Bridging Comparative and International Law: Amicus Curiae Participation as a Vertical Legal Transplant

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Abstract

Legal transplants scholarship has thoroughly examined the transnational diffusion of legal institutions. Although Article 38 of the Statute of the International Court of Justice acknowledges that international law draws upon domestic legal systems, the exchange of legal institutions between states and international law has yet to receive similar treatment. This article highlights the process of vertical diffusion – that is, the borrowing of legal institutions between the nation-state and international law. Vertical diffusion takes place in two forms: downward and upward diffusion. Scholarship on the internalization and vernacularization of international law has highlighted the process of downward diffusion. This article offers a theory of internationalization of law and the emergence of internationalized legal transplants. It draws on a study of the internationalization of the amicus curiae participation procedure from the United Kingdom to the European Court of Human Rights. Three main conditions must be present for internationalization: the institution's structural transformation that results in a law-making opportunity, norm entrepreneurs, and access to the decision-making body. The study of internationalized legal transplants is important to have a more fine-grained perspective on the making of international law. The evidence of the diffusion of legal institutions between domestic law and international law also creates a bridge between international law and comparative law scholarship.

1 Introduction

Already in the first half of the 20th century, Roscoe Pound remarked: '[The] history of a system of law is largely a history of borrowings of legal materials from other

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legal systems and of assimilation of materials from outside the law.’¹ By the 1990s, legal transplants had become the main object of study in comparative law scholarship,² and the study of the borrowing of legal ideas across nation-states continues to enjoy overwhelming popularity.³ Although the transnational diffusion of legal institutions has received considerable attention, the exchange of ideas between national and international law has yet to receive similar treatment.

The fact that international law draws on the legal orders within states is evident from Article 38 of the Statute of the International Court of Justice (ICJ Statute) that lists the sources of international law.⁴ Article 38 recognizes ‘the general principles of law recognized by civilized nations’ as well as ‘judicial decisions … of the various nations’ as sources of international law’.⁵ In individual case studies, scholars have traced the domestic origins of a number of international treaties, including the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the Convention on the Law Applicable to Contracts for the International Sale of Goods.⁶ However, the internationalization of domestic legal institutions has not yet become the subject of a systematic theoretical treatment.

Jonathan Wiener has termed the transfer of domestic legal institutions to international law ‘vertical’ or ‘trans-echelon’ borrowing.⁷ Although Wiener’s terms are helpful, they need to be specified further. I divide the process of vertical exchange into two further categories. The first includes the processes that originate at the international level and are adopted within the nation-state. To make the distinction clear, I call this pattern ‘downward’ diffusion and the institution adopted as a result an ‘internalized legal transplant’. The second category encompasses the diffusion of ideas from nation-states to international law. I call this pattern ‘internationalization’ and the institutions adopted as a result of this process ‘internationalized legal transplants’ (see Figure 1).

This article offers a theory of internationalized legal transplants. Specifically, it draws on a study of the internationalization of the amicus curiae procedure from the United Kingdom (UK) and examines materials related to the three cases that led the European Court of Human Rights (ECtHR) to adopt the procedure in 1982. Amicus curiae participation has been defined as ‘a friend of the court. A term applied to a bystander, who without having an interest in the cause, of his own knowledge makes a suggestion on a point of law or of fact for the information of the presiding judge’.⁸ The procedure has been part and parcel of the theory and practice of English law.⁹ Although the overwhelming
majority of international tribunals now allow *amicus curiae* interventions, little is known about the domestic, historical origins of this institution. As the empirical study of *amicus* interventions in the ECtHR Grand Chamber shows, *amicus* participation procedure has been significantly relied upon by non-governmental organizations (NGO) as an instrument to voice their views before the Court. Furthermore, the number of *amicus* participants, as well as *amicus* briefs, has been growing steadily over the years.

This study shows that three core conditions must be present for internationalization: an opportunity for law-making related to structural transformation, norm entrepreneurs and norm entrepreneurs’ access to the decision-making body. Structural transformation of an international institution creates a demand for a new policy and an opportunity for law-making. Norm entrepreneurs are experts who have expertise in the laws of the relevant country. Norm entrepreneurs latch onto the opportunity, while the decision makers adopt the procedure to respond to the needs presented by the structural transformation. The entrepreneurs succeed in advancing their proposals because they have access to the decision-making body and have allies within the institution.

In this case study, the ECtHR allowed *amicus curiae* participation when the effects of its interpretation of the European Convention on Human Rights and Fundamental Freedoms (ECHR) were being felt far beyond the state parties to a particular case. Article 53 of the original text of the Convention indicated that the Court’s judgments

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were not binding on non-party contracting states. However, in the 1978 case of *Ireland v. the United Kingdom*, the Court made the first statement indicating its own extensive influence. The Court stated:

The Court’s judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.

The Court affirmed this position in its 1979 judgment in the case *Marckx v. Belgium*. In all three cases in this study, *Tyrer v. the United Kingdom* (*Tyrer*), *Winterwerp v. the Netherlands and Young* (*Winterwerp*), and *Young, James and Webster v. the United Kingdom* (*Young, James and Webster*), the English lawyers and entities represented by them advocated the implementation of the *amicus curiae* procedure, which was part of the English law at the time. The English lawyers initiated communication because the interests of their clients were not represented in the Court’s pre-existing adversarial procedure. They advocated for the adoption of the *amicus curiae* intervention procedure since it would allow their clients’ position to be heard. The Court’s new role served as an opportunity to justify the procedure’s implementation by the decision-making body.

The members of the ECtHR, who adopted the revisions to the Rules of Procedure, were the decision makers. The norm entrepreneurs had access to decision makers due to having allies among the decision-making authorities. Their access to the decision makers was also determined by the fact that they occupied positions that provided access. In fact, norm entrepreneurs’ lack of access to decision makers is the main factor that distinguishes successful attempts to advance entrepreneurs’ ideas from those that fail. In the first case, *Tyrer*, the applicant, lawyer Cedric Thornberry, and the organization that he represented, the National Council for Civil Liberties, were not structurally positioned to have access to the Court and they did not have allies within the Court. The importance of access becomes evident in the other cases, in which the UK government and the Trades Union Congress asked to be heard as *amici*. In both cases, their position was advocated by Sir James Fawcett, the president of the Commission and the Commission delegate to the Court. The position of the counsel for the UK government in *Winterwerp* was particularly strong due to the UK’s membership in the Court, its dominant role in founding the Court and its case law at the time. The extensive informal communication that occurred between the UK government officials and the

12 Ibid.
14 ECtHR, *Tyrer v. the United Kingdom* (*Tyrer*), Appl. no. 5856/72, Judgment of 25 April 1978.
16 ECtHR, *Young, James, and Webster v. the United Kingdom* (*Young, James, and Webster*), Appl. no. 7601/76, 7806/77, Judgment 13 August 1981.
Court officials shows the UK government’s substantial access to the decision makers and relates to their successful efforts.

This article contributes to international law scholarship in a number of aspects. First, although scholars have questioned whether clear categories of ‘domestic’ and ‘international law’ are justified, these categories remain strong in scholarship. Thus, evidence of an ongoing exchange of ideas between international and national law underscores the fact that the boundaries between the two realms are not rigid. Mapping the actors and origins of legal institutions across the international-national spectrum and tracing the flow of ideas from specific national contexts help to clarify the architecture of international law. What if the law-making processes within international organizations consistently drew on the legal institutions and ideas from particular states and legal cultures? Showcasing the channelling of legal institutions from national to international law contributes to a more fine-grained and accurate perspective on international law. Moreover, given the traces of the national origins of legal ideas and institutions, one can claim with confidence that there is a significant overlap between the international and national realms. This finding undermines a strong belief that international law is sui generis. Although the detailed explication of the implications falls beyond the scope of this article, a focus on internationalized legal transplants will also impact how we interpret, research, and teach international law.

Second, scholars have long questioned the cultural foundations of international law. Emanuelle Jouannet states that:

there does not exist any global or cosmopolitan vision of international law, but, on the contrary, an inevitable multiplicity of particular national, regional, individual, and institutional visions. This is so because the actors in the international arena are conditioned by their own legal cultures and not by cosmopolitan culture, which at present really does not exist.

