



GREECE

National Courts Study Report

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Background Information on the National Legal Order in Greece

1. Locating the national court(s) studied within the broader national legal order

The Greek Constitution (art. 93 para. 1) establishes two jurisdictions: the administrative and the civil/criminal one. These are organized in three instances: the courts of first instance (lower courts), the courts of appeal (higher, appellate courts) and the Supreme Courts.

Two courts have been studied for this particular stage of the national courts study: the Council of State (CoS or *Simvoulío tis Epikratias*), and a local, administrative court – the Administrative Court of Appeal of Chania. The Council of State¹ is the supreme administrative court of Greece, it rules on all matters of administrative law and its judgments provide the highest authority of legal precedent for the lower administrative courts, while they also set the standards for the interpretation of the Constitution and of national laws for the advancement of legal theory and practice. The Council of State, together with the Court of Cassation and the Court of Audit, constitute the highest courts of the Greek state².

The Council of State is at the head of administrative jurisdiction and is also the Court of first and last instance in some important cases³. It is followed by the Administrative Courts of Appeal, which have jurisdiction upon litigations between the State and civilians (tax cases, social security cases, illegal immigration cases, etc.). In addition, pursuant to Law 702/1977, the competence of Administrative Courts of Appeal has comprised annulment appeals against acts of specific administrative authorities, which are heard on the basis of the procedural provisions of presidential decree 18/1989. Relevant to our case study examined below, in 2001 the competence of Administrative Courts was further extended, amongst others, to the hearing of annulment appeals against individual acts of administrative authorities concerning "the implementation of educational laws on pupils, students, scholars and postgraduate students"⁴.

2. Locating the ECtHR within the broader national legal order

Greece joined the Council of Europe (CoE) on August 9, 1949. It signed the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) on November 28, 1959 and ratified it on November 28, 1974. Article 28 (1) of the 1975 Constitution recognizes to international law and international conventions, including the ECHR, a status above domestic statutes⁵, while the Treaty of Lisbon established the ECHR's superiority over national law, including Constitutional law. Following the (belated) acceptance of the individual right

¹ Council of State: http://www.ste.gr/FL/main_en.htm

² Since there is no Constitutional Court in Greece, all Greek courts are bound to refrain from applying legislation whose content is contrary to the Constitution.

³ The Council of State is, in principle, the judge of excess of power, except in cases where the law renders the Administrative Courts of Appeal (or the Administrative Courts of first instance) competent to judge recourses for excess of power against a specific category of cases. The Administrative Courts are competent, in principle, to judge recourses of full jurisdiction (Vassilis Androulakis, Master of Requests at the Council of State, "Administrative Justice in Europe – Greek Report": http://www.aca-europe.eu/en/eurtour/i/countries/greece/greece_en.pdf)

⁴ Eleni Papadimitriou, Judge of Appeal in Administrative Courts: http://www.adjustice.gr/webcenter/portal/defeteioathEn/judges?_adf.ctrl-state=sqghpsb6g_103&_afLoop=1395279827115035#!

⁵ Though the ECHR has precedence over any contrary legislative act, it does not have primacy over the Greek Constitution.

to petition the ECtHR in 1985, hundreds of individuals from Greece, whose rights were violated or limited by the Greek legal and political system, have filed complaints in the Court in Strasbourg⁶. The ECtHR's judgments are binding for national authorities, which means that both civil and criminal national justice should adapt to the court's jurisprudence.

3. The de facto situation of the status of international jurisprudence (and specifically, that of the ECtHR) at the domestic level

As mentioned above, international law and conventions predominate over domestic statutes. It was not however until the second half of the 1990s that national authorities attempted to more systematically acquaint Greek judges with the ECHR and to disseminate ECtHR case law against Greece. As demonstrated through the findings of the research project JURISTRAS⁷, while references by Greek judges to the ECHR are frequent and usually in conjunction with the human rights provision of the Constitution, legal scholars and prominent members of the Greek judiciary observe lower degrees of acquaintance with the jurisprudence of the ECtHR. Indeed the findings at this stage of the national courts study seem to support the argument of JURISTRAS that "a substantial gap persists between Greek judicial interpretations and the ECtHR jurisprudence even in the decisions of the vanguard Council of State" (13). The same study also notes that Greek judges do not tend to consider compatibility with the Convention on their own motion, but primarily in cases where the litigant expressly refers to it.

This study argues that references to the ECHR in Greek national courts are frequent and are used to demonstrate above all the compatibility of national human rights provisions with international standards. ECtHR case law is referred to generally – though not exclusively – within two contexts: first, when there is the need for the claimants to justify their complaints and, second, in cases where the state seeks to stress its margin of appreciation.

CASES:

Case no1: 115/2012 on Exemption from Religious Education, Chania Administrative Court of Appeal (608167)

Background:

The case concerned the compulsory nature of religious education in Greek public schools and the rules regulating the process of exemption from the class of religion. The specific issue emerged out of the question of *who* is in fact entitled to exemption from this class and specifically of whether this option is available to Orthodox students.

