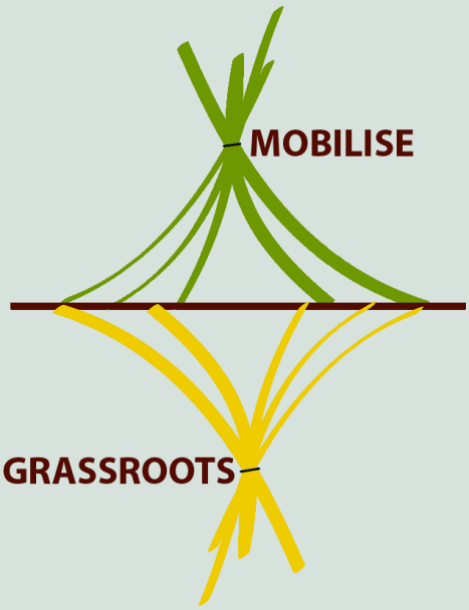

ROMANIA

National Courts Study Report

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v. 8 February 2018

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Background Information on the National Legal Order in Romania

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

The Romanian judicial system is composed of:

a. local courts of first instance (Rom. *judecătorii*);
b. tribunals (Rom. *tribunale*), which are county-level courts with both first instance and appellate jurisdiction, one in each of the country's 41 counties and in Bucharest;
c. intermediate appellate courts (Rom. *curți de apel*), which have broader regional jurisdiction (there are 15 such courts in the country);
d. the High Court of Cassation and Justice (*Înalta Curte de Casație și Justiție*);
e. the Constitutional Court (*Curtea Constituțională*).

The cases discussed in this report were presented before courts spanning the whole judicial system: local courts of first instance (a), tribunals (b), intermediate appellate courts (c), the High Court of Cassation and Justice (d) and the Constitutional Court (e).

2. Locating the ECtHR within the broader national legal order

The path to Strasbourg has become in recent years an avenue frequently pursued by Romanian citizens dissatisfied with solutions given to them by Romanian courts[1]. As one lawyer pointed out within one interview, many clients expect the ECtHR to review domestic decisions, and appeal to the Strasbourg Court even if the details of their case, the resolution of which they deem unjust, do not stand out as systemic problems (e.g., the judge not hearing all witnesses as requested by a defendant).

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

Romania ratified the European Convention on Human Rights (ECHR) in 1994. Article 11 of the Romanian Constitution stipulates that international treaties ratified by the Romanian Parliament are part of domestic law. Article 20 of the Constitution stipulates that international treaties concerning the protection of human rights have priority in relation to Romanian regulations.

ECtHR case-law has been increasingly used domestically in the training of judges and prosecutors starting with the late 1990s (Bogdan and Mungiu-Pippidi 2013). These trainings are organized by the National Institute of Magistracy in Bucharest, and the experts giving the trainings are many times human rights lawyers who have represented cases in front of the ECtHR. Several interviewees working within human rights NGOs pointed out that lawyers should receive more training in ECtHR case-law, because this kind of teaching is not yet integrated at undergraduate level (so far, international human rights courses remain electives, in an academic system which heavily emphasizes mandatory courses). As presented by one interviewee from the National Institute of Magistracy, the teaching of ECtHR jurisprudence is connected in the programs of the Institute to the national casuistry which judges encounter on an everyday basis. This means that judges are much more exposed to ECtHR casuistry from the area of property rights, for instance, than from the area religious freedom (in connection to which there is comparatively less litigation at the national level).

In Romania, one formal criterion in the evaluation of judges' performance is the extent to which they make reference in their decisions to decisions of the ECtHR and of the Court of

[1] On 31 December 2016, Romania ranked fifth out of 47 member states of the Council of Europe in number of cases pending before the ECtHR (9.3% of a total of approximately 79,750 applications; data available at http://www.echr.coe.int/Documents/Facts_Figures_2016_ENG.pdf, accessed 19 January 2018).

Justice of the European Union (CJEU). Additionally, ECtHR jurisprudence is an important component of the exams that judges take in order to advance in the professional hierarchy. The Superior Council of Magistracy (Rom. *Consiliul Superior al Magistraturii*, CSM) is the independent professional body that, among others, nominates judges and prosecutors, and is in charge with appointments, promotions, and the observance of professional standards. The CSM organizes the translation of ECtHR judgments into Romanian. Not only decisions in cases brought to the Strasbourg Court against Romania are translated, but also decisions regarding other states. There are currently approximately 800 ECtHR judgments available on the website of the CSM (www.csm1909.ro). An order for the translation of up to around 1,400 ECtHR judgments (in cases brought primarily against Romania but also against other states) is currently placed at the governmental agency European Institute from Romania. The CSM reviews and validates these translations which have official character.

As a general note, in the national context briefly outlined above, the ECHR and ECtHR case-law are likely to be referenced in the decisions of Romanian judges. The extent to which the references are purely formal and even 'ornamental', or substantive and important for the case under scrutiny will surely vary between judges. The referencing practices documented in relation to the cases analyzed here do not point to a clear pattern regarding the frequency of referencing the ECHR and the ECtHR's case law in courts located at different levels in the national system (the influence of the formal evaluation standards is thus not easily discernible). A certain preference is visible though for judges at different levels of the judicial system to anchor their reasoning in the general provisions of the ECHR rather than to draw on specific statements from the ECtHR's case-law (even in cases in which ECtHR case-law had already been referenced by the parties involved in the litigation, during the court proceedings).[2]

CASES:

Case #1: The organization of national evaluation exams on Saturdays, conflicting with religious norms

The case concerns the organizing of national school evaluations for pre-high school pupils on Saturdays in the year 1999. The regulations issued by the Ministry of Education, to the extent that all students shall take the examinations on Saturdays and Sundays, were contested by parents belonging to the Seventh-day Adventist religious community. In their efforts, the parents were assisted by the Seventh-day Adventist Church from Romania and by the Association "Conscience and Liberty" (*Asociația "Conștiință și Libertate"*, an NGO ancillary to the Seventh-day Adventist Church, defending the right to freedom of religion and conscience). The case was won in the same year in the domestic system through decisions of the High Court of Cassation and Justice demanding the organization of separate evaluation sessions for the students from the Seventh-day Adventist community.