Balakrishnan Rajagopal has underscored the idea that international law scholars assume that “universality was the normal language of international law which was beyond culture”. Nina Louisa Arold’s study of the legal culture of the ECtHR argues that, although the Court’s judges originate from different legal cultures, the Court serves as a place where legal cultures have converged. Continuing this line of scholarship on cultural foundations of international law, the present study demonstrates how international legal institutions are formed with ideas born in particular domestic legal cultures, and it underlines the factors contributing to the internationalization of these ideas. Future studies can research in-depth the specific impact that the internationalization of particular legal institutions has on the legal culture of an international organization.

18 See, in general, Philip Jessup, Transnational Law (1956).
19 See Sir Herch Lauterpacht, The Function of Law in the International Community (2011). Martti Koskenniemi dubbed the manuscript ‘the most important English-language book on international law in the twentieth century’. Ibid., at xvii.
21 Balakrishnan Rajagopal, International Law from Below: Development, Social Movements, and Third World Resistance (2003), at 204.
Third, the discussion about the making of international law has often been divorced from the discussions of structure – that is, ‘the political context and the rules of the games in which the actors’ choices are made’. This case study shows how structural changes facilitate international law-making. Namely, the expansion of the ECtHR’s role has created an opening for new policies regarding the entities that are not party to the litigation. The international adoption of domestic legal institutions was dependent on the access to the institution. In the internationalization of the amicus curiae procedure, access itself was determined by the position of the UK as a founder of the structure of the ECHR and by the presence of an influential ally in the structure, UK-appointed Human Rights Commissioner Sir James Fawcett.

Fourth, this article aims to bridge the comparative law scholarship on legal transplants and international law scholarship. Conditions that have led to the internationalization of domestic law are also present in cases involving legal transplants. Numerous case studies on legal transplants have stressed the important roles of the norm entrepreneurs, agents, experts, lawyers, structural factors and elites. The fact that these conditions also emerge as being central to the internationalization process suggests their importance for diffusion processes in general.

Moreover, the relationship between the legal transplants and vertical transplants is illustrated in Figure 1. The amicus curiae participation procedure is a particularly good example of both transnational and vertical diffusion. More and more countries that share the civil law tradition are adopting amicus curiae interventions. Commentators have explained this process as resulting from the global influence of American legal culture – that is, Americanization. Nevertheless, the vertical upward diffusion of amicus curiae, at least at the early stage, draws on English law and legal tradition. Future research can explore the similarities and differences in these processes to determine whether these developments mirror each other and what the implications are of the processes themselves.

The second section of this article reviews the fundamental tenets of the scholarship on legal transplants. It shows that the academic literature has engaged with the vertical diffusion of legal institutions yet has left the phenomenon without a systematic theoretical treatment. It also outlines the main questions that the scholarship on internationalization has left unanswered and indicates the questions that are tackled by the present study.

The third section is divided into two parts. The first part presents an empirical perspective in relation to the utilization of amicus participation procedure within the ECtHR. Based on the empirical study of amicus participation within the Court’s Grand Chamber, the section provides a number of insights on the contemporary uses of the instrument.


25 Ibid., at 246.

26 A note on methodology: the study is based on the examination of Grand Chamber’s jurisprudence. Cases were found on the ECtHR search engine HUDOC on the ECHR website (http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{‘documentcollectionid2’:‘GRANDCHAMBER’,‘CHAMBER’})), which allows
For example, the section shows that more than one-third of the Grand Chamber’s judgments include a reference to an *amicus* brief and that both the number of briefs and the number of organizations that participate as *amici* has been steadily growing. It also illustrates that although governments are active users of the *amicus* procedure, it is the nongovernmental entities that resort to the procedure in the majority of cases. Finally, the section presents the list of governments and organizations that are the most active as friends of the Court. The second part narrates the story of the internationalization of *amicus curiae* briefs, based on historical records related to three cases heard by the ECtHR. The last section draws insights from the case study and relates the findings to the scholarship on legal transplants and the research on the internationalization of domestic laws.

### 2 Vertical Diffusion of Law

The comparative law debate on legal transplants originates in a 1974 publication by Alan Watson, who defined ‘legal transplant’ as ‘the moving of a rule or a system of law from one country to another or from one people to another’.

Different assumptions regarding law’s relationship to the context has often been at the centre of the debates about legal transplants. In his now-seminal work *Legal Transplants: An Approach to Comparative Law*, Watson posits that law is autonomous of the social structures in which it exists. Thus, law is fully mobile: ‘There is no exact, fixed, close, complete, or necessary correlation between social, economic, or political circumstances and a system of rules of private law.’ According to Watson, ‘most changes in most systems are the result of borrowing’. Watson proposes nine conditions that determine the transferability of laws. The conditions are: pressure force, opposition force, transplant bias, a discretion factor, a generality factor, societal inertia, felt needs, the source of law and law-shaping lawyers. Legal transplants have been subject to extensive research and

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27 See Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung*, vol. 1 (2nd edn, 1984), at 16–17 (indicating that ‘the primary object of comparative law – as in the case of all scientific methods – is knowledge ... Comparative law, however, has four more specific practical objectives: ... comparison provides material for the legislator; it serves as an instrument of interpretation; it plays a role in university instruction; and it is of significance for the supranational unification of law’).


30 Watson, *Legal Transplants*, supra note 30, at 94.

31 Watson, ‘Comparative Law and Legal Change’, supra note 30, at 322.

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scholarly debate, with commentators debating the processes and agents involved in legal transplantation as well as the implication of transplantation.  

Vertical legal transplants that stem from international law become adopted domest-
ically as a result of the process of downward diffusion. Scholars have written about downward diffusion and have explored the conditions that facilitate the adoption of international laws domestically. However, inquiries into the processes that cause, accompany or relate to the internationalization of law are quite limited. Most studies that are peripherally related to the issue originate in, and contribute to, the scholar-
ship in political science. The topic has not yet been treated systematically.

Hidemi Suganami in his 1989 book *The Domestic Analogy and the World Order Proposals*, inquires: ‘How beneficial is it from the viewpoint of world order to transfer to the domain of international relations those legal and political principles which sustain order within states?’ Suganami touches upon the issue of internationalization of legal institutions only tangentially. He offers a typology of proposals that suggest the design of the world order based on domestic analogies. However, Suganami’s interest in ‘domestic analogy’ is much broader than the study of legal diffusion. As the author himself asserts, ‘domes-
tic analogy’ includes ‘institutions’ broadly defined as ‘rules, practices, and conventional techniques of a society which are not expressed in the form of law’. Moreover, his objective is not to explicate the processes that led to the international adoption of these proposals or apparatuses involved in their implementation. Suganami’s work is focused on exploring and categorizing the emergence of domestic analogy proposals. Nevertheless, his study shows that the inspiration for the ideas aimed at designing the world order has often originated from the various aspects of experience within nation-states.

In her 1993 article ‘Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State’, Anne-Marie Slaughter points to the rationales underlying the construction of several post-World War II international institutions, including the Food and Agricultural Organization and the International Civil Aviation Organization. She argues that US policy makers, aspiring to apply to

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ization of international rules).


