# Changing Society in International Courts: The Complicated Roles of NGOs before the European Court of Human Rights

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Abstract

This thesis examines the role of NGOs before the European Court of Human Rights (ECtHR), drawing on interview data with a variety of stakeholders. It is often assumed that NGOs enhance the function of international courts to solve disputes, process cases efficiently, and foster the development of international law. Above all, NGOs are often said to play a re-distributive role: supporting the comparatively less powerful applicants (typically human rights victims) and thereby advancing social change. Against this backdrop, this thesis makes use of empirical research in an attempt to present a more nuanced picture of the role of NGOs than the above narrative alone may suggest.

Taking the ECtHR as a field of research, this thesis explores the gap between the prevailing narratives and the reality of NGOs' activities before the ECtHR. Deploying the sociological framework suggested by Anthony Giddens, the author focuses on the daily routines of players before the ECtHR, rather than their discourses alone, in an attempt to to understand and reveal hidden social dynamics. The author conducted interviews with a variety of stakeholders, including activists of large NGOs but also activists of smaller NGOs as well as Registry lawyers working at the ECtHR.

The empirical data reveals a complicated, interdependent Court-NGO relationship which differs from the expected narrative. The data suggests that Large NGOs, under the pressure from the Court to provide 'useful' information and maximise its efficiency, seek an interdependent relationship through third-party interventions, despite the acknowledged unlikelihood of influencing the Court's jurisprudence, while smaller NGOs lack the resources necessary to build this type of interdependent relationship with the Court and consequentially face a diminished role, to the detriment of the ECtHR's human rights objectives. (280 words)

Table of Contents

1. Introduction........................................................................................ 5
2. Literature Review ................................................................................... 14
2.1 Do Courts Equalise Social Relationships? ........................................... 16
2.2 Civil Society Groups as a Mitigator? .................................................. 23
2.3 Dual Views on NGOs .......................................................................... 28
2.3.1 Are Interventions by NGOs Effective?........................................... 29
2.3.2 Do NGOs Provide Support for the Most Disadvantaged?.............. 32
3. Methodology and Method...................................................................... 38
3.1 Analysing Difference ........................................................................... 39
3.2 Diversification of Samples .................................................................. 41
3.3 Anthony Giddens: Bridging Agents and Structure ............................... 42
3.4 Methods ............................................................................................... 46
3.4.1 Choice of Methods........................................................................... 46
3.4.2 Sampling.......................................................................................... 49
3.4.3 Questions to Interviewees and Coding ............................................ 55
3.4.4 Practical Arrangements.................................................................... 57
4. The Role of NGOs for the Court ............................................................ 62
4.1 Explicit Rules....................................................................................... 62
4.1.1 The Convention ................................................................................ 63
4.1.2 The Rules of Court........................................................................... 65
4.2 Historical Origins................................................................................. 67
4.3 Discretionary Power of the Court......................................................... 71
4.3.1 Substantive Aspect........................................................................... 71
4.3.2 Procedural Aspect ............................................................................ 74
4.4 Existence of Informal 'Rules'............................................................... 76
4.4.1 Prohibition from Referring to Facts and Merits .............................. 77
4.4.2 Undesirability of Providing Alternative Interpretations .................. 79
4.5 The Role of NGOs from the Court's Perspective ................................. 81
4.6 Direct Representation .......................................................................... 84
4.7 The Court's Focus on Efficiency ......................................................... 86
5. The Role of NGOs for Transnational and Large NGOs ......................... 96
5.1 Development of Law ........................................................................... 97
5.2 Caveats of 'Development' .................................................................... 99
5.3 Risks and Reputation .......................................................................... 103
5.3.1 Bureaucratic rationales .................................................................... 103

5.3.2 As ‘Repeat Players’ ........................................................................ 105
5.4 Interdependence and Consequences ..................................................................111
5.5 In the Distant Future ........................................................................ 113
6. The Role of NGOs for SNGOs and Human Rights Lawyers .................................. 117
6.1 Winning Cases ........................................................................ 118
6.2. Resource Constraints ........................................................................ 122
6.3 Diminishing Roles ........................................................................ 129
7. Discussion ........................................................................ 136
7.1 Theory of Structuration ........................................................................ 136
7.2 Discursive Aspects: What Roles Are NGOs Expected to Play? ......................... 137
7.3 Practical Aspects: Routines of NGO Activists .................................................. 140
7.4 Implications and Consequences ........................................................................ 143
8. Conclusion ........................................................................ 146
Bibliography ........................................................................ 151

Table of Cases

p.6

- Hirst v the United Kingdom (No. 2) [2005] ECHR App no 74025/01 (6 October 2005)
- Lautsi v Italy [2011] ECHR App no 30814/06 (18 March 2011)
- Oliari v Italy [2015] ECHR App nos 18766/11 and 36030/11 (21 Jul 2015)

p.69

- Young James and Webster v the United Kingdom [1981] ECHR App nos 7601/76 and 7806/77 (13 August 1981)

p.71

- Magyar Helsinki Bizottsag v. Hungary [2016] ECHR App no 18030/11, (8 November 2016)

p.74

- Savran v. Denmark [2021] ECHR App no 57467/15

p.85

- Big Brother Watch and others v the United Kingdom [2021] ECHR App nos 58170/13, 62322/14 and 24960/15 (25 May 2021)
- Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [2014] ECHR App no 47848/08 (17 July 2014)

p.115

- Grzeda v. Poland [2022] ECHR App no 43572/18 (15 March 2022)

Table of Statutes

- The Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) (as amended by Protocols Nos. 11, 14 and 15, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16)
- Rules of Court (10 February 2023, Registry of the Court)

1. Introduction

When a wave of political conservatism washes over Europe, human rights law seems to be a rock to which human rights activists can cling on. The European Court of Human Rights (ECtHR) in Strasbourg is certainly one of their strongholds. Praised as 'the most effective human rights regime in the world', [1] the Court seems to have functioned quite well as a 'de-facto constitutional court' of Europe, at least until recently.[2] Indeed, having started as a product of European diplomacy after the Second World War, the Court has expanded its role both qualitatively and quantitatively over the past few decades.[3] Qualitatively, it has encouraged the so-called 'judicialization' of political matters in Europe.[4] Controversial political matters such as migration, the right to strike, and LGBTQ rights have been increasingly discussed in legal terms across Europe, and lawyers have started to dominate these conversations. Quantitatively, the

[1] For example, Helen Keller and Alec Stone Sweet, A Europe of rights: the impact of the ECHR on national legal systems (OUP, 2008) 11

[2] Mikael Rask Madsen, 'The Challenging Authority of The European Court of Human Rights: From Cold War Legal Diplomacy To The Brighton Declaration And Backlash' [2016] 79(1) Law and Contemporary Problems 141, 166

[3] Ibid

[4] Helen Keller, Cedric Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' [2015] 26 (4) EJIL 829

Court has achieved significant geographical expansion towards the East after the end of the Cold War, and from those Eastern European countries the Court receives tens of thousands of applications each year, some of which have had a significant impact on those societies.[5]

For the author, who studied law in Japan, the qualitative and quantitative expansion of the ECtHR was intriguing not only legally but also sociologically. In the ECtHR, a small number of judges sitting in Strasbourg can decide whether prisoners should have votes, a cross can be hung in a classroom, and LGBTQ people can marry, effectively across 46 states[6] in Europe.[7] At least in a certain aspect, the ECtHR is a highly political organisation. It seems unlikely that the 46 judges in Strasbourg are deciding cases in accordance solely with the European Convention on Human Rights (ECHR), without considering (consciously or not) the societies within which they are operating.[8]

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[5] Madsen (n2) 159

[6] Recently the number of the member states of the Council of Europe has become 46, with the expulsion of Russia.

[7] Hirst v the United Kingdom (No. 2) [2005] ECHR App no 74025/01 (6 October 2005), Lautsi v Italy [2011] ECHR App no 30814/06 (18 March 2011), and Oliari v Italy [2015] ECHR App nos 18766/11 and 36030/11 (21 Jul 2015)

[8] Of course, the ECtHR makes attempts to incorporate the view of ‘European society’ into its legal principle. About its doctrine of ‘European Consensus’, see the analysis in: Robert Wintemute, ‘Same-Sex Marriage in National and International Courts: “Apply Principle Now” or “Wait for Consensus”?’ (2020) 1 Pub L, 134

When the author first visited the ECtHR and observed an oral hearing at the Grand Chamber, he was struck by the massive imbalance of power between the parties. It was not the contrast between skilful government agents and oppressed human rights victims that one might have anticipated; quite the contrary. On one occasion, the applicant's representative—an eloquent British human rights activist (who was also fluent in French)—appeared to overwhelm the attorneys of a government of a Baltic state, who found it difficult even to advocate for themselves in English. That was not what the author had expected. This is just one case, but past research also indicates that human rights NGOs play a significant role in the judicial process in Strasbourg.[9] The social dynamics at the Court may be understood beyond the adversarial contest of applicants and respondents (governments) through the lens of the interactions between NGOs joining in the legal process and the Court.

The vast majority of the literature about the ECtHR has focused on the relationship between the Court and states, but there are few studies which focus on the role of social groups. In this small area of literature, generally, there is an overarching tendency to

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[9] For example, Rachel Cichowski, 'The European Court of Human Rights, Amicus Curiae, and Violence against Women' (2016) 50 Law & Soc'y Rev 890; Loveday Hodson, 'Activating the Law: Exploring the Legal Responses of NGOs to Gross Rights Violations' in Mikael Rask Madsen and Gert Verschraegen (eds), Making Human Rights Intelligible: Towards a Sociology of Human Rights, (Hart Publishing, 2013)

give a positive—even celebratory—evaluation of the role of human rights NGOs. Such scholars, either through statistical or case-based studies, or both,[10] argue that civil society groups, such as human rights NGOs, trade unions, and professional groups, have contributed to the development of Strasbourg's jurisprudence through their advocacy and third-party interventions. In doing so, scholars insist, NGOs facilitate social changes in favour of the disadvantaged through the ECtHR.[11]

The research for this thesis started from examining this hypothesis. Unlike the past literature, the author adopted interviews as a main method of research to complement the studies based on statistical investigations or the legal analysis of specific cases. The author would like to cast light on the more details and nuances of the interactions between NGOs and the ECtHR through which NGOs' interventions engage with the Court's jurisprudence. In short, this paper investigates the mechanisms governing the relationship between NGOs and the ECtHR.

The author interviewed 16 NGO activists, the Court's judges, and the Registry

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[10] Ibid

[11] Marc Galanter expresses this as 're-distribution' through judicial system. 'Re-distribution' is used in a broad sense that includes the re-distribution of legal rights, social status, and political power, in addition to that of wealth. This paper also follows his suite; Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change'(1974) 9 (1) Law & Soc'y Rev 95, 95

lawyers (and had 5 additional informal talks) during the fieldwork from January to May 2021, and heard contrasting, or even contradictory, narratives among these groups. While the activists from transnational large NGOs stressed their positive influence on the 'development of law' by the ECtHR, judges and the Registry lawyers did not seem to attach great importance to the activities of NGOs. More interestingly, the answers of the NGO activists also differed: the activists from smaller NGOs were less confident about the effectiveness of their involvement than their counterparts in larger organisations. Given these doubts on the part of small NGOs, it may be oversimplistic to argue that their participation directly enhances the ECtHR's re-distributive capacity. At least, there is more we might want to add to give nuance to this picture.

Additionally, this topic is particularly important in light of the Court's recent tendencies. As scholars point out, the ECtHR is increasingly becoming cautious after the Brighton Declaration in 2011; it has put more importance on its subsidiary role and the 'margin of appreciation' of member states since then.[12] NGOs maintain campaigns in and around the ECtHR, but it seems that these efforts are not as effective as they were in the 1990s and 2000s. An analysis of the mechanism working between the Court and

[12] For example, Madsen (n2). As to the UK, Keith Ewing & John Hendy 'Article 11(3) of the European Convention on Human Rights'(2017) Euro HRL Rev(4) 356

NGO might shed some light on this broad question.

In this paper, the author will depict a complex picture of the relationship between NGOs and the Court, such as the Court's strong commitment to the value of 'efficiency', the way in which the bureaucratic rationales of large NGOs create a gradualist approach to activism before the ECtHR, and the struggle of small NGOs to obtain adequate resources. It argues that it is difficult, or at least unusual, for NGOs to achieve social changes through the ECtHR. In particular, although large NGOs play an important role in enhancing the Court's capacity for processing cases, their interventions rarely influence the Court's jurisprudence. This is not because each individual activist is insincere; often the opposite. As the Court does not want NGOs to intrude on its jurisprudence, there seems to exist a nearly trade-off relationship between raising voices for the disadvantaged and becoming a good friend of the Court. As a result, while large NGOs probably tend to strategically prioritise the latter, small NGOs often struggle with striking a right balance between the two. Since it seems to be often small NGOs that have the expertise and information for the Court to properly filter and judge disputes from the ground of 46 European nations, it is implied that the Court's capacity as a promoter of human rights protection in Europe is quietly eroded.

In the next section (Section 2), the author reviews the past literature. Scholars have

been divided regarding the point of whether NGOs can play a role in mitigating the inherent conservativeness of judicial fora and utilising them for creating social changes. In Section 3, arguing that this division is caused by different methodological standpoints among scholars, the author brings in the sociological framework suggested by Anthony Giddens. As he argued that there is a significant gap between how one understands and explains the reality ('discursive consciousness') and how one actually acts routinely ('practical consciousness')[13], the author adopted his theory to interpret interview materials beyond their face value. In addition, details about the interviews, document analysis and archival research as well as potential biases will be also discussed. Sections 4 to 6 surveys the findings from the author's field research. These three sections are dedicated respectively to the Court officials, transnational and large NGOs (TNGOs), and small to middle-sized NGOs (SNGOs). The interview materials are examined to explore the gap between the interviewees' 'discursive consciousness' and their practical day-to-day motives. In Section 7, the author suggests a possible mechanism mediating the relationship between the Court and NGOs through a coherent interpretation of the evidence. The conclusion wraps up the whole argument and indicates potential

[13] See Anthony Giddens, Constitution of Society: Outline of the Theory of Structuration (OUP, 1984): details will be discussed in Section 3.

contributions to a few relevant fields that could be based on this exploratory work.

Lastly, the precise scope of this thesis should be specified in advance. Firstly, this paper does not address NGOs' campaigns and activities in extra-judicial fora such as political lobbying. It is, of course, preferable to observe NGOs' activities as a whole, since transnational NGOs work not only before the ECtHR, but also on various occasions in other international organisations and domestic politics. However, broadening the scope from Strasbourg to other international organisations or to the politics of member states is beyond the resources of the author and largely peripheral to the argument of this thesis. The interactions between NGOs' activities before the ECtHR and other occasions will be dealt in Section 5 as far as necessary for the scope of this thesis.

Secondly, this paper aims to capture a cross-sectional snapshot of NGOs' activities at the point of early 2021. Generally, to pursue trends over time, panel data rather than cross-sectional data are needed. But as the author chose interviews as a main method, it was difficult in practice to conduct interviews at two different times within a one-year Master's programme. Needless to mention, it is also considerably more difficult to examine interviewees' remarks about their past experiences than to examine their comments about their ongoing activities, since people's memories often do not reflect

the facts of the time entirely accurately. Of course, what the author observed during the research included some hints about changing policies of the Court and strategies of NGOs in response to the increasingly conservative environment over time, but they are not what this paper primarily seeks to address.

Thirdly, this paper is about the theme of so-called 'legal mobilisation'[14], but the focus is slightly different from past research. Socio-legal scholars who focus on this theme have pursued various questions regarding civil society groups' participation in the judicial process, such as when they 'mobilise' law, how they actually do so, and how effective such mobilisation is.[15] However, this paper does not seek to investigate details of this kind. Each NGO may or may not succeed in mobilising law in individual cases, but the main interest of this paper is whether the aggregation might create a different mechanism from the simple sum of the cases.

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[14] The concept of legal mobilization has been used in the socio-legal literature to capture the various processes through which individuals or collective actors 'invoke legal norms, discourse, or symbols to influence policy or behaviour' (Lisa Vanhala, 'Legal Mobilization' (2021) in Oxford Bibliographies in Political Science). There are also similar concepts such as 'public interest law' in the US context or 'pressure through law' by Harlow and Rawlings (n43), but the objects of such studies are more or less similar.

[15] For example, Aude Lejeune and Julie Ringelheim, 'The Differential Use of Litigation by NGOs: A Case Study on Antidiscrimination Legal Mobilization in Belgium' (2022) Law & Social Inquiry 1

## 2. Literature Review

One apparently simple assumption about the role of NGOs before the ECtHR is that the ECtHR protects the rights of the disadvantaged and NGOs facilitate such 're-distribution'. Yet past socio-legal research has shown that a mechanism working between courts and civil society groups is not always simple. Also, in the context of this paper, scholars are divided on the point of whether the ECtHR itself, as well as the NGOs working around it, functions as a mitigator of economic and social inequality in reality.

Subsection 2.1 introduces Marc Galanter's general argument on the re-distributive capacity of the judicial system. Galanter famously argued that the judicial system is structurally conservative, because it prioritises Repeat Players over One-Shotters.[16] According to him, this conclusion is unaffected by the existence of expert lawyers such as human rights lawyers; even though they are themselves Repeat Players, they will have a problem of reconciling the best tactics in the long run with the immediate needs of their clients.[17] Similarly, Sarat and Scheingold focused on the fragile positioning of

[16] Galanter (n11)

[17] Ibid 114

‘cause lawyers’.[18] They argued that there is a fundamental contradiction between utilising the authority of law, which is supported by its neutrality, and mobilizing law politically. Additionally, this paper also briefly introduces Tony Prosser’s argument about the utilisation of courts to achieve social changes.[19]

Subsections 2.2 and 2.3 discuss whether the participation of NGOs/civil society groups does anything to change this inherent conservativeness of the judicial system. Following scholarly studies of pressure groups before the US Supreme Court, some scholars of the ECtHR also argue that NGOs appearing before it are bringing about changes in its jurisprudence through their repeated participation as third-party intervenors.[20] On the other hand, others question the intentions and abilities of NGOs to create re-distributive changes through this process. For instance, some socio-legal scholars note the emergence of ‘conservative’ NGOs.[21] Political scientists also point out

[18] See Scheingold and Sarat (n39)

[19] Tony Prosser, Test Cases for the Poor: Legal Techniques in the Politics of Social Welfare (Child Poverty Action Group, 1983), Ch4

[20] Cichowski (n9)

[21] Laura Van den Eynde, ‘An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs before the European Cout of Human Rights’ (2013) Netherlands Q of HR 31(3) 287-8

that NGOs are driven by their own interests, just the same as other private entities.[22] Cliquennois argues that NGOs are effectively controlled by a few large donors, which utilise the judicial process of the ECtHR to achieve their political goals.[23] The critical issue here is how one evaluates and/or reconciles the optimistic and pessimistic views about the role of NGOs.

