RIGHTS, COURTS AND DEMOCRATIC PARTICIPATION

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Keywords:  comparative constitutionalism, European Court of Human Rights, rights politics, democratic participation, democracy

Abstract: This article theorizes the connection between courts, constitutional rights and the changing nature of democracy. The general comparative model developed is then applied to a time-series analysis of the European Court of Human Rights (ECHR). The article is the first to offer a systematic social science analysis of ECHR decisions with particular emphasis on changing democratic opportunities for individuals at both the domestic and supranational level. The findings reveal a court that plays a significant role in expanding political participation and access to justice at the domestic and supranational levels in Europe – a consequence that brings into question dominant theories of international organization and comparative studies of democratic governance.
Citizens around the world are demanding more participation in their democracy and a greater power over their governments. Courts are at the core of this transformation. Scholars observe a growing change in democratic governance reflected by a general shift away from traditional representative democracy and instead governance that is characterized both by the demand for, and the attainment of, greater citizen access, increased transparency and renewed accountability (Dalton, Scarrow, and Cain, 2003). Today, democratic politics is increasingly defined by a set of institutions and political processes that afford greater public participation in important policy processes, whether through referenda, electoral reforms, public access to information and expanded legal rights and access to judicial institutions (citations). Around the world, both domestically and internationally, we see this expansion in the development of higher order norms (both constitutional rights and international treaties) and expanded public access to new courts designed specifically to protect and enforce these new rights (Stone Sweet 2000; Ginsburg 2003; Tate & Vallinder 1995). Courts are increasingly given the power to constrain, shape and dismantle government action and acts (e.g. Cichowski 2004; Ginsburg 2003; Stone Sweet 2000).

This expansion of rights and public access to increasingly powerful review courts not surprisingly renews long-standing debates over the tenuous relationship between courts (as counter-majoritarian organizations) and representative democracy (e.g. Bickel 1962; Black 1960; Bobbit 1982). Likewise, scholars have raised a skeptical eye at expanded rights, arguing that the subsequent “rights talk” can actually undermine rather than enhance democracy (e.g. Glendon, 1991). Contrary to these scholars who warn of the counter-majoritarian difficulty and potential undemocratic nature of courts and rights, in this article, I assert how courts can serve as the cornerstones of an incremental transformation and expansion in public participation in democratic politics. This article contributes to scholarship highlighting when and how courts may provide a more responsive institutional form for democracy than do traditional
representative institutions as evidenced from the American experience (e.g. Zemans, 1983; Miller; Sarat; Graber; Lovell, 2003) and I extend this to examine judicial politics in Europe. In particular, drawing from the analytic framework in the issue Introduction, I examine how rights and access to legal institutions may condition how courts are used as opportunities for public participation through law enforcement, rights claiming and expanded protection.

The article is organized as follows. In the first part, I provide a general framework to conceptualise how rights and access to legal institutions can change opportunities for democratic participation and provide a set of testable expectations that will guide the empirical analysis. How have rights (both domestic and international) changed the opportunities for participation through law enforcement, rights claiming and expanded protection? Further, how does change in legal standing rules and accessibility of legal institutions condition the extent to which citizens and public interest groups use courts to participate in law enforcement, rights claiming and expanded protection? In the second part, I turn to a case study of the European Court of Human Rights (ECHR). The empirical analyses explore these expectations and in particular examine the impact of expanded rights and greater access to legal institutions on change in public participation in important human rights issues in Europe (both within domestic and supranational governance structures).
CONCEPTUALIZING COURTS AND DEMOCRATIC PARTICIPATION

Democratic transformations are on the rise worldwide. New democratic institutions and processes are being adopted in formerly authoritarian, military and communist regimes and the rule of law and constitutional courts are central features of these new political systems (e.g. Ginsburg, 2003). Equally important are the incremental and at times radical democratizing reforms that are taking place in advanced industrial democracies. Citizens are demanding more transparency, accountability and access to their democratic institutions through reforms to the electoral process, citizen access to regulatory agencies and legal institutions (e.g. Inglehart 1997; Dalton 2002; Norris 2002; Fishkin 1995; Elster 1998; Dalton et. al 2003). Surprisingly, the comparative politics scholarship on advanced industrial democracies possesses a relative paucity on the potential role of courts in this transformation, despite the acknowledged importance of courts and judicial independence in new democracies (e.g. Ginsburg, 2003; Epstein et al., 2001; Schwartz, 2000; Guillermo 1999; Larkin, 1996) and a long history of scholarship examining the role of courts in the development and maintenance of American democracy (e.g. Dahl, 1957; Casper, 1976; Rosenberg, 1991).² The gap in our research is particularly problematic, as social, political and economic developments are increasingly shaped by judicial institutions in new and advanced industrial democracies throughout the world (Kenney et al., 1999; Tate & Vallinder, 1995). Further, in many OECD countries, those in Europe in particular, legislative and executive actions fall under not only the legal surveillance of domestic courts but increasingly powerful international courts (e.g. the European Court of Justice (ECJ) and ECHR).
The democratic implications for this rise in judicial power has garnered significant critical attention by public law and legal scholars sparking renewed discussion over the appropriate place of courts as non-majoritarian institutions in representative democracies (e.g. Rubenfeld, 2004; Hirschl, 2004). Yet, interestingly, these legal reforms have also brought expanded opportunities for individuals to bring rights claims, and a liberalization of legal standing rules enabling wider citizen and interest group participation in the development, monitoring and enforcement of laws at both the domestic and international level (Cichowski & Stone Sweet, 2003, p. 193; Stone Sweet 2004; Alter 2001; Conant 2002; Cichowski, 2006). Certainly, these legal avenues of participation do not replace the primary importance of electoral, lobbying or protest activities, but they may suggest that if we care about democratic participation, courts may present a complementary arena of opportunity - thus, enhancing rather than diminishing democracy.

The Introduction to this special issue gives us a general framework to identify when we might expect to find a transformation or change in democratic governance. In the following discussion, I apply this general conceptual framework to examine the interaction between rights, courts, and democratic participation. In particular, I examine how constitutional rights and access to legal institutions condition how courts can serve as arenas for public participation.

