

## The Classic Approach in the Literature to ECHR Article 9

It is difficult to overemphasise the perceived centrality of the *forum internum* and *forum externum* distinction to the understanding and protection of the right to freedom of thought, conscience or religion in the literature. It has become the agreed conceptual framework or the ‘traditional terminology’ underpinning analyses;<sup>1</sup> it is now, as Petkoff points out, ‘almost inconceivable to consider freedom of religion or belief without coming across at least one reference to *forum internum* and *forum externum*’.<sup>2</sup>

### 1.1 THE ORIGINS OF THE TERMS *FORUM* *INTERNUM* AND *FORUM EXTERNUM*

The terms ‘*forum internum*’ and ‘*forum externum*’ look like legal terms but they do not appear in legal dictionaries or dictionaries of Latin legal terms, so it is useful to explore their ordinary meaning. In modern usage, ‘forum’ is usually used to describe ‘a meeting or medium where ideas and views on a particular issue can be exchanged’.<sup>3</sup> Originally, however, the Latin noun *forum* (pl. *fora*) referred to a ‘public square or marketplace used for judicial and other business’ in Roman cities;<sup>4</sup> in Late Middle English, it referred specifically to

<sup>1</sup> Bielefeldt, Ghanea and Wiener, *Freedom of Religion or Belief*, 76. Bielefeldt and Wiener explain: ‘Applying the traditional terminology, commentators usually differentiate between the *forum internum* and the *forum externum* dimensions of freedom religion or belief; see Bielefeldt and Wiener, *Religious Freedom under Scrutiny*, 33.’

<sup>2</sup> 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) 7:3 *Religion and Human Rights* 183, 184.

<sup>3</sup> *Oxford English Dictionary*, 7th ed. (Oxford: Oxford University Press, 2015).

<sup>4</sup> *Ibid.*

‘what is out of doors’, typically an enclosure surrounding a house.<sup>5</sup> The Latin adjective *internum* (from *inter*, meaning ‘between’ or ‘among’) describes that which is inward or internal, whereas the term *externum* (from *exter*, meaning ‘outward’ or ‘outside’) describes that which is outward or external.<sup>6</sup> Latin dictionaries explain that the adjective *internus* means ‘inward’ or ‘internal’ as well as ‘domestic’,<sup>7</sup> and the adjective *externus* means ‘outward’ or ‘external’ and, with respect to one’s family or country, ‘foreign’ or ‘strange’.<sup>8</sup>

There is some disagreement in different disciplines as to the meaning and origin of *forum internum* and *forum externum*. In the fields of political theory and philosophy, it has been argued that the distinction between the *forum internum* and *forum externum* originated in, and was central to, the medieval understanding of the self.<sup>9</sup> 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’, whereas the *forum externum* represented the individual’s external appearance, ‘the forum in which the individual identified himself and was identified’ in the community.<sup>10</sup> However, others have contended that the distinction between the *forum internum* and *forum externum* emerged in Cartesian epistemology to refer to the mind (or conviction) and to outward, publicly observable behaviour, respectively.<sup>11</sup>

<sup>5</sup> *Oxford Advanced Learner’s Dictionary*, 9th ed. (Oxford: Oxford University Press, 2015). The term *forum* itself may derive from the Proto-Indo-European *dhworom*, meaning ‘courtyard’, ‘dooryard’ or similar; see Fernando López-Menchero, ‘Proto-Indo-European Etymological Dictionary’, Indo-European Language Association (2012), 55, available at: <https://indo-european.info/indo-european-lexicon.pdf>; Andrew L. Sihler, *New Comparative Grammar of Greek and Latin* (Oxford/New York: Oxford University Press, 1994), 180.

<sup>6</sup> *Oxford English Dictionary* 7th ed. (Oxford: Oxford University Press, 2015).

<sup>7</sup> Charlton T. Lewis, *An Elementary Latin Dictionary* (New York: Harper and Brothers, 1890).

<sup>8</sup> *Ibid.*

<sup>9</sup> Alin Fumurescu, *Compromise: A Political and Philosophical History* (Cambridge: Cambridge University Press, 2013), 10, 12, 119, 166.

<sup>10</sup> *Ibid.*, 10. See also 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* (London/New York: Routledge, 2017); F. R. Ankersmit, *Aesthetic Politics: Political Philosophy Beyond Fact and Value* (Stanford: Stanford University Press, 1997), 247, 249.

<sup>11</sup> See, e.g., 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; F. R. Ankersmit, *History and Topology: The Rise and Fall of Metaphor* (Berkeley: University of California Press, 1994), 104. For Little, Sachedina and Kelsay, the distinction 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* (New York: Columbia University Press, 1996), 218–25.

In the field of law and history, specialists in canon law, such as Goering,<sup>12</sup> Gerosa,<sup>13</sup> Makinen and Pihlajamaki,<sup>14</sup> and Petkoff,<sup>15</sup> argue that the terms originated in canon law and represented different ways in which the medieval Church exercised jurisdiction – in the external forum of the ecclesiastical court, and in the internal forum of the court of conscience (*forum conscientiae*).<sup>16</sup> Petkoff suggests the ‘dichotomy’ first appeared at the Council of Trent;<sup>17</sup> 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’ because the ‘articulation of a neat distinction between private and public church proceedings’ – between a *forum internum* and *forum externum* – did not fully develop until early modernity.<sup>18</sup> Whatever the precise origins may be, it is possible to see a distinction between the internal forum and the external forum in Canon 196 of the 1917 Code of Canon Law<sup>19</sup> and Canon 130 of the 1983 Code of Canon Law,<sup>20</sup> which relate to the power of jurisdiction or governance in the Church.