2.1 Do Courts Equalise Social Relationships?

Scholars from diverse fields of the social sciences have discussed effective ways to make social changes in favour of the disadvantaged.[24] Litigation certainly seems to be a very attractive instrument for this purpose. Compared to the political arena where the ‘haves’ easily overwhelm the ‘have-nots’, ‘litigation, on the other hand, has a flavour of equality’.[25] Theoretically, ‘the parties are "equal before the law" and the rules of the

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[22] Details will be discussed in Section 2.3.2.

[23] Gaëtan Cliquennois, European Human Rights Justice and Privatisation : The Growing Influence of Foreign Private Funds (CUP, 2020); Gaetan Cliquennois and Brice Champetier, ‘The Economic, Judicial and Political Influence Exerted by Private Foundations on Cases Taken by NGOs to the European Court of Human Rights: Inklings of a New Cold War?’(2016) 22 ELJ 92

[24] For example, Steven Greer, ‘Towards a Socio-legal Analysis of the European Convention on Human Rights.’ and Mikael Rask Madsen, ‘Beyond Prescription: Towards a Reflexive Sociology of Human Rights’ in Mikael Rask Madsen and Gert Verschraegen (eds), Making Human Rights Intelligible: Towards a Sociology of Human Rights, (Hart Publishing, 2013)

[25] Galanter (n11) 135

game do not permit them[actors] to deploy all of their resources in the conflict, but require that they proceed within the limiting forms of the trial.'[26]As a result, it is often considered that 'law [is]… a prime catalyst for social change'.[27]

In the 1960s and 1970s, this 'myth of rights'[28] strongly supported the civil rights movement of the United States, but a few socio-legal scholars challenged it. Marc Galanter, one of the leading socio-legal scholars in the United States, suggested that the view of litigation being more 'redistributive', or 'systemically equalizing' was mistaken.[29] He argued that the 'haves' also came out ahead in legal systems as in political systems, but simply in a different way. In his article entitled 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' in 1974, Galanter pursues a threefold argument.

First, he classified litigants in two ideal types; *One-Shotters* who are rarely involved in litigation and *Repeat Players* who constantly deal with litigation such as insurance

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[26] ibid

[27] ibid

[28] Stuart Scheingold, The politics of rights: lawyers, public policy, and political change (University of Michigan Press, 2004, 2nd edn)

[29] Galanter (n11) 135

companies or the government. While Repeat Players tend to be well-equipped in legal arguments and can use their resources to change the rules of the game (such as precedents) in the long run, One-Shotters are often less prepared, and struggle to gain immediate outcomes in the particular case they are facing. As a result, Repeat Players usually enjoy more strategic advantages than One-Shotters in the judicial process.

Secondly, Galanter argues that various instruments of our legal system—expert lawyers who can represent One-Shotters, the institutional capacity of courts, and formal rules—are unlikely to overturn this balance of power.[30] Especially, he notes that expert lawyers who support One-Shotters do not bring about substantial changes. He raises several reasons for this, but he particularly underscores the fact that expert lawyers are not in a position to leverage their advantage as a Repeat Player in representing One-Shotters. Galanter notes:

> while they [expert lawyers] are themselves RPs [Repeat Players], these specialists have problems in developing optimizing strategies. What might be good strategy for an insurance company lawyer or prosecutor trading off some cases for gains on

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[30] Ibid, 114

> others is branded as unethical when done by a criminal defense or personal injury plaintiff lawyer. It is not permissible for him to play his series of OSs[One-Shotters] as if they constituted a single RP. Conversely, the demands of routine and orderly handling of a whole series of OSs may constrain the lawyer from maximizing advantage for any individual OS.[31]

Finally, he observes that alternative ways to settle disputes—either 'lumping', 'exit', or various types of arbitration—still favour the 'haves' because in these extrajudicial fora economic or social power influences outcomes more directly. As he concludes,

> court-produced substantive rule-change is unlikely in itself to be a determinative element in producing tangible redistribution of benefits. The leverage provided by litigation depends on its strategic combination with inputs at other levels.[32]

Indeed, socio-legal scholars after Galanter have expanded their scope of research to

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[31] Ibid, 117

[32] Ibid, 149

the aspects of litigation not limited to narrow dispute resolution. Michael McCann described the development of the women's pay equity reform movement in the US, and reached the conclusion that such expansion was brought about by extra-judicial, or political mobilization of law, rather than by litigation itself.[33] Going one step further, scholars such as Stuart Scheingold and Gerald Rosenberg cautioned that one should not confuse the cause and the result of social movements.[34] According to them, standalone litigation rarely creates social changes.[35] As Rosenberg states, 'a court's contribution…is akin to officially recognizing the evolving state of affairs, more like the cutting of the ribbon on a new project than its construction.'[36]According to him, judicial victory only happens when the social context surrounding the case has sufficiently ripened. This observation is fundamental; the relationship between litigation and social change might be one of correlation rather than causation. In his view, one must consider carefully before insisting that a 'landmark case' produced a certain social change.

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[33] Michael McCann, Rights at work: pay equity reform and the politics of legal mobilization (University of Chicago Press, 1994)

[34] Scheingold (n30) ; Gerald Rosenberg, The hollow hope : can courts bring about social change? (University of Chicago Press, 2008, 2nd edn)

[35] ibid

[36] Rosenberg (n36), 338

While Galanter considered that the role of expert lawyers was limited due to the inherent gap between clients' needs and the best long-term strategies, Sarat and Scheingold complemented his view from a different perspective. In their seminal work about cause lawyering, in which lawyers 'commit themselves and their legal skills to furthering a vision of the good society', they argued that such lawyers face a fundamental dilemma.[37] While these lawyers try to utilise the power of law and judicial systems for specific political goals, such activities endanger the professionalism of lawyers and the neutrality of legal systems, from which the authority of the lawyers and the legal systems themselves is derived. They argue:

> Cause lawyering, in contrast, is frequently directed at altering some aspect of the social, economic, and political status quo. Because it gives priority to political ideology, public policy, and moral commitment, cause lawyering often attenuates, or transforms, the lawyer-client relationship—a cornerstone of the established conception of professional responsibility. … Because it shifts cause and moral commitment from the margins to the core of legal practice, cause

[37] Austin Sarat & Stuart Scheingold, Cause Lawyering: Political Commitments and Professional Responsibilities (OUP, 1998) Ch1

lawyering works at cross-purposes to market-driven conceptions of professionalism.[38]

The most radical lawyers risk their positions and privileges due to their partisan activities, while the mildest modestly devote some of their worktime to pro bono advocacy for the poor. Scheingold's observation is that the former type of activity is difficult to continue amidst the hostile political climate of the United States in the mid-90s, and the latter approach, which emphasizes their professionalism, has become the mainstream of cause lawyering.[39]

Lastly, from the perspective of the incapability of legal systems in re-distribution, Tony Prosser's research about legal battles over social benefits in the UK is worth highlighting, though it did not make a lasting academic trend as his US colleagues' works. In essence, he argued that courts are incapable with regard to re-distributive matters. Based on careful analysis of cases in England and Wales until the 80s regarding

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[38] ibid 4

[39] ibid, ch3; Luca Falciola's recent work depicts the contradiction between the politicisation of the court and the value of neutrality from a historical perspective. He observes that the movement of radical lawyering by the National Lawyers Guild (NLG) was tilted after 1975, and lawyers returned to more traditional tactics while utilising inflammatory rhetoric; Luca Falciola, Up Against the Law Radical Lawyers and Social Movements 1960s-1970s (University of North Carolina Press, 2022)

the Social Benefit scheme, Prosser reached a rather disappointing conclusion. As he argues, 'the overall conclusion must be that the use of the courts to gain social change for the poor gives rise to serious problems' because the Court does not have any information or knowledge to judge whether specific social benefits should be given to a particular group of people. [40] It seems that the scope of this reasoning is well beyond the specific time and place of his research. Perhaps courts, since they usually do not have adequate knowledge either about the reality of administrative process or the budget of state and municipal governments, can only give reactions 'so inconsistent as to make the outcome of cases very much a lottery'.

## 2.2 Civil Society Groups as a Mitigator?

While American socio-legal scholars highlighted the difficulties individual lawyers must face when they try to work for the disadvantaged, studies regarding interest groups and pressure groups have sometimes pushed back against the view that it is difficult to utilise legal system to further a particular vision of society. These researchers, when admitting the conservativeness of the judicial process, insist that the involvement of

[40] Prosser (n22) Ch4

civil society groups may provide a solution to Galanter's critique. According to them, civil society groups support disadvantaged applicants in various ways, including the submission of *amicus curiae* (friend of the court) briefs to courts.

In the US, special attention has been paid to social groups since the early 20th century by political scientists.[41] Because of the political significance of the US Supreme Court, lobbying by these groups before the court has also come into their interest from the early stage.[42] Legal scholars also followed suit, *amicus curiae* or third-party intervention[43] in particular gathered attention due to the fact that the participation of third-parties as *amicus* can create a venue for wider civil society groups to join a seemingly closed judicial process. These civil society groups, such as NGOs, trade unions, and professional associations utilising their wide range of expertise, submit their views on specific issues to courts, and as scholars argue, exert significant influence on them.[44] For example, according to Songer et al, the rate of the US Supreme Court ruling

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[41] Probably the most famous work on political pluralism based on social groups is; Robert Dahl, Dilemmas of pluralist democracy: autonomy vs. control (Yale University Press, 1982)

[42] Carol Harlow and Richard Rawlings, Pressure Through Law (Routledge, 1992) 3-4

[43] Some people separately use these two words as the former pointing the case where the court invites social groups and the latter where social groups proactively seek to intervene in the judicial process, but this paper will not distinguish these two in a rigid sense, as before the ECtHR it is often difficult to do so.

[44] Paul Collins Jr, 'Friends of the Court: Examining the Influence of Amicus Curiae Participation in

in favour of One-Shotters is significantly higher when supported by amicus curiae.[45] Others have found that the submission of amicus briefs has the effect of flagging the importance of the case to the court. These findings mean that systematised support from civil society groups has the potential to change the conservative nature of the judicial system. Songer et al. writes:

> While one-shot litigants like individuals with relatively low levels of resources generally have low rates of success in state supreme courts, their chances of victory can be dramatically increased by the intervention of interest groups who will support their position with the filing of an amicus curiae brief. In contrast, repeat players did not appear to benefit from the addition of support from amici.[46]

In connection with the global expansion of international human rights law in the 1990s, this strand of socio-legal research in the United States influenced scholars across

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U.S. Supreme Court Litigation' (2004) 38(4) Law & Soc'y Rev 807

[45] Donald Songer, Ashlyn Kuersten and Erin Kaheny, 'Why the Haves Don't Always Come out Ahead: Repeat Players Meet Amici Curiae for the Disadvantaged' (2000) 53(3) Political Res Q 537

[46] Ibid, 552

the Atlantic. Harlow and Rawlings spotlighted the expanding use of the judicial system by pressure groups both in the British and European contexts, in which it had until then been regarded as ‘apolitical’. Alongside the introduction of the Human Rights Act in the UK, [47] the significant expansion of human rights jurisprudence in the European Court of Human Rights attracted scholarly attention. For example, while the ECtHR has boasted of its reputation as ‘the most successful international court’ or ‘the de-facto constitutional court of Europe’ since its reformation in 1998, Rachel Cichowski argues that the influence of social groups such as NGOs on its judicial process had been largely neglected.[48] She claims that observing third parties (amici curiae)—rather than the power balance between the ECtHR and member states as in past research—can provide counterevidence to Galanter’s claim that the judicial system is inherently conservative. According to her, ‘international courts can provide an avenue for enhancing, rather than undermining, participation in processes of human rights governance’.[49] In her view, ‘NGOs were critical to the evolving jurisprudence of the Court and the precision, scope,

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[47] Sangeeta Shah, Thomas Poole, and Michael Blackwell, ‘Rights, Interveners and the Law Lords’ (2014) 34 (2) OJLS 295–324

[48] Cichowski (n9)

[49] Ibid, 891

and enforceability of human rights in Europe.'[50]

Specifically, Cichowski places emphasis on the expansion of standing for NGOs to participate in the judicial process of the ECtHR. Although the ECtHR's procedure generally focuses on providing remedies for individuals and does not presuppose the participation of civil society groups, she points out that there are four possible ways for them to be involved: direct application, indirect application, representation of applicants, and third-party intervention.[51] She argues that the ECtHR's jurisprudence has developed in step with the expansion of standing for civil society groups. In particular, she argues that NGOs' participation as third parties (amicus curiae) was the engine for the ECtHR to develop its jurisprudence.[52]

Cichowski highly values the substantive changes brought about by NGOs participation in the Court's process. She argues that NGOs have strategically chosen the cases they bring to the Court and made attempts to enlarge the scope of each provision of the ECHR. For example, in Cichowski (2011), she depicts various legal strategies

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[50] Rachel Cichowski, 'Civil Society and the European Court of Human Rights', in Jonas Christoffersen and Mikael Rask Madsen (eds), The European Court of Human Rights between Law and Politics (OUP, 2011) 96

[51] Cichowski (n9)

[52] ibid

deployed by NGOs to protect minorities' rights through the observation of cases concerning the UK and Turkey.[53] In Cichowski (2016), she examines the development of the ECtHR's case law regarding violence against women.[54] As a result of these observations, she concludes that there are connections between the expansion of the ECtHR's jurisprudence and the strategies of NGOs. As she says, 'the evolution of the Convention system was and continues to be critically linked to a dynamic interaction between civil society and the ECtHR.'[55]

2.3 Dual Views on NGOs

While Cichowski's argument is extremely valuable in highlighting the role of amicus curiae before the ECtHR, there is also a question about NGOs' intentions and capacity to make changes. As Galanter pointed out, in the first place, expert lawyers working for the disadvantaged must face the ambivalence between being Repeat Players and working for individual applicants. If such lawyers would like to leverage their expertise strategically, they should not become too closely involved in pursuing specific cases.

[53] Cichowski (n51)

[54] Cichowski (n9)

[55] Cichowski (n51), 77

This logic may also apply to NGOs; if they are to act strategically, they have to discard some victims while supporting others. Moreover, NGOs have a stronger strategic incentive than expert lawyers in the sense that they cannot gain revenues simply by representing the disadvantaged; they need to seek external donors. Similarly, Sarat and Scheingold's point also applies to NGOs; radical political activities might endanger the professional and neutral image of international NGOs and international courts. If international courts are seen to be excessively influenced by radical NGOs, their authority could be undermined. The sections below highlight the various motives and capacities of NGOs working on strategic litigation, before discussing some sceptical views on NGOs' intentions in the literature.

### 2.3.1 Are Interventions by NGOs Effective?

Although Cichowski's research does not focus on specific types of NGOs, it is unlikely that all NGOs are equally influential players before the ECtHR. The fact that there are some correlations between civil society groups' campaigns and the development of case law in the ECtHR does not mean that every campaign by every civil society group is successful. Albeit in the context of the UK Supreme Court, a landmark work by Shah, Poole and Blackwell demonstrates that the increase of third-

party interventions does not always lead to more wins for the victims.[56] Instead, according to them, what is often observed is the predominance of small numbers of 'Repeat Players', including large NGOs:

> [T]he study seems to show that intervention in the UK's top court increased significantly after the HRA[Human Rights Act] came into operation, albeit that this trend was to an extent already underway. On the other hand, it seems to confirm the predominance of a relatively small number of players, such as already well-established interest groups as well as the government in its various manifestations. Moreover, despite the increased activity, it would appear that this has relatively little impact on decisions and decision-making. Third party interveners do not appear to have had the kind of leverage that they might have hoped for.[57]

This finding has an important implication for the study of the ECtHR, as the increase of third-party interventions may not result in the victory of the disadvantaged, while

[56] Shah et al (n48)

[57] Ibid 324

large NGOs might benefit from these interventions in ways that are different from winning the case.

In the particular context of the ECtHR, Loveday Hodson suggested that third-party interventions by NGOs play different roles depending on the type of NGO.[58] She classified NGOs in three categories: (i) issue-specific NGOs such as those working against 'systemic human rights abuse' of Roma or Kurdish people, (ii) 'pure' human rights NGOs working for 'traditional' human rights in Western European countries, and (iii) 'new' groups that promote new rights such as environmental rights. In her observation, issue-specific NGOs, which typically draw attention to severe and systemic human rights abuses in specific jurisdictions, often have a significant impact on the Court, whereas other groups are not as influential.[59]

In relation to the theory of Repeat Players, Hodson's detailed study illuminates the necessity for a closer look at the factors that make NGOs influential, or not, before the ECtHR. All of Hodson's three categories are Repeat Players in a certain sense, but the ways they work before the ECtHR are significantly different.

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[58] Loveday Hodson, NGOs and the struggle for human rights in Europe (Hart, 2011)

[59] Ibid

2.3.2 Do NGOs Provide Support for the Most Disadvantaged?

Cichowski's study almost presupposes that NGOs work for the disadvantaged, which suggests that NGOs' successes contribute to the enhancement of the re-distributive capacity of the Court, but some socio-legal scholars are critical about treating cause lawyering as synonymous with progressive lawyering in the first place. In the US context, Ann Southworth argued that 'conservative' lawyers, such as religious groups, nationalists and those representing business interests, learned from the tactics of liberals and successfully mobilised the concept of 'public interest law'.[60] Indeed, even before the ECtHR, multiple groups support respondent governments for various ideological or religious reasons such as the right to life (anti-abortion) or faith-based reasons. As an example of this phenomenon, Van den Eynde discusses the activities of the European Centre for Law and Justice, which regularly intervenes before the ECtHR. The European Centre for Law and Justice is a counterpart organisation of the American Centre for Law and Justice, and its interventions before the ECtHR focus on presenting

[60] Ann Southworth, 'Conservative Lawyers and the Contest over the Meaning of Public Interest Law' (2005) 52 UCLA L Rev 1223; see also Anthony Paik, Ann Southworth & John P. Heinz, 'Lawyers of the Right: Networks and Organization' (2007) 32 Law & Soc Inquiry 883

a conservative perspective centred on Christian values.[61] To take the approach of treating NGOs' activities as synonymous with the pursuit of liberal goals may obscure the complexity of this reality.

