

that international law places on radical changes in the *status quo* as well as of the dangers of upsetting delicate balances.

The author feels that the Security Council's lack of regard for international law has done more damage in Iraq than it did in Yugoslavia. More critically, one can question the reliability of much of the empirical material cited, but this should not detract from the book's usefulness, for what we need in future cases is not more empirical data on undernourishment and mortality but better elaboration of the legal framework of Chapter VII measures.

The irrepressible ascendancy of soft law made the questions and answers of this book inevitable, and we should be grateful to the author for having worked them out with such system and clarity. But whether the insurgency of soft law against hard law in a case like this will be a corrective, a supplement or a replacement, and what new equilibrium will ultimately emerge, is a matter for the future to decide.

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Evans, Carolyn, *Freedom of Religion Under the European Convention on Human Rights*. Oxford: Oxford University Press, 2001. Pp. 222.

Freedom of Religion Under the European Convention on Human Rights, recently published in OUP's *ECHR Series* (edited by Professor J.G. Merrills of Sheffield University) is an updated version of Carolyn Evans' DPhil dissertation completed in 1999 at Exeter College, University of Oxford. The author is currently Senior Fellow of the Faculty of Law at the University of Melbourne, Australia. Under the auspices of Professors Mark Janis and Guy Goodwin-Gill, Dr Evans has produced a well-researched and truly dense account of the status of the protection of what is often inaccurately described as the freedom of religion in the law of the European Convention on Human Rights (ECHR).

The United Kingdom's incorporation of (some parts of) the ECHR has rocketed the

English-speaking legal market's demand of informative and informed treatises on the often hidden doctrinal treasures of ECHR law.

It is a natural assumption to make, that the coming into force in October 2000 of the Human Rights Act 1998 has expedited OUP's publication of Ms Evans' book. British lawyers have rediscovered ECHR law as a useful tool in everyday legal strategy beyond the traditional mores of international human rights law. The demand for means of insight is voracious, not only relating to the law of the Human Rights Act 1998, but for general ECHR law as well. Few of the works now overflowing the British (and consequently other countries') market live up to minimum qualitative standards of expectation.

Dr Evans' book consists of nine chapters. It is rigidly structured in accordance with archetypal presentations of ECHR law. Thus, the treatise has a short Introduction in Chapter 1 outlining the scope of the book as well as giving a nutshell exposition of the anatomy of relevant ECHR law (the role of the supervisory organs, admissibility requirements, standing, etc.). Chapter 2, "Towards a Theory of Freedom of Religion or Belief", fleshes out the normal justifications given for protection of freedom of religion (broadly defined). Chapter 3 gives an historical background to the drafting of what finally became the protection of religion now mainly based in Article 9 of the ECHR.

The author correctly mentions (p. 6) that freedom of religion broadly defined is protected in other ECHR provisions as well. Reference is made particularly to the accessory anti-discrimination clause in Article 14 of the ECHR and the state's obligation to respect the rights of parents to ensure education of their children in conformity with their own religion as set forth in Article 2, second sentence, of the First Protocol (pp. 5–6). The overlapping nature of ECHR rights provisions as to the protection of the different rights is also noted. The proper function of provisions such as Articles 8 (private life) and 11 (freedom of association and assembly) is not discussed. Perhaps painstakingly aware of the inherently pragmatist approach taken by the

European Court of Human Rights (ECtHR), the author does not find it worthwhile to conduct a formalist investigation of the nitty-gritty details of where in the text of the Convention the ECtHR will situate a freedom of religion related issue. The focus is on Article 9 and — to a lesser degree — on the accessory provision in Article 14. The scope of the book is consequently sufficiently narrow to suit Oxford DPhil dissertation standards.

Following these preliminary exercises, Chapters 4 to 6 concentrate in true black-letter law fashion on the content of the interests protected by Article 9. As is well known to the ECHR law insider, the ECtHR normally takes a two-step approach when deciding on the question as to whether the rights set forth in Articles 8–11 are violated or not.

