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The legal status of religious minorities: Exploring the impact of the European Court of Human Rights

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Abstract

In the last 25 years the European Court of Human Rights (ECtHR) has evolved into a venue where some of the most contentious questions related to religion in European society are addressed. This article focuses on the grassroots level impact of the ECtHR in the domain of legal status of religious minorities. In light of scholarly debates questioning the direct effects of courts on the issues they address (i.e., legal reform and policy change), the research on which this article is based explores the nature and extent of the Court's *indirect* effects on the legal status of religious minorities: how and to what extent does the ECtHR impact upon religious minorities in terms of their *conceptions of, discourse around, and mobilisations pursuing* their legal status-related rights? This question is addressed through results of empirical qualitative research conducted at the grassroots level in four country cases – Greece, Italy, Romania and Turkey.

Keywords

ECtHR religious freedom jurisprudence, equality, grassroots level, indirect effects, legal recognition

Résumé

Au cours des vingt dernières années, la Cour européenne des droits de l'homme (CEDH) est devenue un lieu où certaines des questions les plus litigieuses liées à

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la religion dans la société européenne sont abordées. Cet article met l'accent sur l'impact de la CEDH sur le domaine du statut juridique des minorités religieuses. À la lumière des débats scientifiques qui remettent en cause les effets directs des tribunaux sur les problèmes qu'ils abordent (c'est à dire les réformes législatives et les réorientations politiques), la recherche sur laquelle cet article est basé explore la nature et l'étendue de l'influence juridique européenne sur le statut juridique des minorités religieuses par les effets *indirects* de la CEDH, en ce qui concerne l'évolution de la situation dans l'ombre même de la Cour. Par exemple, comment et dans quelle mesure la CEDH influe-t-elle sur les minorités religieuses en termes de conception, de discours et de mobilisation poursuivant leurs droits liés au statut juridique? Cette question est abordée par la présentation des résultats de recherches qualitatives empiriques menées dans quatre pays: la Grèce, l'Italie, la Roumanie et la Turquie.

Mots-clés

Cour européenne des droits de l'homme, effets indirects, égalité, niveau de base, jurisprudence de la liberté de religion de la CEDH, reconnaissance légale

Introduction¹

The European Court of Human Rights (ECtHR or the Court) represents one of the broadest and most successful international human rights protection regimes. Established by the Council of Europe (CoE) in 1959 with the express task of defending the European Convention on Human Rights to which all CoE members are signatories, in the post-Cold War era the Court grew from being a guarantor of human rights solely in Western Europe to playing a role in the transition to democracy and the rule of law in Eastern Europe (Christoffersen and Madsen, 2011: 2–3). Thus, now bearing relevance for over 800 million people across the 47 member states, where it works towards a harmonious application of standards of human rights protection across this expanse, the Court's impact is both fundamental and wide-reaching (Follesdal et al., 2013: 1; Andenas and Bjorge, 2013: 182).

Though religion-related case law constitutes a relatively small proportion of the Court's overall case law,² for the domain of religion,³ too, the ECtHR represents an important standard-setter. Initially rather slow to engage with matters of religion – from its establishment in 1959 until 1993, the Court judged no cases based on the primary article of the ECHR defending religious freedom (Art.9) – the landmark case of *Kokkinakis v. Greece* in 1993 marked the beginning of a serious and highly consequential engagement with religion.⁴ In the last 25 years the ECtHR has evolved into a venue where some of the most contentious questions related to religion in European society are being addressed. On topics such as whether religious symbols can be worn at work or at school, or displayed in classrooms, whether a state can deny conscience-based exemption to military service, religious education, or religious oath-taking, and the extent of citizens' bioethics related rights (beginning and end of life procedures, medically-assisted

procreation, etc.), the Court has made bold and definitive statements, and has led to legal reform in many such cases.

A focus on such direct effects of the case law – examining the extent to which the Court’s decisions have led to legal reform at the national level – is an interesting, but rather narrow research question.⁵ As a great deal of North American socio-legal scholarship has conveyed, the direct effects of courts, when considered in the context of the broader body of existing rights claims (most of which never reach courts), tell only a very small part of the story of the potential impacts of courts. Provoked in part by arguments that there is ‘hollow hope’ in courts to introduce legal reform, a number of scholars turn our attention instead to the *indirect*, or the ‘radiating’ effects, of courts’ jurisprudence.⁶ Specifically, such scholarship argues that well beyond the implementation, or non, of a given court decision, each court decision may inform social actors’ understanding of changes in the legal and political opportunities at their disposal for pursuing their rights. Court decisions may also influence how social actors conceive of their rights, inspire actors in a different national context to pursue their related rights, or *discourage* actors from such rights pursuit, depending on the decision in question. The metaphor of ‘the shadow of the law’ has also been used to indicate how space for negotiation is created by court decisions so that further related legal conflicts may be resolved ‘in the shadow’ of existing case law rather than necessarily reaching a court⁷. All of the above suggests that in order to grasp the full range of potential impact of a court’s jurisprudence, one must look well beyond its direct effects in terms of legal reform it may or may not have prompted.