Similarly, political scientists and scholars of international relations have questioned the assumption that NGOs are working purely for the good of society. From the standpoint of political scientists, rather, it is natural that NGOs also seek to maximize their own resources and pursue an agenda that may or may not coincide with the interests of disadvantaged people.[62]

Firstly, there is the so-called problem of the autonomy of NGOs. For example, a few scholars argue that under certain conditions, NGOs are effectively controlled by the policy orientation of their donors rather than having a firm policy orientation of their own.[63] Others argue that 'resource dependence, financial incentives, government contracting practices, and competition for resources undermine the principled character

[61] Van den Eynde (n23)

[62] For example, Alexander Cooley and James Ron, 'The NGO Scramble: Organizational Insecurity and the Political Economy of Transnational Action' (2002) 27(1) Int'l Security 5

[63] Jim Igoe, 'Scaling up Civil Society: Donor Money, NGOs and the Pastoralist Land Rights Movement in Tanzania'(2003) 34 Development & Change 863; Jennifer Brinkerhoff, 'Donor-Funded Government-NGO Partnership for Public Service Improvement: Cases From India and Pakistan'(2003) 14 Int'l J Voluntary and Non-profit Organizations 105

of T[ransnational] NGOs and cause them to sacrifice their social missions in the pursuit of financial security'[64]. Moreover, even if NGOs have a certain level of autonomy from donors or contractors, they might still pursue maximization of their political or financial resources rather than pursuing their missions. As Clifford Bob argues, it might be more appropriate to understand NGOs as rational actors similar to large corporations rather than as 'saints'.[65] He does not deny that 'a foundation of moral sympathy and good intentions clearly underlies these [NGOs'] interactions'. But how should we understand why particular local cases are selected and spotlighted in the international arena, while other cases are not? He argues that 'the selection of particular cases of local abuse for international activism is best understood in market terms.'[66]

When it comes to the ECtHR, the work of Gaetan Cliquennois is compelling from this perspective. Cliquennois carefully depicts how powerful American donors leverage their financial resources to influence the ECtHR's judgements.[67] Specifically, he argues

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[64] George Mitchell and Hans Peter Schmitz 'Principled Instrumentalism: A Theory of Transnational NGO Behaviour' (2014) 40 (3) Rev Int'l Studies 489 (the paper itself presents the counterargument against the cited part)

[65] Clifford Bob, The International Struggle for New Human Rights (University of Pennsylvania Press, 2009)

[66] ibid

[67] Cliquennois (2020) (n25)

that the austerity policies in many European countries since the 2000s drove many international NGOs to seek funding from private donors based in the US. In exchange, those donors have demanded that these NGOs implicitly and explicitly reflect their interests in NGOs' litigation programmes.[68] Those donors also 'invest' in some Eastern European countries to establish small professional NGOs which conduct specific types of litigation before the ECtHR to influence the policies of those countries. He underlines:

> Private influence on the inputs, outputs (non-direct threat) and structures (direct threat) of the European Courts could orient European jurisprudence towards certain countries (considered to be enemies of wealthy financiers) and the promotion of private interests (such as free-market capitalism and the promotion of competition and free market in a liberal and international society) pursued by private

[68] A recent work by Haddad and Sundstrom contends that the causal relationship is the opposite; NGOs often persuade donors to invest in specific areas, rather than donors influence NGOs' policies. However, as far as they depict, this argument is based on one remark of a former staff of an American donor foundation and difficult to accept in its face value. At least, it would be possible to argue that there is a correlation between donors' funding programs and the litigation activities of NGOs, leaving aside which causes which; Heidi N Haddad and Lisa M Sundstrom, 'Foreign Agents or Agents of Justice? Private Foundations, Backlash Against Non-governmental Organizations, and International Human Rights Litigation'(2023) Law & Soc'y Rev 57(1)12–35.

> foundations.[69]

As a result, he insists, only the cases of specific categories from specific states (such as Russia and Turkey, which are considered to be ‘enemies of wealthy financiers’) have been strongly represented before the ECtHR today. On the other hand, he argues that this imbalance has caused significant injustice and is undermining the legitimacy of the ECtHR itself by neglecting ‘other’ issues. He argues:

> At any rate, for citizens not belonging to the countries involved or covered by the issues litigated by private foundations, access to justice and protection of their human rights could be made harder.[70]

Consequently, he argues that socio-economic concerns prevalent among West European countries largely remain untouched, which has caused a mild, but persistent, hostility towards the ECtHR in these nations. To be clear, Cliquennois does not deny that there

[69] Cliquennois (n25) 3

[70] Ibid 4

are human rights abuses in countries such as Turkey and Russia, nor that most NGOs are working for the disadvantaged. However, his point is that the overall structure of funding inevitably creates this distortion regardless of each NGO's efforts.

This brief literature review offers several helpful perspectives for analysing the mechanism mediating the relationship between the ECtHR and NGOs. Firstly, such a mechanism might differ according to the types of organisations. Secondly, there are contrasting views on the roles of NGOs in enhancing the re-distributive capacity of the ECtHR. These perspectives help to give nuance to our research question, which could be formulated as follows: Do NGOs enhance the re-distributive capacity of the ECtHR? If so, through what mechanisms do they do so? Do such mechanisms remain the same regardless of the type of NGO and the circumstances of its involvement?

## 3. Methodology and Method

This section has four subsections. In Subsection 3.1, it is suggested that the misalignment between two perspectives regarding the role of NGOs arises from differences in methodology. While the analysis of landmark cases and individual activists' narratives tends to consider the influence that NGOs may exert on individual judgements, the investigation of 'macro' data such as the flow of funding is apt to stress the power structure behind the scenes. If both of these assessments are correct, it suggests that NGO activists are striving to bring about changes for the disadvantaged at the 'micro' level, but seem to be working for other purposes at the 'macro' level.

As statistical analyses alone are not likely to represent the complex goals pursued by NGOs, the author decided to proceed by way of interviews (as fully detailed in subsection 3.2). Firstly, this paper relies on diversified samples as much as possible: the interviews are conducted not only with a variety of NGO activists, but also with the Court officials and human rights lawyers. Secondly, in analysing these interviews, the author follows the lead of Anthony Giddens, who theorised how subjective cognition of individuals is connected to larger social structures. His theory, set out in subsection 3.3, encourages researchers to understand the hidden motives in daily activities of interviewees more deeply. Subsection 3.4, details the concrete methods and practical

arrangements made by the author.

### 3.1 Analysing Difference

Cichowski and Cliquennois are looking at the same phenomenon, namely the increasing involvement of NGOs in the judicial process of the ECtHR. However, their views are drastically different. To what extent can one argue that NGOs' participation in the judicial process fosters the re-distributive capacity of the ECtHR? On the contrary, to what extent can one insist that the participation of NGOs does not contribute much to improving the state of human rights protection in most places?

In the author's view, this difference seems to have been caused by the difference in their methodologies. Generally, legal scholars dealing with human rights law, such as Cichowski, mainly uses case analysis, which tends to focus on successful cases rather than unsuccessful ones (as it is difficult to search for the cases that were held inadmissible, for example). Cichowski and Loveday Hodson rely on interviews but only with activists, which again might create a certain bias in favour of NGOs.[71] What is missing from their micro-level analysis is how the aggregation of these small

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[71] Hodson(n59), Cichowski(n9)

‘successes’ and ‘failures’ of activists compose a whole picture of social dynamics surrounding the ECtHR.

By contrast, Cliquennois’s work focuses on the big picture. This is not to say his method was particularly inaccurate compared to other socio-legal scholars. Galanter’s work on One-Shotters and Repeat Players could also be regarded as theoretical rather than empirical, as he himself admits.[72] Similarly, most of the works by political scientists are based on economic or political analysis at the level of organisations rather than individuals. The problem here is the difficulty of substantiating the big picture by accumulating micro-level data. NGO activists working at well-reputed NGOs usually deem their activities meaningful and effective (otherwise they would not be working there). Furthermore, even if they might occasionally recognise structural problems in their activities, they very rarely speak of them, as it might give rise to ‘misunderstandings’ of their activities.

Both of these perspectives can be reflections on the same reality, but how can one capture a different picture from the previous two? One way is to complement the methods of legal scholars based on case analysis and interviews with activists. For

[72] Galanter(n11) 95

example, interviewing groups of people other than NGO activists may open up the possibility of critically examining the narratives by NGO activists. In addition to interviews, analysing documentary sources can also be a way to complement the data gained from interviews, as data from interviews are inevitably affected by the participation of researchers in the field.

The remaining problem is how one can interpret data gained from various methods coherently. For example, if the Court lawyers tell a different story from that of NGO activists, how can one fill that gap? Does the gap mean that either of two groups is lying? To answer this question, the author follows the lead of Anthony Giddens, which seems to give a valuable perspective on the methodology in such a case. Thus, the following two subsections elaborate more on (a) diversification of samples and (b) the methodology of Giddens.

### 3.2 Diversification of Samples

The first step towards reconciling the contradictory views on the roles of NGOs is to observe NGOs' activities from the different angles adopted by various players. Specifically, it will be instructive to look at the behaviour of a variety of players, including NGOs that have *different* strategies to each other as well as human rights

lawyers and the Court officials. A common problem with the past research is that it tends to treat numerous NGOs in a similar way. In contrast, Hodson points out that there are various types of NGOs before the ECtHR, thereby recognising the different conditions under which each type of NGO is operating.[73] This paper starts from the recognition that there are different types of NGOs before the ECtHR, and their strategic goals and resources to achieve them are also different. The author also considers the autonomy and strategy of the Court itself. Certainly, NGOs might have influenced the Court, but it is simultaneously very likely that the Court's rules and policies influence the strategies of NGOs. As NGOs try to use the ECtHR, the ECtHR also try to use NGOs—it is probable that there is interdependence, rather than active NGOs on the one hand and a passive Court on the other hand.

### 3.3 Anthony Giddens: Bridging Agents and Structure

The second step in the methodology is to interpret the various perspectives in a coherent manner. To do so, the author utilises a sociological theory drawn from an analytical framework suggested by Anthony Giddens. In essence, Giddens tried to

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[73] Hodson (n59)

reconcile two different means of explanation in sociology: a subjective-individualistic and an objective-constructionist views.[74] While this contrast between the two originally derives from Weberian and Durkheimian perspectives, according to Giddens, the former approach, which tries to pursue subjective meanings of individuals' actions and interpret the world from the micro-perspective, often misses larger patterns and structures.[75] On the other hand, the latter approach exclusively focusing on social structures is also insufficient because it treats individual actors as mere puppets of larger structures, when in reality 'all social actors know a great deal about the conditions and consequences of what they do in their day-to-day lives.'[76]

Giddens tries to explain this gap by elaborating three levels of consciousness in human cognition; 'discursive consciousness', 'practical consciousness', and 'unconscious motives'.[77] The uniqueness of his theory is that he established another category in the middle of consciousness and unconsciousness. Namely, practical

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[74] Giddens (n18) Introduction

[75] Emile Durkheim, The Rules of Sociological Method. (The Free Press, 1982) Chapter 2: Max Weber, Economy and Society: An Outline of Interpretive Sociology. Vol. 1. (University of California Press, 1978) Chapter 8

[76] Giddens(n18) 281

[77] Ibid, Chapter 1

consciousness is something controlling one's daily routine almost automatically by 'psychologically…minimizing … unconscious sources of anxiety'[78], which is different from our expressed, discursive consciousness. The point is that people can usually explain the meanings of their everyday activities if asked (discursive consciousness), but then their expressed rationalisation/reflexive self-monitoring may be different from their day-to-day motives (practical consciousness).

Social structures, he argues, emerge as a consequence of the aggregation of agents' daily routines based on practical consciousness. For example, Giddens takes language as an example of structure.[79] Language keeps its integrity because everyone uses it to achieve their different purposes, observing grammatical rules, as a part of routine. But at the same time, this routine reproduces unassailable rules regarding the use of a certain language. The users of language do not always intend to protect the integrity of, for example, the English or Japanese language, but unintended consequences of their actions based on their daily routines consolidate already existing social structures (in this case, languages). 'The knowledgeability of human actors is always bounded on the

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[78] Ibid, 282

[79] Ibid, Chapter 1

one hand by the unconscious and on the other by unacknowledged conditions/unintended consequences of action', which makes the consequences of their actions quite different from their intentions at the discursive level.

At the same time, these routines are not a product of unconsciousness. It is true that social structures strongly constrain individuals to the extent agents feel that they are external to them, but the structures are also being utilized by agents to maximise their gains. One has to learn and observe various verbal rules to make oneself understood in one language, but one simultaneously seeks to make the best use of that language to express oneself. People make efforts to speak languages fluently and eloquently, so as to be seen as well-educated. In this sense, Giddens argued that structures are both 'rules and resources' for agents.[80]

Giddens's theory is highly abstract, but his message seems to be clear regarding methodology. To see the interaction between individuals and structures, or micro and macro, research needs to focus on the routines behind the expressed world. In the context of this paper, the author will make an attempt to fill the gap between the micro-level view of the scholars of human rights law and the macro-level outlook of social

[80] Ibid, 281

scientists by finding out agents' routines, and 'unintended consequences' based on them. We will recall that the research question driving this paper examines the mechanism working between NGOs and the ECtHR, especially regarding NGOs' active interventions. In light of Gidden's theory, that research question can be restated more precisely as follows: 'What are the intentions of different NGOs at the discursive level and at the routine level respectively?' and 'Based on the actual (routine-level) intentions of NGOs, what mechanism is at work behind the active interventions of NGOs in the ECtHR?'

### 3.4 Methods

This paper has described the two significant methodological differences between this thesis and past research: the diversification of samples and the emphasis on the actual routines of actors. The section below expands on various practical dimensions of these methodological decisions.

#### 3.4.1 Choice of Methods

Giddens argues that ethnography is the most suitable method to find out routines, but

he does not exclude other methods.[81]Although most qualitative research in socio-legal studies uses interviews, one needs to apply careful consideration before using them in the case of this study. [82] Firstly, there is obviously a risk of conscious manipulation by interviewees. Most activists, especially from large human rights organisations, are well-trained lawyers or academics with solid educational backgrounds. As activists expect researchers to advertise their activities, it is rather obvious that they may not refer to something they do not like to talk about. Secondly, even if an interviewer builds a good relationship with interviewees and they speak to the researcher frankly, it may still be difficult to investigate their routine, as interviewees are often not interested in their day-to-day activities, but rather want to talk about their ambitious projects. Thirdly, as a consequence, activists themselves are usually not fully aware of the 'unintended consequences' or structural problems surrounding their actions. Of course, they may partially recognise structural problems, but the extent of these problems and their immediate relevance to their activities may not always be clear to them.

[81] Ibid, Chapter 6

[82] Concerning general points regarding the use of interviews: David Silverman, 'How Was It for You? The Interview Society and the Irresistible Rise of the (poorly Analyzed) Interview' (2017) 17(2) Qualitative Research, 144; Paul Atkinson and David Silverman, 'Kundera's Immortality: The Interview Society and the Invention of the Self'(1997) 3(3) Qualitative Inquiry 304

Whilst one recognises that interviews are not a perfect choice from a methodological point of view, there are reasons why their use is partly inevitable in this research. One reason is the difficulty of learning informal rules and customs through document analysis. In order to learn about informalities or daily practices, interviews or ethnographic work are absolutely necessary. Perhaps ethnographic work is more desirable to spotlight hidden assumptions and embedded daily practices, but it requires a degree of time and resources that is in practice incompatible with a one-year MPhil degree.

In addition to interviews, document analysis was used. One of the merits of this analysis is that documents are not produced for a specific research project, but are intended to serve their own purposes. In other words, researchers do not have to care about their intervention producing unintended changes in a field. Of course, documents are biased in their own ways, but these biases are different from those concerning interviews. In this research, the author mainly analyses amicus curiae briefs submitted by NGOs and corresponding judgements. This material illuminates the gap between interviewees' narratives and the reality.

### 3.4.2 Sampling

Since the research question of this paper regards the role of NGOs in enhancing the re-distributive capacity of the ECtHR, the main target of interviews is NGO activists. However, as mentioned above, the author interviewed different groups of people, including human rights lawyers, and the officials of the ECtHR. Within limited resources, the author assumed that it would be more beneficial to diversify the types of sample groups than multiply the number of interviewees from similar backgrounds. This prevents the author from reaching any decisive conclusions, but may be useful to explore various possibilities that are unlikely to be discovered if only one group had been interviewed.

NGO activists, human rights lawyers and Court officials were selected for different reasons. Firstly, the author focused on two different groups of NGOs, which are transnational and large NGOs (TNGOs) and small-to-middle sized NGOs (SNGOs); these two different groups, though being ideal types, seem to have different orientations. This distinction is based on the author's preliminary analysis based on Cichowski and Chrun's database about civil society groups' participation in the judicial process of the ECtHR.[83]

[83] Rachel Cichowski & Elizabeth Chrun 'European Court of Human Rights Database (ECHRdb)'

According to this database, out of 15158 overall cases from 1961 to 2014, civil society groups intervened in 2019 cases. This number encompasses cases in which civil society groups made third-party interventions, as well as cases in which civil society groups represented applicants directly. Out of these cases, participation by 'Rights organization' accounts for 984, while 'business' and 'government' make up 595 and 539 respectively. In the 'Rights organisation' category, 350 are third-party interventions and the rest are largely direct representation of applicants.

In the author's preliminary data analysis, the fifteen most successful organisations (in terms of the number of cases in which states were held to have violated the rights

| Top successful NGOs before the ECtHR(1960-2014) | | | | | |
|---|---|---|---|---|---|
| Name | times | location | respondent state | DR | TPI |
| Stichting Russian Justice Initiative | 130 | Netherland | Russia | 130 | 0 |
| Memorial Human Rights Centre | 79 | Russia(2021 close) | Russia | 77 | 2 |
| European Human Rights Advocacy Centre | 76 | UK | Russia etc | 73 | 3 |
| Lawyers for Human Rights | 56 | Moldova | Moldova | 56 | 0 |
| Moscow International Protection Centre | 49 | Russia | Russia | 49 | 0 |
| Kurdish Human Rights Project | 47 | UK | Turkey etc | 47 | 0 |
| Cyprus government | 41 | Cyprus | Turkey | 0 | 41 |
| Liberty | 41 | UK | UK | 21 | 20 |
| AIRE Centre | 38 | UK | diverse | 20 | 18 |
| European Roma Rights Center | 30 | Belgium | diverse | 22 | 8 |
| Amnesty International | 26 | UK etc | diverse | 0 | 26 |
| Helsinki Foundation for Human Rights (Warsaw) | 24 | Poland | Poland etc | 6 | 18 |
| Interights | 24 | UK(2014 close) | diverse | 5 | 19 |
| Greek Helsinki Monitor | 23 | Greece | Greece | 18 | 5 |

(2017) Version 1.0 Release <http://depts.washington.edu/echrdb/>. The data is generally based on the ECtHR's case-searching system called HUDOC, and they calculated the number of civil society groups' interventions, mainly using a word search function of the database, searching by relevant provisions as well as words such as 'third-party interventions' etc.

stipulated in ECHR) are selected and categorized by their modes of participation: direct representation of applicants or third-party interventions.[84]

As the result shows, many NGOs do not employ these two methods randomly; rather, they clearly seem to prefer one choice over the other depending on the size of the groups. Those two groups of NGOs, one focusing on third-party intervention and the other focusing on direct representation of applicants, coincidently fit the typology of TNGOs and SNGOs. To the former group typically belong large human rights organisations such as Amnesty International, Human Rights Watch and the International Commission of Jurists (though HRW and ICJ are not among the most successful 15 organisations, they also focus on third-party intervention). They usually have a transnational bureaucracy and independent sources of funding from individual donors. Their activities are not limited either regionally or thematically. To the latter group belong small to middle-sized organisations with limited funding and human resources such as the European Roma Rights Centre and many other national NGOs (the table shows there are significant number of Repeat Players regarding cases against Russia

[84] The chart is based on Cichowski and Chrun (ibid). Direct representation (DR) is providing lawyers for applicants, whereas third-party intervention (TPI) is to submit a written comment to the Court regarding legal issues concerning the specific case. Details of these two means of participation will be explained in the next section.

and Turkey). They usually consist of lawyers, and focus on specific regions and/or themes. It goes without saying that these two groups are just ideal types, and there are entities that do not wholly fit this categorisation such as Interights (transnational but middle-sized). However, the author expects that the focus on these two groups can provide a sufficiently accurate framework to investigate the potentially different roles of various NGOs before the ECtHR. Additionally, while it was difficult for the author to interview activists in a way that systematically corresponded to the categories of TNGOs and SNGOs as in the table above, the author expects such deviation of sampling from the statistical framework will be kept to a minimum and will not significantly affect the argument of this thesis.

