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The Right to Freedom of Thought in the European Convention on Human Rights

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1. Introduction

The right to freedom of thought (FOT) is considered a fundamental right enshrined in the European Convention on Human Rights (ECHR) as well as a wide range of national, international and European texts as this Handbook demonstrates. Contrary to the fundamental importance of the right to FOT, scholarly engagement has only started to gather pace more recently, in particular with regards to the right's role and function in the face of unprecedented socio-technological developments.¹ However, even in the limited context of the ECHR, research and practice concerning the right to FOT are embryonic.² This is partially due to uncertainty concerning its content, considering that there is no definition of 'thought', which in turn relates to doubts concerning its particular context of application. Especially from a practitioner's perspective cases do not yet appear to have emerged within the ambit of the ECtHR where a claim was based on the right to FOT as such, rather than its 'sister rights' freedom of conscience and freedom of religion.³ Another reason for the hesitant engagement with the right to FOT is the perception that thoughts only appertain to the inner realm of a person's identity (*forum internum*) and are thus beyond the reach of legal regulation.⁴

Despite the reluctance to directly engage with the right to FOT in scholarship and jurisprudence, this chapter echoes other scholars in the field when it argues that contemporary developments in society and technology warrant a closer look at the history, content and potential of the right.⁵ It aims to explore the status and potential of the right from the perspective of the ECHR and ECtHR, suggesting further possibilities to interpret and apply the right based on its history, content, legal development and contemporary socio-technological changes. Emphasis is placed on the question of whether the right to FOT in Art. 9 ECHR holds independent value or whether it is rather to be interpreted as an ancillary right to other pertinent ECHR rights. If one concludes that the right to FOT has independent value, a related issue to be explored is whether that value is merely symbolic or also of practical significance.⁶

¹ For example, Patrick O'Callaghan & Bethany Shiner, 'The Right to Freedom of Thought in the European Convention on Human Rights' (2021) 8 *European Journal of Comparative Law and Governance* 112-145; Susie Alegre, 'Rethinking Freedom of Thought for the 21st Century' (2017) *European Human Rights Law Review* 3, 221-233.

² Besides O'Callaghan and Shiner cited in the previous footnote, the only other article directly engaging with FOT in the ECHR is Loukis Loucaides, 'The Right to Freedom of Thought as Protected by the European Convention on Human Rights' (2012) *Cyprus Human Rights Law Review* 79-87.

³ Alegre 224.

⁴ William Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 420.

⁵ O'Callaghan & Shiner; Christoph Bublitz "The mind and conscience are the person's most sacred possessions" – The origins of freedom of thought in the Universal Declaration and the Covenant on Civil and Political Rights' in this handbook.

⁶ O'Callaghan & Shiner argue that it is a distinct right. See also O'Callaghan & Shiner 114: 'the prevailing view of an absolute right to freedom of thought is that although it is symbolically important, it is of little or no practical significance'.

Even though rights such as the right to respect for one's private life (Art. 8), freedom of religion (Art. 9), freedom of expression (Art. 10) or freedom of assembly and association (Art. 11) are also relevant to the concept of FOT more broadly, this chapter focuses solely on Art. 9, this being the provision that explicitly protects an individual's right to FOT. In this respect the ECHR is unlike the majority of constitutions of European states, which seldom refer to freedom of 'thought'. Out of 46 Council of Europe (CoE) Member States only 18 provide for the right to FOT in their constitution in a similar fashion to Art. 9, i.e., without limiting it to the expression of thoughts.⁷

Art. 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.

Here, three concepts are acknowledged, the interrelation of which requires clarification: thought, conscience and religion. The ECHR itself does not offer any definitions for these terms, hence the reason the drafters' initial intent and the ECtHR's interpretation are the main ways through which these concepts may be approached. Consequently, this chapter is composed of four main sections. Section 2 maps out the historical background of Art. 9, aiming to gain insight into the origins and intentions behind introducing a right to FOT in the ECHR. Section 3 analyses the scope and content of Art. 9. Emphasis is placed on the jurisprudence of the ECtHR to explore the question of whether more recent developments under Art. 9 support an interpretation of the right to FOT as a right of independent value and practical significance. Section 4 reflects upon contrasting findings of sections 2 and 3 to shed light on how, if at all, the interpretation and application of the right evolved over time. It also summarises the key findings and points to further avenues for research.

2. Historical background of Art. 9

The ECHR - as a legal instrument envisaged to protect human rights in CoE Member States - has no direct predecessor. Rather it was the first instrument of its kind giving binding effect to the rights set out in the Universal Declaration of Human Rights (UDHR) and to establish a supranational human rights court. Yet, despite not having a direct predecessor, the content of the ECHR must be viewed in a line of evolution of earlier legal sources. These include the 1689 English Bill of Rights, the 1789 French Declaration of the Rights of Man and of the Citizen, the 1791 US Bill of Rights (1791), arguably the German Basic Law (1949) and notably the UDHR (1948).⁸ The idea of fundamental rights and freedoms appertaining to the individual was endorsed and developed in all these instruments long before the ECHR was adopted. Thus, the ECHR must be considered a product of longstanding and consistent socio-legal development over centuries, while equally recognising its ground-breaking impact for the

⁷ Felicitas Benziger, 'The Right to Freedom of Thought in the Tradition of Eastern European States' (Lawinnerself, 2024) at <https://www.lawinnerself.org/post/the-right-to-freedom-of-thought-in-the-tradition-of-eastern-european-states>.

