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## Religious Freedom in Flux: The European Court of Human Rights Grapples with Ethnic, Cultural, Religious, and Legal Pluralism

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### ABSTRACT

This article examines the growing influences of the European Court of Human Rights (ECtHR), and controversies arising as a result of the Court's movement toward establishing itself as a *de facto* Supreme Court of member nations of the Council of Europe (CoE) in the area of human and civil rights, including religious freedom. Responses to criticisms of the Court are considered, as is the growing problem of some member states refusing to enforce rulings of the Court. Some recent cases, mostly involving Islam, that seem to demonstrate a growing recognition of the ethnic, cultural, and legal pluralism that exists within the expanded CoE are examined. Also discussed is the apparent two-track approach the Court has taken as a result of having to manage religious freedom within such a diverse group of member nations.

### KEYWORDS

European Court of Human Rights, religious freedom, legal pluralism, margin of appreciation, pilot judgments, Islam, Russia's extremism statutes, minority religions, Jehovah's Witnesses<sup>1</sup>

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<sup>1</sup> An organization proscribed in the Russian Federation (Editor's note).

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## Introduction

The European Court of Human Rights (ECtHR or the Court) is the court of last resort concerning possible violations of human and civil rights for citizens in the 47 member states of the Council of Europe (CoE). It is a major part of the enforcement machinery established after WWII to promote western democratic values as presented in the European Convention on Human Rights and Fundamental Freedoms (herein the European Convention) which was developed by the nascent Council of Europe in 1950 and went into force in 1953, having been signed by all original members of the CoE (Harris et al., 2009). Established initially as a part-time court nearly seven decades ago, the Court was an important part of efforts to preclude atrocities such as occurred during WWII. Establishment of the Court also was meant to deter the spread of communism by emphasizing other values, goals, and methods of societal organization (Madsen, 2016). The Court, which became a full-time court in 1998, has since evolved considerably and grown in influence within the European region and around the world (Fokas, 2015/2016; Fokas & Richardson, 2018; Richardson, 2015; Koenig, 2015; Hammer & Emmert, 2012). The Court has sometimes worked with constitutional and other courts in CoE nations in efforts to promote human and civil rights in CoE nations. This has been especially the case with newer member states of the CoE which were accepted as members by the CoE after collapse of the Soviet Union (Sadurski, 2008/2009; Richardson & Shterin, 2008). The growing influence and power of the Court has suggested to some observers that it is rapidly becoming a *de facto* Supreme Court of Europe in the human and civil rights arena (Harris et al., 2009, p. 2; Koenig, 2015, p. 51; Madsen, 2016, p. 141).

Herein I will summarize some important recent changes in how the Court operates, and also discuss major problems being faced by the Court in recent years. I will also review selected recent decisions of import for religious freedom in the CoE member states. Included in cases discussed are several that involve variants of Islam, and which, taken together, seem to suggest that the Court is becoming more accommodating of the cultural, religious, ethnic, and legal pluralism that exists within the CoE<sup>2</sup>. Also covered will be the large number of pending ECtHR cases deriving from Russia's effort to apply extremism laws to religious groups, including the Jehovah's Witnesses, Islam, and other minority faiths. I will conclude with a brief analysis of how the Court has responded to its many pressures, and of how it seems to be developing a unique pattern of jurisprudence cognizant of the vast differences that exist within the enlarged CoE.

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<sup>2</sup> In brief, legal pluralism refers to "...the presence of different legal traditions and institutions within a single political framework such as a state, thereby raising problems about how laws might be enforced and recognizing the prospect of contradictory traditions" (Turner, Possamai & Richardson, 2014, p. 1). For discussions of legal pluralism see Merry (1988), Tamanaha (2009), Berman (2007), and Richardson (2014b). For applications of the concept to Shari'a law in western societies see Possamai, Richardson and Turner (2014), Aires and Richardson (2014), and Richardson (2014a/2014c). For development of specific theoretically grounded hypotheses in this area of socio-legal studies see Richardson and Springer (2013).