As to the Court officials, the reason to interview them is quite simple. As NGOs (at least try to) communicate with the Court to influence judicial outcomes, it is necessary to investigate how their communications are perceived and how they are treated inside the Court. Of course, other researchers have identified the necessity of understanding the Court's internal mechanism, but it is often judges whom they have tried to interview.[85] This paper also recognises the role of judges (the author conducted

[85] For example, though the author fully admits the contribution of this work: Helen Keller, Magdalena Forowicz and Lorenz Engi, Friendly Settlements before the European Court of Human Rights: Theory and Practice (OUP, 2010) Annexes 1 Interviews

interviews with them), but it places greater emphasis on the Registry lawyers inside the Court. The ECtHR has 46 judges from each member state, but there are more than 300 lawyers supporting them. The Court is a large bureaucracy; lawyers, especially so-called 'senior lawyers' who often work in one section over a few decades, have a huge influence over the day-to-day business of the Court.[86] Judges might be eloquent in advertising the Court's political position, but what this research would like to understand is not the official messages from the Court, but the reality of the Court's business processing thousands of cases every year.

With regard to human rights lawyers, the reason for interviewing them is similar to that for interviewing activists from SNGOs. The general intention is to articulate the difference between third-party interventions, which TNGOs usually use, and direct representation of applicants. It is also probable that independent human rights lawyers, who often work for victims on a pro-bono basis and have a good salary from law firms,

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[86] More specifically, there are two types of lawyers in the ECtHR. One is so-called 'senior lawyers', and the other is 'junior lawyers'. According to an informant, while senior lawyers have a permanent employment contract, junior lawyers have a two-year contract (renewable only once). As the Court is now under massive austerity pressure, it is extremely difficult from junior to change their positions to senior. Seniors have various institutionalised and uninstitutionalised prerogatives: for example, while juniors are mainly tasked to deal with filtering, seniors mainly work on merits of cases. These prerogatives potentially create a huge imbalance of power inside the Court. For detail, see: Tommaso Soave, The Everyday Makers of International Law: From Great Halls to Back Rooms (Cambridge University Press 2022) Chapter 5

see the strategies of NGOs differently. [87]

Finally, as to the means of sampling, snowball sampling is utilised. The author recognises that snowball sampling is generally considered to be a last resort in research due to the significant risk of biases, but other means of sampling such as purpose sampling were difficult to adopt in the case of this thesis. Contacting TNGOs in particular was a challenge. It seems that having read the research proposal of this study, they were very reluctant to cooperate. Initially, the author sent introductory emails and LinkedIn messages requesting to participate in the project with the overview of the study to 11 activists from 5 major organisations, according to plan of purpose sampling, but there were only two replies. Even those two turned down the request after learning of the content of this study. Fortunately, one of the supervisor's personal connections gave the opportunity of interviewing a renowned activist from a very large NGO, and the author had to rely on snowball sampling starting from him. On the other hand, independent human rights lawyers (including academics) and SNGOs were more open to the author's proposal; 8 emails attained 4 replies and 3 of them accepted the

[87] On an additional note, these three categories—activists, Registry lawyers, and human rights lawyers—are not immovable categories. Most interviewees had the experience of working in a different role from their current one.

interview. Lastly, the Registry lawyers were another extremely closed group. As a result, the only way to gain access to them was to use the author's personal network from his previous position in the Japanese government. As this way utilised a 'semi-official' route, the response rate was remarkably high (contacted 13 people and 11 accepted). However, consequently, the proportion of interviewees from specific sections inside the Registry (such as the Turkish and Romanian sections) becomes large. Overall, the expected bias in the participants gathered by this method may be significantly large, and this bias has to be taken into account when interpreting the results.

### 3.4.3 Questions to Interviewees and Coding

As the author conducted interviews with different groups of people, it was necessary to prepare different sets of questions for different participant groups. As the interviews were semi-structured, the exact wording of these questions was not completely the same.[88]

The questions for NGO activists were straightforward. They were asked about their roles in their organisations, their career as activists, the involvement of their

[88] The author prepared a rough interview aide memoire for each interview, but given the space limitation, and because the contents are largely the same, he decided to put only the essence and omit the memo itself.

organisations in the judicial process of the ECtHR (third-party interventions or representation of applicants), relative importance of the ECtHR for their organisations), the difference between third-party interventions and representations, their goals in participating in the judicial process of the EctHR, and strategies to achieve them. In particular, interviewees were asked not only about their 'discursive' views, but also about internal processes regarding decision-making of their organisations. This is to learn their 'routines' in their daily activities in an indirect way.

For human rights lawyers, the interview was structured to learn about NGO's activities from the activists' viewpoints. Especially, as human rights lawyers rarely do third-party interventions, they were asked about the difference between third-party interventions and the representation of applicants. At the same time, the author asked how they work as human right lawyers (e.g., pro-bono activity, request from other organisations, etc).

As for the Court officials, they were asked about their works in the Registry, their views regarding NGOs' activities before the Court, the difference between third-party interventions and representation, and the Registry's internal process to deal with the applications and NGOs' submissions. Again, this aims at highlighting their routines in their internal processes to process applications and submissions.

Each interview was recorded to the author's field note and as a video where there was consent. Video is usually transcribed using the transcription function of Microsoft Word and the author edited these automated transcripts afterwards looking at the handwritten notebook. Important remarks, such as parts directly answering the author's questions or repeated/stressed by interviewees, were highlighted at this stage. Particularly, following the framework of Giddens, the author focused on the gap between their 'discursive' views about how they influence the Court, and their routines. The author then attempted to map out these gaps and identify a mechanism at work in the ECtHR which could provide an explanation for their existence and allow a coherent interpretation of the material gathered as a whole.

### 3.4.4 Practical Arrangements

The author conducted 16 formal online interviews and 5 informal talks. Informal talks included short (10-15 minutes) talks in a casual manner, 1-hour lunch talks, and a 1-hour online talk without any recording as per the participant's request. While this type of short talk should not be treated in the same way as formal 'interviews', the author still made reference to them because the content of some of these talks was particularly valuable. This is due to the fact that high-rank court officials and NGO executives were

extremely difficult to formally interview, and these talks were the only way that the author could collect views and comments from them.

The participants consist of 7 NGO activists, 11 ECtHR officials (including judges, the Registry lawyers and an intern), and 3 human rights lawyers. Notably, several interviewees had experience working in more than two organisations. For example, 2 lawyers from the Court Registry and 1 human rights lawyer were also former NGO activists. The author was able to learn about their experience as NGO activists as well as their current work as Court officials/human rights lawyers. In particular, the reasons why they left NGOs gave precious insights into the realities of NGOs' activities. As for the NGOs, out of 10 activists consisting of current and former NGO activists, 4 activists were from 3 different large transnational organisations. The remaining 6 were from small organisations; 4 were from thematic but transnational organisations and 2 were from country-specific organisations.

Due to time constraint and difficulties of access, the number of participants was relatively small, which may cause some biases in the data in conjunction with snowball sampling. Given the closed nature of NGO activists, some narratives reached 'saturation' status—in which researchers do not hear new narratives, and begin to hear similar narratives over and over again—but other narratives did not. That means the

credibility of all the findings in this research is not equal. Still, the overall body of evidence remains sufficient to support an exploratory work, rather than definitive conclusions.

Additionally, 26 amicus curiae briefs were analysed, along with corresponding judgments by the ECtHR, and 8 documents drafted by Amnesty International about the Court's reform process in the 2000s. The author initially made attempts to gain access to the Court's archives, but this was unsuccessful due to the ongoing pandemic. Instead, the author obtained amicus briefs mainly from the NGO activists whom he interviewed and their webpages. This dependence on NGOs may also cause a bias in sampling. Additionally, the author obtained documentary material concerning Amnesty International's involvement in the Court's reform process in the 2000s by performing archival work at The Modern Records Centre, University of Warwick. A number of suggestions made by Amnesty as well as other TNGOs about the reform of the ECtHR gave a precious insight into 'diplomatic' relationship between the Court and TNGOs. That said, given the limited space, the author will not expressly introduce the content of this material, as it will slightly diverge from the main scope of this paper. All the judgements relied on in this paper are available at HUDOC (the Court's website).

### 3.4.5 Research Ethics

The Statement of Principles of Ethical Research Practice by the UK Socio-Legal Studies Association (SLSA) lists four major areas of obligations for socio-legal researchers: obligations to the academic and wider communities such as research integrity, obligations to colleagues such as appropriate credits, obligations to subjects and participants such as anonymity and informed consent, and social obligations such as the relationship with donors. Research integrity, informed consent, and protection of anonymity are particularly relevant in the case of this research.

With regard to academic integrity, it goes without saying that plagiarisms or fabrication should absolutely be avoided, but the issue of data traceability and the risk of confusing the author's interpretation with the research subject's remark in the field note still exists. To avoid this, the author transcribed or made records in a clear manner within three days after the interview. Concerning informed consent and anonymity, the author sent a written consent form to interviewees beforehand and confirmed orally whether interviewees are happy to (a) participate in the project and (b) recording the interview. The author also notified interviewees that they had the right to withdraw/request him to show/edit transcripts, but there were no such requests. Finally, the author made every effort to keep the anonymity of the participants in this paper. As

the community of human rights NGOs is quite small, names of participants, name of organisations, and other identifiers which may enable readers to locate individuals were carefully erased. These considerations were prerequisite to conduct this research, and formally, the project had been approved by the Central University Research Ethics Committee in January 2022 before starting fieldwork.

More fundamentally, research ethics is not a matter limited to these formal considerations. Academic research inevitably has an aspect of generalisation. While interviewees talk about their unique individual experiences, researchers often have to put these materials into theoretical frameworks to some extent, thereby discarding the uniqueness of each experience. The author tried his best to spotlight the uniqueness of each participant's experience and avoid overgeneralisation, but this is a matter which readers should judge.

## 4. The Role of NGOs for the Court

This section introduces the findings about the role of NGOs according to the officials in the ECtHR and the role in reality. Subsections 4.1 and 4.2 analyse explicit rules regarding third-party interventions by NGOs and their origins, and 4.3 spotlights the huge discretionary power of the Court in admitting interventions, despite its official openness to civil society. Subsections 4.4 and 4.5 present the informal rules that the Court has imposed on NGOs and the role that it expects them to play. 4.6 briefly touches on the constraints faced by NGOs that want to represent applicants rather than submit third-party interventions. 4.7 concludes the whole section by analysing the motives of Registry lawyers' behaviour.

### 4.1 Explicit Rules

The data from the interviews has shown that there are some important 'rules', which NGOs abide by in the judicial process of the Court, regardless of third-party intervention or direct representation. These rules are not always explicit. While some of them are written in the Convention and/or the Rules of Court ('Rules'), other essential rules simply exist as a form of specific interpretation of explicit rules, or even as established practices, which might not be immediately noticeable for newcomers. In this

subsection, explicit rules regarding third-party interventions are explained, as they play a critical role in NGOs determining their strategies. Subsection 4.1.1 will deal with the Convention and 4.1.2 will deal with the Rules of Court. It is argued that the Court exercises very wide discretion as to how they treat NGOs in the formal system.

4.1.1 The Convention

The fundamental rules of the ECtHR are defined in the Convention, and more specific administrative rules are stipulated in the Rules of Court, which can be adopted and amended at the Plenary Court (a special session of the Court in which all the judges attend) according to Article 25 of the Convention. Today, the rules regarding third-party interventions are stipulated in Article 36 of the Convention, and its content is further specified in Rule 44 of the Rules. The Convention states as follows:

> ARTICLE 36 *(extraction)*
>
> Third party intervention
>
> 1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

> 2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings. (TBC)

This article has three subsections, but the most frequently debated and invoked is certainly subsection (2). This is the subsection most civil society groups (and even some of the member states) rely on when they try to submit their views to the Court. However, it is noteworthy that this provision does not itself stipulate anything about civil society groups making submissions by their own initiatives. Rather, it only states that the President of the Court can invite any person (mainly external experts) on her/his own initiative. This is in a sense symbolic of the ambiguous legal status of third-party interventions; intervention is after all at the discretion of the Court, rather than a right enshrined in the Convention. This contrast is very clear when one compares (2) with (1), which states that member states 'one of whose nationals is an applicant shall have the *right*' to intervene.

4.1.2 The Rules of Court

A more concrete legal foundation for third-party interventions can be found in the Rules of Court. Rule 44 has expanded the scope of Article 36 in a subtle manner, thus creating a venue for civil society groups to join the judicial process on their own initiative.

Rule 44 – Third-party intervention *(extraction)*

3. (a) Once notice of an application has been given to the respondent Contracting Party under Rules 51 § 1 or 54 § 2 (b), the President of the Chamber may, in the interests of the proper administration of justice, as provided in Article 36 § 2 of the Convention, invite, or grant leave to, any Contracting Party which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing.

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

Under this rule, NGOs seem to have *de facto* rights to request the President's permission for submitting written comments. However, these provisions beg various questions. Under which circumstances, for example, are third-parties granted leave to submit written comments? Are there any informal criteria? If the Court examines whether the request to intervene is 'duly reasoned', what does it mean in this context? What sort of documents should be sent as requests, and as final submissions?

All these questions are left unanswered. This lack of clear rules means that the system of third-party intervention is far from transparent and gives a massive advantage to repeat players. If someone is working for a small organisation in a smaller Eastern European state, perhaps he/she will have to ask more experienced partner organisations in Western Europe for extensive advice on the practicalities of third-party interventions, before actually making any legal arguments. The procedural barrier is very high in this respect.

Particularly, as to the content of third-party interventions, the formal rules do not mention any clear standards. The Convention only defines a very abstract standard referring to 'the interests of the proper administration of justice'. Does this lack of explicit standard mean that any request for third-party intervention with reasonable

content is acceptable?

## 4.2 Historical Origins

The Court's discretionary power potentially prevents NGOs' participation, but with regard to this ambiguity, researchers have insisted that the system of third-party interventions has actually empowered NGOs as well as facilitated the development of the jurisprudence of the ECtHR. To understand this claim, one must look at the history of third-party intervention.

Looking back at the history of the ECtHR, one may notice that the omission of explicit standards is seen as a product of NGOs' victory over member states. Indeed, when the practice of third-party intervention was formed in the early 1980s, NGOs were not given a free hand in any respect. It was only in 1979 that the government of the UK succeeded in submitting an observation as the first third-party. Subsequently, in 1981, the British Trades Union Congress was granted leave to submit a written 'memorial' firstly as a non-governmental organisation according to Article 38 of the Rules at that time, which stipulates that the Court can hear 'as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it [the Chamber]

in the carrying out of its task'.[89] The judgement of that case (Young James and Webster v the United Kingdom) states as follows:

> 8. …the Court …decided proprio motu, in pursuance of Rule 38 par. 1 of the Rules of Court, that during the oral proceedings it would hear, on certain questions of fact (including English law and practice) and for the purpose of information, a representative of the British Trades Union Congress.
>
> 10. The Delegates of the Commission filed various documents during the hearings, including one entitled "memorial (submissions on fact and law) of the Trades Union Congress". The Court decided that it would take the latter document into account as regards any factual information, but not any arguments of law, which it contained.[90]

It is clear from these statements that the Court only allowed the Trades Union Congress to submit factual information, but not legal arguments. Later, in 1983, Protocol 8 was

[89] Laura Van den Eynde, 'Amicus Curiae: European Court of Human Rights (ECtHR)' in The Max Planck Encyclopedias of International Law (OUP, 2019)

[90] [1981] ECHR App no 7601/76 and 7806/77

amended in favour of NGOs and the following paragraph (which is the proto-type of the current article 44) was adopted. The difference from the current Rules is underlined.

> [t]he President may, in the interest of proper administration of justice, invite or grant leave to any Contracting State which is not a Party to the proceedings to submit written comments within a time-limit and on issues which he shall specify. He may also extend such an invitation or grant such a leave to any person concerned other than the applicant (Rule 37 (2) Revised Rules of Court).

This was a huge step forward in the sense that third-party intervention was formally institutionalised, but the limitation was that third-parties could write only ‘on issues which he [the President] shall specify.’ When one compares this historical development to present-day conditions in light of the current Rules, it is natural that scholars understand this as a history of ‘the expansion of participation’ by civil society groups, as Cichowski rightly did. Indeed, Protocol 11 removed the substantive restriction ‘on issues which he shall specify’ from Article 37(2) and left room for future interpretation. As long as one looks at ‘law in books’, this is nothing less than a victory for NGOs.

Indeed, the Court has maintained a welcoming stance towards third-party

interventions from NGOs since then. As one of the Court's lawyers put it, 'the Court has always had a comparatively liberal policy as regards granting leave to third party interveners.' Van den Eynde also finds that the Court rarely rejects submissions: 'The ECtHR has demonstrated that today it is particularly receptive to amicus participation and that the large majority of requests to intervene receive a positive answer.' The Court proactively announces its openness to NGOs as well. In *Magyar v Hungary*, the Court applauded the role of NGOs as 'a public watchdog'.

> The Court has also acknowledged that the function of creating various platforms for public debate is not limited to the press but may also be exercised by, among others, non-governmental organisations, whose activities are an essential element of informed public debate. The Court has accepted that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press and may be characterised as a social "watchdog" warranting similar protection under the Convention as that afforded to the press.[91]

[91] Magyar Helsinki Bizottsag v. Hungary (Application no. 18030/11), para166

It is therefore clear that the Court welcomes NGOs and their intervention.[92]

4.3 Discretionary Power of the Court

4.3.1 Substantive Aspect

However, even after the Rule ceased to specify the contents of third-party interventions, the Court and NGOs do not stand on an equal footing. The disappearance of express rules opened up a tug-of-war contest between NGOs and Strasbourg, and one should not forget that the Court continues to have a high degree of discretion over the whole process. Importantly, the fact that the Court stated that it rarely rejected submissions from NGOs does not mean that NGOs can freely draft their submissions. NGOs must still work 'in the shadow of Strasbourg' as the Court potentially has the power to decline their requests, and there is some evidence from the interviews that the Court actually does decline some requests in certain situations. Recently, there has been a tendency for the Court to only accept interventions with specific kinds of content. A young lawyer in the Court, who was formerly working in a small international NGO,

[92] Indeed, unlike in some national courts, there is no cost in pursuing an intervention before the ECtHR; JUSTICE and Freshfields Bruckhaus Deringer LLP, 'To Assist the Court: Third Party Interventions in the Public Interest' (2016) 27

recalled a case where third-party intervention was rejected regardless of its good quality:

> It [rejecting third-party interventions] will be more and more common because we are changing the procedure and for cases where there is kind of a well-established case law, they will be rejected…. You know the court is very hierarchical. We have lots of supervisors, and they said 'yes, this information is useful, but it is unlikely to modify the outcome of the case so we will reject it'…It was a very well-reasoned third party intervention request. It had nothing to do with the request itself.