36 Ibid., at 29–30.

international challenges tools that had been tested domestically, projected a domestic model of the regulatory state onto the international arena. Slaughter claims: ‘The most comprehensive designs of the postwar order were drawn up in Washington.’\(^{38}\) Thus, the domestic solutions that were part and parcel of the New Deal regulatory state in the USA were projected onto the international order. Although the final results of such transposition did not mirror domestic US institutions, their inspiration was largely domestic.\(^{39}\) In particular, the article demonstrates that the successive list of international organizations whose establishment had been spearheaded by the USA after World War II drew upon the preceding ‘institutional revolution’ within the USA.\(^{40}\)

The author stresses that US policy makers were not motivated by idealism to find international solutions. Rather, they were driven by a pragmatic motivation to search for the policy approaches that would ensure the USA’s best interests.\(^{41}\) Therefore, US policy makers did not venture to create ‘any grand theoretical design’ but, rather, focused on finding pragmatic responses to impeding challenges.\(^{42}\) According to Slaughter, the individuals who participated in the design of the post-war international order were ‘the actual planners and beneficiaries’ of the relevant domestic solutions.\(^{43}\) Thus, according to her, in the process of looking for international policy solutions, decision makers in Washington, DC, drew on their domestic experiences.\(^{44}\) Finally, Slaughter discusses three possible reasons that motivated leaders to project US models. She argues that a drive to establish a liberal order both domestically and abroad motivated US policy makers. Behind the impetus to design a centralized regulatory institution to handle problems lay the liberal conception of the rule of law as it was understood and implemented in the USA in that particular era. Another factor contributing to US policy makers’ extensive reliance on domestic analogy was a relative lack of experience in international affairs and a relative lack of distinction between international and domestic law.\(^{45}\)

Slaughter’s study focuses on instances when international institutions were designed in their entirety. Her analysis does not encompass the cases of transformation within existing institutions. Indeed, the cases with which the article is concerned took place in the period of time when there were very few, nascent international institutions. Furthermore, her analysis does not distinguish between the origins of ideas and the decision makers who subsequently legalized the ideas in question. The individuals that generate ideas or specific conceptions of international institutions are also the ones that implement them. Thus, these case studies are narrated in a way that makes the concept of ‘internationalization’ inapplicable. These are not instances of

\(^{38}\) Ibid., at 130.

\(^{39}\) Ibid., at 133.

\(^{40}\) Ibid., at 134–135.

\(^{41}\) Ibid., at 235.

\(^{42}\) Ibid., at 135.

\(^{43}\) Ibid., at 133.

\(^{44}\) Ibid., at 145.

\(^{45}\) Ibid., at 146.
the diffusion of ideas between national and international actors. However, insofar as Slaughter’s argument emphasizes the design of international organizations based on American analogies, highlighting the relationship between international law-making and legal institutions within a nation-state, it is drawn upon by this article. Slaughter’s emphasis on the global dominance of the USA as a factor that was important in the international adoption of US models is echoed by the present case study in relation to the UK’s influence on the internationalization of an English legal institution.

Martha Finnemore and Kathryn Sikkink’s article ‘International Norm Dynamics and Political Change’ examines where international norms come from and, in particular, how norms change or contribute to the change in the political environment. The authors suggest a number of propositions explaining the relationship between norms and political change. Finnemore and Sikkink explain the degree of the influence of norms on the political environment through the theory of norm’s ‘life cycle’. They suggest that ‘the agreement among critical mass of actors on some emergent norm can create a tipping point after which agreement becomes widespread’. They underline the connection between domestic and international norms, many of which begin their international life as a result of the activity of ‘entrepreneurs’.

Like the works by Suganami and Slaughter, Finnemore and Sikkink’s article also contributes to the inquiries within political science. Their work focuses on the study of ‘norms’. Thus, it is much broader than an inquiry into the diffusion of legal institutions. Moreover, it is noteworthy that Finnemore and Sikkink’s article focuses on norms related to the conduct of war and women’s rights. The emphasis is important because it is expected that procedural rules with their technical nature cannot garner the same degree of emotional support as substantive norms. Second, the distinction between substantive norms and procedural laws is interesting from the perspective of the actors’ motivations. Are actors always engaged in concerted, coordinated and altruistic efforts, as described by Finnemore and Sikkink? Or are the actors’ motivations and tactics different in instances when they advocate for the internationalization of procedural norms? This question is addressed by the present inquiry.

Jonathan Wiener’s work about the borrowing of the US national regulatory mechanisms into the climate change treaties explores specifically the borrowing of domestic legal institutions. Specifically, Wiener studies the borrowing of two regulatory concepts, comprehensive scope (integration) and market-based emissions trading (incentives) by the United Nations Framework Convention on Climate Change and the Kyoto Protocol. Although the article does not explain the elements of internationalization in a systematic fashion, it emphasizes the role of US environmental lawyers, including

47 Ibid., at 892–893.
48 Ibid., at 893.
49 Weiner, supra note 7.
law professors, in internationalizing the US national environmental law concepts. It also echoes Finnemore and Sikkink’s emphasis on legal entrepreneurs, noting that vertical borrowing takes place as a result of the activity of change agents.\textsuperscript{51} For Wiener, legal entrepreneurs may be academics advising governments and NGOs.\textsuperscript{52}

Furthermore, the article is silent whether these individuals have acted in a coordinated manner or advanced their own ideas individually. Although the article lists in passing approximately 5 to 6 factors that prompted the White House to advance a new environmental policy internationally, including bad media coverage, it mostly focuses on domestic factors, including domestic political competition, overlooking international developments that might have contributed such action.\textsuperscript{53} In relation to the motivation of the initial drafters, the author notes that borrowing was ‘a conscious and deliberate attempt to select the most appropriate legal ideas for addressing the climate change problem’.\textsuperscript{54} It stresses that the drafters borrowed those national legal concepts of which they were aware of, noting that lawyers ‘borrow what they know’.\textsuperscript{55} Most importantly, the article does not discuss specifically the processes and the conditions related to the endorsement of the US environmental policy proposals by other countries, which supported their adoption in international treaties, although it does note in general that vertical borrowing might be closely related to the processes of globalization.\textsuperscript{56} Some concepts mentioned or eluded to in the previous studies, including the conditions for internationalization and the motivation and strategies of norm entrepreneurs, are systematized and advanced further by the present case study.

3 The Internationalization of the *Amicus Curiae* Participation Procedure

A *Amicus Curiae Participation in the ECtHR: An Empirical Perspective*

The ‘Principles of Transnational Civil Procedure’, published by the American Law Institute and the International Institute for the Unification of Private Law (UNIDROIT), put forth the following description of the *amicus curiae* procedure:

Written submissions concerning important legal issues in the proceeding and matters of background information may be received from third persons with the consent of the court, upon consultation with the parties. The court may invite such a submission. The parties must have an opportunity to submit written comment addressed to the matters contained in such a submission before it is considered by the court.\textsuperscript{57}

In 1970, Michael Reisman explained:

\textsuperscript{51} Weiner, supra note 7, at 1349.

\textsuperscript{52} Ibid.

\textsuperscript{53} Ibid., at 1310.

\textsuperscript{54} Ibid., at 1320.

\textsuperscript{55} Ibid., at 1349–1350.

\textsuperscript{56} Ibid., at 1350.

In common law countries, the amicus curiae brief has been an institution which has provided useful information to courts, permitted private parties who were not litigating to inform the court of their views and the probable effects the outcome might have on them and, overall, has served as means for integrating and buttressing the authority and conflict-resolving capacities of domestic tribunals.58

Currently, the amicus curiae participation procedure is accepted by most international tribunals,59 both inter-state and transnational.60 Although the procedures for participation within each tribunal is different, the amicus curiae participation instrument is endorsed by the ECtHR, the Inter-American Court of Human Rights (IACHR), the World Trade Organization’s dispute resolution mechanism,61 the International Criminal Court62 and international investment treaty arbitration.63

The international tribunal that stands out for its restrictive approach to amicus submissions is the International Court of Justice (ICJ). Article 34 of the ICJ Statute allows only ‘public international organizations’ and states to submit their views about a case before the Court. In 2004, the ICJ adopted Practice Direction XII, regulating amicus curiae submissions by international NGOs. It states that while NGO submissions will not be treated as part of the case file, they will be saved in the Peace Palace.64 The International Tribunal for the Law of the Sea (ITLOS) is similar to the ICJ in a restrictive approach to amicus curiae submissions by NGOs, yet it allows for the participation of international organizations of a hybrid nature, such as the International Union for the Conservation of Nature and displays NGO briefs on the Tribunal’s website.65