**Constitutional Rights**

Is it acceptable, or legitimate, for any modern democracy to go without judicially enforceable, constitutionally entrenched rights? The United Kingdom and a few Commonwealth countries notwithstanding, the question has definitively been answered: ‘no.’ (Cichowski & Stone Sweet, 2004, p. 217; Hirschl, 2004; Epp, 1998). Despite this pervasive acceptance of constitutional rights as an empirical characteristic of modern democracies, their effect on democratic politics is far more contentious. Classic libertarian conceptions of democracy give
pride of place to individual rights as assurance of protecting individual liberties (e.g. freedom of expression, to assemble) from the tyranny of the state (e.g. Locke). Similarly, pluralist democratic theorists argue that individual rights protect and empower citizen autonomy in democratic politics (e.g. Dahl 1989). And legal theorists such as Dworkin (1977) argue that rights function positively as “trumps” assuring that the individual interests they protect are recognized even when this might go against a general or majority interest. Such perspectives suggest that rights are essential for democracy and have a positive effect on democratic participation the extent to which rights are judicially enforceable enabling individuals to assert and seek protection against public authorities - a particular advantage for those who might not otherwise receive representation or protection through electoral politics.

Yet scholars have also raised questions of the limitation of rights protection and reform garnered through litigation. Scheingold observes that a pervasive “myth of rights” has led many to believe in the myth that all individuals are assured their day in court and that judicially affirmed rights ipso facto lead to rights protection in liberal democracies (Scheingold, 1974). This assertion led to subsequent studies documenting the institutional limitations of legal strategies for progressing social change and reform (Rosenberg, 1991; Horowitz, 1977). Likewise, others have highlighted how the initiation of “rights talks” (or an assertion of what is often take as an irrevocable right) can impede further democratic debate and dialogue (Glendon, 1991) as well as serve to perpetuate “illusions” of social change (Tushnet 1984, p. 1383). Together these approaches offer a somewhat simplified view of rights - as either saviour or demon of democracy.

Drawing from legal mobilization scholarship, I argue that rights are not rigid norms embodying a set interest that will automatically “trump” others but instead are “constitutive” of everyday interactions in society - amongst citizens, groups and private and public institutions (McCann, 1994, p. 6; Zemans, 1983). Rights are often purposefully vague and they gain
meaning through dialogue, negotiation and adjudication, often changing how rights are practiced and enforced in the future (Minow, 1990). By adopting this view of rights, we can begin to see the possibilities for democracy rather than the obstacles.

The effects are two fold. First, the extent that rights are judicially enforceable they serve as a powerful tool for participation by enabling rights litigation with the possible effect of law enforcement and expanded protection in the future. The European Convention requires that all contracting states implement and enforce these supranational rights provisions in their domestic legal systems. Domestic incorporation formalizes these rights in domestic law and increases their enforceability both by national courts and the ECHR and is critical to the realization of these rights in action rather than just on the books (Polakiewcz, 1996). Civil rights reform in the United States is an example of how constitutional rights can expand protection through litigation, as judicial rulings aided in the eventual change in exclusionary political processes (e.g. desegregation, Brown vs. Board of Education). Further, at the supranational level, the ECJ’s case law is now famous for expanding law enforcement and protection by transforming an international treaty into a quasi-constitution granting individual rights – despite considerable domestic government opposition to such an expansion (Weiler, 1991; Stone Sweet, 2004).

Second and related, rights can also have a more indirect or “radiating” effect on participation, by creating a space for rights discourse and mobilization (McCann, 1994; Galanter 1983). This can change who has access to political and legal institutions the extent to which new societal groups and their concerns are included in important policy debates and law enforcement in the future. For example, the ECJ’s gender equality case law is now heralded as having brought not only procedural and substantive change in EU law (Ellis 1998) but also mobilized women to bring subsequent rights cases ensuring greater enforcement and expansion in sex discrimination law (Cichowski, 2006). Again, this increased participation must be understood in the context of complementing rather than supplanting larger reforms that may take place through
legislative processes, but nonetheless incremental judicial rulemaking has enabled sensitive and radical reforms that may not have stood the test of electoral politics. Together we can see that rights can have both a direct and indirect effect on participatory politics and this suggests the following general expectation:

As rights become more formalized and judicially enforceable, we would expect increased opportunities for participation through law enforcement, rights claiming and expanded protection.

Access to Courts

While rights clearly serve as a tool for litigation, an equally important factor in understanding how courts can change participatory politics is the degree of access the public has to legal institutions. Access to judicial processes in this analysis is understood in terms of legal standing and access to a fair trial by courts with judicial review powers. While a legal system or court may technically be open to all individuals and societal groups, standing rules often filter out which individuals and groups can successfully pursue their claims (Cichowski & Stone Sweet, 2003). Alongside standing rules, the institutional procedures and how courts interpret governing whether a court or legal system permits individual or group complaints and how these are interpreted by courts is equally if not a greater obstacle to public access. Finally, the relative review powers of the court will also condition the subsequent effects of litigation for participation through law enforcement, rights claiming and expanded protection (see Alter this issue).

Cross-national variation in access to courts, in particular courts given jurisdiction over constitutional rights adjudication, is considerable. In the United States, individuals and groups are given considerable access points between local, state and federal high courts to bring claims before judges with the power of judicial review. The access is more limited in Europe. In
France for example, the Constitutional Council (a quasi-judicial institution with constitutional review powers) will only hear claims from elected officials. Somewhat more accessible, the Constitutional Court in Italy will take cases from elected officials as well as lower court judges. Still greater access is found in Spain and Germany, whose Constitutional Tribunal and Court are open to direct individual complaints. Similarly when we look at supranational courts, there is variation. The European Court of Justice is notoriously difficult for direct individual and group claims, preferring that such cases reach the ECJ via domestic courts (Rasmussen, 1980).

Similarly, the original European Convention constructing the European Court of Human Rights created optional clauses that enabled member state governments to 1) not allow direct individual access (Art. 25) and 2) not recognize the Court’s jurisdiction over the interpretation of Convention rights (Art. 46). Following massive restructuring of the Convention legal system in 1998, accessibility is today greatly improved as the measures are compulsory.

This issue focuses on access to judicial institutions in international legal systems. As the above discussion of non-majoritarian organizations would suggest, increased individual access to international courts may subsequently change both the role of the court as well as individuals in international governance. International courts with individual access generally have higher caseloads (Keohane et al., 2000, p. 475). This gives courts a greater opportunity to engage in important political issues through the strategy of incremental development of doctrine (e.g. Helfer & Slaughter, 1997). Individuals, rather than states, may be more likely to utilize these courts for strategic policy reform (e.g. Cichowski, 1998, 2004; Alter & Vargas, 2000; Harlow & Rawlings, 1992; Conant, 2002, 2003). Finally, a key and somewhat straightforward observation when examining participatory politics at the international level, is that increased participation by non-state actors – whether business associates, citizens or societal groups – is an enhancement of participation at the international level as this denotes a widening in access to a political arena that traditionally was dominated by states and international organizations.
Despite this variation in public access to courts, there is a general trend towards greater access (Cichowski and Stone Sweet 2003). The expansion of constitutional rights and enhanced judicial review powers is part of this trajectory, yet the importance of individual access can also not be understated. This leads to the following expectation:

*As access to justice is strengthened (institutional direct access increased), we would expect individuals and public interest groups to have increased opportunities to participate in public policy and rights reform.*

**Data and Methods**

To test these expectations, I created a dataset that includes applications submitted to and judicial decisions of the European Court of Human Rights from 1955-2004. The European Court of Human Rights offers a unique opportunity to examine the interaction between courts and rights politics and the subsequent impact on international and domestic governance structures. The Court is a judicial organization for the Council of Europe and was established in 1959 by the then 13 contracting states. Today membership includes 46 states although currently only 45 have ratified the Treaties granting the ECHR jurisdiction.⁵

The Court’s main function is to ensure contracting state compliance with and the uniform interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (hereafter the European Convention or Convention). Technically, the Court’s jurisdiction involves international – not constitutional – law, such that the ECHR does not have constitutional review powers. Yet interestingly, while contracting states remain sovereign states in the Council of Europe system, the Convention rights as protected and interpreted by the ECHR have served as a body of higher order norms and led to considerable constraint on what national legislators can do. As scholars such as Martin Shapiro observe of the ECHR, “the Court has rendered enough judgments that have caused enough changes in state practices so that it can
be counted to a rather high degree as a constitutional judicial review court in the light of realities as opposed to the technicalities” (Shapiro 2002: 155). Thus, the ECHR becomes an interesting test of how rights politics can emerge even without constitutional review and also how the practical effects of administrative review can at times render new rights. The legal processes examined by these data involve a uniform body of civil rights and liberties at the supranational level, variation in national legal systems, variation and then harmonization of individual access at the supranational level and change in national level legal processes (e.g. incorporation of Convention rights, adoption of ECHR rulings).

The dataset was compiled from primary documents from the European Court of Human Rights including the Yearbook of the European Convention on Human Rights, the European Commission and European Court of Human Rights and Reports of Judgments and Decisions/European Court of Human Rights and the Court’s Annual Survey of Activities. The dataset includes all ECHR decisions from the first, 1960 through 2004. Applications data is collected from the first application, 1955 through 2004. Each case was coded for the following information: date complaint was lodged, date of final judgment, Convention provisions invoked, contracting state involved, and judicial decision (violation or no-violation). The dataset also includes supplementary time-series information on the original application: including date lodged and the nationality (including third country nationals) of the plaintiffs.

Historical data illustrate quite clearly that the European Convention and the ECHR serve as an expanding opportunity for rights claims above and beyond the domestic legal system. The upward trajectory of the Court’s case load is phenomenal. Figure 1 displays the annual number of applications invoking Convention rights lodged with Convention Institutions between 1955 and 2004. These numbers are standardized to account for a growing number contracting states and the data still illustrate a steady increase in rights claims to these supranational institutions. Institutional changes help explain this expansion in claims. The radical increase in applications
following 1998 is primarily attributable to a massive institutional restructuring of the Convention institutions: a change that was both cause and effect of the increasing number of rights claims. Due to an increasing number of contracting states and a growing number of claims even from existing states, signatory states agreed to a new institutional structure, which abolished the Commission (formerly the main access point for claims), and combined these functions into a strengthened and enlarged the European Court of Human Rights. Further, the previously optional clauses – Art. 25 granting individuals to bring claims directly to this supranational institution and Art. 46 granting the Court jurisdiction as final arbitrator – became compulsory requirements for all contracting states.

-------- Figure 1 about here --------

THE EUROPEAN COURT OF HUMAN RIGHTS AND DEMOCRATIC PARTICIPATION

We have seen that a set of institutional factors can systematically shape the evolving role of courts and public participation in democratic governance. In particular, the previous hypotheses posit that change in constitutional rights, the power of judicial institutions and the level of access to justice can alter the degree of participatory politics and balance of power between individuals and elected officials in important policy and rights reforms. In the following analysis, I examine how these factors influenced the expansion and growing role of individuals in important human rights claims and reforms in Europe. Rights politics surrounding the European Court of Human Rights is the focus of the analysis.

Expansion of Convention Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms (1950) serves as a set of higher order “quasi-constitutional” norms for contracting states throughout Europe. In this section, I explore if, how and why these Convention rights have expanded over
time and how this might vary cross-nationally. We would expect that as these rights expand in
precision, scope and enforceability, there might be greater opportunity for public participation
and empowerment in politics.

Creating Constitutional and Statutory Rights in Domestic Law

The relationship between the ECHR, rights politics and democratic governance is
critically affected by the status that Convention rights are given in domestic law. Given the
various legal traditions of monism and dualism, following ratification of the Convention,
countries following a dualist tradition are given some degree of choice in how these new
“constitutional” international human rights will be incorporated into the domestic legal order.
Monist countries automatically incorporate international law upon ratification of international
treaties. Incorporation, in some cases, has effectively created a quasi-Bill of Rights in countries
that previously did not possess such a body of judicially enforceable rights. France, Sweden and
the United Kingdom are examples. These rights can serve as a powerful tool for individuals to
engage public authorities and bring into question discriminatory state actions. Yet the level to
which these rights can empower the individual vis à vis public authorities, is critically linked to
the actual domestic law status given to these international human rights. The Convention is
given constitutional rank in some countries, including the Netherlands, Austria, Belgium,
Cyprus, Czech Republic, France, Greece, Lithuania, Luxembourg, Malta, Portugal, Romania,
Spain and Switzerland. Thus, when these international human rights come in conflict with
domestic law they are given supremacy. This gives individuals considerable power to alter and
in some cases quash discriminatory national policies.

Other states relegate Convention rights to the level of national legislation. Germany and
the United Kingdom followed this strategy when incorporating the Convention into the national
legal system. In Germany, Article 59.2 of the Basic Law assigns the Convention the status of
federal law (Zusimmungsgesetz). Thus, an individual cannot make a constitutional complaint based directly on these incorporated international human rights. This limits the ability of the individual to utilize the Convention in questioning the constitutionality of a public act or practice - an action that was possible in the above discussed countries. That said, the German Federal Constitutional Court continues to state clearly in its case law, that a constitutional complaint may (indirectly) invoke the Convention along with the individual’s fundamental right to equality under Article 3.1 of the German Basic Law to argue for an arbitrary misapplication or non-application of the Convention rights. Although the Convention is not given formal constitutional status, this case law gives individuals the opportunity to invoke Convention rights before the Constitutional Court in order to appeal a court’s misapplication of the Convention.