⁸ Bublitz 3.

subsequent evolution and proliferation of comparable human rights frameworks in other regions.⁹

In the literature and in practice, rather than being known as the norm providing for the right to FOT, Art. 9 is more commonly referred to as the provision protecting the right to freedom of religion.¹⁰ The provision's drafting history supports such an understanding. In the initial draft 'freedom of thought' was not mentioned, only 'freedom of religious belief, practice and teaching'.¹¹ This indicates that freedom of religious belief and practice was at the forefront of the drafters' minds when they first worked on Art. 9. The references to FOT and conscience were adopted following Pierre-Henri Teitgen's proposal that the ECHR provision should reproduce Art. 18 UDHR.¹² While initially the plan was to include a reference to Art. 18 UDHR in Art. 9, without mentioning FOT or freedom of conscience separately,¹³ eventually it was decided to reproduce the entire wording of Art. 18 UDHR in the ECHR instead of merely including a reference.¹⁴

Teitgen elaborated on the reasoning behind his proposal:

...in recommending a collective guarantee not only of freedom to express convictions, but also of thought, conscience, religion and opinion, the Committee wished to protect all nationals of any member State, not only from 'confessions' imposed for reasons of State, but also from those abominable "methods of police enquiry or judicial process which rob the suspected or accused person of control of his intellectual faculties and of conscience".¹⁵

From this explanation it becomes apparent the scope of the provision started to expand beyond 'only' religion. The references to 'abominable methods of police enquiry ... which rob the suspected or accused person of control of his intellectual faculties and of conscience' set a specific context. Given the temporal proximity to the Second World War and the known measures taken by the Nazi regime to ensure compliance and effective persecution of dissidents, the references made by members of the drafting committee to 'history' appear to refer to such instances of (attempted) thought control.¹⁶ Another historical point of reference in temporal proximity to these preparatory works is the start of the Cold War, and emerging concerns about individual freedoms, including academic freedoms and FOT.¹⁷

⁹ For example, the Inter-American Court of Human Rights and the Inter-American Convention on Human Rights.

¹⁰ Commentaries on the provision focus on this aspect of Art. 9, see for example Schabas, *Commentary* 412-414, who does not consider freedom of thought separately in the introductory comments to Art. 9; see further section 3.1 below.

¹¹ Schabas 414.

¹² Ibid 415.

¹³ Ibid.

¹⁴ Ibid; Pierre-Henri Teitgen, 'Establishment of a Collective Guarantee of Essential Freedoms and Fundamental Rights', Report Doc. 77 05 September 1949 at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=36&lang=en> para 6.

¹⁵ European committee on Human Rights, Preparatory Work on Article 9 of the European Convention on Human Rights, 16th August 1956, DH (56) 14, 3-4 at [echrtravaux-art9-dh-56-14-en1338892 \(coe.int\)](https://www.echr.europa.org/en/press/communiqu%C3%A9s/1956-1957/1956-14-en1338892).

¹⁶ See Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 4-10.

¹⁷ Ralph H. Lutz, 'The History of the Concept of Freedom' (1950) 36(1) *Bulletin of the American Association of University Professors* 18-32.

Given the conscious choice to use the UDHR as point of departure as well as a point of reference for the ECHR, the question arises if the intention behind introducing certain rights was the same as well. The open reference to Art. 18 UDHR in the preparatory works, the reproduction of its wording in Art. 9 and the absence of further discussions concerning the substance of the right to FOT in the ECHR including the absence of deviating statements concerning its rationale indicate this. In fact, most discussions in the drafting committee focussed on the question of limitations of the right. Despite the direct reproduction of Art. 18 UDHR, as we shall see below in section 3.3, Art. 9 developed in a slightly different fashion concerning its potential limitations.

3. The Right to Freedom of Thought in the ECHR

Even though Art. 9 explicitly provides for the right to FOT, its practical relevance and individual significance is questionable. In jurisprudence, the right to FOT usually sits behind 'more specific' provisions that are related to thought, such as practising religious or spiritual beliefs, expressing opinions and convictions, etc.¹⁸ This is particularly the case where ECHR rights embody the *forum externum*, i.e. situations in which thought is being expressed in a manner perceivable to persons other than the individual holding it.¹⁹ Thus, rather than being treated as a right of independent value, FOT is considered in connection with related rights and in such cases is not regarded by the ECtHR as a freestanding right.²⁰

Against this background, the question is whether the right has any distinct value or is rather to be interpreted as ancillary to the other rights in Art. 9 or to related rights beyond this provision. In particular, the question arises about the significance and applicability of Art. 9's right to FOT in practice and/or whether it is better viewed as a right of symbolic value. The importance of this question is furthermore underlined by the Court's observation that 'the Convention is designed to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.²¹

