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## Transnational Culture Wars

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## Transnational culture wars

Christopher McCrudden \*

*The well-known “culture wars” clash in the United States between civil society actors has now gone transnational. Political science scholarship has long detailed how liberal human rights non-governmental organizations (NGOs) engage in extensive national and transnational activity in support of their ideals. More recently, US conservative groups (including faith-based NGOs) have begun to emulate these strategies, in particular promoting their convictions by engaging in transnational advocacy. NGOs thus face off against each other politically across the globe. Less well known is the extent to which these culture wars are conducted in courts, using conflicting interpretations of human rights law. Many of the same protagonists, particularly NGOs that find themselves against each other in US courts, now find new litigation opportunities abroad in which to fight their battles. These developments, and their implications, are the focus of this article. In particular, the extent to which US faith-based NGOs have leveraged the experience gained transnationally to use international and foreign jurisprudence in interventions before the US Supreme Court is assessed.*

### 1. Introduction

The assumption, common some years ago, that Western liberal democracies had solved the problem of the relationship between state and religion, with constitutional secularism as a main plank of the solution,<sup>1</sup> now seems somewhat naïve and precipitous, akin to confident declarations of the “end of history.”<sup>2</sup> Similarly, the days when the relationship between human rights law and religion was a quiet backwater, appearing to confirm arguments about the end of religion as a serious force in the world, are long gone. Increasingly, conservative religious groups have

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<sup>1</sup> See CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL (Susanna Mancini & Michel Rosenfeld (eds), 2014)

<sup>2</sup> FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

appropriated human rights arguments to support their causes.<sup>3</sup> Human rights have become a central site of normative contestation over the implications of modernity, with both sides claiming to interpret human rights in the “right” way. This is possible because of the contested nature of human rights standards, and their sources of authority, as well as confusion as to whether there is a lexical ordering of the importance of particular human rights compared with others. Both sides see themselves as proponents of human rights, often claiming different human rights in support of their positions.

These issues are currently litigated in a range of different jurisdictions. As a result these bodies have to grapple with some of the most difficult issues in what has sometimes been referred to in the United States as the “culture wars,” borrowing from the German expression for the dispute between Bismarck and the Catholic Church in the nineteenth century.<sup>4</sup> An important feature of these modern culture wars is that they are often waged by civil society organizations, as well as by political parties. The United States is now one of the most prominent examples of this phenomenon.<sup>5</sup> All this is well known, giving rise to a large and expanding academic literature documenting the twists and turns of the complex legal and political maneuverings in that jurisdiction.<sup>6</sup>

This well-known “culture wars” clash in the United States between civil society actors has now gone transnational. For some time, legal scholars have discussed how United States administrations have periodically sought to place restrictions on funding non-governmental organizations (NGOs) outside the United States that support abortion.<sup>7</sup> More recently, political science scholarship has detailed how conservative groups (including faith-based NGOs) promote their convictions by engaging in transnational advocacy.<sup>8</sup> NGOs thus face off against each other *politically* across the globe. Less well known, however, is the extent to which these transnational

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<sup>3</sup> Clifford Bob has referred to this phenomenon as “frame-jacking,” in which one group’s framing of an issue is hijacked by the opponent group to serve a contradictory end, CLIFFORD BOB, *THE GLOBAL RIGHT WING AND THE CLASH OF WORLD POLITICS* 29, 30 (2012), but that is somewhat question-begging.

<sup>4</sup> The term is a translation of the German *Kulturkampf*, which describes the clash between the first Chancellor of a united Germany, Otto von Bismarck and the Catholic Church in the 1870s, see RONALD J. ROSS, *THE FAILURE OF BISMARCK’S KULTURKAMPF: CATHOLICISM AND STATE POWER IN IMPERIAL GERMANY, 1871–1887* (1998).

<sup>5</sup> The term became popular in the United States in the 1990s as a way of describing the clash between traditionalist/conservative/religious and liberal/progressive/secular values. For an early use in this context, see JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO CONTROL THE FAMILY, ART, EDUCATION, LAW, AND POLITICS IN AMERICA* (1992).

<sup>6</sup> For a recent example, see CHRISTOPHER EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2010).

<sup>7</sup> James Gathii, *Exporting Culture Wars*, 13(1) U.C. DAVIS J. INT’L L. & POL’Y 67 (2006).

<sup>8</sup> See esp., BOB, *supra* note 3.

culture wars are conducted in courts, using human rights law.<sup>9</sup> The role that advocacy networks and NGOs play as translators, or norm entrepreneurs, in debates about freedom of religion in the modern world is my particular focus, but this has implications for debates about the diffusion and socializing of human rights norms more generally.

This article identifies two separate, but closely related, phenomena in litigation with a religious dimension: the increased presence of NGOs in such litigation in their own jurisdictions; and their increased presence in transnational religious litigation. Many of the same protagonists, particularly NGOs, find new litigation opportunities abroad in which to intervene. NGOs are increasingly operating on a transnational basis, identifying litigation opportunities to promote their ideological positions wherever they occur and this jurisdictional opportunism may carry them well outside their own jurisdictions. Both developments involve decisions by religiously affiliated NGOs to get into the “intervention game” that more secular NGOs had already made their own. Religiously affiliated NGOs are relative latecomers to this game. They are attempting to “catch up” with the practices of secular NGOs in their national jurisdictions, and taking advantage of globalization to tackle the secularizing effects of modernization in other jurisdictions as well.

The thick description of modern religious litigation to be presented, and in particular the way that NGOs now operate in the context of religious litigation, appear to challenge some common assumptions in the scholarly analysis of the role that NGOs play in the human rights context. This has tended to focus on their role in institutions other than courts, and this focus has led to the relative dearth of studies considering the role that NGOs play as norm entrepreneurs in the litigation context. This article suggests that NGOs have well understood the power that courts have in generating interpretations of existing legal norms that support their policy positions and have sought to expand their activities into regional and domestic litigation in order to secure such favorable interpretations.<sup>10</sup>

NGOs, at least in the religious litigation context, now find themselves increasingly confronted by NGOs on the other side, in what becomes a battle of NGOs of different ideological persuasions. NGOs have significantly different normative preferences, and

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<sup>9</sup> *But see id.*, esp. chs. 3 and 4, and Clifford Bob, *The Global Battle over Religious Expression: Sweden's Ake Green Case in Local and Transnational Perspective*, 40(2) J. ETHNIC & MIGRATION STUD. 212 (2014).

<sup>10</sup> *See, e.g.*, the Center for Reproductive Rights, *International Legal Program Summary of Strategic Planning Through October 31, 2003*, repr. in *Congressional Record*, Extension of Remarks (Dec. 8, 2003), at E2534 (Hon. Christopher H. Smith).

(unsurprisingly) may end up on different sides of the domestic and international political and legal divide. Any assumption that NGOs will necessarily adopt “liberal” or “progressive” political orientations seems increasingly questionable. As Bob has observed: “most global issues involve not just a single ‘progressive’ movement promoting a cause, but also rivals fighting it.”<sup>11</sup> “Global civil society,” he continues, “is not a harmonious field of like-minded NGOs. It is a contentious arena riven by fundamental differences crisscrossing national and international boundaries.”<sup>12</sup>

The further assumption that *transnational* civil actors will share the same or similar preferences to *local* NGOs will be shown to be equally questionable. The assumption that transnationalization is “a positively enabling process” for local civil society actors, or that “transnational network structures are predominantly seen as benefiting the goals and activities of domestic, civil society norm entrepreneurs”<sup>13</sup> should be taken with a considerable pinch of salt. As Stachursky suggests, “domestic civil society actors employing transnational human rights discourses, and linguistic repertoires . . . might easily participate in transnational dialogue but face opposition and suspicion by other local civil society actors or their local constituencies.”<sup>14</sup> Sally Engle Merry has described how

Intermediaries such as NGO and social movement activists play a critical role in interpreting the cultural world of transnational modernity for local claimants. They appropriate, translate, and remake transnational discourses into the vernacular. At the same time, they take local stories and frame them in national and international human rights language.<sup>15</sup>

There is, however, a potentially difficult relationship between the different social actors who may have very different understandings of how best (or whether) to translate the vernacular into the international, and the international into the vernacular, because these actors may have different sources of legitimacy that will be differently affected.<sup>16</sup>

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<sup>11</sup> BOB, *supra* note 3, at 2.

<sup>12</sup> *Id.* at 6.

<sup>13</sup> BENJAMIN STACHURSKY, THE PROMISE AND PERILS OF TRANSNATIONALIZATION: NGO ACTIVISM AND THE SOCIALIZATION OF WOMEN’S HUMAN RIGHTS IN EGYPT AND IRAN 64 (2013).

<sup>14</sup> STACHURSKY, *supra* note 13, at 74.

<sup>15</sup> SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 3 (2006).

<sup>16</sup> Kimerling makes a similar point, see Judith Kimerling, *The Story from the Oil Patch: The Under-Represented in Aguinda v. Texaco*, in LITIGATING HUMAN RIGHTS: PROMISE V. PERILS (Carnegie Council on Ethics and International Affairs ed., 2000).

The article identifies, finally, how NGOs not only use interventions in domestic and foreign courts to attempt to embed particular models of religious rights; they do so in part through arguments based on comparative reasoning. Those who invoke “foreign” norms infuse their own meaning into these norms.<sup>17</sup> We shall see that there appears to have been an increase in interventions by religious rights’ organizations using comparative reasoning in two ways: first, in other countries’ courts using comparative arguments drawn from their own countries, and second, by organizations intervening in their own countries’ courts, using comparative arguments drawn from other countries. The article identifies a symbiotic relationship between the phenomena of NGO participation in religious litigation at home and abroad, and the use of comparative arguments in that litigation. The elements of globalization and catch-up have combined to encourage the use by religiously affiliated NGOs of foreign legal materials in litigation. The game of catch-up has involved not only catching up in playing the domestic litigation game in the first place, but also catching up in *how* to play it. However unlikely it might have seemed some years ago, the greater involvement of NGOs on both sides of transnational litigation may be leading to the routinization of the use of comparative jurisprudence, at least in the context of religious litigation, even in the United States.

## **2. NGOs and the development of human rights**

In their path-breaking work, Margaret Keck and Kathryn Sikkink defined networks as “forms of organization characterized by voluntary, reciprocal, and horizontal patterns of communication and exchange.”<sup>18</sup> One form of network they particularly emphasized was what they described as “transnational advocacy networks,” which they identified as including “those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services.” NGOs, defined by Benjamin Stachursky as “private, voluntary, nonprofit, nonviolent groups with formal institutional

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<sup>17</sup> The reception by foreign judges of *Brown v. Board of Education* bears this out in a striking way, see Sheldon Bernard Lyke, *Brown Abroad: An Empirical Analysis of Foreign Judicial Citation and the Metaphor of Cosmopolitan Conversation*, (2012) 45 VAND. J. TRANSNAT’L L. 83.

