forum externum* distinction is central to Article 9; they argue either that i) it is not as central as it should be or ii) it should not be as central as it is. They seem to be constrained by the perceived centrality of the notion of a clear binary and hierarchical distinction between the *forum internum* and *forum externum* and have held back from asking more radical questions about the *forum internum* and *forum externum* in the right to freedom of thought, conscience and religion.

D. Evaluating the Literature: Limitations and Gaps

This thesis seeks to step back from the traditional understanding of the centrality of this distinction to interrogate the conceptual framework and ask radical questions about the *forum internum* and *forum externum* dichotomy in Article 9. In doing so, the following section asks firstly, *how* the notion of a distinction between the *forum internum* and the *forum externum* evolved in the literature, secondly, *why* it is now so embedded in it, and lastly, examines the evidentiary basis for claims made about the centrality and problematic nature of this distinction. This section, therefore, begins the task of unpicking the assumptions by critiquing the literature.

[210] Peter Petkoff, '*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with Particular Reference to the Jurisprudence of the European Court of Human Rights' (2012) 7 Religion and Human Rights 183, 183. See also Peter Petkoff, 'Religious Symbols Between the *Forum Internum* and the *Forum Externum*' in Silvio Ferrari and Rinaldo Cristofori (eds) *Law and Religion in the 21st Century: Relations Between States and Religious Communities* (Ashgate 2010) 297, 298.

i. The Evolution of the Traditional Approach to the Right to Freedom of Thought, Conscience and Religion

Given the way in which the *forum internum* and *forum externum* distinction has been presented as longstanding distinction, it may come as a surprise that the notion of a distinction between the internal and external realms, particularly as expressed through the language of the *forum internum* and the *forum externum* has not been always been a central feature of the literature relating to the right to freedom of thought, conscience and religion. Rather, this is a notion that has gained traction over time, only becoming central to discussions of Article 9 after the turn of the century.

a. Literature Relating to UN Instruments

There were few references to the *forum internum* or *forum externum* (or the notion of a distinction) in the literature relating generally to UN instruments published before the turn of the century, and this remains largely the trend today[211] (with a few exceptions).[212] In literature relating specifically to freedom of religion or belief provisions in UN instruments, there were also few references to the *forum internum* and *forum externum* distinction in early texts, but since the 2000s there has been a significant increase in the number of references to the terms, and the notion of a distinction, in literature relating specifically to Article 18 of the UDHR and the ICCPR.[213] Much of this literature, however, post-dates the emergence of the notion of a distinction in the material relating to the right to freedom of thought, conscience and religion in

[211] There are no references in the following texts: R Lillich, *Human Rights Instruments* (William S Hein & Company 1983); Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engels 2005); Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd edn, OUP 2005); Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (OUP 2005); Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (OUP 2010); Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (1st edn, CUP 2010); Sarah Joseph and Adam McBeth (eds) *Research Handbook on International Human Rights Law* (Edward Elgar 2010); Conor Gearty (ed), *The Cambridge Companion to Human Rights Law* (CUP 2012); Phillip Alston and Ryan Goodman, *International Human Rights* (OUP 2012); Michael Haas, *International Human Rights: A Comprehensive Introduction* (2nd edn, Routledge 2013);
Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd edn, OUP 2005); Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd edn, OUP 2005); Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd edn, OUP 2014); Rhona KM Smith, *Textbook on International Human Rights* (7th edn, OUP 2015); United Nations, *Universal Declaration of Human Rights* (CreateSpace 2016).

[212] The exceptions include: Daniel Moeckli and others (eds), *International Human Rights Law* (1st edn, OUP 2010) 264; Daniel Moeckli and others (eds), *International Human Rights Law* (2nd edn, OUP 2014) 223.

[213] See e.g., Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016).

ECHR Article 9 and tends to project it backwards into these instruments.[214] A similar pattern is also seen in material relating generally to the ECHR.

b. Literature Relating Generally to the ECHR

In literature relating generally to the ECHR published before the turn of the century, there were very few references to the terms *forum internum* and *forum externum* or to the notion of a strict distinction between the internal and external realms in the right to freedom of religion or belief.[215] Commentators tended speak more loosely of the guarantees under Article 9 instead;[216] for instance by simply noting that Article 9 recognises the right to freedom of thought and conscience, the right to change, and the right to manifest religion or belief.[217] However, there has been a steadily growing number of references to the *forum internum* and *forum externum*, and the notion of a distinction, in discussions of Article 9 in general literature relating to ECHR in recent years.[218] Again, however, much of this material post-dates the emergence of the distinction in literature relating specifically to Article 9, and commentators have tended to project this distinction backwards into Article 9 in general commentaries on the ECHR as a result.

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[214] When there are references to jurisprudence ECtHR cases rather than Human Rights Committee (HRC) decisions are cited, see e.g, Daniel Moeckli and others (eds) *International Human Rights Law* (2nd edn, OUP 2014) 223.

[215] There are no references in the following texts: Peter van Dijk and Fried van Hoof (eds) *Theory and Practice of the European Convention on Human Rights* (2nd edn, Intersentia 1990); Donna Gomien, *Short Guide to the European Convention on Human Rights* (Council of Europe 1991); D Harris, M O'Boyle and C Warbrick, *European Convention on Human Rights* (LexisNexis 1994); D Harris and others, *Law of the European Convention on Human Rights* (1st edn, Butterworths 1995); Bahiyyih G Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff Publishers 1996); D Gomien, D Harris and L Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe 1996); Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (Sweet and Maxwell 1998); Peter van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, Intersentia 1998).
There are some references in the following texts: D Gomien, D Harris and L Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe 1996) 266; Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (Sweet and Maxwell 1998) 344.

[216] There are no references in the following texts: Mark W Janis, Richard S Kay and Anthony W Bradley, *European Human Rights Law: Text and Materials* (3rd edn, OUP 2008); D Harris and others, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009); Alistair Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (OUP 2012); Eva Brems and Janneke Gerards (eds) *Shaping Rights in the ECHR* (CUP 2015).

[217] See e.g. William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 420.

[218] There is a small section entitled, 'Protection of the *forum internum'* in Peter van Dijk and others, *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 752. Reference is made to 'two aspects' in Clare Ovey and Robin CA White, *Jacobs & White: The European Convention on Human Rights* (4th edn, OUP 2006) 412; Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) 412; Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (7th edn, OUP 2017) 456, 457.

c. Literature Relating Specifically to ECHR Article 9

Generally speaking, the terms *forum internum* and *forum externum* were absent[219] or used infrequently in specialist texts relating to Article 9 before the turn of the century.[220] This early literature tended to speak more loosely about the guarantees under Article 9, rather than juxtapose the *forum internum* and *forum externum*. M Evans, for instance, in *Religious Liberty and International Law* did not draw a clear distinction between the *forum internum* and *forum externum*, or between believing and manifesting.[221] In his discussion of Article 9, the *forum internum* appears once, in a citation of *C v The United Kingdom*, in which M Evans explains that the statement that 'Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*' had become a 'standard recital' in the jurisprudence.[222] Notably, the term *forum externum* is not used at all in relation to Article 9; M Evans speaks rather of the right to manifest or of manifestation.

The real catalyst for the use of the *forum internum* and *forum externum* to describe two distinctive elements of the right to freedom of thought, conscience and religion in Article 9 was C Evans' *Freedom of Religion under the European Convention on Human Rights*.[223] Whilst she was not the first to use these terms together in the literature on freedom of religion,[224] she was the first to use it in relation to Article 9, to do so frequently and invest it with such significance. In her monograph, she refers to the *forum internum* over fifty times, and although she only used the term *forum externum* twice,[225] she frequently juxtaposed the *forum internum* with the manifestation of religion or belief.

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[219] There are no references in the following texts: Peter van Dijk and Fried van Hoof (eds) *Theory and Practice of the European Convention on Human Rights* (1st edn, Intersentia 1984); Donna Gomien, *Short Guide to the European Convention on Human Rights* (Council of Europe 1991); Peter van Dijk and Fried van Hoof (eds) *Theory and Practice of the European Convention on Human Rights* (2nd edn, Intersentia 1990); D Harris, M O'Boyle and C Warbrick, *European Convention on Human Rights* (LexisNexis 1994). This may be a reflection of the fact that the first Article 9 violation was not found until 1993, see *Kokkinakis v Greece* (1993) Series A no 260-A.

[220] There are a few references in the following texts: Malcolm D Evans, *Religious Liberty* (CUP 1997) 294-298, 303-304, 317, ; B Labuschagne, 'Religious Freedom and Newly-Established Religions in Dutch Law' (1997) 44 Netherlands International Law Review 168, 173-5; Bahia Tahzib-Lie, 'The European Definition of Religion or Belief' (1998) 9 Helsinki Monitor 17, 17, 19, 21; Javier Martínez-Torrón and Rafael Navarro-Valls, 'The Protection of Religious Freedom in the System of the European Convention on Human Rights' (1998) 3 Helsinki Monitor 25, 31; Natan Lerner, *Religion, Beliefs and International Human Rights* (Orbis Books 2000) 44.

[221] Malcolm D Evans, *Religious Liberty* (CUP 1997).

[222] Ibid., 294-298, 299-314, 317.

[223] Carolyn Evans, *Freedom of Religion* (OUP 2001).

[224] Tazhib was the first to draw a distinction between the *forum internum* and *forum externum* in relation to Article 18 of the UDHR explaining that the first 'prong' concerns the *forum internum* and the second 'prong' the *forum externum*, see Bahiyyih G Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff Publishers 1996) 73. For references to the *forum internum* see also Carolyn Evans, *Freedom of Religion* (OUP 2001) 25, 73, 452, 87-88, 121, 149, 169, 447, 452, 484, 486.

[225] Carolyn Evans, *Freedom of Religion* (OUP 2001) 72, 76.

The impact of the way in which C Evans presented the *forum internum* and the *forum externum,* and popularised the terms, is difficult to overemphasise; her work seems to have heavily influenced not only commentary on Article 9 but also that relating to UDHR Article 18 and ICCPR Article 18 too. Indeed, recognising this turning point in the literature, seems to account for the striking similarities in terms of the presentation of UDHR Article 18, ICCPR Article 18 and ECHR Article 9 in the literature after 2001.

Following this publication, the number of references to the *forum internum* and *externum* to describe the distinction between holding and manifesting religion or belief grew exponentially in discussions relating to the right to freedom of thought, conscience and religion in Article 9. In Taylor's *Freedom of Religion: UN and European Human Rights Law and Practice*, in which there is an extended treatment of Article 9, there are numerous references to the distinction; in fact, there are over seventy references to the *forum internum* and two references to the *forum externum* (the latter, both times in juxtaposition with the *forum internum*) as he too prefers to speak of manifestation instead.[226] And, the notion of a distinction between the *forum internum* and *forum externum* has also become a prevalent feature in practitioner material specifically on the right to freedom of thought, conscience and religion in Article 9;[227] notably, the *forum internum* and *forum externum* aspects of Article 9 are now often addressed in separate chapters[228] or sections.[229]

This chronological analysis is informative because it shows that the use of the language of the *forum internum* and *forum externum* (and the notion of a distinction) has increased significantly over a relatively short period of time in relation to Article 9. It is, therefore, hardly a 'classic' approach and as such, it seems odd to locate its origins in the drafting and architecture of provisions relating to freedom of thought, conscience and religion.

This analysis is also useful in revealing that the *distinctiveness* of the realms has been increasingly stressed over time. In juxtaposing, or contrasting, the *forum internum* and the *forum externum* commentators have brought into sharper focus a *difference* between these two realms. It is striking to note how, as the number of references to the *forum internum* and *forum externum* have increased, the language associated with these terms has changed significantly to emphasise their separateness and distinctiveness.

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[226] Paul Taylor, *Freedom of Religion* (CUP 2005) 19, 344.
[227] James Dingemans and others, *The Protections for Religious Rights: Law and Practice* (OUP 2013) 81.
[228] E.g. Carolyn Evans, *Freedom of Religion* (OUP 2001); Paul Taylor, *Freedom of Religion* (CUP 2005).
[229] E.g. Malcolm D Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Council of Europe/Martinus Nijhoff 2009) 8-9; Jim 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) 12-15; Jim Murdoch, *Freedom of Thought, Conscience and Religion: A Guide to the Implementation of Article 9 of the European Convention on Human Rights* (2nd edn, Council of Europe 2012) 12-15.

Writing in 1997, M Evans commented that although 'separate' the *forum internum* and the external realm of manifestation are 'intimately connected'.[230] Over time, however, any sense that these realms are connected has almost disappeared in the literature relating to this right. Commentators are now increasingly describing a 'clear and sharp distinction',[231] 'a dichotomy',[232] or a 'binary opposition'[233] between the *forum internum* and *forum externum* in the architecture of Article 9 and it is a claimed that there a 'wall of separation' between the *forum internum* and the *forum externum* in Article 9 jurisprudence.[234] It is held that the 'difference' between the *forum internum* and the *forum externum* is 'well-acknowledged' at Strasbourg[235] and that the ECtHR has drawn a line between these two spheres[236] or more emphatically, 'a substantial dividing line between freedom of religion (internal conviction, inner sphere) and freedom to manifest one's religion in the public sphere (the expression of that conviction).' [237] This context is significant because it is against this background that commentators, in recent years, have argued that the ECtHR *should* recognise the relationship between the *forum internum* and *forum externum*.[238]

The emphasis on the distinctiveness of these realms goes hand in hand with the increased use of the terms *forum internum* and *forum externum* as synonyms for absolute and qualified protection, respectively, in the literature. This elision of ideas seems to be an important part of the

[230] Malcolm D Evans, *Religious Liberty* (CUP 1997) 203. M Evans attempted to distinguish between 'active' and 'passive' rights but noted that even such a distinction was 'blunted' because some rights had active and passive dimensions, see ibid. See also Malcolm D Evans, 'The Freedom of Religion or Belief and the Freedom of Expression' (2009) 4:2 Religion and Human Rights 197, 203.
[231] Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016) 566.
[232] Aaron R Petty, 'Religion, Conscience and Belief in the European Court of Human Rights' (2013) 48:4 The George Washington International Law Review 807, 832
[233] Lourdes Peroni, 'Deconstructing 'Legal' Religion in Strasbourg' (2014) 3:2 Oxford Journal of Law and Religion 23, 236.
[234] Peter Petkoff, '*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with Particular Reference to the Jurisprudence of the European Court of Human Rights' (2012) 7 Religion and Human Rights 183, 203 213.
[235] Peter G Danchin and Lisa Forman, 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities' in Peter G Danchin and Elizabeth A Cole (eds) *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press 2002) 198.
[236] Peter van Dijk and Fried van Hoof (eds) *Theory and Practice of the European Convention on Human Rights* (1st edn, Intersentia 1984) 298; Peter G Danchin and Lisa Forman, 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities' in Peter G Danchin and Elizabeth A Cole (eds) *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press 2002) 198.
[237] Françoise Tulkens, 'Freedom of Religion under the European Court of Human Rights: A Precious Asset' [2014] Brigham Young University Law Review 509, 511.
[238] Cf. Peter Petkoff, '*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with Particular Reference to the Jurisprudence of the European Court of Human Rights' (2012) 7 Religion and Human Rights 183.

development of these terms; the *forum internum* and *forum externum* are to be sharply distinguished *because* they represent different levels of legal protection.[239]

ii. Intertextual Reliance

It must be pointed out that this thesis recognises that it is not *in itself* problematic for a concept to gain currency over time. However, what is problematic about the *forum internum* and *forum externum* distinction is the *way* this notion has become so deeply embedded in the literature on Article 9, and the way the distinctiveness of the realms has been emphasised, over time. What is immediately striking from a close analysis of the statements made regarding the *forum internum* and *forum externum* distinction in the literature relating to Article 9 is the lack of evidence provided for claims made and extent of intertextual reliance. It is typical for commentators to simply assert that there is a fundamental distinction between the *forum internum* and the *forum externum* in the structure of this article without providing any evidence to support such claims. When evidence is provided, commentators usually cite one or two earlier commentators who have referred to these realms or made claims about a distinction,[240] rather than engage text of the articles, the relevant *travaux préparatoires* or the case law for themselves.

The distinction has been and continues to be largely reinforced through intertextual reliance on the seminal texts by C Evans and Taylor. Statements made by C Evans and Taylor, relating to the centrality of the *forum internum* and *forum externum* distinction and the problematic nature of the distinction, have largely been accepted as accurate by later commentators; it has been taken as the 'final word' on the topic.

On the whole, the analysis of the case law and the conclusions drawn by these early commentators were not challenged at the time, or more importantly, have not been comprehensively reviewed in light of the significant developments in Article 9 case law over the past decade. This is concerning because C Evans and Taylor did not engage closely with the structure of ECHR Article 9 or the related *travaux préparatoires* relating to this article to support their claims about the centrality of the *forum internum* and *forum externum* distinction. And, the ECtHR case law referred to in these seminal texts in respect of the *forum internum* and *forum*

[239] A similar elision can be seen when the terms *forum internum* and *forum externum* are used synonymously with the private and public sphere, respectively.

[240] In the *Law of the European Convention on Human Rights*, for example, Harris *et al*. cite just one case and rely on statements made by M Evans and C Evans, and even goes as far back as Gomien's first publication on the ECHR, to support the claim that there are two dimensions under Article 9. See D Harris and others, *Harris O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 594, footnotes 30-36.

externum distinction is very limited, both in terms of the number of cases cited and the analysis of the distinction within the cases.[241]

In the rare instances in which later commentators refer to ECtHR case law to support claims made about the *forum internum* and *forum externum* distinction in Article 9 a reference to the case of *C v The United Kingdom*[242] is usually the extent of the evidence provided.[243] This is typically a passing reference in a footnote; commentators do not examine *how* the *forum internum* was used in that case or demonstrate how it supports the claim that there is a clear distinction between the internal and external realm in Article 9, or that it is central to the ECtHR's jurisprudence on Article 9. Reliance on a single case is deeply problematic, of course, because it provides almost no support for generalisations.[244]

Moreover, criticisms of the *forum internum* and *forum externum* distinction by recent commentators tend to unquestioningly build on the claims in the earlier literature relating to the application of the distinction,[245] adding to this material a largely conceptual critique of the *forum internum* and *forum externum* distinction which tends to float free of the case law.[246] The implication from the literature is that the *forum internum* and *forum externum* distinction is such a clear and established legal principle that it needs little explication. It seems to be a notion that has been referred to so often that it has become a dogma which no one thinks to question.[247] Indeed, M Evans has recently noted, with some scepticism, that 'few elements of the Article 9 framework seem to be more settled than the distinction between the…*forum internum*…and the *forum externum*'.[248]

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[241] See Carolyn Evans, *Freedom of Religion* (OUP 2001) 76. She refers to *C v The United Kingdom* as an example of the standard recital, and refers back to Tazhib, who in turn relied on Lillich to support the claim that the *forum internum* is a term used in relation to UN treaties dealing with freedom of religion, see Carolyn Evans, *Freedom of Religion* (OUP 2001) 82. Taylor offers no evidence for claim regarding the division in the architecture & legal protection of the realms, see Paul Taylor, *Freedom of Religion* (CUP 2005), 19.
[242] *C v The United Kingdom* (1983) 37 DR 142.
[243] See e.g., Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011) 57; Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, OUP 2013) 100 footnote 9; Javier Martínez-Torrón, 'The European Court of Human Rights and Religion' in Richard O'Dair and Andrew Lewis (eds) *Law and Religion: Current Legal Issues 2001 Volume 4* (OUP 2001) 198, footnote 39.
[244] M Evans is an exception in the literature in that he cites six (out of a possible nine cases between 1983-1996) to support the claim that it is a 'standard recital', see Malcolm D Evans, *Religious Liberty* (CUP 1997) 294 footnote 61.
[245] See e.g., Alison Mahwinney, 'Coercion, Oaths and Conscience' in Frank Cramner and others (eds) *The Confluence of Law and Religion: interdisciplinary Reflections on the Work of Norman Doe* (CUP 2016).
[246] The same pattern is seen in specialist literature relating to the UN instruments. And commentators usually reference ECtHR jurisprudence rather than HRC decisions, see for instance, Daniel Moeckli and others (eds), *International Human Rights Law* (2nd edn, OUP 2014) 223.
[247] Hong and Provost comment that for lawyers the 'erection of such intellectual scaffoldings presents a largely irresistible urge…' see Caylee Hong and René Provost, 'Let us Compare Mythologies' in Rene Provost (ed) Mapping the Boundaries of Legal Religion: Religion and Multiculturalism from Israel to Canada (OUP 2014) 1-21, 2.
[248] Malcolm D Evans, 'The Freedom of Religion or Belief in the ECHR since Kokkinakis or "Quoting Kokkinakis" in Jeroen Temperman J, T Jeremy Gunn and Malcolm D Evans, *The European Court of Human Rights and Freedom of Religion or Belief: The 25 Years Since Kokkinakis* (Brill 2019) 87.

But question it one must. Just because something has been repeated so frequently does not necessarily mean that it is true. There is a certain sense of 'cognitive ease'[249] surrounding claims about the existence and centrality of the *forum internum* and *forum externum* distinction in the right to freedom of thought, conscience and religion in the literature. It has been uncritically reinforced and mechanically deployed so often that it now feels familiar, true and effortless.[250] However, as this section has demonstrated the *way* in which the notion of a distinction between the *forum internum* and the *forum externum* has become the orthodox approach to Article 9, or the intellectual scaffolding upon which discussions are based, is concerning. It has largely been entrenched through superficial references and repeated, unsupported assertions, rather than through engagement with the primary materials.

The paucity of evidence provided to support claims made about the centrality of the *forum internum* and *forum externum* and the extent of intertextual reliance raises serious questions about the accuracy of claims made about the centrality and problematic nature of the distinction, both at the time they were made and their applicability in light of developments in case law over the past twenty years. Does the lack of serious engagement with the text of Article 9, the relevant *travaux préparatoires* and Article 9 jurisprudence mean that commentators have projected their own understanding of the *forum internum* and *forum externum* distinction onto Article 9 and the jurisprudence, and as a consequence, their own expectations of how the distinction works or should work in practice?

It is evident from the analysis above that claims made in the literature that the *forum internum* and *forum externum* distinction is central to the understanding of Article 9, and that it is detrimentally affecting the protection of Article 9 rights, should be perpetuated no longer. It is clear that a review of the understanding of Article 9 and Article 9 jurisprudence in light of a close and detailed analysis of the primary materials — including the text of ECHR Article 9, related international instruments, relevant *travaux préparatoires* and all Article 9 case law — is necessary and, indeed, well overdue.[251]

Conclusion

This chapter demonstrates that there is an established consensus in the literature that there is a clear, binary and hierarchical distinction between the absolute *forum internum* and the qualified *forum externum* in the architecture of freedom of religion or belief articles and that this is a

[249] Kahneman explains that 'a sentence…that has been repeated, or has been primed, will be fluently processed with cognitive ease', see Daniel Kahneman, *Thinking, Fast and Slow* (Penguin 2012) 59.
[250] These are prerequisites for cognitive ease according to Kahneman, see ibid.,70.
[251] We are inclined to believe statements that have been repeated frequently but it is often useful to think them through again, see ibid., 70.

doctrine of the ECtHR. It has become the conceptual starting point for discussions of Article 9; indeed, it is now, as has been emphasised above, an almost guaranteed feature of any discussion of the right to freedom of thought, conscience and religion in Article 9. Commentators have consistently emphasised the importance of the *forum internum* and *forum externum* distinction to the understanding and protection of this right, particularly the key difference between the absolute *forum internum* and the qualified *forum externum* in terms of protection at the ECtHR.

Yet, despite the emphasis on the centrality of the *forum internum* and *forum externum* distinction, commentators have increasingly criticised the distinction for leading to poor protection of both the *forum internum* and *forum externum*. Commentators have criticised the ECtHR for i) failing to apply the distinction 'correctly', ii) for failing to acknowledge the interrelationship between belief and manifestation and, iii) for working with a conception of religion or belief which reflects a Protestant Christian understanding of religion and disadvantages orthopraxic religions. The suggestions made by commentators to address these 'problems' — such as clarifying the scope of the *forum internum* and *forum externum*, more rigorously applying the distinction or viewing the *forum internum* and *forum externum* as interrelated realms — are unsatisfactory because they are piecemeal and based on the idea that a clear distinction between the *forum internum* and *forum externum* is central to Article 9.

In stepping back from the traditional approach to Article 9 and the jurisprudence, this chapter asks some radical questions about *how* and *why* this distinction became central to literature relating to Article 9. The detailed chronological analysis of references to, and discussions of the *forum internum* and *forum externum* distinction in the literature on freedom of thought, conscience and religion reveals that this distinction only became a central feature of the literature after the turn of the century. Since then there has been an exponential growth in the use of the terms, but this is largely the result intertextual reliance (on two, now somewhat outdated, seminal texts) rather than close engagement with the structure of Article 9, the relevant *travaux préparatoires* or Article 9 jurisprudence.

This chapter points out that the way in which the notion of this distinction has become ossified, and the elision of ideas in respect to the *forum internum* and *forum externum*, is deeply concerning; it seriously calls into question the accuracy of statements made in the literature regarding the centrality of the *forum internum* and *forum externum* distinction. Given the gaps in and limitations of the existing literature with respect to the *forum internum* and *forum externum* distinction, this chapter argues that it is now time for a comprehensive review of centrality of the *forum internum* and *forum externum* distinction to the understanding and protection of Article 9. It is to this comprehensive review of the text of ECHR Article 9, the related *travaux préparatoires* and Article 9 case law that this thesis will now turn.

CHAPTER 2. THE *FORUM INTERNUM* AND *FORUM EXTERNUM*: THE TEXT OF ECHR ARTICLE 9

Introduction

This chapter explores whether the *forum internum* and *forum externum* distinction is central to the architecture of the right to freedom of thought, conscience and religion (the next chapter will focus on the question whether it is a central 'doctrine' of the ECtHR). This chapter comprises three sections. The first section examines the text of ECHR Article 9 in detail. The second analyses the *travaux préparatoires*[1] relating to ECHR Article 9 and to the right to freedom of thought, conscience and religion in two contemporary instruments drafted just before the ECHR, upon which the ECHR drafters relied, namely, UDHR Article 18 and Article 16 of the draft International Covenant on Human Rights. The third section explores two significant changes made to the right to freedom of thought, conscience and religion in two later international (ICCPR Article 18 and Article 1 of the 1981 Declaration) namely, the removal of the right to change religion or belief and the addition of the prohibition on coercion.[2]

Through an original analysis of this material, this chapter argues that a binary and hierarchical distinction between the *forum internum* and *forum externum* is not evident from the structure of ECHR Article 9, nor was it the intention of the drafters of these instruments to create such a distinction in the right to freedom of thought, conscience and religion. Rather the structure of ECHR Article 9, related international provisions, and the *travaux préparatoires* suggest that the drafters understood the importance of both the *forum internum* and *forum externum* aspects of the right to freedom of thought, conscience and religion, and importantly, recognised the interrelatedness rather than the distinctiveness of these realms. This interrelationship, it is contended, is clearly illustrated in the debates relating to the right to change religion or belief and the prohibition on coercion in international instruments finalised after the ECHR.

[1] It is recognised that the *travaux préparatoires* - the drafting documents - relating to ECHR Article 9 are succinct and therefore must be used cautiously but these documents remain useful in identifying what was meant by the drafters at the time.

[2] It is useful to consider these other international instruments because of the shared history with the ECHR. However, the way in which ICCPR Article 18 has been protected by the HRC will not be examined in this thesis because the focus in on the understanding of ECHR Article 9 and the protection of Article 9 at the ECtHR. For discussion of the HRC's approach see, Malcolm D Evans, 'The United Nations and the Freedom of Religion: The Work of the Human Rights Committee' in Rex Adhar R (ed) *Law and Religion* (Ashgate Publishing Ltd 2000) 35-61; Martin Scheinin, 'The Human Rights Committee and Freedom of Religion or Belief' in W Cole Durham Jr and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004); Stephanie Berry, 'A 'Good Faith' Interpretation of the Right to Manifest Religion? The Diverging Approaches of the European Court of Human Rights and the UN Human Rights Committee' (2017) 37:4 Legal Studies 672.

A. ECHR Article 9

i. The Structure of ECHR Article 9

As the previous chapter has demonstrated, commentators recognise that the terms *forum internum* and *forum externum* are not used in the text of Article 9, however, they repeatedly state that the distinction between the *forum internum* and *forum externum* is a clear implication from the structure of Article 9.[3] Nevertheless, on close inspection, a distinction between the *forum internum* and *forum externum* is not clear from the structure of this right itself. Indeed, this very point is revealed by the fact that there is no consensus among commentators as to precisely *how* to divide Article 9 into the *forum internum* and *forum externum*.

a. A Binary Distinction?

Article 9.1 provides that '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.'[4] The commonest approach is to divide Article 9.1 at the semi-colon, i.e. to separate 'the right to freedom of thought, conscience and religion' from the right to change a manifest religion or belief. It is claimed that the rights listed before the semi-colon (in the first 'limb') fall into the *forum internum* and those listed after the semi-colon (in the second 'limb') fall into the *forum externum*. However, the significant problem with this approach is that, in order for it to work, it is necessary to ignore the awkward placement of the right to change in Article 9. In the literature, the right to change religion or belief is invariably presented as a *forum internum* right, but in Article 9 the right to change is placed *after* the semi-colon, thus implying that it is not simply a *forum internum* right. If the drafters inserted the semi-colon in order to distinguish between *forum internum* and *forum externum* rights (as commentators claim) the failure to include the right to change religion or belief in the list of rights *before* the semi-colon suggests that the structure of Article 9.1 was poorly thought through.

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[3] For Murdoch the clear implication from the text is that freedom of thought, conscience and religion may *not* be subject to state interference, see Jim Murdoch, *Freedom of Thought, Conscience and Religion: A Guide to the Implementation of Article 9 of the European Convention on Human Rights* (2nd edn, Council of Europe 2012) 18. See also Yannis Kistakis, 'The Protection of the *forum internum* under Article 9 of the ECHR' in D Spielmann, M Tsirli and P Voyatzis (eds) *La Convention europénne des droits de l'homme, un instrument vivant, Mélanges en l'honneur de Christol L Rozakis* (Bruykant 2011) 287.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950) ETS No.005.

It is also implied in the literature that the two paragraphs in Article 9 (paragraphs 9.1 and 9.2) represent the distinction between the *forum internum* and the *forum externum*.[5] However, this again involves ignoring another aspect of the right in the article, this time the right to manifest. It is not accurate to say that paragraph one rights are *forum internum* rights and paragraph two rights are *forum externum* rights because the right to manifest religion or belief — which is invariably understood as a *forum externum* right in the literature — appears in *both* paragraph one and paragraph two. A paragraph-based division does not work because paragraph one includes both *forum internum* and *forum externum* rights whereas paragraph two relates only to *forum externum* rights.

Some commentators suggest that the *forum internum* and *forum externum* distinction maps onto a private and public distinction in Article 9.[6] However, this is another deeply problematic approach which involves glossing over the actual terms in Article 9. Whilst the literature frequently describes the *forum internum* as the 'private sphere' this is misleading because it is narrower, conceptually, than this.[7] There is a significant difference between the 'private sphere' and the privacy of the mind. Particularly, it is confusing to use 'private sphere' interchangeably with *forum internum* because Article 9 explicitly states that manifestation of religion or belief (understood to be in the *forum externum*) is protected both in public and in private.[8]

The problems with each of the different methods commentators use to divide up Article 9 into the *forum internum* and *forum externum* not only undermines the claim that a binary distinction between the *forum internum* and *forum externum* is evident in the structure of this article but also suggests that such attempts to identify a point of division between these two realms in the structure of Article 9 are misguided. The opening of Article 9 — that 'everyone has the right to freedom of thought, conscience and religion'— seems to function as a chapeau. The following sentence — 'this right includes the right to change and manifest religion or belief,' — seems to provide examples of rights included within the broader right to freedom of thought, conscience and religion. This will be borne out by the *travaux préparatoires* which will be considered later in this chapter.

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[5] Scharffs notes that they are divided into paragraph one and two, or first tier and second tier rights, see Brett G Scharffs, 'Symposium Introduction. The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights: Legal, Moral and Political Perspectives' (2010) 26 Journal of Law and Religion 249, 255.

[6] E.g. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engels 2005) 410. See the discussion of the public/private distinction in Chapter One of the thesis.

[7] Nowak uses '*forum internum*' and '*forum externum*' and 'private' and 'public' synonymously, see e.g. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engels 1993) 314.

[8] Danchin explains the *forum internum* does not include 'external spheres, even if non-state and therefore technically 'private' such as places of worship, school or the family where religious belief may be communicated or acted upon', see Peter G Danchin, 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law' (2008) 49:2 Harvard International Law Journal 249, 261.

Contrary to claims made by commentators, therefore, the structure of Article 9 does not reveal a clear distinction between the *forum internum* and the *forum externum*; rather the structure suggests that both the *forum internum* and the *forum externum* are protected under the broad right to freedom of thought, conscience and religion and are related aspects of this right.

ii. The Limitation Clause

Just as commentators have identified a binary distinction between the *forum internum* and *forum externum* in Article 9 they have also identified a hierarchical distinction between the two realms in the article. Commentators claim that the structure of Article 9 as a whole, specifically the inclusion of a limitation clause in Article 9.2, creates a hierarchy in terms of the different levels of protection to be offered to Article 9 rights. It is constantly repeated that whilst manifestation can be limited by the State (in accordance with Article 9.2), *forum internum* rights must be protected absolutely.[9] However, again, a close reading of the text of ECHR Article 9 suggests that claims about a clear hierarchy in Article 9 are unfounded.

a. A Hierarchical Distinction?

Firstly, all that can be gleaned from the text of Article 9 itself, in terms of the legal status of rights therein, is that manifestation of religion or belief can be subject to limitations in certain circumstances as set out in Article 9.2. Article 9 makes no comment on the level of protection to be offered to the other rights listed. Commentators have assumed that this means that the right to freedom of thought, conscience and religion and the right to change religion or belief are absolute rights. However, it does not automatically follow that, because these rights are not explicitly qualified, they must be absolute rights; they are not *expressly* absolute, so all that can be concluded from the text of Article 9 is that there are no express limitations on the right to freedom of thought, conscience and religion or the right to change religion or belief.[10] Moreover, given the wider context of the ECHR, it is problematic to claim that Article 9 protects absolute rights because Article 9 is not (like other provisions which are understood to protect absolute

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[9] See, for example, T Jeremy Gunn, 'Book Review: Taylor P, Freedom of Religion: UN and European Human Rights Law and Practice' (2008) 23 Journal of Law and Religion 101, 102; Heiner Bielefeldt, 'Freedom of Religion or Belief – A Human Right under Pressure' (2012) 1:1 Oxford Journal of Law and Religion 15, 8; W Cole Durham Jr and Carolyn Evans, 'Freedom of Religion and Religion-State Relations' in Tushnet M, Fleiner T, and Saunders C (eds) *Routledge Handbook to Constitutional Law* (Routledge 2013) 248; Thomas M Krapf, 'Lost Opportunities and Missed Targets' in Peter Petkoff and Julian Rivers (eds) *Changing Nature of Religious Rights in International Law* (OUP 2015) 127; Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (OUP 2016) 64.

[10] For a similar point in relation to Article 3 see generally Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) 15:1 Human Rights Law Review 101; Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2006), 233.

rights, such as Article 3) exempted from derogations in time of public emergency under Article 15.[11]

Secondly, Article 9.2 does not simply state that manifestation can be limited by the State. Article 9.2 says that manifestation of religion or belief can *only* be limited by the State in certain circumstances. This is a subtle but important difference. Rather than a second order concern, what this suggests is that manifestation has a *high* degree of protection in the ECHR. And, in comparison with other limitation clauses in the ECHR, such as Article 8.2 or 11.2, Article 9.2 is one of the least permissible.

Again, therefore, the text of Article 9 does not reveal a clear hierarchical distinction between the level of protection to be offered to *forum internum* and *forum externum* rights; rather the wording of the article suggests that the two are understood to be important aspects of the right to freedom of thought, conscience and religion as a whole.

B. Other Contemporary International Instruments and *Travaux Préparatoires* (pre-November 1950)

It has been argued above that the text of Article 9 does not reveal a binary and hierarchical distinction between the *forum internum* and the *forum externum*. But what about the *travaux préparatoires* relating to Article 9? Do they reveal that the drafters of Article 9 envisaged a binary and hierarchical distinction between the *forum internum* and *forum externum* in Article 9 even if such a distinction is not evident from the text of Article 9 itself? The ECHR was drafted during 1949-1950, was signed on 4 November 1950 and entered into force on 3 September 1953.[12] The key point to make about the ECHR, as revealed from the *travaux préparatoires* relating to Article 9, is the heavy intellectual dependence on provisions relating to freedom of religion or belief in international instruments drafted around the same time.

Firstly, the drafters relied heavily on UDHR Article 18;[13] this instrument was drafted in 1947, finalised in 1948 and adopted by the UN General Assembly on 10 December 1948. Secondly, the drafters relied on the provision relating to freedom of thought, conscience and religion (numbered Article 16) in the June 1949 version of the draft International Covenant on Human Rights. This Covenant, unlike the UDHR, was intended to be legally binding. Initially,

[11] For discussion see Malcolm D Evans, *Religious Liberty and International Law in Europe* (OUP 1997); Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001). 165. For a discussion of Article 15, see D Harris and others, *Harris O'Boyle & Warbrick: Law of the European Convention on Human Rights* (4th edn, OUP 2018) 805- 834.

[12] For a useful summary of the drafting history, see William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 414-419.

[13] COE, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights* (Martinus Nijhoff 1975), Volume I, Consultative Assembly, 1st Session, Sitting 30 August 1949, 174, para 6.

the Committee on Human Rights planned to produce all the elements of the 'international bill of human rights' (a declaration, a covenant and means of implementation) at the same time, but the Covenant was delayed. As it developed, this draft International Covenant on Human Rights was split into two treaties, namely the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR). In this process, Article 16 of the draft International Covenant on Human Rights formed the basis for ICCPR Article 18. The ICCPR was drafted up until 1954, signed on 19 December 1966 and came into force on 3 January 1976.

The first draft of what is now ECHR Article 9, simply stated that freedom of thought, conscience and religion should be protected in accordance with Article 18 of the UDHR.[14] Following recommendations that attention should be paid to the progress which had been made by UN drafters with respect to the draft International Covenant on Human Rights by mid-1949,[15] the ECHR drafters compared the draft International Covenant on Human Rights with the Consultative Assembly's draft of the ECHR.[16] At the time, Article 16 (the provision relating to freedom of religion or belief) in the draft International Covenant on Human Rights, formed two paragraphs.[17] The first paragraph of the International Covenant on Human Rights was taken verbatim from UDHR Article 18 and the second paragraph set out permissible limitations on the right to manifest religion or belief.[18] This two-paragraph version became the basis for ECHR Article 9.

What is striking about the ECHR *travaux préparatoires* is that it reveals that in considering Article 16 of the draft International Covenant on Human Rights, the members of the Committee of Experts focused only upon proposals for alterations to the second paragraph. The *travaux préparatoires* record an extended debate on the precise wording of limitations until agreement was finally reached in 7 August 1950.[19] In contrast, the *travaux préparatoires* do not refer to any discussion whatsoever on paragraph one. The Committee simply accepted the decision to incorporate UDHR Article 18 verbatim into ECHR Article 9. This remained unchanged in the final draft of ECHR Article 9 submitted by the Committee of Ministers to the Consultative Assembly in 25 August 1950.

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[14] Ibid. See also, ibid., Volume IV, Appendix to the Report of the Committee of Experts on Human Rights: Draft Convention of Protection of Human Rights and Fundamental Freedoms, 16 March 1950, 52.
[15] Ibid., Volume II, Second Session of the Committee of Ministers Held in Paris from 3 – 5 November 1949, Letter Addressed by Mr Gustave Rasmussen, Chairman of the Committee of Ministers to Mr Paul Henri Spaak, President of the Consultative Assembly of the 5 November 1949, 296, para 6.
[16] Ibid., Volume III, Working Papers Prepared by the Secretariat General for the Committee of Experts, Preparatory report by the Secretariat-General concerning a preliminary draft convention to provide a collective guarantee of human rights (undated), 26 -38.
[17] UNECOSOC, Report of the Fifth Session of the Commission on Human Rights to the Economic and Social Council (23 June 1949) UN Doc E/CN.4/350, 33.
[18] Ibid.
[19] For a useful summary of the development, see COE, European Commission of Human Rights, Preparatory Work on Article 9 of the European Convention on Human Rights (16 August 1956) Doc DH (56) 14.

Given this clear intellectual dependence on UDHR Article 18 it is, therefore, necessary to analyse the *travaux préparatoires* relating to UDHR Article 18 in order to establish whether the drafters of that instrument conceived of a binary and hierarchical distinction between the *forum internum* and *forum externum* in the protection of freedom of thought, conscience and religion.

i. ECHR Article 9.1 and UDHR Article 18

The previous chapter demonstrated that the *forum internum* and *forum externum* distinction, described as a 'classic', 'fundamental' and 'abiding' distinction, is presented as if it has always been an essential part of provisions protecting the right to freedom of religion at the international level. Bielefeldt, Ghanea and Wiener claim, for instance, that the distinction between the absolute *forum internum* and the qualified *forum externum* was 'embedded' in Article 14 of the Draft Outline of the International Bill of Human Rights in June 1947.[20] There is also an assumption in some of the literature that the right to freedom of thought, conscience and religion was a straightforward article to draft. Indeed, some early commentators writing specifically on the UDHR *travaux préparatoires* explained that Article 18 was 'an easy case.'[21]

Recent scholarship, however, particularly the illuminating research undertaken by Lindkvist, has highlighted many complexities and nuances involved in the drafting of UDHR Article 18.[22] This section will analyse the *travaux préparatoires* relating to UDHR Article 18 in detail[23] to demonstrate that, contrary to popular opinion in the literature, there is not a clear binary and/or hierarchical distinction between the *forum internum* and *forum externum* in that article, or by implication, in ECHR Article 9.1.

[20] See Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016) 93.

[21] Martin Scheinin, 'Article 18' Guðmundur S Alfreðsson and Asbjørn Eide (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement'* (Martinus Nijhoff Publishers 1999) 379. For exceptions to this general trend see John P Humphrey, *Human Rights and the United Nations: A Great Adventure* (Transnational Publishers 1984), 67-68. See also the discussions of Article 18 in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House Trade Paperbacks 2002) 69-70, 107, 154 165-9, 183-4, 222.

[22] Linde Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights* (CUP 2017). See also his earlier PhD thesis, Lindkvist L, 'Shrines and Souls: The Reinvention of Religious Liberty and the Genesis of the Universal Declaration of Human Rights' (2014) <https://lup.lub.lu.se/search/publication/8be4900a-a82a-4d0e-97a8-305fe45b3872> accessed December 2016.

[23] A collection of documents can be found in William A Schabas, *The Universal Declaration of Human Rights: the Travaux Préparatoires* (CUP 2013). However, for the purposes of consistency and clarity - with respect to *travaux préparatoires* relating to each of the UN instruments discussed in this thesis - reference will be made to the UN documents themselves.

a. A Hierarchical Distinction?

UDHR Article 18 opens with the statement that 'everyone has the right to freedom of thought, conscience and religion.'[24] As such, it foregrounds the internal aspect of religious liberty (notably, freedom of thought and conscience) rather than the protection of external manifestation of religion or belief and religious institutions. The foregrounding of the internal aspect of religious liberty is often interpreted as an emphasis on the *forum internum* at the expense of the *forum externum.* However, the *travaux préparatoires* do not support such a reading. Whilst they reveal that there was, undeniably, an emphasis on the individual, internal aspects of freedom of thought, conscience and religion in the drafting of Article 18,[25] the evidence does not suggest that this reflected a hierarchal understanding of the rights within Article 18 or that manifestation in community was considered a second order concern.

The background provided by Lindkvist is illuminating here. Lindkvist has demonstrated that Article 18 of the UDHR represented a new way of approaching religious liberty at the international level.[26] Before the UDHR, religious liberty protection at the international level had focused on protecting minority communities[27] (and the external manifestation of religion). With this already well established in international law, the UDHR emphasised the importance of *also* including individual rights — particularly the protection of the individual against the state —[28] and the emphasis on the individual, internal aspects of freedom of thought, conscience and religion in Article 18 should be understood as a reflection of that.[29]

The emphasis on the internal does not suggest that the right to manifest was considered a second order concern for the drafters. The right to manifest religion or belief, in public or private, alone or in community with others, was also considered to be a fundamental part of the right to freedom of thought, conscience and religion, as a whole. This was reflected in the Belgian representative's comment that 'it would be unnecessary to proclaim that freedom [of religion or belief] if it were never to be given outward expression; if it were intended, so to speak, only for the use of the inner man.'[30]

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[24] UNGA Resolution 217 A(III) Universal Declaration of Human Rights (10 December 1948) UN Doc A/RES/3/217/A.

[25] Cassin and Malik emphasized the 'person' rather than 'individual', see Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House Trade Paperbacks 2002), 42.

[26] Linde Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights* (CUP 2017) 7. See earlier comments by Malcolm D Evans, *Religious Liberty* (CUP 1997) 183ff.

[27] See Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010) 34.

[28] Berry explains that the purpose of human rights instruments is to protect individuals from the power of the State and the tyranny of the majority, Stephanie Berry, 'A 'Good Faith' Interpretation of the Right to Manifest Religion? The Diverging Approaches of the European Court of Human Rights and the UN Human Rights Committee' (2017) 37:4 Legal Studies 672, 692.

[29] Linde Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights* (CUP 2017) 32ff.

[30] UNGA, Record of the 127th Meeting (9 November 1948) UN Doc A/C.3/SR.127, 395.

By appreciating the broader context of international law against which the UDHR was drafted the reason for the emphasis on the individual, internal elements of religion or belief in the drafting of Article 18 becomes clear. Protection of individual, internal rights was novel in the context at the time, whereas the protection of external, communal manifestations of religion or belief was already well established. The emphasis on the individual, internal aspects in the *travaux préparatoires* and the foregrounding of these rights in the text of UDHR Article 18 does not therefore reflect an arbitrary hierarchy between the *forum internum* and the *forum externum* but rather, reveals a concern to ensure that both *forum internum* and *forum externum* aspects of the right to religious liberty were included in the UDHR.

b. A Binary Distinction?

A close examination of *travaux préparatoires* relating to UDHR Article 18 does not support the claim that there is a binary distinction between the *forum internum* and the *forum externum* in UDHR Article 18 either. In highlighting the novelty of the approach to religious liberty protection in the UDHR, Lindkvist explains that it stood out from other international instruments protecting religious liberty at the time because it distinguished between the 'inner and external freedoms' and recognised the right to change religion or belief.[31] Caution, however, must be taken with the precise wording of this claim. Whilst it is indeed accurate to say that, in the context, the UDHR was novel in that it protected both the internal and external freedoms, and a right to change religion or belief, it seems an overstatement to claim that it *distinguished* between the internal and external realms. To distinguish means to set apart of treat differently. The evidence from the *travaux préparatoires* shows whilst it may be argued that individual drafters, at certain points, distinguished between the inner and external freedoms by setting them apart and treating them differently, the same cannot be said of the drafters a whole, or the final text of UDHR Article 18. An original reading of the *travaux préparatoires*, focusing on the presentation of the *forum internum* and *forum externum*, reveals that it was not apparent from the outset that there was a distinction to be drawn between these realms in the protection of freedom of religion or belief at the international level, and, it is not apparent from the final text of UDHR Article 18.

[31] Linde Lindkvist, 'Shrines and Souls: The Reinvention of Religious Liberty and the Genesis of the Universal Declaration of Human Rights' (2014) <https://lup.lub.lu.se/search/publication/8be4900a-a82a-4d0e-97a8-305fe45b3872> accessed December 2016, 31. This was later changed to 'rests on an implicit *distinction* between the freedom of thought, conscience and religion on the one hand and the freedom of external manifestation on the other' (my emphasis) in his monograph, see Linde Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights* (CUP 2017) 22.

In the initial draft of UDHR Article 18 (the 'Humphrey Draft'),[32] the article simply set out 'freedom of conscience and belief and of private and public worship.'[33] Lindkvist highlights the important role of Cassin, Malik and Nolde in shaping Article 18 into its final form. In particular, Lindkvist claims that it was Cassin[34] who 'designed a religious liberty article that drew a sharp line between the inner and external freedoms'[35] and 'marked the freedom of thought and conscience as "absolute and sacred" thus underlining its special status, not only within this specific article, but also within the UDHR in general.'[36]

Indeed, the *travaux préparatoires* do reveal that in 1947, Cassin submitted a proposal for the article which constituted two paragraphs: the first read that 'individual freedom of conscience, belief and thought is an absolute and sacred right' and the second, that 'the practice of private or public worship and the manifestations of opposite convictions can be subject only to such limitations that are necessary to protect public order, morals and the rights and freedoms of others.'[37] The two-paragraph structure of this proposal separated freedom of conscience, belief and thought, on the one hand, and the practice of worship on the other. Importantly, there was also an addition regarding the legal status of the rights within the article; the right to freedom of thought, conscience and religion was identified as an 'absolute and sacred' right whereas manifestations of religion could be subject to certain limitations.[38]

Furthermore, Cassin's proposal was indeed influential in the development of Article 18 as it formed the basis for the Drafting Committee's discussions. Influenced by the UK's more detailed version of the article,[39] the main changes made by the Drafting Committee were to include the right to hold or change religion or belief (at the insistence of Malik) and remove the reference to limitations.[40] The version of the article which was submitted to the Commission on Human Rights read:

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[32] Referred to as such in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House Trade Paperbacks 2002) Appendix i.
[33] UNECOSOC, Commission on Human Rights, Drafting Committee, International Bill of Rights Documented Outline (11 June 1947) UN Doc E/CN.4/AC.1/3/Add.1, 100.
[34] Cassin was influenced by Charles Malik, who was in turn influenced by the Catholic Theologian, Maritian and existentialist philosophy generally, see Linde Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights* (CUP 2017) 21-60.
[35] Ibid., 27.
[36] Linde Lindkvist, 'Shrines and Souls: The Reinvention of Religious Liberty and the Genesis of the Universal Declaration of Human Rights' (2014) <https://lup.lub.lu.se/search/publication/8be4900a-a82a-4d0e-97a8-305fe45b3872> accessed December 2016, 35.
[37] UNECOSOC, Commission on Human Rights, Drafting Committee, International Bill of Rights, Revised Suggestions Submitted by the Representative of France for Articles of the International Declaration of Rights (20 June 1947) UN Doc E.CN.4/AC.1/W.2/Rev.2, 4.
[38] Ibid.
[39] UNECOSOC, Commission on Human Rights, Drafting Committee, Test of Letter from Lord Dukeston, the United Kingdom Representative on the Human Rights Commission (5 June 1947) UN Doc E/CN.4/AC.1/4, 10.
[40] UNECOSOC, Commission on Human Rights, Second Session, Report of the Working Group on the Declaration of Human Rights (10 December 1947) UN Doc E/CN.4/57, 11.

1. ‘individual freedom of thought and conscience, to hold and change beliefs, is an absolute and sacred right.’

2. ‘Every person has the right, either alone or in community with other persons of like mind and in public or private, to manifest his beliefs in worship, observance, teaching and practice.’[41]

However, the final text of UDHR Article 18 differed significantly from this draft. It was the proposal submitted by Malik during the meeting on 4 June 1948 — in which he responded to and incorporated the substantial changes which had been proposed during the meeting by members of the Commission on Human Rights — which became the final text of UDHR Article 18. Malik’s proposal read:

> ‘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, in public or private, to manifest his religion or belief in teaching, practice, worship and observance.’[42]

It is important to compare these versions of the article because there are some significant differences between Malik’s version in June 1948 and the version in December 1947 (which was based on Cassin’s earlier proposal). Notably, Malik’s later version explicitly referred to ‘religion’, reintroduced ‘thought’ and removed the reference to the right to hold a religion or belief (as this was understood to be implicit in the right to freedom of thought, conscience and religion itself). In terms of understanding the importance of the *forum internum* and *forum externum* distinction to the drafters, there were two further significant changes in Malik’s later version. Firstly, the descriptive terms ‘absolute and sacred’ were removed[43] and secondly, the article was framed as a single paragraph.

It is especially interesting in this respect that Lindkvist suggests that these late changes to the text proposed by Malik were regarded as insignificant by ‘the main supporters of segregating the inner and external freedoms in Article 18’.[44] Compared with the December 1947 draft — in which the right to hold and change a religion of belief were described as ‘absolute and sacred’ rights,[45] and were separated from the right to manifest religion or belief in a two paragraph structure – these *are* significant changes. So, if they were as Lindkvist claims, considered

[41] See ‘Geneva Draft’ in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House Trade Paperbacks 2002), Appendix 4.

[42] ‘Everyone…’ formulation was put forward by the United Kingdom and India, see UNECOSOC, Commission on Human Rights, Third Session, India and the United Kingdom: Proposed Amendments to the Draft Declaration on Human Rights (24 May 1948) UN Doc E/CN.4/99, 4.

[43] Brazil had suggested replacing ‘absolute and sacred’ with ‘unrestricted’, see UNECOSOC, Commission on Human Rights Third Session, Collation of the Comments of Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation (1 May 1948) UN Doc E/CN.4/85, 31-32

[44] Linde Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights* (CUP 2017) 29, 141

[45] It was also referred to as ‘absolute and sacred’ by Malik, UNECOSOC, Commission on Human Rights, Drafting Committee First Session, Summary Record of the Eighth Meeting (17 June 1947) UN Doc E/CN.4/AC.1/SR.8, 13.

insignificant, why was this so? Does this mean that those drafters identified by Lindkvist as 'main supporters of segregating the inward and external freedoms' were not really supporters of *segregating* inward and external freedoms at all? Was Cassin's sharp line not a sharp line at all? If this is the case then it calls for a different reading of Article 18, i.e. one which does not suggest that the drafters intended to draw a distinction (let alone a binary and hierarchical distinction) between the *forum internum* and *forum externum* in Article 18. Given the importance of these implications, it is crucial to ascertain whether the *forum internum* and *forum externum* distinction really is, as so often claimed, central to the understanding of the right to freedom of thought, conscience and religion in UDHR Article 18.

A close examination of the *travaux préparatoires* reveals that Cassin did initially object to the one-paragraph structure, however, soon after, he voted in favour of it. The records show that following Cassin's initial objection to the one-paragraph formulation Malik responded by separating the article into two paragraphs so that it read: 'everyone has the right to freedom of religion, conscience and thought, including freedom to change his religion or belief' and 'everyone has the right to freedom…to manifest his religion or belief….'.[46] However — and this is interesting — Malik said that if this met with objection in later discussion it would revert back to a one paragraph structure. The fact that the Drafting Sub-Committee (which included both Cassin and Malik, along with representatives from the UK and Uruguay) recommended Malik's single paragraph structure[47] a short while later indicates firstly that there *was* objection to the two-paragraph structure, and secondly, and more importantly, that Cassin changed his mind about its significance. It was the single paragraph version, approved by the Commission on Human Rights[48] and submitted to the General Assembly[49] which became the final text of UDHR Article 18.[50]

The unanimous adoption of a single paragraph structure provides strong evidence to refute the claim that UDHR Article 18 distinguishes between the *forum internum* and *forum externum*. In particular, the use and placement of the semi-colon is revealing. Semantically, semi-colons separate two closely related independent clauses. In Article 18 the semi-colon separates the statement that 'everyone has the right to freedom of thought, conscience and religion' from

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[46] UNECOSOC, Commission on Human Rights, Third Session, Summary Record of the Sixtieth Meeting (23 June 1948) UN Doc E/CN.4/SR.60, 11.
[47] UNECOSOC, Commission on Human Rights, Third Session, Report of the Sub-Committee Consisting of the Representatives of France, Lebanon, the United Kingdom and Uruguay on the Consideration of Article 16 of the Draft International Declaration on Human Rights and Its Relation to Articles 17 and 18 (7 June 1948) UN Doc E/CN.4/113.
[48] UNECOSOC, Commission on Human Rights, Third Session, Summary Record of the Sixty-Second Meeting (11 June 1948) UN Doc E/CN.4/SR.62, 12-13
[49] UNGA, Draft International Declaration of Human Rights (29 November 1948) UN Doc A/C.3/379, 3.
[50] UNGA Resolution 217 A(III) Universal Declaration of Human Rights (10 December 1948) UN Doc A/RES/3/217/A.

the statement that the right includes the right to change a religion or belief and the right to manifest religion or belief. Rather than marking a point of division between the *forum internum* and the *forum externum,* the semi-colon blurs any such distinction. The placement of the semi-colon after the statement 'everyone has the right…' suggests that this sentence functions as a chapeau — as an introductory text setting out the principles and objectives of the article — whereas the sentence which follow the semi-colon gives *examples* of rights within this broader right to freedom of thought, conscience and religion, namely the right to change and manifest religion or belief.

Given this, an alternative way of making sense of the unanimous decision to adopt this single paragraph structure is to understand the aim of the drafters in a different way. Rather than claiming that they aimed to segregate *forum internum* and *forum externum* rights in the article it makes more sense, in light of the *travaux préparatoires* and the final text of Article 18, to argue that the primary concern of the drafters was to ensure that both *forum internum* and *forum externum* aspects were encompassed. Rather than separating rights based on whether they fell within the *forum internum* or *forum externum* the drafters set out the broad right to freedom of thought, conscience and religion in the chapeau which included both *forum internum* and *forum externum* aspects.

This is a subtle but important difference and it has significant implications for the understanding of the relationship between the *forum internum* and *forum externum* today. There is a danger when examining the *travaux préparatoires* that pre-conceived notions regarding the importance of the *forum internum* and *forum externum* distinction in the literature today may influence the reading of these earlier materials. Indeed, Lindkvist concedes that the current centrality of the *forum internum* and *forum externum* distinction in the literature makes it difficult to imagine that it was debated at the time of drafting the UDHR.[51] Despite this recognition, however, it seems that Lindkvist has been influenced by increasing emphasis on the division between the *forum internum* and *forum externum* in the literature on freedom of thought, conscience and religion, as noted in the previous chapter of this thesis. In his own work, Lindkvist moved from using the language of a 'distinction' between the *forum internum* and *forum externum* in his doctoral thesis[52] to describing 'a sharp line' between the *forum internum* and *forum externum* in his monograph.[53] This is a notable semantic change because the rest of the argument has remained identical.

[51] Linde Lindkvist, 'Shrines and Souls: The Reinvention of Religious Liberty and the Genesis of the Universal Declaration of Human Rights' (2014) <https://lup.lub.lu.se/search/publication/8be4900a-a82a-4d0e-97a8-305fe45b3872> accessed December 2016, 31.
[52] Ibid., 38.
[53] Linde Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights* (CUP 2017) 27.

It is also important to bear in mind the fact that, whilst the drafters did have a notion of internal and external rights, they did not articulate it through the language of the *forum internum* and *forum externum* which, as the previous chapter of this thesis explains, has become a convenient way of emphasising a distinction between the two realms. It is also anachronistic to suggest that the individual drafters drew a neat, binary distinction between the internal and external realms, however conceptualised. For instance, Lindkvist explains that Cassin drew a 'sharp line' between the *forum internum* and the *forum externum* in his two-paragraph proposal and claims he was a main supporter of segregating in internal and external freedoms.[54] However, a close reading of statements made by Cassin elsewhere in the *travaux préparatoires* relating to Article 18 suggests that even he did not view the internal and external realms as segregated. In fact, his statements show the opposite; they show that Cassin conceived of the *forum internum* and the *forum externum* as deeply interrelated elements of religious liberty.

In this respect, Cassin's comments relating to the scope of right to freedom of thought are particularly revealing. For Cassin, the right to freedom of thought did not simply protect the inner freedom to hold a thought; he explained that the right to freedom of thought also protected individuals against situations in which they were forced to 'profess a belief which was not held.'[55] Such an *outward* obligation, Cassin commented, was an example of a way in which freedom of thought could be attacked indirectly. It was this concern for indirect attack from outward obligations which led Cassin to argue for formal protection of the right to freedom of thought in Article 18. These comments are interesting because they show that Cassin had nuanced understanding of the relationship between the *forum internum* and *forum externum*. Rather than viewing them as hermetically sealed realms he understood them to be deeply connected so much so that he thought that in certain circumstances obligations in the external realm could impact upon the internal realm.

This section has demonstrated, from a close reading of the *travaux préparatoires* relating to UDHR Article 18, that the claim that there is a hierarchical distinction between the *forum internum* and *forum externum* in this provision is unsupported. Once the context is taken into account, the foregrounding of the individual, internal aspects of freedom of thought, conscience and religion is understandable and should not automatically be interpreted as a privileging of the *forum internum* over the *forum externum* aspects of freedom of thought, conscience and religion. Secondly, through an original reading of the material, it has also demonstrated that there is not a

[54] Linde Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights* (CUP 2017) 29, 141.
[55] UNECOSOC, Commission on Human Rights, Third Session, Summary Record of the Sixtieth Meeting (23 June 1948) UN Doc E/CN.4/SR.60, 10.

binary distinction between the *forum internum* and the *forum externum* in UDHR Article 18 either. It has argued that the drafters did not conceive of the *forum internum* and *forum externum* as aspects to be kept separate in the article, but rather as important and deeply related elements of the right to freedom of thought, conscience and religion as a whole. As such, contrary to recent claims, UDHR Article 18 does not seem to represent a Protestant Christian understanding of religion in which the internal holding of a religion or belief is prioritised at the expense of external manifestation.

ii. ECHR Article 9.2 and Article 16 of the draft International Covenant on Human Rights

Given that the draft International Covenant on Human Rights became obsolete (as it was later divided into the ICCPR and ICESCR) the very early versions of the provision relating to the right to freedom of thought, conscience and religion, as part of the draft International Covenant on Human Rights, are not well-known today. However, the June 1949 version of Article 16 in the draft International Covenant on Human Rights[56] is important to the understanding of Article 9 because, as explained above, the ECHR *travaux préparatoires* reveal that the drafters of ECHR Article 9 relied upon Article 16 of the draft International Covenant on Human Rights and modelled Article 9 upon it; in this sense, it is a proto ECHR Article 9.

As noted above, in June 1949, Article 16 of the draft International Covenant on Human Rights formed two paragraphs: the first paragraph was taken verbatim from UDHR Article 18 and the second paragraph set out limitations on the right to manifest religion or belief. [57] Specifically, the second paragraph provided that:

> 'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are pursuant to law and are reasonable and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.'[58]

Given that this two-part structure of Article 16 of the draft International Covenant on Human Rights formed the basis for the two-part structure of ECHR Article 9, it is — in order to ascertain whether this represents a binary and hierarchical distinction between the *forum internum* and *forum externum* in ECHR Article 9 — necessary to ascertain whether such a binary and hierarchical distinction between the *forum internum* and the *forum externum* was envisaged by the drafters of Article 16 of the draft International Covenant on Human Rights.

[56] UNECOSOC, Report of the Fifth Session of the Commission on Human Rights to the Economic and Social Council (23 June 1949) UN Doc E/CN.4/350, 33.
[57] Ibid.
[58] Ibid.

a. A Hierarchical Distinction?

It is not evident from the *travaux préparatoires* relating to Article 16 of the draft International Covenant on Human Rights that the drafters intended to create a hierarchy between *forum internum* and *forum externum* in the right to freedom of thought, conscience and religion, namely, by distinguishing between rights which could be subject to limitations and rights which could not be limited by the State.

The previous chapter emphasised that the key point about the *forum internum* and *forum externum* distinction for commentators is that it reflects different levels of protection; commentators hold that *forum internum* rights are absolute rights which cannot be interfered with by the State in any circumstances, whereas *forum externum* rights may be limited in certain circumstances. Indeed, the concepts are often used interchangeably. Like the *forum internum* and *forum externum* distinction itself, this is so deeply embedded in the literature it is difficult to imagine that the protection of the various aspects of the right to freedom of thought, conscience and religion was anything but self-evident to the drafters. However, just as it is important not to read into the *travaux préparatoires* a clear binary distinction between *forum internum* and *forum externum* rights in UDHR Article 18, it is also important not to read into the *travaux préparatoires* of the draft International Covenant on Human Rights a clear hierarchical distinction in terms of the levels of protection to be offered to the rights within that article.

In early versions of Article 16 — which included UDHR Article 18 verbatim in paragraph one — *all* rights within the article were subject to restrictions set out in the limitation clause. In the version discussed by the Commission on Human Rights in May and June 1948 the limitation clause in paragraph three applied to all rights enumerated in the article, including the right to hold and change religion or belief, the right to manifest, the right not to be forced to act contrary to one's religion and the right to give or receive religious teaching.[59]

This is particularly striking because of the overlap in terms of the drafters working on the UDHR and the draft International Covenant on Human Rights. In the *travaux préparatoires* relating to UDHR Article 18, Cassin described freedom of thought and freedom of conscience as

[59] UNECOSOC, Commission on Human Rights Drafting Committee Second Session, Report of the Drafting Committee to the Commission on Human Rights (21 May 1948) UN Doc E/CN.4/95, 29-30. See also UNECOSOC, Commission on Human Rights, Drafting Committee Second Session, Draft International Covenant on Human Rights (Document E/600) with United States Recommendations (3 May 1948) UN Doc E.CN.4/AC.1/19, 17; UNECOSOC, Report of the Third Session of the Commission on Human Rights, Lake Success, 24 May – 18 June 1948 (28 June 1948) UN Doc E/800, 27-28; UNECOSOC, Commission on Human Rights, Draft International Covenant on Human Rights, Recapitulation of Amendments to Articles 16, 17 and 18 (26 May 1949) UN Doc E/CN.4/272 [French], 1.

‘unconditional’ freedoms[60] and as ‘sacred and inviolable’ rights[61] which give the human person ‘worth and dignity’.[62] Given this, and the fact that other drafters also described the right to thought, belief and conscience as ‘unrestricted’ and ‘fundamental’ at various points in the drafting of UDHR Article 18 it is surprising that these rights were not immediately singled out and given a special status in Article 16.

Notably, it was only in response to the May 1949 draft that Malik suggested that the restrictive clause should only be applied to the rights in paragraphs two and three (which protected the right to manifest, the right not to be forced to act contrary to one’s religion, and the right to give or receive religious teaching) and *not* to the rights to thought, belief and conscience, the right to profess any religion or belief and the right to change beliefs, listed in paragraph one.[63] At this stage, Malik emphasised that it was particularly vital to recognise that ‘the principle of conscience expressed in paragraph 1 was intangible and could not be restricted.’[64] Malik did not however comment on the legal status of the right to change religion or belief.[65]

This drafting history undermines the claim that the right to manifest was a second order concern in the right to freedom of thought, conscience and religion, from the outset. Manifestation was not singled out as a less important right and subjected to restrictions as a result of its place in a hierarchy of rights. Initially the limitation clause applied to all rights within the right to freedom of thought, conscience and religion without discrimination. It was only at a later stage that the rights to profess a religion or belief or change a religion or belief were excluded from the scope of the limitation clause which applied to the right to manifest, the right not to be forced to act contrary to one’s religion and the right to give or receive religious teaching. And, it was only after the drafters removed the explicit reference to the right not to be forced to act contrary to one’s religion and the right to give or receive religious teaching that the limitation clause applied *only* to the right to manifest religion or belief. The reason why the limitation clause in ECHR Article 9.2 relates only to the right to manifest religion or belief, therefore, is because

[60] UNECOSOC, Commission on Human Rights, Third Session, Summary Record of the Sixtieth Meeting (23 June 1948) UN Doc E/CN.4/SR.60, 10.
[61] UNECOSOC, Commission on Human Rights, Third Session, Summary Record of the Sixtieth Meeting (23 June 1948) UN Doc E/CN.4/SR.60, 10. See also UNGA, Draft International Covenants on Human Rights: Annotation (1 July 1955) UN Doc A/2929, 48, para 105.
[62] UNECOSOC, Commission on Human Rights, Summary Record of Fourteenth Meeting (5 February 1947) UN Doc E/CN.4/SR.14, 7.
[63] UNECOSOC, Commission on Human Rights, Fifth Session, Summary Record of the One Hundred and Sixteenth Meeting (17 June 1949) UN Doc E/CN.4/SR.116, 9.
[64] Ibid.
[65] Previously, in the French Communication in May 1948, the right to change was described as ‘absolute and sacred’, see UNECOSOC, Commission on Human Rights, Third Session, Observation of Governments on the Draft International Declaration on Human Rights, The Draft International Covenant on Human Rights and Methods of Application: Communication from the French Government (6 May 1948) UN Doc E/CN.4/82/Add.8, 4.

the drafters relied directly upon the 1949 version of Article 16 in the draft International Covenant on Human Rights, in which the limitation clause related only to the manifestation of religion or belief.