Case #2: The presence of religious icons in public classrooms

The case concerns the litigation efforts started in 2005 by Emil Moise, a philosophy teacher (now among the most well-known secularist activists in Romania), to obtain the removal of Christian Orthodox icons from the walls of public classrooms. The argument used in the

[2] This observation is based on the analysis of one decision of the Bucharest Court of Appeal (Decision 565/ 20.02.2008) and one decision of the High Court of Cassation and Justice (Decision 2393/11.06.2008) in Case #2 documented in more detail below, as well as on one decision of the local court of first instance in Case #3 (decision details undisclosed for anonymity reasons).

litigation was two-pronged: on the one hand, the presence of the icons discriminated against children who belonged to religious minority groups or who had no religion by creating a hostile atmosphere in the school context; on the other hand, the display of Christian Orthodox icons in public schools was tantamount to the endorsement by the state of an ideology that endorses gender inequality, in contradiction with national and international legislation on non-discrimination and gender equality. Moise contested in a local court of first instance the responsible county-level school authorities' refusal to issue a regulation for the removal of religious icons from classrooms (including those of the high school in which the claimant's daughter was studying). After losing in the court of first instance, he continued the litigation in front of an appellate court, but lost also on appeal (both courts reasoned that the claimant was unable to present a clear situation of discrimination that affected him or his daughter). The claimant then submitted a complaint to the National Council Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*, hereafter simply 'anti-discrimination Council'), presenting the same arguments. The latter institution accepted the claimant's petition and issued a decision (Decision No. 323/ 2006) in which it recommended that the Ministry of Education regulate the presence of religious icons in public classrooms (more specifically, by limiting their display to the times and places allotted for religious education). The anti-discrimination Council pointed out that regulating the presence of the icons in schools was necessary so as for the state to meet its "positive obligation" (under the principle of state neutrality towards religious beliefs and corresponding values) to "ensure the defense of pluralism". The recommendation of the anti-discrimination Council was contested at the Bucharest Court of Appeal by the Ministry of Education and by the representatives of the Bucharest branch of the faith-based NGO "*Association PRO VITA for the Born and the Unborn*" (*Asociația PRO VITA pentru Născuți și Nenăscuți* - hereafter simply 'ProVita-Bucharest'). The Bucharest Court of Appeal upheld the anti-discrimination Council's recommendation regarding the regulation of the icons' presence in schools. On further appeal by the Ministry of Education and by ProVita-Bucharest, the High Court of Cassation and Justice overturned the decision of the Bucharest Court of Appeal and annulled the recommendation of the anti-discrimination Council. The High Court of Cassation and Justice held that the regulation by the Ministry of Education of the display of icons in schools would amount to a restriction of religious freedom, since the icons were displayed following the will of the local communities of professors, parents and pupils (as argued by the Ministry of Education), and would actually run against the principle of state neutrality. Two complaints related to this litigation were filed by the claimant to the ECtHR (both before and after the *Lautsi v. Italy* decisions). Both complaints were dismissed by the Strasbourg Court.

Case #3: The accusation of unlawfully exercising the profession of priest

The case concerns an Orthodox priest who was defrocked by his hierarchical superiors from the Romanian Orthodox Church, but who continued performing Orthodox religious rituals for his parishioners [3]. Accused of unlawfully exercising a profession by the institutional representatives of his former church, the priest submitted to the attention of his case prosecutor official translations into Romanian of the ECtHR decisions in the cases *Metropolitan Church of Bessarabia and others v. Moldova and "True Orthodox Church in Moldova" and others v. Moldova*. Very likely in relation to these ECtHR rulings, which reaffirm the state authorities' obligation to remain neutral towards conflicts between religious communities, the prosecutor discontinued investigating the charge of the unlawful

[3] In order to protect interviewee anonymity, I do not give any precise details about the years of the litigation. Still, it can be noted that the litigation in this case and in the following case took place after the adoption of Law No. 489 from 2006 on Religious Freedom and Religious Denominations.

exercising of a profession. Contested in court by the representatives of the Romanian Orthodox Church, the prosecutor's resolution was maintained by the court of first instance in which the contestation was judged. The judgment confirmed the prosecutor's interpretation of the application in the case of the provisions of Article 9 of the ECHR.

Case #4: The accusation of unlawfully exercising the profession of priest

The case concerns a priest who, after being defrocked from the Romanian Orthodox Church, continued serving for his parishioners. He was accused by the institutional representatives of his former church of unlawfully exercising the profession of priest. After being defrocked, the priest joined a different Orthodox hierarchy. The institutional representatives of this other church contracted lawyers in order to defend the priest in the domestic procedures. Following the litigation in front of the domestic courts (one court of first instance and one appellate court), the priest received a prison sentence. A complaint arising from this case was submitted to the ECtHR after the prison sentence.