The concept of ancillary rights is not foreign to the ECHR. Art. 14 (prohibition of discrimination) is a known example of an ancillary right. It is therefore not unthinkable that this categorisation may also apply to the right to FOT. According to ECtHR jurisprudence an ECHR right is ancillary when it 'complements the other substantive provisions of the Convention and the Protocols thereto'.²² An ancillary right has 'no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded thereby'.²³ However, even an ancillary right can be considered autonomous to the extent that its application does not require a breach of those provisions it is ancillary to.²⁴ Instead, 'it is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or

¹⁸ See also Jean-François Renucci, *Article 9 of the European Convention on Human Rights: Freedom of Thought Conscience and Religion* (Council of Europe Publishing 2005) 36-40; Loucaides, 'The Right to Freedom of Thought' 80.

¹⁹ O'Callaghan & Shiner 114; see also 'Guide on Article 9' para. 27.

²⁰ Jim Murdoch, *Protecting the Right to Freedom of Thought, Conscience and Religion under the European Convention on Human Rights* (CoE 2012) 12, 13.

²¹ *Airey v Ireland* [1979] ECtHR 6289/73 para. 24.

²² *Molla Sali v Greece* [2018] ECtHR 20452/14 para. 123.

²³ Ibid.

²⁴ Ibid.

more of the Convention Articles'.²⁵ Applying this principle to the right to FOT would mean that it depends on the fulfilment of requirements of other rights, such as the right to freedom of expression, before it can come into play. In this function, the right to FOT would supplement a claim based on the right to freedom for expression, for example, but it could not be claimed as an independent right.

3.1 Scope and Content

3.1.1 'Thought' in Art. 9(1)

FOT is the least explored of the Art. 9(1) freedoms, with virtually no jurisprudence directly relevant to it and minimal consideration in scholarly literature. In the context of freedom of religion, FOT may simply be viewed as embodying the guarantee that an individual can hold any or no religion or 'belief'. It is established ECtHR jurisprudence that beliefs protected under Art. 9 do not need to coincide with religion or even be of a religious nature.²⁶ One could therefore come to the conclusion that FOT coincides with belief in a non-religious context. What speaks against such an interpretation, however, is the different terminology (thought and belief are two different terms, with belief having its own definition, see above) and existing case law. The majority of pertinent case law concerning the right to have a belief is about religious beliefs.²⁷ It appears that belief is a catch-all category in cases where it is not clear whether a 'system of beliefs' qualifies as religion for the purpose of Art. 9.²⁸ It is important in this context to highlight that belief under Art. 9 is not the same as opinion, which falls under Art. 10(1) ECHR.²⁹

Another angle through which FOT is viewed in the jurisprudence is as an integral part of a democratic society.³⁰ The drafting history as explored previously in this chapter underpins the importance of this principle. However, even under this viewpoint, FOT is usually subsumed under the broader concept of freedom of religion.³¹

Substantiating the reluctance to engage with the concept of thought is the fact that the ECHR does not recognise a right to manifest thought, but only religion and belief in Art. 9(2). While this underpins the absolute protection awarded to the *forum internum* of the right to FOT,³² it does not help with approaching the concept of thought as enshrined in the ECHR. Since the adoption of the ECHR, only one case arose,³³ in which it was seemingly determined what falls under the category of thought, and it appears to have been overlooked in FOT literature so far. In *Salonen v. Finland* (1997) parents claimed the refusal to register their name of choice for their child constituted – among other rights – a violation of their right to FOT.³⁴ While the ECmHR did eventually dismiss the claim arguing that the registration of a child's name is not a

²⁵ *Carson and others v The United Kingdom* [2010] ECtHR 42184/05 para. 63.

²⁶ *Kokkinakis v Greece* para. 31.

²⁷ *Ibid* para. 27.

²⁸ *Ibid* para. 18.

²⁹ See also Murdoch 16.

³⁰ *Eweida and others v The United Kingdom* para. 79.

³¹ *Kokkinakis v Greece* para. 31; *Buscarini and others v San Marino* para. 34.

³² See also O'Callaghan & Shiner 113; Murdoch 18.

³³ Based on the author's research.

³⁴ *Salonen v. Finland* [1997] ECmHR 27868/95 (no page numbers or paragraphs in decision).

manifestation of belief and that ‘there is nothing to prevent the parents and acquaintances from calling the child by the name of the parents’ choice’, it acknowledged that

(...) taking into consideration the comprehensiveness of the concept of thought, this wish can be deemed as a thought in the sense of Article 9’. (...) the applicants’ complaint that their right to freedom of thought was violated by the refusal to register the proposed name falls within the ambit of Article 9.

It must therefore be concluded that wishes – at least to the extent that they concern the choice of one’s child’s name – constitute thoughts for the purpose of Art. 9(1). Hence, this is a category in which the right to FOT was accorded individual legal significance with a view to its scope. It should, however, be noted that this was a single judgment and no further supporting evidence has emerged since in neither ECmHR nor ECtHR decisions.

