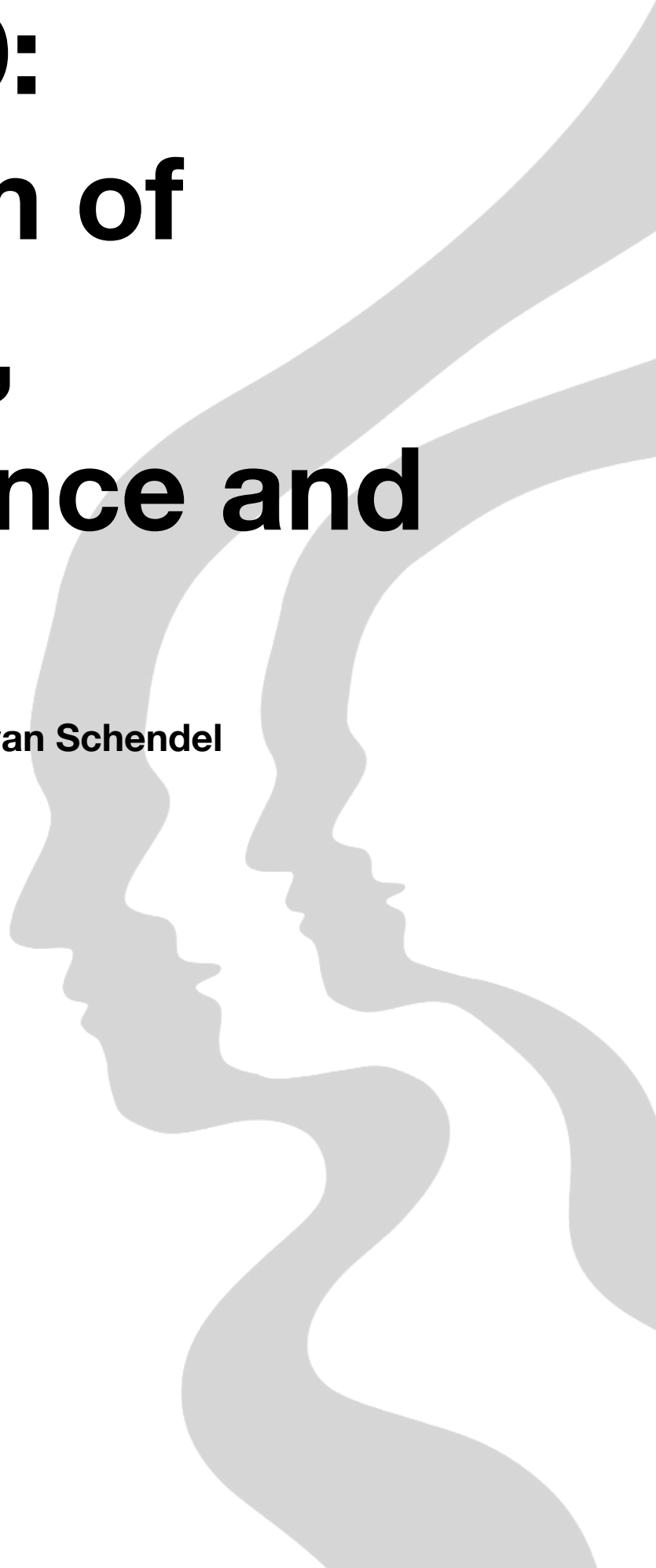


Article 9: Freedom of thought, conscience and religion.

An analysis by Maurice van Schendel



1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

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

- *European Convention on Human Rights*

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Introduction

Following the horrors of the First World War, powerful nations intended to prevent such conflict from ever happening again through a new international organization, the League of Nations. When this organization failed to prevent the atrocities of the Second World War, the international community was faced with a challenge: how were they going to protect citizens from their own government's wrongdoing?

In May 1948, 750 delegates from different sectors and organizations gathered at the Congress of Europe to discuss the protection of human rights. The assembly drafted a list of rights which were to be protected under the Convention, including some rights drafted directly from the United Nations' Universal Declaration of Human Rights.

In 1949, The European Convention on Human Rights was formally drafted by the Council of Europe in Strasbourg, where the Court resides today (Amnesty, 2018). In 1953, the convention came into effect, it was to function as an adaptable, dynamic set of rules. Which not only stipulated the state's duty to protect certain rights, but also included legal obligations to protect individuals, making the convention incredibly impactful (ECHR, 2016).

Cases are brought before the Court by applicants in writing, anyone residing in a contracting state is protected under the convention.

