Freedom of Religion under the European Convention on Human Rights.

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The Work

Evans studied at Melbourne University before undertaking DPhil study at Oxford University as a Rhodes Scholar, initially under the supervision of Prof Mark Janis, and later Prof Guy Goodwin-Gill. She returned to Melbourne in 2000, and is currently Dean of Melbourne Law School.

The monograph focuses on those provisions of the European Convention on Human Rights most clearly relevant to freedom of religion: Article 9, and Article 2 of the First Protocol. These provisions are placed in context, both in terms of the development of freedom of religion at the international level, and in terms of the history of the drafting of the provisions. She then moves on to sustained consideration of the key legal issues: defining religion or belief (Chapter 4), freedom of religion or belief simpliciter (Chapter 5), manifestation of religion or belief (Chapter 6), and justifiably limitations on the manifestation of religion or belief (Chapter 7). The text concludes with a focus on a particular problem – how to deal with neutral and generally applicable laws which impact on religion (Chapter 8), and a brief conclusion (Chapter 9).

The text is a revised version of Evans' DPhil thesis. As would be expected of such a work, it was far from Evans' final word on law and religion. She has continued to write on law and religion with a particular emphasis on Australian law, and comparative law projects involving Australia (Evans, 2015; Evans, 2012a). This has, however, run alongside continued work in the interaction

of law and religion at the theoretical level (e.g. Evans, 2014), and a sustained contribution to the literature on the European Convention on Human Rights (e.g. Evans, 2012b; Evans, 2006a). She has also helped to frame the scholarship of others, for instance through editorship of significant collections (e.g. Evans, 1999; Evans, 2006b; Evans, 2008).

The Context

Carolyn Evans' *Freedom of Religion under the European Convention on Human Rights* was the first monograph published in the Oxford ECHR Series. The aim of the series was to provide "enough practical detail to be used by practitioners … as well as taking a critical approach to past practice". The series has since closed, but the focus fits well with Evans combination of assured, thoughtful, exposition of the primary legal sources of the ECHR, and her critical consideration of how the jurisprudence of the ECHR was developing.

The exposition function was particularly important in a text on freedom of religion or belief. It was the first full-length text providing a sustained consideration of freedom of religion under the ECHR, as opposed to in international law more generally. In focusing so tightly on the ECHR and religion, she was developing the scholarly agenda from Malcolm Evans' *Religious liberty and international law in Europe* (Evans MD, 1997), as well as the generalist ECHR texts of the day. The text appeared less than a decade after the Court had finally given a full decision on Article 9, in *Kokkinakis v Greece*, and before 9/11 with its consequences for religion cases globally. Evans was writing at a time when not only was there comparatively little commentary on the ECHR and religion, but the primary legal sources upon which to draw were also comparatively small. This led to her placing weight on decisions of the Commission, as well as principles derived more broadly from international law, and from a principled approach to religious liberty. The theoretical basis for religious freedom is, to Evans, central to the development of the Convention: "[u]nless a coherent philosophical justification underlies all the cases dealing with Article 9, then the result is likely to be inconsistency and unfairness as the judges moves from one rationale to another to justify their intuitions about the right outcomes for a particular factual situation" (at 33). She takes some time over the theoretical foundations, devoting a wide-ranging chapter to the theoretical rationale for religious freedom, before concluding that arguments from autonomy, emphasising dignity and freedom in decision making, represent the best approach for the Court in developing the ECHR.

The Significance

The text was well-received on publication, being described as "a clear, sensible and appropriately critical account of an important part of Strasbourg human rights jurisprudence" (Rivers, 2003), "a careful and thorough analysis" (Moon, 2002), and "replete with insightful observations and sound judgment and sensible suggestions and it is surely destined to become a standard point of reference on the subject" (Evans MD, 2001). In this brief chapter, we argue that the insights, judgment, and in particular suggestions make this monograph particularly important, more than its use as a standard point of reference.