It is noteworthy that amicus curiae participants are commonplace in the judicial proceedings within the ECtHR. For example, in the most recent case of SAS v. France,66 the Grand Chamber of the Court again engaged in dialogue with the amicus curiae intervens. The case concerned the French law that banned the wearing of the full veil in public places.67 The applicant alleged that the ban contravened Articles 3,
8, 9, 10 and 11 of the ECHR, taken separately and together with Article 14 of the Convention. \( \text{68} \) Amnesty International, Liberty, Open Society Justice Initiative and ARTICLE 19, together with the Human Rights Centre of Ghent University and the Belgian government, took part in the case as amicus interveners. \( \text{69} \) From a substantive point of view, the Court at times agreed and at times disagreed with the position of the amici. The Court disagreed with the presumption put forth by the applicant and some of the interveners, stating:

> [T]he Court would first emphasize that the argument put forward by the applicant and some of the third-party interveners, to the effect that the ban introduced by sections 1 to 3 of the Law of 11 October 2010 was based on the erroneous supposition that the women concerned wore the full-face veil under duress, is not pertinent. It can be seen clearly from the explanatory memorandum accompanying the Bill (see paragraph 25 above) that it was not the principal aim of the ban to protect women against a practice which was imposed on them or would be detrimental to them.\( \text{70} \)

At the same time, the ECtHR agreed with the proposition of the amici with respect to the issue of a blanket ban:

> It should furthermore be observed that a large number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban to be disproportionate. This is the case, for example, of ... the non-governmental organisations such as the third-party interveners.\( \text{71} \)

Furthermore, the Court followed up on the evidence put forth by some of the amici in relation to the Islamophobic remarks made during the drafting of the French ban. \( \text{72} \) Yet it disagreed with the submission of the Open Society Justice Initiative with regard to the existence of the wider European consensus against the ban on religious clothing. \( \text{73} \)

It is noteworthy that the Strasbourg Court has experienced an avalanche of amicus interventions in other cases. For instance, on 18 March 2011 the ECtHR handed down the judgment in \textit{Lautsi v. Italy}, which concerned the display of religious symbols in classrooms in Italy. \( \text{74} \) Ten countries, 33 members of the European Parliament and several NGOs submitted their views on the case as amicus curiae. \( \text{75} \) States and legal and

\( \text{68} \) SAS v. France, supra note 66, para. 3.

\( \text{69} \) Ibid., para. 8.

\( \text{70} \) Ibid., para. 137.

\( \text{71} \) Ibid., para. 147.

\( \text{72} \) Ibid., para. 149.

\( \text{73} \) Ibid., para. 156.

\( \text{74} \) ECtHR, \textit{Lautsi and others v. Italy}, Appl. no. 30814/06, Judgment of 18 March 2011, para. 8.

\( \text{75} \) The ECtHR’s final judgment reflects testimonies from the governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta and the Republic of San Marino, the Principality of Monaco and Romania; from the non-governmental organizations (NGOs): Greek Helsinki Monitor and Associazione nazionale del libero Pensiero; the European Centre for Law and Justice; Eurojuris; International Commission of Jurists and Human Rights Watch; Zentralkomitee der deutschen katholiken; Semaines sociales de France; Associazioni cristiane lavoratori italiani and 33 members of the European Parliament. Consider an example from the case of \textit{ECtHR, A, B, and C v. Ireland}, Appl. no. 25579/05, Judgment of 16 December 2010, which centred on the question of legality of prohibition of abortion under the ECHR.
natural persons can act as amici within the ECtHR. A study of amicus curiae participation within the ECtHR’s Grand Chamber reveals that amicus curiae procedure has been instrumental in providing access to NGOs in the Court. Moreover, the number of Grand Chamber judgments that include an amicus curiae participant has grown over the years. Although there are minor fluctuations over time, the general trend that more Grand Chamber judgments include amicus briefs has been stable. According to the official data published by the Court, since September 1994 the Grand Chamber has issued 386 judgments and decisions – 133 of these have had at least one amicus curiae submission, which means that 34.5 per cent of cases at the ECtHR Grand Chamber since September 1994 have had amicus curie submissions (see Figure 2).

Furthermore, the number of amicus briefs has grown over the years as well. Figure 3 shows that the ECtHR received the largest number of amicus briefs in 2006 (34 briefs) and in 2012 (30 briefs). Figure 4 visually illustrates this pattern.

Figure 5 shows that the Grand Chamber has been consistently minimalistic in terms of rejecting amicus submissions. In 2005, the Chamber rejected three amicus petitions by organizations, which was the largest number of rejections given by the Chamber.

Moreover, although member state governments actively resort to the amicus procedure, it is NGOs that form the majority of the amicus participants. Out of all of the briefs submitted before the Grand Chamber after 1994, only 89 briefs were authored by governments, while 193 briefs were submitted by NGOs and individuals (see Figure 6).

Thus, non-governmental entities comprised 68 per cent of all entities acting as amici interveners in the Grand Chamber. Finally, a closer examination of the authors of amici briefs allows us to have a better knowledge of the entities that have been active...

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77 While it was Protocol 11 to the ECHR that entered into force on 1 November 1998 that made the Grand Chamber part of the ECHR, it was in 1993 that the Court set as a Grand Chamber for issues of particular importance or particularly important questions for the state in question. Rule 51 of the Rules of Procedure regulated the procedure in question. See Ed Bates, The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights (2010), at 463. See also Donna Gomien, David Harris and Leo Zwaak, Law and Practice of the European Convention on Human Rights and the European Social Charter (1996), at 34. Based on the study of the Grand Chamber’s case law, this article regards Jersild v. Denmark as the first case in which the Grand Chamber heard the case under Rule 51. ECtHR, Jersild v. Denmark, Appl. no. 15890/89, Judgment of 23 September 1994.

78 The article uses the data available through the Court’s online search engine http://hudoc.echr.coe.int
as friends of the ECtHR. Figure 7 below shows those entities that have submitted at least five briefs before the Grand Chamber.

The top ten list of the champions in terms of participation as *amici* in the Grand Chamber is as follows: Amnesty International: 16 briefs; Liberty: 14 briefs; Slovakian government: 13; Czech government: 12; Polish government: 12; International Centre
for the Legal Protection of Human Rights (Interights): 10; UK government: 10; JUSTICE: 9; European Centre for Law and Justice: 8 and International Commission of Jurists: 8. Therefore, the list shows that human rights advocacy NGOs are on par with Central European governments in terms of submitting *amicus* briefs. Among other
member countries, the UK and the Russian Federation lead in the practice of *amicus curiae* participation.

**B The Internationalization of the Procedure from the UK**

Article 25 of the ECHR and the relevant Rule 26 grant the right of persons, groups of individuals and NGOs to submit applications only to the Commission. The initial structure of the ECtHR allowed neither for the right of individuals to address the Court nor for the right of third parties to request that the Court hear their views. In the initial version of the Rules of Procedure, even the issue of whether victims had the right to appear as witnesses before the Court was equivocal.\(^{79}\) Subjects allowed to participate in the Court proceedings were (i) parties to the case and their agents; (ii) commission delegates, advisers and aides; (iii) witnesses; (iv) experts and (v) other persons whom the Chamber decides to invite.

The preparatory working paper drafted by the Directorate for Human Rights, which was laying the groundwork for the Rules of Procedure to be adopted by the Court’s judges, inquired whether individuals who appealed to the Commission or victims had the right to appear as witnesses before the Court. Council of Europe, *Preparatory Working Paper Drafted by the Directorate of Human Rights*, ECtHR, First Session, Doc. CDH (59)1, 16 February 1959, at 23, available at www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART55-CDH%2859%291-EN3811033.pdf (last visited 25 October 2015).

The initial version of the Court’s Rules of Procedure define parties as ‘[t]hose Contracting Parties which are the Applicant and the Respondent Parties’.\(^{80}\) Thus, legal standing was limited to states – that is, parties to the ECHR. Parties could be represented by agents, who, in turn, may have been assisted by advocates or advisers.\(^{81}\)

\(^{79}\) Rule 1 ECtHR RPE, at 2. Revised Rules of the Court (adopted on 24 November 1982).