The majority of cases are denied in the admissibility stage. The Court has numerous criteria a case has to meet in order to be considered. Most cases get denied because applicants have failed to exhaust all legal remedies within the country they believe violated their rights (ECHR, 2014).

The number of judges the Court employs is equal to the number of contracting states and these judges don't represent their countries but act as independent agents of justice.

If the Court finds that there has been a violation of the convention it can order the contracting state to end the breach and award financial compensation to the applicant. The execution of verdicts are overseen by the Council of Ministers (ECHR, 2016).

In this paper, I will be examining Article 9 of the European Convention on Human Rights: The right to freedom of thought, conscience and religion. The respect for people's convictions and religious beliefs are often enshrined within the constitution or laws of contracting states, but violations of these rights have however still occurred on numerous occasions (ECHR, 2021b). It is in these cases that the Court decides to assess whether an applicant's rights have truly been violated and consider remedies the contracting state has to undertake in order to prevent such breaches in the future.

I will first examine the text of Article 9, the parameters through which the Court applies the Article in practice and some personal considerations regarding its efficacy. I will then look at a landmark case, one that had a pivotal role in the application of the Article and discuss how the Court decided to apply the Article in this particular case. I will also consider this case's relevance to Article 9 and how the case positions itself within the larger body of jurisprudence of the Court. As the Convention is intended to move in tandem with society's changing values, I will continue by examining two recent cases in which the Court ruled on violations of applicants' rights under Article 9, after which I'll illustrate its relevance to the rights enshrined in Article 9. I will conclude by briefly examining the differences between the Court's assessment of the landmark case and the two recent cases, use these differences to highlight the Article's development over time and assess its efficacy in modern society.

Article 9

The Court vaguely defines the terms 'Thought', 'Conscience' and 'Religion', as the themes are so far-stretching, the mere attempt of trying to identify parameters through which these concepts can be assessed, would most certainly exclude situations in which the Court would actually deem beliefs and convictions as protected under Article 9, but would be hindered due to its definition's limitations. Taking this into consideration, Article 9 functions more as a right, exerting its power in practice, not theory. When applicants believe their rights under Article 9 have been breached, it's up to the Court to assess this in practice, using jurisprudence, contextual information and perhaps most influential: zeitgeist. The themes touched upon by Article 9 are kept intentionally vague, mostly to account for society's changing needs and values. What might be deemed a cult, or loosely held personal belief in the 1970's might be regarded as a respectable religion or school of thought in the present day (ECHR, 2021b).

Perhaps, by trying to define the concepts central to Article 9, I risk putting myself above the Court and the Convention ('if you're not gonna define these concepts, I sure will!'), which would arguably be an arrogant approach to trying to examine the scope of Article 9. Instead I will examine the concepts 'Thought', 'Conscience' and 'Religion' along the lines the Court did set out, the way it has applied these concepts to particular cases and, perhaps arrogantly, my own interpretation of these concepts.

As the Court does not provide an itemized list with definitions, especially with regards to Article 9, it requires some interpretative reading of the Court's guide on Article 9, to determine what constitutes the freedom of thought. Although arguably the hardest to examine, it is possibly also the farthest stretching element of Article 9. The Court considers a myriad of deeply held personal beliefs, be it religious or non-religious, as a 'thought'. It is someone's inalienable right to be able to hold and manifest these convictions, but there are countless limitations as well. In the Netherlands, for example, everyone has the right to hold and manifest their own political opinion, but if someone were to be a school teacher they are prohibited from forcing these convictions upon their pupils. This could mean that the right to hold and manifest personal beliefs are limited to the individual or the private-sphere and one is prohibited from imposing these beliefs onto others.

The Court more specifically defines 'conscience' in the context of the right not to act contrary to one's conscience and convictions. The Court uses the example of military service to illustrate its practical application. In its jurisprudence the Court has ruled that Article 9's protections also safeguards someone's right to refuse compulsory military service, based on deeply held

personal convictions or religious beliefs. If an individual was to be vehemently opposed to military service, like if they were to subscribe to the pacifist current of thought, for example, their opposition to compulsory military service would be protected under Article 9. Conscience, although complex, occupies a more solidified position within the Article, as a person's conscience would be subject to very little or slow change and could therefore be regarded as a deeply held personal conviction. Not a fleeting stance an individual could adopt to avoid inconvenient situations like compulsory military service.