Case #5: The legal recognition of a same-sex marriage contracted abroad

The case concerns the refusal of Romanian immigration authorities to grant residence rights to an US-citizen, because they refused to recognize the existence of a family relation between the applicant and another man (a Romanian citizen) whom the applicant had married in Belgium. The litigation was initiated before a court of first instance in Bucharest in 2013, when the claimants contested the decision of the Romanian immigration authorities. During the procedures in front of the court of first instance the lawyer representing the same-sex couple raised an exception of unconstitutionality with respect to the provisions of Article 277 (Paragraphs 2 and 4) from the Romanian Civil Code, which preclude the legal recognition in Romania of same-sex marriages contracted abroad (Para. 2) while restating the freedom of movement of EU citizens in Romania (Para. 4). The case is still pending before the Romanian Constitutional Court. The latter has addressed preliminary questions concerning the interpretation of EU regulations in the case to the CJEU. This procedure followed the request of the couple's lawyer, who argued that Romanian authorities are bound by the EU directive 2004/38/EC regarding the freedom of movement of persons to allow the freedom of movement of EU citizens together with their family members. The case (registered at the CJEU under the record number C-673/16, and publicly known as the *Coman* case) asks for a pronouncement by the CJEU on the meaning of the term "spouses" (whether it includes same-sex partners or not) in the aforementioned directive. It has already mobilized national and international faith-based NGOs. The latter have submitted *amicus curiae* letters to the Romanian Constitutional Court, arguing that the court should not recognize the existence of family relations between the two men and should not submit preliminary questions to the CJEU. ECtHR case-law has been invoked until now by the lawyer of the couple and by the representatives of the intervening faith-based NGOs.

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?

In **Case #1**, the parents of the affected students of the Seventh-day Adventist community went to court against the Ministry of Education and also approached the Seventh-day Adventist Church in Romania pointing to the inherent problems of the ministerial regulations. The Seventh-day Adventist Church, through its ancillary Association "Conscience and Liberty" supported the parents in their litigation efforts. There was no transnational dimension to the initiation of the case.

In **Case #2**, the main actor was the litigant, who represented himself independently in the domestic court proceedings (as a parent defending the interests of his own child) and who also wrote eventually a complaint to the ECtHR. While there was no consolidated network of lawyers supporting the case, the litigant in the domestic and ECtHR proceedings benefited from the expert knowledge of persons associated to his NGO, an NGO focused on freedom of conscience issues. The transnational dimension is missing from this particular litigation. While the litigation in the Romanian domestic phase took place in parallel to the litigation that led to the *Lautsi v. Italy* case in Italy, there was no strategic link between the two cases. The litigant in the Romanian case found out about the *Lautsi* case only when the ECtHR's Chamber decision was pronounced.

In **Case #3**, the main actors were the defendant Orthodox priest, who was accused of unlawfully exercising his profession in the aftermath of his defrocking, and the institutional representatives of the Romanian Orthodox Church who filed criminal complaints against the priest. The case was basically triggered by these criminal complaints. There was no transnational dimension to the initiation of the case.

In **Case #4**, the main actors were 1) the defendant Orthodox priest who was accused of unlawfully exercising his profession, 2) the institutional representatives of the Romanian Orthodox Church who filed the criminal complaints against the priest, and 3) the institutional representatives of the church accepting the former priest of the Romanian Orthodox Church, and contracting the lawyers who defended the priest in the domestic proceedings. There was no visible transnational dimension to the case.

In **Case #5**, the main actors were 1) the two claimants filing an application for a residence permit as a married couple, 2) the lawyer representing them in front of domestic courts after the application was rejected, and 3) the LGBT-rights NGO ACCEPT, which supported the litigation in the case and promoted it as strategic for the LGBT rights agenda in Romania. The lawyer representing the couple is a member of ACCEPT and a long-time defendant of LGBT rights in Romania. One of the two applicants (the Romanian citizen) is a former president of ACCEPT, presently employed by an US-based foundation supporting LGBT rights worldwide. The transnational dimension of this case can thus be discussed in relation to 1) the embeddedness of one of the claimants in a transnational network of LGBT rights activists; 2) the articulation of the national-level LGBT rights agenda to the international one.

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

In **Case #1**, the most important actors appear to have been the parents of the students affected by the ministerial regulations. It is not possible to speak here of a case of strategic

litigation initiated by the Seventh-day Adventist Church, rather the Church reacted to a state of affairs deemed unjust by its members. As attested within several interviews with institutional representatives of the Seventh-day Adventist Church in Romania, litigation is among the last options for solving conflicts related to religious freedom. Direct negotiation with the involved parties is preferred. Such an approach can lead to lower levels of litigation, given also the fact that (as intimated by one interviewee) members of the religious community are sometimes explicitly asked by the representatives of the Church not to take state institutions to court.

In **Case #2** the most important part was played by the main litigant. He had worked until the initiation of this case for a variety of human rights NGOs and also came to be the president of an NGO dealing with freedom of conscience issues. His activist associates (some with human rights expertise, including in the case law of the ECtHR) offered consultation on the litigation. Once the litigation became known publicly, many human rights and secularist NGOs manifested their public support for the initiative to regulate the presence of the icons in public classrooms. While legal support was also added to the litigation effort[4], the main claimant remained in charge of the litigation process.

In **Case #3** the most important part was played by the defrocked Orthodox priest who continued performing religious rituals and then defended himself in front of the domestic authorities. The priest intimated in an interview that he had found the ECtHR decisions relevant to his case independently, on the Internet. He pointed out that he thought his own university training was important in providing him with some general lines of orientation as to where to find relevant resources to support his own defense (which he grounded primarily in national legislation – the ECtHR judgments were a later addition).