This background shows that the introduction of a limitation clause into the right to freedom of thought, conscience and religion was not a reflection of an automatic, arbitrary hierarchy drawn between different types of rights (i.e. between *forum internum* and *forum externum* rights) or evidence of prioritising one over the other in this article. The drafters recognised that there were some extreme circumstances in which states may need to limit certain forms of expression of religion or belief, which are dangerous such as those which include 'brutal and bloody ritual, self-mutilation, collective suicides and so forth.'[66] Thus, it was agreed a religious liberty article in a legally binding treaty should include a limitation clause. It was only as the article developed, and rights were removed, that the limitation clause related only to manifestation of religion or belief.

Moreover, even then, the limitation clause was not intended to be a *carte blanche* for states to limit manifestation. Manifestation of religion or belief could only be limited in certain, carefully identified, circumstances. The limitation clause is to be strictly interpreted – this has been emphasised since by the Human Rights Committee (HRC) in General Comment 22.[67] So, whilst the scope of the right to manifest was understood to be broad, the scope of the limitation clause was understood to be narrow.

b. A Binary Distinction?

The *travaux préparatoires* relating to the limitation clause in the provision relating to freedom of thought, conscience and religion in the draft International Covenant on Human Rights does not only provide strong evidence that the limitation clause relating to the manifestation of religion or belief in ECHR Article 9.2 does not represent a hierarchical distinction between *forum internum* and *forum externum* rights (specifically between holding and manifesting a religion or belief) it also provides evidence that the drafters did not conceive of a binary distinction between these realms either.

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[66] Stephanie Berry, 'A 'Good Faith' Interpretation of the Right to Manifest Religion? The Diverging Approaches of the European Court of Human Rights and the UN Human Rights Committee' (2017) 37:4 Legal Studies 672, 626. A longer list was provided by Krishnaswami in OHCHR, A Study of Discrimination in the Matter of Religious Rights and Practices by Arcot Krishnaswami, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and the Protection of Minorities (1960) UN Doc E/CN.4/Sub.2/200/Rev.1, 17. See also UNGA, Record of the 127th Meeting (9 November 1948) UN Doc A/C.3/SR.127, 390-391.

[67] OHCHR, General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion), (20 July 1993) UN Doc CCPR/C/21/Rev.1/Add.4, para 8.

A comment made by the Chinese Representative (Cha) in response to Malik's proposal to restrict the application of the limitation clause is key here. Malik suggested that the limitations in paragraph four of Article 16 of the draft International Covenant on Human Rights should only apply to the rights listed in paragraphs two and three, namely the right to manifest, the right not to be forced to act contrary to one's religion and the right to give or receive religious teaching.[68] According to the Chinese representative, however, this proposal 'hardly seemed realistic' because 'it was very difficult in practice to differentiate between religion or belief and its external manifestations.'[69]

Unfortunately, the *travaux préparatoires* do not reveal whether this point was discussed further, nonetheless, the fact that it was raised at all clearly demonstrates that the drafters did not consider the holding of a religion or belief and the external manifestation of religion or belief to be separate aspects; they were understood to be interrelated elements of the freedom of thought, conscience and religion. Indeed, M Evans has noted that most of the drafters of UDHR Article 18 'accepted that the inner realm of private belief and the outward act of manifestation formed a continuum; they differed over the point within the continuum at which the interference with the enjoyment of the right was justified,'[70] i.e. they did not agree on precisely which rights should be subject to limitations. The idea that the *forum internum* and the *forum externum* are interrelated is not, therefore, a novel idea in the literature today; it is important to appreciate that it was there from the very beginning.

Furthermore, the very fact that a right not to be forced to act contrary to one's religion or belief was initially explicitly included in Article 16 of the draft International Covenant on Human Rights suggests that the drafters had an understanding that the right to freedom of thought, conscience and religion was broader than simply the right to hold, change and manifest religion or belief. The inclusion of the right not to be forced to act contrary to one's conscience is particularly relevant here. This right was not included in the 1949 version of Article 16 upon which ECHR Article 9 was based, but interestingly, the discussion relating to this right in Article 16 of the draft International Covenant on Human Rights was later included in the appendix to the summary of the *travaux préparatoires* on ECHR Article 9.[71]

It is particularly interesting to note from the appendix that the drafters of Article 16 of the draft International Covenant on Human Rights did not have any objection to including a right not

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[68] UNECOSOC, Commission on Human Rights, Fifth Session, Summary Record of the One Hundred and Sixteenth Meeting (17 June 1949) UN Doc E/CN.4/SR.116, 9.
[69] Ibid., 12.
[70] Malcolm D Evans, *Religious Liberty* (CUP 1997) 190.
[71] COE, European Commission of Human Rights, Preparatory Work on Article 9 of the European Convention on Human Rights (16 August 1956) Doc DH (56) 14.

to be forced to act contrary to one's religion or belief, in principle, i.e. they agreed that it was within the scope of the right to freedom of thought, conscience and religion. It was removed simply due to concerns about the practical difficulties of protecting such a right at the international level.[72] A different approach was taken to the proposal to include a provision establishing that 'persons who conscientiously object to war as being contrary to their religion shall be exempt from military service.'[73] This was withdrawn on the basis that it was outside the scope of the article and covered in Article 8.[74]

The right not to be forced to act contrary to one's religion or belief is interesting because it seems to be a liminal right straddling both the *forum internum* and the *forum externum*; on the one hand it is concerned with the holding of a religion or belief in the internal realm, whereas on the other, it is concerned with action (or refusal to act) in the external realm. The fact that the drafters had no objection in principle to including this right suggests that there was an understanding among the drafters that the right to freedom of thought, conscience and religion could protect rights which clearly span both the *forum internum* and *forum externum*. This is further evidenced in the debates concerning the right to change religion or belief to which this chapter will now turn.

C. Later International Instruments and *Travaux Préparatoires* (post-November 1950)

This section argues that there are two key pieces of evidence from the drafts of the right to freedom of thought, conscience and religion in ICCPR Article 18 and Article 1 of the 1981 Declaration which further refute the claim that there is a binary and hierarchical distinction between *forum internum* and *forum externum* rights in UDHR Article 18 and ECHR Article 9. The key changes in these later instruments relate to the removal of the right to change religion or belief and the introduction of a clause prohibiting coercion which would impair the freedom to have or adopt a religion or belief.

[72] Cassin cautioned against its incorporation because, in countries with various religious, public life conflicts invariably conflicts with the beliefs of some citizens, see UNECOSOC, Commission on Human Rights, Fifth Session, Summary Record of the One Hundred and Sixteenth Meeting (17 June 1949) UN Doc E/CN.4/SR.116, 10.

[73] UNECOSOC, Commission on Human Rights Sixth Session, Compilation of the Comments of Governments on the Draft International Covenant on Human Rights on the Proposed Additional Articles (22 March 1950) UN Doc E.CN.4/365, 44.

[74] UNECOSOC, Commission on Human Rights, Sixth Session, Summary Record of the One Hundred and Sixty First Meeting (28 April 1950) UN Doc E.CN.4/SR.161, 11-12.

i. The Right to Change Religion or Belief

The clearest evidence to support the argument that there is not a binary distinction between the *forum internum* and *forum externum* in the right to freedom of thought, conscience and religion can be found in a detailed analysis of the right to change religion or belief in the pre-November 1950 *travaux préparatoires* relating to Article 18 of UDHR and Article 16 of the draft International Covenant on Human Rights (which formed the basis for Article 18 of the ICCPR) and the post-November 1950 *travaux préparatoires* relating to ICCPR Article 18[75] and the 1981 Declaration.

Lindkvist has pointed out that the right to change religion or belief was one of the most controversial aspects of the UDHR and was by no means 'a self-evident feature of what religious liberty meant when the declaration came to life.'[76] The right to change religion or belief was included in UDHR Article 18 and Article 16 of the draft International Covenant on Human Rights. However, as Article 16 of the draft International Covenant on Human Rights later developed into ICCPR Article 18, the drafters replaced the right to change with the 'freedom to have or adopt a religion or belief of one's choice'.[77] In the later, non-binding 1981 Declaration even the reference to adopting a religion or belief was removed so that Article 1 does not endorse change at all.[78]

This section argues that the discussions relating to the right to change religion or belief, firstly in the UDHR and the draft International Covenant on Human Rights, and later in the ICCPR and 1981 Declaration, support the claim in this chapter that the *forum internum* and *forum externum* aspects of the right to freedom of thought, conscience and religion were understood to

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[75] Bossuyt provides a useful starting point for relevant materials, see Marc Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Springer 1987). However, as explained in a footnote above, for the purposes of consistency and clarity - with respect to *travaux préparatoires* relating to each of the UN instruments discussed in this thesis - reference will be made to the UN documents themselves.

[76] Linde Lindkvist, 'Shrines and Souls: The Reinvention of Religious Liberty and the Genesis of the Universal Declaration of Human Rights' (2014) <https://lup.lub.lu.se/search/publication/8be4900a-a82a-4d0e-97a8-305fe45b3872> accessed December 2016, 73.

[77] UNGA, Draft International Covenants on Human Rights: Report of the Third Committee (8 December 1960) UN Doc A/4625, para 50. 'Adopt' had also been suggested by the Netherlands, see UNECOSOC, Commission on Human Rights, Third Session, Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation (22 April 1948) UN Doc E/CN.4/82/Rev.1, 7. For discussion see, Malcolm D Evans, 'Historical Analysis to the Freedom of Religion and Belief as a Technique for Resolving Conflict' in W Cole Durham Jr and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 12; KJ Partsch, 'Freedom of Conscience and Expression, and Political Freedoms' in L Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981), 211ff; Malcolm D Evans, *Religious Liberty* (OUP 1997) 187ff; Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (OUP 2005) 27 -42.

[78] UNGA, Thirty-Sixth Session, Third Committee, 43rd Meeting (23 November 1981) UN Doc A/C.3/36/SR.43, 7. For discussion see, Sidney Liskofsky, 'The UN Declaration on the Elimination of Religious Intolerance and Discrimination: Historical and Legal Perspectives' in JE Wood (ed) *Religion and the State: Essays in Honour of Leo Pfeffer* (Baylor University Press 1985); Malcolm D Evans, *Religious Liberty* (OUP 1997) 227ff.

be deeply interrelated elements by the drafters of these instruments. An analysis of the development of the right to change religion or belief shows that this right was not only controversial politically, it was also problematic conceptually in terms of the *forum internum* and the *forum externum*. The focus of concern for the drafters with respect to the right to change was not so much the internal change of mind, but rather the external *impact* of this change of mind; in other words, discussions centred on the *move* from the *forum internum* to the *forum externum*, from a change in belief to a change in action. This was clearly understood by the drafters if not clearly articulated in terms of the language of internal and external, *forum internum* and *forum externum*, at the time.

As the previous chapter demonstrated, commentators invariably categorise the right to change religion or belief as a *forum internum* right. However, in the *travaux préparatoires* relating to UDHR Article 18 and Article 16 of the draft International Covenant on Human Rights, the right to change religion was not understood as an entirely internal right but as a right which had both *forum internum* and *forum externum* aspects. From arguments made by supporters of the inclusion of the right to change in UDHR Article 18, the overlap envisaged between the *forum internum* and *forum externum* within the right to change is evident. According to Malik, for instance, it was not enough to protect the freedom *to be* (a static right) it was also imperative to protect the freedom *to become*, i.e. to change one's religion or belief from the 'good to the better and better as the truth progressively reveals itself'.[79] This freedom to become was not interpreted simply as an internal freedom. It was not just about freedom to change one's mind *internally*; in advocating for the explicit inclusion of the right to change drafters also sought to protect the consequences of this change which would be evident through a change of behaviour in the external realm.

The liminal position of the right to change religion or belief in terms of spanning both the *forum internum* and the *forum externum* is especially evident in the arguments made by those who objected to the inclusion of this right in UDHR Article 18. Objections did not centre simply upon the right to an internal change of mind *per se* but on the external implications of this.

As Lindkvist rightly points out, whilst the literature on the drafting of the UDHR typically presents the controversy surrounding the right to change religion or belief in terms of a 'clash between secular and predominately Western tradition of individual human rights on the one hand, and traditional Islamic doctrines of apostasy on the other' the *travaux préparatoires*

[79] Habib C Malik (ed) *The Challenge of Human Rights: Charles Malik in the Universal Declaration* (Charles Malik Foundation 2000) 16-17.

provide little support for such an interpretation.[80] Objections were not simply theological. The evidence, as Lindkvist indicates, shows that the Saudi Arabian (and the Swedish) amendments were rooted in 'worries about what kinds of social practices the article could be used to legitimise,' such as blackmailing individuals into adopting a religion.[81] Saudia Arabia, for instance, saw the provision as a threat to Islam; there were concerns that such a provision would encourage missionary activity from missionary religions and that Muslims who do not undertake missionary activity or proselytise, would be placed at a disadvantage.[82]

In terms of the *forum internum* and *forum externum* distinction, and the place of the right to change religion or belief within this framework, this is an important difference. The fact that the Saudi Arabian and Swedish representatives were concerned not simply with the *forum internum* element of the right to change but predominantly the *forum externum* element of this right (specifically, the social practices that the right to change could legitimise) shows that it was not understood as a wholly internal right – it was a right which spanned both the *forum internum* and the *forum externum*. In addition, in 1949 the Egyptian representative (Loufti) objected to the inclusion of a specific right to change religion, not because of its internal aspect but because it may lead to abuse in the *forum externum,* specifically, he argued that the right may be invoked for 'unworthy motives' for example to obtain a divorce.[83]

Ultimately the right to change religion or belief remained in UDHR Article 18. And, despite objections about *forum externum* implications from some drafters, early versions of Article 16 in the draft International Covenant on Human Rights included the right because there was a recognition that a failure to explicitly include a right to change in the would be 'tantamount to a denial of that right'[84] because there were 'religious bodies which discouraged conversions, and laws which recognised State religions and discriminated against non-believers of such religions.'[85]

Later, however, there was a definite move away from protecting the right to change religion or belief, and an emphasis on the more static right to maintain a religion or belief instead in the Covenant. In 1952, the draft International Covenant on Human Rights was, as noted above, split into two separate treaties, one on civil and political rights and one on economic,

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[80] Lindkvist L, 'Shrines and Souls: The Reinvention of Religious Liberty and the Genesis of the Universal Declaration of Human Rights' (2014) <https://lup.lub.lu.se/search/publication/8be4900a-a82a-4d0e-97a8-305fe45b3872> accessed December 2016, 103.
[81] Ibid., 107.
[82] For discussion see Paul Taylor, *Freedom of Religion* (CUP 2005) 55.
[83] UNECOSOC, Commission on Human Rights, Fifth Session, Summary Record of the One Hundred and Sixteenth Meeting (17 June 1949) UN Doc E/CN.4/SR.116, 8-9.
[84] UNGA, Draft International Covenants on Human Rights: Annotation (1 July 1955) UN Doc A/2929, 48, para 108.
[85] Ibid.

social and cultural rights (the ICCPR and ICESCR respectively). Article 16 formed the basis for the article relating to freedom of thought, conscience and religion in the draft Covenant on Civil and Political Rights, later known as the ICCPR. In drafting the ICCPR, the emphasis moved from the right to change, to the right to *maintain* one's religion or belief. It was noted that the right to change included a right to maintain one's religion or belief, but it was argued that it was 'not enough to leave this interpretation to implication'.[86] The right to maintain and the right to change were considered to be of equal importance and therefore both deserved explicit recognition in the article.[87] The Egyptian amendment to insert the words, to 'maintain' into the article, so that it read, 'freedom to maintain and to change' was unanimously accepted.[88]

By 1960, the right to change had become the fulcrum point in this article and numerous amendments were proposed which sought to remove the right to change from the article completely, preferring instead to protect an entirely static right, to have a religion or belief. For instance, Saudi Arabia proposed deleting the words 'to maintain or change his religion or belief' in the first paragraph of the article, and also suggested that paragraph two should be replaced by the statement that 'no one shall be subject to coercion which would deprive him of his right to freedom of religion or belief.'[89] And, Brazil and the Philippines proposed replacing 'to maintain or change his religion or belief' with the words 'to have a religion or belief of his choice.'[90] The compromise by the UK to insert 'to adopt' after 'to have' a religion or belief was accepted[91] and the final version of ICCPR Article 18 explains in paragraph one that the right to freedom of thought, conscience and religion includes 'freedom to have or adopt a religion or belief of his choice' and in paragraph two, that 'coercion which would impair his freedom to have or adopt a religion or belief' is prohibited.[92] However, whilst the insertion of 'to adopt' went some way towards expanding the static right to simply have a religion or belief, it is a stretch to claim that

[86] UNECOSOC, Commission on Human Rights, Report to the Economic and Social Council on the Eighth Session of the Commission, (14 June 1952) UN Doc E/2256, para 232.
[87] Ibid.
[88] Ibid., para 233.
[89] Ibid., para 234. See also UNGA, Draft International Covenants on Human Rights: Report of the Third Committee (8 December 1960) UN Doc A/4625, 16, para 46ff.
[90] UNGA, Draft International Covenants on Human Rights: Report of the Third Committee (8 December 1960) UN Doc A/4625, 16, para 47ff.
[91] UNGA, Draft International Covenants on Human Rights: Report of the Third Committee (8 December 1960) UN Doc A/4625, para 50. 'Adopt' had also been suggested by the Netherlands, see UNECOSOC, Commission on Human Rights, Third Session, Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation (22 April 1948) UN Doc E/CN.4/82/Rev.1, 7.
[92] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

this inclusion of 'adopt' specifically protects the right to *change*. The right to adopt implies that one can adopt a religion, but once adopted, cannot abandon it.[93]

A similar pattern with respect to the right to change can be seen in the *travaux préparatoires* relating to the 1981 Declaration. In the initial Working Group drafts the right to change was included in Article 1.[94] This was later replaced with 'freedom to have or adopt a religion or belief of his choice'[95] and eventually even this was removed[96] following continued opposition from representatives of Islamic countries.[97] In removing both the right to change and the right to adopt religion or belief, so the final text of Article 1 of the 1981 Declaration simply provided for 'freedom to have a religion or whatever belief of his choice', the right to change religion or belief was not explicitly endorsed at all.[98]

The right to change religion or belief was problematic precisely because it was understood to span both the *forum internum* and the *forum externum*. The implications of including such a right in a legally binding treaty became so controversial by the time of the ICCPR it was exchanged for the less controversial right 'to adopt' a religion or belief, and both the right to change and the right to adopt were entirely written out of Article 1 of the 1981 Declaration. This is conveniently ignored by commentators as the right is routinely said to be an implied right. Taylor, for instance, argues that there is 'little doubt' that ICCPR Article 18 includes the right to change. In respect of the 1981 Declaration, he argues that Article 8, which states that nothing in the 1981 Declaration shall be 'construed as restricting or derogating from any right defined in the UDHR or the International Covenants on Human Rights', means that the right to change is included in this instrument too.[99]

The precise nature of the right to change is also largely ignored by commentators. The right to change is invariably described as a *forum internum* right in the literature relating to ECHR Article 9, but this section has demonstrated that the *travaux préparatoires* relating to UDHR Article 18 and Article 16 of the draft International Covenant on Human Rights, and the

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[93] See Nazila Ghanea, 'Apostasy and Freedom to Change Religion or Belief' in W Cole Durham Jr and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 673-674.

[94] See e.g., UNECOSOC, Commission on Human Rights, Report on the Thirty-First Session, Supplement No.4 (3 February – 7 March 1975) UN Doc E/CN.4/1179, 39.

[95] UNECOSOC, Commission on Human Rights, Report on the Thirty-Fifth Session, Supplement No.6 (12 February – 16 March 1979) UN Doc E/CN.4/1347, 71, para 13.

[96] UNGA, Thirty-Sixth Session, Third Committee, 43rd Meeting (23 November 1981) UN Doc A/C.3/36/SR.43, 7.

[97] For a discussion of this debate see JA Walkate, 'The Right of Everyone to Change His Religion or Belief: Some Observations' (1983) 30:2 Netherlands International Law Review 146.

[98] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (25 November 1981) UN Doc A/RES/36/55.

[99] Paul Taylor, *Freedom of Religion* (CUP 2005) 31. See also Nazila Ghanea, 'Apostasy and Freedom to Change Religion or Belief' in W Cole Durham Jr and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 677.

travaux préparatoires relating to Article 18 of the ICCPR, show that it was not conceived in this way by the drafters of these instruments. Rather, the evidence demonstrates that the drafters understood that the right to change religion or belief spans both the *forum internum* and the *forum externum*.[100] Objections were not just based on opposition to an internal change of mind on a theological basis (i.e. because certain religions prohibited apostasy) but rather on the external consequences of a change of mind; it was the move from thinking to doing within this right that was its most controversial feature. Contrary to the claims of commentators, it is not clear from the structure of ECHR Article 9 that the right to change religion or belief is a *forum internum* right. The right to change occupies an ambivalent place both in UDHR Article 18 and ECHR Article 9.

Once it is recognised that the *forum internum* and *forum externum* aspects of the right to change religion or belief were appreciated by the drafters of freedom of religion or belief provisions, it is extremely difficult to claim that there is an either/or, binary distinction between the *forum internum* and the *forum externum* in ECHR Article 9. Any attempt to categorise rights into *forum internum* or *forum externum* is undermined by the fact that the right to change spans both the *forum internum* and the *forum externum*. One is forced to concede, therefore, that UDHR Article 18 and by implication ECHR Article 9, protects rights in the *forum internum,* rights in the *forum externum* and rights which span both the *forum internum* and *forum externum*. There is therefore no binary distinction; any boundaries which may be perceived between these two realms are in fact blurred.

ii. The Prohibition on Coercion

The claim that there is a clear hierarchical distinction between absolute *forum internum* and qualified *forum externum* rights in UDHR Article 18 and ECHR Article 9 is also undermined by a significant change to the structure of the provision in what became Article 18 of the ICCPR in 1952, namely, the introduction of the provision that prohibited coercion which would impair the freedom to maintain or change a religion or belief.

Whilst the terms ‘absolute’, ‘sacred’ and ‘unconditional’ had been used to describe the rights to hold and change a religion or belief in the drafting of the UDHR up to 1949, these terms were ultimately removed from the final text of UDHR Article 18. This meant that the precise level of protection to be offered to rights included in UDHR Article 18 was not clear from the text itself. Given the fact that the ICCPR was intended to be a legally binding treaty, the drafters

[100] Interestingly, Ghanea points to difficulties with respect to the place of apostasy because it cannot be situated completely within either the right to have or the right to manifest religion or belief, see Nazila Ghanea, ‘Apostasy and Freedom to Change Religion or Belief’ in W Cole Durham Jr and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 671.

of ICCPR Article 18 decided to insert a paragraph into the text to expressly prohibit any coercion which would impair the rights to maintain or change a religion or belief.

In 1952 the drafters of the ICCPR explained that in order to 'ensure the conditions in which the freedom to maintain or change one's religion could be enjoyed', the article should include, in paragraph two, a provision which expressly prohibited coercion which would impair the freedom to maintain or change a religion or belief.[101] This paragraph was retained in the final version of ICCPR Article 18 and also appears in Article 1 of the 1981 Declaration. Whilst it is recognised that this does not alter the meaning of ECHR Article 9, it does affect the perception of it given that provisions relating to freedom of religion or belief in the UDHR, ICCPR, ECHR and the 1981 Declaration are often addressed together.

For the purposes of this thesis, the prohibition on coercion in ICCPR Article 18.2 is illustrative because it shows a further blurring of any distinction between the *forum internum* and the *forum externum.* Firstly, the prohibition on coercion is not restricted to *forum internum* rights because it relates both to the *forum internum* right to hold a religion or belief and the right to change, which spans both the *forum internum* and *forum externum.*

Secondly, and crucially in terms of the *forum internum* and *forum externum* distinction, the elaboration in paragraph two emphasises the interrelationship between the holding and changing of a religion or belief and manifestation. In choosing to prohibit coercion which would impair the freedom to maintain or change a religion or belief**,** *any* coercion which has this effect is prohibited. Indeed, the scope of this provision was made explicit in the *travaux préparatoires* relating to ICCPR Article 18. They explain that the words 'coercion which would impair' were preferred over 'coercion which would deprive' because it was broader in scope and also covered 'indirect pressures'[102] such as 'improper inducements'.[103] The scope of this provision has also been elaborated on in General Comment 22 which explains that ICCPR Article 18.2 prohibits coercion which would impair the right to have or adopt a religion or belief, including the use (or threats) of physical force or punishment to 'compel' individuals to adopt a religious belief, recant

[101] Adopted unanimously in UNECOSOC, 'Commission on Human, Eight Session, Summary Record of the Three Hundredth and Nineteenth Meeting' (17 June 1952) UN Doc E/CN.4/SR.319, 13.
[102] UNGA, Draft International Covenants on Human Rights: Report of the Third Committee (8 December 1960) UN Doc A/4625, para 52. The drafters did note that 'coercion' did not extend to 'moral or intellectual persuasion' or any of the legitimate limitations on manifestation, see UNGA, Draft International Covenants on Human Rights: Annotation (1 July 1955) UN Doc A/2929, para 110.
[103] OHCHR, A Study of Discrimination in the Matter of Religious Rights and Practices by Arcot Krishnaswami, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and the Protection of Minorities (1960) UN Doc E/CN.4/Sub.2/200/Rev.1, 27. See also Bahiyyih G Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff Publishers 1996) 326.

or convert, and also, policies or measures which have the 'same intention or effect', for instance, bars to education, to medical treatment or employment on the basis of religion or belief.[104]

In terms of the *forum internum* and *forum externum* distinction, it is important that ICCPR Article 18.2 relates both to direct and indirect forms of coercion. This suggests that interference with other Article 18 rights, such as the right to manifest religion or belief, which would *impair* the rights to hold or change a religion or belief, is also covered. This seems sensible because limitations on an individual's right to manifest religion or belief may be so severe that their right to hold a religion or belief may also be seriously affected.[105] For instance, if an individual is prevented from adhering to a religious diet, this may significantly impair that individual's right to hold their religion.

Article 18.2 even seems broad enough to encompass coercion to *act* in a particular way (especially coercion to act contrary to one's religion or belief), if such coercion would impair the right to maintain or change a religion or belief.[106] For instance, it seems that compulsion to participate in military service may also be covered by this provision if the individual's religion or belief is impaired as a result, or if the purpose of the coercion is to force the individual to abandon or change their religion or belief.

This wider scope of Article 18.2 is significant because it further blurs any boundary between the internal and external aspects of the right to freedom of thought, conscience and religion. This important point is missed by most commentators who simply label *forum internum* rights as absolute rights and *forum externum* rights as qualified rights and draw a clear line between the two. In doing so, they fail to appreciate the interrelated nature of the *forum internum* and the *forum externum* in this provision, in particular, they fail to recognise that just as direct coercion with respect to the right to hold and change religion or belief is prohibited, the scope of this provision is such that interference with other rights which would impair the right to hold or change religion or belief is also encompassed.

It must be conceded that an exception to this trend in the literature is the recently published *Freedom of Religion or Belief: An International Law Commentary*, by Bielefeldt, Ghanea and Wiener. In their discussion of the prohibition of coercion in ICCPR Article 18, they argue that in practice the *forum internum* and *forum externum* in ICCPR Article 18 'do not exist as two clearly separated domains' but rather are 'typically interwoven'.[107] They contend that it is 'plausible to assume that in reality the dimensions covered in article 18(2) [the right to have or

[104] OHCHR, General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion) (20 July 1993) UN Doc CCPR/C/21/Rev.1/Add.4, para 5.
[105] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 201.
[106] Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016) 85.
[107] Ibid., 82.

adopt a religion or belief] and article 18(3) [the right to manifest religion or belief] usually overlap.'[108] Elsewhere, they argue specifically 'against dichotomized views of the *forum internum* and *forum externum*' contending instead that, in relation to ICCPR Article 18, these elements should be understood in terms of continuum,[109] emphasising that the 'dimensions belong together and jointly constitute the human right to freedom of thought, conscience, religion or belief.'[110] Indeed, they argue that understanding the *forum internum* and *forum externum* as 'closely interrelated dimensions within the freedom of religion or belief…makes a lot of sense.'[111]

Importantly, Bielefeldt, Ghanea and Wiener stress that in ICCPR Article 18 the *forum internum* is 'unconditional'[112] whereas the *forum externum* can be limited, however, they contend that this difference in terms of the level of protection to be offered to the *fora* should not be interpreted as privileging the internal over external manifestation which is 'supposedly devalued as mere worldly affairs and pushed back into second order concerns.'[113] They argue that ICCPR Article 18 does not 'establish an abstract priority of the internal sphere to the detriment of external manifestation of convictions in the larger life-world, nor does it do so to a particular religious rationale.'[114] In fact, they stress that it 'cannot be emphasized enough that the *forum externum* aspects of freedom of religion or belief are not in any sense less important than the *forum internum*' even though the *forum internum* is protected unconditionally.[115]

However, Bielefeldt, Ghanea and Wiener highlight practical problems of recognising the interrelationship between the *forum internum* and *forum externum* for the protection of the right to freedom of thought, conscience and religion. They argue that the assumption that the *forum internum* and *forum externum* overlap in ICCPR Article 18.2 could lead to the extreme consequence of 'extending the unconditional guarantee of article 18(2) to most (or even all) religious activities or, alternatively, of denying the practical applicability of article 18(2) altogether.'[116] They point out that, if the *forum internum* and *forum externum* are seen on a continuum, i.e. if manifestation in the *forum externum* is understood to flow from beliefs held in the *forum internum*, it may be argued that manifestations should also be protected unconditionally under Article 18.2 because a restriction on manifestation infringes the *forum internum*. This 'maximalist approach', they rightly suggest, would lead to 'an extremely broad application of the

[108] Ibid., 76.
[109] Ibid, 82, 487.
[110] Ibid., 76-77.
[111] Ibid., 85.
[112] Ibid., 84-85.
[113] Ibid., 84.
[114] Ibid., 84.
[115] Ibid., 93.
[116] Ibid., 76.

non-coercion provision' and lead to the irrelevance of Article 18.3 which specifically sets out permissible limitations on manifestation.[117] On the other hand, they point out that, seeing the *forum internum* and *forum externum* on a continuum may lead to the argument that Article 18.2 has little practical value because, without external manifestation, purely internal convictions will 'hardly ever become issues of legal contention.'[118] Again, as they rightly suggest, this 'minimalist' approach would eliminate any relevance for Article 18.2. They key to overcoming this impasse, they contend, is to 'find a reasonable way between maximalist and minimalist interpretations.'[119]

For Bielefeldt, Ghanea and Wiener the answer is found in the understanding of Article 18.2. They advise sticking to the 'precise wording' of Article 18.2 as this paragraph does not simply prohibit 'any kind of impact on the *forum internum*' it prohibits, 'more narrowly "coercion" of such a nature that it would actually "impair" the affected person's "freedom to have or adopt a religion or belief of his choice".'[120] This, they point out is a 'high threshold'.[121] The absolute protection in Article 18.2 cannot apply to manifestations of religion or belief in general.[122] However, the right to manifest 'can benefit from the unconditional status' of this provision in an 'indirect manner' because, they explain, the absolute protection of the *forum internum* is likely to 'spill over' to the *forum externum* and 'support individuals in their freedom to live in accordance with their faith and to manifest their convictions in their social environments.'[123] In this way, they explain, the freedom to have or adopt a religion or belief of one's choice without being subject to coercion, directly or indirectly, has a positive effect on 'the freedom to live an authentic religious life within the *forum externum*, both as individuals and in community with others.'[124]

That the high level of protection to be offered to the *forum internum* can 'spill over' into the *forum externum* to protect the right of individuals to manifest their religion or belief, in certain circumstances, further demonstrates the interrelationship between the *forum internum* and *forum externum* aspects of the right to freedom of thought, conscience and religion. For Bielefeldt, Ghanea and Wiener, ICCPR Article 18.2 is an element of the 'holistic guarantee of

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[117] Ibid. 76, 84.
[118] Ibid., 82.
[119] Ibid., 76.
[120] Ibid., 83, 87.
[121] Ibid.
[122] Indeed, the drafters of ICCPR Article 18 specifically noted that the prohibition on coercion did not apply to legitimate limitations under Article 18.3, see UNGA, Draft International Covenants on Human Rights: Annotation (1 July 1955) UN Doc A/2929, para 110.
[123] Ibid., 84.
[124] Ibid.

freedom of religion or belief' which in Article 18.1 'spans *forum internum* and *forum externum* alike'.[125]

Elsewhere, however, Bielefeldt, Ghanea and Wiener explain that whilst the holistic guarantee spans the *forum internum* and *forum externum* alike, it does not blur 'the distinction between different degrees of legal protection';[126] whilst related, the *forum internum* and *forum externum* are 'nonetheless distinguishable dimensions'[127] for the purposes of protection and it remains an 'important'[128] distinction in practice. Despite recognising the interrelationship between belief and action in respect of conscientious objection to military service, for instance, they argue that 'for the sake of dogmatic clarity and in view of the possible practical implications it is advisable to strictly distinguish between the *forum internum* and *forum externum* components.'[129] There seems to be a concern that the recognition of the interrelationship between these realms may lead to contradictory jurisprudence and threaten the protection of the right in practice.[130]

While the claim made regarding the interrelationship between the *forum internum* and the *forum externum* by Bielefeldt, Ghanea and Wiener seems to be based more on a philosophical perspective than textual analysis it is, nonetheless, a deeply valuable contribution to the understanding of the *forum internum* and *forum externum* distinction in ICCPR Article 18. However, the suggestion that in theory, the *forum internum* and *forum externum* in ICCPR Article 18 should be understood as interrelated elements but, in practice, the components should be strictly distinguished seems somewhat difficult to reconcile. It appears to maintain the importance of a clear distinction between the *forum internum* and *forum externum* to the protection of the right to freedom of thought, conscience and religion in practice. This is a point which will be returned to later in this thesis.

Conclusion

This chapter focused on the question of whether there is a clear binary and hierarchical distinction between the *forum internum* and *forum externum* in the architecture of Article 9 and related international provisions protecting the right to freedom of thought, conscience and religion (namely Article 18 of the UDHR and ICCPR and Article 1 of the 1981 Declaration). The analysis of the structure of ECHR Article 9, the *travaux préparatoires* relating to this article, and the right

[125] Ibid., 84.
[126] Ibid.
[127] Ibid., 76.
[128] Ibid., 486.
[129] Ibid., 290.
[130] Ibid, 83, 152, 289-290, 297.

to freedom of thought, conscience and religion in other international instruments reveals that a binary and hierarchical distinction between the *forum internum* and *forum externum* is not evident from the architecture of these articles, nor was it the intention of the drafters of these instruments to create such a distinction in the right to freedom of thought, conscience and religion.

Rather, this chapter argued that the structure of these provisions suggest, and the *travaux préparatoires* reveal, that the drafters emphasised the importance of both the *forum internum* and *forum externum* aspects of the right to freedom of thought, conscience and religion, and importantly, recognised the interrelatedness rather than the distinctiveness of these realms. It repeatedly demonstrates that the interconnected nature of the *forum internum* and the *forum externum* has been, and remains, an inescapable feature of freedom of thought, conscience and religion. This interrelationship, it contends, is clearly illustrated in the debates relating to the right to change religion or belief and the prohibition on coercion in international instruments finalised after the ECHR. Rather than a *forum internum* and *forum externum* distinction, therefore, the primary materials analysed in this chapter point to a *forum internum* and *forum externum* relationship.

This begs the question whether this understanding of ECHR Article 9 also reflected in the jurisprudence? Is the binary and hierarchical distinction between the *forum internum* and the *forum externum* really a 'doctrine' of the ECtHR? In order to address these questions, the next chapter will focus on the presentation of Article 9 and the protection to be offered to the right to freedom of thought, conscience and religion, in ECtHR jurisprudence.

CHAPTER 3. THE *FORUM INTERNUM* AND *FORUM EXTERNUM*: ECtHR JURISPRUDENCE

Introduction

This chapter explores the question whether a bright line, binary and hierarchical distinction between the *forum internum* and *forum externum* is a 'doctrine' of the ECtHR. In other words, it examines whether Article 9 jurisprudence actually says what commentators say that it says about Article 9. To do this, this chapter focuses on the way in which Article 9 has been presented before being applied to the facts of the case in Article 9 jurisprudence from the 1960s to the present day, available in both English and French.

This chapter forms three sections. The first analyses the way in which the terms *forum internum* and *forum externum* are used and the notion of a distinction between the two realms is presented in the general principles relating to Article 9. It argues, contrary to claims made by commentators, that a binary or hierarchical distinction between the *forum internum* and the *forum externum* is not a doctrine of the ECtHR. Rather, the ECtHR consistently presents the *forum internum* and *forum externum* as interrelated elements of the right to freedom of thought, conscience and religion as a whole. As such it contends that it is more helpful to understand the *forum internum* and *forum externum* in terms of a conceptual continuum ranging from the *forum internum* to the *forum externum* because the *forum internum* is always relevant in Article 9 claims, it is just that the extent of its relevance depends on the ECtHR's consideration of the facts. Even in cases concerning manifestations, the *forum internum* is relevant because manifestations flow from the *forum internum*; in other words, individuals usually act in a particular way because they believe they should or have a desire to do so.[1] Thus, this section supports the conclusion in Chapter Two.

The second section analyses the way in which the ECtHR has presented the protection to be offered to Article 9 rights in the general principles relating to Article 9. Whilst it is conceded that the ECtHR does state that certain rights can be limited whereas others cannot, this chapter argues that the ECtHR does not set up a rigid hierarchy between qualified and unqualified rights in which the *forum externum* is treated as a second order concern. Rather, it contends that the ECtHR's comments about different levels of protection under Article 9 are part of a much more nuanced understanding of the protection to be offered to Article 9 rights. The ECtHR does not

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[1] This thesis recognises that some actions have very little connection with the *forum internum*, for instance, an individual may simply wish to wear a religious item of clothing for cultural reasons. In such instances, *forum internum* relevance would be very weak indeed. And, it is likely that the ECtHR would not consider such an action a 'manifestation' under Article 9. For further discussion of manifestation, see page 88 of this thesis.

seem to be concerned with whether an issue falls into the *forum internum* or the *forum externum*, but rather with the *extent* to which the *forum internum* is relevant in any given case. This section argues that for the ECtHR, *forum internum* relevance seems to be the primary factor weighing in favour of the applicant. However, it is not the only factor which determines the outcome of a case; the ECtHR balances factors indicating a violation (primarily, but not only, *forum internum* relevance) with countervailing factors indicating no violation, to reach its decision.

From this, section three sets out a hypothesis to be tested in Part II of this thesis, that if the protection of Article 9 rights in *practice* (i.e. when the general principles are applied to the facts of the case) is consistent with the way in which Article 9 has been presented by the ECtHR, one would expect to see the ECtHR conducting a balancing exercise in order to reach its decision, in *all* Article 9 cases.

A. The Structure of ECtHR Jurisprudence: Fact and Law

Before embarking on the analysis in this chapter, it is helpful to note the structure of ECtHR jurisprudence. Typically, cases are formed of three main sections: 'the facts', 'the law' and the outcome (sometimes followed by separate opinions). 'The facts' section includes the circumstances of the case, the relevant domestic law and practice, and also, relevant international materials (including the ICCPR, HRC's General Comments, reports of the UN Special Rapporteur on Freedom of Religion or Belief) and comparative law.[2]

'The law' section includes the ECtHR's consideration of the admissibility of the complaint, the alleged violations of Convention rights, the parties' submissions and the ECtHR's assessment. It is in 'the law' section that the ECtHR sets out general legal principles, rules and doctrines relating to the article in question and relates the points of law to other ECtHR cases. Then it applies these principles to the facts of the case in its assessment, before reaching the outcome.

Given that this thesis aims to analyse both what the ECtHR *says* and what the ECtHR *does*, and whether these are congruent, it is helpful to examine the presentation of Article 9 (through the principles) and the application of the principles relating to Article 9, separately. This chapter focuses on the *presentation* of Article 9 (through the general principles). The following chapters in Part II will focus on the *application* of Article 9, that is, the decisions reached through the application of the principles of law to the facts.[3]

[2] A table of contents is helpfully set out in *İzzettin Doğan and Others v Turkey* App no 62649/10 (ECtHR, 26 April 2016).

[3] It is recognised that this is a difficult distinction to make because there is considerable overlap but the ECtHR does make this distinction, see *İzzettin Doğan and Others v Turkey* App no 62649/10 (ECtHR, 26 April 2016) paras 103 ('general principles') and 115 ('application of the above-mentioned principles in the present case').

B. The *Forum Internum* and the *Forum Externum* in Article 9 Jurisprudence

Despite the claim that the distinction between the *forum internum* and the *forum externum* is a 'doctrine' of the ECtHR,[4] and that the terms '*forum internum*' and '*forum externum*' constitute 'Strasbourg jargon',[5] commentators have not analysed the ECtHR's use of the terms *forum internum* and *forum externum* or the notion of a distinction comprehensively in the jurisprudence. This section seeks to redress this.

i. References to the *Forum Internum* and *Forum Externum*

A detailed analysis of the case law reveals some striking points about the use of the terms, *forum internum* and *forum externum*, and the notion of a distinction between them. Firstly — and this is remarkable to note given the emphasis on this terminology in the literature — whilst the term *forum internum* appears in the case law, the ECtHR does not use the term *forum externum*. Instead, it prefers to speak of 'acts' or 'manifestations' of religion or belief. The claim that the *forum internum* and *forum externum* is 'Strasbourg jargon' is therefore seriously undermined by this simple textual examination, if anything, the evidence suggests that it is more accurate to say that these terms are commentators' jargon.

Secondly, whilst the ECtHR does use the term *forum internum* it has not always been part of Article 9 jurisprudence. A few commentators have noted (usually in a footnote) that the first use of the term *forum internum* in Article 9 jurisprudence is found in *C v The United Kingdom* on 15 December 1983;[6] this is close, but not entirely correct because the first time the term appeared was slightly earlier that year in the very similar case of *X (Ross) v United Kingdom* on 14 October 1983.[7] Commentators usually present the use of the '*forum internum'* in *C v The United Kingdom* as evidence for the existence of a distinction between the *forum internum* and the *forum externum.* However, as pointed out in Chapter One, the problem with references to this case in the literature in support of such claims is just that, they are simply references. Commentators have not engaged with *C v The United Kingdom* in any detail in this respect, critically, they have not

[4] Javier Martínez-Torrón, 'The (Un)protection of Individual Religious Identity in the Strasbourg Case Law' (2012) 1:2 Oxford Journal of Law and Religion, 363, 366 footnote 18.

[5] Lourdes Peroni, 'Deconstructing 'Legal' Religion in Strasbourg' (2014) 3:2 Oxford Journal of Law and Religion 235, 236.

[6] *C v The United Kingdom* (1983) 37 DR 142. See for example: Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 72; Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, OUP 2013) 100 footnote 9; B Labuschagne, 'Religious Freedom and Newly-Established Religions in Dutch Law' (1997) 44 Netherlands International Law Review 168, 173–5; Javier Martínez-Torrón, 'The European Court of Human Rights and Religion' in Richard O'Dair and Andrew Lewis (eds) *Law and Religion: Current Legal Issues 2001 Volume 4* (OUP 2001) 198 footnote 39.

[7] *X (Ross) v The United Kingdom* App no 10295/82 (Commission Decision, 14 October 1983).

reflected on *why* it was introduced into the jurisprudence in 1983 or examined precisely *how* the term *forum internum* was used in that case or subsequent cases. It is, therefore, worth examining this in more detail.

Both *X (Ross) v The United Kingdom*[8] and *C v The United Kingdom*[9] concerned Quakers who complained about being forced to contribute to military expenditure through the payment of tax. In *C v The United Kingdom* the applicant wanted to divert the percentage of his taxes used for defence expenditure to peaceful purposes because, he argued, directly or indirectly supporting defence expenditure was an 'outrage to his conscience' and 'contrary to the requirements of the manifestation of his belief through practice.'[10] In this case, the Commission opened its Article 9 assessment with the statement that 'Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*.'[11] It added that 'in addition, it protects acts which are intimately linked to these attitudes, such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form.'[12]

However, the Commission noted that whilst Article 9 protects this 'personal sphere', it 'does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief.'[13] In respect of this case, the Commission explained that i) the obligation to pay taxes was a general and neutral obligation which had no specific conscientious implication in itself, ii) that the right of States to raise taxes is a right specifically authorised by the ECHR[14] and iii) that Article 9 does not confer a right to refuse to abide by legislation, on the basis of a religion or belief, when laws apply generally and neutrally in the public realm. Consequently, it found no interference with Article 9.

The principle that 'Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*' has become known as the 'standard recital'[15] and the sentence which follows this, which refers to 'acts intimately linked to those attitudes,' has been referred to as a 'dictum'.[16] Since 1983, the ECtHR has referred to the

[8] Ibid.
[9] *C v The United Kingdom* (1983) 37 DR 142
[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] For discussion see, Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005) 123.
[15] Malcolm D Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 296.
[16] Paul Taylor, *Freedom of Religion* (CUP 2005) 215.

forum internum in twelve other cases reported in English.[17] But why was the term *'forum internum'* introduced by the Commission in 1983? What precisely did it add?

Given that the Commission had not used the term before but referred to the fact that the sphere of personal beliefs and religious creeds is 'sometimes called the *forum internum*' it seems likely that it was drawing on external material. A probable explanation is that the term *'forum internum'* was drawn from Catholic theology. As explained in the introduction the terms *forum internum* and *forum externum* are used in canon law. What is particularly interesting, and this is a point which has not been made in the literature to date, is that the promulgation and entry into force of the 1983 Code of Canon Law by Pope John Paul II, coincided with the first appearance of the term in ECtHR jurisprudence. This may simply be an interesting coincidence or may suggest that the term was introduced by someone acquainted with Catholic theology as shorthand way of referring to internal sphere of personal beliefs and religious creeds.

Despite the emphasis on the *forum internum* in the literature on Article 9, it is striking to note that this term is not the most common way of referring to the 'sphere of personal beliefs and religious creeds' in the case law. In cases reported in English the term 'individual conscience' appears much more frequently than the term *forum internum*.[18] Indeed 'individual conscience' appears more commonly than *forum internum* in a variation on the following version of the standard recital: 'while religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion…'[19] Since *Kokkinakis v Greece* in 1993 this formulation has appeared in over forty cases available in English,[20] thus, it is no overstatement to say that it permeates the case law.

Furthermore, another point which has not been recognised in the literature to date (which is striking given the working language of the ECtHR is both English and French) is that both the term *forum internum* and the more commonly used synonym 'individual conscience' usually

[17] *C v The United Kingdom* (1983) 37 DR 142; *Vereniging Rechtswinkels Utrecht v the Netherlands* (1986) 46 DR 200; *H B v The United Kingdom* App no 11991/86 (Commission Decision, 18 July 1986); *K v The Netherlands* App no 15928/89 (Commission Decision, 13 May 1992); *Van Den Dungen v The Netherlands* (1992) 80-A DR 147; *CJ, JJ and EJ v Poland* (1996) 84-B DR 46; *Thlimmenos v Greece* App no 34369/97 (Commission Report, 4 December 1998) para 40; *Saniewski v Poland* App no 40319/98 (ECtHR, 26 June 2001); *Porter v UK* App no 15814/02 (ECtHR, 8 April 2003); *Blumberg v Germany* App no 14618/03 (ECtHR, 8 March 2008); *Skugar and Others v Russia* App no 40010/04 (ECtHR, 3 December 2009); *Schilder v The Netherlands* App no 2158/12 (ECtHR, 16 October 2012) para 18.

[18] The term 'individual conscience' is used by very few commentators. For an example of its use, see Carolyn Evans, *Freedom of Religion* (OUP 2001) 101.

[19] *Kokkinakis v Greece* (1993) Series A no 260-A, para 31. In *Pichon and Sajous v France* the ECtHR explained that the 'main sphere protected by Article 9 is that of personal convictions and religious beliefs, in other words what are sometimes referred to as matters of individual conscience', see *Pichon and Sajous v France* ECHR 2001-X 381. See also *Begheluri And Others v Georgia* App no 28490/02 (ECtHR, 7 May 2014) para 157.

[20] The latest is in *Mockutė v Lithuania* App no 66490/09 (ECtHR, 27 February 2018) para 140.

appears as '*for intérieur*' in Article 9 case law in French.[21] The first time in which *for intérieur* appears in the case law as part of the standard recital is in the French translation of *C v The United Kingdom* in 1983. The first time it appeared in a case reported *only* in French was in *K and V v The Netherlands* in 1987[22] and since then *for intérieur* has appeared in almost fifty cases available *only* in French.

The standard recital, whether expressed using the language of the *forum internum*, individual conscience or *for intérieur* is therefore deeply embedded in Article 9 jurisprudence. Indeed, it is much more embedded than commentators who have simply focused on appearances of the term *forum internum* have appreciated. In fact, it has become one of the 'stock phrases' in the ECtHR's repertoire when dealing with Article 9.[23] But what do all of these references mean? Is it evidence that a clear binary and hierarchical distinction between the *forum internum* and the *forum externum* is a doctrine of the ECtHR?

To answer this question, it is necessary to further examine *how* the *forum internum* (and related notions) are presented in the general principles section in Article 9 jurisprudence. If the purpose of the standard recital, and its variants, was to establish a clear binary and hierarchical distinction between the *forum internum* and acts or manifestations, then it can be argued that the Commission expressed this poorly, given that it continually referred to the *forum internum* alongside the right to manifest. The terms *forum internum*, individual conscience or *for intérieur* almost exclusively appear as part of the standard recital which is *always* followed by a reference to acts or manifestations in ECtHR jurisprudence. The relationship between the internal and external realm is therefore consistently emphasised in the case law through this textual feature. Looking more closely, the language used in the standard recital strengthens the relational element further. Whilst Article 9 'primarily' protects the *forum internum* or is primarily a matter of individual conscience, it 'also' protects or protects 'in addition', acts in the *forum externum* which are intimately linked to the *forum internum*. Put another way, individual conscience implies, or in French, 'it "implies" moreover' the freedom to manifest.[24]

It is worth reflecting on what is meant by 'implies' here. To 'imply' is 'to indicate the existence of something by suggestion rather than explicit reference' or to suggest that something

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[21] See *CJ, JJ and EJ v Poland* (1996) 84-B DR 46 [French] and *Kokkinakis v Greece* (1993) Series A no 260-A para 31 [French].

[22] *K and V v The Netherlands* App no 11086/84 (Commission Decision, 16 July 1987) [French].

[23] Other stock phrases include the statement that freedom of religion or belief is 'one of the most vital elements that go to make up the identity of believers and their conception of life, but is also a precious asset for atheists, agnostics, sceptics and the unconcerned' (see *Kokkinakis v Greece* (1993) Series A no 260-A, para 31), that Article 9 does not protect 'every act motivated or inspired by a religion or belief' (see *Arrowsmith v United Kingdom* (1978) 8 DR 123) and that Article 9 includes the 'freedom to hold or not to hold religious beliefs and to practise or not to practise,' (see *Busacrini and Others v San Marino* ECHR 1999-I, para 34).

[24] *Kokkinakis v Greece* (1993) Series A no 260-A, para 31 [French].

is a ‘logical consequence’.[25] In the context of the right to freedom of thought, conscience and religion, it seems that for the ECtHR, whilst Article 9 primarily protects the *forum internum* or individual conscience, it also protects manifestation, because manifestation is a logical consequence of holding a religion or belief. In other words, the internal holding of a religion or belief presupposes external manifestation.

Indeed, this has been emphasised by the ECtHR throughout its Article 9 jurisprudence.[26] In *Kokkinakis v Greece*, the most well-known ECtHR case concerning limitations on proselytism, the interconnection between belief and manifestation was explicitly emphasised by the ECtHR when it explained that ‘bearing witness in words and deeds’ was ‘bound up with the existence of religious convictions.’[27] More recently, in *Eweida and Others v United Kingdom*[28] which concerned limitations on actions taken in the employment context on the basis of religious beliefs, the ECtHR emphasised the connection between the *forum internum* and the *forum externum* even more strongly. The ECtHR reiterated the principle established in *Arrowsmith v The United Kingdom* that Article 9 does not protect every act motivated or influenced by a religion or belief,[29] adding that in order to be considered a ‘manifestation’ for the purposes of Article 9, ‘the act in question must be intimately linked to the religion or belief’ in question.[30] The ECtHR stressed that ‘acts or omissions’ which are only ‘remotely connected to a precept of faith’ are not protected by Article 9, thus highlighting the important interconnection between belief and action. This was further emphasised in the statement that manifestations are not limited to acts of worship or devotion, but rather the ECtHR determines whether there is a ‘sufficiently close and direct nexus between the act and the underlying belief’ in each case.[31] Thus, the important interrelationship between the *forum internum* and the *forum externum* is clear here.

Indeed, in the only definition of *forum internum* and *forum externum* in the case law the relationship between the two is emphasised. Judge Alberquerque explains, in his Concurring Opinion to *Krupko and Others v Russia*, that ‘the word religion derives from the Latin term *religare* which means, to bind, to bring together’; in the *forum internum* men and women are united with the deity and in the *forum externum* men and women are united with each other’.[32]

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[25] ‘imply’ in *Oxford English Dictionary* (7th edn, OUP 2015).
[26] Indeed, when an applicant criticised the government’s ‘artificial and ineffective’ distinction between ‘activity’ arguing that Article 9 of the Convention protected both religious belief (*forum internum*) and its manifestation in practice (*forum externum*)’, the ECtHR, again emphasised the connection between the realms in setting out Article 9 principles, see *Nolan and K v Russia* App no 2512/04 (ECtHR, 12 February 2009), para 59, 61.
[27] *Kokkinakis v Greece* (1993) Series A no 260-A, para 31.
[28] *Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts).
[29] Ibid., para 82. See *Arrowsmith v United Kingdom* (1978) 8 DR 123.
[30] *Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts), para 82.
[31] Ibid.
[32] *Krupko and Others v Russia* App no 26587/07 (ECtHR, 26 June 2014), Separate Opinion of Judge Alberquerque, para 5.

Whilst there are certainly problems with this definition of religion (and it is beyond the scope of this thesis to engage in that debate), this statement reveals that Judge Alberquerque understands the *forum internum* and the *forum externum* to be interrelated and corresponding elements.

The notion of a relationship between internal beliefs and external acts is similar to the nuanced approach taken in respect of private life in Article 8. The ECtHR has explained that it would be too restrictive to understand 'private life' as relating solely to an 'inner circle' in which an individual can live his own life as he wishes; it must be understood in relation to the 'outside world' which is 'not encompassed with in that circle.'[33] This was emphasised by Judge Martens who explained that Article 8 does not simply guarantee 'immunity of an inner circle in which one may live one's own, one's private life as one chooses'[34] because 'the "inner circle" concept presupposes an "outside world" which, logically, is not encompassed within the concept of private life.'[35] Referring to the Commission, Judge Martens explains that it has 'repeatedly held' that 'private life' comprises to a certain degree 'the right to establish and develop relationships with other human beings…' and the 'development and fulfilment of one's own personality.'[36]

Furthermore, it is important to reflect on the fact that the ECtHR seems to prefer the language of 'individual conscience' rather than *forum internum*. It is certainly more difficult to map 'individual conscience' onto a binary divide. If the *forum externum* is the opposite of the *forum internum*, what is the opposite of individual conscience? Is it group conscience, or external conscience? These are notions which do not appear in the case law. That the ECtHR prefers to describe religious freedom as 'primarily a matter of individual conscience' (which has no clear opposite) supports the theory that there is no binary divide between the *forum internum* and the *forum externum* in Article 9.

ii. The Scope of the *Forum Internum* and *Forum Externum*

Outside of the standard recital (the statement that 'Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum,* and its variants) the terms *forum internum,* individual conscience and *for intérieur* are very rarely used by the ECtHR. Importantly, rights are not generally labelled as '*forum internum'* rights, which means, as commentators have pointed out, it is very difficult to identify precisely which rights fall into this realm.

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[33] *Fernandez Martinez v Spain* ECHR 2014-II 449 para 109. See also *Niemietz v Germany* (1992) Series A no 251-B, para 29; *Schüth v Germany* ECHR 2010-V 397, para 53; *Travaš v Croatia* App no 75581/13 (ECtHR, 4 October 2016) para 51.

[34] *Beldjoudi v France* (1992) Series A no 234-A, Concurring Opinion of Judge Martens, para 3.

[35] Ibid.

[36] Ibid.

Indeed, there is only one instance in all of the case law of a right being explicitly described as a *forum internum* right. In *Sinan Işik v Turkey* the ECtHR explained that what was 'at stake' in the case was the 'right not to disclose one's religion or belief' which 'falls within the *forum internum* of each individual.'[37] This is, however, an exception. Generally, the ECtHR speaks loosely of the rights encompassed by Article 9, preferring to speak of the 'general right' to freedom of thought, conscience and religion and the right to manifest.[38] Occasionally it refers to specific protections offered under Article 9, for instance, that it protects against compulsion to participate in religious activities when one is not a member of the religious community in question[39] but, in these instances, the ECtHR does not mention whether these are *forum internum* or *forum externum* rights.

For commentators, this vagueness is a significant problem. They place a great deal of emphasis on the legal significance of the *forum internum* and *forum externum* distinction (namely that the *forum internum* is synonymous with absolute protection and the *forum externum* with qualified protection) and as such argue that the scope of these realms should be strictly delineated in order to ensure that the correct level of protection is offered. To address this perceived 'failure' on the part of the ECtHR to identify *forum internum* and *forum externum* rights, commentators frequently draw up lists of rights which fall (or should fall) into either the *forum internum* or the *forum externum* and be protected as absolute or qualified rights by the ECtHR, respectively. However, as Chapter One pointed out, this is a particularly contested area in the literature as commentators frequently reach very different conclusions as to which rights are *forum internum* and which are *forum externum* rights.

This chapter argues that the fact that the ECtHR does not categorise rights as either *forum internum* or *forum externum* rights is not a 'failure' but rather reflects the ECtHR's understanding that there is an integral relationship between the *forum internum* and *forum externum* and, as such, rights cannot be categorised so simplistically. The notion that rights should, or even can, be categorised as either *forum internum* or *forum externum* rights in such a binary way, seems to be a misreading of the presentation of the right to freedom of thought, conscience and religion in Article 9 jurisprudence. Rather than revealing a binary distinction between the *forum internum* and *forum externum*, a close examination of the presentation of Article 9 in the jurisprudence reveals a much more holistic understanding of Article 9; the *forum internum* (individual conscience and *for intérieur*) and *forum externum* are not 'strictly separated' but rather are

[37] *Sinan Işik v Turkey* ECHR 2010-I 341, para 42.
[38] See e.g., *Darby v Sweden* App no11581/85 (1989) Report 31, para 44, *Darby v Sweden* (1990) Series A no 187; *Kustannus Oy Vapaa Ajattelija AB and Others v Finland* (1996) 85-A DR 29; *Thlimmenos v Greece* Report 1998 para 40.
[39] See e.g., *Darby v Sweden* App no11581/85 (1989) Report 31, para 51; *Klein v Germany* App no 10138/11 (ECtHR, 6 April 2017), para 76.

presented as deeply interconnected realms across which the broad right to freedom of thought, conscience and religion is exercised.

That the ECtHR considers belief and manifestation to be inextricably linked is clear from statements made in the jurisprudence. In *Ebrahimian v France*, for instance, the ECtHR stressed that there was no reason to doubt that the applicant's decision to wear the headscarf was a manifestation of a 'sincere religious belief' which was protected by Article 9.[40] And, in *Bayatyan v Armenia*, for example, the Grand Chamber stressed the interrelationship between the *forum internum* and the *forum externum* in its recognition that conscientious objection to military service can be considered a manifestation of religion or belief, where there is a 'serious and insurmountable conflict between the obligation to perform the military service and a person's conscience or his deeply and genuinely held religious or other beliefs.'[41] These cases will be looked at in detail in Part II of the thesis, but it is important to note them here because these statements illustrate that the ECtHR does not envisage a binary and hierarchical divide between the *forum internum* and *forum externum*.

iii. A Conceptual Continuum from the *Forum Internum* to the *Forum Externum*

Taking all this into account, it seems more faithful to the text of ECHR Article 9, the related *travaux préparatoires* and the way in which Article 9 is presented in the jurisprudence to see the *forum internum* and the *forum externum* aspects of Article 9 in terms of a relationship rather in terms of a strict dichotomy. Refining this further, it seems helpful to see the *forum internum* and the *forum externum* in terms of a conceptual continuum ranging from the *forum internum* to the *forum externum*; because actions flow from, or are 'bound up' with the *forum internum*, the *forum internum* is always relevant in Article 9 cases, to some degree.[42]

On this continuum, at the one 'end' there is the holding of a religion or belief, entirely within the *forum internum* without any action, or manifestation, of any sort. At the other 'end' there are acts in *forum externum* which seem to have very little connection with religion or belief for the purposes of Article 9, in other words, they seem to have very little to do with the protected *forum internum* (despite claims to the contrary made by applicants). In terms of *forum internum* relevance, therefore, there is a spectrum of 'weight'.

In between these 'ends', there seems to be a considerable area in which the *forum internum* is engaged to a greater or lesser extent depending on the way in which the facts of the case are interpreted. The most obvious example of a right in this middle section of the continuum

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[40] *Ebrahimian v France* ECHR 2015-VIII 99, para 47.
[41] *Bayatyan v Armenia* ECHR 2011-IV 1, para 110.
[42] A 'continuum' is defined as a 'continuous sequence in which adjacent elements are not perceptively different from each other, but the extremes are quite distinct', see *Oxford English Dictionary* (7th edn, OUP 2015).

is the right to manifest religion or belief. This is because the ECtHR has stressed that acts flow from beliefs (i.e. that there is an interrelationship between the *forum internum* and *forum externum*), however, it has also explained that manifestations can be limited in accordance with Article 9.2 in certain circumstances. Another right which seems to fall into this middle section is the right to change a religion or belief. The previous chapter demonstrated that this right has both *forum internum* and *forum externum* elements in that it is both to do with changing one's mind (in the *forum internum*) and changing the way one behaves as a result of this change of mind (in the *forum externum*). Likewise, the right not to be forced to act in a way that is contrary to one's religion or belief has both a *forum internum* and *forum externum* dimension; individuals refuse to act in a certain way because it is contrary to their conscience (in the *forum internum*) but in their refusal to act they can also be seen as acting in accordance with, or manifesting, their religion or belief (in the *forum externum*).

This notion of a continuum ranging from the *forum internum* to the *forum externum*, in contrast to the notion of a bright line distinction between the *forum internum* and *forum externum*, seems to be a more helpful way of understanding Article 9. When the *forum internum* and *forum externum* are seen in terms of a rigid dichotomy, in which issues fall either into the *forum internum* or into the *forum externum*, issues which span both the *forum internum* and the *forum externum* cannot be accommodated. Significantly, in the *forum internum* and *forum externum* dichotomy model, when an issue is deemed a *forum externum* issue, the *forum internum* seems to become irrelevant. In contrast, the key point about the conceptual continuum is that it emphasises that the *forum internum* is *always* relevant; it is just that the extent of its relevance depends on the ECtHR's consideration of the facts.

This seems a sensible way of understanding Article 9 because, given the nature of the right to freedom of thought, conscience and religion, the *forum internum* dimension can never be completely irrelevant; the *forum externum* is inextricably linked with the *forum internum* because actions flow from the *forum internum*. As such, rather than asking whether a complaint is a *forum internum* or *forum externum* complaint, it seems much more likely that a key preliminary question for the ECtHR when addressing Article 9 complaints, concerning all Article 9 rights, is 'how relevant is the *forum internum* in the case in question?'.

So far, however, no account has been taken of the role of countervailing factors in Article 9 cases. At this point, therefore, it must be noted that whilst *forum internum* relevance appears to be the most important factor weighing in favour of the applicant in Article 9 cases it is not the only factor that the ECtHR takes into account. In considering complaints, it seems the ECtHR conducts a balancing exercise, weighing factors indicating a violation (primarily, but not only,

forum internum relevance) against countervailing factors indicating no violation of Article 9, in order to reach its decision. This will be explored further in the next section of this chapter.

C. General Principles Relating to Article 9 Protection

Commentators argue that evidence for a hierarchical relationship between the *forum internum* and manifestation is not only found in the language used to describe the realms in the standard recital (e.g. that the *forum internum* is the primary realm) but that this is hierarchy is clearly reflected in the different levels of protection to be offered within these realms. It is continually emphasised in the literature that the *forum internum* is the realm which is protected absolutely under Article 9 whereas the *forum externum* is offered qualified protection in accordance with Article 9.2. This is so embedded in the literature that the term *forum internum* is often used synonymously with absolute protection and the term *forum externum,* with qualified protection.

This section demonstrates that the ECtHR does not set up a hierarchy between the absolute *forum internum* and the qualified *forum externum* in the jurisprudence. And, importantly, it does not, as commentators frequently do, conflate the *forum internum* with absolute protection and *forum externum* with qualified protection either. Rather, it takes a much more nuanced approach to the protection of limited and absolute rights.

i. Limited Rights

In the literature, commentators imply that because the right to manifest religion or belief *can* be limited by States, it receives little protection at the ECtHR. However, this simple statement misses a subtle but important point in Article 9 jurisprudence; the ECtHR actually states that manifestation *cannot* be limited unless it meets certain criteria set out in Article 9.2. There is, therefore, a presumption of enjoyment. In order for the interference to be deemed legitimate by the ECtHR, the restriction must be prescribed by law, 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. This reflects the importance placed on the right to manifest, and the recognition that the *forum internum* right to hold a religion or belief is always engaged, to some extent, in the manifestation of religion or belief so it will inevitably be affected by any restriction in the *forum externum*.

a. The ECtHR's Fluidity

In cases concerning acts performed on the basis of religion or belief, it seems the ECtHR has to consider the procedural question whether, on the basis of the facts of the case, the right to manifest is engaged (i.e. if the act in question constitutes a manifestation for the purposes of

Article 9), before considering the legal question of whether there has been interference on the basis of the facts, and if so, whether such interference is in accordance with Article 9.2.[43]

There is fluidity in terms of the ECtHR's approach in cases concerning the right to manifest because of the ambiguity in the wording in ECHR Article 9.1 and 9.2. The term 'manifestation', for instance, is vague; whilst the ECtHR has set out certain guiding principles in relation to what constitutes a manifestation for the purposes of Article 9,[44] there are no objective tests which means a great deal depends on interpretation. It is not clear whether 'worship, teaching, practice and observance' is meant to be exhaustive of the scope of manifestation or simply examples of manifestation under Article 9. If it *is* an exhaustive list, then everything to be protected as a manifestation has to fit under one of the headings. This reading is supported by the fact that the ECtHR frequently rejects claims by emphasising that Article 9 'does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief,'[45] i.e. that it only protects certain forms of manifestation intimately connected with a religion or belief.

The ECtHR has been clear that elements of Article 9.2 must be interpreted narrowly, 'for their enumeration is strictly exhaustive and their definition is necessarily restrictive.'[46] For instance, the ECtHR has explained that Article 9.2 specifically excludes certain conditions, such as national security; this is not, as the ECtHR has explained, an 'accidental omission' but reflects

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[43] See e.g., James Dingemans and Others, *The Protections for Religious Rights: Law and Practice* (OUP 2013) 81.

