



WORKING PAPER 1

The 'radiating effects' of the European Court of Human Rights on social mobilisations around religion in Europe – an analytical frame

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Introduction

Since the 1990s, the European Court of Human Rights has become a central site where increasingly complex issues regarding religious freedom and diversity are contested. Before this court, local and national minority and majority faith communities as well as NGOs of religious, non-religious and other persuasions have invoked human rights principles to challenge how European states approach and manage religious diversity. In response to a large number of petitions in the religious field¹, the European Court of Human Rights (hereby ECtHR, or Court) has pronounced authoritative and occasionally landmark judgments that state-parties to the European Convention of Human Rights (hereby ECHR or Convention) have an obligation to implement domestically. Controversies related to religious symbols in public spaces (whether worn, as the headscarf, or on the wall, as in the crucifix), whether a right not to be offended can be upheld through blasphemy laws, or bioethics and the rights of homosexuals, are all issues which touch upon deeply held religious beliefs and which have arisen before the ECtHR. In the context of such cases, the Court has been addressing some of the most divisive and emotive issues facing European societies.

By applying and interpreting human rights principles in the context of specific disputes and individual claims, the Court has been setting, from above, wittingly or unwittingly and fruitfully or not, certain parameters for religious pluralism in Europe. The Court's religion-related jurisprudence and its evolution over time have been widely explored by legal scholars, and some studies have also examined the domestic implementation of relevant judgments. This research examines the Court's impact specifically at the grassroots level, with an aim to bring the Court's influence on religious pluralism into sharp focus, but from the ground up. Do ECtHR judgements make a difference when it comes to religious pluralism on the ground?

The ECtHR's pronouncement of authoritative judgments in a variety of areas that encompass how states define and manage religious freedom and diversity exemplifies a global phenomenon in terms of the rise of international courts. One of the roles that these courts perform resembles that of constitutional courts in their scope and aim.² In their de facto constitutional review role, courts like the ECtHR scrutinize national laws, policies and practices for conformity with human rights principles.³ While a growing non-legal scholarship has begun to explore the domestic implementation of international court judgments in

¹ 'Religious field' is interpreted broadly to include issues that directly implicate faith groups (whether majority or minority) but also which relate to deeply-held beliefs and concerns of non-religious, secular and/or secularist, atheist, and humanist groups; the latter may have no direct link to religion per se but may lie more in the realm of social ethics (e.g., same-sex marriage). Thus the 'social actors' of interest to the research is similarly a broad range of groups and individuals who engage in social or legal mobilization around such issues.

² See Karen J. Alter, *The New Terrain of International Law – Courts, Politics, Rights* (Princeton: Princeton University Press, 2014), 16.

³ The ECtHR is not formally a constitutional court, but an international tribunal. However, in its evolution over time, the Strasbourg Court has increasingly performed a role that closely resembles that of constitutional courts. This evolution is reflected in scholarship on the Court presenting it as 'largely, though not fully constitutional'; see Wojciech Sadurski, 'Partnering with Strasbourg', *Constitutionalisation of the ECtHR, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments*, *Human Rights Law Review*, Vol. 9, No. 3 (2009), 397-453, at 448-9. See also Alec Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court', *Faculty Scholarship Series* (2009), Paper 71, accessible Online at http://digitalcommons.law.yale.edu/fss_papers/71.

national law and policy,⁴ virtually no attention has been paid to their indirect effects. Yet, the indirect effects of international human rights rulings are arguably far more important than the direct impact that they can have by means of their formal implementation by state authorities.⁵

Indirect effects include the ways in which international human rights judgments may influence domestic debates in law, politics and academia, raise public consciousness, change how social actors perceive and articulate their grievances and claims, empower national rights institutions, or prompt mobilization among civil society and other rights advocates. For example, studies show that decisions of high profile and authoritative courts like the US Supreme Court prompt individuals to clearly elaborate their attitudes on an issue, crystallizing their views for or against the ruling and underpinning a broad range of mobilization efforts.⁶ Alluding – at least in part – to the variable indirect effects of judicial rulings, some authors claim that the ECtHR in tandem with national constitutional courts play a significant role in redefining religious freedom in Europe.⁷ Nonetheless, the indirect effects of such court rulings remain unstudied.

The Grassrootsmobilise research programme, of which this paper is a part, seeks to start filling this gap in academic research and knowledge about the indirect effects of human rights case law in the area of religion and religious freedom. Specifically, the research programme examines the extent to and ways in which ECtHR religion-related case law influences social actors' conceptions of and discourse about their rights, as well as their strategies in pursuit of those rights. This bottom-up research considers whether and how the Court's case law mobilizes grassroots level actors, in terms of rights consciousness raising, agenda setting, providing the terms of negotiations, etc. Judicially articulated legal norms take a life of their own when deployed in social actions.⁸ This means we require a study of different types of actors, in multiple venues and contexts, and in different country (i.e., national, cultural and religious) cases in order to establish a fuller perspective on the indirect effects of ECtHR case law.

Religion⁹ and religious freedom form a particularly fruitful focus for study of the Court's indirect effects for several reasons. This is an area where the tension between the national and translational levels is especially acute: considered a fundamental aspect of culture and identity, religion is a first candidate for falling within the realm of what should be addressed at the lowest level of governance (subsidiarity) and of what deserves an especially wide

⁴ Dia Anagnostou and Evangelia Psychogiopoulou (eds.), *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy* (Edinburgh: Edinburgh University Press, 2013); Helen Keller and Alec Stone Sweet (eds.), *A Europe of Rights – The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008); Courtney Hillebrecht, 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights', *Human Rights Review*, Vol. 13, No. 3, (2012), 279–301.

⁵ Douglass Cassel, 'Does International Human Rights Law Make a Difference?', *Chicago Journal of International Law*, Vol. 2, No. 1 (2001), 121-136, at 122.

⁶ Timothy R. Johnson and Andrew D. Martin, 'The Public's Conditional Response to Supreme Court Decisions', *American Political Science Review*, Vol. 92, No. 2 (June 1998), 299-310.

⁷ James T. Richardson and Brian M. Lee, 'The Role of the Courts in the Social Construction of Religious Freedom in Central and Eastern Europe', *Review of Central and East European Law*, Vol. 39, No. 3/4, (2014), 291-313, at 292. See also James T. Richardson, 'Managing religion and the judicialization of religious freedom', *Journal for the Scientific Study of Religion*, Vol. 54, No.1 (2015), 1-19.

⁸ Michael McCann, 'Reform Litigation on Trial', *Law & Social Inquiry*, Vol. 17, No. 4 (1992), 715-743, at 733.

⁹ 'Religion' is notoriously difficult to define. In the present paper, the word is used very loosely to refer also to conscience or belief (as the three notions are presented together in Article 9 of the European Convention on Human Rights).

'margin of appreciation' within the ECtHR context. Further, religion and religious freedom entail the subject of societal and political debates which are increasing in number and intensifying in effect at the local, national and international level. Finally, these developments find their reflection in the rapid judicialisation of religion in the ECtHR (which, for example, from 0 violations of Article 9 found in its first 34 years of operation, has found over 50 in the last 20 years).

A sizeable legal scholarship has explored the evolution of the European Court of Human Rights religion-related case law, its jurisprudential content and legal argumentation.¹⁰ But there has been hardly any scholarly attention to the social and legal activism that emerges in response or in reaction to the ECtHR judgments around religion. (This stands in stark contrast to the US context in which the socio-legal responses to Supreme Court decisions on have been widely examined.¹¹) This study is specifically interested in whether and the extent to which European Court of Human Rights rulings influence and structure local, national and transnational patterns of contestation and mobilization around religion. The starting point of this study is a bottom-up perspective of the Court's influence: it shifts attention from policy effects to the variable, dynamic and interactive effects of knowledge and discourses communicated through the Court's religion-related decisions, on a broad range of social actors and in a broad range of settings. It investigates whether and how local communities and various religious and societal actors invoke, react to, or plainly ignore Strasbourg judgments in the course of engaging in disputes and in activism around religion vis-à-vis other confessional or non-confessional groups or vis-à-vis state authorities.

