

# Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence

Effie Fokas\*

## ABSTRACT

Over the past 20 years the European Court of Human Rights (ECtHR) has evolved into a conspicuous, often contentious, force in the multilevel battles over the place of religion in the European public sphere. In the light of scholarly debates, questioning the direct effects of courts on the issues they address, this article explores how the nature and extent of European juridical influence on religious pluralism are better understood through developments taking place ‘in the shadow’ of the Court. Specifically, what is the aftermath of the Court’s religion jurisprudence in terms of its applications at the grassroots level? And how might legal and political elites operating at the national and international levels influence the Court’s engagement with religion? These questions are important because ECtHR case law will shape, to a large extent, both local and national case law and—less conspicuously but no less importantly—grassroots-level developments in the promotion of or resistance to religious pluralism, which will, in turn, influence the future of the ECtHR caseload.

The European public square has, in the past 20 years and increasingly so, been inundated with controversies and debates broadly conceived around the place of religion in the public sphere. In spite of (and, some would argue, *because of*) popular and scholarly expectations of religion’s retreat in Europe, issues such as freedom of religious expression, freedom of speech versus protection against blasphemy, and the public display of religious symbols loom large in the workplace, in schools, in media coverage, etc throughout Europe, at local, national, and supranational levels. The presence of Islam in Europe has acted as a catalyst in many debates on religion in Europe, but these debates have now grown to encompass much broader assumptions about the nature of religious communities, their relationship to state institutions, and the place of minority religious communities in society. In short, the

\* Research Fellow, Hellenic Foundation for European and Foreign Policy (ELIAMEP); Research Associate, Hellenic Observatory, LSE. Email: e.s.fokas@lse.ac.uk. This research is supported by a grant from the European Research Council (Grant no 338463, 1/2014–12/2018). I would like to thank the research team in the Grassroots mobilise programme for their insights contributed during discussions of an earlier version of this text.

debates have come to encompass the place, role, and rights of the 'Christian majority' (however passively and vicariously Christian it may be in most of Europe) in relation to a plurality of minority religions that are present in Europe. It is against this backdrop of shifting attitudes towards religion–state relations and a multitude of Christian, Muslim, secular, and otherwise non-religious voices, that the European Court of Human Rights (ECtHR, or the Court) jurisprudence on religion issues has emerged to add its own voice.

And it is a powerful voice: the ECtHR through its role defending the rights enshrined in the European Convention on Human Rights (ECHR, or the Convention), has evolved into 'the most effective transnational human rights institution on earth'.<sup>1</sup> It has become a quasi-constitutional court for approximately 820 million individuals residing in the 47 Member States of the Council of Europe,<sup>2</sup> under which auspices the Convention was adopted. The ECtHR is now an arena where some of the most challenging debates around European religious pluralism take place, and its case law has centrally contributed to shaping the terms of such controversies. The latter to the extent that the Court may be considered to be in the process of developing a 'theory' on the proper place of religion in the public sphere<sup>3</sup>: a process observed by some,<sup>4</sup> welcomed by others,<sup>5</sup> and criticized by yet others.<sup>6</sup> The Court increasingly deals with matters touching a nerve of European Christian, Muslim, secular, and atheistic publics alike, with its decisions regarding their 'national' rights to display a crucifix in public schools (Italy); its engagement with the right to wear the crucifix while working for an airline (UK); and its refusal to engage with resistances to 'the proliferation' of religious architectural structures such as minarets (Switzerland), among many others. Thus, its voice is also a contentious one. The latter is exacerbated by the variable 'margin of appreciation' it allows individual states on religion issues,<sup>7</sup> particularly when concerning Islam.<sup>8</sup>

At the heart of this subject matter is the current *juxtaposition* of: the extreme state of flux currently characterizing the place of religion in the European sphere, both at the European and national level, and thus also instigating major crises of identity as the Christian component of the latter both nationally and supranationally is being (and has been, for a very long time) challenged by secularization (with 'Islam' as a real or perceived factor in this); intense negotiations of religion–state relations in the

- 1 W Cole Durham and David Kirkham, 'Introduction' in W Cole Durham, David Kirkham, and Christine Scott (eds), *Islam, Europe, and Emerging Legal Issues* (Ashgate 2012) 1–18, 2.
- 2 Matthias Koenig, 'Governance of Religious Diversity at the ECHR' in Jane Bolden and Will Kymlicka (eds), *International Approaches to the Governance of Ethnic Diversity* (OUP 2012).
- 3 Julie Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?' in Lorenzo Zuca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (CUP 2012) 283–306.
- 4 Koenig (n 2).
- 5 Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty' (2010) 6(1) *European Constitutional Law Review* 6.
- 6 Malcolm Evans, 'Freedom of Religion and the European Convention on Human Rights: approaches, Trends and Tensions' in Peter Cane, Carolyn Evans, and Zoe Robinson (eds) *Law and Religion in Theoretical and Historical Context*, Reissue edition (CUP 2008) 291–315.
- 7 Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001).
- 8 Jeremy Gunn, 'Religious Symbols in Public Schools: The Islamic Headscarf and the European Court of Human Rights Decision in *Sahin v Turkey*' in Durham, Kirkham, and Scott (n 1) 111–46.

light of the above (where minority religions are pursuing their religious freedoms and, in many cases, majority religions are fighting to maintain the status quo of their privileged positions); and a European institution (the ECtHR) increasingly passing judgments related to religion–state relations and the place of religion in the public sphere, both because of and in spite of all of the above. The latter makes the ECtHR an important space to be watched by scholars studying the place of religion in the public sphere. The impact of the Court’s decisions, in terms of their implementation (or non) at the national and local level is one critical dimension.

Another, thus far unexplored, dimension is how the Court’s decisions define the ‘political opportunity structures’ and the discursive frameworks within which citizens act. What is the aftermath of the Court’s religion jurisprudence, in terms of its applications (beyond but also including its implementation) at the local and national level? Do the Court’s judgments serve as a platform for mobilizations at the local and national level in favour of rights won at the ECtHR level? These questions are important because ECtHR case law will shape, to a large extent, both local- and national-level case law and—less conspicuously but no less importantly—grassroots-level developments in the promotion of or resistance to religious pluralism. Both the latter will, in turn, influence the future of the ECtHR caseload.

Also critical to the Court’s engagement with religious pluralism is ‘grasstops’ mobilization, in terms of direct and indirect lobbying of the Court by legal and political elites operating at the national and international levels. Increasingly, we also find transnational legal activism influencing the Court on matters of religion (particularly conspicuously from the US to the European context). Thus, a firm grasp of the Court’s role, mediated and/or direct, in relation to religion requires attention also to the increasingly complex *geography* of judicialisation of religion.

The underlying premise of the present article is that such mobilizations, at local, national, and international level (ie at the grassroots *and* grasstops, as it were), are one place we need to look to understand directions in religious pluralism in the European setting.

Scholarly interest in the ECHR and the Court outside the discipline of law has surged and a growing number of studies have explored the reception and impact of the Convention and the ECtHR at the national level,<sup>9</sup> the domestic implementation and impact of the ECtHR’s judgments both on legal and policy change, and on social mobilization<sup>10</sup> as well as the influence of such judgments over the policy formation and change.<sup>11</sup> However, this literature has not dealt specifically with the Court’s jurisprudence on religion.

Meanwhile, a vast body of incisive scholarship offers critical analyses of the Court’s religious freedom judgments, examines their consistency with past case law

9 Helen Keller and Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008).

10 Dia Anagnostou, *The European Court of Human Rights: Implementing Strasbourg’s Judgments on Domestic Policy* (Edinburgh UP 2013).