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## Recent Changes in How the Court Functions

Recently, I summarized the history and organization of the CoE and the Court (Richardson, 2017), describing a number of recent significant changes in how the Court operates and in the Court's jurisprudential pattern concerning religion that has developed of late. These changes, a few major ones which will be highlighted herein, were brought about in part because of concern among some both older and newer member states about the growing influence and power of the Court, as well as concern over the huge growth in applications that has occurred in large part because nations formerly dominated by the Soviet Union have affiliated with the CoE. The history and culture of former Soviet nations has had the effect of forcing the Court to take into account significant differences among those nations.

The recent changes have developed against a background of decades during which the Court operated by giving great deference to the “margin of appreciation” doctrine, established early in the Court's history with the *Handyside v. United Kingdom* (7 Dec 1976) decision when the CoE was much smaller and culturally more homogeneous (Adrian, 2018; Beaman, 2016; Jusic, 2018; McGoldrick, 2016). This doctrine allows original member states to monitor their internal affairs in areas of national sensitivity without external interference from the then newly-formed ECtHR. As Fokas (2016, p. 552) has noted, “religion holds a special place in the ‘politics of the margin of appreciation’”, a point also made by Ringelheim (2012), with the Court often allowing an expanded margin of appreciation in such cases. However, the overall doctrine has evolved in recent decades with the Court issuing rulings viewed by governments of some member states as unduly intrusive and ill-advised. This has been especially the case with the United Kingdom and Russia, but also other member states, including both original and newer member states (Koenig, 2015; Fokas, 2016; Madsen, 2016; Richardson, 2017)<sup>3</sup>.

One major way some members of the CoE have attempted to gain leverage over the ECtHR is by gaining support for the principle of “subsidiarity” by which is meant that decisions should be made at the lowest possible political level. To emphasize this concept a new section was added the end of the preamble to the Convention mentioning both the subsidiarity principle and the margin of appreciation. That section, added as a result of the Brighton Statement<sup>4</sup>, reads as follows:

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

Thus, it is clear that the Court must work with governments to promote the values expounded in the Convention.

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<sup>3</sup> Koenig (2015, p. 61) also makes the point that the growth of concerns about human rights throughout the CoE has also been a major contributor to the huge case growth that the Court has experienced.

<sup>4</sup> See: High Level Conference on the Future of the European Court of Human Rights [Brighton Declaration]. Retrieved from [https://www.echr.coe.int/Documents/2012\\_Brighton\\_FinalDeclaration\\_ENG.pdf](https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf)

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The “pilot judgment” process is another important change in how the Court operates, and has contributed to the trend toward the Court becoming a *de facto* “supreme court of Europe”, establishing precedents that should be followed by member states (Sadurski, 2009; Richardson, 2017). This new procedure is an effort to address the issue of multiple and continuing applications to the Court with similar claims that laws from member states, especially newer members, violate Convention articles. Pilot judgments have become a powerful tool for the Court to deal with what are referred to as structural problems with laws of member states. When the Court issues a pilot judgment against a member state in a problematic area of law, the member state is expected to modify its legal structure to comport with Convention values (as are other member states with similar provisions).

The establishment of a Network of Superior Courts and an agreement allow major courts in member states to request advisory opinions from the ECtHR are other recent innovations designed to encourage dialogue between the ECtHR and court systems in member states (Richardson, 2017). These important changes demonstrated the Court’s new willingness to work with national courts to promote ECHR values by educating member state’s court personnel about the work and rulings of the ECtHR. The changes, most of which were designed to lessen the Court’s dramatically increasing case load as well as limit the Court’s reach, also demonstrate that the Court is attempting to involve national court systems in the promotion of Convention values.

The Court’s welcoming of intervention by member states and NGOs in cases accepted for adjudication also is a major development with implications for how cases are handled as well as outcomes of the adjudication process (Fokas, 2018; Van den Eynde, 2013/2017). More “friendly settlements” are also encouraged, which means that an agreement between the member state and the applicant has been reached short of full adjudication (Richardson, 2017). Such an outcome has occurred with increasing frequency when it becomes obvious (perhaps because of other “pilot judgments” rendered by the Court) that any forthcoming decision probably will be against the government involved.