This brief overview reveals that whilst the precise meaning and origin of the terms ‘*forum internum*’ and ‘*forum externum*’ is debatable, it is evident that these

<sup>12</sup> Joseph Goering, ‘The Internal Forum and the Literature of Penance and Confession’ (2004) 59 *Traditio* 175, 176; Joseph Goering, ‘The Internal Forum and the Literature of Penance and Confession’ in Wilfried Hartmann and Kenneth Pennington (eds.), *The History of Medieval Canon Law in the Classical Period 1140–1234* (Washington, DC: Catholic University of America Press, 2008), 379–80. See also Alexander Murray, ‘Confession before 1215’ (1993) 3 *Transactions of the Royal Historical Society* 51.

<sup>13</sup> Libero Gerosa, *Canon Law* (Münster: LIT, 2002), 157.

<sup>14</sup> Virpi Makinen and Heikki Pihlajamaki, ‘The Individualization of Crime in Medieval Canon Law’ (2004) 65:4 *Journal of the History of Ideas* 525, 531.

<sup>15</sup> Petkoff, ‘*Forum Internum* and *Forum Externum* in Canon Law and Public International Law’, 183–214.

<sup>16</sup> 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 Makinen and Pihlajamaki, ‘The Individualization of Crime in Medieval Canon Law’, 531.

<sup>17</sup> Petkoff, ‘*Forum Internum* and *Forum Externum* in Canon Law and Public International Law’, 201.

<sup>18</sup> Wolfgang P. Müller, ‘The Internal Forum of the Later Middle Ages: A Modern Myth?’ (2015) 33:4 *Law and History Review* 887, 912. Sullivan, Hurd, Mahmood and Danchin also argue that the *forum internum* and *forum externum* dichotomy is an ‘early modern bifurcation’. See Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood and Peter G. Danchin, ‘Introduction’ in Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood and Peter G. Danchin (eds.), *Politics of Religious Freedom* (Chicago: University of Chicago Press, 2015), 6–7.

<sup>19</sup> Edward Peters, 1917 *Pio-Benedictine Code of Canon Law: In English Translation with Extensive Scholarly Apparatus* (San Francisco: Ignatius Press, 2001), 86. See also Arthur Caron, ‘Canon Law and Moral Theology’ (1962) 22 *Jurist* 319, 319–20.

<sup>20</sup> Canon Law Society of America, *Code of Canon Law, Latin-English Edition, New English Translation* (Washington, DC: Canon Law Society of America, 1999).

terms have a spatial meaning: the *forum internum* relates to the internal realm (the individual's mind or conscience), whereas the *forum externum* relates to 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). In addition, in each of the disciplines in which the terms '*forum internum*' and '*forum externum*' are discussed, they are generally used in conjunction, indicating a relationship between them.

## 1.2 THE *FORUM INTERNUM* AND *FORUM EXTERNUM* DISTINCTION IN ECHR ARTICLE 9

The terms '*forum internum*' or '*forum externum*' do not appear in UDHR Article 18, ICCPR Article 18 or ECHR Article 9, yet it is widely understood that these provisions distinguish between two different aspects of the right to freedom of thought, conscience and religion: the internal aspect (the *forum internum*), which is understood to consist of the right to have or change a religion or belief; and the external aspect (the *forum externum*), which is understood to consist of the right to manifest religion or belief. The distinction between the *forum internum* and the *forum externum* is understood to be 'spelled out'<sup>21</sup> in these provisions, and is believed to be a 'foundational'<sup>22</sup> distinction, having been described as a 'fundamental organising concept'<sup>23</sup> and the 'most well-entrenched feature'<sup>24</sup> of the right to freedom of religion or belief.

In the context of the right to freedom of thought, conscience and religion, the term '*forum internum*' is understood to relate to inner belief or conviction, or private, internal conscience, which is 'largely exercised inside an individual's heart and mind',<sup>25</sup> whereas the term '*forum externum*' is understood to

<sup>21</sup> Theo van Boven, 'The United Nations Commission of Human Rights and Freedom of Religion or Belief' in Tore Lindholm, W. Cole Durham Jr., Bahia G. Tahzib-Lie, Elizabeth A. Sewell and Lena Larsen (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook* (Leiden: Martinus Nijhoff Publishers, 2004), 176. See also 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.

<sup>22</sup> 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; 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.

<sup>23</sup> Mawhinney, 'Coercion, Oaths and Conscience', 205.

<sup>24</sup> Danchin and Blond, 'Unlawful Religion?', 467.

<sup>25</sup> Donna Gomien, *Short Guide to the European Convention on Human Rights* (Strasbourg: Council of Europe, 1991), 69. 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.

relate to the 'sphere of external manifestation',<sup>26</sup> where religion or belief is outwardly expressed.

This distinction between internal and external realms,<sup>27</sup> spheres,<sup>28</sup> domains,<sup>29</sup> dimensions<sup>30</sup> or components<sup>31</sup> is considered to be legally significant because, it is held, the *forum internum* and the *forum externum* have different levels of protection. The *forum internum* is variously described as an 'absolute',<sup>32</sup> 'unrestricted',<sup>33</sup> 'unqualified'<sup>34</sup> or 'inviolable'<sup>35</sup> realm that cannot be subject to limitations or coercion,<sup>36</sup> not even for reasons of national security or in an emergency. The *forum internum*, it is explained, has 'long been held...to be absolutely beyond state regulation'.<sup>37</sup> Indeed, it is considered

<sup>26</sup> Malcolm D. Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Strasbourg: Council of Europe Publishing, 2009), 9.

<sup>27</sup> Manfred Nowak and Tanja Vospernik, 'Permissible Restrictions on Freedom of Religion or Belief in Tore Lindholm, W. Cole Durham Jr, Bahia G. Tahzib-Lie, Elizabeth A. Sewell and Lena Larsen (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook* (Leiden: Martinus Nijhoff Publishers, 2004), 147.

<sup>28</sup> Malcolm D. Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997), 304.