11 Laurence R Helfer and Erik Voeten, ‘International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe’ (2014) 68(1) *International Organization* 77.

and, to a lesser extent, considers their implications for the legal culture.<sup>12</sup> Beyond this is a relatively small body of socio-legal examinations of the broader significance of ECtHR religious freedom jurisprudence in terms of secularization and the experience of religious minorities.<sup>13</sup> There is very limited attention to impact at the national level in terms of religion–state relations (eg Greece after *Kokkinakis v Greece*<sup>14</sup>; Romania in the light of *Moise* case in Romania<sup>15</sup>; Turkey in the light of *Sahin v Turkey*<sup>16</sup>). But there is a lacuna in the scholarship as regards the influence of these judgments at the local and national level, in policy terms and more so in terms of their discursive impact.

In the pages that follow, I will elaborate a matrix of certain characteristics and mechanisms of the Court's workings that render its decisions especially prone to such discursive impact. I will then offer an evolutionary perspective on the Court's religious freedom jurisprudence that culminates in a focus on ways in which the *Lautsi v Italy* case<sup>17</sup> represents a critical moment in this evolution; references to the more recent cases of *Sindicatul Păstorul v Romania*, *Fernández Martínez v Spain*, and *SAS v France*<sup>18</sup> reinforce the point. *Lautsi* also serves as an expedient entry point for a discussion, in a third section, of the potential impact of grasstops mobilizations

- 12 Evans (n 7); Carolyn Evans and Christopher Thomas, 'Church-State Relations in the European Court of Human Rights' (2006) 3 Brigham Young University Law Review 699; Evans (n 6); Paul M Taylor, *Freedom of Religion UN and European Human Rights Law and Practice | Human Rights* (CUP 2006).
- 13 David Herbert and Max Fras, 'European Enlargement, Secularisation and Religious Re-Publicisation in Central and Eastern Europe' (2009) 37(1–2) Religion State and Society 81; Haldun Güllalp, 'Secularism and the European Court of Human Rights' (2010) 16(3) European Public Law 455; Koenig (n 2); Dia Anagnostou, 'Does European Human Rights Law Matter? Implementation and Domestic Impact of Strasbourg Court Judgments on Minority-Related Policies' (2010) 14(5) The International Journal of Human Rights 721.
- 14 *Kokkinakis v Greece*, App no 14307/88 (ECtHR, 25 May 1993). For *Kokkinakis v Greece* see Nikos Alivizatos, 'A New Role for the Greek Church?' (1999) 17(1) Journal of Modern Greek Studies 23; John Anderson, 'The Treatment of Religious Minorities in South-Eastern Europe: Greece and Bulgaria Compared' (2002) 30(1) Religion, State and Society 9; Effie Fokas, 'Greece: Religion, Nation and European Identity' in Haldun Güllalp (ed) *Citizenship and Ethnic Conflict: Challenging the Nation State* (Routledge Press 2006) 39–60; Effie Fokas, 'A New Role for the Church? Reassessing the Place of Religion in the Greek Public Sphere' (2008), Hellenic Observatory Papers on Greece and Southern Europe (GreeSE) Paper Series no 17 <<http://www.lse.ac.uk/collections/hellenicObservatory/pdf/GreeSE/GreeSE17.pdf>>; Kyriakos Kyriazopoulos, 'The Prevailing Religion in Greece: Its Meaning and Implications' (2001) 43(3) Journal of Church and State 511.
- 15 Decision 323/2006, Romania's National Council for Combating Discrimination. See Liviu Andreescu and Gabriel Andreescu, 'Passive/Aggressive Symbols in the Public School: Religious Displays in the Council of Europe and the United States, with a Special Focus on Romania' in Jeroen Temperman (ed) *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Brill Academic Publishers 2012). For *Moise* see further Gabriel Andreescu and Liviu Andreescu, '“The European Court of Human Rights” Lautsi Decision: Context, Contents, Consequences' 2010 9(26) Journal for the Study of Religions and Ideologies 47.
- 16 *Leyla Sahin v Turkey*, App no 44774/98 (ECtHR, 10 November 2005). For *Sahin v Turkey* see Haldun Güllalp, 'Religion on My Mind: Secularism, Christianity, and European Identity' in Haldun Güllalp and Günter Seufert (eds) *Religion, Identity and Politics: Germany and Turkey in Interaction*, 1 edition (Routledge 2013) 164–79.
- 17 *Lautsi v Italy*, App no 30814/06 (ECtHR, 27 July 2009 and 18 March 2011). The Chamber decision in the *Lautsi* case was issued in 2009, and the Grand Chamber decision in 2011; citations of the case henceforth reference these dates.
- 18 *Sindicatul 'Păstorul cel bun' v Romania*, App no 2330/09 (ECtHR, 9 July 2013), *Fernández Martínez v Spain*, App no 56030/07 (ECtHR, 12 June 2014), *SAS v France*, App no 43835/11 (1 July 2014).

on religious pluralism. Then, with the help of American legal scholarship, I elaborate how grassroots-level mobilization is an important part of the story of the Court's impact on religious pluralism in Europe. In a penultimate section, I explore indirect, unintended, and counterproductive effects we may find the Court will have on religious pluralism, when considering developments taking place 'in the shadow' of the Court. I close with reflections on how understanding such developments 'in the shadow' of the Court is critical to any conception of directions underway in religious pluralism in Europe.

### 1. THE MATRIX: SUBSIDIARITY, THE MARGIN(S), CONSENSUS, AND PLURALISM

Key to this topic is what may be described as a matrix—comprising four principles or doctrines—from within which the Court's decisions elicit intense reactions at the local, national, and international level. The principle of subsidiarity (in fact a religious-originated—Roman Catholic—concept suggesting that a matter ought to be handled by the smallest, lowest, or least centralized authority capable of addressing the matter effectively), is a fundamental aspect of the ECHR. In the ECtHR context, the principle dictates that while certain standards must be universally observed by all contracting states, each contracting state is, in the first place, responsible for securing the rights and freedoms protected by the Convention. According to Mancini, the Court developed the doctrine of the 'margin of appreciation' to reconcile the potential tension between universality and subsidiarity.<sup>19</sup> Through this doctrine, the Court allows states a 'margin' in determining whether a particular restriction of a right is required ('necessary in a democratic society') in the given circumstance.<sup>20</sup> The doctrine, closely linked in practice to the principle of subsidiarity, is based on the Court's assumption that 'By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them' (*Handyside v UK*).<sup>21</sup>

In the religious freedoms context where, according to Evans,<sup>22</sup> the margin tends to be particularly wide, the margin of appreciation is a substantial tool through which the Court allows states a certain, variable, leeway to interpret religious rights and freedoms within the broader context of their national cultures and traditions. Meanwhile, it provides an exit for the Court from certain culturally and politically sensitive issues: as Julie Ringelheim notes, 'the large discretion [the Court] often grants to national authorities on [religion] cases is symptomatic of its difficulty in dealing with them.'<sup>23</sup> By 'them' Ringelheim means the religion cases, but it could equally apply to the states and the Court's difficulty in challenging existing religion–state arrangements.

19 Mancini (n 5) 20–21.

20 Evans (n 7) 142.

21 *Handyside v United Kingdom*, App no 5493/72 (ECtHR, 7 December 1976).