<sup>18</sup> MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 8 (1998).

character and aiming at some form of social change,”<sup>19</sup> play a particularly important role in these networks.

NGOs, with and without a religious background or orientation, have long played an important political role in the development of human rights law relating to religion. There is now extensive scholarly work demonstrating convincingly that transnational advocacy networks comprising NGOs have played a significant role in lobbying for human rights in general, and influencing the content of particular human rights covenants, both generally and as regards the protections for freedom of religion.<sup>20</sup> Several NGOs with a strong religious background and commitment continue to play a significant role beyond this “legislative” development of the law. Their role in monitoring human rights abuses is also well-documented,<sup>21</sup> including the role they play in advocating a religion-friendly interpretation of human rights in international and regional organizations.<sup>22</sup> Academic studies have identified for some years an emerging relationship between religious organizations in the United States and the international human rights movement.<sup>23</sup> In that context, Bob has described a continuous and continuing war of attrition between conservative religious and progressive secular NGOs for influence over policy making across a wide swath of issues.<sup>24</sup> In particular, a strategy has been developed of seeking to ensure that soft-law standards developed by one side are met by soft-law standards developed on the other side, in order to attempt to disrupt the hardening of the soft-law instruments into hard law by showing them not to reflect a settled consensus.<sup>25</sup>

### 3. NGOs and domestic religious litigation

There is growing evidence, however, that the legislative and political role of these organizations is now being supplemented by an additional role: the initiation and conduct of, or participation in, litigation at the domestic level and beyond. Non-governmental organizations play a prominent

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<sup>19</sup> STACHURSKY, *supra* note 13, at 46.

<sup>20</sup> ROBERT TRAER, FAITH IN HUMAN RIGHTS: SUPPORT IN RELIGIOUS TRADITIONS FOR A GLOBAL STRUGGLE (1991).

<sup>21</sup> ALLEN D. HERTZKE, FREEING GOD’S CHILDREN: THE UNLIKELY ALLIANCE FOR GLOBAL HUMAN RIGHTS (2004).

<sup>22</sup> *See, e.g.*, NORWEGIAN AGENCY FOR DEVELOPMENT COOPERATION, LOBBYING FOR FAITH AND FAMILY: A STUDY OF RELIGIOUS NGOS AT THE UNITED NATIONS (2013); Lucian Leustean, *Representing Religion in the European Union: A Typology of Actors*, 12(3) POL., RELIGION & IDEOLOGY 295 (2011).

<sup>23</sup> Lowell W. Livezey, *US Religious Organizations and the International Human Rights Movement*, 11(1) HUM. RTS Q. 14 (1989).

<sup>24</sup> BOB, *supra* note 3, ch. 3.

<sup>25</sup> For example, the stand off between the Yogyakarta Principles and the Doha Declaration, which overlap and contradict each other on issues of sexual orientation: *see* BOB, *supra* note 3, at 62.

role in religious litigation on both sides of these human rights conflicts. Yet their role and the role of the transnational advocacy networks of which they are a part, has attracted little attention in so far as their transnational activities are concerned. Rachel Cichowski has suggested that, while some scholars “point to the increasingly integral role that advocacy groups play in developing and connecting local to global governance . . . we know far less about their role in international litigation—a very powerful process at the global level that shapes both domestic and international law.”<sup>26</sup> I shall turn to consider these transnational activities subsequently, but fully to understand the transnational developments, we need first to consider NGO litigation activity at the domestic level.

A comparative examination of the role of NGOs and transnational advocacy networks in religious litigation in all domestic jurisdictions is beyond the scope of this article. Instead, examples drawn from a limited set of jurisdictions<sup>27</sup> will be provided to support the general proposition that their involvement in religious litigation, and the techniques of involvement that they have used, is an important phenomenon. The NGOs identified are a heterogeneous group. Some are local, while others are transnational. Some are “conservative” in their approach to issues of law and religion, while others are “liberal” (terms that will require some further explanation subsequently). Some are specialist NGOs, meaning that they concentrate on issues of law and religion to the exclusion of other human rights issues, while others are generalist, viewing law and religion issues as only part (and possibly a relatively minor part) of the menu of issues with which they engage. Some are established on an *ad hoc* basis, simply focusing on the particular case or issue before the court with no aim to be involved in the longer term, while others have been involved in human rights issues for some considerable time.

Some NGOs are significantly focused on litigation as their primary *modus operandi*, while others see litigation as only one of a menu of other techniques that may be used to secure their objectives. Although NGOs may also fulfill other less traditional roles in their dealings with courts,<sup>28</sup> among those NGOs that consider using litigation, the formal role of NGOs in human rights litigation involving religious issues is evident in three ways: by taking cases in their own

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<sup>26</sup> Rachel A. Cichowski, *Courts, Advocacy Groups, and Human Rights in Europe*, in *THE POLITICS OF THE GLOBALIZATION OF LAW: GETTING FROM RIGHTS TO JUSTICE* 107, 109 (Alison Brysk ed., 2013).

<sup>27</sup> The United States, Canada, the United Kingdom, the European Convention on Human Rights, Uganda, and the Commonwealth Caribbean.

<sup>28</sup> Heidi Nichols Haddad, *Judicial Institution Builders: NGOs and International Human Rights Courts*, 11 *J. HUM. RTS.* 126, 131 (2012).



name; by financially supporting litigation taken by others or providing support in kind; and by intervening as an *amicus curiae* (or equivalent) in cases in which the NGO is not involved either as a party itself or in directly supporting one of the parties. This developing role in litigation is neither surprising nor unique to the world of religious rights litigation. One of the more important developments in human rights litigation more generally is the increasing role that NGOs play in initiating and sustaining such cases, but there is a relative dearth of information on (and transparency about) this phenomenon. However, the use of *amicus curiae* mechanisms or other cognate modes of intervention is a visible manifestation of this NGO involvement and it appears to be growing in importance.<sup>29</sup>

The United States provides one of the best-developed examples of the NGOs' involvement in religious litigation. Litigation specifically by religious groups<sup>30</sup> is not a new development in the United States.<sup>31</sup> Much of the Free Exercise and Establishment Clause jurisprudence was prompted by active litigation by two minority religious groups, Seventh Day Adventists and Jehovah's Witnesses.<sup>32</sup> There has also been longstanding activity by groups that want greater separation of church and state, such as Americans United for Separation of Church and State. The present activity by NGOs differs in two respects from what has gone before: in the sheer number of groups now involved, and in the broad swath of social policy issues that they now find themselves litigating.

Two recent examples of this phenomenon must suffice. In *Lawrence v. Texas*,<sup>33</sup> the case in which the United States Supreme Court decided that state laws criminalizing sodomy was unconstitutional under federal law, thirty-one amicus briefs were submitted to the Supreme Court, some in favor of upholding the criminalization of sodomy as constitutional (sixteen) and some against (fifteen). There was a diverse set of interests represented, including, as Paul Collins has noted, "religious organizations (e.g. Agudath Israel of America), public interest law firms (e.g. Institute for Justice), medical societies (e.g. the American Public Health Association), public policy organizations (e.g. Centre for Arizona Policy), academics, members of Congress,

<sup>29</sup> Anna Dolidze, *Anglo-Saxonizing Rights: Transnational Public Interest Litigation in Europe*, ASIL PROCEEDINGS 47, 48 (2011), refers to it as "the elephant in the room" that "deserves more attention."

<sup>30</sup> For a discussion of the variety of religious NGOs, see Julian Berger, *Religious Nongovernmental Organizations: An Exploratory Analysis*, 14(1) VOLUNTAS 15 (2003).

<sup>31</sup> A study in 1981 found that the earliest example dated from 1925, see Leo Pfeffer, *Amici in Church-State Litigation*, 44 LAW & CONTEMP. PROB. 83, 83 (1981).

<sup>32</sup> FRANK J. SORAUF, *THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE* (1976). I am grateful to Cole Durham for this reference.

<sup>33</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

and U.S. states.”<sup>34</sup> In *Hosanna Tabor v. EEOC*,<sup>35</sup> the Supreme Court held in a unanimous decision that the Establishment and Free Exercise Clauses barred suits, brought on behalf of ministers against their churches, claiming termination in violation of employment discrimination laws. The respondent was a minister within the meaning of the “ministerial exception,” a judicially devised restriction on the coverage of the employment laws. Twenty amicus briefs supporting the application of the ministerial exception were filed.

Although there are few, if any, jurisdictions with so extensive a system of civil society organizations involved in religious litigation as in the United States, a similar trend appears to be emerging in several other countries.<sup>36</sup> Courts and legal procedures outside the United States are in the process of adopting an understanding of NGOs in the human rights field that mirrors the general welcome that NGOs are given in US courts, although the pattern of activity will vary depending on several factors such as differing cultural preferences for operating via NGOs, the extent to which litigation is central to political debate, the ease with which NGOs are able to identify relevant cases in which to intervene in a timely manner,<sup>37</sup> and technical court rules determining access to courts to by organizations.<sup>38</sup>

In Canada, there is a history beginning in the 1980s of “interfaith” coalitions intervening in some of the major court cases in which religious rights and freedoms were at issue, initially on the issue of abortion,<sup>39</sup> then increasingly on issues around sexual orientation,<sup>40</sup> for which a coalition of the Evangelical Fellowship of Canada (representing some thirty or so Protestant churches) and the Canadian Conference of Catholic Bishops came together with national associations of Hindus, Sikhs, and Muslims in order to intervene in the litigation. Such interventions go beyond abortion and sexual orientation. In *Syndicat Northcrest v. Amselem*,<sup>41</sup> in which the Supreme Court of Canada considered whether Canadian law required the private

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<sup>34</sup> PAUL M. COLLINS, FRIENDS OF THE SUPREME COURT 166 (2008).

<sup>35</sup> *Hosanna Tabor v. EEOC*, 132 S. Ct. 694 (2012).

<sup>36</sup> In addition to those countries discussed below, see 27(1) S. AFR. J. HUM. RTS. (Special Issue: Public Interest Litigation in South Africa) (2011).

<sup>37</sup> For example, improvements in the ECtHR’s website have made it easier to pick up on cases in time for NGO response.

<sup>38</sup> The openness to amicus input varies depending on rules. The US has fairly easy access, as spelled out in Rule 37 of the Supreme Court Rules in the U.S. Supreme Court. The ECtHR is becoming more flexible in allowing interventions, but the policy is more restrictive

<sup>39</sup> *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342.

<sup>40</sup> *Egan and Nesbit v. Canada* [1995] 2 S.C.R. 513; *Barbeau v. British Columbia (A.G.)*, 2003 BCCA 406; *Halpern v. Canada* [2003] O.J. 2268; *Marriage Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698.

