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Comparative Susceptibility and Differential Effects on the Two European Courts: A Study of Grasstops Mobilizations around Religion

Effie Fokas*

ABSTRACT

'Grasstops mobilizations' in the context of the European Court of Human Rights and the Court of Justice of the European Union refers to legal and political mobilization carried out by cause lawyers, NGOs, religious, secularist and humanist organizations, political figures and national governments, and by transnational networks which may develop within and between the above groups, depending on their stakes in a given issue. In the domain of religion, such grasstops mobilizations may seek to influence what religion-related issues get placed on a court's agenda and the climate within which the Court takes its decisions on the latter; they are forces at the European and transnational levels potentially influencing the Court's engagements with and ultimate handling of religion-related cases. This article draws on interviews carried out with various actors engaged with or impacted by mobilizations around the European courts to yield special insight into who mobilizes, for what reasons and to what effects, and into the conditions under which particular political, religious, or NGO actors are influential. Based upon the latter research as well as examination of certain structural differences between the two courts rendering them differently 'open' to various pressures, this contribution considers the comparative susceptibility of the two courts to such mobilizations.

1. INTRODUCTION

The increasing judicialization of religion in the European context over the past 20 or so years has paved the way for rapidly developing mobilizations around religion-related issues. Controversies related to religious symbols in public spaces (whether worn, as the headscarf or burqa, or on the wall, as the crucifix), blasphemy laws protecting a right not to be offended, or the banning of religious political parties in order

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to defend secularism, are all issues which have been debated within courts, and they all touch upon deeply held religious, and non-religious, beliefs. In the context of such cases, courts have been addressing some of the most divisive and emotive issues facing European societies. And members of those societies are increasingly paying attention to and seeking to influence these developments in court.

Meanwhile, the issue base has grown as the topics with which courts wrestle that may be deemed ‘religion-related’ expand dramatically and well beyond the domain of religious freedom, *per se*: case law of the European Court of Human Rights has evolved from addressing more ‘classic concerns’ around religion stemming from protection of or respect for majority religions through issues such as church tax (*Darby v Sweden*, 1990), blasphemy (*Otto-Preminger v Austria*, 1994), and religious education (*Folgerø v Norway*, 2007), to an increasing trend to include issues such as bioethics (eg abortion, *ABC v Ireland*, 2010; embryo screening, *Costa and Pavan v Italy*, 2012), social ethics (eg same-sex civil partnership, *Vallianatos v Greece*, 2013), and religion-related refugee rights (*FG v Sweden*, 2016). In the Court of Justice of the European Union, which (as noted elsewhere in this thematic series) is relatively new to the field of religion-related rights *per se*, recently we have seen cases having to do with the right to wear a headscarf in employment settings,¹ and we can expect cases to arise around labour rights for religious individuals and specifically around ministerial exemption.²

Thus, ‘religion-related’ issues may be broadly defined as issues that either directly or indirectly implicate faith groups (whether majority or minority religious groups) but which also relate to deeply held beliefs and concerns of non-religious, secular and/or secularist, atheist, and humanist groups. It follows that accompanying the growth in issue base is also an expansion in the volume and scope of the actors engaged in related issues, representing the full range of such groups.

Mobilization around religion and courts takes place at different levels. Grassroots-level mobilizations may include, eg mass demonstrations calling for a reintroduction of religious education in post-Communist-context public schools, protests to the barring of same-sex marriage, or litigation in local courts in an effort to secure religion-related rights, by members of religious or secularist groups and/or lawyers working at the local level. ‘Grasstops’-level mobilizations, meanwhile, take the form of legal, political, and other elites working supra-, inter-, and often transnationally, and seeking to influence what gets placed on courts’ agendas, how the issues are handled there, and actions that should be taken in the aftermath of a court decision.

This article focuses on grasstops-level mobilizations around the European courts, specifically to do with religion-related issues, broadly defined as above. ‘Grasstops mobilizations’ in the context of the European Court of Human Rights (ECtHR) and

1 The Achbita case (C-157-15), lodged with the court as a preliminary reference request by the Belgian Court of Cassation on 3 April 2015, and the Bougnaoui and ADDH case (C-188/15), lodged with the court as a preliminary reference request by the French Court of Cassation on 24 April 2015. Neither has been decided at the time of writing, but the Advocate General of the CJEU issued her opinion on the Achbita case in May 2016; more on the latter below.

2 On the latter, see Ronan McCrea, ‘Singing from the Same Hymn Sheet? What the Differences Between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination, and the Secular State’, in the first issue of this thematic series, (2016) 5(2) *Oxford Journal of Law and Religion* 183.

the Court of Justice of the European Union (CJEU³) (or, henceforth, the European courts) refers to legal and political mobilization carried out by cause lawyers, NGOs, faith-based organizations, political figures and national governments, and by transnational networks which may develop within and between the above groups, depending on their stakes in a given issue. Such grasstops mobilizations are forces at the European, international, and transnational levels potentially influencing the two courts' engagements with and ultimate handling of religion.

'Influence' in this context refers to the ability of an actor to shape a decision in line with the actor's preferences.⁴ 'Mobilizations', meanwhile, are processes involving the strategic action of individuals and groups to promote or resist change in a given policy arena,⁵ and in the context of the present article, refer specifically to actions somehow related to courts (whether directly or indirectly). What distinguishes 'grasstops' from 'grassroots' mobilizations is mainly the level at which the relevant activities take place. Grasstops actors may also be grassroots actors, when working in different contexts: hypothetically speaking, the Roman Catholic Church engages in grassroots mobilization when local clerics encourage local school headmasters to display the crucifix in their classrooms in the aftermath of the first *Lautsi v Italy* decision in the ECtHR,⁶ and it engages in grasstops mobilizations when liaising with the Russian government in the generation of a coalition of states calling for the reversal of that decision in the Grand Chamber of the ECtHR via a third-party intervention.

Grasstops mobilizations entail a variety of activities: strategic (or non-) litigation; support of an existing claim in court (eg an NGO provides funding to assist in the litigation process); third-party interventions by NGOs; and third-party interventions by governments. Beyond such legal mobilization activities however, other grasstops developments of a political nature are also significant in assessing various pressures on the European courts, such as the reform process the ECtHR has been undergoing, in the extent to which this was driven by national governments, particularly since the Interlaken Summit of 2010 but most conspicuously in the 'Brighton process' (—a term encompassing both the Brighton Conference of 2012⁷ and also the

3 CJEU is the abbreviation used throughout for the Court of Justice of the European Union, in spite of the fact that the Court is actually comprised of three distinct courts: the Court of Justice, the General Court, and the Civil Service Tribunal.

4 Dorte Sindbjerg Martinsen, 'Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union' (2015) 48(12) *Comparative Political Studies* 1622, 1624.

5 Rachel Cichowski, 'Civil Society and the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (2nd edn, Oxford University Press 2013) 77–97, 80.

6 The Chamber judgment in the *Lautsi v Italy* case was issued in 2009; here the Court ruled that the display of the crucifix on public school walls in Italy entailed a violation of Protocol 1, art 2 on the right to education in line with one's own philosophical views; the Grand Chamber judgment in *Lautsi v Italy*, 2011, overturned the original ruling.

7 The Brighton Conference of 2012 was the third in a series of high-level conferences (the first having been held in Interlaken in 2010, the second in Izmir in 2011, a fourth was held in Brussels in 2015), all of which were part of the reform process of the ECtHR. As Christoffersen and Madsen note, the conferences progressively moved from addressing technical problems facing the ECtHR to addressing *political* concerns related to the Court, with the UK leading the way in the proposal of political reforms which would entail a more subsidiary role of the Court (Jonas Christoffersen and Mikael Rask Madsen, 'Postscript: Understanding the Past, Present, and Future of the European Court of Human Rights' in Christoffersen and Madsen (n 5) 230–49).

political developments leading to and in the aftermath of that conference, including especially the decision to introduce the margin of appreciation doctrine and the subsidiarity principle into the Preamble of the European Convention on Human Rights (ECHR). This process has had more and less tangible effects, as will be explained below, on the Strasbourg Court's 'exposure' to political pressures and, one might contend, on the trajectory of its case law post-Brighton—specifically in terms of the margin of appreciation featuring rather prominently in several religion-related cases. Likewise, the political debates around and their impact on the possibility of accession of the CJEU to the ECHR have arguably left a mark on the CJEU's potential engagements with religion-related issues.

As one might surmise based on the above, *grasstops* mobilizations are not always fully transparent, or easy to trace. Locating the field for such mobilizations can be rather complicated: intuitively one might expect Brussels, Strasbourg, and Luxembourg to be the centrifugal spaces of *grasstops* mobilizations. In reality, an intricate network which stretches at least as far east as Moscow and as far west as San Francisco is in place, with shifting strands connecting cause lawyers with potential claimants and NGOs with particular governments across countries and continents. The picture is complicated both geographically and substantively: the geography of the mobilizations also has some bearing on the content of the mobilization activity (eg Evangelical Christians and human rights activists tend to work transatlantically more than other stakeholder groups).

This article asks what is the relative susceptibility of the two courts to *grasstops* mobilizations in the domain of religion? Though an equal comparison of the two courts is of course difficult because of their uneven experience with religion-related case law, there are still certain structural factors which serve as helpful clues as to what might be expected as the CJEU increasingly engages with religion-related issues. Also, certain developments around the ECtHR specifically suggest new trends to be anticipated in *grasstops* mobilizations around the CJEU as actors engage in 'forum shopping' and, whether with realistic hopes or not, increasingly turn their attentions to the CJEU.

Not least because of the aforementioned non-transparent nature of much of the activity studied, qualitative empirical research is valuable in offering a fuller perspective of processes, discourses, and politics behind *grasstops* mobilizations. Thus, this article draws on interviews carried out with various actors engaged with mobilizations around the ECtHR and considering activity before the CJEU, but also of judges and former judges who might be considered 'recipients' of the various pressures,⁸ in order to yield insight into who mobilizes, for what reasons and to what effects, and

8 This article draws on interviews conducted between November 2015 and May 2016 under the auspices of the ERC-funded *Grassrootsmobilize* research programme (n 1). The sample included here comprises 10 representatives of NGOs active before the European courts (two of which represent religious organizations, and two secularist/humanist organizations); three US-based religious cause lawyers engaged with ECtHR case law, two UK-based cause lawyers (one representing majority religious interests, one minority religious interests); two current judges of the ECtHR and two former ECtHR judges; and three scholars of the ECtHR and the CJEU. The lack of interviews with CJEU judges included in the present study entails a gap in the research, which is ongoing. The interview research is anonymized; thus, quotations appearing in this article without citations may be assumed to be from this research.

into the conditions under which certain political, religious, or NGO actors are particularly influential.

In the first section, the theoretical underpinnings of the research shared here are set out, with a special focus on the bases in American sociolegal scholarship and in an American sociolegal *experience* in mobilizations around religion—an experience which, as we shall see, has a certain direct connection to developments in the European context. Second, the article explores a number of pressures on and legitimacy threats to the two European courts, noting divergences between the two where relevant. The sources of pressure and of potential legitimacy threats explored here are civil society and especially NGOs; national courts and national judges; national governments; and public opinion. A third section builds on the discussion of threats from national governments and public opinion by pausing to consider specifically the example of the UK in relation to the ECtHR. The aim is to explore the repercussions of a complex web of developments (some overlapping, temporally), including the ECtHR *Hirst v UK* judgment,⁹ the Brighton process, the *Lautsi v Italy* judgment, and the introduction of Protocol 15.¹⁰ These repercussions go beyond the ECtHR, with certain effects also on the CJEU. In relation to all of the above, the voices of actors in the field will be brought to bear on the individual topics at hand. Finally, the article will close with an assessment of what the comparative vulnerability of the two courts to pressures from grasstops mobilizations around religion may mean for the protection of religion-related rights in the European legal framework.

