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ARTICLE



The European Court of Human Rights and minority religions: messages generated and messages received

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ABSTRACT

This contribution introduces a collection of studies focused on engagements of religious minorities with the European Court of Human Rights (ECtHR). Setting out first the global importance of the ECtHR as a standard setter in the protection of the rights of religious minorities, the text goes on to introduce the ten contributions that together make up the present special issue on the European Court of Human Rights and Religious Minorities. Beyond briefly summarising the contexts of the special issue, this contribution indicates that the first part of the special issue entails critical assessments of some of the Court's case law dealing with religious minority claims (exploring on their clarity and consistency – or lack thereof – and controversy), and that the second part offers insight into the grassroots level impact of the Court's case law on religious minority claims. It explains how each of these contributions deepens our understanding of the ECtHR in its approach to and impact on religious minorities. And it introduces the fact that, rather uniquely, this collection of texts offers a rare vantage point on the 'circle of life' of the Court's case law on religious minorities.

KEYWORDS

Minority religion case law;
Court-produced messages;
margin of appreciation;
grassroots level

The European Court of Human Rights (ECtHR) has unquestionably developed to become a major player in the defence of religious minority rights, both within its incredibly vast geographic scope (covering over 800 million people across 47 states), and beyond, through its influence as 'the most effective human rights regime in the world' (Keller and Stone Sweet 2008, 11¹), 'the most successful international human rights adjudication and enforcement regime in the world today' (Moravcsik 2000, 243) and 'a sort of world court of human rights' (Attanasio 1996, 383). Indeed, as Goldhaber (2009, 2) notes, 'Scholars invariably describe it with superlatives'² and with good reason as the Court has undoubtedly reached a status of standard-setter for human rights protection globally.

Though proportionately its case law dealing with minority religion is not especially extensive,³ the Court has communicated rather powerful statements regarding the protection of minority religious rights.⁴ And it has done so over a wide range of issue areas. From its watershed case in 1993, in which the Court issued its first finding of a violation of European Convention on Human Rights (ECHR) Article 9 on the protection of religious freedom (*Kokkinakis v. Greece*), until more recently, in the case of *Genov v.*

Bulgaria (2017), the Court has addressed such issues as the right to manifestation of a minority religious faith (in the context of the Greek proselytism ban in *Kokkinakis*); the right to legal personality allowing groups to carry out legal proceedings (*Canea Catholic Church v. Greece*, 1997) and to own property and operate a bank account (*Krupko and Others v. Russia*, 2014); the right to land restitution in cases favouring the majority faith and the 'will of the [majority of the] faithful' (*Lupeni Greek Catholic Parish and Others v. Romania*, 2016); the right to nondiscrimination in the provision of public religious services (*Dogan and Others v. Turkey*, 2016) and in the exemption to electricity bills provided to the majority faith (*CEM Vakfi v. Turkey*, 2014); the right to education in accordance with one's (minority) religious or philosophical beliefs (*Mansur Yalcin and Others v. Turkey*, 2014; and *Sofuoglu and Others v. Turkey*, 2014); the right to build and maintain a place of worship (*Manoussakis and Others v. Greece*, 1996; and *Vergos v. Greece*, 2004); and the right to register a religious association with the same name, beliefs and rights as another (in *Genov v. Bulgaria*), to name only a few.

Likewise, the Court has addressed issues of concern to a very broad base of religious minority groups, including Jehovah's Witnesses (pioneers in the ECtHR religion-related case law, as outlined by Richardson in this volume), Muslims in majority Christian contexts (e.g. *SAS v. France* [2014c], on the wearing of the burqa in public spaces) and Alevis in majority Sunni Muslim contexts (particularly in Turkey, where Alevis have waged campaigns through ECtHR case law on a number of issues).

Of course the terms 'religions' and 'minority' require some unpicking. We see trends before the Court of minority groups in religion-related cases to be atheistic/humanistic groups or individuals, often challenging the status quo in majority religious privilege or religion-state relations. For example, in the case of *Lautsi v. Italy* (2009), an atheist parent, supported by an atheist union of which she was a member, claimed that the display of the crucifix in Italian public schools violated her ECHR-enshrined right to educate her children in accordance with her own religious or philosophical beliefs. Meanwhile, we see Christian groups in historically Christian countries speaking in terms of 'minority' status amidst secular and/or secularist regimes. This also in the case of *Lautsi v. Italy*, revisited in 2011 by the ECtHR Grand Chamber, where the original decision in favour of the claimant was dramatically overturned, after an unprecedented number of third-party interventions in favour of the Italian state. Similarly the cases taken together in *Eweida and Others v. UK* (2013) regarding the right of a British Airways employee and a nurse in the UK National Health Service to wear necklaces bearing a cross during their employment, and of a public counsellor and magistrate to be exempted from counselling and marrying same-sex couples, generated public discussions of majority Christianity being disadvantaged in favour of secular neutrality.