22 Evans (n 7) 143.

23 Ringelheim (n 3) 306.

In *Rasmussen v Denmark*,<sup>24</sup> the Court introduced the concept of consensus into its workings. Here the Court declared that ‘the scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of *common ground* between the law of the Contracting States’ (emphasis added). According to Benvenisti, the consensus doctrine, coupled with the margin of appreciation doctrine, poses a serious obstacle to the protection of minority values:

In the jurisprudence of the ECtHR, consensus is inversely related to the margins doctrine: the less the court is able to identify a European-wide consensus on the treatment of a particular issue, the wider the margins the court is prepared to grant to the national institutions. Minority values, hardly reflected in national policies, are the main losers in this approach.<sup>25</sup>

Beyond opening the Court to criticism of moral relativism, the particular combination of the margin of appreciation and the consensus doctrine also leads to claims of double standards, as differential treatment of Islam has been noted.<sup>26</sup> Richardson and Shoemaker make a similar argument about bias in Christian Orthodox cases.<sup>27</sup> According to one scholar, ‘In the mid-1990s, Lord Lester affirmed that the margin of appreciation “has become as slippery and elusive as an eel”. Now consensus, too, has become as slippery and elusive as the margin.’<sup>28</sup>

The variable applications of the margin of appreciation by the Court on religious freedoms issues threaten to undermine, for many scholars (some of whom are cited above), but also for many publics, the Court’s commitment to pluralism and, ultimately, the legitimacy of the Court. Critically, however, perspectives vary regarding on which side the Court errs—too much or too little activism in the area of religion; too narrow or too wide a margin, etc; and normative statements abound. While the Court looks for consensus among contracting states on issues related to religion, there is a marked lack of consensus, among scholars and at the grassroots and grass-roots level, regarding the Court’s handling of religious freedoms issues. One prominent critique is that the mandate of the Court is *religious freedom*, not religion in general, nor the place of religion in the public sphere. Thus, also on trial is the extent to which the Court has a secularizing agenda,<sup>29</sup> or a selectively secularizing one which still tends to protect majority Christian rights.

24 *Rasmussen v Denmark*, App no 8777/79 (ECtHR, 28 November 1984).

25 Eyal Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’ 1998 31(4) *International Law and Politics* 851.

26 Gunn (n 8); Tore Lindholm, ‘The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief: An Assessment in Light of *Leyla Şahin v. Turkey*’ in Durham, Kirkham, and Scott (n 1) 147–68.

27 James T Richardson and Jennifer Shoemaker, ‘The European Court of Human Rights, minority religions, and the social construction of religious freedom’ in Eileen Barker (ed) *The Centrality of Religion in Social Life: Essays in Honour of James A Beckford* (Ashgate Publishing Ltd 2010) 103–16.

28 Paolo Ronchi, ‘Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*’ (2011) 13(3) *Ecclesiastical Law Journal* 287, 296.

29 Ringelheim (n 3); Koenig (n 2); Evans (n 6).

Until relatively recently, the margin of appreciation and the subsidiarity principle were established through and embedded only in the Court's case law. But as of 2013, both formally entered the ECHR with the introduction of Protocol 15 that inserts a reference to the principle of subsidiarity and the doctrine of the margin of appreciation into the Convention's preamble pending ratification by contracting states. The latter development, critically, is to be seen as the result of grassroots mobilizations taking place linked to the reform process the Court has been undergoing, especially in the context of the Interlaken (February 2010), Izmir (April 2011), and Brighton (April 2012) conferences on the future of the Court; the Brighton Declaration and the role of the UK government in urging for a more subsidiary role of the Court (during its Presidency of the Council of Europe, January–June 2012, but not only); and the ongoing consultation on the 'longer-term future of the system of the European Convention on Human Rights and the European Court of Human Rights' under the Council of Europe's auspices.

Certainly the aftermath of the reform process will significantly influence future religion-related cases, and thus will feed into broader, Europe-wide discussions and developments around neutrality, pluralism and secularism, and religion in the public sphere. The latter point highlights the need for insight into the *full process* of the Court's impact on religious pluralism in Europe: from developments at the grassroots which may influence the decisions taken by the ECtHR; down through to the impact of these decisions at the grassroots level, on mobilizations taking place there 'in the shadow' of the Court's decisions; and then, through the implications of these grassroots-level developments for religious pluralism at the local and national level, back up to the supranational level via national and then ECtHR case law. A useful starting point for the latter examination is an overview, albeit necessarily schematic, of the Court's engagements with religion.

## 2. THE JUDICIALIZATION OF RELIGION IN THE ECtHR

In its first 34 years of operation as a Court, from 1959 to 1993, the ECtHR did not issue a single conviction against a state on the basis of the main religious freedom provision of the ECtHR, Article 9 on the freedom of thought, conscience, and religion.<sup>30</sup> Since that first ground-breaking case in 1993, *Kokkinakis v Greece*, the Court has issued more than 50 Article 9 convictions. These numbers in themselves suggest a rapidly increasing judicialization of religion.<sup>31</sup>

Throughout the Court's religious freedoms case law, the Court has increasingly dealt with issues going to the heart of religion–state relations and of the place of

30 Notably, in the Court's first 33 years (1959–92), 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 European Commission of Human Rights filtering which cases would reach the Court. Protocol 11 abolished that Commission, and allowed for direct access of individual applicants to the Court. As Ringelhem indicates in n 3, until 1989 almost all cases brought under art 9 were deemed inadmissible.

31 Of course, not all religious freedom cases are dealt with exclusively or even primarily under art 9 of the Convention: also highly relevant are art 10 on Freedom of Expression; art 11 on Freedom of Assembly and Association; art 14 on Prohibition of Discrimination; and arts 1 and 2 of the first Protocol, on Property and Education, respectively.

religion in the public sphere. The evolution is by no means linear, but certain trends can be detected. For example, Matthias Koenig<sup>32</sup> observes a trend of the Court towards more narrow margins of appreciation and, effectively, towards more secularist approaches.<sup>33</sup> Koenig sees a three-step evolution of the Court's jurisprudence on matters of religion, leading increasingly to assertive secularist stances. The first step consists of a broad definition of religious freedom which tends to work in favour of majority religion over negative religious freedom claims—for example, the maintenance of asymmetric blasphemy laws as in the case of *Otto-Preminger-Institut v Austria*<sup>34</sup>, where the Court defended the state's right to seize and forfeit a film considered offensive to Christians.

The second stage reflects a tendency of the Court to uphold secularism, mostly through cases to do with Islam. Characteristic here is the case of *Leyla Sahin v Turkey*, in which it upheld a ban on wearing the Islamic headscarf at Turkish universities.

Finally, the third phase in ECtHR jurisprudence transposes the secularist line of argument in cases related to Islam, onto cases involving Christian majorities. In other words, in this latter stage, the Court may be seen not only as ceasing to protect majority religious rights but also actively influencing the status quo of church–state relations in signatory nations.<sup>35</sup>

The *Lautsi vs Italy* (2009) judgment (or, *L1*), is a case in point. Here through its reasoning the Court described the crucifix as a symbol which could 'easily be interpreted by pupils of all ages as a religious sign', which would result in them feeling 'that they have been brought up in a school environment marked by a particular religion'. The latter, the Court argues, is problematic because 'What may be encouraging for some religious pupils may be emotionally disturbing for pupils of other religions or those who profess no religion.'<sup>36</sup>

The fact that Italy historically, culturally, and institutionally is an 'environment marked by a particular religion' is a factor that prevailed in the Grand Chamber's 2011 reversal of that earlier Chamber judgment (*L2*). For Julie Ringelheim, this dramatic, 15-2, reversal represents yet another stage in the evolution of the Court's religion case law, one backtracking to the Court's earlier stance of 'non-coercive neutrality'.<sup>37</sup>

The *Lautsi* case draws our attention convincingly to the importance of both grassroots and grasstops mobilizations 'in the shadow' of the Court's religion case law.