That is not to say that the text has not had an obvious impact on scholars and judges as evidenced by citation. Within specialist work on law and religion, this can be seen in texts as diverse as P.M. Taylor's consideration of UN and European law and practice on freedom of religion (Taylor, 2005), Trigg's consideration of the privatization of religion (Trigg, 2007), McCrea's study of religion in the EU (McCrea, 2010), and Temperman's consideration of religious neutrality (Temperman, 2010). Outside of this core audience, the text has been important to two scholarly audiences which do not necessarily identify as law and religion specialists. Firstly, scholars who work on the topic of religion, but who do not work within a legal frame, and who seek to engage with legal ideas of religious rights under the European Convention on Human Rights (e.g. Marinovic and Marinovic Jerolimov, 2012; Ipgrave, 2011) Secondly, scholars of human rights, and human rights law, who do not have a particular focus on religious rights and religious human rights, especially those writing on the UK situation (e.g. Feldman, 2002). The text has also been cited by national courts, for instance by the UK Supreme Court in *RT (Zimbabwe) v Secretary of State of the Home Department* [2012] UKSC 38; the Court of Appeal in Northern Ireland in *Re Parsons* [2003] NICA 20; and the Federal Court of Australia in *Iliafi v Church of Jesus Christ of the Latter Day Saints* (2014) 311 ALR 354.

The greater significance of the text, however, is in Evans' prefiguring of concerns in the way in which the jurisprudence of the European Court of Human Rights, then in its very early days in relation to freedom of religion, could take the wrong turn. In the current century, the Court has returned to these issues repeatedly, gradually overcoming the tremendous reluctance of the Court

to engage with religious liberty cases as religious liberty cases, and a pattern of closing down discussion of religious liberty as quickly as possible even in such cases. In four areas in particular Evans identified significant problems with the way in which the jurisprudence may develop – areas in which her concerns were, for at least some of the cases decided since her text, fully justified by later events.

The religion or belief rights of atheists and *Lautsi*.

An ongoing concern in the text is that under-theorising by the judges means that Article 9 in particular lacks an explicit foundation: "unless a coherent philosophical justification underlies all the cases dealing with Article 9, then the result is likely to be inconsistency and unfairness as the judges move from one rationale to another to justify their intuitions about the right outcomes for a particular factual situation" (at 33). It may be argued that one area where the Court has not thought through the issues properly is in relation to the Article 9 rights of atheists and agnostics. Evans was concerned that the jurisprudence on education in particular was "less sympathetic to atheists/agnostics who claim the need to be exempted from religious instruction than to members of other religious faiths" (at 95).

A lack of sympathy, or perhaps better put, a failure of judicial imagination when considering the position of atheists within a religious rights regime, materialised in *Lautsi v Italy* (App. 30814/06). In that case an atheist parent and children complained at the display of a crucifix in the classrooms of the state school attended by the children. Initially, the Chamber found that the mandatory display was a violation of Article 2 of the First Protocol taken together with Article 9. The Chamber found that the State had an obligation to refrain from imposing beliefs, even indirectly, in places such as schools where persons were particularly vulnerable. The crucifix, although a complex symbol, had a predominantly religious meaning, so that compulsory display of the crucifix not only clashed with the secular convictions of the family, but was also emotionally disturbing for non-Christian children. The finding by the Chamber was controversial, and as the case proceeded to the Grand Chamber, a significant number of third-party interveners, including national governments, joined the case. The Grand Chamber took quite a different view of the crucifix: there was no evidence that the display of the religious symbol "may have an influence on pupils" (para. 66), and the crucifix was "an essentially passive symbol … it cannot be deemed to have an influence on pupils comparable to that of

didactic speech or participation in religious activities" (para. 72). The Grand Chamber noted in particular that "Italy opens up the school environment in parallel to other religions", giving examples of non-majority religious practices including Islamic practices (para. 74). While the Grand Chamber could see why "pupils who are in favour of secularism may see in the presence of crucifixes in the classrooms of the State school they attend an infringement of [their] rights", the Grand Chamber did not agree (para. 78). The Grand Chamber failed, as Evans feared, to be fully sympathetic towards the atheists family.

The nature of manifestation of religion, individual belief, and *Eweida*.

