Religious Pluralism and the European Court of Human Rights: Insights from the Cases of Bulgaria and Romania

Effie Fokas

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Introduction to the European Court of Human Rights

The European Court of Human Rights (henceforth Court or ECtHR) is the court established by the European Convention on Human Rights (ECHR) in order to enforce the ECHR. The ECHR was adopted by the Council of Europe, whose primary aim is to create a common democratic and legal area throughout the European continent, ensuring respect for its fundamental values: human rights, democracy and the rule of law. The Council of Europe was established in Strasbourg in 1949 by 10 founding countries. Today it has 47 member states; all states in geographic Europe are members except Belarus' (candidate status since 1993).

The ECHR was adopted in 1950 and went into force in 1953. Ratification of the Convention is a prerequisite for joining the Council of Europe. The Court began operating in 1959. In 2008 it delivered its 10,000th judgment.

The ECHR has 59 articles and a number of protocols amending it. Of these, the most relevant to religious rights and freedoms are article 9, article 14, and article 2 of the first protocol.

Article 9: Freedom of Thought, Conscience and Religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 14: Prohibition of Discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

1st Protocol, Article 2: Right to Education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The EU is currently in the process of becoming a signatory of the ECHR (a draft agreement on the accession was published on 14 October 2011).

The Tension between Two Fundamental Principles of Subsidiarity and Pluralism and how this Tension is Played out in the Court in Terms of the Margin of Appreciation

The principle of subsidiarity is a fundamental aspect of the ECHR. The subsidiarity principle dictates that, by way of respect to national specificity, issues which can be effectively addressed at the national level should be addressed there, without intervention from a 'higher' level of governance. In the Court context specifically, the principle dictates that while certain standards must be universally observed by all Contracting States (CS), each CS is, in the first place, responsible for securing the rights and freedoms protected by the Convention.

According to Mancini (2010, pp. 20-21), the margin of appreciation was developed by the Court in order to reconcile the potential tension between universality and subsidiarity. This doctrine was set out by the Court in 1976 in *Handyside v UK,* where the Court indicated that it allows states a 'margin of appreciation' in determining whether a particular restriction of a right is required ('necessary in a democratic society') in the given circumstance (Evans 2001, p. 142). The doctrine, closely linked to the principle of subsidiarity, is based on the Court's assumption in that case that

> *By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.*

Clearly, both the principle of subsidiarity and the margin of appreciation introduce significant elements of moral relativism to the projection of human rights and religious freedoms. In *Rasmussen v Denmark* (1984), the Court introduced a further factor of relativism: that of consensus. Here the Court declared that

> *the scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of* ***common ground*** *between the law of the Contracting States'* (emphasis mine).

As Benvenisti (1999, p.851) argues, the 'consensus' doctrine, coupled with the 'margin of appreciation' doctrine, poses a serious obstacle to the projection of minority values:

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

Minority religious values, where representing a challenge to religious majorities, are slighted through the margin of appreciation. The margin has been applied especially to reinforce the status of religious majorities to the detriment of the rights of those belonging to religious and ideological minorities (most conspicuously in *Otto-Preminger-Institut v Austria, 1994*). Thus, as Mancini (2010) explains, the Court has often legitimised the interference by the state with certain rights, and in particular free speech, in order to protect the cultural/religious sensitivities of the (Christian) majority.

In the religious freedoms context where, according to Evans (2001, p. 143), the margin tends to be particularly wide, the margin of appreciation is a substantial tool through which the Court allows states a certain, variable, leeway to interpret religious rights and freedoms within the broader context of their national cultures and traditions. Meanwhile, it provides an exit for the Court from certain culturally and politically sensitive issues: as Julie Ringelheim notes (2012, p. 306), 'the large discretion [the Court] often grants to national authorities on [religion] cases is symptomatic of its difficulty in dealing with them'.

