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THE BATTLE FOR THE ESSENCE OF ARTICLE 9: A STUDY OF THIRD- PARTY INTERVENTIONS IN SELECTED CASES

Abstract

Vast body of literature on the jurisprudence of the European Court of Human Rights and its transformations focuses on the role of member-states and the Court itself. This paper will contribute to a less explored area focusing on the role of third-party interventions in Article 9 cases within a narrow scope of judgments in Key Cases and in front of the Grand Chamber. I argue that third parties communicating their interest through third party interventions shape the reasoning of the Court and influence the outcome of its decisions. However, like other recent authors in this paper, I challenge the assumption that third-party participation leads to the Court finding a violation. The paper will more specifically analyze: 1) the actors (*who* intervenes); 2) their arguments (towards *what*); and 3) what arguments the Court take seriously (what *works*). The analysis will not be conducted in isolation rather than through the prism of the specificities of the Courts' Article 9 jurisprudence; especially the use of the substantive margin of appreciation and the principle of subsidiarity, leading to the preliminary assumption that the Court has a more difficult task finding a violation due to self-imposed restraints. Consequently, an additional emphasis will be placed on locating the inter-play between the Courts' own principles and doctrines and the operationalization of third-party arguments towards the outcome of the judgments.

Keywords: European Court of Human Rights, third-party interventions, Article 9

I. INTRODUCTION

The place of religion in contemporary liberal democracies, as a matter that once seemed settled under the pretext of the secularization of the world as a social phenomenon, in the past two decades has been under serious review. The "return of religion" (if it was ever gone) as a strong force in the public realm seems undeniable. From a liberal constitutional perspective, this has proven challenging, as the normative salience of constitutional secularism (as a founding element) has been recently questioned by political and legal developments that have altered its interpretation and tested *its meaning* - more specifically its counter-majoritarian function. Such events enter the

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jurisprudential universe as controversies in front of national Courts, where those same policies and laws are to be tested, not only through the lens of national legal and constitutional protections but, also through the prism of international human rights.

Many such controversies turned cases in front of the European Court of Human Rights (from herein the Court), shape the meaning and interpretation of Article 9 of the European Convention of Human Rights (from herein ECHR) aimed at protecting religious freedom; but, also demark the boundaries of state sovereignty in religion-state relationships juxtaposed the ECHR. From deciding on the permissibility of the crucifix in public classrooms[1] or impermissibility of Muslim minarets placed among churches,[2] the Court has recently been tasked with ruling on difficult issues, stuck between its mandate under the Convention, political considerations and in the middle of ongoing culture wars. As a consequence, the Court has been turned into a battel ground for those same culture wars occupying the European public debate and unavoidably revolving around issues of pluralism, diversity, tolerance and identity.

Developments in the 1980s culminating with the implementation of Protocol 11 opened the door for third party interventions (from herein TPIs) in front of the Court. This allowed for third parties to not only provide information to the Court, but also attempt to influence the outcome in certain cases, and thus to play a role in the development of human rights law. Against the background described above, interveners have become important actors in bringing such culture wars to the Court. Depending on their ideological underpinnings, national, international and transnational advocacy groups have attempted to introduce certain interpretations to the Court, while states have intervened towards greater judicial deference and thus, state sovereignty in matters of managing religion.

This paper will look at TPIs in selected Article 9 cases. The aim of this paper is not to present large-scale empirical research into TPIs, rather than to look at specific Article 9 cases and give an insight into *who* intervenes, *what* towards and with what *arguments*. It also attempts to answer the very complicated and ambitious question of what works (to the limited extent possible).

In terms of the selection of cases, I will look only at Grand Chamber cases and Key Cases as categorized by the Court itself (as marked in the HUDOC database).[3] Even before Protocol 11 entered into force, Shelton has noted that "amicus briefs tend to be filed most often in plenary cases, those which are likely to be the most significant."[4] Considering, the paper operates under the assumption that there are a larger number of TPIs in Key and Grand Chamber cases because of their importance and in Grand Chamber cases because of the time available for mobilization once a Chamber judgment has been appealed.