The first issue is that of the applicability of the right provision to the issue in question (as determined by the law of Article 9(1)). The second is that of the proper scope of protection once the provision is found applicable (as determined by Article 9(2)). Dr Evans takes the same well-trodden path. The second part of the book thus deals with the question of applicability in Article 9(1). Suggestions as to defining religion or belief within the framework of ECHR discourse are made in Chapter 4. Essentially, the book here makes an effort of crystallizing the subtle distinctions between ‘thought and conscience’ on the one hand, and ‘religion [and] belief’ on the other. While the first two interests enjoy protection of their contemplative sides only, the latter two enjoy an additional expressive protection. In other words, ECHR law protects the right to have ‘thought’ and ‘conscience’ as such, but does not protect manifestations of them. But it safeguards the manifestation of ‘religion [and] belief’. The drawing of lines in theory or practice between these two groups of four concepts can easily take on comical dimensions. Dr Evans makes a sober attempt to compartmentalize the concepts without any overly theorized overtones.

The book’s dealing with the question of applicability is primarily devoted to the conceptual content of the interests protected as

expressed by the four words mentioned (thought, conscience, religion and belief). Some questions as to the applicability *ratione personae* of Article 9 (i.e. who is entitled to protection under the provision) is less substantially dealt with. In contemporary ECHR discourse, especially in its British variant preceding and following the incorporation of the ECHR, much has been said about the possible ‘horizontal’ effect of ECHR protection and the traditional positive/negative obligations dichotomy in ECHR law.¹ The purpose of ECHR law is primarily that of protection against direct governmental intrusion of the private sphere (the state’s so-called negative obligations not to interfere with the interests protected). However, based on the effectiveness principle, the ECtHR has established a doctrine of implied positive obligations as well. Occasionally, ECHR provisions might include a right for the private person to require public activity (and not only public omission) for the protection of its rights. This can somewhat imprecisely be described in terms of affirmative action.² Those positive obligations can even extend to require public intervention in a genuinely inter-personal dispute (the often-called third-party effect of the Convention).

¹ Recent contributions include Bamforth, ‘The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies’, *Cambridge Law Journal* (1999) 159–170; Dickson, ‘The Horizontal Application of Human Rights Law’, in A. Hegarty and S. Leonard (eds), *Human Rights: An Agenda for the 21st Century* (1998) 59; and Markesinis, ‘Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany’, 115 *Law Quarterly Review* (1999) 47.

² One should note the emerging tendency in German ECHR discourse to analogize positive obligations doctrine with the German constitutional *Schutzpflichten* theory; see e.g. Bleckmann, ‘Die Entwicklung staatlicher Schutzpflichten aus den Freiheiten der Europäischen Menschenrechtskonvention’, in U. Beyerlin, M. Bothe, R. Hofmann and E.U. Petersmann (eds), *Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt* (1995) 555.

The questions relating to positive obligations doctrine raise extremely complex discussions of the proper role of the ECtHR in allocating functions and roles of and between public and private spheres of society. Whereas US constitutional jurisprudence flourishes in the questions as to requiring active government performance for the effective safeguard of religious rights, ECHR case law on these matters is still rudimentary and suggestive. The question as to whether Article 9 merely imposes negative obligations on governments, or whether an effective freedom of religion or belief also calls for additional positive undertakings for public authorities, is treated (pp. 69–74). The interesting aspect of the negative/positive obligations discussion in ECHR discourse is that the potential force of ECHR law as being an important strategic means increases proportionally with the scope of a doctrine of positive obligations. In particular, the matter is interesting when using Article 9 in domestic courts. Dr Evans hints at some cases of relevance. More extensive analyses are available in English, French and German literature.³

The contemplative side to freedom of religion and belief as understood in Article 9(1) is dealt with in Chapter 5, 'Freedom of Religion or Belief'. The expressive side of this fundamental right is dealt with in Chapter 6, 'The Right to Manifest a Religion or Belief'. There is an essential distinction in Article 9(2) between contemplative and expressive facets (of 'religion' and 'belief'), as public authorities can only permissibly limit the latter. The contemplative right to have 'religion [and] belief' cannot legitimately be limited unless government authorities have used their right of derogation in instances of public emergency (Article 15).

True, freedom of religion is a fundamental human right. But all facets of it are neither inviolable nor absolute. Chapter 7, 'Limitations on Manifestations of Religion and Belief', pursues the scope of protection as decided mainly by case law relating to Article 9(2). Thus, the book now has reached the second step of inquiry following the first step of stating applicability.

