



European
University
Institute

POLITICIZATION AND INSTRUMENTALIZATION OF HUMAN RIGHTS/FORB

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- Politicization and instrumentalization: what do we mean when we use this terminology?
- The narrative of the separation between law and politics
- Is really law different from politics?
- **François Foret** contribution: see *Religion and Fundamental Rights in European Politics: Convergence and Divisions at the European Parliament*, Human Rights Review, 2013, available at:
<https://dipot.ulb.ac.be/dspace/bitstream/2013/160531/1/rel.fund.rights.2013.pdf>



- **Terminology:** freedom of religion or belief; religious liberty; religious freedom

- **The politics of religious freedom**



Two stories on Human Rights and Politics

- Christian opposition to the internationalization of human rights

The formulation and conception of human rights non only presupposes a certain political convergence on fundamental values-such as their universality. It also presupposes a **certain underlying anthropological definition of the human being.**

How is the human-rights bearing individual to be defined in anthropological terms?

P. Annicchino, O. Roy, *Religion, Culture and Human Rights*, in A.F. Vrdoliak, *The Cultural Dimension of Human Rights*, Oxford, OUP, 2013, pp. 13-25



➤ **Possessive individualism**

The individual is traditionally understood as a ‘self’ who possesses his body, his thoughts and is in a contracting relationship with other free selves.

The social bond is thus a consequence of the will or action of the self, hence the centrality of the theory of the social contract in the philosophical construction of the human rights theory.

The political sphere is understood not as the expression of a transcendental power, nor even the embodiment of a holistic society **but rather as a space ruled by law, which is in fact a set of “rules of the game”**



➤ **Human Rights as the rules of the game**

Human rights are understood as enabling individual citizens to enjoy their rights without infringing upon those of others; constraints do not come from a great “Other” (God, The Sovereign) but **rather from the need for rules of the game agreed upon in the name of public good by the citizens themselves**



Two stories on Human Rights and Politics

➤ **Christian skepticism (hostility) towards human rights**

Does this description of human rights fits with a Christian understanding?

- The Establishment of the League of Nations and Christian Anti-Internationalism



➤ **Christian skepticism (hostility) towards human rights**

The League of Nations as a “Satanic plan to convert ever more people into thinking that a secular world organization, without reference to the Christian plan of salvation, could solve all the problems that burdened the war-torn world”

M. Routsila, *American Protestantism in the League of Nations Controversy*, *Church History*, 72, 3, 2003, p. 596



➤ **Christian skepticism (hostility) towards human rights**

The action by F.D. Roosevelt and his dream of a global institution in the UN system were understood as if “the United States was lining up with Europe in preparation for a world dictator”

Christian Anti-Internationalist “saw liberal Christianity, political liberalism, and Soviet communism as interwoven dimension of the gradually emerging antichristian world empire that they thought was prefigured and anticipated by the United Nations”

M. Routsila, *The Origins of Christian Anti-Internationalism, Conservative Evangelicals and the League of Nations*, Washington D.C., Georgetown University Press, 2008, p. 177.



Two stories on Human Rights and Politics

- **Christian skepticism (hostility) towards human rights**
 - Debate in Zambia and LGBT rights
 - Russian Orthodox Church and Human Rights



➤ **Christians and human rights: another story**

“American protestants were (...) by any standard most responsible for the original move to internationalize religious freedom. (...) Their groups, spearheaded by the Federal Council of the Churches of Christ and its Commission of Churches on International Affairs always placed religion first among all other causes, as the foundation of all other rights, and the basic premise of their early struggle against the Soviet Union and on behalf of far-flung missionary activity”

S. Moyn, *From Communist to Muslim: European Human Rights, the Cold War and Religious Liberty*, *The South Atlantic Quarterly*, 113, 1, 2014, p. 68



Two stories on Human Rights and Politics

➤ **Christians and human rights: another story**

Are Human Rights necessarily liberal?

The history of the European Convention of Human Rights seems to indicate otherwise.

“All over Europe, Socialism is proving no defence against Communism’s attack on the triple heritage of Christianity, mental freedom and even-handed justice”, David Maxwell-Fyfe, 1948

“ We must make it clear that our concepts of human dignity and human rights are something different from what we see in Eastern Europe”, Irish Delegate William Norton, 1948



Are Human Rights, Rights?