<sup>29</sup> Bahiyih Tahzib-Lie, 'The European Definition of Religion or Belief' (1998) 9 *Helsinki Monitor* 17, 17.

<sup>30</sup> 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 and Legal Studies* 377, 379; 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.

<sup>31</sup> 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.

<sup>32</sup> David Little, 'Does the Human Right to Freedom of Conscience, Religion and Belief Have Special Status?' (2001) *Brigham Young University Law Review* 603, 605; Ben-Oni Ardelean, 'Liberty: The *Forum Internum* of Faith and Belief' (2013) 9:5 *European Journal of Science and Theology* 23, 27; Heiner Bielefeldt, 'Freedom of Religion or Belief – A Human Right under Pressure' (2012) 1:1 *Oxford Journal of Law and Religion* 15, 23; James Dingemans, Can Yeginsu, Tom Cross and Hafsa Masood, *The Protections for Religious Rights: Law and Practice* (Oxford: Oxford University Press, 2013), 81; Bielefeldt and Wiener, *Religious Freedom under Scrutiny*, 33.

<sup>33</sup> Taylor, *Freedom of Religion*, 19.

<sup>34</sup> *Ibid.*, 115.

<sup>35</sup> 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* (Cambridge: Cambridge University Press, 2008), 292; Malcolm D. Evans, 'The Freedom of Religion or Belief and the Freedom of Expression' (2009) 4:2 *Religion and Human Rights* 197, 203.

<sup>36</sup> See Evans, *Freedom of Religion*, 96; Bielefeldt, Ghanea and Wiener, *Freedom of Religion or Belief*, 560.

<sup>37</sup> W. Cole Durham Jr and Carolyn Evans, 'Freedom of Religion and Religion-State Relations' in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds.), *Routledge Handbook to Constitutional Law* (London/New York: Routledge, 2013), 248. See also Thomas M. Krapf, 'Lost Opportunities and Missed Targets' in Malcolm Evans, Peter Petkoff and Julian Rivers (eds.), *Changing Nature of Religious Rights in International Law* (Oxford: Oxford University Press, 2015), 127.

‘trite law’ that the main international instruments protecting freedom of religion or belief subject the *forum internum* to unqualified protection.<sup>38</sup> In terms of Article 9 specifically, it has been understood that this level of protection is a ‘clear implication’ from the text of the article.<sup>39</sup>

In contrast, the *forum externum* is described as a ‘qualified’ realm because manifestation may be restricted in certain circumstances in accordance with the limitation clauses in international provisions relating to freedom of religion or belief. ECHR Article 9(2), for instance, provides that the freedom to manifest religion or belief may be limited 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 distinction between the *forum internum* and the *forum externum* is widely understood to be a doctrine of the ECtHR,<sup>40</sup> and also ‘imperative’ in its judgments.<sup>41</sup> The ‘difference’ between the *forum internum* and the *forum externum* is, many commentators have claimed, ‘well-acknowledged’ by the ECtHR,<sup>42</sup> and the ECtHR is understood to have developed a ‘rich jurisprudence’ around the distinction.<sup>43</sup>

### 1.3 CRITICISMS OF THE *FORUM INTERNUM* AND *FORUM EXTERNUM* DISTINCTION

The ‘correct’ application of the *forum internum* and *forum externum* distinction by the ECtHR is understood to be crucial for the effective protection of the right to freedom of thought, conscience and religion. Yet the ECtHR’s

<sup>38</sup> Taylor, *Freedom of Religion*, 115.

<sup>39</sup> See, e.g., Jim Murdoch, *Freedom of Thought, Conscience and Religion: A Guide to the Implementation of Article 9 of the European Convention on Human Rights*, 2nd ed. (Strasbourg: Council of Europe, 2012), 18; 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* (Abingdon/New York: Routledge, 2014), 127.

<sup>40</sup> See, e.g., 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 (Un)protection of Individual Religious Identity in the Strasbourg Case Law’ (2012) 1:2 *Oxford Journal of Law and Religion* 363, 366, footnote 18.

<sup>41</sup> 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* (London: Routledge, 2017), 110.

<sup>42</sup> 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* (New York: Columbia University Press, 2002), 198.

<sup>43</sup> Doe, *Law and Religion in Europe*, 44.

understanding and application of the distinction has been the subject of intense criticism on the grounds that it undermines rather than enhances the protection of Article 9 rights.

### 1.3.1 *Problematic Forum Internum Protection*

In relation to the *forum internum* and *forum externum* distinction, some commentators have argued that the ECtHR offers inadequate protection to the *forum internum* because it has not clearly set out the scope of the realm or the criteria for interference with it. In early commentary, it was argued that the *forum internum* had little role to play in Article 9 cases because its scope was so narrow that it was difficult to envisage how a State could interfere with it 'short of brainwashing'.<sup>44</sup> It was held that the approach of the Commission and the Court meant that it was difficult for applicants to assert *forum internum* rights and this undermined the 'absolute, unimpugnable and fundamental nature of the *forum internum*'.<sup>45</sup>

A further, connected, criticism concerned the perceived failure on the part of the ECtHR to recognise the relevance of the *forum internum* in Article 9 complaints concerning limitations on manifestations of religion or belief. Carolyn Evans, for instance, explained that the wording of Article 9 suggests that a 'distinction must be drawn between the general right to freedom of religion or belief and the right to manifest that religion or belief',<sup>46</sup> but in her analysis of the Article 9 jurisprudence, she suggested that in some instances the Commission and the Court failed to recognise, and reflect in its case law, the complex relationship between belief and action.<sup>47</sup> 'It is not clear', she explained, that 'the first limb of Article 9 simply becomes irrelevant once some manifestation is in question';<sup>48</sup> in some cases, she argued, limitations on manifestation may be so severe that they interfere not only with the *forum externum* but *also* with the *forum internum*. Carolyn Evans also contended that being forced to act contrary to one's conscience could engage both the *forum internum* and the *forum externum*, and criticised the ECtHR for its narrow focus on the question of whether manifestation had been legitimately limited by the State.<sup>49</sup> Her observation that it is difficult to maintain a 'strict line' or a 'neat distinction'<sup>50</sup> between the *forum internum* and the *forum externum* in some

<sup>44</sup> Evans, *Freedom of Religion*, 205.