The research on which this article is based studies the indirect, or radiating effects of the ECtHR religion-related case law and the impact of the shadow of that case law specifically at the grassroots level. In other words, it examines the extent to and ways in which that case law influences grassroots level actors’ conceptions of their rights, their discourse about their rights, and their mobilisations in pursuit of those rights, whether through political or legal means; it also studies whether the case law alters actors’ perceptions of the political opportunity structure or the legal opportunity structure for the pursuit of their religion-related rights in any way.

This article focuses on such indirect effects of ECtHR religion-related case law on issues related to the legal status of conscience-based groups (mainly religious minorities, but also in some cases secularist, atheist and humanist groups,⁸ sometimes pursuing equal rights and privileges offered to religious groups or seeking freedom *from* religion, amongst other aims).

Defining the scope of ‘legal status-related issues’ is far from straightforward. The starting point is the right of a conscience-based group to recognition by the state as such, but there is a whole host of related rights that comes with such legal recognition – for example, tax exemptions, the right to build and maintain places of worship, rights to engage in public chaplaincy and pastoral care and to provide religious education in public schools, access to cemeteries, the right to own property, to operate a bank account, and to defend itself in a court of law, etc.

Insight into the indirect effects of the Court’s case law has been generated through empirical, qualitative research conducted at the grassroots level in four country contexts:

Greece, Italy, Romania and Turkey. In each country representatives of a broad range of religious minorities and of other conscience-based groups, representatives of religious majority groups, NGO spokespersons and cause lawyers have been engaged in in-depth interviews aiming to understand whether, how and the extent to which ECtHR religion-related case law has influenced these social actors' conceptions of and discourse about their legal status rights as well as their mobilisations (whether legal or political) to secure these rights. Approximately 200 interviews were conducted in the context of this research by postdoctoral researchers based in each of the four countries (approximately 50 interviews in each country). The bulk of the data was gathered between February 2015 and February 2017.

The analysis in the pages that follow begins with a discussion of theoretical premises underlying debates on legal status of conscience-based minority groups, focused specifically on the relationship between religious freedom and equality amongst different conscience-based groups. This is followed by a consideration of relevant ECtHR case law which forms a pool of potential resources for grassroots level actors. Third, the ways and extent to which this pool of resources is used by grassroots level actors is examined through the data generated through the aforementioned empirical research. The article closes with observations and tentative hypotheses based on cross-country comparison.

Does freedom require equality?

A large proportion of the legal-status related issues that arise amongst conscience-based groups provokes broader questions to do with discrimination and inequality: To what extent does or should religious freedom include an equality dimension and how can such equality translate into practice? Should all religious groups have equal rights and equal access to state-provided privileges? Does equality require non-establishment? And what can or should be the role of the Court in addressing such questions?

In the country cases under study – but also to some extent in most country contexts – there are varying levels of inequality amongst religious groups. In the Greek and Romanian contexts, the majority Orthodox Church enjoys a significantly more privileged position than other faith groups whose rights are described as having 'multiple speeds' and multiple tiers, respectively. The Italian situation, meanwhile, is described as a pyramidal structure of rights, with the Roman Catholic Church at the top of the pyramid, but also simultaneously as a 'jigsaw' in the sense that the rights enjoyed by different religious minority groups vary from one region of Italy to the next. And in Turkey, the nominally secular state combined with a heavily Sunni Islam-dominated governance renders nearly all minority religions without legal status-conferred rights. Thus we have, across four country cases studied, different degrees and modes of rights discrepancies amongst conscience-based groups.

As Heiner Bielefeldt, former UN Special Rapporteur on freedom of religion or belief explains, 'On an abstract level, requirements of equality and non-discrimination receive an almost unanimous approval ... [but] when it comes to drawing the necessary consequences from such general professions, things are often less clear' (2013: 53). Indeed, there is a great gap between theory and practice where the relationship between religious freedom and equality is concerned and, specifically, regarding whether religious

freedom *requires* equality amongst all individuals of different religious beliefs, or non-belief. Bielefeldt emphasises that equality and freedom inextricably belong together, as part of the ‘architectural principles’ of human rights (2013: 50–1): ‘Without equality, rights of freedom would amount to mere privileges of the happy few. Vice versa, without due account of the spirit of freedom underlying human rights in general, equality could easily be mistaken for uniformity or sameness, a misunderstanding that has often appeared in the writings of conservative critics of human rights’. There is much scholarly debate about whether the privileging of one or more religious groups (or ideologies) is conducive to the provision of religious freedom for all.

Malcolm Evans voices some of the resistances to human rights approaches to religion, particularly as expressed through the ECtHR religious freedoms jurisprudence:

The need to restrict the manifestation of religion by believers in order to secure pluralism and tolerance between religions is becoming something of a counter-intuitive mantra in human rights circles. Indeed, in adopting such a stance, the European Court is not itself acting in an even-handed fashion since it appears to be embracing a form of ‘secular fundamentalism’ which is incompatible with its self-professed role as the overseer of the state as the ‘neutral and impartial organiser’ of the system of beliefs within the state. This is deeply problematic for all religious believers since it is tantamount to elevating secularism in the name of pluralism, and achieving this by ‘sanitising’ public life of traces of the religious (2008: 312).

Here Evans is focusing on rights at the individual level. But he also expresses concern regarding religious rights at the national level, seeing in the Court’s engagement with the question of religious neutrality ‘an attempt to brush aside the reality of church-state relations and with it a foundational element of national identity in many member states of the Council of Europe’ (2008: 303).