In **Case #4** the institutional representatives of the church joined by the priest after being defrocked by the Romanian Orthodox Church played a particularly important role. One of the representatives of this church is also a jurist and has played an active role in formulating the written submissions of the defense in front of the domestic courts. The lawyers who represented the defrocked priest in front of the domestic courts appear to have played minor roles in supporting the litigation, some of them giving up the case along the way.

In **Case #5** an important role was certainly played by the two married men who applied for a residence permit. Interviews with actors involved in the litigation (which became strategic on the way, and received funding within an anti-discrimination project) indicated that the determination of litigants to go all the way until the exhaustion of all remedies is crucial in such cases, which sometimes take years. The main lawyer in the case, who chose the normative path to pursue (EU regulations rather than ECtHR case law), also can be denoted as having played a very important role in the development of the case.

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

In **Case #1** I was only able to interview representatives of the Seventh-day Adventist Church in Romania knowing about the case, but not the litigants themselves or their lawyer. Based on the conducted interviews, it is possible to say with a certain degree of certainty that the legal mobilization arose very likely in isolation from the dynamics of the ECtHR's jurisprudence,

[4] For instance, the Bucharest-based NGO Center for Legal Resources (*Centrul de Resurse Juridice*) supported the complaint both at the anti-discrimination Council and at the Bucharest Court of Appeal through *amicus curiae* briefs.

since it developed in response to an unsatisfactory state of affairs and was not part of a larger litigation strategy.

In **Case #2**, the litigant knew about the existence of the ECtHR before initiating the domestic proceedings and, in the course of our interview, stated that it was his aim to reach the Strasbourg Court with his case (reason for which he had based his argumentation primarily on Article 9 of the ECHR). He eventually indeed reached the Court with two complaints, one submitted before the *Lautsi* Chamber and Grand Chamber judgments and one submitted after the *Lautsi* Grand Chamber judgment. If the Grand Chamber decision in the *Lautsi* case could have prompted other litigants to renounce litigating in Strasbourg, the litigant in this case appeared to be determined to reach the ECtHR with his own case, disregarding (either wittingly or unwittingly) the risk of being unsuccessful.[5]

In **Case #3**, the defendant conceded having felt encouraged in his defense in front of the domestic courts by the pronouncements of the ECtHR regarding the obligation of state authorities to remain neutral towards conflicts between religious communities, which supported his own defense. This happened during the litigation, when the defendant found out about the ECtHR judgments relevant for his own case. It can thus be said that the jurisprudence of the ECtHR played a supportive role in the litigation.

In **Case #4** it was quite obvious that experience with ECtHR jurisprudence is at least not necessary for reaching the ECtHR. The lawyer and jurist who wrote the domestic submission for the defendant cited inaccurately one decision of the European Commission of Human Rights (as being an ECtHR decision, and with a different case name). These actors were also the ones who worked together on submitting the complaint to the ECtHR. Given that the lawyer in the case is not a human rights lawyer, the way this case reached the ECtHR could probably be best understood in relation to the wider context in which nowadays in Romania lawyers are sometimes willing, at the demand of their clients, to try their last chance at the ECtHR, after failing in front of the domestic courts. The service is offered at times free of charge (or at least at minimal charges), with the hope that the money would be obtained by the lawyer from the Government following a positive resolution in Strasbourg.

In order to understand the role of the ECtHR's jurisprudence in **Case #5** it is important to note at the outset that the ECtHR has been for a very long time relevant for LGBT rights activists and supporters in Romania, even before Romania ratified the ECHR. Different actors from the wider circle of LGBT rights supporters in Romania provided advice in the course of the litigation in Case #5. One of them, a human rights expert I interviewed, pointed out that it is important to know the state of the Strasbourg Court's jurisprudence at one point in time in order not to risk reaching the Court with a case at a moment at which the risk of being unsuccessful is too high.

The normative strategy adopted in the *Coman* case (emphasizing EU regulations rather than the ECHR) cannot be attributed to lack of ECtHR-related knowledge among the actors involved in the litigation. In light of the above-presented expert statement, one reason for relying on EU regulations rather than the ECHR may have been that the ECtHR jurisprudence was not as supportive of the argumentation being made in the case as it is at present (after, for instance, the Strasbourg Court's decisions in cases such as *Oliari v. Italy* or *Pajic v. Croatia*, among an increasing number of resolutions supporting the legal protection of same-sex couples). An additional reason for the decision to ground the argumentation in EU regulations may have been the previous experience with EU law and CJEU mechanisms of the main lawyer involved in the *Coman* case and the ACCEPT NGO, which obtained in 2013 a positive resolution in Luxembourg in a case concerning the discriminatory public

[5] See below in reference to Case #5 data illustrating more prudent approaches to litigation in Strasbourg.

statements of a former Romanian MEP regarding the refusal to employ members of the LGBT community. [6]

The basic frame of the litigation (beginning in front of the court of first instance) was set by appeal to Romanian constitutional provisions, domestic anti-discrimination legislation, and on the EU directive concerning the free movement of persons. Articles 8 and 14 of the ECHR were also mentioned. The case-law of the ECtHR appears in the written statements submitted to the Romanian Constitutional Court (both in the aftermath of important relevant decisions, like that in the *Oliari v. Italy* case as well as in response to opponents' *amici curiae* invoking the ECtHR case law, as discussed in more detail below).

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.