The claimants were a group of nine theologians in charge of teaching religious education (RE) in high schools in Chania, who appealed against the Minister of Education and Religious affairs and the Head of Secondary Education of the Municipality of Chania. The claimants complained that, as a result of a statement submitted by the Union of Teachers of Secondary

⁶ According to the Statistics by State of the ECtHR, Greece had by 2015 an overall number of 881 judgments at the Court: http://www.echr.coe.int/Documents/Stats_violation_1959_2015_ENG.pdf

⁷ Anagnostou and Psychogiopoulou, "Supranational rights litigation, implementation and the domestic impact of Strasbourg Court jurisprudence: A case study of Greece".

Education of Chania (UTSE) to all school directors of Chania in which they argued that exemption from the class of religious education should be available to all students, regardless of their religious belief or conscience (meaning also to Orthodox students), there followed a significant rise in the number of students who asked for exemption.

The claimants then addressed a letter of appeal to the Head of Secondary Education. In their appeal, the claimants argued that one of the responsibilities of the Head of Secondary Education was, first, to clarify the compulsory nature of religious education and, second – due to the many instances where students simply asked for exemption from RE so that they have one less subject to study – to inform school directors that the option of exemption is in fact limited only to non-Orthodox students.

The nine theologians and their lawyer claimed that the Head of Secondary Education “silently rejected” their appeal over the specific matter and did not react in any way to it for a period longer than three months.

The administration argued, by contrast, that the claimants’ suggestion that the student should justify each time his/her reasons for not wishing to study RE by revealing his/her religious convictions is inadmissible, since such an act would violate Article 13 of the Constitution.

In the end, the Court ruled in favour of the theologians. It emphasized the compulsory nature of the class of RE, which is addressed to all Orthodox students for the “development of their religious consciousness”, according to the Constitution. It argued, moreover, that the declaration of students’ non-Orthodox religious identity does not violate their religious freedoms, as this process takes place in a legal framework established for the practice and protection of certain rights.

Case no2: 2980/2013 on Religious Icons in Courtrooms, Council of State (CoS 610374)

Background:

This case at the Council of State emerged following the appeal of three legal activists, who all happened to be members of the Green Party (*Oikologoi-Prasinoi*) at the time, against the Minister of Justice, Transparency and Human Rights. The complaint involved the applicants’ request for the removal of (Orthodox) religious icons and symbols from the walls of the Administrative Courts of Thessaloniki in northern Greece⁸. They asked specifically for the annulment of the judicial finding by the Commission of Administration and Management of the Administrative Courts of Thessaloniki, which stated that this case should be tried by central institutions (at the legislative and executive levels) and not by the administration of each court. In the end, the CoS proclaimed the claimants’ appeal as inadmissible.

Case no3: 1920/2014 on the Buddhist Worship Place, Council of State (CoS 630347)

Background:

This trial concerned the right to establish and run a house of worship by a heterodox, non-Orthodox community: the Bodhipath Karma Kagyu Buddhist community (the house was to

⁸ As explained in the proceedings, a decision by the Council of State would eventually affect courtrooms throughout the country.

be named "Centre of Buddhist Studies Karma Rigdrol Ling"). The specific community was charged by the local Orthodox priest with establishing a worship place in Cholomontas, Chalkidiki, without government authorization from the Ministry of Education and Religious Affairs (note that the legal struggle began in 1991, when the Buddhist centre was first established, and that it has only been resolved recently). The claimants were appealing against the Ministry of Education and Religious Affairs, asking for the annulment of the rejection of the Administration, so that they receive authorization to build and run a place of worship. The appeal was rejected by the CoS.

Case no4: 115/2009 on Same Sex Marriage, Multimember Court of First Instance, Rhodes (currently at Supreme Court)

Background:

The case concerns a same-sex civil marriage that was performed at the City Hall of an island of the Dodecanese, Tilos, on June 3, 2008 by the island's mayor. The prosecutor of the Dodecanese island asked for the annulment of the marriage based on the argument that Greek law only allows marriage to be performed amongst adults of different sex. The judges in this Court of First Instance held that the Tilos marriage was invalid. The case is still pending and, despite the passing of the mayor of Tilos, the two defendants and their lawyer have now reached the Supreme Court, which will soon reach a verdict on the validity or not of the marriage.

Case no5: 940/2015 on Conscientious Objection (Jehovah's Witness), Council of State

Background:

The case concerns alternative social service to the compulsory military service for male adults in Greece. The applicant's request for exemption from military service – on the basis of his conscientious objection and the fact that he is a member of the Church of Jehovah's Witnesses – was submitted after the date on which he had to begin his military service. Moreover, this request did not include all necessary documents for his inclusion in the status of "conscientious objectors". His request was therefore rejected by the Military court of Thessaloniki not only because of the delayed submission, but also because of the fact that the applicant had in fact served seven days in the military prior to this request. In this trial, the CoS also rejected the applicant's appeal.

PART I

First order questions addressed through the empirical research:

a. Who were the people involved in triggering the selected case? A network of lawyers/NGOs? Was there a transnational dimension to the process?

Case #1 on Exemption from Religious Education:

Other than the nine theologians who triggered the case, who were represented by the legal advisor of the Pan-Hellenic Union of Theologians, no NGO or network of lawyers were involved.