<sup>45</sup> Taylor, *Freedom of Religion*, 202.

<sup>46</sup> Evans, *Freedom of Religion*, 76.

<sup>47</sup> *Ibid.*, 201.

<sup>48</sup> *Ibid.*, 76.

<sup>49</sup> *Ibid.*, 102.

<sup>50</sup> *Ibid.*, 77.

cases has been reiterated by more recent commentators who have argued that the line between the two realms has shown itself to be ‘elusive’<sup>51</sup> or ‘blurry’.<sup>52</sup>

Another key problem identified in the early analyses of Article 9 jurisprudence was the treatment of complaints engaging the *forum internum* as complaints engaging the *forum externum*. *Buscarini v. San Marino* – in which the Grand Chamber found that the requirement on the applicants to swear an oath on the Gospels in order to take their seats in Parliament constituted a ‘limitation’ under Article 9(2)<sup>53</sup> – has been taken to exemplify this perceived error on the part of the ECtHR.<sup>54</sup> Taylor has argued forcefully that the ECtHR tends to ‘shoehorn’ complaints (such as those concerning refusals to act contrary to one’s religion or belief) into the category of manifestation so they can be subjected to limitations under Article 9(2).<sup>55</sup> 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, he claimed, often did the latter.<sup>56</sup> This, he contended, seriously undermined the protection of Article 9; in his view, the focus on the *forum externum* at the detriment of the *forum internum* reflected the ECtHR’s more widespread assumption that *forum internum* interference was not in question in Article 9 complaints.

Again, this early claim that the ECtHR offers inconsistent protection to Article 9 rights has been reiterated by more recent commentators. The ECtHR has been criticised for its so-called ‘confused’ approach of offering absolute protection to the *forum internum* in some cases but, in other similar cases, inappropriately treating *forum internum* rights as *forum externum* rights and considering the legitimacy of the interference with them under Article 9(2).<sup>57</sup> Furthermore, 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.<sup>58</sup>

<sup>51</sup> Nicolas Bratza, ‘The “Precious Asset”: Freedom of Religion under the European Convention on Human Rights’ (2012) 14:2 *Ecclesiastical Law Journal* 256, 259.

<sup>52</sup> Lourdes Peroni, ‘Deconstructing “Legal” Religion in Strasbourg’ (2014) 3:2 *Oxford Journal of Law and Religion* 235, 252.

<sup>53</sup> *Buscarini and Others v. San Marino* ECHR 1999-I 605, paras. 34–40. The Grand Chamber proceeded to examine the legitimacy of the limitation, finding that there had been a violation of Article 9 on the grounds that the limitation was not necessary in a democratic society.

<sup>54</sup> See, e.g., Evans, *Freedom of Religion*, 73–4; Taylor, *Freedom of Religion*, 129–30.

<sup>55</sup> See Taylor, *Freedom of Religion*, 199.

<sup>56</sup> *Ibid.*

<sup>57</sup> See, e.g., Mawhinney, ‘Coercion, Oaths and Conscience’, 205–6.

<sup>58</sup> See, e.g., Jeroen Temperman, ‘*Lautsi II*: A Lesson in Burying Fundamental Children’s Rights’ (2011) 6 *Religion and Human Rights* 279.



## 1.3.2 Problematic Forum Externum Protection

It is not, however, just the ECtHR's protection of the *forum internum* that has been criticised in the literature. It has been claimed that the distinction between the *forum internum* and *forum externum* employed by the ECtHR is also undermining rather than enhancing the protection of the right to manifest religion or belief, which is understood to be a *forum externum* right.

The *forum internum* and *forum externum* distinction has come under criticism for separating the holding of a religion or belief from its manifestation in an artificial way and arbitrarily privileging internal belief over external manifestation.<sup>59</sup> There is a growing perception that, for the ECtHR, religion is about an inner state of mind and manifestations based on religion or belief (such as rites, rituals, wearing of religious clothing or adhering to a diet) are somehow separate.<sup>60</sup> Such a distinction is considered to be 'obnoxious' because it does not reflect the lived experience of believers and contradicts their self-understanding.<sup>61</sup> As a result of this interpretation of the jurisprudence, the ECtHR has been criticised for erecting an 'artificial boundary' between different ways of understanding and experiencing religion, and for failing to recognise that belief and manifestation are 'mutually dependent' and 'cannot be neatly separated from each other'<sup>62</sup> or 'surgically kept apart'.<sup>63</sup> This has led to the *forum internum* and *forum externum* distinction being described as a 'fallacy of dualism'<sup>64</sup> and an example of the law as a 'literature of caricature'.<sup>65</sup>

In addition, it has been contended that the imagining of religion or belief by the ECtHR in terms of a 'binary opposition' between belief and practice has led to the privileging of the *forum internum* over the *forum externum*.<sup>66</sup> Peroni argues forcefully that this is evident from the ECtHR's emphasis on the *forum internum* as the primary realm and is 're-affirmed in the Court's

<sup>59</sup> See, e.g., Peroni, 'Deconstructing "Legal" Religion in Strasbourg', 248.

<sup>60</sup> See, e.g., Slotte, 'International Law and Freedom of Religion or Belief', 110–11; Danchin, 'Of Prophets and Proselytes', 263; Silvio Ferrari, 'Law and Religion in a Secular World: A European Perspective' (2012) 14:3 *Ecclesiastical Law Journal* 355, 367.