The statements communicated by the Court through this body of case law may be described as powerful in the sense of noteworthiness. But whether these statements have been clear, consistent or uncontroversial is another matter. And yet another matter is the impact of these statements on the actors, the religious minorities having a vested interest in the topics covered in each case.⁵

The contributions collected here engage with both matters. Specifically, they critically assess some of the Court's case law dealing with religious minority claims in terms of their clarity, consistency and controversiality, and they offer insight into the grassroots

level impact of the Court's case law on religious minority claims (and, specifically, claims to do with legal status).

Roughly divided, the first five contributions speak to the former matter, and the last five to the latter. And most derive from papers presented at a conference on Religion and Human Rights at the University of Padova in April 2016, organised within the International Joint PhD programme on 'Human Rights, Society, and Multilevel Governance'. That conference allowed scholars who were working on various aspects of the work of the ECtHR to meet and interact in various sessions. Out of that interaction came the idea of developing a special issue on the work of the Court. The first five contributions are by scholars who presented independently on different panels at the latter conference, and the second batch of contributions showcases research conducted in the context of the Grassrootsmobilise Research Programme led by Effie Fokas,⁶ four of which were presented on a panel on 'Legal Status of Religious Minorities: Exploring the Impact of the European Court of Human Rights' at the Padova conference (Fokas' contribution was drafted subsequently).

Melanie Adrian's contribution, 'The principled slope: Religious freedom and the European Court of Human Rights', examines four cases, *Dahlab v. Switzerland*, *Şahin v. Turkey*, *SAS v. France* and *Ebrahimian v. France*, handed down by the Court between 2001 and 2015 (*Dahlab v. Switzerland*, 2001). Each of these cases has helped shape the right to religious freedom, and an examination of these cases shows that the ECtHR has increasingly prohibited women from wearing the headscarf and face veil in public spaces. Adrian's contribution argues that the rationale used to support these limitations has progressively moved away from an adjudication of harm and evaluation of the facts to emphasising general principles and creating vague new legal concepts. This approach by the ECtHR is problematic because appealing to vague general principles lessens the requirement of member states to present a fact-based case that carefully weighs trade-offs on key issues such as religious freedom vis-à-vis diversity and pluralism. Adrian notes that this approach also makes it easier for the Court to expand the already widening application of margin of appreciation to states, a posture which imperils its ability to exercise supervisory functions and limits diversity and the possibility of viable democracy.

Marcella Ferri's contribution 'The expression of religious identity in the public sphere' argues that within contemporary pluralistic societies, the relationship between state and religion is increasingly complicated especially with regard to the individual's freedom to express his/her religious identity in the public sphere. This contribution summarises the interpretation elaborated by the ECtHR of Article 9 of the Convention concerning the issue of the wearing of religious symbols. Ferri focuses on two decisions recently adopted by the Court. Firstly, the *SAS v. France* case, decided in 2014, concerns the French law 'prohibiting the concealment of one's face in public places', namely the *burqa* ban. According to the Court, this prohibition is necessary in order to assure the minimum set of values of an open and democratic society as well as the requirements of 'living together'. Secondly, the contribution analyses the decision in *Ebrahimian v. France*, adopted by the Court in 2015. This ruling involved a social assistant, employed in a public hospital who did not want to remove her Islamic headscarf while at work and whose contract was not renewed as a result. On this occasion the Court found that the contract nonrenewal was legitimate because every public servant has the duty to assure the neutrality of public services and

state secularism. These two decisions, Ferri argues, exemplify the Court's tendency to significantly restrict religious pluralism in the public sphere.

Christos Tsevas' contribution 'Human rights and religions' addresses the issue of how freedom of religion balances between universality of human rights and the religious particularities of states in recent ECtHR decisions. Tsevas asks whether the European or international consensus on definitions, standards or mechanisms has been maintained or discarded. Specifically, he argues that it is essential to understand the interaction between the notion of 'living together', included in *SAS v. France*, and the concepts of *laïcité* and secularism, and to attempt to integrate these legal interpretations into applicable principles. This contribution examines the joint partly dissenting opinion of Judges Nussberger and Jäderblom to focus on the key aspects of the notion of 'living together' when interpreting it in accordance with the nexus of human rights and religions. This analysis reveals a gap between cultural and religious divergences, and in so doing raises concerns about the content of the notion of 'living together'. A comparative analysis with older and more recent jurisprudence of the Court is offered to see if the notion of 'living together' is compatible with that jurisprudence and could be applied as a principle.