32 Koenig (n 2).

33 Sylvie Langlaude, 'Indoctrination, Secularism, Religious Liberty, and the ECHR' (2006) 55(4) *International & Comparative Law Quarterly* 929.

34 *Otto-Preminger-Institut v Austria*, App no 13470/87 (EctHR, 20 September 1994).

35 Koenig (n 2).

36 *Lautsi v Italy* (ECtHR 2009) (n 17) para 55.

37 Ringelheim in 'Du Voile Au Crucifix: La Neutralité Confessionnelle de l'Etat Dans La Jurisprudence de La Cour Européenne Des Droits de L'homme' in *Actes Du Colloque Sur La Neutralité de l'Etat*, also describes a three-stage evolution in the Court's case law, when examined from the perspective of state neutrality: stage one is a period of 'neutrality with non-coercion' (eg *Darby v Sweden* 1989); stage two (in the 2000s, eg *Folgero v Norway*, App no 15472/02, 29 June 2007), 'neutrality without preference'; and stage three, beginning with the Grand Chamber decision in *Lautsi v Italy* 2011 (n 17), entails a return to the first stage of 'neutrality with non-coercion'. For another evolutionary perspective on the case law, please see Marco Ventura, 'Law and Religion Issues in Strasbourg and Luxembourg: the Virtues of European Courts' (Kick-off Meeting Conference Paper, ReligioWest Project Meeting, European University Institute, November 2011).



More than any other ruling on religion, the 2009 and 2011 *Lautsi* rulings brought the ECtHR to the mass level. *L1* was momentous in terms of the breadth of its reach, potentially affecting every public school in a large number of Member States, and on an issue that is highly emotive for many mass publics (eg the removal of crucifixes and icons). For many European nominal Christians, religious symbols in public spaces form an important part of their vicarious religion<sup>38</sup>: they may not *use* the symbols themselves or particularly pay attention to them, but they like them there, on the walls of public spaces, and certainly want to maintain their *right* to have them there. For many *practising* Christians in Europe, religious symbols form a fundamental and active role in their expression and practice of their belief (as for the British Airways employee in whose favour the Court ruled, in her struggle for the right to wear a visible cross while at work, in *Eweida and others vs UK*).<sup>39</sup> In *L2*, the Grand Chamber judged that the crucifix in the classroom is seemingly harmless due to the *passive* nature of its presence.

The *Lautsi* case, through both *L1* and *L2* and, critically, through the unprecedented interest in the case exemplified by the large number of third-party interventions by national governments, Members of the European Parliament (MEPs), and NGOs representing religious, secular, and atheistic ideologies, serves an example *par excellence* of the strong contestation of religious matters in the ECtHR jurisprudence. The *Lautsi* case is also suggestive of the extent to which subsidiarity, the margin of appreciation and the consensus doctrine are at the centre of tensions between states, the Court, and religious pluralism.

*L1* threatened what was conceived by many as a national tradition, reflecting historical relations between religion and the state now embedded in national culture, and it applied a relatively narrow margin of appreciation in not allowing the Italian state space to decide for itself whether the presence of the crucifix in the classroom entailed a limitation on Ms Lautsi's religious freedom (the freedom *from* religion interpreted in Article 2 of the first Protocol on the right to education in line with one's own philosophical views). And *L2*, after a two-year period marked by local, national, transnational, and supranational mobilizations on the *Lautsi* case (elaborated below), entailed a return to a broad margin of appreciation.

While *L1* emphasized the state requirement of neutrality in relation to religion and suggested, following *Kokkinakis v Greece* (1993), that pluralism is necessary for the preservation of a democratic society,<sup>40</sup> *L2* has been interpreted by some as a departure from the Court's conception of state duty of neutrality and impartiality.<sup>41</sup>

38 Grace Davie, *Religion in Modern Europe: A Memory Mutates: A Memory Mutates* (OUP 2000).

39 *Eweida and others vs UK*, App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).

40 'As enshrined in art 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics, and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.' *Kokkinakis v Greece* [1993] para 31.

41 Hin-Yan Liu, 'The Meaning of Religious Symbols after the Grand Chamber Judgment in *Lautsi v Italy*' (2011) 6(3) *Religion & Human Rights* 253; Ronchi (n 28); Ringelheim (n 37).

As such, according to Liu, *L2* raises the question as to whether states themselves 'have been granted a "right" to manifest [their] religious beliefs'.<sup>42</sup>

The implications are substantial. Post-*L2*, and in the light of other major ECtHR cases on issues of religious freedom, are there trends reflecting conceptions of 'national collective religious rights' which can be pursued in the face of challenges to the status quo by religious, secular, and ideological minorities? And can we see increasing tendencies of the Court to avoid religion-related convictions by recourse to the margin of appreciation? A brief consideration of the more recent cases of *Sindicatul Păstorul v Romania* (2013), *Fernández Martínez v Spain* (2014), and *SAS v France* (2014) suggests that the post-*L2* world of ECtHR engagements with religion may indeed be somewhat altered. Each of these three religious freedoms judgments delivered after the *Lautsi* Grand Chamber judgment were decided in favour of the states in question.<sup>43</sup> And in each, the margin of appreciation factored significantly (see below).

In *Sindicatul Păstorul v Romania* (2013), the applicant—a union of a group of priests of the Romanian Orthodox Church who are seeking to form a trade union against the wishes of their ecclesiastical leaders—argued that the state's refusal of its application for registration as a trade union infringed its members' right to form a trade union, as guaranteed by Article 11 (on Freedom of Assembly and Association) of the Convention. Here the Court 'shares the respondent Government's view that in refusing to register the applicant union, the State was simply declining to become involved in the organisation and operation of the Romanian Orthodox Church, thereby observing its duty of neutrality under Article 9 of the Convention'<sup>44</sup> and thus also respecting the principle of the autonomy of religious communities. Here one of the third-party interveners supported the Romanian government with the argument that 'Just as an individual must be absolutely free to organise her own beliefs, a church or other religious body must also be free to organise the people who personify its beliefs.'<sup>45</sup>

Similarly, support of religious autonomy, here too of the majority religion, is also found in the Court's ruling in favour of the Spanish state in *Fernández Martínez v Spain* (2014). In this case, a teacher of a course in Roman Catholic religion and ethics in a state secondary school, a married priest, alleged that the non-renewal of his contract of employment as a school teacher entailed an infringement of Article 8 of the Convention (Right to respect for private and family life), taken separately and together with Article 14 (Prohibition of discrimination). Fernández Martínez argued that the cause of the non-renewal was the publicity given to his family and personal situation as a married priest, and thus the non-renewal conflicted with his rights to freedom of thought and freedom of expression under Articles 9 and 10 of the

42 Liu, *ibid* 254.

43 The very interesting *Vojnity v Hungary* case of course (App no 29617/07 (ECtHR, 12 February 2013), decided around the same timeframe as *Sindicatul*, *Fernández* and *SAS* cases, rules in favour of the applicant, with the Court finding *Vojnity* has been discriminated against on the basis of religion.

44 *Sindicatul 'Păstorul cel bun' v Romania*, App no 2330/09 (ECtHR, 9 July 2013) para 166.

45 'Written comments of third-party interveners the Becket Fund for Religious Liberty and the International Center for Law and Religion Studies.' <<http://www.becketfund.org/wp-content/uploads/2012/10/Sindicatul-v-Romania-brief1-FINAL.pdf>>.