[44] The ECtHR has explained that ''practice' in Article 9.1 'does not cover each act which is motivated or influenced by a religion or belief' (known as a the '*Arrowsmith* test' in the literature), see *Arrowsmith v United Kingdom* (1978) 8 DR 123. In the early jurisprudence the ECtHR held that an act must 'directly express' or be 'intimately linked' to the belief in question to constitute manifestation, but this has softened so that 'sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case' (*Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts), para 82) and it is no longer necessary to show that the act fulfil a duty mandated by their religion or belief (*SAS v France* ECHR 2014-III 341 (extracts) para 55).

[45] *HB v The United Kingdom* App no 11991/86 (Commission Decision, 18 July 1986); *Van Den Dungen v The Netherlands* (1992) 80-A DR 147; *Yanasik v Turkey* (1993) 74 DR 22; *Karaduman v Turkey* App no 16278/90 (Commission Decision, 3 May 1993); *Karakuzey v Germany* App no 26568/95 (Commission Decision, 16 October 1996); *Van Schijndel and Others v The Netherlands* App no 30936/96 (Commission Decision, 1 September 1997); *Thlimmenos v Greece* ECHR 2000-IV 263; *Pichon and Sajous v France* ECHR 2001-X 381; *Porter v UK* App no 15814/02 (ECtHR, 8 April 2003); *Leyla Şahin v Turkey* ECHR 2005-XI 173, para 121 ; *Kurtulmuş v Turkey* ECHR 2006-II 297; *Köse and 93 Others v Turkey* ECHR 2006-II 339; *Blumberg v Germany* App no 14618/03 (ECtHR, 8 March 2008); *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008) 61; *Skugar and Others v Russia* App no 40010/04 (ECtHR, 3 December 2009); *Schilder v The Netherlands* App no 2158/12 (ECtHR, 16 October 2012), para 18; *SAS v France* ECHR 2014-III 341 (extracts), para 125; *Güler and Uğur* App no 31706/10, 33088/10 (ECtHR, 2 December 2014) para 36. There is the slightly different formulation in *Pichon and Sajous*, 'in safeguarding this personal domain…', see *Pichon and Sajous v France* ECHR 2001-X 381.

[46] See *Svyato-Mykhaylivska Parafiya v Ukraine* App no 77703/01 (ECtHR, 14 June 2007), para 132; *Sidiropoulos and Others v Greece* ECHR 1998-I, 1594 para 38;*SAS v France* ECHR 2014-III 341 (extracts) para 113. In *X v Latvia*, Judge Albuquerque explained that it is 'axiomatic that "restrictions" to human rights must be interpreted narrowly', see *X v Latvia* ECHR 2013-VI 319.

the importance of freedom of religion.[47] The ECtHR has also defined what is meant the concept 'prescribed by law'. In order to meet the requirement of being 'prescribed by law' it is necessary for a measure not only to have a basis in domestic law but also to be sufficiently accessible and predictable, i.e. it must be clear enough to allow individuals to regulate their conduct. These limitations on the powers of States, the ECtHR has explained, are necessary so that public authorities do not arbitrarily interfere with the ECHR.[48]

However, importantly the ECtHR has not clearly defined what is meant by the looser terms 'necessity' and 'proportionality' in Article 9.2 which opens a considerable space for disagreement.[49] And, added to this, under Article 9.2 the ECtHR can afford States a margin of appreciation[50] which can be narrow or wide depending on the particular issue in question.[51]

Taken together, the interpretation of the protection to be offered to the right to manifest religion or belief suggests that there are a number of possible approaches that the ECtHR may take in cases in which applicants have complained that their right to manifest has been unduly interfered with by the State. For instance, the ECtHR may find that the right to manifest religion or belief is not engaged on the facts of the case and i) choose to dismiss the Article 9 complaint as manifestly ill-founded or, ii) it may choose to characterise the complaint as one engaging a different Article 9 right (for example, the right to hold a religion or belief), or a different ECHR article altogether. Alternatively, the ECtHR may find that the right to manifest religion or belief is engaged and that State actions have affected this right, but that this does not constitute interference. If the ECtHR finds that the right to manifest religion or belief is engaged, and that State actions have interfered with this right, it may decide that the action is prescribed by law, necessary and proportionate and find no violation of Article 9 or that it is not prescribed by law, necessary or proportionate and find a violation of Article 9. In its Article 9 assessment, it seems the ECtHR balances factors indicating a violation (primarily, but not only, *forum internum* relevance) with factors indicating no violation in order to reach its decision. It can, on balance,

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[47] See *Nolan and K v Russia* App no 2512/04 (ECtHR, 12 February 2009), para 73.

[48] See *Boychev and Others v Bulgaria* App no 77185/01 (ECtHR, 27 January 2011) [French] para 48; *Hasan and Chaush v Bulgaria* ECHR 2000-XI 117, para 84.

[49] For a discussion of the 'necessity test' in the ECHR see, Janneke Gerards 'How to improve the necessity test of the European Court of Human Rights (2013) 11:2 International Journal of Constitutional Law 466. For a discussion of the principle of proportionality, see D Harris and others, *Harris O'Boyle & Warbrick: Law of the European Convention on Human Rights* (4th edn, OUP 2018) 12-14.

[50] The ECtHR recognises that there are cultural and political differences in Member States and the margin of appreciation is the 'leeway' given to States as a result. In some instances, the ECtHR considers that the State is best placed to make certain decisions. For a very early reference to the notion see, *Handyside v United Kingdom* (1976) Series A no 24. For a discussion, see Javier Martínez-Torrón, 'Freedom of Religion in the European Convention on Human Rights under the Influence of Different European Traditions' (2012) 17 Pontifical Academy of Social Sciences 329, 332.

[51] For a discussion of examples of broad and narrow margin of appreciation, see Kristin Henrard, 'How the European Court of Human Rights' Concern Regarding European Consensus Tempers Effective Protection of Freedom of Religion' (2012) 4:3 Oxford Journal of Law and Religion 398

give greater weight to countervailing factors or less weight to countervailing factors depending on the facts of the case.

Considering the ECtHR's emphasis on the importance of manifestation, and recognition of the inherent relationship between manifestation and the *forum internum* right to hold a religion or belief, one might expect the ECtHR to *always* interrogate State claims about the necessity and proportionality of any interference with an applicant's right to manifest before reaching its decision. However, it would not be surprising to see the ECtHR choosing not to conduct such a rigorous assessment in some cases. If the ECtHR considers, from the outset of its Article 9 assessment, that countervailing factors under Article 9.2 clearly outweigh *forum internum* relevance in a particular context, it may decide that a superficial or perfunctory examination is sufficient,[52] choosing instead to accept the State's analysis and permit the limitation on the right to manifest.

ii. Absolute Rights

The ECtHR has consistently stressed that the Article 9.2 does not apply to Article 9 as a whole but only to the right to manifest. However, despite this emphasis, it does not appear that other rights, including those understood to be 'absolute' rights, are exempt from balancing.

In *Kokkinakis v Greece*, the ECtHR explained that the 'fundamental nature' of the rights in Article 9.1 is reflected in the wording of Article 9.2. Unlike the second paragraphs of Articles 8, 10 and 11 which relate to all the rights listed in the first paragraphs of those articles, Article 9.2 'refers only to "freedom to manifest one's religion or belief".'[53] This was also reiterated in *Darby v Sweden* in which the Commission explained that the first limb of Article 9.1 protects the right to freedom of thought, conscience and religion (the general right to freedom of religion) and the second limb protects the rights to change and manifest, and went on to explain that, whilst manifestation can be limited under Article 9.2, States are 'obliged to respect everyone's general right to freedom of religion and that right may not be restricted.'[54]

In recent years, the ECtHR has been more emphatic that certain parts of Article 9 cannot be limited. In *Tarhan v Turkey* the Court stated that freedom of thought and conscience, and the right to have or adopt a religion or belief of one's choice are rights according to which 'Article 9

[52] In *SAS v France* the ECtHR noted that the 'Court's practice is to be quite succinct when it verifies the existence of a legitimate aim' under the second paragraph of Articles 8-11, see *SAS v France* ECHR 2014-III 341 (extracts), para114.

[53] *Kokkinakis v Greece* (1993) Series A no 260-A, para 33. See also *Masaev v Moldova* App no 6303/05 (ECtHR, 12 May 2009) para 23; *Ivanova v Bulgaria* App no 52435/99 (ECtHR, 12 April 2007), para 79.

[54] *Darby v Sweden* App no 11581/85 (1989) Report 31 para 44.

does not allow any restriction whatsoever.'[55] This is further evidenced in the ECtHR's statement that 'freedom of conscience is protected without reservation' and along with the 'right of everyone to have or adopt a religion or belief of his choice' forms the 'core' of Article 9.[56] This was reiterated in *Eweida and Others v United Kingdom*, and again in *Suveges v Hungary*, in which the ECtHR observed that 'religious freedom is primarily a matter of individual thought and conscience' and then explained, for the first time in the jurisprudence, that this 'aspect of the right set out in the first paragraph of Article 9 — to hold any religious belief and to change religion or belief — is absolute and unqualified.'[57]

Ostensibly, the use of the language of 'absolute and unqualified' to describe the rights to hold and change a religion or belief in *Eweida and Others v United Kingdom* looks like a development in the jurisprudence. The phrase 'absolute and unqualified' has not been used by the ECtHR to describe any other ECHR right, not even Article 3 which is almost indisputably considered an absolute right which cannot be subject to limitations of any kind, not even under Article 15.[58] However, in the context of the case as a whole, it seems that this language in *Eweida and Others v United Kingdom* is largely rhetorical given that the ECtHR found no violation of Article 9 as a result of the limitations placed on three out of four applicants in that case. The absolutist language was not used to protect absolutely against interference, but rather, it seems, to justify the ECtHR's decision to permit limitations on Article 9. If the ECtHR had really considered the rights to hold and change religion or belief to be absolute and unqualified, it is unlikely that it would have reached the outcome it did in that case, particularly in respect to the third applicant.[59]

The key point is to consider what is meant by the terms 'absolute', 'unqualified', and 'unrestricted' in terms of the ECHR as a whole. An 'absolute' right is usually understood to be a right which is subject to no exceptions in any circumstances whatsoever — no interference can ever be justified. Unlike qualified rights, interference with absolute rights cannot be justified on

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[55] *Tarhan v Turkey* App no 9078/06 (ECtHR, 17 July 2012) [French], para 52. It is interesting that the ECtHR chooses to use language imported from ICCPR Article 18 here rather than using the language of 'change' in ECHR Article 9; it suggests that the ECtHR has been directly influenced by the way in which ICCPR Article 18 is understood.
[56] Ibid.
[57] *Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts), para 79; *Suveges v Hungary* para 151. Peroni claims that this is a well-known principle, see Lourdes Peroni, 'Deconstructing 'Legal' Religion in Strasbourg' (2014) 3:2 Oxford Journal of Law and Religion 235, 238.
[58] Greer is an exception to the trend, see Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) 15:1 Human Rights Law Review 101.
[59] This is because the dissent argued that, in respect of the third applicant (Ms Ladele), there should have been no balancing under Article 9.2 because the complaint was a matter of freedom of conscience, see *Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts), Dissenting Opinion of Judges Vučinić and Judge De Gaetano, para 2, 4, 6.

the basis of countervailing factors, no matter how serious or weighty. Commentators have suggested, or implied, that this means that absolute rights are 'largely sacrosanct'[60] or 'untouchable' rights. Given that they tend to equate the *forum internum* with the absolute realm, they argue that the *forum internum* is an entirely hands-off area for States, it is an area outside of a State's control. For Danchin, for instance, the 'inviolability' of the internal realm is 'unchallenged and unchallengeable'.[61] Even in texts in which commentators do not use the terms 'absolute', 'unconditional', 'unqualified' or 'unrestricted' to describe the *forum internum* there is the clear assumption that the *forum internum* is never to be encroached upon. C Evans, in her monograph, does not ever precisely describe the level of protection offered to the *forum internum* but rather speaks vaguely of the 'importance' of this realm.[62] It is this assumption which drives her to criticise the ECtHR for failing to recognise the importance of, and adequately protect, the *forum internum*.[63]

However, it seems that what the ECtHR is concerned about here is not impact upon absolute rights *per se* but rather impact which crosses a particular threshold; the nature and degree of the impact appears to be key.[64] The ECtHR has provided a clear example of the type of impact it considers to be prohibited under Article 9; the ECtHR has explained that 'a State cannot dictate what a person believes or take coercive steps to make him change his beliefs'.[65] In light of this, one would expect certain actions on the part of a State such as torture to recant or change a religion or belief, brainwashing (also known-as mind control or coercive persuasion), deprogramming, and indoctrination (the process of teaching an individual to uncritically accept beliefs) to always be prohibited under Article 9.[66] This is because such actions are first and foremost concerned with an individual's innermost thoughts and, in seeking to effect an internal change, they constitute a clear and direct assault on the right to hold or change a religion or

[60] Jim 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) 60.
[61] Peter G Danchin, 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law' (2008) 49:2 Harvard International Law Journal 249, 263.
[62] Carolyn Evans, *Freedom of Religion* (OUP 2001) 4, 200ff.
[63] Ibid.
[64] For a similar point in relation to ICCPR Article 18 see, Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016) 83.
[65] See *Ivanova v Bulgaria* App no 52435/99 (ECtHR, 12 April 2007) para 79. See also *Nolan and K v Russia* App no 2512/04 (ECtHR, 12 February 2009) para 73; *Masaev v Moldova* App no 6303/05 (ECtHR, 12 May 2009) para 23; *Mockutė v Lithuania* App no 66490/09 (ECtHR, 27 February 2018) para 129.
[66] This is consistent with the understanding in the *travaux préparatoires* in which the drafters explained that the right to freedom of thought, conscience and religion was intended inter alia as a 'bulwark against the dehumanising techniques adopted by a police state', see Mark Janis and Carolyn Evans, *Religion and International Law* (Brill 1999), 393. It was intended to offer protection against 'confessions imposed by reasons of State, abominable methods of police enquiry or judicial process which rob the suspected or accused person of control of his intellectual faculties and his conscience' see COE, Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights (Martinus Nijhoff 1975), Volume I, Report presented by Mr P H Teitgen to Consultative Assembly of the Council of Europe, 200, para 12.

belief. Once such interference has been substantiated by the ECtHR one would not expect the ECtHR to conduct a lengthy analysis before finding a violation of Article 9. Indeed, it seems that any consideration of countervailing interests in the assessment would be inappropriate.

However, it is important to note that the ECtHR does not say that this type of State action is *always* prohibited in *all* circumstances. It seems logical to infer that 'cannot' in the statement that 'a State cannot dictate what a person believes or take coercive steps to make him change his beliefs' means that, but, just because the ECtHR does not qualify what is meant by 'cannot', does not mean that no qualification is possible, i.e. does it mean that a State 'cannot' in any circumstances or does it mean that it 'cannot' except for very rare circumstances?[67] It is difficult to tell for certain from the statement alone.

a. The ECtHR's Flexibility

An analysis of the language used in Article 9 jurisprudence suggests that the ECtHR seems to have considerable flexibility in terms of protecting absolute rights too. Firstly, it can ask the procedural question whether a right to hold or change a religion or belief is engaged on the basis of the facts of the case. There is no objective test for reaching a decision as to whether a specific Article 9 right is engaged. Just because a complaint is framed in a particular way before the ECtHR (e.g. just because it is framed as a complaint concerning interference with the absolute right to hold or change a religion or belief) does not mean that the ECtHR has to deal with it in that way. Indeed, the ECtHR has been clear that it is 'master of the characterisation to be given in law to the facts of the case' and it is not 'bound by the characterisation given by applicants', nor a government or even the Commission.[68] The ECtHR has explained that in accordance with the *jura novit curia* principle it can choose to consider a complaint under a different paragraph or article (even if not relied upon by the applicant) or an article previously deemed inadmissible by the Commission, because, for the ECtHR, 'a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on.'[69] This means that when presented with a complaint about interference with the right to hold or change a religion or belief, the ECtHR can characterise the complaint in a different way, for instance, as a complaint concerning limitations on manifestation if it deems that the most suitable way to approach the issue in the circumstances.

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[67] For a similar discussion in relation to Article 3 see Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) 15:1 Human Rights Law Review 101, 101, 132.

[68] *Guerra and Others v Italy* ECHR 1998-I 210 para 44. See also *Powell and Rayner v The United Kingdom* (1990) Series A no 172, para 29). See, Peter Kempees, *A Systematic Guide to the Case Law of the European Convention on Human Rights* (Springer 1996) 697.

[69] See *Philis v Greece* (1991) Series A no 209, para 56.

Secondly, if it establishes that a complaint engages the absolute right to hold or to change a religion or belief, the ECtHR can then ask whether what happened in the case amounts to an interference with these absolute rights. Importantly, just because the ECtHR considers that the absolute right to hold or change a religion or belief is engaged, or even affected, in a particular case does not mean that it will find a violation of Article 9.

The ECtHR does not suggest that the rights to hold or change a religion or belief are 'untouchable' rights so that any State action which relates to, or affects, these rights must be considered a violation of Article 9. Rather, the ECtHR explains that any State action which constitutes an 'interference' or 'limitation' on these rights must be absolutely prohibited, and it has specifically set out the principle that States cannot dictate a person's religion or belief or coerce a person to change it. This is similar to the protection offered in ICCPR Article 18.2. As explained by Bielefeldt, Ghanea and Wiener, ICCPR Article 18.2 does not simply prohibit any State conduct which *affects* the right to have or adopt a religion or belief, but more specifically, it prohibits any conduct attributable to the State which would 'impair' (i.e. weaken or damage) these rights.[70] And, in deciding whether State action has affected or whether it has interfered with Article 9 it seems the ECtHR also has considerable flexibility. For instance, because the ECtHR has not defined what is meant by 'coercion' (or 'compulsion') which is often key in cases concerning claims of interference with the right to hold or change a religion or belief, it considers all the factors involved rather than reaching a decision based simply upon a strict definition.

In light of the context of ECtHR jurisprudence as a whole, this recognition of flexibility in terms of protecting absolute rights under Article 9 seems sensible. The ECtHR does not automatically find a violation of Article 3 whenever applicants complain that they have been subjected to ill-treatment or torture or inhuman or degrading treatment, or even when it finds that these rights are engaged. There must be a 'minimum level of severity' in order to fall within the scope of Article 3, i.e. the facts of the case must cross the threshold required.[71] However, there is no fixed criteria here.[72] With respect to claims about ill-treatment, for instance, the ECtHR has explained that the assessment is relative; the ECtHR cannot list at the outset behaviour that constitutes ill-treatment because it depends on a variety of factors.[73] If there is flexibility with

[70] Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016) 83.
[71] See *Pretty v The United Kingdom* ECHR 2002-III 155 para 52. The notion of a threshold is also evident in Article 8 jurisprudence, see *Seven Individuals v Sweden* (1982) 29 DR 104. The ECtHR has explained that Article 8 only comes into play where there is an invasion of 'such gravity' that 'personal integrity is compromised', see *Polanco Torres and Movilla Polanco v Spain* App no 34147/06 (ECtHR, 21 September 2010) [French], para 40.
[72] In some cases, the threshold seems to be low, see e.g., *Bouyid v Belgium* ECHR 2015-V 457 paras 86-7, 101.
[73] See also *Kudła v Poland* ECHR 2000-XI 197 para 91; *Peers v Greece* ECHR 2001-III 275 para 67. For Rivers, *Kudła v Poland* is a 'tolerably clear…example of balancing' in relation to Article 3, see Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65:1 Cambridge Law Journal 174, 183.

respect to absolute protection under Article 3 in different circumstances,[74] this raises the question whether 'absolute' in Article 9 means that there can never ever, under any circumstances whatsoever be interference or restriction on the rights to hold or change a religion or belief, or whether this is also dependent on circumstances. It seems likely that it is the latter. If there are very weighty countervailing factors the ECtHR might not find a violation. Therefore, it seems that ECtHR also conducts a balancing exercise in respect of absolute rights too. This will be discussed in detail in the analysis of the cases in Chapter Four of this thesis.

Overall, it seems that the ECtHR balances factors indicating a violation (primarily, but not only, *forum internum* relevance) with factors indicating no violation, in *all* Article 9 cases, in order to reach its decision. Whilst *forum internum* relevance is critical, therefore, it does not seem that every other consideration can simply be overridden when *forum internum* relevance is identified. In other words, *forum internum* relevance, even strong *forum internum* relevance, does not appear to be a trump card.

In terms of the margin of appreciation, there seems to be a 'trade-off' in that the 'loosening' of the *forum internum* and the *forum externum* distinction seems to imply a narrower margin of appreciation. This is because, presently, there is a fairly broad margin of appreciation in relation to the area traditionally understood to be the *forum externum*. If the *forum internum* is not understood in absolute terms (i.e. if there can be intrusions into the *forum internum* in certain circumstances) decisions cannot simply be left up to the State. The margin of appreciation needs to be narrower in such cases because a higher degree of scrutiny on the part of the ECtHR is necessary in respect of the balance between *forum internum* relevance and countervailing factors.

D. *Forum Internum* Relevance and Countervailing Factors

In addressing any complaint before it, the ECtHR considers both issues of fact and law. As Kritzer points out, it is important not to draw too sharp a distinction between the law and facts; the 'framework established by the law determines which facts are relevant, and the particular facts influence the applicability of different legal principles'.[75] The question, 'what is a fact for the purpose of the case?', is a legal question. The ECtHR is master of which facts are deemed legal facts and therefore relevant, and which are immaterial. Legal facts become 'factors' which the ECtHR takes into account in order to conduct the balancing exercise under Article 9.

[74] Greer points out, in relation to Article 3, that the 'variability of relevant thresholds undermines this [absolute] status or at least raises a query about what it really means', Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) 15:1 Human Rights Law Review 101, 116.
[75] Herbert M Kritzer, *The Justice Broker: Lawyers and Ordinary Litigation* (OUP 1999) 171.

The way in which the ECtHR approaches cases, and the decisions it reaches, depends heavily on the facts it deems relevant, and the way in which it characterises them for the purposes of the case. Take, for example, *Darby v Sweden*, mentioned above. This case concerned the obligation to pay church tax. The Commission found a violation of Article 9 because it decided that in refusing an exemption the State had failed to protect the applicant's *forum internum*.[76] In contrast, the Court decided not to examine the complaint under Article 9 at all because it characterised the complaint as an issue concerning the peaceful enjoyment of possessions and discrimination, and found a violation of Article 14 taken together with Article 1 of Protocol 1.[77] This example shows that the way in which the factual circumstances are framed is crucial.

If the ECtHR only took into account *forum internum* relevance in its consideration of Article 9 complaints, one would simply expect to see the highest level of protection in cases where *forum internum* relevance was strongest and the very lowest level of protection where *forum internum* relevance was weakest. However, as explained above, whilst significant, *forum internum* relevance is only one factor in the context of determination. The ECtHR balances factors weighing in favour of the applicant (primarily, but not only, *forum internum* relevance) with countervailing factors, to reach its decision.

On the facts in some cases, one would naturally expect the ECtHR to consider *forum internum* relevance to be at its strongest and countervailing interests to be at their weakest, and thus, to offer the very highest degree of protection. For instance, in cases where applicants have complained that the State has directly interfered with the rights to hold or change a religion or belief (by coercing them to believe in or abandon a religion, for example), and the ECtHR has found such claims substantiated, one would expect the ECtHR to find a violation of Article 9.

In contrast, on the facts in other cases, one would naturally expect the ECtHR to consider *forum internum* relevance to be at its weakest and countervailing factors to be at their strongest, and thus, to offer the very lowest degree of protection. For example, in cases in which restrictions have been placed on applicants who seek to inflict harm on themselves or others on the basis of their religion or belief, one would expect the ECtHR to find no violation of Article 9. Indeed, this is consistent with the understanding of limitations advanced by Krishnaswami; he explained that certain 'obvious' harmful manifestations — such ritual sacrifice, self-immolation and collective suicides — could (and should) always be limited.[78] In more recent years, there is growing

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[76] *Darby v Sweden* App no 11581/85 (1989) Report 31.
[77] *Darby v Sweden* (1990) Series A no 187. *Darby v Sweden* will be examined in detail in Chapter Seven.
[78] OHCHR, A Study of Discrimination in the Matter of Religious Rights and Practices by Arcot Krishnaswami, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and the Protection of Minorities (1960) UN Doc E/CN.4/Sub.2/200/Rev.1, 29.

consensus that other harmful manifestations of religion or belief, such as religiously motivated corporal punishment, can be clearly outweighed by countervailing factors.

Most cases, however, are not as clear-cut because *forum internum* relevance and countervailing factors may both be strong or *forum internum* relevance and countervailing factors may both be weak. Whilst the facts are important in all Article 9 complaints, it is in these contested cases that one would expect the facts to play the greatest role, influencing the approach and outcome from the outset. In such cases, the balancing exercise is 'harder' (relatively speaking) and the outcome depends heavily on the way in which the ECtHR characterises the case.

i. The Loose Concentric Circles Model

Given the above, a helpful way of grouping the cases according to the ECtHR's characterisation seems to be a loose concentric circles model, comprising three circles.[79] In the innermost circle, one would expect to see cases in which *forum internum* relevance is strongest and countervailing factors are weakest, and thus for the ECtHR to offer a very high degree of protection. In the outermost circle, one would expect to see cases in which *forum internum* relevance is weakest and countervailing factors are strongest, and thus for the ECtHR to offer a very low degree of protection. In the middle circle one would expect to see the most contested cases (either because both *forum internum* relevance and countervailing factors are weak or both *forum internum* relevance and countervailing factors are strong) and thus, for the ECtHR to offer protection ranging from a high to a low degree depending on the way in which it balances the factors.

It is important to note that this loose concentric circles model is, therefore, different from the continuum of *forum internum* relevance. The three circles (innermost, middle and outermost) do not represent different degrees of *forum internum* relevance; the loose concentric circles model is simply a way of grouping the cases according to the ECtHR's characterisation and it is a useful way of ordering the cases for analysis in this thesis.

An important point about this loose explanatory model is that there are no hard boundaries between the circles; the boundaries are porous. And, significantly, there are no 'correct' places for a right to fall. Where a right is seen to fall, using this model, depends on the way in which the ECtHR balances factors indicating a violation (primarily, but not only, *forum internum* relevance) with countervailing factors indicating no violation. Thus, it recognises and allows for the ECtHR's flexibility and fluidity in addressing Article 9 cases.

[79] 'concentric' meaning '[o]f or denoting circles, arcs, or other shapes which share the same centre, the larger often completely surrounding the smaller', *Oxford English Dictionary* (7th edn, OUP 2015).

This thesis recognises that the doctrine of proportionality[80] has been subject to a great deal of academic exploration.[81] The balancing of rights and public interests is, as Rivers explains, 'endemic' under the ECHR[82] and some interesting normative accounts, which aim to discipline the ECtHR's approach, have been advanced in the literature.[83] Whilst the understanding of balancing in this chapter is drawn from the way in which Article 9 has been presented by the ECtHR and, as such, reflects what one would expect the ECtHR to do rather than setting out what it ought to do, there are clear similarities between theoretical accounts in the literature and the approach in this thesis.

Take, for instance, Klatt and Meister's account of proportionality and balancing.[84] Relying on Rivers' discussion of the structure of proportionality analysis,[85] they explain that in order to determine whether an act is proportionate (and therefore, justifiable) it is necessary for the ECtHR to consider whether it pursues a legitimate aim, whether it can achieve the aim it pursues, whether it impairs the right as little as possible and, whether there is a 'net gain' when the impact on the exercise of the right is weighed, or balanced, against the extent to which the aim is realised.[86]

In respect of balancing, Klatt and Meister explain that it is necessary to establish the degree of infringement of a right, the importance of pursuing the legitimate aim, and, whether or not the importance of pursuing the legitimate aim justifies the infringement of the right.[87] They contend that there can be three outcomes of balancing: if the infringement of the right outweighs the importance of pursuing the legitimate aim, the right prevails; if the importance of pursuing the legitimate aim outweighs the infringement of the right, the pursuit of the legitimate aim prevails;

[80] As Rivers explains, 'the doctrine of proportionality in the wide sense is the name given to the set of tests used to establish whether a limitation of rights is justifiable', Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65:1 Cambridge Law Journal 174, 174. The tests in the proportionality analysis are legitimate aims, suitability, necessity and proportionality in the narrow sense, ibid., 180-181. See also, Julian Rivers, 'The Presumption of Proportionality' (2014) 77:3 Modern Law Review 409, 412-415.

[81] See e.g., ibid.; Yutaka Arai-Takahashi, 'Proportionality' in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law* (OUP 2013); Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review* (Europa Law Publishing 2013); Julian Rivers, 'The Presumption of Proportionality' (2014) 77:3 Modern Law Review 409; Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* (Martinus Nijhoff 2015); Adam Ramshaw, 'The case for replicable structure full proportionality analysis in all cases concerning fundamental rights' (2019) 39:1 Legal Studies 120.

[82] Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65:1 Cambridge Law Journal 174, 187.

[83] See e.g., Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012); Matthias Klatt and Moritz Meister, 'Proportionality-a benefit to human rights? Remarks on the I·CON controversy' (2012) 10:3 International Journal of Constitutional Law 687.

[84] Ibid.

[85] Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65:1 Cambridge Law Journal 174, 180-181.

[86] Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012) 8, 10.

[87] Ibid., 57, 79.

or, if both the infringement of the right and the importance of pursing the legitimate aim have the same weight, this causes a 'stalemate' and there will be 'discretion in balancing'.[88] In terms of attributing weight, Klatt and Meister suggest using Alexy's 'triadic scale' of 'light, moderate and serious'[89] but they do not set out the precise weight to be given to rights or competing principles in the balance.

Klatt and Meister's account, therefore, resonates with the loose concentric circles model above and it helpfully illustrates that there is no dissonance between theory and the approach in this thesis. This thesis does not seek to challenge theoretical accounts of proportionality but, rather, to go beyond them because theoretical accounts tend not to describe what happens in ECtHR cases in practice. This thesis focuses on the way balancing works in Article 9 jurisprudence to produce a descriptive ordering of cases relating to the right to freedom of thought, conscience and religion.

ii. A Hypothesis

At this juncture, a hypothesis can be proposed: if the protection of Article 9 rights in *practice* (i.e. when the ECtHR applies the principles to the facts of a case) is consistent with the way in which the right to freedom of thought, conscience and religion and its protection by the ECtHR has been *presented*, then one would expect to see the ECtHR balancing factors indicating a violation (primarily, but not only, *forum internum* relevance) with countervailing factors to reach its decision in relation to all Article 9 rights. This chapter suggests that one would expect to see cases grouped roughly in terms of a loose concentric circles model in which the innermost circle represents *forum internum* relevance at its strongest and countervailing factors at their weakest, the outermost circle represents *forum internum* relevance at its weakest and countervailing factors at their strongest and, the middle circle represents *forum internum* relevance and countervailing factors at their most contested. This nuanced understanding of protection to be offered under Article 9 is very different to the idea advanced in the literature – that there is, or should be, a clear-cut distinction between the protection of absolute and qualified rights.

The following chapters will test this hypothesis against the practice of the ECtHR when deciding cases. Does the ECtHR offer a very high degree of protection under Article 9 when it

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[88] Ibid., 58, 79-80.

[89] Ibid., 12-13, 57, 59, 79. See also, Robert Alexy, *A Theory of Constitutional Rights* (OUP 2010) 402. The way Klatt and Meister envisage this working in practice is helpfully illustrated through their discussion of *Otto-Preminger Institut v Austria.* They argue that the ECtHR did not balance properly in this case because it relied on the margin of appreciation doctrine. As there was a serious interference with the applicant association's rights, the importance of pursuing the legitimate aim could only have outweighed the right if it was also serious. They argue that it was not serious and, therefore, contend that the interference could not be justified in this case, see Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012) 157, 158-160.

considers that *forum internum* relevance is strongest and countervailing factors weakest? Does it offer a very low degree of protection when it considers that *forum internum* relevance is weakest and countervailing factors strongest? Does protection vary from a very high to a very low degree in cases in which *forum internum* relevance and countervailing factors are both strong, or both weak, depending on the way in which the ECtHR balances the factors?

In considering these questions, Part II will demonstrate further that there is not a binary and hierarchical distinction between the *forum internum* and *forum externum* in Article 9. The detailed analysis of the protection of Article 9 in the case law will reveal that the ECtHR not only recognises that the *forum internum* and *forum externum* are interrelated aspects in theory, it also recognises this in practice.

Conclusion

This chapter demonstrates that presentation of the *forum internum* and the *forum externum* in Article 9 jurisprudence supports the reading of the *forum internum* and *forum externum* advanced in the previous chapter. By focusing on the precise wording, this chapter reveals that the way in which Article 9 and the protection to be offered under this right is presented in the jurisprudence suggests that there is not a binary and hierarchical relationship between the *forum internum* and the *forum externum* but, on the contrary, that these are both important aspects of the broad right to freedom of thought, conscience and religion and deeply interrelated realms.

The focused examination of the use of the terms *forum internum* and *forum externum* in Article 9 jurisprudence demonstrates that rather than emphasising a separation, the standard recital, in which the term *forum internum* most commonly appears, consistently stresses an interconnection between these two realms. The *forum internum* is ‘intimately related’ and ‘bound up’ with the *forum externum*. The *forum internum* and *forum externum* are presented as interconnected, overlapping spaces, encompassed by the broad right to freedom of thought, conscience and religion. As such, it argued that the notion of a conceptual continuum ranging from the *forum internum* to the *forum externum*, which recognises the *forum internum* is always relevant, is a helpful way of understanding the relationship between the *forum internum* and *forum externum* in Article 9. Indeed, the terms themselves remain useful in understanding Article 9; what is problematic is the way in which they have been understood in the literature, particularly the elision of *forum internum* and *forum externum* and absolute and qualified respectively.

In respect to the presentation of protection under Article 9, this chapter argued that the terms *forum internum* and *forum externum* are not used as a device for distinguishing between rights in order to identify the level of protection to be offered by the ECtHR. Again, the ECtHR

takes a more nuanced approach to protection under this article. The ECtHR does not seem to be concerned with the question whether a right 'fits' either into the *forum internum* or the *forum externum* but rather with the subtler question of the extent to which the *forum internum* is relevant in a given case. However, it appears that whilst the *forum internum* is the most significant factor weighing in favour of the applicant it is not the only factor that determines Article 9 cases. The ECtHR seems to balance factors indicating a violation (primarily, but not only *forum internum* relevance) with countervailing factors indicating no violation in order to reach its decision.

These findings led to a hypothesis. This chapter hypothesised that, if the presentation of Article 9 and the protection to be offered under Article 9 is consistent with the understanding of Article 9 and the protection of this right in *practice* (i.e. when applied to the facts of the case) one would expect the ECtHR to conduct a balancing exercise to reach its decision in all Article 9 cases. It suggests that the ECtHR's characterisation of cases can be helpfully understood using a model of three loose concentric circles. One would expect the highest degree of protection in the innermost circle where *forum internum* relevance is strongest and countervailing factors are weakest. One would expect the lowest degree of protection in the outermost circle where *forum internum* relevance is weakest and countervailing factors are strongest. In the middle circle, where *forum internum* relevance and countervailing factors are at their most contested, one would expect protection to range from the highest to lowest degree depending on the way in which the ECtHR characterises the case. Part II of this thesis will test this hypothesis by analysing the ECtHR's application of the right to freedom of thought, conscience and religion.

PART II: THE ECtHR's APPLICATION OF THE RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

CHAPTER 4. STRONGEST *FORUM INTERNUM* RELEVANCE AND WEAKEST COUNTERVAILING FACTORS

Introduction

This chapter focuses on cases in which one would expect to see strongest *forum internum* relevance and weakest countervailing factors. In terms of the loose concentric circles model, advanced in the previous chapter, this chapter focuses on the innermost circle. Specifically, it examines cases in which applicants have complained about State interference with their right to hold, or pressure to change, a religion or belief. This is because these rights are understood to be absolute and unqualified rights so, where the ECtHR finds claims of interference or pressure substantiated, one would expect to see the ECtHR giving very little weight to countervailing factors on balance, and, offering a very high degree of protection. Is this is seen in Article 9 jurisprudence in *practice*?[1]

This chapter argues that in *practice* the protection of Article 9 rights is largely consistent with the way in which protection has been presented under Article 9. Notably, this chapter shows that the ECtHR does not treat the rights to hold or change religion or belief as 'untouchable' rights; it is not simply a given that if an applicant complains about interference with these rights the ECtHR will automatically find a violation of Article 9. The ECtHR can and does deploy a range of approaches. Firstly, when a complaint about interference with the right to hold or change a religion or belief is raised in conjunction with complaints under other ECHR articles, the ECtHR does not always conduct an examination of the Article 9 complaint if it finds a violation of another article. Secondly, when the ECtHR does examine such Article 9 complaints it does not necessarily find the rights to hold or change religion or belief are engaged. On some occasions it finds that the complaint is more appropriately characterised as engaging another Article 9 right, or on other occasions, finds no Article 9 right engaged at all. Thirdly, when the ECtHR considers that the right to hold or change a religion or belief is engaged, it only finds a violation of Article 9 if it considers that the *forum internum* relevance is not outweighed by countervailing factors in the balance.

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[1] There is a widespread assumption in the literature that the 'nucleus' of the right to freedom of thought, conscience and religion is 'unproblematic' because 'States have not found it difficult to allow people to think', see Martin Scheinin, 'Article 18' Guðmundur S Alfreðsson and Asbjørn Eide (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement'* (Martinus Nijhoff Publishers 1999) 380; Owain Thomas, 'Article 9: What is it, where does it come from, and do we need it (anymore)? (1 Crown Row, 2008) <http://www.preview2.1cor.enstar.net/1155/records/1150/OT%20Talk.pdf> accessed February 2018, 3; William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 420. However, in an increasing number of ECtHR cases, applicants are arguing that States have interfered with their rights to have or change a religion or belief.

So, whilst significant, *forum internum* relevance is not the determining factor in complaints concerning the rights to hold or change a religion or belief, rather, the ECtHR balances factors indicating a violation of Article 9 (primarily, but not only, *forum internum* relevance) with countervailing factors indicating no violation, in order to reach its decision.

To illustrate this, this chapter examines cases in which complaints have been made about interference with the rights to hold and change religion or belief in three paradigmatic areas: Section A examines deprogramming measures, coercive psychiatric treatments and criticism of religion, Section B examines indoctrination and Section C examines employment sanctions on the grounds of religion or belief affiliation.

A. Deprogramming, Coercive Psychiatric Treatment and Criticism of Religion

This section examines cases in which applicants have complained about interference with the right to hold or change religion or belief as a result of deprogramming measures, coercive psychiatric treatment and criticism of religion. Through a close analysis of case law, this section will demonstrate that, in addressing complaints about such interference, the ECtHR exercises considerable flexibility. Contrary to what one might expect from the presentation of Article 9 in the literature, *forum internum* relevance, even very strong *forum internum* relevance, is not the determining factor in these cases. It is just one of the factors the ECtHR takes into consideration, in the balance.

i. Deprogramming

It is useful to begin the analysis in this chapter with a case concerning deprogramming because, given deprogramming is such an extreme form of interference with the right to hold a religion or belief, one might expect (from the way in which Article 9 is presented in the literature, at least) the ECtHR to always offer the very highest degree of protection against any such interference. This is not, however, what the jurisprudence reveals. Rather, the ECtHR's approach in these cases offers support for the theoretical argument advanced in the previous chapter that the ECtHR exercises considerable flexibility in addressing complaints about interference with the absolute rights to hold or change religion or belief. Cases concerning deprogramming illustrate that the ECtHR can decide to conduct a superficial or perfunctory examination of the Article 9 complaint where it has already found a violation of a different ECHR Article (notably Article 5) even when it seems obvious that interference with the right to hold or change a religion or belief is potentially at issue.

This approach is illustrated in *Reira Blume v Spain*[2] in which seven members of the *Centro Esoterico de Investigaciones* (CEIS), considered a 'sect' by the Spanish government, complained that they had been deprived of their liberty by their parents and State agents for ten days and subjected to deprogramming measures.[3] Following the applicants' arrest and release, they were taken by the Catalan police to a hotel and handed over to their families, where they were confined under constant supervision, in individual rooms with boarded up windows, for ten days and subjected to deprogramming measures by a psychologist and psychiatrist at the request of the government organisation, *Pro Juventud*. Upon leaving the hotel the applicants complained unsuccessfully to the domestic courts about *inter alia* false imprisonment and before the ECtHR the applicants asked the Court to hold that the State had failed to discharge its obligations under Articles 5 and 9.[4]

For the ECtHR, the core of the applicants' complaint was the detention itself,[5] rather than the deprogramming. And, having found a violation of Article 5 on the basis that such a major deprivation of liberty, for which the authorities were ultimately responsible,[6] was not justified even where there was a risk of suicide, it decided not to conduct a separate examination of Article 9.[7] It simply noted that the government had argued that 'no Catalan police officer or other authority had taken part in the alleged deprogramming' and the applicants accepted this.[8]

Commentators have tended to gloss over the ECtHR's decision not to address the Article 9 complaint in detail. C Evans for instance thought that the case showed the ECtHR supporting the 'right of an individual to make the controversial decision of changing from a mainstream religion to a so-called cult', even if the protection was gained under a different article. [9] A similar reading was advanced by Taylor who argued that in this case the 'element of personal choice seemed to prevail'.[10] However, on closer inspection, the ECtHR's decision not to address Article 9 is revealing in terms of the ECtHR's protection of the *forum internum*. The ECtHR has explicitly explained that States are prohibited from dictating an individual's religion or belief or coercing an individual to change their religion or belief. Therefore, in choosing not to address Article 9 directly the ECtHR did not, as C Evans conceded, address 'some complicated but

[2] *Reira Blume and Others v Spain* ECHR 1999-II 539; *Reira Blume and Others v Spain* 37680/97, ECHR 1999-VII 1.
[3] *Reira Blume and Others v Spain* ECHR 1999-II 539, paras 12-15.
[4] *Reira Blume and Others v Spain* 37680/97, ECHR 1999-VII 1, para 23.
[5] Ibid., para 38.
[6] Ibid., para 35.
[7] Ibid., para 38.
[8] Ibid., para 36.
[9] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 97. See also Sylvie Langlaude, 'Indoctrination, Secularism, Religious Liberty and the ECHR' (2006) 55 International and Comparative Law Quarterly 929, 941.
[10] Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005) 332

important issues that would have been raised by consideration of the applicants' arguments based on freedom of religion.'[11]

Whilst it is recognised that applicants often make claims under various ECHR articles, and as such it is generally sensible for the ECtHR to focus on what it considers to be the most important claims,[12] this approach sometimes means the ECtHR overlooks important implications for other articles, especially Article 9. Harris and others have explained that given the heavy case load of the ECtHR, it may want to address cases as quickly as it can, and 'this may be best achieved by avoiding having to examine an article that is as (frequently) as controversial as Article 9.'[13] However, as they rightly point out this is a 'regrettable' approach because it means some important issues are left unresolved and it potentially limits 'the opportunities for Article 9 to be interpreted in such a way as to realise its full potential.'[14]

In *Reira Blume v Spain,* the fact the ECtHR decided not to conduct a detailed examination of the Article 9 complaint implied that the claim concerning deprogramming (i.e. the claim of interference with the right to hold a religion or belief) was not considered important by the ECtHR or, at least, not as important as the claim concerning the deprivation of liberty in this case.[15] It also suggests that the ECtHR's analysis misses the point of the complaint as a whole as the applicants would not have been detained if they had not held the particular belief in question; it was the belief that *motivated* the detention. Moreover, in simply stating that no Catalan police officer or any other authority had taken part in the deprogramming the ECtHR did not address the request made by the applicants under Article 9. The applicants did not complain that State authorities had engaged in the deprogramming but rather asked the ECtHR to find that the State had failed to *discharge its obligations* under Article 9. Had the ECtHR considered whether the State had failed to discharge its positive obligations under Article 9, to protect the applicants' right to hold a religion or belief, it is highly likely that it would also have found a violation of Article 9 on the facts.[16]

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[11] Carolyn Evans, *Freedom of Religion* (OUP 2001) 7.
[12] Ibid.
[13] D Harris and others, *Harris O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 612.
[14] Ibid. Temperman argues this approach could leave an applicant with a 'profound, "what if" feeling', Jeroen Temperman, '*Lautsi II:* A Lesson in Burying Fundamental Children's Rights' (2011) 6 Religion and Human Rights 279, 282. Renucci discusses the 'marginalisation of Article 9', see Jean-François Renucci, 'Article 9 of the European Convention on Human Rights' Human Rights Files No 20 (Council of Europe 2005) <https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-20(2005).pdf> accessed July 2015, 36.
[15] It would have been interesting to have seen the ECtHR's approach to the complaint about forced hypnosis in order to adhere to an educational programme at a care home in *GG v Italy*, but this complaint was deemed inadmissible for failure to exhaust domestic remedies, see *GG v Italy* App no 42414/98 (ECtHR, 7 May 2002).
[16] For a discussion of positive obligations, see *Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts), para 84.

The key point here is that, despite the striking facts in this case, the question of *forum internum* relevance was not the determining factor for the ECtHR in its analysis. On the contrary, it was just one factor the ECtHR (briefly) took into account. This case shows that in practice, in the context of deprogramming, the ECtHR does not consider the absolute right to hold a religion or belief to be an 'untouchable' right which acts as a 'trump card' in Article 9 claims. If that were the case, the ECtHR would surely have found a violation of Article 9 here; the fact that it did not provides evidence against such an interpretation of 'absolute' rights. Further evidence is seen in in cases concerning coercive psychiatric treatment motivated by an individual's adherence to a religion or belief.

ii. Coercive Psychiatric Treatment

In some cases concerning coercive psychiatric treatment, the ECtHR has decided not to address the Article 9 complaint *at all*, after finding a violation of another ECHR article even when the *forum internum* is potentially at issue. This approach is illustrated well in the recent case of *Atudorei v Romania*[17] which concerned coercive psychiatric treatment motivated by an individual's adherence to a religion or belief. The applicant complained about being detained, twice, in a psychiatric hospital against her will and being kept under surveillance and heavily medicated by her parents for six months, as a result of her involvement with the Movement for Spiritual Integration into the Absolute (MISA).[18] Whilst one might have expected the ECtHR to have given great weight to the *forum internum* in such circumstances, it did not even examine the applicants complaint under Article 9 that she had been prevented from practising her beliefs. It simply explained, after finding a violation of Articles 5 and 8, that it need not examine the complaints under Articles 9, 12 or 14.

Again, it seems that the applicant in *Atudorei v Romania* was detained and kept under surveillance as a direct result of her involvement with MISA. Had the ECtHR examined the Article 9 complaint it may have not only found that the detention and surveillance interfered with her right to practice her religion or belief but also that there had been interference with her absolute right to hold a religion or belief too.[19] Whilst it is recognised that the ECtHR may have decided not to address Article 9 for reasons of expediency, it is difficult to overlook the

[17] *Atudorei v Romania* App no 50131/08 (ECtHR, 16 Sept 2014).
[18] Ibid., para 36.
[19] In *Tsavachidis v Greece*, a number of dissenting Commissioners found that government surveillance of a Jehovah's Witness community not only constituted an interference with the right to manifest religion or belief but also the right to hold a religion or belief, see *Tsavachidis v Greece* App no 28802/95 (Commission Report, 28 October 1997).

implication that the Article 9 claim was considered to be unimportant by the ECtHR, or at least, not as important as the Article 5 and 8 claims in this case.

And, in other cases concerning psychiatric treatment motivated by an individual's religion or belief, in which the ECtHR has examined the Article 9 complaint in detail, the ECtHR has tended not to protect the *forum internum* absolutely either.

This is clear from *Mockute v Lithuania*.[20] The background to the complaint in this case is salient. The applicant, who had been taken by force to a psychiatric hospital following a deterioration in her mental health, was a member of the controversial Ojas Meditation Centre.[21] Whilst the applicant was in hospital, her mother and sister took part in a TV programme focusing on the activities of the Ojas Meditation Centre, in which they claimed meditation had had a negative impact on the applicant. These accounts, she claimed, were 'blindly believed' by the psychiatrists and after making the diagnosis that she was under the influence of a sect, the psychiatrists sought to stop her from meditating. She claimed *inter alia* that she had been forced to 'promise not to meditate' (because it was deemed harmful for her mental health and incompatible with her 'social status') and was told to adhere to Roman Catholicism, the traditional religion in Lithuania.[22]

After her release the applicant complained before the domestic courts about interference with her right to liberty, privacy and her right to freedom of religion. In terms of the latter claim, the regional court initially found that the efforts made by hospital staff to alter the applicant's views towards 'non-traditional religion, meditation and their practice at the Ojas Meditation Centre' infringed her right to freedom of religion.[23] However, whilst the Court of Appeal agreed that the applicant had been deprived of her liberty, it disagreed with the finding in relation to freedom of religion, arguing that meditation was not a religious practice and the Ojas Meditation Centre did not have the status of a religion.[24]

Before the ECtHR, the applicant argued that the hospital had interfered with both her right to privacy and to freedom of religion. After finding a violation of Article 8, the ECtHR addressed the Article 9 claim, specifically the claim that the applicant was prevented from meditating at the hospital and had been subjected to 'psycho-correction techniques aimed at bringing about a critical and negative attitude towards her religion.'[25] In terms of understanding the ECtHR's approach to protection of the *forum internum* the ECtHR's assessment under Article 9 in this case is extremely interesting so it is worth examining in detail.

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[20] *Mockutė v Lithuania* App no 66490/09 (ECtHR, 27 February 2018).
[21] Ibid., paras 6-10.
[22] Ibid.
[23] Ibid., para 37.
[24] Ibid., paras 42-4.
[25] Ibid., para 109.

The ECtHR began by emphasising the primary importance of the right to freedom of thought, conscience and religion, reiterating the principles that 'State authorities are not entitled to intervene in the sphere of an individual's freedom of conscience and seek to discover his or her religious beliefs or oblige him to disclose such beliefs' and that a 'State cannot dictate what a person believes or take coercive steps to make him change his beliefs'.[26] After considering the facts, the ECtHR found the applicant's claims largely substantiated. During the applicant's 52-day stay at the hospital, it observed, she had to submit to the 'unyielding authority of the psychiatrists who were trying to "correct" the applicant so that she abandoned her "fictitious" religion.'[27] It found pressure had been exerted on the applicant *both* to change her religious belief and to prevent her manifesting it.[28] Taking into account her history of mental illness, her vulnerable situation and the extent of the control exercised over her by the psychiatrists who encouraged her to become critical of her religion, the ECtHR found that there had been interference with the applicant's right to respect for her religion.

However, strikingly, the ECtHR then went on to consider whether this interference was justified under Article 9.2. In its (confused) assessment of whether the interference was prescribed by law the ECtHR relied upon the Lithuanian Constitution and constitutional case law, explaining that according to domestic law having a religion 'falls within the 'inviolable' sphere of private life and may not be limited in any way' unless expressed through actions.[29] The ECtHR observed that Lithuanian law did not allow psychiatrists to 'pry' into patients' beliefs in order to 'correct' them when there is no obvious and imminent risk that thought will turn into dangerous actions threatening the safety of the individual in question or others.[30] In addition, it added that in terms of its own jurisprudence, States have a limited margin of appreciation 'to justify interference with the freedom of individual conscience'[31] and repeated again, the primary importance of freedom of thought, conscience and religion and the 'fact that a State cannot dictate what a person believes or take coercive steps to make him change his beliefs'.[32] It concluded that, having found the interference was not prescribed by law, there was a violation of Article 9 in this case.

Having found that during the applicant's involuntary hospitalisation she was subjected to pressure to change her religious beliefs and was prevented from manifesting them, and that there

[26] Ibid., para 119.
[27] Ibid., para 124.
[28] Ibid., para 123.
[29] Ibid., para 129.
[30] Ibid.
[31] This is curious because the margin of appreciation doctrine is relevant only to considerations of proportionality, not to the question of whether the measure is prescribed by law.
[32] In para 118, the Court refers to *Bayatyan v Armenia* ECHR 2011-IV 1, para 123 and to *Moscow Branch of the Salvation Army v Russia* App no 72881/01 (ECtHR, 5 April 2007), para 76.

had been interference with her right to respect for her religion, one might have expected the ECtHR to have decided that there had been a violation of Article 9 in this case, without considering permissible limitations under Article 9.2. Indeed, in considering the limitations under Article 9.2 it may look like the ECtHR was seriously undermining the principles that the rights to hold and change a religion or belief are 'absolute' and 'unqualified' rights and that a 'State cannot dictate what a person believes or take coercive steps to make him change his beliefs'.[33]

However, there is an alternative reading. Rather than viewing the consideration of Article 9.2 limitations as an error on the part on the ECtHR it *might* reflect that, for the ECtHR absolute rights in theory are not *always* to be protected absolutely in practice, in *all situations*. Indeed, the ECtHR explicitly conceded that psychiatric treatment might necessitate discussing religion, and in its interpretation of Lithuanian law it even implied that 'prying into' and (importantly) 'seeking to correct' beliefs *could* be legitimate where there is a 'clear and imminent risk that such beliefs will manifest [but have not yet manifested] into actions dangerous to the patient or others'.[34] In other words, it might not find a violation of Article 9 where there are very strong countervailing factors. This is a far cry from the notion that the *forum internum* is an 'untouchable' realm which must be an entirely 'hands-off' area for States. Crucially, it seems to suggest that, for the ECtHR, State interference with the right to hold a religion or belief might be justifiable in specific circumstances.

Indeed, the issue of psychiatric treatment poses a real challenge to the notion that interference with the right to hold a religion or belief should *always* be absolutely prohibited because it would preclude the ECtHR permitting the State to step in with such medical treatment where religion was at issue, even if the religion in question was deeply harmful.[35] This does not seem sensible or workable in practice. Indeed, in taking a 'hands-off' approach in such situations it could be argued that the State would not simply be protecting the *forum internum* of the individual in question but rather ignoring its positive obligations under the ECHR.

The fact that the issue in *Mockute v Lithuania* concerned the *forum internum* was not, for the ECtHR, therefore, a 'trump-card' meaning that all other countervailing considerations could be immediately set aside. Rather than being the determining factor, the *forum internum* — whilst important — was a factor taken into account by the ECtHR in the balance.[36] Further examples of

[33] *Mockutė v Lithuania* App no 66490/09 (ECtHR, 27 February 2018), para 119.
[34] Ibid., para 129 (my emphasis).
[35] See Mari Stenlund and Pamela Slotte, 'Is there a Right to Hold a Delusion? Delusions as a Challenge for Human Rights Discussion (2003) 16 (4) Ethical Theory and Moral Practice 829.
[36] It would have been interesting to have seen the ECtHR's approach to a similar complaint in *Schmutz v Switzerland,* but the applicant died before he could pursue the application, see *Schmutz v Switzerland* App no 61780/10 (ECtHR, 10 December 2013).

this approach can be seen in cases concerning criticism of religion or government warnings relating to 'sects', to which this section will now turn.

iii. Criticisms of Religion or Belief and Government Warnings against 'Sects'

The ECtHR has considered a number of complaints concerning interference with the right to freedom of thought, conscience and religion as a result of criticism of religious groups or government warnings against 'dangerous' religious groups or 'sects'. Again, in these cases, the ECtHR has not viewed the *forum internum* relevance as a 'trump card' but rather has taken it into account in the balance.[37]

Take for instance, the *Church of Scientology v Sweden* which concerned an academic's criticism of Scientology.[38] The Commission pointed out that there is no right to be free from criticism under Article 9 and found the criticism in question — which included referring to Scientology as the 'cholera of spiritual life' — did not, given the setting of an academic lecture, constitute an interference with Article 9.[39] And in *Keller v Germany* in which Scientologists claimed that a State school publication had derided their beliefs, the Commission found that the criticism was 'not aimed at any identifiable person' and the effects were 'too indirect and remote' to constitute a violation of Article 9.[40] In *Dubowska and Skup v Poland* in which the applicants complained that a newspaper's depiction of the Madonna and Child in gas masks insulted religious feelings the Commission explained that 'members of a religious community must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.'[41] As in *Otto-Preminger Institut v Austria,* the Commission did note that 'respect for the religious feelings of believers' protected by Article 9 might be violated by 'provocative portrayals of objects of religious veneration', however, it did not consider that the applicants were 'inhibited from exercising their freedom to hold and express their belief' in the circumstances.[42] The key point for the ECtHR seems not to be whether there *is* criticism or agitation which may affect the *forum internum* but rather whether the criticism or

[37] As M Evans has pointed out individuals do not have a right to be 'untroubled by actions which challenge or offend' their religion or belief, see Malcolm D Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 284.
[38] *Church of Scientology v Sweden* (1980) 21 DR 109.
[39] Ibid.
[40] See *Keller v Germany* App no 36283/97 (Commission Decision, 4 March 1998).
[41] *Dubowska and Skup v Poland* App nos 33490/96 34055/96 (Commission Decision 18 April 1997).
[42] Ibid. See also *Otto-Preminger Institut v Austria*, (1994) Series A no 295-A, 47. For a critique of the ECtHR's approach in this case see, George Letsas, 'Is there a Right not to be Offended in one's Religious Beliefs? in Loreno Zucca and Camil Ungureanu (eds) *Law, State and Religion in New Europe: Debates and Dilemmas* (CUP 2012).

agitation against a church or a religious group reaches a level where it 'might endanger freedom of religion'.[43]

The notion of a threshold is also evident in the jurisprudence relating to government criticisms of, or warnings against, 'sects'. In *Universelles Leben v Germany*,[44] which concerned a complaint about a proposed governmental publication warning about the danger of 'so-called youth sects and psycho groups', the Commission explained that a State, in informing the general public on matters of concern, 'is entitled to convey, in an objective but critical manner, information on religious communities and sects, if such information does not pursue aims of agitation or indoctrination endangering the freedom of religion'.[45] In the circumstances of this case, the ECtHR found that if the government went ahead with the publication there would be no interference with Article 9 as the criticisms were lawfully raised against the group.

The ECtHR's approach is further illustrated in *Leela Forderkreis EV and Others v Germany*,[46] in which the government not only criticised sects, but went to considerable lengths to prevent people joining them. In this case the applicants complained before the ECtHR that the government's long standing 'warning' and 'information campaign' against sects, including the Osho movement, interfered with their right to manifest their religion.[47] The ECtHR observed that since the 1970s the government had run an extensive campaign intended to increase public awareness about sects and sectarian groups and provoke discussion of their aims, and had given a number of official warning about sects.[48] The ECtHR considered that the negative statements made about the Osho movement in this context interfered with the applicants' right to manifest their religion or belief. However, in its assessment of the legitimacy of the interference the ECtHR found no violation of Article 9 because the interference was prescribed by law, pursued a legitimate aim (the protection of public safety, public order and the rights and freedoms of others) and was necessary and proportionate. Specifically, the ECtHR observed that the government campaign did not go beyond what may be viewed as public interest[49] and in highlighting the dangers of a movement which the State considered to be 'disturbing', it was acting in accordance with ECHR Article 1 which places obligations upon Member States to ensure everyone in their jurisdiction can enjoy the rights and freedoms in the ECHR.[50]

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[43] *Church of Scientology v Sweden* (1980) 21 DR 109. See also *Choudhury v The United Kingdom* App no 17439/90 (Commission Decision, 5 March 1991).
[44] *Universelles Leben e.V v Germany* App no 29745/96 (Commission Decision, 27 November 1996).
[45] Ibid. See also *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) Series A no 23, para 53.
[46] *Leela Forderkreis EV and Others v Germany* App no 58911/00 (ECtHR, 6 November 2008).
[47] Ibid., paras 8, 67.
[48] Ibid., para 8.
[49] Ibid., para 100.
[50] The ECtHR may have been influenced by the context in Germany regarding 'sects', see generally UNECOSOC, Implementation of the Declaration on the Elimination of All Forms of Intolerance and of

Given the facts of this case, one might have expected the ECtHR to have made more of the *forum internum* relevance. As the information provided by the State in their campaign was likely to have already been known to members of the Osho movement it could have been interpreted as persuading 'adherents to abandon their religion or belief.'[51] Whilst it is recognised that the ECtHR is master of characterisation and can therefore characterise a complaint in the way it deems most suitable, the ECtHR's decision not to address the question of whether the State's actions interfered with their right to hold their religion or belief is revealing in terms of understanding *forum internum* protection. The *forum internum* was not a 'trump-card' in this case either but a factor taken into account in the balance. Rather than being an entirely 'hands-off' realm for States, it seems the ECtHR will, in certain circumstances, allow States to encroach upon the rights to hold or change a religion or belief to a considerable extent, without finding a violation if it considers there are weighty countervailing factors.[52]

To sum up this section, cases concerning claims of deprogramming and coercive psychiatric treatment show that the argument in the literature that the rights to hold and change religion or belief are 'untouchable' rights is deeply flawed. The jurisprudence simply does not support such a claim. Rather, the ECtHR's approach to the protection of the rights to hold a change religion or belief in these areas is, as hypothesised in Chapter Three, much more flexible**.** Frequently the ECtHR decides not to examine Article 9 in detail and when it does do so, the *forum internum* does not act as a 'trump' card. This sections shows that whilst significant, *forum internum* relevance is not the determining factor; the ECtHR balances factors indicating a violation (primarily, but not only, *forum internum* relevance) with countervailing factors to reach its decision. This approach is further evidenced in cases concerning indoctrination, to which this chapter will now turn.

B. Indoctrination: Religious Education and the Educational Environment

Complaints of indoctrination (or exposure to indoctrination) are commonly seen in relation to religious education in school, particularly as a result of State refusals to allow exemption from

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Discrimination Based on Religion or Belief: Visit to Germany (22 December 1997) UN Doc E/CN.4/1998/6/Add.2.

[51] Malcolm D Evans, 'The Freedom of Religion or Belief in the ECHR since Kokkinakis or "Quoting Kokkinakis" in Jeroen Temperman J, T Jeremy Gunn and Malcolm D Evans, *The European Court of Human Rights and Freedom of Religion or Belief: The 25 Years Since Kokkinakis* (Brill 2019) PAGE

[52] It would have been interesting to have seen the ECtHR's approach in *MM v Bulgaria* in which the applicant complained that the denial of parental rights due to her membership of a sect constituted 'indirect coercion' to change her religious beliefs and not to manifest them, but the parties reached a friendly settlement before it reached the ECtHR, see *MM v Bulgaria* App no 27496/95 (Commission Decision, 10 September 1996); *MM v Bulgaria* App no 27496/95 (Commission Report, 9 July 1997).

such education.[53] The ECtHR has consistently reiterated the principles that Article 9 'affords protection against indoctrination of religion by the State, be it in education at school or in any other activity for which the State has assumed responsibility'[54] and that Article 2 Protocol 1 forbids the State to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions.[55] In addressing complaints about such interference, this section argues that the ECtHR again exercises considerable flexibility. The ECtHR does not automatically find a violation of Article 9 when applicants complain that States have interfered with their rights to hold a religion or belief in this area, rather, the ECtHR balances *forum internum* relevance with countervailing factors to reach its decision.

i. Religious Education

In the early case of *CJ, JJ and EJ v Poland*[56] which concerned *inter alia* compulsory religious education the Commission characterised the Article 9 complaint as a complaint about indoctrination, however, after a brief examination of the facts it concluded that there was no indoctrination, and found no interference with Article 9, because the second and third applicants had not been compelled to attend religious instruction which was 'given on a voluntary basis' and they were not 'prevented from expressing their views concerning their beliefs.'[57] It observed that the second applicant had made the decision to attend religious instruction for a year and the third applicant had opted to take an ethics course.

On a detailed reading of the facts, one might take issue with the Commission's decision that there was no compulsion (or coercive manipulation)[58] to attend religious instruction. The second applicant claimed that as a direct result of opting out of religious instruction she was made to 'spend time alone in the corridor', had to 'repeatedly explain to passing teachers' why she was not in class, and was told by one teacher that 'it would be better if she did attend religious

[53] There is extensive literature on the topic, see e.g. Ingvill Thorson Plesner, 'Legal Limitations to Freedom of Religion or Belief in School Education' (2005) 19 Emory International Law Review 557; Sylvie Langlaude, 'Indoctrination, Secularism, Religious Liberty and the ECHR' (2006) 55 International and Comparative Law Quarterly 929; Eugenia Relaño, 'Educational Pluralism and Freedom of Religion: Recent Decisions of the European Court of Human Rights' (2010) 32:1 British Journal of Religious Education 19; Jeroen Temperman, 'State Neutrality in Public School Education: An Analysis of the Interplay Between the Neutrality Principles, the Right to Adequate Education, Children's Right to Freedom of Religion or Belief, Parental Liberties and the Position of Teachers' (2010) 32 Human Rights Quarterly 865; Ian Leigh, 'Objective, Critical and Pluralistic? Religious Education and Human Rights in the European Public Sphere' in Loreno Zucca and Camil Ungureanu (eds) *Law, State and Religion in New Europe: Debates and Dilemmas* (CUP 2012).
[54] *Angeleni v Sweden* (1986) 51 DR 41; *Efstratiou v Greece* App no 24095/94 (Commission Decision, 16 October 1995).
[55] *Folgerø And Others v Norway* ECHR 2007-III 51, para 84; *Dojan and Others v Germany* App nos 319/08 2455/08 7908/10 and 2 others, (ECtHR, 13 September 2011).
[56] *CJ, JJ and EJ v Poland* (1996) 84-B DR 46.
[57] Ibid.
[58] For a discussion of coercive manipulation in the educational context, see Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016) 85.

instruction.'[59] She also claimed she was under pressure from her peer group as she was asked 'incessantly' by other children why she did not attend the class. This psychological pressure, she argued, was such that she 'felt rejected and grew increasingly silent and depressed,' and 'it broke her resolve', so that she finally decided, against the wishes of her parents to attend religious instruction along with the other children.[60] Indeed, in the context of the Article 3 claim, in which the applicant complained that this resulted in 'depression, nervousness and a feeling of being rejected,' the Commission conceded that the child 'might have felt emotional distress,' but did not consider that this met the minimum threshold for inhuman or degrading treatment under Article 3.[61]

However, even if the ECtHR had found compulsion to attend religious education classes it might not have found a violation of Article 9 because, in light of the jurisprudence as a whole, it seems the question of whether an applicant has been compelled to attend religious instruction forms only part of the ECtHR's consideration of whether there has been indoctrination (or exposure to indoctrination). What seems to be more important is whether applicants have been forced to attend classes which are intended to indoctrinate, i.e. the *content* of the classes is key.

The ECtHR has examined the content of religious education in a number of cases concerning indoctrination in education. In *Angelini v Sweden*, for instance, in which the applicants complained that their child had been 'obliged to be brought into the Christian way of thinking' (i.e. indoctrinated), the ECtHR found that the applicant had been exempted from religious instruction whenever it involved elements of worship, such as hymn singing, and agreed with the government that whilst there was an emphasis on Christianity, religious instruction concerned religions rather than the teaching of one specific religion.[62] As such, the Commission concluded that the child had not been exposed to any religious indoctrination. [63]

The consideration of the facts in *Folgerø v Norway*,[64] however, led the ECtHR to a different conclusion. In this case, in which parents claimed that the government's refusal to grant full exemption to their children from compulsory KRL (teaching of Christianity with orientation about religion and philosophy) constituted an interference with Article 2 of Protocol 1 and Article 9, the ECtHR considered that the heavy emphasis on Christianity in these classes meant that State did not take sufficient care that the 'information and knowledge' was 'conveyed in an objective,

[59] Ibid.
[60] Ibid.
[61] Ibid. A similar complaint about 'harassment' was made but was not pursued in *Nowak and Krynicki v Poland* App no 32932/02 (ECtHR, 23 as 2009).
[62] *Angeleni v Sweden* (1986) 51 DR 41.
[63] Ibid. For a similar approach, see *Bulski v Poland* App nos 46254/99 31888/02 (ECtHR, 30 November 2004) [French].
[64] *Folgerø And Others v Norway* ECHR 2007-III 51.

critical and pluralistic manner for the purposes of Article 2 of Protocol 1 and found a violation of that article.[65] For similar reasons, the ECtHR also found a violation of Article 2 of Protocol 1 in *Hasan and Eylem Zengin v Turkey*[66] and in *Mansur Yalçin and Others v Turkey*.[67]

This emphasis on content seems logical because there is an important difference between forcing an individual to attend classes to learn about something that they simply do not want to know about (for instance, Lesbian, Gay, Bisexual and Transgender (LGBT) issues) and forcing an individual to attend classes in which they will be indoctrinated (i.e. coerced into beliefs other than their own).[68] It is not simply that the ECtHR ignores the *forum internum* in cases in which it finds that compulsion to attend religious education, or other classes, does not violate Article 9. The ECtHR considers *forum internum* relevance but balances this with countervailing factors in order to reach its decision.