The United Kingdom presents a similar dynamic, if not more limited in terms of an individual’s ability to alter public policy through litigation. After years of debate and 46 years after ratification, the European Convention was finally incorporated into the British legal system through the Human Rights Act of 1998. This made the UK the oldest signatory state to incorporate. Much of this delay centered on the issue of what status Convention rights would have, as the repercussions of constitutional status, both empowering individuals and national courts vis à vis parliament, were not welcomed. The Human Rights Act does not give supra-legislative status to Convention rights (and thus, allegedly maintains parliamentary sovereignty), yet it does state clearly that national courts are required to address these rights: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with Convention rights.” Further, under the Act, it is mandatory for all British courts and tribunals to take into account any judgment of the European Court of Human Rights. While this may bode well for greater access to and opportunities for rights claims before British courts, individuals challenging the British government may continue to find direct action before the ECHR a more successful route.
Together the varying status of the Convention in national law, whether constitutional or statutory, illustrates how this may impact access to justice and an individual’s ability to bring human rights claims against public authorities. Further, this may begin to tell us something about general cross-national trends in direct claims to the European Court of Humans Rights. The fact individual claims from the United Kingdom make up a large portion of the ECHR’s case load may be partially attributable to the lack of opportunities to make the claims within the domestic legal system.\textsuperscript{12}

**Expanding Judicial Enforceability**

The domestification of the Convention enhanced domestic judicial review powers and enabled national courts to make bold moves in the assertion of international human rights protection \textit{vis \`a \textit{vis}} the preferences of national executives and parliamentarians.

In France, the Conseil d’Etat, after years of maintaining a reserved attitude towards the Convention, gave priority to an international treaty over a municipal law that was enacted after the treaty had been made applicable.\textsuperscript{13} This decision not only dismantled the national legislation in question, but laid down how the Conseil d’Etat would treat a similar conflict between the Convention and domestic law in the future. In Germany, where the Convention has the status of statutory law (not constitutional), the Federal Constitutional Court has upgraded this rank. A recent decision by the Constitutional Court held that the German Constitution must be interpreted in light of the European Convention.\textsuperscript{14} In short, this argument requires that German fundamental rights be placed in the shadow of the practice of the Strasbourg Court, rather than vice a versa, as originally conceived and mandated by legislators.

Similarly, the Austrian Constitutional Court and the Swiss Federal Court, both of whom have a long history of engaging Convention rights, have intensified their tendency to expand rights protections, sometimes interpreting the rights beyond the practice of the ECHR.\textsuperscript{15} The dialogue between the ECHR and national courts is also paramount to the work of the Spanish
Constitutional Court. Following ratification of the Convention and simultaneous incorporation in domestic law in 1979, the ECHR immediately began assisting in the development of constitutional law by the Court in this developing democracy.

The ECHR and the Expansion of Rights

We know that the incorporation of Convention provisions into domestic law can expand the type of rights available to individuals and societal groups and the relative power they may gain in bringing claims against government action and acts. ECHR decisions can also be another source for rights expansion. Scholars have long recognized the power of courts as rulemakers, the extent to which their decisions change the precision, scope and meaning of legal norms in the process of dispute resolution (e.g. Shapiro 1981). In the following section, I examine ECHR decisions cross-nationally and over time. First, I explore whether the ECHR has actively worked to expand the precision, scope and enforceability of Convention provisions or whether the Court is hesitant to declare violations and instead preserve national legal practices. Second, the analysis determines which contracting states are the subject of this litigation. Finally, I explore which Convention rights and procedures invoked in these legal claims.

The data illustrate a distinct trend. Figure 2 displays the annual number of European Court of Human Rights decisions finding a contracting state in violation (or breach) of European Convention rights as a percentage of total annual ECHR decisions between 1960-2004. The data present quite clearly that the Court does not act to protect national government actions or acts, but instead quite actively dismantles domestic laws and practices that come in conflict with Convention rights. In an overwhelming majority of the cases the Court finds contracting states in violation of the convention (3914 out of 5290 decisions, or 74%). The early years were characterized by a relatively small number of decisions (44 decisions between 1960-1979) and a large number of these cases ended in either mutually agreed upon settlements between applicant
and defendant state (friendly settlements, and thus, no violations) or the few cases heard in some years all ended in the Court finding a contracting state in violation. By the early 1980s, the Court’s caseload is growing and we find the Court consistently ruling in favor of individuals bringing claims against their own governments in over half of all annual cases. This supranational legal process increasingly became a successful route for individuals to demand for and achieve reforms from their government.

------- Figure 2 about here -------

Which countries are finding their laws and legal practices the subject of this litigation? Table 1 contains the total number of decisions of the European Court of Human Rights and the percentage of decisions declaring a violation of Convention rights by country between 1960-2004. Overwhelmingly, these cases involve Italy, Turkey, the United Kingdom, Greece, France and in recent years Poland. Between 1960 and 2004, over a third of all ECHR rulings involved Italy as the defendant. Similar to trends of European Court of Justice litigation originating from the Italian legal system, the high number of cases may reflect the fact that individuals turn to the courts to demand national compliance with supranational laws when local, regional and federal Italian administrative agencies present considerable lags in implementation time (Cichowski 1998). Other factors equal, the claims may also be a function of those countries, which lack an equally powerful body of constitutional rights protection. The Turkish government has consistently been less supportive of extending rights protection to the Kurdish community and thus, the ECHR presents another avenue for these individuals to seek equal rights within their domestic legal system. Likewise, until the adoption of the Human Rights Act in 1998 the United Kingdom lacked a codified set of civil liberties and rights and individuals consistently turned to the ECHR as an avenue to seek rights protection. Prior to 1998, the United Kingdom was second to only Italy in total ECHR cases.
Clearly, lack of rights is not a sufficient condition, but works in tandem with other factors such as legal expertise and support for individuals to engage this supranational legal system, but in those systems with some legal support and a lack of constitutional rights protection we might expect more litigation. Yet all of these cases do not end in the ECHR declaring a violation and thus it is important to look at outcomes. The data also reveal which countries receive a higher percentage of violation rulings. Again, even thought these data quite clearly illustrate that the majority of cases brought do end in a violation, the cross-national variation is noteworthy. Countries such as Portugal, while being in the top ten ranking of countries involved in the greatest amount of ECHR litigation, its violation rate is comparatively low at 57% (the ECHR declared a violation in 57% of the cases involving Portugal). Interestingly, some countries with higher percentage of violation rulings, such as Ukraine (94%), Russia (91%), and Bulgaria (91%), are countries recently establishing democratic rights and reforms, illustrating that the ECHR may serve as important influence in correcting and expanding the rights available in these new democracies.