<sup>61</sup> Roger Trigg, *Equality, Freedom and Religion* (Oxford: Oxford University Press, 2012), 101. See also Daniel Hill and Daniel Whistler, *The Right to Wear Religious Symbols* (Basingstoke: Palgrave Macmillan, 2013), 18.

<sup>62</sup> Aaron R. Petty, 'Religion, Conscience and Belief in the European Court of Human Rights' (2016) 14:4 *The George Washington International Law Review* 802, 830.

<sup>63</sup> Iona Cismas, *Religious Actors in International Law* (Oxford: Oxford University Press, 2014), 29.

<sup>64</sup> Celia G. Kenny, 'Public Space, Private Face: Veiling as a Challenge for Legal Reasoning' in Russell Sandberg (ed.), *Religion and Legal Pluralism* (Farnham: Ashgate, 2015), 221, 223–24.

<sup>65</sup> Petty, 'Religion, Conscience and Belief in the European Court of Human Rights', 834.

<sup>66</sup> Peroni, 'Deconstructing "Legal" Religion in Strasbourg', 237.

well-known principle that the protection of the *forum internum* is “absolute and unqualified”, whereas the *forum externum* can be subject to limitations under Article 9(2).<sup>67</sup> The *forum internum* and *forum externum* distinction has, the literature suggests, encouraged the assumption that, regardless of the restrictions in the *forum externum*, the *forum internum* remains untouched.

Related to this, some commentators have held that the conceptual and legal distinction between the *forum internum* and *forum externum* in Article 9 has facilitated, or been definitive for, the emergence of a spatial distinction between the public and private spheres, and lent weight to the privatisation of religion. With its emphasis on the internal, private realm, the *forum internum* and *forum externum* distinction is seen to have contributed to the ‘hiving off’ of religion to the private sphere,<sup>68</sup> so that religion remains ‘behind closed doors rather than in public’.<sup>69</sup> The emphasis is, it has been claimed, 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 employment) and, as such, the former enjoys greater protection than the latter.<sup>70</sup> When individuals cross the spatial divide, from the private to the public sphere, it is believed that the State often intervenes to limit manifestation.

It has been argued in the literature, however, 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. The idea that religion or belief can be compartmentalised in such a way, or ‘left at the door’ when entering the public sphere,<sup>71</sup> is seen as deeply problematic by some commentators and the public–private distinction has been criticised for giving ‘the contradictory message that society thinks it is important that they [religious believers] can believe what they choose, but it is not sufficiently important to be able to act on those beliefs,’ especially not in public.<sup>72</sup>

<sup>67</sup> *Ibid.*, 238.

<sup>68</sup> Nadirsyah Hosen and Richard Mohr, *Law and Religion in Public Life: The Contemporary Debate* (Abingdon: Routledge, 2011), 242. See also Pamela Slotte, ‘The Religious and the Secular in European Human Rights Discourse’ in Jan Klabbbers (ed.), *Finnish Yearbook of International Law*, Volume 21 (Oxford: Hart Publishing, 2012), 266.

<sup>69</sup> 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.

<sup>70</sup> See, e.g., 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* (Oxford: Oxford University Press, 2010), 278–9.

<sup>71</sup> 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.

<sup>72</sup> Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State*, 2nd ed. (Oxford: Oxford University Press, 2013), 156. See also Slotte, ‘What Is a Man if He Has Words but Has No Deeds?’, 259.

Furthermore, some commentators have argued that the *forum internum* and *forum externum* distinction has led to a bias at the ECtHR towards orthodoxy and against orthopraxy, that is, towards doctrine and against practice.<sup>73</sup> McIvor, for instance, has claimed that the ECtHR privileges ‘intellectual assent’<sup>74</sup> and others have criticised the ECtHR for working with a largely Protestant Christian view of religion and, as a result, for placing more emphasis on internal belief rather than outward manifestation.<sup>75</sup> And it has also been argued that the ECtHR is more ready to protect ‘voluntarist, private and individualist’ forms of belief rather than those which are ‘communitarian or organisational in orientation’.<sup>76</sup>

Religious or belief minorities, especially those which place particular emphasis on external manifestation, ritual and material objects, have been seen to be relegated to second place.<sup>77</sup> Danchin, for instance, has argued that Christian or post-Christian norms have been incorporated into the ECtHR’s interpretation of Article 9 and this has meant that the claims of Muslim and other religious communities have been ‘placed in jeopardy and marginalised’.<sup>78</sup> This was reiterated more recently by Berry and by Gunn in their analyses of the ECtHR’s approach in French and Turkish headscarf cases in particular.<sup>79</sup>

<sup>73</sup> For a discussion of the terms, see, e.g., Lucy Vickers, ‘The Relationship between Religious Diversity and Secular Models: An Equality-Based Perspective’ in Marie-Claire Foblets, Katayoun Alidadi and Zeynep Yanasmayan (eds.), *Belief, Law and Politics: What Future for Secular Europe?* (Aldershot: Ashgate, 2014), 124.

<sup>74</sup> Meadhbh McIvor, ‘Carnal Exhibitions: Material Religion and the European Court of Human Rights’ (2015) 17:1 *Ecclesiastical Law Journal* 3, 5.

<sup>75</sup> For further discussion, see Bielefeldt and Wiener, *Religious Freedom under Scrutiny*, 31–2. See also Ronan McCrea, ‘Religion, Law and State in Contemporary Europe: Key Trends and Dilemmas’ in Marie-Claire Foblets, Katayoun Alidadi and Zeynep Yanasmayan (eds.), *Belief, Law and Politics: What Future for Secular Europe?* (Aldershot: Ashgate, 2014), 92–4.

<sup>76</sup> Evans, ‘Freedom of Religion and the European Convention on Human Rights’, 313–4.