\(^{80}\) Rule 28 ECtHR RPE.
Rule 29 allows the Commission to appoint one or more of its members as delegates before the Court. Rule 29(1) indicates that the delegates chosen by the Commission to take part in presenting the case before the Court ‘may be assisted by other persons’.  

Participation in the proceedings is also open to other persons, including witnesses and experts, as long as they have been called upon by the Chamber. The Chamber is entitled to ‘[h]ear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in the carrying out of its task’. Nevertheless, only the initiative of a party, a Commission delegate or the Chamber itself can trigger this possibility. The parties can object to hearing a witness or an expert. Nevertheless, the Court retains the right to hear ‘for the purpose of information’ a person who could not be heard as a witness.

On 24 November 1982, the judges of the ECtHR held a plenary session in which they adopted revisions to the procedural rules. The revised Rules of Procedure came into force on 1 January 1983. The new Rule 37 in Chapter III establishes the possibility of intervention by third persons. Clause 2 states:

The President may, in the interest of proper administration of justice, invite or grant leave to any Contracting State which is not a Party to the proceedings to submit written comments within a time-limit and on issues which he shall specify. He may also extend such an invitation or grant such a leave to any person concerned other than the applicant.

This procedural amendment of 1982 institutes two important changes. First, entities other than parties (that is, states) acquired the right to request intervention in cases. The president of the Chamber must agree to, or decline, such requests. Previously, only the Chamber could invite such persons to intervene. Second, third parties became entitled to make written submissions. Prior to the amendment, entities other than parties had been able to make only oral representations before the Court when asked to do so. The ECHR recognized this procedure in 1998 when the newly adopted Article 36(2) stipulated that ‘[t]he President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings’.  

Two authors, Anthony Lester and Paul Mahoney, have written that the initial change in the rules was made based on three cases in which the ECtHR consented to hear witnesses, experts, and third parties.

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82 Rule 29(1) ECtHR RPE.
83 Rule 38 ECtHR RPE (emphasis added).
84 Ibid.
85 Rule 41 ECtHR RPE.
88 Rule 37 ECtHR RPE.
89 Art. 36(2) ECHR.
91 Mahoney, supra note 87.
or declined to receive representations from a ‘third party’. These individuals’ insights acquired even greater importance given that the travaux préparatoires of the Rules of Procedure are confidential. 92 Both commentators personally took part in the cases at hand. When the facts unfolded, Paul Mahoney worked as an administrator at the Court. In fact, he signed one of the letters on behalf of the Registrar in his absence. 93 Anthony Lester is a Queen’s Counsel (QC), a practising barrister and a member of Blackstone Chambers, London. He is a member of the House of Lords (Lord Lester of Herne Hill) and is co-founder and honorary president of Interights. 94 He has been involved in numerous cases before the ECtHR. Lester argued one of the first cases at the Human Rights Commission soon after the government had accepted the Court’s compulsory jurisdiction. 95 At that time, the Court had decided only one case, Lawless v. Ireland. 96 Nevertheless, the commentators have not provided specific accounts and details about the change. By presenting an account of the emergence of this procedure, this article will remedy the gap.

Before 1982, there were three informal attempts, one unsuccessful and two successful, to intervene as a third party before the Court. All three instances originated in the UK. The first request for intervention took place on 22 June 1977 in the Tyrer case. 97 The second attempt was in Winterwerp on 24 October 1979. 98 The third intervention occurred in Young, James, and Webster on 30 January 1981. 99

1 Tyrer

The Tyrer intervention is not mentioned in official case reports because the attempt was unsuccessful in that the actors did not persuade the decision makers to adopt their claims. As is shown below, Cedric Thornberry, a UK-trained lawyer, acting for the National Council for Civil Liberties (NCCL) was a norm entrepreneur in the case. Thornberry was a legal professional and possessed expertise in the domestic law of the UK, of which the amicus curiae procedure was an integral part. In contrast to the other cases, his attempts to advance the amicus curiae procedure did not succeed because he did not have allies within the Court, who would have facilitated his access to the institution.

At the age of 15, Anthony Tyrer was subjected to three strikes of the birch on the Isle of Man, a punishment imposed by the local juvenile court. Tyrer’s birching occurred at a police station, where his father, a doctor, and some police officers were present. After the birching, Tyrer contacted the NCCL, which put forth a complaint before the ECtHR on the day Tyrer turned 16. 100 The applicant alleged, among other

92 Letter from the Registry of the Court to the author (in the author’s possession).
93 Ibid.
94 Lester, supra note 90.
95 Ibid., at 4.
96 ECtHR, Lawless v. Ireland, Appl. no. 332/57, Judgment of 1 July 1961.
97 Tyrer, supra note 14.
98 Winterwerp, supra note 15.
99 Young, James, and Webster, supra note 16.
100 Tyrer, supra note 14, para. 109.
complaints, that his birching violated Article 3 (prohibition of torture) of the ECHR.\textsuperscript{101}

In January 1976, Dickinson, Cruikshank and Company, solicitors based on the Isle of Man, notified the Commission that the applicant wished to withdraw his application and had already withdrawn his instructions from the NCCL,\textsuperscript{102} but the Commission declined the applicant’s request.\textsuperscript{103} The Court defied public opinion and the will of the nominal applicant himself, who now seemed to agree that the punishment had been justified. Nevertheless, even without the applicant’s consent, the Commission decided that the merits of the case deserved closer examination. Tyrer’s family friend, Susan Kelly, when commenting on the case, indicated that Tyrer had always believed that the birching was justified. He was ‘totally mystified and annoyed about the whole matter’.\textsuperscript{104} The British judge on the bench, Sir Gerald Fitzmaurice, wrote a powerful and memorable dissent.\textsuperscript{105}

The UK submitted that the case should be struck from the list because, \textit{inter alia}, some forms of corporal punishment were to be abolished by legislation in the future. Nevertheless, both the Commission and the Court opposed striking the case from the list. The Court reasoned that the suggested move by the respondent did not address the fundamental question raised by the case whether ‘the corporal punishment as inflicted on the applicant in accordance with Manx legislation is contrary to the Convention’.\textsuperscript{106}

Tyrer was represented by Cedric Thornberry, who acted on behalf of the NCCL.\textsuperscript{107} The NCCL, founded in 1934, was one of the oldest legal advocacy organizations in the UK. At the time of Tyrer’s request, it already had a rich history of defending civil rights through litigation.\textsuperscript{108} Cedric Thornberry was himself a barrister and lecturer in law. He appeared alongside Tyrer’s other counsel, all of whom were UK-trained lawyers: W.A. Nash, legal officer for the NCCL; L. Grant, of the Law Clinic of the University of Kent at Canterbury and Nigel Rodley, legal officer of Amnesty International (acting in a private capacity).\textsuperscript{109}

On 21 March 1977, Cedric Thornberry, on behalf of the NCCL, inquired to the Registrar about the opportunity to intervene before the ECtHR.\textsuperscript{110} Responding on 25 March 1977, the Registrar explained that only the Chamber could, \textit{proprio motu}, invite any person to be heard before the Court. Alternatively, the Commission could decide to employ the assistance of any individual it deemed necessary.\textsuperscript{111} Following the Registrar’s instructions, Thornberry pursued the matter further with the Secretary of

\begin{thebibliography}{9}
\bibitem{notes2} \textit{Ibid.}, at 8.
\bibitem{notes3} Michael D. Goldhaber, \textit{A People’s History of the European Court of Human Rights} (2009), at 102.
\bibitem{notes5} \textit{Tyrer}, supra note 14, para. 26.
\bibitem{notes6} The organization was later renamed Liberty.
\bibitem{notes8} ECtHR, \textit{Oral Arguments and Documents, supra} note 101, vol. 24, at 13.
\bibitem{notes9} \textit{Ibid.}, at 43.
\bibitem{notes10} \textit{Ibid.}
\end{thebibliography}
the Human Rights Commission. In a letter dated 31 March 1977, he requested ‘audience’ with the Court despite the ‘somewhat mysterious events of early 1976 when the Applicant purported to withdraw his petition’. The Council had been involved in preparing the applicant’s submission and would appreciate if the Commission would consider its involvement necessary in the case. The Commission’s Secretariat responded that, considering that the applicant had withdrawn his instructions from the NCCL, it would not be ‘appropriate’ to request its assistance for the hearing.