2. THE AMERICAN CONNECTION: THEORETICAL UNDERPINNINGS AND EMPIRICAL REALITIES

There are in fact two ‘American connections’ of relevance to the topic at hand. One has to do with the theoretical underpinnings of research on legal mobilization around religion, largely influenced by US-based scholarship which, in turn, arises from an earlier and more developed experience of religion-related case law, both at the state level and in the US Supreme Court. Indeed, European scholarship on the ECtHR and on the CJEU—including the present study—has increasingly appropriated and built upon American sociolegal scholarship (especially on the US Supreme Court) to understand and explain developments in the European context.¹¹ The second American connection, distinct from but of course not unrelated to the first, entails an empirical dimension in terms of American legal groups and religious interests

9 In 2004, a Chamber Judgment of the ECtHR (*Hirst v UK*, 2004), found that the blanket ban on prisoner voting rights in the UK is in contravention of the ECHR; the case was revisited by the Grand Chamber in October 2005, where the Chamber decision was upheld. *Hirst* has been particularly controversial because of the UK government refusal to implement the judgment and because of debates which it sparked (directly or indirectly) regarding potential withdrawal of the UK from the ECHR.

10 Protocol 15 entails, among other things and most importantly for our purposes, the insertion of reference to the principle of subsidiarity and to the margin of appreciation into the Preamble of the Convention.

11 See Cichowski (n 5); Christopher McCrudden, ‘Transnational Culture Wars’ (2015) 13(2) *International Journal of Constitutional Law* 434; Erik Voeten, ‘Public Opinion and the Legitimacy of International Courts’ (2013) 14(2) *Theoretical Inquiries in Law* 411; Effie Fokas, ‘The Secular Court? Trends in the United States Supreme Court and the European Court of Human Rights Compared’ in Abby Day and Mia Löfheim (eds), *Modernities, Memory and Mutations: Grace Davie and the Study of Religion* (Ashgate 2015).

increasingly feeding into European developments through direct participation in European case law (whether through the lending of know-how to claimants or states, or through third-party submissions). Each dimension is *differently* relevant to the arguments put forth in the present article, and each will be addressed in turn below.

A. Theoretical Underpinnings

In addition to taking place at different levels—grassroots and grasstops—as described in the introduction, mobilizations around religion in relation to courts also take place at different stages, pre- and post-litigation. The study of both the latter categories of mobilization around religion-related issues is relatively far more developed in the US context than in Europe.

In terms of post-litigation mobilizations, the most relevant body of literature studies the ‘indirect effects’ of case law. In the aftermath of judgments, what are the various, less conspicuous ways a court’s decisions may influence ‘stakeholder’ groups in terms of their conceptions of, discourse about and legal, political, and social mobilizations around their rights? American sociolegal scholars such as Marc Galanter,¹² Michael McCann,¹³ and Stuart Scheingold¹⁴ lead us respectively to consider the radiating effects of case law, the extent to which the ‘shadow’ of existing case law provides opportunity structures for pursuit and achievement of rights *outside* of courts, and how past court successes can lead to the development of a ‘politics of rights’ so that court successes translate into political strengths. The study of such indirect effects of case law remains limited in relation to the ECtHR¹⁵ and the CJEU, while there is a complete lacuna in empirically based qualitative study of the two courts’ indirect effects in the domain of religion.¹⁶

Pre-litigation mobilizations may, of course, be intimately related to post-litigation mobilizations and may be driven by the same actors. In general, distinguishing between the two categories can in some cases be difficult. Yet it is worthwhile also to consider separately the pre-litigation activities of various sources of pressure, be they civil society groups or strategic litigants, eg which work specifically towards reaching courts with their own claims in hopes of achieving favourable court precedents in the

12 Marc Galanter, ‘The Radiating Effects of Courts’ in Keith Boyum and Lynn Mather (eds), *Empirical Theories about Courts* (Longman 1983) 117–42.

13 Michael W McCann, *Rights at Work. Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press 1994).

14 Stuart Scheingold, *The Politics of Rights* (Yale University Press 1974).

15 See the following for some attention to indirect effects of ECtHR case law though not specifically related to religion: Rachel Cichowski, *The European Court and Civil Society – Litigation, Mobilization and Governance* (Cambridge University Press 2007); James T Richardson and Brian M Lee, ‘The Role of the Courts in the Social Construction of Religious Freedom in Central and Eastern Europe’ (2014) 39(3/4) *Review of Central and East European Law* 291; Voeten (n 11).

16 The study of the indirect effects of ECtHR religion-related case law is one of the main aims of the Grassrootsmobilise research programme (see n 1). See also Effie Fokas, ‘Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence’ (2015) 4(1) *Oxford Journal of Law and Religion* 54. Qualitative empirical research has been conducted by Başak Çali, Anne Koch and Nicola Bruch (‘The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights’ (2013) 35(4) *Human Rights Quarterly* 955), who explore conceptions of ECtHR legitimacy among political leaders, lawyers, and judges in Turkey, the UK, Ireland, Germany, and Bulgaria; but their focus is not on religion.

issue-areas of concern to them. The activities may come in the form of direct litigation (strategic or otherwise), support for groups in their own legal endeavors (financial or otherwise), and/or *amicus curiae* (or ‘amicus briefs’; ‘third party-interventions’, in the European context). American scholars have paved the way with study in these fields also, but increasingly scholars on both sides of the Atlantic have also turned their attention to such mobilizations around the ECtHR and the CJEU.¹⁷

The predominance of the United States in this field of study is not surprising: American society is historically actively litigious. The American predominance in the study of mobilizations around religion is also not surprising, given the fact that religion plays a more prominent public and political role than in the European context.¹⁸ Indeed, the US provides one of the best developed examples of NGO and civil society engagement in religious litigation and of litigation specifically by religious groups.¹⁹ That said, increasingly scholars note that ‘American exceptionalism’, in terms of the fact that US political culture produced an unusually litigious society, still holds but is gradually eroding as other cultural contexts (namely, the Canadian) catch up in the pace and volume of case law related to religion.²⁰ ‘Although there are few, if any, jurisdictions with so extensive a system of civil society organizations involved in religious litigation as in the United States, a similar trend appears to be emerging in several other countries’²¹—the UK first among the European examples.

The engagement of American religious groups in litigation is not a mere straightforward account of a cultural backlash via legal countermobilization after years of progressive rights-claims wins in the US Supreme Court on issues of concern to religious groups. First, the response was not immediate: at least among evangelical groups, there was little systematic effort to engage with courts on issues of concern in the 1970s and part of the 1980s,²² in spite of the *Roe v Wade* challenge coming as early as 1973. Second, the content of even the early activity was not simply reactionary discourse attacking secular legal developments; rather, as den Dulk and others have argued, the initial legal mobilization of Christian conservatives in the United States reflected a remarkable adaption to and *appropriation* of the language of equal rights²³—a

17 See Cichowski (n 15); McCrudden (n 11); Laura van den Eynde, ‘An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs before the European Court of Human Rights’ (2013) 31(3) *Netherlands Quarterly of Human Rights* 271.

18 See Peter Berger, Grace Davie and Effie Fokas, *Religious America, Secular Europe? A Theme and Variations*, London (Ashgate 2008).

19 McCrudden (n 11) 440.

20 Dennis R Hoover and Kevin R den Dulk, ‘Christian Conservatives go to Court: Religion and Legal Mobilization in the United States and Canada’ (2004) 25(1) *International Political Science Review* 9; see also McCrudden (n 11).

21 McCrudden, *ibid* 440.

22 Jayanth K Krishnan and Kevin R den Dulk, ‘So Help Me God: A Comparative Study of Religious Interest Group Litigation’ (2002) 30 *Georgia Journal of International and Comparative Law* 233, 249. Notably and by contrast, Roman Catholic organizations maintained a more steady rate of participation in case law. See Krishnan and den Dulk, *ibid* 253–59.

23 Kevin R den Dulk, ‘In Legal Culture, But Not of It’ in Austin Sarat and Stuart A Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press 2006) 197–219; Clifford Bob, *The Global Right Wing and the Clash of World Politics* (Cambridge University Press 2012).

cooptation of progressive ‘rights-talk’ which Clifford Bob has called ‘frame-jacking’.²⁴ The discourse of these groups was not so much anti-egalitarian in fighting the rights won in the Supreme Court with pro-egalitarian rights claims but, rather, entailed a recasting of the concept of equality, as well as of rights, freedom, and the rule of law, into a religious worldview.²⁵ The 1980s marked the beginning of what one scholar has called the ‘revolutionary era of religious politics’.²⁶ It is in this context that the ‘Moral Majority’ movement arose in the 1980s, with an aim of defending the rights of ‘the majority of citizens, who were devoted to Judeo-Christian values’, against ‘the powerful secular minority trying to foist its will on the rest of society’.²⁷ A language of ‘the religious majority has rights too’ has reached the European context far later but with similar appeal.

Thus, decisions such as *Roe v Wade* did not spark an automatic reactionary legal mobilization among American Evangelicals. Rather, the path to their engagement with courts was paved by evangelical intellectuals who gradually but increasingly called for a legal response to such progressive US Supreme Court decisions:

Where were the Christian lawyers during the crucial shifts from forty years ago to just a few years ago? Surely the Christian lawyers should have seen the change taking place and stood on the wall and blown the trumpets loud and clear. A nonlawyer like myself has a right to feel somewhat let down because the Christian lawyers did not blow the trumpets clearly between, let us say, 1940 and 1970.²⁸

This statement by evangelical pastor Francis Schaeffer, describes more or less a spiritual *calling* to law. The statement is echoed by an editorial published in *Christianity Today* in 1981: ‘Encourage Christian young people . . . to consider a calling to a *ministry* in law.’²⁹ Resonances with developments around American Christian conservatives engaging with the European courts context will be discussed below.

All of the above led to a rapidly developing religious involvement in courts. As Krishnan and den Dulk note, only one amicus brief was filed by an evangelical organization between 1971 and 1980; 49 were filed between 1981 and 1990, and 77 from 1991 to 2000 (ie 20 per cent of *all* briefs filed in that period).³⁰ The embeddedness

24 Bob, *ibid*.

25 den Dulk (n 23) 201.

26 Gregg Ivers, ‘Religious Organizations as Constitutional Litigants’ (1992) 25(2) *Polity* 243, 254, citing Jack R Van Der Slik.

27 den Dulk (n 23) 202.

28 Francis Schaeffer, *A Christian Manifesto* (Crossway Books 1981) 47, cited by den Dulk, *ibid* 207.

29 Cited by den Dulk, *ibid* 207.

30 See Krishnan and den Dulk (n 22) 250. Ivers (n 26) offers different statistics, based on a study exclusively of religion-related case law: 254 (refers to a table): 1969–79, religious organizations sponsored four of the 25 cases (16%) decided with full, signed opinions, and participates as *amici curiae* in 16 others (64%). But from 1980 to 1989, sponsored 14 of the 39 cases (35.8%) decided, and rate of *amici* participation in 36 of the 39 (ie 92.3%).

of religious organizations in the legal process is now much engrained, as is clear in the following words of a former director of the Center for Law and Religious Freedom (CLRF):

If my wife had a brain tumor and I said all we are doing is praying because my God is a mighty God and he can save and heal and he can take care of that tumor, you would say to us ‘We admire your faith, but go to the doctor.’ So when it comes to religious liberty this idea of just praying without going to a lawyer is inadequate, superficial, and unbiblical.³¹

One of the earliest pressure group formations of its kind—the Christian Legal Society (founded in 1961)³²—eventually turned its attention to courts, as expressed with its establishment of the CLRF in 1975. The dual role of the Christian Legal Society (CLS) as a centre for spiritual fellowship *and* a religious litigation firm through its subsidiary CLRF reflected the strong link between faith and legal action described above as central to the evangelical intellectuals’ call to a ministry through law. As one scholar notes, by the early 1980s, beyond the CLRF, Rutherford, and several other movement law firms had been founded to answer the call to cause lawyering.³³ Many more religious litigation powerhouses were to follow, most importantly among these earlier establishments, the American Center for Law and Justice (ACLJ, founded in 1990), the Alliance Defense Fund (ADF, 1994³⁴), and the Becket Fund for Religious Liberty (1994).