In terms of the research approach, as submitted written third-party briefs are not listed nor accessible through the HUDOC database, I simply relay on the Court references to TPIs in the text of the specific cases. Thus, the study includes a total of five Grand Chamber (Lautsi and Others v. Italy[5] , Fernández Martínez v. Spain[6], Cha'are Shalom Ve Tsedek v. France[7], S.A.S v. France[8] and

[1] See *Lautsi and Others v. Italy* App 30814/06 (ECHR 18 March 2011)

[2] See Ouardiri v. Switzerland, App 65840/09 (ECHR 8 July 2011) and Ligue des Musulmans de Suisse and Others v. Switzerland App 66274/09 (ECHR 8 July 2011)

[3] https://hudoc.echr.coe.int/

[4] Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 AJIL 611

[5] *Lautsi and Others v. Italy* App 30814/06 (ECtHR 18 March 2011)

[6] *Fernández Martínez v. Spain* App 56030/07 (ECtHR 12 June 2014)

[7] *Cha'are Shalom Ve Tsedek v. France* App 27417/95 (ECHR 27 June 2020)

[8] *S.A.S v. France* App 43835/11 (ECHR 1 July 2014)

Bayatyan v. Armenia[9]) and three other Key Cases (Ewieda and Others v. UK[10], Stavropoulos and Others v. Greece[11] and E.S. v. Austria[12]) where TPIs are mentioned in the case.
Finally, as interveners adopt different strategies/take different avenues with the aim to sway the Court in a certain direction, the most difficult and ambitious task of this paper will be to assess whether or not certain strategies employed by interveners were successful. Thus, I will consider only the arguments that the Court has included in the text of the judgments, and attempt to shed some light on what arguments the has Court taken seriously. Aware of the methodological problem in measuring success of TPIs, I will consider two elements: if the Court has *explicitly* referred to the arguments/information employed by the interveners and whether the outcome of the decision was in line with what the interveners advocated (violation/no violation). An unavoidable consideration must be the element of judicial deference that the Court employees in Article 9 cases, thus I will also look at instances when interveners also attempted to make the use of the margin of appreciation "more attractive" for the court, and when and how interveners refer to the lack or existence of a European common ground/consensus.

II. THE ROLE AND SIGNIFICANCE OF THIRD-PARTY INTERVENTIONS IN FRONT OF THE ECTHR

TPIs are interventions in the proceedings in front of the Court, by any party (person, group, or a third State Party to the ECHR) which is not a party in the particular case. Considering, apart from what can be considered as traditional *amicus curiae* briefs, the court also receives interventions from other State Parties and *actual* third-party interventions mostly in cases in the realm of civil law.[13] The possibility for TPIs was formally introduced in 1983 by expanding Article 37 (2) of the Rules of the Court, which gave the President of the Court the mandate to invite or grant a request by a concerned third party to submit written comments.
Later, formally included as part of Convention with Article 36 of Protocol 11, the main purpose of TPIs is to provide information to the Court that can contribute to the pursuit of administration of justice. Further regulated by Rule 44 of the Rules of the Court, the current framework provides that TPIs can be submitted upon the request of the Court (this is a rather rare occurrence)[14], or by request of the third party itself, upon which it's for the President of the Chamber to decide whether or not it will be accepted. Empirical research has shown not only that there is a steady rise in submissions of TPIs in front of the Court but, that they are almost always accepted by the Presidents of Chambers.[15]
TPIs were primarily introduced as a consequence and/or culmination of attempts of third parties to enter the proceedings, starting in the second half of the 1970s. Shelton has tracked the trajectory of the cases leading to this development;[16] starting with the first unsuccessful attempt for a TPI in

[9] *Bayatyan v. Armenia* App 23459/03 (ECHR July 7 2011)
[10] *Ewieda and Others v. United Kingdom* App 48420/10, 59842/10, 51671/10 and 36516/10 (ECHR 15 January 2013)
[11] *Stavropoulos and Others v. Greece* App 52484/18 (ECHR 25 June 2020)
[12] *E.S. v. Austria* App 38450/12 (ECHR 25 October 2018)
[13] Nicole Bürli, *State Third-Party Interventions before the European Court of Human Rights: The "What" and "How" of Intervening* (Intersentia 2017).
[14] Laura Van den Eynde, 'An Empirical Look at the Amicus Curiae Practice of Human Rights NGO's Before the European Court of Human Rights' (2013) 31 NQHR 271.
[15] Ibid.
[16] Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 AJIL 611.

the case of Tyrer v. UK[17], to the first accepted TPI (in a limited capacity) in Winterwerp v. Netherlands[18]; and finally to Young, James and Webster v. United Kingdom when the Court relying on Winterwerp accepted information submitted by the Trades Union Congress (TUC). The rather late "arrival" of such attempts in front of the Court, according to Shelton, was due to the limited role of the petitioner under the Rules of the Court before 1983 and under the Convention before the entry of Protocol 11 into force.

