Public Places, Private Lives: Balancing of Privacy and Freedom of Expression in the United Kingdom

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ABSTRACT
The rights of privacy and expression often conflict. Case law from the United Kingdom suggests that the incorporation of the European Convention on Human Rights into domestic law has spurred the growth of domestic privacy law at the expense of the rights of the press to free expression and, in line with prior theory, has also granted greater political authority to courts and judges tasked with balancing privacy and expression in domestic legal disputes. These shifts in privacy case law may also suggest that incorporation has increased opportunities for participatory democratic governance by the citizenry, at least through enhanced access to judicial remedies for privacy violations and the enforcement of Convention rights, as interpreted by the European Court of Human Rights.

Keywords
Free speech, expression, privacy, information privacy, law.

INTRODUCTION
Within the past 60 years, courts around the world have “incrementally transformed international politics” (Cichowski, 2006a, p. 3) and have increasingly claimed power to review the legality of legislative or executive actions in what has been termed the judicialization of politics (Hirschl, 2008, p. 95). Rather than conforming to what Shapiro calls the non-political “ideal type” or prototypical view, these courts have begun to act in “uncourtlike” ways, much like other political actors (Shapiro, 1981, p. 1). In the United Kingdom (UK), where parliamentary sovereignty has long been a prized component of British democracy, enactment of the Human Rights Act (HRA) in 1998, thereby formally recognizing the right of British citizens to bring claims under the European Convention on Human Rights (the “Convention”) in domestic courts, was “unquestionably the most significant formal redistribution of political power [in the UK] since 1911, and perhaps since 1688” (Ewing, 1999, p. 79). According to Ewing (1999), “the Act also represents an unprecedented transfer of political power from the executive and legislature to the judiciary, and is a fundamental restructuring of our ‘political constitution’” (p. 79).

As these statements make clear, the judicialization and legalization of human rights, as with other transfers of important political powers, are potentially very meaningful and may have significant effects on individual liberties, powers of the state, and democratic governance (Cichowski, 2006a, p. 4). Additionally, when state commitments to international treaties or conventions are the impetus behind these shifts of power (rather than purely internal politics), the adjustment costs to states undergoing these shifts may also be substantial because they impose the state to international compliance pressures and challenge the core notions of domestic and culturally appropriate legal precedent (Simmons, 2009, p. 72). These concerns are only exacerbated in common law jurisdictions, like the UK (Simmons, 2009, p. 72), and they raise important questions about how the adoption of the HRA in the UK has affected domestic politics, judicial power, and democratic participation.

In this context, this paper seeks to answer the following question: has this shift in power to the judiciary (and the related obligation to apply Convention rights in domestic courts) impacted how the British judiciary balances the potentially competing interests of personal privacy and free expression? In doing so, the paper will explore how the judicialization of politics may have affected democratic participatory governance in the UK around these important (and often conflicting) rights and, secondly, the way in which British judges have reacted to these new powers in cases where they are forced to balance the rights of privacy and free expression.

Theory suggests that democratic governance is enhanced by increased transparency and accountability of political actors and individual participation in political processes. Though answers about the causal links between HRA adoption and democratic political participation is outside the scope of this paper, a basic understanding of how these issues may be implicated by adoption of the HRA can provide a good
starting point for understanding the impacts of the HRA and Convention on judicial balancing of privacy and expression. Theory also suggests that, when courts are empowered, we can expect to see a related increase in rights protections. But, how will this expectation play out when the rights in question are conflicting? Will one right (privacy or expression) realize greater protections at the expense of the other, or will any expected gains not materialize because of the obvious conflicts between the two? Predictably, the results of these developments (which involve granting courts additional power) will play out most clearly in the judicial context; specifically, for present purposes, in cases that require judges to balance rights of privacy and freedom of expression.

As mentioned above, freedom of expression and the right to privacy (two rights generally protected under the international human rights umbrella) often conflict with each other and pose especially difficult situations for domestically minded politicians and judges tasked with balancing these competing interests. Determining the proper balancing of these two rights is especially challenging for courts when privacy is claimed in public or quasi-public information that others believe they should have the right to publicize. At first glance, the very idea that publicly accessible information should merit some level of privacy protection appears paradoxical (Nissenbaum, 1998a, p. 567, 1998b, p. 212). This paradox might suggest that, in relation to this public information, the right to freedom of expression should be given free reign. Of course, such information might be false, defamatory, or harmful in various other ways that might warrant some restrictions based on reputational interests, but what claim should privacy have in this publicly available information? And what role are courts (domestic or international) playing in resolving these questions? The recent decision of the Court of Justice of the European Union in Google Spain SL v. AEPD (2014) requiring Google to remove links to publicly available information about individuals in certain circumstances from its search results provides a clear example of how difficult it is to answer these questions in practice.