As the interviewee puts it, the recent tendency is that even if the third-party intervention itself is good but does not fit the way in which the Court wants to argue, it is likely to be rejected.

More fundamentally, it goes without saying that the Court has full discretion over how to use (or not to use) submitted papers. The Court does not have any obligation to consider or mention third-party interventions in its judgments. The customs of the Court are to mention the name of the NGOs which have been granted leave to intervene and

the summary of the main arguments of their briefs, but this is totally dependent on the Court's volition. Indeed, facing the recent increase of third-party interventions, one lawyer working at the Registry confesses that they currently do not have to refer to the third-party interventions at all as a result of the recent revision of the Court's internal procedure.[93] They continued; 'in some type of judgments, we no longer include any information on the third-party request'. The Court had at one time ensured a place in its judgments for summarizing third-party interventions regardless of their content, but one can infer that this custom is now being quietly eroded.

Even when the Court expressly summarises third-party interventions in its judgements, these summaries are often carefully crafted to only illustrate the specific arguments for which the Court would like to gain support. Otherwise, the summaries will be extremely short—for example, in the case of *Savran v Denmark*, Amnesty International's 10-page submission was summarised in just one paragraph of 68 words, perhaps because 'the direction of the argument it wanted to take was different from that of the Court', according to an activist from Amnesty International.[94]

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[93] Although the author asked for the details, the interviewee cannot disclose them due to the confidentiality.

[94] Savran v. Denmark (App no. 57467/15), para. 119

4.3.2 Procedural Aspect

It should also be pointed out that the Court's procedural discretion in procedural aspects regarding third-party interventions is a huge potential burden for NGOs. In particular, deadlines are repeatedly referred to in the Rules. The deadline for requests to intervene is usually 'not later than twelve weeks after notice of the application has been given to the respondent Contracting Party'[95], but this timeline is tighter than it looks. The Court does not advertise it when it sends a specific application to the Respondent state; communicated cases are just uploaded to the specific page of the Court's website (which is difficult to reach for people who do not know where that page is). Actually, many activists raised this burden of monitoring as one of the main reasons why their organisations cannot have strategic visions in intervening in the ECtHR's process. One of them pointed out this difficulty. 'We'd like to [monitor all cases before the ECtHR], but there are just far too many cases…it's just impossible to be aware of [them] all. Sometimes you become aware of something when it's too late.'

Even if the organisation is fortunate enough to find a relevant summary immediately

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[95] Rule 44 3(b) of RoC

or has enough resources to monitor the Court's website every day, the contents of these summaries are usually quite modest, so activists must devote a certain amount of time and resources to gain more information on the specific case in which they want to intervene. A few activists complained about the summaries of communicated cases published by the Court becoming increasingly shorter and sparser. This impression is not restricted only to activists. One of the internship students at the ECtHR also confirmed that the summaries seemed to have been becoming shorter due to considerations for efficiency over these years.

Additionally, these deadlines are largely at the President's disposal. Rule 44 reiterates the President's discretionary power both in para. 3 (b), which states 'another time-limit may be fixed by the President of the Chamber for exceptional reasons', and para. 5, which says 'any invitation or grant of leave referred to in paragraph 3 (a) of this Rule shall be subject to any conditions, including time-limits, set by the President of the Chamber.'

The final point is about the length of third-party interventions. Again, there are no explicit rules here, but conventionally, submissions are usually limited to ten pages by the President of the Court, and in exceptional circumstances to twenty pages. Activists' views vary regarding how seriously this constraint matters, but this restriction on the

length surely hinders NGOs from writing information-oriented papers.

4.4 Existence of Informal 'Rules'

Based on its discretionary powers, even following the removal of explicit restrictions on the contents of written submissions, the Court has repeatedly announced its preference for third-party interventions with specific contents. Indeed, the lawyers working there often call these preferences 'rules'. For example, Paul Harvey, a UK lawyer in the Registry of the Court writes: 'The well-established *rule* is that a third-party intervener should not comment on the facts or merits of the case.'[96] Similarly, one of the senior lawyers at the ECtHR noted: 'As you know, there are *rules* for third-party interventions. This is written in the Rules of Court and they cannot comment on anything that they would wish to comment.'

There is no such rule written in the Rules, but it is also unlikely that one of the senior lawyers with a twenty-year career in the Court misunderstands it. The author interprets this phenomenon not just as a misunderstanding but as something that exposes the extent to which implicit rules are recognised as 'rules' among the Court officials. The

[96] Paul Harvey, 'Third Party Interventions Before The ECtHR: A Rough Guide'(Strasbourg Observers, 24 Feb 2015) < https://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/> accessed on 24 Feb 2023

interpretation of Article 44 in a way consistent with the *Young* case in 1980, which states that third-party intervention is allowed to comment 'only on factual points', seems still valid as an implicit 'rule'.

4.4.1 Prohibition from Referring to Facts and Merits

The Court's repeated position is that third-party intervention should not refer to the facts and merits of specific cases on behalf of the applicants, respondents, or the Court. Providing specific interpretation and application of the Convention is also deemed undesirable. Instead, the intervention can be useful if it provides the Court with specific background information and/or the knowledge it does not have, such as statistical data, scientific expertise, and the knowledge of domestic legislation or comparative law. These 'rules' seem pretty clear—all the seven Court officials the author has interviewed agreed on them.

While the formal justification of these 'rules' originates only from the President's discretion on third-party intervention, each rule has its own substantive rationale, the understanding of which is widespread amongst lawyers in the Court, as well as NGO activists. With regard to referring to specific facts and merits of cases, it is deemed undesirable for third-party interveners to expressly support one side of the litigation as

if they were a direct party. One of the Court lawyers stated:

> I think that precisely the role of third-party interventions is not to convince [the Court] about a violation or non-violation…. They are not supposed to comment on the facts because we already have it because the [applicant's] lawyer is there for this.

While some courts such as the US Federal Courts allow third parties to publicly take one side (i.e. third-party intervention as a form of lobbying), other courts such as the Inter-American Court of Human Rights define *amicus* as 'person or institution that is unrelated to the case and to the proceeding.' (i.e. third-party intervention as representation of public interest).[97] In this respect, the ECtHR's position occupies a middle ground between these two positions. Third party interveners can be related to the parties (such as trade unions), and can effectively support one side, but they are not allowed to have a say in the specific facts or outcome of the case. This position is the product of careful balancing between civil society groups and member states, which are

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[97] Astrid Wiik, Amicus Curiae Before International Courts and Tribunals (Nomos/Hart, 2018) 129

generally reluctant to expand the scope of participation (as third-party interveners usually support the applicants' side).[98]

The prohibition on referring to the facts of specific cases may be one of the strong constraints which make NGOs' submissions in support of applicants ineffective. One of the judges who participated in the research mentioned briefly: 'Justice only becomes clear when you see the fact. That's why third-party interventions are usually not persuasive.' But this criticism may be too harsh on NGOs; in addition to the general prohibition on referring to specific facts of the case, they usually have access neither to the case file nor to background information on the case. The only information they can formally have access to is the very short summary of the case, perhaps one or two paragraphs, which is on the Court's website.

#### 4.4.2 Undesirability of Providing Alternative Interpretations

The other point—the propriety of referring to the interpretation of the Convention—concerns the balance of power between the Court and civil society groups. In essence, the Court's position is simple—*legem novit curia*—it does not want civil society groups

[98] Ibid Chapter 4&5

to step into the jurisprudence of the Court. A lawyer working at the Council of Europe who used to be a renowned activist in a middle-sized human rights NGO pointed out:

> In many third-party interventions that I have seen recently …the intervenors explained to the Court its [the Court's] own case law. I mean… they do an analysis of the Courts' case law present it [as if] the court was not aware of its own jurisprudence. It's very strange but it's a very common mistake as far as I'm concerned.

One of the senior Court lawyers, recalling one specific case, also said: '[The NGO said] the Court must adopt a very flexible concept of victim status, but this was the main question for the Court [not for NGOs].' According to him, the purpose of third-party intervention is not to suggest alternative interpretations of the Convention from that of the Court, but just to provide background information. Paul Harvey's blog post, as mentioned in the previous subsection, is also revealing; he outrightly states that third-party interventions should be *useful* for the Court:

> It has been an unfortunate consequence of the increase in third party interventions

in recent years that not all such interventions have been …useful or …mindful of the purpose of third party interventions …

4.5 The Role of NGOs from the Court's Perspective

What the Court needs is the information or knowledge it does not otherwise have access to. The Court officials are not hesitant to recognise that the Court has limitations in gathering information, and needs some expert assistance with regard to matters of background facts. For example, this might include the national context specific to one member state, such as their judicial or political conventions. A senior lawyer stressed that it was important for the Court to understand whether there is any structural problem behind one specific incident; in that way, the Court can judge whether the application is just asking it to be a 'the court of the fourth instance' or pointing out a systemic problem. Similarly, one lawyer points out that the Court does not know 'law in action' in one country:

> We knew about the law [regarding intimate visits to prisons in the specific country] …so theoretically I [a visitor] could qualify for this [intimate visit]. There are conditions for me to qualify to have a visit, an intimate visit with my [the visitor's]

> wife [in the prison]. But in practice it doesn't work. It's a dead letter of the law, because in fact there are no rooms [for such a visit] because there is no tradition, because the prisons are not well-equipped.

Knowledge pertaining to domestic legislation is also highly valued. One of the judges reiterated the importance of factual information collected in a local language. When an application is made from a non-English/French speaking country, as it is an international court, judges do not have solid sources of information on the interpretations of domestic legislation or knowledge of domestic legal practices other than the inputs from the respondent state, which might be biased. The diversification of sources of information is vital for the Court.

Another senior lawyer expressed this sort of information as ‘some small jewels’, for example, something which:

> is based on FOIA requests, Freedom of Information Act. When you request for public information from some courts or from some authorities, ….this can be very useful in a case. And this is something that an international organisation won't do. It will be the national NGOs who can write local language [that submits these

> requests]. They know the institutions….I needed more information from the ground because we had already known the general information’.

Broadly speaking, comparative law is also included in ‘background information’. But its importance may be relatively low in comparison to other information, since lawyers in the Registry can also gather relevant decisions of member states, or relevant international standards from the UN bodies or other international organisations. Indeed, the Registry has a team dedicated to the research of comparative law. In other words, the information on comparative law, especially submitted by organisations which only search for the information in English, is sometimes a superfluous assistance to the Court that could also be done by its research assistants. As one senior lawyer mentioned:

> This [third-party intervention] enables the courts to work better and faster because otherwise we would have to do the research, whereas if you have a Human Rights Watch or Amnesty International, they already know and they have reports…

The evaluations of this sort of third-party interventions vary among the Court lawyers. While some give it a positive role as a resource saver, others are very critical of it:

> Really, there are NGOs who say [things] everyone knows … I'm like OK this is not an argument; you know it's useless. You see it in reports. Then it's copied in the information submitted before UN treaty bodies, or copied in some amicus curiae, but it's useless. It's not advocacy.

As one lawyer remarked, ‘they [third-party interventions] have to be very well researched because they are supposed to change jurisprudence, so I think it's quite hard.’

4.6 Direct Representation

The other main path for NGOs to be involved in the judicial process is to represent applicants before the Court. Notionally, it is also possible for NGOs to become applicants by themselves, but this rarely works due to the Court’s strict interpretation of its standing rule (unless NGOs themselves are the victim of human rights abuse, such as in the *Big Brother* case, or they are exceptionally admitted the status of an indirect victim in *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*). [99]

[99] Big Brother Watch and others v the United Kingdom (App. nos. 58170/13, 62322/14 and 24960/15) 25 May 2021: Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania (App. no. 47848/08) 17 July 2014

There is no such thing as rules exclusively for NGOs, but the general rules with regard to the application to the Court also apply to them when they represent applicants. This means that NGOs too, unlike third-party intervenors, can make whatever arguments they want—including regarding the facts and merits of the case as well as analysis of the Court's case law on behalf of applicants.

However, when choosing this path, civil society groups must also undergo the lengthy filtering process for applicants. Generally speaking, the application procedure to the ECtHR is notoriously difficult—it takes time and resources, and it is difficult to go through all the filtering processes to get a chamber judgement. Indeed, statistics show that over 90% of the applications are held inadmissible every year, most of which go to the single-judge formation as 'manifestly ill-founded' without any written reasoning. Even when they are held admissible, most of such cases are dealt with within the framework of WECL—Well Established Case Law—which is a 'fast track' to produce as many judgments as possible utilising half-automated texts, and does not lead to the creation of new precedents which NGOs may want.[100] As a few lawyers have acknowledged, the difference between chamber cases (which go to a chamber consisting

[100] A few officials from the Court Registry stated the introduction of automated text during the interview.

of 7 judges) and committee cases (which go to the 'fast track' processed by three judges) is very subtle, to the extent the selection seems almost arbitrary. As a result, there is a risk for NGOs that if they concentrate resources on one specific case, it is quite probable that the case simply goes to the Committee and does not lead to any new precedent, without any clear reasoning behind the decision.

Moreover, perhaps most importantly, the long processing time also becomes a constraint for NGOs, in conjunction with the Court's complex procedures. The ECtHR is also notorious for its long-processing time. Although the Court has discretion to prioritise some matters such as migrant cases or interim measures, it is quite common that one case takes five or six years after the application until it gets a final judgement, especially in the cases which are referred to the Grand Chamber. It goes without saying that this represents a massive investment for NGOs to allocate competent lawyer(s) to that specific case for several years, without any guarantee of success.

### 4.7 The Court's Focus on Efficiency

Rather unexpectedly, judges and lawyers in the Court are harsh on NGOs, whilst diplomatically showing friendly faces towards them. A senior lawyer in the Court confessed, 'Rarely third-party intervention is very relevant. It's important, but not an

essential part of the judicial process…all the information in third-party interventions is already known by the Court…permitting third-party intervention is just to add burden for the Court.' Another remarked, 'The civil society becomes an important factor of social process, but the judicial process doesn't change.' Of course, the views from the Court lawyers are diverse. Some have negative views on third-party interventions, while others have positive ones. But the perspective from which they viewed the question of third-party interventions was common to all of them, focusing on the question of whether the NGOs have the capacity to provide the information needed by the Court. The difference in opinions may be caused by how one evaluates this capacity, but the underlying consensus was that NGOs must be 'useful' for the Court, rather than representing views of the disadvantaged.

This expectation regarding the roles of NGOs does not exist in vacuum; rather, how the Court exercises its discretion is strongly affected by the existing propensities and orientations of the Court's officials. This subsection briefly touches on the author's findings concerning the possible background behind the Court officials' conservative propensities.

During the interviews, the author repeatedly heard that 'efficiency' is important to manage the everyday business of the Court. For example, when the author asked one of

the high executives of the Court Registry how the Court can resolve the dilemma between responding to or settling individual petitions and setting more general minimum standards, he immediately answered that the key was ‘efficiency’. In short, his idea was that the Court should pick up a very small number of cases which can lead to the setting of standards, and that the role of NGOs is to assist with this process of sorting and identifying appropriate cases.

Another senior lawyer, to whom I asked a general question about the role of NGOs, responded that while the Court recognised their importance, it was not permissible for NGOs to delay the process of the Court. This answer is particularly interesting in revealing that NGOs often delay the process of the Court and the Court particularly dislikes it. In past research as well, Van den Eynde points out; ‘According to an insider, when deciding whether to grant leave [for NGOs to intervene], the Court is ‘animated by the desire not to complicate or delay the process’ (Mahoney, 2005, 155) and never consults the parties, who have no right to respond to the request for intervention (Ronen and Naggan, 2013, 812).’ [101]

Van den Eynde’s study as well as the author’s interviews have revealed that the Court

[101] Van den Eynde (n90)

officials are reluctant to listen to civil society when they think it delays the process, while welcoming those interventions which contribute to 'efficiency'. It seems that 'efficiency' means the speedy processing cases, but what makes them prioritise this 'efficiency' over other considerations?

One easy—perhaps slightly facile—answer can be found when considering the relationship between the Court and member states. As some member states are almost 'hostile' to NGO's participation in the process[102], one informant pointed out that the Court could not take the risk of being regarded as partial to NGOs by delaying the process for their participation. This convenient explanation is often heard from the Court lawyers, but in light of the Court's strong autonomy and discretion over the whole process, this explanation is not necessarily convincing. Member states may be able to put pressure on the system from the outside, but in reality, even though pressure from member states certainly exists, it is difficult for them to dictate every subtle point inside the bureaucracy of the Court.

Another possible answer lies in the backgrounds of the Court officials. One might assume that the lawyers working at the Court are from human rights backgrounds, but

[102] A few interviewees pointed out the existence of such countries (especially in Eastern Europe).

actually ‘many of them are from business backgrounds.’ According to a few interviewees, more than half of the lawyers working in the Registry had worked as in-house lawyers or in commercial law firms, though this cannot be proven statistically. One young lawyer in the Court, who is from a small international NGO, said, ‘It's quite rare actually [for the Court to have lawyers with human rights backgrounds]. I am the only one with such a background in [my (Turkish)] division.’ Another lawyer at the Council of Europe who had been working in a human rights organisation, also referred to the scarcity of lawyers who understand human rights law in the Court and the Council. He explained:

> Many of my colleagues have no experience working in the human rights field…I mean obviously everybody will claim some allegiance to human rights but they do not have direct experience of looking into the human rights field.

It may be possible to say that the Court officials are more lawyers than human rights guardians. However, needless to say, these backgrounds do not explain everything. As most of the senior lawyers have worked in the Court for decades, their original backgrounds should not have a huge impact on their behaviour. Rather, the common

behaviour of prioritising ‘efficiency’ may point to the existence of an informal mechanism in the Court to ‘educate’ newcomers to accept the culture of ‘efficiency’ beyond each lawyer’s individual background. This pressure of ‘education’ seems to be particularly strong when senior lawyers, who have a permanent position, teach junior lawyers, who have signed two-year contracts.[103]

This mechanism of ‘education’ is primarily concerned with the filtering process, in which the Court deals with hundreds of cases every day, selecting cases deemed relevant and discarding the others. Generally speaking, while the budget of the Court has remained stable, the number of cases it must handle has more than doubled since the 2000s.[104] Under this constant pressure, the Court has experienced a number of reforms with the aim of quickly dealing with as many cases as possible.

The Court officials, especially senior lawyers, are generally quite confident in their filtering system. They are not sympathetic to the cases which are held inadmissible—as

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[103] With regard to the difference of these two employment types, see n84.

