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Christian Faith-Based Organizations as Third Party Interveners at the European Court of Human Rights

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Christian Faith-Based Organizations as Third-Party Interveners at the European Court of Human Rights

*Eugenia Relaño Pastor**

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INTRODUCTION

Following the phenomenon before the U.S. Supreme Court, many Christian advocacy groups and churches have increased their presence before the European Court of Human Rights (ECtHR). The advocacy groups can adopt a form of non-governmental organizations (NGO), a conference of churches,¹ or

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1. See, e.g., *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, 183 (summarizing the arguments presented in the third-party intervener brief of the Catholic Bishops' Conference of England and Wales); *Martínez v. Spain*, 2014-II Eur. Ct. H.R. 449, 474-75

even an appointed academic scholar as a representative of the church or as an independent neutral actor.² As third-party interveners, these actors argue that to ensure more authentic and more legitimate judicial decision-making, additional voices beyond those of the parties should be heard by the court. The nature of intervention shifts from an invitation by the court to an application to the court; from official or statutory bodies such as governments³ to lobbying groups;⁴ and from neutral submissions to “rather more partisan arguments.”⁵

The so-called public interest intervention has been justified by scholars on two grounds: first, that intervention places a diversity of information, beyond that provided by the parties, before the court; and second, that intervention enhances the legitimacy of the eventual decision.⁶ Regarding the first point, we shall explore how much diverse information Christian advocacy groups effectively add to the cases for the ECtHR. As for legitimacy, the value of legitimization of the decision rendered by the court relies on the fair chance for different actors to “play the game.” As Bryden points out, “judicial decisions create winners and losers. And nobody likes to lose.”⁷ By enhancing opportunities for public participation and showing courts’ willingness to listen to interveners, judges attach importance to people. Bryden also argues that public participation is relevant “not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect.”⁸ This argument will also be explored here by querying whether Christian advocacy groups’ interventions aim to protect human dignity by providing a voice

(summarizing the arguments presented in the third-party intervener brief of the Spanish Episcopal Conference (Conferencia Episcopal Española)).

2. See, e.g., Oral Submission of Professor Joseph H.H. Weiler on Behalf of Armenia et al. as Third-Party Intervening States, *Lautsi v. Italy*, 2011-III Eur. Ct. H.R. 61, https://eclj.org/pdf/weiler_lautsi_third_parties_submission_by_jhh_weiler.pdf; Avidan Kent & Jamie Trinidad, *International Law Scholars as Amici Curiae: An Emerging Dialogue (of the Deaf)?*, 29 LEIDEN J. INT’L. L. 1081 (2016).

3. See, e.g., *Lautsi*, 2011-III Eur. Ct. H.R. at 85–87 (discussing government interveners’ arguments).

4. See, e.g., *Martínez*, 2014-II Eur. Ct. H.R. at 475 (discussing the European Centre for Law and Justice’s arguments).

5. Sarah Hannett, *Third Party Intervention: In the Public Interest?*, 2003 PUB. L. 128, 128.

6. Philip L. Bryden, *Public Interest Intervention in the Court*, 66 CAN. B. REV. 490 (1987).

7. *Id.* at 508.

8. *Id.* at 509.

for disadvantaged groups who have historically been ineffective in influencing public policy or, on the contrary, if their intervention contributes to judicial decision-making in one particular direction according to an overall campaign strategy for their own NGOs' aims, which could be those of the large religious communities.

The first Part of this Article shows how NGOs have become a driving force in shaping rights by intervening strategically in relevant litigation at the supranational level. The second Part aims at analyzing the meaning of the term *amicus curiae* as well as the progressive acceptance of NGOs as third-party interveners before the Strasbourg organs. And the third Part scrutinizes the four main "religious-oriented" areas in which Christian advocacy groups have intervened at the ECtHR. By analyzing the forty-four Strasbourg cases gathered from the Human Rights Documentation (HUDOC) database, as well as the main Christian advocacy groups' internet sites, this contribution also hints at how Christian groups' fundamental philosophical principles—with ramifications in sensitive ethical issues—could conflict with the evolving interpretation of the European Convention's rights asserted by the Strasbourg Court. Furthermore, the study renders self-evident that these third-party actors endorse the governments' arguments, and therefore the states' margin of appreciation when their philosophical and religious principles that inspire their agendas are at stake.

I. SUPRANATIONAL STRATEGIC LITIGATION: THE ROLE OF NGOS

Supranational litigation opportunities offer interest groups as NGOs new participation rights and a voice at the supranational level and, more particularly, at the Council of Europe level. The role of NGOs in legal mobilization has received substantial attention among socio-legal scholars.⁹ Some literature has concentrated on

9. RACHEL A. CICHOWSKI, *THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE* (2007) [hereinafter CICHOWSKI, *EUROPEAN COURT AND CIVIL SOCIETY*]; Peter J. Spiro, *Nongovernmental Organizations in International Relations (Theory)*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* 223–43 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013); Rachel A. Cichowski, *Legal Mobilization, Transnational Activism, and Gender Equality in the EU*, 28 *CAN. J.L. & SOC'Y* 209 (2013); Lisa Conant, Andreas Hofmann, Dagmar Soennecken & Lisa Vanhala, *Mobilizing European Law*, 25 *J. EUR. PUB. POL'Y* 1376 (2017); Sophie Jacquot & Tommaso Vitale, *Law as Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women's Groups at the European Level*, 21 *J. EUR. PUB. POL'Y* 587 (2014); Lisa Vanhala,

how unsuccessful groups, unable to exhaust the conventional political structures, can weaponize and instrumentalize the law as a strategic tool and provoke transformations of law or policy reforms from below.¹⁰ Other socio-legal scholars have adopted macro-level analyses of the political and legal opportunity structures (access to procedures in court) and cost-benefit calculations for NGO's' intervention.¹¹ Another type of socio-legal research has centered on micro-level elements (organizations' legal capacity or prior legal mobilization experience),¹² and some other scholars, such as Anagnostou and Fokas, have analyzed the effect of the judicial rulings on the mobilization of social actors and how courts' decisions can influence the discursive frames of social movements' actors, reconstruct their interests, and at times empower them. As Anagnostou and Fokas highlight, courts—in a contradictory way in legal action related to religion and religious freedom—"can contribute to the emergence, growth or decline of social movements, not only of progressive but also of conservative ones."¹³

Regardless of the angle taken to study the role of NGOs in strategic litigation, Harlow and Rawlings draw a relevant distinction between proactive litigation strategies and reactive litigation strategies that is very useful for our analysis.¹⁴ *Proactive* litigation describes those situations where groups seek to take their cause to the courts and promote some policy change through courts. *Reactive* litigation would include those situations where

Anti-Discrimination Policy Actors and Their Use of Litigation Strategies: The Influence of Identity Politics, 16 J. EUR. PUB. POL'Y 738, 740–45 (2009).

10. Jacquot & Vitale, *supra* note 9, at 587.

11. Conant et al., *supra* note 9, at 1382; HELEN DUFFY, STRATEGIC HUMAN RIGHTS LITIGATION: UNDERSTANDING AND MAXIMISING IMPACT 13–21 (2018).

12. See Muhip Ege Çağlıdil, When NGOs Turn to Strategic Litigation: European Supranational Courts as Venues to Influence EU Asylum Policy and the Dublin Regulations (2018) (M.A. thesis, Central European University), http://www.etd.ceu.edu/2018/caglidil_muhip.pdf.

13. Dia Anagnostou & Effie Fokas, *The "Radiating Effects" of the European Court of Human Rights on Social Mobilisations Around Religion in Europe – An Analytical Frame* 7 (Mobilise Grassroots, Working Paper No. 1, 2015), <http://grassrootsmobilise.eu/the-radiating-effects-of-the-european-court-of-human-rights-on-social-mobilisations-around-religion-in-europe-an-analytical-frame/>.

14. CAROL HARLOW & RICHARD RAWLINGS, *PRESSURE THROUGH LAW* (1992) (cited in Vanhala, *supra* note 9, at 741).

groups feel the law was discriminatory and challenge the law to seek a remedy and acknowledgment by the court.¹⁵

At the supranational European level, judicial decisions can be used by NGOs as leverage to “expand the scope” of rights or “alter the meaning of treaty provisions – rules that are otherwise relatively immune to alteration.”¹⁶ The type of litigation heavily influences NGOs’ use of strategic litigation. In 1974, Galanter distinguished two types of litigation interventions: “repeat players” and “one-shotters.”¹⁷ Repeat players have a broader experience by engaging simultaneously in several complaints, and they have more resources as well. Repeat player litigants are concerned not only about the outcome of a particular case but also about the change, or maintenance, of a specific policy. The very nature of “repeat playing” ensures an accumulation of experience and skills. Indeed, Hodson has argued that NGOs litigating before the ECtHR are mostly repeat players.¹⁸ Additionally, repeat players’ intervention does not always represent those who have traditionally had little effective voice in society. Indeed, in some jurisdictions, like Canada and the United Kingdom, strategic litigation also demonstrates that non-government interveners do not represent the sole interest of the powerless.¹⁹ For example, in the *Pretty* case in England, a terminally ill woman suffering from motor neuron disease sought judicial review of the Director of Public Prosecutions’ decision not to issue an undertaking not to prosecute her husband if he assisted her in killing herself.²⁰ The House of Lords allowed interventions from representatives of the Catholic Church and a consortium of pro-life groups made up of the Society for the Protection of Unborn

15. A reactive litigation strategy is very important for sub-cultural movement organizations such as LGBT activism, which involves campaigning for the decriminalization of homosexual offenses and fighting against the unequal age of consent laws. Individual activists and small grassroots organizations relied on protest and subsequent “reactive litigation strategies” as a way of looking inward and developing and reproducing collective identities. See Vanhala, *supra* note 9, at 750.

16. CICHOWSKI, EUROPEAN COURT AND CIVIL SOCIETY, *supra* note 9, at 6.

17. Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 97 (1974). Galanter points out that “[w]e might divide our actors into those claimants who have only occasional recourse to the courts (one-shotters or OS) and repeat players (RP) who are engaged in many similar litigations over time.” *Id.*

18. LOVEDAY HODSON, NGOs AND THE STRUGGLE FOR HUMAN RIGHTS IN EUROPE 63–64 (2011).

19. Hannett, *supra* note 5, at 138.

20. *Pretty v. Dir. of Pub. Prosecutions* [2001] UKHL 61, <https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd011129/pretty-1.htm>.