<sup>41</sup> *Syndicat Northcrest v. Amselem*, 2004 S.C.C. 47.

company running an apartment block to permit Jewish resident to erect a *succah* on their balcony, the Evangelical Fellowship of Canada, the Seventh-day Adventist Church in Canada, and the World Sikh Organization of Canada all intervened.

The involvement in religious litigation of NGOs at the domestic level in some other European jurisdictions, such as in the British domestic context, is also apparent. In some cases, there are extensive interventions by third parties, a procedure partly popularized by human rights NGOs in the 1990s.<sup>42</sup> In *Jivraj v. Hashwani*,<sup>43</sup> a case dealing with the legality of specifying the religion of international commercial arbitrators, the London Court of International Arbitration, the International Chamber of Commerce, and His Highness Prince Aga Khan Shia Imami Ismaili International Conciliation and Arbitration Board intervened. In *JFS*,<sup>44</sup> a case challenging a Jewish school's refusal to admit a pupil on the ground that he was not Jewish under the Orthodox Jewish definition, the Board of Deputies of British Jews, Equality and Human Rights Commission, United Synagogue, Secretary of State for Children, Schools and Families, and British Humanist Association were all represented in the Supreme Court. In other cases, similar organizations are the named parties. In the *Christian Institute* case,<sup>45</sup> there was an application for judicial review of the making of regulations prohibiting discrimination on grounds of sexual orientation by seven organizations: the Christian Institute, the Reformed Presbyterian Church in Ireland, the Evangelical Presbyterian Church of Ireland, the Congregational Union of Ireland, the Association of Baptist Churches in Ireland, the Fellowship of Independent Methodist Churches, and the Christian Camping International (UK) Limited.

#### 4. NGOs and transnational religious litigation

Thus far, we have focused attention on the involvement of NGOs primarily based in the jurisdictions concerned. This pattern is now undergoing significant change, in two respects. First, NGOs based in one jurisdiction, and seeing themselves as primarily interested in issues within that jurisdiction, are nevertheless increasingly intervening in jurisdictions *other* than their own. Second, many more organizations have been established that consider themselves to have global

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<sup>42</sup> See Sarah Hannett, *Third Party Intervention: In the Public Interest?*, PUBLIC L. 128 (2003), and Mona Arshi and Colm O'Conneide, *Third-party Interventions: The Public Interest Reaffirmed*, PUBLIC L. 69 (2004).

<sup>43</sup> *Jivraj v. Hashwani* [2011] UKSC 40.

<sup>44</sup> *R(E) v. Governing Body of JFS* [2009] UKSC 15.

<sup>45</sup> *Christian Institute & Ors, Re Judicial Review* [2007] NIQB 66.

scope and interests, even though they may have a seat in one jurisdiction or another.<sup>46</sup> Organizations such as Human Rights Watch or Amnesty fall into this second category. One of the features of globalization is that many human rights and religious NGOs are genuinely global in scope, and these NGOs litigate globally.<sup>47</sup>

Interventions by both these types of NGOs in religious litigation appear to be on the increase due to a combination of political and legal reasons. One reason is that human rights NGOs, particularly of the second type, have frequently adopted an understanding of constitutional and human rights that is universalist and cosmopolitan in orientation and this has the effect of encouraging a view that violations of rights in one country are as much the NGO's business as violations in any other country. A second reason, relevant more to the first group of NGOs, is an acceptance of the fact that globalization means that what happens in another country may well directly or indirectly affect developments in the NGO's own country—a favorable decision in one jurisdiction may “cascade,”<sup>48</sup> influencing developments in other jurisdictions, and then globally. A third element in the story, again particularly relevant for the first group, is that one way of appealing to their domestic audience is for domestic NGOs to intervene in litigation in foreign courts against policies and practices that are particularly unpopular in the NGOs' home jurisdiction.

Regional human rights courts,<sup>49</sup> in particular the European Court of Human Rights (ECtHR), have proven particularly important forums for these purposes,<sup>50</sup> and a similar pattern of NGO participation in international and transnational religious litigation to that seen in domestic litigation has been apparent for some time, and on similar issues. In the *Lautsi* litigation before

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<sup>46</sup> The numbers are contested, but Ruth Reetan, *A Global Civil Society in a World Polity, or Angels and Nomads Against Empire?*, 13 GLOBAL GOVERNANCE 445, 445 (2007) notes that between 1973 and 1993, “transnational social movement organizations concerned with human rights, the environment, peace and development more than tripled in number, reaching to over 600 organizations.”

<sup>47</sup> United Nations-based human rights representatives have also intervened in US litigation. See, e.g., *Brief of Professor Juan E. Mendez U.N. Special Rapporteur on Torture as Amicus Curiae on Reargument in Support of Petitioners* in *Kiobel v. Royal Dutch Shell Petroleum*, 133 S.Ct. 1659 (2013). See also *Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party*.

<sup>48</sup> See KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011).

<sup>49</sup> Only one of several fora available, see Jonathan Graubart, “Legalizing” Politics, “Politicizing” Law: *Transnational Activism and International Law*, 41 INT’L POL. 319 (2004).

<sup>50</sup> See LA TIERCE, *INTERVENTION DEVANT LA COUR EUROPÉENNE DES DROIT DE L’HOMME* (Emmanuel Decaux & Christophe Pettiti eds., 2008).

the ECtHR,<sup>51</sup> for example, in which the Court considered whether Italian public schools could keep the crucifix despite objections by a parent, leave to intervene was given to thirty-three members of the European Parliament acting collectively, and to several non-governmental organizations. As well as expressing their views on issues of religious freedom, interveners in cases before the ECtHR have been particularly prominent in cases concerning abortion and the right to life, and sexual orientation. In *A, B and C v. Ireland*,<sup>52</sup> considering Ireland's ban on abortion, numerous third party submissions were received.<sup>53</sup> In *X v. Austria*,<sup>54</sup> a case claiming the right of same-sex couples to adopt, joint third-party comments were received on behalf of six non-governmental organizations. Third-party comments were also received from (among others) the European Centre for Law and Justice (ECLJ) (which also intervened in *Lautsi*), and Alliance Defending Freedom (ADF), which had each been given leave to intervene in the written procedure.

### 5. Advantages of NGO participation

In several of these examples, the preferred method of involvement chosen by the NGO was to submit its views to the domestic or regional court in the form of an *amicus* brief (in the United States cases) or as an intervener (in the United Kingdom and the ECtHR). There are clear advantages for NGOs, and for the courts themselves, in making interventions in this way.

For NGOs, it is a relatively<sup>55</sup> cheap method of demonstrating to their audience and supporters their continuing engagement at the cutting edge of legal debates. To the extent that NGOs are involved in high profile cases, they are likely to be able to generate press interest about their role and that results in publicity and additional funding. NGO participation in litigation is not

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<sup>51</sup> *Lautsi v. Italy*, App. No. 30814/06, (2012) 54 EHRR 3.

<sup>52</sup> *A, B and C v. Ireland*, App. No. 25579/05, (2011) 53 EHRR 13.

<sup>53</sup> From the European Centre for Law and Justice in association with MEP Kathy Sinnott, the Family Research Council (of Washington, DC) and the Society for the Protection of Unborn Children (of London); from the Pro-Life Campaign; joint observations from Doctors for Choice (based in Ireland) and the British Pregnancy Advisory Service (of London); and joint observations from the Center for Reproductive Rights (headquartered in New York) and the International Reproductive and Sexual Health Law Program (based at the University of Toronto).

<sup>54</sup> *X v. Austria*, App. No. 19010/07, (2013) 57 EHRR 14.

<sup>55</sup> *Relatively* cheap. Unless the lawyers preparing these briefs are working *pro bono*, the costs can still be extensive. One relatively recent estimate (2004) put the cost of preparing an *amicus* brief before the United States Supreme Court at around US\$50,000. See Kelly J. Lynch, *Best Friends? Supreme Court Clerks on Effective Amicus Curiae Briefs*, 20 J. L. & POL. 33, 58 (2004). Wealthier organizations are more likely to file such briefs than less wealthy groups, see Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA ST. U. L. REV. 315, 331 (2008).

necessarily based on a short-term desire to win, therefore; being seen to take part is often an advantage in itself,<sup>56</sup> quite apart from any longer term strategic games that they may be playing.<sup>57</sup> NGOs calculate that intervening in this way also means that they are more likely to ensure that their views will find their way to the judges and have some greater prospect of influencing the judge than activity on the margins of the litigation would have. Particularly where judges are burdened with a heavy case load (the ECtHR is the obvious example) and the prospects of judges reading material that is not directly before the court therefore seems slim, such interventions are likely to appear the best (sometimes the only) way of influencing the court.

Nevertheless, for the courts too, there are also potential advantages,<sup>58</sup> if the process of NGO involvement is handled carefully.<sup>59</sup> Human rights cases frequently involve profoundly difficult questions of fact and law, morality, and politics, often in circumstances in which the court is confronted with the issues for the first time.<sup>60</sup> For courts that draw on ideas of regional or international consensus to interpret human rights norms, interveners may help the court identify whether such a consensus exists, and provide information of legal approaches adopted in other legal systems.<sup>61</sup> Particularly in litigation before regional courts and international bodies, the case will arise in one political, cultural, and religious setting, which may be quite different elsewhere. The pleadings submitted by the parties may give no real insight concerning the case's implications for other countries. Ideally, NGOs can help to prompt the court to appreciate a broader range of considerations that the case involves than the parties themselves may be able or willing to provide. NGO involvement can also bring to the court specialized expertise on particular issues to help resolve the issues before the court. And, finally, the court may consider that NGOs provide a greater degree of "popular" participation in the litigation than if they were

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<sup>56</sup> See, e.g., Garcia, *supra* note 55, at 318–20.

<sup>57</sup> JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* (2004).

<sup>58</sup> *But see, e.g.*, the objections to *amicus curiae* by Judge Posner in *Voices for Choice v. Illinois Bell Telephone Co.*, 339 F.3d 542, 644 (7th Cir. 2003).

<sup>59</sup> See, e.g., *In re Certain Amicus Curiae Applications: Minister of Health and Others v. Treatment Action Campaign and Others*, 2002 (5) SA 713 (CC), ¶ 5. See also Haddad, *supra* note 28, at 143 (by providing help to a resource-limited court).

<sup>60</sup> In *Leyla Sahin v. Turkey*, App. No. 44774/98, (2007) 44 EHRR 5, the ECtHR was making decisions with extremely broad ramifications on the basis of very little information, and in particular, without the extensive *amicus* contributions that are typical in comparable cases in the US. That is part of what led to the creation of the Strasbourg Consortium.