Because the pool of empirical data relevant for answering this question is limited if restricted to the cases selected here, I will provide a more general answer by drawing on a wider set of interviews, also with actors involved in other cases. In addition, because the answer provided here touches on issues addressed later at point (i), I combine below the answers to both questions by giving an account of the way lawyers and litigants make use of the ECHR and ECtHR's case-law as evidenced in the wider set of interviews conducted thus far.

The ECHR is mentioned in a litigation from the outset if the litigants aim to reach the Strasbourg Court or if they think the case may reach the Court (as evidenced in interviews related to **Cases #2** and **#5** discussed in this report).

In none of my interviews did I encounter a situation in which a litigation was started after an ECtHR judgment indicated that a national case could be successful if it would reach the ECtHR. Most commonly, the litigants, their lawyers and other legal experts involved in the cases (those documented in this report but also other cases) reported having searched for the relevant ECtHR cases after having gauged the details of their own cases.

Whether one ECtHR case or another is referenced depends (as I could tell from the wider set of interviews) on the litigants' or the legal experts' awareness of cases and the extent to which they deem them relevant for their own situation. How lawyers and litigants find out about ECtHR cases depends (based on the wider set of conducted interviews) on their own individual habits of looking for jurisprudence (e.g., looking into websites or print publications that discuss ECtHR cases), and on their embeddedness in expert networks (either national or transnational) that facilitate the flow of information about new decisions of the ECtHR.

Several interviewees involved in court proceedings (including from among those involved in the cases reported on here) reported having perceived in the past years an increased willingness of judges to take into account the references to the case-law of the ECtHR made by lawyers. One interviewee pointed out that the 'reaction' (positive or negative) of judges can only be judged looking at whether the judge did or did not take into account the references to the ECtHR case law made by the lawyer. For understanding why judges may increasingly take into account the references made by lawyers to the jurisprudence of the ECtHR I think it is important to have in mind the professional standards in place in Romania, which reward judges for making references to the ECtHR's case-law.

[6] See details regarding the case available (in Romanian and English) at http://www.acceptromania.ro/blog/2013/04/25/curtea-de-justitie-a-uniunii-europene-becali-ar-fi-trebuit-sanctionat-pentru-homofobie/, accessed 29 January 2018.

The litigant in **Case #2** pointed out that special attention needs to be paid in order to cite ECtHR cases that are relevant – otherwise one risks annoying the judge by making 'ornamental' references not connected to the argument being made. A lawyer interviewee pointed out that if the jurisprudence of the ECtHR on a particular matter is well known, one needs not cite case names, but rather simply make a general reference to 'the jurisprudence of the ECtHR'. Another lawyer pointed out that it is not good to make reference to the ECtHR in a threatening way (e.g., 'we will take the case to the ECtHR'), risking to annoy the judge.

I have not encountered situations in which lawyers or litigants wittingly avoided to mention relevant ECHR articles or relevant ECtHR judgments in domestic courts. Rather, as I could tell from several interviews, lawyers may not be aware of all the ECtHR judgments that could be relevant for a certain theme. As I understood the practice of lawyers and litigants working with ECtHR case-law, the process is one of incremental learning during the litigation (which means that some relevant cases may be left out if others were found before and were considered useful for a particular argument). Depending on the litigation, the development of a broader perspective may be necessary in some cases, and it can be expected that in such situations the lawyers develop a comprehensive awareness of the case-law relevant for a particular theme (this observation is based on the written submissions to the Constitutional Court in **Case #5**, which exhibit such a broader perspective on the relevant ECtHR case-law).

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?[7]

Case #1 is probably the only relevant case in relation to this question. In this case, the request to go to court was made by believers from the Seventh-day Adventist Church. While the Church did provide support in order to pursue the case, this is not generally its approach to solving situations of conflict with state authorities. Rather, negotiation is preferred. In an interview with a church representative at national level, I was told that tensions still exist with the Ministry of Education with respect to the organization of an extra-curriculum school competition on Saturdays. The same interviewee shared having been contacted by dissatisfied parents who had suggested taking the Ministry of Education to court on this matter. My interviewee intimated having instructed the parents not to go to court, and having asked them to wait until the matter would be solved through negotiation with the governmental authorities.

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)?

In **Case #2**, the litigation was in line with the wider goals of the secularist camp of Romanian civil society, though it was not part of a clearly articulated global strategy. Other NGOs with secularist interests applauded the efforts of the litigant and supported his actions through public position-takings. Moreover, other secularist activists declared to be determined to

[7] 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.

address the ECtHR on matters of freedom of conscience in other situations. Still, the litigation was initiated and continued mainly as a result of the individual litigant's determination, not because such a strategy had been discussed in a broader circle of secularist activists.

Case #3 and **Case #4** are very similar both with respect to the type of conflict that lies at their root and with respect to the legal proceedings involved. They are not exceptional in Romania at present. My interviews (both with persons involved in these two cases and with persons involved in other similar conflicts) indicated that the actors involved in such litigations related to defrocking measures taken by the Romanian Orthodox Church know about one another's existence. While there may be some episodic experience exchange and consultation between those defending themselves from the accusation of unlawfully practicing the profession of priest (as I could gather from my field research), I have not found indications that these actors are collaborating in devising a more global common litigation strategy.

Case #5 would probably best fit the description of a case connected to a global strategy, although here some qualifications are necessary. It can be said that in general the mobilizations to obtain more rights for the LGBT communities in different national contexts are connected to the agenda for obtaining such rights of the global LGBT rights movement. Such connection is practically maintained through regular meetings in which LGBT activists (including legal experts) can exchange views and receive training on various topics (including ECtHR case law). But while such connections exist between the national and transnational levels, activists in each country are responsible for the strategy they adopt and implement in order to obtain or defend rights. This was pointed out to me by a Romanian LGBT rights activist who answered to one of my questions by emphasizing that the activist strategy at national level is not 'made' by the International Lesbian and Gay Association (ILGA).