Historically we find that the Court, in line with the trend in the Europeanisation process in general (Koenig, 2007), has tended to allow significant space to dominant religion (or non-religion, as the case may be), as an expression of cultural and national identity and thus meriting a wide margin of appreciation (Fokas, 2015a).

Such preferential treatment of a majority faith is highly relevant in the Greek, Romanian and Italian contexts, and evinced also in ECtHR case law against these states. Even in the watershed case of *Kokkinakis v. Greece* (1993) which vindicated a minority rights claim, ‘the Court recognizes that the Christian Eastern Orthodox Church, which during nearly four centuries of foreign occupation symbolised the maintenance of Greek culture and the Greek language, took an active part in the Greek people’s struggle for emancipation, to such an extent that Hellenism is to some extent identified with the Orthodox faith’ (para. 14). Thus the Court stopped short of declaring the Greek ban on proselytism in violation of the Convention, showing an understanding of the state’s protection of the Orthodox Church because of its historical role in relation to national identity (it found an Article 9 violation not for the ban itself but rather for its disproportionate to a legitimate aim implementation).⁹ In *Lautsi v. Italy*, in its defense in the 2011 hearing, the Italian government claimed that ‘the presence of the crucifix was the expression of a “national particularity”, characterised notably by close relations between the state, the people and Catholicism, attributable to the historical, cultural and

territorial development of Italy and to a deeply rooted and long-standing attachment to the values of Catholicism' (para. 36). This framing of the issue as a matter of preserving national identity factored significantly in the Grand Chamber's decision to rule in favour of the Italian state. In *Sindicatul Pastoral v. Romania* (2013), the Court defends the Romanian state's upholding of the Romanian Orthodox Church's ban on a union of its clergy: 'Having regard to the lack of a European consensus on this matter . . . it considers that the State enjoys a wider margin of appreciation in this sphere' (para. 171).

Meanwhile in the Turkish case, we find a parallel privileging of (the then) state-promoted secularism (Lerner, 2005). In *Sahin v. Turkey*, 'the Court considers [the] notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey' (para. 114).¹⁰ Thus here the Court sought to uphold a standard of state secularism and neutrality that is seen to be central to European identity and democracy.¹¹

A pool of resources: ECtHR jurisprudence on legal status issues

The ECtHR offers a wealth of case law on which groups can draw in their engagements with legal status-related issues, referencing various articles of the European Convention on Human Rights (ECHR, or the Convention), often including Article 9 taken in conjunction with articles on right to a fair trial (Article 6), because without legal status, groups may not pursue their rights in court; freedom of assembly and association (Article 11); prohibition of discrimination (Article 14); protection of property (Article 1 of Protocol No. 1 to the Convention); and right to education in accordance with one's philosophical or religious beliefs (Article 2 of Protocol 1). A necessarily selective collection of these cases is presented below, to highlight the contours of the case law available as resources for grassroots level actors.

First, there are cases focused on the first-order issue of right to recognition as a religious group (i.e., registration). Two cases decided against the state of Moldova set important precedence in this regard – *Metropolitan Church of Bessarabia and Others v. Moldova* (2001) and *Biserica Adevarat Ortodoxa din Moldova and others v. Moldova* (2007), in both of which the Court ruled that there had been a violation of Articles 9 (freedom of religion) and 13 (right to effective remedy) in the Moldovan state's refusal to register these religious groups.¹² A recent addition to this body of case law is *Genov v. Bulgaria* (2017), where again the Court found the state in question in violation of the Convention (Violation of Article 9 interpreted in the light of Article 11) for refusing to allow the applicant to register a religious association because of the existence of another group with the same name, beliefs and rights.

Again, lack of right to registration or to legal status may serve as the starting point for complaints of other rights violations. In *Canea Catholic Church v. Greece* (1997), the Canea Catholic Church complained that, because it lacked legal personality, it could not carry out legal proceedings against two individuals living next to the church who had demolished one of its surrounding walls. The Court found in the church's favour.

In *Krupko and Others v. Russia* (2014) too, the lack of recognized legal status is linked directly to the claim that a group cannot own property or operate a bank account.¹³ In Turkey in 2016, the *Association for Solidarity with Jehovah's Witnesses and Others* complained of insurmountable bureaucratic challenges raised by the state to the establishment of centres of worship by several congregations of Jehovah's Witnesses. In both cases the Court found in favour of the claimants. And in general, case law initiated by Jehovah's Witnesses is abundant on matters to do with lack of recognition and refusal of the right to registration.

Similarly, the Greek Catholic Church (GCC) in Romania is a leading group insofar as case law on land restitution is concerned. The GCC was banned under communist rule and, after the fall of communism, its property (including churches) was transferred to the Romanian Orthodox Church. In *Lupeni Greek Catholic Parish and Others v. Romania* (2016), the GCC challenges Romanian law-decree no. 126/1990, according to which the 'will of the faithful of the local community owning the disputed properties' should be taken into account in deciding whether a property should be returned to the GCC. According to the claimant, because the faithful in a local community will almost always be in large proportion Romanian Orthodox (the population of Greek Catholics atrophied considerably during the communist ban), the 'will of the faithful' rule is discriminatory. Here the ECtHR found in favour of the Romanian state. Further related cases are pending before the Court.