<sup>77</sup> See, e.g., McIvor, ‘Carnal Exhibitions’, 3–14; Sylvie Bacquet, ‘Religious Symbols and the Making of Contemporary Religious Identities’ in Russell Sandberg (ed.), *Religion and Legal Pluralism* (Farnham: Ashgate, 2016).

<sup>78</sup> Peter G. Danchin, ‘Islam and the Secular Nomos of the ECtHR’ (2011) 32:4 *Michigan Journal of International Law* 663, 715. See also Camil Ungureanu, ‘Europe and Religion: An Ambivalent Nexus’ in L. Zucca and Camil Ungureanu (eds.), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge: Cambridge University Press, 2012), 332–3.

<sup>79</sup> Berry argues 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, 689–91. Also, see T. Jeremy Gunn, ‘The “Principle of Secularism” and the European Court of Human Rights: A Shell Game’ in Jeroen Temperman, T. Jeremy Gunn and Malcolm D. Evans (eds.), *The European Court of Human Rights and Freedom of Religion or Belief: The 25 Years Since Kokkinakis* (Leiden/Boston: Brill Nijhoff, 2019).

In the literature, the ECtHR's approach to the right to manifest religion or belief has been described as haphazard and unpredictable: in some cases, it has found interference with, and a violation of, Article 9; however, 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.<sup>80</sup> For instance, with respect to religious symbols, it has been claimed that there is an 'incoherent approach of double standards' at the ECtHR.<sup>81</sup> In working with the notion that there is a binary and hierarchical distinction between the *forum internum* and the *forum externum*, commentators have struggled to reconcile ostensibly contradictory outcomes.

### 1.3.3 Suggested Refinements

The criticisms brought against the *forum internum* and *forum externum* distinction by commentators relate to 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. In an effort to address perceived problems with the ECtHR's understanding and application of the *forum internum* and *forum externum* distinction, various suggestions have been made.

Some commentators have called for the ECtHR to apply the distinction between the *forum internum* and *forum externum* more conscientiously and have 'greater respect for the structure of the right' because, they argue, this would encourage better and more consistent Article 9 protection.<sup>82</sup> Carolyn Evans has urged the ECtHR to establish the scope of the *forum internum* and *forum externum* and clarify ways in which the *forum internum* could be interfered with but has cautioned against allowing too broad a scope to this realm due to its unrestricted nature.<sup>83</sup> The ECtHR has also been encouraged to take applicants' claims more seriously, especially when complaints relate to the *forum internum*,

<sup>80</sup> Some attempts have been made at reconciling cases. See, e.g., 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' (2015) 4:3 *Oxford Journal of Law and Religion* 398.

<sup>81</sup> Paolo Ronchi, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*' (2011) 13:3 *Ecclesiastical Law Journal* 287, 296–7.

<sup>82</sup> Mawhinney, 'Coercion, Oaths and Conscience', 217.

<sup>83</sup> Evans, *Freedom of Religion*, 201, 205. Efforts have been made to outline the scope of the *forum internum*, but such lists of rights remain largely idiosyncratic. See, e.g., Bahiyih G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (The Hague: Kluwer Law International, 1996), 26; Taylor, *Freedom of Religion*, 115–202.

and to look carefully at complaints where *forum internum* interference may be less obvious, such as in relation to education or State Churches.<sup>84</sup>

Additionally, as a result of the difficulties applicants are perceived to face when asserting interference with *forum internum* rights under Article 9 before the ECtHR, some commentators have suggested seeking *forum internum* protection elsewhere. Taylor, for instance, argued that it was ‘necessary to consider a parallel means of protection when *forum internum* rights are at issue’.<sup>85</sup> Relying on the ECtHR’s approach in *Thlimmenos v. Greece*,<sup>86</sup> which he considered a ‘significant landmark’, Taylor argued that protection of *forum internum* rights could be improved by relying on the prohibition of discrimination under Article 14 in conjunction with Article 9.<sup>87</sup> This, he suggested, was a useful approach because it meant that it would no longer be necessary for applicants to ‘artificially establish an eligible form of manifestation’ in order to gain protection under Article 9.<sup>88</sup>

Commentators who have advanced a more conceptual critique – concerning the very existence of a *forum internum* and *forum externum* distinction in the right to freedom of thought, conscience and religion – have been less forthcoming with practical recommendations to address the perceived problems in the jurisprudence. Generally, suggestions for improvement in the understanding of Article 9 are limited to calls to move away from a binary and hierarchical understanding of the *forum internum* and *forum externum* to a more relational understanding of these aspects. Cismas, for example, argues that the *forum internum* and the *forum externum* should be understood as ‘inherently interlinked’,<sup>89</sup> and Petkoff contends that 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’.<sup>90</sup> However, they have stopped short of showing *how* this would or could work in practice at the ECtHR.

<sup>84</sup> Evans, *Freedom of Religion*, 204–5.

<sup>85</sup> Taylor, *Freedom of Religion*, 201.

<sup>86</sup> In this case, the ECtHR found a violation of Article 14 taken in conjunction with Article 9 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.

<sup>87</sup> Taylor, *Freedom of Religion*, 201.

<sup>88</sup> *Ibid.*

<sup>89</sup> Cismas, *Religious Actors in International Law*, 29.

<sup>90</sup> Petkoff, ‘*Forum Internum* and *Forum Externum* in Canon Law and Public International Law’, 207. 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* (Farnham: Ashgate, 2010), 297–8.

One of the problems with the suggestions made to date is that they are piecemeal; in other words, the suggestions advanced are largely intended to address the specific issues that commentators have themselves highlighted. So far, a way forward which addresses a significant number of the 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 has not been offered.