A second area of concern identified by Evans relates to the nature of manifestation and the extent to which individually held beliefs are protected. She notes that the relatively liberal approach to the definition of religion by the Court and Commission was subtly undermined at the manifestation stage (at 132) with the requirement that in order to be protected, a practice must be necessary to the religion or belief. The requirement can be found in *Arrowsmith v UK* [1978] 3 EHRR 218, where a pacifist was prevented from distributing pacifist leaflets to soldiers: the Court's view was that distributing leaflets was not required by her beliefs, and so was not a manifestation of her beliefs; thus her right to manifest religion or belief was not infringed.

The *Arrowsmith* approach led to a narrowing of the protection potentially offered by Article 9, with the result that even serious burdens on religious practice, such as limiting public employment, could go unprotected. In effect, questions of proportionality were never reached as cases were disposed of at an earlier stage of analysis. As a result, the proper parameters for the protection of religion were not fully explored. Evans identified this as a particular problem for those with individual beliefs (at 57) that are informal and non-hierarchical, as well as for individuals from more formal religions who do not accept all the teachings of the religion, or who believe that the religion puts additional demands on them (at 122). Evans suggested that the Court could deal more respectfully with the subjective claims of individuals (at 205) to avoid undermining the importance of religion or belief, and to allow individuals to create their self-identity and to live autonomously (at 201).

Others have echoed this concern (Sandberg, 2011 at 84), and have noted that since Evans was writing, the court has softened its approach to the link between religious practice and religious requirements somewhat (Knights, 2007)) and allowed a manifestation to be seen where there is

an intimate link between the practice and the belief. The Court went further in *Eweida et al v UK* [2013] ECHR 37, where a flexible approach was taken to the issue of manifestation of religion, saying that there is no requirement on applicants to establish that they were fulfilling a duty mandated by the religion in question; instead there could be a manifestation of religion where there existed of a sufficiently close and direct nexus between the act and the underlying belief. This acceptance by the Court that the manifestation of religion can include a much wider range of activities than those strictly required by religion is very welcome, and avoids some of the problems identified by Evans in 2001.

In addition, the more flexible approach in *Eweida* also means that a religious practice can potentially be protected (e.g. wearing a cross visibly over a uniform) even though the claimant has not identified others who share her view that this is essential to the witness of her religion. Thus, to a large extent, Evans' major concerns regarding the narrow interpretation of manifestation of religion in *Arrowsmith* have been allayed by the 2013 decision in *Eweida*. As a result, a significant preliminary barrier to claims under Article 9 has been removed and many more religious practices can be viewed as manifestations of religion. This does not lead to automatic protection, of course: a manifestation will not be protected, under Article 9(2), if a restriction is necessary and proportionate to the achievement of a legitimate aim. However, by removing the prior barrier, religion and belief are better protected, as cases no longer fall and the first hurdle, and the proportionality of any restrictions on religion can be assessed.

Article 9(2), the margin of appreciation and *SAS v France*.

Although *Eweida* removed the initial hurdle in making a religion or belief claim, a second hurdle is immediately encountered: the margin of appreciation. Evans also noted the use of a wide margin of appreciation in religion or belief cases (at 143) as an area of concern, Moreover, she noted that the Court and Commission had been too willing to accept reasonably trivial reasons for interfering with religious freedom, as well as giving considerable weight to state claims involving public order and administrative convenience. (at 207). These concerns seem especially prescient in the light of the decision in *S.A.S v France* (App.43835/11) in 2014.

In *S.A.S v France* the 'rights of others' was defined even more broadly than in the earlier cases noted by Evans. The case involved a significant and far reaching restriction on religion and belief by imposing a criminal sanction on the wearing of face coverings or veils in public spaces. The

ECtHR discounted several legitimate aims that the ban could potentially serve, such as to uphold human dignity or gender equality, or to maintain security. However, it concluded that the aim of 'living together' (*le "vivre ensemble"*) could potentially justify the ban. The decision typifies the concern identified by Evans, as it creates space for very broad aims for any restriction on religion or belief.