Children, the Medical Ethics Alliance, and Alert.²¹ In this case, the Christian third-party interveners gave voice to a majority sector of the population.

Here, I will analyze the role of the Christian faith-based organizations as repeat players in their intervention at the ECtHR, and more specifically, the impact of their expertise in expanding case law and setting precedents for the Strasbourg Court. Churches and conferences of churches have also intervened as third parties; however, due to the limited space of this contribution, the intervention of churches will not be addressed.²²

II. AMICUS CURIAE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

A. Background: NGO Standing Before the ECtHR

There is no single valid definition of NGO.²³ NGOs are distinguished from other common types of organizations, specifically governmental bodies, enterprises, and informal entities such as families.²⁴ For this Article, the term will be used to describe a type of non-state actor that is formally constituted and non-profit seeking.

When the European Convention on Human Rights (ECHR) entered into force on September 3, 1953, and the 1950 original version was read, individuals and private groups, including NGOs, did not have the right to appear before the ECtHR.²⁵ However, individuals and groups, including NGOs, could file complaints with the European Commission of Human Rights, claiming a violation by one of the member states of his, her, or its rights as set

21. *Id.*

22. Churches have played a prominent role as third-party interveners in relevant ECtHR cases. See *Schüth v. Germany*, 2010-V Eur. Ct. H.R. 397, 422 (summarizing the Catholic Diocese of Essen's arguments as third-party intervener); *Sindicatul "Păstorul cel Bun" v. Romania*, 2013-V Eur. Ct. H.R. 41, 59-60 (summarizing the arguments of third-party interveners, the Archdiocese of Craiova and the Moscow Patriarchate).

23. See Stephan Hobe, *Non-Governmental Organizations*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Anne Peters & Rüdiger Wolfrum eds., 2019), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e968?rskey=ICvYvG&result=3&prd=MPIL>.

24. Lloyd Hitoshi Mayer, *NGO Standing and Influence in Regional Human Rights Courts and Commissions*, 36 BROOK. J. INT'L L. 911, 911 (2011).

25. See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 25, Nov. 4, 1950, 213 U.N.T.S. 221.

forth in the European Convention. Over time, the President of the ECtHR could grant the opportunity to intervene to both individuals and NGOs if, in a given case, it would be in the interest of the proper administration of justice. Before 1998, it appears NGOs participated in only several dozen cases in total.²⁶ When Protocol 11 went into effect in 1998, it eliminated the European Commission and expanded the entities that had a right to bring a case before the ECtHR. More specifically, Protocol 11 amended Article 34 of the European Convention to provide that “[t]he Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.”²⁷ Protocol 11 also amended Article 36 of the ECHR that under the heading *Third-party intervention* to state, “The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.”²⁸

Nevertheless, the right for an NGO to act as a claimant before the ECtHR has been restricted. The NGO must have a claim that it has been the victim of a violation by a member state of the rights set forth in the European Convention, and it is not sufficient that the rights of the group of individuals which the NGO represents have been violated. Consequently, as Laura Van den Eynde points out, since NGOs do not have *locus standi* before the ECtHR to act on behalf of alleged victims within their field of competence, third-party interventions have effectively become one of the few available avenues for NGOs to become involved in cases before the Court.²⁹

B. Third-Party Intervention and Amicus Curiae Briefs

The literal translation of the Latin term *amicus curiae* as “a friend of the court” often causes confusion as to its present nature, scope,

26. Mayer, *supra* note 24, at 916.

27. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 34, May 11, 1994, C.E.T.S. No. 155.

28. *Id.* art. 36.

29. Laura Van den Eynde, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, 31 NETH. Q. HUM. RTS. 271, 276 (2013).

and origins.³⁰ In 1964, Ernest Angell provided a definition by which *amicus* appears “to have been originally a bystander who, without any direct interest in the litigation, intervened on his own initiative to make a suggestion to the court on matters of fact and law within his own knowledge: the death of a party, manifest error, collusion, etc.”³¹ From this definition can be drawn that the *amicus* assists the court on the law and on the facts. As a non-party intervener “without having an interest in the cause,”³² independence and neutrality are assumed. The assistance provided to the court relies on the *amicus*’s expertise and the ability to assist the court with research, arguments, and submissions. An *amicus* can even correct the court when a judge is doubtful or mistaken.³³ Chandra Mohan classifies the *amicus curiae* into four categories for a better understanding of its historical development:

1. *The Classic or Traditional Amicus*: The *amicus* is normally appointed if the court considers that a case involves important questions of law of public interest. The purpose of the *amicus* is to advise or assist the court in arriving at its decision and not to represent the interests of any party or cause.
2. *The Bystander or Intervening Good Samaritan*: The *amicus* is as a bystander-intervener that offers factual or legal information to the court.
3. *The Supportive Amicus*: This category can be subdivided into three categories: (a) the *amicus* appointed by the court to present the case on behalf of an undefended party; (b) the *amicus* as a third party with a “personal and direct interest in one of the parties in the case”;³⁴ and (c) government officers permitted to appear as *amicus* on behalf of a wider public interest to inform the court about public policy issues.

30. See S. Chandra Mohan, *The Amicus Curiae: Friends No More?*, 2010 SING. J. LEGAL STUD. 352, 353, 357.

31. Ernest Angell, *The Amicus Curiae American Development of English Institutions*, 16 INT’L & COMPAR. L.Q. 1017, 1017 (1967).

32. See Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 694 (1963) (quoting 1 BENJ. VAUGHAN ABBOTT, *DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE* 62 (1879)).

33. Kent & Trinidad, *supra* note 2, at 1084.

34. Mohan, *supra* note 30, at 369.

4. *The Political or Modern Amicus*: The amicus often has a strong interest in the outcome and represents an interest group or organization with a social or political agenda.³⁵

Considering this classification, Chandra Mohan raises a pertinent question: Is the amicus a friend of the court or to the court? This question goes beyond semantics. A friend *of* the court assists by providing information so that the court will not fall into error, and a friend *to* the court attempts to persuade the court to adopt a particular point of view or the outcome.³⁶

As previously noted, NGOs can be involved in cases before the ECtHR as *third-party interveners*. This possibility appeared on January 1, 1983, when the Revised Rules of Court came into force and Rule 37(2) stated that:

The President may, in the interest of the proper administration of justice, invite or grant leave to any Contracting State which is not a Party to the proceedings to submit written comments within a time-limit and on issues which he shall specify. He may extend such an invitation or grant such leave to any person concerned other than the applicant.³⁷

The first successful intervention of a third party under this Rule was made by the Post Office Engineering Union with the help of an NGO, namely INTERIGHTS, in *Malone v. United Kingdom*.³⁸ INTERIGHTS, jointly with the British NGO ARTICLE 19, also unsuccessfully intervened in *Otto-Preminger-Institut v. Austria*,³⁹ a case challenging the Austrian blasphemy law, and offered support to the European Commission to consider the necessity of laws that ban expression which ridiculed or was offensive to a particular religion or religious belief.⁴⁰ In *Otto-Preminger*, the third-party intervention was supported by declarations from nine freedom of

35. *Id.* at 365–72.

36. *Id.* at 369.

37. Revised Rules of Court, Eur. Ct. H.R., R. 37(2) (Nov. 24, 1982), https://www.echr.coe.int/Documents/Library_1982_RoC_Revised_Nouveau_BIL.PDF.

38. *Malone v. United Kingdom*, App. No. 8691/79, 7 Eur. H.R. Rep. 14, 16 (1985).

39. *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, 19 Eur. H.R. Rep. 34, 37 (1994).

40. *See generally id.*

expression professors and lawyers of ten European countries and the United States.⁴¹

Today, the European Court has a well-established and important system for intervention in cases by third parties regulated by Article 36 of ECHR and Article 44 of the Rules of the Court.⁴² According to Rule 44 section 3(a):

[T]he President of the Chamber may, in the interests of the proper administration of justice, as provided in Article 36 § 2 of the Convention, invite, or grant leave to, any Contracting Party which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing.⁴³

Further, “the President may decide not to include the comments in the case file or to limit participation in the hearing to the extent that he or she considers appropriate.”⁴⁴ A third party can also seek to provide written comments that “shall be forwarded by the Registrar to the parties to the case, who shall be entitled, subject to any conditions, including time-limits, set by the President of the Chamber, to file written observations in reply or, where appropriate, to reply at the hearing.”⁴⁵ All the provisions under Rule 44 apply as well to the proceedings before the Grand Chamber constituted to deliver advisory opinions under Article 2 of Protocol

41. Marek Antoni Nowicki, *NGOs Before the European Commission and the Court of Human Rights*, 14 NETH. Q. HUM. RTS. 289, 298 (1996).

42. Rule 44 was amended by the Court on July 7, 2003; November 13, 2006; and September 19, 2016. Revised Rules of Court, Eur. Ct. H.R., R. 44 n.2 (Jan. 1, 2020), https://www.echr.coe.int/documents/rules_court_eng.pdf.

43. *Id.* § 3(a); *see also id.* § 3(b) (“Requests for leave for this purpose must be duly reasoned and submitted in writing in one of the official languages as provided in Rule 34 § 4 not later than twelve weeks after notice of the application has been given to the respondent Contracting Party. Another time-limit may be fixed by the President of the Chamber for exceptional reasons.”).

44. *Id.* § 5. It is interesting to note that [i]n cases to be considered by the Grand Chamber, the periods of time . . . shall run from the notification to the parties of the decision of the Chamber under Rule 72 § 1 to relinquish jurisdiction in favour of the Grand Chamber or of the decision of the panel of the Grand Chamber under Rule 73 § 2 to accept a request by a party for referral of the case to the Grand Chamber.

Id. § 4(a). According to Rule 44 section 4(b), “[t]he time-limits laid down in this Rule may exceptionally be extended by the President of the Chamber if sufficient cause is shown.” *Id.* § 4(b).

45. *Id.* § 6.

No. 16 to the Convention.⁴⁶ In this latter case, the President of the Court has the power to determine the time limits which apply to third-party interveners.