In the area of religious discrimination-based case law we have another religious minority group leading in several cases: the Alevis, litigating in the Turkish context. In *Dogan and Others v. Turkey* (2016), the Court ruled that the Turkish state discriminates against the Alevite Branch of Islam in Turkey by not providing public Alevite religious services, when services are provided for the majority Sunni population. Likewise, in cases such as *Mansur Yalcin and Others v. Turkey* (2014) and *Sofuoglu and others v. Turkey* (2014), the Court ruled that the state mandatory classes on 'religious culture and ethics' failed to take into account Alevi philosophy (*Yalcin*) and were based on the Sunni understanding of Islam (*Sofuoglu*), thus violating Article 2 of Protocol 1 on the right to education in accordance with one's religious or philosophical beliefs. And in *Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfı v. Turkey* (2014), the Alevi organisation claimed discrimination on the grounds that it was not granted an exemption from paying electricity bills as is granted to other places of worship under Turkish law. The Court ruled in the claimants' favour in all of the above.

Limitations on building or operating places of worship are also a font of significant related ECtHR precedence. In *Manoussakis and Others v. Greece* (1996), Jehovah's Witnesses were barred from worshipping in the rooms they had rented for these purposes. *Manoussakis* is a significant case in that the Court not only found a violation of Article 9 but also issued a critique of what it saw as the broader problem of 'a clear tendency on the part of the administrative and ecclesiastical authorities to use these provisions to restrict the activities of faiths outside the Orthodox Church.' (para. 48). In contrast, in *Vergos v. Greece* (2004), where the claimant who was refused authorization to build a house of prayer complained that his right to religious freedom was violated as well as his right to a fair trial, the Court ruled in the claimant's favour only on the fair trial point but sided with the Greek state in judging that, since there was another place of worship of the

religious group in question (the 'True Orthodox Christians') in a nearby town, the claimant's right to worship could reasonably be fulfilled in the nearby town.

From this necessarily selective collection of cases we get a sense of the breadth of the case law, covering a range of topics related to legal status. Critically, also evident is how the case law offers resources both to potential minority faith claimants and to defendant states.

The ECtHR case law at the grassroots level¹⁴

To what extent is this pool of resources known and used at the grassroots level? Before addressing this question, it is necessary to consider an array of variables which necessarily influences the latter. Following this, the impact of the related ECtHR case law at the grassroots level will be addressed both in terms of impact on the propensity of groups and individuals to pursue rights legally (at the national and/or European level), and in terms of its broader impact on groups' conceptions of rights and the opportunities available to them to pursue the latter.

Place of the ECtHR case law in the national legal order

The potential impact of the ECtHR case law at the grassroots level will naturally depend, amongst other things, on where the Convention and the Court are situated within the broader national legal order. Does ECtHR jurisprudence take precedence over national law in cases of conflict between the two? The relevance of this factor is based on the assumption that, to an extent at least, grassroots level awareness of and interest in the ECtHR case law will be contingent on its relevance to social actors' own causes at the national level. Recourse to the ECtHR is one element of the legal opportunity structure available to all citizens; but the process of reaching the Court varies of course depending on the length of national level proceedings. Also critical, and related to the latter, are the relative political opportunities available for exploitation by the citizen in each country, for example, is lobbying politicians a potentially fruitful way to pursue their rights? The latter may vary from one conscience-based minority group to another.

In the Greek, Romanian and Turkish contexts, the prevalence of international human rights law and conventions over national law is constitutionally enshrined (Articles 28(1), 20 and 90, respectively). In Italy, several Constitutional Court rulings have sought to clear a blurred status of international law in Italian law, culminating with a judgment (49/2015) through which the Italian Constitutional Court narrowed the domestic impact of the ECHR case law (Pin and Tega, 2015). Thus, in theory at least, in the Greek, Romanian and Turkish contexts, ECtHR precedence trumps national law, whilst in Italy, as explained by Annicchino and Giorgi,¹⁵ in essence the ECHR serves as an intermediate standard for judicial review of legislation, and is still subject to the Italian Constitution.

But of course, care must be taken to distinguish between the *de jure* situation and the *de facto* reality on the ground. For example, beyond the constitutional pronouncements of the primacy (or non-, in the Italian case) of international human rights law, there is also the less formal but no less substantial factor of the extent to and ways in which national level judges, lawyers etc. are educated and cultured into referencing of the

ECtHR. In the Greek context the research shows that legal scholars and prominent members of the Greek judiciary exhibit rather low degrees of acquaintance with the jurisprudence of the ECtHR,¹⁶ and that where Greek judges do refer to compatibility with the ECHR, this tends to be not on their own initiative but in response to such references in the litigants' claims. Further, in Italy, following logically from the relatively weaker position of the ECtHR case law within the national legal order, application of that case law tends to vary significantly based on the judge in question; it also tends to be raised in court by the same small group of lawyers who are well-versed in the case law. Meanwhile, in Romania and Turkey, education explicitly in ECtHR case law has been offered for national judges and, in the Romanian case, for prosecutors as well. The Turkish state-provided ECHR training seminars were introduced in the context of the Turkish EU accession process and have since ceased being offered, but Turkish bar associations continue to hold seminars and certificate programs for lawyers on how to apply to the ECtHR and how to include this precedence in their petitions to the courts.