These difficult situations demand careful consideration. The legal and ethical implications of limiting freedom of expression or personal privacy in democratic societies is of particular importance. However, the narrower purpose of this paper is to examine the approach taken by the European Court of Human Rights (EChHR) to balance these two important rights, as well as to gain a better understanding of how the UK courts have begun to balance these competing interests, in an empirical and descriptive fashion, paying attention to the domestic implications of British accession to the Convention (including adoption of the HRA), to better understand how these changes may have increased participatory democratic governance. The succeeding section contains an analysis of the relevant theory and literature explaining the judicialization of politics, participatory democratic governance, the role of courts in democratic states, and the effect of international treaty obligations on domestic politics. The subsequent section outlines the methodological choices made in conducting this present study, including case selection and analysis. Next the paper offers a brief overview of British privacy law prior to adoption of the HRA, as well as an analysis of the text of key decisions of the EChHR outlining the balancing test employed by that court to balance privacy and expression rights. Following that analysis, the paper presents an analysis of decisions of British courts that deal with balancing privacy and free expression after adoption of the HRA. A careful analysis of the judicial reasoning in these cases, against the backdrop of the theory developed earlier, should begin to shed light on how judges are intervening, and what factors might lead judges to prioritize one right over the other, and (in a more limited manner) how these developments may have affected participatory democratic governance around these issues in the UK. Finally, conclusions are offered along with a discussion of the limitations of the current study.

DEMOCRATIC GOVERNANCE IN THE UNITED KINGDOM

Democratic theorists have argued that models of governance that afford more direct participation provide “richer ‘strong’ democracy” than do representative models (Cichowski, 2006a, p. 7; see also e.g., Barber, 1984; Dahl, 1989). While the necessary characteristics of democratic governance itself are debated (and probably include “individual rights, direct participation, equality, an active and informed citizenry, and the rule of law”), democratic governance is enhanced by increased transparency and accountability of political actors and individual participation in political processes (Cichowski, 2006a, p. 7; see also Héritier, 2003; Curtin & Meijer, 2006). In the past century, many governments have indeed become more transparent and accountable as democracy and the judicialization of politics have spread (see Simmons, 2009, pp. 24-25). Prior work addressing the effect of international legal regimes on domestic democratic governance (e.g. Cichowski, 2006a, 2006b; Alter 2006; Kelemen, 2006; Börzel, 2006), has sought to understand if, how, and why certain international legal mechanisms promote participation in democratic governance at the domestic level. The questions of if, how and why domestic incorporation of the Convention, through adoption of the HRA, has affected participatory democratic governance around the rights of privacy and expression in the UK are important questions. However, the focus of this paper is to explore a related question: what adjustment costs have the UK political institutions (e.g. the courts and parliament) faced as a result of incorporation of the Convention and adoption of the HRA? More specifically, this paper seeks to explore how British courts are balancing privacy and freedom of expression in cases that require balancing, and particularly in cases involving the publication of photographs of private persons taken in public spaces, after adoption of the HRA.

As an initial matter, the judicialization of politics – or the increased reliance on and power of the judiciary to intervene
in and decide political questions – has had a great part to play in the development of international legal mechanisms, such as the ECtHR tasked with interpreting the Convention (see e.g. Hirschl, 2008). This judicialization of politics has been a major consequence of a recognized international trend towards increasing levels of constitutionalism, especially as many post-authoritarian states have rapidly adopted constitutional principles during their transitions to democracy (Hirschl, 2008, p. 94; see Cichowski, 2006b, p. 52). The enlargement of democratic accountability has also led to increased rights protections at the domestic level (Simmons, 2009, p. 25). Even countries like the United Kingdom, with long-held commitments to parliamentary supremacy, have recently adopted laws that resemble constitutions or bills of rights, and that often give courts some (additional) powers of judicial review (Hirschl, 2008, p. 94), however limited in certain cases. Predictably, these developments have frequently led to judicial intervention in cases that require judges to balance rights of privacy and freedom of expression (see Hirschl, 2008, p. 94). In the UK, these developments are characterized well by the adoption of the HRA, which incorporated much of the Convention – including articles 8 and 10 dealing with privacy and expression, respectively – into domestic law. Importantly, the HRA also allowed individuals to claim violations of their rights directly in UK courts (Ewing, 1999). The Act also gave the courts the unprecedented authority to declare (though not to strike down or overrule) a parliamentary statute as incompatible with Convention obligations (Ewing, 1999).