<sup>61</sup> Ludovic Hennebel, *Le role des amici curiae devant la Cour européenne des droits de l'homme*, 71 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 641, 658 (2007).

not there, and increased participation of this type may itself help to increase the quality of the deliberative process.<sup>62</sup>

We should not rush to conclude, however, that such interventions have influence with judges. The question of influence is problematic. The empirical evidence is scanty and contested,<sup>63</sup> and few sustained studies appear to have been conducted outside the United States attempting to estimate the effect of such interventions in courts.<sup>64</sup> But the United States experience tends to support a conclusion that such interventions can be influential, at least in part, some of the time.<sup>65</sup> If they are influential in the United States and in other courts, then we should know more about these groups: how they operate, what they seek, and when they intervene.

## 6. Development of US religious NGOs

Although some scholars have discussed transnational litigation of this type as the result of the global nature of activist networks, it is a noticeable feature of *religious* transnational litigation that it is, in the main, American conservative NGOs which are at the forefront of this development. As Clayton Fordahl has argued, “the ‘global’ networks seem to be constituted almost entirely by American actors, resources and ideologies.”<sup>66</sup> The remainder of this article thus focuses primarily on interventions by US religious groups in litigation,<sup>67</sup> not least because

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<sup>62</sup> See, e.g., Baroness Hale, *Who Guards the Guardians*, Speech at Public Law Project Conference (2013), available at [http://www.publiclawproject.org.uk/data/resources/144/PLP\\_conference\\_Lady\\_Hale\\_address.pdf](http://www.publiclawproject.org.uk/data/resources/144/PLP_conference_Lady_Hale_address.pdf). I am grateful to Ben Jaffe for drawing this to my attention.

<sup>63</sup> Haddad, *supra* note 28, at 130, describing the “mixed” results of research attempting to identify the impact of NGO participation as third parties on courts.

<sup>64</sup> Although see Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT’L L. 611 (1994), finding a positive correlation between third part interventions and a violation, but contrast Laura van der Eynde, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, 31(3) NETHERLANDS Q. HUM. RTS. 271, 292 (2013), questioning this finding. ALAN PATTERSON, *THE LAST LAW LORDS AND THE SUPREME COURT* (2013) gives examples of when individual justices in the apex UK court have reported that interventions have been decisive in both reasoning and outcome. I am grateful to Ben Jaffe for this reference.

<sup>65</sup> The empirical evidence is mostly confined to the United States, see, e.g., COLLINS, *supra* note 34, at 116; Lynch, *supra* note 55, at 34. See also R. Reeves Anderson & Anthony J. Franze, *Commentary: The Court’s Increasing Reliance on Amicus Curiae in the Past Term*, NAT’L L. J. (Aug. 24, 2011); R. Reeves Anderson & Anthony J. Franze, *The Supreme Court’s Reliance on Amicus Curiae in the 2011–12 Term*, NAT’L L. J. (Sept. 24, 2012); R. Reeves Anderson & Anthony J. Franze, *The Supreme Court’s Reliance on Amicus Curiae in the 2012–13 Term*, NAT’L L. J. (Sept. 18, 2013).

<sup>66</sup> Clayton Fordahl, *Book Review: Clifford Bob, The Global Right Wing and the Clash of World Politics*, 57 ACTA SOCIOLOGICA 95 (2014).

<sup>67</sup> For a discussion of secular NGOs in religious litigation, see Michael Roan, *The Role of Secular Non-Governmental Organizations in the Cultivation and Understanding of Religious Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 135 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

such interventions appear to be increasing. NGOs are frequently on both sides of these issues, but the growing involvement of religious NGOs in religious litigation appears to be generated by the growing number of NGOs on what, for the moment, I shall term the “conservative” side of the political divide, particularly in the United States.

There are at least three factors explaining their growing involvement in courts. First, conservative religious groups have been increasing willing to enter the political fray, a tendency which is characteristic of a more general trend among conservative groups in the United States, and litigation is often seen as a natural extension of political campaigning. Second, other groups with which religious groups share something of an overlapping set of concerns -- such as conservative legal networks not involved in religiously-related issues -- have increasingly turned to the courts in pursuit of their goals. Third, and most importantly, religious groups consider that they have been forced into a litigious posture because secular NGO’s (e.g., the American Civil Liberties Union (ACLU) and American’s United for Separation of Church and State) have been effective in using litigation to pursue their agendas.

The growth of a US “conservative” legal network forms the backdrop to the development of a US “conservative” *religious* legal network. Several recent studies have set out in convincing detail how groups were established since the 1970s, and particularly during the Reagan and Bush presidencies, to counter the ability of “liberal” legal groups to change the direction of US law in a more liberal direction, including in such areas as racial equality, personal privacy, women’s rights, criminal justice, voting reform, and reproductive rights.<sup>68</sup> Steven Teles has shown how, having failed to translate electoral victory (such as the election of Ronald Reagan) into effective political change, in part because of the perceived liberal bias in the courts, foundations and groups promoting conservative ideas built a network designed to dislodge legal liberalism from American elite institutions, such as elite law schools and the judiciary. Conservative legal advocacy groups were established to emulate their liberal antagonists, using similar tactics.

Rather than seeing this conservative movement as homogeneous, it is more accurate to view the networks of “lawyers from the right” as a loose coalition comprising: religious and social conservatives -- particularly interested in opposing social change in areas such as abortion and gay rights --; libertarians and affirmative action opponents particularly interested in reducing

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<sup>68</sup> See esp. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008). For earlier studies, see LEE EPSTEIN, *CONSERVATIVES IN COURT* (1985); Karen O’Connor & Lee Epstein, *The Rise of Conservative Interest Group Litigation*, 45 J. POL. 479 (1983).



governmentally sponsored or required social engineering such as in areas of racial equality; and *laissez faire* liberals particularly interested in pursuing economic policies that reduced government intervention in the market and were favorable to business interests.<sup>69</sup> These different interests shared a relatively small number of goals, such as opposition to “judicial activism,”<sup>70</sup> but differed on many others, such as what role individual autonomy and choice should play, and how far the state should actively pursue goals such as social and racial justice.<sup>71</sup> On the basis of extensive interviewing of the lawyers involved, Southworth concluded that “lawyers for the constituencies that compose the conservative movement are fundamentally divided . . . fundamental class and cultural differences tend to separate these lawyers and their organizations along the lines of the constituencies they represent.”<sup>72</sup> Studies dating to the 1990s have identified religious organizations as sufficiently separable from other groups to warrant separate analysis.<sup>73</sup>

Even within each of these broad policy orientations (such as that comprising “religious organizations”) there are also significant differences. As the number of such groups has increased, and as “their leaders struggled to compete in the market for patrons, credit, and influence,”<sup>74</sup> groups have attempted to identify how they differ from other groups in terms of the subject areas on which they focus and the strategies and tactics they use. Thus, within the broad area of conservative religious organizations, some focus on opposing pornography while others advocate home schooling; some will be primarily Catholic and others will be Evangelical Christians; some will target Congress while others focus on the courts. The most prominent groups that have focused significantly on the courts include the Alliance Defense Fund, the American Center for Law and Justice, the Becket Fund for Religious Liberty, the Christian Legal Society, and the Rutherford Institute.<sup>75</sup> (This is not to say that all religiously affiliated or religiously committed organizations support “conservative” positions.<sup>76</sup>)

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<sup>69</sup> ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008).

<sup>70</sup> *Id.* at 106–110.

<sup>71</sup> *Id.* at 103–106.

<sup>72</sup> *Id.* at 64, 65

<sup>73</sup> Gregg Ivers, *Religious Organizations as Constitutional Litigants*, 25 *POLITY* 243 (1992).

<sup>74</sup> SOUTHWORTH, *supra* note 69, at 30.

<sup>75</sup> For a detailed analysis, see STEVEN P. BROWN, *TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS* (2002), esp. chapter 3, *One in Purpose*.

<sup>76</sup> In *Gonzales v. Carhart*, 550 U.S. 124 (2007), for example, a brief was filed by a group of (primarily) Jewish organizations opposing the ban on partial-birth abortions. The Catholic Church has worked with NGOs opposing capital punishment and supporting gun control, and opposes abortion and same-sex marriage.

The picture is complicated in two further respects. First, various organized religions have played significant roles directly, rather than relying on less directly connected NGOs to represent their positions before the courts. The legal staff of the United States National Conference of Catholic Bishops has played a significant role, for example, and much the same could be said about lawyers for the Baptist Joint Committee for Religious Liberty. The Religious Liberty Committee of the National Council of Churches, which has a history of bringing experts together from all sides, has been a significant clearinghouse for alerting religious groups and others to emerging issues. The American Jewish Committee and the now defunct American Jewish Congress have also been significant players. Second, and relatively unnoticed, American law schools have become involved in religious litigation through temporary networks of professors with fluid memberships, who come together to submit briefs, particularly to the US Supreme Court. These professors are sometimes supported in their submissions by human rights clinics based in the Law Schools, which focus on human rights cases as part of the law students' clinical legal education.<sup>77</sup> Until recently, these human rights clinics have been involved in cases on the liberal or progressive side. There are signs that this too may be changing. In what follows, all these groups will be included as NGOs, although several may strenuously object to be so designated.

In the United States, the involvement of NGOs in religious litigation appears to be growing, partly because the *number* of NGOs is growing and each needs to set itself apart from the others in a crowded field. Involvement in litigation may be a useful way of doing so. The growing involvement of such NGOs also has much to do with the growing centrality of American courts in deciding hot-button issues in American political life, particularly those that involve contested issues of the relationship between law and morals. The United States has for some time been experiencing increasingly bitter political standoffs between "liberal" and "conservative" political forces, and this has been particularly evident in controversies on issues such as abortion, same-sex marriage, healthcare, gun control, capital punishment, affirmative action, the treatment of immigrants, the issue of torture in the interrogation of suspected terrorists, and the role of religion in public life, to name but a few of the more contentious issues. All of these issues have ended up before the federal judiciary.

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<sup>77</sup> See Deena R Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505 (2003).

Those involved in intervening in religious litigation differ ideologically, organizationally, and strategically and they largely proceed independently in the actions they pursued. Although they differ, NGOs that are involved primarily on one of these issues, taking a conservative position on abortion, say, identify NGOs that take a “conservative” position on other issues in this list (say, health care) as potential allies. We see a broad coalition of “conservative” groups coalescing around an issue that at first sight seems far from the concerns of some members of the group (say, an anti-abortion group and an anti-gun control group both filing amicus briefs opposing same-sex marriage). This development is not confined to the conservative side of the political divide, with the same phenomenon occurring among “liberal” groups, and seems to be a clear indication of the importance of “acculturation,”<sup>78</sup> with single-issue groups becoming acculturated to a liberal or conservative position on other issues as a result of tactically useful close involvement with the broader conservative or liberal movement. Precisely because of differences of agendas, networks tend to take the form of *informal* coalitions. Where they happen to coincide, for example when they participate in the same litigation by filing amicus briefs, there is a tendency to avoid “open conflict.”<sup>79</sup> Those involved understand that shared values on one issue may not carry over to other issues of concern. However, open and cordial relations make it at least easy to check with others to determine whether there are shared interests on particular issues.