Having been rejected this time by the Commission, Thornberry wrote again to the Registrar of the ECtHR. This time he annexed a memorandum to the letter, elucidating certain questions related to the case that otherwise might not become available. In addition, on behalf of the NCCL, he requested the opportunity to develop the issues in an oral submission. On 29 June, the Court’s Registrar explained that the memorandum could not be treated as part of the official case file because the Commission had declined the organization’s participation, which was entirely in the hands of the Court. The Registrar assured Thornberry that the letter, along with the enclosures, would be transmitted to the president of the Chamber, but they could not be treated as part of the official case file. In a follow-up letter to Thornberry, the Court’s Registrar informed him that the Court had decided not to hear the Council’s position at the public hearings.

2 Winterwerp

The first amicus intervention that the ECtHR welcomed was requested by Eileen Denza, agent on behalf of the UK government in the case of X v. the United Kingdom. Denza, a UK-trained lawyer and a representative of the UK government, succeeded in persuading the Court to use the amicus procedure, due to her direct access to the Court officials. The access is evidenced by the extensive informal communication between the Court and the UK government. The UK government’s access was also facilitated by an influential ally within the Court structure, the president of the Commission, himself a UK lawyer, Sir James E.S. Fawcett, QC.

The Commission received the application in X v. the United Kingdom on 14 July 1974. The Commission filed a request in the Court on 13 October 1980. Therefore, the case was on the Court’s docket at the time when it was deliberating Winterwerp. The Winterwerp case (1979) concerned the lawfulness of detention under Article 5(4) for the applicant, a mentally unstable citizen of the Netherlands. The Commission submitted a report to the Court, emphasizing that both the applicant and the respondent Dutch government agreed that the lawfulness of the procedural and substantive bases of the detention was subject to the Court’s scrutiny. This interpretation...

112 Ibid., at 45.
113 Ibid., Annex II.
114 Ibid., at 44, Report of the Commission.
115 Ibid., at 47.
116 Ibid., at 51.
117 ECtHR, X v. the United Kingdom. Appl. no. 7215/75, Judgment of 5 November 1981.
118 Ibid., paras 1–2.
contravened the position of the UK, against which similar cases, including X v. The United Kingdom, were pending before the Commission. Thus, the UK sought to prevent a precedent that would adversely impact its national policies. Although she acted as an agent in X v. the United Kingdom, Denza requested the possibility of intervention on behalf of the UK in the Winterwerp case. Since the views of the Commission and the UK government diverged on important issues, Denza asserted that the UK government’s views could only be properly presented directly to the Court and not through the Commission.

Denza, now a professor at University College London, was a member of the bar at Lincoln’s Inn and worked as a legal adviser at the Foreign and Commonwealth Office. She has a Master’s degree in jurisprudence from Oxford University and a Master’s degree in law (LLM) from Harvard. In a letter dated 1 November 1978, Denza asked the Court to hear the UK government’s oral submissions under Article 38.1 of the Rules of Procedure. The Court’s response was similar to its reaction in Tyrer. The Registrar advised Denza to submit the views through the Commission delegates, pursuant to the procedures envisaged in the Rules. Nevertheless, in contrast to Thornberry’s reaction in Tyrer, Denza did not comply with the recommendation and persisted with her position: ‘The United Kingdom Government believes that their position could only be adequately safeguarded by the opportunity to present their argument orally to the Chamber through their own representative.’

The agent requested that the ECtHR hearings be adjourned until the judges decided whether to allow UK intervention in the case or not. The Court rejected this request as well. Having learned of the rejection, the agent expressed her disappointment on behalf of the UK government. Later, the agent modified this claim, requesting that the Court proceedings not be closed on the scheduled date. Leaving the proceedings formally open would allow the UK government to submit the government’s views, which would ‘go some way to protect the position of the United Kingdom’. The Court met the request favourably. Although the original request would not be satisfied, the Court did deem it appropriate to allow the UK government to submit its written views through the Commission ‘during or soon after the hearings fixed for 28 November’. The president of the Court kept this promise with an announcement at the end of the public hearing and through subsequent correspondence.

119 Winterwerp, supra note 15, para. 7.
120 ECtHR, Oral Arguments and Documents, supra note 101, vol. 31, at 65.
121 Ibid., at 68.
124 ECtHR, Oral Arguments and Documents, supra note 101, vol. 31, at 65.
125 Ibid., at 67.
126 Ibid., at 68.
127 Ibid., at 69.
128 Ibid.
129 Ibid., at 70.
130 Ibid., at 70.
131 See the discussion in this article at notes 151–152.
In Winterwerp, the UK government agent acknowledged possessing ‘no right to intervene’ in the case. Nevertheless, she suggested making use of Rule 38(1). According to the argument put forward by the UK representative, if the judges so desired, they could call on this representative to make submissions on the proper interpretations of the convention article in question. At the same point, the representative promised to confine the submissions to the question of Article 5(4) and not to extend them to other cases. The agent made a plea that the Court hear the party’s legal submission ‘in the interest of justice’.

In Winterwerp, the very first letter in the case files contained signs of prior informal communication between the government and the ECtHR. In the initial letter to the Registrar of the Court, a representative of the UK government in the case X v. the United Kingdom wrote: ‘David Anderson has already spoken to you informally about the concern.’ At the time, David Anderson served as a legal counsellor in the Foreign and Commonwealth Office. In another period of negotiations with the Court, the agent for the UK indicated that there had been a telephone communication between the negotiating parties in addition to their written correspondence. In a letter to the Court dated 21 November 1978, the agent wrote: ‘I have been informed by telephone that the President of the Chamber has not felt able to agree to the request of the United Kingdom Government.’

Informal communication between the Court and the agent for the UK continued. In a letter written the next day, the Court’s Registrar indicated that a subsequent telephone conversation on 21 November had taken place between Paul Mahoney, an employee of the Registrar, and the agent’s office: ‘The present reply is to confirm the information communicated to your Government by Mr. Mahoney of the registry in his telephone conversation yesterday with your colleague Mrs. Glover.’ Informal communications also continued after the hearing. At the conclusion of the public hearing on 5 December 1978, the Court’s Registrar wrote to the agent of the UK, acknowledging previous communication again by telephone: ‘[I]n confirmation of what Mr. Petzold told you by telephone on 24 November last.’ In a later letter from the UK agent to the Commission, in which the agent requested an extension to file a written statement, the agent noted that ‘the President of the Court has indicated informally that there will be no difficulty in meeting this request but has asked that it should be formally transmitted to you’.

In the Winterwerp case, the submissions of the interveners were circulated through the Commission. Sir James E.S. Fawcett, the president of the Commission, who also served as the Commission’s delegate to the Court, appealed to the Court to hear the

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132 ECtHR, Oral Arguments and Documents, supra note 101, vol. 31, at 65
133 Ibid., at 66.
134 Ibid., at 65.
135 Ibid., at 65.
137 ECtHR, Oral Arguments and Documents, supra note 101, vol. 31, para. 69.
138 Ibid., para. 70.
139 Ibid., para. 110.
140 Ibid., para. 113.
intervener’s submission. Sir James Edmund Sandford Fawcett, QC, was born in 1913. He was a British lawyer and a member of the European Human Rights Commission from 1962 to 1984. He was elected as a member of the Commission on 30 January 1962 to replace Sir Humphrey Waldock, the previous commissioner from the UK. At the time of election, Fawcett was a bursar at All Souls College in Oxford.141 He was the Commission president from 1972 to 1981, during which the aforementioned interventions took place. His term was to expire on 17 May 1984.142