These developments within the UK fit within a broader picture of expanding instances of participatory governance in democratic regimes (see Cichowski, 2006b, p. 52). First, liberalized access to courts increases opportunities for citizen and interest group participation in the lawmaking process, as well as for monitoring and enforcement (Cichowski, 2006a, p. 7; Cichowski & Stone Sweet, 2003; Shapiro, 1981). Heightened judicial powers and widening public access can, alongside the rights they protect, enhance public participation in domestic politics (Cichowski, 2006b, p. 51). Second, because “the expansion of judicial power has gone hand in hand with an expansion of rights protection” (Cichowski, 2006a, p. 7; see e.g., Epp, 1998; Stone Sweet, 2000), we can expect to see increased rights protection vis-à-vis empowered courts. But, if this is correct, what rights will (or should) be protected at the expense of others when they easily conflict with others, such as when an individual’s right to privacy conflicts with another’s freedom of expression?

Scholars have shown that, in some cases, courts can provide a “more responsive institutional form of democracy” than some representative institutions, in both the European context (Cichowski, 2006b, p. 51) and in the United States of America (e.g. Graber, 1993; Lovell, 2003; Zemans, 1983). Courts have played an important, even crucial, role in realizing social change in many areas (Cichowski, 2004; Conant, 2002; McCann, 1994), but we might expect their ability to create substantive change is more limited when they lack strong judicial review powers that include the ability to overrule statutory law. In the case at hand, what has adoption of the HRA meant for participatory democratic governance around the rights of privacy and expression in the United Kingdom (a regime without strong judicial review powers)? How have the courts balanced these rights? Have rights (of either kind) increased in substance or scope, or has the judicialization of these political questions resulted in any loss in substantive right to privacy or expression? To understand the answer to these questions, the relationship between the ECtHR (and its jurisprudence) and the decisions of domestic judges in the UK becomes an important matter.

Prior scholarship addressing questions about changes in participatory democratic governance has focused on three general institutional variables: rules and regulations, non-majoritarian organizations (NMOs), and access points and resources (Cichowski, 2006a, p. 8). Similarly, in this paper I focus on these variables as they relate to the context of the present inquiry. The first of these variables, rules and regulations, is defined by Cichowski (2006a) as “the nature and scope of rules, regulations, rights, and other legal instruments that individuals may plead in court against public acts” (Cichowski, 2006a, p. 8). The enforceability of rights-based rules or regulations (laws) – whether through application to the courts or another adjudicating body – is of paramount importance to broad and effective democratic participation in monitoring and enforcing those rights (Cichowski, 2006a). The rule of law, whatever that means in specific terms, is also therefore important in analyzing this variable, because rights-based laws are not of much use to the citizenry if they have no enforceability through official channels. Judicial review – or the right of courts to rule on the legality of the acts promulgated by the other political bodies of government – is also highly pertinent to this inquiry. Thus, for changes to be seen in this variable, we should expect 1) the existence of rights-based rules and regulations, 2) judicial enforceability mechanisms (including the presence or expansion in judicial review powers), and 3) increased rights to hearings or review of claimed violations in domestic or international courts (see Cichowski, 2006a, pp. 9-10). Of course, the mere existence of rights-friendly rules, regulations, or laws does not ensure effective protection, especially when certain international legal orders, such as the ECtHR, often decide issues after referral from domestic legal institutions (Cichowski, 2006a, p. 10), so qualitative analysis of court decisions and judicial pronouncements are an important part of understanding the bigger picture.

Second, the definition of NMOs includes courts as well as other non-elected regulatory bodies. These organizations, and especially courts in many democratic regimes, have been granted increasing powers to review government action in a variety of settings. As the power of NMOs increase, individuals are similarly empowered “to place a check on
As predicted in prior work, governmental decisions to ratify international treaties, like the ECHR. First, the sincere ratifiers are those states that “value the content of the treaty and anticipate compliance” (Simmons, 2009, p. 58). The second and third types are more problematic. False negatives, those that approve of the content but refuse to ratify and accept obligations, are not particularly relevant to the current research. However, the third type, the strategic ratifiers, are relevant because some states may ratify a treaty for a variety of reasons (including peer pressure) but not intend to follow through with domestic rights protections. There are strong reasons to hope the UK was a sincere ratifier of the Convention, and that the government has continued to comply with its obligations, but there are also aspects of the findings of this study (discussed below) that suggest the UK government has resisted wholehearted compliance.

This resistance is not altogether unexpected, however. The ex post costs of integrating international human rights treaties into domestic law may often be significant for the domestic political system (although this impact may vary by legal regime) because they impose the state to outside, international, compliance pressures and also challenge core notions of culturally appropriate balancing and legal precedent (Simmons, 2009, pp. 71-72). Because of their focus on judicial power, case law precedent, and judicial independence, common law systems tend to favor legal dualism, thereby giving domestic legislative bodies power to determine the scope of domestic integration prior to judicial intervention (Simmons, 2009, p. 71). Such is the case in the UK.