Introduced and developed from the legal instrument *amicus curiae* (translated "friend of the court") originating from Roman Law[19] or common law practice[20] (depends on who you relay on)[21], the aim of the TPIs (as noted) is primarily to provide the Court with information that will help in the administration of justice, but also to represent a specific individual or group interests. These two functions are interrelated: TPIs grant the possibility of third parties to inform about realities and impact of certain laws/polices and in return to attempt to influence the outcome of a decision/judgment. As such, TPIs also have a democratizing function[22], one of elevating the legitimacy of the court,[23] as expanding access to the courts allows for public opinion to enter the proceedings. TPIs from states can also have a positive influence on the implementation of judgments as specific third-state interests have been considered in court decision-making. On the other hand, this also gives the Court an insight into the impact of the judgment and its more or less successful implementation in other State Parties.[24]

Different actors peruse different goals as interveners. NGOs aim at representing the public interest, and more particularly the interest of the persons/groups they are established to represent.[25] Additionally, their interventions strengthen their role of a watchdog[26] in society and signal to governments that they continually monitoring the implementation of the Convention. Finally, continuing involvement and advocacy through TPIs legitimizes the NGOs and makes them more appealing to their current and potential members.[27] There are other national organizations that take part as interveners such as unions, that also aims at representing specific group interests. States as interveners on the other hand, mainly argue for judicial deference, and the reinforcement of state sovereignty (which in the context of the Court is the use of a wide margin of appreciation).[28] Other individuals and types of organizations might also appear as interveners, which in the context of Article 9, are actors such as officials of religious organizations and religious organizations themselves, which understandably represent the views and interest of the organization at the question.

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[17] Tyrer v. United Kingdom App 5856/72 (ECHR 25 April 1978)

[18] Winterwerp v. Netherlands App 6301/73 (ECHR 24 October 1979)

[19] Samuel Krislov, 'The Amicus Curiae Brief: From Friendship to Advocacy' (1963) 72 YLJ 694, 695

[20] See Frank M. Covey, Jr., 'Amicus Curiae: Friend of the Court' (1959 - 1960) 9 DPLR 30, 34-35

[21] See S. Chandra. 'The Amicus Curiae: Friends no More?' (2010) SJLS 352

[22] Ruben J. Garcia, 'A Democratic Theory of Amicus Advocacy' (2007) 35 FSULR 315, 338

[23] Omari Scott Simmons, 'Picking Friends from the Crowd: Amicus Participation as Political Symbolism' (2009) 42 ClR 185

[24] Nicole Bürli, *State Third-Party Interventions before the European Court of Human Rights: The "What" and "How" of Intervening* (Intersentia 2017).

[25] On representing public interest see Clom O'Cinneide, 'Third-party Interventions: The Public Interest Reaffirmed' (2004) PL 69

[26] See Laura Van den Eynde, 'An Empirical Look at the Amicus Curiae Practice of Human Rights NGO's Before the European Court of Human Rights' (2013) 31 NQHR 271.275

[27] Ibid.

[28] Nicole Bürli, *State Third-Party Interventions before the European Court of Human Rights: The "What" and "How" of Intervening* (Intersentia 2017).

Quantitative and qualitative studies focused on TPIs in front of the Court in its entirety have shown the active role of so-called conservative actors or groups in general[29], and especially in cases dealing with abortion or LGBTIQ+ rights.[30] McCrudden, has also shown how US bases conservative advocacy groups and NGOs (including faith-based NGOs) engage in transnational litigation and have become prominent players in front of the Court.[31] As late-comers in the "intervention game" (as he calls it) they engage as "translators, or norm entrepreneurs, in debates about freedom of religion in the modern world" and by what Clifford Bob called "frame-jacking"[32] try to ultimately "tackle the secularizing effects of modernization."[33] Similarly, yet years before, András Sajó argued that at the constitutional level, constitutional arrangements are challenged by strong religions that among other strategies, "employ the ostensibly liberal arguments [as] Trojan horses used to bring religious concerns into the citadel of the secular state, [as] [r]eligion seeks to smuggle itself into the public and political sphere using fundamental rights language." [34]
In line with the considerations above, this article also shows that Article 9 jurisprudence proves to be a battleground for culture wars, where conservative actors introduce specific interpretations of international human rights norms by introducing comparative perspectives, to compete with other liberal actors, aiming to influence the landscape and interpretation of Article 9 and thus, the boundaries of religious freedom. Annicchino rightfully sent warning signals in the aftermath of *Latusi*[35], emphasizing the effective advocacy of united conservative actors and religious organizations that aim and succeeded into confirming the supremacy of Christian symbols in public spaces in Europe, which he warns might lead to reduction of religious vitality in the long run.[36]