### **Remaining Problems and Issues Faced by the Court**

When nations affiliate with the CoE they pledge to abide by the Convention. Thus, when a decision is rendered against a member state the government in question is expected to modify its laws to comport with Convention values and rulings of the Court. There is a growing problem of member states refusing to implement decisions of the Court (Madsen, 2016; Richardson, 2017). This includes some major decisions concerning religious freedom, but also other areas of law as well. A growing number of member states are refusing to enforce decisions of the Court or to modify their statutes and procedures. Some member states simply pay whatever monetary damages are awarded, but do little else to respond to the Court’s decisions. Included among this list of recalcitrant member states are Russia, Hungary, Ukraine, Poland, and Turkey, but also the U.K., France, and Italy are balking at fully implementing decisions of the Court.

The worst offenders include Ukraine, which as of 2014 had 1,002 cases filed with the Court and with violations found in all but 10 (Madsen, 2016, p. 172). In 2018

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Ukraine has had 12,000 cases referred to the Council of Ministers for final disposition because Ukraine has refused to modify its laws and procedures to address similar problems raised by many applicants. Poland's record is similar with 1,070 cases filed since 2014 and violations found in all but 107 of them (Madsen, 2016, p. 172). Italy's failure to address prison reform has been a continuing issue with the Court (Madsen, 2016, pp. 162–163). And officials the U.K. have expressed considerable concern about ECtHR rulings that would grant voting rights to prisoners, among other issues (Bates, 2014/2015). Turkey and Hungary are other recalcitrant member nations (Madsen, 2016). Some 27,000 applications deriving from the failed *coup d'état* in Hungary were declared inadmissible because of failure to exhaust internal remedies (which in fact do not exist as an effective way to address the issues raised). Hungary has had over 6,000 cases dealing with prison overcrowding declared inadmissible because of failures to deal with the issues raised internally.

Russia has an especially dismal record overall before the Court. Madsen (2016, p. 171) notes that as of 2014 Russia had been the subject of 1,604 cases with the Court, with violations found in all but 74 of them, which means that 15% of all judgments finding a violation by the Court were against Russia. Russia has lost a number of cases dealing with religion before the Court (Lykes & Richardson, 2014; Richardson & Lee, 2014) and has more recently begun enforcing extremism laws against minority faiths such as the Jehovah's Witnesses, Islamic groups, and others. As of early 2019 there are 49 cases involving the Witnesses filed with the Court because of the drastic actions taken against the group by Russian authorities. Included in these cases are ones concerning the dissolution of the entire national Witness organization, the banning of its website, invasions of churches and homes of members, and the incarceration and even physical harm being visited upon some members and church buildings by Russian police or citizens acting with apparent impunity. The majority of these cases have been "communicated" to the Russia authorities, which means the Court has asked Russia to explain its actions (or inactions), a procedure by the Court that usually precedes a judgment. Russia has made no effort to pass legislation that would require implementation of ECtHR rulings, and indeed, political and national court officials have in recent years been voicing strong criticisms of the ECtHR, claiming interference with internal affairs. So it is unclear what will occur if and when the Court rules against Russia in these Witness cases.

All these criticisms of the Court and its rulings have placed pressure on the Court to more fully recognize the legal pluralism that exists with the many diverse nations that make up the CoE. The following discussion of some recent selected cases may indicate ways the Court is attempting to deal with the many pressures it faces in dealing with the contemporary makeup of the CoE.

### Recent Religion Cases of Interest

Some recent ECtHR cases seem particularly of interest in terms of understanding the evolving jurisprudential record of the Court in the area of religion. Perhaps not surprisingly many of these cases involve Islam in some manner. These cases may

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demonstrate an effort by the Court to make decisions that increase the chances of successful integration of Islam into the fabric of Europe, as well as show that the Court is not always acting in ways that promote a Christian or even a secular agenda, a controversial and much-discussed claim<sup>5</sup>. Adrian's (2019) discussion of *SAS v. France*, *Dahlab v. Switzerland*, *Sahin v. Turkey*, and *Ebrahimian v. France* illustrates this apparent bias toward a secularist or possible anti-Islam agenda. She states:

The Court's judgements have barred elementary school teachers from wearing the headscarf in public schools, restricted university students from wearing the veil, banned the face veil from all citizens in most public spaces, and ... stripped civil servants from the right to wear the headscarf at work. Thus the type of wearers (from civil servants to citizens) and the spaces (from schools, to streets, to other public institutions) have broadened in the past 16 years, thereby curtailing the right to manifest religious freedom for more people in more places (Adrian, 2018, p. 9).