That the ‘new kid on the block’ was here to stay signalled at least a partial ‘rebalancing of the scales of justice’, in O’Connor and Epstein’s terms.³⁵ The rapid proliferation of such evangelical and fundamentalist religious groups as the CLS, the National Association of Evangelicals (NAE), the Rutherford Institute, and the Concerned Women for America (CWA), and the exponential increase in their litigation activities caught by surprise the network of mainline religious and secular civil liberties organizations that had until then enjoyed a comfortable position of strength vis-a-vis church–state litigation. As Gregg Ivers notes, it also led to a significant reconfiguration of the litigation environment, requiring the mainline Protestants as well as the Jewish legal organizations to change tack.³⁶

31 Cited by den Dulk (n 23) 211.

32 CLS is ‘a nationwide fellowship of Christians committed to acting justly, loving mercy, and walking humbly with their God (Micah 6:8). . . CLS defends the religious liberties of all Americans in the legislatures and the courts and serves those most in need in our society through Christian Legal Aid . . . [b]y inspiring, encouraging, and equipping Christian lawyers and law students both individually and in community to proclaim, love and serve Jesus Christ through the study and practice of law, the provision of legal assistance to the poor and needy, and the defense of the inalienable rights to life and religious freedom. . .’. See <<https://www.clsnet.org/>> accessed 20 October 2016.

33 den Dulk (n 23) 208.

34 Note that the Alliance Defense Fund was renamed the Alliance Defending Freedom in 2012.

35 Karen O’Connor and Lee Epstein, ‘Rebalancing the Scales of Justice: An Assessment of Public Interest Law’ (1984) 4(2) *Harvard Journal of Law and Public Policy* 483.

36 Ivers (n 26) 255.

B. Empirical Realities

As noted above, beyond the usefulness to the present study of literature developing mainly in the US context for our understanding of mobilizations around religion, a ‘second American connection’ turns our attention from theory to practice and traces increasing links between the empirical realities of the US and European contexts via American legal groups and religious interests engaging with European legal developments around religion, including direct engagement in European case law.

One of the most conspicuous examples of this is the establishment of a European wing of the ACLJ—the European Center for Law and Justice (ECLJ)—with the headquarters set up in Strasbourg in 1998. The two centres share the same Chief Counsel, Jay Sekulow, and, as we shall see below, the ECLJ is by far the most influential religious NGO on the European legal scene.³⁷ According to Christopher McCrudden,³⁸ the ECLJ was established by the ACLJ specifically with an aim to establish favourable precedents in the ECtHR. He cites the comment of the president and general counsel of ADF regarding the permission received to intervene in a particular ECtHR case, describing this as ‘a remarkable opportunity . . . to stand in defense of religious freedom . . . in cases that—if they are decided the wrong way—could have a negative impact on your religious liberty here in the United States. However, as McCrudden notes, such comments should be taken with a grain of salt, as they may be designed in order to justify their activities to funders of the organization. US-based lawyers I consulted for this study (see below) offer more nuanced and a broad range of explanations for their engagements with European litigation on religion.

Also noteworthy is the striking similarity between the CLS and its subsidiary CLRF, on the one hand, and the UK-based Christian Concern—a Christian lobby group which was founded in 2004 as part of the Lawyers’ Christian Fellowship—and its subsidiary the Christian Legal Centre (CLC, est’d 2007). As in the case of CLS/CLRF, the close ties between spiritual fellowship and legal activity are conspicuous,³⁹ and also like the CLS/CLRF, Christian Concern and the Christian Legal Centre have a powerful legal presence in their national (UK) context. They are also very active at the European level; the CLC represented two of the four claimants that appeared alongside Eweida in the *Eweida et al v UK* cluster of cases before the ECtHR,⁴⁰ but has also pursued the ECtHR route with several other cases.

37 For a full list of cases in which the ECLJ has been involved at the ECtHR. See <<http://eclj.org/institutions>> accessed 20 October 2016.

38 McCrudden (n 11), at 451.

39 According to the CC website, ‘At Christian Concern we have a passion to see the United Kingdom return to the Christian faith. . . . We have now launched the ‘Awake Arise’ campaign to encourage and equip the Church to engage with issues of vital concern to the nation. . . . We run an annual academy for young people called the “Wilberforce Academy” . . . featuring top speakers who train and equip the invited students on what it means to proclaim Christ in public life. . . . We launched the ‘Not Ashamed’ campaign in 2010, a major initiative designed to encourage Christians to take a public stand for Jesus. . . . The Christian Legal Centre is a sister organisation of Christian Concern. We defend a wide variety of individuals and churches who have suffered discrimination and challenges because of their desire to live and work according to biblical beliefs. . . . We handle more religious discrimination cases than any other organisation in the UK. See <<http://www.christianconcern.com/about>> accessed 20 October 2016. See also n 33 for comparison.

40 CLC represented both Shirley Chaplin and Gary McFarlane.

As McCrudden observes in an article entitled ‘Transnational Culture Wars’,⁴¹ and as supported by interview research cited below, the culture wars in the United States between civil society actors around issues related to religion have gone transnational and have been exported to Europe.⁴² McCrudden documents the extent to which human rights law is appropriated in the conduction of these transnational culture wars in courts and suggests that ‘NGOs have well understood the power that courts have in generating interpretations of existing legal norms that support their policy positions and have sought to expand their activities into religion and domestic litigation in order to secure such favourable interpretations.’⁴³ The comment of one particular representative of the Open Society Foundation (notably, US-based) working with European case law and describing religious NGOs in Europe as ‘wolves in sheep’s clothing’ is reminiscent of what Clifford Bob has described as ‘a continuous and continuing war of attrition between conservative religious and progressive secular NGOs for influence over policy making across a wide swath of issues’.⁴⁴

McCrudden attributes to NGO interventions an institutional adaptation of European courts leading them to become ‘more like the “public law” litigation forums beloved of liberals and reformers in the heyday of public interest litigation in the United States’.⁴⁵ Certainly the marks left by the ‘American connection’ are many and multifaceted. One cultural shift that can be traced to the United States is that of majority religious groups now taking on ‘minority’ characteristics in the way they litigate and lobby, as suggested by a recent UK news headline: ‘British Christians must start to think and act like a minority.’⁴⁶ And of course, in the ECtHR one of the cases generating the most mobilization activity in the Court’s history was on religion, and in defense of a majority religion-related right (for the display of the crucifix in public schools, in the *Lautsi* case).⁴⁷

3. PRESSURES ON AND LEGITIMACY THREATS TO THE EUROPEAN COURTS

Legal, political, and social mobilizations of various ‘stakeholder’ groups⁴⁸ must be located within a broader framework of pressures on and legitimacy threats to the European courts (ie the CJEU and the ECtHR). The latter framework serves as important background to understanding who acts, in relation to the European courts, how, why, when, where, and to what effects. The two courts are *differently* exposed to the various sources of pressure and legitimacy threats, as shall be elucidated below. These pressures on and

41 McCrudden (n 11) 434–35.

42 See also James Gathii, ‘Exporting Culture Wars’ (2006) 13(1) UC Davis Journal of International Law & Policy 67.

43 McCrudden (n 11) 436.

44 Cited in *ibid* 438.

45 *ibid* 460.

46 Tim Stanley, ‘British Christians Must Start To Think and Act Like a Minority’ *The Spectator* (29 March 2016).

47 Notably, eight of the ten intervening national governments in the *Lautsi* Grand Chamber hearing were represented in court by an American lawyer.

48 The breadth of stakeholder groups mirrors the breadth of religion-related issues, as defined above, and thus includes both religious and secular, but also secularist, humanist, and atheist groups; it also encompasses state actors seeking to impact upon/influence developments in the European courts.

legitimacy threats to the European courts are general and not specific to the domain of religion. But it is critical that we establish a strong understanding of how this broader framework operates, within both courts, if we are also to understand religion's variable place within it. Further, the margin of appreciation serves as a red thread running through most of the pressures and legitimacy threats addressed below and, as we shall see, religion holds a special place in the 'politics of the margin of appreciation'.⁴⁹

A. Civil Society and NGOs

One relatively new and understudied, in the European context, source of pressure comes from civil society, especially NGOs. Rachel Cichowski⁵⁰ describes what she calls a remarkable transformation through which civil society has become 'a central participant in the enforcement and development of human rights law in Europe'. As noted above, NGOs may act directly by litigating on behalf of a claimant, providing support for the litigation, or by submitting *amicus curiae* (in the European context, third-party interventions); they may also act more indirectly by disseminating information about Convention rights and the Charter of Fundamental Rights of the European Union as well as about related case law to both the press and the broader public. NGOs are actors in all of the above ways in the European context.⁵¹

There are certain stark structural features in the two European courts rendering them differently open to civil society influence. These include differences in the conditions under which third-party interventions by civil society and NGOs are allowed; access to case files for such third parties; and, more generally and linked to the above two points, the extent to which civil society and NGOs may be active before the two courts in support of claimants. In terms of the first category, a most conspicuous difference is embedded in Article 40 of the Statute of the Court of Justice, whereby the court does not accept or use third-party interventions in direct actions; exceptions include interventions from EU institutions, a Member State, or in cases in which a third party 'can establish an interest in the result of a case submitted to the Court of Justice' (with 'interest' interpreted rather narrowly).⁵² But even in this case there are

49 According to Carolyn Evans (*Freedom of Religion under the European Convention on Human Rights* (Oxford University Press 2001)), the margin of appreciation tends to be particularly wide in the religious freedoms context, as the ECtHR (especially, though the margin of appreciation is also significant in the CJEU context—see Francisco Javier Mena Parras, 'From Strasbourg to Luxembourg? Transposing the Margin of Appreciation Concept into EU Law' (2015) Working Paper 2015/7, Centre Perelman De Philosophie du Droit, ULB) allows states a certain, variable, leeway to interpret religious rights and freedoms within the broader context of their national cultures and traditions. See <http://www.philodroit.be/IMG/pdf/fm_transposing_the_margin_of_appreciation_concept_into_eu_law_-_2015-7.pdf?lang=en> accessed 20 October 2016. Further, Julie Ringelheim argues that the margin provides an exit for the Court from certain culturally and politically sensitive issues, so that the large discretion often granted to states on religion cases is symptomatic of the Court's difficulty in dealing with them ('Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?' in Lorenzo Zucca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press 2012) 283–306). On the 'politics of the margin of appreciation', see Fokas (n 16).

50 Cichowski (n 5) 77.

51 On the important role of NGOs, see also Robert Harmsen, 'The Reform of the Convention System' in Christoffersen and Madsen (n 5) 119, 131.