C. Methodology: Data Collection

The amicus briefs submitted to the court have increased since Protocol 11 came into effect in 1998.⁴⁷ However, it is difficult to access the number and the content of the third-party interventions because they are not listed in any open and comprehensive database. The only online database that identifies participation by organization type and modes of participation (direct victim, legal representative, and amicus/third-party intervention) is the European Court of Human Rights Database (ECHRdb) run by Cichowski and Chrun.⁴⁸ It is not an open database, although some key information can be found in the opening remarks on the ECHRdb internet site: from 1960 until 2014, a total of 15,147 judgments have been delivered and 1,233 amicus briefs have been filed.⁴⁹ Therefore, this Article only uses the data extracted from the HUDOC database (decisions as well as judgments). Unfortunately, HUDOC does not list in any way the third-party interventions. Consequently, the way to proceed has been twofold: first, to search for the keywords in Article 36(2)—the current article allowing third-party interventions—and Article 37(2)—the article related to third-party interventions before the entry in force of Protocol 11; and second, from the results thus obtained, to search for the most well-known Christian advocacy groups as keywords (like the European Centre for Law and Justice, ADF International, Alliance Defending, and *Movimento per la Vita*).

However, using only the HUDOC database is precarious due to the deficiency in the advance search engine provided that reveals notable imperfections: (1) sometimes the court mentions amici and

46. See Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, Oct. 2, 2013, C.E.T.S. No. 214.

47. For an illustration of the increase of amicus participation in the court, see Van den Eynde, *supra* note 29, at 280.

48. Rachel Cichowski & Elizabeth Chrun, EUR. CT. OF HUM. RTS. DATABASE, <https://depts.washington.edu/echrdb/> (last visited Mar. 16, 2021).

49. *Id.* The ECHRdb supposes to make available a set of downloadable data files and an online analysis tool enabling broad access to the data. However, the ECHRdb Online Analysis Tool has not yet been implemented at the time of writing, and the access to the datasets was not possible through the mail contact provided. See *id.*

other times “third-party intervener” without specifying who; (2) occasionally the court does not even mention the participation of amici; and (3) there is no access to the original written briefs submitted by the third parties. To complete the information about potential amici submitted by the advocacy groups mentioned above, the internet sites of these groups have been scrutinized, although only some written submissions presented before the ECtHR are accessible on their websites. Hence, because the information comes from diverse sources and is not systematized, the analysis of the interventions of these NGOs as third parties is incomplete.⁵⁰

III. CHRISTIAN ADVOCACY GROUPS AS AMICUS CURIAE AND THEIR IMPACT ON THE STRASBOURG COURT

A. Who Are the Most Prominent Christian NGOs Active Before the Court?

As Van den Eynde notes, the appearance of Christian groups labeled as “conservative” in the Strasbourg Court is an echo of the phenomenon observed before the U.S. Supreme Court for at least three decades.⁵¹ The adjective “conservative” speaks for socially conservative Christian advocacy groups—mainly Catholics and Evangelicals—who have been actively mobilized in litigation in the United States in abortion decisions, right-to-die cases, and issues of religion and education since the 1970s.⁵² Indeed, United States and Canada provide the best-developed examples of NGO involvement in religious litigation and in litigation specifically by religious groups.⁵³ The study of mobilizations around religion is not surprising given the fact, as Fokas notices, that religion plays a more prominent public and political role in North America than in

50. Sometimes the advocacy organization represents the applicant so is not listed as a third-party intervener. See the intervention of ADF International in *Dimitrova v. Bulgaria*, ADF INT’L, <https://adfinternational.org/legal/dimitrova-v-bulgaria/> (last visited Mar. 16, 2021); *Vitaliy Bak v. Russia*, ADF INT’L, <https://adfinternational.org/legal/vitaliy-bak-v-russia/> (last visited Mar. 16, 2021); and *Altinkaynak v. Turkey*, ADF INT’L, <https://adfinternational.org/legal/altinkaynak-and-others-v-turkey/> (last visited Mar. 16, 2021).

51. Van den Eynde, *supra* note 29, at 287.

52. Dennis R. Hoover & Kevin R. den Dulk, *Christian Conservatives Go to Court: Religion and Legal Mobilization in the United States and Canada*, 25 INT’L POL. SCI. REV. 9, 11 (2004).

53. See generally Bryden, *supra* note 6; Hannett, *supra* note 5; Hoover & den Dulk, *supra* note 52, at 21–26.

the European context.⁵⁴ Due to the experience of the U.S. Christian advocacy groups in litigation and the fact that Evangelical Christians tend to work transnationally more than other stakeholder groups, the two most influential Christian advocacy groups at the Strasbourg organs are the European Centre for Law and Justice (ECLJ) and the Alliance Defending Freedom (ADF, also known as ADF International, and formerly known as Alliance Defense Fund). Both are originally from the United States.

ADF defines itself “[l]ike the Body of Christ, . . . [a] body made up of many parts[.]” and for more than 25 years it has been advocating “for religious liberty, the sanctity of human life, freedom of speech, and marriage and family.”⁵⁵ Founded in 1993 by thirty-five Christian leaders who “came together to build a ministry that “would defend your religious freedom— . . . before it was too late[.]”⁵⁶ the founders knew that “it would take an alliance to keep the doors open for the Gospel in the United States.”⁵⁷ One of its main goals is advocacy with an impact on society. ADF’s website explains, “It is not enough to just win cases; we must change the culture[.]”⁵⁸ The transplantation of ADF to Europe results in a branch of the original U.S. matrix under the name of ADF International, and it characterizes itself as a “faith-based legal advocacy organization that protects fundamental freedoms and promotes the inherent dignity of all people.”⁵⁹ As an advocacy group, it advocates for the sanctity of life, marriage and family, and religious freedom by “[m]aking a far-reaching and lasting impact[.]”⁶⁰

ECLJ defines itself as “an international, Non-Governmental Organization dedicated to the promotion and protection of human

54. Effie Fokas, *Comparative Susceptibility and Differential Effects on the Two European Courts: A Study of Grasstops Mobilizations Around Religion*, 5 OXFORD J.L. & RELIGION 541, 545 (2016). As Dennis R. Hoover and Kevin R. den Dulk note: “American political culture is exceptionally *litigious* and exceptionally *religious*.” Hoover & den Dulk, *supra* note 52, at 10.

55. *About Us*, ALL. DEFENDING FREEDOM, <https://www.adflegal.org/about-us> (last visited Mar. 16, 2021).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Who We Are*, ADF INT’L, <https://adfinternational.org/who-we-are/> (last visited Mar. 16, 2021).

60. *Advocacy*, ADF INT’L, <https://adfinternational.org/advocacy/> (last visited Mar. 19, 2021).

rights in Europe and worldwide.”⁶¹ ECLJ is the European arm of the American Center for Law and Justice (ACLJ),⁶² and it advocates in particular for the protection of religious freedoms and the dignity of the person at the ECtHR. ECLJ also “bases its action on ‘the spiritual and moral values which are the common heritage of European peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy[.]’”⁶³

Both transnational Christian faith organizations have been active in litigation beyond the domain of religious freedom and have extended the agenda to topics that concern core issues for the most conservative Christian groups such as same-sex civil partnerships, same-sex marriages, bioethics, LGBT rights, religious feelings and freedom of expression, the autonomy of the religious groups, euthanasia, embryo screening, etc.⁶⁴

The third Christian NGO active as a third-party intervener before the ECtHR is *Movimento per la Vita Italiano* (the Italian Pro-Life Movement, or MPVI). The organization is not a transnational NGO but an Italian association that brings together in a single federation more than five hundred local pro-life movements, centers, and services existing in Italy.⁶⁵ The MPVI has the aim of defending and promoting the value of human life “from conception to natural death” and the recognition of every human being as the holder of the inalienable right to life.⁶⁶ Although Christianity is not mentioned on the MPVI internet site, the *Movimento per la Vita* is an association of the Catholic Church that aims to promote social goals, and it is quite well spread across Italy.⁶⁷ No information can

61. EUR. CTR. FOR L. & JUST., <https://eclj.org/> (last visited Mar. 19, 2021).

62. American Center for Law and Justice is a not-for-profit, religious corporation “specifically dedicated to the ideal that religious freedom and freedom of speech are inalienable, God-given rights . . . The organization has participated in numerous cases before the Supreme Court[.]” AM. CTR. FOR L. & JUST., <http://aclj.org/> (last visited Mar. 16, 2021).

63. EUR. CTR. FOR L. & JUST., *supra* note 61.

64. For legal mobilization in courts, Hoover and den Dulk grouped two religious traditions (evangelical Protestantism and Roman Catholicism) under the single rubric of “Christian conservatives” because “both traditions have staked out socially conservative positions on abortion and the right to die and on religion and education.” Hoover & den Dulk, *supra* note 52, at 22.

65. *Chi Siamo*, MOVIMENTO PER LA VITA, <http://www.mpv.org/il-movimento-per-la-vita-italiano/> (last visited Mar. 20, 2021).

66. *Id.*

67. *Catholic*, SAPERE.IT, <https://www.sapere.it/enciclopedia/catt%C3%B2lico.html> (last visited Mar. 17, 2021).

be found on MPVI's internet site about its role before the ECtHR. According to the HUDOC database, MPVI has intervened as *amicus curiae* in two seminal cases: *Costa & Pavan v. Italy*⁶⁸ and *Parrillo v. Italy*.⁶⁹

The research conducted in the online database HUDOC shows that ADF International has intervened as a third party in fourteen ECtHR decisions or judgments and an additional four decisions under its American counterpart, ADF. ADF International and Alliance Defending Freedom have both concurred in fourteen cases together, and ADF International has intervened by itself in *A. v. Switzerland*,⁷⁰ *Y.T. v. Bulgaria*,⁷¹ *A.A. v. Switzerland*,⁷² and *Wunderlich v. Germany*.⁷³ It is difficult to understand the motivation to intervene via both NGOs jointly in some cases while opting for single interventions in other cases.

Regarding ECLJ, it has intervened as a third party twenty-four times according to the HUDOC database (see, for example, *W.K. v. Sweden*).⁷⁴ Unfortunately, the data retrieved from the HUDOC database is incomplete. For example, according to the ECLJ internet site, this NGO has submitted some written submissions in *B.B. v. Poland*,⁷⁵ *Cassar v. Malta*,⁷⁶ and *Teliatnikov v. Lithuania*,⁷⁷ but the ECtHR does not refer to such participation.