Furthermore, and perhaps more importantly, the criticisms of the *forum internum* and *forum externum* distinction and the recommendations made by commentators to improve the protection of the right to freedom of thought, conscience and religion tend to be rooted in the idea that the *forum internum* and *forum externum* distinction is fundamental to Article 9. It is either argued that i) it is not as central as it should be or, ii) it should not be as central as it is. The perceived centrality of a binary and hierarchical distinction between the *forum internum* and *forum externum* in Article 9 has tended to constrain analyses and commentators have held back from asking more radical questions about the place of the *forum internum* and *forum externum* in the right to freedom of thought, conscience and religion.

### 1.3.4 *The Evolution of the Classic Approach*

At this point, it is useful to take a step back to consider how this classic approach to the understanding of Article 9 and its protection by the ECtHR evolved and came to dominate, and to explore the evidentiary basis for claims about the existence and importance of the *forum internum* and *forum externum* distinction.

Despite the perception that it is a fundamental feature of the architecture of Article 9 and a doctrine of the ECtHR, the notion of a distinction between the internal and external realms – particularly as expressed through the language of the *forum internum* and *forum externum* – developed over a relatively short period of time in the literature. Before the turn of the century, the terms '*forum internum*' and '*forum externum*' were absent from or used infrequently in discussions of freedom of religion or belief. There was a tendency to speak more loosely about the rights under Article 9 rather than to juxtapose the *forum internum* and the *forum externum*.<sup>91</sup> The catalyst for the use of the terms '*forum internum*' and '*forum externum*' to describe two distinctive elements of the right to freedom of thought, conscience and religion in Article 9 seems to be Carolyn Evans' *Freedom of Religion Under the European Convention*

<sup>91</sup> See, e.g., Evans, *Religious Liberty and International Law in Europe*, 203. Malcolm 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.*, 284–6.

on *Human Rights*. Whilst she was not the first to use these terms together in the literature on freedom of religion or belief,<sup>92</sup> she was the first to use them (particularly the '*forum internum*') so frequently in relation to Article 9.

Carolyn Evans invested the distinction between the *forum internum* and the *forum externum* with considerable significance. In addition to observing that the wording of Article 9 suggests that 'a distinction must be drawn between the general right to freedom of religion or belief and the right to manifest that religion or belief', she referred to an '[i]nternal/external dichotomy' in the right to freedom of thought, conscience and religion.<sup>93</sup> She also stressed that, in the interpretation of Article 9, the emphasis is on the *forum internum* which is subject to no limitations or restrictions, and noted that the right to have or change a religion is non-derogable under Article 9 whereas the right to manifest religion or belief may be subject to restrictions under Article 9(2).<sup>94</sup> The distinction between the *forum internum* and *forum externum* was also subtly reinforced through the monograph's structure in which the *forum internum* and *forum externum* aspects of Article 9 are addressed in separate chapters.<sup>95</sup>

The impact of the way in which Carolyn Evans presented the *forum internum* and the *forum externum* and popularised the use of the terms is difficult to overemphasise. Subsequent analyses of Article 9 employed the language and stressed the centrality of the distinction between the two realms further. In Taylor's extensive treatment of Article 9 in *Freedom of Religion: UN and European Human Rights Law and Practice*, for instance, frequent references are made to the *forum internum* which is often contrasted with the *forum externum* or external manifestation.<sup>96</sup> Additionally, he imbued the distinction between the two realms with an increased intensity, explaining that there is an 'inescapable and immutable distinction' between the unqualified *forum internum* and the qualified *forum externum* in the 'architecture of all core freedom of religion Articles' which 'must be observed at all times'.<sup>97</sup>

In 2008, in his review of Taylor's monograph, Gunn pointed out that 'no major scholar has ever suggested that there is a simple bright line between the

<sup>92</sup> Tahzib, for instance, explained in relation to UDHR Article 18 that the first 'prong' concerns the *forum internum* and the second 'prong' the *forum externum*. See Tahzib, *Freedom of Religion or Belief*, 73.

<sup>93</sup> Evans, *Freedom of Religion*, 76, 74.

<sup>94</sup> *Ibid.*, 68, 96, 201.

<sup>95</sup> This approach has been followed in later analyses. See, e.g., Taylor, *Freedom of Religion*, chapters 2, 3 and 4; Evans, *Manual on the Wearing of Religious Symbols in Public Areas*, 8–9; Murdoch, *Freedom of Thought, Conscience and Religion*, 2nd ed., 18, 21.

<sup>96</sup> See, e.g., Taylor, *Freedom of Religion*, 19, 344.

<sup>97</sup> *Ibid.*, 19, 292. See also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed. (Kehl/Arlington: NP Engel Verlag, 2005), 412.

*forum internum* and *forum externum*'.<sup>98</sup> As discussed earlier, Carolyn Evans argued that in some Article 9 cases the relationship between belief and action was complex, and Malcolm Evans noted that whilst 'separate', the *forum internum* and the external realm of manifestation are 'intimately connected'.<sup>99</sup> However, whilst a relationship between the *forum internum* and *forum externum* has been noted by these scholars, and they have recognised the difficulty in drawing a line between these aspects of Article 9 in some cases, the idea that it is essential to draw a bright line between the *forum internum* and the *forum externum* in practice, because of the different levels of protection to be offered to these realms, is deeply embedded in the literature.

This notion seems to be the driving force behind Carolyn Evans' reproach of the ECtHR for its failure to develop a test to distinguish between the *forum internum* and the *forum externum*.<sup>100</sup> This was put more explicitly by Taylor who contended that, given that State interference in the *forum internum* cannot be justified but the State can limit the *forum externum* in certain circumstances, it is 'vital to know precisely where the boundaries of each are to be drawn'.<sup>101</sup> He devoted two out of the five chapters in his monograph to discerning 'the true reach of the unrestricted *forum internum* as distinct from the external right of manifestation'.<sup>102</sup>

Over time, the terms '*forum internum*' and '*forum externum*' have become synonymous with absolute and qualified protection, respectively. This elision of ideas reflects the notion that the *forum internum* and *forum externum* are to be sharply distinguished *because* they represent different levels of legal protection. In addition, there has been a change in the language associated with the *forum internum* and *forum externum* to further emphasise the separateness and distinctiveness of these realms. Rather than simply describing a 'distinction', it is now common to see descriptions of a 'clear and sharp distinction',<sup>103</sup> a 'substantial dividing line',<sup>104</sup> or 'bifurcation'<sup>105</sup> between the *forum internum* and *forum externum*.