Adrian further notes that these decisions represent an expansion of "the already extensive application of the margin of appreciation allowed to states", and that this posture of the Court, "undermines the mandate of the Court to protect vulnerable minority populations in Europe" (Adrian, 2018, p. 10).

Ferri (2018) discusses some of these same cases, among others, asserting that taken as a groups the cases represent the Court's avoidance of its "positive obligation" to promote ideological and cultural pluralism. By this she means that states have a positive obligation to take measures designed to guarantee effective implementation of human rights within their jurisdiction. She too is critical of the wide margin of appreciation granted to some member states in such matters because it seems to absolve states of performing their duties toward their citizens in the area of human rights, including religious rights.

Medda-Windischer (2018) offers a somewhat more sympathetic interpretation of recent decisions by the Court, including those discussed by Adrian and by Ferri<sup>6</sup>. She says (Medda-Windischer, 2018, p. 52):

If it is true that the Strasbourg Court has in those cases displayed a rather restrictive approach towards accommodating religious diversity, it is also true that, in other cases, the Court has discarded a militant form of secularism and has followed a more pluralistic model of open secularism.

Medda-Windischer (2018, p. 62) goes on to discuss some of the cases she thinks demonstrate a greater appreciation and support for a more pluralistic model, asserting that the Court has sometimes treated the Convention as a "living instrument", and

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<sup>5</sup> For discussions pro and con of a possible pro-Christian and/or anti-Muslim bias in the Court's jurisprudence also see the entire volume edited by Durham et al. (2012) as well as Martinez-Torron (2014/2017), Meerschaut and Gutwirth (2008), Kayaoglu (2018), and Barras (2018).

<sup>6</sup> Also see Martinez-Torron (2015) for a more sympathetic analysis of the Court's religion decisions.

that “the Court can be influenced by the development of standards shared by member states of the Council of Europe”. She adds (Medda-Windischer, 2018, p. 63):

The principles applied so far by the Court in cases related to the freedom of religion represent a pragmatic response to variations existing among states in interpreting the right to manifest one’s religion. In particular, the most controversial margin of appreciation can be considered as an implementation of the general principle of subsidiarity regulating – in international law – the relation between national and supranational bodies, such as the European Union and the Council of Europe.

The more recent decisions to be discussed below seem to vary from the overall thrust of earlier cases involving aspects of Islam, and may suggest efforts by the Court to accommodate the ethnic, religious, cultural, and legal pluralism that exists within the CoE. Perhaps some of these selected cases demonstrate the pragmatism that Medda-Windischer (2018) claims to see in some recent, but sometimes quite controversial decisions.

### **Russia’s Extremism Statute and the ECtHR**

In the wake of the 9/11 attack on the World Trade Center in New York, a number of nations passed various statutes designed to assist in the “war on terrorism”<sup>7</sup>. One of the most far-reaching was passed in Russia, and this new statute has been used since against a number of minority religions, ironically including even ones whose explicit teachings promote non-violence in human affairs. Thus the new extremism law has been used to declare entire groups such as the Jehovah’s Witnesses (JW) as extremist, leading to the dissolution of the national JW organization, confiscation of all JW property, and the arrest of practicing members of the group. This in turn has led to the filing of nearly 50 applications with the ECtHR by the Witnesses with the Court having “communicated” with Russia about many of the cases, which means they are being considered for adjudication.

The statute has also been used against the teachings of Islamic scholar Said Nursi<sup>8</sup>, a well-known Turkish Muslim theologian who has written about the meaning of the Qu’ran. Applications were filed with the ECtHR by a Russian citizen, a publisher of Nursi’s books, and a national religious organization, claiming a violation of Article 9 (freedom of religion or belief) an Article 10 (freedom of expression), and these applications were dealt with together in the 28, August, 2018 decision in *Ibragim Ibragimov and others v. Russia* (Duval, 2018). This important decision, which found a violation of Article 10 in light of Article 9, makes it clear that the extremism statute cannot be applied against a group or publication unless there is an explicit incitement to hatred or violence contained in the writings. The decision also explicitly criticized the Russian courts for accepting one-sided expert reports on the writings in question,

<sup>7</sup> For one example of the reaction see James T. Richardson’s discussion of what occurred in Australia (Richardson, 2013).