Consequently, the scope and content of the right to FOT in Art. 9(1) is best understood as the root of all unmanifested specifics, such as opinion, religion and belief, but also as an essential aspect of a person’s *inner* private life. In the context of the latter, the right to FOT is intertwined with Art. 8, which also protects an individual’s psychological and moral integrity,³⁵ further suggesting its fundamental significance in conjunction with other ECHR rights. As such, the relevance of the distinction between *forum internum* and *forum external* is vital to grasping the right to FOT as enshrined in Art. 9(1), despite the uncertainties regarding how to precisely demarcate the line between the two *fora*.³⁶ Taking wording and drafting history together, FOT is a distinct category that was consciously included as a separate right, precisely to protect all kinds of inner cognitive processes beyond a religious or philosophical nature.³⁷ The right to freedom of *thought* was recognised by the drafters as a significant requirement for individuals to enjoy all other related freedoms that flow from a person’s inner thought process. Even though the ECtHR formulated minimum standards concerning belief and religion, which ‘must attain a certain level of cogency, seriousness, cohesion and importance’,³⁸ if one interprets ‘thought’ in the manner suggested in this chapter, namely as the organic basis (in a metaphysical sense) from which all manifested thought recognised in other parts of the ECHR emerge, it is unthinkable to apply a set of specific requirements. In fact, the very rationale of FOT is to maintain a protected space for a person’s inner cognitive processes free from any outside judgement or interference.³⁹ It is beyond doubt that so understood, the right to FOT is justified as a foundational precondition to related rights, which further substantiates the question about its legal nature as a potentially ancillary right.⁴⁰

3.1.2 The Nature of the Right to FOT: Approaches in ECtHR/ECmHR Jurisprudence

A frequently used lens through which FOT may be observed within the scope of Art. 9(1) concerns the protection from indoctrination, be this of a religious or scholarly nature, for example in the course of education. Such an interpretation is anchored in Art. 9’s drafting

³⁵ *X and Y v The Netherlands* [1985] ECtHR 8978/80 para. 22.

³⁶ Harris 579.

³⁷ O’Callaghan & Shiner 129.

³⁸ (n48).

³⁹ See section 2.

⁴⁰ Recent scholarship in the field has proposed the reconceptualisation of the right to freedom of thought in light of neuro-technological developments. Depending on future developments in this direction, this could constitute a new/emerging context in which the right to FOT may have independent value. See further Nina Keese and Mark Leiser ‘Online manipulation as a potential interference with the right to Freedom of Thought’ in this Handbook.

background. It was found in several cases that ‘compulsory school attendance may come into conflict with a family’s religious beliefs’.⁴¹ Two relevant cases shall be highlighted here. The first is a ECmHR decision in the case *Angeleni v. Sweden* (1986).⁴² Notably, the atheist parents alleged a violation of their child’s right to FOT by not being exempt from religious instruction at school, which they considered would oblige their child ‘to be brought into the Christian way of thinking’.⁴³ Supplementing their application, the parents also based their claim on the rights to freedom of conscience and religion.⁴⁴ The ECmHR seemingly ignored this aspect of the application, focussing solely on assessing a potential infringement on the right to freedom of religion.⁴⁵ In its decision, the Commission upheld that the parents did not sufficiently establish that their child had ‘to participate in any form of religious worship or that she has been exposed to any religious indoctrination’.⁴⁶ Simply ignoring the FOT claim could indicate that the ECmHR did not consider it to have independent value besides the right to freedom of religion.⁴⁷ The other case is *Kjeldsen, Busk Madsen and Petersen v. Denmark* (1976), which was brought before the ECtHR.⁴⁸ In this case, the parents complained about a violation of their Art. 9(1) ECHR rights (including FOT) because they considered their daughter’s school’s approach to sex education to be contrary to their religious beliefs.⁴⁹ The Court’s approach in this case is relevant because it shows how it subordinates an alleged violation of the right to FOT to a more specific provision, in this case Art. 2 of Protocol No. 1 (the right of parents to ensure education in conformity with their own religious and philosophical convictions).⁵⁰ Without engaging with the substance of the other alleged provisions, the Court concluded that it did ‘not find any breach of Articles 8 and 9 which, moreover, it took into account when interpreting Article 2 of Protocol No. 1’.⁵¹

However, it would be premature to interpret this as an approach indicating an interpretation of the right to FOT as an ancillary right. First, based on this individual case, the same could be said about Art. 8, which no one would consider ancillary. Second, the applicants did not provide details to support their application under the viewpoint of possible infringements of Arts. 8 and 9. As such, the Court rightly focused on the provision that appeared to be at the heart of the claim, namely Art. 2 of Protocol No. 1. It is, however, true that the case of *Kjeldsen, Busk Madsen and Petersen v. Denmark* also indicates the link between the right to FOT and the right to education, which are inherently connected concepts.⁵² While it is unlikely that the right to FOT would come into play independently in such cases, unless the child’s own right to FOT is being claimed, since the right to education is *lex specialis* here, there could be room for it to be claimed as a supplementary right which would emphasise its legal nature as a potentially ancillary right. While once again the focus is religious belief as opposed to thought more

⁴¹ E.g. *Folgerø and others v Norway* [2007] ECtHR 15472/02.