[29] VanLaura Van den Eynde, 'An Empirical Look at the Amicus Curiae Practice of Human Rights NGO's Before the European Court of Human Rights' (2013) 31 NQHR 271. den Eynde (n 4).
[30] Ibid.
[31]Christopher McCrudden, 'Transnational culture wars' (2015) 13 ICON 434
[32] Clifford Bob *The Global Right Wing and the Clash of World Politics* (1st edn, Cambridge University Press 2012)
[33] Christopher McCrudden, 'Transnational culture wars' 13 ICON 434, 435-436
[34] András Sajó, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6 ICON 605.
[35] *Lautsi and Others v. Italy* App 30814/06 (ECtHR 18 March 2011)
[36] Pasquale Annicchino, 'Winning the Battle by Losing the War: The Lautsi Case and the Holy Alliance between American Conservative Evagelicals, the Russian Orthodox Church and the Vatican to Reshape European Identity' (2011) 6 R&HR 213

III. THIRD-PARTY INTERVENTIONS IN ARTICLE 9 CASES

1.1 The "who" and towards "what"

Case	For *violation*	For *no violation*	Outcome
Bayatyan v. Armenia	Amnesty International; Conscience and Peace Tax International; Friends World Committee for Consultation (Quakers), International Commission of Jurists, and War Resisters' International The European Association of Jehovah's Christian Witnesses.		V
Eweida and Others v. UK	Premier Christian Media Trust; Dr Peter Forster, Bishop of Chester; Nicholas Reade, Bishop of Blackburn and Bishop Michael Nazir-Ali, Equality and Human Rights Commission, the Associazione "Giuseppi Dossetti: i Valori" Lord Carey of Clifton The European Centre for Law and Justice; Dr Jan Carnogurksy and the Alliance Defence Fund; Clapham Institute and KLM	The National Secular Society The International Commission of Jurists, Professor Robert Wintemute, the Fédération Internationale des Ligues des Droits de l'Homme and ILGA-Europe	V/N-V
Fernández Martínez v. Spain		Spanish Episcopal Conference (Conferencia Episcopal Española – "the CEE") European Centre for Law and Justice (ECLJ) Chair in Law and Religions of the Université catholique de Louvain and the American Religious Freedom Program of the Ethics & Public Policy Center	N-V A8
SAS v. France	Amnesty International, ARTICLE 19, Human Rights Centre of Ghent University Liberty Open Society Justice Initiative	The Belgian Government	N-V

Lautsi v. Italy	Greek Helsinki Monitor Associazione nazionale del libero Pensiero Eurojuris International Commission of Jurists, Interights and Human Rights Watch	Governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, and the Republic of San Marino; The Government of the Principality of Monaco; The Government of Romania; European Centre for Law and Justice, Zentralkomitee der deutschen katholiken, Semaines sociales de France and Associazioni cristiane lavoratori italiani Thirty-three members of the European Parliament acting collectively (11 + 30 states; 4)	N-V
E.S. v Austria	The European Centre for Law and Justice		N-V
Stavropoulos and Others v. Greece	The Greek Ombudsman		V

Table 1. Interveners per case for/against violation and outcome of the case (violation/no violation)

Looking at *Table 1*., four considerations can be drawn regarding the nature and aims of interveners. *First,* that verities of actors emerge as interveners in the selected cases. Mainly they can be divided into individuals, organizations and states. Individual interventions are submitted by three categories of citizens: religious officials (more particularly Bishops), academics (in the capacity of professors and as representatives of academic institutions) and in one instance an individual holding a position of a Lord in the United Kingdom. Organizations differ in their organizational nature: NGOs (national and international), religious organizations, national human rights bodies and academic institutions. As to states, they intervene both individually and in a group. In one instance a group of states intervened together in the capacity of EU Member States.
Second, the assumption that more interventions lead to the outcome of the Court finding a violation in a specific case[37] (and thus towards greater protection of the applicants), does not seem to hold merit in these cases, nor does it seem to be a relevant point of departure. As we can see, interveners advocate for both finding a no violation as much as they do in finding a no violation. This mainly depends on the nature of the interveners and the nature and circumstances of the case.
Generally, with a very few exceptions, NGOs mostly advocated for finding a violation in a specific case. The determining factor for the exceptions seems to be the nature and the ideological underpinnings of the organization in question in relation to the nature of the case. Two examples transpire from the overview. In the cases of *Fernández Martínez* and *Lautsi*, the European Centre for Law and Justice (ECLJ) as a conservative actor, appears advocating for no violation twice. In the particular cases, the judgments of non-violation ultimately allowed for larger autonomy of religious institutions (*Fernández Martínez*) and the presence of religious symbols in public schools (Christian-thus, in the context of Italy a symbol of the majority religion in *Lautsi*). On the other