Case #2 on Religious Icons on Courtroom Walls:

There was no transnational dimension to this process. The three applicants were lawyers, themselves, as well as human-rights activists.

Case #3 on Buddhist Worship Place:

The people who triggered the case were members of the Buddhist community, supported by the legal expertise of their lawyer, who also happened to be a member of the specific Buddhist community.

Case #4 on Same-sex Marriage:

The defendants, meaning the two married men, are LGBT activists who had decided to mobilize in favour of same-sex marriage in Greece back in 2008. Though they were both members of the NGO called "Homosexual and Lesbian Community of Greece", the actual NGO did not get involved in the case.

Case #5 on Conscientious Objection:

So far, it appears that this case was triggered by the applicant himself, together with the support of the Central Church of Christian Jehovah's Witnesses in Greece, which provided the necessary documents that confirmed the applicant's membership and participation in the Church's events and gatherings, so that he could justify his request for alternative civil service as conscientious objector.

b. What are the relative roles of individual actors – lawyers, claimants, NGOs, etc., in the selected case?

Case #1 on Exemption from Religious Education:

The role of the actors who triggered the specific case is significant as it represents the views of the largest (and, until recently, the only) union of theologians – the Pan-Hellenic Union of Theologians – who are in charge of teaching the class of religion in Greek high schools. As such, the applicants benefited from the support of the legal expertise of the Pan-Hellenic Union of Theologians on a question that is recurrent in Greek society (i.e. about the preconditions for exemption from religious education).

Case #2 on Religious Icons on Courtroom Walls:

No NGO was involved in this case, which was triggered by the three politicians and human-rights activists.

Case #3 on Buddhist Worship Place:

It is important to note that the lawyer of the specific Buddhist Community – who played the most crucial role in this litigation – is a human rights activist and was, amongst others, also one of the claimants in Case No2 on Religious Icons in Courtroom Walls.

Case #4 on Same-sex Marriage:

The key actors in this case were the two men who chose to get married and to thus initiate a legal struggle over the issue of same-sex marriage in Greece (for more details see below). The mayor of Tilos was also an important actor, as he was the only mayor contacted by the same-sex couple who was willing to perform the ceremony.

Case #5 on Conscientious Objection:

The key actors here were the applicant and the Church of Jehovah's Witnesses who offered him the necessary support in his litigation.

c. Role played by experience with ECtHR case law in mobilizing groups and individuals to litigate (in general and, where appropriate, at the ECtHR)?

Case #1 on Exemption from Religious Education:

Other than the several references to ECtHR case law by the claimants and the defendants, there was no intention to reach the actual Court in Strasbourg.

Case #2 on Religious Icons on Courtroom Walls:

Though reaching Strasbourg was not amongst their intentions, one of the applicants in this case explicitly told me that the main motive and driving force behind their decision to litigate in national courts was the first ECtHR judgment on *Lautsi*. But, again, *Lautsi* 2009 came at an ideal time when the applicants wanted to mobilize politically and to challenge the omnipresence of the Orthodox Church. By focusing specifically on courts, just like *Dimitras and others*, they would be targeting the main institution representing the state: justice.

Case #3 on Buddhist Worship Place:

As mentioned above, this specific CoS trial only includes a reference to the ECtHR case *Vergos v Greece*. However, the applicants' lawyer had informed me that, in the earlier stages of their legal struggle, they had relied to a great extent on *Manoussakis and others* in support of their right to establish the community's worship place. In her own words "We were always carrying *Manoussakis* in our folders, threatening them that we would go to Strasbourg".

Case #4 on Same-sex Marriage:

The objective of the same-sex couple and their lawyer is to eventually reach the ECtHR. Their lawyer has experience in international courts, he has litigated a number of times in Strasbourg and has recently won a case (involving two journalists and the libelling of an actress). Though he is not certain that the ECtHR will rule in their favour in this case, he considers the Strasbourg Court the appropriate arena where such questions should be addressed.

Case #5 on Conscientious Objection:

No objective to reach Strasbourg was expressed by the applicants in this case.

d. What lawyers and representatives of NGOs that are legally active around religion say about whether they invoke the ECHR/ECtHR and when they do, what the reaction of judges tends to be.

Case #1 on Exemption from Religious Education:

The lawyer of the Pan-Hellenic Union of Theologians, who acted as legal advisor to the applicants in this case, expressed the view that – as indicated in the final judgment – both the ECHR and ECtHR case law are compatible with national laws on religion and education and that this view is also shared by Greek judges.

Case #2 on Religious Icons on Courtroom Walls:

The lawyer of the applicants informed me that their primary objective was a *political one*, in the sense that they sought to make a political – not legal – statement by targeting in some way church-state relations and the privileged position of the Orthodox Church in the country⁹. The first ECtHR judgment on *Lautsi* served precisely as the ideal motive for them to use in their political struggle. But the judges of the Council of State had a different view on the matter. In the lawyer's own words: "the judges thought that people in Greece were not ready for such a change. And, to be frank, they were right. Someday they will be ready – in the same way as things have gotten much better here since the 1970s".

Case #3 on Buddhist Worship Place:

Though the lawyer did comment on the predisposition of certain judges in this case (see previous section), no reference was made specifically to their reactions vis-à-vis the ECtHR.