Convention, respectively. Though the Court's ruling supported the religious autonomy of the Spanish Catholic Church, this support is certainly far less absolute than in the *Sindicatul* case: *Sindicatul* was decided with an 11-6 majority; *Fernández Martínez* stands on the very shaky ground of a 9-8 split decision, with all eight dissenting judges expressing their dissent in separate opinions (either jointly or individually).<sup>46</sup>

Of these three more recent cases, *SAS v France* (2014) generated the most criticism of the Court, both raising new critiques to do with the Court's reasoning, and reinforcing old ones to do with differential treatment of Islam as a minority faith.<sup>47</sup> Here the Court ruled in favour of the French state, finding the French ban on the wearing of the full-face veil in public not in violation of Article 8 of the Convention (Right to respect for private and family life) or of Article 9 (Freedom of thought, conscience and religion) (15-2 majority on both points), and not in violation of Article 14 prohibiting discrimination, taken together with Article 8 or 9 (a unanimous finding on this point). The criticisms of the judgment's reasoning focus especially on the Court's acceptance of the promotion of 'living together' as a legitimate ground for the restriction of fundamental rights.<sup>48</sup> 'Living together' (*le 'vivre ensemble'*) is a concept employed in a French parliamentary report on the wearing of the full-face veil which is cited in the *SAS* judgment, and wherein the practice of wearing the full-face veil is described as 'at odds with the values of the Republic', and specifically at odds with the concept of fraternity, 'constituting the negation of contact with others and a flagrant infringement of the French principle of living together'.<sup>49</sup> Five of the six third-party interventions were in support of the applicant; only the Belgian government intervened, unsurprisingly, on behalf of the French state. Whether, why, and under what conditions third parties—governmental or non, religious or secular, acting independently or forming alliances—may influence the Court's engagement with religion through mobilizations at the 'grasstops' level is a question worthy of careful consideration.

### 3. GRASSTOPS MOBILIZATION AND THE 'POLITICS OF THE MARGIN OF APPRECIATION'

The term 'grasstops mobilization' encompasses a broad range of activity carried out by an equally broad spectrum of actors; here the term is used to indicate legal and political mobilization that takes place at the national, international, European, and transnational levels and which may be enacted by cause lawyers, judicial activists,

46 For commentary on the *Fernández Martínez* case, see Stijn Smet, 'Fernández Martínez v Spain: The Grand Chamber Putting the Brakes on the 'Ministerial Exception' for Europe?' <<http://strasbourgobservers.com/2014/06/23/fernandez-martinez-v-spain-the-grand-chamber-putting-the-breaks-on-the-ministerial-exception-for-europe/>> and Panagiota Emmanouilidou, 'Balancing the autonomy of religious institutions with the right to a private and family life?'

A commentary on *Fernández Martínez v Spain*, ELIAMEP Briefing note 32/2014 <[http://www.eliamep.gr/wp-content/uploads/2014/07/Briefing-Notes\\_32\\_July-2014\\_Panagiota-Emmanouilidou-1.pdf](http://www.eliamep.gr/wp-content/uploads/2014/07/Briefing-Notes_32_July-2014_Panagiota-Emmanouilidou-1.pdf)>.

47 See Gunn (n 8) and also Françoise Tulkens, 'The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism' (2009) 30(6) *Cardozo Law Review* 2575.

48 See Eva Brems, '*S.A.S. v France* as a problematic precedent' <<http://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/>>.

49 *S.A.S. v France*, App no 43835/11 (1 July 2014) para 17.

NGOs, faith-based organizations (FBOs), political figures and national governments, and by transnational networks that may develop within and between the above groups, depending on their stakes in a given issue.<sup>50</sup> The repertoire of activities may include petitions, demonstrations, lobbying of politicians and judges, legal activism, pressure on the Council of Europe for reform of the Court, etc.

I return to the *Lautsi v Italy* case here as it serves as an excellent example of grass-tops mobilization in the ECtHR context. In terms of *transnational* developments, quite notably it was a US-based lawyer who represented eight of the ten intervening governments before the Grand Chamber in 2011; Annicchino<sup>51</sup> describes a ‘holy alliance’ having developed between American conservative evangelicals, the Russian Orthodox Church, and the Vatican in efforts to influence the final ruling.<sup>52</sup>

Grasstops mobilization is also exhibited in the *Lautsi* case through the ‘politics of the margin of appreciation’ played out at the national, international, and European levels. *L1* was a *unanimous* ruling of the seven-member chamber of the Court to which the case was assigned, finding that the display of the crucifix in Italian classrooms violates Article 2 of Protocol 1 of the ECHR, which protects the parents’ right to educate their children in accordance with their own religious or philosophical beliefs. The Italian State sought and won a referral of the case to the Grand Chamber of the ECtHR as noted above, and an *unprecedented* number of states, associations, and individuals sought and won the right to intervene in the hearing with statements either for or against the original ruling.<sup>54</sup> The interventions were in great majority *against* the 2009 ruling: all of the ten intervening national governments,<sup>53</sup> the thirty-three Members of the European Parliament, and four of the ten NGOs opposed the Court’s finding against the Italian State.

A detailed view of the arguments set forth by the national governments and the MEPs offers us useful insight into the dimensions of national politics and the politics of sovereignty between contracting states and the Court. Eight of the ten national governments,<sup>55</sup> acting collectively, argued that the Chamber’s reasoning had been based on ‘a misunderstanding of the concept of “neutrality”, which the Chamber had confused with “secularism”, and that states should not have to ‘divest themselves of

50 Dia Anagnostou, ‘Law and Rights’ Claiming on Behalf of Minorities in the Multi-Level European System’ in Dia Anagnostou (ed) *Rights in Pursuit of Social Change. Legal Mobilisation in the Multi-Level European System* (Hart Publishing 2014) 1–24.

51 Pasquale Annicchino, ‘Winning the Battle by Losing the War: The Lautsi Case and the Holy Alliance between American Conservative Evangelicals, the Russian Orthodox Church and the Vatican to Reshape European Identity’ (2011) 6(3) *Religion and Human Rights: An International Journal* 213.

52 On transnational mobilizations in other areas of ECtHR litigation, see Dia Anagnostou, ‘Transnational Legal Mobilisation and State of Emergency’ in Anagnostou (n 50) 157–80. Here Anagnostou traces the influence of Northern Irish litigation of states of emergency abuses on Kurdish cases against the Turkish state and, in time, the transposal of litigation patterns and mobilization strategies of both the latter onto Chechen cases against the Russian state.

54 On third-party interventions in the Court in general, see also Laura van den Eynde, ‘An Empirical look at the Amicus Curiae practice of human rights NGOs before the European Court of Human rights’ (2013) 3(3) *Netherlands Quarterly of Human Rights* 271.

53 Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, San Marino, Romania, and the Russian Federation.

