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## REVIEW

*Of* Dia Anagnostou and Evangelia Psychogiopoulou, “The European Court of Human Rights and the Rights of Marginalised Individuals and Minorities in National Context” (Leiden: Martinus Nijhoff Publishers, 2010)

By ALBA RUIBAL\*

In the extensive scholarship on the European Court of Human Rights (ECtHR), this book is the first to offer an encompassing assessment of the role of the Court on the protection of the rights of vulnerable and minority groups in member states. It stands out for the breadth of its approach, covering from detailed case-law analysis, to the institutional and socio-legal factors that have contributed to define the influence of the Court in each national setting. The study covers eight countries -Austria, Bulgaria, France, Germany, Greece, Italy, Turkey and the United Kingdom- that differ in several structural dimensions as well as on their outcomes in terms of minority-rights litigation and consequent ECtHR jurisprudence.

The first chapter, by Dia Anagnostou, does an excellent job of providing a general analytical overview of the evolution of the work of the Court on the rights of marginalized individuals and groups, and of presenting the main theoretical problems and empirical findings that are raised throughout the volume. One of the central questions highlighted in this chapter, and explained across the country case-studies, is how since the 1990s the Court has become a significant venue for the protection of minority rights, even if resort of minority groups to the Court was not enabled or foreseen by the drafters of the European Convention of Human Rights (ECHR) in the late 1940s. In effect, there is no minority rights provision entrenched in the Convention, and the proposal for a new protocol to the Convention providing for these rights was hampered by lack of consensus among states in 1993. The only legal basis for such claims can be found in article 14, which precludes discrimination in the enforcement of Convention rights, and must be read together with other Convention provisions, and in article 34, which confers standing to groups, as well as to individuals and NGOs, to submit claims before the Court. How this transformation in the role and jurisprudence of the Court regarding minority rights has taken place is the matter of this book.

As Anagnostou explains, this development has been produced by the Court itself, through its interpretation of the scope of rights that can be claimed under the Convention, in a process triggered by claims and litigation by individuals “whose views, ethnic-national origins or way of life set them apart from –and potentially in conflict with- the majority”. This process has implied, on the one hand, a doctrinal development by the Court on principles of interpretation and application of the ECHR, in particular the “living instrument” doctrine, which has enabled the Court to interpret the Convention according to present-day conditions. On the other hand, this process has

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been fueled by the increasing legal mobilization of social actors. The country studies explain in detail how the interaction between both developments, internal and external to the Court, has taken place. They also analyze the reception of the ECtHR's jurisprudence in each country, and the impact of its decisions on the constitutionalization of the rights of vulnerable groups at the national level, as well as on national courts' approaches to issues related to equality and discrimination. Through the combination of case-law analysis and a socio-legal approach, and through the assessment of the sources and implications of the Court's decisions on minority rights, each chapter offers an in-depth and situated perspective on the main jurisprudence of the ECtHR in this field, which allows to understand the significance and consequences of the work of Court in this area of rights.

Legal mobilization can be considered, in fact, the factor that most strongly links legal and social problems and developments at the national level with the supranational jurisdiction of the Court. It is logical, then, that a book devoted to analyze the role of the Court in national contexts focuses in this aspect. The country case-studies detail the role of rights advocacy NGOs as complainants in rights claims, as well as in offering legal advice and submitting *amicus curiae* briefs in cases before the Court, and show how legal mobilization has contributed to shape and expand the work of the Court in the area of minority rights. A key development in all country studies, although with varied intensity, has been the use of strategic litigation by actors in civil society, who have increasingly approached the ECtHR not only as a venue to resolve particular cases, but also as a relevant instance in their pursuit of broader legal and policy change. The cases approached through strategic litigation are also those in which, according to the country case-studies, the Court's decisions have been more consequential in terms of the impact on national policy and legal reforms. The main cases addressed by each country chapter in which there has been strategic litigation offer an overview of the scope and dynamics of claims before the Court in the field of minority rights.

The chapter on Austria, by Kerstin Buchinger, Barbara Liegl and Anstrid Steinkellner, shows that the groups that have been more represented by NGOs in cases before the Strasbourg Court are immigrants and asylum seekers, gays and lesbians and religious minorities. The authors observe that certain groups, such as the Muslim minority or the Carinthian Slovenes, have not been represented at the ECtHR. It would be interesting to know, through further studies, the reasons for this group, and other groups in different national contexts not to have recourse to the Court. The Bulgarian case, analyzed by Yonko Grozev, Daniel Smilov and Rashko Dorosiev, explains that human rights NGOs focused on the violation of basic rights and racist violence against Roma, as well as on the religious rights of minorities. The authors point out an interesting aspect related to the legal strategy developed by Jehovah Witnesses, whose leadership developed a strong legal strategy in favor of the group and not only of particular litigants, and were successful in negotiating with the government to settle cases if there was a commitment to legal reform, particularly regarding non-military service. Emmanuelle Bribosia, Isabelle Rorive and Amaya Úbeda interestingly explains how, in the case of France, reluctance to legally recognize minorities, as well as a historical preference of political over legal means by activist groups have implied that most cases that reached the ECtHR have been presented by individuals instead of NGOs; but they also point out that this situation has started to change, and rights advocacy