The existing knowledge gap about the indirect effects of international human rights rulings limits our understanding of the actual effects these rulings have on the ground. It also inhibits us from discerning their potential to reach and influence the local and national communities that are most centrally concerned. By developing a research agenda to study the indirect effects of the ECtHR judgments, this study shall make a contribution not only to our knowledge of the Strasbourg judiciary; it shall also advance the state of research on international courts more broadly, and their role and potential to influence domestic politics and societies, as well as international governance.

¹⁰ See Julie Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?', in Lorenzo Zucca & Camil Ungureanu (eds.), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge: Cambridge University Press, 2012), 283-306; Julie Ringelheim, 'Du Voile Au Crucifix: La Neutralité Confectionnelle 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 (on file with author); Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty'. *European Constitutional Law Review*, Vol. 6, No. 1, 6-27; Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001); Carolyn Evans and Christopher Thomas, 'Church-State Relations in the European Court of Human Rights', *Brigham Young University Law Review*, Vol. 2006, No. 3, 699-725; 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* (Cambridge: Cambridge University Press, 2008), 291-316; Matthias Koenig, 'Governance of religious diversity at the European Court of Human Rights', in Jane Bolden & Will Kymlicka (eds.), *International Approaches to the Governance of Ethnic Diversity* (Oxford: Oxford University Press, 2012) 51-78.

¹¹ See Michael McCann, *Rights at Work – Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994); Michael McCann, 'Law and Social Movements: Contemporary Perspectives', *Annual Review of Law and Social Science*, Vol. 2, 17-38; Marc Galanter, 'The Radiating Effects of Courts', in Keith O. Boyum & Lynn M. Mather (eds.), *Empirical Theories about Courts* (New York: Longman, 1983), 117-142; Stuart A. Scheingold, *The Politics of Rights – Lawyers, public policy, and political change*, 2nd edition (Ann Arbor: University of Michigan Press, 2004).

Understanding the indirect effects of international courts has become imperative at a time when both interest in, but also skepticism about these courts has grown, more in Europe than anywhere else. As a recent study shows the salience of European courts, the Court of Justice of the European Union (hereby CJEU) and the ECtHR, has grown for the citizens of Europe. People pay increasing attention to what these courts do, and their knowledge about it has significantly improved. The publics' knowledge of and interest in European courts is possibly closely linked to the substantial levels of legitimacy and trust these courts enjoy. Such legitimacy and trust though is likely to vary across countries and to fluctuate in response to unpopular decisions.¹² The political debates around the potential UK withdrawal from the European Convention on Human Rights pose one conspicuous example, but of broader relevance to the Convention system as a whole is the reform process the Court has been undergoing in recent years, resulting in, amongst other things, a greater emphasis on the principles of subsidiarity and the margin of appreciation.

The primary purpose of this paper is to conceptualize the indirect effects of the ECtHR, specifically in connection with religion and religious freedom. It draws from socio-legal perspectives on law and rights to reflect on how local and national actors and faith communities view, interpret and deploy (to the extent that they do so) European human rights rulings. How do courts and the ECtHR judgments in particular influence local, national and transnational struggles around religion and religious freedom in Europe? Do social actors and their organizations invoke or refer to European human rights rulings in formulating their claims and strategies of action on religion-related issues? What is the nature of the indirect influences that the rulings exert, if they exert any such influences at all? The first section of this paper discusses the assumptions and implications of a constitutive approach to law and court impact. In the second section, a brief overview of jurisprudential directions in the Strasbourg Court's case law precedes a discussion of the relevant case law and the country-cases to be studied in *Grassrootsmobilise*. The third and fourth parts develop a preliminary analytical frame to conceptualise the indirect effects of the ECtHR, first with a focus on the discourses, identities and strategies of social actors and then on the legal and political context for mobilisations. Finally, the fifth section serves as a guide to the empirical research in *Grassrootsmobilise*.

1. The indirect effects of courts: decentering law and rights

How do we understand the indirect effects of courts and why are they significant? An appreciation of their indirect effects has grown out of the documented limitations of court rulings in ordering or enforcing significant legal and policy change. While courts are independent, they are not entirely autonomous as they operate in a system where they institutionally interact with legislators and the executive. The situation of the European Court of Human Rights is even more complex as it is part and parcel of an inter-governmental structure; therefore, it is necessarily attentive to the views and stances of national

¹² Erik Voeten, 'Public Opinion and the Legitimacy of International Courts', *Theoretical Inquiries in Law*, Vol. 14, No. 2, (2013), 411-436. See also Susannah Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', *European Constitutional Law Review*, Vol. 6, No. 1 (2010) 6-27, and Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards', *International Law and Politics*, Vol. 31, No. 4 (1999), 843-854.

governments of the 47 states that are parties to the Convention. Furthermore, the nature of judicial decision-making is partial and incremental, and thus unsuitable for providing a roadmap for reform. For the most part, court decisions focus on specific points of law and on limited aspects of an issue, rather than provide a complete statement about how to reform law and policy in a particular issue area.

Within the context of a well-developed American legal scholarship on this question, scholars have thoroughly questioned the ability of court decisions to bring actual social and policy change on the ground in line with pronounced judicial norms.¹³ Even when they vindicate those pursuing progressive social change, court decisions arguably mete out little more than “hollow hope”: they can promote significant legal and social change only when there is ample support from legislative and executive officials, as well as significant elite and public support for their rulings.¹⁴ 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’.¹⁵ 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.¹⁶

Of course, the tremendous progress made by the European Court of Human Rights in the area of religious freedom should not be underestimated, both in terms of important decisions taken and in terms of the engagement of civil society in relation to these.¹⁷ Notwithstanding, the ‘constrained’ nature of courts in instigating legal and policy reform is particularly pronounced in regard to international courts in general and also specifically to the ECtHR.¹⁸ Focusing on the domestic implementation of ECtHR judgments, a collection of country-based case studies found their direct policy impact at the national level to be restricted, and largely dependent upon national social mobilisation and political support.¹⁹ In Greece for example, the ECtHR judgments that vindicated religious freedom claims raised by Jehovah’s Witnesses (JWs) offered a justification for liberalizing administrative practice and national jurisprudence in the direction of expanding the religious freedom enjoyed by this minority. In the absence of sufficient, domestic political and Church support though, they

¹³ Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

¹⁴ Gerald Rosenberg, *The Hollow Hope*; see also Michael J. Klarman, ‘How Great Were the “Great” Marshall Court Decisions?’, *Virginia Law Review*, Vol. 87 (2001), 1111-1184.

¹⁵ Malcolm M. Feeley, ‘Hollow Hopes, Flypaper, and Metaphors’, *Law & Social Inquiry*, Vol. 17, No. 4 (1992), 745-760, at 751.

¹⁶ Michael McCann, ‘Reform Litigation on Trial’, *Law & Social Inquiry*, Vol. 17, No. 4 (1992), 715-743. See Effie Fokas, ‘Directions in Religious Pluralism in Europe: Mobilisations in the Shadow of European Court of Human Rights religious freedom jurisprudence’, *Oxford Journal of Law and Religion*, Vol.15, No.4 (2015), 54-74, for further development of this argument in relation to the Grassrootsmobilise research programme.

¹⁷ Marco Ventura, ‘Law and Religion Issues in Strasbourg and Luxembourg: the Virtues of European Courts’, Kick-off meeting conference paper, ReligioWest meeting, European University Institute, Florence, 2011; Rachel A. Cichowski, ‘Civil society and the European Court of Human Rights’, Paper delivered at the 2010 Annual Meeting of the American Political Science Association, Sept. 1-4 2010, Washington D.C.; and Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001).

¹⁸ Virginie Guiraudon, ‘European Courts and Foreigners’ Rights: A Comparative Study of Norms Diffusion’, *International Migration Review*, Vol. 34, No. 4 (Winter 2000), 1088-1125.