**METHODOLOGY**

To test the expectations announced in the previous section, I examined UK court decisions that referenced both articles 8 and 10 of the Convention since 1998 (when the HRA was enacted). Subsequently, I narrowed my analysis to include only those decisions that include a discussion of how the courts are (or should be) balancing Article 8 (privacy) and Article 10 (expression) rights in light of domestic obligations under the Convention. Within these decisions, I highlight those cases that stem from claims that personal privacy in public or quasi-public information (for present purposes, photographs of individuals in public spaces) has been violated by publication or dissemination of this information by an opposing party. In addition these UK court decisions, I also examined a smaller, less exhaustive set of landmark cases from the ECtHR that delineate the scope and balancing of Article 8 and Article 10 rights in situations involving the publication of photographs of individuals in public spaces.

These cases are generally those, like von Hannover v. Germany (2004), which have received considerable attention in the domestic cases collected above.

The scope of this set of cases, and of the focused analysis, is necessarily limited for purposes of the present paper, especially in light of the nature of the expectations I intend to test. This does limit my ability to generalize beyond participation and rights claiming outside this narrow set of
cases. Future iterations of this research will expand the scope described here (in terms of case selection, analysis, and incorporating research about the effect of incorporating human rights treaties in countries besides the UK), and will be able to provide a more generalizable answer to the questions I am seeking to answer against the broader context of democratic political participation related to privacy and freedom of expression rights.

PRIVACY, EXPRESSION, AND THE DOMESTIC INCORPORATION OF THE CONVENTION

The rights of freedom of expression and freedom of the press often conflict with the individual rights of individuals to the privacy of their personal information. Whether an individual may take a photograph of another person in a public space (e.g. on a public street or in a public park) and then publish or distribute that photograph without violating the other person’s right to privacy is an important political question. It is also a question that has confronted, and divided, domestic and supranational courts, such as the ECtHR, in recent years. In particular, courts and lawmakers in the UK have begun to question whether the ECtHR has gone too far in protecting personal privacy in some of its decisions under Article 8 of the Convention at the expense of the other party’s freedom of expression. Privacy rights in publicly available information may seem paradoxical to some (Nissenbaum, 1998a; 1998b), but recent decisions of the ECtHR have granted these rights over claims of freedom of expression under Article 10 in a variety of contexts.

Often these situations involve the right of the press to publish photographs taken of individual persons in public spaces, but we need not limit ourselves to consider the rights of the press, as citizens also may claim a right to publish or distribute personal information of others available in public spaces (whether online or offline). In recent months, the British Royal Family has objected to the publication of a number of images of family members, including photographs of Catherine, Duchess of Cambridge, sunbathing topless while on vacation (Foster & Smith-Spark, 2012). The family has also initiated criminal charges against the photographer, who used a high-powered lens while standing on the edge of a public road to take the photographs. Reportedly, President Barack Obama has also recently pressured news photographers to remove photographs of his daughters from agency circulation (Renfrew, 2013). These high-profile cases generate a certain expected amount of buzz in online news reporting and on gossip websites, but presumably ordinary citizens also similarly value their privacy, even while in publicly visible places, although the risk of publication might not be as high.

PRIVACY IN PUBLIC: CASES FROM THE ECtHR

In Europe, the ECtHR has been an important international (regional) venue for the resolution of issues related to rights of privacy and expression. The court has often been forced to balance the competing interests at stake in cases coming from all over Europe, often producing controversial outcomes, such as that in von Hannover v. Germany (2004).

In 2012, the court suggested some limitations to (but ensured its decision was nonetheless consistent with) its earlier decision, in the follow-up case of von Hannover v. Germany (II) (2012). In the first von Hannover case, however, the ECtHR protected a public figure’s right to privacy in public spaces against the right of the German press to publish photographs of the claimant in various public places. In the second, it elaborated on the balancing test courts should undertake to decide these controversial cases. In this section, I will use the von Hannover decision as my jumping off point, and will explore decisions both prior to and following that decision that have also addressed the tension between these competing human (and civil) rights.

Article 8 of the Convention states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society... or for the protection of the rights and freedoms of others.”

On the other hand, Article 10 states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers....

2. The exercise of these freedoms... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society... [including] for the protection of the reputation or the rights of others, [or] for preventing the disclosure of information received in confidence....”