52 See Grainne de Burca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?' (2013) 20(2) *Maastricht Journal* 168, 177.

strict limitations on standing (*locus standi*) for interveners, and the intervener is further limited to support the conclusions of one of the parties before the Court: no new-to-the-case grounds or data may be raised by the third party.⁵³ Meanwhile, third-party access to the Court in indirect actions (eg in the preliminary ruling procedure) is even more restricted: interveners may not address the Court directly and their contributions are shared with the Court only if they have been parties in the national judicial proceedings prior to the CJEU case.⁵⁴ The latter is in line with a more general lack of ‘openness’ of the CJEU, as regards limited third-party access to case files and to substantial background information about cases, the limitations on attendance of hearings outside the Court’s premises, and the only partial translation of certain court materials.⁵⁵

As Alemanno and Stefan note, preventing disclosure of the original request ‘precludes the observer from understanding why the Court has declared a request inadmissible. More fundamentally, [it] prevents understanding the gap between the judicial context characterizing the national court’s decision to refer and the final judgment of the Court.’⁵⁶

Also, procedural documents and supporting items filed in the EU courts by the parties are not published. In theory, copies or abstracts of such documents are available to third parties for a fee, but not all groups can consult the relevant registers of the three courts making up the CJEU on equal terms. And in terms of access to the case file, only parties to the proceedings and interveners enjoy access. The rules for third-party right of access to the case file vary from one court within the CJEU to the other: there is no right to third party access recognized by the rules of the Court of Justice;⁵⁷ at the General Court, the President of the Chamber may authorize third-party access or, if the case is still pending, the President may issue permission, but only after the parties have been heard; and at the Civil Service Tribunal, right to third-party access is fully at the discretion of the President. In general though, the onus is on the third party requesting access to a case to prove a legitimate interest in inspecting the file.⁵⁸

By contrast, in the ECtHR context, third-party interventions have been rather key to an active engagement of civil society and NGOs. However, the requests to intervene are not always accepted: as in the case of the CJEU, this is at the discretion of the President of the Court and, rather problematically, there is no transparent process governing the latter. Still, though the number of cases with (accepted)

53 Sergio Carrera, Marie De Somer and Bilyana Petkova, ‘The Court of Justice of the European Union as a Fundamental Rights Tribunal’ (2012) 49 CEPS Paper in Liberty and Security in Europe 14; the latter applies in cases aimed to bring an action for annulment of acts adopted by EU institutions and agencies, and is one of the most contested aspects of art 263 of the TFEU.

54 *ibid* 14.

55 Specifically, the original requests from national courts for preliminary rulings are not published in all the official languages of the EU; they are translated into the official language of the state to which the reference is addressed, but these documents are not disclosed to the public. See Alberto Alemanno and Oana Stefan, ‘Openness at the Court of Justice of the European Union: Toppling a Taboo’ (2014) 51 *Common Market Law Review* 97.

56 Alemanno and Stefan, *ibid* 120.

57 Though Alemanno and Stefan indicate this is under discussion.

58 *ibid* 123.

third-party interventions tends to be small compared with the case law as a whole, those cases also tend to be particularly significant ones:

[T]he number of cases involving NGOs is admittedly small compared to the total number of ECtHR cases. But the quality of the cases is high, meaning most of these groups are very strategic about choosing to participate in cases which they believe will lead to significant changes in European law. They see it as an opportunity to participate in the development of international human rights law, which would not only be used by the ECtHR in the future, but domestic courts and international courts throughout the world.⁵⁹

Critically, the right to third-party intervention was not originally foreseen by the Convention but, rather, has evolved over time. Cichowski notes that initially the Convention system was geared towards preservation of national sovereignty, privileging the role of national governments, since it was not until after 1998 that both the individual right to bring direct claims against states, and the jurisdiction of the ECtHR as final arbiter, became compulsory for the signatories of the Convention. But as the Court increasingly developed into a formidable international court able and willing to nullify domestic legislation and domestic constitutional provisions, and to face the potential wrath of national governments in the process, the Court also increasingly became an interesting prospect and fruitful aim for NGOs and individual legal activists.

An amendment to rule 37(2) of the Rules of the Court in 1983 allowed third-party participation both by states or any other person. Between 1984 and 1998 the Court authorized 41 requests for third-party interventions.⁶⁰ Over time there has been a striking growth in the number of third-party interventions: in 2010 alone there were more interventions than over the entire period of 1985–96; of the 307 total judgments delivered by the ECtHR Grand Chamber by 2013, it accepted NGO interventions in 65 of them (21 per cent).⁶¹

There are of course limitations on NGO involvement in the ECtHR system as well. Besides the lack of transparency governing the third-party intervention acceptance/rejection procedure, also NGOs cannot act as direct claimants, because according to Article 34 of the ECHR, claimants are required to be direct victims of a human rights violation by one of the contracting parties.

Still, the impact of NGOs on the life of the Court is significant. And as compared with their role in third-party interventions, by far the most significant role played by NGOs in the ECtHR setting is through their active support of claimants, whether financial or in terms of the sharing of other resources and know-how. According to Cichowski, active NGO involvement in the ECtHR is both partially responsible for the heavy case load of the ECtHR, and bears potential to significantly help decrease that case load through their work bringing Convention rights to life at the national level: 'By pressuring the executive, legislatures, and especially national courts to

59 Cichowski (n 5) 88.

60 *ibid* 86.

61 van den Eynde (n 17) 280.

domesticate Convention rights, victims may find their complaints increasingly remedied in their home legal system.⁶² Also, through their work educating the broader public on Convention rights and offering legal advice and support, NGOs help filter claims likely to be treated as inadmissible.

Returning now to the American connection, the second largest group of NGOs active before the ECtHR comes from the United States, and a significant proportion of the latter is made up of religious conservative groups.⁶³ The largest group is UK based,⁶⁴ the UK arguably being the European country with the strongest connection to the United States. The UK is both home to the largest number of NGOs systematically involved with applications before the ECtHR, and the sending country of a large proportion of the key litigators before the ECtHR over the last 30 years.⁶⁵ Notably, 82 per cent of NGOs active before the ECtHR are 'repeat players', which of course gives them a significant advantage in the field; 10 of the 18 'repeat players' are based in the UK. In terms of changes over time and projections for the future, research suggests that the number of NGOs active before the ECtHR is gradually increasing, with non-British NGOs achieving a more conspicuous presence as well as new 'less traditional' actors, especially religiously conservative groups.⁶⁶

The two most prominent religion-related NGOs acting before the Court are either American NGOs or their counterparts: ECLJ made 15 interventions and ADF seven interventions by 2013.⁶⁷ According to McCrudden,⁶⁸ NGO involvement in their own jurisdictions is beginning to change, in two ways. First, NGOs which are based in one jurisdiction and self-identify as primarily interested in issues within that jurisdiction, are nevertheless increasingly intervening in jurisdictions *other* than their own. Second, many more organizations have been established that consider themselves to have global scope and interests, even though they may have a seat in one jurisdiction or another.

The increased interventions of both these categories of NGOs in religious litigation may be explained by several factors, including a universalist and cosmopolitan understanding of human rights which suggests a rights violation anywhere in the world is equally worthy of their time and effort; an awareness that globalization means that what happens in another country may well directly or indirectly affect developments in an NGO's own jurisdiction; and that interventions abroad on issues of concern to their own jurisdictions might win more favour with their domestic audience (and funders). Further, as elaborated above regarding the mission-like 'calling' to religion-related litigation, intervention arises somewhat organically from religious NGOs' religious ideas: once human rights lingo was appropriated for religion too,

62 Cichowski (n 5) 84. Cichowski compares a number of international courts on various counts and finds the case load of the ECtHR significantly higher in part because of its openness to NGOs and civil society and through the latter's role both pursuing litigation strategically and supporting existing claims.

63 McCrudden (n 11) 449–50.

64 van den Eynde (n 17) indicates that 30% of NGOs active before the ECtHR are UK based, and 15% US based. Russia follows at 9% and Switzerland at 7%.

65 Cichowski (n 5) 93.

66 van den Eynde (n 17).

67 *ibid* 287.

68 McCrudden (n 11) 442.

then there was no going back on the need to engage the law in issues of concern,⁶⁹ wherever those might arise geographically.

Elements of all of the above and more can be found in responses of US-based religious cause lawyers intervening in religion-related cases at the European level. Recognition of the weight the ECtHR carries in general as an international court and specifically in relation to religion is one motivating factor: in the words of the representative of one prominent US-based Christian law firm engaging in European case law, 'the prestige, magnitude and scope of the European jurisdiction has grown to be so massive, you can't ignore it.' And related to this of course is the globalization of religious issues, which carries with it two dimensions sometimes difficult to disentangle: first, the sense that globalization necessarily entails a traffic of ideas and influences between courts internationally and so 'insofar as there is a conversation and mutual influence, it is therefore good to enter into it and to affect the conversation' (according to the same cause lawyer, working independently of any firm but collaborating on ECtHR interventions with colleagues in Christian law firms: 'since it goes back and forth, we don't want Europe to go too out of whack'); and second, as noted above, the fact that globalization entails similar problems faced by believers in different contexts, 'and this', according to a third US, university-based cause lawyer, 'will affect religious people wherever. People in this field are often religious themselves, and they know what it means for their people, there's a lot of historical consciousness of how important these issues are, so you have to pay attention to what's going on, wherever you are.'

In terms of what governs their selection criteria for cases in which they choose to get involved, a primary factor for my respondents seems to be whether the case in question is on a matter of principle, and thus bears the potential 'to be really important to freedom of religion or belief and religious liberty for all groups over the long term'. One respondent notes also being driven to consider issues of particular importance to the church to which he belongs (issues about labour law context), but which may also be considered high-priority concerns for many religious groups. And, finally, also key is the extent to which the lawyer in question has something particularly useful to offer, 'where we may have some comparative law expertise', or 'where we have something meaningful to say. For example, I stayed out of *Lautsi* because I don't think Americans really have anything to say about it . . . we have an establishment clause and that makes us totally different.' The latter cited respondent was involved in *Fernández Martínez v Spain*, however, both because of the US Supreme Court *Hosanna Tabor* precedent on ministerial exemption and more generally because the relation of the right to ministerial exemption to antidiscrimination laws 'is a really interesting problem. And so that's what I was interested in *Fernández*, because it's the same problem but under European law instead.'⁷⁰

69 See Krishnan and den Dulk (n 22), and den Dulk (n 23).

70 It is worth noting, in relation to the above point about the lack of transparency in grassroots mobilizations in general: my citing a 'US based lawyer involved in the *Fernández* case' does not suggest this is a lawyer listed in the case nor that he/she is related to an organization listed as a third-party intervener; many of my respondents are involved in cases much more 'behind the scenes' and their names and organizations appear nowhere formally in relation to the case in question. Also, it may be the case that one's claim to

This leads us to the much-cited factor of a desire to lend expertise where it might be helpful. The fact that many of the issues arising before the ECtHR have already been dealt with in the US Supreme Court context is key, but also the comparative historical *depth* to the US-based litigation experience on many of the issues (the example is raised of Jehovah's Witnesses cases, central to US Supreme Court case law in the 20s, 30s, and 40s and, in a similar fashion, to ECtHR Article 9 case law starting only in the 90s). Third-party interventions on religion–state relations cases are, in general (both in Europe and in the United States), important because 'there are a lot of people with a lot of expertise, and in these issues there's a tremendous risk they will be litigated by people who don't know what they are doing', deems one US-based cause lawyer focused on religion-related issues. The comment suggests that religion is too particularly complex a matter to be left solely to actors (litigants and judges) who do not understand it.

A more cynical interpretation of such US-based religious cause lawyers' motivation in engaging with European case law could be a hope to help set precedence which might be useful in the US Supreme Court context—as, for example, is suggested by the ADF chief counsel cited by Christopher McCrudden⁷¹: 'We're forced to do it, because if we don't, we're going to lose according to rules of a game we never created.' Here the reference is specifically to the *Lawrence* case in which the US Supreme Court relied on ECtHR jurisprudence to find unconstitutional the criminalization of sodomy under state law. 'Since *Lawrence*', McCrudden argues, 'US-based conservative NGOs see European decisions as potentially undermining their position in US courts.'⁷² This may indeed be the case, though one of my respondents notes that conservative judges on the Supreme Court are, in principle, opposed to taking into account precedence from abroad.⁷³ 'So', this respondent explains, 'as the Court changes that may change, but I don't aim to get cases that I can then cite in the US Supreme Court; that would be a bit overly simplistic. It will be a side issue, especially when half the Court is principally opposed to citing other cases.' Or, as another interviewee puts it, Supreme Court justices look to other jurisdictions *very* opportunistically; 'by and large it's the liberals in the Court who do it, primarily in cases to do with capital punishment.' That said though, this same interviewee has been cited above in saying that insofar as there is a conversation and mutual influence, 'it's therefore good to enter into it and try to affect the conversation.' This suggests that hopes of setting precedent that may be influential in the United States in the future may be a 'side issue', but it is not wholly negligible as a motivating factor.