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

In **Case #1**, the submissions are not available at the time of the completion of this report.

In **Case #2**, the ECtHR decisions in the cases *Kokkinakis v. Greece* and *Refah Partisi v. Turkey* are mentioned by the claimant in the initial submission to the anti-discrimination Council.

In **Case #3**, the judgments in the cases *Metropolitan Church of Bessarabia and others v. Moldova and "True Orthodox Church in Moldova" and others v. Moldova* were submitted to the case file in order to support the defense against the prosecutor's inquiry into the accusation of unlawful practicing of the profession of priest.

In **Case #4,** a reference to the *Tyler v. UK* (1994) case presented before the European Commission on Human Rights was made (case name identified by myself according to the relevance of its contents – the name was not correctly reproduced in the written submission and the case was presented as having been decided by the ECtHR).

In **Case #5**, references to the ECtHR cases (arranged in chronological order*) Handyside v. UK (1976)*, *Dudgeon v. UK (1981)*, *F. v. Switzerland* (1987), *Smith and Grady v. UK (1999), Rotaru v. Romania (2000), Mata Estevez v. Spain (2001), S.L. v. Austria (2003), Sissanis v. Romania (2007), Schalk and Kopf v. Austria (2010), P.B.& J.S. v. Austria (2010), Alekseyev v. Russia (2010), X and others v. Austria (2013), Vallianatos and others v. Greece (2013), Hämäläinen v. Finland (2014), Oliari and others v. Italy (2015), Pajic v. Croatia (2016), Novruk and others v. Russia (2016), Chapin and Charpentier v. France (2016), Aldeguer Tomas v. Spain (2016) and Taddeucci and McCall v. Italy (2016)* were made by the lawyer of the same-sex couple in front of the Constitutional Court (in the written submissions).

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

With respect to **Case #1**, I found little ECtHR jurisprudence dealing with the requirement to respect Saturday as a day of rest. In fact, until now I identified just one such case of a Seventh-day Adventist from Finland (*Konttinen v. Finland*, 1996 – a State Railways employee complained of having been dismissed from his job for not having worked on Saturdays). The European Commission of Human Rights declared this case inadmissible.

In **Case #2** I was able to analyze the submission of the claimant to the anti-discrimination Council. The decisions in the cases *Kokkinakis v. Greece* and *Refah Partisi v. Turkey* are mentioned. Relevant decisions such as *Følgerø v. Norway* or *Zengin v. Turkey* came out in 2007, after the date of this submission (they would have been theoretically relevant if the applicant had chosen to argue that the presence of religious icons constitutes indoctrination, which he did not actually argue, at least not in this complaint [8]).

For the situation in **Case #3**, cases such as *Serif v. Greece* and *Hasan and Chaush v. Bulgaria* would have been relevant as well. It is important though to note that the two decisions that the defendant priest submitted to the case file were translated into Romanian. *Serif v. Greece* and *Hasan and Chaush v. Bulgaria* (which the case prosecutor actually cited in favor of the defendant) [9] are not available in Romanian translation.

In **Case #4**, the decisions in the cases *Metropolitan Church of Bessarabia and others v. Moldova*, *Serif v. Turkey*, *Hasan and Chaush v. Bulgaria* could have been cited. I interviewed one legally-trained institutional representative of the new church joined by the priest after his defrocking. My interviewee had been involved in the defense of the defrocked priest, and worked on the materials submitted to the domestic courts. He knew about the historical facts related to the recognition of the Metropolitan Church of Bessarabia by the Moldovan state, but he had not read the text of the ECtHR decision in the case. In my interviewee's words, 'that's all I found out, that through the European institutions [the Metropolitan in Bessarabia] managed to find justice'. He supported the idea that a complaint be submitted to the ECtHR after the final prison sentence was issued in this case.

In **Case #5** I am not aware of any additional cases that could have been referenced.

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)

See the answer at point (d) above.

[8] The complaint was framed as relevant for the issue of 'indoctrination' by the anti-discrimination Council, which referenced the cases *X v. Sweden* (of the European Commission of Human Rights) *and Kjeldsen, Busk Madsen and Pedersen v. Denmark* (of the ECtHR) to indicate the European human rights perspective over the rights of parents to educate their children and the obligation of states to refrain from any form of indoctrination. In addition to the two cases already mentioned, the anti-discrimination Council also referenced in its decision the ECtHR judgments in the cases *Hasan and Chaush v. Bulgaria*, *Serif v. Greece*, *Agga v. Greece*, *Kokkinakis v. Greece*, and *Otto-Preminger-Institut v. Austria*.

[9] Prosecutors are also evaluated according to whether they make reference to the jurisprudence of the ECtHR and the CJEU, just like the judges.

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?

The question is most relevant for **Case #2** and for **Case #5**, but not strictly in relation to the parties formally involved in the case. In both cases, the claimants made use of references to the ECtHR. In both cases, faith-based NGOs intervened in the proceedings (initiated parallel litigations, submitted *amicus curiae* letters) also citing the ECHR and the ECtHR's jurisprudence.

In **Case #2**, for instance, the faith-based NGO ProVita-Bucharest contested the decision of the anti-discrimination Council at the Bucharest Court of Appeal. Among other things, the NGO claimed that the Council's decision cited preferentially from ECtHR jurisprudence, taking quotations out of context. Thus, for criticizing the decision of the anti-discrimination Council, the representatives of ProVita-Bucharest cited the same textbook cited by the Council (a book written by Corneliu Bârsan, former Romanian judge at the ECtHR), but what was said on a different page.