In light of this discussion, the broad-brush distinction drawn above between “liberal” and “conservative” is not a particularly well chosen, and may well be misleading if the characterization is thought to indicate that interventions are intended to pursue a Republican or Democratic political agenda. It is, unfortunately, almost impossible *not* to use the liberal/conservative distinction, given how pervasive it is in current American political discourse, but many of those who advocate for religious freedom issues do not think they are pursuing a “conservative” agenda. They view themselves as pro-religious freedom, and pro-human rights *in general*. A better characterization, perhaps, is to view the controversies as ones within constitutional and human rights law, arising from the clash of human rights, especially the clash between freedom of religion, association and speech on the one hand (attracting “conservative”

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<sup>78</sup> See RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013), in which the concept of “acculturation” is analyzed in the context of decision-making by states.

<sup>79</sup> SOUTHWORTH, *supra* note 69, at 153.

support), and non-discrimination, equality or personal autonomy norms on the other (attracting “liberal” support). In the context of this article, therefore, the terms “conservative” and “liberal” have specialized meanings, indicating broadly different orientations on which rights should have priority, and how particular rights should be interpreted.

## 7. US religious groups and transnational litigation in Europe

Although they share a broad set of common values, in several respects US conservative *religious* groups have developed tactics that diverge from other conservative groups. One tactic of religiously based US organizations has been to seek to intervene in litigation at the national level in *other* countries. Three examples illustrate this development. First, the European Centre for Law and Justice, which was established as the European arm of the American Center for Law and Justice, has intervened in litigation before the Slovak Constitutional Court challenging a law permitting abortion up to twelve weeks, at the request of the pregnant woman.<sup>80</sup> Second, the American-based groups Advocates International and the Alliance Defense Fund were involved in supporting Pastor Åke Green in resisting criminal conviction in Sweden for a sermon that was alleged to be homophobic. This support included submitting (apparently influential<sup>81</sup>) amicus briefs to the Swedish Supreme Court on his behalf, an initiative that was joined by several other foreign interveners, including the Becket Fund, the Family Research Council, Focus on the Family, the (Canadian) Christian Legal Fellowship, and the (British) Jubilee Campaign.<sup>82</sup> Third, in Romania, when the Constitutional Court was petitioned to validate a referendum seeking to constitutionalize a ban on same-sex marriage, ADF filed a brief supporting a local NGO (the Alliance of Romania’s Families, modeled on equivalent American NGOs).<sup>83</sup> The brief argued that the proposed amendment was constitutional, drawing in part on European Union law. This was countered by a brief from another local NGO, ACCEPT, also with overseas backing, citing international standards as prohibiting the proposed amendment.<sup>84</sup>

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<sup>80</sup> European Centre for Law and Justice, *Interest of Amici Curiae, Submitted to the Constitutional Court of the Slovak Republic*, PL. ÚS 12/01. The Court upheld the law as constitutional, PL. ÚS 12/01, No. 1/2007.

<sup>81</sup> BOB, *supra* note 3, at 89.

<sup>82</sup> *Id.* at 86.

<sup>83</sup> *Id.* at 101.

<sup>84</sup> *Id.* at 100–101.

NGOs originating in the US environment seek to have US understandings of how NGOs operate transplanted into their new local environment.<sup>85</sup> Technical rules governing access, in particular the development of *amicus curiae* interventions, have been developed by US-based NGOs in several of these cases to enable them to be given greater access than those foreign courts would usually accord.<sup>86</sup>

After *Lawrence*,<sup>87</sup> a particular target for interventions has been the ECtHR. The largest group of NGOs active before the Court is based in the United Kingdom, but the second largest group of NGOs comes from the United States, including several that are law school clinics,<sup>88</sup> and a significant proportion of that group of American NGOs is made up of religious conservative groups.<sup>89</sup> In the ECtHR, the European Centre for Law and Justice (ECLJ)<sup>90</sup> and the Alliance Defense Fund (now renamed Alliance Defending Freedom, ADF),<sup>91</sup> are particularly evident,<sup>92</sup> but the Becket Fund,<sup>93</sup> American United for Life,<sup>94</sup> the International Center for Law and Religion Studies of Brigham Young University,<sup>95</sup> and the Family Research Council<sup>96</sup> have all intervened. This is at first sight surprising given that these NGOs are frequently hostile to the use of comparative arguments in the United States courts, betraying a deep skepticism towards internationalist, universalist and cosmopolitan arguments. Indeed, in the United States, such groups not infrequently rail against the use of “foreign” jurisprudence as anti-American. Why,

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<sup>85</sup> What has been termed “Anglo-Saxonizing rights,” see Anna Dolidze, *Anglo-Saxonizing Rights: Transnational Public Interest Litigation in Europe*, ASIL PROCEEDINGS 47 (2011). For a related argument, see Benedict Kingsbury, *First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society*, 3 CHI. J. INT’L L. 183, 185 (2002).

<sup>86</sup> BOB, *supra* note 3, at 86 and 100 (referring to developments in Sweden and Romania).

<sup>87</sup> *Lawrence*, 539 U.S. 558 (2003).

<sup>88</sup> Van de Eynde, *supra* note 64, at 287–288 (noting the appearance of “conservative” groups as interveners before the ECtHR, but all those identified are faith-based groups).

<sup>89</sup> *Id.* at 283.

<sup>90</sup> See, e.g., Sindivatul “Păstorul cel Bun” v. Romania, App. No. 2330/09, 9 July 2013; SH v. Austria, App. No. 57813/00, (2011) 31 B.H.R.C. 443; Koch v. Germany, App. No. 497/09, (2013) 56 EHRR 6; Gross v. Switzerland, App. No. 67810/10, (2013) 35 BHRC 187; X v. Austria, (2013) 57 EHRR 14; A, B and C, (2011) 53 EHRR 13; Lautsi, (2012) 54 EHRR 3; Eweida v. United Kingdom, App. No. 48420/10, (2013) 57 EHRR 8.

<sup>91</sup> Gross, (2013) 35 BHRC 187; Koch, (2013) 56 EHRR 6 (third-party comments were received from Aktion Lebensrecht für alle e. V. (AlfA), an association based in Germany, represented by the Alliance Defense Fund); X v. Austria, (2013) 57 EHRR 14.

<sup>92</sup> Van de Eynde, *supra* note 64, at 287–288, has described them as the “two most prominent” conservative NGOs before the court.

<sup>93</sup> Sindivatul, App. No. 2330/09.

<sup>94</sup> Gross, (2013) 35 BHRC 187.

<sup>95</sup> Sindivatul, App. No. 2330/09.

<sup>96</sup> A, B and C, (2011) 53 EHRR 13.

then, are they to be found to be a significant presence in European religious litigation, and particularly in the ECtHR?

Their involvement abroad is linked to the split between conservative and liberal justices on the Supreme Court concerning the utility, persuasiveness and appropriateness of relying on foreign precedents. Bob quotes the chief counsel of ADF, Benjamin Bull, as explaining the apparent contradiction: “We’re forced to do it, because if we don’t, we’re going to lose according to rules of a game we never created.”<sup>97</sup> In *Lawrence*, over strident dissents, the majority opinion of the United States Supreme Court partially relied on ECtHR jurisprudence to find unconstitutional the criminalization of sodomy under state law.<sup>98</sup> Since *Lawrence*, US-based conservative NGOs see European decisions as potentially undermining their position in US courts. Some US NGOs thus litigate in Europe partly in the hope of staving off decisions that may come back to haunt them when similar issues are litigated in the US. As Bob put it, their objectives are, preemptively, to forge “overseas law into something less dangerous, more ambiguous, or downright helpful.”<sup>99</sup> Interventions seem partly to be based on the idea that, following *Lawrence*, one way of instantiating a particular model of accommodation with resurgent religion *in the United States* is therefore to ensure “favorable” decisions *by the ECHR*.

One “conservative” reaction to *Lawrence*, therefore, has been to carry the fight into the “enemy’s” camp. It is noteworthy that the ECLJ was established by the American Center for Law and Justice precisely in order to establish such precedents in the ECtHR. It is not alone. When ADF was granted permission to intervene in the *Eweida* case,<sup>100</sup> its President and General Counsel described it as a “remarkable opportunity . . . to stand in defense of religious freedom . . . in cases that—if they are decided the wrong way—could have a negative impact on your religious liberty here in the United States.”<sup>101</sup> However, the context in which these remarks were made means that too much significance should not be read into them. Such statements may be motivated in part by the need to make such interventions relevant to funding and volunteer service constituencies in the United States.

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<sup>97</sup> BOB, *supra* note 3, at 83.

<sup>98</sup> *Lawrence*, 539 U.S. 558 (2003).

<sup>99</sup> BOB, *supra* note 3, at 83.

<sup>100</sup> *Eweida*, (2013) 57 EHRR 8.

<sup>101</sup> Alan E. Sears, *ADF Granted Right to Defend Four Crucial Cases*, available at <http://www.alliancealert.org/2011/08/23/alan-e-sears-adf-granted-right-to-defend-four-crucial-cases/>.

There are several characteristics of these US-based interventions in European cases that reflect the US origins of the organizations involved. First, there is a tendency for interventions to occur in types of issues that have already given rise to debates in the United States, or are considered likely to generate such debates in the near future; areas of settled law in the United States context, or issues that seem to arise from what might be called “European exceptionalism,” are unlikely to attract interventions.<sup>102</sup> Second, there is a tendency to formulate issues and generate legal theories that map onto US conceptual thinking, particularly constitutional thinking, a consequence of unwitting American legal parochialism; there is more likelihood, for example, that bright-line conceptual categories will be advocated in US-influenced interventions than in European-based interventions that veer more towards proportionality reasoning. Third, US-based interventions appear more likely to cite United States Supreme Court judgments than opinions from any other jurisdiction, with the effect that the European courts may over time be more exposed to US jurisprudence than that from any other single jurisdiction. This is no doubt a reflection of what American lawyers know best,<sup>103</sup> but the United States remains one of the most sophisticated jurisdictions dealing with complex rights disputes, so it is perhaps not so surprising.

As regards the substance of interventions before the ECtHR, American religious conservative interventions are also likely, in general, to follow US conservative approaches that are evident when these organizations intervene in US litigation: one opposed to what would be perceived to be judicial activism, and in favor of the preservation of national sovereignty.<sup>104</sup> The *Lautsi* case<sup>105</sup> is a paradigm example, with US-based interventions consistently arguing that the Court should apply the “margin of appreciation” in such a way as to give substantial freedom to Italy to decide whether or not to permit or require crucifixes to be displayed in public schools.