Thus, this particular American lawyer suggests a careful disentangling of certain issues: 'There are two different things: when do we invoke European precedent in American constitutional conversation, and when do we Americans intervene, file

'involvement' in a case may be in submission of a third-party intervention which however was not accepted by the President of the Court.

71 McCrudden (n 11) 450.

72 *ibid.*

73 The respondent (a US law professor and cause lawyer engaged in European case law) explains, 'The liberal wing is more receptive, and Justice Kennedy in particular, while Justice Scalia was always [frank in saying] "that's not our task!" [to consider developments beyond the US context].'

amicus briefs, in European cases? Those two things may be connected at a high level of generality but there's no immediate connection.'

B. National Courts and National Judges

Beyond civil society and NGOs, another source of pressures comes from national courts and national judges. National judicial attitudes to the European courts will fluctuate, of course, depending on how overpowering the latter's rulings are and how much leeway is granted to the national level in terms of implementation.⁷⁴ National judicial attitudes to the European courts will also fluctuate in relation to the level of 'judicial dialogue' between national courts and the European court in question—judicial dialogue currently being a buzz term in both ECtHR and CJEU contexts.

In the setting of the CJEU, national courts and judges have been critical not only to the legitimacy of that court but also to the European integration project.⁷⁵ The doctrines of direct effect and supremacy, embedded in the workings of the Court, have placed national courts and their judges in particularly powerful positions vis-à-vis the European integration project. As Arthur Dyevre notes, 'Without the [CJEU's] doctrines of supremacy and direct effect and without national courts willing to enforce the doctrines against recalcitrant state officials, the chances are that the EU would not enjoy the level of integration it does at the beginning of the 21st century.'⁷⁶ Further, national courts are in a strong position given their integral role in the EU judicial order through the preliminary ruling procedure whereby national courts send cases to the CJEU for a ruling on the interpretation of European legislation. But of course the relationship between national courts and judges, on the one hand, and the CJEU, on the other, has not always and in relation to all courts been smooth. The Italian Constitutional Court and the French Conseil d'État are national courts which have shown, especially, willingness to come head-to-head with the CJEU.⁷⁷

Likewise, national courts in Nordic Member States, as well as in some of the newer Eastern European Member States, tend to be reluctant to use the preliminary ruling procedures. As Daniel Kelemen⁷⁸ indicates, there are still considerable tensions between the CJEU and national courts over who holds ultimate supremacy in cases of conflict between European and national law, and German and Czech constitutional courts have taken decisions seemingly aimed to challenge the CJEU over supremacy.⁷⁹

One of the starkest examples of challenge from a national court to the CJEU is that of the German Federal Constitutional Court (FCC), in the FCC's ruling to

74 Alexandra Huneus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell International Law Journal* 493.

75 Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004).

76 Arthur Dyevre, 'The German Federal Constitutional Court and European Judicial Politics' (2011) 34(2) *West European Politics* 346, 347.

77 *ibid* 348.

78 R Daniel Kelemen, 'Selection, Appointment, and Legitimacy: A Political Perspective' in Michal Bobek (ed), *Selecting Europe's Judges. A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press 2015) 244–58.

79 *ibid* 250.

make Germany's ratification of the Lisbon Treaty conditional upon the passage of a new law giving the Bundestag greater oversight of European affairs. According to Arthur Dyevre,⁸⁰ with the decision coming after a series of highly controversial judgments by the CJEU, the FCC's decision on the Lisbon Treaty was meant as a *warning*, both to Brussels and especially to the CJEU:

Because non-compliance at national level puts both the effectiveness of EU law and the [CJEU's] authority at risk, the FCC's warning may prompt the [CJEU] to reconsider the most activist aspects of its recent jurisprudence. If so, it would move the relationship between the [CJEU] and national courts to a new equilibrium, restricting the scope for supranational judicial policy-making.⁸¹

It is worth noting that activism in the CJEU context is rather different from that in the ECtHR setting: CJEU activism is more or less synonymous with 'EU integrationism', ie pushing an integrationist agenda, while ECtHR activism connotes an expansion of human rights protection. This distinction helps nuance our approach to national court and national judges' resistances to the two European courts, though concern to defend national sovereignty is a common denominator across both contexts.

In the ECtHR setting, individual national high court judges have been rather vocal in their criticisms of and resistances to the Strasbourg court.⁸² And in this context one of most impactful defiances of the Court's ruling has been in the case of *Hirst v UK*, on prisoners' voting rights. (The case however is dealt with below, as the resistance to the judgment was more firmly based in governmental rather than judicial action.) In the ECtHR setting, the call for enhanced judicial dialogue is especially conspicuous, particularly among British judges,⁸³ some calling specifically for greater emphasis on the margin of appreciation.⁸⁴ In an article entitled 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe', Lady Justice Arden expresses the following concern:

However much we value the jurisprudence of the supranational courts, there is always a risk, now that their jurisprudence is becoming ever-more pervasive, of European law introducing concepts which do not sit easily with our own domestic law. European law very often has to be superimposed onto a body of

80 Dyevre (n 77).

81 *ibid* 347.

82 See *ibid* also for some consideration of the ECtHR on this topic.

83 See eg Lord Kerr, 'The Conversation Between Strasbourg and National Courts – Dialogue or Dictation?' (2008) 43 *Irish Jurist* 109, and Lord Kerr, 'The Need for Dialogue Between National Courts and the European Court of Human Rights' in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its discontents* (Edward Elgar 2013) 104–55.

84 See eg Lord Hoffman, 'The Universality of Human Rights'. Speech delivered to the Judicial Studies Board on 19 March 2009 <<https://www.judiciary.gov.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/>>; accessed 20 October 2016; see also Rt Hon Lady Justice Arden, 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe' (2010) 29(1) *Yearbook of European Law* 3.

domestic law and occasionally it also makes changes to the fabric of English law.⁸⁵

As a high court judge herself, Arden vocalizes a call for national courts to be brought into the process of determining how best supranational adjudication can work: ‘it is time to turn the tables and ask what the national courts are entitled to expect of supranational courts.’⁸⁶ And she issues three particular complaints against the Strasbourg court: first, that its jurisprudence is often ambiguous, second that it sometimes calls for profound change to domestic law, and third that the ECtHR has sometimes misunderstood national law and thus issued judgments on poor bases. Arden describes as an ‘embarrassing position’ cases in which national courts are called on by the ECtHR to revise their interpretation of a constitutional right. ‘What we need’, she argues, ‘is a *right of rebuttal*: We need to be able to say to the Strasbourg court that it has not made the principle clear, or that it has not applied the principle consistently, or that it has misunderstood national law or the impact of its decisions on the United Kingdom’s legal system.’⁸⁷

The cry for enhanced judicial dialogue between the ECtHR and national courts did not fall on deaf ears. First, Protocol No 16 (adopted by the Parliamentary Assembly of the CoE in June of 2013), was introduced in order to create an advisory procedure allowing national high courts to seek guidance from the ECtHR on questions of principle in interpreting or applying the Convention in regards to a case pending before it.⁸⁸ Further, in October 2015 Dean Spielmann, then President of the ECtHR, announced the establishment of a ‘Network of Superior Courts’.⁸⁹ A first purpose of this network is to allow the participating courts to consult the Court’s Registry directly, and with minimum formality, in order (amongst other things) to seek help in identifying relevant Strasbourg precedents in a given case. Second, the network is also meant to assist the ECtHR in its ability to gauge the degree of consensus that exists in Europe on a given issue. Notably, Spielmann preceded this announcement with the statement ‘I am mindful of the criticism often directed against the Convention, that it stands for “foreign meddling” in national affairs’, but he defends the validity of the ‘external [read ECtHR] viewpoint’ as a collective one from which has developed ‘the *ius commune* of human rights in Europe.’⁹⁰ The new Network of Superior Courts is presented as a remedy to the ‘foreign meddling’ criticism and as a direct response to challenges received from national judges.

85 Arden, *ibid* 4.

86 *ibid* 5.

87 *ibid* 15.

88 For the full text of the Protocol, see <http://www.echr.coe.int/Documents/Protocol_16_ENG.pdf> accessed 20 October 2016.

89 Dean Spielmann, ‘Whither Judicial Dialogue?’, Sir Thomas More Lecture, Lincoln’s Inn, 12 October 2015 <http://www.echr.coe.int/Documents/Speech_20151012_Spielmann_Sir_Thomas_More_Lecture.pdf> accessed 20 October 2016. For more information on the Network of Superior Courts, see <<http://www.echr.coe.int/Pages/home.aspx?p=court/network&c=>> accessed 20 October 2016.

90 *ibid*.

C. National Governments

The extent to which the two European courts are susceptible to pressures from national governments is a highly contentious question, and one much contended in the scholarly literature.⁹¹ As with the other potential pressures on and legitimacy threats to the two courts, it is worth considering certain structural differences between the two impacting upon their relative insulation from governmental pressures, ie if and to what extent the courts are ‘above politics’. This consideration will then be supplemented by perspectives of stakeholders which, though not of unbiased bystanders, are still important for our purposes because the perceptions of these actors shape their mobilization efforts.

The CJEU enjoys a significant advantage vis-à-vis national governments in the sense that override of a CJEU ruling is exceedingly difficult: it requires unanimous agreement reached at an intergovernmental conference and ratification by all 27 Member States. Thus, even having one Member State on board with the Court is sufficient to protect the latter against an override amendment of its decisions. This has been termed the ‘joint decision trap’ in which the CJEU find itself.⁹²

That said though, formal override is only one of several ways in which national governments could resist CJEU decisions. Contributing to the above-mentioned debate, essentially between the perspectives of the CJEU as a ‘dynamic court’ (whose decisions will be codified into law) versus a ‘constrained court’ (whose decisions will be influenced by concerns regarding potential governmental backlash), Dorte Sindbjerg Martinsen⁹³ argues that the fact that it is increasingly difficult for politicians to override CJEU case law does not prove that codification of the Court’s decisions occurs or that politicians cannot shape judicial influence. Through careful study of the *ex post* legislative responses or constraints to jurisprudence in particular issue areas, Martinsen shows that if we broaden our perspectives beyond the dichotomous options of *override* of the Court’s decisions or *codification* into national law, and instead pay attention also to other potential political responses to the Court’s case law, such as demands for *modification* of a decision or *non-adoption*, then we are offered a much more nuanced perspective on the vulnerability of the CJEU to political pressures. And vulnerability she does indeed find, concluding that the Court’s ultimate influence is contingent on how a larger set of forces may align to overcome governmental resistance to court decisions, including the Commission’s strategic use of case law.

91 One of the most cited scholarly debates is embedded in a series of articles in the American Political Science Review between 2008 and 2012. See Clifford J Carrubba, Matthew Gabel and Charles Hankla, ‘Judicial Behavior under Political Constraints: Evidence from the European Court of Justice’ (2008) 102(4) American Political Science Review 435; the critique of the latter text by Alec Stone Sweet and Thomas Brunell in ‘The European Court of Justice, State Non-Compliance, and the Politics of Override’ (2012) 106(1) American Political Science Review 204; and the rebuttal by Carrubba, Gabel and Hankla in ‘Understanding the role of the European Court of Justice in European Integration’ (2012) 106(1) American Political Science Review 214.