The submission of ProVita-Bucharest exemplifies well the dynamic of references to the ECtHR and its case-law: once a reference is made by one party involved in a legal case, another party may take up that reference and accept it, reject it, reinterpret it. One representative of this NGO shared in the course of an interview that it was as a reaction to the fact that their ideological opponents were invoking so much the ECtHR that he had become interested in the Strasbourg Court's workings and its jurisprudence. The same NGO referenced the cases *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (which had also been referenced by the Romanian antidiscrimination Council in its decision in the icons' case), *Konrad v. Germany* and *Valsamis v. Greece* in a later request for intervention in the *Lautsi* case (asking for the deferral of the case to the Grand Chamber).

In **Case #5**, an *amicus curiae* submitted by the Association of Jurists for the Defense of Rights and Liberties - Bucharest to the Constitutional Court, opposing the legal recognition of family relations between same-sex partners, framed its brief as a discussion of the applicability in the case of ECtHR jurisprudence. The *amicus curiae* was framed as a response to the recent "'evolution'" (word used between quotation marks in the document) of the jurisprudence of the ECtHR (what the authors of the *amicus* brief suspected may have been the foundation on which the claimants based their request to the Constitutional Court). As already pointed out above, also the lawyer representing the same-sex couple has made references to ECtHR case-law.

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

The dynamic of referencing the same case law was particularly visible in **Case #5**. Here, for instance, in the *amicus curiae* submitted by the Association of Jurists for the Defense of Rights and Liberties - Bucharest, the case *Schalk and Kopf v. Austria* is cited to support the argument against the legal recognition of the existence of family relationships between same-sex partners.
In order to do this, the *amicus* brief cites one passage from the *Schalk and Kopf* decision stating that,

The Court notes that since 2001, when the decision in Mata Estevez was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then, a considerable number of member States have afforded legal recognition to same-sex couples.

The passage is then interpreted as indicating that the ECtHR, in stating in *Schalk and Kopf* that stable same-sex relationships fall under the legal category of "family life" (more than just "private life"), started from the rapid positive evolution of social attitudes towards same-sex couples in many member states of the Council of Europe. Based on this observation, the authors of the *amicus* argue that the principle stated by the ECtHR in *Schalk and Kopf v. Austria* (2010) and reiterated in *Oliari and others v. Italy* (2015) only applies to those states in which such a positive evolution of attitudes (like in Austria and Italy) is visible. They argue that the recent jurisprudence of the ECtHR does not apply to Romania, since the aforementioned positive evolution of attitudes towards same-sex couples is not documented in Romania. Quite the contrary, the authors of the *amicus* brief hold, in Romania 3 million signatures of support had recently been gathered for organizing a national referendum that would define "marriage" in the Romanian Constitution as explicitly "the union between a man and a woman". Thus, in their view, the relevant ECtHR jurisprudence applicable to the Romanian case would be that until the *Mata Estevez v. Spain* (2001) case in which same-sex couples were afforded legal protection under the category of "private life" not "family life".

Both *Schalk and Kopf v. Austria (2010)* and *Oliari and others v. Italy (2015)* have been referenced by the lawyer representing the same-sex couple in this case. The judgment in the *Schalk and Kopf* case has been referenced as stating that same-sex couples are just as able as heterosexual couples to enter stable and committed relationships, and as stating that relations within same-sex couples are "family relations". The lawyer moreover pointed out that the principle that relations within same-sex couples fall under the category of "family relations" (just as relations within heterosexual couples do) has been reasserted by the ECtHR in several other cases, including in *Oliari and others v. Italy*. The lawyer also pointed out that the evolution of the ECtHR case-law since the *Mata Estevez v. Spain (2001)* judgment must be taken into account by the Constitutional Court in the evaluation of the present case.

In **Case #2**, the ECtHR judgment in the case of *Hasan and Chaush v. Bulgaria* (2000) was invoked by the anti-discrimination Council in its Decision No. 323/ 2006 (Para. 78 of the ECtHR judgment was cited) to argue for an "active" conception of state neutrality in which the state is called to intervene in order to maintain pluralism (in the case at hand, by regulating the presence of religious icons in classrooms). In its Decision No. 2393/ 11.06.2008, the High Court of Cassation and Justice made a brief reference to the same ECtHR decision (mentioning just the case name) to argue for a contrary notion of state neutrality, which precluded any intervention with respect to the regulation of the presence of religious symbols in public schools.

PART II

Before embarking on the analysis of the specific cases based on the questions below, some preliminary remarks are useful for consulting the answers in a way that allows for a processual understanding of the occurrence of references to the ECHR and ECtHR's case-law. As such, the data below should be read with an eye to the wider context of practice within which judges, prosecutors and lawyers work.

As mentioned already above, Romanian judges and prosecutors receive training in ECtHR case-law. Still, the case-law they enter into contact with generally deals with the most common casuistry. As a consequence, in the less common cases such as those related to religious freedom or to the legal protection of same-sex couples, judges may take up a reference to an ECtHR judgment made by a lawyer, rather than making such a reference

from own initiative. This pattern was indicated as plausible by my interviewee from the National Institute of Magistracy. Moreover, the judgments analyzed in the cases presented here show a marked preference of judges to ground their reasoning in general legal provisions (from the Constitution, national applicable laws, international treaties) and hence to make reference to the ECHR more than to the case-law of the ECtHR.