Case #4 on Same-sex Marriage:

The lawyer in this case made a very interesting distinction (which has also been brought up in other interviews I have conducted with legal and constitutional experts) between the Council of State on the one hand and the much more conservative Supreme Court, on the other. Thus, while the judges at the Council of State have started over the last ten years to use ECtHR jurisprudence in their own decisions, the judges at the Supreme Court still tend to exclusively refer to previous Supreme Court decisions, ignoring the Strasbourg Court case

⁹ At the time, the Green Party's position in Greece had the clearest position in terms of Church-state relations and in making the separation of the two a priority in their agenda.

law. The same applies, in his view, to the reactions of the respective court's judges when the ECHR/ECtHR is invoked: though the CoS judges do seek to examine the compatibility of a given national law or practice with the Convention and the ECtHR, the judges at the Supreme Court tend to adjudicate by relying mainly on national laws and on Supreme Court case law.

Case #5 on Conscientious Objection:

No interviews have been conducted so far with the lawyer of the specific case. However, the legal counselor of Jehovah's Witnesses in Athens had informed me during our interview that some cases regarding conscientious objection and JW's in Greece were still pending at the time, so I would like to confirm whether there is a link between those cases he was referring to and the specific one treated here.

e. Do we see a tension between the collective strategies of stakeholder organisations and the individual claimant who is interested in taking his/her own case to court?¹⁰

Case #1 on Exemption from Religious Education

I have conducted interviews with the applicants and with other theologians who are members of the Pan-Hellenic Union of Theologians and they all seem to share the view on the necessity to litigate in this case.

Case #2 on Religious Icons on Courtroom Walls:

N/A

Case #3 on Buddhist Worship Place:

N/A

Case #4 on Same-sex Marriage:

Though, as mentioned above, the two men who litigated against the annulment of their marriage were also members of the "Homosexual and Lesbian Community of Greece", the particular NGO was not involved in this case. There was some tension, by contrast, over the very fact that this specific NGO (which is the largest LGBT rights community in Greece) was not involved in the case.

Case #5 on Conscientious Objection:

Not to my knowledge thus far.

¹⁰ Here we explore those cases where individual claimants were discouraged by related interest-group organisations/NGOs from taking the case to court (whether local, national, or the ECtHR) and/or in which the aims of the groups and individuals in question were divergent. The direct relation to our study's aims may not be clear but it may yield interesting results to look into such examples, where they arise in our research. Sometimes inter-organisational politics may influence how and to what effects the ECtHR case law is employed – e.g., in the *Oliari* case, the competition between two lgbt-related groups.

f. Do we have examples of isolated individuals litigating in parallel but not connected to one another, and others where we have examples of a more global strategy (whether legal or political)?

Case #1 on Exemption from Religious Education:

Though there has been another case in national courts (and specifically at the Ombudsman's Office in Athens) over the question of exemption from religious education, this was not simultaneous to the Chania court case and had the exact opposite objective, namely to render the process of exemption easier and open to any student.

Case #2 on Religious Icons on Courtrooms Walls:

As mentioned above, the applicants in this case sought to make a political statement by strategically using *Lautsi 1* in order to target church-state relations and the prevalence of the Orthodox Church.

Case #3 on Buddhist Worship Place:

No other individuals litigated in parallel with this case.

Case #4 on Same-sex Marriage:

As mentioned above, the same-sex couple has been acting strategically with the aim of challenging what they consider as the discriminatory laws over marriage in Greece, which is only addressed to adults of different sex. As their lawyer has informed me, they now await the decision of the Supreme Court. He believes that the Supreme Court is highly unlikely to reverse the decision of the Multimember Court of First Instance of Instance. Such a negative decision towards their request will help them to finally reach Strasbourg, which has been their main objective from the start.

A further important feature of this litigation is that this couple litigated together with the lesbian couple that also got married on Tilos by the same mayor. This couple was represented by the same lawyer but is no longer litigating due to health reasons.

Case #5 on Conscientious Objection:

Not to my knowledge thus far.

g. ECtHR cases which were referenced in relation to this case

Case #1 on Exemption from Religious Education:

The following ECtHR cases are referenced in this trial: *Grzelak v. Poland*, *Folgerø and Others v. Norway*, *Kjeldsen, Busk, Madsen and Pedersen v. Denmark*, *Hassan and Eylem Zengin v. Turkey*, *Valsamis and Others v. Greece*, *Bernard and Others v. Luxembourg*, *Campbell and Cosans v. The United Kingdom*, *Lautsi v. Italy*, *Kokkinakis v. Greece* and, finally, *Larissis and Others v. Greece*.

Case #2 on Religious Icons on Courtrooms Walls:

The following ECtHR cases are referenced in this trial: *Lautsi v. Italy*, *Dimitras and Others v. Greece* and *Ashingdane v. The United Kingdom*.

Case #3 on Buddhist Worship Place:

The one ECtHR case referenced in this trial is *Vergos v. Greece*.

Case #4 on Same-sex Marriage:

The one ECtHR case referenced in this trial is *Evans v. The United Kingdom*.