Presentation of a Theory that the Court is Moving towards More Narrow Margins of Appreciation and More Secularist Approaches

The above goes a long way towards explaining the fact that from its first cases in 1959, it was only in 1993, 34 years after the start of its operation, that the Court issued a ruling which found a state in violation of article 9. And so the *1993 Kokkinakis v Greece* case is a watershed. Notably, in the nearly 20 years since 1993, there have been at least 40 cases in which states have been found in breach of article 9 (Koenig, 2012, p. 17). This is not least because Greece and Turkey ratified the individual complaint procedure in the early 1990s and because of more claims from new member states in Eastern Europe after the

fall of Communist regimes.

However, observers have in fact noted a trend of the Court towards more narrow margins of appreciation and, effectively, towards more secularist approaches (Langlaude, 2006; Koenig, 2012). Matthias Koenig sees a three-step evolution of the Court's jurisprudence on matters of religion, leading increasingly to assertive secularist stances.

The first step consists of a broad definition of religious freedom which tends to work in favour of majority religion over negative religious freedom claims – for example, the maintenance of asymmetric blasphemy laws as in the case of *Otto-Preminger-Institut v Austria (1994),* where the Court defended the state's right to seize and forfeit a film considered offensive to Christians.

The second stage reflects a tendency of the Court to uphold secularism, mostly through cases to do with Islam. Characteristic here is the case of *Leyla Sahin v Turkey (2005),* in which it upheld a ban on wearing the Islamic headscarf at Turkish universities.

Finally, the third phase in Court jurisprudence transposes the secularist line of argument in cases related to Islam onto cases involving Christian majorities. In other words, in this latter stage, the Court may be seen not only as ceasing to protect majority religious rights but also actively influencing the status quo of church-state relations in signatory nations (Koenig, 2012). The *Lautsi v Italy* (2009) decision is a case in point, where the Court ruled that the display of the crucifix in Italian classrooms is in violation of the ECHR. Critically however, this decision was reversed by the Grand Chamber decision of 18 March 2011, following not least the unprecedented interventions by several national governments, 33 MEPs and a number of NGOs.

If this reversal of *Lautsi* is any measure to go by, it suggests that the political and 'direct' secularising trend will not continue without an intense fight on the part of individual member states. Further, the reactions to the 2009 *Lautsi* decision also suggest an increasingly intense popular awareness of and engagement with the potential influence of the Court (and, for many, that of 'Europe' in general) over religious affairs.

It remains to be seen whether that reversal of the original *Lautsi* decision marks the beginning of a new stage in the Court's jurisprudence, whether that be a pause, reversal or some other new trend in the evolution of the Court's jurisprudence.

Why Orthodoxy? The Place of Greece and Other Orthodox countries in Court Jurisprudence on Religious Freedom

My own research engages with limitations to religious freedoms in Orthodox contexts. I am in the midst of a study of this topic in four countries – Greece, Bulgaria, Romania and Russia. Thus far I have conducted the research on the Bulgarian and Romanian cases. But why Orthodoxy?

As I mentioned earlier, Greece was the first state to be convicted under the ECHR article protecting freedom of religion and belief (article 9), in the watershed *Kokkinakis v Greece* case of 1993, and was the defendant in nine of the twelve subsequent cases where religious freedom was supported (with seven of them involving Jehovah's Witnesses) (Richardson and Shoemaker, 2008). Since the end of Communist regimes in Eastern Europe, more and more religious freedom cases involving Orthodox states have arisen in the Court and ended in rulings against those states.

So disproportionate are the figures between conviction of Orthodox versus non-Orthodox states that Richardson *et al.* have questioned whether Greece in particular was being used by the Court as an example for new post-Communist signatories to the ECHR (Richardson and Garay, 2004; Richardson and Shoemaker, 2008). Richardson and Shoemaker (2008) have argued that the Court is biased and operates on the basis of a double standard, with a more narrow margin of appreciation for Orthodox countries.

My main research question has been what are the factors influencing the limitations to religious freedoms in four majority Orthodox country cases? Are they the same in all the cases or are there significant differences on the basis of which we can draw conclusions about the relative role of Orthodoxy *per se?* These questions arise also in response to a number of social and political science texts arguing that there is something inherently anti-pluralistic about Orthodoxy as a religion.