Considering the inadequacy of the HUDOC database to provide a comprehensive view of the actors intervening as *amici curiae*, as well as the insufficiency of the data supplied by the above

68. *Costa v. Italy*, App. No. 54270/10, ¶ 6 (Aug. 28, 2012), <http://hudoc.echr.coe.int/eng?i=001-112993>.

69. *Parrillo v. Italy*, 2015-V Eur. Ct. H.R. 249, 258.

70. *A. v. Switzerland*, App. No. 60342/16 (Dec. 19, 2017), <http://hudoc.echr.coe.int/eng?i=001-179573>.

71. *Y.T. v. Bulgaria*, App. No. 41701/16 (July 9, 2020), <http://hudoc.echr.coe.int/eng?i=001-203898>.

72. *A.A. v. Switzerland*, App. No. 58802/12 (Jan. 7, 2014), <http://hudoc.echr.coe.int/eng?i=001-139903>.

73. *Wunderlich v. Germany*, App. No. 18925/15 (Jan. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188994>.

74. *W.K. v. Sweden*, App. No. 36802/15 (May 23, 2017), <http://hudoc.echr.coe.int/eng?i=001-174797>.

75. *B.B. v. Poland*, App. No. 67171/17 (Feb. 17, 2020), <http://hudoc.echr.coe.int/eng?i=001-201485>.

76. *Cassar v. Malta*, App. No. 36982/11 (July 9, 2013), <http://hudoc.echr.coe.int/eng?i=001-123392>.

77. *Teliatnikov v. Lithuania*, App. No. 51914/19 (June 8, 2020), <http://hudoc.echr.coe.int/eng?i=001-202965>.

NGOs' internet sites as third-party interveners, this Article relies on the analysis of the forty-four cases gathered (see Appendix) to examine the patterns of the mentioned Christian advocacy groups' participation as third parties across time and topics at the ECtHR. Knowing that Alliance Defending Freedom and ADF International are interconnected in their roots, the following table shows that the most repeat player at the Strasbourg Court is ECLJ. It is noteworthy to underscore that ECLJ and ADF (and ADF International) often join forces together.

Third-Party Interventions	Cases	Percentage
European Centre for Law and Justice	18	40.9%
ADF International, Alliance Defending Freedom	8	18.2%
Alliance Defending Freedom, European Centre for Law and Justice	5	11.4%
ADF International	4	9.1%
Alliance Defending Freedom	4	9.1%
European Centre for Law and Justice, <i>Movimento per la Vita</i>	2	4.5%
ADF International, European Centre for Law and Justice	1	2.3%
Alliance Defending, European Centre for Law and Justice	1	2.3%
ADF International, Alliance Defending Freedom, European Centre for Law and Justice	1	2.3%
Total	44	

Table 1: Third-Party Interventions by Actors Involved

1. The substantive areas of concern as third-party interveners

For clarity, the forty-four cases have been classified according to four main topics that are "religious-oriented" or include a religious factor: (1) family and private life (abortion, procreation technologies, gender identity, and same-sex couples), (2) autonomy of religious groups and individual religious freedom, (3) freedom of expression, and (4) religion-based refugee claims. These four categories touch a variety of articles of the ECHR, and the list of cases analyzed here fall mainly on the following articles of the Convention: Article 2 (right to life), Article 3 (prohibition on torture or to inhuman or degrading treatment or punishment), Article 8 (right to respect for private and family life), Article 9 (freedom of

religion or belief), Article 10 (freedom of expression),⁷⁸ and Article 2 of Protocol No. 1 (right to education).⁷⁹ It is beyond the scope of this Article to consider in detail the trends and ambivalences of the Strasbourg Court case law on each of the mentioned articles. What this contribution will seek to do, however, is to first consider the impact of intervention, either in the determination of facts of the case or in the legal approach to the question at stake, and once determined, to analyze the influence of the written submission by the third parties in the outcome of the cases.

2. *Family and private life*

The greatest number of the Christian advocacy groups' interventions (twenty-one out of the forty-four cases) have been proposed under the umbrella of private life and family life cases, and they deal almost exclusively with Article 8 of the ECHR. This Article encompasses four concepts that have been given autonomous meaning by the Strasbourg organs: "private life, family life, home, and correspondence[.]"⁸⁰ As regards "family life" and "private life," the ECtHR has extended the scope of Article 8 by incorporating social, legal, and technological developments, and it is difficult to provide definitions for both terms. Indeed, "private life" has been described by the ECtHR as "not susceptible to exhaustive definition[.]"⁸¹ and therefore, it is not surprising that new rights are born out of the right of respect for private life.⁸² In *Pretty v. United Kingdom*, the court gave an overview of the meaning of "private life" as an area that "covers the physical and psychological integrity of a person . . . [that will] sometimes embrace aspects of an individual's physical and social identity[.]"⁸³ Such elements as, for example, gender identification, name, sexual orientation, and sexual life, fall within the personal sphere

78. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 25.

79. Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Mar. 20, 1952, 213 U.N.T.S. 262.

80. Maris Burbergs, *How the Right to Respect for Private and Family Life, Home and Correspondence Became the Nursery in Which New Rights Are Born*, in *SHAPING RIGHTS IN THE ECHR: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DETERMINING THE SCOPE OF HUMAN RIGHTS* 315, 322 (Eva Brems & Janneke Gerards eds., 2013).

81. *Costello-Roberts v. United Kingdom*, App. No. 13134/87, ¶ 36 (Mar. 25, 1993), <http://hudoc.echr.coe.int/eng?i=001-57804>.

82. Burbergs, *supra* note 80, at 323.

83. *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, 193.

protected by Article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Although no previous case has established the right to self-determination contained in Article 8 of the Convention, the court will consider that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.⁸⁴ The Strasbourg Court's approach to the notion of personal autonomy conflicts bluntly with the notion of human rights that Christian advocacy groups support. To these groups, human rights are not arbitrarily defined according to the will of an individual concerning each subject. As ECLJ has particularly noted in the written observations submitted in *Cassar v. Malta*:

[I]t is necessary to preserve even the philosophy of the Convention, as it is from its philosophy that its authority is derived. . . . Subjectivism relative to individualism, by rejecting the reference to the nature of man, leads to the destruction of the basis and philosophy of human rights.⁸⁵

The contrast in understanding between the philosophy beyond the ECHR for the Christian third parties and the Strasbourg Court is noticeable. For the latter, ECHR rights and freedom should be interpreted in the light of contemporary practice, and it would be futile to argue that ECHR should primarily be interpreted in accordance with the original intent of the drafters. For example, from the late 1980s, the court read Article 2 in a context of a contemporary rejection of the death penalty,⁸⁶ while for some Christian groups such as ECLJ, "the universality of human rights presupposes and requires a universal concept of man" and the universality of rights (i.e., the right to marry) requires universal concepts (i.e., concept of marriage).⁸⁷

a. Marriage, transgender marriage, and same-sex marriage. Likewise, ECLJ underlined in the written observations in *Cassar v.*

84. See, e.g., *id.* ("[T]he Court considers that the notion of personal autonomy is an important principle underlying the interpretation of [Article 8's] guarantees.")

85. Written Observations for Eur. Ctr. for L. & Just. as Third-Party Intervener at 9, *Cassar v. Malta*, App. No. 36982/11 (July 9, 2013) [hereinafter Written Observations for ECLJ in *Cassar*], <https://7676076fde29cb34e26d-759f611b127203e9f2a0021aa1b7da05.ssl.cf2.rackcdn.com/eclj/echr-cassar-v-malta-eclj-observations-en.pdf>.

86. See *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989).

87. Written Observations for ECLJ in *Cassar*, *supra* note 85, at 16.

Malta the content of the right to marriage. According to the ECLJ's philosophy, the right to marriage has been considered not as an individual right that belongs to a person, but a right that belongs to the couple. Additionally, the content of the right to marry is not determined by its subject—it is precisely defined by society. Therefore, Article 12 of the ECHR enshrines a reciprocal commitment between the couple and society, where the right to marry involves three players (the man, the woman, and society), with a common interest (the family). This approach is well reflected in the case *Orlandi v. Italy*, a seminal case about the right to marriage for same-sex couples.⁸⁸ In *Orlandi*, ECLJ joined forces with Alliance Defending Freedom. The latter provided to the Strasbourg Court information about heterosexual marriage in the European context. ADF insisted that there is a European consensus on recognizing marriage exclusively between a man and a woman. The ECLJ provided to the court detailed information about marriage registration and the scope of the notion of public order. Surprisingly, the *Orlandi* Strasbourg judgment only partly reproduces the written observations submitted by ECLJ.⁸⁹ Despite the fact that the submitted written observations are long and founded in comparative law and case law analysis, the ECtHR addressed them both very briefly and refuted the arguments of public order⁹⁰ and the lack of legal recognition of same-sex couples in a superficial manner.⁹¹ The court found a violation of Article 8 since the State (Italy) failed to ensure that the applicants had available a specific legal framework providing for the recognition

88. *Orlandi v. Italy*, App. Nos. 26431/12, 26742/12, 44057/12 & 60088/12 (Dec. 14, 2017), <http://hudoc.echr.coe.int/eng?i=001-179547>.

89. Written Observations for Eur. Ctr. for L. & Just. as Third-Party Intervener, *Orlandi*, App. Nos. 26431/12, 26742/12, 44057/12 & 60088/12 [hereinafter Written Observations for ECLJ in *Orlandi*], <https://7676076fde29cb34e26d-759f611b127203e9f2a0021aa1b7da05.ssl.cf2.rackcdn.com/eclj/Oliari-Orlandi-v-Italy-ECHR-ECLJ-WO-English.pdf>.

90. Unlike other provisions of the Convention, Article 8 did not list "the notion of 'public order' as one of the legitimate aims in the interests of which a State m[ight] interfere with an individual's rights." *Orlandi*, App. Nos. 26431/12, 26742/12, 44057/12 & 60088/12, ¶ 200.