Case #5 on Conscientious Objection:

The following ECtHR cases are referenced in this trial: *Peters v. The Netherlands* and *Bayatyan v Armenia*¹¹.

h. Obvious ECtHR cases which could have been referenced in relation to this case (researchers' own assessment)

Case #1 on Exemption from Religious Education:

All relevant ECtHR cases to this Chania Administrative Court case on exemption from RE are referenced (including those which are not directly relevant, i.e. *Kokkinakis*).

Case #2 on Religious Icons on Courtrooms Walls:

As the applicants, themselves, relied on *Lautsi 1* to support their own argument, they could have in a similar manner mentioned *Dahlab v. Switzerland*, which concerned the wearing of a headscarf by a primary-school teacher while teaching.

Case #3 on Buddhist Worship Place:

As mentioned above, the applicants have referred to *Manoussakis and Others v. Greece*¹² in a previous court in this case.

Case #4 on Same-sex Marriage:

Since the judgment in the specific case at the Multimember Court of First Instance of Rhodes, the ECtHR has dealt with the question of same-sex marriage (in *Chapin and Charpentier v. France* or in *Oliari and Others v. Italy*). Though these decisions were not in their favour, the

¹¹ The trial transcripts reference one more case, *Heuden v. Belgium*, which I could not find in the database.

¹² In *Manoussakis and Others v. Greece* the applicants were Jehovah's Witnesses. In 1990, the Court of Cassation dismissed their appeal after the Heraklion Criminal Court had found them guilty of having converted the room that they had rented into a place of worship without the authorization of the recognized ecclesiastical authority and of the Ministry of Education and Religious Affairs. The applicants complained that their conviction constituted a violation of Articles 3, 5, art. 14+6, and Articles 8, 9, 10 and 11 of the Convention and of Article 1 of Protocol No. 1. On 10 October 1994 the Commission declared their application admissible as regards the complaint based on Article 9, but inadmissible for the rest. In its report of 25 May 1995 (Article 31) (art. 31), the ECtHR expressed the unanimous opinion that there had been a breach of that Article (art. 9).

couple's lawyer remains optimistic that the ECtHR may reach a different verdict over their case.

Case #5 on Conscientious Objection:

Another case that could have been referenced by the applicant is *Savda v. Turkey* (2012), which concerned the failure to recognize the right to conscientious objection in Turkey, where the system of compulsory military service allowed for no exceptions on religious grounds. The Court found violations of Articles 3 and 9 and a violation of Article 6 § 1 of the Convention.

i. Interviewees' explanations for the lack of reference to the ECtHR, where applicable (And/or to the specific relevant ECtHR cases identified by the researcher)

Case #1 on Exemption from Religious Education:

This case entailed a number of references to the ECtHR by the applicants, the claimants and the judges.

Case #2 on Religious Icons in Courts:

Again – both the applicant and the judges referred to the ECtHR in this court.

Case #3 on Buddhist Worship Place:

No specific explanation was given for the brief reference to just one ECtHR case (*note that the specific trial proceedings do not include references to Manoussakis and Others v. Greece*).

Case #4 on Same-sex Marriage:

The lawyer of the same-sex couple expressed the view that lack of references to the ECtHR by this local court on the island of Rhodes is due to the conservative outlook of these smaller courts, which, just like the Supreme Court, are more inward than outward-looking in their litigation.

Case #5 on Conscientious Objection:

No interviews have been conducted so far with the applicant or his lawyers.

j. Do we have cases in which ECtHR case law is invoked by both sides in the given case (by both the defendant and claimant), in support of their positions?

Case #1 on Exemption from Religious Education:

Yes, this is an indicative case where both sides (including the judges) use ECtHR decisions.

Case #2 on Religious Icons in Courts:

Yes, both the claimants and the defendants invoke *Lautsi* in this case.

Case #3 Buddhist Worship Place:

In these specific trial proceedings, the ECtHR is only invoked by the judge.

Case #4 on Same-Sex Marriage:

Not in this case (only the judge refers to *Evans v. UK*).

Case #5 on Conscientious Objection:

Only the applicant refers to *Bayatyan v. Armenia* in this trial.

k. Within such examples (where ECtHR case law is invoked by both sides), examples of cases where the same case law is invoked by both sides

Case #1 on Exemption from Religious Education:

Yes – see detailed analysis of these instances on pp. 17-18.

Case #2 on Religious Icons in Courts:

Yes, this is an indicative case of how the applicants base their line of reasoning on *Lautsi 1*, while the defendants and the judge rely on *Lautsi 2* (see p.18 for a detailed analysis).

Case #3 on Buddhist Worship Place:

N/A

Case #4 on Same-sex marriage:

N/A

Case #5 on Conscientious Objection:

N/A

PART II

Please provide your analysis of:

a. The source of references to the ECHR/ECtHR case law (where applicable): claimant, defendant, or judge?

Case #1 In this trial, the ECtHR is referenced by the claimants, by the defendants and by the judges, themselves.

Case #2 The ECtHR is here referenced by the claimants, by the defendants and by the judge.

Case #3 The judge in this trial references both the ECHR and the ECtHR.

Case #4 The defendants, meaning the two married men and the mayor of Tilos who had married them, reference the ECHR, while the judges of the Multimember Court reference both the ECHR (three times) and the ECtHR (once).