⁴² *Angeleni v. Sweden* [1986] ECmHR 10491/83.

⁴³ Ibid 46.

⁴⁴ Ibid.

⁴⁵ Ibid 48.

⁴⁶ Ibid 49.

⁴⁷ Of course, it could also indicate that the ECmHR considered there was not sufficient substance in the application to support such a claim, which correlates with its overall finding of the case.

⁴⁸ *Kjeldsen, Busk Madsen and Petersen v. Denmark* [1976] ECtHR 5095/71.

⁴⁹ Ibid para. 44.

⁵⁰ See also *Lautsi v Italy* [2011] ECtHR 30814/06 paras. 59, 60, 65, 77.

⁵¹ Ibid para. 57.

⁵² *Kjeldsen, Busk Madsen and Pedersen v Denmark* para. 52.

generally, it is plausible that this angle may well be extended to the right to FOT and beyond the context of interference with religious beliefs. History shows the relevance of preserving the freedom of individuals to safeguard the free development of their inner thoughts, which may be targeted as part of a wider propaganda machinery in totalitarian states, even without a focus on religion.⁵³ In fact, this was the background of including the right to FOT as evident from Art. 9(1)'s drafting history. In practice, such cases would partially be absorbed by Art. 2 of Protocol No. 1 (the right of parents to ensure education in conformity with their own religious and philosophical convictions) where underage individuals are concerned. Beyond this provision's narrow scope, however, the right to FOT could apply.

The de-programming of beliefs, in an attempt to re-socialise members of a sect, was at the heart of *Riera Blume and others v. Spain* (1999).⁵⁴ While the claimants did invoke their right to FOT based on Art. 9(1), they also based their application on the issue of unlawful deprivation of liberty, which led the ECtHR to conclude that

(...) the applicants' detention is at the core of the complaints under consideration. Having held that it was arbitrary and hence unlawful for the purposes of Article 5 § 1 of the Convention (...) the Court does not consider it necessary to undertake a separate examination of the case under Article 9 (...).⁵⁵

Thus, while it appears plausible that such cases concern the scope of the right to FOT, the Court avoided engaging with this question by emphasising the violation of Article 5.⁵⁶ The de-programming of beliefs therefore constitutes a thinkable but so far not established legal avenue for applying the right to FOT independently. However, again, this decision should not prematurely be taken as supporting an ancillary interpretation of the right to FOT – *lex specialis* rules as such do not affect the independent nature of rights.

Even though the issue of parents refusing their children to be vaccinated – whether this is based on religious or other convictions or beliefs – was topical already, it certainly gained traction during the Coronavirus pandemic.⁵⁷ Despite the topicality of the issue, the ECtHR has not conclusively answered the question whether the refusal to be vaccinated/to let under-age children be vaccinated falls into the scope of Art. 9.⁵⁸ In *Vavříčka and Others v. the Czech Republic* parents of under-age children brought a case against the State claiming a violation of their right to freedom of conscience ('parental conscience')⁵⁹ due to laws that required compulsory 'routine' vaccinations.⁶⁰ The Court eventually dismissed the case *ratione materiae*, having found that the applicants did not sufficiently substantiate their claims.⁶¹ What makes this case interesting, however, is that the Court elaborated in its judgment that

⁵³ O'Callaghan & Shiner 122.

⁵⁴ *Riera Blume and others v. Spain* [1999] ECtHR 37680/97 para. 36.

⁵⁵ *Ibid* para. 38.

⁵⁶ See also Murdoch 18.

⁵⁷ See further Carmen Clayton & others, 'Understanding Parental Hesitancy toward Children's COVID-19 Vaccinations: The Influence of Government, Media and Interpersonal' (2023) 7 *Frontiers in Communication* 1-20.

⁵⁸ 'Guide on Art. 9' para. 35.

⁵⁹ *Vavříčka and Others v. the Czech Republic* [2021] ECtHR 47621/13 para. 322.

⁶⁰ *Ibid* para. 11.

⁶¹ *Ibid* paras. 334-337.

The three applicants have sought to invoke the protection of Article 9 for their critical stance towards vaccination. There is no suggestion on the part of any of them that their stance on this matter is religiously inspired. It is therefore not their religious freedom that is potentially at stake, but their freedom of thought and conscience.⁶²

Thus, even though the applicants did not claim a violation of the right to FOT themselves, the Court suggested on its own initiative that this would have been a potential legal avenue.