In the first von Hannover case, the applicant, Princess Caroline von Hannover of Monaco, claimed that decisions of the German courts refusing to prohibit the publication of certain photographs of her in the tabloid press violated her rights to private life under Article 8 of the Convention (von Hannover v. Germany, 2004, paras. 2, 10). Rather than being a one-off attempt at prohibiting publication, this series of judicial decisions represents only a small part of the Princess’s overall litigation strategy to limit publication of photographs all over Europe, as she had brought lawsuits in a variety of European countries since the 1990s (von Hannover v. Germany, 2004, para. 9). The case at hand involved the publication of over 40 photographs in three different German tabloid papers from 1993 until 1997, including images of the Princess sitting in a restaurant courtyard with a male companion, riding a horse, with her children, shopping, tripping over an obstacle at a Monte Carlo beach club, and riding a bicycle.

Initially, the German courts found that von Hannover was “a contemporary figure ‘par excellence’” and thus had to
tolerate the publication of photographs taken in public places (von Hannover v. Germany, 2004, para. 21). “Even if the constant hounding by photographers made her daily life difficult,” the Hamburg Court of Appeal stated, “it arose from a legitimate desire to inform the general public” (von Hannover v. Germany, 2004, para. 21). On appeal, the Federal Court of Justice allowed part of the Princess’s appeal, stating that (as summarized by the ECtHR):

“…even figures of contemporary society “par excellence” were entitled to respect for their private life and that this was not limited to their home but also covered the publication of photos. Outside their home, however, they could not rely on the protection of their privacy unless they had retired to a secluded place – away from the public eye … where it was objectively clear to everyone that they wanted to be alone and where, confident of being away from prying eyes, they behaved in a given situation in a manner in which they would not behave in a public place” (von Hannover v. Germany, 2004, para. 23).

Based on this standard, the court held that publication of the photographs showing the Princess sitting with a male companion in a secluded part of a restaurant courtyard violated her right to privacy. In regards to the other photographs, the court found that the public had legitimate interests in knowing how she behaved in public. On a subsequent appeal to the German Federal Constitutional Court (FCC), von Hannover won another small victory. The FCC held that the publication of three photographs of the Princess with her children also violated her personality (privacy) rights under German law. Subsequently, the Princess initiated two more rounds of litigation based on additional photographs published in 1997, but the German courts denied her claims based on the publication of those images. And, in relation to the photographs taken at the open-air Monte Carlo Beach Club, which was a private establishment, the courts found that her claims of privacy failed because the area where she was photographed was not a “secluded” place.

Princess von Hannover argued to the ECtHR that the German reliance on a “secluded place” was too narrow to protect her Article 8 right to privacy, especially because she claimed that paparazzi “constantly hounded” her and “followed her every daily movement” (von Hannover v. Germany, 2004, para. 44). This situation, she claimed, deprived her of any privacy and limited her ability to move around freely. Rather than contributing to legitimate public debate, she argued the photographs merely provided tabloid press with an opportunity to satisfy its readers’ “voyeuristic tendencies” and rake in big profits from her exploitation (von Hannover v. Germany, 2004, para. 44). The ECtHR considered these claims in relation to the remaining photographs, including those depicting her on horseback, riding a bicycle, shopping on her own and with companions, with her bodyguard at a market, on a skiing holiday in Austria, leaving her Parisian residence, playing tennis, and tripping over the obstacle at the Monte Carlo Beach Club. The court found that these photographs fell within the scope of the Princess’s private life under Article 8, because they included aspects of her identity and interfered with her ability to develop relationships with others (von Hannover v. Germany, 2004, para. 50).

According to the court, a person’s private life “includes a person’s physical and psychological integrity” and therefore, even in public, some interactions with others “may fall within the scope of “private life” (von Hannover v. Germany, 2004, para. 50). The court also made clear that Article 8 obligated states to not merely refrain from interfering with their citizens’ private lives, but it also entails positive obligations, including the “adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves” (von Hannover v. Germany, 2004, para. 57). Additionally, even though freedom of expression is “one of the essential foundations of a democratic society” (von Hannover v. Germany, 2004, para. 58), photographs implicate a person’s privacy rights and reputational interests in particularly important ways. Photographs, the court stated, do not just disseminate ideas, but they also reveal private and intimate information about an individual (von Hannover v. Germany, 2004, para. 59). The court also noted that the “climate of continual harassment” implicated by paparazzi photography and the tabloid press has the capability to create strong subjective feelings of intrusion into private matters (von Hannover v. Germany, 2004, para. 59). In conclusion, the court found a violation of Article 8, because

“…the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution, since the applicant exercises no official function and the photos and articles related exclusively to details of her private life” (von Hannover v. Germany, 2004, para. 76).

The court further held that

“the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.…. Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the Court’s view, yield to the applicant’s right to the effective protection of her private life” (von Hannover v. Germany, 2004, para. 77).