Case #5 In his intervention – quoted in these proceedings –, the claimant has referenced the ECtHR (the case *Bayatyan v. Armenia*). The judge references both the ECHR (Articles 4, 9 and 14) and the ECtHR (*Bayatyan v. Armenia*).

b. Context in which the Court is referenced: in defense of the claimant or of the defendant?

Case #1 The majority of references to the ECtHR are explicitly used in defense of the claimant, in this case, the group of nine theologians teaching religious education (also representing the views of the Pan-Hellenic Union of Theologians) who are in charge of the teaching of the class of religion in secondary education schools in Chania, Crete. Their appeal was against the Minister of Education and the Head of Secondary Education of the Municipality of Chania. In some instances, however, it becomes clear that the claimant chooses to mention the ECtHR in an effort to argue against the defendant's earlier, particular reference to it.

Case #2 The main ECtHR case that the claimants refer to is the first decision on *Lautsi* in 2009. However, by the time that this trial took place in 2012, the ECtHR Grand Chamber had also ruled on *Lautsi* (in 2011). Thus, based on the Grand Chamber's final judgment, references to *Lautsi* in this CoS case are used primarily in defense of the state.

Similarly, the case of *Dimitras and Others* is also mentioned in defense of the state. Though in *Dimitras and Others v. Greece* the Court examined whether the Greek legislator gave the possibility to witnesses in courts to opt for the solemn declaration instead of taking a religious oath, the applicants had also complained about the presence of Orthodox religious icons in courtrooms.

Case #3 Though the ECHR is cited several times, the one ECtHR case that is mentioned in these CoS trial proceedings in defence of the state is *Vergos v. Greece*¹³. This ECtHR case involved a member of the Church of the religious community "True Orthodox Christians" (Old-Calendarists) who wished to acquire authorization by local authorities to build place of worship. The Court eventually found that the house of prayer in a nearby town could satisfy the applicant's needs for prayer.

Case #4 In this trial, the Court is referenced exclusively in defense of the claimant, meaning the prosecutor. The judges only reference the Court to challenge an argument put forward by the defendants on the rights granted to them through Article 8 of the ECHR, which – in

¹³ I had initially started looking into this CoS case after the applicants' lawyer had informed me that, throughout the years, they had relied on *Manoussakis and others v Greece* (and, to a lesser extent, *Kokkinakis v Greece*) as part of their appeal in different courts. Though these two ECtHR cases (including other JW's national court cases) were mentioned in my interview with the lawyer, it was only when I gained access to the specific CoS trial proceedings that I realized that they are not referenced here.

their view – gives public authorities (hence, including the prosecutor) no right to intervene in their personal and family lives. The judges responded by referencing *Evans v United Kingdom* (see question 5), arguing that, even though the Convention does respect the right to one's private life, litigating over the issue of a marriage that is in essence non-existent does not constitute a violation of one's private life but is a process provided by law for the protection of morals and the smooth functioning of family relations in society.

Case #5 The Court is referenced both in defense of the claimant and of the defendant (the Minister of National Defense). The claimant references *Bayatyan v. Armenia*, in which the Court had found a violation of Article 9 over the case of a Jehovah's Witness who was convicted of draft evasion and sentenced to prison for refusing to perform military service for conscientious reasons. By contrast, the judge references the exact same case at the ECtHR in defense of the state, arguing that no parallel can be drawn with *Bayatyan*, as it concerned a state (Armenia) that did not provide (at the time) for alternative service to military service.

c. 'Weight' of the reference for this case: central to the argument or not?

Case #1 References to the ECtHR are central to the argument throughout the proceedings, particularly when the Court is mentioned in conjunction with the Greek Constitution, the Council of State and other national laws on education and the place of religion within it. Other than references to specific cases (*Lautsi, Grzelak, Folgerø, Kjeldsen and others, Zengin, Bernard and others, Campbell and Cosans, Kokkinakis, Larissis and others*), this is usually done in a vague manner, stressing the "compatibility [of national laws] with the decisions of the ECtHR".

Both the claimants and the defendants seem to, however, be using the argument of "compatibility" of national rules with the ECtHR, suggesting significant divergences in the understanding and the interpretations of its case law. This is seen most clearly through the ways in which the applicants (representing the Orthodox theologians) argue that the option of exemption in force at the time, which was, in their view, offered only to non-Orthodox students "for reasons of conscience", is in line with the decisions of the ECtHR. By contrast, the Union of Teachers of Secondary Education of Chania (UTSE), in support of the defendant (the Head of Secondary Education of the Municipality of Chania), and by referring to a recommendation by the Greek Ombudsman, argues that the circular¹⁴ issued by the Ministry of Education in fact states that exemption is offered not only to non-Orthodox students, but also to *all* students, regardless of their religious belief or conscience. This interpretation, the UTSE argues, is compatible with the ECtHR¹⁵.

¹⁴ The rules underpinning the process of exemption in Greece are set by government circulars (or directives), which serve to clarify legislative regulations, aiding the civil servants and employees of the respective office in the realization of their work and responsibilities.