Dr Evans correctly refers (pp. 134–136) to the much criticized lack of consistency of the supervisory organs to adopt the required (and already mentioned) two-step approach in every case before them. The ECtHR occasionally sees no reason to assess the applicability of the provision before it concentrates on whether government authorities have sufficient ground for legitimately limiting the protection initially promised. This might seem practical from the point of view of the ECtHR. But it hardly gives the applicant private person a sense that the Court has considered the private interests on an equal footing with the interests of public authorities. The author's critique of this approach is promising. The discussion is part of a greater debate in ECHR discourse as to the appropriateness of the ECtHR not always conducting separate assessments of the two limbs of Articles 8–11. This has particularly been critiqued in relation to positive obligations doctrine.⁴

The book's analysis of the tripartite requirement of permissible government interference in freedom of manifestation of religion and belief set forth in Article 9(2) (pp. 136–164) follows the traditional pattern. A public interference with the expressive right to freedom of religion and belief must be 'prescribed by law' and be 'necessary in a democratic society' for the pursuit of explicitly listed legitimate aims. Dr Evans' treatment of these cumulative requirements does not depart from previous

³ E.g. D. Spielmann, *L'effet potentiel de la Convention européenne des droits de l'homme entre personnes privées* (1999) 38, 39, 49 and 70; B. Moser, *Die Europäische Menschenrechtskonvention und das bürgerliche Recht. Zum Problem der Drittwirkung von Grundrechten* (1972) 222–223; and A. Clapham, *Human Rights in the Private Sphere* (1993) 207–208, 313–314 and 240.

⁴ Van Dijk, "Positive Obligations" Implied in the European Convention on Human Rights: Are the States Still the "Masters" of the Convention?, in M. Castermans-Holleman, F. van Hoof and J. Smith (eds), *The Role of the Nation-State in the 21st Century. Essays in Honour of Peter Baehr* (1998) 17.

doctrine either in quality or in quantity, although the account naturally is more updated than commentaries on Article 9(2) from two or three years ago. Finally, Chapter 7 gives an indication as to what extent public authorities might derogate from Article 9 in accordance with Article 15 (pp. 165–166).

The book's novel contributions to ECHR discourse are found in Chapter 8, 'Neutral and Generally Applicable Laws', in which the author departs from her hitherto generalized and introductory approach to Article 9. Chapter 8 is devoted to an issue not expressly analyzed theoretically in an ECHR law context: To what extent does legislation, which on its face applies equally to individuals regardless of their religion or belief, contravene the principle of freedom of religion and belief as safeguarded in ECHR law? To some extent, that question is closely related to issues of affirmative action requirements in ECHR law — issues generally treated in terms of positive obligations doctrine. The issue is well known from US constitutional law. The author is apparently aware of some parts of the immense amount of case law and jurisprudence that has emerged in the US over the years discussing this problem. By providing a systematic presentation of relevant Strasbourg case law as well as a policy-oriented analysis related to the issue, Dr Evans offers an interesting critique of ECHR jurisprudence as being undeveloped and inconsistent in this field. It is obvious from reading the book that this particular critique has been the author's prime concern in writing her treatise.

Unfortunately, the analysis of ECHR jurisprudence on this issue is given, relatively speaking, too little space (pp. 168–199). The topic, related to the problem of general and neutral laws, would, one might suggest, have

benefited somewhat from being the focus of the book at the outset. Chapter 9 offers some summary conclusions regarding Strasbourg case law relating to Article 9, and to some extent provides the reader with a clearer concept of the purpose of the dissertation on which this book was built.

While appreciating the coming of a long-awaited comprehensive account of the legal status of the interpretation of an important ECHR right, one remains somewhat unconvinced of the book's ability to recognize that ECHR law, as a system of law, has now moved beyond the realm of introductory commentaries. Chapter 8 is a fine example of what ECHR discourse should be about today, more than 50 years after the ECHR was adopted and more than 40 years after supervision of it commenced in Strasbourg. It is not a bold assertion, however, that English-speaking ECHR discourse — as it is dealing with a pan-European body of law — in general would have benefited from drawing more extensively on relevant seminal ECHR literature from major language groups on the continent.

Dr Evans' book is an important introduction to Article 9 of the ECHR for the enlightened English-speaking juridical community. One suspects that community, still hungry for ECHR literature at the dawn of statutory British human rights law, of being the publisher's prime target group. One can but be sympathetic to the purpose of feeding British lawyers with human rights food for thought as well as for their wallets. Many ECHR (and Human Rights Act) books so far would have been more appropriately subtitled *Human Rights for Dummies*. Carolyn Evans' book is certainly not for dummies.

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