This is further illustrated in *Konrad v Germany*, for instance, in which the applicants sought permission to home school their children because school education — which included sex education — did not 'suit their beliefs'.[69] In this case the ECtHR did not ignore the relevance of the parents' *forum internum* but considered that, on the facts, countervailing factors had more weight. The ECtHR explained that parents could not refuse 'a child's right to education on the basis of their [own] convictions', emphasising the important benefits of school education for children.[70] A similar approach was taken in *Dojan and Others v Germany* in which the ECtHR found that compulsory attendance of sex education classes did not violate the parents Article 2 Protocol 1 or Article 9 right.[71]

This balancing of *forum internum* relevance and countervailing factors is further illustrated in cases concerning the educational environment which will be examined next.

[65] The ECtHR did note, however, that the predominance of one religion in the curriculum does not necessarily constitute 'a departure from the principles of pluralism and objectivity amounting to indoctrination', see *Folgerφ And Others v Norway* ECHR 2007-III 51, para 22, 89. See also *Hasan and Chaush v Bulgaria* ECHR 2000-XI 117, para 63. For further discussion see, John Rees, 'Religion, Politics and Law' (2011) 11:1 International Journal for the Study of the Christian Church 101; Ian Leigh I, 'Objective, Critical and Pulralistic? Religious Education and Human Rights in the European Public Sphere' in Loreno Zucca and Camil Ungureanu (eds) *Law, State and Religion in New Europe: Debates and Dilemmas* (CUP 2012), 202ff.
[66] *Hasan and Eylem Zengin v Turkey* App no 1448/04 (ECtHR, 9 October 2007).
[67] *Mansur Yalçin and Others v Turkey* App 21163/11 (ECtHR, 16 September 2014).
[68] In *Bernard and Others v Luxembourg* the Commission found that attendance of moral and social education classes did not amount interfere with Article 9, see *Bernard and Others v Luxembourg* (1993) 75 DR 57. And, elsewhere the ECtHR has explained that where the 'rights of parents to respect for their religious convictions conflicts with the child's right to education, the interests of the child prevail', see *Martins Casimiro and Cerveira Ferreira* v *Luxembourg* App no 44888/98 (ECtHR, 27 April 1999) [French].
[69] *Konrad v Germany* ECHR 2006-XIII 355.
[70] Ibid. See also *Appel-Irrgang and Others v Germany* ECHR 2009-IV 397.
[71] *Dojan and Others v Germany* App nos 319/08 2455/08 7908/10 and 2 others, (ECtHR, 13 September 2011).

ii. The Educational Environment

One of the most well-known and controversial cases concerning the educational environment is *Lautsi v Italy*.[72] A comparison between the approach of the Chamber (*Lautsi* I)[73] and later the Grand Chamber (*Lautsi* II)[74] shows the ECtHR's flexibility with respect to the claims of interference under Article 9; again, *forum internum* relevance is not the determining factor, but a factor taken into account by the ECtHR in the balance.

In *Lautsi* I the applicant complained about the display of crucifixes in public-school classrooms in Italy, arguing that it was contrary to the principle of secularism, violated her Article 2 Protocol 1 right to educate her children in conformity with her convictions and the Article 9 rights of her children to believe or not believe, specifically their right *not* to profess Catholicism. Whilst it is recognised that this was largely a piece of strategic litigation, aimed at changing attitudes in Italy, for the purposes of the argument in this chapter it is useful to examine the way in which the ECtHR responded to the Article 9 complaint about *forum internum* interference.

In its assessment, the ECtHR observed that it was 'impossible not to notice crucifixes in the classrooms.'[75] Relying on *Dahlab v Switzerland*[76] it pointed out that as an integral part of the school environment, crucifixes 'may be considered "powerful external symbols",'[77] and, referring to *Karaduman v Turkey*,[78] it noted that in countries where most of the population adhere to one religion, such manifestations of religious signs, may place 'pressure' on students who do not hold the same religion or follow another religion.[79] Whilst such manifestations 'may be encouraging for some religious pupils' it explained, they 'may be emotionally disturbing for pupils of other religions or those who profess no religion.'[80] In respect of the Article 9 claim, the ECtHR reiterated the principle that Article 9 protects both the 'freedom to believe and the freedom not to believe',[81] describing the latter, for the first time in Article 9 jurisprudence, as a 'negative freedom'.[82]

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[72] There is extensive literature on this case, see e.g. Malcolm D Evans, 'Lautsi v Italy: An Initial Appraisal' (2011) 6 Religion and Human Rights 237; Gabriel Andreescu and Liviu Andreescu, 'The European Court of Human Rights' Lautsi Decision: Context, Contents, Consequences' (2010) 26 Journal for the Study of Religions and Ideologies 47; Jeroen Temperman (ed) *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Martinus Nijhoff Publishers 2012); Lorenzo Zucca, 'Lautsi: A Commentary on the Grand Chamber Decision' (2013) 11:1 International Journal of Constitutional Law 218, 221-222.

[73] *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 3 November 2009).

[74] *Lautsi and Others v Italy* ECHR 2011-III 61.

[75] Ibid., para 54.

[76] *Dahlab v Switzerland* ECHR 2001-V 447.

[77] *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 3 November 2009), para 54.

[78] *Karaduman v Turkey* App no 16278/90 (Commission Decision, 3 May 1993).

[79] *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 3 November 2009), para 50.

[80] Ibid., para 55.

[81] *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 3 November 2009), para 47 (e).

[82] Ibid. This is the first time 'negative freedom' was used by the ECtHR in relation to Article 9. For earlier use in Article 11 jurisprudence see, *Young, James and Webster* (1982) Series A no 55, paras 52-7.

In applying this principle to the facts, the ECtHR observed that 'negative freedom of religion is not restricted to the absence of religious services or religious education', it also 'extends to practices and symbols expressing, in particular or in general, a belief, a religion or atheism.'[83] Furthermore, it stated that this negative right deserves 'special protection' if it is the State which expresses a particular belief and places those who do not share the same belief in a situation from which they cannot remove themselves without considerable difficulty. The ECtHR decided that in displaying a symbol of a particular faith in school classrooms the State had failed in its duty to respect neutrality in the field of education,[84] restricted the rights of parents to educate their children in conformity with their own convictions and the 'right of schoolchildren to believe or not to believe.'[85] In a unanimous decision it found a violation of Article 2 of Protocol 1 taken together with Article 9.[86]

In terms of the Article 9 claim, therefore, the ECtHR characterised this as a case in which *forum internum* relevance was strong and countervailing factors were weak. Indeed, in expanding the right not to hold a religion or belief to encompass protection against 'practices' or 'symbols' which express a religion or belief the ECtHR went far beyond what had previously been protected as part of this right. In effect, it created an 'anti-right'[87] because the right to manifest religion or belief includes the right to display religious symbols.[88] And, in terms of the jurisprudence as a whole, this claim in *Lautsi* I is contradictory given that just a month earlier in *Appel-Irrgang and Others v Germany* (a case concerning exemption from classes on the basis that ethics teaching was 'critical of or opposed to Christian beliefs') the ECtHR had stated that it was 'not possible to deduce from the Convention a right not to be exposed to convictions contrary to one's own'.[89]

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[83] *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 3 November 2009), para 55.
[84] For discussion of the State Church in Italy, see Silvio Ferrari 'State and Church in Italy' in Gerhard Robbers (ed) *State and Church in the European Union* (2nd edn, Nomos 2005).
[85] *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 3 November 2009), para 57.
[86] Andreescu and Andreescu thought that this was a logical conclusion for the ECtHR and suggested that it was unlikely that the Grand Chamber would reverse the decision, see Gabriel Andreescu and Liviu Andreescu, 'The European Court of Human Rights' Lautsi Decision: Context, Contents, Consequences' (2010) 26 Journal for the Study of Religions and Ideologies 47, 63ff.
[87] Malcolm D Evans, '"And Should the First be Last?"' [2014] Brigham Young University Law Review 531, 532. For further discussion see, Caroline K Roberts, 'Is There a Right to be 'Free From' Religion or Belief at Strasbourg? 19:1 Ecclesiastical Law Journal 35; Caroline K Roberts, 'Interpreting freedom from religion: a step too far?' (University of Bristol Law School Blog) 13 June 2016 <https://legalresearch.blogs.bris.ac.uk/2016/06/interpreting-freedom-from-religion-a-step-too-far/> accessed June 2016.
[88] OHCHR, General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)' (20 July 1993) UN Doc CCPR/C/21/Rev.1/Add.4, para 4.
[89] *Appel-Irrgang and Others v Germany* ECHR 2009-IV 397.

In Italy, the Chamber's decision caused an 'uproar'[90] and across Europe there was 'unprecedented interest'[91] in and 'widespread political condemnation of the decision'.[92] Many critics appealed to the margin of appreciation doctrine,[93] and this seems to have heavily influenced the Grand Chamber, which took a very different approach and reached the opposite outcome.[94] Unlike the Chamber, the Grand Chamber explained that the crucifix was a 'passive symbol' which may have cultural, historical and religious symbolism and its influence could not be 'deemed comparable to that of didactic speech or participation in religious activities'.[95] It found that the display of crucifixes in public school classrooms did not denote a process of indoctrination, was within the margin of appreciation afforded to States under Article 2 Protocol 1 and did not constitute a violation of that article. And, having found that there was no violation of Article 2 Protocol 1, the Grand Chamber decided that it was not necessary to conduct a separate examination of Article 9.[96] It simply noted that Article 9 protects the 'freedom not to belong to a religion' and imposes an obligation upon States of neutrality and impartiality.[97]

Indeed, it seems that the Grand Chamber rejected the Chamber's broad interpretation of the right not to hold a religion or belief, given that it did not address this at all.[98] Judge Bonello, in his Concurring Opinion, argued that 'freedom of religion, and freedom from religion' contains the rights to profess or embrace a religion, change one's religion, and the right to manifest one's religion by means of belief, worship, teaching and observance but does not include a right not to be exposed to religion or belief.[99] On the facts, he contended, the 'Lautsi's enjoyed the most

[90] Gabriel Andreescu and Liviu Andreescu, 'The European Court of Human Rights' Lautsi Decision: Context, Contents, Consequences' (2010) 26 Journal for the Study of Religions and Ideologies 47, 50.
[91] 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, 63.
[92] Dominic McGoldrick, 'Religion in the European Public Square and in European Public Life: Crucifixes in the Classroom? (2011) 11:3 Human Rights Law Review 451, 500.
[93] Gabriel Andreescu and Liviu Andreescu, 'The European Court of Human Rights' Lautsi Decision: Context, Contents, Consequences' (2010) 26 Journal for the Study of Religions and Ideologies 47, 60.
[94] For M Evans, the 'Grand chamber unpicked one of its most serious errors of recent times', see Malcolm D Evans, '"And Should the First be Last?"' [2014] Brigham Young University Law Review 531, 539. But Ferrari thought both decisions were problematic, see Silvio Ferrari, 'State-Supported Display of Religious Symbols in the Public Space' (2013) 52 Catholic Legal Studies 7, 21. McGoldrick sees this as a 'political decision' to avoid 'populist resentment', Dominic McGoldrick, 'Religion in the European Public Square and in European Public Life: Crucifixes in the Classroom? (2011) 11:3 Human Rights Law Review 451, 502.
[95] *Lautsi and Others v Italy* ECHR 2011-III 6, para 72. For discussion see, John Witte, 'Lift High the Cross? An American Perspective on *Lautsi v Italy*' (2011) 13:3 Ecclesiastical Law Journal 341, 342; Lorenzo Zucca, 'Lautsi: A Commentary on the Grand Chamber Decision' (2013) 11:1 International Journal of Constitutional Law 218, 221-222.
[96] For a criticism of this decision, see Jeroen Temperman, '*Lautsi II:* A Lesson in Burying Fundamental Children's Rights' (2011) 6 Religion and Human Rights 279.
[97] *Lautsi and Others v Italy* ECHR 2011-III 61, para 60. For a discussion of the implications of State neutrality and impartiality see, Malcolm D Evans, 'Lautsi v Italy: An Initial Appraisal' (2011) 6 Religion and Human Rights 237, 243.
[98] Notably the ECtHR did not refer to this 'negative' aspect of Article 9 in *SAS v France* either, see generally *SAS v France* ECHR 2014-III 341 (extracts).
[99] *Lautsi and Others v Italy* ECHR 2011-III 61, Concurring Opinion of Judge Bonello, para 2.6.

absolute and untrammelled freedom of conscience and religion' and whilst the presence of crucifixes in classrooms may be seen as a 'betrayal of secularism', it does not constitute a violation of Article 9.[100]

To sum up, these cases concerning claims of indoctrination through requirements to attend religious education, or of interference with the right to hold (or not hold) a religion or belief as a result of the educational environment itself, show the ECtHR's approach to the protection of the absolute right to hold a religion or belief is much more flexible than one would expect from the presentation in the literature. Again, the *forum internum* is not an entirely 'hands-off' area for States. Even when the ECtHR accepts that the right to hold a religion or belief (or the right not to be indoctrinated) might be at issue, it does not necessarily find a violation of Article 9. The cases examined above support the claim that, whilst significant, *forum internum* relevance does not determine Article 9 cases alone. The ECtHR balances factors indicating a violation (primarily, but not only, *forum internum* relevance) with countervailing factors to reach its decision. This is further illustrated in cases concerning employment sanctions and dismissals, to which this chapter will now turn.

C. Employment Sanctions on the Grounds of Religion or Belief Affiliation

In cases in which applicants have complained about sanctions in employment, taken on the basis of their religion or belief, the weight placed on the *forum internum* is again heavily influenced by the ECtHR's consideration of the facts.

i. Expulsion, Compulsory Retirement and the Cancellation of Contracts

Complaints under Article 9 concerning expulsion or compulsory retirement from the military on the basis of religion or belief appear frequently in the case law, particularly against Turkey in the early 2000s.[101] It is useful to examine the paradigmatic cases of *Yanasik v Turkey*[102] and *Kalaç v Turkey*[103] to illustrate the ECtHR's approach here.

In *Yanasik v Turkey* a military cadet complained *inter alia* under Article 9 that he had been expelled from the army for indiscipline because the army claimed that he had participated in Muslim fundamentalist activities and propaganda. The applicant argued that the charges were 'unfounded' and specifically 'designed to punish him for his beliefs' (i.e. that it interfered with

[100] Ibid., para 2.9.

[101] See e.g., *AC v Turkey* App no 37960/97 (ECtHR 9 October 2001) [French]; *Gulabi v Turkey* App no 33367/96 (ECtHR, 29 January 2002) [French]; *Kahramanyol v Turkey* App no 38385/97 (ECtHR, 4 June 2002); *Tahta v Turkey* App no 39068/97 (ECtHR, 4 June 2002) [French]; *Usta v Turkey* App no 57084/00 (ECtHR, 21 February 2008).

[102] *Yanasik v Turkey* (1993) 74 DR 22.

[103] *Kalaç v Turkey* ECHR 1997-IV 1199.

his *forum internum*).[104] Despite this, however, the Commission characterised the complaint as a one concerning limitations on the manifestation of religion or belief, and in its assessment, it placed heavy emphasis on the facts, notably the applicant's specific situation in the Turkish military and the countervailing factors of ensuring proper functioning of the armed forces. The Commission explained that by enrolling at a military academy a cadet voluntarily submits to military rules[105] which may limit the right to practice religion or belief in order to allow the army to function properly and may require members of the armed forces to refrain from taking part in the Muslim fundamentalist movement, which seeks to 'ensure the pre-eminence of religious rules.'[106] In the circumstances, the Commission found that the cadets had not been prevented from worshipping at the academy, and as such did not find any interference with Article 9.

A similar approach was taken by the ECtHR in *Kalaç v Turkey* which concerned a judge advocate and high command's director of legal affairs in the Turkish Air Force who complained under Article 9 that his compulsory retirement was ordered on the basis of his religious beliefs and practices.[107] The government contended that the applicant's compulsory retirement was not motivated by his religious beliefs (his unlawful fundamentalist opinions) but rather that he was removed because he showed a lack of loyalty to the principle of secularism, which the armed forces were responsible for guaranteeing.[108]

Again, the ECtHR characterised this as a complaint about limitations on manifestation, and placed a heavy emphasis on the facts, specifically the applicant's specific situation in the Turkish armed forces. The Commission explained that the applicant chose to pursue a career in the military which may limit the right to manifest and forbid the adoption of conduct and attitudes hostile to 'an established order'.[109] Like the government, the ECtHR drew a distinction between the applicant's religious opinions and beliefs on the one hand and his conduct and attitude on the other, finding that the compulsory dismissal was not motivated by the way in which the applicant manifested his religion (indeed it noted he was able to perform Salat and observe Ramadan) but rather his conduct and attitude which 'breached military disciple and infringed the principle of secularism.'[110] Therefore, again, it found no interference with Article 9.

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[104] *Yanasik v Turkey* (1993) 74 DR 22.
[105] The Commission recalled its decision in *X v The United Kingdom* that the State's refusal to allow a Muslim teacher to work half day on a Friday to attend prayers did not violate Article 9, see *X v The United Kingdom* (1981) 22 DR 27.
[106] *Yanasik v Turkey* (1993) 74 DR 22.
[107] *Kalaç v Turkey* ECHR 1997-IV 1199. Two similar complaints were not pursued or were stuck out, *Hamarattürk v Turkey* App no 18673/91 (Commission Decision, 10 January 1995); *Sipahioglu v Turkey* App no 31245/96 (Commission Decision, 11 May 1999)
[108] *Kalaç v Turkey* ECHR 1997-IV 1199, para 25.
[109] Ibid., para 25.
[110] Ibid., paras 30-31.

This reasoning is typical of the ECtHR's approach in numerous similar cases involving the dismissal of soldiers in Turkey.[111] But it is not limited to Turkey. In *Pitkevich v Russia*, for instance, which concerned a judge who was dismissed for abusing her office to promote the Living Faith Church, the ECtHR distinguished between the applicant's behaviour and views, noting she had not been dismissed for 'belonging to a Church or holding religious views' but for breaching her statutory duties and 'jeopardising the image of impartiality' of the judiciary.[112]

The distinction between belief and attitude in *Kalaç v Turkey* has been criticised in the literature. C Evans, for instance, argued that *Kalaç v Turkey* was a case about the 'right not to be discriminated against or penalised for holding a particular religion', and in drawing such a distinction it was 'difficult to see how any but the most totalitarian state could breach' the right to freedom of religion.[113] Taylor elaborated on this, arguing that the distinction was unconvincing and was 'not sufficient to distinguish interference with manifestation from interference with the *forum internum* through punishment for merely holding particular beliefs'[114] which may not be justified in any circumstances.[115] For Taylor, the applicant had been punished 'in order to persuade him to drop his religious interests' (i.e. that it constituted coercion) but this, he argued, was ignored by the ECtHR.[116] Indeed, this case caused Taylor to lose hope that *forum internum* protection would develop with the full-time ECtHR.[117] More recently, Peroni, who has forcefully criticised the ECtHR for arbitrarily privileging the *forum internum* over the *forum externum* conceded that in *Kalaç v Turkey* the ECtHR did not follow the absolute form of protection of the *forum internum* that it 'advocates in theory.'[118]

The ECtHR's approach to the complaints in *Yanasik v Turkey* and *Kalaç v Turkey* are, however, only really problematic if Article 9 is understood as establishing a clear binary and hierarchical distinction between the absolute *forum internum* and the qualified *forum externum*, in which the *forum internum* is ignored when the *forum externum* is deemed to be at issue. This thesis argues that this is a misreading of the jurisprudence; the ECtHR understands that the *forum internum* and *forum externum* are deeply interrelated realms and this means that the *forum*

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[111] See e.g. *Kahramanyol v Turkey* App no 38385/97 (ECtHR, 4 June 2002) [French]; *Özcan v Turkey* App no 39337/98 (ECtHR, 9 July 2002) [French]; *Sengülec v Turkey* App no 39331/98 (ECtHR, 9 July 2002) [French]; *Meral v Turkey* App no 39336/98 (ECtHR, 9 July 2002) [French]; *Kati v Turkey* App no 39323/98 (ECtHR, 9 July 2002) [French]; *Cevik v Turkey* App no 39443/98 (ECtHR, 9 July 2002) [French]; *Balci v Turkey* App no 48718/99 (ECtHR, 3 October 2002); *Duman v Turkey* App no 42788/98 (ECtHR, 3 October 2002); *Aksoy v Turkey* App no 45376/99 (ECtHR, 3 October 2002)

[112] *Pitkevich v Russia* App no 47936/99 (ECtHR, 8 February 2001).

[113] Carolyn Evans, *Freedom of Religion* (OUP 2001) 79

[114] Paul Taylor, *Freedom of Religion* (CUP 2005) 143.

[115] Ibid., 144.

[116] Ibid., 217.

[117] Ibid., 143.

[118] Lourdes Peroni, 'Deconstructing 'Legal' Religion in Strasbourg' (2014) 3:2 Oxford Journal of Law and Religion 235, 255.

internum is never irrelevant, it is just relevant to a greater or less extent depending on the facts. Rather than suggesting the ECtHR got the approach 'wrong', and ignored the *forum internum*, these cases can be read as examples of the ECtHR exercising its flexibility in the protection of the right to freedom of thought, conscience and religion. Based on the facts in these cases, the ECtHR decided to give more weight to countervailing factors.[119]

That the ECtHR does not *ignore* the relevance of the *forum internum* if it characterises a complaint as a complaint concerning limitations on the right to manifest is further illustrated in *CR v Switzerland* in which a security agent, with a licence to wear firearms, complained under Article 9 about the cancellation of a work contact on the grounds that he joined a religious movement which was considered to be dangerous.[120] Whilst the ECtHR characterised the complaint about limitations on manifestation, it also considered whether the right to hold a religion or belief was engaged on the facts. In its assessment it agreed with the Federal Court that the interference did not compel the applicant to 'abandon his convictions, to modify or abandon his practice within the sect.'[121] It decided that the cancellation of the contract was not motivated by the applicant's religion or belief, but rather by the concern for the protection of public order, security the rights and freedoms of others, and thus found no violation of Article 9.[122]

These cases concerning expulsion, compulsory retirement and cancellation of contracts reveal that, for the ECtHR, paying a price for having a religion or belief does not necessarily constitute an interference with or violation of Article 9 in all circumstances.[123] This is further evidenced in more recent cases such as *Siebenhaar v Germany* in which the ECtHR did not find the State had overstepped its margin of appreciation when it dismissed a childcare assistant from a kindergarten run by a Protestant Church, on the basis that her membership of the Universal Church was incompatible with the teachings of that Protestant Church.[124] And in *Fernandez Martinez v Spain*, which concerned a teacher of Catholic ethics, the Grand Chamber upheld the State's decision not to renew the teaching contract of a former Roman Catholic Priest who had subsequently married and fathered a family, because the applicant had 'placed himself into a situation which was incompatible with the rules of the Catholic Church and that his right to resign was the ultimate guarantee of freedom of religion.'[125]

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[119] See UNGA, Elimination of all Forms of Religious Intolerance: Interim Report of the Special Rapporteur of the Commission on Human Rights and the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief: Situation in Turkey (11 August 2000) UN Doc A/55/280/Add.1, para 66.
[120] *CR v Switzerland* App no 40130/98 (ECtHR, 14 October 1999) [French].
[121] Ibid.
[122] Ibid.
[123] Malcolm D Evans, *Religious Liberty* (CUP 1997) 300.
[124] *Siebenhaar v Germany* App no 18136/02 (ECtHR, 3 February 2011) [French].
[125] See *Fernandez Martinez v Spain* ECHR 2014-II 449.

This 'cost' however does not seem to be limitless. This is evident from cases such as *Knudsen v Norway* and *Konttinen v Finland*, in which the ECtHR explained that 'pressuring an individual to change his religious beliefs or preventing him from manifesting them' would constitute an interference with Article 9'.[126] Whilst the ECtHR deemed the complaints in these cases inadmissible due to a lack of evidence, the ECtHR reached a different outcome when it applied these principles to the facts of the case in *Ivanova v Bulgaria*.[127]

ii. Dismissal from Employment

In *Ivanova v Bulgaria* a swimming pool manager at a school in Bulgaria claimed she had been dismissed because of her religious beliefs and that this violated her right to freedom of religion.[128] The government contested this, arguing that her membership of a Protestant Evangelical community (the Word of Life) was not at issue, rather her employment had been terminated because the school changed the job requirements.[129]

In the general principles section, the ECtHR reiterated that only the right to manifest religion or belief can be limited in accordance with Article 9.2, not the right to freedom of thought, conscience or religion itself.[130] And, it explained that a State cannot dictate what a person believes or take coercive steps to make him change his beliefs,'[131] recalling the principle that 'pressuring an individual to change his religious beliefs or preventing him from manifesting them' would constitute an interference with Article 9'.[132]

In its examination of the facts, however, the ECtHR found that the termination of the applicant's employment *was* driven by the applicant's religious beliefs and her connection with the Word of Life.[133] It found that government officials had placed pressure on the applicant to abandon her beliefs in order to keep her position at the school, and in applying the general principles to the facts, considered this constituted a 'flagrant violation' of her right to freedom of religion under Article 9,[134] and in a unanimous decision, found a violation of that article.[135]

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[126] *Ivanova v Bulgaria* App no 52435/99 (ECtHR, 12 April 2007), 80. *Knudsen v Norway* (1985) 42 DR 247; *Konttinen v Finland* App no 24949/94 (Commission Decision, 3 December 1996).
[127] *Ivanova v Bulgaria* App no 52435/99 (ECtHR, 12 April 2007).
[128] Ibid., para 69.
[129] Ibid., para 81.
[130] Ibid., para 79. See also *Kokkinakis v Greece* (1993) Series A no 260-A, para 33; *Masaev v Moldova* App no 6303/05 (ECtHR, 12 May 2009), para 23.
[131] *Ivanova v Bulgaria* App no 52435/99 (ECtHR, 12 April 2007), para 79. See also *Nolan and K v Russia* App no 2512/04 (ECtHR, 12 February 2009), para 73; *Masaev v Moldova* App no 6303/05 (ECtHR, 12 May 2009) para 23.
[132] *Ivanova v Bulgaria* App no 52435/99 (ECtHR, 12 April 2007), para 80.
[133] Ibid., para 84.
[134] Ibid., para 84.
[135] Ibid., para 86.

For the ECtHR, therefore, this was a case in which *forum internum* relevance was at its strongest and countervailing factors at their very weakest. In the circumstances, this decision was unsurprising, and it is consistent with General Comment 22, which explains that measures (including restrictions access to employment on the basis of religion or belief) which have the 'same intention or effect' as the use or threats of physical force or punishment to coerce individuals into adopting a belief, recanting or converting, are inconsistent with ICCPR Article 18.2.[136]

Conclusion

Commentators have placed a great deal of emphasis on the immutable distinction between the absolute *forum internum* and the qualified *forum externum* in Article 9 in theory but have been forced to recognised that such a distinction is not readily apparent from the jurisprudence itself. Moreover, commentators have been forced to concede that when complaints have been made about interference with the 'absolute' rights to hold or change a religion or belief the ECtHR has not always accepted that these rights are engaged, and even when it does, it has not always considered that there has been interference with these rights. These observations have led commentators to argue that absolute rights have not been adequately protected by the ECtHR.[137]

However, this chapter reveals that the way in which the ECtHR protects the absolute rights to hold or change a religion is largely consistent with the way in which it presents protection in practice. Building upon the previous chapter, this chapter demonstrates that the ECtHR does not draw a binary and hierarchical distinction between the *forum internum* and *forum externum* in addressing complaints concerning interference with the rights to hold or change a religion or belief in practice. Rather, the ECtHR takes a much more nuanced approach, focusing not upon whether a *forum internum* or *forum externum* right is at issue but, instead, upon the *extent* to which the *forum internum* is relevant in the complaint in question.

Through the analysis of some paradigmatic cases relating to deprogramming, coercive psychiatric treatment and criticism of religion, indoctrination, employment sanctions and dismissal on the grounds of religion or belief affiliation, this chapter reveals that the ECtHR exercises considerable flexibility in its approach. In cases in which applicants have argued that the State has interfered with the rights to hold or change a religion or belief the ECtHR does not automatically find a violation of Article 9. In other words, the *forum internum* is not simply a 'trump-card'. If the ECtHR decides not to examine Article 9 in a particular case, decides that the

[136] OHCHR, General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion) (20 July 1993) UN Doc CCPR/C/21/Rev.1/Add.4, para 5.
[137] See e.g., Carolyn Evans, *Freedom of Religion* (OUP 2001), 102, 142; Paul Taylor, *Freedom of Religion* (CUP 2005) 127.

absolute rights to hold or change a religion or belief are not engaged, or decides that they are engaged but there has not been interference, the ECtHR is not necessarily (as commentators frequently suggest) getting the approach to the protection of these rights 'wrong'. The ECtHR's approach would only be 'wrong' if the ECtHR had set up a strict binary and hierarchical distinction between the *forum internum* and *forum externum* and had set out the principle that everything which touches upon the *forum internum* constitutes a violation of Article 9. As Chapter Three has demonstrated, this is not what the ECtHR has done.

The ECtHR's approach is, therefore, far more flexible than recognised in the literature. As 'master of the characterisation to be given in law to the facts of the case' the ECtHR is not bound by the way in which applicant characterise cases, nor is it bound by the way in which the respondent government, or even the Commission characterises the complaint.[138] If the ECtHR does not consider the absolute rights to hold a religion or belief to be engaged, it can dispose of the case in another way using a range of techniques, for instance, by examining the complaint under a different article, or by characterising the complaint as a limitation on manifestation. Contrary to popular opinion in the literature, if the ECtHR characterises a complaint as a complaint about limitations on the right to manifest a religion or belief, rather than interference with the right to hold a religion or belief, this does not mean that the *forum internum* becomes irrelevant. On the contrary, the ECtHR recognises that the *forum internum* is always relevant, it is just that the extent of its relevance depends on the ECtHR's consideration of the facts.

Moreover, even when the ECtHR find that the rights to hold or change a religion or belief are engaged, and finds interference with these rights, it is not guaranteed that the ECtHR will *always* find a violation of Article 9, if it considers there are very weighty countervailing factors. Despite presenting these rights as absolute and unqualified rights in theory, the ECtHR does not always protect these rights absolutely in *practice*, in absolutely all circumstances. However, where it deems fit, the ECtHR does offer a very high degree of protection, thus revealing that such a level of protection is not just theoretical.

The cases examined in this chapter present a real challenge to notions in the literature that the *forum internum* is, or should be, always protected absolutely by the ECtHR. Indeed, the notion that there is an 'inner sanctum' which is a 'hands-off' realm for the State in *all* circumstances, is just not evident from a close analysis of the case law. The jurisprudence examined in this chapter reveals that it is perhaps more appropriate to understand 'absolute' as meaning '"virtually", rather than strictly, absolute.'[139] Greer has argued in respect of Article 3

[138] *Guerra and Others v Italy* ECHR 1998-I 210, para 44.

[139] Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) 15:1 Human Rights Law Review 101, 128, 132.

that it seems that absolute protection 'applies in all but the rarest of circumstances' but not 'to the exclusion of every possible justification, exoneration, excuse or mitigation.'[140] The absolute status is, a 'matter of attribution rather than, as the orthodoxy holds, legal necessity.'[141] This seems an apt way of describing Article 9 jurisprudence too.

This is, of course, a very different way of interpreting Article 9 jurisprudence than in the literature. Whilst *forum internum* relevance is the principal factor weighing in favour of the applicant it is not the determining factor; the ECtHR balances factors indicating a violation (primarily, but not only, *forum internum* relevance) with countervailing factors in order to reach its decision. In terms of the loose concentric circles model, this chapter shows that the innermost circle, where *forum internum* relevance is strongest and countervailing factors weakest, and the highest degree of protection is seen, is very small indeed. It seems that the ECtHR reserves the very highest degree of protection under Article 9 for the most serious invasions into the right to hold or change a religion or belief.

The next chapter will explore cases in the outermost circle, in the loose concentric circles model, where *forum internum* relevance is weakest and strongest countervailing factors are strongest and the lowest degree of protection is seen.

Gewirth explains that 'for a right to be absolute, it must be conclusively valid without any exceptions', see 'Are There Any Absolute Rights?' (1981) 31:122 The Philosophical Quarterly 1.

[140] Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) 15:1 Human Rights Law Review 101, 101.

[141] Ibid.

CHAPTER 5. WEAKEST *FORUM INTERNUM* RELEVANCE AND STRONGEST COUNTERVAILING FACTORS

Introduction

The previous chapter examined cases in which one would have expected to see strongest *forum internum* relevance and weakest countervailing factors, in other words, it focused on the innermost circle in terms of the loose concentric circles model. In contrast, this chapter focuses on cases in which one would expect weakest *forum internum* relevance and strongest countervailing factors, in other words, it focuses on the outermost circle in terms of the loose concentric circles model.

Specifically, it examines cases in which applicants have claimed that their right to act in accordance with a religion or belief has been limited by the State on the grounds that the acts in question harm, or seek to harm, the applicant or others. It is recognised that 'harm' is a relative concept;[1] precisely what is understood to be 'harmful' activity depends heavily on both place and time. Therefore, this chapter will focus upon cases concerning activities which are generally considered unacceptable in modern, democratic countries (even if the applicants do not agree). The key question for this chapter is whether the ECtHR has, as one would expect from the presentation of Article 9, considered *forum internum* relevance to be at its weakest and countervailing factors to be at their strongest, and thus offered a very low degree of protection where it finds such claims of harm to be substantiated, in *practice*.

This chapter argues that in practice the protection of Article 9 is largely consistent with the way in which protection has been presented under Article 9. Again, the ECtHR's approach is fluid here. If the ECtHR decides that the action in question cannot be construed as a manifestation and/or it considers that the act in question is widely understood to be harmful, it often conducts a succinct Article 9 assessment and permits the limitation in question. However, where the claim is understood as an 'individual conscience' issue (e.g. disciplining children) the ECtHR will take complaints seriously and conduct a lengthier assessment, even if it ultimately rejects them. This is because the ECtHR recognises that the *forum internum* is always relevant in Article 9 cases. Actions or manifestations in the *forum externum* flow from the *forum internum*, therefore, the ECtHR understands that limitations on manifestation inevitably impact upon the *forum internum*. So, whilst the ECtHR often finds no violation of Article 9 where there is evidence to support allegations of harm, the key point is that even at this 'end' of the spectrum of *forum internum*

[1] Here 'harm' is understood to mean physical and psychological injury. For a 'harm analysis' in relation to Article 9 see, Robert Wintermute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (2014) 77:2 The Modern Law Review 223.

relevance, the *forum internum* is not irrelevant for the ECtHR; it remains an important factor in the balance. To illustrate the ECtHR's approach, Section A of this chapter will examine sanctions on individuals due to concerns about religiously motivated harm. It will analyse paradigmatic cases relating to religiously motivated sexual relations with minors, corporal punishment of children, compulsory vaccination refusal and use of illegal substances.

The ECtHR does not, however, simply permit all limitations on manifestations which States claim to be harmful. In terms of the balance of factors, it is worth noting here that reliability of evidence is a factor which may weigh in favour of, or against, the applicant. For example, if the ECtHR considers that evidence to justify an intrusion is weak, then this will weigh in favour of the applicant.

The question of reliability of evidence often arises in cases in which States have alleged that applicants are acting or seeking to act in harmful ways. Where the ECtHR considers that allegations of harm are suspect, or considers that the alleged harm is credible but the proportionality of State measures in response is questionable, it conducts a detailed Article 9 assessment. Where it finds that allegations of harm are unfounded, or that State measures in response are disproportionate, it offers a high degree of protection. In other words, it gives less weight to countervailing factors in the balancing process.

The balancing exercise in cases in which *forum internum* relevance and countervailing factors may both be weak, is harder (relatively speaking) than in cases in which *forum internum* relevance is clearly weak and countervailing factors are clearly strong. Such cases can be seen falling within the contested middle circle in which the degree of protection can be either high or low depending on the way in which the ECtHR balances the factors.

To illustrate this, Section B of this chapter examines dissolution of, or refusals to register, religious communities due to concerns about religiously motivated harm, and analyses a number of typical cases relating claims about threats to national security, challenges to the rights and freedoms of members, and violations of health and safety regulations.

A. Sanctions on Individuals Due to Concerns about Religiously Motivated Harm

i. Sexual Relations with Minors and Corporal Punishment of Children

As one would expect, the ECtHR has considered *forum internum* relevance to be at its very weakest and countervailing interests to be at their very strongest in cases in which applicants have sought protection under Article 9 for engaging in sexual relations with minors. Take the case of

Khan v The United Kingdom[2] for instance, which concerned the punishment of a twenty-one-year-old Muslim man for engaging in sexual relations and marrying a Muslim girl, aged fourteen, in accordance with Islamic law. Before the Commission the applicant complaint *inter alia* under Article 9 that domestic laws relating to sexual offences with minors had prevented him from manifesting his religion through his marriage under Islamic law.

In its assessment the Commission reiterated the *Arrowsmith* principle that Article 9 does not protect every act motivated by a religion or belief, [3] and observed that whilst the applicant's religion may permit marriage of girls at twelve years old, marriage cannot be 'considered simply as a form of expression of thought, conscience and religion' under Article 9, but rather is covered by Article 12.[4] In relation to Article 12, the Commission explained that the right to marry is subject to national laws, and under English law, a girl could marry with her parents' consent at the age of sixteen, and without her parents' consent at the age of eighteen. Given the age of the girl in question, the Commission agreed with the government that the marriage was invalid and that engaging in sexual intercourse with the girl constituted an offence under domestic law. It therefore deemed the complaint manifestly ill founded.

Given the facts, the Commission's swift assessment under Article 9 was not surprising. Whilst it must be conceded that many countries would still permit marriage between an adult man and a young girl (and not view it as harmful), in Europe, and in the UK, in which this claim was raised, there is a general consensus that underage marriage is harmful. It is widely accepted that sexual abuse of a minor damages the physical and psychological health of the child in question and, as such, constitutes a clear violation of the child's human rights. It seems obvious, therefore, that the ECtHR would give greater weight to countervailing factors, on balance.

The ECtHR's approach in such cases is further illustrated in *KS v The United Kingdom*.[5] In this case a convicted sexual offender complained that the ultimatum placed on him by the local authority — that he could only return to his family if he underwent psychiatric treatment to address his sexual offending — interfered with his Article 9 rights. The ECtHR, however, considered that, in so far as the complaint fell under Article 9, it could be restricted under Article 9.2 to protect the health and rights of the applicant's daughter. Thus, again, the *forum internum* was considered to have a weak bearing whereas the countervailing factors under Article 9 were considered to be very strong indeed.

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[2] *Khan v The United Kingdom* App no 11579/85 (Commission Decision, 7 July 1986).

[3] Ibid.

[4] This is consistent with *X v Federal Republic of Germany* (1974) 1 DR 64. Recently, the ECtHR has asked whether a planned Islamic marriage ceremony constitutes a manifestation of religion or belief, see *Dzikowski v Poland* (communicated case) App no 38799/11 (27 May 2017); *Dzikowski v Poland* App no 38799/11 (ECtHR, 15 May 2018).

[5] *KS v The United Kingdom* App no 45035/98 (ECtHR, 7 March 2002).

It also seems obvious that in cases in which applicants have claimed that the State has restricted their Article 9 right to manifest religion or belief through the corporal punishment of children that the ECtHR would also give little weight to the applicant's *forum internum* and greater weight to countervailing factors. Indeed, again this is what the jurisprudence reveals. Take *Seven Individuals v Sweden*, for instance, in which the applicants — seven members of the Protestant Free Church Congregation in Stockholm — objected to changes in domestic law banning 'corporal punishment or any other form of humiliating treatment' because, they argued it restricted their rights and freedoms under the ECHR.[6] The applicants claimed that 'traditional' methods of raising children including the 'necessity of physical punishment' was in accordance with their religious doctrine and the changes to the domestic law violated Articles 8, 9 and Article 2 of Protocol 1. The ECtHR deemed all these complaints inadmissible.[7] In respect of the Article 8 claim, the Commission explained that there was no interference with this right because the changes in domestic law were intended to protect 'protect potentially weak and vulnerable members of society' from abuse and violence, adding that the same reasoning applied, *mutatis mutandis*, to the Article 9 complaint.

The ECtHR took the same approach in *Abrahamsson v Sweden* which concerned a parent who had punished his son by hitting him on the bottom with a birch rod and was convicted of assault and battery.[8] The applicant complained that domestic law violated his rights under Article 8, 9 and Article 2 of Protocol 1. Again, however, the ECtHR deemed all of these complaints inadmissible. In respect to the Article 8 claim, the ECtHR referred explicitly to its reasoning in *Seven Individuals v Sweden*, pointing out that in extending the Swedish law on assault and molestation to cover physical chastisement of children by their parents the State aimed to protect 'potentially weak and vulnerable members of society' from abuse and violence.[9] On this basis, there was no interference with Article 8 and the same reasoning applied *mutatis mutandis* to the Article 9 complaint.

This is an approach which has remained consistent over time, and is illustrated even more clearly in the recent case of *Tlapak and Others v Germany*.[10] In this case the ECtHR found no violation of Article 8 when parental authority was withdrawn from two members of the Twelve Tribes Church who believed corporal punishment (namely, caning) was a necessary part of parenting in accordance with their faith. Referring to *Vojnity v Hungary*[11] the ECtHR explained

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[6] *Seven Individuals v Sweden* (1982) 29 DR 104.
[7] Ibid.
[8] *Abrahamsson v Sweden* App no 12154/86 (Commission Decision, 5 October 1987). See also *Phillip Williamson and others v UK* App no 55211/00 (ECtHR, 2000).
[9] *Abrahamsson v Sweden* App no 12154/86 (Commission Decision, 5 October 1987).
[10] *Tlapak and Othes v Germany* App nos 11308/16 11344/16 (ECtHR, 22 March 2018).
[11] *Vojnity v Hungary* App no 29617/07 (ECtHR, 12 February 2013).

that the ‘parents right to communicate and promote their religious convictions in bringing up their children’ does not extend to exposing ‘children to dangerous practices or to physical or psychological harm’.[12] Further, it explicitly took into account international law in its consideration of the facts, referring to Article 19 of the UN Convention on the Rights of the Child which stipulates that State parties have a duty to take measures to protect children from *inter alia* physical or mental violence.[13]

In these cases, the ECtHR did not simply ignore the applicants claim that their beliefs justified inflicting corporal punishment. The ECtHR recognised that the actions flowed from the *forum internum* but found the intrusion justifiable because of concerns about harm, and thus offered a low level of protection under Article 9. Thus, even in these cases, where countervailing factors were very weighty, *forum internum* relevance remained a factor which the ECtHR took into account in the balance. This same pattern is also seen in cases in which applicants have claimed that the State has unduly restricted their rights to manifest religion or belief by obliging them to allow their children to take part in compulsory vaccination schemes.

ii. Compulsory Vaccination Refusal

A typical case illustrating the ECtHR’s approach to compulsory vaccination refusal under Article 9 is *Boffa and 13 Others v San Marino*[14] in which the applicants refused to have their children vaccinated in accordance with a domestic decree. Before the ECtHR the applicants argued that domestic legislation violated ECHR Articles 2, 5, 8 and 9. In its assessment the Commission reiterated the standard recital and the dictum — that Article 9 protects the *forum internum* and acts intimately linked with beliefs — but explained that the obligation to be vaccinated, set out in domestic legislation did not constitute an interference with Article 9 because it was generally applicable, relating to everyone regardless of religion or personal creed.

Again, therefore, the ECtHR did not simply ignore the *forum internum* in this case. The ECtHR explained that Article 9 protects the *forum internum* and actions which are intimately linked to it, but in considering the facts, decided to give more weight to countervailing factors, namely the fact that the obligation to be vaccinated was a general and neutral requirement. Indeed, the ECtHR has consistently held (rightly or wrongly) that general and neutral laws which do not have a link with an applicant’s personal beliefs, do not, in principle, interfere with Article

[12] *Tlapak and Othes v Germany* App nos 11308/16 11344/16 (ECtHR, 22 March 2018), para 79.
[13] Ibid, paras 58-60.
[14] *Boffa and 13 Others v San Marino* (1998) 92-B DR 27.

9.[15] Given this, it seems likely that in *Vavřička v Czech Republic*[16] — in which the applicants have argued that the compulsory vaccination scheme violated their rights under Articles 8, 9 and Article 2 of Protocol 1 — the ECtHR will also decide that the obligation to vaccinate does not constitute an interference with Article 9 because it is a general and neutral obligation.[17]

iii. Consumption of Illegal Substances

As one would also expect, the ECtHR considers that *forum internum* relevance is weak and gives greater weight to countervailing factors in cases in which applicants have sought to justify the use of illegal substances under Article 9. A paradigmatic case in this respect is *Franklin-Beentjes and CEFLU-Luz da Floresta v Netherlands*[18] in which an office holder in *CEFLU-Lux da Floresta* and the religious community itself complained that their right to manifest their religion or belief had been limited as a result of the confiscation of an illegal substance used and consumed in religious ceremonies.

The applicants explained that the aim of the association was to study and practice the teaching of the Holy Daime and their central right was the 'Holy Sacrament', involving the consumption of a hallucinogenic decoction (referred to as 'Santo Daime' or 'ayahuasca') ritually produced using Amazonian plants.[19] This brew contains N-Dimethyltryptamine (DMT), a banned substance listed in the Opium Act.[20] Following a search of office holder's home, the police confiscated ten jerrycans of 'ayahuasca' containing DMT, and unsuccessfully attempted to prosecute her for possession of an illegal substance. Before the ECtHR the applicants complained *inter alia* under Article 9 that the domestic authorities' refusal to return the jerrycans filled with ayahuasca to the office holder prevented the applicants from 'performing an essential sacrament', and as such, unjustly interfered with their freedom of religion. Under Article 14, they complained that they had suffered discrimination because they were prevented from using ayahuasca when other religious denominations were allowed to use alcoholic wine in their ceremonies.

In considering this complaint, the ECtHR accepted that preventing applicants from using ayahuasca, which they claimed was an essential aspect of their religious rites, constituted an interference with their right to manifest religion in 'worship'.[21] Therefore, the ECtHR recognised

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[15] See *Skugar and Others v Russia* App no 40010/04 (ECtHR, 3 December 2009).
[16] *Vavřička v Czech Republic* (communicated case) App no 47621/13 3867/14 73094/14 and 3 others (ECtHR, 7 September 2015) [French].
[17] See *X v Netherlands* App no 1068/61 (Commission Decision, 14 December 1962).
[18] *Fränklin-Beentjes and CEFLU-Luz da Floresta v Netherlands* (communicated case) App no 28167/07 (ECtHR, 25 October 2012); *Fränklin-Beentjes and CEFLU-Luz da Floresta v Netherlands* App no 28167/07 (ECtHR, 6 May 2014).
[19] *Fränklin-Beentjes and CEFLU-Luz da Floresta v Netherlands* App no 28167/07 (ECtHR, 6 May 2014), paras 5-7.
[20] Ibid., para 8.
[21] Ibid., para 36.

the relationship between the *forum internum* and the *forum externum*, in other words, it recognised that their actions flowed from their beliefs.

However, in its Article 9.2 assessment the ECtHR decided that the interference was prescribed by law because it was in accordance with the Opium Act which banned the possession of DMT and agreed with the government that the interference pursued the legitimate aim of protecting public order and public health, both clearly listed under Article 9.2. The ECtHR also found, after a detailed analysis of the facts, that the interference was necessary in a democratic society.

In this respect the ECtHR reiterated that Article 9 protects a number of forms of manifestation but does not protect every act motivated or inspired by a religion or belief.[22] In particular, referring to *C v The United Kingdom*,[23] the ECtHR emphasised that Article 9 does not protect a right to refuse to obey laws which apply generally and neutrally, even if the refusal is motivated by a religion or belief. It recalled that for many years, the Commission and the Court have recognised that religious practices could be legitimately limited under Article 9.2 in order to protect health. Referring to *X v United Kingdom,* the ECtHR explained that in the case of a Sikh who refused to wear a helmet when riding his motorcycle, the interest of road safety overrode the applicant's religious duty to wear his turban.[24] The ECtHR also referred to *Eweida and Others v United Kingdom* to illustrate that the ECtHR had recently held that a hospital nurse (Ms Chaplin) could be prohibited from wearing a cross on a necklace whilst working in order to protect her own health and safety, in addition to that of the patients.[25]

In *Franklin-Beentjes and CEFLU-Luz da Floresta v Netherlands*, the ECtHR agreed with the government that prohibiting the possession of DMT, given its potentially harmful nature, was essential for the protection of public health. The ECtHR observed that DMT was not only a prohibited substance in the Netherland's Opium Act but also in rules of international law, namely, the Convention on Psychotropic Substances[26] which is binding upon the Netherlands. Consequently, it deemed the Article 9 complaint manifestly ill-founded.

With respect to the complaint under Article 14 – that the applicants had been discriminated against because other churches, namely the Roman Catholic and Protestant Church, use alcoholic wine in their rituals – the ECtHR again found the complaint manifestly ill-founded.

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[22] Referred to *Kalaç v Turkey* ECHR 1997-IV 1199; *Kosteski v The Former Yugoslav Republic of Macedonia* App no 55170/00 (ECtHR, 13 April 2006); *Francesco Sessa v Italy* ECHR 2012-III 165.
[23] *C v The United Kingdom* (1983) 37 DR 142.
[24] *X v The United Kingdom* (1978) 14 DR 234.
[25] *Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts), paras 98-99. This case will be discussed in the next chapter.
[26] *Fränklin-Beentjes and CEFLU-Luz da Floresta v Netherlands* App no 28167/07 (ECtHR, 6 May 2014), paras 26-28.

The ECtHR explained that in order for an issue to arise there must be 'difference in treatment of persons in comparable situations', without any objective or reasonable justification, but the ECtHR did not find a comparable situation here.[27] Firstly, it noted the consumption of wine is not regulated by the Opium Act and secondly, that the rites that the applicants refer to 'differ significantly' because, in the case of the Roman Catholic and Protestant Churches, the members do not 'intend or expect to partake of psychoactive substances to the point of intoxication.'[28]

The ECtHR did not simply dismiss the applicant's complaint under Article 9 in this case; it took into account *forum internum* relevance because it recognised that the consumption of 'ayahuasca', as a central part of a religious rite, constituted a manifestation of religion or belief. And, in doing so it intuitively recognised that limitations on the manifestation in question inevitably impacted upon the *forum internum*. However, after a lengthy assessment of the facts, the ECtHR decided to give greater weight to countervailing factors.

So far, this chapter has demonstrated that in cases in which applicants have complained about State limitations on their behaviour — which challenges generally applicable State laws intended to protect individuals from harm — the ECtHR has, where it agrees with the State that the action in question is clearly harmful, offered a very low degree of protection under Article 9. The cases examined above, which are typical of such cases, illustrate that the ECtHR either finds that the acts in question do not constitute manifestations of religion or belief or if they do, *forum internum* relevance is clearly outweighed by countervailing factors such as the protection of public safety or public order, health or morals, or for the protection of the rights and freedoms of others.

Given the specific facts of the cases examined this is unsurprising; the limitations on the acts in the cases above are consistent with the text of ECHR Article 9, the *travaux préparatoires* and the way in which Article 9 has been presented in the jurisprudence. Indeed, the limitations are also consistent with the ECHR more broadly in that Article 17 explains that there is 'no right to engage in an activity or perform any act aimed at the destruction of rights and freedoms' of others set out in the ECHR.[29]

This chapter does not intend to imply that the ECtHR simply restricts all forms of behaviour that States regard as harmful. Just because the right to manifest *can* be limited in certain circumstances does not mean that the ECtHR always permits limitations, even when States argue forcefully that it should be limited in order to protect individuals from harm. In cases which are not so 'clear-cut', i.e. where the harm is question is not obvious or the applicants

[27] Ibid., para 54.
[28] Ibid. Perhaps it would have reached a different conclusion if alcohol was illegal.
[29] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950) ETS No.005.

contest the governments' claims that they have acted or sought to act in a way which is considered harmful, the ECtHR begins with the question whether the actions in question *are* actually harmful (i.e. whether there is evidence to support State claims). And, even when it finds evidence to support claims that actions are harmful, it does not necessarily automatically defer to the State in limiting the manifestation, but rather conducts a detailed necessity and proportionality analysis before reaching its decision.

This approach is frequently seen in cases in which religious communities, which are protected under Article 9,[30] have argued that their right to manifest their religion or belief has been limited (particularly through the dissolution of religious communities and refusals to re-register them) because States have made general claims that their practices are harmful, or that they have transgressed domestic laws intended to protect citizens from harm.[31] This will be examined in detail in the next section.

B. Dissolution of, or Refusals to Register, Religious Communities Due to Concerns about Religiously Motivated Harm

This section demonstrates that in cases in which religious communities have complained about State interference with the right to manifest religion or belief, the ECtHR has again recognised that manifestations are inextricably linked with the *forum internum*, and as such, limitations inevitably have an impact on it. In light of this, the ECtHR not only offers a high degree of protection when it finds little or no evidence to support the claims of the State that there is a risk of harm, it also offers a high degree of protection when it considers that the measures taken by States in response to alleged harm are disproportionate. Put another way, in cases concerning religious communities the ECtHR offers a high degree of protection when it does not consider that *forum internum* relevance has been outweighed by countervailing factors.

i. Threats to National Security

The case of *Moscow Branch of the Salvation Army v Russia*[32] illustrates the ECtHR's approach to protection of Article 9 when evidence for State claims of 'harm' is lacking. In this case the government argued that it had refused to re-register the Salvation Army as a legal entity as an independent religious organisation because it was a 'paramilitary organisation' which posed a

[30] For discussion, see Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010), 52ff.
[31] See e.g., *Altun and Others v Turkey* App no 54903/10 (ECtHR, 10 July 2018); *Güler and Uğur v Turkey* App no 31706/10, 33088/10 (ECtHR, 2 December 2014); *Metodiev and Others v Bulgaria* App no 58088/08 (ECtHR, 15 June 2017).
[32] *Moscow Branch of the Salvation Army v Russia* App no 72881/01 (ECtHR, 5 April 2007).

threat to national security. The applicants argued that the State action interfered with Article 9 and 11 and claimed that the notion that the Salvation Army was a 'paramilitary organisation' presented an impermissible assessment of the legitimacy of the religion practised by the applicants.

In its assessment the ECtHR emphasised the relationship between the *forum internum* and the *forum externum* by setting out the general principle that Article 9 protects both individual conscience and the right to manifest one's religion or belief in practice. And the ECtHR explained that there is an expectation that believers can manifest their religion or belief in community with others without arbitrary State intervention. It emphasised that the list of exceptions both to freedom of religion and freedom of assembly 'is exhaustive', adding that the exceptions are 'to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom.'[33] Furthermore, the ECtHR reiterated that the general duty of neutrality and impartiality means that the State does not have any power to assess whether religious beliefs, or the ways in which they are expressed, are legitimate.[34]

In its consideration of the facts, the ECtHR observed *inter alia* that whilst it was 'undisputable' that the members of the Salvation Army used ranks similar to military ranks and wore uniforms, these were ways of organising the internal life of the community and manifesting religious beliefs and it 'could not seriously be maintained that the applicant Branch advocated a violent change in the State's constitutional foundations or thereby undermined the State's integrity or security.'[35] Given the State did not advance compelling reasons for the interference with the right to manifest in this case, the ECtHR unanimously found a violation of Article 11 in light of Article 9.[36]

In this case, because the ECtHR considered that the 'harm' in question was not plausible and evidence for intrusion was weak, the ECtHR gave very little weight to countervailing factors in the balance.[37] In other cases concerning alleged threats to national security, where the ECtHR has found allegations of harm unfounded, the ECtHR has also offered a high degree of protection. Take *Nolan and K v Russia*, for instance, in which the government denied re-entry to a member of the Unification Church on the grounds of national security because, it argued, the Unification Church was a cult which encouraged illicit or criminal activities, including 'sexual

[33] Ibid., para 76.
[34] Ibid., paras 58, 92. Referring to *Metropolitan Church of Bessarabia and Others v Moldova* ECHR 2001-XII 81; *Hasan and Chaush v Bulgaria* ECHR 2000-XI 117.
[35] *Moscow Branch of the Salvation Army v Russia* App no 72881/01 (ECtHR, 5 April 2007) para 92
[36] See also *Perry v Latvia* App no 30273/03 (ECtHR, 8 November 2007).
[37] This is consistent with variable intensity of review, see Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65:1 Cambridge Law Journal 174, 205-206.

abuse…slavery, tax fraud…trafficking in arms or drugs'.[38] After a lengthy analysis of the facts, the ECtHR found that the ban was intended to repress the applicant's exercise of his right to freedom of religion and given the lack of evidence to support his exclusion from Russia on the basis of his religious activities, found a violation of Article 9.[39]

ii. Challenges to the Rights and Freedoms of Members

In cases in which States have claimed that religious groups challenge the rights and freedoms of their members, and the ECtHR has found little or no evidence to support such claims, the ECtHR has also offered a high degree of protection.

A case which is typical of the ECtHR's approach here is *Jehovah's Witnesses of Moscow v Russia*[40] in which the applicants complained that the Russian courts' judgments dissolving the community and banning its activities interfered with Articles 9, 10 (right to freedom of expression) and 11 (right to freedom of association). The government argued that its measures were necessary because, it claimed, the community engaged in extreme acts which infringed rights of Russian citizens[41] listing in its submission *inter alia* subjecting members to 'psychological pressure, 'mind control' techniques and 'totalitarian'[42] or 'paramilitary discipline',[43] and encouraging members to commit suicide and refuse medical assistance, particularly blood transfusions. The government also claimed that the community encouraged members to refuse to perform military or civilian service,[44] 'lured' children into the community (thus interfering with the parental rights of non-Witness parents) and spread literature which undermined respect for other religions.[45] The State was emphatic that it was these concerns — rather than the beliefs of the Jehovah's Witnesses — which motivated the restriction.[46] Citing *Manoussakis and Others v Greece*, the government pointed out that the ECtHR has explicitly stated that States can 'verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population',[47] and, referring to *Otto-Preminger-Institut v Austria*, that States may take 'measures aimed at repressing certain forms of

[38] *Nolan and K v Russia* App no 2512/04 (ECtHR, 12 February 2009) para 60.
[39] Ibid., paras 66, 75.
[40] *Jehovah's Witness of Moscow and Others v Russia* App no 302/02 (ECtHR, 10 June 2010).
[41] Ibid., para 115.
[42] Ibid., para 128.
[43] Ibid., para 131.
[44] Ibid., para 95.
[45] Ibid.
[46] Ibid., para 97ff.
[47] Ibid., para 97 referring to *Manoussakis v Greece* ECHR 1996-IV 1346, para 40.

conduct…judged incompatible with respect for the freedom of thought, conscience and religion of others'.[48]

In its assessment under Article 9, the ECtHR set out a range of general principles. It reiterated the importance of freedom of thought, conscience and religion in a democratic society, noting the interrelationship between the *forum internum* and *forum externum* by repeating the standard recital that whilst Article 9 primarily protects the *forum internum* it also protects the right to manifest. The ECtHR stressed the importance of manifestation in community with others,[49] and emphasised that the 'autonomous existence of religious communities' is necessary for pluralism in democratic societies and is at 'the very heart' of Article 9 protection, adding that the State's duty of neutrality and impartiality prohibits it from assessing the legitimacy of religious beliefs.[50] In terms of religious communities, which generally exist in the form of organised structures, the ECtHR explained that Article 9 must be interpreted in light of Article 11 which protects the right of association. Whilst States have powers to protect citizens from associations which might endanger them, these powers must be used 'sparingly' as permissible limitations on Article 11 are to 'be construed strictly and only convincing and compelling reasons can justify restriction on that freedom'.[51]

In applying these principles to the facts, the ECtHR found that the refusal to grant legal entity status to the association constituted an interference with Article 11 and, given that this was a religious organisation, also constituted an interference with Article 9. In dissolving the community, the State had deprived the members of the right to manifest their religion in community with others, 'indispensable elements of their religious practice.'[52] In its consideration of the justification of the interference under Article 9.2, the ECtHR accepted that the interference was prescribed by law and considered that it pursued a legitimate aim, namely the protection of the health and rights of others.[53]

The ECtHR's consideration of the necessity of the measure, however, was very detailed; because the harm in question may have been plausible, it was necessary for the ECtHR to conduct a more detailed analysis.[54] The ECtHR pointed out that in carrying out its scrutiny, it does not

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[48] *Jehovah's Witness of Moscow and Others v Russia* App no 302/02 (ECtHR, 10 June 2010), para 97; *Otto-Preminger Institut v Austria* (1994) Series A no 295-A, para 47.
[49] *Jehovah's Witness of Moscow and Others v Russia* App no 302/02 (ECtHR, 10 June 2010), para 99.
[50] *Metropolitan Church of Bessarabia and Others v Moldova* ECHR 2001-XII 81, para 188; *Hasan and Chaush v Bulgaria* ECHR 2000-XI 117, para 62. See also *İzzettin Doğan and Others v Turkey* App no 62649/10 (ECtHR, 26 April 2016), 93.
[51] *Jehovah's Witness of Moscow and Others v Russia* App no 302/02 (ECtHR, 10 June 2010), para 108.
[52] Ibid., para 103.
[53] *Metropolitan Church of Bessarabia and Others v Moldova* ECHR 2001-XII 81, para 113; *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* ECHR 2001-IX 273, para 84.
[54] Again, this seems consistent with the variable intensity of review, see Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65:1 Cambridge Law Journal 174, 205-206.

aim to substitute its own view for the view of the State, but rather to ascertain whether the reasons given by the State for the interference are 'relevant and sufficient' and that action was taken based 'on an acceptable assessment of the relevant facts.'[55]

In its examination, the ECtHR found that what the Russian courts took to be an infringement of the rights of its members to respect for private life (for instance, encouraging unpaid work and mandatory missionary activities) constituted a manifestation of their religion or belief, protected by Article 9. Indeed, recalling *Kokkinakis v Greece*, the ECtHR explained that bearing witness is an 'essential responsibility of every Christian',[56] thus again emphasising the interrelationship between belief and action. On the facts, the ECtHR found that there was no evidence of improper proselytism, or use of improper means to involve children of non-Witness parents in the organisation.[57] With respect to allegations of proselytism, 'mind control', totalitarian discipline and coercion the ECtHR found it 'remarkable' that the domestic courts did not cite a single victim and concluded that these claims were not based on an 'acceptable assessment the relevant facts'[58] but rather 'on conjecture uncorroborated by fact.'[59]

In regard to the claim that the association encouraged suicide and the refusal of medical assistance, the ECtHR found that the domestic court's decision that 'No Blood' cards justified a ban on the associations activities was tantamount to declaring the applicants' beliefs illegitimate. It found that the domestic court had not provided relevant and sufficient reasons for the interference with individual autonomy with respect to religious beliefs and physical integrity and claims that the association's activities damaged citizens health 'lacked a factual basis.'[60] The ECtHR also found that the government had 'not persuasively shown' the community, or individual members were incited to refuse to carry out civic duties,[61] explaining that it is 'a well-known fact' that Jehovah's Witnesses are pacifists, and in carrying out civilian service instead of military service, they are simply exercising their right to do so under Russian law.[62]

Before concluding, the ECtHR explicitly referred to the broader context. It observed that in Moscow following the 1997 Religions Act, Russian authorities had consistently refused the re-registration of religious associations which are considered non-traditional, such as the Salvation Army and the Church of Scientology. It noted that prior to the act, the Jehovah's Witnesses of

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[55] *Jehovah's Witness of Moscow and Others v Russia* App no 302/02 (ECtHR, 10 June 2010), para 108. See also *United Communist Party of Turkey and Others v Turkey* ECHR 1998-I 1, para 47; *Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania* ECHR 2005-I 209 para 49.
[56] *Jehovah's Witness of Moscow and Others v Russia* App no 302/02 (ECtHR, 10 June 2010), para 122. See *Kokkinakis v Greece* (1993) Series A no 260-A, para 31.
[57] Ibid., paras 147-148.
[58] Ibid., para 108.
[59] Ibid., para 130.
[60] Ibid., para 146.
[61] Ibid., para 153.
[62] Ibid., para 153.

Moscow had legally operated in Moscow. The dissolution of the community comprising 10,000 members and the indefinite ban on its activities, was, according to the ECtHR 'obviously the most severe form of interference, affecting, as it did, the rights of thousands of Moscow Jehovah's Witnesses'.[63] The ECtHR explained that even if it were to accept that the reasons for the interference were compelling, the dissolution of the community and ban on the activities was a 'drastic measure' which was disproportionate to the aim pursued.[64] The ECtHR pointed out that the State could have adopted less restrictive means in this case, such as issuing a warning or fine before taking the measures that it did. As such, it unanimously found a violation of Article 9 read in light of Article 11, and Article 11.

The critical question in this case was one of evidence. Given that the ECtHR found insufficient evidence to justify limiting the exercise of the right, it offered a high degree of protection.[65] However, it is interesting to reflect on the fact that the ECtHR explained, in hypothetical terms, that even if it had found that there were 'compelling' reasons for the interference (i.e. if it had found claims of harm substantiated) it would still have found a violation on the basis that State action was disproportionate to the aims pursued.

So, even when claims of harm are substantiated, the ECtHR may still find a violation of Article 9 if it considers that factors indicating a violation of Article 9 (primarily, but not only *forum internum* relevance) are not outweighed by countervailing factors. To see this approach in practice it is useful to examine *Biblical Centre of the Chuvash Republic v Russia*.[66]

iii. Transgressions of Fire and Health and Safety Laws

In *Biblical Centre of the Chuvash Republic v Russia*, the domestic authorities claimed the dissolution of a Pentecostal Biblical Centre which ran a Sunday School for children and a Biblical college for adults, was necessary because an inspection had revealed numerous violations of health and safety regulations.[67] Before the ECtHR, the Biblical Centre complained that the government's actions violated *inter alia* Articles 9 and 11.

In this case the ECtHR followed and directly cited *Jehovah's Witnesses of Moscow*, explaining that it is expected that believers will be allowed to associate freely, without arbitrary State intervention, and that any decision to dissolve a religious community amounts to an interference with Article 9 in light of Article 11. Whilst the ECtHR noted that the State's

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[63] Ibid., para 159.
[64] Ibid.
[65] More recently the ECtHR has explained that there must be evidence of 'real encroachment on the interests' of others is required in order to justify a limitation', see *Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts), para 95.
[66] *Biblical Centre of the Chuvash Republic v Russia* App no 33203/08 (ECtHR, 12 June 2014).
[67] Ibid., para 27.

arguments may be taken to mean that the interference pursued the aims of the protection of health and rights of others under Article 9.2. and Article 11.2 it observed that the 'drastic measure' to dissolve the organisation with immediate effect 'entailed significant consequences for the believers' and as such required 'very serious reasons by way of justification before it could be deemed proportionate to the legitimate aim pursued', emphasising that it would only be warranted 'in the most serious of cases.'[68]

In its analysis the ECtHR did not find sufficient reasons for the serious interference. In addition to pointing to inconsistencies in the domestic courts' approach with respect to reasons justifying dissolution of religious organisations,[69] the ECtHR found that it had not been convincingly established that the organisation had received advance notice that its activities were in breach of the law and that it was not given time, or opportunity, to address the issues raised by the authorities with respect to the educational licence or the sanitary conditions. For the ECtHR this revealed the 'determination' of the authorities in 'seeking to put an end to the applicant organisation's existence.'[70] The ECtHR criticised the domestic courts for the failure to take into consideration the impact of the dissolution of the organisation on the fundamental rights of the believers and observed that putting 'an end to the existence of a long-standing religious organisation' amounted to 'the most severe form of interference' which could not be deemed proportionate to the aims pursued.[71] Therefore, it unanimously decided that there had been a violation of Article 9 in light of Article 11.