55 Of the governments cited above (n 53), Monaco and Romania issued separate interventions.

part of their cultural identity simply because that identity was of religious origin'.<sup>56</sup> The government of the principality of Monaco also argued that the Court should remain *neutral* and offered a definition of neutrality which hinges on the status quo: 'the principle of State neutrality require[s] the authorities to refrain from imposing a religious symbol where there ha[s] never been one and from withdrawing one that ha[s] always been there.'<sup>57</sup> And the Romanian government argued that 'the Chamber had taken insufficient account of the wide margin of appreciation available to the Contracting States where sensitive issues were involved and that there was no European-wide consensus.'<sup>58</sup> For their part, the MEPs, acting collectively, argued that the Court must respect the principle of subsidiarity and recognize a 'particularly broad margin of appreciation' on religion–state relations: 'a State which, for reasons deriving from its history or its tradition, show[s] a preference for a particular religion d[oes] not exceed that margin.'<sup>59</sup> Issuing a warning about potential repercussions of a 'wrong' judgment in *L2*, the MEPs indicated that 'by taking a decision whose effect would be to make it compulsory to remove religious symbols from State schools, the Grand Chamber would be sending a radical ideological message' (*L2*, para 56).<sup>60</sup>

Also indicative of the 'politics of the margin of appreciation' is the fact that in the text of the *L1* judgment, the margin of appreciation is mentioned only on three occasions, each time by the Italian government. But in the 2011 Grand Chamber judgment, the margin is mentioned 27 times in total, and eight times in the final paragraphs of assessment, which is indicative of the importance the margin is imparted in the Court's overall reasoning.<sup>61</sup> In the latter ruling the Court declares, 'the fact that there is no European consensus on the question of the presence of religious symbols in State schools . . . speaks in favour of granting the Italian state a wide margin of appreciation.'<sup>62</sup>

As noted above, the margin of appreciation also factored significantly in the *Sindicatul, Fernández*, and *SAS* cases. 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.

Well before these particular cases arose, legal scholars presaged, in a way, the problems to arise around the margin of appreciation in its relation to subsidiarity and consensus in terms of politicizations and mobilizations around certain issues. In 1999 Benvenisti writes,

Given the importance of State sovereignty, the only way to impose on State parties newly evolving duties is by resorting to the notion of *emerging* custom, or 'consensus'. By resorting to this device . . . [the Court's] decisions reflect a respect of sovereignty, of the notion of subsidiarity, and of national democracy . . . One wonders to what extent it is really possible to envision

56 *Lautsi v Italy* (ECtHR 2011) (n 17) para 47.

57 *ibid* para 48.

58 *ibid* para 49.

59 *ibid* para 56.

60 *ibid*.

61 *Ronchi* (n 28).

62 *Lautsi v Italy* (ECtHR 2011) (n 17) para 70.

credible threats by member States to challenge the court's authority in reaction to unpopular judgements.<sup>63</sup>

Likewise, post-*L1* and pre-*L2*, Mancini<sup>64</sup> notes that 'the collective reputation of a court depends, to a large extent, on the audience at which its opinions are aimed. Judicial authority ultimately depends on the confidence of its citizens. If a court's interpretations deeply differ from the convictions of the people, the people will start resisting judicial decisions.' This was clearly the case in *Lautsi*. This draws our attention more firmly to the grassroots level of the individual citizen.

The extent to and the ways in which political and religious lobbying made a difference to the *L2* decision is a matter that requires careful examination. Mancini explains that

the application of the margin of appreciation doctrine, had so far protected the ECtHR from direct confrontations with contracting parties. The vituperative criticism directed at the European judges in the aftermath of the *Lautsi* decision indicates that a more active European court will not automatically be welcomed by the European peoples. . . . If the European court, as the *Lautsi* case might suggest, abandons its traditional judicial self-restraint and becomes a true arbiter in highly divisive issues, such as religion, it will face many challenges. A crucial one will be to gain the confidence of European citizens, in order to avoid provoking populist resentments when establishing rights in a context of cultural controversy.<sup>65</sup>

In general, states' handling of religious matters (often) reflects grassroots-level 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 is reflected back (or forward) into the Court's handling of religion. We now turn our attention to mobilizations at the grassroots level.

#### 4. GRASSROOTS MOBILIZATIONS 'AT THE MARGINS'

The ultimate influence of case law over the issues which it targets is much debated in legal scholarship, particularly in the American context. Applying the relevant literature to the European setting, do ECtHR judgments make a difference when it comes to religious pluralism on the ground? A court-centred approach to the question finds relatively little *direct effect* of case law on related practices. Within the context of a well-developed American legal scholarship on this question, Gerald Rosenberg (1991) argues that courts have little direct and independent impact on citizens' behaviour and as such the notion that they can bring about social change is a

63 Benvenisti (n 25) 852.

64 Mancini (n 5) 26.

65 *ibid* 26–27.

'hollow hope'.<sup>66</sup> The courts' decisions are implemented in practice and can influence policy only as long as they find support among government decision-makers. In fact, based on comparative analysis, Benvenisti contends that national courts' case law tends to protect short-term governmental interests.<sup>67</sup> Measured by such a direct standard, courts often appear to provide powerful support for the status quo but weak sources for challenging the prevailing order.<sup>68</sup> As Malcolm Feeley puts it, 'the conventional wisdom among political scientists and sociologists who have studied these matters is that the courts by themselves are not very powerful and, at best, are important at the margins or in conjunction with other governmental bodies.'<sup>69</sup> Adding to this point the fact that actual resort to judicial intervention is more the exception than the rule, the message one gleans is that courts are not always 'where it's at': we need a closer look at the margins, and at local- and national level-developments on matters of religious pluralism.<sup>70</sup>

A second approach, then, to the question of whether case law matters, is an adaptation of McCann's theory on law and social movements and suggests instead an examination of what is happening in the *aftermath* of a law or judgment, at the grassroots level.<sup>71</sup> This 'decentered' approach shifts attention from the direct effects of case law and recognizes that court decisions can significantly facilitate the placement of issues on the public agenda and thus serve as catalysts for significant social change—what Scheingold calls the development of a 'politics of rights'.<sup>72</sup> According to Scheingold, marginalized groups may capitalize on *perceptions* of entitlement associated with particular legal developments to initiate and to nurture political mobilization. This process of 'rights consciousness raising', which takes place during the earliest phases of organizational and agenda formation, is, according to McCann 'perhaps the most significant point at which law matters for many social movements'.<sup>73</sup>

McCann describes rights consciousness raising as comprising two separate processes of cognitive transformation among members of a movement: (i) the process of 'agenda setting', by which movement actors draw on legal discourses to 'name' and to challenge existing social wrongs or injustices; and (ii) case law can help define the overall 'opportunity structure' within which movements develop.<sup>74</sup> To the first point, the proposed project adds the process of agenda setting whereby actors draw on ECtHR legal discourses to preserve the status quo (eg in the case of religious majorities that may use case law to *maintain* what other groups might consider 'existing

66 Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change? Second Edition* (1st edn, University of Chicago Press 1991).

67 Benvenisti (n 25)

68 Michael McCann, 'Law and Social Movements' in Austin Sarat (ed) *Blackwell Companion to Law and Society* (Blackwell 2004) 507.

69 Malcolm M Feeley, 'Hollow Hopes, Flypaper, and Metaphors' (1992) 17(4) *Law & Social Inquiry* 751.

70 Michael McCann, 'Reform Litigation on Trial' (1992) 17(4) *Law & Social Inquiry* 715.

71 Michael McCann, 'Law and Social Movements: Contemporary Perspectives' (2006) 2 *Annual Review of Law and Social Sciences* 17.