92 Fritz W Scharpf, ‘The Joint-decision Trap: Lessons from German Federalism and European Integration’ (1988) 66(3) Public Administration 239; See also Dyevre (n 76); and Daniel Kelemen, ‘The Political Foundations of Judicial Independence in the European Union’ (2010) 19(1) Journal of European Public Policy 43.

93 Martinsen (n 4).

The ‘dynamic court’ perspective is buttressed by certain claims which, in the current context of a genuine crisis in EU governance (including the financial crisis, the refugee crisis, and the results of the referendum on Brexit), have been rendered relatively feeble. Daniel Kelemen, for example, argues that Member State governments ‘believe that in order for their project of political and economic integration to succeed, they need a powerful court.’⁹⁴ Thorbjorn Bjornsson and Yuval Shany discuss the ‘reluctance by the member states to undercut the perceived authority of the CJEU’, which, he considers, contributes to the valid conclusion that ‘the [CJEU] is likely to continue and maintain a high degree of independence from the member states.’⁹⁵ The current crisis in European governance somewhat undermines one’s certainty of governmental ownership of the project of political and economic integration.

The CJEU’s ‘majoritarian activism’ is also often cited as a protection against governmental backlash—ie the fact that the CJEU has to a large degree pursued legal harmonization across Member States by imposing norms that are favoured by the *majority* of Member States. This leads us to one significant structural difference between the two European courts in this regard. Robert Spano’s claim that courts are, by definition, counter-majoritarian⁹⁶ may not hold in a strict sense, but certainly it should in theory at least apply to a human rights court as is the ECtHR (in spite of the consensus doctrine). The above-noted distinction between two different ‘activisms’ in the two European courts is also key in relation to national governmental reception of case law: in the ECtHR setting, activism entailing an expansion of human rights protection may, and often does, conflict with national political interests, particularly where the rights in question touch on nationally sensitive issues (eg asylum rights for claimants deemed terrorists post-2005 London bombings, abortion rights in highly Catholic Ireland, or indeed, most issues either related to religion or which mobilize religious groups—ie a broad range of social ethics or bio-ethics issues).

The example *par excellence* of national governmental threats to ECtHR legitimacy is embedded in a series of controversial ECtHR rulings—above all the aforementioned judgment on prisoner voting rights, *Hirst v UK*—which provoked public outcry, outright defiance of the ECtHR in the UK House of Commons and calls for the UK to withdraw from the European Convention on Human Rights.⁹⁷ Indeed the results of the *Hirst v UK* decision straddle both the governmental and public opinion pressures (the latter addressed in the following section) on the ECtHR as politicians actively engaged public opinion in what became a political battle over much more than merely one particular case (more on *Hirst* below).

94 Kelemen (n 78) 249.

95 Thorbjorn Bjornsson and Yuval Shany, ‘The Court of Justice of the European Union’ in Yuval Shany (ed), *Assessing the Effectiveness of International Courts* (Oxford University Press 2014) 277–305. Both Kelemen and Bjornsson and Shany, however, temper these statements, suggesting that ‘vigilance is required’ (Kelemen) and ‘possible threats of adverse reaction by the member states might affect the results of individual cases’ (Bjornsson and Shany).

96 Robert Spano, ‘Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity’ (2014) 14 *Human Rights Law Review* 487, 488.

97 Kelemen (n 78).

States' compliance with court judgments is, of course, an important measure of potential threats to the legitimacy of the court in question. The ECtHR is highly dependent on compliance by national governments, and the latter *generally* have a positive track record of respecting ECtHR rulings with regard to specific individual applicants.⁹⁸ The rate of compliance may be considered as fairly high, and in this context it is important to consider the fact that disproportionate numbers of violations are attributed to a small number of states (mainly, Italy, Russia, and Turkey).⁹⁹

The example of one area of higher non-compliance—that of interim measures and especially those to do with requests to forestall deportation of aliens—offers us a poignant example of policy change tailored to such non-compliance (ie supporting the 'constrained court' view). One pair of observers wonders whether a recent spate of non-compliance with interim measure orders may signify a trend undermining the Court's authority: 'In what may be a response, the Court appears to have reigned in on the granting of interim measures. Whether this will reinforce the Court's authority, however, remains to be seen.'¹⁰⁰ Another crucial test for the legitimacy of the ECtHR vis-à-vis national governments will come in the form of the pilot judgment procedure as this becomes deeper embedded in the Court's practice.¹⁰¹

In general, one could argue that the margin of appreciation as a concept—in cases where and in the extent to which it has been applied by the Court—has helped to temper governmental critiques of an activist ECtHR. (The latter has also increased scholarly critique of the Court.¹⁰²) According to Lovat and Shany, '[e]xpanding the margin of appreciation, as perceived in the not yet in force Protocol 15 . . . would run against the grain of the current trend in the Court's judgments, and may also run counter to the Court's goal of enhancing minimum protection standards.'¹⁰³

The latter interpretation is supported by several social, legal, and judicial actors consulted for this study.¹⁰⁴ Of the 22 individuals interviewed representing various group interests, when asked who are the 'big players' on the ECtHR scene, in terms of pressures which make a difference to the Court, the response is overwhelmingly

98 *ibid.*

99 Henry Lovat and Yuval Shany, 'The European Court of Human Rights', in Shany (n 95) 253–76.

100 *ibid* 269. The 'constrained court' approach, as applied to the ECtHR, is taken rather far by Shai Dothan, *Reputation and Judicial Tactics. A Theory of National and International Courts* (Cambridge University Press 2015), who argues that courts judge rationally based on a desire to maintain and enhance their reputations; so high are the stakes for the Court's legitimacy and good reputation when 'important' ('high reputation') states do not comply with its judgments that the Court should, instead, aim to issue more demanding judgments against 'low reputation' states, because non-compliance of such states would not damage the Court's reputation as much as non-compliance of high reputation states.

101 The pilot procedure is that whereby the ECtHR considers not just the violation of an individual applicant's rights, but the underlying, systemic situation in the state leading to that and similar rights violations. The Court provides guidance to the state on remedial measures that must be taken to rectify the situation not only for the individual in the pilot judgment, but for other similarly affected individuals. In other words, the pilot procedure significantly broadens the potential effect of decisions taken under it. See Kelemen (n 78).

102 See eg Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1998) 31(4) *International Law and Politics* 843; Paolo Ronchi, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*' (2011) 13(3) *Ecclesiastical Law Journal* 287, 296; and Ringelheim (n 49).

103 Lovat and Shany (n 99) 267.

104 See n 8 for details of the research sample.

the national governments (with a significant distance from other potential pressures such as national courts and/or judges, NGOs, or the broader public). Regarding the case of *Hirst*, for example, a UK-based cause lawyer representing religious claims before the ECtHR indicates: ‘There the government simply failed to make sufficiently clear what results it wanted.’ ‘Cameron’, he contends, simply ‘spoke too late on *Hirst*: he didn’t make it clear to the Court early on that it was unacceptable to his party’. In this sense, in this lawyer’s view, the margin of appreciation is a ‘political valve’: ‘The reason McFarlane¹⁰⁵ lost is because of the margin of appreciation, because what happened in England would not have happened in Italy or Greece or Russia. The judgments are very politicized. I knew from the second the Italian prime minister said he would not implement the [2009] *Lautsi* decision, I knew the Grand Chamber would reverse it.’

Or as one former ECtHR judge expresses it: ‘The Court has always on its mind that the state is present, that of course the state funds it, the state supports it, and the Court cannot ignore the state.’ He also nuances the perspective, indicating that some states ‘matter’ more than others—specifically, Germany, France, and the UK, ‘those are the important ones’. Russia may make a lot of noise, but because it is not a country on which the Court relies for its legitimacy (because of its poor track record in any case implementing judgments), it is not among the countries—according to this former judge’s perspective—which is ‘always on the Court’s mind’.

D. Public Opinion

Public support for courts is a ‘bulwark of judicial independence’, and its erosion opens the Court to potential attacks.¹⁰⁶ According to one scholar, ‘every public institution needs a certain “reservoir of favourable attitudes or good will” that makes members of the public willing to accept policy outputs to which they are opposed.’¹⁰⁷ Such diffuse support is important, as the greater the levels of diffuse support for a court, the better protected it is from political interference. From this perspective, it is important that courts maintain their ‘reservoir of public good will’.

Public support for courts is differently central to the two European courts. In the CJEU context public support for the Court, because of its very nature in relation to the European integration project, is rather intimately linked to public perceptions of the EU in general. In the ECtHR setting, where the content of the case law largely contends with the defense of minority rights, support amongst the populations’ majorities is in a rather fragile position.

Scholarly debate on national governmental threats to courts’ legitimacy is echoed in the domain of public opinion. Gibson and Caldeira¹⁰⁸ argue that the CJEU ‘rests

105 Gary McFarlane is one of the four claimants in the cases taken together to the ECtHR under *Eweida et al v UK*. McFarlane was a relationship counsellor for a public organization (Relate), dismissed from his post after he refused to confirm that he would provide directive sex therapy to homosexual couples due to his religious beliefs.

106 Kelemen (n 92) 45.

107 David Easton, *A Systems Analysis of Political Life* (John Wiley and Sons 1965), cited by Kelemen (n 92) 45.

108 Gregory A Caldeira and James L Gibson, ‘The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support’ (1995) 89(2) *American Political Science Review* 356.

on a precarious bedrock of support' (not least because it is too obscured from the public for the latter to have much of an opinion about it) which puts its support at risk, and that while levels of trust in the CJEU are relatively high, few people are willing to accept CJEU decisions that they find objectionable. This argument may be pitted against that of Kelemen¹⁰⁹ and Voeten¹¹⁰ who, in different ways, argue that public support for the Court should be seen in relative terms. Kelemen contends that support for the CJEU should be considered against support for other institutions; 'the ECJ's good standing in public opinion in relative terms owes less to public esteem for the ECJ than it owes to public distastes for other public institutions.'¹¹¹ And Voeten posits that perceptions about international courts in general are correlated with perceptions about the international organizations with which they are associated; that individuals who trust national courts are more likely to trust international courts;¹¹² and that support for international courts drops precipitously in the face of public controversy over unpopular decisions (here Voeten and Gibson and Caldeira's stances meet).

It follows from the latter point that a crisis in European institutions may negatively affect support for European courts. Thus, as suggested above, the European crisis may well have consequences for the CJEU and even for the ECtHR regardless of whether these institutions carry any responsibility for the crisis.

Some scholars claim that the European Court of Human Rights in particular is facing a legitimacy threat amongst the broader public,¹¹³ and this less related to the financial and other European crises, but rather to unpopular decisions. Certainly it can be argued, for example, that the *Lautsi v Italy* Chamber (2009) judgment provoked a popular backlash, in Italy and beyond,¹¹⁴ and that this backlash influenced not only the overturning of the unanimous (7-0) Chamber judgment by a 15-2 Grand Chamber judgment, but also, notably, the move from a judgment in which the margin of appreciation was mentioned three times (*Lautsi v Italy*, 2009) to one in which the margin was mentioned 27 times (*Lautsi v Italy*, 2011). As I contend elsewhere,¹¹⁵ in general, states' handling of religious matters often reflects popular demands, expectations, and mobilizations which, in turn, are often embedded in predominant conceptions of religion in relation to national identity and thus protected by the margin of appreciation. And all of the above may be reflected in the Court's handling of religion. Consideration of the prominence of the margin of appreciation in the ECtHR

109 Kelemen (n 78).

110 Voeten (n 11).

111 Kelemen (n 78) 248.

112 This point might be contended with evidence from particular case studies, as the opposite might be argued: that public may trust international courts the more they *distrust* national ones.