Other factors for examination were: the relationship between religion and national identity; the relationship between church and state; the particular post-Communist narrative in each country; where applicable, the role of agency (political and religious); and the specific minority presence (groups, size, temporal dimension and so on).

During the research project new important factors emerged: party politics; relative degrees of secularisation versus religiosity; and the EU/European Court of Human Rights.

What Effect does the Court have on Religious Freedom in Orthodox countries? Evidence from Research on the Cases of Romania and Bulgaria

Note on Methods

Regarding the case selection, taken together the four countries provide a good

balance in the sense that one of the four did not experience Communist rule (Greece), one is not a member of the EU (Russia), Greece is an older EU member, Bulgaria and Romania newer; and together they cover a broad range of levels of religiosity versus secularity.

The project entails qualitative research, carried out through in-depth interviews with:

- Representatives of minority religious groups
- Representatives of the Orthodox Church
- The director of the state's 'religious affairs' department/ministry, as applicable
- Representatives of NGOs dealing with religious freedom issues
- Lawyers handling religious freedom cases

In the Bulgarian and the Romanian cases, I approached most interviewees through three initial key contacts, and the snowball method took effect. I conducted 25 interviews in each country, during which:

- I asked **religious minority representatives** about their experiences as religious minorities in relation to the state, to the Orthodox Church, and to society in general; and their assessment of motivations for attitudes and policies against them, where applicable
- I asked **Orthodox Church representatives** about their relationship with religious minorities, and with the state, as well as their assessment of reasons behind the nature of those relationships
- And I asked **the other three categories** listed above about the legal framework governing religious freedoms (including their assessments of the evolution of the legislative framework; their opinion of the laws currently in place; and their perspective on the state of religious freedom in the country).

Why interviews? Besides offering a vibrant picture of current grassroots developments in the domain of religious pluralism, interviews made me privy to the deeper mentalities, perceptions and perspectives of people in positions of power (in each of the five categories), and to their broader objectives – what do they hope to achieve? These perspectives, mentalities etc. have, I would argue, value independent of the actual facts and realities on the ground; together they offer a picture of pluralism, or lack thereof, internalised by the representatives of various stakeholder groups.

Purely on the basis of the interview research, I've drawn up two rather crude lists of limitations to religious freedom for each country case, as voiced by my interviewees (I emphasise, these are not lists based on my own assessments). The lists are crude especially because they give no sense of the nuance behind

each problem in each country, which would take far more time to discuss than I have at my disposal. Second, lists can give a sense of hierarchy which clearly cannot apply here: not all groups experience all problems equally, and some of the most conspicuous religious freedoms limitations which influence large populations may be limited only to one or two religious groups. Third, the number of the problems can give no sense of their size. If there's any point in presenting such lists it is to offer entry points to a discussion of various factors and mechanisms behind some of these religious freedom limitations.

The Top Five Religious Freedom Problems,
on the Basis of Interview Research

Bulgaria

1. Legislative Framework on Religion

- Preferential treatment for the Bulgarian Orthodox Church (BOC)
- Maintained role for executive branch in religious group registration
- Local level registration required

Government Interference in Internal Affairs

- The BOC schism
- The Muslim community schism

Societal Hostility towards Religious Minority Groups

- Closely linked to the mass media 'anti-sect' campaign in the early 90s

Local-Level Limitations

- Regarding the degree to which religious freedom limitations are much greater in smaller towns and villages than in the capital city

5. Limited Access to Mass Media

Romania

1. Legislative Framework on Religion

- Very strict registration process
- Continued heavy state control of registration process

2. De Jure and De Facto Romanian Orthodox Church (ROC) privileges

- Gross financial benefits
- Access to cemeteries and media; chapels

3. ROC actions and attitudes

- Influence exerted over politics

- Anti-ecumenical stance
- Hostility towards religious minorities

4. *Land retribution to Greek Catholics*

5. *Religious Education*
   - Orthodox, catechetical and & anti-minority
   - Mandatory *by default*
   - 10-child threshold for other classes

6. *Local level limitations*

Two Preliminary Observations

It is worth noting that there was little to no reference to Orthodox theology by any of the interviewees.