91. "[T]o date[,] . . . twenty-seven countries out of the forty-seven [Council of Europe] member states h[ad] . . . enacted legislation permitting same-sex couples to have their relationship recognised . . ." *Id.* ¶ 112. The same could not be said about registration of same-sex marriages. *Id.* ¶ 113.

and protection of their same-sex unions.⁹² Although the third-party submissions meticulously analyzed the legal arguments and comparative law, NGOs' interventions did not have an impact on the legal reasoning in the outcome of the *Orlandi* case. In this latter case, ECLJ reiterated the argument against the interpretation of the Convention in light of the circumstances and noted that:

[T]hese circumstances only provide guidance and cannot be substituted in place of the Convention as the principal point of reference. Otherwise, the mission of the Court would be transformed, particularly regarding social issues, into an instrument of the ideological updating of national legislation. This path would lead far beyond its jurisdiction.⁹³

b. Assisted reproductive technologies (ART) and gender reassignment. This category comprises several cases in which the Strasbourg Court connects ARTs with family and private life. In the case of *S.H. v. Austria*,⁹⁴ the court clarified that the right of a couple to use ARTs to conceive a child falls under the scope of Article 8. The right to respect for private and family life was further expanded in *Costa v. Italy*, where the court held that it covers "the applicants' desire to conceive a child unaffected by the genetic disease of which they are healthy carriers and to use ART and [pre-implantation genetic diagnosis] to this end[.]"⁹⁵ Similar to other cases like *Orlandi v. Italy*, the ECtHR referred only briefly to the arguments submitted by the amici curiae. For example, in *Costa v. Italy*, it is worthy to note that if the content of the amici's submission does not add any new element to the argumentation advanced by the government, the court uses sentences like "[t]he first third-party intervener reiterated the observations of the respondent Government[.]"⁹⁶ which renders it difficult to know if the court has taken into consideration the scientific explanations about ARTs submitted by the third parties. Regardless of the disagreements

92. In *Schalk v. Austria*, 2010-IV Eur. Ct. H.R. 409, 429, the court stated that Article 12 cannot "in all circumstances be limited to marriage between two persons of the opposite sex . . . [But] whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State." See also JENS M. SCHERPE, THE PRESENT AND FUTURE OF EUROPEAN FAMILY LAW 24-27 (2016); SHAZIA CHOUDHRY & JONATHAN HERRING, EUROPEAN HUMAN RIGHTS AND FAMILY LAW 148-51, 167-69 (2010).

93. Written Observations for ECLJ in *Orlandi*, *supra* note 89, at 6.

94. *S.H. v. Austria*, 2011-V Eur. Ct. H.R. 295, 318.

95. *Costa v. Italy*, App. No. 54270/10, ¶ 57 (Aug. 28, 2012), <http://hudoc.echr.coe.int/eng?i=001-112993>.

96. *Id.* ¶ 50.

among the third parties and the ECtHR about whether ARTs should fall under Article 8, the court agreed with the third party that there was not a positive obligation on the member states for medically assisted procreation techniques.⁹⁷ More specifically, the Grand Chamber held in *S.H. v. Austria* that the absolute ban on ova donation and sperm donation for in vitro fertilization did not exceed the states' margin of appreciation.⁹⁸

Another emblematic case in terms of the high number of observations submitted by the third-party interveners is *Parrillo v. Italy*.⁹⁹ This case reached the Grand Chamber and touches core issues for Christian advocacy groups: the right to life, the right over embryos as a property right, human dignity, the ontological conception of human rights, and states' margin of appreciation. ECLJ and MPVI were authorized to submit an amicus brief. Since the full text of the written submissions is not available in the HUDOC database, we only have access to the submissions presented by ECLJ through its internet site. No information has been found regarding the *Movimento per la Vita*'s brief in *Parrillo*. According to the text of the judgment, the arguments put through by *Movimento per la Vita* were scarce and quite redundant.¹⁰⁰ Both advocacy groups insisted that in vitro embryos in a state of cryopreservation should benefit from the protection of the measures of Italian law that forbid the destruction of human embryos. Additionally, they noted that since embryos are subjects, "they cannot be things or objects of a right *in rem*, and cannot be deliberately destroyed."¹⁰¹ The ECtHR observed in *Parrillo* that, according to its case law, the concept of "private life" within the meaning of Article 8 of the Convention is a broad one, not susceptible to an exhaustive definition, and embraces, among other things, a right to self-determination. The concept also incorporates the right to respect for both the decisions to become and not to become a parent. Regarding the particular question of the fate of

97. *S.H.*, 2011-V Eur. Ct. H.R., at 316-17.

98. See ALICE MARGARIA, THE CONSTRUCTION OF FATHERHOOD: THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS 52-53 (2019).

99. *Parrillo v. Italy*, 2015-V Eur. Ct. H.R. 249.

100. *Id.* at 293.

101. "The legal principle of the primacy of the human being clearly contradicts the justification of the destruction of embryos *in vitro* in the interest of science." *ECHR to Rule on the Status of Embryo*, EUR. CTR. FOR L. & JUST., <https://eclj.org/eugenics/echr/the-european-court-on-human-rights-to-rule-on-the-status-of-the-human-embryo> (last visited Mar. 17, 2021).

embryos obtained from assisted reproduction, the court had regard to the parties' freedom of choice. However, the right to donate embryos to scientific research is not one of the core rights attracting the protection of Article 8 of the Convention, as it does not concern a particularly important aspect of the applicant's existence and identity. Consequently, the court considered that the respondent State should have afforded a wide margin of appreciation. Once again, although the legal reasoning advanced by the Christian advocacy groups and by the ECtHR are quite divergent, the outcome with regards to the scope of the margin of appreciation is similar. The difference is the willingness of the court to apply the Convention as a living instrument in accordance with individuals' needs through a careful implementation of the proportionality test. However, where the court is unable to find the existence of a European consensus and the state's margin of appreciation prevails, the Strasbourg jurisprudence may coincide with Christian advocacy groups if they endorse the government's arguments.

In the same way, the margin of appreciation has been very relevant in cases regarding gender reassignment and the right to gender identity. There have been a high number of cases with the active participation of ECLJ and ADF International: *A.P. , Garçon & Nicot v. France*,¹⁰² *X v. Former Yugoslav Republic of Macedonia*,¹⁰³ *Y.T. v. Bulgaria*,¹⁰⁴ and *S.V. v. Italy*.¹⁰⁵ Both NGOs indicated that this line of cases raises fundamental questions regarding definitions in the spheres of ethics, psychology, and medical science, and the states should enjoy a wide margin of appreciation in striking a balance between the competing public and private interests at stake. Therefore, how states addressed transgender issues would depend on the specific features of each state.¹⁰⁶ In contrast, the ECtHR has carefully weighed the competing interests in each case and has expressly asserted that Article 8 may also impose certain positive obligations on the state. These obligations may involve the adoption of specific measures, including the provision of an

102. *A.P. v. France*, App. Nos. 79885/12, 52471/13 & 52596/13 (Apr. 6, 2017), <http://hudoc.echr.coe.int/eng?i=001-172913>.

103. *X v. Former Yugoslav Republic of Macedonia*, App. No. 29683/16 (Jan. 17, 2019), <http://hudoc.echr.coe.int/eng?i=001-189096>.

104. *Y.T. v. Bulgaria*, App. No. 41701/16 (July 9, 2020), <http://hudoc.echr.coe.int/eng?i=001-203493>.

105. *S.V. v. Italy*, App. No. 55216/08 (Oct. 11, 2018), <http://hudoc.echr.coe.int/eng?i=001-187111>.

106. *See X*, ¶ 60.

effective and accessible means of protecting the right to respect for private life. Such measures may include both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of these measures in different contexts.¹⁰⁷ For example, in *X v. Former Yugoslav Republic of Macedonia*, the applicant's Article 8 grievances concerned allegations about the lack of regulatory framework for legal gender recognition and the requirement that such recognition is conditional on complete sex reassignment surgery. In *A.P. v. France*, the court reiterated that this kind of application entails essential aspects of an individual's intimate identity, physical integrity, and sexual identity, and making recognition of the sexual identity of transgender persons conditional on undergoing an operation or treatment entailing sterilization against their wishes is a violation of the Convention. However, the state parties retained a wide margin of approval in deciding whether to impose the condition of a prior psychological diagnosis for the identity of transgender persons.¹⁰⁸ Similarly, in *S.V. v. Italy*, with regards to the refusal by the authorities to authorize a change of forename before the completion of gender reassignment surgery, ADF International repeated the same arguments as in *A.P. v. France*, and the Strasbourg Court observed that "the rigid nature of the judicial procedure for recognizing the gender identity of transgender persons . . . , which [had] placed the applicant for an unreasonable time in an anomalous position" that was apt to engender feelings of "vulnerability, humiliation[,] and anxiety[.]" constituted a violation of Article 8.¹⁰⁹ Similarly, in the recent case *Y.T. v. Bulgaria* in July 2020, the ECtHR restated the relevance of the vulnerability of the applicant when assessing the violation of Article 8. The court identified that the rigidity in the domestic courts' reasoning had placed Y.T. for an unreasonable and

107. See *Hämäläinen v. Finland*, 2014-IV Eur. Ct. H.R. 369, 390-91.

108. *A.P. v. France*, App. Nos. 79885/12, 52471/13 and 52596/13, ¶¶ 116-28 (Apr. 6, 2017), <http://hudoc.echr.coe.int/eng?i=001-172913>.