[104] The number of applications allocated to a judicial formation surged from 10500 in 2000 to 65800 in 2013 (45500 in 2022): European Court of Human Rights, ‘Analysis of statistics’(European Court of Human Rights, annual reports) <
https://www.echr.coe.int/sites/search_eng/pages/search.aspx#{%22sort%22:[%22createdAsDate%20Descending%22],%22Title%22:[%22\%22analysis%20of%20statistics\%22%22],%22contentlanguage%22:[%22ENG%22]} > accessed on 24 Feb 2023> : Regarding budget, see Lambert Abdelgawad É, ‘Measuring the Judicial Performance of the European Court of Human Rights’ (2017) 8 Int’l J for Court Administration 20

they put it, ‘remember that we are a factory’ of human rights law. Inside this ‘factory’, ‘efficient’ processing of cases is the prime goal. They seem to have a common understanding that the Court needs to further develop this filtering system to maximise its efficiency. For example, the selection of cases by utilising Article 47 of the Convention, which stipulates procedural requirements of application, seems to be widely supported in the Court, because the failure to fulfil the procedural requirement (a submission not having a signature in the right place or being outdated etc.) will constitute a reason to reject the case without any judicial assessment. One informant told the author that the role of Article 47 has been very positively acknowledged by the Court recently:

> There is also another procedural rule that we use. It's Rule 47. And it was always there, but we started relying on it more in the past ten years in order to filter. This case goes into the bin without examination. It's not even a case, it's it doesn't become a case, you see.

The Court officials are encouraged to maximise efficiency through their socialisation process at the Court. One of the interns reported some hesitation in discarding cases just

because the applicants were not familiar with the complicated formal requirements of the Strasbourg Court. But with pressure from senior lawyers to assess cases quickly, as she puts it, juniors become accustomed to working ‘efficiently’. Conversely, a senior lawyer said to the author, ‘You see, [you may think] you [young lawyers] are learning some theory, but actually the other way around. You're theorising things that come to you in practice.’ And in ‘practice’, what would come to young lawyers is ‘just stamp[ing] on the envelope you are going to send prisoners. Prisoners complain they're bored. Hundreds of cases from the same prisoner. And there is nothing. But they're bored, so they write.’ Another lawyer simply says, ‘the vast majority is almost a waste of time. Really.’ As even applications themselves are treated in this way, third-party interventions are often treated still less carefully. ‘The government submitted 300 pages of comments and then I was like I have enough information and then the applicant replies. You know you have so many, so so many documents. …No research is now necessary. It's useless. It will just be put on the side by a lawyer who already has a full desk.’

The senior lawyers not only educate junior lawyers, but they also ‘educate’ judges. Senior lawyers, who have permanent employment and have been serving in the Court for decades, regard themselves as the ‘institutional memory’ of the Court. They teach

judges the way they can deal with cases 'efficiently' by utilising various techniques which the Court has, such as pilot judgments or friendly settlements. 'So you see there are those kind of creative ways of really dealing with the root problem, *without wasting the energy of the court and without wasting time, actually*. So if a new judge arrives he or she has no idea about these things.' Thus, the philosophy of 'efficiency' keeps its orthodoxy even as judges come and go.

This 'efficiency' is not a neutral term. Rather, its consideration very often results in undesirable outcomes for victims and NGOs. Andrew Tickell points out that it may be misleading if one understands the ECtHR as a bureaucratic system in a sense that they mechanically apply the existing rules. Rather, like most bureaucratic systems, they manipulate the subtleties of facts and control the outcomes of the cases where necessary. For example, with regard to the rule of six months deadline (recently this was shortened to four) to make an application, as he puts it:

> The foregoing cases clearly demonstrate, contrary to the general "technical" impression many have about the six month admissibility rule, that the Court can and will apply the rule in a number of creative ways, bearing out …[the] observation that discretion is heavily implicated in making sense of rules and in

making choices about the relevance and use of rules, even those rules which seem superficially clear on their own terms.[105]

Under the constraint of 'efficiency', it is assumed that NGOs would find their roles very limited. While the Court seems to regard input from NGOs, it merely seeks complementary information or research assistance. This attitude has been justified in the name of efficiency under the increasing workload ever since the 2000s.

[105] Andrew Tickell, 'Dismantling the Iron-Cage: The Discursive Persistence and Legal Failure of a "Bureaucratic Rational" Construction of the Admissibility Decision-Making of the European Court of Human Rights'(2011) 12 (10)German Law Journal 1786

5. The Role of NGOs for Transnational and Large NGOs

This section will explore the role played by TNGOs before the ECtHR. Subsections 5.1 and 5.2 will illustrate their self-expected role to develop the law, and the caveats of this narrative. The ECtHR is reluctant to adopt NGOs' views in the immediate term, and the link between their activities and 'development' is often very notional. On the other hand, Subsection 5.3 will analyse their motives in daily routines, namely acute awareness of 'risk' and 'reputation', which is embedded in their bureaucracy. Subsection 5.4 will consider the consequence of this routine in the short term. Lastly, Subsection 5.5 will reconsider the meaning of the behaviour of TNGOs in the long run.

TNGOs include large NGOs such as Amnesty International, Human Rights Watch, FIDH (Fédération Internationale Ligue des Droits de l'Homme), and the International Commission of Jurists. Most of them were born from the political struggles that arose during the Cold War.[106] Their agendas may have drastically changed since then, but their organisational DNA—which aims at global political mobilisation—seems to survive even today. As they themselves are powerful political players with strong

[106] Mikael Rask Madsen, 'France, the UK, and the 'Boomerang' of the Internationalisation of Human Rights (1945-2000)' in Simon Halliday and Patrick Schmidt (eds), Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context (Hart Publishing, 2004)57

bureaucracies, their core concern is the social and political impact of their actions, not just winning or losing in specific cases before the ECtHR. They are financially independent from external donors to some extent, and therefore have strong autonomy in deciding their priorities. For example, in 2021, Amnesty International relied on 'regular and non-regular donations from individuals' for 71% of their revenue, whereas it relied on external grants and donors for around 10%.[107] Their activities usually cover wide geographical and topical areas. Needless to say, there is great variety even amongst TNGOs. While Amnesty International has strong independence and a large network including regional offices and national sections which conduct country-level campaigns, more law-centred organisations, such as the International Commission of Jurists, have relatively small networks consisting of loosely connected regional/national associations.

## 5.1 Development of Law

When the activists of TNGOs are asked about the roles of their organisations, most of them responded with 'development of law', 'advancement of law', or similar answers.

[107] Amnesty International, '2021 Global Financial Report' (2021), < https://www.amnesty.org/en/2021-global-financial-report/ > accessed 24 Feb 2023

Their role before the ECtHR is, they say, to expand the scope of protection by human rights law, through third-party interventions. Their logic is clear; once the scope of human rights is expanded by the ECtHR, all the individuals in member states will be legally guaranteed the same scope of human rights. This may not be achieved in reality, but then the main issue concerns the implementation of judgments in member states, which is purely a factual problem.

Indeed, TNGOs seem to have a strong desire to create changes in law. As an activist from International Commission of Jurists remarked, ‘Our engagement intends to create more impact on jurisprudence. It is not exactly a social impact….an impact on the law suffices. It is not necessarily social.’ At the same time, in challenging its jurisprudence, the author found that NGOs were apparently quite argumentative towards the Court. TNGOs take every public occasion to display their efforts to challenge the Court’s jurisprudence. For example, regarding the regular dialogues between the Registry lawyers and TNGOs which the Court holds on occasion (annually or once in two years), one Registry lawyer revealed as follows:

> We organise the meeting with European NGOs. ...They are very critical against the Court. And it's important to give to them the opportunity to express. I do not see

> any NGO which is happy with the Court. And it's normal.

5.2 Caveats of ‘Development’

However, there are a few questions concerning this narrative presented by TNGOs of developing the law by constantly challenging the Court’s jurisprudence. First, as was clarified in the previous section, the Court is not willing to adopt NGOs’ views in interpreting the Convention. Even if TNGOs keep challenging, there is actually a very low probability of success. Indeed, the same Registry lawyer evaluated the above-mentioned opportunity of dialogue as follows:

> It's a kind of dialogue and we try to explain why the Court adopts this judgement or cannot. I cannot follow the whole proposition of NGOs etc. It's a dialogue, only a dialogue. And this is not a judicial process.

From the insights of the previous section, the ‘development of law’ seems to be exactly what the ECtHR does not want from third-party intervenors. The Court needs ‘useful’ research assistants, but here TNGOs want instead to step into the Court’s jurisprudence and try to ‘develop’ it in the place of judges and the Registry lawyers. Under the system

of third-party intervention, where the Court has strong discretion, it may not be realistic for NGOs to take this strategy of challenging the Court so apparently, as such a stance will eventually lead to expulsion from Strasbourg.

Secondly, even putting the Court's stance aside, the actual mechanism of 'development' is so unclear that it is doubtful whether it can serve as practical guidance for activists. It is not easy for NGOs to establish a tangible connection between their activities and changes in the jurisprudence of the ECtHR. As the Court usually refers to third-party interventions in a very modest and formalised way, in most cases it is difficult for the NGOs which submit these interventions to prove that they actually influenced the Court's reasoning or the results of specific cases. When the author asked a renowned activist for LGBTQ rights how he could know if he had influenced the Court after submitting third-party interventions, the response was that he could infer it by reading judgments carefully, but ultimately, the conclusion was that he could only assume. Another activist also pointed out this uncertainty:

> You hopefully will influence the court. But even if you don't, …you want your intervention to be read and they may influence others who happen to read it. … we still don't know what judges think…It's totally unclear, just totally, it's still quite

random.

This seems to be a huge problem—how TNGOs can pursue such an unstable goal and fulfil their accountability, if there is no way to know the outcome of their interventions?

Additionally, it is also unclear what 'development' means. Is it about Roma segregation, or media freedom in Turkey, or social security for immigrants in the UK? If the 'development' is an abstract concept which includes all of these, then what decides the priorities among them? The problem is that the concept of 'development' itself does not have any internal imperatives concerning the relative importance of these rights. When asked about the criteria for intervening in the judicial process of Strasbourg, a senior activist from a TNGO revealed, 'we all have the criteria, but it is difficult to have them in a consistent way.' TNGOs do have strategic plans to work on, and they carefully decide which litigation to be involved in, but it is difficult for outsiders to see why some 'developments' are considered to be more important than others.

Thirdly, the answers by activists themselves often show that they are not aiming at creating changes only through battles in the ECtHR. As is revealed below, ultimately, legal challenges before Strasbourg are not a priority for them despite their narratives. While they said that their roles are the catalyst for 'development', they also repeatedly

said that Strasbourg was just one of many battlefields. Their scope is by no means limited to Strasbourg; the decisions of other international bodies and national courts including the Human Rights Council in the UN, The European Court of Justice, and the Supreme Court of the UK, were often cited in their responses. Litigation itself is also part of a wider global strategy. One senior member of a major human rights organisation said:

> There's still a wide variety of types of work. It's not just about one or two clients. We'd set up litigation, but integrate it [into other works]. We're not dedicated to litigation. Organisations like the AIRE Centre is one of the few suchlike [organisations dedicated to litigation] but that's not many. But then you have documented abuses. You use the media, you use some pressure on the governments to make decision. You just use even the implementation of the Council of Europe mechanisms.

Even if we accept that TNGOs are aiming at the 'development' in the long run, this 'development' is a very vague and broad concept regionally and chronologically, significantly apart from specific outcomes before the ECtHR. Individual cases there are

just a venue for trial and error. In this sense, these NGOs are ultimate ‘repeat players’; as repeat players seek to establish rules in their favour, and maximise their gains in the long run.

### 5.3 Risks and Reputation

If ‘development’ does not guide the day-to-day activities of TNGO activists, what instead serves as guidance for their routines? In relation to the roles of NGOs, what are their ‘real’ roles before the ECtHR, if the role of being active changemakers is superficial? The following subsections 5.3.1 and 5.3.2 highlight their principles of behaviour and how deeply they are embedded in their bureaucracy.

#### 5.3.1 Bureaucratic rationales

To answer these questions, one needs to understand the bureaucratic nature of TNGOs. According to the interviews, for example, Amnesty International is a ‘multi-headed beast’, which consists of ‘national sections’ and the ‘international secretariat’ with regional offices and thematic teams. As interviewees repeatedly pointed out that internal clearance is necessary to control their risks and resources, one can easily assume that this large organisation is not monolithic; activists need to justify their

activity not only externally, but also internally—they have to fulfil their internal accountability through a large amount of paperwork before actually submitting third-party interventions. One of the internal documents of Amnesty International, entitled 'Strategic Litigation at Amnesty International', states as follows:

> Litigation is strategic when…it is part of a broader programme of change, in and out of the courtroom and beyond the legal victory, that often employs other complementary tools (such as advocacy and campaigning) to achieve the desired outcome; it is a product of deliberative and conscious choice, rather than responding to whoever walks in the door with a problem or a case.[108]

In the case of Amnesty International, the proposal either made by national sections or thematic teams must be assessed by the Litigation Committee of the International Secretariat before actually being implemented. There is a very strong incentive for low-level officers or national sections to frame their problems as ones of 'development of law' in order to gain approval for their projects from their senior organs. This may lead

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[108] Amnesty International, 'Strategic Litigation at Amnesty International'(internal document upon informant's permission, updated Feb 2019); A report by JUSTICE (see n93) also indicates that very careful consideration is needed before deciding whether to intervene.

to an explosion of 'development' rhetoric—without concern for its precise definition. As one senior member of Amnesty International revealed the nature of this 'development', he talked about the example of reframing a "property rights" issue into one of "right to housing", because property rights is 'controversial' and a 'sensitive issue'. If this sort of reframing is a part of daily routine inside TNGOs, and if this is called 'development', the actuality of such 'development' is heavily dependent on calculations rooted in organisational politics.

5.3.2 As 'Repeat Players'

What the author consistently saw throughout the interviews was TNGOs' persistence in focusing on 'risks' and 'reputation'. The consideration of 'risks' and 'reputation' is deeply embedded into the internal processes of these organisations. One of the informants from a TNGO confidentially showed the author a paper they use to get internal clearance when making strategic litigation, and the content was generally about the gains (how much reputation the organisation gets from the intervention) and the risks (how much resources the intervention consumes, and how likely it is to win the case). Leaving aside the characteristics prevalent among bureaucracies in general, this persistence regarding these two factors seems to originate from the fact that TNGOs are

*political* organisations, rather than legal.

They may actually be fighting a different battle from the specific one that they place before the ECtHR. They may not use third-party interventions as an instrument to influence the judicial outcome, but rather provoke public awareness regarding a specific agenda. According to this interpretation, it is not a huge problem even if the Court does not take their views in a specific judgement. They may carefully select cases to intervene, in order to maximise their resources for battles elsewhere. They may also repeatedly intervene in the cases featuring the same legal points, and try have their names displayed on the record. In short, maybe they are not there to persuade the Court so much as to efficiently advertise their positions to the wider public. As one activist remarked:

> And then that's the point view of the intervenor that *we're on the record*. And that's even more important [than influencing on judges]. …Well, the judges won't listen to this even if it is said, but we'd say, well, this is the key point in international law. And if, even if the judges don't like it, we have to say that it has to be said.

The same interviewee insisted that they were sending messages *to the world* in

submitting interventions:

> Politics is what they[governments] are saying and the media is what they're saying. …they claim that the law of conflict displaces human rights. Say there's no human rights when the conflicts taking place and it meaning they can treat detainees as they wish, which is not true, and by any interpretation of the law. We had to make that clear *to the world*.

As TNGOs put importance on messaging effect to the world, the selection of cases before the ECtHR is strongly affected by the environments around the ECtHR and TNGOs. For example, one TNGO has worked on Roma rights for a long time, but is recently phasing out its involvement in the campaign, though activists themselves recognise there is still much to do: 'It's inevitable [for] NGOs…We are global movements.' Another also described the retreat from the Roma rights campaign; 'I mean 20 years ago we did a lot in the rights of the Roma…. We hope we do last on that [but] now it's just over.'

NGOs are obliged to show their progress to fulfil accountability, meaning that being strategic often means concentrating resources on the areas which have better odds of

winning or increasing their resources. As a result, in some areas where there is little probability of winning in Strasbourg, there are very few organisations to challenge the Court. For example, the ECtHR's weakness in addressing racism seems to be notorious among activists. As one activist reveals, 'we are just advertising for one case on racism in Europe. [But]…the European Court of Human Rights is particularly weak on addressing racism': Another echoes, 'In addressing legal issues around racism, the ECHR hasn't been a strong place'.

Their persistent preference for third-party interventions can be also explained from the perspective of risks and resources. The general consensus among the Court lawyers is that third-party interventions are not necessarily effective in winning specific cases, but they are effective in promoting the views of organisations if successfully combined with political campaigns and research projects. It does not damage the neutral and professional images of TNGOs, and can minimise the risk of any conflicts with applicants or their lawyers. Most importantly, one-off third-party interventions do not carry the risk of expending too many of their resources on lengthy judicial processes which may last for several years. Additionally, by avoiding representation, TNGOs can avoid troubling themselves with the complex processes in domestic courts: 'it's hard [that] you have to hire local lawyers in [every] country, in Albania, or in Bulgaria,

knowledgeable of circumstances in 36 or 37 member states.'

Finally, to avoid the damage to their reputation, TNGOs usually abide by the 'rule' of the Court which prohibits third-parties from mentioning the facts and merits of specific cases. This tendency, in combination with the second point, indicates that TNGOs wish to be seen by the Court as neutral experts rather than as supporters of the applicants. The trust of the Court as a 'useful' intervener is a very valuable asset for TNGOs. It means that they have the privilege to play the card of 'submitting third-party interventions to the ECtHR' whenever they want. One activist, who is a regular intervener to the ECtHR, showed resolute obedience to this 'rule'. She remarked, 'in a third-party intervention, you are not allowed, strictly forbidden to comment on the facts or the merit…We never never, never comment on the case.' Similarly, another activist from a different organization framed this obedience as an 'ethical thing'. He reiterated:

> Our intervention in the case will be fully impartial and independent. We do not take sides in the dispute before the court. …We do not comment on facts; even if we do have specific research which would allow us to do so.

He also implied that being seen as neutral is the foremost concern for them, saying:

> Of course, the rules that we have is once we decide to intervene in the case we don't have the communication with the applicants because we are meant to be independent and impartial. Obviously, we indirectly support the applicants, but we don't want to be seen to be just siding with the applicants, as amicus curiae, a friend of the court, is not a friend of applicants.

Regardless of the Court's officials putting emphasis on facts, these activists from TNGOs seem rather indifferent to specific facts; as a lawyer from the International Commission of Jurists says, 'Often we do not need to know a lot about a particular case…[as] our primary motivation is not to win the case.'

There is also an interesting contrast to be seen with third-party interventions made by member states. Glas points out that '[d]espite the Court's request not to address the facts, admissibility or merits of the case, many third-party interveners[governments] precisely do that'. While member states do not hesitate to refer to merits or facts of the case (as this prohibition is not legal), TNGOs cannot do this in consideration of their images and reputation with the Court. This shows that there is a difficult problem of positioning for TNGOs in Strasbourg.