Even though this was framed as a complaint about limitations on manifestation, the ECtHR took into account *forum internum* relevance because, for the ECtHR, manifestations are understood to be inextricably linked to the *forum internum*, and as such, the ECtHR recognises that limitations on manifestation inevitably impact upon the *forum internum*. The ECtHR also emphasised that in respect of religious communities, manifestation in community is an essential part of practice. Even after finding that State claims of harm were substantiated, the ECtHR did not simply defer to the State. In its proportionality assessment, the ECtHR found the failure on the part of the State to consider less restrictive measures (for instance, a warning or a fine) and the drastic action it took to dissolve the community, indicated that the authorities were determined to prevent the organisation from operating.

[68] Ibid., para 54.
[69] Ibid., para 56.
[70] Ibid., para 57.
[71] Ibid., para 61.

On the facts of this case, therefore, the ECtHR gave less weight to countervailing factors in the balance. Where the facts are different, however, the ECtHR can decide that on balance, similar State measures have greater weight and find no violation of Article 9.[72]

The explicit references to the facts, particularly the general clamp-down on religious groups in Russia in *Jehovah's Witnesses of Moscow v Russia*, in the law section of the judgment clearly shows the importance of the broader context for the ECtHR in the consideration of Article 9. Given the current climate, it would of course have been very difficult for the ECtHR not to have referred to the general context in Russia and other Eastern European countries in which the right to manifest religion or belief is being increasingly threatened by the numerous and varied limitations being placed on religious communities. Concerns about encroachments on the right to freedom of religion in these States (and others) are consistently raised in news reports and by human rights organisations.[73] Indeed, the vast majority of cases concerning Article 9 communicated to the ECtHR in recent years concern Russia, and nearby countries such as Azerbaijan, Ukraine and Bulgaria.[74] A significant proportion of these cases concern Jehovah's Witnesses[75] but it is increasingly the case that other religious groups are complaining about limitations on the right to manifest in these States.[76]

It will be interesting to see the outcome of *Milshteyn v Russia* in which the applicant, a follower of Elle-Ayat, a sun worshipping religious cult, complained about the government's ban on the group's activities for *inter alia*, publishing 'extremist and dangerous texts' and inducing members to 'refuse medical assistance' in favour of alternative therapies, including drinking 'active tea'.[77] The key question put to the parties by the ECtHR was whether the ban was compatible with Articles 11 and 9, and whether the domestic courts carried out a 'balancing

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[72] See *Cisse v France* ECHR 2002-III 19 (extracts).
[73] See e.g, Strasbourg Consortium, Europe Law and Religion Headlines <https://www.strasbourgconsortium.org/common/headline.php?pageId=13> accessed March 2019; Forum 18 News, <http://www.forum18.org/>_accessed March 2019; Article 19, <https://www.article19.org/issue/freedom-of-religion-or-belief/>_accessed March 2019.
[74] *Christian Religious Organisation of Jehovah's Witnesses in the NRK v Armenia* (communicated case) App no 41871/10 (ECtHR, 15 March 2018); *Jafarov and Others v Azerbaijan* (communicated case) App no 406/12 (ECtHR, 12 March 2018).
[75] See e.g. *Glazov LRO and Others v Russia* (communicated case) App no 3215/18 (ECtHR, 7 May 2018); *Christensen v Russia* (communicated case) App no 39417/17 (ECtHR, 4 September 2017); *Religious Community of Jehovah's Witnesses of Kryvyi Rih v Ukraine* (communicated case) App no 21477/10 (ECtHR, 22 November 2017); *Samara Lro and Others v Russia* (communicated case) App nos 15962/15 24622/16 2861/15 and 4 others (ECtHR, 4 September 2017); *Tagiyev and Others v Azerbaijan* (communicated case) App no 66477/12 (ECtHR, 31 October 2017); *Administrative Centre of Jehovah's Witnesses of Russia and Kalin v Russia* (communicated case) App no 10188/17 (ECtHR, 1 December 2017).
[76] See e.g. *AO Falun Dafa and Others v The Republic of Moldova* (communicated case) App no 29458/15 (ECtHR, 18 December 2018); *Abdulov and Others v Russia* (communicated case) App nos 32040/12 47400/12 6731/14 and 6 others (ECtHR, 31 August 2017).
[77] *Milshteyn v Russia* (communicated case) App no 1377/14 (ECtHR, 16 June 2017).

exercise which would have allowed them to weigh considerations of public health and safety against the countervailing principle of personal autonomy and religious freedom'.[78] Similar questions were put to the parties in another recently communicated case of *Evangelical Christian Church New Generation in Blagoveshchensk v Russia*, which concerned restrictions on the organisation's practice of neurolinguistic programming (NLP). The ECtHR enquired whether the domestic courts had carried out a balancing exercise between public safety and countervailing principles of religious freedom.[79]

Conclusion

The first section of this chapter demonstrated that in cases in which individuals have complained about restrictions on their behaviour resulting from generally applicable State laws intended to protect individuals from harm, the ECtHR has, where it concludes that the action in question is clearly harmful, offered a very low degree of protection under Article 9. However, even when the ECtHR considers that limitations on the freedom are, in principle, justifiable, *forum internum* relevance is not ignored. This is particularly evident in cases concerning manifestation of a deeply held inner belief, such as the corporal punishment of children. Because the ECtHR recognises that manifestations flow from the *forum internum* it intuitively recognises that limitations on manifestation inevitably impact upon the *forum internum*. However, when balancing *forum internum* relevance with countervailing factors in these cases, the ECtHR has, unsurprisingly, given greater weight to countervailing factors and found the restrictions to be justifiable.

The second section of this chapter demonstrated that where the ECtHR does not find evidence to support claims of alleged harm, or finds allegations of harm credible but considers that State measures are disproportionate, the ECtHR offers a high degree of protection. This was illustrated through an examination of cases in which States have dissolved religious communities or refused to re-register them, on the grounds that the groups threaten national security, challenge the rights and freedoms of members, or transgress fire and health and safety laws. In such cases, after finding interference with the right to manifest religion or belief, the ECtHR has balanced factors indicating a violation (primarily but not only *forum internum* relevance) with countervailing factors in order to reach its decision. Importantly, in cases concerning religious communities the ECtHR has consistently emphasised the interrelationship between belief and manifestation (i.e. the relationship between the *forum internum* and the *forum externum*) and has

[78] Ibid.
[79] See *Evangelical Christian Church New Generation in Blagoveshchensk v Russia* (communicated case) App no 73458/11 (ECtHR, 6 July 2017).

intuitively recognised that limitations on manifestation will inevitably impact upon the *forum internum*. So, even when the ECtHR has found evidence to support State claims of harm, it has not necessarily found that *forum internum* relevance is outweighed by countervailing factors, on balance, especially when this concerns severe limitations such as the dissolution of communities.

The balancing exercise in cases where *forum internum* relevance and countervailing factors may both be weak is harder (relatively speaking) than in cases where the *forum internum* is clearly strong and countervailing factors clearly weak. Such cases can be seen to fall into the middle circle in the loose concentric circles model, where the degree of protection ranges from a high to low degree depending on the way the ECtHR balances the factors. It is to a detailed examination of such contested cases that this thesis will now turn.

CHAPTER 6. *FORUM INTERNUM* RELEVANCE AND COUNTERVAILING FACTORS AT THEIR MOST CONTESTED (I)

Introduction

This chapter forms one of two chapters focusing on contested cases, that is, the kinds of cases in which it seems from the outset that the ECtHR might find a violation of Article 9 or might not. In terms of the loose concentric circles model of protection, these chapters concentrate on cases in the middle circle where *forum internum* relevance and countervailing factors are most contested and thus protection ranges from a very high to a very low degree depending on the balance of factors. The balancing exercise in cases the middle circle is 'harder' (relatively speaking) because in such cases *forum internum* relevance and countervailing factors may both be strong or *forum internum* relevance and countervailing factors may both be weak. As such, a 'diligent empirical and normative analysis' is required to ascertain whether limitations can be justified.[1]

This chapter focuses specifically on the ECtHR's approach to complaints concerning State limitations on the exercise of individual manifestation of religion or belief specifically through proselytism activities and the wearing of religious clothing or symbols. The next chapter will focus on the ECtHR's approach in cases concerning complaints of State pressure on individuals to act in a way which is contrary to their religion or belief or to disclose their religion or belief against their will.

Given the relationship between the *forum internum* and the *forum externum* one would expect the ECtHR to give considerable weight to *forum internum* relevance in cases concerning State limitations on the exercise of individual manifestation of religion or belief through proselytism activities and the wearing of religious clothing or symbols. However, again, one would not expect it to be *the* determining factor but rather *a* factor which the ECtHR takes into account in the balance.

The key question for this chapter is whether this happens in *practice*: in such cases does the ECtHR draw a binary and hierarchical distinction between the *forum internum* and the *forum externum* and treat the *forum externum* as a second order concern, consistently permitting State interference with the right (as the literature generally suggests)? Or does the ECtHR balance factors indicating a violation (primarily, but only *forum internum* relevance) with and countervailing factors, and offer protection ranging from a very hight to a very low degree depending on the facts of the case?

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[1] See Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (OUP 2016) 79.

This chapter argues that the evidence supports the latter. To illustrate this, this chapter will examine the ECtHR's approach in some paradigmatic cases; Section A will explore cases concerning limitations on proselytism activities in i) the community, ii) the armed forces and iii) the household. Section B will examine well-known cases concerning limitations on the wearing of religious clothing or symbols in i) schools and universities, ii) hospitals and iii) public spaces and Section C will examine lesser-known cases concerning limitations on the wearing of religious symbols in i) public spaces and ii) courtrooms.

A. Proselytism Activities

i. Proselytism Activities in the Community

That the ECtHR takes into account the relevance of the *forum internum* in cases concerning restrictions on proselytism is evident in the most well-known case concerning proselytism, *Kokkinakis v Greece.*[2] In this case, the applicant, a Jehovah's Witnesses, gained entry into the home of a local Orthodox Cantor and his wife, and entered into a discussion with the wife, with the aim of converting her to their beliefs. Following this, the applicant was arrested, charged and convicted under the recently introduced Greek law against proselytism. Before the ECtHR the applicant complained *inter alia* under Article 9 that his right to manifest his religion or belief had been unduly limited by the State, specifically, he criticised the domestic legislation on proselytism, arguing there was a 'logical and legal difficulty of drawing any even remotely clear dividing line between proselytism and the freedom to change one's religion or belief…and to manifest it.' [3]

In setting out the general principles, the ECtHR emphasised the interrelationship between the *forum internum* and the *forum externum* through the standard recital (that Article 9 primarily protects the *forum internum* but also protects manifestation of religion or belief) adding that 'bearing witness in words and deeds is bound up with the existence of religious convictions.'[4] The ECtHR explained that the right to manifest includes in principle the right to try to convince one's neighbour, for example, through 'teaching', without which the freedom to change religion

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[2] *Kokkinakis v Greece* (1993) Series A no 260-A.

[3] Ibid., para 29. For discussion see generally, Tad Stahnke, 'Proselytism and the Freedom to Change Religion in International Human Rights Law' [1999] Brigham Young University Law Review 251; Ted Stahnke, 'The Right to Engage in Religious Persuasion' in W Cole Durham Jr and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004).

[4] *Kokkinakis v Greece* (1993) Series A no 260-A, para 31. Cumper explains that for many it is a 'sacred duty', see Peter Cumper, 'The Public Manifestation of Religion or Belief: Challenges for a Multi-Faith Society in the Twenty-First Century' in Richard O'Dair and Andrew Lewis (eds) *Law and Religion: Current Legal Issues 2001 Volume 4* (OUP 2001) 311.

or belief, protected by Article 9 'would likely remain a dead letter.'[5] However, it observed that the right to manifest can be limited in certain circumstances, explaining that where multiple religions coexist, it may be necessary to restrict manifestation in order to 'ensure that everyone's beliefs are respected.'[6] In terms of proselytism, the ECtHR noted that a distinction had to be made between 'bearing Christian witness and improper proselytism', explaining that the latter represented a 'corruption or deformation' of Christian witness,[7] which could involve offering material or social advantage in order to gain new members, exerting 'improper pressure on people in distress or need', and 'may even entail the use of violence or brainwashing'[8] which was not compatible with the rights of others to freedom of thought, conscience and religion.[9]

In applying the principles to the facts, the ECtHR agreed with the government that domestic legislation was 'designed to punish improper proselytism'[10] and, as such, found that the interference was 'prescribed by law'[11] and pursued the legitimate aim under Article 9.2 of protecting the rights and freedoms of others.[12] However, after a brief consideration, it did not find that the restriction was justified by a pressing social need, so found a violation of Article 9.

The point about *Kokkinakis v Greece* is that it shows that just because the ECtHR characterises a complaint as a complaint concerning limitations on the right to manifest religion or belief, it does not simply ignore the *forum internum* relevance for the applicant. Indeed, it could be argued that the importance placed on manifestation as an expression of belief by the ECtHR meant that it did not adequately examine whether the applicant's actions — in entering the home of the Cantor and his wife to share his beliefs — constituted 'true evangelism' or 'improper proselytism'.

Kokkinakis v Greece is also interesting because it shows that *forum internum* relevance can be a factor weighing in favour of the applicant and also a factor weighing against the applicant, when the *forum internum* of others (in this case, the proselytised) is considered as part of the rights and freedoms of others under Article 9.2. Whilst the ECtHR did not explicitly refer to the *forum internum* of others, it is, as Taylor points out, possible to interpret the consideration of the rights and freedoms of others as a consideration of 'coercion impairing free religious

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[5] *Kokkinakis v Greece* (1993) Series A no 260-A, para 31.
[6] Ibid., para 33.
[7] For discussion of the problem of the ECtHR's reliance on the World Council of Churches definition of proselytism here, see Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005) 68 footnote 212.
[8] *Kokkinakis v Greece* (1993) Series A no 260-A, para 48.
[9] Ibid.
[10] Ibid.
[11] Ibid., paras 38, 41.
[12] Ibid., para 44. For a critique of the ECtHR's decision not to address the domestic law in detail, see Nicholas Hatzis, 'Neutrality, Proselytism and Religious Minorities at the European Court of Human Rights and the US Supreme Court' (2009) 49 Harvard International Law Journal 120. For a general critique, see Satvinder S Juss, 'Kokkinakis and Freedom of Conscience Rights in Europe' (1996) 1 Journal of Civil Liberties 246.

choice, amounting to interference with the *forum internum*.'[13] Indeed, the protection of the *forum internum* of others features heavily in the separate opinions in this case.

The majority's decision was supported by Judge Martens, in his partly dissenting opinion, who argued that the applicant's visit to the Cantor's wife was 'perfectly harmless' because there was 'no trace of violence' or 'coercion', 'at worst, there was a trivial lie.'[14] He contended that a violation of Article 9 should have been found on the basis that Greek law on proselytism did *not* pursue a legitimate aim, explaining that Article 9 does not allow States to criminalise attempts made by religious individuals to encourage others to change their religion. Judge Martens emphasised that it is not the role of the State to meddle in the conflict between proselytisers and the proselytised, arguing that it is no concern of the State if someone decides to change their religion and neither is it any concern of the State if someone 'attempts to induce another to change his religion.'[15] For Judge Martens the absolute nature of the right to hold or change a religion or belief meant that it was entirely beyond the purview of the State. This is an extreme position which is, as M Evans noted, 'tantamount to abandoning the rights of the 'proselytised' who would be left to their own resources in the protection of their freedom and would seem to ignore the obligation placed on States by ECHR Article 1, to ensure that every citizen under its jurisdiction can enjoy the rights and freedoms in the ECHR.[16]

Judge Valticos, in his dissenting opinion, took a very different approach to the protection of the *forum internum* of others in this case. He argued that the State has a responsibility to protect the rights of the proselytised and was emphatic that proselytism through deceptive means should not in any way be protected under Article 9 because it constitutes a 'rape of the beliefs of others'.[17] He argued that Jehovah's Witnesses engage in systematic and insistent efforts at conversion which constitute an attack on the religious beliefs of others, and characterised the applicant in *Kokkinakis v Greece* as a 'hardened', 'militant' Jehovah's Witness, a 'specialist in conversion' and a 'cunning purveyor of a faith he wants to spread' who gained entry to the home of the Cantor's wife and used the techniques of a salesman on the naïve woman to seduce her 'simple soul'.[18] Whilst he conceded that 'innocuous conversations' should not be prosecuted, he argued that systematic and insistent proselytism activities, like the activity in *Kokkinakis v Greece*, should be prosecuted as 'an intrusion on people's beliefs'.[19]

[13] Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005) 74.
[14] *Kokkinakis v Greece* (1993) Series A no 260-A, Concurring Opinion of Judge Martens.
[15] Ibid.
[16] Malcolm D Evans, *Religious Liberty and International Law* (OUP 1997) 332.
[17] *Kokkinakis v Greece* (1993) Series A no 260-A, Dissenting Opinion of Judge Valticos.
[18] Ibid.
[19] Ibid.

One way of understanding these diverging interpretations in this case is to appreciate the way in which the broader context may influence the weight given to countervailing factors. In Greece, the Eastern Orthodox Church is recognised as the State religion and the vast majority of citizens belong to that Church.[20] It is difficult to overlook the fact that the strongest voice arguing that the State limitation was legitimate, because it was intended to protect the conscience of others, was the national judge, Judge Valticos. For him, in proselytising the wife of a Cantor of the Greek Orthodox Church the applicant threatened to the status-quo; in Judge Valticos' words, 'sects are going to fish for followers in the best-stocked waters.'[21] Therefore, he gave more weight to countervailing factors in the balance.

In contrast, it seems highly likely that the majority were influenced by the ongoing clamp-down on Jehovah's Witnesses' activities in Greece at the time, and this background may have influenced their decision to give less weight to countervailing factors. The lack of methodological rigour with respect to determining whether the applicant's actions constituted true evangelism or improper proselytism, may have been a reflection of the fact that the ECtHR knew from the outset the decision that it was going to reach.

In the decade prior to *Kokkinakis v Greece*, over 2,000 Jehovah's Witness were arrested for proselytism and many imprisoned.[22] Kokkinakis himself was 'exiled six times, arrested more than sixty times and served five years in various prisons for proselytism'.[23] But it was not just Jehovah's Witnesses who were targeted.[24] Indeed, other individuals arrested and sentenced for proselytism included Pentecostalists, four of which also complained before the ECtHR about limitations on proselytism activity in *Larissis v Greece.*[25] This is another case which demonstrates, more clearly, that *forum internum* relevance is not only a factor weighing in favour of the applicant, it may also be a countervailing factor when the *forum internum* of others is considered as part of the rights and freedoms of others under Article 9.2.

ii. Proselytism Activities in the Armed Forces

In *Larissis v Greece,* four officers of the Greek Air Force, who were members of the Pentecostal Church (in which evangelism is considered a duty),[26] complained that the punishment for

[20] See e.g., Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011) 11, 30.
[21] *Kokkinakis v Greece* (1993) Series A no 260-A, Dissenting Opinion of Judge Valticos.
[22] Caroline Moorehead, 'Jehovah's Witnesses Jailed in Greece for 'Proselytising', The Independent (28 September 1992) <https://www.independent.co.uk/news/world/jehovahs-witnesses-jailed-in-greece-for-proselytism-1554153.html> accessed November 2015.
[23] UNGA, Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Greece (7 November 1996) UN Doc A/51/542/Add.1. para 88.
[24] *Larissis and Others v Greece* ECHR 1998-I 362.
[25] Ibid.
[26] Ibid., para 7.

manifesting their religion constituted a violation of *inter alia* Article 9. In its assessment under Article 9, the ECtHR set out the standard recital — that Article 9 primarily protects the *forum internum* but also protects manifestation of religion or belief — but also explained, that Article 9 does not protect every act motivated or inspired by a religion or belief, specifically, that Article 9 does not protect 'improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a church'.[27]

In applying these principles to the facts, the ECtHR paid close attention to the details and distinguished between the proselytism activities directed at the officers' subordinates and the proselytism activities directed at civilians. The proselytism efforts of the officers with respect to their subordinates constituted, according to the ECtHR, improper proselytism, and as such it decided that the interference with the manifestation in this respect did not violate Article 9.[28] The ECtHR explained that 'what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life be view as a form of harassment or the application of undue pressure in abuse of power.'[29] Given the subordinates were unable to remove themselves from the context in which the proselytism had occurred, the ECtHR found that this amounted to coercion.

In this respect, the ECtHR considered the protection of the *forum internum* of others (namely, the individuals proselytised) as a countervailing factor. Whilst the protection of the applicants' *forum internum* was the most significant factor weighing in their favour, the protection of the *forum internum* of others was a factor weighing *against* the applicants. In the balance, the ECtHR decided to give more weight to countervailing factors (namely the protection of the *forum internum* of the proselytised) and thus found no violation of Article 9.

In contrast, the ECtHR found the proselytism efforts of the officers with respect to civilians did not constitute improper proselytism. It did not find sufficient evidence that the officers had taken advantage of the civilians' family issues or 'psychological distress' or 'applied unlawful pressure'.[30] In the balance here, therefore, the ECtHR decided to give less weight to countervailing factors (namely the protection of the *forum internum* of the proselytised) and thus found a violation of Article 9.

Again, therefore, despite characterising the complaint in this case as a complaint concerning limitations on manifestation, the ECtHR recognised the interrelationship between belief and manifestation, i.e. it took into account *forum internum* relevance. However, the ECtHR was not driven by general guidelines explaining when proselytism activities become unacceptable

[27] Ibid., para 45.
[28] Ibid., para 54.
[29] Ibid., para 5.
[30] Ibid., paras 56, 61.

intrusions into the *forum internum* of others, but rather focused on the facts, namely the specific relationships between the proselytisers and the proselytised, to decide whether the action in question constituted acceptable religious persuasion or unacceptable coercion. This emphasis on the facts left open considerable scope for disagreement as evidenced in the separate opinions.

Both Judge Repik and Judge van Dijk argued that a violation of Article 9 should have been found in relation to proselytism of the subordinates *and* the civilians, because, they argued it was not clear that the interference was prescribed by law.[31] For Judge van Dijk, there was an issue with the ECtHR's assumption of undue influence exercised by a more senior ranking figure over a lower ranking figure in the army. He argued that claims of 'pressure' on subordinates were not sufficiently substantiated and disagreed that there was a pressing social need to limit the manifestation.[32] In particular, he argued that the alleged victim's testimony revealed that he contacted one of the officers and sought his advice, and as such, the conversations on religion and the subsequent conversions were prompted by his own free will.

In contrast, Judge Valticos (who has also dissented in *Kokkinakis v Greece*) and Judge Morenilla argued that there was no violation of Article 9 in this case.[33] These judges cast the action as 'deliberate acts of proselytism are contrary to the respect for freedom of conscience and religion' and contended pressure existed because subordinates would have been 'influenced by the officers' authority over them' and civilians would have been influenced by the officers' uniform.[34] Thus, these judges reached diverging decisions in this case because they gave more, or less, weight to countervailing factors (namely the *forum internum* of others).

iii. Proselytism Activities in the Household

Given the ECtHR's approach in *Larissis v* Greece, one might expect the ECtHR to also consider the *forum internum* of others (as part of the rights and freedoms of others under Article 9.2) as a countervailing factor in cases concerning proselytism activities in the family. Strikingly, however, in this context the ECtHR seems to give very little weight to the *forum internum* of others as a countervailing factor in the balance. The ECtHR's approach in this respect is illustrated well in *Vojnity v Hungary*.[35]

In this case, the applicant complained that the State had interfered with Articles 8, 9 and Article 2 of Protocol 1 in restricting his access rights to his son. The domestic authorities had

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[31] *Larissis and Others v Greece* ECHR 1998-I 362, Partly Dissenting Opinion of Judge Repik; ibid., Partly Dissenting Opinion of Judge van Dijk.
[32] *Larissis and Others v Greece* ECHR 1998-I 362, Partly Dissenting Opinion of Judge van Dijk.
[33] Ibid., Partly Dissenting Opinion of Judge Valticos, Joined by Judge Morenilla.
[34] Ibid. This was supported by Judge De Meyer, see Larissis and Others v Greece ECHR 1998-I 362, Concurring Opinion of Judge De Meyer.
[35] *Vojnity v Hungary* App no 29617/07 (ECtHR, 12 February 2013).

raised concerns about the 'heavy handed' proselytism of the child by his father and had denied the applicant, a member of the religious denomination *Hit Gyülekezete*, access rights because it considered that he held 'ideas hallmarked by religious fanaticism' and had abused his right to influence his son by forcing his beliefs onto him in such a way as to trigger anxiety and fear in the boy, endanger his development, leading to his alienation from the applicant.[36]

In considering the legitimacy of the denial of access rights, the ECtHR explained that Articles 8, 9 and Article 2 of Protocol 1 give the right to parents to 'communicate and promote their religious convictions' to their children, 'even in an insistent and overbearing manner, unless this exposes the latter to dangerous practices or to physical or psychological harm'.[37] Whilst the ECtHR noted the domestic authorities' concerns that the applicant's participation in the child's life was 'harmful' due to his 'insistence on proselytism',[38] and recognised that the child had been placed under 'psychological strain' which had caused emotional imbalance, the ECtHR did not find 'convincing evidence' of 'actual harm'.[39] The ECtHR concluded that the protection of the son's psychological health from the stress placed upon it by his father's intensive proselytism efforts did not qualify as a 'weighty reason' justifying the different and less favourable treatment with respect to the applicant's access rights, and therefore, found a violation of Article 8 and 14, and did not find it necessary to examine the applicant's Article 9 complaint.[40]

In choosing not to examine the complaint under Article 9, the ECtHR did not explicitly weigh up the applicant's Article 9 right to proselytise against the son's *forum internum* right not to be coerced.[41] The fact that it chose not to do this suggests that, for the ECtHR, parents can impact upon a child's *forum internum* to a considerable extent without this necessarily constituting a violation of Article 9.[42]

The first section of this chapter demonstrates that the ECtHR does not simply defer to States and permit limitations on the right to manifest in cases concerning the right to manifest through proselytism. Rather than drawing a binary and hierarchical distinction between the *forum internum* and the *forum externum,* as the literature suggests, the ECtHR recognises that the *forum*

[36] Ibid., para 17.
[37] Ibid., para 37. This was consistent with the earlier statement concerning parental rights to steer their children along the lines of their own beliefs, see *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) Series A no 23.
[38] *Vojnity v Hungary* App no 29617/07 (ECtHR, 12 February 2013) para 38.
[39] Ibid.
[40] It will be interesting to see ECtHR's approach in the recently communicated case of *Fouquet v France* in which the applicant (a Muslim) complained about being forced to convert to the faith or her foster family (who were Jehovah's Witnesses), see *Foquet v France* (communicated case) App no 59227/12 (ECtHR, 2 October 2017) [French].
[41] For a discussion of coercion within the family see, Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016) 87.
[42] See the finding under Article 3 in *CJ, JJ and EJ v Poland* (1996) 84-B DR 46.

internum and *forum externum* are deeply interrelated, emphasising that bearing witness is bound up with beliefs. And, the ECtHR intuitively recognises that limitations on manifestation through proselytism may affect an individual's right to hold a religion or belief. Even when the proselytisers right to manifest religion or belief comes into conflict with the right of the proselytised to hold a religion or belief, the ECtHR does not simply allow limitations on the right to manifest in order to protect the absolute right to hold a religion or belief at all costs but, instead, considers whether the right of the proselytised to hold a religion or belief has been *interfered* with by the proselytiser, on the particular facts of the case.

Again, these cases show that *forum internum* relevance is not the determining factor but rather a factor taken into account in the balance in Article 9 cases. This which means that the ECtHR (and individual judges) often reach different outcomes in ostensibly similar cases depending on the balance of factors. In some instances, State restrictions can be viewed as illegitimate interferences with the right to manifest religion or belief, whereas, in other instances, restrictions can be viewed as justified by a pressing social need, namely the protection of the rights and freedoms of others. This pattern of protection is also illustrated in cases concerning the wearing of religious clothing and symbols which the next section of this chapter will explore in detail.

B. Wearing Religious Clothing or Symbols (I)

As noted in Chapter One, the literature relating to Article 9 tends to focus heavily, sometimes exclusively, on cases concerning limitations on the wearing of religious clothing or symbols, especially those concerning the wearing of headscarves including the *hijab, niqab* and *burkha*.[43] Such cases are contentious because whilst the wearing of such religious clothing, and symbols such as a cross around one's neck,[44] is usually considered a legitimate form of manifestation by

[43] See e.g. Aernout Nieuwenhuis, 'European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of *Leyla Sahin'* (2005) 1:3 European Constitutional Law Review 495; Carolyn Evans, 'The Islamic Scarf in the European Court of Human Rights' (2006) 7 Melbourne Journal of International Law 52; T Jeremy Gunn, 'Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights in *Sahin v Turkey*' (2008-2009) 3 Droit et Religions 339; Erica Howard, *Law and the Wearing of Religious Symbols: European Bans of the Wearing of Religious Symbols in Education* (Routledge 2011); T Jeremy Gunn, 'Religious Symbols in Public Schools: The Islamic Headscarf and the European Court of Human Rights Decision in *Sahin v Turkey*' in W Cole Durham Jr and others (eds) *Islam, Europe and Emerging Legal Issues* (Ashgate 2012); Daniel Hill and Daniel Whistler, 'Religious Symbols and the European Convention on Human Rights' (2013) 171 Law and Justice 52; Tereas Sanader, 'Religious Symbols and Garments in Public Places – a Theory for the Understanding of *SAS v France*' (2015) 9 Vienna Journal on International Constitutional Law 186; Sylvie Bacquet, 'Religious Symbols and the Making of Contemporary Religious Identities' in Russell Sandberg (ed) *Religion and Legal Pluralism* (Routledge 2016); Stephanie Berry, 'A 'Good Faith' Interpretation of the Right to Manifest Religion? The Diverging Approaches of the European Court of Human Rights and the UN Human Rights Committee' (2017) 37:4 Legal Studies 672.
[44] *Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts), paras 91, 97.

the ECtHR, States have often argued that it is necessary to restrict this manifestation in order to pursue legitimate aims under Article 9.2, particularly to protect public safety, public order and the rights and freedoms of others. Indeed, this section follows naturally from the examination of complaints about limitations on proselytism above because States often argue that religious clothing and symbols can have a proselytising effect on others.

Again, in cases concerning limitations on manifestation through the wearing of religious clothing or symbols the ECtHR intuitively recognises that limitations affect the right to hold a religion or belief because the *forum internum* and the *forum externum* aspects of Article 9 are interrelated. But, *forum internum* relevance is not the determining factor; the ECtHR balances *forum internum* relevance with countervailing factors to reach its decision. In this section, the ECtHR's approach in well-known cases concerning complaints about restrictions on the right to manifest religion or belief through the wearing of religious clothing or symbols will be examined, in the following subsections: i) schools and universities, ii) hospitals and iii) public spaces.

i. Schools and Universities

A well-known case concerning restrictions on the wearing of headscarves is *Dahlab v Switzerland* in which a teacher in a State primary school complained that the measure which prohibited her from wearing her headscarf whilst teaching interfered with her right to manifest her religion.[45] The government claimed that the restriction did not interfere with Article 9, but if it was deemed to do so by the ECtHR, it could be justified under Article 9.2 as the restriction, which was based on the principle of denominational neutrality in schools, pursued the legitimate aim of upholding religious harmony and preserving 'individual freedom of conscience in a pluralistic democratic society.'[46] Further, the government argued that as a State representative the applicant should not align herself with any belief, especially when this was expressed by the wearing of 'a powerful external symbol' such as the Islamic headscarf.[47]

Through its general principles, the ECtHR explained that Article 9 primarily protects the *forum internum* but also protects manifestation of religion or belief, adding that 'in democratic societies' where a number of religions coexist it 'may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's

[45] *Dahlab v Switzerland* ECHR 2001-V 447.
[46] Ibid.
[47] Ibid. For discussion of 'powerful external symbol' see generally T Jeremy Gunn, 'Religious Symbols in Public Schools: The Islamic Headscarf and the European Court of Human Rights Decision in *Şahin v Turkey*' in W Cole Durham Jr and others (eds) *Islam, Europe and Emerging Legal Issues* (Ashgate 2012).

beliefs are respected'.[48] Whilst it found that the limitations on the wearing of the headscarf constituted interference with Article 9, it did not however find a violation of that article.

In its assessment, the ECtHR explained that the measure was prescribed by law, and pursued legitimate aims under Article 9.2, namely the protection of the rights and freedoms of others, public safety and public order. And with respect to the necessity of the restriction, the ECtHR explained that States have a certain margin of appreciation in determining the need for interference. In considering the facts, the ECtHR observed that whilst the applicant had worn the headscarf for years without any complaints and that there were no objections to her pedagogy, it was 'very difficult to assess the impact' of a 'powerful external symbol' such as the headscarf on young children, recognising that it could not 'be denied outright' that the headscarf *may* have 'some kind of proselytising effect', especially given that it is stipulated in the Koran.[49] The ECtHR concluded that it was difficult to reconcile the wearing of a headscarf in a classroom with the principles of tolerance, respect for others and non-discrimination which teachers in a democratic society have a responsibility to convey to pupils and decided that in restricting the applicant's right the State had not exceeded its margin of appreciation.[50]

Whilst Bielfeldt, Ghanea and Wiener note that the wearing of a headscarf by a teacher is unlikely to constitute coercion, it is (like proselytism within the family) an issue which may fall into the 'grey zone between the mere exercise of legitimate influence and the use of illegitimate coercion' and, as such, needs careful consideration.[51] It may be argued in *Dahlab v Switzerland* that the ECtHR did not conduct a sufficiently detailed analysis. Despite pointing out its important oversight role in terms of State claims of necessity, the ECtHR did not seek concrete evidence for the need to restrict the wearing of the headscarf nor did it explain precisely *how* the such a manifestation undermined the principles of tolerance, respect for others and non-discrimination. Indeed, one could argue that restrictions on the wearing of the headscarf had the very same effect. The ECtHR uncritically accepted the government's argument that the headscarf is a 'powerful external symbol' and put the impact of the manifestation in very vague terms.

Langlaude, for instance, has criticised the ECtHR's broad and speculative reference to 'some kind of proselytising effect' and the way it seems to have expanded the notion of indoctrination so that the wearing of the headscarf in front of children of a tender age is seen to affect their freedom of conscience.[52] Taylor made a similar criticism arguing that *Dahlab v*

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[48] See the earlier statement in *Kokkinakis v Greece* (1993) Series A no 260-A, para 33.
[49] *Dahlab v Switzerland* ECHR 2001-V 447.
[50] Ibid. The ECtHR reached a similar decision in *Kurtulmuş v Turkey* ECHR 2006-II 297.
[51] See Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief* (OUP 2016) 89.
[52] Sylvia Langlaude, 'Indoctrination, Secularism, Religious Liberty and the ECHR' (2006) 55 International and Comparative Law Quarterly 929, 931.

Switzerland 'sadly illustrates the error of applying too low a threshold' for interference with the *forum internum* of others.[53]

There is, however, another way of reading this case; the lack of methodological rigour may have been a conscious choice rather than a failing on the part of the ECtHR. It seems that for the ECtHR the context in *Dahlab v Switzerland* was key; at the material time in Switzerland denominational neutrality in schools was a central constitutional principle, and in wearing the headscarf whilst teaching, the applicant directly challenged this. Whilst the ECtHR observed that in wearing a headscarf the applicant was manifesting her religion, and as such recognised the *forum internum* relevance (because of the interrelationship between the *forum internum* and the *forum externum*), in the balance, the ECtHR gave greater weight to countervailing factors (including upholding the principle of denominational neutrality in schools).

This approach is further evidenced in *Leyla Şahin v Turkey* in which a university student complained under Article 9 that the ban on wearing headscarves at university constituted an interference with her right to manifest her religion.[54] She contended that it was a religious obligation and not, as the State argued, intended as a 'means of protest,' 'did not constitute a form of pressure, provocation or proselytism'[55] and was not incompatible with the principles of secularism and neutrality in education.[56] In its Article 9 assessment, the ECtHR found that the ban constituted an interference with the right to manifest but considered that the principle of secularism was consistent with the values underpinning the ECHR[57] and the ban, which was motivated by this principle, could be regarded as necessary in a democratic society in light of the margin of appreciation afforded to States.[58] This was reiterated by the Grand Chamber which observed that in the educational context, where values such as pluralism, respect for the rights of others and gender equality are taught and applied, it is understandable that the State would want maintain the secular nature of the institution in question and deem the wearing of religious clothing to be contrary to the principle of secularism.[59]

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[53] Paul Taylor, *Freedom of Religion* (CUP 2005) 172. This fits in with Taylor's broader criticism of the ECtHR that it protects the *forum internum* very strongly when it considered indirectly (as part of the rights and freedoms of others) but offers very weak protection to the *forum internum* when direct claims of *forum internum* interference are made by applicants, ibid.

[54] *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 29 June 2004); *Leyla Şahin v Turkey* ECHR 2005-XI 173. There are numerous similar cases such as *Köse and 93 Others v Turkey* ECHR 2006-II 339; *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008); *Kervanci v France* App no 31645/04 (ECtHR, 4 December 2008).

[55] *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 29 June 2004), para 85.

[56] Ibid., para 86.

[57] Ibid., para 106.

[58] Ibid., para 114.

[59] Ibid., para 116. This is consistent with *Kurtulmuş v Turkey* ECHR 2006-II 297; *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008); *Kervanci v France* App no 31645/04 (ECtHR, 4 December 2008).

The ECtHR also considered what effect the headscarf 'which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it'.[60] Here the ECtHR referred to *Karaduman v Turkey* (which concerned the refusal to remove a headscarf for a degree certificate photograph) in which the Commission noted that States may enforce dress regulations to ensure that public order in higher education is not disturbed by fundamentalist religious movements and the beliefs of other students are not impinged upon.[61] The ECtHR explained that in the context of Turkey, in which most of the population belong to a particular religion, steps taken by universities to avoid fundamentalist religious movements putting pressure on students who do not belong to the same religion, or belong to another religion, may be acceptable under Article 9.2.[62] In light of this, the interference was considered to be justified and proportionate, so no violation of Article 9 was found.[63]

Again, in this case the ECtHR did not explain *why* the wearing of the headscarf was contrary to the principle of secularism, nor did it seek concrete evidence from the State as to precisely *how* the wearing of the headscarf could place pressure on students who did not wear one. Whilst it may be 'understandable' that the authorities may wish to maintain the secular nature of the university in question, it was the duty of the ECtHR to ascertain whether the *way* in which it sought to do this was compatible with the ECHR. Judge Tulkens, in her dissenting opinion, questioned the majority's 'general and abstract appeal to secularism' and criticised it for failing to conduct a thorough necessity and a proportionality analysis.[64] She pointed out that only 'indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying the requirement and justifying interference with a right guaranteed by the Convention.'[65] Relying on *Smith and Grady v The United Kingdom*[66] she argued that concrete examples are required to justify interference with a fundamental right. For Judge Tulkens, the majority simply assumed that the headscarf placed pressure on others.[67] and ignored the fact that

[60] *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 29 June 2004), para 108; *Leyla Şahin v Turkey* ECHR 2005-XI 173, para 115. Elver notes this is a 'rather unusual argument for a human rights court,' see Hilal Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* (OUP 2014) 79.
[61] *Karaduman v Turkey* App no 16278/90 (Commission Decision, 3 May 1993).
[62] *Leyla Şahin v Turkey* ECHR 2005-XI 173, para 99. This is consistent with *Kose and 93 others v Turkey* in which the ECtHR explained schools must ensure that manifestations do not become 'ostentatious and thus a source of pressure and exclusion', see *Köse and 93 Others v Turkey* ECHR 2006-II 339. Langlaude criticised the ECtHR for seeing Şahin as 'being on the verge of indoctrinating other students', see Sylvie Langlaude, 'Indoctrination, Secularism, Religious Liberty and the ECHR' (2006) 55 International and Comparative Law Quarterly 929, 932. This, however, seems to be an exaggeration of the reasoning because the ECtHR did not mention indoctrination and considered potential pressure as part of its broader range of considerations under Article 9.2.
[63] The question of European consensus was a point of disagreement between the majority and dissenting judges, see *Leyla Şahin v Turkey* ECHR 2005-XI 173 para 166.
[64] *Leyla Şahin v Turkey* ECHR 2005-XI 173, Dissenting Opinion of Judge Tulkens, paras 4-5.
[65] Ibid., para 5.
[66] *Smith and Grady v The United Kingdom* ECHR 1999-VI, 45, para 99.
[67] *Leyla Şahin v Turkey* ECHR 2005-XI 173, Dissenting Opinion of Judge Tulkens, para 8.

bans by Member States on religious symbols in schools had not extended to universities because they were intended for adults 'who are less amenable to pressure.'[68]

Again, however, it is likely that the lack of methodological rigour in this case was a conscious choice rather than a failing on the part of the ECtHR.[69] The ECtHR did not ignore the relevance of the *forum internum* for the applicant; the ECtHR balanced it against countervailing factors, and in doing so, decided to give greater weight to countervailing considerations.[70] The ECtHR agreed with the government that in wearing the headscarf at university — where it was specifically banned — the applicant was provocatively challenging the constitutional principle of secularism, and given the background in Turkey at the material time, in which wearing a headscarf at university was one of the ways of making a political statement,[71] this decision on the part of the ECtHR was unsurprising. Rather than taking a step by step approach to the complaint the ECtHR seems to have skimmed over key questions under Article 9.2 because it knew, from the outset, the outcome it was going to reach (i.e. that it would defer to the State) because of the facts.[72]

Another case which illustrates this is *Kurtulmuş v Turkey* in which an Associate Professor at the University of Istanbul, who was suspended and eventually dismissed on the basis that she wore a headscarf, complained that the ban on wearing headscarves whilst teaching violated *inter alia* her right to manifest her religion.[73] In its Article 9 assessment the ECtHR decided that the ban constituted an interference with the right to manifest. However, it considered that the measure was prescribed by law and pursued legitimate aims, namely the protection of rights and freedoms of others and protection of public order. With respect to the question of necessity, the ECtHR noted States can restrict the wearing of the Islamic headscarf where it deems it incompatible with aims above, and referring to *Dahlab v Switzerland*, emphasised the importance of preserving neutrality in State school education. It noted that it was not objections to a person's

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[68] Ibid.
[69] For an attempt at rewriting this judgment, see Pierre Bosset, 'Mainstreaming religious diversity in a secular and egalitarian state: the roads(s) not taken in Leyla *Şahin v Turkey*' in Eva Brems (ed) *Diversity and European Human Rights: Rewriting the Judgments of the ECHR* (CUP 2012).
[70] For a critique of this judgment see, T Jeremy Gunn, 'Religious Symbols in Public Schools: The Islamic Headscarf and the European Court of Human Rights Decision in *Sahin v Turkey*' in W Cole Durham Jr and others (eds) *Islam, Europe and Emerging Legal Issues* (Ashgate 2012).
[71] Demands to wear the Islamic veil at university was noted as one of the main ways of challenging secularism in Turkey by the UN Special Rapporteur on Freedom of Religion or Belief, see UNGA, Elimination of all Forms of Religious Intolerance: Interim Report of the Special Rapporteur of the Commission on Human Rights and the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief: Situation in Turkey (11 August 2000) UN Doc A/55/280/Add.1, para 48.
[72] Bleiberg illustrates the importance of the facts in the case, arguing that it was a 'legally flawed and politically motivated decision', see Benjamin Bleiberg, 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Leyla Sahin v Turkey*' (2005) 91 Cornell Law Review 129, 168.
[73] *Kurtulmuş v Turkey* ECHR 2006-II 297.

religious beliefs which motivated restrictions on religious dress but rather the 'principle of secularism and neutrality in public service' which was a fundamental principle of the Turkish State.[74] The ECtHR decided that the State had not overstepped its margin of appreciation with respect to determining requirements on state school teachers and thus deemed the complaint manifestly ill founded.

So, whilst the ECtHR took into account the applicant's *forum internum* (because it recognised that the limitation on wearing a headscarf inevitably impacted on the applicant's *forum internum*), the ECtHR decided, in the balance, to give greater weight to countervailing factors.

Again, the ECtHR did not conduct a lengthy analysis of the necessity of the limitation or seek concrete evidence of *how* a teacher, wearing a headscarf at a university, undermined the rights and freedoms of others and threatened public order, particularly given the applicant was teaching adults who are not so easily influenced as children. And, the applicant was allowed to wear her headscarf during her PhD, and for the first two years of teaching so the proportionality of the ban was 'debatable' indeed.[75] In pointing out that the applicant had taken on the role of a public servant voluntarily and would not have been unaware of the obligation upon her not to express her religious beliefs in an 'ostentatious manner', the ECtHR seems to reveal its own understanding of what was at stake here.[76] Commentators have pointed out that the ECtHR seems able to appreciate different motivations in relation to the display of a crucifix in schools, but chooses not to do so in relation to the wearing the headscarf.[77] This thesis argues that this *choice* to do, or not to do so, is not simply arbitrary. It reflects the fact that the ECtHR balances *forum internum* relevance and countervailing factors in order to reach its decision.

In some cases, the ECtHR gives the impression that it is all about the weight of countervailing factors. This is particularly so when the case concerns a manifestation, such as the wearing of a headscarf. In such instances, because the focus is on an action in the *forum externum* the consideration of *forum internum* relevance is reduced to the background.

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[74] Ibid.

[75] See Saila Ouald Chaib, 'Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights' in Katayun Alidadi, Marie-Claire Foblets and Jogchum Vrielink (eds) *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (Ashgate 2012) 47.

[76] *Kurtulmuş v Turkey* ECHR 2006-II 297. Chaib points out that 'this "choice" hides the dilemma between manifesting one's religion on the one hand and pursuing a career as an academic and public servant on the other', see Saila Ouald Chaib, 'Religious Accommodation in the Workplace: Improving the Legal Reasoning of the Euroepan Court of Human Rights' in Katayun Alidadi, Marie-Claire Foblets and Jogchum Vrielink (eds) *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (Ashgate 2012) 47.

[77] See also Paolo Ronchi, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*' (2011) 13:3 Ecclesiastical Law Journal 287, 294; Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) 416.

This is particularly evident in *Melek Sima Yilmaz v Turkey* in which a high school teacher complained that prohibition on wearing headscarf whilst teaching violated *inter alia* her right to manifest.[78] Here the ECtHR did not explicitly consider *forum internum* relevance at all. It simply noted that it had already examined similar complaints in *Dahlab v Switzerland* and *Kurtulmuş v Turkey* and in those cases found no violation of Article 9 given the importance of respect of neutrality in education and the margin of appreciation available to States with respect to requirements on state school teachers, and saw no reason to depart from its conclusion in the case in question.[79]

These cases concerning the wearing of headscarves in schools and universities demonstrate that the ECtHR tends to focus heavily on the countervailing factors in this context, and *forum internum* relevance often seems to have a minimal role in the assessment. This approach is further evidenced in cases concerning limitations on the wearing of clothing or symbols in hospitals.

ii. Hospitals

In *Ebrahimian v France* a social worker in a psychiatric department of a public hospital argued that the non-renewal of her contract, on the grounds that she refused to remove her headscarf, interfered with *inter alia* her right to manifest her religion and was not, as the government claimed prescribed by law[80] and did not pursue a legitimate aim of protecting the rights and freedoms of others.[81] The government argued that neutrality in hospitals was important because of the potential effect a 'visible external sign' might have on 'the freedom of conscience of frail and easily influenced patients,'[82] but the applicant contested this, claiming that the headscarf did not undermine the principle of neutrality of the public service, did not threaten public order, and was not an 'act of proselytism'.[83] For the applicant, the non-renewal of the contract was motivated by the new management's objections to her religion.[84]

In its Article 9 assessment the ECtHR stated that there was no reason to doubt that that the wearing of the headscarf 'was a "manifestation" of sincere religious belief protected by Article 9', and that the decision not to renew the applicant's contract constituted an interference with the right to manifest religion or belief.[85] Given that the ECtHR understands that

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[78] *Yilmaz v Turkey* App no 37829/05 (ECtHR, 3 April 2007) [French].
[79] Ibid.
[80] *Ebrahimian v France* ECHR 2015-VIII 99, para 41.
[81] Ibid., paras 42 and 43.
[82] Ibid., para 44.
[83] Ibid., para 38.
[84] Ibid., para 39.
[85] Ibid., para 47.

manifestations flow from the *forum internum*, and thus, any restrictions upon manifestations inevitably impact the *forum internum*, the ECtHR implicitly recognised that the *forum internum* was engaged in this case. In terms of the balance of factors, *forum internum* relevance was therefore a factor weighing in favour of the applicant. However, the ECtHR concentrated largely upon the strength of countervailing factors in its assessment.

In its consideration of whether the measure was prescribed by law the ECtHR explained that in order to meet the requirements under Article 9.2 the measure must not only have a basis in domestic law, it must accessible, individuals must be able to foresee the consequences of it, it must be compatible with the rule of law and sufficiently clear about the circumstances in which States can take measures affecting ECHR rights.[86] In this case the ECtHR agreed with the applicant that there was no law prohibiting public employees from wearing religious symbols,[87] however, it observed that France is a secular republic, and neutrality of public services is part of State secularism and is a 'fundamental principle of the public service'.[88] Despite the fact that there was no explicit reference to the applicant's profession in this general obligation of neutrality, and that when the applicant started the job she could not have foreseen that her manifestation would be restricted, the ECtHR nevertheless found the *Conseil d'Etat's* opinion in 2000 made it clear that the principle of secularity applied to 'all public services', so found the measure to be prescribed by law.[89]

The ECtHR found that the 'requirement of religious neutrality in a context of vulnerability of public service uses' pursued the legitimate aim of protecting the rights and freedoms of others,[90] specifically patients' rights to respect for their religious or spiritual beliefs, and their 'equal treatment without distinction of religion.'[91] And it also found that the restriction was necessary in order to uphold neutrality in public service and to protect the rights and freedoms of others. Citing *Leyla Şahin v Turkey*, the ECtHR observed that the precise details of regulations on public servants must, to a degree, be left in the hands of the State given that it depends on the national context,[92] noting that States can invoke the principle of secularism and neutrality to justify restrictions on the wearing of religious clothing and symbols by public

[86] Ibid., para 48.
[87] Ibid., para 49.
[88] Ibid., para 50.
[89] Ibid., para 51.
[90] Referring to *Leyla Şahin v Turkey* ECHR 2005-XI 173, para 99; *Kurtulmuş v Turkey* ECHR 2006-II 297; *Ahmet Arslan and Others v Turkey* App no 41135/98 (ECtHR, 23 February 2010) [French], para 43.
[91] Referred to *Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts), paras 105, 106, 109.
[92] *Ebrahimian v France* ECHR 2015-VIII 99, para 56. The ECtHR also referred to *Vogt v Germany* in respect of the principle that democratic states 'may be entitled to require its officials to be loyal to the constitutional principles on which it is based', see *Vogt v Germany* (1996) Series A no 323.

servants, particularly teachers working in public schools or universities.[93] With respect to the question of proportionality, the ECtHR explained that in the hospital environment States have a wide margin of appreciation 'because hospital officials are better placed to take decisions concerning their establishment than a judge, or international tribunal'[94] and also better placed to assess the proportionality of the punishment for failing to adhere to the opinion of the *Conseil d'Etat*.[95] Consequently it found no violation of Article 9.

In this case, therefore, the ECtHR gave more weight to countervailing factors. Given ECtHR had already found that headscarf bans on students (e.g. *Leyla Şahin v Turkey*),[96] pupils (e.g. *Kose and 93 Others v Turkey,*[97] *Dogru v France,*[98] *Kervanci v France,*[99] *Atkas v France*[100]), and teachers and lecturers (e.g. *Dahlab v Switzerland,*[101] *Kurtulmuş v Turkey*[102]), were in accordance with Article 9.2 it seemed, as Brems has pointed out, '*a fortiori* that it had to accept bans for agents of a public service.'[103] However, again the ECtHR did not consider precisely *how* the wearing of the headscarf undermined the rights and freedoms of others, and in accepting that the ban was intended to ensure respect for the beliefs of patients and ensure equal treatment without distinction on the grounds of religion, the ECtHR implied that the wearing of the headscarf could be equated with disrespect for the beliefs of others and discriminatory treatment without seeking any evidence to support this. Indeed, Judge De Gaetano, in his dissenting opinion, criticised the majority for assuming that the 'abstract principle of *laicite* or secularism of the State requires a blanket prohibition' on the wearing of religious clothing or symbols.[104] The majority's reasoning was, he contended, 'very weak and at times contradictory' and based on the 'false' and 'dangerous' idea that users of public services 'cannot be guaranteed an impartial service if the public official manifests in the slightest way, his or her religious beliefs'.[105] Whilst

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[93] For a critique of the notion that secularism is neutral, see Karl-Heinz Ladeur and Ino Augsberg, 'The Myth of the Neutral State and the Individualization of Religion: The Relationship between State and Religion in the Face of Fundamentalism' (2007) 8 German Law Journal 143; Rex Adhar, 'Is Secularism Neutral?' (2013) 26:3 Ratio Juris 404; Malcolm D Evans and Peter Petkoff, 'A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights' (2008) 36 Religion, State and Society 205.
[94] Citing *Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts), para 99.
[95] *Ebrahimian v France* ECHR 2015-VIII 99, para 96.
[96] *Leyla Şahin v Turkey* ECHR 2005-XI 173.
[97] *Köse and 93 Others v Turkey* ECHR 2006-II 339.
[98] *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008).
[99] *Kervanci v France* App no 31645/04 (ECtHR, 4 December 2008).
[100] *Aktas v France* App no 43563/08 (ECtHR, 30 June 2009).
[101] *Dahlab v Switzerland* ECHR 2001-V 447.
[102] *Kurtulmuş v Turkey* ECHR 2006-II 297.
[103] Eva Brems 'Ebrahimian v France: Headscarf Ban Upheld for Entire Public Sector' (*Strasbourg Observers,* 27 November 2015) <https://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector/> accessed November 2015.
[104] *Ebrahimian v France* ECHR 2015-VIII 99, Dissenting Opinion of Judge De Gaetano.
[105] Judge De Gaetano argued that inferences about an individual's religious affiliation are often made on the basis of their name, see ibid.

he noted that States have a wide margin of appreciation in respect of regulations on public servants, he contended that this is not limitless, and argued that in this case, there had been a violation of Article 9.

The ECtHR also paid little attention to the proportionality of the limitation, instead, it simply considered whether the authorities had taken an acceptable approach. This, as Brems has pointed out is a 'quasi-procedural' approach, which limited the examination to the type of arguments made by the State rather than looking at their relevance to the issue in question. In his partly concurring and partly dissenting opinion, Judge O'Leary argued that the majority had 'mixed' both concrete and abstract approaches to the assessment of proportionality under Article 9.2 – it was both 'targeted and functional and vague and broad.'[106] On the one hand, it considered the applicant's job role, and the vulnerability of the patients and service users,[107] but on the other hand, it conducted a more abstract assessment of proportionality based on the 'abstract nature of the principle of neutrality and secularism'.[108] The latter, which formed the 'heart' of the analysis, was problematic because the majority did not find evidence that the applicant had infringed the principle of neutrality in public service, by for example pressuring or proselytising others.[109] Like Judge Tulkens in *Leyla Şahin v Turkey*, Judge O'Leary emphasised the importance of conducting a concrete assessment of proportionality, especially in relation to blanket bans. Referring to *SAS v France*,[110] he emphasised that where States rely on 'flexible notions, principles and ideals to justify interferences with the freedom to manifest one's religion' (i.e. secularism and neutrality), the ECtHR must carefully examine the limitation. This, he argued, was lacking in the majority's assessment.

However, again there seems to be an alternative explanation for the ECtHR's approach. Rather than failing to take a methodologically rigorous approach it seems the ECtHR *chose* not to do so. It accepted the argument that upholding the constitutional principle of secularism and neutrality in public services was a legitimate basis for limiting manifestation and gave a wide margin of appreciation to the State in deciding how to safeguard it. Whilst the ECtHR did not ignore the *forum internum* relevance in this case, it seems to have decided from the outset of the

[106] *Ebrahimian v France* ECHR 2015-VIII 99, Partly Concurring and Partly Dissenting Opinion of Judge O'Leary.
[107] Ibid. See *Ebrahimian v France* ECHR 2015-VIII 99, paras 60, 61, 65, 70.
[108] *Ebrahimian v France* ECHR 2015-VIII 99, Partly Concurring and Partly Dissenting Opinion of Judge O'Leary. See *Ebrahimian v France* ECHR 2015-VIII 99, paras 63-69.
[109] Brems questions whether they could be 'more adequately labelled as Islamophobic reactions', see Eva Brems 'Ebrahimian v France: Headscarf Ban Upheld for Entire Public Sector' (*Strasbourg Observers,* 27 November 2015) <https://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector/> accessed November 2015.
[110] *Ebrahimian v France* ECHR 2015-VIII 99, Partly Concurring and Partly Dissenting Opinion of Judge O'Leary. See *SAS v France* ECHR 2014-III 341 (extracts), para 122.

Article 9.2 assessment that it would give more weight to countervailing factors (i.e. that it would defer to the State) so the analysis under Article 9 was succinct.

This approach is further evidenced in respect of the second applicant (Ms Chaplin) in *Eweida and Others v United Kingdom,* a nurse who was prohibited from wearing a cross around her neck whilst working on an NHS hospital ward.[111] The ECtHR had decided — in respect of the first applicant (Ms Eweida) who complained about limitations on the wearing of a cross when working for *British Airways* — that wearing a cross to bear witness to Christian faith was a manifestation of religious belief, in accordance with Article 9.[112] And, it had emphasised the importance of manifestation in its assessment of Ms Eweida's complaint, explaining the right to manifest is a 'fundamental right' because it is essential for a democratic society to 'tolerate and sustain pluralism and diversity' and because of 'the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others.'[113] The ECtHR also considered that Ms Chaplin's desire to manifest her religious belief through the wearing of a cross at work constituted a manifestation of religion for the purposes of Article 9 and considered that the health authorities' refusal to allow the applicant to remain in her nursing role while wearing the cross constituted an interference with her right to manifest her religion.[114] That the ECtHR took seriously the importance of this manifestation of a deeply held religious belief in respect of the second applicant is evident from the ECtHR's statement that Ms Chaplin's right to wear the cross should, as in the case of Ms Eweida, weigh 'heavily in the balance' in the Article 9.2 assessment.[115] However, whilst the ECtHR found a violation of Article 9 in respect of Ms Eweida, because the domestic authorities did not sufficiently protect her right to manifest her religion, and thus breached its positive obligations,[116] the ECtHR did not find a violation of Article 9 in respect of Ms Chaplin.

How can this decision be explained? This thesis stresses that *forum internum* relevance is the most significant factor weighing in favour of the applicant, but it is not the only factor which determines the outcome in Article 9 cases. The ECtHR balances *forum internum* relevance with countervailing factors to reach its decision. In considering the facts, in respect of Ms Eweida, the ECtHR gave little weight to countervailing factors because evidence regarding encroachment on the interests of others was lacking. However, with respect to Ms Chaplin, the ECtHR gave more weight to countervailing factors, namely the protection of health and safety on the hospital ward. This, it explained, was a factor which 'was inherently of greater magnitude than that which

[111] *Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts).
[112] Ibid., para 89.
[113] Ibid., para 94.
[114] Ibid., para 97.
[115] Ibid.
[116] Ibid., para 95.

applied in respect of Ms Eweida',[117] and thus it found the intrusion to be justified in the circumstances in respect of Ms Chaplin.[118] In terms of the loose concentric circles model, this is a good example of a 'harder' case (relatively speaking) in the middle circle, because both *forum internum* relevance and countervailing factors were strong.

iii. Public Spaces

In terms of limitations on manifestation through the wearing of religious clothing in public spaces, a controversial and much debated case is *SAS v France*, in which the applicant complained that the French ban on face coverings in public interfered with her right to manifest her religion.[119] In setting out the general principles, the ECtHR explained that the list of exemptions in Article 9.2 is 'exhaustive and their definition restrictive' and explained that the restriction must pursue an aim therein in order to be deemed legitimate.[120] In a detailed examination, the ECtHR accepted the government's argument that the law pursued the aim of protecting public safety, however, it pointed out that respect for the minimum set of values of an open and democratic society was not an aim expressly included in Article 9.2. Whilst the ECtHR did not accept that the ban sought to ensure equality between men and women, nor did it accept the argument that it sought to uphold respect for human dignity (because it was not considered contemptuous or offensive behaviour) it did accept the argument that 'living together' could be linked to the legitimate aim of protecting the rights and freedoms of others.[121] However, it observed that 'living together' was a vague concept which was at 'risk of abuse', so explained that a careful examination of the necessity of the limitation was required.[122]

In its assessment of the necessity of the measure, the ECtHR again recognised the interrelationship between the *forum internum* and the *forum externum*, but explained where several religions co-exist, it may be necessary to restrict the right to manifest — in order to

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[117] Ibid., para 99.
[118] Ibid., para 100. The ECtHR took a similar approach to a complaint brought by a student who was prohibited from wearing her headscarf during practical lessons at a nursing school, see *Zeynep Tekin v Turkey* App no 41556/98 (ECtHR, 29 June 2004) [French].
[119] *SAS v France* ECHR 2014-III 341 (extracts). There is extensive academic literature on this case, see e.g. Tereas Sanader, 'Religious Symbols and Garments in Public Places – a Theory for the Understanding of *SAS v France*' (2015) 9 Vienna Journal on International Constitutional Law 186; Miriam Hunter-Henin, 'Living Together in an Age of Religious Diversity: Lessons from *Baby Loup* and *SAS*' (2015) 4:1 Oxford Journal of Law and Religion 94; Gabrielle Elliot-Williams, 'Protection of the Right to Manifest Religion or Belief Under the European Convention on Human Rights in SAS v France' (2016) 5:2 Oxford Journal of Law and Religion 344.
[120] See *Moscow Branch of the Salvation Army v Russia* App no 72881/01 (ECtHR, 5 April 2007), para 76; *Nolan and K v Russia* App no 2512/04 (ECtHR, 12 February 2009) para 73.
[121] This was a key question raised by Judge Pietroski and Judge Muzer at the oral hearing, see European Court of Human Rights, 'SAS v France no 43835/11, Grand Chamber Hearing 27 November 2013' <https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=4383511_27112013&language=en&c=&py=2013 > accessed August 2015.
[122] *SAS v France* ECHR 2014-III 341 (extracts) para 122.

reconcile the interests of different groups and ensure everyone's rights are respected — emphasising the State's role as the neutral and impartial organiser, and its duty to ensure mutual tolerance.[123] The ECtHR noted that the ban was not motivated by religious clothing but rather the fact it concealed the face; the ECtHR gave considerable weight to the government's argument that the face plays an important role in social interaction and that the veil challenges 'open interpersonal relationships'.[124] The ECtHR considered that the State was best placed to ensure conditions in which individuals can 'live together in diversity', and in giving the State a wide margin of appreciation, decided that the ban on face coverings was justified under Article 9.2.

Again, the methodological approach in this case was suspect. Whilst the ECtHR found that 'living together' could be linked to a legitimate aim under Article 9.2, it did not explain precisely how the ban protected the rights and freedoms of others[125] and did not seek concrete evidence to support the government's claim that face coverings had a negative effect on interpersonal relationships.[126] The proportionality analysis was also lacking in that the ECtHR did not enquire why a general ban on face coverings in all public spaces, rather than a less intrusive or restrictive measure was necessary. Given that forty-five out of forty-seven Member States did not ban face coverings in public there was a 'very strong indicator for a European Consensus' *against* such measures.[127]

However, again the ECtHR's decision may be explained by recognising that the ECtHR placed more weight on countervailing factors in the balance. Whilst the ECtHR did not ignore the *forum internum* – indeed, it stressed the importance of manifestation and the need for strong reasons to justify limitations – the ECtHR agreed with the government that in wearing the face covering in a public area, individuals challenged an important societal principle (*le vivre ensemble*) and therefore gave greater weight to countervailing interests. This is typical of the ECtHR's approach in other similar cases. In *Belcacemi and Oussar v Belgium*[128] and *Dakir v Belgium*[129] which also concerned a ban on face coverings in public, the ECtHR again permitted

[123] Ibid., paras 126-127.
[124] Ibid., para 152.
[125] For further discussion see Sune Laegaard, 'Burqua Ban, Freedom of Religion and 'Living Together' (2015) 16:3 Human Rights Review 203.
[126] Judges Nussberger and Jaderblom criticised the ECtHR for permitting such a 'far reaching law' on the basis of the 'far-fetched and vague' notion of 'living together, see *SAS v France* ECHR 2014-III 341 (extracts), Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom, paras 5, 9.
[127] Ibid, para 19.
[128] *Belcacemi and Oussar v Belgium* App no 37798/13 (ECtHR, 11 July 2017) [French]. For further discussion see, Marcella Ferri, '*Belkacemi and Oussar v Belgium* and *Dakir v Belgium*: The Court again Addresses the Full-Face Veil but does not Move Away from its Restrictive Approach' (*Strasbourg Observers,* 25 July 2017) <https://strasbourgobservers.com/2017/07/25/belkacemi-and-oussar-v-belgium-and-dakir-v-belgium-the-court-again-addresses-the-full-face-veil-but-it-does-not-move-away-from-its-restrictive-approach/> accessed December 2017.
[129] *Dakir v Belgium* App no 4619/12 (ECtHR, 11 July 2017).

the State a wide margin of appreciation, holding that the decision whether or not to ban the full face veil in public was a 'choice of society'.[130]

So far, this section has examined cases in which the ECtHR has largely deferred to the analysis of the respondent government. As noted, many commentators have commented on the ECtHR's lack of rigour in these cases. In particular, they argue that the ECtHR permits limitations on the *forum externum*, without considering the potential implications for the *forum internum*. The implication is that *if* the ECtHR had adopted a more methodologically rigorous approach it would have reached more satisfactory outcomes including, potentially, finding violations of Article 9 in situations where it currently tends not to do so.

Whilst this general criticism about the ECtHR's lack of methodological rigour may be correct the implication drawn from it may be overstated. Firstly, the ECtHR takes into account *forum internum* relevance in these cases because it recognises that the *forum externum* flows from the *forum internum* and is inevitably affected by limitations on the *forum externum*. In Article 9 complaints the *forum internum* is always relevant; it is just that the extent of its relevance depends on the ECtHR's consideration of the facts.

Secondly, the lack of methodological rigour in these cases need not be understood as a 'failure' on the part of the ECtHR but rather as a conscious *choice*. In some cases, the ECtHR chooses to conduct a detailed and methodologically rigorous examination. This is clearly evidenced in cases such as *Franklin-Beentjes and CEFLU-Luz da Floresta v Netherlands*,[131] *Jehovah's Witnesses of Moscow v Russia*[132] and *Biblical Centre of the Chuvash Republic v Russia* examined in the previous chapter.[133] In other cases, such as those examined so far in this chapter, the ECtHR chooses not to conduct a detailed and methodologically rigorous examination in order to reach its outcome.

How can this be explained? The answer lies in recognising the important role of the facts in Article 9 cases. The case law examined so far in Part II reveals that *forum internum* relevance, whilst the most significant factor weighing in favour of the applicant, is not the determining factor. The ECtHR balances *forum internum* relevance and countervailing factors to reach its decision. Importantly the ECtHR seems to conduct this balancing from the *very outset* of the Article 9 examination, so it heavily influences the approach the ECtHR takes and the outcome it reaches from the outset.