However, to regard American religious conservative interventions in United States courts or in the European courts as simply reflecting hostility to judicial activism and favoring national

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<sup>102</sup> The Chief Counsel of ADF, Benjamin Bull, told BOB, *supra* note 3, at 84, that ADF selects cases using several criteria: “Does the case have potential to adversely impact American jurisprudence? Does the case have potential to positively influence events in the States? Is the case of significance locally; has it made the media; is it precedent setting.”

<sup>103</sup> Tarrow has referred to transnational advocates as “rooted cosmopolitans” in SIDNEY TARROW, *THE NEW TRANSNATIONAL ACTIVISM* (2005), at 2.

<sup>104</sup> In *Rasul v. Bush*, 542 U.S. 466 (2004), for example, the *Amici Curiae* brief of the American Center for Law and Justice, the European Centre for Law and Justice, and the Slavic Centre for Law & Justice was concerned to curb attempts to incorporate a particular reading of international law into domestic law.

<sup>105</sup> *Lautsi*, [2012] 54 EHRR 3..

sovereignty would be to miss an equally important element in US-based interventions in religious litigation, whether from conservative or liberal sources: that they reflect a commitment to a particular set of normative understandings of human rights and of the role of religion in public life. Underestimating the depth of this normative commitment contributes to a view that all that is going on in these interventions is the expression of a rather crude national or organizational self-interest. Self-interest does not fully explain the approach taken, one in which those intervening are interested in persuading the court that a particular approach is *right* (morally and legally). Religious NGOs are concerned about what they regard as moral issues that are being eroded by global tides of opinion. They no longer see these issues as merely national, therefore, but rather as issues that need to be confronted globally.

The courts in which they intervene are often urged to adopt a stance that would involve actively developing the law, and in ways that would significantly depart from the positions that US courts have upheld. Indeed, in many of the cases involved, there is no settled American consensus to convey. Southworth recounts how, in one of the interviews she conducted, a “Christian who had litigated religious liberties claims in the European Court of Human Rights said, ‘[I]n Europe, it’s like the Marshall Court of 1810. We’re at the very early formative stages, and so there is a lot of excitement. We can write the road map in this area in Europe.’”<sup>106</sup>

## **8. US religious groups and transnational litigation beyond Europe**

Interventions by transnational NGOs have, so far, been relatively uncontroversial in the European context. Where such interventions occur outside Europe, however, this has proven more controversial, because it has raised accusations of neo-colonialism that feature much less prominently in the European context. A common pattern of NGO involvement appears to be evolving. Initially, local progressive groups become involved in a particular jurisdiction to reform an aspect of domestic policy or practice, often using the local courts as part of their reform strategy. These efforts are frequently supported by arguments drawing on international law and precedents from other jurisdictions, as well as material and other support from progressive human rights groups outside the jurisdiction. This, in turn, results in those opposing

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<sup>106</sup> SOUTHWORTH, *supra* note 69, at 154.



these changes arguing that those advocating change are not only wrong in principle, but that such changes only come about as a result of objectionable outside interference.

The current controversy surrounding the criminalization of sodomy is a prime example. Although not entirely restricted to states with a history of British colonial rule, these states have proven particularly attracted to criminalization.<sup>107</sup> At least since the decision of the ECtHR in *Dudgeon*,<sup>108</sup> attempting to have such crimes struck down has become an important aspect of the work of groups campaigning in favor of gay rights, often using international law to argue that such legislation is illegitimate.<sup>109</sup> A good example of this is the successful campaign to ensure that the Inter-American Court of Human Rights would decide that criminalization was contrary to the Inter-American Convention on Human Rights.<sup>110</sup> This case attracted interventions from influential lawyers drawing on European human rights law,<sup>111</sup> which the Inter-American Court largely adopted. In India, a similar strategy also led initially to a successful outcome for gay rights campaigners, with the Delhi High Court holding that criminalizing sodomy was contrary to the Indian Constitution,<sup>112</sup> only to see that judgment itself overturned by the Indian Supreme Court.<sup>113</sup>

These actions have, however, led to a counter-reaction, based partly on opposition to change on the basis of principle, but also objecting to what local conservative groups have characterized as a transnational attempt to undermine domestic decisions on issues of morality that are more appropriately left to national decision-making processes. We thus see in several countries attempts to restrict the activities of NGOs, particular foreign-based NGOs, operating in this field. It is unclear how much such developments are part of larger anti-foreign pressures -- legislation aimed at limiting the influence of civil society organizations or restricting foreign funding of non-commercial organizations is evident in several places for reasons that seem unconnected to the types of religious controversies we are concerned with in this article.<sup>114</sup> The most high profile

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<sup>107</sup> HUMAN RIGHTS WATCH, *THIS ALIEN LEGACY: THE ORIGINS OF "SODOMY" LAWS IN BRITISH COLONIALISM* (2008).

<sup>108</sup> *Dudgeon v. United Kingdom*, (A/59) (1983) 5 EHRR 573.

<sup>109</sup> Notably, the Human Dignity Trust, based in London, which has supported legal cases challenging the criminalization of sodomy in Belize (before the domestic Belize courts), in Northern Cyprus (before the ECtHR), and in Jamaica (before the Inter-American Commission on Human Rights). See <http://www.humandignitytrust.org/>.

<sup>110</sup> *Atala Riffo v. Chile*, Inter-Am. Ct. Hum. Rts, Feb. 24, 2012 (Merits).

<sup>111</sup> See written report of expert witness: Professor Robert Warren Wintemute, Sept. 12, 2011, and the subsequent questioning at the oral hearing.

<sup>112</sup> *Naz Foundation v. Government of NCT of Delhi*, High Court of Delhi, 2 July 2009.

<sup>113</sup> *Suresh Kumar Koushal and others v. Naz Foundation and others*, S. Ct. of India, Dec. 11, 2013.

<sup>114</sup> Ethiopia, for example, has adopted legislation that restricts funding of NGOs.

examples of states seeking to restrict foreign NGOs, however, have been presented as arising from gay rights activities. Recent developments in Russia and Uganda are the most controversial examples of this development. Russia's law prohibiting "gay propaganda"<sup>115</sup> is echoed by the decision of the Ugandan parliament not only to introduce draconian legislation criminalizing "any form of sexual relations between persons of the same sex," but also to criminalize "the promotion or recognition" of homosexual relations "through or with the support of any government entity in Uganda or any other nongovernmental organization inside or outside the country."<sup>116</sup>

Another effect, however, is that, partly in reaction to the intervention by liberal transnational NGOs, conservative religious groups, many from the United States, not infrequently come in to support local conservative forces. Having lost the constitutional battle at home to preserve the criminalization of sodomy in *Lawrence*, these US conservative religious groups have turned their attention to other places where equivalent issues are under consideration.<sup>117</sup> This has resulted in interventions at the legislative and policy levels in several developing countries,<sup>118</sup> most controversially in Uganda, where US-based conservatives have been criticized as partly responsible for the passage of the legislation just mentioned.<sup>119</sup> Indeed, these interventions have themselves given rise to transnational litigation, back in the United States. The US-based Centre for Constitutional Rights has sued Scott Lively, the president of Abiding Truth Ministries, and the former state director of the American Family Association, in US federal court, on behalf of Sexual Minorities Uganda, a group based in Uganda. The suit claimed that Mr. Lively's activities in Uganda are contrary to the Alien Tort Claims Act in collaborating with government officials in the deprivation of the fundamental rights of Ugandan homosexuals.<sup>120</sup>

There is often, therefore, significant foreign support for local actors on *both* sides of religiously engaged litigation. We thus increasingly see a standoff occurring, between the local

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<sup>115</sup> Miriam Elder, *Russia Passes Law Banning Gay "Propaganda"*, THE GUARDIAN, June 11, 2013.

<sup>116</sup> Alan Cowell, *Ugandan Lawmakers Pass Measure Imposing Harsh Penalties on Gays*, N.Y. TIMES, Dec. 21, 2013.

<sup>117</sup> *Strange Bedfellows; The War on Gays*, THE ECONOMIST, May 4, 2013, at 61–62. See also Max Fisher, *From Colonialism to "Kill the Gays": The Surprisingly Recent Roots of Homophobia in Africa*, WASH. POST, June 27, 2013.

<sup>118</sup> Kapya Kaoma, *Exporting the Anti-Gay Movement*, AM. PROSPECT, Apr. 24, 2012.

<sup>119</sup> For a discussion of these themes, see BOB, *supra* note 3, at 49–53.

<sup>120</sup> *Sexual Minorities Uganda v. Scott Lively*, Mass. D. Ct., CA No. 12-cv-30051-MAP, Memorandum and Order Regarding Defendant's Motions to Dismiss, Aug. 14, 2013, Ponsor, DJ. It is unclear how the decision of the US Supreme Court in *Kiobel*, 133 S.Ct. 1659 (2013) will affect this litigation.

progressive actors and local conservative groups, but also between transnational progressive and transnational conservative groups. Conservative and liberal transnational NGOs are facing each other in the Caribbean, for example, in the case of *Orozco v. Attorney General of Belize*, in which the Human Dignity Trust, the International Commission of Jurists, and the Commonwealth Lawyers Association are supporting a local gay rights activist, Caleb Orozco, the head of United Belize Advocacy Movement, in challenging the constitutionality of the Belize criminal code which criminalizes consensual sexual conduct between adults of the same sex. The case has potential importance beyond Belize, as similar laws are under scrutiny across the Commonwealth Caribbean. They are opposed by a coalition named Church Interested Parties, which includes the local Catholic Church in Belize, the Belize Church of England Corporate Body and the local Evangelical Association of Churches. In addition, there is a local umbrella group, Belize Action, which also supports the existing law. The issue of outside interventions (on both sides) has been mired in controversy, with criticisms of the Human Dignity Trust for appearing to take over the Orozco's case.<sup>121</sup> On the other side, the Southern Poverty Law Center reported that Belize Action is partly funded by Alliance Defending Freedom, a US-based religious NGO,<sup>122</sup> a report that an American pastor associated with Belize Action has denied,<sup>123</sup> while accepting that Alliance Defending Freedom has provided advice, legal assistance and strategy.

### 9. US religious groups and the use of international and foreign law in US courts

As well as distinguishing themselves from other US conservative groups by engaging in transnational litigation in Europe and the developing world, US religious groups are also beginning, however tentatively, to take advantage of their position as emerging transnational

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<sup>121</sup> See Corinne Lennox & Matthew Waites, *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: From History and Law to Developing Activism and Transnational Dialogues*, in HUMAN RIGHT, SEXUAL ORIENTATION AND GENDER IDENTITY IN THE COMMONWEALTH: STRUGGLES FOR DECRIMINALIZATION AND CHANGE, 1, 41–42 (Corinne Lennox & Matthew Waites eds., 2013).