<sup>98</sup> 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.

<sup>99</sup> Evans, 'The Freedom of Religion or Belief and the Freedom of Expression' (2009) 4:2 *Religion and Human Rights* 197, 203.

<sup>100</sup> Evans, *Freedom of Religion*, 3.

<sup>101</sup> Taylor, *Freedom of Religion*, 19.

<sup>102</sup> *Ibid.*

<sup>103</sup> Bielefeldt, Ghanea and Wiener, *Freedom of Religion or Belief*, 566.

<sup>104</sup> Tulkens, 'Freedom of Religion under the European Court of Human Rights: A Precious Asset', 511.

<sup>105</sup> Peter Danchin, 'The Modern Architecture of Religious Freedom as a Fundamental Right' in Susana Mancini (ed.), *Constitutions and Religion: Research Handbook in Comparative Constitutional Law* (Cheltenham: Edward Elgar Publishing, 2020), 78.



Whilst it is not necessarily problematic for a notion to gain currency over time, some concerns may be raised about the way in which the *forum internum* and *forum externum* distinction has become the classic approach to understanding the right to freedom of thought, conscience and religion in Article 9 and its protection by the ECtHR. The first point to note is that statements relating to the centrality of the *forum internum* and *forum externum* distinction, both as an architectural feature of Article 9 and as an ECtHR doctrine, are often supported by very limited, if any, evidence from the text of Article 9, the relevant *travaux préparatoires* or ECtHR jurisprudence. Occasional references are made to *C v. The United Kingdom*<sup>106</sup> – which concerned a Quaker’s objection to tax payments – to support the claim that the ECtHR draws a distinction between the *forum internum* and the *forum externum* in Article 9.<sup>107</sup> However, the way in which the term ‘*forum internum*’ was used in that case has not been thoroughly explored in the scholarly literature; it has not been demonstrated how it supports the claim that there is a clear distinction between the *forum internum* and the *forum externum* in Article 9, or the claim that the distinction is central to the ECtHR’s Article 9 jurisprudence.

Secondly, there appears to be some intertextual reliance at work.<sup>108</sup> Claims made about the centrality of the *forum internum* and *forum externum* distinction have tended to build upon earlier statements. Additionally, some of the more recent conceptual critiques appear to have taken earlier critiques of the case law as a starting point for their analyses rather than beginning with the text of Article 9 or the case law itself.

The implication in discussions relating to the right to freedom of thought, conscience and religion is that the *forum internum* and *forum externum* distinction is a clear and established legal principle which needs little explanation. Statements reinforcing its centrality have been repeated so often that the notion has become an unquestioned dogma. But question it one must. The paucity of evidence provided to support claims made about a binary and hierarchical distinction between the *forum internum* and *forum externum* in Article 9, and the extent of intertextual reliance in the commentary raises

<sup>106</sup> *C v. The United Kingdom* (1983) 37 DR 142.

<sup>107</sup> See, e.g., Evans, *Freedom of Religion*, 72, footnote 22; Doe, *Law and Religion in Europe*, 44; Adhar and Leigh, *Religious Freedom in the Liberal State*, 127, 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 (Oxford: Oxford University Press, 2001), 198, footnote 39.

<sup>108</sup> Carolyn Evans, for instance, referred to Tahzib, 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 Evans, *Freedom of Religion*, 72.

some serious questions concerning the legitimacy and accuracy of claims made about the existence and centrality of the distinction and its and problematic nature, both at the time in which the claims were made and in light of the significant developments in the case law over the past three decades. This suggests that a review of the understanding of ECHR Article 9 and the related ECtHR jurisprudence is not only necessary but overdue.

#### 1.4 CONCLUSION

There is an established consensus in the literature that a binary and hierarchical distinction between the absolute *forum internum* and the qualified *forum externum* is a fundamental architectural feature of Article 9 and an important doctrine of the ECtHR. However, despite this emphasis on the centrality of the distinction to the understanding and protection of the right to freedom of thought, conscience and religion, commentators have increasingly argued the notion is leading to problematic protection of both the *forum internum* and the *forum externum* at the ECtHR.

The ECtHR's understanding and application of the distinction has been heavily criticised. In terms of the *forum internum*, it has been criticised for its perceived failure to apply the distinction 'correctly' and consistently, and to recognise when *forum internum* rights may be at issue in Article 9 complaints. In terms of the *forum externum*, it has been criticised for treating manifestation of religion or belief as a second-order concern, for allowing manifestations to be relegated to the private sphere, and for emphasising internal belief over external manifestation. Suggestions proposed by commentators to address these perceived problems tend to be piecemeal and, more importantly, are rooted in the idea that a binary and hierarchical distinction between the *forum internum* and the *forum externum* is, or should be, fundamental to the understanding and protection of Article 9.

By stepping back to consider how this classic approach to the right to freedom of thought, conscience and religion evolved, why it is now so embedded in the literature, and the evidentiary basis for claims made about the *forum internum* and *forum externum* distinction, this chapter raised some concerns about its legitimacy as a conceptual framework. In doing so, this chapter has laid the foundation for the review of the centrality of the *forum internum* and *forum externum* distinction to the understanding and protection of Article 9 – based on the text of ECHR Article 9, the related *travaux préparatoires* and Article 9 case law – in the subsequent chapters.