[37] See Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 AJIL 611

hand, ILGA-Europe, The National Secular Society and The International Commission of Jurists, as so-called liberal actors, also advocated towards finding a no violation in the case of *Eweida*. With that, they advocated that termination of employment of one of the applicants (a public servant in charge of issuing marriage certificates) for discriminating against same-sex couples based on her religious beliefs, did not violate the applicants' freedom of religion under Article 9. They claimed that "statutory exceptions to discrimination laws are generally for religious institutions and organisations rather than individuals."[38] Considering, the groups intervened in relation to their ideological underpinnings or in the interest of the groups they are mandated to represent.
Religious organizations and representatives have appeared on both sides of the isle (advocating for both violation and no violation) and much like the ECLJ, depending on the specificities of the case have always advocated towards larger autonomy of religious institutions and towards a broader interpretation of what Article 9 protects.
Third, Article 9 cases have also become a forum where the demarking the boundaries of state sovereignty and judicial deference are drawn. States acting in line with current literature[39], in all instances, whether individually or collectively, states have advocated for greater judicial deference, strengthening national sovereignty and thus, finding a no violation.
Finally, without a doubt, the most active intervener, engaging in 4 out of 7 cases is the ECLJ, which confirms the role of transnational advocacy of conservative groups in general and specifically in Article 9 cases.

1.2 Avenues taken and what works

In line with the primary and most traditional role of TPIs, interveners in almost all the cases aimed at providing the Court with information[40], presenting results from conducted research studies,[41] the situation on the ground[42], academic literature[43] and documents from other international bodies. They also provide the Court with insight into the larger implications of a potential judgment, both from a legal and social perspective. It seems that the Court takes such information into consideration, and in some instances, specifically refers to them in its reasoning. We find such an example in *Stavropoulos,* where the Court relayed on information provided by the Greek Ombudsman to find an argument provided by the government unconvincing and thus, not accepted.[44] Another example is found in *S.A.S*, where the Court took into account the information provided by interveners both regarding the disproportionality of the blanket ban on full-face coverings and the Islamophobic discourse made in the process of enacting the national Law under which the case was brought. In this case, however, it is more difficult to answer whether the provided information swayed the Court one way or the other. The Court noted that states should promote tolerance and be wary of the "risk of contributing to the consolidation of the stereotypes which affect certain categories of the population," however, it nevertheless maintained that it is not for the Court to rule on whether legislation is desirable in such matters.[45]

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[38] *Ewieda and Others v. United Kingdom* App 48420/10, 59842/10, 51671/10 and 36516/10 (ECHR 15 January 2013) para 78
[39] See Nicole Bürli, *State Third-Party Interventions before the European Court of Human Rights: The "What" and "How" of Intervening* (Intersentia 2017).
[40] *Cha'are Shalom Ve Tsedek v. France* App 27417/95 (ECHR 27 June 2020) para. 81
[41] *S.A.S v. France* App 43835/11 (ECHR 1 July 2014) para. 104
[42] *Stavropoulos and Others v. Greece* App 52484/18 (ECHR 25 June 2020)
[43] *S.A.S v. France* App 43835/11 (ECHR 1 July 2014) para. 95
[44] *Stavropoulos and Others v. Greece* App 52484/18 (ECHR 25 June 2020) para. 49
[45] *S.A.S v. France* App 43835/11 (ECHR 1 July 2014) para. 149

A common (and somewhat unavoidable) strategy is to relay on the Court's previously established case law to make certain arguments. In the selected cases the interveners relied on the previous case law for several purposes.

First, to advocate for the *application of certain doctrines* that the Court has previously employed. In *Bayatan*[46] interveners advocated for the application of the "Convention as a "living instrument" doctrine, to convince the Court to change its previous held positions. In the particular case, the Court both applied the "living instrument" doctrine and found a violation (as the interveners advocated). However, it is much more plausible that the changing landscape in Europe and in regional/international standards aimed against compulsory military service without the possibility of conscientious objection was ultimately decisive for the Court.

Second, to advocate for the *adoption of certain definitions* that the Court has previously determined. In that regard, the case of *Lautsi* shows how different interveners can use the Courts case law to advocate for completely opposite positions. For example, The Greek Helsinki Monitor argued that the crucifix is just a religious symbol and that "participation of pupils in religious activities could in act influence them and considered that the same was true where they were taught in classrooms where a religious symbol was displayed,"[47] which according to Folgerø and Others v. Norway[48] was a violation of the Convention. Similarly, Eurojuris referred to cases involving the wearing of Islamic veils in educational institutions to argue that the "school should not be a place for proselytism or preaching."[49] On the other hand, 33 members states (intervening together) claimed preference towards one religion based on history and tradition, allows for the presence of the crucifix in public places and it's in line with the Court's previous case-law.[50] The Court refused to enter into discussions about the nature of the crucifix as a symbol and restricted itself into only answering the question of "compatibility … of the presence of crucifixes with the requirements of Article 2 of Protocol 1."[51] Ultimately, it arrived to the interpretation that states must have respect for "the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions"[52] but, that "the notion of "respect" … vary considerably from case to case, given the diversity of the practices followed and the situations obtaining in the Contracting States."[53] This interpretation together with the application of a wide margin of appreciation led to a judgment of no violation. It is, therefore, reasonable to assume that the overwhelming engagement of third states as interveners influenced the Court and swayed it towards this particular outcome.