<sup>122</sup> HEIDI BEIRICH, DANGEROUS LIAISONS: THE AMERICAN RELIGIOUS RIGHT AND THE CRIMINALIZATION OF HOMOSEXUALITY IN BELIZE (2013). See also Javier Corrales & Cameron Combs, *Christian and LGBT Groups Have Brought the Battle for Gay Rights to the Caribbean*, THE ATLANTIC, <http://www.theatlantic.com/international/archive/2013/06/christian-and-lgbt-groups-have-brought-the-battle-for-gay-rights-to-the-caribbean/277280>, posted June 27, 2013.

<sup>123</sup> William G. Ysaguirre, *Belize Action not U.S. Funded—Pastor Stirring*, REPORTER NEWSPAPER, Aug. 5, 2013.

religious conservative “norm entrepreneurs,”<sup>124</sup> by feeding particular interpretations of international and foreign law back into the American courts.

To those who observe NGOs’ role in litigation in other countries, this is hardly surprising. The supply of comparative arguments by such interveners appears to be a primary method in which the courts receive such information.<sup>125</sup> This is significantly on the increase, taking advantage of (or, as we have seen, sometimes creating) procedure in different courts that allow for interveners or *amicus curiae* arguments to be presented to appellate courts. The increased use of such arguments in the ECtHR, for example, dates from the changes in the Court’s rules of procedure in the early 1980s, which permitted interventions.

One of the ways in which these actors make themselves particularly useful to such courts is by bringing an explicitly comparative approach to bear in their arguments. Indeed, one of the main roles of NGOs is to provide comparative argumentation,<sup>126</sup> and it is thus not surprising that US conservative religious groups have done the same when intervening in these foreign courts. For example, in *Eweida*,<sup>127</sup> a number of interveners (including the European Centre for Law and Justice and the Alliance Defense Fund) introduced the concept of “reasonable accommodation.” The Alliance Defense Fund drew the Court’s attention to jurisprudence from the United States, which required reasonable accommodation of religious beliefs and practices, insofar as that accommodation did not cause “undue hardship” to the employer.

That such groups have also drawn on comparative arguments *in the United States* is, however, much more noteworthy. We have seen that in the United States, the reference by the Supreme Court in the *Lawrence* case<sup>128</sup> to ECtHR jurisprudence contributed to the strong reaction among conservative commentators against the use of international and comparative materials by the United States’ courts. The issue of judicial borrowing has, indeed, become another key indicator of one’s position in the continuing battle between conservatives and

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<sup>124</sup> Cass R. Sunstein, *Social Norms and Social Roles*, 96(4) COLUM. L. REV. 903, 909 (1996).

<sup>125</sup> See, e.g., Sangeeta Shah, Thomas Poole, & Michael Blackwell, *Rights, Interveners and the Law Lords*, 34 OXFORD J. LEGAL STUD., 295, text at n.29 (2014). There are generally other sources of comparative arguments, as well, see, e.g., Elaine Mak, *Why Do Dutch and UK Judges Cite Foreign Law?*, 70 CAMBRIDGE L.J. 420 (2011).

<sup>126</sup> See, e.g., Anderson & Franze, *The Supreme Court’s Reliance on Amicus Curiae in the 2012-13 Term*, *supra* note 63, who note that the Justices of the US Supreme Court “were more inclined to cite briefs that provided information on state *or foreign* law” (emphasis added). Haddad, *supra* note 28, at 139 reported interviews with “long-standing court officials” at the ECtHR describing how “the only situation where NGO briefs can have an impact is when they provide well-researched comparative law.” See also Cichowski, *Courts, Advocacy Groups, and Human Rights in Europe*, *supra* note 25, at 119 (on effects in particular cases in the ECtHR).

<sup>127</sup> *Eweida*, (2013) 57 EHRR 8.

<sup>128</sup> *Lawrence*, 539 U.S. 558 (2003).

liberals. In general, conservatives are heavily against transnational judicial borrowing; liberals appear in general more supportive. This has resulted in comparative arguments advanced before the United States Supreme Court coming overwhelmingly from those with a liberal agenda.<sup>129</sup> It has become something of an article of faith in conservative legal networks that the use of such materials is to be opposed and that conservatives should not themselves refer to such materials when they intervene in cases, except to criticize their use by others.<sup>130</sup>

Given this, it is therefore of some significance that in major cases before the US Supreme Court in recent years, lawyers closely connected to “conservative” *religious* groups have intervened in order to bring foreign and international materials to the attention of the US Supreme Court in a way that has significantly departed from previous “conservative” opposition to the use of such arguments. Although highly controversial within conservative circles, these groups have attempted to try to beat the liberals at their own game by providing US courts with comparative materials that support their “conservative” position. The relevance of foreign law for swing Justices (notably Kennedy J) heightens the importance of such interventions.

Particularly following *Lawrence*,<sup>131</sup> and adopting tactics very similar to those used by groups supporting gay rights in *Lawrence*, some religious conservative groups have therefore intervened in US courts using comparative arguments, particularly citing ECtHR jurisprudence to illustrate that there is no consensus about how to treat the issue before the Supreme Court. In *Gonzales v. Oregon*,<sup>132</sup> for example, the *amicus curiae* brief of the International Task Force on Euthanasia and Assisted Suicide argued that international standards of medical practice rejected the provision of drugs for the purpose of induced death. Throughout most of the world, it argued, assisted suicide and euthanasia are considered profound violations of medical ethics, drawing attention to the fact that when it decided an assisted-suicide case, the ECtHR found that its policies “did not confer any claim on an individual to require a State to permit or facilitate his or her death.”<sup>133</sup> In *Ayotte v. Planned Parenthood of Northern New England*,<sup>134</sup> counsel for *amicus curiae* the University Faculty for Life in support of the petitioner was Richard G. Wilkins,

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<sup>129</sup> See, e.g., *Brief of amici curiae Human Rights Advocates, and ors, in Support of Respondents* in *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), arguing that “consideration of race in admissions decisions to universities is consistent with the United States’ treaty obligations as well as international practice.”

<sup>130</sup> A good illustration is *Morse v. Frederick*, 551 U.S. 393 (2007).

<sup>131</sup> *Lawrence*, 539 U.S. 558 (2003).

<sup>132</sup> *Gonzales v. Oregon*, 546 U.S. 243 (2006).

<sup>133</sup> *Pretty v. United Kingdom*, App. No. 2346/02, (2002) 35 EHRR 1.

<sup>134</sup> *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006).

Professor of Law and Managing Director of the World Family Policy Center at Brigham Young University, a Mormon supported university. Their Brief argued that:

Unlike other questions, for which a strong consensus exists, resort to international law regarding abortion provides little guidance for this Court. To the extent such guidance does exist, it supports the right of parents to be involved in the care and treatment of their daughters, and thus supports the petitioner in this case.

In the US Supreme Court in *Hosanna-Tabor*,<sup>135</sup> the International Centre for Law and Religious Studies, also at Brigham Young University, filed a brief in support of the petitioners, drawing extensively on European and other foreign jurisprudence in favor of protecting the religious freedom of the church involved. One of the challenges in such cases is to draw on comparative materials in ways that stress the general persuasiveness of foreign precedents without suggesting that by relying on the authority, the Supreme Court should abdicate to foreign rule. Thus, although the Brief in *Hosanna-Tabor* acknowledged that Church-state relations in the United States “differed in many ways from those in much of the world” it went on to argue that it “is, therefore, striking to note the degree to which other countries, representing a wide range of church-state systems, have nonetheless recognized the need for an equivalent to the United States’ ministerial exception, which protects religious organizations’ ability to select, supervise, discipline, and remove leaders, teachers, and others who have ministerial functions.”<sup>136</sup> Foreign jurisdictions had “repeatedly recognized how essential autonomy is to religious freedom,” and cited approvingly how the ECtHR had described the autonomy of religious organizations as ‘indispensable for pluralism in a democratic society and . . . an issue at the very heart of the protection [of religious freedom].’<sup>137</sup>

In *Hollingsworth v. Perry*,<sup>138</sup> same-sex couples who had been denied marriage licenses brought a civil rights action against the Governor of California and other state and local officials. They argued that California’s Proposition 8, a voter-enacted ballot initiative that amended the California Constitution to provide only marriage between a man and a woman, thereby eliminating the right of same-sex couples to marry, violated their rights to due process and equal

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<sup>135</sup> *Hosanna Tabor*, 132 S. Ct. 694 (2012).

<sup>136</sup> The Brief cited as examples cases from the ECtHR, the U.N. Human Rights Committee, and the German Federal Court of Justice in Civil Matters (Mar. 28, 2003, BGHZ 154, 306, 315).

<sup>137</sup> See also the Brief of Amicus Curiae Advocates International in Support of Petitioner, Christian Legal Society v. Martinez, 130 S.Ct. 2971 (2010).

<sup>138</sup> *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).

protection under the Fourteenth Amendment to the Federal Constitution.<sup>139</sup> The *amicus curiae* brief of the American Civil Rights Union in support of Hollingsworth distinguished between the prohibition of same-sex acts by the state (which the Brief accepted, after *Lawrence*, was unconstitutional), from a requirement that same-sex marriage be held to be constitutionally required.<sup>140</sup> The Brief adopted the position that the jurisprudence of the ECtHR was of some importance to the issue before the Court in this respect. In what seemed like a coordinated move, *amicus curiae* briefs were also submitted in *Perry* to a similar effect by a group of International Jurists and Academics,<sup>141</sup> by Judge Georg Ress (formerly of the European Court of Human Rights), and by the Marriage Law Foundation. Even the Brief of the Petitioners drew on the ECtHR's practice to support their argument that "Our Constitution does not take this sensitive, controversial social issue out of the hands of the People themselves", citing approvingly an ECtHR decision, in which it declined to "rush to substitute its own judgment in place of that of the national authorities," holding instead that the right to marry in the Convention does not require Council of Europe member nations to redefine marriage in the absence of a "European consensus regarding same-sex marriage."<sup>142</sup>

In the *Hobby Lobby* case, decided by the United States Supreme Court in 2014,<sup>143</sup> we can see a similar pattern. This case concerned the constitutional limits on Congressional power arising from controversial healthcare reforms. The issue, simplified, was whether requirements on for-profit employers included in the health insurance scheme to provide certain types of treatment under that scheme, including contraception, was constitutional. The argument against its constitutionality was that the requirement breached the religious freedom guaranteed by the First Amendment, unless an employer with religious objections to providing such treatment, was able to gain an exemption from that requirement. As in *Perry*, the International Centre for Law and Religion Studies at Brigham Young University filed an *amicus* brief on behalf of a group of academic institutions and comparative law and religion scholars in support of the employer,

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<sup>139</sup> The Supreme Court held by a majority of 5 to 4 that proponents did not have standing to appeal district court's order declaring the Proposition unconstitutional.