<sup>8</sup> In Russia, several Nursi’s writings has been included into the “Federal List of Extremist Materials” (Editor’s note).

and not allowing counter expert opinions to be considered by the courts. This decision focused on the ECtHR's assessment of what constitutes "hate speech" and ruled that the writings in question did not qualify as such, citing as precedent the famous "Pussy Riot" case of 2018 (*Mariya Alekhina and Others v. Russia*)<sup>9</sup>. The ECtHR referred several times in its decision to the report of the Venice Commission (2008) which was critical of the Russian extremism statute and its application to rather selected religious groups and writings. The ECtHR also indicated support for the right to proselytize and promote one's religious beliefs to others. How Russia responds to this quite critical ruling remains to be seen. However, this ruling suggests that the eventual decisions on many JW cases will also favor the applicants, thus raising the stakes considerably for Russia, for the ECtHR, and even the Council of Europe itself.

### Shari'a and the ECtHR

For nearly two decades the ECtHR has, through its jurisprudential record, posited that the values and principles of Shari'a are incompatible with the values of democracy and human rights enshrined in the European Convention. This was made clear in 2003 with a controversial decision in *Refah Partisi and Others v. Turkey* (13 Feb., 2003) which supported the Turkish government's decision to dissolve the largest political party in Turkey. The *Partisi* decision has been criticized as demonstrating a limited understanding of Islam (see i.e., Meerschaut & Gutwirth, 2008, among others). However, the decision in *Molla Sali v. Greece*, rendered on Dec. 18, 2018 (HUDOC Information Note, *Molla Sali v. Greece*, 2018) might be viewed as undermining the firm stance taken in *Partisi*, although that assessment is controversial (Puppinc, 2018). The case involved a Muslim woman whose husband left her all his property with a common law will properly notarized according to Greek law. However, the will was challenged by the husband's sisters who claimed that since the husband was Muslim inheritance should be dictated under Shari'a law which would result in the two sisters being the recipients of three quarters of the inheritance<sup>10</sup>. The Greek courts, although initially favoring the widow, on appeal issued a ruling siding with the sisters and annulling the Greek common law will. The Court indicated that inheritance had to be settled according to Shari'a law or Greece would be in violation of the Treaty of Lausanne granting the right of the Islamic minority in Thrace to be governed in domestic matters by Shari'a law.

The widow then appealed to the ECtHR, claiming violations of Article 6.1 (right to a fair trial) taken alone and in conjunction with Article 14 (discrimination) and Article 1 of Protocol 1 (property). The case was initially assigned to a section, but then, in a somewhat unusual move, was relinquished to the Grand Chamber for adjudication. In a lengthy and thorough ruling the Grand Chamber unanimously found a violation of Article 14 (discrimination) in conjunction with Article 1 of Protocol 1 (protection of property). The key question addressed by the Court was whether the widow was discriminated against in a manner that would not have occurred had she not been

<sup>9</sup> See Maclean (2018) for a discussion of this and related Pussy Riot cases.

<sup>10</sup> The practice of Shari'a law in Greece in the Muslim community of Thrace is an anomaly which dates back to the terms of a population exchange between Greece and Turkey embedded in the 1923 Treaty of Lausanne.



a Muslim. The Court concluded that indeed she was treated differently because of her faith, thus resulting in the decision that her claim under Article 14 was warranted.

However, the Court, rather than affirming its hard stance against applications of Shari'a, indicated that, if a country desired, Shari'a could be acceptable under certain circumstances that involved an informed choice by all parties to allow domestic matters to be governed under Shari'a. But the Court's explanation of what circumstances might warrant acceptance of Shari'a were not entirely clear, leaving room for debate and needing further clarification (World Politics Review, 2018; Puppinck, 2018).