Religion could be regarded as one of the more tangible and easier-to-define aspects of Article 9, as religion does not only pertain to merely the belief in a superhuman controlling power, like a god. But religions have grown to be large international organizations with extensive power structures, assets and huge followings. But despite some religious organizations' tangibility, the definition of the word 'religion' is still incredibly broad, vague and widely applicable. The right to practice a religion also works with a negative aspect: the right not to practice a religion. This came to fruition in a case in which an applicant was required to conduct an act which could be deemed as swearing allegiance to a certain religion (*Alexandridis v. Greece*). The Court regarded this as an infringement on the applicants right to practice, or to not practice a religion. The right also extends to the choice to reveal one's beliefs. The Article protects the individual's right to refrain from revealing one's religious affiliations or beliefs or be forced to conduct behavior pointing towards a particular religious adherence (ECHR, 2021b).

Article 9 often works in tandem with other Articles of the convention. Like protections from discrimination, right to family life or the freedom of assembly and association. The latter, Article 11, protects the individual's rights to associate themselves with others, or join in a peaceful assembly. This extends to religious gatherings and services, or becoming a member of an organized religious movement. This means, if a Government restricts the gathering of a certain religious movement, it runs the risk of impeding the adherents' right under both Article 9 and Article 11 (ECHR, 2021c).

It is this maneuverability of Article 9 throughout the Convention, and its ability to be applied in combination with other Articles of the Convention, where I believe its power comes to full fruition. As the Article pertains to broad and abstract terminology and themes, its efficacy is seen more often in conjunction with other, more substantive Articles of the Convention.

Notable

The landmark case of *Kokkinakis v. Greece* concerned Mr Minos Kokkinakis, who was a retired businessman of Greek nationality. Mr Kokkinakis was born into an Orthodox family in Crete in 1919. In 1936, Mr kokkinakis became a Jehovah's Witness, a Christian denomination which holds distinct views from mainstream Christianity. After becoming a Jehovah's Witness, Mr Kokkinakis was arrested more than sixty times for proselytism. He was also jailed and imprisoned several times.

In 1986, Mr Kokkinakis and his wife engaged in a discussion with Mrs Kyriakaki, the wife of the cantor at the local Orthodox church, the latter of which accused them of proselytism and subsequently informed the police.

Mr Kokkinakis and his wife were subsequently prosecuted and sentenced under the law making proselytism an offense. They were each sentenced to four months imprisonment or to pay a monetary sum. Mr and Mrs Kokkinakis appealed against this judgment to the Crete Court of Appeal, which quashed Mrs Kokkinakis' conviction and reduced Mr Kokkinakis' prison sentence.

Mr Kokkinakis appealed once again, claiming that provisions in the law that criminalized proselytism were in conflict with Article 13 of the Constitution. The Court of Cassation dismissed the applicants appeal stating the law prohibiting proselytism was actually fully compatible with the Constitution as it is the act of involuntarily forcing one's religion upon others, whatever this religion might be, is illegal, as explicitly stipulated in the Constitution. To clarify, Article 3 of the Greek constitution of 1975 declares the Greek Orthodox Church as the dominant religion of Greece. While Article 13 outlines protections for people's right to exercise their beliefs and religion, it also underlines the protection of one's right to worship and practice religious rituals. Article 13, in a sentence comprising three words, does explicitly forbid proselytism. This was first criminalized under the dictatorship of metaxas between 1936 and 1940 (ECHR, 1993).

The Supreme Administrative Court defined proselytism as follows: to entice disciples away from the dominant religion (the Christian Eastern Orthodox church) by means which are unlawful or morally reprehensible. The Court further excludes spiritual teaching from being proselytism, even if it demonstrates the errors of other religions and entices followers of these religions to convert. Since the revision of the Greek constitution in 1975, the Jehovah's witnesses have been labeled as a religion numerous times, but some first-instance Courts still tend to rule against this consensus regularly, describing the group as a 'sect', like in the judgment Mr Kokkinakis had received from the Lasithi Criminal Court.

In the proceedings before the European Court of Human Rights, Mr Kokkinakis claimed his rights had been violated under Articles 5 (right to liberty and security),