<sup>140</sup> It contrasted *Dudgeon*, (1983) 5 EHRR 573 (criminalizing homosexual conduct violates the ECHR), with *Schalk and Kopf v. Austria*, App. No. 30141/04, (2011) 53 EHRR 20 (ECHR does not require members to extend traditional marriage to same-sex relationships).

<sup>141</sup> Professor W. Cole Durham of the J. Reuben Clark Law School was Counsel of Record, and the group consisted, among others, of four former members of national apex courts in Italy, Slovakia, and the UK, two former judges of the ECtHR, and a former judge of the CJEU.

<sup>142</sup> Quoting *Schalk*, (2011) 53 EHRR 20.

<sup>143</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

drawing extensively on comparative and international law.<sup>144</sup> On the other side, against the employer, was an amicus brief by Lawrence Gostin of Georgetown University Law Centre and four other legal academics also drawing on international and comparative law.<sup>145</sup>

Religious groups that otherwise follow a broad conservative political agenda in other respects are, therefore, willing to break ranks on the use of international and comparative law, confirming that the “conservative” movement is much less monolithic than it might appear to be. Southworth has identified a clear difference within “conservative” understandings of legal interpretation, contrasting conservatives “who emphasize national sovereignty and democratic accountability,”<sup>146</sup> with those from a conservative *religious* perspective who draw on a natural law and natural rights approach. For the latter, developments in other legal systems could and should be drawn on as a manifestation of practical reason playing out in ways that are relevant to US judicial decision-making. She quotes the Becket Fund, for example, as asserting that religious freedom is “a basic human right that no government may lawfully deny; it is not a gift of the state, but instead is rooted in the inherent dignity of the human person.”<sup>147</sup> Such a position is more sympathetic to arguments drawn from international human rights law.

The human rights story that is being told, however, is an increasingly complicated one in this respect. In both the ECtHR and the United States Supreme Court, we can observe a somewhat similar development in the citation of international and comparative law in religious litigation—resort to such sources is increasingly occurring on *both* sides of contested issues, with each side attempting to contest the other’s efforts. Indeed, at the level of the contending parties and their supporters, it is becoming usual to attempt to head off the use of such sources by the other side. In *Ladele*,<sup>148</sup> for example, extensive arguments were made on *both* sides on how to interpret the comparative material on conscientious objection. So too, in *Perry*, detailed briefs on the issue of foreign law were submitted in support of both sides. One brief pointing to “the international trend towards equal marriage rights for same-sex couples” was filed by a transnational coalition composing the International Center for Advocates Against Discrimination (based in the United States), Liberty (in the UK), the Canadian Civil Liberties Association (in Canada), the Legal Resources Centre (in South Africa), and the Center for Legal and Social Studies (in Argentina).

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<sup>144</sup> *Brief of Amicus Curiae, W Cole Durham, Counsel of Record.*

<sup>145</sup> *Brief for Foreign and Comparative Law Experts.*

<sup>146</sup> SOUTHWORTH, *supra* note 69, at 174.

<sup>147</sup> *Id.* at 175.

<sup>148</sup> *Ladele* was one of the four cases reported under the name: Eweida (2013) 57 EHRR 8.



A second brief, by Professors Harold Koh, Sarah Cleveland, Laurence Helfer and Ryan Goodman, also argued that there was an increasing trend towards the recognition of same sex marriage. The latter was developed as a direct result and in response to the international and comparative arguments first submitted by the petitioners and several NGOs supporting them.<sup>149</sup>

Indeed, there seems to be a strategy emerging in these cases which views the *absence* of an argument based on these materials as more potentially dangerous than the *presence* of such arguments, because it may indicate to the Court that the use of such materials by the other side cannot be rebutted. We are now in the interesting situation where the use of such materials may be becoming “normalized” to a degree that would have seemed surprising (at least in the United States) even a decade ago. International and comparative norm internalization by way of emulation appears to be operating at least at the level of the parties, even if no equivalent development has emerged at the level of the court. Indeed, this strategy may be adopted not in order to persuade the respective court that the preferred interpretation of these materials should be adopted by the court, but as a spoiler of what the other side has presented. Success may be measured by stopping the court from citing the other side’s use of this material. If so, then in both *Ladele*,<sup>150</sup> *Hollingsworth*,<sup>151</sup> and *Hobby Lobby*,<sup>152</sup> this spoiler tactic worked; it is noticeable that despite the extensive set of arguments based on international and comparative materials on both sides in these cases, the relevant Court did not advert to these arguments in either case, thus supporting Bob’s suggestion that one of the outcomes of (and sometimes the intention behind) such clashes between ideological rivals is non-policy making.<sup>153</sup>

## 10. Some normative implications

The aim of this article has been to produce a thick description rather than a normative analysis, but it is legitimate to ask how far NGO interventions of the type we have been considering are acceptable on normative grounds. On one reading, the separate elements of this phenomenon (NGOs actively involved beyond the borders of the state in which they are situated; NGOs engaging in litigation; religious issues raising human rights questions; conservative groups

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<sup>149</sup> *Brief for Foreign and Comparative Law Experts Harold Hongju Koh, Sarah H. Cleveland, Laurence R. Helfer, and Ryan Goodman as Amici Curiae Supporting Respondents*, Feb. 28, 2013, No. 12-144.

<sup>150</sup> *Eweida* (2013) 57 EHRR 8.

<sup>151</sup> *Hollingsworth*, 133 S.Ct. 2652 (2013).

<sup>152</sup> *Hobby Lobby*, 134 S.Ct. 2751 (2014)..

<sup>153</sup> *BOB*, *supra* note 3, at 6, 32.

adopting the tactics of liberals), even when taken together, raise no new normative issues. These groups have simply combined together already existing elements, each of which is broadly legitimate, to produce the phenomenon described. The phenomenon is no more than the sum of its parts, and no more normatively problematic than each of its parts taken separately. Those who object to such NGO interventions are likely to be driven by similar ideological objections as have been raised about international human rights in general, such as an objection based on the prime importance of retaining national sovereignty. Such arguments are increasingly heard from both the left and the right of the political spectrum. This normative position is then simply applied to the phenomenon described, and we can assess the validity of the argument in that context in the same way as we assess its validity in the other contexts in which it arises. There is nothing new.

There is, however, an alternative reading, in which bringing together these elements into the phenomenon described does, indeed, raise additional normative issues that go beyond existing debates. Just as the confluence of different streams into a river may produce something of a different character to the streams taken separately, so too (goes the argument), taken together these separate strands amount to more than the sum of their parts and are normatively problematic in this form. How, more precisely, might this phenomenon give rise to new normative issues?

We have seen that interventions by NGOs have sometimes led to European courts (combining European domestic and European regional courts together, for the moment) adapting themselves institutionally and becoming more like the “public law” litigation forums beloved of liberals and reformers in the heyday of public interest litigation in the United States. Such institutional changes are undoubtedly likely to lead to significant changes in the power dynamics that currently exist between national governments and the courts. There is, however, little prospect that such external interventions will significantly destabilize the dominant pluralistic view of the relationship between religion and the state, and they have not in fact done so. In the European context, the effect of such interventions as those described are likely to affect human rights developments only at the margins, and primarily at the level of institutional power relationships. The normative questions engaged relate primarily to the desirability of the shifts in power relations. The fact that they arise from outside the state itself does bring a new element into that debate, but it is unlikely to generate much *angst* because the external interventions fall

clearly within the parameters of internal domestic debates on these issues. And we have seen that, in fact, these interventions have generated little controversy.

Were such interventions seriously to challenge existing European values, and to stand any real chance of succeeding in doing so, it might be a different story. At this point, we can introduce the other dimension of foreign NGO involvement, that which goes beyond interventions in Europe and engages directly in intervening in other parts of the world, such as in Uganda. In these contexts, there are objections to what is seen as a sustained attempt to lay the foundations for an alternative conception of rights, seen by some as an anti-Enlightenment view of the world, in circumstances where an Enlightenment view is still far from having been fully instantiated. Conservative religious groups have identified an important vacuum in the ideological underpinnings of human rights there and have sought to fill that space with their own preferred values, and to do this through the courts. In this context, their agenda is partly institutional, relating to power relations within the state, but also significantly value-based. And all this in a context where the judicial institutions are weak, only semi-independent, and starved of resources. What we see, according to critics, is an attempt to re-write the human rights culture in the image of the interveners. That is seen as concerning, not least because it shows real signs of succeeding in some contexts.

What might be done about this is another matter, however, and the approach adopted must blend arguments of principle and prudence. I suggest that we should think of foreign NGO involvement in litigation within the paradigms of freedom of speech and freedom of association. This would lead to several possible strands of argument, many of which would support the NGOs freedom to intervene, but some of which might also lead to restrictions on such involvement. Thus, for example, if we think of the issue of human rights interventions before courts as one closely approximating the issue of political lobbying, we might support some restrictions. We are sometimes willing to support restrictions on freedom of association because we are suspicious of well-financed interest groups dominating the political process and driving out poorer groups, hence the regulation of campaign financing. We might think of the phenomenon described in this article as closely akin to foreign lobbying of the political process and be willing to consider introducing regulatory constraints similar to those applying in that context. Increasingly, states have been concerned at foreign-dominated political lobbying and have introduced transparency requirements, such as a requirement to register, declare foreign

involvement, and disclose sources of funding. At the moment, few, if any of these types of requirements apply to foreign “lobbying” in the judicial process, but should they?

At one level, it is hard to resist calls for greater transparency or limiting the role in courts of foreign organizations that have simply bought such access, but the problem is that, in some circumstances, requiring transparency or limiting the role of foreign financial subventions will act as a severe disincentive to groups participating in judicial intervention to support preferred values. Requiring pro-democracy groups to disclose that they are partly funded by foreign government sources, for example, could have severe consequences for those involved with such groups, including in some countries the threat of violence and death.<sup>154</sup> These restrictions will surely be used by repressive regimes to justify their own attempts to suppress dissent.

What we seem to be left with, to return to the free speech analogy, is a normative conclusion that encourages more speech rather than restricting existing speech. Those concerned with foreign NGO involvement, whether in Europe or elsewhere, and whether of the left or the right, should seek to counter their influence, if they object to their involvement, by ensuring that they are at least aware that such activity is occurring (and in that context it is surprising that this article is, so far as I am aware, the first in the legal literature to map the extent of this practice), and ensuring that an equally well-funded voice is present on each occasion that can respond with sophistication and authority to such interventions.

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<sup>154</sup> Analogous to Southern states in the US requiring civil rights groups, such as the National Association for the Advancement of Colored People (NAACP), to register and disclose membership lists as a way of suppressing their activities, a tactic subsequently struck down by the US Supreme Court, *NAACP v. Alabama*, 357 U.S. 449 (1958).