Third, to advance certain *interpretations of principles* used by the Court such as pluralism, neutrality and secularism. In *Lautsi*, the International Commission of Jurists, Interights and Human Rights Watch argued that previous case law establishes educational pluralism as a principle, that the state has a duty of neutrality and impartiality among religious beliefs in public services, including education. On the other hand, Romania as a third party advocated that the removal of religious symbols from schools will breach neutrality.[54] In that regard, the Court ultimately stated that states have a duty of neutrality and impartiality, however, considered the crucifix is "an

[46] *Bayatyan v. Armenia* App 23459/03 (ECHR July 7 2011) para. 102
[47] *Lautsi and Others v. Italy* App 30814/06 (ECHR 18 March 2011) para. 50
[48] *Folgerø and Others v. Norway* App 15472/02 (EHCR 29 June 2007)
[49] *Lautsi and Others v. Italy* App 30814/06 (ECHR 18 March 2011) para. 53
[50] *Lautsi and Others v. Italy* App 30814/06 (ECHR 18 March 2011) para. 56
[51] *Lautsi and Others v. Italy* App 30814/06 (ECHR 18 March 2011) para. 61
[52] Article 2 of Protocol 1 of the European Convention of Human Rights.
[53] *Lautsi and Others v. Italy* App 30814/06 (ECHR 18 March 2011) para. 61
[54] *Lautsi and Others v. Italy* App 30814/06 (ECHR 18 March 2011) para. 49

essentially passive symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality…it cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities."[55] Thus, the Court accepted both interveners' arguments while ultimately interpreting them in a different independent manner, swaying towards the solution advocated by Romania and in line with other intervener states.

In the same case interpretations of the principle of secularism were raised, with states advocating against the requirement of strict separation and "Americanization of Europe".[56] Eurojuris on the other hand claimed that the constitutional value of the principle of secularism prohibited for the school to become a place for proselytism or preaching.[57] The Court avoided "to rule on the compatibility of the presence of crucifixes in State school classrooms with the principle of secularism as enshrined in Italian law"[58] and instead interpreted "secularism [as] cogent, serious, and coherent enough to qualify as a matter of philosophical conviction that parents [invoked] as part of their right to have their children educated compatibly with their convictions."[59] Zucca has warned about the implications of such interpretation, and understanding secularism as a philosophical conviction, "demoted from an overarching principle of the constitutional state."[60]

Apart from the existence of conflicting positions on the same issue among interveners whilst employing different interpretations of the Court's jurisprudence, what makes it additionally difficult to assess whether these specific strategies worked is the fact that the Court itself is bound by its previous case-law. Considering, the cases presented by the interveners are relevant to the extent that the Court would have in any event referenced them itself. How the Court then applies its established standards to the particular case and how much it will rely on its institutional and self-imposed judicial restraints (see below), makes the job of drawing conclusions of how and if the interveners impacted the Court difficult.

Interveners also rely on case law from foreign courts/institutions to advance their arguments. The Court has been somewhat open but, still practising restraint in utilizing external case law. Erik Voeten has shown that citations of external cases might have increased over time in the Courts judgments but, "this increase has not kept pace with the overall increase in judgments."[61] Additionally, in most judgments, external case law is referenced in separate (concurring or dissenting) opinions rather than the majority judgment. He notes that one justification for this might be that "reliance on external sources would lead to challenges that the Court is exceeding its delegated authority."[62] Considering, the point of departure is that relying on external case-law might not be an effective strategy for interveners. Still, in the selected cases, interveners have relayed on external case-law and more specifically on Supreme Court of the United States case-law (*Eweida* and *Fernández Martínez*); case-law of other member states (*Lautsi*), case-law of other UN Human Rights Committee (*S.A.S* and *Bayatan*). In each of these instances, the Court has not directly considered nor relied on the referenced cases in the majority judgment.