------ Table 1 about here ------

Table 2 reveals the Convention rights and provisions that are invoked in ECHR decisions between 1960 and 2004. The table only includes the top ten rights and procedures that are invoked in this time period and provides information on both the total number of times the right is invoked and also the number of ECHR decisions involving a violation of that provision as a percentage of all ECHR decisions ending in a violation. The results are astounding with the vast majority of all cases involving Article 6 of the Convention, the right to a fair trial (3941 out of 5290 or 74% of the time). Similarly, three quarters of all the decisions in which the ECHR finds domestic practices in violation of Convention rights, Article 6 is the subject of these rulings. As will be discussed further below, individuals throughout Europe have systematically reached out to the ECHR to demand a higher level of legal protection and access to justice than they are
receiving from their own domestic courts and legal systems. Overtime, the ECHR case law has come to expand and define the relatively vague and broad rights embodied in Article 6 including such provisions as the length of legal proceedings (“reasonable time”) and the right to a court. Protocol 1 Article 1 which provided for general protection of property has also been invoked in a significant number of cases (847 cases) and makes up 15% of the violation decisions of the ECHR. The Protocol provides relatively general and open principles pertaining to an issue that often creates considerable tension between governments and their citizens: the regulation of property. And through the resolution of the dispute, the Court expanded the meaning and scope of how this provision is protected in domestic law leading to such changes as the administration of property tax codes\[17\] and expanded access to judicial remedies in property disputes.\[18\]

-------- Table 2 about here --------

Compliance with the ECHR’s decisions is also an important component of its judicial power relative to national governments. Again, almost three quarters (74%) of the Court’s case law ends in a ruling declaring national practices in violation of the Convention. Do national governments subsequently comply? The overwhelming, and somewhat surprising answer is yes. Compared to other international courts, the ECHR has a remarkable compliance rate (Norgaard 1993). ECHR rulings have led to payment of monetary damages, administrative, legislative, judicial and even constitutional reforms.\[19\] For example, ECHR decisions resulted in expansion of administrative review powers of courts in Sweden,\[20\] a new code of criminal procedure in Italy,\[21\] led the Austrian Constitutional Court to reverse its previous interpretations of “civil rights and obligations,”\[22\] and resulted in an Irish Constitutional amendment enabling access to information about foreign abortion services.\[23\]

Access to Justice
Critical to this dynamic transformation in rights and judicial power is the expansion in access to justice for individuals. Alongside, changes in the scope and enforceability of Convention rights and also incremental strengthening of the review powers of both domestic courts and the ECHR, the avenues for legal claims have also widened. Public access to these important rights reforms is a cornerstone of democracy in Europe today. As these institutional direct access points increase, we would expect individuals and public interest groups to have increased opportunities to participate in public policy and rights reform.

Improving access from above: Supranational Access to Justice

Alongside reforms to the Court’s jurisdiction, direct access to the Court by individuals and groups also changed overtime. Old Article 25 recognized the right of individuals to file an application. Similar to Article 46, this was an optional clause, leaving up to contracting states the decision to allow individuals to bring claims. Again, this was a key intergovernmental element of the original Convention system, as limiting individual access, potentially limited the number of complaints and in effect minimized the impact of this supranational legal regime on domestic law and practices. Yet even if a state had accepted Article 25, the European Commission of Human Rights served as the intermediary between the individual and the Court. Prior to 1994, only contracting states and the Commission had standing to bring cases before the Court. In 1994, Protocol 9 was adopted and individual access was reformed radically improving legal standing for individuals. Protocol 9 amended old Articles 44 and 48 extending standing to individuals, non-governmental organizations and groups of individuals.
Individual access to the ECHR underwent further reform in 1998. Protocol 11, which governed the changes to the Convention institutions, also amended to Article 25 and made individual access compulsory. Following these reforms, individuals were given both formal and practical access to the Court. The floodgates were opened, as individuals throughout Europe did not hesitate to utilize this new avenue of access to justice. This trend is revealed in the data. If we return for a moment to Figure 1, which details the annual number of applications, we can see the initial shift upward in the early 1990s and then the radical increase that followed the 1998 reforms. Again these are standardized numbers, so even with an increasing number of contracting states we have an increase in individuals and groups utilizing this supranational legal system. The Convention legal system recognizes the importance of protecting and improving access to justice for individuals as these supranational reforms indicate.

The Convention legal system has over time also increased access to justice for individuals who might otherwise have very limited if any rights at the domestic level. In particular, this is the plight of individuals and families who are not citizens of their new host country and they are also not citizens of another Council of Europe state; they are third country nationals (TNCs). The data on the applications filed with the European Commission of Human Rights (prior to 1998) and subsequently the ECHR reveal an increasing number of TNCs bringing claims against host countries that are contracting states. The data in Figure 3 reveal that between 1955 and 2004 third country nationals filed almost 7000 applications against contracting states citing a violation of Convention rights. Even though the number of claims is generally small (only 4% of total applications), the standardized totals reveal an upward trend, reflecting a real change in number of non-national complaints, not just a growing number of contracting states. With the exception laid down in Art 16 of not obligating states to extend political rights to aliens, ratification of the Convention obligates states to ensure rights protections of all those
living within their borders, irregardless of citizenship status – an access to rights that is not duplicated with other international legal orders (such as the European Union).

As rights protections for immigrants and non-citizens are often limited more generally (see Conant this Issue), the ECHR in the past has offered at least some protection on rights such as family life (Art 8)\(^2\) and inhuman treatment (Art 3).\(^3\) Yet despite the somewhat narrow protections given to non-nationals, the ECHR has played an increasingly important role in establishing the protection of minority rights in international law – a protection that might directly benefit TCNs in the future. One example was a case involving Greece in which the ECHR argued, “…the existence of minorities and different cultures in a country was a historical fact that a ‘democratic society’ had to tolerate and even protect and support according to the principles of international law” (Sidiropoulos Case 10/07/1998, para. 41).\(^4\) Further, variation across nationalities is noteworthy. If we look at the last five years, individuals from Morocco, Algeria and the United States consistently are the top three TCNs to file applications with the ECHR. While the factors influencing initiation of a complaint is beyond the scope of this article, the data may suggest that these third country nationals are not necessarily devoid of rights in their home domestic legal system.

-------- Figure 3 about here --------

**Demand for better access from below: National Access to Justice**

The 1998 reforms may also be indicative of a continued demand for better access to justice within the domestic legal system. Thus, an attempt to change supranational institutions enabling access to justice may be one step to remedying a continued problem with access to the legal system at the domestic level. One indicator of this dissatisfaction with domestic legal procedures is the frequency to which contracting states are litigated for breach of Article 6 of the European Convention. Article 6 concerns the issue of the right to a fair trial. The provision
continues to be an important area of the Court’s evolving case law, especially the extent to which
the ECHR continues to connect this “right” to provisions provided in domestic law. This creates
a degree of limitation on the right for the reason that the Court has consistently ruled “that for
Article 6 to apply, a claim must relate to a right which domestic law can, at least arguably, be
said to recognize” (Council of Europe 2002: 28). Applicability of Article 6 to the areas of
domestic civil proceedings, the right to a court, and rights of the defence continue to be
critical parts of the Court’s evolving case law on access to justice. The decisions involving a
“right to a court” are particularly interesting as this is in fact not an absolute right protected by
the Convention, but instead can only be deduced from the “spirit” of Article 6 (Council of
Europe 2002: 30).