➤ **Human rights as a political problem**

“The international human rights movement has for the most part failed to penetrate the consciousness of societies where the worst abuses occur. It remains a largely elite project of activists and lawyers using global rather than vernacular language”

“Liberalism and individualistic legalism are alien doctrines in much of the developing world, not just because of historical cultural differences with Europe but even more because the Global south remains strongly influenced by the logic of traditional society”

J. Snyder, quote in **B. Clarck**, *Religion and Human Rights. Awkward, but necessary, bedfellows*, 4/9/2014



Are Human Rights, Rights?

➤ **Human rights and the problem of “enforcement”**

“(…) to transform goodwill into legally binding obligations is to make human rights instrumental for change and protection. In the case of freedom of religion it can be seen in the difference between expressing a good intention without any obligations and taking on obligations granting rights”

“In specific states a lack of commitment by state parties is sometimes all too apparent as well as lack of enforcing implementation and control mechanisms. In other situations the concept of human rights is used but given another interpretation, based, it is claimed, on religious or cultural understanding”

G. Gunner, *Instrumentalisation/Politicisation of Human Rights*, in **E. Kitanovic**, *European Churches engaging in human rights*, CEC, 2012, p. 80



- **The enforcement of Human Rights in Europe today**
 - A) The role of national states
 - B) The role of Supranational institutions
 - C) The role of Courts and the judicialization of politics**



Are Human Rights, Rights?

➤ The role of Courts and the judicialization of politics

“The Enlightenment hope in written constitutions is sweeping the world. Constitutional courts are powerful forces in Germany and France, Spain and Italy, Israel and Hungary, Canada and South Africa, the European Union and India”, **B. ACKERMAN**, *The rise of World Constitutionalism*, in “Virginia Law Review”, 83, 4, 1997, p. 772

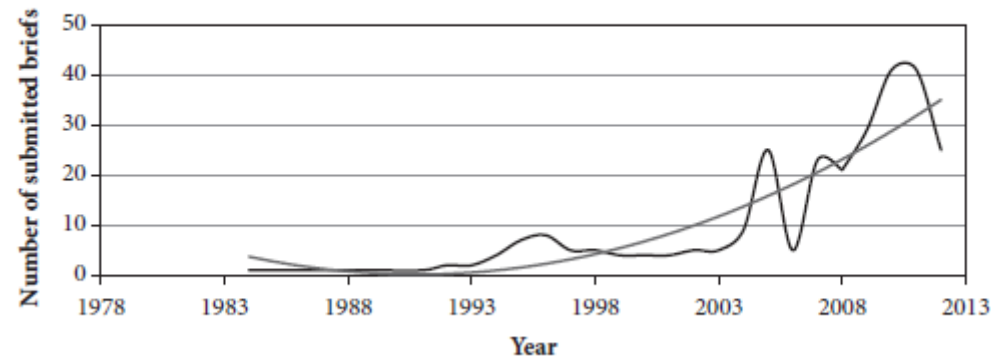
“The judicialization of politics – the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies – is arguably one of the most significant phenomena of late twentieth and early twenty-first century government” **R. Hirschl**, *The Judicialization of Mega-Politics and the Rise of Political Courts*, in “Annual Review of Political Science”, 11, 2008, p. 121



Are Human Rights, Rights?

- **The role of Courts and the judicialization of politics: is there a role for civil society?**

Figure 1. Number of NGOs' interventions per year



L.V. Den Eynde, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, in “Netherlands Quarterly of Human Rights”, 31,3, 2013, p. 280



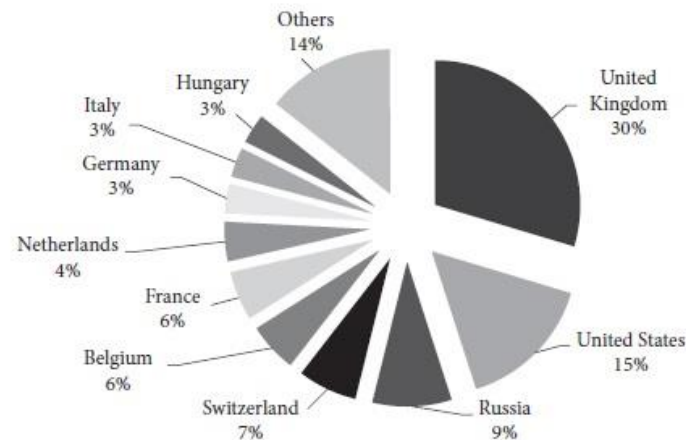
Are Human Rights, Rights?