113 Tom Zwart, for example, argues that 'the only question one has to ask is whether the Court's *acquis* would today receive the support of a majority of the people if put to a referendum. Since the likely answer is "no" . . . there is a problem, which is this: although the Court's work may still be applauded by its inner circle, it seems to have lost at least some of its legitimacy among the wider public.' See Tom Zwart, 'More Human Rights than Court' in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents* (Edward Elgar 2013) 71–95. But again, as suggested above, empirical evidence to support such an argument is lacking.

114 On the latter, see Fokas (n 16) 9–11.

115 *ibid* 14.

decisions in the post-*Lautsi* religion-related cases of *Sindicatul 'Păstorul cel Bun' v Romania* (2013), *Fernández Martínez v Spain* (2014), and *SAS v France* (2014)¹¹⁶ gives pause for thought as to the sway of public opinion specifically through the politics of the margin of appreciation.

But there is scant evidence to support an argument that the ECtHR is generally facing a legitimacy threat among the broader public: the picture from the UK may easily colour perceptions, but opinion polls on trust in the ECtHR have not been conducted across the 47 Member States of the Council of Europe. As Kelemen notes, we know little about the public legitimacy of the ECtHR, because no systematic cross-national opinion polls investigating the legitimacy of the Court have been conducted.¹¹⁷ Voeten does however provide evidence regarding the UK situation: 71 per cent of the British public favoured the ECtHR in 1996, but by 2011 only 24 per cent favour remaining a party to the European Convention on Human Rights.¹¹⁸ The UK situation has become so complex,¹¹⁹ particularly in light of the outcome of the 23 June 2016 referendum calling for British withdrawal from the EU, that it merits careful consideration, not least for its potential impact on the broader Convention system.

E. *Hirst*, Brighton, etc

This leads us to turn our attention rather more carefully to the Brighton process and its possible corollaries.¹²⁰ It is difficult to estimate how 'large' or 'small' the Brighton process is, in the grand scheme of things, or whether there is indeed a web of any type, with strings of any substance, connecting it to the *Hirst* decision, much less to the *Lautsi* decision and, furthermore, to UK threats to leave the Convention system and/or the referendum on membership in the EU. And the truth of the matter may never be fully certain, regardless of the outcome of the June 2016 UK referendum on EU membership.

Here we formally enter the realm of exploration rather than arguments that can be scientifically proven. In so doing, again I engage the voices of actors in the field, less for insight into realities around the questions at hand but rather because their opinions and perspectives are valuable in and of themselves: they reveal reasons behind particular actions they are taking or consider taking before the European courts, and regardless of whether these reasons are valid, they are important to understand

116 In very broad terms, the *Sindicatul* case entailed a judgment in favour of religious autonomy of the Romanian Orthodox Church, thus allowing the latter's barring of the establishment of a union of church employees; likewise in the *Fernández* case the judgment favoured the religious autonomy of the Roman Catholic Church in barring the renewal of a married priest's public school teaching contract; and in the *SAS* case the concept of 'living together' was deemed central enough to French national identity as to justify a ban on the wearing of the burqa in public spaces. There were nine references to the margin in *Sindicatul*, 12 in *Fernández*, and 10 in *SAS*; more often than not the word 'margin' was preceded by 'broad', 'wide', or 'wider' in these references.

117 Kelemen (n 78).

118 Voeten (n 11) 418.

119 To the extent that prominent leaders such as then UK Home Secretary Theresa May pit the question of leaving the Convention against that of leaving the EU: 'If we want to reform human rights laws in this country, it isn't the EU we should leave but the ECHR and the jurisdiction of its court.' See <<http://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum>> accessed 20 October 2016.

120 See n 7.

why groups act in ways they do and the extent to which their expectations and hopes in the ECtHR are impacted upon by the Brighton Process and its corollaries.¹²¹

For example, two representatives of a Christian-interest NGO, one behind much religion-related case law at the national level but also behind certain important cases at the ECtHR, discuss their concerns together:

YY: I even wonder whether, but this is speculation really, the fact that the UK put pressure on the Council of Europe . . . complete speculation, but I could see that the European Court therefore might feel that it doesn't want to . . . that it wants to tread carefully with its relationship with the UK and because there is this talk of could the UK leave the European Convention? . . . And I wonder whether, in terms of other cases that we tried to bring to Europe, whether that's been a factor that may . . . Particularly because the cases that we've been involved with, they oughtn't be contentious but they are contentious . . .

XX: And they're getting increasingly difficult to get there.

YY: Yeah . . . maybe the Court is thinking perhaps we don't want to deal with that.

XX: . . . They're not touching our cases, whereas they would have done . . . we think . . . 3 particular cases . . . we can't understand why they weren't taken . . .

YY: We haven't made a big deal of the fact that . . . those three cases aren't going to Europe, but . . .

XX: Because that's where we thought we would get more justice for . . . we would get traction . . . but they've just been refused at first level, no argument.

. . .

YY: [The Court] didn't really seem to engage . . . well it didn't engage with the argument . . .

XX: So we've been taken by surprise because it is as if we can't get through the door now.

The above comments then reflect a concern that they, as an NGO pursuing religious freedoms cases against the UK in the ECtHR, are being punished, in a way, for the UK's threats to withdraw from the Convention system. At the same time, they also reflect an acute awareness that they cannot be sure about the latter and they refer to their thoughts on the matter as purely speculative. Their speculations are supported, however, by a careful analysis of post-*Hirst* case law by UK lawyer John Wadham.¹²²

The timing of a number of events related to the *Hirst* decision and linking it to the actions of the UK government as chair of the Council of Europe Committee of Ministers (November 2011 to May 2012) have been well documented by

121 It should be noted that the interviews cited in this section of the text were conducted before the June 2016 referendum on UK membership in the EU.

122 Former executive director of INTERRIGHTS (the Centre for the Legal Protection of Human Rights); former General Counsel for the Equality and Human Rights Commission; and former Director of Liberty (the National Council for Civil Liberties). See John Wadham, 'Bending the Jurisprudence and UK Threats to Leave the ECHR' (29 January 2016) <<http://johnwadham.com>> accessed 20 October 2016.

scholars.¹²³ For our purposes it is sufficient to note that the ‘Hirst saga’ entailed an original ECtHR Chamber Judgment (*Hirst v UK*, 2004), and a Grand Chamber judgment in the same case of October 2005, both finding that the blanket ban on prisoner voting rights in the UK is in contravention of the ECHR; inaction on the part of the UK government in terms of implementation of the judgment; decisions by the Council of Europe Committee of Ministers issued in May 2010, calling for the process of legal change to commence; a further judgment finding a violation on the same issue in *Greens and MT v UK*, 2010; a debate in the UK House of Commons leading to a vote against a change in the law;¹²⁴ the ECtHR suspension of its order against the UK to begin the process of legislative change until six months after the judgment in an Italian prisoner voting case, *Scoppola v Italy No 3*; the *Scoppola* judgment, issued in May 2012, which confirmed that blanket bans on convicted prisoner voting rights are incompatible with the Convention *but* offered a wide margin to states in terms of legal reform options (a decision ‘widely seen as Strasbourg’s attempt at appeasement, for it signaled (in essence) that a comparatively minor change to the UK’s laws was very likely to comply with the Convention’¹²⁵); a new Draft Prisoner Voting Bill produced by the UK government in November of 2012, still including a blanket ban on prisoner voting; a reaction by the CoE Committee of Ministers indicating that the maintenance of a blanket ban is not Convention-compliant; and continued application of the blanket ban and refusal to implement *Hirst* since.

One UK expert in European law expresses an increasingly putative theory that *Hirst* was a little more than a proxy for politicization of anti-EU feeling in the UK. According to this scholarly observer, ‘... one parliamentarian, an astute man, who has wanted to destabilize the European side of policy for many years, anti-EU, anti-Human rights convention, saw in [*Hirst*] an opportunity to make energetic noise. . . . *Hirst* of course is obviously a totally dreadful person He is actually literally an axe-killer, having killed his landlady with an axe; perfect if you want to destabilize the Convention system . . .’. He describes how the *Hirst* judgment got caught up in Conservative Party politics about hostility to Europe ‘and so it became a rallying call for people who don’t like the European Union, don’t like the Convention, and therefore, at proxy, don’t like the Human rights Act.’ The respondent continues, ‘I think you could make a very plausible argument, that the salience of the *Hirst* decision, the

123 See, especially, Edward Bates, ‘Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg’ (2014) 14 Human Rights Law Review 503, and Edward Bates, ‘The UK and Strasbourg: A Strained Relationship – the Long View’ in Katja Zeigler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights – A Strained Relationship?* (1st edn, Hart 2015) 39–69. See also the House of Commons Library detailed briefing on the prisoner voting issue <<http://researchbriefings.files.parliament.uk/documents/SN01764/SN01764.pdf>> accessed 20 October 2016; and Wadham, *ibid*.

124 ‘This House notes the ruling of the European court of Human Rights in *Hirst v. the United Kingdom* . . . ; acknowledges the treaty obligations of the UK; is of the opinion that legislative decisions of this nature should be a matter for democratically-elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand’. See Edward Bates, ‘A Chronology on the Prisoner Voting Saga’ (28 October 2015) <<https://ukstrasbourgsplight.wordpress.com/2015/10/28/a-chronology-on-the-prisoner-voting-saga-2004-2015-echr/>> accessed 20 October 2016.

125 Bates, *ibid*.

reverberation of *Hirst*, the political *importance* of *Hirst*, was generated by those who saw a good basis for embarrassing the European Court of Human Rights.’

Notably, the controversy around the original *Hirst* judgment centered on the margin of appreciation, with the argument that the UK law on the matter was within the margin of appreciation supported by the fact that, at the time (2005), there were 13 European countries which also had bans on prisoners’ voting rights (ie lack of European consensus on the matter).¹²⁶ The Grand Chamber, however, argued that ‘Such a general, automatic and indiscriminate restriction on a vitally important Convention right *must be seen as falling outside any acceptable margin of appreciation*, however wide that margin might be, and as being incompatible with Article 3 of Protocol No.1’ (*Hirst v UK*, 2005, para 82). This point is key as a championing of the margin of appreciation became a central rallying cry of the UK government in its chairmanship of the Committee of Ministers of the Council of Europe (November 2011 to May 2012), and in the resulting Brighton Declaration (April 2012). And, of course, the Brighton Declaration proposed, amongst other things, the introduction of the margin of appreciation, and of the subsidiarity principle, into the Preamble to the ECHR (Protocol 15, accepted by all 47 Member States and now in the process of ratification).

Also critical is the fact that in the 2012 *Scoppola* judgment (which, again, is widely seen to reflect a stance of appeasement on behalf of the Court towards the UK), the Grand Chamber overturned the Chamber decision 16-1. In finding no violation in the Italian ban on prisoner voting, the Court relied heavily on the margin of appreciation:

83. Nevertheless, the rights enshrined in Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and the Contracting States must be afforded a margin of appreciation in this sphere. The Court has repeatedly affirmed that the margin in this area is wide. . . .

And in the very final paragraph of the judgment:

110. Taking the above considerations into account, the Court finds that, in the circumstances of the present case, . . . The margin of appreciation afforded to the respondent Government in this sphere has therefore not been overstepped. Accordingly, there has been no violation of Article 3 of Protocol No. 1.

Finally, completing the ‘potential web’, whether the *Lautsi* case can legitimately be viewed through the prism of these developments is a very difficult but interesting question which deserves consideration. Certainly the timing is noteworthy: the Chamber judgment of 2009 was unanimous in its finding in favour of Ms. Lautsi against the Italian state which, the Chamber considered, was in violation of Article 2 of Protocol 1 on the right to education in its display of the crucifix in public school classrooms, in a case in which the margin of appreciation appeared only three times

(as noted above), all mentioned by the Italian counsel. Two years later, and after a period in which UK anxiety with the Convention was at its peak,¹²⁷ and one month after the UK House of Commons debate on *Hirst* (February 2011, see above), and in the same month that a Commission on a UK Bill of Rights was set up, the Grand Chamber ruled, 15-2, in favour of the Italian state, in a case with 27 mentions of the margin of appreciation, 8 of which were in the final paragraphs of the Court's judgment.¹²⁸ There is of course no proof, just as one cannot prove that the Court's post-*Hirst* judgments in a number of UK cases found no violation where they might have otherwise, were it not for the UK threats to withdraw from the Convention system.¹²⁹ Still, the timing is worth considering, as are—again—the perspectives of actors involved.