In a case arising under similar circumstances, the ECmHR also touched upon the issue of parental refusal to have their children vaccinated. In *Boffa and Others v. San Marino* (1998) the parents brought an application alleging a violation of their right to FOT and conscience.⁶³ Yet, the Commission dismissed a violation of Art. 9 with the brief statement that

Article 9 of the Convention does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief. The Commission recalls that the term ‘practice’ does not cover each and every act which is motivated or influenced by a religion or belief. The Commission notes that the obligation to be vaccinated, as laid down in the legislation at issue, applies to everyone, whatever their religion or personal creed. Consequently, the Commission considers that there has been no interference with the freedom protected by Article 9 para 1 of the Convention.⁶⁴

It is indicated in this reasoning that the focus was on the aspect of freedom of religion, rather than FOT and conscience. To this extent, one could argue that the ECmHR did not sufficiently address the claim brought by the applicants. Be this as it may, this case is insightful in so far as it shows a development in the legal consideration of such cases within the ambit of Art. 9(1). While the Commission did not engage with the right to FOT even though its violation was claimed in the application, the Court in *Vavříčka* suggested its potential applicability by its own initiative. In conclusion, it appears that this could be a potential context of application in which the right to FOT and conscience may be given independent value, uncoupled from its sister right of freedom of religion.

3.2 Potential Applicants

Art. 9 with all the rights it enshrines is generally viewed as applying to individuals.⁶⁵ Nevertheless, the recognition that ‘a community’s sense of self-identification’ is also relevant to the ambit of the provision is reflected in ‘an emphasis upon the protection of the rights of members of minorities’.⁶⁶ That Art. 9(1) recognises its applicability to not only individuals is indicated by the statement: ‘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’. Furthermore, in *X and Church of Scientology v Sweden* (1979) the ECmHR held that a church body lodging an application on behalf of its members is an admissible applicant.⁶⁷ It could therefore be possible to extend the

⁶² Ibid para. 330.

⁶³ *Boffa and Others v. San Marino* [1998] ECmHR 26536/95 30-31.

⁶⁴ Ibid 31-32.

⁶⁵ Murdoch 10.

⁶⁶ Ibid 11, 14.

⁶⁷ *X and Church of Scientology v Sweden* [1979] ECmHR 7805/77 para. 2.

scope of the right to FOT from protecting an individual's inner self to protecting what a community perceives as its collective inner self. However, three caveats need to be conceded: first, according to the wording the expression 'either alone or in community with others' only refers to the right to freedom of religion. Second, the preparatory works concerning Art. 9, while considering 'all nationals' do not explicitly include any discussions concerning collective communities.⁶⁸ Third, lacking other references in the ECHR to groups of people as a possibly protected legal entity raises questions as to how such an interpretation of Art. 9(1) aligns with the Convention overall.⁶⁹ In order to allow for such a reading, it is therefore more likely that the ECHR itself requires modification so as to embrace the protection of collective rights. While good reasons speak for such an undertaking, exploring this option further exceeds the scope of this chapter.⁷⁰

3.3 Limitations

Art. 9(2) limits only the right to manifest one's religion or beliefs:

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.

Thus, the rights to FOT and conscience must be considered absolute based on a *prima facie* reading of the provision's wording, which is further supported by the drafting history of Art. 9. Discussions concerning limitations always only revolved around the right to freedom to manifest one's religion or beliefs, never, however, the rights to FOT and conscience.⁷¹ Even where submitted draft proposals were more ambiguous in their wording,⁷² the ensuing discussions focused on the freedom to manifest one's religion or beliefs as opposed to FOT and freedom of conscience.⁷³

However, while the right to FOT enjoys absolute protection concerning its *forum internum*,⁷⁴ as soon as thought is manifested towards other members of society (*forum externum*) the right becomes qualified. The ECHR recognises specific external manifestations of thought, namely practising a religion or belief, expression, assembly and a person's private and family life, including correspondence.⁷⁵ For these specified rights, limitations are spelled out in the ECHR in their respective provisions. Yet, there appear to be no limitations for the rights to FOT and conscience in the ECHR. An exception is conscientious objection, which, as shown above, is

⁶⁸ 'Preparatory Work on Article 9' 3.

⁶⁹ Murdoch writes that 'a "consciousness" of belonging to a minority group (and in consequence, the aim of seeking to protect a group's cultural identity) does not give rise to an Article 9 issue.' 16.

⁷⁰ The lack of considering collective rights in the ECHR stands in contrast to historical antecedents that underpin the gradual development towards increasing supranationalism and the relevance of collective rights in relation to supranational governance, see further Felicitas Benziger, 'Self-Determination of Peoples in the Context of Supranational Governance', unpublished PhD thesis, Middlesex University London (2023).

⁷¹ See 'Preparatory Work on Article 9' 5-10.

⁷² A proposal from Turkish Committee members submitted in 1950 reads: 'Subject to reservations concerning legislative measures to prevent attempts being made once again to suppress these freedoms'. Since reference is made to 'these freedoms' in the plural form, this could be interpreted to include the rights to freedom of thought and conscience, 'Preparatory Work on Article 9' 5.

⁷³ 'Preparatory Work on Article 9' 4-6.

⁷⁴ See also Murdoch 18.

⁷⁵ See also O'Callaghan & Shiner 123.

not recognised as a general right within the ECHR. Furthermore, a conscientious objection undoubtedly concerns the *forum externum* since it is being expressed towards others. Considering this, the only Art. 9 right without an established *forum externum* is the FOT – that is if one expects a *forum externum* of thought as opposed to the other manifestations listed above.