As the president of the Commission and the Commission’s principal delegate, Fawcett appeared before the ECtHR to present the case and the rationale behind the Commission’s decision.143 This time, the Commission’s decision was unanimous.144 The main objective of bringing this case before the Court was the Commission’s request that the Court interpret Articles 5.1 and 5.4 of the ECHR, particularly to specify the scope of review necessary to satisfy the requirements of the condition involving ‘lawful detention of persons of unsound mind’ under the respective article.145 The bigger issue at stake was whether the psychiatric detention should have been subject to judicial review or left under the jurisdiction of the administrative authorities.146

Fawcett’s efforts to persuade the Court to become acquainted with the UK submissions are evident from the record of public hearings. In one of his addresses to the Court, Fawcett mentioned the impact that the Court’s judgment would have on psychiatric detention in countries other than the Netherlands, and he stated the UK government’s request to present its views on the legal interpretation of Article 5.4. He suggested that if the Court interpreted the article so that it would have implications for countries other than the Netherlands, then the Court should consider leaving the proceedings open to allow submission of opinions by the UK government: ‘We believe that this would be of assistance and we believe that, when the Court is making possibly a wider interpretation ... it is important that the counter-arguments be fully presented.’147

After hearing the request by the president of the Commission, the president of the ECtHR announced his decision to extend the time limit for the proceeding and, with this gesture, to allow the UK government to make their submissions: ‘And possibly it [British government submission] might be submitted with some comments from the Commission. In any event, I am not at present in a position to indicate what the further procedure will be; we must wait and see.’148 In fact, in his decision to extend the time limits of the proceedings and to allow the UK government to make a written submission, the Court’s president explicitly relied on Commissioner Fawcett’s efforts. At the end of the public hearing, the president of the Court announced:

143 ECtHR, Oral Arguments and Documents, supra note 101, vol. 31, at 72.
144 Ibid., at 11.
145 Ibid.
146 Ibid., at 73.
147 Ibid., at 100.
148 Ibid.
Based on the suggestions by the President of the Commission, I will not declare the procedure closed. I declare it only provisionally closed so as to allow the Commission, should it consider it useful to submit to us another document from ... the British Government. The Commission could submit this document, within ... let us say, a fortnight.\footnote{Ibid., at 107.}

The Court relied on Fawcett’s request again in a follow-up letter in which the Court fixed the specific conditions for the British government’s submission: ‘The Chamber, after duly considering your Government’s request and the submission made by the President of the Commission at the public hearing on 28 November, has decided that the proceedings in the Winterwerp case should not be formally closed for the present.’\footnote{Ibid., at 110 (emphasis added.).}

Even the time limit for the UK submission was fixed in agreement with Sir James Fawcett. The ECtHR’s president set the initial time limit in his statement during the hearing, using phrases suggesting that the limit was flexible. He stated: ‘[T]he Commission should submit this document, within, let us say, a fortnight.’\footnote{Ibid., at 107.} The term was more a suggestion that required an agreement rather than a determination, for Sir Fawcett replied: ‘[Y]es, I believe that is possible, Mr. President.’\footnote{Ibid.} Subsequent events confirmed that the time frame was adaptable upon agreement. The UK government made two requests to extend the time limit, both of which were satisfied by the Court. First, the government agent requested that the deadline be moved from 13 December to 22 December. This extension had been informally negotiated with the Court’s president.\footnote{Ibid., at 112–113.} Later, the government asked for a second extension, having realized that postal service would be delayed over the Christmas holidays. The government asked for the time limit to be extended until 5 January.\footnote{Ibid.} Both extensions were granted on the same day.\footnote{Ibid., at 112.} Therefore, the Commission sent the UK government’s submission to the Court on 5 January 1979.\footnote{Ibid., at 114.}

The ECtHR itself acknowledged the presence of specific case-related interests. In a letter explaining to the representatives of the Trades Union Congress (TUC) why the Court had decided to hear the UK government in the case of Winterwerp even though the UK had not been a party to the case, the Registrar maintained: ‘[I]n an earlier case ... the Court, by way of an ad hoc solution and without prejudice to the question of principle involved, accepted the written observations from the United Kingdom government, which was not a party to the case but had an interest therein.’\footnote{Ibid., at 151.}

3 Young, James, and Webster

In Young, James, and Webster, Russell, Jones and Walker, solicitors for the Trades Union Congress (TUC), requested to participate as amicus curiae. Sir James E.S. Fawcett, acting as a Commission delegate to the ECtHR, served as the solicitors’ ally, who provided

\footnotesize{\begin{itemize}
\item \footnote{Ibid., at 107.}
\item \footnote{Ibid., at 110 (emphasis added.).}
\item \footnote{Ibid., at 107.}
\item \footnote{Ibid.}
\item \footnote{Ibid., at 112–113.}
\item \footnote{Ibid.}
\item \footnote{Ibid., at 1112.}
\item \footnote{Ibid., at 114.}
\item \footnote{Ibid., at 151.}
\end{itemize}
access for the organization’s position to be heard by the Court. During the proceedings, it was through Fawcett that the TUC’s memorial was circulated. He also persuaded the Court to hear the TUC’s views in the capacity of *amicus curiae*.

In the case, the applicants alleged a ‘closed shop’ agreement between British Rail and three railway workers’ unions. As a result of the ‘closed-shop’ agreement, the employees were required to be, or to become, members of a specified union. The applicants alleged that the practice violated their rights to freedom of association under Article 11 of the ECHR. The TUC sought an opportunity to voice its views on the issues raised in the case. On 30 January 1981, the lawyers for the TUC requested that the Court’s registrar admit their application in relation to the case. Their legal argument was twofold. First, they argued that their application should have been admitted based on Rules 38 and 41 of the ECtHR. Alternatively, they requested that the Court allow their application ‘under its inherent jurisdiction’.

In their letter of 30 January 1981, requesting the possibility of intervention, the solicitors for the TUC provided that the three unions implicated in the cases were part of the TUC’s umbrella structure. The organizations affiliated with the TUC were engaged with union membership agreements. Therefore, the judgment would have great importance in the law and practice of labour-industrial relations in the UK. The representatives of the TUC indicated that they did not expect the UK government, even though it was acting as a respondent in the case, to present an adequate argumentative defence for their position. Having examined the memorial submitted by the UK government to the Court, the TUC’s representatives asserted that the UK would not put forward adequate information and justification in defence of its own laws. Although the UK was the only party with the full power to provide the Court with relevant knowledge and ‘historical, legal, and social’ information, the UK government’s failure to do so would create a serious detriment to a judgment.

It was again the Commission president James Fawcett who introduced the document submitted by the TUC as an extension of the Commission’s existing mandate to assist the ECtHR. Fawcett had dissented with the Commission’s majority finding that the UK had breached its obligations under the ECHR by mandating a ‘closed-shop’ system of union membership. Thus, his position coincided with the position of the TUC. Although there was no adequate legal foundation for his action, it was through Fawcett that the document was circulated during the hearing and introduced for the Court’s consideration.

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160 Ibid., at 111.

161 Ibid.

162 Ibid., at 112.

163 Ibid., at 113.


165 Ibid., para. 50 (dissenting opinion of J.E.S. Fawcett).

166 Ibid., para. 218.
Sir James Fawcett also used the term ‘amicus curiae’ during the public hearings on *Young, James, and Webster*, even though the term was nowhere mentioned in the ECHR or in the Rules of Procedure. In his efforts to persuade the Court to consider the document put forth by the TUC, Fawcett introduced the term as an extension of the Commission’s existing function to assist the Court. He explicated this *amicus curiae* function as an activity separate from, yet related to, the Commission’s established mission to represent the position of applicants.\textsuperscript{167} In *Young, James, and Webster*, the Court insisted that the submissions be strictly limited to factual circumstances. Therefore, the interveners in the case were not allowed to do exactly what the UK government had done in the previous instance. In strict authoritative language, the Registrar indicated: ‘Accordingly, it is to be understood that the matters on which that representative will be heard do not include pleading as to the interpretation of the law of the European Convention on Human Rights.’\textsuperscript{168}

In *Young, James, and Webster*, even after the public hearings, as the TUC presented its submissions, the Court opened up the opportunity for the UK government and the applicants to provide their comments on the TUC’s intervention. Nevertheless, the Registrar insisted on a strict division between the facts and arguments on the legal questions raised by the case. The Registrar insisted: ‘[I]t is to be understood that they are to be limited to issues of fact, including English law and practice. The decisions taken by the Court are not to be construed as authorizing the filing of observations or submissions on the issues of law arising in this case.’\textsuperscript{169}

4 Conclusion

*Amicus curiae* participation procedure has been accepted by a majority of international tribunals. At the ECtHR Grand Chamber, the *amicus* procedure has been established as a vehicle for NGOs to voice their opinion before the Court. Although some states, notably Eastern and Central European states have been active in submitting *amicus* briefs, the majority of the briefs – 68 per cent – have been authored by NGOs. Furthermore, the empirical data suggests that the *amicus* procedure is here to stay. The Court has been accepting the majority of *amicus* petitions, while rejecting only a very small part of submissions. Moreover, *amicus* briefs have been growing steadily over time, which could show that it is now a well-established mechanism of communication between the Court and non-litigant entities.