According to one former ECtHR judge, 'The UK intervention terrified the Court, and it is still terrified, as evinced in its use of the margin of appreciation since then.' Or, in the words of a current ECtHR judge: 'religion is a place where there's room for judicial lobbying' and 'it's clear that the Grand Chamber [*Lautsi*] decision of 2011 had more emphasis on the margin of appreciation because of a "Brighton climate".' The margin of appreciation, another former ECtHR judge argues, is not a human rights argument but a political argument, and we have been witnessing a backtracking, a departure from the Court's jurisprudence, in such cases as *Fernández, Sindicatul*, and *SAS*. And in the opinion of one more current ECtHR judge: 'The sheer existence of Protocol 15 [quite apart from its ratification] has already changed the case law.' He adds, in this context: 'It is clear there will be no foreseeable change in the field of religion. We are on a plateau.'

Again, just how important, in the long run, this collection of developments will be for the ECtHR and the Convention system is difficult to ascertain. Jonas Christoffersen and Mikael Rask Madsen¹³⁰ contend that the British chairmanship of the Council of Europe Committee of Ministers (November 2011 to May 2012) opened up a debate about the future role of the Court and thereby paved the way for the ECtHR to play a potentially different role in the future. Thus, the Brighton Declaration stands out in comparison to earlier declarations as it 'did not adhere only to the legal and technical matters, but instead openly raised political questions about the Court's future'.¹³¹ The debates which led up to the Brighton Declaration were animated by normative differences between Member States in terms of perspectives on the role that the ECtHR *should play* in the protection of human rights in Europe and, specifically, on whether it should play a strictly subsidiary role or, instead, push forward a closer European integration of human rights by further harmonizing of human rights standards. 'History tells us', Christoffersen and Madsen point out, 'that singular events should not be overstated but . . . the Brighton process and

127 According to Michael O'Boyle, former Deputy Registrar of the ECtHR, 'The Court has never, in its 50-year history, been subject to such a barrage of hostile criticism as that which occurred in the United Kingdom in February 2011'. See Michael O'Boyle, 'The Future of the European Court of Human Rights' (2011) 12 *German Law Journal* 1862.

128 On this, see also Ronchi (n 102).

129 Wadham (n 122).

130 Christoffersen and Madsen (n 7).

131 *ibid* 230.

subsequent Declaration . . . paved the way for some both interesting and challenging potential new paths for the ECtHR.¹³²

Christoffersen and Madsen divide the historical evolution of the Court roughly into four phases, whereby in its early years the Court was governed more by (or at least highly sensitive to) national politics, a process which then yielded to a greater emphasis on national law, followed by a period in which international politics and, subsequently, international *law* came more to the forefront of the Convention system as lived out through the ECtHR's case law. According to these scholars, 2012 (year of the Brighton Declaration) may prove to have been the turning point and even the beginning of a new phase in the evolution of the Court where legitimacy can no longer be viewed as simply a question of effectiveness, and where the balance may tilt back towards the national level in terms of national politics and national law. They argue that the transfer of power from national politics towards, first, international law and politics and later also national law seems only very recently to have been countered by a wide offensive from national politics. Specifically, it is only in relation to the Brighton process that national political powers have acted collectively with a view to regaining power from the international legal sphere back to the at the national level.¹³³

In assessing the potential long-term effects of Brighton and its corollaries, it is important to consider what about the entire process was rather *new*. One scholar, Colm O'Conneide, writes, 'The manner in which UK's presidency of the Council of Europe coincided with a domestic political backlash against the Court has altered the internal dynamics of the Interlaken reform process: the legitimacy of the Court's role has been called into question to an unprecedented degree, and new tensions have emerged in the relationship between national authorities and the Court.'¹³⁴ Indeed, the Brighton Declaration may be understood as a rather long list frustrations with the ECtHR, and frustrations that transcend the realm of the technical (the domain on which the Interlaken and Izmir Summits maintained a more central focus) and lie more squarely in the realm of the political. Whether the Court will 'recover' from this process—ie whether it will remain at the political level or rather return to the technical and thereby return also to the international level rather than maintaining the national level focus introduced especially by the Brighton Process, remains an open question.¹³⁵ Undoubtedly though, the resultant introduction of the margin of appreciation (and the subsidiarity principle) into the preamble of the ECHR leaves a permanent mark on the Court—one which, in the recent case law climate, is rather conspicuous but which may or may not fade over time as the pressures on the Court also shift.

4. ASSESSMENT: WHERE DO WE GO FROM HERE?

The rather thorough attention to the *Hirst* case and its relation to the Brighton process as well as to the *Lautsi* case and the introduction of Protocol 15 has a particular

132 *ibid.*

133 *ibid* 238.

134 *ibid* 239.

135 *ibid* 242, 243.

aim of setting the scene in which my respondents, working at and in relation to the European courts, conceive of their mobilization efforts and the potential effects of the latter.¹³⁶ Thus in this section we move from a focus on the relative susceptibility of the two European courts to grassroots mobilizations to a focus on actors engaged with the courts and their perceptions of changing opportunity structures. In light of the ‘plateau on religious freedom’ reached in the ECtHR, according to a current ECtHR judge (cited above), what might be expected in terms of future trends in grassroots mobilizations?

One tangible effect seen amongst NGO representatives and cause lawyers is a tendency to think in terms of ‘forum shopping’: the CJEU has become a more attractive forum for consideration both, objectively, as it begins to address religion-related cases under the anti-discrimination directives in particular, and, especially, as the ECtHR is increasingly perceived as weaker vis-à-vis states in potentially unfavourable decisions¹³⁷ and as less predictable as the margin of appreciation becomes more central to its case law.¹³⁸

The CJEU, according to one Open Society Foundation (OSF) representative, is preferred because ‘it’s faster’, and in general since Article 9 arguments are more difficult to sustain in the current ECtHR climate, a focus on discrimination and the intersection between religion and other rights within the CJEU setting will be more fruitful. ‘Too much leeway is given to states on religion’, he argues, through the margin of appreciation, whereas in the CJEU one treads on more certain grounds with the anti-discrimination directives. A UK based human rights lawyer makes a similar argument for turning her attention to the CJEU, with SAS being a turning point for her in terms of her disappointment with the ECtHR over use of the margin of appreciation as a political tool: ‘it would be such a big deal for them to say France is wrong.’ Or, as one humanist association representative puts it, ‘It feels like if they told the French “you can’t do that” and effectively reversed [the French] ban, it would potentially jeopardise their authority, because the French would react so strongly against that. Maybe they were thinking back to the crucifix case, and thinking well, the last time they did this, they ended up being dragged in.’ ‘Civil society is thinking of abandoning the European Court of Human Rights’, another OSF

136 Here it is important to note that, because by its very nature interview research reflects perspectives of respondents in a given moment in time, the latter perspectives may be expected to be influenced by social and political developments in that time period. Without follow-up interviews (not conducted for the purposes of the present article), one cannot be sure the perspectives would hold fast in a different social and political climate and, specifically, in the aftermath of religion-related case law decided differently (or, indeed, in the aftermath of more recent developments in the CJEU context; see below).

137 That said, of course not all ‘religiously-informed’ perspectives favour a powerful court vis-à-vis the states; perspectives vary depending on the issue at hand and, in some cases, on whether majority or minority religions are defended by a given judgment. But interviewees across the range of perspectives all cite an increasing interest in looking to the CJEU as a potential venue for pursuing their religion-related claims.

138 The margin of appreciation is also a doctrine applied by the CJEU, a fact with which many of my interviewees are unfamiliar. See Parras (n 49). For trends in use of the margin of appreciation especially after *Lautsi*, see also Alastair Mowbray, ‘Subsidiarity and the European Convention on Human Rights’ (2015) 15 *Human Rights Law Review* 313. But of course, we have thus far little insight into how it might be employed in religion-related cases.

representative explains: the Court, she argues, lost its legitimacy in NGO circles after *Lautsi* and *SAS*.¹³⁹

It is worth noting that roughly half of the respondents in NGOs consulted are rather young in age, and this factor seemed to make a difference in terms of their experience with and knowledge of earlier ECtHR case law. Thus their judgments tend to be disproportionately informed by post-*Lautsi*, post-Brighton case law. Yet their perspectives on the ECtHR in the current climate coincide with those of both current and former ECtHR judges. But in the case of the NGO representatives, they tend to pair their thinking about ‘closed doors’ at the ECtHR with ‘new opportunities’ at the CJEU through equality and anti-discrimination directives.

These Europe-based NGO representatives reveal an awareness of the processes of litigation and intervention before the CJEU and a preparation to learn to navigate what is, for them, a new system. Their US-based counterparts, however, are equally interested in the CJEU prospect but, as of yet, less informed as to what engagement in that setting might entail. One US-based cause lawyer expresses a certain ‘wait and see’ approach, in suggesting that his interest and engagement will develop if and as the CJEU’s engagement with issues of concern will develop: ‘We have not developed a great system for tracking [the CJEU] as much as the ECtHR right now. We pay less attention to it but would like to pay as much as it goes to freedom of religion or belief issues.’

Another US-based lawyer indicates that ‘in principle I would be interested in intervening in [CJEU] cases in exactly the same way. Obviously, I keep trying to get my staff to take the same interest in [CJEU] cases that they have in the ECtHR. But it’s, to me, a little less transparent how one goes about intervening. I would be interested to know more about that.’ Also involved in the Strasbourg Consortium website¹⁴⁰ (established, he explains, in order to ‘raise the level of discourse’ about the ECtHR religion-related jurisprudence), he indicates ‘I would love to see the Strasbourg Consortium site following [CJEU] cases, tracking cases the same as it does for ECtHR. The religion cases there are even more needles in the haystack.’

Certainly, as these perspectives indicate, the ‘push’ and ‘pull’ factors are in place for social and legal actors to increasingly turn their attentions from the ECtHR to the CJEU. It is difficult to know how long the time lag may be between the developing of these intentions and their realization in terms of gathering information about the relevant processes and actually seeking to act before the CJEU. Also, clearly and *admittedly* on the part of certain respondents, this ‘turn’ towards the CJEU is based on relatively less knowledge about how the CJEU operates, and about the above-explained relative limitations on third-party engagements with the latter court. Further, these perspectives were elaborated *before* the opinion issued by the CJEU Advocate General Julianne Kokott on the Achbita case regarding the wearing of a headscarf in the workplace,¹⁴¹ in which opinion a ‘strict neutrality’ in the workplace

139 Notably, a colleague of hers at OSF, also interviewed, is employed by the Foundation to work on the anti-Brexit campaign.

140 See <www.strasbourgconsortium.org> accessed 20 October 2016.

141 See n 2; for the AG’s opinion see <<http://publications.europa.eu/en/publication-detail/-/publication/bf51643a-27cd-11e6-914b-01aa75ed71a1/language-en>> accessed 20 October 2016.

rule trumps freedom of religious manifestation in terms of the employee's right to wear the headscarf. All of the above may suggest wishful thinking on the part of those seeking a more religion-friendly reception by the CJEU. The extent to which the CJEU's engagement with religion will be activated and otherwise influenced by grassroots mobilizations remains to be seen; so too the extent to which the CJEU will, in the long run, prove better insulated against various grassroots pressures and legitimacy threats in the domain of religion.