However, even without an explicit option to limit a right, it may still be derogated from within the ambit of Art. 15 ECHR. In fact, a reading of Art. 15 reveals that Art. 9 is not included in paragraph two, where non-derogable provisions are listed explicitly, such as Art. 2. The possibility of derogating from the absolute right to FOT appears dumbfounding considering its fundamental significance as illustrated in section 2. While the ECtHR itself did not yet pronounce a position on this question, the United Nations Human Rights Committee (HRC) observed in General Comment 24 that certain rights may still be non-derogable even if they are not explicitly mentioned as such.⁷⁶ This may be due to the object and purpose of the provision itself and the overall Convention, which precludes derogation for reasons of teleology, because a norm is peremptory (*ius cogens*) even if the treaty itself does not say so explicitly, because ‘their suspension is irrelevant to the legitimate control of the state of national emergency’, or because derogation is simply impossible.⁷⁷

It is difficult to envision how the right to FOT in its internal dimension may be derogated from, unless an individual is deprived of its neurological capacity, in which case other ECHR rights would likely automatically be violated as well. Hence, this may fall under the category of impossibility. However, it is equally inconceivable how restricting the right to FOT could be relevant to the *legitimate* control of the state of national emergency. Finally, given the acknowledged absolute protection of the right to FOT in other international human rights treaties, which do not permit derogation from it like Art. 15(1) does in theory, accompanied by its recognised fundamental significance for other individual rights and freedoms, it could also be held that it constitutes a peremptory norm. Caution needs to be exercised, however, regarding the qualification of a right as peremptory given the high threshold and far-reaching implications, especially where no explicit statements exist.⁷⁸ Whatever category mentioned by the HRC one eventually finds applicable, it becomes clear that even though Art. 9(1) may theoretically be derogated from under Art. 15(1), this likely does not have any practical relevance. It is possible that not including the right to FOT among the non-derogable rights may have been an oversight in the course of drafting.⁷⁹

3.4 State Obligations

Generally, Art. 1 ECHR obliges all Contracting States to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention’. Building up on this wording, the ECtHR developed the doctrine of positive obligations which was gradually extended to

⁷⁶ UN HRC, General Comment No. 24: Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UN Doc CCPR/C/21/Rev.1/Add.6 para. 10; that Art. 15 was based on Art. 4 ICCPR suggests this finding is relevant to the ECHR as well, see *Travaux Préparatoires* on Article 15, Document DH (56) 4, Appendix I 10.

⁷⁷ *Ibid.*

⁷⁸ ILC, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens): Report on Jus Cogens (2022) Conclusions 4, 6-8, 10-19.

⁷⁹ Thanks to Patrick O’Callaghan for this point.

apply to essentially all substantive ECHR rights.⁸⁰ Such a positive safeguarding obligation can include the option of taking measures against ‘private agents’ even where measures are ‘not directly attributable to the respondent State’, as has been confirmed with regards to, for example, the right to freedom of religion.⁸¹ While the ECtHR did not make a finding about positive obligations arising from the right to FOT specifically, it did consider these in relation to Art. 9 rights as a whole.⁸² Therefore, it can be expected that there must also be a positive obligation arising from the protection of the right to FOT to safeguard it.⁸³

This positive obligation is accompanied by a negative obligation on the Contracting States not to infringe upon the rights set out in the ECHR, except to the extent this is justified based on specific limitations. It should be noted, that according to current jurisprudence, Art. 9 ‘does not guarantee, as such, the right to benefit from preventive measures to protect freedom of religion’.⁸⁴ This raises the question if the same applies to the right to FOT and if so, what situations this comprises. Considering this question is particularly relevant given suggestions by other scholars that ‘it is increasingly incumbent upon states to intervene in important areas of technological and scientific development to establish appropriate forms of protection’.⁸⁵ If such protection extends to the sphere of prevention, problems could arise considering the above-mentioned finding regarding preventative measures in relation to the right to freedom of religion.

4. The Right to FOT in Art. 9(1): Independent or Ancillary Right?

To conclude the analysis of the drafting history and jurisprudence on the right to FOT, this subsection returns to the initial question of whether the right is to be interpreted as having independent value or rather is best conceived of as an ancillary right.

The drafting background of the right is unequivocal in that no indications exist that suggest it was envisioned as being ancillary. To the contrary, it was decided to follow the example of the UDHR and to explicitly protect the right to FOT considering its fundamental significance as a safeguard of a person’s inner self against the background of infringements by the State in history. Equally, Art. 9(1) absolutely protects the right to FOT and presents it as an independent freedom besides the freedoms of conscience and religion.

The practical application of the right to FOT – or rather the lack thereof – however, points in the opposite direction. While applications have been partially based on the right to FOT, there is not a single case where this was the core or even only provision claimed. Similarly, both the ECtHR and the ECmHR have either considered such claims in conjunction with other rights and in a supplementing fashion or avoided engaging with the right to FOT completely. This attitude is reinforced by cases in which Art. 9(1) was subordinated to other provisions that

⁸⁰ Jean-François Akandji-Kombe, ‘Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights’ (CoE Human Rights Handbook No. 7, 2007) 5-6.