¹⁹ Dia Anagnostou (ed.), *The European Court of Human Rights – Implementing Strasbourg’s Judgments on Domestic Policy* (Edinburgh: Edinburgh University Press, 2013).

did not bring about any reform of the underlying and restrictive legal frame.²⁰ Even a supranational court like the Court of Justice of the European Union (CJEU) has limited power in ordering domestic change. The decisions that it issues are often evasively complied with by national authorities, which often seek to circumvent their prescriptive content, thereby 'containing' justice.²¹ A normative implication underlying the 'constrained' view of courts is that as institutions they are on the side of the powers that be, rather than on the side of the less privileged or more marginal social actors. Courts often appear to provide powerful support for the status quo but weak sources for challenging the prevailing order.²² By the same logic, international and supranational courts could be seen as basically upholding rather than challenging the interests and sovereignty of states. The affirmation of state sovereignty is in fact enshrined in the principle of the margin of appreciation that is variably but frequently invoked by the Strasbourg Court. From this perspective, law is a weapon for maintaining rather than challenging the dominant distribution of power and political order in the national and international system.

From a decentred perspective of law and rights, however, whether courts maintain or challenge the status quo is far more contingent and dependent upon contexts of social or religious struggle. Such a perspective moves away from the centre – a court's ruling – to explore how interested actors view it, decipher and enact its perceived messages. McCann argues that there is nothing either inherently conservative or socially emancipatory in law and rights' claiming; whether and in what way these matter for reform, depends on the context in which the social and political struggle takes place, and of which the legal action and the court's decision form a part.²³ From such a decentred perspective, socio-legal research has shifted the terrain of inquiry away from the direct, policy-related effects of courts, to probe into their indirect and constitutive effects. It builds upon the socio-legal notion of law as primarily a cultural institution that forms and transforms via the meanings that people attach to it. Through its lens, law and rights are primarily understood as discursive logics, and as traditions of knowledge that shape the normative frames through which individual and collective actors conceptualise and seek to address social problems.²⁴

In an early formulation of the constitutive perspective of law and rights, Marc Galanter's seminal contribution referred to 'the radiating effects of courts'.²⁵ Galanter proposed a consideration of the *centrifugal* flow of influence outward from courts and into the wider world.²⁶ From this perspective, the principal contribution of courts to dispute resolution is the provision of a background of norms and procedures against which

²⁰ Dia Anagnostou and Evangelia Psychogiopoulou, 'Under what conditions do national authorities implement the ECtHR's rulings?', in Dia Anagnostou (ed.), *The European Court of Human Rights – Implementing Strasbourg's Judgments on Domestic Policy* (Edinburgh: Edinburgh University Press, 2013), 143-165.

²¹ Lisa Conant, *Justice Contained* (Ithaca: Cornell University Press, 2002). See also Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart Publishing, 2008), 96-100.

²² Michael McCann, 'Law and Social Movements', in Austin Sarat (ed.) *The Blackwell Companion to Law and Society* (Oxford: Blackwell, 2004), 507.

²³ Michael McCann, 'Law and Social Movements: Contemporary Perspectives', *Annual Review of Law and Social Science*, Vol. 2 (2006), 17-38, at 19.

²⁴ Michael McCann, *Rights At Work - Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994). See also the debate with Rosenberg, in Gerald Rosenberg, 'Hollow Hopes and Other Aspirations: A Reply to Feely and McCann', *Law and Social Inquiry*, Vol. 17, No. 4, (1992), 761-778.

²⁵ Galanter, 'The Radiating Effects of Courts', 117-142.

²⁶ *ibid* 119.

negotiations and regulation take place in both private and governmental settings.²⁷ '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)'.²⁸ Courts of course 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.

While Galanter's 'radiating effects' refer to judicially pronounced norms that exert influence both in the public sphere and in private relations, other scholars have explored the indirect effects of law and courts specifically in terms of developing a 'politics of rights'.²⁹ A politics of rights develops, for example, when marginalised groups capitalise on *perceptions* of entitlement associated with particular legal norms in order to initiate social mobilisation. Even though law and rights are neither necessary nor indispensable resources for social movement activism, they can potentially transform the tactical landscape in favour of the latter. Pay equity legal action in the 1980s in the USA has been studied by McCann as such a case. The relevant federal and state court decisions, when victorious, signalled to activists that they may have a powerful ally in courts, but they also helped dramatize social injustices even when the rulings did not vindicate pay equity advocates. Equally importantly, activists appropriated the language of rights to name and interpret gender inequalities at work in new and more compelling terms, cultivating rights awareness among a broader circle of constituents and allies.³⁰

In sum, legal norms and judicial rulings may have various less conspicuous but nonetheless important constitutive effects: they can alter both the context of social struggles, as well as the strategies and identities of social actors. Their variable and multifaceted effects that go well beyond policy change and elude the control of the state and government institutions. Court decisions can recast the contours of public debates on an issue by imparting legitimacy on, or enhancing the salience of particular kinds of rights claims. They can influence the discursive frames of social movement actors, reconstruct their interests, and at times empower them. At the same time, they can provoke reactionary mobilization to curtail rights' advancements, as it has often been the case in legal action related to religion and religious freedom. In these variable and contradictory ways, courts can contribute to the emergence, growth or decline of social movements, not only of progressive but also of conservative ones.³¹ Such largely unintended and often contradictory indirect effects are amongst the least studied aspects of law and social change. In fact, as scholars suggest, activists often use litigation and seek court rulings "more for their secondary consequences such as changing people's perceptions about a stigmatised social group or situation".³²

²⁷ id 121.

²⁸ Galanter, 'The Radiating Effects of Courts', 126.

²⁹ Stuart A. Scheingold, *The Politics of Rights – Lawyers, public policy, and political change*, 2nd edition (Ann Arbor: University of Michigan Press, 2004).

³⁰ Michael McCann, *Rights at Work – Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994), 89, 136-7.

³¹ Michael McCann, 'Law and Social Movements: Contemporary Perspectives', *Annual Review of Law and Social Science*, Vol. 2 (2006), 17-38.

³² Lauren B. Edelman, Gwendolyn Leachman and Doug McAdam, 'On Law, Organizations and Social Movements', *Annual Review of Law and Social Science*, Vol. 6 (2010), 653-685, at 664.

Viewing law and rights as primarily a cultural institution, to which people in particular situations appeal to construct meaning and to negotiate disputes, entails a loud cry for contextualisation of any study of the radiating effects of the courts. In the 'shadow' of European Court of Human Rights religious freedoms cases, judicial enunciations of human rights supply standards and the setting for negotiations and conflicts among the multiplicity of religious, social and state actors active in the field of religion. The nature, extent, and results of the dynamics that emerge are critical to an understanding of the fuller impact of the Court on religious pluralism, which cannot be limitedly focused on implementation or *non*-implementation of its decisions. Instead, this study takes a national and local case-study based approach to the impact of the European Court of Human Rights religious freedoms case law on religious pluralism at the grassroots level. Through qualitative empirical research it asks the following questions: Do local and national-level social actors know and pay attention to relevant ECtHR judgments, and how do they perceive them? How do they change (if they do change) their views and understand their goal and mission in the aftermath of and in response to a Court's judgment? What kinds of strategies do they employ, and do their strategies change in response to ECtHR's judgments? If yes, why so?

Answers to such questions will impart valuable insight into the radiating indirect effects of the Court's case law, and thus also on the Court's impact, or lack thereof (as the case may be) on religious pluralism at the grassroots level. Consideration of the latter requires at least a brief overview of the types of cases that may impact upon religious pluralism at the grassroots level.

2. Religion-related case law in the European Court of Human Rights: a tailored approach

As noted above, religion and religious freedom form a particularly fruitful focus for study of the Court's indirect effects. The Court has radically changed the context for religious pluralism in Europe (and beyond) through its handling of a large number of issues which are central to the concerns of religious minorities and majorities, but also of many secularist and humanist groups. Increasingly, and especially through certain high-profile cases such as *Lautsi v. Italy*, *Eweida et. al v. UK*, and *S.A.S. v France*, the messages communicated by the Court relating to religion are drawing the attention of various groups of social actors with vested interests in the Court's handling of religion-related cases.³³ This attention forms the basis for potential social and legal mobilisations around European Court of Human Rights case law.