organizations have represented marginalized groups, mostly immigrants and asylum seekers, and also in cases of discrimination based on gender or sexual orientation, and religious minorities. In Germany, as explained by Christoph Gusy and Sebastian Müller, specialized organizations have given advice mainly to asylum seekers, who otherwise generally don't appear before the Court. The chapter on Greece, by Evangelia Psychogiopoulou describes strategic litigation patterns in favor of religious and ethnic minorities, among them Jehovah Witnesses, who, as in the Bulgarian case, have developed a strong case-testing strategy before the ECtHR. In Italy, as explained by Serena Sileoni, there is an incipient development of strategic litigation before the Court, in cases concerning the rights of immigrants and asylum seekers. The chapter on Turkey, by Dilek Kurban, shows that activism before the Court was developed mainly by Kurdish lawyers for human rights abuses under the state of emergency in the 1990s, and also by non-Muslim minorities. In the case of the United Kingdom, analyzed by Susan Millns, Christopher Rootes, Clare Saunders and Gabriel Swain, there has been extensive litigation supported by NGOs on diverse areas of rights concerning vulnerable individuals and minorities, for example in gender-related test cases, or in the defense of the human rights of Irish prisoners, immigrants and Roma.

Furthermore, in each case-study, the authors include an interesting and frequently overlooked aspect of the interaction between courts and external actors, i.e. the role played by the academic community and scholarship in each country in changing the public perception of the ECtHR, as well as in influencing the conceptualization of human rights in each national context. In the case of Austria, for example, it is observed how legal scholarship on rights protection under the ECHR has influenced the development of the concept of equality before the law in gender-discrimination cases, as well as on discrimination on grounds of ethnicity and race. On the other hand, the chapter on Bulgaria illustrates how the silence of the academic community regarding minority rights and minority representation, which has started to be broken, had become an obstacle for the incorporation of ECtHR's criteria on Bulgarian constitutionalism.

The country case-studies show that the Court has had a positive role in the protection and advancement of the rights of marginalized individuals and minorities. However, many of them also offer insights on the limitations of the Court to offer redress to the underprivileged. The main obstacle observed in most cases is that access to the Court is determined by access to material resources for litigation, which as a rule are less available for vulnerable and minority groups than for the majority population. As observed by the chapter on Austria, even in successful cases in which claimants obtain compensation, they have to devote a great part of it to pay for their lawyers. In the more extreme situations, some groups either are unaware of their legally recognized rights and the means for their protection, or they do not search for remedy because of their lack of legal residency status. This problem alludes to the paradoxical role of counter-majoritarian institutions, devoted to protect a system of rights that may go against majoritarian preferences, but whose functioning cannot be isolated from the structural social determinants of majoritarian political systems. This is even more striking in the case of human rights courts, which are more essentially linked to the protection of those members of society who are vulnerable or disadvantaged precisely for their lack of resources and-or for following different customs than the majority population. In many

cases, the same situations that disadvantage vulnerable or minority groups also limit their access to justice. This makes it all the more important the existence of a material support structure in society to offer legal aid and allow for sustainable legal mobilization before the ECtHR, as observed throughout this book. A different important obstacle that strongly affects the possibilities of minorities such as immigrants or refugees to reach the Court is the long time it takes to exhaust the national proceedings in some countries until the ECtHR jurisdiction can be accessed. As observed in the chapter on the Austrian case, in order for the Court to be able to offer effective remedy in these situations, a more expedite protection system would be necessary at least in some national settings.

Although in general the focus of this volume is on the impact of the Court on the national level and its main insights are on domestic processes triggered by appeal to the Court's jurisdiction in cases related to minority rights, the issues it deals with also contribute to understand the general working of the European system of rights protection. They also shed light on the recent evolution of the institutional role of the Court, after several developments that have affected its work. Among these changes are, in the first place, the accession of new countries to the Convention in the post-communist context, which expanded the Court's jurisdiction to forty-seven member states; second, the restructuration of the European human rights system in 1998, through Protocol No. 11, which among other measures implied the conversion of the two-tiered system based on the Commission and the Court into a single Court, and introduced a mandatory right to individual petition by which individuals have direct access to the Court; thirdly, through the expansion of the scope of rights that the Court can deal with, among them the rights of minorities, as explained by this book. These developments have converged to produce an expansion of the Court's workload but also have consequences on how the Court's agenda is formed nowadays, based on individual petitions, and without the investigation and mediation role of the Commission. They pose new concerns and questions regarding, for example, efficiency in the work of the Court, and, more fundamentally, regarding the way in which it can select cases in order to set a jurisprudence in particular areas of rights under the Convention. In this sense, litigation strategies by social actors may function as a fundamental recourse for the Court in that they generally entail the preparation of cases that are representative of the main administrative and legal obstacles for the enforcement of human rights found at the national level, as shown in this book.

Overall, this volume offers a landmark analysis of processes and forces that have contributed to shape the mechanisms for human rights protection of minorities and disadvantaged individuals and groups in the interface between national contexts and Europe's supranational legal system. Moreover, the processes described and explained in this book also shed light more generally on the complex relationships between actors and institutions involved in the working of the European human rights regime, and provide elements to analyze the recent evolution of the ECtHR. A final consideration regards the impressive methodology that sustains the structure of this book. It is, in fact, an excellent example of how a wide collaborative project can result in a cohesive and well-integrated volume. The book is superbly well-edited, and one of its strengths is that the country studies are developed following a consistent methodological layout, which makes this work an extraordinary resource as well as a solid base for further

cross-country comparative studies in the European context, as well as for comparison with the role of human rights courts in other regional settings.