5.4 Interdependence and Consequences

What can one say about the roles of NGOs from their focus on risks and reputation? It can be observed that the Court and TNGOs are in an interdependent relationship; the Court tends to rely on TNGOs as long as they ensure the 'efficient' processing of cases and independence from member states. TNGOs need an independent and strong Court in order to leverage their participation in its judicial process and improve their reputations. Though activists often recognise the status quo is suboptimal in relation to their distant goals, as an organisation, TNGOs do not take the risk of being denied by the Court, and abide by its 'rules'. Among 26 third-party interventions by the TNGOs that the author analysed, there were no referral to specific facts of the cases; this rule was thoroughly observed.

As this interdependence is deeply embedded in actors' routines, few interviewees explicitly refer to it. However, some interviewees from TNGOs underlined the importance for NGOs of protecting the current system of the ECtHR. Also, symbolically, one high official of the Court said to the author that third-party intervention was important because of 'appearance'. Although he did not fully articulate the meaning of his words, this 'appearance' seems to be a double code. For the Court, it

is important to maintain the appearance of ‘equality of arms’ (in his own words). Governments are often regarded as powerful and well-equipped, while applicants are regarded as powerless. The impression of openness towards NGOs is an important part of the Court’s business to maintain the ‘appearance’ of equality. Simultaneously, this ‘appearance’ might be also important for NGOs, since in order to assert their raison d’être they need to appear to their audience as if they significantly influenced the Court’s jurisprudence.

So, does the existence of TNGOs enhance the re-distributive capacity of the ECtHR? Given the Court’s stance that allows NGOs only marginal roles, the ‘development of human rights law’ that is often emphasised by TNGOs does not seem to be a feasible way of bringing about re-distribution in the short term. Rather, in reality, TNGOs often try to maintain this situation before the ECtHR by creating an interdependent—perhaps symbiotic—relationship with it. They try to maximise their reputation by constantly ‘being on the record’, and they are partly ‘insiders’ in the sense that they work as part of the broad governance system surrounding the ECtHR. Symbolically, according to one judge, a variety of events and dialogues are arranged by the Court only for renowned NGOs. This venue is far from a place of mutual communication; rather, it is a place where the Court explains the interpretation of their judgments almost one-sidedly. The

judge explained the role of NGOs for the Court to the author; disseminating correct understandings on the Court's jurisprudence, rather than helping the Court to form its jurisprudence.

Moreover, reflecting the position of TNGOs in the system as a partial insider, there is generally a shared tendency among Court officials and TNGO activists, namely something close to hostility against amateurish third-party interventions. As one former activist from a TNGO puts it:

> There're a lot of interventions, I think, which get lost. It's a real danger that sometimes as for these big cases, it seems people are intervening for the sake of intervention itself or just getting on the bandwagon almost.

As insiders, TNGOs are not always friendly to outsiders. In this sense as well, TNGOs' constant participation may not necessarily be helpful in building a system open to the disadvantaged.

### 5.5 In the Distant Future

Nevertheless, to be fair, one should note that TNGOs may still have some influence

on the Court exactly through this interdependence. This is not an immediate and provable influence, but in the very long run, one cannot deny that TNGOs are providing counterproposals for the current interpretation of the Convention. Even though TNGOs are not heard, they constantly try to tweak the Court's jurisprudence by displaying alternative interpretations. Since there is a mutually beneficial relationship, even if the Court notices their attempts to exert influence over its reasoning, it is also unbeneficial to wholly reject those interventions.

The first step for TNGOs would be to be regarded by the Court officials as a reliable and knowledgeable organisation—in short, to prove their 'usefulness'. Then the Court tries to exploit their expertise. But to do so, they also have to disclose information and invite those TNGOs; one member from a very reputable TNGO said that the Court selectively provided information to them which might be of use for drafting third-party interventions. Sometimes they gave full application documents and responses from the government. In one case, the Court even asked an internationally famous NGO to intervene in a specific case through the phone.

The Court also proactively utilizes the contents of third-party interventions when they support the argument that it wants to provide. For example, in *Grzeda v Poland*, the Court repeatedly refers to the content of third-party interventions by NGOs to reinforce

their argument against the submission of the Polish government.[109] Of course, the intention of the Court is to utilise their expertise, but it is difficult to separate the purely informative from the argumentative parts in third-party interventions. If the Court tries to utilise TNGOs, it is inevitable that it will also be influenced by TNGOs to some extent.

Moreover, even if TNGOs themselves cannot change the Court's jurisprudence, they can still work as a conductor (conveyer) of information among international organisations. As Keck and Sikkink have pointed out, the activists of TNGOs see cases transnationally—and whether consciously or unconsciously, tend to push for international standardisation through their global activities.[110] TNGOs usually submit third-party interventions which effectively display their own interpretation of the Convention, citing relevant (at least to them) laws and cases of international law. Notionally, the Court does not have to care about other international courts' views, but in reality, it does care about them. A judge revealed to the author that the ECtHR was particularly sensitive to the jurisprudence of the International Court of Justice and the

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[109] Grzeda v. Poland (Application no. 43572/18)15 March 2022

[110] Margaret Keck and Kathryn Sikkink, Activists beyond Borders: Advocacy Networks in International Politics (Cornell University Press, 1998)

European Court of Justice. In this case, even when TNGOs do not play a critical role, it can still function as a facilitator to 'develop the law' in one sense.

Overall, this section can be summarised as illustrating that TNGOs play a dual role before the ECtHR. In the short term, TNGOs do not have as important a role as they claim. The Court rarely takes their views into consideration, and activists aim simply at 'being on the record' rather than influencing the outcome of cases in order to maximise their reputation, whilst minimising risks. The relationship between the Court and TNGOs is almost symbiotic; they mutually utilise the other party for their own purposes and, while so doing, create a common social platform from which they exclude outsiders. In this sense, the role of TNGOs does not contribute to the enhancement of the re-distributive capacity of the Court. However, in the long run, though it may not be strictly verifiable, TNGOs make meaningful attempts to reflect their views in the Court's jurisprudence. One can perhaps say that this is also a very important role of TNGOs before the Court.

6. The Role of NGOs for SNGOs and Human Rights Lawyers

While TNGOs make attempts to utilise the power of the Court to increase their reputation, SNGOs often struggle to prove their raison d'être before the Court. One of the reasons for this struggle is that small NGOs do not have sufficient resources to take advantage of the Court's judicial system. This section is composed of three subsections. Subsection 6.1 depicts the expressed goal for SNGOs, namely to create social movements through litigation. On the other hand, Subsection 6.2 reveals the difficulties for SNGO activists in achieving the above-mentioned goal. Subsection 6.3 analyses the actual role played by SNGOs.

Before beginning the discussion, it is necessary to elaborate the definition of SNGOs to make our focus clearer. Unlike TNGOs, it is difficult to pinpoint well-known examples in the case of SNGOs, but there are three typical vectors featuring SNGOs as an ideal type. Firstly, they have geographical or thematic focuses. Secondly, they consist of small number of lawyers. Thirdly, they financially depend on a few large donor organisations including foundations in the US or public-funded organisations. According to this definition, national NGOs focusing on specific topics, such as Lawyers for Human Rights (dealing with cases on anti-corruption in Moldova), fit the concept best. International issue-specific organisation, such as European Roma Rights

Centre, also fit the arguments of this section fairly well. The author believes that the arguments are also partly applicable to international (European) organisations composed of a limited number of lawyers without clear thematic focuses, such as Interights and AIRE Centre.

## 6.1 Winning Cases

According to interviews, the goal for SNGOs is to win specific cases. Thus, their role is to support applicants in winning their cases. In this respect, SNGOs are clearly 'one-shotters'. They are repeatedly involved in the judicial process, and aim at developing the law, but they do not have large campaigning machines or pre-existing reputation. It is difficult for them to make changes through political processes, or gain sufficient financial support, only by 'being on the record'. They must rely on the power of the judicial system.

Activists in SNGOs acknowledge that their role before the ECtHR is to support applicants. Unlike activists from TNGOs, they do not seem to place a strong emphasis on the value of neutrality. An ex-activist previously working in a middle-sized organisation exclusively focusing on the ECtHR said:

> I mean, …third party intervenor should not have allegiance to any of the parties in theory, but you know, at the same time, we are working within the scope of a mechanism that is guided by human rights. …Although neutral in theory, in practice [we] support one of the parties to the case. It's inevitable.

When the author asked whether his organization also puts importance on ‘being on the record’ like larger organisations, he looked very surprised. ‘I find it quite strange…. It's not what we had done.’

In this context, SNGOs prefer directly representing applicants to submitting third-party interventions. There are a few reasons for this, but most importantly, activists from SNGOs are sceptical regarding the utility of third-party interventions in winning cases. The above-mentioned activist described them as a ‘gamble’:

> [Large] organisations want to do third party interventions [as] it's so much easier, but it's not necessarily more effective in terms of achieving the goals…I say it's a bit of a gamble …It's a gamble because there are different cases you may seek to intervene on one specific point amongst several…but that case maybe rejected for inadmissibility or for different issues that have nothing to do with substance.

As he points out, third-party interveners do not have any sort of control over the case. Even though NGOs submit interventions, applicants may withdraw applications, be rejected by procedural mistakes, or submit poorly drafted documents. Moreover, he also points out the structural limits of third-party intervention: as stressed in the previous section, there is no way to know whether a specific submission had an impact on jurisprudence. He cynically mumbled to the author, ‘I mean it may be that nobody will read this [third-party intervention] or they will read it, but maybe just a junior lawyer.’

Another renowned activist who leads a small international organization pointed out an inherent problem with limiting the avenue of participation to third-party interventions. ‘Maybe [third-party intervention] becomes a political message for a large organization.… But it doesn't create the movement itself.’ She repeatedly compared ‘easy’ third-party interventions and ‘hard’ and ‘long’ direct advocacy work:

> I think third-party interventions are much more limited in scope of work and also in time scale, because if you're going to undertake a strategic litigation campaign, that could take a really long time. You have to conceptualise it, you have to work together for a longer period of time through the different stages of the process.

> There's advocacy work involved. There's campaigning involved. There are all sorts of different things just trying to get other people involved…. (but in the case of third-party interventions) you are basically trying to tell the court that in this case that someone else's litigating they should go in a certain direction.

She reiterated the necessity of giving the initial impetus to a movement, rather than only jumping on the band wagon of one that is already underway:

> If you do not engage in litigation from the very beginning…there won't be any cases to intervene in. So, to make cases happen you have to litigate and then once cases reach certain maturity, of course, there will be people who are intervening. But if there are no cases there are no interventions either…. I would say that we would be working on the type of case in which we would want others to provide a third-party intervention so we will be litigating the landmark case itself.

She added that her organization focuses on direct support in order to help building a grass-roots coalition of people. Especially with regard to cases concerning minorities, she points out that often the most disadvantaged people do not litigate by themselves,

meaning that the problem may be left untouched unless someone stands up to represent it:

> [My organisation] really is focused on providing direct support so actually really working with partners to develop litigation projects, and third-party interventions, I don't think, will do a lot….For some issues like disability rights, it's very difficult for people with disputes to bring cases to litigate to go to courts for different reasons. Or for other vulnerable applicants it's very difficult for them to find support …which is why it may be preferable for you to take cases from the start and develop litigation.

She is probably right concerning the point that third-party interventions do not have the power to find and create issues. As she describes, the role of her organisation before the Court is to create a social movement through litigation, which is often called 'strategic litigation'.

6.2. Resource Constraints

Ideally, strategic litigation should involve broader advocacy work and campaigning

than that restricted to the courtroom. However, from the overall interview materials, the author finds that SNGOs very often struggle to act in accordance with their narrative due to resource constraints. While they often consider third-party interventions to have limitations, direct representation requires more resources, namely financial resources, human resources, and information.

Financial dependence on external donors/organisations potentially deprives SNGOs of the capacity to work on their own initiatives. With regard to financial resources, almost every activist both from TNGOs and SNGOs stressed that it took extremely long to reach any tangible achievements before the ECtHR. As an ex-activist from a SNGO told the author:

> The litigation quite often takes a very long time. Before moving to the ECtHR you have to exhaust domestic remedies, again a very lengthy process. So when you choose a client…while keeping the interest of the client in mind, which is paramount, you are sort of projecting what the case is bringing, maybe in 10 years' time. …It's a very big investment. There is discussion to be had as to the extent to which NGOs are prepared for that big investment because NGOs have funding cycles …that [last] 1-2 years or 3-4 years, but the litigation may last longer than

that.

Another activist remarked similarly:

> We need to plan for the long term… they need to fund for the long term. The fact is that change is not as immediate…sometimes you know in this project you publish a report and that is a tangible result of your work, but [for] litigation to get the judgement, it may last five, ten or fifteen years. To be able to show some impact it takes longer and there is more sort of uncertainty.

Due to this structural difficulty in fulfilling the accountability to donors, it is natural these small organisations tend to depend on a few external donors.[111] As a result, it seems that they often face a trade-off between taking cases that donors expect SNGOs to litigate, and risking running out of resources by pursuing what they themselves believe is necessary to take to the Court. An activist heading a small international organisation confessed to the author:

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[111] Haddad and Sundstrom (n69)

> A very much kind of thing that I want to avoid is that we are told [by donors], hopefully, that there's just no other way of doing the work. In that way …it [the donor] doesn't want us to take a cue from the field…I'm not going to turn this organisation into something like a service provider that is funded by a fundraiser.

> [T]he further you go down that rabbit hole and the more you go into the direction from core funding like 'we just trust you to do what you want', to like a project funding and we would have to be precise and do only specific things. The more you go in that direction, the more the funder, even without having to request specifically the fact that they're offering funding for that specific thing or for that specific type of activity, already pushes work into a certain direction, unless there is a like a perfect match with the thing you already wanted to do.

The lack of human resources is another huge problem, often overlapping with financial difficulties. SNGOs struggle to secure sufficient human resources. There are many young and ambitious lawyers coming to TNGOs, but for local organisations not widely known, hiring lawyers with knowledge of both international and domestic law

(plus, fluency in English!) is not easy. Needless to say, financial conditions compound this difficulty. A lawyer who moved from a SNGO to the Council of Europe recalls:

> I used to work for NGOs fairly small in size 20 to 30 people and was always facing sort of financial issues … so in that respect to the Council of Europe is very different because they have a budget that is paid for by states you know it's quite secured, it's safer.

Notably, when the author asked the difference between the work at a SNGO and at the Council of Europe, he immediately answered with this point, which shows how grave this issue is.

Legal qualification is another problem. A senior member of a famous SNGO before the ECtHR stressed that they never litigated without an appropriately qualified lawyer with a law degree from the country of the applicant/respondent state, as legal systems in each jurisdiction are often significantly different. But again, prominent human rights lawyers are very rare. A former SNGO lawyer, now working at the Registry of the ECtHR, recalls:

> To actually represent clients and domestic litigation is quite a major undertaking and you would have to be qualified to litigate. In most cases, you need domestic lawyers working pro bono to do with the representation …Human rights field is a difficult one because you know many of these cases are pro bono…you cannot afford to do this all the time unless you have some external funding. All the cases take years until you exhaust all domestic remedies…It's very, very hard to be a good human rights lawyer.

Indeed, it is rare for human rights lawyers to exclusively deal with human rights cases. Many informants, including the lawyers in the Court, activists in TNGO/SNGOs, and even human rights lawyers themselves, complained about the quality of work by ‘human rights lawyers’. Particularly, in the Court, young lawyers in charge of filtering cases often find that the involvement of human rights lawyers tends to worsen the quality of applications. According to them, while human rights are becoming ‘a fancy thing’ for lawyers, in reality a significant portion of ‘human rights lawyers’ simply keep submitting applications where member states are destined to lose (for example, types of cases where WECL exists but member states have not dealt with that legal caveat). One of the informants in the Court said with an annoyed expression on her face: ‘Now it's

something just very repetitive, and it's not like you're an amazing legal professional. There is nothing new to argue and every application is very simply written.' According to her, there seem to be so many 'human rights lawyers', but most of them do not meet the standards which are needed by SNGOs and the Court.

Moreover, the work of lawyers in SNGOs is much harder than that in TNGOs, as an above-mentioned junior lawyer in the Court confessed. Even if SNGOs are lucky enough to hire a good international lawyer, they often become burned out and eventually leave the field:

> This [the long judicial process] is not only financially difficult, but mentally as well, because the stories [of applicants] are very emotionally consuming. You go through this 1000 times. You have to be a psychologist and the lawyer and more. It's definitely much easier to write a third-party intervention from my point of view.

Lastly, connected to human resources is the information that is necessary to work before the ECtHR. The formalities in submitting third-party interventions are extremely complex, and the imbalance of information often creates a sort of patronage between

TNGOs and national or local NGOs. Many of the interviewees from TNGOs mentioned the existence of 'behind-the-scenes advice', and more frequently, 'trainings' provided for grassroots national NGOs by TNGOs. The existence of this kind of 'advice' or 'training' may seem obvious and rather desirable, but as information is often vital before the ECtHR, one can imagine that TNGOs are functioning as de-facto 'headquarters' and outsourcing grassroots work to national NGOs. Similar to what is often discussed in other contexts, many lawyers 'step up' from national NGOs to TNGOs or to the Court, when they have adequate knowledge and experience.[112] Indeed, many informants currently working at TNGOs or at the Court originally worked at small, national NGOs.

### 6.3 Diminishing Roles

These limitations severely constrain SNGOs' activities before the ECtHR. They face a dilemma; they want to support and lead litigation, but they do not have sufficient resources to realise this. On the other hand, they do not regard more cost-efficient third-party interventions as a valid strategy for making changes. Consequently, if they want to stay on the stage of the ECtHR, there are only two options available to them: taking

[112] For example, the following describes how local activists move up to large organisations and the UN-funded positions: Mark Fathi Massoud, 'Do Victims of War Need International Law - Human Rights Education Programs in Authoritarian Sudan' (2011) 45 Law & Soc'y Rev 1, 28

advantage of their positions as ‘repeat players’ to efficiently utilise the power of third-party interventions, or continuing to litigate on a small scale within the limits of their funding. Unfortunately, both of these paths lead in the direction of working to consolidate the status quo, rather than making significant changes.

Firstly, some SNGOs ‘turn more strategic’. This often means shifting to focus mainly on third-party interventions. A senior member from one of the small international NGOs that had continuously worked on cases before the ECtHR for decades, revealed to the author that they ‘used to do more representing individuals and now we do more third-party interventions.’ Although she told the author that the reason was unknown, it seemed there was a structural reason. Indeed, even when they continue to represent individuals, they need to act as a ‘repeat player’, who selects cases extremely carefully so as not to ‘waste’ their resources. This activist continued:

> Sometimes they[lawyers] take bad cases…[which are the] cases that are never going to win. I mean, ...there are a lot of cases that the court just doesn't want to touch…they are very reluctant, for example, to take deportation cases from countries like the UK…They are much more likely to take cases from other jurisdictions where the domestic authorities, including the judicial authorities are

> rigorous in examining the issues in their own court.

There is also hesitance to prioritise the pursuit of strategic interests to the interests of the applicant in the case, as one of the informants from a SNGO revealed to the author:

> In a lot of cases, you're going to end up with a situation where what may be best for the individual applicant is not best for the change you want to bring about with the case…things can change in people's lives. Circumstances change [and] they might want to just settle and be done with it.