The ECtHR's 'active' engagement with freedom of religion emerged late – forty years after the Court's establishment – with the watershed case of *Kokkinakis vs. Greece*, in 1993, with which it issued its first conviction in this field. It was in *Kokkinakis* that the Court first elaborated the notion of pluralism as central to the flourishing of democracy:

As enshrined in Article 9 (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

³³ See Cichowski, 'Civil Society and the European Court of Human Rights' and Fokas, 'Directions in religious pluralism in Europe'.

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.

The Court has built on this foundation in significant ways in the years since *Kokkinakis* and its broader engagement with religion has grown increasingly diverse.³⁴ Well beyond judgments in which the Court reviews disputes in relation to Article 9 of the Convention (on Freedom of Thought, Conscience and Religion), the Court's religion-related case law also encompasses disputes which invoke a variety of other provisions that have a bearing on religious freedom, including Article 10 on Freedom of Expression; Article 11 on Freedom of Assembly and Association; Article 14 on Prohibition of Discrimination; and Articles 1 and 2 of the first Protocol, on Property and Education, respectively. Over time the case law has evolved from addressing more 'classic concerns' around religion stemming from protection of or respect for majority religion through issues such as church tax (*Darby v. Sweden*, 1990), blasphemy (*Otto-Preminger v. Austria*, 1994), and religious education (*Folgero v. Norway*, 2007), to an increasing trend to include issues such as bioethics (e.g., abortion, *ABC v. Ireland*, 2010), limitations on religious symbols in public spaces (*Lautsi v. Italy*, 2011), social ethics (e.g., civil partnership, *Vallianatos v. Greece*, 2013), and religious dress in public spaces (*S.A.S. v. France*, 2014).

The Court's religion-related case law bears special relevance for the countries examined in the Grassrootsmobilise research programme. In all the cases of Greece, Romania, Italy and Turkey, religion is socially, culturally and politically significant, and the stakes are perceived by a broad range of religious, social and political actors to be relatively high in relation to ECtHR religious judgements on religion. In each of these countries, a strong relationship between religion and national identity, and church and state (whether 'positive', in the cases of Greece, Romania and Italy, or 'negative', as in the case of Turkey) renders highly salient the Court's pronouncements that bear the potential to influence the public place of religion.

At the heart of the Strasbourg Court's religion-related case law are what Hunter-Henin describes as "tensions between a systemic approach, sensitive to States' heritages and legal frameworks, and an individual approach, more attuned to individual rights and beliefs".³⁵ The ultimate resolution of such tensions carries broad-ranging implications for religious and ideological majorities and minorities, whether these are operating in overarching secularist environments or, alternatively, in contexts with differing levels of established religion.³⁶ As Evans and Thomas (2006: 706) note, the ECtHR has held that establishment of religion is not in itself a breach of the Convention but is only prohibited to the extent that it implicates one of the other Convention rights, and this is the case for at least three reasons. First, the

³⁴ Between 1959-2014, the ECtHR issued judgments finding a violation of Article 9 ECHR only in 59 cases, which is strikingly small in comparison to violations of related Convention provisions such as Articles 8, 10 and 11 ECHR. See http://www.echr.coe.int/Documents/Stats_violation_1959_2014_ENG.pdf. See also Lourdes Peroni, 'The ECtHR and Intra-Group Religious Diversity: A Critical Review', *Chicago Kent Law Review*, Vol. 89, No. 2 (January 2014), 663-687, at 664.

³⁵ Myriam Hunter-Henin, 'Introduction. Religious Freedoms in European Schools: Contrasts and Convergence', in ed. Myriam Hunter-Henin, *Law, Religious Freedoms and Education in Europe* (Farnham, Surrey: Ashgate, 2012), 1-33, at 4.

³⁶ Establishment of religion entails state official recognition and support of a particular religious institution as a national institution.

Convention does not mention establishment and takes no explicit position on whether or not it should be permitted. Second, at the time the ECHR was drafted, a number of member states had established churches, including the UK, Sweden, and Norway; prohibition of establishment could have threatened the Convention's ratification. Third, the Court 'is not convinced that all forms of establishment are necessarily incompatible with the right set out in the ECHR'.³⁷ Still, establishment or significant privileging of a majority faith have many times been on trial in the Court. For example, in *Grandrath v. Germany* (1964), Mr. Grandrath, a minister of Jehovah's Witnesses, was a "total objector", seeking to be exempted both from military and from civilian service, an exemption allowed to Roman Catholic and Protestant ministers but not to Jehovah's Witnesses. Similarly, in *Darby v. Sweden* (1990) the applicant, a Finnish citizen of British origin, complained about the mandatory payment of a church tax benefiting the Church of Sweden.

Such privileging of a majority faith is highly relevant in the Greek, Romanian and Italian contexts, and evinced also in ECtHR case law against these states. In *Kokkinakis v. Greece* (1993), '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 but rather only reprimanded the Greek state for its disproportionate to a legitimate aim implementation of the ban.³⁸ 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, encompassing the right to decide whether or not to recognise trade unions that operate within religious communities and pursue aims that might hinder the exercise of such communities' autonomy' (para 171). 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.

Meanwhile in the Turkish case, we find a parallel privileging of state-promoted secularism.³⁹ In *Sahin v. Turkey*, 'the Court considers [the] notion of secularism [defended by the Turkish government] 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

³⁷ Carolyn Evans and Christopher Thomas, 'Church-State Relations in the European Court of Human Rights', *Brigham Young University Law Review*, Vol. 2006, No. 3 (2006), 699-725.

³⁸ 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 Greek military dictatorship under general Metaxas), as prescribed by law (para.41), with in 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 Nikos Alivizatos, 'A new role for the Greek Church?', *Journal of Modern Greek Studies*, Vol. 17, No. 1 (1999) 23-40.

³⁹ Natan Lerner, 'How wide the margin of appreciation? The Turkish headscarf case, the Strasbourg Court, and secularist tolerance', *Willamette Journal of International Law and Dispute Resolution*, Vol. 13, No. 1 (2005), 65-85.

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).⁴⁰

As suggested in the *Sahin* case, the Court has also sought to uphold a standard of state secularism and neutrality that are seen to be central to European identity and democracy.⁴¹ In spite of this, it has affirmed the legitimacy of national traditions and state-religion arrangements, even if they do not quite conform to a clear standard of neutrality. For example, while the Court has defended a tradition of state neutrality in the public sphere in countries like France and Germany, which bar Muslims from wearing a headscarf or other religious attire in certain public spaces (or in all public spaces, as in the case of the French burqa ban), it has also accepted a national tradition that prescribes the display of religious symbols of the majority in public places, as in the final judgment of the *Lautsi* case. In this regard, it can invoke the principle of the margin of appreciation that states enjoy, and refrain from scrutinizing the entrenched and variable national traditions shaping relations between religion and the state across European countries. Specifically in regard to the ECtHR's unwillingness to accept symbols of Islam in public space, critical analyses have questioned whether in fact the ECtHR case law defends particular normative values in religious affairs.⁴²

All of the above forms the backdrop against which social and legal mobilisations around European Court of Human Rights case law may occur. Mobilisations around the *Lautsi* case were particularly conspicuous, not least in the unprecedented number of third party interventions in the case.⁴³ Less conspicuously though, as the Court's case law has grown far more diverse so that the scope of 'religion-related' jurisprudence is intensively diversified, the case law finds its way into the discourses, identities and strategies of a very wide array of addressees and interested stakeholders – social and state actors – situated in different countries. The effects of the case law may also reverberate over different time periods: as Mary Ziegler argues in relation to abortion politics in the aftermath of *Roe v. Wade*, ideological entrenchments around certain issues may develop long after the cases they have as reference points.⁴⁴ Achieving insight into the various ways in which the Court's

⁴⁰ 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).