Roberta Medda-Windischer in 'Militant, open or laissez-faire secularism' addresses how increased diversity of contemporary European societies has multiplied the claims to accommodate diversity, in particular religious diversity, in different contexts of everyday life such as work places, schools and public offices. In the light of some recent cases on the use of religious symbols in public places, public schools and universities (*SAS v. France*; *Şahin v. Turkey*; *Dahlab v. Switzerland*), some assume that the Court has sustained a form of strict secularism, or even a sort of intolerant secularism or 'enlightened fundamentalism'. This may seem especially so in cases when individual religious manifestations do not display any signs of political intentions but are performed bona fide, making these prohibitions difficult to reconcile with the necessity to protect a democratic society. However, if it is true that the Strasbourg Court has in those cases displayed a rather restrictive approach to accommodate religious diversity, it is also true that in other cases, the Court has discarded a militant form of secularism and has followed a more neutral approach, using a more soft or open secularism model (*Folgerø v. Norway*; *Lautsi v. Italy*; *Eweida and others v. UK*). The author's investigation yields insight into which approach – militant, open or laissez-faire secularism – prevails within the Strasbourg Court.

The contribution by James T. Richardson details the large number of cases, 256 so far, carried by Jehovah's Witnesses to the ECtHR during its existence, and examines the many positive outcomes of those cases for the Witnesses and for religious freedom in the Council of Europe (COE) region more generally. It also discusses theoretical debates concerning the underlying philosophy of the Court as it adjudicates the many religion cases the Witnesses have brought. Concepts from the sociology of law, such as 'courts as partners' and 'third party partisans', also are examined as possible explanations of how the long-term and surprising relationship has evolved over the life of the Court. Richardson posits that the court has actually partnered with the Witnesses to accomplish its own agenda of expanding its authority over newer member states of the COE while at the same time it has expanded its definition of

what is allowed in terms of activities by at least some minority religious groups in the COE region.

The rest of the collection is derived from the Grassrootsmobilise Research Programme, which involved in-depth empirical research conducted by postdoctoral researchers in Greece, Italy, Turkey and Romania. The bulk of the fieldwork was completed between March 2015 and March 2017, and it examines grassroots level impact of ECtHR religion-related case law dating back to the watershed *Kokkinakis v. Greece* (1993) case.

Offering some background material for the collection of the Grassrootsmobilise contributions, Effie Fokas begins the examination of grassroots level impact of ECtHR religion-related case law with a study focused specifically on the extent to which grassroots level actors are *aware* of this case law. Such insight is a critical first step to understanding whether, how and to what extent that case law is used by grassroots actors in their pursuit of their own rights (whether through legal or political means). Fokas shows that the social actors involved in the religious arena have varying understandings of the work of the ECtHR and make use of the Court's decision in vastly different ways. As such her text serves as a useful lead-in to the four contributions that follow.

Margarita Markoviti's text examines the impact of ECtHR case law on religious freedoms in Greece. The breadth of ECtHR religious freedoms cases and convictions against Greece, most of which involve Jehovah's Witnesses, suggests a degree of incompatibility of national practices in relation to religion and human rights. This contribution seeks to comprehend the ways this case law is diffused in Greek society and in particular amongst religious minority groups. It critically considers the two emerging topics of legal recognition and the right to worship places in the light of 2014 legislation on the legal forms of religious communities. The discussion draws on in-depth interviews with members, representatives and legal advisors of a selection of religious minority groups in the country in order to grasp their knowledge and concerns about such matters. The original findings demonstrate that the direct impact of the specific ECtHR case law is indeed pronounced in the case of some groups pursuing their rights in Strasbourg, particularly Jehovah's Witnesses. Markoviti then argues that the direct effects of the case law on other religious minority groups are more limited and seem to be *filtered through* their attention to Jehovah's Witnesses, whose litigation at the Court acts as a source of inspiration and rights-awareness for the pursuit of other religious rights claims and mobilisations within the country.

The contribution by Alberta Giorgi and Pasquale Annicchino addresses the debate in Italy on the definition of religion from a multiscale perspective. Supranational courts, especially the ECtHR, have earned a major legitimising role in this respect and religious minorities with uncertain status look to such courts as attractive and favourable venues. However, local considerations must be taken into account in the complex management of religious diversity. Decentralised policies and different religious profiles offer room for a different treatment of religious minorities at the local level. Grounded on an analysis of the national and international case law, and relying on interviews addressing the representatives of religious minorities, this contribution explores the multiscale repertoires of action of religious minorities in pursuing the official recognition and the

protection of their religious rights. This contribution focuses particularly on the claims of the Atheist Union to be recognised by the Italian State and the localised religious rights of Islam in Italy.