The data reveal the importance of access to justice claims. Between 1960 and 2004, the
ECHR issued 5290 judgments of which 74 % involved Article 6. The systematic magnitude of
these rights to legal justice decisions illustrates not only that this is a very serious concern for
individuals throughout Europe, but also that the ECHR has engaged this important issue. How
have these Article 6 violations varied cross-nationally? Table 3 displays the standardized and
actual total number of ECHR decisions declaring a violation of Article 6 by defendant state and
these numbers as a percentage of the total number of decisions involving each country between
1960 and 2004. For almost all countries, violations of the right to a fair trial (Article 6) make up
over a third if not more of the judgments. Again, if we revisit the fact that most ECHR cases
ending in a violation decision lead to subsequent domestic legal change, these data would
suggest that the ECHR plays a critical role in expanding domestic access to justice. Individuals
in Italy have persistently brought claims before the ECHR demanding the reform of the Italian
judicial system, in particular the length of civil, administrative and criminal proceedings.
Similarly, in France, Turkey and Austria individuals utilize the ECHR to demand change to
prolonged legal proceedings. These judgments lead to both damages and domestic policy reform.
that overtime erodes parliamentary sovereignty over domestic judicial systems.\textsuperscript{36} Further, these data suggest that access to law and courts remains a salient public concern in both established and transitioning democracies throughout Europe today.

\textbf{Conclusions}

Human rights protection is no longer a domestic policy issue in Europe. Sensitive national legal issues such as right to privacy and criminal law are no longer impermeable to non-legislative reform and the reach of international legal institutions. The European Court of Human Rights, national courts and a growing body of individuals engaged in supranational rights claims explains this transformation. Rather than compromising the status of democracy in Europe, I argue this expansion in supranational judicial power has increased the participatory nature of governance in Europe empower individuals to demand and receive a more accountable, transparent and accessible government.

This transformation in governance is a dynamic process. First, the analysis reveals that as constitutional rights expanded in precision, scope and enforceability through domestic incorporation of the European Convention and through the judicial rulemaking of the ECHR, individuals are given a powerful tool to engage in important policy reform and to constrain the action of their own governments. Second, as judicial power expanded, through the expansion in judicial review powers and jurisdiction, the ECHR and domestic courts all attained greater power over rule innovation, evolution and enforcement \textit{vis a vis} their legislative colleagues. The findings illustrate how domestic courts gained new judicial review powers in order to protect Convention rights and similarly, the ECHR’s review powers were strengthened with the shift to compulsory jurisdiction.
Finally, access to justice remains a salient issue and important demand of the public throughout Europe. Art 6 of the Convention and the levels of justice and access enshrined in this provision were the number one complaint brought before the Court. In response to these claims, the ECHR has not hesitated to dismantle discriminatory national practices despite contracting state opposition. Similarly, the findings illustrate how a steady stream and demand of Convention violations led to an expansion in access to the ECHR – further limiting national government control over this supranational legal system in the future.

The analyses also suggest a set of broader conclusions. First, involves the role of courts in democratic governance. Courts and the individuals they can empower may play a significant factor in the changing nature of democracy – a more participatory democracy where individuals are given new powers to directly impact rights reform and to place a check on the acts and actions of their elected governments. An outcome not necessarily intended by the creators of these institutions. This is a process of institutional change and is a story about deviation from original intent, not just unintended consequences (e.g. Pierson 2000), but radical transformation. It is also not unique to the European Court of Human Rights. Instead, wherever we find expanded rights, judicial power and public access, we might expect a change towards more participatory politics. Throughout the domestic legal systems of Europe today, constitutional politics are characterized by a constitution with enumerated rights and a constitutional court empowered to protect those rights. The result has been the very “government of judges” feared by the creators of these institutions, as courts have systematically transformed the work of legislatures (Stone Sweet 2000). Similarly, at the supranational level, the European Court of Justice, created to ensure the uniform interpretation of EU law has become a key forum for individuals to bring claims against their own governments – case law that has subsequently dismantled national legal practices despite vehement member state opposition (e.g. Cichowski 2004; Stone Sweet 2004).
Second, understanding the role of courts in international governance may be less about foundational moments (e.g. Moravcsik 2000), but instead change over time. Put simply, original intent may matter less to explaining the political effects of courts than judicial power accrued over time. Scholars focus on foundational moments to understand the subsequent ability of courts to constrain state behavior in general (e.g. Ginsburg 2003) and more specifically in international politics (e.g. Moravcsik 2000). Delegation theory and principle agent models are often enlisted to assist in this task. This can obscure reality. Such assumptions lead scholars to conclude that the adjudicative function of human rights regimes are unique from other international regimes, such as trade, monetary and environment because they are specifically designed to enable individuals to challenge the domestic activities of their own governments (Moravcsik 2000: 217).

While these arguments about institutional design and original intent are accurate, it tells us little about how that international legal regime may evolve overtime and with what political effects. Functional variation in the structure of courts exists, as seen in Alter’s judicial role argument (see Alter this Issue), but scholars observe how courts can transform their review powers – in particular blurring between administrative and constitutional review (e.g. Sterett 1997; 1994; Shapiro 2002). But if we look at the incremental expansion in the precision, scope and enforceability of legal norms, the increasingly autonomous power of judicial review and expanded opportunities for individual legal claims – the impact of courts such as the ECHR (human rights regime) and the ECJ (economic/trade regime) start to look very similar despite very different original intents. The question of whether courts operate as “trustees” or “agents” emphasizing the relationship between the original functional demands of governments and the courts they create (Stone Sweet 2002), may be less relevant – as these legal systems may over time shift to operate more directly in relation to the demands of the people. Thus, the expansion of rights, judicial power and access to justice may become a uniform, socially accepted and
legitimate remedy to counter balance parliamentary sovereignty (at both the domestic and international level) pushing the scale in the direction of participatory democracy.
REFERENCES


Figure 1 Annual Number of Claims (Applications) Lodged with European Commission and Court of Human Rights, 1955-2004

Notes: The data entries are standardized numbers of applications to adjust for increasing number of contracting states. For each year, the total number of applications is divided by the number of contracting states in that given year. Total unstandardized number of applications = 154,242
Source: Yearbook of the European Convention on Human Rights, the European Commission and European Court of Human Rights (various years).
Figure 2  Number of ECHR Judicial Decisions Finding a Country in Violation of the Convention as a Percentage of Total Annual ECHR Decisions, 1960-2004