Some interveners utilized EU law (ECLJ in *Fernández Martínez*), laws and jurisprudence form other national jurisdictions (in *S.A.S* the Belgian government provided examples of its own legal

[55] *Lautsi and Others v. Italy* App 30814/06 (ECHR 18 March 2011) para. 72
[56] *Lautsi and Others v. Italy* App 30814/06 (ECHR 18 March 2011) para. 47
[57] *Lautsi and Others v. Italy* App 30814/06 (ECHR 18 March 2011) para. 53
[58] *Lautsi and Others v. Italy* App 30814/06 (ECHR 18 March 2011) para. 57, 71
[59] *Lautsi and Others v. Italy* App 30814/06 (ECHR 18 March 2011) para. 61
[60] Lorenzo Zuca '*Lautsi:* A Commentary on a decision by the ECtHR Grand Chamber' (2013) 11 ICON 218, 222
[61] Erik Voeten 'Borrowing and Nonborrowing among International Courts' (2010) 39 JLS 547, 558
[62] Ibid. 572

context) or other human rights instruments, including soft law such as general comments and recommendations (in *S.A.S*, *Fernández Martínez* and *Bayatan*). The Court takes such arguments seriously, while also conducting its own analyses on regional human rights standards as well as comparative perspectives, mostly in the quest for European consensus or changes thereof. In several instances, the Court explicitly mentioned the sources introduced by the interveners in its reasoning but, in line with its own comparative analysis. I mentioned above that interventions, especially by states, give the Court an insight into the impact of the judgments and their more or less successful implementation in other member states.[63] In regard to the intervention of Belgium, it is also important to mention that soon after *S.A.S* was decided two cases[64] against Belgium, based on almost the same facts reached the Court. *S.A.S* and the interpretations established therein were identically applied in the Belgian cases amounting to judgments of non-violation.

Interveners also engage with arguments employed in the course of the procedural history of the case, more specifically: 1) the reasoning of the Chamber/Commission decision (in Grand Chamber cases), arguing for or against its conclusion (both examples of this can be found in *Lautsi*) or referring to the evolution of the approach of the Commission as a general trend (*Bayatyan*); 2) reasoning employed by national courts (*S.A.S* in reference to the Council of State and in *Lautsi* in reference to the Administrative Court reasoning; 3) for/against arguments of law-makers (*S.A.S* in reference to Islamophobia and to gender equality and abuse). Since the Court does engage in all these aspects in one or another part of its analysis, engaging with such arguments seem to be a reasonable strategy. In all of the instances mentioned above, the Court has explicitly considered the arguments by interveners.

Perhaps the most important part of the analysis, however, is the one focused on how interveners engage with the Court's doctrines and practices of judicial deference namely the margin of appreciation and its interplay with the search for European consensus. The institutional mandate and nature of the Court, and the limitations that come with it, namely the principle of subsidiarity that defines it, has led to the development of the margin of appreciation as a "sensible pragmatic legal doctrine for a system applying to 47 States and over 820 million people."[65] In the past two decades, however, the Court has been criticized for applying the doctrine in a manner that "has made it into a rather empty rhetorical device,[66] with some suggesting that the Court ought to develop a "rationalized" version of the margin of appreciation doctrine so that "the Strasbourg supervisory system [can reflect] the dynamics of the cooperative principle of subsidiarity and the inclusive rationale of the suggested political conception of human rights."[67] In the realm of religious freedom protections, however, the Court has been under criticism for using the margin of appreciation doctrine to develop its own interpretations of secularism (moving from a pluralistic

[63] Nicole Bürli, *State Third-Party Interventions before the European Court of Human Rights: The "What" and "How" of Intervening* (Intersentia 2017).

[64] *Belkacemi and Oussar v. Belgium* App 37798/13 (ECHR 11 July 2017) and *Dakir v. Belgium* App 4619/12 (ECHR 11 July 2017)

[65] Domenic McGoldrick 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2016) 65 ICLQ 21 58

[66] Janneke Gerards 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) 18 HRLR 393, 495

[67] Marisa Iglesias Vila 'Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights' (2017) 15 ICON 412

towards a fundamentalist approach),[68] or for using it simply as an avoidance mechanism in matters closely related to the public interest of states.[69]

Indeed, in almost all of the selected cases, the Court considered whether or not there was a European consensus on the specific issues and granted a certain margin of appreciation to the state. Considering, interveners have developed different strategies to appeal to the use and the extent of the use of these doctrines in specific cases. It might be intuitive, in a manner of speaking, to assume that mostly states as interveners advocate for the application of the margin of appreciation, specifically a wider margin of appreciation. This has been certainly the case in certain instances (for example Romania in *Lautsi*). However, depending on the party's interests and context of the specific case, NGOs considered ideologically liberal have also advocated for the application of a wider margin of appreciation. In *Eweida* both the National Secular Society and Liberty advocated that the United Kingdom be granted a wide margin of appreciation.[70] Application of the wide margin of appreciation leading to a judgment of no violation in the specific case would have deemed discrimination in the form of denying services based on religious belief impermissible. It must be noted that such advocacy might make the use of the margin of appreciation even more attractive for the Court.