The contribution by Mihai Popa and Liviu Andreescu addresses the reconfiguration of religion–state relations in Romania after the fall of socialism and the relevance of the ECtHR religion-related case law within that context. They assert that the changes did not result in a complete rearrangement of the landscape of officially recognised religious faiths ('culte') there and that the decades following 1989 witnessed little increase in the number of officially recognised religious groups in the country. Law 489 from 2006, regulating religious freedom, distinguishes between 'religious groups' free to practice their religion, and 'religious associations' and 'culte' qualifying for state support in the form of subsidies and tax exemptions. From a strictly legal perspective, the religious freedoms of religious 'groups' are as protected as those of religious 'associations' and 'culte'. However, the legal categories are also linked to symbolic recognition at societal level, which is in turn reflected in administrative practice and correlates with more or less secure rights. The authors discuss the legal solutions adopted by representatives of religious groups and scrutinise the practical relevance of the ECtHR and its case law for minority religions. The European Court's relevance for religious groups seeking official recognition in Romania is directly linked to the groups' involvement in litigation, either in a proactive or a reactive manner, and to their access to legal expertise.

Ceren Ozgul's contribution on the situation in Turkey notes that Turkish law does not currently allow religious minorities and belief communities to register and obtain legal status as such (though Jehovah's Witness communities have won ECtHR cases granting legal status to their 'community associations' as an interim solution to their legal status problems as a community, as detailed by Richardson herein). Although Greek Orthodox, Armenian and Jewish communities were recognised as minorities based on the Lausanne Peace Treaty of 1923, they have suffered from loss of community property due to lack of legal status. After more than 70 years of legal struggle and loss in the national courts, these communities have successfully litigated in the ECtHR regarding confiscation of properties by the state. Ozgul explores the radiating effects of this litigation on the legal mobilisation of other religious minorities and belief groups in the country and addresses this question by attending two different periods of grassroots legal mobilisation in the ECtHR: an earlier one, marked by successful litigation in the Court, and a later one, marked by a striking decline in legal mobilisation in the Court. The contribution explores the effect of these developments on both the grassroots actors' perception of ECtHR and their frequency of litigation.

Each of these contributions deepens our understanding of the ECtHR in its approach to and impact on religious minorities. Brought together though, this collection of texts offers a rare vantage point on the 'circle of life', so to speak, of the Court's case law on religious minorities. Beginning with an in-depth examination of the Court's treatment of certain issues of concern to religious minorities and moving on to consider its treatment of a particular religious minority group, the first set of contributions shows how lacking in clarity and consistency the Court may be on certain issues. In the process these texts impart a nuanced perspective on the challenges the Court faces in striking the right balance between protecting individual freedoms and respecting (in the framework of its subsidiary role) state rights to manage 'nationally' and 'culturally' sensitive matters.

The second set of contributions makes readers privy to the varied results of this balancing act on the ground. Specifically, it offers empirically based insight into the impact of the Court's religious minorities-related case law on religious minority groups working at the grassroots level to defend their individual and communal rights. Thus, in their totality, these texts provide both top-to-bottom and bottom-up perspectives on the Court's influence in the domain of religious minority rights. In so doing it is hoped they also raise new questions and inspire further study of the causes and consequences of the disconnect, where applicable, between messages generated by the Court and messages received by its publics.

Notes

1. More precisely, Keller and Stone Sweet refer here to the European Convention on Human Rights, which the ECtHR defends.
2. The above collection of scholarly descriptions of the Court is gathered in Lovat and Shany (2014, 253–254).
3. We lack readily available statistics about relative numbers of submissions to, decisions on and violations found by the ECtHR on various issue areas but, simply indicatively, between 1959 and 2016 only 65 Article 9 violations were found out of a total of 25,959 violations, that is, 0.25% of the total violations found in that period (*ECHR Overview 1956-2016* 2017, 6 available at http://www.echr.coe.int/Documents/Overview_19592016_ENG.pdf). Additionally, up until March 2017 there have been 267 religion-related Article 6 violations, 58 religion-related Article 11 violations and 227 religion-related Article 14 violations.
4. For the present collection, minority religion is defined as conscience-based groups not belonging to the religious majority; they may be splinter groups or atheist groups.
5. Whether these statements have been implemented, in terms of leading to policy change at the national level, is yet another matter, and one dealt with by Anagnostou and Psychogiopoulou (2013), though not specifically related to religious minority claims.
6. Grassrootsmobilise (www.grassrootsmobilise.eu) is a 5-year research programme funded by the European Research Council (ERC), Grant Agreement No. 338463. Effie Fokas would like to acknowledge the ERC for its generous support of the research underlying half of the texts collected here, as well as the London School of Economics Hellenic Observatory for the research associateship which facilitates my work in Grassrootsmobilise.

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