¹⁵ The Head of Secondary Education had also argued that the applicants' claim that students should justify their refusal to attend the class of religion was unacceptable, as any disclosure of the students' religious belonging would violate Article 13 of the Constitution.

Case #2 Both sides seemed to have used references to the ECtHR – and primarily to *Lautsi* – as a key part of their argument.

Lautsi influences to a great extent the argumentation of the state. Towards the very end of the proceedings, *Dimitras and others* also crucially contributes to the shaping of the final outcome that turns against the applicants (see below). Though the Grand Chamber's ruling on *Lautsi* is used as a means to justify the margin of appreciation, as well as the complexity of this issue that is closely linked to Greek history and culture, the ECtHR is overall present and rather influential in this CoS trial. As we will say later on (following question), however, it seems that references to the ECtHR were used to rather support a preconceived argument and decision.

Case #3 In this trial, references to the ECtHR only come up at the very end of the proceedings and are rather marginal.

Case #4 The single reference to the ECtHR, which is in defense of the claimant, does not appear to be central to the argument; it is rather mentioned in conjunction with the ECHR, which is quoted with respect to the right to family life as well as to the possibility of marriage for same-sex couples.

Case #5 References to the Court are relatively marginal in this trial, as the judge rejects the applicant's argument on the relevance of *Bayatyan v. Armenia* with this case.

d. Ultimate effect of the reference: to the extent possible, an ascertainment of whether the reference swayed the decision or not.

Case #1 The frequency of references to ECtHR case law in defense of the claimant indicates the ECtHR's central role in shaping the course of the trial. Indeed, the judges argued that the Head of Secondary Education failed to take the necessary legal action following the claimants' appeal that would resolve the question of exemption from RE. As such, the Court accepted the claimants' application and convicted the Head of Secondary Education and the Administration.

It appears overall that references to the ECtHR by the applicants were persuasive and did, therefore, significantly sway the final decision.

Case #2 This CoS case on the presence of religious symbols/icons in courtrooms is an indicative example of how a trial in national courts is influenced and to a great extent determined by the developments in Strasbourg. As two of the claimants explained to me, the fact that the ECtHR retrieved its initial ruling and produced a different decision that allowed for the presence of religious symbols in Italian classrooms, almost led to their own embarrassment before national courts. Though the final Grand Chamber ruling did affect the argument of the CoS, the applicants were nonetheless certain from the very start of their mobilization that they would lose the case either way.

It is important to mention here the crucial role of both the respective judge (as one of the claimants explained to me, the moment she found out who the judge was going to be, she

“knew that the case was lost”) and of other legal actors who intervened, as was the case of the president of the Bar Association in Thessaloniki (whose involvement against the claims of the applicants was decisive at the early stages of their appeal).

Case #3 Considering the long duration of the overall procedure and the different stages of this legal case (which had begun in 1991), the only brief reference to the ECtHR at the very end of the proceedings suggests its minimal role in influencing the final decision of the court. As in other national court cases examined, the applicants' lawyer emphasized the crucial role of the respective judge (whom, in this case, she described as conservative and far-right leaning) in determining the final outcome.

Case #4 Reference to the ECtHR is marginal and does not appear to have swayed the decision of the judges, which concurs with the prosecutor in terms of the annulment of the same-sex marriage.

Case #5 References to the Court do not appear to have swayed the judge's final decision.

e. Nature of the reference: to the extent possible, an ascertainment of whether the reference reflects the thrust of the ECtHR case/judgment referenced.

Case #1 In addition to the general references to the ECtHR mentioned above, which seek to stress levels of compatibility with national laws, references to *specific* cases vary from reflecting the main points of the ECtHR case to adjusting the case (or fragments of it) to fit the respective argument put forward each time.

Most references to ECtHR cases are used to emphasize the principle of the margin of appreciation. In the first place, *Grzelak v. Poland* is mentioned to justify the margin of appreciation granted to national authorities as to whether and how a class of religion will be included in the school curriculum. *Larissis and others v. Greece* is also cited to argue that states are better positioned to comprehend “the respective needs for the protection of the religious conscience of their population”. The proceedings further explain (citing *Kokkinakis v. Greece*) that the right of national authorities, in this case school directors, to intervene in such affairs and to decide whether or not a student is eligible for exemption, is within their discretion and is compatible with European standards.

In general, there is an overall tendency in the Chania Court's thinking to deduct certain parts of the ECtHR's judgments that serve to validate the given argument put forward, while leaving other parts unmentioned. This way, though such citations of the judgment are not invalid *per se*, the partial or strategic reference to the Court's global thinking may overshadow or mislead as to its actual objective also in relation to the specific issue of the Chania Administrative Court of Appeal. For instance, the Court's ruling over the context of a specific country does not necessarily signify that the Court would have ruled in the exact same manner in the case of Greece. This is seen most clearly through the references to *Lautsi* (on the effect of religious symbols in school classrooms) and *Folgerø v. Norway* and *Zengin v. Turkey* (on the prevalence of Christianity and the precondition of pluralism in the teaching of religion, as well as the option of exemption). Specifically, by referencing *Zengin* and

Folgero, the judges of the Chania Administrative Court of Appeal claim that the predominance of Christian Orthodoxy in the class of religion in Greek schools, which also includes references to other religions, does not, in itself, constitute a violation of the principles of pluralism and objectivity, which may then lead to catechesis and indoctrination. On the contrary – just like with Islam in Turkey (*Zengin*) or with Christianity in Norway (*Folgerø*) – “the compulsory character of religious education guarantees respect for all, different beliefs, as proven historically through the long coexistence with people of other races and other religions” (it is here unclear whether this coexistence also refers to the Greek case).