The facts that in Romania, as Mihai Popa explains, one criterion in judges' performance evaluation is the extent to which they make reference in their decisions to decisions of the European Court of Human Rights, and that ECtHR jurisprudence is an important component of the exam that judges take in order to advance in the professional hierarchy, lead to greater referencing of the ECtHR case law in national courts, though not necessarily with the greatest of judicial reasoning. All of the above, in the Romanian case, can be seen through the prism of Romanian-EU relations, and as part of harmonization with the European human rights norms.

Likewise in Turkey, and perhaps more conspicuously in this case, the place of the Convention and the Court's case law in the national legal order is intimately linked to the ongoing EU accession process. A series of legislative changes impacting on legal status of religious minorities was introduced specifically as part of the harmonization packages for the European Union accession process in 2003. These include legislation regarding the establishment of places of worship other than mosques, as well as the 2006 introduction of a new Law on Foundations (Law no. 5737) which grants to non-Muslim foundations the right to acquire new property, to dispose of existing properties, and to collect cash and in-kind donations and assistance from domestic and foreign institutions and organizations. The immediacy of the connection to the EU accession process is further evinced by the fact that the first legal status-related Turkish cases to the ECtHR were filed rather close, temporally, to the announcement of Turkey's EU candidacy (1999). As will be elaborated below, the victories of the religious minority groups in these first cases very much paved the way for future related case law.

Place of the conscience-based group in the 'national religious order'

A second important variable to consider in terms of the relative engagements with the ECtHR case law is the place of the given conscience-based minority group within the broader 'national religious order'. As indicated above, in all the country cases under study here, there is a system in place distinguishing between rights and privileges afforded by the state to different religious groups, arranged in different forms of hierarchy in each case. Thus the grievances of each group in question are largely contingent on

where in the hierarchy it falls and thus on what rights and privileges the group is denied, particularly in comparison with other religious groups. Lack of legal recognition as a conscience-based group is first and foremost amongst these grievances, and, beyond this, limitations on tax exemptions, right to own property, to build places of worship, etc.

Of course, the lengths to which a group is willing to go to resolve these grievances also depends on the extent of the group's resources, as well as their culture and values. Certain groups are more likely to seek out legal opportunities to pursue their rights, whilst others are rather focused on political lobbying. Amongst the former, some groups systematically employ legal advisors; such are, logically and, as the research conducted confirms, more likely to be aware of ECtHR case law and to seek to use it in their own struggles to secure new rights.¹⁷

Across the cases we see certain patterns emerging in terms of the propensity of various conscience-based groups to utilise political or legal means to pursue their claims and this, in turn, influences the extent to and ways in which the ECtHR's case law will bear relevance for them. And amongst these patterns the tendencies of three groups stand apart as particularly noteworthy in their engagements, or non, with the ECtHR: Jehovah's Witnesses, Muslims, and atheist associations.

Jehovah's Witnesses are a religious minority group that have faced (and continue to face) significant challenges to their legal status in many states across the globe. They are particularly active on the legal front and, specifically, before the ECtHR; they come to their cases with a fairly firm foundation in the Strasbourg Court's jurisprudence and have a tendency to build on it. The Witnesses are centrally organised (from their headquarters in Brooklyn, NY), where many of the decisions are taken regarding the legal or other means to be used in pursuit of their rights globally.¹⁸ Thus in spite of differences across the four country cases in terms of the legal status conferred on the Jehovah's Witnesses, in three of these cases (Greece, Romania and Turkey) this group stands out as especially prone to use and build on ECtHR precedence for securing their legal status-related rights, and as rather successful in this aim at the ECtHR. In the Italian context, though the Witnesses are recognised as a religious corporation and enjoy a number of legal status-related rights (for example, to celebrate legally recognised marriages, and to pastor in prison); they do not have an *intesa* (a concordat with the state) but, unlike the Atheist Network, the group has not challenged this fact before court (see below).¹⁹

Meanwhile, Muslim minority groupings in the Greek and Italian cases *tend* to avoid legal routes and use political opportunity structures instead. In these case studies they have this in common with some smaller and newer, to the country in question, religious minorities,²⁰ but in Muslim minority groups this characteristic is particularly prominent.²¹ In both country contexts, Muslim representatives express a fear of being perceived as confrontational, and from this perspective litigation is considered a particularly confrontational route to pursuing a group's claims. As one Italian respondent expresses, 'You can file a case to the court, of course but, in addition to the uncertainty of the outcome, it is already the "hard way", it's confrontational, whilst we want to be moderate and responsible citizens'.²² Muslim respondents emphasize the importance of the public image of Islam as a non-confrontational religion, particularly in the context of the political polarization around Islam-related issues. Thus, as Giorgi and Annicchino explain, this delicate cultural and political climate impacts upon the Muslim actors' perceptions of their opportunity structure.²³

If Jehovah's Witnesses stand out for their relative propensity to litigate and to do so successfully both on the basis of ECtHR jurisprudence and before the ECtHR, whilst Muslim minority (immigrant-based) groups tend to avoid litigation (whether nationally or before the ECtHR) and reveal relatively little attention to related ECtHR case law, atheist groups stand out for both their knowledge of and interest in ECtHR case law relevant to them and their propensity (or, at least, expressed desire) to litigate, in general and before the ECtHR. Atheist groups' legal activism must be understood to mean different things in different contexts and, specifically, in Romania (post-communist specially active civil society) and Turkey (atheist groups differently situated in this Muslim majority but strictly secularist – until relatively recently – context) as compared with Greece and Italy.