It is noticeable just looking at the lists that complaints relating to the Orthodox Church are far fewer in Bulgaria and higher in Romania. This has to do with church-state relations, which are weaker in Bulgaria, because – amongst other factors – of its relative secularity. Thus in the Bulgarian case we find fewer Orthodoxy-specific religious freedom complaints. This relative secularity in the Bulgarian case is significant in the sense that it influences the fact that there is little (compared with the other cases) popular interest in either promoting or suppressing religion in Bulgaria as compared with Romania. Hence, for example, BOC efforts to introduce mandatory religious education in state schools have struggled to achieve any political support.

Assessment of the Role of the ECtHR, Drawing on Interviews and on the Relevant ECtHR Cases

In both the Bulgarian and Romanian cases, pressures related to hope and efforts to join the EU played a large role in pushing through postcommunist reform of legislation regulating religion (2002 in Bulgaria; Romania managed new legislation only in 2006, just in time for accession). Until then, new religious movements, but also other religious minority groups with a historic presence in each country, operated through loopholes and, often, as some type of NGO rather than as religions or denominations.

The fear of ending up in the ECtHR was also a mobilising factor; but there are few groups with the resources or will to reach that far into the legal system in both countries: Jehovah's Witnesses tend to be an exceptional case in this regard. In general, as noted by McCann (1992), actual resort to judicial intervention is more the exception than the rule; and reaching the ECtHR

tends to entail a very long, difficult and expensive process, so the Court seems not to act as much of a deterrent to religious freedoms violations.

In my view, the Court decisions may have a much more powerful effect in terms of grassroots mobilisations based on these. Court decisions can significantly facilitate the placement of issues on the public agenda and thus serve as catalysts for significant social change – what Scheingold calls the development of a 'politics of rights' (1974). According to Scheingold, marginalised groups may capitalise on perceptions of entitlement associated with particular legal developments in order to initiate and to nurture political mobilisation. This process of 'rights consciousness raising', which takes place during the earliest phases of organisational and agenda formation, is, according to McCann (2004, p. 510), 'perhaps the most significant point at which law matters for many social movements'. Such grassroots mobilisation is, I believe, where we should look to better ascertain the broader influence of the ECtHR on religious freedoms and religious pluralism more generally. This is the topic of my current research (beyond that focused specifically on religious pluralism in majority Orthodox contexts).

NOTES

Note 1: As C.Evans and C.Thomas (2006, p. 699) note, 'the ECHR only prohibits discrimination in regards to ECHR-acknowledged rights and does not include a general provision requiring the equality of all people before the law. The absence of a general non-discrimination provision in the main body of the ECHR has a significant legal effect in church-state cases'.

Note 2 Kokkinakis, a Greek national who converted to the Jehovah's Witnesses, was arrested over 60 times on the charge that he was practising proselytism. The Court condemned the Greek state for infringing on his right to religious freedom. At the same time, it ruled that member states have a legitimate interest to prosecute 'improper proselytism' (which, according to article 9 of the ECHR is understood as abusive, fraudulent or employing violent means). Significantly, the Court did not declare the Greek law on proselytism incompatible with the ECHR, since the law could also be seen as a means to protect the rights and freedom of others. (Martinez-Torron and Navarro-Valls, 2004).

Note 3: For some scholars, Orthodox theology is the root of the problem; and, specifically, the Orthodox understanding of the human person as foremost a member of the collective, rather than an autonomous individual. The inference is that individualism does not take root properly in Orthodox contexts as it does in the West, and so without a proper regard for the individual and individual rights nor is it possible to have sufficient protection of rights of religious minorities which lie outside the collective.

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Effie Fokas is a Research Fellow at the Hellenic Foundation for European and Foreign Policy and a Research Associate of the LSE Hellenic Observatory. She was the Founding Director of the LSE Forum on Religion established in 2008 at the European Institute.