*Amicus curiae* participation procedure has been part and parcel of the English law, and it is from the UK that the procedure was internationalized to the ECtHR. Three main factors contributed to the internationalization of the institution from domestic law: an opportunity for law-making caused by the structural transformation of the Court, the involvement of norm entrepreneurs and their access to the decision makers.

\textsuperscript{167} Ibid.
\textsuperscript{168} Ibid., at 161.
\textsuperscript{169} Ibid., at 307.
The adoption of the *amicus curiae* procedure is related to a particularly transformative moment in the ECtHR’s history. The Court began to understand itself as not simply an instrument for conflict resolution in particular disputes but also as an institution whose pronouncements would have policy implications for all of Europe. The fact that the Court adopted the *amicus* procedure in the period when the Court started asserting its Europe wide policy-making role is noteworthy. Moreover, the discussion in the *Winterwerp* case in which the UK alerted the Court to the implications of the Court’s decision in the case against the Netherlands is noteworthy in this regard. The Court’s judgment would impact policy not just within the Netherlands but also in the UK.

Furthermore, the procedural amendments that allowed for the *amicus curiae* intervention also permitted the standing of an applicant who previously had not been allowed to stand before the Court. The adoption of these safeguards, aimed at enhancing the rights of the parties, might signal that the Court forgave its self-image as a nascent institution and began to perceive itself as a full-fledged court of regional importance. In light of the Court’s judgments’ far-reaching impact, the fact that the Court’s original procedure did not give the floor to entities that would be adversely affected by the Court’s rulings had become evident.

In the cases in question, it was the British lawyers, representatives of the UK government as well as the UK NGOs, who acted as norm entrepreneurs and requested that the Court allow them to use the practice of *amicus curiae* participation to represent their clients’ position. Finally, both the entrepreneurs’ failure in the first case and success in the second case are attributable to their lack of access and allies within the Court’s structure. The petitioning lawyer Cedric Thornberry in the *Tyrer* case was not successful in his effort to convince the Court to give the floor to the NCCL. The major difference between this case and the later cases in which persuasion attempts were successful is that in the two later cases, the interveners’ attempts were aided by Sir James Fawcett, the head of the Human Rights Commission and a lawyer trained in the UK, who persuaded the judges to give the floor to the interveners in the capacity of *amicus curiae*.

This study advances the scholarship on internationalization of law in a number of ways. First, it distils the three core conditions under which the occurrence of internationalized legal transplants is possible. Previous studies have suggested that the inspiration for the design of an international organization or the new world order has sometimes come from the experiences within nation-states. Although international lawyers are accustomed to acknowledging the role of domestic law in the formation of the sources of international law, the three main conditions for internationalization of legal institutions has not been systematized.

Second, the study underscores the importance of structural factors in facilitating the internationalization of domestic law. Although none of the scholars spoke directly about the preceding structural transformation that results in a law-making opportunity, they all indicated that the diffusion of domestic legal ideas takes place in the

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170 Mahoney, *supra* note 87.
context of global transformation, be it the design of a global order after World War II or global environmental crisis. Furthermore, it shows that access to decision makers and the presence of allies within an institution are highly significant factors for the vertical diffusion of laws. The influence of the UK within the ECtHR and the presence of UK-trained lawyers in high positions facilitated the adoption of a UK-based legal institution. This study reinforces, in micro terms, Anne-Marie Slaughter’s point about the USA’s post-World War II global dominance and the resulting spread of American policy approaches.

Third, the study expands the list of entities that can act as ‘entrepreneurs’. In Finnemore and Sikkink’s work, they are agents who have ‘strong notions about appropriate or desirable notions in their community’. The authors name independent individuals, such as banker Henry Dunant and women’s rights activist Elizabeth Cady Stanton, as well as the organizations founded by them as ‘norm entrepreneurs’. In Wiener’s article ‘norm entrepreneurs’ include government advisers. This case study provides that the UK government officials, as well as British civil society organizations, acting independently, engaged with the staff and judges of the ECtHR and persuaded the Court to adopt the _amicus curiae_ intervention procedure. It thus shows that civil servants can act as norm entrepreneurs as well.

Fourth, the distinction in the diffusion of the substantive and procedural law emerges. Finnemore and Sikkink write about the diffusion of norms—the laws of war and women’s rights. It is plausible that the strategies and factors related to the internationalization of a procedural law are different than those engaged with the vertical diffusion of a substantive law. Future research can explore whether the internationalization process of substantive law is similar to the vertical diffusion of a procedural instrument. Moreover, in contrast to the case studies by Finnemore and Sikkink, in the internationalization of a procedural law the actors do not engage in a concerted effort. Their interests often diverge, although each individually seeks the same outcome. They search for a procedural mechanism to represent their clients’ interests. Therefore, the adoption of the norm, or the tipping point, is not a result of the entrepreneurs’ coordinated activity.

Fifth, this study suggests that the nature of the internationalized legal institution can change over time. In her study of the ECtHR and civil society, Rachel Chichowski has noted that the _amicus curiae_ institution evolved over time as a result of the Court’s interaction with social activists, referring to the three cases noted in this article. In fact, as we see from the _Winterwerp_ case, originally it was the UK government, not civil society organizations, that for the first time successfully advanced the _amicus_ procedure as a possibility to intervene when its interests were not presented in the proceedings. Lawyers for the TUC built on the previous successful attempt by the UK government. It was through the government’s use of access to the Court, the use of informal contact with the Court officials and advocacy by James Fawcett that the

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171 Finnemore and Sikkink, _supra_ note 46, at 896.

amicus petition was allowed for the first time. Yet, as we see from the empirical study, the amicus curiae procedure later turned into a pathway mostly for NGOs to present arguments before the Court.

Moreover, the motivations of actors who resort to internationalized institutions change as well. This article illustrates that initially the norm entrepreneurs were motivated not by idealistic concerns, as they are in the case studies by Slaughter, Finnemore and Sikkink and Wiener. They were driven with the need to protect and to adequately represent their own interests. However, over time, the amicus curiae participation procedure has been established as an instrument for groups who use it for public interest intervention. These findings echo conclusions from certain studies in legal transplants. Namely, Maximo Langer’s study on the acceptance of the American plea-bargaining in civil law jurisdictions in Europe shows that the countries have accepted the institution in divergent ways. By translating some principles and ideas differently in different countries, and by merging the new principles with the underlying inquisitorial culture of criminal law, the borrowing resulted in the differentiation of those aspects of recipient systems that were previously homogeneous.173

Finally, the three core factors, law-making opportunity resulting from structural change, norm entrepreneurs and access to decision makers, have been explored in the legal transplant scholarship as well. The study of the international diffusion of legal institutions confirms that these three particular conditions are significant both for transnational and international diffusion. Moreover, the study of internationalized vertical legal transplants contributes to comparative scholarship by illustrating how legal institutions from particular domestic settings become influential on a global scale as they are adopted by international institutions. Institutions from particular domestic legal cultures not only spread transnationally by being accepted and borrowed by various countries, as shown by legal transplant scholarship, but such institutions also feed the architecture of international law through their acceptance by international decision makers.

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