6 (right to a fair trial), 7 (no punishment without law), 9, and 10 (freedom of expression). In December 1990, the Court declared the application admissible, except for the claims that the applicant's right had been violated under Article 5 and 6, labeling them as manifestly ill-founded. The applicant's complaint with regards to Article 9 mainly focused on a restriction imposed on him to exercise his religion. The applicant not only opposed the way the law criminalizing proselytism had been applied to him, but that the law as a whole was incompatible with the right to freedom of thought, conscience and religion protected under Article 9. The applicant further argued the law in its entirety functioned as a substantial body of restrictions and threats of punishment, influencing adherents of any and all beliefs other than Orthodox Christianity. The Government based their defense mostly on the semantic circumstances of the case. Using the event of Mr Kokkinakis' discussion with Mrs Kyriakakis as paramount in illustrating the necessity of its proselytism prohibition law. The Government argued it was Mr Kokkinakis' insistence on entering Mrs Kyriakakis' home under false pretenses which warranted a case of proselytism, which needed to be prosecuted as a criminal offense. Furthermore, the Government stated it was the applicant's skillful interpretation of holy scriptures, directed at someone who did not possess extensive knowledge of the same subjects, which illustrated a criminal attempt of using someone's lack of knowledge and naivety in order to convert them to one's religion. Eventually the Court ruled, six votes to three, that there had been a violation of Article 9, it noted the Greek Courts had not specified in what manner the applicants behavior warranted a conviction under the section of the law prohibiting proselytism. The Court concluded that it had not been shown that the applicant's conviction was justified in the specific circumstances and therefore ruled there had been a violation of Article 9 of the European Convention on Human Rights (ECHR, 1993).

The case of *Kokkinakis v. Greece* has been widely used to assess the Court's practical application of Article 9, and is regarded as a landmark case for contextualizing Article 9 within the sphere of the rest of the convention. As Article 9 touches on incredibly difficult to define concepts, like 'belief' and 'religion' the grounds on which the Court assesses a case can serve as a tangible example of the interpretation of the themes central to Article 9. The case occupies a considerable space in any case touching on Article 9, that followed *Kokkinakis v. Greece*. This is understandable, as it was the first real, substantive instance in which the Court assessed the right to freedom of thought, conscience and religion, since the founding of the Convention.

The *Kokkinakis* judgment has actually received criticism as well. These criticisms stem from a perception that the Court set out to apply the concepts central to

Article 9, without fully elaborating on the way it chose to interpret rather abstract concepts. It arguably chose to apply certain criteria to the facts of the case without transparently reflecting on the consideration the Court made with regards to these highly complex and multi-faceted concepts. As Judge Pettiti even says in his partly concurring opinion: “I considered that the reasoning given in the judgment could usefully have been expanded.”. It seems as if the Court could have used this case as a way through which they could more accurately define Article 9, which could have possibly solidified it more among the other Articles of the Convention (Evans, 2017).

Contemporary application

Vavříčka and Others v. the Czech Republic

The case of Vavříčka and Others v. the Czech Republic consisted of six separate applications by Czech nationals, who were fined after failing to comply with a statutory duty to vaccinate their children. One of the applicants refused to vaccinate their children, incurring a fine. The other applicants were minors who were refused admission to preschools or nurseries on the same grounds. This case touches on sensitive topics, of which the relevance has been underlined by the Covid-19 pandemic. Amid the rise of misinformation and vaccine skepticism, Europe has seen declining numbers of child vaccination rates. To counter this, several governments, including the Czech government, introduced vaccine mandates for certain vaccines for children with the aim of safeguarding public health. In the case of Vavříčka and Others v. the Czech Republic, the applicants challenge the legality of these vaccine mandates, claiming they infringe on their human rights (ECHR, 2022).

The applicants' claim mostly focused on Article 8 (Right to respect for private and family life) and Article 9 of the Convention.

During the proceedings Article 8 and Article 9 were argued separately, along the lines of 'family life' and 'personal convictions'.

The first applicant claimed he acted contrary to the vaccine mandate with the aim of safeguarding the health and interests of his children. The applicant was convinced vaccines cause damage to people's health, which led him to not have his children vaccinated. The Government considered the arguments made with regards to Article 8 were almost identical as those made with regards to Article 9 and felt like the Court should only assess the claims under Article 8. The Government also argued that personal views with regards to vaccinations would not constitute a 'belief' within the context of Article 9. The Court, in their assessment, concluded that the applicants' Article 9 objections to the vaccine mandate were not religiously motivated, furthermore the Court underlined the right to act upon your beliefs does not mean someone can forgo national laws intended to safeguard public health (ECHR, 2021a).

This case, and consequently, the Court's judgment is noteworthy as it is the first time the Court has addressed compulsory child vaccination and the legal framework contracting states create to enforce their vaccination-mandates. This case is incredibly interesting within the context of Article 9, because it illustrates the Court's high regard of matters like public health and it serves as another interpretation of a broad concept like 'beliefs'. The challenge of wording an Article like Article 9 is that terms like 'belief' and 'conscience' are incredibly broad. The act of trying to demarcate criteria through which these terms could be assessed

would pose a grave risk of limiting the text in such a way it might not evolve with society's changing needs and values in the future. In the case of *Vavříčka and Others v. the Czech Republic*, the Court has moved to prioritize matters like public health and child wellbeing over loosely held and unsubstantiated personal beliefs.