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[130] *Belcacemi and Oussar v Belgium* App no 37798/13 (ECtHR, 11 July 2017) [French] para 53; *Dakir v Belgium* App no 4619/12 (ECtHR, 11 July 2017), para 56.
[131] *Fränklin-Beentjes and CEFLU-Luz da Floresta v Netherlands* App no 28167/07 (ECtHR, 6 May 2014).
[132] *Jehovah's Witness of Moscow and Others v Russia* App no 302/02 (ECtHR, 10 June 2010).
[133] *Biblical Centre of the Chuvash Republic v Russia* App no 33203/08 (ECtHR, 12 June 2014).

The analysis of the cases in the above section reveal that where the ECtHR agrees with the State that the manifestation in question threatens the essential interests of the State, such as the upholding of the principles of secularism and of denominational neutrality, the ECtHR is unlikely to dwell on the evidence requirement and/or proportionality analysis and is likely to defer to the State. The way in which the ECtHR characterises the facts has an important influence on the ECtHR's approach. In these cases, it seems the ECtHR knows the outcome it wishes to reach and the Article 9.2 assessment is often superficial or perfunctory because it is little more than a means of reaching that end. The idea that a more methodical step-by-step approach to the Article 9.2 assessment in such cases would have led to a different outcome seems, therefore, unlikely.

C. Religious Clothing and Symbols (II)

There are a number of cases in the jurisprudence concerning limitations on the right to manifest religion or belief through the wearing of religious clothing and symbols in which the ECtHR has not deferred to the State but rather has offered very strong protection under Article 9. These cases, however, are not as well-known as the cases examined above because they tend to be conveniently overlooked by commentators seeking to justify their argument that the ECtHR treats manifestation as a 'second order concern' simply deferring to States whenever they wish to restrict the right. This section will examine these lesser known cases in i) public spaces and ii) courtrooms, and in doing so, will further highlight the importance of the facts in the consideration of Article 9 complaints.

i. Public Spaces

Take for instance *Ahmet Arslan v Turkey* which concerned members of the Aczimendi community who were convicted for manifesting their religion through the wearing of religious clothing outside of their mosque.[134] The government argued that it was necessary to limit such manifestations in order to uphold secular and democratic principles and to 'prevent acts of provocation, proselytism and propaganda.'[135] Whilst the ECtHR, relying on *Refah Partisi (The Welfare Party) and Others v Turkey*[136] and *Leyla Şahin v Turkey,*[137] agreed that the restriction pursued legitimate aims under Article 9.2 (namely maintenance of public security, protection of order and the rights and freedoms of others) it did not find that the need for the restriction had been convincingly established by the government.

[134] *Ahmet Arslan and Others v Turkey* App no 41135/98 (ECtHR, 23 February 2010) [French].
[135] Ibid., para 29.
[136] *Refah Partisi (The Welfare Party) and Others v Turkey* ECHR 2003-II 267.
[137] *Leyla Şahin v Turkey* ECHR 2005-XI 173.

For the ECtHR there were two key differences between this complaint and other complaints concerning religious dress. Firstly, the applicants who considered that their religion required them to dress in a particular manner were 'ordinary citizens' rather than State representatives and, therefore, were not under an obligation to refrain from expressing religion or belief in public (cf. *Dahlab v Switzerland*[138] and *Ebrahimian v France*[139]). Secondly, the applicants' manifestation did not take place in a public establishment but rather in a place which was open to all, namely in front of the Kocatepe Mosque as part of a religious ceremony organised in this Muslim place of worship.[140] As such, the ECtHR explained, case law emphasising the role of State in limiting religious clothing in public establishments was not applicable to this case. In assessing the necessity of the limitation, the ECtHR found no evidence that the applicants had provoked others and engaged in acts of proselytism.[141] Consequently, it found a violation of Article 9.

Whilst the ECtHR sought to distinguish this case from other religious clothing cases in which applicants were public servants, or sought to manifest religion in public establishments, it could still be argued that the ECtHR's approach here was inconsistent with cases such as *SAS v France*,[142] *Belcacemi and Oussar v Belgium*[143] and *Dakir v Belgium*,[144] in which the applicants, who were also 'ordinary citizens' complained about bans on the wearing of religious clothing in public spaces. However, the ECtHR's approach does not seem inconsistent if one recognises that the ECtHR gave less weight to countervailing interests in this case because it did not consider the manifestation to be a provocative challenge to the constitutional principle of secularism; it was considered a legitimate manifestation of belief through which the applicants neither threatened public order nor placed pressure on the rights of others. Indeed, the ECtHR placed particular emphasis on the right to manifest in its reasoning. Notably, it did not employ the standard recital with the caveat that 'in protecting this personal sphere, Article 9 does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief', suggesting from the outset, that it would not limit the right to manifest in this case.

Other examples of the ECtHR giving little weight to countervailing factors and offering a high degree of protection under Article 9 can be seen in relation to wearing religious clothing or symbols in the courtroom, to which this chapter will now turn.

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[138] *Dahlab v Switzerland* ECHR 2001-V 447
[139] *Ebrahimian v France* ECHR 2015-VIII 99.
[140] *Ahmet Arslan and Others v Turkey* App no 41135/98 (ECtHR, 23 February 2010) [French], para 35.
[141] Ibid., para 51.
[142] *SAS v France* ECHR 2014-III 341 (extracts).
[143] *Belcacemi and Oussar v Belgium* App no 37798/13 (ECtHR, 11 July 2017) [French].
[144] *Dakir v Belgium* App no 4619/12 (ECtHR, 11 July 2017).

ii. Courtrooms

Cases concerning the wearing of religious clothing in the courtroom provide further, clear challenges to the argument that the ECtHR consistently defers to the State in such manifestation cases, showing the ECtHR can, and does, give less weight to countervailing factors when it deems appropriate, on the facts.

Take *Hamidovic v Bosnia and Herzegovina*,[145] for instance, in which a member of the Wahhabi/Salafi version of Islam complained under Article 9 and 14 about interference with his right to manifest as he had been punished for refusing to remove his skullcap when giving evidence in court. According to the domestic courts, the rule relating to the removal of headgear on public premises was 'one of the basic requirements of life in society,' and in the secular State of Bosnia and Herzegovina, manifestations of religion in courtrooms was prohibited.[146]

Whilst the ECtHR agreed that the measure was prescribed by law and referring to *Leyla Şahin v Turkey* and *Ahmet Arslan and Others v Turkey*, explained that it pursued the legitimate aim of upholding the principle of secularism,[147] it did not consider that the measure was necessary. In its examination the ECtHR again distinguished the issue from earlier cases concerning religious clothing in the workplace,[148] pointing out that as this case concerned a witness in a criminal trial, it was a 'completely different issue.'[149] As a private citizen, and not a public official, the applicant was not 'under a duty of discretion, neutrality and impartiality'.[150]

The ECtHR placed a heavy emphasis on the importance of individual manifestation, noting that in *Eweida and Others v United Kingdom* the ECtHR had stressed the fundamental nature of this right, not only because pluralism and diversity is part of a healthy, democratic society, but also because it is important that individuals for whom religion is a 'central tenet' of their life, can communicate their beliefs to others.[151] Further, it observed that whilst, in some instances, individual interests must be subordinated to those of the group, 'democracy does not always mean that the views of a majority must always prevail.'[152] In this case, the ECtHR did not find that the applicant sought to mock the trial, encourage others to reject secular values or

[145] *Hamidovic v Bosnia and Herzegovina* App no 57792/15 (ECtHR, 5 December 2017)
[146] Ibid., paras 8, 9, 10.
[147] The ECtHR reiterated that the 'aim to uphold secular and democratic values can be linked to the legitimate aim of the "protection of the rights and freedoms of others under Article 9.2"', ibid, referring to *Leyla Şahin v Turkey* ECHR 2005-XI 173, para 99; *Ahmet Arslan and Others v Turkey* App no 41135/98 (ECtHR, 23 February 2010), para 43.
[148] E.g. *Dahlab v Switzerland* ECHR 2001-V 447; *Kurtulmuş v Turkey* ECHR 2006-II 297; *Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts).
[149] *Hamidovic v Bosnia and Herzegovina* App no 57792/15 (ECtHR, 5 December 2017), para 26.
[150] Ibid., para 40. See also *Pitkevich v Russia* App no 47936/99 (ECtHR, 8 February 2001).
[151] Ibid., para 41. Refers to *Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts), para 81.
[152] *Hamidovic v Bosnia and Herzegovina* App no 57792/15 (ECtHR, 5 December 2017), para 22.

disturb proceedings.[153] In punishing the applicant for refusing to remove his skullcap the ECtHR considered the State had exceeded its wide margin of appreciation and found a violation of Article 9.

Again, the decision may appear inconsistent with earlier cases which also concerned limitations on ordinary citizens who wished to manifest their religion in public institutions, such as *Leyla Şahin v Turkey*.[154] However, there seems to be a key difference in terms of the context for the ECtHR. The ECtHR considered the wearing of the headscarf in *Leyla Şahin v Turkey* to be a subversive or provocative action, whereas in *Hamidovic v Boznia and Herzegovina* it did not find that the skullcap was worn with intent to 'make a mockery of the trial, incite others to reject secular democratic values or cause a disturbance'.[155] In terms of the balance in this case, the ECtHR considered that countervailing factors were weak, and thus it offered a higher degree of protection under Article 9.

This is further illustrated, albeit slightly differently, in *Lachiri v Belgium* in which a Muslim woman who was excluded from the courtroom during a criminal trial because she refused to remove her headscarf, complained under Article 9.[156] The government argued that the measure was in accordance with domestic law which stipulates that individuals attending hearings must stand uncovered, in respect and silence.[157] However, the applicant contended that domestic law was used inconsistently because magistrates asked individuals to remove hats, caps and helmets in the courtroom but did not ask Catholic nuns to remove veils, Jews to remove Kippahs or Sikhs to remove turbans.[158] She claimed that in banning her from the courtroom for wearing a headscarf the magistrates had equated the wearing of the Islamic headscarf with disrespectful behaviour.[159] Further, she contended that, as an ordinary citizen she was not under an obligation of discretion with respect to the public expression of her religion, and courtrooms are public places, open to all.

The Centre for Human Rights of the University of Ghent supported the applicant in their third party intervention, pointing out that the domestic law relating to headgear was outdated (because it related to a time in which removal of headgear in a house or church was deemed a sign of respect and recognition of authority) and there was significant confusion about the circumstances in which the provision should be applied. They argued that the purpose of the

[153] Ibid., para 41.
[154] *Leyla Şahin v Turkey* ECHR 2005-XI 173.
[155] Ibid., para 41.
[156] *Lachiri v Belgium* App no 3413/09 (ECtHR, 18 September 2018) [French].
[157] Ibid., para 22.
[158] Ibid., para 25.
[159] Ibid., para 26.

provision was to ensure order in the courtroom and in excluding the applicant for simply refusing to remove her headscarf, the government violated the applicant's Article 9 right.

In its assessment the ECtHR accepted that the action constituted a manifestation and that there had been interference with the right to manifest. Whilst it found that the measure had a basis in law and was accessible and predictable the ECtHR did not, given its conclusion about the necessity of the interference, consider it necessary to examine whether it was foreseeable.[160] The ECtHR explained that maintaining the authority of the judiciary was an aim under Article 10.2, rather than Article 9.2, but considered that the prevention of disrespectful and disruptive behaviour in judicial institutions[161] could be linked to the protection of order in Article 9.2. The ECtHR pointed out that the facts in this case were similar to *Hamidovic v Boznia and Herzegovina* and *Ahmet Arslan v Turkey* because the applicant, who wore religious dress in a public space, was a 'mere citizen', not a state representative exercising a public function. The ECtHR did note that the public nature of the Brussel's Courthouse was different from a public square or a street and, as a public institution, it recognised that the principle of neutrality could override the right to manifest, however, it did not find that the government pursued an objective of neutrality in the public institutions. And, the ECtHR did not find that the applicant had acted in a disrespectful way or threatened the conduct of the hearing. Therefore, it considered the necessity of the restriction had not been established so it found a violation of Article 9.[162]

This case provides a further example of the ECtHR balancing *forum internum* relevance and countervailing factors; in the circumstances it considered that countervailing factors did no outweigh *forum internum* relevance therefore offered a high degree of protection under Article 9. This case also provides further, clear evidence that the ECtHR often knows the outcome it is going to reach in a case, from the outset, and this affects its approach. In *Lachiri v Belgium* the ECtHR explained that it did not need to address the question of foreseeability because of the decision it had reached regarding the necessity of the interference. In a step-by-step approach under Article 9.2 the question of foreseeability of a law should be addressed before the question of necessity of interference. That the ECtHR skipped the former question because of its decision in respect of the latter, indicates that the ECtHR knew the outcome it wanted to reach *before* it conducted the Article 9.2 assessment. Thus, this case again shows that the ECtHR's approach to Article 9 complaints is much more broad brush than previously recognised in the literature.

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[160] Ibid., para 35.
[161] Ibid., para 38.
[162] Recently, the ECtHR found a violation of Article 3 of Protocol 1 (the right to free elections) when an MP was forced to leave parliament to take an oath following protests about the Islamic headscarf, see *Kervanci v Turkey* (communicated case) App no 79690/11 (ECtHR, 27 September 2017).

Conclusion

This chapter focused on the ECtHR's approach to complaints concerning State limitations on the exercise of manifestation of religion or belief specifically through proselytism activities and the wearing of religious clothing or symbols by individuals. In terms of the loose concentric circles model, these are cases which one would expect to fall in the contested middle circle because both *forum internum* relevance and countervailing factors may be strong or both *forum internum* relevance and countervailing factors may be weak.

This chapter argues that in addressing these complaints the ECtHR does not draw a clear binary and hierarchical distinction between the *forum internum* and the *forum externum* treating the latter as a second order concern. Rather, the ECtHR recognises that the *forum internum* and the *forum externum* are deeply interrelated and as such intuitively understands that limitations on the right to manifest religion or belief inevitably affect the *forum internum*.

Contrary to claims made in the literature, the ECtHR does not *always* defer to the State and permit limitations on this type of manifestation. It is not the default position that the *forum externum* is overridden. Instead, as one would expect from the way in which Article 9 has been presented, the ECtHR offers a range of protection under Article 9 depending on the weight it gives to the *forum internum* and to countervailing factors in these cases.

It seems that, in some cases concerning limitations on manifestation through the wearing of religious clothing, the ECtHR chooses not to take a methodologically rigorous approach and scrutinise States' decisions. Instead, it opts to conduct a superficial or perfunctory examination under Article 9.2 because, having taken into consideration the facts, it knows the from the outset the decision it will reach (i.e. that it will not find a violation of Article 9). This chapter demonstrates that this is a clear trend where the ECtHR considers that the manifestation in question threatens the essential interests of the State, such as the upholding of the principles of secularism or denominational neutrality. In such cases the ECtHR is unlikely to dwell on the evidence requirement and/or proportionality analysis and more likely to defer to the State in restricting the manifestation.

However, this chapter also demonstrates that in cases in which the ECtHR does not consider that the manifestation in question threatens essential interests of the State the ECtHR sometimes chooses to conduct an in-depth analysis under Article 9 before reaching its outcome, or sometimes decides to skip over aspects of the Article 9.2 assessment because it knows from the outset the decision it will reach (i.e. that it will find a violation of Article 9).

The key point here is that the ECtHR does not deploy a particular approach when addressing complaints about interference with the right to manifest through the wearing of religious clothing or symbols. The ECtHR seems to work very much on a case by case basis.

Therefore, generalisations about the ECtHR's approach — particularly simplistic claims that the ECtHR is biased towards Christians and against Muslims, or towards orthodoxy and against orthopraxy — which are extrapolated from a few cases in which the ECtHR has permitted limitations on manifestation, are deeply problematic. Such generalisations conveniently ignore cases which show the ECtHR offering a high degree of protection in manifestation cases. Indeed, it is very difficult to explain these cases away as 'anomalies' or as evidence that the ECtHR is unable to effectively pursue its agenda against orthopraxic religions, specifically Islam.[163] And, the jurisprudence as a whole also seriously calls into question the idea that the ECtHR largely protects the right to manifest religion in 'private lives of adherents and unstructured public spaces.'[164] Recent cases show the ECtHR can, and does, offer a high degree of protection to manifestation in the public sphere and in public institutions in particular circumstances.

A significant corollary of the analysis in this chapter is that it reveals that the 'lens' which the ECtHR brings to the case is more important in cases concerning manifestation, than the 'type' of issue in question. In cases concerning limitations on manifestation of religion or belief the ECtHR does not seem to work with a category mindset, deploying a predefined approach when faced with certain 'types' of cases, but rather seems to take a much more nuanced, case by case approach. This chapter has revealed that the approach and outcome in some 'headscarf cases' is actually more akin to that in 'proselytism cases' than it is to other 'headscarf cases'. As such categorising cases as 'proselytism cases' or 'headscarf cases' and looking for consistency of approach *within* each of these types of cases is potentially mistaken. Taking this further, in the context of claims concerning limitation on manifestation, some of the 'headscarf cases' are similar to cases concerning dissolution of religious communities or refusals to register religious communities which were examined in the previous chapter. Whilst commentators have argued, therefore, that the ECtHR requires more evidence of justification and less reliance on the margin of appreciation in registration cases than in headscarf cases,[165] the jurisprudence as a whole does not seem to support such simplistic claims.

The next chapter — which will explore the ECtHR's approach in cases concerning State pressure to act in a way which is contrary to one's religion or belief or to disclose religion or belief through an examination of conscientious objection, refusal to pay tax and objection to

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[163] Recently, after conducting a highly detailed comparative analysis of cases concerning manifestation through the wearing of religious clothing in Turkey and France, Gunn concluded that the ECtHR is biased against Islam, see T Jeremy Gunn, '"Principle of Secularism" and the European Court of Human Rights: A Shell Game' in Jeroen Temperman J, T Jeremy Gunn and Malcolm D Evans, *The European Court of Human Rights and Freedom of Religion or Belief: The 25 Years Since Kokkinakis* (Brill 2019). However, Gunn has conveniently ignored cases concerning Muslims in which the ECtHR has found a violation of Article 9.

[164] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010) 65.

[165] 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, 335.

revealing one's religion or belief in oath taking procedures or official documents — will provide further support for the findings in this chapter.

CHAPTER 7. *FORUM INTERNUM* RELEVANCE AND COUNTERVAILING FACTORS AT THEIR MOST CONTESTED (II)

Introduction

This chapter forms the second of two chapters focusing on contested cases, that is the kinds of cases in which it seems that the ECtHR might find a violation of Article 9 or might not. Again, in terms of the loose concentric circles model, these chapters focus cases in the contested middle circle. The balancing exercise in cases in the middle circle is 'harder' (relatively speaking) because in such cases *forum internum* relevance and countervailing factors may both be strong, or *forum internum* relevance and countervailing factors may both be weak. As such, a 'diligent empirical and normative analysis' is required to ascertain whether limitations can be justified.[1]

This chapter explores the ECtHR's approach in cases in which applicants have complained about State pressure to act contrary to their religion or belief and State pressure to disclose their religion or belief. Again, these issues seem to engage the *forum internum* to a considerable degree so one would expect the ECtHR to give considerable weight to *forum internum* relevance, in the balance, in these cases. However, in light of the presentation of Article 9, one would not expect it to be the determining factor but rather a factor taken into account by the ECtHR in the context of determination.

The key question for this chapter is whether this is what is seen in *practice*. Through the analysis of the case law this chapter argues that is largely the case. The ECtHR does not take a rigid, pre-defined approach to these complaints based on the *type* of right in question but rather offers a range of protection as a result of balancing *forum internum* relevance and countervailing factors. To illustrate this approach, this chapter forms two sections. Section A explores refusals to act contrary to one's religion or belief in the context of conscientious objection to military service and payment of church tax and Section B examines objections to disclosing one's religion or belief during oath taking procedures and on official documents.

A. Refusals to Act Contrary to One's Religion or Belief

i. Conscientious Objection to Military Service

One of the most prominent types of conscientious objection in the jurisprudence is conscientious objection to military service. Of all these cases, the most well-known is *Bayatyan v Armenia* in

[1] See Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (OUP 2016) 79.

which the applicant argued that imprisonment for refusing to perform military service (when no alternative civilian service was available) interfered with Article 9.[2] In this case, the Grand Chamber reversed the Chamber's decision, overturning the ECtHR's long-standing approach established in *Grandrath v Germany*,[3] of deferring to Article 4.3.b (the provision relating to forced labour) when complaints concerning conscientious objection to military service have been brought under Article 9. Given the bulk of case law in which the ECtHR has consistently deferred to Article 4.3.b, regardless of the specific circumstances,[4] the Grand Chamber's decision to examine the complaint under Article 9 in *Bayatyan v Armenia* was a turning point and it has set the precedent for subsequent cases. In terms of this chapter, *Bayatyan v Armenia* illustrates the Grand Chamber balancing *forum internum* relevance with countervailing factors and deciding, on the basis of the facts, to give less weight to countervailing factors and thus to offer a high degree of protection.

Like the applicant,[5] the Grand Chamber recognised that since *Grandrath v Germany* there had been considerable development in terms of recognising a right to conscientious objection, so much so, there was virtually a European consensus.[6] It took a 'living instrument' approach to the

[2] *Bayatyan v Armenia* App no 23459/03 (ECtHR, 12 December 2006); *Bayatyan v Armenia* ECHR 2011-IV 1, para 108.
[3] *Grandrath v Germany* (1966) 10 Yearbook 626.
[4] For the Commission the decision whether to grant a right to conscientious objection (and alternative service) is the choice of the State and there is no right to exemption under Article 9, see e.g., *X v Austria* (1972) 40 DR 50-52; *Conscientious Objectors v Denmark* (1977) 9 DR 117; *Chardonneau v France* App no 17559/90 (Commission Decision, 29 June 1992) [French]; *Dimitrov v Bulgaria* App no 47829/99 (ECtHR, 23 September 2004); *Stefanov v Bulgaria* App no 32438/96 (ECtHR, 3 May 2001). It maintained this position regardless of whether conscientious objection was motivated by religion or belief or by a position of thought or conscience, see e.g., *GZ v Austria* App no 5591/72 (Commission Decision, 2 April 1973); *A v Switzerland* (1984) 38 DR 222; *Heudens v Belgium* App no 24630/94 (Commission Decision, 22 May 1995); *Peters v Netherlands* App no 22793/9 (Commission Decision, 30 November 1994) *Johansen v Norway* ECHR 1996-III 979; *Ulke v Turkey* App no 39437/98 (ECtHR, 24 January 2006). It also held that it was the State's choice when providing a right to conscientious objection whether to limit this to objectors motivated by religious beliefs, see *N v Sweden* App no 23505/09 (ECtHR, 20 July 2010); *Suter v Switzerland* (1986) 51 DR 162 [French]; *Peters v Netherlands* App no 22793/9 (Commission Decision, 30 November 1994). And when States offered alternative civilian service, the Commission explained that it was the State's decision whether this had the same or a longer duration than the military service, see e.g., *Julin v Finland* App no 17087/90 (Commission Decision, 6 December 1991); *Autio v Finland* App no 17086/90 (Commission Decision, 6 December 1991). The Commission held Article 9 did not offer protection to 'total objectors' those objecting not only to military service but also to alternative civilian service (where offered), e.g. *X v Federal Republic of Germany* (1977) 9 DR 201; *Fadini v Switzerland* App no 17003/90 1826/91 (Commission Decision, 8 January 1993); *Hudens v Belgium*. And, the Commission held that being penalised for refusing to perform military service did not violate Article 9, see e.g. *A v Switzerland* (1984) 38 DR 222. For further discussion see, Howard Gilbert, 'The Slow Development of the Right to Conscientious Objection to Military Service under the European Convention on Human Rights' [2001] European Human Rights Law Review 554; Leonard Hammer, 'Selective Conscientious Objection and International Human Rights' (2002) 36 Israel Law Review 145; José de Sousa e Brito, 'Conscientious Objection' in W Cole Durham Jr and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004).
[5] *Bayatyan v Armenia* App no 23459/03 (ECtHR, 27 October 2009), paras 51, 63.
[6] *Bayatyan v Armenia* ECHR 2011-IV 1, para 108. For discussion of the notion of European consensus see, Fiona De Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Red Globe Press 2018) 79ff.

ECHR[7] — explaining that 'a failure…to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement' —[8] and decided that Article 9 should no longer be read in light of Article 4.3.[9] It also supported the applicant's reading of the *travaux préparatoires* concerning the purpose of Article 4.3.b, namely, that it did not recognise or exclude conscientious objection, and therefore, should not limit Article 9. [10]

Whilst the Grand Chamber noted that Article 9 does not explicitly mention a right to conscientious objection, it set out the principle that where opposition to military service is 'motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply held religious or other beliefs,' this constitutes a 'conviction of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.'[11] On the facts, the Grand Chamber considered that the applicant's objection to military service was motivated by his genuinely held religious beliefs, which were 'in serious and insurmountable conflict with his obligation to perform military service' and as such his 'failure to report for military service' constituted 'a manifestation of his religious beliefs.'[12] It decided that the conviction for draft evasion constituted 'interference with his freedom to manifest his religion'[13] and after finding that the interference was not necessary in a democratic society found a violation of Article 9.

In this case the ECtHR clearly recognised the interrelationship between the *forum internum* and the *forum externum,* i.e. the connection between an individual's beliefs and their refusal to perform military service**.** Indeed, the approach taken in this case was consistent with General Comment 22 in which the HRC observed that whilst ICCPR Article 18 'does not explicitly refer to a right of conscientious objection', the HRC understands that this right can 'be

[7] Judge Power criticised the Chamber for failing to take a 'living instrument' approach, see *Bayatyan v Armenia* App no 23459/03 (ECtHR, 27 October 2009), Dissenting opinion of Judge Power, para 2. See also *Bayatyan v Armenia* App no 23459/03 (ECtHR, 27 October 2009), Concurring opinion of Judge Fura, ibid., para 2.
[8] *Bayatyan v Armenia* ECHR 2011-IV 1, para 98.
[9] Ibid., para 109.
[10] Ibid., para 100.
[11] Ibid., para 110. This is similar to the 'serious conflict' test of the HRC. For discussion see, Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005) 152.
[12] Previously, the Commission noted in the *obiter dicta* in *Thlimmenos v Greece* that the applicant's original conviction for refusing to enlist constituted an interference with the applicant's right to manifest religion or belief, but did not consider this further because the issue in question concerned discrimination in respect of a job application, see *Thlimmenos v Greece* App no 34369/97 (Commission Report, 4 December 1998), para 45. Judge Power in her dissent to the Chamber's judgment, and Judge Liddy in her dissent to *Tsirlis and Kouloumpas v Greece*, both argued that conscientious objection was a manifestation of religion or belief, see *Bayatyan v Armenia* App no 23459/03 (ECtHR, 27 October 2009), Dissenting opinion of Judge Power, para 2; *Tsirlis and Kouloumpas v Greece* ECHR 1997-III 909. For discussion see Howard Gilbert, 'The Slow Development of the Right to Conscientious Objection to Military Service under the European Convention on Human Rights' [2001] European Human Rights Law Review 554; Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (OUP 2016) 291ff.
[13] *Bayatyan v Armenia* ECHR 2011-IV 1, para 112.

derived from Article 18 in as much as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief.'[14] In light of the facts in *Bayatyan v Armenia*, the Grand Chamber characterised it as a case in which there was strong *forum internum* relevance, which was not outweighed by countervailing factors (namely, the obligation to perform military service), and therefore, it offered a high degree of protection.

The ECtHR has followed the Grand Chamber's approach in subsequent cases concerning conscientious objection to military service. Where the ECtHR considers that there is a 'serious and insurmountable conflict' between the obligation to perform military service and the individual's 'conscience or his deeply held religious or other beliefs' and considers that Article 9.2 limitations are not legitimate, it finds a violation of Article 9.[15] However, where it does not consider such a conflict exists, or considers limitations legitimate, it does not find a violation of Article 9.[16]

The 'clear and unequivocal reversal of the case law' in *Bayatyan v Armenia* certainly marks a 'breakthrough'[17] in the jurisprudence with respect to conscientious objection.[18] However, despite now offering protection under Article 9, the ECtHR's approach is not, according to commentators, problem free. Taylor, for instance, argues that conscientious objection claims are *prima face* about interference with the *forum internum* and should not be 'shoe-horned' into the manifestation bracket.[19] This, and similar arguments, are founded upon the notion that there is a clear binary and hierarchical distinction between the *forum internum* and the *forum externum*; in other words, the assumption that if the ECtHR characterises a complaint as a manifestation issue it ignores the *forum internum*. This thesis argues, however, that this a potentially mistaken assumption. So far, Part II has demonstrated that the ECtHR does not draw a clear binary and hierarchical distinction between the *forum internum* and the *forum externum* in Article 9 jurisprudence but rather considers that these two aspects of Article 9 are deeply interrelated. In

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[14] OHCHR, General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion) (20 July 1993) UN Doc CCPR/C/21/Rev.1/Add.4, para 11. Notably, Judge Power referred to Reports of the COE Committee of Ministers and UN in her dissenting opinion, see *Bayatyan v Armenia* App no 23459/03 (ECtHR, 27 October 2009), Dissenting Opinion of Judge Power, para 2.

[15] See e.g. *Erçep v Turkey* App no 43965/04 (ECtHR, 22 November 2011); *Bukharatyan v Armenia* App no 37819/03 (ECtHR, 10 January 2012); *Feti Demirtaş v Turkey* App no 5260/07 (ECtHR, 17 January 2012) [French]; *Buldu and others v Turkey* App no 14017/08 (ECtHR, 3 June 2014) [French]; *Papavasilakis v Greece* App no 66899/14 (ECtHR, 15 September 2016).

[16] The ECtHR found no violation in *Iorga and Moldovan v Romania* App nos 15350/05 19452/05 (ECtHR, 9 April 2013) or in *Enver Aydemir v Turkey* App no 26012/11 (ECtHR, 7 June 2016) [French]. For an analysis, see Caroline K Roberts, 'Conscientious Objection to Military Service in Turkey' 5 European Human Rights Law Review, 567.

[17] Ann Power-Forde, 'Freedom of Religion and 'Reasonable Accommodation' in the Case Law of the European Court of Human Rights' 5:3 Oxford Journal of Law and Religion 575, 602.

[18] Council of Europe/European Court of Human Rights, 'Overview of the Court's Case-Law on Freedom of Religion' (30 April 2019) <https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf> accessed April 2019, para 4.

[19] E.g. Paul Taylor, *Freedom of Religion* (CUP 2005) 148-153.

doing so, it intuitively recognises that limitations on the right to manifest religion or belief affect the *forum internum*.

Even before the ECtHR decided to consider conscientious objection to military service under Article 9, it did not simply ignore related *forum internum* claims. This is clearly seen in the Chamber's approach in the initial *Bayatyan v Armenia* judgment. Before the Chamber, the applicant had argued firstly that his conviction for refusing to serve in the army interfered with his right to freedom of thought, conscience and religion, and secondly, that the primary aim of the prosecution was 'to coerce him into abandoning his conscientious objection to military service' and 'coerce him to join the Armenian Apostolic Church'.[20] The ECtHR considered *both* arguments under Article 9. It deemed the first inadmissible (because it deferred to Article 4.3.b) and found the second complaint about interference with the absolute right to hold a religion or belief unsubstantiated because, it noted, there was nothing in the material submitted to indicate that the domestic courts were doing anything other than enforcing domestic legislation.[21] Had it found the claim about coercion to abandon beliefs substantiated it is likely that it would have considered *forum internum* relevance to be very strong and any countervailing factors to be weak in this context and thus offered a very high degree of protection under Article 9.[22]

And, in the Grand Chamber's decision in *Bayatyan v Armenia*, and the subsequent similar cases, the ECtHR has emphasised the interrelationship between the *forum internum* and the *forum externum*. It is, therefore, highly unlikely that just because it has now characterised conscientious objection to military service as a manifestation (i.e. in the *forum externum*) it will now ignore the *forum internum* in Article 9 complaints. Given its flexibility, it seems the ECtHR could decide to characterise a complaint about punishment for refusing to perform military service as an interference with the right to manifest a religion or belief and/or the right to hold a religion or belief depending on its interpretation of the facts. The important point here is that, for the ECtHR, rights are not 'fixed' as either *forum internum* or *forum externum* rights. Rather, the extent to which the *forum internum* is relevant in any given case depends heavily upon the ECtHR's consideration of the facts.

Again, therefore, there is the corollary here that the ECtHR's approach does not simply depend upon the 'type' of issue in question (i.e. conscientious objection to military service). If the ECtHR finds that there has been interference not only with the right to manifest religion or belief but also interference with the right to hold a religion or belief in a case concerning conscientious

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[20] *Bayatyan v Armenia* App no 23459/03 (ECtHR, 12 December 2006)

[21] Ibid.

[22] It would have been interesting to have seen the ECtHR's approach to the complaint that imprisonment for refusing to perform military service was intended to force the applicants to 'alter the contents of their conscience and religion' but this application was withdrawn, see *Petrou and Konstantinou v Cyprus* App nos 24120/94 25506/94 (Commission Decision, 27 November 1995).

objection to military service, the approach and the outcome may be more similar to cases such as *Ivanova v Bulgaria*, which concerned dismissal from employment on the grounds of religion or belief,[23] than to other conscientious objection cases. This flexibility is further illustrated in cases concerning refusals to pay church tax to which this section will now turn.

ii. Refusals to Pay Church Tax

The ECtHR has addressed numerous cases in which individuals and organisations have complained about obligations to pay general taxes.[24] In these cases, the ECtHR has generally considered that in respect of individuals, the obligation to pay general taxes has 'no specific conscientious implications in itself'[25] and they cannot, as Rivers points out, 'insist on a hypothecated tax regime to reflect their religious or ideological convictions'.[26] In respect of organisations, the ECtHR has pointed out that Churches or other religious organisations are not exempt from all taxation,[27] and profit making corporations cannot benefit from Article 9 in this respect.[28]

The ECtHR has also examined numerous cases in which individuals have complained about payment of church taxes. This is a more complex area because the ECtHR has to balance both the right of religious organisations to 'solicit and receive voluntary contributions'[29] and the right of individuals not to be forced to contribute to religious activities of a religious organisation of which they are not a member. Again, this section reveals that, in deciding complaints concerning the obligation to pay church taxes, the ECtHR balances *forum internum* relevance and countervailing factors to reach its decision.

a. Obligations to Pay Church Tax arising from Employment

The most well-known case concerning payment of church tax is *Darby v Sweden* in which a Finnish citizen, who worked in Sweden, complained under *inter alia* Article 9 that he had been enrolled as a member of the Church of Sweden (Lutheran Church) against his will and had been

[23] *Ivanova v Bulgaria* App no 52435/99 (ECtHR, 12 April 2007).
[24] See e.g., *C v The United Kingdom* (1983) 37 DR 142; *HB v The United Kingdom* App no 11991/86 (Commission Decision, 18 July 1986); *Iglesia Bautista El Salvador and Ortega Moratilla v Spain* App no 17522/90 (Commission Decision, 11 January 1992); *Bouessel du Bourg v France* App no 20747/92 (Commission Decision, 18 February 1993); *Kustannus Oy Vapaa Ajattelija AB and Others V Finland* (1996) 85-A DR 29; *L'Assocation 'Sivananda de Yoga Vedanta' v France* App no 30260/96 (Commission Decision, 16 April 1998) [French].
[25] *Skugar and Others v Russia* App no 40010/04 (ECtHR, 3 December 2009).
[26] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010) 62.
[27] *Iglesia Bautista El Salvador and Ortega Moratilla v Spain* App no 17522/90 (Commission Decision, 11 January 1992); *L'Assocation 'Sivananda de Yoga Vedanta' v France* App no 30260/96 (Commission Decision, 16 April 1998) [French].
[28] *Kustannus Oy Vapaa Ajattelija AB and Others V Finland* (1996) 85-A DR 29.
[29] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010) 61.

forced to pay church tax.[30] The only way to avoid paying the tax, he claimed, would be to become a resident of Sweden and apply for exemption under the Dissenter Tax Act. The government disputed that the applicant had been registered as a member of the Church of Sweden. It also argued that Article 9 does not include a right to exemption from payment of taxes and, even if the Commission considered it did, it would be 'too far-fetched' to argue that it did in this case because the applicant voluntarily subjected himself to domestic law by working in Sweden.[31]

Whilst the Commission agreed with the government that the applicant had not been registered as a member of the Church of Sweden (so deemed that complaint manifestly ill-founded) it found the applicant had been refused a reduction in the tax under the Dissenter Tax Act, and as such, considered whether the obligation on the applicant to pay church tax, contrary to his wishes, was compatible with Article 9.

In setting out the general principles, the ECtHR explained that Article 9 'can be divided into two parts:'[32] the first 'limb' protects the 'general right to freedom of religion' whereas the second limb protects 'a more specific right to change and manifest one's religion,'[33] but, these limbs are not exclusive. It explained that given Article 9.2 'only permits limitations on the freedom to manifest one's religion', States are 'obliged to respect everyone's general right to freedom of religion and that right may not be restricted'.[34] It also reiterated that a State Church system does not, in itself, violate Article 9, however, it stressed that 'no one may be forced to enter, or be prohibited from leaving, a State Church.'[35] Providing domestic law permits individuals to leave a church (and thereby avoid paying church tax) freedom of religion is safeguarded.[36]

In its assessment, the Commission noted that as the applicant was not a member of the Swedish State church, he could not leave the church in order to avoid the obligation to pay tax.[37] And, in the circumstances, the legal obligation to pay the church tax could 'not be *characterised* as a "manifestation of his religion".'[38] Instead, it considered that the complaint engaged the 'general right to freedom of religion,' explaining that 'this right protects everyone from being compelled to be involved directly in religious activities against his will without being a member

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[30] *Darby v Sweden* (1988) 56-B DR 173; *Darby v Sweden* App no11581/85 (1989) Report 31; *Darby v Sweden* (1990) Series A no 187.
[31] Ibid.
[32] *Darby v Sweden* App no 11581/85 (1989) Report 31, para 44.
[33] Ibid., para 44. See also *Thlimmeenos v Greece* Report 1998 para 40.
[34] *Darby v Sweden* App no 11581/85 (1989) Report 31, para 44.
[35] Ibid., para 46.
[36] This is consistent with the earlier decisions in *E and GR v Austria* (1984) 37 DR 42 and *Gottesmann v Switzerland* (1984) 40 DR 287.
[37] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 296.
[38] *Darby v Sweden* App no11581/85 (1989) Report 31, para 50 (my emphasis).

of the religious community carrying out those activities.'[39] For the Commission, the obligation to pay church tax was viewed as such involvement.[40] It emphasised that States are required to respect religious convictions of individuals who do not belong to a Church, by, for example, allowing them to be exempted from contributing to its *religious activities*.[41] It decided that the government's claim that the Dissenter Tax Act did not apply to the applicant because he was not resident in Sweden, was not sufficient justification for departing from the positive obligation to protect the applicant's freedom of religion, and as a result, the Commission found a violation of Article 9.

In this case the Commission considered that *forum internum* relevance was strong and that countervailing factors were weak. However, it did not explain precisely why it considered that the applicant was 'compelled' to be 'directly involved' in religious activities, and thus, why *forum internum* relevance was so strong here. Indeed, on the facts, it is debatable whether the applicant was 'directly involved' in religious activities. The jurisprudence reveals that payment of church tax is not necessarily considered a religious act. Elsewhere the Commission has referred to it as an 'obligation' stemming from Church membership, in a similar way that financial obligations arise as a result of membership of private associations.[42]

Secondly, it is debatable whether the applicant was 'compelled' to pay church tax. To be compelled is to be 'forced to do something' or to be 'under constraint'.[43] Whilst the applicant was under a legal obligation to pay church tax, he was only under the obligation because he *chose* to work in Sweden. Judge Martinez argued, in his dissenting opinion, that there was no violation of Article 9 because it was simply a financial matter. The applicant was obliged to pay taxes which corresponded with his income in accordance with the Swedish law, where he worked of his own volition.[44]

Given the wider jurisprudence, it is striking that the majority specifically rejected this argument. There are numerous instances in Article 9 case law where the ECtHR has argued that because applicants have 'voluntarily' submitted themselves to a system of norms (a 'specific situation')[45] in university, employment or the army, which limits their right to manifest, they cannot claim a violation of Article 9.[46] This was illustrated in the discussion of *Yanasik v Turkey* and *Kalaç v Turkey* in Chapter Four of this thesis, in which the ECtHR took into account the

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[39] Ibid., para 51.
[40] Ibid. See *Bruno v Sweden* App no 32196/96 (ECtHR, 28 August 2001); *Lundberg v Sweden* App no 36846/97 (ECtHR, 28 August 2001).
[41] *Darby v Sweden* App no11581/85 (1989) Report 31, para 58 (my emphasis).
[42] *E and GR v Austria* (1984) 37 DR 42.
[43] 'compel' in *Oxford English Dictionary* (7th edn, OUP 2015).
[44] *Darby v Sweden* App no 11581/85 (1989) Report 31, Dissenting Opinion of Judge Martinez.
[45] For a discussion of this notion see Russell Sandberg, *Law and Religion* (CUP 2011) 84-86.
[46] See e.g., *Karaduman v Turkey* App no 16278/90 (Commission Decision, 3 May 1993).

applicants' specific situation (their military career) into account when considering the legitimacy of limitations.[47] The ECtHR has also frequently advanced the right to resign argument in cases in which applicants have complained that their duties as a result of their employment conflict with their religion or belief. The ECtHR has repeatedly explained that the right to freedom of thought, conscience and religion is protected by the right to resign.[48]

It seems the Commission, could, therefore have taken a very different approach and reached a very different outcome in this case. Indeed, the fact that the complaint in *Darby v Sweden* need not necessarily have be construed as an interference with the right to freedom of thought, conscience or religion is evidenced by the ECtHR judgment, in which the complaint was characterised as an issue concerning the peaceful enjoyment of possessions under Article 1 of Protocol 1 and discrimination under Article 14.[49]

How can the Commission's approach in *Darby v Sweden* be explained? It seems that this case again reveals the significance of the 'lens' adopted by the ECtHR. The Commission thought there was strong *forum internum* relevance in this case because it decided that what was at stake was 'respect' for the religious convictions of those who did not belong to the State church, in other words, their right to hold (or not hold) a religion or belief.[50] The Commission stressed that States are required to *respect* the religious convictions of those who do not belong to the State church by permitting exemptions from obligations to contribute to religious activities (i.e. through a Dissenter Tax) and found that in refusing to offer the applicant exemption it had 'failed to respect the applicants right to freedom of religion'.[51] In considering countervailing factors, the Commission gave very little weight to the government's claim that the Dissenter Tax Act did not apply to the applicant because he was not a resident in Sweden, and thus, decided that there had been a violation of Article 9. However, by looking at the case through a different 'lens' (as an issue about the peaceful enjoyment of possessions and of discrimination) the Court did not find it necessary to consider Article 9 *at all*.

[47] *Yanasik v Turkey* (1993) 74 DR 22; *Kalaç v Turkey* ECHR 1997-IV 1199.
[48] See *X v The United Kingdom* (1981) 22 DR 27; *Konttinen v Finland* App no 24949/94 (Commission Decision, 3 December 1996); *Stedman v The United Kingdom* (1997) 89-A DR 104. It is only recently, in *Eweida and Others v United Kingdom* that the ECtHR observed that rather than holding that freedom of religion is protected by the right to resign, it would be better to 'weigh that possibility in the overall balance when considering whether or not the restriction was proportionate', see *Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts), para 83.
[49] *Darby v Sweden* (1990) Series A no 187. A similar approach was taken to an applicant's complaint about being forced to tolerate hunting on his land. The Chamber thought that Article 9 was engaged but the Grand Chamber characterised it as a property rights issue and having found a violation of Article 1 Protocol 1, did not examine Article 9, see *Herrmann v Germany* App no 9300/07 (ECtHR, 20 January 2011); *Herrmann v Germany* App no 9300/07 (ECtHR, 26 June 2012).
[50] Malcolm D Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 296 and Paul Taylor, *Freedom of Religion* (CUP 2005) 160.
[51] *Darby v Sweden* App no 11581/85 (1989) Report 31.

b. Obligations to Pay Church Tax arising from a Joint Tax Assessments

The importance of the facts in cases concerning objections to pay church tax is further evidenced in *Klein v Germany*.[52] In this case, the Court, like the Commission in *Darby v Sweden* did examine the complaint under Article 9, but in balancing *forum internum* relevance and countervailing factors, it reached a different decision.

In *Klein v Germany* the applicant complained under *inter alia* Article 9 that he had been 'compelled to pay the special church fee levied on his wife without being a member of that church'[53] because it had been offset against his tax reimbursement claim in their joint tax bill.[54] In its assessment the ECtHR explained, citing the earlier case of *Bruno v Sweden*,[55] that it would examine the complaint from the perspective of the 'negative aspect' of freedom of religion and conscience, namely the 'right of an individual not to be compelled to be involved in religious activities against his will without being a member of the religious organisation in question'.[56] Whilst the Court shared the government's view that it was the applicant's wife on which the church fee was levied, and not the applicant himself, it reiterated that Article 9 is important 'for non-believers or for those not belonging to any institutionalised religious group' and explained that in cases where States oblige individuals to contribute to a religious organisation, whether directly or indirectly, when they are not a member of the organisation in question, there will be an interference with Article 9.[57] The ECtHR found that due to the joint tax assessment the German legislation caused a situation in which the applicant was also under his wife's financial obligations to her church when he was not a member.[58]

This finding was almost identical to that in the Commission Report in *Darby v Sweden*.[59] However, rather than following the Commission's approach in *Darby v Sweden* by finding a violation of Article 9 at this point, the ECtHR considered the legitimacy of the interference under Article 9.2. It decided that the interference was prescribed by law and pursued the legitimate aim of ensuring the rights of churches and religious communities to levy church taxes. And, after a lengthy consideration of the administrative process for joint tax assessments and offsetting, decided that in light of the wide margin of appreciation left to States in this area, the reasons provided for the interference with the applicant's rights were sufficient so found no violation of Article 9. Notably, the ECtHR pointed out that the applicant and his wife had *decided* to make a

[52] *Klein v Germany* App no 10138/11 (ECtHR, 6 April 2017).
[53] Ibid., para 76.
[54] Ibid., para 69.
[55] *Bruno v Sweden* App no 32196/96 (ECtHR, 28 August 2001); *Lundberg v Sweden* App no 36846/97 (ECtHR, 28 August 2001).
[56] *Klein v Germany* App no 10138/11 (ECtHR, 6 April 2017), para 76.
[57] Ibid., para 81.
[58] Ibid., para 82.
[59] *Darby v Sweden* App no 11581/85 (1989) Report 31.

joint tax declaration which meant that their claims were processed jointly. The applicant could have undone the offsetting, and received a refund, by applying for a settlement notice which would not have caused any financial burden or been time consuming.

If one expects consistency of approach and outcome across the category of 'church tax cases' then, on the basis of the facts of the case, and the finding made by the ECtHR (that the applicant was subjected to financial obligations towards a church of which he was not a member), one might have expected the ECtHR to have reached the same decision as the Commission in *Darby v Sweden*, i.e. to have found a violation of Article 9. The fact that it did not may look inconsistent from this angle. Moreover, if one approaches these church tax cases from the perspective that there is binary and hierarchical distinction between the *forum internum* and *forum externum* in Article 9 then the approach and outcome in the Commission Report in *Darby v Sweden* and approach and outcome in *Klein v Germany* may not only appear inconsistent but also erroneous because it might look like the ECtHR subjected an absolute right to limitations suitable only for qualified rights. In *Darby v Sweden, Bruno v Sweden* and *Lundberg v Sweden* the Commission and Court observed that the obligation to pay church tax to a church of which one is not a member, could not be characterised as a manifestation of religion or belief.[60] However, it may appear that the ECtHR treated the right as a manifestation in *Klein v Germany* because it considered the legitimacy of the interference with the right under Article 9.2.

However, there are a number of serious problems with such criticisms. Firstly, as has already been argued, it is deeply unhelpful to view the case law in terms of categories, for instances, in terms of 'headscarf cases', 'conscientious objection cases' or in this instance, as 'church tax cases'. The previous chapter, and the previous section of this chapter, explained that a close analysis of the case reveals that it is not the *type* of complaint in question that is key to the ECtHR's approach and outcome in a case. The ECtHR is concerned with the particular facts of the case in question. In its assessment, the ECtHR balances factors pointing towards a violation of Article 9 (primarily, but not only, *forum internum* relevance) with countervailing factors, in order to reach its decision. The different decisions in *Darby v Sweden* and *Klein v Germany* can be explained by looking at countervailing factors. In *Darby v Sweden* the Commission considered that countervailing factors (including the government's argument that the Dissenter Tax Act did not apply to the applicant) were weak, so found a violation of Article 9. However, in *Klein v Germany*, it considered countervailing factors (including the fact that the applicant could simply have applied for a settlement notice) were very strong, so found no violation of Article 9.

[60] Ibid.; *Bruno v Sweden* App no 32196/96 (ECtHR, 28 August 2001); *Lundberg v Sweden* App no 36846/97 (ECtHR, 28 August 2001).

Secondly, the notion that the ECtHR's approach in *Klein v Germany* was erroneous because it subjected an absolute right to limitations under Article 9.2 is also hugely problematic. The overarching argument of this thesis is that there is no clear binary and hierarchical distinction between the *forum internum* and the *forum externum* in Article 9; rather, it has repeatedly stressed that the evidence from the ECHR, the *travaux préparatoires* and the case law supports the argument that these elements are deeply interrelated and should be understood in terms of a continuum. If the ECtHR had explicitly stated that the right not to be compelled to directly participate in religion or belief related activities of which one is not a member was an absolute right, which could not be limited in any circumstances, and then considered the legitimacy of any interference under Article 9.2, one could potentially have argued that there was an internal inconsistency in this case.

However, the ECtHR did not do this. In *Klein v Germany* it simply presented the right not to be compelled to be directly involved in religious activities of an organisation of which one is not a member as a 'negative right' without indicating the level of protection to be offered. So, rather than arguing that the ECtHR in *Klein v Germany* made a mistake — that it confused the *forum internum* and *forum externum* aspects of Article 9 — it is more sensible to see the ECtHR's approach as a reflection of its flexibility in the protection of Article 9. Rights are not 'fixed' at certain points but can move along the continuum of *forum internum* relevance depending on the facts of the case. And depending on the weight the ECtHR gives to countervailing factors in the balance, the ECtHR can and does reach different decisions on different facts. The point here is that just because a right has been protected in a particular way, in a particular case, does not mean it *always* has to be protected in the same way in later cases.[61] This flexibility on the part of the ECtHR is illustrated further cases concerning the disclosure of religion or belief which will be explored in the next section.

B. Objections to Disclosing One's Religion or Belief

i. Disclosure During Oath Taking

a. Oaths of Office

Before practising as a lawyer in Greece it is necessary to take an oath on the Christian Gospels or make a solemn declaration before a competent court.[62] In *Alexandridis v Greece*, which concerned a newly qualified lawyer, the applicant complained to the ECtHR that whilst he chose

[61] For an overview of the ECtHR's various approaches to conscientious objection claims see, Caroline K Roberts, 'Conscientious Objection at the European Court of Human Rights' (Accommodating Conscience Research Network (ACoRN) Blog) 23 May 2019 <http://wp.lancs.ac.uk/acorn/blog/> accessed May 2019.

[62] See, e.g., *Alexandridis v Greece* App no 19516/06 (ECtHR, 21 February 2008) [French].

to affirm, in order to do so, he was forced to reveal that he was not an Orthodox Christian and this violated Articles 8, 9 and 14.[63] The ECtHR decided to address this complaint under Article 9 alone.[64] In setting out the general principles the ECtHR reiterated the standard recital (that Article 9 primarily protects the *forum internum* but also protects manifestation) and recalled that in previous case law, including *Buscarini v San Marino*,[65] the ECtHR had invoked 'negative rights' under Article 9, including the 'freedom not to join a religion and the right not to practice'.[66] In *Alexandridis v Greece*, the ECtHR explained that it considered the right to manifest one's religion or belief '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.'[67]

In considering the facts, the ECtHR found that there was a 'presumption' that a lawyer who appears before the tribunal is an Orthodox Christian, and therefore wishes to take the religious oath of office. This presumption meant that the applicant was forced to partly reveal his religious beliefs (i.e. that he was not an Orthodox Christian) when he asked to make a solemn declaration.[68] Further, the ECtHR observed that to 'be allowed to make a solemn declaration individuals are forced to declare that they are atheists or that their religion forbids the taking of an oath.'[69] The ECtHR explained the scope of the negative aspect of the right to manifest, stressing that it is not open to State authorities to interfere in the freedom of conscience of a person by enquiring into their religious beliefs or by obliging them to manifest them, especially in relation to the taking of an oath to exercise certain functions. The ECtHR concluded that the 'obligation imposed on the applicant to disclose before the competent court that he was not an Orthodox Christian and that he wished to make a solemn declaration rather than take a religious oath infringed his right not to be compelled to express his religious beliefs'[70] and, in a unanimous decision, found a violation of Article 9.

In this case the ECtHR gave great weight to the applicant's *forum internum* and very little weight to countervailing considerations. Interestingly, again, the ECtHR did not explain precisely *why* forcing individuals to reveal their religion or belief in part or in full constituted an

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[63] Ibid., para 21.
[64] Ibid., para 35.
[65] In *Buscarini v San Marino*, the applicants complained about compulsion to take an oath on the Gospels in order to take their seats in Parliament. The ECtHR emphasised that Article 9 protects the right to profess and not to profess a religion or associate with a religion and found that the compulsion complained of violated their right not to adhere to a particular religion Article 9, see *Buscarini v San Marino* ECHR 1999-I 605.
[66] *Alexandridis v Greece* App no 19516/06 (ECtHR, 21 February 2008) [French], para 32.
[67] Ibid., para 38. For discussion of this as a 'new trend' see, Ian Leigh, 'New Trends in Religious Liberty and the European Court of Human Rights' (2010) 13:3 Ecclesiastical Law Journal 266, 277.
[68] *Alexandridis v Greece* App no 19516/06 (ECtHR, 21 February 2008) [French], para 36.
[69] The State authorities argued that judges did not 'insist on scrutinising the *for intérieur*' in requests to affirm but the ECtHR found the opposite in this case, see ibid., para 37.
[70] Ibid, para 41.

interference with the *forum internum*. Perhaps this was simply considered unnecessary given the principle that States are prohibited from interfering in the freedom of conscience of a person by enquiring into their religious beliefs or by obliging them to manifest them, especially in *relation to the taking of an oath to exercise certain functions*. Having characterised the issue in such a way, and in taking the facts into account, the ECtHR offered a very high degree of protection under Article 9, from the outset, in this case.

However, that the ECtHR can take a different approach when the facts are different is illustrated in cases concerning oath taking procedures for witnesses in court.

b. Oaths Taken by Witnesses in Court

In *Dimitras and Others v Greece*[71] in which the applicants, who were legal representatives for the Helsinki International Federation (a human rights non-governmental organisation (NGO)), made complaints about the oath taking procedure for witnesses in Greek courts, the ECtHR gave greater weight to countervailing factors than it did in *Alexandridis v Greece*, but nonetheless, decided that countervailing factors did not outweigh *forum internum* relevance on balance. The applicants complained that the assumption in Greek courts that witnesses are Orthodox Christians meant they had to disclose that they were not Orthodox Christians, and often had to reveal that they were atheists or Jews, in order to make a solemn declaration when swearing in.[72] Despite this, however, the applicants found that court minutes often described them as Orthodox Christians and recorded that they had taken an oath by placing their hands on the Gospel.[73] In order to have the minutes corrected they had to again 'exteriorise' their beliefs.[74] Before the ECtHR the applicants argued that this violated Article 9 (and also Articles 8 and 14),[75] and claimed they had no recourse to an effective remedy under Article 13.

After examining the Article 13 complaint and finding a violation, the ECtHR examined the Article 9 complaint regarding the obligation upon the applicant to disclose his religion or belief during oath taking procedures in court.[76] In setting out the principles the ECtHR explained that it had previously invoked 'negative rights' under Article 9, including the right not to join or practice a religion[77] and relying on *Alexandridis v Greece* explained that the right to manifest one's religion or belief 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

[71] *Dimitras and Others v Greece* App no 42837/06 and 4 others (ECtHR, 3 June 2010) [French].
[72] Ibid., para 75.
[73] Ibid., paras 6-13.
[74] Ibid., paras 10, 13, 14.
[75] Ibid., para 3.
[76] Ibid., para 70.
[77] Ibid., para 77.

which it could be inferred that he has – or does not have – such beliefs.'[78] In addition, the ECtHR again emphasised that States are prohibited from interfering in the freedom of conscience of a person by enquiring into their religious beliefs or obliging them to manifest them and noted that this is all the more true when a person is obliged to do so in order to perform certain functions, in particular, in connection with oath taking.[79]

In its assessment of the facts the ECtHR found that there was a presumption that the applicants were Orthodox Christians and they not only had to reveal whether or not they were Orthodox Christians but also that they were atheists or Jews in order to be allowed to affirm and for the standard text to be corrected in the minutes.[80] Consequently, the ECtHR found interference with the applicant's 'freedom of religion' under Article 9.[81]

In considering the legitimacy of the interference, the ECtHR found that the interference was prescribed by law and pursued a legitimate aim under Article 9.2, namely the protection of public order and guaranteeing the administration of justice. However, in its consideration of the proportionality of the measure, the ECtHR decided that State legislation and the way it was applied by the domestic courts was inconsistent with the right to freedom of religion under Article 9. It emphasised that domestic law created a presumption that witnesses were Orthodox Christians[82] and did not allow individuals to avoid the obligation to take the religious oath by opting to make a solemn declaration.[83] Instead, domestic law implied that detailed information about religious convictions should be provided (namely that individuals must explain that they adhere to another recognised religion, that their religion does not allow oath taking, or that they do not believe in a religion)[84] and did not allow individuals who were Orthodox Christians to avoid taking the oath if it contradicted their convictions. Further, the ECtHR found that domestic law obliged witnesses to confirm their identity including *inter alia*, their religion before hearings. Consequently, the ECtHR concluded that the interference was not justified in principle or proportionate to the objective pursued and unanimously found a violation of Article 9.

So, whilst the ECtHR gave greater weight to countervailing factors in *Dimitras and Others v Greece* than it did in *Alexandridis v Greece,* on balance, it did not consider that *forum internum* relevance was outweighed by countervailing factors. This is further evidenced in a raft of later cases dealing with very similar complaints brought by Dimitras and other individuals in

[78] Ibid., para 78.
[79] Ibid., para 78.
[80] Ibid., para 70.
[81] Ibid., para 80.
[82] Ibid., para 84.
[83] Ibid., para 85.
[84] Ibid., para 85.

Dimitras and Others v Greece in 2011,[85] *Dimitras and Others v Greece* in 2012,[86] *Dimitras and Gilbert v Greece* in 2013,[87] and *Dimitras v Greece* in 2018.[88]

Again, it is likely that for those who work with a binary and hierarchical *forum internum* and *forum externum* framework the approach in *Alexandridis v Greece* and the approach in the *Dimitras and Others v Greece* may seem inconsistent because the ECtHR did not consider limitations under Article 9.2 in *Alexandridis v Greece* but did do so, in respect of the same right, in *Dimitras and Others v Greece.* Thus, it might appear that in the latter case the ECtHR inappropriately subjected a right, previously treated as an absolute right, to Article 9.2 limitations.

However, it seems that this is a misunderstanding of the ECtHR's approach. For the ECtHR rights are not 'fixed' at certain points on the continuum of *forum internum* relevance; rights can move along the continuum depending on the specific facts of the case in question. That the ECtHR took a different approach in *Alexandridis v Greece* and in *Dimitras and Others v Greece* is not evidence that the ECtHR is unable to consistently apply a bright line distinction between the *forum internum* and *forum externum* or between absolute and qualified rights, but rather evidence that such a clear distinction does not exist for the ECtHR. The ECtHR adopts a much more nuanced approach to the protection of Article 9, balancing *forum internum* relevance and countervailing factors in order to reach its decision. Whilst the complaints in *Alexandridis v Greece* and *Dimitras and Others v Greece may* look similar, they were quite different, and the different facts led the ECtHR to take a different approach.

In *Dimitras and Others v Greece*,[89] the complaint was brought by members of the Greek Helsinki Monitor an organisation in Greece which campaigns on human rights, minority rights and anti-discrimination issues (and which represented the applicant in *Alexandridids v Greece*). Mr Dimitras, the lead applicant in the *Dimitras* cases in 2010, 2011 and 2013, 2017 and 2018 was the founder and president of the Greek Helsinki Monitor,[90] and the other applicants in these cases (Valliantos, Papanikolatou, Gilbert and Alexandridis) were employees of the organisation. The complaint about being forced to disclose religion or belief in order to make a solemn declaration in court was brought along with a complaint about impartiality in the judiciary. The applicants in *Dimitras and Others v Greece* complained under Article 6 that 'the presence of religious symbols

[85] *Dimitras and Others v Greece (no 2)* App no 34207/08 ad 6365/09 (ECtHR, 3 November 2011) [French].
[86] *Dimitras and Others v Greece (no 3)* App no 44077/09 and 2 others (ECtHR, 8 January 2013) [French].
[87] *Dimitras and Gilbert v Greece* no 36836/09, 2 October 2014 [French]. The ECtHR did not find that the government had set out 'facts or arguments which might lead to a different conclusion as to the proportionality of the interference', ibid., para 24.
[88]*Dimitras v Greece* App no 11946/11 (ECtHR, 19 April 2018). *Dimitras and Others v Greece* in 2017 was struck out of the list on the basis that a friendly settlement had been reached by the parties, see *Dimitras and Other v Greece* App no 46009/11 (ECtHR, 27 June 2017) [French].
[89] *Dimitras and Others v Greece* App no 42837/06 and 4 others (ECtHR, 3 June 2010) [French].
[90] Mr Dimitras was also involved with a sexual discrimination complaint before the ECtHR, see *Vallianatos and Others v Greece* ECHR 2013-VI 125.

in the courtroom and the fact that Greek judges are Orthodox Christians contribute to raising doubts as to their objective, even subjective, impartiality.'[91] The ECtHR rejected this complaint as manifestly ill-founded[92] because the applicants did not demonstrate that they were directly affected (i.e. that they were victims), explaining that the system of individual petition in Article 34 'excludes applications lodged by way of *actio popularis*.'[93]

This complaint may have affected the way in which the ECtHR approached the Article 9 complaint. i.e. that it saw the complaint in a different light to that in *Alexandridis v Greece,* as a piece of strategic litigation which sought to expose and eliminate discriminatory structures, namely the oath taking system in Greece. As such, it gave greater weight to the countervailing factors (the interests of the State) in the assessment and framed the complaint as one concerning limitations on manifestation so that balancing could take place explicitly under Article 9.2. But as mentioned above, even though the ECtHR appeared to give more weight to countervailing factors in *Dimitras and Others v Greece* than it did in *Alexandridis v Greece*, the ECtHR also found a violation of Article 9 in *Dimitras and Others v Greece*.

This pattern of balancing *forum internum* relevance and countervailing factors is further demonstrated in cases concerning the disclosure of religion or belief through official documents.

ii. Disclosure Through Official Documents

A number of applicants have complained that there has been interference with the right to freedom of thought, conscience and religion as a result of disclosure of religion or belief through official documents, including school reports, identity documents and wage tax cards. Whilst the complaints are ostensibly similar the ECtHR does not always give the same weight to countervailing factors and thus, does not reach the same outcome in each of these cases.

a. School Reports

A useful case to illustrate the ECtHR's approach in this area is *Grzelak v Poland* in which the third applicant complained *inter alia* under Articles 9 and 14 that the lack of a mark for 'religion/ethics' on his school reports throughout his time at school, because he opted out of religious education (and ethics classes were not provided) meant that he was compelled to reveal his convictions (or lack thereof) each time he presented his reports.[94]

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[91] *Dimitras and Others v Greece* App no 42837/06 and 4 others (ECtHR, 3 June 2010) [French], para 55.
[92] Ibid., para 56.
[93] Ibid., para 57.
[94] *Grzelak v Poland* App no 7710/02 (ECtHR, 15 June 2010).

The ECtHR reiterated the general principles set out in *Alexandridis v Greece* — relating to disclosure of religion or belief — verbatim.[95] In addition, the ECtHR recalled that Article 9 is a precious asset for non-believers, explaining that when a State creates a situation in which individuals are obliged to reveal that they are non-believers, whether directly or indirectly, it will find an interference with the negative aspect of Article 9.[96] This, the ECtHR added, is especially so when an individual is obliged to reveal such information in the context of education.[97] In considering the facts, the ECtHR observed that the missing mark for 'religion/ethics' on the applicant's school reports (because he had opted out of religious education and no ethics classes were provided[98]) fell within the scope of the negative aspect of Article 9 because it would probably be understood from this that he did not hold religious beliefs.[99] This case differed from *Saniewski v Poland*,[100] the ECtHR explained, because in that case there were marks missing for other subjects too so one could not conclude whether the applicant had decided not to take religious education classes or whether classes were just not organised in that year.

Furthermore, in *Grzelak v Poland* the ECtHR noted that marks for religion/ethics classes were taken into account in calculating the pupil's average score for the year, so opting out of religious education classes when no ethics classes were available could have put the pupil at a disadvantage and thus, he may have felt pressured to take the religious education classes.

In its consideration of the facts, the ECtHR explicitly referred to the immediate context (education) and the broader facts of the case (including the religious demographic in Poland). It explained that it was 'mindful of the politically sensitive nature of the issues at hand,'[101] noting that in countries like Poland where there is a dominant religion, the lack of a mark on school reports distinguished the applicant from the majority of the population.[102] The ECtHR concluded that the margin of appreciation offered to the State (in respect of the provision of religious

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[95] Ibid., para 87.
[96] Ibid., para 87. In *Folgerø And Others v Norway* the ECtHR had observed that the obligation on parents to disclose 'detailed information' to the school in order to get their children exempted from religious education may constitute a violation of Articles 8 and 9 as parents might feel 'compelled' to provide this information, see *Folgerø And Others v Norway* ECHR 2007-III 51, para 98.
[97] *Grzelak v Poland* App no 7710/02 (ECtHR, 15 June 2010), para 87.
[98] Ibid., para 91.
[99] Ibid., para 88, 96. The ECtHR's approach differed from that in *CJ, EJ and JJ v Poland* in which the Commission noted that the act of choosing either 'religion' or 'ethics' classes reveals an applicant's preferences, to a certain extent, but does not necessarily reveal his or her 'religious beliefs or denomination,' see *CJ, JJ and EJ v Poland* (1996) 84-B DR 46.
[100] *Saniewski v Poland* App no 40319/98 (ECtHR, 26 June 2001).
[101] Myriam Hunter-Henin, *Law, Religious Freedoms and Education in Europe* (Ashgate 2012) 215
[102] *Grzelak v Poland* App no 7710/02 (ECtHR, 15 June 2010), para 95. The same argument was made by the applicants in *Bulski v Poland,* but this complaint was withdrawn, see *Bulski v Poland* App nos 46254/99 31888/02 (ECtHR, 30 November 2004) [French]; *Bulski v Poland* App nos 46254/99 31888/02 (ECtHR, 9 May 2006) [French]. It will be interesting to see the outcome to the recent complaint that the exemption system stigmatises individuals who do not follow the dominant religion in *Papageorgiou and Others v Greece* (communicated case) App nos 4762/18 6140/18 (ECtHR, 12 March 2018) [French].

education in school) had been exceeded and found a violation of Article 14 in conjunction with Article 9 because of the 'unwarranted stigmatisation' and the infringement of the right not to manifest religion or belief.[103]

Again, in this case the ECtHR did not explain precisely *how* the State's actions constituted an interference with, and violation of, Article 9. It did not seek concrete evidence that the lack of a mark on his school report for religious education 'stigmatised' the applicant but rather the ECtHR seems to have acted on pre-emptive concerns, suggesting that the report *would* be understood that he did not take part in religious education classes, and that he *would* be 'regarded as a person without religious beliefs' (with the implication that he would be subject to discrimination). Indeed, the majority's approach was criticised by Judge Björgvinsson who argued that they went too far in finding a violation of Article 9 because 'the applicant had not been subjected to any kind of indoctrination or pressure by the authorities' regarding religion or belief, neither did he show that he had, or would, suffer 'detriment which would amount to an interference'.[104]

Again, however, it is likely that the ECtHR did not consider it necessary to explain *why* the State action in this case interfered with Article 9 given that it had set out the principle that where States create situations in which individuals are forced to reveal they are non-believers (especially in the educational context) it will find an interference with Article 9. Having characterised the issue in such a way, the ECtHR offered a very high degree of protection under Article 9 from the outset, in this case.

b. Identity documents

The ECtHR also considered that *forum internum* relevance outweighed countervailing factors in *Sinan Işik v Turkey* in which the applicant complained firstly, that the Turkish government had refused his request to alter his religious affiliation from 'Muslim' to 'Alevi' on his identity card, and secondly, that it obliged him to disclose his religion, contrary to Article 9, because it was mandatory to include such information on identity cards.[105] In its assessment, the ECtHR was not

[103] *Grzelak v Poland* App no 7710/02 (ECtHR, 15 June 2010), para 100. For further discussion, see Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) 427; Myriam Hunter-Henin, *Law, Religious Freedoms and Education in Europe* (Ashgate 2012) 215.