In a concurring opinion, Judge Barreto argued that the proper balancing test is not whether the publication contributes to a debate of public interest (the majority view) or whether the photographs are taken in a secluded place (as the German courts had held), but should be based on a case-by-case
inquiry into whether the individual has a "'legitimate expectation' of being safe from the media" (von Hannover v. Germany, 2004, J. Barreto concurrence). Interestingly, this is similar to the "reasonable expectation of privacy" test employed in subsequent decisions by UK courts.

The von Hannover (2004) decision has been hailed as a landmark in ECtHR privacy and expression jurisprudence, but the court has also handed down a number of additional decisions about the right to publish or distribute photographs of private individuals. An in-depth analysis of these other decisions is not within the scope of this present paper, but a short summary of these cases is important. In Peck v. United Kingdom (2003), the court held that an individual’s Article 8 rights were violated when CCTV images, that depicted him in a public street moments after he had attempted to commit suicide by slashing his wrists with a knife, were published in print and on television, because certain incidents that occur in public can still fall within the person’s private life, especially when publication could expose the action to far greater observation than reasonably expected by the individual. In Sciacca v. Italy (2006), the court reaffirmed the von Hannover (2004) decision and held that the publication by the police of the photograph of a private individual suspected of criminal activity violated the person’s Article 8 rights. The court found that being the subject of criminal proceedings was not enough justification to publish an individual’s photograph. Finally, in 2012, Princess Caroline von Hannover got another day in court. In von Hannover v. Germany (II) (2012), she and her husband Prince Ernst August von Hannover claimed, in reliance on her previous victory, that publication of additional photographs in the German tabloids violated their rights to a private life. This time around, the case was heard by the ECtHR’s Grand Chamber. The photographs at issue in this case depicted the applicants out on walks during a ski vacation in St. Moritz and riding the chair lift at the resort. These images were published alongside photographs of other members of the royal family, including Caroline’s father, Prince Rainier, who was suffering poor health. In this case, the court found that the German courts had altered how they balanced privacy and freedom of expression after the first von Hannover decision by recognizing greater protections for personal privacy when contributions to public debate were minimal, and that the Federal Court of Justice and FCC had upheld an injunction barring publication of the photographs not related to stories about Prince Rainier’s failing health. On these facts, the ECtHR held that the German courts had acted reasonably and had complied with their positive obligations under Article 8.

THE HRA AND THE EMERGING TORT OF MISUSE OF PRIVATE INFORMATION IN THE UK

As evidenced by the Peck v. United Kingdom (2003) decision mentioned above, courts in the United Kingdom have also been confronted with similar types of claims. The UK situation is also interesting because, prior to the HRA taking effect in 2000, Britain did not have any national privacy law, rather relying on the historical tort of confidence as the only avenue for potential privacy claims (Ewing, 1999). The implementation of the HRA, which finally made the Convention enforceable in UK domestic courts, marked the first time that UK courts were directed by domestic law to explicitly protect privacy – specifically as delineated in Article 8 of the Convention. This development placed resolution of cases brought against the government on Convention grounds within the ambit of domestic courts, and it allowed citizens to bring claims in domestic courts, rather than being restricted to taking their cases to the ECtHR in Strasbourg, France. In earlier cases (prior to the HRA), British courts had also been asked to consider whether Article 8 required courts to find a broader right to privacy in UK law. In Malone v. Metropolitan Police Comr. (1979), a domestic court was confronted with a claim that government wiretapping, without any physical trespass, should constitute a cause of action. In that case, Sir Robert Megarry stated:

"I am not unduly troubled by the absence of English authority: there has to be a first time for everything, and if the principles of English law, and not least analogies from the existing rules, together with the requirements of justice and common sense, pointed firmly to such a right existing, then I think the court should not be deterred from recognising the right. On the other hand, it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another" (Malone v. Metropolitan Police Comr., 1979, para. 372).

In that case, the European Court of Justice eventually found that the wiretapping violated the claimant’s Article 8 right to privacy (Malone v. United Kingdom, 1984). And in Wainwright v. Home Office (2004), the House of Lords analyzed the Malone decisions and held that no independent right to privacy exists in UK law and that courts should not be creating new law, which remained the ambit of the parliament (of which the House of Lords is part). Lord Hoffman did suggest, however, that although courts couldn’t create a new tort of “invasion of privacy,” they might be able to refashion the tort of confidence by disregarding strict confidentiality as a requisite element of that tort (Wainwright v. Home Office, 2004, para. 29-32; see Murray v. Express Newspapers, 2007, para. 18). Lord Hoffman determined that this was the meaning of Judge Sedley’s comments in Douglas v. Hello! Ltd. (2001), when he stated,

“The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy” (Douglas v. Hello! Ltd., 2001, para. 126).

However, Judge Sedley’s comments could clearly be interpreted much more broadly to encompass an independent right to privacy under Article 8.