109. *S.V.*, App. No. 55216/08, ¶¶ 53, 72; see also *Recommendation CM/Rec (2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity*, COUNCIL OF EUR., https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a (last visited Mar. 17, 2021).

continuous period in a troubling position, in which he was liable to experience feelings of “vulnerability, humiliation[,] and anxiety.”¹¹⁰

c. The right to life and the right to end life: abortion and euthanasia cases. The Strasbourg organs authorize States, within their limited margin of appreciation, to determine the starting point of the right to life in their domestic legal system.¹¹¹ In the case of *A, B & C v. Ireland*, the court ruled that there was no European consensus as to the scientific and legal definition of the starting point of the life of a person.¹¹² As a Grand Chamber case, *A, B & C v. Ireland* had a high number of written observations from pro-life NGOs, and the court held that while Article 8 could not be interpreted as conferring a right to abortion, its prohibition in Ireland came within the scope of the applicants’ right to respect for their physical and psychological integrity within their private lives under Article 8.¹¹³ The most striking difference between the ECtHR and the Christian advocacy groups is that while the court relies on the States’ margin of appreciation concerning the question of when life begins, as there is no European consensus on the scientific and legal definition of the beginning of life, ECLJ explicitly criticized the ECtHR’s reasoning in *A, B & C v. Ireland*:

To speak of a “*scientific and legal definition of the beginning of life*” confuses scientific reality and its judicial representation, the fact (the child) and the value (the person). . . . It cannot be claimed that it is the state of scientific knowledge (that is to say, embryology and foetology) which makes it “*impossible to answer the question whether the unborn child is a ‘person,’*” it is only a matter of moral understanding, a choice of values, and not an issue of fact.¹¹⁴

Here, there are two different approaches: one relies on facts such as a possible European consensus on when life begins, and the other relies on fundamental principles beyond European consensus. On one hand, the ECtHR holds that “[t]he Convention is intended to

110. *Y.T. v. Bulgaria*, App. No. 41701/16, ¶ 72 (July 9, 2020), <http://hudoc.echr.coe.int/eng?i=001-203898> (editors’ translation). The domestic authorities’ refusal to grant legal recognition to Y.T.’s gender reassignment, without giving relevant and sufficient reasons thus constituted an unjustified interference with Y.T.’s right to respect for his private life. *Id.* ¶ 74.

111. *Vo v. France*, 2004-VIII Eur. Ct. H.R. 67, 107–08.

112. *A v. Ireland*, 2010-VI Eur. Ct. H.R. 185, 243.

113. *Id.* at 255.

114. GRÉGOR PUPPINCK, ABORTION AND THE EUROPEAN COURT OF HUMAN RIGHTS 3 (Eur. Ctr. for L. & Just., 2015), <http://media.aclj.org/pdf/FINAL-6.-Abortion-and-the-European-Court-of-Human-RightsV1.pdf>.

guarantee not rights that are theoretical or illusory but rights that are practical and effective[.]”¹¹⁵ This is the reason why the Strasbourg Court has found states to be under a positive obligation to secure to their citizens the right to effective respect for their physical and psychological integrity, and it has found that the prohibition of abortion when sought for reasons of health and/or well-being falls within the scope of the right to respect for one’s private life.¹¹⁶ On the other hand, for Christian advocacy groups, there is a founded philosophical approach to the definition of a person:

[T]he unborn child and the person materially designate the same thing, a single and unique being. . . . The distinction between the unborn child and the person is fictional, because the notion of the person itself becomes fictional from the moment it claims to mean something other than tangible reality. This difference between the fact (the child) and the notion (person) only exists by choice, in order to make space for individual liberty. . . . The human being is then a person because of and in proportion to his animation by his spirit¹¹⁷

This latter argument has also been deployed by the Christian groups in cases regarding assisted suicide and euthanasia. For example, *Gross v. Switzerland* is another Grand Chamber judgment with a high number of third-party interventions but with no access to the submissions written by them.¹¹⁸ Unfortunately, the court did not even refer to the content of the written submissions. In *Gross v. Switzerland*, the applicant complained, relying on Article 8 of the Convention, that the Swiss authorities, by depriving her of the possibility of obtaining a lethal dose of sodium pentobarbital, had violated her right to decide by what means and at what point her life would end. The court did not address substantial issues but decided the case on Article 35 section 3(a) grounds (abuse of the right of petition).¹¹⁹ Although the court did not delve into substantive considerations, ECLJ’s written submission, available

115. See *Airey v. Ireland*, App. No. 6289/73, 2 Eur. H.R. Rep. 305, 314 (1979); see also *P. v. Poland*, App. No. 57375/08, ¶ 99 (Oct. 30, 2012), <http://hudoc.echr.coe.int/eng?i=001-114098> (using a similar approach to *Airey v. Ireland*); *A.K. v. Latvia*, App. No. 33011/08 (June 24, 2014), <http://hudoc.echr.coe.int/eng?i=001-145005>.

116. *P.*, App. No. 57375/08, ¶ 96.

117. PUPPINCK, *supra* note 114, at 4.

118. *Gross v. Switzerland*, 2014-IV Eur. Ct. H.R. 463.

119. *Id.* at 477.

on the NGO's internet site, provides substantive points for reflection. ECLJ relies on *Pretty v. United Kingdom*, in which the court stated that "Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life."¹²⁰ ECLJ, in its amicus brief, asked whether the State should have an obligation to take positive action to prevent suicide or whether an assisted suicide falls within the scope of private life, and argued the state obligation to prevent suicide is conditioned on the autonomy of the person. It is interesting how ECLJ frames this dilemma as two conflicting values at stake: personal autonomy vs. the principle of heteronomy.¹²¹ The mentioned Christian NGO understands the principle of heteronomy as a set of values, as objective and universal as possible, which arise from universal human nature and upon which the ECHR has been built. Consequently, the ECtHR should not adjudicate cases without taking into consideration these universal and heteronomous values.

d. Foster care and family life. The following cases of *Lobben v. Norway*,¹²² *Wunderlich v. Germany*,¹²³ *Tlapak v. Germany*,¹²⁴ and *Wetjen v. Germany*¹²⁵ deal with parental rights and upbringing of children, foster care, corporal punishment, and homeschooling. In all these cases, the court confronts two potential competing rights: the right to have family and the protection of family ties versus the

120. *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, 186.

121. "This conception of individual autonomy, seen as a liberation of the individual from standards of society that are perceived as heteronomous, poses a danger to social unity, as well as to the consistency and effectiveness of the law, including the law pertaining to human rights." Written Observations for Eur. Ctr. for L. & Just. as Third-Party Intervener at 8, *Gross*, 2014-IV Eur. Ct. H.R. 463 (No. 67810/10), <https://eclj.org/pdf/alda-gross-v-switzerland.pdf>.

122. *Lobben v. Norway*, App. No. 37283/13 (Sept. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-195909>.

123. *Wunderlich v. Germany*, App. No. 18925/15 (Jan. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188994>.

124. *Tlapak v. Germany*, App. Nos. 11308/16 & 11344/16 (Mar. 22, 2018), <http://hudoc.echr.coe.int/eng?i=001-181584>.

125. *Wetjen v. Germany*, App. Nos. 68125/14 & 72204/14 (Mar. 22, 2018), <http://hudoc.echr.coe.int/eng?i=001-181583>.

child's best interests. In *Tlapak v. Germany* and *Wetjen v. Germany*,¹²⁶ ADF International appears as the only third-party intervener to emphasize the importance of upholding family ties. The court asserts that Article 8 requires a fair balance between the interests of the child and those of the parent and, in striking such a balance, particular importance must be attached to the best interests of the child.¹²⁷ The prevalence of the best interest of the child also follows in *Lobben and Others v. Norway*. In this latter case, ADF International emphasized that "family was internationally recognised as the fundamental group of society and of particular importance to children . . . [and] emphasised the duty to maintain contact between parents and children and to provide practical assistance to families."¹²⁸ However, the court reiterates:

[T]he best interests of the child dictate, on the one hand, that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from its roots. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family . . .¹²⁹

In *Wunderlich v. Germany*,¹³⁰ ECLJ strongly defends the parents' rights in homeschooling since "family takes precedence on State, particularly as regards education and teaching."¹³¹ The parents complained to the ECtHR about the violation of their family life under Article 8. The court acknowledges the infringement of this right but considers that Germany has the right to prohibit homeschooling to protect the interest of the child and concludes

126. In both cases, the applicants were members of the Twelve Tribes Church, a religious community where it was alleged various forms of corporal punishment were used in the upbringing of children.

127. *Tlapak*, App. Nos. 11308/16 & 11344/16, ¶ 82.

128. *Lobben v. Norway*, App. No. 37283/13, ¶ 192 (Sept. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-195909>.

129. *Id.* ¶ 207.

130. Mr. and Mrs. Wunderlich had four children and wished to teach them at home, which is forbidden in Germany. The German courts withdrew the custody of their children and asked them to hand over the children to a legal guardian so that they could go to school. The children repeatedly refused to accompany the guardian who came to take them away. *Wunderlich v. Germany*, App. No. 18925/15, ¶ 14 (Jan. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188994>.

131. Written Observations for Eur. Ctr. for L. & Just. as Third-Party Intervener at 1, *Wunderlich*, App. No. 18925/15 [hereinafter Written Observations for ECLJ in *Wunderlich*], <http://media.aclj.org/pdf/EN-Observations-ECLJ-Wunderlich-v-Germany.pdf>.

that the withdrawal from homeschooling was fully necessary and proportionate in a democratic society and that there was no violation of the right to respect for family life. The ECtHR supported the German courts that justified the partial withdrawal of parental authority by relying on the risk of the persistent refusal of the applicants to send their children to school, stating:

[T]he children would not only acquire knowledge but also learn social skills, such as tolerance or assertiveness, and have contact with persons other than their family, in particular children of their age. The [German] Court of Appeal further held that the applicants' children were being kept in a "symbiotic" family system.¹³²

The observations about homeschooling submitted by ECLJ are very interesting. Considering that homeschooling is quite widespread in the United States and supported by ACLJ, which is directly connected to ECLJ, the latter reminds the ECtHR that the rights of parents are natural rights and are entitled to full respect in their freedom of education by the state. According to ECLJ, public or state school is in no way a guarantee of political and ideological neutrality; "quite the opposite, experience shows that families are generally less politicized than the State, and hence constitute a natural obstacle to totalitarianism."¹³³ The ECtHR fears "the emergence of parallel societies" based on separate philosophical convictions;¹³⁴ on the contrary, ECLJ contends that not allowing homeschooling will result in homogenous society by the state without respect for minorities and families.

132. *Wunderlich*, App. No. 18925/15, ¶ 49.

133. Written Observations for ECLJ in *Wunderlich*, *supra* note 131, at 7.

134. In *Wunderlich*,

The Court further reiterates that it has already examined cases regarding the German system of imposing compulsory school attendance while excluding home education. It has found it established that the State, in introducing such a system, had aimed at ensuring the integration of children into society with a view to avoiding the emergence of parallel societies, considerations that were in line with the Court's own case-law on the importance of pluralism for democracy and which fell within the Contracting States' margin of appreciation in setting up and interpreting rules for their education systems[.]

Wunderlich, App. No. 18925/15, ¶ 50.