Notes: Total Judgments = 5290, Total Violations = 3914
Data includes all ECHR decisions that either 1) declare a defendant state is in breach (violation) of the European Convention or 2) found in favor of the applicant on procedural grounds stating the defendant state is in violation on procedural grounds.
Source: Reports of Judgments and Decisions/European Court of Human Rights, (various years).
<table>
<thead>
<tr>
<th>Contracting State</th>
<th>Standardized Total # of Decisions</th>
<th>Total # Decisions</th>
<th>% of Decisions Finding a Violation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>37</td>
<td>1655</td>
<td>74</td>
</tr>
<tr>
<td>Poland</td>
<td>19</td>
<td>223</td>
<td>81</td>
</tr>
<tr>
<td>Turkey</td>
<td>18</td>
<td>824</td>
<td>72</td>
</tr>
<tr>
<td>France</td>
<td>17</td>
<td>536</td>
<td>74</td>
</tr>
<tr>
<td>Greece</td>
<td>9</td>
<td>287</td>
<td>81</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>9</td>
<td>408</td>
<td>62</td>
</tr>
<tr>
<td>Romania</td>
<td>7</td>
<td>80</td>
<td>88</td>
</tr>
<tr>
<td>Croatia</td>
<td>7</td>
<td>53</td>
<td>51</td>
</tr>
<tr>
<td>Moldova</td>
<td>5</td>
<td>37</td>
<td>95</td>
</tr>
<tr>
<td>Portugal</td>
<td>5</td>
<td>138</td>
<td>57</td>
</tr>
<tr>
<td>Slovakia</td>
<td>5</td>
<td>61</td>
<td>62</td>
</tr>
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<td>Czech Republic</td>
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<td>Ukraine</td>
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<td>Austria</td>
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<td>Bulgaria</td>
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<td>Russia</td>
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<td>23</td>
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<td>Finland</td>
<td>3</td>
<td>39</td>
<td>69</td>
</tr>
<tr>
<td>Spain</td>
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<td>54</td>
<td>78</td>
</tr>
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<td>Belgium</td>
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<td>107</td>
<td>76</td>
</tr>
<tr>
<td>Lithuania</td>
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<td>80</td>
</tr>
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<td>Germany</td>
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<td>69</td>
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<td>Switzerland</td>
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<td>Netherlands</td>
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<td>Latvia</td>
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</tr>
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<td>89</td>
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<td>San Marino</td>
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<td>Cyprus</td>
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<td>81</td>
</tr>
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<td>Ireland</td>
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</tr>
<tr>
<td>Denmark</td>
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</tr>
<tr>
<td>Georgia</td>
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<td>2</td>
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</tr>
<tr>
<td>Norway</td>
<td>0.3</td>
<td>12</td>
<td>75</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>0.2</td>
<td>10</td>
<td>90</td>
</tr>
<tr>
<td>Malta</td>
<td>0.2</td>
<td>6</td>
<td>100</td>
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<tr>
<td>Iceland</td>
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<td>57</td>
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<td>1</td>
<td>100</td>
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<tr>
<td>Liechtenstein</td>
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<td>2</td>
<td>100</td>
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<tr>
<td>Andorra</td>
<td>0.2</td>
<td>2</td>
<td>50</td>
</tr>
<tr>
<td>Macedonia</td>
<td>0.3</td>
<td>2</td>
<td>0</td>
</tr>
</tbody>
</table>

N= 5290
Notes: ‘Total #’ column denotes the total number of ECHR decisions involving each country within this time period. ‘% of Decisions’ column denotes the number of ECHR decisions finding a violation of Convention Rights as a percentage of the total number of decisions involving the country.
Source: *Reports of Judgments and Decisions/European Court of Human Rights*, (various years).
Table 2  Top Ten Rights of the European Convention Invoked in Decisions of the European Court of Human Rights, 1960-2004

<table>
<thead>
<tr>
<th>Convention Rights &amp; Procedures</th>
<th>Number of Times Provision is Invoked</th>
<th>% of Violation Decisions involving the Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art 6  Fair Trial</td>
<td>3941</td>
<td>74%</td>
</tr>
<tr>
<td>Prot. 1 Art 1 Protection of Property</td>
<td>847</td>
<td>15%</td>
</tr>
<tr>
<td>Art 5 Liberty &amp; Security</td>
<td>502</td>
<td>7%</td>
</tr>
<tr>
<td>Art 8 Private Life &amp; Family</td>
<td>410</td>
<td>6%</td>
</tr>
<tr>
<td>Art 13 Effective Remedy</td>
<td>372</td>
<td>5%</td>
</tr>
<tr>
<td>Art 3 Torture</td>
<td>328</td>
<td>3%</td>
</tr>
<tr>
<td>Art 14 Discrimination</td>
<td>264</td>
<td>1%</td>
</tr>
<tr>
<td>Art 10 Freedom of Expression</td>
<td>230</td>
<td>4%</td>
</tr>
<tr>
<td>Art 2 Life</td>
<td>127</td>
<td>2%</td>
</tr>
<tr>
<td>Art 26 Plenary Court</td>
<td>83</td>
<td>2%</td>
</tr>
</tbody>
</table>

Notes: ‘Number of Times’ column denotes the total number of times in which a particular Convention Right or Procedure is invoked in an ECHR decision. This number is more than the total number of cases (5290) as a single claim often involves multiple Convention rights. ‘% of Violations’ column denotes the number of decisions involving a violation of a particular Convention Right or Procedure as a percentage of all decisions where the ECHR finds a country in violation of the Convention.