⁸¹ ‘Guide on Art. 9’ para. 52; *Affaire Siebenhaar c Allemagne* [2011] ECtHR 18136/02 paras. 41,

⁸² *Affaire Siebenhaar c Allemagne* para. 38.

⁸³ Similarly, O’Callaghan & Shiner 144.

⁸⁴ *Hernandez Sanchez c L’Espagne* [1996] ECmHR 30479/96.

⁸⁵ O’Callaghan & Shiner 144.

were considered pertinent instead.⁸⁶ Even forced confessions – the context of application intended for the right to FOT by Pierre-Henri Teitgen in the course of its drafting – are not treated as falling within the ambit of Art. 9(1) but rather Art. 3 (prohibition of torture) and 6 (fair trial).⁸⁷

Summarising, Art. 9(1) as a point of departure for research on the right to FOT leaves a somewhat contradictory message: while on the one hand the wording suggests ‘a potentially wide scope’ for FOT this is not reflected in the literature or the ECtHR’s approach.⁸⁸ In fact, the ECtHR has adopted a much more restrictive approach in its case law.⁸⁹ This chapter has shown that the right of FOT (and the right to freedom of conscience) is exercised in association with other ECHR rights that deal with specific external manifestations, namely practising a religion or expressing opinions.⁹⁰ Considering the lack of room given to FOT in the literature and jurisprudence despite its explicit mention in Art. 9(1), the question as to its independent value therefore remains. Even though the drafting history points towards a right to FOT of independent value, this was so far not acknowledged in practice.

On the other hand, the chapter highlighted that evidence can also be found in jurisprudence that supports an interpretation of the right to FOT as intended by its drafters, namely as a right of independent value and legal significance. Such evidence from the ECtHR ranges from finding - on its own initiative - that a claim falls within the scope of the right to FOT,⁹¹ rather than its sister right to freedom of religion, all the way to finding that claims making allegations of a violation of FOT are admissible.⁹² Overall, observing the development of case law on the right to FOT from the ECmHR in older cases to the ECtHR’s more recent approach there are signs indicating that there could be judicial readiness to consider it as having independent legal standing in specific contexts, even without supporting claims concerning other rights. While the ECmHR did not engage with the right to FOT or avoided to do so even where it recognised that its scope is affected, the ECtHR started to admit potential room for it recently.

Thus, while from a purely pragmatic point of view no significant body of jurisprudence has emerged yet that illustrates the independent standing and application of the right to FOT, there is not sufficient evidence to consider the right ancillary either – the latter being an interpretation that moreover contradicts the intent of the drafters and the fundamental significance attributed to FOT throughout history.

From a practical perspective, it is worth noting that although the right to FOT has not been significantly developed by the ECtHR, especially not when considered as an independent right, there are no indicators in the ECHR that suggest that the right is not justiciable. Questions concerning the specific context in which the right to FOT may have independent legal value and significance are not questions about justiciability, as they do not preclude the option that such situations may arise in the future. Rather, being a right protected by Art. 9(1),

⁸⁶ See also *Başkaya and Okçuoğlu v. Turkey* [1981] ECtHR 23536/94 para. 44; *Yazar and Others v. Turkey* [2002] ECtHR 22734/93 para. 62;

⁸⁷ O’Callaghan & Shiner 132.

⁸⁸ See also Murdoch 16: “Use of the terms “thought, conscience and religion” (and “religion or beliefs” in paragraph 2) suggests a potentially wide scope for Article 9, but the case-law indicates a somewhat narrower approach is adopted in practice.”.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ *Vavříčka and Others v. the Czech Republic* [2021] para. 330.

⁹² Even though this was in conjunction with other Art. 9(1) rights.

infringements of FOT can be claimed in applications to the ECtHR in the same fashion as other ECHR rights. Indeed, tentative developments are discernible towards engaging legally with the right by the ECtHR. This is supplemented by attempted claims based on FOT by applicants.

5. Conclusion

This chapter proposes that the right to FOT is best understood as fertile soil from which related rights obtain their foundation. It has thus foundational value. However, the analysis conducted in this chapter also shows that there are contexts in which FOT is relevant in its own right. These include the potential to shape this right with a view to neurotechnological developments, but also situations such as refusal of vaccination. Importantly, it is not disputed that despite being mentioned in the same line with freedom of conscience and religion, FOT goes beyond being a rationale for the protection of its sister rights.⁹³

A separate question is how the right to FOT should be developed going forwards. This chapter has illustrated the increasing call from scholars in the field to shape the right in view of technological advancements that may interfere with a person's inner cognitive world. While this is certainly an important aspect, it is furthermore argued here that the seeds that were planted in jurisprudence concerning other potential contexts of application equally need to be legally explored in more depth in order to shape a functional and effective right to FOT that fulfils the role it was envisaged to take: as a safeguard against external interferences in to a person's inner self so as to maintain a free, unqualified space that forms the basis of the enjoyment of all other rights and the development of a free society, but also one that is a cornerstone of being human – in the spirit of *cogito ergo sum*. As such, it must not be overlooked or too hastily be subsumed under equally pertinent rights.

⁹³ Similarly Schabas 420.