3. *Autonomy of religious groups and individual religious freedom*

Church autonomy has been one of the workhorses for Christian advocacy groups at the ECtHR, and the Strasbourg Court has been very sensitive to their arguments as third-party interveners. Indeed, the autonomous existence of religious communities has been considered indispensable for pluralism in democratic societies because it directly concerns not only the organization of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. As the Strasbourg Court noted in *Martínez v. Spain*, if the organizational life of the community is not protected by Article 9, all other aspects of the individual's freedom of religion would become vulnerable.¹³⁵ Alliance Defending Freedom submitted written observations jointly with ECLJ in *Travaš v. Croatia*,¹³⁶ and it stood alone as a third party in *Nagy v. Hungary*.¹³⁷ ECLJ was not accompanied as amicus curiae by ADF in *Sindicatul "Păstorul cel Bun" v. Romania*¹³⁸ nor in *Martínez*. The Strasbourg Court has outlined that the respect for the autonomy principle of religious communities implies, among other aspects that cannot be exhausted here, that states, including national courts, cannot decide on the question of the religious belonging of an individual or group, which is the sole responsibility of the authorities of the religious communities. In this point, the ECtHR is very much aligned with the arguments submitted by the mentioned NGOs. However, problems arise when religious autonomy conflicts with the individual beliefs of the member or the employee of the religious group (Article 9) or with her or his private and family life (Article 8). ADF and ECLJ have jointly argued that the "exercise of Church autonomy guaranteed under Article 9 of the Convention . . . could not as such be subjected to judicial review before the civil courts[.]"¹³⁹ Moreover, for both advocacy groups, the principle of heightened duty of loyalty, recognized in labor law, should be applicable in the context of employment by a religious community, irrespective of whether such employment was direct

135. *Martínez v. Spain*, 2014-II Eur. Ct. H.R. 449, 482–83.

136. *Travaš v. Croatia*, App. No. 75581/13 (Oct. 4, 2016), <http://hudoc.echr.coe.int/eng?i=001-166942>.

137. *Nagy v. Hungary*, App. No. 56665/09 (Sept. 14, 2017), <http://hudoc.echr.coe.int/eng?i=001-177070>.

138. *Sindicatul "Păstorul cel Bun" v. Romania*, 2013-V Eur. Ct. H.R. 41.

139. *Travaš*, App. No. 75581/13, ¶ 73.

or indirect through the state employment system.¹⁴⁰ Despite the ECtHR's tendency to strongly protect organizational autonomy, a new trend seems to be emerging for balancing religious autonomy with the right to private life (Article 8)—a more contextual and sensitive approach to cases involving conflicting rights.¹⁴¹

In cases regarding the manifestation of religious freedom through personal or static symbols, the two Christian NGOs provided interesting arguments in their written submissions on two landmark cases, *Lautsi v. Italy*¹⁴² and *Eweida v. United Kingdom*.¹⁴³ Following U.S. case law in *Lautsi v. Italy*, ADF, on behalf of thirty-two members of European Parliament, outlined the fact that a cross, certainly a Christian symbol, by its placement in the public sphere does not necessarily promote a Christian message when some religious symbols have been secularized.¹⁴⁴ ADF insisted “that the ‘separation of church and state’ does not require the eradication of all public symbols in the public realm” but rather their “accommodation.”¹⁴⁵ Similarly, ECLJ, jointly with ADF, drew the court's attention to the concept of reasonable accommodation of religious beliefs and practices, insofar as that accommodation did not cause “undue hardship” to the employer.¹⁴⁶ American case law played an important role in the legal reasoning in the ECtHR's assessment of both cases in their third-party interventions by the Christian advocacy groups.

It is also remarkable to note that ADF International has intervened to extend the scope of freedom of religion in cases regarding members of minority groups, particularly Jehovah's Witnesses who refuse to perform their military service. In

140. *Id.*

141. *Id.* ¶ 88.

142. *Lautsi v. Italy*, 2011-III Eur. Ct. H.R. 61.

143. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. 215.

144. Written Observations for All. Def. Fund on Behalf of 32 Members of European Parliament as Third-Party Interveners at 2-3, *Lautsi*, 2011-III Eur. Ct. H.R. 61 (No. 30814/06), http://1ztp833emcflef7tm24jjqbe-wpengine.netdna-ssl.com/wp-content/uploads/2017/12/Lautsi-and-Others-v.-Italy_ADF-Brief4.pdf.

145. *Id.* at 2 (quoting *Salazar v. Buono*, 559 U.S. 700 (2010)).

146. Written Observations for All. Def. Fund et al. as Third-Party Interveners at 9-10, *Eweida*, 2013-I Eur. Ct. H.R. 215 (Nos. 48420/10, 59842/10, 51671/10 & 36516/10) (citing Title VII of the Civil Rights Act of 1964 and subsequent case law).

*Mammadov v. Azerbaijan*¹⁴⁷ and in *Papavasiliakis v. Greece*,¹⁴⁸ ADF acknowledged the difficulty in practice for domestic courts to assess whether a claim relating to a belief was genuine and sincere.¹⁴⁹ For that reason, ADF encouraged the court to follow the framework for evaluating such claims and noted that the question was whether an individual opposed to the obligation to perform military service was placed “in a serious conflict between that obligation[,] . . . his or her genuinely and deeply held religious” beliefs, and being “forced to act against the dictates of his or her conscience.”¹⁵⁰ In these cases, the NGO’s intervention was just a reminder to the ECtHR of previous case law.¹⁵¹

4. Freedom of expression

Four cases regarding the freedom of expression, *Religious Community of Jehovah’s Witnesses v. Azerbaijan*,¹⁵² *Annen v. Germany*,¹⁵³ *Alekhina v. Russia*,¹⁵⁴ and *E.S. v. Austria*,¹⁵⁵ reveal the relevance of freedom of speech for ADF and ECLJ. The latter advocated for abolishing blasphemy as a criminal charge in *E.S. v. Austria*,¹⁵⁶ and in *Religious Community of Jehovah’s Witnesses*, ADF

147. *Mammadov v. Azerbaijan*, App. No. 14604/08 (Oct. 17, 2019), <http://hudoc.echr.coe.int/eng?i=001-197066>.

148. *Papavasiliakis v. Greece*, App. No. 66899/14 (Sept. 15, 2016), <http://hudoc.echr.coe.int/eng?i=001-166850>.

149. *Id.* ¶ 49.

150. *Id.*; see *Mammadov*, App. No. 14604/08, ¶ 74 (using similar language).

151. Interestingly, the court extended the scope of Article 9 of the Convention to conscientious objections to compulsory military service in *Bayatyan v. Armenia*, 2011-IV Eur. Ct. H.R. 1, 34, by applying its living instrument doctrine to interpret Article 9 in accordance with the current standard recognizing conscientious objection. In this case, the President gave leave to intervene in the written procedure to the European Association of Jehovah’s Christian Witnesses. *Id.* at 8.

152. *Religious Cmty. of Jehovah’s Witnesses v. Azerbaijan*, App. No. 52884/09 (Feb. 20, 2020), <http://hudoc.echr.coe.int/eng?i=001-201087>. ADF International intervened to underscore the importance of religious freedom and freedom of expression as well as the dangerous precedent it sets when the government is allowed to blacklist certain religious texts. See *id.* ¶ 23.

153. *Annen v. Germany*, App. No. 3690/10 (Nov. 26, 2015), <http://hudoc.echr.coe.int/eng?i=001-158880>.

154. *Alekhina v. Russia*, Eur. Ct. H.R., App. No. 38004/12 (July 17, 2018), <http://hudoc.echr.coe.int/fre?i=001-184666> (involving the Russian feminist punk band, Pussy Riot).

155. *E.S. v. Austria*, App. No. 38450/12 (Oct. 25, 2018), <http://hudoc.echr.coe.int/eng?i=001-187188>.

156. *Id.* ¶ 38.

encouraged the court to not restrict the dissemination of religious publications unless done “in response to a particular pressing social need.”¹⁵⁷ To safeguard tolerance, broadmindedness, and pluralism, freedom of expression could be hampered only exceptionally.¹⁵⁸ The line of argumentation goes in hand with the ECtHR’s general principles on Article 10. The Christian advocacy groups endorse religious minorities’ claims, such as the Jehovah’s Witnesses’s application, because it involves litigation to protect the manifestation of religion, which is part of these NGOs’ main goals.

5. Religion-based refugee claims

According to the UN guidelines’ general principles on religion-based refugee claims, religion should be broadly interpreted “to encompass freedom of thought, conscience or belief[.]”¹⁵⁹ and membership in a persecuted group with a reasonable fear of persecution should be enough for asylum adjudication.¹⁶⁰ There are two controversial questions addressed by the ECtHR and the Court of Justice of the European Union (CJEU) that have driven the attention of ECLJ and ADF. The first is regarding the definition of persecution and which kind of interference with the right to religious freedom would constitute persecution. The second regards the extent to which an asylum seeker is expected to conceal or restrain their religion in their country of origin to avoid persecution. The participation of ECLJ and ADF, as NGOs defending religious freedom for Christians worldwide, deserves attention in the following cases: *A. v. Switzerland*,¹⁶¹ *F.G. v. Sweden*,

157. *Religious Cmty. of Jehovah’s Witnesses*, App. No. 52884/09, ¶ 23.

158. *Annen*, App. No. 3690/10, ¶ 48 (summarizing ADF’s reasoning that “controversial opinions expressed in the course of an intense political debate of public interest [are] protected under Article 10, even if formulated in strong, offensive, shocking or disturbing language[.]” and that any restrictions on such speech must be justified by “significant reasons”).

159. U.N. HIGH COMM’R FOR REFUGEE, GUIDELINES ON INTERNATIONAL PROTECTION: RELIGION-BASED REFUGEE CLAIMS UNDER ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 3 (2004), <https://www.unhcr.org/en-us/publications/legal/40d8427a4/guidelines-international-protection-6-religion-based-refugee-claims-under.html>.

160. See Rosita Šorytė, *Religious Persecution, Refugees, and Right of Asylum: The Case of The Church of Almighty God*, 2 J. CESNUR 78, 78–99 (2018).

161. *A. v. Switzerland*, App. No. 60342/16 (Dec. 19, 2017), <http://hudoc.echr.coe.int/eng?i=001-179573>.