The implications of the *Molla Sali* decision may be immense, as the decision may be viewed ultimately as another example of the Court recognizing legal pluralism in the contemporary world, and an effort by the Court to find ways to better integrate Islam into the fabric of Europe<sup>11</sup>. Greece seems in the process of attempting to address the discrepancy between European anti-discrimination law and the practice of allowing Shari'a personal law in the Thrace area, as per the Lausanne Treaty of 1923. It recently modified relevant laws prior to the *Molla Sali* decision (which was decided under extant law prior to the change), allowing for the optional application of Shari'a law. However, this recent action by the Greek government have been subject to considerable criticism as potentially limiting personal choice of women in the Muslim community because the family and societal pressures they may face to submit to Shari'a law may render moot the 'optional' aspect (World Politics Review, 2018).

### **Blasphemy and the Prophet Mohammed: E.S. v. Austria**

On October 25, 2018 the ECtHR decided a quite controversial case from Austria, *E.S. v. Austria*, ruling that Austria had not violated Article 10 (freedom of expression) when its courts refused to overturn a decision that the applicant had violated the criminal code of Austria making it illegal to disparage religious precepts. The applicant had referred to Muhammad as a pedophile during presentation at a seminar entitled "basic information on Islam" presented by right-wing Freedom Party Institute, resulting in the charges against her and a resulting fine. This claim about Mohammed was based on the apparently historical fact that Muhammed had, at the age of 56, married a nine-year-old girl.

The Court ruled that the application of the law had a legitimate aim of preventing disorder by safeguarding religious peace and protecting religious feelings of Austrian citizens who were Muslims. The Court indicated that the seminar presentation had been misleading and was not in fact an objective treatment of Islam. The Court thus granted a very wide "margin of appreciation" to Austria in the matter, indicating that government officials were closer to the situation and better able to understand the importance of applying the statute in this matter.

Note that this decision, while of concern to advocates of freedom of expression, aligns, for good or ill, with much earlier decisions where the Court upheld restrictions on

<sup>11</sup> It is noteworthy, as the Court notes, that Shari'a law is allowed in at least one other CoE country under limited circumstance (domestic law in the U.K.), and applications of Shari'a rules in the area of finance are also spreading among CoE member nations (Possamai, Richardson & Turner, 2014; Ahmed Aries & Richardson, 2014).

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blasphemy against Christianity. These early decisions include *Otto-Preminger Institut v. Austria* (20 Sept., 1995), and *Wingrove v. UK*. (20 Nov., 1996), which were at the time also controversial in part because they seemed to be supportive of efforts to control blasphemy, but only in favor of Christianity. Perhaps the recent *E.S.* decision will level the playing field a bit and indicate that the Court is seeking a path that recognizes the extant pluralism of many CoE countries. However, for proponents of free speech *E.S.* and the *Otto-Preminger* and *Wingrove* decisions represent significant limitations of freedom of expression.

### **Religious Attire in the Courtroom: Hamidovic v. Bosnia and Herzegovina**

The wearing of religious attire in public has been a major point of contention throughout Europe in recent years, mainly provoked by the desire of many Muslims to wear apparel that identifies them with their faith. And usually the ECtHR has seemed tone-deaf to the concerns of Muslims, rejecting most applicants who bring cases dealing with religious dress to the Court<sup>12</sup>. However, this attitude of the Court may be shifting somewhat, as indicated by a recent case.

The *Hamidovic* case, decided in December, 2017, involved a member of a fundamentalist Islamic religious community who was called to testify in court in Bosnia-Herzegovina (BiH), but who refused to take off his Islamic skullcap as instructed by the judge. The witness was respectful of the court and willing to testify but unwilling to remove his headgear for religious reasons. He was sanctioned for contempt and fined 5,000 Euros (later reduced on appeal to 1,500 Euros), but he did not pay the fine and thus was sentenced to 30 days imprisonment. After he was released Hamidovic sought relief from the Constitutional Court of BiH which ruled against him, stating that his contempt citation was a lawful interference with his religious rights. Hamidovic then applied to the ECtHR for relief, claiming that his rights under articles 9 and 14 of the Convention had been violated.

The ECtHR took considerable care in analyzing the case, noting that among other things BiH was 51% Muslim and 46% Christian, with a constitution that guaranteed religious freedom and was based on secular principles. The Court presented results of a comparative analysis focusing on rules applied to the wearing of religious symbols in court proceedings in 38 CoE member states. This research revealed that only four states required removal of headgear in court proceedings and that in those four the rule was not enforced consistently. The Court then focused on whether such a requirement concerning the removal of religious headgear was necessary in a democratic society, and ruled that in this case it was not. The Court found a violation of articles 9 and 14.