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4.2.1. *The Geographical Origin*

This data only indicates the main seat of the NGOs and not their territorial scope of action.

Figure 2. Geographical Origin of NGOs



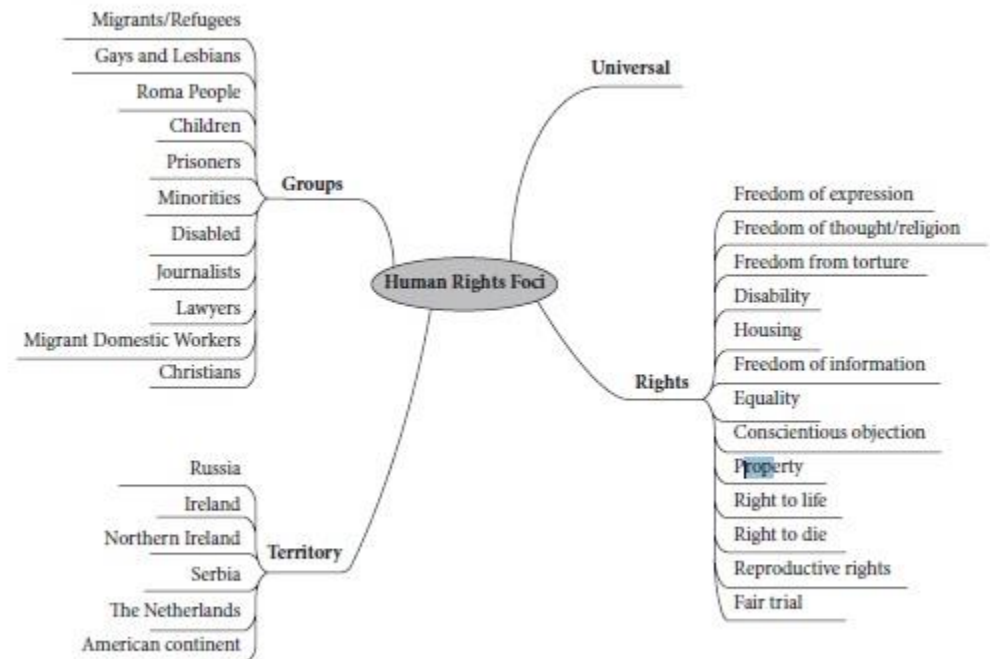
L.V. Den Eynde, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, in “Netherlands Quarterly of Human Rights”, 31,3, 2013, p. 283



Are Human Rights, Rights?

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Figure 3. Human Rights Foci of the NGOs



L.V. Den Eynde, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, in “Netherlands Quarterly of Human Rights”, 31,3, 2013, p. 284