One relevant example exhibiting the above-mentioned preference is, for instance, the judgment of the Bucharest Court of Appeal (No. 565/ 2008) which dismissed the complaint filed by the NGO ProVita-Bucharest against Decision 323/2006 of the anti-discrimination Council. In this judgment, the fact that the NGO ProVita-Bucharest criticized the way in which the anti-discrimination Council made use of ECtHR jurisprudence is simply noted by the judges of the Bucharest Court of Appeal, without going into details regarding the ECtHR's jurisprudence. The decision of the Bucharest Court of Appeal (upholding the decision of the anti-discrimination Council) is grounded in the provisions of the Romanian Constitution and of the Law on Education (regarding the separation between church and state, and the right of parents to choose with respect to the religious education of their children). The arguments of the anti-discrimination Council (which had been made by the Council also through appeal to ECtHR case-law) are confirmed by the Bucharest Court of Appeal solely by analyzing the situation in view of Para. 2 of Article 9 of the ECHR (reproduced integrally in Romanian in the judgment), which stipulates the possibility to restrict the right to manifest one's religion in public in order "to protect the rights and liberties of others" (a formulation emphasized in the text of the judgment).

We can thus expect lawyers (or litigants, if they represent themselves in court) to make more often references to the case-law of the ECtHR than judges (who may, nonetheless, take up a reference already made during the proceedings).

Please provide your analysis of:

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

Case #1. Not known

Case #2. Claimant, judge

Case #3. Defendant

Case #4. Defendant

Case #5. Claimant

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

Case #1. Not known

Case #2. In defense of the claimant (by the claimant himself, by the anti-discrimination Council); against the claimant (by the High Court of Cassation and Justice)

Case #3. In defense of the defendant (by the defendant himself, by the case prosecutor)

Case #4. In defense of the defendant (by the lawyer)

Case #5. In the defense of the claimant (by the lawyer); against the claimant (in opponents' *amicus curiae*)

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

Case #1. Not known.

Case #2. The weight of the reference to Article 9 of the European Convention is rather central in the argumentation of the submission to the anti-discrimination Council in Case #2. The ECtHR judgments in the cases *Kokkinakis v. Greece* and *Refah Partisi v. Turkey* are also cited to support the argument.

Case #3. The submission of the relevant ECtHR decision to the case prosecutor was an important step in obtaining a favorable judgment in Case #3. Still, this was not the first step that the defendant took, and he attempted to make an argument primarily based on national legislation (constitutional provisions, Law on religious freedom).

Case #4. The reference made in this case to one decision of the European Commission of Human Rights is rather marginal to the overall argumentation.

Case #5. The references to the ECtHR's case-law are central in the argumentation before the Constitutional Court (also due to the opponents' *amicus curiae* letters invoking ECtHR case-law).

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

Case #1. Unknown whether the ECtHR was cited and to what effect.

In **Case #2,** and with respect to the decision of the anti-discrimination Council, it is difficult to say that the claimant's references swayed the decision, since they appear to have merely provided an opportunity for the Council to develop an argument based on a much broader body of jurisprudence (including jurisprudence from Poland and Germany). The reference to the *Refah Partisi v. Turkey* case was not taken up by the Council, whereas the reference to *Kokkinakis v. Greece* was repeated by the Council, and was supplemented with other ECtHR decisions (which also added the element of 'indoctrination', absent from the initial submission of the claimant).

Case #3. Quite visibly, the submission of the ECtHR judgments swayed the decision of the prosecutor (and of the judge) in favor of the defendant.

Case #4. The reference was remarked by the judge in analyzing the argumentation of the defense but was not discussed and not mentioned in the body of the judgment.

Case #5. The case is still ongoing.

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

A preliminary remark concerning the way in which lawyers work with ECtHR jurisprudence is necessary here before answering this question, in order to re-calibrate the analysis in relation to the "thrust" issue. Based on my interviews with actors involved in litigation (in relation to the five cases analyzed in detail here, but also beyond) and on my analysis of written submissions, it is quite visible that ECtHR judgments provide argumentative resources that actors involved in litigation encounter during the litigation process. Normative statements from ECtHR judgments are thus more likely to be selected and referenced based on their

usefulness for the argument being made in court, rather than on the degree to which they reflect the "thrust" of the case within the wider body of relevant ECtHR jurisprudence.

In my analysis of ECtHR case-law references encountered in relation to the cases presented here I encountered the following types of references to the ECtHR case-law (the order does not reflect the frequency with which I encountered the references):

1) loose citations (mentioning of ECtHR case name) very remotely connected to the argument being made (or 'ornamental' references);
2) loose citations in which the argument being made is connected to the argumentation made in the ECtHR judgment;
3) close citations (citation of ECtHR judgment text between quotation marks, or at least reference to paragraphs in the referenced judgment) departing from the main argument being made in the judgment;
4) close citations keeping close to the main argument being made in the ECtHR judgment.

I have not encountered in the analyzed written submissions references that could be called 'unfaithful', namely references that would cite an ECtHR judgment as saying exactly the opposite of what it says (e.g., by distorting a quotation). Still, within interviews conducted with legal experts, it was pointed out to me that such situations can also arise in practice.

References:

Bogdan, Dragoş, and Alina Mungiu-Pippidi. 2013. "The Reluctant Embrace: The Impact of the European Court of Human Rights in Post-Communist Romania." In *The European Court of Human Rights: Implementing the Strasbourg's Judgments into Domestic Policy,* ed. Dia Anagnostou. Edinburgh: Edinburgh University Press, 71-93.