In Greece, the Atheist Union focuses its efforts on limiting the privileges enjoyed by the Greek Orthodox Church (GOC) in terms of its place in the public sphere (including religious education, tax exemption, state pay of clergy wages, etc.), and its representatives express a keen interest in reaching the ECtHR with their claims against highly advantaged legal (not to mention political) status of the GOC. In Italy, the Atheist Network claims to be on its way to the ECtHR with a challenge to the state's refusal to grant them an *intesa*. In Romania, atheist/secularist groups are the only groups litigating against the majority Romanian Orthodox Church privileges in the domain of religious education. And across all the cases such atheist groups tend to be comparatively well-versed in ECtHR religion-related jurisprudence.

Indirect and radiating effects in the shadow of the ECtHR case law

Against the backdrop of these general factors influencing the potential impact of the ECtHR on grassroots level rights pursuits in the domain of legal status, I turn now to consider the evidence from the fieldwork at the grassroots level. From the pool of relevant case law presented above, it is notable that very few of these cases have served as resources for grassroots level actors consulted for this study. In spite of the fact that in most of those cases the Court decided in favour of the claimants, groups expressing similar grievances to those articulated in the Court's case law have not tended to lean on the breadth of that jurisprudence in support of their own claims.

Instead what can be observed is a disproportionately large impact of a small number of cases. For example, in the Turkish case study the first two religion-related ECtHR cases launched around the time of the commencement of the process of Turkish accession to the EU communicated a loud and powerful message: we now have a new and truly promising window of opportunity to pursue these rights (not least because the Copenhagen Criteria demand it).²⁴ Forty follow up cases are credited to these particular two cases. In Greece, the domain of legal status issues has the *Church of Canea* case as its flagship, with not only its (presumed) direct effect in the form of a new bill on legal status for religious minorities, but also indirect effects in terms of shaping conscience-based groups' strategies in relation to the state for their pursuit of legal status-related rights.

Meanwhile, in the Romanian and Italian case studies, two ECtHR cases stand out as particularly *demobilising*. The *Lupeni* case, where the Court rejected a land-restitution claim made by Greek Catholics in Romania, not least *because* of there being so many

such outstanding cases (with precisely the same claim, for land retained by the state under precisely the same argument), left in its wake shattered hopes of justice being done at the ECtHR in this field. As one respondent put it, ‘until then, we had hopes’. In *Lupeni’s* aftermath, the disappointment with the result has yielded lower expectations of defense of Greek Catholic rights by the Strasbourg Court.

An even larger shadow is cast by the *Lautsi* case, unsurprisingly as it is one of the few religion-related cases which crossed country borders, and it did so to a rather large extent. Notably, *Lautsi* is not a legal status-related case (except insofar as it has to do with the majority church privileged position), yet it more than any other ECtHR case has impacted upon Italian conscience-based groups’ legal status claims, and here not least *because of* the dramatic turn around its message entailed: in the 2009 chamber ruling of the ECtHR declared unanimously (7–0) that the display of the crucifix on public school walls entailed a violation of the parental right to educate children in accordance with their religious or philosophical beliefs, and in 2011 the Court’s Grand Chamber delivered a resounding (15–2) alternative message, in favour of the Italian state’s right to decide on the matter. Thus in Italy (but also beyond), *Lautsi’s* aftermath entailed a discouragement for religious minorities. One Buddhist group representative even questioned why she had consented to giving an interview on the topic: ‘we do not care about the ECtHR: we thoroughly studied the [*Lautsi*] case and we totally disagreed with its outcome’. Another religious minority representative, with reference to *Lautsi*, called the Court a ‘double-edged sword’ i.e., you go there to expand your rights and you come back in a far weaker position, *especially* because – as the Court communicated in *Lautsi* – ‘each and every state must find its own path of pluralism . . . the governance of religious diversity is a national concern. This is the real meaning of the margin of appreciation’. These words represent a perception that the *Lautsi* decision fully undermines the notion of the Court as the defender of the weak, of the minority.

As suggested above, *Lautsi* is rather exceptional in garnering cross-country attention. The opposite – an attention span totally nation-centred, as far as ECtHR case law goes – is far more the norm. To a striking degree, that is, grassroots level actors – even those with a rather firm grasp on the ECHR and exhibit a comfort discussing ECtHR case law – tend to rely on case law generated in their own national context in discussion of their own rights claims. It should be noted though that in the case of some groups – for example, the Jehovah’s Witnesses in Turkey – the knowledge of case law beyond national borders may be rather extensive, but the use of it in national level legal mobilisations limited on to the national context; the latter says more about the national court system (not swayed by arguments derived from a different national context) than it does about the grassroots level actors themselves.

That said, one example stands out as somewhat extraordinary: in the Romanian context, a priest who was ‘defrocked’ by the majority Romanian Church and who has been litigating in hopes of restoring his right to lead a congregation, read excerpts of a ECtHR case supporting a religious minority claim to registration rights (*Metropolitan Church of Bessarabia and Others v Moldova*) to his congregation ‘to instil in his parishioners the confidence that justice is on his side’. But of course, both geographically (neighbouring Moldova) and thematically (to do with an Orthodox Church), the case does not actually stray too far from the Romanian context.