Source: Reports of Judgments and Decisions/European Court of Human Rights, (various years).
Figure 3: Annual Number of Human Rights Violation Claims (Applications) filed by Third Country Nationals (TCNs) with the European Commission of Human Rights and European Court of Human Rights, 1955-2004

N= 6935 (unstandardized total number of TCN Applications)
Notes: The numbers are standardized to account for a growing number of contracting States. Third country nationals (TCNs) are individuals who are living in a Council of Europe state, but who are not citizens of either that state or another Council of Europe state.
Source: Yearbook of the European Convention on Human Rights, the European Commission and European Court of Human Rights (various years).
### Table 3  European Court of Human Rights Decisions Declaring a Violation of Article 6 of the European Convention (right to fair trial) by Country, 1960-2004

<table>
<thead>
<tr>
<th>Contracting State</th>
<th>Standardized Total # of Art 6 Violation Decisions</th>
<th>Total # Art 6 Violation Decisions</th>
<th>Art 6 Violations as % of Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania</td>
<td>0.1</td>
<td>1</td>
<td>100</td>
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<tr>
<td>Czech Republic</td>
<td>3</td>
<td>39</td>
<td>83</td>
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<tr>
<td>San Marino</td>
<td>0.6</td>
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<tr>
<td>Moldova</td>
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<td>Hungary</td>
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<tr>
<td>Italy</td>
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<td>Romania</td>
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<tr>
<td>Luxembourg</td>
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<tr>
<td>Greece</td>
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<tr>
<td>Georgia</td>
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<td>1</td>
<td>50</td>
</tr>
<tr>
<td>Austria</td>
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<td>91</td>
<td>50</td>
</tr>
<tr>
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<td>53</td>
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</tr>
<tr>
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<td>3</td>
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<td>Slovakia</td>
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<tr>
<td>Lithuania</td>
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<td>Ireland</td>
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<td>Netherlands</td>
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<td>2</td>
<td>29</td>
</tr>
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<td>Iceland</td>
<td>0.04</td>
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</tr>
<tr>
<td>Turkey</td>
<td>5</td>
<td>214</td>
<td>26</td>
</tr>
<tr>
<td>Latvia</td>
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<td>1</td>
<td>14</td>
</tr>
<tr>
<td>Denmark</td>
<td>0.1</td>
<td>3</td>
<td>13</td>
</tr>
</tbody>
</table>

Notes: ‘Total #Art 6’ column denotes the total number of decisions finding a country in violation of Article 6 of the European Convention within the time period. ‘Art 6 Violations as a %’ column denotes the number of Art 6 violations for a particular country as a percentage of all decisions involving that country within the time period.

Source: Reports of Judgments and Decisions/European Court of Human Rights, (various years).
The author would like to acknowledge insightful comments from participants at the Courts, Civil Society and Governance: European and International Perspectives Conference, University of Washington, Seattle, 14 May 2004 and from participants at the ECPR SGIR Pan-European Conference, the Hague Netherlands 9-11 September 2004. The general ideas developed in this piece were also fostered by discussions and earlier collaborative work with Alec Stone Sweet (Cichowski and Stone Sweet 2003). The author would also like to recognize the German Marshall Fund and the UW European Union Center for their generosity in supporting this research. Sections of this article draw on preliminary research included in Cichowski and Stone Sweet (2003).

There is a long history of scholars examining the role of the United States Supreme Court in the development and maintenance of democracy (Casper 1976; Dahl 1957; Rosenberg 1991). (See Cichowski and Stone Sweet (2003) for an exception.

The Convention for the Protection of Human Rights and Fundamental Freedoms (1950) will be referred to as the European Convention throughout this article

The ECJ is a clear example. Despite the Treaty provision granting direct action before the ECJ Art , the court has consistently in its case law made it very difficult for individuals to bring claims, instead preferring such claims come through domestic courts via the preliminary ruling procedure (Rasmussen, 1980; Harding, 1980).

On 5 October 2004 Monaco became the newest member of the Council of Europe and at this time signed the European Convention along with other Council legal instruments. However, the Convention has not yet been ratified.

Similarly Sterett has examined how administrative judicial review has served as quasi-constitutional review in a system with technically no constitutional law – the United Kingdom (Sterett 1997).

Prior to 1998 the European Commission of Human Rights served to first address these cases before being sent on to the Court and post 1998 these cases were lodged directly with the Court.

Decision of 17.5.1983, BverfGE 64, 135 (157); 13.1.1981, VverfGE 74, 102 (128). Essentially, Article 3.1 (“All men shall be equal before the law”) is interpreted a fundamental right protecting
against unreasonable (arbitrary) distinctions. The Federal Constitutional Court has brought arbitrary misapplication of law by courts under this provision. See Polakiewicz (1996).

9 See discussion in Loveland (1999).

10 Human Rights Act 1998 s. 3.

11 It would be wrong to suggest that prior to the Human Rights Act, British Courts have not engaged Convention rights and ECHR jurisprudence. In fact, in numerous cases (the Court of Appeals Derbyshire County Council v. Times Newspaper (1992) decision is one example) the courts already behave exactly how the Act now requires.

12 Between 1960 and 2004, 408 of the total 5290 ECHR decisions involved the United Kingdom. This number of decisions places the UK in the top six countries being litigated before the ECHR in this time period (standardized ranking, actual number would be in the top four).


14 Decision 26 March 1987. BverfGE 74, 358. This was later confirmed by Decision of 29.5.1990, EuGRZ 1990, 329.

15 In two Austrian cases, December 1987 and March 1988, the Constitutional Court followed the ECHR interpretation of Article 6 by extending the determination of compensation for hunting damages and for expropriation measures by administrative authorities to civil rights and obligations. A Swiss case that exemplifies this trend was also rendered in 1988 in which the Court went beyond the ECHR case law to interpret Article 6 in relation to judges.

16 See Boyle and Thompson (2001) for a time-series analysis of domestic factors shaping cross-national variation in ECHR application rates.


20 Pudas and Boden Cases 27/10/87.

21 F.C.B Case 28/8/91

22 Ringeisen Case 16/7/71.

23 Open Door and Dublin Well Woman Case 29/10/92

24 Chahal Case 15/11/1996; Cruz Varas et al Case 20/03/1991.


26 See also Medda-Windischer (2003).

27 Bozhilov Case, 22/11/2001; Pellegrin Case 8/12/1999; Devlin Case 30/10/2001

28 Ferrazzini Case 12/07/2001; Levage Prestations Services Case 23/10/1996; Yagtzilar and Others Case 6/12/2001

29 Kress Case 7/06/2001; Medenica Case 14/06/2001; Pelissier and Sassi Case 25/03/1999

30 Albergamo Case 28/03/2002; Scalvini Case 26/10/99

31 Mosca Case 08/02/2000; Caliri Case 08/02/2000

32 Pesoni Case 05/10/1999; Aggiato Case 26/04/2001

33 Bouilly Case 30/11/1999

34 Yorgiyadis Case 19/10/2004

35 Widmann Case 19/06/2003

36 Golder Case 21/02/1975 led to the British Prison Rules of 1964 law to be reformed (Resolution (76) 35 of 22 June 1976); Airey Case 09/10/79 led to the establishment of a program to administer Civil Legal Aid and Advice (Resolution DH (81) 8 of 22 May 1980); De Haan Case 26/08/1997 led a law reforming the administrative courts procedures of appeal (Resolution DH (98) 9 of 18 February 1998).

37 See Thatcher and Stone Sweet (2002) for a general discussion on the application of delegation theory to non-majoritarian institutions. Also Talberg (2002) on delegation to supranational institutions and
Alter (2003) for a review of delegation theory and international law and courts.