72 Stuart A Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (Yale University Press 1974).

73 McCann (n 61) 510.

74 *ibid* 511.

social wrongs and injustices). As McCann notes,<sup>75</sup> judicial victories can impart salience or legitimacy to general categories of claims, such as equal rights: in the post-*Lautsi* context, majority religious groups have in some cases sought to advance the argument that ‘majorities have rights too.’<sup>76</sup> In the extent to which the interests of religious majorities coincide with those of the nation-state, then we have situations as described by Hin-Yan Liu, in which the claims of a right of Member States *parallel* the individual right to thought, conscience, and religion under Article 9 of the Convention.<sup>77</sup>

From this decentred perspective that studies the local- and national-level grassroots mobilizations at the ‘margins’ of courts’ jurisprudence, actual compliance with a court ruling is only a small part of the possible policy consequences of any given court decision. General precedents set and specific legal ploys used, play an important role in delimiting the tactical options, opportunities, and resources available to citizens to seek change (or indeed, to seek to preserve the status quo). According to McCann, ‘judicial opinions can reshape the strategic landscape in ways that encourage other citizens and officials to circumvent, defy, and even initiate counter-reform efforts to alter court rulings.’<sup>78</sup> A bottom-up approach, then, includes attention to the various ways that reform activists deploy legal resources (eg discourses drawn from the *Lautsi* case Grand Chamber decision of 2011 by local- and national-level actors-see below) to wage their campaigns in multiple venues including but also beyond courts.

This is a dimension of movement activity which ‘requires the most complex, subtle, and unique reflections both about law and about social change.’<sup>79</sup> Thus, in terms of the aftermath of ECtHR religious freedoms jurisprudence and the related grassroots-level developments, a bottom-up, decentred approach to the Court’s influence is required, which will be sensitive to the variable, dynamic, and interactive effects of knowledge and discourses communicated through the Court’s decisions, on a broad range of social actors and in a broad range of settings. It is here, in conversation with cause lawyers, NGO representatives, members of religious minority groups, etc, that we find unintended implications such as development of rights consciousness, which are among the least studied aspects of law and change. What rights consciousnesses might be developing in the aftermath of ECtHR cases of religious freedoms, and to what potential effects? Answers to these questions will yield important insight into the impact of the ECtHR’s case law on social perceptions and views concerning religious pluralism and religious freedom rights at the local and national level.

For example, in terms of public discourse, an examination of grassroots-level developments can help us to understand whether religion and religious pluralism acquire greater public attention in the aftermath of particular judgments. In terms of the mobilization and empowerment of religious and social actors, such a focus on developments ‘at the margins’ offers insight into whether religious and social actors gain, or lose, leverage as a result of the Court’s religious freedoms judgments.

75 *ibid.*

76 Effie Fokas, ‘“Eastern” Orthodoxy and “Western” Secularisation in Contemporary Europe (with Special Reference to the Case of Greece)’ (2012) 40(3–4) *Religion, State and Society* 395.

77 Liu (n 41).

78 Michael W McCann (n 70) 733.

79 McCann (n 68) 518.



Finally, by studying the grassroots level we get a sense of the extent to which the aims of religious and social actors are articulated in terms which either echo or react against particular ECtHR judgments.

##### 5. IN THE SHADOW OF THE COURT: INDIRECT, UNEXPECTED, AND/OR COUNTERPRODUCTIVE EFFECTS OF THE ECtHR ON RELIGIOUS PLURALISM

Well beyond the direct effects of the Court's engagement with religion, in terms of the rights won or denied to the individual applicant and the penalty issued or not to the defendant state in question, as suggested above there is a whole other dimension of the Court's engagement with religion and consequent impact on religious pluralism. This may be effectively described with the use of Marc Galanter's term, 'the radiating effects of courts'.<sup>80</sup> Instead of a perspective focusing on the centripetal movement of cases into courts (as eg characterizes much literature examining and critiquing the workings of the ECtHR and discussions of its reform required because of the heavy case load and large backlog of cases), Galanter proposes a consideration of the *centrifugal* flow of influence outward from courts and into the wider world.

Limiting our attention to 'direct' effects of the Court on religious pluralism (for example to decisions it takes related to religion and the implementation, or non, of those decisions) entails a drastic and *imprudent* narrowing of our purview of the Court's influence. As Galanter notes,

courts resolve by authoritative disposition only a small fraction of all disputes that are brought to their attention. These are only a small fraction of all disputes that might conceivably be brought to court and an even smaller fraction of the whole universe of disputes.<sup>81</sup>

But the potential impact of courts on the 'whole universe of disputes' is much broader, if one considers the 'radiating effects' of courts. According to Galanter, the principal contribution of courts to dispute resolution is the provision of a background of norms and procedures against which negotiations and regulation take place in both private and governmental settings.<sup>82</sup> Thus, widening our lens only slightly, we can begin to see courts as conferring on the parties engaged in a given case a 'bargaining endowment', eg a set of 'counters' to be used in bargaining between disputants. Courts supply standards and the setting for negotiations among the parties. The nature, extent, and results of such negotiations, taking place 'in the shadow' of ECtHR religious freedoms cases, are critical to an understanding of the fuller impact of the Court on religious pluralism.

Galanter extends the notion of bargaining endowment to describe courts as conferring on disputants a 'regulatory endowment': 'That is, what the courts might do (and the difficulty of getting them to do it) clothes with authorizations and

80 Galanter, 'The Radiating Effects of Courts' in Keith O Boyum and Lynn M Mathe (eds) *Empirical Theories about Courts* (Longman 1983) 117–42.

81 *ibid* 119.

82 *ibid* 121.

immunities the regulatory activities of the school principal, the union officer, the arbitrator, the Commissioner of Baseball, and a host of others such as, in the case of ECtHR religion jurisprudence, the state, the religious association, the NGO, etc.<sup>83</sup>

Beyond bargaining and regulatory endowment, Galanter draws our attention to a host of other effects which flow from the activity of a court, which he categorizes as either ‘special effects’ or ‘general effects’.<sup>84</sup> Special effects are those produced by the impact of a court’s action on the parties before it. They include changes in the behaviour of the actors who are the subjects (or targets) of the application or enforcement of the law. For example, in *Kokkinakis v Greece*, a special effect was a stop put on the imprisonment of Jehovah’s Witnesses by the Greek police forces. Other special effects are *incapacitation, surveillance, special deterrence, reformation* of the actors in a given case. In addition to, or *instead of*, changing one’s disposition towards the issue at hand, the experience of the Court may also change one’s perceptions and evaluations of the *activity* of disputing about it, the institutions in which the disputes are processed (ie the Court), and of oneself as a disputant. Galanter offers the example of women winning in anti-discrimination cases who may still emerge disillusioned with the Court and despair of vindicating their rights. Galanter labels these effects as *claim encouragement* and *claim discouragement*. These are all special effects of the courts.

General effects, on the contrary, are effects of the communication of information by or about the Court’s action, and effects of the response to that information. These effects are, then, clearly of a broader nature and reach, affecting not only those immediately subject to the Court but others as well. For example, communication of information about what was, or what could be, done by courts can lead to *general deterrence*. Deeper rooted effects could take the form of *enculturation*—that is, a change in the moral evaluation by individuals and groups of a specific mode of conduct, or *normative validation*, in the sense of a court decision serving to maintain or intensify already existing evaluations of a particular conduct. Another potential general effect of court decisions is *facilitation*: ‘legal applications may be taken neither as facts to be adapted to nor norms to be adhered to, but as recipes to be followed. Using the law as a cookbook, we can learn how to bring about desired results—disposing of property, forming a partnership, securing a subsidy.’<sup>85</sup> Finally, and as discussed above, court decisions may have *mobilization* and *demobilization* effects: they may encourage groups and individuals to invest in claims of a given type, providing symbols for rallying a group, and/or broadcasting awareness of grievance and dramatizing challenge to the *status quo*; or grievances may lose legitimacy, claims may be discouraged, and organizational capacity may be dissipated in the aftermath of a court decision.

All of the above ‘general effects’ are enacted through transmission and reception of information, rather than by ‘concrete imposition of controls’ by a court. Critically, as Galanter notes, the information that induces the changes *need not be accurate*: ‘What the court has done may be inaccurately perceived; indeed, the court itself may have

83 *ibid* 122.