Also, beyond the examples presented above of Muslim reticence regarding litigation (deriving from a fear of being perceived as confrontational), other groups too, particularly in the Greek, Romanian and Turkish contexts, express a sense in which pursuing one's grievances nationally is one thing but at the ECtHR is quite another, being perceived more as an act of betrayal of one's nation. As one Turkish minority faith respondent put it, 'We are sons of this country, we don't want to complain about our country [to international institutions such as the ECtHR].' In Greece, one religious minority representative declared 'discrimination against a religion is proportional to the "noise" and trouble the respective religion makes'. This is a direct reference to Jehovah's Witnesses, especially noisy in their long list of ECtHR wins against the Greek state, and particularly discriminated against in the Greek context.

Cross-country comparative observations and hypotheses

Though scholars and practitioners working in the field of religious freedom argue that the privileging of certain groups and hierarchies of recognition are not conducive to religious freedom, such inequality not only persists but prevails. On this point the contribution of the ECtHR case law is measured: overall, the Court communicates that it is within each state's margin of appreciation to manage religion-state relations. But this state management often comes into conflict with the protection of certain Convention-enshrined rights – as shown above – thus leading to a wealth of related case law.

The Convention is, of course, a 'living instrument' and as such we see in this pool of case law that there is not necessarily a linear process towards greater guarantees of religious freedom. The Court is at times more or less interventionist, which means it offers resources both for claimants and for states wishing to defend themselves from what is perceived by claimants as unlawful rights limitation. What impact does that case law have at the grassroots level? Is it useful to social actors in their pursuit of their own rights at the local and national level? Are they mobilised, or de-mobilised, as the case may be, by certain ECtHR cases?

As noted at the outset, this study focused on legal status of religious minorities is part of a broader study of the impact of the ECtHR religious freedoms jurisprudence on grassroots level mobilisations around religion. In the context of the latter, data has been generated regarding the impact of the Court's case law on the domain of religion and education; references to the ECtHR in national mass media and in national courts; and mobilisations before and in the aftermath of particularly salient ECtHR cases. Results of the present study focused on legal status must be cross-analysed with those of the (still ongoing) other dimensions of the broader investigation.

Still we can observe certain noteworthy facts based on the four case studies and venture some tentative hypotheses. First, it is important to consider legal opportunity structures specifically in relation to political opportunity structures. Where groups can have higher hopes of their voices being heard and their claims being fulfilled through political negotiation, there is a lesser tendency to lean on the ECtHR for help. This finding is particularly conspicuous in the case of the majority faiths in the Greek and Italian contexts. Further, we observe that political opportunities may significantly broaden legal ones: in the cases of Romania and Turkey, many stages and aspects of the EU accession process

serve to encourage grassroots level actors to look to the ECtHR for support, not least an expectation that the state in question would not want to muddle relations with the EU with a black mark (an ECtHR conviction) for poor human rights protection.

Indeed several similarities emerge between the Romanian and Turkish cases, on the one hand, and the Greek and Italian, on the other in terms of social actors' tendencies to seek support in the ECtHR case law. On a purely superficial level one can say that the temporally deferred relationship with the EU (for Romania, because of communist rule and, for Turkey, uncertain democratisation), led to heightened emphasis on the ECtHR by the states in question and, thus, by the grassroots actors also. But more substantially, the distinction between the two sets of cases seems to be a greater attention to and engagement with ECtHR case law in Romania and Turkey because of the relatively lower expectations (regardless of whether these expectations are borne out by facts) minority religious groups have of achieving justice through national political or legal means. And the latter has to do with different levels of democratization in the two sets of cases. It also depends on the quality (or perceived quality) of the national courts system. And finally, it also relates to the larger number of cases vindicating religious minorities in the Turkish and Romanian cases, translating generally into more hope in the Court amongst such groups. However, the distinction is not clear-cut on this point because Greece has one of the highest levels of religious freedom-related convictions from the ECtHR.

In spite of these differences across the cases, still, against the backdrop of an indeed very rich body of case law potentially helpful for conscience-based minorities, one might ask *why so relatively little* engagement of grassroots level actors with the ECtHR? Equally pertinent, however, is the question of 'why expect more?' European institutions are notoriously distant from (and intransparent to²⁵) the citizens which they serve, and this is no less the case for the European Court of Human Rights. Many respondents consulted for this study were in fact unable to distinguish between the ECtHR in Strasbourg and the Court of Justice of the European Union in Luxembourg. For most, there is simply 'a European court', and whether its existence is perceived as a good thing for them as citizens depends on a great many contextual factors, as this article has demonstrated.

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Notes

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shadow-of-the-european-court-of-human-rights/, as well as on texts drafted for publication in an edited volume on legal status of religious minorities, and the National Courts Studies generated by the postdoctoral researchers in Grassrootsmobilise; for an updated list of publications and other output, see www.grassrootsmobilise.eu.