Against this backdrop, British decisions discussing the application of the von Hannover ruling in the domestic context raise interesting questions about how strictly national
courts (bound by state commitments to uphold the Convention and rulings from the ECtHR) should follow the ECtHR’s decisions, especially when they conflict with domestic precedent. The Law Lords (and others) have also recently debated how strictly to implement the ECtHR’s decisions in domestic courts, and decisions at various levels have attempted to push back on certain applications of the ECtHR’s decisions, evidencing a judicial preference for the decisions of domestic courts when conflict arises (see Bowcott, 2011). Reportedly, Lord Phillips stated in 2011 that Article 8, in particular, was “baffling” to judges and that “Article 8 is one of the most difficult [issues] we happen to be faced with. It’s very difficult to pin down what is meant by Article 8” (Bowcott, 2011). These findings of domestic resistance are in line with the theoretical perspective that recognizes that “international human rights agreements… rest on universalistic principles that are likely to come into tension with cultural specificities that [domestic] systems are often designed to protect” (Simmons, 2009, p. 70). In Kay v. London Borough of Lambeth (2006), the House of Lords found that domestic precedent should be binding on UK courts, even when such precedent was inconsistent with more recent ECtHR decisions interpreting Convention obligations (Kay v. London Borough of Lambeth, 2006, para. 42-44). In so finding, Lord Bingham stated, “…in its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply” (Kay v. London Borough of Lambeth, 2006, para. 44).

Interestingly, EU accession to the Convention might serve to aggravate these domestic political problems, as it could bring greater compliance pressures on member states and require them to take more strict account of Strasbourg jurisprudence (see Bowcott, 2011), which might also have important implications for democratic participation around these issues.

Post-HRA adoption, British courts have been confronted with a number of cases where claimants have claimed violation of their privacy rights by the publication of photographs of them in public places. Most of these cases have involved judges struggling to apply Article 8, and von Hannover (2004), in line with domestic precedent, particularly the House of Lords judgment in Campbell v. MGN Ltd. (2004). In Campbell (2004), a majority of the Lords decided that publication of photographs of fashion model Naomi Campbell outside Narcotics Anonymous meetings – and the associated story about her attempt to overcome drug addiction – violated Campbell’s right to privacy. In order to come to this conclusion, the Lords noted that the traditional British tort of confidence had changed after adoption of the HRA and that privacy law in the UK was developing rapidly in response to Article 8 and Convention obligations (see statement of Lord Nichols, in Campbell v. MGN Ltd., 2004, para. 16). This change, according to Lord Hoffman, has been “a shift in the centre of gravity of the action for breach of confidence” in British law (statement of Lord Hoffman, in Campbell v. MGN Ltd., 2004, para. 51). According to Lord Nichols, “The essence of the tort is better encapsulated now as misuse of private information” (Campbell v. MGN Ltd., 2004, para. 14).

Rather than restricting privacy (in confidence) to cases where a confidential relationship was violated by the publication of personal information, Article 8 now requires judges to protect privacy as an aspect of human autonomy and dignity. According to Lord Hoffman,

“Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people” (Campbell v. MGN Ltd., 2004, para. 51)

Baroness Hale stated that a distinction should be made between photographs of a person “when she pops out to the shops for a bottle of milk” and when more private information is published (Campbell v. MGN Ltd., 2004, para. 154). This comparison has been evoked in subsequent cases as a test of whether the information is really private or personal, or whether it should be outside the protections of Article 8. In Campbell (2004), Baroness Hale felt that the text published alongside the photograph was more intrusive than the photograph itself, as was the potential for harassment (para. 155). As a consequence, the majority found that, rather than embracing a wide view of “private life” under Article 8 (as the ECtHR subsequently did in von Hannover (2004)), “the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy” (Campbell v. MGN Ltd., 2004, para. 51). Thus later cases have applied this “reasonable expectation of privacy” test as a predicate for applying Article 8.

In Murray v. Express Newspapers (2007), Mr. and Mrs. Murray (otherwise known as J.K. Rowling, author of the Harry Potter book series) claimed that the taking and subsequent publication of a photograph of their 1 year-old son sitting in his buggy on a public sidewalk violated his right to privacy. The High Court identified a conflict between von Hannover (2004) and the Campbell (2004) requirement that the claimant demonstrate, as a threshold matter, that he had a reasonable expectation of privacy in the context of the photographed activity (Murray v. Express Newspapers, 2007, especially para. 43-62). The court
recognized that the ECtHR had delineated “a much wider view of what should be regarded as falling within the scope of an individual’s private life” (Murray v. Express Newspapers, 2007, para. 45) but that in the present case, the judge stated that “I am in no doubt therefore that if it comes to a straight choice between von Hannover and Campbell I should follow the decision in Campbell” (para. 62).