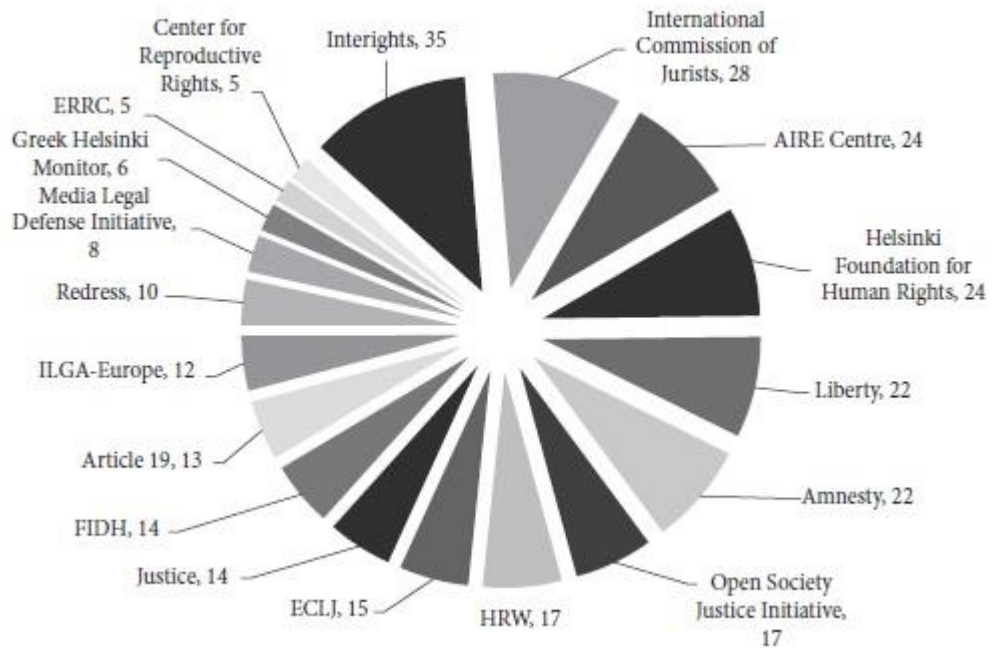


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L.V. Den Eynde, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, in “Netherlands Quarterly of Human Rights”, 31,3, 2013, p. 285

Figure 4. Repeat Players (Groups which have intervened 5 times or more)





Are Human Rights, Rights?

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etc.).

4.2.3.3. The appearance of 'conservative' groups

Another feature worth underlining is the recent appearance of groups that can be labelled as 'conservative'. The phenomenon has been observed before the US Supreme Court already for three decades and since then, conservative and libertarian legal advocacy groups have multiplied and gained currency.⁸⁶ Defined primarily by the socially conservative causes they espouse and by the interests they represent (often business, employers and so on), O'Connor and Epstein included in this category groups that reveal 'a consistent ideological pattern'.⁸⁷ It is natural that they appeared before the ECtHR as well, as '[t]he debate about the nature and content of human rights reflects, after all, a struggle for power and for favoured conceptions of the 'good society''.⁸⁸ A few groups fitting this definition have advanced their causes

L.V. Den Eynde, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, in "Netherlands Quarterly of Human Rights", 31,3, 2013, p. 287



Are Human Rights, Rights?

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Third party interventions are regulated by article 36 of the Convention and article 44 of the Rules of the Court

Rule 44 provides that notice of an application has been given to the Respondent State, the President of the Chamber may invite, or grant leave to, any person concerned who is not the applicant to submit written comments or, in exceptional cases, to take part in the hearings.



Are Human Rights, Rights?

- **What is the role of churches in a scenario governed by the “judicialization of politics”?**
 - A. In Theory
 - B. In Practice

Interventions in court: Bishop Michael Nazir-Ali in *Eweida vs. United Kingdom*, 2013



Are Human Rights, Rights?

➤ **Making use of rights in divided societies**

A. “Rights as weapons”: judicialization of political disputes and the role of courts

B. Global culture war: the circulation of legal political arguments

Lawrence v. Texas, U.S. Supreme Court

The Court struck down the sodomy law in Texas and, by extension, invalidated sodomy law in other states, making same-sex sexual activity legal in every U.S. state and territory. The Court overturned its previous ruling on the same issue in the 1986 case *Bowers v. Hardwick*, where it upheld a challenged Georgia statute and did not find a constitutional protection of sexual privacy.



Are Human Rights, Rights?

➤ **Making use of rights in divided societies**

*«Of even more importance, almost five years before Bowers was decided, **the European Court of Human Rights considered a case with parallels to Bowers and to today's case.** An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws prescribing the conduct were invalid under the European Convention on Human Rights»*

Lawrence v Texas, U.S. Supreme Court



- **The Politics of Religious Freedom in Lautsi v. Italy**
- The strategic litigation behind the case

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**Winning the Battle by Losing the War:
The *Lautsi* Case and the Holy Alliance between American
Conservative Evangelicals, the Russian Orthodox Church
and the Vatican to Reshape European Identity**

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Florence, Italy; Law and Religion Program, University of Siena, Italy



- **The Politics of Religious Freedom in Lautsi v. Italy**
- The strategic litigation behind the case

After the November 2009 decision, Archbishop Hilarion of Volokolamsk, chairman of the department of External Church Relations, clearly expressed his opinion on the judgment and on the future actions to be taken from religious groups in a letter to the Vatican Secretary of State, Tarcisio Bertone:

We consider this practice of the European Court of Human Rights to be an attempt to impose radical secularism everywhere despite the national experience of church-state relations. The above mentioned decision is not the only one in the practice of the Court, which has increasingly shown an anti-Christian trend. Taking into account the fact that the decisions of the European Court of Human Rights have clearly lost touch with legal and historical reality in which most of the Europeans live, while the Court itself has turned into an instrument of promoting an ultra-liberal ideology, we believe it very important that religious communities in Europe should be involved in a discussion concerning its work.¹⁶



- **The Politics of Religious Freedom in Lautsi v. Italy**
- The strategic litigation behind the case



The convergence of these different religious groups behind a single cause, a form of cultural realignment, was a classical example of the “*New Ecumenism*” as described by James Davison Hunter: “a new form of cooperative mobilization, in which distinct and separate religious and moral traditions share resources and work together toward common objectives”.¹⁸



- **The Politics of Religious Freedom in Lautsi v. Italy**

- The strategic litigation behind the case
 - A. What is the politicization of FORB in the Lautsi case telling us?
 - B. Is there an unequivocal interpretation and therefore enforcement of human rights?
 - C. What is the role of churches and religious groups in a context where many legal disputes concerning important moral and ethical issues are decided by courts?**



➤ **The Politics of Religious Freedom and EU External Action**

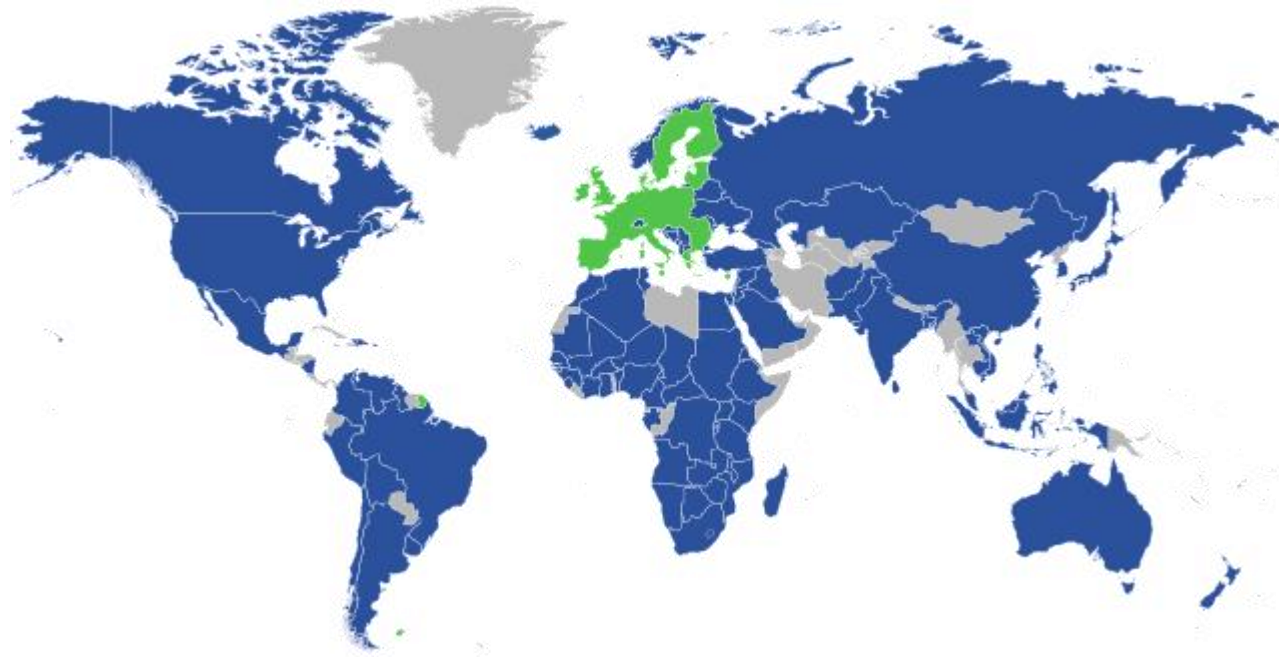
The EU guidelines for the protection and promotion of Freedom of Religion or Belief in the External Action of the European Union

- A. The “American influence”
- B. The myth of the incompetence of the EU in religious affairs
- C. How should religious groups make use of the guidelines?**

P. Annicchino (ed.), *Freedom of Religion or Belief in Foreign Policy. Which one?*, EUI University Press 2013, available at: <http://cadmus.eui.eu/handle/1814/30059>



[8]





Questions?