[104] *Grzelak v Poland* App no 7710/02 (ECtHR, 15 June 2010) Partly Dissenting Opinion of Judge Björgvinsson, para 8-9. Judge Björgvinsson's approach was similar to that of the majority in *Sanieweski v Poland* which found inter alia that the applicant had not suffered discrimination as a result of the school report, *Saniewski v Poland* App no 40319/98 (ECtHR, 26 June 2001).

[105] *Sinan Işik v Turkey* ECHR 2010-I 341, para 22. At the material time, there was no option to leave the box blank. For further discussion about identity cards, see Seval Yildirim, 'The Search for Shared Idioms: Contesting Views of *Laiklik* before the Turkish Constitutional Court' in Gabriele Marranci (ed) *Muslim Societies and the Challenge of Secularization: An Interdisciplinary Approach* (Springer 2010) 246.

persuaded by the government's claim that this did not constitute a measure compelling citizens of Turkey to disclose their religion or belief.[106] On the contrary, the ECtHR explained that what was at stake in the case was 'the right not to disclose one's religion or beliefs, which falls within the *forum internum* of each individual.'[107] As explained in Chapter Three of this thesis, this is the only case in which the ECtHR has explicitly stated that an issue falls into the *forum internum*, and it is curious that it does so here because this is clearly not a 'classic' *forum internum* situation. In this case, the ECtHR emphasised that the right is 'inherent' in the right to freedom of thought, conscience and religion, and to 'construe Article 9 as permitting every kind of compulsion with a view to the disclosure of religion or belief would strike at the very substance of the freedom it is designed to guarantee'.[108] In applying these principles to the facts, the ECtHR found a violation of Article 9.

Again, however, the ECtHR did not seek evidence of precisely *how* obliging an individual to reveal his religion or belief on an identity card (especially when it was, later, possible to leave the box blank) constituted compulsion. For Judge Baretto the majority went 'too far' in finding a violation of Article 9, because, since the change in the law which meant individuals could leave the religion box blank, there was no interference with Article 9.[109] This did not oblige an individual to disclose religion and considering that asking for religious adherence to be deleted from official registers constituted disclosure of religion was excessive.[110] The majority's decision can, however, again be explained by recognising that the ECtHR balanced *forum internum* relevance and countervailing factors, and in doing so, decided that the *forum internum* was not outweighed by countervailing factors in this case.

For the ECtHR, leaving the box for religion blank was no solution to the problem of disclosure because individuals would still be distinguished from the majority who entered their religion in the box.[111] The ECtHR noted that the cards were used frequently (for school registration, identity checks, military service and so on) and so opened up the potential for card

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[106] *Sinan Işik v Turkey* ECHR 2010-I 341, para 42, 44.

[107] This is consistent with the understanding in *Folgerø And Others v Norway*, in which the Court observed that 'information about personal religious and philosophical convictions concerns some of the most intimate aspects of private life', see *Folgerø And Others v Norway* ECHR 2007-III 51, para 98.

[108] *Sinan Işik v Turkey* ECHR 2010-I 341, para 42; *Sinan Işik v Turkey* ECHR 2010-I 341, Dissenting Opinion of Judge Cabral Barreto, para 3.2.

[109] *Sinan Işik v Turkey* ECHR 2010-I 341, Dissenting Opinion of Judge Cabral Barreto, para 3.2. Barretto's argument is similar to that in *X v Austria* in which the applicant complained that the voting procedure forced him to manifest his beliefs in public. The Commission explained that he was 'not compelled' to choose a candidate as he could leave the slip blank or invalidate it, see *X v Austria* (1972) 40 DR 50-52.

[110] Ibid.

[111] For further discussion of the importance of this issue in Turkey, see B Özenc, 'The Religion Box on Identity Cards as a Means to Understand the Turkish Type of Secularism' in Ozgar Cinar and Mine Yildirim, *Freedom of Religion and Belief in Turkey* (Cambridge Scholars Publishing 2014). S Esen and L Gonenç, 'Religious Information on Identity Cards: A Turkish Debate' (2007-2008) 23 Journal of Law and Religion 579.

bearers to be discriminated against on the basis of their religion or belief by State authorities in Turkey.[112] Having characterised the issue in this complaint as one concerning compulsion to disclose religion or belief, and placed little very weight on countervailing factors (including the claim that disclosure of religion or belief on identify cards was necessary for demographic purposes[113]) the ECtHR offered a very high degree of protection under Article 9, from the outset. In other cases concerning disclosure of religion or belief through official documents, the ECtHR can, and does, take a different approach and reach a different outcome.

c. Wage Tax Cards

In balancing *forum internum* relevance and countervailing factors, the ECtHR can, and does sometimes, offer a low degree of protection under Article 9 in cases concerning the right not to disclose religion or belief. This is illustrated clearly in *Wasmuth v Germany*[114] in which an independent lawyer complained that the dashes on his wage tax card in the space for 'Church tax levy' revealed to his employer that he did not belong to one of the six churches entitled to levy tax (or had chosen to opt out of the payment of church tax entirely)[115]and this constituted an infringement of his right not to declare his religious convictions.[116] The ECtHR found no violation of Article 9 here.

In setting out the principles the ECtHR explained, by drawing explicitly on *Alexandridis v Greece*[117] and *Dimitras and Others v Greece*,[118] that the right to manifest religion or belief has a negative aspect, namely the right of an individual not to be obliged to act in such a way that it can be deduced that he or she has or does not have particular convictions.[119] In its assessment the ECtHR noted that in light of recent case law (namely, *Sinan Işik v Turkey* and *Grzelak v Poland*)[120] the situation did constitute an interference with the 'applicant's right not to declare his religious convictions.'[121] In considering the legitimacy of the interference under Article 9.2, the ECtHR found that the obligation imposed on the applicant was prescribed by domestic law[122] and served the legitimate purpose of 'guaranteeing the rights of churches and religious societies to

[112] *Sinan Işik v Turkey* ECHR 2010-I 341, para 43.
[113] Ibid., para 44.
[114] *Wasmuth v Germany* App no 12884/03 (ECtHR, 17 February 2011) [French].
[115] For discussion of the implications of opting out of church tax see, Lasia 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).
[116] *Wasmuth v Germany* App no 12884/03 (ECtHR, 17 February 2011) [French].
[117] *Alexandridis v Greece* App no 19516/06 (ECtHR, 21 February 2008) [French].
[118] *Dimitras and Others v Greece* App no 42837/06 and 4 others (ECtHR, 3 June 2010) [French].
[119] Ibid., para 50.
[120] *Sinan Işik v Turkey* ECHR 2010-I 341; *Grzelak v Poland* App no 7710/02 (ECtHR, 15 June 2010).
[121] Ibid., para 55.
[122] Ibid., para 54.

levy tax'.[123] In terms of the proportionality of the interference, it found that the information on the tax card was 'of limited informative value' as it just revealed that the applicant was not a member of one of the six churches or religious organisations permitted to levy taxes[124] and explained that the applicant's religion or belief could not be deduced from this. It observed that the wage tax card was not intended for 'general use' but only for relations between the taxpayer, tax authorities and the employer.'[125] Drawing upon *Lundberg v Sweden* and *Bruno v Sweden*[126] the ECtHR added that a margin of appreciation was enjoyed by States in respect of the financing of churches and religions. Whilst the provision of the information constituted an interference with the applicant's right not to manifest his religion, the interference was not disproportionate,[127] so found no violation of Article 9.[128]

Again, as noted in respect of *Alexandridis v Greece* and *Dimitras and Others v Greece,* commentators who think that the ECtHR draws a binary and hierarchical distinction between the *forum internum* and the *forum internum* might argue that the ECtHR's approach, to the *same* right, in *Wasmuth v Germany*, in which it considered permissible limitations under Article 9.2, was inconsistent with the approach in *Grzelak v Poland* and *Sinan Işik v Turkey* in which the ECtHR did not consider permissible limitations under Article 9.2. However, again, this thesis argues that this is a misunderstanding of the jurisprudence because rights are not 'fixed'. The extent to which the *forum internum* is relevant in any given case depends heavily on the facts. And, whilst in *Sinan Işik v Turkey* the ECtHR stated that the right to disclose one's religion or belief fell within the *forum internum*, it did not state that the *forum internum* was synonymous with absolute protection. This is an important point which must not be overlooked. The ECtHR explained in *Sinan Işik v Turkey* that 'permitting every kind of compulsion with a view to the disclosure of religion or belief would strike at the very substance of the freedom it is designed to guarantee',[129] it did not, however, say that *all* types of compulsion should be prohibited. In *Wasmuth v Germany*, the ECtHR explained that an obligation to reveal religion or belief in order to substantiate a claim was a type of compulsion that it could permit.

The ECtHR took a different approach and reached a different outcome in *Wasmuth v Germany* because of the facts were different; it seems this complaint was construed as a claim for

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[123] Ibid., para 55.
[124] Ibid., para 58.
[125] Ibid., para 59. This is a similar argument to that made in relation to the degree certificate in *Karaduman v Turkey* App no 16278/90 (Commission Decision, 3 May 1993).
[126] *Bruno v Sweden* App no 32196/96 (ECtHR, 28 August 2001); *Lundberg v Sweden* App no 36846/97 (ECtHR, 28 August 2001).
[127] *Wasmuth v Germany* App no 12884/03 (ECtHR, 17 February 2011) [French], para 63.
[128] Ibid., para 64. The Court used the reasoning in relation to Article 9 to find no violation of Article 8 either, ibid., para 75.
[129] *Sinan Işik v Turkey* ECHR 2010-I 341, para 42.

a special exemption. The ECtHR considered that the applicant was seeking a special measure (exemption from the payment of church tax) and as such the State's request for substantiation did not constitute a disproportionate interference with Article 9. Notably, however, the ECtHR did express, in an *obiter dictum*, that in cases where the interference was 'more significant' the 'balancing of interests could lead to a different conclusion' (i.e. a violation of Article 9).[130]

To support its finding in *Wasmuth v Germany*, the ECtHR relied on the case of *Kosteski v Former Yougoslav Republic of Macedonia* in which the ECtHR had observed that 'while the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions,' in seeking substantiation for claims based on religion or belief it is acceptable in certain circumstances.[131] In *Kosteski v Former Yugoslav Republic of Macedonia* the applicant 'sought to enjoy a special right' which allowed Muslims to take holidays on particular days; it was this attempt to enjoy a 'special right', which was later referred to as a 'privilege or entitlement not commonly available,' that justified the enquiry into the applicant's religion or belief.[132] In that case, the ECtHR explained that when employees seek to rely on a particular exemption to explain their absence, 'it is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when that claim concerns a privilege or entitlement not commonly available' and, if an individual is unable to provide such substantiation then the employer is entitled to reach a negative conclusion.[133] And elsewhere in the jurisprudence, the ECtHR has found that States can seek information concerning 'values and beliefs' held by candidate for public employment to check that they do not hold views which are incompatible with the office.[134]

That the *forum internum* is not synonymous with absolute protection is further evidenced in the dissenting opinion of Judge Berro-Lefèvre and Judge Kalaydjieva in *Wasmuth v Germany*.[135] They reiterated that freedom not to manifest one's religion or belief is a matter for the *for intérieur* of each individual but also considered permissible limitations under Article 9.2. For these judges there was a violation of Article 9 in this case because the structure of the wage-tax card revealed that the applicant was not a member of the churches or religious organisations permitted to levy taxes and, given this was revealed to the employer, it could impact on the applicant's career prospects. It would be more satisfactory, they argued, if this was revealed only

[130] Ibid., para 61.
[131] *Kosteski v The Former Yugoslav Republic of Macedonia* App no 55170/00 (ECtHR, 13 April 2006), para 39.
[132] Ibid.
[133] The ECtHR decided that in the circumstances, the interference was justified under Article 9.2, prescribed by law and necessary in a democratic society for the protection of the rights of others, ibid.
[134] This is consistent with the principle set out in *Vogt v Germany* (1996) Series A no 323.
[135] *Wasmuth v Germany* App no 12884/03 ECtHR, 17 February 2011) [French], Dissenting Opinion of Judge Berro-Lefèvre and Judge Judge Kalaydjieva.

to the authorities so that a balance between the right of churches to raise taxes and the individual right to freedom of thought, conscience and religion could be maintained. [136]

The key point about this analysis of cases relating to objections to revealing one's religion or belief is that it shows that the *forum internum* in Article 9 jurisprudence is not synonymous with absolute protection. This idea, constantly reiterated in the literature, is just not supported in the practice of the ECtHR.

Conclusion

This chapter formed the second part of the examination of contentious cases, that is, the kinds of cases in which it seems that the ECtHR might find a violation of Article 9 or might not. In terms of the concentric circles model of protection, it focused on the middle circle. It examined cases concerning State pressure to act contrary to one's religion or belief and compulsion to disclose religion or belief examining cases concerning conscientious objection to military service, refusals to pay church tax, and State pressure to disclose one's religion or belief through oath taking procedures or official documents. This chapter explained that if one understands i) there to be a clear distinction between the *forum internum* and the *forum externum* in Article 9, ii) for the former to be synonymous with absolute rights and the latter to be synonymous with qualified rights and, iii) for rights to be 'fixed' as either *forum internum* or *forum externum,* or absolute or qualified rights, the approach of the ECtHR in a number of these cases also looks inconsistent or erroneous. However, building on the previous three chapters, this chapter argues that this is a potentially mistaken way of viewing Article 9 jurisprudence.

Thorough a close analysis of the case law, this chapter argues that the ECtHR does not draw a binary and hierarchical distinction between the *forum internum* and *forum externum* but rather, the ECtHR considers the *forum internum* and *forum externum* to be interrelated realms. The ECtHR recognises that the *forum internum* is always relevant in Article 9 claims; the precise weight given to the *forum internum* in any given case, is determined heavily by the ECtHR's consideration of the facts. Importantly, the ECtHR does not consider the *forum internum* to be synonymous with absolute rights, and it does not 'fix' rights at certain points on the continuum of *forum internum* relevance. The ECtHR's approach is much more nuanced and context dependent.

Moreover, the degree of protection offered is not predetermined at the outset by the 'type' of case it is, i.e. a conscientious objection claim, a complaint about obligations to pay church tax, or to disclose religion or belief. This chapter has further illustrated that the ECtHR does not work with a category mindset. Thus, in supporting the findings in the previous chapter, this chapter

[136] Ibid. In *Schüth v Germany* the ECtHR noted that wage-tax cards revealed personal information about the employees personal and family situation, see *Schüth v Germany* ECHR 2010-V 397, para 73.

shows that this is a pattern across the jurisprudence as a whole. It is not just unhelpful to look for consistency of approach and outcome in the same 'type' of cases concerning limitations on manifestation. Looking for consistency in 'types' of cases is an unhelpful approach in Article 9 jurisprudence overall.

Again, this chapter shows that there is a different sort of dynamic at play in this middle circle in the loose concentric circles model. The ECtHR is heavily influenced by the 'lens' which it brings to the cases, or in other words, what the ECtHR considers to be at stake in a given case. The strength of *forum internum* relevance and countervailing factors is heavily dependent on the ECtHR's interpretation of the facts in the case. When this is recognised, the different approaches and outcomes in these contested cases in the middle circle appear to be much more consistent and coherent.

Overall, Chapters Four, Five, Six and Seven, which form Part II of this thesis, demonstrate that it is not the *forum internum* and *forum externum* distinction which is the driving force behind the ECtHR's approach to Article 9 complaints. This distinction is not a useful tool for understanding the ECtHR's approach. If anything, relying on the distinction to analyse the jurisprudence is not only unhelpful but also harmful because it leads to commentators criticising the ECtHR for taking an inconsistent approach and reaching contradictory outcomes in ostensibly similar cases. The close analysis of the cases in these preceding chapters demonstrates that the loose concentric circles model is a helpful way of grouping the cases according to the ECtHR's characterisation. Cases in which *forum internum* relevance is deemed strongest and countervailing factors weakest, fall into the innermost circle and receive the highest degree of protection. Cases in which *forum internum* relevance is deemed weakest and countervailing factors strongest, fall into the outermost circle and receive the lowest degree of protection. Most cases, however, fall into the contested middle circle. In the middle circle, *forum internum* relevance and countervailing factors may both be strong or *forum internum* relevance and countervailing factors may both be weak, and as such, protection ranges from a high to a low degree depending on the way the ECtHR balances factors indicating a violation (primarily, but not only, *forum internum* relevance) with countervailing factors indicating no violation.

The loose concentric circles model is, therefore, helpful because it recognises the ECtHR's considerable flexibility in protecting Article 9 rights; it better reflects the reality of the case law than the notion of a binary and hierarchical distinction between the absolute *forum internum* and qualified *forum externum* and is conducive to a more coherent interpretation of Article 9 protection by the ECtHR.

PART III: RECONCEPTUALISING THE PLACE OF THE *FORUM INTERNUM* AND *FORUM EXTERNUM* IN ECHR ARTICLE 9

CHAPTER 8. AN ALTERNATIVE APPROACH TO UNDERSTANDING ECHR ARTICLE 9 AND THE JURISPRUDENCE

Introduction

This chapter draws together the findings from the detailed analysis of Article 9 jurisprudence, available in English and in French from the 1960s to the present day, in Part II of this thesis and, in doing so, advances an alternative approach to the understanding of Article 9 jurisprudence. Section A examines the *forum internum* and *forum externum* relationship and the loose concentric circles model of Article 9 protection, emphasising the importance of the facts in Article 9 cases and more widely across ECHR jurisprudence. Following from this, Section B explores broader contextual factors which may legitimately be taken into account by the ECtHR in its consideration of Article 9 complaints.

A. The *Forum Internum* and *Forum Externum* Relationship and the Loose Concentric Circles Model

The findings in Part II of this thesis support the hypothesis set out in Part I, namely that if the presentation of Article 9 and the protection to be offered under Article 9 is consistent with the protection of this right in *practice* (i.e. when applied to the facts of the case) one would expect to see the ECtHR balancing factors indicating a violation of Article 9 (primarily, but not only *forum internum* influence) with factors indicating no violation, in order to reach its decision in all Article 9 cases.

Part II demonstrates that the ECtHR does not, as the literature so frequently claims, draw a binary and hierarchical distinction between the *forum internum* and the *forum externum* offering absolute protection to the former and qualified protection to the latter. Indeed, it has shown that it is artificial to claim that the ECtHR approaches Article 9 complaints on the basis of whether an issue is a *forum internum* or *forum externum* issue and offer protection on the basis of such a categorisation. The ECtHR's approach is considerably more nuanced than this. Notably, the ECtHR recognises that the *forum internum* and *forum externum* aspects of Article 9 are deeply interrelated and this has a significant impact on the way in which it approaches Article 9 complaints. Contrary to what C Evans has argued in relation to other Article 9 principles, the standard recital — that Article 9 primarily protects the *forum internum* but also protects acts which are intimately linked to this — is not simply a 'not-particularly-pithy aphorism' or

'incantation' which is 'strangely disconnected' from the reasoning and the outcome.[1] This thesis argues that statements made about the relationship between the *forum internum* and *forum externum* reflect the fact that this understanding of Article 9 is deeply embedded in the jurisprudence as a whole.

The *forum internum* is not considered to be either relevant or irrelevant by the ECtHR, rather, the *forum internum* is always deemed to be relevant because the ECtHR intuitively recognises that limitations on the *forum externum* will inevitably affect the *forum internum*. The key question for the ECtHR, therefore, concerns the extent to which the *forum internum* is relevant in any given case because *forum internum* relevance is the most significant factor weighing in favour of the applicant.

However, *forum internum* relevance is not the only factor the ECtHR takes into consideration in Article 9 complaints; the ECtHR balances factors indicating a violation (primarily, but not only, *forum internum* relevance) against countervailing factors indicating no violation, in order to reach its decision. Where the ECtHR considers *forum internum* relevance to be strongest and countervailing factors to be weakest, it offers a high degree of protection. Where it considers *forum internum* influence to be weakest and countervailing factors to be strongest it offers a low degree of protection. Where the strength of the *forum internum* and countervailing factors are contested (because they are both weak or both strong), the degree of protection depends heavily on the way the ECtHR balances the factors.

Taken together, these findings support the suggestion that the explanatory model of three loose concentric circles denoting *forum internum* relevance at its strongest and countervailing factors at their weakest, *forum internum* relevance and countervailing factors at their most contested, and *forum internum* relevance at its weakest and countervailing factors at their strongest, is a useful way of ordering the cases according to the ECtHR's characterisation. This model is helpful because it recognises the flexibility in terms of the ECtHR's approach to Article 9 protection.

Secondly, and linked to this, the analysis in Part II has demonstrates that the ECtHR does not and should not necessarily take the *same* approach and reach the *same* outcome when addressing complaints concerning the *same* right. It was noted in Chapter Three that, given the presentation of Article 9, in which the ECtHR has explicitly identified the right to hold and to change religion or belief as absolute and unqualified rights, one might expect the ECtHR to *always* protect these rights absolutely whenever the ECtHR finds that the rights are engaged on the facts and that there has been interference with them. However, whilst this is, as Part II has

[1] 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.

demonstrated, generally the case it is not *always* the case with respect to these rights. The *forum internum* is not a trump card outweighing all possible countervailing factors; it is not an inviolable core. Indeed, the ECtHR not only allows States to affect the *forum internum* to a considerable degree without deeming such impact a violation in certain situations (e.g. government warnings against sects) it even suggests that in certain circumstances interference with absolute rights might be permissible (e.g. in psychiatric treatment). There is, therefore, considerable flexibility in terms of the ECtHR's approach in protecting these absolute rights. Absolute in theory does not always mean *absolutely* absolute in practice.

The ECtHR does not mechanically deploy a particular approach to the protection of the right to manifest either. It was explained in Chapter Three that given the presentation of the right to manifest one would expect the ECtHR to carefully consider the legitimacy of limitations under Article 9.2. However, whilst Part II has demonstrated that this is generally the case, there are numerous instances in which the ECtHR has chosen not to conduct a methodologically rigorous examination of permissible limitations under Article 9.2 because, having characterised the complaint in a particular way, the ECtHR has established from the outset the conclusion it will reach.

This flexibility in terms of approach to Article 9 rights has been further illustrated in respect to other rights within the scope of Article 9 such as the right to conscientious objection, the right not to be compelled to participate in religion or belief related activities of an organisation of which one is not a member, and the right not to disclose one's religion or belief. Notably, the ECtHR has not indicated the level of protection to be offered to these rights (e.g. absolute or qualified). This seems to be because, for the ECtHR, rights are not 'fixed' but rather the level of protection offered against interference with Article 9 differs depending on the facts.

Thirdly, and again linked to this, Part II has demonstrated that it is not the 'type' or 'category' of complaint that defines the ECtHR's approach in an Article 9 case.[2] Importantly, the ECtHR does not mechanically deploy a pre-defined approach when faced with certain 'types' of complaints, such as complaints concerning limitations on the wearing of headscarves, refusals to pay tax or disclose religion or belief.[3] Rather, the ECtHR takes a much more holistic and nuanced approach to Article 9 complaints than has been previously recognised in the literature. Whilst commentators have divided up Article 9 into the *forum internum* and *forum externum* and drawn

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[2] Cf. M Evans who argued that cases were considered in 'categories rather Article 9 as a whole' and that the ECtHR was 'overly influenced by the general category' into which the case fell, see Malcolm D Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 282.

[3] Henrard also recognised that there is not always consistency in 'themes' but to address this, she identifies 'sub-themes' instead, see Kristin Henrard, 'How the European Court of Human Rights' Concern Regarding European Consensus Tempers Effective Protection of Freedom of Religion' (2012) 4:3 Oxford Journal of Law and Religion 398, 431.

up lists of various rights included therein, and sought to categorise complaints according to the particular right engaged, or 'type' of complaint at issue, the ECtHR seems to take a much looser approach. Again, it is not the 'type' of complaint in question that is key for the ECtHR but rather the extent to which the *forum internum* is relevant in a particular case. This means that ostensibly similar cases can, and do, receive different degrees of protection depending on the balance of factors.

At the end of Chapter One, this thesis suggested that if the jurisprudence revealed that there is not a distinction between the *forum internum* and the *forum externum* in the text of Article 9 *or* the practice of the ECtHR, then it would be essential to grapple with the implications of this. And indeed, this is what Part II sought to do. Part II embraces the reality of the *forum internum* and *forum externum* relationship in Article 9 jurisprudence; it does not simply retreat to the established orthodoxy that a bright line distinction must be maintained between the *forum internum* and the *forum externum* in practice to ensure the protection of the right to freedom of thought, conscience and religion. In taking the jurisprudence on its own terms, Part II shows that the ECtHR's recognition of the interrelationship between the *forum internum* and the *forum externum* in Article 9 does not necessarily lead to problematic jurisprudence and threaten the protection of the right to freedom of thought, conscience and religion in practice. Part II demonstrates that the ECtHR can, and does, protect Article 9 rights whilst recognising the interrelationship between the *forum internum* and the *forum externum*.

Going a step further, Part II has not only brought a new analysis of Article 9 jurisprudence but also a new understanding of the driving force behind Article 9 jurisprudence. In revealing that the *forum internum* is always relevant, just to a greater or lesser extent depending on the ECtHR's consideration of the facts, this thesis shows that the *forum internum* and *forum externum* distinction does not operate in way in which it has traditionally been understood to operate according to the literature. That the *forum internum* and the *forum externum* aspects of Article 9 are important elements flows from the text of Article 9 and the doctrine. However, despite what commentators suggest, the question of whether an issue falls into the *forum internum* or *forum externum* (and thus should be protected absolutely or qualified, as a result) is not the driving force in Article 9 jurisprudence. A close analysis of the jurisprudence reveals that whilst *forum internum* relevance is the most significant factor weighing in favour of the applicant, it is not the determining factor. The ECtHR balances *forum internum* relevance with countervailing factors to reach its decision.

In some cases, the facts means the ECtHR deems the question of *forum internum* relevance a critical part of the context of determination, whereas in others, it is not deemed to be

hugely relevant because of the nature of the complaint in question.[4] This is a novel understanding of the place of the *forum internum* and *forum externum* in Article 9 jurisprudence, and as such, will be unpacked in detail in the following sections of this chapter.

i. The Driving Force in Article 9 Jurisprudence

In characterising Article 9 complaints the ECtHR does not simply follow the way in which the Article 9 complaint has been framed by an applicant or respondent government but rather, taking into account the complaint as a whole, characterises the issue in the way it deems most suitable and, as a result of its characterisation, offers the level of protection it deems most fitting. Instead of dividing and subdividing Article 9, the ECtHR tends to take a more holistic approach. Whilst it often refers to the right to manifest religion or belief, it frequently prefers to speak loosely of the right to freedom of thought, conscience and religion when addressing other aspects of Article 9, only occasionally identifying particular rights or protections under Article 9 such as the right not to disclose one's religion or belief or the right not to be forced to directly participate in a religion or belief of which one is not a member.

In doing so, the ECtHR has often been criticised by commentators for 'ignoring' specific rights in Article 9 cases or for getting the approach to complaints 'wrong' by either not understanding or not correctly applying the binary and hierarchical *forum internum* and *forum externum* distinction.[5] However, a close reading of the case law shows that the ECtHR's more nuanced approach is consistent with its own principles. The ECtHR has stated that it is 'master of the characterisation to be given in law to the facts of the case and does not consider itself bound by the characterisation given by the applicant or the government or the Commission'.[6] And, following the *jura novit curia* principle, the ECtHR has explained that once it has received a complaint it is free to characterise it 'by the facts alleged in it and not merely the legal grounds or arguments relied on'.[7] The ECtHR, therefore, may 'deal with *any* issue of fact or law that arises

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[4] For a discussion the opposite problem (using language relating to State regulation of religion in cases concerning individual rights) see, Malcolm D Evans, 'From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights' (2010) 26:1 Journal of Law and Religion 345, 370.

[5] Kiviorg argues that the case law is 'inconsistent' and that there is 'inconsistent theoretical reasoning, in cases dealing with individual or collective freedom of religion', see Merlin Kiviorg, 'Religious Autonomy in the ECHR' (2009) 4 Derecho y Religion 131, 131. See also 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, 339.

[6] *Guerra and Others v Italy* ECHR 1998-I 210, para 44.

[7] Ibid.

during the proceedings before it,'[8] suggesting that what is conceived of as relevant fact and law may be very broad indeed.

As such, it is not surprising that the ECtHR's characterisation of the complaint in question is not always the same as that of the applicant or respondent government. For the ECtHR the *forum internum* is not the determining factor in any given case, rather it is *a* factor which the ECtHR takes into account when considering the facts in Article 9 complaints. This important finding is worth unpacking in more detail here.

Part II argues that Article 9 jurisprudence is not driven simply by the question of whether a complaint engages the *forum internum* or the *forum externum*. Instead, the ECtHR takes into account *forum internum* relevance when considering the facts in Article 9 complaints and balances this against countervailing factors, to reach its outcome. This approach is not simply limited to the most contested cases, but rather, is the approach the ECtHR takes in all Article 9 cases, concerning all Article 9 rights.

This thesis argues that the ECtHR's consideration of the facts plays a significant role in Article 9 cases because the ECtHR's interpretation of the facts imbues its approach from the very outset in Article 9 complaints and plays out through the assessment as a whole. In the literature it is widely recognised that the ECtHR takes into account broader contextual factors in its consideration of whether there is a European consensus on a particular issue (e.g. conscientious objection or headscarf bans) or the breadth of the margin of appreciation to be afforded to States under Article 9.2. However, this thesis has stressed that these considerations do not simply appear at the end of an assessment under Article 9.2. Rather these considerations are there from the very *beginning* of the Article 9 assessment; the ECtHR balances in complaints of *all* 'types', concerning *all* rights, at *all* stages of the Article 9 assessment.

Indeed, the ECtHR has recently explicitly described its approach in *Rasul Jafarov v Azerbaijan* in which the applicant complained that he had been arrested and detained without 'reasonable' suspicion that he had committed a crime.[9] In its assessment under Article 5 and 3 the ECtHR explained, in order to be satisfied that the suspicion against the applicant was reasonable, it had 'to have regard to *all the relevant circumstances*', and 'in that connection, at the *outset*, the Court considers it necessary to have regard to the *general context* of the facts of this particular case.'[10] Further it explained that whilst the ECtHR was not asked to give a 'judicial assessment of the general context outlined in the complaint' it, 'nevertheless, considers that this *background*

[8] *Philis v Greece* (1991) Series A no 209, para 56 (my emphasis). See also Peter Kempees, *A Systematic Guide to the Case Law of the European Convention on Human Rights* (Springer 1996) 697.
[9] *Rasul Jafarov v Azerbaijan* App no 69981/14 (ECtHR, 17 March 2016), para 85.
[10] Ibid., para 120 (my emphasis). This is consistent with the comment made by Judge Mastscher in *Guzzardi v Italy*, explaining that 'measures complained of must always be put back into the general setting in which they belong', see *Guzzardi v Italy* (1980) Series no A 39, Partly Dissenting Opinion of Judge Matscher.

information is extremely relevant to the present case and calls for a particularly close scrutiny of the facts giving rise to the charges brought against the applicant.'[11]

It is worth examining this important statement here because this is precisely what this thesis argues that the ECtHR is doing, and should be understood to be doing, in relation to Article 9 complaints. The ECtHR makes three key points in *Rasul Jafarov v Azerbaijan*. Firstly, it explains that, taking into account all of the *relevant circumstances* it gives weight to the general context. Secondly, it explains that it gives weight to the general context from the *outset*. Bearing in mind that in this case the ECtHR was assessing the complaint under Article 5 (a qualified right) and Article 3 (an absolute right) this is important because it demonstrates the general context is not simply taken into account in the consideration of margin of appreciation in ECHR limitation clauses. It is important in all stages of the assessment. Thirdly, the ECtHR explains that its assessment of the general context can significantly affect its approach. In some cases, it may consider the background to be more or less important. The fact that some contexts call 'for a particularly close scrutiny of the facts'[12] implies that in others, a more superficial examination may be sufficient.

The ECtHR has further emphasised the importance of taking the general context into account in the recent case of *Khalaifia and Others v Italy.*[13] In this case the Grand Chamber emphasised that the absolute nature of Article 3 means that a State cannot be absolved of its obligations as a result of 'an increasing influx of migrants',[14] however, the ECtHR observed that 'it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose.'[15] Thus, it explained that in its assessment it would 'bear in mind, together with other factors' the 'situation confronting the Italian authorities at the relevant time.'[16]

It certainly seems that in recent years, in relation to Article 3 at least, the ECtHR is willing to explicitly acknowledge the importance it places on broader contextual factors in its assessment of Article 3 complaints.[17] Whilst the ECtHR has not been so explicit in its Article 9 jurisprudence, the analysis in Part II of this thesis leads one to acknowledge that the key question for the ECtHR when addressing Article 9 complaints seems to be: what is the issue for this particular applicant, in that particular context, at the relevant time? And, following from this,

[11] *Rasul Jafarov v Azerbaijan* App no 69981/14 (ECtHR, 17 March 2016), para 120.
[12] *Rasul Jafarov v Azerbaijan* App no 69981/14 (ECtHR, 17 March 2016), para 120.
[13] *Khlaifia and Others v Italy* App no 16483/12 (ECtHR, 15 December 2016).
[14] Ibid., para 184. See also, *MSS v Belgium and Greece* ECHR 2011-I 255, paras 223-224.
[15] *Khlaifia and Others v Italy* App no 16483/12 (ECtHR, 15 December 2016), para 185.
[16] Ibid.
[17] In *Sakir and Greece*, for instance, the ECtHR explicitly pointed out that the background of a rise in racist violence in the district in question was an important factor in this case concerning the physical assault of an Afghan national in Greece, see *Sakir v Greece* App no 48475/09 (ECtHR, 24 March 2016) [French].

what does it *mean* to protect the right to freedom of thought, conscience and religion for this particular applicant, in that particular context, at the relevant time?

This is of course a very different way of understanding the *forum internum* and *forum externum* distinction Article 9 jurisprudence than that advanced in the literature. The ECtHR takes into account *forum internum* relevance when considering the facts in Article 9 complaints. Recognising this means the way in which the ECtHR characterises a complaint, the approach it takes in the Article 9 assessment and the outcome it reaches appears much more understandable (or explicable) and apparent 'contradictions' or 'inconsistencies' in terms of characterisation, approach and/or outcome are often reconciled.

It must be stressed at this point, however, that this thesis does not intend to imply that the characterisations, approaches and outcomes in Article 9 cases are necessarily *correct*. What this thesis seeks to show is that, by recognising that the ECtHR balances factors indicating a violation (primarily, but not only, *forum internum* relevance) with countervailing factors indicating no violation one can understand *why* the ECtHR has approached a case in a particular way and reached a particular decision. The facts help the ECtHR to identify what the issue is in a given case and thus to respond accordingly. Notably, it explains why the ECtHR may take different approaches and reach different outcomes in ostensibly similar cases. If the facts are different it is likely that the ECtHR's approach and/or outcome might be different.

When Article 9 jurisprudence is understood in terms of the loose concentric circles model of protection, the ECtHR's approach and the outcomes it reaches does not appear arbitrary or inconsistent (as argued in the literature)[18] but rather appears more consistent. In cases in which the ECtHR establishes that States have interfered with an individual's absolute right to hold or change a religion or belief it usually gives greatest weight to the *forum internum* and very little weight to countervailing factors and thus offers a very high degree of protection. In terms of the concentric circles model, the innermost circle includes, for example, cases in which the ECtHR has established that an individual has been forced to abandon or adopt a religion or belief in order to keep a job.

In contrast, in cases in which the ECtHR finds that States have limited the behaviour of an individual or a community on the basis that it is considered harmful, and there is widespread consensus that it is harmful, the ECtHR usually gives little weight to the *forum internum* and great weight to countervailing factors and thus offers a very low degree of protection. In terms of the

[18] C Evans, for instance, argues that the outcomes are 'ad hoc', see 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.

concentric circles model, the outermost circle includes, for example, cases concerning corporal punishment of children or the use of large quantities of illegal drugs in religious ceremonies.

In the contested middle circle in the loose concentric circles model, protection ranges from the highest to lowest degree depending on the balance of factors. Whilst it is argued that the ECtHR balances *forum internum* relevance and countervailing factors in all Article 9 complaints, it is in cases in which *forum internum* relevance and countervailing factors are both strong or *forum internum* relevance and countervailing factors are both weak that the balancing exercise is most difficult. Relatively speaking, therefore, these are 'harder' cases. For example, the middle circle includes contested cases concerning limitations on the wearing of religious clothing or refusals to disclose religion or belief. If the ECtHR decides, on the basis of the facts, to give less weight to countervailing factors, it offers a higher degree of protection; if the ECtHR decides to give more weight to countervailing factors, it offers a lower degree of protection.

Given the stress on the importance of the facts in Article 9 jurisprudence in this thesis it is worth considering this in more detail.

ii. The Importance of the Facts in Article 9 Complaints

Part II revealed that the ECtHR often takes different approaches and reaches different outcomes in ostensibly similar Article 9 cases. In doing so, it is argued, the ECtHR is not necessarily being inconsistent. Rather this can be explained by recognising that the ECtHR considers that for the particular applicant, in that particular place at the relevant time the issue was *different*, and therefore, what it means to protect the right to freedom of thought, conscience and religion is also *different*. In respect of this, the ECtHR's consideration of differences between Member States is an important factor.

a. Differences Between Member States

For years, commentators have argued that the ECtHR gives too much deference to (certain) States through the doctrine of the margin of appreciation under Article 9.2 leading to it uncritically supporting State decisions to limit the manifestation of belief in question.[19] This approach, it is contended, has led to poor protection of the right to manifest religion or belief.

This thesis, however, has argued that this is an oversimplification which is the result of drawing generalisations from a small selection of Article 9 case law, especially early 'headscarf cases'. This thesis has repeatedly demonstrated that a close analysis of *all* case law relating to

[19] Ungureanu argues that the ECtHR is 'incapable' of developing a 'flexible but coherent understanding of the margin of appreciation', see 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* (CUP 2012), 333.

Article 9 does not reveal a consistent pattern of deference to Member States in relation to any 'type' of case. In fact, it reveals that in many cases the ECtHR disagrees with arguments advanced respondent governments, instead finding that State actions have violated Article 9. To take manifestation cases as an example, the ECtHR does not simply defer to States. The analysis of the case law in Part II has highlighted some typical counterexamples in which the ECtHR has found that the dissolution of religious communities, refusals to re-register and limitations on the wearing of religious clothing by individuals (including headscarves) constitutes not only an interference with, but a violation of, Article 9.

A close reading of the case law shows that the ECtHR is attuned to the variations across Member States and this affects the ECtHR's Article 9 analysis.[20] In some cases, this influences the finding of no violation of Article 9, whereas in other cases it leads to the ECtHR disagreeing with arguments put forward by States, and a finding of an Article 9 violation. Recognising that the ECtHR pays close attention to the broader context in Member States is not to suggest that the ECtHR understands the right to freedom of thought, conscience and religion differently in different cases, but rather, that the ECtHR appreciates that *what it means* to protect this right may be different depending on the particular applicant, place and time.[21] In other words, by taking into account broader contextual considerations in addition to the specific facts of the case, the ECtHR is making rights relevant rather than relative.

Take the issue of disclosing one's religion or belief. Commentators tend to argue that if the ECtHR finds that forcing individuals to disclose their religion or belief during oath taking proceedings in Greece constitutes a violation of Article 9, the ECtHR should take the same approach and reach the same outcome if a similar issue of disclosure against one's will is raised in Germany in the context of tax declarations *because* the complaints engage the *same* right. However, this thesis has argued, the ECtHR does not simply deploy a pre-defined approach just because the complaint engages the same Article 9 right. The approach is more nuanced and contextualised.

In these cases the ECtHR not only considered that there was a significant difference in terms of the facts (i.e. a State forcing an individual to reveal religion or belief without being prompted by that individual and a State seeking to substantiate an individual's claim for special measures), it also considered that there was something quite different at stake for the applicants in

[20] For a discussion of the importance of 'geographical politics' between Western and Eastern Europe see 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, 335-336.
[21] In *Ebrahimian v France*, for instance, the ECtHR explained that regulations on the manifestation of religion or belief 'vary from country to another depending on national traditions and the requirements imposed by the protection of the rights and freedoms of others and the maintenance of public order', see *Ebrahimian v France* ECHR 2015-VIII 99, para 56.

being forced to disclose one's religion or belief in Greece, in the context of oath taking proceedings in a public setting in 2008 and being forced to disclose one's religion or belief in Germany, on a confidential tax declaration in 2011. In these cases, the ECtHR seems to have given considerable weight to broader contextual factors, including the constitutional arrangements of the State in question, the religious make-up of the State and the potential for discrimination, particularly against minorities, as a result of being forced to reveal one's religion or belief. It seems that these considerations, taken together, were influential in leading to the ECtHR's different approach and outcome in these cases. The lesson here, therefore, seems to be that one should not expect the same outcome in different States, on similar facts.

b. Differences Within Member States

In addition to accounting for different outcomes in different Member States, this thesis argues that the ECtHR's approach to broader contextual considerations within the balancing process helps explain its different approaches and outcomes in ostensibly similar cases brought against the *same* State.

Take complaints about limitations on the wearing of religious clothing for instance. Commentators tend to argue that if the ECtHR finds that a limitation on the wearing of religious clothing outside of a Mosque constitutes a violation of Article 9, the ECtHR should take the same approach and reach the same outcome in a similar issue of limitations on the wearing of religious clothing on a university campus, because these cases are of the *same* 'type' (i.e. religious clothing cases). Given that the ECtHR has not done this, commentators have criticised the ECtHR for taking an inconsistent, unpredictable or ambiguous approach to this 'type' of complaint, especially when complaints of the *same* type are brought against the *same* State.[22]

This thesis has emphasised that for the ECtHR it is not the 'type' of complaint that is the driving force behind its approach; rather it is the ECtHR's interpretation of what it at stake for the particular applicant, in the particular context at the relevant time. Take, for instance, cases concerning limitations on the wearing of religious clothing in Turkey. It is clear that the ECtHR has given considerable weight to the political context, in the balance of factors, in these cases. As such, the ECtHR characterised the wearing of a headscarf on a university campus as a provocative challenge to the constitutional principle of secularism but characterised the wearing of religious clothing on the street outside of a Mosque as an innocuous manifestation.

[22] For Iglesias and Ungureanu, for instance, Article 9 jurisprudence is 'marked by ambiguity and inconsistency', see 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* (Routledge 2014) 27.

Thus, recognition of the changing context explains why the ECtHR reaches similar but not the *same* outcomes in similar cases. It is not a matter of incommensurability, but of the ECtHR taking into account the different and shifting facts when balancing factors indicating a violation (primarily, but not only, *forum internum* relevance) with countervailing factors indicating no violation. Indeed, the ECtHR has explicitly stated that it has 'regard to the changing conditions' in States.[23] This is a more rights-based rather than mechanical approach. And, this reading suggests that the ECtHR does not necessarily need to 'discipline', as Kamal has argued, the 'free-wheeling case by case balancing' in Article 9 jurisprudence.[24]

iii. The Importance of the Facts in Other ECHR Complaints

a. Predicting ECtHR outcomes Using Artificial Intelligence

The importance of the relevant facts is also being recognised in relation to complaints brought under other ECHR articles. A recent study which used natural language programming to predict the outcome in Article 3, 6 and 8 cases is illustrative in this respect.[25] The study found that the facts of a case are the best predictor for accuracy in Article 3 cases, and in Article 6 and Article 8 cases, the circumstances (which contain the factual background of the case) was the best predictor for accuracy. Indeed, they concluded that the factual background of a case is 'the most important part of the case when it comes to predicting the decision' whereas the law was the 'lowest factor for predictability.'[26] The authors argued that this supported a legal realism interpretation of the case law. Whilst this new study of this kind is not without its methodological limitations it is, however, interesting because it reveals that the facts is important in driving the outcome in complaints concerning articles other than Article 9.

b. Pilot Judgments

The importance of the specific facts to the ECtHR's approach is further evidenced when pilot judgments are considered. The pilot judgment procedure was introduced in 2004 to enable the ECtHR to address repetitive cases concerning systemic or structural problems at the national level efficiently.[27] When the ECtHR receives numerous (sometimes thousands)[28] of applications which

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[23] *Chapman v United Kingdom* ECHR 2001-I 41, para 70.
[24] See Jilan Kamal, 'Justified Interference with Religious Freedom: The European Court of Human Rights and the Need for Mediating Doctrine under Article 9(2)' (2007-2008) 46 Columbia Journal of Transnational Law, 667.
[25] Nikolas Aletras and others. 'Predicting Judicial Decisions of the European Court of Human Rights: A Natural Language Processing Perspective' 2 PeerJ Computer Science e93 <https://peerj.com/articles/cs-93/> accessed March 2019.
[26] Ibid.
[27] Council of Europe, 'European Court of Human Rights Factsheet: Pilot Judgments' (January 2019) <https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf> accessed January 2019.
[28] In *Greens and MT v The United Kingdom*, there were 2,500 similar complaints, see *Greens and MT v The United Kingdom* ECHR 2010-VI 57 (extracts).

'share a root cause' it can select one (or more) for 'priority treatment' in a pilot judgment[29] in which, the ECtHR not only decides whether there has been a violation in the selected case/s, but also identifies 'the systemic problem' and indicates to the government the (legislative) changes it needs to make to resolve it.[30]

In pilot judgments the ECtHR is concerned with the general, not the specific. Rather than considering what the issue is for the particular applicant, in the particular context at the relevant time, the ECtHR takes a much more general, broad brush approach so that the 'solution extends beyond the particular cases or cases', i.e. for the benefit of all.[31] For instance, with respect to claims concerning the right to property the ECtHR has called for States to implement a property right,[32] to 'secure effective and rapid right to restitution,'[33] and to 'take general measures' in order to effectively secure the right to compensation.[34] And, with respect to complaints about excessive length of proceedings and lack of domestic remedy, the ECtHR has, for instance, repeatedly called for States to introduce 'effective remedies' in respect of length of criminal proceedings. So, whilst the cases relate to specific States, the general guidance offered by the ECtHR is not State specific – it is about ensuring a standard across Member States (and increasingly dialogue with them).

It is, therefore, the general rule, rather than the particularities of the case/s, that the ECtHR seems to focus on in pilot judgments. This contrasts with Article 9 jurisprudence which is very fact specific, and in which the ECtHR usually refrains from making generalisations in respect the right to freedom of thought, conscience and religion. It must be noted that there have not yet been any pilot judgments in relation to Article 9, however, if there were to be, it is likely that they would concern complaints concerning endemic issues where the specific facts of individual cases would not be that important, such as complaints concerning refusals to register (or re-register) certain religious communities in Eastern European States. Indeed, a good example of a very 'general' complaint which might indicate what one would expect from an Article 9 pilot judgment is *Cyprus v Turkey* which concerned Greek Cypriots living in Northern Cyprus. [35] The

[29] Council of Europe, 'European Court of Human Rights Factsheet: Pilot Judgments' (January 2019) <https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf≥ accessed January 2019.
[30] Ibid. See also, Costas Paraskeva, 'Human Rights Protection Begins and Ends at Home: The "Pilot Judgment Procedure" Developed by the European Court of Human Rights' (University of Nottingham, 2006) <https://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2007/pilotjudgmentprocedure.pdf> accessed January 2019.
[31] Council of Europe, 'European Court of Human Rights Factsheet: Pilot Judgments' (January 2019) <https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf> accessed January 2019.
[32] Following one application, the ECtHR found that 80,000 people were in the same situation in *Broniowski v Poland* ECHR 2004-V 1.
[33] *Maria Atanasiu and Others v Romania* App no 30767/05 33800/06 (ECtHR, 12 October 2010).
[34] *Manushaqe Puto and Others v Albania* App nos 604/07 34770/09 43628/07 and 1 other (ECtHR, 31 July 2012), 110.
[35] *Cyprus v Turkey* ECHR 2001-IV 1.

ECtHR focused heavily on the 'general context' and in the Article 9 assessment, the ECtHR found that the restrictions on the freedom of movement placed on that population limited their right to manifest their religion and constituted a violation of Article 9.[36]

B. Broader Contextual Factors: Legitimate Considerations

This thesis argues that the ECtHR balances factors indicating a violation (primarily, but not only, *forum internum* relevance) with countervailing factors indicating no violation, in order to reach its decision in Article 9 cases. This, it is argued, shapes the Article 9 analysis from the outset, filtering through the assessment, whether explicitly or implicitly, to the outcome.

The ECtHR has emphasised that it can take into account any point or law or fact which arises out of the proceedings.[37] Indeed, in respect of the consideration of law, Judge Rozakis, has recently emphasised that 'the judges of Strasbourg do not operate in the splendid isolation of an ivory tower built with material originating solely from the ECHR's interpretative inventions or those of the States party to the Convention.'[38] Indeed, it is a 'cardinal principle' that the ECHR is a 'living instrument' which must be interpreted in light of 'present day conditions' in accordance with developments in international law.[39]

A detailed examination of the myriad of factors which the ECtHR takes into account, or which could legitimately be taken into account by the ECtHR, in the balance, is beyond the scope of this thesis. Specifically, such an examination would address a very different question to the questions that this thesis addresses. However, at this stage it is useful to briefly consider three broad cultural, social and political factors that one would *expect* to see the ECtHR consistently giving weight to when carrying out the balancing exercise in Article 9 cases, namely, i) the religious landscape of Europe, ii) constitutional arrangements of Member States and iii) contemporary concerns and values of Member States.

i. The Religious Landscape in Europe

It seems straightforward that in addressing complaints about State interference with the right to freedom of thought, conscience and religion that the ECtHR should take into account the religious landscape of Europe in order to place a particular complaint, in a particular Member State, against a broader background. As noted in the introduction, contrary to the secularisation

[36] Ibid., paras 241-247.
[37] *Philis v Greece* (1991) Series A no 209, para 56.
[38] Christos L Rozakis, 'The European Jude as a Comparatist' (2005) 80 Tulane Law Review 257, 278.
[39] Paulo Pinto de Alberquerque, 'Is the ECtHR Facing an Existential Crisis?' (Mansfield College, University of Oxford 28 April 2017) <https://www.law.ox.ac.uk/sites/files/oxlaw/pinto_opening_presentation_2017.pdf> accessed January 2019. See also *Tyrer v The United Kingdom* (1978) Series A no 26, para. 31; *Bayatyan v Armenia* ECHR 2011-IV 1, para 98.

thesis, there has not been a decline in religious observance. In Europe, religion has not been rejected, rather there has been a solidifying of religious observance and in many States, a marked increase in it.[40] Paradoxically, at the same time, there has been a significant growth in numbers of atheists and agnostics. Whilst, on the one hand, many religious adherents support and call for religion in the political sphere,[41] there are increasing calls for the public sphere, including politics, to be 'purged' of religion.[42] As such the relationship between religion and the State has become a really contested area.

This social and cultural trend is reflected in the Article 9 jurisprudence. There has been a significant shift, particularly over the last decade, in respect of the type of applicant bringing complaints under Article 9 before the ECtHR. For many years the ECtHR addressed complaints under Article 9 made by individuals who sought to justify behaviour which challenged the *status quo* or to access special treatment by appealing to their religion or belief and the ECtHR rarely found a violation of Article 9 in such cases. For instance, it was common to see cases in which prisoners attempted to ameliorate their situation by appealing *inter alia* to Article 9 rights.[43] Also, many of the earlier ECtHR cases featured applicants who were members of New Religious Movements (NRMs) including Druids,[44] Wiccans[45], Scientologists[46] and Moonies[47] and others[48] which were not often, at the material time, accepted as a religion or belief under domestic law (or even by the ECtHR) and they sought to access protection under Article 9. As the scope of 'religion or belief' under Article 9 has expanded to cover a broad spectrum of world views and types of manifestation, in recent years, cases concerning atypical behaviour or 'fringe' movements have tended to fade into the background.

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[40] Karl-Heinz Ladeur and Ino Augsberg, 'The Myth of the Neutral State and the Individualization of Religion: The Relationship between State and Religion in the Face of Fundamentalism' (2007) 8 German Law Journal 143, 143.

[41] See e.g., Roger Trigg, 'Religion in the Public Forum' (2011) 13:3 Ecclesiastical Law Journal 274.

[42] See e.g., Denise Meyerson, 'Why Religion Belongs in the Private Sphere, not the Public Square' in Peter Cane, Carolyn Evans and Zoe Robinson (eds) *Law and Religion in Theoretical and Historical Context* (CUP 2008). For discussion of the notion of 'freedom from religion' see, Heiner Bielefeldt, 'Misperceptions of Freedom of Religion or Belief' (2013) 35 Human Rights Quarterly 33, 49-50.

[43] *X v Germany* (1966) 22 Collection 1; *X v Federal Republic of Germany* (1970) 37 Collection 119; *X v Federal Republic of Germany* (1972) 40 Collection 25; *McFeely and Others v The United Kingdom* (1980) 20 DR 44; *X v The United Kingdom* (1982) 28 DR 5; *X v The United Kingdom* (1974) 1 DR 41; *X v The United Kingdom* (1976) 5 DR 100; *Natoli v Italy* App no 26161/95 (Commission Decision, 15 May 1998); *Kuznetsov v Ukraine* App no 39042/97 (Commission Decision, 20 October 1998); *Chester v The United Kingdom* App no 14747/89 (Commission Decision, 1 October 1990).

[44] *Chappell v The United Kingdom* (1987) 53 DR 241; *Pendragon v The United Kingdom* App no 31416/96 (Commission Decision, 19 October 1998).

[45] *X v The United Kingdom* (1977) 11 DR 55.

[46] *X and Church of Scientology v Sweden* (1979) 16 DR 68; *Church of Scientology v Sweden* (1980) 21 DR 10.

[47] *X v Autria* [sic] (1981) 26 DR 89; *L'Association Spirituale Per L'Unificazione Del Mondo Cristiano v Italy* App no 11574/85 (Commission Decision, 5 October 1987).

[48] *Omkarananda and the Divine Light Zentrum v Switzerland* (1981) 25 DR 105; *L'Assocation 'Sivananda de Yoga Vedanta' v France* App no 30260/96 (Commission Decision, 16 April 1998) [French].

In terms of the more recent jurisprudence, it is much more common to see individuals from 'traditional' religions (including Muslims[49] and Christians[50]) bringing Article 9 claims, and perhaps, most significantly, traditional religious organisations bringing claims under Article 9 (such as the Jehovah's Witnesses,[51] the Orthodox Church[52] and Muslim[53] and Jewish communities[54]). Reflecting the global picture, religious persecution is also on the rise in Europe;[55] there has been a dramatic rise in violence against religious groups,[56] bans on and dissolution of religious groups, confiscation and destruction of religious properties,[57] interference with structure and autonomy of religious communities,[58] disruption of religious meetings,[59] refusals to recognise religious communities,[60] and other oppressive measures actively preventing individuals from manifesting their religion or belief in community with others. Following the 2017 ban on Jehovah's Witnesses in Russia, for instance, which 'effectively criminalises peaceful worship of 175,000 citizens'[61] many Jehovah's Witnesses have sought asylum in Finland on the grounds of religious persecution.[62] And there is a marked rise in Islamophobia[63] and anti-Semitism across

[49] *Leyla Şahin v Turkey* ECHR 2005-XI 173; *Ahmet Arslan and Others v Turkey* App no 41135/98 (ECtHR, 23 February 2010) [French]; *Sinan Işik v Turkey* ECHR 2010-I 341.
[50] *Larissis and Others v Greece* ECHR 1998-I 362; *Eweida and Others v United Kingdom* ECHR 2013-I 215 (extracts).
[51] *97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia* App no 71156/01 (ECtHR, 3 May 2007); *Religionsgemeinschaft Der Zeugen Jehovas and Others v Austria* App no 40825/98 (ECtHR, 31 July 2008); *Association for Solidarity with Jehovah's Witnesses and Others v Turkey* App no 36915/10 8606/13 (ECtHR, 25 May 2016) [French].
[52] *Metropolitan Church of Bessarabia and Others v Moldova* ECHR 2001-XII 81; *Biserica Adevărat Ortodoxă Din Moldova and Others v Moldova* App no 952/03 (ECtHR, 27 February 2007); *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v Bulgaria* App nos 412/03 35677/04 (ECtHR, 22 January 2009).
[53] *Supreme Holy Council of the Muslim Community v Bulgaria* App no 39023/97 (ECtHR, 16 December 2004).
[54] *Cha'are Shalom ve Tsedek v France* App no 27417/95 (ECtHR, 27 June 2000).
[55] See Melissa Steffan, 'European Union Expands Asylum for Religious Persecution' *Christianity Today* (13 September 2012) <https://www.christianitytoday.com/news/2012/september/european-union-expands-asylum-for-religious-persecution.html> accessed January 2019; May Bulman, 'UK Government vows to do more to protect Christians from persecution worldwide after 'dramatic rise in violence' *Independent* (29 December 2018) <https://www.independent.co.uk/news/uk/politics/christians-persecution-jeremy-hunt-foreign-secretary-a8698446.html> accessed December 2018; New Europe Newsroom, 'Religious Persecution is increasingly becoming a global crisis' (11 March 2019) *New Europe* <https://www.neweurope.eu/article/religious-persecution-is-increasingly-becoming-a-global-crisis/> accessed January 2019.
[56] See, e.g., *Jehovah's Witness of Moscow and Others v Russia* App no 302/02 (ECtHR, 10 June 2010), para 94.
[57] Ibid.
[58] *Hasan and Chaush v Bulgaria* ECHR 2000-XI 117.
[59] *97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia* App no 71156/01 (ECtHR, 3 May 2007); *Boychev and Others v Bulgaria* App no 77185/01 (ECtHR, 27 January 2011) [French].
[60] *İzzettin Doğan and Others v Turkey* App no 62649/10 (ECtHR, 26 April 2016).
[61] Lizzie Dearden, 'British Government 'alarmed' at Russian ban on 'extremist' Jehovah's Witnesses, *Independent* (22 April 2017) <https://www.independent.co.uk/news/world/europe/russia-jehovahs-witnesses-ban-supreme-court-vladimir-putin-british-government-alarmed-criticism-a7696621.html> accessed December 2017.
[62] Oliver Carroll, 'Hundreds of Russian Jehovah's Witnesses apply for asylum in Finland' *Independent* (22 August 2018) <https://www.independent.co.uk/news/world/europe/jehovahs-witness-russia-finland-asylum-seekers-religion-a8503326.html> accessed August 2018.
[63] This has promoted a new European 'Counter-Islamophobia Kit' Project, see University of Leeds, 'Counter-Islamophobia Kit' (2019) <https://cik.leeds.ac.uk/> accessed February 2019.

Europe.[64] Puppinick suggests that there is a battle 'raging throughout Europe, a 'battle of cultural identity'.[65] Given the influx of immigrants to Europe questions of identity have become pre-eminent.[66]

And, notably, there are also more and more claims being brought before the ECtHR by atheists and agnostics, particularly in respect of forced disclosure of religion or belief. This issue is no longer confined to historic inquisitions or to dystopian fiction;[67] States are increasingly seeking to find out what individuals believe and/or are putting them into situations in which this can be plausibly deduced. Moreover, given advances in computing and neuroscience, it is likely that such issues might become even more problematic and widespread in the future.[68]

The point is that Article 9 jurisprudence is now largely concerned with individuals or religious communities that are bringing quintessential complaints about State interferences with or limitations upon their rights under Article 9, and the seriousness of these complaints is reflected in the fact that the ECtHR frequently finds violations of Article 9. On the whole, cases are not 'trivial',[69] despite what politicians or the mass media may suggest.[70] That the ECtHR should take into account the significant changes with respect to the protection of freedom or religion or belief in Europe in its analysis of such complaints seems obvious.

Moreover, and related to this, it seems that the changes in terms of the types of applicant complaining about violations of Article 9 and the different questions that arise as a result, should also be a legitimate consideration for the ECtHR. Take for example the increasing number of cases brought by religious organisations under Article 9.[71] Approaching such claims in the same way as claims about interference with an individual's freedom of religion may not be entirely

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[64] European Commission, 'Combatting Antisemitism' (European Commission) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/combating-antisemitism_en> accessed December 2018; 'German Jews warned not to wear kippas after rise in anti-Semitism, BBC News (26 May 2019) <https://www.bbc.co.uk/news/world-europe-48411735> (accessed May 2019).
[65] Grégor Puppinck, 'Lautsi v Italy: The Leading Case of Majority Religions in European Secular States' (Annual International Law and Religion Symposium, Provo, Utah 2-6 October 2010), 1.
[66] For a discussion of Muslims in France, see Sophie Body-Gendrot, 'France Upside down over a Headscarf?' (2007) 68:3 Sociology of Religion 289, 290-291.
[67] See, e.g. the 'thought-police' in George Orwell, *1984* (reissue edition, Penguin 1991).
[68] As brain computer interfaces can decode neurological activity, thoughts are no longer inviolable, see, 'Reading the Brain: Mind-goggling' *The Economist* (29 October 2011) <https://www.economist.com/science-and-technology/2011/10/29/mind-goggling> accessed January 2019. For a discussion of legal issues relating to mind-interventions, see Jan-Christoph Bublitz, 'My Mind is Mine!? Cognitive Liberty as a Legal Concept' in Elisabeth Hildt and Andreas G Franke (eds) *Cognitive Enhancement: An Interdisciplinary Perspective* (Springer 2013).
[69] There are of course still some unusual complaints, e.g. *Skugar and Others v Russia* App no 40010/04 (ECtHR, 3 December 2009).
[70] See e.g., David Cameron, 'Speech on the European Court of Human Rights' (25 January 2012) <https://www.theguardian.com/law/2012/jan/25/cameron-speech-european-court-human-rights-full>accessed December 2018.
[71] See e.g., Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010) 55-56.

appropriate given the facts. Firstly, it is not clear that religious organisations have freedom of conscience in the same way as individuals, especially if they are commercial enterprises.[72] And, religious communities tend to appeal to different combinations of ECHR rights in their claims before the ECtHR. [73] Whilst individuals often make claims under Article 9 in conjunction with Article 8 or Article 2 of Protocol 1, complaints under Article 9 by religious communities are often brought in conjunction with Article 11, Article 1 of Protocol 1 or Article 10.[74] This brings additional considerations into the mix. In particular, in complaints concerning religious organisations it seems the ECtHR should consider much wider questions about the place of religion in society, not just the specific facts of the case in hand.[75] This leads to the next point.

ii. Constitutional Arrangements of Member States

It also appears straightforward that the ECtHR should take into account the constitutional arrangement of the Members States in question in its analysis of Article 9 complaints. As Doe has pointed out, there are many different church-state arrangements or models across Member States in Europe.[76] The relationship between the religion and the State has numerous different dimensions[77] and the State's attitude towards religion is often reflected in the constitutional settlement.[78]

Even when the constitution of the State in question is not *directly* relevant to the complaint under Article 9, it remains relevant to some degree in any consideration of Article 9 because it reveals something about the attitude of the State towards religion or belief in general. For instance, there are often significant differences between the attitude towards the exercise of the right to freedom of thought, conscience and religion in 'secular' States and those with a clear State Church. That the ECtHR should take this into account seem obvious because it may significantly affect what it means to protect freedom of religion or belief for a particular

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[72] See e.g., *Kontakt-Information-Therapie and Hagen v Austria* (1988) 57 DR 81; *Kustannus Oy Vapaa Ajattelija AB and Others V Finland* (1996) 85-A DR 29. For discussion see Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010) 69.
[73] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010) 60.
[74] *United Christian Broadcasters Ltd v United Kingdom* App no 44802/98 (ECtHR, 7 November 2000); *Murphy v Ireland* ECHR 2003-IX 1 (extracts).
[75] Rivers points out that the growth in these types of cases means that some 'fundamental questions' concerning organised religions and the State are becoming prominent, see Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010) 71.
[76] Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011).
[77] Aernout Nieuwenhuis, 'State and Religion, a multidimensional relationship: some comparative law remarks' (2012) 10:1 International Journal of Constitutional Law 153.
[78] Ronan McCrea, 'The Recognition of Religion within the Constitutional and Political Order of the European Union' (LSE Europe in Question Discussion Paper, September 2009) <http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper10.pdf> accessed November 2018.

applicant, in a particular context. This is closely linked to the next point regarding contemporary concerns and values in Member States.

iii. Contemporary Concerns and Values in Member States

It also seems that the ECtHR should take into account contemporary concerns and values of Member States in its analysis of Article 9 claims. However, whilst one would expect the ECtHR to consider national norms, given the significant cultural and historical differences in Member States, it is important for the ECtHR to ascertain whether a measure in question reflects genuine concerns on the part of the State or reflects the pursuit of oppressive measures.

This is particularly evident in the area of legal regulation of religion. In recent years, religious association laws have been increasingly passed in order to control and restrict the activities, and sometimes even the existence, of religious organisations rather than to enhance their freedom.[79] Indeed, the legal recognition of a religious community by a State through registration laws can have a particularly negative effect of minority communities whose practices are not always well understood by the State in question. That the ECtHR should take into account this broader background to ascertain whether a limitation in a case in question is legitimate, seems natural and indeed appropriate.

It is also necessary for the ECtHR to take a cautious approach to claims of national security, particularly in response to heightened concern about safety in relation to terrorism. The protection of national security is explicitly excluded from Article 9.2, but States often advance such arguments under the protection of the rights and freedoms of others. Whilst the ECtHR should take into account the national setting, it also seems important that the ECtHR should carefully scrutinise the evidence to support the interference so concerns about extremism are not used as a vehicle for oppression of, or discrimination against, minority religions, especially Muslims, [80] or Jehovah's Witnesses,[81] which are often perceived to be a 'threat'.

The same goes for the ECtHR's consideration of values or policy arguments. Whilst it seems that the ECtHR should take this into account in any Article 9 assessment, the ECtHR

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[79] See generally, W Cole Durham Jr, 'Facilitating Freedom of Religion or Belief through Religious Association Laws' in W Cole Durham Jr and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004); Organisation for Security and Co-operation in Europe (OSCE), 'Freedom of Religion or Belief: Laws Affecting the Structures of Religious Communities' by Cole Durham (September 1999) <https://www.osce.org/odihr/16698?download=true#f3> accessed November 2018; Organisation for Security and Co-operation in Europe (OSCE), 'Guidelines on the Legal Personality of Religious or Belief Communities' (2014) <https://www.osce.org/odihr/139046?download=true> accessed November 2018.

[80] E.g. Jamie Grierson and Vikram Dodd, 'Prevent Strategy on Radicalisation Faces Independent Review' *The Guardian* (22 January 2019) <https://www.theguardian.com/uk-news/2019/jan/22/prevent-strategy-on-radicalisation-faces-independent-review> accessed January 2019.