Of course, even if the legitimate aim is relatively easy to establish, any restriction must also be necessary in a democratic society; however, with a wide margin of appreciation in religion and belief cases, any protection from the Court may be rather weak. Again, *S.A.S v France*, is illustrative of the problem predicted by Evans: having noted the need for careful consideration of the proportionality given the broad nature of the legitimate aim of 'living together', the Court relied on the margin of appreciation to decide that the ban was proportionate, despite having noted earlier that the face veil ban was inconsistent with international human right norms and European values and that it was necessary neither to uphold human dignity nor gender equality.

S.A.S v France serves as a useful illustration of the flexibility of the notion of the margin of appreciation and the way in which it can undermine the protection available in the ECHR for religion and belief. However, the broad use of the margin of appreciation is not only a creation of the jurisprudence of the ECtHR. Since Evans was writing, ideas of subsidiarity and the margin of appreciation have been put on a more formal basis within the Convention itself, which now explicitly refers to the margin of appreciation in Article 1 of Protocol 15 to the Convention. The formalisation of the role of the margin of appreciation in the Convention reflects the sensitivity of religion and belief matters to member states, and their preference for leaving the setting of the parameters for legal protection to national courts, taking into account the national context. The effect on the scope of European supervision for human rights remains, with the risk, as Evans noted (at 208), that religious vitality and tolerance is undermined.

The definition of religion or belief.

Evans devoted an entire chapter to definitional issues, and in particular identified the complexity of the relationship between "religion or belief" and "thought and conscience" with a clarity

which has not always been followed through in later discussions of the issue (Ch.4). More specifically, she identified concerns that individualised beliefs were not always protected because of difficulties of proof (at 57). There has been some solidification of the Courts understanding of religion or belief since. In *Eweida*, for instance, the court cited a line of post-Evans cases to show that "the right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance" (*Eweida*, at para.81). The same decision stressed the significance of Article 9 as an individual right. The importance for individualised beliefs is brought out most clearly by the partly dissenting opinion of Bratza and Bjorgvinsson: "to require evidence of group disadvantage will often impose on an applicant an excessive burden of demonstrating that persons of the same religion or belief are put at a particular disadvantage. This may be especially difficult, as the applicant argues, in the case of a religion such as Christianity, which is not prescriptive and which allows for many different ways of manifesting commitment to the religion" (at para. 9). The ramifications of this for individualised religion have still to be worked out.

The Legacy

The political climate regarding religion and belief has changed dramatically since Evans was writing in 2001, meaning that it is more important than ever that clarity is achieved in relation to the scope of Article 9. At the time that Evans was writing, the case law was just emerging, and the issue that was expected to develop in terms of religion or belief in Europe was the role of religion in emerging eastern European countries as they negotiated religious freedom after an era or religious oppression. Since 2001 the political context has entirely changed and the range of issues with which the Court is concerned has grown ever wider. One focus is on Islam in an era of heightened security concerns; another focus is on social concerns such as abortion, embryo screening, same-sex civil partnership, and religion-related refugee rights, all in a context of an increased polarisation in opinion. In the UK context, questions have also emerged regarding the state's commitment to accepting the jurisdiction of the ECHR and its replacement with a British Bill of Rights. All this suggests that long after the publication of *Freedom of Religion under the ECHR* the concerns it raised remain subjects of serious interest to legal scholars.

The text also had a significant impact on how we developed our own work on law and religion (for instance Edge, 2006; Vickers, 2016). In particular, while the text would not claim to be

methodologically innovative, it is methodologically sensitive. It would not have been unusual if the text had taken methodogical issues around data collection and data analysis as implicitly understood by author and reader, simply a given within doctrinal international legal scholarship. Evans did not do this, instead taking time to outline a robust and explicit methodology around data collection – even when the data she draws upon is public domain sources of law. This thoughtfulness had a strong influence on Edge, particularly as it highlighted to him that doctrinal legal scholarship needed to think through methodology in the same way as other forms of legal scholarship. Similarly her subtle multi-method, drawing on other forms of scholarship and other types of argument to aid her doctrinal project, has influenced us in our later work – the centre of gravity for the text is clearly doctrinal international law, but arguments are enriched by her consideration of, for instance, the historical context of the provisions drafting.

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