2. Simply indicatively, between 1959 and 2016 only 65 Article 9 violations were found out of a total of 25,959 violations i.e. 0.25% of the total (ECHR Overview 1956-2016, 2017, 6 available at http://www.echr.coe.int/Documents/Overview_19592016_ENG.pdf). Additionally, up until March 2017 there have been 267 religion-related Article 6 violations, 58 religion-related Article 11 violations and 227 religion-related Article 14 violations.
3. The religious domain is defined broadly for the purposes of the research underpinning this article: it includes freedom of, and from, religion, as well issues which engage religious arguments for or against the right in question in a given case. For example, bioethics issues such as abortion and euthanasia are not religious, per se, but in many cases the limitations on these in a given country context are in place in part because of religious arguments.
4. It should be noted that in the Court's first 33 years (1959–1992), cases related to the right to religious freedom were dealt with exclusively by the European Commission of Human Rights and not by the Court. Until the introduction of Protocol 11 in 1998, a two-tiered system was in place, with the Commission filtering which cases would reach the Court; Protocol 11 abolished that Commission, and allowed for direct access of individual applicants to the Court.
5. On national level implementation, see Anagnostou (2013).
6. For a range of perspectives, see McCann (1992, 2004, 2006), Rosenberg (1991, 1992), Feeley (1992) and Galanter (1983).
7. Robert H. Mnookin and Lewis Kornhauser (1979) studied the impact of the legal system on negotiations and bargaining that occur outside the courtroom, specifically in the case of divorce.
8. On the inclusion of 'nonreligion' in conceptions of religion and human rights, see Beaman et al. (2018) in this volume.
9. Specifically, the Court found application of the ban against proselytism, set out in section 4 of Law 1363/1938 (a law dating back to the Metaxas military dictatorship), as prescribed by law (para. 41), within pursuit of a legitimate aim (para. 44), but not 'necessary in a democratic society' in that Kokkinakis' conviction was not shown to be justified by a pressing social need and could thus not be deemed proportionate to the legitimate aim pursued for the protection of the rights and freedoms of others (para. 49). See also Alivizatos (1999).
10. The case of *Refah v. Turkey* also serves as a pertinent example: 'The Court further observes that there was already an Islamic theocratic regime under Ottoman law. When the former theocratic regime was dismantled and the republican regime was being set up, Turkey opted for a form of secularism which confined Islam and other religions to the sphere of private religious practice. Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considers that the Constitutional Court was justified in holding that Refah's policy of establishing sharia was incompatible with democracy' (para. 125).
11. 'State neutrality' is far from a neutral term. See Casanova, 2006. For extensive discussions of the term see Foblets et al. (2014); see also Fokas (2015b).
12. In *Biserica Adevarat Ortodoxa din Moldova and others v. Moldova* the Court ruled that there had also been a violation of Article 1 of Protocol 1.
13. The Russian state's offensive against the Jehovah's Witnesses culminated in 2017 in a complete ban of the faith group.
14. Material on each country case study presented in this and the following sections of this text, unless indicated otherwise, has been generated by Margarita Markoviti (Greece); Alberta

- Giorgi and Pasquale Annicchino (Italy); Mihai Popa (Romania); and Ceren Ozgul (Turkey).
15. National Courts Study; see note 1.
 16. Here our research corroborates that conducted under the JURISTRAS project; see Anagnostou and Psychogiopoulou; Cited by Markoviti (National Courts Studies, available online under 'Output' as www.grassrootsmobilise.eu).
 17. However, there are certain exceptions to the latter: in the Romanian case, for example, there are several ECtHR cases that have been launched by individuals with fairly little juridical experience or knowledge of the Court, but who have built their cases around their very narrow understanding of only those aspects of the case law necessary for making their case.
 18. For more information about Jehovah's Witnesses' litigation efforts see Richardson (2015, 2017).
 19. As Giorgi and Annicchino (Legal Status Report) explain, the *intesa* is a bilateral agreement between a religious group and the state, which requires parliamentary approval; it grants different types of benefits such as clergy access to hospitals or prisons, and allows for civil registry of religious marriages. According to Massimo Introvigne, the government signed *intesas* with Jehovah's Witnesses in 2000 and 2007, but 'speakers of the Parliament, rather than calling for a presumably negative vote, adopted the tactic of never scheduling a vote'. Opposition, Introvigne explains, no longer derives from the Catholic Church but comes, rather, from 'political parties who believe a concordat with the Witnesses would open the way to a concordat with one or another Muslim organization, to which several parties are ferociously hostile, and no party is clearly in favor of it'. Personal communication, 3 April 2017.
 20. In the Greek context a distinction must be drawn between the Muslims of Thrace – a native to Greece minority group, entailing a large minority in this region of Greece, and whose legal status is rather uniquely governed by the 1923 Lausanne Treaty between Greece and Turkey, on the one hand, and Muslim groups based in the rest of Greece which are primarily immigrant communities.
 21. The situation as different regarding Muslims in the Romanian and Turkish contexts of course, as Muslims do not entail primarily immigrant communities in Romania, and they form the vast majority of the population in Turkey.
 22. Interviewee cited by Giorgi and Annicchino in their chapter in the edited volume on legal status-related issues (forthcoming; see www.grassrootsmobilise.eu for updated publication details).
 23. *Ibid.* Notably, nor do Muslim groups in Italy have an *intesa* with the state
 24. *Yedikule Surp Pirgiç Ermeni Hastanesi Vakfi v. Turkey* (2007). *Fener Greek High School Foundation v. Turkey* (2007).
 25. Also critical here is the question of how accessible the case law is in the national language in each context, which varies from case to case.

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