[81] Daniel Ortner, 'Conscientious Offenders: Russia's Ban on "Extremist" Religious Literature and the European Court of Human Rights' (2014) 55:3 Virginia Journal of International Law 1.

should be cautious about the weight it decides to give to such factors. Societal values, such as the notion of *le vivre ensemble*, can be vague and, as the ECtHR has pointed out, are at 'risk of abuse'.[82] Again, appeals to social values, or policy arguments, can again be part of an oppressive or discriminatory agenda on the part of the State. For instance, whilst States may claim that the disclosure of religion or belief of citizens is necessary for policy reasons, such as the organisation of religious education in schools, it could also function as a means of control of discrimination. So, what may seem like an appropriate way of safeguarding freedom of religion in one State may not be an appropriate way of safeguarding in another, where there are different concerns and values. By paying close attention to the facts in Article 9 complaints the ECtHR can tailor the protection to the circumstances. This, however, may become increasingly difficult for the ECtHR in practice, given the recent developments concerning the role and future of the ECtHR.

iv. Future Trajectory of the ECtHR: A 'Closer Union' with Member States?

A common criticism of the ECtHR in general is that it interferes too much with the sovereignty of States, in other words, that it intrudes excessively into the domain of domestic courts and parliaments. For instance, the UK's ex-Prime Minister, David Cameron, argued that the ECtHR did not 'respect' reasonable decisions made by domestic courts, and that the margin of appreciation afforded to States was too 'slim'.[83] In recent years, particularly during the UK government's presidency of the Council of Europe in 2012, attempts have been made to address this perceived problem. Recent reforms of the ECtHR envisage an even closer relationship between the ECtHR and Member States through a greater emphasis on the principle of subsidiarity[84] and margin of appreciation.

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[82] *SAS v France* ECHR 2014-III 341 (extracts) para 122.

[83] David Cameron, 'Speech on the European Court of Human Rights' (25 January 2012) <https://www.theguardian.com/law/2012/jan/25/cameron-speech-european-court-human-rights-full>accessed December 2018.

[84] The principle of subsidiarity means that Members States are first and foremost responsible for ensuring ECHR rights, and the ECtHR should only intervene where domestic authorities have failed in their duty. Interestingly, Fokas claims that the principle of subsidiarity is also originally a Roman Catholic concept, which suggests a matter should be dealt with by 'the smallest, lowest, or least centralized authority' which can address it effectively, 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, 59.

Both the Brighton Declaration[85] and the Copenhagen Declaration[86] on the reform of the ECtHR emphasise the role of domestic legal and political institutions in ensuring respect for ECHR rights. The Brighton Declaration encouraged the ECtHR to give 'greater prominence to and consistently apply' the principles of subsidiarity and the margin of appreciation in its judgments.[87] Building upon calls for 'a closer union', it was decided at the conference to add a recital to the preamble of the ECHR explaining that in accordance with the principle of subsidiarity, Member States have the 'primary responsibility' for ensuring that rights in the ECHR and the Protocols can be enjoyed by citizens, and in doing so, they have a margin of appreciation which is subject to the supervisory jurisdiction of the ECtHR.[88] The Copenhagen Declaration further emphasised the principle of subsidiary, explaining that it is intended to enhance rather than weaken human rights protection in Europe by underlining the responsibility domestic authorities have for ensuing the rights and freedoms in the ECHR. The role of the ECtHR, it explains, is to act as a 'safeguard for violations that have not been remedied at the national level.'[89] The ECtHR is to act as a 'fail-safe'[90] or an '*ultimum remedium*'.[91] The principle of subsidiarity has been further strengthened through the Advisory Opinion procedure in Protocol

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[85] European Court of Human Rights, 'High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration' <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed January 2019. For a summary of the meeting see, Derek Walton and Elizabeth Wilmshurst, 'The Future of the European Court of Human Rights: The Brighton Declaration' (8 November 2012) <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/081112summary.pdf> accessed January 2019.

[86] Council of Europe, 'Copenhagen Declaration' (12-13 April 2018) <https://rm.coe.int/copenhagen-declaration/16807b915c> accessed January 2019.

[87] European Court of Human Rights, 'High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration' <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed January 2019, para 12.

[88] Council of Europe, 'Copenhagen Declaration' (12-13 April 2018) <https://rm.coe.int/copenhagen-declaration/16807b915c> accessed January 2019, para 7. As Fokas rightly points out the margin of appreciation and subsidiarity principle has been a long established feature of the ECtHR jurisprudence, but was formally made a part of the ECHR in Protocol 15, 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, 61.

[89] European Court of Human Rights, 'High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration' <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed January 2019; Council of Europe, 'Copenhagen Declaration' (12-13 April 2018) <https://rm.coe.int/copenhagen-declaration/16807b915c> accessed January 2019, para 26.

[90] Willi Fuhrmann, 'Perspectives on Religious Freedom from the Vantage Point of the European Court of Human Rights' [2000] Brigham Young University Law Review 829, 830.

[91] Costas Paraskeva, 'Human Rights Protection Begins and Ends at Home: The "Pilot Judgment Procedure" Developed by the European Court of Human Rights' (University of Nottingham, 2006) <https://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2007/pilotjudgmentprocedure.pdf> accessed January 2019.

16, effective from 1 August 2018.[92] According to Protocol 16 the highest court in Member States that are party to the Protocol can request non-binding advisory opinions from the ECtHR on questions of interpretation and application of the ECHR and its protocols, which have arisen out of cases that are pending before the domestic court.[93] According to the preamble to Protocol 16, this procedure is intended to further enhance the 'enhance the interaction' between the ECtHR and domestic authorities, and in doing so, enhance the implementation of the ECHR.[94]

The key point is that in these reforms the importance of knowledge of the local context is a *leitmotif.* Both the Brighton and Copenhagen Declarations, for instance, explain that national authorities are 'in principle' better placed to understand the local context than an international court[95] (and by implication, better positioned to protect ECHR rights). And the Copenhagen Declaration reiterates the importance of context in its observation that, in respect of Articles 8-11, 'there may be a range of different but legitimate solutions' which may be compatible with the ECHR 'depending on the context.'[96]

The draft Copenhagen Declaration affirmed the importance of ensuring that ECHR rights are protected by State authorities at a national level 'in accordance with their constitutional traditions and in light of national circumstances.'[97] However, it is interesting to note that the ECtHR reacted to this statement in the draft text, on the grounds that it was 'confusing'. The ECtHR explained that while it would take into account 'constitutional traditions' and 'national circumstances' in establishing whether a State has complied with the ECHR in a given case, it is 'ultimately' for the ECtHR to make the decision whether State actions are compatible with the ECHR, as stated in the case law.[98] This reveals that whilst the ECtHR will continue to take into account the specific facts (and perhaps place even more emphasis upon them), it remains committed to its supervisory function.

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[92] Council of Europe, Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (12 October 2013) CETS No.214, para 2, <https://www.echr.coe.int/Documents/Protocol_16_ENG.pdf> accessed December 2018.
[93] Ibid.
[94] Ibid.
[95] This is recognised by the ECtHR, see e.g. *İzzettin Doğan and Others v Turkey* App no 62649/10 (ECtHR, 26 April 2016), para 112.
[96] Council of Europe, 'Copenhagen Declaration' (12-13 April 2018) <https://rm.coe.int/copenhagen-declaration/16807b915c> accessed January 2019, para 28.
[97]Council of Europe, 'Draft Copenhagen Declaration' (5 February 2018) <https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf> accessed January 2019, para 14.
[98] Council of Europe, 'Opinion on the Draft Copenhagen Declaration', (19 February 2018) <https://www.echr.coe.int/Documents/Opinion_draft_Declaration_Copenhague%20ENG.pdf> accessed January 2019.

Conclusion

This chapter draws together the findings from Part II, emphasising that Article 9 jurisprudence does not operate on the basis of a binary and hierarchical distinction between the absolute *forum internum* and the qualified *forum externum* but shows rather that the ECtHR takes a much more nuanced approach to Article 9 protection. For the ECtHR, the *forum internum* is always relevant, it is just that the extent of its relevance depends on the ECtHR's consideration of the facts. However, whilst *forum internum* relevance is the most significant factor weighing in favour of the applicant, it is not the only factor which determines the outcome in Article 9 cases; the ECtHR balances factors indicating a violation (primarily, but not only, *forum internum* relevance) with countervailing factors indicating no violation, from the outset of its assessment, in order to reach its decision.

For the ECtHR the key question in Article 9 complaints seems to be: what is the issue for the particular applicant, at the material time, in the particular context? And, what does it mean to protect freedom of religion or belief as a result? This approach means that the ECtHR takes into account important factual differences between and within Member States, and in doing so, makes rights relevant.

An examination of the broad cultural, social and political factors that the ECtHR could take into account in its consideration of the facts is beyond the scope of this thesis, however, it one would *expect* to see the ECtHR consistently giving weight to the religious landscape of Europe, constitutional arrangements of Member States and contemporary concerns and values of Member States. And, given the emphasis on knowledge of the local context stressed in the ongoing ECtHR reforms, it is likely that the facts, will continue to be relevant — and perhaps become even more prominent — in subsequent Article 9 cases.

CONCLUSION

The purpose of this thesis was to explore the understanding of the right to freedom of thought, conscience and religion in Article 9 of the ECHR and the protection of this right by the ECtHR. More specifically, it sought to examine whether the orthodoxy in the literature — that there is a binary and hierarchical distinction between the *forum internum* and the *forum externum* in Article 9 and that the understanding and application of this distinction by the ECtHR is undermining rather than enhancing the protection of the right to freedom of thought, conscience and religion — stands up to scrutiny, or whether there is a better way of understanding Article 9 and the jurisprudence. Through a comprehensive doctrinal analysis of the text of ECHR Article 9, the related international instruments, the relevant *travaux préparatoires* and a detailed examination of *all* of the case law relating to Article 9 available in English and also in French, from the 1960s to the present day, this thesis has argued that there is very little support for the traditional approach to Article 9 in the literature and has, instead, offered a radical reappraisal of the understanding of Article 9 and Article 9 jurisprudence.

The detailed examination of the way in which the right to freedom of thought, conscience and religion and the protection of this right by the ECtHR has been presented in the literature revealed that it is difficult to overemphasise the centrality of the *forum internum* and *forum externum* distinction in this material. For many years, commentators have claimed that there is a binary and hierarchical distinction between the absolute *forum internum* and the qualified *forum externum* in the architecture of freedom of religion or belief articles and that this is also a doctrine of the ECtHR. Crucially, there is widespread consensus that the correct application of the distinction is paramount for the protection of Article 9 rights in practice. Despite this, however, commentators have increasingly criticised the ECtHR's understanding and application of the distinction, and the very existence of such a distinction in Article 9. In offering suggestions to address the problems they have identified commentators have been constrained by the perceived centrality of the *forum internum* and *forum externum* distinction and have sought to 'tweak' this rigid framework.

The comprehensive and chronological analysis of the literature in this thesis revealed the interesting fact that, rather than being a feature of the literature on Article 9 from the *outset*, the distinction between the *forum internum* and *forum externum* has become increasingly central over time, notably, growing exponentially after the publication of C Evans' seminal text.[1] And, the increased use of the terms, and the emphasis on their distinctiveness, is largely the result of intertextual reliance rather than engagement with the case law; it is an idea that has become

[1] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001).

entrenched in the literature through superficial references, and repeated, unsupported assertions. And the same goes for early criticisms of the ECtHR; these criticisms have largely been built upon unquestioningly by later commentators, who have added a further conceptual critique of the binary and hierarchical *forum internum* and *forum externum* distinction. On the basis of this literature review alone, therefore, the accuracy of the presentation of the *forum internum* and *forum externum* distinction can be seriously called into question.

The credibility of the claim that there is a clear binary and hierarchical distinction between the *forum internum* and the *forum externum* is further undermined through the examination of the way in which the right to freedom of thought, conscience and religion is presented in the text of ECHR Article 9, related international instruments (including the UDHR, ICCPR and 1981 Declaration) and relevant *travaux préparatoires.* This primary material reveals that the *forum internum* and the *forum externum* aspects of the right to freedom of thought, conscience and religion are both important and deeply interrelated elements of this broad right and suggests it is more faithful to the text of Article 9 and the original intent of the drafters to speak of a *forum internum* and *forum externum* relationship. Indeed, any claims that there is a bright line distinction are textually unfounded.

This understanding of the *forum internum* and *forum externum* in terms of a relationship is supported in the close textual analysis of the presentation of Article 9 in all of the case law, available in both English and in French from the 1960s to the present day. The presentation of Article 9 (in the general principles section of the case law) reveals that the *forum internum* and the *forum externum* are integral and deeply interrelated aspects of the right to freedom of thought, conscience and religion. The notion that a binary and hierarchical distinction between these rights is a 'doctrine' of the ECtHR is, therefore, jurisprudentially unfounded.

These findings called for a radical reappraisal of the understanding of Article 9. Building upon a recent, deeply valuable, interpretation of the *forum internum* and *forum externum* relationship in ICCPR Article 18 in the literature,[2] this thesis argued ECHR Article 9, the relevant *travaux préparatoires* and the general principles in the case law, suggest that the *forum internum* and *forum externum* in Article 9 is also best understood in terms of a conceptual continuum, ranging from the *forum internum* to the *forum externum*. The notion of the conceptual continuum is more apt to encompass the complexities of the broad right to freedom of thought, conscience and religion, than the idea of a clear-cut *forum internum* and *forum externum* distinction because it recognises that the *forum internum* is always relevant in Article 9 complaints. The *forum*

[2] See Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (OUP 2016), 76, 82-89, 93, 98, 290-291, 486-487, 566-567.

internum is always in play, even in cases concerning limitations on the right to manifest, because manifestations are intimately linked to, or flow from, the *forum internum.*

Sanderson criticised C Evans for continuing to use the term *forum internum* despite pointing out 'conceptual uncertainty and inconsistencies in its application,' noting that she failed to offer 'a stronger or more coherent conception' in its place, or a 'more accurate or unifying description of the concept itself'.[3] The thesis argues that the terms *forum internum* and *forum externum* remain useful to the understanding of Article 9; the terms themselves are not problematic, what is problematic is the way in which they have been understood in the literature.

As a corollary of recognising the relationship between the *forum internum* and *forum externum*, and as a result of closely examining the language used to describe protection under Article 9, this thesis hypothesised that if the protection of Article 9 corresponds to the presentation of Article 9 by the ECtHR, one would expect protection to be more nuanced than the literature suggests. Rather than a bright line between 'absolute' and 'qualified' protection, one would expect protection under Article 9 to range from a very high degree of protection to a very low degree of protection. Where *forum internum* relevance is strongest and countervailing factors weakest, one would expect the highest degree of protection. Where *forum internum* relevance is weakest and countervailing factors strongest, one would expect the lowest degree of protection. Where *forum internum* relevance and countervailing factors are contested, one would expect to see protection ranging from the highest to lowest degree depending on the balance of factors.

As such, a loose concentric circles model was proposed as a useful way of grouping the cases according to the ECtHR's characterisation. Cases in which *forum internum* relevance is strongest and countervailing factors weakest fall into the innermost circle. Cases in which *forum internum* relevance is weakest and countervailing factors strongest fall into the outermost circle. Cases in which *forum internum* relevance and countervailing factors are both strong or cases in which *forum internum* relevance and countervailing factors are both weak fall into the contested middle circle. Whilst the ECtHR balances in cases concerning all Article 9 rights, cases in the middle circle are 'harder' cases (relatively speaking) than those which fall into the innermost and outermost circles because the balancing exercise is more difficult in those cases.

To test this hypothesis, this thesis conducted a detailed analysis of the application of the principles to the facts of the case in Article 9 complaints concerning a very wide variety of Article 9 rights (including the right to hold or change a religion or belief, the right to manifest a religion or belief, the right to conscientious objection, the right not to be forced to directly participate in a religion of which one is not a member and the right not to disclose a religion or

[3] MA Sanderson, 'Book Review: Evans C, Freedom of Religion Under the European Convention on Human Rights' (2002) 65:1 Modern Law Review 141, 142.

belief) and a wide variety of ‘types’ of cases (including cases relating to psychiatric treatment, religious education, dissolution of religious organisations, proselytism, religious clothing, conscientious objection to military service, church tax, oath taking and so on). This analysis, of the vast corpus of case law relating to Article 9 available in English and French from the 1960s to the present day, revealed the loose concentric circles model of protection is a better model for understanding Article 9 case law than the notion of a strict binary and hierarchical *forum internum* and *forum externum* distinction because it reflects the ECtHR’s nuanced approach to Article 9 protection. Importantly, the loose concentric circles model shows that there are some clear patterns in the jurisprudence. Where the ECtHR considers *forum internum* relevance to be strongest and countervailing factors weakest, it offers a very high degree of protection under Article 9. Where the ECtHR considers *forum internum* relevance to be weakest and countervailing factors strongest, it offers a low degree of protection under Article 9. Where the ECtHR considers the relevance of countervailing factors to be contested, if offers protection ranging from a high to low degree depending on the balance of factors.

This is a significant conclusion. Article 9 jurisprudence is driven by the ECtHR balancing factors indicating a violation of Article 9 (primarily, but not only, *forum internum* relevance) with countervailing factors indicating no violation, from the outset of the assessment. This is a very different way of understanding Article 9 jurisprudence. Rather than asking whether the complaint at issue is a *forum internum* or *forum externum* complaint, and deploying an approaching accordingly, the ECtHR seems to take a much more nuanced approach. The key question for the ECtHR seems to be: what was the issue for this particular applicant, in that particular context, at the relevant time? And, given this, what does it *mean* to protect the right to freedom of thought, conscience and religion for that particular applicant, in that particular context at the relevant time? This is a much more rights-focused rather than a mechanical approach to Article 9. Importantly, it explains why the ECtHR reaches different decisions in cases of a similar ‘type’. If the ECtHR considers that there are significant differences in the facts, the ECtHR’s approach to the complaint and the outcome it reaches may also be different.

A key point about the analysis in this thesis is that it grapples with the implications of the *forum internum* and *forum externum* relationship not only being a feature of the text of Article 9 and the related *travaux préparatoires* but a feature of Article 9 jurisprudence too. It does not, after recognising the textual relationship between the *forum internum* and *forum externum*, retreat to the traditional position that a strict dichotomy between the ‘absolute’ *forum internum* and the ‘qualified’ *forum externum* must be maintained in order to protect Article 9 rights in practice. It recognises that the ECtHR appreciates the relationship between the *forum internum* and *forum externum* in Article 9 claims and this does not necessarily threaten, but can enhance, protection.

This reconceptualisation of the place of the *forum internum* and *forum externum* in ECHR Article 9 and Article 9 jurisprudence has significant corollaries. Notably, it reveals that many of the criticisms of Article 9 and the protection of this right in the literature which are based specifically on the notion of a binary and hierarchical distinction between the *forum internum* and *forum externum* are potentially mistaken because they are the result of viewing Article 9 and the case law through an inappropriate framework. Just because the jurisprudence does not fit the rigid, binary and hierarchical *forum internum* and *forum externum* framework, largely set up in the literature, does not mean the ECtHR is getting the approach to, and decisions in, Article 9 cases, 'wrong'. Article 9 jurisprudence is considerably more fluid than recognised in the literature. Importantly, the ECtHR appreciates the interrelationship between the *forum internum* and the *forum externum*, and this is reflected in the protection of Article 9 rights. It is misleading to continue to criticise the ECtHR for 'ignoring' the *forum internum* implications in complaints concerning the *forum externum*. It is also misleading to continue to criticise the ECtHR for failing to precisely delineate which rights fall into the *forum internum* and the *forum externum* and/or for 'confusing' the distinction between the absolute *forum internum* and the qualified *forum externum.* There is not a bright line between the *forum internum* and the *forum externum* in Article 9 jurisprudence; for the ECtHR, the *forum internum* is always relevant in Article 9 cases, it is just that the extent of its relevance depends on the ECtHR's consideration of the facts.

Added to this, it is also harmful to criticise the ECHR Article 9 and the jurisprudence on the grounds that it reflects a Western Christian model of religion or belief, and as a result is biased towards orthodoxy and against orthopraxy. This is because this kind of criticism feeds into general criticism of the ECtHR that it is a Western instrument, biased against non-Western values, and thus, contributes to the undermining of the universality of human rights.[4] Article 9 protects various rights including the rights to hold, change and manifest a religion or belief. This thesis has argued that the holding of a religion or belief is not considered to be superior to the manifestation of it; the ECtHR recognises that holding a belief and acting in accordance with it are both integral aspects of the right to freedom of thought, conscience and religion and are interrelated because the *forum externum* flows from, or is 'bound up' with the *forum internum*.[5]

The findings in this thesis, therefore, have significant implications for the way in which Article 9 and the jurisprudence is understood by commentators. The current model in the literature is frustrating and constraining analysis of Article 9 jurisprudence. Criticisms about the inconsistency and incoherence of the jurisprudence, on the basis of a rigid *forum internum* and

[4] For discussion of the universality debate, see Malcolm D Evans, 'Human Rights, Religious Liberty and the Universality Debate' in O'Dair R and Lewis A (eds) *Law and Religion* (OUP 2001) 205-226.
[5] *Kokkinakis v Greece* (1993) Series A no 260-A, para 31.

forum externum distinction, detracts from the considerable contribution that the ECtHR *has* made to the protection of the right to freedom of thought, conscience and religion since the 1960s. Given the ECtHR is already facing a 'crisis of legitimacy' as judgments are frequently criticised and their legitimacy often questioned by Members States, media and society in general,[6] it would be wise to avoid such potentially misplaced criticisms.

The corollary of demonstrating that the *forum internum* and the *forum externum* are understood as integral and interrelated aspects of Article 9 and that this is reflected in the nuanced approach in the jurisprudence, is that commentary should move away from a narrow focus on the jurisprudential purity of the application of the *forum internum* and *forum externum* distinction (largely in isolation from the facts) and towards the more important question; is the ECtHR effectively implementing the ECHR right to freedom of thought, conscience and religion? In other words, it could potentially lead to an increased focus on the cogency of Article 9 cases. It must be emphasised that where decisions are not clear, logical and convincing, they should rightly be criticised.[7] But, the jurisprudence should be criticised on its own terms, not on the basis of its adherence to a binary and hierarchical framework largely perpetuated in the literature.

Additionally, these findings — particularly those concerning the driving force in Article 9 jurisprudence — also have implications for the way in which legal practitioners acting for applicants, frame Article 9 complaints (and for the way in which governments respond to such complaints). The notion of a strict distinction between the *forum internum* and the *forum externum* is increasingly becoming a feature of practitioner material.[8] However, this thesis argues that such a distinction is not founded textually or jurisprudentially. The *forum internum* is always relevant in Article 9 complaints, it is just relevant to a greater or lesser extent depending on the ECtHR's consideration of the facts. This means that practitioners do not need to frame Article 9 complaints *either* as complaints engaging the *forum internum* or the *forum externum* but can take a more nuanced approach. What seems to be really key is to show the extent to which the *forum internum* is engaged on the facts because where the ECtHR considers *forum internum* relevance to be strongest and countervailing factors to be weakest, it offers the very highest degree of protection. So, if the State actions in question have affected an applicant's *forum internum*, then it is essential that practitioners make this clear.

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[6] Given the ECtHR is already facing a 'crisis of legitimacy' as judgments are fiercely criticised and their legitimacy is repeatedly questioned by Members States, media and society in general, it would be wise to avoid such potentially misplaced criticisms, see Kanstantsin Dzehtsiarou and Alan Greene, 'Legitimacy and the future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners' (2011) 12:10 German Law Journal 1707, 1707.

[7] Indeed, the ECtHR has itself emphasised the importance of consistency in terms of the interpretation and application of the ECHR, see *Chapman v United Kingdom* ECHR 2001-I 41, para 70.

[8] See e.g. James Dingemans and others, *The Protections for Religious Rights: Law and Practice* (OUP 2013) 81.

Furthermore, these findings also have implications for judges, both at the domestic level and at the ECtHR in terms of the interpretation and application of Article 9. Future judges are not only being shaped by the ECtHR's jurisprudence but also by academic commentary on Article 9. Given that the literature is not, as this thesis argues, an accurate reflection of what the ECtHR has done and what it continues to do in relation to Article 9, this is potentially damaging to the protection of this right at the ECtHR. Indeed, judges often disagree over the interpretation of Article 9, particularly in dissenting opinions.[9] If there were a general understanding that the *forum internum* and the *forum externum* are deeply interrelated elements, and that as such, the *forum internum* is always relevant in Article 9 complaints, to a greater or lesser extent depending on the facts, perhaps there would be less disagreement on this architectural point.

Overall, therefore, this thesis contends that this radical reconceptualisation of the place of the *forum internum* and the *forum externum* in ECHR Article 9 and the ECtHR jurisprudence advances the understanding of the right to freedom of thought, conscience and religion and the protection of this right in practice.

[9] Sophie van Bijsterveld S, 'A Typology of Dissent in Religion Cases in the Grand Chamber of the European Court of Human Rights' (2017) 12 Religion and Human Rights 223, 226-228, 231.

BIBLIOGRAPHY

Books

Adhar R and Leigh I, *Religious Freedom in the Liberal State* (2nd edn, OUP 2013)

Alexy R, *A Theory of Constitutional Rights* (OUP 2010)

Alston P and Goodman R, *International Human Rights* (OUP 2012)

Ankersmith FR, *History and Tropology: The Rise and Fall of Metaphor* (University of California Press 1994)

Ankersmit FR, *Aesthetic Politics: Political Philosophy Beyond Fact and Value* (Stanford University Press 1997)

Bielefeldt H, Ghanea N and Wiener M, *Freedom of Religion or Belief: An International Law Commentary* (OUP 2016)

Bossuyt M, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Springer 1987)

Brems E (ed) *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (CUP 2013)

Brems E and Gerrards J (eds) *Shaping Rights in the ECHR* (CUP 2015)

Cane P, Evans C and Robinson Z (eds) *Law and Religion in Theoretical and Historical Context* (CUP 2008)

Cochran CE, *Religion in Public and Private Life* (Routledge 2015)

Canon Law Society of America, *Code of Canon Law, Latin-English Edition, New English Translation* (Canon Law Society of America 1999)

Cismas I, *Religious Actors in International Law* (OUP 2014)

Cohen J and Laborde C (eds) *Religion, Secularism and Constitutional Democracy* (Columbia University Press 2016)

Collinson P, *Reformation* (Weidenfeld and Nicolson 2005)

De Londras F and Dzehtsiarou K, *Great Debates on the European Convention on Human Rights* (Red Globe Press 2018)

Dingemans J and others, *The Protections for Religious Rights: Law and Practice* (OUP 2013)

Doe N, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011)

Edge PW and Harvey G (eds) *Law and Religion in Contemporary Society: Communities, Individualism and the State* (Ashgate Publishing Ltd 2000)

Elton GR, *Reformation Europe 1517-1559* (Fontana 1963)

Elver H, *The Headscarf Controversy: Secularism and Freedom of Religion* (OUP 2014)

Evans C, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001)

Evans MD, *Religious Liberty and International Law in Europe* (CUP 1997)

---------, *Manual on the Wearing of Religious Symbols in Public Areas* (Council of Europe/Martinus Nijhoff 2009)

Fawcett JES, *The Application of the European Convention on Human Rights* (2nd edn, OUP 1987)

Fumurescu A, *Compromise: A Political and Philosophical History* (CUP 2013)

Gearty C (ed), *The Cambridge Companion to Human Rights Law* (CUP 2012)

Gerosa L, *Canon Law* (LIT Verlag Munster 2002)

Glendon MA, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House Trade Paperbacks 2002)

Gomien D, *Short Guide to the European Convention on Human Rights* (Council of Europe 1991)

---------, *Short Guide to the European Convention on Human Rights* (3rd edn, Council of Europe 2000)

Gomien D, Harris D and Zwaak L, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe 1996)

Greer S, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2006)

Harbo T, *The Function of Proportionality Analysis in European Law* (Martinus Nijhoff 2015)

Harris D, O'Boyle M and Warbrick C, *European Convention on Human Rights* (LexisNexis 1994)

Harris D and others, *Law of the European Convention on Human Rights* (1st edn, Butterworths 1995)

Harris D and others, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009)

Harris D and others, *Harris O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, OUP 2014)

Harris D and others, *Harris O'Boyle & Warbrick: Law of the European Convention on Human Rights* (4th edn, OUP 2018)

Haas M, *International Human Rights: A Comprehensive Introduction* (2nd edn, Routledge 2013)

Hill D and Whistler D, *The Right to Wear Religious Symbols* (Palgrave 2013)

Hosen N and Mohr R, *Law and Religion in Public Life: The Contemporary Debate* (Routledge 2011)

Howard E, *Law and the Wearing of Religious Symbols: European Bans of the Wearing of Religious Symbols in Education* (Routledge 2011)

Humphrey JP, *Human Rights and the United Nations: A Great Adventure* (Transnational Publishers 1984)

Hunter-Henin M, *Law, Religious Freedoms and Education in Europe* (Ashgate 2012)

Janis M, Kay R and Bradley A, *European Human Rights Law: Text and Materials* (3rd edn, OUP 2008)

Janis M and Evans C (eds) *Religion and International Law* (Brill 1999)

Joseph S, Schultz and Castan M, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd edn, OUP 2005)

Joseph S and McBeth A (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010)

Kälin W and Künzli J, *The Law of International Human Rights Protection* (OUP 2010)

Kahneman D, *Thinking, Fast and Slow* (Penguin 2012)

Kempees P, *A Systematic Guide to the Case Law of the European Convention on Human Rights* (Springer 1996)

Klatt M and Meister M, *The Constitutional Structure of Proportionality* (OUP 2012)

Langlaude S, *The Right of the Child to Religious Freedom in International Law* (Martinus Nijhoff Publishers 2007)

Lennon TM, *The Plain Truth: Descartes, Huet, and Skepticism* (Brill 2008)

Lerner N, *Religion, Beliefs and International Human Rights* (Orbis Books 2000)

Lillich R, *Human Rights Instruments* (William S Hein & Company 1983)

Lindkvist L, *Religious Freedom and the Universal Declaration of Human Rights* (CUP 2017)

Malik HC (ed), *The Challenge of Human Rights: Charles Malik in the Universal Declaration* (Charles Malik Foundation 2000)

Marks S and Clapham A, *International Human Rights Lexicon* (OUP 2005)

McCrea R, *Religion and the Public Order of the European Union* (OUP 2010)

Moeckli D and others (eds), *International Human Rights Law* (1st edn, OUP 2010)

---------, *International Human Rights Law* (2nd edn, OUP 2014)

Mowbray A, *Cases, Materials and Commentary on the European Convention on Human Rights* (OUP 2012)

Murdoch J, *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)

Murdoch J, *Freedom of Thought, Conscience and Religion: A Guide to the Implementation of Article 9 of the European Convention on Human Rights* (2nd edn, Council of Europe 2012)

Nowak M, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engels 1993)

---------, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn NP Engels 2005)

Ovey C and White R, *Jacobs & White: The European Convention on Human Rights* (4th edn, OUP 2006)

Orwell G, *1984* (reissue edition, Penguin 1991)

Peters E, *1917 Pio-Benedictine Code of Canon Law: In English Translation with Extensive Scholarly Apparatus* (Ignatius 2001)

Pirker B, *Proportionality Analysis and Models of Judicial Review* (Europa Law Publishing 2013)

Provost R, *Mapping Legal Boundaries of Belonging: Religion and Multiculturalism from Israel to Canada* (OUP 2015)

Puppinck G, *Conscientious Objection and Human Rights*: *A Systematic Analysis* (Brill Research Perspectives 2017)

Rainey B, Wicks E and Ovey C, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th edn OUP 2014)

---------, *Jacobs, White and Ovey: The European Convention on Human Rights* (7th edn, OUP 2017)

Reid K, *A Practitioner's Guide to the European Convention on Human Rights* (Sweet and Maxwell 1998)

Rivers J, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010)

Rostboll C and Scavenius T (eds) *Compromise and Disagreement in Contemporary Political Theory* (Routledge 2017)

Sandberg R, *Law and Religion* (CUP 2011)

---------, *Religion, Law and Society* (CUP 2014)

Schabas WA, *The Universal Declaration of Human Rights: the Travaux Préparatoires* (CUP 2013)

---------, *The European Convention on Human Rights: A Commentary* (OUP 2015)

De Schutter O, *International Human Rights Law*: *Cases, Materials, Commentary* (2nd edn CUP 2014)

Smith RKM, *Textbook on International Human Rights* (7th edn, OUP 2015)

Sullivan W and others, *Politics of Religious Freedom* (University of Chicago Press 2015)

Sullivan W, *The Impossibility of Religious Freedom* (Princeton University Press 2005)

Taylor P, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005)

Tahzib B, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff Publishers 1996)

Trigg R, *Religion in Public Life: Must Faith be Privatized?* (OUP 2009)

----------, *Equality, Freedom and Religion* (OUP 2012)

van Dijk P and van Hoof G (eds) *Theory and Practice of the European Convention on Human Rights* (1st edn, Intersentia 1984)

--------- *Theory and Practice of the European Convention on Human Rights* (2nd edn, Intersentia 1990)
van Dijk P and others, *Theory and Practice of the European Convention on Human Rights* (3rd edn, Intersentia 1998)

---------, *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006)

Witte J and Green MC, *Religion and Human Rights* (OUP 2011)

White R and Ovey C, *Jacobs, White & Ovey: The European Convention on Human Rights* (5th edn, OUP 2010)

Zucca L and Ungureanu C (eds) *Law State and Religion in the New Europe: Debates and Dilemmas* (CUP 2012)

United Nations, *Universal Declaration of Human Rights* (CreateSpace 2016)

Contributions to Edited Books

Arai-Takahashi Y, 'Proportionality' in Shelton D (ed) *The Oxford Handbook of International Human Rights Law* (OUP 2013)

Bacquet S, 'Religious Symbols and the Making of Contemporary Religious Identities' in Sandberg R (ed) *Religion and Legal Pluralism* (Routledge 2016)

Bosset P, 'Mainstreaming religious diversity in a secular and egalitarian State: the roads(s) not taken in Leyla *Şahin v Turkey*' in Brems E (ed) *Diversity and European Human Rights: Rewriting the Judgments of the ECHR* (CUP 2012)

Bottici C and Challand B, 'Islam and the Public Sphere: Public Reason or Public Imagination?' in Zucca L and Ungureanu C (eds) *Law and State and Religion in the New Europe: Debates and Dilemmas* (CUP 2012)

Brito J, 'Conscientious Objection' in Durham WC, Lindholm T and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004)

Bublitz JC, 'My Mind is Mine!? Cognitive Liberty as a Legal Concept' in Hildt E and Franke AG (eds) *Cognitive Enhancement* (Springer 2013)

Chaib SO, 'Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights' in Alidadi K, Foblets MC and Vrielink J (eds) *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (Ashgate 2012)

Cumper P, 'The Public Manifestation of Religion or Belief: Challenges for a Multi-Faith Society in the Twenty-First Century' in O'Dair R and Lewis A (eds) *Law and Religion: Current Legal Issues 2001 Volume 4* (OUP 2001)

Danchin PG and Forman L, 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities' in Danchin PG and Cole EA (eds) *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press 2002)

Danchin PG, 'Religious Freedom in the Panopticon of Enlightenment Rationality' in Sullivan W and others (eds) *Politics of Religious Freedom* (University of Chicago Press 2015)

Durham Jr WC and Evans C, 'Freedom of Religion and Religion-State Relations' in Tushnet M, Fleiner T, and Saunders C (eds) *Routledge Handbook to Constitutional Law* (Routledge 2013)

Durham Jr WC, 'Facilitating Freedom of Religion or Belief through Religious Association Laws' in Durham WC, Lindholm T and Tazhib-Lie BG, *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers 2004)

Evans C, 'Introduction' in Cane P, Evans C and Robinson Z (eds) *Law and Religion in Theoretical and Historical Context* (CUP 2008)

---------, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Janis MW and Evans C (eds) *Religion in International Law* (Martinus Nijhoff Publishers 2004)

Evans MD, 'The United Nations and the Freedom of Religion: The Work of the Human Rights Committee' in Adhar R (ed) *Law and Religion* (Ashgate Publishing Ltd 2000)

---------, 'Human Rights, Religious Liberty and the Universality Debate' in O'Dair R and Lewis A (eds) *Law and Religion* (OUP 2001)

---------, 'Historical Analysis to the Freedom of Religion and Belief as a Technique for Resolving Conflict' in Durham WC, Lindholm T and Tazhib-Lie BG, *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers 2004)

--------, 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions' in Cane P, Evans C and Robinson Z (eds) *Law and Religion in Theoretical and Historical Context* (CUP 2008)

---------, 'The Freedom of Religion or Belief in the ECHR since Kokkinakis or "Quoting Kokkinakis" in Temperman J, Gunn TJ and Evans MD, *The European Court of Human Rights and Freedom of Religion or Belief: The 25 Years Since Kokkinakis* (Brill 2019)

Ferrari S 'State and Church in Italy' in Robbers G (ed) *State and Church in the European Union* (2nd edn Nomos 2005)

Ghanea N, 'Apostasy and Freedom to Change Religion or Belief' in Durham WC, Lindholm T and Tazhib-Lie BG, *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers 2004)

Gogineni RRB and Gule L, 'Humanism and Freedom From Religion' in Durham WC, Lindholm T and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004)

Gunn TJ, 'Religious Symbols and Religious Expression in the Public Square' in Davis DH (ed) *The Oxford Handbook of Church and State in the United States* (OUP 2010)

Gunn TJ, 'Religious Symbols in Public Schools: The Islamic Headscarf and the European Court of Human Rights Decision in *Sahin v Turkey*' in Durham Jr WC and others (eds) *Islam, Europe and Emerging Legal Issues* (Ashgate 2012)

---------, "'Principle of Secularism" and the European Court of Human Rights: A Shell Game' in Temperman J, Gunn TJ and Evans MD, *The European Court of Human Rights and Freedom of Religion or Belief: The 25 Years Since Kokkinakis* (Brill 2019)

Hong C and Provost R, 'Let us Compare Mythologies' in Provost R (ed) *Mapping the Boundaries of Legal Religion: Religion and Multiculturalism from Israel to Canada* (OUP 2014)

Keane W, 'What is Religious Freedom Supposed to Be?' in Sullivan W and others (eds) *Politics of Religious Freedom* (University of Chicago Press 2015)

Kenny CG, 'Public Space, Private Face: Veiling as a Challenge for Legal Reasoning' in Sandberg R, *Religion and Legal Pluralism* (Routledge 2015)

Kistakis Y, 'The Protection of the *forum internum* under Article 9 of the ECHR' in Spielmann D, Tsirli M and Voyatzis P (eds) *La Convention europénne des droits de l'homme, un instrument vivant, Mélanges en l'honneur de Christol L Rozakis* (Bruykant 2011)

Krapf TM, 'Lost Opportunities and Missed Targets' in Petkoff P and Rivers J (eds) *Changing Nature of Religious Rights in International Law* (OUP 2015)

Leigh I, 'Objective, Critical and Pluralistic? Religious Education and Human Rights in the European Public Sphere' in Zucca L and Ungureanu C (eds) *Law and State and Religion in the New Europe: Debates and Dilemmas* (CUP 2012)

Little D, 'Religion, Human Rights and Public Reason: Protecting the Freedom of Religion or Belief' in Witte J and Green MC (eds) *Religion and Human Rights: An Introduction* (OUP 2011)

Little D, Sachedina A and Kelsay J, 'Human Rights and the World's Religions: Christianity, Islam and Religious Liberty' in Bloom I, Martin JP and Proudfoot WL (eds) *Religious Diversity and Human Rights* (Columbia University Press 1996)

Liskofsky S, 'The UN Declaration on the Elimination of Religious Intolerance and Discrimination: Historical and Legal Perspectives' in JE Wood (ed) *Religion and the State: Essays in Honour of Leo Pfeffer* (Baylor University Press 1985)

Lerner N, 'The Nature and Minimum Standards of Freedom of Religion or Belief' in Durham WC, Lindholm T and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004)

Letsas G, 'Is there a Right not to be Offended in one's Religious Beliefs? in Zucca L and Ungureanu C (eds) *Law, State and Religion in the New Europe: Debates and Dilemmas* (CUP 2012)

Mancini S and Rosenfeld M, 'Unveiling the Limits of Tolerance: Comparing the Treatment of Majority and Minority Religious Symbols in the Public Sphere' in Zucca L and Ungureanu C (eds) *Law and State and Religion in the New Europe: Debates and Dilemmas* (CUP 2012)

Martínez-Torrón J, 'The European Court of Human Rights and Religion' in O'Dair R and Lewis A, *Law and Religion: Current Legal Issues Volume 4* (OUP 2001)

---------, 'Religious Liberty in European Jurisprudence' in Hill M (ed) *Religious Liberty and Human Rights* (University of Wales Press 2002)

---------, 'Religious Pluralism: The Case of the European Court of Human Rights' in Requejo F and Ungureanu C (eds) *Democracy, Law and Religious Pluralism in Europe* (Routledge 2014)

Martínez-Torrón J and Navarro-Valls R, 'The Protection of Religious Freedom in the System of the Council of Europe' in Durham WC, Lindholm T and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004)

Mahwinney A, 'Coercion, Oaths and Conscience' in Cramner F and others (eds) *The Confluence of Law and Religion: interdisciplinary Reflections on the Work of Norman Doe* (CUP 2016)

McCrea R, 'Religion, Law and State in Contemporary Europe: Key Trends and Dilemmas' in Foblets MC and others (eds) *Belief, Law and Politics: What future for a secular Europe?* (Ashgate 2014)

McColgan A, 'Religion and (In)equality in the European Framework' in Zucca L and Ungureanu C (eds) *Law and State and Religion in the New Europe: Debates and Dilemmas* (CUP 2012)

Meyerson D, 'Why Religion Belongs in the Private Sphere, not the Public Square' in Cane P, Evans C and Robinson Z (eds) *Law and Religion in Theoretical and Historical Context* (CUP 2008)

Nowak M and Vospernik T, 'Permissible Restrictions on Freedom of Religion or Belief' in Durham WC, Lindholm T and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004)

Özenç B, 'The Religion Box on Identity Cards as a Means to Understand the Turkish Type of Secularism' in Çinar OH and Yildirim M, *Freedom of Religion and Belief in Turkey* (Cambridge Scholars Publishing 2014)

Partsch KJ, 'Freedom of Conscience and Expression, and Political Freedoms' in L Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981)

Petkoff P, 'Religious Symbols Between the *Forum Internum* and the *Forum Externum*' in Ferrari S and Cristofori R (eds) *Law and Religion in the 21st Century: Relations Between States and Religious Communities* (Ashgate 2010)

Ringelheim J, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?' in Zucca L and Ungureanu C (eds) *Law, State and Religion in the New Europe: Debates and Dilemmas* (CUP 2012)

Scheinin M, 'The Human Rights Committee and Freedom of Religion or Belief' in Durham WC, Lindholm T and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004)

---------, 'Article 18' Alfreðsson GS and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement'* (Martinus Nijhoff Publishers 1999)

Slotte P, 'The Religious and the Secular in European Human Rights Discourse' in Klabbers J (ed) *Finnish Yearbook of International Law: Volume 21* (Bloomsbury 2010)

---------, 'International Law and Freedom of Religion or Belief: Origins, Presuppositions and Structure of the Protection Framework' in Ferrari S (ed) *Routledge Handbook of Law and Religion* (Routledge 2015)

Stahnke T, 'The Right to Engage in Religious Persuasion' in Durham WC, Lindholm T and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004)

Uitz R, 'Rethinking *Deschomets v France:* reinforcing the protection of religious liberty through personal autonomy in custody disputes' in Brems E (ed), *Diversity and European Human Rights: Rewriting the Judgments of the ECHR* (CUP 2012)

Ungureanu C, 'Europe and Religion: An Ambivalent Nexus' in Zucca L and Ungureanu C (eds) *Law, State and Religion in the New Europe: Debates and Dilemmas* (CUP 2012)

Ungureanu C and Vila M, 'The Conundrum of Pluralism and the Doctrine of the Margin of Appreciation: The Crucifix "Affair" and the Ambivalence of the ECtHR' in Requejo F and Ungureanu C (eds) *Democracy, Law and Religious Pluralism in Europe* (Routledge 2014)

van Bijsterveld SC, 'Freedom of Religion: Legal Perspectives' in O'Dair R and Lewis A (eds) *Law and Religion: Current Legal Issues* (OUP 2001)

van Boven T, 'The United Nations Commission of Human Rights and Freedom of Religion or Belief' in Durham WC, Lindholm T and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004)

Vickers L, 'The Relationship between Religious Diversity and Secular Models: An Equality Based Perspective' in Foblets M-C and others (eds) *Belief, Law and Politics: What Future for Secular Europe?* (Ashgate 2014)

Yildirim S, 'The Search for Shared Idioms: Contesting Views of *Laiklik* before the Turkish Constitutional Court' in Marranci G (ed) *Muslim Societies and the Challenge of Secularization: An Interdisciplinary Approach* (Springer 2010)

Journal Articles

Adhar R, 'Is Secularism Neutral?' (2013) 26:3 Ratio Juris 404

Andreescu G and Andreescu L, 'The European Court of Human Rights' Lautsi Decision: Context, Contents, Consequences' (2010) 26 Journal for the Study of Religions and Ideologies 47

Ardelean B, 'Liberty: The *Forum Internum* of Faith and Belief' (2013) 9:5 European Journal of Science and Theology 23

Bell M, 'Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace' (2017) 17:4 Human Rights Law Review 784

Berry S, 'A 'Good Faith' Interpretation of the Right to Manifest Religion? The Diverging Approaches of the European Court of Human Rights and the UN Human Rights Committee' (2017) 37:4 Legal Studies 672

Bielefeldt H, 'Freedom of Religion or Belief – A Human Right under Pressure' (2012) 1:1 Oxford Journal of Law and Religion 15

Bielefeldt H, 'Misperceptions of Freedom of Religion or Belief' (2013) 35 Human Rights Quarterly 33

Bleiberg B, 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Leyla Sahin v Turkey*' (2005) 91 Cornell Law Review 129

Body-Gendrot S, ‘France Upside down over a Headscarf?’ (2007) 68:3 Sociology of Religion 289

Bratza N, ‘The “Precious Asset”: Freedom of Religion under the European Convention on Human Rights’ (2012) 14:2 Ecclesiastical Law Journal 256

Canon A, ‘Canon Law and Moral Theology’ (1962) 22 Jurist 319

Cumper P and Lewis T, ‘Taking Religion Seriously’? Human Rights and *Hijab* in Europe – Some Problems of Adjudication’ (2008) 24 Journal of Law and Religion 599

Danchin PG, ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’ (2008) 49:2 Harvard International Law Journal 249

---------, ‘Islam and the Secular Nomos of the ECtHR’ (2011) 32:4 Michigan Journal of International Law 663

Danchin PG and Blond L, ‘Unlawful Religion? Modern Secular Power and the Legal Reasoning in the *JFS* case’ (2014) 29 Maryland Journal of International Law 419

Davis K, ‘The Veil That Covered France’s Eye: The Right to Freedom of Religion and Equal Treatment in Immigration and Naturalization Proceedings’ (2010) 10 Nevada Law Journal 732

Donald A, Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for Optimism? (2013) 2:1 Oxford Journal of Law and Religion 50

Dzehtsiarou K and Greene A, ‘Legitimacy and the future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners’ (2011) 12:10 German Law Journal 1707

Edge P, ‘The European Court of Human Rights and Religious Rights’ (1998) 47 International and Comparative Law Quarterly 681

Elliot-Williams G, ‘Protection of the Right to Manifest Religion or Belief Under the European Convention on Human Rights in SAS v France’ (2016) 5:2 Journal of Law and Religion 344

Esen S and Gonenç L, ‘Religious Information on Identity Cards: A Turkish Debate’ (2007-2008) 23 Journal of Law and Religion 579

Evans C, ‘The Islamic Scarf in the European Court of Human Rights’ (2006) 7 Melbourne Journal of International Law 52

---------, ‘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

Evans MD, ‘From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights’ (2010) 26 (1) Journal of Law and Religion 345

---------, ‘The Freedom of Religion or Belief and the Freedom of Expression’ (2009) 4:2 Religion and Human Rights 197

---------, ‘Lautsi v Italy: An Initial Appraisal’ (2011) 6 Religion and Human Rights 237

---------, ‘Advancing Freedom of Religion or Belief: Agendas for Change’ (2012) 1:1 Oxford Journal of Law and Religion 5

---------, ‘“And Should the First be Last?”’ [2014] Brigham Young University Law Review 531

Evans M and Petkoff P, ‘A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights’ (2008) 36 Religion, State and Society 205

Ferrari S, ‘State-Supported Display of Religious Symbols in the Public Space’ (2013) 52 Catholic Legal Studies 7

---------, ‘Law and Religion in a Secular World: A European Perspective’ (2012) 14:3 Ecclesiastical Law Journal 355

Fokas E, ‘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

Fuhrmann W, ‘Perspectives on Religious Freedom from the Vantage Point of the European Court of Human Rights’ [2000] Brigham Young University Law Review 829

Gerards J ‘How to improve the necessity test of the European Court of Human Rights (2013) 11:2 International Journal of Constitutional Law 466

Gewirth A, ‘Are There Any Absolute Rights?’ (1981) 31:122 The Philosophical Quarterly 1

Gilbert H, ‘The Slow Development of the Right to Conscientious Objection to Military Service under the European Convention on Human Rights’ [2001] European Human Rights Law Review 554

Gunn TJ, ‘Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights in *Sahin v Turkey*’ (2008-2009) 3 Droit et Religions 339

Gürsel E, ‘The Distinction Between the Freedom of Religion and the Right to Manifest Religion: A Legal Medium to Regulate Subjectivities’ (2013) 22 Social & Legal Studies 377

Goering J, ‘The Internal Forum and the Literature of Penance and Confession’ (2004) 56 Traditio 175

Greer S, ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really ‘Absolute’ in International Human Rights Law?’ (2015) 15 Human Rights Law Review 101

Hammer L, ‘Selective Conscientious Objection and International Human Rights’ (2002) 36 Israel Law Review 145

Hatzis N, ‘Neutrality, Proselytism and Religious Minorities at the European Court of Human Rights and the US Supreme Court’ (2009) 49 Harvard International Law Journal 120

Henrard K, ‘How the European Court of Human Rights’ Concern Regarding European Consensus Tempers Effective Protection of Freedom of Religion’ (2012) 4 Oxford Journal of Law and Religion 398

Hill D and Whistler D, ‘Religious Symbols and the European Convention on Human Rights’ (2013) 171 Law and Justice 52

Hunter-Henin M, ‘Living Together in an Age of Religious Diversity: Lessons from *Baby Loup* and *SAS*’ (2015) 4:1 Oxford Journal of Law and Religion 94

Kamal J, ‘Justified Interference with Religious Freedom: The European Court of Human Rights and the Need for Mediating Doctrine under Article 9(2)’ (2007-2008) 46 Columbia Journal of Transnational Law, 667

Kiviorg M, ‘Religious Autonomy in the ECHR’ (2009) 4 Derecho y Religion 131

Klatt M and Meister M, ‘Proportionality - a benefit to human rights? Remarks on the I·CON controversy’ (2012) 10:3 International Journal of Constitutional Law 687

Ladeur K-H and Augsberg I, ‘The Myth of the Neutral State and the Individualization of Religion: The Relationship between State and Religion in the Face of Fundamentalism’ (2007) 8 German Law Journal 143

Laegaard S, ‘Burqua Ban, Freedom of Religion and ‘Living Together’ (2015) 16:3 Human Rights Review 203

Langlaude S, ‘Indoctrination, Secularism, Religious Liberty and the ECHR’ (2006) 55 International and Comparative Law Quarterly 929

Labuschagne B, ‘Religious Freedom and Newly-Established Religions in Dutch Law’ (1997) 44 Netherlands International Law Review 168

Leigh I, ‘New Trends in Religious Liberty and the European Court of Human Rights’ (2010) 13:3 Ecclesiastical Law Journal 266

Lewis T, ‘What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation’ (2007) 56 International and Comparative Law Quarterly 395

Little D, ‘Does the Human Rights to Freedom of Conscience, Religion and Belief has Special Status?’ [2001] Brigham Young University Law Review 603

McCrudden C, ‘Religion, Human Rights, Equality and the Public Sphere’ (2011) 13:1 Ecclesiastical Law Journal 26

Maher J, ‘Eweida and Others: A New Era for Article 9? (2014) 63 (1) International and Comparative Law Quarterly 213

Makinen V and Pihlajamaki H, ‘The Individualization of Crime in Medieval Canon Law’ (2004) 65 (4) Journal of the History of Ideas 525

Martínez-Torrón J, ‘The (Un)protection of Individual Religious Identity in the Strasbourg Case Law’ (2012) 1:2 Oxford Journal of Law and Religion 363

---------, ‘Freedom of Religion in the European Convention on Human Rights under the Influence of Different European Traditions’ (2012) 17 Pontifical Academy of Social Sciences 329
Martínez-Torrón J and Navarro-Valls R, ‘The Protection of Religious Freedom in the System of the European Convention on Human Rights’ (1998) 3 Helsinki Monitor 25

McGoldrick D, ‘Religion in the European Public Square and in European Public Life: Crucifixes in the Classroom? (2011) 11:3 Human Rights Law Review 451

McIvor M, ‘Carnal Exhibitions: Material Religion and the European Court of Human Rights’ (2015) 17:1 Ecclesiastical Law Journal 3

Moens G, ‘The Action-Belief Dichotomy and Freedom of Religion’ (1989) 12 Sydney Law Review 195

Morini C, 'Secularism and Freedom of Religion: The Approach of the European Court of Human Rights’ (2010) 43 Israel Law Review 611

Müller WP, ‘The Internal Forum of the Later Middle Ages: A Modern Myth?’ (2015) 33:4 Law and History Review 887

Murray A, ‘Confession before 1215’ (1993) 3 Transactions of the Royal Historical Society 51

Nieuwenhuis A, ‘European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of *Leyla Sahin*’ (2005) 1:3 European Constitutional Law Review 495

Nieuwenhuis A, ‘State and Religion, a multidimensional relationship: some comparative law remarks’ (2012) 10:1 International Journal of Constitutional Law 153

Ortner D, 'Conscientious Offenders: Russia's Ban on "Extremist" Religious Literature and the European Court of Human Rights' (2014) 55:3 Virginia Journal of International Law 1

Parker T, 'The Freedom to Manifest Religious Beliefs: An Analysis of the Necessity Clauses of the ICCPR and the ECHR' (2006) 17:1 Duke Journal of Comparative and International Law 91

Perry M, 'The Morality of Human Rights: A non-religious grounds' (2005) 27 Dublin University Law Journal 63

Peroni L, 'Deconstructing 'Legal' Religion in Strasbourg' (2014) 3:2 Oxford Journal of Law and Religion 235

Petkoff P, '*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with Particular Reference to the Jurisprudence of the European Court of Human Rights' (2012) 7 Religion and Human Rights 183

---------, 'Legal Protection of Sacred Places as a Medieval Gloss- Towards Working 'Soft Law' Guidelines under Public International Law' (2011) 167 Law and Justice 27

Petty AR, 'Religion, Conscience and Belief in the European Court of Human Rights' (2013) 48:4 The George Washington International Law Review 807

Plesner IT, 'Legal Limitations to Freedom of Religion or Belief in School Education' (2005) 19 Emory International Law Review 557

Power-Forde, A, 'Freedom of Religion and 'Reasonable Accommodation' in the Case Law of the European Court of Human Rights' 5:3 Oxford Journal of Law and Religion 575

Ramshaw A, 'The case for replicable structure full proportionality analysis in all cases concerning fundamental rights' (2019) 39:1 Legal Studies 120

Relaño E, 'Educational Pluralism and Freedom of Religion: Recent Decisions of the European Court of Human Rights' (2010) 32:1 British Journal of Religious Education 19

Rivers J, 'Proportionality and Variable Intensity of Review' (2006) 65:1 Cambridge Law Journal 174

---------, 'The Presumption of Proportionality' (2014) 77:3 Modern Law Review 409

Roberts CK, 'Is there a Right to be 'Free From' Religion or Belief at Strasbourg? (2017) 19:1 Ecclesiastical Law Journal 35

Ronchi P, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*' (2011) 13:3 Ecclesiastical Law Journal 287

Rothkamm J, 'Religious Freedom in Time of Conflict: An Overview of International Legislation and a Discussion of Recent Cases' (2007) 46 Military Law and Law of War Review 261

Rozakis CL, 'The European Jude as a Comparatist' (2005) 80 Tulane Law Review 257

Sanader T, 'Religious Symbols and Garments in Public Places – a Theory for the Understanding of *SAS v France*' (2015) 9 Vienna Journal on International Constitutional Law 186

Scharffs BG, 'Symposium Introduction. The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights: Legal, Moral and Political Perspectives' (2010) 26 Journal of Law and Religion 249

Slotte P, 'What is a Man if he has Words but has no Deeds? Some Remarks on the European Convention on Human Rights' (2011) 11 Ars Disputandi 259

---------, '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

Stenlund M and Slotte P, 'Is there a Right to Hold a Delusion? Delusions as a Challenge for Human Rights Discussion (2003) 16:4 Ethical Theory and Moral Practice 829

Stahnke T, 'Proselytism and the Freedom to Change Religion in International Human Rights Law' [1999] Brigham Young University Law Review 251

Stopler G, 'Religion-State Relations and Their Effects on Human Rights: Nationalization, Authorization, and Privatization' (2017) 6:3 Oxford Journal of Law and Religion 474

Sullivan DJ, 'Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1988) 82:3 American Journal of International Law 487

Tahzib-Lie B, 'The European Definition of Religion or Belief' (1998) 9 Helsinki Monitor 17

Temperman J, '*Lautsi II:* A Lesson in Burying Fundamental Children's Rights' (2011) 6 Religion and Human Rights 279

---------, 'State Neutrality in Public School Education: An Analysis of the Interplay Between the Neutrality Principles, the Right to Adequate Education, Children's Right to Freedom of Religion or Belief, Parental Liberties and the Position of Teachers' (2010) 32 Human Rights Quarterly 865;

Trigg R, 'Religion in the Public Forum' (2011) 13:3 Ecclesiastical Law Journal 274

Tulkens F, 'Freedom of Religion under the European Court of Human Rights: A Precious Asset' [2014] Brigham Young University Law Review 509

Van Bijsterveld S, ‘A Typology of Dissent in Religion Cases in the Grand Chamber of the European Court of Human Rights’ (2017) 12 Religion and Human Rights 223

Walkate JA, ‘The Right of Everyone to Change His Religion or Belief: Some Observations’ (1983) 30:2 Netherlands International Law Review 146

Wintermute R, ‘Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others’ (2014) 77:2 The Modern Law Review 223

Witte J, ‘Lift High the Cross? An American Perspective on *Lautsi v Italy*’ (2011) 13:3 Ecclesiastical Law Journal 341

Zucca L, ‘Lautsi: A Commentary on the Grand Chamber Decision’ (2013) 11:1 International Journal of Constitutional Law 218

Case Comments

Roberts CK, ‘Conscientious Objection to Military Service in Turkey’ 5 European Human Rights Law Review 567

Book Reviews

Durham WC and Beatty JT, ‘Book Review: Evans MD, Religious Liberty and International Law in Europe’ (2001) 16:2 Journal of Law and Religion 623

Gunn TJ, ‘Book Review: Taylor P, Freedom of Religion: UN and European Human Rights Law and Practice’ (2008) 23 Journal of Law and Religion 101

Sanderson MA, ‘Book Review: Evans C, Freedom of Religion Under the European Convention on Human Rights’ (2002) 65:1 Modern Law Review 141

Strong SI, ‘Book Review: Evans C, Freedom of Religion Under the European Convention on Human Rights’ (2002) 61 Cambridge Law Journal 477

Vincent-Jones P, ‘Book Review: Evans C, Freedom of Religion Under the European Convention on Human Rights’ (2002) 65 Modern Law Review 141

Conference Papers

de Alberquerque PP, ‘Is the ECtHR Facing an Existential Crisis?’ (Mansfield College, University of Oxford 28 April 2017) <https://www.law.ox.ac.uk/sites/files/oxlaw/pinto_opening_presentation_2017.pdf> accessed January 2019

Puppinck G, ‘Lautsi v Italy: The Leading Case of Majority Religions in European Secular States’ (Annual International Law and Religion Symposium, Provo, Utah 2-6 October 2010)

Reports, Recommendations and Guides

All Party Parliamentary Group on International Religious Freedom (eds Evans MD and others) ‘Article 18: An Orphaned Right’ (unknown) <https://appgfreedomofreligionorbelief.org/media/Article-18-An-Orphaned-Right.pdf> accessed August 2015

Bloß L, ‘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)

McCrea R, ‘The Recognition of Religion within the Constitutional and Political Order of the European Union’ (LSE Europe in Question Discussion Paper, September 2009) <http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper10.pdf> accessed November 2018

Walton D and Wilmshurst E, ‘The Future of the European Court of Human Rights: The Brighton Declaration’ (8 November 2012) <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/081112summary.pdf> accessed January 2019

Dictionaries

López-Menchero F, *Proto-Indo-European Etymological Dictionary* (Indo-European Language Association 2012)

Oxford English Dictionary (7th edn, OUP 2015)

Oxford Advanced Learner’s Dictionary (9th edn, OUP 2015)

Sihler AL, *New Comparative Grammar of Greek and Latin* (OUP 1994)

Lewis CT and Short C, *A New Latin Dictionary* (Harper and Brothers Publishers 1981)

Electronic Articles, Dissertations and Theses

Aletras N and others. ‘Predicting Judicial decisions of the European Court of Human Rights: A Natural Language Processing perspective’ 2 PeerJ Computer Science e93 <https://peerj.com/articles/cs-93/> accessed March 2019

Brems E, ‘Ebrahimian v France: Headscarf Ban Upheld for Entire Public Sector’ (*Strasbourg Observers,* 27 November 2015) <https://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector/> accessed November 2015

Glogowska-Balcerzak A and Wasiński MJ, ‘Druids, Scientologists and Wiccans – Religions, Beliefs and Their Manifestation in Strasbourg Jurisprudence’ (2015) 1 Studia Humanitas

<http://st-hum.ru/content/glogowska-balcerzak-wasinski-mj-druids-scientologists-and-wiccans-religions-beliefs-and> accessed March 2016

Ferri M, 'Belkacemi and Oussar v Belgium and Dakir v Belgium: The Court again Addressed the Full-Face Veil but does not Move Away from its Restrictive Approach' (*Strasbourg Observers* 25 July 2017) <https://strasbourgobservers.com/2017/07/25/belkacemi-and-oussar-v-belgium-and-dakir-v-belgium-the-court-again-addresses-the-full-face-veil-but-it-does-not-move-away-from-its-restrictive-approach/> accessed December 2017

Lindkvist L, 'Shrines and Souls: The Reinvention of Religious Liberty and the Genesis of the Universal Declaration of Human Rights' (2014) <https://lup.lub.lu.se/search/publication/8be4900a-a82a-4d0e-97a8-305fe45b3872> accessed December 2016

Nemec M and Vladár V, 'The Essentials of Canon Law' (Trnavská univerzita v Trnave, Právnická fakulta 2013) <http://iuridica.truni.sk/sites/default/files/dokumenty/zahranicne-vztahy/en/publications/pdf/01Canon%20Law.pdf> accessed February 2015

Paraskeva C, 'Human Rights Protection Begins and Ends at Home: The "Pilot Judgment Procedure" Developed by the European Court of Human Rights' (2006) <https://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2007/pilotjudgmentprocedure.pdf> accessed January 2019

Renucci J-F, 'Article 9 of the European Convention on Human Rights' Human Rights Files No 20 (Council of Europe 2005) <https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-20(2005).pdf> accessed July 2015

Roberts CK, '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' (Aberystwyth University, 2014) < https://cadair.aber.ac.uk/dspace/bitstream/handle/2160/30063/Roberts_Caroline.pdf?sequence=2&isAllowed=y> accessed July 2019

Thomas O, 'Article 9: What is it, where does it come from, and do we need it (anymore)? (1 Crown Row, 2008) <http://www.preview2.1cor.enstar.net/1155/records/1150/OT%20Talk.pdf> accessed February 2018

Online News Articles

Bulman M, UK Government vows to do more to protect Christians from persecution worldwide after 'dramatic rise in violence' *Independent* (29 December 2018) <https://www.independent.co.uk/news/uk/politics/christians-persecution-jeremy-hunt-foreign-secretary-a8698446.html> accessed December 2018

Cameron D, ‘Speech on the European Court of Human Rights’ (25 January 2012) <https://www.theguardian.com/law/2012/jan/25/cameron-speech-european-court-human-rights-full>accessed December 2018

Carroll O, ‘Hundreds of Russian Jehovah’s Witnesses apply for asylum in Finland’ *Independent* (22 August 2018) <https://www.independent.co.uk/news/world/europe/jehovahs-witness-russia-finland-asylum-seekers-religion-a8503326.html> accessed August 2018

Dearden L, ‘British Government ‘alarmed’ at Russian ban on ‘extremist’ Jehovah’s Witnesses, *Independent* (22 April 2017) <https://www.independent.co.uk/news/world/europe/russia-jehovahs-witnesses-ban-supreme-court-vladimir-putin-british-government-alarmed-criticism-a7696621.html> accessed December 2017

‘German Jews warned not to wear kippas after rise in anti-Semitism, BBC News (26 May 2019) <https://www.bbc.co.uk/news/world-europe-48411735> accessed May 2019

Grierson J and Dodd V, ‘Prevent Strategy on Radicalisation Faces Independent Review’ *The Guardian* (22 January 2019) <https://www.theguardian.com/uk-news/2019/jan/22/prevent-strategy-on-radicalisation-faces-independent-review> accessed January 2019

Moorehead C, ‘Jehovah’s Witnesses Jailed in Greece for ‘Proselytising’, The Independent (28 September 1992) <https://www.independent.co.uk/news/world/jehovahs-witnesses-jailed-in-greece-for-proselytism-1554153.html> accessed November 2015

New Europe Newsroom, ‘Religious Persecution is increasingly becoming a global crisis’ (11 March 2019) *New Europe* <https://www.neweurope.eu/article/religious-persecution-is-increasingly-becoming-a-global-crisis/> accessed January 2019

‘Reading the Brain: Mind-goggling’ *The Economist* (29 October 2011) <https://www.economist.com/science-and-technology/2011/10/29/mind-goggling> accessed January 2019

Steffan M, ‘European Union Expands Asylum for Religious Persecution’ *Christianity Today* (13 September 2012) <https://www.christianitytoday.com/news/2012/september/european-union-expands-asylum-for-religious-persecution.html> accessed January 2019

Websites and Blogs

Article 19 <https://www.article19.org/issue/freedom-of-religion-or-belief/> accessed March 2019

Forum 18 News <http://www.forum18.org/> accessed March 2019

Roberts CK, ‘Interpreting freedom from religion: a step too far?’ (University of Bristol Law School Blog) 13 June 2016 <https://legalresearch.blogs.bris.ac.uk/2016/06/interpreting-freedom-from-religion-a-step-too-far/> accessed June 2016

Roberts CK, ‘Conscientious Objection at the European Court of Human Rights’ (Accommodating Conscience Research Network (ACoRN) Blog) 23 May 2019 <http://wp.lancs.ac.uk/acorn/blog/> accessed May 2019

Strasbourg Consortium, Europe Law and Religion Headlines <https://www.strasbourgconsortium.org/common/headline.php?pageId=13> accessed March 2019

University of Leeds, ‘Counter-Islamophobia Kit’ (2019) <https://cik.leeds.ac.uk/> accessed March 2019

Online Resources

European Court of Human Rights, ‘*SAS v France* no 43835/11, Grand Chamber Hearing 27 November 2013’ <https://www.echr.coe.int/PAGEs/home.aspx?p=hearings&w=4383511_27112013&language=en&c=&py=2013> accessed August 2015