⁴¹ 'State neutrality' is far from a neutral term, drawing a great deal of controversy around it. See for example José Casanova, 'Religion, European secular identities and European integration', in Michalski Krzysztof (ed.), *Religion in the New Europe* (Budapest: Central European University Press, 2006), 23–42. For extensive discussions of the term see Marie-Claire Foblets, Katayoun Alidadi, Jørgen S. Nielsen and Zeynep Yanasmayan, *Belief, Law and Politics* (Farnham, Surrey: Ashgate, 2014); see also Effie Fokas, 'Sociology at the intersection between law and religion', in Silvio Ferrari (ed.), *Routledge Handbook of Law and Religion* (Abingdon: Routledge, 2015), 59–74, at 62–64.

⁴² Haldun Gulalp, 'Secularism and the European Court of Human Rights', *European Public Law*, Vol. 16, No. 3 (2010), 455–471; see also Julie Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?', in Lorenzo Zucca and Camil Ungureanu (eds.), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge: Cambridge University Press, 2012), 283–306, and W. Cole Durham, Rik Torfs, David M. Kirkham and Christine Scott (eds.), *Islam, Europe and Emerging Legal Issues*, (Farnham, Surrey: Ashgate, 2013).

⁴³ Fokas, 'Directions in religious pluralism in Europe'.

⁴⁴ Mary Ziegler, 'Beyond Backlash: Legal History, Polarization, and *Roe v. Wade*', *Washington and Lee Law Review*, Vol. 71, No. 2 (2014), 969–1021. Meanwhile, the effects of the case law may also reverberate with greater or lesser degrees of accuracy; this point is supported by evidence of *Lautsi* after-effects in the Greek case, where long after the 'resolution' of the issue in the Grand Chamber, Greek clerics continue to wage discursive campaigns

jurisprudence is reflected in the discourses, identities and strategies of social actors is a significant aim in and of itself. Such insight may also be necessary for a fuller understanding of legal mobilisations that occur in the aftermath of ECtHR religion-related case law.

3. The discourses, identities and strategies of social actors

Religious and social actors decide to pursue particular kinds of legal or political, domestic or international action, independently or in alliance with state actors, because they perceive a particular course of action to be essential and appropriate, or conversely irrelevant or unavailable.⁴⁵ Their perceptions of the legal and political environment are closely linked to their prevailing discursive frames and their organisation's identity. Changing discourses and identities are central in explaining why an organisation or group resorts to legal action, and or to a particular amalgam of legal and political strategies.⁴⁶ This is particularly essential for religious actors, for whom involvement in any form of public engagement may not cohere with religious convictions and a religious way of life. As Krishnan and den Dulk argue based on the experience of religious groups mobilizing in the USA, changing attitudes and normative orientations towards the law and its potential implications were instrumental in the decision of religious organizations in the USA to use courts to pursue their policy goals.⁴⁷

Shifting patterns of discourse, identity formation and strategy building can be observed at two levels: at the level of a social-religious movement organisation (SRMO), and/or at the level of a broader constellation of organisations and professional groups (i.e. academics, lawyers) that are active in a particular issue area and constitute a social movement field. By influencing the perceptions, identities and discourses of an SMO, court decisions can impact on a) the level of organisational momentum, b) the kinds of strategies that they pursue, and c) the forms of networking and alliances that they may forge with other individual and collective actors.

Contrary to how it is sometimes depicted, a social movement is not a coherent and unified entity. Instead, it may be comprised of organisations and other loosely associated actors who are not necessarily in agreement with each other in how they view the main issues of the movement, their priorities and their proposals on how to tackle the problems at stake, or the kinds of strategies that should be pursued.⁴⁸ It is important to recognise the internal diversity and to differentiate among the various actors in a social movement field.⁴⁹ Likewise, the field of religion-related mobilization comprises a highly pluralistic and diverse array of

against the threat to religious symbols represented by the ECtHR. See Makis Adamopoulos, 'Values can't be bought; they require struggle and sacrifice', emphasised the Archbishop from Argos', *Ecclesia.gr*, 3 May 2015. See also Fr. Demetrios Bathrellos, 'Christians in times of (post-) secularisation', to be published as part of a monograph by the same author in 2016 by En Plo, Athens.

⁴⁵ For instance, this perspective is advanced in the study on legal mobilisation of disability rights by Lisa Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (Cambridge: Cambridge University Press, 2011).

⁴⁶ Lisa Vanhala, *Making Rights a Reality?*

⁴⁷ Jayanth K. Krishnan, and Kevin R. den Dulk, 'So Help Me God: A Comparative Study of Religious Group Litigation', *Georgia Journal of International and Comparative Law*, Vol. 30, No. 2 (2002), 233-275, at 233.

⁴⁸ Lauren B. Edelman, Gwendolyn Leachman and Doug McAdam, 'On Law, Organizations and Social Movements', 669.

⁴⁹ William A. Gamson and David S. Meyer, 'Framing Political Opportunity', in Doug McAdam, John McCarthy and Mayer Zald (eds.) *Comparative Perspectives on Social Movements: Political Opportunity, Mobilizing Structures, and Cultural Framing*, (Cambridge: Cambridge University Press, 1996), 275-290, at 283.

actors, who are relevant to this study. These include religious minority actors; religious majority actors; representatives of secular, religious, and other ideological NGOs; 'cause lawyers' representing religious freedoms cases; and state representatives dealing with religious freedoms issues.

Judicial rulings can have significant indirect effects on the perceptions and identities of religious and social actors: they may be invoked by different organizations seeking to carve a distinct identity in a competitive and highly diverse social movement field. NeJaime argues that court losses may allow an organisation to carve out a distinct niche and identity within a competitive social movement environment. An organisation may take up issues that are not favored by the large and well-established SMOs in the field; it can appear as daring to stand up and defend a legal cause that courts are not (yet) willing to accept, articulating a "vision of justice unachievable in the present" but which may be attained in the future by a more enlightened court.⁵⁰

In understanding the formation and change of the perceptions and discourses of SRMOs, an analytically useful notion is that of framing. Framing refers to the contentious processes in which meanings and ideas are both debated and contested, but also negotiated and produced.⁵¹ Social movement activists extensively engage in the construction of collective action frames; the product is "action-oriented sets of beliefs and meanings that inspire and legitimate the activities and campaigns of a social movement organisation".⁵² Framing takes place through contestation as individuals and groups are called to navigate amidst contradictory conceptions and worldviews – "sets of ideas that help groups explain, evaluate, and engage the social and political world", and which may encourage or discourage legal advocacy and resort to courts.⁵³

Being sufficiently flexible, inclusive and broad in interpretive scope and cultural resonance, human rights can be seen to function as a 'master frame' in Europe but also globally. It has spread across many countries, and in a wide variety of issues and situations which were not originally seen to be fundamental human rights but which may be increasingly cast through such a lens. Over the past twenty to twenty five years, an increasing number of activists and lawyers in Europe have actively engaged in articulating and constructing rights claims on behalf of various religious and ethnic minorities, secularists and atheists, migrants and refugees, among others, by invoking human rights principles.⁵⁴ They have been engaging in 'frame bridging', namely, the linking of two or more ideologically congruent but structurally unconnected frames regarding a particular issue or problem.⁵⁵ The interpretations and ideas contained in the ECtHR's decisions and judgments can be seen to significantly influence such framing processes, bolstering or weakening the connection between human rights and religious groups or ethnic minority claims.

⁵⁰ Jules Lobel, *Success without Victory, Lost Legal Battles and the Long Road to Justice in America* (New York: New York University, 2004), 123; quoted in Douglas NeJaime, 'Winning Through Losing', *Iowa Law Review*, Vol. 96, No. 3 (2011), 977.

⁵¹ For an overview of a sizeable social movement scholarship on framing, see Robert D. Benford and David Snow, 'Framing Processes and Social Movements: An Overview and Assessment', *Annual Review of Sociology*, Vol. 26 (2000), 611-639.