As such, the applicant was citing these cases in support of a wider margin of appreciation, but fully neglecting the outcome of those cases as, in both, the courses were found to violate freedom of conscience. Thus the applicant was only referring to arguments used in these ECtHR cases but overlooking the judgments in these cases, which were *not* in favour of the applicant.

Case #2 The reasoning of the CoS judges largely follows the developments in *Lautsi* and it does reflect to a significant degree the thrust of this specific ECtHR judgment.

Two main features of *Lautsi* are highlighted in the proceedings: the first relates to the margin of appreciation granted to national authorities on such “complex and sensitive matters so closely linked to the culture and history of the Greek nation”. The second has to do with the actual, final Grand Chamber judgment on *Lautsi*, which, according to the judges in the trial transcripts, resolves the matter in this CoS case as well: religious icons and/or symbols (in this case, the crucifix) can remain on the walls of classrooms of public schools, since the competent national authorities have acted within the margin of appreciation provided to them, while respecting the right of parents to ensure the education of their children according to their religious or philosophical beliefs. Accordingly, there has been no violation of Article 2 of the 1st Protocol, nor of Articles 9 and 14 of the ECHR. As such, the judges related the *Lautsi* Grand Chamber decision directly to this case, suggesting that, since the ECtHR has ruled that religious symbols are allowed in classrooms, this also applies to courtroom walls.

While *Lautsi* is primarily used to draw parallels between the two cases, it is also cited as a means to make distinctions. The CoS judges distinguish between the decision of *administrative* authorities in the case of *Lautsi* (meaning the school director) and this specific decision that had originated from Greek *judicial* authorities. Unlike in the case of *Lautsi* therefore, the claimants' application for annulment of the judicial findings of the administrative courts of Thessaloniki (a judicial authority) is dismissed.

The CoS further uses a specific aspect of *Dimitras and others* to draw parallels with the case under consideration over the principle of non-discrimination and the right to fair trial. Other than the question of the religious oath, the applicants in *Dimitras and others* had indeed alleged that the presence of religious symbols in the courtrooms and the fact that Greek judges were Orthodox Christians raised doubts about their impartiality¹⁶. The CoS judges thus compare the two cases and make the following argument: just like the complaint by *Dimitras and others* that the presence of religious symbols on courtroom walls violated the principle

¹⁶ See ECtHR, *Dimitras and Others v. Greece*: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-3151460-3507511&filename=003-3151460-3507511.pdf>.

of non-discrimination had been rejected as manifestly ill-founded (as the direct link between the claimants and the violations of Article 6, para. 1 of the ECHR on the right to a fair trial could not be established), so the claim of the Thessaloniki applicants that the examination of their appeal was dictated by Article 6 of the ECHR is rejected.

Case #3 The reference to *Vergos*, though reflective of the main points of the judgment, can be seen as strategic, since the specific ECtHR case touches upon the key issue that the state wishes to emphasize in this context, namely the urban planning issues that emerge in the establishment and running of houses of worship.

The specific nature of this Buddhist center in Chalkidiki, which was meant to function not as a place of worship *per se*, but rather as a center of coenobitic monasticism and retreat, brought about questions of compatibility of the building standards with its functioning and operation. The derogation from pre-established planning regulations form the main argument of the state against the applicants' right to establish the center, as the proposed site is seen as inappropriate for this type of construction and usage. *Vergos* (in which the ECtHR found no violation of article 9) is thus mentioned here, arguing that, though the state did interfere with the applicants' exercise of their right to freedom to manifest their religious through worship and observance, this interference "was prescribed by law and pursued with a legitimate aim, namely protection of public order and the rights and freedoms of others".

Case #4 The judges in this trial reference the ECtHR case *Evans v. United Kingdom* in which the applicant, Ms Evans, complained that requiring the father's consent – after their relationship had ended – for the continued storage and implantation of the fertilized eggs, which represented her only chance of bearing a child to which she was genetically related, was in breach of her rights under Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the Convention and the rights of the embryos, under Article 2 (right to life). The Strasbourg Court held that there had been no violation of Articles 8, 14 or 2. This ECtHR case dealt primarily with the scientific and ethical controversies around IVF procedure in the UK. Yet, the judges in the Multimember Court of Rhodes reference *Evans v. United Kingdom* as an example of a case where the applicant complained that there had been a violation of her right to respect for private and family life, which constitutes a main argument put forward by the same-sex married couple.

Case #5 Though the applicant had referred to *Bayatyan v. Armenia* as a case that had important similarities with his (alternative service to military service, Jehovah's witness and conscientious objection), the judge's argument that the specific ECtHR case did not involve a country that, unlike Greece, offered at the time an alternative to military service for conscientious objectors is accurate.