On appeal, the Court of Appeals reversed the lower court’s ruling, although they still held that Campbell (2004) was binding, primarily because they found that a child should have a greater expectation of privacy than his adult parents, even when the parents were public figures or celebrities (Murray v. Big Pictures, 2008, para. 45-46). They distinguished both Campbell (2004) and von Hannover (2004) because those cases did not deal with claims of children (Murray v. Big Pictures, 2008, para. 47), and because the claim was novel in UK courts.

Other cases, such as John v. Associated Newspapers Ltd. (2006), followed similar reasoning, but emphasized the element of harassment found in the von Hannover (2004) decision. In John (2006), Sir Elton John sued a newspaper to enjoin the publication of a photograph of himself, along with his driver, walking on the street near his home. The court found that this case was more akin to Baroness Hale’s “popping out for a pint of milk” than it was to identifying any more personal information about the claimant, such as the Narcotics Anonymous connection in Campbell (2004) (John v. Associated Newspapers Ltd., 2006, para. 14).

CONCLUSION
In conclusion, the adjustment costs to UK politics of adopting the HRA have been substantial and we can begin to see an increase in potential opportunities for participatory democratic governance around the issues of privacy and expression, especially as citizens are empowered to bring claims in domestic courts under the Convention. The HRA granted courts considerable power, including the power to declare parliamentary legislation incompatible with Convention obligations and the ability to enlarge the domestic tort of confidence to include misuse of private information absent any confidential relationship. This power has enabled courts to signal when domestic law may not be in harmony with international law, increasing transparency and taking some (albeit small) steps towards greater accountability as citizens can now bring claims against the government in domestic courts for violations of the state’s international human rights obligations. Post-HRA adoption, British courts have been tasked with interpreting a broader right to a private life in ECtHR jurisprudence against a narrower domestic interpretation (even as the domestic law has expanded through the influence of these same courts). In line with theory, the UK courts have been empowered under the HRA and we see a related increase in rights protections, at least as far as the law of confidence has expanded to include a wider array of protections. However, this increase in privacy protections has come at a direct loss to the right of the press to publish information about individuals, even celebrities and public figures. As expected (see Cichowski, 2006a, p. 9-10), we can see that new rights-based rules and regulations (the HRA) has resulted in the expansion of judicial enforceability mechanisms (e.g. judicial review powers) and the ability of UK citizens to bring suit in domestic courts over violations of Convention obligations. British courts, as non-majoritarian organizations, have been given increasing political power and ability to review the actions of parliament and, as might be expected, this increase has the potential to empower individual citizens. The role of the court in international governance, while muted somewhat by parliamentary concerns for protecting parliamentary supremacy and the authority of domestic precedent over application of ECtHR jurisprudence has been shown by the increase in rights and access to domestic courts to claim violations of international law. These developments have directly led to courts developing doctrine (e.g. tort law) at an accelerated pace. However, as prior literature has suggested, the cases reviewed above demonstrate that this increased public participation has been somewhat limited to those who can afford to pursue litigation rather than spreading them across British society more broadly (Cichowski, 2006a, p. 13; Galanter, 1974), although a broader and more rigorous quantitative analysis of cases arising under the HRA might help answer that question more forcefully. Thus, these findings suggest initial confirmation of Cichowski’s (2006a) expectation that,

“As judicial institutions with a wider scope of review powers increase in accessibility to individuals who possess the resources and expertise to litigate, we would expect increased opportunities for participation through law enforcement, rights claiming, and expanded protection.”

Because we do see changes in the three primary structures identified in past work (rules and regulations, non-majoritarian organizations, and increased access), however, “we can feel confident that the politics surrounding them are also changing” (Cichowski, 2006a, p. 13). Finally, despite evidence that the House of Lords has attempted to limit the courts to a restrained position in regard to the von Hannover line of cases (and that adoption of the HRA itself limited domestic applicability of the Convention) we have seen evidence that British courts are attempting to comply with, and recognize, Convention obligations when they arise in domestic cases. This expansion in privacy rights in domestic law in response to Convention obligations, signals that the United Kingdom has been a (mostly) sincere ratifier of the Convention (at least in terms of Article 8).

However, as discussed above, this study is limited in scope (and thus its generalizability). The current research cannot produce any causal connections between incorporation of the Convention and increases (or decreases) in participatory democratic governance as defined herein. Future iterations of this work will encompass a larger set of cases, from the ECtHR and UK courts as well as other countries, to provide broader, more reliable conclusions about the effect of
Convention obligations on participatory democratic governance and how these states are balancing domestic and international approaches to balance the important human rights of privacy and freedom of expression. Additionally, future work should further investigate how adoption of Convention obligations increases protections for certain rights while restricting others.

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