Even activists in TNGOs acknowledge this gap between providing support for individuals and pursuing strategic goals. Many of these activists started their careers as human rights lawyers in small organisations, but facing the reality, they decided to become ‘more strategic’ to make ‘more structural changes.’ One activist from a major human rights NGO recalled as follows; this is a long extraction, but worth looking as it depicts how one gives up making changes by the power of law alone.

> Even many years later, it's quite satisfying, with one client, to be able to help them

> with their problems…It's [when] someone comes in about to be evicted from their homes with their children and you come and stop them being evicted that day. That's power, that's being of assistance. That's using law for the good. But, when you see the same type of people coming in being evicted every day because of the politics, then it's much more difficult. That's probably one reason [I turned to an activist in a large human rights organisation] … then you can try to use the law to strategise. And yes, winning a case can change things, but even then there's frustration. When I worked in Bosnia during and just after the end of the war, they[the authority] had set up a system that was inherently discriminatory…After we won in the European Court of Human Rights, then for many years everyone talked about it, …, so you'd have thought they would have changed about 10 years later, and [The Name of His Organisation], [with which] I hope I did a small [contribution], report on this in in 2019, says that even then they still haven't changed the Constitution.

However, regardless of individual lawyers' hesitance, this move towards 'becoming more strategic' seems inevitable; otherwise, NGOs will simply dissolve due to the shortage of funding. As such, if they do not wish to engage in third-party interventions,

the alternative way for SNGOs to survive is to accept external funding, but this may mean that they lose autonomy in determining their strategies. Even if they keep litigating, they can do so only within the framework of specific funding. As reported by Cliquennois, one activist claims that there is a significant imbalance of resources among areas of human rights:

> [Our] concepts were working on racial social and economic justice in the same way as there are people working on technology or on climate change…there was a difference in the access to justice basically for marginalised communities compared to others…this was missing from the ecosystem and it was a gap that needed to be filled…It also has to do with the really toxic funding culture …a lot of these [large] organisations rely on high net worth individuals on donations …so it keeps on catering to a certain way of doing things which is just needs to be broken through at some stage.

When the author asked her why she choose to set up a new organisation, rather than join one of the large human rights organisations, an interviewee responded the role of NGOs is to help disadvantaged groups by means of grassroots activities. She passionately

accused TNGOs of facilitating, not fighting against, the current structure dominated by white males:

> You were asking why I wouldn't want to work in a big human rights organisation …I do have criticism for the human rights field more generally. Human rights field traditionally has been very much dominated by a white privileged perspective. There's very much replication of colonial dynamics…these organisations internally are very oppressive when it comes to staff members who are not part of the privileged white…Indeed, governance structures very much facilitate this power imbalance. I think⋯, if you look at the broader human rights field like the whole fact that salaries are low, unpaid internships, there are all of these things facilitates people who can afford to work for free, people who can afford to work for less than what they're worth, do it as a kind of passion project or whatever, not making sure that the people who have live experience with some of the issues that they're working on are able to undertake [this] like a serious job in that field …As a woman of colour I don't see why I would legitimise a system that's fundamentally not set up to serve more diverse audience.

Needless to say, this style incurs a high cost. Indeed, this type of representation by SNGOs is hardly recognised by the Court officials. When they were asked about NGOs, they talked about third party interventions, but they rarely referred to representation by NGOs. Even when the author explicitly asked questions about the topic, their responses were that they had not known any case backed by NGOs except third-party interventions. According to a junior lawyer at the Court, ‘from my experience, it almost seems like NGOs are not in existence on the part of representation.’

Overall, SNGOs usually play a very minor role in the whole ecosystem surrounding the ECtHR. In a few limited fields, SNGOs can exert influence on the Court by directly supporting applicants, but in order to do so, SNGOs have to rely on funding from external donors. Some of the interviewees showed hesitation in reproducing the ‘fundamentally inegalitarian’ structure by taking this avenue.

## 7. Discussion

This section will synthesise the findings from Sections 4 to 6, applying Giddens's theory. Subsection 7.1 will present his theory of structuration. Subsection 7.2 will display the roles of NGOs expressed by the interviewees at the level of discursive consciousness, while Subsection 7.3 will show the different stories based on their routines. Subsection 7.4 will analyse whether the social dynamics produced by the interaction between the Court, TNGOs and SNGOs can contribute to the enhancement of the ECtHR.

### 7.1 Theory of Structuration

Giddens argued there were three levels of consciousness characterising human activities, namely discursive consciousness, practical consciousness, and unconscious motives. At the discursive level, individuals know well about the structure surrounding them and can rationalise and verbalise their day-to-day activities. However, in his observation, this rational narrative does not always reflect the reality. At the level of practical consciousness/daily routine, though they notionally know what they are doing, they do not fully understand what the consequences/meanings of their activities are in the long run. As a result, the aggregation of their routines and unconscious motives

produces ‘unintended consequences’ and reproduces social structures which seem alien to individual agents. Agents subjectively use such structures as resources, but objectively, such utilisation itself recreates the constraints for their activities.

As was discussed in the earlier sections, the purpose of this paper is to clarify the mechanism behind the active interventions of NGOs in the ECtHR. To do so, the sections below will discuss the discursive and practical aspects of NGOs’ activities learned through interviews. Then this paper will identify the gaps between these two aspects, and explore the implications and consequences of these gaps. Of course, it should be reiterated that Giddens’s framework cannot perfectly explain the reality, but these analytical tools are sufficiently relevant to explain the core dynamics of NGOs’ behaviour before the ECtHR.

## 7.2 Discursive Aspects: What Roles Are NGOs Expected to Play?

In this research, each of the Court, TNGOs and SNGOs expressed their own expectations regarding the roles of NGOs before the Court. From the Court’s perspective, the role of NGOs is to improve the openness of the Court, to supply information, and to boost the Court’s efficiency in processing cases. In the case of TNGOs, activists expected that their activities would contribute to the ‘development of

law'. For SNGOs, their goal is to create social movements through litigation. Importantly, each of these roles are expected to enhance the different functions of the Court as discussed below.

Firstly, it seems to be the case that SNGOs view their own role as one that enhances the capacity of the ECtHR to find disputes. As suggested by Felstiner et al, not every dispute goes to a court.[113] Even when their human rights are abused, many people do not recognise the existence of potential legal disputes. Even if they notice such possibility, it is still a very difficult choice for lay people to start litigation. Needless to say, even if they litigate it in local courts, the road from a local courthouse all the way to Strasbourg is extremely long and winding for individuals living in villages in Turkey, Romania, Poland etc. And the ECtHR, sitting in Strasbourg, cannot reach out to every corner of the 46 member states, despite its significant efforts to promote public understanding. The support of SNGOs in finding out issues on the ground and flagging important cases to the Court should provide an indispensable bridge between local communities and Strasbourg.

Secondly, the role of NGOs from the Court's perspective concerns its capacity to

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[113] William Felstiner, Richard Abel, and Austin Sarat 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .'(1980)15(3) Law & Soc'y Rev 15 631

resolve disputes brought before it. Undoubtedly, dispute resolution is one of the essential roles of a judicial system. Support from 'useful' NGOs not only provides information and resources for the Court, but also strengthens its legitimacy. The Court, chronically struggling with the massive volume of its workload and its tight budget, can supply justice to disputes more efficiently owing to the help of NGOs.

Thirdly, the role of NGOs as seen by TNGOs concerns the capacity of the Court to set general standards/rules. Apart from individual dispute settlements, courts have a role to play in providing more or less general rules for potential disputes in the future.[114] TNGOs essentially assert that their role before the ECtHR is to influence these general rules or standards. By doing so, as TNGOs argue, they not only have an impact on the future victims of human rights abuse who will come to the ECtHR, but also indirectly exert influence on the national judiciaries in 46 member states of the Council of Europe. In this way, TNGOs assert that their actions significantly strengthen the re-distributive aspects of the ECtHR.

The results of this analysis are consistent with past research by legal scholars such as Cichowski. These narratives show, in essence, that various NGOs support the ECtHR in

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[114] For example, David Luban, 'Settlements and the Erosion of the Public Realm' (1995) 83 Georgetown LJ 2619

different aspects such as dispute-finding, dispute resolution, and setting rules/standards, and all NGOs are supposed to work towards helping the disadvantaged.

## 7.3 Practical Aspects: Routines of NGO Activists

However, these discourses are, at best, inadequate to explain all of the information gained from the author's empirical research. While NGO activists talk about their ideal goals, it seems that their routines are not necessarily consistent with these ideals.

First, in the case of TNGOs, there are high hurdles to overcome to make real changes through third-party intervention. The Court is generally reluctant to listen to NGOs. Even if it listens to them, it is still difficult for them to know whether and how they have influenced the Court. As a result, one cannot easily prove that TNGOs' activities enhance the re-distributive capacity of the ECtHR through 'development of the law'.

As a matter of daily business, TNGO activists seem to be working for the survival of their organisations, by advertising the organisations 'on the record' of the ECtHR. They think of risks and reputation when making everyday judgements. Of course, they recognise that there may be tensions between their objective of the 'development of law' and their routines, but their daily tasks urge them to rationalise their routines in a way consistent with the narrative of 'development of law' (and people who cannot do so

often end up simply leaving the organisation). Specifically, in large organisations, activists are accustomed to filling in large amounts of paperwork to meet their internal accountability standards. Those works often encourage them to justify their proposition of third-party interventions by placing them in the context of the ‘development of law’ , however abstract the connection is. In the name of the ‘development of law’, they discuss the risks and potential reputation gains for their organisations. As the survival and empowerment of their organisations are considered to contribute to achieving their long-term goal, activists can thus subjectively overcome the potential contradiction between discursive and practical consciousness without facing serious ambivalence. However, the gap between the discursive and practical consciousness of the activists in TNGOs can lead to the reproduction of an interdependent relationship between the Court and TNGOs; while the Court can save resources by utilising those of TNGOs and ensure the appearance of neutrality by inviting ‘civil society’ into the judicial process, TNGOs can advertise their efforts and political positions through ‘being on the record’.

Secondly, in the case of SNGOs, their different circumstances from TNGOs produce a different narrative for their activities from that of TNGOs. In short, if one may say that TNGOs are *more* strategic than they insist, SNGOs are *less* strategic than they insist. They insist that they aim at creating changes at the systemic level, but in reality, they are

struggling with their day-to-day business of surviving before the ECtHR.

From what the author has heard, it seems that their capacity to monitor and select cases is actually very limited. They do not have sufficient resources to monitor all the cases flowing through the ECtHR, and so their choice of cases is often passive rather than proactive. In addition, as they cannot afford to finance multiple cases which may last several years at the same time, they have no choice but to forgo most of the cases they find from the field. Additionally, they do not have sufficient human resources to manage already existing cases in a satisfactory manner; qualified lawyers are overburdened and often burned out, tired from being a lawyer and a psychotherapist at the same time. Finally, they sometimes have very little autonomy in selecting cases due to the conditionalities placed on their funding: their action plans are often specified in detail by their external donors, and they also have to care about day-to-day financing from different donors, to which they must submit reports and applications frequently. In short, there seems to be a significant gap between their wider strategies to make changes and the routines they maintain in order to survive before the ECtHR.

This hardship for SNGOs splits the activists into two groups. On the one hand, some activists 'go more strategic'. Activists who are unsatisfied with the lack of strategies and resources in SNGOs often move to 'upstream' organisations, going to TNGOs,

sometimes to the Court, or even to the governments. Indeed, a significant portion of the interviewees from TNGOs and the Court actually had experience of working in SNGOs. On the other hand, activists who do not like to reproduce the 'fundamentally unequal structure' stay in SNGOs and continue their grassroots activities with limited resources. Those who seek more power are by assimilating themselves into the structure, and those who stay away from power are by remaining powerless, only reproducing the ecosystem surrounding the ECtHR.

### 7.4 Implications and Consequences

The findings above can be summarised in three points. Firstly, SNGOs do not have sufficient resources to play the role of finding disputes from their grassroots activities, and often have to rely on external donors. Secondly, the Court may be able to resolve disputes more rapidly with the assistance of NGOs, but its emphasis on 'efficiency' may result in favouring applicants supported by resource-rich organisations. Thirdly, TNGOs assert that they contribute to establishing general rules which expand the scope of human rights protection, but their contribution is likely to be quite limited given the Court's reluctance to listen to NGOs.

At the core of these issues is the fact that TNGOs are half 'insiders' of the system

surrounding the ECtHR. Being an insider is not in itself a bad thing; many NGOs take strategies of becoming insiders and thereby influencing decision-making in many fields.[115] However, in the case of NGOs working before the ECtHR, it seems that the interdependent relationship hinders, rather than promotes, the potential for NGOs to enhance the re-distributive capacity of the ECtHR.

First of all, the intimate relationship with the Court prevents NGOs from confronting the Court. Although third-party intervention is a good avenue for them to present the appearance of working to 'develop law', generally speaking, the Court officials agreed that third-party interventions are less likely to change its jurisprudence than the representation of applicants. Secondly, even if TNGOs make third-party interventions, past research shows that their interventions systematically focus on specific legal and geographical areas, which are of relatively low risk. Of course, there might be cases where socially and legally meaningful interventions have lower risks, but one can easily assume such cases are rare. Thirdly, the interdependent structure between TNGOs and the Court tends to prevent other small or national NGOs from leveraging the power of

[115] Generally, research regarding legal mobilisation also suggests that the degree of NGO's participation in a political decision-making process changes their behaviours. For example, according to Lejeune and Ringelheim's research on Belgian politics (see n16), while political 'insiders' do not necessarily use legal means to get their voices heard, 'outsiders' exclusively use legal means, as litigation is the only means for them to make changes.

Strasbourg without TNGOs' support. It is theoretically possible for any parties to submit third-party interventions, but the Court does not have an incentive to accept a large number of submissions; they simply do not have time to read all of them. Throughout the interviews, the author observed a strong tendency among the Court officials to prioritise the submissions made by 'well-established' NGOs.

While the coordination between the ECtHR and TNGOs may certainly enhance the Court's efficiency in processing cases, it is less likely that TNGOs actually facilitate the establishment of general rules in favour of the disadvantaged in the short term. In the long run, perhaps they have a certain amount of influence, but it is difficult to prove it. More seriously, such interdependence may have undermined the Court's capacity to find disputes from the ground by weakening SNGOs. Facing the powerlessness of SNGOs, the reality is that very many activists choose to go to larger organisations. It is difficult to resist the temptation of 'becoming more strategic', because it is what they always insist they do, and it also guarantees a more stable and promising career as a human rights activist. In this way, the ECtHR may have been losing part of its capacity to find disputes from the ground, which may influence its overall legitimacy as a European court.

## 8. Conclusion

This research was inspired, in large part, by the author's interest in the driving force behind the qualitative and quantitative expansion of the ECtHR. The introduction raised a question about the mechanism at work between NGOs and the Court, a different focus than the conventional interest in the relationship between the Court and member states. Past research expects that the expansion of the ECtHR is partly explained by Court-NGO relationships. Broadly, these studies also lead to the conclusion that these NGOs enhance the re-distributive capacity of the ECtHR.

Yet the findings from the field suggest a slightly different picture. The Court-NGO relationship was found to be characterised by interdependence, but did not appear to expand the Court's protection of human rights either qualitatively or quantitatively. The relationship, in the author's view, rather consists in the Court saving resources and creating an image of openness, while giving large NGOs the opportunity to assert their importance by constantly 'being on the record' while supplying resources to the Court. On the other hand, small NGOs which cannot provide 'useful' information for the Court seem to be dropping out of this process, with the exception of NGOs focusing on niche subjects. Overall, NGOs may have an important role in maintaining this structure, but it might not generally be re-distributive, as resources are generally distributed based on

the NGOS’ consideration of risks and reputation. It may also additionally weaken the dispute-finding capacity of the ECtHR by pushing out SNGOs that would otherwise be best placed to identify disputes.

In light of the current conservative turn of the ECtHR and the governments, the outlook of the picture described above might become gloomier. All of the author’s findings, namely, the persistence of the Court officials in their pursuit of efficiency against the backdrop of an increasing caseload and a static budget, the hesitance of TNGOs to take risks, and the shortage of funding faced by SNGOs, clearly show how NGOs are directly and indirectly pressured and change their activities as the surrounding environment becomes increasingly conservative. Although this thesis primarily aims at capturing the conditions of early 2021 rather than pursuing chronological trends, this cross-sectional picture can be interpreted as a midpoint between an earlier era characterised by its transnationalism and a future that is still unknown.

Due to various limitations, this research remains exploratory. Its purpose is not to provide a decisive conclusion nor to discuss any of the questions raised outside of the context of the ECtHR. Qualitative and quantitative elaboration is needed, and chronological and geographical expansion may be desirable. Having said that, this paper

could have relevance for future research. Particularly, the author would like to consider the contributions of this paper from three perspectives, namely studies regarding legal mobilisation, organisational theories, and international human rights law.

In the context of legal mobilisation, this paper reaffirms the findings of Galanter, Sarat and Scheingold. Judicial fora, similarly to the political system, inherently function in favour of financially and socially advantaged people, and it might be difficult to overcome this caveat through the participation of lawyers or civil society groups. In the case of the ECtHR, the conservativeness of the Court was created by the mindset of the Court's officials prioritising 'efficiency' in processing cases. In particular, the increasing burden of cases to be processed with limited resources has strongly pushed it to favour those actions by NGOs which are 'useful' for its bureaucracy, while disliking others which might delay the process. Against the backdrop of the court's propensity to favour 'efficiency', a situation has arisen where NGOs facilitate the work of the Court and the pursuit of its bureaucracy's priorities, rather than resisting or challenging any of its unwritten 'rules'.

From the viewpoint of NGO studies, by employing the theory of Anthony Giddens, this paper tried to reconcile the gap between the motivation of individual activists and the overall strategy of organisations. Though it is a fundamental problem for any

organisations, in the case of NGOs which are often regarded as ‘saints’, the discovery of a significant gap may be important. Some political scientists have already pointed out the hierarchical organisational structures of NGOs, but the author believes that this paper made a small methodological contribution to explaining why activists sometimes turn conservative when they work as a part of bureaucracy, by applying sociological theories.

Lastly, and most importantly, this paper aims at deepening our understanding of international human rights law ‘in action’. The relationship between the Court and NGOs before the ECtHR provides a compelling example of how international human rights law might easily become an arena for small groups of resource-rich experts to earn and polish their reputations. At the cusp of new era, the more legalistic international human rights law becomes, the less of a possibility there is for it to act as a breakwater against the conservative tide. Of course, this does not mean that we cannot rely on the concept of human rights as a whole. Instead, it suggests that the legalisation of human rights might weaken the concept itself, by overlooking ‘minor’ injustices which cannot be represented in judicial systems for various reasons. As the concept of human rights is increasingly employed as a means of global geopolitical confrontation, it is a huge task for human rights NGOs to successfully mobilise it in domestic politics,

not limited to the confines of courtrooms. (29998 words)

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