Abdi Ibrahim v. Norway

The case of *Abdi Ibrahim v. Norway* concerned a Somali national of Muslim faith who received refugee status in Norway in 2010. She arrived in Norway with her baby son, who was placed in emergency care soon after the applicant arrived. The baby was later placed with a Christian foster family. The applicant's wishes were that the child be either placed in the care of her cousins or a Muslim family. The applicant was initially granted six one-hour visits per year, which were revoked when the child's foster family were allowed to adopt the child in 2013. After the child was adopted by the foster family, the applicant's parental rights were removed. The applicant appealed the decision, not with the aim of getting the child back, but to maintain his religious and cultural roots. The Norwegian Court of Appeals dismissed the applicant's appeal and authorized the adoption (ECHR, 2022).

The applicant complained that the withdrawal of her parental responsibility and the authorisation of her son's adoption by his foster family had violated her right to respect for family life under Article 8. The applicant also cited Article 9's guarantee of her right to exercise her religion 'alone or in community with others', in this case her son, had been violated by the Government's decision to strip her of parental and visitation rights. The applicant also felt like her rights under Article 2 of Protocol No.1, the State's obligation to respect the parent's rights to raise their children in conformity with their religious beliefs, had been breached. The government argued they had tried to respect the applicant's wish to find a muslim foster family, to no avail. The Government then decided to act in the best interest of the child and place him in a Christian foster family, which went against the wishes of the applicant. The Court decided that the applicant's claimed infringement on her Article 9 rights should be considered within the context of Article 8 of the Convention. The Court eventually found a violation of Article 8, taking the religious aspects of the case pertaining to Article 9 into consideration within its assessment of Article 8 (ECHR, 2021d).

This case is very relevant to the essence of Article 9, not in a substantive manner, but in a more abstract one. As the Court decided to assess a breach of Article 9 in the context of a more substantive and tangible complaint, namely that the applicant's right to family life had been breached. This is understandable as

religion often plays an essential part of family and community life, it wouldn't necessarily work the other way around. In the context of the European Convention on human rights, this would mean: A breach of the right to family life could easily mean someone's rights under Article 9 are breached as well, if religion were to play a substantial role in family life. While a breach of someone's right to freedom of thought, conscience and religion could happen without someone's right to family life ever coming into play.

Conclusion

The case of *Kokkinakis v. Greece* is widely used to examine the Court's application of Article 9, but to compare its judgment to more recent cases, it would be necessary to summarize the Court's application of the Article. If I should characterize the Court's judgment of the *Kokkinakis* case, I would say its landmark status is mostly dependent on the novelty of such a case at the time. It is perhaps this novelty why the Court chose to use a more abstract and broad application of the Articles, judge Pettiti mentioned this in his partly concurring opinion, that the Court could have elaborated more on its reasoning behind its decision. In the cases of *Ibrahim* and *Vavříčka*, a verdict shrouded in mystery could not be deemed sufficient, instead the Court elaborated very explicitly on what grounds they formed their judgment. This is fitting as the case of *Kokkinakis* dealt with broader themes of religious freedoms, while the cases of *Ibrahim* and *Vavříčka* touched on incredibly specific instances in which Governments were accused of encroaching on their citizen's Human Rights.

This increased specificity by the Court might be the result of the Court's assessment of more cases touching on Article 9's protection after the *Kokkinakis*' case, but could also point towards an ever increasing complexity of modern society's views on religion and personally held beliefs. In a time where spirituality moves fluidly in and out of our lives and personal beliefs are influenced by factually incorrect streams of information, concepts like 'thought', 'conscience' and 'religion' are charged with layered complexities.

I personally believe Article 9 positions itself well within an abstract sphere of understanding, one of religion, beliefs and convictions. As these terms are hard to define, they are hard to protect as well. The broad and vague wording, as well as careful interpretation of 'religion' and 'belief', have led to the Article occupying an interesting place in the Convention in which its efficacy as a standalone Article is disputable. It is within the context of violations of other Articles like Article 11, that Article 9 exerts its true power within the convention.

Despite this, I believe that Article 9's importance is only growing. The Court's continuing assessment of increasingly more complex cases plays a vital role in the distinction we make between religion, beliefs and convictions. It challenges us to critically look at what these things mean to us and what their place is in a practical legal framework, like the European Convention on Human Rights.

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