84 *ibid* 124.

85 *ibid*.

inaccurately depicted what it has done.<sup>86</sup> One might expect that an examination of national-level case law to be ripe with misreferences of ECtHR cases. And certainly the ECtHR has been faulted on many occasions for misrepresenting its own activities and decisions (conspicuously so on Islam-related cases but not only).<sup>87</sup>

From this perspective, the impact of courts on disputes is accomplished largely by the dissemination of information: ‘Courts produce not only decisions, but messages. These messages are resources that parties use in envisioning, devising, pursuing, negotiating, vindicating claims (and in avoiding, defending, and defeating them).’<sup>88</sup> The impact of these messages is largely contingent on who receives what messages from the court, who is in a position to evaluate and process those messages, how he or she processes the information, and who is in a position to *use* that information.

Galanter makes the key point that ‘just how potential disputants and regulators will draw on these resources is powerfully affected by their culture, their capabilities, and their relations with one another.’<sup>89</sup> Thus, inaccuracy in the transmission of the message is one variable. The plot thickens further when we consider the additional factor of variations in *reception* of the message: ‘a single judicial action may radiate different messages to different audiences.’<sup>90</sup> And then we must also consider the competing messages already present in the space where the new court-originated messages land. Because of course, courts are not the only, nor are they the primary, sources of normative messages in a given society, or of *controls* in a given society: family, work group, church, associations, and networks of various forms, all of these make up what Galanter calls the ‘indigenous law’, or the ‘indigenous ordering’ of society.

The latter entails a loud cry for contextualization of any study of the radiating effects of the courts in general, and specifically regarding our purposes, a call for national and local case-study based approaches to the impact of the ECtHR religious freedoms case law on religious pluralism at the grassroots level. For example, in the aftermath of *Lautsi v Italy*, 2009, a Greek Orthodox bishop in a Greek town, feeling certain the decision would be overturned, rallied his fellow Orthodox to start thinking of ways to ‘nationalise our religious symbols so we can protect them from Europe’. Thus, an indirect, unexpected, and in fact counterproductive effect of the Court was to encourage further nationalization of an already nationalistic-tending church and conceptions of ‘Europe’ as something from which protection is needed. That same Greek Orthodox Church actively engaged in grassroots mobilizations around the *Lautsi* Grand Chamber hearing. In a different cultural context, a Romanian humanist activist was encouraged in his case against the Romanian state for the presence of icons on public school classrooms, but his lawyers were demobilized in the aftermath of the 2011 Grand Chamber decision. And in Italy, in the aftermath of the 2009 Chamber decision, three law proposals were brought before the Italian Parliament to make the crucifix compulsory.<sup>91</sup> The Northern League gathered

86 *ibid.*

87 M Evans (n 1); Durham, Kirkham, and Scott (n 1).

88 Galanter (n 80) 126.

89 *ibid.*

90 *ibid.*

91 The first two were presented by PDL—People of Freedom coalition (a coalition gathering the former Berlusconi’s party Forza Italia and the former right-wing party Alleanza Nazionale) and the last one was

signatures for a referendum and proposed to add a cross to the Italian flag. And several mayors bought and hung crucifixes, offered them to citizens, and imposed sanctions against their removal from public spaces.<sup>92</sup>

Following Galanter's conviction that any major advance in our understanding of how official legal regulation works depends on knowing more about indigenous law, any real understanding of the ECtHR's impact on religious pluralism requires our understanding the extent to which its case law is known (eg 'Lautsi awareness' at the grassroots level), and how it is received, interpreted, reacted against, supported, etc, within the context of indigenous law in given national and cultural contexts.<sup>93</sup> And it is at this level we may expect to find a broad gamma of effects of the same ECtHR actions and decisions.

## 6. DIRECTIONS IN RELIGIOUS PLURALISM

Scholars have observed a general increase in the judicialization of human rights as both individual and collective actors are more prone to seek redress, contest policies, and pursue social reform through courts.<sup>94</sup> The same applies for religious freedoms issues addressed by the ECtHR, which represent some the main debates in the European sociological and legal discussions around religion. The Court's religious freedoms jurisprudence covers a strikingly contentious topical ambit: from religious symbols in public spaces (whether worn, as the headscarf, or on the wall, as in the crucifix), to whether a right not to be offended can be upheld through blasphemy or hate speech laws, and from abortion to same-sex marriage. Thus, the Court has been addressing some of the most divisive and emotive social issues facing European societies.

And in the process, the Court has been setting, from above, the parameters it would like to see for religious pluralism in Europe. This is among several reasons for the Court, as with many other European institutions, to be viewed by European citizens as non-transparent and distant from 'the people'. This is *in spite of* the direct recourse citizens have to the Court: spontaneous litigation is increasingly rare and replaced by strategic litigation reflecting agendas which, again, may be far from the individual European citizen. Thus, a focus on developments taking place 'in the shadow' of the ECtHR brings the influence of the Court on religious pluralism into sharp focus, but from the ground up.

Can we detect a particular direction being taken in the Court's influence on religious pluralism? For example, can we trace patterns towards an encouragement of pluralism through decisions promoting secularism as a form of neutrality? Or, alternatively, can we detect a trend towards acceptance of the various national and

presented by the UDC—Catholic centre party, Südtiroler Volkspartei, and movements for autonomies. They have not been discussed in the Parliament at the time of writing. See Lucca Ozzano and Alberta Giorgi 'The debate on the Crucifix in public spaces in twenty-first century Italy' (2013) 18(2) *Mediterranean Politics* 259.

92 *ibid* 268.

93 Galanter (n 80) 133.

94 Anagnostou (n 52); Alec Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2012) 1(1) *Global Constitutionalism* 53; R Daniel Kelemen, 'Eurolegalism and Democracy' (2012) 50(1) *Journal of Common Market Studies* 55.

cultural approaches to religion, without passing judgment on the form of religion–state relations in a given case?

I have argued here that, valuable though these questions are, they cannot be adequately addressed through a study of the Court’s case law. And this for at least two basic reasons. First, courts are not immune to social and political pressures. There are too many unpredictable influences from too many sources, grassroots, and grassstops, to be able to suggest one direction in the courts’ handling of matters related to religion. Scholars either praising or condemning the European Court of Human Rights’ judicial activism in the religious domain, both groups seeing evolutionary trends in the direction of secularism which climaxed in the *Lautsi v Italy* 2009 decision, were given pause for thought with the 2011 *Lautsi* Grand Chamber decision. And this will likely be the case again and again over time as we seek to draw evolutionary charts of the Court’s engagements with religion. And secondly, as Marc Galanter emphasizes, the effects of the courts also do not exist in a vacuum: they are contingent on how the courts’ messages are received, interpreted, and used by potential actors which, in turn, is contingent on the information, experience, skill, and resources that individual or collective actors bring to those messages.<sup>95</sup>

Hence the emphasis on developments ‘in the shadow’ of the ECtHR. The shadow is where we find evidence of the fact that judicially articulated legal norms take a life of their own when deployed in social actions<sup>96</sup>; and it is here that we can detect how the messages of the courts may be amplified, cancelled, or transformed by the presence of indigenous norms and controls, in ways that lie well beyond anticipation of the courts *or* the scholars studying them.<sup>97</sup> Quite apart from offering scholars, a more realistic sense of the multilevel and multidirectional influences of the Court on religious pluralism, such insight would also entail valuable feedback for the Court itself.

95 Galanter (n 80).

96 McCann (n 63) 733.

97 Galanter (n 80) 136.