¹⁶² and *A.A. v. Switzerland*.¹⁶³ In *A. v. Switzerland*, the ECtHR endorsed an expulsion of a convert in Iran and accepted the argument of the Swiss government according to which the Christians “who practised their faith discreetly, did not face a real risk of ill-treatment upon return.”¹⁶⁴ However, one year earlier, in *F.G. v. Sweden*, the Grand Chamber of the Court had refused to deport a converted Iranian to his country, and the court explained that it could not “accept the respondent State’s assumption that the applicant would not be persecuted in Iran because he could engage in a low-profile, discreet or even secret practice of his religious beliefs.”¹⁶⁵ ECLJ and ADF submitted legally grounded third-party observations in *F.G. v. Sweden* in which they reminded the court that “in the light of the CJEU’s judgment in *Bundesrepublik Deutschland v. Y and Z* . . . , the applicant could not be expected to conceal his religion to avoid persecution covered by Article 3 of the Convention.”¹⁶⁶ The same line of argumentation was presented by ADF International in *A.A. v. Switzerland*, and the ECtHR considered that the return to Afghanistan of an asylum seeker who had converted to Christianity would be contrary to the European Convention because after returning to Afghanistan, A.A. could not be expected to “modify his social behavior to confine his faith to the strictly private domain” to the point of even hiding his baptism.¹⁶⁷

CONCLUSION

The research above has revealed the strategies of the three main Christian advocacy NGOs as third-party interveners before the ECtHR: (1) whether their written submissions result in a broad impact in Strasbourg’s legal reasoning, (2) whether they aimed to legitimize their own organizations and signal to their members about the relevance of their role to inform and assist the court, or (3) whether their participation aims to influence public policies on specific matters in European states by raising awareness of the

162. *F.G. v. Sweden*, App. No. 43611/11 (Mar. 23, 2016), <http://hudoc.echr.coe.int/eng?i=001-161829>.

163. *A.A. v. Switzerland*, App. No. 32218/17 (Nov. 5, 2019), <http://hudoc.echr.coe.int/eng?i=001-197217>.

164. *A.*, App. No. 60342/16, ¶ 44.

165. *F.G.*, App. No. 43611/11, ¶ 6.

166. *Id.* ¶ 108.

167. *A.A. v. Switzerland*, App. No. 32218/17, ¶ 55 (Nov. 5, 2019), <http://hudoc.echr.coe.int/eng?i=001-197217> (author’s translation).

relevance of highly contested topics such as abortion, same-sex marriage, procreation techniques, assisted suicide, etc.

The best third-party intervention assists the court by providing legal materials and helping in interpreting and applying the rights set out in the Convention. However, as the third-party procedure stands, it is difficult to know how effective their interventions have been: the written submissions are not public, and the court only refers partially to the content of the submissions. What should be self-evident from this analysis is that through their amicus participation, ECLJ, ADF or ADF International, and MPVI have sought to assist the court in a partisan way (the Modern Amicus, in Mohan's typology)¹⁶⁸ to influence the outcome of the ECtHR when adjudicating Convention rights that touch fundamental principles of these NGOs: religious freedom, the sanctity of life, marriage and family, and Christianity. Nevertheless, these third parties have also assisted (as Mohan's Intervening Good Samaritan) on comparative law (*Lautsi v. Italy*), on the context and circumstances of the facts of the case (*F.G. v. Sweden*), and in providing information to the court about the court's own precedents for the interpretation of rights (*Gross v. Switzerland*).

The three advocacy groups have taken "proactive" litigation to get as much impact as possible in matters broadening the scope of freedom of religion for individuals (conscientious objections and religious accommodation) and groups (autonomy of religious groups). Even when advancing their own interests on these matters, above all, they have had an impact on the court's adjudicative task because their submissions have reinforced the court's legal assessments.

However, on sensitive ethical issues such as family life and private life, their interventions can be described as "reactive" litigation as part of their conservative agenda because they advocate for maintaining the rights that were articulated by the Convention's drafters. As a result, they have challenged the evolutive interpretation of the "progressive" articles of ECHR linked to personal autonomy, the right to self-determination, and the principle of the child's best interests.

Finally, the present research also shows the contrasting approaches from the ECtHR and these repeat-Christian players before the court in claims of ultimate validity, grounded in

168. Mohan, *supra* note 30, at 371.

ontological foundations, such as the definition of a person, the self-contained authoritative philosophy of the Convention, and the existence of parallel sovereignty spheres like churches and families. In these particular matters, what can be witnessed is a struggle in which the interventions of the traditional friend of the court, *amicus curiae*, as described in Section II.B, could slowly turn into an "*inimicus curiae*," an antagonist to the court.

APPENDIX: CASE TABLE

	Case Title	Third-Party Intervention	ECHR	Outcome
1	Lobben v. Norway (G.C)	ADF International Alliance Defending Freedom	Art. 8	Violation of Art. 8
2	A.P., Garçon & Nicot v. France	ADF International	Art. 8	No violation of Art. 8 for two applicants Violation of Article 8 for one applicant
3	Wunderlich v. Germany	ADF International European Centre for Law and Justice	Art. 8	No violation of Art. 8
4	Wetjen v. Germany	ADF International Alliance Defending Freedom	Art. 8	No violation of Art. 8
5	Tlapak v. Germany	ADF International Alliance Defending Freedom	Art. 8	No violation of Art. 8
6	Y.T. v. Bulgaria	ADF International	Art. 8	Violation of Art. 8
7	X. v. Former Yugoslav Republic of Macedonia	ADF International Alliance Defending Freedom	Art. 8	Violation of Art. 8
8	S. V. v. Italy	Alliance Defending Freedom	Art. 8	Violation of Art. 8
9	Goucha v. Portugal	Alliance Defending Freedom	Art. 8	No violation of Art. 8
10	Travas v. Croatia	Alliance Defending European Centre for Law and Justice	Art. 8	No violation of Art. 8
11	S.H. v. Austria	European Centre for Law and Justice	Art. 8	No violation of Art. 8
12	Orlandi v. Italy	Alliance Defending Freedom European Centre for Law and Justice	Art. 8	Violation of Art. 8

13	Parillo v. Italy	European Centre for Law and Justice <i>Movimento per la Vita</i>	Art. 8	No violation of Art. 8
14	A.K. v. Latvia (G.C)	European Centre for Law and Justice	Art. 8	Violation of Art. 8
15	Martínez v. Spain (G.C)	European Centre for Law and Justice	Art. 8	No violation of Art. 8
16	Cassar v. Malta	European Centre for Law and Justice	Art. 8	Strike the application out of list of cases
17	A, B & C v. Ireland	European Centre for Law and Justice	Art. 8	No violation of Art.8 for two applicants Violation of Art. 8 for the third applicant
18	Costa & Pavan v. Italy	European Centre for Law and Justice <i>Movimento per la Vita</i>	Art. 8	Violation of Art. 8
19	Gross v. Switzerland (G.C)	Alliance Defending Freedom European Centre for Law and Justice	Art. 2 Art. 8 Art. 35	Abuse of the right of petition
20	X v. Austria (G.C)	Alliance Defending Freedom European Centre for Law and Justice	Art. 14 Art. 8	Violation of Art. 14, in conjunction with Article 8 (an unmarried different-sex couple) No violation of Art. 14, in conjunction with Article 8 (married couple)
21	P. & S. v. Poland	European Centre for Law and Justice	Art. 8 Art. 3	Violation of Art. 8 Violation of Art. 3

22	A.A. v. Switzerland	ADF International	Art. 3	Violation of Art. 3
23	A. v. Switzerland	ADF International	Art. 2 and Art. 3	No violation of Art. 2 and Art. 3
24	F. G. v. Sweden	Alliance Defending Freedom European Centre for Law and Justice	Art. 2 Art. 3	No violation of Art. 2 Violation of Art. 3
25	O'Keeffe v. Ireland	European Centre for Law and Justice	Art. 3	Violation of Art. 3
26	M. B. v. Turkey	European Centre for Law and Justice	Art. 3	Violation of Art. 3
27	W.K & M.F. v. Sweden	European Centre for Law and Justice	Art. 3	
28	A.R.M. v. Bosnia & Herzegovina	European Centre for Law and Justice	Art. 3	Application inadmissible
29	R.B.G. v. Turkey	European Centre for Law and Justice	Art. 3	Not found in HUDOC
30	Alekhina v. Russia	Alliance Defending Freedom	Art. 3 Art. 10	Violation of Art. 3 Violation of Art. 10
31	Annen v. Germany	ADF International Alliance Defending Freedom European Centre for Law and Justice	Art. 10	Violation of Art. 10
32	Religious Community of Jehovah's Witnesses v. Azerbaijan	ADF International Alliance Defending Freedom	Art. 10	Violation of Art. 10
33	E.S. v. Austria	European Centre for Law and Justice	Art. 10	No violation of Art. 10
34	Papavasiliakis v. Greece	ADF International Alliance Defending Freedom	Art. 9	Violation of Art. 9
35	Eweida v. United Kingdom	European Centre for Law and Justice Alliance Defending Freedom	Art. 9	Violation of Art. 9

36	Mammadov v. Azerbaijan	ADF International Alliance Defending Freedom	Art. 9	Violation of Art. 9
37	Nagy v. Hungary (G.C)	Alliance Defending Freedom	Art. 9 Art. 6.1	Application inadmissible
38	Asociación de Abogados Cristianos contre l'Espagne	European Centre for Law and Justice	Art. 9 Art. 8	Pending
39	Sindicatul "Pastorul Cel Bun" v. Romania	European Centre for Law and Justice	Art. 11	No violation of Art. 11
40	Shioshvili v. Russia	ADF International Alliance Defending Freedom	Art. 2 of Protocol 4	Violation of Art. 2 of Protocol No. 4
41	Herrmann v. Germany	European Centre for Law and Justice	Art. 1 of Protocol No. 1	Violation of Art. 1
42	Lautsi v. Italy (G.C)	European Centre for Law and Justice	P 1- 2	No violation of P 1 – 2
43	B.B contra la Pologne	European Centre for Law and Justice		Not delivered yet
44	Teliatnikov contre Lituanie	European Centre for Law and Justice		

Sources: HUDOC Database (<https://hudoc.echr.coe.int/>), European Center for Law & Justice (<https://eclj.org/>), ADF International (<https://adfinternational.org/>), and Alliance Defending Freedom (<https://adfllegal.org/>).