⁵² Benford and Snow, 'Framing Processes and Social Movements', 614.

⁵³ Krishnan and Den Dulk, 'So help me God', 246.

⁵⁴ See Dia Anagnostou, *Human Rights Law and Activism on behalf of the Disadvantaged: Minorities and Immigrants in the Strasbourg Court*, unpublished book manuscript.

⁵⁵ Benford and Snow, 'Framing Processes and Social Movements', 624.

Framing social and religious issues as human rights issues has often been quite effective and empowering for movement mobilisation.⁵⁶ Relevant ECtHR judgments that promote religious pluralism can be drawn upon by disadvantaged social actors to place new issues on the agenda of religious freedom (agenda setting), and also to raise their consciousness: they may invoke human rights in order to 'name' and to challenge existing social wrongs or injustices.⁵⁷ In another context of pay equity reform in the USA, successful lawsuits sparked and were supplemented by local organising efforts, which provided crucial impetus for collective action.⁵⁸ But a judicial defeat may also allow SMOs and litigators to raise consciousness among and mobilise constituents and to dramatise social injustices in the face of judicial resistance and rejection. The judicial denial of a claim may raise awareness by triggering more aggressive organization, advocacy and direct action by highlighting more intensely the injustice suffered by the group, and the courts' ineffectiveness in redeeming it.⁵⁹ It must be noted that legal advocacy and court decisions are "... less likely to bring together isolated individuals than to transform, active and unite citizens already integrated into some form of common group activity or allegiance".⁶⁰

Framing issues and grievances as human rights is significant because it opens up the potential for creating new alliances and transforming social institutions such as religion.⁶¹ For instance, new alliances become possible when the right to practice one's minority religion is seen as significant not only by minorities but also for larger groups of citizens and for majorities who defend religious pluralism as a key component of democracy. If human rights can meaningfully and obviously be construed to advance liberal, rights-expansive claims on behalf of disadvantaged groups, such 'bridging' is far from self-evident when it comes to established and privileged religious actors. Whether they challenge or uphold the views, convictions and interests of particular faiths, court judgments also influence and potentially alter the discourse, views and strategies of status quo religious actors. Conservative religious actors in the USA appropriated the language of rights but they reframed their arguments to reflect an alternative understanding of equality itself – in the process constructing a 'competing' myth of rights.⁶² In large part, they did so in response to Supreme Court decisions that expanded rights for minorities and upheld abortion rights in the 1970s but also earlier. These decisions heightened concern among Catholics and Evangelicals with what they perceived as the ascendancy of secular humanism and the moral decay of the broader culture.⁶³

⁵⁶ Michael McCann, 'Law and Social Movements: Contemporary Perspectives', *Annual Review of Law and Social Sciences*, Vol. 2 (2006) 17–38, at 28.

⁵⁷ On rights consciousness raising, see Michael McCann, 'Law and Social Movements', in *Blackwell Companion to Law and Society*, 511.

⁵⁸ McCann, *Rights at Work*, 68.

⁵⁹ Douglas NeJaime, 'Winning Through Losing', *Iowa Law Review*, Vol. 96, No. 3 (2011), 941-1012, at 984.

⁶⁰ McCann, *Rights at Work*, 111.

⁶¹ David W. Maciacek and Adrienne Fulco, 'The Courts and Public Discourse: The Case of Gay Marriage', *Journal of Church and State*, Vol. 46 (2004), 767-785, at 785.

⁶² Kevin R. Den Dulk, 'In Legal Culture, but Not of It: The Role of Cause Lawyers in Evangelical Legal Mobilization', in Austin Sarat and Stuart A. Scheingold (eds.), *Cause Lawyers and Social Movements*, (Stanford: Stanford University Press, 2006), 197-219, at 200.

⁶³ Krishnan and Den Dulk, 'So help me God', 253; Dennis R. Hoover and Kevin R. Den Dulk, 'Christian Conservatives Go to Court: Religion and Legal Mobilization in the United States and Canada', *International Political Science Review*, Vol. 25, No. 1, 9-34, at 18.

In sum, an important unintended effect of US Supreme Court decisions promoting pluralism and religious freedom was that they prompted conservative religious actors to engage the law. They began to use the courts and the language of rights in order to defend their rights and values, and to curtail liberal advancements.⁶⁴ Against secular and egalitarian adversaries who supported separation of religion from state and equal acceptance and recognition of all faiths, religious conservatives argued that they value of equality demanded greater state accommodation of religion in public life.⁶⁵ Norms such as religious freedom and equality, among others, were appropriated to advance a conservative agenda invoking morality and a religious way of life. In developing active legal and political strategies, religious conservatives had to overcome their profound ambivalence about actively engaging in political and social life. Significantly, the legal activism of Catholics and Evangelicals helped shape a highly active movement and powerfully injected religion into US politics.

The case of religion-related legal mobilization in the USA is instructive in helping us conjecture the kind of dynamics that law and courts may unleash among religious actors. Even though most of the initial religion-related cases in the ECtHR have raised claims on behalf of minority groups whose religious freedom was allegedly and variably restricted by states, they subsequently expanded and diversified. Human rights have also been invoked in the Strasbourg Court by minority groups within dominant religions, by secularists, atheists, or by individuals from majority religions alleging discrimination in expressing their faith. Such diversification of religion-related claims in the ECtHR may suggest that one of the unintended and indirect effects of its judgments may have been to instill human rights discourse into a variety of liberal, progressive, or conservative and reactionary religion-related mobilization, in judicial and/or political arenas.

Strasbourg Court judgments may spark action on behalf of disadvantaged minorities and egalitarian rights claims, but they may also prompt reaction and counter-mobilization on the part of status-quo religious actors whose privileges may be questioned. Social actors may draw on ECtHR legal discourses to preserve the status quo (e.g., in the case of religious majorities which may use case law to *maintain* what other groups might consider 'existing social wrongs and injustices'). They may seek to uphold national and state traditions against European-wide standards of religious freedom enunciated by the Strasbourg Court (counter-mobilizing to restrict rights established by law and/or courts).⁶⁶ Do established religious groups or majorities view themselves as members of a disadvantaged constituency? Do they use human rights to frame their views, positions and strategies, or do they invoke alternative and competing values of tradition, nation and religious morality?

A number of further empirical questions can be raised: have religion and religious pluralism gained greater public attention in the aftermath of ECtHR decisions? How, if at all, do the decisions factor into the articulation of religious rights (whether of the majority or of minority faiths or other groups) and strategies developed for pursuing individual and group goals? To what extent do ECtHR judgments on religious freedom prompt activism on behalf

⁶⁴ See Kevin R. Den Dulk, 'In Legal Culture, but Not of It: The Role of Cause Lawyers in Evangelical Legal Mobilization', in Austin Sarat and Stuart A. Scheingold (eds.), *Cause Lawyers and Social Movements*, (Stanford: Stanford University Press, 2006), 197-219.

⁶⁵ Den Dulk, 'In Legal Culture, but Not of It', 205

⁶⁶ For instance, this has been clearly the case in the USA and in Canada. See Dennis R. Hoover and Kevin R. den Dulk, 'Christian Conservatives Go to Court: Religion and Legal Mobilization in the United States and Canada', *International Political Science Review*, Vol. 25, No. 1 (2004), 9-34, at 11.

of minorities, or alternatively trigger social mobilisation to defend and uphold national and state traditions related to religion (or secularism, as the case may be)? In the aftermath of ECtHR judgments, do shifting interests and identities of religious actors and their constituents become more organised and concerted? Have religious and social actors gained, or lost, leverage as a result of the judgements? In a final assessment, do ECtHR judgments promote the mobilization and empowerment of liberal and pluralist religious and social actors? Or do they conversely prompt reactionary and conservative religion-related activism and politics? In addressing all of these questions, it is important to determine the national legal-political context in which religious actors operate.