Interveners have also engaged in arguments regarding the existence of a European consensus upon which the application of the margin of appreciation (might) depend(s). For example, Romania in *Lautsi* claimed that there is no European consensus on the display of religious symbols in public schools, thus advocating for greater judicial deference. In two instances the Court specifically engaged with such arguments. Once, in *S.A.S* when the Open Society Justice Initiative argued that "there was a European consensus against bans on the wearing of the full-face veil in public."[71] The Court explicitly observed that "contrary to the submission of one of the third-party interveners…there is no European consensus against a ban,"[72] thus, refused to accept the argument. A second time in *Bayatan*, when interveners argued: "that the imperatives of defence of member States were no longer applicable at the level prevailing at the time of earlier decisions on this matter and the need to make arrangements for national service could be met by member States without overriding the rights guaranteed by Article 9."[73] Ultimately the Court after conducting its own analysis concluded that it is time to change the principles set in the previous case-law.

IV. CONCLUSION

This limited study into TPIs in selected Article 9 cases has shown that there is a variety of actors that intervene in front of the Court. The assumption that more interventions lead to the outcome of the Court finding a violation in a specific case (and thus towards greater protection of the applicants) is disproven by this analysis. On the contrary, depending on the nature of the interveners and the nature and circumstances of the case, interveners advocate towards both finding a no violation as much as they do in finding a violation. Thus, Article 9 cases have become

[68] Claudia Morini 'Secularism and Freedom of Religion: The Approach of the European Court of human Rights' (2010) 34 ILR 611

[69] Itır Aladağ Görentaş 'The Effects of Margin of Appreciation Doctrine on the European Court of Human Rights: Upholding Public Morality over Fundamental Rights' (2016) 11 AİD 197

[70] *Ewieda and Others v. United Kingdom* App 48420/10, 59842/10, 51671/10 and 36516/10 (ECHR 15 January 2013) para .78

[71] *S.A.S v. France* App 43835/11 (ECHR 1 July 2014) para. 105

[72] *S.A.S v. France* App 43835/11 (ECHR 1 July 2014) para. 156

[73] *Bayatyan v. Armenia* App 23459/03 (ECHR July 7 2011) para. 91

a forum where liberal and conservative actors clash aiming to interpret the essence of Article 9, and where states intervene advocating for judicial deference while making claims for enhanced state sovereignty. The study also shows that without a doubt the most active intervener, engaging in 4 out of 7 cases is the ECLJ, which confirms the active role of transnational advocacy of conservative groups in general and specifically in Article 9 cases. Conservative groups and religious organisations advocate towards greater autonomy of religious institutions and broader perceptions of believers under the Convention.

Interveners employ several strategies and advance different kinds of arguments to sway the Courts reasoning mainly: 1) in line with their traditional function by providing information to the Court; 2) by employing the Court's previous jurisprudence to advocate for the adoption of certain definitions, doctrines or interpretations of principles; 3) by using case-law from foreign courts/institutions; 4) by utilizing EU law, laws and jurisprudence form national jurisdictions or other human rights instruments/organizations; 5) by engaging with arguments employed in the course of the procedural history of the case (reasoning of the Chamber/Commission, national courts and law-makers). Although determining with certainty which of these strategies work and which arguments the Court takes seriously has proven to be a hard task, several conclusions can be drawn. The Court takes into account information provided by interveners, and often times explicitly mentions them. Since it's bound by its previous case-law it's a good strategy to construct arguments applying the Court's own interpretations. Juxtaposed, with its own interpretations and explicitly (and thus, officially) relying only on its own considerations, it is implicitly clear that the Court considered such interpretations, especially if they are coming from states (mainly due to considerations related to the future implementation of judgments). The Court, however, has been less keen on explicitly relaying on foreign case-law or foreign doctrines of interpretations and keener on addressing arguments engaging in reasoning employed in the procedural history of the case.

Finally, due to the nature of Article 9 in almost all of the selected cases the Court considered whether or not there was a European consensus on the specific issue and granted (in accordance) a certain margin of appreciation to the state. Interveners have developed different strategies to appeal to the use and the extent of the use of the margin of appreciation and consensus in specific cases, advocating both for and against the application of a wider margin of appreciation and for and against the establishment of a European consensus. What is striking is that, apart from states, both liberal and conservative NGOs and organizations have at times advocated for the application of a wider margin of appreciation by the Court. This might make the use of the margin of appreciation more attractive for the Court, that has already been criticized for using the doctrine as an avoidance mechanism at the expense of protecting individual rights under Article 9.

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