The Court tried in its ruling to make it clear that this decision was unique to the facts of this case and did not overrule earlier ECtHR decisions concerning religious dress in public spaces. It also stated that there might be future cases where removal of religious symbols, including headgear, in courtrooms would be justified. Thus,

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<sup>12</sup> One exception is *Ahmet Arslan v. Turkey* App. No. 41135/98, decided Feb. 23, 2010, in which Turkey was found to have violated Article 9 when it found 127 members of an Islamic sect to have violated Turkish laws when they refused to remove their turbans during court proceedings. But see Jusic (2019) for a discussion of contrary cases involving religious garb in legal proceedings.

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the Court tried to limit application of the decision, but nonetheless the decision may represent a recognition of some circumstances where basic tenants of Islamic sects could prevail within a courtroom setting.

## Conclusions

The European Court of Human Rights has become one of the most powerful international courts in the world. But the gradually accruing success and growing influence of the Court over the decades since its creation have raised concerns among several of its original sponsors in the CoE. Also, the operating environment of the Court has undergone a dramatic change with the collapse of the Soviet Union and the subsequent addition of many former Soviet-dominated nations to the CoE. Thus, the Court has been forced to respond to growing disquiet among some original sponsors while at the same time it is grappling with thousands of applications from citizens of newer member states whose backgrounds and cultures have not been supportive of human rights.

Not surprisingly the Court has, in the face of these two major concerns, developed a complicated bifurcated response and may be in the process of developing a dual track jurisprudence in the area of religious regulation as well as in other areas (see analyses and empirical evidence offered in Cali, 2018; Jusic, 2018; Stiansen & Voeten, 2019). Thus the “judicialization of religious freedom” (Mayrl, 2018; Richardson, 2015) within the much-enlarged CoE has evolved in a manner cognizant of the vast cultural and historical differences among CoE nations. The Court’s more recent jurisprudential record seems to promote legal pluralism as it grapples with many differences present within the CoE concerning religious practices, as demonstrated particularly by the cases cited above involving Islam.

One track seems to treat most original members of the CoE with considerable deference involving an expansion of the margin of appreciation, an approach that has resulted in allowing those member states to exercise substantial control over human rights matters including religious practices as well as other areas. This broad margin of appreciation has resulted in the Court often deferring to national governments’ attempts to regulate religion in cases dealing with Islam but other cases as well. If the member state’s governmental review of the issue involved has been demonstrably thorough then the ECtHR has begun to use this as grounds for deferring a substantive analysis and finding in favor of the member state. This recently developed track seems designed to maintain favor with and support from original member nations.

The second track appears to treat most new members of the CoE (and also sometimes Turkey and Greece) as being in need of considerable hands on guidance in how it deals with matters involving religious freedom and other human rights. This approach can involve a more thorough substantive analysis of the claims before the Court and less deference to claims of the member state, even as the Court recognizes historical and cultural differences within the newer members of the CoE. This second track also has had implications for how the Court has recently been adjudicating cases involving Islam, and this development has had an impact on some cases concerning Islam brought before the Court from original members of the CoE. This

newer jurisprudential pattern involving Islam cases appears to represent a recognition of the legal and cultural pluralism that exists not only within newer CoE members, but also with original member states as well.

Thus, the Court seems in the process of developing a quite complex jurisprudence in its efforts to manage the vastly differentiated landscape of a much enlarged CoE. The consequences of applying this complicated mode of operation adopted by the Court, and how it comports with the “judicialization of religious freedom” concept remains to be seen. As the Court begins to develop a jurisprudence that seems more deferential to the cultural and legal pluralism that exists within the new (and older) CoE nations, can it succeed in “educating” newer CoE members, some of whom are quite recalcitrant and openly hostile to the Court’s rulings and overall authority, while treating more consolidated democracies with greater deference? Or will the Court end up effectively neutered with respect to older CoE members and ignored by newer members? Indeed, there are ultimate questions to be posed concerning the future of the Court and of the CoE itself given these recent developments. Can the Court and the CoE survive in the modern era with so many conflicting demands being made on it? That seems the major question of the time.

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