4. Legal-political context and opportunities for mobilization

Relations between religion and the state are shaped by deeply ingrained and highly diverse traditions across countries, where there is often a dominant or official religion; by degrees of tolerance for minority faiths; and by the presence or accommodation of religion in public life, among other factors.⁶⁷ Such religion-specific variables alongside broader structures of political representation and participation domestically shape the opportunities and constraints that different religious actors face in mobilizing to promote their views and ideas, as well as to press their claims. Existing constitutional provisions, laws and policies may privilege one official or state religion of the majority at the expense of other faiths or of secular and atheist groups. While majority religions may be able to access and influence decision-makers, non-majority religious actors and minorities may be faced with variable restrictions in regard to their recognition, operation and ability to influence decision-makers. National courts may be more or less receptive to equality claims from different religious groups. In tandem with broader legal characteristics that define access to courts and rules of standing, normative parameters may create incentives or disincentives for the different groups to claim rights through litigation.

The nature and degree of opportunities available for collective action can first be defined in reference to the *structural* features of a political or the legal system or it can be conceived to encompass both as components of an integrated structure. Opportunity for collective action refers to the relatively stable set of rules, institutions and legal norms that shape how closed or open a legal or a political system is to the participation and influence of particular groups and social actors. A broader notion of opportunities for (or constraints to) collective action though must also take into account *contingent* and more volatile factors that enhance or restrict the possibilities for social or religious groups to mobilize, such as the receptivity of elites, as well as established patterns of political conflict or alliance.⁶⁸ Judicial decisions can have effects external to social movement actors and organisations; these are the “effects that advocates cultivate in relation to non-movement actors, including both state actors and the general public” in the aftermath of a judicial victory or even defeat.⁶⁹ Finally, legal and political opportunities (LPO) are present at the national level but they can

⁶⁷ James T. Richardson, ‘Managing Religion and the Judicialization of Religious Freedom’, *Journal for the Scientific Study of Religion*, Vol. 54, No. 1 (2015), 1-19.

⁶⁸ Chris Hilson, ‘New social movements: the role of legal opportunity’, *Journal of European Public Policy*, Vol. 9, No. 2 (April 2002), 238-255, at 242.

⁶⁹ NeJaime, ‘Winning Through Losing’, 988.

extend beyond it, and encompass access to and potential to influence judicial or political arenas at other levels of government – the federal, the supranational or the international.

The normative content of ECtHR judgments may influence the structure of opportunities (SO) and thus the mobilization strategies of different sets of religious actors. ECtHR judgments may alter the legal stock of rules and precedents around religious freedom issues and prompt shifts in the approaches of national judges, and in domestic case law. In this way, they can provide new or complementary resources to activists to articulate their grievances and make claims in national, European or international judicial bodies. In response to ECtHR decisions, national courts and judges tend to adjust their approaches and interpretations incrementally, interpreting international norms creatively in response to follow-up domestic litigation.⁷⁰

An overall trend is noted in courts across different European countries and in the ECtHR, to grant greater recognition to religious pluralism and the rights of minority faiths.⁷¹ Such a shift in case law can be seen to alter the legal opportunities by making existing legal stock more favorable and responsive to the religious claims of minorities, possibly leading them to redefine the amalgam of legal, social and political tactics that they employ. In another context, Riddell shows how the legal victories of the French-speaking communities in Canadian courts in the 1980s expanded the deployment of legal strategies to mobilise in the political system, to draw legitimacy for their claims, and to overcome opposition to minority language education.⁷²

Court decisions may prompt social or religious organizations to partly shift their mobilization efforts to other levels of law and government where conditions are more propitious. In Europe, since the 1970s the decisions of the European Court of Justice (now Court of Justice of the European Union) expanded substantive and procedural rights. In this way, they opened up opportunities for social activists in gender equality and environmental protection across different Member States. These advocates invoked them before courts and in social activism in order to push for more rights and greater space for public participation at the EU level.⁷³ Alternatively, in the wake of a judicial loss or victory, advocates may shift their energy and efforts into other venues, either across levels of government (i.e. from courts in the federal to state level or vice-versa), and/or across different branches of government (i.e. from courts to legislative and executive officials). In the USA, the rejection of the Supreme Court to rule against sodomy laws in the *Bowers* case led LGBT organisations to turn to courts at the state level where they actively pursued their legal struggles. State courts recognized a wider right to privacy than what was available under the US Constitution.⁷⁴ At the same time, a loss in court may prompt activists and advocates to shift the battle out of courts altogether and into public opinion.

⁷⁰ Nancy Maveety and Anke Grosskopf, "'Constrained" Constitutional Courts as Conduits for Democratic Consolidation', *Law and Society Review*, Vol. 38, No. 3 (2004), 463-488.

⁷¹ Richardson, 'Managing Religion and the Judicialization of Religious Freedom', 5.

⁷² Troy Riddell, 'The Impact of Legal Mobilization and Judicial Decisions: The Case of Official Minority-Language Education Policy in Canada for Francophones Outside Quebec', *Law and Society Review*, Vol. 38, No. 3 (2004), 583-610.

⁷³ Rachel A. Cichowski, *The European Court and Civil Society – Litigation, Mobilization and Governance* (Cambridge: Cambridge University Press, 2007).

⁷⁴ NeJaime, 'Winning Through Losing', 991-992.

International legal norms and court decisions can potentially form the basis for forging collaborations and endorsing common causes together with other social and religious actors across state borders.⁷⁵ Considering the geographic and cultural barriers that exist, the difficulties of forging collective interests and identities at the transnational level are far greater than at the national level. Yet, as Kay shows in the case of the North American Free Trade Agreement (NAFTA), the set of labour rights that it guaranteed arguably provided a nexus for developing common interests and identities among trade union activists across the participating countries. It did so by establishing a legal redress mechanism that required cross-national collaboration and by providing a common transnational arena for adjudication and enforcement across states. In these ways, international law helped build a transnational labour movement in North America.⁷⁶

From the above perspective, the ECtHR decisions and judgments can be seen to contribute to the (trans)formation of transnational networks around different issue areas. As we saw in the case of *Lautsi*, but also in cases related to Jehovah's Witnesses (JWs), legal recourse in the ECtHR often involves the mobilisation and participation of a variety of actors such as nationally-based JW organisations, organisations working on religious freedom issues more broadly, public law organisations acting as third party interveners, and academic experts, among others. We may hypothesise that ECtHR judgments promote the creation of new or contribute to the buttressing of formerly existing transnational advocacy networks. These are loosely or more densely associated non-governmental actors motivated primarily by shared principled ideas and values employing "strategies aimed to use information and beliefs to motivate political action and to use leverage to gain the support of more powerful institutions".⁷⁷ Transnational advocacy networks are significant because they multiply the channels of access to the international system and they also make international resources available to new actors in domestic political and social struggles.⁷⁸

How do ECtHR judgments influence legal opportunities for religious actors in different countries, and do they alter established alliances between elites, as well as the leverage that less advantaged religious actors have? Furthermore, do Strasbourg Court judgments open up opportunities for transnational collaboration, and the development of activism at different levels of government?

5. A research agenda

As elaborated above, jurisprudential shifts and the related changes in the structural power of various religious actors to access, leverage and influence a legal and political system do not alone shape the patterns of mobilization, demobilization or counter-mobilization of religious actors. How social actors are likely to react and respond to court decisions, whether victorious or not, and whether and how they change their mobilization strategies is impossible to infer at the outset. As one factor – among many others – affecting legal and political opportunities,

⁷⁵ Tamara Kay, 'Legal Transnationalism: The Relationship between Transnational Social Movement Building and International Law', *Law and Social Inquiry*, Vol. 36, No. 2 (Spring 2011), 419–454, at 423.

⁷⁶ Tamara Kay, 'Legal Transnationalism'.

⁷⁷ Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders – Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998), 30.

⁷⁸ Keck and Sikkink, *Activists Beyond Borders*, 1.

court decisions are neither just a resource nor just a constraint for movement building. Their utility in this regard varies depending on the local and national circumstances and the situations in which they are deployed, as well as on how social actors view and interpret them.⁷⁹

This study employs a bottom-up approach that contextualizes court judgments within broader processes of religion-related social mobilization. Such an approach includes attention to the various ways that groups and individuals deploy legal resources – i.e., ECtHR judgements and decisions, including the *language* of those judgements and decisions and the reasoning therein – to wage their campaigns in multiple venues including but also beyond courts. In order to understand why and under what conditions ECtHR judgments can be seized upon as resources to mobilise and empower social and religious actors, we must unravel the local and national conditions and contexts within which they are received and debated, and which may have important similarities or differences across the four country cases. Qualitative in-depth interview research with such actors will yield critical insight into how, why and under what conditions the Court's religious freedom jurisprudence impacts upon grassroots level mobilisations around religion, and upon religious pluralism as seen in action at the grassroots level.

The basic aim of research into mobilisations at the grassroots level is to determine levels of religious, political, legal and NGO awareness of, engagement with and uses of ECtHR religion-related judgements. The Grassrootsmobilise research employs a two-pronged approach to ascertain the impact of the Courts' case law at the grassroots level. First, it explores the extent to which social actors with a vested interest in selected **issue areas** invoke Strasbourg Court judgments, and how they (re)configure their discourses, identities and interests in response to these judgments. Here, the research aims to trace the impact of the Court's religious freedom case law on certain issue-areas/themes identified by the Grassrootsmobilise programme researchers as salient in the given country context. The issue-based research allows a broader sense of what is (or is not) happening on the ground in the shadow of the Court's case law, thus imparting insight into the impact of the case law on religious pluralism more generally.

A wide range of issue-areas addressed by the Court is relevant to this study. As noted above, the relationship between church and state is highly salient in the four countries under study; so too, minority religious rights, religious autonomy, religious education in public schools, the right to manifest one's faith; and, to a lesser degree of salience across all cases, bioethics and life issues (such as abortion, beginning-of-life and end-of-life issues), and family/marriage issues (e.g., civil partnerships, discrimination against same-sex unions/couples, etc.).

In order to ensure a certain degree of comparability across the country cases, two particular issue areas have been chosen for examination across the cases (whilst additional issues particularly relevant to the individual cases will also be examined): these are *religious pluralism in the educational arena*, and *the legal status of religious minorities* (including minority rights to property and places of worship). This selection allows for insights to be drawn on the secular vs. religious dimension of case law impact, in that around both religious education and legal status questions, both religious and secularist actors actively contribute

⁷⁹ McCann, *Rights at Work*, 137.

to the relevant social and political debates. The selection also allows examination of the minority vs. majority dimension in that religious majorities and religious minorities have vested interests and actively engage in social and political struggles around both the teaching of majority religion in public schools (and rights to exemption for minority groups) and the rights to religious minority education in accordance with their own faith, as well as around the rights of minority groups to property and places of worship (with both the latter often impeded by religious majority mobilisations).⁸⁰

Secondly, the research focuses on how **particular ECtHR judgments** influence the structure of opportunities and constraints for mobilisation in different national contexts, but also at the transnational level. It aims to trace the impact on the grassroots level and on grassroots mobilisations in each country of selected ECtHR religious freedom cases arising in each country context. The ECtHR case-based research facilitates the tracing of impact of particular cases where mobilization has occurred on the ground (thus imparting insight into the impact of the case law on mobilisations more specifically).

In terms of the particular ECtHR cases to be studied, one specific case is chosen for each country for in-depth study (though not to the exclusion of other relevant cases), based on salience in each country and conduciveness to examination of mobilisations taking place around particular cases. These are, in the Greek case study, *Vallianatos v. Greece*; in the Romanian case study, *Sindicatul Pastoral v. Romania*, in the Italian case *Costa and Pavan v. Italy*; and in the Turkish case, *CEM Vakfi v. Turkey*.⁸¹ Here too the selection as a whole covers both secular vs. religious dimensions and minority vs. majority dimensions.

Together the two approaches (a focus on issue-areas and a focus on particular ECtHR cases) are well suited to understanding the often *interrelated* indirect effects of case law on movement building and social mobilisation, as well as on changes in the political and legal context of opportunities and resources. Insights into the above will be pursued through in-depth interviews conducted in the four country cases with religious minority actors, religious majority actors, representatives of secular, religious and other ideological NGOs, cause lawyers representing religion-related cases, and state representatives dealing with religious freedoms issues, as well as through careful examination of references to ECtHR case law in local and national level litigation.

The fieldwork conducted in Grassrootsmobilise speaks to a number of questions which help get to the heart of how and the extent to which the European Court of Human Rights impacts upon religious freedom in the European setting. First, who mobilises? To whom are the ECtHR engagements with religion relevant, interesting, important, *accessible*? At the grassroots level this can only be ascertained through qualitative fieldwork on the ground in

⁸⁰ Additional issue-areas proposed for study are conscientious objection in the Turkish case; same-sex unions in the Greek and Italian cases and more generally LGBT-related issues also in the Romanian case; bioethics in the Italian case (beginning of life issue of assisted reproductive technology); and conflicts around religious hierarchies in the Romanian case. Also, since the drafting of this paper the researchers in the project have agreed to conduct a systematic study of references to the ECtHR religious freedom case law, with a focus on our two selected issue-areas and those additional issues mentioned above, in 5 mainline newspapers in the four country case studies. For more information, see www.grassrootsmobilise.eu under 'Research' and 'In the field'.

⁸¹ Since the original drafting of this paper the research team has agreed also to study references to the ECtHR religion-related case law in national high courts; this study will lead to in-depth study of further ECtHR cases in each country case. For more details see www.grassrootsmobilise.eu under 'Research' and 'Before the Courts'.

particular localities.⁸² Second, to what effects? The implications of who mobilises and where are contingent upon a number of factors, including the relative potential impact of different groups of actors.⁸³ Third, what are the main overarching issues that are contested? And do we see changes in these over time? E.g., after *Lautsi*, are issues arising from relationships between religion and national identity less likely to mobilise groups, locally, nationally and transnationally? After *S.A.S. v. France*, are strategic litigators abandoning headscarf cases for other domains of religious discrimination?⁸⁴ Further, what are the fault lines in the Court's case law? For quite some time, and most conspicuously post-*Sahin*, a focal point of criticism of the Court had to do with differential treatment of Islam as a minority faith.⁸⁵ In the present context do the uses of the margin of appreciation form a new fault line? Answers to such questions will yield a more holistic picture than is currently discernable of the impact of the European Court of Human Rights on religious pluralism in Europe.

⁸² At the grassroots level even preliminary research suggests a very complicated picture, geographically and substantively: grassroots actors mobilise around religion in the ECtHR with fluency in their movement between New York, Brussels, Washington D.C., Moscow and London, and the geography of the mobilisations also has some bearing on the content of the mobilisation activity (e.g., evangelical Christians and human rights activists tend to work transatlantically more than other stakeholder groups).

⁸³ Again, based on preliminary research at the grassroots level, the relative weight of intervening governments is significant. Thus for example in 3rd party interventions certainly the overall number of interventions is key, and the content of the arguments, either for or against the state in question, is important; but the participation of governments in the interventions seems to be a more decisive factor.

⁸⁴ 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 (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 judgement'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 (see Eva Brems, 'S.A.S. v France as a problematic precedent', available online at <http://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/> (2014))

⁸⁵ See Jeremy Gunn, 'Religious Symbols in Public Schools: The Islamic Headscarf and the European Court of Human Rights Decision in *Sahin v. Turkey*', in W. Cole Durham, Rik Torfs, David M. Kirkham, and Christine Scott (eds.), *Islam, Europe, and Emerging Legal Issues*, (Farnham, Surrey: Ashgate, 2012), 111-46, and Françoise Tulkens, 'The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism', *Cardozo Law Review*, Vol. 30 No. 6 (2009) 2575-2591. For a quick introduction to criticisms around the Court's handling of Islam in *Sahin* and beyond, see also Effie Fokas, review of *Islam, Europe, and Emerging Legal Issues*, in *Religion, State and Society*, Vol. 42, No.1 (2014) 89-94.